

“Small House Policy, Custom and Article 40 of the Basic Law”
Summary of Discussion on 15 January 2014

1. About Junius Ho

- Senior partner of KC Ho & Fong Solicitors & Notaries
- Mr. Junius Ho was born and used to lived in Tuen Mun. Mr. Junius Ho is an indigenous villager of Leung Tin Village, Tuen Mun.
- In 2011, Mr. Junius Ho was elected as the Indigenous Village Representative of Leung Tin Village and the Chairman of Tuen Mun Rural Committee
- Mr. Junius Ho holds the posts of Ex officio member of Tuen Mun District Council and Ex officio Executive Member of the 33rd Executive Committee of Heung Yee Kuk
- Now Mr. Junius Ho is also an Executive Committee member and a spokesman for the New Territories Concern Group

2. Historical Background of the Indigenous Villagers’ Rights

Date	Event
1842 Aug 29	The Treaty of Nanking was signed It marks the end of the First Opium War (1839–42) between the United Kingdom of Great Britain and Ireland and the Qing Dynasty of China.
1898 Jul 1	Convention between Great Britain and China Respecting an Extension of Hong Kong Territory, commonly known as the Second Convention of Peking was signed between Qing China and the United Kingdom in 1898. The territories north of what is now Boundary Street and south of the Sham Chun River, and the surrounding islands, later known as the "New Territories" were leased to the United Kingdom for 99 years rent-free, expiring on 30 June 1997, and became part of the crown colony of Hong Kong

1899 Apr	<p>The Six-Day War of 1899</p> <p>It was a battle between the British Army and the NT inhabitants. The cause was that the British government intended to receive NT and the prospect was unclear for the inhabitants there.</p> <p>The Tang clan of Ping Shan along with other large clans fought to resist the British government. The NT inhabitants suffered great casualties. After the battle, both sides settled amicably.</p>
<u>1899-1902</u>	<p>After occupying the New Territories, a survey of the area was conducted, using staff from the Indian Survey of the army. This mapped every field and house.</p>
<u>Around 1903</u>	<p>A Blake Proclamation (“Proclamation”) was made by the HK government to guarantee the lawful Chinese Customary rights of the New Territories inhabitants should continue on the land. That was the “political concession” made to the indigenous villagers.</p>
1905	<p>The findings of the Indian Survey of the army were summarized in schedules and were attached to a Block Crown Lease issued for each Demarcation District/Survey District in 1905</p> <hr/> <p>A block crown lease for each Demarcation District (DD) contains:-</p> <ol style="list-style-type: none"> (1) Lease terms (2) Survey map on which the location and boundaries of individual lots are indicated with numbers assigned to denote the lots; and (3) Schedule that lists the name of the owner, the land use and rent collected for each lot indicated on the survey map.
1949	<p>Chinese Civil War (1927-1950)</p> <p>When the PRC was proclaimed in 1949, more migrants fled to Hong Kong for fear of persecution by the Communist Party. Many corporations in Shanghai and Guangzhou shifted their operations to Hong Kong</p>

<p><u>1967</u></p>	<p>Outbreak of Hong Kong 1967 riots.</p> <p>There were large-scale leftist riots between communist members and its sympathizers and the establishment. While originating as a minor labour dispute, the tensions later grew into large scale demonstrations against British colonial rule. Demonstrators clashed violently with the Hong Kong Police Force. Instigated by events in the PRC, leftists called for massive strikes and organised demonstrations, while the police stormed many of the leftists' strongholds and placed their active leaders under arrest. These riots became still more violent when the leftists resorted to terrorist attacks, planting fake and real bombs in the city and murdering some members of the press who voiced their opposition to the violence.</p>
<p><u>70'</u></p>	<p>New Territories Development started whereby agricultural lands be resumed for building satellite towns in New Territories.</p>
<p><u>1972</u></p>	<p>Small House Policy (小型屋宇政策) (“the Policy”) was introduced in Hong Kong. The Policy allows an indigenous male villager who is 18 years old and is descended through the male line from a resident in 1898 of a recognized village in the New Territories, an entitlement to one concessionary grant during his lifetime to build one small house. The Political Concession was partly absorbed into the policy which became an “Administrative Measure”.</p>
<p><u>1986</u></p>	<p>An article protecting the lawful traditional rights and interests of the indigenous inhabitants of the "New Territories was incorporated into the draft of the Basic Law by the Basic Law Drafting Committee, which later becomes Article 40 in Chapter 3 of the Basic Law.</p>
<p><u>1997</u></p>	<p>Implementation of the Basic Law</p> <p>The Policy became a constitutional right of indigenous villagers.</p>

3. The Nature and Reasons for the Proclamation / Policy/ Article 40

3.1 As an administrative measure of the government

- The Policy was introduced by the British Government to pacify the inhabitants who were living in the New Territories
- The administration of New Territories was treated differently by the British Government, *e.g.* The Secretary for the New Territories was the highest ranking official to deal with the affairs in the New Territories. Later, they were managed by the Secretary for City and New Territories Administration.

3.2 As a measure to deal with population expansion.

- WWII and Chinese Civil War caused influx of population to Hong Kong from various places in China
- In 1970s, the government decided to develop the N.T. for the urban expansion. The Small House policy was also introduced to earn the support of the people in the New Territories

4. The Policy

4.1 In Tiu Sum Fat and ors v Shun Sing Development Ltd and anor, HCA1746/2005, Reported in [2010] 1 HKLRD 553, at para 12 per Deputy High Court Judge H. Wong SC cited another case to explain the Policy as follows:-

“THE SMALL HOUSE POLICY

.....

13. In the case of Chung Mui Teck & others v Hang Tak Buddhist Hall Association Ltd and another [2001] 2 HKLRD 471, the Court of Appeal referred to the Small House Policy as follows (at 473E-I):

“This policy, implemented since December 1972, is *designed to allow male indigenous villagers of a village which has been in existence since 1 July 1898 to apply for permission to erect small houses for their own habitation.* Strict limitations apply to the building of such houses. Under the Buildings Ordinance (Application to the New Territories) Ordinance (Cap.121), a small house is to be no more than three storeys or 27 ft in height with a maximum roofed-over area of 700 sq ft but the building of such a house does not require the employment of an authorised person or approval of building plans under the Buildings Ordinance (Cap.123) ... which are significant privileges, quite apart from the concessionary terms mentioned below.

Where a villager owns his own piece of land either in the village or within 30ft (SIC) [actually it should be 300 feet] of it, he is entitled to apply for a free building licence on this land or the Government might agree to grant new building land in return for the surrender of land elsewhere. If he does not own any land in the village, he may apply for a private grant of land from the Government at a concessionary rate, generally between \$1,000 and \$2,000. Procedurally, a villager who wishes to make an application is required to complete a standard Small House Application Form.” [Emphasis added]

5. Post 1972 development of the Policy

5.1 The Policy was as an administrative measure before 1997

- The British Government had two reasons to support the policy:
 - (1) to return the favor to the N.T. people given that, in 1967, Heung Yee Kuk N.T fully supported the ruling of Hong Kong by the British Government; and
 - (2) to negotiation for NT land from them for urban development. In particular, in 1972, there was the urban development plan of satellite town.
- Hence, Customary rights were kept, including:-
 - (1) Succession rights
 - (2) Right of building village houses without having to pay premium
 - (3) Burial rights
 - (4) Rights of Tso Tong interests
- Further, the right of building village house was regulated, known as the **Small House Policy**.
- In fact, a basket of benefits was given to NT people. The British Government hoped to have the cooperation of the Heung Yee Kuk, which comprises the representatives of Rural Committees.
- The benefits includes:-
 - The Small House Policy
 - Compensation at resumption of land and the “Letter A/B” resumption (source: “Political Order and Power Transition in Hong Kong”)

“Rural land was acquired by the government through which the land owners surrender 5 units of rural land in exchange of a future claim of 2 unites of urban land in the new town according to a pre-determined schedule or prices. a Letter A/B is a certificate issued by the government to the rural land owner for such exchange of right. This system has been abandoned by the government and all residual claims had been settled by a buy-bank before July 1997.”
- At that time, Sir David Akers-Jones played a major role in liaising with the NT people.

5.2 Indigenous rights transforming from administrative measure into the constitutionality

- Before the Basic Law, there were certain political statements and proclamation made by Government officials. However, they did not amount to legislation or part of the law. Though not written in law, there were guidelines in Home Office in relation to the scope and application of these customary rights.
- During the discussion of the Basic Law, Heung Yee Kuk strongly advocated for the continuance of the customary rights of indigenous people. As a result, Article 40 of the Basic Law enshrines the indigenous rights:-

“The lawful traditional rights and interests of the indigenous inhabitants of the "New Territories" shall be protected by the Hong Kong Special Administrative Region.”

”

- Around 1997, court cases started to touch upon the indigenous rights. E.g. the legislation was amended in 1993 and abolished the customary rule that, when an indigenous father deceased without a will, the indigenous rights were automatically confer upon male successors

5.3 Secretary for Justice & ors v. Chan Wah & ors

FACV No. 11 and 13 of 2000, [2000] HKCFA 88

(Leading judgment delivered by Chief Justice Li was unanimously agreed)

- The functions of a village representative were said to be “beyond the village” as follows:-
 - (1) At the Rural Committee level, village representatives are automatically members of the Rural Committee of the area in which the village is situated and they elect the Chairman and Vice-Chairman of the Rural Committee from among themselves
 - (2) At the District Councils level, the chairmen of Rural Committees elected by the village representatives are ex-officio members of the relevant District Councils, which have an advisory function in relation to various matters affecting the district
 - (3) At the Heung Yee Kuk level, given that the Executive Committee includes ex-officio members namely the Chairmen of Rural Committees, New Territories Justices of the Peace and ordinary members.

- an issue in the appeal was whether the Bill of Rights Ordinance is engaged and whether the electoral arrangement in question was inconsistent with it. Article 21 of the Bill of Rights, corresponding with Article 25 of the ICCPR provides that:-

“Article 21 Right to participate in public life

Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions-

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives.....”

- It was held that (at para 46) “the electoral arrangements in restricting Mr Chan from voting and Mr Tse from standing as a candidate are unreasonable and inconsistent with Article 21(a) of the Bill of Rights.”
- Below are excerpts of the judgments:-

“(para 2) The Ordinance [Government Rent (Assessment and Collection) Ordinance (Cap.515)] defines "**indigenous villager**" to mean "a person who was in 1898 a resident of an established village in Hong Kong or who is descended through the male line from that person". "**Established village**" is defined to mean a village that was in existence in 1898 and which the Director of Lands has satisfied himself was then in existence.”

“(para 61) There is no doubt that the lawful traditional rights and interests of the indigenous inhabitants are protected by Article 40. One is *not concerned here with a comprehensive definition of the rights and interests* within **Article 40**. It is **not disputed** that they include various property rights and interests such as exemption from Government rent and rates in respect of certain properties held by indigenous villagers and benefits relating to land granted to male indigenous inhabitants under what is known as the small house policy.” [Emphasis added]

6. Summary of arguments

(1) The Policy should not be abolished

- The Policy has a long history and has evolved. It changed from a political concession into an administrative measure and it is now one of the indigenous rights enshrined and protected by the Basic Law
- Now it has become one of legal and constitutional rights of the indigenous inhabitants, enjoying the same status and protection under the Basic Law just as our legal system and other fundamental rights

(2) The Policy is specifically stated to be one of the indigenous rights that is protected by the Basic Law

- Although the drafting of Article 40 is general and scope of the indigenous rights is not particularized, the right of entitlement under the Policy is specifically recognized in the CFA case of Chan Wah.
- In the Chan Wah case, the subject involved the right of indigenous villagers to vote and to stand as a candidate in elections for village representative to the exclusion of others. Although the right under the Policy was not in issue, it was recognized by the CFA and the Secretary of Justice did not dispute that it is one of the right and interest protected by Article 40 of the Basic Law.
- It was an intentional addition of Article 40 into the Basic Law. The Heung Yee Kuk at that time pressed strongly for such addition to protect the indigenous rights and the drafting committee diligently considered it. Article 40 does not provide details of the rights and interest because the Basic Law is a constitutional document and also the customary rights were widely recognized in the course of history.
- Further, one can also refer to historical background to look at the scope of indigenous rights.
- It is not arguable that a distinction should be made between (i) Free Building Licence and (ii) Private Treaty Grant (of Government land). Although the history of Private Treaty Grant could only be traced into around 1970s but not before 1898, it still has numerous cases from around 1970s to the implementation of the Basic Law. Hence, no matter which form it has taken, it has long been one of the rights enjoyed by the indigenous inhabitants.

(3) The Policy - the way forward

- the argument that Basic Law will expire in 2047 and hence indigenous rights would be no longer protected as such is not sustainable. It is because:-

(a) the legal system and other fundamental rights we now enjoying is under equal protection by the BL and they ought not expire.

(b) Secondly, there is no legal basis to isolate and abolish indigenous rights

- Hence, only amendment of the Basic Law can abolish the Small House policy or other indigenous rights.

- In fact, due to the shortage of land, the Policy may fade out naturally.

- Government policy can deal with the current problems we are facing. For instance, to deal with the shortage of land, instead of the current policy that each storey should not be larger than 700 sq. feet, we can allow multi-storey buildings to be built and allowed each indigenous villager to own 2,100 sq. feet equivalent of housing space.

Dated 15th January 2014

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