

The tangle of colonial modernity: Hong Kong as a distinct linguistic and conceptual space within the global common law

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Introduction

Hong Kong, or more formally, the Hong Kong Special Administrative Region (SAR), is a common law jurisdiction within the People's Republic of China (PRC). Hong Kong was officially a British colony from 1843 to 1997, although colonial rule began in practice in 1841. Post-1997 Hong Kong is unusual in that it is a common law jurisdiction within a civil law state, the legal system of which was set up initially on the Soviet model. The People's Republic of China is a unitary state under one party rule, and no power can be permanently ceded from the centre. Hong Kong is therefore a zone of discretionary exception created under the 'one country, two systems' policy, albeit one buttressed by an international agreement, the Sino-British Joint Declaration of 1984, and formalised in the Basic Law. A striking feature of this constitutional arrangement is that it is time-bound. The 'high degree of autonomy' promised to Hong Kong expires on June 30, 2047, with the subsequent special status of Hong Kong, if any, yet to be determined.

This paper begins with an account of the fictional ideal of the linguistic and conceptual unity of the common law. It moves on to review aspects of Hong Kong's legal history, focusing on tensions

in the unfolding of Hong Kong's colonial modernity. These tensions between the cross-jurisdictional conceptual unity of the common law and the recognition of Hong Kong's culturally distinct status are then illustrated through a number of cases. In particular, Hong Kong's distinctiveness is up for discussion in two classes of legal decisions. The first represent classic instances of 'legal pluralism', involving the application of principles of Chinese customary law by the Hong Kong administrative authorities (in particular through the district officer system) and the courts. These cases involve what are understood as traditional Chinese social institutions, family structures, forms of marriage, adoption and intergenerational possession and transmission of property. Linguistic and conceptual parity between the mainstream common law and traditional Chinese culture is not presumed, and the correct translation and anthropological interpretation of key cultural concepts is at issue. The second class of cases is much more nebulous. This is where courts in the course of a common law judgment explicitly evoke the *different* nature of Hong Kong society and its 'Chineseness', for example in relation to the definition of basic terms such as *wife* and *woman*.

1 The ideal conceptual unity of the common law

The fundamental principle of common law interpretative practice is the so-called 'plain meaning' or 'ordinary meaning' rule. Ordinary words and their everyday meanings operate as the default setting of the common law, and law's departures from ordinary meaning must be justified by specific elements of legal culture (Hutton 2014: 41).¹ The common law understands itself as an essentially universal jurisdiction, in that it is not tied to local conditions or conceptual micro-worlds. This (quasi-)universal jurisdiction is also the domain of the English language, which, at least from the perspective of the centre, is largely co-extensive with it.² By 'English language' is meant in this context neither a sociologically identifiable variety nor an ethnically defined mother tongue. Rather 'English' represents a legal Esperanto, a set of assumptions about the language of the common law, namely that

it possesses definitional stability, conceptual transparency, universal applicability and the ability to carry and sustain the coherence of legal reasoning across multiple contexts of application. It represents an ideal form of English which exists in uneasy relation to its sociologically messy, ill-defined real world analogue, the English language.

It follows that the common law understands itself to be transparent between jurisdictions, in the sense that these are in constant dialogue and exchange. This conversation between different (autonomous or semi-autonomous) legal systems and their different sub-domains, operates centripetally, in part because of centres of authoritative decision making (such as the Privy Council, the United Kingdom Supreme Court, the United States Supreme Court) and in part because this dialogue is anchored in the historical legacy of the common law and its fundamental reservoir of cases, principles and modes of reasoning. In its essence the common law is held to stand unchanging outside the historical contexts of its application, though it may paradoxically be adapted to those contexts: 'The Common Law may develop but it cannot change' (*Chan Wei-keung v R* per Huggins J, 846).

The inter-jurisdictional dialogue is, of course, not one between equals: for example the Hong Kong courts were, in general, bound by decisions of the House of Lords and the Privy Council before the end of colonial rule in 1997 (Wesley-Smith 1988: 191; 215). In the twenty-five years before 1997 the Hong Kong courts consistently drew on English cases for over 70% of their citations, with around 20% being from Hong Kong (Wesley-Smith 1999).

In addition to this cross-jurisdictional dialogue, there exists the presumption of a linguistic-conceptual world that is shared between the domain of law and the society over which it governs. The ideal of the comprehensibility of law, was expressed in a statement by Cozens-Hardy MR in *Camden (Marquis) v Inland Revenue Commissioners* (647):

I thought that a modern Act of Parliament was framed in a language which is intelligible to everybody, and which applied not to any local custom or consideration of that kind, but to the whole of Great Britain (and I think beyond that, elsewhere, but at any rate to the whole of England).

This statement blurs the universal applicability of law, in that it is held to apply universally within its jurisdiction (and to disregard matters of local practice or belief) with the principle of its universal intelligibility. The hesitation about the geographical boundaries of this jurisdiction reflects the fact that it is a purely imagined or ideal domain – it is not possible to make it precise sociologically or sociolinguistically. Few ‘ordinary people’ can read an Act of Parliament and gain an accurate sense of its legal effect. The actual sociological boundaries of this (idealised) English are impossible to determine, but, in this fictional or ideal sense, it is possible to imagine a judge knowing the language completely. Baron Martin expressed this in the form of a rhetorical question: ‘is not the Judge bound to know the meaning of all words in the English language; or if they are used technically or scientifically, to *inform his own mind* by evidence, and then to determine their meaning?’ (*Hills v The London Gaslight Co*, per Baron Martin, 63).

The presumption of conceptual universality operates unseen as a foundational fiction of law. In practice, it is a rebuttable presumption, once conceptual difference is explicitly at issue in a particular case. If one looks at the history of a jurisdiction like Hong Kong, this ideal of a conceptually unified common law comes very sharply into focus, and, on occasion, the fiction breaks down or is set aside as a matter of policy. So while historically, much of the explicit work of Hong Kong legal culture has been the fine-tuning of the relationship between the wider common law, in particular the law of England and Wales, and the legal culture of Hong Kong, a deeper unstated assumption has been at work that the basic conceptual resources of the English language constitute a shared and stable backdrop to both jurisdictions. Words of ordinary English (such as *person, man, woman, child, wife*) are taken for legal purposes as having the same meaning in Britain and Hong Kong, as are basic legal terms of art such as *contract, trust, equity, mens rea*. These terms are held to be part of the conceptual world of both the original jurisdiction and its colonial transplant.

2 Too much or too little?

The question of whether Hong Kong has been, fundamentally, a Chinese society under a thin veneer of colonial administration, or whether it is better characterised as a cosmopolitan (quasi-) city-state run on free trade principles, runs through the entirety of Hong Kong's legal and social history. It has commonly been argued that while Hong Kong is 'a modern city', the Chinese population is westernised only in a 'superficial sense' (Wong 1986: 307; Hsu 1992: 51). Even on the city-state model, it has been argued that traditional Chinese family structures, with their 'capacity to mobilise seed capital and to provide emergency funds' and 'a favourable regulatory framework' which encouraged risk-taking underlay the economic success of Hong Kong (Cullen 2006: 43). British colonial rule placed Hong Kong outside the social and economic reforms of Republican China (founded 1911) and beyond the reach of the radical communist modernity of the People's Republic (founded 1949). Nonetheless Hong Kong has been understood as modern in the sense that it is 'westernised', with that modernity being primarily understood as economic, administrative and juridical (the 'rule of law').

This problematic colonial modernity leads to two contrasting criticisms of British colonialism. For some, colonialism is seen as having imposed 'too much modernity', for example, by introducing or imposing forms of modernity that go beyond the provision of administrative and economic order to operate directly on the private sphere. Such critics generally speak on behalf of an (essentialised) traditional Chinese culture. Colonial rule in Hong Kong is seen as a channel for inauthentic westernisation and for the imposition of alien moral values, including liberal individualism. Alternatively, British rule in Hong Kong has been seen as wrongly denying its subjects access to 'full' modernity, as represented by equality before the law and the rights and political freedoms granted to citizens of modern democracies. The colonial Hong Kong government on this view conspired with the local Chinese (patriarchal) elite to deny progressive reforms to Hong Kong society. The criticism of 'too much modernity' in the domain of language politics

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targets the colonial imposition of English; the criticism of ‘too little modernity’ points to the denial of equal access to English in a socially stratified education system.

3 One territory, two legal cultures

The original seizure of Hong Kong was accompanied by two proclamations (Lewis 1983: 348–9). The first was issued on February 11, 1841 by Commodore Bremer as Commander-in-Chief and Captain Elliott as Plenipotentiary. It was addressed to the ‘Chinese inhabitants’ and included the pledge they would be

secured in the free exercise of their religious rights, ceremonies, and social customs and in the enjoyment of their lawful private property and interests. They will be governed, pending Her Majesty’s further pleasure, according to the laws, customs and usages of the Chinese (every description of torture excepted) by the elders of villages, subject to the control of a British magistrate.

The second, issued by Captain Elliott and dated February 2, 1841, renewed the pledge that the ‘natives of the island of Hong Kong’ would be ‘governed according to the laws and customs of China, every description of torture excepted’. In addition, ‘British subjects and foreigners residing in, or resorting to, the island of Hong Kong, shall enjoy full security and protection, according to the principles and practice of British law’. In spite of their uncertain legal status (Wesley-Smith 1995), the Hong Kong courts have, on occasion, treated these pronouncements as foundational statements (*HKSAR v Ma Wai Kwan, David & Others*).

There were a series of precedents for this dual system, including an 1807 Charter of Justice for Penang. Under this, and a subsequent 1826 Charter for Penang, Malacca, and Singapore, the Chinese inhabitants of British settlements were guaranteed protection for their religious beliefs and social customs, though ‘the extent to which English law was modified to pay this respect to local usages was unclear’ (Freedman 1979: 94). Hong Kong, unlike the Straits colonies, had been part of the Qing Empire, and the term ‘Chinese customary law’ covers both

the formal rules of imperial Qing law and local customs and usages attested in particular regions or lineages. Early Hong Kong laws set out a framework for two parallel systems, but again theory and practice were unclear. An Ordinance to Regulate Summary Proceedings before Justices of the Peace (1844) 'provided that Chinese offenders were to be punished according to Chinese usage' (Norton-Kyshe 1898: 20). The Supreme Court Ordinance (1844) affirmed that 'the law of England shall 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'. It stressed the primacy of property rights in the new colony and the indivisibility of its sovereignty:

provided nevertheless, that in all matters and questions touching the right or title to any real property in the said Colony, the law of England shall prevail, and that no law shall be recognized in the said Colony, which shall in any way derogate from the sovereignty of the Queen of England (cited in *The Queen v Wong King Chau and Others* [1964] HKDCLR 94, at 101).

These founding statements envisaged a 'dual prospective system of law' (*Ho Tze Tun v Ho Au Shi and others*: 79; Cheung 1996: 69), albeit in an unequal and unstable relationship. According to the legal historian Norton-Kyshe (1898: 19), the decision to institute this dual system was not without controversy. 'Public opinion', i.e. that of Europeans in the colony, saw it as 'ill-judged and impolitic that Chinese residents should be amenable to their own laws and usages' (Norton-Kyshe 1898: 19). The argument was that although 'the large bulk of the population was Chinese and mostly of the worse class, still the British laws were admirably suited to their necessities and fully adequate to all their moral and social exigencies'. The policy which had been applied elsewhere of guaranteeing 'the maintenance of the laws, franchise, and customs, besides the official use of the languages, of conquered countries' was a 'capital error'. There existed 'an English *patois* which was regularly taught in schools and was spoken by thousands in Hongkong'. This was 'of immense value'; further, it was the wish of 'the intelligent classes of the Chinese to know more of use and of our institutions'.

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These natives should be encouraged to adopt ‘our customs, manners, and language’, and this could only be effected ‘by making all residents in Hongkong *amenable to British laws, and to none other whatsoever*’ (Norton-Kyshe 1898: 20). This was in effect a debate about the degree to which, at least as far as the law was concerned, British colonialism in Hong Kong should take the form of what was later termed ‘indirect rule’ (see Ho 2006).

Norton-Kyshe’s evocation of high-minded debate about the appropriate system of law for the Chinese residents somewhat misrepresents the inchoate and often chaotic and racist nature of the early Hong Kong legal system, in particular the criminal law. While some Chinese residents responded positively to the possibility of a legal system that treated Europeans and Chinese equally (as opposed to the handing over of Chinese offenders to Qing officials), the reality was that the magistracy system was overburdened, marred by a lack of competent interpreters, and juries of Europeans decided the fate of Chinese defendants (see Munn 2001; 2013). In any case this ‘dual system’ aspect of Hong Kong’s legal pluralism diminished with time, very rapidly so in relation to the criminal law (Cheung 1996). What survived was Chinese customary law in relation to family structures, property and inheritance. The legal position was set out in the section 5 of the Supreme Court Ordinance (1873):

Such 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.

By the subsequent Application of English Law Ordinance (1966), it was affirmed that: ‘The 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’ (section 3).

The acquisition by lease of (what became) the New Territories under the 1898 Convention of Peking was accompanied by a set of concessions

in relation to the established way of life of its inhabitants. The Convention contained assurances that there would be no expropriation of land and that any resumption of land would be compensated at a fair price (Wesley-Smith 1998: 320-1). Subsequently, the New Territories Ordinance (1910, section 13) provided: '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'. A government report affirmed that Chinese customary law (rather than Qing statutory law) governed questions of land in the New Territories (Wesley-Smith 1998: 128, [Strickland Committee] 1953: 17). The descendants of the villagers registered at the time of the British take-over are to this day treated as indigenous inhabitants. This status is accompanied by various legal privileges. These include innovations by the colonial government, such as the right of male indigenous villagers to be allocated land for the building of a 'small house' (丁屋). This policy was formalised in 1972 (Chiu 2006). In addition the indigenous population enjoys exemptions from certain planning laws and from registration for clan bodies under the Companies Ordinance (Cheung 1996: 74-5). The special position of the indigenous population is protected by Article 40 of the Basic Law (see Chan 2011).

4 The colonial time-lag

In the colonial era, the decision whether or not to copy UK legislation (and whether and how it should be modified) was highly indicative of the political reading of the socio-cultural differences between the UK and Hong Kong. The time-lag was in part a matter of practicality, in that Hong Kong was able to draw on the UK process of legislative reform and drafting. It was also a delay in the transplantation of human rights, in that the post-1945 colonial government could not without self-contradiction apply the full range of internationally-understood democratic human rights to Hong Kong. One element was explicitly cultural, in that Hong Kong was understood as an only partially modernised or semi-traditional Chinese society with its own distinct

moral codes and ethical attitudes. A further factor in the waxing and waning legal differentiation between the UK and Hong Kong was active steps taken by the colonial government to meet perceived exigencies in the Hong Kong situation, including social unrest and strikes. Such measures were frequently of a repressive nature, especially those concerning triad societies, sedition, public order, public meetings (Regulation of Chinese Ordinance No 3 of 1888), freedom of speech and censorship, (such as the Control of Publications Consolidation Ordinance: 1951). Flogging and deportation were used as means of political control (see Keller 1992; Klein 1997).

Often the human rights time-lag and the evocation of cultural difference coincided in effect. In Hong Kong the death penalty was formally abolished in 1993 (with the repeal of the Corporal Punishment Ordinance), though it had been effectively suspended since the last execution was carried out in 1966. The gap between these dates in part represents deference to public opinion in the colony. In Britain the *Murder (Abolition of Death Penalty) Act* 1965 suspended the death penalty for murder and it was formally abolished in 1969 (though not until 1973 in Northern Ireland). Hong Kong's Sex Discrimination Ordinance was enacted in 1995, twenty years after the UK's *Sex Discrimination Act* of 1975.

In the case of racial discrimination the 'time-lag' is even wider: the UK Race Relations Act was passed in 1976, whereas the Hong Kong Race Discrimination Ordinance was only enacted in 2008. In relation to the regulation of private, consensual sexual behavior, in 1865 Hong Kong adopted verbatim the English Offences Against the Persons Act 1861, which defined a set of 'abominable offences' (sections 49-53). The Hong Kong Law Commission Report on Laws Concerning Homosexual Conduct (Law Commission 1983) adopted the approach of the 1957 Wolfenden Report, in that it accepted a disjunction between moral judgments about private consensual behaviour and the intervention of the criminal law (Law Commission 1983: 6-7). This was HLA Hart's position in his famous debate with Patrick Devlin on the relationship between law, morality and the public-private distinction (Hart 1963; Devlin 1965).

One strand of the committee's discussion was devoted to the argument that toleration of homosexuality would constitute a Western imposition on Hong Kong as a society shaped by traditional Chinese morality. Given Hong Kong's Chinese character, one view expressed was that the government should adopt the stance of a moral leader. This was acknowledged by the committee: 'We respect without reservation those who have urged upon us their conviction that Hong Kong is a Confucian society, and that the role of Government is therefore to set by law the moral tone for the community' (1983: 4-5). This was analogous in effect to Thomas Aquinas' understanding of natural law (Law Commission 1983: 5). The committee recognised that the metropolitan centre might be seen to be imposing its moral liberalism on a society which, if fully self-governed, would not have initiated such a reform. It noted a parallel between Hong Kong and Northern Ireland. But in response to assertions that homosexuality was not compatible with 'traditional Chinese concepts of morality' (1983: 122), the report documented in some detail discussions of homosexuality in Chinese literature and historical texts (1983: 14). It concluded from a survey that 'more countries in the region tolerate consensual homosexual conduct by adults in private than penalise it' (1983: 67-68).

The *Sexual Offences Act* (1967) decriminalised homosexual conduct between males over the age of twenty-one; the same reform was carried out in Hong Kong in 1991 by an amendment to the Crimes Ordinance. This left the age of consent for male homosexuals at 21 in Hong Kong, whereas the age of consent for heterosexuals was 16. This disparity is in contrast to the UK *Sexual Offences (Amendment) Act* of 2000 equalised the age of consent. In a judicial review of s.118C of the Crimes Ordinance (1971), the applicant in *Leung TC William Roy v Secretary for Justice* sought a declaration that the difference in the heterosexual and homosexual ages of consent offended the rights to equality and to privacy under the Basic Law and the Bill of Rights. To the government's evocation of 'the conservative attitude of the Hong Kong community in matters of sexual mores' (para 105), the court retorted that in 'a cosmopolitan society like Hong Kong "social norms and values" change, often rapidly' (para 106). The court's decision

that the age of consent was unconstitutional was upheld by the Court of Appeal (*Secretary for Justice v Leung TC William Roy*), though the government has to date not actually amended the text of the law.

In terms of the socio-legal modernity of Hong Kong, the colonial government only gradually and reluctantly dismantled certain core social institutions of pre-modern Chinese society. The Female Domestic Service Ordinance of 1923 abolished the *mui tsai* 妹仔 system, whereby young girls were sold by poor families as bonded maidservants. For its critics, this system amounted to child slavery (Haslewood and Haslewood 1930), though the girls in question were normally able to get married once they reached adulthood. The 1923 law rejected the notion that one could acquire property rights in a person in exchange for a payment (section 2), though the institution persisted, since the law only forbade new contracts. It continued to be the subject of campaigns, government investigation and further legislative intervention (Jaschok 1988; Liu 1994; Sheriff 2000).

One underlying question was whether the institution, in its ideal or canonical form, could correctly be termed ‘child slavery’, or whether this was a pejorative label which masked anthropological ignorance. The argument of its defenders was that, while it could be abused, the system was in its essence philanthropic (see Pedersen 2001; Samuels 2007; Pomfret 2008). This debate was part of a much broader legal engagement which involved the comparative mapping of Chinese concepts and institutions onto Western, specifically English, ones. However sophisticated (or not) the anthropological understanding of the *mui tsai* system, the need was for a definitive label and a ‘yes-no’ answer to the slavery question.

Concubinage remained an officially recognised social institution in Hong Kong until the Marriage Reform Ordinance of 1970. The Republic of China had enacted a Civil Code in 1930 which defined marriage as monogamous. A marriage was required to be formalised by a public ceremony with at least two witnesses (Article 982). The code made no direct reference to concubinage (Tran 2009). In 1950 the People’s Republic of China enacted a further reform of marriage

through its New Marriage Law (新婚姻法), abolishing all feudal characteristics of the institution. The Hong Kong law of 1970 stipulated that after October 7, 1971 the only form of legal marriage would be a registered, monogamous partnership (Lee 2000: 231; Lam 2004: 72-80), though existing traditional marriages were still recognised.

Forms of perpetual intergenerational clan or lineage-based landholding such as the *tso* 祖 and the *tong* 堂 (Wong 1990), which would otherwise have been invalid under common law principles (in particular the rule against perpetuities), have been given formal recognition by the Hong Kong courts (*Tang Kai Chung and another v Tang Chik Shang and others*, 279):

a Tso may be shortly described as an ancient Chinese institution of ancestral landholding whereby land derived from a common ancestor is enjoyed by his male descendants for the time being living for their lifetimes and so from generation to generation indefinitely.

One way that common law judges have sought to bring the *tso* into the common law conceptual world is by analogy with the *trust*. But this attempt to map this customary law concept onto the common law has been rejected as muddling further an already confused situation (Merry 2012). The dilemma is clear: in order for a common law court to analyse a particular factual scenario it is tempting to map a Chinese customary law concept onto a familiar common law one. But a customary law concept is by definition foreign to the common law.

5 Word meanings and cultural difference: the definition of wife

Analogous difficulties arise in relation to family structure. The question of how to define *wife* was a recurrent problem in the understanding of traditional Chinese marriage and the institution of concubinage. In *Ho Tsz Tsun v Ho Au Shi and others* (1915) the court made a strong statement of the status and importance of 'Chinese law and custom' to the Chinese inhabitants of Hong Kong (73):

Nor is to be believed that a conservative people, like the Chinese, are in the least likely to abandon their ancient system in a Colony where they are in an enormous majority, and which is on soil which was once part of the Chinese Empire.

In particular, China was a 'polygamous country' with a different understanding of marriage family line and inheritance. It was evident 'that the first wife has precedence, but that the other wives are wives and not merely concubines' (73). The alternative characterisation was that the Chinese were monogamous. The judgment emphasized this point: 'in Hong Kong great care has always been taken by the Legislature and the Courts to draw a definite distinction between a wife (Tsai) and a concubine (Tsip) and to apply the words "marriage" and "wife" only to the former'. While a *tsip* 妾 was not a wife, the status reflected a recognised social institution: 'the status of a Tsip in a Chinese family is recognised as very different from that of a mistress or kept woman, who, indeed, has no legal status whatsoever' (C G Alabaster, Attorney General of Hong Kong, cited in the Strickland Report 1953: 137).

One case where an issue within the common law had to be resolved with reference to customary law was *Chan Hing-Cheung and others v The Queen* (1974). The question was whether the rule of evidence that a wife was not a competent witness for the prosecution against her husband applied to a secondary wife or concubine (*tsip* 妾), as opposed to the principal wife (*tsai* 妻). The case was reducible to a simple principle: 'Stripped down, the present effect of s.6 [of the Evidence Ordinance] is that a wife may not give evidence against her husband, and vice versa, in criminal proceedings' (para 24). But was the witness a *wife* in this relevant sense: 'There can be no question that at Common Law in England a "wife" meant the female partner of a monogamous marriage' (para 25). The court recapitulated the various historical statements about the limitations on the applicability of the common law, including Captain Elliot's proclamations. The question was whether the common law was applicable to the 'circumstances' before the court:

The overwhelming 'circumstance' with which we are faced is that in Chinese law and custom, secondary wives have always been regarded as

lawful rather than bigamous. Concubinage continued to be recognised until the 7th October 1971 and the status of existing secondary wives at that date, including Madam Wong, continues to be recognised (para 25).

The court found that internal evidence as to the status of the *tsip* in customary law suggested she was a wife in the full sense of the word:

‘We have seen that Madam Wong is entitled to maintenance equally with the principal wife, that her children are legitimate, that she would be entitled to administer the estate of her husband, and that she is part of the family’ (para 33). This was further buttressed by the decision of the Privy Council in *Maraji v R*, where the rule of evidence was extended to include any spouse in a potentially polygamous marriage that was legal under the law of Tanganyika (para 35):

We see no reason to think that whatever may have been originally the practical reason or reasons for the rule rendering spouses not competent as witnesses against each other (reasons conveniently enshrined in the Christian concept of the marriage union) those reasons which have been suggested are not equally applicable to a Chinese customary marriage. The fact that in some respects a *tsip* is of lower status than a *tsai* and, therefore of the wife of a monogamous union does not affect the basic similarity arising from the fact that she is a wife.

This went against some case law (e.g. *In The Estate of Chan Yan Deceased*: 1925) where Sir Henry Gollan, C J, rejected the notion that a *tsip* 妾 was the wife of the testator ‘if that term is used in its ordinary meaning which limits its application to a *kit fat* [結髮 principal wife] or *tin fong* [填房 principal wife on remarriage]’ (36). But in the absence of any legislative intervention the Privy Council decision was binding. The murder convictions were quashed. The common law, almost in spite of itself, must here translate a culturally local and graded distinction into an ‘either-or’ one (‘wife or not-wife’), in the process drawing an analogy, via the Privy Council decision, with a marriage form in East Africa. The distinctive Chinese institution is re-imagined through a global common law understanding of other non-Chinese, non-modern, non-Western forms of marriage.

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One can contrast these cases of foregrounded cultural difference with one where the general law of marriage was at stake. In *W v Registrar of Marriages* (litigated between 2010 and 2013) the issue was whether a post-operative transgender woman (with a birth certificate designating her as male) was a *woman* for the purposes of marriage in Hong Kong. This was a classic human rights ‘time-lag’ case, in that the authoritative case law in Hong Kong (*Corbett v Corbett*; *Bellinger v Bellinger*) and related statutory provisions (the Marriage and Ordinance 1875; Matrimonial Causes Ordinance 1972) reflected a situation now superseded in the United Kingdom by the Gender Recognition Act 2004. This had been passed after the decision by the European Court of Human Rights in *Goodwin v United Kingdom*. The Hong Kong Marriage Ordinance provides ‘for the celebration of Christian marriages or the civil equivalent thereof’, and under the Matrimonial Causes one ground for nullity is that ‘the parties are not respectively male and female’.⁵ The Christian and the modern are effectively fused in this legal framing, the implicit contrast being with Chinese customary marriage.

The issue of transgender identity has offered a radical challenge to the presumption of a universal conceptual language for the common law. As Cheung J stated in the High Court, the question as far as statutory interpretation was one of the ‘ordinary meaning’ of the terms *man* and *woman*. These are terms which one might assume to have a single meaning across the common law world, a meaning which, once ascertained, could then be applied to the law of marriage. The English courts had used a mixture of biology and lexicography in arriving at the decision that a transgender woman was not a woman for the purpose of marriage, whereas in the Australian case of *Re Kevin* Chisholm J asserted (paras 289; 311) that the ordinary meaning of *man* and *woman* encompassed (post-operative) transgender identities (Hutton 2011). This meant that, in terms of the fictional English of the law, these words had a different ‘everyday, ordinary meaning’ in Australia than in England and Wales. Given that there were no statutory definitions of these terms, Cheung J treated the question in Hong Kong as a quasi-sociological or sociolinguistic one:

Whilst it is quite true that a sex reassignment surgery is colloquially referred to as a 'sex change operation' (變性手術), so far as the Court observes, the reference to 'sex change' (變性) in the ordinary usage does not, or does not yet, represent a general understanding or acceptance that the person's 'sex' (whatever one understands the word to mean) has really been 'changed'. I am therefore of the view that so far as the plain meaning of the text, or the plain and ordinary meaning of the relevant words, is concerned, the applicant has not established a case that the relevant words, according to their ordinary, everyday usage in Hong Kong nowadays, encompass post-operative transsexuals in their assigned sex (para 140).

On the argument in terms of constitutional rights, the judge stressed the distinct nature of Hong Kong as a 'predominantly Chinese society', so that the required social consensus for a widening of the constitutional right to marry was absent. This judgment defined Hong Kong society as a distinct linguistic and conceptual space from other jurisdictions, both more Chinese and, ironically, effectively more Christian than the UK: the judgment dealt at length with the colonial-Christian framing of marriage in Hong Kong (paras 114-116). The Court of Appeal upheld the judgment in relation to Hong Kong usage in English and Chinese (as well as on the related constitutional arguments) (*W v Registrar of Marriages*):

There is very little evidence before the court regarding the ordinary, everyday usage of the relevant words in this jurisdiction. The evidence there suggests that transsexuals are not generally referred to simply as 'male' or 'female' or 'man' or 'woman' (para 71).

These statements about ordinary meaning are clearly at best sociolinguistic and sociological fictions, and cannot be taken seriously as descriptive generalisations.

What is exposed here is the artificiality of law's inquiry into ordinary meaning and the irrelevance of actual usage, even supposing it would be possible to capture it. What is masked is the specificity of law's inquiry, since it asks for a definition of *man* and *woman* only for the purposes of the law of marriage. On the one hand, this might seem to

be the paradigm application of the ordinary meaning, since marriage is deemed to be a key social institution; on the other, the adjudication might be seen purely as a narrow inquiry for the purposes of law, which has no authority to make statements about the ordinary meaning of the terms *man* and *woman* for other purposes. This ambiguity shaped the original common law decision in *Corbett* (1970), where the judge, Ormrod J, sought to define the essence of human sexual identity: 'It appears to be the first occasion on which a court in England has been called upon to decide the sex of an individual and, consequently, there is no authority which is directly in point' (105). The decision depended on what he termed 'true sex' (89). At the same time the judge disavowed any such intention, limiting himself to the requirements of the law of marriage. At issue was what was 'meant by the word "woman" in the context of a marriage', it was not the task of the judgment 'to determine the "legal sex" of the respondent at large' (*Corbett*, 106)

The Court of Final Appeal in *W v Registrar of Marriages* (2013) chose to stress the specific legal context of the inquiry into ordinary meaning, thereby removing the question from the (quasi-)sociological to the legal: 'Our approach to construction has not proceeded on the basis of some textual "ordinary meaning" but on the legislative intent made evident by their enactment history in the light of the Corbett decision' (para 53). This had the effect of uncoupling the issue of statutory interpretation from the constitutional argument, and freed the judgment from the fictional constraints of an imagined Hong Kong consensus about the meanings of the word *man* and *woman*. The majority then aligned the law in Hong Kong with modern human rights law, distancing themselves from the Christian 'emphasis on procreative sexual intercourse being an essential purpose of the matrimonial union' and drawing on the dissenting judgment in *Bellinger* in the Court of Appeal (2001): 'the world that engendered those classic definitions [of marriage] has long since gone. We live in a multi-racial, multi-faith society' (para 128, per Thorpe LJ).

The conservative-Christian nexus that marked the High Court judgment was emphatically set aside as the Court stepped

beyond the constraints of the Hong Kong context to align the law with international human rights trends. It pointed to the UK Gender Recognition Act as a ‘compelling model’ (para 38). The messy sociolinguistic issue of the ordinary meanings of *man* and *woman* in Hong Kong usage (English and Chinese/Cantonese) was once again submerged within the presumption of a unified language of the common law. A dissenting judgment by Patrick Chan PJ however insisted on Hong Kong as a distinctive conceptual space (para 188):

In my view, the present position in Hong Kong is quite different from that in Europe and the UK when Goodwin was decided. While there was evidence of the changing attitudes in both Europe and the UK, I do not think there is sufficient evidence to show that the circumstances in Hong Kong are such as to justify the Court giving an interpretation to art 37 to include transsexual men and women for the purpose of marriage.

The use of the word ‘circumstances’ resonates with the early colonial-era discussions of the distinct nature of Hong Kong society (para 188):

As pointed out earlier, there is no evidence showing that for the purpose of marriage, the ordinary meanings of man and woman in Hong Kong have changed to accommodate a transsexual man and woman. More importantly, there is no evidence that the social attitudes in Hong Kong towards the traditional concept of marriage and the marriage institution have fundamentally altered. Nor is there evidence on the degree of social acceptance of transsexualism.

Following the decision in the Court of Final Appeal the Legislative Council has begun debating how to respond to the decision, with the Council divided over the scope of any legislation. Priscilla Leung Meifun, a ‘pro-establishment’ legislator, attacked recognition of transgender rights: ‘Hong Kong is not a Western society and should not follow Britain’s model, as this would lead to social chaos’ (Chui 2014). One theoretical issue is whether the traditional rights and privileges of New Territories, and lineage structure, would be affected by transgender status, such as how an affirmed gender identity which conflicted with the assigned category at birth would be understood in relation to

patrilinear lineage structures. Would an indigenous person who had been assigned a female identity at birth and who subsequently affirmed a male identity, including undergoing Sexual Reassignment Surgery, be entitled to build a 'small house'? In the UK, matters pertaining to peerages are exempt from the effects of the Gender Recognition Act (section 16) (Jiang 2013: 69).

As a footnote to the High Court decision in *W v Registrar of Marriages*, it is interesting to note that the judge, Andrew Cheung J, also presided over a controversial decision concerning customary rights. In *Liu Ying Lan v Liu Tung Yiu and another* the question at issue was whether the surviving daughters of deceased parents, who had not adopted a son to continue the male line, could inherit a property. The court heard expert evidence as well consulting directly the Qing code, both in the original and in translation. The father had died in 1943, and the mother in 1987. Among the legal issues exotic to the common law was the possible validity of the posthumous adoption of an adult carried out by members of the lineage. There was one Hong Kong authority to this effect from 1954, *In the Goods of Chan Tse Shi, deceased*, and a powerful underlying cultural logic to this custom (para 49)

the rationale of the device to continue the male line is not difficult to guess or understand by anyone with some general understanding of the traditional Chinese society and its conventional or Confucius values and thinking.

The judgment continues with a length quotation from Jamieson's *Chinese Family and Commercial Law* (1921), beginning with the statement that (cited, para 49):

The foundation of Chinese society is the Family, and the religion is Ancestral Worship. Ancestral Worship is not a thing which the community as a whole can join in; it is private to each individual family, meaning by family all those who can trace through male descent to a common Ancestor, however numerous, and however remotely related.

Based on this understanding of Chinese society the judgment explicitly adopted the view that the inheritance of the property by the daughters was a solution 'almost as a matter of last resort' (para 55).

While the claim of the particular male relative (a nephew) was rejected (since he had already inherited property from his own father), it sent the matter back to the lineage in order to allow time for another male relative to be found or adopted. This judgment took its reference points from a socio-legal imaginary radically at odds with the constitutional framework underlying Hong Kong's post-1997 legal order, with its promises of equality before the law in the Bill of Rights and the Basic Law. It envisaged a pure type of Chinese customary law, in which there was no room even to debate flexibility and a context-sensitive solution.

One comment from the Strickland report seems pertinent here (1953: 67): 'It is somewhat disturbing that in nearly every case in which the Courts in Hong Kong have had to inquire into Chinese law and custom there has been conflicting evidence on some material point with which the Court is concerned' (see also Chan 1998; 2001; Chan 2013). A glance at an in-depth scholarly discussion of the nature of Qing law suggests that reading the Qing text as if it were a common law statute is a perilous undertaking (Su 1999). In the event, the decision was reversed on appeal (*Liu Ying Lan v Liu Tung Yiu and another*), on the grounds that the Adoption Ordinance (1972) had been intended to bring an end to posthumous adoption under customary law (para 49). In any case the High Court judge had been 'over-cautious':

Sixty years had passed since the death of the deceased. Apart from the 1st defendant no one from the Liu clan had come forward and made a claim to succeed the deceased. After the present proceedings was commenced in 1992, no member had applied to be joined as a co-defendant (para 69).

One can understand the Court of Appeal to be saying that the original judgment had been 'hyper-Chinese' in its approach. In debates over legal pluralism one important strand of argument has been about the Romanticisation of nonstate, indigenous or 'folk' law (Galanter 1981; Sharafi 2008). In Hong Kong the other side of this coin is the Romanticisation of colonial common law.

6 Conclusion

In the history of the Hong Kong jurisdiction, questions of conceptual and legal equivalence have arisen primarily in relation to marked or foregrounded elements of traditional Chinese culture. In such cases the issue is the mapping of Chinese concepts and institutions onto Western, specifically English, ones and the reduction of anthropological complexity to 'yes-no' distinctions expressed in terms of common law categories such as: 'wife or not wife'. But, for much of its history, specific Chinese customs aside, Hong Kong has been treated as a sub-domain of the universal common law jurisdiction (centred in England and Wales). Principles of English law and the categories of the English language (both legal and those of ordinary language) have been applied as a matter of course to factual scenarios arising, to use Cozens-Hardy's words, in a world 'beyond that, elsewhere'. This had led to the 'legal ghettoisation' of Chinese culture, and a stereotyped polarisation of the modern and the traditional characteristics of Hong Kong society.

Postcolonial theory often attempts to resolve (or at least particularise) the dilemma represented by colonial modernity by studying the interface between the local and the global (Lee 2000; Merry and Stern 2005) and by pointing to or imagining alternative, non-Western modernities (for a survey and critique, see Dirlík 2013). In so doing, it draws both on the 'too much modernity' and the 'too little modernity' strands of critique, but goes further to point out that notions of 'the traditional' are formulated in a complex reaction to, and interaction with, colonial modes of knowledge and governance. Colonial social engineering in the name of respect for difference, it is argued, has led to 'an eternally frozen monolithic indigenous Han-Chinese culture' which is understood as 'essentially patriarchal' (Chiu 2006: 50).

The irony of Hong Kong's colonial legacy is that social progressiveness, equality and freedom of individual expression is now defined in opposition to 'Chineseness' (see Wat 2011). This 'Chineseness' is a mix of re-imagined Confucianism and Leninist authoritarianism. The notions of respect for hierarchy and patriarchal, monogamous

family values are not greatly distinct from social, specifically Christian, conservatism in the West. The representatives of this normative, state-sponsored Chineseness include the same class of business tycoons who formed the economic leadership of Hong Kong in the later stages of British rule, as well as a political party strongly supported by the authorities in Beijing, namely the Democratic Alliance for the Betterment and Progress of Hong Kong (DAB), and the Heung Yee Kuk, the colonial-era institution set up to represent the rural-indigenous villagers.

As a result of the processes described in this paper, ‘Chineseness’ in Hong Kong is identified in the socio-legal sphere with everything anti-progressive, as if this was an inevitable and fixed cultural fact. Given this polarisation of rights discourse between a ‘non-progressive Chineseness’ and the ‘progressive West’, and the importance of an idealised ‘rule of law’ within Hong Kong popular imaginary (Tam 2013), it has become a logical tactic for the Court of Final Appeal to seek to maintain Hong Kong’s alignment with UK law and thereby reassert the conceptual unity of the common law, especially given the impact on UK law of the European Court of Human Rights. And given the surreal reinvention of colonialism as equivalent to international human rights, it has become a logical tactic for disaffected young people to wave the Hong Kong colonial flag and the Union Jack, as a provocation to the ‘pro-Beijing’ Hong Kong establishment and officials of the Central People’s Government (Cheung et al 2013). The Occupy Central (Umbrella Movement) demonstrations, which erupted in Hong Kong in late September 2014, are an evident symptom of this polarisation of rights discourse and of the profound alienation of many Hong Kong young people from the normative identity labels and symbols promoted by the political establishment.

Notes

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- 1 I am not referring here to 'high' jurisprudential debates about legal interpretation but rather to the principles that common law judges appeal to in mundane decisions when faced with a problematic term in a statute or a contract, and the basic rules of legal interpretation taught to first-year law students. The jurisprudential status of these assumptions is of course highly contentious.
- 2 In recent years Chinese/Cantonese is increasingly being used as a language of law, but as this article is primarily historical in focus this important issue will not be pursued here.

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