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聖保祿中學
St Paul's Secondary School

「How clashes finally lead to the convergences of the Hong Kong legal system in the colonial period (1841 to 1997)」

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**The 5th Inter-school Competition of Project Learning on Learning
on Hong Kong's History and Culture**

**Topic: Clash and Convergence: The Fusion of Chinese and Western
Cultures in Hong Kong**

School: St. Paul's Secondary School

**Topic: How clashes finally lead to the convergences of the Hong
Kong legal system in the colonial period (1841 to 1997)**

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1. Preface:

Colonization is a conquest of knowledge where the colonizers strove to assemble and order a coherent body of knowledge about the language, landscape, social practices and mentalities of the colonized. Through this process of making what previously unknown known, colonizers constituted, projected and protected their authority. However simultaneously, the philosophy of the British colonial rule was a policy of indirect rule, which was mainly about non-intervention since it did not regard Hong Kong as a conquered colony but an important gateway to external markets. Through this way, Great Britain colonized Hong Kong for one and a half century and with it- the spirit, core values, system of the law, use of bilingual laws, polygamy, small-housing policy, *mui tsai* and wen wu temple are various examples of clashes and convergences of its still present legacy. These cases will be presented through analyzing causes and characteristics of the coexistence of the dual legal systems of British laws and Chinese customary laws in Hong Kong in the period 1841-1997.

An old Chinese proverb goes like this, "There cannot be two tigers in a territory." A legal system is the basis of a city and region, yet seldom can one practise two set of legal systems simultaneously, let alone the fact that they possess distinct legal features. Hong Kong-- international financial centre, which is well-known for its rule of law and its multi-cultural merge, making this thesis particularly worth investigating on. One can only know how to appreciate and make a city prosperous by looking back at its history. It is also interesting as to how some terms compliment and contradict each other on controversial issues during the colonial period.

Therefore, a gradual approach and a transnational scope was conducted for our project so as to further understand the unique importance and impacts of the clashes and convergences in Hong Kong. We first looked at contemporary documentaries, the British Parliamentary Papers, the Colonial Office files, Hong Kong Census Reports, *Hong Kong Government Gazette*, *Sessional Papers*, etc. for an overview on these subjects, followed by a collection of authoritative and diverse newspaper cuttings at that time, such as *Man Wei Pao*, *Hong Kong Daily Press*- one of the oldest English newspapers published in Hong Kong, *China Times*, *Huazi ribao* (for the coverage of Chinese newspapers for balance), etc. Intensive and exclusive reading were also carried out throughout the investigation, after visiting different libraries for specific resources and data, which will provide an all-rounded perspective of the thesis.

During the colonization period, the Great Qing Legal Code and the Great British Laws were both used to strike a balance between establishing British's governance authority, as well as room for self autonomy for the ethnic Chinese. Such policy has since been integrated in Hong Kong's modern legal system consisting of two parts- the Basic Law and the Common Law, which is under the bilingual principal as the basis for all legal interpretations.

"The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions." This is the fundamental value of adjudgement in Hong Kong that has been preserved from the Common Law of the British government during the colonial period. However, there are different interpretations of the Chinese and Western laws and the values they hold in terms of equality, liberty, women status, rural land use, etc. which led to a polarized city, but eventually reached compromise on the issues of marriage and land distribution and policy making, amongst other things. These will be discussed in detail below.

2. Dual Legal System

Origin

In 1842, the Treaty of Nanjing stated that Hong Kong would be ceded to Britain. However, before that, The Convention of Chuanbi, signed on the 20th of January has already listed Hong Kong as a territory to be ceded, and Captain Elliot had already raised the British flag in Hong Kong.

On 1st February, 1841, the British armies occupied Hong Kong Island. Charles Elliott and J.J. Bremer issued a joint proclamation, guaranteeing Hong Kong's indigenous villagers that all terms of Great Qing Legal Code, excluding penal torture, would still be effective before any new amendments took place.¹ On the next day, declarations of similar contexts were made. They were known as the "Elliot's Proclamations", which provided the breeding ground for the basis of the dual legal system- Chinese law and custom for Chinese and Common Law for the British².

Clashes

The Chinese and British legal cultures were very distinct. For the former, the traditional Chinese means of social control is based on Confucianism, which is given expression through a complicated sets of rituals, practices and class and gender codes. It does not have a legal culture in the Western sense of a set of cultural beliefs in the primacy of law as an instrument of social control and legal institutions as the appropriate forum for enforcing correct social behavior. For the latter, it puts emphasis on notions of rationality, scientific thinking and truth. Its methodology applies reason and rational thinking to facts and law, which means the scientific tools of investigation separate legally material facts of the case from irrelevant or background facts of conduct.³

Therefore, the concept of a dual legal system had sparked great controversy. Some contended that such ruling principle would encroach on the authoritative status of Great Britain, which in turn would undermine the social stability of Hong Kong. G.E. Strickland, along with some other law authorities, such as E.S. Haydon, D.M. Emrys Evans, Peter Wesley-Smith, however, argued that the judicial power bestowed under such framework of a dual legal system acted as an 'interim' in managerial strategies when handling newly colonised territories⁴. Such 'interim theory' was also accepted by the Chief Justice, Hogan in the re-Tse Lai-chiu case in 1969. Prime Minister Viscount Palmerston yet rebuked the theory. D.J Lewis, was also on his side, and he was of the opinion that this system could fulfill the spirits of British rule - whenever a British-based society has to penetrate into other countries as a result of colonisation, mainstream of the society would follow laws of Britain while local indigenous residents were entitled to be ruled in a way they were accustomed to, for instance, observing their own custom laws. Beside the British ruling authority, the Chinese also expressed great dissatisfaction towards the proclamations which advocated simultaneously-run legal systems. Daoguang emperor was enraged after seeing lines of 'Hong Kong residents now are under the rule of Great Britain citizens' and responded with 'With the Emperor in sight, each inch of land and citizen belong to the state but no one else.' He then immediately dismissed Qishan from his post of the Manchu government official and condemned him to death due to Convention of Chuenpee (20 January 1841) which demanded the ceding of Hong Kong Island and an indemnity of 6 million dollars to the British. The sentence was later commuted to banishment. From this, we could see that the attitude of Chinese authority towards dual legal system was neither welcoming nor supportive.

Convergences

Despite the disagreements on the interpretation of Elliot's Proclamations by Western authorities and discontent of Chinese government towards concept of dual legal system, it was undeniable that there was

¹ 《香港殖民地時期二元化法制之確立》 http://www.cuhk.edu.hk/ics/21c/issue/articles/060_991219.pdf

² The Common Law System in Chinese Context: Hong Kong in Transition, Berry Fong-Chung Hsu (p.9)

³ Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region, Ann D. Jordan (p.4-5)

⁴ in re-Tse Lai-chiu [1969] H.K.L.R.169

significant influence and existence on either the legal history and people's daily lives. Many common Chinese viewed it as a promise by the colonial government, a mutual constitutional covenant between Hong Kong and British. Norman Miners also stated out the fact that courts referring to Elliot's Proclamations as reference in later cases was the best evidence of British's intention in constructing simultaneously-practised legal systems, and they were still treated as valid references after establishing the Legislative Council set up in 1843.

The Chinese civilians' observance for the Elliot's Proclamations was also understandable. The Chinese had long been bounded by the concept of 'yue fa'- a kind of provisional agreement between two parties. In Chinese traditions, founding emperors were accustomed to make pledges or commitments before the people in exchange of their compliance and trust. There were also longstanding common historical stories about the practice of 'yue fa', for example, Emperor Gaozu of Han clarified his political agenda in front of influential elders at that time before overthrowing the Qing dynasty through yue fa("Yue Fa San Zhang"), Emperor Gaozu of Tang also made 12 agreements with the people before carrying out his rule("Yue Fa Shi Er Tiao"). Such traditional Chinese mindset of 'yue fa' favoured the emergence of Elliot's Proclamations which was also of a mutual covenant basis, therefore it was respectable in eyes of many Chinese.⁵

Supposedly, colonies would be ruled under strict governance with less flexibilities in order to maintain supreme status of the sphere of influence of certain power. However, Britain was in fact more determined in searching for an external trade centre in China, rather than particularly ambitious in occupying Chinese territories for expanding colonial empire in Asia. Under the British principle of "indirect rule" in colonisation, which refers to the ruling concept of limited colonial officers or advisors governing extensive amount of overseas colonies with variable amount of administrative power, Hong Kong was one of the benefitted colonies. Considering Hong Kong's potential export market resources, as well as its hidden agenda in building rapport among Chinese indigenous residents for maintaining stability of rule, the main purpose of introducing such proclamations could be interpreted as a strategic method in pacifying the Chinese by making compromises on legal systems which might provoke largest resentment among peasants. On one hand, the Qing Legal Code was valid especially for protecting property rights for indigenous residents; on the other hand, British laws were adopted to protect British in Chinese and symbols of colonisation.

The concept of simultaneously-practised legal systems born by Elliot's Proclamations during the colonial period further proved the existence of convergence in context of law. Its influence is also significant in setting basis for contemporary legal systems in Hong Kong as it is now composed of the Basic Law, Common Law, Rules of Equity and Statute Law which combines two distinct legal cultures in one set of laws.

⁵ 清史通俗演義: 蔡東藩歷史演義-清朝, 蔡東藩

3. Bilingual Laws

Bilingual law refers to the bilingual texts of Ordinances and subsidiary legislation in force having both version in Chinese and English.

In 1842, the Chinese Government and the United Kingdom signed the Treaty of Nanking that marked the beginning of Hong Kong's colonial rule. Since then, the British started to impose English statutory and common law on Hong Kong in order to strengthen their control. However, even though over 90% of Hong Kong people spoke Cantonese, the laws were in English when the United Kingdom first brought into Hong Kong.

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"You cannot treat the sick if you cannot speak their language". Due to the problem of having a "language gap" between the government and citizens, disturbance and riots started to occur during 1966 and 1967. In response to local public pressure, the government passed the Official Languages Ordinance 2 in 1974, making Chinese become the official language under the British colonial rule.

As most people were unable to understand the language of the laws, the English common law system is handicapped, and since the monolingual system before had resulted in the public's alienation from the law, leading to inequality and injustice, the Chinese law was much more preferable.

Although Chinese was legalized as an official language for judiciary, judges can still decide which language to use in each case. These circumstances not only promoted the coexistence of the dual language law system, but also clashes and arguments regarding the mistranslated ordinances.

Hong Kong was practicing laws including the English common law, the Statutory law which is composed of local ordinances, the Chinese Customary Law, etc. during 1841 to 1997. Within this period, the legal practices in Hong Kong demonstrated the convergences of laws and ordinances regarding the dual language system and its translations/ There were a number of massive challenges throughout the process of translating English legal concepts into Chinese since different languages has their own specific diction and sentence structures.

Eventually, in less than two years before the handover, in 1995, ordinances were finally passed for the right of related personnel to have the ability to choose to use Chinese in different courts.

Clashes

The most obvious clash was the conflicts between the two equally authentic language texts. Since law is one of the professions which require absolute accuracy on terminologies and expressions, slight differences in wordings might lead to misinterpretation and erroneous judgements. Therefore, Hong Kong must build up a legal vocabulary system, but this caused a number of disputes. For example, "duty" and "liability" are often translated interchangeably as yi wu (義務) or ze ren (責任). Thus, expressing the tort "law concept that a party has a 'duty' reasonable care, but may not be 'liable' due to unforeseeable circumstances" presents a problem. Thus, it's a challenging task to transfer English terms into new Chinese legal terms that have a clear, specific meaning. Thus, the creation of legal terms require a long time for measuring and finalizing the most appropriate wordings.

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As a result, having two starkly different languages to be used in court created polarized opinions, of which the matter was finally settled in 1995. Beyond these mere translation problems, other aspects of the profession also faced difficulties. Here are a few examples:

For lawyers, before the introduction of the Chinese legal system, there were a large proportion of foreign lawyers in Hong Kong. They had no experience or ability to practice Chinese laws. Clashes began to occur between the English and Chinese speaking lawyers as competition kept on increasing between the two parties.

For legal proceedings, in some civil appeals, the witness is a local who could only speak Cantonese and could not understand English, hindering efficient communication in court. Even though there was a translator, the translation of the judge's question or the witness answer may be misinterpreted. Moreover, foreign judges and lawyers encountered difficulties in understanding the local culture and traditions. This created clashes on cases related to local moral considerations, thereby affecting the final court judgement.

Convergences

The Chinese, Hong Kong and British government worked together to promote the use of the Chinese law. The British government, the PRC government and Hong Kong government officials were the initiators suggesting of the use of bilingual laws. They tried to merge the differences of the two languages when setting up laws by showing support of the use of Chinese as a show of respect to the Chinese government, while at the same time maintaining the importance of English.⁶

Hence, as there were language barriers between legal practitioners, judges, magistrates and tribunal officers who could be either a Chinese or a British. To support their communication and cooperation, a Chinese version of law is needed during the colonial period, which extended until now.

Although there were clashes when implementing the dual language laws, but the efforts for improvement cannot be omitted. There were law schools established in 1969 in order to contribute to the development of the bilingual legal system. It provided training for the lawyers and introduced a new course on "The Use of Chinese Law". There is no doubt that the colonial government was trying hard to establish the Chinese law and to promote the recognition of it.

Since 1995, both Chinese and English was recognized courts. Comparing to the 1960's, when the Chinese had no legal representation, the Chinese finally had their rights protected. Throughout this period, convergences on the coexistence of the two different law system were supported by the three governments.

Related Cases

These are cases which explained the slow implementation of the Chinese language in courts due to the difficulties in presenting legal arguments and legal judgement in Chinese based on the English common law.

Case of Sun Er Jo vs. Lo Ching:

The plaintiff brought an action against her children, claiming that they were withholding property held in a trust for her based on an oral arrangement. "The deeds in question were written in Chinese and dated back thirty years. The parties did not understand English, and lawyers did not represent them. Under these circumstances, the Chief Justice chose to conduct the trial in Chinese."

Case of Ng Ching Man vs. Eliza Ng Lai Wah:

The case addressed the validity of a marriage. If the marriage was valid, the plaintiff and her children would be entitled to a share of the family property left by a member who died intestate. Because the marriage in question was conducted according to Chinese tradition dating back to World War II, the court decided that the arguments on the establishment of the Chinese marriage custom and tradition would be presented most effectively in Chinese. "Nevertheless, the court admitted frankly that the preparation and delivery of a bilingual judgment was a difficult process, requiring a week's work."

⁶ One Country, Two Systems, Three Languages- A Survey of Changing Language Use in Hong Kong (editors: Sue Wright and Helen Kelly-Holmes)

4. Mui tsai

Mui tsai, meaning “little young sister” in Cantonese was a legally accepted South China practice in which a girl’s parents would abdicate their rights of their child to a wealthy family who will then have absolute right over her, even the right to sell, in exchange for a sum of money, usually through trade, but sometimes indirectly by kidnapping as well. The girl would then work from a very young age in their households with no fixed hours or wages as maidservants, provided with food and lodging, but were often alienated from their natural families and given a new name. Most of them would eventually be married to the son of this family when they reach adulthood, usually at the age of eighteen, even though this is the time when their bondage ends. The conservative estimate number of maidservants were over 10 000 in 1929.

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Although the British Slavery Abolition Act and the Slave Trade Act were enacted during the mid 19th century, the Chinese defended this practice which was a symbol of racial and cultural “Chinese traditions”, as well as “Chinese values” based on its “patriarchal order”; and the Hong Kong government did not impose any restrictions on the mui tsai system because this was deemed as a family matter and traditional custom, but still, the practice ignited imperial and international debates over slavery and women’s rights from the 1880s to the late 1930s, which were supported by the League of Nations. There was a difference in the concept of girl and women in Britain and China. This thesis aims to compare and contrast the culture and public opinions of Britain and Hong Kong through analyzing the issue of mui tsai through a legal perspective, as well as looking at similar policies undertaken in the British Malaya at that time on the issue of mui tsai.

The issue of mui tsai also rendered young labouring females as a distinct social group in need of protection and supervision as the very inclusiveness of the term mui tsai as the linguistic designation for the subset of labouring girls influenced legislators and social reformers efforts towards providing effective protection to them.

Clashes

After returning from a sojourn in Hong Kong, Colonel John Ward brought the British Parliament’s attention on the issue of mui tsai in 1917 on the British government’s “pledge to civilize”; while on 17 June 1880, Hong Kong Chief Justice John Smale stated that “no one can acquire any right over the person of another, that no man can sell his own person into slavery, that a parent has no saleable property in his child.”, criticizing the Hong Kong government on legalizing child slavery. Both did not have the foresight to know that this issue would cause debates that would reshape Britain’s understanding of their position in Southeast Asia. The Colonial Office merely instructed the Hong Kong government to conduct enquiries to assess whether, as some European residents in Hong Kong claimed, the practice amounted to slavery, resulting an amendment of the legislation regarding the protection of females in Hong Kong that satisfied the Colonial Office. However, thirty years later, activist groups in Britain noticed Colonial Ward’s enquiry, putting pressure on the Colonial Office and raising public awareness through continuous campaigns, eventually led to the passing of mui tsai ordinances in Hong Kong in 1923 and 1928, which objective was to eradicate the practice as people viewed the practice was a “blot on the honor of England”. The metropolitan uproar reached its peak when Commander Hughe, a retired Lieutenant Commander, and Mrs. Haslewood published their book – *Child Slavery in Hong Kong: The Mui Tsai System* in 1930 after attending a sermon conducted by the Chaplain of the colony at the Cathedral of St. John, which accused the British of being apathetic to the “evil mui tsai custom” in light of the 1917 case of a brother selling his two sisters under the guardianship of two mistresses and other mui tsai maltreatment cases, making them believe that the mui tsai system was the buying and selling of slaves. They actively published news articles in Hong Kong and Britain attacking

⁷ Photo from *Women and Chinese Patriarchy: Submission, Servitude, and Escape*, edited by Maria Jaschok and Suzanne Miers

was finally mutual ground between westerners and chinese through raised awareness and different perspectives of the issue.

⁹Hence, some westerners in Hong Kong still have mui tsai, who although have long reached 18 years of age, but because they are so poor and have nowhere else to go, are forced to stay with their host families until they die.

Hong Kong vs. British Malaya

¹⁰During the colonial period, the public viewed Hong Kong and British Malaya on a par. For reform-minded British, mui tsai signifies as one of the evils the Empire had to correct in their holdings east of the Suez and also to protect their international image. "[T]he practice [mui tsai] has spread to Malaya under the influence of the Chinese immigrants who are numerically and economically an important factor in the States [of British Malaya]." this was stated in the report of the Mui tsai Commission, which made colonial officials in Malaya to believe that if the problem was eradicated in hong Kong, then the new regulations would 'gradually have an educative influence on the Chinese who emigrate to Malaya.

⁹ Gender and Change in Hong Kong: Globalization, Postcolonialism, and Chinese Patriarchy, edited by Eliza W.Y. Lee

¹⁰ THEORIZING THE CHINESE: THE MUI TSAI CONTROVERSY AND CONSTRUCTIONS OF TRANSNATIONAL CHINESENESS IN HONG KONG AND BRITISH MALAYA KAREN YUEN

the system as well as consulting key figures. Add in the long-standing official opposition to slavery and the slave trade of the British government, the Colonial Office and the Hong Kong government were placed under gigantic pressure to abolish the practice immediately as the British sees the "so-called customs" contained "the most revolting abuses" and that it was "intolerable". Given that mui tsai was also a practice that was popular in the British Malaya, the Mui tsai Commission was formed in 1936, consisting of two colonial officers and a leading female activist. Together, they interviewed numerous witnesses and distributed questionnaires, even encouraging locals to provide oral testimony, but were not able to offer a unified and coherent conclusion about the status of mui tsai. The committee simply concluded in their majority report that it would be 'a long and tedious business' to abolish the mui tsai system, identifying the practice of mui tsai as a transnational phenomenon central to Chinese life in Hong Kong and British Malaya, leading to a number of amendments being made in Hong Kong and British Malaya on mui tsai and child protection ordinances. In 1922, after press campaigns in Britain, Winston Churchill, the Secretary of State for the Colonies, pledged that the Mui Tsai system in Hong Kong would be abolished within 1 year. Under scrutiny from the British Parliament, the Hong Kong Legislative Council enacted the Female Domestic Service Bill the next year. Further importations and transfers of Mui Tsais were prohibited.

However, in Hong Kong, amongst local residents, this practice was generally regarded as a charitable act by masters who see themselves as saviors who rescued poor and helpless girls from poverty, treated them like adopted daughters, giving them food and shelter when they would have either died by starvation or become prostitutes; nor was it regarded as inhumane by the general public. The girls born in poor, rural villages in Mainland China would have faced a lifetime of heavy labour or even death had their parents decided they were too big of a liability or burden. The Chinese even claimed that if there was indeed a problem, western imperialists were to blame since the colony was notorious as a transit hub for Chinese children trafficking and prostitution that goes unhindered by the colonial government, further creating bias on westerners who view mui tsais as child slaves.⁸ The Straits Settlements' Acting Secretary of Chinese Affairs contended much of the criticism of the practice is arisen by a misunderstanding of it, from ignorance of the living conditions the poor girls would otherwise be subjected to and from the unreasonable sentiment that most British place on the word- "home". Being strong armed by public opinion in Britain, the Hong Kong government enacted the Female Domestic Service (Amendment) Ordinance. All mui tsais, later including adopted girls as there was a concern mui tsais will be kept under a different title, were to be registered prior to 31 May 1930, after which no registration, thus sale of a mui tsai would be permitted. Mui tsais were ensured of safety and salary through house visits by inspectors. After World War Two, the Protection of Children and Juveniles Ordinance was enacted to protect all adopted girls as well. By then, no mui tsais were legal as all registered mui tsais has already broken their bondage at the age of eighteen. However, the proposed abolition of mui tsais is a backslap at the British who vowed to protect any and all Chinese customs.

Convergences

Mui Tsai is an entrenched Hong Kong culture for centuries. As many of the Chinese people who had Mui Tsai were wealthy, the British government tried to preserve this tradition to avoid provoking vengeful feelings of the middle and upper class, who insisted on separating mui tsai and prostitution-which was regarded as unethical, and thus pressured the Hong Kong government into supporting their stand. This blurred and merged the ideological difference between the locals and the British the upper class regarding mui tsai.

Carl Smith in his book, *A Sense of History: Studies in the Social and Urban History*, and his article, "The Chinese Church, Labour and Elites and the mui tsai Question in the 1920s" also discusses the rhetoric of the mui tsai system as a social problem that drew the attention of both labour unions and Chinese Christians, raised concerns on the British parliament system, the response from the Chinese elites, the formation of the Anti-mui tsai Society, leading to the drawing up of the Female Domestic Service Ordinance of 1923. There

⁸ From 'slavery' to 'girlhood'? age, gender and race in Chinese and western representations of the mui tsai phenomenon, 1879- 1941 Ko, Yeung, Katherine

5. Polygamy/ Concubinage

Polygamy is “the practice or condition of having more than one spouse, especially wife at one time”. What it means is that a man will divide spending his time equally between his wives. It is arguably both beneficial and detrimental to women. By a polygamous marriage, women can enjoy free time when taking turns to do housework, but feminists insist that the love and property of the husband will have to be shared, creating an inevitable result of jealousy and inequality, as well as concerns on the psychological growth of the offspring because they might not have been able to receive any forms of education due to the divided use of income and the high costs of education.

Polygamy had been prevalent for a prolonged period of time in some many countries. In China, it had long been a tradition for rich men to have wives or concubines as before the establishment of the People’s Republic of China, polygamy and concubinage is legitimate. It is the by-product of the traditional belief of continuity of the paternal bloodline of a family. In addition, polygamy had been incorporated into some Chinese modern plays and stories, for instance, the famous play “The Mad Phoenix” by Raymond To, which displays the life of a genius who was born in a polygamous family.

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However, following the footsteps of modernisation and the emergence of voices on equality, rights and feminism, both polygamy or concubinage are now less common or even vanished in many countries across the world. China, starting from the Mao rule, prohibited polygamy. People found committed this act would be sent to jail at that time.

Clashes

Without any doubt, Britain and China had very different traditions and ideologies regarding polygamy. The Western tradition has always been the practice of monogamous marriage for more than 2,500 years.¹¹ They consider polygamy as destructive to not only wives and children, but also to good citizenship and political stability. Therefore in Britain, polygamy is prohibited. According to the ¹²Offences Against the Person Act, “*Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable . . .*” - if a polygamous marriage is performed, the already-married person may be guilty of the crime of bigamy. Even until now, polygamy in western countries are still unacceptable, which can be seen in this excerpt written by famous writer and feminist, Susan Blumberg Kason: “*A wife is not as good as concubine, a concubine is not as good as a prostitute, a prostitute is not as good as a secret affair, a secret affair is not as good as the affair you want but can’t get.*”¹³

However, the Chinese had opposing views. In the family law of the Qing Dynasty, polygamy is a social convention and is widely encouraged and accepted. The Chinese even believed that through polygamy, benefits can be brought to women because more of them can share the wealth of a man with high status.¹⁴ Therefore Hong Kong, which had been ruled by China before the time, was under the tradition of polygamy. There were conservative Chinese who firmly protected the long-held tradition and objected on the abolishment of polygamy issued by the colonial government in the 1960s. On the other hand, the colonial government was criticised on the slow progress of abolishing concubinage in Hong Kong in its native land.

¹⁵ The British government saw it as a must to alter this Chinese culture and were finding opportunities to

¹¹ The book “The Western Case for Monogamy over Polygamy” by John Witte.

¹² <http://www.legislation.gov.uk/ukpga/Vict/24-25/100/section/57#> Offences Against the Person Act 1861

¹³ <http://www.susanbkason.com/2010/06/06/polygamy-in-hong-kong/#.Vzwo9DV96M8>

¹⁴ <https://www.psychologytoday.com/blog/the-scientific-fundamentalist/200802/the-paradox-polygamy-ii-why-most-women-benefit-polygamy>

¹⁵ 香港：解殖與回歸 編者：思想編輯委員會 p. 153 paragraph 2

abolish it, while local rich men such as Sir Man Kam Lo pressed for a stop to change, namely for the sake of preserving Chinese tradition, but instead preserved his interests as well. Therefore when Britain ruled over Hong Kong in 1841, the British law contradicted with the Chinese Customary Law and clashes were inevitably created.

Convergences

Britain implemented a flexible common law in all its colonies. Since they knew clearly that their own law could not be rigidly implemented in other colonies, the British government set up different laws to cope with the specific place's custom and culture. This method was called as "invented tradition". Thus, at the very first stage of the colonial rule of Britain in Hong Kong, to stabilize its ruling, the British government carried out the policy of "Chinese ruling Chinese". Cultural acceptance is one of Britain's policy. It recognised the Great Qing Legal Code for allowing polygamy to remain to be legal as the locals of Hong Kong strongly defended this tradition. In order to avoid chaos in society and follow their tradition of implementing common law, the British government compromised with local traditions despite their aversion to polygamy. They tried not to interfere with Chinese policies by accepting and respecting their laws to strengthen its rule.¹⁶

However, the voices of feminism grew larger in Hong Kong and the demand of banning polygamy was increasing throughout the decades.¹⁷ Women had been complaining about the inequality. Hong Kong women groups, led by Hong Kong Council of Women, had been initiating campaigns for marriage law reform including the abolishment of polygamy starting from 1940s.¹⁸ In October 1948, the government carried out evaluations on the Chinese laws and customs implemented in Hong Kong. In the evaluation report, it stated that unstable family relationships were often resulted due to the concubinage problem, adding that the mainland China and Taiwan had already implemented the monogamy law and many social organisations greatly supported the abolishment of concubinage. The council which issued this report suggested the prohibition of concubinage. However, this led to the objection from the Chinese locals. One of the largest voices was from the member of the Administrative Council Sir Man Kam Lo. He protested against this suggestion to preserve Chinese culture and customs. His objection finally led to the dismissal of the suggestion in the report. However, this did not last long. The growing pressure from the British government led to the upcoming events: in 1957, the Governor of Hong Kong Alexander Grantham pointed out in his telegram that they would have to put pressure on the Hong Kong society through education and consultation to abolish concubinage instead of through legislation, which might create embitterment. Although polygamy is deemed as deplorable through the eyes of the British, the feelings of the Chinese still need to be put into thought to preserve social harmony and the rule of the government. This method of changing the Chinese custom had been commented as a "drip drip method". In the following years after that, several consultations and some government official groups were set up.¹⁹ These demonstrated the convergence and the compromises of the two different rule of law which is based on the wills of the two groups of people holding opposite views in order to solve the problem brought by the clashes between their cultures, traditions and beliefs.

The problem of polygamy had gradually faded throughout the decades. Up to 1967, the Hong Kong government had issued three reports and a white paper. Until 18th July in 1969, the British government announced the implementation of the adoption amendment of the Marriage Reform Ordinance starting from the 7th of October in 1971 when polygamy would be prohibited²⁰.

¹⁶ The Milwaukee Sentinel- sep 19. 1957 Article "Hong Kong Has Polygamy Pain"

¹⁷ 工商晚報1946-05-10

¹⁸ [https://books.google.com.hk/books?id=cz7cCQAAQBAJ&pg=PA30&lpg=PA30&dq=britain+Hong+kong+concubinage&source=bl&ots=kHhAAe-sGT&sig=vfU9xWRpIQ-vC7N7nBB9WHRqWjc&hl=zh-TW&sa=X&ved=0ahUKewi5viGOjOPMAhUHu48KHcQeBfkQ6AEINzAE#v=onepage&q=bri](https://books.google.com.hk/books?id=cz7cCQAAQBAJ&pg=PA30&lpg=PA30&dq=britain+Hong+kong+concubinage&source=bl&ots=kHhAAe-sGT&sig=vfU9xWRpIQ-vC7N7nBB9WHRqWjc&hl=zh-TW&sa=X&ved=0ahUKewi5viGOjOPMAhUHu48KHcQeBfkQ6AEINzAE#v=onepage&q=britain%20Hong%20kong%20concubinage&f=false)

¹⁹ 香港：解殖與回歸 編者：思想編輯委員會

²⁰ Bound to Emancipate: Working Women and Urban Citizenship in Early Twentieth-Century China and Hong Kong -- by Angelina Chin

Starting from 1971, polygamy was officially banned. It stated that locals should only practice the union of life of one man and one woman to the exclusion of all others and may be contracted only in accordance with the Marriage Ordinance. According to the Marriage Reform Ordinance, locals need to make their promise that each other is the only beloved companion in front of an official witness, and this marriage is constrained by social law.

Throughout the whole process of the British attempt in changing the custom of polygamy in Hong Kong, the Chinese and Westerners finally reached mutual ground over the increased knowledge of both cultures and the upholding of the utmost importance - preservation of social harmony. Therefore, both sides finally agreed on the terms of ordinances of the new law, leading to convergence of a new legal system.

Impacts

Hong Kong people strictly followed the monogamy marriage. But cases of polygamy can still be seen in today's society, due to a loophole of the Marriage Reform Ordinance. Some men in Hong Kong had several wives before the implementation of the Marriage Reform Ordinance in 1971, therefore they were the last group of Hong Kongers who were still under the influence of the tradition of polygamy. For example, Stanley Ho, who is living in Hong Kong, was given privileges to marry a second wife and have affairs with two other women. Some also used the Qing Legal Code to avoid prosecution on the grounds to bigamy. However, generally, most Hong Kong locals are now practising monogamous marriage under the bounding of law.

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Hong Kong vs New Zealand²¹

As one of the British colonies, polygamy in New Zealand also shared the same fate. Polygamy once existed in the traditional Maori society, and was practised by the tribal chiefs. Later when New Zealand was occupied by Britain in 1840, polygamy was prohibited. This shows that the situation of having a tradition of polygamy was not unique to Hong Kong. In fact, Malaysia, Indonesia, Nigeria, etc. all practice polygamy during 1840-1997.

²¹ OMICS international

6. Wen Wu Temple

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Wen Wu Temple is a temple for the worship of the civil or literature deities, Man Tai (文帝) / Man Cheong (文昌) and the martial god Mo Tai (武帝) / Kwan Tai (關帝). They have been popularly patronized by scholars and students for seeking achievements in civil examinations during the Ming and Qing dynasties. Currently, there are several Man Mo Temples in Hong Kong, the most widely known is the one in Sheung Wan. Its history could date back to the British colonial period.

[1]With the expansion of maritime supremacy and the entrance into Asia Pacific region, Britain had further embraced individualism and liberalism in its colonial governance. Even when they frowned upon backward traditions and “paganism” in the conquered colonies, they still upheld rationality in their ruling philosophy as well as maintaining a non-intervention policy. For instance, in India, there had been overwhelming critiques on controversial issues like the caste system, child marriage, temple prostitute, etc. However, as long as the continuity of culture posed no hindrance to governance, the British colonial government saw no necessity in changes, thus promoted laissez-faire policy and tried in every bid to avoid racial oppression. Similar mindsets and attitudes can be traced in colonial Hong Kong. As soon as the British government took over rule, they put emphasis on the governmental principle, “all ritual ceremonies, customs in Chinese society remained unchanged”, paving way for a stable foundation in ruling Hong Kong.

Clashes

During the first stage of the British colonial rule, the Baojia system- a collective neighbourhood guarantee system, was initially adopted in ethnic Chinese societies. At that time, many Chinese committed atrocities in order to express their discontent towards the transition of power. On top of that, their patriotic feelings were particularly vigorous. However, due to fundamental cultural differences, the British failed in alleviating such governance crisis. After scrutinising the circumstances, it adjusted its governmental objective to ‘rule according to the existing set of laws’ with slight modifications from Great Qing Legal Code. They believed such practice could appease the Chinese for granting higher degree of freedom, relieve pressure of the government, thus increase operational efficiency of implementation with a democracy and voluntary based election for job positions.

It was a longstanding tradition tracing back to the Ching Dynasty for Chinese to settle disputes in a temple gathering. Originally, the civil judicial power was not recognised by the official legislative body, however, after Hong Kong was opened for trade, there was an influx of investments from Mainland China due to the flexible British legal system. In order to manage public affairs, Hong Kong merchants Luya Gui and Tan put forward the idea of building the Man Mo Temple in Sheung Wan as an assembly hall. It was a longstanding tradition tracing back to the Ching Dynasty for Chinese to settle disputes in a temple gathering.²²

Convergences

In 1853, Man Mo Temple Ordinance was signed for acknowledging the practice of dissolving conflicts

²² 香港的傳統宗教管理初探——從《文武廟條例》到《華人廟宇條例》

http://nansha.schina.ust.hk/Article_DB/sites/default/files/pubs/news-049.05.pdf

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through community tribunals. It was the first legal document concerning religion beliefs and temples' usage in colonial Hong Kong and was particularly significant to the Chinese as it certifies them to have the authority to commence meetings by themselves under recognition. The Wen Wu Temple was one of the most significant examples in illustrating the religious compromises made between an Christianity-oriented country and the traditional culture of ethnic Chinese.²³

According to the old Chinese Newspaper- *The Friend of China*, it depicted the Chinese immense joy, "in this colony, we have never seen the Chinese being so pleased about the commencement ceremony of a religious temple just enshrining Wen Di and Wu Di... in 1857, Tai Ping Shan, Sai Ying Pun, Sheung Wan and Central, all the four districts celebrated the establishment by organising Yu Lan events, as well as allocating areas for special occasions like public worship and festival celebration."²⁴

Without a doubt, the Man Mo Temple once symbolised the dominance of Chinese organizations in Hong Kong. As the colonial period advanced, the temple evolved from a symbol of ethnic Chinese into an organisation playing multi-roles- worshipping of the civil or literature god Man Tai, Man Cheong and the martial god Mo Tai, Kwan Tai; as venues for celebrating the Temple Fair; mediating commercial discord; hospitalising Qing officials and being the middleman between ethnic Chinese and Guangdong government, etc.

²³ 華人廟宇與殖民地的香港華人社會——以上環文武廟為研究個案
<http://hub.hku.hk/bitstream/10722/192998/2/FullText.pdf>

²⁴ Dennys, N.B. (ed), "The Districts of Hong Kong and the Name Kwan Tai Lo", *The China Review: Or, Notes and Queries on the Far East*, Vol. 1, (Hong Kong: China Mail Office, 1873), pp. 333-334

7. Small-housing policy in the New Territories



The Small House Policy was introduced in 1972 in Hong Kong. This policy allows an indigenous male villager who has passed the age of 18, and is descended from a male line from a resident in 1898 of a recognized village²⁵ in the New Territories to build one small house. This policy shows the government's goal to expand villages in Hong Kong so as to improve the low standard of housing in the rural areas of the New Territories at that time.

Clashes

The conflict on the right to continue building houses. Up until World War II, the customs in the New Territories villages were that sons were able to build themselves village houses. After the British government took over the New Territories, the indigenous inhabitants reacted violently by the Six-Day War fought by the British Empire and the major punti clans of the New Territories. In 1899, a fierce fight broke out between the New Territories' residents and British officials. This incident killed nearly 2,000 villagers. In the 1970s, the relationship between the government and villagers remained tense. Villagers refused to live under the control of Britain. One reason is that it became more and more difficult for villagers to build houses in their villages. The British government even prohibited people from selling the land of village houses through public auctions, ignoring the traditions of indigenous villagers. This led to local mass discontent.

In 1967, just after the riots, the government planned to develop land in the New Territories, thus they urgently needed support from the villagers. In an attempt to alleviate the tension between the colonial government and indigenous inhabitants, as well as gaining the villagers' support in the land development, the British government finally recognised their rights of building small houses entitled in the Great Qing Legal Code.

Convergences

After the transference of sovereignty, the original lawful traditional rights of the New Territories inhabitants in Hong Kong still remain protected. The Small Housing Policy was proposed mainly because of the political background. Article 40 of the Basic Law states that "The lawful traditional rights and interests of the indigenous inhabitants of the 'New Territories' shall be protected by the Hong Kong Special Administrative Region." In 1967, a riot broke out to resist the colonial government's governance and in 1970, there was a plan to start new town planning in the New Territories, which involves private land of villagers. The government was unwilling to risk having confrontations with villagers, so they needed to gain the support of indigenous villagers in the New Territories in order to have further development. According to the Kung Sheung Evening News in 1976, the government tried to compromise through cancelling the five

²⁵ A 'recognized village' is one, which is shown on the list of recognized villages approved by the Director of Lands. (small house policy english version)

²⁶ Photo showing the three-storey "Ding Uk"

years of waiting time for reselling their own house. Today, villagers are allowed to build a small estate within the range of their living village and are permitted to resale the property to others. In 2007, the Secretary for Development Carrie Lam wrote to Heung Yee Kuk, stating that the acts of villagers transferring their rights will not be considered as criminal acts.²⁷ To provide more living place for villagers, the storey restrictions of houses have gradually increased from two to three storeys. The appeasement towards villagers' dissatisfaction towards the government and the preservation of the rights of the New Territories' indigenous residents led to the convergences of rural culture and the legal system of the Chinese and the British.

²⁷Explainer: Hong Kong's divisive Small house
<https://www.hongkongfp.com/2016/01/21/explainer-hong-kongs-divisive-small-house-policy/>

8. Conclusion

After exploring the clashes and convergences in the legal system during the colonial period in Hong Kong, this project brings us to a more detailed and in-depth learning about the dramatic development in our legal system throughout the century. Due to its unique history in which Hong Kong was once put under the ruling of two totally different regimes, clashes and convergences inevitably occurred in a cause-and-effect relationship. We can see the attempt of the British government of merging the distinction between its own rule and the Chinese tradition and culture, thus creating a new mixture of both English and Chinese culture, preserving Chinese culture such as the small-housing policy and simultaneously eliminating many of the Chinese corrupt customs such as Mui Tsai and polygamy.

The idea of a dual legal system first stated in Elliott's Proclamations set the basis for a combination of legal culture in colonial Hong Kong. Out of concerns for maintaining government operational efficiency, preserving local cultures and customs, and protecting the rights of British living in the territory; the Great Qing Legal Code was practiced along with Common Law. Although the introduction of such ruling philosophy initially aroused much heated debate from different parties, it later gained widespread recognition among Chinese citizens and especially the courts. The former, due to Chinese's longstanding tradition of making lawful pledges ("yue fa" 约法), were more receptive towards the newly established legal systems, while the latter's frequent references made to the proclamations in handling judicial cases proved the authoritativeness of Elliott's Proclamations in achieving a dual legal system. Today, there are still traces of dual legal systems within Hong Kong when considering its diverse composition of law references- the Basic Law, Common Law, Rules of Equity and Statute Law.

The Bilingual Law was another branch derived from the dual legal system and one of the major issues brought up by the colonization of Hong Kong. Languages were the cornerstone in presentation and expression of the law. However, the language barrier and cultural differences between the Chinese and British became a fundamental problem, causing confusion in interpretations. Since there were few Chinese who could read English at that time, translation of law jargons or bilingual texts of law were necessary for narrowing the gap lying within interpretations in the context of law. It also helps illustrate how cultural disparity between the colony and the colonizer would impose detrimental effects on judicial efficiency and the carrying out of justice. Having these policies, it can be seen that the British government did put decent effort in narrowing the language barrier, making it become progress of convergences in law fields.

Cultural convergence can be further portrayed by a range of essential Chinese traditions during the colonial period, which is Mui Tsai and Polygamy. The Chinese perceived the act of adopting mui tsai as a genuine virtue and Polygamy as a legal marriage practice entitled in the Chinese books; while the British saw it as a contemptible violation against human rights that they had long upheld. Clashes were unavoidably provoked by the opposing stances. Regarding this issue, the British adopted the tolerating policy for they eschewed autocratic style of rule in favour of political pacification and appeasement. However, with increasing prevalence of global civilisation and civil rights, Mui tsai and polygamy marriage are successfully eliminated by the British government.

Small house policy in New Territories is again an typical example in discussing cultural convergence. The policy introduced by colonial government in 1972 aimed to gather the villagers' support for their future land development and improvement in living environment of the locals. However, due to the recognised property rights of local inhabitants, conflicts of interests were resulted and they proved to be major hindrances in the New Territories development. Moreover, the sense of the inhabitants' resentment surged after several conflicts and the confrontation of Britain's occupation and ruling. In order to relieve tension between the locals and government, the British government carried out the small-housing policy that bestows locals with designated rights for owning land. Under this policy, a qualified indigenous male villager aged 18 or above is entitled to build one small house with a concessionary grant. This allowed villagers to build their own house in their own private agricultural land without premium or give preferential land price for those who

did not own land. This policy continues to benefit the cultural and traditional needs for locals now as according to Article 40 of the "Hong Kong Basic Law", the original lawful traditional rights of the indigenous inhabitants of the New Territories in Hong Kong after the transfer of sovereignty is still protected.

Colonial government understood that intervening or restricting Chinese traditional culture was not favourable for their ruling toward Hong Kong. So with the Laissez-faire policy of the government, the Man Mo Temple Ordinance was signed to preserve the Wen Wu Temple. The British government also allowed locals to keep their own religious belief and Chinese customs despite the fact that Christianity is a dominated religion in Britain.

From each of the cases that we have studied in, clashes are clearly shown and how they lead to convergences in Hong Kong's legal system: whether it is the cultural disparity between the locals and the British government or resentment over colonization of Hong Kong, convergences are created out of clashes through compromise from both sides, one-sided tolerance or just generally an increased awareness and knowledge of both sides' perspective. These have further been highlighted through our transnational approach through comparing Hong Kong's colonial situation with that of Malaya, New Zealand, etc. to put emphasis to the uniqueness of Hong Kong's geographical and political uniqueness during the colonial period and how the same colonial government in different places could lead to different outcomes, clashes and convergences of their respective traditions and cultures.

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