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ARTICLE

Filial Piety across Legal Systems: Analysing the Influence of Traditional Chinese Legal Culture of Property in Hong Kong, Taiwan, and China

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Abstract

This article explores and compares the influence of traditional Chinese legal culture of property on contemporary Chinese societies of Hong Kong, Taiwan, and China, who share the same legal cultural heritage but have developed different legal systems under different socio-political environment. These three jurisdictions now proclaim adherence to Westernised legal principles of private property and individual ownership. But in Confucian-dominated traditional China where family was the core societal unit, property was recognised for their collective value, and ownership was structured in network ties of relationships to preserve filial-piety-based sociomoral order. Such property practices and norms form an integral part of traditional Chinese legal culture. By examining the approaches in which customary property-holding practices have been codified, and the reasoning made by courts in parent-child property disputes, this article unveils the interpretive and adaptive ingenuity in which the three Chinese societies embrace Confucian ethos and traditional Chinese legal culture. The article suggests that the differences with the ways divergence between state-imposed systems and social norms are handled may be explained by the nature of legal systems, and that the courts of the three jurisdictions, as they apply Westernised prescripts, display similar tendency to treat belonging and kinship as central components of property.

The Western legal academia seems to embrace complicated attitudes towards Chinese law. There are scholars who emphasise its differences with Western law. Many have written about the 'lack of law' in China,[1] and the influential view, as represented by Weber, perceives the Chinese legal tradition as irrational, inseparable from morality and radically different in nature.[2] On the other hand, there are scholars who argue that the differences should not be overstated, as Menski suggested it is inappropriate to treat Chinese law as a unique example of a legal tradition,[3] and Ruskola called for Western legal academia to accommodate alternatives in legal concepts and move past negative views rooted in 'legal orientalist' stereotypes.[4] Yet despite the opposing views, there is the common tendency to

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[1]See Deborah E Townsend, 'The Concept of Law in Post- Mao China: A Case Study of Economic Crime' (1987) 24 Stanford Journal of International Law 227.

[2]Max Weber, *Max Weber on Law in Economy and Society* (Harvard University Press 1954); Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth & Claus Wittich eds, Bedminster Press 1968).

[3]See Werner F Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press 2006).

[4]Teemu Ruskola, 'Legal Orientalism' (2002) 101 Michigan Law Review 179.

attend particularly to 'incompatibility' – how and why is Chinese law different, and more recently, what and why are the alleged differences perceived by the West in a certain way.[5] This provides and defines the image of Chinese law as a somewhat self-contained system, and does not pay much attention to its adaptive capacity. Moreover, there is a tendency to interpret 'Chinese law' as a whole, without referring to the diverse nature of legal systems in contemporary Chinese societies. While the three Chinese societies, namely Hong Kong, Taiwan, and China, share a common legal tradition, their contemporary legal systems are the products of different legal cultures, both Chinese and foreign. Hong Kong, as a former British colony, has preserved a common law system which stays close to the decisions of English courts.[6] Taiwan has a civil law system, and its civil codes were drafted with the assistance of foreign consultants, with significant influence from Japanese, German, and Swiss civil codes. China is also a civil law jurisdiction, but socialist law with Soviet influence forms a substantial part of its legal system. As the legal systems of these three Chinese societies are closely linked with various strands of Western law, there may be problems with defining 'Chinese law' in China-related comparative law research.

If 'Chinese law,' following the more common approach, is understood along the lines of Chinese legal cultural tradition, how exactly does this tradition still manifests itself across Chinese jurisdictions today is a question that has not been very well answered yet. Western legal scholarship generally recognises the subtle role of Confucian ethos in the legal system of contemporary China,[7] but not much has been done to identify and compare the influence of traditional Chinese legal culture on different Chinese societies. This is probably because their legal systems do not appear to have preserved Chinese legal tradition as a distinct legal order coexisting with the Western-influenced legal system;[8] unlike, for example, in some Islamic countries that there is an 'explosive mixture including traditional law, Islamic law, customary law, and some aspects of modern law.'[9] Scholars moaned the death of Chinese customary law in Hong Kong,[10] and some others questioned whether there is a place for Chinese legal tradition to be 'modernised' and incorporated into legislations.[11] Is traditional Chinese legal culture dead? If not, in what forms does it exist? Despite the differences that we have observed between legal systems of Chinese societies, are there any similarities derived from sharing a legal cultural background? Seeking to answer these questions, this article unveils the various modes of interpretive and adaptive ingenuity in which the three contemporary Chinese jurisdictions embrace traditional legal culture in their adoption and application of Westernised law.

[5]See Thomas Coendet, 'Critical Legal Orientalism: Rethinking the Comparative Discourse on Chinese Law' (2019) 67 The American Journal of Comparative Law 775; Donald Clarke, 'Anti Anti-Orientalism, or Is Chinese Law Different?' (2020) 68 The American Journal of Comparative Law 55.

[6]Kwai Hang Ng & Brynna Jacobson, 'How Global Is the Common Law? A Comparative Study of Asian Common Law Systems – Hong Kong, Malaysia, and Singapore' (2017) 12 Asian Journal of Comparative Law 209.

[7]See Jianhong Liu & George B Palermo, 'Restorative Justice and Chinese Traditional Legal Culture in the Context of Contemporary Chinese Criminal Justice Reform' (2009) 7 Asia Pacific Journal of Police & Criminal Justice 49; Jianhong Liu et al, 'Chinese Legal Traditions: Punitiveness versus Mercy' (2012) 9 Asia Pacific Journal of Police & Criminal Justice; Paul A Barresi, 'The Chinese Legal Tradition as a Cultural Constraint on the Westernization of Chinese Environmental Law and Policy: Toward a Chinese Environmental Law and Policy Regime with More Chinese Characteristics' (2013) 30 Pace Environmental Law Review 1156; Bee Chen Goh, *Law Without Lawyers, Justice Without Courts: On Traditional Chinese Mediation* (Routledge 2016).

[8]This is not to say legal plurality does not exist in Chinese societies, given the regional diversity and social differences between classes: see Janet E Ainsworth, 'Categories and Culture: On the Rectification of Names in Comparative Law' (1996) 82 Cornell Law Review 19.

[9]Etienne Le Roy, 'Local Law in Black Africa: Contemporary Experiences of Folk Law Facing State and Capital in Senegal and Some Other Countries', in Antony Allott & Gordon R Woodman (eds), *People's Law and State Law: the Bellagio Papers* (De Gruyter Mouton 1985).

[10]See Anne SY Cheung, 'The Paradox of Hong Kong Colonialism: Inclusion as Exclusion' (1996) 11 Canadian Journal of Law and Society 63; DJ Lewis, 'A Requiem for Chinese Customary Law in Hong Kong' (1983) 32 The International and Comparative Law Quarterly 347.

[11]See Alex KL Lau & Angus Young, 'In Search of Chinese Jurisprudence: Does Chinese Legal Tradition Have a Place in China's Future?' (2009) 20 International Company and Commercial Law Review 155.

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Westernised property law, based on individual ownership of private property, serves as a great starting point for exploring the legal cultural tensions. The three Chinese jurisdictions of Hong Kong, Taiwan, and China now all proclaim adherence to the legal principles of Westernised property law. But in Confucian-dominated ancient China where family was the core societal unit, property was recognised, by law and custom, for their collective value as 'family property' belonging to the whole familial community and lineage, and property ownership was structured in network ties of human relationships as a practice to sustain collective identity and preserve filial-piety-based moral order. These traditional socio-cultural norms, obviously in conflict with Westernised conceptions of property in law, form an integral part of traditional Chinese legal culture. In this article, I examine the approaches in which traditional Chinese legal culture of property has been codified into primary law, and by focusing on parent-child property disputes –very likely to trigger moral concerns in the Chinese context – I explore the influence of such legal culture on the reasoning and analysis regarding property ownership as made by the courts. I also compare how the three Chinese jurisdictions, sharing the same legal cultural heritage but having developed different legal systems under different socio-political environments, make use of Westernised prescripts and principles – characterised by the emphasis on individual property rights – to respect, uphold, and promote traditional Confucian-influenced norms and practices.

Traditional Chinese Legal Culture of Property

Traditional Chinese legal culture, as expressed in various dynastic codes, philosophical principles, and moral norms, is primarily formed from the blend of two schools of thought in Chinese tradition – Confucianism and Legalism.[12] Confucianism centres on creating harmony on the basis of virtues, and Confucians believe family relationships are the foundation for a harmonious society.[13] While Confucians prefer using moral force exhibited in the form of customary rites, duties, behaviours, and conduct (collectively known as *li* (禮)) to promote family-oriented virtues and maintain social order,[14] the Legalists are opposed to *li* as the means to rule or govern, holding in firm belief that humans are rationally self-interested creatures that must be manipulated through a rigid system, and that codes, decrees, regulations, and laws are necessary for establishing a well-ordered society.[15] In the course of history, Confucianism became the orthodox philosophy and foundation of traditional Chinese moral order, but gradually Confucian and Legalist views merged, and law and legal culture in ancient China developed in a way described by some scholars as 'Confucianisation of law' or 'Legalisation of Confucianism,' meaning Confucian ethos were incorporated into state law to be enforced by punishment. Confucian doctrines became the foundation of law, and criminal code became the instrument for executing such content.[16]

Since much of the Confucian ethics and social order is based on family kinship, filial piety – expressed in deference and care for parents, continuity of lineage and veneration of ancestors – is upheld as the cardinal virtue,[17] and the Confucian-influenced norms and ethos of property have clear utilitarian overtones. Confucians believe that property should be used by people as means to venerate their ancestors, serve their parents, and provide for their wives and children.

[12]Eric W Orts, 'The Rule of Law in China' (2001) 34 Vanderbilt Journal of Transnational Law 43.

[13]See Wei-Ming Tu et al, *Confucianism and the Family* (Walter H Slote & George A De Vos eds, State University of New York Press 1998).

[14]Caleb Wan, 'Confucianism and Higher Law Thinking in Ancient China' (2013) 10 Regent Journal of International Law 77.

[15]See Li Ma, 'A Comparison of the Legitimacy of Power Between Confucianist and Legalist Philosophies' (2000) 10 Asian Philosophy 49; Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge University Press 2002).

[16]See Wan (n 14); T'ung-tsu Ch'ü, *Law and Society in Traditional China* (Mouton and Co 1961); Herbert HP Ma, 'The Legalization of Confucianism and Its Impact on Family Relationships' (1987) 65 Washington University Law Review 667.

[17]Tu et al (n 13); Gary G Hamilton, 'Patriarchy, Patrimonialism, and Filial Piety: A Comparison of China and Western Europe' (1990) 41 The British Journal of Sociology 77.

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Society overall will become more stable, harmonious, and orderly, when people make good use of their property to fulfil their duties of filial piety.[18] This understanding of property and the emphasis on its collective value went hand in hand with the social environment of ancient China, when family was the basic unit of society, and Chinese families followed the practice of *tongju gongcai* (同居共財).

Under this arrangement of *tongju gongcai*, three or more generations of the same bloodline lived together and shared common property.[19] Land, house and other means of production were collectively owned as family property by the family as a whole,[20] with rights reserved for the family head to control, manage, and use the property for the collective benefit of the family.[21] Upon the death of the family head, the family property would be divided among male descendants, and apart from this exception, there were few sources of legitimate private property. Even as adults with income-generating ability, filial junior members of the family remained under the control of their parents, largely bound to the family business with all their earnings brought into the family 'common fund,' and they did not have the right to legitimately keep income or property alike at their own disposal.[22]

As such, it can be said that in the Confucianised legal culture of ancient China, the concept of individual property ownership was largely absent. In the Western world, especially since the Enlightenment era, property became a concept closely associated with individual freedom and empowerment, as it is believed that the right of an individual to own, use, and dispose of his or her property is nearly absolutely and must be protected.[23] In stark contrast, property in ancient China belonged to the whole familial community with lineage extended to dead ancestors and unborn children.[24] Property ownership was structured in a hierarchy of human relationships, as the ruling family head had authoritarian control over all family members and property, subordinating interest of individual family members to the family's collective interest.[25] As argued by scholars who engage in critique of the modern Western conception of property predicated upon the liberal ideal, 'property' is much more than an object, but rather an expression of a set of legally defined and social relations between persons with respect to an object.[26]

With the 'Confucianisation of law,' Confucian-influenced values and practices of filial piety and family property were incorporated into the law codes of ancient China. The earliest reference can be found in *Falü Dawen* (*Answers to Questions about Laws*), a work of judicial interpretation written during the Qin Dynasty (211–206 BC). By stipulating that a father stealing from a son would not constitute the crime of theft, yet the contrary would be so, children are denied the capacity to own property to the exclusion of their parents, indicating their subordinate status in the family space.[27] In the *Tang Code* promulgated in the Tang Dynasty (618–907 AD), *tongju gongcai* was for the first time codified into a legal requirement, with the code explicitly prohibiting children of a family from

[18]Norman P Ho, 'A Confucian Theory of Property' (2016) 9 Tsinghua China Law Review 1.

[19]Xing Ke, *Succession and the Transfer of Social Capital in Chinese Family Businesses* (V&R Unipress 2018).

[20]ibid; George Jamieson, *Chinese Family and Commercial Law* (Vetch and Lee 1970).

[21]Chuanchuan Zhang, 'Family Support or Social Support? The Role of Clan Culture' (2019) 32 Journal of Population Economics 529.

[22]Ke (n 19).

[23]See Mo Zhang, 'From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China' (2008) 5 Berkeley Business Law Journal 317; Benjamin L Read, 'Property Rights and Homeowner Activism in New Neighbourhoods', in Li Zhang & Aihwa Ong (eds), *Privatizing China: Socialism from Afar* (Cornell University Press 2008).

[24]See Martin C Yang, *A Chinese Village: Taitou, Shantung Province* (Taylor & Francis 1947); Xiaodong Ding & Dale Yuhao Zhong, 'Towards a Thick Description of Chinese Family and Political Culture: Confucianism, Socialism and Liberalism in China' (2014) 9 Frontiers of Law in China 425.

[25]Zhang, 'From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China' (n 23).

[26]Margaret Davies, *Property: Meanings, Histories, Theories* (Routledge 2007); Bradley Bryan, 'Property as Ontology: On Aboriginal and English Understandings of Ownership' (2000) 13 Canadian Journal of Law and Jurisprudence 3.

[27]Qinhua He, 'Qinhan Lüxue Kao [An Investigation of Qin and Han Law]' (1999) 5 Chinese Journal of Law 121.

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committing the 'unfilial crime' of *bieji yicai* (別籍異財) – unilaterally moving out and dividing up family property – when their parents are still alive, and offenders could be sentenced to three years of hard labour.[28] A thousand years later well into the Qing Dynasty (1644–1912 AD), *bieji yicai* remained a crime in the Chinese empire under the *Great Qing Code*.[29]

Although as exemplified by the criminalisation of *bieji yicai* that there was little distinction between criminal and civil laws, and between public and private worlds, in Chinese dynastic laws, it is important to note that Confucian-influenced social order in ancient China took shape primarily through self-executing rules, norms, and customs of propriety.[30] The difficulty in ruling a huge Chinese empire and the weak administrative power of the empire resulted in the fact that state governing power reached only the cities, towns, and counties, while rural areas were typically ruled by clans and village groups.[31] The dynastic law codes incorporated basic rules backed by criminal sanctions, leaving the locals at different parts of the Chinese empire to establish their own detailed practices and arrangements, enforce their private sanctions and settle their disputes through persuasion and mediation. In this way, ancient China's legal system preserved flexibility in view of the regional differences in customs. Local communities at the countryside maintained a strong degree of autonomy, and the state would not usually intervene except for criminal cases that seriously threatened the state order.[32]

Traditional Chinese legal culture lived on for more than a thousand years in Chinese societies, until the nineteenth century when colonial powers began to flex their muscles in East Asia. Hong Kong became a British colony in 1842. The territory was the first to move on from Chinese legal tradition by adopting a common law system. Taiwan, ceded to Japan in 1895, went through a series of reforms, among which was the legal reform that gradually replaced traditional Chinese law with modernised Japanese law. China initiated legal reforms in the early 1900s as the last effort of the ruling Qing dynasty to salvage its crumbling empire, but the eventual downfall of monarchy in 1912 sealed the fate of the last legal code of imperial China. In spite of these dramatic transformations, the demise of ancient China's dynastic legal codes does not imply the demise of Chinese traditional legal culture, which is very much built on the sociomoral order of Confucian ethics. Since there remains a strong impact of Confucianism on every aspect of Chinese societies, as will be shown in the coming section, traditional legal culture continues to exert influence chiefly in the private sphere of family relationships and property.

Contemporary Chinese Jurisdictions

Hong Kong

Codifying traditional Chinese legal culture: tso and tong

When the whole of Hong Kong became a British colony in the late nineteenth century, the British colonial government tried to assure that the customs of the local Chinese people, specifically those practiced in the largely rural region of the New Territories, would not be interfered with.[33] Some Chinese customs which prevailed in Hong Kong at that time were identified by the colonial

[28]Shuyuan Li, *Zhengcai Jingchan: Tangsong de Jiachan Yu Falü [Competing for Wealth and Property: Family Property and Law in Tang and Song Dynasties]* (Mingshi Gao ed, Peking University Press 2005).

[29]Jingyi Lu, *Qingmo Minchu Jiachan Zhidu de Yanbian - Cong Fenxi Jiachan Dao Yichan Jicheng [The Evolution of Family Property System at the End of Qing Dynasty and the Beginning of the Republic of China – From Family Analysis to Property Inheritance]* (Angle Publishing 2012).

[30]See Xingzhong Yu, 'State Legalism and the Public/Private Divide in Chinese Legal Development' (2014) 15 Theoretical Inquiries in Law 27.

[31]Xiaofeng Wu, 'Understanding of Criminal Reconciliation in Ancient China' (2010) 5 Frontiers of Law in China 91.

[32]ibid.

[33]Stephen Selby, 'Everything You Wanted to Know About Chinese Customary Law (But Were Afraid to Ask)' (1991) 21 Hong Kong Law Journal 45.

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government and established as Chinese customary law. Initially, a semi-legal framework was set up with local elders or government officers acting as 'magistrates' to apply Chinese customary law for settling disputes.[34] Over the years, jurisdictions were transferred to the courts, and through a number of case precedents, Hong Kong's common law system demonstrated that it has recognised and shown certain respect to Chinese customary practices, in particular the ownership of land by family or quasi-family institutions.[35] After the handover to China in 1997, Hong Kong's mini-constitution, the Basic Law, continues to recognise 'Chinese customary law,' and the courts are conferred power to enforce the 'lawful traditional rights and interests of the indigenous inhabitants of the New Territories.'[36]

Tso (祖) and *tong* (堂) are Chinese traditional institutional arrangements in Hong Kong. Mostly practiced by 'indigenous inhabitants' living in rural villages of the New Territories,[37] they closely resemble the traditional Chinese legal culture of *tongju gongcai* in many ways. Under these traditional arrangements, land is held in common ownership for the benefit of the whole family lineage.[38] Male descendants of the family, during their lifetimes, are entitled to an interest in the land held in the name of the *tso* or *tong*, and the family rules usually stipulate that the *tso* or *tong* members (ie, beneficiaries) must ensure sufficient income is generated for venerating the family's common ancestors with religious activities, and for assisting family members in their education, healthcare and general welfare. With important role in the management of land property in the New Territories, *tso* and *tong* typify how traditional Chinese customs are recognised and incorporated into Hong Kong's common law legal system, forming an integral part of 'Chinese customary law' in Hong Kong. Upon formation of the *tso/tong* body and completion of necessary registration procedures as required by law, private property is converted into this special form of family property with a unique nature of being inalienable, indivisible, and perpetual, and courts will apply principles from case laws and statutory obligations to govern them.

As a form of legal pluralism resulting from colonisation, the creation and application of 'customary law' on customary institutions had led to subtle changes in these institutions and the rural society itself.[39] While the relevant law, the *New Territories Ordinance* (NTO), does not define the legal status of *tso* or *tong*, nor does it establish many provisions governing the conduct of these institutions, there are 'inventions' which the colonial government created to facilitate their management; for example, as *tso* and *tong* are legally codified into NTO, the NTO establishes mechanisms for the government to appoint trustees for a minor vested with land and mandate the registration of quasi-family institution managers (called *si lei* (司理) in Cantonese). Since the 1960s that jurisdiction was transferred from customary tribunals run by local leaders and colonial officers to the common law courts,[40] and instead of treating Chinese customary law as flexible rules open to negotiation and

[34]Sally Engle Merry & Rachel E Stern, 'The Female Inheritance Movement in Hong Kong: Theorizing the Local/Global Interface' (2005) 46 Current Anthropology 387.

[35]Selby (n 33).

[36]Hong Kong Basic Law, arts 8 and 40.

[37]Hong Kong is divided into three regions: Hong Kong Island, Kowloon, and the New Territories. Hong Kong Island, ceded to Britain in 1842, and Kowloon, ceded to Britain in 1860, form the high-density urban areas of Hong Kong. The New Territories, leased to Britain in 1898, comprise mostly of rural areas. When British colonial government established control of the New Territories, local Chinese residents who claimed that they had lived in the New Territories for centuries were granted the status of 'indigenous inhabitants.'

[38]There are different types of *tongs*, some are set up for family use, and some are set up for religions or business purposes. Within the scope of this article, I refer only to the family *tongs* holding property on behalf of the family or clan. *Tso* and *tong* are similar in their role of promoting ancestor worship, except a *tong* usually builds a hall to house the ancestral tablets, but a *tso* does not.

[39]See Christopher Hutton, 'The Tangle of Colonial Modernity: Hong Kong as a Distinct Linguistic and Conceptual Space within the Global Common Law' (2014) 18 Law Text Culture 221; Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 Legal Theory and the Social Sciences 375; Allen Chun, '"Govern-Mentality" Transition: Hong Kong As Imperial Object and Subject' (2000) 14 Cultural Studies 430.

[40]James Hayes, 'Chinese Customary Law Revisited' (2016) 56 Journal of the Royal Asiatic Society Hong Kong Branch 111.

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modification, the courts have applied them in a fashion analogous to the common law, and in respect of *tso* and *tong*, the courts have established judicial knowledge to regard such communal land-holding bodies as trusts, in that their managers are regarded as trustees, making the institutional arrangement in principle subject to English trust law.[41]

As *Tso* and *tong* are inventions of Chinese culture, from the outset there are problems with treating such traditional institutions as trusts, a concept in English common law. Theoretically speaking, if the registered institution managers are treated as trustees, that would mean the members would have merely an equitable interest as beneficiaries and that the sole legal owners would be the managers, but this is clearly inconsistent with the co-ownership nature of *tso* or *tong*.[42] A more practical problem is that *tso* and *tong* arrangements, with land intended to be held in perpetuity, seem to conflict with the Rule Against Perpetuities in common law.[43] To some extent, by acknowledging power of registered institution managers and trustees to deal with land held in the name of the institutions as if they were owners, the colonial government had conceded to Chinese custom and accepted the existence of perpetuities as in ancestral estates.[44]

In the judiciary, however, the position is less clear. In some cases, the court was of the opinion that once the land had been registered in the name of a traditional institution like *tso*, it should not be subject to the Rule Against Perpetuities because applying the rule would be 'unjust and oppressive,' effectively rendering void and destroying these traditional arrangements.[45] In another case, though, the court took a different position. Equating *tong* with purpose trusts, the court held that the 'trust' concerned in the case must fail, as it was intended to be endowments of indefinite duration, and its purpose of promoting ancestral worship and common welfare was considered 'too wide to be exclusively charitable.'[46] Therefore, when traditional Chinese custom was incorporated into the system, it seems that both lawmakers and the courts in Hong Kong felt compelled to give themselves the comfort of familiar concepts and access to a body of familiar rules to be able to make sense of such custom and to adjudicate relevant disputes.[47] The administration might have respected the freedom of the locals to manage their own affairs following their traditional institutional arrangements, but such arrangements, closely related to Chinese legal cultural traditions, had to be reinvented and represented by common law concepts, and sometimes confusion could result due to different approaches of interpretation.

Invoking traditional Chinese legal culture: trusts and filial piety

Taking into regard the recognition of *tso* and *tong* in Chinese customary law and their codification into the NTO, the influence of traditional Chinese legal culture of property on Hong Kong appears to be obvious. Yet quite often, such legal culture does not manifest itself through statutes or some specific customary law concepts, but through a more nebulous form, when the courts invoke their own perception of Confucian-influenced values in their application of common law principles to settle cases. For the purpose of this article, I use parent-child property dispute cases to illustrate this phenomenon, since their emergence, development, and resolution are closely related to the traditional Chinese legal culture that I have discussed.

Famous for having the most unaffordable property prices in the world, it is common to see family members in Hong Kong finance each other in the purchase of property or hold property in each

[41]*Tang Kai-Chung & Another v Tang Chik-Shang & Another* [1970] HKLR 276.

[42]Malcolm Merry, 'Are T'sos Really Trusts?' (2012) 42 Hong Kong Law Journal 669.

[43]The Rule Against Perpetuities is a legal rule in common law that restricts the creation of a contingent future interest. See Robert J Lynn, 'A Practical Guide to the Rule Against Perpetuities' (1964) 2 Duke Law Journal 207.

[44]Chun (n 39).

[45]*Kan Fat-Tat v Kan Yin-Tat* [1987] HKLR 516; *Tang Kai-Chung & Another v Tang Chik-Shang & Another* (n 41); *Li Tang-Shi v Li Wai-Kwong* (1969) HKLR 367.

[46]*Ip Cheung-Kwok v Ip Siu-Bun & Others* (1988) HKLR 247.

[47]Hutton (n 39); Merry (n 42).

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other's name. When property ownership disputes arise from such arrangements, because *tso* and *tong* are rarely, if ever, found in the urban areas of Hong Kong, courts usually inquire the possibility of equitable relief in common law by conceiving the arrangements as implied trusts, respectively 'resulting trust' and 'common intention constructive trust.' The resulting trust presumes that a person contributing to the cost of acquisition of property registered in another's name intends to take a proportionate share in the beneficial interest, subject to another presumption that parents intend to make a gift when they fund acquisition of property for their child. Both presumptions are rebuttable by evidence suggesting the parties' actual intention, which may establish a common intention constructive trust based upon a bilateral understanding or bargain between parties as to property ownership.[48] Hence, the decision on property ownership ultimately is based on the finding of facts. In determining whether an implied trust was created, the courts determine the parties' intentions, hence interests in the property, with reference to available evidence demonstrating relevant facts such as who contributes to the purchase price, who lives in the property, who keeps the title deeds and keys, and who pays for the relevant expenses.

However, when trying to discern the intention of the parties, Hong Kong courts' reasoning is often shaped by Confucian-influenced values and cultural practices. This is the case, for example, that the courts are inclined to find children to be making a gift when they fund property acquisition for their parents. In a landmark case, a father who owned legal title of the family home, assigned that property into the sole name of his son, who claimed that the father, being a very 'traditional' man, had long made known his wish to give the property to him, the only son. When the daughter contested this and sought beneficial interest in the property, relying on the fact she had for years given a significant proportion of her salary to the father, which had been used to discharge the property's outgoings and expenses, the court in deciding whether financial contribution from offspring supported the inference of an intention to share beneficial ownership, perceived the daughter's financial contribution to be a filial practice known as *gaajung* (家用) (family use money).[49] In contemporary Chinese societies, when children start to work and earn income, they are expected to reciprocate their parents by giving a portion of salary to them.[50] Since children's financial contribution was perceived as fulfilling a filial duty, in the eyes of the court, it failed to justify a claim of beneficial interest in property, and in explaining the decision, the court suggested people 'would be taken aback if they be told that … the children's contributions could be used to support the inference of an intention to share the beneficial interest of the parents' property.'[51]

In another case of a similar nature, a woman claimed that property registered under the names of her ex-husband's mother and elder brother was held on resulting trust or common intention constructive trust for her ex-husband, based on the fact that for decades, her ex-husband had given a huge portion of salary to his mother, and the money had been used to repay the mortgage loan. The court found that the ex-husband had provided money to his mother as *gaajung*, even though there was evidence he deposited money into a bank account as monthly instalment for the mortgage loan. As the judge remarked, the deposit arrangement was only intended to be an expression of filial piety 'for convenience and for saving the mother's effort,' hence there was no implied trust established.[52]

Giving traditional Chinese legal culture an importance in judicial decisions is not limited to cases of children financing property acquisition for their parents. In another landmark case, a couple purchased property in the name of the father and son, and after the father died, the son became sole legal owner through right of survivorship, and the son's creditors sought an order for sale of the

[48]Nick Piska, 'Intention, Fairness and the Presumption of Resulting Trust after Stack v Dowden' (2008) 71 The Modern Law Review 120.

[49]*Jiayong* in Mandarin.

[50]Yanto Chandra, 'Philanthropy Research in China: The Influence of Informal Institutions' (2019) 25 Third Sector Review 105.

[51]*Fung Oi Ha v Fung Pui On* (2016) HKEC 1272.

[52]*Leung v Lee & Others* (2020) HKFC 91.

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property. The mother claimed there was common intention for her to retain beneficial interest in the property until she passed away. When deciding the case, the court emphasised that a 'holistic approach' must be adopted to assess the common intention, and relying heavily on the mother's evidence, the court held in favour of the mother, emphasising 'there is nothing incredible or inherently improbable about such an intention particularly in the context of a Hong Kong Chinese family where it is not uncommon that parents would acquire a property in the name of their children and yet retain control and beneficial ownership of the property during their lifetime.'[53] This 'not uncommon' common intention is probably a unique feature of Hong Kong society, given added force due to sky-high property prices making it impossible for many young adults to purchase property.[54]

Courts in Hong Kong have repeatedly denied family property is, or had ever been, part of the law of Hong Kong,[55] giving the explanation that since Hong Kong became a British colony, English law concept of individual property has applied and become widely accepted amongst all sections of the community, to the exclusion of the Chinese concept of family property that could be said to apply to some Chinese inhabitants and not others.[56] But in reality, in addition to the Chinese customary law practice of *tso* and *tong*, it is evident from the cases discussed above that sometimes, when inferring the parties' intentions, courts are inclined to give weight to Chinese legal cultural traditions. Stating 'it has to be borne in mind the property was the only property which the parents had,' the court dismissed the idea that the mother, a senior member of the family, would voluntarily during her lifetime relinquish interest in the family home in favour of her son. Deducing a common intention for the parent to retain beneficial ownership of property during lifetime, the court gave limited weight to the fact that there appeared to have been no evidence the mother made financial contribution to the purchase price of the property, because according to court, the mother's interest in the family home was not only determined by her financial contribution, but also by reason of her status as a married old woman. If we compare the above cases of children claiming from parents and parents claiming from children, we can see that when the courts infer common intention, sometimes the assumptions and interpretations based on cultural values may be more important than the legal presumptions established in common law.

Taiwan

Codifying traditional Chinese legal culture: jisi gongye

Originally part of the Qing empire, Taiwan became a Japanese colony in 1895. While almost all of Japan's legal codes took effect, the Japanese colonial government created a framework of customary law to be applied to the Taiwanese people, which were recognised by the colonial courts when dealing with civil cases related to family and succession matters.[57] Although more minor disputes could be submitted for administrative mediation in the local government, was a system modelled upon the commonplace form of dispute resolution in Qing-era Taiwan, over time the Taiwanese became accustomed to using colonial courts to handle their disputes.[58] After the defeat of Imperial Japan in World War Two, the Republic of China (ROC) government (then led by Kuomintang) took

[53]*Primecredit Limited v Yeung Chung Pang Berry & Another* (2009) 4 HKLRD 327.

[54]Yang-Wahn Hew, John Hui & Alvin Tsang, 'A Change of Direction by the Court in Favour of Filial Piety?' (A Word of Counsel, 2018) <https://dvc.hk/Primecredit-Ltd-v-Yeung-Chun-Pang-Barry.pdf> accessed 16 Nov 2022.

[55]*Kan Fat-Tat v Kan Yin-Tat* (n 45).

[56]ibid.

[57]Tay-sheng Wang, 'Translation, Codification, and Transplatation of Foreign Laws in Taiwan' (2016) 25 Washington International Law Journal 307.

[58]Tay-sheng Wang, 'The Modernization of Civil Justice in Colonial Taiwan, 1895 – 1945' (2013) 18 Zeitschrift für Japanisches Recht 95.

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control of Taiwan and enforced the ROC legal codes.[59] Ever since, Taiwan codified more customary practices, some through new legislations, and some others by revising the ROC Civil Code.[60]

Treating land as inalienable family property to be inherited by male descendants and used as gathering place for family members to worship the common ancestry, *jisi gongye* (祭祀公業) (official translation: 'ancestor worship guilds') are traditional Chinese institutional arrangements in Taiwan that share similar characteristics with *tso* and *tong* in Hong Kong. Since the transplantation of foreign legal system into Taiwan, this traditional cultural practice had been incorporated by various governments into the Westernised civil law system effective in Taiwan, and at different historical periods, *jisi gongye* were understood, conceived, and regulated in different manners. Coming from a civil law background unfamiliar with the legal concept of trust, the Japanese as opposed to the British used another legal analogy and treated *jisi gongye* as 'customary juristic persons,' subjecting them to the law applicable to juristic persons, in addition to customary law.[61]

After the ROC government took over, *jisi gongye* lost their status as juristic persons and were treated merely as ancestral property in family members' collective ownership that had no legal personality, because it was decided by Taiwanese supreme court in 1950 that *jisi gongye* could not satisfy the ROC civil law requirement of having 'the nature of a foundation or any association established for the purpose of public welfare.'[62] Tremendous changes happened again after decades, with the passing of the Act for Ancestor Worship Guild (AAWG) in 2007. Aiming to 'promote filial piety, continue the heritage of family tradition, and improve the management of properties for ancestor worship guild to create public interest and efficient land management,' the Act marked the beginning of a new era for *jisi gongye*, as they are now regulated as *jisi gongye* juristic person (translated as 'corporation' in the English version of AAWG) – a special kind of juristic person with rights and responsibilities as stated in AAWG.

Therefore, throughout history, the Taiwanese lawmakers and courts have relied strictly upon pre-existing concepts and categories of the then-functioning civil law system to conceptualise and codify this traditional practice, and perhaps unsurprisingly, there remains recurrent problems of 'incompatibility' yet to be satisfactorily resolved. For example, the ROC-era Taiwanese Supreme Court decided that *jisi gongye* should be conceived as property held in collective ownership, but for decades this had created many challenges. Implying the consent of collective owners was necessary to handle the property, but it proved to be extremely difficult under Taiwan's household registration system that dates back to Japanese colonial era to identity all the people lawfully entitled to the property transcripts (named 'successors' (*paixiayuan*) in AAWG) and produce their household registration.[63]

Moreover, since AAWG came into force in 2007, the nature of property held in the name of *jisi gongye* remains unclear today. In 2015, the Supreme Court remarked that collective ownership ceases to exist once a *jisi gongye*, in accordance with AAWG, is registered as a juristic person with all its properties under its name.[64] But in another case in the same year, the Supreme Court stated that even after a *jisi gongye* has completed registration and achieved the status of a juristic person, its property is still collectively owned by all its entitled successors. The conflicting views

[59]The Republic of China government was established in 1912, following the success of the Xinhai Revolution which led to the fall of the Qing dynasty. The ROC government, then led by Kuomintang, later lost to the Chinese Communist Party in the Chinese Civil War and fled to Taiwan in 1949. Claiming victory at the same year, the Chinese Communist Party established the People's Republic of China on the China mainland, while Taiwan remains under the rule of the ROC government until today.

[60]Wang, 'The Modernization of Civil Justice in Colonial Taiwan, 1895 – 1945' (n 58).

[61]Juristic person, known as *faren* in Chinese, is also translated as 'juridical person.'

[62]Supreme Court (Civil Division) Adjudication Taiwan – Appeal No 364 (1950).

[63]Huiqiao Wu, 'Woguo Zongjiao Yongdi Wenti Yu Shenyi Jizhi Jianzhi Zhi Yanjiu [A Study on the Reviewing System and "Related Issues of The Religious Area Developments" in Taiwan]' (National Taiwan Normal University 2005) <http://rportal.lib.ntnu.edu.tw/bitstream/20.500.12235/85796/6/017406.pdf> accessed 16 Nov 2022 (in Chinese).

[64]Supreme Court (Civil Division) Adjudication Taiwan – Interlocutory Appeal No 531 (2015).

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indicate that AAWG might have granted official recognition to the *jisi gongye* and set out the basic procedures for their registration and supervision, but the Taiwanese courts, even after decades, have yet to reach a consensus on the nature of this traditional institution as seen from the lens of Westernised civil law.

Invoking traditional Chinese legal culture: 'contracts of registration with borrowed name' and filial piety

It has been suggested that amongst ethnic Chinese societies, Taiwan has preserved more Chinese cultural tradition in respect of interpersonal relationships and intergenerational living arrangements,[65] such that even if a property is not subject to the *jisi gongye* arrangement, it is not difficult to observe the influence of traditional values and practices on property-related conduct. Like what has been discussed about the courts in Hong Kong, there are many instances of which the Taiwanese courts attempt to appeal to, or even impose, traditional values when they are applying Westernised legal concepts to resolve ownership disputes arising from the alleged vesting of legal title and beneficial interest in different family members.

To settle these kind of disputes, Taiwanese courts have identified and made use of a legal concept called *jieming dengji qiyue* (借名登記契約) (contracts of registration with borrowed name), an informal arrangement of which 'parties agree that one party registers his or her own property in the name of another party, but retains the right to manage, use, and dispose of the property,'[66] and burden of proof rests upon the party alleging the existence of such an implied contract. Rooted in a Westernised civil law tradition, the concept of a 'contract of registration with borrowed name,' governed by civil law principles of contract law and property law, assumes the freedom to contract, the recognition of individual property ownership, and the presence of a functioning land title registration system. There are different views as to the exact nature of these implied 'contracts,' whether they should be classified as trusts, 'contracts of mandate' or something else.[67] As a civil law jurisdiction, Taiwan's trust law is formulated based on common law principles but has a much narrower scope of application, recognising only 'active' trusts, where a settlor transfers property to a trustee who uses and manages it for the benefit of the settlor or any third party, and not 'passive' trusts, where a settlor transfers property to a trustee who merely holds legal title and does not assume responsibility of use and management.[68]

Given the pervasiveness of situations resembling 'passive trusts' in property ownership disputes, trust is rarely employed by Taiwanese courts as a form of relief for holders of alleged beneficial interest. Instead, they usually attempt to infer 'contracts of registration with borrowed name' by accounting for factors such as who purchased the property, who lives in the property, who discharges the outgoings, and who keeps the title deeds. Interestingly, just like Hong Kong, there is an observable influence of traditional Chinese legal culture on the Taiwanese courts' reasoning and analyses of facts, to the extent that they seem to attach more weight to traditional cultural values and practices than other facts in place before the court. In one case, a mother claimed that the arrangement of having property registered under the name of her son was intended to be a 'contract of registration with borrowed name,' and she was allegedly deceived by her son into transferring title

[65]See CY Cyru Chu, Yu Xie & Ruoh Rong Yu, 'Coresidence with Elderly Parents: A Comparative Study of Southeast China and Taiwan' (2011) 73 Journal of Marriage and Family 120; Bao Jane Yuan & Jianping Shen, 'Moral Values Held by Early Adolescents in Taiwan and Mainland China' (1998) 27 Journal of Moral Education 191.

[66] Supreme Court (Civil Division) Adjudication Taiwan – Appeal No 2448 (2010).

[67]Yuhui Huang, 'Nongdi Jieming Dengji Qiyue Zhi Xingzhi Ji Hefaxing – Yi Zuigaofayuan 105 Niandu Taishangzi Di 1852 Hao Panjue Wei Zhongxin [The Nature and Legitimacy of the Agricultural Contract of Registration with Borrowed Name – on the Supreme Court (Civil Division)' (2019) 23 Taiwan Bar Journal 85.

[68]Zhicheng Wang & Changhong Feng, *Xintuo Shuifa Yu Shili Jieshi* [*Law on Taxation of Trusts and Explanation of Practical Examples*] (Taiwan Academy of Banking and Finance 2015).

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to him.[69] The undisputed facts appear to place the son in an advantageous position, since he had been residing in the property for a long time, had paid all the taxes and fees incurred in the transfer and registration process, and was in possession of the title deeds. While residence in the property in other property dispute cases is usually construed by Taiwanese courts to be strong conclusive evidence of actual ownership, the court here, unconvinced by facts favourable to the son, identified a 'contract of registration with borrowed name' and ordered legal title to be transferred to the mother. In reaching this decision, the court found that the property was perceived by senior family members as an 'ancestral home' to be used as a family gathering site for ancestor veneration, based on the agreed facts that the property was purchased in the earlier years for the entire family to live in, ancestral tablets were enshrined in the property, and the family members visited the property regularly during festivals to pay tribute to their ancestors.

As the case demonstrates, when looking at the intention of the parties, Taiwanese courts are influenced by their concern and understanding of the customary practices of family property and *jisi gongye*. The son might have been residing in a property registered in his own name, but the property, according to the court, did not belong to him alone; it belonged to the entire family as a site for ancestral worship. Treating belonging and kinship as central components of the property, the property was perceived by the court as an expression of social relationships organising people with respect to each other, rather than simply a bundle of rights conferred upon the son when specified legal criteria were met. With the breakdown of relations resulting in court proceedings, the property might not be used anymore for family gatherings, maintaining familial ties, and preserving the family's collective identity. Yet, between the son's claim of sole legal ownership and the mother's demand for the property to be returned so that all her children could divide the property equally, the court seemed more willing to uphold Confucian-influenced norms and practices, which was to treat the property as family property that should be managed, controlled, and divided up by the family head.

Similar to the Hong Kong cases, we can observe a contrast in Taiwanese cases between parents-claiming-from-children, with an example discussed above, and cases of children-claiming-from-parents. In a notable case, a son claimed property ownership by alleging that the property was registered under the 'borrowed name' of his mother, on the grounds that he was the one who provided the funds to purchase the property.[70] Sympathetic to the mother's situation, the court dismissed the son's claim. The court reasoned that the son at that time had already started his career and was earning a stable income, which meant that the son's contribution of funds for his parents should be construed as an act consistent with the 'principles of human relationships,' in this sense meaning the filial duty to return the 'debts of upbringing' to parents through filial care. It followed naturally, under this line of reasoning, that the funds concerned should more appropriately be seen as a gift, rather than evidence supporting the 'unfilial' claim that a child providing support to parents is merely acting out of self-interest to confer property ownership rights on him/herself.

Furthermore, just as children's financial contribution to parents tend to be viewed as fulfilling a filial obligation to reciprocate without conferring interest upon oneself, the transfer of property by children to parents is also likely to be construed by Taiwanese courts as a gift. In one case, an attempt to contest a children-to-parent property transfer eventually failed, because the transfer was found by the court to be a manifestation of filial piety, being a son's gift to provide a sense of security to his parents of old age.[71] Given the position in Taiwanese law was that any gifts intending to 'fulfil moral obligations' could not be revoked, as filial obligations were said by the courts to be 'at a higher level than ordinary moral obligations,' the court found that a gift based on filial obligations was even harder, if not impossible, to be revoked. All these rulings seem to indicate that the

[69]Taiwan High Court Civil Judgment No 307 (2015).
[70]Taiwan New Taipei District Court Civil Judgment No 300 (2015).
[71]Taiwan Taichung District Court Civil Judgment No 2211 (2019).

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values of traditional Chinese legal culture, particularly filial piety and family property, remain a potent force in the Westernised legal system of contemporary Taiwan.

China

Codifying traditional Chinese legal culture: jitian

Facing increasing threat from Western colonial powers, China from late-Qing to the ROC era tried hard to transform its legal system and code of law. Drafted with reference to foreign law, the civil codes during those years transplanted Westernised legal principles into China, while preserving traditional practices only in areas like property, inheritance, and family life.[72] When the communists defeated the ROC government in the Chinese Civil War and rose to power, the ROC codes were swiftly abolished and replaced by new codes based on Soviet law and communist ideology, and it was not until the late 1970s that China began reforming its codes of law once again based on the laws of Western capitalist countries. Despite the tremendous political changes and different top-down efforts to revise China's civil code, China's legal reforms were unlike that of Hong Kong and Taiwan: there had been very limited effort to codify the country's existing customs.

Jitian (祭田) was a traditional practice in the rural areas of southern China that developed since the Song dynasty (960–1279 AD), highly likely the cultural root from which the practices of *tso*/*tong* and *jisi gongye* originated. Land was owned collectively by a clan as family property to generate income for ancestor veneration and improve the livelihoods of clan members. While *tongju gongcai* was long codified as a general requirement to preserve and promote Confucian ethos, as discussed above, traditional Chinese legal culture provided autonomy to countryside communities; hence, governments of imperial China for hundreds of years did not step in to regulate the practice of *jitian*. The first legislation governing *jitian* only appeared in 1765 during the Qing era, and the rules were designed to be broad, criminalising only the unauthorised sale of collectively owned property and facilitate dispute resolution by local magistrates, but much room was left for local clans and communities to set their own 'family rules' regarding the formation, management, and disposal of property held under *jitian*.[73]

It was after the drastic legal reforms in the ROC era that China began to construe *jitian* in accordance with Western civil law concepts. The ROC supreme court defined *jitian* as a form of collectively owned property, and the judiciary when deciding on *jitian* cases promulgated judicial explanations setting out some rules in relation to the management and disposal of *jitian*. These regulatory efforts were short-lived since the communists quickly rose to power and established a new regime after winning the civil war. Vowing to confiscate ancestral halls, temples, farmland, and any other properties owned by the 'evil' and 'greedy' landlords, the communists carried out land reforms in the 1950s that nationalised most privately-owned property, including those held by *jitian*. The traditional practice of *jitian* disappeared in China ever since.

Invoking traditional Chinese legal culture: 'contracts with borrowed name' frequently constrained by policy considerations, and filial piety

Jitian and other customary institutions might have disappeared in China, but it does not mean that contemporary China is a jurisdiction completely removed from the influence of traditional Chinese legal culture. In the socialist state, the Chinese courts, with some amount of discretion, at times prefer the means of legal interpretation and reasoning that is consistent with their perception of filial piety norms, albeit subject to state policy considerations which play a leading role in China's legal system.

[72]Tsung-Fu Chen, 'Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution' (2011) 6 National Taiwan University Law Review 389.

[73]Qicheng Li, *Wailai Guize Yu Guyou Xiguan: Jitian Fazhi de Jindai Zhuanxing* [*Foreign Rules and Inherent Habits: The Modern Transformation of Jitian System*] (Peking University Press 2014).

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Wearing the dress of civil law, in contemporary China, trust law incorporates civil law principles of property and draws no distinction between legal and equitable ownership.[74] As trust is ruled out as a possible form of relief, Chinese courts take an approach highly similar to the Taiwanese courts when handling property ownership disputes between parents and child. They determine whether 'contracts of registration with borrowed name' exist, and if so, the person whose name was borrowed for registration will be ordered to transfer the property to the person who borrowed the name. However, it appears that Chinese courts require stronger evidence of common intention to establish an arrangement to purchase property with borrowed name, and as compared to Taiwanese and Hong Kong courts, they are less influenced by traditional Chinese legal culture in deciding whether legal relief should be provided. For example, in one case, a father alleged that the property was held in the borrowed name of his daughter, since he provided all the funds for its acquisition and was in possession of the title deeds.[75] After a full examination of the facts, the court held that the father's claim failed, as he had not been residing in the property, and there was insufficient evidence to infer a common intention to establish the name-borrowing arrangement. Notwithstanding that the father did visit his daughter at the property which he purchased and briefly resided in it throughout the COVID-19 pandemic, the Chinese court had not interpreted it to be akin to 'family property,' and had not inferred a 'not uncommon' common intention for the father to acquire it in the name of his daughter while retaining control and ownership. Instead, this court opined that 'it is extremely common phenomenon for parents to buy property for their children' that such arrangements should be construed as gifts or advancements.

Chinese courts' strict attitude towards 'contracts of registration with borrowed name' is reflected in judgments where they held that claims for interest in property on the basis of such arrangement can be rejected for contravening state policies. In one interesting case, a father claimed ownership of property alleging it was acquired with the name 'borrowed' from his son.[76] Apart from proving that he contributed the funds, he was able to produce copy of an 'agreement to purchase property with borrowed name' as strong proof of the common intention, and he admitted in trial that the agreement was made in light of government policies restricting property purchases. The court did not give any weight to the father-son relationship at all; notwithstanding the evidence suggesting a 'borrowed' name arrangement, it did not hesitate to base itself almost entirely on policy considerations. Stating that the judiciary must comply with the responsibility to 'correctly understand and apply national and municipal polices of property-purchasing limitations, and ensure the effective implementation of state real estate control policies through judicial judgments,' the court dismissed the father's claim, reasoning that the arrangement could not be accepted due to its nature being a violation and circumvention of government policies.

Some Chinese scholars criticised this approach taken by the court, arguing that since there are no provisions prohibiting registration with borrowed names, this kind of arrangement should not be invalidated or deemed illegal unless it violates mandatory provisions of laws and administrative regulations.[77] Still, the case exemplifies the dominant view of Chinese courts in this respect: private contracts deviating from public policy should be invalidated on such grounds. Other courts in China, such as the Beijing High People's Court, even released a guideline judgment explicitly stating that to 'ensure judicial trials are consistent with state polices on the real estate market,' the court would not support ownership claims of property registered in a borrowed name that arise from

[74]Rebecca Lee, 'Conceptualizing the Chinese Trust' (2009) 58 International and Comparative Law Quarterly 655.

[75]*Chen Jiasong v Chen Nuo Ownership Confirmation Dispute Second Instance Civil Judgment* (2020) Zhe 03 Minzhong No 20590.

[76]*Huang Guocheng v Huang Yixuan Ownership Confirmation Dispute First Instance Civil* Judgment (2017) Hu 0101 Minchu No 20590.

[77]See Xiumei Zhao, 'Jieming Dengji Hetong Zhong de Falv Wenti [Legal Issues in Contracts of Registration with Borrowed Name]' (2014) 22 Journal of National Prosecutors College 118.

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property-purchase restriction policies.[78] It is apparent that Chinese courts' approach of creating norms differs significantly from that normally employed to create precedents in common law jurisdictions.[79]

While Chinese courts' prudent attitude about inferring contracts with borrowed name seem to reflect an indifference to traditional Chinese legal culture, in certain situations when the issue of private contract is not brought to the centre of attention, the reasoning of the courts reveals the influence of filial piety values. Unconstrained by doctrines like the 'presumption of advancement,' some courts were reluctant to support the claim that funds contributed by parents to a property bought in their children's name should be construed as gift. Criticising the attitude of taking parents' financial assistance for granted, and indicating that such attitude could not be promoted by the law and affirmed by judicial decisions, courts have held that if the parents did not clearly indicate that the fund was intended to be a gift, it should be deemed to be a loan with the purpose of helping the children to overcome financial difficulties; and the children, acting out of a moral duty to respect the elderly, should repay the loan and protect the rights and interests of their parents.[80] Contrarily, financial contribution from children to parents, even to parents-in-law, is perceived quite differently. In one case, the court held that the funds contributed by a daughter-in-law to a property registered in her mother-in-law's name should be understood as a filial act from the younger to the older generation, and should therefore be construed as a gift.[81] All in all, although *jitian*, the customary practice embodying traditional Chinese legal culture, is long gone in China, it can be said that the reasonings of Chinese courts, just like Taiwanese and Hong Kong courts, are at times shaped by values and norms pertaining to filial piety, albeit probably to a smaller extent given the prevailing norm of Chinese courts is that state policy considerations should take precedence over private arrangements between citizens.

Comparative Assessment

Traditional Chinese justice was a legal culture that exerted limited control on family units and was not too concerned with activities within the domestic forum.[82] Law was not used to interfere in household matters and to systematically change local practices, nor was it designed to confirm pre-existing customary rules to bind people or guarantee their rights.[83] It was meant only to provide the basic principles for the Chinese empire's subjects to follow. State bureaucrats generally respected the diversity and flexibility of local custom, and not much effort was put into recording, compiling, and codifying them. It is not suggested that state law assumed no role in family disputes in ancient

[78]Beijing shi gaoji renmin fayuan minyiting guanyu tuoshan chuli sheji zhufang xiangou zhengce de fangwu maimai hetong jiufen anjian ruogan wenti de huiyi jiyao [Minutes of the Meeting of No 1 Civil Tribunal of the Beijing High People's Court on the Proper Handling of Property Sale and Purchase Agreement Involving Property Sales contract disputes involving Property-Purchase Restriction Policies].

[79]Qiao Liu, 'Chinese "Case Law" in Comparative Law Studies: Illusions and Complexities' (2019) 14 Asian Journal of Comparative Law S97.

[80]See *Mr Huang v Mr Yu Private Lending Dispute Civil Judgment for Retrial Review and Trial Supervision* (2017) Chuan Minshen No 4120. See also *Zuo Zhaoyan and Shen Chuanlai v Qin Yuxiu and Shen Hanqin Private Pending Dispute Civil Judgment* (2017) Jing 03 Minzhong No 9865, in which the court took a rather strict interpretation of the 'Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Marriage Law of the People's Republic of China (2),' understanding that although the provisions are meant to clarify that a property purchased by parents for their married child and the married child's partner should be construed as a gift, that provision does not solve the problem of whether the money transferred by parent to child for the purpose of purchasing property is a gift or a loan.

[81]*Deng Jingjing v Liang Fengying Ownership Confirmation Dispute Second Instance Civil Judgment* (2019) Yue 01 Minzhong No 276.

[82]Henry McAleavy, 'Certain Aspects of Chinese Customary Law in the Light of Japanese Scholarship' (1955) 17 Bulletin of the School of Oriental and African Studies, University of London 535.

[83]See Kathryn Bernhardt, *Women and Property in China: 960–1949* (Stanford University Press 1999); Jérôme Bourgon, 'Uncivil Dialogue: Law and Custom Did Not Merge into Civil Law under the Qing' (2002) 23 Late Imperial China 50.

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China, but as the Chinese saying goes, 'different villages act according to their own rules (*gechu xiangcun gechu li* 各處鄉村各處例),' and these rules play an irreplaceable and even more important role than state law. In terms of the distinction made by Toennies, traditional Chinese law was classified as the law of a *Gemeinschaft* (community), based on the primacy of social relationships and not of the right-and-duty-bearing individual, and on social ties rather than contractual obligations.[84] Unless there were gross deviations requiring local officials to mediate or the criminal justice system to impose penalties, family disputes were expected to be resolved by disputants' reconciliation and compromise, usually through a process of settlement led by the family elder.

Although Hong Kong, Taiwan, and China share the same traditional legal culture, their perception, observance, and regulation of traditional custom today greatly differ. Hong Kong and Taiwan became colonies, and to facilitate local administration and reduce resistance, their respective colonial administrations tried to preserve the local way of life by establishment a framework of customary law. In Hong Kong, the Chinese customary law on traditional institutions embodies *Gemeinschaft* to a great extent; the law and the administration largely refrain from interfering in the internal practices of *tso* or *tong*, and the courts, albeit using common law terms to describe and make sense of traditional arrangements, show a certain degree of respect to practices of *tso* or *tong*, even when they are in clear violation of common law rules. Compared with Hong Kong's relatively laissez-faire approach in codifying the traditional arrangement, Taiwanese law takes a more active role in regulating and monitoring these institutions, imposing several obligations that restricts them to tailor their own governance rules. Having confiscated all privately-owned land back in the 1950s and 1960s, China with its communist government appears to be the only jurisdiction among the three that does not recognise in law any such traditional land-holding practices.

The differences in the three Chinese societies' codification and treatment of traditional practice may be explained by the nature of their legal systems as derived from the different socio-political developments they experienced. Influenced by the rise of liberalism, Western systems of law since the nineteenth century saw all property rights vested in individuals or legal personalities, which had led to the destruction of other land-holding arrangements based on clan, tribal or communal ownership principles.[85] However, it has been suggested that common law systems, with the concept of personal law and an open-endedness with central conceptions, provide relatively more flexibility in respect of the plurality of individuals and institutions when compared to more state-centred European legal traditions and Marxist socialist legal arrangements.[86] Accordingly, such flexibility as applied in colonies gave colonial administrators greater latitude in handling local affairs and meeting altered conditions.[87] The situation in Hong Kong reflects such an argument to some extent. From the early days, the British colonial administration, seemingly influenced by the spirit of the common law, implemented a policy intending that beyond criminal law and other necessary adjuncts of public control, the local population could look after their own affairs and keep their local traditions.[88] Although debatably, some features of Chinese customary law were invented after the colonial authorities dismissed customs they deemed 'repugnant,'[89] the locals practicing

[84]Alice Erh-Soon Tay, 'Legal Culture and Legal Pluralism in Common Law, Customary Law, and Chinese Law' (1996) 26 Hong Kong Law Journal 194.

[85]ibid.

[86]ibid.

[87]Brett L Shadle, '"Changing Traditions to Meet Current Altering Conditions": Customary Law, African Courts and the Rejection of Codification in Kenya, 1930–60' (1999) 40 Journal of African History 411.

[88]DM Emrys Evans, 'Common Law in a Chinese Setting – The Kernel or the Nut?' (1971) 1 Hong Kong Law Journal 9.

[89]See Thomas Spear, 'Neo-Traditionalism and the Limits of Invention in British Colonial Africa' (2003) 44 The Journal of African History 3; Selina Ching Chan, 'Colonial Policy in a Borrowed Place and Time: Invented Tradition in the New Territories of Hong Kong' (1999) 7 European Planning Studies 231.

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their traditions were for years left with mostly self-regulating systems with their own internal norms and own decision-making mechanisms.[90]

The approach in which *tso* and *tong* was codified best illustrates this. Although specified by NTO as representatives to deal with *tso*/*tong* land 'as if they were owners,' the institution managers in reality have limited decision-making power, because under customary practice, any decision that affects land rights and interests, such as those involving rent collection, land use, and entering into covenants, have to receive unanimous support from, or at least consult, members of the *tso* or *tong*. The NTO itself, as the principal legislation regulating traditional land-holding institutions, is brief by any standards. Only concerned with a handful of matters for facilitating regulation, the Ordinance does not define the nature of property ownership and succession rights, nor does it stipulate the organisational structure and governance mechanisms of these institutions. The regulatory approach of this Ordinance in part reflects the tendency of common law system to avoid conceiving statutes as entering into the legal system as an 'organic whole' constituting an all-inclusive and cohesive legal schema.[91] Not much effort was made to accommodate traditional customary practices into the legal system and reduce them into a comprehensive body of written laws designed to generate perceived clarity and precision.

As the administration favoured a more flexible and tolerant approach towards local custom, the courts of Hong Kong also expressed a general tendency to uphold customary practices and norms derived from traditional Chinese legal culture. At times, their position has been ambiguous and inconsistent, due to their different conceptualisations of Chinese cultural inventions using Westernised legal principles. Still, as emphasised by the court in a seminal customary law case, it was considered the duty of the court 'to ascertain and apply the custom or customary rights applicable to New Territories,' and in this area, it was said that a non-interventionist attitude should be taken leaving 'little room for judicial initiative.'[92] Ironically though, it was probably this inclination to conform to local custom which led to some degree of judicial initiative to invoke traditional legal culture. As the cases discussed above demonstrate, the Hong Kong courts, in the process of applying the law with reference to the facts available to deal with parent-child property disputes, may infer and even impute the parties' common intention to reflect their perceived systems of local norms and values. By portraying the parent as loving seniors and the child as a submissive junior, cultural narratives like filial piety, when perceived and employed by the courts, conceptualise property as being organised around filial relations and kin hierarchies, and parents are therefore placed in an advantageous position, leaving the younger generation with the burden to dispute and disprove the 'common intention' as inferred by the courts.

The common law approach to customary practices in Hong Kong can be contrasted with the approach developed in Taiwan. Thinking that it was unnecessary to implement a separate body of Taiwanese codes, the Japanese colonial administration enforced Japanese codes in Taiwan and employed customary law to deal with domestic matters, with the construction of such customary law by colonial administrators and courts to be based entirely on the framework of Japanese law.[93] After the ROC government took over and transplanted ROC codes to Taiwan, the ROC codes were gradually revised to codify traditional customs in Taiwanese society; and especially since democratisation in the 1990s, there was an apparent trend of transforming customary law into legislation. Despite regime changes, the treatment of traditional practices in Taiwan had always been about directing local private law to conform to the jurisprudence and terminology of Westernised civil law. Unlike Chinese customary law in Hong Kong where certain legal ambiguities

[90]Evans (n 88).

[91]Vivian Grosswald Curran, 'Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union' (2001) 7 Columbia Journal of European Law 63.

[92]*Kan Fat-Tat v Kan Yin-Tat* (n 45).

[93]Marie Seong-Hak Kim, 'Customary Law and Colonial Jurisprudence in Korea' (2009) 57 The American Journal of Comparative Law 205; Wang, 'The Modernization of Civil Justice in Colonial Taiwan, 1895–1945' (n 58).

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left room for the courts to exercise discretion, customary law in Taiwan was something that must be clearly defined and fully incorporated into the state legal system, as epitomised by the regulation of *jigi gongye*.

Throughout the past one hundred years, *jisi gongye* were conceptualised and treated in different manners, and finally under the AAWG, *jisi gongye* is recognised in Taiwanese law as customary juristic persons. By its nature, the AAWG is very different from the NTO, its Hong Kong counterpart. Given that the NTO does not define the legal nature of *tso*/*tong* and lack provisions governing their operation, it appears that there had been no perceived need to formally accommodate *tso*/*tong* into Hong Kong's legal system as a distinct legal entity. In comparison with its counterpart, the AAWG contains comprehensive provisions governing *jisi gongye* in many aspects, ranging from their registration, management, and supervision. To apply for registration at the local district offices, the managers or successors must submit the real estate documentations, list of managers and successors' names, and the family rules in relation to inheritance, management, and division of property. To further proceed and register as a customary juristic person, a formal charter comprising even more information of the *jisi gongye* must be submitted.[94] The AAWG mandates formalised governance and supervision of *jisi gongye*, introducing as a statutory requirement that an 'assembly of successors,' somewhat like annual general meeting in corporations, must be held every year. As *jisi gongye* are conceived as juristic persons, they are regulated in a manner akin to other juristic persons in Taiwanese law.

The codification and regulation of *jisi gongye* has also placed this traditional practice under the scrutiny of Westernised legal norms. As suggested that customary law often includes gender discriminatory rules that violate women's rights under constitutional equality guarantees,[95] there has long been criticisms in Taiwan that with the granting of rights exclusively to male descendants, *jisi gongye* are discriminatory in nature. Thus, to promote gender equality, the courts should refuse to uphold family rules depriving females of succession rights, and the government should remove provisions in the AAWG that preserve discriminatory practices.[96] The courts were probably unconvinced; in a controversial case, the Taiwanese Supreme Court considered it appropriate to follow ancestral customs and upheld the decision of a *jisi gongye* to deny succession rights to a female descendent.[97] Yet, the AAWG was finally revised in 2019, with the amendment stating that a successor's direct descendants of both sexes should be listed as successors, and if the successor does not have offspring, the mother (if not remarried) and spouse should be listed. This amendment in effect makes it easier in the future for women to enjoy equal succession rights.

The amendment, arguably a direct interference with tradition, is a rather interesting development, given that Taiwanese courts as shown in the cases discussed seem inclined to maintain the integrity of customary practices and uphold traditional values. They tend to see concepts of property as tied to social relations, and traditional arrangements of property-holding as connecting rather than dividing people. In resolving the commonly observed tension between customary law and gender equality, the eventual amendment of the AAWG indicates that Taiwan has begun to adopt a gender neutral approach, based on the belief that the law, and the institutions sanctioned and constituted by it, should be gender neutral to reflect commitment to gender equality. This is in stark contrast with the continued preference for a consent-based approach in Hong Kong, premised

[94]Although the AAWG was enacted partly to facilitate land clearance, it has been noted that the certain provisions have created problems and hindered the administrative process. For example, it is difficult for many *jisi gongye* to provide household certificate transcript of all its successors, since Taiwan's household registration system was only established in 1905 during Japanese rule, but many *jisi gongye* can be traced to much earlier times. See Wu (n 63).

[95]Susan H Williams, 'Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption' (2011) 18 Indiana Journal of Global Legal Studies 65.

[96]Rongchuan Chen, 'Buwen Jisi Wen Jicheng – Jisi Gongye He Shizi Di 728 Hao Jieshi [Asking Not of Ancestor Worship But of Succession: Jisi Gongye and Explaining Interpretion No 728]' (2015) 243 The Taiwan Law Review 5.

[97]Supreme Court (Civil Division) Adjudication Taiwan-Appeal No 963 (2010).

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on the idea that individuals may structure their family matters in ways that are not gender neutral as long as decisions are made freely and independently.[98] Although the *Sex Discrimination Ordinance* in Hong Kong provides for exemption to any gender discrimination relating to rural land granted to male indigenous villagers, Taiwan has clearly taken a much more interventionist role in regulating the private sphere. Again, this difference coincides with the civil and common law systems distinction between these two contemporary Chinese jurisdictions. Probably exemplifying a civil law state's approach to law by privileging 'the whole, the coherent, and the interrelatedness' of law based on constitutional rights, little room is left in Taiwan to exempt the 'particular' and the 'isolated' incidences of ancestral practices.[99]

Despite having absorbed Western legal ideas since its move to adopting a market economy, China, as a communist state since 1949, has a unique civil law system shaped and influenced heavily by Leninist ideology and a conception of socialist legality.[100] Indeed, some points of difference have not removed socialist law from the civil law tradition,[101] but there is a fundamental difference, being that socialist law rests upon the ideology that social conflict and political pluralism belonging to the old world should be overcome through revolution to create a communist society.[102] China typifies this aspect of socialist legality observed in communist states – an extreme manifestation of legal positivism which sees law as something emanating from the state that leaves very little space for customary rules or natural rights.[103] Considering law to be a tool for political domination and social engineering, a very different approach to traditional custom has been taken by China. *Jitian*, along with many other traditional practices like concubinage, were swiftly outlawed as part of the political campaign to drastically transform Chinese society and remove the 'remnants of feudalism' and 'bureaucrat-capitalism.' While it is written in China's *Civil Code* that 'custom may be applied' where the law does not specify, provided that 'public order and good morals may not be offended,'[104] there is an absence of written customary law in China, and not much attempt has been made to codify customary practices.

It is not to say that customary law does not apply at all or has ceased to exist. Some written rules are produced by autonomous bodies within ethnic minority regions to reflect customary practices of minority ethnic groups, but such rules are mostly designed to provide some degree of flexibility where certain customary practices may violate basic principles of state laws and administrative regulations, rather than to acknowledge and regulate customary practices. For example, as an adaptation to China's marriage law, a provision of the 'supplemental rule' on marriage in the Illi Prefecture of Xinjiang states that 'Kazakh people's customary taboo on marriage between people who are relatives by blood up to the seventh degree of kinship shall be preserved,'[105] and as an adaptation to China's succession law, a provision of the 'adjustment rule' on succession in Ngawa Tibetan and Qiang Autonomous Prefecture states that in the absence of a will, the successor can also inherit 'according to the custom of ethnic minorities.'[106] Whereas legislative bodies in ethnic minority

[98]For discussion of the gender neutrality and consent-based approaches, see Tracy E Higgins, Jeanmarie Fenrich & Ziona Tanzer, 'Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism' (2007) 30 Fordham International Law 1653.

[99]Curran (n 91).

[100]Eric C Ip & William Partlett, 'Is Socialist Law Really Dead? Related Papers' (2015) 48 NYU Journal of International Law and Politics 463.

[101]John Quigley, 'Socialist Law and the Civil Law Tradition' (1989) 37 The American Journal of Comparative Law 781.

[102]Tay (n 85).

[103]John Gillespie & Pip Nicholson, *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (Asia Pacific Press 2005).

[104]Civil Code of the People's Republic of China.

[105]Yili hasake zizhizhou shixing zhonghua renmin gongheguo hunyinfa buchong guiding [Supplement Rule of Illi Kazakh Autonomous Prefecture for Implementing the Marriage Law of the People's Republic of China].

[106]Aba zangzu qiangzu zizhizhou shixing zhonghua renmin gongheguo jichengfa de biantong guiding [Adjustment Rule of Ngawa Tibetan and Qiang Autonomous Prefecture for Implementing the Law of Succession of the People's Republic of China].

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regions are at least granted limited autonomous powers to make 'adjustment regulations,' no similar authority or interpretative power is given to the courts operating in minority areas, and the state never mentions the need for the judiciary to consider customary law when applying state law.[107] It has been reported that courts in ethnic minority regions are generally very cautious about customary law, and they rarely apply it in trial. There even seems to be a widespread belief within China's judiciary that ethnic minority litigants, by virtue of showing up in court to resolve their problems and disputes, have 'given up' their traditional practices to be bound instead by the judiciary and state law.[108]

With a cautious approach to customary practices and a tendency to substitute policy for law, socialist legality in China may partly explain Chinese courts' attitude of prioritising government policies over private arrangements influenced by Chinese tradition, forming a sharp contrast with Taiwan, another civil law jurisdiction. In Taiwan, unless the private arrangement like a 'contract of registration with borrowed name' constitutes a criminal offense by violating the relevant regulations, such as the land use regulations stating that only people of indigenous backgrounds shall acquire ownership of land reserved for the indigenous population, the private agreement will in principle be held by a court to be valid, suggesting a more liberal approach to contractual freedom and private arrangements. In China, though, a private agreement made in an attempt to circumvent even a government policy not implemented as compulsory regulations, like the temporary measures taken by local governments to restrict property purchase for a period of time, would be invalidated on the basis of 'violating public order and morals,' since the distinction between law and policy is more a matter of formality than of substance, and law is merely a codified and institutionalised version of the Chinese Communist Party's policies and measures.[109] Even though it has been argued that socialist law is only nominal in China and is intertwined with the country's original legal tradition embedded in Confucian ethics,[110] it appears that any form of pluralism, including customary law and private arrangements that are influenced by traditional values, must ultimately give way to the communist state's authority.

Conclusion

In this article, I have discussed the legacy of traditional Chinese legal culture in the contemporary Chinese societies of Hong Kong, Taiwan, and China, in the context of property ownership and succession. I began with a discussion of the cultural traditions in this respect, illustrating the values of filial piety, family property arrangements and practice of *tongju gongcai*. I used these as the point of reference to investigate specifically how the three jurisdictions differ in their approach of codifying traditional property-holding institutions, and in their tendency of invoking traditional values while applying terminologies and concepts of Westernised law to resolve cases of parent-child property disputes. Using a comparative approach, I examined the distinctive and lasting impacts of traditional Chinese legal culture on the three aforementioned jurisdictions, which have legal systems rooted in different legal traditions, but all adhere similarly to the individual rights-based principles of Westernised property law.

Scholars who tend to highlight the differences between Chinese law and Western law may describe the Confucian-influenced Chinese traditional legal culture as a factor that constrains the

[107]Katherine P Kaup, 'Controlling the Law: Legal Pluralism in China's South-West Minority Regions' (2018) 236 China Quarterly 1154.

[108]Weiran Shi, 'Dangdai Zhongguo Xiguanfa Yu Guojia Sifa Guanxi de Bianzheng Sikao - Cong Dui Liangge Jiceng Fayuan de Fangtan Zhankai [Dialectical Thinking on the Relationship between Contemporary Chinese Customary Law and State Justice - Starting from Interviews with Two Primary Courts]' (2012) 2 Journal of Fujian Jiangxia University 55.

[109]Jianfu Chen, 'Policy as Law and Law as Policy: The Role of Law in China's Development Strategy', in Christoph Antons (ed), *Law and Development in East and Southeast Asia* (Routledge/Curzon 2003).

[110]Chen Lei, 'The Historical Development of the Civil Law Tradition in China: A Private Law Perspective' (2010) 78 Legal History Review 159.

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effectiveness of Western-style laws, such that some conceptions in Western legal traditions have to be 'sacrificed' to accommodate social relationships in Chinese society.[111] On the flip side, some scholars may lament that Chinese law had long lost its autonomy and creativity, as the modern transition of Chinese law amounts to full-scale Westernisation with little consideration given to the suitability of Western-style laws.[112] There might be a certain degree of truth to both of these arguments which posit Chinese law and Western law to be two competing systems. As it has been shown in this article, Chinese legal tradition gives collective interests primacy over individual identity, hardly accommodates individual ownership – a notion central to Western property law –and that the laws and legal systems of Hong Kong, Taiwan, and China today reflect a myriad of foreign influences, from the forced imposition of foreign legal system to the voluntary adoption of foreign civil codes.

In this article, however, I suggest that the Westernised contemporary legal systems of the three Chinese societies have demonstrated different degrees of adaptability, flexibility, and tolerance for ambiguity regarding Chinese customary practices. Reasoning of the courts in all three jurisdictions are influenced by Confucianism and the Chinese legal tradition to various extents. In upholding the tradition-influenced values and practices, Hong Kong preserves the *Gemeinschaft* aspect of traditional Chinese justice a bit more by providing freedom for customary practices and treating them as concepts open for interpretation; Taiwan puts in more effort to accommodate custom into its civil law system, at times are not reluctant to intervene and force traditional practices to change; and between the three, China is the most 'enthusiastic' about extending state power into private lives and arrangements.

By conducting a comparative analysis involving jurisdictions belonging to the same Chinese legal tradition but modelled after different foreign legal systems, the approach in this article explores the different methods in which divergence between state-imposed systems and traditions are handled in practice. It is hoped that this approach provides a starting point for future Chinese law research to rethink the 'incompatibility' discourse and explore the relationship between traditional customs and legal transplants in contemporary Chinese societies.

[111]Barresi (n 7).

[112]Jinfan Zhang, *The Tradition and Modern Transition of Chinese Law* (Springer 2014).

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