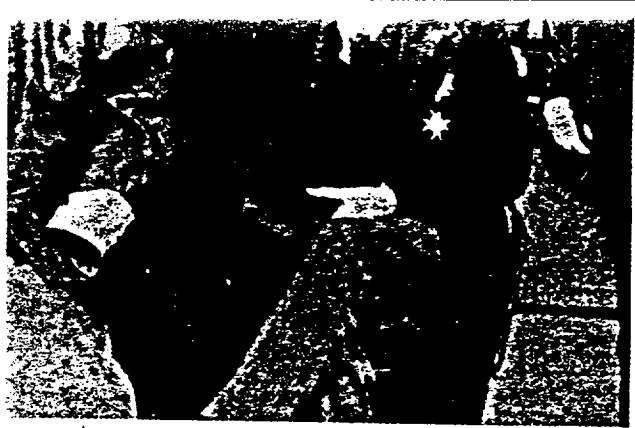




New Territories women



Governor Blake

Back to the drawing board

Proclamation August 1990

PRACTICALITY AND RULING with a light hand has been one of the better traits of the British Colonial system.

Practicality won the day when the British decided to retain an element of Chinese customary law when they took lease on New Territories from a moribund Qing Government.

It was the best solution to the complex questions surrounding how a leased territory should be administered, as compared to the ceded territories of Kowloon and Hong Kong.

Hence on April 9, 1899, a week before the British flag was hoisted in Tai Po, the then Governor Sir Henry Blake sought to assure the anxious residents of the New Territories with a proclamation.

"I would also impress upon you that this territory having been leased by his Imperial Majesty the Emperor of China to Her Britannic Majesty the Queen, as subjects of Her Majesty's Empire, your commercial and landed interests will be safeguarded," he said, adding that "your usages and good customs will not in any way be interfered with."

Ruling with a light hand in the New Territories was the result of this promise.

The indigenous residents there were accorded legal exemptions and administrative treatment not applicable to other Chinese residents in the colony.

Section 118 (1) of The Public Health and Municipal Services Ordinance, for instance, allowed the New Territories villagers to bury their dead outside designated public cemeteries, on permission from Government.

Other laws exempt the villagers from the provisions of the Buildings Ordinance, from paying rates for property under the Rating Ordinance, and from a three per cent increase of annual rental on extension of their land lease beyond 1997 in the New Territories Leases (Extension) Ordinance.

On top of these laws the New Territories Ordinance (Section 13) spells out clearly that in matters in relation to land Chinese customs and customary rights are to be recognised and enforced.

The 1972 "small house" policy was an example of an administrative practice which took into account the succession rights of male indigenous villagers.

The Basic Law also seems to reflect this continuation of policy for in Article 8 it says that the laws previously in force in Hong Kong, including customary law, shall be maintained.

Article 40 is even more specific, stating that the "lawful traditional rights and interests of the indigenous inhabitants of the "New Territories" shall be protected by the Hong Kong Special Administrative Region."

Article 122 states that the rent charged on a piece of land shall remain unchanged after June 30, 1997 so long as the leaseholder is descended through the male line from an indigenous villager in 1898.

There is no doubt that all these laws and practices have succeeded in preserving, even encouraging, the continuation of practices such as male succession rights under Chinese customary law.

Now, after 91 years during which the Government adhered to Blake's promise, we are told that these very customs are against the notion of sexual equality, which the Government has neglected to enforce for 14 years since the International Covenant on Civil and Political Rights became applicable to Hong Kong.

At the same time, however, we are told by the Chief Secretary that while the New Territories villagers will not be exempted from the provisions of the Bill of Rights, their customs need not necessarily be incompatible with the bill and the Basic Law. He added that differentiation between sexes need not amount to discrimination.

This may mollify some critics, but the reality is that by introducing the Bill of Rights in the "spirit" of upholding sexual equality the Government is setting it on a collision course with the Basic Law, which protects customary rights; but at a later date and shifting the arena to the courts.

Prevention is always better than cure and legislators might want to ponder whether this potential conflict can be solved now or let it precipitate a constitutional conflict later.

Legislators might also want to ponder the following questions before they pass the Bill of Rights at the next Legco session:

- Is it fair to accord a people their customary rights, encourage them to continue to practice it for 91 years, and then decide to strip them of such rights—all because the Government wants to push through a Bill of Rights to show the world that it is doing something positive for Hong Kong?
- Is the Government being ethical in deciding that sexual equality should be upheld at all costs, pass a law in that spirit and then ask the courts to resolve the inevitable conflict it will have with the Basic Law?
- Apart from an unelected and thoroughly Western-oriented elite in Hong Kong which claims to speak for the public, who in Hong Kong is demanding that sexual equality be upheld in the context of land matters in the New Territories?
- Has anyone ever bothered to consult the wives and daughters of the indigenous villagers there who should be most concerned about such rights as it would affect them and not others?

Unless these questions can be answered persuasively the best recourse might be to go back to the drawing board.

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