

The Unruly New Territories

Small Houses, Ancestral Estates, Illegal Structures,
and Other Customary Land Practices of Rural
Hong Kong

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An Unruly Territory

Ever since incorporation into Hong Kong at the end of the nineteenth century, the New Territories have been causing trouble. Initially that was in the form of armed resistance to the British takeover of April 1899. This was followed by reluctance to co-operate with, and occasional misleading of, the surveyors who mapped and recorded the land and its ownership on behalf of the new authorities. Then it turned out that most of the land had two owners and some of the population tried to convince the new government that they owned land which was not theirs. A pattern was set for the future.

The truculent attitude and independent spirit of the rural population was referred to by Sir Frederick Lugard, Hong Kong's governor, a few years after the takeover. 'The people are not lambs in the Territory!' he declared to Legislative Council approval.¹ The spirit has been noted by one familiar with rural life in the mid-twentieth century. Dr James Hayes, who served as a District Officer in various, largely poorer, parts of the New Territories, became aware that the past was still influencing thinking and behaviour: 'For centuries, circumstances had obliged them to be self-managing and independent-minded, and their robustness and tenacity, tinged with a strong dose of pragmatism, was still very much in evidence.'²

This spirit must have been one of the factors behind the population's careful and considerate treatment by Hong Kong administrators during that century. Traditional attitudes and customs were indulged and protected by colonial officers, especially in regard to land and houses. Care and consideration was also advisable because of the organizational capacity and solidarity of the indigenous community evident in rural committees and the Heung Yee Kuk.

Contrary to their original intention of simply using the existing Ching land register, the new authorities imposed upon rural landowners a fundamental change in the method of holding land. They were forced to do so by circumstances. The change, which is explored later in this book, was not as great as has been claimed

1. Quoted in James Hayes, 'The Great Difference, The Great Rift, and The Great Need: The New Territories of Hong Kong and Its People, Past and Present' (2008) 30 *Asia Pacific Journal of Public Administration* 139, 143 ('The Great Difference' (article)).

2. Hayes, 'The Great Difference' (article) 160.

from time to time by indigenous spokesmen, but the perception that it was has fuelled rural discontent for generations. So has the conviction that the incoming government reneged on promises made in 1899 not to interfere with the people's customs. In fact the government instituted a statute specifically preserving customary law in land matters and recognizing family landholding institutions and other traditional practices. Most of that statute, the New Territories Ordinance, survives today. Its background and content are dealt with in six of the chapters that follow.

As if in compensation for such perceived wrongs, government officials embarked on an approach of mollifying and indulging the indigenous community and their practices. The policy was to keep things much the same, so the territory was shielded from developments elsewhere. The way of life in rural parts in the 1950s and 1960s, with their quaint villages, ancient ways and preserved culture, was in marked contrast to that in urban Hong Kong and on the mainland. The whole place seemed out of time, a museum piece, more Chinese than China itself. Even in those days the contrast and the privileges led to New Territories people being described as 'China's spoilt children'.³

The Kuk

Partly spurred by perceived grievances against their treatment by the New Territories administration, in 1926 wealthier members of the local population established a representative body out of which emerged the Heung Yee Kuk, or Rural Representative Council. This association's original aim was to promote the welfare of the people of the New Territories not just in respect of agricultural land and housing, but also in commerce and industry. Within a generation of the absorption of the area into the vibrant Western-style colony of Hong Kong, native leaders had resolved to exploit the opportunities it created. They have been doing so ever since. Making difficulties for the government has been part of their method, and a successful one.

The kuk has become a well-organized and effective modern interest group with influence well beyond what might be expected given the numbers of the people that it represents. Consisting as it does of people with roots in the New Territories, it has not been without internal disputes. Factionalism and machinations in the 1950s led to withdrawal of official recognition, followed by the kuk's reform in November 1959 with the enactment of its own ordinance.⁴ The object was, according to the ordinance's long title, 'to ensure that it will as far as possible be truly representative of informed and responsible opinion' in the New Territories. Its governing body is made up of representatives elected by the various rural committees, themselves elected by indigenes and other villagers.

3. Austin Coates, *Myself a Mandarin: Memoirs of a Special Magistrate* (Hong Kong: Heinemann Asia, 1975), p 62.

4. Ordinance No 45 of 1959 (11 November 1959), now Cap 1097.

The kuk represents 'the people of the New Territories', a phrase repeatedly used, but not defined, in its ordinance. Since some villages came into existence after 1898 and are represented on rural committees, the people referred to are not confined to aboriginals, but the majority of the population in the modern New Territories, those who live in suburbs and new towns, are certainly not regarded as being represented by the kuk. Here, therefore, 'the New Territories' is largely synonymous with the rural areas.

The statutory functions of the kuk are full of high-sounding generalizations: to promote and develop mutual co-operation between the people of the New Territories and understanding between those people and the government; to advise the government on social and economic development in the interests of the welfare and prosperity of those people; and to encourage observance of such of their customs and traditional usages as are conducive to their welfare. The focus is upon their relationship with each other and with the administration, without regard for the wider Hong Kong community. The ordinance remains redolent of the era in which it was first enacted: of paternal concern for the rural poor and advancement of the under-privileged.

The well-meaning aims of the colonial government were hardly reciprocated by the kuk's leaders. Rather, they dwelt upon perceived injustices, particularly in relation to land, and composed a narrative of victimhood that quite ignored both historical fact and the good fortune of their incorporation into twentieth-century Hong Kong. This statement of one of the kuk's chairmen indicates the attitude: 'Without the consent of the New Territories landowners the Hong Kong Government unilaterally drew up the Block Crown Lease in 1905 in order to control the use of private land.'⁵ These assertions disregard the principal purpose of the leases, which was to raise government revenue, ignore the exclusive rights bestowed by the leases upon the leaseholders (who under the imperial Chinese system had to share ownership with landlords), assume a pre-colonial freedom to use land that probably never existed and overlook the modern reality that control of the use of land is a widespread and legitimate power of government. In similar vein is this exaggerated and vaguely-threatening extract from a press release by the kuk in 1981: 'New Territories people loathe colonialism and there is a limit to their toleration of the unfair measures taken by the Hong Kong Government towards the New Territories'. In reality, as we shall see, rural people soon learnt to exploit and enjoy the benefits of being part of a free-enterprise economy. The more thoughtful among them must occasionally have reflected upon what their fate would have been had they remained within imperial China.

The kuk as a body has naturally shown the attributes of those it represents and of whom it is composed. It has been vociferous and tenacious in furthering their interests, attaching itself determinedly to those in authority, in latter years

5. Chan Yat-san, Heung Yee Kuk chairman, 1968–1978.

under the leadership of a superb political operator, its long-serving chairman the late Lau Wong Fat. But long before Mr Lau's chairmanship the practice had arisen of the government directing rural affairs in consultation with the kuk, as if the country areas were no business of the rest of Hong Kong. This unofficial condominium may be said to have worked. When land was needed for the factories and other undertakings which transformed the colony into an industrial powerhouse soon after the Second World War, farmers in the affected areas were persuaded to swap country for town. When continuation of British rule came under threat from mainland-inspired agitation in 1967, the majority of the kuk's leaders and of the rural population rallied to the government's side. They may or may not have loathed the colonialism that had brought so many changes to their lives, but most feared the available alternative even more. When, a few years later, land was needed for housing Hong Kong's rising population, country landowners acquiesced in providing it and were eventually well rewarded for doing so.

The acquiescence may have been reluctant but the kuk's wealth, organization, skilled negotiation and successful lobbying ensured that exceedingly generous compensation was offered to the owners whose lands were taken. At about the same time, it secured exorbitant privileges with regard to village houses. During the Sino-British negotiations on the future of Hong Kong in the 1980s, the kuk pressed the governments of both countries to heed its concerns. Later, further favourable terms were extracted from those who drafted the Basic Law of the Hong Kong Special Administrative Region (HKSAR). When functional constituencies were introduced into the Legislative Council in 1988, one (with the smallest electorate) was allocated to the kuk. Successive Chief Executives of the HKSAR have invited an individual from the kuk to join their Executive Council. In the twenty-first century, despite greatly changed circumstances, the kuk and the rural committees have been strident in asserting and advancing the sectional interests of the indigenous community.

They continued to be successful in doing so after the territory was handed back to China. The HKSAR's government has treated the indigenous with indulgence similar to that of its predecessor. In 1997 the government attempted to curb the sale of indigenous building rights to developers by insisting that applicants for small house grants make solemn declarations that they had not sold their rights to anyone and that they were the owners of the land on which the small house was to be built, a subversion of the Small House Policy that had been rife for years. When prosecutions for making false declarations followed, the kuk vehemently protested and the government eventually backed down, saving face by substituting criminalization of the conduct with an ineffective condition forbidding the practice in the house grant. In 2011 the proliferation of illegal extensions to village houses as a result of decades of failure to enforce building controls at last led to an announcement that action would be taken against them. Again, the rural reaction was sharp and again the administration backed off, substituting a voluntary register of such extensions for honest offenders in place of enforcement of the law. The kuk celebrated

its continued dominion over the New Territories by building itself a palace-like headquarters at Shatin.

Certainly the Heung Yee Kuk's greatest achievement has been ensuring the continuation of rural privileges by entrenchment of indigenous traditional rights and interests, in Article 40 of the Basic Law. Those rights and interests are to be protected by the HKSAR, so the article declares. The provision is opaque: nobody knows exactly what rights and interests are referred to. This may be deliberate, the result of political compromise. Judges have so far largely avoided having fully to define the phrase. But it must refer to something and the doubt has given the kuk enough traction to intimidate administrators and challenge those who seek to curb indigenous privileges. The kuk believes that the article sets the Small House Policy in stone. This will be examined later in the book when an account will be given of the background to and content of the policy and an attempt will be made to give more meaning to Article 40.

Forged by Land and Climate

In fact, the attitudes that characterize the rural population go back to well before they were incorporated into the colony of Hong Kong. Survival in the largely rugged terrain and harsh summer climate of Po An Hsien (later San On or Xin'an), the imperial Chinese administrative district or county out of which the New Territories were later to be carved, demanded self-reliance and inventiveness of its villagers. In the seventeenth century the population had suffered the dislocation and trauma of forced evacuation. Only the hardy survived and returned. They were largely Cantonese, or Punti. Later they were joined by industrious peasant farmers from elsewhere. Under Ching rule, San On had enjoyed a large amount of autonomy.⁶ The mountains were indeed high and the emperor far away. County magistrates were starved of resources and their staff corrupt. They relied upon local leaders to run the villages and markets. By the time of the British takeover, a large proportion of the people were descended from Hakka immigrants originating from northern and central China, people who had had the initiative to start a new life in an unpromising environment. The population's lives were remote from the regional capital, Canton, and little touched by the light and ineffective local government of the magistrate. At the end of the nineteenth century their way of life had hardly changed for more than two hundred years.

During those centuries not only had the inhabitants of San On acquired some independence from central government, they had also evolved a system of landholding and transfer that was flexible and inventive—and illegal. Both the independence and the system were swept away by the reforms of land and administration introduced during the early years following the British takeover. However, incorporation

6. Hayes, 'The Great Difference' (article)143.

into Hong Kong hardly affected the attitudes of the people. They remained suspicious of authority. Writing thirty years after the takeover, S. H. Peplow, who had experience of rural parts from his service as Land Bailiff and as a District Officer, observed that life there little differed from that in other parts of China, nor had it altered much during the years of British occupation:

The average villager does not set great store by cleanliness, or better housing. He finds himself unable to understand our aims and ideas . . . He frankly dislikes our iconoclastic spirit, our want of imagination, and our blindness to the forces of nature. He fears the inquisitions of the Police, or for that matter any other officer of the government service.

Peplow went on to recount how, if he asked a group of villagers for a certain person, they would enquire what the man was wanted for and Peplow would be forced into a long explanation before, if it was not a serious matter, one of them would step forward and reveal that he was the one sought.⁷

The people were conservative as well as suspicious. They were set in their ways, resisted innovation and adhered to custom and superstition. Veneration of ancestors and continuation of the male line were important, as was respect for age and experience. Lineage, clan, village and land were the essence of their identity. They were protective of their traditions and privileges. Traces of these attitudes can be detected in several aspects of the New Territories' twentieth-century story.

Housing Privileges

The most prominent example of continuing rural indulgence has been the Small House Policy, instituted towards the end of 1972, the main feature of which is the making of land available at preferential prices to male villagers so that they can exercise their custom of building a house for their families. Originally those houses were truly small but rural disdain for restrictions upon size and colonial accommodation of indigenous demands led to their becoming progressively larger. The policy has resulted in Hong Kong's village areas being dominated by uniform rectangular three-storey houses. These buildings proliferated during the final three decades of the last century and the early decades of the present one. The houses have usually been built by developers, nominally on behalf of indigenous villagers. The houses are rarely occupied by an aboriginal family, for they have been sold to others by the developer with the co-operation of the villager. That co-operation has extended to misleading the authorities about the real ownership of the land upon which the house is to be built. How this came to be is explained in Chapter 12 of this book.

7. S. H. Peplow, *Hong Kong About and Around* (Hong Kong: Commercial Press, 1930), extracted in John Strickland (ed), *Southern District Officer Reports: Islands and Villages in Rural Hong Kong, 1910-60* (Hong Kong: Hong Kong University Press, 2010), pp 8 and 11.

The exploitation and continuation of the Small House Policy are controversial matters. They have had the effect of pitting the minority and largely rustic indigenous population against the urban majority. The policy has become the primary exhibit for those who charge that villagers are privileged, selfish and grasping. Aboriginal exemptions from payments of rates and increases in government rent are similarly resented. The sympathy that indigenous minorities attract elsewhere is notably lacking in Hong Kong.

Yet from the rural point of view these privileges are not simply justified by traditional practices and promises from long ago. They have been earned by a vital contribution to Hong Kong's twentieth-century success, namely the provision of land for the expansion of the colony and the SAR. Villagers have been uprooted to make way for reservoirs and roads. Their land has been compulsorily taken to be covered by new towns. They have seen housing, much of it subsidized, provided for millions of people both on what was once their land and in the urban areas. Hong Kong has prospered beyond the wildest imaginings of 1898 or even 1948. Why should they be denied a share of the wealth?

To indigenous minds, the turning of the small house right into money is a form of compensation for the losses that they have suffered in the last seventy years or so. In that time, little more than the span of two generations and within living memory, their communities have been turned upside down by change. A stable life, centred on village, family, tradition and land, has given way to a hectic, more commercial existence.

According to the indigenous narrative, this started when their ancestors were incorporated against their will into a colony run by foreigners. At first there was not a great deal of change; they could use their land much as before and the new rulers actually brought some benefits. But then came the Japanese, followed by squatters, immigrants and severance from the rest of China. The government took their cherished soil for this and that project. They were not given replacement farms, nor paid compensation that fully reflected the fact that the fields were to be developed. Farming had ceased to be a viable occupation. The government told them that they could not build on what ground they retained, nor use it for anything except agriculture. At the same time they saw the rest of the population prospering in a reformed economy, living in better housing in the new towns and the high-quality estates on what used to be their land, and the property market booming.

Against that background it was only natural that the rural community should regard the sale of their traditional housing rights as a way of tapping into that prosperity. To them, it is simply unfair that the rest of Hong Kong should enjoy the benefits of the transformation made possible by the development of the New Territories yet at the same time resent villagers' desire to share in those benefits. It appears to them inconsistent of the Hong Kong government to proclaim its belief in the free market yet try to prevent them from selling their rights and their property to the highest bidder.

Ruined Environment

Prosperity has led to the conversion of what was once agricultural land into a variety of unsightly 'brown field' uses. The decline of rice farming in the middle of the twentieth century was rapid, spurred by migration of agricultural workers to more remunerative employment in the city and abroad. The industrialization of Hong Kong, followed by the opening of China and consequent growth in cross-border trade, provided economic impetus for new uses. Absence of legal controls and improvement in roads laid disused agricultural lots open to exploitation. The administration's hands-off attitude meant that building controls were not applied to the New Territories (except in northern Kowloon) until 1961. Even then, there was an exemption for village-type houses. Planning controls, regulating other uses, took longer to arrive, being extended to the New Territories only in 1991. Prior to these statutory restrictions upon land use, the administration had relied for control upon the terms of Crown leases. These were standard-form grants made early in the twentieth century covering whole tracts, and listing in a schedule the individual lots of which they consisted. It had been thought that their terms were adequate since they prevented building without governmental permission and limited use of the land to that recorded in the schedule. As explained in Chapter 17, the limitation proved a delusion. The effect of a court decision in 1982 was that every use that did not need permanent structures was allowed. The easiest such use to arrange was open-air storage. The timing of the legal clarification was financially fortunate for rural landholders in that roads to and within the New Territories were being improved and cross-border trade was prospering. But it was unfortunate for the rural environment. In the aftermath, container yards, vehicle parking lots, building supply depots, car repair shops, scrap metal and spare parts pounds, waste tips and wrecked car dumps proliferated. Any use that could yield profit might be attempted. That is why today one also encounters restaurants, golf driving ranges, holiday camps, motor tracks, columbaria, and other odd uses of doubtful legality under environmental and planning legislation.

In turning their property to such uses, indigenous landholders are of course taking advantage of commercial opportunities. There is nothing shameful or illegal in that, although the contrast with their professed concern for and reliance upon tradition where that leads to advantage is striking.

Degradation of rural areas is not solely the result of the absence of planning restrictions during a vital period in Hong Kong's development. The building of so many village houses, almost all to be sold to the non-indigenous, has produced construction waste, much of it simply dumped, as well as flooding and pollution consequent upon site formation and the construction of vehicular access routes (some unauthorized) and parking spaces. The deliberate piling of refuse of all descriptions upon vacant land has more recently come to the fore. Owners allow these unsightly

and dangerous 'waste mountains' in order to improve the chances of the land being re-zoned for housing use.

A Vanished Life

Following the closure of 'New China' to the world after 1949, the rural New Territories was one of the few places in which traditional China survived and was available to be observed. Consequently, the villages attracted more than their share of attention from historians, anthropologists, and social scientists from Western centres of learning. They marvelled at the close-knit, family-based nature of the villages, the veneration of ancestors, the role of custom, and the rice-growing economy. They were intrigued by the place of collectively owned ancestral estates in the way of life. But their investigations revealed an uncomfortable truth for those who value the old ways: the population was quite willing to discard subsistence agriculture for something less arduous and better remunerated and the younger ones at least did not mind at all giving up their land provided that the money was right. The people were ready to disregard their customs and exploit their heritage if that was to their material advantage. So the customary right to build a small house in the village for the family was transformed into the sale of that right to a developer who would construct and sell the house to an incomer. The practice of passing from generation to generation shared ancestral estates held by customary institutions (*t'so* and *t'ong*) was found to be subject to the collective wish of the generation currently enjoying the estate to sell it. The moral bar upon an individual selling inherited land and houses was revealed to be similarly flexible.

Even into the 1980s guide books advocated a visit to rural Hong Kong for a taste of traditional China. Visitors would be rewarded with walled villages, venerable halls, ancient temples and the occasional water buffalo. If they came at festival time, they would witness rituals, processions and feasts. But beneath the appearance, attitudes had altered. Social trends and commercial pressures meant that the old world was vanishing. Not the least of these was the change in the make-up of the rural population. Indigenous people had become a minority. Immigrants from other parts of China had moved in.

Rural Squatting

Rapid expansion of the population of Hong Kong after the Second World War inevitably led to strains upon housing and infrastructure. In urban parts this manifested itself in the appearance of dense areas of squatter huts. In the New Territories there were squatters too, although fewer in number. They took over both government and private land. Those who settled on private land tended to be squatters of a different sort, immigrant farmers taking over unused fields or staying on after renting them from owners who later died, emigrated or lost interest. This was followed by the

acquisition by developers of swathes of erstwhile agricultural terrain which they kept vacant for long periods in 'land banks' for future construction, thereby presenting further opportunities to squatters. Deficiencies in the system contributed to the opportunities for taking over others' property—lot boundaries were imprecisely identified and there was no scheme of registered title with plans. The upshot was an outbreak of litigation in which land was alleged to have been acquired by adverse possession, that is to say by a long period of exclusive control without the consent of the true owner.

The taking of land without entitlement, a sort of property theft that eventually becomes legally sanctioned, is not confined to country parts but it is prone to occur more there because of the absence of walls and owners. In the city, most properties are parts of buildings with consequent restricted access and greater security. In the country, there is simply more open space abandoned by owners to be occupied by squatters. Consequently, most instances of long unauthorized use happen in the New Territories. These are dealt with in Chapter 15.

Executive Indulgence

The peculiar history of the New Territories underlies all these phenomena. The Small House Policy built upon a custom that existed long before Hong Kong took over in 1899. For a number of reasons, colonial administrators appeased the local population. The recognition of the custom, its replacement (or perhaps extension) by the policy and their continuation since in the face of public hostility can be explained by those reasons: the promise in 1899 that good customs of the settled population would not be interfered with, the sound sense of keeping the natives content, the need for a light touch given the numbers and resources of staff in the administration, the recognition that British control was temporary, a feeling that the New Territories were culturally different from the rest of the colony, gratitude for villagers' wartime support, and interest in (bordering upon enchantment with) the indigenous way of life by administrators posted to the rural areas. More recently a less attractive factor, which was always part of the mix, has come to the fore: the political influence of rural representatives. This, and understandable reluctance by administrators to avoid controversy in a climate in which even the seemingly most straightforward issue is prone to become politicized, must explain the continued indulgence of the indigenous minority after June 1997.

The relaxed and paternalistic approach of colonial-era District Officers no doubt contributed also to the attitude of their successors towards villagers' extensions of their not-so-small houses. But the main contribution towards that attitude is that contemporary district administrations are inevitably more concerned about the problems of the populous new towns, in reality cities, which now dominate their districts. Enclosed balconies and unauthorized rooftop coverings in the villages no doubt seem of minor importance.

The 'abuse' of the Small House Policy, as it is frequently labelled, may be the greatest but is by no means the only instance of rural inhabitants' disregard for authority. Almost as grievous is their willingness to extend their houses, upwards, outwards and downwards, without the permission that is required by law. This practice of building 'illegal structures' and engaging in unauthorized building works is widespread, not only amongst the indigenous but also other inhabitants of villages and owners of other types of property in the New Territories. It would be widespread elsewhere in the SAR too, were enforcement of the law as loose as it is in rural parts.

The reasons for that lax enforcement are a matter of debate but there is no doubt that the authorities have treated the rural community more leniently than its urban counterparts. No fewer than three investigations and reports by the Ombudsman have proved this. The reaction of the administration to these reports has been cautious and muted. This has increased friction between town and country. There seems to be one law for the former and another (or rather, no) law for the latter.

Anyway, it is unclear who is responsible for forcing the removal of such structures. For many years the Buildings Ordinance did not apply to the New Territories and even now small village houses are exempt from it, so the Building Authority is out of the picture. They fall within the purview of the District Land Office. However, the responsibility and the exemption apply only to those houses' original construction within set dimensions. Extensions beyond those dimensions are a matter for the Building Authority. So the District Lands Office is in turn out of the picture.

Amid such confusion it is understandable that little was done about the growth in unauthorized building work in and around the villages. A practice of extending the house became tolerated; once tolerated, it became regarded by villagers as allowed; and once allowed, it came to be seen as a right. So when in 2012 the government announced a 'crackdown' on illegal structures in the villages, the reaction of some rural spokesmen was one of outrage and indignation. As one indigenous leader declared on a different occasion, 'villagers are not easy victims!'⁸ The same leader once told the press that the police required permission to enter his village.

Integration

Rural resistance to building inspections easily grows into threats and intimidation of government officials. Such conduct can also be directed towards outsiders who occupy land near the villages. Indigenous people have been known to resort to intimidation in attempts to remove squatters or to prevent a resident exercising a right of way. Such conduct gives the villages a reputation as a source of triad membership. The separate, closed nature of the indigenous community and its tradition of self-governance perhaps explain, though do not excuse, this conduct. It certainly

8. Brian Kan of Tsung Pak Long near Sheung Shui, quoted in Hayes, 'The Great Difference' (article) 154.

encourages the impression that their villages are beyond rule by law. Incidents of corruption, for instance the buying of votes in village elections, reinforce that impression. So do incidents of extortion, as when a government building contractor's preparatory site work is accused of ruining the local fung shui which can only be repaired by a generous donation to village funds.

Piracy and smuggling, once associated with the New Territories, may have declined but the modern rural regime presents special opportunities for bribery. A village elder whose confirmation is required that an applicant for a small house is a clan member may expect some consideration from the applicant. A voter in village elections may demand of a candidate payment for his vote. An estate manager may anticipate some consideration from the tenant for his signature upon a lease of customary land. These are seen as natural dealings by an insular community with its own values and which is used to exploiting its opportunities.

The position of members of the rural community in the modern, wealthy Special Administrative Region into which they are now integrated seems anomalous. It is questionable whether they are different from the rest of the population and whether they really are indigenous. They are not distinguishable by race, language, religion or dress from the majority of Hong Kong's population. They are not homogenous in origin, being a mixture of Cantonese, Hakka, Hoklo, and Fukinese. They no longer live far from the centres of urban life; indeed many have moved to town or abroad. What distinguishes them are certain vestiges of a former way of life and the privileges bestowed upon them by government.

Despite that integration, rural leaders continue to profess their community's separateness. They declare that they and their ancestors have lived in their village for thousands of years, as if this is a special virtue and as if other Chinese had no *heung ha* (native place). The claim is anyway inaccurate since everyone was forced to leave the region by imperial edict during the seventeenth century and absence for purposes of work has been a fact of life for New Territories men for more than a century. Looking back over the past 120 years, if one were seeking a distinguishing feature of rural people who can trace their ancestors to the villages of 1898, it would not be sense of place or reverence for the past but rather disdain for the rules.

Small Houses

The New Territories of 1898 was typical of the rural China of that era. In China '[p]ractically the whole of the rural population lives in villages, being drawn together by a sense of mutual security' observed one authority on Chinese traditions and law.¹ The fending off of predatory bands by living in compact proximity to others of the same kin was one of the principal purposes of the village combination. San On contained hundreds of such compact villages, some with walls or ramparts or moats.

At the heart of every village surveyed at the turn of the twentieth century was a cluster of houses. They can be seen on the maps of the demarcation district that accompanied each block Crown lease, neat rectangles, usually arrayed in rows or terraces with the village temple at the centre. Often the village was in a valley beside a stream, numerous irregular small plots straggling along its banks and up the surrounding hillsides, a grove of trees behind the houses. The plots were the fields tended by the villagers for a living. The trees were the fung shui wood, sited to protect the inhabitants from evil influences.

A District Officer and former Land Bailiff, S. H. Peplow, writing at the end of the 1920s, remarked upon the sameness of the villages and the houses. Peplow went on to describe the houses.

The average size of village house is 40 feet long and 12 feet wide, one storey . . . A wooden partition divides the long room into two, one being used as a sleeping compartment. The doors are of wood held together by a cheap lock and the floor is merely the earth beaten flat. If the occupants own any pigs or poultry, there may be a small shed at the back of the building for them, but more often than not they are kept at the back of the house.²

A similar description was found in an old District Office file uncovered in 1950:

The houses are all of one room structures with the rear portion partitioned into a small dark sleeping chamber. A cockloft usually forms the upper ceiling of the sleeping chamber. Entrance to the sleeping chamber is always on your right as you go in, and the furniture in the main living room is simple and of varied items.

1. Jamieson, *Chinese Commercial and Family Law*, p 73. Jamieson had been British Consul in Shanghai.
 2. Peplow, *Hong Kong About and Around*, quoted in Strickland (ed), *Southern District Officer Reports*, p 10.

The family shrine (red papers with Chinese characters written on) occupies the centre of the partitioning wall, a few benches or stools would serve as seats for all occasions.³

The houses really were small. Most were no more than 436 square feet in size: 'yat fan dei' in the Cantonese phrase, one hundredth of an acre. The foundations were usually made of stone, the walls of brick and earth. The ground floor was a single room, for sitting, cooking, and eating. The rear portion might be screened off as a bedroom for the husband and wife. The floor consisted of packed mud. Above, and beneath a wooden pitched roof topped with tiles, might be a cockloft, for sleeping or storage. The interior was sparse and dark, with few if any windows. Outside the front there was often a small yard marked off by a low wall: this was a kitchen and latrine during the day and a compound for the family's chickens and pigs at night.⁴

A few of these old houses can still be seen, usually in a line at the old centre of the village. Some have been restored in show-villages near to new towns such as Yuen Long and Sheung Shui. Occasionally an unaltered one can be found, tumble-down and uncared for, now used for storage or nothing at all.

Such houses were common until well after the end of the Second World War. Writing in the late 1960s of his experiences and investigations earlier in that decade during 18 months researching in Sheung Shui, Dr Hugh Baker described the houses of the hamlets there. The houses were arrayed in terraces, all facing the same direction:

one behind the other, a gap of only about six feet separating one row of houses from the next. The normal length of a terrace is six houses. The narrow alleys between the terraces are often paved with granite blocks, but in some cases with concrete. The houses are small, generally about 30 feet by 12 feet, and consist of one large room half covered by a cockloft, with a kitchen-cum-washhouse forming an entrance hall.⁵

A few houses in prosperous villages of 1898 were larger, some with two storeys. No doubt many villagers would have liked something greater than 436 square feet. Those who could afford more space would acquire two houses rather than build a larger one.⁶ Wealthier inhabitants certainly built bigger and better houses as the twentieth century progressed. But for the most part small houses were all that the nineteenth-century rural subsistence economy could afford. Even if they could have been afforded, bigger buildings would have extended the village beyond the compactness that security dictated—robbery and piracy still plagued the south

3. Quoted in Hayes, *Friends and Teachers*, p 19.

4. Hayes, *The Hong Kong Region*, p 42; Hase, *Custom*, pp 13–14. Hase puts the internal area of a typical house at 340 sf.

5. Baker, *Sheung Shui*, pp 20–21.

6. Nelson, 'The Chinese Descent System', 113–123; Hase, *Custom*, p 14.

China coast and raids from rival villages were not unknown. Isolated farm houses were seldom, if ever, found.⁷ New, larger houses would also have impinged upon the farmland upon which the villagers' livelihood depended. Where the village was walled or moated, room for expansion was physically restricted.

This then is what was originally meant by a traditional village-style or village-type house. They were also sometimes called small village houses, on account of their size. We know approximately how many of them there were at the turn of the twentieth century because of the great survey. No fewer than 35,957 building lots were recorded in the old schedules to the 477 block Crown leases. These accommodated a rural population estimated in 1898 to total about 84,000. Since a portion of that population would have been boat people, and another portion would have lived in the market towns, the average number of people occupying each house would have been between two and three only. However, the survey numbers for houses may not be reliable as indicative of dwellings. Howard Nelson, who conducted research in 1967 and 1968 at Sheung Tsuen, a village near Sek Kong in the Pat Heung district, found some houses there which were separated by an alley from their kitchens, yet each house and kitchen had been recorded by the surveyors as two buildings.⁸

Nelson observed that one household (meaning a group of kin sharing a common budget and a single stove) could be spread over several houses, often adjacent and sometimes with an interconnecting door. He also found that there were more habitable old structures in the village than recorded in the survey plans—structures which might have been used as cowsheds or pigsties or been in ruins at the time of the surveyors' visit. Equally, he suggests that the total number of houses recorded in the block leases may include a good many that were not fit for human habitation. Therefore, the numbers cannot be relied upon as precise. Even so, they do suggest that in the early twentieth century the villages were not over-crowded and that the demand to build more accommodation in the countryside would not have been great.

Ever since the forced evacuation of the coast in the seventeenth century, the southern part of Guangdong had been short of people. The toughness of the life contributed to this under-population. The climate was harsh, the terrain difficult. Contaminated wells, poor personal hygiene and bad food storage meant that diseases such as dysentery and malaria were common. The diet was poor. Danger lurked in the fields: snakes and wild boar, even the occasional tiger. Work hazards abounded. A cut might result in septicæmia. Deaths in childbirth and childhood were common. Adults rarely survived beyond the age of fifty years.

During the middle of the nineteenth-century southern China, including San On, mysteriously suffered a fall in population. This can have been only partially the

7. Jamieson, *Chinese Commercial and Family Law*, pp 73 and 74.

8. Nelson, 'The Chinese Descent System'.

result of emigration in search of job opportunities. It seems likely that the cause was some disease or other, although famine may have played a part.⁹

Small House Custom

Accordingly, when an extra household had to be accommodated there must often have been a vacant or ruined building that could be adapted or an unused house or lot within the village that could be occupied or built upon. The practice in at least the more prosperous parts was said to be that when a male member of the village married, if suitable land and sufficient money was available, his father as head of the family would build one of these small houses for his son's family.¹⁰ Indigenous males were called 'ding' (meaning male) and such houses were known as ding (or ting) houses, ding ngok. The house would be on land which the father owned (that is to say, held on customary terms) within the village. His bride would be from another village: not from one immediately neighbouring the groom's village, for usually the relationship between adjacent villages was bad, their inhabitants being rivals if not enemies. As is usual with human beings, from football teams to nations, the closer and more alike they were, the more they disliked each other.

There is disagreement as to whether marriage was the occasion for the construction of a ding house. The Hong Kong government, which presumably investigated this and drew information from its civil servants across the territory, says that the custom was exercised on marriage. The Hung Yee Kuk, whose members might also be thought to be in a position to know, maintains that the construction of houses was not restricted to marriage. However, the kuk and its members are hardly impartial in this, having an interest in drawing the custom as widely as possible. Perhaps the practice differed from district to district or even from village to village. One can confidently assert that a young ding was unlikely to have need of a house of his own until he became married, so it would be natural that most houses were built on that occasion.

It is also unclear whether the house was to be built by the father or the son. Howard Nelson found that '[f]athers were under a clear obligation to provide each of their sons with a house when he marries.'¹¹ That was at Sheung Tsuen; one cannot rule out the possibility that the obligation was different in other villages or outside the relatively prosperous Pat Heung. The obligation is anyway not inconsistent with a son building a house if he had land. The reality may be that the father was more likely to be the one with land to spare or who could afford to buy land and build upon it. Nelson observed that when their son married, parents generally vacated and renovated their own house for the son to occupy and moved to a more modest

9. Hayes, *The Hong Kong Region*, pp 43, 106–110.

10. Joseph Lam Ding Kwok, Chief Land Executive, New Territories Administration, *The New Territories Small House Policy* (unpublished paper, February 1980). No source is given.

11. Nelson, 'The Chinese Descent System', p 116.

one. The background facts of a case from Tsung Pak Long near Sheung Shui showed that the family had been living in one village house, passed down from father to eldest son, for multiple generations with no suggestion of a father building a new house for the son.¹²

Formulation of the custom has proved elusive. The Heung Yee Kuk naturally puts it in wide and simple terms: their indigenous members have a ‘birthright’ to build a house. This leaves much to be debated. The summary by Denis Bray, the District Commissioner with carriage of the Small House Policy in the 1970s, is almost as succinct: sons of local inhabitants could build themselves a village house on their land in accordance with the orderly layout of the village.¹³ This introduces one qualification yet leaves out others. The authors of Civic Exchange’s first paper on the policy say that indigenes had the right to convert agricultural land into building land without any prior permission of the Ching government.¹⁴ This may be correct but does not address what the custom was, i.e. what was done in practice. The custom is discussed further in the context of Article 40 of the Basic Law in Chapter 14.

There is a distinct possibility that the building of a house for sons was not a territory-wide phenomenon but differed from district to district or from clan to clan. The practice may have been confined to more prosperous villages whose inhabitants had the resources to construct new homes. In this sphere, as in others, the practice of the districts dominated by the prominent clans inhabiting the flat and fertile north and north-east of the territory may have been taken by administrators, academics, and observers as general. Villages in these districts have been the subjects of intense scrutiny by anthropologists and therefore their customs have received publicity and analysis. Yet they are by no means representative of all villages. Their size, wealth, antiquity, and location set them apart. The five clans that dominated these districts constituted less than a third of the indigenous population.

It is difficult to believe that in the late nineteenth century smaller communities in more rugged surroundings in the eastern section of the New Territories and on the islands followed the same custom. They did not have the money, the space, or the demand to build houses. Most families were poor. Invariably village houses were located in tight clusters for reasons of security and fung shui. Land outside the cluster was often unsuitable for building. Populations were steady or falling. During an interview in April 2018 the retired headman of a small 300-year-old, dual-clan Hakka village at Fei Ngor Shan (Kowloon Peak) stated that his clan had no tradition of the father giving a house to his son on marriage.¹⁵

12. *Kan Fattat v Kan Yintat* [1987] 4 HKLR 516.

13. Denis Bray, *Hong Kong Metamorphosis* (Hong Kong: Hong Kong University Press, 2001), p 163.

14. Lisa Hopkinson and Mandy Lao Man Lei, *Rethinking the Small House Policy* (Hong Kong: Civic Exchange, 2003).

15. Interview with Cheng Gau Hung (born 1923) of Mau Cho Nam, 8 April 2018. The village population had been 100–200 in the 1930s and about 100 post-war; currently it is about 150.

Dr James Hayes, the historian who was a District Officer at Sai Kung, at Tsuen Wan, and on the islands with more than three decades of experience, is sceptical about the alleged custom. He observes that in the 180 or so villages of those areas during the 1950s there were few new houses, suggesting that any such custom, if it had existed, had fallen away during the first half of the twentieth century. 'I consider the "custom" to be the ideal rather than the attainable . . . It could not be attained everywhere, and at all times, nor was it during the first fifty years of British rule.'¹⁶

By contrast, and consistent with the possibility that the practice varied from place to place, at Fung Yuen near Taipo, there was a spate of building outside the village confines in the 1860s and 1870s, then a pause for some 30 years, followed by more building. The last houses in the old Fung Yuen village of Mak Uk were put up in the 1940s and by the 1950s some houses there were in ruins.¹⁷ But the Fung Yuen villages were in a fertile, secluded valley, close to water (Tolo Harbour) and a town, and inhabited by six relatively recent immigrant clans, so it was more prosperous than remote, small, single-lineage villages that typified Sai Kung and Lantau.

Building on the Custom

If there was a practice in his village of supplying a son with a new house or marriage or otherwise, in order to exercise it the villager needed both land and money. In the early decades of the twentieth century, economic conditions rarely permitted such expenditure. Indigenous males were driven or enticed to work in urban Kowloon and Hong Kong or abroad. The population of the villages did not grow. In fact after 1899 the population of the New Territories as a whole initially declined in number, a continuation of a trend that seemingly had begun in the middle of the century. If there was a vacant or derelict house in the village, it might be more economical and convenient to take over or rebuild on that lot rather than to build on other land. Most agricultural lots were small and irregular in shape and many were on sloping ground, so they were not conducive to construction. Besides, to build on agricultural land meant sacrifice of crops and income. In most villages, there would have been neither the wealth nor the demand for construction of numerous new houses.

However, the block Crown leases of the early twentieth century had envisaged that there might be such a demand. As regards 'old schedule' lots, that is land which had been occupied at the time of the survey and therefore the majority of the land within and around villages, the Crown leases introduced an element that originated in the common law of contract and of land rather than in Chinese custom. The leases contained a provision that government permission (licence) would be required for construction of buildings on any agricultural ground to which the lease applied. This enabled administrators to control construction of buildings on old schedule

16. E-mail communication from Dr Hayes to the author, 23 July 2012.

17. Strauch, 'Community and Kinship in Southeastern China', 36.

farmland and even to charge money for that permission. Exercise of the power was delegated by the Governor to District Officers.¹⁸ In the event, it was soon decided not to charge a premium. The reasons for not doing so were political. The Peking Convention provided that there should be no expropriation of land and taking away the right to build might be construed as an expropriation. Both the Attorney General (the government legal adviser) and the Registrar General (the government land officer) doubted whether the new administration was entitled to extract any benefit from old schedule lots, presumably on the basis of the Convention's provisions. Villagers had not had to pay the Ching authorities for permission to build on their own land and protested loudly at any suggestion that they now do so. Not charging a premium would placate them. The new government had also promised not to interfere with landed interests and customs. Its approach was consistent with and indirectly acknowledged the old custom.

It would, however, be an exaggeration to say that the custom was continued under the new regime. The restriction on building in the block leases and the need for prior permission to build from the Hong Kong authorities were innovations which interfered with the customary position. Moreover, although the grant of building permission did not require a premium, it did result in an increase in the Crown rent charged on the developed lot.

There was also an economic reason for not charging a premium. The government wished to encourage development within the New Territories. Most of the native population there was poor by the standards of the rest of Hong Kong. Allowing them to build on their land would increase economic activity and confidence. No doubt for much the same reason in 1909 on the recommendation of the Hong Kong government the Secretary of State for the Colonies gave permission for the making by private treaty, rather than by sale at auction, of new grants (i.e. of land not covered by block Crown lease) of up to 1000 square feet for building small houses in rural areas. New land had in fact been sold since the turn of the century but always at auction and generally in the expanded Kowloon or in the vicinity of the new roads and railways. The making of direct grants for houses to residents of remoter parts would enable their villages to grow. Sale by private treaty did not extend to New Kowloon or easily accessible land on the coast, along the railway lines and near to new roads or anywhere likely to be the subject of development and the applicant had to be a bona fide villager wanting a house for his own occupation.

It seems that both the power to make private grants and the power to permit building on old agricultural land by giving the owner a building licence were sparingly used. The reason was not that District Officers discouraged building. Their attitude tended to the indulgent so as to foster good relations with natives. It was simply that there was little demand. Villages were not expanding or prospering. Indigenous men saw fresh and better opportunities in urban employment or work

18. GN 191/1906 (9 March 1906).

outside Hong Kong. They began to abandon the land. The rural population continued to fall.

During their early years as part of the colony, the attention of rural land owners was focused not on the construction of houses but on the level of ground rent that the new authorities charged them. In 1903, even before the issue of the block leases, eighteen elders of Shataukok protested against increases in Crown rent. Administrators summarily dismissed the complaint, saying that there had been no promise that the rent would not change or that it would not exceed the amounts payable to the imperial authorities. Internal government memoranda observed that the petitioners were quite well off and could afford to pay. In 1905 residents of Tung Chung on Lantau island also protested about increases in Crown rent. This too was rejected. However, the discontent was so widespread that the Governor, Sir Matthew Nathan, decided that it would be politic to promise that rents would not be further increased. On 11 July 1906 a proclamation was issued that Crown rent would not be raised during the term of the lease.

In an attempt to encourage purchase of land, in 1905 the reserve (or upset) price for sales by auction was set at the low level of HK\$1 for every hundred square feet. Then in 1909 concessionary rates were set for sales of house sites within village areas by private treaty. The conditions upon which these concessions were made were the first appearance of a concern about the re-sale or letting of village houses to incomers, a concern which ran throughout the twentieth century. So as to prevent speculation and exploitation, it was stipulated that the privileges should be confined to real villagers who would actually live in the houses with their families.

The villages remained exclusionary places. Outsiders were not welcome and did not wish to live there. Anyway, the District Office would not give permission to non-natives to build there. There was no shortage of housing, so no demand to do so. Accordingly, the great majority of village house sites were sold by private treaty at a low price.

Free Building Licences

The restrictive condition against building without government consent is a means of regulating the use of land, a form of planning control, but it can also be used as a tool for raising revenue. The policy in urban Hong Kong was to obtain income from the betterment of land by charging a fee or premium for relaxation of restrictions upon development coupled with an increased annual Crown rent. The same practice was initially followed with regard to newly granted land in the New Territories. The Tung Chung villagers had complained about this as well as the increases in Crown rent. They had petitioned the Colonial Secretary in London about it. Their complaints had been rejected but the influential Cecil Clementi, who as a member of the Land Court had acquired knowledge of customary land practices, wrote to the Colonial Secretary stating that villagers believed that they were entitled to build

on their own padi and that he considered that they had been nothing to stop them from doing so. The secretary responded by allowing District Officers to grant building licences to villagers free of charge.

Rural land management then entered a quiet period until the early 1920s. Years later, reflecting upon the evolution of land policy, a District Commissioner for the New Territories described it as the period of optimism 'when farmers were abandoning their land and it looked as if we could do what we liked'.¹⁹ The optimism must have given administrators confidence to re-visit the question of charging for permission to build on, and for permission to lease out houses on, agricultural land. In 1923 the government determined to extend the practice of levying a premium for these permissions to land appearing in the schedules to block Crown leases. The government also confirmed that only 'native cottages' could be built on agricultural lots. District Officers were instructed accordingly. The rural reaction was sharp. Villagers argued that the new approach was inconsistent with the contents of the 1898 Convention and with assurances given in 1899. At Taipo a committee was organized to petition the Land Officer, the Governor and an official of the Chinese government. Their protests were initially rejected by the Hong Kong government. These grievances led to the formation the following year of the Coalition for Agriculture, Industry and Commerce in the Leased Territory, the forerunner of the Heung Yee Kuk.

The government offered a compromise on the premium issue: villagers who built for their own use would not have to pay a premium, only an increased rent. If they built and rented the house out, half premium would be charged plus additional rent. Non-villagers would have to pay both full premium and increased rent. This did not satisfy village representatives who petitioned the Governor Sir Reginald Stubbs. They argued that the new rules amounted to expropriation of their interests contrary to the terms of the Convention. At about the same time, government compulsory acquisition of land in rapidly-developing New Kowloon was causing disquiet. In April 1925 representatives of 671 villages petitioned the Secretary of State for the Colonies, Leo Amery, in London, enclosing a legal opinion to the effect that resumption was inconsistent with the terms of the Convention. The government postponed implementation of the new rules. There was then another petition, this to Sir Cecil Clementi the new governor who, as a Sinophile and a former officer of the Land Court, might be expected to be more sympathetic to rural interests. This may be why eventually Sir Cecil promised that no premium would be charged.²⁰

Thus was established a pattern that was to be repeated several times in the course of the next ninety years. Concern about construction on agricultural land

19. Kenneth M. A. Barnett to Colonial Secretary, 20 September 1956, "Conversion" of Agricultural Land to Building Status, HKRS 163, 1/2805.

20. S. H. Goo, 'The Small House Policy and Tso Tong Land', Ch 15 in Fu Hualing and John Gillespie (eds), *Resolving Land Disputes in East Asia: Exploring the Limits of Law* (Cambridge: Cambridge University Press, 2014).

and about rural houses being owned or rented by people who were not true villagers would lead to an attempt by the government to control the building of those houses. This would be resented by indigenous landowners who would organize resistance and protests, including petitions to Hong Kong authorities and later if necessary to sovereign authorities, arguing that the changes were in violation of the terms of the Convention and of Sir Henry Blake's promises or, later, the Basic Law. The local authorities would offer a concession which would be rejected. There would then be negotiation and a compromise would be struck. The compromise usually resulted in rural representatives obtaining much of what they had asked for. Legislators and the general public would not be consulted, or even informed, until later. The compromise would be put into effect by executive action only.

The discontent was quieted by the 1926 compromise but there was also another factor at play. In the mid-1920s the colony's economy entered a prolonged recession, curbing property values and transactions. Nobody wanted land in the New Territories. The recession was triggered by a general strike in 1925 and a boycott of Hong Kong goods, called after nationalist protestors in Shanghai and Canton had been shot by British troops. The downturn worsened in the 1930s as the worldwide slump affected all sectors of the Hong Kong economy, including shipping which had provided so many jobs for rural men. Incentives to build were offered but had little effect. Economic woes were exacerbated by the outbreak of war between China and Japan in 1937. Then in December 1941 war came to Hong Kong with the Japanese invasion and occupation. There would be no rural construction, only destruction, for the next four years.

A New Spirit

The return of British administration in September 1945 heralded a different era. During the war, a dedicated planning unit of exiled Hong Kong people had come up with ideas and worked out policies which included development of the New Territories. A '1946 outlook' pervaded the post-war administration. The economy sprang back to life. The restored Governor, Sir Mark Young, contemplated the introduction of elections. The sense of turning a fresh page was enhanced by the destruction of pre-war records and the recruitment of a cohort of younger senior civil servants.²¹

Town planning was very much part of the new spirit. Planning had become fashionable in Britain in the 1930s. In Hong Kong a Town Planning Ordinance had been enacted just before the war but had not been brought into effect and was anyway confined in application to the urban areas. Therefore in the New Territories the only means by which planning could be put into practice was through the terms of Crown leases and government conditions of grant.

21. Frank Welsh, *A History of Hong Kong* (London: Harper Collins, 1997), pp 433–434.

Whether it was from a sense of a new beginning or simply that memory of pre-war practices had faded cannot be said but from 1945 the government ceased to sell land for small houses by private treaty. Sales were nearly all by public auction, in accordance with general government policy. However, the majority were sold at concessionary rates, presumably reflecting the fact that those most likely to purchase them were indigenous villagers. Demand for land was stimulated by the post-war influx of refugees and immigrants, including the wealthy from China. In 1948 there were instances of rich mainlanders, including manufacturers from Shanghai, acquiring old schedule agricultural lots in order to build impressive country houses. Reacting to this in January 1949 the District Commissioner John Barrow initiated a prolonged debate about what he termed (echoing the words of the block Crown lease) conversion of land in the New Territories to building status, in other words the circumstances in which the restrictions upon construction on old schedule lots would be lifted. Although he could find no copy of Clementi's 1926 decree that there should be no premium for building on such lots, he discerned that the pre-war practice had been to charge conversion premium only on lots other than old schedule ones. He felt that 'the intention originally must have been that we should not charge a countryman premium for building a simple peasant house on his land, rather than for a luxurious villa.'²² Accordingly, a premium was to be extracted from land owners who wished to build unless they conformed to this description and they proposed to construct a modest house and live there with their families. Barrow composed some notes on land use for the guidance of District Officers reflecting this.

Of course, the new rules led to protests from the Heung Yee Kuk which petitioned Barrow the following November. The kuk wanted all private land to be exempt from premium. The Registrar General, Anuerin Jones, thought what he called a genuine New Territories resident should be allowed to build a house for himself and his family on his native ground. Barrow's successor, Mr K. Keen, was certain that the administration was entitled to charge but the question was whether it should do so. It was decided that the free building licence would remain for genuine villagers wishing to build a family home in the traditional style but that in other circumstances a premium would be required. Meanwhile a land boom was well under way as more and more people came to Hong Kong.

No doubt a desire to participate fully in this boom caused the Heung Yee Kuk not to let the matter lie. In 1956 it returned to the attack on the conversion policy. The usual pattern of demand, proposal, rejection, counter-proposal, discussion, and compromise, or something very like it, recurred. A petition from the chairman of the kuk to the then Governor, Sir Alexander Grantham, deployed familiar arguments based on the terms of the Peking Convention and promises made at the time of the British takeover to argue that extraction of any premium was an assault on the right of inhabitants to develop, use, and transfer village land.

22. Barnett, "Conversion" of Agricultural Land in the New Territories to Building Status', Attachment 1, 15 January 1949, HKRS 163, 1/2805.

In advising the Colonial Secretary on the response, Kenneth Barnett, the Director of the New Territories Administration, wrote a lengthy review of the history of the land conversion policy. Listing the principles underlying the policy, Barnett gave primacy to the need for control of development and therefore the desirability of maintaining a requirement of permission to build. Other principles were the need to raise finance for services for developing areas, the need to encourage development where suitable and the need to tax the betterment of the land arising from allowing building. But he also identified the need to 'honour our undertakings towards the country people' so he distinguished farming areas and villages from developed and developing areas and concluded that a premium should not be necessary for granting permission to build on block lease land.²³ This was actuated more by the pragmatic consideration that auctions of village land rarely exceeded the upset price because only villagers were interested in buying than by acceptance of the kuk's arguments. Barnett recommended that the reply to the kuk should avoid mention of the Convention and other irrelevancies. Aneurin Jones was also confident that it would be legal to require permission before a house was built but he pointed out that the block Crown leases did not mention any payment being required. He was wary of saying that the Convention and the promises had no bearing on the matter. He was unable to come to a definite conclusion as to whether payment would be legally justifiable.

Time has proved Barnett correct to say that arguments based on what had been agreed and said in 1898 and 1899 were irrelevant. They were political rather than legal statements. The Convention was a treaty between nations, not justiciable in domestic courts.²⁴ The governor's proclamations were assurances of intent, analogous to a statement of policy or a political manifesto, and likewise had no legal status. As far as law and administrators were concerned, the important document was the Crown lease. The kuk's arguments were moral and political only.

Barnett was no enemy of rural interests. He was one of the most talented men to hold the various-titled positions which constituted head of administration in the New Territories. He had joined the Hong Kong civil service in 1934 and quickly shown his gift for languages and his love of Chinese culture. As an army officer and later prisoner of war he had displayed courage in daunting circumstances.²⁵ A scholar of Chinese, he was one of the founders of the Hong Kong Branch of the Royal Asiatic Society. During his time in the New Territories he had established good connections with rural leaders.²⁶

23. Barnett, "Conversion" of Agricultural Land in the New Territories to Building Status', Attachment 56, 3 July 1956, HKRS 163, 1/2805.

24. *Winfat Enterprises (HK) Co Ltd v Attorney General* [1988] 1 HKLR 5 (PC); [1984] HKLR 32 (CA).

25. Barnett had complained, in French, to a Swiss inspector of the prison camp of lack of food (Japanese soldiers were stealing prisoners' food parcels with the connivance of the commandant), which earned him solitary confinement and beatings; in 1946 his testimony helped to convict the commandant of war crimes.

26. Later Barnett founded the Census and Statistics Department and organized the 1961 census, the first full census in Hong Kong for thirty years, widely admired for its organization. After retirement he worked for the United Nations on census matters in Africa and Asia.

Trouble at the Kuk

One difference between the 1925 dispute (and another lesser eruption about premium and increased rent in the 1930s) and protests in the mid-1950s was the political context: in between times, the Japanese had first overrun and then been forced out of Hong Kong, China had been through the turmoil of international and civil war and the Communists had taken charge of the mainland. Towards the end of Barnett's tenure in the New Territories the Heung Yee Kuk was torn apart by an internal dispute. In 1957 there was a power struggle between a nationalistic traditionalist faction from long-established lineages intent on pushing rural land claims to the ultimate and a more moderate progressive group, centred on the existing leadership, which felt that the kuk should not provoke the Hong Kong authorities and should exploit the New Territories' good fortune in being part of an expanding British colony and aim to profit from the demand for their land. Representatives of the latter faction tended to come from parts adjacent to industrial or urban areas.

Elections of chairman and committee members took place in August 1959. Leaders of the former faction ('an unscrupulous bunch' according to Denis Bray, who was soon to become the Deputy District Commissioner) staged a coup by rigging the vote. They arranged for electors to be presented with an enormous list of candidates—hundreds of village representatives qualified to serve on the committee—and then gave perplexed electors a list of those for whom they should vote. The consequence of course was that the traditionalist faction's candidates were elected.

Government recognition of the kuk was withdrawn shortly before the tainted elections took place. Barnett himself attributed the trouble to the premature death of one of the kuk's leaders, presumably because this opened up possibilities for election of new leaders. In any event, the government considered it pragmatic to dissolve the existing kuk and reform it, placing it on a statutory basis. Barnett engaged in secret talks with the progressive faction. The Bill setting up the new organization was introduced to the Legislative Council by the Colonial Secretary (who spoke 'a lot of hot air', according to Bray) and was passed quickly. The land upon which the kuk's office in Taipo stood was resumed. The office was seized in an early morning raid, then the land was conveyed to the new statutory organization. The kuk's new leaders were considerably friendlier towards the authorities than their predecessors.²⁷

A Sensitive Matter

It has been suggested that during the middle decades of the twentieth century there was a 'tacit agreement' between the government and indigenous villagers that the latter would be allowed to erect houses for their own use on their own land held

27. Bray, *Hong Kong Metamorphosis*, pp 97–101; Chun, *The Fictions of Colonial Practice and the Changing Realities of 'Land' in the New Territories*, p 143; Akers-Jones, *Feeling the Stones*, pp 29–30. The statute was the Heung Yee Kuk Ordinance (Cap 1097) passed in 1959.

under block lease.²⁸ This seems to be putting the matter too high. District Officers were no doubt sympathetic to the request of a villager who needed a home and could afford to build one on his own land. They may well have been sensitive to the desire of a father to supply a house to his son upon marriage. But ‘agreement’ suggests surrender by the government of its control over village development and a decision that it would not exercise the condition against building without Crown licence, neither of which happened.

At an internal meeting in February 1957 the principal officials of the government concluded that there was no legal obstacle to imposing a premium but that old schedule lots should continue to enjoy free conversion for the erection of genuine village houses. So, far from there being a tacit agreement, the truer position was that the government decided unilaterally not to exercise its rights because it wished to avoid trouble—it steered a pragmatic course, for the power to impose a premium was a sensitive political matter. Landholders within the rural community fiercely contested the making of payment which they saw as an affront to their traditional rights and a breach of promise and were prepared to complain loud and long about any attempt to make them pay.

So, when formally approving the policy concerning the grant of permission to build in the New Territories in 1957, the Executive Council decided that no premium would be required for a village-type house for occupation by a bona fide villager. But this was expressly subject to there being no planning or fung shui objections. The qualification concerning planning shows that the 1957 policy was not a simple continuation of the traditional small house right, still less acceptance of the arguments of rural landowners.

A Revised Policy

The 1957 policy imposed no restriction upon the size of village houses: this seems to have been recognition of existing practice and may explain the presence during the mid-twentieth century in villages of domestic houses greater than the traditional 436 square feet including the occasional house of four storeys. However, the policy did demand that the applicant be a bona fide villager, that the house be of a traditional type so as to be in keeping with the village (the term ‘small house’ had yet to enter official vocabulary) and that there be no objections to its siting. Any objections were invariably based on considerations of fung shui or of planning. The former objection would come from fellow villagers for whom protection of the good fortune of the village was of great importance; the latter came from the administration. Planning considerations assumed importance when general development policies for whole areas and particular layout plans for certain villages became more

28. Memorandum for the Executive Council, XCR (67), 28 February 1967, referred to by the Director of Audit, *Report on the Accounts of the Hong Kong Government for the Year ended 31st March 1987*.

common. By the late 1950s plans had been devised for Tsuen Wan, Shek Wu Hui (Sheung Shui), Sham Tseng and Tai Wai (Shatin).

There were, however, two difficulties with the application of the administrative approach towards the grant of free building permission. Who was a genuine, or bona fide, villager? And what was a village-type house? A bona fide villager certainly did not mean an urban outsider who desired to erect a spacious country home on some farmland that he had acquired. At the other extreme, it certainly included a man who had always lived in the village and who could trace his ancestry back through men to one who had lived there since the nineteenth century or before. But what about those living in the village whose families had settled there during the twentieth century? And what about those living outside the New Territories who had been born in the village and regarded it as their place of origin? Then there was the complication of new villages. Villages were founded after 1898, sometimes as offshoots of well-established settlements. Were long-term residents of these new villages bona fide villagers, even if their villages had no long history? Moreover, insistence upon the applicant being a genuine villager seemed a waste of effort. The block Crown lease contained no restriction upon alienation, so a bona fide villager could sell the house on to someone else quickly.

There were differing views about what constituted a village-type house. Must it be small? Must it have only one storey? Must it have been built from traditional materials? Must it have only one large room, possibly with cockloft over? Must the kitchen be situated at the front? How many windows were permitted and what size could they be? The traditional style of house was not attractive for modern living.

In 1959 Barnett's successor as District Commissioner for the New Territories, Ronald Holmes, resolved to cut through these difficulties. Holmes, a brave and wiry Yorkshireman fluent in Cantonese who had been a young government cadet before the Second World War and an intelligence officer during it, was an astute, decisive, and long-serving senior civil servant with a reputation as a trouble-shooter. Perhaps he sensed that the momentary weakness of the Heung Yee Kuk was an opportune time to take the initiative. The New Territories administration had become overwhelmed with work, in part because of its modest size and in part because of the influx of people into its sphere during the previous decade. Holmes thought that the administration of land could be made easier by dropping the requirements that the owner applicant be a bona fide villager and that the house be in traditional style, though he could see that a building free-for-all had to be avoided. In March 1959 he proposed to the Colonial Secretariat, the command centre of the Hong Kong Government, new rules for the conversion of land to building. The proposal did away with the notions of a bona fide villager and of a village-type house. Instead it employed the idea of a small house and a restriction of one such house to each family.

Holmes suggested that, provided there were no planning or feng shui objections, any owner of an old schedule lot should, as before, be given a free licence to

build a house, but the house should be a small one. He defined small as a single-storey dwelling up to a maximum of 15 feet in height and occupying no more than 700 square feet of ground. This requirement was larger than the traditional type of house but it was what District Officers thought a contemporary poor man might afford and thus was likely to help those with genuine housing need. The officers called such houses bungalows. The requirement also happened to be the same as the restrictions imposed upon residential buildings on newly granted land in the 1930s. These small houses would be free of building controls: fortuitously, legislation to extend those controls to the New Territories was being drafted so an exemption could be written in for such houses. The height restriction would allow for the usual cockloft above the living room and for a traditional peaked roof, but not for two or more storeys. Holmes thought this would encourage farmers to replace wooden sheds with permanent and more hygienic buildings. Permission for a house of larger dimensions would attract a premium and require engagement of an architect.²⁹ A new Crown rent would be charged on the small house.

Although, somewhat disingenuously, Holmes presented these as merely slight modifications to the existing rules, the Colonial Secretariat had reservations about them. The secretariat feared that the proposals would not prevent urban dwellers from setting up weekend bungalows on old lots or prevent the establishment of a considerable number of houses in what once had been cultivated areas.³⁰ Nevertheless, the new rules were approved in June 1959, although with a stern warning that the issue of building licences for old lots should be closely controlled and confined to one per family.

The new rules were a distinct departure from previous policy. They in effect extended free building licences to those who were not bona fide villagers but who happened to own old schedule lots. They also limited what villagers might build. Holmes was well aware that this would not be welcome to the indigenous population. At the time, the change of policy was not revealed. It was regarded as too sensitive: 'political dynamite' according to Holmes. It might have been feared that announcing the new policy would rekindle faction-fighting within the Heung Yee Kuk. The anticipated explosion would not be about the giving of free licences to non-villagers but about the restrictions in size to 700 square feet and 15 feet in height with only one-storey, the imposition of payment for anything larger and the restriction to family use.

The new conversion rules were initially confined to old lots. The reason for this was presumably that prior to 1898 owners of land in private ownership had not been required to ask or pay for permission to build on that land. But this rather ignored that much new land had been granted by the Crown over subsequent decades and that an influx of people in recent years had stimulated demand

29. District Commissioner, New Territories (Holmes) to Colonial Secretary, confidential memorandum, 20 March 1959.

30. Colonial Secretariat (I. M. Lightbody) to DCNT (Holmes), confidential memorandum, 29 April 1959.

for residential buildings. A year later the Executive Council quietly approved the extension of the rules to new grants made before the Second World War, that is to say grants made in and between 1901 and 1941. This too was not publicized, for fear that it would set off demand for similar concessions regarding post-war grants which the administration discerned were often taken for speculation. The extension was a little surprising, for the argument that building restrictions broke promises made at the turn of the century and were tantamount to confiscation of traditional rights could hardly be made in respect of land first granted after 1900. In the event the extension was little used. Land which had been the subject of pre-war New Grants was generally on higher, more marginal ground, unsuitable for rice and for buildings.³¹

In remoter parts of the New Territories new buildings must have been rare. But the post-war city was spreading out as population pressures grew and transport improved. Rural landowners were keen to take advantage of this. Restrictions under the Crown lease were the only means of control upon buildings. The Buildings Ordinance, which had been overhauled in 1955, did not apply beyond the old urban area. New Kowloon was the only part of the New Territories to which building controls applied.

The extension of the Buildings Ordinance and its associated regulations to the whole New Territories was, however, about to pass through the Legislative Council. Among other things, these would require plans of new buildings to be drawn up by professionals and approved by the Building Authority, for the authority to give permission before work could start and for a permit to be granted before a house could be occupied. But the administration did not want villagers to incur such trouble and expense. To accommodate the new approach an exception was incorporated for a dwelling house with a roofed-over area of 700 square feet or fewer which was not more than 15 feet in height.³² These houses were to become known within the administration as New Territories Exempted Houses. The ordinance and the exception applied to all buildings and all people throughout the whole New Territories. There was no privilege specific to the indigenous. As such, the ordinance and the revised policy marked a further departure from the old custom which had become subsumed by executive acts and by statute.

31. Barnett, 'Land Conversion in the New Territories', XCR 217/60, discussion paper for the Executive Council (1960).

32. Buildings Ordinance (Application to the New Territories) Ordinance (Cap 322), effective 1 January 1961. This was the first of (eventually) two ordinances of that name. Regulation 2 of the Buildings Ordinance (Application to the New Territories) Regulations provided that various provisions of the ordinance should not apply to the erection, alteration or demolition of certain buildings in the New Territories.

Rural Response

The new restrictions on size and the charging of a premium for a larger building were finally disclosed in June 1960 through a circular to village representatives from Holmes' substitute as District Commissioner, Arthur Walton. As feared, they received a fiery reception from the indigenous population. At Sheung Shui the Rural Committee and its legal advisers discussed the new policy and the impending extension of building controls to the New Territories with village representatives. They resolved to request an amendment to the policy and, if that should be rejected, to request the Heung Yee Kuk to start a self-government movement in the New Territories.³³ The District Officers must have been feeling the heat, for they raised the question of revising the restrictions at a meeting with Walton that September.

In November a group of kuk representatives toured the mainland New Territories to test opinion on land policy. They visited rural committees at Shatin, northern Sai Kung, Taipo, and Fanling, with the press in attendance to ensure that publicity would be given for the views expressed. The feeling was that landowners should be allowed to build without any restrictions unless the village had a planned layout. The size restrictions were denounced as unsuitable. Every villager should be allowed to build a house. Building licences should be free. No architect's plan should be required. Owners should be allowed use of land outside the village layout without payment. No premium should be charged for converting agricultural land to building land. Bitterness was voiced about the slowness, or complete lack, of response of the administration to house applications. At Fanling, however, there was more concern about the poor telephone system than about small houses.³⁴

The kuk pressed for the 15-foot height limitation to be raised and the 700 square-foot size limitation to be dropped. They had some momentum for this since many existing houses exceeded the new limits. The maximum height for houses constructed on new grant land had been 25 feet with two storeys since the 1930s. They found a sympathetic ear in the District Officers. After one meeting with the officers and another with kuk representatives, Walton beat a retreat. He recommended to the Colonial Secretariat substitution of a limit of 25 feet and two storeys, provided that no reinforced concrete was used in the construction: a safety concern prompted by the Director of Buildings. However, Walton resisted the kuk's demand that a roofed-over area in excess of 700 square feet be allowed. The recommendation was approved. The poor man's bungalow had lasted but fifteen months.

Small houses were therefore getting larger and as they did, the traditional house was left behind. Also the practice of the government negotiating a private settlement of land difficulties with the kuk was further established. 'For some reason,' commented Ronald Holmes to the government's Political Adviser about the right to build on agricultural land, 'the leaders of New Territories opinion have shown, and

33. *Wah Kiu Man Po*, 26 July 1960; there is no mention of seeking approval for this from the PRC.

34. *Kung Sheung Yat Po*, 10 November 1960.

are likely to continue to show, less delicacy and forbearance than ordinary people in this kind of matter.³⁵ Perhaps the reason was that rural people had discovered that being forceful with the administration brought results.

The government's fear that village houses would be built for occupation by non-villagers proved well founded. At the Ping Shan village of Hang Mei in 1962, eight new houses were constructed, five of them specifically for rental to outsiders. The building and letting of houses was a prime topic of conversation among the local population. Jack Potter observed:

They often discuss such matters as the proper design and height of a house; how to build a house to get the maximum income from minimum construction costs; the amount of rental to be derived from each square foot of house space; new government regulations on the building of village houses; and how to get around the government building inspector.³⁶

Since its constituents were so keenly interested in exploiting their housing, it is no surprise that the kuk continued to press for concessions. In representations to the authorities during the early 1960s, it argued that the size limitations on new houses were too severe and resulted in unsatisfactory living conditions. It said that the ban on the use of reinforced concrete was unreasonable. The pressure eventually worked. At a dinner given by the kuk in his honour in November 1964 the Governor, Sir David Trench, announced that two-storey houses of reinforced concrete with up to 1,000 square feet of covered area would be allowed by District Officers within village areas or their natural extensions, although with the caveat that standardized plans and a registered building contractor would have to be used. The caveat proved unpopular. In 1965 only seventy-five applications were made for premium-free licences to build. The kuk complained that it was difficult to engage architects who were willing to work on buildings in country areas.

So the pressure for more changes continued. In 1967 it was rewarded when the Executive Council removed the requirement for use of plans and engagement of a registered contractor. This was though subject to a proviso that the house was genuinely needed by the villager himself or his sons when they married. If no suitable land was available within the established village, the site could be within natural extensions of the village. The statutory exemption for small houses was accordingly amended with effect on 1 July 1967.³⁷ At the same time the permitted maximum dimensions were converted into metric measurements: 65.03 square metres instead of 700 square feet and 7.62 metres instead of 25 feet. Everybody continued to use the old figures.

Therefore 'small houses' continued to move away from the traditional design. Wood had long given way to concrete. Pitched roofs had been replaced by flat ones.

35. Confidential memorandum, 16 January 1961.

36. Potter, *Capitalism and the Chinese Peasant*, p 99.

37. Regulation 3, as amended, of the Buildings Ordinance (Application to the New Territories) Regulations.

Two storeys became more common. The new height limit, measured to the level of the main roof, or to the apex of a pitched roof, was widely adopted. The restriction to 15 feet if reinforced concrete were to be used was widely flouted. Later an extra half-floor at roof level was tolerated.³⁸

Being allowed to build taller houses and do so without plans did not satisfy the kuk. New houses had to be within the confines of the villages or their natural extensions, a restriction which reflected traditional practice and gave the DO ability to plan village extensions. But the restriction reduced the amount of land available for building and held back the expansion of accommodation for villagers. An indigene who wanted a house had to find his own land in or around the village and such land was scarce. Even where land was available for sale, he had to compete with others who would usually out-bid him. So the kuk wanted villagers to be able to build outside the village and not to have to pay a premium for doing so. Administrators resisted this: they could see that it would encourage sale to outsiders. The kuk also wanted villagers to be allowed to build one house for each son free of premium regardless of the age of the son—in other words, to do away with the marriage requirement. Again administrators pushed back: they anticipated that the house would be let out until the son was old enough to live there or to sell it at a profit. This reflected the long-standing disagreement as to whether the custom was linked to the son's marriage; the kuk said that it was not, the government that it was. Officials thought that if they gave way on this, there would be disorderly development of houses which would be let to people who were not indigenous.

Village houses were becoming known and popular outside rural circles. Between 1905, the time of the block leases, and the start of the Small House Policy in 1972, 27,431 new grants were made for building purposes. This was aside from free building licences made to both indigenous and non-indigenous landowners. Certain desirable places such as Lamma Island near to Hong Kong Island and the Sai Kung peninsula proximate to Kai Tak airport, suffered an influx of new, largely expatriate, residents. Officials were sympathetic to rural complaints. For a time in the late 1960s sales of building plots at Lamma and Sai Kung were suspended. The government was prepared to restrict participation in auctions of village building land.

Government policy dictated that building land be sold by public auction. This created a problem for those whom administrators regarded as 'genuine villagers', by which they seem to have meant families of modest means who had settled in a village for generations and were unable to compete with the bids of outsiders. One solution attempted was to hold 'restricted' auctions in the village and at dawn. Another was to have a 'closed' auction in which only villagers were allowed to bid. But closed village auctions merely led to those who wished to bid colluding to

38. Dr Patrick Hase, quoted in Hopkinson and Lau, *Rethinking the Small House Policy*, 3.1.

divide up the lots which were for sale by agreeing amongst themselves that only one of them would bid for a particular lot.

Squatters

Simultaneously, the New Territories Administration had an additional housing problem, one faced by Hong Kong in general. This was the post-war influx of immigrants from mainland China. Millions of newcomers flooded into the colony and hundreds of thousands of them settled in the rural areas. They found there land to work and to live upon, sometimes as tenants, occasionally as owners but generally as squatters.

Pressure for more homes in the New Territories really began with that influx. The vacant land in the countryside was largely government land, although some of it belonged to private owners who had chosen or been forced by circumstances to abandon it or who had simply disappeared. This set the scene for numerous claims of title by adverse possession in later decades (see Chapter 15). The squatters put up huts, shacks and sheds on the empty land. In course of time many of these temporary dwellings became accepted by the authorities who granted the squatters licences to occupy (Crown land permits). By the beginning of the 1970s there were almost as many of these as there were traditional village houses, but almost as many again remained unapproved.³⁹ Accordingly, authorized village-type houses had become a minority among the dwellings in rural areas.

On government land the immigrants set up humble abodes of wood, brick, wire, stone, asbestos, and metal, small houses of a different sort from the traditional village-type construction. They were generally about 400 square feet in area and 12 feet in height, often with small dependencies such as pig sties and chicken sheds. These flimsy structures formed extensions of existing settlements or even new villages on their own. Politely termed 'cottage areas', they were in effect rural shanties or slums, and they constituted a health hazard, a safety concern, and an administrative headache.

The small staff of the various District Offices struggled to keep track of this problem. They could not prevent or control it, so they attempted to regularize it. Occupiers of Crown land were given permits to occupy the land or short-term tenancies. Where the land occupied was private, the owner (Crown lessee) was given a licence for the erection of the structures for a small annual fee which was usually paid by the occupier. If the squatting involved a change of use, the owner would be granted a temporary waiver of the restriction on use.

39. In 1972 a then-secret discussion paper for the Executive Council, XCR (72) 219, estimated that there were 43,000 traditional village houses, 36,000 lawful temporary houses, and 35,000 unlawful houses.

Rural Housing Crisis

By the late 1960s, the squatter problem, coupled with the recurrent complaints of the indigenous that their building rights had been denied, their land was being confiscated and that new village land was being sold beyond their means, led to perceptions of a rural housing crisis and a sense that something radical had to be done about it.

Illegal Structures

Buildings legislation has existed in Hong Kong for more than 125 years.¹ The original concern was to ensure the safety of buildings and the health of their inhabitants in the crowded parts of the then colony. The legislation was not extended to the New Territories when they were acquired in 1898. Until the middle of the twentieth century the bulk of the New Territories were predominantly countryside with relatively spacious low-rise buildings even in the market towns. In the rural parts the custom was that an indigenous male could build in his village a small house for himself or his son upon marriage. What little control over these and other constructions was exercised by the District Office through the terms of the Crown lease which forbade the erection of buildings except with government permission. However, the process of creeping urbanization and suburbanization rendered this approach inadequate so the administration determined to extend statutory controls to the New Territories.

On 1 January 1961 the Buildings Ordinance and associated regulations were first applied to the whole of the New Territories.² Previously, the only part of the territory ceded in 1898 to which they had applied was New Kowloon. Until then, what control the administration had exercised over construction work outside the urban areas had been through the provisions of Crown leases which required that government permission be obtained before any new building was constructed but did not lay down any requirement for the drawing up and approval of plans or compliance with quality controls.

The application of building controls to the whole of the territory meant that, in principle, country areas had to comply with the same rules as everyone else. But this was in principle only, for, as we have seen, the construction of village houses was excluded from the rules and in respect of other buildings there is much laxer enforcement of the rules. Illegal structures, or as administrators call them, unauthorized building works, have proliferated throughout the New Territories. What are those rules?

1. The earliest legislation dealing solely with buildings was the Buildings Ordinance 1889, No 15 of 1889.

2. Buildings Ordinance (Application to the New Territories) Ordinance, effective 1 January 1961; originally Cap 322, replaced in 1987 by Cap 121.

The Law

The underlying law concerning illegal structures is simple. Anyone who wishes to carry out building works must obtain permission from the Building Authority. It is an offence to carry out such works without that permission. The principal provision is section 14(1) of the Buildings Ordinance, the relevant part of which reads:

- no person shall commence or carry out any building works . . . without having first obtained from the Building Authority –
- (a) his approval in writing of documents submitted to him in accordance with the regulations; and
 - (b) his consent in writing for the commencement of the buildings . . .

The Building Authority (or BA) is the government's Director of Buildings and Lands who is in charge of the Buildings Department.³

Building works are very widely defined. They include repairs, demolition, alterations, and additions. They embrace any kind of building construction and every kind of building operation.⁴ There is very little judicial guidance as to the limits of this definition and as to what does or does not constitute building works. Unhelpfully, this is said to be a matter of fact and degree in every case. It is safe to say that the Buildings Department's view of what is building works is wider than most people's conception of them.

Grammatically, the description 'building works' suggests a process rather than a result. Works start, are carried out and eventually finish. The result of the works is a building, or a changed building, a wall, a wharf, a bridge, or whatever: all are structures. This result cannot sensibly be described as works, yet the statutory definition says otherwise.

There are exceptions to the requirement of permission for works. Those that take place inside a building, which do not involve the structure of the building and which do not contravene any regulations are exempt.⁵ Under a relatively recent and long overdue amendment, minor works, such as canvas canopies and air-conditioner supports, can be erected without prior permission provided that an authorized contractor is used.⁶ There is however no exception for works done in traditional village houses or by indigenous villagers.

Building works or their consequences which take place without the required permission are known as unauthorized building works: UBWs in the Buildings Department's jargon. The terminology 'illegal structure', although commonly used and convenient, is inaccurate. It is not the structure which is forbidden so much as the works that lead to its making. Also, unauthorized works may not lead to a structure: demolition of a building would require permission just as much as

3. Buildings Ordinance (Cap 123) (hereinafter BO) s 2.

4. BO s 2.

5. BO s 41(3).

6. BO s 14AA.

would erection of a building. Moreover, it is an offence to build without permission but not, without more, to keep or have the building that results. Consequently, a person who buys and uses property which contains an unauthorized structure does not commit an offence. That person would, however, be guilty of an offence if the Building Authority were later to order him, as owner, to remove the structure and he did not comply.⁷

Documents and Permissions Required

Regulations made under the Buildings Ordinance require that plans of the proposed works (other than minor works, which have a separate procedure) be lodged with the Buildings Department for approval. Those plans must be drawn up by an architect, engineer or other authorized person. Standards regarding design, planning and construction with which the plans must comply are set out in regulations. The plan is to be approved and consent to commencement of works given by the Building Authority. A permit must be sought and granted before a building can be occupied. Any drainage works or street access must be separately approved.⁸

When the Buildings Ordinance and regulations were applied to the New Territories, it was recognized that the complex and expensive business of lodging plans for approval, complying with regulations and applying for permissions was undesirable and unnecessary for small village houses. So an exemption was written into the ordinance which extended the law to the New Territories. Provided that a house was within set dimensions and met certain other requirements, the controls would not apply to it. This is the New Territories Exempted House, or NTEH, introduced in Chapter 10.

The dimensions of an NTEH have changed from time to time but currently and for many years exempted houses have no more than three storeys, do not exceed 27 feet (8.3 metres) in height, and have a flat roof and a roofed-over area not exceeding 700 square feet (65.03 square metres). There are also restrictions upon the size of balconies, canopies and roof-top structures and upon the thickness of walls.

Houses of this size, typically a three-storey, flat-roofed, 2,100 square-foot, so-called Spanish-style villa, proliferated in the rural New Territories during the final quarter of the last century. They were built mainly on the periphery of villages on land made available by the government under the Small House Policy or provided by developers and transferred temporarily into the names of indigenous males. The intention of the policy to alleviate a perceived shortage of affordable housing for indigenous men and their families in the rural areas has been frustrated by the continued migration of native villagers to the city and overseas and by the sale of their rights to developers and of their completed houses to 'outsiders'. This has led

7. BO s 24.

8. BO ss 4, 21, 28 and 30.

to tensions between new residents and old in the villages. It has also led to suburbanization, with developers building clusters of expensive 'small' houses on the periphery of villages.

Nevertheless, a proportion of 'small' houses, particularly those at the centre of the villages built on land which was used for housing long before 1972, continue to be occupied by original villagers. Typically the occupants are several generations of a family or are members of one extended family. A few of these houses have more than three storeys and have had more than three since the time that they were built. However, the great majority were built within the scheduled dimensions and have three storeys or fewer.

Construction of this type of house is therefore not subject to the Buildings Ordinance and is outside the jurisdiction of the Building Authority. Responsibility for ensuring that the rules regarding construction of exempted houses are obeyed is solely upon the government's Lands Department operating through its District Land Offices (DLOs) which took over responsibility for land matters from the District Offices in 1982. Control is exercised through the terms of the government lease and the policies adopted by the DLOs with respect to the giving of permissions under that lease. The DLO is responsible for issuing the requisite documentation: a certificate that the building is exempt from the Buildings Ordinance, a certificate that the terms of the government lease have been complied with and a letter that there is no objection to the occupation of the house. Once the house has been finished and occupied, changes to the house fall under the jurisdiction of the Building Authority.

Construction of other types of buildings in the New Territories is subject to the Buildings Ordinance and is therefore the responsibility of the BA throughout. These include high-rise constructions and commercial centres found in the new towns and estates of modern luxury villas. Only houses within the dimensions of a NTEH fall outside building controls; such a house ceases to be exempted if for some reason it exceeds those dimensions. So if, during construction, an extra floor or half floor is added, or a ground-floor extension is built, or a balcony is widened, the house will not be exempt and will become subject to the Buildings Ordinance and regulations thereunder, enforcement of which is the responsibility of the BA. Should such adaptations occur after the house has been completed, the works require BA permission as with any other building in the SAR.

In law, therefore, every piece of building construction or demolition which requires Building Authority consent and does not have it, is a breach of the law and ought to be stopped or removed. The requirement of consent is however roundly ignored throughout the Special Administrative Region. The reasons for this are a matter of speculation, but one reason must be that the law is a paper tiger: the chances of 'getting away with it', at least for a considerable period, are large. The chances are, however, significantly greater in the rural areas than in town.

Practice

Enforcement action against unauthorized structures is primarily carried out by the Buildings Department. Many years ago the department recognized the inevitable—that it could not inspect every building for UBWs and that disobedience of the law was widespread. The department also recognized another reality: that the removal of every unauthorized structure is not equally pressing. Accordingly, a policy of distinguishing between UBWs for enforcement purposes was adopted. This was called ‘prioritized enforcement’. A statement of this policy was released to the public in 1995. That statement has been modified, but only slightly, over the years. It is published in leaflet form and on the department’s website.

According to the statement the highest priority was to be given to the removal of structures that posed an obvious or imminent danger to life or property and those that were newly completed or in the course of construction.⁹ In theory, structures for which the case for removal was less pressing would be dealt with later. In practice such structures would not be the subject of a removal order, even if discovered in the course of taking action against high-priority structures in the same building or vicinity. Instead, the owner of the building would be given a warning, in the form of a letter advising that the structure was unauthorized and the owner might like to consider removing it.

In 2002 a small but significant revision of the policy took place. As a result of reconsideration by a working group of representatives from various government land divisions, it was decided that action would be taken at NTEHs against dangerous structures and work in progress only. So, in the case of village houses, recently completed unauthorized works would not be acted against. When does work cease to be in progress and become simply new? The dividing line adopted by administrators in 2006 was that work is regarded as new but not in progress if it is ‘practically completed’, which means that the main structure is completed. This is to be judged as at the date of first detection of the structure.¹⁰

The manpower limitations of the Buildings Department have necessitated this approach. They have also necessitated that the department use enforcement weapons of lower potency than a removal order. So the department issues advisory letters to owners, suggesting that the UBW at the owner’s property ought to be removed (or ‘purged’). It also issues letters to owners demanding removal of UBWs, these letters being registered on the Land Register if the structure is not removed so as to warn potential purchasers of the property. The thought was that this registration would blight the title and force the owner to remove the structure if he really wanted to sell the property. Anecdotal evidence however suggests that

9. Other high priority targets were UBWs which had been the subject of complaint by public bodies and UBWs in buildings or districts which were the subject of ‘blitz’ operations for comprehensive enforcement action.

10. Office of the Ombudsman, *Enforcement against Unauthorised Building Works in New Territories Exempted Houses*, April 2011.

the registration does not prevent the property from being sold or even lead purchasers to bargain for a reduced price. At most, the purchaser's intending mortgagee lender will reduce the amount of the loan that it offers to the purchaser by the estimated cost of the removal of the structure. Sometimes an owner will comply and the Building Department's inspector will ascertain that the offending structure has gone but the owner will later re-instate the structure. The department's power to carry out works itself or through contractors to remove unauthorized works, the cost to be met by the owner, has been used in cases of persistent breach. However, shortage of funds, staff and technical expertise has limited the use of this power.¹¹

Enforcement action has increased somewhat as a result of the Buildings Department contracting out the inspection of premises to professional consultants. These are typically firms of building surveyors. Nevertheless, statutory notices and orders issued as a result of such inspections have to go out under the name of the Building Authority.

The Buildings Department therefore concentrates upon eliminating UBWs which are dangerous or in course of construction. It has enforcement teams and action units ready to intervene when unauthorized changes to a building are taking place. They issue letters advising the owner to stop the work and remove whatever has so far been built. If that is not done, a removal order will follow, requiring the works to be removed within a certain period of time. If that is not done, prosecution may follow.

Whilst the occasion for enforcement action by the Buildings Department is the carrying out of unauthorized works, the occasion for enforcement action by the District Lands Office is the carrying out of works which are, or which result in, what the office regards as a breach of the government lease. These are not necessarily the same. However, in the case of village houses the most common kinds of unauthorized structure, such as those on roofs and balconies, would usually lead to the dimensions of the house permitted by the government lease being exceeded so the DLO would have grounds for action for breach of the lease.

The DLOs' practice is to distinguish between blatant (i.e. obvious and major) breaches and minor breaches of the government lease. Many alterations to exempted houses constitute minor breaches. These can be tolerated on payment of a penalty. The policy adopted in 2002 of not taking action against completed new works at exempted houses and concentrating upon work in progress and dangerous structures was applied to lease enforcement as well as Buildings Ordinance enforcement.

The jurisdiction of the Buildings Department does extend to building works added to village houses. The exemption from building controls applies only to the initial construction of such houses. Any later additions, or indeed any initial construction beyond the scheduled dimensions, would be required to comply with the buildings legislation. Nevertheless, the notion has taken root that exempted houses

11. BO s 24. *Enforcement against Unauthorised Building Works in New Territories Exempted Houses*, April 2011, p 5.

are completely outside building controls and are entirely the responsibility of the District Lands Office. This is partly a matter of convenience: the BD is so stretched by looking after UBWs on multi-storey buildings in the urban areas that it has no desire or capacity to take on UBWs in the rural areas as well. So in practice enforcement there has been left to the various DLOs.

This pragmatic division of responsibility has contributed to the perception that there is uneven enforcement of the law; or that there is in reality one law for unauthorized structures on village houses and another for unauthorized structures on all other buildings. The perception is essentially correct, as the reports of the Office of the Ombudsman reveal. The DLOs give priority to action against the use of residential buildings for dangerous industrial undertakings. The DLOs also keep an eye open for work in progress at NTEHs but have a different interpretation from the BD as to what constitutes work in progress and consequently a more tolerant attitude towards illegal structures.

There is, however, more to it than a matter of interpretation. It turns out that the nine District Land Offices have different procedures for dealing with illegal structures. As with the Buildings Department, the DLOs have limited resources. Low priority is given to lease enforcement. In 2004 the Ombudsman examined the practices of the DLOs with regard to lease enforcement in the villages and reported that DLOs lacked a positive attitude towards tackling the UBW problem.

One consideration barely touched upon in the report but which must be a major consideration for land officers is the attitude of indigenous villagers. They are very protective of their property and of what they consider to be their rights. They are suspicious and confrontational towards officialdom. Accordingly, they tend to adopt an aggressive, fierce attitude towards outsiders and officials. The attitude is epitomized by the reply of one village wife when she was asked about action being taken against illegal structures in their extended house. 'This is village land. No policeman dares to come in here, let alone any official from the Lands Department. You saw the signs.' The signs said, in Chinese, 'strangers are not welcome'.¹²

The closed, exclusionary nature of villages has survived a century of change. Despite immigration and emigration, despite advances in education and communication, traces of a tribal attitude subsist. The family, ancestors, and local customs remain important as part of the indigenous identity and what it means to be Chinese. The right to extend a family home is seen as a natural adjunct to the right to build one.

The taking of action against unauthorized works requires proof of the work and of the breach which often involves entry to and inspection of property. Offenders are often obstructionist and confrontational. They refuse entry to officials. They stall and are uncooperative. Government staff are naturally cautious and diffident. Some of them may live in villages and be sympathetic to the claims of indigenous

12. Evan Fowler, 'Two Systems, One Colony: The Small House Policy Is a Reminder of the Duality of Hong Kong's Past', *Hong Kong Free Press*, 13 January 2018.

people; they may even be indigenous themselves. In many cases no action is taken for want of evidence.

After inspection, a letter is sent to the house owner and may be registered. In cases in which the unauthorized structure is removed as a result of the letter and the removal verified by inspectors from the DLO, a replacement may be erected after the inspectors have gone. Often the letter is ignored, especially if the owner has no desire to sell the house. No further action is taken in most instances. If the breach of the lease is minor, it will be tolerated, a waiver being given on payment of a penalty, for the life of the house. The ultimate sanction is re-entry (termination of the government grant by forfeiture) which can be effected by an entry on the land register.¹³ But this is used very rarely indeed since it is grossly disproportionate to the breach. The Ombudsman's investigations showed that the proportion of cases in which a satisfactory result was achieved has been estimated at just 5 per cent.¹⁴

Proliferation of Rural Illegal Structures

In consequence of these factors, unauthorized additions and alterations to village houses are rife. Attention has focused upon roof structures: covers of aluminium and glass, metal framework, additional rooms or half floors, even complete extra storeys. But new, extended and enclosed balconies are common, too, as are concrete or framed retractable canvas canopies and other projections, grilles and gates, also window and door grilles. In the case of houses standing in their own grounds, extensions, out-houses and car ports can be constructed.

No systematic statistics are collected but the total number of unauthorized structures at village houses is estimated to be in the tens of thousands. A survey by the DLO in Tuen Mun in 2003 found that the number of detected UBWs there was five times that of two years earlier. A visual survey conducted by the Lands Department in 2004–2005 concluded that the UBW problem at NTEHs was serious. The northern and western parts of the New Territories are particularly affected.¹⁵ On average there are about 500 complaints a year concerning UBWs on village houses. But of course not all UBWs are the subject of complaint. The Lands Department estimated that, as at February 2004, about 13,000 of the unauthorized structures resulted in a breach of lease conditions.¹⁶

The number of removal orders and prosecutions relating to UBWs on village houses is modest. There were 217 orders in 2010, 155 in 2009 and 220 in 2008. Prosecutions were 129 in 2010, 132 in 2009 and 66 in 2008. Compare those figures with the corresponding ones for urban areas where the number of removal orders

13. Government Rights (Re-entry and Vesting Remedies) Ordinance (Cap 126) s 4.

14. *Enforcement against Unauthorised Building Works in New Territories Exempted Houses*, April 2011.

15. Carrie Lam, Secretary for Development, in answer to an oral question from LegCo member Lee Wing-tat, 18 May 2011.

16. Ombudsman's Report, 2011.

is usually in excess of 20,000 per annum and the number of prosecutions is usually more than 2,000 per annum.¹⁷

When asked to estimate how long it would take to complete action against existing UBWs in their district, one DLO answered fifty years and another ninety-seven years. The Ombudsman concluded in 2004 that the problem of illegal structures in the New Territories was widespread and that it would not be possible for the government to eliminate it in the foreseeable future: the best that could be aimed for was containment by stopping new UBWs being completed and having a realistic enforcement policy which was widely known.¹⁸

Conclusions

What lessons can we learn from the above? There seems to be a number but they can be grouped under three general propositions. The first is that the law is generally misunderstood and is confused with its application and enforcement. The law itself casts a wide net. It requires prior permission for nearly all building work. The definition of building work is very broad, taking in items which sensible people would not regard as building work and requiring permission for doing things which ordinary property owners regard as part of their rights. In consequence the law is unrealistic and has been brought into disrepute. The requirement of permission, if understood, is roundly ignored. Full enforcement of the law is impossible. The administration has tacitly recognized this with its policy of prioritized enforcement.

The policy of prioritization has given a false impression of the law. It is widely believed, even among professionals such as architects and estate agents, that certain types of work do not require permission or at least are tolerated and therefore within the law. The severity of the Buildings Ordinance is therefore generally not appreciated: perhaps this is as well, for there might otherwise have been civil discontent.

The second proposition is that the impression that there is one law of building works for village houses and another for all other property is false. The Buildings Ordinance applies to all buildings throughout the territory. The only qualification to that concerns the initial construction of village houses. These are subject to separate controls. However, once completed, the Buildings Ordinance applies to them, too.

The idea that there are no controls for village houses stems from a confluence of factors. One is that initial construction of village houses is exempted from statutory controls. Another is that indigenous villagers enjoy privileges and that those privileges relate most notably to housing. Their lawful traditional rights are enshrined in the Basic Law and jealously guarded by the Heung Yee Kuk. The courts are empowered to apply customary law in the rural New Territories. The major supposed custom is that male villagers may build a house on their own land in

17. Reply of the Secretary of Security to a written question raised in LegCo by Wong Yuk-man, 15 June 2011.

18. Office of the Ombudsman, *Report on Enforcement Action on UBWs in NTEHs*, 2004.

their ancestral village. For almost fifty years the government has facilitated this by creating and maintaining the Small House Policy under which building land near villages is made available to indigenous males at low cost. This privilege has been roundly exploited with non-resident, and even non-native, male descendants of indigenous males claiming (often through developers) the right to a house which they promptly re-sell. The government has done little to stop the practice. Given the number and scale of their land privileges, indigenous immunity from building controls is only to be expected.

Indeed some villagers and their representatives claim just such an immunity. They assert that custom permits small houses to be enlarged if indigenous people require the living space. They say that before the Small House Policy was instituted, or at least before the British took over in 1899, there was no limit to the size of such houses. That is why on some old house lots in the centre of certain villages you find houses with more than three storeys. The claims are exaggerated, if not entirely specious, but they add to the perception that the law does not apply to village properties.

However, the biggest contribution to the false impression is administrative inaction. The Buildings Department and the District Land Offices are over-stretched so they have adopted a practice of not acting against new UBWs in rural areas. They concentrate instead upon dangerous structures and work in progress. This difference in approach to enforcement between urban and rural parts has been exacerbated by the adoption of a very narrow interpretation by DLOs of what constitutes work in progress. Add to this the reluctance of government officers to incur the wrath of villagers and the result is that there is a markedly lower degree of enforcement of the law in the New Territories. This is not confined to village houses. Other types of residence in rural areas enjoy the same tolerant treatment.

The final proposition is a deeper one: the law is badly in need of reform. This is not addressed by the Ombudsman's reports—unsurprisingly, since they are concerned with administrative practice in the enforcement of the existing law. However, the reports unwittingly bring out the weaknesses, indeed the absurdity, of the current law. By forbidding land owners from altering their properties in any substantial way without first going through a debilitating bureaucratic process with no certainty of receiving permission, the government is setting itself against normal expectations. A law which may have been appropriate when Hong Kong had a much smaller population, many fewer buildings and far fewer property owners, and when building standards were much lower, is not appropriate now. A law which does not provide for retrospective consent to be given, so that an owner is obliged to remove perfectly safe unauthorized structures before applying to re-build them, is seriously flawed. When the administration itself does not expect its legislation to be obeyed, as is apparent from the prioritization policy and the starving of the Buildings Department and the District Land Offices of resources to enforce the legislation, how can the public be expected to respect the law?

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