Proceedings of the 5th International Conference on Art, Design and Social Sciences
DOI: 10.54254/2753-7064/2026.36272

On the Interpretation Method of "Legitimate Traditional Rights and Interests" in the Case of Kwok Cheuk Kin v. Director of Lands of the Hong Kong Court of Final Appeal

Siying Zhang

Discipline Inspection and Supervision School, Shandong University, Weihai, China
ZhangSiying529@outlook.com

Abstract. The New Territories Small House Policy allows male indigenous villagers to apply, it has sparked debates on resource allocation and gender discrimination along with urbanization. The Kwok Cheuk Kin case became a landmark case in the Court of Final Appeal for fully reviewing the constitutionality of this policy. This article focuses on the court's reasoning in that case, tracing how judgments evolved across different court levels and analyzing the Court of Final Appeal's interpretation of 'lawful traditional rights' under Article 40 of the Basic Law. The findings show that the Court of Final Appeal set the time point for defining 'traditional' at the 1990 enactment of the Basic Law, limited 'lawful' to procedural compliance, applied special laws over general laws, and considered Article 40 to take precedence over equality provisions. Although it acknowledged that the policy objectively discriminates, it avoided a substantive human rights review under the proportionality principle, forming a judgment pattern of 'acknowledge discrimination, effectively avoid it.' This ruling stemmed from judicial restraint and separation of powers considerations, leaving policy adjustment responsibilities to the administration and legislature. The article reveals how Hong Kong courts technically handle conflicts between historical privileges and human rights.

Keywords: Legitimate traditional rights and interests, Hong Kong court of final appeal, director of lands

1. Introduction

The New Territories Small House Policy, as a historical legacy within Hong Kong's land management system, has been highly distinctive and controversial since its implementation in 1972 [1]. This policy allows eligible male indigenous villagers of the New Territories to apply once in their lifetime to build a private house within their village without paying land premium. However, as Hong Kong's modern urbanization accelerates, land resources have become extremely scarce [2]. The Small House policy not only intensifies systemic pressures on spatial planning, but also—by being accessible exclusively to specific communities and genders—has sparked intense debate in contemporary society over unfair resource distribution, gender discrimination, and the entrenchment of privilege [3].

© 2026 The Authors. This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (https://creativecommons.org/licenses/by/4.0/).

DOI: 10.54254/2753-7064/2026.36272

In this context, the case of Kwok Cheuk Kin v Director of Lands, which lasted several years, has become a focal point. This case is the first final ruling by the Hong Kong Court of Final Appeal to comprehensively review the constitutionality of the entire small house policy, establishing a landmark precedent in clarifying the constitutional boundaries of traditional rights of New Territories indigenous people under the Basic Law. The core issue of the case centers on the conflict between Article 40 of the Basic Law of the Hong Kong Special Administrative Region, which states that "the lawful traditional rights and interests of the indigenous people of the 'New Territories' are protected by the Hong Kong Special Administrative Region," and Article 25, which stipulates that "all Hong Kong residents are equal before the law". The judicial review in the Kwok Cheuk Kin case is not merely a legal tug-of-war over the right of Ding right itself, but also a profound test of how "equality clauses" and "traditional rights clauses" coexist within Hong Kong's constitutional order.

This article aims to provide an in-depth analysis of the Court of Final Appeal's reasoning in the Kwok Cheuk Kin case. The court employed a historical interpretation approach to define the meaning of "tradition," and applied the principle that "special laws take precedence over common law" to give priority to Article 40 of the Basic Law over Article 25, which serves as a general equality provision. However, this sophisticated textual interpretation technique reveals a "recognition-avoidance" reasoning limitation—while the court devotes extensive effort to interpreting and affirming the overall legality of the Small House policy, it sidesteps substantive justice issues such as gender equality and land resource allocation by employing legal interpretive techniques that exclude meaningful human rights scrutiny [4]. Further analysis reveals that behind this ruling lies the Hong Kong judiciary's careful consideration based on the principle of separation of powers, as well as a judicial restraint rationale aimed at maintaining local "social stability". By critically examining this case, this article seeks to reveal the institutional compromises and functional boundaries that the judiciary makes when confronting complex, large-scale political issues intertwined with political consultation, historical sentiments, and modern rule of law.

2. Historical background, litigation process, and initial judicial assessment of the Ding House Policy

2.1. The historical background of the Ding House Policy and its three forms

To clarify the constitutional controversy in the Kwok Chak-kin case, one must analyze it in conjunction with the history of land governance in the New Territories. After the New Territories were leased to Britain in 1898, the colonial authorities originally intended to continue existing colonial policies but encountered strong resistance from the local indigenous inhabitants of the New Territories. In 1926, the colonial government established a Village Council composed of respected elderly local men to reduce conflicts with indigenous people [5]. After World War II, the population of the New Territories surged. The New Territories government introduced the small house policy with the aim of improving living conditions in the region. Policy stipulates that male indigenous residents of the New Territories aged 18 and above are eligible to apply once in their lifetime for the right to build a small house with up to three floors, each not exceeding 700 square feet, free of land premium. Policy implementation is divided into three models. The first is the free housing permit, allowing residents to apply to convert their own agricultural land into residential building sites, the most common form. The second is private agreements, enabling landless residents to acquire vacant government land at a nominal symbolic price. The third is land exchange arrangements, whereby

DOI: 10.54254/2753-7064/2026.36272

residents whose own land is restricted by planning or topographical constraints can swap it with suitable buildable plots within the village designated by the government.

2.2. Litigation process and shift in judgments

The Kwok Chak-kin case, after being reviewed by multiple levels of courts, has shown a clear shift in judicial reasoning. In 2019, the High Court's original division ruled that freehold land development permits are protected, but private agreements and land swaps are unconstitutional. In 2021, the Court of Appeal ruled that all three methods were constitutional. That same year, the Final Court upheld the conclusion of full constitutionality but adjusted the reasoning behind the interpretation.

2.3. The final determination by the court of final appeal

The final judgment determined that the small house policy contains inherent discrimination: allocating rights solely based on patrilineal male status and excluding women and non-New Territories indigenous people clearly conflicts with the equality clause under Article 25 of the Basic Law. However, since the small house policy falls under the "legitimate traditional rights" protected by Article 40 of the Basic Law, and Article 40, as a special provision, takes precedence over Article 25, which is a general provision. Therefore, although the court acknowledged the discriminatory nature of the policy, it ruled that the small house policy as a whole complies with the provisions of the Basic Law.

3. The court of final appeal's approach to interpreting "legitimate traditional rights"

3.1. Definition of "traditional"

To understand the Court of Final Appeal's interpretive approach to "tradition", it is necessary to first clarify the implications of the debate over tradition in the judgments of the High Court and the Court of Appeal, as well as how "tradition" is defined. If 1898 is taken as the cut-off point for defining "tradition", the Small House Policy is partially unconstitutional; if the cut-off point is set at the promulgation of the Basic Law in 1990, the entire Small House Policy is constitutional.

This study first examines the Court of First Instance proceedings in 2019. The Court of First Instance held that the "lawful traditional rights and interests" protected under Article 40 of the Basic Law must be traceable to legal rights or customary laws that existed prior to the British lease of the New Territories in 1898. Subsequently, in the Court of Appeal proceedings, the judgment was completely overturned. The Court of Appeal revised the 1898 cut-off criterion adopted by the Court of First Instance and instead took the New Territories land system that had taken shape when the Basic Law was promulgated in 1990 as the benchmark for defining "tradition". It further held that even if "traditional" rights are restricted to those enjoyed by indigenous inhabitants prior to 1898, all three grant forms issued under the Small House Policy meet this criterion.

Finally, at the Court of Final Appeal stage, the Hong Kong judiciary issued a final adjudication. The Court of Final Appeal upheld the Court of Appeal's conclusion that the Small House Policy is "fully constitutional", but revised part of the reasoning. The Court of Final Appeal held that fundamental changes to the political, social and economic systems occurred between 1898 and 1990, such that by 1990, the issue of continuity between the Qing Dynasty and the colonial regime no longer existed. The Basic Law was established to regulate the transfer of sovereignty between the

DOI: 10.54254/2753-7064/2026.36272

People's Republic of China and the colonial government, rather than the transfer of rights between the People's Republic of China and the Qing government. Accordingly, it ruled that the cut-off point for defining "tradition" should be set at 1990.

3.2. Definition of "lawful"

Similarly, the Court of Final Appeal's definition of "lawful" should also be considered in light of the rulings issued by the High Court and the Court of Appeal. From the context of the Basic Law's drafting, as reflected in the High Court judgment, it can be inferred that the legislators were aware of the gender restrictions on certain traditional rights in the New Territories and anticipated potential judicial challenges based on equality rights in the future. Thus, BL40 introduces the term "legal" precisely to protect these traditional rights from being deemed illegal on grounds such as discrimination. Meanwhile, he acknowledged the legal representative of the Rural Council's argument that "legal" in the current context merely describes the traditional rights enjoyed by indigenous residents of the New Territories, thus agreeing with the legal characterization as "descriptive." The Court of Appeal largely upheld the High Court's interpretation of the term "legal" in BL40, differing only in the determination of the relevant timeline. However, precisely because of this difference, the two courts reached divergent conclusions regarding the legality of the three forms of implementation of the policy.

The Court of Final Appeal upheld the appellate court's finding in its judgment that the policy should be protected under BL40. At the same time, it also addressed the applicant's lawyer's question regarding whether the term "legal" in BL40 is redundant. The court held that "legality" is neither purely descriptive nor redundant but rather defined it as "public law procedural compliance," which constrains the government's exercise of administrative discretion in accordance with the law. As long as the Lands Department handles male applicants' applications fairly, without corruption or bribery, free from subjective bias, and in accordance with the rational standards of administrative law, then the application process and its approval are considered "legal." Accordingly, the Court of Final Instance adjusted the scope of "legality" review through legal interpretation, narrowing it from a substantive assessment of equality values to a single standard of administrative procedural compliance.

3.3. Resolution of norm conflict

The court upheld the submissions of the Government and the Heung Yee Kuk based on the following four grounds. First, proceeding from the purpose of the Basic Law, the Court held that the law, anchored in the principle of continuity, is intended to "maintain the status quo". As a policy protecting the existing rights of specific crowd, Article 40 is consistent with the spirit of the Basic Law. Second, the Court resolved the apparent normative conflict between BL40 and BL25 in accordance with the common law principle that "Special laws take precedence over general laws". Citing the precedent of *Pretty v Solly*, the Court held that where a specific provision and a general provision coexist within the same statute, and the latter would, in the broadest sense, override the former, the specific provision must be given effect, and the general provision only applies to the remaining scope. Accordingly, Article 25, as an anti-discrimination provision, is characterized as a "general provision" guaranteeing universal equal rights in society, while Article 40 is a "special provision" specifically enacted for the special status of indigenous inhabitants in the New Territories. Therefore, BL40 shall take precedence over Article 25 in application. Third, from the perspective of legislative function, if the priority effect of Article 40 as a special norm is not

DOI: 10.54254/2753-7064/2026.36272

recognized, and the policy is forcibly constrained by general equality standards, the purpose of Article 40's special protection for traditional rights and interests will be difficult to achieve, and the legislative value of this provision will be substantially undermined. Fourth, when the drafters of Basic Law addressed the issue of small house rents in BL122, they implicitly acknowledged the continued existence of the Small House Policy, which constitutes evidence that the policy is protected by BL40. Based on above reasoning, the court, applying purposive interpretation and the principle of "Special laws take precedence over general laws", ruled that the entire Small House Policy is constitutional and dismissed application filed by the applicant.

4. "Recognition-avoidance" in normative conflicts: the limitations of judicial reasoning"

4.1. Legal analysis of the "acknowledgment-avoidance" pattern

In addressing the gender and class discrimination controversy arising from the constitutionality of the Small House Policy, the Court of Final Appeal of Hong Kong has demonstrated a distinctive judicial adjudication paradigm, which this paper terms the "Acknowledgement and Avoidance" model. The core characteristic of this model lies in that: the court frankly acknowledges the "inherent discriminative nature" of the policy on the factual level, but on the jurisprudential level, it resorts to exclusive statutory interpretation techniques and refuses to apply the proportional principle generally accepted in modern constitutional studies for substantive review, thereby successfully "avoiding" value judgment on the core human rights proposition technically.

The principle of proportionality is a core review instrument in public law. Courts can assess whether differentiated treatment measures have objective and reasonable legitimate justifications through the three-tier criteria of appropriateness, necessity and proportionality. Once the principle of proportionality is invoked, courts must conduct a substantive review to examine whether the means by which the policy restricts the rights of women and non-indigenous inhabitants serves a "legitimate objective", and whether there exists a "rational connection" between the means and the objective, as well as whether the measure entails the "least intrusion possible". However, the Court of Final Appeal avoided this issue through statutory interpretation techniques and merely addressed the conflict between legislative purpose and the application of law, refusing to deliberate on whether this "discriminatory feature" conforms to the principle of proportionality.

This " Acknowledgment-Avoidance " adjudicative logic has public law defects: in the field of New Territories land rights and interests, substantive human rights values such as gender equality can hardly be judicially protected through substantive constitutional review. Furthermore, it has pushed the judiciary into a dilemma when conducting substantive rationality review on century-crossing historical privileges. Although the court has formally completed the constitutionality declaration, it refuses to substantively discuss whether this policy conforms to modern human rights values.

4.2. Systematic evaluation

In summary, the reasoning of Hong Kong courts in the case concerning the constitutionality of the Small House policy exhibits a disjunction between substantive justice and formal logic. This interpretive approach is internally consistent within the framework of common law formalism. By invoking the principle that "special laws take precedence over general laws," it sidesteps substantive scrutiny of discriminatory provisions. However, in terms of upholding constitutional values, this reasoning suffers from systematic deficiencies. The Constitution is not merely a technical instrument

DOI: 10.54254/2753-7064/2026.36272

for allocating power; it should also serve as a declaration of values such as social equity, human dignity, and gender equality. The court has narrowly defined "legality" as the permissibility of discretionary authority exercised in public law within individual cases—meaning that as long as the Lands Department's approval process is fair, free from corruption and bias, it is deemed to meet constitutional requirements. This technocratic approach has had adverse effects on safeguarding substantive social justice.

After the court ruled that Article 40 takes precedence over the equality clause, disadvantaged groups are no longer able to challenge the gender discriminatory design of the "tin house" policy itself through constitutional litigation and can only seek administrative remedies for procedural flaws in individual case approvals. Although this ruling is logically consistent within the framework of common law, it sidesteps substantive justice review, creating tension between formal constitutional rules and core human rights values, thereby leaving unresolved value conflicts within the public law system.

5. Judicial restraint in judgments

5.1. Definition of judicial restraint and its application in this case

In public law and constitutional theory, "judicial restraint" is a theoretical perspective that explains how courts decide cases when faced with major social or political crises [6]. Judicial restraint refers to the principle that when exercising the power of judicial review, judges shall strictly respect the decision-making of legislative and executive organs and maintain modesty and restraint regarding their own power. Unless a legislative act or administrative act is clearly and unambiguously unconstitutional, judges shall not declare it void. When interpreting laws, judges shall, to the greatest extent possible, follow the original meaning of the text, legislative intent and precedents, and avoid replacing the will of elected institutions with personal value judgments. This tendency is particularly evident in disputes involving historical legacies, major economic interest realignments, and the foundations of social stability.

In the constitutionality review of the policy, the court appeared to conduct a purely jurisprudential deduction. However, upon a close examination of the rationale behind this judgment, the underlying deep-rooted logic of "judicial restraint" can be identified. Courts are not only confronted with the technical task of textual interpretation but also faced with the practical challenge of balancing the rule of law and politics in a transforming society. By adopting the appellate court's interpretation of "tradition" and limiting "legality" to procedural aspects, the final court proactively established a self-imposed boundary for judicial authority. The court deliberately refrained from conducting an in-depth review of the substantive fairness of the policy, thereby avoiding judicial rulings that could exacerbate class tensions between New Territories' indigenous residents and other citizens, and thus prevent widespread social governance conflicts [7].

5.2. Non-judicial justifiability of the Small House Policy

Judicial restraint is manifested in this case as the Court identified the "non-justiciability" inherent in the squatter policy [8]. The so-called non-justiciability refers to the fact that certain social public issues are essentially unsuitable for resolution by courts through clear-cut judicial decisions, as they involve excessive "pluralistic and multilateral interests" that cannot be addressed through judicial techniques.

DOI: 10.54254/2753-7064/2026.36272

The policy introduced in 1972 is not merely a controversy over the application of legal provisions and human rights norms but is intertwined with multiple complex issues including historical commitments, land interests, and local politics. Longitudinally, it embodies the constitutional commitment made during the Sino-British negotiation period to ensure the smooth transition of Hong Kong; horizontally, it is intertwined with the huge distribution of land and economic interests among indigenous New Territories residents, local political forces, real estate developers, the government, and the vast majority of citizens without housing [9].

Should the court directly rule that the entire policy is unconstitutional, the legal validity of tens of thousands of existing and pending small house applications would be thrown into doubt, disrupting the long-standing stable land development order in the New Territories. This would not only place tens of thousands of approved and pending small house rights applications in a state of legal uncertainty, but also directly intensify the fierce confrontation between the Heung Yee Kuk camp and the Hong Kong Special Administrative Region (HKSAR) Government, triggering catastrophic and unbearable turbulence in the political, economic and social governance of the HKSAR. Therefore, when addressing this social issue involving the interests of multiple stakeholders, the Court's choice to rationalize the policy through the method of historical interpretation is essentially a rational compromise that accounts for the complex historical reality of the New Territories [10].

5.3. Separation of powers from the functionalist perspective

From a functionalist perspective, the value of the separation of powers lies not in the mechanical opposition and checks among different branches, but in each branch optimizing governance effectiveness according to its institutional competence. Faced with the structural social contradiction between the discriminatory nature of the policy and Hong Kong's extremely scarce land resources, the court clearly recognizes that the judiciary lacks public mandate and administrative resources to address this distributive justice issue. Matters such as alleviating land shortages or revising or abolishing the tin house policy fall within the realm of macro-level policy discretion and should be led by the executive and legislative branches, which possess the functions of comprehensive planning, resource allocation, and public opinion integration [11].

Accordingly, the Court of Final Appeal transformed a major constitutional issue concerning whether the said system should exist into a micro-level administrative law question regarding the compliance of case-specific approval through the technique of statutory interpretation. First, it ruled that the overall framework of the policy is constitutional, thereby avoiding political conflict in the New Territories. Subsequently, the Court retained legitimate supervisory power in the form of "legitimate expectation, anti-corruption review and bias review" under administrative law and handed over the issues of how to restrict individual Small House Rights and how to adjust the pace of future approvals back to the Lands Department and the government.

Thus, the court refrained from making a judicial determination on the substantive rationality of the Ting House policy, leaving room for institutional optimization and reform adjustments to the executive and legislative branches. This is an inevitable choice—given the nature of the Ting House policy as a "super complex issue" involving history, land, constitutional commitments, and substantial economic interests, which has been in place for over fifty years, the judiciary, due to its inherent limitations, cannot serve as an effective means of resolution [12].

DOI: 10.54254/2753-7064/2026.36272

6. Conclusion

In conclusion, the final judgment rendered by the Court of Final Appeal of Hong Kong in the case of Kwok Cheuk Kin v. Director of Lands constitutes a landmark precedent after the reunification of Hong Kong. On its face, this case is a legal contention over whether the land privileges of male indigenous inhabitants in the New Territories violate the principle of equal rights; in essence, it represents a profound confrontation between historical traditions and contemporary human rights values within the constitutional order. In addressing the substantive value conflict between the traditional rights and interests provision under BL40 and the equal rights provision under BL25, the Court of Final Appeal did not apply the proportionality principle to conduct substantive equality review. Instead, it resolved the conflict in the application of legal provisions by applying the common law principle of "Special law prevails over general law". By establishing BL40 as a specific provision that restricts the equal rights clause, the Court has legally upheld the privileges of indigenous inhabitants, and completed the constitutional validity argumentation for the three implementation forms of the policy in terms of formal logic.

However, this trial, which was formally legally compliant, inevitably fell into a division between formal justice and substantive justice. The court adopted a passive adjudicative approach of "recognition-evasion": while frankly acknowledging that the policy constitutes systemic gender and class discrimination, it employed technical statutory interpretation methods to redefine the term "lawful" from substantial constitutionality down to case-specific procedural review in the administrative context, thereby resulting in the closure of remedies for human rights issues at the judicial level.

The underlying motivation for this adjudicative choice, which sacrifices substantive justice in exchange for formal logical consistency, is not the absence of judicial capacity, but the ultimate embodiment of judicial restraint and political prudence under functionalism. Faced with this "non-justiciable" super multilateral issue, which involves the intertwined historical land rights of the New Territories and enormous contemporary economic interests, the Court of Final Appeal recognized the institutional capacity limitations of judicial power itself. A blanket declaration of unconstitutionality can certainly embody the moral high ground of modern human rights law, but it would easily trigger drastic social upheaval. Therefore, the court chose to adopt a moderate historicist approach to statutory interpretation, leaving the determination of policy direction to the executive and legislative branches, which hold the corresponding resources and popular mandates.

References

[1] Goo, S. H. (2014). The small house policy and tso and tong land. In H. Fu & J. Gillespie (Eds.), *Resolving Land Disputes in East Asia: Exploring the Limits of Law* (pp. 374–391). Cambridge University Press.

[2] Goo, S. H., & Lee, H. (2020). Lawful traditional right and sustainability: An unbalanced interest in the customary Ding right in Hong Kong? *Hong Kong Law Journal, 50*, 961.

[3] Liu, K. T., & Lai, L. W. C. (2026). The small house. In *Principles of Land Administration at Work: The Hong Kong Practice* (pp. 173–180). Singapore: Springer Nature Singapore.

[4] Lu, S. Y. (2026). Women's rights under the small house policy in Hong Kong. *Gender & History, 38*(1), 370–389.

[5] Dupré, J. F. (2023). Urban development and land controversies in rural Hong Kong: An indigenous rights perspective. In *Rights and Urban Controversies in Hong Kong: From the Eastern and Western Perspectives* (pp. 49–67). Singapore: Springer Nature Singapore.

[6] Thayer, J. B. (2017). The origin and scope of the American doctrine of constitutional law. In *Bills of Rights* (pp. 293–320). Routledge.

[7] Chan, J. (2023). Responsive judicial review without democracy: The Hong Kong experience. *Hong Kong Law Journal, 53*(2), 507–538.

DOI: 10.54254/2753-7064/2026.36272

[8] Fuller, L. L., & Winston, K. I. (1978). The forms and limits of adjudication. *Harvard Law Review, 92*(2), 353–409.
[9] King, J. (2008). The pervasiveness of polycentricity. *Public Law*, 101–124.
[10] Coxon, B. (2022). Beyond the basic law: Interpretive principles protective of fundamental rights in Hong Kong. *Cardozo International & Comparative Law Review, 51*(4), 248–267.
[11] Lao, M. M. (2013). Small house policy II: An update. *Civic Exchange*.
[12] Hyatt, C. J. (2020). Hong Kong small house policy: Modernity, crisis, morality & policies for repair. *Cardozo International & Comparative Law Review, 4*, 763.