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Analysis of Gender Issues in Hong Kong's Small House Policy-Focusing on the Kwok Case

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Abstract. In 1972, Hong Kong New Territories Small House Policy as an important land policy, implemented for to date its gender discrimination issues being highly controversial. This article takes the case of Guo Zhangjian v. Director of Lands, which was tried by the Hong Kong Court of Final Appeal, as the starting point to elaborate on its constitutional judgment. Based on textual, this article finds that the employed various to circumvent substantive review of gender discrimination. First, change traditional time so that traditions can be realized; Secondly, using of legal circumvent the scrutiny of women's rights; Finally, this study cites China's reservations to the Convention on the Elimination of All Forms of Women and, based on this, combines survey data to draw the following conclusions. The Hong Kong legal system reflects a systemic neglect of women's rights when addressing "traditional" issues. To resolve the gender discrimination controversy over the Small House Policy, at the judicial level, it is necessary to unify the standards for "traditional rights and interests" and establish a substantive review mechanism to break the unilateral monopoly interpretive power.

Keywords: Gender issues, Small House Policy, Kwok Case

1. Introduction

The Small House Policy in Hong Kong was implemented in February 1972 to Take effective measures to address the long-standing housing problem in the New Territories and effectively optimize the living conditions of local indigenous people [1]. The policy allows male indigenous residents aged 18 or above to build houses of no more than three floors (with each floor not exceeding 700 square feet) within their designated villages. The Small House Policy was introduced in 1972, stipulating males are eligible to apply for building small houses. This eligibility restriction has been a focal point in gender equality discussions since its implementation. The small house policy stipulates that only male indigenous residents who are over 18 years old can apply for the qualification to build houses, it implies infringement on women's rights and has therefore been criticized for gender discrimination. The Committee on the Elimination of Discrimination against Women clearly stated in its concluding observations that the Hong Kong government must amend the unequal provisions in the Small House Policy and promptly abolish the relevant discriminatory regulations [2]. The academic community conducts research on the gender discrimination aspect of this policy, it is pointed out that the small house policy constitutes institutional discrimination

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against women at the legal level. The key is how to reconcile policies that implement discriminatory practices in the name of tradition with gender equality. IIn 2021, the final court confirmed in the Kwok Cheung Kin v Director of Lands case that the small house policy is fully constitutional. After sorting out the three-level judgment documents, Lu Shengyan proposed that the entire set of judgments spent a lot of space defining the traditional rights enjoyed by the indigenous inhabitants of the New Territories but did not conduct substantive value balancing for gender discrimination in male exclusive clauses [3]. The judgment did not directly address gender discrimination, the use of special clauses over general clauses proves that the small house policy is fully constitutional. This study will focus on textual analysis, based on the Kwok, discuss the reasons why courts use recusal strategies in their judgments, namely by narrating traditions to avoid scrutiny of gender discrimination. Lu Shengyan's research only sorted out the court's avoidance of substantive examination judgments, but it lacks systematic of the multi-layered jurisprudential and institutional motivations behind the court's adoption of this adjudicatory approach [3, 4]. This study will analyze the court's references to the temporal "tradition," hierarchy of legal provisions, and the invocation of CEDAW reservations in the judgment and how the judicial system uses interpretive strategies to avoid substantive review of gender discrimination. This article supplements the existing discussions and analyzes the underlying causes of the final court's avoidance of gender review based on the description of the phenomenon. This study reveals the fundamental issues reflected in the court's interpretation strategies and provides reference directions for future scholars researching similar cases [5-7].

2. Traditional definition of law

March 1898 forced the Qing government to sign the "Convention for the Hong Kong Territory" under the pretext of defense, the New Territories were leased to the British Empire for 99 years under a July 1898. In stages of administration, the colonial government intended to directly apply the existing colonial, investigators entered the New Territories to research, during which they encountered strong opposition from local villagers, to facilitate smooth governance, the colonial government decided to adopt a policy of preserving most of the land use customs in the New Territories and ruled the residents through influential male elders and patriarchs in the New Territories to achieve the purpose of indirect rule. The then Governor of Hong Kong, Sir Murray Mac Lehose, issued a statement promising to respect the inherent way of life and land customs in the New Territories, colonial officials only interviewed male gentry to collect traditional evidence, while women's land-related claims were excluded from the records. According to Article 13 of the Ordinance enacted in 1910, courts shall apply Chinese customary law when handling land disputes in the New Territories, but during the British's investigation and research into traditions, they mostly consulted elderly men of higher social status in the New Territories, neglecting women's rights [8]. This has resulted in the examination of historical traditions, researchers obtained information only from the paternal while neglecting the situation of women. Hong Kong Development Bureau's 2024 Legislative Council Reply: Clear Response, the Small House Policy was implemented in 1972. According to policy, male indigenous villagers aged 18 or above rilineal ancestors were residents of recognized villages in the New Territories of Hong Kong in8 are entitled to apply once in their lifetime to the authorities to build a for their own residence on a suitable site within their own village. The male inheritance rule for small houses perpetuates the colonial-era patrilineal land system, creating statutory-level differential treatment, institutional gender discrimination. In the Kwok case court did not conduct a substantive review of gender discrimination, only avoiding the examination of gender equality based on temporal reference points. In the Kwok case, the Court of

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Final Appeal determined that the reference point for "traditional" was the year 1990, the Small House Policy was introduced in 1972 by the in collaboration with the Heung Yee K safeguard the rights and interests of New Territories residents, with the aim of improving their living conditions, while the Basic Law was promulgated in 1990. From this, it can that before the lease of Territories in 1898, there was no complete small house approval system in place as a tradition, but was actually an administrative policy specifically created by the British Hong Kong government in response to the demands of the Heung Yee Kuk. From this, it can be seen that the final court's choice of 1990 as the traditional time point can classify the small house policy as a traditional category. In the judgment, the final court determined that Ding Quan belongs to the legitimate traditional rights and interests protected by Article 40 of the Basic Law, the court accordingly determined that Article 40 constitutes a special regulation applicable to the New Territories, following the principle that special laws prevail over general laws, and thus refrained from conducting a substantive proportionality assessment regarding gender-based policy distinctions. In the High Court ruling, the court recognized that traditions should be traced back to before 1898 Free building licenses issued before 1898 were also retroactively deemed constitutional, but private agreements and land exchange arrangements were ruled unconstitutional due to their non-retroactive nature. The Court of Final Appeal overturned the High Court's ruling, stating need not necessarily date back to before 1898,According to the at of the promulgation of the Basic Law in , Article 40 require that the protected rights and interests be "retroactive" to before the commencement of the New Territories Lease in 1898.

3. Strategic avoidance behavior of courts as seen from the Kwok case

The High Court's that traditional recognition must be traceable, meaning only customs existing before could be included in the traditional category. Based on this criterion, the court found that certain provisions of the Small House Policy were unconstitutional. Unlike the High Court, the Court of Final Appeal set the traditionally recognized time point at 199 Based on this criterion, the court ultimately ruled that the Small House Policy as a whole does a violation of. This led to the Policy introduced in 1972 as a traditional practice, allowing it to be recognized as a protected and lawful traditional right. Scholars such as Lu Shengyan criticized the interpretation logic of the Court of Final Appeal, which packaged the artificially created administrative policy in 1972 as a historical tradition, belonging to the "constructed tradition" [3]. The Small House Policy was jointly discussed by the colonial government and the Rural Council in 1972, The court chose as the reference point, deliberately avoiding inquiries into the historical origins of the Small House Policy, it also paves the way for avoiding gender equality review in the future. After confirming the Small House Policy as a "traditional" practice, the court faced dilemma: on one Article 40 of Law requires the protection of traditional rights; on the other hand, article points the need to ensure gender equality. When the two conflict, how should the court weigh them? The second recusal strategy adopted by the Court of Final Appeal is to no longer conduct substantive balancing considerations of various rights, but rather to shift to using the hierarchical ranking of legal provisions as a technical basis for judgment. The court's reasoning is as follows: Given that Article 40 a "special provision" safeguarding the traditional rights and interests of indigenous inhabitants in the New Territories, its effect precedence over Article 25, which serves as a "general provision," in matters concerning indigenous land affairs. Zhang Xiaoshan pointed out in his analysis that the court's determination that Ding Quan belongs to the "legitimate traditional rights and interests" protected by Article 40 logically circumvents gender equality review [9]. The crux of this argument lies in the court's failure to conduct a substantive value balancing between traditional rights and women's equal rights, the principle of special law

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being superior to general law and the avoidance of proportional review. The actual harm caused by the small house policy to female indigenous residents has not been specifically measured by the court, and did not examine whether there were alternative measures that could protect tradition without discriminating against women. As pointed out by Lu Shengyan, the court neither actively addressed the issue of discrimination against women in the Small House Policy nor weighed the conflict between tradition and gender equality [3]. The court has not actively addressed or substantially balanced the issue of discrimination against women involved in the small house policy, as well as the tension between traditional rights and gender equality. In the third round of recusal strategy, the Court of Final Appeal utilized the reservations made by China and the United Kingdom to the Convention on the Elimination of All Forms of Discrimination against Women to construct a legitimate basis for the constitutionality of the Small House Policy at the international legal level. The court noted in its judgment that when the UK extended CED Hong Kong, and when China extended the Convention to Hong Kong in 1996, it made reservations to Article 14 [10]. These reservations exempt the Small House Policy from direct constraints on women's land rights. The court believes that the constitutionality of the small house policy has also been supported at the international legal level. This strategy has led to the court not only finding a basis for Ding's rights at the domestic legal level (Article 40 of the Basic Law), but also providing "legitimacy protection" for it at the international legal level. The Hong Kong government also followed this logic when responding to the AW Committee's criticism in 2023: " reservation to Article 14 of AW allows the Hong Kong Special Administrative Region to continue implementing the Small House Policy in the New Territories." The court cited the CEDAW reservation clause as the basis for decision, attempting to prove the legality of the Small House Policy from the perspective of international law violating the basic principles and regulations, this reservation does not have an effect beyond the local constitutional provisions. The most noteworthy phenomenon in the Kwok case judgment is that the court repeatedly emphasized the "legislative intent" of Article 40 of the Basic Law. The court pointed out that at the time of drafting the Basic Law in 1990, the Policy had already been in existence for nearly 20, The drafters were fully aware that the policy was "in discriminatory in nature," yet they still chose to include it under the protection of Article 40.Based on this, the court held that Article 40 itself constitutes a "constitutional affirmation" of the Small House Policy by its drafters, at its core, the abolition of the Small House Policy is a legislative issue, not a judicial one. The statement of the appellate court is more clear. The appellate court proposed that if the judiciary completely denies the traditional arrangements in the New Territories protected by Article 40, deviating from the legislative intent of this provision, but this wording does not represent a prohibition against legal challenges targeting systemic optimization. Article 40 aims to Small House Policy, and the no authority to substitute the legislature in making policy judgments. This method of argumentation is referred to as "judicial in constitutional law, where courts voluntarily narrow the scope of their review, the problem with handing over politically sensitive disputes to the legislative body is that the legislative body has also failed to take action. In 2014, when the Legislative Council discussed amendments to the Sex Discrimination Ordinance, the government clearly stated that the Small House Policy was not within the scope of review. The Development Bureau's reply in 2025 still stated that " currently has no plans to review the relevant policy". The court upheld judicial restraint by leaving the responsibility for system to the legislative and executive branches, but the government has not initiated the revision of gender rules for small houses for years, leaving the controversy in a prolonged state of neglect.

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4. Issues legal theory regarding courts' recusal strategies

The interpretation of the Constitution requires courts to objectively ascertain the original intent of the legislators as much as possible. But in the Kwok case, the court's approach was not like this. The High Court set 1898 as the reference point, clarifying that only customs predating colonial rule could be, thereby ruling that the Small House Policy was partially unconstitutional. The Court of Final Appeal used 1990 as the temporal benchmark in its judgment and did not insist on applying the 1898 standard retroactively, resulting in an overall constitutional rule. Regarding the same one bedroom policy, the original court and the final court only adjusted the "traditional" time judgment criteria and reached opposite constitutional conclusions on private agreements and land exchange rules. This illustrates that "tradition" does not factually exist in the court, but is "chosen" by the court. The court first decided to rule it constitutional, then selected a reference point that could classify the Small House Policy as a "tradition". The selection method of this time benchmark reflects the referee's value-first inclination, deviating from the neutral and objective norms of constitutional text interpretation. One of the most important responsibilities of the Constitutional Court is to determine which constitutional value takes precedence and reconcile conflicts between laws when different constitutional values come into conflict. In the Kwok case, Article 40 states the need to protect tradition, while Article 25 states the need to ensure equality. These two collided. The question the court should answer is: When tradition and equality cannot be reconciled, which one should be prioritized for protection? The judgment merely's equal rights in passing without quantifying the extent of rights infringement caused by restricting women's application rights in the name of preserving tradition. It employs a technical rule that "special provisions take precedence over general provisions," where special over general laws. However, this is merely rule for the application of legal provisions and cannot replace the substantive balancing of public and private legal interests required by the principle of proportionality. The CEDAW Committee of the United Nations has been criticizing the gender discrimination in the Small House Policy since 1995, and 2006 explicitly that Hong Kong "abolish provisions". Over the past thirty years, UN human rights agencies have repeatedly pointed out that the core rules for male exclusive application policies have not been fundamentally revised. In the 2021 Kwok case, the court could have been an opportunity for change, ruling that policies were unconstitutional or requiring the government to review them within a specified period of time, but ultimately chose to recuse itself. From indirect rule colonial period to the patrilineal of the Policy in 1972. By 2014, the "Sex Discrimination Ordinance" listed the small house policy as an "exception", and by 2021, the court recused itself from the Kwok case. The phenomenon is not due to judicial authorities lacking review capabilities, but rather stems from courts proactively limiting the scope of substantive review based on judicial restraint and multiple jurisprudential considerations.

5. An exploration on improving the resolution path of gender discrimination disputes in Small House Policy

Establishing a balance mechanism. In the Kwok case, the High Court set 1898 as the traditionally recognized and, based on this standard, ruled that certain aspects of the Small House Policy were inconsistent with constitutional provisions; The final court used 1990 as a reference point and ultimately ruled that the policy was constitutional as a whole. This shows that the court lacks a unified standard for defining tradition and should abandon the traditional definition method of "conclusion first" and unify the standard for identifying "traditional rights and interests". Judicial authorities should not arbitrarily switch between the dual temporal of 18981990 in subsequent

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similar cases, but rather judgment criteria. At the legislative level, the rules for Small House Policy eligibility were revised. The root cause of gender discrimination in the small house policy is that only male indigenous residents have the right to build houses, and this "patrilineal" standard excludes female indigenous residents, resulting in systemic gender discrimination. The application criteria for small house policy should be revised to abolish the patrilineal restriction that only allows male indigenous villagers to apply for Ding rights. Establishing a balanced mechanism tradition and equality. Establishing a specialized platform for negotiating the rights and interests of indigenous residents in the New Territories. Absorbing rural representatives, female representatives from the New Territories, civil affairs, and legal professionals to jointly participate in policy adjustment discussions. Changing the single channel of defining "tradition" solely based on male elders of the clan, incorporate the demands of the female group into the entire policy revision process, and correct the historical defect of the single male discourse power left over from the colonial period.

6. Conclusion

This study focuses on the case of Kwok, which was adjudicated by the Hong Kong Court of Final Appeal, and through textual analysis, systematically examines the court's interpretation strategy of avoiding gender equality review in the constitutional judgment of the small house policy. Research finds that courts have achieved avoidance discrimination issues manipulation. Firstly, the time reference point for "tradition" was locked in at the time of the promulgation of the Basic Law in 1990, allowing the small house policy that only emerged in 1972 to be recognized as "tradition". Secondly, the recognition of Article 40 of the Basic Law as a "special provision" takes precedence over Article 25 on equal rights, replacing the substantive value balance between tradition and equality with technical rules based on the hierarchy of articles. Thirdly, citing China's reservation to CEDAW as an legal argument provides "legal shelter" at the international law level for the constitutionality of male indigenous inheritance rights. The article further points out that the court's avoidance strategy exhibits a "conclusion-oriented" characteristic in constitutional interpretation the systematic neglect of women's rights within Hong Kong's legal system when addressing "traditional" issues. By revealing the three interpretive strategies of the court and their jurisprudential issues, this article fills the gap in existing research that describes phenomena but fails to explain the reasons. This study has the. First, the research primarily focuses on the Kwok case does not systematically compare other Hong Kong judgments involving Article 40 or gender discrimination, the overall pattern of the court's handling of similar cases is not fully grasped. Relationship colonial land system and the customary law of the New Territories primarily rely on secondary literature, without consulting primary historical sources such as colonial archives, thus limiting the depth of historical argumentation. The analysis of international law concerning CEDAW reservations is relatively simplistic, failing to delve into the hierarchical effectiveness of international human rights law norms within the legal system of the Hong Kong Special Administrative Region and their interaction with the Basic Law. Future research could delve into the following directions: First, with reference to common law jurisdictions such as Canada and Australia, examine the judicial approaches taken by their authorities in reconciling conflicts between indigenous and gender equality, providing Hong Kong with comparative legal references. Second, combining feminist legal theory, further analyze how "traditional" discourse is instrumentalized in judicial argumentation. Third, sorting out the legislative process of small house policy reform and explore the systemic reasons for the legislative body's prolonged delay, and provide more operational solutions for policy reform.

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