The Invention of Tradition: Same-Sex Marriage and Its Discontents in Hong Kong

Abstract
This article interrogates the premise that the protection of traditional marriage constitutes a reason against the recognition or implementation of same-sex marriage in the context of Hong Kong. Through a critical examination of the legal and political discourses on marriage equality in the territory, it demonstrates that those who argue against same-sex unions in the name of ‘traditional marriage’ participate in what the historian Eric Hobsbawm calls an ‘invention of tradition’, whereby a fantasmatic past is conjured up as a way of resisting the forces of social, cultural, and legal change. By analyzing government documents on Chinese law and marriage from Hong Kong’s colonial era, this article explores the complex and varied set of marriage regimes that once existed in the territory, and that the rhetoric of traditional marriage represses. It further shows how Hong Kong’s unique marriage history can shed light on the debate about marriage equality in our own time.

Key words
Same-sex marriage, Gay rights, QT, Leung Chun Kwong, Marriage History, Invention of Tradition, Hong Kong

Author biography
Marco Wan is Associate Professor of Law at the University of Hong Kong, where he is also a Director of the Law and Literary Studies Programme. His research is on the intersections of law and the humanities, with a particular focus on how the interpretative humanities can shed light on the legal regulation of gender and sexuality. He is the author of Masculinity and the Trials of Modern Fiction (Routledge, 2017), which was awarded the Penny Pether Prize by the Law, Literature and the Humanities Association of Australasia as well as the HKU Research Output Prize. He obtained his law degree and PhD from the University of Cambridge, his LLM from Harvard Law School, and his BA from Yale University. He is Managing Editor of Law & Literature.
The Invention of Tradition: Same-sex Marriage and Its Discontents in Hong Kong

Marco Wan, Faculty of Law, University of Hong Kong

Since Hong Kong’s retrocession from Britain to China in 1997, gay and lesbian rights in the territory have progressed in a steady, though not linear, manner. This development has culminated in the Court of Final Appeal’s recent decision in QT v. Director of Immigration.¹ In that case, two women, QT and SS, entered into a civil partnership in the United Kingdom. SS subsequently relocated to Hong Kong for work, and QT moved with her. However, since Hong Kong did not recognize any form of same-sex union, the Immigration Department did not consider QT as the spouse of SS, which meant that QT was ineligible for the ‘dependant visa’ normally granted to spouses of people relocating to Hong Kong for work. As a result, QT could only enter the territory as a visitor. Without a dependant visa, QT could not, amongst other things, work, study, or open a bank account in Hong Kong. She argued that the authorities’ refusal to recognize the same-sex union – the basis for the denial of the dependant visa – amounted to sexual-orientation discrimination. The court ruled in her favor.

Moving in tandem with QT is another closely-watched case, Leung Chun Kwong v. Director of Immigration.² In that case, a gay civil servant challenged the government’s refusal to recognize his same-sex marriage, legally entered into in New Zealand, for the purposes of local spousal benefits and joint tax assessment. The Leung case is currently on appeal to the highest court. Both QT and Leung have been extensively covered by the Hong Kong and the international press, and a number of cases relating to same-sex marriage have arisen in their wake. These include the case of Nick Infinger, a Hong Kong permanent resident who married his boyfriend in Canada and who has been denied public housing in Hong Kong on the basis of a government policy that only recognizes the eligibility of opposite-sex married couples for

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¹ QT v. Director of Immigration [2018] CFA 28
² Leung Chun Kwong v. Secretary for the Civil Service and Another [2018] HKCA 318

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certain categories of public housing rental; the case of a woman known as MK, who is arguing for the introduction of civil partnership in the territory; and a case brought by a university student and a gay activist, whose names are as yet undisclosed, that challenges local laws restricting marriage to opposite-sex couples.

These cases signal that marriage equality is a question whose time has come in Hong Kong, and there is currently an ongoing, and impassioned, debate in law and politics about the meaning of marriage and scope of gay and lesbian rights. Perhaps unsurprisingly, opponents of same-sex marriage have insisted on the need to protect ‘traditional marriage’. They argue that marriage in the territory is based on longstanding Chinese traditions, and maintain that any legalization of same-sex marriage in other jurisdictions is irrelevant to the local situation because changes there occurred under different cultural conditions. The rhetoric of ‘traditional marriage’ has entered into the discourse not only of politicians, activists, and policy makers, but also that of the judges, barristers, and jurists.

In light of the recent and upcoming cases, it is necessary not only to take stock of the rapidly evolving landscape of gay and lesbian rights in Hong Kong, but to analyze the possible future trajectories of same-sex marriage in the territory, and to scrutinize the terms with which the debate is conducted. In this article, I will examine the work done by the rhetoric of ‘traditional marriage’ in the context of the law and politics of same-sex marriage in Hong Kong. I will proceed on the basis that marriage, whether heterosexual or homosexual, is a desirable institution, a basis by no means shared by all queer critics. The reliance on history and tradition as a way of resisting marriage equality is of course not unique to Hong Kong. For instance, decades before the U.S. Supreme Court legalized same-sex marriage in Obergefell v. Hodges, the Minnesota Supreme Court held in Baker v. Nelson that a state law limiting the right

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to marry to opposite-sex couples was constitutional because the idea of marriage as a union of one man and one woman was ‘as old as the Book of Genesis’. In a similar vein, the court in *Shields v. Madigan* held that same-sex couples could be denied marriage licenses given that marriage ‘as a union of man and woman’ constituted a ‘historic institution’ that ‘uniquely foster[ed] procreation’. However, I will posit that this rhetoric is particularly problematic in the Hong Kong context given the territory’s unique marriage history, and I will return to the historical documents on marriage reform from the time of the British colonial administration to make my case. More specifically, I will argue that the supposedly longstanding history that opponents of same-sex marriage claim undergirds the concept and system of marriage in the territory today constitutes what the historian Eric Hobsbawm calls an ‘invention of tradition’, whereby a fantasmatc past is conjured up as a way of resisting the forces of social, cultural, and legal change.

My argument is divided into four parts. In Part I, I will chart the changing legal environment affecting gays and lesbians in the city from the Handover to the present day. I will then focus on the rhetoric of ‘traditional marriage’ as it has manifested itself in the marriage equality debate in Hong Kong in Part II. I will show that claims about the obvious rootedness of traditional Chinese marriage in the territory are problematic because the current marriage regime was in fact not established until the early 1970s, and that the insistent iterations of such claims mask a much more complex and varied set of marital traditions that existed for most of Hong Kong’s history. In Part III, I seek to recover the local traditions that have been sidelined, neglected, and ultimately repressed by the rhetoric of ‘traditional marriage’. I will explore the multiple forms of

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7 *Baker v. Nelson* 191 N.W.2d 185 (1971)
marriage that for a long time co-existed largely peacefully with the current version of marriage, including marriage under the Chinese Civil Code of 1930; Chinese customary marriage; concubinage, and *kim t’iu* marriage. I will also examine the factors leading to the disappearance of these alternative traditions, as well as the conditions for the implementation of the existing marriage system in the territory in the second half of the twentieth century. In Part IV, I will consider the relevance of this history for the issue of same-sex marriage in Hong Kong in our own time, and posit that Hong Kong’s marriage history provides an important basis for thinking about marriage equality in the territory in the twenty-first century.¹¹

1. **The Past and Present of Gay and Lesbian Rights**

Since the Handover, the most persistent feature of the landscape of gay and lesbian rights in Hong Kong has been the government’s staunch refusal to introduce a law proscribing sexual-orientation discrimination. The authorities are insistent that such a law would only be considered when there was sufficient public support for the protection of gay and lesbian rights. In 2005, it declined to introduce a bill in the legislature because without ‘community support’, its efforts would not only ‘fail in the end’ but also ‘hurt the government’ and ‘result in a loss of resources’.¹² Three years later, the government repeated its stance that there were no plans to introduce antidiscrimination law due to the ‘divergent views of the community’ on the issue.¹³ As the city moved into the next decade, it continued to observe that the time was not yet ‘ripe’ for new laws as they would ‘only lead to arguments, divisions and conflicts’.¹⁴ To date, plans to introduce a bill to proscribe discrimination on the basis of sexual orientation are still nowhere in sight.

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¹¹ A shorter, preliminary version of the argument focusing exclusively on the judgment in the *Leung* case can be found in ‘Sexual Orientation and the Historiography of Marriage in Leung Chun Kwong v. Secretary for the Civil Service and Another’, 48(2) *Hong Kong Law Journal* (2018), 605-623. The current article examines the debate about both gay rights and same-sex marriage in Hong Kong more broadly, and presents a substantially deeper engagement with the primary historical material.


Such inaction has had a number of consequences. First, it has encouraged local anti-gay rights group to become more vocal. Since the authorities have made clear that a high level of public support was required before it would act, such groups have sought to strategically amplify the level of dissensus in society. When the Equal Opportunities Commission suggested to the legislature that a clear consensus on the need for antidiscrimination legislation already existed, a coalition of conservative parental groups staged a high-profile announcement that they would storm the Commission’s office in protest. More recently, similar groups have placed pressure on local public libraries to remove children’s books with purportedly gay and lesbian themes on the grounds that they were promoting immoral and unconventional lifestyles. The libraries have since taken the books off the open shelves and placed them in the restricted section. At the same time, conservative religious organizations have carefully calibrated their opposition to equality by reproducing the government’s vocabulary of majority support. For instance, the head of the Christian Council has underscored the need not to ‘further divide people’ and ‘intensify confrontations’ as a reason for its stance against gay and lesbian rights. These efforts have so far been successful in stalling new laws proscribing discrimination.

The second consequence of government inaction is that it has encouraged gays and lesbians to turn to the courts for redress; the inertia of the executive branch meant that they have had to rely on the judicial branch for protection. Within a short span of around a decade, there emerged a robust body of judge-made law on sexual-orientation discrimination, of which QT forms a part. These cases revolved around the right to equality under Article 25 of the Basic Law, or the city’s mini-constitution, and Article 22 of the Bill of Rights. The earliest case is Leung TC William Roy v. Secretary for Justice. In that case, a twenty-year old homosexual man

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15 Cannix Yau, ‘Family Concern Groups to Protest After Hong Kong’s Equalities Chief Claims Consensus on Law to Protect Sexual Minorities’, South China Morning Post, 28 June 2016.
challenged a criminal provision which prohibited consensual male buggery under the age of 21. He argued that the provision was discriminatory as the age of consent for heterosexual intercourse was set at the lower age of 16. The court held that, given that buggery was the only form of intercourse available to homosexuals, the discrepancy between the ages of consent for homosexual and heterosexual intercourse effected by the provision constituted unlawful discrimination. This was the first post-Handover case in which the court declared that laws discriminating on the basis of sexual orientation were unconstitutional. It also constituted the first case in which the Hong Kong courts explicitly applied the proportionality test in the context of discrimination on the basis of sexual orientation. The decision stood out against the backdrop of the government’s inaction, and its groundbreaking nature is reflected in the South China Morning Post’s observation at the time that the struggle for gay rights in Hong Kong remained an ‘uphill battle’ despite the legal victory. This case was soon followed by Secretary for Justice v. Yau Yuk Lung Zigo and Another. The defendants in that case were homosexual men who were caught in flagrante delicto in a car parked beside a public road. They were prosecuted under a criminal provision which proscribed homosexual buggery otherwise than in private. The defendants argued that the provision was discriminatory in that it only targeted homosexual buggery, and there was no comparable law targeting heterosexual intercourse in public. The Court of Final Appeal found in favor of the defendants. In doing so, it consolidated the framework of antidiscrimination law in relation to sexual orientation. The court held that sexual-orientation discrimination violates the right to equality guaranteed by both the Basic Law and the Bill of Rights. It reiterated that fundamental rights and freedoms are to be given a generous interpretation. It further held that it would ‘scrutinize with intensity’ any legislation, government decision, or policy that accorded differential treatment due to sexual orientation, thereby establishing beyond doubt that the proportionality test would be applied with particular intensity in those situations. Finally, the Court of Final Appeal in Yau modified the

20 Leung [2005], para 56.
23 Yau, para 11.
24 Yau, para 35.
25 Yau, para 21.
proportionality test as applied in *Leung*. In the earlier case, the court had conceived of a two-stage test, first asking whether the applicant’s right to equality had been infringed, and then analyzing whether the infringement could be justified. In *Yau*, it was decided that if the differential treatment could be justified under the proportionality test, then there would be no infringement of the applicant’s right to begin with.  

The two cases form the foundation of anti-discrimination jurisprudence on which *Leung* and *QT* were built. In a rare interview, QT spoke of the impact of the government’s denial of a dependent’s visa for her. She had a management-level job in London, but since she could not work without the visa in Hong Kong she became a financial burden on her partner. The responsibility for supporting her parents back home also fell on her partner. This drastic change in status from highflying career woman to her partner’s financial burden took a toll on QT’s self-esteem and exacerbated her existing health problems. The sting of the dignitary wound was especially sharply felt when she found out that friends in a heterosexual marriage who were moving to Hong Kong around the same time had no trouble obtaining a visa; QT and her partner had been together for 12 years while the other couple had only been together for 2 to 3 years.

The Court of Final Appeal held in QT’s favor and found no rational connection between the government’s aims of attracting talent and maintaining immigration control on the one hand, and the policy of granting visas based on marital status on the other. The court reiterated a number of principles on equality in the judgment. First, it reaffirmed that the level of scrutiny or standard of review in the assessment of differential treatment on the basis of sexual orientation was one of heightened scrutiny: it held that it would subject the impugned measured to ‘particularly severe scrutiny’. It also overturned the analysis of so-called ‘core rights and obligations of marriage’ put forward by the Court of Appeal in the same case. The Court of Appeal had opined that if an alleged differential treatment of a person on the basis of

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26 *Yau*, para 22.
27 Chris Lau, ‘I feel Guilty: Same-sex Partner Tells of Angst Battling Hong Kong Government To Be Recognized As Dependent’, *South China Morning Post*, 27th March, 2016.
28 *QT*, paras 90, 93 and 99.
29 *QT* para 108.
30 *QT v. Director of Immigration* [2017] 5HKL RD 166 (HKCA).
marital status was premised on certain ‘core rights and obligations’ that were unique to marriage, such as the right of divorce, then the differential treatment did not need to be justified. Only if the differential treatment did not relate to such ‘core rights and obligations’ would it need to be justified under the proportionality test. The judgment was vague on how the content of such ‘core rights and obligations’ would be identified. The Court of Final Appeal rejected the entire framework laid down by the Court of Appeal: it opined that instead of assuming that there could be benefits arising from supposed core rights of marriage that are by definition reserved to those who are married, the courts should ask why that benefits should be reserved uniquely for married couples. It reasoned that the authorities’ logic was circular: ‘It is hardly satisfactory [for the government] to answer the question “Why am I treated less favorably than a married person” by saying “Because that person is married and you are not”’. The QT ruling means that all same-sex civil partnerships and marriages legally entered into abroad would now be recognized locally, but only for immigration-related issues such as visa applications.

The case of Leung, the gay civil servant who is demanding that the government recognize his same-sex marriage legally entered into in New Zealand, is now on appeal to Hong Kong’s highest court. Unlike QT, which concerns the government’s immigration policy, this case hinges on the idea of traditional marriage. Leung argues that the government has acted against him in a discriminatory manner by refusing to recognize his marriage in that he cannot claim spousal benefits for his husband nor have his taxes jointly assessed with him without such recognition, while a similarly positioned couple whose overseas heterosexual marriage is automatically granted recognition would be able to do so. The Court of Appeal ruled against Leung. It noted that even though the government did treat Leung differently in relation to an employee who was in a union recognized under Hong Kong law – i.e. a heterosexual marriage – the differential treatment was justified because the government had a legitimate aim in protecting traditional marriage, and that the policy was rationally connected to that aim.

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31 QT (HKCA), para 15.
32 QT, para 66.
33 QT, para 42.
34 Leung, paras 125-126.
the court notes, ‘marriage has a unique status’, and extending privileges such as spousal benefits and joint tax assessment to ‘some other relationships resembling marriage’ entered into abroad would ‘necessarily erode the uniqueness of the status’.  

With the QT decision in place, the Leung appeal on the horizon, and cases on sexual-orientation discrimination in public housing, civil partnership, and the constitutionality of local marriage laws coming before the courts, the litigation over marriage equality is coming to a head in Hong Kong. It is worth highlighting two factors that have brought about the current situation, one related to international influences and the other related to internal changes in the territory. They can be termed ‘external’ and ‘internal’ factors. The ‘external factor’ is that Hong Kong’s status as an international financial center means that it attracts a large number of highly-skilled expatriates. As a city whose success depends to a great extent on the flow of talented workers and professionals from abroad, Hong Kong cannot shut off the osmotic infiltration of ideas about marriage equality from incoming expatriates in the longer term. The majority of these expatriates come from countries in which same-sex marriage has been legalized, including the United Kingdom, the United States, Australia, and France, and they bring with them ideas and values about marriage equality from their home countries. In fact, one of the most unusual, and prominent, aspects of the QT case was an attempted intervention in the proceedings by thirty-one international banks and law firms. The firms emphasized that the recognition of same-sex unions conducted overseas was vital to their ability to recruit talented people to Hong Kong, and that it was also central to Hong Kong’s continued importance as a global finance hub. As the American law firm Davis Polk & Wardwell, acting for interveners, stated, the Hong Kong government’s policy ‘significantly diminishes’ the firms’ ability ‘to attract and retain the world-class talent’ which is ‘crucial to maintaining and enhancing Hong Kong’s status as a leading legal services center in Asia-Pacific and globally.’

Even though the Court of Final Appeal rejected the interventions, it explicitly noted that it was cognizant of the impact of the government’s policy on international businesses in the

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36 Chris Lau, ‘Lesbian Expat in Hong Kong Court Case Gets Backing From Goldman Sachs, 31 Other Major Groups’, *South China Morning Post*, 12th April 2018.
territory.\textsuperscript{37} What the attempted intervention underscores is the significant expatriate presence in Hong Kong; as same-sex marriage becomes legal, normalized and entrenched in the expatriates’ home countries, conceptions of marriage equality will travel across borders.

The ‘internal’ factor is the increasing awareness of marriage equality amongst Hong Kong-born gays and lesbians. Even though Leung is seeking recognition of his overseas marriage rather than challenging local marriage laws, he has made clear that he is fighting for the local community and not only with the rights and benefits of expatriates and their spouses in mind. He deliberately gives interviews to the press in both Chinese and English, and speaks of himself as someone who is ‘born and bred in Hong Kong’.\textsuperscript{38} Leung’s anecdote about why he brought his case is telling: his friend’s long-term partner died in a watersports accident, but without the rights guaranteed by marriage his friend was shut out from the funeral and had no say in the burial arrangements. The incident sparked Leung’s determination to play a part in changing the status quo of his home city because he felt that ‘something like that should not happen in Hong Kong’.\textsuperscript{39} He is adamant that same-sex marriage constitutes ‘a very local issue’ that affects not only foreigners, but Hong Kongers as well.\textsuperscript{40} As a further indication of how pressing the question has become, a recent survey by the Chinese University of Hong Kong shows that almost half of the gay and lesbian respondents had considered leaving the territory because it has lagged behind globally in the legalization or recognition of same-sex marriage.\textsuperscript{41} Marriage equality will remain a live issue for both the courts and for Hong Kong society for the foreseeable future.\textsuperscript{42}

\section*{2. The Rhetoric of ‘Traditional Marriage’}

\textsuperscript{37} \textit{ABN Amro Bank N.V. and Others v. QT} [2018] HKCFA 17.
\textsuperscript{38} Choi Wai Man, \textit{Marriage in New Zealand, Ceremony in Iceland: Angus Leung says “He is My Partner, Not My Friend’}, \textit{Next Media}
\textsuperscript{39} ‘He is My Partner, Not My Friend’
\textsuperscript{40} Chris Lau, ‘Why Gay Civil Servant Angus Leung Took On the Hong Kong Government To Claim For Spousal Benefits’, \textit{South China Morning Post}, 5\textsuperscript{th} July, 2018.
\textsuperscript{41} Suen Yiu Tung, ‘Lack of Legal Protection is Driving Sexual Minorities Out of Hong Kong’, \textit{South China Morning Post}, 27\textsuperscript{th} February, 2017.
\textsuperscript{42} ‘Gay Marriage Issue Must Not Be Avoided’, \textit{South China Morning Post}, 27\textsuperscript{th} May, 2017.
One group in Hong Kong that has understood the urgency of the issue is its opponents. They have long argued for the need to protect ‘traditional marriage’ from being eroded by demands for marriage equality by gays and lesbians, and they have intensified their opposition as a reaction to both the QT decision and to the increasing number of countries legalizing same-sex marriage in recent years. Their use of the term ‘traditional marriage’, and variations thereof, seems to refer to the institution of monogamous, heterosexual marriage as it exists in the territory today. Even though the turn to tradition is a common anti-same sex marriage strategy in many jurisdictions, as I will argue below it is especially problematic in the Hong Kong context given the city’s distinctive marriage history.

A number of comments by local conservative legislators will give a flavor of the rhetoric of traditional marriage. Writing in response to Obergefell v. Hodges, the U.S. Supreme Court ruling that legalized same-sex marriage in America, lawmaker Holden Chow argued for the need to ‘protect traditional family values and heterosexual marriage’. He has also cautioned that the institution of ‘traditional marriage between one man and one woman’ faced ‘considerable challenges’ in light of ‘global trends’ towards same-sex marriage. Chow’s comments are especially controversial as they are contrary to the position of the equality commission, of which he is a board member. Another lawmaker, Priscilla Leung, expressed concern that the Leung’s litigation would undermine ‘the traditional family values of marriage between a man and a woman’. Finally, writing in response to the QT ruling, legislator and former President of the Hong Kong Law Society Julius Ho contended that it ‘challenged Hong Kong’s traditional notions of marriage and family’. He described the judgment as a ‘Trojan Horse’ that ‘fundamentally challenges the values and functions of traditional marriage and family’. He

43 s40(2) Cap.181 Hong Kong Marriage Ordinance defines marriage as ‘the voluntary union for life of one man and one woman to the exclusion of all others’.
46 Ellie Ng, ‘Protect Family Values’: Hong Kong Government Urged To Appeal Ruling on Marriage Benefits For Gay Couple’, Hong Kong Free Press, 24\textsuperscript{th} May, 2017.
underscored that ‘the traditional concept of marriage as that of “one man one woman” must be protected, and Hong Kong’s core values cannot be destroyed’.

This rhetoric is not confined to the domain of lawmakers. The terms of the political domain have migrated to the judicial one, and a virtually identical vocabulary and set of assumptions underpin the Court of Appeal judgment in the Leung case. The terms ‘history’, ‘tradition’, ‘practice’ and ‘long usage’ appear repeatedly in the judgment. Chief Judge Andrew Cheung opines that Hong Kong ‘society’s established understanding and concept of marriage’ is based on, amongst other things, ‘traditional, historical […] background and values’. 48 He goes on to presume that the Basic Law must have ‘embodied’ these purported ‘historical’ and ‘traditional […] values of Hong Kong people’, such that monogamous heterosexual marriage must be the only constitutionally permissible form of marriage in the territory. 49 In a similar vein, Justice Jeremy Poon notes that the protection of marriage as it currently exists is a legitimate aim pursued by the government’s policy because this form of marriage is based on local ‘practice’ and ‘long usage’ as well as Hong Kong’s ‘history’ and ‘traditions’. 50 This rhetoric of traditional marriage has a number of effects in the Leung judgment. First, it establishes an equivalence between the current regime of monogamous, heterosexual marriage and marriages of the past, such that the contemporary conception of marriage becomes synonymous with the traditional conception of marriage. Second, it sidelines the vast international jurisprudence on marriage equality in other common law jurisdictions and beyond: by insisting that marriage in Hong Kong has to give effect to the territory’s ‘own’ history and traditions – the word ‘own’ is repeated, emphasized, and prioritized in the judgment – it renders irrelevant developments overseas where traditions and values are deemed to be ‘markedly different’. 51 Thirdly, by presuming that majority views about marriage in Hong Kong society are ‘rooted in’ history and tradition, it posits that same-sex marriage should only be recognized in Hong Kong when they are accepted by ‘prevailing views of the

48 Leung, para 12.
49 Leung, para 16.
50 Leung, para 96-97.
51 Leung, para 110.
community’, thereby perpetuating the view that rights should only be protected when there is societal consensus for doing so.\textsuperscript{52}

Most importantly, the reiteration of terms like ‘history’, ‘tradition’, ‘practice’ and ‘long usage’ which underpins the narrative of traditional marriage in the case and beyond forges a history whereby the current form of marriage in Hong Kong is presented as something derived from an uninterrupted and monumental past. As Hobsbawm has observed, “‘traditions” which appear or claim to be old are often quite recent in origin and sometimes invented’, and the discourses of ‘traditional marriage’ in Hong Kong can be productively analyzed in light of his insight.\textsuperscript{53} Hobsbawm defines the ‘invention of tradition’ as ‘essentially a process of formalization and ritualization, characterized by reference to the past, if only by imposing repetition’.\textsuperscript{54} The ways in which the vocabulary of traditional marriage has become entrenched in arguments and opinions about marriage in both the legislature and the courts can be taken as evidence of such ‘formalization and ritualization’. The reiteration of the terms outlined above reflects the process of ‘repetition’ at work; their insistent use in law, politics, and parts of civic discourse creates an illusion of invariance that is constitutive of the invented tradition. The past that gets invoked often has few or even no connections to historical reality, and any sense of temporal continuity is ‘largely fictitious’.\textsuperscript{55} This rhetoric gives a ‘sanction of perpetuity’; marriage as it exists now is imagined to have always existed, such that the authority of tradition renders it worthy of legal protection.

The relevance of Hobsbawm’s observations becomes immediately obvious when we realize that Hong Kong’s current marriage regime was only put in place in the late twentieth century. The Marriage Ordinance, which constitutes its legal basis, did not come into effect until October 7, 1971. Marriage in Hong Kong today is not a tradition but a part of a distinctly, and self-consciously, modern system. Critically, the invention of ‘traditional marriage’ has had the effect of erasing from political, legal, and cultural memory the vast and varied marriage traditions that existed for a long time in the territory. My reference to Sigmund Freud’s

\textsuperscript{52} Leung, para 125.
\textsuperscript{53} Hobsbawm, p.1.
\textsuperscript{54} Hobsbawm, p. 4.
\textsuperscript{55} Hobsbawm, p.2.
Civilization and its Discontents in the title of this article is deliberate: the rhetoric of marriage in Hong Kong has done nothing less than to repress the marital traditions unique to Hong Kong by establishing its own status through a narrative process of formalization, ritualization, and repetition. As the idea gets repeated continuously over time – days, years, decades, generations – and as Hong Kong society moves further and further away from the past, ‘traditional marriage’ comes to take over the discourse on marriage and submerges memories of the other longstanding marital forms under its own discursive weight. It is important to bring back these other marital forms in discussions involving changing conceptions of marriage. The next section returns to government records and reports dealing with marriage from the period of British colonial governance to recover such repressed local marriage traditions. The final section will consider their relevance for debates about marriage equality in Hong Kong in our own time.

3. In Search of Lost Traditions

Prior to the reform of 1971, different kinds of marriages co-existed ‘cheek by jowl’ with each other, resulting in a complex and varied marital landscape. In addition to registry marriage, there were Chinese customary marriages that were in place long before Hong Kong became a British colony in 1843. Since concubines were allowed by the system of customary marriage, concubinage was a widespread and deeply rooted practice. To complicate matters further, early twentieth-century changes to the marriage laws in China added marriages under the 1930 Chinese Civil Code to the mix. Finally, there was the relatively rare kim t‘iu marriage, whereby a man could take two wives without running afoul of bigamy laws. Even though only registry marriages could be entered into after the Marriage Ordinance came into effect in 1971, some of the marital forms from before that date – customary Chinese marriage; concubinage; Chinese marriage under the 1930 Civil Code; and kim t‘iu marriage – lasted well beyond the


57 Leonard Pegg, Family Law in Hong Kong, 3rd edn (Singapore: Butterworths, 1994), v.
1970s. Government figures show that as late as the first half of the 1960s only about half of the marriages in Hong Kong were registry marriages of the kind recognized today, which meant that the other categories of marriage constituted a significant, and longstanding, part of family formation.  

The abolition of these different marriage traditions, and the concomitant establishment of the current marriage regime, was the result of a more than thirty-year period of discussion, consultation, and negotiation. It began with the government report entitled *Chinese Law and Custom in Hong Kong* (1948) (more popularly known as the Strickland Report, after the Attorney General George Strickland). As the title suggests, the report considered the place of traditional Chinese legal rules and customary norms in the British colony, and a significant part of the document was devoted to Chinese marriage and related issues such as divorce, inheritance, and succession. There followed the White Paper on Chinese Marriages in Hong Kong (1960); the *McDouall-Heenan Report* (1965); the White Paper on Chinese Marriages in Hong Kong (1967), and finally the Marriage Ordinance of 1971. At all stages, the colonial administration was careful to seek the views of experts and key stakeholders in Hong Kong society; recommendations were variously introduced, revised, and discarded in light of their responses. The extreme caution with which the government handled marriage reform reflects its awareness of how entrenched these marital traditions were for the local Chinese population; Governor David Trench was warned by his senior civil servants that any legal changes that threatened to overthrow indigenous ideas about marriage would be ‘largely ignored’ by the locals and also ‘taken as an example of how little the Government was in touch with the facts of everyday life’ of its people.  

An exploration of the government documents between 1948 and 1971 gives us a rich sense of the marriage traditions that have now been largely forgotten.

Marriages under the 1930 Chinese Civil Code were contracted between one man and one woman. They were termed ‘modern’ marriages as they were instituted across the border in the People’s Republic of China as part of the Chinese government’s attempt to modernize the marriage system there. Some Hong Kong residents entered into this form of union in China, and

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others entered into them in Hong Kong.\textsuperscript{60} Formalities for modern Chinese marriages were kept to a minimum.\textsuperscript{61} In accordance with Article 982 of the Code, the prerequisite was an open ceremony in front of at least two witnesses.\textsuperscript{62} The specific format of the ceremony was flexible, though it seemed essential that it was not held behind closed doors and could be witnessed by those unrelated to the ceremony itself. Modern Chinese marriages were presumed to be monogamous insofar as the Code made no mention of concubines. However, there is evidence to suggest that some men continued to take concubines even under this system, and as the Strickland Report notes a concubine who had no official place within this modern Chinese marriage could reappear ‘disguised’ as ‘a member of the household’ under the Code.\textsuperscript{63} The validity of modern Chinese marriages was never officially tested or challenged in the Hong Kong courts, but it was beyond doubt that they were ‘widely accepted’ as legitimate marriages locally.\textsuperscript{64} The colonial government also noted comments by members of the local community that they were ‘woven into the fabric of Chinese society and custom’.\textsuperscript{65} They were deemed valid in a wide variety of contexts by the government and the courts in Hong Kong, including probate in connection with the administration of estates, tax liabilities, and the calculation of civil servants’ emoluments.\textsuperscript{66}

Chinese customary marriages, as the name suggests, were entered into in accordance with traditional customs. Their legal validity was never in doubt: the White Paper 1967 underscored that they ‘have been and still are valid’ under Hong Kong law of the time.\textsuperscript{67} What is worth underscoring about this form of marriage is that it privileged the family over the individual. The families, and not the couple, were the contracting parties.\textsuperscript{68} As such, the preferences and desires of the couple were ‘subordinated to those of the senior members of their families’.\textsuperscript{69} Chinese customary marriages were therefore emphatically not socially

\textsuperscript{60} White Paper 1967, paras 20-21. \\
\textsuperscript{61} \textit{Chinese Law and Custom}, para 46. \\
\textsuperscript{62} White Paper 1967, para 21. \\
\textsuperscript{63} \textit{Chinese Law and Custom}, para 50. \\
\textsuperscript{64} White Paper 1967, para 22. \\
\textsuperscript{65} White Paper 1967, para 24. \\
\textsuperscript{66} White Paper 1967, para 22. \\
\textsuperscript{67} White Paper 1967, para 1. \\
\textsuperscript{68} \textit{Chinese Law and Custom}, para 45. \\
\textsuperscript{69} Pegg, p.5.
understood as voluntary unions. Their formalities were fairly extensive and were known as the six rites, and they again reflect the dominance of the family over the betrothed: a go-between conducted the negotiations and spoke the name of the father of the bridegroom-to-be in each of the first five rites, which included introducing the marriage proposal, asking the name of the girl, reporting the results of the divination before the groom’s ancestral shrine, presenting the betrothal gift if the divination was propitious, and asking for the wedding date. The welcoming of the bride constituted the sixth and final rite and was performed by the bridegroom, but he could only fetch the bride when his father ordered him to do so. A formal contract was usually drawn up by the go-between, but acceptance of the presents by the bride’s family was usually deemed sufficient evidence of a marriage contract.

Customary marriages became a particularly vexing problem for the colonial administration because the traditions, customs, and cultural practices relating to them differed from locality to locality and also changed over time. Under colonial law, the relevant customs were fixed as those of 1843, the year Hong Kong became a British colony. However, customary rules were ‘diverse and conflicting’ even back then, and as time passed there were fewer and fewer people who could give first-hand accounts of what constituted marriage customs within a particular municipality or village on that date. By the time of the 1967 White Paper there was no one living who could testify to what the actual customs were. It was therefore difficult to gauge whether a genuine marriage existed when disputes arose, for instance in the context of a husband claiming that the union never formally existed to avoid making maintenance payments to his spouse. The government was urged to legislate to set up a viable framework for ascertaining the existence of customary marriages. The 1960 White Paper proposed defining customary marriages as unions contracted in accordance with ‘the traditional customs of the parties’ families’, but this proposal was rejected as problems could arise if the families of the betrothed couple came from different localities with divergent or incompatible marriage traditions. The final proposal entailed defining customary marriage either in accordance with

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70 Pegg, p.6
71 Chinese Law and Custom, para 45.
‘appropriate local practice in Hong Kong’ or with ‘the practice in the place of origin of either party’, a proposal which the committee acknowledged was imperfect but which it hoped would significantly reduce the scope for dispute.\textsuperscript{74}

The 1960 White Paper recognized that concubinage as a deeply entrenched practice in Hong Kong and urged the government to proceed with caution when considering changes to this institution. Within the traditional Chinese family, the principal wife was known as \textit{t’sai} and the concubine was known as \textit{t’sip}. As the colonial Attorney General noted, a firm cultural distinction was maintained between the principal wife and the concubine, and accordingly in law ‘care has always been taken by the Legislature and the Courts to draw a definite distinction between a wife (\textit{t’sai}) and a concubine (\textit{t’sip}) and to apply the words “marriage” and “wife” only to the former’.\textsuperscript{75} It was clear that a concubine occupied a lower position than the wife. It seems that the consent of the principal wife was not strictly necessary for a man to take a concubine, though in practice married men did seek their spouse’s consent.\textsuperscript{76} No formal ceremony was required for a man to take a concubine, even though a ceremony less elaborate than the six rites, known as \textit{Yap Kung} (literally, to enter the household), was often performed. Chinese customary law did not limit the number of concubines a man could take. In practice, men often took as many concubines as they could financially support. A concubine often came from a much lower social stratum than the wife, and was subject to the commands of both the wife and the husband’s mother after she joined the family. A number of factors affected her standing in the household, including the economic and social position of her birth parents, the favor shown by her husband, as well as her ability to produce male heirs.

Unlike the category of the mistress in Western society, the concubine was unequivocally a part of the family, and her legal and social status were ‘equiparated’ to that of the wife for many purposes. For instance, a man who hired out his wife or concubine to another or who married his wife or concubine to another was punished by 80 blows under the penal laws of the Qing Dynasty. Her position was also reflected in the financial arrangements: a husband had an obligation to provide his concubine with a suitable maintenance during the course of their

\textsuperscript{74} White Paper 1967 para. 16.
\textsuperscript{75} Chinese Law and Custom, Appendix 3, para 2.
\textsuperscript{76} Chinese Law and Custom, para 49.
union, and after this death that obligation would fall upon his estate. Restrictions which applied equally to the wife and to the concubine further attested to the latter’s socially and legally recognized position. For instance, neither the wife nor the concubine was allowed to remarry during the period of mourning after the husband’s death, and the rules regulating divorce also applied to them equally. The concubine’s children were recognized as legitimate, and the sons of concubines were entitled to inherit the same share of the property as sons born of the principal wife after their father’s death. Under the Inland Revenue Ordinance, a concubine’s children were eligible for inclusion in any claim by their father for personal allowances.

Finally, *kim t’iu* marriage was an arrangement whereby a man took two principal wives in order to ensure the continuation of the family line of a male relative with no next of kin. This form of marriage was different from concubinage in that the two women in the union were both considered as wives, rather than as a wife and a concubine. The Chinese terms underscore the distinctiveness of *kim t’iu* marriage: the two wives were known as *ping chai*, or ‘wives of equal standing’. The husband in a *kim t’iu* marriage was not considered guilty of bigamy. The clearest explanation of this form of marriage remains that of Dr Vermier Yantak Chiu in Appendix 9 of the Strickland Report:

A and B are brothers. A has no son while B has an only son named X. Now, X is adopted by A. X is a ‘*kim t’iu*’ son. The privileges X enjoys are: (a) He inherits the estates of both A and B. (b) He may marry 2 wives, one for A and one for B. (c) He is responsible for the propagation of the future generations of both A and B and for their ancestral worship.

The term *kim t’iu* needs to be understood within the context of the traditional Chinese belief that a family’s inability to continue worship at the ancestral temples of its members constituted a great tragedy. *Kim t’iu* literally means ‘concurrent temples’; the husband in a *kim t’iu* marriage shouldered the responsibility of safeguarding the uninterrupted worship of two temples by continuing two family lines. The children the husband produced with one wife

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78 *Chinese Law and Custom*, para 42.
80 ‘Dr. Chiu’s Views on Adoption, Divorce and “Tsip”’, *Chinese Law and Custom*, pp.200-207(201-2)
would continue the lineage of his biological father, and the children he produced with the other wife would continue the lineage of his adoptive father.

The kinds of marriages that existed in Hong Kong prior to the legal reform of the late twentieth century may seem quaint, bizarre, objectionable, and even outrageous today, but that does not make them any less real. Their existence is an incontrovertible part of the territory’s marriage history. For reasons that we will examine below, the colonial government enacted the 1971 Ordinance with the aim of bringing to a close this set of unions. As such, to call the current marriage regime one of ‘traditional marriage’ is to turn history on its head: the system that exists today was established and entrenched to end longstanding and increasingly problematic marital traditions, and to modernize the marriage system by bringing it in line with international norms and practices. It is important to keep these points firmly in view when analyzing the debate about marriage equality in our own era.

4. Learning from the Past, Looking to the Future

What insights regarding the question of same-sex marriage in the twenty-first century can we derive from this exploration of Hong Kong’s unique marriage history? I am obviously not suggesting that we should return to any of the kinds of marriage discussed in the previous section. To learn from history does not mean repeating the past wholesale, but recognizing instances where history gets consciously or unconsciously marginalized, rewritten, or erased to suit particular political, cultural, or legal worldviews. It also means appreciating how past experiences can shed light on current controversies. There are three lessons that can be derived from the analysis so far.

The first lesson is that the narrative of ‘traditional marriage’ is problematic because it is ahistorical: by presenting the current form of marriage as a traditional one that has existed throughout history, it disguises the origin of a resolutely modern way of organizing intimate relations and family life, and writes a past that departs from actual circumstances. By inventing a tradition that was never monolithic or uninterrupted, and by fostering cultural amnesia about
the forms of unions that existed for most of territory’s history, it creates the false impression that the marital regime today has the weight of thousands of years of history behind it.

The irony is that some of the unions repressed by the modern narrative of ‘traditional marriage’ are precisely those that constitute the marriage traditions of Hong Kong. The 1960 White Paper explicitly underscored that concubinage constituted a ‘genuinely traditional institution’ in the territory, and urged the government not to abolish it ‘at one stroke’ out of concerns about local resentment. As the committee predicted, the consultation on the potential abolition of the system generated heated debate; some of those who favored the status quo at the time based their argument specifically on the importance of preserving tradition by noting that concubinage was ‘an age-old system’. The same can be said of the related practice of customary marriage: as one family law scholar notes, customary marriage was ‘a product of centuries of development and evolution from earlier customs and practices’ in Qing Dynasty China, and the tradition continued in Hong Kong as a distinctly Chinese practice for many years after the arrival of the British. The government was also keenly aware that customary marriages were an integral part of Hong Kong cultural life, and the 1967 White Paper opens with the acknowledgment that ‘it has long been a tradition for Chinese people in Hong Kong to marry in accordance with traditional Chinese customs’. Finally, Dr Chiu foregrounded the historical genesis of kim t’iu marriage in her submission to the Strickland Committee when she noted that ‘the law of kim t’iu was made by Emperor Chien Lung in the eighteenth century and was in force in 1843 throughout China, including of course Kwongtung [the province where Hong Kong is located]’. Time and time again, the documents show the historical inaccuracy of ‘traditional marriage’ and the narrative it generates today.

Of course, one could object that none of the traditions I have discussed above are same-sex marriages. Does the lack of evidence pointing to the previous existence of same-sex unions in Hong Kong mean that history is irrelevant to the marriage equality debate? I do not believe that is the case. I turn to the past not to scour for historical models to authorize same-sex

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82 Athena Nga-Chee Liu, *Family Law for the Hong Kong SAR* (Hong Kong: University of Hong Kong Press), p.6.
marriage in our own era, but to disrupt a narrative about marriage that passes itself off as self-evident fact, and on the basis of which some contend that same-sex marriage should not be introduced or recognized. The point is that if, as I contend, the idea of an uninterrupted, longstanding legal regime mandating that marriage can only take the form of a union between one man and one woman does not correspond to history, then it follows that the version of the past which opponents to same-sex marriage rely on to argue that the status quo should be maintained simply does not exist. The marital form that the rhetoric of ‘traditional marriage’ presents as an ancient heritage is in fact part of a process of modernization, and there is no single marital tradition, supposedly stretching from time immemorial to present day Hong Kong, that needs to be defended. Unshackled from this fantasmatic past, the courts can consider marriage equality without worrying that changes to the contemporary system would undermine any unchanging, monolithic traditions. In fact, one can go further: the reform in the 1970s suggests that the marriage regime in Hong Kong can, and does, change, and the debate about same-sex marriage today can be regarded simply as part of an ongoing process of modernization.

The turn to Hong Kong’s marriage history therefore shows that arguments against marriage equality in the name of protecting ‘traditional marriage’ rest on a historical fallacy. Gender inequality was built into Chinese customary marital forms, family priorities took precedence over individual choice or happiness in decisions about marriage partners, and beliefs about the importance of the ancestral temple at times meant that the care of the dead trumped the wishes of the living. The rhetoric of ‘traditional marriage’ is problematic because the version of the past that it presents covers over this less pleasant side of reality, and its narrative of an unbroken, uncomplicated history that merges seamlessly with the system today gives a false impression of the authority and standing of the institution which it promotes. Judges, lawyers and politicians who oppose same-sex marriage in the name of tradition need to either acknowledge that what they advocate does not have historical grounding that they claim it has (and therefore should not be privileged over any other contemporary form of union simply because of its purported age), or concede that what is derived from the past can be problematic and may not be worth preserving in full.
The second lesson is that international law and legal developments overseas matter. This point is reflected in the demise of these longstanding traditions in the latter part of Hong Kong’s marriage history. What accounted for the government’s determination to put an end to them? While the reports discussed a number of reasons, including the difficulty of determining the exact customs of customary marriage, the declining popularity of customary marriages after the implementation of the 1930 Civil Code in China, and the efforts of women’s rights groups such as the Hong Kong Council of Women and the local branch of the Young Women’s Christian Association, one determining factor was the rapidly evolving international norms on gender equality and the right to marry. These evolving norms included both specific changes to international human rights law, as well as more general shifting practices in neighboring countries.

The importance of the international jurisprudence is reflected in an appendix in the McDouall-Heenan Report that was entirely devoted to the Charter, decisions, resolutions, conferences, and seminars of the United Nations on these issues, as well as on the responses of various Asian countries to developments at the U.N. This section of the report reflects a thorough and detailed engagement with international law. Amongst the provisions it examines are the Preamble of the U.N. Charter, which reaffirms ‘faith in [...] the equal rights of men and women’; Article 3 of the Charter, which underscores the role of the UN in promoting and encouraging ‘respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’; Article 16 in the Declaration of Human Rights, which enshrines the equal right to marry for both men and women; General Assembly Resolution 843(IX) (1954), which urges states to address ‘ancient laws and practices’ related to marriage that were inconsistent with international standards; and provisions from the Supplementary Convention on the Abolition of Slavery, which proscribes the selling or giving away of daughters in marriage by their families. Of particular relevance seemed to be the Convention on Marriage (1962); in addition to recalling the principles set forth in the foregoing instruments, it enshrines the ‘full and free consent of both parties’ as an integral part of marriage, requires states to take legislative action to specify a minimum age, and stipulates that all marriages should be officially registered with a competent authority. The McDouall-Heenan Report recognized that the
Convention ‘could become one of the yardsticks by which our legislation and administration will in due course be measured’. It also quoted in full draft recommendations by the Permanent Commission on the Status of Women, and presciently noted that they would likely serve as ‘a guide in Hong Kong on the way in which U.N. if not world opinion is shaping’.

The report also devotes considerable attention to a U.N. seminar on the status of women in family law held in Tokyo in 1962. It was attended by representatives from nineteen Asian and Australasian territories, four U.N. officials, as well as observers from non-government organizations and a number of other countries. Hong Kong’s representative was J.C. McDouall, Secretary for Chinese Affairs and one of the drafters of the report. There was a free and frank exchange of ideas and opinions between the participants, and the influence of McDouall’s exposure to the region’s growing concerns about gender inequality, emerging awareness of equal rights and freedoms, and accelerating legal reforms at the seminar seemed to have found its way into the report, which notes that one of the greatest contributions of the Tokyo event was ‘the lessons to be learned’ in the ‘searches for solutions’ to conflicts between women’s rights and local practices by the nineteen other Asian and Australasian territories. He ‘returned home with ten kilogrammes of findings and reports, including much relevant U.N. material that did not previously appear to have been available in Hong Kong’. Its impact is again registered in the White Paper 1967, which noted that ‘the proceedings of this seminar gave emphasis to the importance of setting Hong Kong’s problems into the context of the relevant international conventions and resolutions’. McDouall thought that ‘virtually all Hong Kong’s independent Asian neighbors appeared to assess their own and, even more readily, to judge neighboring territories’ laws and practices in relation to women’s rights by comparing them closely with U.N. standards’, and this takeaway from the seminar played a key role in the government’s decision to institute marriage reform in the early 1970s.

Marriage traditions in Hong Kong changed to a great extent because of evolutions in the global legal environment, not only in terms of specific international law instruments but also of

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norms in other jurisdictions. The government was keenly aware of Hong Kong’s place in the international community, and of its obligations to maintain that place by being responsive to the international jurisprudence. As ideas about the equal right to marry, the pivotal importance of free and full consent, gender equality, and the need to render indigenous practices compatible with global standards crystallized in the international arena and percolated into domestic jurisdictions around the world, the need to overhaul the territory’s marriage laws became increasingly pressing.

The Court of Final Appeal in our own time has signaled the importance of international developments to its consideration of issues relating to marriage equality. In W v. Registrar of Marriages, the court held that the government’s refusal to allow a male-to-female transsexual to marry in her new gender violated her right to marry under Article 37 of the Basic Law and Article 19(2) of the Bill of Rights, and it reiterated that both documents are ‘living instruments intended to meet changing needs and circumstances’. The court then underscored that the interpretation of the relevant provisions must be attentive to how ‘the institution of marriage has evolved [...] in contemporary society’. It concluded that in light to societal changes, procreation could no longer be considered an essential purpose of matrimonial union. What deserves emphasis here is that in reaching that conclusion, the court paid close attention to legal developments beyond Hong Kong, including the Australian Family Court decision in AG (CTH) v. Kevin and Jennifer and European Court of Human Rights decision in Christine Goodwin v. United Kingdom.

To date, W remains the only Court of Final Appeal decision on the right to marry. Furthermore, in QT the court highlighted the ‘convergence’ between the jurisprudence of the Hong Kong courts and ‘the approaches of various other courts’ in the area of anti-discrimination law, and foregrounded the importance of ‘international human rights instruments’ as well as the ‘particular relevance’ of ‘the jurisprudence of the European Court of Human Rights and its interaction with the jurisprudence of the House of Lords, the Privy Council

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91 Attorney-General (Cth) v Kevin and Jennifer (2003) 172 FLR 300
92 Christine Goodwin v. United Kingdom, Application no. 28957/95 (2002)
and the United Kingdom Supreme Court relating to the Human Rights Act 1998 and domestic anti-discrimination legislation’.\(^93\)

In light of the importance that Hong Kong’s highest court attaches to developments in the international arena, it is significant to note that, just as global norms about gender equality consolidated and spread in the years leading up to marriage reform in the territory, so international principles about equal respect for gays and lesbians are emerging and crystallizing in our own era. The Yogyakarta Principles, formulated by a group of human rights experts in Indonesia in 2006, have formed the basis of the international jurisprudence on sexual orientation and gender identity in the twenty-first century. Ten new principles were added in 2017, and the document is now known as the Yogyakarta Principles Plus Ten. In 2011 the U.N. established the Free and Equal Campaign to advocate for equal rights and fair treatment of sexual minorities. In 2016, its Human Rights Council passed the resolution on ‘Protection Against Violence and Discrimination based on Sexual Orientation and Gender Identity’ which mandated the appointment of an independent expert on the issue. In the same year, the World Bank also appointed an advisor on sexual orientation and gender identity.

Moreover, there is, in the words of the European Court of Human Rights, a ‘continuing international movement’ towards the legal recognition of same-sex relationships that cannot be ignored in the twenty-first century.\(^94\) At the national level, Taiwan’s constitutional court has ruled that same-sex couples have the right to marry, and gave the legislature two years to amend the country’s marriage laws.\(^95\) Even though the majority of voters in Taiwan subsequently backed keeping the civil code’s definition of marriage as a union between a man and a woman in a series of referendums, the government has said that the outcome will not affect the changes required by the court ruling.\(^96\) Same-sex marriage has been legalized in many developed democracies around the world, including common law jurisdictions such as the United Kingdom, Australia, Ireland, and South Africa whose case law Hong Kong courts regularly draw inspiration and guidance from. Article 84 of the Basic Law explicitly states that Hong Kong

\(^{93}\) QT, para 30  
\(^{95}\) Judicial Yuan Interpretation No.748 (2017)  
courts ‘may refer to precedents of other common law jurisdictions’. As such, decisions Obergefell v. Hodges in the United States and Minister of Home Affairs v. Fourie in South Africa may have a considerable influence on marriage equality in the territory.

At the level of regional courts, while the European Court has stopped short of mandating same-sex marriage in individual countries, it has rapidly developed an equivocal jurisprudence on the protection of same-sex couples. In Schalk and Kopf v. Austria, it noted that the right to marry under Article 12 of the Convention did not necessarily preclude same sex unions. It also underscored that the relationship of cohabiting same-sex couples living in stable de facto partnerships fell within the notion of ‘family life’ under the right to respect for private and family life in Article 8. In Oliari v. Italy, it held that Italy violated Article 8 by failing to fulfill its positive obligation to institute a specific legal framework providing for the recognition and protection same-sex unions. Two years later, in Orlandi v. Italy, it held that Italy again violated Article 8 by failing to provide a mechanism for formally acknowledging the legal existence of the applicants same-sex unions which had been validly contracted abroad. The three cases together clearly demonstrate that in Europe, there is a positive obligation on the state to legally recognize and protect long-term, stable same-sex relationships. The Inter-American Court of Human Rights has gone further, and held that states ‘must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples’ on the same terms as heterosexual couples. It recognized that same-sex marriage could not be implemented overnight, and further held that ‘states that do not yet ensure the right of access to marriage to same-sex couples’ must ensure that they would nonetheless have the full rights as married heterosexual couples in the transition period to same-sex marriage.

97 Basic Law Article 84
100 Oliari, para 185.
101 Orlandi and Others v. Italy, Application nos. 26431/12; 26742/12; 44057/12 and 60088/12), paras 209-210.
Such changes in the international environment provide a noteworthy indication of possible future developments in Hong Kong. Carole Petersen has noted that ‘the human rights treaty system has become vital’ in areas of gender and sexuality in the territory, as international and comparative jurisprudence found their way into local court cases on equality, international treaties such as the U.N. convention on the Elimination of All Forms of Discrimination Against Women (‘CEDAW’) shaped local gender norms, and treaty-monitoring bodies put pressure on the local government by publicly highlighting situations of discrimination that need redressing.\textsuperscript{104} Petersen focuses largely on the period from the Sino-British Joint Declaration of the 1980s to the present day, but the role of international human rights in the territory is even more critical and goes even further back than in her account. The historical records show that the last time a debate about major changes to the marriage regime took place, Hong Kong was keenly responsive to consolidating international norms and rules about equality. In this light, it is those who are sensitive to changes in international law and practices, rather than whose who put forward tradition as a reason for sidelined international developments, who are most true to the territory’s marriage history.

The third lesson is that Hong Kong’s marriage history is characterized by diversity. The different categories of marriage that existed alongside registered marriage and that were integral to Hong Kong culture and society for so long fundamentally differed in form and nature from marriage as we know it today. As the colonial government realized, there was no single, monolithic, unchanging institution of Marriage (with a capital M) that dominated the marital landscape for most of the territory’s existence. The customary and the modern, the Chinese and the Western, the Christian and the non-religious, the nuclear family and the more expansive households were all represented in the heterogeneous familial terrain of the city. The viability of their simultaneous presence was one reason why the British left them untouched for over a century after their arrival. Those who speak so insistently of ‘traditional marriage’ today seem oblivious to the fact that for much of Hong Kong’s past there was no single marriage tradition, but rather a plurality of traditions that were all legitimate in the eyes of both the local residents and the government. This matters because the twenty-first century

debate about marriage equality is in part a debate about the possibility of the peaceful coexistence of different marital forms. On the one hand, traditionalists insist that only one marital form is acceptable and that it must be protected. On the other hand, same-sex marriage advocates argue that Hong Kong society can have more than one marital form, and that different kinds of marriages, heterosexual and homosexual, can co-exist harmoniously. In light of numerous and diverse strands of marriage revealed by the historical records, it seems that the latter view is more in line with Hong Kong’s distinctive history. When considered against the historical backdrop of the diversity, variety, and multiplicity of marriages in the territory, the legalization of same-sex marriage and the concomitant movement away from the monolithism of the current marital landscape seems truer to Hong Kong’s marital traditions.

Conclusion

In this article, I have sketched the landscape of gay and lesbian rights in Hong Kong, from the early cases on equality and non-discrimination to the current controversies over marriage equality. I then explored the terrain of the past to expose the fallacies of the traditionalist narrative of marriage in the specific context of Hong Kong’s unique marriage history. I have argued that terms such as ‘traditional marriage’ as used by local opponents of marriage equality constitute an invention of tradition, or an ideological narrative of times past that denies gays and lesbians the recognition, protection, and dignity that they deserve. Finally, I have contended that a more accurate understanding of the longstanding presence, and subsequent disappearance, of diverse marital forms in Hong Kong can help to make a case for same-sex marriage today.

Hobsbawm has pointed out that from a historian’s perspective, an invented tradition is often a ‘symptom’ of an inability to deal with changing political, cultural, social, and one could add, legal, circumstances. The characterization of my topic in such diagnostic language brings us back to the reference to the work of Freud in the title. Freud famously noted that repressed memories are never fully repressed, but subsist in the unconscious and often return at unexpected moments and in startling ways. Working through repressed memories, whether of

105 Hobsbawm, p.12.
a person or of a society, may not be a pleasant process, but it is a necessary one. Without being overly psychoanalytic – a frame of reference largely foreign to a legal mind – it may not be a stretch to say that the recovery of these repressed traditions can be understood as precisely the return of the repressed. The past, buried under the weight of a fabricated history, comes back from the archives to disrupt the surface narrative of the traditionalists, in the uncanny, disquieting, and perhaps even astonishing form of a foundation for approaching same-sex marriage.