The HKU Scholars Hub The University of Hong Kong 香港大學學術庫

Title	Putting Cyber Weddings and Aquatic Nuptials in their Wider Context
Author(s)	Rwezaura, B
Citation	Hong Kong Law Journal, 2002, v. 32 n. 1, p. 1-11
Issued Date	2002
URL	http://hdl.handle.net/10722/133095
Rights	Creative Commons: Attribution 3.0 Hong Kong License

COMMENT

PUTTING CYBER WEDDINGS AND AQUATIC NUPTIALS IN THEIR WIDER CONTEXT

Introduction

A recent proposal that Hong Kong solicitors be permitted to conduct marriage ceremonies "anywhere and at any time" has been widely supported by some commentators. It has been argued that the proposal will save public money by freeing up under-utilised public services and manpower.[1] It is also expected to generate income, not only for solicitors, who in recent years have seen their incomes dwindle, but also for *feng shui* masters and owners of potentially desirable wedding sites such as the Peak Tram, Star Ferry, five star hotels and various public facilities at the Peak. In addition, fashionable places like Lan Kwai Fong and Soho are also reported to be lining up for their share of the business. Resorts such as Ocean Park, Blue Water Divers clubs and even the future Disneyland are also likely to be in demand. According to one source, an aquatic wedding ceremony including a boat, underwater video cameraman and scuba equipment for guests would cost at least HK$100,000. Not surprisingly, the editor of the *South China Morning Post* has supported the proposal, noting that, if implemented, it "will likely breathe life into other sectors as well".[2] As anyone familiar with the Hong Kong psyche will recognise, particularly in these difficult times, the temptation to focus primarily on the economic aspect of new public policies is always strong.

The object of this paper is not to pre-empt the work of the Hong Kong Law Society Working Group, which is reported to be studying this proposal.[3] Indeed, I do not oppose the policy of liberalising marriage ceremonies as such. What I would like to see, however, is a broader debate that goes beyond the mere question of who is to be empowered to celebrate a marriage and where the marriage ceremony is to take place. I wish to argue that the liberalisation of procedures leading to marriage should be placed in a wider context and viewed as part of a comprehensive reform of the law relating to the formal requirements for contracting a valid marriage under Hong Kong law.

This paper examines the primary objective of the current law governing formalities to marriage, the extent to which the law achieves its objective and whether the law meets the needs of Hong Kong society.

1 There are currently 10 marriage registries in Hong Kong of which only three are effectively used. These are Cotton Tree Drive, City Hall and the Cultural Centre. Mainly due to their location, the other seven registries are rarely used. It is said that prospective couples prefer to wed close to scenic sites such as the seafront where they can take idyllic photographs and / or record the memorable event on film. It has been proposed that the other seven facilities be closed.

2 Editorial, "Wedded Bliss", *South China Morning Post*, 5 Feb 2002, p 13.

3 *See* R. Shamdasani and M. Luk, "SAR says 'I do' to marriage proposal", *South China Morning Post*, 6 Feb 2002, p 2.

HeinOnline -- 32 Hong Kong L.J. 1 2002

Why Legal Formalities to Marriage?

From the state's point of view the primary purpose of the law governing formalities to marriage is supervisory. It ensures that only people with legal capacity are permitted to marry[4] and that such people comply with existing legal procedures for the celebration of marriage.[5] Failure to comply with these two aspects will render the marriage either void or voidable.[6] For the bride and groom, as well as their families, a marriage ceremony is more than an entry into a legally binding union. It is a significant social occasion to be celebrated with pomp and ceremony, often costing considerable sums of money.[7] As one scholar put it, "there is a correlation between the amount of formality and display and the importance of the alliance that is being created".[8] In traditional Chinese culture, for example, failure to observe the correct and very detailed marriage ceremony can be fatal to the validity of a marriage. It is written in the *Book of Rites* that *pin* leads to marriage while *pen* leads to concubinage.[9] The notion of *pin* and *pen* is indeed not far removed from the concept of void and voidable marriage under English family law.

It must also be stressed that in almost every society, and from ancient times to the present, there are individuals who marry without complying with all or some of these formalities. The reasons for such non-compliance may range from lack of means to lack of family support for the intended marriage. Some individuals, even with the legal capacity to marry, are unwilling to bind themselves into a formal marriage. They would rather cohabit without undergoing any ceremony whatsoever. In contemporary terminology, theirs

4 There are five basic requirements regarding capacity to marry: first, the parties must be respectively male and female; second, they must be at least 16 years of age; third, they must not fall within prohibited degrees of consanguinity or affinity; fourth, they must not be parties to a subsisting marriage; and finally, they must be mentally sound. *See* the Matrimonial Causes Ordinance (Cap 179) (hereinafter MCO), s 20(1) and (2)(c).

5 The main procedures of the Marriage Ordinance (Cap 181) (hereinafter MO) include: giving a notice of intention to marry (s 6); obtaining the registrar's certificate permitting the celebration of marriage (s 9); securing a written parental consent to marriage (s 14); producing two witnesses to the marriage (s 21(4)(a)); and signing a declaration before the registrar (s 21(1) and (2)).

6 A void marriage is a nullity from the start while a voidable marriage remains valid until set aside by a court of law: *De Reneville v De Reneville* [1948] P 100.

7 The common practice in Singapore (and to some extent in Hong Kong) is for the couple first to go through a civil marriage ceremony and continue to live apart for "several months before celebrating their union with a wedding in the presence of family, friends and work colleagues". *See* Carol Tan, "'We are registered': Actual processes and the law of marriage in Singapore" (1999) 13 *International Journal of Law, Policy and the Family* 1, 3.

8 *See* Lucy Mair, *Marriage* (1971) cited in B. Hogett and D. Pearl, *The Family and Society* (London: Butterworths, 3rd edn, 1991), p 30.

9 According to Chiu, "*Pin* means the taking of a woman by observing the Six Rites and *pen* means the taking of a woman into the household by running away from the Six Rites ... The former constitutes a valid marriage to all intents and purposes, while the latter is valid only in so far as it confers the status of concubinage on the woman". *See* Vermier Y. Chiu, *Marriage Laws and Customs of China* (Hong Kong: The Chinese University of Hong Kong, 1966), p 23.

HeinOnline -- 32 Hong Kong L.J. 2 2002

are called *de facto* unions, something presumably equivalent to the old English common law marriage. On the other hand, in a society like Hong Kong, which has at least three systems of marriage law, namely, the Chinese customary system, the Western system and various religious systems, some individuals may be under family pressure or may simply be eager to undergo more than one marriage ceremony in order to satisfy the formal requirements of the state, the community or their religious group. All this is to be expected given that a marriage has multiple identities depending on the system or systems to which the parties belong and the primary motivation driving the couple to the registrar's office.[10]

These multiple and sometimes conflicting identities of marriage have been the major source of complexity and conflict in the law in relation to formal requirements to marry. Historically, many legal systems have tended to tolerate such pluralism, sometimes recognising unions that do not fully comply with formal procedures. Some of these errant unions become regularised belatedly by a formal ceremony of marriage while those not so regularised may nonetheless be recognised, if only for limited purposes.[11] In certain cases, state law does invite parties to a valid non-Christian customary marriage to convert their marriage into a Christian marriage or its civil equivalent.[12] Yet some who accept the invitation to "convert" their marriage may be totally unaware of the legal consequences resulting from a second marriage ceremony with the same wife.[13]

Procedural Requirements for Contracting a Valid Marriage

Any person wishing to contract a valid marriage in Hong Kong must give notice of intention to marry to the Registrar of Marriages in a prescribed form.[14] The notice contains the full names of the intended spouses, their

[10] In modern times, the provision of social benefits, including preferential housing for married couples and tax allowances, have created for some an additional incentive, and at times the main motivation, for contracting a civil marriage. For example, two same-sex couples who recently swapped partners to go through a civil marriage ceremony stated that they were driven by the need to access public housing and tax allowance benefits. *See* Chow Chung-yan, "Gay and lesbian wed in benefits protest", *South China Morning Post*, 26 Mar 2002, p 7.

[11] *See Chan Hing-cheung and Others v The Queen* [1974] HKLR 196, where it was held that a concubine is deemed to be a wife for purposes of the Evidence Ordinance (Cap 8), s 6 and the Criminal Procedure Ordinance (Cap 221), s 54.

[12] *See* the MO, ss 38 and 40.

[13] *See Leung May Ling v Leung Sai Lun Robert* [1997] HKLRD 712, [1998] 1 HKLRD 208 and FACV No 5/198. In this case a second ceremony of marriage under the MO, s 38 between the same parties was held to have the effect of revoking a previous will in accordance with the Wills Ordinance (Cap 30), s 13(1). It is very unlikely that the testator knew that the second marriage ceremony would have such an effect. *See also* the MO, s 39(2), which now states that the marriage of a dying person under the MO, s 39(1) will not have the effect of revoking any will or codicil previously made by either of the parties to the marriage.

[14] *See* the MO, s 6.

HeinOnline -- 32 Hong Kong L.J. 3 2002

marital status (ie whether single, divorced or widowed) and their age. Where one of the parties is under 21 years of age, the name of the person giving parental consent to the marriage must be included in the notice.[15] The Registrar or Deputy Registrar of Marriage to whom the notice is given will file the notice. He or she also places a copy of the notice at the registrar's office and may also exhibit copies in other conspicuous places accessible by the public. Members of the public are entitled to free access to the filed notice. Furthermore, copies of the notice remain on display for up to three months or until the registrar's certificate permitting the solemnisation of the marriage is issued.[16] The registrar's certificate may not be issued within 15 days of the filing of the notice of intention to marry.

Before the registrar issues a certificate permitting the celebration of the marriage, one of the parties to the intended marriage is required to appear in person before the registrar to swear an affidavit that he or she believes that no impediment of kindred or alliance or any other lawful hindrance to the marriage exists.[17] Moreover, where the intended party to the marriage, not being a widower or widow, has attained the minimum age of 16 years but has not reached 21 years, the written consent of a parent or other person authorised to give consent must also be provided to the registrar before the certificate is issued. Where the party is a ward of the court, the consent is given by the court.

A marriage may also be celebrated on the strength of a special license issued by the Chief Executive of Hong Kong. The issue of a special license dispenses with the requirement for notice, including the 15 days' waiting time.[18] Unless otherwise stipulated by special license, no marriage may be celebrated in any place other than the registrar's office or in a licensed place of public worship.[19] The Chief Executive can license any place of public worship to be a place for the celebration of marriages.[20] In rare cases, the law permits the marriage of a dying person either by the registrar or a minister of religion at any place and at any time, without the need to give notice of intention to marry, provided that the parties meet the essential conditions under section 39 of the Marriage Ordinance.

15 As noted below, the requirement for parental consent for a person who has attained majority age may be in conflict with Art 1 of the United Nations Convention on the Rights of the Child, which defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier".

16 *See* the MO, s 7.

17 *Ibid.*, s 12. In cases where the registrar is also the official who will celebrate the marriage, he or she may, in lieu of issuing the certificate, simply endorse on the notice that the issue of a certificate has not been forbidden by any person authorised by law to do so. The endorsement will take effect as if a certificate had been issued. *See* the MO, s 9(2).

18 *Ibid.*, s 11.

19 *Ibid.*, s 19.

20 *Ibid.*, s 4 .

HeinOnline -- 32 Hong Kong L.J. 4 2002

Does the Existing Law Achieve its Primary Objectives?

As stated, the primary objectives of the law relating to formalities is first, to exclude parties who lack the legal capacity to marry and second, to ensure those who have the capacity to marry follow the stipulated marriage procedures. In this section, it is argued that the law relating to the issuing of notice of intention to marry does not achieve these objectives primarily because it relies on the parties to be truthful. Second, it is argued that the requirement for parental consent to marriage for parties who have attained the age of eighteen years is illogical and inconsistent with other laws. Third, that the provisions of section 27(1) of the Marriage Ordinance, which determines the validity of marriage on the basis of English law, is out of touch with Hong Kong's local conditions. Fourth, there are significant trends in Hong Kong, as elsewhere, that demand a comprehensive review of the law relating to the entry into legal marriage. These include the growth of *de facto* unions, the narrowing down of the distinctions between married and unmarried couples and the removal of most distinctions between children born in wedlock and those born out of wedlock. In the short run it will be necessary to find ways of recognising *de facto* unions and of extending to them some or all the rights currently enjoyed by legally married couples.

Lack of Publicity and Verification of Notice of Marriage

It might surprise most people to discover that despite the elaborate provisions for the issuing of a notice of intention to marry, there is no law requiring the Registrar of Marriages to verify the particulars contained in the notice. Even though the law requires one of the parties to swear an affidavit confirming that there is no impediment to the marriage, there is no guarantee that the deponent will not commit perjury or innocently overlook an important fact which he or she ought to reveal. This is probably more so in Hong Kong where, as noted, Chinese customary family law survives in some measure and operates side by side with mainstream family law which is based on the English system. Furthermore, Hong Kong has an immigrant population from mainland China, and to a lesser extent from elsewhere, some of whom have a previous marital history that is never fully investigated before they are permitted to contract a marriage under Hong Kong law.

The cases of *Pan* and *Fong* illustrate this point. They are by no means isolated cases. On 1 July 1983 Pan Oi-lin married Leung Cheng in Macau in accordance with Chinese custom. Unlike in Hong Kong, such marriages are still permitted in Macau. Subsequently, Pan married Mr Choi at the Aberdeen marriage registry in Hong Kong on 3 January 1991. Pan was fined $750 by a magistrates court after she pleaded guilty to bigamy.[21] In *Fong's* case the

[21] *See* Charlotte Parsons, "Bigamy case hinges on rites", *South China Morning Post*, 12 Dec 1996, p 3.

HeinOnline -- 32 Hong Kong L.J. 5 2002

husband had previously contracted a valid marriage in 1958 in mainland China before purporting to marry another wife in Hong Kong in 1975.[22] Even more perplexing is the recent case where two same-sex couples, two males and two females, agreed to swap partners and one of these couples contracted a sham marriage before the registrar at the City Hall registry in the glare of the media.[23]

Another area of weakness is the provision relating to the publication of the notice. The law anticipates that on publication of the notice, any member of the public who reads the notice and is aware of any impediments as to why the proposed marriage should not be solemnised will come forward to object to the marriage or perhaps alert the authorities regarding the impediment.[24] With certain exceptions, where parties lack the legal capacity to marry or where the stipulated procedures are not complied with, the resulting marriage ceremony will be a nullity.[25] Indeed, in certain cases the participants to such an illegal ceremony may be liable to prosecution and punishment.[26]

It should be stressed that the registrar's only obligation when the notice is lodged is to file the original and display a copy on a notice board. He or she is not required to take further initiatives to publicise the notice widely nor to ensure that the notice is seen by many people. In *Chong's* case it was held that the Registrar of Marriages has no obligation to investigate the accuracy of the facts contained in the notice, and further that a certificate of marriage is not conclusive proof of the validity of the marriage it purports to represent.[27] Given the lack of any law requiring the registrar to investigate or to ensure the notice of the intended marriage is seen by as many people as possible, it follows that potential objectors to the marriage are unlikely to know of the intended marriage. Moreover, in Hong Kong, where time is of the essence, people cannot be expected to visit the 10 registries either to look at the notice boards or inspect the registry files without being adequately forewarned of the proposed marriage.

As discussed above, in cases where the parties, for whatever reason, are in a hurry to contract a marriage, they can apply to the Chief Executive for a special licence to dispense with the notice and the waiting period of 15 days. Here again there is no specific provision for what factors the Chief Executive

22 *See Fong Pak Kai v Fong Chue Yin Ling Margaret* [1995] 2 HKC 518.

23 *See Chow Chung-yan* (n 10 above). Parties are said to contract a sham marriage when they go through a valid marriage ceremony without any intention of becoming husband and wife. Such marriages are recognised in some jurisdictions such as England, Canada and Australia. *See Puttick v Attorney General* [1980] Fam 1 and *R v Cahill* [1978] 2 NSWLR 453. There is no reported decision in Hong Kong on this point but courts are likely to follow English law.

24 *See* the MO, ss 7(4) and 16–18.

25 *Ibid.*, s 27 and the MCO, s 20.

26 *See* especially the MO, ss 27, 29, 30 and 33 and the Offences Against the Person Ordinance (Cap 212), s 45.

27 *See Chong Chui Yuk-ching v Chong Pui-cheong* (1983) 13 *HKLJ* 412. *See also* the MO, s 24.

HeinOnline -- 32 Hong Kong L.J. 6 2002

should take into account before issuing a special license. This power is entirely discretionary except for section 13, which prevents the issuing of a special licence where one of the parties is under 16 years of age. Given the absence of the duty to investigate or publish the notice widely on the part of the Registrar of Marriages, it is unlikely that the issuing of a special license would call for greater stringency. As the English Law Commission noted in respect of a comparable provision, the "absurdity of the present position is, perhaps, that the payment of an extra fee enables the major safeguard of a waiting period to be by-passed".[28]

Why Parental Consent for "Children" Over Eighteen?

The requirement for parental consent to a marriage under section 14 of the Marriage Ordinance also calls for comment. The section requires that a written consent to the marriage must be provided to the registrar or the Chief Executive before a certificate of marriage or a special licence is issued. Schedule 3 to the Marriage Ordinance contains a long list of people entitled to give such written consent. There are also relatively new provisions under section 18A of the Marriage Ordinance, enacted in 1997, for a District Court Judge to give consent in lieu of the parent or guardian under certain conditions.[29] The problem with section 14 of the Marriage Ordinance is that 18 years is the age of majority in Hong Kong for all purposes except marriage.[29A] It is odd that a person who has the legal capacity to enter into a commercial contract and to elect his or her Legco representative, among other things, cannot marry without parental consent unless that person is a widow or widower.[30] The requirement for parental consent also appears to contravene Article 1 of the United Nations Convention on the Rights of the Child (UNCRC), which defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". In 1986, some eight years before the UNCRC was extended to Hong Kong, the Law Reform Commission recommended that the requirement for parental consent for people aged 18 years and over should be abolished.[31] The proposal was, however, opposed by the parental-rights lobby.[32] The government yielded by introducing section 18A of the Marriage Ordinance as noted above. More

[28] *See English Law Commission's Report on Solemnization of Marriage* (1973) cited in Hoggett and Pearl (n 8 above), p 32.

[29] This section was added to accommodate, albeit partially; the objections of those who sought to abolish the parental consent provisions for people aged 18 years and over.

[29A] But see ss 118C and 118D of the Crimes Ordinance (Cap 200) which respectively create the offences of homosexual buggery with or by a man under 21 years, and buggery with a girl under 21 years, irrespective of consent to the act.

[30] *See* Ng Man Kin, "Parental Consent", *Hong Kong Lawyer*, 18 Dec 1995, p 18.

[31] *See Young Persons–Effect of Age on Civil Law*, (Topic No 11 1986), para 8.8.1. The recommendation was also supported by the ad hoc group in the Legislative Council.

[32] *See* The Law Reform Commission of Hong Kong, *Sub-Committee on Guardianship and Custody Consultation Paper* (Hong Kong, Dec 1998), p 49, para 2.141.

HeinOnline -- 32 Hong Kong L.J. 7 2002

recently, the Law Reform Commission has again recommended the abolition of the requirement, noting that "it seemed indefensible to maintain the age of marriage at 21 years with young people maturing at an earlier age in Hong Kong".[33] It remains to be seen whether this rule will finally be abolished. But now there is reason for optimism given that the proposed abolition of parental consent for marrying couples who have attained majority age is eminently consistent with a growing recognition of children's rights in Hong Kong. It is also in line with a movement away from the notion of parental rights toward parental responsibility[34] and is consistent with international trends and the spirit of the UNCRC.

The Problem with Section 27(1) of the Marriage Ordinance

Section 27(1) of the Marriage Ordinance states that "[n]o marriage shall be valid which would be null and void on the ground of kindred (ie consanguinity) or affinity in England or Wales". English law on this subject is based primarily on a mixture of Canon law and Archbishop Parker's table. In 1949 these two sources were codified into the English Marriage Act.[35] There are two main objections to this section. First, it assumes that the people of Hong Kong and the United Kingdom have the same moral and eugenic criteria for determining who stands in prohibited degrees of consanguinity and affinity. But nothing could be further from the truth. As noted by Cretney and Masson, the rules on this subject are diverse even in the West and tend to differ among jurisdictions.[36] For example, although under English law a marriage between cousins is valid (whether maternal or paternal), no such marriage would be acceptable under Chinese custom, especially between cousins on the paternal line.[37] Similarly, under English law a man can marry his daughter-in-law if both his son and the son's mother are dead.[38] And a woman can marry her son-in-law if both the daughter and the daughter's father are dead. Many people in Hong Kong would find this culturally unacceptable. On the other hand, although adopted children continue to stand in prohibited degrees of consanguinity in relation to their birth parents and other blood relatives, and are also prohibited from marrying their adopted parents, there is no marriage

[33] *Ibid.*, p 182, para 6.151, which states: "With the exception of one of our members, we recommend that the age of marriage be reduced to age 18 without parental consent." It is notable, however, and this may be unknown to most parents, that a marriage which complies with other essential requirements will not be deemed invalid only because parental consent has not been given. *See* the MO, s 27(3).

[34] *Ibid.*, pp 152–165.

[35] For the historical development of the law *see* P. M. Bromley and N. Lowe, *Bromley's Family Law* (London: Butterworths, 8th edn, 1992), pp 36–38.

[36] *See* S. M. Cretney and J. M. Masson, *Principles of Family Law* (London: Sweet & Maxwell, 6th edn, 1997), p 44.

[37] *See* Vermier Y. Chiu (n 9 above), pp 46–48.

[38] *See* Marriage (Prohibited Degrees of Relationship) Act 1986, s 1(3) and (4); Marriage Act 1949, s 1(4), (5) and Sch 1, Pt III as amended.

HeinOnline -- 32 Hong Kong L.J. 8 2002

prohibition between them and their adopted brothers or sisters.[39] Many Hong Kong people would shrink at the idea of marrying their adopted sisters or brothers even though this is not prohibited by the law.

The second objection is that since 1949, following heated debate, the English law on prohibited degrees of relationships has undergone several periodic reviews and amendments. This has been necessary given the religious background of the rules and people's changing social values and morality.[40] No such debates have taken place in Hong Kong, primarily because our law has been, for so long, tied to English law and presumably no one pays any attention to it. It is now time to revisit this provision and, if there is public support, to replace it with something culturally acceptable and in line with local conditions.

Legal Marriage and Marriage-like Unions

Western jurisdictions have grappled for decades with the rights of heterosexual couples who live together without undergoing any marriage ceremony.[41] More recently, the rights of same-sex couples have also attracted heated debate, especially in the West, leading to significant policy changes in some jurisdictions.[42] Thus the narrowing of the gap between legal marriage and marriage-like unions has led commentators to argue that marriage has become an unnecessary concept in law.[43]

In Hong Kong, except for the widely publicised problems arising from cohabitation with so-called Mainland mistresses (*bao ernai*),[44] there has been no sustained debate on the whole question of non-marital cohabitation. Indeed, the recent protest by two same-sex couples who went through a sham marriage to highlight their plight may have been intended to provoke the

39 *See* Cretney and Masson (n 36 above), pp 48–49.

40 *Ibid.*, pp 44–48.

41 *See*, for example, The New South Wales *De Facto* Relationships Act 1984 and the Domestic Relationships Act, Australian Capital Territory (ACT) and for comments on these statutes *see* S. Parker, et al, *Australian Family Law in Context* (Sydney: LBC Information Services, 2nd edn, 1999), pp 712–735.

42 *See* Paul L Spackman, "*Grant v South-West Trains*: Equality of Same Sex Partners in the European Community" (1997) 12 *Am U J Int'l Law & Policy* 1063 and Anne Barlow and Rebecca Probert, "Cohabitants: a Survey of European Reforms" (1999) 19 *NLJ* 1738. See also the House of Lords decision in *Fitzpatrick v Sterling Housing Association Ltd* [2000] 1 FLR 271 where it was held that the term "family" member under the Rent Act 1977 includes a male partner in a "longstanding, close, loving and faithful monogamous homosexual relationship" (at p 289). See also Alan Inglis, "We are Family? The uneasy engagement between gay men, lesbians and family law" [2001] 31 *Fam Law* 830.

43 *See* E. M. Clive, "Marriage: An Unnecessary Legal Concept?" in J. M. Eekelaar and S. Katz (eds), *Marriage and Cohabitation* (Toronto: Butterworths, 1980), p 71.

44 *See* Eric Li Ka-Cheung, "Protect victims of 'bigamy affairs'", *Sunday Morning Post*, 29 Jan 1995, p 13 and Quinton Chan, "Proposal to jail men who keep concubines", *Sunday Morning Post*, 29 Jan 1995, p 4. For additional comments on the debates about the legal status of Mainland mistresses, *see* Bart Rwezaura and Rebecca Ho, "Hong Kong Family Law: Moving Forward with its Plural Heritage," in Andrew Bainham (ed), *The International Survey of Family Law* (Bristol: Jordan, 2002, forthcoming).

HeinOnline -- 32 Hong Kong L.J. 9 2002

government to do something.[45] In any case, there is currently no clear policy or expressed intention on the part of the Hong Kong government to address the needs of cohabitant couples (whether gay or heterosexual). Legal reforms in this area should aim to provide legal protection to cohabitants, including the regulation of their property rights during the relationship and on its termination.

In contrast to the apathy in Hong Kong, some jurisdictions, such as Australia and a number of European and American states, have moved steadily toward giving limited recognition to such relationships.[46] As the numbers of cohabitants continue to rise, and their voices grow louder, it will become increasingly difficult for the government to ignore them. Therefore, as we seek to liberalise the rules governing the ceremony of marriage it is also timely to consider the rights of cohabitants. It cannot be said that the solution for non-marital cohabitation is to contract a valid marriage under the existing law. Indeed, it remains to be seen how the government will react, if at all, to the recently publicised sham marriages.

Conclusion

Historically, the entry into legal marriage in most countries was not regulated by state law or religious law. It was a private family affair. Over time, the Christian church in Europe became interested in the regulation of marriage and divorce. With the secularisation of marriage and family law, the state in western Europe took over much of what had developed under the jurisdiction of the church. Thus the elements of Canon law remain in English law and, by necessary implication, in the law of modern Hong Kong. Some of the ancient rules have been discarded in their country of origin as the law evolves. Indeed, it is widely agreed that many western states have greatly relaxed rules relating to the entry into marriage and any rules that exist on the subject are rarely enforced. As some commentators have argued, many of these jurisdictions have lost interest in who marries whom, with marriage restrictions becoming "primarily statements of what ought to be".[47] Even then, as Mary Ann Glendon correctly notes, the trend in Western Europe and the United States is

[45] *See* Chow Chung-yan, "Gay and lesbian wed in benefits protest", *South China Morning Post*, 26 Mar 2002, p 7 and Chow Chung-yan, "Gay and lesbian plan sham marriages in bid for benefits", *South China Morning Post*, 25 Mar 2002, p 1.

[46] *See* Lynn D. Wardle, "Same-Sex Marriage and the limits of legal pluralism" and Ingrid Lund-Andersen, "Cohabitation and Registered Partnerships in Scandinavia: The Legal Position of Homosexuals," in John Eekelaar and T. Nhlapo (eds), *The Changing Family, Family Forms & Family Law* (Oxford: Hart Publishing, 1998), pp 381–396 and pp 397–404.

[47] *See* M. A. Glendon, *State, Law and Family: Family Law in Transition in the United States and Western Europe* (Amsterdam: North Holland Publishing Company, 1977), p 66.

HeinOnline -- 32 Hong Kong L.J. 10 2002

towards state regulation of those features of marriage formation which affect society in general.[48] Both England and Scotland are now seeking to relax their rules as to the place of ceremony. The Marriage (Scotland) Bill published in November 2001 allows local councils to approve specific venues for civil marriages as long as they preserve the dignity of marriage.[49] England and Wales are set to follow this trend.[50] Should Hong Kong wish to follow suit, as recently reported, it would be wise to recognise that such piecemeal amendment will leave a number of unanswered questions. In my opinion, now is the time to locate cyber weddings and aquatic nuptials in their wider context.

*Bart Rwezaura**

[48] *Ibid.*, p 66.
[49] *See* Paul Groves, "Heading for Troubled Waters", *Birmingham Post*, 23 Jan 2002, p 11.
[50] *See* Holyrood, "Register Office monopoly ends", *The Times of London*, 15 Nov 2001.

* Senior Lecturer, Faculty of Law, University of Hong Kong.

HeinOnline -- 32 Hong Kong L.J. 11 2002