

## **‘LOST IN TRANSPLANTATION’: THE *DE FACTO* RECOGNITION IN HONG KONG OF BIGAMY IN *MA SIU SIU VIVIAN v TAM WAI MUN ALICE***

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Anyone who takes the view that ‘the law’ or ‘the rules of the law’ travel across jurisdictions must have in mind that law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage (Legrand 1997: 114).

The recognition of two marriages entered into by a man and one woman and then another in the judgment of *Ma Siu Siu Vivian v Tam Wai Mun Alice* (2020)<sup>2</sup> (hereafter, *Ma v Tam*) has raised the issue of judicial recognition of bigamous marriage in Hong Kong. This is an interesting case of the legal transplantation of law, where the technical provisions—the forms—were transplanted from another jurisdiction, but the relevant substance such as cultural and historical contexts of the laws were not considered fully by the judiciary. The effect has been a recognition of a bigamous marriage. It is important to note that bigamy has never been legally recognized in traditional Chinese law and nor hitherto in Hong Kong law.

The recognition of Chinese marriages in Hong Kong has been problematic, largely as a legacy of colonial rule. There were two forms of Chinese marriage that existed in the colonial era, and the legislative solution adopted by the colonial government in rationalizing these two forms so as to create a uniform system left unresolved several issues. Before the Marriage Reform Ordinance (hereafter, MRO) in force on 7 October 1971, the two forms of marriage widely adopted by Chinese residents in Hong Kong were Chinese customary marriage and Chinese modern marriage. The former refers to the traditional form of Chinese marriage system which contains some ritual elements—the ‘three books and six rites’ (Chiu 1966: 4). This form of marriage, which was often

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<sup>2</sup> [2020] 1 HKLRD 267.

a parentally arranged marriage, was recognized in section 39 of the Marriage Ordinance 1950 (Cap 181),<sup>3</sup> and before. The latter adopted 'western' marriage celebration as the norm and emphasized freedom of marriage. It had originated in Shanghai in the 1920s and 1930s and was gradually accepted by the Chinese community in China, especially in large urban areas. This form was often characterized as a more 'civilized marriage' (*wenmin hunyin*) and was legally recognized in the marriage reforms provided for in the Civil Code of the Republic of China (hereafter, ROC) in 1931.

This 'civilized marriage' was codified in article 982 of the Civil Code 1931: '[A] marriage must be celebrated by open ceremony and in the presence of two or more witnesses' (Civil Code of the ROC 1931). The key elements of this provision were (and still are) an 'open ceremony' and the presence of 'witnesses'. On the meaning of 'open ceremony', the Judicial Yuan (the highest judicial authority during that time in the ROC) in Yuan no 859 of 1933 explained that an 'open ceremony' means that 'ordinary non-specified persons could see the ceremony' (*The Collection of the Interpretations of the Judicial Yuan* 1998: 751-752). On the meaning of 'witnesses', the Judicial Yuan stated that the witnesses must be present at the ceremony, willing to undertake the responsibility for verifying that marriage (*The Collection of the Interpretations of Judicial Yuan* 1998: 751-752). The Judicial Yuan further explained that, nevertheless, the names of the witnesses were not necessarily required to be shown in the marriage certificate (*The Collection of the Interpretations of Judicial Yuan* 1998: 751-752; Zhang Fenjie 1993: 165; Gau Fehng-shian 2015: 35).<sup>4</sup>

Another important feature of the marriage reforms in the Civil Code was the reaffirmation of the traditional prohibition of bigamy. Traditional Chinese law permitted the taking of concubines by a married man, but not additional wives. Article 985 of the Civil Code 1931 specified that: '[A] person who has a spouse may not contract another marriage. A person shall not be married to two or more persons simultaneously.'<sup>5</sup> Bigamy was then criminalized in article 237 of the Criminal Code of the ROC 1935: '[A] person who has a spouse and marries again or who marries two

<sup>3</sup> Section 39 of Hong Kong's Marriage Ordinance 1950 provides that 'this Ordinance shall apply to all marriages celebrated in the Colony except non-Christian customary marriages duly celebrated according to the personal law and religion of the parties'.

<sup>4</sup> In the Supreme Court 1962 Taiwan Appeal Number 881, the court held that the term 'open ceremony' means that first, the husband and wife must conduct certain forms of ceremony; and secondly some persons were present with the knowledge that the couples are getting married (Zhao Fengjie 1993: 165; Gau Fehng-shian 2015: 35).

<sup>5</sup> [Article 985 of the Civil Code.](#)

or more persons at the same time shall be sentenced to imprisonment for not more than five years; the other party to such marriage shall be subject to the same punishment.’<sup>6</sup> In *Ying Yuanyin and others v Shen Wenqing* (1933), a decision of the ROC Supreme Court, the judge held that, in accordance with the Family Provisions in the Civil Code 1931, if a person has a spouse, he or she should not contract another marriage. The judge further held that even followed the laws before the promulgation of the Civil Code 1931, according to the offence of ‘taking another wife while the husband [already] has a wife’ (*youqi gengqu*) as specified by the Great Qing Code—the main source of statutory law in imperial China and still applied after 1912 in the early years of the new Republic—the second ‘wife’ could not be given the status of wife (Jones 1994: 125-136; Huang Yuen-shang 1994: 487).<sup>7</sup>

It is important to note that the form of marriage as specified in article 982 of the Civil Code 1931 was in administrative and judicial practice in Hong Kong regarded as ‘Chinese modern marriage’. It was widely practised by the Chinese in Hong Kong and *de facto* but not legally recognized in the Colony until the MRO in force on 7 October 1971. Section 8 of the MRO validates all Chinese modern marriages retrospectively before the ‘appointed day’, that is, 7 October 1971, and date their validity back to the date of celebration. This section specified that:

Subject to section 14, every marriage celebrated in Hong Kong before the appointed day as a modern marriage by a man and a woman each of whom, at the time of the marriage, was not less than 16 years of age and was not married to any other person shall be a valid marriage, and shall be deemed to have been valid since the time of celebration.

This provision is similar to and very likely borrowed from article 982 of the Civil Code 1931. And after 7 October 1971 (the appointed day of this provision), the Hong Kong authorities will only recognize registered or religious marriages contracted in Hong Kong.

In the recent case of *Ma Siu Siu Vivian v Tam Wai Mun Alice* (2020), a probate action was brought by the plaintiff, namely, Ma Siu Siu, Vivian. The plaintiff applied to the Court of First Instance in Hong Kong for a grant of letters of administration in respect of the estate her late father, Mr Ma. The latter had died intestate on 8 December 1970. The plaintiff is the daughter born to the first marriage of her father and his wife and her mother, Madam Wong. The first defendant, Madam Tam, is the wife of a

<sup>6</sup> [Article 237 of the Criminal Code of the ROC 1935](#).

<sup>7</sup> Article 103 of the Great Qing Code (*Da Qing Lü Li*): ‘If, while he has a wife, he marries another wife, he will also receive 90 strokes of the heavy bamboo’ (Jones 1994: 125-136; Huang Yuen-shang 2014: 487).

second marriage, and the second defendant, Mr Lawrence Ma, is a son to the second marriage. The first marriage was contracted in late 1961, whereas the second marriage was registered on 28 April 1970. The court had to consider two matters. First, whether the first marriage, conducted in 1961, was valid as a Chinese modern marriage under the provisions of the MRO. Secondly, if the first marriage was held to be valid, then the mother of the plaintiff was a living former wife under section 20 of the Matrimonial Causes Ordinance (Cap 179),<sup>8</sup> and the second marriage which took place on 28 April 1970 between the husband Mr Ma and Madam Tam was or was not bigamous and void.

In determining the first issue, that is, whether the first marriage was held valid under the Chinese modern marriage, the judge investigated the sufficiency of 'two witnesses' as required by the MRO. The judge accepted that all three witness statements were truthful and correct. The judge held that since these three witnesses attended the celebration dinner at Tung Wo Restaurant together, so 'there is no question of sufficiency of witnesses' (*Ma v Tam* 2020: 279).

Then the judge turned to discuss the meaning of 'open' in 'open ceremony'. He first commented that no definition was provided in article 982 of the Civil Code 1931, nor in Hong Kong's MRO, on the elements required for holding an 'open ceremony'. But he then rejected the idea that formal invitations to guests or relatives were necessary. Also, the judge stated that no special clothes were necessary to be worn for the occasion by the husband and wife. Further, the court considered that the grandmother of the plaintiff ('Grandma') had taken the initiative to raise her glass in a toast celebrating Madam Wong's new formal status as a daughter-in-law in the Ma family. The Grandma by this conduct confirmed the marital relationship of Mr Ma and Madam Wong. The court considered that Grandma was 'acting in the open and in all probability in an open manner' (*Ma v Tam* 2020: 280), thereby satisfying the requirement of an 'open' ceremony.

On the meaning of 'ceremony', the judge considered that article 982 and the MRO provided that the ceremony could be held in as simple and unsophisticated manner as the husband and wife might wish it to be, so that the husband and wife 'can contract a modern marriage by going through the simplest of ceremonies. A ceremony can also be conducted in a cheerful manner. It needs not be solemn or courtly' (*Ma v Tam* 2020: 282). The judge added that, first, in 1961, the husband was very poor, so there was no reason for him to be 'lavish' in celebrating the wedding

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<sup>8</sup> This section refers to the nullity of marriage in Hong Kong.

dinner (*Ma v Tam* 2020: 282). Secondly, the judge accepted the evidence that the Grandma was very happy about the event and took the matter seriously—the Grandma also said Madam Wong had ‘formally’ joined the family. The Grandma also provided a ‘confirmation’ of husband and wife relationship between Mr Ma and Madam Wong, so,

though Mr Ma and Madam Wong had not made specific declarations of marriage, they had acknowledged Grandma’s announcement and confirmation of a marriage by their acquiescence and participation in the celebratory toast. The fact that a dish of chicken had been ordered and that more spirits had been consumed also showed that this was a dinner gathering of ‘significance and importance’ (*Ma v Tam* 2020: 282).

The judge further observed that the use of the term ‘teacher mother’ by the pupil in addressing Madam Wong suggested that the pupil knew that Madam Wong was Mr Ma’s wife (*Ma v Tam* 2020: 283). Based upon the above analysis, the judge held that this first marriage was a simple but valid modern marriage ceremony in accordance with article 982 of the 1931 ROC Civil Code and Hong Kong’s MRO.

On the second issue, however, the judge rejected the claim that recognition of the first marriage as a Chinese modern marriage would necessarily invalidate the second marriage, which had been registered—namely that between Mr Ma and Madam Tam. The judge first considered, in Hong Kong law, whether there was any provision to the effect that, if a Chinese modern marriage was contracted before any second ‘marriage’, the second marriage would be void. The judge noted that a draft provision making this explicit had been proposed and discussed in the White Paper on Chinese Marriages in Hong Kong (1967). This important document recommended that, if a first marriage had been entered into as a Chinese modern marriage, but the husband then entered into a second marriage, the first marriage would be recognized in law only for the period that it subsisted:

Legislation to be enacted whereby marriages contracted in Hong Kong, elsewhere than in a licensed place of worship or a marriage registry and prior to a date to be appointed, shall be retrospectively recognized as valid if they were between two persons over the age of 16 and celebrated in a public place before at least two witnesses, provided that—

- (1) at the time of such marriage neither spouse was lawfully married to anyone else;
- (2) where either of the parties to such a marriage has subsequently married someone else, *the earlier marriage shall be recognized in law only for such period as it subsisted* (emphasis added).

However, this recommendation had not been adopted by the legislature in the final version of the MRO in 1971. No reason was given in the official documentation for its omission. So, the reason for its exclusion, the judge surmised, was that the legislature did not want to see 'the implementation of a recommendation which would validate the first marriage and then dissolve it on the day of the second marriage (*Ma v Tam* 2020: 286). But the puzzle was that the legislature had not conferred on the court any authority to invalidate the subsequent marriage (in the present case, the registered marriage *Ma v Tam* 2020: 286).

Since the judge considered that the legislature had 'deliberately' disregarded the draft provisions, so he felt he could not determine that 'the validation of a modern marriage (that is, the first marriage) would invalidate the subsequent valid registry marriage (that is, the second marriage). In other words, the judge considered that, since the above recommendation was intentionally not adopted by the legislature, he could not make a decision to invalidate the second marriage. The judge concluded there was no applicable statutory provision in Hong Kong law for any such invalidation, and he could not see any proper reason for deciding that the second marriage in time was invalid. He then pointed to the interests of the spouse and children: 'if the subsequent marriage should be invalidated automatically, the interest of the other party to the valid subsequent marriage and the children of that marriage may be prejudiced. This can produce unfairness to many people' (*Ma v Tam* 2020: 286). The judge reiterated that the legislature did not want to deal with the problem because 'the legislature did not want to be exposed to the embarrassment of legislating for bigamy if the law should say that the validation of the [Chinese Civil Code] modern marriage would not affect the validity of the subsequent valid marriage'. So, to the judge, the logical conclusion was that both marriages, that is, the first marriage (a Chinese modern marriage) between Mr Ma and Madam Wong, and the second marriage (a registered marriage under the MRO), between Mr Ma and Madam Tam, were valid from the time of their respective celebrations.

The fundamental problem of this judgment is that it recognizes the bigamous marriage. The judge in reaching this conclusion failed to consider the long-standing monogamous nature of Chinese marriage and the strict prohibition of bigamy, in the Great Qing Code of imperial China, and the reaffirmation of the centrality of monogamous marriage in the ROC the Civil Code 1931. Following the *ratio* of the judgment, it would be reasonable to postulate that, a Chinese man could not contract any bigamous marriage in Qing China nor ROC, but he could—if he moved to and became domiciled in Hong Kong—contract a Chinese modern

marriage and also then contract another form of marriage in Hong Kong, with two Chinese women. Both unions would be recognized in law. This is an unacceptable state of affairs.

Further, the judge failed to examine thoroughly the background and context of the legislative changes in the Civil Code 1931. It is important to note that the issue of the recognition of Chinese modern marriage in Hong Kong has its origins in the social movement for the freedom of marriage, including the use of ‘civilized marriage’, soon after the 1911 Revolution in mainland China. This social movement should be regarded as reform from below, not the top-down approach taken by the Republican Government aiming at ‘revolutionizing’ antiquated social practices. And article 982 was only part of the marriage reform package in the Civil Code 1931. The marriage reform proposals also included provisions such as abolition of concubinage, specific prohibition of bigamous marriage, and greater rights to women on dissolution of marriage, and these were all provided for in Civil Code 1931. Thus, it is suggested that, when the judge went about the task of interpreting article 982 of the Civil Code 1931, he should have considered other provisions relating to marriage reform, and to give more consideration to the *raison d’être* and context behind the marriage reforms. The judge had interpreted article 982 too literally and without suitable contextualization in terms of the relevant provisions of the Civil Code 1931.

In addition, the judge might have usefully considered the origins and nature of the recognition of the Chinese modern marriage in Hong Kong. The Chinese community in Hong Kong, heavily influenced by marriage reforms in China, also adopted as a matter of practice Chinese modern marriage. Indeed, Chinese modern marriage became very popular both before and after the Second World War in Hong Kong. Unfortunately, this form of marriage was not provided for and recognized explicitly in Hong Kong law. The Hong Kong Government subsequently decided to develop a legislative solution that would fill the gap. This was the solution offered in the MRO: all marriages henceforth other than those celebrated by a religious ceremony should be registered. But retrospective recognition could be given to the Chinese modern marriages entered into before the MRO came into force. Thus, the validation of Chinese modern marriage in Hong Kong was a response of the social change from below. Since the form of Chinese modern marriage originated from legal changes (and social practice) in China, the Hong Kong Government dealt with the issue by transplanting relevant provisions from the ROC Civil Code 1931 to Hong Kong when drafting the MRO. Indeed, the problem of the ‘modern marriage’ had been brewing for some time. The first proposal to recognize

in Hong Kong law Chinese modern marriage was made in the Strickland Report published in 1953 (Committee on Chinese Law and Custom in Hong Kong 1953: 44). The Strickland Report was an attempt to deal with the felt need to modernize marriage and other aspect of family law on the one hand, and to allow law to be sensitive to local Chinese society in Hong Kong on the other. A marriage reform package—with abolition of concubinage (Wong 2020, 181), establishment of registered marriage, new procedures for dissolving marriage and so on—was proposed by the Strickland Report but unfortunately rejected by the Government. The main reason for such delay was to be found in the opposition of the senior Chinese members of the Legislative Council in Hong Kong on the issue of abolition of the concubinage. Their perception of senior status included the idea that they should continue to be allowed to take concubines. Subsequent reports in 1960 (White Paper on Chinese Marriages in Hong Kong 1960) and 1967 (White Paper on Chinese Marriages in Hong Kong 1967) also made similar reform proposals on Chinese modern marriages. But these proposals were not taken up by the colonial government as, in not only the 1950s but also the 1960s, there was blanket opposition from the Chinese members of Hong Kong's Legislative Council to any legislative proposals on marriage reform. It was only the intervention of the Colonial Office in London which finally forced the colonial government to propose legislation to reform Chinese marriage in Hong Kong. The result was the MRO, promulgated in 1971 (Wong 2020: 156). So, to understand the case better, the judge should also have considered the origins and development of the marriage reform proposals in Hong Kong made in the 1950s and 1960s and examined more closely the legislative intentions of the drafters of the MRO. The statutory interpretation approach taken by the judge in the present case takes the MRO provision too literally. It accepts the technical aspect of provisions but not their substance and intention when the law was transplanted from the ROC Civil Code 1931 to the MRO 1971.

This case, if it stands, may well have profound impact upon the inheritance and succession laws in Hong Kong, especially on the judicial recognition of bigamy on the Chinese modern marriages contracted before the MRO 1971. Consider this: if a deceased husband contracted two Chinese forms of marriages (such as a Chinese modern marriage followed by a Chinese customary marriage) before 1971 in Hong Kong and he domiciled in Hong Kong and then died without a will, how would his two surviving 'wives' inherit his estates? The current laws in Hong Kong such as the provisions of the Intestates' Estates Ordinance (Cap 73) might not offer help because they only govern the inheritance of a monogamous



marriage. Also, traditional Chinese law and custom in Hong Kong might not be able to help because it did not recognize bigamy. Thus, it is important for the Hong Kong Special Administrative Region authorities to examine the judgment closely and to propose legislative solutions that would reassert exclusive recognition of monogamous marriage in Hong Kong law between Chinese parties.

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## Legislation

- Civil Code of the Republic of China 1931
- Criminal Code of the Republic of China 1937
- Great Qing Code (Da Qing Lü Li)
- Intestates' Estates Ordinance (Cap 73), Hong Kong
- Marriage Ordinance 1950, Cap 181, Hong Kong
- Marriage Reform Ordinance, Cap 178, Hong Kong
- Matrimonial Causes Ordinance, Cap 179, Hong Kong

## Cases

- Ma Siu Siu Vivian v Tam Wai Mun Alice* [2020] 1 HKLRD 267
- Ying Yuanyin and others v Shen Wenqing* (1933) Supreme Court of the Republic of China