Article

Sticking to the Past: Same-sex Union and Original Meaning in Hong Kong

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ABSTRACT

This article builds on the author's work on the uses of history by the Hong Kong law courts in the context of sexual minority rights, and focuses on the judicial turn to original meaning in the territory's latest case on marriage equality: MK v. HKSAR. In that case, the Court of First Instance held that neither the government's refusal to legalize same-sex marriage nor its failure to provide an alternative framework for the recognition of same-sex relationships was unconstitutional. In particular, the court reasoned that the meaning of "marriage" in Article 37 of the Basic Law, which guarantees the right to marry and to raise a family freely, should be determined in light of the understanding of the term when the constitutional document was promulgated. I argue that the court's insistence on original meaning goes against the grain of the majority judgment in W v. Registrar of Marriages, which to date remains the only case on the right of marry from Hong Kong's Court of Final Appeal. I further argue that despite the Court of First Instance's reliance on lex specialis, there is significant precedential force for the introduction of both same-sex marriage and civil partnerships in Hong Kong.

Keywords: *Marriage Equality, Civil Unions, Lex Specialis, Originalism, Hong Kong*

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CONTENTS

In Hong Kong, as in many other jurisdictions, opposition to marriage equality is often framed in the name of a purported fidelity to the past. In *W v. Registrar of Marriages*, in which a male-to-female transsexual argued that the government's refusal to recognize her new gender for the purposes of marriage violated her right to marry under Article 37 of the Basic Law, the Court of First Instance (CFI) held against the litigant, partly on the basis that "marriage as a social institution has existed for thousands of years", such that allowing transsexual marriage would undermine millennia of conjugal orthodoxy.[1] In *Leung Chun Kwong v. Secretary for the Civil Service*, in which a gay civil servant challenged the government's refusal to recognize his marriage with another man in New Zealand in the context of his application for local spousal benefits and joint tax assessment, the Court of Appeal repeatedly referred to local "history", "tradition", cultural "practice", and "long usage" as the basis of marriage in Hong Kong, and characterizes monogamous, opposite-sex unions as an institution with a longstanding and venerable history that should not be broken by the recognition of same-sex marriages.[2] I have argued against the courts' use of history in those decisions.[3] The litigants in both *W* and *Leung* appealed to the territory's highest court, which ruled in their favor.[4]

The CFI decision in *MK v. HKSAR* represents not only the latest judgment in the series of cases relating to marriage equality in Hong Kong, but also the latest manifestation of this broader tendency to resist the development of sexual minority rights in the name of history.[5] In that case, the court held that neither the government's refusal to allow MK to legally marry her same-sex partner, nor its failure to provide an alternative legal framework such as civil unions for the recognition of same-sex relationships, was unconstitutional. The judgment is premised on an originalist interpretation of Article 37: Judge Anderson Chow notes that it would be "unreal" to "attribute to the draftsman of the Basic Law an intention that the word 'marriage' in BL 37 would include a same-sex marriage" back in 1990, when the constitutional document was promulgated.[6] He further opines that while it is accepted that the Basic Law is a living instrument, the current circumstances did not justify an "updated interpretation" of the provision.[7]

1. W v. Registrar of Marriages, [2010] 6 H.K.C. 359 (C.F.I.).
2. Leung Chun Kwong v. Secretary for the Civil Service, [2018] 3 H.K.L.R.D. 84 (C.A.).
3. *See* Marco Wan, *Doing Things with the Past: A Critique of the Use of History by Hong Kong's Court of First Instance in W. Registrar of Marriages*, 41 HONG KONG L.J. 125 (2011); Marco Wan, *Sexual Orientation and the Historiography of Marriage in Leung Chun Kwong v. Secretary for the Civil Service*, 48 HONG KONG L.J. 605 (2018).
4. W v. Registrar of Marriages, [2013] 16 H.K.C.F.A.R. 112 (C.F.A.); Leung Chun Kwong v. Secretary for the Civil Service, [2019] 22 H.K.C.F.A.R. 128 (C.F.A).
5. MK v. HKSAR, [2019] 5 H.K.L.R.D. 259 (C.F.I.).
6. *Id*. at 269.
7. *Id*. at 277.

The turn to originalism is a critical interpretative move in the judgment: on the basis of that turn, the court holds that the constitutional provision constitutes a form of *lex specialis* which pre-empts consideration of any of the other clauses that could shed light on same-sex unions, including those on equality and non-discrimination; on privacy, home, and family; and on the freedom of thought and conscience.

In this article, I scrutinize the use of original meaning in the *MK* decision. Parts I and II discuss the court's opinion on same-sex marriage. In Part I, I argue that interpreting "marriage" in Article 37 solely in light of its original meaning goes against the reasoning of the Court of Final Appeal (CFA) in the *W* case, which to date remains the only judgment on the right to marry handed down by Hong Kong's highest court. I further demonstrate that the logic of *lex specialis*, which is premised on the CFI's originalist approach, constitutes a judicial sleight of hand which transforms the constitutional protection of Hong Kong residents' *right to marry* into the protection of the *institution of marriage*. In Part II, I bring back the common law authorities on equality and non-discrimination which the court sidelines to demonstrate that there is significant precedential force for the introduction of same-sex marriage in Hong Kong. Part III focuses on the court's opinion on an alternative legal framework to recognize and protect same-sex relationships. I argue that, even if the local courts do not accept the argument for same-sex marriage, they should at least introduce such an alternative framework in light of the jurisprudence of the European Court of Human Rights (ECtHR).

I. A MOMENT IN TIME: ON THE MEANING OF MARRIAGE

In the CFI judgment, the meaning of the word "marriage" in 1990 controls the way in which the term should be legally construed today: Justice Chow notes that marriage was "at the time of the promulgation of the Basic Law, clearly understood in the traditional sense of being a union between a man and a woman".[8] He offers three reasons for this conclusion. First, Hong Kong law did not provide for or recognize same-sex marriage when the constitutional document was promulgated, nor did it do so when it came into effect in 1997.[9] Second, in terms of the international legal environment, same-sex marriage was not recognized anywhere in the world until 2001, when it was legalized by the Netherlands. Third, Article 37 needs to be read consistently with Article 19 in the Bill of Rights. Article 37 protects the right to marry, and states that "the freedom of marriage of Hong Kong residents

8. *Id*. at 270.
9. *Id*. at 269.

and their right to raise a family freely shall be protected by law." Article 19(1) states that "the family is the natural and fundamental group unit of society", and Article 19(2), which guarantees "the right of men and women to marriageable age to marry and to found a family", is based on Article 23(2) of the International Covenant on Civil and Political Rights which has in turn been construed to mean recognition and protection of heterosexual, and not same-sex, marriages. Reading the provisions in relation to each other, Justice Chow opines that "it cannot […] seriously be argued that BL 37 was intended to protect the right of marriage of same-sex couples when such form of marriage was simply unknown at the time of the enactment of the Basic Law".[10]

The court's observation that same-sex union was not part of the public meaning of marriage in 1990s Hong Kong, and that it was likely not in the minds of the draftsmen at the time, is uncontroversial. While there was some gay activism in the final years of British colonial governance, it is indisputable that the general social understanding of marriage then did not encompass the union of two men or two women. Moreover, the merits and demerits of originalism as an approach to constitutional adjudication is not one which has been addressed or debated amongst judges in Hong Kong in any sustained, explicit manner. As such, unlike some of the scholarship on same-sex marriage and originalism in the American context, my argument here does not seek to argue for same-sex unions within an originalist interpretative paradigm, nor does it seek to theorize its adoption by the Hong Kong courts.[11]

What I do take issue with in this article is the CFI's conclusion that the meaning of "marriage" in the Basic Law should not be given an "updated interpretation" even though the CFA has repeatedly stated that it is a living instrument intended to meet changing needs and circumstances.[12] Judge Chow finds support for his conclusion in the opinion of Permanent Justice Patrick Chan in the CFA decision in *W*: Chan PJ notes that the courts should be cautious of giving an updated meaning to the provision, and should only do so if it is satisfied that "there is sufficient evidence to show that the present circumstances *in Hong Kong* are such as to require the court to construe Article 37 differently from the law which formed the basis on which

10. *Id*. at 273.

11. For examples of how original meaning can provide a basis for same-sex marriage, *see* Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-sex Marriage*, 70 U. MIAMI L. REV. 648 (2016); William N. Eskridge Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067 (2015); Michael Ramsey, *Is There an Originalist Case for Same-sex Marriage?*, ORIGINALISM BLOG (Mar. 25, 2013), https://originalismblog.typepad.com/the-originalism-blog/2013/03/is-there-an-originalist-case-for-same-sex-marriagemichael-ramsey.html.

12. *MK*, 5 H.K.L.R.D. at 274. On the Basic Law as living instrument, *see* Ng Ka Ling v. Director of Immigration, [1999], 2 H.K.C.F.A.R. 4, 28 (C.F.A.).

this article was drafted/adopted".[13] The words "in Hong Kong" are critical: Chan PJ opines that since "the culture and social conditions in each place are not the same", the courts' "principle consideration" when deciding whether to update the meaning of marriage in the Basic Law "must be the circumstances in Hong Kong", rather than the developments in other common law jurisdictions or the European Court of Human Rights.[14] He concludes that since, in his view, "there is no evidence that social attitudes in Hong Kong towards the traditional concept of marriage and the marriage institution have fundamentally altered", therefore Article 37 cannot be construed to include a transsexual person's right to marry in her new gender. In Chan PJ's opinion, the unchanging understanding of marriage within Hong Kong, together with the supposedly incompatibly different conditions in other places, bar the court from considering foreign cases as relevant precedent.

The court in *MK* goes one step further than Chan PJ's *W* opinion in that it states more categorically that "marriage" should be understood only in light of its meaning at the time the Basic Law was promulgated.[15] The CFI's reliance on Chan PJ's opinion case here is curious, because it is the dissenting one in the CFA judgment. A closer look at the majority opinion, from which Chan PJ is the sole dissenter, shows that the dissent's exclusive focus on Hong Kong goes against the grain of the majority's reasoning. The majority opinion in that judgment underscores, first of all, that developments in international jurisprudence and changes in the global milieu play a crucial role in the court's constitutional analysis. Second, it is attuned to the ways in which the institution of marriage has already evolved in light of changes in social attitudes.

In terms of internal conditions, the majority notes that the traditional understanding of marriage in Hong Kong is premised on "an emphasis on procreative sexual intercourse" as "an essential purpose of the matrimonial union".[16] It further observes that this traditional understanding is embodied in Justice Omrod's judgment in the case of *Corbett v. Corbett*, in which it was held that gender was to be determined through biological criteria alone.[17] It concludes that since "in present-day multi-cultural Hong Kong […], procreation is no longer (if it ever was) regarded as essential to marriage", therefore a male-to-female transsexual person's inability to procreate cannot be taken as a reason for not allowing her to marry in her

13. *W*, 16 H.K.C.F.A.R. at 176.
14. *Id*. at 180.
15. *MK*, 5 H.K.L.R.D. at 269.
16. *W*, 16 H.K.C.F.A.R. at 153.
17. Corbett v. Corbett (otherwise Ashley), [1970] 2 All E.R. 33.

new gender.[18] It also holds that the *Corbett* understanding of gender should be abandoned in favor of a more comprehensive approach that takes into account not only biological factors, but also psychological and social ones.[19]

The majority's emphasis on international legal developments in *W* is most evident in its examination of the ECtHR jurisprudence. In asking how the right of transsexual people to marry in their new gender came to be recognized by the ECtHR, the majority begins by observing that the Strasbourg court had declined to give such recognition in a series of early cases, including *Rees v. United Kingdom*,[20] *Cossey v. United Kingdom*,[21] and *Sheffield and Horsham v. United Kingdom*.[22] In those early cases, the ECtHR held that transsexual marriage came within the United Kingdom's margin of appreciation due to a lack of a common European approach on the issue.

The majority went on to note that it was not until the Grand Chamber decision in *Goodwin v. United Kingdom* that the ECtHR finally recognized a person's right to marry in the new gender.[23] In that case, the Strasbourg court attached less importance to "the lack of evidence of a common European approach" because of the "clear and uncontested evidence of a *continuing international trend*" in favor of the recognition of the new sexual identity of post-operative transsexuals--not only in Continental Europe and the United Kingdom, but also in other developed nations such as Australia and New Zealand.[24] This case, cited approvingly by the majority opinion in Hong Kong's highest court, clearly points to the importance of international developments for construing constitutional provisions on the right to marry. These international developments include both the jurisprudence of the European supranational court and the cases from the common law jurisdictions of the developed world. Chief Justice Geoffrey Ma and Permanent Justice Robert Ribeiro both took overseas developments into account alongside changes in local attitudes when they held that that the meaning of marriage in Article 37 had to be updated: "there have *in many developed nations* and in Hong Kong clearly been far-reaching changes to the nature of marriage as a social institution".[25] The court then turned to a number of common law cases on transsexual marriage beyond Hong Kong, including the Australian case of *AG (CTH) v. "Kevin and Jennifer"*[26] and

18. *W*, 16 H.K.C.F.A.R. at 154.
19. *Id*. at 158.
20. Rees v. The United Kingdom, 9 Eur. Ct. H.R. 56 (1987).
21. Cossey v. The United Kingdom, 184 Eur. Ct. H.R (ser. A) 16 (1990).
22. Sheffield and Horsham v. United Kingdom, 1998-V Eur. Ct. H.R. 2011.
23. Goodwin v. The United Kingdom, 35 Eur. Ct. H.R. 18 (2002).
24. *Id*. at 25.
25. *W*, 16 H.K.C.F.A.R. at 153.
26. Attorney-General for the Commonwealth v. Kevin and Jennifer (2003) 172 FLR 300 (Austl.).

the New Zealand case of *AG v. Otahuhu Family Court*,[27] and held that the sole emphasis on biological criteria for determining a person's gender stipulated in *Corbett* should no longer be followed.

The majority's internationalist approach to understanding marriage is consistent with the approach in other common law jurisdictions. In *Day and Bush v. Governor of the Cayman Islands*, in which it was held that the denial of same-sex marriage to the applicants violated their right to private and family life, the Cayman Islands Grand Court noted that the process of judicial interpretation, including the interpretation of the constitutional provision on the right to marry, is guided by "the wealth of judicial precedent which has become available from around the world, in response to humanity's common quest for the realization and enforcement of rights".[28] In *Commonwealth v. Australian Capital Territory*, in which it was held that the word "marriage" in Sections 51(xxi) and 51 (xxii) is a juristic concept which "embraces" same-sex unions, the High Court of Australia took note that "other legal systems now provide for marriage between persons of the same sex", and this wider picture informed the court's view that the boundaries of the class of persons who can have the legal status of marriage are not immutable.[29] Yet the CFI in *MK* insists that "while the word 'marriage' may now be understood in some parts of the world as being applicable to same-sex couples, it is, […] how the word is, and has always been, understood *in Hong Kong* that is relevant for the purpose of interpretation of the Basic Law".[30] In light of the cases from the wider common law world as well as the majority opinion in *W*, this exclusive focus on Hong Kong and the concomitant setting aside of foreign cases in the name of different cultural and social conditions, derived from the dissenting opinion in *W*, seems myopic and therefore misguided.

On the basis of its originalist approach, the court also posits that Article 37 constitutes a *lex specialis* which precludes the applicant's reliance on the Basic Law's equality provisions or on the common law cases on marriage equality. The maxim of *Generalia specialisbus non derogant*, or the general does not detract from the specific, is a doctrine for resolving conflicts that arise from two legal provisions. The court notes that since, on an originalist reading, Article 37 "does not confer the right of marriage on same-sex couples", therefore "other general articles in that constitution or human rights instrument providing for other rights cannot give rise to such a

27. Attorney-General v. Family Court at Otahuhu (1995) 1 NZLR 603 (HC).

28. Day and Bodden Bush v. The Governor of the Cayman Islands et al (2018) Civil Cause No. 111 and No. 184 at 32.

29. Commonwealth v. Australian Capital Territory (2013) 304 ALR. 204, 213 (Austl.).

30. *MK*, 5 H.K.L.R.D. at 272-73.

right".[31] It derives support for this conclusion from the case of *Schalk and Kopf v. Austria* in the European Court of Human Rights. In that case, the ECtHR held that since Article 12 (on the right to marry) did not obligate states to introduce same-sex marriage, therefore the argument for same-sex marriage cannot be premised on "a provision of more general purpose and scope" such as Article 8 (on the respect for private and family life), even when taken in conjunction with Article 14 (on the prohibition of discrimination).[32] The CFI judgment constructs a series of parallels: Article 12 of the ECHR maps onto Article 37 of the Basic Law insofar as they both concern the right to marry, and Article 14 (taken in conjunction with Article 8, as Article 14 must be interpreted in relation to another Convention right) maps onto Article 25 of the Basic Law and Article 22 of the Bill of Rights, insofar as they are all provisions on equality or non-discrimination. Since the European Court held that the possibility of same-sex marriage cannot be derived from Article 14 (taken in conjunction with Article 8) if it is not already encompassed by Article 12, the Hong Kong court reasons that it, similarly, does not have to consider Article 25 of the Basic Law or Article 22 of the Bill of Rights on the basis that they are more general provisions.

In the following sections, I will address how the factual matrix of *Schalk and Kopf* itself, as well as the approach to it by the Cayman Islands Grand Court in *Day and Bush*, suggest that it is problematic for the Court of First Instance to directly adopt the reasoning on *lex specialis* in *Schalk and Kopf*. For the moment, it suffices to note that the CFI's turn to *lex specialis* via originalism here leads to a number of strange consequences. Strictly speaking, it can preclude a person's right to treat their illegitimate children on equal terms as their legitimate children (since, in the early 1990s, children born out of wedlock would likely not have been considered as part of a "family" within the "the right to raise a family freely" in Article 37). It may also mean that a person cannot accept the sexed identity of their children should they happen to be transgendered (unlike today, there was almost no public discussion of transgendered children as part of a "family" at the time). More important for my purposes, it renders irrelevant a line of common law cases outside of Hong Kong which hold that a state's denial of access to marriage by same-sex couples is unconstitutional, on the basis that the constitutions in those jurisdictions do not contain specific provisions on the right to marry: the cases that the court sets aside include *Halpern v. Attorney General of Canada*,[33] *Minister of Home Affairs v. Fourie* from the South African Constitutional Court,[34] the U.S. Supreme Court's *Obergefell v.*

31. *Id*. at 280.
32. Schalk and Kopf v. Austria, 2010-IV Eur. Ct. H.R. 409.
33. Halpern et al. v. Attorney General of Canada et al. (2003), 65 O.R.3d 161 (Can. Ont. C.A.).
34. Minister of Home Affairs v. Fourie 2006 (1) SA 524 (CC) (S. Afr.).

Hodges,[35] and *Ferguson v. Attorney General of Bermuda*.[36] The insistence on freezing the meaning of marriage in Article 37 as it was understood in the 1990s underpins a problematic sidelining of relevant twenty-first century local and global developments through the *lex specialis* argument.

To put the case more forcefully, the fixation on original meaning constitutes a judicial sleight of hand which turns the provision protecting Hong Kong residents' *right to marry* into a provision protecting *traditional marriage*. This sleight of hand is evident in the language of the court itself. Article 37 refers to "the freedom of marriage of Hong Kong residents": it is that *freedom* which the Article protects. However, Justice Chow repeatedly characterizes Article 37 as a "marriage protection clause", such that in the judgment, what is protected becomes, bizarrely, the *institution of marriage* rather than the freedom of the individual applicant.[37] The court's justification for distinguishing the other common law cases is particularly revealing of this tendentious slippage:

It would appear that there was no *marriage protection clause*, or *lex specialis* concerning or relating to the right of marriage, in the relevant constitutions under consideration by the courts in the above cases, and thus those courts did not have to consider the impact that a *marriage protection clause* would have on the argument that the denial of right of same-sex couples to marry breached various constitutional rights which did not relate specifically to the right of marriage.[38]

The paragraph refers to the "marriage protection clause, or *lex specialis* concerning or relating to the right of marriage": in the eyes of the court, a provision specifically protecting the right to marry is synonymous with a provision protecting marriage. The former morphs into the latter, and this transformation constitutes the premise for setting aside the provisions and the cases on equality. Even though the court frames its reasoning in the language of rights, and deploys a conventional analytical framework which address the scope of, and limitations to, a right, the shift in the subject which the right protects enacts a removal of sexual minorities from constitutional protection. If Article 37 protects the right to marry, then the freedom of Hong Kong residents to marry their same-sex partners could potentially come within its scope. If, on the other hand, Article 37 protects marriage, then any attempt by sexual minorities to argue for their right to marry becomes recast as an assault on the very institution that needs protecting.

35. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
36. Attorney General for Bermuda v. Ferguson et al (2018) 45 B.H.R.C. 305.
37. *MK*, 5 H.K.L.R.D. at 280.
38. *Id*. at 284.

II. MARRIAGE, EQUALITY, DIGNITY

We therefore need to re-open the question of same-sex marriage in Hong Kong by looking afresh at both local attitudes and overseas developments. In terms of local attitudes, the court in *MK* asserts that the way the concept of marriage "is, and has always been, understood in Hong Kong, has no application to same-sex couples".[39] This assertion is made with no evidence of its veracity, and seems curious at best in light of a recent study by the Centre for Comparative and Public Law at the University of Hong Kong, which found that public support for gay and lesbian rights has been steadily rising in recent years. The study is based on a telephone survey of a representative sample of Hong Kong residents, first in 2013, and again in 2017. Within that four-year period, the percentage of people who supported same-sex marriage increased significantly, to 50.4% from 38%.[40] There were also significant rises in support for same-sex couple rights associated with marriage, including hospital visitation (78% in 2017, from 64% in 2013); protection from housing discrimination (67%, from 60%); and inheritance rights (61%, from 55%). An even more recent survey conducted by the Sexualities Programme at the Chinese University of Hong Kong found that opposition to sexual minority rights was at a "historical low".[41] In particular, it found that 75% of the respondents aged between 18 and 34 supported same-sex marriage. These figures indicate that social mentality is changing; contra the court's assertion, support for same-sex marriage is steadily and rapidly rising in Hong Kong.

In terms of international development, there is, in the words of the Strasbourg court in *Oliari v. Italy*, a "rapid" and "continuing international movement" towards the legal recognition of same-sex relationships not only in Europe, but also globally, and in particular in the Americas and Australasia.[42] In Latin America, the Inter-American Court of Human Rights held that signatory states to the Inter-American Convention on Human Rights "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

39. *Id*. at 272.

40. Holning Lau et al., *Support in Hong Kong for Same-sex Couples' Rights Grew Over Four Years (2013-2017) Over Half of People in Hong Kong Now Support Same-Sex Marriage*, CENTRE FOR COMPARATIVE AND PUBLIC LAW AT THE FACULTY OF LAW, THE UNIVERSITY OF HONG KONG, 2018, https://www.law.hku.hk/ccpl/wp-content/uploads/2018/07/Change%20Over%20Time%20Paper%20English%20(3%20July%20Final%20for%20Distribution).pdf.

41. Suen Yiu-Tung et al., *Public Attitudes Towards LGBT+ Legal Rights in Hong Kong 2019/20*, SEXUALITIES RESEARCH PROGRAMME, CHINESE UNIVERSITY OF HONG KONG (2020), https://7bb73318-120e-454d-84c6-9da78469b28b.filesusr.com/ugd/c27b9b3a3de20a3fba492b974e883d8a09d3aa.pdf.

42. Oliari v. Italy, nos. 18766/11 and 36030/11, ECHR 2015 at 30.

heterosexual couples.[43] In Asia, Taiwan constitutes a jurisdiction whose culture is predominantly Chinese, but where the Constitutional Court nonetheless held that restricting marriage to a union between a man and a woman constitutes a violation of the freedom of marriage and the right to equality.[44] Significantly, same-sex marriage in Taiwan came about despite considerable opposition to marriage equality: a 2018 referendum indicated that many people there disapproved of same-sex marriage, but the Taiwanese government still introduced legislation to give effect to the court ruling, and marriage was legalized in May 2019.[45] In terms of common law countries, Article 84 of the Basic Law explicitly states that Hong Kong courts "may refer to precedents of other common law jurisdictions" when they adjudicate, and it is established practice for the local courts to be guided by evolutions, adjustments, and advancements in other common law countries. In this regard, it is crucial to place Hong Kong in the wider context of the changes in the common law world.

At the time of the *MK* litigation, same-sex marriage had already become firmly entrenched in the developed countries that adopt a common law framework: they include America, the United Kingdom, Canada, South Africa, Australia, and New Zealand, amongst others. Moreover, there is a corpus of cases from some of the highest courts of these jurisdictions which demonstrate, in detail, that the constitutional basis of same-sex marriage is premised on fundamental human *dignity*--a word which, astoundingly, does not feature even once in the CFI's judgment. The dignitary wound the law inflicts by withholding recognition of the love and commitment of same-sex partners is poignantly expressed in the words of Justice Albert Sachs of the South African Constitutional Court:

> The exclusion of same-sex couples from the benefits and responsibilities of marriage […] is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of

43. Gender Identity, and Equality and Non-discrimination of Same Sex Couples, State Obligations Concerning Change of Name, Gender Identity, and Rights Derived From a Relationship Between Same-sex Couples (Arts. 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in Relation to Article 1 American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am Ct. H.R. (ser. A) No.24, ¶ 229 (Nov. 24, 2017).

44. Sifa Yuan Dafaguan Jieshi No. 748 (司法院大法官解釋第748號) [Judicial Yuan Interpretation No. 748] (2017) (Taiwan).

45. Chris Horton, *Taiwan Asked Voters 10 Questions. It Got Some Unexpected Answers*, N.Y. TIMES (Nov. 26, 2018), https://www.nytimes.com/2018/11/26/world/asia/taiwan-election.html.

> heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.[46]

The judicial language here makes clear the indignity which the law inflicts: gays and lesbians are treated as second class citizens (note the repetition of the word "less"), genetic misfits ("biological oddities"), "outsiders", and sub-humans ("failed or lapsed human beings"). In the U.S. Supreme Court, Justice Kennedy places a similar focus on human dignity in *Obergefell v. Hodges*: holding that the premise for same-sex marriage deprives from the Equal Protection clause and the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment, he underscores that, at its core, the claim for recognition of same-sex marriage is claim for "equal dignity in the eyes of the law".[47] He notes that:

> As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.[48]

He further observes that such an exclusion imposes "stigma" and dignitary "injury" on sexual minorities. In *MK*, Justice Chow distinguishes both of these cases on the basis that the constitutions in South Africa and the U.S., unlike the Basic Law, do not contain provisions which specifically address the right to marry. However, setting side these cases on the purely technical grounds of *lex specialis* overlooks the more fundamental point underscored in both *Fourie* and *Obergefell*: the liberty to choose one's partner and the form of sexual and emotional attachments one enters into is a central, constitutive element of human dignity.

The nature and scope of *lex specialis* receives detailed consideration in the Cayman Island s Grand Court case of *Day and Bush*: Section 14(1) of the Cayman Islands Bill of Rights states that the "Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a

46. *Minister of Home Affairs*, 2006 (1) SA 524 (CC). at 45 para. 71.
47. *Obergefell*, 135 S. Ct. at 2608.
48. *Id*. at 2601-02.

family". The restriction of the right to marry to opposite-sex couples here is clear; to adopt Justice Chow's description, this is a "marriage protection clause" if there ever was one. The similarity in the factual matrix of this case to *MK* means that this is a judicial authority that Hong Kong courts need to take into serious consideration. However, the CFI's reasoning for distinguishing the case seems peremptory at best. The paragraph on why it did so is set out in full below:

> It is of course not for this court to comment on how Section 14 [on the right to marry] of the Cayman Bill of Rights ought to be interpreted. Insofar as Basic Law Article 37 and Bill of Rights Article 19 are concerned, I consider it to be clear that they protect only the right of opposite-sex couples to marry, and those articles constitute the relevant *lex specialis* precluding the right to marriage from being accorded to same-sex couples under other articles of the Basic Law and/or the Hong Kong Bill of Rights. I am not persuaded by the reasoning of the Grand Court of the Cayman Islands in *Day and Bush* that a different conclusion should be reached.[49]

The first sentence reflects the tendency throughout the *MK* judgment to sideline foreign jurisprudence: how they decide their cases over *there* has no relevance for us *here*. The second sentence is a simply a recap of the court's interpretative position on Hong Kong law; it does not offer any reasons why it did not consider *Day and Bush* despite the similarities in constitutional structures and the legal issue at hand. The third sentence simply states the court's conclusion that *Day and Bush* is not convincing precedent, again without any reason for why this is so. The CFI also refers to the Chief Justice Smellie's observation in the Cayman court that the word "only" was not used to restrict marriage to heterosexual couples in the island's Bill of Rights, but does not offer any reasons why it did not find his observation adequate. The Hong Kong court's lack of compelling reasoning for casting the Cayman Islands case as irrelevant raises questions about the foundation for its view, and makes it especially urgent to reexamine the overseas case's implications for Hong Kong. How did the Cayman Islands Grand Court reach the conclusion that same-sex marriage must be recognized, and how does its reasoning differ from that of the CFI's consideration of the same issue in *MK*?

The first element that should be foregrounded is the Cayman Island court's considered view that the legal concept of marriage "may not be

49. *MK*, 5 H.K.L.R.D. at 285.

regarded as immutable for all time".[50] In a long section tracing how the institution of marriage changed throughout its history, the court observes that "it was only during the course of the 20th century that long standing but deeply undignified norms--such as male biased restitution of conjugal rights; inequality in the grounds for divorce; and marriage being unlawful before a girl attained true capacity to consent--norms which had hitherto been regarded as settled traditions of marriage, were finally consigned to the annals of history".[51] Far from being a static institution, "the ongoing legal evolution of the institution of marriage is as constant as the institution itself".[52] While the changes the court highlights do not relate specifically to same-sex couples, evidence of this ongoing evolution suggests that the contemporary institution does not belong to any unchanging and unproblematic tradition, so that "legal history certainly does not preclude further development of the Law to reflect an evolving view of marriage by reference to the Constitution itself", including potential development in the direction of same-sex marriage.[53] The Cayman Island Grand Court's analysis of marriage history stands in stark contrast to the CFI's insistence that how marriage is understood today in Hong Kong is equivalent to how it has always been understood, a point which is especially problematic in light of the fact that concubinage and even bigamy existed for a long time in the territory.

Monogamous, heterosexual marriage is the only form of legally permissible union today, but it gained its exclusive status relatively late in Hong Kong's history. In fact, its entrenchment can be dated to 7th October, 1971, when the local marriage ordinance came into effect. Prior to that date, multiple forms of marital unions were entered into, and many of them endured for decades after 1971. The White Paper on Chinese Marriages, published as part of the colonial government's public consultation on local marriage reform, gives a succinct and comprehensive account of the different kinds of unions that existed. There were Chinese Modern Marriages, which were contracted under the 1930 Chinese Civil Code, and their principal requirement was a celebration in an "open but otherwise ceremony in the presence of at least two unspecified witnesses".[54] They did not have to be registered, nor did they have to be celebrated before an official. There were customary marriages, under which a man was allowed to have as many concubines as he wished as long as he could financially

50. *Day and Bodden Bush*, Civil Cause No. 111 and No. 184. at 28.
51. *Id*. at 27.
52. *Id*. at 28.
53. *Id*.
54. HONG KONG COLONIAL SECRETARIAT, WHITE PAPER ON CHINESE MARRIAGES IN HONG KONG (1967).

support them.[55] Concubines had well recognized marital rights under Customary Chinese law, and their children were regarded as legitimate children of the family. Furthermore, a rare but permissible union known as *kim tiu* marriage existed whereby a man was allowed to take two wives to help further the family line.[56] The 1971 Ordinance was introduced by the colonial government to modernize and streamline a complex, multimodal marriage regime. Even a quick glance at Hong Kong history reveals that marriage in the territory is a complex, evolving institution, and any resistance to modernization in the name of an unchanging, original form of marriage needs to be approached with great skepticism.[57]

The second element to foreground is the Cayman Islands court's observation that *lex specialis* cannot render irrelevant the principle of equality: "no principle of constitutional construction allows for the preclusive and discriminatory reading of Section 14(1) [on the right to marry]" because such an interpretative approach "would preclude access to same-sex couples on the basis only of their sexual orientation".[58] In other words, Section 14(1) of the Cayman Islands Bill of Rights must be read in light of Section 16 [on non-discrimination], and any purported exclusion of gay and lesbian couples from the institution of marriage needs to be justified. This logic echoes particularly loudly in Hong Kong given the structure of the Basic Law: the rights of Hong Kong residents are set out in Chapter III of the constitutional document. The first Article (Article 24) determines who is considered a Hong Kong resident who can enjoy the rights set out in the Chapter, and the right to equality (Article 25) follows immediately after. The position of the provision on the right to equality indicates its importance in the overall schema of rights analysis in Hong Kong: if one construes the Basic Law's provisions in harmony with each other, it follows that one must first ask whether MK is a Hong Kong resident (which she undoubtedly is), and then construe all the rights that follow, including the right to marry under Article 37, in light of the principle of equality which is enshrined in the first substantive right of the Chapter. To posit that Article 37 should be interpreted independently of Article 25 is to ignore the constitutional structure of the Basic Law.

The third element is that, on the question of international jurisprudence,

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55. *Id*. at 6-8.

56. MAN KAM LO, COMM. ON CHINESE L. & CUSTOM IN H.K., CHINESE LAW AND CUSTOM IN HONG KONG: REPORT OF A COMMITTEE APPOINTED BY THE GOVERNOR IN OCTOBER, 1948, at 200-07 (1953).

57. For a more detailed argument of the relevance of marriage history in the context of the contemporary debate and litigation on same-sex marriage in Hong Kong, *see* Marco Wan, *The Invention of Tradition: Same-sex Marriage and Its Discontents in Hong Kong*, 18(2) INT'L J. CONST. L. 539 (2020).

58. *Day and Bodden Bush*, Civil Cause No. 111 and No. 184. at 50 and 117.

the Cayman Islands court establishes a roadmap for reconciling the European jurisprudence and developments in the common law jurisdictions. In *Day and Bush*, the counsel for the Cayman Islands government, like the counsel for the Hong Kong government in *MK*, relied on the European case of *Schalk and Kopf v. Austria* as the premise for their *lex specialis* argument. The Cayman Islands court held that while the principle in *Schalk and Kopf* should be followed, a more robust understanding of equality as the lynchpin of dignity suggests that the cases from the ECtHR should be understood as only providing the "bare minimum protections" for same-sex couples in this instance, and that the court can go beyond this minimum level by following the authorities from the wider common law world.[59] Rather than acting as a bar to same-sex marriage, then, the European cases can be regarded as a foundation upon which a more expansive understanding of the right to marry can be built.

Crucially, it notes that the "fundamental flaw" in the *lex specialis* argument is that "even in the absence of a provision which enshrines the right to marry (let alone one which could be seen as enshrining that right only for heterosexuals), we see that the *Courts from around the common law world* refuse to countenance discriminatory treatment in the enjoyment of rights, in the absence of clear justification".[60] The court then discusses these common law cases to show why the preclusion of same-sex couples from access to marry cannot be justified. It cites Baroness Hale's observation in *Rodriguez* that there is no rational connection between the aim of protecting heterosexual marriage and the policy of excluding gay and lesbian couples from the institution, as heterosexual couples are not any more likely to get married knowing that their homosexual counterparts cannot do so.[61] It also cites *Fourie*, observing that the dignitary wound inflicted on sexual minorities is so great that the exclusion cannot survive proportionality analysis *stricto sensu*: "the message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity".[62] *Day and Bush* provides a powerful precedent for thinking about same-sex marriage in Hong Kong. The university surveys I cited at the beginning of this section show that fundamental shifts in local social views towards sexual minorities and same-sex marriage have gained traction, and cases such as *Obergefell*,

59. *Id.* at 74-75.

60. *Id.* at 95-96.

61. Rodriguez v. Minister of Housing [2010] UKHRR 144 (¶26) (P.C.) (appeal taken from Gibraltar).

62. *Minister of Home Affairs,* 2006 (1) SA 524 (CC). at 33-34 para. 54.

Fourie, and *Day and Bush* testify to changing mentalities in the wider common law world. We are not in 1990 anymore, and the courts should not close their eyes to that reality.

III. OLIARI AND AN ALTERNATIVE FRAMEWORK

The CFI then goes on to discuss the question of whether Hong Kong is obligated to introduce a framework other than marriage, such as civil unions or registered partnerships, to recognize and protect same-sex relationships. In that section of the judgment, Justice Chow focusses on the European case of *Oliari v. Italy*, in which the European Court of Human Rights held that while Italy was not obligated to legalize same-sex marriage, its failure to provide any other framework violated the applicants' right to respect for private and family life under Article 8 of the European Convention taken in conjunction with the prohibition of discrimination under Article 14.

Justice Chow opines that the reasons for which Italy was obligated to provide an alternative framework in *Oliari* were inapplicable in Hong Kong, for two reasons. First, unlike Article 8 of the European Convention, the protection of the right to privacy in Article 14 of the Hong Kong Bill of Rights is expressed in negative terms: Article 14(1) states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation", and Article 14(2) states that "everyone has the right to the protection of the law against such interference or attacks". Thus, "instead of providing for a 'positive' right to respect for his private and family life", Article 14 "is 'negative' in nature".[63] It goes on to state that *Oliari* does not apply because "the absence of legislation to give legal recognition or protection to same-sex relationships cannot be said to amount to arbitrary or unlawful interference with the right to a family". Second, and more importantly, Justice Chow notes that the circumstances specific to Italy limits the jurisdictional reach of the *Oliari* ruling.[64] He underscores that the Strasbourg court considered the fact that the Italian Constitutional Court had already declared that two people of the same sex living in stable cohabitation have a right to juridical recognition of the rights and duties attached to that union under the Italian Constitution, as well as the fact that the Italian legislature had not acted to make new laws to give effect to those rights. Chow J. states that these circumstances are not present in Hong Kong.

In this final section, I contend that even if the Hong Kong courts do not accept the argument about same-sex marriage, there is a compelling case for

63. *MK*, 5 H.K.L.R.D. at 288.
64. *Id.*

the need to implement an alternative framework that recognizes and protects same-sex relationships based on the jurisprudence of the European Court of Human Rights. First, the distinction between positive and negative rights is not absolute, as robustly stated by Sachs J. in the South African *Sodomy* case: citing a lecture by the former U.S. Supreme Court Justice William J. Brennan, Jr., Sachs notes that "just as 'liberty must be viewed not merely *negatively* or selfishly as a mere absence of restraint, but *positively* and socially as an adjustment of restraints to the end of freedom of opportunity', so must privacy be regarded as suggesting at least some responsibility on the state to promote conditions in which personal self-realization can take place".[65] In other words, the right to privacy, even if phrased as a negative right, entails a positive obligation on the state to create the conditions for its expression. As I noted above, in *Fourie* Justice Sachs underlines how the failure to give legal form to same–sex relationships itself constitutes an intrusion into human dignity by casting sexual minorities as second class citizens, genetic misfits, and subhuman beings.

Second, Justice Chow's focus on a single dimension of a single case--namely, the Italian courts' earlier decisions and the inertia of the Italian legislature within the factual matrix of *Oliari*--eclipses a clear judicial position that has emerged in the wider corpus of the twenty-first century ECtHR cases about same-sex marriage or transsexual marriage, which is that the Strasbourg court considers the question of whether there exists a framework to recognize and protect the relationships of sexual minorities to be one of no small consequence in rights analysis. Let us return to *Schalk and Kopf*. As has often been noted, the Strasbourg court in that case held that the relationship of a cohabitating same-sex couple in a stable *de facto* partnership falls within the notion of "family life" under Article 8.[66] As has been underscored equally often, the court also held that states enjoy a wide margin of appreciation as to whether to introduce same-sex marriage.[67] What is less often noted, however, is that the court reaches this conclusion with the firm awareness that its ruling does not leave the litigants without recourse to the law, because the Registered Partnership Act, the aim of which was to "provide same-sex couples with a formal mechanism for recognizing and giving legal effect to their relationships", had come into force prior to the decision.[68] Even though the court does not explicitly highlight this alternative mechanism made available by the Act in its analysis of Article 12, and even though it notes in its consideration of Article 8 and Article 14 that

65. National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others 1999 (1) SA 6 (CC) at 113 para. 116 (S. Afr.).

66. *Schalk*, 2010-IV Eur. Ct. H.R. at 409 para. 94.

67. *Id*. at para. 61.

68. *Id*. at para. 16.

this alternative mechanism may not confer the exact same status as marriage, the existence of such an alternative forms an operative part of the factual matrix within which the court made its ruling. In other words, and unlike the CFI in *MK*, the court decides against finding a right to same-sex marriage with the knowledge of the availability of an alternative legal framework that renders same-sex relationships legally cognizable. In *Hämäläinen v. Finland*, the Strasbourg court held that Finland's refusal to acknowledge the new gender of a male-to-female transsexual in the absence of her wife's consent that their existing marriage be turned into a registered partnership did not violate the applicant's right under Article 8 or Article 12.[69] In reaching its conclusion, the court took into consideration the fact that the applicant is able to enjoy "in essence, and in practice, the same legal protection under a registered partnership as that afforded by marriage".[70] Once again, the wide margin of appreciation given to the state is enabled at least in part by the existence of a framework of registered partnerships that gives the applicant a framework of recognition and rights protection. The importance of an alternative framework is articulated more forcefully in *Vallianatatos and Others v. Greece*, in which it was held that the state's restriction of civil unions to opposite-sex couples violated the applicants' right under Article 8 taken in conjunction with Article 14. In that case, the court regarded the lack of any framework at all for the applicants' relationships as a critical factor: it underscored that the legal recognition of love and intimacy constituted a matter of "intrinsic importance" to the applicants, and that entering a civil union provided them with "the *only* opportunity […] under Greek law of formalizing their relationship by conferring on it a legal status recognized by the state".[71] Italy overstepped its margin of appreciation not only because it restricted civil unions to opposite-sex couples, but because it shut out same-sex couples from any overall scheme of legal recognition.

Far from a case that should be confined to its facts, then, *Oliari* is part of a robust line of cases which repeatedly underscores that it is unacceptable for a state to fail to provide any mechanism of recognition and protection for same-sex couples. *Oliari* was affirmed in *Orlandi v. Italy*, in which the Strasbourg court held that Italy's refusal to recognize the applicants' same-sex marriages conducted abroad was unacceptable because it left them in a legal vacuum.[72] The Hong Kong Court of Final Appeal has underscored in *QT* that "the jurisprudence of the ECtHR and its interaction with the jurisprudence of the House of Lords, the Privy Council, and the United Kingdom Supreme Court relating to the Human Rights Act 1998 and

69. Hämäläinen v. Finland, 2014-IV Eur. Ct. H.R. 369.
70. *Id*. at para. 83.
71. Vallianatos and Others v. Greece, 2013-VI Eur. Ct. H. R. 125, paras. 81 and 84.
72. Orlandi and Others v. Italy, nos. 26431/12; 26742/12; 44057/12 and 60088/12, ECHR 2017.

domestic anti-discrimination legislation" are of "particular relevance" in local cases on discrimination, and the ECtHR's emphasis on alternative mechanisms is a crucial part of its jurisprudence that should guide the local courts in their consideration of same-sex unions.[73] By restoring to *MK* the fuller spectrum of European cases, it becomes clear that even if the Hong Kong courts do not accept the argument about same-sex marriage, there is considerable precedential force for requiring the government to implement an alternative framework that recognizes and protects the rights of same-sex couples.

CONCLUSION

The turn to originalist meaning as a way of pre-empting advancement in sexual minority rights is nothing new, either in Hong Kong or in other jurisdictions, and the CFI decision in *MK* constitutes the latest manifestation of that tendency in the litigation over marriage equality in Hong Kong. The court's reliance on original meaning underpins its opinion that the provision on the right to marry in the Basic Law constitutes a form of *lex specialis* precluding considerations of principles of equality and non-discrimination. It also serves as the premise for sidelining a long line of precedent cases on the closely intertwined relationship between the right to marry and the right to equality from other common law jurisdictions. While original meaning constitutes a sensible starting point for the interpretation of constitutional provisions, one must put pressure on signs of fixation on the past, especially in the context of rapid and continuing changes in both local attitudes and international jurisprudence, as Hong Kong continues its long and uncertain journey towards marriage equality.

73. Q.T. v. Director of Immigration, [2018] 21 H.K.C.F.A.R. 324, 346 (C.F.A.).

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同性結合與香港憲法的原意

Marco Wan

摘　要

在*MK v. HKSAR*的案件裡，香港的原訟法庭載定香港政府不容許同性婚姻的決定並不違憲，而且它亦沒有責任提供其他承認同性伴侶關係的構架。在判詞裡，法庭提到在基本法37條裡「婚姻」的定義是跟據法律頒布時的理解來決定。這一篇文章指出MK案的判詞對「婚姻」的理解跟終審法院在*W. v. Registrar of Marriages*裡的解讀並不一致。它更指出香港法院應該跟隨歐洲人權法院和一些其他普通法國家的案例，承認同性婚姻或是在本地把同性婚姻合法化。

關鍵詞：婚姻平權、同性結合、特別法（Lex Specialis）、原本意思、香港