

What is a family? A Hong Kong perspective

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In today's world, if you were to ask someone what a family is, they would likely describe it as being a core group of people, related either by blood/ancestry (consanguinity), or by some form of relationship (affinity). It is a fundamental social group in any society. In Hong Kong, the nuclear family is commonly viewed as comprising a father, a mother and their children. Indeed, the majority of families in Hong Kong are derived from a heterosexual, monogamous marriage. This is because since 1971, a valid marriage in Hong Kong has been defined as the voluntary union of one man and one woman to the exclusion of others under s 40 of the Marriage Ordinance Cap 191. This abolished all other forms of marriages that existed at the time, more particularly, those under the Chinese system. The current and prevailing construct is distinctly based on the concept of a Christian marriage, and the introduction to the Marriage Ordinance specifically references this. Yet those of Christian faith only represented approximately 16% of Hong Kong's population in 2019,¹ which incidentally was the same percentage of population that Christian faith represented back in 1971,² when the change was imposed.

This concept of a heterosexual monogamous marriage has, since 1971, been put forward as representing the traditional marriage in Hong Kong, although that was not in line with Hong Kong's actual cultural traditions. Those who have been against legalising same-sex marriages or civil partnerships in Hong Kong have often used the post-1971 definition of traditional marriage as the basis for their opposition.

The irony is that when one looks at the relatively recent history of marriages in Hong Kong from the last 50 years, before the restriction was imposed by the Marriage Ordinance in 1971, the nature of the majority of marriages that actually existed in Hong Kong was beyond that scope. Indeed, from the turn of the last century, the prevailing marriages within the local Hong Kong population were that of Chinese customary marriages, modern Chinese marriages, 'kim tiu' marriages and concubinage. These marriages did not adhere to a strict heterosexual monogamous view of marriage as being between one man and one woman.

Customary marriage

A customary marriage is one celebrated in accordance with traditions, customs, rites and ceremonies of the parties' families. This is seen more as a union between two families as opposed to a union between two individuals. Parties to a customary marriage involve a husband and a principal wife (known as a 'tsai'), who could be the first and principal wife, or a subsequent wife (although not a concubine).

Chinese modern marriage

A Chinese modern marriage is one contracted in accordance with certain requirements of the Chinese Civil Code and the Republic of China. For example, it requires an open ceremony to be witnessed by at least two individuals. While technically intended to be monogamous, it was common practice for husbands in such marriages to take on concubine(s).

1 Information services department of the Hong Kong special administrative region government, *Hong Kong 2019: The Facts, Hong Kong Yearbook 2019* (2019).

2 Christianity in its Global Context, 1970–2020: Society, Religion, And Mission (June 2013), South Hamilton, Ma: Center for the Study of Gobal Christianity, p 36.

Kim tiu marriage

A kim tiu marriage is a union of three, whereby a man can formally marry two principal wives who would both be considered as equal. A husband in such a marriage is not considered a bigamist.

Concubinage

Concubinage allows for a union of three or more whereby a man can take on a principal wife, and in theory an unlimited number of women as his concubines. While the marriage and role of the 'wife' apply only to the principal wife in such a dynamic, the concubine does not fall into the category of a mistress although she is in a lower hierarchical position. A concubine, or a wife in a kim tiu marriage, a Chinese customary marriage or Chinese modern marriage are all afforded certain entitlements, rights and obligations from these unions.

In these family dynamics, any children could be born to any one of the female partners in the marriage/union. Consequently, those children would have been raised in a family where there are potentially several parental figures, more specifically, more than just one of each gender, albeit not all blood related. That has historically been the widely accepted and long-standing social norm in Hong Kong prior to 1971. The statistics show that even as late as the 1960s, about half the marriages were made up of these traditional Chinese marriages in Hong Kong.³

Yet currently, Hong Kong's laws are based on a set of so called 'traditional family values', which do not reflect the actual historical norm of Hong Kong. Equally, it is questionable whether these so-called 'traditional family values' indeed reflect the prevailing norms and acceptance of current society, which could vary based on the age of the person asked.

In a recent survey conducted by the Gender Research Centre of the Hong Kong Institute of Asia Pacific Studies of the Chinese

University of Hong Kong (Commissioned by the Equal Opportunities Commission) and published in January 2016, the views of 1,500 respondents were gathered on potential legislation in Hong Kong against discrimination on the grounds of sexual orientation, gender identity and intersex status. The data collected from the telephone survey was deliberately weighted to align with the sex/age distribution of the Hong Kong so that the findings of the survey would be representative of the opinions and views of the population in Hong Kong above the age of 18. The report showed that compared with a decade ago, the support for non-discrimination legislation on the grounds of sexual orientation, gender identity and intersex status almost doubled from 28.7% in 2005, to 55.7% in 2015. Those against remain more or less at 34%. Further, those below age 40 who attained post-secondary education, were never married, had no children and/or religious faith, and who have had contact with the LGBTI community in their daily lives were more supportive of legislating against discrimination. Of significant note is that the younger the respondent, the more supportive he/she was of anti-discrimination legislation, with those between the ages of 18 to 24 being the most supportive, at 91.8%. What these findings support is the acceptance of different forms of unions and family dynamics outside the heterosexual monogamous relationships increases with each new generation.

As the stigma associated with unmarried parents and divorces is on the decline, two trends have emerged. One is the increase in couples choosing to cohabit and have children without getting married. The other is the increase in individuals raising children as single parents. If the younger generations are breaking free from the conventional parameters of what was deemed socially acceptable for a family unit, and away from the constraints of being in a heterosexual marriage, then one must ask why the laws relating to human reproductive technology are still so restricted that they only leave

3 Hong Kong Colonial Secretariat, White Paper On Chinese Marriages In Hong Kong ¶ 2 (1967).

treatments, particularly surrogacy, open to a very narrow group of people, namely those married to a partner of the opposite gender and limited to two such parental figures.

As it stands, the prevailing law in Hong Kong is governed by the Human Reproductive Technology Ordinance (Cap 561) ('HRTTO'), read in conjunction with the Parent and Child Ordinance (Cap 429) ('PCO'). The HRTTO specifically prohibits the provision of a wide range of human reproductive technology procedures to persons who are not 'parties to a marriage'.⁴

Because the only valid marriage in Hong Kong is confined to a heterosexual couple, this means that the entire condition for allowing anyone to engage in human reproductive technology, most specifically surrogacy, is heavily restricted to just the two parties to such a marriage. If you are single, in a same-sex marriage (even if valid from overseas), or in a heterosexual relationship but are unmarried, regardless of how enduring your relationship may be, you cannot avail yourself to having a child by way of surrogacy whether in Hong Kong or elsewhere, because the prohibition of commercial surrogacy from the HRTTO has extraterritorial effect.⁵

The law seems to presume that parties to a heterosexual marriage are automatically better parents than any other individuals from other family dynamics and only they are entitled to engage in a surrogacy arrangement. It ignores the fact that there are many other considerations that would make an individual a good parent.

The HRTTO is unfortunately stuck with a set of societal norms and technology from decades ago, which ignores the change in attitudes over time. The research and consultation exercises leading up to the HRTTO took place in the 1980s and 1990s. The HRTTO was first enacted in 2000, initially just to deal with the more

administrative part of preliminary issues such as interpretation of references, and the setting up of the Human Reproductive Technology Council.⁶ The more practical parts dealing with prohibitions (including commercial surrogacy⁷), licences, access to information and enforcement and offences were not enacted until 2007.⁸ The HRTTO is therefore based on medical/scientific boundaries that existed nearly four decades ago and is now outdated. Likewise, social norms have also changed. Yet the ordinance has stayed stagnant. It does not take into consideration social norms that are no longer considered taboo, especially since there has been one, if not two, generations that have grown up since, each with their evolving views and acceptance of cultural norms.

If the intention is to ensure that surrogacy consideration is based on the best interest of a child, then the more important factor is surely to consider the suitability of the commissioning individuals as parents, rather than relying simply on their marital status and sexual orientation alone. It is a child's right and in a child's best interest to have loving and caring parent(s). A parent's sexual orientation, gender and/or marital status should have no part to play in that consideration. Equally, as the dynamics of families change over time, not every child necessarily has two opposite-sex parents involved in their care, and a parent may not necessarily be genetically related to a child. We now frequently see single parents, as well as multiple parental dynamics (not unlike the situation with the pre-1971 traditional marriages), often involving new partners or step-parents, forming part of a family unit from a child's perspective. Consequently, there is the development and the increasing recognition of the concept of a 'psychological parent', who is an individual taking on the daily role of a parent and fulfilling the needs of a child, although he or she does not necessarily have

4 Section 15(5) of the HRTTO.

5 Section 17(1)(a) of the HRTTO.

6 Parts 1 and 2 of the HRTTO.

7 Section 17 of the HRTTO.

8 Parts III to IV of the HRTTO.

a link to the child, whether by way of consanguinity or affinity.

Furthermore, those not in a heterosexual marriage face another challenge by way of the PCO, which provides for the application to obtain parental status for the commissioning couple upon the birth of a child in a surrogacy arrangement.

Otherwise, under Hong Kong law, the surrogate mother is deemed the legal mother, and her husband or male partner is deemed the legal father unless it can be shown that the husband or male partner did not consent to the process. If there is no husband or male partner, then the child is deemed not to have a legal father. This is regardless of whether the commissioning couples' own gametes were used or if another individual has a genetic link to the child (eg a gamete donor). In order to transfer those parental rights to the commissioning couple, a Hong Kong parental order must be obtained. Hong Kong does not recognise any foreign parental orders.

In seeking a parental order under the PCO, restrictions are imposed so that only the two parties to a marriage specifically referred to as 'the husband' and 'the wife' can apply for such an order.⁹ As such, no other individuals have the locus standi to apply for such a parental order.¹⁰

This selective prohibition, allowing only one group of people from society to engage in a surrogacy arrangement, and obtain the obligatory parental order simply because of marital status and sexual orientation, is discriminatory. There is no reasonable basis to deny their rights to raise a family. The current laws on surrogacy are, on the face of it, arguably in breach of the Hong Kong Bill of Rights under the following articles:

- Article 1, which provides for rights to be enjoyed without distinction of any kind, such as race, colour, sex, language,

religion, political or other opinion, national or social origin, property, birth or other status.

- Article 14, which provides for no one to be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
- Article 22, which provides that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law. Article 22 specifically prohibits against any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Likewise, the restrictions imposed by the HRTD and the PCO would appear to be a contravention of Article 37 of the Hong Kong Basic Law, which provides for freedom of marriage of Hong Kong residents and that their rights to raise a family freely shall be protected by law.

Turning to other family/children-related legislations in Hong Kong, we can see progress has been made to accept changing family dynamics within society. This magnifies the outdated nature of the restrictions imposed by the HRTD and PCO. For example, the Adoption Ordinance (Cap 290) allows for single-parent adoptions.¹¹ Domestic violence legislation was also amended on 1 January 2010 to recognise the existence of different family dynamics and now offers the same protection to cohabitants regardless of their sexual orientation or gender.¹²

What we need is a balance between being current with prevailing views/norms, and setting reasonable boundaries. No doubt,

⁹ Section 12 of the PCO.

¹⁰ Section 4 of the Adoption Ordinance.

¹¹ Sections 4 and 5 of the Adoption Ordinance.

¹² Section 3B of the Domestic and Cohabitation Relationships Violence Ordinance (Cap 189).

there are many social and ethical issues to consider in the context of a surrogacy arrangement. At the end of the day, it should be the individual qualities of a parent on which we should focus, and not simply whether he or she is married. The best interest of the child should be the guiding principle in considering anything related to his/her welfare. The law as it stands, does not promote this. As a result of the current restrictions on surrogacy arrangements, an innocent child could end up being deprived of his/her right to a family, of whatever dynamic. The paradox of the surrogacy laws

is that although intended to deal with cutting-edge technology, and to enable children born out of those advance medical treatments to be given proper protection and status, they are now having the opposite effect. Why are Hong Kong's laws being left to fossilise? They should be amended, so as to remain supple enough to move with the changing times, to reflect the reality and prevailing norms in Hong Kong society. This is important for Hong Kong, as it prides itself on being a modern and international city, with openness and diversity.