



## **A Case Study Approach: An Analysis of the Application of Same-Sex Marriage Law of the United States of America into Thai Law**

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### **Abstract**

In pursuance of Section 1448, Minimum Age of Marriage clause of Thai Civil and Commercial Code B.E. 2475 which states that A marriage can take place only when the man and woman have completed their seventeenth year of age. But the Court may, in case of having appropriate reason, allow them to marry before attaining such age. Upon studying this certain Section, it is not beyond one's comprehension that the Section looks upon marriage as an exclusively heterosexual institution and unconsciously institutes bans on same-sex marriage. Furthermore, to inflict further degradation and heap scorn on a person already injured Section 1457 also states further that "Marriage under this Code shall be effected only on registration being made." Therefore, the same-sex couples or the group of persons subsequently known as LGBT (Lesbian, Gay, Bisexual and Transgender) has made an attempt to make the government to extend legal recognition to same-sex couples by working through the undeniable issue and finally legalizing same-sex marriage in order to protect their right guaranteed under the Constitution that they must be treated equally under the law regardless of gender. As a result of the unedifying spectacle of the group fights over the same-sex marriage, "the Bill of the Companion Registration B.E..." had been proposed but not yet passed. However, I, the researcher, has a strong believe that "The Bill of Same-Sex Marriage Registration B.E..." should be proposed instead. The Bill will surely be seen as a pillar of State's legal recognition to the right of same-sex couples as it specifically orders State to both issue marriage licenses to same-sex couples, and to recognize as valid marriages performed all over country. As a result, the proposed law will unequivocally guarantee that all are equal before the law and are entitled without any discrimination to equal protection of the law respecting. The principles of equality and non-discrimination and that the same-sex couples shall be entitled to a fair and impartial treating established by law. Last but not least, the laws of Thailand shall be made in pursuance of the Constitution of the Kingdom of Thailand B.E. 2560, the supreme law of the land by the assistance of the laws of the United States.

**Keywords:** Same Sex, Same Sex Marriage, Same Sex Marriage of United States Law

### **Introduction**

#### **Rationale of the Study**

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected in which human beings is entitled to all the rights and freedoms set forth in this Declaration, men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. Everyone has the right to education, the right to life and the right to freedom of religion. Thailand became the 55th member of the United Nations on 16 December, 1946. It is bound to implement the obligations of the Universal Declaration of Human Rights, international treaties on human rights to which it is a high state party. In addition, essential elements of the Universal Declaration of Human Rights and such international treaties on human rights have also been incorporated into the Constitutions of the Kingdom of Thailand such that they come into force – a development regarded as a move to effectively promote and protect human rights for the



country's population. The term 'LGBT' refers to the community of lesbian, gay, bisexual and transgender people. This collective group is subject to much legislation worldwide concerning their sexuality. The Universal Declaration of Human Rights is one significant international instrument provide LGBT rights protections. As declared unequivocally in the opening words of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights." Nevertheless, deeply embedded homophobic and conservative attitudes, often combined with a lack of adequate legal protection against discrimination on grounds of sexual orientation and gender identity, expose many LGBT people of all ages and in all regions of the world to egregious violations of their human rights. Gay men and lesbians are often perceived as sources of both symbolic and realistic threat to society. This perception is grounded in acceptance of negative stereotypes – mostly exaggerated and ill-founded beliefs – about gay men and lesbians. For instance, many have speculated that adherence to traditional gender role ideologies is a major contributor to prejudice against gay men, female must be a good housewife, gay men and lesbians are often stigmatized as immoral, violators of gender norms, In addition, the traditional marriage of the heterosexual marriages still are encouraged, particularly, in the view of the ability of heterosexual couples to reproduce. As a result, many LGBT people felt unable to disclose their sexual orientation or gender identity on the grounds that they want to live peacefully in the society and it was largely a method to avoid stigmatizing reactions from others. Nowadays, Thai society has become more accepting of same-sex sexuality between partners of legal age. Many LGBT people decide to reveal their sexual orientation and choose to make their LGBT identity clear. Since the global tolerant attitudes toward homosexuality and bisexuality have been increasing with time and many countries have also seen rising support for LGBT rights in modern times, in consequence Thailand should promote and support the right to marry and to found a family according to national laws governing the exercise of this right. For the time being, many countries have officially legalized same-sex marriage, for instance, Argentina, Belgium, Canada, Iceland, Netherlands, Norway, Portugal, South Africa, Spain, Sweden, Taiwan and every states of the United States of America. To strengthen protection of the human rights of lesbian, gay, bisexual and transgender (LGBT) persons, first, it should be taking into account that the prohibition against discrimination on the basis of sexual orientation and gender identity is not limited to international human rights law so enforcing the universally applicable guarantee of nondiscrimination in the enjoyment of all rights and legalizing same-sex marriage or civil marriage is the core obligations that Thailand has towards LGBT persons. These obligations, clearly established in The Yogyakarta Principles: The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity should be adopted in pursuance of ensuring that people of all sexual orientations and gender identities can live with the equal dignity, rights and respect to which all persons are entitled so that civil marriage should be available, without discrimination, to all couples, regardless of sex, sexual orientation or gender identity. Second, in pursuance of upholding the above-mentioned right, an initiative to propose amendment to the Constitution of the Kingdom of Thailand BE 2560 which would define marriage in Thailand as "Marriage, for civil purposes, is the lawful union of two persons to the exclusions of all others."

#### **Research Objectives**

1. To study the legal principles appertain to the registration of same-sex marriage under the laws of the United States.
2. To conduct comparative study on marriage registration of same-sex couples in accordance with the United States law and Thai law.



3. To propose guidelines to regulate legislation concerning the registration of same-sex marriage in Thailand.

### **Hypothesis**

Many LGBT people decided to live together as other heterosexual couples do nonetheless obstacles to acceptance and equality still remain since there has no legal framework to approve same-sex marriages in Thailand and even same-sex marriages have been more recognized elsewhere. Unfortunately, according to the legislation regarding the institution of marriage, the marriage that is recognized by law means only a legal union between one man and one woman as husband and wife. Given that this is a highly debated issue and globalization results in the instigation of new ideas regarding marriage for the LGBT community, it should be taken into consideration whether to the legislation legalizing and recognizing same-sex marriage should be finally passed.

### **Scope of the Research**

Pursuant to Section 1448 of the Civil and Commercial Code, a marriage can take place only when the man and woman have completed their seventeenth year of age (Boondech, 2016, p. 118). But the Court may, in case of having appropriate reason, allow them to marry before attaining such age. This provision establishes the basic right to marriage, and for years it has been argued that there is discrimination against the LGBT community. Given that this article does not specifically state the rights of the LGBT community, it can be construed that Thailand is the country that does not allow for same-sex marriage. In essence, the above-mentioned discrimination provision provides none of any valuable protections of LGBT rights. Furthermore, Section 1457 of the Civil and Commercial Code, marriage under this Code shall be effected only on registration being made. After the long journey of struggle and uncertainty of the attempt to make their rights recognizable to the government, the LGBT people, they put it forward the demand that state shall stop the violations of their human rights and take the necessary steps to meet the fundamental human rights obligations. Simply put, they remind the government of its obligation to establish law to secure transsexuals' enjoyment of the right to marriage under any circumstance. As a matter of fact, Rights and Liberties Protection Department, Ministry of Justice in Thailand has drafted Registration Civil Partnership Bill however, in certain cases, the Draft Bill does not successfully resolve the above-discussed issues however, from my point of view, I strongly recommend the drafting of new particular bill which would guarantee LGBT people of nondiscrimination in the enjoyment of all rights and legalizing same-sex marriage or civil marriage without discrimination, to all couples, regardless of sex, sexual orientation or gender identity and the new provision shall comply with Thai Constitution B.E. 2560 which were legislated with the principle of non-discrimination against gender. The applied methodology was qualitative method, basing on documentary works including Thai Civil and Commercial Code and the Registration Civil Partnership Bill B.E... comparing with the U.S. Law concerning the Registration of Civil Partnership.

### **Research Methodology**

The applied methodology was qualitative method, basing on documentary works from Thai and International laws, researches and articles, furthermore, the research question would be addressed in-depth using the case study method, this included case study related to Marriage Laws heard in the U.S. courts and Thai courts. Last but not least, the documentary works found online also were studied and analyzed as well.



### Expected Benefits from Research Project

The research project results are expected to be useful for human rights organizations including Governmental organizations, Non-governmental organizations and public which would like to be further facilitated their recognitions of same sex marriages by means of offering the reason and necessity why state need to give legal recognition to same sex marriages. As a result, the persons concerned would undoubtedly use these positive research results to pass the legislation legalizing and recognizing same-sex marriage in order to ensure the equality of rights under the law which shall not be denied or abridged on account of sex.

### Research Analysis

Legal recognition of same-sex marriage afterwards a landmark civil rights ruling by the Supreme Court of the United States on April 28, 2015 that the fundamental right to marry is guaranteed to same-sex couples thus the states must provide marriage licenses to same-sex couples and must recognize marriages that were legally licensed and performed in other state.

On April 28, 2015, the US Supreme Court heard oral arguments in *Obergefell v. Hodges* over whether or not gay marriage is a right guaranteed by the US Constitution, and whether or not gay marriages performed in states where it has been legalized must be recognized in states which ban the practice. This was the Supreme Court case that made banning same-sex marriage in any state illegal in the United States. On June 26, 2015, the 5-4 decision in favor of marriage equality stated that under both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the fundamental right to marry is guaranteed to same-sex couples thus the states must provide marriage licenses to same-sex couples and must recognize marriages that were legally licensed and performed in other state , meaning that all 50 states must allow it and that all existing bans are invalid. (Governing, n.d.)

Prior to the Supreme Court ruling making same-sex marriage a right nationwide (Supreme Court of the United States, 2014), same-sex marriage in the United States was initially established on a state-by-state basis, expanding from 1 state in 2004 to 36 states , court ruling or voter initiative in 37 states and the District of Columbia: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. (Wikimedia Commons, 2015)

Vermont was the first state to introduce civil unions in July 2000, and the first state to introduce same-sex marriage by enacting a statute without being required to do so by a court decision. The Marriage Equality Act is a 2009 Vermont state law which legalized the officiating of marriages between same-sex couples in the state. The law went into effect on September 1, 2009. Vermont became the fourth state to legalize same-sex marriage, the first to do so by legislation rather than a court ruling. (Reuters Staff, 2013)

Same-sex marriage became legal earlier as the result of court decisions, not legislation, or voter initiative in three states: Massachusetts, Connecticut, and Iowa. On May 17, 2004, Massachusetts became the first U.S. state to legalize same-sex marriage following the Supreme Judicial Court's decision in *Goodridge v. Department of*



*Public Health* six months earlier. This is a landmark case in which the Court held on November 18, 2003 that the Massachusetts Constitution requires the state to legally recognize same-sex marriage.

On October 10, 2008, the Connecticut Supreme Court ruled that the state's civil unions statute discriminated against same-sex couples and required the state to recognize same-sex marriages. On November 12, 2008, the first marriage licenses to same-sex couples were issued and the following year, the state enacted gender-neutral marriage legislation. On April 3, 2009, a unanimous Iowa Supreme Court ruling upheld a lower court ruling in *Varnum v. Brien* that denying marriage rights to same-sex couples violated the state constitution, and licenses became available on April 27.

***Obergefell v. Hodges***, legal case in which the U.S. Supreme Court ruled (5-4) on June 26, 2015, that state bans on same-sex marriage and on recognizing same-sex marriages duly performed in other jurisdictions are unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution. The Court held that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects, and that analysis applies to same-sex couples in the same manner as it does to opposite-sex couples. The Equal Protection Clause of the Fourteenth Amendment also guarantees the right of same-sex couples to marry as the denial of that right would deny same-sex couples equal protection under the law meaning the First Amendment does not allow states to deny same-sex couples the right to marry on the same terms as those for opposite-sex couples. Thereupon, the states must provide marriage licenses to same-sex couples and must recognize marriages that were legally licensed and performed in other state, meaning that all 50 states must allow it and that all existing bans are invalid.

Notwithstanding, the Court in *Obergefell* manifests the state's pluralistic obligation however it left the state's pluralistic obligation devoid of any substantial meaning and avoided setting an alternative standard for state intervention in illiberal communities' conduct. *Obergefell* manifests the state's pluralistic obligation to ensure a diverse society. This obligation maintains a balance between the goals of ensuring equal rights of all citizens and recognizing the limited ability of religious communities to reject liberal norms while preserving their social legitimacy. The pluralistic obligation should be set as new standard to ensure diverse cultures and religions characterized by illiberal norms. Nevertheless, there should be limits to impose on a liberal state's pluralistic obligation (YourDictionary, n.d.). A person who enjoys the ability to exercise his values and beliefs should not prevent others from doing so. The principle would require the prevention of illiberal communities' internal norms from expanding beyond the boundaries of the community. (Stern, 2015)

## **Conclusions and Recommendations**

### **Conclusions**

The aim of this study was to explore legal issues and find the relevant legal principles concerning rights and responsibilities of the same sex couples guaranteed by both Thai law and the US laws. A qualitative approach was adopted using a range of complementary methods. The findings highlight the most important problem of same-sex couples was the absence of legal platform to recognize the existence of same-sex spouses that refrained them from the legal rights available for registered marriage. From the researcher's point of view, Thailand should approve landmark legislation to recognize civil unions between same-sex couples, granting them virtually all the benefits, protections and responsibilities that married opposite-sex couples have under Thai law. Thailand must provide these benefits and protections by legalizing marriage for same-sex couples instead of gradually orienting towards



the “Registration of Civil Partnership” bill currently being under scrutinizing of the committee. Given the inevitability of laws change over time, difficult and burdensome amendment procedures seem to require that we resort to less difficult and time consuming mean to pursue change so implementing new law: “**The Same-Sex Marriage Act**” to pave way for same-sex partnerships would be able to address problems caused by the enactment of Marriage Law under Thai Civil and Commercial Code (CCC) and the Draft Civil Partnership Registration Act. The proposed Act will offer legal recognition in the form of same-sex marriage and provide them the same rights and benefits as heterosexual couples. To enrich and improve the legal recognition in the form of same-sex marriage in Thailand, in order to obtain an enriched improved legal text, both in form and substance, is the aim of the study and analysis of the Proposal for Same-Sex Marriage Law. The study and analysis of this legal instrument arose as a result of observing the legal issues within the Civil and Commercial Code and the Draft Civil Partnership Registration Act in relation to rights and benefits of same-sex couples. In order to better understand, one shall study all of the following principles and reasons.

1. A spouse is a life partner in a marriage. The term is gender neutral, whereas a male spouse is a husband and a female spouse is a wife. The legal status of a spouse, and the specific rights and obligations associated with that status, vary significantly between different jurisdictions of the world however, in Thailand, these regulations are described in Book 5 of the Civil and Commercial Code since 1932. Spouses enjoy a marital privilege provided by the above-mentioned law and also are protected under no less than 20 of any other law. Unfortunately, since the term “Civil Partner” or “Civil Union” was new and unfamiliar term first introduced in the “Registration of Civil Partnership” bill in order to address the near-total absence of legal recognition and protection for same-sex couples so no one would see it being virtually addressed in any law. The LGBT people would be convinced by the said evidence that their legal recognition would not truly be acknowledged by the state and their longing to enjoy the same state benefits, rights, and protections of the law to same-sex couples as married couples would be driven beyond the bounds of possibility.

2. Under section 27 of the Constitution of the Kingdom of Thailand B.E. 2560, it states that all persons are equal before the law, and shall have rights and liberties and be protected equally under the law. Men and women shall enjoy equal rights. Unjust discrimination against a person on the grounds of differences in origin, race, language, sex, age, disability, physical or health condition, personal status, economic and social standing, religious belief, education, or political view which is not contrary to the provisions of the Constitution, or on any other grounds shall not be permitted. Insomuch as the proposed law has made an attempt to make the government to extend legal recognition to same-sex couples by working through the undeniable issue and finally legalizing same-sex marriage in order to protect their right guaranteed under the Constitution that they must be treated equally under the law regardless of gender, the proposed law would certainly be an ideal and well-constructed law which is not contrary to the provisions of the Constitution.

Underpinning this analysis, were powerful reasons supporting the legalization of Same-Sex Marriage by implementing new law: “**The Same-Sex Marriage Act**” with regard to acknowledging the legitimacy of same-sex relationships but also addressing problems caused by the enactment of Marriage Law under Thai Civil and Commercial Code (CCC) and the Draft Civil Partnership Registration Act. Besides, providing the same-sex couples the same access to the same significant benefits enjoyed by heterosexual married couples is the way to show how Thailand can effectively scrutinize and contribute to the Universal Declaration of Human Rights which



is one significant international instrument provide LGBT rights protections. The principles of non-discrimination and equality before the law under the proposed Act are clearly portrayed as follows.

1. To be entitled to the benefits, rights and protections which will be available to same sex married couples and their children, two individuals entering into a marriage contract shall not be otherwise prohibited from marrying under the proposed law. By way of explanation, the lawful marriage under this proposed law must be entered into between either a man and a man or a woman and a woman.

2. The legal prerequisite for marriage shall be prescribed as follows.

2.1 A marriage can take place only when both partners have completed their twenty years of age so they cease to be a minor and become *sui juris*.

2.2 A marriage cannot take place if both partners are blood relations in the direct ascendant or descendant line, or brother or sister of full or half blood. The said relationship shall be in accordance with blood relation without regard to its legitimacy.

2.3 A marriage cannot take place if either one partner is an insane person or adjudged incompetent (Kamphusiri, 2017, p. 123).

2.4 Adultery has been historically regarded as a legal wrong and has been considered objectionable on social, religious, moral, or legal grounds. Since adultery was wrongful intercourse between a married woman and any man other than her husband, a same-sex marriage should be stood on the same ground as well so it cannot take place if one partner or both of the partners is/are already the spouse of another person. According to the legal point of view, adultery is an offense injurious to public morals and a mistreatment of the marriage relationship.

2.5 In consideration of marriage which is a personal relation arising out of a civil contract between two persons, to which the consent of the parties capable of making that contract is necessary thus consent alone does not constitute marriage. Additionally, in order to make valid the marriage contract, which shall be permitted between two individuals, it shall be necessary that consent of neither party to the marriage has been obtained by force, duress, or fraud.

Only a marriage between two individuals who are not otherwise prohibited from marrying is valid so marriages within certain degrees of relationship ,in other words, first, a marriage takes place with closest living blood relative or relatives both downward and upward, second, a marriage takes place when one partner or both is an insane person or adjudged incompetent ,third, a marriage takes place when one partner or both is already the spouse of another person ,forth, a marriage takes place without consent shall be void but it is only a judgment of the Court that effects the void of the marriage which is made against the law.

3. Whereas Thailand gives many rights to both citizens and non-citizens living in Thailand nevertheless, given the special characteristic of the same-sex marriage law promising the same rights and benefits for same-sex couples as those for heterosexual couples, the law should state precisely that the person being entitled to the rights and benefits under this law shall only be the one holding Thai nationality. This principle will act as safeguard to intervene in a situation where a non-citizen might deliberately manipulate legal arrangements for purposes they were not meant for, guided by self-interested motives.

4. Since the marriages of same-sex couples and the marriages of opposite-sex couples are recognized as equal by the proposed law. Their legal recognition method shall be perform in the same manner, so marriage registration process shall be applied accordingly. A marriage can take place on declaration made by both the parties intending to marry by giving consent publicly before the registrar in order to have it recorded by the Registrar. Marriage



shall be affected only on registration being made. After registration is completed, a Marriage Registration Certificate to be obtained as evidence.

5. In consideration of the concerns being criticized, first, the relationship of the same-sex couple, second, the property of the same-sex couples after registration being made, the researcher believes that the application of the provisions concerning not only relationship of husband and wife but also the property between husband and wife stated in Book 5 of the Civil and Commercial Code of the Kingdom of Thailand respectively shall be applied *mutatis mutandis* to the relationship and property of the same-sex couples as well. For instance, the same-sex couples shall maintain and support each other according to his or her ability and condition in life (Akaruwiboon, 2009, p. 365).

6. Termination of marriage is another critical issue as well, however, applying the provisions concerning the termination of opposite-sex marriage stated in Book 5 of the Civil and Commercial Code of the Kingdom of Thailand *mutatis mutandis* to the termination of same-sex marriage might serve as a good fundamental principle of marriage equality. In conclusion, same-sex marriage is terminated by death, divorce or being cancelled by the Court equivalently.

7. It can be denied that the prejudice of society justifies the denial of marriage licenses to same-sex couples with the strong belief that marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race. According to this line of reasoning, the right to marry would pathetically only exist only because the state of marriage is conducive to procreation and childrearing. On the contrary, same-sex couples' determination to create their own families demonstrates that there is no connection between sexual identity and a desire to have children. same-sex couples raise children without many of the advantages married parents take for granted: societal approval, legal recognition, and ease of conception. Yet same-sex parents have the same responsibilities: they must clothe, feed, and shelter their children, educate them, prepare them to face society and teach them moral values. Studies reveal that children raised in same-sex parent families fare just as well as children raised in different-sex parent families across a wide spectrum of child well-being measures including: academic performance, cognitive development, social development, psychological health, early sexual activity and substance abuse. In addition, since gender and moral development of a child are always topics that require specific and special interest in their handling, in relation to gender identity, participatory activities and preference also for the children, adoption is a better alternative to orphanage, thereupon, the right of the same-sex couples to adopt shall not be denied by the state. This may be in the form of a joint adoption by a same-sex couple, adoption by one partner of a same-sex couple of with respect to the right to give or withhold consent to the adoption of the child of the another partner (Meeintarakerd Meesidhi, 2013, p. 16).

8. Under the provisions concerning portions between several classes and degrees of statutory heirs, the surviving spouse is also a statutory heir, subject to the special provisions of Section 1635. As a result, the intestacy rules under the propose law shall specifically provide for surviving civil partners to be treated in exactly the same way as a surviving spouse. The rules entitle a same-sex partner to the inheritance of the deceased in the class and according to the division as hereunder provided (Hutangkoon, 2017, p. 71):

(1) if there is an heir according to Section 1629 (1) surviving or having representatives as the case may be, such surviving same-sex partner is entitled to the same share as an heir in the degree of children;



(2) if there is an heir according to Section 1629 (3) and such heir is surviving or has representatives, or if in default of an heir according to Section 1629 (1), there is an heir according to Section 1629 (2) as the case may be, such same-sex partner is entitled to one half of the inheritance;

(3) if there is an heir according to Section 1629 (4) or (6) and such heir is surviving or has representatives, or if there is an heir according to Section 1629 (5) as the case may be, such same-sex partner is entitled to two-thirds of the inheritance; (Meeintarakerd Meesidhi, 2014, p. 81)

(4) if there is no heir as specified in Section 1629, such same-sex partner is entitled to the whole inheritance.

9. Under the Provision of Maintenance, maintenance may be claimed between husband and wife or parent and child when the party entitled to maintenance has not been furnished with the maintenance or has been furnished with the maintenance insufficient to his condition in life. Considering the status of same-sex marriage being legally recognized by the proposed law, the application of the Provisions concerning Maintenance stated in Book 5 of the Civil and Commercial Code of the Kingdom of Thailand shall be applied mutatis mutandis to the Maintenance Provision applied to the same-sex couple.

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