

Same Sex Marriage and Legal Equality in The World

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The topic of same sex marriage has frequently been on world headlines with new developments that have shifted historical tradition. The ongoing debate to whether or not enact same-sex marriage laws often evolved around arguments that relate to political, social, human, civil rights, and religious issues. As many countries have considered its importance as constitutional guarantees of equality (or a by direct popular vote through a referendum), we shall take a closer look at the developments, arguments that support / oppose, and related laws that have been applied from various countries. The topics and ideas in this discussion may be used as relevant case studies in the consideration of enacting same-sex marriage in Thailand's constitutional rights.

Definition and related terms

Before we explore the topics associated with same-sex marriage, let us discuss its definition and other terms that are related to this matter. *Same-sex marriage is a marriage between two persons of the same biological sex and/or gender identity*¹. In dictionaries, the term "marriage" is defined as (*noun*):

- the relationship that exists between a husband and a wife²
- a legally accepted relationship between two people in which they live together, or the official ceremony that results in this³
- the formal union of a man and a woman, typically as recognized by law, by which they become husband and wife⁴

Other terms include Lesbian Gay Bisexual Transgender Queer/Questioning (LGBTQ) marriages.

In Thailand, the legal conditions of marriage are chartered in Chapter 2 of the Thailand Civil and Commercial Code. Section 1448 specifically quotes that:

¹ http://en.wikipedia.org/wiki/Same-sex_marriage

² <http://www.merriam-webster.com/dictionary/marriage>

³

http://dictionary.cambridge.org/dictionary/british/marriage_1?q=marriage

⁴ <http://oxforddictionaries.com/definition/english/marriage?q=marriage>

“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.”

In many nations around the world, “marriage” is argued to be reserved for male-female couples and a different status such as “civil unions”, “registered partnerships”, and “domestic partnerships” are more suitable.

Background

Historically speaking, same sex couples have been recorded throughout history such as in the Zhou Dynasty of China, the Roman Empire, and the medieval period in Europe though almost all of these unions have not been legally binding⁴.

Before the formation of the United Kingdom in 1707, English law identified acts of sodomy that were punishable by hanging. As time passed, the death penalty would be removed but male homosexual acts remained illegal and punishable by imprisonment.

It was not until 1954 that a special initiative called the Wolfenden Committee was set up to consider UK laws relating to homosexual offences. Laws that limited the decriminalization of homosexual acts did not materialize until The Sexual Offences Act of 1967 was passed. Homosexual acts would not be illegal if 3 conditions were met: 1) the act had to be consensual, 2) the act had to take place in private, and 3) the act could involve only people that had attained the age of 21. The Sexual Offences Act of 2003 would replace older sexual offences laws with more specific and explicit wording. It also created several new offences such as non-consensual voyeurism, assault by penetration, causing a child to watch a sexual act, and penetration of any part of a corpse.⁵

The earliest official recognition of a legal same-sex relationship in modern history took place in 1989 in Denmark by allowing same-sex couples to engage in “registered partnerships” which represented virtually the same conditions as a marriage.

The first same-sex marriage, however, took place in the Netherlands in which four same-sex couples were officially married and registered by the Mayor of Amsterdam. This marks the success of gay rights activists that began their movements in the 1980s asking the government to permit same-sex marriages. The Dutch Parliament created a special commission to study the possibilities of enacting the law. In 2000, the House of Representatives passed the marriage bill by a majority vote. “The main

⁵ [\[http://www.legislation.gov.uk/ukpga/2003/42/contents\]](http://www.legislation.gov.uk/ukpga/2003/42/contents)

article in the Act changed article 1:30 in the marriage law to read as follows: *A marriage can be contracted by two people of different or the same sex*"⁶.

Arguments that Support / Oppose

Just over a decade since the first legal same-sex marriages, nearly 20 countries have passed laws to allow same-sex marriages. Despite the recent shifts in official endorsements, it remains that the developments in these countries reflect just a fraction of marriage traditions and laws around world. The following are topics that have at the same time pushed legal same-sex registrations and challenged the movements.

It may be logical to begin the discussion by studying and comparing the legal rights found in traditional opposite-sex marriages. The benefits, rights, and privileges that same-sex couples demand is usually the same as those granted in existing marriage laws.

In the United States, the enactment of the 1996 Defense of Marriage Act (DOMA), explicitly defined marriage for the purposes of federal law as between a man and a woman and allowed states to ignore same-sex marriages from other states. There were 1,049 statutory provisions in a marital status that determine benefits, rights, and privileges. As of 2003, the number of statutory provisions for a legal marriage were repealed or amended to 1,138 by the General Accounting Office and are grouped into 13 categories:⁷

CATEGORY 1—SOCIAL SECURITY AND RELATED PROGRAMS, HOUSING, AND FOOD STAMPS:

- Federal health and welfare programs such as social security retirement and disability benefits.

CATEGORY 2—VETERANS' BENEFITS:

- Providing pensions, compensation for service-connected deaths, and educational assistance.

CATEGORY 3—TAXATION

- Giving married taxpayers the option to file joint or separate income tax returns.

CATEGORY 4—FEDERAL CIVILIAN AND MILITARY SERVICE BENEFITS

- Providing health, leave, retirement, survivor, and insurance benefits provided by the United States to those in federal service and their families.

⁶ [\[http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_Netherlands\]](http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_Netherlands)

⁷ [\[http://www.gao.gov/new.items/d04353r.pdf\]](http://www.gao.gov/new.items/d04353r.pdf)

CATEGORY 5—EMPLOYMENT BENEFITS AND RELATED PROVISIONS

- Laws that address the rights of employees under employer-sponsored employee benefit plans that provide for continuation of employer-sponsored health benefits after events like the death or divorce of the employee and that give employees the right to unpaid leave in order to care for a seriously ill spouse.

CATEGORY 6—IMMIGRATION, NATURALIZATION, AND ALIENS

- Special consideration to spouses of immigrant and nonimmigrant aliens in a wide variety of circumstances. Under immigration law, aliens may receive special status by virtue of their employment, and that treatment may extend to their spouses.

CATEGORY 7—INDIANS

- Providing the outlines for the descent and distribution rights for Indians' property.

CATEGORY 8—TRADE, COMMERCE, AND INTELLECTUAL PROPERTY

- National Housing Act (rights of mortgage borrowers); the Consumer Credit Protection Act (governs wage garnishment); and the Copyright Act (spousal copyright renewal and termination rights).

CATEGORY 9—FINANCIAL DISCLOSURE AND CONFLICT OF INTEREST

- Federal law imposes obligations on members of Congress, employees or officers of the federal government, and members of the boards of directors of some government-related or government chartered entities, to prevent actual or apparent conflicts of interest. These individuals are required to disclose publicly certain gifts, interests, and transactions. Many of Page 18 GAO-04-353R Defense of Marriage Act these requirements, which are found in 16 different titles of the United States Code, apply also to the individual's spouse.

CATEGORY 10—CRIMES AND FAMILY VIOLENCE

- Laws that implicate marriage in connection with criminal justice or family violence: spouses as victims of crimes; others with spouses as perpetrators.

CATEGORY 11—LOANS, GUARANTEES, AND PAYMENTS IN AGRICULTURE

- Spouse's income, business interests, or assets are taken into account for purposes of determining a person's eligibility to participate in the program.

CATEGORY 12—FEDERAL NATURAL RESOURCES AND RELATED PROVISIONS

- Special rights to spouses in connection with a variety of transactions involving federal lands and other federal property.

CATEGORY 13—MISCELLANEOUS PROVISIONS

- Federal provisions that prohibit discrimination on the basis of marital status are included in this category.

As summarized above, the categories of rights and benefits are available for couples in the United States and are the same rights that same-sex couples push for marriage equality.

Basically, arguments that support the introduction of same-sex marriage laws is driven based on constitutional guarantees of equality. The passage of DOMA in 1996 explicitly defined marriage in federal law as a union of one man and one woman. DOMA has since then been challenged in several federal court cases based on its unconstitutionality under the Tenth Amendment and Section 3 under the Fifth Amendment of the United States Constitution (further discussed in the next section).

In the United Kingdom's recent history, LGBT rights have sought support based on the respect for human rights and equality. Several LGBT aspects of equality were pushed including legal allowance of same-sex activity, gender identity/expression, military service, discrimination protection, and recognition of relationships⁸.

LGBT rights supporters such as Amnesty International believe that all people, regardless of their sexual orientation or gender identity should be able to enjoy their human rights. Although the Universal Declaration of Human Rights does not explicitly mention sexual orientation or gender identity, a broad interpretation should include the protection of rights of the global LGBT community. Excerpts drawn as a basis include⁹:

Article 5- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9- No one shall be subjected to arbitrary arrest, detention or exile.

Article 20- (1) Everyone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association¹⁰.

Examples of the denial of these rights include:

- Execution by the state
- Denial of employment, housing or health services
- Loss of custody of children
- Denial of asylum

⁸ [http://en.wikipedia.org/wiki/LGBT_rights_in_the_United_Kingdom]

⁹ [<http://www.amnestyusa.org/our-work/issues/lgbt-rights/about-lgbt-human-rights>]

¹⁰ [<http://www.un.org/en/documents/udhr/index.shtml#a5>]

- Rape and otherwise torture in detention
- Threats for campaigning for LGBT human rights
- Regular subjection to verbal abuse

On the other hand, there remains a strong opposition to same-sex marriages as they are viewed as harmful. The reasons and standpoint drawn from governments, institutions, religion, and the society most often include the following:

- Infringement of human dignity: Those born with their given sex are failing to treat themselves with proper respect. It is a fact that their given biological sex determine their true identity and should be proud to live life accordingly. There is a biological, physiological, and psychological difference between men and women in a marriage. The natural inclination for procreation and raising of children depend on this difference.
- It offends God and is a Violation of Natural Law: *“From the beginning of the creation, God made them male and female. For this cause a man shall leave his father and mother; and shall cleave to his wife.”* (Holy Bible, Mark 10:6-7). Marriage is not just any relationship between human beings. Its is a relationship rooted in human nature and thus governed by natural law. Being rooted in human nature, natural law is universal and immutable. It applies to the human race , equally. Saint Paul taught in the Epistle to the Romans that the natural law is inscribed on the heart of every man. (Holy Bible Romans 2:14-15).
- It always denies a child either a father or a mother: It is in the best interest that the child be raised under influence of his natural father and mother. This rule is confirmed by the evident difficulties faced by orphans, single parents, or caretakers. In the State’s point of view, one of the main reasons there are numerous benefits on marriage is the upbringing of children. The population drives the economy.

Laws and Judicial Interpretation

We now take a closer look at laws that have been the basis for judicial rulings and their significance.

Mentioned earlier, the passage of DOMA followed by its unconstitutionality marked a significant change in the marriage laws in the United States. Significant federal court cases involved the interpretation of the Tenth Amendment and the Fifth Amendment of the United States Constitution.

The Tenth Amendment states:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

In the 2010 case ***Gill et al. v. Office of Personnel Management***, Judge Tauro of the District Court of Massachusetts ruled that the federal Defense of Marriage Act, which defined marriage as a union exclusively between a man and a woman, was unconstitutional because it violated the Tenth Amendment and the right of married same-sex couples to equal protection under the law and was contrary to the federal government's long history of allowing states to set their own marriage laws.

The Fifth Amendment states:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

In a 2013 landmark case ***Windsor vs. United States***, the United States Supreme Court held that restricting U.S. federal interpretation of "marriage" and "spouse" to apply only to heterosexual unions, by Section 3 of the Defense of Marriage Act (DOMA), is unconstitutional under the Due Process Clause of the Fifth Amendment.

However, it must be noted that as of August 2013, only 13 states, 5 counties in New Mexico, and 5 native American tribes have legalized same-sex marriages. Moreover, 6 states prohibit same-sex civil marriage by statute and 29 prohibit it in their constitutions. For instance, Oklahoma Governor Mary Fallin in 2013 ordered the National Guard to stop processing requests for military benefits for same-sex couples as a result of Oklahoma voters that approved a constitutional amendment in 2004 prohibiting giving benefits of marriage to gay couples.

With respect to the United Kingdom, the first judicial rulings related to same-sex marriages occurred in 2006 when the High Court refused to legally accept a married lesbian couple's marriage registration from Canada. In ***Wilkinson vs. Kitzinger & Ors***, the pair wanted their union to be recognized as a marriage and not a civil partnership. Civil partnerships had just been promulgated under the passage of the Civil Partnership Act in November 2004. It gives most (but not all) the rights and responsibilities of a civil marriage.

Countries with legal recognition of same-sex relationships

Country	Year of Legislature	Initial Judicial rulings
Argentina	2010	2009 Court in Buenos Aires. Articles 172 and 188 of the Civil Code were unconstitutional

Belgium	2003	-
Brazil	2013	2011 Supreme Court. Same-sex couples are legally entitled to legal recognition of cohabitation (known as <i>união estável</i> ,
Canada	2005	1999 Supreme Court. Same-sex couples in Canada were entitled to receive many of the financial and legal benefits commonly associated with marriage
Denmark	2012	-
France	2013	2004 Bordeaux court of general jurisdiction declared the marriage null and void. The civil code speaks several times of a <i>husband</i> and a <i>wife</i> , which implies different genders 2011 Constitutional Council. The Council decided that the illegality of same-sex marriages was not contrary to the Constitution, stating that this was a question for Parliament to decide
Iceland	2010	-
Mexico	2009	2010 Supreme Court. While not every state must grant same-sex marriages, they must all recognize those performed where they are legal.
Netherlands	2001	-
New Zealand	2013	1996 High Court. The High Court sided with the government and common law and reiterated that marriage is between one man and one woman. Section 5 (<i>Justified limitations</i>) of the Bill of Right Act, which allowed rights and freedoms in the Bill of Rights to "be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".
Norway	2009	-
Portugal	2010	2007 Constitutional Court. The constitution does not demand the recognition of same-sex marriage, but also does not oppose it, and that the decision must be made by the Assembly of the Republic.
South Africa	2006	2002 Pretoria High Court. The common-law definition of marriage was invalid because it unconstitutionally discriminated on the basis of sexual orientation, and that it should be extended to read "Marriage is the union of two persons to the exclusion of all others for life. The order of invalidity should be suspended for two years to allow Parliament to adopt its own remedy for the situation. 2005 Constitutional Court. The common-law definition of marriage and the marriage formula in the Marriage Act, to the extent that they excluded same-sex partners

		from marriage, were unfairly discriminatory, unjustifiable, and therefore unconstitutional and invalid.
Spain	2005	-
Sweden	2009	2008 Supreme Administrative Court. The Swedish Tax Authority did not break any rules as the definition of marriage under Swedish law was at the time the union of one man and one woman, and that same-sex relationships were to be recognised as a registered partnership.
United Kingdom	2013	2006 High Court. British university professors, legally married in British Columbia, Canada. However, on their return their marriage was not recognised under British law. Their union would not be granted marriage status and would continue to be recognised in England and Wales as a civil partnership. 2013 European Court of Human Rights. Eight couples from the United Kingdom have filed a challenge against the UK's bans on gay marriage and straight civil partnerships.
United States	2013	2010 United States Court of Appeals for the First Circuit. Office of Personnel Management vs. Gill 2013 Supreme Court. United States vs Windsor. Section 3 of DOMA is unconstitutional.
Uruguay	2013	2012 Judicial court Recognized a foreign same-sex marriage.

Source: http://en.wikipedia.org/wiki/Same-sex_marriage#Same_sex_marriage_around_the_world

Movements in Thailand

Despite global developments and Thailand being viewed as a tolerant country with respect to homosexuality, Thai law currently recognizes neither same-sex marriages nor other forms of civil unions. In the past, there have been movements toward the equality of LGBT rights.

Consensual and non-commercial sodomy was decriminalized in Thailand in 1956. In 2002, the Thai Ministry of Health publicly declared that homosexuality was no longer to be regarded as a mental illness or order. The Thai armed forces also lifted restrictions on LGBT to be enrolled in the military.

The most recent development for the same-sex marriages can be reflected in the government's move to forward the same-sex civil-union bill to the Parliament. According to a September 2013 announcement by Naras Savestanan, the Director General of Rights and Liberties Protection

Department, it is a joint effort with the house Committee on Justice and Human Rights. He expressed hope that same-sex partners would be able to enjoy the same rights as heterosexual couples.

In particular, it is an effort to meet the provisions aimed to protect the rights granted by the Constitution of the Kingdom of Thailand (2007). Although it does not specifically encompass same-sex marriages, the Constitution protects rights and liberties of the Thai people under several sections.

Section 4:

"The human dignity, rights and liberties and equality of the people shall be protected."

Section 5:

"The Thai people, irrespective of their origins, sexes or religions, shall enjoy equal protection under this Constitution."

Section 26:

"In exercising powers of all State authorities, regard shall be had to human dignity, rights and liberties in accordance with the provisions of this Constitution."

Section 30:

"All persons are equal before the law and shall enjoy equal protection under the law. Men and women shall enjoy equal rights. Unjust discrimination against a person on the grounds of the difference in origin, race, language, sex, age, disability, physical or health condition, personal status, economic or social standing, religious belief, education or constitutionally political view, shall not be permitted. Measures determined by the State in order to eliminate obstacles to or to promote persons' ability to exercise their rights and liberties in the same manner as other persons shall not be deemed as unjust discrimination under paragraph three."

In all, the world is changing fast in the way a marriage legally unites two persons. Marriage has traditionally been the official union of a man and a woman. Today, two persons of the same biological sex can form this union. Western nations are the first societies to accept same-sex marriages. As more people form stronger waves to demand equality and rights, political, social, and religious barriers will erode to permit the flow of changes. As discussed in this paper, there are numerous arguments that support or oppose the movement. With respect to Thailand becoming the next society to accept same-sex marriages, lawmakers are already drafting bills for official endorsement. Love stories where same-sex couples get married were to be found only in movies. In reality, there may soon be man couples and women pairs getting married. The question for the long term: is it happily ever after? Thai couples and its society will find out for themselves.
