

LEGALISATION OF SAME-SEX MARRIAGE

A GLOBAL PERSPECTIVE

International Conference Proceedings

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LEGALISATION OF SAME-SEX MARRIAGE: A GLOBAL PERSPECTIVE

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International Conference Proceedings

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PREFACE

As of 2021, marriage between people of the same sex has been legally performed in 29 countries. The Netherlands was the first country in the world to legalise same-sex marriage exactly 20 years ago, with the most recent being Costa Rica in 2020. No country has reversed a law allowing same-sex marriage, while support for same-sex marriage has also increased. In 2019, Taiwan became the first government in Asia to welcome legalisation on same-sex marriage. A Japanese court ruled that the government's failure to allow same-sex marriages is violating Article 14 of the Constitution, which ensures the right to equality. Other countries in Asia, including Thailand, have also been discussing the prospect of legalising same-sex marriage.

However, fighting for equality in marriage is nowhere near completion. Most parts of Asia, Africa, and Latin America still have laws banning same-sex marriage, with nearly 70 countries continuing to criminalise same-sex relations. The world is polarised regarding LGBTIQ acceptance. The rise of nationalism, anti-globalisation and undiscovered intersectional impacts of the pandemic on the marriage equality movement have meant that opposition remains strong in many countries.

In that context, an online international conference titled "Legalisation of Same-sex Marriage: A Global Perspective" will be co-hosted on 7-8 December 2021 by:

- School of Law, Vietnam National University Hanoi
- Asian Law Centre, Melbourne Law School, The University of Melbourne
- The iSEE Institute, Vietnam

The objectives of this conference were to provide an open forum for experts from various countries to discuss theoretical and practical aspects of legalisation of same-sex marriage in the world. Presentations and ideas discussed in the conference mentioned diversified themes, such as: Legalisation of same-sex marriage in countries; Effective legal frameworks for same-sex marriage; Social, economic and cultural impacts of same-sex marriage after legalisation; Civil unions, registered partnerships, domestic partnerships for same-sex couples; Adaption of non-binary, non-heteronormative legislation; Marriages of transgender people; Adaption of non-binary, non-heteronormative legislation; Joint adoption, single parent, same-sex

parenting, surrogacy; Transnational marriage involving same-sex unions; Raising public awareness and social acceptance of same-sex marriage; The role of NGOs and civil society in building community and advocating for marriage equality.

There are 22 papers included in this book of conference proceedings. School of Law, Vietnam National University, Hanoi decides to publish the book to disseminate foreign and domestic scholars' expert research on same-sex marriage and to share knowledge thereof in comparison and connection with other countries in the world.

On this occasion, School of Law, Vietnam National University, Hanoi acknowledges the contribution of scholars attending the conference, the Asian Law Centre, Melbourne Law School, and the iSEE Institute, Vietnam – our co-organizers with valuable support. We would like to thank the Selection Committee, the Editorial Board, our distinguished colleagues for their fruitful contribution: Dr. Mai Van Thang, Dr. Bui Tien Dat, Dr. La Khanh Tung, Dr. Ngo Minh Huong, Dr. Nguyen Thuy Duong, as well as Mr. Vu Thanh Cu and other volunteers for their effectively participating in the course of technically editing the proceeding book.

Hanoi, March 2022

The School of Law, Vietnam National University, Hanoi

UNDERSTANDING THE LGBT SUBCULTURE IN VIETNAM: TOWARD THEORY OF CULTURAL STUDIES

M.A Nguyen Minh Tri[1]

Abstract: *In Vietnam, the gay, lesbian, bisexual & transgender/transsexual group - abbreviated as LGBT - is a social minority group that receives little attention. However, in recent years, the LGBT community has been mentioned more and more in social media, becoming the subject of surveys in several research programs and intervention projects of NGOs. However, for the government, the research community, and even the LGBT group in Vietnam, the LGBT community has not been recognized as a cultural entity, or a part of Vietnam's culture. Are the issues of the LGBT community, in the opinion of cultural researchers in Vietnam, too sensitive, or are cultural researchers rejecting the LGBT subculture as part of Vietnam's diverse culture? In this article, we will repeat a few cultural definitions and analyses to confirm that the LGBT community is a distinct cultural entity that needs to be studied, and the LGBT subculture in Vietnam is part of Vietnamese culture. Moreover, we will research and summarize the characteristics of the LGBT subculture in Vietnam from cultural studies.*

Keywords: *LGBT subculture, cultural studies, Vietnam.*

RESEARCH BACKGROUND

Historically, the LGBT subculture has never been a cultural entity in Vietnam in the view of the government, the media, and even the LGBT community. As a result, it has never been considered a part of the Vietnamese culture. This has hindered the promotion and protection of human rights in Vietnam for the LGBT community. Moreover, the LGBT community has never been recognized for their contribution to the culture and society of Vietnam. To date, the research and understanding of the LGBT community from a cultural perspective is still relatively new, if not an unexplored area.

Many research topics and research surveys have mentioned the LGBT community in Vietnam. For example, *Transgender people in Vietnam - practical and legal issues* was published in 2012 in "Aspiration to be Yourself: Transgender People in Vietnam: Realities and Legal Aspects".[2] This research mentioned transgender groups and their

[1] Nguyen Tat Thanh University, Ho Chi Minh City, Vietnam, Email: nmtri@ntt.edu.vn.

[2] Quynh Phuong Pham, Quang Binh Le and Thanh Tu Mai, "Aspiration to Be Yourself: Transgender People in Vietnam: Realities and Legal Aspects" (World Publishing House 2012).

problems, such as stigma and discrimination in families, schools or public spaces, difficulties with job opportunities, health risks and legal issues. Another study, *The employment of transgender women - the reality and challenges* from iSEE, focused on transgender women. This study mentioned the difficulties that transgender people face in terms of employment. "The work argues that the barriers to transgender women's employment opportunities are complex, reciprocal but mainly rooted in social stigma."[1]

In addition, numerous research, literary and artistic works have been published, as well as typical internet surveys. For example, the Institute for Studies of Society, Economy and Environment (iSEE) published a case study on *Stigma and discrimination of health workers in providing medical services to men who have sex with men (MSM)*, which studied some FHI referral medical facilities in Hanoi and Ho Chi Minh City.[2] Another iSEE survey on *A study of the socio-economic characteristics of MSM in Vietnam* presented the problems faced by men who have sex with men in Vietnam, and suggested specific solutions.[3] In addition, some literary works have vividly and authentically brought audiences the emotions of LGBT people through literature, such as *Transgender (Chuyen gioi)*,[5] *Mom! I'm gay (Me oi! Con dong tinh)*,[4] or *Mom! I need to become a girl (Me oi! Con phai la con gai)*.[5]

In addition to the text documents, there are also unique image documents, such as the photo series *Another Me (Mot toi khac)*,[6] which dedicated more than 15 pages of vivid pictures of the gay community and their lives. *The Pink Choice* photo series by photographer Maika Elan also captured some of the casual daily activities of homosexual people. The *Moments in life (Khoanh khac cuoc doi)*[7] photo series by the Center for Creative Initiatives in Health and Population (CCIHP) also depicted the MSM community, taking pictures to talk about their lives with worries and pressures, love and happiness.

The studies mentioned earlier, as well as surveys, pictures and literary works

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1 Phuong An, "Talk about Transgender Employment" *E-magazine Quality and Life* (Vietnam, 22 July 2014) <https://chatluongvacuocsong.vn/viec-lam-cua-nguoi-chuyen-gioi-chi-di-hat-dam-ma-hoac-lam-gaid19016.html>.

2 iSEE, "Stigma and Discrimination from Medical Staff in Providing Medical Services to MSM (Case Study of Some FHI Referral Medical Facilities in Hanoi and Ho Chi Minh City)" (2011) <http://www.thuvien.lgbt/nghiencuu>.

3 Cuong Q Nguyen, "A Study of the Socio-Economic Characteristics of MSM in Viet Nam" (iSEE 2009).
[5] Ngoc Thach Pham, *Transgender* (Labour Publishing House 2016).

4 Ngoc Thach Pham, *Mom! I'm a Gay* (Labour Publishing House 2016).

5 Just Everlyn, *Mom! I Need to Become a Girl* (Walter Trook Publishing 1998).

6 iSEE, *Another Me* (Transportation Publishing House 2013).

7 CCIHP, "Moments in Life" <https://ccihp.org/>.

only focused on researching and depicting a specific part of the LGBT peoples, such as transgender people or MSM. The research also only presents basic scientific knowledge in biology, health, economy, society, etc. Issues surrounding the LGBT peoples have not been researched from the point of view of cultural studies. Are issues of the LGBT group, in the opinion of cultural researchers in Vietnam, too sensitive? Or is it because we do not yet consider this group of people a distinct cultural entity or, in other words, a subculture within the whole culture of Vietnam? With the help of previous research, I therefore want to confirm and clarify the essential, identifying characteristics of the LGBT subculture in Vietnam from a cultural perspective.

Understanding LGBT

According to Queer Theory, people's sexual identity is much more complicated than dividing gender into male and female.[1] Such division of essence into two extremes represents a way of looking at it as the polaropposite of life's inherent form. Regarding sexual orientation, in work published in the late 1940s, Alfred Kinsey and colleagues showed that sexual orientation could be divided into seven categories, from entirely heterosexual to entirely homosexual, and bisexual are the midpoints.[2] Furthermore, many research documents from anthropology, culture, history, religion, politics, and social activities show that *gender pluralism* is quite common in Southeast Asia.

Who are LGBT people? Biologically speaking, LGBT people have the same body state as other human beings. However, to identify LGBT people with others, we need to understand what human sexuality is. Human sexuality comprises four elements: sexual biology, *gender identity*,[3] *sexual orientation*[4] and gender expression.

Of the four factors, biological sex is the one that cannot be changed because it is a biologically determined factor. Biological sex is mainly associated with sex chromosomes, hormones, and internal and externalorgans. Humans are usually born intotwo distinct biological sexes, female and male, defined by the external genitalia: clitoris/penis, testicles; and internal organs: ovaries/prostate. However, there are exceptions. Some people, who have indistinct or both sexual organs, are called intersex and are usually recommended to receive medical intervention to determine

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1 Annamarie Jagose, *Queer Theory: An Introduction* (Melbourne University Press 1996).

2 Kinsey A.C, Pomeroy W.B and Martin C.E, "Sexual Behavior in the Human Male" (1949) 109 283. [12] Michael G. Peletz, *Transgenderism and Gender Pluralism in Southeast Asia since Early Modern Times* (1st Edition, Routledge 2009) <https://doi.org/10.4324/9780203880043>.

3 APA, "Answers to Your Question about Transgender People, Gender Identity, and Gender Expression" (*American Psychological Association*, 2012) <https://www.apa.org/topics/lgbtq/transgender.pdf>.

4 APA, "Sexual Orientation & Homosexuality" (*American Psychological Association*, 2008) <https://www.apa.org/topics/lgbtq/orientation>.

their biological sex. Although it is a natural factor that can be interfered with by medicine, biological sex combined with other factors will more accurately determine human sexuality.

Sexual orientation is another of the four factors that make up sexuality and is defined as a sustained emotional and/or sexual attraction to others. From there, we can distinguish three basic types of sexual orientation: heterosexual - people who are attracted to the opposite sex; homosexual - someone who is attracted to people of the same sex; bisexual - someone who is attracted to both sexes. Unlike sexual behavior, sexual orientation includes personal feelings. Therefore, a person's sexual behavior may not reflect their sexual orientation.

Gender identity is the third factor in sexuality, expressed through the perception of one's gender as male or female. Gender identity does not necessarily coincide with biological sex. Gender identity is also independent of sexual orientation, as gender identity has to do with who a person thinks they are. In contrast, sexual orientation has to do with to whom is a person attracted.

Gender expression is how a person unconsciously/consciously shows their gender identity through their behavior, clothing, hairstyle, voice, or physical features. However, in today's society, gender expression goes beyond gender identity. It gradually becomes a determining factor by personal preferences and trends of the times. Hence, gender expression is not the decisive factor that defines who you are and what your sexuality is.

The population of LGBT people in Vietnam

There is some difficulty in researching LGBT people because the specific LGBT population in Vietnam is unknown. Vietnam has not conducted a nationwide survey on the number, distribution, and characteristics of LGBT people. Therefore, it isn't easy to approach and research this group of people as a whole, instead, it is only possible through representatives. For example, in Vietnam, a report published at the Scientific and Technical Conference held by the Ho Chi Minh City Dermatology Hospital on September 26, 2006, said there was no firm data on the number of gay men couples. However, if we take the average rate that many scientists have agreed on, that of 3%,[1] then the number of LGBT people in Vietnam can be estimated to be more than 2,900,000 people (according to the population of Vietnam in 2020, which was more

[1] Dinh Luyen, "Scientific Report of the World Health Organization (WHO)" (*Vietnam Law Online Newspaper*, 11 May 2013) <http://baophapluat.vn/toi-18/nguoi-dong-tinh-ngong-tin-quoc-hoi-168740.html>.

than 97.5 million people)[1].

Transgender people may not have had surgery, but if they understand their gender identity differently from their sexual biology, they are transgender people. Of course, they also have a tendency or wish to be transexual. However, this may not become their reality.[2] There has been no national census on transgender people in Vietnam. Transgender people are classified into two groups: male to female (also known as Trans Girl or Trans Women, or Male To Female - MTF) and female to male (also known as Trans Guy, or Female To Male - FTM). The population of LGBT people is a minority amongst Vietnamese people. However, whether the population is large or small, the LGBT subculture must be understood and recognized.

CULTURE DEFINITION

To begin identifing the LGBT subculture, we should look at some perspectives on the definition of culture. However, we should also point out that the definition of culture has changed over time.

There are two types of definitions - *descriptive definitions* and *featured definitions*. The *illustrative description* lists the elements of culture. For example, according to E.B. Tylor (1871), *culture* consists of knowledge, belief, art, morals, law, custom, and all other abilities and habits acquired by man as a member of society.[3]

In the *featured definition*, there are three major trends: The first tendency is to see culture as specific outcomes (products). It can be values, traditions, ways of life, standards, ideas, social institutions, symbols, signs, information created by a community, designed surplus, and accumulation. The second tendency sees culture as a process. It can be creative activities, technologies, processes, ways of existence, living and development, adapting to the environment, and human behavior. Finally, the third trend considers culture as relationships, structures between values, between people and their fellow human beings and species. All these different definitional tendencies have their logical nucleus. The difference between them is mainly because the authors have emphasized one aspect or another of the concept. However, regardless of the trend, all definitions of culture contain an ordinary meaning of *people*, recognizing

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1 GSO, "Population, Labor and Employment in 2020" (*General Statistics Office of Vietnam*, 1 September 2021) <https://www.gso.gov.vn/du-lieu-va-so-lieu-thong-ke/2021/01/infographic-dan-so-lao-dong-va-viec-lam-nam2020/>.

2 Quynh Phuong Pham, *Gay, Bisexual and Transgender People in Vietnam – A Review of Studies* (Social Science Publishing House 2013).

3 Tylor E.B., *Primitive Culture*, vol 2 (Cambridge University Press 2012).

and affirming the close relationship between culture and people.

Tran Ngoc Them also affirmed that *culture and humans are two concepts that are not separate*.[1] Culture has existed since people appeared. Humans are the creators of culture. Throughout its formation and development, people have always been incessantly creative to create cultural values. One of the cultural values created by people is people themselves - people with culture. Humans create culture, and at the same time, people are also products of culture. As a product of culture, man is a typical cultural carrier. Material cultural values may be lost, but as long as people remain, culture will continue to exist and develop. From this point of view, looking back at the biological identity of LGBT people, it is clear that they are also complete human beings, a part of society. Applying a simple inference, the LGBT group also has its own culture.

For a long time, culture in Vietnam was understood in a very narrow sense: the level of civilization was rated from 1 to 12 on administrative documents. However, stopping at this interpretation leads to a misunderstanding and forms the concept of people with and without cultures. Cultured people (ie. people with culture) are often identified as educated people. This incorrect understanding amongst Vietnamese people gradually creates barriers and prejudices against people in the LGBT community. For example, if LGBT people, especially transgender people, cannot afford to go to school, they will be considered uncultured or countercultural. Moreover, culture is always associated with a set of historical values inherited from generation to generation,[2] limiting other small subcultures that may be born later. Subcultures that are not in the same frame of reference, or that have not been known historically, may quickly lead to cultural frictions as they may be considered contrary to the central culture.

Anthropologists have developed many theories to analyze and explain ethnicity. In the Euro-American anthropological tradition, cultural anthropologists in North America and social anthropologists in the United Kingdom have developed significant theories that explain culture and society, including ethnic themes. Prominent among them are two opposing theoretical views. First, the academic view of *cultural evolution*[3] holds that human culture in general and the culture of specific ethnic groups, in particular, have developed from low to high along a single path. Since then, anthropologists studying specific ethnic groups have often placed this ethnic culture

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1 Ngoc Them Tran, *Treatise on Culture: Social Science & Humanities Issues – Cultural Studies* (Ho Chi Minh City National University Publishing House 2013).

2 Ngoc Them Tran, *Vietnamese Cultural Establishment* (2nd Edition, Education Publishing House 1999).

3 "What Is Cultural Evolution" (*Cultural Evolution Society*, 2018) <https://culturalevolutionsociety.org/story/What_is_Cultural_Evolution>.

somewhere in the evolutionary framework from barbarian to barbarian or civilized. For example, Morgan labels seven different stages of human culture: lower, middle, and upper savagery; lower, middle, and upper barbarism; and civilization.[1] Because anthropologists in the late 19th century and early 20th century usually came from the West, they used the values and cultural standards of their ethnic group to reflect and analyze their subject's research. As a result, it leads them to fall into ethnocentrism in exploring the cultures of other ethnic groups, creating an unscientific perception that some ethnic groups are superior to others is different.

The anthropologist Franz Boas, on the other hand, developed the theoretical view of cultural relativism, arguing that there is no high culture or low culture, to reject the cultural theory of evolution. Instead, each culture is formed from its geographical and historical context. Cultural relativism is the ability to understand a culture on its own terms and not to make judgments using the standards of one's own culture. This goal is to understand cultural practices that are not typically part of one's own culture. Using the perspective of cultural relativism leads to the view that no culture is superior to another culture when respective systems of morality, law, politics, etc are compared.[2]

This concept argues that cultural norms and values derive their meaning within a specific social context. This is also based on the idea that there is no absolute standard of good or evil. Therefore every decision and judgment of right and wrong is individually decided in each society. Cultural relativism also means that any opinion on ethics is subject to each person's perspective within their particular culture. Overall, there is no right or wrong ethical system. A holistic understanding of the term cultural relativism tries to promote the knowledge of cultural practices that are unfamiliar to other cultures, such as eating insects, genocides, or genital mutilation.

Every society has its own unique cultures in which people will have different ideas of moral codes. The diversity of these cultures cannot be said to be correct or incorrect. Every society has independent standards of ethics within its community, and these standards are culture-bound. Cultural Relativism has a perception in which the rightness or wrongness of an action depends entirely within the bounds of the culture.

CHARACTERISTICS OF THE LGBT SUBCULTURE IN VIETNAM

The LGBT community has been a member of society for a long time in Vietnam. However, in Vietnamese culture, there is limited recognition or reference to the presence of LGBT people. Therefore, in the process of research and observation, we

[1] Morgan Lewis H., *Ancient Society* (Harvard University Press 2013).

[2] Philosophy Home, "Cultural Relativism: Truth Is Relative" (*Philosophy Home*, 2009) <http://www.culturalrelativism.com/>.

see that cultural events and phenomena are sometimes minor, inconsistent, or not universal for a group of LGBT people. In fact, those cultural events and phenomena bring the representativeness and specificity of the LGBT subculture.

VietPride - The series of events

In June 1969, patrons and supporters of the Stonewall Inn in New York City staged an uprising to resist police harassment and persecution that LGBT Americans were commonly subjected to. This uprising marks the beginning of a movement to overturn discriminatory laws and practices against LGBT Americans. Today, celebrations include pride parades, picnics, parties, workshops, symposia, concerts, and LGBT Pride Month events attract millions of participants worldwide. In addition, memorials are held during this month for members of the community who have been lost to hate crimes or HIV/AIDS. The purpose of the commemorative month is to recognize LGBTQ individuals' impact on history locally, nationally, and internationally.[1]

Accordingly, with its humanistic meaning, PRIDE has become a wave, constantly spreading to every country. From a global activity, LGBT people in Vietnam, in general, have turned it into a unique and meaningful one of their own. The Viet Pride series of events - the most significant of the year for the LGBT community in Vietnam - has celebrated sexual diversity, brought pride and cheer to the community, spread the values of love, and the courage to live true to yourself. The Viet Pride series is also an intercultural exchange between the significant global LGBT culture and the Vietnamese LGBT subculture.

Initially, the Pride project implemented in Vietnam was initiated by a small group of LGBT friends in the capital, Hanoi in 2011. It then spread to many people in different provinces across the country. Ten regions participated in Viet Pride in the first year, and now more than 30 provinces and cities have participated. In 2017, the series of Viet Pride activities from North to South, took place from July 2017 to the beginning of October 2017. It has once again affirmed the irreplaceable role of Viet Pride for the LGBT community across the country. As a result, society is also gradually transforming, smashing stereotypes about gay, transgender, and bisexual people.[2] Every year, the Viet Pride events have a different theme: *Come out* in 2012; *Strive with pride* in 2013;[3] *Blossom your life* in 2014; *Spread my wings* in 2015; *Be*

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1 Youth.gov, "June Is LGBT Pride Month" (*youth.gov*) <https://youth.gov/feature-article/june-lgbt-pridemonth>.

2 An Nguyen, "Viet Pride - Connecting Thousands of Hearts" (*Motthegioi.vn*, 15 September 2017) <http://motthegioi.vn/lgbt-c-131/viet-pride-noi-ket-noi-hang-van-trai-tim-71585.html>.<https://hanoigrapevine.com/2013/07/viet-pride-2013-strive-with-pride/>.

3 Goethe-Institut Hanoi, "Vietpride 2013 - Strive with Pride" (*Hanoi Grapevine*, 23 July 201AD)

yourself free to love in 2016; *Seeds of equality* in 2017; *It's our pride* in 2018; *Out and proud* in 2019; *Light up the Pride* in 2020; *No matter what* in 2021.[1]

Accordingly, manystraight people, parents, and friends of LGBT people held hands and joined the Viet Pride parade to support the LGBT community. The journey of the past ten years has brought Viet Pride beyond its initial limitations, bringing about positive changes for the whole society, with a correct and positive view of gay, transgender, and bisexual people. People have come closer together, and Viet Pride has gradually become similar to the *Tet holiday* for LGBT people in Vietnam.

Lo to Show

Besides the Viet Pride cultural event, another activity can be considered a part of life for LGBT people An activity mainly by transgender women, the Lo to Show (similar to a bingo game) has gradually become a feature that everyone associates about LGBT people. Lo to Show is a form of entertainment very familiar to the people of the South in Vietnam. The bustling atmosphere in the theater troupes in the southwestern towns, with traditional games, funny bingo papers, and colorfully dressed girls, has become a typical memory - the feeling of holding the purchased tickets and anxiously waiting for the girls to dial the numbers. Familiar songs that are "mixed" make it interesting to find the numbers. Whoever has five numbers appearing on the same row will be "Kinh", which means bingo. *Gifts are nothing big, just packets of instant noodles, a few bags of MSG, but it's still fun*.[2] In addition, the Lo To Troupe, a group of LGBT people in provinces or cities, moves from one location to another. They set up fairs with game booths and stages in empty spaces; they sing, dance, circus, and do magic tricksat night to earn money. If the audiences do not play bingo or watch the show, the LGBT people will continue to move. In 2014, Nguyen Thi Tham's feature-length documentary on this topic - *Chuyen di cuoi cung cua chi Phung* (The Last Trip of Sister Phung) - was warmly received by domestic and foreign audiences with haunting emotions. The Last Trip of Sister Phung is actual footage recorded by director Tham who followed the Phung for many years. Although it is a documentary, it attracted a lot of attention. A large audience of people bought tickets because it showed a different perspective of people who use entertainment as their livelihood. Director Huynh Tuan Anh then decided to make a movie Loto, inspired by this story.

Drag Queen

1 ICS, "VietPride" (*ICS Center*) <http://ics.org.vn/viet-pride>.

2 Phuc Du, "Lo to Show: Both Tragic and Floating" (*Newspaper young intellectuals*, 30 March 2017) <http://ttvn.toquoc.vn/>.

Drag[1] is the reception of an international artistic activity associated with the transgender community. The phrase *Drag-queen*[2] was first used around 1870 in England to refer to male actors playing female roles, stemming from various theatrical causes, including a shortage of female workers. Today, the term is generally used for artists who dress up as women, not necessarily stage actors, singers, dancers, television actors, comedians, or contestants of beauty contests. Lip-sync artists are also an iconic art activity of the "Drag-queen" world.

Countries in Asia, especially Thailand, influenced drag queens in Vietnam. Initially, the drags experimented with styles from Europe and America but they gradually formed their own style, returning to the original inspiration of the Asian Drag Queen. Lip-syncing performances, gorgeous costumes, and thick makeup are the characteristics of Drag Queens. However, Vietnamese Drags often do not update their trends. Instead, they only reference musical performances like Whitney Houston and Celine Dion.

In Thailand, Drag Queen shows can be performed outside the stage. However, people can only go outside to watch the show. In Vietnam, many performances occur during the night. Although society has opened up to the LGBTQ+ community in recent years, they are still not fully accepted. Therefore, the Drag Queen community needs a place where they can be more open to society but not be afraid of being abused or unsafe.

Being subjected to disgusting glances, jokes, or even violent fights are typical for gay and transgender people, especially when they show signs of being "deviant". When faced with such a situation, people often have two choices: Hide or live with it. This is one of the reasons that the "drag queen" movement was born. These people did not try to affirm their masculinity, but calmly turned their faces and covered themselves with lipstick and silk. They live and work as true artists with the affirmation: "Feminine does not mean weak and only men who are strong enough dare to show it". "Drag queen" is considered a highlight of the colorful nightlife of the LGBT community. Not only are the men dressed in fancy clothes and lip-syncing the masterpieces of the Divas, but they are also true artists who work hard every night for the audience.

Making money from art activities is the biggest challenge of the Drag Queen community. However, as mentioned, perceptions are still skewed towards the

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1 David A Gerstner, *Routledge International Encyclopedia of Queer Culture* (Routledge 2006).

2 Felix Rodriguez Gonzales, *The Feminine Stereotype in Gay Characterization: A Look at English and Spanish. (In María de Los Ángeles Gómez González; J. Lachlan Mackenzie; Elsa M. González Álvarez)* (John Benjamins Publishing Company 2008).

performance activities of the LGBT community. Continuously performing late at night also adversely affects the artists' health.

CONCLUSION

If talking about a culture in general, or a subculture in particular, there are many things to mention, such as customs and habits, costume culture, food culture or specific religious beliefs, etc. However, these aspects are often associated with the culture of the entire ethnic group. With the LGBT group having a specificity related to sexual orientation, as I shared above, their subculture identification is also somewhat different. However, there are also identifiable aspects, such as festivals, cultural events, cultural activities, livelihood methods, etc., and other identifiable factors such as sexual culture and family culture, cultural behavior, etc., of LGBT people.

However, within the framework of this essay, I would like to present the typical identifying factors of the LGBT group to show that this group of people is also eligible to be considered a subculture, and needs to considered as a subculture. When we identify LGBT people who have their own culture, who also have their own identity, they may be taken out of the counterculture group. This is the reason that leads to LGBT people being scorned, stigmatized, and overlooked in society. Up to now, the Vietnamese people only take an interest in the issues of LGBT people, such as health issues, social issues associated with social evils, social diseases, etc., generally only the problems, not the positives. Agencies and organizations mainly support LGBT people in human rights, law, media, health, etc. If we stop there, we can only solve the cultural reality of LGBT people; we are not changing the mindset of Vietnamese people. When the LGBT group is considered a cultural entity, they will be considered as a community with distinct cultural characteristics, with its own cultural identity. They will see the large, colorful culture that they can contribute to society. Identifying the LGBT subculture will therefore create a premise not only for the study of LGBT groups from a cultural perspective, but also for promoting the rights and presence of LGBT people in Vietnamese society.

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MARRIAGE OVERRULED? "CERTIFICATE OF NON-IMPEDIMENT" AND IMPEDIMENT TO THE RIGHT TO SAME-SEX MARRIAGE

Ignatius Yordan Nugraha

The purpose of this article is to analyse the requirement to provide a certificate of non-impediment from the perspective of international human rights law. This obligation is often imposed on LGBT non-nationals who wish to marry in a legalised same-sex marriage. Authorities in countries without same-sex marriage have refused to issue this certificate because national law only recognises marriage between a man and a woman. At the same time, excessive bureaucratism in the country that requires the certificate means that LGBT non-nationals cannot enter into a same-sex marriage. In this article, I will argue that both countries have violated the right to marry, the right to private and family life and the right to non-discrimination. I will specifically analyse in abstracto the compatibility of the certificate of non-impediment with the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

INTRODUCTION

As of December 2021, same-sex marriage has been legalised in 30 countries, with most concentrated in Western Europe, North America, South America and Oceania. In an increasingly interconnected world, these states are now home to a plethora of LGBT non-nationals. Many of them found the love of their life and subsequently intended to enter into a same-sex marriage in their new home. There are also citizens from states with same-sex marriage who found their partner abroad and subsequently sought to found a family with them officially. Romantic daydreaming and planning, however, soon turn into a bureaucratic quagmire, as LGBT non-nationals are often asked to provide a "certificate of non-impediment', "certificate of no impediment', "certificate of marital status" or "certificate of legal capacity to marry'. This document is usually defined as a letter declaring that there is no impediment to marriage for the person concerned under the law of the issuing state. This letter is particularly required to prove that one is still unmarried, and thus it can be considered an instrument to prevent bigamy.

As an illustration, imagine a homosexual man from Indonesia who has settled in Germany. He wants to marry another man from Poland who is working in Heidelberg, Germany, thanks to the freedom of movement within the European Union. In order to marry in Germany, the Indonesian national would have to prepare many different

documents. Most pertinent for the purpose of this paper is an *Ehefähigkeitszeugnis* (literally means "certificate of marriage capacity') issued by the competent authority in Indonesia. The legal basis of this requirement is laid down under Section 1309 (1) of the German Civil Code:

A person who, with regard to the requirements for entering into a marriage, is subject to foreign law (…), should not enter into marriage before he has furnished a certificate of the domestic authority of his home state that there does not impede the marriage under the law of that state. A certificate of the domestic authority includes a written confirmation issued by another office under a treaty entered into with the home state of the person affected. The certificate becomes ineffective if the marriage is not entered into within six months after it is issued; if the certificate states a shorter validity period, the latter is conclusive.[1]

Because of the bureaucratic quagmire in Indonesia, it is usually not obvious for many applicants to which authority they should turn. In the past, they would have to obtain the certificate from the Office of Religious Affairs (if they are officially registered as a Muslim) or the Civil Registry Office (if they are not a Muslim). However, new regulations seem to indicate that they have to apply to the city or regency administration. However, for the Indonesian national, it is practically impossible to obtain this document. While usually not mentioned on the official website of city or regency authorities,[2] the bureaucrats in charge often ask the applicant to provide a copy of the identity of the spouse, together with their picture. This requirement is even explicitly mentioned on the website of the Consulate General of the Republic of Indonesia in Frankfurt.[3]

Why would the requirement to show the spouse's identity act as a hurdle to the right to marry? Indonesia only recognizes marriage between a man and a woman as defined under Article 1 of Law No. 1 of 1974 on Marriage.[4] Furthermore, Article 2 of the same law stipulates that "a marriage is valid if it has been performed in

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1 § 1309 Abs. 1 BGB <www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p4771> accessed 23 November 2021.

2 See, for instance, "Persyaratan Surat Keterangan Belum Menikah" (*Disdukcapil Kabupaten Sleman*) <web.archive.org/web/20180201100841/https://dukcapil.slemankab.go.id/persyaratan-surat-keterangan-belummenikah > accessed 23 November 2021; "Surat Keterangan Belum Menikah" (*Disdukcapil Kota Pontianak*) <online.disdukcapil.pontianakkota.go.id/pendaftaran/surat-keterangan-belum-menikah> accessed 23 November 2021.

3 "Surat Keterangan" (*Konsulat Jenderal Republik Indonesia Frankfurt*) < www.indonesia-frankfurt.de/layanankonsuler/surat-keterangan/> accessed 23 November 2021.

4 Article 1 of Law No. 1 of 1974 on Marriage.

accordance with the laws of the respective religious beliefs of the parties concerned."[1] Once the authorities realise that the Indonesian national was seeking to contract same-sex marriage abroad, they would most likely reject the request to obtain a certificate of non-impediment. Under Indonesian law, marriage is only valid between a man and a woman. As commonly believed by many Indonesians, the authority could also hold that "all religions prohibit homosexuality",[2] and thus the applicant's intended marriage would not be in line with Article 2 of Law No. 1 of 1974.

Meanwhile, the hypothetical Polish spouse is also facing an insurmountable headwind. This difficulty is illustrated in the case of *Szypuła and Others v Poland*, which is yet to be decided by the European Court of Human Rights (ECtHR) when this paper was written. In that case, the Warsaw Civil Status Office refused to issue a certificate of non-impediment because the issuance of this certificate was deemed to be contrary to Polish law, which restricts marriage to a bond between a man and a woman.[3]

However, the issue of the certificate of non-impediment has not yet gained the attention of existing human rights scholarship. This is despite the potential of this document to negate the effective exercise of the right to marry LGBT non-nationals in a country that has legalised same-sex marriage. Against this backdrop, the purpose of this paper is to analyse *the abstract* certificate of non-impediment from the perspective of international human rights law. For the analysis, I focus on two major human rights instruments, namely the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). The former is selected given its global scope, whereas the latter is included since the communication of *Szypuła and Others v Poland* has led to the publication of some legal analyses, which could enrich the research on the compatibility of the certificate of non-impediment with human rights.[4] As for the scope of the states, I will include both states that impose

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1 ibid. See also Letezia Tobing, "Hukum Perkawinan Sesama Jenis di Indonesia" (*Hukumonline*, 19 December 2012) <www.hukumonline.com/klinik/detail/ulasan/lt50c9f71e463aa/hukum-perkawinan-sesama-jenis> accessed 23 November 2021.

2 See, for instance, Ali Mansur, "ICMI: Kalau LGBT Itu HAM, Mengapa Semua Agama Melarangnya?" (*Republika*, 22 January 2018) <www.republika.co.id/berita/p2xlek330/icmi-kalau-lgbt-itu-ham-mengapa-semuaagama-melarangnya> accessed 23 November 2021; Yose Rizal, "MUI : LGBT Tidak Dibenarkan Semua Agama" (*Antaranews*, 9 May 2018) <https://www.antaranews.com/berita/708465/mui-lgbt-tidak-dibenarkan-semuaagama> accessed 23 November 2021.

3 *Tomasz Szypuła v Poland, Jakub Urbanik and Jose Luis Alonso Rodriguez v Poland* App nos 78030/14 and 23669/16 (ECtHR, 20 June 2020).

4 See, for instance, Claire Poppelwell-Scevak and Sarah Den Haese, "The Challenges of Saying "I Do" for SameSex Couples: The Human Rights Centre Submits a Third Party Intervention in Transnational Same-Sex Marriage Case" (*Strasbourg Observers*, 20 November 2020) <strasbourgobservers.com/2020/11/20/the-challenges-ofsaying-i-do-for-same-sex-couples-the-human-rights-centre-submits-a-third-party-intervention-in-transnationalsame-sex-marriage-case/> accessed 23 November 2021.

the requirement of certificate of non-impediment for foreigners, as well as states that prevent their nationals from contracting same-sex marriage abroad by refusing the issuance of such a certificate.

In this paper, I will first argue that the refusal to issue a certificate of non-impediment constitutes a violation of the right to private life, the right to marry and the right to non-discrimination, as the refusal is grounded solely on sexual orientation. Second, I will extend the analysis to states that have imposed a requirement to furnish a certificate of non-impediment. Finally, I will conclude that the certificate of non-impediment is discriminatory, as it creates an insuperable bureaucratic hurdle for LGBT non-nationals. While states may invoke the ground of protection of public orders, the formalistic imposition of the requirement does not satisfy the proportionality test.

REFUSAL TO ISSUE CERTIFICATE OF NON-IMPEDIMENT AS A HUMAN RIGHTS VIOLATION

In the communicated case of *Szypuła and Others v Poland*, the Warsaw Civil Status Office refused to issue a certificate of non-impediment to the applicants, who intended to marry in Spain, under the grounds that the issuance would be contrary to Polish law that restricts marriage to a union between a man and a woman.[1] In Poland, same-sex marriage is explicitly prohibited under Article 18 of the Polish Constitution, which enshrines that "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."[2] The applicants had to provide the name and the gender of the future spouse to obtain the certificate, and consequently, the Polish authorities became aware of the applicants' intention to contract same-sex marriage abroad.[3]

As the Polish courts dismissed the applicants' appeals, the case was brought to the ECtHR. At the time this paper was written, the case was yet to be decided by the Court. Nevertheless, the applicants have raised pertinent arguments concerning the compatibility of the refusal to issue a certificate of non-impediment with the ECHR. The applicants specifically argued that their right to private and family life under Article 8 of the ECHR had been violated, since the refusal has effectively prevented them from marrying in Spain. Furthermore, the applicants also invoked Article 12 on the right to marry, as they were effectively barred from marrying in Spain because of the decision of the Polish authorities. Finally, they also added that the refusal

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1 *Szypuła and Others v Poland* (n 8).

2 Poland's Constitution of 1997, art. 18 <www.constituteproject.org/constitution/Poland_1997.pdf> accessed 23 November 2021.

3 *Szypuła and Others v Poland* (n 8).

constitutes discrimination on the basis of sexual orientation, and thus they contended that there is a breach of Article 14 on the accessory right to non-discrimination in conjunction with Article 8.[1]

In this Section, I shall demonstrate that the applicants' arguments have grounds under international human rights law. In other words, I will argue that refusal to issue a certificate of non-impediment on the grounds of sexual orientation violates the right to marry, the right to private and family life, and the right to non-discrimination. I will base my arguments not only on the jurisprudence of the ECtHR, but also on the authoritative interpretation of the Human Rights Committee (HRC) as the treaty body of the ICCPR. At the same time, there are also important differences between the jurisprudence of the ECtHR and the HRC, as the latter still has not recognised that the right to marry is applicable to same-sex couples. Nevertheless, I will still conclude that there is a violation, given the existence of the right to privacy and the right to non-discrimination.

Right to Marry

Under the jurisprudence of the HRC, there is no legal obligation to legalise same-sex marriage. The HRC in *Joslin v New Zealand* observed that Article 23(2) of the ICCPR on the right to marry specifically mentions "men and women" instead of "everyone". Thus, the HRC concluded that the objective of the provision was "to recognize as marriage only the union between a man and a woman wishing to marry each other."[2] This statement implies that Article 23(2) is exclusively applicable to opposite-sex couples. As a result, same-sex couples who intend to marry abroad cannot enjoy the protection of this article.[3]

Similarly, the ECtHR in *Schalk and Kopf v Austria* found that the use of the term "men and women" was deliberate to refer to traditional marriage.[4] The Court also held that "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another", and that it "must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess

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1 ibid.

2 *Juliet Joslin, Jennifer Rowan, Margaret Pearl and Lindsay Zelf v New Zealand* (2002) UN Doc CCPR/C/75/D/902/1999, para 8.2.

3 At the same time, it should be born in mind that *Joslin* was decided in 2002; as observed by Manfred Nowak, "Article 23(2) (…) does not necessarily rule out a broader interpretation in the future, taking into account the rapidly changing views in many societies in this respect." See Manfred Nowak *U.N. Covenant on Civil and Political Rights: CCPR commentary* (NP Engel 2005) 526-27.

4 *Schalk and Kopf v Austria* App no 30141/04 (ECtHR, 24 June 2010) para 54-55.

and respond to the needs of society."[1] In other words, states have a wide margin of appreciation in deciding whether to legalise same-sex marriage.[2]

There is, however, an important difference between the jurisprudence of the HRC and the ECtHR. In the case of *Schalk and Kopf v Austria* (decided in 2010), the Court explicitly ruled that Article 12 of the ECHR can no longer be regarded as being exclusively applicable to heterosexual couples, since the institution of marriage has undergone "major social changes" in recent years.[3] For the Court, this change was demonstrated by the deliberate omission of the term "men and women" in Article 9 of the Charter of Fundamental Rights of the European Union.[4] The Court's red line was only that Article 12 cannot be construed to establish an obligation on Contracting States to grant access to marriage to same-sex couples.[5] In this light, Article 12 of the ECHR would be applicable for homosexual couples who wish to marry in another state that has legalised same-sex marriage.

In response to this assertion, states such as Poland may point to the fine print of Article 12, which indicates that the right to marry is subject to national laws of Contracting States.[6] They would thus argue that the refusal to issue a certificate of non-impediment is based on a national law, which restricts the right of opposite-sex couples to marry. Moreover, they could assert that the measure is intended to protect "traditional marriage", which has been recognised by the Court as a "weighty and legitimate interest".[7]

However, the ECtHR has also established that limitations on the right to marry "must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired."[8] While the applicants in *Szypuła* were barred from marrying in Poland, they had the option to do so in Spain. Poland's refusal had effectively prevented them from getting married in a state where same-sex couples are granted access to marriage, which means that the very essence of the right to marry of

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1 ibid.

2 Laurence Burgorgue-Larsen, *La Convention européenne des droits de l'homme* (3rd edn, LGDJ 2019) 187-88.

3 *Schalk and Kopf v Austria* (n 16) para 60-61.

4 ibid para 60.

5 ibid para 54-55; *Oliari and Others v Italy* App nos 18766/11 and 36030/11 (ECtHR, 21 July 2015) para 191192; *Hämäläinen v Finland* App no 37359/09 (ECtHR, 16 July 2014) para 96.

6 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 12; *Rees v the United Kingdom* App no 9532/81 (ECtHR, 17 October 1986) para 50.

7 *Fedotova v Russia* App no 73225/01 (ECtHR, 13 April 2006) para 54.

8 *Rees v the United Kingdom* (n 22) para 50; *F v Switzerland* App no 11329/85 (ECtHR, 18 December 1987) para 32.

the applicants *in that state* has been impaired.[1] As argued by the Human Rights Centre of Ghent University in its Third-Party Intervention:

the mere fact that a State does not allow for same-sex marriage does not contradict the possibility of that State nonetheless being subjected to some kind of obligations under Article 12, such as the obligation not to hinder the effective enjoyment by its nationals of their right to marry *in another country*."[2]

Furthermore, the Human Rights Centre also emphasised the importance of analysing the case in light of increasing transnational mobility, particularly within the European Union. Thus, they exhorted the Court to take into account this factor "with a view to ensuring that those human rights which are prerequisite to the effective enjoyment of transnational lives are not unduly hampered by the acts of the States concerned."[27] To rule otherwise "would grant a disproportionate power for rights-restrictive States in transnational situations, a scenario that in our opinion runs counter to the object and purpose of the Convention as an instrument for the protection of individual human beings."[3]

The overreliance on domestic law is also a classic example of "excessive formalism'. The ECtHR has held in the context of the right of access to a court under Article 6(1) that the practical and effective enjoyment of this right can be impaired by "excessive formalism'.[4] As argued by the Human Rights Centre, this observation is applicable by analogy to the case of certificate of non-impediment, since "excessive formalism" with respect to that certificate effectively impairs the enjoyment of the right to marry and the right to private and family life of LGBT non-nationals.[5]

Finally, regarding the potential argument that states are entitled to protect traditional marriage, this argument is also weak given that granting a certificate of non-impediment is not equal to recognising or legalising same-sex marriage, particularly because *Schalk and Kopf* still allows states to refuse recognition of same-sex marriage.[31] In its Third-Party intervention, the Human Rights Centre also made an analogy with the case of

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1 Eva Brems et al, "European Court of Human Rights, *Szypuła v Poland* and *Urbanik & Alonso Rodriguez v Poland* (Application Nos. 78030/14 and 23669/16), Third Party Intervention by the Human Rights Centre of Ghent University" (*Human Rights Centre*) <hrc.ugent.be/wp-content/uploads/2020/11/Szypula-v.-Poland-TPI.pdf> accessed 23 November 2021, 3-4.

2 ibid 4. [27] ibid.

3 ibid 5.

4 *Zubac v Croatia* App no 40160/12 (ECtHR, 5 April 2018) para 97; *Inmobilizados y Gestiones S.L. v Spain* App no 79530/17 (ECtHR, 14 September 2021) para 33.

5 Brems et al. (n 25) 9. [31] ibid 4.

Coman in the Court of Justice of the European Union (CJEU).[1] This *Coman* case is concerned with granting the right of residence to the same-sex spouse of a European Union (EU) citizen based on marriage performed in another EU country.[2] The CJEU in this case ruled that the right to residence "does not undermine the national identity or pose a threat to the public policy of the Member State concerned".[3] The Human Rights Centre then asserted that this dictum is also applicable in the context of certificate of non-impediment, as "the mere granting of a marriage eligibility certificate to a national who wants to contract a same-sex marriage abroad would similarly not undermine national identity or pose a threat to public policy."[4]

Right to Private and Family Life

Even if it is assumed that the right to marry is not applicable at all to the case of certificate of non-impediment due to the existence of the phrase "men and women', refusal to issue the document still intervenes with the right to private and family life. Article 8(1) of the ECHR enshrines that "Everyone has the right to respect for his private and family life, his home and his correspondence."[5] Meanwhile, Article 17(1) of the ICCPR is phrased in a slightly different manner: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."[6] Nevertheless, the French version uses the term *vie privée*.[7] As observed by Nowak, "[d]espite the discrepancy in the two authentic English texts, it may be assumed that "private life" under Art. 8 of the ECHR and "privacy" under Art. 17 of the Covenant basically means the same thing

(…)."[8]

Under the jurisprudence of the ECtHR, it has been established that "the relationship of a same-sex couple (…) falls within the notion of "private life" within the meaning of Article 8."[9] Furthermore, the Court in *Schalk and Kopf* also ruled that "it is artificial

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1 ibid 4-5.

2 Case C-673/16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociaţia Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne* [2018] ECLI:EU:C:2018:385.

3 ibid para 46.

4 Brems et al. (n 25) 5.

5 ECHR (n 22).

6 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

7 Pacte international relatif aux droits civils et politiques (adopted 16 December 1966, entered into force 23 March 1976) <ohchr.org/FR/ProfessionalInterest/Pages/CCPR.aspx> accessed 23 November 2021.

8 Nowak (n 15) 385.

9 *Oliari and Others v Italy* (n 21) para 103.

to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8."[1] Additionally, the Court observed in *Orlandi and Others v Italy* that:

(…) there is no reason why a State's acknowledgment of the real marital status of a person, be it, *inter alia*, married, single, divorced, widow or widower, should not form part of his or her personal and social identity, and indeed psychological integrity protected by Article 8. Therefore, registration of a marriage, being a recognition of an individual's legal civil status, which undoubtedly concerns both private and family life, comes within the scope of Article 8 § 1.[2]

Thus, the intention of same-sex couples to marry abroad does fall under the ambit of not only private life, but also family life. In this regard, refusal to issue a certificate of non-impediment prevents same-sex couples from enjoying their private and family life with their partner abroad, and negates a part of their personal and social identity. Thus, it constitutes an interference with Article 8 of the ECHR.

The HRC has also held in the landmark case of *Toonen v Australia* that consensual sex between adults in private falls under the scope of the term "privacy" or *vie privée*.[3] Furthermore, it has long been established by the HRC that privacy "refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone."[4] Thus, a relationship between persons of the same sex is also covered by this term. As for the meaning of "family', the HRC observed in General Comment 16 that "the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood *in the society of the State party concerned*."[5] Subsequently, in *Hopu and Bessert v France*, the HRC reiterated this point and further added that "cultural traditions should be taken into account when defining the term "family" in a specific situation."[6] As a result, in a case concerning refusal to issue a certificate of non-impediment, it would seem that the term "family"

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1 *Schalk and Kopf v Austria* (n 16) para 94; ibid; *Chapin and Charpentier v France* App no 40183/07 (ECtHR, 9 June 2016) para 44; *Vallianatos and Others v Greece* App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013) para 73.

2 *Orlandi and Others v Italy* App nos 26431/12; 26742/12; 44057/12 and 60088/12 (ECtHR, 14 December 2017) para 144.

3 *Toonen v Australia* (1994) UN Doc CCPR/C/50/D/488/1992, para 8.2.

4 *Coeriel and Aurik v the Netherlands* (1994) UN Doc CCPR/C/52/D/453/1991, para 10.2; *G v Australia* (2017) UN Doc CCPR/C/119/D/2172/2012, para 7.2.

5 HRC, "General Comment 16: Article 17 (Thirty-second session, 1988)" (1994) UN Doc HRI/GEN/1/Rev.1, 22 para 5, emphasis added.

6 *Francis Hopu and Tepoaitu Bessert v France* (1997) UN Doc CCPR/C/60/D/549/1993/Rev.1, para 10.3.

would be interpreted in line with the prevailing understanding and cultural traditions of the refusing state. Nevertheless, Article 17(1) is still applicable since the refusal to issue the certificate interferes with the couple's privacy who intended to marry abroad.

The admissibility of the right to private and/or family life may be contested by the claim that the right to marry is a *lex specialis*, and thus it takes precedence over the two in the matter of same-sex marriage. In the case of *Hämäläinen v. Finland*, the ECtHR explicitly held that "Article 12 of the Convention is a *lex specialis* for the right to marry."[1] Moreover, in *Joslin*, the HRC found that "Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision."[2] However, this *lex specialis* claim is only valid specifically with regard to recognition and legalisation of same-sex marriage. Refusal to issue a certificate of non-impediment is already concerned with a different matter: a state preventing its own citizen from marrying abroad. As a result, the *lex specialis* argument would not hold, and the right to private and/or family life would still apply.

Since there is an interference with Article 8 of the ECHR and Article 17 (1) of the ICCPR, the question would be whether the refusal to issue a certificate of non-impediment can be justified by one of the grounds of limitations enshrined in each respective convention, such as protection of (public) morals.[3] A potential argument in this regard is that the refusal reflects the profound moral values of the society of the refusing state that is against same-sex marriage. Nevertheless, this argument is rather weak; as has been discussed in the previous Subsection, there is no link between granting a certificate of non-impediment to a few individuals to the destruction of the so-called "traditional family'. In this light, it is difficult to sustain that the refusal to issue a certificate of non-impediment is necessary and proportional to achieve the aim of protecting (public) morals.

Right to Non-Discrimination

The refusal to issue a certificate of non-impediment to same-sex couples can be considered a violation of the autonomous right to non-discrimination as enshrined

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1 *Hämäläinen v Finland* (n 21) para 96.

2 *Joslin v New Zealand* (n 14) para 8.2.

3 See ECHR (n 22), art. 8(2). While the right to be free from arbitrary or unlawful interference with one's privacy and family does not contain any limitation clause under the ICCPR, the HRC has interpreted the term "arbitrary" to mean that the interference must be "reasonable', which means that it has to be "necessary in the circumstances of any given case" and "proportionate to the end sought". See *Toonen v Australia* (n 43) para 8; General Comment 16 (n 45) para 4; *G v Australia* (n 44) para 7.4.

under Article 26 of the ICCPR and Article 1 of Protocol No. 12 of the ECHR. Moreover, the refusal is contrary to the accessory right to non-discrimination as found under Article 2(1) of the ICCPR and Article 14 of the ECHR, which are invokable in conjunction with the right to private and family life or the right to marry (depending on whether same-sex relationship falls under the ambit of "family" and "marry', as explored in the previous two Subsections). The reason is because the refusal is based on the fact that the applicants do not intend to marry the opposite sex. This means that the refusal is solely grounded on the sexual orientation of the applicants. Opposite-sex couples do not have to face this predicament, as the document would be issued once they show the identity of their opposite-sex spouse. Thus, there is a difference in treatment between same-sex and opposite-sex couples in states where the decision to issue a certificate of non-impediment is linked with heteronormative marriage.

Under the jurisprudence of the ICCPR, despite the right to marry being only applicable to opposite-sex couples, states are still not allowed to unlawfully discriminate against same-sex couples, particularly in light of the observation that "the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation."[1] As observed by Rajsoomer Lallah and Martin Scheinin in their individual opinion to *Joslin*, the finding that states do not have to legalise same-sex marriage:

should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of article 26. On the contrary, the Committee's jurisprudence supports the position that such differentiation may very well amount to prohibited discrimination depending on the circumstances of a concrete case.[2]

Nowak also found that "a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria."[52] Thus, he argued that "[i]f States uphold unreasonable distinctions between married and same-sex couples in the enjoyment of other rights, such as housing, social security, pension or inheritance rights, while not interfering with the right to marry in Art. 23(2), may nevertheless constitute discrimination in violation of Art.26."[53]

The jurisprudence of the HRC further corroborates that states can still be found to violate the right to non-discrimination if they discriminate against same-sex couples. In

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1 *Toonen v Australia* (n 43) para 8.7.

2 *Individual Opinion of Committee Members Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring), Juliet Joslin, Jennifer Rowan, Margaret Pearl and Lindsay Zelf v New Zealand* (2002) UN Doc CCPR/C/75/D/902/1999. [52] Nowak (n 15) 526. [53] ibid 527.

the case of *X v Colombia*, national courts in Colombia refused to transfer a deceased man's pension to his lifelong partner, even though this was possible for opposite-sex couples. Similar to how states may defend the certificate of non-impediment, Colombia claimed that the purpose of the law "was simply to protect heterosexual unions, not to undermine other unions or cause them any detriment or harm."[1] The HRC was not convinced and held that "the State party has put forward no argument that might demonstrate that such a distinction between same-sex partners, who are not entitled to pension benefits, and unmarried heterosexual partners, who are so entitled, is reasonable and objective."[2] Consequently, the HRC found that Article 26 of the ICCPR was violated.

Subsequently, in 2017, the HRC in *C v Australia* had to decide whether states may deny granting divorce to a same-sex person who married abroad.[3] The HRC observed that under Australian law, there are also other forms of opposite-sex marriage that are not recognised in Australia, namely polygamous marriage and marriages involving parties who are between 16 and 18 years. Australians who have contracted such a marriage abroad do have the possibility of obtaining a divorce in Australia. Consequently, the HRC found that there is a differential treatment between homosexual and heterosexual couples.[4] Since the HRC ruled that there was a differential treatment, in accordance with its jurisprudence on Article 26, the question was whether this distinction pursues a legitimate aim and is reasonable and objective.[5] The HRC then found that Australia failed to justify why the exceptions for polygamous and underage marriage were not also applicable for same-sex marriage. The HRC also asserted that "compliance with domestic law does not in and of itself establish the reasonableness, objectiveness or legitimacy of a distinction."[6] Consequently, the HRC concluded that there had been a violation of Article 26.[6]

These two cases demonstrate that even if the right to marry does not impose an obligation to legalise same-sex marriage, states still have to ensure that their existing measures do not create an unlawful distinction between opposite-sex and same-sex couples. As observed by Aleardo Zanghellini, "under the ICCPR, the interest in founding and cultivating interpersonal relationships in lesbian and gay families is no less valuable than the corresponding interest in heterosexual families."[7] In the context

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1 *X v Colombia* (2007) UN Doc CCPR/C/89/D/1361/2005, para 7.1.

2 ibid 7.2.

3 *C v Australia* (2017) UN Doc CCPR/C/119/D/2216/2012, para 2.1-2.2.

4 ibid para 8.3.

5 ibid para 8.4.

6 ibid para 8.6. [60] ibid.

7 Aleardo Zanghellini, "To What Extent Does the ICCPR Support Procreation and Parenting by Lesbians and Gay Men?" Melbourne Journal of International Law" (2008) 9 Melbourne Journal of International Law 125, 149.

of certificate of non-impediment, the discriminatory treatment was the fact that same-sex couples were unable to obtain such a certificate. At the same time, opposite-sex couples who also intended to marry abroad did not have to face this predicament. This implies that the refusal would be contrary to Article 26 of the ICCPR and Article 2(1) of the ICCPR in conjunction with the right to privacy.

As for the ECHR, it has long been established under the jurisprudence of the Court that sexual orientation constitutes one of the grounds of non-discrimination under the ECHR.[1] Moreover, since sexual orientation relates to "intimate and vulnerable sphere of an individual's private life", states would have to advance "particularly weighty reasons" in order to justify a differential treatment.[2] Furthermore, the Court observed in *Kozak v Poland* that:

Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought. Still, it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention.[6]

Since the refusal to issue a certificate of non-impediment is based solely on sexual orientation, *in abstracto* this decision would infringe Article 14 of the ECHR in conjunction with the right to marry and the right to private and family life, and also Article 1 of Protocol No. 12 of the ECHR (if the state concerned has ratified the protocol).

Having established that the right to non-discrimination is infringed, the question would be whether the refusal is justified; in other words, whether it is based on "reasonable and objective" criteria for the purpose of the ICCPR, or whether it is grounded on "particularly serious reasons" under the jurisprudence of the ECtHR. In this regard, the onus is on the state to prove that the refusal satisfies these criteria. Nevertheless, given that the refusal itself is based solely on the sexual orientation of the applicants, it would be rather difficult for states to uphold the legality of this discriminatory treatment.[3]

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1 *Salgueiro da Silva Mouta v Portugal* App no 33290/96 (ECtHR, 21 December 1999) para 28; *Karner v Austria* App no 40016/98 (ECtHR, 24 July 2003) para 37; *Kozak v Poland* App no 13102/02 (ECtHR, 2 March 2010) para 92. See also Jens M. Scherpe, "Same-Sex Couples Have Family Life" (2010) 69 Cambridge Law Journal 463, 46465.

2 *Kozak v Poland* (n 62) para 92. [64] ibid, emphasis added.

3 Brems et al. (n 25) 6. [66] Brems et al. (n 25) 7.

Table 1: Summary of the Compatibility of the Refusal to Issue a Certificate of Non-Impediment with International Human Rights Law

	ICCPR	ECHR
Right to Marry	Right to marry is not applicable	Violation of Article 12
Right to Private and Family Life	Right to family life is not applicable, but the violation of right to privacy/vie privée	Violation of Article 8
Right to Non-Discrimination	Violation of Article 2(1) in conjunction with the right to privacy, and Article 26	Violation of Article 14 in conjunction with the right to marry and the right to private and family life, and Article 1 of Protocol No. 12 (if the state concerned has ratified this protocol)

The Requirement to Provide a Certificate of Non-Impediment as a Human Rights Violation

On the other side of the coin, the issue with the certificate of non-impediment would not have arisen in the first place if the country where same-sex marriage is legalised did not require this document. As observed by the Human Rights Centre in its Third-Party Intervention to the case of *Szypuła*, "it is only because Spanish private international law referred to Polish family law that the Polish authorities were placed in a position in which they could make a decision to deny granting the applicants the required certificate."[66] Thus, one may ask whether states who have legalised same-sex marriage can also be found to be in violation of the right to marry, the right to private and family life and the right to non-discrimination if they insist that this certificate is a prerequisite for same-sex marriage.

I argue that the findings of the previous Subsection are also applicable in this case, because by requiring same-sex couples to furnish a certificate of non-impediment in an "excessively formalist" manner, the state concerned has effectively impaired the enjoyment of the applicants' right to marry and the right to private and family life. A major difference is that under the ICCPR, the right to marry under Article 23(2) and the right to protection of family from arbitrary or unlawful interference under Article 17(1) are also applicable, since the country who imposed the requirement has recognised that same-sex couples enjoy these rights.

Moreover, as has been argued above, this bureaucratic hurdle only affects same-sex couples. It therefore also constitutes a violation of the right to non-discrimination on the grounds of sexual orientation. Indeed, there is usually a possibility to request an exemption in several countries. In Germany, for instance, Section 1309(2) of the German Civil Code stipulates that the president of the higher regional court may grant exemption from the requirement of certificate of non-impediment.[1] However, this would

[1] ibid.

create an extra burden for LGBT non-nationals who must expect to wait between four and eight weeks for a decision to be made, and spend between 10 to 300 euros to cover the court fees, with no guarantee that an exemption will be granted.[1] Furthermore, the burden is also on the applicant to prove that the certificate is impossible to obtain, which would be onerous given that the problem usually occurs in practice. Heterosexual non-nationals do not face this obstacle, which means that the application of the requirements of the certificate of non-impediment as found under Section 1309 of the German Civil Code leads to a discriminatory effect towards LGBT people.

Furthermore, as convincingly argued by the Human Rights Centre in its Third-Party Intervention, there is also a discrimination based on nationality:

If a Contracting State, for example Spain, allows same-sex marriages, a non-national leading a genuine family life should in principle also be able to exercise the right to contract a same-sex marriage in that State. The fact that access to same-sex marriage is made dependent on the legislation of the State of nationality of the spouses (including by requiring the submission of documents providing information on the marital status or capacity to marry), amounts to a difference of treatment on the ground of nationality for which "very weighty reasons" would have to be put forward. The mere fact that private international law often uses nationality as a connecting factor to determine which law applies to a particular situation with an international dimension (i.e. the designated law), does not in itself justify such discriminatory treatment. In the past, the Court has made clear Contracting States can freely determine the appropriate connecting factor, on condition, however, that the result obtained after applying the designated law does not contravene the rights enshrined in the ECHR.[2]

Consequently, states would have to furnish "very weighty reasons" to justify the differential treatment under the ECHR, or the treatment has to be based on "objective and reasonable criteria" under the ICCPR.

In this regard, states are likely to argue that the certificate is intended to protect public order, specifically to prevent bigamy, and thus the requirement is imposed on all non-nationals, irrespective of their sexual orientation. However, I would submit here that the measure is disproportionate to achieve this aim. Suppose the certificate must be furnished at all costs without exception. In that case, this requirement will constitute a perpetual restraint on LGBT non-nationals from being able to enter into same-sex marriage. This effectively impairs the enjoyment of their rights. Moreover, there are

[1] "Befreiungsverfahren bei ausländischen Verlobten" (*Stadt Heidelberg*) <www.heidelberg.de/hd/HD/Rathaus/Befreiungsverfahren.html> accessed 23 November 2021.

[2] Brems et al. (n 25) 8.

also less intrusive means available to fulfil this aim, such as the possibility to confirm by signature under criminal liability that one is unmarried.[1] In fact, many states have also criminalised bigamy,[2] and thus the aim of preventing bigamy can already be pursued with these means without having to impose a perpetual restraint on LGBT non-nationals. For cases where it is not possible to apply for an exemption, the requirement would still impose an onerous burden on LGBT non-nationals, and with the availability of a less intrusive means, this measure also cannot be regarded as proportionate.

Table 2: Summary of the Compatibility of the Requirement to Provide a Certificate of Non-Impediment with International Human Rights Law

	ICCPR	ECHR
Right to Marry	Violation of Article 23(2)	Violation of Article 12
Right to Private and Family Life	Violation of Article 17(1)	Violation of Article 8
Right to Non-Discrimination	Violation of Article 2(1) in conjunction with Article 23(2) and 17(1), and Article 26	Violation of Article 14 in conjunction with Article 12 and 8, and Article 1 of Protocol No. 12 (if the state concerned has ratified this protocol)

CONCLUSION

This paper has analysed certificates of non-impediment from the perspective of international human rights law. This bureaucratic requirement was initially intended to prevent bigamy, and yet its excessively formalist application has led to a discriminatory outcome against LGBT non-nationals, specifically those who hail from homophobic countries. The imposition of this requirement also effectively hampers the right of LGBT non-nationals to marry and enjoy their private and family life, and thus the requirement to provide a certificate of non-impediment constitutes a human rights violation.

The case study of the certificate of non-impediment has also highlighted how the scope of the right to marry and the right to family life can determine which right is applicable. Under the jurisprudence of the HRC, these rights are only applicable to opposite-sex couples, and thus same-sex couples could only benefit from the protection of the right to non-discrimination and the right to privacy. Meanwhile, under

[1] See, for instance, "If You Wish to Get Married in Denmark" (*Familieretshuset*) <familieretshuset.dk/en/yourlife-situation/your-life-situation/international-marriages/if-you-wish-to-get-married-in-denmark> accessed 23 November 2021: "If you do not include a certificate of marital status in your application, you confirm under criminal liability with your signature that you are both unmarried."

[2] See, for instance, Art. 391, Strafwetboek <www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=1867060801> accessed 23 November 2021; § 172 StGB <www.lewik.org/term/15657/bigamy-section-172-german-criminalcode/> accessed 23 November 2021; Section 57 Offences Against The Person Act, 1861, <www.irishstatutebook.ie/eli/1861/act/100/section/57/enacted/en/html> accessed 23 November 2021.

the ECHR, the Court has recognised that the right to marry and the right to family life are no longer exclusively applicable to opposite-sex couples, and thus same-sex couples can invoke these rights in the case of the certificate of non-impediment. These differences could perhaps dissipate in the future if the HRC decides to "update" its jurisprudence on the right to marry and protect the family from arbitrary or unlawful interference.

At the same time, this study has not delved into the issue of the certificate of the non-impediment *in practice*. Despite the right to marriage equality being guaranteed at the national level, bureaucrats and judges often construe regulations concerning non-impediment certificates in an excessively formalist manner, which prevents LGBT non-nationals from exercising their rights. Furthermore, they are often unaware of the existing international human rights standards. As observed by Sarah Den Haese in her research:

In the online survey distributed among Belgian and Dutch public servants (…), no less than 124 participants (or 80% of the respondents who answered this question) disclosed that they are not aware of the case-law of the ECtHR regarding the recognition of a personal status obtained abroad. Only 31 participants stated that they are familiar with the ECtHR's case-law, of which only 20 indicated that they also apply this case law in practice. At the level of the courts, the situation is not different. Only a handful of cases referred to the case-law of the ECtHR and the rights and guarantees enshrined in the ECHR.[1]

More studies are needed in order to understand the extent to which the certificate of non-impediment has impeded the right to marry *in practice*; the results could be pertinent to designing a program to increase awareness among civil servants and judges. Nevertheless, this research has fulfilled its role by demonstrating how the requirement to provide a certificate of non-impediment is not in line with human rights. States should therefore abolish this requirement in order to ensure that the rights of LGBT non-nationals are not further trampled in a country where hard-earned marriage equality is already a reality for nationals.

[1] Sarah Den Haese, "Crossing Borders: Proving Your Personal Status, Interactions between Private International Law and Human Rights Law" (DPhil thesis, Ghent University 2021) 315 para 544.

DOES THE POLISH CONSTITUTION DEFINE MARRIAGE ONLY AS A UNION BETWEEN A MAN AND A WOMAN, OR IS ANOTHER INTERPRETATION POSSIBLE? POLEMIC WITH THE PREVIOUS JURISPRUDENCE

Anne Michalak[1]

INTRODUCTION

The change of approach to homosexuality and homosexual relationships took place gradually. In the interwar period and the first two decades after the Second World War, depenalization of homosexual acts took place in developed countries. The culmination of this stage was the official deletion of homosexuality from the list of mental disorders by the American Psychiatric Association in 1973, and in 1990 by WHO from the International Classification of Diseases and Health Problems.[2]

Currently, there are 30 jurisdictions all over the world where same-sex marriage is legal. Among them, 21 countries/jurisdictions have legalized same-sex marriage nationally through legislation. However, Australia, Ireland and Switzerland legalized same-sex marriage through legislation only after nationwide votes. Another seven countries/jurisdictions have legalized same-sex marriage nationally through court decisions (Austria, Brazil, Colombia, Costa Rica, Ecuador, Mexico, South Africa, Taiwan and the United States of America), and two countries/jurisdictions (South Africa and Taiwan), enacted legislation legalizing same-sex marriage after courts mandated them to do so.[3]

Regarding the same-sex marriage legal regulations, Europe is both the leader in the number of states that allow same-sex marriage (16) and the pioneer, as the first jurisdictions that allowed same-sex marriage were the Netherlands in 2001 and Belgium in 2003. Other countries, such as Germany[4], Croatia, Estonia, Hungary,

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[2] World Health Organisation https://www.who.int/bulletin/volumes/92/9/14-135541/en/ (accessed: 12.01.2019).

[3] https://www.hrc.org/resources/marriage-equality-around-the-world (accessed: 28.11.2021). .

[4] Germany has legalized same-sex marriage in 2017.

Slovenia, the Czech Republic and Italy recognise civil unions, registered partnerships, or unregistered cohabitation[1]. At the same time, six EU countries, i.e., Poland, Lithuania, Latvia, Slovakia, Bulgaria and Romania, do not provide for any legal sanctioning of same-sex couples.

Article 18 of the Polish Constitution[2] states: Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland**.** As a consequence, article 1 of the Family and Guardianship Code (hereinafter: the Code) in the wording "A marriage is contracted when a man and a woman who are present at the same time submit declarations to the head of the registry office that they are entering into marriage with each other, has remained unchanged so far.[3]

The courts, including the constitutional tribunal, have so far consistently indicated in their rulings that in the Polish legal system, the requirement of being differentiated by sex is undoubtedly a substantive prerequisite for marriage.

Such an interpretation leads to a refusal to transcribe a same-sex marriage certificate concluded abroad,[4] the impossibility of compulsory health insurance in Poland covering the partner of a woman remaining in a same-sex civil partnership concluded in Great Britain,[5] refusal to change the surname acquired as a result of entering into same sex marriage,[6] and refusal to transcribe a child's foreign birth certificate in which same-sex persons are entered as parents.[7]

THE CONSTITUTIONAL DEFINITION OF MARRIAGE IN THE STATEMENTS OF THE CONSTITUTIONAL COURT

Common and administrative courts adjudicate on the basis of statutes and are therefore bound by the definition mentioned above of marriage. On the other hand, the constitutional court is not bound by statutes. In its jurisprudence, this court may interpret the constitution that is consistent with the aims of its authors (historical and

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1 E. Kużelewska, Same-Sex Marriage – A Happy End Story? The Effectiveness of Referendum on Same-Sex Marriage in Europe, Białostockie Studia Prawnicze 2019, vol. 24, no 1, p. 15.

2 As adopted by the National Assembly on 2nd April 1997 (Journal of Laws 1997, No 78, pos. 483 with amendments).

3 This is a normative act that is the basic source of Polish family law, comprehensively regulating family relations, passed by the Sejm of the People's Republic of Poland on February 25, 1964, in force from January 1, 1965.

4 Judgment of Provincial Administrative Court in Warsaw of 18 September 2019, case IV SA/Wa 1638/19.

5 Judgment of the Supreme Administrative Court of 25 October 2016, case II GSK 866/15.

6 Judgment of the Supreme Administrative Court of October 10, 2017, case II OSK 293/16.

7 Resolution of the seven judges of the Supreme Administrative Court of 2 December 2019, case II OPS 1/19.

legal interpretation), or interpret the Basic Law in accordance with the principle of a democratic state ruled by law, which requires the preservation of minorities' rights as a necessary condition for the functioning of democracy.

Following the views of the majority of Polish constitutionalists and the will of the ruling party - also in the rulings passed in 2021[1] - the Polish constitutional tribunal chose a different path, maintaining the current status quo.

Both in the previous rulings and in the rulings issued in July 2021, the constitutional court raises the following arguments leading to the conclusion that recognizing a homosexual relationship as marriage would require an amendment to the constitution.

1. Axiology of the constitution of 1997

Including article 18 among the general principles of Polish statehood is primarily aimed at emphasizing the role of the family in society. This principle is elaborated on in subsequent provisions of the Constitution - Art. 47,[2] art. 48,[3] art. 53 paragraph 3,[4] art. 71,[5] and art. 72.[6] To the greatest extent possible, their interpretation should guarantee the implementation of the values indicated in Art. 18 of the Constitution. The commented provision is addressed primarily to public authorities. It expresses the program norms ordering the implementation of the values expressed in it as much as possible.

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1 Cases: SK 4/19, SK 15/17.

2 Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.

3 1.Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions. 2.Limitation or deprivation of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment.

4 Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48, para. 1 shall apply as appropriate.

5 1. The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances - particularly those with many children or a single parent - shall have the right to special assistance from public authorities. 2. A mother, before and after birth, shall have the right to special assistance from public authorities, to the extent specified by statute.

6 1. The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense. 2. A child deprived of parental care shall have the right to care and assistance provided by public authorities. 3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child. 4. The competence and procedure for appointment of the Commissioner for Children's Rights shall be specified by statute.

The discussed provision is an element of setting the goals and tasks of public authorities, because it imposes on these authorities the obligation to "protect and care for" the values and institutions indicated in this provision. This affects the legal nature of Art. 18. The dominant view is that it should be treated as a "program norm."[1] Thus, this provision does not create individual rights, so "it cannot constitute the basis for an individual pursuit of claims (...) and may not (...) be the basis for a constitutional complaint".[2]

However, there are no obstacles to the fact that Art. 18 constituted an independent basis for the assessment of constitutionality in a specific or abstract control of norms, because statutory regulations that would destroy the existing system of protection and care of family values may – only for this reason – be considered unconstitutional.[3] In practice, the Constitutional Tribunal judgments state non-compliance with Art. 18, but always with a parallel declaration of non-compliance with other (other) constitutional provisions.[4] Sometimes the Tribunal treats Art. 18 only as appearing "in connection with" the provision, the violation of which is adjudged to be.[5]

Nevertheless, in one passage, namely in establishing the heterosexual definition of marriage, Art. 18 takes on a more specific character, taking the form not so much of the principle of the system as of a legal norm.[6]

This article is the only provision of the Constitution in which the term "marriage" appears. Art. 18 of the Constitution, while defining marriage, does not allow for "dilution" of its content in ordinary legislation. The concept of marriage is therefore uniform throughout all public and private law. The lack of a clear indication of this in Art. 18 can only be considered as a relationship concluded in compliance with the requirements of art. 1 of the above-cited Code.

2. Shaping the content of art. 18 during the legislative procedure regarding the constitution of 1997

During the work on the Basic Law, the institutionalization of homosexual marriages in some countries were taken into account and rejected.

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1 See judgments of the Constitutional Tribunal, cases: K 1/98; SK 21/99; SK 11 / 09; SK 24/01.

2 Constitutional Tribunal judgment SK 21/99; see also the judgment of the Supreme Administrative Court of March 19, 2009, case II FSK 151/08.

3 especially the judgment of the Constitutional Tribunal in case P 18/06.

4 E.g. judgments of the Constitutional Tribunal in case: K 8/03; K 16/04 and P 18/06, as well as P 41/07.

5 E.g. judgments of the Constitutional Tribunal in case: SK 11/09; P 40/12.

6 E.g. judgment of the Constitutional Tribunal in case K 18/04. See also the decision of the Supreme Court of July 7, 2004, case II KK 176/04.

Despite the lack of such an indication directly in the provision previously of the binding Constitution, there was no doubt that marriage is a union between a man and a woman. It is obvious this is the view, as it was not given much attention in the reference works to the definition of marriage and the rules governing marriage. Adoption of the gender distinction in the Polish Constitution for the constitutive determinant of the existence of marriage resulted directly from the will of the constitution-shapers and then the will of the nation expressed in the referendum. That led to exclusion in Polish law of the possibility of the ordinary legislator to introduce unions of the same sex person.

Including in art. 18, the definitional "relationship between a woman and a man" was a reaction to the appearance in foreign countries of a regulation that subjected the relationships of same-sex persons of regulation similar to or coinciding with the institution of marriage. The discussed constitutional provision was to play the role of a preventive instrument introducing such regulation into Polish law. The essence of this regulation was a normative determination not only about the impossibility of regulating "same-sex marriages" in Polish law, but also other relationships that, even though they would not be defined as marriage, would perform functions similar to it.

3. Legislative omission

Legislative omission means the legislator deliberately and intentionally leaves a given issue unregulated. According to the established jurisprudence of the Polish constitutional court, the examination of a legislative omission is not subject to the examination of the Constitutional Tribunal. At the same time, the Constitution does not contain an order addressed to the legislator, obliging the legislator to introduce a regulation allowing marriage between persons of the same sex. The legislator is bound by the unambiguous wording of Art. 18 of the Constitution, defining marriage as a union of a woman and a man. Without an amendment to the Constitution, it is not permissible to introduce the institution of homosexual marriage into ordinary legislation.

POLEMICS

The arguments cited above, repeated in every ruling of the constitutional court concerning same-sex marriages, in the opinions of experts analyzing the bills submitted to parliament in this regard and quoted by politicians of the currently ruling majority, are selective and, above all, do not take into account the international legal environment shaping Polish domestic law. At the same time, they oppose the concept of a living constitution, which is a directive interpreting the constitution that protects the rights of individuals and minorities in the most effective manner.

1. Arguments omitted in the jurisprudence of the constitutional court

Firstly, in work on the adoption of the Constitution of 1997, the topic of same-sex marriage was not overlooked. One of the Constitutional Committee experts of the National Assembly, Professor Kazimierz Działocha (judge of the Constitutional Tribunal in 1985-1993), referring to Art. 54 sec. 2 of the draft (ie, the current Article 18 of the Basic Law), stated that the normative content of the proposed (and finally adopted) regulation "boils down to the fact that the state protects marriage as a union of a woman and a man. Marriage understood in this way is under the protection of the state, and the dogmatic interpretation of par. 2 does not preclude another marriage. If marriage is understood primarily as a civil contract between a man and a woman, then another marriage is not excluded.

Secondly, the administrative courts see the possibility of a different interpretation of Art. 18 of the Constitution. In one ruling it was indicated that the above constitutional principle implies not so much the constitutional understanding of the institution of marriage, but the guarantee of granting special protection and state protection to the institution of marriage, but only on the assumption that it is a relationship between a man and a woman. The above provision does not prohibit the legislator from institutionalizing the status of same-sex or othersex unions, which for obvious reasons do not want to contract marriage in its traditional meaning. However, the court points out that the decisive factor in this respect is the will of the legislator, who is the only entity competent to implement the provisions of the Constitution, and for this purpose, it is a relevant law in the form of acts of a lower order. Currently, however, the Polish legislator has not decided to introduce this type of solution, sticking to a certain minimum limit set by the content of Art. 18 of the Polish Constitution.[1]

2. Acts of international law and their interpretation that should change the current view on Article 18 of the Constitution

According to the Polish constitution, an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes (article 92 paragraph 2).

The European Convention on Human Rights (hereinafter: ECHR) is a genuine constitutional fundamental charter - civil and political - of rights and freedoms for countries within the Council of Europe. This document is the common value of European democracies. It creates, in fact, a set of criteria that political systems should meet to be considered truly democratic. There is no exaggeration in saying that thanks

[1] judgment of the Provincial Administrative Court in Warsaw of January 8, 2019, case IV SA / Wa 2618/18.

to the Convention, there is now a European legal order to protect the rights of an individual, including not only the catalog of protected rights, expanded by additional protocols and interpretations of its bodies, but also unique on a global scale in terms of the mechanism of their implementation.

Today, all member states of the Council of Europe are parties to the ECHR. Accession to the Convention is one of the fundamental and indispensable terms of membership in this organization. Poland signed the Convention on November 26, 1991, and ratified on January 19, 1993.

Accession to the Convention means that the state undertakes to respect and guarantee the following human rights and fundamental freedoms: right to life; freedom from torture and other inhuman treatment or punishment; freedom from slavery and servitude and forced or compulsory labor; the right to freedom and personal safety; the right to a fair, public trial, within a reasonable amount of time, in criminal and civil matters; freedom from punishment without legal grounds; the right to respect for private life, family life, home and correspondence; freedom of thought, conscience and religion; freedom of expression, including freedom of press; freedom of peaceful assembly and association, including the right to create and join trade unions; marriage and establishment rights for families; the right to effective remedies; and freedom from discrimination.

The European Court of Human Rights (hereinafter: ECtHR), the guardian of the Convention, is currently the only international court directly accessible to all victims of human rights violations after meeting certain conditions. The right to an individual complaint is the most important part of this system and one of the important elements of modern European legal culture. On the one hand, the Tribunal examines specific charges against the state by the aggrieved. On the other, it creates common rules and standards in the sphere of human rights and determines the minimum level of their protection that European countries are obliged to provide.

In the case of Orlandi and Others v. Italy,[1] the ECtHR indicated that it does not meet the requirements of Art. 8 of the Convention. In this situation, the state does not provide minimum protection standards for same-sex marriages, as they cannot be refused the status of "family" under the Convention.

This ruling - in my opinion - should lead to a change in the interpretation of Article 18 of the Polish Constitution. Nevertheless, in the opinion of the Tribunal: "Marriage (as a union of a woman and a man) obtained in the domestic law of the

[1] judgment of the ECtHR of 21 July 2015, application no. 18766/11.

Republic of Poland has a separate constitutional status determined by the provisions of Art. 18 of the Constitution. The change of this status would be possible only under the rigors of the procedure of changing the Constitution, defined in Art. 235 of this act. In no event, also for formal and legal reasons, a change in the nature or status of marriage in the Polish constitutional legal system could not take the form of a ratified international agreement (even if ratified in a qualified manner)".[1]

In June 2020, the ECtHR communicated 7 cases (19 joined complaints) to the Polish government. In all three cases to which the Ombudsman joined, citizens living in relationships with persons of the same sex accuse Poland of violating their right to private and family life by preventing them from legalizing their relationship. In Przybyszewska and others v. Poland (10 complaints) the applicants were refused in the Registry Offices to accept a declaration of no obstacles to marriage in Poland, and these decisions were later upheld in court proceedings. In Formela v. Poland, the applicants, who entered into a civil partnership abroad and later married, tried to avail themselves of the legal privileges enjoyed by spouses in Poland. In administrative and court proceedings regarding the right to joint taxation, the right to care allowance in connection with caring for a family member and the right to cover the spouse with health insurance, they were refused these rights. It was pointed out that they were reserved only to spouses and immediate family members, whom the applicants were not under Polish law. They were also refused a transcription ("transfer" to Polish civil status registers) of their marriage certificate concluded abroad. On the other hand, in the Szypuła and other v. Poland case, the applicants (citizens of the Republic of Poland) wanted to marry in another country with persons of the same sex, but were refused a certificate of the possibility of marriage abroad in accordance with Polish law.

In the written comments submitted to the ECtHR, the Polish Ombudsman presented an analysis of the provisions of Polish law and the legal and social situation of people living in same-sex relationships in Poland, in the context of the human rights standard resulting from the ECHR and the Court's jurisprudence. In the opinion of the Ombudsman, there is no doubt that in view of the European consensus and the well-established jurisprudence of the Tribunal, the member states of the Council of Europe are obliged to provide same-sex couples with the possibility of legalizing their relationship. If the state does not decide to open up marriage to same-sex couples, it must introduce an alternative institution of civil partnerships. Meanwhile, despite numerous legislative initiatives, Polish regulations still do not provide for any form of institutionalization of civil partnerships (both for people of the same and different sexes). At the same time,

[1] judgment of the Constitutional Tribunal of 11 May 2005, case K 18/04 (a ruling on the conformity of the accession treaty to the European Union with the Constitution).

the marriage institution in Poland remains available only to people of different sexes. In the opinion of the Ombudsman, such a legal status leads to the necessity to breach the state's positive obligation under Art. 8 ECHR. This unjustifiably differentiates the legal situation of persons remaining in a stable same-sex relationship from persons remaining in a relationship of different sexes, for whom the possibility of contracting marriage and exercising the related rights remains open. Regardless of the debate on the possibility of introducing same-sex marriage in Poland in light of Art. 18 of the Constitution, in the Ombudsman's opinion, it is indisputable that the Constitution does not prevent the legal possibility of institutionalizing same-sex unions.

On the contrary, both Art. 18 of the Constitution, pointing to the special protection of the family, and Art. 47 of the Constitution, which guarantees everyone the legal protection of private and family life, oblige the state to ensure this protection also to persons living in same-sex relationships. Their legalization would thus implement the provisions of the Constitution, and not violate them.

Moreover, public support for the legalization of same-sex relationships in Poland is high and is constantly growing. Regardless of the homophobic actions of part of the society and some public figures, repeating prejudices and stereotypes about non-heterosexual people, the results of two different studies from 2019 indicate that over half of Poles favor granting same-sex marriage couples the right to enter into partnerships. This answer was given by 56% of respondents in the IPSOS survey for OKO.press from February 2019 and 57% in the Kantar survey for Wyborcza in November 2019. Such social changes must be noticed and taken into account by the state, as the Court has repeatedly pointed out in its jurisprudence. The Ombudsman emphasized that the unjustified differentiation of the legal situation of same-sex couples in relation to couples of different sexes results in indirect discrimination based on their sexual orientation. He discussed the legal privileges reserved in Poland only to spouses or immediate family members, which persons living in same-sex relationships cannot use in any way. At the same time, the Ombudsman emphasized that although the change of relevant provisions - so that rights under inheritance law, family law or social security were available to informal partners, including the same sex – would have a positive impact on their legal situation and avoid discrimination, it would not invariably constitute fulfillment of the state's obligation to ensure the protection of the right to private and family life. The latter requires legal recognition of same-sex unions, e.g., through the institutionalization of civil unions.[1]

[1] https://bip.brpo.gov.pl/pl/content/rpo-nieuregulowanie-zwiazkow-jednoplciowych-narusza-prawo-do-zyciaprywatnego, accessed 29.11.2021.

It should also be noticed that the European Union does not have any legal instruments to force the revision of national family law in the Member States, but in the resolution adopted on September 14, 2021, the European Parliament pressed for the enforcement of common standards in relation to the principle of free movement of persons. In practice, it would mean that, for example, for a daughter of a Bulgarian born in Spain and a British woman from Gibraltar (they were married in Spain), Bulgaria – after recognizing the child as a Bulgarian citizen – should issue an identity card or other travel document according to the Spanish birth certificate, and Bulgarian and British travel documents for the parents. This is because it is related to freedom of movement within the EU and would allow the child to travel with either mother. However, Bulgaria may at the same time refuse to enter both mothers on the Bulgarian birth certificate for the purposes of its national law.[1] The above-mentioned resolution also states that marriages or registered partnerships concluded in one Member State should be recognized uniformly in all Member States, and that same-sex spouses and partners should be treated in the same way as their counterparts of the opposite sex.

3. Living constitution

The interpretative activism that determines the result of the interpretation of the constitution is the protection of individual rights - the doctrine of interpretation that finds justification in the core of the assumptions of constitutionalism. Protection is understood as ensuring the coexistence and equal vote to unrepresented entities in the majoritarian discourse typical of legislative bodies. It is a forum for legal guarantee of the significance of neglected individual interests. At the same time, the interest of the individual and the will of the majority are dynamic categories subject to reinterpretation, thus constituting on the volatility of constitutional concepts (living constitution). Changing the constitution through judicial interpretation motivated by the behavior of the essence of constitutionalism does not have to be viewed as a process indeterminate, and thus contested as a threat to the immutability of the constitutional text. At the same time, the invariability of understanding the concepts of the constitution does not always constitute a guarantee against democracy's turning against itself.

Therefore, the change in social conditions and the legal environment should justify a change in the understanding of marriage formulated by the authors of the Constitution even when adopted by way of a referendum.

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[1] A key issue before the CJEU in V.M.A. v Stolichna Obsthina (C-490/20). See also CJEU judgment of 5 June 2018, case C-673/16.

CONCLUSION

The concept of marriage under Art. 18 of the Polish Constitution is controversial in the doctrine and jurisprudence. These controversies concern the definition of marriage and its impact on the admissibility of introducing homosexual marriages and civil partnerships. Several positions are formulated. Under the first, used in art. 18, the formulation defines marriage only as a union between a man and a woman, excluding same-sex marriage and civil partnerships' institutionalization. The second and most widespread position also defines marriage as a union between a man and a woman, excludes same-sex marriage, but allows for the institutionalization of civil partnerships. The third position assumes that Art. 18 of the Constitution prescribes special care and protection of heterosexual marriages, which does not exclude the institutionalization of homosexual marriages and even more civil partnerships.

However, the arguments raised by the supporters of each of these positions do not take into account the evolution of views on the notion of marriage and partnership in international law binding Poland. Although it is impossible to question the highest legal force of the Polish constitution,[1] such an interpretation significantly weakens the presented arguments.

The right to marry (Article 12 of the ECHR), in accordance with the current case law of the ECtHR, concerns traditional marriage between persons of different sexes. Where national law does not provide for the registration of same-sex partnerships or cohabiting partnerships, the state should consider providing same-sex couples with certain legal remedies to deal with the practical problems arising from the lack of such legal recognition without discrimination. Nor should it result in discriminatory treatment of different-sex couples when they have similar needs. In 2000, the Parliamentary Assembly of the Council of Europe called on the Member States to adopt legislation providing for the registration of same-sex partnerships.[2] The ECtHR has repeatedly emphasized that same-sex couples living in permanent relationships are under the protection of Art. 8 of the Convention for the Protection of Human

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[1] According to article 8 of the Constitution: 1/ The Constitution shall be the supreme law of the Republic of Poland. 2/ The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise. [28] Recommendation 1474 (2000) of the Parliamentary Assembly of the Council of Europe of 30.6.2000 on the situation of lesbians and gays in the member states of the Council of Europe, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML- en.asp? fileid = 16829 & lang = en (accessed: 2.10.2018).

[2] Recommendation 1474 (2000) of the Parliamentary Assembly of the Council of Europe of 30.6.2000 on the situation of lesbians and gays in the member states of the Council of Europe, available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML- en.asp? fileid = 16829 & lang = en (accessed: 2.10.2018).

Rights and Fundamental Freedoms and enjoy the protection of their family life. Moreover, the Court found that same-sex couples had a need for legal recognition and legal protection of such a relationship.[1] Determination by the legislator of the rights and obligations of non-married couples should take place in a manner free from discrimination against couples of the same or different sex. The distinction based on sexual orientation requires justification with particularly important reasons each time. The state has a narrow margin of appreciation in this respect. In such a case, the principle of proportionality does not only require that the measure chosen is appropriate to the attainment of the objective in question, but must be necessary in the circumstances. Thus, if the reasons presented to justify the difference in treatment are based solely on the applicant's sexual orientation, it amounts to discrimination under the Convention.[2]

The provisions of Polish law do not currently provide for the possibility of contracting marriage by persons of the same sex, nor do they provide for any form of institutionalization of partnerships. Same-sex couples enter into partnerships and marriages abroad, then attempt to transcribe – transfer to the Polish registry of marital status – a foreign marriage certificate.

In the judgment of February 28, 2018, the Supreme Administrative Court dismissed the cassation appeal against the refusal to transcribe the foreign marriage certificate of two women.[3] The Supreme Administrative Court referred to Art. 12 of the ECHR, according to which men and women of marriageable age have the right to marry and to found a family, in accordance with the national laws governing the exercise of this right. In the opinion of the Supreme Administrative Court, the transcription of the marriage certificate of two women would be contrary to the fundamental principles of the legal order of the Republic of Poland. The basic principle of the legal order is, according to the Supreme Administrative Court, Art. 18 of the Constitution, which "defines marriage as a relationship between a woman and a man, and thus results from it the principle that in Poland, only a heterosexual relationship should be treated as marriage", as well as Art. 1 of the Code.

The line of jurisprudence determined in this way by the Supreme Administrative Court is to this day consistently implemented by provincial administrative courts that refuse to transcribe foreign marriage certificates. Only in the justification of one of the

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1 Judgment of ECtHR of 24.6.2010, Schalk and Kopf v. Austria, application no. 30141/04, § 99.

2 Judgments of the ECtHR: of January 22, 2008, E.B. v. France (Grand Chamber), application no. 43546/02, § 91 and 93; Smith and Grady v. the United Kingdom of 27.9.1999, application no. 33985/96 and application no. 33986/96, § 89 and 94; of 24.7.2003. Karner v. Austria, application no. 40016/98, § 37 and 41.

3 Case II OSK 1112/16.

judgments in such a case, the Administrative Court in Warsaw presented an opinion contrary to the previous jurisprudence, which has already been quoted above.

The case law clearly states that the provisions of domestic law prevent marriage by same-sex couples. Although there is an impossibility of concluding a same-sex marriage in Poland, one can try to justify the wording of Art. 18 of the Constitution. It is difficult with the same provision to justify the refusal to issue Polish citizens with a certificate enabling them to marry a person of the same sex abroad.[1]

As there is no possibility of any institutionalization of same-sex partnerships, the courts grant protection to same-sex couples in a situation where the provisions of national law grant certain powers to informal partnerships. For example, the Supreme Court found that a person remaining in cohabitation with a tenant is a person connected with him by an emotional, physical and economic bond, also if it is a person of the same sex.[2] The Supreme Court also recognized a person remaining in common life as a partner of the same sex within the meaning of Art. 115 § 11 of the Criminal Code.[3] The jurisprudence mentioned above of the ECtHR and the jurisprudence of the Supreme Court clearly indicate that whenever the provisions of Polish law grant any right - as the closest person - to partners remaining in an informal relationship, this right is granted to partners regardless of their sex.

However, many of the rights reserved to spouses do not apply to partners in informal relationships - same or different sex. Partners of different sexes have a chance to gain access to it through marriage. Same-sex partners are deprived of this possibility. In this regard, courts are reluctant to grant same-sex partners access to such rights, without seeing any indirect discrimination here. For example, the Supreme Administrative Court dismissed a cassation appeal regarding the refusal to cover a same-sex partner with health insurance as a family member - the applicant entered into a partnership with her partner in Great Britain.[4] The Supreme Administrative Court took the position - unlike the dominant jurisprudence of common and administrative courts - that Art. 18 of the Constitution and Art. 47, "do not provide a basis for building a legal definition of the family". The Supreme Administrative Court only concluded that "family relationships based on marriage between a man and a woman, as well as motherhood and parenthood deserve protection". This provision also does not provide grounds for "reducing the concept of the family to relationships anchored in marriage as defined in it". Since the Constitution does not define the concept of the family, it

1 Decision of the District Court in Warsaw dated October 28, 2015, case VI Ca 435/15.

2 Resolution of the Supreme Court of November 28, 2012, case III CZP 65/12.

3 Resolution of the Supreme Court of February 25, 2017, case I KZP 20/15.

4 Judgment of the Supreme Administrative Court dated October 25, 2016, case II GSK 866/15,

is therefore up to the ordinary legislator to determine the group of persons belonging to the family. Within the meaning of the ordinary legislation, family members are spouses, thus within the meaning of Art. 18 of the Constitution and Art. 1 of the Code, two people of different sex. The Polish legal order does not recognize the institution of a partnership and it is also an institution different from a marriage union. According to the Supreme Administrative Court, the basis for the differentiation of persons remaining in civil partnerships and married couples is their formal status, not their sex. Equal treatment is given to "heterosexual and homosexual partners." The Supreme Administrative Court then explains that even if "the inability to obtain the status of a spouse by a person remaining in a homosexual relationship is hidden under Art. 18 of the Constitution, the prohibition of marriage between persons of the same sex, one could not see indirect discrimination in this. This would require proving that Art. 18 of the Constitution is of a discriminatory nature ".

The indicated jurisprudence and the problems resolved therein clearly demonstrate the urgent need to undertake legislative actions aimed at legalizing formal relationships of persons of the same sex. There is also no doubt that there is no political will to be able to introduce the institution of same-sex marriage into the Polish legal system. The issues related to international standards of protection of the human rights of LGBT people in Poland have been, are and will continue to arouse controversy among politicians fighting for support, not only voters (but above all of the Catholic Church). As it seems, and as the polls show, the majority of voters do not have such conservative views. However, it is not the voters who directly shape the laws.

MARRIAGE APOSTATES: WHY HETEROSEXUALS SEEK SAME-SEX REGISTERED PARTNERSHIPS

Nausica Palazzo*

Abstract: *Same-sex marriage is now a reality across Western countries. While this was a positive achievement for the LGBTQ community, some crucial questions remain unanswered. One of these questions concerns the future of registered partnerships, such as domestic partnerships or civil unions. After the legalization of same-sex marriage, most states are simply phasing them out.*

I wish to argue against this trend. Based on an original analysis of empirical data and case law, I argue that these partnerships retain value for non-traditional families. In fact, states must introduce registered partnerships open to couples regardless of gender, including adult friends and relatives. To support this argument, I present two analyses.

First, I survey empirical research showing that (1) less traditional families, including opposite-sex couples, are signing up for partnerships at increasingly high rates, where available; (2) interest in such laws is growing even among same-sex couples in countries where same-sex marriage has existed for a long time.

Second, I outline the legal and theoretical justifications for extending same-sex partnerships to all couples. To this end, I analyze recent strategic litigation in Europe initiated by heterosexual couples who sought access to registered partnerships reserved for same-sex couples. The analysis allows me to identify three approaches: a status recognition approach, a utilitarian approach, and a choice-based approach.

Ultimately, I offer guidance to groups willing to engage in legal mobilization and to policymakers in crafting a registered partnership that would be suitable for modern couples. Families that do not tick the boxes of the traditional marital family model continue to slip under the radar of law. Resurrecting these laws can fix the problem of their legal invisibility.

Keywords: *Registered Partnerships, Civil Unions, Domestic Partnerships, Non-Traditional Families, Same-Sex Marriage, Friendship, Queer Families.*

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INTRODUCTION

Same-sex marriage is now recognized in several jurisdictions in the West.[1] This result is ascribable to the untiring work of LGBTQ groups, that have utilized much of their energies to attain it. Pervasive forms of discrimination because of one's sexual orientation are still in place, such as legislation restricting access to foster and adoption services. But there is little doubt that marriage equality constituted a watershed moment for LGBTQ politics.[2] As Justice Roberts' immortal words in *Obergefell* attest to, "[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union two people become something greater than once they were."[3] After the Supreme Court's decision in *Obergefell*, gay and lesbian couples could also finally create the most profound of all unions, and cease being second-class citizens.

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1 By "West" I narrowly refer to Europe, North America, and Oceania. For instance, within the 27 member states of the European Union, thirteen legally recognize same-sex marriage. Canada recognized same-sex marriage in 2005 through the Civil Marriage Act S.C. 2005, c. 33. In the United States, same-sex marriage became legal nationwide after the decision in Obergefell v. Hodges, 576 U.S. 644, 681 (2015). Several states had, however, legalized this form of marriage well before the Supreme Court stepped in. Amongst these were Massachusetts (2003), Connecticut (2008), Iowa, Vermont, New Hampshire, District of Columbia (2009), New York (2011), Washington, Maryland (2012), California, New Jersey, New Mexico, Rhode Island, Delaware, Minnesota, Hawaii, Illinois (2013), and Oregon and Pennsylvania (2014). In Australia, this form of marriage has become legal in December 2017, and in New Zealand, in August 2013.

2 Same-sex marriage was hailed as an historic victory for the movement. See, e.g., Adam Liptak, Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide, N.Y. TIMES (June 26, 2015), https://www.nytimes.com/2015/06/27/us/supreme-courtsame-sex-marriage.html [https://perma.cc/56YR-F74F]; Jess Bravin, Supreme Court rules Gay Marriage Is a Nationwide Right, WALL ST. J. (June 26, 2015), https://www.wsj.com/articles/supreme-court-rules-in-favor-of-same-sex-marriage-1435180972 [https://perma.cc/WBV8-FJQB]; Richard Wolf and Brad Heath, Supreme Court strikes down bans on same-sex marriage, USA TODAY (June 26, 2015) [https://perma.cc/VC93-4VLU].

3 *Obergefell*, 576 U.S. at 681. On which *see, e.g.*, Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147–148 (2015) (describing the implications of the decision for substantive due process jurisprudence); Melissa Murray, *One Is the Loneliest Number: The Complicated Legacy of Obergefell v. Hodges*, 70 HASTINGS L. J. 1263 (offering a critique of *Obergefell*'s emphasis on ideals of perfect love and complementarity). A separate issue concerns whether *Obergefell* will be under attack by the current more conservative Supreme Court. While this is a legitimate concern, at present, the Supreme Court has not taken steps to overrule this precedent, and there seems to be room for arguing that it will not overrule it anytime soon. Steve Sanders, *Relationship Check-in: LGBTQ People and the Supreme Court*, ACS EXPERT FORUM (June 30, 2021) https://www.acslaw.org/expertforum/relationship-check-in-lgbtq-peopleand-the-supreme-court/ [https://perma.cc/7CM8-GAH] SHS3-3LRS].

Since marriage was seen by many as "the final stop for "full equality" for lesbians and gay men,"[1] a question lurked behind these events: "what now?" The question has various ramifications.[2] "What now?" within the LGBTQ movement? Since the final objective has now been reached, the structure, financing, and strategies of the LGBTQ movement are inevitably changing.[3] A second, more crucial "what now?" bears upon the future of family law and policy. It concerns the fate of registered partnerships, that in many places have been erased at the stroke of a pen after marriage equality.[4] By the term "registered partnerships" (also "RPs"), I refer to all recognition models whereby two persons take affirmative steps to register their relationship and gain a bundle of legal benefits, rights, and obligations: civil partnerships, domestic partnerships, civil unions, reciprocal beneficiary laws, civil pacts of solidarity, etc. My argument in this article is that these laws are still very much relevant. More specifically, I contend that not only should they be retained or reintroduced for same-sex couples but, more generally, that they should be available to all couples that eschew the paradigm of the traditional family, including two friends or two relatives.

Marriage equality seems to have sounded the death knell to many of these laws. A similar outcome was somehow predictable as registered partnerships came to be seen as either "useless" or "odious"—useless as they exhausted their role of being a temporary fix before "full" marriage equality; odious as gay and lesbian couples perceived them as second-class statuses for second-class citizens.[5] Consequently, once same-sex marriage became legal in 2015, the seemingly natural reaction has been their erasure.[6] This occurred through a variety of techniques. A standard reaction has been a gradual phasing out of these legal partnerships. Other jurisdictions have opted for their forcible conversion into marriage. Others yet have asked couples to marry within a certain date to avoid losing their family benefits. Yet, we should sharpen our

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1 NICOLA J. BARKER, NOT THE MARRYING KIND: A FEMINIST CRITIQUE OF SAME-SEX MARRIAGE 2 (2013). See also Gwendolyn M. Leachman, Media, Marriage, and the Construction of the LGBT Legal Agenda, 69 RUTGERS U.L. REV. 691–92 (2017) (explicating how the issue of same-sex marriage gained disproportionate media coverage compared to other issues on the LGBT legal agenda, likely due to the appeal of culture wars for the public).

2 *See generally* ROBERT LECKEY, AFTER LEGAL EQUALITY: FAMILY, SEX, KINSHIP (2015).

3 *See* JOSEPH NICHOLAS DEFLIPPIS ET AL., QUEER ACTIVISM AFTER MARRIAGE EQUALITY (2018).

4 *See* Pamela Laufer-Ukeles & Shelly Kreiczer-Levy, *Family Formation and the Home*, 104 KY. L.J. 449, 451–52 (2016); Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1510 (2016). *Cf*. Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791, 794–95 n.12 (2010) (noting that it is commonplace to eliminate alternate statuses after the introduction of same-sex marriage).

5 *See infra* Section I.B.

6 *See infra* Section I.B.

critical edge and ask whether indulging a dynamic whereby legislatures erase registered partnerships is beneficial to modern couples. There seems to be something special about these laws which renders them more attuned to the values of modern families.

Registered partnerships can promote a more pluralistic model of relationship recognition,[1] and, as I will argue, offer legal protection to families that eschew the paradigm of the traditional marital family. The case of jurisdictions that have adopted similar laws as an alternative to marriage demonstrates this point. A registered partnership is considered as an alternative to marriage when both opposite- and same-sex partners can sign up.[2] The rationale of alternatives to marriage is not that of offering a separate-but-equal regime for same-sex couples but a distinct regime that any couple can choose in lieu of marriage. Examples of jurisdictions adopting these laws are Illinois, Hawaii, and Colorado; and outside of the United States, France, Belgium, The Netherlands, and Luxemburg.[3]

Interestingly, in these countries, not only are partnerships being preserved but they are also becoming increasingly popular amongst opposite- and same-sex couples.[4] Empirical research further shows that registered partnerships are especially appealing to couples that eschew the model of the archetypical marital family.[5] These include couples disenchanted with the ideal of fidelity, the imperative of having children, or who live in less traditional financial arrangements.[6]

There is a second powerful demonstration of the relevance of these laws to modern couples. It comes from the strategic litigation that "heterosexuals" across Europe are now waging to access same-sex registered partnerships, i.e., regimes only open to same-sex couples.[7] This might be surprising at first sight: how ironic that after gay and lesbian couples have fixed their perceived main source of discrimination—

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1 *E.g.*, Cyril Ghosh, *The Emergence of Marriage Equality and the Sad Demise of Civil Unions*, 73 STUD. L. POL. & SOC'Y 1 (2017).

2 Jens M. Scherpe, *Quo Vadis, Civil Partnership?*, 46 VICTORIA U. WELLINGTON L. REV. 755, 759 (2015).

3 *See infra* Section I.A.

4 *See infra* Section II.A. As to the low likelihood that states repeal partnerships that are an alternative to marriage see Matsumura, *supra* note 7, at 1519.

5 By "archetypical marital couple" I will refer to a relationship of two persons, heterosexual, nuclear, sexual, exclusive, and based on a for-life commitment. NAUSICA PALAZZO, LEGAL RECOGNITION OF NON-CONJUGAL FAMILIES: NEW FRONTIERS IN FAMILY LAW IN THE US, CANADA AND EUROPE 3 (2021).

6 *See infra* notes 108-111, 113-117 and accompanying text.

7 To refer to these laws, I adopt the term "same-sex partnerships" used in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW 437, 437 (Robert Wintemute & Mads Andenæs eds., 2001).

the exclusion from marriage—"privileged" or "mainstream" heterosexuals are now appropriating the language of equality to take over registered partnerships… My analysis, however, demonstrates that these heterosexual partners are not mainstream at all. There is a nontraditional component in their family arrangement that is slipping under the radar and that deserves protection through means other than marriage.

In light of this, the Article contends that the role for registered partnerships in a world with same-sex marriage is that of offering a legal structure to less traditional family arrangements (through a RP open to all couples, including friends and relatives). The Article then makes a second distinctive contribution. It systematizes the motives that drive couples to claim access to these laws and describes how these motives morph into *legal* arguments. Much literature has addressed the problem of the fate of registered partnerships on both sides of the Atlantic.[1] Yet, what is still missing is a detailed account of how the expansion of these laws to all couples regardless of gender can occur.[2] American litigation is of little help in this regard. Opposite-sex couples have not

[1] See, e.g., John G. Culhane, After Marriage Equality, What's Next for Relationship Recognition?, 60 S.D. L. REV. 375, 376-377 (2015) [hereinafter Culhane, After Marriage Equality] (assessing which registration regime "deserves" to be retained and which does not); John G. Culhane, Civil Unions Reconsidered, 26 J.CIV. R. & ECON. REV. 621 (2012) [hereinafter Culhane, Civil Unions Reconsidered]; Melissa Murray, Paradigms Lost: How Domestic Partnership Went from Innovation to Injury, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 296-298 (2013) (discussing how the potential of these laws to pluralize lifestyles was curtailed by the LGBTQ movement's decision to embrace marriage equality as the final goal); Ghosh, supra note 10 (describing the demise of civil unions as harmful to marriage-rejecting couples that nonetheless wish to formalize their union); Matsumura, supra note 7 (assessing the contours of a constitutional right not to marry and its implications in terms of resisting the forcible conversion or termination of civil unions and domestic partnerships); Mary Charlotte Y. Carroll, When Marriage Is Too Much: Reviving the Registered Partnership in a Diverse Society, 130 YALE L.J. 478 (2020); Jessica R. Feinberg, The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal, 87 TEMP. L. REV. 47, 51 (2014). As to Europe and especially the UK, where the issue has attracted relatively broad attention due to the launch of an equal civil partnerships campaign, see, e.g., Scherpe, supra note 11, at 762-768; NICOLA BARKER & DANIEL MONK, From Civil Partnership to Same-Sex Marriage: Interdisciplinary Reflections (Nicola Barker & Daniel Monk eds., 2015); Andy Hayward, Relationships with Status: Civil Partnership in an era of Same-Sex Marriage, in SAMESEX RELATIONSHIPS, LAW AND SOCIAL CHANGE 189, 190 (Frances Hamilton & Guido Noto La Diega eds., 2020) and Alexander Maine, The Hierarchy of Marriage and Civil Partnerships: Diversifying Relationship Recognition in the same collection; Lucinda Ferguson, The Curious Case of Civil Partnership: The Extension of Marriage to Same-Sex Couples and the Status-Altering Consequences of a Wait-and-See Approach, 28 CHILD & FAM. L.Q. 347 (2016); Ruth Gaffney-Rhys, Same-Sex Marriage but Not Mixed-Sex Partnerships: Should the Civil Partnership Act 2004 Be Extended to Opposite-Sex Couples?, 26 CHILD & FAM. L.Q. 173 (2014).

[2] As I will explain in this Article, the ideal registration scheme must be available to conjugal and non-conjugal couples alike, including two adult relatives or friends.

mobilized to gain access to civil unions or domestic partnerships. By contrast, Europe is a site of considerable experimentation and (sometimes involuntary) innovation. Especially instructive is the experience of states opening their partnerships to all couples from the beginning—including non-romantic couples in Belgium—and the recent UK litigation through which "heterosexuals" gained access to same-sex civil partnerships.[1]

European case law helps discern the legal-philosophical reasons that inform opposite-sex couples' claims in the courtroom. I organize such motives around three approaches: a status-based, utilitarian, and choice-based approach. If the couple pursues social status recognition, the argument is that the partners suffer from expressive harms because of their exclusion from the regime. A utilitarian argument stresses the need for the couple to have access to a more flexible and lighter legal regime. A choice-based approach argues that adding options to the menu of family regimes is a value *per se*, due to its ability to accommodate different conceptions of the good life.

The systematization of these approaches is especially needed if one considers the patchworked landscape of registered partnerships. It is of reduced utility to discuss their (re)introduction in abstract terms. For instance, some laws are "light" and only confer a pared-down list of benefits while others mimic marriage.[2] Some regimes are still in place and others have been repealed (an aspect that hinges on whether to pursue change through courts or policymakers). Some are already available to all couples regardless of gender, while others are not.[3] In light of this, viewing the litigation strategies of heterosexuals as to how they unfolded differently along these lines is a more fruitful exercise. Organizing these approaches in a tripartite manner is also a novel contribution beneficial to future mobilization strategies.

Before moving any further, I shall provide a detailed roadmap. The next section offers a primer on RPs. Section II provides understandings about why RPs are increasingly appealing to modern couples, from both an empirical and normative perspective. Section III explicates the philosophical and legal grounds on which the extension of same-sex partnerships to opposite-sex couples can occur. For each

[1] By the term "heterosexuals" I narrowly refer to the claimants that have engaged in strategic litigation in Europe (described in Section III), since they happened to display this sexual orientation. However, I acknowledge that some opposite-sex couples might also include bisexual persons and persons with other non-normative sexual orientations. This methodological choice aims to avoid the epistemological "flaw" of bisexual erasure, *see generally* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000). Thus, I shall use the more accurate term "opposite-sex couples" in sections other than Section III.

[2] *See infra* Section I.A.1.

[3] See infra Section I.A.2.

approach, I first offer relevant examples of European judicial cases from which it emerges. Second, I provide an assessment of the potential weaknesses of each approach to be aware of. I discuss my insights and offer some advice for policymaking in Section IV. Part V concludes.

I. REGISTERED PARTNERSHIPS: AN OVERVIEW

This section sketches out the different types of partnerships currently available. It then illustrates how these laws have "fared" after same-sex marriage became legal.

A. DEFINITION AND MODELS

Laws introducing registered partnerships can vary significantly in terms of their personal and material scope. I use the term "registered partnerships" ("RPs") as an umbrella concept to identify all the schemes where two parties take affirmative steps to gain legal benefits linked to their relationship status. These legal partnerships are formal mechanisms of recognition. Unlike functional mechanisms of recognition, they do not (forcibly) ascribe couple status. They instead require parties to affirmatively seek the recognition of the law. The terms "registration," "registration schemes," and "registration regimes" are also used as synonyms.

I also include within the umbrella term schemes more of a contractual nature, such as the French *pacte civil de solidarité* (Pacs) and Belgium's *cohabitation légale*.[1] For instance, Pacs is a contractual partnership through which two persons can govern some aspects of their relationship under agreed-upon terms and register their agreement.[2] The fact that these contracts require registration renders the use of the term registered partnerships less problematic—while the use of the term "status" when referring to them is more controversial.[3]

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[1] Jens M. Scherpe & Andy Hayward, The Future of Registered Partnerships: An Introduction, in THE FUTURE OF REGISTERED PARTNERSHIPS: FAMILY RECOGNITION BEYOND MARRIAGE 3 (Jens M. Scherpe & Andy Hayward eds., 2017). See also Ilaria Pretelli, Équivalence et reconnaissance du statut civil des personnes faisant ménage à deux [The Equivalence and Recognition of the Civil Status of Two Persons], 11 CUAD. DER. TRANSNAC'L. 8 (2019) (Fr.).

[2] *See* Joëlle Godard, *PACS Seven Years on: is it Moving Towards Marriage*, 21 INT'L J.L. POL'Y & FAM. 310 (2007).

[3] By status I refer to the acquisition of a new position in society and before the law (with partners being no longer seen as single) and of a bundle of rights and benefits that are applicable *erga om*nes. Considering some characteristics (such as the prohibition to enter into another Pacs), some scholars argued that Pacs can be considered as conferring family status. *See generally* Ian Curry-Sumner, *A Patchwork of Partnerships: Comparative Overview of Registration Schemes in Europe*, in LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE: NATIONAL, CROSS-BORDER AND EUROPEAN PERSPECTIVES 76 (Katharina Boele-Woelki & Angelika Fuchs eds., 2d ed. 2012). *See also* Godard, *supra* note 24, at 317. In the field of private international law, the same conclusion was reached in an attempt to ensure legal

RP is thus a broad category. It encompasses a plethora of schemes that can substantially vary in their layout as well as personal and material scope.

1. What is the content of the RP? Weak and strong models

The first variable is the content of registered partnerships. They could carry the same incidents of marriage, as with many civil unions.[1] Alternatively, they could offer a pared-down list of rights and obligations, as with French Pacs.[2] Based on this variable, one can distinguish "strong" and "weak" registration models.[3] Under a strong registration model, the rights and obligations of partners are equal to that of spouses. By contrast, under a weak model the parties only gain limited legal benefits, such as property rights, mutual obligations of support, and some fiscal privileges.[4] The regime does not affect their personal law, including names, citizenship status, parental authority rights, and inheritance law.[5]Illustrative examples of "weak" models are those in force in France, Belgium, and Luxemburg. For instance, Belgium's regime, which was enacted in 1999, is known as *cohabitation légale*. The regime promotes a form of minimum solidarity by granting a limited bundle of rights and obligations.[6] Important legal benefits, such as the survivor's pension or a reserved portion of the estate, are excluded.[7] Likewise, when France enacted Pacs in 1999, the legislature sought to draw a clear distinction between marriage and Pacs, inspired as it was by a "principe différentialiste" (principle of differentiation).[8] Over time, the substantive content of Pacs became richer.[9] Yet important differences to marriage remain.[10]

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continuity and certainty when families cross borders (a certainty that mere contracts would not ensure). Cf. *Loi sur le droit international privé: Convention de Lugano [Law on International Private Law: The Lugano Convention]*, commentary, 542 n. 3 (Andreas Bucher ed., 2011) (Fr.).

1 Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 591 (2013).

2 *Id*. at 594.

3 Curry-Sumner, *supra* note 24, at 82.

4 *Id*. at 82-83.

5 *Id*.

6 The limited array of rights and obligations includes tenancy rights upon the death of one of the two parties, a duty to contribute to household expenses, and the applicability of matrimonial property rules. See Geoffrey Willems, Registered Partnerships in Belgium, in THE FUTURE OF REGISTERED PARTNERSHIPS, supra note 22, at 392.

7 *Id*.

8 Wilfred Rault, *Entre droit et symbole: Les usages sociaux du pacte civil de solidarité [Between Law and Symbol: Social Usages of the Civil Pact of Solidarity]*, 48 REVUE FRANÇAISE DE SOCIOLOGIE [REV. FR. SOCIO.] 555, 562 (2007) (Fr.).

9 Examples include the exemption from the succession tax as well as the partial exemption from the tax on donations between partners. *See* Godard, *supra* note 23, at 315-316.

10 Differences to marriage include the inability of Pacs to establish kinship, the lack of maintenance obligations upon dissolution of the relationship, the absence of the special inheritance rights created by

A comparative analysis between the U.S. and Europe offers additional insights into the content of these laws. Based on such analysis, one notices that some models are "stronger" than others. U.S. civil unions mirrored marriage in all respects (they were marriage by another name).[1] By contrast, European instruments ascribable to strong models (such as those in force in Sweden, Norway, and Denmark) offered the same legal benefits of marriage but lacked provisions on filiation[2]—these laws tended to only recognize the horizontal relationship of the two partners. Research, however, shows how these European states ended up recognizing provisions on filiation a few years after the enactment of the law.[3]

The reverse trend occurred in the U.S. There, the recognition of vertical parent-child relationships came before that of horizontal adult-adult relationships[4]—a pattern that polyamorous unions also seem to be following.[5] As of 2002, apart from Vermont's

marriage, the lack of certain social benefits such as survivor's pensions, and the absence of rights when it comes to children such as the right to joint adoption of a common child. Laurenze Francoz Terminal, *Registered Partnerships in France*, in THE FUTURE OF REGISTERED PARTNERSHIPS, *supra* note 22, at 169-180. Pacs partners with children are treated in the same way as cohabitants as far as the legal recognition of the child-parent relationship is concerned. *Id*. at 178.

1 In the U.S., civil unions were marriage by another name because they were created as a remedy to the exclusion of same-sex partners from marriage. CONTEMPORARY FAMILY LAW 296 (Douglas E. Abrams et al. eds., 5th ed. 2019).

2 Scherpe, *supra* note 11, at 757.

3 Ingrid Lund Andersen, *Registered Partnerships in Denmark*, in THE FUTURE OF REGISTERED PARTNERSHIPS, *supra* note 22, at 19.

4 There are some limited examples of European jurisdictions that followed this path too. For instance, in England and Wales, gay and lesbian couples could adopt since 2002, i.e., two years before the law recognized them as a family (Civil Partnership Act of 2004). Also, in 2001, the Netherlands became the only country in the world to bestow upon same-sex couples adoption rights (to be distinguished from second-parent adoption, which was also recognized in many U.S. states). *See* YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 119-120 (2002).

5 In this regard, it is interesting to note that polyamorous unions seem to follow a similar pattern. The recognition of multi-parenting—and thus vertical parent-child relationships—is preceding the official recognition of the horizontal relationship between the partners. *See* Angela Chen, *The Rise of the Three-Parent Family*, THE ATLANTIC (Sept. 22, 2020) https://www.theatlantic.com/family/archive/2020/09/how-build-threeparent-family-david-jay/616421/ [https://perma.cc/J8QX-LP8T]. *See also* Andrew Solomon, *How Polyamorists and Polygamists Are Challenging Family Norms*, THE NEW YORKER (March 22, 2021), https://www.newyorker.com/magazine/2021/03/22/howpolyamorists-and-polygamists-are-challenging-family-norms [https://perma.cc/6GGCJZ8P]. The legalization of multi-parenting is especially advanced in Canada. Ontario, British Columbia, and Saskatchewan permit the recognition of three or more intentional parents. *See* Lois Harder, *How queer!? Canadian approaches to recognizing queer families in the law*, 4 WHATEVER 303 (2021).

civil unions and a few reciprocal beneficiary laws,[1] legislation and case law on same-sex relationships were mostly concerned with parental rights.[2]

Overall, registered partnerships tend to be easier to dissolve compared to marriage.[3]

2. Who can register? Functional equivalent or alternative to marriage

A second variable regards who can enter into the union. First, to date, only two persons have been allowed to register. There are only marginal exceptions at the local level, such as two municipalities in Massachusetts that recently opened municipal domestic partnerships to multi-party relationships.[4] Second, conjugal couples can usually register.[5] This is to say that, save for limited exceptions, only couples in a sexual relationship are eligible. These two implicit norms having been outlined, an additional variable concerns the gender of the (dyadic, conjugal) couple. Based on this variable, one can distinguish laws that are *functionally equivalent* to marriage from laws that introduce an *alternative* regime to marriage. The former category refers to registration schemes only open to same-sex couples. The latter refers to schemes open to both opposite- and same-sex couples.

Several jurisdictions only introduced registration schemes for same-sex couples to specifically address the problem of their legal invisibility. In such cases, the scheme was meant to be a separate marriage-like regime, only lacking the name marriage. Due to their origins, this functional equivalence is basically the rule for these "civil unions."[6] From time to time, states would also reserve or nearly reserve domestic

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1 Laws including a minimal list of rights, usually open to conjugal and non-conjugal couples alike. States with reciprocal beneficiary laws are Hawaii, Colorado, District of Columbia (D.C.), Maine, and Maryland. For instance, D.C. refers to "any two people in a mutually caring relationship." *See* D.C. CODE § 32–701 (2006).

2 MERIN, *supra* note 39, at 276-277.

3 *See infra* note 261.

4 *Second Massachusetts city to recognize polyamorous relationships*, CNA (Mar. 20, 2021), https://www.catholicnewsagency.com/news/246980/second-massachUsetts-cityto-recognize-polyamorous-relationships [https://perma.cc/2CGN-ZX43].

5 *See generally* PALAZZO, *supra* note 14. As to the exceptions, including schemes open to non-conjugal couples, see Nausica Palazzo, *Queer and Religious Convergences Around Non-Conjugal Couples: "What Could Possibly Go Wrong?'*, *in* QUEER AND RELIGIOUS ALLIANCES IN FAMILY LAW POLITICS AND BEYOND s. 1 (Nausica Palazzo & Jeffrey A. Redding eds., forthcoming July 2022) [hereinafter, Palazzo, *Queer and Religious Convergences*].

6 *See supra* note 36.

partnerships for samesex couples only.[1] For instance, the domestic partnership currently in force in Oregon is solely open to same-sex couples.[2]

The civil unions in Colorado,[3] Illinois,[4] and Hawaii[5] and the domestic partnerships in New Jersey[6] and New York are alternatives to marriage open to all couples regardless of gender.[7] Some states also offer lighter regimes that are virtually open to non-romantic couples as well, such as close relatives.[8] These regimes are called designated or reciprocal beneficiary schemes. Belgium also offers a legal option for relatives or friends to register their union and gain a limited array of rights.[9]

Alternatives to marriage usually "make more sense" if their content is distinct from that of marriage (since these alternatives are options that all couples can choose in lieu of marriage).

French Pacs, Belgian *cohabitation légale,* and the various reciprocal/designated beneficiary laws demonstrate this point by coming up as lighter, more flexible options. But this is not always the case. Consider the example of Dutch registered partnerships. Registered partnerships in the Netherlands are open to all couples yet mirror marriage.[10] While the content of the registered partnerships was also lighter than that of marriage at the beginning, there has been an equalization process between the two through waves of legislation over the last twenty years. After these reforms, the two regimes basically carry the same legal incidents.[11] This is to say that alternatives to marriage open to all couples can also mirror marriage.

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1 Some states also feature hybrid forms of domestic partnerships whereby eligible couples include same-sex couples and, in addition, opposite-sex couples who are 62 years of age or older. *See, e.g*., N.J. STAT. §§ 26:8A-1 to 26:8A-13 (LexisNexis 2021).

2 OR. REV. STAT. §§ 106.300-106.325 (LexisNexis 2021).

3 COLO. REV. STAT. ANN. §§ 15-22-101 to 15-22-112 (LexisNexis 2021). Civil unions in Colorado have the same substantive content of marriage in terms of legal benefits attached thereto.

4 750 ILL. COMP. STAT. ANN. 75/1 to 75/90, 80/1 (Lexis 2021). Civil unions in Illinois have the same substantive content of marriage in terms of legal benefits attached thereto.

5 HAW. REV. STAT. §§ 572B-1 to 572B-11 (Lexis 2021).

6 N.J. STAT. ANN. § 26:8A-2 (Lexis 2021).

7 N.Y. PUB. HEALTH LAW § 2961(6-a) (Lexis 2021).

8 *See* Nausica Palazzo, *The Strange Pairing: Building Alliances Between Queer Activists and Conservative Groups to Recognize New Families*, 25 MICH. J. GENDER & L. 161, 195-197.

9 CODE CIVIL [C. CIV] art. 1475 (1) (Belg.).

10 The legal regime is now included in Titel 5A. BURGERLIJK WETBOEK BOEK 1[BWB1] [TITLE 5A. of the first Book of the DUTCH CIVIL CODE]. Ian Sumner, *Registered Partnerships in the Netherlands*, in THE FUTURE OF REGISTERED PARTNERSHIPS, *supra* note 22, at 123. In 2001, the Netherlands became the first country in the world to legalize same-sex marriage. Therefore, both marriage and registered partnerships are available for all couples.

11 Sumner, *supra* note 56, at 129.

The next section summarizes the legislatures' attitude towards these laws after they enacted same-sex marriage.

B. FATE AFTER SAME-SEX MARRIAGE

After same-sex marriage became legal throughout the U.S.,[1] the seemingly "natural" reaction has been the erasure of registered partnerships.[2] Either because they were deemed "useless"[3] or "odious,"[4] most partnerships did not manage to survive the furor of marriage equality.

The "uselessness" of these laws the day after same-sex marriage was legalized is explained by the historical context in which they were created.[5] Since the 90s, Western jurisdictions have become more receptive to same-sex couples' demands for legal recognition.[6] At some point, RPs represented a win-win situation for both social

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1 Same-sex marriage has been legalized nationwide in 2016, after Obergefell v. Hodges, 576 U.S. 644, although several states had already legalized this form of marriage well before the Supreme Court stepped in. For a list of states legalizing same-sex marriage before the Supreme Court decision, see *supra* note 1.

2 Carroll, *supra* note 17, at 539 (noting how Connecticut, Delaware, New Hampshire, Rhode Island, Vermont, Washington, and Wisconsin no longer offer these legal regimes). Same-sex marriage was legalized nationwide in 2016. *See Obergefell,* 576 U.S. 644.

Several states had, however, legalized this form of marriage well before the Supreme Court stepped in. Amongst these were Massachusetts (2003), Connecticut (2008), Iowa, Vermont, New Hampshire, District of Columbia (2009), New York (2011), Washington, Maryland (2012), California, New Jersey, New Mexico, Rhode Island, Delaware, Minnesota, Hawaii, Illinois (2013), Oregon and Pennsylvania (2014). In Australia, this form of marriage became legal in December 2017; in New Zealand, it became legal in August 2013.

3 The redundancy argument was especially visible in Nordic European countries in the aftermath of marriage equality (Hayward, *supra* note 17, at 195) and, more generally, in jurisdictions adopting a nonmarital regime as the functional equivalent of marriage (*see* Scherpe, *supra* note 11, at 761). The idea of their redundancy is further attested by case law that views registered partnerships as fulfilling a "transitional purpose" (Steinfeld v. Sec'y of State for Educ. [2017] EWCA Civ 81 [172] (appeal taken from Eng. & Wales)).

4 *See, e.g.*, Sue Wilkinson & Celia Kitzinger, *In Support of Equal Marriage: Why Civil Partnerships is not Enough*, 8 PSYCH. WOMEN REV. 54, 54 (2006) (describing these laws as a "painful compromise").

5 As to the U.S., for a primer of the different origins of domestic partnerships and civil unions *see* Abrams et al., *supra* note 36.

6 Hawaii Supreme Court ruled in 1993 that the exclusion of same-sex couples from marriage triggered the highest standard of scrutiny, strict scrutiny. The standard response to LGB groups' mobilization, however, has been the introduction of RPs. These include Vermont's civil unions (1999), Hawaii's Reciprocal Beneficiary Act (1997), and civil unions in Denmark (1989), Norway (1993), Sweden (1995), and Iceland (1996).

conservatives and progressives.[1] Social and religious conservatives wished to avoid the expansion of marriage to gay and lesbian couples. The introduction of RPs was aimed, from their vantage point, at pleasing the demands of the LGB community while at the same time preserving traditional marriage.[2] As more courts demanded "some form" of legal recognition, compromising around these regimes seemed appropriate.[3]

On the other side, progressives also had their stakes in the introduction of registered partnerships. These reforms finally offered legal protection to intimate relationships between gay and lesbian couples that had attracted (and continued to attract) much social contempt. These laws were surely important to the LGB community. Yet they were not enough. The accepted wisdom is that registered partnerships were indeed a "necessary" step towards the full legalization of same-sex marriage.[4] I here refer to the incrementalist paradigm or "law of small change."[5] The paradigm had strong normative overtones: it conveyed the idea that the best way forward globally was to pursue incremental changes.

Not all scholars, however, are at ease with this narrative. Some reclaim the central role of RPs in the context of LGB activism.[6] Such scholars describe the first wave of registered partnerships as laws deliberately enacted by queer activists to recognize the richness of family forms outside of marriage (and outside of the mold of the marital family). John D'Emilio, for instance, praised the set of domestic partnerships enacted in the 80s as creative tools for the recognition of the multifold reality of family arrangements—utilized before the movement dismissed the goal of

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1 Culhane, *After Marriage Equality*, *supra* note 17, at 376.

2 *Id*.

3 *E.g.,* Baker v. State, 744 A.2d 864, 886–89 (Vt. 1999) (leaving how to recognize gay and lesbian couples up to the legislature's discretion). The techniques right-wing actors came up with to oppose marriage equality reached a peak of creativity in North America, when Alberta, Hawaii, and Vermont enacted registration schemes open to gay couples as well as friends and/or relatives to symbolically dilute the import of recognizing samesex partners. Palazzo, *supra* note 54, at 195.

4 *See* Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage,* 18 DUKE J. GENDER L. & POL'Y 105 (2010).

5 Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, *in* Wintemute & Andenæs, *supra* note 16, at 437; Kees Waaldijk, Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries, 5 JUD. STUD. INST. J. 104, 112 (2005). *See also* WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 115-118 (2002).

6 John D'Emilio, *The Marriage Fight Is Setting Us Back*, GAY & LESBIAN REV. 10, 10–11 (Nov.-Dec. 2006). *See also* Nancy D. Polikoff, *Recognizing Parents but not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 713-14 (2000) (rejecting the applicability of Waaldijk's sequence to the US for reasons including the distinctive role of the judiciary in the US).

family pluralism to embrace marriage equality.[1] In similar terms, Melissa Murray noted how, at the outset, these laws were supposed to offer an additional model of relationship recognition beyond marriage.[2] Looking at the other side of the Atlantic, Erez Aloni also noted that several LGB organizations were in favor of registration schemes instead of marriage.[3] He thereby rejected the applicability of the paradigm of small changes to the European context as well.

This demonstrates that the history of RPs is non-linear. However, one can confidently argue that they were especially aimed at tackling a specific social issue: the lack of legal recognition of same-sex couples.[4] The disagreement within the LGB community focused on whether these laws were meant to be endpoints themselves or intermediate steps towards marriage. The latter view-such laws being a stepping stone to marriage-seems to have prevailed.[5] Melissa Murray identifies this twist as occurring in the 90s, when same-sex couples obtained a largely unexpected judicial victory bearing upon same-sex marriage.[6] According to Murray, galvanized by the victory, activists changed strategy nationwide. They started depicting RPs as a temporary fix.[7] Once RPs became a mere steppingstone to marriage, in addition to the temporary-fix narrative, a second narrative emerged: the inferior-status narrative.[8] Some activists depicted these laws as unfair regimes confining gay and lesbian couples to a status of second-class citizens. Analogies were drawn both with the separate-but-equal regime imposed on the Afro-American community (*Brown* analogy)[9] and with antimiscegenation laws prohibiting interracial marriages (*Loving* analogy).[10] As much as these laws were premised on an ideology of white supremacism and race, exclusion from same-sex marriage was said to be premised on heteronormativity and homophobia.[11]

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1 D'Emilio, *supra* note 69, at 10.

2 Murray, *supra* note 17, at 300–01. *See also* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1256 (2010).

3 Aloni, *supra* note 67, at 109.

4 Even when open to both same-sex and opposite-sex couples, these laws were still the result of efforts to especially secure rights for same-sex couples. Murray, *supra* note 18, at 294.

5 *See* Murray, supra note 17, at 297; Carroll, *supra* note 17, at 500-501. *See also* Cummings & NeJaime, *supra* note 71, at 1258.

6 Murray, *supra* note 17, at 296-300.

7 *Id*. at 296.

8 *Id*. at 296.

9 MERIN, *supra* note 39, at 283-290.

10 Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination,* 98 YALE L. J. 145, 162-163 (1988); Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 114 (1996); MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 66-69 (1997); WILLIAM N. ESKRIDGE JR, THE CASE FOR SAME-SEX MARRIAGE 153-163 (1996).

11 MERIN, *supra* note 39, at 288.

There might also be a third, less obvious, reason behind their erasure: the view that marriage is the gold standard, inviting the question as to why we would need a "lame" version of marriage.[12] This view is engrafted into law, through rules such as the form-hierarchy voidness rule.[13] Janet Halley coined this term to refer to the automatic dissolution of reciprocal beneficiary unions if any party gets married or enters a civil union (both considered superior statuses). By the same logic, any time a party to a civil union or domestic partnership gets married, the regime that "prevails" is marriage. RPs are indeed traditionally seen as second-rate regimes compared to the institution of marriage, that fully retains its "moral superiority" in our intellectual imaginaries *and* the law.[14] Hence, there is little doubt that the repeal of RPs is also the result of an internalized, scarcely articulated hierarchy amongst family regimes that puts marriage steadily on top.

All these reasons created the perfect storm that led to the dismissal of RPs through a variety of techniques. A first response involved phasing out. Through this technique, the law did not admit new entrants after a certain date, while leaving in force existing unions. Vermont followed a similar route.[15] This reaction was quite popular in Europe as well, with jurisdictions following this path including Ireland, Germany, and the Nordic countries (Norway, Iceland, Sweden, Denmark, Finland).[16] For instance, Ireland is phasing civil partnerships out after a national referendum legalized same-sex marriage, due to which no civil partnership could be created after November 16, 2015.[17] Germany also barred new life partnerships[18] starting from October 1, 2017, following the legalization of same-sex marriage.[19]

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[12] Wilkinson v. Kitzinger [2006] EWHC 2022 (Fam) [6] (Eng. and Wales).

[13] Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND 1, 41 (2010).

[14] Elizabeth S. Scott, *Marriage, Cohabitation, and Collective Responsibility for Dependency* 5 (Univ. of Chicago Legal F. Working Paper, Vol. 2004, p. 225, 2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=529045.

[15] VT. STAT. ANN. tit.15, § 1301(A) (repealed 2013, Adj. Sess. No. 164).

[16] Andy Hayward, *New Models of Registered Partnership Reform: Embracing Family Recognition beyond Marriage*, in EXPLORING NORMS AND FAMILY LAWS ACROSS THE GLOBE 4 (Melissa Breger ed., forthcoming in 2022).

[17] Marriage Act 2015 (Act No. 35/2015) (Ir.), https://www.irishstatutebook ie/eli/2015/act/35/enacted/en/html.

[18] Lebenspartnerschaftsgesetz [LPartG] [Act on Registered Life Partnerships], Feb. 16, 2001, BUNDESGESETZBLATT, TEIL I [BGBL I] at 266 (Ger.).

[19] Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts [Eheöffnungsgesetz] [Act Introducing the Right of Marriage for Same-Sex Couples], July 20, 2017, BGBL I at 2787 (Ger.).

Some jurisdictions were more trenchant. After the legalization of same-sex marriage, existing unions in a registered partnership were forcibly converted into marital unions.[1] Partners were not given an opportunity to choose between the two regimes. They thus woke up married the day after the state law took effect. Examples of states opting for forcible conversions are Connecticut,[2] New Hampshire,[3] and Delaware.[4] Washington has restricted existing domestic partnerships to couples in which either or both parties are above the age of 62.[5] All other couples in Washington could either marry, dissolve their union, or do nothing, in which case their union would automatically merge into marriage.[6] Arizona opted for a third, more radical option: a flat-out termination of legal benefits unless the partners married within a certain date (more or less within a month).[7]

As previously seen, the erasure of registration schemes has not occurred in jurisdictions that have adopted regimes open to all couples regardless of gender.[8] This can be mostly explained by the substantive content of these laws, which usually differed from marriage. In this sense, they constituted a valid alternative to marriage for all conjugal couples, including opposite-sex ones. This aspect made their repeal politically costly: numerous (mostly opposite-sex) couples had invested in similar laws and were not willing to lose the status they had acquired.[9] By contrast, same-sex only registered partnerships tend now to be a thing of the past.[10]

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1 Excel chart *"*Domestic Partnerships and Other Status Relationships Chart*"* sent via e-mail by Naomi Cahn, Dist. Prof. L. Va. U., to author [Mon., Jul. 26, 9:34 PM IDT] (on file with author); *Civil Unions and Domestic Partnership Statuses*, NAT'L CONF. OF ST. LEGISLATURES, (Mar. 10, 2020), https://perma.cc/VGP3-NF2F.

2 CONN. GEN. STAT. § 46b-38rr (2009).

3 N.H. REV. STAT. ANN. § 457:46 (2010).

4 DEL. CODE ANN. tit. 13, § 218 (2013).

5 WASH. REV. CODE § 26.60.010 (2014). The reason stated in the law is that, for these couples, marriage may be impractical in light of current social security and pension laws.

6 *Id.* § 26.60.100.

7 Matsumura, *supra* note 7, at 1510-1511.

8 Section I.A.1. has mentioned laws in Europe (like Pacs and legal cohabitation) as well as in the U.S. (like reciprocal and designated beneficiary laws) that are still in force despite the introduction of same-sex marriage. The reciprocal beneficiary law in Vermont is an exception to this and was repealed in 2013. *See supra* note 84.

9 Cf. Murray, *supra* note 17.

10 It is worth recalling that, in the United States, the only exception is Oregon, which has maintained (or rather not yet repealed) its same-sex domestic partnership status. OR. REV. STAT. § 106.300–106.325. Exceptions also exist in Europe and include civil unions in Italy. *See* Legge 20 maggio 2016, n. 76, G.U. Magg. 21, 2016, n. 119 (It.) [Act no. 76 of 2016], titled "Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze" (Law on Same-Sex Civil Unions and Cohabitation).

II. THE ROLE OF RPS IN A WORLD WITH SAME-SEX MARRIAGE

The next two sections demonstrate the ongoing significance of registered partnerships to modern families. More specifically, Section II.A explains their relevance in light of some recent empirical trends. Section II.B explicates how these trends tie nicely with modern family values—as well as how such relevance might grow even bigger.

A. AN EMPIRICAL ACCOUNT: THE GROWING INTEREST OF MODERN FAMILIES IN RPS

European registration schemes open to all couples regardless of gender are becoming more appealing to opposite-sex pairs, particularly to less traditional ones. French Pacs are emblematic in that regard. The popularity of Pacs has increased steadily,[1] unlike marriage, whose figures continue to sink. While in 1997, nearly 284,000 couples got married, from 2013 on, figures never went beyond 225,000, with a new low of 212,000 married couples in 2019.[2] The numbers of registered Pacs are almost nearing marriages. It would not be surprising if they surpassed marriages soon if the two opposite trends (downward for marriage and upward for Pacs) continue.

According to the *Institute National des Études Démographiques* (INED), the largest share of Pacs is opposite sex couples.[3] Forinstance, in 2010, the number of new opposite-sex *pacsés* couples reached 196,405 while the number of new same-sex couples was 9,145 units. But this ratio is not considerably different from the ratio of same-sex couples in marriages.[4] What is more interesting is that the introduction of same-sex marriage in 2013 did not have a tangible impact on this ratio. The latest available statistics demonstrate how, in 2019, there were 188,014 Pacs created by couples of the different sex and 8,356 Pacs created by couples of the same sex.[5] Further, except for the first three years since the introduction of same-sex marriage (2013,

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1 There has been a constant increase in the number of Pacs. The only exception was the year 2011, when a fiscal reform was approved. Magali Mazuy, Magali Barbieri & Hippolyte d'Albis, *L'évolution démographique récente en France : la diminution du nombre de mariages se poursuit [Recent Demographic Evolutions in France: Marital Rates Continue to Decrease]*, 69 POPULATION (FRENCH EDITION) 313, 328 (2014) (Fr.).

2 *Marriage and Nuptiality*, INSTITUT NATIONAL D'ÉTUDES DÉMOGRAPHIQUES (2021), https://www.ined.fr/en/everything_about_population/data/france/marriages-divorcespacs/marriage-nuptiality/ [https://perma.cc/6EF8-PVDR].

3 *Pacs*, INSTITUT NATIONAL D'ÉTUDES DÉMOGRAPHIQUES (2021), https://www.ined.fr/fr/tout-savoir-population/chiffres/france/mariages-divorcespacs/pacs/ (last visited July 22, 2021) [https://perma.cc/93UB-C2YJ].

4 *See Marriage and Nuptiality*, *supra* note 100.

5 *Pacs, supra* note 101.

2014, 2015) when same-sex marriages surpassed same-sex Pacs, this enthusiasm for marriage somehow vanished. Starting from 2016, the number of Pacs created by same-sex couples exceeds the number of same-sex marriages.[1]

The case of Pacs is paradigmatic of the ongoing relevance of RPs for less traditional couples. Empirical data shows that Pacs tend to attract couples that display distinct social and demographic characteristics, and that are less aligned with the model of the archetypical marital couple.[2] By "archetypical marital couple," I refer to a relationship of two persons that is heterosexual, nuclear, sexual, exclusive, and based on a for-life commitment.

Research conducted by sociologist Wilfred Rault over the last two decades of the life of Pacs compellingly illustrates this point.[3] *Pacsés* couples display more liberal attitudes towards sex and sexual orientation.[4] They are more at ease with the idea of "casual sex," that is, a dissociation between sexuality and affection. They are less attached to the ideal of for-life fidelity, with only 42% of couples adhering to the ideal, compared to 64% of spouses.[5] Rault argues that the disenchantment with heteronormativity, including the norm of heterosexuality, might correlate with the fact that Pacs itself challenged this norm-as it was also open to homosexual couples.[6]

The beliefs of *pacsés* couples also tend to be more egalitarian when it comes to gender norms. While half of *pacsés* couples think that parents should raise male and female children in the same fashion, this idea is only shared by 37% of married couples.[7] Further, registered partners may be less interested in having children and more inclined to embrace a "pure relationship" model (grounded in utilitarian ideals of selfsatisfaction and personal blossoming).[8] While having children is an imperative

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1 *Compare Pacs*, *supra* note 101 *with Marriage and Nuptiality*, *supra* note 100. Both in 2018 and 2019, Pacs exceed nearly by 2000 unions the number of marriages.

2 This is especially so because these partners often choose Pacs over marriage due to their disenchantment with the marital ideal.

3 *See infra* notes 108-111, 113-117 and accompanying text.

4 Wilfred Rault, *Is the Civil Solidarity Pact the Future of Marriage? The Several Meanings of the French Civil Union*, 33 INT'L J.L., POL'Y & FAM. 139, 142 (2019).

5 Wilfried Rault et al., *Les orientations intimes des premier.e.s pacsé.e.s [Intimate Orientations of First Pacsés Couples]*, 66 POPULATION (FRENCH ADDITION) 343, 356 (2011) (Fr.).

6 *Id.* at 355–56.

7 *Id.* at 360. Within marriage, husbands tend to be more conservative than wives. Disaggregated data show that only 32% of men would raise girls and boys alike, compared to 41% of women. *Id.* at 361.

8 *See generally* ANTHONY GIDDENS, THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES (1992) (coining the notion of "pure relationship model" and describing the growing influence of a logic of self-fulfillment to building intimate relationships).

under the model of the nuclear family-that is part and parcel of the archetypical model of family, *pacsés* couples oftentimes think that they can make their way through life without children ("on peut reussir sa vie sans enfant").[1] It is emblematic in this regard that the law introducing Pacs does not even mention children.[2] This might constitute evidence that the law itself may have contributed to debunking this traditional family norm, i.e. the "nuclear imperative." Similarly, *pacsés* couples show more positive attitudes towards feminism (63%), compared to married spouses (47%).[3] These findings are consistent with the rationale of the UK Equal Civil Partnership Campaign, where one of the grounds for seeking the expansion of the law to opposite-sex relationships was the "feminism factor."[4]

Empirical research on Pacs also shows the parties' interest towards material benefits such as property rights. Unlike married couples, registered partners can show little or no interest in the expressive benefits of recognition, which include the sanctioning of the social relevance of the relationships.[5] They might be more inclined to keep finances separate and enter into less "traditional" financial arrangements.[6] This might be explained by the way in which Pacs and laws similar to it are drafted. For instance, in regimes such as those enacted in France, Belgium, and Luxemburg, separation of property is the default regime that applies to partners,[7] unlike marriage, where community property is usually the default regime.[8] Then, only if the parties cannot prove exclusive ownership, the presumption of *indivisum* applies-whereby

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1 Rault, *supra* note 109, at 368. *See also* Estelle Bailly & Wilfried Rault, *Are heterosexual couples in civil partnerships different from married couples*?, 497 POPULATION & SOCIETIES 1, 1–2 (2007) (describing how PACS partners aged 25-39 years tend to be more often childless compared to spouses).

2 Rault, *supra* note 108, at 142.

3 Rault, *supra* note 109, at 361, Table 7.

4 Catherine Fairbairn & Oliver Hawkins, *The Future of Civil Partnership* 11 (House of Commons Library, Briefing paper No. 07856, 2018).

5 Rault, *supra* note 108, at 143.

6 *Cf.* Sophie Ponthieux, *Income-sharing by couples* (Insee Premiere, No. 1409, 2012), https://www.insee.fr/en/statistiques/1281045 [https://perma.cc/69BJ-NY4Q] (noting that, in 2010, two thirds of French couples reported full-income sharing and that full sharing is more common amongst married couples).

7 In France, for instance, partners can adopt a community property regime ("régime de l'indivision") either by the initial agreement or by subsequent agreement. FRÉDÉRIQUE GRANET & PATRICE HILT, DROIT DE LA FAMILLE [FAMILY LAW] 112, ¶241 (6th ed., 2018) (Fr.). But, after a reform occurred in 2006, the default regime is separation of property under art. 515-5 Code civil [C. Civ.] [Civil Code]. Terminal, *supra* note 35, at 169.

8 Frederik Swennen & Sven Eggermort, Same-Sex Couples in Central Europe: Hop, Step and Jump, in LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN EUROPE, supra note 23, at 35 (citing KATHARINA BOELE-WOELKI, IAN CURRY-SUMNER, MIRANDA JANSEN & WENDI SCHRAMA, HUWELIJK OF GEREGISTREERD PARTNERSCHAP 152 (2006)).

courts conclude that property is jointly owned.[1] A similar regime is explained by the fact that registered partners are more inclined to have a "double income and no kids."[2] Yet, understanding whether the law influenced the shape of these family arrangements or whether families with these characteristics are simply attracted by these laws (by creating a phenomenon of "positive selection") is perhaps a chicken and egg problem. It is unquestionable that there is a positive interplay between more modern legal regimes and modern family arrangements.

Belgium also confirms the impression that these regimes are increasingly popular.[3] The total number of declarations has increased steadily from an average of 6,623 in the period 2000-2004, to an average of 26,942 in the period 2005-2010, and an average of 40,047 in the period 2011-2019.[4] For the first time, in 2020, the number of declarations of *cohabitation légale* has surpassed the number of marriages.[5] Once again, unions of the opposite sex constitute the largest share of couples by far,[6] but the ratio is similar within marriages.[7]

While there is no research on the "nature" of these relationships comparable to that on Pacs, the case of Belgium is telling in another respect. *Cohabitation légale* is also open to non-conjugal couples (friends and relatives), which could be a hint *per se* that these schemes are well suited for less traditional families. Yet, understanding how many non-conjugal couples register is an arduous task. Statistics only single out close relatives: a parent and a child or two siblings.[8] For instance, in 2019, out of

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1 *See, e.g.*, Belgium (C.Civ., art. 1478, par. 2), and France (C. Civ., art. 515–5).

2 Swennen & Eggermort, *supra* note 120.

3 Data can be downloaded in the "figures" section of *Declarations of legal cohabitation*, STATBEL, https://statbel.fgov.be/en/themes/population/partnership/declarations-legalcohabitation#panel-12 [https://perma.cc/Y26X-F3SR].

4 Starting from 2011, the total number of declarations of *cohabitation légale* has been relatively stable: 38.921 in 2011, 39.038 in 2012, 39.970 in 2013, 40.054 in 2014, 40.080 in 2015, 40.184 in 2016, 40.608 in 2017, 40.770 in 2018, 40.801 in 2019. *Id*.

5 *Compare Marriages*, STATBEL, https://statbel.fgov.be/en/themes/population/partnership/marriages#panel-12 [https://perma.cc/H7K3-FNVN], *with Declarations of legal cohabitation*, *supra* note 123.

6 For instance, in 2017, out of 39,038 declarations, 37,727 were made by persons of the opposite sex. In 2019, out of 40,801 declarations, 39,384 were made by persons of the opposite sex. *Declarations of legal cohabitation*, *supra* note 123.

7 According to the most recent statistics, out of 32,779 marriages, 909 were samesex marriages, and out of 36,329 legal cohabitations, 1,364 were same-sex unions. *Compare Marriages in 2020* (downloads section) in *Marriages*, *supra* note 125, *with Déclarations de cohabitation légale 2020* (downloads section) in *Declarations of legal cohabitation*, *supra* note 123.

8 The Directorate-General Statistics offers data regarding the number of close relatives, namely those in a parent-child relationship or siblings. In 2018, out of 38,921 registrations, only 58 regarded those in a parent/child relationship and 112 siblings. Likewise, in 2019, out of 40,801 declarations, 75 have been

40,801 declarations, only 160 had been made by close relatives.[1] However, the Bureau of Statistics does not capture pairs of friends or pairs that include relatives outside of the mentioned degrees of consanguinity, so at present we still do not have conclusive figures regarding non-conjugal couples.

Empirical data from the Netherlands is revealing of yet another trend. First, Dutch registered partnerships mimic marriage.[2] This might tempt us to think that very few couples would still register. Since registered partnerships have the same features as marriage, logic has it that it is better to get the golden version instead of the copy. Yet, this is not what happened, at least not in the last few years. While at the beginning, few opposite-sex couples registered, the latest survey from 2020 illustrates a marked upward trend.[3] If, in 2009, registered partnerships accounted for 10.5% of opposite-sex couples' formalized relationships (including marital relationships), the share rose to 19.1% in 2016 and reached 32.1% in 2020. The popularity of this form of union is also markedly on the rise within the LGBTQ community. In 2020, 38.9% of formalized lesbian relationships and 43.6% of formalized gay relationships were registered partnerships while in the first years following its enactment, the popularity of RPs amongst gay and lesbian partners was significantly low.[4]

The three examples of France, Belgium, and the Netherlands attest to the significant growth in popularity of RPs amongst both opposite- and same-sex couples. However, data from the Netherlands is illustrative of two additional points: (i) couples might still want a registered partnership even when it mimics marriage, and (ii) same-sex couples are veering back to such laws in a country where "choice" between registration and marriage has been available for many years. In the Netherlands, same-sex marriage became legal in April 2001. While it is too early to make any prediction in this regard, it might well be the case that the Netherlands is illustrative of a broader trend "backward" in the area of LGBTQ families whereby such couples veer back to registered partnerships precisely for the reasons this Article outlines (registered partnerships' ability to accommodate less traditional families). In the

made by a parent and a child, and 85 by siblings. *Compare Marriages*, *supra* note 125, *with Declarations of legal cohabitation*, *supra* note 123.

1 *Id*. *Compare Marriages*, *supra* note 125, *with Declarations of legal cohabitation*, *supra* note 123.

2 *See generally* Sumner, *supra* note 56.

3 *years of gay marriage in the Netherlands: 20 thousand couples*, CBS.NL (Mar. 31, 2021), https://www.cbs.nl/en-gb/news/2021/13/20-years-of-gay-marriage-in-thenetherlands-20-thousand-couples [https://perma.cc/MXU4-A9DX].

4 *Id.*

next few years, data coming from the UK[1] and Austria[2] will allow the opportunity to test this hypothesis. The two countries have recently extended "marriagelike" civil partnerships to all couples. The terms of comparison will therefore be homogeneous, unlike France and Belgium, which have in place much lighter registration schemes.

It is not easy to interpret this growing interest in registration. Specifically, its potential ramifications on the future of marriage and cohabitation are unclear. First, the growing popularity of registration does not necessarily sound the death knell to marriage. Marriage is very much alive and continues to be attractive to a large number of couples.[3] Second, it is unclear whether registration schemes can become a viable solution to the lack of recognition of cohabitants. Some scholars argue they cannot.[4] While I acknowledge these potential parallel implications to the growing interest in registration, I do not engage them in this Article. I limit myself to outlining this growing popularity and explicating that these laws are especially valuable to a certain type of family: couples in less traditional family arrangements.

The next section helps locate these empirical shifts within a new normative framework. It explicates how similar changes might be explained by these families valuing different things compared to the past.

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1 In England and Wales, opposite-sex couples could register starting from December 31, 2019, in Northern Ireland from January 13, 2020, and in Scotland from July 28, 2020.

2 In Austria, opposite-sex couples could register their union starting from January 1, 2019.

3 Marriage continues to be more popular than registration, and the ideology of marriage continues to survive. BARKER, *supra* note 4, at 22. However, recent statistics suggest that marital rates are declining across the West. Decreasing marital rates are especially visible in a number of Western countries. I here provide four examples taken from the Euro-American context: Canada, the United States, the U.K., and Italy. As to Canada, see JULIEN D. PAYNE & MARILYN A. PAYNE, CANADIAN FAMILY LAW 2 (6th ed. 2015). As to the United States, see HANDBOOK OF MARRIAGE AND THE FAMILY 528 (Gary W. Peterson & Kevin R. Bush eds., 2013). As to England and Wales, see Claire Miller, *Number of People Getting Married is Falling—and Here's the Reason Why*, MIRROR ONLINE (Apr. 27, 2016), [https://perma.cc/3GW6-2LMD]. As to Italy, see *Matrimoni, Separazioni e Divorzi*, ISTAT (Nov. 14, 2016), [https://perma.cc/ZAF4-2WVF].

4 Joanna Miles, *Financial Relief Between Cohabitants on Separation: Options for European Jurisdictions*, *in* EUROPEAN CHALLENGES IN CONTEMPORARY FAMILY LAW (Katharina Boele-Woelki & Tone Sverdrup eds., 2008) 269. *But see* Feinberg, *supra* note 17, at 61 (arguing that "[w]ith marriage in decline, cohabitation on the rise, and the number of children born to cohabiting couples increasing at a rapid pace, … [e]xpanding rights and protections on the basis of a status other than marriage is likely to have a number of positive effects.").

B. A NORMATIVE ACCOUNT: RPS ARE MORE ATTUNED TO THE VALUES OF MODERN COUPLES

Major normative shifts are affecting the relationship between modern families and family law. Processes of individualization, secularization, pluralism, and the increasing influence of egalitarianism are widely known to family law scholars and sociologists of the family.[1] These patterns are changing the way individuals experience intimacy and, in turn, affecting the way they approach the law. After a cursory primer of these trends, this section investigates whether marriage or registration is better suited to accommodate them. It concludes that registration schemes are more suitable because they are consistent with and the likely consequence of these shifts.

Processes of individualization are prominent in Western family law. One of the main individualism theorists, Anthony Giddens, has compellingly described the movement towards individualization in conceptions of family.[2] Pursuant to the trend, the family is increasingly seen as a sum of individuals. Not only do individuals therein retain their full legal capacity (without dispersing it into the familiar unit), but they also take center stage in the relationship, bringing their set of aspirations, utilitarian goals, and particular logic of personal blossoming.[3] Processes of pluralization in family law whereby a menu of regimes replaces the "monopoly" of marriage are also relevant. Such processes have been steadfast and have contributed to the pluralization of lifestyles. After the decriminalization of "fornication", cohabiting relationships became not only accepted but also legally visible; after the decriminalization of so-called sodomy laws, nonmarital regimes open to same-sex couples were introduced.[4]

Egalitarian, secularizing, and individualism-driven trends have irreversibly affected the law of the family. Rights discourse and its focus on the individual members (spouse, child, parent, etc.) as opposed to the family unit, which is not a rights-bearer, has also played an indisputable role in transforming the legal framework. As a consequence of these concomitant trends, the law's focus is no longer on the family

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1 *See, e.g.*, Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1508 (1992); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1226–28 (1998); ULRICH BECK & ELISABETH BECK-GERNSHEIM, INDIVIDUALIZATION: INSTITUTIONALIZED INDIVIDUALISM AND ITS SOCIAL AND POLITICAL CONSEQUENCES 88 (2002).

2 GIDDENS, *supra* note 112.

3 *Id.* at 58; *see also* BECK & BECK-GERNSHEIM, *supra* note 137, at 22; JOHN WITTE JR, FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 209 (1997) (describing marriage as "a terminal sexual contract designed for the gratification of the individual parties.").

4 William N. Eskridge, *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1884, 1927 (2012). *See also infra* Section III.D.

unit but on the individuals therein, who are seen as independent and separate from each other.

The trend has garnered criticism by scholars conceiving of the family as a unit of its own from which rights and obligations should flow.[1] Canadian scholar Jean-François Gaudreault- DesBiens, an exponent of this school of thought, maintained that the focus on rights and personal aspirations disintegrates families.[2] Utilitarian ideals, he argues, have rendered the family unit more precarious than ever. This precariousness is a consequence of the "trivialization" of the relationship's breakup, which is in turn a consequence of the decreasing influence of duties within families.[3] With contract, autonomy, and utilitarian ideals taking center stage in intimate arrangements, people's own aspirations become "the alpha and omega" of the relationship. In his view, these forces feed self-indulgent narcissism, best typified by the metaphorical utterance of modern couples, "I want the world and I get it now!"[4]

He more specifically refers to an attitude whereby couples resort to legal tools instrumentally to satisfy their demands. Instrumental attitudes are visible in these couples' seeking to promptly amend legal tools not suited to fully satisfy their needs (as if there were an à la carte menu from which to order the dishes of choice).[5] This phenomenon is described as a form of patronage-based conjugality ("*conjugalité clientéliste*").[6] To curb it, he proposes a more traditional model of marriage, one in which conjugality works as a key-in-the-ends or "turnkey contract."[7] This is a type of contract where the construction company executes the work in its entirety, with the customer "taking the key" and entering the house as it is.[8]

Gaudreault-DesBiens's attempt to curb individualism by opposing modern couples' instrumental attitudes towards law is noteworthy. His proposal, however,

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1 *See, e.g.*, Jean-François Gaudreault-DesBiens, *Le droit constitutionnel comme vecteur de transformation sociale : le cas de la conjugalité au Canada [Constitutional Law as a Vehicle of Social Change: The Case of Conjugality in Canada]*, *in* CONJUGALITÉS ET DISCRIMINATIONS [CONJUGALITIES AND DISCRIMINATIONS] (Alain Charles Van Gysel ed., 2012) (Fr.); Jean Carbonnier, *Cinquante années de transformation de la famille française (1917-1967) [Fifty years of Transformations of the French Family]*, L'ANNÉE SOCIOLOGIQUE [Année Socio.] (1967), reprinted in ÉCRITS 1908-2003 [WRITINGS OF 19082003] (2008) (Fr.).

2 Gaudreault-DesBiens, *supra* note 141, at 14-15.

3 *Id.* at 14-15.

4 *Id.* at 49.

5 *Id.* at 15.

6 *Id.* at 14.

7 *Id.* at 15.

8 *Id.* Gaudreault-DesBiens, *supra* note 141, at 15.

is not workable. Not only is it debatable that we could actually put an end to these monumental shifts in family law, but there is also a question as to why we would do so. For those committed to more egalitarian values and secular legal institutions, including me, the new framework merits accommodation. Given the premise that recent trends are not reversible and merit accommodation, the issue remains whether marriage or registration is the most appropriate vehicle to do so. There are reasons to believe that marriage does not pass muster. Marriage is met with disenchantment by a growing number of couples. The way in which modern couples articulate this disenchantment might explain why marriage is not the answer.

First, marriage as an institution has patriarchal roots and is not fully secularized.[1][2] Historically, the institution of marriage has been a site of oppression for women. Younger generations are increasingly aware of these issues due to growing exposure to gender studies in academia, media, and social networks. These studies have shown how women were absorbed into marriage. The common law doctrine of coverture posited that they had no legal personality after marriage. Their rights were subsumed under those of the husband, with the consequence that women could not own property, conclude contracts, sue, or even buy anything. Not only did women become legally obscured within marriage, but their subjectivity also became obscure. Only through marriage and child-rearing could they justify their station in life.[3]

Looking at post-revolutionary America, Lisa McIntyre noted a second overlooked consequence of the so-called "cult of domesticity": "the idea that society had a stake in the family."[4] Families did not exist for their own good. They were not overtly aimed at meeting the utilitarian goals of their members but those of society, as "[families] were the basis of civilization and our hope for the future."[5] Marriage still is a repository of social values and is charged with a multitude of social and personal expectations. It is a public good in many ways.[6] When examining the European context, for instance, one

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1 Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2004-05).

2 WILLIAM BLACKSTONE, COMMENTARIES *442. The doctrine posits that "[b]y marriage, the husband and wife are one person in law: that is, the very being or existence of a woman is suspended during marriage or at least is incorporated and consolidated into that of the husband."

3 NANCY COTT, THE BONDS OF WOMANHOOD: "WOMEN'S SPHERE" IN NEW ENGLAND, 1780-1835, 94 (1977). Exceptions whereby marriage started to also involve companionship and affection started to appear in the first half of the eighteenth century. However, they mostly concerned upper-class families and were soon obfuscated by a revival of conservativism. MERIN, *supra* note 39, at 23-24.

4 Lisa McIntyre, *Law and the Family in Historical Perspective: Issues and Antecedents*, in FAMILIES AND THE LAW 15 (Lisa McIntyre et al. eds., 1995).

5 *Id.* at 15.

6 Ethan J. Leib, *Hail Marriage and Farewell*, 84 FORDHAM L. REV. 41, 42 (2015).

notices that the vestiges of this glorious past are visible in a number of constitutions, where the traditional (marital) family is depicted as "the cornerstone of the preservation and the advancement of the Nation"[1] or even "the basis of the nation's survival."[2]

The patriarchal roots of marriage are much less visible today. They have been obfuscated by provisions sanctioning the legal equality of the spouses. Yet, they have not been fully eradicated. Scholars who critique marriage as a sexist institution have demonstrated for instance that wives live fewer years and are less healthy compared to their husbands.[3]

Further, marriage has yet to emerge as a full-fledged secular legal status. As argued by Elizabeth Scott, "[v]estiges of the religious origins of marriage continue to shape attitudes and inform the views of many marriage defenders, and cause concern for those who are committed to secular legal institutions."[4] By contrast, registration schemes are not seen as institutions with transcendent meaning but as a (mere) "construct of statute."[5] They are less loaded with the heavy expectations that society poured into marriage and are, as a "thoroughly modern, secular construction,"[6] more attuned to present-day conceptions of family.[7]

Based on this premise, first, some couples are ideologically opposed to marriage due to its historical vestiges as well as ongoing sexism embedded in it.[8] Second, other

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1 1975 Syntagma [Syn.] [Constitution] art. 21 (Greece). The English translation is available on the website of the Greek Parliament, https://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/ToPolitevma/Syntagma/ [https://perma.cc/F5ZF-TJMTBRC2-6T2U].

2 2011 Magyarország Alaptörvénye [The Fundamental Law of Hungary], Alaptörvény, art. L, 1 ch. "Foundations" (Hung.). The English translation is available on the website of constituteproject.org, https://www.constituteproject.org/constitution/Hungary_2011.pdf [https://perma.cc/488X-JX7M2Q8D-G4P9].

3 JESSIE BERNARD, THE FUTURE OF MARRIAGE 37 (1972).

4 Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 538 (2007).

5 *R v Bala and Others* [2016] EWCA Crim 560 [8] Eng. & Wales). However, it must be noted that that many couples mimic wedding ceremonies when registering, including symbols such as the wedding cake and the white dress, due to the gravitational pull of marriage's imaginary. *See, e.g.*, Emily Jupp, *Just civil partnered!*, BOUNDLESS, https://unbound.com/boundless/2019/12/31/just-civil-partnered/ [https://perma.cc/8TAH4EZ6].

6 Scott, *supra* note 159, at 551.

7 Culhane, *Civil Unions Reconsidered*, *supra* note 17, at 636; Greg Johnson, *Civil Union: A Reappraisal*, 30 VT. L. REV. 891, 905-906 (2006).

8 An ideological opposition to marriage seems to be a common reason for registering instead of marrying in states that opened registration regimes to opposite-sex couples, such as Illinois. *See* John Culhane, *No to Nuptials: Will opposite-sex civil unions spell the end of traditional marriage?*, SLATE (Jan. 3, 2012), [https://perma.cc/672Y-QGFJ]. The survey John Culhane refers to is available here: Cook Cty. Clerk,

couples might not like that marriage seems to be characterized by a certain rigidity relative to registration.[1] By way of example, registration regimes are oftentimes easier to dissolve. They can also carry fewer legal obligations compared to marriage. The enhanced flexibility of registration sits well with the observed attitude whereby couples instrumentally resort to legal tools to satisfy their demands. Rigidity runs contrary to modern utilitarian norms as it prevents people from injecting their own values into the law and contributing to the crafting of their legal regime.

This point regarding the "relative" rigidity of marriage, however, needs nuance. It unfolds differently along two variables: (i) the extent to which marriage lends itself to customization, and (ii) the content of registration schemes. As to the latter aspect, since it refers to a relative property, increased flexibility will depend on the extent to which the registration scheme differs from marriage. A law that resembles marriage in all respects except the name will not be more flexible.[2] As to marriage itself, it is undeniable that it is no longer the rigid institution we used to know. A fixed set of rights and obligations once accrued through marriage and the law only allowed a limited departure from its rigid legal framework. This is no longer the case in the U.S., as couples can opt out of marital rights and obligations and opt into new ones if they like.[3] The opportunities for departing from legal baselines have significantly increased, with a telling example being the enforceability of pre-nuptial and post-nuptial agreements.[4]

But private ordering is not unfettered: not everything can be contracted out. The common law has a long catalogue of nonnegotiable marital terms. The items of this catalogue are called "essentials" of marriage because they go to the substance ("essence") of what it means to be married.[5] U.S. courts have prevented parties from

Opposite-Sex Civil Unions: Motives for Not Marrying (2011) https://www.cookcountyclerkil.gov/sites/default/files/pdfs/Opposite%20Sex%20Civil%20 Union%20Report%20Final%2012.19.11.pdf [https://perma.cc/EDE9-YKKV].

1 Halley, *supra* note 82, at 39–44 (discussing certain civil unions that allow greater contractual freedom).

2 This is why, as we shall see *infra* in Section III.C, the European Court of Human Rights did not "buy" the argument that Austria's civil partnerships were too rigid compared to marriage.

3 *See* Eskridge, *supra* note 140.

4 Martha M Ertman, *Marital Contracting in the Post-Windsor World,* 42 FLA. ST. U. L. REV. 479 (2014).

5 *See generally* Anita Bernestein, *Toward More Parsimony and Transparency in "The Essentials of Marriage,"* 2011 MICH. ST. REV. 83 (2011); Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J. L. & FEM. 1 (2003).

altering during marriage matters as varied as sexual relations,[1] mutual financial support,[2] and domestic services.[3] Contracts casting marriage as temporary (and jeopardizing a commitment to marital permanence) were also declared void.[4] On a more general level, intimate agreements can encounter significant obstacles due to the fact that the state is still eager to police them based on public policy considerations.[5] These public policy considerations are grounded in a certain vision of appropriate marital roles, and limit the possibility for spouses to alter spousal duties. A new, carefully drafted registration regime might not encounter similar problems. To conclude, in many situations, marriage law can be less flexible than the law governing registration.

A third reason for which couples do not want to marry is the perception that marriage is too "committing."[6] Nicola Barker's notion of marriage "ideology" is useful in understanding this point.[7] By that term, she refers to the web of social understandings that are conjured up by the word marriage. These understandings possess some kind of "obvious, even universal" flavor, and especially include the commitment and stability associated with marriage.[8] This should explain why in wishing to express commitment, we might use the vernacular of marriage even without being married. As a consequence of marriage's ideology, some couples simply think that tying the knot is a form of excessive commitment. At the same time, the possibility of marriage at a later stage is not excluded. The Pew Research Center has demonstrated that unmarried persons, including partners in a nonmarital regime, might want to marry at some point and certainly do not rule out this possibility.[9]

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1 *See* Favrot v. Barnes, 332 So. 2d 873 (La. App. 1976), *cert. denied*, 431 U.S. 966 (1977) (refusing the enforcement of contracts concerning sexual relations between spouses).

2 The doctrine confines the duty of support during marriage to necessaries as applied to medical expenses. *See* Bernestein, *supra* note 168, at 100. Yet the duty of support has a second function: it conceptually justifies subsequent alimony obligations.

Id. at 100. *See also* Mani v. Mani, 869 A.2d 904, 908-910 (N.J. 2005).

3 *See* Borelli v. Brusseau, 12 Cal. Ct. App., 647, 649-650 (1993).

4 Bernestein, *supra* note 168, at 101.

5 Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 162–63 (2013).

6 MERIN, *supra* note 39, at 275 (reporting how same-sex couples choosing registration over marriage believe that the former is less "binding"); Culhane, *supra* note 163 (describing a report compiled by Cook county clerk's office, where some respondents argued that the reason for entering into the civil union was a problem with "commitment/labels").

7 BARKER, *supra* note 4, at 22.

8 *Id*. at 22.

9 D'Vera Cohn, *Love and Marriage*, PEW RES. CTR. (Feb. 13, 2013), http://www.pewsocialtrends.org/2013/02/13/love-and-marriage/. [https://perma.cc/7BHE9VU7].

Research on French Pacs and Belgian *cohabitation légale* confirms that these regimes are oftentimes steppingstones or trials before marriage.[1]

"Too committing" might also mean too financially committing. As explained by Ruth Gaffney-Rhys, a factor that might hold back couples from marrying is the cost of wedding ceremonies as well as "the enormity of the event."[2] So, couples want "something"—e.g., solving some basic administrative or financial issues, but not marriage which is too much.

Of course, these rationales to avoid marriage are often not easily discernable: they can overlap and intersect by creating a complex web of reasons (or perhaps instincts) backing the decision not to marry.[3] The analysis also helps understand why modern couples might be more interested in registration instead. This a consequence that does not necessarily flow from these couples' skepticism towards marriage. Couples could opt for mere contracts or to simply avoid any encounters with the law. Yet, registration, unlike contracts or legal invisibility, can indeed offer major benefits. The main benefit is the default regime that comes with it, which is useful to better address financial and administrative issues.[4] When registration confers status, it also offers higher certainty when moving across borders.[5] Further, compared to contracts, registration could confer a wider array of legal benefits, especially in the realm of public law. For instance, in the U.S., social security benefits or rights under the Family and Medical Leave Act, cannot be freely assigned through contracts.[6]

However, at present, the described link between modern families and registration has not been established in a clear and univocal manner. This gap has produced severe

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1 Cf. Terminal, *supra* note 35, at 160 (footnote omitted); *Le nombre de cohabitations légales et de cessations augmentent en 2019 [The number of legal cohabitations and dissolutions increases in 2019*], STATBEL (Oct. 22, 2020), https://statbel.fgov.be/fr/themes/population/partenariat/cohabitation-legale.

2 Gaffney-Rhys, *supra* note 17, at 190 ("The expectations placed on couples to hold an elaborate marriage ceremony and reception should not be underestimated … The enormity of the event can discourage the self-conscious from marrying, while the cost of the wedding will deter many more.").

3 *See, e.g.,* Owen Bowcott, *"How to get hitched as a feminist": mixed sex civil unions to begin*, THE GUARDIAN (Dec.1, 2019), https://www.theguardian.com/uknews/2019/dec/01/how-get-hitched-feminist-mixed-sex-civil-partnerships-beginengland-wales [https://perma.cc/KR7W-6SAB] (describing civil partnerships, i.e., the target of the UK equal civil partnerships campaign, as a "*simpler arrangement* without what they believe is the accumulated baggage of *arcane rituals*, *excessive expenditure* and a *history of patriarchal dominance*.") (emphasis added).

4 Palazzo, *supra* note 54, at 188-190.

5 *See supra* note 22 regarding scholarship arguing that more contractual regimes like Pacs should also be considered as status with a view to enhancing legal certainty when crossing borders.

6 Laura A. Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189, 231 (2007).

consequences, including the described automatic disestablishment of these laws after same-sex marriage. The next section offers guidance to activists and policymakers to reverse this course of action, by outlining the legal and philosophical reasons that support the introduction of gender-neutral registered partnerships.

III. THREE APPROACHES TO EXPANDING SAME-SEX RPS

To date, research has not ventured to systematize the distinct approaches to claiming equal access to registered partnerships. This might be due to the relative lack of litigation. Registration did not seem to be a major concern for American opposite-sex couples. In Europe, too, the issue has slipped beneath the radar until recently, when "heterosexuals" started bringing legal claims in both domestic and international courts to access these regimes. This section engages in a comparative analysis to investigate why opposite-sex couples have sought these laws and how they have articulated their motives.

Organizing their approaches has a two-fold utility. First, the work can assist policymakers and courts in grasping the new phenomenon. Ideally, courts should cease to consider similar claims as frivolous. Legislatures, on their part, will have tools to identify a social issue that has slipped under the radar and a new "constituency" whose demands warrant redress. Second, the work aims to assist modern families and LGBQT groups in teasing out their mobilization strategies. A case law analysis reveals multiple, overlapping motives behind past mobilization. Any attempt in systematizing these approaches as well as identifying their potential weaknesses is thus beneficial to them.

In greater detail, in my analysis, I identify three main approaches to expanding same-sex partnerships to all couples:

i. A status recognition approach, whereby opposite-sex partners point to the expressive harms of non-recognition (with status referring to social status).

ii. A utilitarian approach, based on which opposite-sex partners claim more flexibility in crafting their legal regime, a flexibility that only registration grants.

iii. A choice-based approach, under which adding options to the menu of relationship-recognition mechanisms is a value *per se*.

These approaches are not strictly legal, but theoretical and philosophical: the legal structure of the claim will hinge on the specific jurisdiction where the claim is pressed. Let me demonstrate this point by taking the example of the utilitarian approach. When the two partners are driven by utilitarian ideals, they believe that a certain registered partnership offers increased opportunities for them to tailor the law

to their needs. Implied in this way of thinking is a conviction that marriage cannot accommodate their needs. Claiming flexibility and a lighter regime in the courtroom would, however, bear resemblance to those policy arguments that courts dislike. The matter-that is the creation and modulation of different legal-regulatory family regimes-usually falls under the exclusive province of the legislature. As such, any court would flatly reject the claim. Thus, claimants must first ensure that there is a credible legal underpinning for their claim.

In Europe, the matter has been couched in terms of discrimination. The heterosexual couple in *Ratzenböck and Seydl v Austria*-a case decided by the European Court of Human Rights (ECtHR) which I discuss below-wished to access civil partnerships.[1] At the time, Austrian civil partnerships offered more opportunities for customization as well as shorter statutory limits to dissolve the union compared to marriage.[2] By pointing out these two aspects, the opposite-sex couple advanced a typical utilitarian argument. But they framed it in terms of discrimination based on sexual orientation, an option that was available since same-sex couples had access to this "better law."[3]

Despite the claim being eventually dismissed, the decision of the litigants to frame the issue as one involving discrimination was doctrinally sound. Both European supranational courts- the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU)-display a penchant for accepting equality-based lines of arguments.[4] This also explains why, in Europe, all three approaches appear under the guise of equality claims. For instance, before the ECtHR, this involves invoking a violation of the following Articles of the European Convention of Human Rights (ECHR or the

Convention): Article 8 (right to respect for one's family life) and Article 14 (banning discrimination).[5] This is to say that one thing is the legal structure of the claim—that is contingent on the jurisdiction at stake, quite another is the theoretical and philosophical justification behind mobilization. After sketching out the U.S. case law in the field, the article turns its attention to Europe to identify these approaches.

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1 Ratzenböck and Seydl v. Austria, App. No. 28475/12 (Oct. 26, 2017), http://hudoc.echr.coe.int/eng?i=001-177916 [https://perma.cc/4DVH-88CG].

2 *See infra* note 275 and accompanying text.

3 *See generally infra* Section III.B.

4 PALAZZO, *supra* note 14, at 146.

5 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 8 and 14 [ECHR].

A. THE LESS DEVELOPED U.S. CASE LAW

There are very few cases brought by American heterosexual couples. Some of them submitted constitutional arguments,[1] while others pressed statutory ones under antidiscrimination codes.[2]

In *Irizarry*, litigants pressed both equality- and liberty-based lines of arguments under the Constitution. The *Irizarry* case had been filed in Illinois by an unmarried heterosexual couple who could not legally enter into a domestic partnership but neither wanted to marry. The couple challenged the policy of the Chicago Board of Education that at the time only recognized "domestic partners" of the same sex and opposite-sex *spouses* for purposes of conferring health benefits to employees' partners.[3] However, the Court did not buy either argument. The liberty-based argument was bizarrely framed and thus quickly rejected.[4] As to the equal protection strand of their argument, the Court concluded that heterosexual couples merely trigger the most deferential scrutiny, reasoning that [o]nly when the plaintiff in an equal protection case is complaining of a form of *discrimination that is suspect because historically it was irrational or invidious* is there a heavier burden of justifying a difference in treatment than merely showing that it is rational (citations omitted). *Heterosexuals cohabiting outside of marriage are not such a class.* There is a history of disapproval of (nonmarital) cohabitation, and some states still criminalize it (citations omitted). But the disapproval is not necessarily irrational or invidious (citation omitted), given the benefits of marriage discussed earlier.[5] (emphasis added)

According to the Court, while it is true that disapproval of "heterosexuals cohabiting outside of marriage" still exists, it is not necessarily irrational. The Court indeed embarked on a lengthy description of the reasons for which nudging heterosexual couples into marriage is an acceptable state interest, along with the interest in avoiding the increase in expenditures that an expansion of the definition

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1 *See* Irizarry v. Bd. of Educ. of Chi., 251 F.3d 604, 611 (7th Cir. 2001). On which see generally Nancy D. Polikoff, *"Two Parts of the Landscape of Family in America": Maintaining Both Spousal and Domestic Partner Employee Benefits for Both Same-Sex and Different-Sex Couples*, 81 FORDHAM L. REV. 735 (2012).

2 *See* Putnam/N. Westchester Bd. of Coop. Educ. Servs. v. Westchester Cnty. Human Rights Comm'n, 917 N.Y.S.2d 635, 637 (App. Div. 2011) (upholding a school board's decision to only recognize same-sex registered domestic partners for purposes of health care benefits and exclude opposite-sex registered domestic partners by applying a human rights law prohibiting discrimination based on marital status and sexual orientation).

3 The parties contended that the Board's violation of local law (prohibiting marital status discrimination) constituted *per se* a form of deprivation of property (the legal benefit they sought). *Irizarry*, 251 F.3d at 606.

4 *Id.* at 6106111.

5 *Id*. at 610.

of domestic partners entails.[1] It is not clear whether the case engaged the expressive harms of non-recognition, the desire for a more suitable legal framework or the value of choice. The motives of the parties are insufficiently articulated.

What is, by contrast, clear is the reduced traction of equality-based lines of argument more generally, unlike in the European context. The idea of minority that the American constitution protects judicially from discrimination might *inter alia* explain why. This idea is embedded in the famous footnote four of *Carolene Products*.[2] The footnote refers to minorities that lack power or numbers to seek redress for their grievances through the political process—which the Supreme Court dubbed "discrete and insular minorities."[3] Only in the 70s did the Court start delineating the concept, by speaking of groups "saddled with […] disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[4]

One could hardly make a case that heterosexual couples are such a minority under the current constitutional doctrine. U.S. claimants might thus wish to explore alternative routes. Can, for instance, a liberty-based line of argument offer legal "shape" to their motives?[5] The answer is mixed and depends on the factual circumstances. I shall make a distinction between a situation where claimants wish to access same-sex partnerships from a situation where claimants seek to resist the forcible termination of the registered partnership (following the introduction of same-sex marriage).

In both cases, there is an opportunity to invoke a right to privacy under the substantive due process clause of the Fourteenth Amendment, as same-sex couples have in *Obergefell*.[6] The clause safeguards the most fundamental liberties of all

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1 *Id*. at 607-609.

2 United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938). This decision inspired the influential political process theory informing judicial review of Ely. The theory mandates that courts can substantively review political decisions affecting due process liberties or the equal protection of the law only if the political process does not work normally. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). *See generally* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991). For a critique of the theory see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) and Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

3 *Id*.

4 Saint Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

5 The parties in *Irizarry* attempted to make one but it was bizarrely framed and hence soon rejected. Therefore, the rejection does not testify to the likelihood of success of liberty-based arguments.

6 *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

individuals. It protects liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[1] It could hence be argued, along the lines of what same-sex couples stated in *Obergefell*, that access to these laws on a gender-neutral basis pertains to such fundamental liberties. However, seeking the expansion of same-sex legal partnerships through the due process clause, in my view, would be a doctrinally weak claim.[2] This claim would conjure up the sort of affirmative duties on the part of the state that judges are reluctant to uphold as a matter of constitutional law.[3] *Obergefell* is an exception in this regard.[4] Yet, it is an exception not amenable to analogization, because it involves the most cherished and historically relevant institution, marriage.[5] By contrast, new institutions such as civil unions and domestic partnerships will not attract the same due process protection as marriage, precisely because they are "new."[6] Therefore, an opposite-sex couple in Oregon, i.e., the only jurisdiction which has not yet "fully" repealed its same-sex partnership, could hardly invoke this liberty to expand the regime to opposite-sex couples.[7] This would result in claiming affirmative obligations on the part of the state that courts tend to reject.

By contrast, resisting the conversion of registered unions one has already entered into has a more solid doctrinal basis. In his article *The Right not to Marry*, Kaiponanea Matsumura offers reasons as to why the forcible conversion of such partnerships is potentially unconstitutional. He argues that after the Supreme Court decision in *Obergefell* there is at least *some* corollary right to not marry.[8] In this sense, he carves out from constitutional doctrine a negative right to "be free from state-imposed marriage."[9] This argument is an important resource for couples who are already in a registration regime and wish to prevent its automatic conversion. Take the example of opposite-sex couples in Illinois, Hawaii, and Colorado that have registered a civil union. Should the state decide to transform these unions into marriages they could

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1 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

2 PALAZZO, *supra* note 14, at 61–63.

3 *See, e.g.*, David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864-866 (1986).

4 PALAZZO, *supra* note 14, at 61–63.

5 The decision of the Supreme Court is replete with passages underlying the transcendent nature of the institution. *See* Obergefell v. Hodges, 576 U.S. 681 (2015).

6 PALAZZO, *supra* note 14, at 63.

7 I use the term "fully" since other jurisdictions have barred new entrants from entering into civil unions, but existing civil unions are still in force. Therefore, a claim aimed at enlarging the partnerships to all couples might still be pressed. *See, e.g.*, WIS. STAT. ANN. § 770.07 (West); VT. STAT. ANN. tit. 15, § 1206.

8 Matsumura, *supra* note 7, at 1512.

9 *Id*. at 1513.

brandish the due process sword to claim their negative liberty to remain registered.[1] Yet, except for this specific circumstance, constitutional law hardly offers an aegis to registration. It is, for instance, unclear where the phasing out or flat-out repeal of the regime *without* forcible conversion would attract any constitutional protection.

In the next subsections, I look at the European context, where the motives that drive opposite-sex couples' mobilization surface more clearly.

B. STATUS RECOGNITION APPROACH

I shall call the first approach a "status recognition approach," with status referring to social status, not family status. A status recognition approach seeks to counter the expressive harms of non-recognition. On this point, it is useful to recall Nancy Fraser's dualist perspective, according to which cultural and economic injustices can be dealt with separately.[2] In her view, recognition addresses those cultural or expressive harms that a social group seeking to have its collective identity recognized suffers from.[3] Redistribution, by contrast, addresses economic injustice or "disadvantage." Status recognition hence refers to the struggle taking place whenever a social group seeks to have its collective identity acknowledged by society.

I shall now apply this notion to the situation of opposite-sex couples seeking access to registration. When adopting a status recognition approach, heterosexual couples essentially argue that they feel diminished by a state decision to deny heterosexuals access to a legal regime to which they attach value: registration. Think of a young couple in a progressive urban center. This couple might hold fast to more egalitarian conceptions of intimacy and feel offended by marriage's history of exclusion of women. By denying access to the modern and secular institution of domestic partnerships, for instance, and forcing the partners to gain the protection of the law only through marriage, the state is inflicting expressive harms.[4] Interestingly, in such a case, expressive harms are also indirectly inflicted upon same-sex couples. As noted in the context of the enactment of Dutch civil partnerships, "to open up the registered partnership to opposite sex couples would emphasize the equal value of same-sex partnerships."[5]

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1 OR. Stat. ANN. § 106.310.

2 NANCY FRASER AND AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 7-9 (2003). In Fraser and Honneth's view, the market can influence yet not determine the social status of individuals. In this sense,

3 FRASER & HONNETH, *supra* note 216.

4 Cf. Swennen & Eggermont, *supra* note 120, at 27.

5 *Id*. at 27 (footnotes omitted).

Since the gist of the argument is that the state must acknowledge these couples' personal beliefs, an alternative tag could have been "ideological approach". However, since I holistically refer to both the parties' and court's approach, it would be odd to refer to a court's ideological approach. An additional reason is that UK campaigners disliked and rejected the label "ideological."[1]

The main example of a lawsuit embracing a status recognition approach can be found in the UK. Reference is made to they contend that the oppression of women, for instance, cannot be understood through the lenses of a logic of class. *See also* Estelle Ferrarese, *Nancy Fraser and the Theory of Participatory Parity*, BOOKS & IDEAS 9 (Sept. 14, 2015) (book review).

Steinfeld,[2] the lawsuit that led to the extension of civil partnerships to all couples.[3]

The procedural posture of the case is peculiar. More than one approach emerged as the case went up from the High Court (the court of first instance) to the Supreme Court (the apex court). Whereas the UK Supreme Court placed more emphasis on choice,[4] the applicants' ideological opposition to marriage played a more substantial role in litigation before lower courts.[5] In the original complaint and decisions of the High Court and Court of Appeal, emphasis was placed upon the discrimination suffered by heterosexual couples ideologically opposed to marriage.[6] The High Court, despite rejecting the claim, engaged at length with the issue of whether exclusion from civil partnerships constituted a form of "humiliation, derogatory treatment or any other lack of respect for their private lives."[7]

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1 E-mail from Andy Hayward, Assoc. Prof. Durham L. School, to author (Sun., Jul. 11, 9:34 PM IDT) (on file with author). [please see attached file, comment by Hayward at page 42].

2 R (Steinfeld and Keidan) v. Secretary of State for International Development [2018] UKSC 32 (UK) [Steinfeld].

3 Following the Supreme Court's declaration of incompatibility, Parliament enlarged civil partnerships in England and Wales from December 31, 2019, through the Civil Partnership (Opposite Sex Couples) Regulations 2019. In Scotland, the Civil Partnership (Scotland) Bill introduced them starting from July 28, 2020, and, in Northern Ireland, the Northern Ireland (Executive Formation etc.) Act 2019 made them available from January 13, 2020.

4 *Steinfeld*, *supra* note 221.

5 *See, e.g.*, the High Court judgment in Steinfeld and Keidan v. The Secretary of State for Education [2016] EWHC 128 (Admin) [*Steinfeld and Keidan*].

6 *See infra* notes 228–43 and accompanying text.

7 Steinfeld and Keidan, *supra* note 226, ¶ 38. The Court eventually answered in the negative to the question whether an exclusion from civil partnerships constituted a form of "humiliation, derogatory treatment or any other lack of respect for their private lives."

Before the Court of Appeal, the parties' desire to access civil partnerships was justified on the ground that such a regime "would reflect their values and give due recognition to the equal nature of their relationship."[1] Unlike marriage, the parties argued, the civil partnership law reflects more egalitarian conceptions of family. They hence wished that their child could grow up in an environment where the relationship was "one of total equality reflecting the equal independent contribution which both parties make."[2]

The Court of Appeal's decision then proceeded to quote various witness statements from same-sex couples in a civil partnership "confirming" the more egalitarian and secularized nature of these unions. A first witness stressed that "the term "civil partnership" reflects the pragmatism, respect, loyalty, friendship and teamwork that is at the core of our relationship, added to which the secular, un-solemnised process of forming a civil partnership suits us perfectly."[3] A second witness, a lesbian partner in a thirty-five-year-long relationship, started by clearly articulating her objection to marriage.[221] She then pointed to the injustice associated with leaving out of protection all those "young cohabitees with children" that potentially were in the same situation as hers.[4] Here, there are several signposts of a status recognition approach. First are continuous references to the values to which the heterosexual applicants hold firm; second is the sense of diminishment and denial of equal social status that ensues from their inability to access civil partnerships.

The Court of Appeal went along with the arguments submitted by the applicants and ruled in their favor. The centrality of the status recognition approach surfaces from a number of passages. Emblematic is Lady Justice Arden's analogization with the *Oliari* decision for purposes of determining if the right to respect for family life under Article 8 ECHR applied.[5]

Oliari is a landmark precedent of the ECtHR, where the Court held that same-sex couples in Italy have a right to a "specific legal framework" (meaning a right to at least a form of recognized partnership).[6] Yet, until recently, it was unclear whether a

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1 Steinfeld and Keidan v. Secretary of State for Education [2017] EWCA Civ 81, 5 [*Steinfeld EWCA*].

2 *Id*. at 5.

3 *Id*. at 5. [221] *Id* at 6.

4 *Id.*

5 *Id.* at 45 (citing Oliari and others v. Italy, Appl. nos. 18766/11 & 36030/11 (July 21, 2015), https://perma.cc/B9DX-G5WL [*Oliari*]. It is to be noted that, in *Oliari*, samesex couples lacked access to any legal regime, while in *Steinfeld*, opposite-sex couples could marry. However, in Arden LJ's view, the availability of marriage to opposite-sex couples was not sufficient to rule out the analogy. *Id*. at 127, 35-44.

6 *Oliari*, *supra* note 235, at 185 ("the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.").

full-fledged right to same-sex registered partnerships existed under the ECHR: when issuing *Oliari*, the ECtHR placed much emphasis on the "special" circumstances of Italy.[1] The existence of a similar right has now been confirmed by a recent decision issued against Russia, where the European Court reaffirmed the right to legalized unions (through, at minimum, registration).[2] Zooming out, we can notice that: (i) the ECHR context is very unique, and this new right to registration is the likely consequence of the reluctance of the Court to carve out a (more problematic) right to same-sex marriage, due to the lack of consensus amongst Contracting Parties, and (ii) despite the unique circumstances leading to the emergence of a right to registration, this is an important legal precedent that could be invoked by domestic courts in Europe and outside of Europe to buttress the existence of a similar right.

The UK Court of Appeal is an additional resource for arguing as much. The ECtHR has only upheld a right to registration for same-sex couples. The UK Court of Appeal, by contrast, upheld such a right for opposite-sex couples as well. Its decision thereby demonstrates the applicability of these legal precedents of the ECtHR in the context of heterosexual couples' mobilization. In greater detail, in Lady Justice Arden's decision, the analogy with *Oliari* is followed through by placing emphasis on the invidiousness of any difference in treatment between same- and opposite-sex couples.[3] In her view, the applicability of *Oliari* entails that the state has a positive obligation to "respect" the private and family life of every person, with civil partnerships being a "modality" through which the obligation can be fulfilled. Arden LJ went on to emphasize the significance of legal recognition *per se* as well as of the rights flowing therefrom. As with *Oliari,* these two aspects were considered key "facets of an individual's existence and identity."[4] She then pointed, more specifically, to the significance of civil partnerships, by mentioning the "intrinsic value" that civil partnerships had for cohabiting same-sex partners, as attested by the jurisprudence of the ECtHR.[5]

When assessing the proportionality of the government's choice to exclude heterosexuals from the purview of the law, Arden LJ found a lack of proportionality. In so doing, she further stressed that the objection that heterosexuals can marry has no traction: a potential infringement of the right to access civil partnerships can

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1 *See infra* note 321 and accompanying text.

2 Fedotova and others v. Russia, Appl. Nos. 40792/10 and two others July 13, 2021, [https://perma.cc/7ZMN-9KUC].

3 *Steinfeld EWCA*, *supra* note 229, at 37.

4 *Id*. at 62, citing *Oliari*, *supra* note 235, at 177.

5 *Id*. citing *Oliari*, *supra* note 235, at 174.

occur regardless of whether the partners can already marry.[1] This passage is another important resource to reject arguments to the effect that heterosexual couples can already marry.

Ultimately, Lady Justice Arden addressed the objection that marriage and civil partnerships had the same material scope.

The objection boiled down to arguing that the parties were complaining about a petty problem of "labels." She firmly rejected this argument, stating that "[i]f the name of an institution for recognition of their relationship is treated by Parliament as significant for same-sex couples [marriage], the name of another institution for that purpose may have significance for other couples too."[2] This part of the judgment is significant given that the objection that these couples are spoiled, or worst pedantic persons wrestling with problems of labels is recurring.[3]

1. Potential Limits of the Approach

A status-based approach has some advantages but also disadvantages to be aware of when contemplating to employ it. The clearest advantage is that pointing out expressive harms is an effective legal strategy. There is nothing more odious than stripping a social group of its dignity or equal status in society. The case of same-sex couples is emblematic in this regard. In the Euro-American context, LGBTQ couples adopted a litigation strategy that focused on the symbolic and cultural harms of nonrecognition of their intimate relationships. This strategy partly moved other problems to the background, such as lack of access to financial resources (redistributive harms), that remains a severe problem within the LGBTQ community,[4] although it was largely understandable.

The heightened traction that this line of argument has weighs in favor of employing a status-based approach. Even so, heterosexuals have yet to demonstrate that they can fruitfully invoke the approach. Cultural and expressive harms are especially

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1 *Id*. at 127, 35–44.

2 *Id*. at 45.

3 E-mail from Andy Hayward, Assoc. Prof. Durham L. School, to author (Sun., Jul. 11, 9:34 PM IDT) (on file with author). *See also* David Mitchell, Heterosexual civil partnerships are for better, not worse, THE GUARDIAN (July 1, 2018), https://www.theguardian.com/commentisfree/2018/jul/01/heterosexual-civilpartnerships-david-mitchell-comment [permalink] ("my instinctive reaction was that it was a waste of time. It seemed like a pedantic point on which to insist on equality - like a lacklustre attempt at a sequel to the triumph for civilisation of equal marriage").

4 LIBBY ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM (2018).

visible when they affect the "powerless, excluded and disadvantaged."[1] It seems that, in the end, protecting historically disadvantaged groups is the *reason d'être* of antidiscrimination laws. There is indeed a sense that whenever traditionally privileged groups are able to invoke the protection of the equality guarantee, this is an anomaly. Martha Fineman puts it succinctly by arguing that "incidental" inclusion within a prohibited ground of discrimination—e.g., "I am a privileged man, but I can still avail myself of the ground of sex to challenge a certain law"—lends itself to exploitation by persons that are not being discriminated: it potentially allows everyone to claim equality and "excel, even triumph in a "white men's world.""[2]

A critical distinction bears on this issue: the distinction between symmetry and asymmetry in discrimination law. It concerns whether discrimination laws should only protect marginalized identities under a certain umbrella (e.g., gay and lesbian persons within "sexual orientation") or all identities under it.[3] The first category refers to asymmetrical systems, while the second to symmetrical ones. The design choice of which social groups we wish to shield from discrimination is salient.[4] It touches at the heart of what it means to have an antidiscrimination system in place, and what kind of discrimination as a society we want to eradicate. For instance, asymmetrical anti-discrimination laws only protect a sub-group falling under the relevant category. The sub-groups are typically identified based on social disadvantage. They include "[r] acial and ethnic minorities, women, the elderly, and the disabled" as "groups that have been viewed to have been burdened in the distribution of societal costs and benefits."[5]

Antidiscrimination laws, including constitutional equality guarantees, are usually symmetrical.[6] Yet, differences may exist depending on the ground. Disability is a typical example where we almost reflexively assume that the law should only protect the sub-

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1 Women's Legal Education and Action Fund (LEAF), Intervener factum, in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, 23-24, 33.

2 Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 16 (2008).

3 *See generally* SANDRA FREDMAN, DISCRIMINATION LAW 104-105, ch. 5 (2011).

4 The debate on symmetry is vivid, although most of the literature focuses on grounds separately. *See, e.g.*, Cary Franklin, *The Antistereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 101 (2010) (sex); Samuel R. Bagenstos, *Subordination, Stigma, and "Disability",* 86 VA. L. REV. 397 (2000) (disability); *but see* Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69 (2017) (attempting to provide a comprehensive analysis around symmetry in antidiscrimination law).

5 Schoenbaum, *supra* note 249, at 78.

6 For instance, when Title VII of the Civil Rights Act of 1964 bans employment discrimination based on sex, both men and women can invoke its protection. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, & 42 U.S.C.).

group "people with disability."[1] Age discrimination is a more borderline example, with some jurisdictions designing laws symmetrically and others asymmetrically.[2] The ground of sexual orientation is usually a symmetrical one.

Even when a symmetrical ground of sexual orientation is adopted, however, there are reasons militating against heterosexual couples invoking discrimination. These reasons pertain to the (instinct-based) refusal to allow traditionally privileged groups to invoke the protection of the equality guarantee. The idea that we would allow heterosexuals to "excel, even triumph in a "[…heterosexuals'] world'" seems unpalatable. In the end, we still live in a world where discrimination towards LGBTQ people is pervasive, and structures of power systematically deny them equal citizenship.

This explains why the litigants in *Steinfeld* placed emphasis on another "facet" of their identity: their genuine objection to marriage. Legally, this stance still entails invoking sexual orientation discrimination for opposite-sex couples.[3] But the denounced cultural harms derive more specifically from a state failure to recognize that some couples might hold genuine convictions against marriage.[4] Couples who hold similar beliefs do not wish to endorse the institution by marrying, and yet marriage for them is the only legal option.

Absent this emphasis on the ideological objections to marriage, opposite-sex couples will have a hard time persuading the court. An illustration of this reluctance is a decision in 2011 of the Constitutional Court of Austria.[5] In rejecting the claim that the two heterosexual partners Ms. Ratzenböck and Mr. Seydl should be able to access Austrian civil partnerships, the Constitutional Court offered a potpourri of laconic reasons. These reasons were so short (less than a line each) that the main takeaway was that the Court

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1 The Americans with Disabilities Act (ADA) states the *prohibition* of interpreting the law in a symmetrical way. *See* 42 U.S.C. § 12201(g).

2 The Age Discrimination in Employment Act (ADEA) shields from discrimination employees above the age of forty, and only if any such worker is disfavored as compared with younger workers. *See* 29 U.S.C. §§ 621-34.

3 A separate issue—which lies outside the scope of this paper—regards whether a legal system would accept this narrow sub-category "heterosexuals which object to marriage" as a distinct ground of discrimination. In the US, the answer is likely no. The category which comes closer to this sub-category is that of conscientious objectors, a group which the Supreme Court has refused to recognize as a constitutionally protected "discrete and insular minority." Johnson v. Robison, 415 U.S. 361 (1974). In the case of conscientious objectors, the Court found, the mentioned "traditional indicia of suspectedness" were not present. *Id*. at 375 n.14.

4 *See supra* Section II.B.

5 Verfassungsgerichtshof [VfGH] [Constitutional Court], Sept. 22, 2011, B1405/10, ERKENNTNISSE UND BESCHLÜSSE DES VERFASSUNGSGERICHTSHOFES [VFSLG] No. 19492/2011 (Austria).

barely felt compelled to articulate them in the first place. Amongst them was the contention that heterosexual couples are not a historically discriminated group.[1] The litigation before the ECtHR, which will be examined below as emblematic of a utilitarian approach to the expansion of registered partnerships, originated from this case.[2]

C. UTILITARIAN APPROACH

A second approach is the utilitarian approach. It posits that opposite-sex partners must gain access to a registered partnership because they have a (legally relevant) need for a more flexible and "lighter" regime compared to marriage, meaning a regime with less obligations and rights. The philosophy behind their mobilization is that they should be able to better tailor the applicable legal regime to their aspirations. They might, for instance, desire to dissolve the relationship without the lengthy and cumbersome procedures set forth for marital couples.[3] They might want to enjoy broader freedom to contract out of specific obligations or opt into others that better align with their view of intimacy.[4] Ultimately, they might want to enjoy the more favorable tax regime of partnerships.[5] This approach uses the label "utilitarian" as it is ultimately grounded in ideals of self-fulfillment.[6]

The ECtHR's case *Ratzenböck and Seydl v. Austria* instantiates this approach.[7] This was the first case in which the Court was faced with a question of discrimination in accessing a legal-regulatory family regime from the viewpoint of opposite-sex couples. All applications had been lodged by samesex couples, who still suffered from

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1 *Id.* at III.1.6.

2 *See infra* Section III.C.

3 Registered partnerships tend to have less cumbersome procedures for their dissolution. They can sometimes be terminated by unilateral decision of which is given notice to the other party, as in the case of Hawaii's Reciprocal Beneficiary Law (HAW. REV. STAT. ANN. § 572C-7 (West 2012)) and Italian civil unions (Legge n. 76 del 2016 [Act no. 76 of 2016] art. 1, par. 24). When separation is consensual, they usually do not require a judicial intervention, as it is the case with Dutch Registered Partnerships. Sumner, *supra* note 56, at 148.

4 *See supra* Section II.B.

5 *See* Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1547, 1559 (2008) (reporting substantially lower income tax liability at the federal level for same-sex marriages, civil unions, and domestic partnerships). While Seto's analysis was conducted prior to 2008, fiscal advantages at the federal level and, in certain cases, state level continue to exist. E-mail from Theodore P. Seto, Chair & Prof. L. Loyola L. School, to author (Sat., Oct. 30, 9:38 PM CEST) (on file with author).

6 On the growing significance of customization regarding one's the legal regime see Eskridge, *supra* note 140, at 1886.

7 *Ratzenböck*, *supra* note 185.

pervasive discrimination in the member states of the Council of Europe. The case was brought by two unmarried heterosexuals with Austrian citizenship, Ms. Ratzenböck and Mr. Seydl, who sought to register in a civil partnership, the so-called Eingetragene Partnerschaft.[1] Yet, the regime was only open to same-sex couples, as it had been introduced in 2010 to specifically tackle the problem of gay and lesbian couples' legal invisibility.[2] Before the ECtHR, the two heterosexual applicants argued discrimination based on sexual orientation (under Articles 8 and 14 ECHR).[3]

The historic posture of the case illustrates the motives driving.

Ms. Ratzenböck and Mr. Seydl. Before the domestic administrative court and then Constitutional Court, the partners argued that marriage "was not a suitable option for them, as it was substantially different from a civil partnership."[4] Unlike marriage, "a registered partnership was in many ways more modern and "lighter" than marriage."[5] When Austria's law on civil partnerships was enacted in 2010, civil partnerships substantially differed from marriage in terms of their content.[6] Before domestic courts, the two applicants thus had an opportunity to point out the many ways in which civil partnerships were better suited to their circumstances. Since its enactment, the regime, however, underwent continuous innovations. In particular, the legislature closed the gap between marriage and civil partnerships in the area of parenting.[7] When the case reached the ECtHR, the differences between the two regimes were no longer sizeable.[8]

Nonetheless, civil partnerships remained slightly more flexible, compared to marriage.[9]

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1 Eingetragene Partnerschaft-Gesetz [EPG] [Registered Partnership Act], entered into force on 1 January 2010, Bundesgesetzblatt (Federal Law Gazette) I no. 135/2009 (Austria).

2 VfGH, Dec. 4, 2017, G 258/2017, VFSLG No. 20225/2017. A summary of the decision in English is available here: [https://perma.cc/RY9C-XTJC].

3 *Ratzenböck*, *supra* note 185, at 3.

4 *Id.* at 9.

5 *Id*.

6 At the time, the regime had a shorter statutory time-limit for dissolution, distinct alimony payment obligations, distinct rules concerning trust, fidelity duties and contributions to the household, and ultimately distinct consequences upon the death of one of the two parties. *Id.* at 9.

7 In the span of a few years, it granted same-sex couples adoption rights (Adoptionsrechts-Änderungsgesetz 2013 (Adoption Law Amendment Act 2013), Federal Law Gazette I no. 179/2013), access to artificial insemination (VfGH, Dec. 10, 2013, G 16/2013 and others, VFSLG No. 19824/2013), and access to the stepchild adoption (VfGH, Dec. 11, 2014, G 119/2014 and others, VFSLG No. 19942/2014), cited in Ratzenböck, *supra* note 185, at 16.

8 *Ratzenböck*, *supra* note 185, at 5.

9 The first difference was that spouses could not contract in or out of the different regimes concerning the time-limits for divorce and dissolution (which remained less lengthy and burdensome for civil partners). *Id*.at 16. The second difference concerned post-mortem legal consequences of the declaration of death of one of the spouses or partners were different. *Id*.

Before the ECtHR, Ms. Ratzenböck and Mr. Seydl continued to argue, as they had in domestic courts, that they wished to access civil partnerships because "marriage was not a suitable alternative for them."[1] In its legal analysis, the ECtHR first concedes that opposite-sex couples are "in principle" in a comparable position to same-sex couples as far as their need for legal recognition is concerned.[2] Yet, the Court also moves on to argue that the claim must be assessed against the backdrop of the actual legal framework governing the relationship of the applicants.[3] In conducting this assessment, the Court concluded that the parties are not in a comparable or relevantly similar situation to same-sex couples: while LGBTQ couples *need* a registered partnership because they are ineligible to marry, heterosexuals can access marriage.[4] The reasoning of the Court is relatively simple: there is no need for legal recognition because Ms. Ratzenböck and Mr. Seydl can marry, and this prerogative is sufficient to rule out a violation of the Convention.

A second ground for rejecting their application concerns the parties' duty to demonstrate that they have been personally affected by a differential treatment under marriage law—what the Court calls a "more specific need" for their legal recognition.[5] The Court found that, based on their complaint, the applicants failed to demonstrate so.[6] For instance, they did not argue that they were penalized because of the different statutory periods for dissolving marriage.[7]

However, this passage is at best circular. The applicants were two unmarried cohabiting partners, who (predictably) had their request to access civil partnerships rejected by domestic authorities. Thus, they could not possibly invoke any specific legal provision affecting them personally in a way that would satisfy the Court's requirement to qualify as "personally affected." This is a peculiar catch-22 situation: Either the parties sacrifice their personal interests and get married to meet the condition or they indulge their convictions by remaining unmarried without, however, meeting the condition.

The ECtHR ends its judgment here without moving to the proportionality stage. The heterosexual couple is not in a relevantly similar or comparable situation with same-sex couples.[8] Yet, if the Court moved forward to an assessment of the

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1 *Id*. at 17.

2 *Id*. at 34, 35, 39.

3 *Id*. at 40.

4 *Ratzenböck*, *supra* note 185, at 40.

5 *Id*. at 41.

6 *Id*. at 41.

7 *Id*. at 41.

8 *Id*. at 42.

proportionality of the measure, chances are high that it would have also rejected the claim. The ECtHR usually grants a certain margin of appreciation—meaning discretion whose exercise is policed by the Court—to Contracting Parties when they make substantive policy decisions.[1] The breadth of the discretion the states enjoy will hinge on several factors. One of the main factors is a consensus of the member states around a certain issue. If a consensus is traceable, their discretion shrinks.[2] At present, consensus around the expansion of registered partnerships to heterosexuals is still relatively weak. At the time the judgment was handed the states with similar laws in force were Belgium, France, the Netherlands, Luxemburg, Greece.[3] More recently, Malta introduced genderneutral partnerships in 2014, Cyprus in 2015, and Estonia in 2016. While the group of states enlarging their registered partnerships to all couples is growing, we might not yet be able to speak of a clear European consensus around the issue.[4] Hence, the Contracting Parties will continue to enjoy a broad discretion on the decision whether to open up their registered partnerships to all couples.[5]

1. Potential Limits of the Approach

Utilitarian norms nowadays play an influential role in family regulation. This is especially true in the U.S. The whole fabric of American family law has been changed so as to allow the parties themselves to shape their legal-regulatory regime.[6] Several scholars have observed the "contraction" of family law to make way for people's own legal choices.[7] In this sense, this approach ties nicely with one of the most powerful

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1 *See generally* KANSTANTSIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS (2015).

2 *Id.*

3 *Ratzenböck*, *supra* note 185, at 26.

4 At present, a consensus on the need to extend RPs to heterosexuals is at best "emerging," but not yet consolidated. On the notion of emerging consensus see Shai Dothan, *Judicial Deference Allows European Consensus to Emerge*, 18 CHI. J. INT'L L. 393, 399 (2018).

5 In addition to the lack of consensus, decisions involving economic and social policy, as the ones at issue, warrant the broadest margin of appreciation unless ""manifestly without reasonable foundation." *See, e.g.*, James v. United Kingdom, App. No. 8795/79, 8 Eur. H.R. Rep. 123, (1986), at 46.

6 Eskridge, *supra* note 140. Within marriage, this movement has entailed a shift "away from the natural law norm of procreative marriage and strongly toward the utilitarian norm that emphasizes individual flourishing." *Id*. at 1887. Outside of marriage, it has led to the expansion of the menu of family regimes from which couples can choose. *Id*. at 1889.

7 *See, e.g.,* NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010); J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA (1997); Margaret F. Brinig & Steven L. Nock, *The One-Size-Fits-All Family*, 49 SANTA CLARA L. REV. 137 (2009); June Carbone & Margaret F. Brinig, *Rethinking Marriage:*

forces in modern family law, utilitarianism itself. The judges might thus be sympathetic or at least not hostile to similar claims.

However, there are also downsides to adopting this approach. The first downside is that utilitarian motives are harder to couch in legal terms—compared to the motives informing a status recognition approach. While the philosophy behind a utilitarian stance is easily understood, giving it a legal structure can prove complicated. Without a convincing legal basis, judges will ascribe the claim to the realm of policy rather than law, as it touches at the heart of legislatures' ability to craft and modulate distinct family law regimes. It is well-known that lawmakers are much better suited to make such delicate decisions involving social and economic policy.

The second shortcoming emerges from the ECtHR's contention that the couple lacks a "need for legal recognition."[1] It seems that judges are unclear about why the two Austrian heterosexual applicants are mobilizing and "what is the big deal." Judges think that parties are pursuing a frivolous claim. This aspect also emerged from public debates surrounding the equal civil partnerships campaign in the UK. The campaign was constantly underplayed as involving a group of spoiled white middle-class young people.[2] A potential explanation for this reaction refers to the internalization of the hierarchy rule.[3] The internalized view that registered partnerships are an inferior regime compared to marriage likely prevents the Court from even grasping the genuine nature of the parties' complaint. It conjures up Gaudreault-DesBiens' warning that couples are becoming increasingly spoiled and inclined to embrace the selfish rhetoric of rights over duties, captured by the adage "I want the world and I get it now!"[4]

A second explanation for the idea that there is no need for legal recognition concerns the ongoing, unresolved tension between need and desire. It more specifically concerns the idea that desires do not belong in law in the sense that they are not suitable for backing legal claims. It's one thing to need a regime, it's quite another to desire it. This tension is, for instance, visible when it comes to homosexual couples'

Feminist Ideology, Economic Change, and Divorce Reform, 65 TUL. L. REV. 953 (1991). At the same time, scholars noted an expansion of status to new groups, the most relevant example being homosexual couples. *See* Frederik Swennen, *Private Ordering in Family Law: A Global Perspective*, in CONTRACTUALISATION OF FAMILY LAW - GLOBAL PERSPECTIVES 1 (Frederik Swennen ed., 2015). (describing this expansion as part of the "perpetual pendular movement of family law between status and contract").

1 *Ratzenböck*, *supra* note 185, at 41.

2 *See supra* note 244.

3 *See supra* Section I.B.

4 Gaudreault-DesBiens, *supra* note 141, at 49.

attitudes towards the issue of equal civil partnerships.[1] In the UK, homosexuals think that requiring access and desiring access are two fundamentally different things and thus refuse to support the cause of expanding UK civil partnerships to heterosexuals.[2]

A further limitation of the utilitarian approach is that it only "stands a chance" if the two comparator terms (marriage and the registered partnership) are different in a meaningful way.[3] This is why Strasburg's Court (the ECtHR) had an easy time rejecting the parties' complaint in *Ratzenböck*.[4] The fact that civil partnerships mimic marriage also rendered the parties' claim somewhat frivolous in the eyes of the Court. Observing that, unlike *Ratzenböck,* the UK kissing cousin case *Steinfeld* succeeded might suggest that other approaches are more effective when RPs mirror marriage.

D. CHOICE-BASED APPROACH

When, in January 2020, California enacted a new partnership law open to all couples regardless of gender, a San Francisco resident commented "[i]t's a personal choice, but at least there's another option out there, options are good right?"[5] Under a choice-based approach, the plurality of legal regimes is a value *per se* ("more is good"). Choice matters because we acknowledge that nowadays it is legitimate to pursue different lifestyles and values. Put differently, the plurality of legal regimes is a way to mirror the plurality of ways in which individuals arrange their family relationships and the beliefs that constitute the groundwork on which these relationships stand.[6] The centrality of plural values to the architecture of modern family law led some scholars to point to a "movement in family law from an era of privatization to an era of pluralism."[7] Pluralism in family law has, however, an ambiguous meaning.[8]

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1 *See* Adam Jowett & Elizabeth Peel, *"A Question of Equality and Choice": SameSex Couples' Attitudes Towards Civil Partnerships After the Introduction of Same-Sex Marriage,* 8 PSYCH. & SEXUALITY 69 (2017).

2 *Id*.

3 *See infra* Section IV.

4 *Ratzenböck*, *supra* note 185, at 40 ("the institutions of marriage and the registered partnership are essentially complementary in Austrian law.").

5 Lyanne Melendez, *Heterosexuals can choose between marriage or domestic partnership under new California law*, ABC7 NEWS (Jan. 2, 2020), https://abc7news.com/domestic-partnership-california-domestica-in-ca-what-is/5805848/ [https://perma.cc/YR8T-EPLS].

6 Abdullahi Ahmed An-Na'im, *Religious Norms and Family Law: Is It Legal or Normative Pluralism?,* 25 EMORY INT'L L. REV. 785 (2011).

7 Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J. GEN. & L. 101, 102 (2016).

8 Linda C. McClain, *Marriage Pluralism in the United States: On Civil and Religious Jurisdiction and the Demands of Equal Citizenship*, in MARRIAGE AND DIVORCE IN A MULTI-CULTURAL CONTEXT: MULTI-TIERED MARRIAGE AND THE BOUNDARIES OF CIVIL LAW AND RELIGION 309, 309-310 (Joel A. Nichols ed., 2012).

It now tends to refer to the plurality of family regulatory regimes, and to be used in connection with personal autonomy.[1] Registration is of course one of the many ways through which this value is put to work. Another one would be, for instance, the introduction of a range of state-created contracts to recognize different forms of intimate relationships.[2]

There are several similarities between a choice-based approach and a utilitarian one.[3] First of all, the fact that they are both used in connection with personal autonomy might induce us to think that they necessarily have the same philosophical matrix. However, this section demonstrates that one could also invoke choice in a context where other social groups have more options and thus point to the dignitary harms flowing from this kind of discrimination. Under these circumstances, the approach would pivot more explicitly on a desire to be free from discrimination than a desire to uphold personal autonomy. The similarities between a choice-based and utilitarian approach, however, continue to be evident. As with the utilitarian approach, the approach here analyzed is also on the edge of the realm of policy. Furthermore, it does not lend itself to be couched in legal terms easily.[4]

Looking at the relevant case law, the UK Supreme Court upheld choice-based arguments, while the Court of Strasbourg declined to do so. Before the ECtHR, a major case where the parties foregrounded a choice-based approach is *Chapin and Charpentier v France*.[5] The application had been filed by Mr. Stéphane Chapin and Mr. Bertrand Charpentier, a French same-sex *pacsés* couple. Although the case was not initiated by an opposite-sex couple, it shines a spotlight on the position of the European Court regarding choice-based arguments. The applicants argued discrimination based on sexual orientation because "heterosexuality" granted access to three options: *concubinage* (cohabitation), Pacs, and marriage.[6] When, in 2016,

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1 Aloni, *supra* note 306, at 107.

2 HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS 105, 125-126 (2017). For a critique of the theory see Sharon Shakargy, *Family, Contracts, Autonomy and Choice: A Comment on Dagan and Heller's The Choice Theory of Contracts*, 20 JERUSALEM REV. LEGAL STUD. 90 (2019) (book review).

3 On the linkage between individualism and (anti-dogmatic) pluralism see DAPHNA HACKER, LEGALIZED FAMILIES IN THE ERA OF BORDERED GLOBALIZATION 55–56 (2017).

4 As previously seen, in the system of the ECHR, the only suitable legal basis to employ this argument is the discrimination ban (Article 14 ECHR) taken in conjunction with the right to respect for one's family life (Article 8 ECHR). Therefore, one cannot demand more options *tout court,* but must first point to a group that has more options than her.

5 Chapin and Charpentier v. France, App. No. 40183/07 (June 9, 2016), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-163436%22]} (text only available in French) [*Chapin*].

6 *Id*. at 3.

the case was decided in Strasbourg, French same-sex couples had already gained access to marriage.[1] Yet, at the time the lawsuit was lodged, French same-sex partners only had two options: becoming *pacsés* or remaining cohabitants. Therefore, their marriage application was rejected by the municipal registrar. The Court, however, was not prepared to issue a decision that somehow implied a right to same-sex marriage.[2] This is why the judges spill considerable ink on the issue of the lack of a European consensus around "homosexual marriage" while moving to the background the issue of choice.[3]

A passage, however, clarifies the position of the Court vis-à-vis the value of choice: the reason for the compatibility of the impugned measure with the Convention is that the French applicants had access to at least one legal regime.[4] As long as the parties have access to *some form* of legal recognition, the Court goes, the requirements of the Convention will be satisfied.

To corroborate this conclusion, the Strasbourg's Court is forced to draw the line between the factual circumstances underlying the case and those underlying the *Oliari* and *Vallianatos* decisions, where a violation of the Convention had been found.[5] In both cases, same-sex couples lacked *any* form of legal recognition—they lacked what, in *Oliari,* the Court defined a "specific legal framework" for their legal recognition.[6] Therefore, unlike the applicants in *Vallianatos* and *Oliari*, the applicants in *Chapin and Carpentier* had options, although not the preferred ones.

This idea that any formalized partnership will satisfy the Convention is explicitly articulated in *Ratzenböck*. In rejecting the opposite-sex couple's claim that they should access civil partnerships, the Court observes that [i]n the case of *Vallianatos*... different-sex couples, unlike same-sex couples, could have their relationship legally recognised

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1 Loi n° 2013-404 du 17 mai 2013 [Act no. 2013-404 of 17 May 2013] (Fr.).

2 The two decisions are *Oliari*, *supra* note 235, and Hämäläinen v. Finland, App. No. 37359/09 Eur. Ct. H.R. 369 (2014).

3 *Chapin*, *supra* note 314, at 36-39. On the notion of European consensus see generally KANSTANTSIN DZEHTSIAROU, EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS (2015).

4 *Chapin*, supra note 314, at 49.

5 *See Chapin,* supra note 314, at 50 citing to *Oliari*, *supra* note 235 and Vallianatos and Others v. Greece, App. Nos. 29381-09 and 32684/09, Eur. Ct. H.R. 125 (2013).

6 *Oliari*, *supra* note 235, at 185. In *Vallianatos,* the Greek government introduced an extra option for opposite-sex couples (civil partnerships), although at the time samesex couples lacked access to any other legal framework. *Vallianatos, supra* note 320. The *Oliari* case challenged Italy's continued reluctance to legally recognize lesbian and gay relationships even after the Italian Constitutional Court admonished the government to do so. *Oliari*, *supra* note 235, at 16–17.

even before the enactment of the law governing the civil union... Consequently, the Court concluded that same-sex couples would have a particular interest in entering into a civil union, since it would afford them, unlike different-sex couples, *the sole basis in domestic law* on which to have their relationship legally recognized.[1] (emphasis added)

A caveat is in order. The framework of the ECHR is an international legal system. As an international legal system, it is relatively advanced, as it also includes an individual complaint mechanism. However, the judicial body enforcing the Convention cannot be equated to a full-fledged domestic court in terms of its role and powers. For this reason, the Court presents itself as only having a "subsidiary role" and exercises selfrestraint in sensitive areas where a European consensus is not yet discernible.[2] Therefore, while the ECtHR worked up the courage to protect same-sex couples through registration in cases where they lacked *any* form of legal recognition, it might not be willing to take this argument one step further and grant a right to registered partnerships to couples that already enjoy legal recognition. Domestic courts might be better suited to do so. They would be unbound by the pragmatic concerns of international courts.

I offer two examples with opposite outcomes to demonstrate the extent to which domestic courts might be receptive of choicebased arguments. Notably, I refer to the case before the French Constitutional Council ("*Conseil constitutionnel"* or *"Conseil"*) giving rise to the *Chapin* litigation before the ECtHR, that was rejected, and the UK Supreme Court decision *Steinfeld,* that eventually granted equal civil partnerships for all couples.

In the constitutional petition before the French *Conseil*, a gay couple wanted access to marriage. The approach was fashioned in terms of negative liberty to conduct a "normal family life," an equality right, and individual liberty (that of marrying).[3] In its decision, the *Conseil* refused to find an incompatibility between same-sex couples' exclusion from marriage and the French Constitution. An important strand of the judges' reasoning concerns the application of the notion of "normalcy" to family life ("droit à mener une vie familiale normale"),[4] which had been inferred from the

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1 *Ratzenböck, supra* note 185, at 36.

2 *See, e.g.,* James Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 INT'L & COMP. L.Q. 459 (2005).

3 CC, decision no. 2010-92 of 28 January 2011, 4 (Fr.) [Dec. no. 2010-92], https://www.conseil-constitutionnel.fr/decision/2011/201092QPC.htm.

4 *Id*. at 8.

Preamble to the Constitution of 1946.[1] According to the *Conseil*, the exclusion from same-sex marriage does not interfere with the right to run a normal life, as samesex couples can still conduct their family life as cohabitants or *pacsés* couples, and enjoy the legal benefits thereof.[2] While the *Conseil* does not articulate it explicitly, the implicit assumption is that anytime a couple has access to a formal mechanism of recognition this will satisfy the French Constitution.

Moving on to the second example, the decision in *Steinfeld*, Section III.B has outlined the complex posture of the case. It is worth recalling that litigants adopted multiple approaches at once. This notwithstanding, the case litigated before the UK Supreme Court had a noticeable choice-based component.[3] The parties eventually downplayed the argument that pivoted on the expressive harms of non-recognition to argue that discrimination only arises from the day same-sex couples could (also) marry.[4] Discrimination, consequently, does not directly flow from the fact that heterosexuals are excluded from civil partnerships. It arises from same-sex couples' suddenly having more options than opposite-sex couples.[5]

True, ideological objections to marriage still lurk in the background and overlaps with the ideological approach exist. The status recognition approach seems, for instance, to resurface when the Court analogizes the case to *Vallianatos*—the judgment where the ECtHR concluded that discrimination ensues from the lack of recognition of the equal worth of certain couples (LGBTQ couples) which is a consequence of lack of access to legalized unions.[6] However, the UK Supreme Court's concludes that there is no intrinsic discrimination in excluding opposite-sex couples from civil partnerships.[7] Discrimination materializes only after another social group acquires more routes for legal recognition.[8] This induces me to classify this decision as mainly informed by a choice-based approach.

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1 The Preamble is part of the so-called *bloc de constitutionalité,* i.e., the set of constitutional principles and values against which the *Conseil* assesses the constitutionality of laws.

2 Dec. no. 2010-92, *supra* note 326, at 8.

3 *Steinfeld*, *supra* note 221, 3-4 ("same sex couples have a choice. They can decide to have a civil partnership or to marry. That choice was not - and is not - available to heterosexual couples … It is also accepted by the respondent Secretary of State that the inequality of treatment of heterosexual couples requires to be justified from the date of its inception, ie the coming into force of MSSCA.").

4 *Id*.

5 *Id*. 46 (speaking of a "new form of discrimination [that] was introduced by the coming into force of MSSCA [law on same-sex marriage].).

6 *Id*. at 35-40.

7 *Id*. at 40 ("The government and Parliament must be taken to have realised that, when MSSCA came into force, an inequality of treatment would inevitably arise.").

8 *Id*. at 40.

1. Potential Limits of the Approach

The principal argument in favor of choice contends that this value already informs our legal reality because we translated into law the normative forces underpinning it. The process whereby family law became more plural has been relatively unidirectional, and steadfast, and nowadays marriage is no longer the only regime available for (dyadic, romantic) couples.[1] One can, therefore, contend that it is simply untimely and inopportune to interrupt (and interfere with) this process of pluralization, by repealing registration regimes, or by refusing their expansion to a larger set of families.

The degree of acceptance of this line of argument, however, varies. The argument has very little traction at the international level.[2] Hardly will an international court interfere with a state decision regarding the number of legal regimes to enact (marriage, registration, etc.). This sharply differs from the decision whether to have *at least one* recognition mechanism for a social group, which seems to trigger stricter scrutiny even before an international court.[3] The degree of receptivity of choice-based approaches increases at the domestic level. It might well be the case that a domestic court understands that if the state has a certain number of options to recognize families, these options should be available to *all* families. This is especially true in a post–same-sex marriage world. If the special reasons linked to tradition prevented states from opening marriage to gay and lesbian couples based on similar arguments (see the *Chapin* case mentioned above),[4] these tradition-related reasons for refusing enlargement are simply absent when it comes to registration.[5]

However, the case law analysis also sheds light on the limits of a choice-based approach. I noted that the ECtHR keeps rejecting similar claims on the ground that the applicant already has access to one recognition mechanism.[6] A hurdle to grasping why these parties seek RPs concerns the value of legal pluralism *per se*. According to the Court in *Ratzenböck,* access to an institution (marriage, in the case at stake) satisfies the parties' "principal need" for recognition.[7] The Court's attitude suggests that the alleged need to access a further legal regime is secondary to the principal

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1 Eskridge, *supra* note 140.

2 *See supra* Section III.D.

3 *See e.g. Oliari*, *supra* note 235.

4 *Chapin*, *supra* note 314.

5 Scott, *supra* note 159, at 551 ("The civil union, in contrast, is a thoroughly modern, secular construction, and as such, is less likely to be defined by the historical traditions and values that surround marriage.").

6 *See supra* Section III.D.

7 *Id*. 41 ("The applicants, as a different-sex couple, have access to marriage. This satisfies – contrary to same-sex couples before the enactment of the Registered Partnership Act – their principal need for legal recognition.").

need for legal recognition. It further suggests that once you have access to one means of recognition, you are satisfied. Therefore, while the choice-based approach might accommodate values to which Western societies largely subscribed, there are some doctrinal limits to be aware of when contemplating its employment.

IV. ANALYSIS

This section teases out some final takeaways from the work. Section IV.A. outlines the main takeaways in the area of strategic litigation. Section IV.B. offers final thoughts regarding the future of policymaking in the area of registered partnerships. It argues that the ideal registration scheme must be open to a larger number of families, including non-conjugal couples, and that its content must be meaningfully different from marriage.

A. COURTROOM LITIGATION

The previous section has classified the various approaches to expanding same-sex partnerships. The three approaches do not have clear-cut theoretical boundaries and present many overlaps in practice. Yet, the proposed classification has offered an orderly overview of past litigation. The major finding is that there is no one-size-fits-all approach. Registered partnerships differ in terms of their content, personal scope, or historical context in which they were enacted. Understanding which approach is more suitable to obtaining access to a certain type of legal partnership seems like a more fruitful exercise, as opposed to discussing the resurrection of these laws in abstract terms.

In general terms, the case law analysis reveals that each approach has certain advantages. Status-based arguments are powerful, and hard to rebut when there is evidence that a group does not enjoy equal status. Utilitarian forces are also important, and are shaping our family laws in a way that makes utilitarian arguments palatable and in line with the widely accepted notions of individualism, and self-actualization. Choice is also connected to utilitarian norms. The idea that we should enjoy choice and a menu of relationship-recognition mechanisms ties nicely with these normative forces.

There are also limits of which to be aware. The main problem with the status recognition approach is that opposite-sex couples do not belong to a historically privileged group. Hence, emphasis is to be placed on the invidiousness in excluding a sub-set of heterosexual couples: those ideologically opposed to marriage. Even in this circumstance the outcome of the case is uncertain. Our instincts suggest to us that heterosexuals should not enjoy the benefits of equality laws. The problems

with a utilitarian approach are also numerous. It is especially difficult to couch this argument in legal terms. Also, I noted that this argument can only succeed if the desired registered partnership is meaningfully different from marriage—which is not often the case with same-sex partnerships, due to the equalization with marriage that many of these laws underwent in recent years. Ultimately, as to the choice-based approach, the main hurdle is that courts struggle to comprehend the "need" behind heterosexual couples' mobilization, especially since heterosexuals have access to the "first-class regime" of marriage. This shortcoming also applies to utilitarian claims.

The case law review demonstrates that a couple wishing to go to court must carefully consider the content of the desired partnership. The suitability of the approach to adopt will hinge on several factors. The content of the regime is likely the most significant one. The couple should hence check if the law's content mirrors that of marriage, or if it offers a minimal list of benefits. Within this macro-categorization, there are approaches that are virtually suitable and unsuitable. The suitability in practice of these approaches will, in turn, depend on another feature: their "elasticity" or "inelasticity" regarding the differences between marriage and the registered partnership. In economics, the term elasticity refers to the measurement of a variable's sensitivity to a change in another variable. I will appropriate the term to simply refer to the degree to which the suitability of an approach is sensitive to changes in the legal content of the registered partnership—and notably, to whether the gap between marriage and the partnership increases or decreases. If it is sensitive to these changes, it will be elastic, if it is not sensitive to these changes it will be inelastic.

TABLE 1. APPROACHES TO EXPANDING REGISTERED PARTNERSHIPS BASED ON THEIR CONTENT

Approach(es)	Suitability of the approach if:	Elasticity/inelasticity if the gap between marriage and the RP is closed
Status recognition	RP has a distinct content RP mirrors marriage	Inelastic
Utilitarian	RP has a distinct content	Highly elastic
Choice-based	- RP has a distinct content	- Elastic (if closer to a utilitarian approach)
	- Mimics marriage (suitable only if closer to a status recognition approach)	- Inelastic (if closer to a status recognition approach)

1. Suitability of the Approach

Based on the analysis conducted in Section III, when marriage and a certain RP are different in a meaningful way, all three approaches can potentially apply. Lack of access to the RP could be challenged based on social status-related reasons, utilitarian reasons, or by invoking choice.

When considering the opposite scenario in which RPs mirror the content of marriage, the status recognition approach is still applicable. Whether it is a reciprocal beneficiary law that only confers health-care prerogatives or a broader civil union that confers nearly all marital rights, my expressive and cultural harms are still present.

Skeptics might wonder why a heterosexual couple would want a nonmarital regime that resembles marriage in all respects in the first place. The analysis illustrates that even if the law were to carry the same legal incidents of marriage, parties might still dislike the *label* marriage. These parties are what Anne Barlow and Janet Smithson have dubbed the Ideologue couples.[1] On the one hand, Ideologues might hold genuine objections regarding the institution of marriage; on the other, they might not want to remain legally invisible or sign private contracts, that is to say: they might want to enjoy the obvious benefits of registration.[2] Courts in Europe have embraced this stance by noting that even if marriage and the RP carry the very same legal incidents, the specific *label* still matters to many couples.[3]

If the regimes have nearly the same content, then the utilitarian approach will have, by contrast, limited traction.

What is the point in asking for a more flexible and distinct regime if the regime is not distinct at all? The choice-based approach warrants a separate conclusion. When asking whether the approach is suitable in a situation where the two regimes mirror each other, the answer depends on how the claim is framed:

(i) The claim is explicitly grounded in ideals of personal autonomy and thus resemble a utilitarian approach. In this case, it might be less persuasive: since there is no tangible difference between regimes, less clear is why a plurality of regimes is necessary.

(ii) The claim places emphasis on discrimination and on the injustice ensuing from another social group having more options. In those cases, the choice-based approach becomes more similar to a status recognition approach. In such case, the actual differences between marriage and the RP are immaterial. Choice is choice,

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1 Anne Barlow, Carole Burgoyne & Janet Smithson, *The Living Together Campaign - An Investigation of Its Impact on Legally Aware Cohabitant* 8 (Ministry of Justice Research Series 5/07, July 2007), http://www.lawcom.gov.uk/app/uploads/2015/03/livingtogether-research-report.pdf.

2 As seen, registration usually comes with a comprehensive default regime, it can confer-unlike contracts-public law benefits, etc. *See supra* Section I.B., especially notes 150-152.

3 *See Steinfeld*, *supra* note 221 (citing *Oliari*, *supra* note 235; *Vallianatos*, *supra* note 320). As to case law acknowledging the expressive harms inherent in withholding the label *marriage* from gay couples. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 443 (Cal., 2008); *Lewis v. Harris*, 908 A.2d 196, 226-227 (NJ, 2006) (Poritz, C.J., concurring and dissenting).

and if one social group has more options, another group is also entitled to the same number of options.

2. Elasticity of the Approach

The third column in Table 1 refers to the elasticity of each approach to subsequent amendments to the content of RPs. These amendments, where adopted, have historically followed one trajectory: the RPs becomes richer in content and, especially, more akin to marriage. Therefore, the third column refers to the scenario in which the RP becomes more like marriage in terms of its substantive content.

The status-based approach is persuasive and relatively inelastic. Exclusion from the registered partnership creates a feeling of rejection and diminishment that needs to be remedied.

By contrast, the utilitarian argument is highly dependent on the actual differences between the two regimes and how these change over time (as it was the case with the civil partnership in Austria). Closing the gap between marriage and the RP will have implications on the seriousness of the claim and even the credibility of parties. While the two heterosexual partners in *Ratzenböck* were "credible" as they initiated their domestic lawsuit targeting civil partnerships with a distinct, lighter, and more flexible content compared to marriage, their argument became weaker once legal reforms narrowed the gap between these partnerships and marriage.[1] This in turn impacted the credibility of parties because the court seemed to imply that they were pursuing a frivolous claim.

As to the choice-based approach, I argued above that the plausibility of the claim hinges on the way in which claimants fill the value of choice with content. The same caveat applies when assessing the elasticity of the approach. If partners argue that lack of choice is causing expressive harms to them as a group (mixed approach with a status-recognition one) the success of the argument will not depend on how different marriage and the RP become. Once again, labels matter irrespective of this.[2] If, by contrast, they claim choice because they aspire to more options on the menu of relationships and their drivers are, therefore, mostly utilitarian, then the plausibility of their claim will be impacted by the narrowing differences between the two regimes.

B. POLITICAL AVENUES OF CHANGE

There is a positive interplay between strategic litigation and political avenues of change. In the cases where heterosexuals went before courts, as in UK and Austria,

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1 *See supra* notes 273-275.

2 *Steinfeld EWCA*, *supra* note 229, at 127 (mentioning the "intrinsic value" of civil partnerships).

legislatures have eventually widened their registered partnerships to all couples. Therefore, litigating RPs seems to be a powerful tool to "motivate" policymakers to pursue legal reform. This route could be followed by other potential litigants in the European continent to expand same-sex partnerships. It could be, for instance, followed by opposite-sex couples in Italy that, at present, lack access to civil unions and are considering taking legal action.[1] At the same time, however, I acknowledge that this route is less relevant to American couples. In the U.S., samesex partnerships have been dismantled, with the exception of Oregon—and a couple of other jurisdictions that, however, bar new entrants from registering.[2] Thus, the very object of litigation is missing and when mobilizing couples would most likely need to address policymakers.

Therefore, I wish to outline some takeaways that specifically bear on policymaking.

1. Marriage-like or with Distinct Content?

First, the Article warns against reforms in which registered partnerships suffer from the gravitational pull of marriage. If newly introduced regimes were to constitute a mere replica of marriage (in terms of their substantive content and procedural rules to access or dissolve the union), the potential of the law to accommodate non-conventional families would dwindle.[3] Registered partnerships must be crafted in a way that distinguishes them "meaningfully" from marriage to attract a larger number of couples.[4]

The case of the Netherlands is somewhat unique in this regard. Both opposite- and same-sex couples are registering at growing rates at a time in which the substantive

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[1] Certi Diritti, a renowned nonprofit organization active in the area of civil rights is contemplating taking action in light of the irrational discrimination suffered by both same-sex couples unable to access marriage and opposite-sex couples unable to access civil unions. Daniele Tarozzi, *A tu per tu con la libertà: i diritti civili e i sex workers in Italia e non solo - Amore Che Cambia #23*, ITALIA CHE CAMBIA (Sept. 9, 2021), https://www.italiachecambia.org/2021/09/battaglie-certi-diritti/ [Perma].

[2] *See supra* note 212 and accompanying text.

[3] *See* Naomi Cahn & Barbara Atwood, *Nonmarital Cohabitants: The US Approach*, HOUSTON J. INT'L L. 16 (forthcoming 2022) (noting that "[i]f the registration scheme mimics marriage, couples may be more likely to simply marry."). *See also* Giovanna Savorani, *Due Cuori e Una Capanna nel Terzo Millennio: Fuga dal Matrimonio e Contratti di Convivenza [Love on a Shoestring: Escape from Marriage and Cohabitation Agreements]*, POL. DIR. 37, 43 (2014) (explaining how, in Italy, proposals to introduce alternative regimes to marriage failed as influenced by same-sex couples' desire to receive equal treatment, thereby creating a replica of marriage that has no appeal on couples who do not wish to marry).

[4] For some reflections around which requirements to retain and which to drop see Palazzo, *Queer and Religious Convergences, supra* note 45 (examining the ongoing relevance of conjugality, exclusivity, the requirement to have children, financial interdependence, etc.). For a critique of registrations that are "marriagemimic" see Aloni, *supra* note 306, at 150.

gap with marriage has almost been closed.[1] At first glance, this seems to suggest that introducing a RP with the same content of marriage is also a viable option. Yet, there are two potential interpretations for the popularity of Dutch registered partnerships. According to the first one, registered partnerships are appealing precisely because they are marriage-like. Partners might not register were they to lose something (i.e., some legal benefits). However, this interpretation is contradicted by the large number of opposite- and same-sex couples opting for RPs in countries where their content differs from that of marriage, such as France and Belgium. This lends credence to a second interpretation: *even* in countries where the two regimes are nearly the same, there is still a sub-set of couples that will opt for registered partnerships (mostly couples who reject the label of marriage or the higher commitment associated with marriage). Through an *a fortiori* argument—meaning with greater reason—one can conclude that if the two regimes are meaningfully different a larger number of couples could sign up: not only Ideologues, but also those that are driven by utilitarian ideals and material interests that marriage-like regimes cannot accommodate.

2. What Does "Meaningfully Different" Mean??

A separate issue concerns what the tag "meaningful" means in practice. For policymakers, this is a central question. Understanding which provisions to drop, retain, or add when crafting a RP would go well beyond the scope of the paper. However, it seems that any intervention would require policymakers to act on two fronts: the provisions in marriage law that reflect the troubling history of marriage, and the need for increased flexibility in crafting one's legal regime.

The first set of interventions must concern those legacies of marriage history. Think of name laws where one spouse (the woman) must take on the name of the other spouse[2] or the archaic habit of only listing the occupation of the husband on the marriage certificate.[3] These requirements will not only be out of date, but also irrational,

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1 It is worth recalling that since 2001, in the Netherlands, both opposite- and samesex couples can freely choose between marriage and registered partnerships. While the interest in these partnerships has usually been low, the most recent statistics attest to the growing attraction of registered partnerships for all couples. *See supra* section II.A.

2 In Austria, for instance, the *eingegtragenen Partner/Partnerinnen* may change the name to acquire the name of the other partner. By contrast, married couples must change their name to acquire the "family name" (*familienname*). ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [AUSTRIAN CIVIL CODE] § 93. See the website of the Government of Austria, "Effects of a registered partnership", here: https://www.oesterreich.gv.at/en/themen/familie_und_partnerschaft/eingetragene_part nerschaft/Seite.1890200.html.....https://www.oesterreich.gv.at/en/themen/familie_un d_partnerschaft/eingetragene_partnerschaft/Seite.1890200.html [https://perma.cc/NP2Y-Y5BT].

3 Catherine Fairbairn, *Mothers' Details on Marriage Certificates* (HC Library, Briefing Paper No. 07516, 2018).

considering that registered partnerships will be available for all couples, including same-sex ones, thereby making it arbitrary to choose whose name to "impose" or whose occupation to list.[1] Another example is fidelity requirements. For instance, in Italy, fidelity is no longer required within civil unions. This move was the result of an attempt by a conservative party to insult same-sex couples by arguing that they are not sexually exclusive.[2] Yet, other commentators noted that the abandonment of the requirement of fidelity is a positive move towards the modernization of family law.[3] The choice of avoiding similar references also ties nicely with the type of couples that tend to be attracted by these laws, i.e., couples that are less attached to ideals of "for-life" fidelity.[4] I might be stating the obvious but it would be a serious mistake to include similar archaic provisions within RPs.

Another related aspect is the dismissal of the requirement of conjugality, meaning a sexual relationship.[5] The ideal registered partnership should drop the requirement that parties must have sex to deserve legal benefits.[6] Adult relatives and friends must also be eligible to register. Not only is this policy decision more consistent with normative and empirical trends in family law,[7] it would also respond to principles of rationality that should inform the legal system.[8] Looking at the rationale of most legal benefits (e.g., a survivor's pension) the requirement of conjugality does not pass muster as it is not connected to the aim the benefit pursues (compensating the surviving partner

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1 In addition to the fact that same-sex couples are of the same gender, empirical research seems to confirm that they report more "egalitarian ways of dividing up labor." Charlotte Patterson, *Family Lives of Lesbian and Gay Adults*, in HANDBOOK OF MARRIAGE AND THE FAMILY 659, 661 (Gary W. Peterson & Kevin R. Bush eds., 3d ed. 2013).

2 Andrea Carugato, *Unioni civili, Renzi: "Accordo fatto". Dopo la stepchild adoption, salta anche l'obbligo di fedeltà. La vittoria di Alfano [Civil Unions, Renzi: "Deal reached." After stepchild adoption, fidelity duties are also removed from the law. Alfano wins]*, Huffpost (Feb. 24, 2016, 8:40 AM CET), https://www.huffingtonpost.it/2016/02/24/unionicivili-salta-fedelta_n_9307750.html (It.) [https://perma.cc/E45X-7Z2M].

3 Marco Gattuso, *Cosa C'è nella Legge Sulle Unioni Civili: Una Prima Guida [What is the Content of the Law on Civil Unions: A Primer]*, ARTICOLO29 (Feb. 25, 2016), http://www.articolo29.it/2016/cosa-ce-nella-legge-sulle-unioni-civili-una-prima-guida/ (It.) [https://perma.cc/CM56-SMER].

4 Rault, *supra* note 109, at 356.

5 *Conjugal*, CambridgeDictionary https://dictionary.cambridge.org/dictionary/english/conjugal (last visited Nov. 2, 2021) [https://perma.cc/3T5M-X4RY], (defining it as "connected with marriage or the relationship between two married people, especially their sexual relationship.").

6 PALAZZO, *supra* note 14.

7 PALAZZO, *supra* note, 14, at 7-14.

8 LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS xii (2001), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1720747&rec=1&srcabs=1524246 &alg=7&pos=3 (follow "Download This Paper" hyperlink).

for the support provided while the other one was active on the job market, to follow through with the previous example).

This route has been followed in Hawaii, Vermont, Colorado, Maine, D.C., and Maryland, which have enacted designated and reciprocal beneficiary laws.[1] A thorough study of these laws and of the problems that hinder their applicability to nonconjugal pairs is in order. For instance, conjugality-even when formally dropped as a requirement-continues to inform understandings of partners' behavior as well as provisions of legal benefits to which the partnership law refers, as in Belgium.[2] Eliminating the requirement is thus a necessary yet insufficient condition to overcome the pull of conjugality.

The second line of intervention concerns the accommodation of the need for increased flexibility. It would be a missed opportunity to enact a registered partnership that does not display flexibility, and that is less "creative."[3] The main example in this regard concerns the regime for the dissolution of the union. These laws must not have the same cumbersome dissolution procedures as marriage.[4] Second, they must display increased opportunities for contracting out of default provisions.[5] Legislators tend to gradually equalize the RP and marriage, by reducing similar opportunities.[6] This trend is the consequence of the misplaced, reflexive conviction that any difference between marriage and RPs, even when both laws are open to all couples, is discriminatory.[7] Yet, increased flexibility cannot be discriminatory considering that access to marriage is

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1 D.C., Maine, and Maryland do not use the tag reciprocal beneficiary law but that of domestic partnerships. Yet, eligibility to register is articulated in such a way that these laws seem to be open to non-conjugal pairs.

2 Frederick Swennen, *Un-coupling Family Law: The Legal Recognition and Protection of Adult Unions outside of Conjugal Coupledom*, 28 FEMINIST LEGAL STUD. 39, 41 (2020) citing SVEN EGGERMONT*, DE JURIDISCHE BESCHERMING VAN PRIVATE RELATIES* [*THE LEGAL PROTECTION OF PRIVATE RELATIONSHIPS]* (2016).

3 Aloni, *supra* note 306, at 151.

4 For instance, in Wales and England, the same dissolution procedures of marriage apply to civil partnerships.

5 In the U.S., this would entail critically assessing the so-called essentials of marriage that cannot be contracted out by the parties. *See supra* notes 168–172 and accompanying text.

6 As to French Pacs see Hayward, *supra* note 85, at 7, citing Hugues Fulchiron, *Le mariage est-il soluble dans le partenariat (et réciproquement)? [Is marriage soluble into Pacs and vice versa?]*, in MÉLANGES EN L'HONNEUR DE JEAN HAUSER [COLLECTION IN HONOR OF JEAN HAUSER] 125 (2012) (Fr.). Austria and the Netherlands are additional examples in this regard and have been deal with respectively in section III.B. and section II.A.

7 *See, e.g., Austria*, ATLAS, https://www.euro-family.eu/atlas_scheda-at (last visited July 27, 2021) [https://perma.cc/U4Y8-MLE5] (describing any difference between marriage and civil partnerships under the heading "Discriminatory rules").

no longer barred. Therefore, we might simply see the two regimes as accommodating different lifestyles.

3. Bringing to Light the "Queer" in Modern Families

One last set of reflections concerns opposite-sex couples being an important vector of change to revitalize registered partnerships. Heterosexual litigants, however, are not ideal litigants. Any discrimination claim will be hard to press since they are not a historically discriminated against group. To increase the persuasiveness of their arguments two aspects must be foregrounded. First, many seemingly mainstream couples are non-traditional. A desire not to marry "now" due to uncertainties surrounding the intensity of commitment is a departure from the marital baseline. A desire to not uphold traditional norms within marriage is another departure. An interest in easier dissolution procedures because one does not believe in the "till death do us part" norm is another way to defy the model. This is to say that the label "non-traditional" does not only apply to more radically non-heteronormative family forms, as, for instance, polyamorous relationships are. It might also apply to Jack and Hanna, a seemingly mainstream heterosexual couple that for some such reason does not wish to marry. In these cases, there is a "queer" component, if you like, that slips beneath the radar. By queer component I mean a form of resistance to the gravitational pull of the traditional marital family.[1] All these practices in fact align with the queer ambition to decentralize this traditional model of family. Bringing their non-traditional component to light is a first necessary step.

Second, the link between registered partnerships and nontraditional families must be consolidated further. These nontraditional families are interested in legal recognition, yet not marriage. The problem is that when the couple has access to marriage, courts (and likely policymakers) struggle to see a "need" for legal recognition through other means. A stronger link between these partnerships and non-traditional families will allow them to grasp the reasons behind opposite-sex couples' quest for same-sex partnerships. It might also allow them to understand why, in the future, same-sex couples might seek registration in lieu of marriage.

V. CONCLUSION

California's extension of domestic partnerships to oppositesex couples was received with enthusiasm by state residents. Many of them even wondered why the state had not

[1] DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 62 (1995) (defining "queer" as "… whatever is at odds with the normal, the legitimate, the dominant. There is nothing in particular to which it necessarily refers.").

thought about it before.[1] There are many advantages to registration: more choice, greater flexibility and a more neutral history compared to marriage. Nonetheless, registered partnerships are on the decline. Their demise now seems like a grim reality. After same-sex marriage became legal, many jurisdictions are jettisoning them.

The article took issue with the dismantling of registered partnerships. In an attempt to inject some life back into these laws it showed how valuable they are to modern families, especially those that eschew the model of the marital family. It showed how popular these laws are becoming in European countries where both same- and opposite-sex couples can sign— to the point that in Belgium *cohabitation légale* has surpassed marriages and it seems that French Pacs might soon do the same. Initial clues indicate interest even amongst same-sex couples in countries that have long permitted same-sex marriage. The strategic litigation to access these laws that starts to take hold in Europe is additional evidence of their ongoing relevance. Opposite-sex couples are suing the state for discrimination, arguing that it unjustly bars access to the regime. This article overcomes the narrative of the "spoiled kids" litigants to put forward a new narrative whereby couples mobilizing for same-sex partnerships are more modern, even subversively queer. Their demands, therefore, merit redress.

I am aware that some obstacles exist. The case law is also at an early stage of development. Couples are encountering several hurdles to convince decisionmakers and the general public that this *is* a big deal. Yet, looking at empirical data and normative patterns, it appears that registration as a phenomenon that challenges marriage is on the rise and that, likely, the best is yet to come. Registration might even replace marriage as the dominant mode of recognition in the span of a few decades. Through an original analysis of emerging case law, the article aimed to push future conversations in a direction that duly accounts for these empirical and normative shifts. Same-sex marriage is a symbolically important victory for the LGBTQ community. Yet it may be a short-sighted one, considering that chances are that, in the future, families might just register and live happily ever after.

[1] Melendez, *supra* note 304.

SAME-SEX COHABITATION VIA THE COURT'S DECISION ON RESOLUTION OF CIVIL MATTERS - A FIRST STEP ON THE PATH OF LEGALIZING SAME-SEX MARRIAGE IN VIET NAM

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Abstract: *Although same-sex marriage is regulated in some jurisdictions throughout the world, it is still contested in many countries, especially Asia. Following the Marriage and Family Law 2014 reform, same-sex marriage in Viet Nam is no longer prohibited by law, but it has been unrecognized. Although same-sex marriage cannot be legalized immediately due to the strong influence of Confucianism on the concept of family, first steps are needed to protect LGBT people. Hence, same-sex cohabitation in Vietnam is suggested to be the most efficient way to transform society's attitude toward same-sex marriage. Thus, the article is dedicated to shedding light on "To what extent can Vietnam first lay the foundation for same-sex marriage?'. In order to answer this question, it is necessary to answer the two sub-questions of (i) What is the current context and the current legal framework of Vietnam?; and (ii) Is it necessary to legalize same-sex marriage?. These two sub-questions shall be answered by examining Vietnam's current context and legal framework on same-sex relationships. Since this type of decision is strongly related to moral principles and depends on a case by case basis, this article suggests some factors that the Court may consider when making decisions. With this first step, recognizing same-sex cohabitation is believed to gradually change society's attitude and help complete the structure of the future legal framework involving same-sex marriage.*

Keywords: *Same-sex couples; same-sex marriage in Vietnam; cohabitation procedures; civil matters.*

INTRODUCTION

If same-sex romance was once considered unnatural[4] and was treated as a crime,[5] it is now excluded from the list of crimes and is legalized in some countries.[6] Specifically, same-sex marriage was first legalized in the Netherlands (2001)[7] and expanded to other European countries such as Belgium (in 2003)[4] or Spain (in 2005).[9] This trend has opened new rules for the rights and obligations of same-sex couples, including the foundation of cohabitation, partnership, or civil union.[5]

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4 Kathleen E. Hull, *Same-Sex Marriage The Cultural Politics Of Love And Law* (1st edn, Cambridge University Press 2006), xv. [9] Ibid 36.

5 Ibid 29.

Though the number of countries that legalize or consider same-sex marriage is limited, it shows that people have their preferences on their lives and how they will live in a globalization era.[1] Indeed, LGBT (Lesbian, Gay, Bisexual, and Transgender) people are fighting for their right to choose whom they love and whom they live with regardless of opponents' arguments due to varied reasons: reproduction, children's development, or assumption regarding gender roles.[2] In Asia, however, people seem to be sceptical about this topic. Until now, Taiwan has been the first territory/jurisdiction in Asia to recognize same-sex marriage in 2017.[3] In other Asian countries, same-sex relationships may be either treated as criminal[4] or left unregulated. For the latter case, take Vietnam as an example.

Before Viet Nam's Marriage and Family Law reform in 2014, same-sex marriage was treated as a violation of the law and thus was monetarily punished.[5] When drafting the Marriage and Family Law reform, there were arguments on legalizing same-sex marriage to protect LGBT people better.[6] The result was that same-sex marriage in Vietnam is no longer prohibited by law, but it has been unrecognizeduntil now. In practice, abolishing the sanction on same-sex marriage means that same-sex couples can hold a commitment ceremony - which is considered a symbolic marriage in Vietnam and get rid of the administrative sanction. In that period, abolishing administrative sanctions was reasonable because Vietnam seemed not ready for same-sex marriage because of many factors such as the long history of the family's concept, the Confucian influence, or society's acceptance.[7] However, the tremendous

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1 C.F. Stychin, "Same-Sex Sexualities And The Globalization Of Human Rights Discourse" (2004) 49 McGill Law Journal, 954

2 Silvia Di Battista, Daniele Paolini and Monica Pivetti, "Attitudes Toward Same-Sex Parents: Examining The Antecedents Of Parenting Ability Evaluation" (2020) 17 Journal of GLBT Family Studies, 237

3 Elaine Jeffreys and Pan Wang, "Pathways To Legalizing Same-Sex Marriage In China And Taiwan: Globalization And "Chinese Values"', *Global Perspectives on Same-Sex Marriage A Neo-Institutional Approach* (1st edn, Palgrave Macmillan, Cham 2021), 198.

4 For example, article 377A of the Singaporean Penal Code states: *377A. Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.*

5 Article 8 of Decree No. 87/2011/ND-CP on sanctioning administrative violations in the field of marriage and family stated that same-sex marriage shall be sanctioned from 100.000 VND (approxiatimately 5 USD) to 500.000 VND (approxiatimately 25 USD).

6 Võ Văn Thành, Lê Kiên and Chi Mai, "Hôn nhân đồng tính: vì sao chưa công nhận? (Same Sex Marriage - Why It Still Has Not Been Recognized?)" (*Tuổi trẻ*, 2013) <https://tuoitre.vn/hon-nhan-dong-tinh-vi-sao-chua-cong-nhan-569132.htm> accessed 23 October 2021.

7 Institute for Social, Economic and Environmental Research, "Kết quả trưng cầu ý kiến người dân về hôn nhân cùng giới (Results Of The People's Opinion Poll On Same-Sex Marriage)" (2013), 22.

impact of globalization has led to gradual changes in society's acceptance of same-sex relationships. Currently, a growing number of people accept this as a normal relationship, just the same as different-sex relationships.[1]

However, with a long history of Confucian and social norms,[2] it is not easy for Vietnam to immediately legalize same-sex marriage. Experiences from pioneers countries/territories such as the Netherlands or Taiwan showed that the procedure of legalizing same-sex marriage should have solid foundations and a long-term effort that help to change the long-term norms about the definition of marriage. Although the foundation in each country may differ from each other, it is undeniable that first steps should be taken to legalize same-sex marriage. Thus, when it comes to the case of Viet Nam, the authors argue that the rights of same-sex couples can not be continually left unregulated. Instead, the first steps should be taken as a foundation for the legalization of same-sex marriage. Accordingly, the authors suggest same-sex cohabitation via the Court's decision to resolve civil matters as a first step for legalizing samesex marriage. Currently, cohabitation is defined as "*men, women who organize to live together and consider themselves husband and wife*" (article 7, section 7, Marriage and Family Law 2014). This raises the question of whether homosexuals live together and consider themselves as spouses could be included within the scope of this definition.

Furthermore, the term civil matters apply in a situation where individuals request the Courts to recognize their marriage and family rights.[3] Therefore, requesting same-sex cohabitation via the Court's decision on civil matters is a way of gaining recognition of a legal event. In this situation, a same-sex couple can ask for the recognition of cohabitation since the current legislation does not prohibit this case.

Thus, the article is dedicated to shedding light on "To what extent can Vietnam first lay the foundation for same-sex marriage?'. In order to answer this question, it is necessary to answer the two sub-questions of (i) What is the current context and the current legal framework of Viet Nam?; and (ii) Is it necessary to legalize same-sex marriage? These two sub-questions shall be answered by examining Vietnam's current context and legal framework on same-sex relationships.

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1 Bronwyn Winter, "Preserving The Social Fabric: Debating Family, Equality And Polity In The UK, The Republic Of Ireland And Australia', *Preserving the Social Fabric: Debating Family, Equality and Polity in the UK, the Republic of Ireland and Australia* (1st edn, Palgrave Macmillan, Cham 2018), 150.

2 United States Agency for International Development, "Being LGBT In Asia: Viet Nam Country Report" (United Nations Development Programme 2014), 12.

3 Aritlce 361, Code of Civil Procedure 2015.

LITERATURE REVIEW

Much effort on gaining LGBT's rights was made before the Marriage and Family Law Reform. The "*Vietnamese people's opinion polls on same-sex marriage*"[1] report were conducted nationally with 5303 people. Accordingly, the percentage of people who supported legalizing same-sex marriage was relatively low: 33,7%[2]. The report also showed a high rate of 52,9%[3] of people who did not support the legalization of same-sex marriage. However, when asking about same-sex cohabitation, the percentage of people who supported and did not support the legalization of same-sex cohabitation was equivalent, which was respectively about 41.2% and 46,7%.[4] Another report of "*Being gay, bisexual and transgender (LGBT) in Asia: Vietnam national report*"[25] in 2014 presented the struggles LGBT individuals were facing regarding working[26], health needs[5]and the discrimination they suffered from the society.[6]

After the Marriage and Family law reform, the report "*Social points on same-sex marriage: a qualitative study in Hanoi and Ho Chi Minh City*"[7] in 2019 showed reasons for supporting and not supporting the legalization of same-sex marriage. Besides the reasons for not supporting or supporting same-sex marriage stated in the last report in 2013, other explanations for not supporting same-sex marriage were presented, such as the misunderstanding of young people about their gender and sexual orientation,[8] the worry of social conflict or the negative impact of same-sex marriage on the Vietnamese population.[31] The report of "same-sex couples living together"[9] stated difficulties that same-sex couples were facing and raised an alert on the legal recognition for their partnership when they live together.[10]

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1 Institute for Social, Economic and Environmental Research, "Kết quả trưng cầu ý kiến người dân về hôn nhân cùng giới (Results Of The People's Opinion Poll On Same-Sex Marriage)" (2013).

2 Ibid 44.

3 Ibid.

4 Ibid 51.

5 Ibid 29.

6 Ibid 14.

7 Institute for Social, Economic and Environmental Research, "Báo cáo nghiên cứu: quan điểm xã hội về hôn nhân đồng giới (Social Points On Same-Sex Marriage: A Qualitative Study In Hanoi And Ho Chi Minh City)" (Institute for Social, Economic and Environmental Research 2019).

8 Ibid 13[31], Ibid 15.

9 Vũ Thành Long, Đỗ Quỳnh Anh and Chu Lan Anh, "Sống chung cùng giới: tình yêu và quan hệ chung sống của người đồng tính, song tính và chuyển giới ở Việt Nam (Same-Sex Cohabitation: Love And Cohabitation Of Gay, Bisexual And Transgender People In Viet Nam)" (Institute for Social, Economic and Environmental Research 2019).

10 Ibid 47.

Besides reports, there are some studies conducted by scholars examining the situation of the LGBT community. The article "*Recognizing shadows: masculinism, resistance, and recognition in Vietnam*"[1] by Paul Horton posed the effort of Vietnamese gay men to have recognition from the society and their families in Viet Nam due to the traditional norms of masculinity,[2] the impact of Confucian and Taoist for a long time and the state policies.[3] Stories of some gay men who tried to cover their "shadow" by either marrying women[4] or to find spaces for their "shadow" by going to gay bars while in the marriage relationship[5] contributed to the fact that being homosexual is the nature of a people, no matter how they hide it. Also, the article "*Reshaping boundaries: Family politics and GLBTQ resistance in urban Vietnam*"[6] by Paul Horton and Helle Rydstrom proved the negative relationship between the government's effort to exclude the same-sex relationship from society by the soft regime the resistance of LGBT individuals.[7] The research also presented how LGBT individuals choose to step out of their comfort zone.[8]

Furthermore, research shows the relationship between the law and its effect on shaping society's attitudes towards same-sex marriages or same-sex relationships. For example, results of study of "*Do Laws Shape Attitudes? Evidence from Same-Sex Relationship Recognition Policies in Europe*"[9] by Cevat G. Aksoy et al. found that the attitudes towards same-sex marriage/relationships only changed after the policy amendments.[10] In other words, they found that the recognition of the law on same-sex marriage positively changed society's attitudes.

To conclude, these findings are solid grounds for the lobby of a strategy of legalizing same-sex marriage in the next period of amending the law after almost eight years of the Marriage and Family Law 2014. Nevertheless, all mentioned reports and research focused on LGBT individuals and same-sex marriage mainly from social perspectives.

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1 Paul Horton, "Recognising Shadows: Masculinism, Resistance, And Recognition In Vietnam" (2019) 14 NORMA.

2 Ibid 67.

3 Ibid 73.

4 Ibid 76.

5 Ibid 75.

6 Paul Horton and Helle Rydstrom, "Reshaping Boundaries: Family Politics And GLBTQ Resistance In Urban Vietnam" (2019) 15 Journal of GLBT Family Studies.

7 Ibid 294.

8 Ibid 299.

9 Cevat G. Aksoy and others, "Do Laws Shape Attitudes? Evidence From Same-Sex Relationship Recognition Policies In Europe" (2020) 124 European Economic Review.

10 Ibid 19.

Furthermore, none of the statements or analysis has focused on recognizing same-sex cohabitation as the first step to changing society's attitudes towards same-sex marriage. They generally indicated the need to change society's attitudes and the role of actors such as media, government or LGBT individuals. Specifically, the mentioned reports conducted surveys regarding the legalization of same-sex marriage, but they did not set out a specific strategy to achieve that goal. Since the legalization of same-sex marriage can affect the core nature of society and economic development, the legalization must be made step by step with the specific strategy. Furthermore, the reports concluded general suggestions that same-sex marriage should be legalized but did not explicitly state the legal grounds to do so. Therefore, the research shall focus on same-sex cohabitation from the legal perspective to lay the first foundation on the process of legalizing same-sex marriage, especially in the context that Vietnam is towards the globalization era, in which people, regardless of their sexual orientation or gender, are treated and protected equally.

RESEARCH METHODOLOGY

The doctrinal method shall analyze the authors' arguments on cohabitation as the first foundation of legalizing same-sex marriage. The sources used are the available primary and secondary resources. Legal documents as a primary source were used when addressing the legal framework of Vietnam. The paper used secondary sources of academic articles and reports relating to same-sex marriage to examine the development and current situation of same-sex marriage in Vietnam.

OVERVIEW ON SAME-SEX MARRIAGE IN VIET NAM

The current context of Viet Nam

A same-sex relationship was never considered to be a crime in Vietnamese history. Indeed, a same-sex relationship was not mentioned in Vietnamese culture before due to the heavy impact of Confucianism in Vietnamese tradition.[1] Following the significant development in many areas in the Doi Moi period in 1986, the Vietnamese government focused on remaining the Vietnamese culture in the context of globalization.[2] Through years of enforcement, the Marriage and Family Law reform has brought a chance to reshape society's attitude towards same-sex marriage. Accordingly, the reform of Marriage and Family law in 2014 has abolished the prohibition of same-sex marriage and left it neither recognized nor prohibited. In practice, this meant a lot for the LGBT

[1] Paul Horton (n 39) 292.

[2] Montoya, A., 2021. Becoming MSM: Sexual Minorities and Public Health Regimes in Vietnam. Open Anthropological Research, 1 (1), 37.

community since they can hold a commitment ceremony just like different-sex couples without being monetarily fined.[1]

Furthermore, same-sex marriage was a topic that left little recognition[2] because of the heavy impact of Confucianism in the concept of family, which is made by different-sex couples.[48] Accordingly, different-sex marriage is considered natural, and it plays a crucial role in reproduction.[3] Together with the deep-rooted norm of gender roles in a family makes different-sex marriage more natural than ever.[4] The Vietnamese family also values the patriarchal nature.[5] For example, in Viet Nam, there is a quote for building a Vietnamese family *"Men build houses, women build homes*,'[6] which means that only men can use their strength to build a house physically or earn money to take care of his family, and the women have the duty take care of that family by doing things such as housework or raising children. Therefore, same-sex relationship is considered unnatural because it breaks the social norm on the meaning of *"traditional family'*.[7] Besides the mentioned Vietnamese traditional reasons, the development of children is also the reason for society's negative attitude towards same-sex marriage.[8] The traditional family in Vietnamese society must be between men and women to ensure a child's development. [9] A same-sex family is indicated to bring adverse effects on children, such as gender bias or social stigma for that child.[10]

To conclude, the mentioned reasons are typical examples of reasons causing society's negative attitude towards same-sex marriage. However, significant changes

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1 Trần Hiền, "Hạnh phúc đáng ngưỡng mộ của 5 đôi đồng tính, chuyển giới sau đám cưới (Admirable Happiness Of 5 Gay, Lesbian And Transgender Couples After The Wedding)" (*Báo Thanh niên*, 2019) <https://thanhnien.vn/hanh-phuc-dangnguong-mo-cua-5-doi-dong-tinh-chuyen-gioi-sau-dam-cuoi-post879987.html> accessed 23 October 2021.

2 United Nations Entity for Gender Equality and the Empowerment of Women, "Country Gender Equality Profile - Vietnam 2021" (United Nations Entity for Gender Equality and the Empowerment of Women 2021), 200 [48] Paul Horton and Helle Rydstrom (n 39) 292.

3 Institute for Social, Economic and Environmental Research (n 29) 15.

4 Ibid 22.

5 United Nations Entity for Gender Equality and the Empowerment of Women, "Country Gender Equality Profile - Vietnam 2021" (United Nations Entity for Gender Equality and the Empowerment of Women 2021), 38.

6 In Vietnamese "Đàn ông xây nhà, đàn bà xây tổ ấm".

7 Vũ Thành Long (n 32) 5.

8 Ibid.

9 Institute for Social, Economic and Environmental Research (n 29) 5.

10 Stephanie N. Webb, Phillip S. Kavanagh and Jill M. Chonody, "Straight, LGB, Married, Living In Sin, Children Out Of Wedlock: A Comparison Of Attitudes Towards "Different" Family Structures' (2019) 16 Journal of GLBT Family Studies, 56 [57] Vũ Thành Long (n 32) 25.

have happened over the years that brought LGBT people closer to Vietnamese community. Indeed, a recent report in 2019 showed the shift in the coming out of LGBT people.[57] These recent coming-out events seem to bring a more friendly view to the LGBT community and bring more sympathy and better understanding about the LGBT community by showing the various struggles they are facing. For example, TV shows such as *"Coming out'*, *"Love is Love"* or *"Yêu là cưới"* are not only gradually providing more information about the LGBT community their marriage (without legal recognition) but also prepreparing for LGBT people who want to come out. From here, it is easy to see that in the past, maybe it was the heavy burden of fulfilling the family and society's expectation and the fear of coming that made the LGBT remains silent. However, the impact of globalization on same-sex marriage around the world has contributed to a less strict permissive stance of the government and society and encouraged LGBT persons to step outside their "shadow'.

The current legal framework of Vietnam

To begin with, it should be noted that same-sex marriage was not recognized globally. Especially prior to 2000,[1] where marriage is generally interpreted as the union of the opposite sex. The Netherlands' legislation is the leading example of allowing same-sex marriage in 2001, which marked the possibility of changing the legal definition of marriage. This has proved that marriage is not only a heterosexual union but also a homosexual union. Accordingly, same-sex couples' marital rights were gradually legalized in many jurisdictions, including Belgium, Spain, Canada and has widely grown in various countries up to 2010.[2] From the European Union's perspective, same-sex marriage is closely linked to the right to marry or not to be discriminated against based on sex under the European Convention of Human Rights.[3] As a result, several resolutions have been enacted to prevent discrimination against homosexuals and ensure equal rights in the European Union.[4] Furthermore, the principle of equal treatment before the law and non-discrimination regardless of sex is also stated in the International Covenant on Civil and Political Rights – of which Viet Nam has been a member from 1982. Throughout the years, there has been an increase in the number of countries that has taken applicable forms of same-sex relationship

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1 Bosede Bukola Oludairo, "Same-Sex Marriage, Civil Marriage And Cohabitation: The Law, The Rights And Responsibilities" (2018) 9 African Journals Online, 179.

2 Kathleen A. Lahey, "Same-Sex Marriage, Transnational Activism, And International Law: Strategic Objectives Beyond Freedom To Marry" (2010) 104 Proceedings of the ASIL Annual Meeting, 380.

3 European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8, 12, 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

4 Resolution on Equal Rights for Gays and Lesbians in the EC, 1998 O.J. (C 313) 186; Resolution on Equal Rights for Homosexuals and Lesbians in the European Community, 1994 O.J. (C 61) 40.

into account, including registered partnerships or cohabitation as a non-registered form of partnership.[1] In terms of cohabitation, it refers to cohabiting couples without regulating by law or a so-called "*trial*" marriage.[2] In the United Kingdom and the United States, cohabiting couples may be entitled to some rights and be imposed responsibilities under the laws of property and Trust in case of divorce, which does not include rights and duties similar to married couples.[3] Similarly, cohabitants in Nigeria are not granted the same rights and responsibilities as married couples due to the disapproval of cohabitation in regulating marriages.[65] These evidence show the opening up of marriage law to same-sex couples in many countries worldwide, notably in the European countries.

Since same-sex relationships face resistance in Vietnam at the national level, it can not be found in specific legal documents. However, the idea of same-sex marriage can be indirectly found in the 2013 Constitution - the legal document with the highest authoriy/ power in the Vietnamese legal framework. Expressly, the right to marry someone they love is stated clearly in article 36 *"men, women have the right to marry and divorce. Marriage must adhere to the principles of voluntariness, progressiveness, monogamy, equality and mutual respect between husband and wife'*. The meaning of these words can indicate that either men or women shall have the right to marry someone they choose by the principles of voluntariness. Therefore, the term 'husband' and 'wife' does not indicate the formation of a family must be between a man as a husband and a woman as a wife because this term is just a way to call those having marital relationships[4]. Generally, it should be understood that the nature of this provision is about the freedom to marry someone without the parents' arrangement, which used to be a precedent in Vietnamese society before. Furthermore, article 16 of the 2013 Constitution stated that "*All people are equal before the law; no one is subject to discriminatory treatment in political, civil, economic, cultural or social life*'.

THE SIGNIFICANCE OF LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN VIET NAM

From the social perspectives

From the current context of Vietnam, it can be seen that same-sex couples are left behind because there is currently no legal framework to regulate same-sex relationships.

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1 Orsolya Szeibert-Erdős, "Same-Sex Partners In Hungary
 Cohabitation And Registered Partnership" (2008) 4 Utrecht Law Review, 212.

2 Wendy D. Manning and Jessica A. Cohen, "Premarital Cohabitation And Marital Dissolution: An Examination Of Recent Marriages" (2012) 74 Journal of Marriage and Family.

3 Bosede Bukola Oludairo (n 58) 186 [65] Ibid.

4 Not every same-sex couples call themselves using those terms, and perhaps may feel discomfort from having those terms enforced on them.

The Marriage and Family Law reform is only the preparation to reshape society's attitude towards same-sex couples. After almost eight years of enforcement of the 2014 Marriage and Family Law, it is time to reconsider same-sex marriage, especially in the case that the context of Vietnam has changed over the years. Specifically, there are four important arguments as follows:

First, the concept of marriage in a globalized society has evolved from many perspectives. Specifically, marriage nowadays is considered to be the matter of a person and not of society.[1] This leads to the right to freely marry anyone that a person loves and not be affected by the heavy burden made by society's attitude or the social norm that only different-sex couples can build a perfect family. Furthermore, in many reports, the most mentioned reason is the concern on the reproduction of the family. However, thanks to the development of technology, matters related to reproduction have been resolved. In the past, the belief that only different-sex couples could have babies was rooted deeply in most people's minds. However, the advancement of medicine has changed the situation. Nowadays, many assisted reproduction methods can help same-sex and different-sex couples have a baby. Furthermore, if the reproduction function is the reason for marriage, infertile different-sex couples shall also be excluded from the right to marry since they can not fulfill their responsibility.

Second, there is a close link between economic development and the protection of LBGT's rights. Undoubtedly, one of the highest protection measures is legalizing same-sex marriage. Recent research has proved that the legal exclusion of the LGBT community is harmful to LGBT people themselves and negatively impacts the economy. Specifically, this exclusion may cause loss of working time, low output, or insufficient work allocation.[2] This may lead to the reduction of economic output and growth. In other words, the level of LGBT rights' protection and economic development positively impacts each other. For example, the research shows that countries having more legal protection for LGBT people have higher GDP per capita.[3] This is easy to understand since one of the driving factors to increase job performance is job satisfaction. Among many elements contributing to job satisfaction, one element that has a close link to LGBT people is the level of openness of their colleagues about

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1 Nan D. Hunter, "The Future Impact Of Same-Sex Marriage: More Questions Than Answers" (2012) 12 Georgetown Public Law and Legal Theory Research Paper, 1857.

2 M.V. Lee Badgett, Kees Waaldijk and Yana van der Meulen Rodgers, "The Relationship Between LGBT Inclusion And Economic Development: Macro-Level Evidence" (2019) 120 World Development, 12.

3 Ibid.

their sexual orientation (for example, reducing discrimination).[1] Recent research shows that disclosing sexual orientation to colleagues brings about confidence and self-esteem or increases their interaction.[2] The higher the employee satisfaction, the more productivity or the output of an organization increases.[3] Thus, recognizing LGBT's rights gives them the motives to disclose their sexual orientation, which is an integral part of the scale of job satisfaction.

Lastly, the recognition of same-sex marriage can significantly affect the attitudes of society towards same-sex marriage. First, as can be seen from the mentioned reports, same-sex couples are being mistreated just because of their sexual orientation. However, if nothing is done, the attitude towards same-sex marriage is expected to remain the same as it is at the moment. This means that the rights and interests of same-sex couples shall be continuedly excluded. Second, marriage has long been considered necessary because of both its social and legal roles. For the former, notably, it is the reproduction function and the gender role. For the latter, it is the legal benefit. Furthermore, being legally married also brings spiritual recognition by their family and society. Although in the case of Viet Nam, the legalization of same-sex marriage can not be done immediately, the recognition of same-sex cohabitation is surveyed to be highly supported and can create a new space for people to rethink about same-sex marriage.

From the legal perspectives

As can be seen from above, the lack of current legal recognition and society's attitude towards same-sex relationships have put same-sex couples into a vulnerable situation.

Generally, when comparing to different-sex couples, the current legal framework gives them no protection in pregnancy, adoption, inheritance or common property. Comparisons between different-sex couples when marriage and same-sex couples are as follows:

First, regarding the labour area, for different-sex marriage, couples are entitled to pregnancy rights under the 2014 Law on Insurance. Specifically, a male worker is entitled to a maternity regime when his wife is pregnant while he is currently paying social insurance premiums for at least 6 months within 12 months before childbirth or

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[1] Huang-Chi Lin and others, "Impacts Of Public Debates On Legalizing The Same-Sex Relationships On People'S Daily Lives And Their Related Factors In Taiwan" (2020) 17 International Journal of Environmental Research and Public Health.

[2] Alfred Montoya, "Becoming MSM: Sexual Minorities And Public Health Regimes In Vietnam" (2021) 1 Open Anthropological Research, 4.

[3] Abdulwahab S. Bin Shmailan, "The Relationship Between Job Satisfaction, Job Performance And Employee Engagement: An Explorative Study" (2021) 4 Issues in Business Management and Economics, 6.

child adoption. Under section 2, 4, 6, article 34 and section 1, article 39 of the 2014 Law on Insurance, the maternity regime for male workers who have their wife pregnant includes (i) the leave period for childbirth[1]and (ii) allowances.[2] For same-sex couples Only the persons who have pregnancy or adoption may be entitled to these rights.

Furthermore, for the survivorship allowance regime, the husband (at least 60 years old) or wife (at least 55 years old) in different-sex marriage shall take advantage of the monthly survivorship allowance under article 67 of the Law on Insurance 2014. The requirements are that the deceased must meet one of the following conditions (i) *Have paid social insurance premiums for at least full 15 years but have not yet received a lump-sum social insurance allowance*; (ii) *Being on a pension*; (iii) *Being on monthly labour accident or occupational disease allowance for a working capacity decrease of 61% or more*; or (iv) *Die of a labour accident or an occupational disease.* In this case, that deceased person's husband or wife must either (i) *have no income or* (ii) *have a monthly income lower than the basic salary.* For same-sex couples, since they are not legally married couples, their partner shall not have this benefit.

Second, regarding inheritance, according to article 644 of the 2015 Civil Code, the wife or husband is considered the heirs, notwithstanding the contents of wills. In other words, if a testator does not grant any an inheritance to or give a legacy which is less than two-thirds of the share that his/her children who are minors or incapable of working, father, mother, wife or husband shall be entitled to, these mentioned people

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[1] Article 34, Leave period for childbirth of the Law on Insurance 2014

2. Male employees currently paying social insurance premiums whose wives give birth to children are entitled to a maternity leave of:

a/ 5 working days; b/ 7 working days, in case their wives undergo a surgical birth or give birth to children before 32 weeks of pregnancy; c/ 10 working days, in case their wives give birth to twins; or additional 3 working days for each infant from the second; d/ 14 working days, in case their wives give birth to twins or more infants and take childbirth operation.

[2] Article 39. Allowance levels of the maternity regime the Law on Insurance 2014

For employees entitled to the maternity regime as prescribed in Articles 32 thru 37 of this Law, the allowance levels shall be calculated as follows:

a/ A monthly allowance must equal 100% of the average of salaries of 6 months preceding the leave on which social insurance premiums are based. For employees who have paid social insurance premiums for only under 6 months, the allowance level under the maternity regime specified in Article 32 or 33, Clause 2, 4, 5 or 6, Article 34, or Article 37, of this Law, is the average of salaries of the months for which social insurance premiums have been paid; b/ The per-diem allowance for the case specified in Article 32, or Clause 2, Article 34, of this Law must equal the monthly maternity allowance divided by 24 days; c/ The allowance level after childbirth or child adoption shall be calculated based on the monthly allowance specified at Point a, Clause 1 of this Article; in case of odd days or the case specified in Article 33 or 37 of this Law, the per- diem allowance must equal the monthly allowance divided by 30 days.

are still entitled to have a share of the estate equivalent to two-thirds of the share that he or she would have received if the estate had been distributed under law. Thus, in every case, the wife or husband shall entitle to have their partner's inheritance. This is particularly important if one of the partners passes away and does not have any wills (for example, in case of accidents or the testator has no listed heirs notwithstanding contents of intentions). For same-sex marriage, there is no way that their same-sex partner is entitled to the rights as legal heirs since wills can only inherit them because they are not recognized by law.

Third, regarding personal income tax. It should be noted that income from inheritances that are real estate between spouses shall not be liable to personal income tax under section 4 article 4 of the Law on Personal income tax 2007.[1] Further, incomes from real estate transfers between spouses are also excluded from the personal income tax. Contrastly, same-sex couples shall be taxed for the incomes from the inheritances or their partner's real estate transfer.

Last is about common property. Currently, there are two types of multiple ownership which are owned in common and joint ownership. Under article 210 and article 213 of the Civil Code 2015, the ownership between a husband and wife is divisible joint ownership, which means that "*each owner's share of the ownership rights concerning the multiple ownership property is not specified*". In other words, joint owners have equal rights and obligations concerning the multiple ownership property (section 2 article 210 of the Civil Code 2015). Also, common marital property under article 33 of the Marital and Family Law 2014 is stated as "*property created by a spouse, incomes generated from labour, production and business activities, yields and profits arising from separate property and other lawful incomes in the marriage period; except the case prescribed otherwise; property jointly inherited by or given to both, and other property agreed upon by husband and wife as common property*. Because of this nature, the common property shall be divided into fifty percent for each person and taken into account the factors stated by the law in case of divorce under article 59 of the Marital and Family Law 2014.

Meanwhile, for same-sex couples, their type of ownership is owned in common. Accordingly, ownership in common is defined under section 2, article 209 of the Civil 2015 as "*multiple ownership whereby each owner's share of the ownership rights*

[1] Article 4. Tax-exempt incomes of the Personal Income Tax 2007

Incomes from receipt of inheritances or gifts that are real estate between spouses, parents and their children; adoptive parents and their adopted children; fathers-in-law or mothers-in-law and daughters-in-law or sons-in-law; grandparents and their grandchildren; or among blood siblings.

concerning the multiple ownership property is specified'. In contrast to joint ownership, each of the owners in common ownership has "*rights and obligations concerning the multiple ownership property corresponding to its share of the ownership rights, unless otherwise agreed*." In other words, the percentage of contribution depends on the agreement or the share of the ownership, and this shall also be the grounds for the division. When comparing the request of different-sex marriage and same-sex couples, it can be seen that regardless of what the law states, the nature of the ownership between different-sex marriage and same-sex couples is the same as what is stated as common property under article 33 of the Marital and Family 2014. However, in case of dispute, it would be harder to prove the share of each party's ownership in same-sex couples since the obligation to prove the evidence is one of the parties' obligations in a civil dispute under Article 91 of the Civil procedures 2015.[1]

COHABITATION FOR SAME-SEX MARRIAGE IN VIETNAM - THE FIRST STEP

While controversies surrounding same-sex marriage still exist in many nations, including Vietnam, many countries have changed their legal systems to deal with social changes.[2] According to the Netherlands' Civil Code, the Conditions for Registration of a same-sex registered partnership are almost similar to the requirements for marriages of opposite sex regulated in Vietnamese law, regarding age, marital status, and proof of non-relative...[3] While the

Netherlands permits two institutions without distinction of sex: registered partnership[4] and marriage[5], Viet Nam only accepts the legal marriage of different-sex.[6] According to Vietnamese Marriage and Family Law, cohabitation can be implied to be not limited to the heterosexual relationship, which is defined as "cohabitation as husband and wife', by which means men and women living together and considering

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1 Article 91. Obligations to prove of the Civil Procedures Code 2015

1. The involved parties who petition the Courts to protect their legitimate rights and interests must collect, introduce and supply the Courts with materials and evidences to prove that such petitions are well-grounded and lawful, except for the following cases:

[...]

2 W. Schrama, "Registered Partnership In The Netherlands" (1999) 13 International Journal of Law, Policy and the Family, 315.

3 Article 8, Marriage and Family Law 2014.

4 The Dutch Civil Code entered into force on April 1, 2001 in an attempt to provide same-sex couples with the right to register their relationship and enjoy the same rights and duties as marriage.

5 The Dutch Civil Code also opens marriage to homosexuals on the ground of the right to be treated equally.

6 Clause 2 article 8 of Marriage and Family Law 2014 [81] Article 16 of the Marriage and Family Law 2014.

themselves as husband and wife . Under article 16 of the 2014 Marriage and Family Law, property relations, obligations and contracts between cohabitation couples shall be settled under the partners' agreement. In case of no agreement, the property relations shall be divided by the contributing share of each party. In the case of same-sex cohabitation, there is one thing that the Court shall declare in its decision that is related to housework and other related work to maintain cohabitation shall be counted as contributing shares.[81]

Under the 2015 Civil Procedures Code, two procedures shall be applied in specific cases: the resolution of civil matters and civil cases. Under article 361, civil matters mean a situation where individuals request Courts to recognize their marriage and family rights. At present, the law does not regulate any limitations for specific requests in this case. Therefore, it means that all requests can be brought to the Court for recognition. In the case of same-sex cohabitation, it is considered as "another civil matters" prescribed in section 10, article 27 of the Civil Procedures Code 2015. Accordingly, the Court is prohibited from claiming no legal grounds for resolving when refusing to settle this type of civil matter (section 2, article 4 of the Civil Procedures Code 2015). Therefore, it can be seen that the role of the Court, in this case, is critical since the result of cohabitation recognition entirely depends on the view of the Court since there have not yet been any legal grounds for same-sex cohabitation. Furthermore, it should be noted that this also requires a step-by-step procedure. Specifically, there are five main following steps :

First, the party shall prepare the application and the attached documents under article 362 of the Civil Procedures Code 2015. It should be noted that the request made in the application shall be explicitly and clearly stated . The requests, in this case, shall include (i) the Court's recognition of cohabitation between same-sex couples, (ii) the Court's recognition of the rights and obligations in the case of same-sex cohabitation. For the latter, the Court can refer to article 16 of the Marriage and Family Law 2014 on the rights. The property relations, obligations and contracts between same-sex couples cohabiting shall be settled under the partners' agreement. In case of no agreement, the property relations shall be divided by the contributing share of each party. In the case of same-sex cohabitation, there is one thing that the Court shall declare in its decision that is related to the interests of the housework and the children. Specifically, housework and other related work to maintain cohabitation shall be counted as the contributing shares.

Second, the requesters for civil matter resolution shall apply to the competent Court and pay the advanced court fee of 300.000 VND under the Appendix B, Resolution No.326/2016/UBTVQH14 on the level of collection, exemption, reduction, collection,

payment, management and use of court fees. As mentioned, this shall be categorized as another civil matter. Thus, under section 2, Article 35 of the Civil Procedures Code 2015, the competent Court is the District Court. Furthermore, under point a, section 2, article 40 of the Civil Procedures Code 2015, the requester may apply to the Court where he/she is currently settling or working.

Third, the Court considers accepting the application. The procedures for receiving and processing applications are stated under section 1, article 191, article 363 and article 364 of the Civil Procedures Code 2015. The Court then accepts the civil matter.

Fourth, under article 366 of the Civil Procedures Code 2015, the time limit for request consideration of the Court shall be 01 months from the day the Court accepts the request. During this period, the Court may summon the relevant persons to clarify identity and family marriage issues under point b, section 2, Article 366. These relevant persons may be the two parties' parents or children. The purpose of the summon is to listen to their opinions about cohabitation. This is important because the support of these persons plays a crucial role in the cohabitation life of same-sex couples[1] , just as in the case of different-sex couples, since family acceptance is considered to have a positive link to the physical and mental health of LGBT individuals.[2] Also, the power of law may help family members change their traditional norm of marriage and leads to stronger family relationships.[3] However, it should be noted that this shall not be the only basis for the Court's decision. Other factors that may be considered when deciding may be the years of same-sex couples living together or whether they have common property or not. After collecting sufficient evidence, the Court shall issue a decision to open a meeting under point c, section 2, article 366 of the Civil Procedures Code 2015. The Court must also send the dossier to the competent Procuracies, which shall be returned to the Court within 07 days from the date of receipt of the dossier (section 3, article 366 of the Civil Procedures Code 2015).

Last but not least, the Court opens a meeting to review the application with the participation of the relevant parties under article 367 of the Civil Procedures Code 2015. The meeting procedures shall be conducted following article 369 of the Civil Procedures Code 2015. It should be noted that in the Court's judgement, the grounds

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1 Yuanyuan Wang and others, "Mapping Out A Spectrum Of The Chinese Public's Discrimination Toward The LGBT Community: Results From A National Survey" (2020) 20 BMC Public Health.

2 Caitlin Ryan and others, "Family Acceptance In Adolescence And The Health Of LGBT Young Adults" (2010) 23 Journal of Child and Adolescent Psychiatric Nursing.

3 Aaron Hoy, "From The Political To The Personal: LGBT People And Their Relationships In The Era Of Marriage Equality: An Introduction', *The Social Science of Same-Sex Marriage* (1st edn, Routledge 2021), 7.

for accepting or not accepting the request shall be stated clearly and reasonably (point g, section 1, article 370 of the Civil Procedures Code 2015). In case the proposal is accepted, the Court then issues the decision regarding the acceptance of the cohabitation between parties and related rights and obligations.

As mentioned above, none of the reports or research has focused on recognizing samesex cohabitation as the first step to changing society's attitude towards same-sex marriage. Therefore, in the context that same-sex marriage is left unregulated in Viet Nam, a flexible resolution is needed as a first step to legalizing same-sex marriage. In this case, it is undoubted that the judiciary plays a crucial role in the path of legalizing same-sex marriage.[1] Currently, some countries have legalized same-sex marriage via the Court's decision, such as Taiwan, the United States, Austria or Brazil.[2] At the regional level, Viet Nam can take Taiwan as a lesson in legalizing same-sex marriage. Research showed that factors that significantly contributed to the success of legalizing same-sex marriage in Taiwan are long-term efforts in many areas such as LGBT movements,[3] women's movements, the introducing of knowledge about LGBT in the education area,[4] and the introduction of same-sex relationships through the Court[5] as well as the role of the Judge in settling these matters.[6] From the legal perspectives of all the mentioned factors, same-sex cohabitation via the Court's decision seems the most suitable way to introduce same-sex relationships. This introduction shall play a vital ground in the gradual shift of society's attitude towards same-sex relationships. As many theories[7] suggest that one of the factors that significantly influence attitude and behaviour is the social norms,[8] the authors suggest that, in the context that Viet Nam is still affected by Confucianism, the acceptance of same-sex cohabitation plays a crucial role in changing the social norms. This shall have a positive effect (for

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1 Frédéric Krumbein, "Who Will Be Asia's Next Unicorn? Comparing Marriage Equality In Taiwan With Hong Kong, Japan And South Korea" [2021] Asian Studies Review, 12.

2 Doris T. Chang, "Legalisation Of Same-Sex Marriage In Contemporary Taiwan" (2020) 3 International Journal of Taiwan Studies, 269.

3 Min Zhou and Tianyang Hu, "Social Tolerance Of Homosexuality: A Quantitative Comparison Of Mainland China, Singapore, And Taiwan" (2019) 52 Chinese Sociological Review, 7.

4 Ibid 8.

5 Frédéric Krumbein (n 85).

6 Frédéric Krumbein, "Rainbow Island: Taiwan'S Struggle For Marriage Equality" (2020) 19 Journal of Human Rights, p 489.

7 Stephen M. Haas and Sarah W. Whitton, "The Significance Of Living Together And Importance Of Marriage In Same-Sex Couples" (2015) 62 Journal of Homosexuality.

8 Margaret E. Tankard and Elizabeth Levy Paluck, "The Effect Of A Supreme Court Decision Regarding Gay Marriage On Social Norms And Personal Attitudes" (2017) 28 Psychological Science.

example, decreasing anti-LGBT bias gradually[1]) on society's attitude towards same-sex marriage. This shall bring emotional support for same-sex couples such as in life sharing[94] or family support.[95]

CONCLUSION

In summary, the impact of globalization has led to a significant change in society's attitudes towards same-sex relationships. However, depending on each country's culture and social norms, society's attitudes towards same-sex relationships may vary.

As mentioned, the current context of Viet Nam has three main obstacles for people to accept same-sex relationships, which are (i) the heavy impact of Confucian on the family concept, (ii) the norm of a patriarchal family, and (iii) the negative impact on children's development. These have led to the lack of legal protections for same-sex couples such as (i) same-sex couples shall not be entitled to the maternity regime or survivorship allowance regime; (ii) same-sex couples are excluded from the list of legal heirs; (iii) same-sex couples shall be tax-liable for the incomes from inheritances or incomes from the transfer of their partner's real estate; and (iv), their type of ownership is owned in common, which may make it complicated when same-sex couples have a dispute related to common property. These statements shall answer the first sub-question of "what is the current context and the current legal framework of Viet Nam?"

From these arguments, reasons for legalizing same-sex marriage are presented as follows (i) the changing concept of marriage opens the way for same-sex couples to choose the one they love and not be affected by society; the factors that used to be the main characteristics of a family such as reproduction can be solved nowadays by alternative assisted methods thanks to technology; (ii) the positive link between economic development and the protection of LBGT's rights; and (iii) the impact of the legalization of same-sex marriage in changing the society's attitudes towards same-sex relationships. These shall be the answer for the second-sub question of "Is it necessary to legalize same-sex marriage?"

For countries that have been greatly affected by Confucianism, it shall take time and great effort to change the negative attitudes towards same-sex relationships. Before the reform of Marriage and Family Law, many research and reports had been made to support same-sex marriage in Viet Nam. However, same-sex marriage was still a new phenomenon in Vietnamese society, and people were still reserved about this

[1] Eugene K. Ofosu and others, "Same-Sex Marriage Legalization Associated With Reduced Implicit And Explicit Antigay Bias" (2019) 116 Proceedings of the National Academy of Sciences [94] Frédéric Krumbein (n 90) 10 [95] Ibid 18.

topic. Furthermore, at the international level, same-sex marriage was just legalized in a few countries worldwide at that time,[1] and consequently, same-sex marriage had not been closely linked to globalization. During the years following, same-sex marriage gradually drew much attention from countries worldwide due to the growing number of countries legalizing same-sex marriage and similar forms such as civil union or partnership. Thanks to globalization, society's attitudes towards same-sex relationships are also changed.

Similarly, recent reports showed that people have a more sympathetic view of homosexuals in Viet Nam. However, if the law is just left unregulated, same-sex marriage may always be impossible for LGBT people because it may take forever for society to accept same-sex relationships. Since the choice of marriage has not been available to same-sex couples in Vietnam, the authors suggest same-sex cohabitation via the Court's decision on the resolution of civil matters as the first step on the pathway for Viet Nam to recognize same-sex marriage. Though same-sex cohabitation can not bring more legal protections for same-sex couples, it is suggested to be the most suitable and flexible solution for the law to meet the purpose of changing society's attitudes. This also answers the research question of "To what extent can Viet Nam first lay the foundation for same-sex marriage'.

LIMITATIONS

Regardless of our efforts, two certain limitations should be noted. First, the lack of data on same-sex couples, LGBT people and non-heterosexual people's opinions nowadays at the national level further limits our ability to examine preferences for cohabitation. Second, the missing interviews of judges about same-sex cohabitation limit our ability to have more suggestions on the factors or matters that may be looked at they when consider accepting or not accepting a civil matter. Despite these limitations, the suggestion of same-sex cohabitation from the study has important policy implications for the Vietnamese legal framework in which same-sex couples' rights and obligations are still left unregulated.

[1] Elisa Tang and Lesley Hauler, "All Of The Countries Where Same-Sex Marriage Is Legal" (*Good Morning America*, 2018) <https://www.goodmorningamerica.com/culture/story/29-countries-sex-marriage-officially-legal-56041136> accessed 29 October 2021.

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6. European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8, 12, 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].
7. Singaporean Penal Code.
8. The Dutch Civil Code.

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THE STATUS OF MARRIAGE AS A SOURCE OF RECOGNITION

Mary Anne Case[1]

INTRODUCTION

For the last thirty years, since my earliest days as a legal academic, I have researched, analyzed, and made predictions about the development of marriage law in the United States and elsewhere in the world.[2] That same period also encompasses not the first legal claims for marriage rights by same sex couples (which, in the United States, date back further several decades)[3] but their gradual acceptance by many courts and legislatures, as well as the development in various parts of the world of other forms of legal relationship recognition, such as registered and unregistered partnership for couples regardless of sex. I welcome the opportunity offered by this conference to celebrate the future opened for marriage and family in Taiwan Beyond 748 to reflect broadly on the effect the same-sex marriage movement has had on marriage more generally as a legal and societal institution. My reflections will combine a defense of my longstanding normative commitments with an acknowledgment of how very incorrect some of the descriptive predictions I made decades ago turned out to be.

With apologies for the difficulties this may cause in translation to Chinese, I intend my title The Status of Marriage to be a pun, a play on the multiple meanings of the English word "status" several of which I shall be discussing. Status can refer to a position in a hierarchy, as one up or one down; some institutions and some individuals

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2 *See, e.g.,* Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993) (discussing various then ongoing and recently decided cases concerning same-sex marriage and relationship recognition).

3 The first same sex marriage case to reach the U.S. Supreme Court was Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972). As I explained in *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005), that meant that the case arrived before the groundwork of substantive due process and equal protection jurisprudence that would undergird later, successful claims for same sex-marriage under the U.S. Constitution had been put in place. Like the individual plaintiff in J.Y. Interpretation 748, Chi Chia-Wei, who filed his first petition for same sex marriage in 1986, Jack Baker and his partner kept litigating until they ultimately won. See *Marriage Licenses* at 1759-64 and discussion below.

can be seen to have a higher status, others a comparatively lower status. Marriage has historically had a higher status in this sense than most other forms of legally recognized coupled relationship, such as, for example, concubinage, and in many societies, those individuals who are married are generally seen to be of higher status than single individuals, divorced, separated, or widowed. This notion that marriage is "an honorable estate"[1] marking those who have successfully entered into it as respectable and responsible adult members of their community, has driven much of the push for and much of the opposition to the opening up of marriage to same-sex couples. This notion of marriage as having a peculiarly high status that I had fervently hoped but wrongly predicted would be far more greatly diminished than it now is in many of the countries I study, including my own.

Status has other meanings also relevant to the development of marriage law. When English legal historian Sir Henry Maine famously wrote that "the movement of the progressive societies has hitherto been a movement from Status to Contract,"[2] he was specifically discussing the development of the law of persons as it pertains to the family and its members. At the time he was writing, in the second half of the nineteenth century, marriage in Anglo-American law was correctly described as a contract for entry into a status: the choice to enter into it was contractual on the part of the spouses, but "the relation once formed, the law steps in and holds the parties to various obligations and liabilities" which "rest not upon their agreement but the general law of the State,… which defines and prescribes those rights, duties, and obligations.".[3] For the last century and a half, the law of marriage in many legal systems has increasingly allowed spouses to contract between themselves as to their obligations and to arrange their lives as suits them rather than as demanded simply by their legal status as Husband and Wife.

Most importantly to me as a feminist, a status-like role differentiation in which the rights and duties of the partners in marriage differ by sex as a matter of law has been eliminated in both the United States and Taiwan,[4] allowing for the sharing or

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1 I take this phrase from the Form of the Solemnization of Matrimony of the Church of England's Book of Common Prayer, whence derive the form of marriage vows most familiar to the English-speaking world, such as the vow to take one's spouse "for better, for worse, for richer, for poorer, in sickness and in health…" *See, e.g.*, *Form of the*

2 Henry Maine, ANCIENT LAW 100 (1917).

3 Maynard v. Hill, 125 U.S. 190, 211 (1888) (citations omitted).

4 This end to sex-based distinctions with respect to rights and obligations in marriage came about through a combination of constitutional decision-making and legislative reform in both countries. In the United States, the constitutional revolution was led by Ruth Bader Ginsburg, later a Supreme Court Justice, while she was a litigator for the ACLU Women's Rights Project; this revolution was ultimately embraced

division of roles within a marriage to be Like the United States, Taiwan is among the many legal systems in which this has happened. As Chen Shao-Ju explained:

The replacement of status rules with contract rules, as one of the products of the constitutionalization of family law, is the basic theme of the evolution of Taiwanese family law. Since family law is also called "the law of status" in Taiwan, this development can also be understood as the contractualization of "the law of status." The "old" family law featured status rules that reflected and constituted male supremacy. The "new" family law, celebrated as the achievement of a liberal feminist legal reform project launched in the 1990s, is dominated by contract rules that privilege private negotiation between free individuals, although such contractual freedom is not absolute and is subject to legal regulation individually determined by the members of the couple. Precisely this elimination of legally defined sex roles within marriage has set the stage and served as the precondition for opening up legal marriage to couples regardless of their sex.[1]

Though there is now much scope for freedom of contract between spouses within a marriage, marriage itself still appears status-like from the perspective of third parties, who often determine what legal treatment is to be given a couple (their access to certain legal benefits and the imposition on them of certain legal restrictions,

by even the conservative Chief Justice William Rehnquist, who had initially strongly resisted it. *See, e.g.,* Mary Anne Case, *Feminist Fundamentalism on the Frontier between Government and Family Responsibility for Children*, 2009 UTAH L. REV. 381, 386-389 (2009) (setting forth Rehnquist's early opposition and his later embrace of constitutional antistereotyping jurisprudence in his majority opinion in Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728-730 (2003)). In Taiwan, constitutional judicial decisions similarly prompted legislative reform in the direction of sex equality. *See, e.g.,* Lee Li-ju, *The Constitutionalization of Taiwanese Family Law*, 11 N.T.U. L. REV. 273, 282-288.

[1] Thus, it no longer makes sense as a legal matter to ask of members of a same-sex couple applying for a marriage license "Which one of you is the wife?" as it did in 1971, when Jack Baker and Michael McConnell, who unsuccessfully took their case to the U.S. Supreme Court, first applied for one. For further discussion, see *Marriage Licenses, 2004 Lockhart Lecture*, 89 MINN. L. REV. 1758, 1685-1686 (2005). With all other legally enforceable sex stereotypes about the parties to a marriage having been struck down as a constitutional matter in countries like the U.S. and Taiwan, the notion that it took one of each sex to make a marriage was logically ripe to fall. For further discussion*, see, e.g.*, Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1488 (2000). As Judge Vaughan Walker found in declaring California's attempted elimination of same-sex marriage through the infamous Proposition 8 unconstitutional, the exclusion of same-sex couples from marriage "exists as an artifact of a time when the genders were seen as having distinct roles in society and in marriage. That time has passed. . . . Gender no longer forms an essential part of marriage; marriage under law is a union of equals." Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 992-993 (N.D. Cal. 2010).

for example)[1] by determining whether they are married to one another. In this way, as I will discuss, marital status functions similarly to the status of being a business corporation - registration with the state enables easy recognition not only by one's own and other governments but by a host of private parties, facilitating legal relations with them, especially in circumstances when individually negotiated contractual arrangements are not practically possible.

Although the above senses of the word status will be of greatest relevance to my discussion, underlying the discussion will also be status in the sense of the marriage situation. What kind of institution is marriage in this or any other society or legal system? Today, marriage can be seen as either/ or, both/and a legal, religious, and social institution, which will affect how one looks at it and interacts with it. And finally, marriage can be seen as a natural right, as a constitutional right, as a democratically or legislatively granted privilege, as far more than a simple matter for private agreement by the members of a couple.

In addition to engaging with multiple meanings of the word status, I shall also in this article consider the various senses in which the English word "recognition" has relevance to the status of marriage. As I shall discuss, recognition can refer both to what is familiar, socially and legally, and to what is validated, socially and legally. Making marriage available to same-sex couples facilitates their recognition in every sense of the word - it makes their relationship more easily legible to family members and society on the one hand[2] and the law in all its applications on the other. Additionally, same-sex marriage is often seen both in general as a matter of constitutional and human rights and as a goal for particular members of the LGBT community because it acknowledges the worth and dignity of LGBT individuals and their relationships. The various meanings of status thus intersect with the various senses in which recognition is on offer. While I shall continue by and large urge an emphasis on the practical, I shall acknowledge and discuss the important symbolic aspects that have played in the evolution of relationship recognition in the last several decades.

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[1] While attention is most often focused on the legal benefits attached to marriage, as will be discussed further below, it is more accurate to speak of the treatment accorded as a matter of law to marriage and those who are married. Whether this treatment is a benefit or instead a burden, restriction, or penalty on the members of the married couple depends on their particular circumstances.

[2] This legibility can have downside for some couples, in light of the fact that behavior historically and stereotypically expected of spouses, even though it can no longer be legally required of them, can continue to be socially imposed.

I intend this article on marriage status to be a counterpart to an article I published in 2005 called Marriage Licenses.[1] That title was also a play on words. A marriage license in the Anglo- American legal system is the document that a celebrant of a marriage ceremony (a justice of the peace or a member of the clergy or other authorized official) gets from the state as authorization to perform a ceremony marrying a particular couple in conformity with state law. But, in using this phrase as the title of a law review article, I treated it primarily, not as a plural noun with an adjective, but as a subject and a verb, as a complete sentence. I argued that in American law at the turn of the millennium, the institution of marriage was licensed in the sense that it left couples freer to structure their own lives than any of the then available alternatives, for example, registered and unregistered domestic partnership.[2] I set forth how I, particularly as a feminist, saw that as desirable, saw it as a move away from rigid enforcement of gender roles, whether those roles were hierarchical or not, and even though those roles, such as breadwinner or homemaker, were now able to be occupied by people of any sex.[3]

A central part of my earlier article was the prediction that the law of marriage would gradually follow a similar arc as that of the law of business corporations, as I will discuss further below. The English state had first asserted monopoly control over the entry into both marital and corporate status in the mid-eighteenth century.[4] The state's hold over corporations rapidly loosened so that, by the end of the nineteenth century in both the United Kingdom and the United States, general incorporation had replaced special incorporation - corporate status was no longer limited as it had been to the state's favorites for certain specifically enumerated worthy purposes. Still, it was available to almost anyone for almost any purpose, which need not even be specified so long as it was not illegal.[5]

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1 Mary Anne Case, *Marriage Licenses, 2004 Lockhart Lecture*, 89 MINN. L. REV. 1758 (2005).

2 I explained that, in contrast to the freedom, privacy, and flexibility offered by the then prevalent laws of marriage in the United States: The requirements of actual cohabitation in a shared residence and commingled finances are quite typical of most domestic partner registries. Ascriptive or functional recognition schemes may also weigh additional requirements, such as that a couple be monogamous or be known as a couple to family and neighbors. *Id.* at 1774.

3 *See, e.g.*, Orr v. Orr, 440 U.S. 268, 282 (1978) (holding that when "family units defied the stereotype and left the husband dependent on the wife," the wife could be ordered to pay the husband alimony on divorce).

4 For marriage, the relevant law was the 1753 Act for the better preventing of Clandestine Marriages, popularly known as Lord Hardwicke's Act, by which the state exerted control through its Established Church. For further discussion*, see Marriage Licenses* at 1767. For business corporations, it was the Bubble Act of 1720, which forbade all joint-stock companies not authorized by royal charter.

5 *See, e.g., Marriage Licenses* at 1777.

Businesses also had a growing variety of corporate and partnership forms from which to choose, with the state generally indifferent to which they chose. Moreover, dissolving a particular form, and reconfiguring to make more productive use of one's assets, had become increasingly possible, as the laws of bankruptcy came to emphasize, no longer the shame of failure in one's enterprises but the need to facilitate a fresh start.

As I shall discuss further below, I predicted and hoped that the same flexibility and expansion in choices would soon be available to persons organizing their family lives. I applied to my analysis of the laws governing family relations the principles my law and economics colleagues had developed to analyze business relations. Like my colleagues, I found centering the value of efficiency to be useful. I hoped that a focus on efficiency as a central consideration for the law's approach to marriage would prove a more helpful guide to concrete law reform than a more exclusive focus on, for example, human dignity or moral virtue.

What would it mean to look at the law of marriage from the perspective of efficiency? Let me illustrate by quoting two opinions concerning the role of the law in marriage, each outlined in the context of the debates about legal recognition of same-sex marriage. The first is from Vermont State Supreme Court Justice Denise Johnson's partial concurrence in her court's 1999 decision that it was unconstitutional for Vermont to "exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married couples." [1] Her colleagues in the majority, acknowledging the "deeply-felt religious, moral, and political beliefs"[2] they saw implicated in opening up marriage to same-sex couples, were themselves content not only to allow the state a period to develop a remedy for the exclusion but also for the legislature to adopt as the remedy, not marriage itself but instead a new status, called the civil union, which would be limited to same-sex couples.[3] Johnson, by contrast, thought that the appropriate remedy was for marriage in Vermont to be immediately opened up to same-sex couples. She wrote:

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1 Baker v. Vermont, 744 A.2d 864, 867 (Ct. 1999).

2 Baker v. Vermont, 744 A.2d 864, 867 (Ct. 1999).

3 Civil unions for same-sex couples turned out to be only an interim, and, in the end, unsatisfactory solution for Vermont, however. Once other states, beginning with Vermont's neighbor state of Massachusetts in 2004, made marriage available to couples of any sex, the Vermont legislature followed suit in 2009, opening marriage to samesex couples and discontinuing the ability to enter into civil union. *See, e.g.*, *Marriage and Civil Union Certificates*, VERMONT DEP'T OF HEALTH, *available at* https://www.healthvermont.gov/health-statistics-vital-records/vital-recordspopulation-data/marriage-and-civil-unions (last modified Jan. 6, 2021).

This case concerns the secular licensing of marriage. The State's interest in licensing marriages is regulatory… The regulatory purpose of the licensing scheme is to create public records for the orderly allocation of benefits, imposition of obligations, and distribution of property through inheritance. Thus, a marriage license merely acts as a trigger for the state-conferred benefits. In granting a marriage license, the State is not espousing certain morals, lifestyles, or relationships but only identifying those persons entitled to the benefits of the marital status.[1]

Christiane Taubira, the Garde des Sceaux, the Justice Minister of France, responsible for shepherding the law opening marriage to same sex couples through the French legislative process, took a similar position. She said of "mariage pour tous" (marriage for all) in France, "Il ne revient pas à la puissance publique de dire ce qui est le bien ou ce qui est le mieux, il lui revient d'organiser. "[2] ("It is not up to the public authority to say what is good or what is the best. It is up to it to organize [things].")

I find this descriptively true and a normatively appealing view of state-sponsored legal marriage. As I said above, marriage is many things to many people. It is a social institution. It is a religious institution. It is a cultural institution. But if we focus on it as a legal institution, I think it should be about the orderly allocation of benefits and obligations. Most modern societies under the rule of law have made many benefits and obligations turn on the status of being married.[3] We can imagine a world in which things are not so structured around marriage, in which marriage is not so significant for what Christiane Taubira calls organization. But that is not the world in which we are living. We live in a world where marriage matters nationally and internationally, and immediate developments in the law of marriage must take that into account.

I. APPLYING THE TOOLS OF LAW AND ECONOMICS TO THE LEGAL INSTITUTION OF MARRIAGE

In focusing on efficiency when looking at the law's regulation of marriage, I am, of course, adopting the traditional focus of scholars in law and economics, something I sometimes joke that I am contractually obligated to do as a member of the faculty of

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1 Baker v. Vermont, 744 A.2d 864, 898-899 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (internal citations omitted).

2 *Mariage pour tous: les déclarations de Christiane Taubira à l'Assemblée nationale*, MINISTERE DE LA JUSTICE (Apr. 23, 2013), *available at* http://www.justice.gouv.fr/le-garde-des-sceaux-10016/archives-2013-c-taubira12869/mariage-pour-tous-les-declarations-de-christiane-taubira-30071.html.

3 Consider for example, the discussion below and in Marco Wan's article for this symposium of litigation for recognition of same-sex marriage in Hong Kong. Although to date the courts of Hong Kong have denied a general claim for access to same-sex marriage, a number of recent lawsuits there have successfully claimed for same-sex couples married abroad particular benefits the law of Hong Kong ties to marital status.

the University of Chicago Law School, home to so many of the distinguished pioneers of the law and economics movement.[1] But my analysis of what makes legal marriage an efficient institution bears no resemblance to my late colleague Gary Becker won a Nobel Prize.[2] Becker's work, which focused mostly on decision-making within a family unit,[25] is rooted in a sex-role differentiated world, and his model of family decisionmaking is an ultimatum game in which the "husband-father-dictator-patriarch" can make a take-it-or-leave-it offer to other family members."[3]

My inspiration comes, not from Becker, but from another of my late Nobel Prize-winning colleagues, Ronald Coase, whom the Nobel Committee lauded for "specifying principles for explaining the institutional structure of the economy" through attention to "the costs of entering into and executing contracts and managing organizations… commonly known as transaction costs."[4] I have long argued that Coase's theory of the firm[5] can fruitfully be applied to the family.[6] Coase's theory of the firm suggests that people in business choose how to organize their business depending upon the legal and social circumstances in which they find themselves and compare the transaction costs involved in the alternative forms of organization available. They might incorporate or simply engage in a series of one-off contracts; they might form a sole proprietorship, a partnership, a limited liability company, or a franchise operation. Just as one is now generally free, as Coase observed, to structure one's business affairs as one finds most suitable, similarly both law and society now offer a variety of ways to structure one's personal life. The provision of sex and care (for example, elder and child

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1 In fact, I began thinking of marriage in these terms long before arriving at Chicago. The University of Virginia, where I taught in the 1990s, also had a strong commitment to law and economics, and my work drawing analogies between the law's regulation over time of marriages and of business corporations began as a collaborative project in legal history with my University of Virginia School of Law colleague Paul Mahoney, a scholar of corporate law with a generally libertarian approach to regulation, to whom I remain most grateful.

2 See *This Year's Laureate Has Extended the Sphere of Economic Analysis to New Areas of Human Behavior and Relations*, THE ROYAL SWEDISH ACADEMY OF SCIENCES (Oct. 13, 1992), *available at* https://www.nobelprize.org/prizes/economic-sciences/1992/press-release/ (crediting Becker for having

3 I take this analysis of Becker from Robert A. Pollak, *Tied Transfers and Paternalistic Preferences*, 78 AM. ECON. REV. 240, 242-243 (1988) and I develop an alternative approach to Becker's in Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J OF L. & PUB. POLICY 225 (2011) on which Pollock commented at 35 WASH. U. J OF L. & PUB. POLICY 261 (2011).

4 *See Press Release*, THE ROYAL SWEDISH ACADEMY OF SCIENCES (Oct. 15, 1991), *available at* https://www.nobelprize.org/prizes/economic-sciences/1991/press-release/.

5 *See, e.g.*, Ronald Coase, THE FIRM, THE MARKET, AND THE LAW (1988).

6 *See, e.g.*, Mary Anne Case, et al., *Pregnant Man: Amazon or Etana?*, 22 YALE J. OF L. & FEM. 207, 220 (2010); The University of Chicago, *Ronald Coase's Theory of the Firm and the Family*, YOUTUBE (Jun. 7, 2012) https://www.youtube.com/watch?v=Xho-x3ITgfM.

care) and the production of children can each be outsourced or internalized within a legally recognized family structure.[1] This has been true from time immemorial, as the Hebrew bible's description of the role of surrogacy in the generation of the twelve tribes of Israel[2] and the evolution of the legal treatment of concubines and their children in imperial China[32] both indicate. With families, as with businesses, the perceived costs and benefits of the available legal structures will influence individual and societal choices. It should be the legal system's role to offer structures that work well. "formulated a general theory for the behavior of the family" by applying to it "the principle of rational, optimizing behavior").

When I first began to consider what it would mean to apply Coase's theory of the firm to the family, some feminist theorists were arguing for the complete abolition of all firm-like options for couples. Martha Fineman, for example, argued that we should abolish marriage as a legal category and with it any privilege based on sexual affiliation... There would be no special legal rules governing the relationships between husband and wife or defining the consequences of the status of marriage as now exist in family law... Instead, the interactions of female and male sexual affiliates would be governed by the same rules that regulate other interactions in our society—specifically those of contract and property and tort and criminal law.[33]

Others, like Nancy Polikoff and Paula Ettelbrick, who deplored both marriage's oppressive, sexist history and the modern tendency of state and society to pile tangible and intangible benefits onto married couples to the exclusion of other relationships and individuals, argued that not recognition of same-sex marriage, but rather a broader move toward legal recognition for a variety of functional family forms such as de facto domestic partnerships, should be the goal of LGBTQ activists like themselves.[3]

I shared these feminists' bleak view of marriage's history and their critical view of its privileges. Still, I lacked their optimism that de facto relationship recognition would have the liberatory advantages they foresaw. I observed that, as it happened,

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1 Indeed, in the United States, a much fuller Coasean range of options than is provided for adult relationship recognition has long been legally available for parenthood given the range of legal possibilities for structuring marital and non-marital parentage, adoption, the new reproductive technologies, and market provision of child care. *See id*.

2 *See* Mary Anne Case, et al., *Pregnant Man: Amazon or Etana?*, 22 YALE J. OF L. & FEM. 207, 222 (2010). [32] *See, e.g.*, Lisa Tran, *The Concubine in Republican China: Social Perception and Legal Construction*, 28 ÉTUDES CHINOISES 119, 127 (2009).

3 Both these theorists have weighed in on these subjects in a number of works over a number of years. *See, e.g.,* Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *in* William B. Rubenstein, LESBIANS, GAY MEN AND THE LAW 721, 724 (2d ed. 1997); Nancy D. Polikoff, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008).

courts and legislatures in the U.S. tended to impose on couples seeking de facto recognition a very conservative template of what it meant to be a couple, requiring them to, for example, share a domicile, commingle finances, hold themselves out publicly as a couple, and be sexually faithful; in other words courts and legislatures tended to demand of them what had traditionally been demanded by the law of those who married.[1] By contrast, reform in the laws of marriage in the United States in the twentieth century meant:

Married couples in this society are not required to do the [se] rather conservative things. A marriage certificate now allows heterosexual couples to have an open marriage, to live in different cities or different apartments in the same city, to structure their finances as they please, without having their commitment or the legal benefits that follow from it challenged... [I]n our society marriage can be liberating rather more than it need be oppressive from the perspective of gender.[2]

I must stress that my emphasis in making this claim was exclusively on the law, not on the social norms that still may constrain married couples. I looked to the work of two other University of Chicago law and economics colleagues, Frank Easterbrook and Daniel Fischel, for a way to understand this development in the law of marriage in Coasean terms. In a series of articles ultimately summarized in their book The Economic Structure of Corporate Law, which they dedicated to their "parents and Ronald Coase," Easterbrook and Fischel argued that, despite the prevalence of the language of the regulation, "the corporate code in almost every state is an "enabling" statute,… allow[ing] managers and investors to write their tickets."[3] Although there are many differences in law and, in fact, between marriages and business corporations, I find it productive to apply a template similar to that articulated by Easterbrook and Fischel for business corporations to the law of marriage. Though Easterbrook and

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1 As an example of a court imposing a traditional template, I cited Braschi v. Stahl Assocs., 543 N.E.2d 49, 54 (1989) (granting rent control succession rights to survivor of a gay couple the court found had "all of the normal familial characteristics"). As an example of a legislature doing so, I cited the California and N.J. Domestic.

2 Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643,1665-1666 (1993). My argument here was a direct response to Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage."*, 79 VA. L. REV. 1535 (1993), published in the same symposium volume.

3 Frank H. Easterbrook & Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991), at 2.

Fischel stress the role of specialization within the corporation,[1] as Gary Becker did specialization within marriage,[40] specialization is not a component of my analysis here. Rather I want to emphasize how the laws governing both marital and corporate status today allow those acting within these statuses to "write their tickets, to establish systems of governance without substantive scrutiny from a regulator."[2] While both Becker in his analysis of the family and earlier theorists of corporate law (including Coase himself) can be seen to stress hierarchical command and control within the institutions they analyzed,[3] Easterbrook and Fischel instead saw the internal workings as a "nexus of contracts.".[4] They observed that this term was just a shorthand for the complex arrangements of many sorts that those who associate voluntarily in the corporation will work out among themselves. The form of reference is a reminder that the corporation is a voluntary adventure and that we must always examine the terms on which real people have agreed to participate. The agreements that have arisen are wonderfully diverse, matching the diversity of economic activity carried on within corporations.[5]

What Easterbrook and Fischel say here of business corporations seems to me, *mutatis mutandis*, also true of marriage. I am in strong disagreement with the assertion with which Tolstoy opens his novel Anna Karenina that "[a]ll happy families are alike, but an unhappy family is unhappy after its fashion."[6] Whatever may be true of unhappy families, in my view, happy families, and in particular happy marriages, are also "wonderfully diverse, matching the diversity" of tastes and preferences of their members and the diversity of living arrangements they reach to fulfill them. The law in the U.S. today facilitates this diversity in part through an increasing willingness to enforce the pre-and postnuptial agreements reached by parties to a marriage,[7] but much

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1 Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1425 (1989).[40] *See, e.g.*, Gary S. Becker, *Chapter 2 (Division of Labor in Households and Families)*, *in* A TREATISE ON THE FAMILY (1981), at 30ff.

2 Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1417, 1425 (1989).

3 For a summary of the evolution of the theory of the firm from a theory of hierarchical command as posited by Coase to one of a network of contracts, see Thomas S. Ulen, *The Coasean Firm in Law and Economics,* 18 J. CORP. L. 301, 318ff. (1993).

4 See Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989).

5 Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989).

6 Leo Tolstoy, ANNA KARENINA (Rosemary Edmonds trans., 1954).

7 One important difference between marriages and business corporations in American law remains that the bargains contractually reached within corporations, but not within marriages, can be legally enforced

more importantly through the complete abolition of status-based, sex-differentiated mandatory rules such as that imposed on husbands and wives through the regime of coverture.[47] Virtually every rule that governs spousal relations in the U.S. today is a default rule, which the spouses are free to alter as best suits them.

The law in Taiwan seems to be moving in a similar direction.[1] As in the U.S., where Ruth Bader Ginsburg's work with the ACLU Women's Rights Project played a key role, so in Taiwan, the feminist Awakening Foundation played a key role in efforts "to equalize marriage by abolishing sex-specific provisions that privilege husbands and fathers, reshaping the marital property,… and enhancing the exit" from marriage.[2] Decisions of the Judicial Yuan also moved the law away from the legal enforcement of status-based hierarchies within marriage.[3] Most recently, in May 2020, the Judicial Yuan reversed a fairly recent precedent and declared that criminal penalties for adultery were an unconstitutional violation of proportionality,[4] observing that the

while the relationship is ongoing; marriages, but not corporations seem still to be subject to a rule another of my University of Chicago law and economics colleagues, Saul Levmore, called "Love It or Leave It." *See generally* Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 LAW & CONTEMP. PROBS. 221 (1995). I have argued against the continuing validity of that rule as applied to marriage in Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J OF L. & PUB. POLICY 225 (2011). [47] For an enumeration of some of these mandatory rules of coverture in the (legally unenforceable) marriage contract entered into in 1855 by two resisters to the unequal laws of marriage, see Jane Johnson Lewis, *Marriage Protest of Lucy Stone and Henry Blackwell*, THOUGHTCO. (last updated Jan. 16, 2020), *available at* https://www.thoughtco.com/marriage-protest-lucy-stone-henry-blackwell-3529568.

1 As feminist theorists are right to remind us, a change in the law is, however, often not enough to change couples' behaviors, if it is not also accompanied by a change in social norms. *See, e.g.*, Chen Chao-ju, *Becoming "Outsiders Within": A Feminist Social-Legal Study of Surname Inequality as Sex, Race, and Marital Status.*

2 Chao-Ju Chen, *Migrating Marriage Equality Without Feminism:* Obergefell v. Hodges *and the Legalization of Same-Sex Marriage in Taiwan*, 52 CORNELL INT'L L. J. 65, 112 (2019) ("Mobilized by married and divorced women's suffering and facing strong public opposition, women's movement focused not on the entry to but the exit from marriage, as well as on rights and obligations during the marriage."). *See also, generally,* Lee Li-ju, *The Constitutionalization of Taiwanese Family Law*, 11 N.T.U. L. REV. 273 (2016).

3 *See, e.g.*, J.Y. Interpretation No. 410 (overruling, in reliance on 1985 Amendments to the Civil Code that were motivated by the constitutional requirement of sex equality, an earlier 1966 precedent that had held that property obtained by a wife during a marriage which cannot be proved separate property or contributed property belonged to the husband).

4 J.Y. Interpretation No. 791 (Effect of the Offense of Adultery and Withdrawal of Charges). The Judicial Yuan had previously upheld the criminalization of adultery in 2002 in Interpretation No. 554. In addition to the justifications for reversal cited in the text, the court emphasized that a disproportionate number of those actually convicted of the crime of adultery were women, making an additional consideration for

constitutionally guaranteed freedom of marriage without arbitrary state interference is increasingly valued, including the right of the individuals to decide for themselves "whether to marry," "whom to marry," "whether to divorce by mutual consent," and whether to form and manage their marital relationship with their spouses (e.g., intimate relationship between a couple, economic relationship, lifestyle, etc.). Marriage is established based on mutual affection, and whether it can be maintained harmoniously and satisfactorily depends on the efforts and commitment of the couple.[1]

The court further found that in addition to interfering with privacy and personal (including sexual) autonomy and human dignity, criminalizing adultery could even harm the marital relationship and therefore constituted an unconstitutional "restriction on the autonomy of spouses in the marriage relationship."[2]

II. EFFICIENCY ADVANTAGES OF MARRIAGE AS A LEGAL STATUS

Suppose the law of marriage now looks from the inside like a relational contract whose terms the parties are free to shape without much interference (although also sometimes without much possibility of legal enforcement) [3] by the state. Why not then take up Martha Fineman's suggestion to abolish marriage as a status, and leave the spouses to the ordinary rules of contract, as well as tort and criminal law? The best reasons I can think of for not doing as Fineman also suggests sound inefficient.

First, what marriage today offers to spouses is a series of off-the-rack rules, a package deal. Among the chief functions of civil marriage, today is as a series of reciprocal default designations - I designate you, my spouse, and you designate me, at least as a default, as the answer to a wide variety of questions, including such end of life questions as, "Who shall make decisions in the event of incapacity?", "Who shall determine the disposal of the body on death?" and "Who shall inherit the bulk of my

abolishing criminalization the state's obligation to eliminate sex discrimination and promote substantive equality between the sexes.

1 This summary of a portion of J.Y. Interpretation No. 791 is taken from Tiffany Hsiao, *The One Not Loved Is the Other Man/Woman? A Perspective on the Decriminalization of Adultery Based on Judicial Interpretation No. 791 (Taiwan)*, LEXOLOGY (Sept. 1, 2020), *available at* https://www.lexology.com/library/detail.aspx?g=8a55d926-e86b4f4a-bbc5-ad0032cde5fe.

2 J.Y. Interpretation No. 791 (Effect of the Offense of Adultery and Withdrawal of Charges). The court noted that aggrieved spouses would retain the ability to seek civil remedies, for example through an action for the tort of infringement of spousal rights. *See also Awakening Foundation, Post Conference Press Release on Interpretation* 791 (May 29, 2020), *available at* https://www.awakening.org.tw/news/5454.

3 For a discussion of the perceived limits on enforcement in the U.S., see generally Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J OF L. & PUB. POLICY 225 (2011).

property?" In most countries, these designations are rarely any longer mandatory. For example, those married persons who want their property to pass upon their death to the children of their first marriage or their favorite charity rather than to a surviving spouse can generally arrange this through appropriate pre-nuptial or post-nuptial agreement. And, if, in preparing for potential incapacitation through illness, you want to give your health care proxy to your sister the doctor, your power-of-attorney to your brother the lawyer, and the decision what to do with your remains after your death to an old friend, you today may usually do so by executing the proper paperwork. But, given that many people seem to wish to choose their spouse as the designee for most of these rights and responsibilities, the institution of legal marriage offers an efficient package with which they can accomplish this.

Offering such an off-the-rack set of default rules to couples reduces a couple's transaction costs. It helps answer a question Martha Fineman never in any detail addressed in her proposal that the rules of contract govern the members of a couple: what will the default rule be in the absence of an explicit contract between members of a couple? This is a particularly crucial question given that so few today do explicitly contract or are likely to. More importantly, it reduces the transaction costs of others who deal with the members of a couple, transaction costs which would approach infinity in those situations, not uncommon in modern life, when members of a couple find themselves interacting in the circumstances and with third parties they cannot predict or control in advance.

A. MARRIAGE RECOGNITION AT THE BORDER BETWEEN LIFE AND DEATH

Consider, for example, the circumstances I happened to observe a decade ago while a passenger on a plane on its way to New York City. The plane made an emergency landing in Virginia to allow a passenger who had unexpectedly been taken seriously ill to be admitted for treatment to a hospital. The passenger herself and her traveling companion were protesting this decision, which caused me to turn to my seatmate and hope that the two were not a lesbian couple. I had in mind the fact that, in 2004, Virginia had passed a state law, denominated a "Marriage Affirmation Act," declared void and unenforceable, any "civil union, partnership contract or other arrangements between persons of the same sex purporting to bestow the privileges or obligations of marriage,"[1] regardless of where this arrangement had been entered into. Commentators at the time expressed the fear that the law could interfere "with wills, medical directives, powers of attorney, child custody and property arrangements,

[1] Code of Virginia § 20-45.3. Civil unions between persons of same sex. Repealed by Acts 2020, cc. 75 and 195 , cl. 1, and c. 900, cl. 2.

even perhaps joint bank accounts." However, the sponsors of the bill disclaimed such a sweeping intent. The voters of Virginia in November 2006 had followed up this law with a constitutional amendment forbidding the state to "create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage."[1]

The sick passenger being removed from the plane could have had no idea in advance that she would end up in the state of Virginia, let alone in the particular hospital to which she was being taken. Even had she had gone through all the proper steps to execute and then carried with her all the paperwork necessary in her home state to designate a partner to accompany her and make decisions, itself a cumbersome process, there was no guarantee such paperwork would be treated as valid in Virginia. Had her traveling companion been a man, he could have said he was her husband and likely been accepted with no questions asked or proof required. Few heterosexual married couples in the United States seem to carry their marriage certificates, and they are rarely asked to produce them. Another woman might have better luck falsely claiming to be a sister than truthfully claiming to be a domestic partner.

By contrast, even when members of a same-sex couple have gone through the trouble of executing the necessary individual paperwork for matters such as hospital access and medical decision-making, they have often found it to be disrespected. In the United States and elsewhere, well-publicized instances of such disrespect provided an impetus to law reform.

In the United States, the Obama administration was motivated on April 15, 2010, to issue a "Memorandum Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies"[2] after a widely publicized incident in which a member of a lesbian couple, while aboard a cruise ship with her partner of eighteen years and their adopted children, collapsed with an aneurysm, and was taken to a Miami, Florida trauma center, where, less than

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[1] Similar fears were expressed about its potential reach, with law professor Kerry Abrams noting that "[t]he language in the amendment is broad and could affect the ability of an unmarried person to leave property to a significant other or child, to designate a partner as a medical proxy, or even visit a loved one in the hospital." Emily Williams, Pr*oposed Virginia Amendment May Strike Down More than Same-Sex Marriage, Panelists Say* (Sept. 25, 2006), *available at* https://www.law.virginia.edu/news/200609/proposed-virginia-amendment-may-strike-downmore-same-sex-marriage-panelists-say.

[2] Barack Obama, *Memorandum on Respecting the Rights of Hospital Patients To Receive Visitors and To Designate Surrogate Decision Makers for Medical Emergencies*, THE AMERICAN PRESIDENCY PROJECT (April 15, 2010), *available at* https://www.presidency.ucsb.edu/documents/memorandum-respecting-the-rights-hospital-patients-receivevisitors-and-designate.

24 hours later, she died.[1] The surviving partner was initially told she could be given no information on the patient's condition without a health care proxy.[2] Even when she had a copy of her proxy faxed to the hospital. She was, she claimed, given less information and less access to her dying partner than the patient's sister when she arrived many hours later.[3] As President Obama wrote in directing his Department of Health and Human Services to craft new rules on the subject, such failure by a hospital "means that a stressful and at times terrifying experience for patients is senselessly compounded by indignity and unfairness. And it means that all too often, people are made to suffer or even to pass away alone, denied the comfort of companionship in their final moments while a loved one is left worrying and pacing down the hall."[4]

While the number of people who should be allowed to visit a dying patient can be somewhat flexibly adjusted depending on the patient's condition and the capacities of the hospital, the same cannot be said of those authorized to make medical decisions when the patient is no longer able to do so. Recognizing exactly one person as clearly authorized to do so has efficiency advantages all around. Somewhat paradoxically, the example of end-of-life decision making, therefore, shows that a limited (some would say amoral) descriptive and normative focus on efficiency as a principal aim for state-sponsorship of marriage may provide a strong brake to the slide down the slippery slope toward polygamy to which opponents of same-sex marriage so often point a cautionary finger.[5] If just one spouse is recognized, the hospital knows to

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1 *See, e.g.*, Tara Parker-Pope, *Kept From a Dying Partner's Bedside,* NY TIMES (May 18, 2009), *available at* https://www.nytimes.com/2009/05/19/health/19well.html

2 *Id.*

3 *Id.*

4 Barack Obama, *Memorandum on Respecting the Rights of Hospital Patients To Receive Visitors and To Designate Surrogate Decision Makers for Medical Emergencies*, THE AMERICAN PRESIDENCY PROJECT (April 15, 2010), *available at* https://www.presidency.ucsb.edu/documents/memorandum-respecting-the-rights-hospital-patients-receivevisitors-and-designate.

5 In his dissenting opinion in Obergefell v. Hodges, for example, U.S. Chief Justice John Roberts correctly notes, "It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage," going on ask, "If "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices," why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry?" *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2621-2622 (2015) (Roberts, J., dissenting) (citations omitted). As I have previously discussed, had Justice Kennedy framed his Obergefell opinion around the U.S. constitutional prohibition on sex discrimination, rather than around substantive due process and the right to marry, he could have avoided this challenge from Roberts. *See, e.g.*, Mary Anne Case, *Missing Sex Talk in the Supreme Court's Same-Sex Marriage Cases*, 84 U.M.K.C. L. REV. 673, 688 (2016). For a further explication of the sex discrimination argument as it applies to bans on same-sex marriage, *see, e.g.*, Mary Anne Case, *"The Very Stereotype the Law*

whom to turn; not so if several, with competing visions and agendas, come forward, one demanding, for example, that all heroic measures be taken to revive the patient, another that the patient should not be resuscitated once there is no longer hope of full recovery.

If I am right that a principal function of state-sponsored marriage today is to provide an off-the-rack rule to structure certain relations between members of the couple and third parties (at least this is the part of marriage that is most difficult to achieve by other means, such as a private contract), then recognizing polygamous unions could not easily be justified under existing law by the best arguments used in support of same-sex marriage.[1] This is because much of what a marriage license now accomplishes, i.e., the designation, without elaborate contracting, paperwork, or other complications, of a single other person third parties can look to in a variety of legal contexts, could not be achieved as neatly if more than two persons are involved. Rather, with more than two persons, one is almost necessary for a realm closer to contract or at least of choice among multiple options with no clear default choice.[2]

Condemns:" Constitutional Sex Discrimination Law as a Quest for Perfect Proxies, 85 CORNELL L. REV. 1447, 1486-1490 (2000).

[1] While the future of legal status for polygamy is a subject well beyond the scope of this paper, let me simply note here that arguments against creating or recognizing a legal status for polygamous unions generally seem to focus on the likely "harm to women, to children, to society." *See, e.g.*, Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588, paragraph 129 (upholding, after extensive expert submissions and testimony, the criminal prohibition of polygamy as applied to religiously motivated polygamists from the Fundamentalist Church of Jesus Christ of Latter Day Saints (FLDS) because of "a reasoned apprehension [of] a risk of such harms"). Monogamous marriage has developed beyond its inegalitarian history of legally mandated submission of wives to husbands. Still, no legally recognized form of polygamy I am aware has yet made a similar transition, even as a formal matter. While it is certainly possible to imagine multi-partner domestic relationships that do not in fact cause "harm to women, to children, to society," these, because of the complications involved when the number of persons exceeds two, remain more readily imaginable in the realm of contract than of legally recognized status.

[2] Of course, as litigants such as the United Kingdom's Burden sisters, as well as theorists and policymakers from a variety of perspectives have observed, it is wrong to assume or require that for two people to reciprocally wish to designate one another they need be in a sexual or romantic relationship. The Burden sisters, who had lived their entire lives together in a shared home, argued that they should be treated for inheritance purposes the way those in a civil union or a marriage were. They had not, however, sued to be granted access to civil union, and the courts of both the UK and the EU held that, however intertwined the lives and finances of the two sisters in fact were, they were "not in an analogous situation" to married or civilly united couples because they had "not made a financial commitment by entering into a formal relationship recognized by law." Burden and Burden v. the United Kingdom (application no. 13378/05) at § 49. No such formal relationship was on offer to the sisters, since UK civil unions had incest restrictions similar to marriages. But other jurisdictions have experimented with reciprocal beneficiary designations

Situations such as those addressed in the 2010 Obama memo, where one member of a gay couple is dying in hospital, and the other seeks to be by the bedside and to be consulted on medical decisions, bring together the warmly human and the coldly practical reasons to recognize same sex marriage. Perhaps, for this reason, they have been central to the marriage equality movement in Taiwan and other East Asian countries and the United States and the Netherlands, the first country to recognize same-sex marriage. They illustrate the observation made by comparativist Kees Waaldijk, looking at the development of legal recognition for same-sex couples across jurisdictions, that "bad-times rights," dealing with, for example, death and sickness, typically come before "good–times rights" and also generate more ready consensus, leading a "very large majority of countries now [to] take the position that it would be unfair (and non-compassionate) to exclude same-sex partners from legal protections designed for such sad times."[1]

Though today these cases involve many different illnesses and causes of death, it is important to remember the role of the AIDS epidemic in bringing to public attention and gradually to legal acceptance the ways gay couples cared for one another in sickness and in health until death parted them. According to Dutch scholar Gert Hekma, it was the questions raised by the AIDS crisis ("Who inherits when a partner dies?… Who can visit me in the hospital? Who belongs to my family?") that led not only Dutch society but a Dutch gay community initially skeptical or even hostile to marriage, to come to favor it. In the context of the recently overwhelmingly successful Swiss referendum on same sex marriage,[2] Hekma recently told a Swiss interviewer that

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or partnership registrations that neither require a relationship to be in any sense conjugal nor foreclose two close relatives from accessing registration, and there is much to be said in favor of expanding such options.

1 *See, e.g.*, Kees Waaldijk, *More and more together: Legal family formats for same-sex and different-sex couples in European countries - Comparative analysis of data in the LawsAndFamilies Database*, FAMILIES AND SOCIETIES WORKING PAPER SERIES (2017) 1, 42 (noting that "[m]ost of the rights and responsibilities with the highest consensus… are about situations where one of the partners dies, or where the partners are hit by other seriously "bad times'" and that a "very large majority of countries now take the position that it would be unfair (and non-compassionate) to exclude same-sex partners from legal protections designed for such sad times"). *See also,* summarizing Waaldijk's analysis and concluding that "relative slowness of access to reproductive rights seems to corroborate the "bad times before good times' trend" at 42.

2 The measure to approve same-sex marriage, dubbed, following the French example, "Marriage for All," passed with 64.1% of voters and a majority in all of Switzerland's 26 cantons in favor. In a country some of whose female citizens were only granted full local voting rights in 1991 but which has had same-sex civil partnerships since 2007, the new marriage laws will provide access to adoption by same-sex couples and assisted reproductive technology by female same-sex couples. See, e.g., *Swiss Voters*

what led same-sex marriage to become popular in the Netherlands was the realization that it was possible to get all the rights through marriage at once.[1] Similarly, though other Dutch activists, such as those associated with the periodical Gay Krant, pushed a more romantic view, these practicalities, not romance, that Hekma said led him to marry his husband.[2]

In Taiwan, the push for the legalization of same-sex marriage gained strength among legislators, activists, and the public following the widely publicized 2016 suicide of Frenchman Jacques Picoux, a year after the death from cancer of his long-term same sex Taiwanese partner, Tseng Ching-chao.[3]

Picoux, an artist and lecturer in French at the National Taiwan University, had lived in Taiwan since 1979, sharing a home and a life with Tseng for 35 years. When Tseng was dying, however, Picoux was excluded from medical decision-making, with Tseng's family of origin authorizing emergency resuscitation, which Picoux insisted Cheng would not have wanted. After Tseng's death, the family's claim that Picoux had no rights in the apartment he and Tseng had shared further contributed to Picoux's ultimately fatal depression.[4] In the year of Picoux's death, Kaohsiung became the first city in Taiwan to register same-sex couples. A city official explained that the cards would make it easier to contact partners in emergencies and for hospitals to include partners in medical decisions.[5]

Approve Same-Sex Marriage In A Nationwide Referendum, ASSOCIATED PRESS (Sept. 26, 2021), *available at* https://www.npr.org/2021/09/26/1040761090/switzerland-same-sex-marriagereferendum?sc=18&f=&fbclid=IwAR1J41VPC-r-P18f1h3XhFC4gi8PiY_6EncweNAtK3pBfyk1dEcD-MOyElo.

1 See Gert Hekma, *Interview with Salome Mueller: "Schwule und Lesben waren anfaenglich gegen die Ehe fuer alle" ("Gays and Lesbians were initially opposed to marriage for all")*, REPUBLIK (Sept. 19, 2021), *available at* https://www.republik.ch/2021/09/14/die-schwulen-und-lesben-waren-anfaenglich-gegen-die-ehe-fuer-gleichgeschlechtliche-paare?fbclid=IwAR2ussMQ5ZqvoN6vo4UqufmR0-M6J4NDA_MsNb-XNDfj5o8-UmRfMJheNgc. For further discussion of the advantages of getting all the rights at once, see discussion, *infra*, of Hong Kong litigations.

2 *Id.* Especially given that Taiwan has yet to grant full adoption rights to same-sex married couples, it is important to add that Hekma also lists the lesbian baby boom as among the practical reason for marriage's popularity in the Netherlands.

3 *See, e.g.*, Joe Williams, *Death of gay professor may lead to same-sex marriage in Taiwan*, PINK NEWS (Oct. 28, 2016), *available at* https://www.pinknews.co.uk/2016/10/28/death-of-gay-professor-may-lead-to-same-sexmarriage-in-taiwan/.

4 Among the many articles setting forth details of Picoux's situation, *see, e.g.*, *French ex-lecturer falls to death*, TAIPEI TIMES (Oct. 18, 2016), *available at* https://www.taipeitimes.com/News/taiwan/archives/2016/10/18/2003657410. I am also grateful to Yen-jong Lee, a friend of Picoux's and attorney for Picoux's family, for answering my questions about Picoux and Cheng's situation.

5 *See, e.g.*, Chris Horton, *Taiwan May Be First in Asia to Legalize Same-Sex Marriage*, NY TIMES (Nov. 18, 2016), *available at* https://www.nytimes.com/2016/11/19/world/asia/taiwan-gay-marriage-legalize.

In Japan, the lead up to the first ever Japanese court decision, by the Sapporo District Court in March 2021, holding the Japanese government's failure to allow same-sex marriages to marry an unconstitutional violation of equality rights under Article 14 of the Japanese constitution,[73] included separate litigation by members of several long-term same-sex couples in situations similar to Picoux's. One elderly Japanese survivor of a long term gay couple had sued his deceased partner's sister in 2018 in Osaka District Court for damages arising from his exclusion from participation in the funeral arrangements of the deceased and their shared home and business.[1] And the lesbian couple of Miyuki Fujii and Rie Fukuda were motivated to bring their still ongoing marriage equality lawsuit in Tokyo after Fukuda was diagnosed with cancer. Told only family members were authorized for hospital visits, the two lied that they were cousins, but continued to worry that, if Fukuda should die, Fujii could be evicted from the apartment they shared, despite her contributions to mortgage payments.[2]

In Hong Kong, among the numerous couples who have gone to court to obtain at least partial recognition of same-sex marriages they have entered into in other countries, were Henry Li Yik-ho and Edgar Ng Hon-lam, two Hong Kong residents who, in January 2017, married in London, followed by a blessing service at a church in Hong Kong "so as publicly to declare their commitment to each other in a form which was dignified and socially recognized."[76] Their marriage was not legally recognized in Hong Kong, so, like other same-sex couples in Hong Kong legally married elsewhere, they sued for recognition of particular incidents of their marriage. The first of their lawsuits to be decided sought "clarification on whether the [Hong Kong] Government accepted that same-sex marriages performed according to the laws of foreign jurisdictions would be recognized as marriages for the purpose of probate, inheritance, and intestacy."[3] The particular concern was whether the government-sponsored flat Ng had purchased as their matrimonial home could be passed on to Li in the event of Ng's death. In December 2020, a few months after Judge Anderson

html. [73] Rurika Imahashi, *Marriage equality in Japan: finally within reach?*, NIKKEI ASIA (April 28, 2021), *available at* https://asia.nikkei.com/Spotlight/The-Big-Story/Marriage-equality-in-Japan-finally-within-reach (describing the litigation).

[1] See, e.g., *Japanese man seeks damages after death of same-sex partner, claiming he was barred from cremation ceremony*, SOUTH CHINA MORNING POST (April 26, 2018), *available at* https://www.scmp.com/news/asia/eastasia/article/2143508/japanese-man-seeks-damages-after-death-same-sex-partner-claiming.

[2] Rurika Imahashi, *Marriage equality in Japan: finally within reach?*, NIKKEI ASIA (April 28, 2021), *available at* https://asia.nikkei.com/Spotlight/The-Big-Story/Marriage-equality-in-Japan-finally-within-reach. [76] Ng Hon Lam Edgar v. Secretary for Justice [2020] HKCFI 2412 at § 4.

[3] *Id.* at § 8.

Chow ruled in Ng's favor, Ng, who had long suffered from depression, took his own life.[1] In April 2021, Judge Chow again ruled in the couple's favor, holding that it had also been discriminatory to deny same-sex partners joint occupancy and ownership rights in government-sponsored housing.[2] Li had brought the third lawsuit as a result of his treatment by the authorities in the aftermath of Ng's death, when, according to his lawyers, he "had been barred by multiple ordinances in the city from handling matters arising from his spouse's death, ranging from identification of the deceased and taking part in an investigation into the cause of death, to the collection of the body to arrange the funeral, and burial or cremation."[3]

The named plaintiffs in both US. Supreme Court cases upholding constitutional rights for same sex married couples, *U.S. v. Windsor*[4] and *Obergefell v. Hodges*, also each went to court to deal with questions arising on the occasion of the death of a same-sex spouse.[5] In Edie Windsor's case, the issue was inheritance taxes on the

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1 *See, e.g.*, *Same-sex partners can own subsidised housing as court overturns Hong Kong's anti-LGBT housing policy*, AFP25 (June 25, 2021), *available at* https://hongkongfp.com/2021/06/25/same-sex-partners-can-ownsubsidised-housing-as-court-overturns-hong-kongs-anti-lgbt-housing-policy/.

2 Ng Hon Lam Edgar v. The Hong Kong Housing Authority [2021] HKCFI 1812; HCAL 2875/2019 (June 25, 2021).

3 *See, e.g.*, Brian Wong, Hong *Kong widower launches legal bid for recognition after being denied right to organise his husband's funeral*, SOUTH CHINA MORNING POST (March 8, 2021), *available at* https://www.scmp.com/news/hong-kong/law-and-crime/article/3124582/hong-kong-widower-launches-legal-bidrecognition-after. Although Li was initially given court permission to challenge the government pathologist's insistence that Ng's mother needed to authorize Li's role in identifying and disposing of Ng's body, the Hong Kong government sought to have this permission overturned, claiming there had simply been a misunderstanding, that Hong Kong had "no such policy of discriminating same-sex couples as alleged," and introducing an apologetic statement from the senior forensic pathologist, who insisted he had only wanted to make sure Ng's mother had no objection to Li's actions, not that he had any "intention… whatsoever to demean, disrespect or diminish the dignity of the marriage between the applicant and Mr Ng." Jasmine Siu, *Hong Kong man's legal fight over late husband's funeral faces fresh challenge*, SOUTH CHINA MORNING POST (June 9, 2021), *available at* https://www.scmp.com/news/hong-kong/law-and-crime/article/3136665/hong-kong-mans-legal-fight-over-latehusbands-funeral.

4 133 S. Ct. 2675 (2013).

5 From the time of the earliest U.S. court victories for same-sex couple recognition through the US. Supreme Court same-sex marriage cases, I have observed that "courts… accord[ed] the most favorable treatment to those gay men and lesbians involved in close, long-term relationships from which the sexual aspect ha[d] perforce been removed due to the death, illness, or imprisonment of one of the members of the couple," perhaps because courts could then "focus on all the wonderful pair bonding without being threatened by the sexual implications of that pair bonding." Mary Anne Case, *Missing Sex Talk in the Supreme Court's Same-Sex Marriage Cases*, 84 U.M.K.C. L. REV. 673, 680 (2016), quoting Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating*

homes she had shared for decades with her deceased spouse Thea Speyer. Although some in the gay rights movement initially feared that a wealthy woman suing to lower her tax burden might not be the most sympathetic of plaintiffs. The couple's love story, including years of Windsor nursing Speyer through her paralyzing and ultimately fatal multiple sclerosis, captured the nation's hearts.[1] A documentary film which premiered shortly after Speyer died in 2009, Edie and Thea: A Very Long Engagement,[2] showed the progress of the couple's relationship from their early encounters on the dance floors of Greenwich Village through their still dancing together more than forty years later, when Speyer could only twirl around in a motorized wheelchair, with Windsor on her lap or holding her hand.

Jim Obergefell also nursed his spouse through a long illness resulting in death, and, as Windsor did with Speyer,[85] Obergefell accompanied his partner, John Arthur, shortly before the latter's death, to a jurisdiction, which, unlike their home state at the time, would allow same-sex couples to marry. Upon their return to their home state, Obergefell and Arthur went to court to have their marriage recognized for reasons that had little to do with money. The couple's principal request of the court was that Arthur's death certificate, which was expected to be needed within a few weeks of filing the litigation, would list his status on death as married and Obergefell as his surviving spouse. The practical consequences would be the ability to file joint tax returns and claims for survivor's benefits. But equally importantly, only if Obergefell were designated as Arthur's spouse on his death certificate could the two be buried together in Arthur's family plot, where rules put in place by his maternal ancestors

for Lesbian and Gay Rights, 79 VA. L. REV. 1643, 1644 (1993). Among the early victories of the gay rights movement in the U.S. was Braschi v. Stahl Assocs., 543 N.E.2d 49, 54 (N.Y. 1989) (recognizing the survivor of a same-sex couple as a member of the deceased's family and hence eligible to succeed to tenancy rights in the rent-controlled apartment in which the two had lived because the life the two shared had "all of the normal familial characteristics").

1 *See, e.g.*, Stephanie Fairyington, *Inside the Love Story That Brought Down DOMA*, THE ATLANTIC (Feb. 14, 2014), *available at* https://www.theatlantic.com/national/archive/2014/02/inside-the-love-story-that-brought-downdoma/283840/. ("The couple's love story, captured so compellingly in [the documentary film] Edie & Thea, played a huge role in the outcome.")

2 Directed by Susan Muska and Gréta Olafsdóttir. The film made clear how active and fulfilling a sex life the two maintained throughout their lives together, something Windsor was eager to highlight though her lawyer urged her not to talk publicly about sex during the pendency of the litigation. For further discussion see Mary Anne Case, *Missing Sex Talk in the Supreme Court's Same-Sex Marriage Cases*, 84 U.M.K.C. L. REV. 673, 683-684 (2016). [85] Windsor and Speyer flew to Canada to marry in 2007, four decades into their relationship and two years before Speyer's death, knowing that their home state of New York would recognize this out-of-state same-sex marriage.

See U.S. v. Windsor, 133 S. Ct. 2675, 2682 (2013).

"limited burials and memorials to descendants and married spouses only."[1] As Obergefell testified, "We've been beside each other for more than 20 years, and we deserve to be beside each other in perpetuity."

Beyond these practical considerations, Obergefell stressed how "hurtful for the rest of time" it would be "that John would forever be listed as unmarried on his death certificate." As he put it in an affidavit, "It breaks my heart to think that this [last official record of his life] would omit the most important fact of his life--our marriage." Obergefell explained further:

Our legacy as a married couple is very important to John and me. Our present family and friends know we are committed to each other. But in two or more generations our descendants will not know who we are. Married couples, often through research based on death records, recognize their special status forever. I want my descendants generations from now who research their history to learn that I loved and married John and that he loved and married me. They will know that they had a gay ancestor who was proud and strong and in love.

It is only recently that the state, rather than the family itself or a religious institution, has maintained the authoritative version of such genealogical records. And it is rare for those with no direct descendants to be so focused on what place in a family future generations will see them occupied. But, as will be discussed further below, this form of recognition, which is also a form of validation, can be among the most important goals for some same-sex couples who seek to marry, and it helps account for why marriage has, contrary to my expectations, tended to crowd out other forms of relationship recognition.

B. MARRIAGE AS A PACKAGE DEAL

While some of the benefits and obligations now tied to marriage status are obviously and closely related to the historical purposes of marriage, others are not. A marriage certificate can thus be seen as somewhat analogous to a driver's license, at least as driver's licenses have come to be used in the United States, Taiwan, and other countries. At their core, both a driver's license and a marriage certificate were initially intended to authorize holders to engage in heavily regulated, potentially dangerous, but also pleasurable and socially productive activities. Just as the precondition for the lawful operation of a motor vehicle is these days ordinarily the possession of a valid driver's license, so, until quite recently, a valid marriage was the prerequisite

[1] Joint Appendix at 28, Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013) (No. 1:13-cv-501) (quoting the trial testimony of Jim Obergefell).

to engaging lawfully in most any form of sexual activity, licensed cohabitation, and having children recognized as one's own.[1] Although marriage no longer holds a legal monopoly on sex, cohabitation, reproduction, or parenting, a marriage certificate, like a driver's license, has taken on functions far removed from what was earlier at its central core.[2] Because a driver's license today serves as a form of identification that, in the United States, facilitates activities as diverse and far removed from operating a motor vehicle as boarding a commercial airplane, cashing a check, and purchasing an alcoholic beverage. Even those who rarely get behind the wheel of a car frequently find it useful to possess a driver's license. Similarly, as Jack Baker, a member of the first same sex couple to take their case for marriage to the United States Supreme Court explained, "the legal system has used the institution of marriage as a distribution mechanism for many rights and privileges [which] can be obtained only through a legal marriage" among them "inheritance rights, property privileges [and] tax benefits," all provided directly by the state.[3]

Additionally, nongovernmental actors, sometimes under state compulsion, provide a host of other rights and privileges on account of marriage, from insurance benefits for employees' spouses, to spousal privileges at institutions ranging from

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1 [87]As further explained in *Marriage Licenses*, 89 MINN. L. REV. at 1769, in the United States until the late twentieth century, "while marriage licensed a husband's sexual access to his wife (unconstrained even by the law of rape), criminal laws prohibited fornication and adultery (i.e., nonmarital and extramarital vaginal intercourse), homosexual and heterosexual oral and anal sex, bestiality, even access to masturbatory aids and pornographic materials. Marriage was also seen as a prerequisite to licensed cohabitation, with both criminal laws and zoning ordinances prohibiting unmarried persons from sharing a dwelling." And at English common law, a child born out of wedlock was referred to as "fillius nullius" (no one's child) because ineligible to be the heir of either parent. *See* William Blackstone, *Of Parent and Child*, *in* COMMENTARIES ON THE LAWS OF ENGLAND (1765). In the United States today, however, "every constitutionally recognized aspect of liberty legal marriage formerly monopolized (sex, cohabitation, re-production, parenting, etc.) seems, as a matter of constitutional right, no longer within the state's or marriage's monopoly control." *Marriage Licenses*, 89 MINN. L. REV. at 1769.

2 Of course, a major difference between driver's licenses and marriage licenses is that to obtain the former, the would-be-driver has to demonstrate a certain level of relevant knowledge and skills. Much less is generally required by the state from those who marry today. See, e.g., Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 Law & Hum. Behav. 439 (1993). Experiments in incentivizing or mandating informative pre-marital counseling have been comparatively rare and seem not to focus on informing couples about the legal effects of marriage. See e.g Utah Code Ann. 30-1-34 (2021) (setting forth requirements for pre-marital counseling on, inter alia, "commitment in marriage" and "effective communication and problem-solving skills," and offering a reduced marriage license fee to who couples who certify completion of such counseling by approved counselors, who include clergy and mental health professionals).

3 As quoted in Donn Teal, Jack Baker, THE GAY MILITANTS 284 (1971).

hospitals and nursing homes to country clubs and automobile rental agencies. As Paula Ettelbrick critically observed, marriage "has become a facile mechanism for employers to dole out benefits, for businesses to provide special deals and incentives, and for the law to make distinctions in distributing meager public funds."[1]

I share Ettelbrick's opposition to the extent to which benefits, particularly those provided through an employer, are accorded on the basis, not of need or desert, but of mere marital status.[2] But, when it comes to the state's use of marriage as a distribution mechanism, it is important to remember that marital status, while often beneficial to married couples, is not always so. Even in distributing meager public funds, sometimes marriage disqualifies people,[3] by, for example, leading the state to combine their incomes in determining eligibility. The income tax laws of the United States, like those of Taiwan until recently,[4] have a long history of marriage penalties as well as marriage bonuses.[5] One of the arguments effectively made against DOMA, the U.S. Federal Defense of Marriage Act struck down by the U.S. Supreme Court in Windsor, was that anti-nepotism and other ethics laws[95] would not apply to same-sex couples absent federal marriage recognition, thereby, according to Justice Kennedy,

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1 Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *in* William B. Rubenstein, LESBIANS, GAY MEN AND THE LAW 721, 724 (2d ed. 1997).

2 See Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1763-67 (2001).

3 *See, e.g.*, *Califano v. Jobst*, 434 U.S. 47, 54 (1977) (upholding the termination of a dependent child's social security benefit upon marriage because "it was rational for Congress to assume that marital status is a relevant test of probable dependency").

4 *See* J.Y. Interpretation No. 696 (2015) (holding unconstitutional the requirement that a married couple file a joint tax return when the effect was a marriage penalty and giving the legislature two years to craft a remedy for this marriage penalty in the tax law).

5 The current U.S. federal tax laws have eliminated the marriage penalty for all but the extremes of the tax scale (very high earners taxed at a 35% rate and those poor enough potentially to qualify for an Earned Income Tax Credit), but, in the years before 2017, couples with relatively equal incomes, whether they were both shift workers at a factory or both corporate lawyers, tended to face a higher tax rate upon marriage to one another than they would have if they were single. *See, e.g.*, *What are marriage penalties and bonuses?*, TAX POLICY CENTER (updated May 2020) *available at* https://www.taxpolicycenter.org/briefing-book/what-are-marriage-penalties-and-bonuses. Feminist critics of the U.S. federal income tax laws have observed that they tended to penalize married couples with relatively equal earnings as well as secondary earners (who are often wives) while favoring breadwinner/homemaker married couples. *See, generally, e.g.*, Edward J. McCaffery, TAXING WOMEN (1997); Martha T. McCluskey, *Taxing the Family Work: Aid for Affluent Husband Care*, 21 COLUM. J. GENDER & L. 109 (2011).

95 133 S. Ct. at 2695. As Judge Michael Boudin explained, in denying federal recognition to same-sex married couples, "DOMA's definition of marriage arguably undermines both federal ethics laws… and abuse reporting.

"divest[ing] married same-sex couples of the duties and responsibilities that are an essential part of married life."[1] The examples of tax and ethics laws show one respect in which the status of marriage is today like corporate status - both lead in law to a particular treatment which may or may not be advantageous, depending on the circumstances; the status is not simply a privilege.

Campaigners for same-sex marriage recognition were thus not quite accurate in their tendency to equate the thousands of laws that took marital status into account with thousands of benefits of marriage; marital status also came with legal restrictions and obligations. But marital status did provide benefits as a package, which in a variety of respects was much more efficient than providing them one at a time. This was the conclusion reached in 1995 by the state of Hawaii's Commission on Sexual Orientation and the Law. Tasked with "examining major legal and economic benefits extended to married opposite-sex couples but not to same-sex couples [and] the public policy reasons to extend or not to extend all or some of such benefits to same-sex couples" and then with "recommending legislative action," the Commission concluded that "the simplest solution would be, amending the marriage statute to allow same-gender marriage and extend all the benefits and burdens of such status to those couples if they wished to assume them."[2] However, the people of Hawaii rejected this recommendation at the time, and, despite the Hawaii court's pioneering state-constitutional same-sex marriage decision, same-sex couples could not legally marry in that state before 2013.

It is just as inefficient for the courts as it would be for the legislature to provide same-sex couples with the legal benefits associated with marriage piecemeal, as recent litigation in the courts of Hong Kong demonstrates. As discussed above, a single same-sex couple, Messrs Ng and Li, have already had to bring three separate lawsuits to have particular incidents of their marriage recognized. As Li said when the first of these lawsuits was decided in their favor, "It's very tiring, we have mounted two challenges just for our home."[3] Other same-sex couples married abroad have had

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1 133 S. Ct. at 2695.

2 *Report of the Commission on Sexual Orientation and the Law*, STATE OF HAWAII iii, iii-iv (Dec. 8, 1995), *available at* lrb.hawaii.gov/wp-content/uploads/1995_Report Of The Commission On Sexual Orientation And The Law.pdf. The Commission listed among the many tangible and intangible benefits of marriage available in law retirement benefits, health insurance benefits, state and federal tax advantages, inheritance rights, spousal support, hospital visitation, divorce, confidential privilege, wrongful death actions, and the right to decide the disposition of the body of one's spouse. *See id.* at vii (Ch. 1).

3 Jasmine Siu, *Bittersweet day for Hong Kong LGBT community as court rules in favour of inheritance rights between gay couple, but rejects foreign same-sex marriage bid*, SOUTH CHINA MORNING POST (Sept. 19, 2020), *available at* Hong Kong / Society https://www.scmp.com/news/hong-kong/society/article/3102011/hong-kongactivist-jimmy-sham-loses-high-court-bid-recognise.

similar success in litigation asking the government of Hong Kong to recognize their marriage for specific legal purposes, requirements in the military,… anti-nepotism provisions,... judicial recusals,… restrictions on receipt of gifts,… and on travel reimbursement,… and the crimes of bribery of federal officials… and threats to family members of federal officials." Mass. v. HHS, 682 F.3d 1, 14 at n. 8 (2012) (citations omitted) (upholding a challenge to the constitutionality of DOMA brought by the state of Massachusetts and some of its citizens).

From joint tax assessment to spousal medical and dental benefits,[1] and from spousal dependent visas[2] to public rental housing benefits.[3] But a lawsuit by activist Jimmy Sham Tsz Kit to have his foreign same-sex marriage recognized across the board was rejected[4] by the same judge, Anderson Chow, on the very same day Messrs Ng and Li won their first court victory. And, one year earlier, a claim that it was unconstitutional for the government of Hong Kong to provide neither same-sex marriage nor an alternate legal framework for the recognition of same-sex relationships to its residents had also failed.[5]

Jimmy Sham's lawyer's had responded to Judge Chow, who expressed concern about being "asked to draft a blanket legislation," "We should not burden Mr. Sham to come to court 100 times to fight for 100 benefits - it's simply unfair."[6] In addition to being unfair, I would argue that it is also inefficient, wasteful not only of the resources of litigants and the court system, but of those who must then craft individual legislative or administrative remedies for each benefit the court finds same-sex couples are entitled to. Sham himself put the same point more colorfully. "They won't sell you the entire strip of barbecue pork - but once chopped in pieces they'll let you purchase one by one," he said.[7]

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1 Leung Chun Kwong v. Secretary for the Civil Service and Commissioner of Inland Revenue, [2019] H.K.C.F.A. 19. Although Leung's spouse, Scott Adams, remains alive and well, Leung explained that he was motivated to sue for spousal rights when "his friend's long-term partner died in a watersports accident, but without the rights guaranteed by marriage, his friend was shut out from the funeral." Marco Wan, *The Invention of Tradition: Same-sex Marriage and its Discontents in Hong Kong*, 18 I•CON 539, 546-7 (2020). C. MARRIAGE RECOGNITION AT THE BORDER BETWEEN STATES.

2 QT v. Director of Immigration, [2018] H.K.C.F.A. 28.

3 Infinger, Nick v. Hong Kong Housing Authority [2020] HKCFI 329.

4 Sham Tsz Kit v Secretary for Justice [2020] HKCFI 2411.

5 MK v. Government of the HKSAR [2019] 5 HKLRD 259.

6 Jasmine Siu, *Lawyers for Hong Kong rights activist Jimmy Sham urge court to recognise his same-sex marriage*, South China Morning Post (May 29, 2020), *available at* https://www.scmp.com/news/hong-kong/law-andcrime/article/3086771/lawyers-hong-kong-rights-activist-jimmy-sham-urge.

7 Jasmine Siu, *Bittersweet day for Hong Kong LGBT community as court rules in favour of inheritance rights between gay couple, but rejects foreign same-sex marriage bid*, SOUTH CHINA MORNING

To be sure, just as many people don't want to buy an entire strip of barbecue pork. Still, only one or two small pieces (indeed some want no pork at all in their diet) so many may not want the package deal that marriage now provides,[1] and, as I will discuss further below, the law should do a better job accommodating them with alternatives than in most countries it now does. But so long as there are a significant number of people in the market for a bundle of benefits and obligations akin to marriage, as there now appear to be, it makes sense for the state to put it on offer as a legal status.

In the period between 2005, when same-sex marriage became a legal option throughout Canada, and 2013, when the U.S. Supreme Court struck down DOMA, allowing the U.S. federal government to recognize same-sex marriages, members of same-sex married couples spoke poignantly of their emotions during the moments at the border when immigration officers directed family groups to approach together – when crossing into Canada, they could do so with one another, as spouses, and this simple act of official recognition felt deeply meaningful to them, but, when crossing into the United States, they had to approach separately, as unattached individuals. For couples of citizens from either the U.S. or Canada, the practical effect was no more than the difference of a few minutes and the space of a few feet in crossing the border, but the symbolic effect was immensely powerful.

The ability to have one's marriage recognized when crossing a border has important practical consequences, however, especially when so many lives cross borders, temporarily or permanently. Without the official recognition offered by marriage, multinational same-sex couples may simply find no nation on earth where they can legally build a life together. This is the realization to which American Richard Adams and his Australian partner Tony Sullivan came. Having overstayed his visitor visa to be with Adams in the 1970s, Sullivan faced deportation. Hearing that a county clerk in Colorado was offering marriage licenses to same-sex couples, the two obtained one in 1975, were married by a minister, and then applied for a spousal immigrant visa. The official response from the U.S. Department of Justice's Immigration and Naturalization Service (INS) was that the two had "failed to establish

POST (Sept. 19, 2020), *available at* Hong Kong/Society https://www.scmp.com/news/hong-kong/society/article/3102011/hong-kongactivist-jimmy-sham-loses-high-court-bid-recognise.

[1] Also using food-based imagery, Justice Ruth Bader Ginsburg described the effect of the U.S. Defense of Marriage Act as offering same-sex couples not "full marriage" but only a "sort of skim milk marriage." *See* Transcript of Oral Argument at 71, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307). But, just as some people are vegetarian, others prefer skim milk to full fat milk. The grocery market has learned to accommodate diverse preferences in food; as will be discussed briefly below, the law should do a better job of those whose taste in relationship recognition does not extend to marriage as a preferred choice.

that a bona fide marital relationship can exist between two faggots[sic]."[1] Their appeal was unsuccessful, as was their attempt to persuade the Ninth Circuit to grant instead of a hardship waiver that would suspend Sullivan's deportation so he could remain with Adams. Over a strong dissent, the judge held that Sullivan had not shown the requisite "extreme hardship," nor could Adams because the latter was not under INS rules "a qualifying relative to whom hardship may be shown" was Anthony Kennedy.[2] When he appended to his majority opinion in Obergefell a list of federal court opinions addressing same-sex marriage, Justice Kennedy put Adams and Sullivan's case at the top.[3] As a Supreme Court justice deciding a constitutional case, Kennedy had more freedom to move beyond statutory precedent, but he also acknowledged for himself, the Court, and the nation that "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[4]

These new insights came too late to allow Adams and Sullivan ever to live openly as a legally recognized couple in the United States, although they managed to stay together, abroad and then

Underground back in the United States, until Adams died of cancer in December 2012. Only thereafter, more than forty years after their marriage did Sullivan receive official U.S. government recognition of that marriage, a green card authorizing his residence and employment in the United States, and a letter of apology from León Rodriguez, President Obama's director of U.S. Citizenship and Immigration Services.[5]

In Taiwan, some multinational same-sex couples, those who do not both come from a country that recognizes same-sex marriage, still face the obstacles Adams and Sullivan did because Taiwan to date will only allow foreigners from countries where their marriage would be legal to register their same-sex marriage in Taiwan. Chien Chih-chieh, the secretary-general of the Taiwan Alliance to Promote Civil Partnership

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1 *See, e.g.*, Robert Barnes, *40 years later, story of a same-sex marriage in Colo. remains remarkable*, WASHINGTON POST (April 18, 2015), *available at* https://www.washingtonpost.com/politics/courts_law/40-years-later-a-samesex-marriage-in-colorado-remains-remarkable/2015/04/18/e65852d0-e2d4-11e4-b510-962fcfabc310_story.html.

2 Sullivan v. Immigration & Naturalization Service, 772 F.2d 609, 611 (9th Cir. 1984) (citation omitted).

3 *See* Obergefell v Hodges, 133 S. Ct. at Appendix A: State and Federal Judicial Decisions Addressing Same-Sex Marriage (citing Adams v. Howerton, 673 F.2d 1036, (9th Cir. 1982), the case first affirming Sullivan's deportation, notwithstanding his marriage to Adams).

4 Obergefell v. Hodges, 133 S. Ct. 2584, at 2590.

5 *See* Troy Masters, *United States Government says L.A. Gay Couple's 1975 Marriage is Valid*, THE PRIDE (June 7, 2016), *available at* http://thepridela.com/2016/06/united-states-government-says-gay-couples-1975-marriage-isvalid/.

Rights, called this "the final missing piece of the puzzle that we need to achieve marriage equality," explaining that" [m]any people have had to resort to using student or travel visas to stay here. It's causing a lot of anxieties and uncertainties."[1] Because the Legislative Yuan is considering amendments proposed by the Judicial Yuan to loosen restrictions on multinational same-sex marriages, and because Taiwanese courts have begun to rule in favor of some multinational same-sex couples, for example by accepting that both members of a couple are habitually resident in Taiwan or by rejecting the application of foreign laws prohibiting same-sex marriage because to apply them would lead to a violation of the public order or boni mores of Taiwan,[2] it can be hoped that this serious gap in Taiwan's recognition of same-sex marriage will soon be definitively remedied.

Taiwan's Act for Implementation of J.Y. Interpretation No. 748 allows two persons of the same sex to register their marriage so they may "create a permanent union of intimate and exclusive nature for the committed purpose of managing a life together."[3] Marriage recognition matters enormously to transnational couples because is difficult for a couple to fulfill the "purpose of living a common life"[4] when separated by a border. Marriage recognition also matters to the national border and immigration authorities, because, in the absence of the clear status of marriage,[5] these authorities are faced with the nearly unmanageable and potentially tragic task of using their discretion to evaluate which forced separations will result in "extreme hardship"[6] to those separated.

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1 *See, e.g.*, Beh Lih Yi, *"Happily ever after" eludes Taiwan, a year after Asia's first gay marriages*, THOMPSON REUTERS (May 20, 2020), *available at* https://www.reuters.com/article/us-taiwan-lgbt-rights-feature-trfn/happily-ever-after-eludes-taiwan-a-year-afterasias-first-gay-marriages-idUSKBN22X03A (detailing the concrete situations faced by some such couples). Of course, there would then still remain the gap in recognition of full parental and family rights for same-sex couples to be remedied.

2 *See, e.g.*, Keoni Everington, *Taiwan court ruling on Macau citizen opens door to international same-sex marriages*, TAIWAN NEWS (May 6, 2021), *available at* https://www.taiwannews.com.tw/en/news/4196648 (detailing results in two such cases and the Judicial Yuan's legislative proposals).

3 *Press Release on the Same-Sex Marriage Case*, CONSTITUTIONAL COURT, REPUBLIC OF CHINA (TAIWAN) (May 24, 2017), *available at* https://cons.judicial.gov.tw/jcc/en-us/contents/show/p2kdmcuv4dakqngi.

4 *Act for Implementation of J.Y. Interpretation No. 748, Article 2*, MINISTRY OF JUSTICE, REPUBLIC OF CHINA (TAIWAN), *available at* https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000008.

5 Of course, U.S. immigration authorities are generally authorized to investigate a couple's bona fides in marrying and to look beyond the formal legal validity of their marriage before granting spousal benefits to see if they really do propose to build a life together, but, as explained in Bark v. INS, 511 F.2d 1200, 1201 (9th Cir. 1975):

6 *See, e.g.*, Sullivan v. Immigration & Naturalization Service, 772 F.2d 609, 612 (9th Cir. 1984) (Pregerson, J., dissenting) (finding, contrary to Judge Kennedy, that the immigration authority's "conclusory

D. THE BUSINESS CASE FOR SAME-SEX MARRIAGE

The ability for a same-sex couple to cross a border together as partners in a legally recognized relationship matter not just to the couple themselves but to employers of the members of the couple who wish to recruit talent and transfer it across borders on temporary or permanent assignments. This is among the principal reasons, so many multinational corporations have made what has come to be known as the business case for same-sex marriage in so many different venues. Amicus briefs on behalf of hundreds of prominent corporations were submitted to the U.S. Supreme Court in support of the challengers to Proposition 8,[1] of Edith Windsor in her challenge to DOMA,[2] and of Jim Obergefell and his fellow petitioners for nationwide same-sex marriage.[3] In the case of *QT v. Director of Immigration*,[121] which involved the ultimately successful efforts of a British lesbian who had accepted employment in Hong Kong to obtain a dependent visa for her lesbian spouse, who could otherwise join her in Hong Kong only as a visitor and with no possibility of employment, "a group of 15 financial institutions [and] a group of 16 law firms… had applied for leave to intervene in the appeal" in order "to draw to the Court's attention the fact" that Hong Kong's policy of non-recognition "had the effect of limiting the pool of foreign employees from which employers might wish to select and that this would adversely affect their interests as well as the wider interests of Hong Kong"[122] but the Hong Kong Court of Final Appeal declined their intervention since it considered "that the perspective of the Banks and Law Firms were evident without requiring their intervention."[4]

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treatment" of Sullivan and Adams's situation had dismissed their claim of "extreme personal and emotional hardship as mere "general hardship and emotional adjustments," giving "no recognition to the strain Sullivan would experience if he were forced to separate from the person with whom he has lived and shared a close relationship for the past twelve years" or to the fact that, while "most deported aliens can return to their native lands with their closest companions" Sullivan could not).

1 *See* Brief of American Companies as Amici Curiae in Support of Respondents, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144), 2013 U.S. S. Ct. Briefs LEXIS 1212.

2 *See* Brief of 278 Employees and Organizations Representing Employers as Amici Curiae in Support of Respondent Edith Schlain Windsor, United States v. Windsor, 133 S. Ct. 2675 (2013), 2013 U.S. S. Ct. Briefs LEXIS 1149.

3 *See* Brief of 379 Employees and Organizations Representing Employers as Amici Curiae in Support of Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 U.S. S. Ct. Briefs LEXIS 981. [121] QT v. Director of Immigration, [2018] H.K.C.F.A. 28 . [122] *Id.* at Paragraph 16.

4 *Id.* at Paragraph 17. For further discussion, *see* Marco Wan, *The Invention of Tradition: Same-sex Marriage and its Discontents in Hong Kong*, 18 I•CON 539, 546 (2020).

Importantly, multinational banks and other corporate and business actors have a somewhat different perspective in making a case for same-sex marriage recognition than, for example, Amnesty International, which also sought to intervene on QT's behalf. To be sure, these business actors have also come out In favor of the human rights and dignity of LGBTQ persons.[1] But, when they do so, as they recently have in a series of national and multinational reports published by Open For Business, "a coalition of global companies organized as a charity to promote LGBT+ inclusion,"[2] it has been with an emphasis on how much more prosperous countries, cities, regions, and businesses who welcome and legally recognize LGBTQ individuals and their relationships turn out to be overall and how important it is to these companies to be able to recruit, retain, freely transfer, and keep happy the best possible employees, many of whom are either themselves LGBTQ or care about LGBTQ inclusion.[3]

The business case for same-sex marriage also involves more purely practical considerations, which fall again under the rubric of efficiency around which I have tried to focus so much of my analysis. As a brief filed in the U.S. Supreme Court on behalf of 100 "Fortune ranked and other leading American businesses" put it: Recognizing the rights of same-sex couples to marry is more than just a constitutional issue. It is a business imperative. By singling out a group for less favorable treatment, [a ban on same-sex marriage] impedes businesses from achieving the market's ideal of efficient operations - particularly in recruiting, hiring, and retaining talented people who are in the best position to operate at their highest capacity. [4]

I shall first set forth the case as businesses themselves have generally made it, and then go on, in the following section, to suggest ways I have long thought it could be expanded.

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[1] As one Japanese Goldman Sachs employee and gay rights activist put it in a recent editorial invoking a similar 2012 statement by the company's head, Lloyd Blankfein, "Fundamentally, freedom of marriage is a human rights issue. However, it can also be a positive driver for business." Masa Yanagisawa, I*t is time for Japan to say "I do" to marriage equality*, NIKKEI ASIA (March 17, 2021), *available at* https://asia.nikkei.com/Opinion/It-is-time-for-Japanto-say-I-do-to-marriage-equality.

[2] For links to the various country, regional, and other specialized reports and lists of the associated multinational companies, *see* https://open-for-business.org/.

[3] This emphasis on making LGBT employees feel welcome goes beyond legal and lobbying interventions. Thus, months before the Judicial Yuan had mandated legal recognition of same-sex marriage, the CEO of HSBC Taiwan stepped in to walk a lesbian employee down the aisle for her ceremonial (though not then legally registerable) wedding when her parents declined to do so. *See* Judy Lin, *HSBC Taiwan CEO walks lesbian employee down the aisle*, TAIWAN NEWS (March 10, 2017), *available at* http://www.taiwannews.com.tw/en/news/3113485.

[4] Brief of American Companies as Amici Curiae in Support of Respondents at *23, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144), 2013 U.S. S. Ct. Briefs LEXIS 1212.

1. THE EMPLOYER CASE FOR SAME-SEX MARRIAGE

As the quotation above suggests, in the amicus briefs they filed in U.S. Supreme Court same-sex marriage cases as well as in the statements they have made concerning marriage recognition in other countries, businesses have generally stressed almost exclusively their role as employers. Their announced stake in same-sex marriage thus includes on the one hand, the desire to recruit talent and transfer it without resistance or complications across borders, whether from one state in the U.S. to another or from one country to another and whether temporarily or permanently,[1] and on the other hand the desire to minimize their own administrative burdens while achieving equity between employees.[2] An Amicus brief filed in Obergefell on behalf of nearly 400 business entities summarized the employers' argument:

Discriminatory state laws force amici to implement inconsistent policies across the various jurisdictions in which we operate, our stated corporate principles of diversity and inclusion notwithstanding… The patchwork of state laws applicable to same-sex marriage thus impairs our business interests and employer/employee relations. If the Court were to affirm the decision below, the costs and uncertainty imposed by inconsistent state marriage laws will only continue. In contrast, reversal will reduce current costs, administrative burden, and diversion of resources from our core businesses.[3]

The administrative burdens then detailed in the brief are those related to employees, such as "dealing with… immigration system that made it difficult for same-sex partners to immigrate"[4] and responding to tax and benefit inequalities to those in unrecognized marriages with "workarounds [that] impose additional and

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1 *See, e.g.*, Brief of 379 Employees and Organizations Representing Employers as Amici Curiae in Support of [Obergefell] Petitioners at 33f, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 U.S. S. Ct. Briefs LEXIS 981 (enumerating disadvantages to "employee recruitment and retention" when seeking to hire "in the states that do `not allow same-sex couples to marry, or in asking current personnel to relocate to such states" where "their pre-existing marriages will not be recognized, and where they can expect to lose access to certain previously-enjoyed state-level benefits").

2 *See, e.g.*, Brief of 278 Employees and Organizations Representing Employers as Amici Curiae in Support of Respondent Edith Schlain Windsor at 8 ff, U.S. v. Windsor, 133 S. Ct. 2675, 2013 U.S. S. Ct. Briefs LEXIS 1149 (explaining that DOMA imposes "compliance burdens on employers" putting them "to unnecessary cost and administrative complexity, and regardless of… business or professional judgment forc[ing them] to treat one class of… lawfully married employees differently than another, when… success depends upon the welfare and morale of all employees").

3 Brief of 379 Employees and Organizations Representing Employers as Amici Curiae in Support of [Obergefell] Petitioners at 11-12, Obergefell v. Hodges, 135 S. Ct. 2584 (2015), 2015 U.S. S. Ct. Briefs LEXIS 981.

4 *Id.* at 36. [132] *Id.* at 40.

unnecessary business expense, while still not fully ameliorating the differential treatment of employees."[132]

This, from my perspective rather narrow, business case for same-sex marriage has shown itself to have a broad appeal in other business friendly jurisdictions, including Taiwan, where, about a month before the late May 2019 deadline the Judicial Yuan had imposed on the Legislative Yuan for legislating on same-sex marriage, some of the world's largest companies joined with companies based in Taiwan to endorse same-sex marriage, "not only because it is the right thing to do," but also because it can make both companies and society "stronger and more successful."[1] In Japan, the powerful Keidanren (Japan Business Federation) stated support of LGBT rights recognition in 2017, followed by the American Chamber of Commerce in Japan in 2019, which warned that the "the disparity in legal rights between heterosexual and same-sex couples "makes Japan a less attractive option for LGBT couples, compared to many other countries vying for the same talent.'"[2] As of March 2021, when a Sapporo court first ruled in favor of a Japanese constitutional right to same-sex marriage, nearly 150 companies and organizations in Japan, including Panasonic and Fujitsu, had signed on to the Business for Marriage Equality initiative,[3] leading headlines to read "Japan Inc. embraces landmark same-sex marriage ruling."[4]

2. EXPANDING THE BUSINESS CASE FOR SAME-SEX MARRIAGE

For decades, I have been convinced that businesses large and small have a much greater efficiency interest in supporting legal recognition of same-sex marriage in the jurisdictions in which they operate than they have hitherto articulated. While the Employers' Brief in *Obergefell* was right to say that "the combined burden of administrative costs and tax consequences is significant" the brief, in my view, grossly underestimated "the 2015 estimated cost of marriage inequality to the private sector [in

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1 The companies included not only Microsoft Taiwan, whose spokesperson Patrick Pan made the quoted statement, but also Google, Airbnb, Deutsche Bank, EY, Mastercard and nine other companies. *See, e.g.*, Hugo Greenhalgh, *Multinationals see benefits in Taiwan same-sex marriage*, THOMPSON REUTERS (April 26, 2019), *available at* https://www.reuters.com/article/us-taiwan-lgbt-economy/multinationals-see-benefits-in-taiwan-same-sexmarriage-idUSKCN1S029C.

2 Rurika Imahashi, *Marriage equality in Japan: finally within reach? In the only G-7 nation to prohibit same-sex unions, the mood is changing*, NIKKEI ASIA (April 28, 2021), *available at* https://asia.nikkei.com/Spotlight/The-BigStory/Marriage-equality-in-Japan-finally-within-reach.

3 For further information, *see* BME (BUSINESS FOR MARRIAGE EQUALITY) *at* https://bformarriageequality.net/.

4 Rurika Imahashi and Francesca Regalado, *Japan Inc. embraces landmark same-sex marriage ruling*, NIKKEI ASIA (March 18, 2021), *available at* https://asia.nikkei.com/Spotlight/Society/Japan-Inc.-embraces-landmark-same-sexmarriage-ruling.

the United States at] $ 1.3 billion"[1] because it seems to have limited the calculation of costs to those related to businesses in their roles as employers. In my view, however, the case to be made that samesex marriage recognition is efficient and good for business should not stop at a consideration of what pertains to the employees of that business.

For a wide variety of businesses, the marital status of their customers is as relevant as that of their employees. Marital status can matter in all manner of contracts, from those involving real estate (including purchase, rental, sublease or mortgage), insurance, banking, organizational membership,[138] even car rental agreements.[2] The words spouse, married, or marriage can appear as operative terms in any number of contracts, whether by the business's own choice or as a result of government regulation. For decades now, businesses have been struggling with how to deal contractually with customers as well as employees in same-sex relationships where marriage is not an available option. Some of their efforts to specify what sorts of relationships qualified as the equivalent of marriage verged on the ridiculous, as when the University of Florida proposed to extend benefits to employees' domestic partners conditional on their executing an affidavit declaring not only that they intend to remain domestic partners indefinitely and that they have some joint financial obligations, but also that they "have been in a non-platonic relationship for the preceding 12 months." When media began to enquire whether this really meant that the partners had to pledge that they were having sex and how such a pledge would be enforced, the University quickly backed down.[3]

Once some governments began offering same-sex couples the opportunity to have their relationships legally recognized but not to call the resulting status marriage, a different set of problems arose for businesses. First, it had to be determined which statuses (for example, civil unions, civil partnerships, domestic partnerships, pacts

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1 Brief of 379 Employees and Organizations Representing Employers as Amici Curiae in Support of [Obergefell] Petitioners at 40, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 U.S. S. Ct. Briefs LEXIS 981. [138] *See, e.g.*, Koebke v. Bernardo Heights Country Club, 36 Cal. 4th 824 (2005) (detailing decade long effort by lesbian member of a golf club to obtain spousal privileges for her partner, initiated before California offered an option for recognition to the couple, and ultimately won in litigation after the state had provided the two the possibility of registering as domestic partners with all the rights of spouses under state law).

2 For example, those renting a car from Avis must pay a daily fee for each driver in addition to the person named in the rental contract. "A spouse or life partner can drive a rental car without an additional fee" but "[t]he additional driver fee does apply to friends and extended family members who want to drive the rental car as an additional driver." *See Can I Add Another Driver to my Car Rental?*, AVIS, *available at* https://www.avis.com/en/help/usa-faqs/additional-driver.

3 *See, e.g.*, Jack Stripling, *UF requirement for partner benefits: You must have sex*, GAINESVILLE SUN (Jan. 23, 2006), *available at https://www.gainesville.com/article/LK/20060120/News/604164525/GS.*

of civil solidarity, registered partnerships, life partnerships, reciprocal beneficiary relationships, durable unions, interdependent adult relationships, to name only some of the English language terms used in one or more jurisdictions) were sufficiently equivalent to marriage to lead to the same legal consequences, either as a matter of law or of business judgment. Then it might be necessary to amend contractual language to clarify which additional statuses would qualify. This all could be a cumbersome and expensive undertaking, especially when the same terminology could be associated with a radically different bundle of rights and obligations from one jurisdiction to another and from one time period to another, sometimes describing a legal status essentially identical to marriage in that jurisdiction at that time, at others a status very different from marriage.[1]

Nation-states had and continue to have the same problem. Even today, decades after many of the nations of Western Europe began offering legal recognition to same-sex couples, private international law complications remain when sorting out how a particular status available in country A will be treated by Country B within the European Union. In 2013, the European Parliament proposed the mutual recognition of "various legal partnerships and their rights" as part of an effort to facilitate free movement of workers, but the final legislation did not adopt this proposed amendment.[2] As a study commissioned by the European Parliament reported in March 2021, "it is anomalous that a same-sex All Member States must now recognize "spouse', but that a same-sex "registered partner" may be ignored by (at least) 6 Member States."[3]

To be sure, the laws of marriage also differ in many of their details from country to country, but "international recognition is far more straightforward with marriage (which every country has, in one form or another)."[4] Thus, to cut down on paperwork,

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[1] For an example of how two different terms use by two different legal jurisdictions can in some cases have identical legal consequences, whereas the same term can be associated with a vastly different set of legal consequences in a single jurisdiction over time, consider the term "domestic partnership" under the laws of California. When first introduced by California cities, it afforded no rights; when then adopted by the state, it initially offered a small bundle of rights, but by 200_ it was basically equivalent to marriage but for the name and even more exactly equivalent to what the law of Vermont called civil union. For further discussion, *see, e.g.*, *Marriage Licenses* at 1775.

[2] *See* Ruth Lamont, *Registered Partnerships in European Union Law*, in THE FUTURE OF REGISTERED PARTNERSHIP: FAMILY RECOGNITION BEYOND MARRIAGE (2017) 497, 509.

[3] Alina Tryfinidou and Robert Wintemute, *Obstacles to the Free Movement of Rainbow Families in the EU*, EUROPEAN PARLIAMENT THINK TANK (Oct. 3, 2021), *available at* https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2021)671505.

[4] Kenneth McK. Norrie, *Registered Partnership in Scotland* in THE FUTURE OF REGISTERED PARTNERSHIP: FAMILY RECOGNITION BEYOND MARRIAGE (2017) at 250 (arguing with respect to an imminent change in the law of Scotland that "insofar as names are important, that registered relationship has to be called "marriage"' once it becomes "equally open to all .. irrespective of gender mix").

uncertainty, and other complications for governments and for private actors, and to facilitate recognition of the relationship status by others, a country is well-advised to do the efficient thing by using the term marriage for a legally recognized relationship status it makes available to same-sex couples.

E. NUMERUS CLAUSUS AND THE PLUG AND PLAY EFFICIENCIES OF MARRIAGE

From the perspective I have taken in this article, which focuses on the practicalities of legal recognition, it seems to me not in the least "anomalous," but rather easily predictable and explicable that a same-sex "spouse" now has more universal access to recognition by EU member states than a registered partner. The theoretical legal concept of numerus clausus, or what Germans call *Typenzwang*, can be helpful here. Most well-developed for the law of property, but also applied to analyze family law and the law of business organizations, the numerus clausus principle suggests that while there can be an infinite variety of contracts, "the law will enforce as property only those interests that conform to a limited number of standard forms."[1] Theorists of law and economics have articulated a variety of explanations and justifications for this limitation, but have generally argued that "numerus clausus functions to promote the optimal standardization of property rights."[2]

What optimal standardization now looks like for family relationships is debated in many legal systems. But at the risk of overgeneralizing, let me suggest that there has been at least until recently a rigid numerus clausus for adult domestic relationship recognition, in that marriage was often the only recognized legal form such relationships could take in a given legal system, and only one form of marriage was usually available to a given couple.[3] Even resort to contract, foregoing legal status, was not an option, because a contract between unmarried cohabitants was until

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[1] Thomas W. Merrill and Henry E. Smith, O*ptimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3 (2000). Merrill and Smith are among the principle expositors and defenders of the numerus clausus principle for property in the law & economics literature in English, but they acknowledge that the concept was developed much earlier in German law and legal academic writing. *See Id.* at 4 n. 6 (citing to the BGB's definition of property and a number of German treatises and commentaries on the subject with publication dates ranging from the late nineteenth century through the turn of the millennium).

[2] *See* Thomas W. Merrill and Henry E. Smith, O*ptimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4, 38 (2000).

[3] Legal systems such as those of India and Israel, where marriage is a question of so-called personal law and governed by the rules of the religious group to which a person is deemed to belong, may offer a variety of marital.

recently treated as "meretricious," that is to say akin to a contract for prostitution and hence generally unenforceable, indeed possibly criminal.[1]

I will consider below the ways and places in which the numerus clausus for adult partner relationships has expanded beyond marriage, but now let me examine the efficiency advantages to continuing to use and make even more universally available to same-sex couples the readily recognizable legal statuses of "marriage" and "spouse." To recap the current state of the law I have described above: Today in most legal systems marriage can look like a network of contracts from the inside, but still like a status from the outside, recognizable to the state and to private actors. Marriage functions more or less like a black box,[149] available off-the-rack from the state. A couple, by registering for marriage, can opt for internal customization of the black box in many respects. However, its shape and status are still recognizable from the outside, not only by their own state and those private actors with whom they do business, but also by other nation states and legal systems.[2] Moreover, to a lesser extent, the status of marriage in one country is a bit of a black box to other countries - at the border they recognize a couple as married without in general delving into detail as to the particular formalities required by the place the couple entered into marriage or the details of the marital property regime that governs them in their home state.

Although my limited knowledge of computing terminology may mean that I am using the terminology I have borrowed from the world of computing inaccurately, I have come to think of marriage in the world today as being a plug-and-play status. Just as a plug-and-play device or software regimes nationwide, but not a choice to a given couple, and severe complications for interfaith couples, one of whose members may be required or deemed to have converted to the religion of the other. In India, for

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[1] For further discussion, *see, e.g.*, Mary Anne Case, *Pets or Meat?*, 80 CHI. KENT L. REV 1129, 1141 (2005) (explaining the development of the term "meretricious relationship"). *See also, e.g.*, Frederik Swennen, PRIVATE ORDERING IN FAMILY LAW: A GLOBAL PERSPECTIVE IN CONTRACTUALISATION OF FAMILY LAW - GLOBAL PERSPECTIVES 1, 8 (Springer 2015, ed. Frederick Swennen) ("The principle of a *numerus clausus* of family formations has long stood in the way of the validity of contracts between cohabiting partners with regard to their pecuniary rights and duties. Such contracts were considered *contra bona mores* because they would organise sexual relations ("*pretium stupri*')). [149] In many countries, the extent and the reasons for which the law will open the black box of marriage to intervene have changed radically in the last century, often for constitutional reasons and along feminist lines, - for example, previously protected activities like spousal battery or spousal rape are now generally seen as within the state's power and duty to intervene to control, whereas other sexual activities, like the use of contraceptives are protected. See e.g..Griswold v. Connecticut 381 U.S. 479 (1965) (holding that it would be an unconstitutional intrusion on marital privacy for the state to criminalize the use of contraceptives by a married couple).

[2] This is so notwithstanding that, unlike a business corporations, a marriage is not treated as a legal person.

example, the marriages of Hindu woman with Muslim men, occasionally demonized under the label "love jihad," have been the subject of hostile local legislation and judicial interference, but have been vindicated in at least on instance by a recent Indian Supreme Court decision. *See, e.g.*, *A New Law In India Is Making It Harder For Interfaith Couples To Get Married*, NPR (Sept. 10, 2021), *available at* https://www.npr.org/2021/09/14/1037096376/a-new-law-in-indiais-making-it-harder-for-interfaith-couples-to-get-married; Shafin Jahan v. Ashokan K.M., Crl.A 366/2018 (arising out of SLP (Crl.) 5777/2017) (the so-called Hadiya marriage case, in which the Indian Supreme Court reversed a lower court's annulment of the marriage between a Muslim man and a Hindu woman who had converted to Islam).

only needs to be connected to a computer in order to function, without requiring additional action, such as manual reconfiguration, and also without the user's requiring knowledge of computer hardware, so "marriage" and "spouse" are terms for a legal status that can be plugged into an infinite variety of private contracts, laws, and regulations in every language, country, and legal system in the world today and, in general, function seamlessly as a matter of law. There are still important differences between the legal rules for and incidents of the status of marriage between nations and between legal systems (rules about, for example, age of entry, conditions of exit, marital property regimes, availability of and requirements for obtaining certain benefits under law) just as there are differences between certain of the internal workings of plug-and-play devices. But these differences do not hinder interoperability, in no small part because the words "marriage" and "spouse" are in such universal use and there is now sufficient agreement as to the meaning of the words as legal terms of art around the world. The exception that proves the rule is polygamous marriage, which has had difficulty being recognized outside of the countries and legal systems that make it available for centuries. As a descriptive matter, I continue to argue that obstacles to recognition of polygamy in law are at least as effectively attributable to the legal complexities it presents as to the moral objections that might be raised against it.[1]

[1] Thus, in the classic old case denying recognition to even a potentially polygamous Mormon marriage, Hyde v. Hyde and Woodmansee, [L.R.] 1 P. & D. 130 (1866), the court began with the premise that "all that the Courts of one country have to determine is whether or not the thing called marriage - that known relation of persons, that relation which those Courts are acquainted with, and know how to deal with - has been validly contracted in th other country where the parties professed to bind themselves," *id* at 134, observed that marriage "creates mutual rights and obligations, as all contracts do, but beyond that it confers a status. The position or status of "husband" and "wife" is a recognized one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents' *id.* and concluded that "it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy." *Id*. at 135. Let me again stress, that a sufficient basis for the

None of the other names under which relationships resembling marriage are recognized today in any legal system has achieved anything like the plug-and-play portability of marriage itself, and they are too numerous and diverse for any to come close at any time soon.

Many have proposed that the name marriage be reserved to the religious institution, but there are a number of important reasons not to do this.[1] One is that it runs the risk of confusing people who enter into a religious ceremony regarding the validity of the state or secular law. For this reason, Lord Hardwicke's Act in eighteenth century England made it a criminal offense for clergy to perform a marriage without first complying with the legal formalities[2] (and today states in the U.S. do the same); for this reason marriage licenses are required, to license the clerical officiant.[3] For this reason countries like Germany, despite an otherwise fairly high degree of cooperation between church and state, draw a sharp distinction between entry into civil and religious marriage;[155] the law mandates that the civil marriage be entered into before the religious and that the religious marriage itself has no civil effect.[4] For this reason the United Kingdom and many countries of the British Commonwealth are increasingly looking for solutions to the problems caused when a substantial percentage of their married Muslim population enters into a nikah, or Islamic religious marriage ceremony, without registering that marriage with the state and often without being aware that this means the marriage has no civil legal validity.[5] Another reason not to

English courts not to recognize polygamous marriages as the court explains it is the complexity of legal rules the English legal system does not have ready to hand and would have to generate to deal with a polygamous marriage. In this, polygamy is quite unlike same sex marriage, which, by contrast, is statutorily and bureaucratically extremely easy to implement, whatever moral or policy objections it may give rise to.

1 Part of the argument for this is that confusion between religious and civil marriage leads those faith traditions opposed to same-sex marriage, especially if they have no strong religious law tradition of enforcing and adjudicating marital status, to have particular cause to resist state recognition of same-sex marriage In contrast, some might be less resistant to state recognition of same-sex couples under the name partnership or civil union. For further discussion of the ways in which some religions have come to depend on the state to enforce their religious marriage rules *see* Mary Anne Case, *The Peculiar Stake U.S. Protestants Have in the Question of State Recognition of Same-Sex Marriages*, *in* AFTER SECULAR LAW 303-21 (Winnifred Fallers Sullivan ed., 2011).

2 *See* Act for the Better Preventing of Clandestine Marriages, 1753, *26 Geo. 2,* ch. 33 (Eng.).

3 For further discussion, *see* Mary Anne Case, *The Peculiar Stake U.S. Protestants Have in the Question of State Recognition of Same-Sex Marriages*, *in* AFTER SECULAR LAW 303-21 (Winnifred Fallers Sullivan ed., 2011).

4 *See, e.g.*, FAMILY LAW IN EUROPE 297 (Carolyn Hammond & Alison Perry eds., 2d ed. 2002).

5 *See, e.g.*, Harriet Sherwood, *Most women in UK who have Islamic wedding miss out on legal right*, THE GUARDIAN (Nov. 20, 2017), *available at* https://www.theguardian.com/world/2017/nov/20/women-

abandon the term marriage to religious bodies and laws, to be discussed further below, is that couples who are not themselves religiously affiliated increasingly seem to want the same sort of symbolic validation from state-sponsored marriage as religions offer those who marry within their faith, and these couples accordingly would strongly resist having this symbolically important terminology taken away from them.

From the perspective of efficiency, perhaps the most important reason not to cede the term marriage to religions is that the term marriage has become entrenched and comprehensible in secular law. There are significant differences among the various religions' conceptions of marriage and in the marriage laws of the various nations and states. But, with the exception above of polygamy, they are generally not of the kind to complicate cross border recognition of marriages or the use of the term marriage as a plug-and-play term in contracts and other legal documents that cross borders. If the name marriage were relegated to religions and therefore the secular legal world (from nation-states to private actors) had to find another name for the institution they previously called marriage, the mere coordination difficulties settling on a name and making sure it is consistently and universally applied would be enormous. One would have to delve deep into the law of Taiwan, for example, to discover what an Article 2 relationship is,[1] so it seems advantageous all around for that such a relationship has come to be more generally referred to internally as well as externally as a marriage, albeit one entered into by two persons of the same sex. More generally, simply and consistently using the term "civil marriage" to refer to the status recognized in secular law should solve a lot of the religious confusion worldwide.

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uk-islamic-wedding-legalrights-civil-ceremony-marriage (detailing results of a survey indicating that more than 60% of women who have had a traditional Muslim wedding ceremony are not in legally recognised marriages, although most of these women wanted and expected their marriages to be recognized and many later face problems because it is not);

Russell Sandberg, The House of Lords on marriages and sharia law, Law & Religion UK, 24 October 2019 available at https://lawandreligionuk.com/2019/10/24/the-house-of-lords-on-marriages-and-sharia-law/ (describing reaction in the House of Lords to the recommendation in a February 2018 independent review into the application of sharia law in England and Wales that there be created a criminal "offence that would apply to celebrants of religious marriages that do not confer legal rights").

[1] Because Article 2 of the Enforcement Act of Judicial Yuan Interpretation No. 748 authorized that "two people of the same sex may, to manage a life together, conclude a permanent union that is intimate and exclusive" and because the remainder of the act, for example in setting forth the rules for entry and the portions of the code applicable referred back to "a relationship concluded under article 2" rather than

F. THE EFFICIENCY ADVANTAGES OF DIVORCE

The first same-sex couple to have brought their case to the U.S. Supreme Court, Jack Baker and Michael McConnell, are still together more than 50 years later (and were still litigating to have their marriage fully recognized well into the new millennium).[1] As discussed above, Sullivan's marriage to Adams lasted for more than 40 years until Adams's death. But the named plaintiffs in the case that first brought legally recognized same-sex marriage to a U.S. state, the Massachusetts couple of Hillary and Julie Goodridge, were divorced in 2009 after nearly twenty years as a couple but only five years of marriage. There was, however, good reason for Chief Justice Margaret Marshall's majority opinion in the *Goodridge* case to list access to "the equitable division of marital property on divorce [and] temporary and permanent alimony rights" as among the many "enormous… benefits accessible only by way of a marriage license."[2] According to Hillary Goodridge, "access to the protections provided through a divorce were as important as being able to marry." As she explained in a TV interview while sitting on a couch next to her ex and the now grown child who had prompted them to marry,[3] "[h]aving divorce means there are rules… At a time when you're craziest, it gives you a structure and a process and other people to help you dismantle this as fairly as possible."

Divorce is yet another aspect of marriage I think it valuable to examine from efficiency more than from the traditionally moralistic perspective. This is indeed a turn the law has taken, in the U.S., Taiwan, and elsewhere. It is illuminating, I think, to compare the development of the law of divorce with that of corporate or business bankruptcy. For both divorce and bankruptcy, what had once been a heavily moralistic, indeed punitive legal framework has evolved to focus instead on using the term "marriage," one might argue that a same-sex couple's status in Taiwan is that of being in an "article 2 relationship," not a marriage. For further discussion, see *See* Chao-Ju Chen, *A Same-sex Marriage that is Not the Same: Taiwan's Legal Recognition of Same-sex Unions and Affirmation of Marriage Normativity*, 20 AUSTL. J. OF ASIAN L., Article 5, 1 (2019).

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1 *See* McConnell v. United States, No. CIV.04-2711, 2005 WL 19458, 1-3 (D. Minn. Jan. 3, 2005) (litigation concerning filing of joint tax return).

2 Goodridge v Dept. of Public Health, 798 N.E.2d 941, 955-6 (Mass. 2003).

3 Both practical and symbolic forms of recognition were at the root of their daughter's leading the Goodridges to seek legal marriage. When she was born, both she and her birth mother Julie suffered complications and were in intensive care, leaving Hillary "stuck in the hospital's waiting room… [w]ith no legal relationship to either of them, ….unable to visit or help make medical decisions." And when she was three, she asked her parents, "If you love each other, then why aren't you married?" *See, e.g.*, Gabrielle Emanuel, *How Making History Unmade A Family*, NPR (May 16, 2019), *available at* https://www.npr.org/2019/05/16/723647834/how-making-history-unmade-afamily.

The notion that failure is shameful, however much it may still permeate social norms attached to business or marital dissolution, no longer forms part of the law in these areas. Prison, public shaming rituals,[1] and heavy financial penalties no longer face either those who cannot pay their debts or those who cannot keep their marital vows. Both bankruptcy and divorce used to be deliberately made very difficult to obtain - just as only proof of specified fault grounds would allow a wronged spouse to seek divorce, so insolvency petitions could only to be brought by a creditor who could establish that the debtor had committed one or more statutorily enumerated "acts of bankruptcy." [2] Neither the guilty spouse nor the debtor could file a petition, although some petitions were the result of collaboration or collusion between debtor and creditor or between spouses.[3]

Today, neither fault grounds for divorce nor specified acts of bankruptcy are generally required for a petition. The aim of bankruptcy law these days is not to minimize the number of bankruptcies but to see that assets are put to productive use, to see that those firms that should fail do so expeditiously and with a minimum of dead-weight loss and those that have a chance of succeeding be given the time and flexibility they may need to do so. So it has come to be, *mutatis mutandis*, with the law of divorce. The assets in question for a marriage include a couple's sexual, reproductive, and domestic capacities, as well as their financial assets and earning power, and remarriage today is more readily facilitated where it was once forbidden or penalized. It is no accident that the notion of a "fresh start" is common today in both bankruptcy and divorce.[4]

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1 For examples of some of the shaming penalties earlier imposed on insolvent debtors, including forced nudity in the public square, *see, e.g.*, James Q. Whitman, Th*e Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841, 1873-1883 (1996).

2 For discussions of elements of the evolution of bankruptcy law relevant to my comparison with divorce, *see, e.g.*, Douglas G. Baird, *Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Creditor Law*, 73 U. CHI L. REV. 17, 21-31 (2006); Bruce H. Mann, REPUBLIC OF DEBTORS 228 ff. (2002); Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 34-39 *(1986)*. I am grateful to Douglas Baird for his generous assistance in helping me develop the comparison.

3 Indeed, notorious instances of collusion between spouses eager to divorce but without a legitimate fault ground to do so were one of the motivating factors for no-fault divorce reform. For a description of some typical collusive schemes, *see, e.g.*, Nelson Manfred Blake, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 190199 (1962).

4 In making this descriptive observation, I do not mean to endorse the full extent to which the perceived desirability of a fresh start informs the law of divorce nor thereby to reject out of hand the many thoughtful feminist suggestions for reform. *See, e.g.*, Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994).

III. LIMITS ON AN ANALOGY BETWEEN MARRIAGE AND THE BUSINESS CORPORATION?

When I first began, in the 1990s, to reflect on the future of the law of marriage, the law of divorce in the United States had already evolved in ways similar to the law of corporate bankruptcy in the ways above described. This was one of many reasons I then predicted that the status of marriage would continue to gradually to evolve in an arc analogous to the one the status of the business corporation had followed in Anglo-American law over the course of the last several centuries.[1] As I then saw it:

"for both marriage and the corporation, a pivotal point [wa]s the eighteenth century, in which the state made its most aggressive attempt to assert monopoly control over both institutions… In the case of the corporation, that attempt was rapidly acknowledged to be a failure. The state then co-opted the private network of contracts it had begun by resisting. The end result was more state control than in a world of purely private ordering, but much more flexibility than in the original state-sponsored status institution. Marriage [at the turn of the millennium] seems to be where corporations were in the nineteenth century, and one optimistic vision for its future is that it complete the trajectory followed by the law of corporations, co-opting competitors by moving closer to a system of default rules within which couples can structure their own lives. Admitting same-sex couples to civil marriage could be an important step in moving that trajectory forward.[2]

To this extent, my prediction has been borne out. I was correct to see the development of the law of marriage as akin to the development of general incorporation. Just as, on the one hand, a business venture no longer required the state's corporate imprimatur in order legally to be allowed to undertake certain particularly valuable activities,[3] so one no longer needed to be legally married to engage in lawful sex or produce legitimate children. Laws of general incorporation allow a business corporation to be formed without a charter from the legislature. Those who incorporate no longer have to limit themselves to a single registered business purpose or enterprise. Similarly, the law in most places does not now limit the purpose for which a couple marries - couples who

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1 I set out some of these predictions, together with an analysis of the history of the development of the law, in an unpublished working paper generated in a collaboration with my University of Virginia School of Law colleague, Mary Anne Case and Paul Mahoney, The Role of the State in Corporations and Marriage (1996).

2 Marriage Licenses at

3 For example, to explore the East Indies, as the British Crown had chartered the East India Company to do as a monopoly in the early modern period. *See e.g.* Frank Evans, *The Evolution of the English Joint Stock Limited Trading Company*, 8 Columbia L. Rev. 339, 342, ff (1908).

are unable or unwilling to have children or even to have sexual intercourse are still generally free to marry.[1]

At least in the United States, marriage has also co-opted its competitors – while couples are afforded greater opportunities for enforceable private contract, there are very few status alternatives available in state law available to them, and most of them do not differ substantially from marriage in anything but name.[2] But I also predicted that, just as the state now offered a variety of forms in which one could do business, including a variety of status-like forms each with their own off-the-rack rules,[3] and had become in general indifferent to the form any particular business chose, so the state would come to offer a variety of forms, a menu of options, for adult relationship recognition, and develop in general a similar indifference as to what form a given couple chose. As I shall conclude this article by discussing, my prediction on this was wrong - not only did the menu of options not emerge in as many places as I might have predicted, marriage, certainly in the United States, albeit to a somewhat lesser extent in other countries, is still widely perceived as the gold standard for relationships.

My initial instinct was to see this divergence from my expectations with respect to the path followed by the status of marriage over the past thirty years as not only a failure of my predictive powers and a dashing of my normative hopes, but evidence of a significant limit to the analytic force of the analogy I had been trying to draw between the historical development of the status of marriage and corporate status. However further research into attitudes toward incorporation gave me renewed faith in the strength of the analogy. Specifically, I was intrigued to learn while reading about recent "proposals for the creation of a new legal form through which small businesses in the United Kingdom could operate" the following:

There appears to be a perception amongst some business community sectors that incorporation bestows prestige and credibility. Any new form would need to carry

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1 For example, in Goodridge, the Massachusetts case that first brought same-sex marriage to one of the United States, the court observed that the claim that "the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation" was "incorrect." According to the court majority: Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. General Laws c. 207 contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married. Goodridge 440 Mass. 309, 331 (2003).

2 For example, California domestic partnerships and Illinois civil unions now offer treatment under state law essentially identical to marriage, although not recognition under federal law. See further discussion below.

3 For example, limited liability companies and limited partnerships.

similar status in order to be attractive. This perception seems odd to lawyers familiar with the true import of limited liability and may be unwarranted in many cases but cannot be ignored by those considering reform if it is a major motivating factor. The belief amongst incorporated firm owners that banks, suppliers and customers prefer dealing with limited companies may have some root in the simple fact of registration and increased visibility and disclosure. Again, any comfort given by this apparent transparency may be based on a misperception of its value, but this does not remove the importance of the belief as a motivating factor amongst those who incorporate.[1]

Surveys of businesses indicated that "the most often mentioned reason for incorporation after obtaining limited liability was prestige and credibility (50 per cent), well ahead of tax reasons (38 per cent) and ownership of property in the firm's name (26 per cent) [and o]ther textbook factors for preferring incorporation."[2] Moreover, there was an apparent "lack of understanding of what is obtained by incorporating and, indeed, what rights and obligations are created by the particular incorporation documents of the firm, suggests that business owners are not interested in this documentation prior to problems arising."[3]

If these survey results are at all representative, they reinforce the strength of analogies between incorporation and entry into the legal status of marriage even today. Initially, empirical studies have shown that those who marry like those who incorporate often have a "lack of understanding of what is obtained… and, indeed, what rights and obligations are created by the particular" status.[4] Next and more importantly, just as "clearly there is a great deal of incorporation for reasons which do not fit the usual economic or legal analyses,"[5] so there is a great deal of marrying that is engaged in chiefly because of a perception that it "bestows prestige and credibility," rather than chiefly for economic and legal reasons.

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1 Judith Freedman, *Small Businesses and the Corporate Form: Burden or Privilege?*, 7 THE MODERN LAW REVIEW 555, 563-564 (July 1994), *available at* https://www.jstor.org/stable/1096555.

2 Id. at 561.

3 Id. at 565

4 See, e.g., Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 Law & Hum. Behav. 439 (1993) (reporting on surveys indicating low level of knowledge of marriage laws among recently married Virginia couples and high levels of confidence that their own marriages would avoid the problems of divorce).

5 Judith Freedman, *Small Businesses and the Corporate Form: Burden or Privilege?*, 7 THE MODERN LAW REVIEW at 561.

A. MARRIAGE AS A SOCIALLY AND SYMBOLICALLY SIGNIFICANT STATUS

Whatever my normative preferences, and whatever the descriptive accuracy of Justice Denise Johnson's claim that "in granting a marriage license, the State is not espousing certain morals, lifestyles, or relationships, but only identifying those persons entitled to the benefits of the marital status"[1] and of Christiane Taubira's claim that the role of the state in marriage was "not to say what was good or bad but to organize things,"[2] I must acknowledge that a large percentage of couples who today choose to marry, including same-sex couples who have fought hard to attain the right to marry, do see marriage as an important source of recognition, not in the merely practical but in the deeply symbolic sense of the word. For them the "State's interest in licensing marriages is" more than merely "regulatory in nature."[3] It offers a sense of validation, as well as recognition. Nowhere have I seen this more clearly articulated than in the trial testimony of plaintiffs' witnesses in the *Perry* case, in which two gay couples argued that California's Proposition 8, which by referendum amended the California constitution so as to remove the right to marry from same-sex couples after the California Supreme Court had recognized that right, was unconstitutional.[4]

The testimony of these witnesses is not isolated and unrepresentative, despite their being involved in a lawsuit whose sole purpose was to reclaim the possibility that same-sex couples in California could give their relationship the legal name and hence the status of marriage. In the words of sociologist Andrew Cherlin, "marriage has become a trophy" for many couples in the U.S. today. Cherlin analyzed a 2013 Pew poll, in which, for example, only 46% gave access to "legal rights and benefits" as a very important reason to marry, with 84% naming "love" and 71% "companionship."[5]

In the *Perry* trial, even the proponents of Proposition 8 stipulated that "[t]here is a significant symbolic disparity between domestic partnership and marriage,"[6] and

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1 *Baker v. Vermont*, 744 A.2d 864, 898-899 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (internal citations omitted).

2 *Mariage pour tous: les déclarations de Christiane Taubira à l'Assemblée nationale*, MINISTERE DE LA JUSTICE (Apr. 23, 2013), *available at* http://www.justice.gouv.fr/le-garde-des-sceaux-10016/archives-2013-c-taubira12869/mariage-pour-tous-les-declarations-de-christiane-taubira-30071.html.

3 *Baker v. Vermont*, 744 A.2d 864, 898-899 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part) (internal citations omitted).

4 While the case ultimately reached the Supreme Court, where it was dismissed for lack of standing under the name Hollinsworth v. Perry, my discussion centers on the trial in the District Court, where the case was known as Perry v. Schwarzenegger, 704 F. Supp. 2d 921(N.D. Cal. 2010).

5 Andrew Cherlin, Marriage has become a Trophy, The Atlantic March 20, 2018 available at https://www.theatlantic.com/family/archive/2018/03/incredible-everlasting-institution-marriage/555320/.

6 Id. at 936.

each of the plaintiff couples testified that, although registered domestic partnership gave them the same rights as marriage under California law, they found the domestic partnership to be a deeply unsatisfying institution. Sandra Stier, named plaintiff Perry's registered domestic partner, testified that "there is certainly nothing about domestic partnership that indicates the love and commitment that are inherent in marriage." She gave this testimony notwithstanding that California's statutory definition of the domestic partnership was "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring,"[1] while the statutory definition of marriage mentioned neither intimacy nor caring.[2] Marriage, according to Stier, would "make them feel included "in the social fabric." Marriage would be a way to tell "our friends, our family, our society, our community, our parents and each other that this is a lifetime commitment we are not girlfriends. We are not partners. We are married."[3] This would, she said, make them feel "proud" and "respected."

Related to the personal feelings of status boost these couples anticipate is the fact of marriage being a legible relationship, one that is socially recognizable in addition to being socially validated. As plaintiff Paul Katami testified:

Being married allows us access to the language. Being able to call him my husband is so definitive. It changes our relationship. We currently struggle, in certain circumstances, about what to call each other. But "husband" is definitive. It's something that everyone understands. There is no subtlety to it. It is absolute and also comes with a modicum of respect and understanding that your relationship is not temporal, it's not new, it's not something that could fade easily… But for us, marriage is so important because it solidifies the relationship. And we gain access to, again, that global language,… Because not everyone knows exactly what a domestic partnership is... If I were married to Jeff, I can safely say that the struggle that we have validating ourselves to other people would be diminished and potentially eradicated. I know how I felt when people have asked, "An LLC or an S Corporation"? No, not my business partner. My partner.[4]

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1 *Cal. Fam. Code 297(a)* (West 2005).

2 Marriage in the California Code was at the time defined as "a personal relation arising out of a civil contract between a man and a woman," id. 300, and those eligible to marry are described only as "an unmarried male... and an unmarried female of the age of 18 years or older, and not otherwise disqualified," id. 301.

3 Id. at 936.

4 Testimony of Paul Katami. Transcript of Trial at 88-89, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

Perhaps the most dramatic evidence that the symbolic status of marriage meant more to some than the legal status of the domestic partnership came from the testimony in *Perry* of Chinese- American witness Helen Zia, who compared her experience getting married in California in the so-called winter of love, when then San Francisco mayor Gavin Newsome offered marriage licenses to same-sex couples even though he had no legal authority to do so that all the resulting marriages were in short order invalidated by the California courts on the one hand with her experience of registering for a domestic partnership, even when that eventually provided her all the legal rights of marriage on the other hand. For Zia, registering for domestic partnership was A little anticlimactic. We were excited about being able to register as domestic partners. We came to City Hall. We went to a window that I would describe as… it's kind of a purpose postal window kind of thing, where I think they issued dog licenses as well as domestic partner licenses… I left feeling a little like, So this is -- this is a domestic partnership? We walked away with a little certificate, the kind that a kid gets for perfect attendance that week… But it didn't feel like… much at all. It wasn't the kind of thing we sent the notice out to friends about or sent invitations to a party or anything.[1]

It is important to remember that marriage licenses are often given out at bureaucratic windows in the same way as are dog licenses and that couples can marry without notifying their friends or having a party. Conversely, there is no formal obstacle to celebrating or widely announcing one's registration as domestic partners. Yet the impersonality of registering as partners compared with the ceremonial aspect of marrying has disturbed many. In France, for example, when the PACS was first introduced, it, too, was handed out in a back office and not celebrated in the much grander Salle des Mariages in a French City Hall. The process may have provided ample legal benefits, but it did not feel special or recognizable. Like Katami, Zia testified that when she would introduce her domestic partner to others at gatherings.

I can't count the number of times people say, "Oh, partner. Partner in what business?" And Lia and I got used to having to have an answer to that, to say, "Well, we're partners in life." And then we'd just get used to watching the look on their faces,

[1] Testimony of Helen Zia, Transcript of Trial at 235-236, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010). This initial registration took place when comparatively few legal rights and benefits were associated with registration. But even when domestic partnership status became legally equivalent to marriage in California, Zia felt she had nothing to celebrate when she" got another form back in the mail. And it said, "You 4 are now domestic partners in the State of California" Testimony of Helen Zia, Transcript of Trial at 1277, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

to see whether they got it. And often it would just be this look of bewilderment: Oh, what business is life? Do you mean life insurance?[1]

By contrast, even though her winter-of-love marriage, unlike her domestic partnership, ended up having no legal force, and even though it was invalidated a week before their wedding reception, Zia testified that it "made a difference to our parents, to how our parents related to us. It made a difference to how we related to people." They did throw a big wedding party and invited many family members, who suddenly seemed to understand and recognize their relationship and include her in her partner's family with familiar familial terms:[2]

Before we would marry, my mother would struggle and just say, "She's Helen's friend." And then it changed. And she would say, "This is Helen's" -- "This is my daughter-in-law." And they would get it. And whether they approved or disapproved, it didn't matter. They got it. It's like you don't insult somebody's wife. You don't insult somebody's mother. Our families related to each other differently because marriage is -- and I'm beginning to understand what I've always read -- marriage is the joining of two families.[3]

Zia testified that, as a daughter-in-law, she was then included in the immediate family circle for the hospice care of her partner's father, in the memorial hall for the funeral service, and in obituary notices.[4] This inclusion in an intergenerational family formation would have gratified Jim Obergefell, but it was in point of fact what allowed for Zia's inclusion was not any narrowly legal status, of the sort Obergefell was litigating, but the social status and recognizability of the term "marriage."

In Taiwan, unlike the United States, heterosexual legal marriage is as a matter of law, the joining of two families, forging legal ties beyond that of the couple to each other, but the Article 2 relationship that same-sex couples can now enter into not only limits their ability to have intergenerational legal ties to children, it also does not create legal ties to in-laws, and has therefore been described as "same-sex marriage without family." For some Taiwanese, as well as some Americans, the ability to be incorporated into the family is all-important, but for others, in the LGBTQ (and also in the heterosexual

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1 Testimony of Helen Zia, Transcript of Trial at 243, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

2 E.g. "Auntie Lia, now you're really my auntie." Testimony of Helen Zia, Transcript of Trial at 243, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

3 Testimony of Helen Zia, Transcript of Trial at 243, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

4 Testimony of Helen Zia, Transcript of Trial at 1237, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

community), it can be seen as an advantage to be legally free of traditional family roles and obligations. For the former group, same-sex marriage without family does not go far enough (and not simply because it prevents the adoption of children and therefore the formation of a family including younger generations, but also because it excludes the possibility of a connection with ancestors). Any break from the traditional family configuration may be a step in the right direction for the latter group. Hust as Helen Zia affirmatively wanted to be known as someone's wife. Others may share the view of lesbian feminist theorist Paula Ettelbrick, who, despite spending much of her life in solidly coupled relationships, insisted, "Marriage, as it exists today, is antithetical to my liberation as a lesbian and as a woman because it mainstreams my life and voice. I do not want to be known as "Mrs. Attached-To-Somebody-Else.""[1]

B. THE EFFECT OF THE SAME-SEX MARRIAGE MOVEMENT ON THE STATUS OF MARRIAGE AND THE AVAILABILITY OF ALTERNATIVE FORMS OF LEGAL RECOGNITION

Over decades of public debates with those advocates of traditional marriage who say they oppose same-sex marriage because they fear that licensing it will contribute to the decline of marriage among heterosexuals and the decline in the status of marriage as an institution,[2] I have insisted to them that, as it happens, no group in the last thirty years has done more to preserve, indeed, to elevate the status of marriage than the same-sex marriage movement. It is thanks to gay people far more than in spite of them that marriage remains so widely regarded as the gold standard for relationships for better or for worse. Nothing the traditional marriage movement has said or done has revitalized marriage in the United States the way the same-sex marriage movement has, both as a matter of law (in the sense that alternatives to marriage are much less talked about, and much less available than I predicted thirty years ago they would be) and as a matter of social practice, with the notion still socially current that everyone ought to be married, and that being married is prestigious. If I have not already, let me clarify that I deplore what researcher Bella de Paolo has dubbed "matrimania."[3] Of all the flowery prose and impassioned arguments in the various Justices' opinions in *Obergefell*, the passage that attracted my personal most heartfelt assent was in a footnote by Clarence Thomas:

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[1] Paula Ettelbrick, Since When Is Marriage a Path to Liberation?, in William B. Rubenstein, Lesbians, Gay Men and the Law 721, 724 (2d ed. 1997).

[2] I am referring here to those campaigners against same-sex marriage who disavow an aversion to homosexuality, but foreground a commitment to the status of marriage in their work, such as Maggie Gallagher, former head of the National Organization for Marriage.

[3] See e.g. Bella DePaulo, Singlism and Matrimania, Nov 7, 2018 available at http://www.belladepaulo.com/2018/11/singlism-and-matrimania/.

The majority also suggests that marriage confers "nobility" on individuals… I am unsure what that means. People may choose to marry or not to marry. The decision to do so does not make one person more "noble" than another. And the suggestion that Americans who choose not to marry are inferior to those who decide to enter such relationships is specious.[1]

Specious though it may be, the suggestion remains all too common. I also have to acknowledge as a descriptive matter that the marriage equality movement has sucked much of the air out of proposals to create alternate legal forms of family recognition in the United States. At present, only a tiny number of states have robust alternatives to marriage.[2] Other states have always focused on limiting options. Consider the changes over time to the laws applicable to couples registered in California as domestic partners. From the time the first statewide partner registry went into effect on January 1, 2000, the State has gradually increased the benefits and obligations of such partners. As of January 2002, such partners had rights including access to stepparent adoption procedures and wrongful death suits, as well as medical decision making, sick leave, and insurance benefits, on account of a partner. The most recent change in rights and obligations, effective January 1, 2005, conveyed to domestic partners virtually all the state-level rights and responsibilities of marriage. Previously registered partners were, however, presented by the new law with an up-or-out choice. They either dissolved their partnership before January 1, 2005 or were automatically subject to the new regime of benefits and burdens. The option of remaining with the bundle of rights and obligations available under the earlier regime was not made available. In other words, although the size may have grown larger over time, domestic partnership in California remained one size fits all. Not only could young heterosexual couples never avail themselves of the more limited form of partnership provided to samesex couples before 2005, but even same-sex couples can also do so no longer.[3]

But unlike many other states, California has retained domestic partnership, even after the advent of same-sex marriage. It indeed has expanded its availability to include all those heterosexual couples for whom marriage is an option, not only, as it had earlier, only those one of whose members is a senior citizen.[4] This highlights a significant factor that helps explain why, at least in the United States, my prediction

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1 Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Thomas, dissenting).

2 For a list of available options, see e.g. National Conference of State Legislatures, Civil Unions and Domestic Partnership Statutes https://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnershipstatutes.aspx.

3 For further discussion see Marriage Licenses at 1777.

4 See California Family Code Sec 297 as amended November 2019.

about the development of a menu of options for relationship recognition status similar to that for businesses has not developed to the extent I had hoped. Wherever alternative relationship statuses were made available only to same-sex couples, they have withered on the vine. Where they were opened to all couples, they generally tended to remain as options, even after the advent of same-sex marriage, because they had robust heterosexual constituencies. This happened in, among other places the Netherlands,[1] Quebec, and perhaps most famously in France, whose situation when it comes to the status of marriage, which I see as in some respects the mirror image of the United States, I shall end by sketching briefly.

The first of many hints that beneath the surface in both France and the U.S., things may in complicated ways be the opposite of what they announce themselves to come when we begin by comparing what advocates for the legal recognition of same-sex couples in the respective countries called their movements. French advocates speak of "Mariage pour tous" ("marriage for all") and those in the U.S. of "Marriage Equality," but each one's slogan better fits the other nation's movement. The effect of opening up marriage to same-sex couples in France is designed to have and has achieved equality of access to marriage (although importantly not immediately equality of filiation nor of access to a range of reproductive technologies) for same-sex couples. Yet there is little sense in France that marriage is indeed for all. President Francois Hollande himself, who shepherded the same-sex marriage bill through the legislature as a signature accomplishment of his administration, is not now nor has he ever been married, not to his partner of thirty years and the mother of his four children, fellow politician Ségolène Royal; nor to the woman who replaced her at his side, journalist Valérie Trierweiler, who was only finally divorced from her second husband several years after beginning her public relationship with Hollande; nor to actress Julie Gayet, whose affair with Hollande caused the dramatic end to his relationship with Trierweiler, who had been living with him in the presidential palace. More importantly, there is no sense that opening marriage to same-sex couples will bring an end to the legal availability or widespread popularity of either the PACS (the Pact for Civil Solidarity, through which both same sex and opposite-sex couples may register for a bundle of rights and obligations less comprehensive than marriage) or of concubinage (an even

[1] As the Dutch explained, ""The relatively high number of different-sex couples that contracted a registered partnership in 1998... makes it plausi-ble that there is a need for a marriage-like institution devoid of the symbolism attached to marriage. Therefore, the [Dutch] government wants to keep the institution of registered partnership in place, for the time being." See e.g. Kees Waaldijk, Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands, in Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law 437, 457-58 (Robert Wintemute & Mads Andenaes eds., 2001)

less formal status for cohabitants with even fewer rights and responsibilities, which the courts had limited to opposite-sex couples, but the legislature finally opened to same sex couples in 1999, coincident with the creation of the PACS). The availability of the PACS to opposite-sex couples ensures not only its continued popularity but its conceptual fidelity to French anti-communitarian principles - it is not an institution limited to a defined subset of the population but available to all.[1]

When proponents of same sex marriage in the United States speak in terms of the Freedom to Marry or of Marriage Equality, they are sending a distinct message to two different constituencies. On the one hand, in speaking to those outside the gay community who may not yet be supporters, these slogans build, not only on abstract commitments to liberty and equality but on the very specific resonances each has in U.S. history, particularly the history of the African-American civil rights movement. The freedom to marry was an important consequence of emancipation for formerly enslaved people in the nineteenth century; the freedom to marry the person of one's choice, even across racial lines, followed as a constitutional guarantee nearly a century later. To claim precisely marriage, rather than an alternative legal status with equivalent rights and benefits like civil union or domestic partnership resonates with the hard-won American repudiation of the concept of "separate but equal" in the context of race relations. On the other hand, speaking of the Freedom to Marry and of Marriage Equality is carefully respectful of those many people in the gay rights movement and elsewhere on the American left who are doubtful that marriage should have the central role in American law life. The implicit suggestion is that to be free to marry also entails the freedom not to marry and that to call for marriage equality is not to call for marriage, but merely to argue that if there is going to be marriage, then it should be equally open to same-sex couples. Nevertheless, somewhat paradoxically, marriage equality has turned into "marriage for all" in the United States.

To the extent that there are general lessons to be derived from the experience of France and the United States, this seems to me to put proponents of the preservation of marriage as the gold standard for relationships into a somewhat paradoxical position. They seem to me to be well-advised to do as Taiwan has done - to immediately open up the status of marriage to same-sex couples without yet offering alternative statuses. If they were also to take what I hope is an immediate next step for Taiwan and grant full parentage rights to married same-sex couples, they might also be more likely to achieve their goal of maximizing the number of children who are born to or grow up with married parents.

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[1] For further discussion see Mary Anne Case, Comparative Sexual Democracy.

CONCLUSION

Although I have in the past written extensively about constitutional arguments for same-sex marriage,[1] and although much of the discussion around the world today in the academy, in courts and legislatures, and even in popular media focuses on the question of marriage as a constitutional right under particular constitutions or as a human right under various treaties and convention, I have in this keynote set such questions to one side. My effort has instead been to analyze the functionality and usefulness of the legal status of marriage today for couples and legal systems and the advantages of making it available to same-sex couples. I have to acknowledge that my normative preference to view the status of marriage from the perspective of efficiency more than that of dignity is not yet widely shared, but I nevertheless continue to believe in its descriptive helpfulness and normative desirability and to advocate for it.

[1] *See e.g.* Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation* 57 UCLA L. Rev. 1199 (2010).

CONTEMPORARY TAIWANESE SOCIETY LGBT RIGHTS AND THE ROAD TO MARRIAGE EQUALITY

Doan Khoa [1]

Abstract: *Many acknowledge Taiwan as one of the most socially liberal and progressive societies in the Asia-Pacific region. Indeed, one of the ways the reader can evaluate such meaningful societal progression is the developing acceptance of the LGBT community. However, others argue that the LGBT community is invisible in Taiwan, lacking in various areas of legal protection, and actively opposed by conservative groups with political influence whose key aim is the continued oppression of minority groups. This essay will attempt to analyze the reasons for which Taiwan is regarded as one of the most LGBT friendly communities in Asia by providing a solid understanding of government initiatives and examination of factors influencing opinion, alongside comparative perspectives from its regional neighbors, including China, Japan, the Philippines, South Korea, and Vietnam. Then it will attempt to explain the reasons why some persons believe the statement of Taiwan as a nurturing environment to develop LGBT and their rights to be wholly untrue. Although Taiwan is in many aspects a nation accepting of homosexuality, there are still specific groups with enough influence that they can promote their interests at the expense of society at large and slow down legal progress to hold back further advancement of the LGBT community.*

Keywords: *Asia Pacific; conservative groups; legal protection; LGBT friendly community; societal acceptance.*

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Many acknowledge Taiwan as one of the most socially liberal and progressive nations in the Asia Pacific region. Indeed, one of the ways the reader can evaluate such meaningful societal progression is the developing acceptance of the LGBT community. From 92 percent of people in 1984 believing that homosexuality was fundamentally wrong[1], to almost 75 percent of people demanding imminent marriage equality in 2016[2] coupled with meaningful support from both the government and NGOs, Taiwan provides a nurturing environment in which a robust community has grown, and has evolved into one of the most socially liberal and LGBT friendly nations in Asia. However, others argue that the LGBT community is invisible in Taiwan, lacking in various areas of legal protection, and actively opposed by conservative groups with political influence whose key aim is the continued oppression of minority groups.[3] This essay will attempt to analyze the reasons for which Taiwan is regarded by many as one of the most LGBT-friendly countries in Asia, and will do this through a solid understanding of government initiatives and examination of factors influencing opinion, alongside comparative perspectives from its regional neighbors. Alongside this, we will also attempt to understand the reasons why many people believe this statement is wholly untrue, with the overall aim of understanding that while Taiwan is in many aspects a nation that is accepting of homosexuality, there are still specific groups with enough influence that they can not only promote their interests at the expense of society at large but can also slow down legal processes to hold back further advancement of the community.

A fundamental way in which the reader can see societal acceptance of the LGBT community is by analyzing society's opinions at large. As a result of opinion polls, we can see through this that Taiwan has developed rapidly in this aspect to the point where a majority believe that equality is vital. Although in 2008 over 60 percent believed that homosexuality is wrong on some scale[4], there has been a rapid and significant rise in support for marriage equality, rising steadily the first half of the decade, from 40 percent supporting it in 2013[4] to 71 percent of people supporting full marriage

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1 Yen-hsin Alice Cheng, Fen-Chieh Felice Wu, and Amy Adamczyk, "Changing Attitudes Toward Homosexuality in Taiwan, 1995-2012" [2016] 48(4) Chinese Sociological Review 317, 318-319.

2 Joe Williams, "Nearly Two Thirds of Taiwan Supports Marriage Equality Survey Finds" (Pink News, 30 November 2015) <https://www.pinknews.co.uk/2015/11/30/nearly-two-thirds-of-taiwan-supports-marriageequality-survey-finds/> accessed 20 November 2021.

3 Yu-Rong Chen and Ping Wang, "Obstacles to LGBT Human Rights Development in Taiwan" [2010] 18(2) Positions Asia Critique 399, 400-401 4 Smith et al, 2008.

4 "Opposing Rallies for and against Homosexual Marriage Take to the Streets of Taiwan, with Parliament Split over Legislation" (*ABC News*, 30 November 2013) <https://www.abc.net.au/news/2013-11-30/an-samesex-rival-protests-taiwan/5127096> accessed 20 November 2021.

equality in 2016.[1] Such positive trends in public opinion are evidence of not just acceptance LGBT people have from Taiwanese society but also they are supportive of their equality in a legal sense. Alongside acceptance from a societal perspective, legal rights are also a fundamental way to understand LGBT acceptance. From the beginning of this century, there has been a steady development of rights developed to include Taiwan's gay community.

One of the most significant legal aspects which have facilitated the acceptance of LGBT people in Taiwan is the Gender Equity Education Act[2] (GEEA) which was enacted in 2004. Triggered in part by the suicide of a teenage boy as a result of bullying stemming from his mannerisms (and corresponding negligence by school officials), this act aimed to promote gender equality, eliminate discrimination, and improve educational resources regarding sexual equality, specifically stating that 'no one shall be discriminated based on his or her sex, sexual orientation, or gender identity.'[3] The Ministry of Education annually budgets $3.1 billion NTD to promote this law in educational institutions across the island.[4]

Taiwan's Ministry of Health & Well Being has also ratified the changing of gender on identification cards without requiring reassignment surgery. Previously, those who identified with another gender had to undergo transformative operation and undertake psychoanalysis. Many argued that the price and physical distress forced people to hide their identity or undergo unsafe procedures. From 2015 all gender assignment changes are reviewed by a special committee, followed by a six-month waiting period.[5] Separate from the GEEA Act, since 2011, it has been mandatory for LGBT rights to be promoted in primary school textbooks to diminish any potential root causes for homophobia later in life.[6]

From 2002 onwards, LGBT rights were enhanced in the military sphere, with a discriminatory ban on gay people guarding high-level officials and military

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1 Joe Williams, "Nearly Two Thirds of Taiwan Supports Marriage Equality Survey Finds" (*Pink News*, 30 November 2015) <https://www.pinknews.co.uk/2015/11/30/nearly-two-thirds-of-taiwan-supports-marriageequality-survey-finds/> accessed 20 November 2021.

2 Gender Equity Education Act (adopted 4 June 2004, entered into force 23 June 2004).

3 Yu-Chieh Hsien, *Gender Equity Education in Taiwan: Policy, Schooling and Young People's Gender and Sexual Identities* (PhD Thesis, Longborough University 2010) 301.

4 Ada L. Sinacore et al, "Gender Equity Education Act in Taiwan: Influences on the School Community" [2019] 19(2) International Journal for Educational and Vocational Guidance 293, 293-294.

5 Lii Wen, "Gender Reassignment Rule to be Changed" (*Taipei Times*, 26 December 2014) <https://www.taipeitimes.com/News/taiwan/archives/2014/12/26/2003607642> accessed 20 November 2021.

6 Po-han Lee, "LGBT Rights Versus Asian Values: De/Re-constructing the Universality of Human Rights" [2016] 20(7) The International Journal of Human Rights 978, 982-983.

installations lifted.[1] Although the law did not specifically target gay people, many governing officials regarded homosexuality as a "sexual orientation impairment." In 1994, it was stated that psychiatrists could exempt people from military service if they were gay.[2] Senior Military officials have stated that this change in law was a positive one, and correlated with Taiwan as a nation that values human rights.[3] This evidences Taiwan's relative progression not just regionally but internationally. The Philippines did not repeal a similar law until 2010[15,] and South Korea has ruled it constitutional to bar military personnel that engages in same-sex acts.[4] At this same time, the United States implemented a "Don't Ask, Don't Tell" policy regarding homosexuality.[5]

It is worth noting that alongside Taiwan's legal framework providing the reader with strong evidence regarding the nation's approval and acceptance of LGBT people, both the government and social groups work alongside the community to promote and provide a vibrant and active scene. Taiwan has a vibrant and active LGBT movie scene, and it can actively be described as part of mainstream cinema, receiving both critical and commercial success. Contemporary Taiwan LGBT cinema covers many topics, from documentaries and dark topics to romantic comedies.[6] Since 2013 there has been an annual "Taiwan Queer Film Festival" running in Taipei, Kaohsiung, and Taichung over several months and attempts to represent the multi-faceted nature of the Taiwanese LGBT community. The government and corporate sponsors support the event alongside support from the community, which evidences the accepting nature of Taiwanese society and the government and the private sector.[7]

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1 "CEO Brief: Taiwan" (*Outleadership*, 18 December 2020) <https://outleadership.com/wpcontent/uploads/2021/01/CEO_CountryBriefs_Taiwan_Dec18.pdf>

2 "CEO Brief: Taiwan" (*Outleadership*, 18 December 2020) <https://outleadership.com/wpcontent/uploads/2021/01/CEO_CountryBriefs_Taiwan_Dec18.pdf>

3 Act Prohibiting Discrimination Based on Sexual Orientation or Gender Identity or Expression (Sogie) and Providing Penalties Therefor (1st hearing 2 February 2002); "The Philippines: Acceptance of Gays in the Military Does Not Mean Equality (Yet)" (*Outright Action International*, 18 March 2009) <https://outrightinternational.org/content/philippines-acceptance-gays-military-does-not-mean-equality-yet> accessed 20 November 2021.

4 Military Penal Code (entered into force 20 January 1962) Art 92(6); Bae Hyun-jung, "Court Upholds Ban on Gays in Military" (*The Korea Herald*, 31 March 2011) < http://www.koreaherald.com/view.php?ud=20110331001070> accessed 20 November 2021; "Repealing Article 92(6) Republic of Koreas Military Criminal Act" (*Human Rights Watch*, 7 March 2019) <https://www.hrw.org/news/2019/03/07/repealing-article-92-6-republic-koreas-military-criminal-act> accessed 20 November 2021.

5 Defense Directive 1304.26 (adopted 21 December 1993, entered into force 28 February 1994 to 20 September 2011).

6 Daoming Li, *Historical Dictionary of Taiwan Cinema* (1st edn, The Scarecrow Press, Inc. 2013).

7 "2021 Taiwan International Queer Film Festival Program Announcement" (*TIQFF*, 19 September 2021)<https://en.tiqff.com/news/press/2021-taiwan-international-queer-film-festival-program-announcement-1> accessed 21 November 2021.

It would be unfair to analyze how accepting Taiwan is of the LGBT community without first reviewing the magnitude and popularity of the annual pride parade in Taipei. Since it was first held in 2003, Taipei Pride has grown exponentially to become the second-largest LGBT event globally, with over 82,000 attendees, attracting people from across Asia.[1] It has been hailed as a celebration of diversity.[2] In all cities, the rainbow flag upon important government buildings in each city represents how accepting society is of LGBT people and how much LG BT people have permeated society.[3] The reader needs to contextualize Taiwan's relative acceptance of the homosexual community, and we can do this by comparing key variables with its regional neighbors.

Firstly, Taiwanese approval of marriage equality is significantly higher than the regional average, which stands at 36 percent.[4] Not only that, but Taiwan significantly outperforms its regional neighbors. In Japan, 56 percent of people feel that homosexuality is acceptable, higher than both South Korea (39 percent) and China (21 percent).[5] In comparison to those in Shanghai and Hanoi, residents of Taipei generally have more progressive views, with 46 percent of those polled seeing homosexuality as "normal" - in comparison to 23 percent and 16 percent, respectively.[6] The legal situation is also incredibly disparate. Japan, while voting for the promotion for the end of violence and oppression as a result of sexual identity in the 2011 and 2014 UN Human Rights Councils Resolutions, has yet to implement similar strategies

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1 David Prentice, "Gay Rights on the March in Taiwan" (*The Diplomat*, 3 November 2016) <https://thediplomat.com/2016/11/gay-rights-on-the-march-in-taiwan/> accessed 20 November 2021.

2 Staff Writer, "Kaohsiung Expects Pride Parade to Boost Tourism" (*Taipei Times*, 7 November 2020) <https://www.taipeitimes.com/News/taiwan/archives/2020/11/07/2003746518> accessed 21 November 2021; "Taichung to Usher in 2020 Pride Parade with Music, "Rainbow Products"" (*Focus Taiwan*, 12 November 2020) <https://focustaiwan.tw/society/202011120012> accessed 21 November 2021

3 David Prentice, "Gay Rights on the March in Taiwan" (*The Diplomat*, 3 November 2016) <https://thediplomat.com/2016/11/gay-rights-on-the-march-in-taiwan/> accessed 20 November 2021; Staff Writer, "Kaohsiung Expects Pride Parade to Boost Tourism" (*Taipei Times*, 7 November 2020) <https://www.taipeitimes.com/News/taiwan/archives/2020/11/07/2003746518> accessed 21 November 2021; "Taichung to Usher in 2020 Pride Parade with Music, "Rainbow Products"" (*Focus Taiwan*, 12 November 2020) <https://focustaiwan.tw/society/202011120012> accessed 21 November 2021

4 Alyssa Rosenberg, "Opinion: How the World Feels about LGBT People" (*The Washington Post*, 17 May 2016) <https://www.washingtonpost.com/news/act-four/wp/2016/05/17/how-the-world-feels-about-lgbtpeople/> accessed 21 November 2021.

5 "The Global Divide on Homosexuality" (*Pew Research Center*, 4 June 2013) <https://www.ewresearch. org/global/2013/06/04/the-global-divide-on-homosexuality/> accessed 21 November 2021.

6 Yongliang Feng et al, "Adolescents' and Young Adults' Perception of Homosexuality and Related Factors in Three Asian Cities" (2012) 50 (3) Journal of Adolescent Health 52, 53-54.

at home, where LGBT people have stated that they feel "under siege.'[1] In China, some have started (unsuccessfully) to petition the government to recognize same sex marriage.[2] LGBT individuals still face an uphill battle, from only 5 percent of LGBT people-being out to friends or family and a severe lack of LGBT friendly spaces, to the censorship of any LGBT content in the mainstream media, with the government stating that it refuses to broadcast vile forms of sexual behavior.[3]

While marriage equality has remained elusive in Taiwan since early 2015, various municipalities and jurisdictions have allowed LGBT couples to register their relationships with the government. The reader should note that relationship registration does not allow for any benefits that civil partnerships nor marriages entail and have been described by equal rights campaigners as mocking. It can also be seen as an innovative way in which specific areas of Taiwan prove that the state is not moving fast enough for them and attempting to make their inclusive strides and show respect to the community. [4]

The reader can see that in both a legislative and social & cultural context, Taiwan is a country that appears much more aligned in terms of LG BT progression with the West and stands out as an exemplar in Asia. However, it is of critical importance that we are aware of factors that stand in the way of equal rights and acceptance for the LGBT community in Taiwan and are actively working to repress and stigmatize the community.

Over the past several years, there has been an emergence of right-wing conservative groups in Taiwan in response to the social liberalization period of the 1990s and beyond. Despite many of these groups first emerging as charities (for example "The happiness of the Next Generation Alliance') and referring to themselves as the "silent majority" whose aim is to protect women and children, they have evolved into groups with a strong religious core, wielding enviable political influence on both the Blue & Green coalitions, with a key aim of sexual repression and the delegitimization of LGBT people. These groups have generally been founded by the Christian Church,

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1 Kanae Doi, "Dispatches: Japan's Evolving Public Debate on LGBT Rights" (*Human Rights Watch*, 7 December 2015) <https://www.hrw.org/news/2015/12/07/dispatches-japans-evolving-public-debate-lgbtrights> accessed 21 November 2021.

2 Tom Philips, "China Court Refuses to Allow Gay Marriage in Landmark Case" (*The Guardian*, 13 April 2016) <https://www.theguardian.com/world/2016/apr/13/china-court-refuse-gay-marriage-landmark-case> accessed 22 November 2021.

3 Lilian Shen and Thorben Pelzer, "China's LGBT Community Still Fighting for Their Rights 2016" (*CNN*, 18 June 2016) <https://edition.cnn.com/2016/06/17/opinions/china-shanghai-pride-lgbt-rights/index.html>

4 "Gay Rights Group Says Kaohsiung Decision "Makes Fun of" Them"" (*Focus Taiwan*, 19 May 2015) <https://focustaiwan.tw/society/201505190031> accessed 22 November 2021.

which, although not a major religion in Taiwan, has been proficient in aligning its message and aims with the traditional views of the community to bolster its power.[1]

Indeed, through these groups, the Christian Church has been able to utilize its influence to make lawmakers enact several laws that directly violate the rights of Taiwanese homosexuals. It has been argued that three laws, in particular, aim to suppress the LGBT community under the guise of child protection. Firstly is the Anti-Obscenity Law[2] (Article 235), which aims to restrict the promotion & display of obscene materials. This law was used to prosecute Lai-Cheng Che, the owner of one of the most prominent gay bookstores in Taiwan.[3] Despite legally importing all his products, a shipment of gay magazines was seized, and Mr. Che was successfully charged under this law to disseminate obscene products. He was also the victim of homophobic slurs during questioning, which implies a degree of homophobia from the authorities.[4]

The second of such discriminatory laws is the Suppress Sexual Transaction Law (Article 29), which prohibits the use of the internet or the media to broadcast or broker sexual transactions. Members of the LGBT community have traditionally used alternative sources to find people to engage sexually with and share news and information, the predominant method of which being the internet (and only enhanced in a post smartphone world). Many people have been taken to court due to communications in LGBT-specific forums. As a result, the law can be viewed as a direct attack on LGBT expression and communication methods.[5]

Thirdly, the Children & Juvenile Welfare Act[6] (an amalgamation of two previous laws) designates that anyone under the age of 18 is a child and should therefore be restricted from any kind of adult-orientated content. Mentions of homosexuality are

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1 Wendy Lee, "Pro- and Anti-gay Marriage Demonstrators Rally in Taipei" (*Taiwan News*, 17 November 2016) <https://www.taiwannews.com.tw/en/news/3031855> accessed 21 November 2021; Yu-Rong Chen and Wang Ping, "Obstacles to LGBT Human Rights Development in Taiwan" [2010] 18(2) Positions Asia Critique 399, 420-421.

2 Criminal Code of the Republic of China (adopted 10 March 1928, entered into force 1 September 1928) Art 235.

3 Wen-chen Chang, "Public Interest Litigation in Taiwan: Strategy for Law and Policy Changes in the Course of Democratization" in Po Jen Yap and Holning Lau (eds.), *Public Interest Litigation in Asia (*1st edn, Routledge 2010) 132-157.

4 Yu-Rong Chen and Wang Ping, "Obstacles to LGBT Human Rights Development in Taiwan" (2010) 18(2) Positions Asia Critique 399.

5 K. Jacobs, *Netporn* (1st edn, Rowman & Littlefield 2007).

6 The Protection of Children and Youths Welfare and Rights Act (adopted 28 May 2003, entered into force 28 May 2003) .

included in this, with potential penaIt1es being levied not just on the child but on the parent and website too. It imposes self-censorship to the point that information or even the chance to meet new friends is removed from the realm of possibility. In all cases above, ISP providers are obligated upon request by law to provide the private details of any user requested, removing the safety net of anonymity.[1] When the internet is one of the strongest tools in the dissemination of LGBT ideas and a vital communication and mobilization tool outside of mainstream media biases, an attack on internet freedom is an attack on homosexuality.[2]

While these conservative groups have political influence that directly affects the pace of legal changes and media bias in Taiwan, the role of the family and its traditional values, which are still maintained to this day, cannot be under-emphasized as a factor in why society may not be as accepting of the LGBT community as many wish. Indeed, some have even stated that family is the greatest obstacle to acceptance.[3]

Traditional family values in Taiwan have their origins in Confucianism. The family and its structure play an integral role in Confucian societies. These values underline the importance of continuing the family name and bloodline alongside maintaining standard gender roles of men and women in society, thereby directly promoting the traditional views of masculinity and femininity. In this context, it can be argued that homosexuality is a direct threat to the family in Taiwan, as homosexuality not only subverts traditional gender stereotypes but also puts in jeopardy reproduction and the continuity of the family lineage.[4] Alongside this, with the man seen as the head of the household and key to the family's future, filial piety puts intense pressure on Taiwan's homosexual community.[5]

At the expense of their own identity, many homosexuals in Taiwan choose not to tell their families about their sexuality. Although this can be hidden fairly easily at a young age, family pressure for marriage and children becomes more difficult to avoid as the individual grows older. Rather than telling them the truth and facing their confessions being met with ignorance, attempts to change it or, at worst, ostracization,

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1 Josephine Chun-juel Ho, "Queer Existence Under Global Governance: A Taiwan Exemplar" (2010) 18(2) First Asia Order Critique 537, 538-539.

2 Chung-yi Cheng and Kenneth Yang, "Internet, Computer-Mediated Communications and Gay Rights Movements in Taiwan" in D. Papademas (eds.), *Human Rights and Media* (1st edn, Emerald Publishing 2011) 161-181.

3 P. Y. Tseng, *The Process of Gay and Lesbian Subject Interacting with the Family Context* (Master Dissertation, Fu Jen Catholic University 1999).

4 Feng et al, 55-56.

5 Wang et al, 408-409.

they choose to keep it a secret, and as a result, choose to either live life constantly assessing the risk of whether their parents know and incrementally testing their acceptance and understanding, creating a double life lo appease their parents' wishes, or simply walking away, creating a purposeful distance between themselves and their family so that they can live their life without it impacting others, none of which present the reader with any indication that Taiwanese families are accepting of LGBT identifying people. Therefore although it can be argued that people are accepting of the LGBT community in Taiwan, their stance on the issue can change when it directly impacts their families. And homosexuals generally work within the realm of filial piety rather than try to break the mold.[1]

It may be a factor of all the above that has been a roadblock to marriage equality in Taiwan. Despite a change in the law being viewed as an imminent necessity by the majority of the population, lawmakers have been slow to follow through. Marriage equality continues to be a long, drawn-out battle for Taiwanese LGBT groups. The marriage equality movement started in earnest in 2003 when the Executive Yuan proposed a change in law but was ultimately rejected by the legislature. This was repeated in 2013 and 2014, respectively.[2] Following the election of President Tsai Ying-Wen, who openly courted LGBT people, on the basis that marriage equality would be a priority for her government[3], people were disappointed when there was little progress made on acting upon this during her first few months at the helm. In October, attempts were once again started to remove gender from Taiwan's marriage code, with sixty-six lawmakers (a majority) signaling that they would approve such a bill. However, rather than be brought up as a result of public support, this bill was likely drafted as a result of public outrage at the death of Jacques Picoux, who committed suicide following his long term partner's death from cancer as a result of Taiwanese law allowing his partners' family mom to exclude him from any arrangements regarding his funeral, restricting visitations in his final days, and being refused the right of ownership over the property they both shared.[4] This shows the reader the possibility of courting LGBT

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1 Wang et al, 415-416.

2 Po-han Lee, "LGBT Rights Versus Asian Values: De/Re-constructing the Universality of Human Rights" [2016] 20(7) The International Journal of Human Rights 978, 979-980

3 Maya Oppenheim, "Tawian's First Female President Tsai Ing-Wen: Democracy Campaigner, Gay Rights Champion and Cat-Lover" (*The Independent*, 17 January 2016) <https://www.independent.co.uk/news/people/tawian-s-first-female-president-tsai-ingwen-democracycampaigner-gay-rights-champion-and-catlover-a6817151.html> accessed 22 November 2021.

4 Harriet Agerholm, "Taiwan on Verge of Becoming First Asian Country to Allow Same-Sex Marriage" (*The Independent*, 1 February 2017) <https://www.independent.co.uk/news/world/asia/taiwan-first-asian-countrysame-sex-marriage-end-of-year-lgbt-rights-a7555471.html> accessed 22 November 2021.

for votes and attempting to deal with the issue only when it becomes an issue for the government as opposed to genuinely making a positive impact on the community.

It is important to understand that one of the primary reasons for the failure of such amendments to Taiwan's Marriage Act is conservative Christian influence groups. For the past several years, members of Christian groups have undertaken signature campaigns and organized rallies intending to attempt to galvanize and exaggerate the severity of opposition to marriage equality. Many of the heads of these Christian organizations had strong connections to evangelical groups in the U.S., which have used their influence to create grassroots movements in Africa to restrict LGBT rights. By not only exaggerating the lack of support for marriage equality from society, but these groups also actively lobbied legislators, business leaders (who also carry political clout), and politicians. Alongside attempting legal blockades on LGBT rights, they have also unleashed stringent attacks on their characters linking LGBT people to bestiality and the spread of AIDS.[1] They have also been integral to organizing rallies opposing LGBT people on the same day as Taipei Pride. They have vocally aligned themselves with Nazis, physically handled Pride participants, and been accused of acting maliciously.

While we have seen how both law and society embrace the LGBT community, it is also important to be aware that people may see some requests from the LGBT community as a potential restriction on their rights. There are currently no laws regarding hate speech. Unless some sort of physical violence is involved, people generally see little issue with ridiculing or criticizing others, even within the LGBT community. Often those who actively engage in hate speech against minorities claim that they are speaking as part of the populace, and attempts to demand the government put pressure to apologize often result in the response that people are free to air their opinion. These opinions and thoughts may be based on long-standing discriminatory opinions. Suppose people do not understand why hate speech is not the same as free speech and therefore tacitly accept it as a social norm. In that case, this has serious implications for how people can openly denigrate not just LGBT people but those who come from any minority not specifically protected by law.[2]

We have seen that whether analyzed as a standalone country or in a comparative model against its regional neighbors, Taiwan, in both a legal and societal aspect, is largely accepting of the LGBT community and its growing reputation as a safe space for

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1 J. Michael Cole, "Keeping Legislators Honest – LGBT Style" (*Thinking Taiwan*, 7 May 2014) <http://thinking-taiwan.com/2014/keeping-legislators-honest-lgbt-style/> accessed 22 November 2021

2 Yu-Rong Chen and Wang Ping, "Obstacles to LGBT Human Rights Development in Taiwan" [2010] 18(2) Positions Asia Critique 399, 411-412.

LGBT people can be perceived as accurate. Despite this, there are still several factors at play that continue to undermine the rights of LGBT people today and pose a direct threat to future progression. Although there is a legal framework in place and continued financial, cultural, and societal support for the community, gaps in the legislature and continued conservative influences (in a religious, traditional, and political sense) have slowed down progress and have the potential to negate a competitive advantage for Taiwan in the international arena. A key finding from the analysis was that both had strong underlying influence from religion in terms of conservative groups and traditional family values. We see that to varying degrees, hate speech is regarded somewhat as the norm in Taiwan, and regardless of the party currently in power, the right to discriminate against others can be seen as a person's right to speak freely. In this context, can we argue that democratization and liberalization itself can be a wall against accepting LGBT as the norm?

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4. Gender Equity Education Act (adopted 4 June 2004, entered into force 23 June 2004)
5. Military Penal Code (entered into force 20 January 1962)
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A LEGAL APPROACH ON THE RECOGNITION OF SAME-SEX MARRIAGE IN TAIWAN

Hoang Thao Anh[1]

Abstract: *The second half of the 2010s could be seen as a prosperous era for the same-sex marriage movement worldwide. Following the historic landmark decision Obergefell v. Hodges. in 2016, winning for the right to marry equally in the U.S., Taiwan's constitutional court issued the ruling on same-sex marriage in 2017, then the law to allow it in 2019, making this island the first jurisdiction to recognize same-sex marriage in Asia. From the legal perspective, this success results from a long-lasting marriage equality advocacy. The constitutional court played a significant role in changing the law in stages, adapting to the new concept of each period. Besides, a legal context with no same-sex relation forbidden before the time of legalization in 2019 and the government's administrative acknowledgment of same-sex partnership from 2015 are suitable premises for enacting the law recognizing same-sex marriage.*

Keywords: *Same-sex marriage, lagalization, recoguition Taiwan.*

INTRODUCTION

The legalization of same-sex marriage in Taiwan is not an isolated occurrence, but rather part of a global trend of homosexual marriage acceptance. Many nations have passed legislation recognizing same-sex couples to varying degrees and forms, with the same goal of achieving "marriage equality." An in-depth study of the Taiwan context reveals that the legislative advocacy process on the island for same-sex marriage is part of a long-term legal reform process towards "marriage equality" set out since the beginning of the early half of the last century[2]. Mainly, a radical legislative history of marriage equality had existed since the Japanese colonization in the first half of the 20th century. As a result, in this long-lasting progress, several transitions on the marriage equality concept occurred in various reforms of marriage and family law: from inter-marriage during the Japanese colonization[3], to gender equality for women

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[2] Tai Eika, *The Discourse of Intermarriage in Colonial Taiwan,* The Journal of Japanese Studies 40, no. 1 (2014), p. 87-116.

[3] In this context, it's the marriage between a taiwanese and a japanese.

in the post-colonization era[1], and currently, to marriage equality for the LGBTQ community[2].

From a legal approach, the success of the current marriage equality movement regarding same-sex marriage in Taiwan resulted from three main factors: (1) a legal context with blank space on SSM before the legalization; (2) the administrative recognition since 2015; and (3) long-lasting legal advocacy and constitutional mechanism.

During the toward-recognition progress, it is worth noting that, before the legalization of same-sex marriage in 2019, Taiwan had a legal context with no same-sex relationship banin both civil and criminal law. Specifically, while the Civil Code leaves same-sex marriage out and solely references heterosexual marriage, the criminal code provides provisions for sexual offenders referring to acts against both hetero-victim and same-sex victims. The Civil Code's blank space and the criminal code's protection of same-sex people, along with constitutional rights and freedoms, were the vital foundation for legal advocacy toward same-sex marriage on the island.

Besides, recognition in terms of administrative management since 2015 for same-sex couples has been set through the partnership registration procedure at the local Household Registration Office. Although this registration has no legal effect, it can help same-sex couples make decisions in emergency medical situations for their partners if they have an "information-sharing agreement." This regulation is an important stepping stone for the official recognition of same-sex marriage later on the island through the 2017 constitutional interpretation ruling and the enactment of the 2019 SSM law.

It should also be emphasized that, in legalizing same-sex marriage, Taiwan Constitutional Court played a vital role as a catalyst for the law-making process of the Legislative Yuan. Through the constitutional mechanism, the Court's constitutional interpretation was considered an "order" to the Legislative Yuan and the authorities concerned about issuing a new law for SSM to amend the Civil code. The constitutional mechanism, thus, has contributed to the milestones of legal reform, especially in marriage and family regimes, on the island.

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[1] The Civil code reform in the 90s in order to raise the status of women in Taiwan's marriage and family regime, as a result of the Constitutional court Interpretation ruling No.365 and 452.

See more: Hoàng Thảo Anh (2020), *Khái niệm bình đẳng hôn nhân ở Đài Loan dưới góc nhìn lịch sử pháp luật*, Tạp chí Nghiên cứu Đông Bắc Á, Số 7 (233), tr.30-37. [Hoang Thao Anh (2020), *The concept of marriage equality in Taiwan: a legal historical perspective*, Vietnam Review of Northeast Asian Studies, No. 7 (233) July 2020, p.30-37].

[2] See more: Hoàng Thảo Anh (2020), ibid.

However, despite the efforts to promote SSM from legislative advocacy and the constitutional mechanism, the recognition process collided with the opposition from the national referendum in 2018, a step-back for SSM legalization. With a majority vote against the integration of SSM into the Civil Code, marriage equality for same-sex couples was denied in terms of reaching the same status as heterosexual couples. As a result, SSM can only be recognized in another "equivalent to marriage" formality and cannot be incorporated into the Civil Code to consolidate heterosexual marriage. That's the reason why the SSM Act was released independently in May 2019. While marking Taiwaas n the first jurisdiction in Asia to legalize same-sex marriage, the Act remains some limitations on the rights of same-sex couples.

In the next part of this paper, the author will analyze each factor leading to the Taiwanese SSM legalization in 2019 and then take a short overview of the 2019 SSM Act.

1. THE NON-EXISTENCE OF BAN REGARDING SAME-SEX MARRIAGE IN TAIWAN'S LAW BEFORE THE LEGALIZATION OF SAME-SEX MARRIAGE

1.1. The Civil Code's approach

Before the law was enacted on May 24, 2019, same-sex couples in Taiwan were not legally recognized. In Part IV on Family, domestic marriage legislation is included in Taiwan's Civil Code. While subsection 1 of Chapter 2 on Marriage governs betrothal, subsection 2 of Article 980 regulates marriage as follows: *"A male or female who has not reached his or her eighteenth year of age may not conclude a marriage."* With this exclusionary expression, the law implies that marriage can occur only between a man and a woman and only when the age requirements are satisfied (men from full 18 years old and women from full 17 years old). The current Taiwan Civil Code takes the following stance regarding same-sex couples:

Firstly, marriage or pre-marriage relations between members of the same sex are not regulated, only the fiance-fiancee or husband-wife connection between heterosexual couples. With this approach, the law completely ignores to govern same-sex couples relations and indirectly affirms the non-recognition of same-sex marriage.

Secondly, there is no clause *"prohibiting marriage between individuals of the same sex,"* nor is there a provision saying that *"the state does not recognize marriage between persons of the same sex,"* as is the case under Vietnamese domestic marriage and family law. This premise is crucial for advocating revising Taiwan's law to recognize same-sex marriage relationships in Taiwan.

1.2. Criminal Law regarding homosexual acts

Despite changes and additions, the Taiwan Penal Code (P.C.) enacted in 1935 is still in force today. There are precise regulations for offenses involving sexual activities, such as the act's object, the type of behavior, the age of consent, and the age of delinquency when having sex. Accordingly, with the provisions of Article 227 of the Penal Code, sexual acts can take place between "a person" and a "man" or a "woman"; the age of consent for sexual acts regardless of homosexuality or heterosexuality is 16 years old; if sexual intercourse, precisely sexual intercourse or sensuality, occurs with a person under the age of 14, the other party will be sentenced to prison[1].

1.3. Constitutional protection of LGBTQ's rights

The Taiwanese Constitution, also known as the "Constitution of the Republic of China," which was enacted after the Civil Code and the Penal Code in 1947, does not address the concepts of "sexual orientation" and "gender identity." However, campaigners and the Constitutional Court have relied on Articles 7 and 22 of the Constitution to defend the rights of LGBT individuals, which state:

"Article 7: All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law."

"Article 22: All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution."

However, depending just on the preceding two points is insufficient since they cannot directly address the rights of LGBTQ individuals. As a result, Taiwanese people and the local administration have petitioned the Constitutional Court to interpret the constitution, namely articles 7 and 22 in the issues relating to the SSM. The petitions are the ground for the Constitutional Court's Interpretation No. 748 on May 24, 2017, to recognize and approve persons of the same sex to marry. This section will be discussed in-depth in Section 2.2.

1.4. Administrative recognition

Before the promulgation of the 2019 law on SSM, same-sex relationships were administratively recognized by some localities in Taiwan since 2015 through the "*registration of same-sex couples*" procedure, as so-called *"partnership registration."* This recognition allows same-sex couples to *register their partnership* at the local household registration office.

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[1] Art.227, Taiwan criminal code See more at: https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode =C0000001

The partnership registration does not give rise to inheritance rights and is not recorded in the citizen's identity card and the household registration certificate. Furthermore, same-sex couples do not have rights stemming from marriage relationships, while there are 498 related privileges under Taiwanese law, including property rights, social welfare, and medical care[1]. Thus, partnership registration does not establish a marriage relationship and cannot replace marriage registration, so it cannot guarantee the rights of same-sex couples as legal couples. However, if there is a legal dispute, partnership registration can still prove the cohabitation relationship. In addition, registered same-sex couples can sign an information-sharing agreement that allows hospitals, courts, and law enforcement organs to access civil status registration data. Based on this agreement, they can make decisions for their partner in case of the absence of a representative or relative, such as medical decisions in emergency cases[2].

The receipt of partnership registration is under the competence of the municipal government, whose primary goal is population management. As a result, partnership registration is not implemented synchronously throughout Taiwan at the same time but is somewhat dependent on local leaders' decisions at various periods. However, as of July 2017, same-sex couples registration procedures had been implemented in 18 Taiwanese provinces and cities, accounting for 94% of the national population.

Although this procedure has no legal effect, it is an administrative recognition granted by the local government to same-sex couples living together as spouses. It can be considered a significant acknowledgment and a cornerstone for Taiwan to get closer to SSM recognition in 2019.

2. TOWARDS THE LEGALIZATION OF SAME-SEX MARRIAGE: LEGISLATIVE ADVOCACY, CONSTITUTIONAL MECHANISM, AND THE NATIONAL REFERENDUM

2.1. Legislative advocacy

In October 2003, Taiwan's Executive Yuan[3] proposed a bill that would allow same-sex couples to marry and adopt children. However, the bill was postponed due to opposition from the Cabinet (dominated by the ruling Democratic Progressive Party)

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1 "Taiwan poised to legalize same-sex marriage", Washington Blade, 11/01/2017. https://www.washingtonblade.com/2017/01/11/taiwan-poised-legalize-sex-marriage

2 Trudy Ring, "Does Partnership Registration Mean Taiwan Is Ready for Marriage Equality?", Avocate, 18/06/2015, https://www.advocate.com/world/2015/06/18/does-partnership-registration-mean-taiwan-ready-marriage-equality

3 Executive Yuan, the equivalent of the Government, is the executive power branch according to the structure stated in the Five Powers Constitution of the Republic of China, according to its founding father Sun Yat-sen.

and the Legislative Yuan (ruled by the Pan-blue coalition led by the Kuomintang)[1]. It was not voted to pass on[2]. In 2012, alongside the annual gay pride parade in Taipei, which was the largest in Asia at the time[3], with the slogan "marriage equality," congresswoman Yu Mei-nu, a prominent leader of the Taiwanese feminist movement and also a feminist lawyer, proposed a draft bill to the Legislative Yuan. This proposal promoted marriage equality regarding legalizing same-sex marriage by amending and supplementing Taiwan's Civil Code.

In 2013, the Taiwan Alliance to Promote Civil Partnership Rights (TAPCPR) submitted 03 draft bills for "Diversified family formation," including marriage equality[4]. TACPR's "Marriage Equality Bill" is also a proposal for an amendment to the Civil Code like Ms. Yu Mei-nu. Accordingly, the bill allows two people to marry, regardless of gender, sexual orientation, or gender identity. In addition, the bill also provides an anti-discrimination provision based on sex, sexual orientation, gender identity, or gender expression in adoptions[5] .

On December 22, 2014, a draft amendment to the Civil Code towards legalizing same-sex marriage was considered by the Judiciary Committee of the Legislative Yuan. Modifications include replacing existing marriage provisions in the Civil Code with gender-neutral provisions to recognize same-sex marriage and allow same-sex couples to adopt children. This bill has been well received by members of the Legislative Yuan, including Ms Yu Mei-nu of the Democratic Progressive Party (DPP), more than 20 other DPP members, two from the Taiwan Solidarity Alliance Party, one from the ruling Kuomintang (KMT) party and one from the People's Party[6]. However, the bill stalled, and the efforts of Taiwanese legislators officially failed in January 2016 when the Legislative Yuan's eighth term ended.

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1 The Legislative Yuan, the equivalent of the National Assembly/Parliament, is the branch of legislative power according to the 1947 Five Powers Constitution of the Republic of China.

2 Hogg, Chris, "Taiwan move to allow gay unions", BBC News, 28/10/2003, http://news.bbc.co.uk/2/hi/asia-pacific/3219721.stm

3 Aldrovandi, Martin, *"Taiwan's gays hope for a "Marriage Revolution'".* Deutsche Welle, (October 29, 2012) https://www.dw.com/en/taiwans-gays-hope-for-a-marriage-revolution/a-16340759

4 The other two bills deal with the "civil partnership system" and the "multi-person family" respectively. See more at: https://tapcpr.org/english/about-us

5 *Introduction of Taiwan Alliance to Promote Civil Partnership Rights*, TAPCPR, https://tapcpr.org/english/about-us

6 Lii Wen, "Gay marriage proposal set for review". Taipei Times, 21 December 2014, http://www.taipeitimes.com/News/taiwan/archives/2014/12/21/2003607251

In November 2015, around two months before the general election, Presidential candidate Tsai Ing-wen (Tsai Ing-wen) announced her support for SSM[1]. In July 2016, several members of the Ninth Legislative Yuan stated that they would introduce the SSM bill in the Legislative Yuan at the end of the year[2]. By October 2016, two bills on SSM were submitted to the Legislative Yuan[3].

In conclusion, from 2003 to 2016, many propositions regarding the call for recognition of SSM had been submitted to the Legislative Yuan but had never been accepted for adoption. However, it reflects the permanence and persistence of the legal advocacy on marriage equality. And although being denied, the number of SSM supporters, which was rising year after year, presented a progressive thought spreading among the Legislative Yuan's congresspeople.

2.2. Constitutional mechanism: The J.Y. Interpretation No 748

2.2.1 . Legal context

The Interpretation of Judicial Yuan No. 748 results from a constitutional review of the Marriage chapter of the 1929 Civil Code, collated with the constitutional provisions relating to the right to marry between two persons of the same sex. On March 24, 2017, the Constitutional Court (also known as the Judiciary Yuan) heard the case brought by activist Chi Chia-Wei (who attempted to register his marriage with his same-sex partner in 2013 but failed) and the Taipei City Government's Civil Affairs Department jointly filed. Both plaintiffs asked the Constitutional Court to interpret the constitution on the issue of gay people's right to marry. The Court consolidated the case and decided to rule on whether the existing Civil Code allows for SSM and, if not, whether it violates the provisions of the Constitution of the Republic of China regarding equal rights and freedom to marry or not.

The petitioner Chia-Wei CHI was the first person to come out as gay on Taiwanese national television in 1986[4]. From 1986 to 2013, CHI's application for marriage registration was rejected by the Household Registration Office at Wan-Hua District of Taipei City. After exhausting ordinary judicial remedies, CHI filed a petition to the

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3 Gerber, Abraham (25 October 2016). "Push for same-sex marriages started by DPP and NPP". Taipei Times, http://www.taipeitimes.com/News/taiwan/archives/2016/10/25/2003657881

4 "Chi Chia-wei", LGBT History Month, https://lgbthistorymonth.com/chi-chia-wei?tab=biography

Constitutional Court in August 2015, claiming that Articles 972, 973, 980, and 982 of the Civil Code[1], which prohibited same-sex marriage, violated the Constitution.

The second petition was from the Taipei City Government. This authority has been brought to court by same-sex couples for an administrative lawsuit because it denied their marriage registration application based on the provisions of the Civil Code. Therefore, in 2015, the Taipei City Government also asked the Constitutional Court to clarify whether the provision "marriage is only permitted between a man and a woman" infringes on constitutionally protected freedoms and equality rights?[2]

Since the nature of the legal issue raised by the two petitions above is similar, the Constitutional Court of Taiwan decided to combine the cases and proceed with the settlement through J.Y. Interpretation No. 748 on March 24, 2017. In this interpretation, the legal matter incorporated is :

"Do the provisions of Chapter II on Marriage of Part IV on Family of the Civil Code, which does not allow two persons of the same sex to create a permanent union of intimate and exclusive nature to live a common life, violate the Constitution's guarantees of freedom of marriage under Article 22 and right to equality under Article 7?"[3]

It can be noted that there was no direct reference to the terms "marriage" or "get married" in the legal issue determined by the Court. However, instead, the Court applied its definition as *"a permanent union of intimate and exclusive nature to live a common life."* The usage of the phrase mentioned above is critical in supporting the future enactment of the law, as will be discussed below.

2.2.2. Historical decision of the Constitutional Court

The trial was first reported live on Taiwanese television as an important event. Participants in the trial included lawyers for both plaintiffs, Justice Minister Chiu Tai-san (on the conservative side of the current law on marriage), and a panel of legal scholars[4]. After considering the legal issues raised by the two petitioners as well as the arguments of relevant parties such as the Ministry of Interior and the Ministry of Justice,

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1 Specifically, Articles 972, 973, 980, and 982 of the Taiwan Civil Code stipulate unequivocally that the formation of a prenuptial agreement (pre-marriage) and marriage can only take effect between a man and a woman.

2 "Taiwan constitutional court hears debate on same-sex marriage", Focus Taiwan News Channel. https://focustaiwan.tw/society/201703240029 (24/03/2017).

3 J. Y. Interpretation No 748, https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748

4 "Taiwan top court hears landmark gay marriage case". BBC News. 24/03/2017. https://www.bbc.com/news/world-asia-39376423

the Constitutional Court ruled that: *"the provisions relating to marriage in the Civil Code are unconstitutional."* Specifically, the holding of the interpretation stated that:

"The provisions of Chapter II on Marriage of Part IV on Family of the Civil Code do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose often live said provisions, to the extent of such failure, violate the Constitution's guarantees of both the people's freedom of marriage under Article 22 and the people's right to equality under Article 7"[1].

After that, they ordered the authorities concerned to amend or enact the relevant laws following the ruling of Interpretation 748 within two years of the Interpretation announcement. It is up to the authorities concerned to decide on the determination of the formality to achieve equal protection of the right to freedom of marriage. Suppose the relevant laws are not amended or promulgated within two years. In that case, two persons of the same sex who intend to create the said permanent union shall be allowed to have their marriage registration effectuated at the authorities in charge of household registration by submitting a written document signed by two or more witnesses following the said Marriage Chapter.

2.3. Oppositions from the national referendum

After the announcement of J.Y. Interpretation No. 748, there were still many opposing opinions to this decision. In February 2018, the "Coalition for the Happiness of the Next Generation," a conservative Christian group, proposed holding a referendum on the SSM issue to overturn the Court's decision. The Central Election Commission approved this proposal in April 2018 with two questions related to the SSM[2]. In September of the same year, the advocacy group for SSM also collected enough signatures to submit two more questions related to the recognition of SSM in the Taiwan Civil Code[3].

In November 2018, a nationwide referendum was held in Taiwan, with ten questions on the ballot[4]. There are five sentences related to the rights of the LGBT community as banning same-sex marriage (question 10), prohibiting LGBT-specific sex education in schools (question11), allowing another formality of recognition for

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1 Ibid.

2 "CEC passes review of same-sex marriage referendum proposals". Focus Taiwan. 18/04/2018. http://focustaiwan.tw/news/asoc/201804180011.aspx

3 *"With 9,000 signatures per day, Taiwan petition for marriage equality passes referendum threshold". Taiwan News. 1 September 2018.* https://www.taiwannews.com.tw/en/news/3519385

4 "The 10 referendum questions Taiwanese are voting on". CAN, 24/11/2018, http://focustaiwan.tw/news/aipl/201811240010.aspx

same-sex couples (question 12), allowing same-sex marriage (question 14) and finally maintain sex education for LGBT people in schools (question 15)[1].

Of the above 05 questions, there are 03 questions, 10, 11, 12, submitted by the party opposing SSM

and the other two questions raised by the pro-SSM party. The referendum results show that the majority of Taiwanese people are still conservative when they agree with questions 10, 11, 12, and only a minority vote in favor of questions 14 and 15.

Thus, the referendum result does not allow the inclusion of SSM in the Taiwan Civil Code so that same-sex couples can be protected as heterosexual couples. At the same time, the government of Taiwan is still legally bound to have to make a law consistent with Interpretation No. 748 of the Constitutional Court. However, the referendum also allows same-sex couples to be recognized and protected in a "different form" rather than outright opposition. This regulation is considered a "backward" step for the process of "marriage equality in Taiwan," but not a deadlocked outcome.

With the above results, the legislative amendment of the Legislature according to Interpretation No. 748, had to give up the option of "amending and adding the SSM to the Civil Code" and turn in the direction of "promulgating a separate law to recognize the relationships of same-sex couples" in Taiwan.

3. THE ACT FOR IMPLEMENTATION OF J.Y. INTERPRETATION NO. 748

On February 20, 2019, the Executive Yuan introduced a bill called the "The Act for Implementation of J.Y. Interpretation No. 748", which allows two persons of the same sex to form a "permanent union of intimate and exclusive nature to live a common life." The Act regulates inheritance rights, medical rights and adoption rights, and adultery cases, similar to heterosexual marriage. The Executive Yuan passed the bill on February 21, 2019, and then submitted it to the Legislative Yuan for approval. The

[1] ***Question 10:*** Do you agree that marriage defined in the Civil Code should be restricted to the union between one man and one woman?

Question 11: Do you agree that the Ministry of Education should not implement the Enforcement Rules of the Gender Equality Education Act in elementary and middle schools?

Question 12: Do you agree to the protection of the rights of same-sex couples in co-habitation on a permanent basis in ways other than changing of the Civil Code?

Question: 14: Do you agree to the protection of same-sex marital rights with marriage as defined in the Civil Code?

Question 15: Do you agree in accordance with the Gender Equality Education Act that national education of all levels should educate students on the importance of gender equality, emotional education, sex education, and same-sex education?

Act was officially given by the Legislative Yuan on May 17, 2019, and took effect from May 24, 2019.

The Act does not mention the "recognition of same-sex marriage" in terms of terminology. Instead of the word "marriage" (hunyin), its content refers to a same-sex couple's relationship as a "permanent union of an intimate and exclusive nature to live a common life." Although "same-sex marriage" or "allowing same-sex couples to marry" are not mentioned, the Act uses the exact definition of "marriage" to describe the same-sex union. It recognizes the same rights and benefits as those arising from the marriage of hetero-couples.

3.1. General content

Like the marriage institution in the Taiwan Civil Code, the Act also establishes regulations on establishing a "marriage equivalent" relationship for same-sex couples - a permanent union of an intimate and exclusive nature to live an ordinary life. Accordingly, same-sex couples can register to form a "permanent union" at the local household registration office like the heterosexual marriage registration procedure. The registration must be made in writing, signed by two or more witnesses. Both parties must register it at the authority under the spirit of J.Y. Interpretation No. 748[1].

The Act applies equally to men and women aged 18 and over in terms of age. Persons under 18 years of age must have the consent of their legal representative. This regulation is different from the Taiwan Civil Code where the age of marriage for men is from full 19 years old and for women is from full 16 years old[2].

The formation of same-sex union would be prohibited in case of (1)A lineal relative by blood or by marriage; (2)A collateral relative by blood within the fourth degree of kinship, except persons of a collateral relative within the fourth degree of kinship by adoption; (3)A collateral relative by marriage within the fifth degree of kinship of different rank[3]. The union prohibitions between lineal relatives by marriage provided in the preceding paragraph shall continue to apply even after the dissolution of relations between relatives by marriage. The union prohibitions with the lineal relative by blood or marriage outlined in the first paragraph shall apply to persons of a lineal relative by adoption after the ending of the adoption relationship. Other prohibitions are similar to the institution of marriage in the Civil Code, such as the

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1 See Article 4, The Act for Implementation of J.Y. Interpretation No. 748.

2 See Art.3, *Ibid.* "Persons under the age of eighteen may not form a union as stated in Article 2. A minor must have the consent of his statutory agent for forming such a union".

3 See Art.5, *Ibid.*

prohibition of polygamy; furthermore, if a person has been establishing a same-sex union, they are not allowed to get into a heterosexual marriage, and vice versa.

In addition, the Act also does not allow the guardian and the ward to establish a union if the guardianship still exists unless the ward's parents agree[1].

Similar provisions for "nullity of marriage", "unlawful marriage annulment", inheritance relationship, personal relationship and property relationship of the couple, and divorce, are also regulated similarly or reference to the provisions of the marriage institution in the Taiwan Civil Code.

3.2. The level of recognition of same-sex marriage compared to heterosexual marriage

In general, the level of recognition of the Act for the "marriage" of same-sex couples is almost the same as that of heterosexual couples. The difference is that Taiwan has not legally applied the term "marriage" to the union of same-sex couples due to current social barriers. Therefore, the law still has some limitations, especially provisions related to adoption, identification of parents and children, and recognition of same-sex couples with foreign elements. Specifically:

Regarding adoption, same-sex couples can legally adopt children, but the law only allows them to adopt children directly related to the other partner. That means, among the couple, there must be one person who is the child's biological father or mother. The other person can adopt the child and establish the adoptive mother's or father's relationship. Like Vietnamese law, Taiwanese law only allows one child to be adopted by a couple or a single person. Since Taiwanese law only recognizes the union of same-sex couples but does not recognize their "marital relationship," adoption without any blood relationship is impossible in the current legal framework.

In terms of parent-child identification issues, same-sex couples cannot form a parent-child relationship using assisted reproduction methods. According to Taiwan's Artificial Reproduction Act (Chinese: 人工生殖 法), assisted reproductive technology is only available to heterosexual couples. Although this technology has been accessible to same-sex couples since the 1990s, establishing a parent-child relationship between a same-sex couple and a child born through assisted reproduction is still illegal. Therefore, this relationship is not recognized.

On the recognition of same-sex couples with foreign elements, as of 2019, Taiwan only recognizes "marriage-like relationships" for couples in which one is a Taiwanese citizen, and the other is from the country where the SSM is recognized. Article 46 of the Act, "Determining the applicable law to civil matters with foreign elements" (涉外民

[1] Art.6, *Ibid.*

事法律適用法) states that: *"The national law of each party governs the establishment of a marriage."* Therefore, when a person from a country that prohibits or does not recognize same-sex marriage wants to marry a Taiwanese citizen in Taiwan, there will be barriers in terms of marriage conditions. However, by January 2021, an amendment to articles 46 and 63 of the Civil Code by the Judiciary Yuan had allowed Taiwan to recognize unions between Taiwanese citizens and citizens of almost any other country (except Mainland China), regardless of whether the government recognizes same-sex marriage or not[1].

CONCLUSION

To conclude, although being nominated as the first jurisdiction in Asia to legalize same-sex marriage, Taiwan's law only stops at the level of "recognizing a relationship based on a union which can be considered equivalent to marriage." Still, it has not unified the term and notion of "same-sex union" with "marriage" in the Civil Code. As a result, such unions' rights to same-sex couples are far more limited than the hetero-spouses. Thus, this island still needs a roadmap to officially and fully equalize homosexual marriage with heterosexual marriage.

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[1] Matthew Strong (2021), *Taiwan to allow multinational same-sex marriages, but not with China*, Taiwan News, https://www.taiwannews.com.tw/en/news/4109284

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10. Civil Code of the Republic of China; https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000001

11. Criminal Code of the Republic of China; https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=C0000001

THE FUNDAMENTAL RIGHT TO MARRY IN INDIA: VIEWING SAME-SEX MARRIAGES THROUGH THE THE LENS OF CONSTITUTIONAL MORALITY

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Abstract: *The Indian Constitution does not expressly recognize the right to marry as a fundamental or a constitutional right. Through judicial interpretation, the freedom of choice in marriage has been recognized as an inherent aspect of Article 21 of the constitution. Marriage as an institution is a concept based on exclusion. Same-sex marriages are not currently acceptable under the Indian social structure. The Indian Supreme Court decriminalized homosexuality in 2018 and took a positive step towards recognizing equal rights of queer people. This paper argues that through such creative interpretations, new constitutional spaces are developed. Through the lens of constitutional morality, which is defined by values of inclusiveness, the institution of marriage can be expanded to cover all gender and sexual identities.*

Keywords: *Right to marry, same - sex marriage, constitutional morality, India.*

INTRODUCTION

The popular song "Same Love" by Macklemore & Ryan Lewis talks of a certain "sameness" desired by same-sex couples, in its lyrics.[2] Global politics in the twenty-first century is defined to a large extent by marriage equality campaigns that "mobilised" the "ideas of inclusion and sameness."[3] These movements put forth the case to be "included" within the existing marriage laws and to be treated with

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[2] Macklemore & Ryan Lewis, "Same Love" <https://genius.com/Macklemore-and-ryan-lewis-same-love-lyrics> accessed 4 October 2021.The lyrics talk about this "sameness': "We come from the same one"; "Underneath it's all the same love".

[3] Jessica Gerrard, "Boys in Dresses: Same-sex Marriage, Children and the Politics of Equivalence" (2020) 35:103 AFS 70, 70.

"sameness'. Ruth Vanita correctly understands this current situation when she says that whether a government recognises same-sex marriage or not, it cannot control any person's feelings of love and their "understanding of marriage".[1]

The Indian Constitution does not expressly recognise right to marry as a fundamental or a constitutional right. It is through judicial interpretation that the freedom of choice in marriage has been recognised as an inherent aspect of Article 21[2] of the constitution. Marriage as an institution has been regarded as the foundation of society where the cultural and religious ethos of the society regulates its legality.[3] It is these religious and social norms which do not accord acceptance to same-sex marriages.[4] This spirit of *intolerance* is reflected in the legal policies of different jurisdictions which outlaw homosexuality.[5]

It was recently in *Navtej Singh Johar v. Union of India*[6] (hereinafter *Navtej Johar*) that a constitution bench of the Supreme Court of India decriminalized same-sex relationships. The court held that section 377[7], Indian Penal Code, 1860 (IPC) "is violative of the fundamental rights guaranteed by Article 14, 19 and 21" insofar as it "criminalises voluntary sexual relations between LGBT persons of the same sex" and "discriminates against them on the basis of their "sexual orientation"".[8] This judgment marked the culmination of decades old struggle for decriminalization of non-procreative sex between adults and the recognition of dignity of queer persons.[9]

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1 Ruth Vanita, ""Wedding of Two Souls": Same-Sex Marriage and Hindu Traditions" (2004) 20 J. Fem. S. Rel. 119, 119.

2 Indian Constitution, Art. 21: "Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law." The Indian Supreme Court has given an extremely wide interpretation to the fundamental right to life and personal liberty under Article 21 by including within its ambit numerous new rights. Article 21 is visualised as the repository of all new and evolving fundamental rights in India.

3 C. Weisbrod, "Family, Church, and State: An Essay on Constitutionalism and Religious Authority" (1988) 26 J. Fam. L. 741, 754 <https://opencommons.uconn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1145&context=law_papers> accessed 12 October 2021.

4 D.A.Gay,J.P.Lynxwileret.al.,"Religiosity,Spirituality,andAttitudestowardSame-SexMarriage:ACross-Sectional Cohort Comparison" (2015) Sage Open <https://journals.sagepub.com/doi/10.1177/2158244015602520> accessed 12 October 2021.

5 For full list of countries where homosexuality is still outlawed see, "Homosexuality: The countries where it is illegal to be gay" (*BBC News*, 12 May 2021) <https://www.bbc.com/news/world-43822234> accessed 13 October 2021.

6 *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

7 Indian Penal Code, 1860, s 377 "Unnatural offences - Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

8 *Navtej Johar* (n 8) [643.4].

9 Akshat Agarwal, "Marriage equality in India: thinking beyond judicial challenges to secular marriage law" (2021) Ind. L. Rev. 1, 1.

Despite the progressive judgment on same-sex relationships, the question of same-sex marriage remains unanswered. The issue of same-sex marriage continues to face resistance in India. However, the *Navtej Johar* decision has made it difficult to completely deny legal recognition to such marriages. The anti-discrimination framework as established by *Navtej Johar* has paved the path for achieving marriage equality. A mere decriminalisation of consensual sexual acts does not eliminate the discrimination faced by same-sex couples. It is then we invoke an important principle of constitutional jurisprudence - *constitutional morality* which "means to bow down to the norms of the Constitution"[1]. It is through this progressive and transformative doctrine of constitutional morality[2] that the differences in "being" have been guaranteed equal treatment and concern under the Indian Constitution. This paper attempts to explore the entitlement of full marital rights to same-sex relationships, as viewed through the lens of constitutional morality under the transformative Indian Constitution. This paper argues that it is through such creative interpretations that new constitutional spaces are developed. It is through the lens of constitutional morality which is defined by values of inclusiveness that the institution of marriage can be expanded to cover all gender and sexual identities.

MARRIAGE EQUALITY: IS THE STAGE SET?

The institution of marriage has been stuck to the "normative binaries of male and female" under the assumed normative structure of a marriage.[3] Marriage is an extremely significant aspect under the Indian social context which provides further impetus to the discourse on civil rights especially after decriminalization of homosexuality. The absence of the binding union of marriage results in denial of legal and economic privileges which follow marital status. Legal benefits and rights like inheritance, succession, maintenance, pensions rights, health benefits are denied to homosexuals couples.[4]

Around the world, 30 countries have legalised same-sex marriages, showcasing a great effort to promote progress in the rights of the LGBTQ+ community.[5] The

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1 *Manoj Narula v. Union of India,* (2014) 9 SCC 1 [75].

2 Zeeshan Ahmad, "The challenge of constitutional morality before the court" (*The Leaflet*, 26 March 2020) <https://www.theleaflet.in/the-challenge-of-constitutional-morality-before-the-supreme-court/> accessed 16 October 2021.

3 Sharif D. Rangnekar, "The battle for same-sex marriage is essentially a fight for civil rights" (*Scroll,* 1 March 2021) <https://scroll.in/article/988175/the-battle-for-same-sex-marriage-is-essentially-a-fight-for-civil-rights> accessed 16 October 2021.

4 Shivam Garg, "Legal Recognition of Same-Sex Marriage Rights in India" (2020) 9 CNLU LJ 158, 160.

5 See Saurav Kumar, "A Spectrum of Pride: Recognising Same-Sex Marriage in India" (*The Leaflet,* 23

constitutional court of South Africa in 2005 in the matter of *Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs* held that the common law definition of marriage as "a union of one man with one woman", was incompatible with the Constitution of the country.[1] Subsequently South Africa passed the Civil Union Act, 2006 allowing consensual marriages irrespective of their sex.[2] The United States Supreme Court in 2015 held that same-sex couples also had the same basic right to marry in *Obergefell v. Hodges*.[3] The United Kingdom had adopted a liberal approach on same-sex marriage when it enacted the Marriage (Same Sex Couples) Act, 2013.[4]

Same-sex and queer marriages are not given a similar recognition under the Indian legal regime. However, despite the lack of any clear legal acknowledgement, the judiciary has played a proactive role in the matter. The Madras High Court by holding that the term "bride" under the Hindu Marriage Act, 1955 includes transwomen and intersex persons who identify as women, has paved the path for liberal interpretation of such provisions.[5] The consequence being that a marriage solemnised between a male and a Hindu transwoman is given legitimacy. This widening of the interpretation of the provision has also strengthened the foundation for redefining same-sex marriage rights.[6] This decision of the Madras High Court was the result of the route followed by the apex court, especially in the case of *Shafin Jahan v. Ashok K.M,*[7] where the court held that every person has an absolute right to choose a life partner which is protected under Article 21 of the Constitution.[8] Chandrachud J. stated that "Society has no role

June 2021) <https://www.theleaflet.in/a-spectrum-of-pride-recognising-same-sex-marriage-in-india/> accessed 17 October 2021. Also see AFP, "Same-sex marriage now legal in 30 countries" (*The Tico Times*, 27 September 2021) <https://ticotimes.net/2021/09/27/same-sex-marriage-now-legal-in-30-countries> accessed 18 October 2021.

1 *Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs* (CCT 10/05) [2005] ZACC 20; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005) <http://www.saflii.org/za/cases/ZACC/2005/20.html> accessed 19 October 2021.

2 Civil Union Act, 2006 <http://www.saflii.org/za/legis/consol_act/cua2006139/> accessed 19 October 2021.

3 *Obergefell v. Hodges*, 576 U.S. 644 (2015) <https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf> accessed 19 October 2021.

4 Marriage (Same Sex Couples) Act, (2013), Part 1: Marriage of same-sex couples in England and Wales <https://www.legislation.gov.uk/ukpga/2013/30/contents/enacted> accessed 20 October 2021.

5 *Arunkumar v. The Inspector General of Registration* WP(MD)No.4125 of 2019 and WMP(MD)No.3220 of 2019 <https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf> accessed 20 October 2021.

6 Kumar (n 16).

7 *Shafin Jahan v. Ashok K.M,* (2018) 16 SCC 368.

8 ibid [84].

to play in determining our choice of partners."[1] He believed that the "strength of the Constitution", "lies in the guarantee which it affords that each individual will have a protected entitlement in determining a choice of partner to share intimacies within or outside marriage."[2]

Recently the courts have seen an increase in the number of petitions filed for legitimising same-sex marriages. Pleas have been filed by same-sex couples for registration of marriage under the Special Marriage Act and Foreign Marriage Act before the Delhi High Court.[3] The Delhi High Court also issued notice in a PIL (public interest litigation) seeking recognition of same-sex marriages under the HMA.[4] A similar petition has also been filed by a gay couple before the Kerala High Court for recognition of homosexual marriages.[5] The centre has opposed these petitions in the Delhi High Court while stating that judicial interpretation is not the way to recognise marriage equality as it falls under the power of the Parliament.[6] The stage for marriage equality is set with these petitions raising the issue before the courts.

MARRIAGE EQUALITY: THE CONSTITUTIONAL UNDERPINNINGS

Depriving the homosexual community, the right to get married on account of sexual orientation and gender identity is discriminatory and against constitutional morality.[7] *Navtej Johar* clearly read down section 377, IPC to exclude from its purview sexual intercourse between two consenting adults. It further provided the basis for challenging the male-female binary in a marriage under the evolving vocabulary of constitutional

1 ibid [86].

2 ibid [87].

3 Karan Tripathi, "Marriage Equality for Same-sex couples: The Delhi High Court says this is not an adversarial position" (*Livelaw,* 14 October 2020) <ttps://www.livelaw.in/news-updates/marriage-equality-for-same-sex-couples-the-delhi-hc-says-this-is-not-an-adversarial-petition-164444> accessed 21 October 2021.

4 Meera Emmanuel, "Delhi High Court to hear pleas to recognise same-sex marriages under Hindu Marriage Act, Special Marriage Act, Foreign marriage Act together" (*Bar & Bench,* 19 November 2020) <https://www.barandbench.com/news/litigation/delhi-high-court-pleas-same-sex-marriages-hindu-marriage-act-special-marriage-act> accessed 21 October 2021.

5 Aditya AK, "Till law do us apart? Homosexual couple approaches Kerala HC seeking to register marriage under Special Marriage Act" (*Bar & Bench,* 28 January 2020) <https://www.barandbench.com/news/litigation/till-law-do-us-apart-homosexual-couple-approaches-kerala-hc-challenging-special-marriage-act> accessed 21 October 2021.

6 Agarwal (n 11) 5.

7 Paras Sharma, "The unanswered question of same-sex marriages in India" (*Jurist,* 9 October 2020) <https://www.jurist.org/commentary/2020/10/paras-sharma-india-same-sex-marriage/> accessed 22 October 2021.

morality. This traditional paradigm of limiting marriages to heterosexuals violates the right to privacy and autonomy, the right to choose a life partner and the right to dignity under Article 21 of the homosexual community. It runs contrary to the constitutional mandate of "equality before law" as provided under Article 14[1] and the constitutional prohibition of discrimination on the basis of gender under Article 15[2].[3]

Discrimination in marriage undermines substantive equality

When a person is denied the choice of partner on the grounds of sex, it contravenes the right to equality.[4] Additionally, Article 15 is attracted as it prohibits sex-based discrimination by the State. Justice Chandrachud in *Navtej Johar* states that the "exclusion, discrimination and marginalisation" faced by individuals belonging to sexual and gender minorities is "rooted in societal heteronormativity and society's pervasive bias towards gender binary and opposite-gender relationships, which marginalises and excludes all non-heteronormative sexual and gender identities."[5] It is this discrimination that ultimately undermines substantive equality in both gender neutral relationships as well as marriage. Article 14 incorporates the doctrine of reasonable classification wherein two conditions have to be satisfied, i.e., the classification must be founded on intelligible differentia and that the differentia has a rational nexus with the object sought to be achieved by the statute.[6] The distinction between heterosexual and homosexual adults is not constitutionally valid. There is no valid object sought to be achieved by restricting marriage between a man and a woman only.[7]

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1 Indian Constitution, Art. 14: "Equality before law - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

2 Indian Constitution, Art. 15: "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth - (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."

3 Thomas John, "Liberating Marriage: Same-Sex Unions and the Law" in Arvind Narrain and Alok Gupta (eds), India, Law Like Love: Queer Perspectives on Law (Yoda Press 2011) 355; Satchit Bhogle, "The Momentum of History: Realising Marriage Equality in India" (2019) 12 NUJS L. Rev. 1.

4 Anant Prakash Mishra, "Why same-sex marriages must be judged at the constitutional altar" (*The Leaflet,* 12 March 2021) <https://www.theleaflet.in/why-same-sex-marriages-must-be-judged-at-the-constitutional-altar/> accessed 22 October 2021.

5 *Navtej Johar* (n 8) [489]. Also *see* Alexandra Muller, "Health for All? Sexual Orientation, Gender Identity, and the Implementation of the Right to Access to Healthcare in South Africa" (2016) Health & Human Rts. 195.

6 *Dipak Sibal v. Punjab University*, (1989) 2 SCC 145, [9]; *Navtej Johar* (n 8) [408] (per Chandrachud, J.), [637.2] (per Malhotra, J.).

7 Bhogle (n 34) 12.

As far as Article 15 is concerned, it has been stated that it prohibits discrimination only "on the ground of "sex" which cannot be interpreted so broadly as to include "sexual orientation'."[1] It may therefore follow that homosexual marriages would not be covered under the anti-discriminatory regime of Article 15. However, Chandrachud J. refuted this argument in *Navtej Johar* while pronouncing his decision on same-sex relationships as it is these very "stereotypical notions of differences between men and women" which are "used to justify the discrimination."[2] He opined that it was this narrow interpretation that took away the essential content of the prohibition on discrimination of Article 15 as it "fails to take into account the intersectional nature of sex discrimination."[3] He further held that "Lesbians, gays, bisexuals and transgenders have a constitutional right to equal citizenship in all its manifestations" and that "Sexual orientation is recognised and protected by the Constitution."[4] This perspective finds support with Tarunabh Khaitan's idea that "inclusiveness and pluralism lie at the heart of Article 15" and that is the strongest endorsement of its anti-discrimination principle.[5]

Right to privacy and personal autonomy

The Supreme Court recognised the right to choose a life partner as a fundamental right under Articles 19[6] and 21 of the Constitution in the case of *Shakti Vahni v. Union of India*[7]. While issuing directives to prevent honour killings, the court held that when

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1 *Navtej Johar* (n 8) [427].

2 ibid [431].

3 ibid.

4 ibid [378].

5 Tarunabh Khaitan, "Inclusive Pluralism or Majoritarian Nationalism: Article 15, Section 377 and Who We Really Are', (*Ind. Con. L. Phil.,* 9 July 2018) < https://indconlawphil.wordpress.com/2018/07/09/inclusive-pluralism-or-majoritarian-nationalism-article-15-section-377-and-who-we-really-are/> accessed 23 October 2021.

6 Indian Constitution, Art. 19: "Protection of certain rights regarding freedom of speech etc.

(1) All citizens shall have the right

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India;

(f) omitted;

(g) to practise any profession, or to carry on any occupation, trade or business".

7 *Shakti Vahni v. Union of India,* (2018) 7 SCC 192.

"two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognised under Articles 19 and 21 of the Constitution."[1] In *Shafin Jahan* v. *Asokan K.M.*[2] the Supreme Court while setting aside a Kerala High Court judgment, upheld the right to choose a life partner as well as the autonomy in the sphere of "intimate personal decisions".[3] Emphasising on such autonomy guaranteed by the Constitution, the court held that each individual has a protected entitlement in determining the choice of partner, "within or outside marriage."[4]

The famous *Puttaswamy*[5] decision recognised the fundamental right to privacy as including autonomy over personal choices. It was held that sexual orientation was an important component of right to privacy and of Article 14, 15 and 21.[6] This interpretation was taken a step further in *Navtej Johar* which gave recognition to marriage equality. Chandrachud J. held that an individual not only has the right to choose a partner but also to "decide "on the nature of the relationship that the individual wishes to pursue."[7]

Marriage through the lens of constitutional morality

Though the term *constitutional morality* has not been used anywhere in the Indian Constitution, but *morality* has been mentioned in Articles 19 (2)[8], 19 (4)[9], 25 (1)[10]

1 ibid [43].

2 *Shafin Jahan* (n 23).

3 ibid [51].

4 ibid [87].

5 *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

6 ibid [144-145, 298] (per Chandrachud, J., speaking for himself, Khehar C.J.., Agrawal J., and Nazeer J.), [645, 647] (per Kaul J.).

7 ibid [479].

8 Indian Constitution, Art. 19 (2): "Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

9 Indian Constitution, Art. 19 (4): "Nothing in sub clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub clause."

10 Indian Constitution, Art. 25 (1): "Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

and 26[1].[2] Constitutional morality is an approach to constitutional interpretation as well as a ground to challenge the validity of a legislation as it imposes a duty on the State to advance and promote the "constitutional order of values".[3] The India envisaged by Ambedkar was a land ruled by "constitutional morality" and not "public morality" wherein the State interest is not governed by public morality but by the spirit of the Constitution.[4] The majority in *Navtej Johar* also provided for supremacy of constitutional morality over popular morality.[5]

Relationships which fit into the traditional form of marriage have been considered to be socially acceptable. However social morality keeps evolving wherein acceptability of classifications keeps changing with change in social norms of what is right and what is wrong.[6] Constitutional morality goes beyond the acceptable social norms of the present and looks to the future.[7] Based on this understanding of constitutional morality, Misra C.J. in *Navtej Johar* held "While testing the constitutional validity of impugned provision of law, if a constitutional court is of the view that the impugned provision falls foul to the precept of constitutional morality, then the said provision has to be declared as unconstitutional for the pure and simple reason that the constitutional courts exist to uphold the Constitution."[8] Chandrachud J. added to this belief by taking recourse to the right to privacy which enables an individual to exercise his/her autonomy which may be construed to "signify that not only are certain acts no longer immoral, but that there also exists an affirmative moral right to do them."[9]

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1 Indian Constitution, Art. 26: "Freedom to manage religious affairs - Subject to public order, morality and health, every religious denomination or any section thereof shall have the right

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law".

2 Shruti Bedi, "Constitutional Morality: Ambedkar's Progeny and India's Legacy" in Rattan Singh ed., *Ambedkar's Milestones on the Roadmap of Indian Constitution* (Thomson Reuters, 2021) 39.

3 *Navtej Johar* (n 8) [459].

4 Gautam Bhan, "On Freedoms Avenue" (*Indian Express,* 3 July 2009) <https://indianexpress.com/article/opinion/columns/on-freedoms-avenue/> accessed 23 October 2021.

5 *Navtej Johar* (n 8) [128] (per Misra, C.J.), [349, 351-352] (per Nariman, J.), [459] (per Chandrachud, J.)

6 *John Vallamattom v. Union of India*, (2003) 6 SCC 611, [33, 36].

7 Bhogle (n 34) 13.

8 *Navtej Johar* (n 8) [136].

9 ibid [474]. Also *see* David A.J. Richards, "Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution', (1979) 30 Hastings L.J. 957, 1000-1001.

Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21.[1] Laws in today's times cannot be separated from constitutional morality and any expression of sexuality between consenting adults has to be based on personal autonomy.[2] The mandate of constitutional morality requires the courts to act as "counter-majoritarian" institutions, protecting "constitutionally entrenched rights, regardless of what the majority may believe."[3] It is through this spirit that transformation of the constitution can be achieved. Thus same-sex marriage as a right to equal participation of citizenship and an equal enjoyment of living is protected on the ground of constitutional morality. A word of caution from Ronald Dworkin, who believes that though judges use a moral vision to interpret the Constitution but this moral reading cannot be either their personal belief, nor popular morality.[4]

INDIA'S SECULAR MARRIAGE LAW

With every religious community being governed by different personal laws on marriage and divorce in India, there exists a plethora of legislations. These include The Hindu Marriage Act, 1955 (HMA), The Indian Christian Marriage Act, 1872, The Parsi Marriage and Divorce Act, 1936, The Special Marriage Act, 1954 (SMA) and The Foreign Marriages Act, 1969. This part will now examine whether any of these laws can be interpreted to include same-sex marriages.

Under Hindu Law

Section 5, HMA as applicable to Hindus[5] prescribes the conditions of a valid marriage: i) the parties to the marriage do not have an existing living spouse; ii) neither party is incapable of giving consent due to unsoundness of mind or because of a mental disorder, which makes a person unfit for procreation; iii) the minimum age for a bridegroom is 21 and for a bride 18 years; iv) the parties cannot be within

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1 *Naz Foundation* v. *Govt. (NCT of Delhi)*, 2009 SCC OnLine Del 1762, [79].

2 *Navtej Johar* (n 8) [606].

3 ibid [608]. Also *see* Arvind Narrain, "A New Language of Morality: From the Trial of Nowshirwan to the Judgment in *Naz Foundation'*, (2010) 4 *Ind. J. Const. L.* 84.

4 Salman Khurshid, "Constitutional Morality and Judges of the Supreme Court" in S. Khurshid, S. Luthra et al. (eds.), *Judicial Review: Process, Powers and Problems* 391 (Cambridge University Press, New Delhi, 2020). Unlike constitutional morality, popular morality is "based on shifting and [subjective] notions of right and wrong" and while determining whether a law could be considered justified for achieving a "compelling state interest", the court must take into account constitutional morality and not popular morality [*Naz Foundation* (n 65) [79].

5 The Hindu Marriage Act, 1955, s 2 defines Hindus as anyone who is a Hindu, Sikh, Jain or Buddhist by religion or who follows any of its forms or developments (such as Brahmo Samaj, Arya Samaj etc).

the specified prohibited degrees of relationship or *sapinda* relationship,[1] unless the custom or usage permits such a marriage.[2]

Though the statute uses gender neutral terms as a marriage may be solemnised between any two Hindus, section 5 indicates that for a valid marriage there must be a bride and groom. On the other hand, same-sex couples argue that this provision allows them to characterise themselves as bride and bride, or groom and groom, or even bride and groom.[3] This reasoning however would not stand justification under the statutory interpretation and objective of the HMA. Firstly, the HMA, nowhere in its provisions, explicitly permits same-sex marriages. All countries permitting such unions specifically provide it in their legislations or mandate it through judicial decisions.[4] Secondly, a general reading of the provisions of HMA displays that the legislation perceives a heterosexual marriage. The legislation uses the words "bride and bridegroom" and "husband and wife" to describe the parties to a marriage.[5] Grounds for divorce for wife are provided under section 13(2) wherein section 13(2)(iv) envisages a situation where "her" marriage was solemnized before "she" attained the age of 15 years and "she" has repudiated the marriage after attaining that age but before attaining 18 years of age.[6] Provisions of alimony and maintenance also include reference to "he" and "she', indicative of a heterosexual marriage.[7]

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1 "Sapindas" under Hindu law means when two persons have a common ancestor. It is an expression unique to Hindu law.

2 The Hindu Marriage Act, 1955, s 5 <https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00004_195525_1517807318992&sectionId=38571&sectionno=5&orderno=5> accessed 23 October 2021.

3 Stellina Jolly and Ritika Vohra, "Recognition of Foreign Same-Sex Marriage in India" (2017) 59 JILI 302, 306.

4 21 countries have legalized same-sex marriage nationally through legislation. Among these, Australia, Ireland and Switzerland legalized same-sex marriage through legislation only after nation-wide votes. 7 countries have legalized same-sex marriage nationally through court decisions — Austria, Brazil, Colombia, Costa Rica, Ecuador, Mexico, South Africa, Taiwan and the United States of America. 2 countries, South Africa and Taiwan, enacted legislation legalizing same-sex marriage after courts mandated them to do so. See Human Rights Campaign, "Marriage Equality around the World" <https://www.hrc.org/resources/marriage-equality-around-the-world> accessed 23 October 2021.

5 The Hindu Marriage Act, 1955, s 7(2), 9, 13(2), 24.

6 The Hindu Marriage Act, 1955, s 13(2)(iv) - (iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

7 The Hindu Marriage Act, 1955, s 25 - "Permanent alimony and maintenance (1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such

Under Muslim and Christian Personal law

The Indian Muslims are largely governed by *Shariat* law, with a wide range of subjects provided under the Muslim Personal Law (Shariat) Application Act, 1937 (Shariat Act). Islamic law traditionally does not give recognition to marriage equality, particularly to same-sex unions.[1] This was expressed by the All India Muslim Personal Law Board (AIMPLB) during their opposition to the section 377 litigation.[2] Even the Quran does not provide for such unions and in fact looks down upon such relationships.[3]

Under Christianity, the Bible considers any act of homosexuality a sin.[4] Christians in India are governed by the Indian Christian Marriage Act, 1872 (CMA) which provides that marriage may be solemnised between two Christians or between a Christian and a non-Christian.[5] Similar to the HMA, it does not allow same-sex marriages.[6] The CMA only envisages the solemnisation of marriage either according to the "rules, rites, ceremonies and customs" of the Church or by officials licensed by the State under the Act[7] and therefore the provisions do not support homosexual marriages.

Under the Special Marriage Act, 1954

Hailed as one of the most progressive laws, the SMA allows persons the option to get married under a secular law instead of a specific personal law. The objective behind the SMA is to facilitate inter-caste and inter-religious marriages under a progressive

monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondents own income and other property, if any, the income and other property of the applicant [the conduct of the parties and other circumstances of the case], it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent."

1 Bhogle (n 34) 19.

2 The AIMPLB has earlier voiced opposition when the Delhi High Court had struck down Section 377 in 2009. However, it had decided not to contest if the Supreme Court scraped Section 377 during the *Navtej Johar* litigation. *See* Saba Rahman, "Muslim Personal Law Board will not contest if SC scraps Section 377" (*Indian Express,* 13 July 2018) <https://indianexpress.com/article/india/muslim-personal-law-board-to-not-contest-if-sc-scraps-section-377-5258406/> accessed 24 October 2021.

3 The Quran, Chapter 23, Verse 5-7.

4 Bible Gateway, Leviticus 18:22 <https://www.biblegateway.com/verse/en/Leviticus%2018%3A22> accessed 23 October 2021. Though a number of Christians do not take it as the correct version of Christianity, *see* "Debating Bible Verses on Homosexuality" (*New York Times,* 8 June 2018) <https://www.nytimes.com/interactive/2015/06/05/us/samesex-scriptures.html> accessed 24 October 2021.

5 The Indian Christian Marriage Act, 1872, s 4.

6 The Indian Christian Marriage Act, 1872, s 60. Also *see* Jolly & Vohra (n 72) 307.

7 The Indian Christian Marriage Act, 1872, s 5.

law on marriage.[1] Instead of customary ceremonies, the SMA provides for marriage between people from different religious groups through a civil ceremony of registration before a marriage officer.[2] Even though the SMA seems to apply to heterosexual couples[3], it is considered as the foremost legislation to guarantee marriage equality. Section 4(c) provides that a marriage may be solemnized between two persons "if the male has completed the age of twenty-one years and the female the age of eighteen years". Despite the use of expansive language of "any two persons', the "prohibition on same-sex marriage is incorporated indirectly into the language of the law".[4]

The secular content of SMA arose from the original Special Marriage Act, 1872, enacted by the British which required persons to renounce their religion before entering into a civil marriage under the Act.[5] Individuals could enter into such a union only after being excommunicated from their community.[6] The SMA, 1954 however did away with this requirement in tune with the constitutional mandate of protecting the rights of individuals.[7] Despite such laudatory modifications, the current SMA falls short of being classified as a truly emancipated legislation.[8]

Undoubtedly, the SMA continues to be fraught with drawbacks, but it is the only statute that provides for marriage between those persons who are not permitted to enter into marriage under their personal laws.[9] It is on account of such tolerance that the SMA can be envisaged to become the chariot for marriage outside of the male-female binary.

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1 Agarwal (n 11) 3.

2 Special Marriage Act, 1954, s 12- "Place and form of solemnization (1) The marriage may be solemnized at the office of the Marriage Officer, or at such other place within a reasonable distance therefrom as the parties may desire, and upon such conditions and the payment of such additional fees as may be prescribed."

3 Special Marriage Act, 1954, s 4(c) provides that a marriage may be solemnized between two persons "if the male has completed the age of twenty-one years and the female the age of eighteen years".

4 Agarwal (n 11) 6.

5 See declaration to be made by both Bridegroom and Bride under Second Schedule to SMA, 1972, prior to solemnization of marriage under the Special Marriage Act, 1872. Also *see* Rohit Ghosh, "Special Marriage Act: The interpretation and constitutional perspective" (*The Leaflet,* 23 May 2018) <https://www.theleaflet.in/special-marriage-act-the-interpretation-and-constitutional-perspective/#:~:text=In%201872%2C%20the%20then%20British,the%20formalities%20of%20the%20act.> accessed 23 October 2021.

6 For more on this perspective, see, Perveez Mody, "Love and the Law: Love Marriage in Delhi" (2002) 36(1) Mod. Asian St. 223, 240.

7 ibid.

8 Agarwal (n 11) 6.

9 John (n 34) 362-364.

That it may be possible to register homosexual marriages under SMA has found support in the inclination of the courts to interpret legislations beneficially. In the case of *Danial Latifi v. Union of India*[1], the Supreme Court held that Muslim women could avail the benefit of grant of maintenance under section 125, Cr.P.C. since the Muslim personal law does not provide for maintenance of a divorced wife. Such interpretations that incorporate the requirements of the time must be undertaken, especially to give effect to the objectives of beneficial statutes like SMA. Since we don't have to depend on the mandate of the personal laws either to provide benefits or to facilitate secular marriages, the SMA may be used as the driver for allowing any two consenting adults to marry.[2] However, ultimately it is the legislative will that will pave the path for true marriage equality either through enactment of a new statute or by amending the existing laws. In 2015 a private member's bill was submitted to give legal validation to same-sex marriages, but unfortunately it did not see the light of the day.[3]

CONCLUSION

Navtej Johar gave impetus to recognising equal constitutional citizenship which widens the scope of civil rights of LGBTQ+ persons. The exclusion of homosexual couples from the ambit of marriage and the consequent denial of ensuing benefits that flow therefrom is a case of discrimination on the basis of sexual orientation.[4] With the introduction of the grammar of constitutional morality and the subsequent recognition of same-sex relations, the validation of same-sex marriages is the next step in the right direction. When equality is viewed through the lens of constitutional morality, demarcated by the inherent values of inclusiveness and pluralism, every person will be guaranteed equal respect and recognition under our transformative Indian Constitution.

Constitutional morality encourages tolerance for diversity which encompasses marriage equality. It is the value of an individual that must be given precedence in the

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1 *Danial Latifi v. Union of India,* Writ Petition (Civil) 868 of 1986 (Date of Judgment: 28.9.2001), <https://indiankanoon.org/doc/410660/> accessed 24 October 2021.

2 John (n 34) 363-364.

3 A. Mandhani, "Shashi Tharoor submits private members bill to scrap S.377; Jaitley, Chidambaram and Bhushan opine SC must review Kaushal Judgment" (*Live Law,* 30 November 2015) <https://www.livelaw.in/shashi-tharoor-submits-private-members-bill-to-scrap-s-377-jaitley-chidambaram-and-bhushan-opine-sc-must-review-kaushal-judgment/> accessed 24 October 2021.

4 See Gautam Bhatia, "Indra Sarma v. VKV Sarma: The Supreme Court on Live-in Relationships and Gay Marriage" (*Ind. Con. L. & Phil.,* 30 November, 2013) <https://indconlawphil.wordpress.com/2013/11/30/indra-sarma-v-vkv-sarma-the-supreme-court-on-live-in-relationships-and-gay-marriage/> accessed 24 October 2021.

conflict between the power of the State and individual rights. As held by the *Johar* court, the aim of the Constitution is to transform our society and not simply to preserve the pre-existing values of the majority. It is through constitutional morality that we can overcome the dictates of popular morality that recognises marriage only between heterosexuals.[1] Our Constitution, like Chandrachud J. states, "nurtures dissent as the safety valve for societal conflict" and that it is "our ability to recognise others who are different is a sign of our own evolution."[2]

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SAME-SEX RELATIONSHIPS AND MARRIAGE IN INDIA: THE PATH FORWARD

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There is a rich history in the context of same-sex relationships in India. While there are dissenting voices, an analysis of ancient Indian texts and scriptures reveals a more progressive society than one created in post-colonial India. The introduction of criminal punishment for samesex relationships was owing to the British, who drafted the Indian Penal Code. Section 377 criminalised such relationships with imprisonment and fine, thereby creating a hostile environment for such people. The social structure in India did not contribute to facilitating this vulnerable section. With the advent of the 21st century and global movements against the discriminatory attitude and subjugation, India also faced a similar uprising. Finally, with the landmark Navtej Johar case, the Supreme Court of India decriminalised same-sex relationships and, with the privacy judgement, provided a strong foundation for the community to advance their rights and identity. However, even with the judicial pronouncement, there are sections within the legislative bodies who continue to oppose the idea of same-sex relationships, which is reflected in a case before the Delhi High Court. In light of the above, the paper shall be a doctrinal analysis of the LGBTQ movement in India. The main focus shall be on the judicial perspective and the contribution of the Supreme Court in analysing and providing a liberal interpretation to protect the interests of this marginalised group. The paper shall also dwell on the recent developments, specifically regarding the question of marital rights vis-àvis the case before the Delhi High Court and what could be the future course of action in India.

Keywords: *same-sex, LGBTQ rights, Navtej Johar, privacy, India .*

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INTRODUCTION

The term "LGBTQ" refers to a wide spectrum of people who fall outside the heteronormative understanding of gender and sex. There is no conclusive definition of the term, and therefore, the acronym is often used with a "+" sign to signify that the collective is not exhaustive. However, the term stands for lesbian, gay, bisexual, transgender, and queer. It refers to both aspects of sexuality and gender. While gay, lesbian, bisexual are sexual preferences of persons, transgender is someone who does not identify with their assigned sex at birth. The term "queer" is broadly used to signify the "queerness" of the collective. Other terms like intersex, asexual all fall within the term. It is a complex term that requires understanding gender and sexuality as aspects of human life. The heteronormative standard that has become the default is questioned by this collective and aims to identify their own identities in the spectrum of gender and sexuality.

The LGBTQ community has come a long way globally in terms of social acceptance. In India, the struggle has been a lengthy one, with the judiciary coming to the community's rescue. The Indian legal system, based on the English law, had by law oppressed sexual minorities under the now repealed Section 377 of the Indian Penal Code. The clause which defined *unnatural offences* applied to members of the LGBTQ community and created an environment of fear, oppression and violence by society in general and also by the police force. The decision of the Supreme Court resulted in a major step forward towards normalising the idea of sexual minorities in India and has provided a legal foundation for the community. Transgender persons are in a better position owing to their recognition as the third gender, though the legal enactment drafted for them has been subjected to much criticism. Sexual minorities have been systematically oppressed and have been forced to live a life in anonymity. There is a clear lack of understanding and discrimination may be observed in many different forms; namely, transgender persons are not included in social organisation and are denied work or employment; there are no guaranteed rights of marriage, reproduction or adoption/maintenance for same sex couples among others. However, even after the decriminalisation, social rights are denied, and one among them, which is before the courts in India, is the marriage rights of samesex couples. This is the obvious next step for the community to ensure a normal life but the consistent opposition by the government has made it extremely challenging.

INTERNATIONAL PERSPECTIVE

LGBTQ rights, at the international level, has been restricted mostly at the level of individual nations rather than at a supra-national level. The United Nations has

not drafted any specific convention on the subject. However, it has led the discussion towards removing the stigma and inherent bias against the community by virtue of campaigns and programmes. The United Nations Free & Equal campaign is one such example of advocacy calling for equal rights and fair treatment for the LGBTQ spectrum worldwide.

The lack of consensus and varying degrees of acceptability of this community has made uniformity quite challenging for the United Nations. In many nations, same-sex relations are frowned upon and is punishable as a criminal offence, in some cases, with the likelihood of life imprisonment and capital punishment. One particular attempt made in the year 2006 was the meeting in Yogyakarta to address the community's concerns. Many prominent non-governmental organisations, leading activists and academics met in Yogyakarta, Indonesia and drafted the historic Yogyakarta Principles. This document laid down principles aimed towards the human rights relating to sexual orientation, gender identity, gender expression and sex characteristics. These Principles provide a host of different rights for the community and impose certain obligations on the state to implement the rights. In 2017, this was revised and a new document, Yogyakarta Plus 10 was drafted and adopted, which provided some additional rights and responsibilities for the states to ensure that the community can break free from the discriminatory nature and be treated equally with basic dignity and respect.

THE INDIAN EXPERIENCE

India, at its core, is a conservative nation. India is a secular nation that safeguards for all freedom to practice, profess and propagate any religion of choice. Many facets of society and personal laws are religiously inclined based on faith. This also includes aspects regarding same-sex relationships. An analysis of the history of same-sex relationships reveals an interesting picture of a transition from an open, liberal society to a conservative one. This was aided by legal sanction introduced by the British in India via the Indian Penal Code, specifically Section 377. This provision made such relationships punishable with imprisonment and fines, thereby creating an atmosphere of domination and discrimination against same sex couples. The journey of subsequent decriminalisation took decades, eventually being addressed in 2018 with the Navtej Johar case.

Historically, there have been many references to same-sex relations and transgender persons in the various kingdoms in India. The Vedic times and Hindu scriptures, art, and architecture reflect the idea of gender fluidity.[1] Some of the most

[1] Ray S, "Indian Culture Does Recognise Homosexuality, Let Us Count the Ways" *The Quint* (September 11, 2018) <https://www.thequint.com/voices/opinion/homosexuality-rss-ancient-indian-culture-section-377> accessed December 5, 2021.

prominent examples include Valmiki's Ramayana, which refers to Hanuman seeing rakshasa women kissing in Lanka[1]; the birth of

King Bhagirathi; the temples of Khajuraho, Ellora caves in Maharashtra and Sun Temple in Kornak and the well-known text, Kama Sutra, which deals with sexuality, eroticism, and emotional fulfillment of life, authored by Vatsyayana.[2]

The temples of Khajuraho are a leading example of the community's tolerance in the past.[3] These temples were built between 950-1050AD by the Chandela dynasty. The sculptures in the temples are carved with illustrations of same-sex relations, including an open depiction of exposed men and women erotically embracing each other with sexual fluidity. The Sun temple in Kornak exhibits similar images.[4] The Ellora caves, which depict the life of Gautam Budha, the founder of Buddhism, also have such paintings portraying men and women in same-sex intercourse. These various examples exemplify the existence of a liberal society, one without judgement and openly depicted them in such prominent and respectable places as a temple.

In Islamic literature, Baburnama is the most prominent example of a text referring to same-sex attraction.[5] There are Sufi poets such as Sufi Saint Bulleh Shah, Sarmand Kashani are some prominent writers that have exhibited such references.[6]

With the advent of the British empire in India, societal and legal standards changed with a more anglicised understanding of society. The ideas of western thought, which the Church particularly determined, were imposed in the Indian system. The legal structure in India was a creation of the British and with the drafting of the Indian Penal Code by Lord Macaulay, homosexuality became a criminal offence.

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1 Desk ITW, "Homosexuality in Ancient India: 10 Instances" (*India Today*, July 10, 2018) <https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-12814462018-07-10> accessed December 5, 2021.

2 In the chapter titled, "Auparishtaka', gay men have been referenced in context of oral sex. Homosexual men assumed a passive role and were referred to as "mukhebhaga" or "asekya'.

3 Pandey BV, "Why Legalising Gay Sex in India Is Not a Western Idea" (*BBC News*, December 31, 2018) <https://www.bbc.com/news/world-asia-india-46620242> accessed December 5, 2021.

4 Nair SS, "Life360" (*Life360*, November 28, 2019) <https://jomec.co.uk/life360-2019/uncategorised/religionhas-always-been-the-biggest-tool-to-create-taboo-in-india> accessed December 5, 2021.

5 Salam ZU, "An Emperor with Foibles" *The Hindu* (February 15, 2014). <https://www.thehindu.com/books/books-columns/an-emperor-with-foibles/article5692770.ece> accessed December 5, 2021.

6 Khalid H, "From Bulleh Shah and Shah Hussain to Amir Khusro, Same-Sex References Abound in Islamic Poetry" *Scroll.in* (June 17, 2016) <https://scroll.in/article/810007/from-bulleh-shah-and-shah-hussain-to-amirkhusro-same-sex-references-abound-in-islamic-sufi-poetry> accessed December 5, 2021.

This legal regulation ran parallel to the social infusion of moral right and wrong and the perception of immoral. Morality with the religious interpretation of life after death resulted in the society questioning such practices and clearly depriving them of any civility and humanity. This outlook was ingrained in society and even after independence, the legal system retained the Indian Penal Code and with-it Section 377. The British, who introduced such a provision in the legal sphere repealed the provision in their own nation in 1967 but in India, the struggle continued till 2018.

JUDICIAL REVIEW OF LGBTQ RIGHTS IN INDIA

Judicial analysis of LGBTQ rights in India reveals that while the legislature has been on the backfoot on this matter, the judiciary has been quite proactive in the last few years. Specifically, in the last decade, many important judgements were decided by the Supreme Court, which paved the way for recognizing this marginalized group's basic rights. The lawmakers' failure in this regard reflects the conservative nature of the Parliament which had to be addressed by a liberal judiciary. The following are some of the most prominent judgements of the Supreme Court on the subject.

Naz Foundation v Government of NCT Delhi

The Delhi High Court declared Section 377 of the Indian Penal Code unconstitutional in this landmark case. Based on a Public Interest Litigation filed by the NGO, the judgement paved the way for the legal review of the British era law. The Court declared it to violate Article 14, Article 15 and 16 (all rights around the concept of equality) of the Constitution of India.

NALSA v. Union of India[1]

This case came in the aftermath of the criticised judgement in Suresh Kumar Koushal v. Union of India[2]. In Suresh Kumar, the Supreme Court re-criminalised Section 377, which was decriminalised in Naz Foundation. The National Legal Services Authority led the charge towards raising relevant questions in favour of the transgender community. This judgement declared transgender persons as the third gender. A comprehensive set of guidelines protecting the rights and freedoms of the transgender community was laid down in the judgement. Subsequent to that, legislative developments followed to provide a clear statute that shall forward their rights. There were extensive debates and versions of law presented, which culminated in 2019 with the Transgender Persons (Protection of Rights) Act, 2019. While the law is necessary and has some positive aspects, it has a major issue, i.e., of administrative

1 AIR 2014 SC 1863. (India)

2 Civil Appeal 10972 of 2013. (India)

interference by requiring that each person be recognized as "transgender" on the basis of a certificate of identity issued by a district magistrate. This is a major issue considering the sensitivity of the subject.

Justice (Retd.) K. S. Puttaswamy v. Union of India

Granting the right to privacy as a facet of Right to Life and Liberty, Article 21, this judgement held that privacy is an integral part of a human's life and that it extends to all individuals, notwithstanding gender and sex.[1] In the judgement, Justice Chandrachud observed that the LGBTQ community should be entitled to the right to privacy, particularly autonomy and freedom from interference from the state. A special observation was made in the context of the right to choose partners of one's own choice, sexual freedom, and autonomy. The Court observed that *""The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14 (right to equality), 15 (discrimination on the grounds of sex) and 21 (right to life and personal liberty) of the Constitution."* This judgement was the primary precursor to the breakthrough Navtej Johar case.

Navtej Singh Johar v. Union of India[2]

This judgement decriminalised homosexuality in India by reading down the infamous Section 377. Striking down the section to the extend that it criminalised consensual intercourse between two consenting adults, the judgement held that the section violated Articles 14, 15, 16 and 19 (1)(a) of the Constitution. The right to live with dignity, the freedom to autonomy and choice in personal life were recognised, drawing inspiration from the Puttaswamy judgement.

Abhijit Iyer Mitra case

The matter pertains to the question of recognition of same sex marriage under the Hindu Marriage Act and the Special Marriage Act in India. The argument forwarded by the petitioner is that with the recognition of same sex relationships consequent to the decriminalization; the state should be responsive to the cause and also conform to the international standard and conventions that India is a signatory to. Contradicting this argument, Solicitor General Tushar Mehta argues that the term *"spouse"* under Hindu law can include only a male and female and that such judicial interference will *"cause complete havoc with the delicate balance of personal laws."*[3] The central

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1 AIR 2017 SC 4161. (India)

2 AIR 2018 SC 4321. (India)

3 Ojha P, "Same-Sex Marriage Is Not a Fundamental Right :Delhi HC" (*LAW TIMES JOURNAL*, February 25, 2021) <https://lawtimesjournal.in/same-sex-marriage-is-not-a-fundamental-right-delhi-hc/> accessed December 5, 2021.

government stated that the decirmninalisation of Section 377 did not automatically mean that such relationships would be entitled to the right to marry. Referring to the Indian traditions and those marriages are based on rituals, ethos, and social values, marriages have a spiritual aspect to them, and thus, such same-sex marriage rights cannot fall within the purview of the judicial adjudication; but it is a matter for the government and legislature to review and determine.[1]

THE PATH FORWARD

A clear legislative enactment is the need of the hour that addresses the numerous legal rights that should be protected and safeguarded, along with clear directions and recommendations to states in India to implement the law. This should also include marriage rights under the Indian Special Marriage Act, 1954. The foundation of this law and the inspiration may be the Yogyakarta Principles and Yogyakarta Plus 10. This was the first major legal document created by a working group in Indonesia. This document is an extremely fruitful one that addresses the community's concerns from a human rights perspective and is based on the core notion of equality and freedom.

The next possible solution, which is desperately needed in the Indian context, is engagement with the LGBTQ community. This should begin with a more open- and broad-minded discussion on sex and sexuality within families and communities. Participation of the community in the mainstream is critical. The privacy should be respected and protected. The fact that one is gay or a lesbian does not affect society. It is the sexual preference of a person, and thus, as rightly observed in the Puttaswamy judgement, *"equality demands that sexual orientation of each individual is protected on an even platform*". To that end, what is needed is training and sensitization programmes. The first misconception that is needed to be addressed is it is a matter of choice and not of biology. Many such misconceptions exist in the community, and these need to be addressed with relevant programmes.

Education should be disseminated at all levels, starting with schools as a part of sex education. It should be taught sincerely and without engulfing it in shame or discernment. Another critical sector is the police and law enforcement. Indian police are not known to be sensitive, and there are cases of abuse and violence in the hands of the police against the community.

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[1] The Tribune India, "Same-Sex Marriages Not Recognised by Our Laws, Society and Our Values: Centre to Delhi HC" *The Tribune India* (September 14, 2020) <https://www.tribuneindia.com/news/nation/same-sexmarriages-not-recognised-by-our-laws-society-and-our-values-centre-to-delhi-hc-141139> accessed December 5, 2021.

CONCLUSIONS

It is time to acknowledge that a community within us conform to a different sexual preference than heterosexuals and that sexual preference is only one aspect of their existence. They are as human as any other heterosexual human being. Social engagement aimed towards inclusion should be the focus. This should be normalised, and the idea of shame should be eradicated. There is no need to be offended by one's choice of sexual partners. It is a personal preference. A clear statute can be extremely effective not only in bringing about a sense of uniformity in legal protection in relation to social, economic, and cultural rights, but it will surely provide an avenue to ensure justice. A legislative enactment will empower them to question instances of abuse, violence, and discrimination, and that will give them a voice, which is critical.

LGBT+ RIGHTS CLAIMING FOR MARRIAGE EQUALITY AND THE POSSIBILITIES OF TRANSFORMING INDIAN FAMILY LAW

Akshat Agarwal, LL.M. Candidate[1]

I. INTRODUCTION

The Indian Supreme Court, in its landmark decision in *Navtej Singh Johar v. Union of India,*[2] decriminalized homosexuality in 2018 and recognized the equal constitutional citizenship of LGBT+ Indians.[3] Since then, at least nine different petitions before two High Courts seeking recognition of marriage equality under India's secular and Hindu marriage law have been filed. This has made analyzing the engagement between LGBT+ rights and Indian family law necessary. Family law, which comprises both secular and religion-based personal rules, has seen perennial debates about personal laws being subject to claims of gender equality and the desirability of a uniform civil code to replace existing family laws.

At the same time, critics have argued that traditional approaches to LGBT+ equality may ignore how problematic existing family law institutions are and have stressed the need to think beyond legal inclusion to recognize diverse families.[4] These arguments are not unique to India. Claiming LGBT+ rights within existing family law institutions, such as the recognition of same-sex marriage, has divided LGBT+ activists the world over. The commonly advanced argument is that assimilation into existing patriarchal social institutions disregards radical transformational possibilities. Critics, therefore, argue that such assimilation prioritizes existing family institutions

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[2] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

[3] I use LGBT+ as an umbrella term to refer to the diversity of identities and the broader effort for rights claiming by gender and sexual minorities. However, I recognize that I largely deal with sexual orientation. This is also because issues of transgender family law are generally distinct. For instance, existing law recognizes customary succession practices amongst transgender communities, see Mayur Suresh, *Possession is 9/10th of the Body*, in LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 378 (Alok Gupta and Arvind Narrain eds., 2011).

[4] Saptarshi Mandal, *Redefining the Same-Sex Marriage Question*, THE INDIA FORUM (2021) https://www.theindiaforum.in/article/redefining-same-sex-marriage (last visited 28 November 2021).

such as marriage and the nuclear, biological family, that have had a long history of being oppressive to women over alternative family arrangements such as nonmarital relationships. However, family law scholars in other jurisdictions[1] have challenged this premise and have shown how family law can potentially be transformed through LGBT+ rights claims. They have identified parenthood and non-marital relationships as key sites of transformation.

While we still await an authoritative judicial pronouncement on marriage equality in India, I argue that recognizing same-sex marriage may positively impact existing family laws in India by expanding the recognition of diverse families. India may therefore mimic dynamics in a jurisdiction such as the United States, where the recognition of marriage equality has bolstered constitutional arguments for recognizing non-traditional forms of parenthood and non-marital relationships. Moreover, LGBT+ rights may offer a new entry point for reforms in family law which has been consumed by questions of the clash between personal religious laws and gender equality claims.

I analyze the potential interaction of LGBT+ claims to marriage equality with the law on parenthood. For my analysis, I specifically focus on personal liberty and equality-based claims and their impact on secular and Hindu family law of parenthood. This is because both sets of laws affect most of India's population (with Hindu law also applying to anyone who does not identify as a Muslim, Christian, Parsi, or Jew). Further, due to a high degree of interconnectedness, even if individuals opt into secular law, their religion-based personal laws remain relevant. The choice of parenthood stems from its focus as a site of transformation in other jurisdictions which have seen LGBT+ rights claimed in family law.

I argue that recognizing LGBT+ family equality and a right to legal recognition of intimate relationships is likely to expand Indian parenthood laws progressively. Such an impact is likely to be visible in-laws on guardianship, assisted reproduction, and adoption and may benefit diverse different-sex families, single parents, and persons in non-marital relationships.

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[1] Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 Harv. L. Rev. 1185 (2016); Douglas NeJaime, *Before Marriage: The Unexplored History of Non-Marital Recognition and Its Relationship to Marriage*, 102 Cal. L. Rev. (2014); Courtney G Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. Rev. 425 (2017); Macarena Saez, *Transforming Family Law Through Same-Sex Marriage: Lessons From (And to) the Western World*, 25 Duke J. Comp. Intl. L., (2014); for literature tracing the interaction of LGBT+ law reform and family law, see same sex relationships and beyond: gender matters in the eu (Katherina Boele-Woelki and Angelika Fuchs eds., 3rd edn., 2017); for literature speculating the impact of recognition of same-sex marriage, see Nan D. Hunter, *Introduction: The Future Impact of Same-Sex Marriage: More Questions than Answers*, 100 GEO. L.J. 1855 (2012).

My objective, however, is not to crystal gaze the future of LGBT+ rights or family law in India. I am conscious that the realization of rights remains contingent on various factors, including social and political realities. Instead, it contributes a different perspective to debates on LGBT+ family reform. By demonstrating that marriage equality for same-sex couples can potentially transform other aspects of family law, I want to go beyond the binary of assimilation versus transformation that dominates current thinking on LGBT+ rights. This is not to suggest that marriage equality is the ultimate piece in the puzzle of LGBT+ empowerment. Rather, it highlights why it remains an important endeavor among a range of objectives and can have positive consequences for everyone.

I am also conscious that comparative approaches to family law may have certain pitfalls. National and sometimes even sub-national realities heavily influence family law. Therefore, my use of a comparative approach in this paper is neither to borrow foreign doctrine nor to engage in theorization about social change and LGBT+ rights.[1] Instead, my more modest use of comparative approaches is to see how trajectories of legal change and the proliferation of new concepts in other jurisdictions force us to ask similar questions about the potential for legal change in Indian family law.

Part II of this paper analyzes scholarship on the interaction of LGBT+ rights and family law in foreign jurisdictions, especially the United States. It argues that scholars have observed a positive dynamic between LGBT+ claims to marriage equality and the gradual expansion of family laws such as parenthood to include diverse families. Part III looks at India and argues how current debates on family law reform are in stasis due to perennial controversies about a uniform code, while LGBT+ voices have cautioned against marriage equality and have preferred the recognition of diverse or non-normative families. I argue that dynamics in other jurisdictions give us a new way of thinking about how LGBT+ rights claiming marriage equality may be an entry point for family law reform. It may progressively expand the recognition of diverse families. To show how this can happen, Part IV constructs equality and personal liberty-based arguments for marriage equality based on key advances in the gender and sexuality jurisprudence of the Indian Supreme Court. Part V applies the arguments

[1] Several influential scholars have written on this issue, generally see Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in legal recognition of same-sex partnerships: a study of national, european, and international law 437, 437 (Robert Wintemute and Mads Andenæs eds., 2001); william n. eskridge, jr., equality practice: civil unions and the future of gay rights (2002); yuval merin, equality for same-sex couples: the legal recognition of gay partnerships in europe and the united states (2002).

constructed in Part IV to the law of parenthood, specifically guardianship, assisted reproductive technologies, and adoption, to argue that marriage equality may have positive consequences for diverse different-sex families, single parents, and persons in non-marital relationships.

II. COMPARATIVE PERSPECTIVE ON INTERACTION BETWEEN LGBT+ RIGHTS AND FAMILY LAW

While India awaits developments on LGBT+ family law, many jurisdictions elsewhere have had considerable experience with LGBT+ rights claiming in family law. As of November 2021, thirty countries have recognized marriage equality through legislation or judicial decisions.[1] Some of these jurisdictions have also witnessed subsequent litigation and legislative reform towards the recognition of adoption rights as well as parental rights linked to procreation through assisted reproductive techniques.[2] In some jurisdictions, like the United States, the history of parental recognition even precedes marriage equality.[3]

In the literature on comparative family law, the impact of such rights claiming on family law at large remains relatively under-studied.[4] This is because scholars and advocates often just focus on the claims of LGBT+ persons without taking the next step of how such claims may interact with existing family law. However, such interaction is inevitable since LGBT+ family law is not autonomous but places itself within existing family law.

Legal scholar Macarena Saez writing about comparative family law, argues that the judicial recognition of marriage equality claims through linking the rights to dignity, autonomy, and equality in different national courts opens possibilities of transforming existing family law.[5] She contrasts focus on individual rights-based arguments (seen in a jurisdiction such as Canada, South Africa, Mexico, Brazil, Portugal, Spain, and Columbia) with emphasis on the centrality of marriage in the law (seen in the United States).[11]

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1 Marriage Equality around the World, Human Rights Campaign https://www.hrc.org/resources/marriageequality-around-the-world (last visited 28 November 2021).

2 See Same sex relationships and beyond: Gender matters in the EU (Katherina Boele-Woelki and Angelika Fuchs eds., 3rd edn., 2017).

3 See NeJaime, Marriage Equality, *supra* note 4; Erez Aloni, *First Comes Marriage, Then Comes Baby, Then Comes What Exactly?* 15:1 national taiwan national Taiwan U L REV 49 (2020).

4 For instance, see Jens M. Scherpe, *Comparative Family Law*, in the oxford handbook of comparative law (Mathias Reimann and Reinhard Zimmermann eds., 2nd edn., 2019).

5 Saez, *supra* note 4, at 129. [11] Saez, *supa* note 4, at 129.

For instance, the South African constitutional court in *Minister of Home Affairs v. Fourie*[1] , instead of entrenching a constitutional right to marry, focused on the equal recognition of different kinds of relationships, thus linking dignity to equality. While courts in the United States in cases such as *United States v. Windsor*[2] (Saez is writing before the United States Supreme Court's marriage equality decision in *Obergefell v. Hodges*[3]) have linked dignity to marriage status. Saez argues that approaches like those followed in South Africa, which emphasize liberty and equality by focusing on the equality of relationships rather than the centrality of marriage, allow for the legal recognition of differently constructed families that decenter marriage, including families based on non-marital relationships.[4]

Saez's analysis, however, does not account for how rights-based arguments may interact with specific family law concepts. American legal scholars such as Douglas NeJaime, Courtney Joslin, and Courtney Cahill, in their writings, have shown how LGBT+ rights-claiming has impacted and can impact family law in the future by relying on both the histories of non-normative relationship recognition in family law and the transformative potential of marriage equality arguments. They identify non-marital relationships and parenthood as two key sites of change.

NeJaime's history of LGBT+ advocacy in California shows how marital rights claiming proceeded on a history of non-marital recognition where LGBT+ rights advocate used marital norms to argue for greater non-marital recognition.[5] This, in turn, influenced a shift in the legal understanding of marriage from being based on sex and biological procreation to being characterized by companionship and mutual rights and obligations.[6]

While NeJaime relies on history, Joslin imagines the future doctrinal possibilities of America's marriage equality jurisprudence through decisions such as *Obergefell*. She argues that recognizing same-sex marriage based on autonomy (derived from both equal protection and due process clauses of the American Constitution), dignity, and the recognition of the idea of dynamic constitutionalism[7] can contribute to the potential

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1 Ministry of Home Affairs v. Fourie, ZACC 19, 2006 (1) SA 524 (CC) (Constitutional Court of South Africa).

2 United States v. Windsor, 570 U.S. 744 (Supreme Court of the United States).

3 Obergefell v. Hodges, 576 U.S. 644 (Supreme Court of the United States).

4 Saez, *supra* note 4, at 129.

5 NeJaime, Before Marriage, *supra* note 4.

6 NeJaime, Before Marriage, *supra* note 4.

7 According to Joslin, dynamic constitutionalism views the "constitution as a dynamic doctrine that evolves to reflect legal, cultural, and social developments." Joslin, *supra* note 4, at 454. [19] Joslin, *supra* note 4, at 447-455.

recognition of a so-called right to non-marriage.[19] Such a right could be potentially used to challenge restrictions on the Recognition of mutual property-related claims of cohabitees and parental rights of persons in non-marital relationships.[1]

In the context of parenthood, writing about the implications of marriage equality, NeJaime argues how marriage equality has shifted the understanding of parentage from being based on biology, gender, and marital status to prioritizing intentional and functional relationships.[2] In the context of marital relationships, he shows how the marital presumption, which assumes that the husband of a biological mother is the father of the child when applied to same-sex couples, is transformed from being based on a fiction of biological fact to being based on the intent to parent and functioning as a parent.[3] This is because, in the context of same-sex couples, a fiction of biological relationships may simply not make sense. Moreover, marriage equality decisions also signal sexual orientation equality in family law that requires recognizing equal parental rights of same-sex couples akin to their different-sex counterparts.

The equality of LGBT+ families has implications for assisted reproductive techniques, which are often necessary for same-sex family formation.[4] Fully recognizing family-based LGBT+ equality may lead to greater recognition of and ease of access to such reproductive techniques and surrogacy services. Such recognition is also likely to benefit non-LGBT+ families such as single-parent and different-sex families. Greater recognition of assisted reproductive techniques is also like to expand the recognition of functional parents due to the presence of a non-biological parent.[5] This may have consequences for non-biological parents in other contexts as well. Therefore, by pushing for parental recognition based on intent and function, same-sex families "destabilize norms that constrict familial possibilities for all families, both in and out of marriage".[25]

Similarly, Cahill makes doctrinal arguments about how *Obergefell's* acknowledgment of the realities of LGBT+ parenthood, its protection of choices concerning the family formation, and the recognition of sexual orientation equality in family law disrupt existing arguments for reproductive regulation.[6] She thus argues that the logic of

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1 Joslin, *supra* note 4, at 481-488.

2 NeJaime, Marriage Equality and the New Parenthood, *supra* note 4.

3 NeJaime, Marriage Equality and the New Parenthood, *supra* note 4, at 1242.

4 NeJaime, Marriage Equality and the New Parenthood, *supra* note 4, at 1254-1255.

5 NeJaime, Marriage Equality and the New Parenthood, *supra* note 4, at 1254-1255. [25] NeJaime, Marriage Equality and the New Parenthood, *supra* note 4, at 1265.

6 Courtney Cahill, *Obergefell and the New Reproduction*, MINNESOTA LAW REVIEW HEADNOTES 37, 6 (2016).

Obergefell may lead to the Recognition of a fundamental right to procreate, the recognition of parity between sexual and alternative reproduction, and displacement of the privileged position that sex often occupies in legal regulation.[1]

Therefore, comparative scholarship on the interaction of LGBT+ rights claiming and family law shows a clear dynamic of positive interaction between the legal recognition of LGBT+ families and progressive recognition of non-normative relationships. Therefore, recognition of marriage equality in the law often opens pathways for greater recognition of family relationships outside the heteronormative family unit.

These pathways take the form of rights-based arguments, often based on claims of liberty, equality, and dignity, which can be applied to extend legal protections to diverse family relationships. Moreover, the recognition of familial rights of same-sex couples due to the very nature of their relationship, which is not based on sexual reproduction, also leads to greater flexibility in legal norms around how families are structured. This benefits single persons who may wish to be parents or different-sex couples in non-marital relationships who wish to start families. It can also lead to the recognition of more complex family configurations, such as recognizing roles played by functional parents or non-marital biological parents in multi-parent families.

Such a positive dynamic questions critical scholarship, which argues that inclusion into existing family law privileges marriage at the cost of the recognition of non-normative family forms.[2] This leads to assimilation rather than recognizing the diverse relationships that LGBT+ people may otherwise inhabit. Centering marriage in the law also links all benefits rather than acknowledging how dependency may work in different relationships.[3] Legal scholars such as Katherine Franke[4] and Melissa Murray[31] have also questioned the rhetoric around same-sex marriage. They have argued that claims to same-sex marriage delegitimize and even harm diverse family forms such as single parents and non-marital parenthood. However, as writings are NeJaime, Joslin, and Cahill show many of these concerns have not played out as anticipated. Marriage equality may lead to the greater recognition of unconventional families in the future.

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1 [27]*Id*., at 7-12

2 See generally nancy polikoff, beyond (straight and gay) Marriage: Valuing all families under the law (2008).

3 Nancy Polikoff, *Ending Marriage as we know it*, hofstra law review: VOL. 32: ISS. 1, ARTICLE 9 (2003).

4 Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. Gender & L. 236 (2006). [31] Melissa Murray*, What's So New about the New Illegitimacy*, American university journal of gender social policy and law 20, NO. 3, 387-346 (2012).

III. THE STASIS IN INDIAN FAMILY LAW AND LGBT+ CRITIQUES OF MARRIAGE EQUALITY

A. Family Law in India: The Persisting Personal Law-Uniform Civil Code Bind

India's complex family law framework comprises both secular family law and religious identity-based, but State-enforced, family laws (personal laws). Personal laws provide different frameworks for India's major religious communities, the Hindus, Muslims, Christians, and Parsis. These laws comprise statutory and uncodified personal laws and include customary law.[1] Individuals can usually opt into secular laws. For instance, heterosexual couples who do not want to be regulated by their law can opt for solemnization of marriage under the secular Special Marriage Act, 1954 (SMA). Importantly, such secular laws provide a possible path for relationship recognition to inter-religious couples. However, these frameworks operate in isolation, and religious and secular family laws remain highly "interconnected."[33] This means that no secular law provides a comprehensive code regulating all aspects of family law. Even families who opt into secular law are inevitably governed by a combination of personal and secular laws.

Existing writing on Indian family law primarily focuses on gender equality and the possibility of testing India's religion-based family law framework through rights-based claims grounded in the Indian Constitution.[2] The origin of this controversy can be traced back to the High Court of Bombay's 1950s decision in the *State of Bombay v. Narasu Appa Mali*[35,] which has been interpreted to insulate personal laws from constitutional scrutiny. Over time, however, courts have taken a more interventionist attitude towards scrutinizing personal laws against claims of gender equality.[3] In recent years, Nariman's J., the opinion in the Supreme Court's decision in *Shayara Bano v. Union of India*,[4] where the court invalidated the practice of *triple talaq* (divorce) in Muslim Personal Law, has adequately clarified that statutory or codified personal Law (as opposed to uncodified personal law) is subject to constitutional scrutiny. Since large parts of Indian family law have now been codified, a considerable part of the law is amenable to constitutional challenges.

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1 For a detailed description of Indian family law and its associated complexities see, Akshat Agarwal, *Marriage Equality in India: Thinking Beyond Challenges to Secular Marriage Law*, INDIAN LAW REVIEW, Part III (2021). [33] *Id*., at Part V.

2 For general overview of literature see, Tanja Herklotz, *Law, religion and gender equality: literature on the Indian personal law system from a women's rights perspective*, INDIAN LAW REVIEW, 1:3, 250-268 (2017). [35] State of Bombay v. Narasu Appa Mali, AIR 1962 Bom 84 (High Court of Bombay).

3 Flavia Agnes, *Personal Laws*, in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (Pratap Bhanu Mehta *et al* eds., 2016).

4 Shayara Bano v. Union of India, (2017) 9 SCC 1 (Supreme Court of India).

A related issue concerning personal laws is whether they are included within guarantees of religious freedom under Article 25 of the Indian Constitution.[1] Therefore, to avoid religious objection, advocates of same-sex marriage have often only focused on secular marriage law as a vehicle for marriage equality instead of discussing the entirety of family law.[2] It is also, for this reason, that majority of the judicial challenges seeking marriage equality currently focus on secular marriage law. However, in several decisions, the Supreme Court has reiterated that religion-based personal laws, which do not deal with matters of faith but only concern the secular aspects of religion, are not covered by religious freedom guarantees.[3] Therefore, there are no legal reasons for insulating religion-based family law from constitutional scrutiny.

Yet, debates around family law reform remain contested. Much of this is due to political debates around the enactment of the potential Uniform Civil Code (UCC). Article 44 of the Directive Principles of State Policy in the Indian Constitution[4] makes the formulation of a UCC a constitutional aspiration. However, issues around the UCC have come to be used as a tool by the Hindu right to criticize minority communities, especially Muslims, for discriminatory practices in their uncodified personal laws.[5] In the years after independence, while much of the uncodified Hindu personal law was codified as statutory law by the Union Parliament,[6] Muslim personal law[7] has largely remained uncodified.

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1 Article 25, Constitution of India.

2 Thomas John, *Liberating Marriage: Same-Sex Unions and the Law in India*, in LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW (Alok Gupta and Arvind Narrain eds., 2011).

3 John Vallamattom v. Union of India (2003) 6 SCC 611 (Supreme Court of India); Sarla Mudgal v. Union of India (1995) 3 SCC 635 (Supreme Court of India).

4 Article 44, Constitution of India.

5 The politicization of the debate has also meant that Indian feminists have reversed their position on the issue, see Aarefa Johari, *Demands for a uniform civil code are back and women's groups continue to oppose it. Here's why*, SCROLL.IN (29 December 2020) https://scroll.in/article/980443/demands-for-a-uniform-civil-code-are-backand-womens-groups-continue-to-oppose-it-heres-why (last accessed 30 November 2021).

6 Hindu persona law was codified into legislations such as the Hindu Marriage Act, 1956, Hindu Minority and Guardianship Act, 1956, Hindu Adoption and Maintenance Act, 1956 and the Hindu Succession Act, 1956. Efforts to codify Hindu law, however, had begun pre-independence. For a history of the codification of Hindu law, see ARCHANA PARASHAR, WOMEN AND FAMILY LAW REFORM IN INDIA (1992).

7 While the Muslim Personal Law (Shariat) Application Act, 1937 made the shariat law applicable to all Indian Muslims, large parts of the law remain uncodified. Only issues of divorce and maintenance have seen codification, see The Dissolution of Muslim Marriages Act, 1939; The Muslim Women (Protection of Rights on Divorce) Act, 1986; and The Muslim Women (Protection of Rights on Marriage) Act, 2019.

However, as scholars like Flavia Agnes have shown, such arguments proceed on the false premise that codified Hindu personal law is gender-just.[45] Archana Parashar has argued that the early codification of Hindu law was not animated by concerns of gender equality but was to achieve the goal of nation-building and to assert state authority over civil life in a newly independent nation.[1] Therefore, aspects of Hindu law, which retain problematic remedies such as the restitution of conjugal rights and do not recognize progressive concepts such as matrimonial property and no-fault divorce, continue to violate women's equal rights.[2]

Moreover, India's federal structure with both the Union Parliament and State Legislatures enjoying competence over family laws and the asymmetric constitutional guarantees of autonomy in civil matters to certain North-Eastern states are further barriers to a truly uniform law.[3] At the same time, as I have argued earlier, religion-based personal laws remain important markers of individual identity and community difference.[4] This explains why courts are often hesitant to wade into constitutional issues around personal laws, and attempts by members of religious communities to challenge their law are viewed as being more legitimate.[5]

Therefore, discussions around the UCC have assumed a state of stasis. On the one hand, it has become a political tool to browbeat religious minorities. On the other, there are very few incentives or roadmaps to the secularization of all family law in a manner that secures rights. In its consultation paper on the UCC, even the Law Commission of India concluded that a UCC was "neither necessary nor desirable at this stage."[6] Rather the Law Commission emphasized addressing discriminatory provisions in different personal laws.

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1 Parashar, supra note 43, at 264. For further scholarly work analyzing the trajectories of personal law reform, see NARENDRA SUBRAMANIAM, NATION AND FAMILY: PERSONAL LAW, CULTURAL PLURALISM AND GENDERED CITIZENSHIP IN INDIA (2014); RINA VERMA WILLIAMS, POSTCOLONIAL POLITICS AND PERSONAL LAWS: COLONIAL LEGAL LEGACIES AND THE INDIAN STATE (2006).

2 See FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA (2001). [48] Agnes, *supra* note 36.

3 Agnes, *supra* note 36.

4 Agarwal, *supra* note 32. For a contrary view, see FARAH AHMED, RELIGIOUS FREEDOM UNDER THE PERSONAL LAW SYSTEM (2015).

5 Saptarshi Mandal, *Out of Shah Bano's shadow: Muslim women's rights and the Supreme Court's triple talaq verdict,* 2(1) INDIAN LAW REVIEW 89-107 (2018).

6 Law Commission of India, Consultation Paper on Reform of Family Law (2018) http://www.lawcommissionofindia.nic. in/reports/CPonReformFamilyLaw.pdf (last 30 November 2021).

In this context, LGBT+ rights claiming can potentially prove to be a new entry point for reform that goes beyond the personal law-UCC bind, which animates current debates on Indian family law. The Supreme Court's gender and sexuality jurisprudence emphasize equal constitutional citizenship, providing a strong basis for challenging existing family laws.

B. LGBT+ RIGHTS AND INDIAN FAMILY LAW

At present, at least nine petitions seeking marriage equality are pending before the High Courts of Kerala and Delhi. The petition before the High Court of Kerala has been filed by a same-sex couple seeking recognition of their marriage under the secular SMA.[1] In the High Court of Delhi, four petitions (three filed by a couple and the other by a group of queer individuals) seek recognition under the SMA. One petition seeks recognition of an overseas Indian's same-sex marriage (under US law) under the Foreign Marriage Act, 1968, one petition seeking overseas Indian status for the foreign same-sex spouse of an Indian, and public interest litigation seeks recognition of same-sex marriage under the Hindu Marriage Act, 1954 (HMA).[2] The High Court of Delhi has clubbed the hearings, but final arguments are yet to begin.[3]

The Government of India, in its submissions, has taken a position against the recognition of same-sex marriage.[4] It argues that existing jurisprudence only recognizes same-sex intimate relationships through the right to privacy which does not include any right to public recognition of marriage.[5] Furthermore, it argues that existing law (including family, civil and criminal laws), as well as India's socio-cultural ethos, only recognizes a marriage between a biological man and a biological woman, and therefore there is a legitimate state interest in restricting marriage to different-sex couples.[57]

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1 *Gay couple from Kerala moves HC challenging "discriminatory" provisions of Special Marriage Act*, SCROLL.IN (28 January 2020), https://scroll.in/latest/951357/gay-couple-from-kerala-moves-hc-challenging-discriminatoryprovisions-of-special-marriage-act (last accessed 30 November 2021).

2 Vivek Diwan *et* al, *Happy Together: Law & Policy Concerns of LGBTQI Persons and Relationships in India*, CENTRE FOR HEALTH EQUITY, LAW & POLICY, 7 (2021); *Delhi High Court asks Centre to respond to plea for live streaming of proceedings on same-sex marriage petitions*, THE TIMES OF INDIA (30 November 2021) https://timesofindia.indiatimes.com/india/delhi-high-court-asks-centre-to-respond-to-plea-for-live-streaming-ofproceedings-on-same-sex-marriage-petitions/articleshow/88003547.cms (last visited 30 November 2021).

3 *Id*.

4 Affidavit on file with the author.

5 Affidavit on file with the author. [57] Affidavit on file with the author.

In the background of these judicial challenges, debates around marriage equality have assumed greater urgency.[1] Legal recognition of queer relationships have always animated debates within the LGBT+ rights movement in India. In one of the earliest landmark reports on the status of homosexuality in India, the AIDS *Bhedbhav Virodhi Andolan* expressed the aspirations of India's queer community for relationship recognition, including access to the institution of marriage and parenthood.[2] The report also stressed the need to think beyond conjugality and recognize relationships not based on sex to ensure access to State- benefits.[60] Since then, both feminist and queer organizations and activists have stressed legal inclusion and diverse family recognition beyond marital status or conjugality.[3] They have emphasized the need to account for the lived realities of LGBT+ relationships and for the law to address economic dependency, healthcare decision-making, and intimate partner violence.[4]

However, academic writing on the interaction of LGBT+ rights and family is scant. This may be because, until recently, the focus was largely on decriminalizing same-sex relationships rather than inclusion in existing family laws. Moreover, unlike jurisdictions like the US, no litigation on parental rights of LGBT+ persons has been documented in India. A few trends are, however, notable.

Some scholars make constitutional arguments for familial recognition and especially focus on the secular special marriage law as a vehicle for marriage equality.[5] This is also the preferred approach in a majority of the petitions. I have criticized this focus on secular marriage law in the past since it ignores both the interconnectedness of Indian families and the intersectional identities of religious LGBT+ Indians.[64] Mere inclusion into the SMA also disregards larger Structural issues with the SMA remain a highly patriarchal law with an outdated vision of marriage.[6]

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1 Ruth Vanita, *Marriage equality is a constitutional right, do not deny it to same-sex couples*, THE INDIAN EXPRESS (4 November 2020) https://indianexpress.com/article/opinion/columns/marriage-rights-india-same-sexcouples-6929246/ (last visited 30 November 2021); Manuraj Shunmugasundaram, *In India, looking beyond the binary to a spectrum*, THE HINDU (19 June 2021) https://www.thehindu.com/opinion/op-ed/in-india-lookingbeyond-the-binary-to-a-spectrum/article34853466.ece (last visited 30 November 2021).

2 LESS THAN GAY, AIDS BHEDBHAV VIRODHI ANDOLAN (1991). [60] *Id*.

3 Diwan, *supra* note 53, at 9-13.

4 Diksha Sanyal *et al*, "*Family"* in *Queering the Law: Making Indian Laws LGBT+ Inclusive*, VIDHI CENTRE FOR LEGAL POLICY, 32-35 (2019).

5 John, *supra* note 39; Nayantara Ravichandran, *Legal Recognition of Same-Sex Relationships in India* 5 JOURNAL OF INDIAN LAW AND SOCIETY 95 (2014). Satchit Bhogle, *The Momentum of History: Realising Marriage Equality in India* 12(3-4) NUJS Law Review 1 (2019). [64] Agarwal, *supra* note 32.

6 Akshat Agarwal, *Upgrading India's Special Marriage Law*, VIDHI CENTRE FOR LEGAL BLOG (21 September 2020) https://vidhilegalpolicy.in/blog/upgrading-indias-special-marriage-law/ (last visited 30 November 2021).

Another set of scholars has looked at the interplay between the realities of same-sex relationships, conditioned by vulnerabilities, both socio-economic and based on caste and class locations, with the heteropatriarchal institution of marriage.[1] Reports by think tanks and research organizations (including a report co-authored by me) have mapped the various issues and concerns that would arise while considering LGBT+ inclusion in existing family law frameworks.[2] These reports, too, have stressed diverse family recognition and the need to account for socioeconomic vulnerability.[3] They, however, do not go into specific doctrinal implications of the legal recognition of such relationships.

In a recent essay, family law scholar Saptarshi Mandal calls for queer groups to engage with larger questions of Indian family law.[4] He outlines existing issues with marriage law, such as the non-recognition of unilateral divorce and other restrictions on individual autonomy, which makes mere inclusion problematic.[5] Instead, he suggests that issues such as marital status-based discrimination and the non-recognition of rights such as healthcare decision-making in non-marital relationships must be factored in queer conversations about family law reform.[6]

Therefore, both India's LGBT+ movement and many Indian scholars have emphasized diverse family recognition and have cautioned against blind assimilation within marriage in existing family law. The articulation of these concerns is well-intentioned and not without basis. In the Indian context, where family laws remain unequal and largely out-of-step with changing social realities, the prospect of mere inclusion may only at best re-emphasize old inequalities or at worst create new ones. However, I will show another way of thinking about LGBT+ rights claims. In line with dynamics in comparative family law, the doctrinal force of LGBT+ claims that marriage equality can become a vehicle for transforming aspects of family law for all non-normative families.

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1 Sourav Mandal, *The Politics of Regulating Adult Sexuality through the Institution of Marriage: Reflections on Queer Experiences from India* in MUTINIES FOR EQUALITY: CONTEMPORARY DEVELOPMENTS IN LAW AND GENDER IN INDIA (Tanja Herklotz and Siddharth Peter de Souza eds., 2021); Sayan Bhattacharya, *Reading Queerness: Same-sex marriages in India* in THE POLITICS OF BELONGING IN CONTEMPORARY INDIA: ANXIETY AND INTIMACY (Kaustav Chakraborty ed., 2020).

2 Sanyal, *supra* note 62; Diwan, *supra* note 53.

3 Sanyal, *supra* note 62; Diwan, *supra* note 53.

4 Mandal, *supra* note 3.

5 Mandal, *supra* note 3. Does existing marriage law recognize remedies such as restitution of conjugal rights that violate individuals' decisional autonomy, see Saumya Uma, *Wedlock, or Wed-lockup? A Case for Abolishing Restitution of Conjugal Rights in India*, INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY, Volume 35 Issue 1 (2021).

6 Mandal, *supra* note 3.

IV. CONSTITUTIONAL ARGUMENTS FOR MARRIAGE EQUALITY

In this part, I will construct potential arguments for same-sex marriage recognition based on Indian constitutional law. I speculate that such arguments will fall into two broad heads, 1) arguments based on the personal liberty of individuals and 2) arguments based on equality and anti-discrimination. Before constructing specific arguments, however, I briefly trace key features and concepts in the gender and sexuality of jurisprudence of the Indian Supreme Court.

A. Tracing Constitutional Rights and Concepts

1. Equality and Anti-Discrimination

Article 14 of the Indian Constitution recognizes the right to equality and equal protection of laws,[1] while Article 15 prohibits discrimination against citizens on specific grounds that include sex.[2] Together with other provisions on equality of opportunity in matters of public employment,[3] abolition of untouchability,[4] and the abolition of titles,[5] they form the equality code of the Indian Constitution and demonstrate the constitutional commitment to an equal society. In recent years the equality provisions have been interpreted broadly, with one commentator remarking that they have come to achieve a "highly activist magnitude."[6] Judicial decisions on gender and sexuality have played a key role in this.

(i) Right to Equality

Both the traditional test of classification as well as the test of manifest arbitrariness have been used to test the constitutionality of a law under Article 14.[78] In applying the test of classification, courts, first, ascertain whether there is a reasonable classification based on Intelligible differentia and, second, whether the differentia, which is the basis of the classification, has a rational nexus with the object that the legislation seeks to achieve.[7]

As legal scholar Gauri Pillai argues, the Supreme Court's decriminalization decision in *Navtej* has added new dimensions to both prongs of the old classification test.[8] First,

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1 Article 14, Constitution of India.

2 Article 15, Constitution of India. The other specific grounds include religion, caste, race and place of birth.

3 Article 16, Constitution of India.

4 Article 17, Constitution of India.

5 Article 18, Constitution of India.

6 *M.P. Jain Indian Constitutional Law*, 907 (Justice Chelameswar & Justice Dama Seshadri Naidu eds., 8th edn., 2018). [78] *Id*.

7 Jain, *supra* note 77, at 910.

8 Gauri Pillai, *Naz to Navtej: Navigating Notions of Equality*, 12 NUJS L. REV. 3-4 (2019); For earlier critiques of the classification test, see Catherine A MacKinnon, *Sex equality under the Constitution*

by recognizing the concept of indirect discrimination through the disproportionate impact of facially neutral provisions, the decision furthers the classification test. Moreover, it allows the use of the language of intelligible differential to test the very classification itself. For instance, Chandrachud J., in *Navtej,* questioned the very basis of classification of sexual acts as natural and unnatural and observed that such classification represents the mere heteronormative regulation of sexual acts that fell outside heteronormativity and therefore could not be sustained.[81]

Second, the decision emphasizes constitutional morality in testing the legitimacy of the objective of the legislation. Constitutional morality here contrasts with public or social morality, with the court holding that the former always trumps the latter. The court defines constitutional morality as "the morality that has inherent elements in the constitutional norms and the conscience of the Constitution."[1] The court understood constitutional morality as promoting plural and inclusive values. Therefore, the criminalization of homosexuality based on majoritarian perception tracing back to Victorian morality and Judeo-Christian values was violative of constitutional morality.[2]

Moreover, apart from the classification test, several judicial decisions have also recognized the arbitrariness test under Article 14.[84.] The most influential exposition of this test was in *Shayara Bano,* where Nariman J. defined manifest arbitrariness as "something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary"[3] This test of arbitrariness was relied upon by judges in *Navtej* as well.[4]

(ii) Right against Gender Identity and Sexual Orientation Discrimination

In interpreting the guarantee against discrimination based on sex, the Supreme Court has read in gender identity and sexual orientation as part of Article 15. [5] In

of India: Problems, prospects, and ""personal laws", 4(2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 182, 183 (2006) [81] Para 28, Per Chandrachud's J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

1 Para 118, Per Misra CJI., and Khanwilkar J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

2 Pillai, *supra* note 80. [84] Jain, *supra* note 77.

3 Para 55, Per Nariman J., Shayara Bano v. Union of India, (2017) 9 SCC 1(Supreme Court of India)

4 The four separate opinions in Navtej use the arbitrariness test but arrive at different reasons to hold why Section 377 was arbitrary, see Pillai, *supra* note 83, at n.13.

5 Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India); National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (Supreme Court of India).

National Legal Services Authority v. *Union of India*,[1] the Supreme Court recognized transgender identity and recognized their fundamental rights. The court further held that sex discrimination included both gender and biological attributes.[2] It reasoned that "gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character." Therefore, discrimination based on sex would also include discrimination based on gender identity.[3]

In *Navtej*, on the one hand, Chandrachud's J. opinion interpreted sexual orientation discrimination as part of sex discrimination since sexual orientation discrimination proceeded based on gender and sex-role stereotypes, which were ultimately stereotypes of sex, discrimination based on which is prohibited by Article 15(1).[4] The court, therefore, used the principle of anti stereotyping to include sexual orientation discrimination within sex discrimination.[92] On the other hand, Malhotra J. interpreted sexual orientation discrimination as part of sex discrimination on the theory of analogous grounds, which protects immutable status and fundamental choices.[5] She reasoned that existing grounds in Article 15(1) represent either immutable status Or fundamental choices further linked to an individual's autonomy and are intrinsic to their personality. Since sexual orientation is similarly linked to individual autonomy, it could be justified as an analogous ground of discrimination through the theory of immutable status and fundamental choices.[6]

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1 National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (Supreme Court of India).

2 Para 59, Per Sikri J., National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (Supreme Court of India).

3 Para 59, Per Sikri J., National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (Supreme Court of India); also see Justice M.B. Lokur, *Transgender Rights and Wrongs* in SEX AND THE SUPREME COURT: HOW THE LAW IS UPHOLDING THE DIGNITY OF THE INDIAN CITIZEN (Saurabh Kirpal ed., 2020).

4 Akshat Agarwal, "*Asking Searching Questions to Forms and Symbols of Injustice": Indirect Discrimination, Intersectionality and the Principle of Anti-Stereotyping*, IACL-AIDC BLOG (15 September 2018) https://blogiacl-aidc.org/blog/2018/9/13/asking-searching-questions-to-forms-and-symbols-of-injustice-indirectdiscrimination-intersectionality-and-the-principle-of-anti-stereotyping (last visited 30 November 2021). [92] The principle of anti-stereotyping interpreted as being part of sex-discrimination in Article 15(1), see Anuj Garg v. Hotel Association of India, AIR 2008 SC 663.

5 Para 15(2), Per Malhotra J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India); For an exposition of this theory, see Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal For All Minorities*, 2 NUJS LAW REVIEW, 419 (2009); John Gardner, *On the Ground of Her Sex (uality)*, 18(2) OXFORD JOURNAL OF LEGAL STUDIES, 167 (1998).

6 Para 15(2) Per Malhotra J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India). [95] Article 21 of the Constitution of India provides that no person shall be deprives of his life and personal liberty except according to procedure established by law.

2. Personal Liberty

Article 21of the Constitution provides that no person shall be deprived of their life and personal liberty except according to procedure established by law.[95] The provision has been interpreted broadly to encompass several rights. While the Indian Supreme in its early years read Article 21 in a narrow positivistic sense, [1] its approach changed over time, culminating in a complete turnaround in *Maneka Gandhi v. Union of India*[2] in the late1970s.[3]

Decisions post-*Maneka* were characterized by a large expansion in the meaning of the right to life and personal liberty, which included the recognition of positive obligations on the State.[4] While the focus in the 1980s and 1990s was largely on socio-economic rights, the Supreme Court has built an impressive jurisprudence focusing on autonomy, privacy, and human dignity in recent years. This has significant implications for gender and sexuality rights.

(i) Right to Sexual Orientation

In 2017, nine judge-bench of the Supreme Court in *Justice KS Puttaswamy* v. *Union of India*[5] unanimously held that privacy was a stand-alone fundamental right guaranteed by Article 21 of the Constitution. Chandrachud J., in his plurality opinion (on behalf of four judges) as well as Kaul J., in his concurrence, further held that sexual orientation

It was part of the natural right to privacy since it was a core aspect of the autonomy and dignity of individuals.[6] In *Navtej*, Chandrachud J. held that sexual minorities enjoyed a right to sexual privacy as part of the fundamental right to privacy, which

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1 In AK Gopalan v. State of Madras, AIR 1950 SC 27, the Supreme Court had interpreted Article 21 narrowly and had held that the provision was not to be read in conjunction with other provisions (such as guarantees of equality and freedom) and did not contain any substantive or procedural. Here the court contrasted Article 21 with the American approach to due process on the argument that the Indian framer has explicitly rejected the American approach since they had not included the words "due process of law" in Article 21. See Jain, *supra* note 77.

2 Maneka Gandhi v. Union of India, AIR 1978 SC 59; Jain, *supra* note 77, at 1159-1167.

3 In *Maneka* the Supreme Court held the right to life and personal liberty had to be interpreted in light of other provisions of the Constitution including the right to equality (Article 14) and the right to freedom (Article 19), the term "personal liberty" had to be read expansively, and the deprivation of rights through a procedure established by law could not be arbitrary but had to be fair and reasonable. Jain, *supra* note 77, at 1159-1167.

4 Such rights include the right to livelihood, right to shelter, right to health etc., see Jain, *supra* note 77, at 12071233.

5 Justice K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (Supreme Court of India).

6 Per Kaul J., Justice K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (Supreme Court of India).

included the privacy of both private spaces as well as the ability to navigate public spaces on their own terms.[1]

(ii) Right to be in a relationship with a Partner

Moreover, in decisions on inter-caste marriage in *Shakti Vahini v. Union of India*[2] and interreligious marriage in *Hadiya v. Asokan KM,*[3] the Supreme Court has held that individuals have the right to choose a partner as part of the fundamental rights of freedom and personal liberty. In *Navtej*, Chandrachud J. further emphasized that a right to intimacy or choose a partner was based on values of autonomy and self-determination, which the Constitution cherishes. The court observed that laws and social institutions must be organized in a manner that does not restrict individuals from entering relationships based on sex or gender, and such social institutions must provide them with the "institutional recognition to perfect their relationships."[4]

(iii) Right to Human Dignity

Decisions of the Supreme Court have also held that the right to life under Article 21 includes a right to live with human dignity.[106] In both *Puttaswamy* and *Common Cause v. Union of India*,[5] which dealt with the right to die with dignity, the Supreme Court emphasized that the right to live with dignity was closely linked to the right to life and liberty. In *Navtej,* all the judges recognized that LGBT+ persons enjoyed the right to human dignity. Misra CJI emphasized that the violation of self-determination and autonomy in choosing a sexual partner was also a violation of dignity. Nariman J. recognized the dignity and its link with the value of fraternity, mentioned in the preamble to the Indian Constitution. In contrast, both Chandrachud J. and Malhotra J. linked dignity to their privacy analysis.[109]

Therefore, the gender and sexuality jurisprudence of the Indian Supreme Court has greatly expanded the equality and personal liberty rights of LGBT+ persons. Additionally, the court has recognized the "equal citizenship claims of LGBT+ Indians."[6] This implies that the LGBT+ community cannot be "discriminated against, and

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1 Paras 59 and 62, Per Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

2 Shakti Vahini v Union of India, (2018) 7 SCC 192 (Supreme Court of India).

3 Shafin Jahan v. Asokan KM, (2018_ SCC OnLine SC 343 (Supreme Court of India).

4 Para 67, Per Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India). [106] Francis Coralie v. Delhi, AIR 1981 SC 746 (Supreme Court of India); P Rathinam v. Union of India, AIR 1994 SC 1844 (Supreme Court of India).

5 Common Cause v. Union of India, (2018) 5 SCC 1 (Supreme Court of India).

6 Para 156, Per Chandrachud J., and Para 97, Per Nariman J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

they have a right to express themselves through their intimate choices."[1] Chandrachud J., in his opinion, links the concept of equal citizenship to "constitutional morality," the norms and values of the Constitution that uphold the liberty, dignity, and equality claims of LGBT+ persons. Therefore, in determining the rights of LGBT+ persons, not culture or traditions but values of the Constitution are considered supreme. According to the court, such an approach is not merely about protecting minorities but concerns the constitutional vision of the kind of country that India wants to be.

The court[2] further justifies this approach in the background of the broader concept of "transformative constitutionalism," the idea that the constitution takes cognizance of inherent social inequalities and seeks to be a "text of governance which promotes true equality."[3] Misra CJI recognized it as the duty of the judicial branch of the State to uphold the principle of transformative constitutionalism and usher change in society.[4] In the context of the LGBT+ community, Chandrachud J. emphasizes that transformative constitutionalism requires courts to question the "prevailing notions about the dominance of sex and genders" and resolve the "polarities of sex and binaries of gender".[115]

B. CONSTRUCTING ARGUMENTS FOR MARRIAGE EQUALITY

In constructing arguments for marriage equality, I will focus on the marriage provision of secular and tindu marriage law. Section 4 of the SMA lays down the conditions for sole marriage. While the language of the provision is neutral, clause (c) Specifically refers to "male" and "female" in stipulating marriage age requirements.[5] Section 5 of the HMA lays down a valid Hindu marriage condition. Similar to Section 4 of the SMA, while the language of Section 5 is neutral, clause (iii) refers to the "bridegroom" and "groom" in stipulating the age requirements for marriage.[117] It has been argued that same-sex marriage could potentially be construed in these provisions through statutory interpretation by expanding the meaning of the terms "bride" and

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1 Para 145, Per Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

2 Part M, Per Chandrachud J., and Part H, Per Misra CJI., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

3 Para 153, Per Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

4 Para 110, Per Misra CJI., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India). [115] Para 153, Per Chandrachud J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

5 Section 4, Special Marriage Act, 1954. [117] Section 5, Hindu Marriage Act, 1956.

"bridegroom."[1] It is, however, unclear how same-gender couples can be included in such a reading. Moreover, such an interpretation also goes against the broader scheme of the legislation, which is meant to recognize marriages in the binary.

Therefore, since existing marriage law only recognizes marriage in the male-female binary, I speculate that courts are likely to invalidate existing law on equality and personal liberty grounds. I build these arguments based on the doctrinal concepts and rights recognized by the Supreme Court in its gender and sexuality jurisprudence.

1. Equality Based Arguments

(i) Exclusion from the family law institution of marriage violates LGBT+ persons' right to equality under Article 14

Existing marriage laws such as the SMA and HMA, which exclude same-sex couples from their definition of what constitutes a valid marriage, make a classification based on sexual orientation. This is because they only recognize a valid marriage as between persons of the opposite sex and exclude persons of the same sex. For instance, while Ravi can marry Sarita, he cannot enter a valid marriage with Ali.[2] Therefore while the class of heterosexuals is accorded marital recognition, it is denied to non-heterosexuals. This affects persons in the LGBT+ community and their non-heterosexual relationships.

According to *Navtej,* to pass the test of Article 14, a classification should be based on intelligible differentia. In this case, the classification is not based on intelligible differentia since the trait has been considered intrinsic and a core aspect of the individual's identity.[3] Denial access to the institution of marriage based on a core trait such as sexual orientation, which has also been recognized as a fundamental right as part of the right to life and personal liberty in Article 21, is *prima facie* discriminatory.

Assuming *arguendo,* even if the classification is upheld, such a classification should have a rational nexus with the objective of the legislation. In excluding same-sex couples

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1 Ruth Vanita, *Democratizing Marriage*, in LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 378 (Alok Gupta and Arvind Narrain eds., 2011); Stelllina Jolly and Ritika Vohra, *Recognition of Foreign Same-Sex Marriage in India*, JOURNAL OF THE INDIAN LAW INSTITUTE 59(3), 302-326 (2017). The Madras High Court has followed such an approach in recognizing the marriage of a transwoman with a man by interpreting "bride" to include transwoman under the Hindu Marriage Act, 1956, see Sreeja v. Inspector General Registration, WP (MD) No 4125 of 2019 (Madras High Court, 22 April 2019). This decision, however, cannot be extended to same-sex relationships since it still operates in the male-female binary.

2 Assuming the gender associated with the names aligns with the sex-assigned at birth.

3 Para 14.5, Per Malhotra J., Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India).

from the ambit of marriage, the only legislative objective can be the promotion of a heteronormative worldview where procreation between persons of the biological sex is considered the essence of marriage. Another objective could be promoting a traditional understanding of marriage as a union between persons of the opposite sex. While the former proceeds on stereotypical views of sex and gender (the only reason persons of the opposite sex marriage is to procreate), the latter only accounts for perceived social and historical understandings while disregarding constitutional vision. In *Navtej*, the Supreme Court has emphasized constitutional morality, the underlying values of the Constitution, to determine the legitimacy of a state objective. The equal constitutional citizenship of LGBT+ persons has been recognized as part of constitutional morality by *Navtej.* Therefore, a legislative objective that seeks to exclude LGBT+ persons disregards constitutional morality and cannot be a valid state objective.

Furthermore, under the arbitrariness test of the equality doctrine, acts done without an adequate determining principle can be held to be manifestly arbitrary. A classification based on sexual orientation that seeks to exclude same-sex relationships from the ambit of marriage proceeds on heteronormative conceptions of society. Such a worldview is not in accordance with the equal citizenship claims of LGBT+ people and therefore violates constitutional morality. Therefore, denying access to family law institutions such as marriage to LGBT+ persons is unreasonable and arbitrary.

(ii) The non-recognition of same-sex marriage is discrimination based on sexual orientation and therefore violates Article 15

In *Navtej,* the court has interpreted the guarantee against sex discrimination to include the guarantee against sexual orientation-based discrimination. The exclusion of same-sex couples from the institution of marriage is discrimination based on sexual orientation. Sexual orientation is a prohibited ground of discrimination, and according to the equal constitutional claims of LGBT+ persons, the State can have no interest in excluding them from the institution of marriage. Therefore, the exclusion of same-sex couples from the family law institution of marriage is discrimination based on sexual orientation and will violate Article 15 of the Constitution.

The court is thus likely to find the denial of access to family law institutions such as marriage as a violation of sexual orientation-based equality recognized in Articles 14 and 15 of the Indian Constitution.

2. Personal Liberty Based Arguments

Exclusion from the family law institution marriage violates the fundamental right to sexual orientation

The decisions in *Puttaswamy* and *Navtej* have held that the right to sexual orientation is a fundamental right that is part of the right to privacy as part of the fundamental right to life and liberty under Article 21.[1] The non-legal recognition of same-sex marriage discriminates based on sexual orientation and therefore violates Article 21.

Giving effect to LGBT+ person rights to be in a relationship based on their autonomy and dignity claims requires their inclusion into family law institutions such as marriage

Supreme Court decisions in *Shakti Vahini, Hadiya,* and *Navtej* have held that the right to be in a relationship with a partner based on autonomy and self-determination is part of the fundamental right to privacy. *Navtej* also recognizes LGBT+ persons' right to human dignity due to their equal citizenship claims. LGBT+ persons' right to be in intimate relationships of their choice is thus protected by both values of autonomy and dignity under Article 21.

Due to its centrality in Indian society, marriage represents one of the most intimate expressions of choosing a partner and being in a relationship. Marriage remains a key social fact in India. According to the 2001 census, 45.6% of the population consisted of married persons (this is a very high number considering that majority of India's population is young).[2] The prevalence of social marriage the performance of marital ceremonies without legal recognition amongst same-sex couples[3] underscores both the centrality of marriage and the LGBT+ community's aspiration to get access to the institution of marriage. Moreover, marriage remains a key entry point to the creation of familial relationships such as parenthood and various benefits, including social welfare, tax, inheritance, and the ability to make healthcare decisions are often linked to marital status.[124]

Therefore the legal non-recognition of the relationships of same-sex couples' relationships has both expressive and material harms. Exclusion from marriage in a society that values marriage makes LGBT+ person relationships less legible and equal. Non-recognition also prevents them from accessing key benefits and legal safeguards linked to marriage.

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[1] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (Supreme Court of India); Justice K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (Supreme Court of India).

[2] Office of the Registrar General and Census Commissioner (India), Age Structure and Marital Status (2001) http://censusindia.govin/Census_And_You/age_structure_and_marital_status.aspx (last visited 30 November 2021).

[3] Vanita, *supra* note 118; Shamayita Chakraborty, *Despite social marriage, gay couples still years for legal rights*, TIMES OF INDIA (25 June 2019) https://timesofindia.indiatimes.com/life-style/spotlight/is-gay-marriage-areality-in-india/articleshow/69928813. cms (last visited 19 December 2019) [124] Diwan, *supra* note 53.

The Indian Supreme Court has interpreted liberty and dignity-based rights as imposing a positive obligation on the State for their realization.[1] Marriage is the most significant legal route through which the State recognizes the autonomous choice of intimate partners and accords dignity to such intimate relationships. Solely recognizing LGBT+ persons' right to be in a relationship of their choice without according such a choice, the legal recognition of marriage devalues the autonomy and dignity of LGBT+ person's choices and relationships. Therefore, excluding same-sex couples from the legal institution of marriage violates their rights to autonomy and dignity. These rights also impose a positive obligation on the State to include them in the legal institution of marriage due to its centrality in recognizing intimate partner choices. Not doing so disparages LGBT+ persons' autonomy and dignity and discriminates against their intimate choices. Meaningfully realizing LGBT+ person right to

Therefore, choosing a partner based on their autonomy and dignity necessitates the inclusion of their relationships in the institution of marriage.

The court is likely to find that the denial of access to family law institutions such as marriage violates LGBT+ persons' right to sexual orientation and their right to be in a relationship based on autonomy and dignity values. Such non-recognition, therefore, violates Article 21 of the Constitution.

V. POSSIBILITIES OF TRANSFORMING PARENTHOOD IN INDIA

A. Law of Parenthood under Secular and Hindu Law

Religion-based personal laws govern issues of parenthood in India. In Indian law, a parent who is presumed to be legally responsible for the child's welfare and is legally recognized to take decisions on their behalf is called a natural guardian.[2] In contrast, the concept of custody refers to the child's physical placement and includes the ability to take day-to-day decisions.[3] While all personal laws usually recognize the father as the natural guardian, there is usually a presumption in favor of custody with the mother for younger children.[4] Therefore, while guardianship and custody may often coincide, that may not always be the case.

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1 The Supreme Court has interpreted a number of socio-economic rights such as the right to food and the right to education which impose positive obligations on the State under Article 21's guarantee of life and personal liberty.

2 Asha Bajpai, *Custody and Guardianship of Children in India*, FAMILY LAW QUARTERLY 39(2) 441, 443 (2005).

3 *Id*.

4 *Id.*

The religious laws on parenthood are supplemented by the secular Guardian and Wards Act, 1890 (GAWA), which authorizes courts to declare a guardian for minors in situations where there is no living father or mother.[1] Therefore, ordinarily, secular law emphasizes the rights of both the father and mother. However, courts have repeatedly held that in all issues concerning children, the principle of best interests of the child is paramount and can even override statutory or personal law.[2]

In Hindu law, under the Hindu Minority and Guardianship Act, 1956 (HMGA), the father is the preferred natural guardian, and the mother is only recognized as a natural guardian "after him."[3] The Supreme Court, in *Githa Hariharan* v. *Reserve Bank of India*,[4] recognized the constitutional principle of sex equality has held that the mother could be the natural guardian of the minor even during the lifetime of the father if the father were absent from the life of the minor. The court, therefore, stopped short of recognizing the parental rights of the mother on completely equal terms.[5] For illegitimate children, however, Hindu law gives a preference to the mother.[6] Moreover, stepparents are not recognized as natural guardians.[7]

Surrogacy and assisted reproductive technique are not regulated yet, but legislative proposals to regulate both have been on the cards for a few years. This marks a sharp break from the relatively liberal way in which surrogacy regulation had been approached previously.[8] While the recognition of the intending couple as parents of the child has been uncontroversial, many of these regulatory proposals come in the background of documented exploitation of surrogates, especially in international commercial surrogacy arrangements.[9] For instance, the Surrogacy (Regulation) Bill, 2019, only permits surrogacy

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1 Section 19(b), Guardian and Wards Act, 1890.

2 Bajpai, *supra* note 126, at 443.

3 Section 6, Hindu Minority and Guardianship Act, 1956.

4 Githa Hariharan v. Reserve Bank of India, (1999) 2 SCC 228 (Supreme Court of India).

5 Law Commission of India, Reforms in Guardianship and Custody Laws in India, Report No. 257 (2015) https://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf (last visited 30 November 2021).

6 Section 6, Hindu Minority and Guardianship Act, 1956.

7 Section 6, Hindu Minority and Guardianship Act, 1956.

8 As early as 2005, the Indian Council of Medical Research (ICMR) had issued National Guidelines for Accreditation, Supervision & Regulation of ART Clinics. This was followed by a number of legislative proposals for the regulation of assisted reproductive techniques which before 2016 were largely permissive. See Sneha Banerjee and Prabha Kotiswaran, *Divine Labours, Devalued Work: The Continuing Saga of India's Surrogacy Regulation*, INDIAN LAW REVIEW 5-1, 85-105 (2021).

9 The ICMR guidelines recognized intending couple as parents. Further see Proviso to Section 7, The Surrogacy (Regulation) Bill, 2019; Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, SIGNS 35(4) 969-992 (2010); Aastha Malhotra and Arshia Roy, *Reconceptualising Parenthood: A Model Regulatory Framework for Assisted Reproduction in India*, 13 NUJS L. REV. 1 (2020).

for heterosexual married couples who are infertile and only allows a close relative to be a surrogate mother.[1] Moreover, the bill bans all forms of commercial surrogacy and only permits altruistic surrogacy, i.e., surrogacy, without any compensation.[2] Therefore, restrictions on both who can initiate surrogacy and who can be a surrogate, as well as the ban on commercial surrogacy, aim to address issues of exploitation.

However, the bill has been heavily criticized by feminists since it ignores the realities of surrogacy arrangements and by only allowing altruistic surrogacy devalues the labor of the surrogate mother.[3] Feminists instead suggest that the bill should be permissive to different Surrogacy arrangements while regulating them to protect the surrogate mother's rights and prevent economic exploitation.[4] In line with the surrogacy bill, the Assisted Reproductive Technology (Regulation) Bill, 2020 only envisages an intending heterosexual married couple or a woman opting for assisted reproductive services.[5]

Under the Hindu Adoption and Maintenance Act, 1956 (HAMA), the Hindu law of adoption allows for adoptions amongst Hindus. The secular Juvenile Justice Act, 2015 (JJA) allows for adoptions irrespective of religion. While the adoption regime under HAMA is relatively liberal and adoptions can be conducted privately in most cases without any involvement of the State, adoptions under the JJA are heavily regulated.[6] Moreover, the JJA is the primary legal vehicle through which orphaned or abandoned children are given up for adoption by the State.[7] Even though both the laws permit single men and women to adopt when it comes to couples, they only imagine the heterosexual married couple as eligible parents. Furthermore, unlike HAMA, the JJA only allows single men to adopt male children.[8] Legal scholar Sangeetha Sriram has pointed out how the current adoption law excludes same-sex couples transgender persons and does not recognize second-parent adoption, which affects both LGBT+ couples and persons in non-marital relationships.[9]

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1 Section 4, The Surrogacy (Regulation) Bill, 2019.

2 Section 4, The Surrogacy (Regulation) Bill, 2019.

3 Banerjee and Kotiswaran, *supra* note 136; Neha Thirani Bagri, *A Controversial Ban on Commercial Surrogacy Could Leave Women in India with even Fewer Choices*, TIME (30 JUNE 2021) https://time.com/6075971/commercial-surrogacy-ban-india/ (last visited 30 November 2021).

4 *Id*.

5 Sections 2(g) and 2(x), The Assisted Reproductive Technology (Regulation) Bill, 2020.

6 See Adoption Regulations, 2017.

7 Section 38, Juvenile Justice (Care and Protection of Children) Act, 2015.

8 Section 57(4), Juvenile Justice (Care and Protection of Children) Act, 2015.

9 Sangeetha Sriram, *Revitalizing Adoption Law in India*, INDIAN LAW REVIEW (2020). The Adoption Regulations, 2017 recognize adoption by stepparents but do not recognize second parent adoption.

The existing laws on parenthood, therefore, privileges fathers as well as heterosexual marital relationships. Exclusion of non-normative relationships occurs at all levels. First, the Hindu law of natural guardianship does not recognize the equal parental rights of the mother by privileging the father in marital relationships. Moreover, it does not recognize equal parental rights in non-marital relationships by privileging the mother as the natural guardian in the case of illegitimate children. Second, the proposed regulation of assisted reproductive techniques and surrogacy excludes LGBT+ couples, persons intending to be single parents, and persons in nonmarital relationships. Third, the laws of adoption neither recognize adoption by either same-sex couples or transgender persons or second-parent adoptions, which adversely affects persons in non-marital relationships. Parenthood in Indian family law thus remains highly exclusionary.

B. TRANSFORMING PARENTHOOD THROUGH LGBT+ RIGHTS CLAIMING

I argue that LGBT+ rights claiming for marriage can potentially open possibilities for making arguments to expand the law on parenthood in India. Such expansion may benefit not only LGBT+ families but also persons in different-sex relationships as well as other diverse familial relationships. In Part IVB, I argued that potential marriage equality arguments could be constructed around both equality and personal liberty claims. I will now build on those to demonstrate their implications for the law of parenthood.

A key consequence of the recognition of marriage equality based on sexual orientation equality and the right to legal recognition of relationships based on autonomy and dignity would be the broader recognition of LGBT+ family equality in the law.[1] Such recognition necessarily transcends marriage since it emphasizes the need to legally respect the various ways in which LGBT+ people organize and construct their relationships and not exclude them from existing family law institutions. Underlying these ideas are the broader concepts of constitutional morality and transformative constitutionalism that view legal regulation based on the gendered binary and associated stereotypes, including the privileging of sexual reproduction, as inconsistent with the constitution's plural vision. Both recognizing LGBT+ relational equality and shifts in constitutional understanding of relationships broaden the legal understanding of parenthood.

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[1] For the notion of LGBT+ Family Equality in American Law, see NeJaime, Marriage Equality and the New Parenthood, *supra* note 4.

1. Implications for Guardianship

The recognition of LGBT+ family equality would necessitate the recognition of LGBT+ parenthood and the corresponding claims to the exercise of parental rights by same-sex couples. Such recognition of the parental rights of same-sex couples would likely destabilize our understanding of gendered roles in family law as well as displace the privileged position that sexual procreation enjoys. This is likely to shift the understanding of parenthood from being based on biology or gender to intentional and functional principles of parental recognition. Moreover, as NeJaime has argued in the American context, a shift to intentional and functional parenthood is likely to benefit non-marital families. It may shift the focus from marital status to how the parental relationship exists.[1] There is no reason to believe that with the recognition of marriage equality, a similar doctrinal shift may not come about in India.

Giving same-sex couples parental recognition also does away with the logic of privileging the father as a natural guardian in Hindu law. This is because in recognizing the parental rights of same-sex couples, the notion that men and women have gendered parenting roles is inherently rejected. Such gendered roles form the very basis of presuming the father as a natural guardian over the mother's rights. Thus, the recognition of same-sex couples as parents implies the automatic repudiation of any preference among different-sex couples due to the disavowal of the underlying theory.

Moreover, currently, children born to persons in a non-marital relationship are considered illegitimate in Hindu law, with the mother being given a preference as the natural guardian.[2] Recognizing that the essence of a parent-child relationship is not just sexual reproduction, but that such a relationship can also be formed through intentional and functional principles, as it does in the case of same-sex couples, may also change the way children are born outside of marriage are viewed. Instead of the couple's marital status, the focus shifts to the parent's intention or the nature of the relationship the parent shares with the child. Either can become a basis for asserting parental rights and for equal status and involvement in the child's life. This can have implications for persons in non-marital relationships who may have a child together and may want to be viewed as parents of the child, as well as for unwed biological fathers who may want to take up a larger role in their child's life. This, of course, does not do away with the concept of illegitimacy in Hindu law, which, as has been

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1 NeJaime, Marriage Equality and the New Parenthood, *supra* note 4, at 1250.

2 For a detailed treatment of illegitimacy in Hindu law, see Ravi Gangal and Ravi Shankar Pandey, *Illegitimacy under Hindu Law: A Case for its Abandonment*, INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY, 00, 1-35 (2021).

persuasively argued,[1] should be abolished but weakens the relevance of marital status for determining a parent-child relationship.

2. Implications for regulation of Assisted Reproductive Techniques and Surrogacy

I argued that the rights to autonomy and dignity on which the right to be in a partner is based on obligating the State to give same-sex couples access to family law institutions such as marriage. This is because of the centrality of marriage as a social and legal fact in We are organizing people's relationships. Such an approach can be extended to parenthood as well. LGBT+ person's autonomy claims would include the right to decide to have a child, which is as intimate, if not more, a choice as being in a relationship. Read along with their dignity claims this would necessitate state recognition of their rights to parenthood. This would include the legal recognition of the parent-child relationship that same-sex couples seek to establish and the necessity of access to assisted reproductive techniques and surrogacy services, which remain central to same-sex family formation. Such an argument can also be extended to the intimate choices of single persons and persons in non-marital relationships. The right to decisional autonomy would protect such intimate choices as part of the right to privacy which the Supreme Court has recognized as a fundamental right.

Admittedly, the right to privacy is not absolute. The Supreme Court has held that for the right to be validly infringed, three conditions should be satisfied viz. the existence of a valid law, that such a law should be in pursuance of a legitimate state aim and that such a law should be proportional, that is there should be rational nexus between the objects and the means adopted to achieve them.[2] In the case of the regulation of procreative services, the legitimate state aim is arguable to prevent the exploitation of surrogate mothers. It is, however, not at all clear how restricting the eligibility criteria of access to such services serves such an objective.[3]

The exclusion of same-sex couples, single persons, and persons in non-marital relationships can also be challenged on equality grounds. Like the exclusion from marriage, access to procreative services rests on a heteronormative worldview where only families formed through coupling in the male-female binary are legitimate. However, for the same reasons that such an objective is not in keeping with the values of the Constitution,[4] in the marriage context, it would not be valid in this context as

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1 *Id*.

2 Part H Conclusions, Per Chandrachud J., Justice K. S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (Supreme Court of India).

3 Banerjee and Kotiswaran, *supra* note 136, at 96.

4 See Part IVA.

well. As Kotiswaran and Banerjee argue, there is no normative reason for considering heterosexual couples more capable of parenting than other family formations.[1]

Therefore, existing legislative proposals which currently exclude same-sex couples, single persons, and persons in non-marital relationships would potentially be violative of their rights to autonomy, dignity, and equality under the Indian Constitution.

3. Implications for Adoption

Existing adoption laws exclude same-sex couples and transgender persons from adoption. Like the arguments for a right to access procreative services, recognizing the intimate choice to form a family based on autonomy and dignity claims of LGBT+ persons would also require state recognition of their access to adoption services. Such access can also be justified on equality-based arguments through LGBT+ family equality in family law.

Moreover, apart from questions of access to adoption, recognizing the parental rights of LGBT+ persons would also lead to the recognition of parenthood based on intentional and functional principles. This may make arguments for the recognition of second-parent adoption more compelling. Second-parent adoption benefits parents bringing up children in both same-sex and different-sex non-marital relationships where one of the parents does not share a biological or genetic relationship with the child. It allows the non-biological parent to establish a legal relationship with the child. This is because same-sex couples' recognition as parents proceeds on ideas of a parent-child relationship that goes beyond sexual reproduction or biology. A person in a same-sex relationship may not be related to their child by blood, but they still intend to parent the child and do everything that qualifies them to be a parent. The same logic of a functional parent can also extend to non-biological parents in different-sex relationships, thereby justifying the introduction of second-parent adoption.[2]

VI. CONCLUSION

As the legal recognition of LGBT+ relationships gathers momentum in India, many have cautioned against marriage equality for being assimilationist. Instead, they have argued in favor of diverse family recognition, which is perceived as transforming existing family law. These debates are also taking place in the broader context of the Indian family, which has faced perennial questions about the constitutionality of religion-based personal laws and the desirability of enacting a uniform civil code.

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1 Banerjee and Kotiswaran, *supra* note 136, at 94.

2 Currently only step-parent adoption is permitted by the Adoption Regulations, 2017 issued under the JJA.

I argued that LGBT+ rights claiming marriage equality might transform family law by leading to greater recognition of diverse and non-normative families. India may mimic trends in other jurisdictions where family law scholars have argued for and observed a positive dynamic between same-sex marriage recognition and the progressive expansion of family law on issues such as parenthood. Moreover, in the Indian context, LGBT+ rights may provide a new entry point in thinking about family law reform outside of the current family law stasis of the personal law-uniform civil code bind.

I showed how marriage equality might lead to diverse family recognition in family law by, first, constructing arguments for same-sex marriage based on equality and personal liberty grounds and, second, by applying these arguments to the law of parenthood, specifically, guardianship, regulation of assisted reproductive techniques, and adoption. For doing this, I relied on the doctrinal advances made by the Indian Supreme Court in its jurisprudence on gender and sexuality. The recognition of marriage equality based on LGBT+ family equality and the right to legal recognition of LGBT+ relationships may potentially expand the law of parenthood to include diverse different-sex families, single parents, and persons in non-marital relationships.

Discourses on LGBT+ family law often tend to portray legal recognition as a choice between assimilation versus the transformation of existing family law. These concerns are valid, but as scholars elsewhere have shown, marriage equality can also become the way to recognize diverse and non-normative families. On this view, inclusion itself becomes a tool for transformation.

LEGALIZATION OF SAME-SEX MARRIAGE IN CANADA: A SUCCESS STORY

Sébastien Lafrance[1*]

- To my adoptive father, Françoys Larue-Langlois.
May his unique and precious soul rest in peace.

Abstract: *This paper describes and comments on the major steps that have been taken from a judicial point of view as well as the political and legal evolution that took place towards the recognition of same-sex marriage in Canada, which is a pioneer in that field.*

Keywords: *same-sex marriage, legalization, Canada.*

INTRODUCTION

In November 2017, the Canadian Prime Minister apologized on behalf of Canadians for the discrimination suffered in the past by the LGBTQ2S+[2] community

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This acronym means lesbian, gay, bisexual, transgender and queer.

in the federal public service and the Canadian Armed Forces. Even though same-sex marriage has been legalized in twentynine countries so far, it still remains mostly banned worldwide and one country even does not have a word for "gays,'[1] then Canada's official apologies contrast with that. Canada is the fourth country in the world, after the Netherlands (2001), Belgium (2003) and Spain (2005), to have legalized same-sex marriage in 2005. Although it was the fourth country in the world to allow samesex couples to marry, an author claims that "it is Canada that has had the most impact in the international debate on the issue"[2] since, for example, Canada was the first country in the world to allow gay and lesbian marriages on its territory for people coming from abroad. Unlike in the Netherlands, Belgium, and Spain, the recognition of same-sex marriage was, first and foremost, a legal victory in Canada. Therefore, we will examine in this paper some of the most important Canadian court's decisions that are illustrative of the major steps that have been taken as well as the political and legal evolution that also took place towards that recognition.

Quebec, one of the ten Canadian provinces, is also one of the first places in the world to prohibit discrimination based on sexual orientation, i.e. as early as 1977 in the *Quebec Charter of Human Rights and Freedoms*[3], but because of the division of powers within Canada, Quebec itself could not change the definition of marriage and then could not extend it to same-sex couples. Between the federal government, the provinces and territories, the responsibility (and jurisdiction) for enacting the rules relating to marriage falls to the federal (national) government. The definition of marriage is a prerogative of the federal government in Canada. The provinces and territories only have jurisdiction for the celebration of marriage.

Some authors argue that the few countries "that have legalized gay marriage ... have done so *as a result of political, not judicial, decisions*. In other words, no national or international court, no national or international human rights court has ever considered same-sex marriage as a fundamental right."[4] But in Canada, the legislative change that institutionalized the marriage for *all* "was the result of a long process, in which the judiciary *and* the political power took turns in the dialogue [on same-sex marriage]

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[1] See Voice of North Korea by Yeonmi Park, "Shocking Facts About North Korea's Sexuality', see online: https://www.youtube.com/watch?v=25h0sE_IK-o.

[2] Sylvain Larocque, "Reconnaissance du mariage gai: quand l'affirmation d'une communauté mène à une révolution juridique" (2008) 16 Bulletin d'histoire politique 3, 56 [translated in English by Sébastien Lafrance].

[3] C.Q.L.R., c. C-12. It was amended to prohibit discrimination based on sexual orientation, making Quebec the first place in the world to go this far.

[4] Sylvain Larocque, *Mariage gai: Les coulisses d'une révolution sociale*, Montréal, Flammarion, 2005, 279 (italics added).

that was punctuated, on the one hand, by considerations linked to the protection of fundamental rights guaranteed by the Constitution (equality, freedom of religion) and, on the other hand, political calculations with ethical and moral overtones."[1]

1. UNITED NATIONS HUMAN RIGHTS COMMITTEE AND SAME-SEX MARRIAGE

The claims for same-sex marriage are generally understood in Canada as a matter of fundamental rights.[2] However, some contend that the possibility of having access to marriage for samesex couples is not a fundamental right. The United Nations Human Rights Committee (hereinafter "HRC') considered that it did not fall under human rights at a certain point in time.[3] For example, in the decision *Joslin v. New Zealand* rendered in 2002, the HRC stated:[4]

Marriage is at present universally understood as open only to individuals of opposite sexes, and is so recognized in the civil law of all other States parties to the Covenant. While in recent years some States parties have instituted forms of official recognition for homosexual relationships, *none of these have been described as marriage or possesses identical legal effect*. As such, the clear understanding of marriage, as underscored by the meaning of article 23, paragraph 2 [of the International Covenant on Civil and Political Rights], is of individuals of opposite sexes.

However, this reality changed quite dramatically after this HRC decision was rendered, i.e., several States, including Canada, extended the possibility for same-sex couples to marry, which marriage then possesses the same legal effects as for heterosexual couples. Therefore, as argued by Roos and Mackay in 2019, "a departure from *Joslin v New Zealand* is more likely to be seen as both legal *and* legitimate – and is thus more likely to occur"[5] at the international level.

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1 Dave Guénette and Patrick Taillon, "La légalisation du mariage pour tous au Canada - À la jonction du fédéralisme canadien et des droits et libertés de la personne" in *Annuaire international de justice constitutionnelle*, 30-2014, 2015, 43. (emphasis and italics added) [translated in English by Sébastien Lafrance].

2 Marie-France Bureau and Kim Désilets, "Du mariage gai à la polygamie: triomphe du droit à l'égalité?" (2011) 89-1 Can. B. Rev. 39, 41.

3 *Ibid.*, 278-279.

4 *Joslin v. New Zealand*, Comm. 902/1999, U.N. Doc. A/57/40, Vol. II (HRC 2002), para 4.11 (italics added).

5 Oscar I. Roos and Anita Mackay, "A Shift in the United Nations Human Rights Committee's Jurisprudence on Marriage Equality? An Analysis of Two Recent Communications from Australia" (February 08, 2019), University of New South Wales Law Journal, Vol. 42, 2019, Deakin Law School Research Paper No. 19-07, 7.

2. CANADA'S HISTORICAL BACKGROUND ON SAME-SEX MARRIAGE

The condemnation of homosexuality in the West lasted for some time, too much time. In 1965, in Canada, George Klippert was arrested following his admission to having had sexual intercourse with four men, for which he was charged with gross indecency. The appeal of his sentence was dismissed by the Court of Appeal for the Northwest Territories, then by the Supreme Court of Canada[1], and Klippert had to spend some time in jail. In that case, "[t]he evidence of the two psychiatrists was to the effect that the appellant was likely to commit further sexual offences of the same kind with other consenting adult males."[2] This gives us the occasion to recall that until 1973 the American Psychiatric Association defined being gay as having a mental illness. Canada had not always been friendly to homosexuality. Between 1959 and 1968, more than nine thousand men and women were investigated for their homosexual activities, and at least 295 people were fired because of that.[3]

The gay and lesbian communities of Canada, after many decades of struggles against a system considered heteronormative, segregationist and discriminating against them, succeeded, in 1969, to obtain from the federal government the abolition of standards condemning all physical relations between persons of the same sex. The removal of homosexual behavior from the criminal code through what is famously known as the Omnibus Bill[4] seemed, at the time, to put an end to the difficulties they faced, but decriminalizing homosexuality neither meant nor guaranteed economic parity between same-sex and heterosexual couples. The rights of gays as citizens were not respected insofar as same-sex unions did not enjoy the same rights as those of heterosexual couples.

A few years later, the limits of decriminalizing homosexuality became evident when many same-sex couples could not benefit from many government programs and services during the AIDS crisis because of their legal status. In more general terms, the legal vacuum surrounding the status of same-sex couples did not allow spouses to benefit from each other in the event of death. The objective of being able to get married was then instrumentalized as a means of protecting and guaranteeing their financial and material assets. Marriage has many advantages, including the possibility for a taxpayer to transfer an asset to his or her spouse upon death or marriage breakdown. The AIDS crisis brought to light the need to change Canadian federal, provincial

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1 *Klippert v. R.*, [1967] S.C.R. 822.

2 *Ibid.*

3 Laura Reidel, "Religious Opposition to Same-Sex Marriage in Canada: Limits to Multiculturalism" (2009) Human Rights Review, 269.

4 Bill C-150,1st Sess., 28th Parl. 1969.

and territorial laws to the new category of same-sex couples. The fight for same-sex marriage then became a quest for the protection of the rights for the partners of these couples. When these couples were neither recognized nor eligible for marriage, they were not protected by legal standards.

3. CANADA'S LEGAL AND JUDICIAL BACKGROUND ON SAME-SEX MARRIAGE

Identifying the principles and values of Canadian society as well as giving the possibility to citizens of Canada to challenge the disadvantages and limitations of the legislation, the *Canadian Charter of Rights and Freedoms*[1] (hereinafter "Charter') played a major role in the cause of same-sex marriage. Several of its articles may and did come into play to argue for its legalization. The legal standards set out in the Charter provide that all Canadian citizens enjoy the same rights and freedoms. Therefore, they should be treated equally in their dealings with state institutions. Section 15(1) of the *Charter* reads, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." It must be specified that section 15 does not expressly provide for sexual orientation as a prohibited ground of discrimination.

At the end of the 1990s, the governments of several Canadian provinces as well as the federal government recognized, in various laws, the rights and benefits of common-law spouses of the same sex on the same basis as partners of the opposite sex. But it was not until 1995, in the case of *Egan v. Canada*, that the Supreme Court of Canada has recognized sexual orientation as a ground of discrimination *analogous* to those enumerated in section 15 of the *Charter*: "Sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being *analogous* to the enumerated grounds."[2] This breakthrough court decision had been made

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982 c. 1 (hereinafter "Charter').

[2] *Egan v. Canada*, [1995] 2 S.C.R. 513, 514 (italics added). It must, however, be noted that the exact same position had been the position of the Ontario Court of Appeal three years before then, in 1992, in its decision *Haig v. Canada*, 1992 CanLII 2787 (ON CA); Christy M Glass and Nancy Kubasek, "The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from Their Northern Neighbor Regarding Same-Sex Marriage Rights" (2008) 15 Mich J Gender & L 143, 148: "In Canada, courts are organized at the provincial lower court and appellate level. While no provincial decision can be binding on another province's authority, all provincial courts are subject to the authority of the Canadian Supreme Court."

possible because the same court had previously decided, six years before, in 1989, in the decision *Andrews v. Law Society of British Columbia*[1], that section 15 does not prohibit all statutory distinctions, but only those based on grounds that are listed in the section or are "analogous" to those that are listed.

Nevertheless, the majority of judges in that decision concluded in *Egan v. Canada* that the "government must be accorded some flexibility in extending social benefits and does not have to be pro-active in recognizing new social relationships,"[2] namely same-sex couples. Some authors also pointed out that "the task of apprehending a wide variety of [types of relationships] appears quite complex."[3] Thus, this should not come as a surprise that in 2002, same-sex marriage was described by one prominent jurist, now judge at the Quebec court of appeal, as not foreseeable to exist shortly.[4]

In 1998, the Supreme Court of Canada ruled in *Vriend v. Alberta*[5] that the legislation of the province of Alberta, which refused to amend its own human rights code to include sexual orientation, was obligated to amend it. Importantly, the court stated in that decision that "[t]he notion of judicial deference to legislative choices should not... be used to completely immunize certain kinds of legislative actions from *Charter* scrutiny."[6] That case was about the firing of an employee of a private religious college because he was gay. That employee could not challenge the college's decision under provincial human rights law in Alberta because the Alberta government explicitly excluded it from its legal instrument protecting human rights.

Since 1999, gay couples have been subject to the same tax obligations as heterosexual couples. Having the same obligations and responsibilities as heterosexual couples, some same-sex couples considered that it should be explored as an argument showing the discrimination they are subject to. For instance, heterosexual couples could get married and then have access to various types of benefits to which gay couples had no access to. Gay marriage would contribute to protecting the civil and economic rights of same-sex couples. This instrumentalization of marriage would then bring it closer to the original principles of marriage, i.e., it was created to protect the most vulnerable members of society.

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1 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

2 *Ibid.*, 572.

3 Bureau and Désilets, *supra* note 7, 54-55 [translated in English by Sébastien Lafrance].

4 Benoît Moore, "L'union homosexuelle et le Code civil du Québec : De l'ignorance à la reconnaissance?" *in* Jean-Louis Baudouin and Patrice Deslauriers (eds.), *Droit à l'égalité et discrimination: Aspects nouveaux*, Cowansville (Qc), Yvon Blais, 2002, 275.

5 [1988] 1 S.C.R. 493.

6 *Ibid.*, para 54.

In the same year, in 1999, the Supreme Court of Canada, now with few new judges, adopted a completely different approach in *M. v. H.* than in the latter case, even though "*Egan*, like [*M. v. H.*], was also concerned with the oppositesex definition of "spouse" in provincial legislation in the context where the appellant was seeking spousal support from her partner after the breakup of their lesbian relationship. However, the similar focus of the two cases is not sufficient to bind the Court to the *Egan* decision."[1] In *M. v. H.*, the Supreme Court extended the protection of homosexual persons against discrimination to couple relationships rather than limiting it to individuals. For the highest court, denying same-sex spouses family rights and obligations was contrary to the *Charter*.

In 2001, the battle for the extension of marriage to same-sex couples was not over, including the battles to be had before the courts. Pitfield J. of the British Columbia Supreme Court in the same-sex marriage case, *Egale Canada Inc. v. Canada*, wrote, relying on an originalist or historical interpretation of the Canadian constitution[2],[3] that he was "persuaded that same-sex relationships do not fall within the meaning of marriage"[4] contained in the Canadian constitution.[5] According to him, the common law definition of marriage was "a legal relationship between two persons of opposite-sex".[6] Although the court had the power to change the common law, such a "change would affect a deep-rooted social and legal institution".[7] He added that because "Parliament cannot amend the meaning of marriage within [the meaning given to it in the Canadian constitution] the relationship will persist as a monogamous, opposite-sex relationship... [t]hat being the nature of marriage for purposes of [the Canadian constitution], differentiation between those who can legally marry and those who cannot..."[8] However, Pitfield J.'s decision was, however, the latest setback suffered by same-sex couples in Canadian courts.

As I previously noted in *The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada*[9], "the interpretation used for the Charter is

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1 *M. v. H.*, [1999] 2 S.C.R. 3, para 75.

2 Guénette and Taillon, *supra* note 5, 46-47.

3 Jason Pierceson, "Same-sex Marriage in Canada and the United States: The Role of Political and Legal Culture" (2014) American Review of Canadian Studies, 44(3), 326: "The norm in Canada is for judges to interpret constitutional provisions in light of social changes. This obviously contrasts with the originalism strain in American conservative jurisprudence."

4 *EGALE Canada Inc. v. Canada (Attorney General)*, 2001 BCSC 1365, para 122.

5 See section 91(26) of the Constitution Act, 1867, 30 & 31 Vict., c. 3.

6 *EGALE Canada Inc. v. Canada (Attorney General)*, *supra* note 26, para 8.

7 *Ibid.*, para 93.

8 *Ibid.*, para 123.

9 Chapter 3 (co-written with Prof. (Dr.) Shruti Bedi) in Salman Khurshid, Lokendra Malik and Yogesh Pratap Singh (eds.), *The Supreme Court and the Constitution - An Indian Discourse*, Wolters Kluwer, 2020, 76-77.

illustrated in the Court's decision in *Reference re Same-Sex Marriage*: "The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a *living tree* which, by way of *progressive* interpretation, accommodates and addresses the realities of modern life."[1] As Lord Sankey L.C. famously stated in *Edwards v. Attorney-General for Canada*, our constitution is "a living tree capable of growth and expansion within its natural limits".[2] In the early Charter case *R. v. Big M Drug Mart Ltd.*, the Court stated, "[t]he interpretation [of the Charter] should be a *generous rather than a legalistic one,* aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection."[3]

In 2003, in the decision *Halpern*[4] of the Ontario Court of Appeal, the court stated, "Denying same-sex couples the right to marry perpetuates the view that they are not capable of forming loving and lasting relationships, and that same-sex relationships are not worthy of the same respect and recognition of opposite-sex relationships." That court concluded that excluding same-sex spouses from civil marriage was contrary to the right to equality and that this treatment was not justified in a democratic society.[5] Two additional important courts of appeal elsewhere in the country came to the same conclusion. The federal government decided not to appeal any of these decisions to the Supreme Court of Canada, confirming *de facto* the legality of marriage for *all*.[6] The federal government decided to go one step ahead by introducing a bill to legalize same-sex marriage across Canada. To ensure the constitutionality of its bill, the federal government is submitting it to the Supreme Court of Canada for study.[7] The

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1 [2004] 3 S.C.R. 698, para 22 (italics added); see also Bradley W. Miller, "Beguiled By Metaphors: The Living Tree and Originalist Constitutional Interpretation in Canada" (2009) 22 Can. J. L. & Jurisprudence 331, 331: "Constitutional interpretation in Canada is dominated by the metaphor of the "living tree"; Benjamin Oliphant and Leonid Sirota, "Has the Supreme Court of Canada Rejected Originalism" (2016) 42 Queen's L.J. 113; Leonardo Pierdominici, "Constitutional Adjudication and the Dimensions of Judicial Activism: Comparative Legal and Institutional Heuristics" (2012) 3 Transnat'l Legal Theory 207, 235; Sébastien Lafrance, "A Brief Overview of Quebec Civil Law and Canadian Constitutional Interpretation in Canada" (2020) Amicus Institute (Australia). Retrieved from:

https://www.amicusinstitute.org/scholarship-series

2 1929 CanLII 438 (UK JCPC), [1930] A.C. 124, 106-107.

3 [1985] 1 S.C.R. 295, para 117 (italics added).

4 *Halpern v. Canada (Attorney general)*, 2003 CanLII 26403 (ON CA).

5 Bureau and Désilets, *supra* note 7, 41.

6 Guénette and Taillon, *supra* note 6, 48.

7 In Canada, section 53 of the *Supreme Court Act*, R.S.C. c. S-26, allows the federal government to refer questions of law or fact to the Supreme Court of Canada. They render an opinion about those, which are, in fact, genuine decisions of the court.

Supreme Court of Canada confirmed its constitutionality in the *Reference re Same-Sex Marriage*.[1] The *Civil Marriage Act*[2] was finally officially sanctioned on July 20, 2005.

4. MULTICULTURALISM AND SAME-SEX MARRIAGE

Canada is "a multiethnic and multicultural country… which accentuates and advertises its modern record of respecting cultural diversity and human rights and of promoting tolerance of religious and ethnic minorities - and is in many ways an example thereof for other societies".[3] Section 27 of the *Charter* provides that "[t] his Charter shall be interpreted in a manner consistent with the preservation of the multicultural heritage of Canadians." In addition, the *Canadian Multiculturalism Act* also recognizes Canada's multicultural heritage and obliges the federal (national) administration to consider, and to favor multiculturalism in its decisions; its preamble also "recognizes the diversity of Canadians… as a fundamental characteristic of Canadian society".[4] The Supreme Court of Canada also confirmed the protection of minorities as one of the four foundational principles of Canadian federalism.[5]

These laudable principles, among which "the concept of multiculturalism has not", for some, "been clearly defined"[6], come "with internal limits, as evidenced by Canada's refusal to accommodate the demands of many religious groups that opposed the legalization of same-sex marriage"[7], but "the right to freedom of religion was still safeguarded by the provision that no religious officials were to be required to perform same-sex marriages if doing so would be an affront to their beliefs."[8]

CONCLUSION

The challenges now posed by non-monogamous unions, non-conjugal unions, trans phenomena, etc., all have the diversity and fragmentation of identities in common.[9] This would now bring along more legal issues to be examined. What should be kept in mind is that "until 1982 the Canadian courts did not have jurisdiction to hear cases related to human or civil rights violations [but] the *Charter* extended the role of the Canadian judiciary [and w]ithout this legislation, Canadian gays and lesbians

1 [2004] 3 S.C.R. 698.

2 S.C. 2005, c. 33.

3 *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, para 87.

4 R.S.C. 1985, c. 24 (4th Supp.).

5 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para 79.

6 Reidel, *supra* note 13, 278.

7 *Ibid.*, 262.

8 *Ibid.*, 263.

9 Bureau and Désilets, *supra* note 7, 59.

would not have had the legal route to sue for equal treatment under the law."[1] Perhaps different countries willing to legalize same-sex marriage may decide, for various reasons, to take different routes than the one taken by Canada, but the author submits that the path it took remains useful not only for the researchers to study, but also, possibly, for those who would like to see such important changes be implemented in their own country.

[1] Glass and Kubasek, *supra* note 16, 162.

SAME-SEX MARRIAGE IN CHINA LAW

Pham Luong Khien[1 2 3]

Abstracts: *In recent years, with the promotion of human rights and the progress of China's society, many homosexuals have chosen to enter social activities bravely and propose their requests for civil legal rights. In China, the fundamental rights of homosexuals, especially legal rights including marriage right, are the most important for them. The legislation on same-sex marriage is still blank and the rights of homosexuals can't be guaranteed. The author believes that China, like the other countries, should face up to the issue of same-sex marriage, respecting and protecting the rights and interests of homosexuals. The paper will focus on introducing The debate over legalizing same-sex marriage in Chinese, including agreeing with the legalization of same-sex marriage and opposition to the legalization of same-sex marriage. The paper also expounds on the need to legalize same-sex marriage in China: social problems caused by the lack of same-sex marriage legislation and legal problems caused by the lack of same-sex marriage legislation. Finally, some ideas about the feasibility of same-sex marriage legislation in China. including issues such as Homosexuality is not a disease, The legalization of same-sex marriage in China is not restricted by religion, The tolerant attitude of the general public, Legalization of same-sex marriage is a need to protect human rights, Same-sex marriage has a precedent in China and current Law, especially civil law in Chinese makes same-sex marriage feasible.*

Keywords: *homosexuals; same-sex marriage, same-sex marriage in China, China law.*

1. THE DEBATE OVER LEGALIZING SAME-SEX MARRIAGE IN CHINESE

With the development of the times and the progress of society, vigorous movements for the legalization of same-sex marriage have been launched worldwide. The homosexual community's desire for marriage and the desire to recognize their same-sex relationship in the law, countries around the world have discussed whether same-sex marriage can be legalized and whether same-sex relationships can be protected and adjusted by law. Different sectors of society have different attitudes towards the legalization of same-sex marriage, whether homosexual couples can be married; whether same-sex marriages are feasible; how to protect the legal rights of homosexual groups, etc. A series of issues have become hot in many fields in recent years. The legality of same-sex marriage is related to the vital interests of the gay

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community and the development and progress of China's legal system. Regarding this issue, the Chinese legal academia has the following views:

1.1. Agree with the legalization of same-sex marriage

Professor Li Yinhe submitted a draft of legislation on same-sex marriage to the National People's Congress on more than one occasion, suggesting same-sex marriage in China. Still, her draft proposal was ultimately not qualified for deliberation[1] due to the small number of signature representatives. Professor Li Yinhe's point of view is very representative: First, homosexual marriage demands do not conflict with legal norms. Homosexuals also have Chinese nationality and are protected by Chinese law. They should have the right to enter into marriage. Second, homosexuality is a minority group and a disadvantaged group in China. Many countries in the world have legislation to protect this group, respecting and protecting the human rights of homosexual groups. If China can legalize same-sex marriage, it is bound to show the world that China values and protect human rights and enhance China's international image. Third, the number of people living with AIDS among homosexual groups, especially gay men, increases because there is no legal regulation of their same-sex relationships. The establishment and dissolution of same-sex partnerships are more arbitrary, increasing the risk of AIDS transmission. Fourth, the legal protection of the homosexual group, a disadvantaged minority group, will help maintain social stability, reduce the public's discrimination and prejudice against the homosexual group, help the harmony and stability of the Chinese society, and increase the society of this group. A sense of identity and belonging. Fifth, the early legalization of same-sex marriage in China can avoid a large number of gay demonstrations like Western countries.

Lawyer Lu Jing believes that freedom of marriage has different meanings in different periods. In slave society, freedom of marriage is hierarchical freedom of marriage. Nobles and common people are not allowed to inter-marry. At present, freedom of marriage is the subject of freely choosing partners for a heterosexual marriage. The freedom of marriage in the future is marriage between people. The conclusion of marriage is between opposite sexes, but same-sex subjects can also enter into marriage freedom.

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[1] 李银河，"2015 李银河再提同性婚姻提案（附提案全文）" <https://site.douban.com/bjlgbtcenter/widget/notes/18221245/note/486796605> 2021 年 11 月 30 日 (Li Yinhe, *2015 Li Yinhe again proposes same-sex marriage proposal (with full text of the proposal)*

<https://site.douban.com/bjlgbtcenter/widget/notes/18221245/note/486796605> accessed November 30, 2021.

Professor Wu Changzhen, an expert on marriage law, also put forward his own point of view. The purpose of marriage is not only for the reproduction of the next generation, but also for the happiness of each other. Based on this, China should revise the "Marriage Law" to make the "Marriage Law" more humane. Rather than exclude homosexuality from the scope of the marriage law. The conditions for prohibiting marriage in the Marriage Law are all formulated for the sake of eugenics. The inability of both parties in a same-sex marriage to have children will not violate the purpose of prohibiting marriage by the Marriage Law. The marriage of same-sex couples will not cause excessive impact and harm to society and will not affect the reproduction of offspring.

In addition, Professor Xu Guodong also adopted an agreeable attitude towards same-sex marriage in the draft "Green Civil Code" compiled by him.In the Civil Code, Professor Xu Guodong no longer defines marriage as a union of the opposite sex but as a union, regardless of sex. Combine with the same sex, and the belief that in today's era of rapid increase in social population pressure, such legislation is conducive to alleviating population pressure.

Through the analysis of the above viewpoints, the author believes that scholars who agree to the legalization of same-sex marriage mainly discuss from the following points:

First, it discusses the legality of same-sex marriage from the perspective of protecting the interests of minorities. At present, in order to protect minorities and special groups, Chinese laws have promulgated a series of laws such as the Law on the Protection of the Rights and Interests of the Disabled and the Law on the Protection of the Rights and Interests of Women and Children. In China, although homosexuals are not common, there are definitely many. Homosexuals should also be classified as a minority group. Since the state can promulgate the "Law on the Protection of the Rights and Interests of the Disabled" in order to protect the minority group of persons with disabilities, "Why can't gay marriage be legalized?"

Secondly, the protection of homosexual health discusses the legalization of same-sex marriage. Scholars who support the legalization of marriage believe that the higher risk of AIDS and other diseases among homosexual groups is mainly because the relationship between same-sex couples is not bound by marriage. If same-sex marriage is legalized, same-sex couples will be bound by the law, controlling the spread of AIDS and other diseases.

Third, it demonstrates the legalization of same-sex marriage by discussing the autonomy of marriage. The so-called marriage autonomy is not a specific personal right such as the right to life, health, reputation. Still, a kind of personal interest,

which is based on the willingness of both parties to the marriage to live together, and the personal interest of the marriage relationship is not subject to marriage autonomy. No one can interferes, no one can force others to enter into marriage with oneself. The content of personal interests includes equality of personality, so the marriage autonomy of Chinese citizens should also be equal. The personal interests of homosexuals are not diminished because they are homosexuals. Therefore, homosexuals as Chinese citizens also enjoy the autonomy of marriage. The specific discussion is that homosexuals have the autonomy to enter into marriage and also have the autonomy to dissolve marriages. Homosexuality will not affect the survival of marriage autonomy in this group. Based on the above-mentioned lawyer Lu Jing's point of view, we can see that the freedom of homosexual marriage will not harm national and social interests. The state should guarantee homosexual marriage autonomy by recognizing same-sex marriage.

Finally, it discusses the feasibility of legalizing same-sex marriage by reducing population pressure. The author believes that the legalization of same-sex marriage can reduce a large number of same-husband or same-wife[1] families. Most homosexuals in China face dual pressure from society and family, and they have to enter into heterosexual marriages and have offspring. This will not only affect the threat of illness and psychological distress from the other side of the marriage to the other party, but also The burden on the population is increased in the house. There are 16 million same-wife or same-husband families in China, and most of these families have children. Scholars believe that the legalization of same-sex marriage can greatly reduce such abnormal families and reduce the pressure on the Chinese population.

1.2. Opposition to the legalization of same-sex marriage

Homosexuality was not uncommon in ancient China. In some Chinese song dynasties, there were even gay emperors, such as the Emperor Ai of Han of the Han Dynasty and Ming Wuzong of the Ming Dynasty. Unlike other emperor symbols, these emperors did not shy away from being gay and evenengaged in homosexual behavior themselves. Therefore, it can be seen that the attitudes towards homosexuality in boosting

[1] Same-wife, the wife of gay men. Around gay men, there is a more vulnerable and secretive group, that is, the same wives. They live on the fringe, suppressed by traditional culture, bear the burden of humiliation for their children, and dare not complain loudly. They are large in number and of different ages. The same wife not only cannot get sexual satisfaction, but also suffers from indifference, indifference and domestic violence, as well as the threat of sexually transmitted diseases and AIDS. The definition of the same-husband is the same as above.

morale between China and Western countries are completely different.[1] However, some scholars of China have put forward their views against same-sex marriage.

Professor Yang Dawen believes: "For thousands of years, the marriage system has been set up for the union of a man and a woman. If the same sex can also be married, marriage is not the current marriage." "I agree to tolerate homosexuality in the law. But why do you want same-sex marriage?"[2] Professor Long Yifei believes that "The Marriage Law will not set separate new rules for same-sex marriages, because the protection of the property rights or personal rights of members of the society is regulated in different laws. For example, two people of the same sex help each other together, the inheritance law stipulates that people other than the statutory heir have performed more duty to care for the decedent and can appropriately receive a part of the property, which solves the inheritance problem. It involves some personal rights and property that are accepted by the public. The protection of rights is stipulated in other laws."[3]

Scholars who oppose the legalization of same-sex marriage mainly based their arguments on the following two reasons. First, denying same-sex marriage from the traditional way of marriage. They believe that the marriage system that has been inherited for thousands of years is a monogamous heterosexual marriage, and this way of forming a couple is deeply ingrained. The author believes that the traditional composition of marriage is not a reason for the law to ignore the demands of homosexual groups. The number of homosexual groups is large, and the law should not ignore their demands for marriage rights. In addition to some laws specifically designed to protect special groups, other laws formulated by the state should protect all citizens' legal rights and interests. It is not disputed that homosexual groups are Chinese citizens. Their demands for marriage rights are reasonable and more legal, not pathological. It's against humanity. Based on this, Chinese legal norms should adjust the marriage relationship between homosexuals, truly realize the purpose of the law, and give full play to the legal mechanism. Secondly, some scholars believe

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1 段涛：《同性婚姻立法》，西南大学 2011 年硕士学位论文，第 29 页 (Tao Duan, *Legislation on Same-Sex Marriage*, Southwest University 2011 Master's Thesis, p. 29).

2 费曦：《同性恋者的婚姻权保护之研究 重点》，2011 年 08 月 09 日。 https://wenku.baidu.com/view/3bf3db6548d7c1c708a1459f.html, 2021 年 11 月 30 日 (FeiXi, *Key Points of Research on the Protection of the Marriage Rights of Homosexuals,* <https://wenku.baidu.com/view/3bf3db6548d7c1c708a1459f.html> accessed November 30, 2021).

3 费曦：《同性恋者的婚姻权保护之研究 重点》，2011 年 08 月 09 日。 https://wenku.baidu.com/view/3bf3db6548d7c1c708a1459f.html，2021 年 11 月 30 日 (FeiXi, *Key Points of Research on the Protection of the Marriage Rights of Homosexuals,* <https://wenku.baidu.com/view/3bf3db6548d7c1c708a1459f.html> accessed November 30, 2021).

that the legality of same-sex marriage does not necessarily require amendments to the "Marriage Law". The current laws and regulations can directly adjust the legal issues that arise in the lives of same-sex couples.

The author believes that this view is completely contrary to the theory of legal interpretation. Legal hermeneutics researchers believe that the expression of legal text should be clear, and the meaning of the text should not exceed the scope of the public's understanding of the meaning contained in the revised text. And the marriage law directly adjusts the homosexual relationship to the marriage law's definition of marriage. Differently, the marriage law defines marriage as both men and women. Men and women cannot be interpreted as two parties of the same sex because men and women are originally two contradictory concepts. If the Marriage Law directly adjusts them, they will inevitably confuse legal concepts.

The process of legalization of same-sex marriage will inevitably be a process of academic discussion. Any kind of legislation will experience the emergence of social issues, academic discussions, and the formation of mainstream views. Legislators will use the mainstream views after formation as a reference and basis for legislation. This is the reason why many experts and scholars in related fields are invited to discuss the legislation of many laws. The opinions of experts and scholars play a crucial role in the success of the legislation. If a certain legal hot issue discussed in the current society forms a mainstream view, then it becomes the possibility of legalization. Unfortunately, most scholars disapproved of the legalization of same-sex marriage in China, and only a few scholars agree with the legalization of same-sex marriage.

2. THE NEED TO LEGALIZE SAME-SEX MARRIAGE IN CHINA

2.1. Social problems caused by the lack of same-sex marriage legislation

In China, the proportion of homosexuals may not be high, but the number of homosexuals is very large. "Based on the total population of 1.4 billion in China, the total population of homosexuals in China is about 40-60 million (the ratio of homosexuals to the total population is very controversial in academic circles, but most scientists agree that the ratio should be 3%-5%)[1]." This data is consistent with Dr. Li Yinhe's speculation that "there are about 39-50 million homosexuals in mainland China"[2]. The number of homosexuals is equivalent to the total population of China's Liaoning Province. There is no law to regulate such a large number of homosexual

[1] 靳惠杰：《同性婚姻立法思考》，中国海洋大学 2014 年硕士学位论文，第 13 页。(Jin Huijie, *Reflections on Same-Sex Marriage Legislation*, 2014 Master Thesis, Ocean University of China, p. 13).

[2] 李银河：《同性恋亚文化》，中国友谊出版公司 2002 年版，第 6 页 (Li Yinhe, *Homosexuality Subculture*, China Friendship Publishing Company 2002 edition, p. 6).

groups in China. They always live on the other side of society, facing the lack of legislation, social discrimination, and family misunderstandings alone. This is bound to produce a series of social problems.

The lack of same-sex marriage legislation has not only led to physical health problems such as AIDS, but also a series of mental health problems for same-sex groups

The reasons are as follows: The lack of legislation on same-sex marriages in contemporary Chinese society has resulted in a lower proportion of legal resources enjoyed by same-sex couples than those of opposite-sex couples. There is no legal regulation for the various problems that same-sex couples have during their lives. They can only solve their problems through peer rights protection organizations and psychological counseling activities, which are often on the level of public welfare. However, heterosexual couples can enjoy more legal resources, which are more helpful to solve their marriage problems. The protection of heterosexual marriages by law is clearer and more straightforward than that of same sex. Legislation for same-sex marriage is vital. The lack of same-sex marriage legislation caused mental health problems for homosexuals and caused mental health problems for those who did not know their partner is actually a homosexual. The psychological impact of this phenomenon on the one side of the marriage will inevitably cause psychological problems for the other side. The lack of same-sex marriage legislation has forced many homosexuals to accept heterosexual marriages, making many heterosexuals unable to enjoy the happy couple life they deserve. If same-sex marriages are legalized, then homosexual groups will not have to bear the pressure of having to marry the opposite sex, which not only can meet the requirements of the marriage for homosexual groups, but also ensure the normalization of the married life for a large part of heterosexual groups.

2.2. Legal problems caused by the lack of same-sex marriage legislation

The legalization of same-sex marriage can solve the problems of judicial practice. According to reports, the Ministry of Civil Affairs of China receives a large number of same-sex marriage applications and same-sex divorce applications every year. Most of these applications will be rejected because there are no relevant laws and regulations for same-sex marriages. This is bound to trigger a lawsuit against the Ministry of Civil Affairs by same-sex groups. In January 2016, Mr. Sun, a gay man from Beijing, was rejected by the Ministry of Civil Affairs because he applied for marriage. Mr. Sun appealed to the Ministry of Civil Affairs. This was the first case in which a gay man in China was fighting for the right to marry and the lawsuit was accepted[1]. Such

[1] 《中国男同性恋争取婚姻权利，首次起诉被受理》，http://learning.sohu.com/20160131/n436448648.shtml (*Chinese gay men fight for marriage rights, first lawsuit accepted*, < http://learning.

cases have already existed in China. As time goes by, as the Chinese gay community strives for the legalization of marriage, such cases are bound to increase further and inevitably occupy a certain share of judicial resources.

In China, the failure to legalize same-sex marriage has also led to a series of legal issues. China's current laws and regulations cannot guarantee property issues during homosexual cohabitation. It is because there is no legal regulation of same-sex cohabitation relations. This has led to many cases of same, sex cohabitation being convicted or not convicted in the same case.

The legalization of same-sex marriage can solve the legal application of foreign-related same-sex marriages. In recent years, the legalization of same-sex marriage has become a legislative trend in countries around the world. Different countries and regions have adopted different legislative models to confirm the legal effect of same-sex marriage. With China's accession to the World Trade Organization, economic and cultural exchanges with other countries in the world have become more frequent, and natural persons have been studying, working, and visiting relatives. China and other countries in the world, in order to maintain their international relations responsibility, have to pay attention to the issue of same-sex marriage.

3. FEASIBILITY OF SAME-SEX MARRIAGE LEGISLATION IN CHINA

3.1. Same-sex marriage should be feasible because homosexuality is not a disease

Same-sex behaviors have been considered criminal behaviors for a long time since the founding of New China, and same-sex marriages was neverlegal during this period. By 1997, China's new "Criminal Law" was implemented and abolished "hooligan crimes." From the perspective of the legal status of homosexual groups in China in different periods, same-sex behaviors have experienced a transformation process from sin to innocence. Same-sex behavior has been decriminalized, so the legal barriers to the legalization of same-sex marriage no longer exist. Should homosexual couples have the same rights as us? On April 20, 2001, the third edition of the "Chinese Mental Disorder Classification and Diagnosis Criteria" removed homosexuality from the list of mental disorders. Although this does not mean that Chinese laws and society recognize the status of homosexuality, it does show that the legalization of same-sex marriage in China is as feasible as abroad.

3.2. The legalization of same-sex marriage in China is not restricted by religion

Homosexuality is clearly stated in the laws of modern Islamic countries

sohu.com/20160131/n436448648.shtml> accessed November 30, 2021.

as illegal. In the Christian countries in Europe and America, the resistance to the legalization of homosexuality does not come from the government but from the denial of homosexuality by the Christian doctrine. Although China insists on freedom of religious belief, thanks to the party's firm belief in atheism, the influence of religion on the thinking of the Chinese people is minimal. Compare Chinese society with European and American countries and Islamic countries, the general public is under no religious doctrinal influence and is more receptive to homosexuality. Some people say that the Chinese people believe in Buddhism more, and religious doctrines also impact the Chinese people. However, Buddhist principles are different from Christian Islam, and Buddhist creeds are completely different from Christianity and Islam. There are no extreme religious thoughts in the teachings of Buddhism. Buddhism often promotes the equality of all living beings and the peace of mind and other moderate religious doctrines. Based on this, it determines Buddhism's highly tolerance attitude towards things, and determines that Buddhism's approach to homosexuality is very different from that of Western countries. In summary, the author believes that it is easier to legalize same-sex marriage without religious restrictions than in other countries.

3.3. The tolerant attitude of the general public makes the legalization of same-sex marriage feasible

The implementation and modification of any law is inseparable from the general public's support, and the legalization of same-sex marriage is no exception. In 2011, a survey on same-sex marriage in Guangzhou says: "53% of Guangzhou people support the legalization of same-sex marriage, 30% say they don't care, and 17% oppose it." In 2011, Danlan.org's[1] survey of attitudes towards same-sex marriage of Chinese college students shows: "When dealing with the social phenomenon of homosexuality, the interviewees are quite tolerant. 18.8% of the interviewees believe that "same-sex marriage should be legalized"; 53.5% of the interviewees said that they are "neutral" "; 20.8% of the respondents think "disagree"; 4.2% of the respondents think "this is an alternative fashion." The survey results show that Chinese college students are more tolerant of homosexuality, and overall Higher than the degree of tolerance for premarital sex and extramarital sex."[2] This shows that the public's attitude towards same-sex marriage in today's society has changed, and the public's attitude towards same-sex marriage has become more tolerant, and the legalization of same-sex marriage is feasible.

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[1] 淡蓝网是中国大陆地区流量最高、最具影响力的同志网站 (Danlan.org is the most influential gay website with the highest traffic in mainland China).

[2] 调查：你所不知的大学同性恋现, https://news.qq.com/a/20120509/000977.htm，2021 年 11 月 30 日 (Survey, *Homosexuality in colleges you don't know about*, <https://news.qq.com/a/20120509/000977.htm>, November 30, 2021).

3.4. Legalization of same-sex marriage is needed to protect human rights

The legalization of same-sex marriage is a need for the protection of human rights. Compared with other citizens, homosexual groups are no different except for their different sexual orientations. The Chinese Constitution stipulates: China protects and respects human rights. "The so-called human rights are the various benefits that people should enjoy and be fully protected and realized in the society in which they live, especially in the country. There are three forms of due rights, legal rights and actual rights."[1] Chinese scholars divide human rights into personal rights, freedom rights, equality rights, democracy rights, labor rights, education rights, and humanitarian rights[2]. These rights are reflected in specific legal norms. Article 49 of the Chinese Constitution stipulates: "It is prohibited to destroy the freedom of marriage." The right to freedom is a concept of human rights, and the right to freedom of marriage is a concept of freedom. The protection of the right to freedom of marriage in the Constitution is the protection of the right to freedom. It is the protection of human rights. And the author believes that the scope of the right to freedom of marriage here is both the right to freedom of heterosexual marriage and the right to freedom of same-sex marriage. Article 2 of China's "Marriage Law" stipulates: "Implement a marriage system with freedom of marriage, monogamy, and equality between men and women." From this regulation, it is not difficult to see that China's "Marriage Law" restricts the freedom of marriage between men and women and excludes same sex couples. This provision in the "Marriage Law" is bound to limit the extension of the constitution's right to freedom of marriage, restrict the freedom of marriage of homosexual couples, and violate the human rights of homosexual groups. Therefore, from the perspective of human rights, the freedom of homosexuality granted by Chinese law has not been truly realized in the "Marriage Law" field, and the loss of freedom protected by the law is not true freedom[3]. Therefore, the legalization of same-sex marriage is needed to protect the human rights of the gay community.

3.5. Same-sex marriage has a precedent in China

"Gay marriages already exist in China. It is reported that in 1990, a pair of gay men in Fujian Province applied for a marriage license, which was approved by the

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[1] 李步云主编：《人权法学》，高等教育出版社，2005 年 2 月第 1 版，第 20-21 页 (Editor-in-Chief Li Buyun, *"Human Rights Law"*, Higher Education Press, 1st edition, February 2005, p. 20-21).

[2] 李步云主编：《人权法学》，高等教育出版社，2005 年 2 月第 1 版，第 4-8 页 (Editor-in-Chief Li Buyun, *"Human Rights Law"*, Higher Education Press, 1st edition, February 2005, p. 4-8).

[3] 原婷婷；《关于同性婚姻立法模式研究》，中国政法大学 2011 年硕士论文，第 11 页 (Yuan Tingting, *Research on the Legislative Model of Same-Sex Marriage*, China University of Political Science and Law 2011 Master Thesis, p. 11).

local newspaper. In 1991, a pair of lesbians in Guangxi Province applied for a marriage license. It was approved by the local newspaper and the central government"[1]. There are same-sex marriages in China, although they were only exceptions. Since there are legal same-sex marriages in China, other same-sex couples should also have the right to marry, and everyone should be equal before the law.

3.6. current Law, especially civil law in Chinese, makes same-sex marriage feasible

"As one of the concepts of civil law, the autonomy of will means that civil subjects can freely form rights and obligations relations with other civil subjects in private law according to their own will within the scope of the law, and are not subject to illegal actions by the state, social organizations, and other individuals. Within the scope of the law, any civil subject can independently decide to participate or not to participate in a private law rights and obligations relationship, and can independently choose the counterparty in the private law rights and obligations relationship in which it participates."[2] According to this Interpretation, the law does not expressly stipulate that it is allowed. In the field of marriage law, it is embodied in the freedom of marriage. The Chinese Marriage Law stipulates that everyone has the freedom to marry and divorce except for situations where marriage is prohibited by law. Article 7 of the "Chinese Marriage Law" also stipulates: "Marriage is prohibited under any of the following circumstances: (1) direct blood relatives and collateral blood relatives within three generations (2) suffering from diseases that medically impact marriage." Although the "Marriage Law" does not provide specific provisions for diseases that should not be married, according to Article 9 of the "China Maternal and Child Health Law", it should include designated infectious diseases (AIDS, gonorrhea, syphilis, etc.), mental illness, and serious illnesses such as Hereditary diseases. Obviously, homosexuality does not belong to the prohibited categories of marriage in Chinese law, so homosexual marriage is in line with the principle of autonomy of will. Based on this, the author believes that it is legal for homosexuals to enter into marriages. The previous chapter mentioned that there is a precedent for homosexual marriages in China.

Personal right refers to the inherent right that is exclusively enjoyed by civil subjects, with personal interests as the object and is necessary to maintain the

[1] 李银河：《同性恋亚文化》，内蒙古大学出版社，2009年11月，第403页(LiYinhe,*Homosexuality Subculture*, Inner Mongolia University Press, November 2009, p. 403).

[2] 顾肖荣：《民法的理念与运作》，上海人民出版社 2005 年版，第 105 页 (Gu Xiaorong, *The Concept and Operation of Civil Law*, Shanghai People's Publishing House, 2005 edition, p. 105).

independent personality of civil subjects.[12] The generation of personal rights has a long history. It is impossible to verify who first proposed it. Nowadays, it is generally believed that personal rights first appeared in modern times. Personal rights are human rights enjoyed by natural persons and legal persons from birth (production). In addition to this definition, personal rights also embody civil law's basic spirit and principles. Among them, the focus of equality is incorporated in the rights of personality that all subjects enjoy equal rights. Personal rights. Article 3 of China's "General Principles of Civil Law" stipulates: "The parties have equal status in civil activities," which refers to the principle of equality. As an independent subject, civil entities exercise power and perform obligations equally. No one has privileges in the field of civil law and no one can exercise power without interference from others. This principle is manifested in personal rights as no one shall arbitrarily deprive others of the personal rights enjoyed by civil law. "Personal equality" means that the law equally protects the personal rights of any subject. In the application of the law, except for special circumstances stipulated by the law, the personalrights of any subject shall not be arbitrarily derogated.[3] In the 1950s, the "Declaration of Human Rights" was formulated, in which Article 1 stipulates that natural human rights are born equal, and the law protects human rights equally, and no one may discriminate against others because of their race. Based on the above point of view, homosexuality does not belong to any law-provided personal-rights derogation situation, and the basic principle of personal equality should be used.

As a basic principle of the personal rights law, personal equality is manifested as: the law does not ask about birth, the subject condition of any person does not negate the premise of equal application of personal rights, and differences in religion, education, social status, race, nationality, etc. cannot balance personality and equality. Based on the above point of view, homosexuals are the same as heterosexuals in other respects except for their differences in sexual orientation compared to heterosexuals. Personal equality is fully applicable to homosexuals. Homosexuals should enjoy equal legal personal rights like other civil subjects. This is the most basic requirement for subjects.

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1 杨立新：《人格权法专论》，高等教育出版社 2005 年版，第 25 页 (Yang Lixin, *On the Law of Personality Rights*, Higher Education Press,

2 edition, p. 25).

3 顾肖荣：《民法的理念与运作》，上海人民出版社 2005 年版，第 99 页 (Gu Xiaorong, *The Concept and Operation of Civil Law*, Shanghai People's Publishing House, 2005 edition, p. 99).

MARRIAGE FOR INDONESIAN SAME-SEX COUPLES IN FRANCE

Dr. Wisnu Adihartono[1]

Abstract: *In 2013, same-sex marriage became legal in France. The Government believes that opening up marriage to all couples demonstrates society's respect for all individuals, regardless of their sexuality, making our society fairer and more inclusive for all its members. The number of Indonesian gays who migrated to Paris has also opened their eyes to same-sex marriage. Still, they maintain their love relationship with their partner without marriage ties. Most of them live in Paris with a French partner without getting married. This example is not to blame for those who choose to be same-sex couples, but some legal rules can be handy for those who carry out same-sex marriage. This research will look at how same-sex marriage is defined by Indonesian gays who live in Paris. It is fascinating because most of them said that taking care of their husband, wife, or children makes them dizzy. This study will use qualitative research. The informants who will be interviewed will only be around five people and will use their narratives as the final results.*

INTRODUCTION

Same-sex couples can have stable, committed, satisfying relationships in every healthy long-term intimate relationship. Whether same-sex or different-sex, partners need to develop good relationships skills and social support. Same-sex and different-sex couples' relationships are more alike than different. Unlike different-sex couples, same-sex couples face stigma, prejudice, and discrimination because of their same-sex attraction, their relationships, and the families they create. They still do not enjoy the same access to social and institutional support for their relationship that different-sex couples often take for granted. These challenges, taken together, can cause a lot of stress. Same-sex couples are a very diverse group of individuals with endless combinations of complex intersecting identities. Most same-sex couples experience some form of minority stress. Minority stress includes experiences of prejudice or discrimination, anticipation, fear of rejection, decisions about when to conceal or disclose the identity, negative feelings internalized about the essence, and efforts to cope with the stress that stigma creates. Prejudice based on stigma can be expressed in subtle and blatant forms, making it difficult for couples to recognize and label these stressors. Sometimes couples do not realize the impact of these stressors until one or both partners begin to experience psychological or physical health symptoms.

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Stigma is perpetuated by a culture that supports different-sex couples while devaluing or excluding same-sex couples from these same support systems. In other countries, people grow up in a social system that promotes heterosexual privilege, which is the unquestioned acceptance of heterosexuality as usual, natural, and expected. Heterosexism teaches people that same-sex relationships are inferior to different-sex relationships and creates policies and stereotypes that support this belief. Minority stress, as experienced by same-sex couples (and people who identify as LGBTIQ+), results from living in a heterosexist society that privileges heterosexual identity and devalues non-heterosexual identities.

Same-sex couples can benefit enormously from learning how to recognize and positively cope with minority stress. Creating a positive identity as a same-sex couple involves actively thinking about social expectations and reimagining the lives in new, creative ways. Doing so can help same-sex couples to replace negative ideas with positive ones. Teams need to practice prizing their relationship and asserting appropriate boundaries when others devalue them. They also need to learn ways to trust their partners in the face of life's challenges. Same-sex couples can build enduring and satisfying relationships by recognizing and reframing minority stress experiences as opportunities for enhancing their relationship skills, building their social support networks, and taking positive action. A satisfying relationship is good for mental and physical health. A strong, loving relationship makes them more confident, more resilient, and better able to cope with life's challenges. Solidifying a loving partnership can make a positive difference in couple members' physical and psychological health and well-being. To do this, it needs the appropriate resources, tools, and skills to nurture the relationship. Talking to each other about the experiences and how they impact the relationship can enhance intimacy and keep strongly aligned as they collaborate to create a meaningful and joyful life together.

In 2013, same-sex marriage became legal in France. The Government believes that opening up marriage to all couples demonstrates society's respect for all individuals, regardless of their sexuality, making our society fairer and more inclusive for all its members. The number of Indonesian gays who migrated to Paris has also opened their eyes to same-sex marriage. Still, they maintain their love relationship with their partner without marriage ties. This example is not to blame for those who choose to be same-sex couples, but some legal rules can be handy for those who carry out same-sex marriage. This research will look at how same-sex marriage is defined by Indonesian gays who live in Paris and how they deal with stress when others find out that they are just tying the knot without getting married. It is exciting because most of them said that taking care of their husband, wife, or children takes them dizzy.

METHOD

This little research was held from February to May 2013, with only five participants. This research is for the doctoral degree from 2010 to 2015 on migration and family relations for Indonesian gays at Ecole des Hautes Etudes en Sciences Sociales (EHESS). While writing my dissertation, I was intrigued to find out how Indonesian same-sex couples, in this case, gays, who have lived in Paris for a long time, define and interpret the same-sex marriage policy. This research was based on informal qualitative interviews with only five Indonesian gay individuals. I gave my interviewees the choice to be interviewed together or separately with their partners. They said that it was better to interview them alone without their partners. At that time, my interviewees were between 35 and 45 years of age, and some of them had been together for as long as ten years. Because this research was not included in the dissertation chapter, the narrations that come out will be slightly censored because we had a conversation with rather "dirty" words. I follow where they go to conduct these interviews, such as to a shopping center, restaurant, or coffee shop. The following are the names of the participants and their ages. All the terms used in this paper are pseudonyms, and although periods are included, any references which might compromise anonymity have been removed.

Name of participants	Age
Andi	35
Hartono	40
Herman	45
Michael	40
Handi	41

Due to the very dynamic nature of this research, as I said before, qualitative research methods will be used as a framework. Within each topic, the author is free to lead the conversation by asking questions and clarifying if the answers are not clear (Corbetta, 2003). In this form, the participants have a lot of freedom to answer questions. In a nutshell, qualitative research focuses on acquiring detailed and intimate information about a small group of people to learn how and why actors behave rather than focusing on what people do or think on a large scale (Ambert, Adler, Adler & Detzner, 1995). On the other hand, the author also used the literature research method. This method can be explained as the technique used to classify, study, interpret and identify the limitation of physical sources. May (2001) added that this method tells us about additional information when we were not yet born or were not present. The results of this research are given in the form of narratives or stories from the main participants.

INDONESIAN SAME-SEX COUPLES IN FRANCE

Interpreting Same-sex Couples

Social norms and legal conditions affect how we live our lives. Psychologists document how social stigma directed toward LGBT people can be insidious and damage their health and wellbeing (Meyer, 2003). It can also affect how they form relationships and families. Is this because same-sex couple relationships differ from different-sex relationships in ways that lead to instability? Recent research suggests that the social and legal climate may explain a great deal about why same-sex couples behave differently from different-sex couples in terms of relationship formation and stability. As society has begun to treat same-sex couples more like different-sex couples, the differences between the two groups have narrowed. The social and legal climate for LGBT people also affects how they form families and become parents. In an environment of social stigma, LGBT people can feel pressure to hide their identities and have relationships with different-sex partners. Not surprisingly, some of those relationships produce children. Today, most children raised by same-sex couples were born to different-sex parents, one of whom is now in a same-sex relationship. This pattern is changing, but in ways that may seem counterintuitive. The legal and political debates about allowing same-sex couples tend to focus on two big themes that can be seen even in the earliest attempts to garner legal recognition of same-sex marriages. These two themes pit arguments about the inherent and traditional relationship between marriage and procreation (including the suitability of same-sex couples as parents) against opinions about the degree to which opposition to legal recognition of same-sex relationships is rooted in irrational hatred and discrimination toward same-sex couples or lesbian, gay and bisexual. Take the following quotations on the subject of interpretation of same-sex couples as examples of this practice:

Andi (35): I think being a same-sex couple is no different than if we have to get married, especially if we live in Europe, in this case, France. French society doesn't care whether we want to be same-sex couples or not. It's all the same. After all, our lives here are the same, there is no difference, and I think it would be better if we became same-sex couples. We are both people who have an open partner relationship which means we have other partners too. If we are bored with our single partners, we can have sex with our other partners. In other words, we can do three-some or even four-some. The sensation will be different if we do three-some or four-some. Of course, we use condoms to avoid things we don't want [while laughing happily].

Hartono (40): For me, I feel happy being same-sex couples, especially since I live in France. We didn't feel any difference. We can still travel together or eat together

anywhere as long as we are in Europe. To hell with people who say that being same-sex couples is not happy. We are happy. I don't like people who say it's not normal. What criteria do they say it's not normal? I don't know. That's why we feel there is no difference.

Interpreting Same-sex Marriage

Legalizing same-sex marriage represents a critical step toward advancing equal rights for sexual and gender minorities. Over the past two decades, same-sex marriage has become legally recognized in multiple countries worldwide (Drabble, Wootton, Veldhuis, Riggle, Rostosky, Lannutti, Balsam, Hughes, 2021). The purpose of marriage, as a form of heavily obligated cohabitation, may well be to protect the economically weaker cohabitant from a state of exploitation that would reflect opportunistic behavior emanating from an asymmetry in the life cycle of men compared with women (Dnes, 2007). This theory of marriage is associated with Cohen (1987, 2002), who has made an influential argument that the equivalent of contract (expectations) damages should be awarded to the fault-free party in a divorce to avoid encouraging opportunistic divorce. The theory regards the defining aspects of marriage as the rules governing divorce and post-dissolution obligations. National laws or policies that extend equal marriage rights to same-sex couples signal a reduction in structural stigma and potentially impact the health and wellbeing of sexual minorities positively. Structural stigma refers to norms and policies on societal, institutional, and cultural levels that negatively impact the opportunities, access, and wellbeing of a particular group (Hatzenbuehler and Link, 2014). Forms of the structural stigma that affect sexual minorities reflect and reinforce the social stigma against non-heterosexual people that occurs at the individual, interpersonal, and community levels (Herek, 2009). Marriage is a fundamental institution across societies, and access to the right to marry can reduce sexual-minority stigma by integrating sexual minority people more fully into society (Herdt and Kertzner, 2006). Same-sex marriage also provides access to a wide range of tangible benefits and social opportunities associated with marriage (Lannutti, 2014). Despite the benefits of marriage rights, sexual minorities continue to experience stigma-related stressors, such as rejection from family or community and discrimination in employment and other life spheres (Drabble, Wootton, Veldhuis, Perry, Riggle, Trocki, et al., 2020). In addition, reactions to same-sex marriage appear to differ among sexual minorities and range from positive to ambivalent (Lannutti, 2011; Ocobock, 2018). Although the legalization of same-sex marriage represents a positive shift in the social and political landscape, the negative impact of social stigma may persist over time. Regarding the interpretation of same-sex marriage, it is clear how the opinions of one respondent disagreed with the statements previously mentioned.

Herman (45): I agree with your statement that gay groups are constantly discriminated against, but I do not agree with your account that discredits same-sex couples. I do a same-sex couple and have been walking for almost six years. I live happily in France. No one has ever denied us. Even my partner colleagues also see us as same-sex couples. We don't want to get married because we enjoy it. What's wrong if we choose to be same-sex couples?

RAISING SAME-SEX MARRIAGE FOR INDONESIAN SAME-SEX COUPLES IN FRANCE

The Meaning of Marriage

State recognition of same-sex relationships, whether through marriage, civil unions, de facto schemes, or other official relationship recognition forms, has become increasingly common globally (Paternotte and Kollman, 2013). Scholars posit three explanations for same-sex couples' decisions to formalize their relationships: differences in the benefits that attach to formal relationship recognition; differences in the rate of parenthood between male and female couples; the structure and provisions of the social safety net (Bernstein, Naples, and Harvey, 2016). In addition to its symbolic value, the material benefits of the marital contract generally encompass three main areas: (i) laws that build on assumed emotional relationships between spouses, such as the ability to make financial and medical decisions for one's partner should they become incapacitated; (ii) regulation of the financial relationship between married people and the state, such as taxes, social security, student stipends, or child benefits; and (iii) assumptions about paternity and parental status, regulations addressing parenting, such as custody, visitation, and child support (Bernstein, Naples and Harvey, 2013; Chambers, 2001). But at the heart of same-sex marriage are three crucial questions: What is marriage, why does marriage matter for public policy, and what would be the consequences of redefining marriage to exclude sexual complementarity? (Anderson, 2013). The government recognizes marriage because it is an institution that benefits society so that no other relationship does. Marriage is society's least restrictive means of ensuring the well-being of children. While respecting everyone's liberty, the government rightly recognizes, protects, and promotes marriage as the ideal institution for childbearing and childrearing. Promoting marriage does not ban any type of relationship: Adults are free to make choices about their relationships, and they do not need government sanctions or license to do so (Anderson, 2013). Marriage connects people and goods that otherwise tend to fragment. It helps to associate with love. Marriage is a uniquely comprehensive union. It involves the collaboration of hearts and minds, and distinctively, a bodily union made possible by sexual complementarity. As the act by which a husband and wife (or a husband and

husband or a wife and wife) make marital love also makes new life, marriage itself is inherently extended and enriched by family life and calls for the all-encompassing commitment that is permanent and exclusive. In short, marriage unites a man and a woman (a man and a man, a wife, and a wife) holistically, emotionally and bodily, in acts of conjugal love and in the children such love brings forth, for the whole of life (Anderson, 2013; Girgis, Anderson, and George, 2012). The meaning of this marriage was then responded by one of my respondents,

Michael (40): I agree with your opinion about the concept of marriage. Marriage can strengthen the bond of love between two people. With marriage, we can get what we want, such as child rights, and so on. But I don't want to get married for me [with a chuckle]. I am satisfied with my life like this. I have a partner who can be handsome and has a good job. A few years ago, I asked him if we would get married, and he said why to get married when the state and society can accept us. He also said to hell with what people say about marriage. If you just get married, you can quickly get divorced. Why get married? For him, divorce is an affair. Once we have an experience, then the divorce will occur. And he didn't want that to happen to our relationship. We are happy with this relationship. We can do what we want. We can also three-some or four-some with other people, of course using condoms [while laughing out loud and lighting a cigarette].

Religion versus Same-sex Marriage

Religious intensity and commitment can be manifested in several ways. Religiosity involves several elements or facets of one's life, and there are multiple aspects of what the term or concept conveys (Ellison, Gay, and Glass, 1989; Glock and Stark, 1965). The literature examining the relationship between religiosity and social attitudes and behaviors has a long history in social science research. Personal identity with a religious tradition, denomination, or family of denominations reinforces personal outlooks of what is viewed as acceptable or unacceptable behavior (Gay, Lynxwiler, and Smith, 2015). Identity with a religious tradition likely affects attitudes toward same-sex marriage and may vary by birth cohort. In this research, all respondents are Muslim. Thus, I will only discuss how Islam acts and sees sexuality and homosexuality. Muslims are connected by their common Islamic faith, heritage, and belief in: one God; angels; God's revealed books; prophets through whom God's revelations were brought to the humanity of judgment; individual accountability for actions; God's complete authority over human destiny; and, life after death (Rassool, 2003). Muslims view the Qur'an as a record of the exact words, revealed by God through the Angel Gabriel, to the Prophet Muhammad and on to the people (Ibrahim and Songwathana, 2008). Thus, the Qur'an serves as the prime source of every Muslim's faith and

life practices. Islam is a religion that incorporates approaches and guidelines whole complete way of life and is reflected in Muslim cultural beliefs and practices. The five pillars of Islam include faith (*Sahadah*), prayers (*Shalat*), concerns for the needy (*Zakat*), self-purification (fasting), and pilgrimage, by those who are able, to Makah (Ibrahim and Songwathana, 2008). In a Muslim's world, Islam defines the culture, and culture gives meaning to every aspect of an individual's life, including his/their saviors, perceptions, emotions, language, family structure, diet, dress, body image, concepts of space and time, and attitudes towards health and illnesses. Islam views marriage as sacred and family as the foundation of society, which provides stability and security to individuals and families. Homosexuality is condemned and considered sinful and punishable by Allah. Muslim couples are encouraged to have children, sex outside of marriage is discouraged, and contraception and family planning are allowed. Regarding this, there is one respondent of mine, who reacts rather strongly about the teachings of Islam even though he is a Muslim,

Handi (41): I am Muslim, but I am a liberal Muslim. When I was in Jakarta, I strictly adhered to the teachings of Islam because I did not know that Islam strictly forbids homosexuality. I worship, fast and sometimes I also pay *zakat*. When I studied at a university in Jakarta, I noticed a strange thing: I liked men more than women. I don't know where that desire came from. Maybe it was when I was little or when I was growing up. I don't know. I attended many lectures, and until one day, I heard that Islam forbids homosexuality. Hasn't homosexuality been there from the beginning? I read several books about my religion and homosexuality, and sure enough, my religion forbids it. Once I met one of the old preachers, he said that Islam is not what we imagine. Islam is permissive towards such things.

Then I asked a rather sensitive question about same-sex marriage, and I was surprised and amazed by the answer from the preacher. He replied that I wanted to be anything. I am the one who has to live it as long as I don't forget to pray five times a day, diligently fast, and if I can still pay *zakat*. I then thought that the religion I follow is a very permissive religion, not like what people imagine. Then I asked again if I sinned if I only did same-sex couples instead of same-sex marriage. The preacher just smiled at me and said that running same-sex couples was what I wanted. What I can't get out of my head is that he always advises me to worship because he said later up there when I was resurrected, the first thing that my Lord asked was how your worship was.

The Impact of Parenthood

Every child with homosexual guardians has lost at least one biological parent. The loss of a parent is universally regarded as a great misfortune. If the child has one

biological parent, the other adult is a step-parent. In fables, step-parents are typically hostile to their stepchildren. Homosexual couples with children often experience competition or jealousy over parenting, and the children often have a preference for or "primary bond" with one parent. If one is the child's biological parent, it would be natural for the child to identify the other as secondary or not an actual (Dent, 2011). The child with homosexual custodians has lost both parents. Adoption can be a great blessing for children whose parents are unable or unwilling to care for them, but even adoption by a traditional married couple is not equal to the biological family. If same-sex couples are just as good as birth, they must be better than conventional couples as adoptive parents. Adopted children often crave knowledge of and contact with their birth parents (Fagan, 2010). In effect, these children assert the natural importance of blood ties and the human right to access their biological parents.

Regarding the impact of parenthood, two of my respondents said, Herman (45): Getting married is suitable for living together forever, but I don't like children, neither do my partners. You can imagine that after we took care of all the marriage administration, we had to take care of the administration to adopt children. It's at least very inconvenient for us since we both work here. We don't have time to deal with that. I am old, but I still have great jealousy. My partner is already 50 years old. We are five years apart. But we both still have feelings of jealousy that are so great. How can we take care of the children if jealousy is still in use? I also feel sorry for the child because he will be confused later. After all, both parents are male. So we should choose to do same-sex couples instead of same-sex marriage.

Handi (41): Incidentally, we do not like it when we adopt a child. We both love children very much, they are cute, but we decided to give love only to our nieces and nephews, not to adopted children. We are comfortable here. We could even have sex every day [while laughing out loud]. If there are children, we will be disturbed when we have sex [laughs out loud again]. Don't tell anyone that we are a hyper-sex couple [laughs aloud]. That's why we prefer to be same-sex couples instead of being attached to same-sex marriage [smiles]. So we are proud to be same-sex couples. We are same-sex couples, and we are not doing same-sex marriage.

The three sections above, the meaning of marriage, religion versus same-sex marriage, and the impact of parenthood, illustrate that the awareness of Indonesian same-sex couples is still deficient in carrying out same-sex marriage. In fact, in Indonesia, they cannot do same-sex couples. All parties vehemently oppose same-sex couples in Indonesia. Even same-sex couples are considered an immoral act. This reality happens not only to homosexual couples but also to heterosexual couples.

Marriage is considered very sacred, but the marriage must be done by a heterosexual couple, not a homosexual couple. Even though homosexual culture in Indonesia has existed for thousands of years, since 1965 with the bloody events carried out by the Indonesian Communist Party, the Indonesian government banned homosexuality on the assumption that being gay (lesbian or transgender) is something that is considered despicable, full of sin and has no religion or atheism.

CONCLUSION

Being a person who has a different sexual orientation or is homosexual is very difficult in Indonesia. The feeling of being discriminated against and even criminalized is very feared by homosexual groups. Therefore, they migrate to countries that are least able to tolerate their existence. However, most do not do same-sex marriage, but they only do same-sex couples with their partners. Their awareness to do same-sex marriage is still very lacking even though doing thee-sex marriage is highly recommended to improve their lives. By conducting same-sex marriage, they can claim what they need and adopt children according to the country's policies they live in. It is not a mistake to read their opinions and experiences from the three sections above. In the meaning of marriage, we can find that marriage is a choice between both parties. Michael and his partner don't want to get married because their free life can be disrupted by getting married. Michael states that they can still do three-some or even four-some with other people. It is essential that Michael underlined the issue of divorce. Michael and his partner presuppose a divorce with infidelity. The section on religion versus same-sex marriage also clarifies how Handi responded to these two things. Handi considers that the position of Islam as a religion can be said to be permissive.

Islam does not discriminate against people who have different sexual orientations. The most important thing for Handi is that even though he is gay and lives in France, he still performs the five daily prayers, fasts, and pays zakat. He believed that God would not torture him after God called him because he had done what his religion required him to do. The impact of parenthood section explains that they do not want their private life to be disturbed just because of a child. Herman and his partner had excessive jealousy. Thus, they decided to have same-sex couples instead of same-sex marriage, resulting in divorce.

Meanwhile, Handi admitted that he and his partner had hyper sex, stated that they liked children, but they only expressed their affection for their nieces and nephews. At the beginning of this paper, namely the interpretation of same-sex couples and same-sex marriage, I also found fascinating responses from Andi, Hartono, and Herman. They said that they were pleased with their current state. Even though they are doing same-sex couples, they feel no one discriminates against them. To conclude this paper,

it can be said that same-sex marriage is not something that must be done by Indonesian gays who have migrated to France because by doing same-sex couples, they feel that they can do everything good for both of them.

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SAME-SEX MARRIAGE FROM THE PERSPECTIVE OF TRADITION, MORALITY, AND LAW IN VIETNAM

Hoang Thi Thu Thuy

Abstract: *The marriage between two same-sex people is a hotly contested issue between supporters and opponents, sometimes causing profound social segregation. Supporters of same-sex marriage argue that legalizing this type of marriage ensures human rights equality between sexual orientations and reduces discrimination in society. Opponents of same-sex marriage raise concerns about tradition, morality, broken traditional family models, etc. Countries and territories worldwide have different religious characteristics, cultural, political, and social awareness levels of people, so they also take different steps to legalize same-sex marriage. Thus how does Vietnamese law approach and regulate this issue? According to the Vietnamese Law on Marriage and Family provisions, the law neither prohibited nor recognized same-sex marriage. However, along with the social development, the issues of same-sex marriage have had a great change in the perception and practice of modern social life. With that in signification, the article's content analyzes legal aspects of the marriage between two people of the same-sex, thereby giving some orientations to improve the Vietnamese law on this issue in the current context of integration and development. With that meaning, the article's content analyzes the effects of traditional and moral factors on the legal aspect of marriage between people having the same sex, thereby giving some suggestions to improve the Vietnamese law on this issue.*

In Vietnam, marriage is defined as the combination of two individuals of two different sexes through certain steps with certain rituals to establish a family, perform the main functions of reproduction, educate children, and economic production. Marriage is usually the combination of individuals in terms of emotional, social, religious ... legally between husband and wife. Same-sex marriage is defined as a marriage between two people of the same biological sex. Same-sex marriage is also known as "marriage equality," the term most commonly used by advocates.

Keywords: Sam-Sex marriage, tradition, morality, law, Vietnam.

1. THE RELATIONSHIP BETWEEN TRADITION, MORALITY AND LAW IN SAME-SEX MARRIAGE

From the traditional perspective, it can be said that many people still have an apprehensive view of same-sex marriage because it is not part of an old habit, an old routine that human society is used to, so called tradition, culture. However, it can be seen that customs also move and develop over time. There have been many legal issues that preceded custom, like monogamy or women's equal rights. Tradition is created by people to serve people, not to bind and control people. Giving rights to others does not mean taking away your rights. Legislation opens up equal opportunities to more people, which leads to a happier society. No one can infringe on anyone's rights. Homosexual people are not strangers but can be our descendants or siblings, relatives,

neighbors, friends, colleagues. Like anyone else, they work and contribute to society but suffer from many disadvantages and prejudices. Whoever you are, you have the right to be yourself and be with the people you love.

Morality or moral standards are the system of rules and requirements for human social behavior, which establishes common views and concepts about justice and injustice, good and evil, about conscience, honor, responsibility, and other categories of society's moral and spiritual life. Morality is the spiritual foundation for legal regulations to be formulated and implemented. In many cases, subjects in society comply with some legal provisions not because they know and understand the law, but because they come from moral rules. However, in the process of applying law and morality to social life, conflicts and differences will inevitably arise. In general, there are no profound contradictions between law and morality. They both share the same goal of protecting good behaviors, eliminating bad views and acts, and defining the right order and harmonizing the common interests of society. In terms of human factors, morality is the field with strong compassion and humanity.

Meanwhile, although progressive law considers people as the center, the law is still responsible for regulating the social order, so sometimes it does not fully meet the moral demand of people. Therefore, some behaviors are considered to be moral violations but not against the law, but breaking the law is often an moral violation because the law is built on the foundation of morality and the law is the protection of moral values. After all, a humane and civilized society must ensure that all its citizens are equal in all respects.

In many people's opinion, it is unusual for two people of the same sex to marry each other. Still, if one recognizes that everyone has the right to pursue happiness, which is a legitimate happiness, comes from sincere love, it will not be difficult to answer whether same-sex marriage is reasonable or not. Allowing same-sex couples to get married does not jeopardize the legitimate rights and interests of others. On the contrary, it brings happiness and protection to same-sex people, affirming that they are a normal part of natural and inseparable of the society. The recognition of same-sex marriage will also help the relationship of same-sex people become more cohesive and responsible. As long as the law has not recognized them, they will still feel anxious, worried and vulnerable when living together, because they are not legally bound together. Equally important, the recognition of the law also has a profound spiritual meaning, demonstrating that society respects the dignity of every human being equally and protects the legitimate interests of all citizens. That is also equality. If Everyone in society has the same obligations, they must have the same rights. Marriage is not the prerogative of any group of people, everyone has the right to marry as long as it is voluntary and does not affect the rights of others.

2. SOCIETY'S PERSPECTIVE ON THIS ISSUE

In Vietnam, legislators, researchers, social activists, doctors, lawyers... are arguing and giving opinions on whether to support the recognition of same-sex marriage in the Law on Marriage and Family. Specifically, there are many current views on marriage between people of the same sex, but in general, there are two main opposing views and each has its own arguments to defend.

The point of view in favor of legalizing same-sex marriage is that legalizing same-sex marriage shows equality and fairness among individuals in society. From the human perspective, people of the same sex have the same right to marry and to pursue happiness as everyone else. Because the law is designed to protect human values, it is not possible to deny their human rights because of differences in sexual orientation. It would be easy if everyone were born with similar physical and psychological development. Marriage is the goal for many people, and so is for people of the same sex. The legalization of samesex marriage shows the progress of the majority of people in society in recognizing, evaluating, sharing and empathizing with the people around them. It must be affirmed that, at present, Vietnamese society has a much more open view towards homosexuals. The proof is that now, same-sex people no longer have to hide their sexual orientation, they live openly as a community and have their own groups. The desire for recognition has come true. They are free to love, free to live true to their sexual orientation.

In recent years, Vietnam has also had activities and campaigns to call for support for same-sex marriage, typically the "I Do" campaign. Launched in 2013, this online campaign, jointly implemented by groups, organizations and individuals supporting same-sex marriage, received great support in the community and made a remarkable presentation before the National Assembly of Congress XIII, paving the way for important changes related to the amendment of the law for the LGBT community in Vietnam. After the "I Do" campaign in 2013, the Ministry of Justice amended the Law on Marriage and Family to be more open, changing same-sex marriage from "forbidden" to "not recognized" in 2014.

The campaign's initial success proved one thing: everyone's strong desire for an equal and non-discriminatory Vietnamese society, thereby upholding the diversity of lifeand living. For the same purpose, the "I Do" campaign continues to move to the next phase in 2020 - 2025.

However, in reality, under the pressure of traditional culture and morality, the LGBT community has still been suffering from many stigmas and discriminations from family and society about their sexual orientation, as sharing about their feelings and true sexual orientation is still very difficult.

According to the results of the national survey on: "Social attitudes towards same-sex marriage", conducted by the Institute of Sociology (Vietnam Academy of Social Sciences) and the Institute of Social Research, Economics and Public Environment, announced on March 26, 2014, Vietnam has about 1.6 million gay, bisexual and transgender people, aged 15-59, accounting for about 3-5% of the population. The legalization of same-sex marriage is 33.7% support, 66% oppose. In recognition of the right to live together as spouse between people of the same sex, the number of supporters is 41.2%. This shows that the opposition to same-sex marriage is still a significant figure in society.

The opposing view also argues that, in addition to love, marriage also carries an important mission of maintaining the population. Same-sex marriage will not fulfill this traditional mission. From the moral perspective, accepting same-sex marriage also risks affecting the younger generation. Because of the reality in society, there are many cases where many young people think they are homosexual. And young people always want to show themselves as people of the era, if young people who are wondering about that gender all follow the same sexual orientation, it will lead to gender deviation. In fact, the gay couples who have openly held weddings in Vietnam are in their nineteen and twenty years of age. Who can be sure it's not youthful impulsiveness? On the other hand, Vietnam is a country where many traditional moral characteristics and values govern social relations, it is difficult to accept a marriage contrary to such solid customs and traditions.

3. HARMONIOUSLY HANDLING THE RELATIONSHIP BETWEEN MORALITY, TRADITION AND LAW ON SAME-SEX MARRIAGE

Previously, according to the provisions of Clause 5, Article 10 of the Law on Marriage and Family of Vietnam in 2000, marriage between people of the same sex was in one of the five cases where marriage was prohibited and wil be punished if violated. At this time, a part of society believes that marriage between people of the same sex can degrade moral values and change the traditional standards of Vietnamese society. There are also opinions that same-sex marriage will denegatively affect the population and go against the values of life. Therefore, the issue of same-sex marriage was completely banned. At that time, in Vietnam, there were still weddings between people of the same sex that were held in isolation, which attracted the curiosity of a large number of people. And according to Article 8 of Decree 87/2001/ND-CP in case it is detected, they will be administratively fined for same-sex marriage. Others choose to live together quietly, accepting the fact that they cannot hold a wedding to publicize their love or sexual orientation because the law prohibits this behavior.

Along with being more open and friendly towards the society's view and perception of same-sex marriage, on June 19, 2014, the 2000 Law on Marriage and Family was replace by the Law on Marriage and Family in 2014, which abolished the prohibition on marriage between people of the same sex. Instead, in Clause 2, Article 8 of this Law: "The State does not recognize marriage between people of the same sex". This is a legal change in recognition of marriage between people of the same sex in our country. It is the result of the process of social mobilization and discussion for many years, leading to the fact that legislators having a more positive view on the equal right to marriage and the right to pursue happiness by people of the same sex. This means that people of the same sex can hold a wedding according to traditional marriage procedures and live together asspouses. However, according to the Law, marriage between people of the same sex is not recognized as a legal marriage. Therefore, they cannot register their marriage, are not granted a marriage certificate, their marriage will not be recognized by law, between them will not have the same rights and obligations as other couples.

Thus, caught between the viewpoints of support and opposition, Vietnamese law chooses not to ban same-sex marriage, but at the same time does not recognize it. In fact, there are still many same-sex couples who hold weddings without the law interfering. This is good news for those who want to move towards samesex marriage. It can be seen that the legislators are keeping a neutral attitude towards same-sex marriage, neither recognizing nor prohibiting, which shows the lawmaker's flexibility in limiting unequaled and harsh controversies in society. In Vietnam, marriage between people of the same sex is influenced by many cultural, political, and social influences. With a social context heavily burdened with traditional ideas on the concept of marriage, same-sex marriage is still suffering from a lot of social stigmas. Therefore, Vietnam needs to consider following a suitable process to avoid causing controversy, disturbing social relations, And at the same time, for people to better understand, feel, and share about the marriage between people of the same sex. The refusal to recognize same-sex marriage as a legal marriage mainly depends on social prejudices and cultural traditions. However, along with the development of society, people increasingly have a more objective view and more people empathize with same-sex marriage. People in same-sex marriage also want to live a legally recognized marriage in order to exercise and protect their rights.

Vietnamese law has not yet raised the issue of recognizing marriage between people of the same sex as a legal marriage. Still, in the view of the research team, the issue of recognizing or not recognizing marriage between people of the same sex will have its good and bad sides. To get a complete direction, it is necessary to evaluate

and consider from many different angles. However, it is also necessary to consider the recognition at the appropriate time to avoid controversy in society. In addition, same-sex marriage must be regulated by law. same-sex marriage relationship has already existed, therefore it is necessary to have an adjustment law to regulate that relationship in society according to the framework of the law, as well as for the State to be able to perform well the management, and resolve these marital conflicts in the best and objective way.

From the legal perspective, to be able to legalize same-sex marriage, it is necessary to supplement and further perfect the provisions of the law related to issues of spousal relationship, identification of father and mother, children, property relations and other issues specified in the regulations on marriage and family. Only in this way can we ensure equal rights, legitimate rights and interests for related entities.

FACTORS AFFECTING LEGALIZATION OF SAME-SEX MARRIAGE IN VIETNAM

LLM. Tran Thi Quyen[1]

Abstract: *Freedom to pursue happiness is one of the basic human rights that has been recognized in many international and national legal documents, without discrimination between individuals based on any criteria, especially by gender. However, same-sex marriage has not been officially and widely accepted in many countries worldwide, including Vietnam. Despite eliminating the prohibition and penalties regulations for marriage acts between the same gender people, the legal system of Vietnam has not yet recorded the marriage registration among them. As a result, various Vietnamese homosexual people cannot perform one basic human rights. This study will analyze the influencing factors, including the factors that promote and hinder the official recognition of the employment relationship marriage between same-sex couples, thereby proposing suggestions for this issue in Vietnam.*

Keywords: *same-sex marriage, officially accepted, influencing factors, basic human rights,…*

"*All men are created equal. They are endowed by their Creator with certain inalienable rights, among which are the right to life, the right to liberty, and the right to the pursuit of happiness*"[2]. The statement is an affirmation for Americans and an immortal truth, and no one can deny it in every country today. Resolution of the United Nations Human Rights Council (June 2011) affirmed: " *Everyone has equal rights, regardless of sexual orientation* ". Love and marriage are noble human values and basic human rights - the right to be free to love and to marry, to which everyone has the right to enjoy without distinction differences in gender, skin colour, age, profession, etc., and that does not exclude people in the LGBTQ+[2] community.

However, the love and marriage of people in the LGBT community in general and same-sex people in particular are not as valued as heterosexual people. This is especially common in Asian countries, where traditional cultural values and discriminatory attitudes towards the LGBT community persist as a social feature. In

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[1] Lecturer at Ha Noi Law University, Email: tranquyenhlu@gmail.com [2] American Declaration of Independence, 1776.

[2] LGBTQ+ stands for lesbian, gay, bisexual, transgender, queer (or sometimes questioning), and others. The "plus" represents other sexual identities including pansexual and Two-Spirit.

Asia today, Taiwan is the only country/territory that recognizes same-sex marriage (2019, May 24)[1]. However, even if same-sex marriage is protected by law, it is not for everyone. In Taiwan, same-sex marriage is only available to Taiwanese citizens or citizens of a foreign country that recognizes same-sex marriage and seeks to marry a Taiwanese citizen[2]. Even in a country that is considered a "paradise" for gay couples and the LGBTQ+ community like Thailand, same-sex marriage has not yet received legal protection. However, there is a good sign when this country is on the list of countries to be watched to move towards the protection of same-sex marriage in 2021 according to a survey by Human Rights Campain (HRC). Although this bill, approved by the cabinet, avoids the term "marriage" but allows for the legal registration of same-sex partnerships. Accompanying amendments to the civil code couples would give the right to own property jointly, adopt children and pass on inheritances. Same-sex couples in Thailand will not be able to enjoy certain tax breaks[3]. Following, there are many positive signals from Asian countries such as Singapore, Malaysia, Brunei, Viet Nam, etc. where in the past, samesex relations were considered a crime (eg Singapore, Malaysia) or administrative violations (Viet Nam), even the death penalty (Bruney), there have been many changes in the direction of eliminating those penalties, moving closer to recognizing the basic rights of gay people equally with other people. These are good signs for the LGBTQ+ community in Asia, despite their limited state-protected legal rights.

In line with this trend, on the one hand, Vietnamese awareness of same-sex marriage have also had more positive changes. According to a survey by Vnexpress in August 2013, with the survey question: " *In your opinion, should Vietnam recognize same-sex marriage* ?", the results showed that 1,388/1,732 people (accounting for 80.14%) proposed to admit it[4]. Similarly, a nationwide social survey to find out the views and attitudes of Vietnamese society on same-sex marriage by the Institute for Studies of Society, Economy and Environment (iSEE) in collaboration with the Institute of Social Sciences The sociology and the Institute of Health Strategy and Policy on 5303 people showed that 33.7% of people supported legalizing same-sex

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1 Parliament of Taiwan legislation passed to legalize same-sex marriage which went into effect May 24, 2019.

2 Following "Marriage Equality Around the World", Human Right Campin, Link:< https://www.hrc.org/resources/marriageequality-around-the-world >, access 10 November, 2021.

3 Hannah Beech, " Thai Thailand moves to legalize same-sex Unions, a Rare Step in Asia", submitted on The New York Times, July 9, 2020. Link:< https://www.nytimes.com/2020/07/09/world/asia/thailand-same-sex-unions.html>; access 15 November, 2021.

4 See: "Gay people believe marriage will be recognized", source: http://giadinh.vnexpress.net/tin-tuc/gioi-tinh/nguoi-dongtinh-tin-hon-nhan- supply-gioi-se-duoc-thuan-nhan-2864999.html, dated 16/8/2013.

marriage and 41.2% recognized the right to live together as spouses of people of the same sex[1].

On the other hand, the LGBTQ+ community also wants to be recognized and protected by the law for their marriage relationship as that of the opposite-sex. According to a study by the Institute of Social, Economic and Environmental Studies (ISEE) conducted in 2013 on living with the same sex, up to 82.10% of people reveal their sexual orientation completely; 73.70% only revealed their sexual orientation partially according to the circumstances; and 58.10% who did not indicate if they would register their marriage if permitted by law. Even when permitted by law, the rate of choosing not to get married is very low (2.6% for the group with full sexual orientation; 5.3% for the group with sexual orientation partially and 14.8% for the completely undisclosed group)[2]. Those are good signs that from a social perspective, from both the society and same-sex people themselves, the concept of same-sex marriage has become very open and supported in Vietnam.

From a legal perspective, according to the provisions of the Law on Marriage and Family 2000, marriage between people of the same sex was one of the cases where marriage was prohibited (Clause 5, Article 10). marriages between people of the same sex as prescribed by Vietnamese law was previously also considered a violation of the law and administratively punished (Point 3, Clause 1, Article 8, Decree No. 87/2001/ND-CP stipulates a fine of between VND 100,000 and 500,000 for this act). However, in an effort to protect the right of same-sex people to find happiness, the Law on Marriage and Family 2014 has removed the prohibition on marriage between people of the same-sex and this behaviour also no longer punished (according to the provisions of Decree 82/2020/ND-CP). But even after the prohibition was removed, Clause 2, Article 8 of the Law on Marriage and Family 2014 still stipulates: "*The State does not recognize marriage between people of the same sex*". Thus, same-sex couples in Vietnam can still live together and hold weddings according to traditional customs, but they will not be recognized as spouses. As a result, the legal rights and obligations between husband and wife (rights and obligations of husband and wife, children, alimony, marital property, inheritance, etc.) will not exist between them.

Currently, there have been many studies on the issue of legalizing same-sex marriage. Starting from the needs of the LGBTQ+ community, from theories of human

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[1] Citing ISEE, "Research Report: Social Perspectives on Same-Same Marriage – Qualitative Research in Hanoi and Ho Chi Minh City", Hanoi, 2019, p.4.

[2] Nguyen Thi Thu Nam; Vu Thanh Long; Pham Thanh Tra; Institute for Economic, Social and Environmental Studies (ISEE), "*Living with the same sex: Real experience and pursuit of couple happiness*", World Publishing House, 2013, p.77.

rights, democracy, justice, equality and the advancement of social awareness, many researchers have made arguments in favour of legalization of same-sex marriage in Vietnam. However, the legalization of same-sex marriage, whether in the form of traditional marriage or civil union, has not been achieved in Vietnam until now. The question is why legalizing samesex marriage in Vietnam is still not possible? What factors influence this process? The article will point out the factors affecting the recognition of same-sex marriage and analyze its impact. A. Positive effects promote the legalization of same-sex marriage.

1. THE CHANGE IN PERCEPTION OF HOMOSEXUALS

Many studies on homosexuality have often suggested that it was considered a disease in the past. This "syndrome" can be spread and infected due to an unhealthy lifestyle and living environment. They believe that "*Gayness does not spare anyone"* and "*is contagious quite quickly"*. One of the reasons for this "epidemic" is: "*Gay people are always looking for a partner*. *They quickly get bored and they are eager recruit new* homosexuals"[1]. Since the 1990s, after the World Health Organization (WHO) removed homosexuality from the list of diseases and many studies showed that homosexuality is an natural-born phenomenon, stemming from each person's sexual orientation and thus, they cannot choose or change (Bailey & Zucker, 1995; Simon-Levay, 1991; Wegesin, 1998), society's perception of homosexuality has changed in the direction of being more open and receptive. In Vietnam, according to a study on the society's understanding of homosexuality in Hanoi, Ha Nam, Ho Chi Minh and An Giang of iSEE 2011[2], up to 57% of survey respondents think homosexuality is just a social trend; 77% said they would be disappointed if their child was gay and 58% would prevent their children from playing with gay people[3]. Similarly, CCIHP studied stigma and discrimination against gay, bisexual and transgender in schools with more than 500 respondents. The result is: 44% of people have experienced violence (physical, mental, sexual and economic) and discrimination in schools; up to 81.64% of violent acts occur in the classroom; 46.88% on the schoolyard and 33.2% anywhere on the way home. As a result, 52% always feel stressed and anxious at school, and 33.59% have suicidal thoughts[4].

In recent years, with the development of information technology and the activities

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1 See "diversity and identity of media messages on homosexuality in some print and online newspapers", Institute for Economic, Social and Environmental Research, World Publishing House.

2 These are two large cities with strongly developed economies, convenient access to information and openness in accepting same-sex people compared to other regions in the country.

3 ISEE, "Social attitudes towards homosexuality and same-sex marriage", 2011, p.17.

4 Center for Initiatives and Population Health (CCIHP), research "Stigma and discrimination against homosexuals, bisexuals and transgender people in Vietnam", 2008.

of social organizations, as well as the change in the state's attitude towards the LGBT community, society's perception of same-sex people has changed significantly. official and correct information about same-sex people is more and more easily accessible. Previously, when wanting to learn about this issue, it was difficult to find an official study in Vietnamese with supporting data. Most of the information about the LGBTQ+ community were news articles, emotional or cognitive of certain individuals. Currently, to find information about same-sex people, only with some popular search tools, can people easily seek accurate and scientific articles and information via websites of organizations working for the rights of the same-sex community and publishing research.

Moreover, in recent years, the young generation has had a significant change in awareness from the development of education, science - technology and the influence of Western culture. They have an "open-minded" view on homosexuals, thinking that homosexuals and heterosexuals are similar as human beings, and deserve human rights. More than 80% of young people answered that they feel normal with new family phenomena in their current life, including same-sex marriage[1]. According to a UNDP report, up to 76% of respondents believe that there should be laws to protect LGBT people (although only 36% support same-sex marriage)[15]. In 2018, ISEE study through in-depth interviews about LGBT in public has shown that although there is still stigma and little information about the LGBT community in general or gay people in particular, compared to the surveys conducted from the 2000s and around the 2010s, the awareness of people has improved significantly[2]. Community concern is also high for LGBT people. Besides, instead of stereotypes about the whole LGBT community like "gene deviation, excess, disease, ...", the survey has shown that many people are aware of the perspective of the behaviour of each individual, instead of the entire LGBT community[3]. Even though they are same-sex people, they are also individuals with different personalities and behaviours. They should only be judged by their behaviour, not by their sexual orientation. Furthermore, from a family perspective, instead of being stigmatized, discriminated against, and hated, there are

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1 The article "Young people's perspective on the value of marriage and family" was published on August 18, 2021. Link:< http://smot.bvhttdl.gov.vn/goc-nhin-cua-nguoi-tre-ve-gia-tri-hon-nhan-gia-dinh/>; access 10 November, 2021 [15] UNDP, USAID (2014). "Vietnam LGBT Country Report – Being LGBT in Asia", Bangkok, p.21.

2 It is reflected in the number of interactions with the ISEE/ICS "Open Letter": "Posted on Facebook on February 22, 2018, the iSEE/ICS Open Letter to Vietnam Television has received more than 2500 'likes' and 491 'shares' on iSEE's fanpage, more than 10000 'likes' and 389 'shares' on ICS's fanpage."

3 ISEE, "LGBT people in the public eye: Listening to opposing views to develop a communication strategy for LGBT rights", Ha Noi, 2018, p.23-28.

many parents who open their hearts and accept their children as gay and voice their support and protection for their children against the abuse of social stigma[1].

When there is a correct awareness of homosexuals, stigma and discrimination from the society will be reduced while the confidence of the same-sex community will be increased. Same-sex people will be recognized as equals, similar to heterosexuals and as an inevitable part of society. As a result, people will accept and recognize gay rights more openly, similar to heterosexual people. Thus, Vietnam can completely accelerate the legalization of same-sex marriage without facing barriers to awareness and getting consensus from society.

2. THE ROLE OF SOCIAL ORGANIZATIONS AND THE MEDIA

Along with the development of information technology and the right awareness towards the LGBTQ+ community, Vietnam has many social organizations established with the purpose of working for the interests of the LGBT community with outstanding activities such as the Research Institute for Society, Economy and Environment (iSEE), ICS center, Center for Initiatives in Health and Population (CCIHP),…. These organizations have had a great impact in bringing Vietnam closer to the legalization of same-sex marriage through communication, dissemination, education, and awareness raising activities about same-sex people and about protecting their rights.

According to the National Report on LGBT in Vietnam 2014, from May 2012 to June 2013, there were more than 40 programs with gay and transgender characteristics in Vietnam. The information has reached millions of readers of newspapers, including articles in major newspapers such as Youth, Vanguard, Women, Security and The World, VnExpress,... Television channels such as VTV3, VTV1, VTV4 and VTV6 have shown full documentaries about the lives of transgender people. ICS has organized talks on sexual diversity and LGBT rights at 30 universities, clubs and creative youth groups in Ho Chi MinhCity Hanoi, Can Tho, Nha Trang and Dak Lak. There have been much successful community-organized awareness and informational events, such as iSEE's "I Do" campaign to raise the importance of the legalization of the same-sex marriage in the public eye as the motivation for policy action. In addition, books about LGBT written by themselves have been published. LGBT activities have grown strongly not only with the efforts of the LGBT community itself, but also with support from family, friends, and non-LGBT "allied" friends. More and more heterosexuals are speaking against prejudice, discrimination and violence against homosexuals and demanding equality for LGBT people in the law.[2]

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[1] ISEE, "Parents accept and speak out in favor of LGBT children's rights: Influential factors", 2017, p.91.

[2] UNDP, USAID (2014). "Vietnam LGBT Country Report – Being LGBT in Asia". Bangkok, p.17.

The results of studies, surveys, and campaigns are made available to the media, the community, policymakers, and the government to advocate for legal and policy reforms to improve the lives of LGBT people, including the orientation towards legalizing same-sex marriage. When official information from reliable reports and studies is brought closer to the people, it will help draw people's attention to the issue of legalizing same-sex marriage and leads to contributions and analytical opinions from the correct understanding of homosexuality and valuable data from actual surveys instead of sentimental, discriminatory opinions. Moreover, not only people's awareness of LGBT people has improved, but even same-sex people are also more confident, more open in accepting and openly living true to themselves. Since then, movements and campaigns in favour of legalizing same-sex marriage have also been well received and supported by both insiders and outsiders.

3. INNOVATION IN SOCIETY'S THINKING

Vietnam is a country full of Asian culture characteristics, which has greatly influenced the legalization of same-sex marriage. Since ancient times, the birth of children, the continuation of the lineage,... has been considered the main purpose of marriage. Asians believe that when entering the marriage stage, husband and wife must be responsible for their behaviour, must love, care, procreate and raise children together. This action is meaningful to the family in particular and to the whole society in general. It shows each individual's responsibility to society, and at the same time, children are the foundation to maintain and strengthen the love between husband and wife, thereby maintaining their loyalty and responsibility for marriage. Meanwhile, the marriage relationship between same-sex people is difficult to get these results (unable to have children, or adopt children together), so the relationship between them has always been considered unstable, not meeting the requirements and the minimum purpose of marriage. Thus, it is difficult to recognize in practice and even more difficult to protect that relationship by law.

According to the Confucian concept, the relationship between Yin and Yang, Heaven and Earth, and hence between man and woman is the most natural inner connection, the source of correct world order. Therefore, marriage or having a sexual relationship between people of the same sex is unnatural, incompatible with the word "*rite*" and therefore unacceptable[1]. Confucianism, with its emphasis on etiquette and morality, also greatly influenced thoughts about LGBTQ+ people and

[1] Nguyen Quoc Tan Trung, "Confucian view of same-sex marriage", published on 6/11/2021, link:< https://www.luatkhoa.org/2021/06/cach-nhin-cua-khong-Giao-ve-hon-nhan-dong-gioi/>; access 15 November, 2021. [21] Truong Hong Quang (2014), "Some aspects of views on homosexuality and homosexuality", Human Resource Journal of Social Sciences (Academy of Social Sciences), p.19.

same-sex marriage in society. Since same-sex is considered a violation of traditional moral values, same-sex people are afraid to come out and live true to their sexual orientation. Instead, they perform "*fake*" marriages to create a cover for themselves and not be judged for their sexual orientation. Regarding folk beliefs, fertility beliefs in our country also attach importance to mating between men and women in order to reproduce and develop the nation[21]. Many regions in Vietnam still respect this belief to this day, expressed through the worship of mascots representing the male or female genitals, or worship rituals that abstractly depict the human body sexual relations. So, although the fertility religion does not prohibit same-sex relationships, it considers same-sex relationships to be unnatural and goes against the beliefs of this religion.

However, culture is actually created by people and people can completely change according to the development of society. New models of the family and diversity of gender identities are gradually becoming evident in society[1]. Through the data analyzed above, it can be seen that people's awareness of same-sex marriage has grown significantly. Although some stigma and discrimination still exist, especially in the opinion of the elderly or in rural areas, homosexuals are no longer shunned, stigmatized, or even considered a crime. The development of the internet and social networks also plays an important role in spreading and importing Western culture. Family centrism and heterosexual monopolies have been gradually replaced by individualism. Each individual gradually realizes his or her role, meaning, rights and obligations towards society. Instead of "*living in accordance with and pleasing to everyone*" or "*living for the family*", young people in Vietnam now have a more open mind and value individual freedoms, including the right to be free to love in accordance with their sexual orientation. Viewpoints and ways of looking at traditional moral values have also been much more open.

Cohabitation and love, even sex between people of the same sex, if it really comes from love and understanding, is no longer considered a way of life that is contrary to moral standards or valuable customs and the object of criticism in public opinion. According to iSEE's published research, over 50% (2,958) of the study participants said they were in a relationship with a lover or partner of the same sex. Just like heterosexual marriage, when considering and coming to a decision to live together, it is mostly the result of two people's desire to create a family in which they can share spiritually, emotionally and create a family life (87.5%), demonstrate commitment to loyalty (81%), initiate stable and long-term plans (70%)[2]. With this

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[1] Truong Hong Quang (2014), "Some aspects of views on homosexuality and homosexuality", Human Resource Journal of Social Sciences (Academy of Social Sciences), p.21.

[2] Nguyen Thi Thu Nam; Vu Thanh Long; Pham Thanh Tra; Institute for Economic, Social and Environmental Research (ISEE), "*Living with the same sex: Real experience and pursuit of couple happiness*", World Publishing House, 2013, p.25.

legitimate need of homosexuals, 26.2% of respondents said society has become more open[1]; 18.6% said they were supported or partially supported by their families and 31.2% of their parents' families ignored them, but neither supported nor opposed their children's same-sex cohabitation[2]. These figures all show a change in society's mindset towards same-sex people and same-sex marriage. Vietnamese people are no longer as dependent on traditional moral values or traditional religious views to shape their thinking about homosexuals, but instead are innovative, easy to accept, even support same-sex marriage.

4. DEVELOPMENT OF HUMAN RIGHTS AND GLOBAL TRENDS

Human rights are one of the highest values that all countries uphold, and protect. In recent years, protecting human rights is a subject of growing interest and growth, especially in developing countries, where human rights are still an issue with many gaps. In the theory of modern human rights, the rights of gay, bisexual, transgender and intersex people and the rights of other groups such as people living with HIV/AIDS, migrant workers, etc., have received more and more attention. the issues of homosexual, bisexual, transgender and intersex groups are related a lot to issues of gender, gender, gender expression, sexual orientation and gender identity. The rights of these subjects have become a controversial issue in many countries around the world in the process of law-making and enforcement. However, reality shows that the trend of supporting the rights of these subjects in the world is also increasing, reflected in the increasing number of countries and territories that recognize and legalize same-sex marriage or same-sex couples. If in 2021, the Netheerlands is the first country in the world to legalize same-sex marriage, creating a new wave for protecting LGBTQ+ rights strategies; in 2021, twenty-eight countries, including the United States, have legalized samesex marriage, and many other Western democracies without marriage equality recognize civil unions[3]. Even in areas with traditional cultures that are relatively conservative towards samesex marriage, such as Asia, Taiwan has legalized same-sex marriage; Thailand is the next country in the process of considering accepting civil

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[1] Nguyen My, "Same-sex marriage: anxiously awaiting legalization", published June 23, 2019; Link: (< https://baophapluat.vn/hon-nhan-dong-tinh-khac-khoi-cho-luat-hoa-post310203.html >; access 15 November, 2021.

[2] Nguyen Thi Thu Nam; Vu Thanh Long; Pham Thanh Tra; Institute for Economic, Social and Environmental Research (ISEE), "*Living with the same sex: Real experience and pursuit of couple happiness*", World Publishing House, 2013, p.43.

[3] CFR, "Marriage Equality: Global Comparisons", CFR staff, published by June 28, 2021; <https://www.cfr.org/backgrounder/marriage-equality-global-comparisons#chapter-title-0-1 >; access 15 November, 2021.

marriage between same-sex people and other countries such as Vietnam and Japan are also on the watch list towards legalizing samesex marriage.

This tendency has had a great impact on policy and lawmakers in Vietnam. In order to achieve the goal of building a socialist rule of law state with an important content being the protection of human rights, the 2013 Constitution was born with a dedicated chapter on human rights. The provisions of the 2013 Constitution emphasize "*human rights, civil rights in politics, civil, economic, cultural and social are recognized, respected, protected and guaranteed according to the Constitution and the law law*" (Clause 1, Article 14) and "*Everyone is equal before the law. No one should be discriminated against in political, civil, economic, cultural or social life*." (Article 16). These new provisions of the 2013 Constitution set forth many requirements for the improvement of the legal system on human rights in general and the rights of gay, bisexual, transgender and intersex people in particular. In addition, Vietnam is currently in the process of implementing or developing and completing a number of legal documents related to the rights of these subjects such as the 2015 Civil Code, the Penal Code, and the 2015 Civil Code (amended and supplemented in 2017), the Law on Marriage and Family in 2014, the Law on Gender Affirmation, the Labor Code, etc… These are the progress made from the efforts of the LGBTQ+ community and the impact of same-sex marriage programs that aim to protect the rights of same-sex people globally. This trend is still continuing and will be an effective lever for Vietnam to move towards building a legal framework on marriage between same-sex people, ensuring the basic rights inherent to homosexuals.

B. FACTORS HINDERING THE LEGALIZATION OF SAME-SEX MARRIAGE IN VIETNAM TODAY

Besides the factors that positively affect the legalization of same-sex marriage, Vietnam still faces certain barriers in the process of achieving this goal.

1. The traditional conception of marriage and family

The biggest barrier to legalizing same-sex marriage in Vietnam is the traditional cultural factor. Although it has changed in the direction of more openness, there still exist distinctions, especially the assumptions about marriage under the unique perspective of heterosexual marriage. This even exists in the thinking of the state where in the legal regulations, although it is not forbidden, marriage is define as between a man and a woman. Article 3 of the Law on Marriage and Family 2014 defines "*marriage* is the relationship between husband and wife after marriage"; "*Marriage* is for a man and a woman to establish a conjugal relationship with each other under the provisions of this law on the conditions for marriage and registration

of marriage"; *"Living as husband and wife* means that a man and a woman organize a common life and treat each other as husband and wife". This provision of the Law on Marriage and Family has limited the right of people to marry and live together as spouses. Therefore, there are many same-sex people who do not dare to live with their own sexual orientation but seek to marry the opposite sex to avoid pressure from family and society. According to research results of gay men, 19% of respondents plan to get married with someone of the opposite sex; 50% of same-sex men said that the reason for wanting to get married is because of family pressure. In other words, 40% said the reason was because of social pressure[1].

The family model, a combination of one man and one woman with the main function of maintaining the lineage, is also a "typical tradition" today. The traditional cultural concept of the maintenance of the race and the rearing of children also makes many people doubtful when it comes to the issue of recognizing the equal rights and marriage of gay people. This concept even affects the thinking of same-sex people when up to 66% of them want to get married because they want to have children[2]. Parenting issues of same-sex couples are a typical example. Some people suggest that same-sex couples should not be allowed to have and raise children because the child may not develop normally. It can be seen that the biggest challenge for same-sex parents is living in a society where gay people are less accepted, even stigmatized and condemned. Another difficulty is that these same-sex couples are often married to someone of the opposite sex and even have children. Therefore, they receive less support from their family as well as from their ex-spouse if they ask about divorce. This will cause a lot of pressure and conflict in the family[3]. These notions are the barriers that make it difficult to legalize same-sex marriage in Vietnam. Although studies in other countries have demonstrated that legalizing same-sex marriage does not affect the birth rate or population size in that countries as well as the quality of family life and child-rearing[4], these concepts have existed for a long time and greatly influenced people's perception of same-sex marriage, making many people , including policymakers or legislators who are still hesitant to legalize same-sex marriage in our country.

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1 iSEE, Research "Social Attitudes towards Homosexuals", 2012.

2 iSEE, Research "Social Attitudes towards Homosexuals", 2012.

3 Pham Thu Hoa, Dong Thi Yen; "*Prejudice, stigma and discrimination against homosexuals and transgender people in Vietnam*", VNU Science Journal, Vol. 31, Issue 5 (2015) 70-79.

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2. Legal system

Although Vietnam no longer prohibits marriage between same-sex people, the law does not recognize this type of marriage. In addition, the legal system for same-sex people to live together is still open with many issues that have not been specified and detailed by the law. This issue leads to a significant restriction on the exercise of rights by homosexuals. With the provisions of the Law on Marriage and Family 2014, there has not been any legal mechanism to resolve issues arising between people of the same sex. When the law neither recognizes nor prohibits same-sex marriage, it means that they are still allowed to live together but cannot register their marriage and are not recognized by the law. However, reality shows that when same-sex couples live together (a practice that is not illegal), they will still have problems in marriage such as between husband and wife, such as rights and obligations towards each other, join property, children, inheritance, separation, alimony, civil status, etc.

Nevertheless, due to not being able to register marriage and being regulated by law, the rights of same-sex people have not yet been established or protected by the law. For example, about personal identity: due to the lack of marriage registration, the spousal relationship does not exist, leading to non-existent rights and obligations towards the spouse or children; Regarding property: they do not have a spousal relationship, so the property they create in the process of living together cannot be considered as common property in the marriage and cannot be divided like property between spouses, but only divided according to the provisions of the Civil Code, which may not be equal to the contributions of the parties in a cohabitation relationship as spouses. Thus, from a legal perspective, if same-sex marriage is recognized, it will have to amend and supplement all relevant provisions in the legal system, such as determining the spousal relationship, property relationship, etc. identifying parents and children. Civil status modification problems will also arise, causing difficulties in enforcement and management. This is a barrier to the legalization of same-sex marriage in Vietnam today.

CONCLUSION

In summary, by analyzing the data provided by previous studies, this article identifies the factors affecting the legalization of same-sex marriage in Vietnam today. The change in society's perception of homosexuals in a more positive direction; social organizations working for the rights of homosexuals; the role of the media; innovation in social thinking; the development of human rights, and the global trend are factors that bring positive impacts and accelerate the legalization of same-sex marriage in our country today. However, this goal still faces specific barriers: the

traditional conception of marriage and the legal system. Identifying factors affecting the legalization of same-sex marriage will contribute to helping Vietnam understand and propose solutions to move closer to the goal of legalizing same-sex marriage suitably with the country./.

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THE ENSURING CONDITIONS OF LGBT RIGHT TO ADOPT IN VIETNAM: INADEQUACIES AND RECOMMENDATIONS

Assoc. Prof. Dr. Nguyen Minh Tuan[1], Nguyen Thi Nhat Thao, Dang Thi Nhu Quynh, Nguyen Thi Ngoc Anh, Nguyen Thi Tuoi, Nguyen Thi Huong

Abstract: *The LGBT right to adopt is an issue, which is extremely necessary to research in the context of Vietnam. There are some controversial problems relating to the LGBT right to adopt, including: Should this right be legalized? How have their rights been limited in Vietnam? What should we do to protect this right for LGBT in Vietnam? In our opinion, these questions should be answered clearly and comprehensively, especially in Vietnam's political, social, and economic contexts. There have been some scientific publications in Vietnam concerning this topic over the past few years. They show that LGBT persons wish to adopt children, but this right has not been legalized under Vietnamese law yet. Some LGBT persons, especially same-sex couples, are still living together as a family without legal guarantees such as conditions of personality, mutual property, as well as the nurturing and taking care of children. In this paper, the authors analyze and evaluate the shortcomings of ensuring conditions for the LGBT right to adopt as well as the reasons why they exist. At the end of this paper, the authors point out some long-term and urgent solutions and the ways to actualize them in the conditions of Vietnam to better protect the LGBT right to adopt.*

Keywords: *Right to adopt, LGBT, sexual equality, sexual orientation, gender identity.*

OVERVIEW OF THE LGBT COMMUNITY AND LGBT COMMUNITY'S ADOPTION RIGHTS

LGBT is an acronym for Lesbian, Gay, Bisexual, Transgender, used to describe a person's sexual orientation. According to The American Psychological Association (APA): Sexual orientation refers to an enduring pattern of emotional, romantic and/or sexual attractions to men, women or both sexes. Sexual orientation is distinct from other components of sex and gender, including biological sex (the anatomical, physiological and genetic characteristics associated with being male or female), gender identity (the psychological sense of being male or female) and social gender role (the cultural norms that define feminine and masculine behavior)[2]. With the above definition, sexual orientation includes both emotional and physical attraction to another person. Furthermore, gender identity may or may not be identical with the assigned gender postnatally based on their biological sex.

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[2] Sexual Orientation & Homosexuality, Sexual Orientation & Homosexuality. See: https://www.apa.org/topics/lgbtq/orientation last accessed 6/8/2021.

According to Article 1 of the 1948 Universal Declaration of Human Rights*: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."* Thus, human rights are natural, inherent and objective rights that need to be recognized, respected, protected. And it must be made sure that LGBT persons enjoy the full range of human rights, including life, liberty, and pursuit of happiness. getting married or being a parent of children... is a part of these rights. Therefore, the rights of LGBT persons need to be guaranteed and the right to pursue happiness is no exception. In which, the right to get married and the right to adopt children are considered sacred rights in each individual's life. In addition, a family will be formed, connected together by affection and sharing among family members. Protection of LGBT persons' rights is one of the measures to ensure the social value of the law, with an aim to fairness and equality - the noble goal of the law. Therefore, in essence, the legalization of marriage and adoption of a same-sex couple does not adversely affect the development of society. On the contrary, this action also brings benefits in public health, gender equality, and social harmony.

Adoption rights of LGBT persons

Human rights are the ability of individuals to exercise natural and independent privileges, both as human beings and as members of society, guaranteed by a system of national policies, laws, regulations, international legal agreements on human values in material, cultural and spiritual relations, the needs for freedom and development[1]. In terms of ethics, social standards, and human rights perspectives, LGBT persons' adoption rights are rooted in the essential needs and desires of people's happiness, which are recognized by national standards and recognized by the international community. It can be understood as *"The LGBT rights to adopt are the natural independent demands of gay, bisexual and transgender persons, bearing the common characteristics of human rights and the specific rights of the LGBT persons. to ensure the needs and desires of the LGBT person's right to parenthood, which are recognized, promoted and protected by law".* Through this understanding of the LGBT right to adopt, it could be confirmed that the LGBT right to adopt has the following characteristics: Firstly, the LGBT rights to adopt have the common characteristics of human rights; secondly, the LGBT rights to adopt are rights of Vulnerable and Disadvantaged Groups that need to be guaranteed in society; Lastly, the LGBT rights to adopt reflect the spirit of humanity.

[1] Chu Hong Thanh (1997), *Human rights and international human rights law*, Publishing House, National politics, Hanoi, p. 23.

The relationship between adoption and other rights

Firstly, the relationship between adoption and marriage rights of LGBT couples. Adoption and marriage rights of LGBT couples are two non-conflicting rights. In countries such as the US, France, and Taiwan, the recognition of joint adoption is essentially based on some legal form for cohabitation relationships, including LGBT persons. If a heterosexual couple wants to adopt a child, they must legally get married. Therefore, for LGBT couples, it is also necessary to have a legal mechanism to record their relationship, then there is a basis for implementing adoption rights. However, a few countries also recognize adoption as an independent right, while not recognizing the marriage of LGBT couples such as Andorra (2014), Australia (2016)…[1]

Secondly, it is the relationship between the LGBT right to adopt and the right of children who are adopted. These two rights are closely interrelated. On the one hand, if the adoption of LGBT persons is recognized by law and implemented in practice, the relationship between the adopted LGBT couple and the child will increase in cohesion, such as when family affection through the bond between parents and children was created. In addition, this is also a premise to ensure children's rights such as the right to be nurtured, the right to be educated, the right to health, etc.

Thirdly, the relationship between the LGBT right to adopt and equality, without discrimination against people in society. The legalization of the LGBT right to adopt will be a condition to ensure the right to equality for all persons in society. In opposition to this, if the adoption rights of LGBT persons have not been recognized; gender-related discrimination and stigma will still exist and lead to their other basic rights being easily violated.

INADEQUACIES IN ENSURING THE LGBT RIGHT TO ADOPT IN VIETNAM AND THEIR CAUSES

Inadequacies in the provisions of law

In fact, during the previous period, the adoption of children by LGBT persons has happened. However, due to many limitations of the law, there are still many shortcomings.

Firstly, in provisions of the Law on Gender Equality, the only concerned concepts are "gender" and "sex,"[2] it enables people who have "sexual orientation" or "gender identity" to be different from the majority of individuals in society and not regulated by the law. This has caused difficulties in implementing legal institutions for LGBT couples in general, current regulations on child adoption, care, and protection, especially in the gender identity of transgender people in the adoption process.

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1 European Parliament (Briefing) (May 2016), The rights of LGBTI people in the European Union, p.5.

2 Law on Gender Equality 2006.

Secondly, Clause 3, Article 8 of the Law on Adoption in 2010 stipulates: *"A person may be adopted by only one single person or two persons being husband and wife"*. However, the Law on Marriage and Family only recognizes legal marriages between men and women, but not people of the same sex[1]. This leads to LGBT persons being pushed out of the law's protection. Because the current law does not prohibit two same-sex persons from living together, but it does not recognize it in any legal form, *in the case of joint adoption (the child is not related by blood to both people) of lesbian, gay, bisexual, transgender couples are not allowed by the law on adoption.*

Thirdly, the fact that the law has not yet allowed gay, bisexual, and transgender couples to adopt children, leading to them finding ways to "evade the law". Therefore, one of them will adopt a single child according to Clause 3, Article 8 of the Law on Adoption 2010. This has raised many civil rights-related problems, for example, the person who does not take the initiative to adopt the child will not be able to represent or be a guardian for the child; the person who does not adopt the child will not have any parent-child or inheritance relationships with that adopted child[2]. Especially in the bad case that the LGBT couple breaks up and no longer has a cohabitation relationship, how will the child custody dispute be resolved. Failure to solve that problem can cause great harm to the child, particularly children under 18 when their thinking is still immature.

Fourthly, in the case of surrogacy adoption for a gay couple ("surrogacy") or assisted reproduction for a lesbian couple (one of the two are sperm applicants) also raises many legal issues. According to Clause 4, Article 24 of the Law on Adoption 2010: *"Unless otherwise agreed upon between the natural and adoptive parents, from the date of delivery and receipt of the adopted child, the natural parents no longer have the right and obligation to take care of the child, provide financial support, represent at law, compensate for damage, manage and dispose of personal property for their already adopted child"*, the cohabitant cannot adopt a child and become adoptive mother or father because the law regulates that once the adoption relationship has been established, the biological parents no longer have rights and obligations towards this child. This makes it impossible to guarantee the rights of both same-sex couples to their child[3].

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1 Clause 2, Article 8, Law on Marriage & Family 2014.

2 Truong Hong Quang (2014), On the cohabitation relationship of same-sex people in the Draft Law on Marriage and Family (amended), Institute of Legal Science - Ministry of Justice.

3 Truong Hong Quang (2014), On the cohabitation relationship of same-sex people in the Draft Law on Marriage and Family (amended), Institute of Legal Science - Ministry of Justice.

Fifthly, Vietnam currently does not have a specialized agency to protect human rights in general and the rights of disadvantaged groups in society in particular. Moreover, the supervision of the care and education process of adopted children is still loose, with parents' periodically reporting only leading to the protection of the adopted children's rights not being guaranteed.

Inadequacies in the legal procedure

The procedure for adoption registration, as regulated by the Law on Adoption 2010, Decree No. 19/2011/ND-CP, and Decree No. 24/2019/ND-CP, has a lot of inadequacies. This is as following:

Firstly, there are a plenty of complicated requirements for adoption. Law on adoption requires that an adopting person must fully meet the conditions: Having good health, financial and accommodation conditions for assuring the care for and nurture and education of the adopted child, and having good ethical qualities[1]. However, because each of the foregoing prerequisites has no concrete explanation or evaluation criteria, it will be applied differently in each community. As a result, determining in accordance with the law's criteria is challenging.

Secondly, the "validity" of the adoption files is not clearly defined in the legal documents. After evaluating the adoption files, the civil servant can declare that it is "void" and has no reasonable explanation. However, determining the profile's veracity is challenging. Will the civil servant return the application on the grounds that it is an "invalid application" or will it be regarded a "valid application" and will the application process continue if the adopter does not fulfill one of the necessary conditions? Because the adoptee is LGBT, should you consult with the appropriate people?[2]. It's also a legal gap that has to be solved to avoid future harmful consequences.

Furthermore, the mass media has not adequately pushed its role, and there are few official publications, activities, or legal advertising concerning LGBT persons and the protection of LGBT rights. Organizations such as the ICS Center, iSEE, and PFLAG Vietnam are active, however they haven't had much of an impact on legislative lobbying and aren't broadly recognized.

Causes of inadequacies

The challenges that LGBT persons face in life stem from a variety of sources.

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1 Clause 1, Article 14, Adoption Law 2010.

2 UNDP - USAID Viet Nam (2014), Adoption of Gay, Bisexual and Transgender Persons in Vietnam - Status and Recommendations, p.35.

In subjective causes, LGBT persons still have low self-esteem, are unconcerned about themselves, do not want or need to out their sexual orientation, and are not interested in being informed about the adoption rights. The LGBT persons' challenges are more and more difficult to solve because of their lacking in self-confidence and not active in learning, exercising, and securing their own rights.

In objective causes:

Firstly, society's knowledge of LGBT persons' adoption rights remains limited. People are now more interested in LGBT persons' ability to marry. As a result, child adoption is still not a hot topic.

Secondly, social prejudice has an immense impact on LGBT persons' adoption rights. Society's harsh attitudes and reactions stem from traditional concepts of marriage between a man and a woman, monogamy, a wife giving birth to children to perpetuate the family line, or children whose parents are LGBT persons cannot grow up appropriately... As a result, removal of discrimination barriers in civil marriage access remains an essential problem in Vietnam in order for the country to adapt to the evolving global notion of human rights and marriage[1].

Thirdly, the inadequacies and limits derive from the fact that LGBT persons' adoption rights are not recognized under Vietnamese law. In addition, current legislation only recognizes the relationship between males and females in normative legal documents, and of course, has not yet officially accepted the relationships between different sexual orientations.

RECOMMENDATIONS FOR ENSURING THE LGBT RIGHT TO ADOPT IN VIETNAM

Strategic solutions

+ General solutions:

One of the most important and prerequisite solutions to ensure LGBT rights, including the right to adopt children, *is the demand to change social awareness and attitudes*.

For LGBT individuals: They need to be more active, have a positive attitude, and be more confident in their own lives. LGBT individuals or LGBT couples who wish to adopt a child should have good physical and mental preparation before deciding to adopt a child.

[1] Truong Hong Quang (2016), International law on the rights of gay, bisexual and transgender people, Journal of Legislative Research No. 23 (327), Issue 1 - December 2016, p.23.

For LGBT persons' families and their relatives: LGBT people must be the ones who actively confide and express their thoughts and aspirations so that their parents can sympathize and understand them. At the same time, the fathers, mothers or relatives of LGBT persons must actively seek information and knowledge about the LGBT persons through official sources to better understand LGBT persons and their rights that they deserve.

For the social community: We need to innovate in the traditional concept - the Asian culture that is deeply rooted in Vietnamese culture. In addition, it is necessary to promote education, communication and dissemination of knowledge relating to the LGBT persons (expanding activities of organizations and groups relating to the LGBT persons; promoting the role of mass media; integrating knowledge concerning to the LGBT persons into sex education...). The education about homosexuality and sexual diversity will help to eliminate stereotypes about homosexuals and sexual minorities in general[1].

+ About the group of solutions to improve the law

The recognition and legalization of LGBT rights in Vietnam, especially the right to marry and to adopt children, cannot be changed instantaneously but needs to go through a long process. To move towards recognizing and ensuring the LGBT right to adopt, in our opinions, we need to implement the following solutions:

Firstly, in order to ensure equalityand non-discrimination and to create favorable conditions for the recognition of LGBT people's adoption rights, some legal concepts of "gender", "sex", "gender equality" in the Law on Gender Equality need to be changed and this law should define the "sexual orientation" and "gender identity" norms without considering biological sex in comparison to current law.

Secondly, the implementation and guarantee of the LGBT right to adopt need to be carried out in a specific process. At present, a suggestive solution for Vietnamese law *is that the state should issue a certificate of civil relationship (civil union) to same-sex couples with legal consequences such as the pre-nuptial contract of the law.* This is an important step towards legalizing same-sex marriage in Vietnam. On the legal level, *this civil union certificate will solve problems relating to marriage and family relationships, including common property or child adoption rights and obligations of same-sex couples.* However, this is only a temporary solution. In the coming time, Vietnamese lawmakers should legalize same-sex marriage to create legal frameworks for LGBT right to adopt. At that time, it is necessary to amend the provision "*Men*

[1] iSEE, ICS, APA (July 2012), Answers to your questions about homosexuality and sexual orientation, at http://www.thuvien.lgbt/camnang, last accessed 2/ 11/2021, p.4.

and women have the right to marry and divorce..." in Clause 1, Article 36 of the 2013 Constitution to *"Everyone has the right to marry and divorce..."*, and at the same time amend the Law on Marriage and Family in 2014 on the principle of recognizing the marriage relationship between two people without discrimination of the same or opposite sex and abolishing inappropriate regulations.

Thirdly, legislators need to review to amend and supplement more appropriate provisions in the Civil Code, Law on Adoption, The Law on Children ... and must prescribe the bylaws to guide the conditions of the adopter.

In *the Civil Code 2015, r*egarding the right to have a guardian, in case an LGBT couple lives together and one person is the biological father or biological mother or adoptive father or adoptive mother but has no conditions to take care of the child (due to long business trip or in the process of medical treatment), the other person who is not the child's father or mother in a legal perspective will become the natural guardian (such as a "relative") or be given a preferential appointment at the suggestion of the child's parent. According to Articles 49, 50, 52, 53, and 54, this provision has not created favorable conditions for those who are not "relatives" of the child as defined by law but is a person who have close relationship and have the best care child conditions (for example, staying with the child and taking care of the child in practice) to become the guardian.

In addition, *for the Law on Adoption in 2010,* after recognizing the cohabitation relationship of LGBT couples from a legal perspective, it is necessary to amend Clause 3, Article 8 of the Law on Adoption 2010 from: "A *person may be adopted by only one single person or two persons being husband and wife"* to: *"A person may be adopted by one person, two persons being husband and wife or a couple with a certificate of civil union."*

For *the Law on Children 2016,* it is necessary to add the principle of nondiscrimination against children based on the gender and sexual diversity of themselves or their parents or guardians.

In *normative legal documents,* it is necessary to add specific guidance on the conditions of adoption and provide evaluation criteria for each condition in order to ensure that the review of the adoption application is transparent and legitimate, to ensure the rights of everyone without discrimination based on sexual orientation or gender identity while implementing adoption procedures. Moreover, it contributes to ensuring the rights of children when an eligible person adopts them.

Fourthly, instead of only stipulating that parents raising a child must make periodic reports, or regulations on inspection and examination as at present, *legislators*

need to supplement regulations on adoption supervision and establish a separate agency to carry out this function. In addition, to prevent negative impacts and effects from stigmatization, discrimination or even violent acts affecting the psychology and development of children, *we need to implement synchronous solutions from communication and education to change awareness and attitudes to set up appropriate sanctions. Therefore, it requires mutual cooperation between the State, social organizations, families and the entire community.*

Immediate solutions

To ensure the aim and desire of LGBT persons as well as of children to fully enjoy the human rights of "nondiscrimination against children" and "in the best interests of children," the following solutions should be implemented immediately:

Solutions for improving social awareness:

Firstly, LGBT persons must have more positive actions, confidently live as themselves, and build a beautiful image in the heart of the social community. Moreover, individuals, who are famous LGBT persons or who have great influences on the community, should promote communication and speak up to protect their rights and interests.

Secondly, The Ministry of Education and Training needs to continue to expand sex education programs at all educational units. Specifically, some lectures can be supplemented in school subjects such as sex education in Biology, LGBT rights issues into Civics, stories related to the LGBT persons in Literature to impact the students' perception.

Thirdly, The Ministry of Health must promote scientific information concerning sexual orientation, gender identity, and other issues to agencies, organizations, and individuals, especially medical examination and treatment centers and health workers. Furthermore, it can develop and organize programs to guide the care, nurture, and access to health care services for children. Therefore, LGBT persons who want to adopt children can participate to gain knowledge and skills to raise adopted children in the best way.

Fourthly, news agencies and mass media must do more to emphasize their role in ensuring LGBT persons.

They should actively report, post official articles or organize programs promoting common values from a more favorable perspective so that people have a more positive impression of the LGBT persons; they should expand the scope of information dissemination to rural and the countryside. Therefore, individuals

may better comprehend LGBT persons as well as they understand themselves and their rights.

In addition, we need to premiere movies, videos, photos, or music programs related to LGBT persons and their rights. This is a way that people can easily approach and change their impression of LGBT persons. For example, in Canada, the documentary movie that is *"Mommy Mommy"* was released in 2007 (by director Sylvie Rosenthal). It is about the five-year struggle to have a child by a Montreal lesbian couple, and "*Preacher's Sons"* is an American documentary movie in 2008, by C. Roebuck Reed and Mark Nealey. When these two movies were released, they had a major influence on the attitudes and opinions of many people in these two countries. Therefore*, in Vietnam, it is also recommended to learn and use such films to alter their view and modify their behavior toward LGBT persons and children adopted by them.*

Finally, social organizations, especially those promoting and protecting the rights of the LGBT persons such as ICS Center, iSEE, PFLAG Vietnam, need to be more active and coordinate with agencies to expand their scale and influence in society. For example, they can plan and organize exchanges, knowledge sharing, and events (forums, picture exhibitions, music shows, etc.) to provide basic information about LGBT persons. They should begin with implementing it in large cities such as Hanoi, Ho Chi Minh, Da Nang... and then spread and expand the organization's region in rural and countryside.

Solutions for improved law and enforcement mechanisms

First of all, we need to research to develop *a comprehensive set of concepts, namely "gender," "gender," "sex" and "gender equality."*

Secondly, competent agencies and individuals should immediately inspect relevant legal normative documents to find "loopholes," shortcomings, or contradictions in current regulations that affect the process of ensuring the rights of LGBT persons and their adopted rights. It contributes to perfecting the legal system, to facilitate agencies, organizations, and individuals in the implementation of the law. Furthermore, regulations are going to be eliminating overlaps and inconsistencies in interpretation, which causes difficulties for LGBT persons as well as those who implement the legal procedures for adoption.

The third solution is to establish free hotlines to provide psychological information, give advice, answer questions for LGBT persons, their families, friends, or even people who want to know LGBT persons and their rights.

Fourthly, to ensure the rights of adopted children, we need to *research and prepare the best conditions (such as human resources, finance, etc.) for establishing an adopted monitored mechanism*.

Currently, bureaucrats working on children and families at commune-level People's Committees can periodically supervise LGBT families who have adopted children. Moreover, this agency can also set up a hotline to receive information and feedback from the social community when they find that LGBT parents do not satisfy the conditions for nurturing, educating, and taking care of children or violating children's rights. If that happens, they will promptly intervene to resolve transgressions and prevent physical and mental effects on the adopted children.

Lastly, the State needs to pass appropriate policies such as promoting communication, education, and changing people's awareness to protect and prevent discrimination against LGBT persons and children adopted by LGBT parents. Furthermore, we should continue to replicate community support models that protect the rights of LGBT persons and children rights. Specifically, we can develop the Central Vietnam Women's Union models such as "Peaceful House" and "Community's Trusted Address." Because, these models are promoting well the protection of the rights of women and children, especially in cases of domestic violence, human trafficking... at the moment. The family (especially parents) also needs to educate and build a psychological foundation for the child, to avoid being "shocked". *"Basically, parents must be aware of the functions that the father and mother need to perform in the relationship: Child - Mom - Dad. The mother's warm embrace, the father's firm supportive embrace bring a sense of security to the child. This will help children decrease "shock" and gradually adapt to new living situations. Respect, love, and honesty are essential components in assisting children in overcoming trauma. Behavioral Parenting should focus on two main aspects: significant support and adequate control for children to feel supported and safe"*.[1]

When the above solutions have been implemented, but stigma, alienation or discrimination still occurs to the adopted child, it is necessary to continue to implement the following solutions:

At educational institutions where the child attends, if stigma, discrimination, or school violence occurs, the involvement of mass organizations such as Pioneers'

[1] This is the general opinion of Assoc. Prof. Dr. Tran Thu Huong (Lecturer of the Department of Psychology, University of Social Sciences and Humanities - Vietnam National University), the opinion of Dr. Truong Hong Quang and many other experts which are direct interviewed by the author.

Organization, Communist Youth Union, Parent-Teacher Association, and schools cooperating with children's families should choose a way to thoroughly solve problems (such as criticism, warning, discipline, even forcing perpetrators to quit school).

In the community where the adopted child lives, if there is discrimination, alienation, and violence from people around, it will be necessary to have the intervention of the local government in combination with the family and psychologists to find the most reasonable and effective solution.

In the two cases mentioned above, if that stigma or discrimination causes serious consequences, negatively affecting children's lives, psychology, and development, then appropriate punishments must be imposed on individuals with such negative attitudes or behavior (administrative sanctions, criminal prosecution).

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SEARCHING FOR AN APPROPRIATE MODEL FOR THE LEGALIZATION OF SAME SEX COUPLES' RELATIONSHIP FROM PUBLIC ATTITUDES IN VIETNAM - AN EMPIRICAL ASSESSMENT

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Abstract: *In 2014, Vietnam removed the ban on same-sex marriage from the Law on Marriage and Family, which was a cornerstone for the process of legal recognition of same-sex partnerships. However, there has been no further movement to have more explicit guidance for samesex couples who want to affirm their committed relationship and have their marital rights protected under the law. This ambiguity has not been adapted to the reality that public attitudes have changed positively to accept same-sex partnerships further. In a moment of ongoing legal transitions, Vietnam should learn from the experiences of countries worldwide, with various degrees of official recognition gradually set up, including cohabitation, registered partnership, and full recognition as marriage. This evokes the necessity of identifying an appropriate legal model for the context of Vietnam at present. To achieve this objective, the proposed initiative should closely reflect the public attitudes to take the path of least resistance.*

Nevertheless, little research to date has been dedicated to enriching these aspects. To offer an adequate legal framework for the legal recognition of same-sex unions in Vietnam, this study uses a method of questionnaires to explore public attitudes on various legal aspects of the two models concerning same-sex relationship formalizations: registered partnership and cohabitation. Then, the study gives recommendations on the most feasible model from the lens of public attitudes for Vietnamese policymakers to get ready for the next steps to legalize same-sex marriage.

Keywords: *same-sex partnership, same-sex cohabitation, registered same-sex partnership, the Vietnamese Law on Marriage and Family.*

1. INTRODUCTION

The legal status of same-sex unions has been one of the noticeable topics in social debates worldwide over the last few decades. The legalization process of same-sex marriage plays a vital role in enhancing the well-being of sexual minorities and upgrading marriage equality.[3] Until now, legalizing same-sex couples' relationships

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[3] Denise Tse-Shang Tang, Diana Khor and Yi-Chien Chen, 'Legal recognition of same-sex partnerships: A comparative study of Hong Kong, Taiwan and Japan' (2020) 68 The Sociological Review 192.

has been developed in a rising number of countries.[1] America and European Union are two areas that have played the first steps in officially recognizing legal marriage between two women or two men. For the last few decades, Europe has witnessed the progress of same-sex union formalization. Denmark was the first country in the world which adopt a legal framework for two men or two women to register their union under legal recognition in 1989.[2] In 2000, not many countries in Europe adopted same-sex relationship policies. 20 years later, 29 countries across Europe have passed legislation for at least one form of official recognition of same-sex unions. Some countries adopted same-sex registered partnerships while others fully recognized same-sex marriage.[3] Now, these countries are in the progress of offering more and more rights and obligations for same-sex partners in a legally recognized relationship.[4]

The US's same-sex marriage legal recognition situation is similar to European countries. Until 2006, only one state of the US allowed same-sex couples to get married under legal recognition (Massachusetts). Besides Massachusetts, six other states adopted legislation providing limited rights and obligations for partners in a same-sex union by 2006.[5] In 2015, marriage equality became a reality in the US with the decision of the Supreme Court, which granted same-sex couples in all states of the US the right to be fully recognized under the law.[6]

Same-sex relationship recognitions have been expanded even in a more conservative region like Asia. Taiwan is the first country/jurisdiction/territory in Asia to provide the initial formalization of same-sex relationships. Although, there is a law that is laid outside the civil code, granting different rights and obligations of same-sex couples as different-sex ones.[7] In Hongkong, same-sex couples have limited legal rights and obligations regarding taxation, property, and immigration legislation.[8] Japan also had created "guidelines" that recognized same-sex partnership at the local

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1 Diederik Boertien and Daniele Vignoli, 'Legalizing same-sex marriage matters for the subjective well-being of individuals in same-sex unions' (2019) 56 Demography 2109.

2 Marie Digoix, Same-sex families and legal recognition in Europe (Springer Nature 2020) 2.

3 Cevat G Aksoy and others, 'Do laws shape attitudes? Evidence from same-sex relationship recognition policies in Europe' (2020) 124 European Economic Review 103399.

4 Digoix, *Same-sex families and legal recognition in Europe 2.*

5 Gregory M Herek, 'Legal recognition of same-sex relationships in the United States: a social science perspective' (2006) 61 American Psychologist 607.

6 https://www.vox.com/2015/6/26/18093652/same-sex-marriage.

7 Cheng-Fang Yen and others, 'Preference about laws for the legal recognition of same-sex relationships in Taiwanese people before and after same-sex marriage referenda: a Facebook survey study' (2020) 17 International journal of environmental research and public health 2000.

8 Tang, Khor and Chen, 'Legal recognition of same-sex partnerships: A comparative study of Hong Kong, Taiwan and Japan'.

government level without granting registered partnership for homosexual unions on a national scale.[1]

This tendency of legally recognizing same-sex relationships has emerged from country to country. Vietnam has been affected by these international movements regarding the rights of samesex minorities and marriage equality. Vietnam has been pursuing the strategies of expanding global integration over the past three decades. In this integration process, international standards have been harmonized with internal norms and gradually transformed into the traditional culture and the national legal system.

With the rapid development of rights movements for same-sex people worldwide, the issue of the legalization of homosexual unions in Vietnam has witnessed significant changes in recent years. To specify, marriage between same-sex people was one of the types of marriage banned previously[2] in Marriage and Family Law 2000, Article 10. At that time, the union of same-sex couples would be illegal, and they must pay administrative fines. However, in the present Marriage and Family Law adopted in 2014, the law no longer prohibits same-sex couples from marrying, but it still does not recognize same-sex marriage. The Marriage and Family Law changes show the more open approach concerning same-sex partnership in the Vietnamese legal system. In reality, the public attitude is no longer against the publicity of same-sex weddings. Nowadays, many same-sex weddings have been reported in mass media and social networks annually. Therefore, to meet the demands of international standards concerning marriage equality and adapt to societal developments, policymakers in Vietnam must step forward in granting legal recognition for same-sex couples' relationships.

From the experience of other countries, it is reasonable to follow steps by steps, combined with conducting comprehensive national surveys to assess public support before adopting new same-sex relationship policies. Therefore, our research aims to provide policymakers empirical grounds for their consideration in this progress. The paper will focus on evaluating public attitudes in Vietnamese society to explore how favorable and to what degree Vietnamese people support the legal recognition of same-sex unions. Our approach is also based on specific legal rights and obligations of each partner in a same-sex relationship granted in leading countries, especially European ones, to propose an appropriate legal recognition model for Vietnam at present.

In section 2, we present the overview of the literature review concerning the legalization of same-sex unions in Vietnam. Section 3 considers the theoretical

[1] Ibid.

[2] See Article 10, The 2000 Marriage and Family Law (The Marriage and Family Law of the Socialist Republic of Vietnam adopted by the National Assembly on June 9, 2000).

background and explains our approach to conducting surveys. Then, in section 4, the results will be analyzed to give suggestions for Vietnamese policymakers to have an appropriate solution for dealing with the issue of samesex partnership legalization.

2. A LITERATURE REVIEW OF SAME-SEX COUPLES' RELATIONSHIP LEGISLATION IN VIETNAM

In Vietnam, same-sex people can hold weddings and live together as spouses but cannot carry out marriage registration procedures[1]. There is no legal bond between same-sex couples; marriage registration is not granted. Therefore, the rights and obligations of husband and wife do not exist. Regarding property relations, because there is no spousal relationship, the property regime of spouses as prescribed in the Law on Marriage and Family does not apply. If a dispute arises, the property shall not be divided according to the marital principle of joint property. Stemming from the above context, the study of same-sex marriage rights will contribute to perfecting the law to ensure human rights, improve the social value of the Law in Vietnam and be in line with international trends.

Since the drafting period of the Law on Marriage and Family (2012-2014), the research of LGBT in general and homosexual people in particular has been increasing, especially in the legal field. In terms of theory, many scholarly works have raised the fundamental issues of homosexuals, natural rights, and laws on homosexual rights. First, research has provided comprehensive basic knowledge about homosexuals[2]. The iSEE Institute also carried out a theoretical study on homosexuals through "Homosexual, Bisexual and Transgender People in Vietnam: A Review of Research"[3]. Secondly, other studies have also focused on the theory of rights and the law on homosexual rights. In the study "Theory of rights of gay, bisexual, transgender and intersex people"[4], Truong Hong Quang highlighted the nature of homosexual rights, explained why the law must recognize these rights, and clarified the position of these rights in the legal system. In addition, theoretically, the studies have also provided general

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1 Về mối quan hệ sống chung của người đồng tính trong dự thảo luật hôn nhân và gia đình (sửa đổi), https://phapluatdansu.edu.vn/2014/03/03/12/56/ve-moi-quan-he-song-chung-cua-nguoi-dong-tnh-trong-du-thaoluat-hn-nhn-v-gia-dnh-sua-doi/.

2 iSEE, *Trả lời các câu hỏi của bạn về đồng tính và xu hướng tính dục) [*iSEE, *Answers to your questions about homosexuality and sexual orientation*].

3 iSEE, *Người đồng tính, song tính và chuyển giới ở Việt Nam: Tổng luận các nghiên cứu* (Nxb. Khoa học xã hội, 2013) [iSEE, *Homosexual, Bisexual and Transgender People in Vietnam: A Review of Research* (Social Science Publishers 2013].

4 Trương Hồng Quang, "Cơ sở lý luận về quyền của người đồng tính song tính, chuyển giới và liên giới tính" (2019) Tạp chí *Luật học* [Quang TH, 'Theory of rights of homosexual, bisexual, transgender and intersex people' (2019) Journal of Jurisprudence].

information on international law and the laws of other countries around the world on LGBT people's rights, such as "Same-sex marriage in the United States and its implications for Vietnam"[19], "Same-sex marriage: World trends, social impacts, and experience for Vietnam"[20], "Laws in some countries around the world on homosexual rights"[1]. However, in terms of legalizing same-sex marriage, little research is based on legal rights in the institution of marriage for same-sex couples. Mainly suggestion in comparative law studies without empirical results, for instance, the study "Same-sex marriage in the United States and its implications for Vietnam" has provided information on legalizing same-sex marriage in the US and raised the issue of the certificate of civil union relationship, with legal consequences such as the premarital agreement in the laws of the country.

In recent years, the iSEE Institute has been one of the leading organizations in research on the situation of homosexuals. There are some typical studies of iSEE Institute related to this issue, such as "Living in a heterosexual society - Research on 40 women who love women"[2] (2010), "Social attitudes towards homosexuals"[3] (2012), "Homosexual cohabitation: Practical experience and the pursuit of couple happiness"[4] (2013), "Research Report: Social Perspectives on SameSex Marriage - Qualitative Research in Hanoi and Ho Chi Minh City"[5] (2019), "Homosexual Cohabitation"[6] (2019), "Impact of Covid 19 on the life and need of LGBTI+"[7] (2020), etc. Research focuses on understanding homosexual people in Vietnam regarding the number, sexual orientation, occupation, prejudice, stigma, and discrimination against homosexuals. The iSEE Institute has also conducted reports, surveys about community attitudes on many aspects related to homosexuals. Furthermore, about the legal status

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1 Trương Hồng Quang, "Pháp luật một số quốc gia trên thế giới về quyền của người đồng tính" (2012) Tạp chí *Nhà nước và Pháp luật* [Quang TH, 'Laws in some countries around the world on homosexual rights' (2012) Journal of State and Law].

2 iSEE, *Sống trong một xã hội dị tính - Nghiên cứu 40 người nữ yêu nữ* (Nxb. Thế giới 2010) [iSEE, *Living in a heterosexual society - Research on 40 women who love women* (The Gioi Pulishers 2010)].

3 iSEE, Nguyễn Thị Thu Nam and Lê Quang Bình, *Thái độ của xã hội đối với người đồng tính*, 2012) [iSEE, *Nam NTT and Binh LQ, Social attitudes towards homosexuals*, 2012].

4 iSEE and others, *Sống chung cùng giới: Trải nghiệm thực tế và Mưu cầu hạnh phúc lứa đôi* (Nxb. Thế giới 2013) [iSEE, *Homosexual cohabitation: Practical experience and the pursuit of couple happiness* (The Gioi Publishers 2013)].

5 iSEE, *Báo cáo nghiên cứu: Quan điểm xã hội về hôn nhân đồng giới - Nghiên cứu định tính tại thành phố Hà Nội và Thành phố Hồ Chí Minh*, 2019) [iSEE, *Research Report: Social Perspectives on Same-Sex Marriage - Qualitative Research in Hanoi and Ho Chi Minh City,* 2019].

6 iSEE, *Sống chung cùng giới*, 2019) [iSEE, *Homosexual Cohabitation*, 2019].

7 iSEE, *Tác động của Covid 19 tới cuộc sống và nhu cầu của người LGBTI+*, 2020) [iSEE, *Impact of Covid 19 on the life and need of LGBTI+*, 2020].

of homosexuals, several papers have summarized and generalized the legal status of LGBT people's rights in Vietnam today[1] in terms of the rights to access to law[2], legal aid[3], the right to a marriage or civil union[4], just to name a few.

There are many theoretical studies about homosexual rights, but the empirical research in Vietnam is still relatively modest. In recent times, the quantitative analysis on homosexuals mainly comes from the iSEE Institute. The iSEE Institute had a survey report on public opinion and attitudes about same-sex marriage in 2014[5]. We also research this issue, but our study has a different point. The other study was conducted before the primary revision of the Law on Marriage and Family, which had not yet removed the ban on same-sex marriage. Meanwhile, our study was conducted seven years after the Law on Marriage and Family change. We have approached each group of rights specific to each legal aspect of the institution of marriage and family under Marriage and Family Law 2014, which the other quantitative researches have never done before.

3. THEORETICAL BACKGROUND

3.1. Different forms of legalization

Normally, countries have offered formalization of same-sex relationships under their legislation. There are various forms when it comes to adopting same-sex relationship legalization across countries, such as registered partnership, cohabitation, or civil marriage[6].

In Europe, most countries opened the door of same-sex legalization by introducing

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1 'LGBT Rights in Vietnam' <http://www.equaldex.com/region/vietnam>

2 Trương Hồng Quang, "Về quyền tiếp cận pháp luật và được trợ giúp pháp lý của người đồng tính, song tính và chuyển giới" (2016), Tạp chí *Nhân lực Khoa học xã hội* [Quang TH, 'About homosexual, bisexual and transgender people's right to access to law and legal aid' (2016) Journal of Human Resources and Social Sciences].

3 Thái Thị Tuyết Dung and Vũ Thị Quý, "Bảo đảm quyền của người đồng tính, người chuyển giới trong tư pháp hình sự" (2013), Tạp chí *Nghiên cứu lập pháp* [Dung TTT and Quy VT, 'Securing the rights of homosexuals and transgender people in criminal justice" (2013). Journal of Legislative Studies].

4 Trương Hồng Quang, "Quyền kết hôn của người đồng tính" (2014) 4, Tạp chí *Nghiên cứu lập pháp* [Quang TH, "Same-sex marriage right" (2014) 4, The Journal of Legislative Studies].

5 IOS, iSEE and HSPI, *Kết quả trưng cầu ý kiến người dân về hôn nhân cùng giới*, 2013) [iSEE, iSEE and HSPI, *Results of the people's opinion on same-sex marriage*, 2013].

6 C Waaldijk, 'More and more together: Legal family formats for same-sex and different-sex couples in European countries–Comparative analysis of data in the LawsAndFamilies Database' (2017), More and more together: Legal family formats for same-sex and different-sex couples in European countries-Comparative analysis of data in the LawsAndFamilies Database.

the form of registered partnership for homosexual couples.[1] Hooghe Marc and Cecil Meeusen also suggested that this type of formalization is reasonable for countries with a tolerant public opinion of same-sex partnerships.[2] This form is a tool for the authorities to regulate several rights and obligations between the partners and between the partners and other stakeholders, including the national authorities.

The registered partnership was used in many countries. The registered partnership has allowed same-sex couples to start and end their relationship with legal recognition under the national law system. This registration will lead to specific legal consequences for the couples. The regulations set for the registered partnership create legal requirements that must be met by two same-sex partners who want to register their relationship with a public authority which is often the authority to issue a marriage certificate. Also, the administrative procedures for ending the registered partnerships are similar to the procedures of ending a civil marriage.[3] It is worth noting that a registered partnership would not be ended when the partners decide to stop living together. They need to perform legal procedures to end this legally recognized relationship.[4] Sometimes, it is not easy to distinguish between registered partnership and civil marriage because some countries may fully recognize the same legal rights and obligations in a registered partnership as in a legal marriage. The degree of legal recognition concerning specific rights and obligations of each partner in this form has been varying across countries.[5] There are some noticeable limitations on the legal consequences of registered partnership for same-sex couples in many countries, including paternity rights, second-parent, joint adoption, and medical assisted insemination.[6]

Same sex cohabitation

Cohabitation is a legalization form that has made it possible for two people living together to recognize their relationship when they meet specific criteria regulated by the law. States often offer this legal family format for both different-sex and same-sex couples. The requirements set by the national legislation for allowing legal

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1 Digoix, *Same-sex families and legal recognition in Europe 15.*

2 Cecil Meeusen and Marc Hooghe, *Is same-sex marriage legislation related to attitudes toward homosexuality? Trends in tolerance of homosexuality in European countries between 2002 and 2010* (2013) 8.

3 Waaldijk, 'More and more together: Legal family formats for same-sex and different-sex couples in European countries–Comparative analysis of data in the LawsAndFamilies Database' 39.

4 C Waaldijk and others, 'The LawsAndFamilies questionnaire on legal family formats for same-sex and/or different-sex couples: Text of the questions and of the accompanying guidance document' (2016) Families And Societies Working Paper Series 20.

5 Ibid, p. 39.

6 Ibid, p.39 [40] Ibid, p.40.

cohabitation in most countries are simple. Couples do not need to implement certain procedures before their relationship is legally formalized, such as the sufficient length of the cohabitation or a shared living place. The couple only needs to sign a contract regarding their cohabitation.[40] There are limited rights attached to partners in the cohabitation relationship, for instance, benefits from partners' insurance, compensation for wrongful death, domestic violence protection, resident permission for a foreign partner, etc.

Since it is not only different from country to country in forms of legalization in terms of definition, procedures, criteria, rights, and obligations of each partner, the terminology of "cohabitation" can be considered as any relationship between two people who have not made their unions become a marriage or a registered partnership.[1] As mentioned above, while couples in a registered partnership need to follow certain regulations to end their relationship, it is simpler for cohabitation couples to perform this action where they only need to stop living together.[42]

Same-sex marriage

The terminology of marriage refers to a fully recognized form of same-sex couples' relationship. In countries where same-sex marriage is made available for homosexual couples, such legal form provides the same or almost the same legal consequences as different-sex marriages. Some countries have exclusions clause for same-sex marriage, primarily focusing on parenting rights and obligations.[2]

In conclusion, countries that have already taken steps in legally recognizing same-sex relationships vary in recognition forms, such as cohabitation, registered partnership, and civil marriage.

It is clear that rarely has a country reached the full legal recognition of same-sex relationships at the very first stages. Most countries have started at some non-marital forms of legalization. These countries often start at legal forms of legalization that provide same-sex couples with a limited number of rights and obligations compared to traditional marriage between different-sex couples. There is no clear distinction between these forms (cohabitation and registered partnership) because the rights and obligations attached to partners in each form vary from country to country.

In Vietnam, along with the development of social life, the legal relationship of

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1 The LawsAndFamilies questionnaire on legal family formats for same-sex and/or different-sex couples: Text of the questions and of the accompanying guidance document, Kees Waaldijk, José María Lorenzo Villaverde, Natalie Nikolina, Giuseppe Zago 19 [42] Ibid, p.20.

2 C Waaldijk, *Extending rights, responsibilities and status to same-sex families: trends across Europe* (Ministry of Foreign Affairs of Denmark (for Council of Europe) 2018) 10.

same-sex couples has been identified more clearly and poses more demands and needs. Regarding legalizing same-sex marriage, there have been many quite comprehensive studies conducted by individuals and research organizations specializing in psychology, marriage and family, child protection organizations, LGBT organizations, associations, and organizations working on human rights. Several scholars have also found the reasons for not recognizing the rights of same-sex couples to marry and register a civil partnership[1, 2]. Other studies point out the limitations in the development and enforcement of the law on the rights of same-sex couples in Vietnam.

Based on results obtained from theoretical and practical research, several scholars have proposed solutions to protect the rights of same-sex couples. Researchers have considered recognizing the marital rights or registered partnership rights for same-sex couples. Some studies specifically assessed some issues arising in same-sex couples' legal relationships in Vietnam regarding personal and property relations, to determine the need for legal approval recognition of the legal form of relationships for same-sex couples[3]. On the one hand, some studies recommend full marital rights for homosexuals[47]. On the other hand, much previous literature supports this relationship's legal recognition but offers a different solution as a stepping stone[4, 5, 6]. These researchers suggest that Vietnam should recognize the registered partnerships in the immediate future. Is it an appropriate solution for Vietnamese authorities?

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1 iSEE, *Báo cáo nghiên cứu: Quan điểm xã hội về hôn nhân đồng giới - Nghiên cứu định tính tại thành phố Hà Nội và Thành phố Hồ Chí Minh* [iSEE, *Research Report: Social Perspectives on Same-Sex Marriage - Qualitative Research in Hanoi and Ho Chi Minh City*, 2019)].

2 UNDP and USAID, *Being LGBT in Asia: Vietnam Country Report*, 2014).

3 Trương Hồng Quang, *Người đồng tính, song tính, chuyển giới tại Việt Nam và vấn đề đổi mới hệ thống pháp luật* (Nxb. Chính trị Quốc gia - Sự thật, 2014) [Truong Hong Quang, *Homosexual, Bisexual, Transgender people in Vietnam and the problem of reforming the legal system* (Chinh tri Quoc Gia - Su that Pubulishers 2014)] 47 iSEE and others, *Sống chung cùng giới: Trải nghiệm thực tế và Mưu cầu hạnh phúc lứa đôi* [iSEE, *Homosexual cohabitation: Practical experience and the pursuit of couple happiness* (The Gioi Publishers 2013)].

4 Cao Vũ Minh, 'Các hình thức công nhận hôn nhân đồng giới trên thế giới và sự lựa chọn cho Việt Nam' (2014) Tạp chí Nhà nước và Pháp luật [Minh CV, 'Forms of same-sex marriage recognition in the world and choices for Vietnam' (2014) Journal of State and Law].

5 Cao Vũ Minh and Nguyễn Đức Nguyên Vy, "Nên thừa nhận chế định kết hợp dân sự giữa hai người cùng giới tính" (2014) Tạp chí *Nghiên cứu lập pháp* [Cao Vu Minh and Vy NĐN, "The institution of civil union between two people of the same sex should be recognized" (2014) Journal of Legislative Studies].

6 Quang, "Quyền kết hôn của người đồng tính" [Quang TH, "Same-sex marriage right" (2014) 4 The Journal of Legislative Studies]..

As mentioned above, the different forms of same-sex unions legalization do not depend on the terminology used in each form. It is more important to identify specific rights and obligations granted for partners in the relationship attached in the appropriate form that must be tailor-made for each country. To our knowledge, there is no published paper with an empirical approach to deal with this consideration conducted after 2014. Due to the scarcity of empirical support on the topic, this paper aims to provide empirical support for seeking a reasonable approach for this progress in Vietnam based on experience from leading countries that have succeeded in dealing with this issue, combined with thoroughly considering Vietnam's social and political context.

3.2. The role of public attitudes on forming same-sex relationship recognition policy

Various factors influence legalizing same-sex couples' relationships in each country. On the one hand, numerous specific domestic factors affect the process of same-sex recognition in western countries, including religiosity and the political will of the national authorities. On the other hand, international and transnational factors such as development of the rights movement for LGBT+ play an important role in the domestic legal transformation[1].

According to Marc Hooghe and Cecil Meeusen, the legal recognition of same-sex unions has been initially adopted in societies that have a less conservative public opinion.[2] There is a bonding correlation between favorable public opinion and the improvement of legislation concerning the recognition of same-sex relationships in many countries, specifically European ones. In Europe, most countries conducted qualitative and comprehensive surveys to assess public attitudes before granting official legal recognition.[3] Previous research highlighted that countries with a favorable public opinion on same-sex marriage legalization have successfully implemented this policy.[4] Marc Hooghe and Cecil Meeusen conducted a systematic analysis to confirm a positive correlation between public attitudes toward homosexual unions and the legal recognition of same-sex partnerships.

Along with this progress of legal transformation in European countries, many empirical studies show that public support for legalizing same-sex unions has gradually

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1 Meeusen and Hooghe, *Is same-sex marriage legislation related to attitudes toward homosexuality? Trends in tolerance of homosexuality in European countries between 2002 and 2010 8.*

2 Ibid 1.

3 Ibid 2.

4 Ibid 2.

been positive for the last few decades.[1] Kees Waaldijk argued that it's probably that non-legal factors such as public attitudes play a very important role in paving the way for extending the marital rights to homosexual people.[2] Thus, although there are many other important factors in constructing a comprehensive strategy for the official legalization of same-sex couples' relationships, public attitude needs to be assessed to have answers to the extent the policymakers could recognize same-sex unions under the national legal system.

3.3. Research approach from the context of Vietnam

Therefore, we choose to identify the first steps for legalizing in Vietnam by focusing on important legal aspects based on rights and obligations provided for heterosexual marriage under the Vietnamese national legal system.

According to Article 3 and Article 8 of the Law on Marriage and Family 2014, the current law only recognizes one full form of marriage, by a couple of the opposite sexes. The law clearly defines the rights and obligations of husband and wife in marriage. The rights and obligations of husband and wife in marriage can be divided into two primary groups of rights: personal rights and obligations and property rights and obligations. In the Law on Marriage and Family 2014, the individual rights and obligations of husband and wife are stipulated in Articles 17, 18, 19, 20, 21, 22, 23; Property rights and obligations of husband and wife regarding the marital property are regulated in Articles 24, 28, 29, 30, 31, 37. In addition, the marriage and family law also stipulates the rights and obligations of husband and wife towards their children under Articles 69, 71, and 72. Since the issue of whether the national legal system should fully adopt rights and obligations for same-sex couples in traditional marriage as different-sex ones is a significant sensitive issue in most countries.[3] Even in European countries with a very tolerant and open public opinion toward same-sex relationships, it was very challenging when considering the legal recognition of rights concerning parenting and adoption procedures for same-sex couples in a legally recognized relationship.[4] These issues have also delayed the legalizing progress in Asian countries, except for Taiwan. Therefore, to propose the first steps for the national policymaker, we do not consider

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1 Giulia M Dotti Sani and Mario Quaranta, 'Let Them Be, Not Adopt: General Attitudes Towards Gays and Lesbians and Specific Attitudes Towards Adoption by Same-Sex Couples in 22 European Countries' (2020) 150 Social Indicators Research 2.

2 Digoix, *Same-sex families and legal recognition in Europe 18.*

3 Dotti Sani and Quaranta, 'Let Them Be, Not Adopt: General Attitudes Towards Gays and Lesbians and Specific Attitudes Towards Adoption by Same-Sex Couples in 22 European Countries' 2.

4 Meeusen and Hooghe, *Is same-sex marriage legislation related to attitudes toward homosexuality? Trends in tolerance of homosexuality in European countries between 2002 and 2010 5.*

all marital rights and obligations. We exclude the rights and obligations regarding joint adoption and legal parenthood in the questionnaires because these legal aspects are the last ones that could be granted for same-sex partners in most countries.

On the other hand, from experiences of leading countries in dealing with the issue, such as European ones, we based on a highly qualitative database from comprehensive surveys conducted in 21 European countries - the LawandFamilies Database to build the questionnaire.[1] The detailed questionnaires and the results of this EU-funded project were published at *"The LawsAndFamilies Database - Aspects of legal family formats for same-sex and different-sex couples"*. From the results of this very comprehensive database, we chose legal rights and responsibilities that reach the highest consensus of public opinion to attach to our survey. In other words, these rights and obligations are the least sensitive issues which might be more simple to be implemented into the legal system at the very first stages.

4. MEASURES

The research conducted online surveys due to the covid-19 pandemic. Two hundred fifty-nine Vietnamese citizens served as the participants in this study randomly. The survey was divided into three parts of questionnaires: Questions for demographic information, Questions on attitudes about homosexuality and same-sex relationships, and questions on attitudes about legalizing samesex relationships. The questions were built on previous studies with the proper revision when translating for Vietnamese people.

Demographic Information. Participants provided a range of demographic information. The current study used participant age, gender, sexual orientation, city, marriage status, highest degree, job, religion.

Attitudes about homosexuality and same-sex relationships. Participants answered three questions regarding their opinions, whether homosexuality is a disease that needs to be treated, whether they should be treated with no differences than heterosexuals, and if the same-sex couple could reveal their relationship with society. The questions based on questionnaires in Tarik Abou-Chadi1 and Ryan Finnigan's study[2] (with the question "Gay men and lesbians should be free to live their own life as they wish") and Long Doan, Annalise Loehr, and Lisa R. Millera's research[3] (with the the question

[1] Kees Waaldijk and others, 'The LawsAndFamilies database–Aspects of legal family formats for same-sex and different-sex couples' (2017) Database] Paris, France: INED Retrieved from www LawsAndFamilies eu.

[2] Tarik Abou-Chadi and Ryan Finnigan, 'Rights for same-sex couples and public attitudes toward gays and lesbians in Europe' (2019) 52 Comparative Political Studies 868.

[3] Long Doan, Annalise Loehr and Lisa R Miller, 'Formal rights and informal privileges for same-sex couples: Evidence from a national survey experiment' (2014) 79 American Sociological Review 1172.

"To what extent do you agree or disagree that it is okay for same-sex couples to tell others that they are a couple?").

Attitudes about legalizing same-sex relationships in general

Participants were asked two questions. First, should the term "marriage" of the Marriage and Family Law 2014 only be understood as a relationship between a man and a woman? Second, should same-sex couples be recognized by law for all the rights and obligations of spouses in traditional marriages between a man and a woman?

Attitudes about legalizing same-sex couples The innovative database, Laws And Families Database - Aspects of legal family formats for same-sex and different-sex couples provides a comprehensive overview of developments regarding more than 60 legal issues for (married, registered or cohabiting) same-sex and different-sex couples, over decades (1965-2016). It went online in open access early 2017, with information about 23 jurisdictions in 21 countries. The data in the LawsAndFamilies Database make it possible to track this development for many of the rights and responsibilities included in the questionnaire used to create this database. For monitoring this development, some of the 69 questions in the questionnaire seemed less useful. Only 26 of the 69 questions have been used to assess the substantive legal recognition of same-sex couples. The 26 questions all tell us something about the degree to which countries recognize same-sex partners by making substantive rights and responsibilities available to them. Only 11 items were chosen to be included in the survey as being considered for their suitability with Vietnamese culture and public opinion. These items were combined to create a localized survey, including important legal aspects, such as the degree of legalization, family leave, inheritance, domestic violence, etc. Responses were given on a 5-point Likert-type scale ranging from 1 = never to 5 = almost always. Higher scores indicate more agreement with the given question.

The survey was piloted with small groups to guarantee that all items were comprehensible. Subsequently, all participants completed the study online. Participants were required to complete a battery of self-report measures. The survey took approximately 10 minutes to complete and consisted of questionnaires on the participants' opinions regarding same-sex partnerships and same-sex marriage legalization and relevant demographic information.

5. RESULTS

5.1. Description of study subjects

We conducted an online survey that was randomly sent regarding the sample characteristics. The results obtained 259 forms, of which women accounted for

62% and men 37%. The survey sample is diverse, representing different family and community generations. Survey participants ranged in age from 17 to 75 years old, in which 77.6% were young people aged 17-35 years old, 19.3% were of the middle-aged group of 35-50 years old, and 3.1% were of the elderly group of 50-75 years old. Other socio-demographic characteristics also show that most participants have never been married, with 147 of the 259 forms being single or unmarried. More than 50% of the survey participants live in urban areas—78% no religion, 17.8% Buddhist, and 2% Catholic.

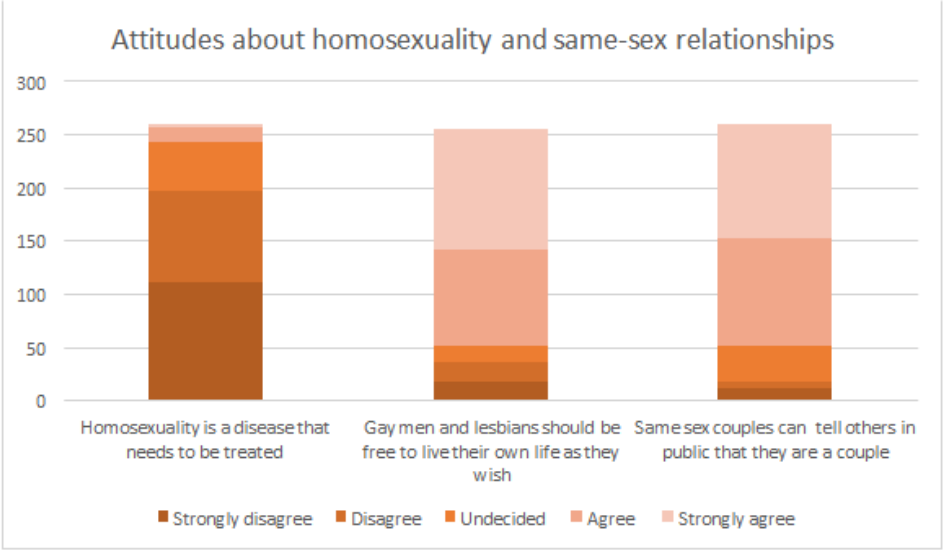
In terms of education level, most respondents in the sample have a high school degree or higher. 54% have college and university degrees, and more than 20% have above university level. State officials, civil servants, and public employees accounted for approximately 22% of the sample. Office workers accounted for 32%; students accounted for 24%; 2% are small businesses owners; 3.5% are self-employed. About 16.6% belong to other occupations. The analysis is based on the above-mentioned multidimensional characteristics to extract the research results, which obtained the most profound findings related to the people's knowledge, attitudes, and views towards same-sex marriage in society.

5.2. Analysis of results

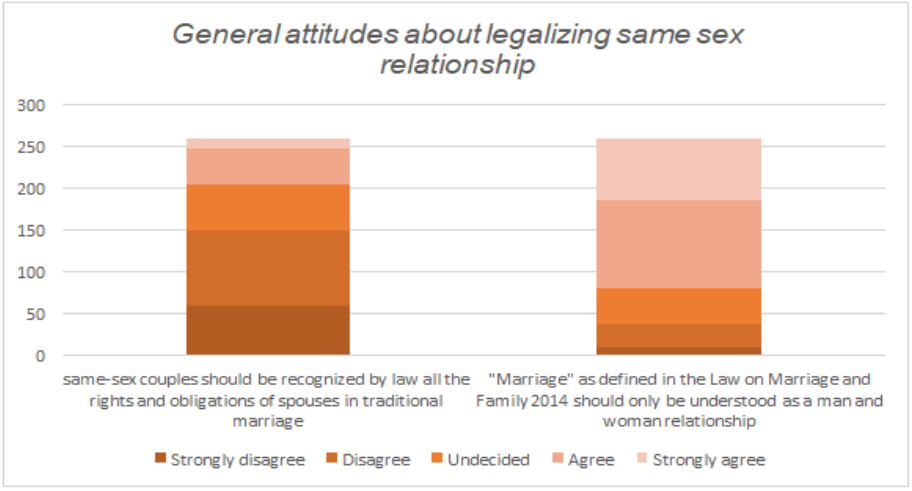
Based on a questionnaire-based survey, the research team obtained the following results:

Firstly, respondents' attitudes about homosexuals and same-sex relationships are found in Questions 1, 2, and 3[1]. The results show that respondents have a positive attitude towards homosexuals. 76% do not think homosexuality as a disease, only a minority of 6% think that homosexuality is a disease. More than 80% believe that homosexual people can study, work, and participate in community activities like heterosexuals. 80% support that same-sex couples can openly tell everyone that they are a couple, only 6.5% oppose this view, about 13% feel undecided.

[1] See the Questionaires as the Annex.



Second, regarding the general attitude of respondents about legalizing same-sex couples (based on the results of Questions 4 and 5), 69% support that same-sex couples should be recognized by law all the rights and obligations of spouses in traditional marriage as between heterosexual couples, but 14% objected. 57% disagree that "Marriage" as defined in the Law on Marriage and Family 2014 should only be understood as a man and woman relationship. Furthermore, the survey also revealed that a high level of education is associated with a high degree of support for legalizing same-sex couples.



50% of people who have not graduated from primary school and those in lower secondary school believe that marriage defined in the Law on Marriage and Family 2014 must be understood as a relationship between a man and a woman. Meanwhile, only 20.3% of people at the university level and 22.7% above the university level advocate for this issue. 16% of those who have not graduated from primary school

and 20% of those in vocational secondary schools oppose that same-sex couples be recognized by law for all the rights and obligations of spouses in traditional marriage between heterosexual couples. Only 13% of people at the university level oppose this. However, 20% of people studying at the university level oppose it.

There is a unique point in our survey: it seems that legal support for same-sex marriage is relatively high, while the 36-50 age group is less open than the youth group (However, there are only eight people in the 51-75 age group and 50 people in 36-50 group). 17.9% of people aged 17 to 35 advocate that marriage must be understood as a relationship between men and women, as defined in the Law on Marriage and Family 2014. Up to 36% of 17 to 35-year-olds and 25% of 51 to 75-year-olds support this. 12.4% of 17 to 35-year-olds objected that same-sex couples should be legally recognized for all the rights and obligations of spouses in traditional marriages between heterosexual couples. 20% of 35- to 51-year-olds oppose. However, 12.5% of 51- to 75-year-olds oppose (See Table 1).

Table 1

Age (years old)	The term "marriage" defined in the Law on Marriage and Family 2014 must be understood as a relationship between a man and a woman					
	Strongly disagree	Disagree	Undecided	Agree	Strongly agree	Total
17-35	27.4%	31.8%	22.9%	15.4%	2.5%	100%
36-50	6%	44%	14%	22%	14%	100%
51-75	0%	62.5%	12.5%	25%	0%	100%

The percentage of never-married people in favor of legalizing same-sex marriage is higher than those of have-been-married. Perhaps because the unmarried mainly fall between the ages of 17 and 35 (young people), while those who have been married fall into the more conservative middle age group. 33% of people living with spouses and 20% of people in a state of separation or divorce believe that marriage stipulated in the Law on Marriage and Family 2014 must be understood as a relationship between a man and a woman. Only 12.9% of people who have never been married think this way. (See Table 2)

Table 2

Marital status	The term "marriage" defined in the Law on Marriage and Family 2014 must be understood as a relationship between a man and a woman					
	Strongly disagree	Disagree	Undecided	Agree	Strongly agree	Total
Married--spouse present	7,2%	37,1%	22,7%	26,8%	6,2%	100%
Married--spouse absent,	0,0%	0,0%	0,0%	100,0%	0,0%	100%
Divorced/Separated	0,0%	80,0%	0,0%	0,0%	20,0%	100%
Widowed	0,0%	0,0%	0,0%	0,0%	0,0%	0%
Never married	33,3%	32,0%	21,8%	10,9%	2,0%	100%
Not answer	25,0%	50,0%	0,0%	0,0%	25,0%	100%

19.6% of people living together and 40% of people in a state of separation or divorce objected that same-sex couples should be recognized by law for all the rights and obligations of spouses in traditional marriages between heterosexual couples. Only 8.9% of people who have never been married oppose it (See table 3).

Table 3

Marital status	Same-sex couples should be recognized by law for all the rights and obligations of spouses in traditional marriages between heterosexual couples					
	Strongly disagree	Disagree	Undecided	Agree	Strongly agree	Total
Married--spouse present	5,2%	14,4%	18,6%	53,6%	8,2%	100,0%
Married--spouse absent,	0,0%	0,0%	50,0%	50,0%	0,0%	100,0%
Divorced/Separated	20,0%	20,0%	20,0%	20,0%	20,0%	100,0%
Widowed	0,0%	0,0%	0,0%	0,0%	0,0%	0,0%
Never married	0,7%	8,2%	15,6%	33,3%	42,2%	100,0%
Not answer	25,0%	0,0%	12,5%	25,0%	37,5%	100,0%

Thirdly, about the respondents' attitudes on specific rights and obligations related to the legalization of relationships with same-sex couples:

Question group related to the right to marriage registration: There are two questions (Question 7 and 8) that asked the respondents should the laws allow "marriage registration" for same-sex couples or should the laws only allow them for "cohabitation registration" *("đăng ký sống chung"* in Vietnamese). Surprisingly, the respondents have a higher objection regarding cohabitation registration than marriage registration. 31% oppose registration of cohabitation (6.6% strongly disagree, 24.3% disagree), while only 10% oppose same-sex marriage (3.9% strongly disagree, 6.2% disagree). There might be a reason for this result. In Vietnamese people's life, marriage is a sacred relationship witnessed by the forefathers - closely linked to the spiritual and religious life of the Vietnamese people, not merely a recognition of law. Therefore, when it comes to cohabitation registration, public attitudes in Vietnam are quite conservative. Vietnamese people consider the activities of cohabitation as "sống thử" in Vietnamese. From the lens of many Vietnamese people, according to Vietnamese traditional culture, the phenomenon of two people living together without marriage registration is morally wrong. It brings many negative consequences for the young generation and the whole society.[1]

Question group on rights and obligations related to family care and medical decisions (Question 9,10, and 14): 57.2% support that if one of the partners is seriously ill, t he other should be given unpaid care work under the law. 78.4% agreed that the other partner should have the medical decision-making power (albeit without a power

[1] https://thanhnien.vn/song-chung-truoc-khi-ket-hon-nen-hay-khong-post487312.html

of attorney) as with the spouse of the accident partner. Among these three questions, question 14 has the highest level of agreement; 82.6% agree that if one partner's parents have died, the other partner should be entitled to 3 days off with full salary as prescribed by the Labor Code to perform funerals. This result is because Vietnamese people think that "all things are forgiven upon death". For the dead, all resentment and hatred should be ignored and should be treated with love, that is, especially in organizing a solemn farewell.

Question group related to inheritance and common property rights of partners in same-sex unions (Question 11, 12, and 13): 82.2% agreed that same-sex couples' partners should have the rights related to the property of spouses legally recognized only 7.3% objected. Assuming one of the partners dies and leaves no will, 79.9% support that the remaining partner should be recognized as his or her spouse's inheritance, 12% feel they can accept it, just only a few survey participants objected (8.1%). Assuming one partner dies or is in an accident due to another's fault and is compensated for the damage, 76.8% agree that the other partner should be balanced, 15.4% have no opinion, and 7.7 % protest.

Question-related to domestic violence: Assuming a partner is a victim of domestic violence, 88% agree that they need to be protected by legal provisions on domestic violence prevention. Only 3.4% oppose this issue.

6. SUGGESTIONS

According to the survey results, some noticeable points need to be considered carefully in passing same-sex relationship legislation in Vietnam.

Firstly, the higher education people have, the less conservative they are concerning the legalization of same-sex relationships. This result is consistent with the context of other countries which have already succeeded in formalizing same-sex unions. Previous research has shown that different educational background is an important variable that affects public attitudes towards homosexual relationships.[1] In general, Vietnamese people with high educational backgrounds have a favorable attitude towards the legalization of same-sex relationships, even with middle-aged and older people who are considered more conservative about this issue than others. Furthermore, people who have gotten married at least once in their life show a higher rate of opposition for allowing same-sex couples to fully recognize their relationship and have the same rights and obligations as different-sex couples in a traditional marriage than people

[1] Meeusen and Hooghe, *Is same-sex marriage legislation related to attitudes toward homosexuality? Trends in tolerance of homosexuality in European countries between 2002 and 2010.*

who have never gotten married. Thus, it strengthens the arguments that it is impossible to adopt fully recognized forms for same-sex unions as same-sex marriage in Vietnam immediately. We need to take step by step on this issue.

Secondly, concerning specific rights and obligations, it is pretty interesting that while a large number of respondents in European countries reach the consensus on the right on leaving to care for partners (80%), there are only 57.3% respondents in our survey support this. Due to time limits, we have not conducted in-depth interviews to explore why Vietnamese people do not favor this right. Further research with in-depth interviews needs to be undertaken to comprehensively assess the differences between Vietnamese public opinion and other countries' public opinion on certain rights and responsibilities that need to be granted for same-sex couples.

Thirdly, although many Vietnamese scholars have suggested that it is reasonable for the national legal system to grant registered partnership or registered cohabitation for same-sex couples as the first step of the legalization process, our results state otherwise. It is possible that Vietnamese people do not have positive attitudes concerning the form of "cohabitation" or "registered partnership" for same-sex couples other than "marriage". In fact, in countries that recognized the registered partnership or cohabitation for same-sex unions, these forms were also provided for the different-sex ones. In Vietnam, registered partnership or formal cohabitation has not been allowed for different-sex couples under Vietnamese legislation. Therefore, we argue that it might not be necessary to introduce a specific terminology for a form of same-sex partnership legalization as "register partnership" or "formal cohabitation" as in other countries. It is more important to identify proper rights and obligations, which can reach a consensus of public opinion to pave the way for the first steps of homosexual relationship legalization.

Fourthly, several rights and obligations are not stipulated under the Marriage and Family Law. For example, the rights to have three days off with full salary as prescribed by the Labor Code to perform funerals and the rights to be protected in case of domestic violence received the highest support from public opinion (82.6% and 88%, respectively). We suggest that it might be more effective in the progression of same-sex union legalization if we implement these rights and obligations, achieving more outstanding popular support. For instance, when Vietnamese people get along with the circumstance that a same-sex partner has a right to take three days off to perform the funerals of their "parents in law", it will have a significant impact on changing people's attitudes on the same-sex partnership, paving the way for extending more legal rights and obligations to them.

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MARRIAGES OF TRANSGENDER PEOPLE IN VIETNAM

Nguyen Quynh Trang[1]

Abstract: *Transgender people stand for the "T" in the LGBT+ community, an indispensable part of the rainbow flag - a symbol of love, hope and talent. That is why the LGBT's consistent, continuous fight for their own equality, freedom of expression, and other fundamental human rights has been happening worldwide. Suffering physical and mental pain, if trans people dare to be true to themselves. Slowly understanding those struggles, modern society seems to be more open about it, but the journey to legalization will be the most difficult. It means transgender people may be luckily accepted by others in some cases, not their marriage with other people, or between them. As a typical east asian country with a kind of conservative mind, the legal relationship of trans people in Vietnam has been an issue left open, forcing activists to work harder to propose the government to acknowledge their legitimate rights. Therefore, this research focuses on two main objectives: investigating the situation of trans marriages in Vietnam from the conception, causes, to current regulations, and proposing potential solutions in the future. The article suggests increasing the number and quality of research (conducted by Vietnamese organizations/ experts) about transgender people, having clear guidelines on the defining gender procedure after transition as well as legal obligations during or after living together.*

Keywords: *transgender, trans, LGBT, marriage, Vietnam.*

INTRODUCTION

The transgender definition has continued to be a controversial issue among and outside the LGBT community. According to American Psychological Association (APA), transgender is a term commonly "used to describe the full range of people whose gender identity and/or gender role do not conform to what is typically associated with their sex assigned at birth" and trans is a popular "short-hand for the terms transgender, transsexual, and/or gender-nonconforming"[2]. The trans meaning is more complicated than many thought. In fact, some trans people define themselves as trans men (female-to-male or FTM) or trans women (male-to-female or MTF), while others identify as non-binary, genderqueer, agender, bigender, etc[3]. The transgender

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[2] American Psychological Association (2015), Guidelines for Psychological Practice with Transgender and Gender Nonconforming People. American Psychologist, 70 (9), 832-864. doi: 10.1037/a0039906

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transition may include using hormones or undergoing reassignment surgery, when others simply change their name, form of address or appearance.

Because of different interpretations in different countries, the trans community faces a range of difficulties in daily life, from gender identification, name/ID change, to using public restrooms, many forms of discrimination, not to mention marriage and family issues. Many legal systems have only recognized heterosexual relations in the context of marriage. It is confusing to define a transgender person as a man or woman if the transition is unclear or incomplete, even if that person has conducted the surgery and in the new sex for other purposes[1].

One of the good signs as a member of ASEAN, is that Vietnam has been quite open with LGBTIQ in recent years. There have been no laws against homosexuality or any state-sanctioned persecution of same-sex activity throughout its history. While Taiwan remains the first country/territory in Asia to recognize same-sex marriage, Vietnam decriminalized same-sex activity in 2015. Furthermore, Vietnam amended The Civil Code enshrining rights for transgender people – allowing those who have undergone sex reassignment surgery to register under their new gender. In 2017, the Ministry of Health announced the gender affirmation draft to provide official legal status to transgender persons, which would allow them easier access to healthcare and public services[2]. But the journey of marriage equality for trans people has just begun.

The situation in Vietnam has so far been largely unexplored, creating a black hole in the marriages of transgender people. This article attempts to close that gap, shedding light on the Vietnamese context for its own purposes, and also as a means to underscore the broader situation in the ASEAN region. Through this article, audiences will hopefully better understand why marriage equality is so important, how transpeople can take a further step closer to their rights and the difficulties of responsible authorities in solving LGBT issues.

Therefore, the article is divided into three main parts. Firstly, it will examine the issues of marriages of transgender people in Vietnam, including exploring the definition and reasons. Secondly, the research analyses the current situation through practice and law. Thirdly, I propose appropriate recommendations for stakeholders.

NEW CONCEPTION OF MARRIAGE IN VIETNAM NOWADAYS

Regardless of recent warnings about the risk of divorce, breakup, and separation of married couples, marriage is still important in Vietnam today. In a survey of

[1] International Commission of Jurists (2009), SOGI Casebook, Chapter nine: Transgender marriage, Geneva, Switzerland.

[2] Eijas Ariffin (2018), ASEAN's shifting attitudes towards LGBT rights, The ASEAN Post.

the Institute For Family and Gender Studies (IFGS), Vietnam Academy of Social Sciences, the majority of respondents affirmed the importance of marriage, and young people when reaching adulthood necessarily have to marry someone. The percentage of people who agree with being single (10.3%) was much lower than the disagree opinion (42,4%). Family continuously is the prime priority of Vietnamese in their lives, besides career and friends.

The old generation's inherent ideas of marriage and family have gradually faded in younger ones such as procreation is the main purpose of marriage, sacrifice is a must-have personal morality in family, individuals need to obey social orders, marriage is about men and women, etc. Gen Y, gen Z nowadays value the connection in a relationship, especially the emotional and sexual aspect more than responsibility or commitment as they are aware of the finite nature of love and that there are multiple soulmates for one person[1].

The extent of acceptance, slow openness with a new marriage and family phenomena is noteworthy. Just under half of the respondents (49,6%) accepted someone having single mom status, expressing the transformation in awareness and humanity in protecting women's rights. Fewer people in traditional families allowed singleness (38.5%), in contrast, the figure was increasing in modern groups and females. People in Traditional families also looked at same-sex marriage negatively (27.7%) and even lower in the old male group with low education while cohabitation was more accepted with 67.5% people agreeing[2]. Those forms of marriage and family are usually very rare or non-existent in the past but quite popular in societies transforming from agriculture-based to industrialization and modernization. In Vietnam, a part of the citizens, especially young Kinh people living in cities with high education are willing to adapt to new kinds of families.

According to The Institute for Studies of Society, Economy and Environment (iSEE), LGBT people in Vietnam accounted for 9% to 11% of total population. Going along with social developments, the LGBT community is more and more accepted as natural, equal and full members of general society. However, LGBT people have always been faced with the danger of discrimination in social, educational, labor interaction. Marriage recognition for LGBT will become a significant foundation for the social integration of this group and contribute to the general cultural - economic - social improvement of Vietnam. From the latest report, "Economic impact assessment

[1] Kayla McKinney (2021), Generation Z is rewriting the love game, send help!, The FAMUAN, Florida A&M University.

[2] Tran Thi Minh Thi (2021), Fundamental values of contemporary Vietnamese families and some setting problems, Family and Gender Research Journal, Volume 31, No. 2.

of same-sex marriage's policy in Vietnam", iSEE and *Viet Nam* Centre for Economic and Strategic Studies (VESS) stated that same-sex marriage legalization would be able to increase 1.65% to 4.36% GDP each year for Vietnam the growth rate would gradually increases in about ten years (because LGBT needs some time to recover from psychological trauma and Vietnamese society needs space to change and adapt). It means that the average GDP growth rate brought by same-sex marriage legalization in the short term is from 0.17% to 0.44% per year. In addition, the recognition also boosts relevant industrial sectors such as wedding planner, wedding dress, wedding jewelry, etc with revenue increase rate from 4.36% to 5.26%. Another benefit of legalization is saving 13 million USD to 71 million USD yearly for contingency expenses resulting from losses because of psychological disorders (depressive disorder and anxiety disorder) when LGBT suffering from their vulnerable positions.

MARRIAGES OF TRANSGENDER PEOPLE UNDER VIETNAMESE LAW

This is a controversial issue because of the lack of a legal corridor in Vietnam for transgender people. Until the Draft Law on Gender Affirmation passes, there would be no law on who trans people are, so determining their role in the marriage relationship would be difficult, leading to thousands of a series of consequences on marriage registration, adoption, division of common property, etc.

So who is transgender people?

Transgender and gender affirmation are two different concepts that are sometimes confused. Transgender is a state in which a person perceives themselves as belonging to a gender that is not identical with the body's gender characteristics at birth. Transgender is only about gender perception, regardless of whether they have undergone gender reassignment surgery or not. In the case of transgender people who have undergone surgery, they are called transsexual people.

The sex reassignment surgery procedure is a series of psychological, hormone and surgical treatments. Not all transgender people want to have sex reassignment interventions such as hormone treatment or surgery for many different reasons: maybe because they don't want to affect their health, they don't have enough money, they don't have family support, suffer from outside discrimination, unable to find a consultant on the gender transition process... In fact, they can still find a life partner, regardless of whether they have had surgery or not.

Who do transgender people love?

Transgender is only about gender perception, and falling in love is due to sexual orientation. These two are independent of each other. There are still transgender people in the world who change from male to female and then fall in love with

women. Transgender people can also belong to one of five main sexual orientations: heterosexual, homosexual, bisexual, pansexual, or asexual. Therefore, transgender women or men can love straight men, straight women, bisexuals, transsexuals, asexuals, pansexuals... like all other people.

Therefore, it is necessary to determine that the marriage partner of transgender people can be very diverse, even many unnamed relationships as the following table:

	Transgender	Partner	Marriage relation
1	FTM	F/MTF	Heterosexual
		M/FTM	Same-sex
		Bisexual	Unknown
		Asexual	Unknown
		Intersex	Unknown
		Pansexual	Unknown
2	MTF	F/MTF	Same-sex
		M/FTM	Heterosexual
		Bisexual	Unknown
		Asexual	Unknown
		Intersex	Unknown
		Pansexual	Unknown

According to Clause 5, Article 3 of the Law on Marriage and Family, marriage means the establishment of a husband and wife relationship by a man and woman in accordance with this Law on marriage conditions and marriage registration. It seems that marriage is the prerogative of straight men and women, the other genders are not mentioned.

According to the provisions of paragraph 2 Article 8 Law on Marriage and Family 2014, currently, Vietnam does not recognize marriage relationships between people of the same sex. Ways for a transgender person to get married in accordance with current law: first of all, transgender people must carry out procedures to change their gender on their identity papers, household registration books, etc. If the transgender person and his/her lover are two people of the same sex on paper, they can not marry each other[1].

THE NEEDS OF MARRIAGE LEGISLATION FOR TRANSGENDER PEOPLE IN VIETNAM

Because it is a right. The right to marry, establish a family and equality in marriage is one of the human rights mentioned in article 16 of the Universal Declaration of Human Rights of the United Nations in 1948. Specifically, human civil rights include the right to marry with the completely free consent of both parties. Transgender people in particular

[1] This is not yet available, since although the right to change gender marker is recognized, there exists no legal documents regulating it.

or the LGBT community in general have the same right to marry like everyone else, they have no special rights or separate rights. The mentioned LGBT rights should be understood as basic human rights that LGBT people are being violated in certain contexts.

Because we all need a family. The Declaration of Independence of the United States of America in 1776 stated: All men are created equal. Their Creator endows them with inalienable rights; Among these rights are life, liberty, and the pursuit of happiness. One of the most important elements of the right to pursue happiness is finding your own happiness, building a family, and being respected and protected by the state. Currently, only 30 countries recognize same-sex marriage, some in the form of civil unions. Theoretically, they are considered as a couple, but in practice, their rights are limited compared to other heterosexual couples.

Because some relationships need legal documents: adoption, property division, guardian in case of illness, surgery. It is difficult for a transgender couple to adopt a child together because they do not have a marriage certificate, which is one of the mandatory requirements for the adopter's application under the Law on Adoption 2010 and Decree 24/2019/ND-CP. Article 16 of the Law on Marriage and Family stipulates settlement of property relations, obligations and contracts of men and women living together as husband and wife without marriage registration as agreed between the parties; in the absence of agreement, the settlement shall be in accordance with the provisions of the Civil Code and other relevant provisions of law.

To gradually push back the stigma and discrimination against transgender people and the LGBT community. Transgender people may be considered as a disadvantaged group in society when participating in socio-economic relations such as looking for jobs, using health services, and enjoying social security benefits. They often face obstacles and may be treated unfairly. Transgender people's ability to self-support and protect when their legitimate rights are violated is very low. The law on the right of transgender people, and more broadly, the right to marry of transgender people, with specific provisions, will reasonably adjust and limit inequality between different groups in society.

SITUATION OF MARRIAGES OF TRANSGENDER PEOPLE IN VIETNAM

It's very hard to have an exact number but based on the world's studies, the rate of transgender people is about 0.3 to 0.5% of population[1]. As a result, with a population of 98,511,486 people in Vietnam by December 7, 2021[2], the average number of transgender citizens is estimated between 295,000 and 492,000. Those

[1] Gary J. Gates (2011), How Many People are Lesbian, Gay, Bisexual, and Transgender?, William Institute, School of Law, UCLA, CA.

[2] Retrieved from: https://danso.org/viet-nam/

hundreds thousand of people don't have any legal framework to regulate, to ensure their rights in daily life is such an unfair situation.

According to a survey conducted by iSEE[1], the reassignment need of transgender people in Vietnam was significant, as 78.1% want to conduct reassignment surgery, 11.1% had done at least a body part (breast, sex organs or both). Other cases identify their own through many ways, 86.3% want to change their names in identity documents and 86.6% want to change their names without surgery. Notably, despite frequently having difficulties in administrative procedures, 95.8 % of trans people want to marry their lovers, in which 78.3% still want to marry even when they can't change their gender in identity documents.

About publicly married and wedding's demand, among 75 LGBT people who were asked whether they need to live with their lovers or partners or not, 64 persons said yes, 10 said no and 1 had no comment[2]. Currently, Vietnamese law does not forbid the wedding organization of same-sex or transgender couples so 43 out of 64 people shared that they wish to hold a wedding with blessings from their families and friends, the rest 21 do not intend to celebrate due to obstacles from families, local authorities or community discrimination. Some individuals worried that if the law disallows the marriage, the wedding is just a formality, or openly organizing a wedding will affect their present occupation.

About having babies and adoption's demands, those are real desires of LGBT people who dream about a full family with all members including parents and children like other people. According to UNDP-USAID Vietnam's online questionnaire, 87.7% of respondents intended or planned for having kids, of which 15.4% want to have children of their own, 34.1% want to adopt and 50.5% claimed that their own or foster kids were the same. The proportion was similar to results from direct interviews, with 14, 21, and 33 people. The trend of wishing to have kids in LGBT is fairly compatible with other countries. As reported by American Community Survey 2012, the ratio of same-sex couples (unmarried and married) adopting was 4.5 times higher than opposite-sex pairs and 10 times higher than unmarried heterosexual couple.

Because of many difficulties above, the situation of transgender marriage in Vietnam might be divided into four cases:

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[1] iSEE (2013), Results of collecting people's opinions about same-sex marriage. Retrieved from: https://static1.squarespace.com/static/526c21b5e4b0d43e45f6c4c2/t/5404bec7e4b05f700aab236d/1409597127728/iSEE_Nghien+cuu_Y+kien+nguoi+dan+ve+hon+nhan+cung+gioi.pdf

[2] UNDP-USAID Vietnam (2014), Adoption rights of LGBT in Vietnam - Reality and Recommendations.

First, Transgender people marry a person of the opposite sex to legalize the marriage to outside people. People who have not/can't come out often live a life of pressure and repression, trying to hide their nature by marrying a same-sex person without changing their gender. The reason are that they want to have children, because of family pressure, because they want someone to rely on or because of social pressure.

Second. Transgender people live with partners as husband and wife but do not get married. Although the law does not recognize it, many trans people still secretly organize weddings, live together as husband and wife, have common property, or adopt a child alone in society's discrimination. Basic rights are not guaranteed. When a dispute arises, there is no law governing it, and it is often resolved through negotiation.

Third. Transgender people organize a wedding and receive support from families but are not legally married. For example, Lam Khanh Chi, who was borned in 1977 as a boy named Huynh Phuong Khanh. She was known as a famous male singer before gender reassignment surgery in 2012. Ms. Chi decided to marry a boy 8 years younger than her after one month of dating in January 2018. A magnificent wedding of Lam Khanh Chi and her young husband was celebrated in both Vung Tau and Ho Chi Minh City. To fulfill her wish to become a mom, Lam Khanh Chi spent 800 million VND (equivalent to about 35,000 USD) doing in vitro fertilization (IVF) then asking for surrogacy in Thailand. She was happy with a full home when her son was born in late 2018 and looked like his dad. Both families luckily supported her marriage. Now, besides singing, hosting, Lam Khanh Chi and her husband run a fashion, cosmetics shop. They inspired many transgender couples to build a relationship and working hard[1].

Four. Transgender people don't come out and maintain their sex assigned at birth because don't get over the stigma from society. In a survey of IFGS, 98% of respondents who asked what is the thing they were afraid of the most when deciding transformation chose the box of "family disapproval" and "no money". Other reasons such as "the pain during surgery process", "death from medical accidents" or "longevity reduction" only accounted for 2%[2]. Using hormones is like a double-edged sword, apart from side effects, transgender people face a danger of serious diseases related to heart, cancer... Far worse than that, it could lead to occlusion of vessels, brain infarction and death. Not many people have enough courage to actualize a complete surgery cause the borderline between life and death is too fragile. On average, a transgender person

[1] Huong Giang (2021), Marriages of three Vietnamese transgender celebrities. Retrieved from: https://ngoisao.net/hon-nhan-cua-ba-nghe-si-viet-chuyen-gioi-4373810.html

[2] Hanh Do (2018), Come out was too hard, Tien Phong News. Retrieved from: https://tienphong.vn/cong-khai-gioi-tinh-da-qua-kho-post1017361.amp

undergoes 30 different surgeries. The most complicated one is plastic surgery of sex organs which is often compared to a major surgery affecting the whole body. It also contains the most sensitive nerves, which get infected or bleeding easily.

Moreover, after surgery, female genitalia needs to be frequently stretched in order to adapt to sexual intercourse creating prolonged pain, more than other plastic surgery's process. The price for a new body is their health gets weakened a lot. Trans people can get gynecological, sexually transmitted diseases or osteoarthritis, operated parts develop complications or fall into anesthesia state. Gender affirmation surgery mess up the whole axis function, including the brain, pituitary, ovary in females and testicle in males.Psychological after-effects might lead to depression, anxiety, even mental disorder in transgender people. Unlike lesbian, gay or bisexual people, transgender has their own obstacles that are not easy to overcome to come out.

Whatever they choose from one of those cases, trans can't be happy with it. Unless they can freely express their own nature, the transgender people's journey to the marriage rights is long ahead.

RECOMMENDATIONS

First, increasing the number and quality of research (conducted by Vietnamese organizations/experts) about transgender people and the solutions helping them in daily life, minimizing discrimination, including marriage and family issues. Despite the objectivity of foreign studies, it is important to highlight the role of indigenous people in understanding the victim's psychology to help them overcome the tragedy. If Vietnamese people do not speak up, others have no reason to care about their fellow citizens.

Second, ideally, the state should pass the gender affirmation draft as soon as possible and specific guidelines on name/ID change and civil status. Then transpeople can get married under their new gender as other male or female.

Otherwise, while waiting for the official law, state agencies should consider accepting the new gender of transpeople by a medical certification issued by the hospital undertaking the transition process. Also, notice that the certification used for transgender is different from one used for intersex or gender-diverse persons or people having congenital disabilities (regulated by Article 36 Civil Code 2015 and Decree 155/2018/ND-CP of the Government on 12th November 2018).

Third, legalize same-sex marriage in Vietnam, which means trans people who haven't completely changed yet can still marry the one they love. As 30 countries have

legalized same-sex marriage[1], and many other Western democracies without marriage equality recognize civil unions. Another suggestion that might be considered is the state recognizes other relations like civil union and domestic partnership.

Domestic partnership vs. civil union means if you are in a relationship with people of the same sex (gay/lesbian), in some countries/states where same-sex marriage is not recognized, domestic partnership and civil union are two legal forms similar to marriage. However, those who are considered to have domestic partnerships have very low legal rights compared to the state married and are generally not recognized if you are out of your country/state area.

	Marriage	Civil union	Domestic partnership
Definition	a social and cultural institution that is understood as an expression of a couple's love and commitment to each other. It is also a legal status that automatically benefits under state law.	A legally recognized relationship status that has many of the same protections as a marriage and can be formed by either opposite-sex or same-sex couples.	a form of relationship that gives limited state rights to both same-sex and opposite-sex couples who live together but wish to remain unmarried.
Recognition	All cultures, countries, religions	Individual regions	Municipality
Benefits	Immigration Social Security Tax Adoption health coverage, educational assistance, home loan programs Alimony	Property rights, health coverage, tort claims, adoption, Alimony	Avoid the "marriage tax penalty" Bereavement leave, family leave for a sick partner Visitation rights in hospitals and jails
Exclusions		Tax, social security	Health insurance, no financial protection in separation

CONCLUSION

Recently, LGBT rights, especially transgender, have attracted the attention of Vietnamese policymakers and law enforcement. This study presents the definition of transgender and marriage in the world and Vietnam. Doing so provides a more exclusive picture of these issues in a SouthEast Asian country, which will be a valuable reference for those interested in this topic.

[1] The Tico Times (2021), Same-sex marriage now legal in 30 countries. Retrieved from: https://ticotimes.net/2021/09/27/same-sex-marriage-now-legal-in-30-countries

In terms of approaches to marriages of transgender people, the findings of this study make several contributions to the current literature. First, this research highlights the lack of regulation in gender affirmation surgery. Second, this research clarifies the difference between old and new conceptions about marriage in Vietnam today. Another contribution made by this study is that it suggests increasing the number and quality of research (conducted by Vietnamese organizations/experts) about transgender.

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TRANSGENDER PEOPLE'S RIGHT TO MARRY IN VIETNAM AND OTHER COUNTRIES – LEGAL RECOGNITION AND PRACTICAL PROBLEMS

Nguyen The Anh (Mr.)[1]

Abstract: *Transgender rights and the right to marry of transgender people have been recognized by many countries in the world, these rights come from the human rights of every person. For the first time, Vietnamese laws have legalised "sex reassignment rights" by article 37 of Civil Code 2015 and all the moral rights of Vietnamese transgender people, including the right to marry. The author will conduct this study to compare and evaluate the provisions of law relating to transgender people's right to marry in Viet Nam and some countries in terms of legal recognition and some practical problems.*

Keywords: *transgender rights, right to marry, sex reassignment surgery, transgender people, gender change.*

I. INTRODUCTION

Same-sex marriage and transgender rights are considered global social problems that have always attracted legal researchers' attention, especially in Vietnam. Although gender change has long ceased to be a new social phenomenon, it's always a new research issue in Vietnam and many countries around the world. From the date of entry into force of the Civil Code 2015 the transgender rights of Vietnamese citizens has been legally recognized can be considered as "a new regulation" for transgender rights in Vietnam. However, the legalization of gender change has existed for a long time in some countries. Especially, in Sweden, the Legal Gender recognition Act (Act 1972:119) relating to recognition of legal gender came into force in 1972. Thereby, Sweden became the first country to codify transgender rights that allow swedish citizens to be assigned a new legal gender after gender reassignment treatment[2]. Up to the present time, there are 62 countries and States that have legalized gender change and Vietnam officially became the 62nd country in the world and the 11th in Asia to recognize the gender change right[3]. There are many countries in Europe, America

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[2] The Government of Sweden, Chronological overview of LGBT persons rights in Sweden, https://www.government.se/articles/2018/07/chronological-overview-of-lgbt-persons-rights-in-sweden/, retrieved October 29, 2021.

[3] Báo Điện tử VOV (2015), "Hợp pháp quyền đổi giới tính tại Việt Nam: Người chuyển giới nói gì?", https://vov.vn/xa-hoi/hop-phap-quyen-doi-gioi-tinh-tai-viet-nam-nguoi-chuyen-gioi-noi-gi-453680.vov, retrieved October 29, 2021

and Asia that recognize transgender rights only after surgery, and other countries permit their citizens to have the right to gender change on official personal documents without undergoing surgery. For Vietnam, there are no legal documents guiding the requirement of medical intervention for gender change recognition.

In fact, the proportion of transgender people is increasing and accounts for a relatively high number of the world's population, the world's studies show that the rate of transgender people is about 0.3 to 0.5% of the population. As a result, in Vietnam, the average number of Vietnamese transgender citizens is estimated between 290,000 and 480,000[1]. However, there are many transgender people who face many problems such as discrimination and difficulties in relationships, job, healthcare, social services and moral rights prescribed by law in which the right to marry must be mentioned. Thus, countries and States should require specific legal corridor to protect the legitimate rights and interests of transgender people and most notably their right to marry may be enforced in practice.

The legal concepts, according to gender transition, are prescribed by the provisions of law of countries:

(1) "Transgender": according to the provisions by law of the United States of America, "*transgender" is an umbrella term for persons whose gender identity or expression (masculine, feminine, other) is different from their sex (male, female) at birth*[2].

(2) "Transgender person": the Transgender Persons (Protection of Rights) Act, 2019 if India provides that "*transgender person means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta*"[3].

(3) "Gender change": under Vietnamese law, at clause 01 of article 02 of the draft law on Gender Transformation stipulates that "*gender change is the process of performing medical intervention in order to change the sex of a person who's assigned at birth to be suitable for identification about their sex*".

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[1] Cục Phòng, chống HIV/AIDS - Bộ Y tế (2019), "Quyền chuyển đổi giới tính - cần một hành lang pháp lý", http://vaac.gov.vn/quyen-chuyen-doi-gioi-tinh-can-mot-hanh-lang-phap-ly.html, retrieved October 29, 2021.

[2] Centers for Disease Control and Prevention, U.S. Department of Health & Human Services, Transgender Persons, https://www.cdc.gov/lgbthealth/transgender.htm, retrieved November 11, 2021.

[3] Ministry of Law and Justice of India, Transgender Persons (Protection of Rights) Act, 2019, https://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf, retrieved November 11, 2021.

(4) "Sex reassignment surgery": in the legal sense, under provisions of the DirectorateGeneral for Internal Policies - European Parliament, "*gender reassignment is the term used to define the legal process whereby the State formally recognises a person in his/her "new" gender role*"[1].

2. TRANSGENDER RIGHTS AND RIGHT TO MARRY IN ACCORDANCE WITH THE PROVISIONS OF VIETNAMESE LAWS

2.1. Transgender rights under Vietnamese law

The previous provisions of Vietnamese law, especially the Civil Code of 2005 and Decree No.88/2008/NĐ-CP of the Vietnamese Government[2], prohibited gender change and didn't recognize the new gender of Vietnamese citizens who have undergone gender reassignment surgery. These legal regulations cause discrimination against transgender people.

However, on the basis of the provisions of the Constitution of 2013, which have ensured for respect and protection of human rights and citizen's rights including transgender rights and right to marriage. At the 10th session of the 13th National Assembly in 2015, the members of Parliament have voted to pass the Civil Code 2015 in which the right to change gender is officially legalized on the territory of Vietnam. Simultaneously, the gender change right becomes one of citizens' moral rights protected by Vietnamese law. This right is concretized in article 37 of the Civil Code 2015 whereby Vietnamese transgender people have the rights and obligations to register for changing their civil status in accordance with the civil status law. According to the provisions of the Civil Code 2015 and other relevant legal documents, they also have moral rights as a Vietnamese citizen.

The legalization of transgender rights is an important step of the Vietnamese law in recognizing the existence and equality of transgender people in Viet Nam to live as themselves. And obviously, after completing the registration for change of civil status, Vietnamese transgender people have moral rights being considered appropriate for their new gender.

It can be said that the recognition of transgender rights is an important legal basis to ensure all the moral rights of transgender people in terms of civil status, marriage and family, child adoption, etc. However, no legal document specifically regulates the procedures for the issues mentioned, so it is difficult to exercise transgender rights in practice. Logically, when the new gender is not recognized, the right to marry of

[1] Directorate-General for Internal Policies - European Parliament (2010), Transgender Persons' Rights in the EU Member States, page No.05.

[2] Expired.

Vietnamese transgender people is also not allowed. Meanwhile, the Civil Code of 2015 stipulates that when any citizen undergoes sex reassignment surgery, he/she must strictly comply with the provisions of the law. Therefore, the Government of Vietnam must soon issue legal documents to determine specifically medical facilities (which are allowed to perform gender reassignment surgery), marital status, and the process of changing the civil status of Vietnamese citizens after undergoing surgery. All of these regulations are aimed at ensuring that transgender people's moral rights are really their rights.

2.2. Rights to marry under the provisions of Vietnamese law and international law

The right to marry is one the most fundamental rights of every human being. All individuals are equal and protected by law in terms of the right to marry. Consequently, it is logical that this right of transgender people must also be guaranteed.

Under international law, the International Covenant on Civil and Political Rights 1966 (ICCPR) is one of the most important international human rights treaties adopted by the United Nations General Assembly, in which one of the rights recognized by this Covenant is the right to marry and to establish a family, specifically the article 23 provides as follows:

"*… 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.*

3. No marriage shall be entered into without the free and full consent of the intending spouses."

This provision affirms that States parties must ensure the right to marry and to establish a family of man and woman who have reached the age of marriage. At the same time, States parties must also guarantee the principle of freedom of agreement and complete consent in marriage. Furthermore, Article 12 of the European Convention on Human Rights (ECHR) prescribes that "*everyone has the right to marry and have a family...*". The regulations from ECHR and ICCPR confer a privilege of marriage on the citizens of member countries including transgender people.

From the perspective of Vietnamese law, the National Assembly has legalized the transgender rights of its citizens, respects and guarantees all the rights of transgender people, and especially the right to marry. In order to exercise the right to marriage registration and be recognized as legal marriage, transgender people need to perform two important procedures as follows:

(a) Firstly, the procedure for changing civil status is the first step that must be taken for transgender people to be legally recognized as man or woman, the content changes are mainly related to gender and full name. However, the name does not have

to be changed, it depends on the wishes of transgender people, they usually will change full name to suit their redefined gender. According to the provisions of Vietnamese law to complete this procedure, Vietnamese citizens can submit their application to the competent state agency to register for changes in their civil status information when they can prove their legitimate reasons in accordance with the provisions of the Civil Code of 2015 and other relevant legal documents[1]. And after completing the registration procedure of civil status change, transgender people who have been recognized as male or female gender can get married only when they comply with the conditions for marriage as prescribed by the law on marriage and family.

(b) Secondly, regarding the implementation of legal procedure for marriage registration, in clause 5, article 3 of the Law on Marriage and Family 2014 of Viet Nam stipulates that "*getting married means a man and a woman's establishment of the husband and wife relation according to the provisions of this Law on marriage conditions and registration*". Therefore, Vietnamese transgender citizens will fully enjoy the right to marry only if they satisfy all the conditions for marriage as specified in article 8 of the Law on Marriage and Family of 2014 as follows: (1) the man is full 20 years or older, the woman is full 18 years or older; (2) the marriage is voluntarily decided by one man and one woman; (3) they do not lose the civil act capacity; (4) the marriage does not fall into one of the cases prohibited by the provisions of law. It is important to note that the Vietnamese law has not yet recognized samesex marriage.

If All conditions mentioned are met, a Vietnamese citizen can completely marry a Vietnamese or foreign citizen of the opposite sex.

3. LEGAL RECOGNITION OF TRANSGENDER RIGHTS, MOVING TOWARDS LEGALIZATION OF THE RIGHT TO MARRY UNDER THE LAWS OF SOME COUNTRIES

Although the National Assembly has acknowledged the transgender right and the right to marry of Vietnamese people, the legalization of these rights in Vietnam is considered later than in the world, many countries have recognized the transgender rights of their citizens and granted them the right to marry after carrying out the necessary legal procedures, although the recognition rules vary widely from state to state. The approach of the States can be divided into two basic groups: (a) some States accept legally the new gender of their citizens without undergoing sex reassignment surgery or have no requirement of hormonal treatment; (b) other States set the legal conditions to recognize the new gender of their citizens only after completing surgery on their reproductive organs. Besides, it is possible to mention the third group in

[1] Điều 27, 28 Bộ luật Dân sự năm 2015.

which certain States haven't any regulations on transgender issues[1].

(a) Firstly, some countries tend not to require their citizens to undergo surgical sterilization, but they can still be legally recognized as transgender gender:

[1]. France: Gay, bisexual and transgender people's rights in France are traditionally considered liberal[2] and France has been named as one of the most gay-friendly countries in the world[3]. As a result, the issue of recognizing transgender rights, same-sex marriage and the right to marry of transgender people has been soon legalized in France[4]. However, in the period since 2010, French citizens must undergo a large surgery such as vaginoplasty for MTFs, mastectomy and hysterectomy for FTMs to accept their new gender legally[5].

Another important step taken on November 06, 2015 to further ensure the transgender rights of French citizens, it is the fact that a drafted bill (known as "Amendment N°282 (Rect)") approved by the French Senate, allow transgender people to legally change their sex without performing a gender reassignment surgery and compulsory sterilization. And on May 24, 2016, this bill was adopted by the National Assembly of France[6]. Finally, "Amendment N°282 (Rect)" took effect on January 01, 2017. The "Rect" marks the transgender rights of the French citizens that begin to enter a new phase when they have the right to decide on medical interventions for their bodies or not.

[2]. United Kingdom: the Gender Recognition Act 2004 (GRA) permits transgender people to apply to the Gender Recognition Panel to have a Gender Recognition Certificate (GRC) since 2005. Then they will be given a new birth certificate, get married and enjoy the same benefits as other ordinary British citizens. The United Kingdom is one of few member States of the European Union where there is no hormonal treatment requirement or no mandatory gender reassignment surgery.

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1 Directorate-General for Internal Policies - European Parliament (2010), Transgender Persons' Rights in the EU Member States, page No.08.

2 Reuters (2013), French parliament allows gay marriage despite protests, https://www.reuters.com/article/usfrance-gaymarriage-idUSBRE93K08B20130423, retrieved October 11, 2021.

3 Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans, and Intersex People in France, European Union, https://rainbow-europe.org/#8633/0/0, retrieved October 11, 2021.

4 LOI n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe, http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027414540&dateTexte=&categorieLien=id, retrieved November 11, 2021.

5 Directorate-General for Internal Policies - European Parliament (2010), Transgender Persons' Rights in the EU Member States, page No.25.

6 Assemblée Nationale de la France, Amendement N°282 (Rect - 12/05/2016), https://www.assembleenationale.fr/14/amendements/3726/AN/282.asp, retrieved October 11, 2021.

However, the GRA have also established the compulsory standards that require a British transgender citizen to be over 18 and they must demonstrate to be diagnosed with gender dysphoria.

Related to marriage rights of transgender people, prior to 2013, British transgender people were required to end their marriage to obtain a gender recognition certificate because same-sex marriage was legally admitted. And transgender people's right to marry has changed in the positive direction since the Marriage (Same Sex Couples) Act 2013 came into force, the requirement of ending marriage no longer applies. So, the current marriage relationship may still be maintained when one or both parties change lawfully their gender as long as both parties intend to continue this marriage after getting a gender recognition certificate.

Although the provisions of law guarantee all the moral rights of transgender people, in practice in the UK, they always face the problem of discrimination. In fact, these rights are easily violated by many different causes such as when transgender people are bullied, stigmatized, discriminated and limited access to education, employment and health care. In order to ensure provisions of law related to transgender rights, which are implemented in practice, the UK Government has enacted the Equality Act 2010 for prohibiting discrimination on the basis of "gender reassignment"[1].

[3]. Taiwan: In first for Asia, in 2019, Taiwan's Legislative Yuan has passed a special law on same-sex marriage (known as the Act for Implementation of J.Y. Interpretation No. 748), Taiwan became the first country/jurisdiction in Asia and the 27th country/jurisdiction in the world to legalize same-sex marriage. Specifically, article 2 of this Act provides that "*two persons of the same sex may form a permanent union of intimate and exclusive nature for the purpose of living a common life*"[2]. It can be said that this regulation is "a big step forward" in terms of equal rights of the LGBT community in Asia.

Regarding transgender rights, it has been recognized in Taiwan since 2008, but Taiwanese people must undergo gender reassignment surgery in order to change their legal gender on personal official documents. On the basis of the Directive issued by the Ministry of the Interior of Taiwan in 2008, the registration of gender change on the ID card of any Taiwanese citizen will not be admitted if the Taiwanese applicants can not provide medical certifications mentioning their gender dysphoria and transgender surgery [3].

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1 UK Parliament (2020), Gender recognition and the rights of transgender people, https://commonslibrary.parliament.uk/research-briefings/cbp-8969/, retrieved November 11, 2021.

2 Ministry of Justice (Taiwan), Act for Implementation of J.Y. Interpretation No. 748, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000008, retrieved October 05, 2021.

3 Focus Taiwan (2021), Taiwan court rules to allow trans woman's ID card gender change request, https://focustaiwan.tw/society/202109240019, retrieved October 05, 2021.

However, at the present time, Taiwan has removed the mandatory requirement performing gender reassignment surgery and instead, the Government stipulates that the applicants only carry out the procedures to change information on official personal documents according to regulations, to be recognized as legal gender. It is considered as a major change in Taiwanese society to facilitate the realization of transgender rights and aspirations of the transgender community.

Thailand has officially become the first Southeast Asian country to legalize same-sex relationships and Thailand is also a famous country that conducts many gender reassignment surgeries for many foreign citizens. Thailand's parliament approved the Civil Partnership Bill which allows same-sex couples to register their partnership and give them the moral rights and privileges as straight couples[1]. To be registered, same-sex couples must be at least 17 years old or older and at least one of whom must be a Thai citizen according to the amendments to Thailand's Civil and Commercial Code. However, the Thai government has yet to legalise gender change as the regulations of Taiwan. Therefore, it is obvious that transgender people in Thailand don't have the right to marry.

The Thai government's regulatory approach comes as a surprise when Thailand is a country that has almost accepted legally same-sex marriage, but does not recognize transgender rights.

[4]. Australia: Same-sex marriage in Australia has been lawful since 2017. The

Australian Parliament has officially approved the Marriage Amendment (Definition and Religious Freedoms) Act 2017. Accordingly, from January 9, 2018, same-sex couples may be permitted to get married in Australia. Prior period of 2017, the Amendment to the Sex Discrimination Act 1984 has provided new provisions for the protection from discrimination based on sexual orientation, gender identity and intersex status on Australian territory in 2013[2].

The Amendment permit Australian citizens to establish or update their new gender in personal records held by Australian Government departments and agencies. It is

[1] Library of Congress (US), Thailand: Draft Legislation on Civil Partnerships for Same-Sex Couples, https://www.loc.gov/item/global-legal-monitor/2013-11-05/thailand-draft-legislation-on-civil-partnerships-forsame-sex-couples/, retrieved October 05, 2021.

[2] Australian Government, Australian Government Guidelines on the Recognition of Sex and Gender, https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/australian-governmentguidelines-recognition-sex-and-gender, retrieved November 11, 2021.

worth noting that the requirement for sex reassignment surgery or hormone therapy is no longer prerequisites to recognize the gender change lawfully[1].

In fact, for the first time, the recognition of the third gender in Australia has been codified, the Australian High Court has ruled that New South Wales must accept the third gender legally for an Australian citizen - Norrie May-Welby, who has beginning a legal battle to be socially recognized as gender-neutral since 2010[2]. The High Court's decision is practical and promotes gender equality, fights againts discrimination, and ensures that the marriage rights of Australian transgender people and gender nonbinary people are enforced in practice.

(a) Secondly, the countries that require citizens to undergo sex reassignment surgery if they want to legally recognize their new gender (affirmed gender) and right to marry. These mandatory requirements are causing serious violations of citizens' rights and human rights prescribed by the International Covenant on Civil and Political Rights 1966 (ICCPR) of the United Nations. In April 2017, the European Court of Human Rights (ECHR) declared that compulsory sterilisation is a serious infringement on human rights, considering it a preliminary step in gender reassignment surgery. However, the "infertility requirement" or "forced sterilisation" has still existed in the EU countries as: Belgium, Bulgaria, Cyprus, Czech Republic, Finland, Greece, Latvia, Lithuania, Luxembourg, Romania, Slovakia and Slovenia[3].

[1]. Japan: In the Asian region, it can be referred to Japan that does not recognize same-sex marriage, but admit transgender rights of citizens. Specifically, article 24 of the Japanese Constitution *stipulates* that "marriage shall be based solely on the consent of both sexes, and it shall be maintained through mutual cooperation with the right of equality between the husband and wife as the basis"[4]. So, people of the same-sex must perform gender reassignment in order to marry legally. And to concretize this provision of the constitution, the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (known as Act No. 111 of 2003, amended

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1 Services Australia (Australian Government), Providing supporting statements for patients updating their gender classification, https://www.servicesaustralia.gov.au/organisations/health-professionals/subjects/providingsupporting-statements-patients-updating-their-gender-classification, retrieved November 11, 2021

2 The Guardian, Third gender must be recognised by NSW after Norrie wins legal battle, https://www.theguardian.com/world/2014/apr/02/third-gender-must-be-recognised-by-nsw-after-norrie-winslegal-battle#:~:text=458-,The%20Australian%20high%20court%20has%20ruled%20that%20New%20South%20Wales,change%20recog nised%20as%20non%2Dspecific, retrieved November 15, 2021.

3 Parliament European (2017), Forced sterilisation of transgender people, https://www.europarl.europa.eu/doceo/document/E-8-2017-007687_EN.html, retrieved October 01, 2021.

4 The Constitution of Japan, https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html, retrieved November 02, 2021.

by Act No. 53 of 2011)[1] has allowed Japanese citizens the right to change their gender according to the relevant legal documents freely. In fact, from the date of entry into force of the Act in the first year, there are about 97 people who apply to be registered for their gender change. Over the past 15 years, it increased to 9,625 cases[2].

However, under provisions of law, only Japanese citizens who have been diagnosed by at least two doctors (as physicians equipped with the necessary knowledge and experience) with a gender identity disorder can be allowed to apply to change their gender[3][4].

In addition, Japanese applicants must also satisfy other conditions prescribed by law such as being at least 20 years of age or older, unmarried and not having children under the age of consent. Besides, reproductive organs of the former sex are no longer functioning due to undergoing sex reassignment surgery, in other words, they are no longer able to reproduce. If all conditions are met, Japanese citizens will of course be able to exercise their transgender rights if they receive the approval of the family court[5].

[2]. China: China is one of the few countries in Asia that admits transgender rights, but to be recognized as the new gender (preferred gender), Chinese citizens must undergo gender reassignment surgery. And Chinese government also allows transgender citizens to change their names and gender markers on their official personal documents legally in accordance with the Sex Reassignment Procedural Management Standards 2017 of China, which requires Chinese citizens to submit the necessary materials and meet the preconditions to be eligible for gender-affirming surgery as follows:

"*Before performing the main surgery, the surgical patient should submit the following materials and enter them into the medical record: (1) verification issued by the local Public Security Bureau that the patient has no prior criminal record, (2) verification issued by a psychologist or psychiatrist of a diagnosis of transsexualism, (3) verified written request from the surgical patient requesting the surgery and (4)*

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1 The Act have taken effect in 2004.

2 The Japan Times (2021), People changing registered gender rising at record pace in Japan, https://www.japantimes.co.jp/news/2021/01/04/national/gender-change-japan/, retrieved November 05, 2021.

3 Article 02, Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (Japan), http://www.japaneselawtranslation.go.jp/law/detail_main?re=&vm=2&id=2542, retrieved November 05, 2021.

4 Human Rights Watch, Japan: A Really High Hurdle (2019), https://www.justice.gov/eoir/page/file/1149876/download, page No. 09.

5 Article 03, Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder (Japan), http://www.japaneselawtranslation.go.jp/law/detail_main?re=&vm=2&id=2542, retrieved November 05, 2021. [29] China Women's Uiniversity, A Legal and Policy Review: Legal gender recognition in China, page No.28.

verification that the surgical patient has already notified the family of the intention to undergo sex reassignment surgery"[29].

In addition to the conditions related to medical intervention, Chinese people who want to be considered as preferred gender are required to meet additional conditions such as they have no prior criminal record and must be older than 20 years old and unmarried. Furthermore, they must obtain consent letters from parents as prescribed by the 2017 Standards. Upon completion of all legal formalities, Chinese transgender people are allowed to marry a person of a different gender in regards to the right to establish a family in practice.

4. LEGAL RECOGNITION IN PRACTICE FOR TRANSGENDER PEOPLE'S RIGHT TO MARRY – INTERNATIONAL EXPERIENCE FOR VIETNAM

The Civil Code 2015 has legalised the transgender rights of Vietnamese citizens. in order to enjoy this right, Vietnamese laws impose conditions that Vietnamese applicants meet them to be legally admitted as male or female gender. And so, the determination of these conditions will be the basis of recognition of gender change and, subsequently, the right to marry of transgender people.

Therefore, the draft law on Gender Affirmation, proposed by the Vietnamese National Assembly, is in the process of getting public opinion from the Vietnamese citizens.

This draft's provisions are considered a legal basis in the future for Vietnamese transgender people to ensure all their moral rights, including the right to marry. Additionally, the issue of the development of law drafting on Gender Affirmation is aimed at the solutions with human values to help the transgender community in Vietnam, they can exercise all their rights and be protected by the law. When the right to transgender is fully recognized on official personal documents by law, the right to marry for Vietnamese transgender people will be guaranteed in practice.

Under the provisions of the draft law, some legal issues have been discussed such as: cases of transgender recognition; change registration of civil status; minimum age to undergo gender reassignment surgery (medical intervention); psychological identification of Vietnamese citizens who want to perform transgender surgery; conditions required for medical facilities which must satisfy to be allowed gender reassignment;… These are just the most basic legal issues mentioned by the draft law. In addition, the other important contents have also been discussed and consulted for the purpose of finalization of regulations before submitting the draft law to the Vietnamese National Assembly for approval.

The most remarkable point in the draft law on Gender Affirmation in Vietnam is the legal recognition of gender change without medical intervention. Based on reference to the regulations of many countries around the world on transgender rights, these legal options are being considered for inclusion in the law, specifically:

(1) The first option, the provisions of the law will recognize Vietnamese citizens as transgender people after the psychological test ("*gender dysphoria*") according to the standards prescribed by law and they will express their desire to change sex, as well as they must take hormones for a continuous period of time as provided by law before the time of the application of gender change registration on official personal documents.

(2) The second option, in addition to combining with the solution mentioned by the first option, the regulations on Gender Affimation require Vietnamese citizens to undergo surgery for partial or total breasts and genitals organs. And if only these conditions are met, Vietnamese transgender people will be recognized as male or female gender.

(3) The third option, recognition of transgender without the medical intervention (such as the use of hormones or surgery on the breasts or genitals): Vietnamese citizens only need to obtain the confirmation certificate of psychological examination in accordance with the standards prescribed by law and they must show their expression of desires for being transgender. And then, Vietnamese transgender people can apply their request to the competent judicial authority in order to change the personal information on their official documents.

In the three options mentioned above, it can be seen that the third option will be the best choice in terms of the economy and health safety of Vietnamese people who want to change their gender.

Firstly, according to the state agency responsible for drafting the law on Gender Affirmation, the total cost of a complete procedure for transgender at a reputable hospital in Thailand (including gender reassignment surgery and counseling support services) for a female to male transsexual conversion range from 30,000 USD (about 700 million VND) in which the breast surgery costs from 3,000 to 5,000 USD. With male-to-female sex reassignment surgery, the total cost is more expensive up to 35,000 USD (equivalent to 800 million VND) which the cost of breast surgery is about 5,000 USD[1]. It can be said that the transgender surgery costs are very high. Many Vietnamese citizens don't want medical intervention due to their inability to pay.

[1] Dân trí (2021), "800 triệu đồng mỗi lần phẫu thuật và sự đánh đổi của người chuyển giới", https://dantri.com.vn/an-sinh/800-trieu-dong-moi-lan-phau-thuat-va-su-danh-doi-cua-nguoi-chuyen-gioi20211106220430088.htm, retrieved November, 15 2021.

Secondly, concerning the health impact of transgender surgery, according to a scientific study conducted by the Center for supporting community development initiatives of Viet Nam (SCDI – "Trung tâm Hỗ trợ Sáng kiến Phát triển Cộng đồng") indicates that the proportion of the transgender population of Vietnam lacks access to essential health services, especially the medical services exclusively for Vietnamese transgender people and consulting support information from reputable sources such as hospitals and large medical facilities. Additionally, the rights of access to psychological counseling and mental health care for transgender people are still limited. Many transgender people have been experiencing mental health problems such as depression, stress, insomnia, and persistent anxiety disorders. Furthermore, Vietnamese young transgender people may risk their lives and health by taking unsafe hormones and attempting surgery on themselves.

They reaffirmed that the cost for surgery is very expensive and gender reassignment treatment carries many risks. As a result, many Vietnamese citizens want to change their sex but they don't have enough money. Some people only pay for breast surgery but have no money for genital surgery. For that reason, based on human rights and international practices recognized by the majority of countries in the world, the provisions of Vietnamese draft law shouldn't require the mandatory condition of gender reassignment surgery to be recognized as legal gender. This option also shows respect for the human rights of every Vietnamese citizen.

On the other hand, loosening regulations on gender transformation as well as promulgating more specific recognition regulations for Vietnamese transgender people will indirectly ensure their right to marry. As mentioned in "*2.1. Transgender rights under Vietnamese law*", the Vietnamese Civil Code of 2015 only provides general provisions on gender reassignment and sex change, so it is necessary to have legal documents detailing the implementation of regulations of some articles of this Civil Code to solve problems of gender identity, especially marriage registration for transgender people. In the author's opinion, the draft law on Gender Transformation should be promulgated soon to have a legal mechanism to deal with difficulties and problems related to recognition procedures, in order to ensure the legitimate rights and interests, the equality right and the right to enjoy the happiness of Vietnamese transgender people.

5. CONCLUSION

The provisions, prescribed by the Civil Code 2015 of Vietnam have given priority to protect and enhance the rights of transgender people, including equality in marriage rights and employment in accordance with international practices and not

being contrary to Vietnamese traditions and customs. Additionally, the regulations on gender change provided by the draft law create turning points in the process of law-making and meet the needs of a part of Vietnamese citizens in society today.

On the other side, even though the Civil Code 2015 recognizes the transgender rights and the right to change the registration of the civil status of each citizen, transgender people aren't able to exercise their rights because of the lack of legal documents guiding the implementation for the

Civil Code 2015. Therefore, only if the draft law on Gender Affirmation is soon promulgated by the Vietnam National Assembly, the provisions prescribed by this law, concerning the procedures of civil status registration to recognize the new gender, will be implemented. Thereby, the Vietnamese transgender people's right to marry will be admitted indirectly.

Besides, the recognition of same-sex marriage is widely legalised in many countries around the world and the current trends of other countries is to able to accept the right to marry for same-sex couples. Therefore, the provisions of the law on Marriage and Family may be considered and amended in order to codify same-sex marriage in Viet Nam.

SURROGACY FOR SAME-SEX COUPLES - WHO ARE THE LEGAL PARENTS OF A SURROGATE CHILD?

Lai Thanh Long[1], Nguyen Thi Kim Cuc[2]

Abstract: *At the end of the 20th century, discrimination against same-sex couples is still alive worldwide, but nowadays, particular states and territories have gradually removed discrimination against same-sex couples. They have the right to be treated equally. Whereby same-sex couples rights are human rights. Besides, these couples have civil rights, which are differently recognized in different countries and territories based on their legal systems. With the desire to be parents of same-sex couples, in reality, many same-sex couples have found methods to have children such as adoption and surrogacy and some countries have referred to this issue in their laws. Same-sex partners have enjoyed the right to marriage or civil relationship, enabling them to have limited legal rights, such as succession and adoption. However, in the legislative and judicial practice, recognizing surrogacy for same-sex couples is controversial because of the difference and conflict in provisions on their rights in different countries caused by various points of view. Surrogacy refers to a contract in which a woman carries a pregnancy "for" another couple. Although this surrogacy arrangement appears to be beneficial for all parties concerned, certain delicate issues need to be addressed through carefully framed laws to protect the rights of the surrogate mother and the intended parents. In this case, what challenges do same-sex couples face when they wish to have biological children, i.e., a child made from genetic material derived from at least one of the individuals, by entering into surrogacy agreements? Assuming same-sex couples can overcome social prejudices, including their ability to raise children because of their sex, what obstacles do they face in declaring legal parents? What might be the surrogate's legal rights, if any? The legal issues about the characteristics, the consequences of surrogacy, and the relationship between children born by surrogacy and same-sex parents will be clarified in detail in this article.*

Keywords: *same-sex couples, surrogacy, legal parents, UK, Vietnam.*

1. INTRODUCTION

The global campaign to secure protections for people of the LGBT[3] community has made significant progress in recent decades. However, due to the misconception that homosexuality is a mental illness with psychological distortions, this community still suffers from discriminatory activities such as ridicule and violence.

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[3] LGBT is an initialism for lesbian, gay, bisexual and transgender.

The 21st century has recorded an increase in the number of cases related to violence and discrimination because of individuals' sexual orientation. Since 2003, the United Nations General Assembly has repeatedly called attention to the killings of persons because of their sexual orientation through its resolutions on the extrajudicial, summary, or arbitrary execution.[1] For instance, according to a Resolution adopted by the General Assembly (A/RES/57/214) on February 25th, 2003, the General Assembly called upon Governments concerned to investigate promptly and thoroughly all cases of killings committed for any discriminatory reason, including sexual orientation; or in Resolution on December 18th, 2014, the General Assembly urged States to conduct prompt, exhaustive and impartial investigations into all killings, including those because of their sexual orientation[5]. On Human Rights Day 2010, the Secretary-General expressed his concern about this issue in a speech, stating that "we reject discrimination in general, and in particular discrimination based on sexual orientation… Together, we seek the repeal of laws that criminalize homosexuality"[2]. What stands out from these reminders and callings is that our society still lacks recognition of the diversity of sexual orientation and respect for legitimate rights and benefits of the LBGT community, including fundamental civil and social rights, similar to those of heterosexual persons. All members of our society who are aware of and uphold human rights have been continuously fighting for this recognition and respect.

Regarding the civil and social rights of individuals of the LGBT community, two basic rights are brought up for discussion in the cohabitation relationship of same-sex couples, namely the right to property during this period and the right to have children. Compared to heterosexual couples, when they think about having children, some traditional methods could be used. Meanwhile, same-sex couples may choose from various routes to parenthood such as co-parenting, adoption or fostering, donor insemination and surrogacy.

Surrogacy is not a new term, as well as being an ideal choice reserved for same-sex couples. However, it is one of several options that these couples prefer taking when they want to enjoy their parental rights, especially the right to raise and take care of their biological children. Based on the comparison, analysis, and commentary on

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[1] United Nations Human Rights Office of the High Commissioner, "United Nations Resolutions on sexual orientation, gender identity and sex characteristics" (*OHCHR*) <https://www.ohchr.org/EN/Issues/LGBTI/Pages/UNResolutions.aspx> accessed 12 November 2021 [5] UNGA Res 69/182 (30 January 2015) UN Doc A/RES/69/182.

[2] UNHCR "Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General" (17 November 2011) UN Doc A/HRC/19/41.

the legal provisions on surrogacy of the United Kingdom, this paper will clarify some legal issues related to surrogacy that same-sex couples will face when choosing this method. Furthermore, this article also refers to the case of Vietnam, which still have not recognized same-sex relationships; thus, I suppose some suggestions to ensure the enjoyment of fundamental rights, including the reproductive rights of these couples.

2. OVERVIEW OF PARENTHOOD DESIRE AND SURROGACY OF SAME-SEX COUPLES

2.1. Parenthood desire

Parenthood desire is a legitimate demand of same-sex couples. It results from previous basic needs such as the need to live together and get married. Having a family life with full members including parents and children is a simple dream of same-sex couples in the LGBT community. In 2015, a study on child custody of homosexual, bisexual and transgender people was conducted. The results of this study show that 87.7% of the people asked through the online questionnaire said they have an intention or plan to have children[1] and 86% of the interviewees stated, "in the past, present or future, having children is a necessary need".[2] The upward trend in parenthood desire of same-sex couples under the above survey was quite compatible with those in some other countries. For instance, in the United States of America, a 2013 Pew Research Center's survey[3] found that 51% of LGBT adults of any age have children or would like to have children in the future. The 2014-2016 American Community Survey revealed that same-sex couples are seven times more likely than different-sex couples to be raising an adopted or foster child and married same-sex couples show higher rates of childrearing.[4] In the United Kingdom, with the total number of adoptions in England falling 3.340, 570 cases were to same-sex couples which means 1 in 6 adoptions in 2020 were to same-sex couples[5]. Eight years ago, this figure was 160 adoptions, representing 1 in 22 adoptions that year.[6] All able examples have partly shown an increase in the need to become parents and enjoy the rights to care for and raise children of same-sex couples.

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1 USAID and UNDP, *The right to adoption of lesbian, gay, bisexual and transgender people in Vietnam: Reality and Recommendation* (UNDP 2015) 23.

2 Ibid.

3 "A Survey of LGBT Americans" (Pew Research Center) <https://www.pewresearch.org/social-trends/2013/06/13/asurvey-of-lgbt-americans/> accessed 13 November 2021.

4 "How many Same-sex couples in the US are Raising Children" (UCLA School of Law Williams Institute) <https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/> accessed 13 November 2021.

5 "1 in 6 adoptions in England in 2020 to same-sex couples [10 December. 2020]" (New Family Social) <https://www.newfamilysocial.org.uk/General-News/9419046> accessed 15 November 2021.

6 Ibid.

Having a child is a great wish of same-sex couples, and difficulties often hinder this aspiration in having and raising children, stemming from the attitudes of the surrounding community and current legal provisions restricting these couples from parenthood. In terms of legal barriers, all the pathways to parenthood have varying degrees of legal obstacles associated with same-sex couples. Laws regarding parenting and relationship recognition differ dramatically by country and state. Regarding social barriers, despite the increase in gay and lesbian couples having children, sexual minorities still face numerous social barriers to becoming parents.[1] Same-sex couples confront a social landscape in which heterosexuality is privileged and the understanding of family entails a heterosexually married couple.[14] In addition, the family's disapproval and the discouraging or unsupportive behaviours from the authorities are also among the factors causing obstacles. Taking care of and raising a child requires huge support from the State and society through taking action against violations of the rights and interests of relevant subjects, especially same-sex couples on the basis of non-discrimination based on sexual orientation when raising children.

2.2. Surrogacy

Surrogacy is a method of assisted reproduction where same-sex couples work with a gestational surrogate who will bear and care for their baby until birth. These couples use surrogacy to start or grow their families when they cannot do so on their own because they cannot procreate through sexual intercourse. Though childbirth once resulted exclusively from heterosexual intercourse, modern technology facilitates reproduction notwithstanding functional and structural infertility.[2] Functional infertility occurs when an individual can not reproduce with her or his partner for medical reasons, such as unviable ova or sperm, whereas structural infertility applies to the situation of individuals who are single or those who have a partner of the same-sex, and therefore require another party's biological assistance to reproduce. Consequently, same-sex couples who are structurally infertile can utilize various assisted reproductive techniques to procreate, including surrogacy.

Unlike adoption, surrogacy is a method for same-sex couples to have their biological children. For instance, for gay couples, only one of the men can fertilize an egg to be used in surrogacy likewise for lesbian couples, they have to accept that their partner is not the child's biological parent. Due to the complexity of the relationship

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1 Nicholas K.Park and Emily Kazyak and Kathleen Slauson-Blevins, "How Law Shapes Experiences of Parenthood for Same-sex Couples" (2016) 12 Journal of GLBT Family Studies 115 [14] Ibid.

2 Michael S DePrince, "Same-Sex Marriage and Disestablishing Parentage: Reconceptualizing Legal Parenthood through Surrogacy" (2015) 100 Minn L Rev 797.

between the parties involved in surrogacy, this will be started under an agreement called the "surrogacy agreement." A surrogacy agreement stipulates the rights and obligations of relevant parties, including the surrogate mother and intended parents. Typically, a surrogacy agreement will include parental rights, custody of the child at birth, location of delivery, future contact between the parties, health insurance, other insurance obligations, medical decisions during pregnancy (right to make medical decisions), payment of medical bills, financial considerations, such as the gestational surrogate's compensation and expense. The surrogacy agreement will be considered as a road map of the process, so the more carefully it is drafted, the more successfully same-sex couples actualize their parenthood desire.

3. REGULATIONS IN THE UNITED KINGDOM ON SURROGACY FOR SAME-SEX COUPLES

3.1. The background

Establishing a family is considered a fundamental aspect of personal and social life. Perhaps because of this, the right to marry and find a family is a universal right protected in both the 1948 Universal Declaration of Human Rights (the 1948 UDHR) and the European Convention of Human Rights. Accordingly, Article 16.1 of the 1948 UDHR states that *"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."* This right was subsequently reaffirmed in the 1950 European Convention on Human Rights, namely in Article 12 that *"men and women of marriageable age have the right to marry and to found a family."* What stands out from the two above articles is that the subjects of marriage are men and women. This is not to imply that this relationship is established only between a man and a woman. However, due to many reasons, especially social conceptions, these provisions have been construed as marriage can only be based on the relationship of two individuals who are heterosexual.

Although sexual reproduction is the traditional method of starting a family, some individuals may have to rely on assisted reproductive methods or surrogacy (the process by which a woman carries a surrogate for another person/couple) to start a family. This reason comes from functional and structural infertility, which is mentioned in Part 2.2. The United Kingdom (the UK) was considered one of the first countries in the world to offer a comprehensive regulatory framework to govern assisted reproductive technologies (ARTs), including surrogacy, after a lengthy process. Furthermore, the UK has also recognized the marriage of same-sex couples since 2013[1]. As a result, the regulations on surrogacy for heterosexual couples will be applied to same-sex couples, similar to other regulations related to fundamental human rights, to ensure

[1] Marriage Act 2013, s 1(1).

legitimate rights and benefits of these couples against discrimination based on sexual orientation.

For same-sex couples who are unable to conceive a child themselves, surrogacy in the UK is becoming an increasingly popular option when they want to become parents. According to new data obtained by Brilliant Beginnings from the Child and Family Court Advisory and Support Service, parental order applications from couples in same-sex relationships reached 350 in 2018, more than five times the figure made in 2014, when just 69 were recorded.[1] Surrogacy in the UK is governed by the 1985 Surrogacy Arrangements Act (the SAA 1985)[2] and some related provisions of the 1990 Human Fertilisation and Embryology Act (amended and supplemented in 2008 - HFEA 2008). Due to the provoked controversy and the need to be critically examined, some possible issues surrounding the law on surrogacy were identified by the Law Commission[3], which is how the law is regulated. From this fact, in Part 3 of this paper, some legal issues on surrogacy under the UK law will be shown, namely (i) definition of relevant terms, (ii) the legitimacy of the surrogacy agreement and (iii) rights of surrogate mother and parental order (for the transfer of parental rights).

3.2. Definitions of relevant terms

Under the SSA 1985, the "surrogacy agreement"[4] and the name of a party to the surrogacy agreement – "surrogate mother"[5] was defined. Accordingly, "surrogate mother" means a woman who carries a child in pursuance of an agreement made before she began to carry the child and an agreement is a "surrogacy agreement" if the child is born as a result of a negotiation agreement made by the surrogate mother. In this case, the SSA 1985 provides an overview of two relevant terms related to pregnancy consent but omits the definition of the other party to the surrogacy agreement, especially the surrogacy agreement for same-sex couples. This other party is called "intended parents". They are couples or individuals who cannot have a child themselves and who are considering surrogacy as a way to help them to realize their

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1 "New data from English family court shows 350% growth in UK and international surrogacy over the last 12 years" (Brillianbegginings) <https://brilliantbeginnings.co.uk/new-data-family-court-350-percent-growth-surrogacy/> accessed 12 November 2021.

2 The Surrogacy Arrangements Act 1985 was enacted in the backdrop that there was a public outcry for surrogacy agreements made in 1976 and 1985. Its provisions were based upon the recommendations of the Committee of Inquiry into Human Fertilisation and Embryology in 1984.

3 The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed.

4 The Surrogacy Arrangements Act 1985, s 1(3).

5 The Surrogacy Arrangements Act 1985, s 1(2).

parenthood desire. They may be heterosexual or same-sex couples in a marriage, civil partnership or living together/co-habiting, or individuals regardless of their relationship status.[1] Therefore, a surrogacy agreement is an agreement between intended parents and a surrogate mother relating to carrying a child in pursuance, made by a surrogate mother and at least one of the intended parents in the couple must be a genetic parent to the child.[2] This agreement basically is not a legally binding document but rather a statement of intention about how the agreement will work and the commitment that each party is making to the other in advance of the surrogacy commencing. This is why some main surrogacy organizations agree that it is fundamentally important to have a written agreement which is a basis for effective communication and mutual understanding between intended parents and surrogate mothers.

3.3. The legitimacy of the surrogacy agreement

The legitimacy of the surrogacy agreement depends on the reason for this agreement. Under UK law, a surrogacy agreement based on a commercial basis is illegal. This means no person shall on a commercial basis do any of the following acts in the UK, including the offer or agree to negotiate the making of a surrogacy arrangement or take part in any negotiations with a view to making a surrogacy arrangement.[3] A surrogacy agreement based on a commercial basis will be related to any payment in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement received by one party to the surrogacy agreement[4]. In this case, "payment" does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother. Therefore, in order not to violate the agreement on surrogacy for commercial purposes[5], the parties to the agreement must prove that they didn't do the act with a view to any payment being received in respect of it. Although this issue was not regulated in the SSA 1985, the HFEA 2008 clarified "payment" to avoid its misuse for commercial purposes. In particular, Section 54(8) of the HFEA 2008 requires the court to consider the legality of this "payment'. Herein, this "payment', not including expenses reasonably incurred for the benefit of a surrogate mother or prospective surrogate mother, has been given or received by either of the

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1 "Guidance The Surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales" (Department of Health & Social Care) <https://www.gov.uk/government/publications/having-a-childthrough-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-inengland-and-wales> accessed 15 November 2021.

2 Ibid.

3 The Surrogacy Arrangements Act 1985, s 2(1).

4 The Surrogacy Arrangements Act 1985, s 2(3).

5 The Surrogacy Arrangements Act 1985, s 2(4).

applicants for or in consideration of the making of the order, the handing over of the child to the applicants,.... unless authorised by the court. However, there is a risk that anything considered to be "payment" for surrogacy could result in the refusal of the court to grant a parental order. It has been a relatively common occurrence in recent years for payments to surrogates that might be thought to be over and above what can be called "reasonable expenses" to be retrospectively authorised by a court when considering whether or not a parental order can be granted. For example, in Re X & Y (Foreign Surrogacy) [2008][1], a British couple paid 235 Euros per month to their Ukrainian surrogate, as well as 25,000 Euros when the children (twins) were born. Though these payments evidently exceeded the surrogate's "expenses" (in fact, the lump sum was to enable her to place a deposit on a flat), the payments were later authorised so that a parental order could be made. As a result, these payments will generally always be authorised by a court unless there is another reason for the court to consider that granting a parental order to the intended parents would not be in the child's best interests.

3.4. Rights of surrogate mother and parental order

Regarding the rights of surrogate mothers, under UK law, in a surrogacy agreement, the woman who gives birth is always treated as the mother and has the right to keep the child, even if they're not genetically related[2]. As a result, the child's legal parents after birth in the surrogacy agreement are the surrogate mother, the intended parent(s) is not the legal parents even though they have the same biological lineage. For instance, in the case of AB v CD, the surrogate mother and her husband remained the legal parents to the child despite the baby living with the intended parent(s).[3] The reason for this matter is that the intended parent(s) didn't know they had to apply for a parental order. Therefore, this infringes on their rights as parents because though surrogacy agreement has been agreed to by the parties (in this case, between intended parent(s) and surrogate mother) legally, the recognition of intended parent(s) as the legal parent of the child is not recognized. This was because Section 36 of the HFEA 1990 introduced section 1A into the 1985 Act to provide that "no surrogacy arrangement is enforceable by or against any of the persons making it" i.e., surrogacy contracts are

1 [2008] EWHC 3030.

2 The Human Fertilisation and Embryology Act 1990, s 27.

3 Annabelle Poole and Hannah Pearman and Ellie Pook and Gledisa Qokthi and Jasmine Rushworth, "The Surrogacy Arrangements Act 1985 To what extent does the current law on surrogacy infringe on parental rights?" (2019) 1(1) Student Journal of Professional Practice and Academic Research 58.

unenforceable in the courts[1]. This means that the surrogate mother cannot be required by the intended parent(s) under any contractual provision to hand over her child, nor can the intended parent(s) be required to hand over any money or recover any money paid to the surrogate mother under the terms of such a contract.

On the other hand, according to the provisions of surrogacy law, if the surrogate changes her mind and wants to keep the child, she still has legal rights over the child in this surrogacy agreement. Without a parental order, the surrogate is entitled to change her mind and keep the baby at any time. Another way in which the law on surrogacy infringes on parental rights of the intended parent(s) in this case. There was an actual case recorded when a surrogate mother changed her mind about handing over the baby to a gay couple, but the Court of Appeal granted the gay couple custody of the baby. Even though the surrogate had the right to change her mind under the HFEA 2008, it was held that this did not mean that the surrogate should keep the child[2]. The right to be a legal parent of the surrogate mother has demonstrated the concern of legislators about the rights of the surrogate child, especially in case the intended parents give up their intention to be a parent of the surrogate child at any stage. In any circumstances, the surrogate will still enjoy their basic rights.

This step plays an important role in the surrogacy agreement in terms of a parental order, transferring parental rights from the surrogate mother to the intended parents. Without a parental order, the commissioning parents will not be the child's legal parents. They may not have parental responsibility and whilst this in itself may not affect their ability to provide day-to-day care for the child, it may have long-term consequences (for example affecting inheritance rights) and could affect their ability to take certain steps on behalf of the child (for example, apply for a passport).[3] Consequently, in this case, both the intended parent(s) and the child in a surrogacy arrangement face potential risks of legal parental rights and a recognition of the fragility of their relationship.

To extinguish the surrogate's parental status, the intended parent(s) have to seek a parental order under Section 54 of The HFEA 2008 and follow the procedure as set

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1 Margaret Brazier, Susan Golombok and Alastair Campbell, "Surrogacy: review for the UK Health Ministers of current arrangements for payments and regulation" (1997) 3(6) Human Reproduction Update 623.

2 Olivia Rudgard, "Surrogate mother who changed her mind must hand baby to gay couple, court rules" (Telegraph, 17 November 2017) <https://www.telegraph.co.uk/news/2017/11/17/surrogate-mother-changed-mind-giving-babymust-hand-child-gay/> accessed 17 November 2021.

3 Alghrani, Amel and Griffiths, Danielle "The Regulation of Surrogacy in the United Kingdom: The Case for Reform" (2017) 29(2) Child and Family Law Quarterly 165.

out in Part 13 of the Family Procedure Rules 2010 (FPR 2010). A parental order which transferred parentage from the surrogate to the intended parents goes to the most fundamental aspects of status and to the very identity of the child (who s/he is and who his/her parents are), and it is applied for through the family courts[1]. A parental order, if made, results in the legal consequence that the intended parent will become the legal parent with full rights concerning the child in the surrogacy agreement. At the same time, extinguishes the surrogate mother's status as the child's legal mother, together with that of her husband or any other legal parent. Importantly, such an order gives the commissioning parents parental responsibility.[2] It is central to a child's being, whether as an individual or as a member of his family. These matters are fundamental to both the intended parent(s) and the child.

Another problem intended parents have to face is that a surrogacy agreement can only be made with the surrogate's consent. It means if the surrogate changes her mind before a parental order has been signed, she is the legal parent. In the case of C, D v E, F, A, B[3] the surrogate changed her mind and did not want to hand over consent to the intended parent(s). Without the respondent's consent, the application for a parental order comes to a juddering halt. The result is that these children are left in a state of legal uncertainty, where, contrary to what was agreed by the parties at the time of the arrangement, the respondents will remain their legal parents even though they are not biologically related to them and they expressly wish to play no part in the children's lives[4]. Once the child is born and a parental order has been granted, the intended parents are now the child's legal parents and have the right to parental leave. The most recent change to the law was brought in by changes to the HFEA 2008 on October 1st, 2013. This change allows for the surrogate and intended parents to grant legal parenthood to either of the intended parents immediately at birth. This is made possible by completing various parental order forms, however, this has to be before the surrogate undergoes the fertility treatment. This gap between birth and parental order is normally a gap of up to twelve months. This latest change has narrowed this but has not replaced parental orders. It cannot grant legal parenthood to the intended parents or terminate the surrogate's legal parenthood[5].

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1 Ibid (n 20).

2 Parental responsibility is defined in section 3 of the Children Act 1989 as "all the rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and administration of his/her property".

3 [2016] EWHC 2643.

4 Ibid [9].

5 Robin Charrot, *"What do you need to know about surrogacy?"* (2014) 1 P.C.B. 39.

About the granted time of a parental order, Section 54(3) HEFA 2008 states that for a parental order to be granted, the application must be made between six weeks and six months after the birth of the child concerned. Despite this, in X (A Child) (Surrogacy: Time Limit) [2014][1], the High Court granted a parental order after the six-month deadline for making them had passed. This decision was later followed in A & B (No 2 - Parental Order) [2015][2]. In this case, a couple applied for a parental order concerning twins born to a surrogate in India in December 2011 (thus, at the time of the hearing, the children were three years old). From the above two cases, to protect the interests of the parties in the surrogacy relationship, especially the interests of the child, HFEA should give the Court the right to consider the reasonableness of the time limit for ordering the parents. Herein, the six-month time limit is described as "almost nonsensical," and the question posed here is, "Can Parliament have intended that the gate should be barred forever if the application for a parental order is lodged even one day late?"[3]. Besides, "without a parental order, the commissioning parents will not be the legal parents of the child they have probably cared for since birth, and whom the child regards as their de facto parents. Whilst this in itself may not affect their ability to provide day to daycare for the child, it may have long term consequences, for example affecting inheritance rights...'[4].

4. SURROGACY FOR SAME-SEX COUPLES FROM THE PERSPECTIVE OF VIETNAMESE LAW

4.1. Regulations of Vietnamese law

Viet Nam is a country that has not yet recognized same-sex marriage. Therefore, in the near future, if Viet Nam acknowledges this issue, the provisions of Vietnamese law relating to surrogacy for heterosexual couples will simultaneously regulate surrogacy for same-sex couples. Surrogacy following Vietnamese law is recorded mainly in the Law on Marriage and Family 2014 and the Decree No.10/2015/ND-CP on Giving birth in vitro fertilization and conditions for altruistic gestational surrogacy (Decree No. 10/2015/ND-CP). In addition, some other relevant texts include the Circular No.57/2015/TT-BYT on detailing a number of articles of Decree No. 10/2015/NDCP dated January 28, 2015, by the Government on in vitro fertilization and conditions for surrogacy for humanitarian reasons (Circular No.57/2015/TT-BYT), the Decree No.98/2016/NDCP on amending a number of articles of the Decree No. 10/2015/ND-CP dated January 28, 2015, by the Government providing for childbirth by in vitro fertilization and conditions for surrogacy for humanitarian purposes (Decree

1 [2014] EWHC 3135.

2 [2015] EWHC 2080.

3 Ibid n 36 [55].

4 Ibid n 37 [12].

No.98/2016/ND-CP), the Decision No. 7358/QD-BYT on the publication of administrative procedure is provided in Decree No.98/2016/ND-CP dated 07/01/2016 amending and supplementing some articles of Decree No.10/2015/ND-CP dated 28/01/2015 regulations on having a baby by IVF technical and conditions for a sustainable party for humanities (Decision No. 7358/QD-BYT). These documents will stipulate some main issues about surrogacy including (i) the definition of relevant terms, (ii) the legitimacy of the surrogacy agreement and (iii) the parental rights of the intended parents involved in this surrogacy agreement.

(i) Definition of relevant terms

Under Law on Marriage and Family 2014, the definition of altruistic gestational surrogacy is provided regarding surrogacy. Accordingly, altruistic gestational surrogacy means a pregnancy carried voluntarily for non-commercial purposes by a woman for a couple of whom the wife is unable to carry a pregnancy and give birth even if assisted reproductive technology is applied. The voluntary gestational carrier is impregnated and gives birth through the transfer into her uterus of an embryo created by in vitro fertilization from the ovule of the wife and sperm of the husband.[42] Furthermore, Decree No.10/2015/ND-CP stipulates the definition of the surrogate mother (single woman)[43] and intended parents (next of kin of the same line of a spouse who asks for gestational surrogacy)[1].

(ii) The legitimacy of the surrogacy agreement

According to Article 5.2. (g) of the Law on Marriage and Family 2014, surrogacy for commercial purposes is prohibited. Commercial gestational surrogacy means a pregnancy carried by a woman for another person through assisted reproductive technology for enjoying economic or other benefits.[2] Vietnamese law only allows surrogacy for humanitarian purposes and requires some accompanying conditions. In this case, Article 95 of the Law on Marriage and Family 2014 supply many conditions for surrogacy agreement such as surrogacy agreement shall be based on the voluntariness of involved parties and established in writing; the intended parents' conditions[3]; the surrogate mother conditions[4]; this surrogacy must not contravene the

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1 Decree No.10/2015/ND-CP, Art 2 (7)

2 Law on Marriage and Family 2014, Art 3 (23).

3 a/ The wife is certified by a competent health organization as unable to carry a pregnancy and give birth even with assisted reproductive technology; b/ The couple has no common child; c/ The couple has received health, legal and psychological counseling.

4 a/ She is a next of kin of the same line of the wife or husband who asks for gestational surrogacy; b/ She has given birth and is permitted for gestational surrogacy only once; c/ She is at a suitable age and is certified by a competent health organization as eligible for gestational surrogacy; d/ In case she is

law on giving birth with assisted reproductive technology; and the Government shall detail this Article. Moreover, in a surrogacy agreement, besides the relevant conditions in Article 95 mentioned above, there should be other conditions such as[1]commitment to fulfill of parties the rights and obligations prescribed in Articles 97 and 98 of the Law on Marriage and Family 2014; civil liabilities in case one or both parties breach commitments under the agreement; a surrogacy agreement shall be made in writing and notarized.

(iii) The parental rights of the intended parents involved in this surrogacy agreement

Under Vietnamese law, rights and obligations of the intended parents toward their child shall arise from the time the child is born[2]. It means a child born in case of the surrogacy agreement is the common child of the husband and wife who asks for such surrogacy agreement from the time this child is born. Besides, the intended parent may not refuse to receive their child. An intended parent that delays receipt of his/her child or breaches the child nursing and caring obligations shall support this child following the Law on Marriage and Family 2014 and be handled under relevant laws. If causing damage to the gestational carrier party, he/she shall pay damages. In case the gestational surrogacy requesting party dies, the child is entitled to the inheritance of the former's estate in accordance with the law. When the surrogate mother refuses to deliver the child, the intended parents have the right to request a court to oblige the former to deliver the child. Thus, the intended parents' parental rights were established since the child was born even though the birth mother is not the child's biological mother.

4.2. Some comments

Based on regulations on surrogacy under Vietnamese and UK laws, what stands out from these regulations is both legal systems have regulated some basic issues on surrogacy, including the definition of relevant terms, the legitimacy of surrogacy agreement and rights of relevant parties. However, there are some outstanding differences between them as below.

To begin with the definition of surrogacy, surrogacy under Vietnamese law is more specific than that of UK law. However, this definition will not cover the case of same-sex couples due to the lack of recognition of Vietnam on same-sex marriage.

married, she obtains her husband's written consent; dd/ She has received health, legal and psychological counseling.

1 Law on Marriage and Family 2014, Art 96.

2 Law on Marriage and Family 2014, Art 98.

Accordingly, Vietnamese law allows surrogacy when the wife is unable to carry a pregnancy and give birth even if assisted reproductive technology is applied—meanwhile, the inability of same-sex couples to have their biological children is because of structural infertility.

In terms of the legitimacy of the surrogacy agreement, both Vietnamese and UK laws affirm that the only surrogacy allowed is for non-commercial purposes. However, Vietnamese law has not yet clearly defined the expression of commercial purposes, while UK law has done this.

Regarding the parental rights of the intended parents involved in this surrogacy agreement, Vietnam's regulations clearly define the legal parental rights to the child in the surrogacy agreement, different from UK law, specifically about the time of determining the parental rights. Accordingly, under Vietnamese law, the legal parental rights of the intended parents are determined from the time the child is born, whereas, under UK law, this legal parental right is only transferred to the intended parent when the "parental order" procedure is granted. In the author's option, the provisions under UK law have flexibility in deciding the child's legal parent. In other words, even if an agreement has been established, the surrogate mother and her husband (or partner, if any) can be legal parents of the surrogate child, instead of the intended parent. If intended parents intend to change their minds, the reluctance to take surrogate children will affect the psychology of raising children, thereby affecting children's rights and interests. For example, these children may be discarded as soon as they are received. Thus, the UK's regulations on parental orders will create opportunities for parties to think carefully before making decisions.

5. CONCLUSION

The right to marriage and family is a universally fundamental human right, including for same-sex couples. Some recommendations have been proposed as follows to ensure the efficiency of enjoying this right:

(i) Recognize the relationship between same-sex couples towards same-sex marriage so that these couples will have a basis to enjoy their related rights such as the right to marriage and family.

(ii) Modify the definition of surrogacy of Law on Marriage and Family 2014 towards a general approach similar to UK law. After the modification, legal provisions on surrogacy under Vietnamese law could be applied for same-sex couples.

(iii) Adding manifestations of commercial purposes in surrogacy, there is a basis to limit taking advantage of surrogacy for illegal reasons thoroughly.

(iv) Adding the "parental order" step in the process of surrogacy to ensure the best rights and interests of surrogate children.

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PROTECTING HUMAN RIGHTS TO ADOPTION OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE (LGBT) - PRACTICE IN SOME ASIAN COUNTRIES AND VIETNAM

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Abstract: *In many countries worldwide, lesbian, gay, bisexual, and transgender people (LGBT) often face stigma and discrimination. The efforts in fighting for equal rights and non-discrimination against LGBT people are made in marriage and many other aspects, such as the right to adopt for LGBT people. This paper studies some issues related to human rights to the adoption of LGBT people, including the influence of individuals' sexual orientation or gender identity on their rights to adoption, the rights of children adopted by LGBT people. The similarities and differences between the laws related to adoption by LGBT in Vietnam and some Asian countries are indicated. Moreover, the paper analyzes the influencing factors and impacts of legal regulations on the rights of LGBT people. The gaps and inconsistencies in the legal system are shown, thereby some recommendations are recommended to improve the law to ensure human rights to the adoption of LGBT people.*

Key word: *human rights, adoption, LGBT, Vietnam, law. . .*

I. INTRODUCTION

Adoption has existed for a long time in human society. The two oldest codes, including Codex Hammurabi and Codex Justinianus, specified the regulations on adoption[1]. Nowadays, although the laws of different countries have different provisions on the right to adoption, through bilateral or multilateral international treaties, the countries cooperate in intercountry adoption.

Adoption is a historical institution. However, the nature of adoption has changed dramatically over time. In the early days, adoption was mainly a means of ensuring that infertile couples had someone to inherit their family name and traditions. The birth of the United Nations Convention on the Rights of the Child 1989 opened the ideological revolution on children's rights. That children should be considered the center of protection affirmed by the Convention has contributed to changing the purpose of adoption from "bringing a child to the family" to "bringing a family to the child".

The adoption, especially the adoption by LGBT people, has been a controversial issue related to ensuring the rights of children and LGBT people. Adoption by LGBT

[1] See Wikipedia, *Adoption,* https://en.wikipedia.org/wiki/Adoption, retrieved on February 23, 2018.

people often occurs when (1) A married or unmarried LGBT couple jointly adopt children; (2) One partner of a same-sex couple got married and gave birth to a child, the other partner adopts such a child or another child; (3) A single LGBT person adopts a child. However, there are many arguments about the future of those children. Will the sexual orientation/gender identity of their parents influence them? How they can face the difficulties in a society that has not fully accepted LGBT people?

Many studies result in different conclusions on this issue. For example, the Social Science Research site published a study by Mark Regnerus, a sociologist and professor at the University of Texas, showing that more than 50% of children raised in LGBT families tend to describe themselves as gay, bisexual or asexual. Children raised by lesbian families are twice as likely to have suicidal thoughts

(12%) than those raised by heterosexual parents (5%)[1]. There is a huge difference in the proportion of victims of sexual abuse, while only 2% of children raised by heterosexual parents face this problem, 23% of children raised by LGBT families experience sexual abuse. In addition, in an article published on *Enewamerica*, Tryce Hansen, Professor of Sociology, emphasizes that same-sex marriage is extremely not good for children. He believes that the best and most ideal environment for the development of children is a family with a mother and father in the true sense of the word. According to Tryce Hansen, men tend to be assertive, rational, and proactive in relationships, while women have the opposite characteristics. In addition, heterosexual parents with their two genders will help children have a more comprehensive view of their own gender, thereby having healthy, balanced thoughts and actions in future relationships. Same-sex marriage confuses children about their gender and unwittingly encourages sexual misconduct in minors, leading to serious consequences later on. Hansen highlights that having same-sex parents is not good for children. Although we sympathize with homosexuals, we should not cause harm to children by that empathy, said Hansen. When we compare gains and losses, the needs of LGBT people and children, children should not be the ones to suffer[2].

However, in the other view, many studies indicate that LGBT parenting does not really negatively impact children. Charlotte J. Patterson in her research, emphasizes that there is no factual basis for concluding that homosexuals are unfit to be parents. Results of the studies on lesbian couples show that lesbian couples tend to share housework and work properly, in some cases they even have better parenting skills

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[1] Mark Regnerus, How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study, https://www.baylorisr.org/wpcontent/uploads/Regnerus.pdf

[2] https://vnexpress.net/lo-ngai-xung-quanh-viec-nguoi-dong-tinh-nhan-con-nuoi-2892081.html retrieved on November 25, 2021.

than heterosexual couples. The author analyzes three components of the sexual identity of children raised by same-sex parents, including gender identity, gender-role behavior, and sexual orientation. Regarding gender identity, several related studies are cited to conclude that there is no research on gender identity to prove the difficulties in determining gender identity of children living in the families lesbian parents, and there is also no similar data for children living in the families with gay parents.

Regarding gender behavior, the author confirms that there is no difference between children raised by lesbian parents and those raised by heterosexual parents regarding favorite toys, activities, favorite TV shows, other personal interests, and career choices. Regarding sexual orientation, in all studies, the majority of children raised by gay or lesbian parents identify their sexual orientation as heterosexual. The study also shows a positive picture of community activities, especially the school environment, of children raised by same-sex parents, although some children have faced same-sex stigma from their peers. In the family, children of lesbian parents often maintain their relationships with family members, such as fathers (divorced mothers) and grandparents[1]. The researchers indicate almost no difference in personality, health, and closeness to family between children in LGBT and normal families. The children of same-sex couples even slightly overwhelming in these aspects. Another study by the University of Massachusetts at Amherst - USA proves that children born into LGBT families are affected only by the relationship and emotions of their parents, not by the gender of their parents. The researchers compare the development of children in 104 families, including 50 families with heterosexual parents, 29 families with gay parents, and 25 families with lesbian parents.

In the context of increasing number of same-sex couples raising children, this issue receives mixed reactions from scientific studies and social viewpoints. Building a legal system to both regulate the legality of this adoption and ensure the human rights of LGBT people and the rights of children adopted by LGBT couples is important and needs more studies in the aspects of both international and national law.

II. RESEARCH METHODS

To study this topic, the author will use the combination of theoretical research methods such as the synthesis-analysis method, the interpretation-inductive method, the statistical method, the comparative comparison method, etc. to study the actual developments to generalize assess the general trend.

[1] Charlotte J. Patterson, Lesbian and gay parents, and their children: Summary of research findings, ibid, pg. 05-15.

III. FINDINGS AND DISCUSSION

1. Adoption is a right of LGBT people from the perspective of international law

Everyone has the right to marry, regardless of their sexual orientation and gender identity. The family exists in many different forms. No family shall be subjected to discrimination on sexual orientation and gender identity of any member of that family, including in adoption and assisted reproduction. Adoption is considered a right of LGBT people for the following reasons:

Firstly, the principle of equality without discrimination in international human rights law. "Non-discrimination" is a fundamental principle of international law in general and human rights law in particular. The principle of non-discrimination was first announced in UDHR and then presented in most of the basic legal documents such as ICCPR, ICESCR, CRC, CEDAW, etc. Article 1 of UDHR affirms that: "Everyone is born free and equal in dignity and rights"; Article 2 of UDHR states: "Everyone is entitled to all the rights and freedoms without distinction of race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or any other status".

The above principle is repeated and concretized in Article 2 of ICCPR and Article 2 of ICESCR. Accordingly, Member States commit to respect and protect the rights specified in ICCPR and ICESCR to all persons within their territories and jurisdictions, without distinction of any kind such as race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or other status. UDHR, ICCPR, and ICESCR include the list of prohibited grounds of discrimination in their articles to ensure nondiscrimination.

This principle requires fair treatment to all individuals or groups regardless of their particular characteristics. It is also used to assess the neutral criteria that could create systematically disadvantageous consequences for people with these characteristics. Thereby, individuals in similar circumstances should receive the same treatment and not be treated less merely because of a particular characteristic they have. The purpose is to give all people equal and fair access to the available opportunities in society. It is an essential principled recognition of respecting and ensuring human rights and accessibility to the rights without any discrimination on the grounds of natural or social characters that are completely random and uncontrollable. The principle emphasizes that human rights law needs to embody the philosophy of respecting the physical and mental differences of randomly existing people[1]. This proves that

[1] Assoc Prof. Dr. Nguyen Hien Phuong - Dr. Dao Le Thu, *Anti-discrimination from the perspective of international and national human rights laws,* Labor Publisher, Hanoi, 2020, tr. 23.

LGBT people must be treated equally like all members of society and have the right to enjoy a happy life and find a family. Having and raising children is a need of both couples and individuals, regardless of their sexual orientation or gender identity. Many factors influence the decision to have biological or adopted children of gay, bisexual and transgender people. Based on the fundamental principle of "equality without discrimination", it can be affirmed that people with every different sexual orientation and gender identity are entitled to be human beings before the law and have full human rights in all areas of life, including the right to marry, to found a family, raise children, and adopt children.

Secondly, the right of LGBT people to marry and to find a family. This right is an overarching and fundamental right to ensure the exercise of related rights, including the right to custody of children. The right to marry, to find a family, and equality in marriage is first mentioned in Article 16 of UDHR, whereby every person of full age has the right to marry and found a family without any restriction on race, nationality, or religion. In addition, Clause 3, Article 16 affirms that "the family is the natural and fundamental cell of society, protected by the state and society". The above provisions of UDHR were subsequently reaffirmed and concretized in Article 23 of ICCPR and Article 10 of ICESCR. According to Commission on Human Rights, "the concept of the family can differ in several respects, such as nationality, even religion, and therefore it is impossible to give a universal standard definition"[1] . In addition, according to the United Nations Committee on the Rights of the Child, family should be considered by "different family structures, arising from diverse cultural patterns and family relationships forming in society"[2]. Therefore, research on the right to adoption needs to study the differences in the right to marry and to found a family.

Thirdly, the content of regulations related to the right to child custody and adoption conditions. Regarding child custody, Article 9, CRC stipulates: "1. States Parties shall ensure that children are not separated from their parents against their will, unless the competent authorities subject to judicial review, in accordance with current laws and procedures, decide that such separation is necessary for the best interests of the children. Such a decision may be necessary in particular cases, such as when a child is abused or neglected by the parents, or when the parents are living separately, and a decision must be made for children's place of residence". At the same time, Paragraph 4, Article 18 of ICCPR clearly states that "The States Parties commit to

[1] General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses, Human Rights Commission, United Nations Instrument. HRI/GEN/1/Rev.2 (1990), at 2.

[2] "Report on the Fifth Session", Committee on the Rights of the Child, United Nations Instrument. CREC/C/24, Appendix V.

respect the freedom of parents, and legal guardians where applicable, in religious and moral education for their children according to their own will". Under these regulations, parents have the right to raise and live with their children. Parents shall be separated from their children only when such separation is necessary in accordance with regulations of national law and the applicable procedures in that national law. Therefore, LGBT parents have the full right to custody of children.

In terms of adoption condition, Clause 1, Article 21 of CRC states that the admission or authorization of adoption must ensure that the child's best interests are of the utmost concern. Accordingly, as long as the individuals are qualified and provide appropriate conditions for adoption, they have the right to adopt. Moreover, there is no regulation stipulating that sexual orientation and gender identity are the basis to prevent individuals from exercising their right to adopt. In the Hague Convention 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, there is no regulation restricting LGBT people from adopting children. The adoption takes place when the competent authority of the country certifies that the prospective adoptive parents are eligible and suitable for adoption, and they will strictly and completely comply with the order and legal procedures of adoption law[1]. Therefore, LGBT people only need to have the ability to provide the best benefits for children, satisfy the adoption conditions, and comply with adoption orders and procedures.

2. THE RIGHTS OF CHILDREN ADOPTED BY LGBT PEOPLE IN FAMILIES WITH LGBT PARENTS

First of all, it should be emphasized that children have the right to be adopted. According to Articles 21 and 22 of CRC, a child who is temporarily or permanently deprived of his or her family environment or in his or her own best interests cannot remain in that environment, have the right to have a new family and to be adopted by lawful means and procedures[2] . CRC States Parties must recognize and permit adoptions and ensure children's best interests. Although CRC provides some specific references to a child's parents, it nevertheless acknowledges that a child's family can be understood more broadly than the nuclear family concept. As proof of this, CRC specifies that a legal guardian, other than parents, may have primary responsibility for raising a child (CRC: Article 18 §1). Therefore, recognizing the right to adoption of LGBT people shall create more opportunities for children to find their own families.

Article 2.1 of CRC further recognizes the principle of equality and nondiscrimination for children, which stipulates: "States Parties shall respect and ensure the rights set

[1] Hague Convention 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, Article 4 and Article 5.

[2] CRC, Article 21, Article 22.

forth in the Covention to each child within their jurisdiction without discrimination of any kind, regardless of race, color, sex, language, religion, political or other opinion, national origin, ethnic or social origin, property, disability, birth or other status". Therefore, adopted children in any family, including adopted children in LGBT families, must be treated equally. For that reason, denying a child the enjoyment of family rights based on the child's birth status, or the sexual orientation or gender identity of the child's parents or guardians without good cause is not compatible with CRC.

Secondly, CRC recognizes the requirements to ensure children's best interests adopted by LGBT people. The adoption must satisfy two core principles in protecting children's rights, including "non-discrimination against children" and "for children's best interests". For children's best interests is the utmost principle of all child-related decisions to ensure that children's best interests are the most comprehensive development environment for children. The sexual orientation and gender identity of children and their parents that is recognized and protected by international law are not the basis for discrimination.

In the case of children adopted by same-sex couples, the recognition of same-sex marriage is an important condition to ensure equal rights for children in LGBT families. The reason is that a child of a married couple usually has a relationship with both mother and father that is fully recognized by law, regardless of whether they are biological children or not. This obviously brings significant and special benefits to the children of LGBT parents. Furthermore, with legal recognition of same-sex marriage, a couple, regardless of gender or sexual orientation, can participate fully in a marital relationship, provide the child with appropriate guidance and direction to exercise the rights recognized in this Convention, in a manner appropriate to the child's developmental level of capacity" (CRC: Article 5).

Vietnam is the first country in Asia and the second country in the world to ratify the United Nations Convention on the Rights of the Child on February 20, 1990 and commit to protecting children's rights and interests, creating all conditions for children to participate and exercise their rights fully. This has been clearly reflected in the Vietnamese legal system. Children's rights are recognized in 2013 Constitution and certain legal documents, such as Civil Code, Criminal Code,

Labor Code, Education Law, Land Law, HIV/AIDS Prevention Law, Law on Gender Equality, Legal Aid Law, Law on Film, Law on Domestic Violence Prevention, and Law on Mutual Legal Assistance. In particular, Law on Child Protection, Care and Education concretize the basic principles of the Convention on the Rights of

the Child, in which Vietnam is a States Party, by emphasizing the principle of "non-discrimination against children" and "for the best interests of children". Specifically, the principle of non-discrimination against children recognized in Article 4 of Law on Child Protection, Care and Education concretizes the basic principles of Convention on the Rights of the Child as follows: "Children, regardless of girls, boys, children in wedlock, children out of wedlock, biological children, adopted children, stepchildren, common children, regardless of race, religion, class, social status, political opinion of parents or guardians, are protected, cared for and educated, and enjoy the rights prescribed by law". Thereby, children have the right to be protected, cared for, educated and enjoy the rights prescribed by law without discrimination.

Through the provisions of international law, it is proved that the rights to custody and adoption of an individual are human rights recognized and protected by international law. LGBT people are also individuals who are treated equally before the law and protected equally by the law, thus the rights to custody and adoption of LGBT people are also recognized and protected by law like the rights of other individuals in society.

3. LAW ON ADOPTION OF LGBT PEOPLE IN VIETNAM IN COMPARISON WITH OTHER ASIAN COUNTRIES

Based on the peculiarities of customs, traditions, culture, religion, etc., discrimination against LGBT people exists in Vietnam and most Asian countries. For example, the Muslim minority in the Philippines still believes that homosexuality is a crime that should be punished. However, the undeniable positive point is that Vietnam has never criminalized homosexuality while some other Asian countries are still criminalizing homosexuality, such as Brunei. In 2019, Brunei officially applied Sharia law to Muslims in this country (with 250,000[1] Muslims, accounting for 65% of the population). Thereby, same-sex crime is classified in the same label of adultery and rape which is punished by stoning to death10. In Indonesia, Aceh province applied Sharia law since it was granted special autonomy in 2001 - an attempt of the central government to quell a protracted separatist insurgency. Instead of the death penalty, the punishment for homosexuals here is often public caning[2].

As of 2020, 28 countries and regions have legalized the possibility of LGBT adoption. Asia and Africa are the two regions with the lowest rates of acceptance for LGBT adoption. In Asia, only same-sex couples in Israel[3] can adopt children.

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1 https://www.humandignitytrust.org/country-profile/brunei/ retrieved on November 25, 2021.

2 https://www.loc.gov/item/global-legal-monitor/2015-10-28/indonesia-aceh-province-law-expands-caningpunishment-to-adultery-and-homosexual-acts/ retrieved on November 25, 2021.

3 https://www.statista.com/statistics/1269946/countries-where-same-sex-couples-can-jointly-adopt-children/ retrieved on November 25, 2021.

First of all, same-sex couples in most Asian countries are currently unable to exercise their right to adoption because same-sex marriage has not been recognized. In terms of recognizing same-sex marriage, Asian countries either do not recognize it, such as Brunei, Indonesia, etc. or do accept it t to verry limited extentMost Asian countries, including Vietnam, have a neutral view which means not banning same-sex marriage but not recognizing it as a legal marriage, not allowing same-sex marriage to be registered at the competent authority. Compared with the past, this view is a new step forward in legal policy for homosexuals, thereby contributing to the reduction of social discrimination against homosexuals and ensuring their right to the pursuit of happiness[1]. However, since same-sex marriage is not recognized, same-sex couples in these countries cannot jointly adopt children because the countries' laws generally allow only single people or legal couples to adopt a child. Gay couples are not assisted in reproduction by surrogacy[2]. Therefore, joint adoption of same-sex couples (not a biological child of two people) in Vietnam and most Asian countries today, such as Korea[3], Thailand[4], Philippines[5], has not been allowed by the law on adoption Therefore, only one of two homosexuals can adopt a child and establish a legal parent-child relationship while the other cannot. Thus, it is very difficult to maintain the rights and obligations of both homosexuals toward their children.

For the territories that have recognized same-sex marriage in Asia, typically Taiwan, same-sex couples' adoption cannot be implemented because this recognition is limited. In 2019, Executive Yuan promulgated a bill called "The Enforcement Act of Judicial Yuan Interpretation No. 748" that allows two samesex people to establish a "permanent union of intimate and exclusive nature for the purpose of living a common life to ensure equal protection of the right to freedom of marriage". Therefore, the Act does not directly recognize same-sex marriage. The content of the Act does not use the term "marriage" (hunyin) to refer to a same-sex couple relationship but uses the term "permanent union of intimate and exclusive nature for the purpose of living". Although it does not directly refer to the term "same-sex marriage" or "allowing same-sex couples to marry", the Act uses the definition of "marriage" and recognizes the rights and benefits that are similar to the ones arising from the marital relationship of samesex couples[6].

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1 Clause 2, Article 8, Law on Marriage and Family of Vietnam 2014.

2 Law on Adoption. Clause 3, Article 8 of the Law on Adoption of Vietnam.

3 https://www.nqapia.org/wpp/lgbtq-rights-in-south-korea/

4 https://www.channelnewsasia.com/asia/thailand-civil-partnership-lgbtiq-gender-equality-discrimination710036.

5 https://www.loc.gov/item/global-legal-monitor/2020-01-24/philippines-supreme-court-rules-on-same-sexmarriage/

6 http://blog.hawaii.edu/aplpj/files/2013/02/APLPJ_14.2_Lin.pdf.

Due to this unclear regulation, it is difficult to confirm that same-sex marriage in Taiwan is legal for these couples to exercise their right to adopt. Even when same-sex couples have a legal marital relationship, the law only allows them to adopt a child who has a blood-relation with the other spouse. That means, in the couple, there must be one person who is the biological father or biological mother of the child, then the other person can adopt the child and thereby establish the relationship of an adoptive mother or adoptive father.

Secondly, although the laws of Vietnam and most Asian countries allow single individuals to adopt children, the exercise of these rights faces many difficulties. Specifically, the Vietnamese Law on Marriage and Family 2014 stipulates that family is *"a collection of people bound together by marriage, blood relation or nurturing relationship"*[1]. By this definition, there are three ways to form a family relationship: (1) marriage; (2) blood relationship (birth of children); (3) nurturing relationship (adoption). In terms of the birth or adoption of a child, the provisions of current Vietnamese law do not discriminate on grounds of sexual orientation or gender identity of individuals in having a biological child or adopting a child.

In case that an LGBT individual wants to adopt a child, Vietnamese law on adoption ensures that the LGBT individual has the same right to adoption as a

a heterosexual person without any discrimination as long as that individual meets the conditions for an adopter as prescribed by the law on adoption[2].

The persons who are gay, lesbian, bisexual, and transgender are, as an individual, entitled to adopt a child on their own when they meet the adoption conditions prescribed by law on adoption. According to this regulation, in order to adopt a child, the adopter must not only meet the conditions of health, economy, and accommodation to ensure the care, upbringing, and education of the adopted child, but also have to satisfy other conditions related to his or her identity, such as having good moral character, having full civil capacity[3]. These conditions are not related to the gender identity or sexual orientation of the adopter. However, the criteria for considering an adoption application, based on the condition that "the adopter must not only meet the conditions of health, economy, and accommodation to ensure the care, upbringing and education of the adopted child and must have good moral character", do not have any specific guideline, that could lead to inconsistent application in each area and reflect the subjective viewpoints of competent agencies allowing the adoption.

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1 Vietnamese Law on Marriage and Family 2014, Article 3, Clause 2.

2 Law on Adoption 2010, Article 14 (Conditions for domestic adopters) and Article 29 (Conditions for adopters involving foreign elements).

3 Article 14, Law on Adoption of Vietnam 2010.

Among the conditions for the adopter, that the adopter must have good moral character and have practical conditions to ensure the care, upbringing, and education of the adopted child is a very important condition to ensure that the child, especially minor one, could live in an environment with their best interests. Obviously, these criteria are qualitative. while the social discrimination against LGBT people still exists, it is assumed that the adoption of LGBT people may affect the normal development of children. As a result, although the right to adoption of LGBT people is allowed by law, it is very difficult to exercise this right.

For transgender people, Vietnam Civil Code 2015 has regulations on transgender, thereby individuals who have undergone sex-change must register for changing civil status in accordance with Vietnamese law on civil status[1]. That means, after transgender people perform sex reassignment surgery and carry out civil status procedures to change the gender on their identification card to get married, for example, a transgender woman marries a male or a transgender male marries a woman, the marriage relationship between these two people is recognized by Vietnamese law, they have the right to adopt children jointly. If a person having a child on his or her own marries a transgender person, the transgender person may adopt his or her spouse's stepchild as a stepfather or stepmother[2].

In short, LGBT people in Asia still suffer from many stigmas and discriminations stemming from traditions, customs, religions, etc. Asian countries have made a positive change in the awareness and legality of LGBT people's rights, from banning same-sex marriage to neither banning nor recognizing it, like in Vietnam. Korea does not recognize same-sex marriage, but in October 2019, the Korean government announced that it recognizes same-sex spouses of foreign diplomats in Korea as legally married couples under Korean law. Another example is that Taiwan recognizes same-sex marriage. Generally, we can see the trend of recognizing the family right of LGBT people. However, the rights of LGBT people in Asia, the right to a happy life, the right to found a family, especially the right to adoption in Asia are extremely limited and in many places almost impossible to enforce.

CONCLUSION

Two core principles emphasized in international treaties related to protecting children's rights are "non-discrimination against children" and "for the best interests of children". International law recognizes and protects children's rights without any discrimination on the grounds of the sexual orientation or gender identity of children or

[1] Civil Code 2015, Article 37 and Civil Status Law 2014, Article 3.

[2] The right to change one's gender marker cannot yet be exercised because of a lack of specific regulation.

their parents. Children have the right to have a family and to be adopted. Recognizing the right to the adoption of LGBT people ensures the rights of this group itself and increases opportunities for orphaned and abandoned children to have a family.

There are currently many scientific studies and mixed reviews on the effect of children living in families with LGBT parents. In particular, under the impact of culture, religions, customs and traditions, as well as the unrecognition of same-sex marriage, LGBT people in Asia have almost no chance to adopt children jointly. Even single individuals cannot adopt children because of unclear provisions in the context of social discrimination.

Current Vietnamese law has no discrimination in the provisions on sexual orientation and gender identity of children or their parents. The differences in sexual orientation or gender identity do not detract legal status from anyone as a human being, and do not take away their human rights in all areas of life, including the right to marry, to found a family, and to adopt children. All people regardless of sexual orientation or gender identity should enjoy the right to nondiscrimination and equality, which are fundamental principles of International Human Rights Law.

Current Vietnamese law has no prohibition or condition on the sexual orientation or gender identity of the adopter or guardian or representative, so the difference in sexual orientation or gender identity does not deprive an individual of these rights. However, the legal provisions are not clear. Some regulations are still subjective, which has led to the discrimination in considering and approving adopters and guardians on the grounds of sexual orientation and gender identity.

Despite the stigma against LGBT people in Asian society and the low proportion of recognition of LGBT people's rights in national laws, it is undeniable that these countries have changed in recognizing and protecting the rights of LGBT people. In the context of Asian family traditions, customs, and religions, although these changes are slow, they are remarkable and represent a turning point in the fighting process to ensure the rights of LGBT people in Asia.

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THỪA NHẬN XÃ HỘI ĐẾN TỪ CÔNG NHẬN HÔN NHÂN: THỰC TRẠNG PHÁP LÝ

Mary Anne Case[1]
Vũ Thành Cự dịch

DẪN NHẬP

Trong ba mươi năm qua, từ khi bước chân vào nghiên cứu luật học, tôi đã nghiên cứu, phân tích và dự đoán về sự phát triển của luật hôn nhân ở Hoa Kỳ cũng như những nơi khác trên thế giới.[2] Những yêu cầu pháp lý về quyền kết hôn của các cặp đôi cùng giới không phải mới chỉ xuất hiện ở giai đoạn này (thực tế, chúng đã xuất hiện tại Mỹ từ trước đó vài thập kỷ), nhưng, thay vào đó, giai đoạn này chứng kiến việc những yêu cầu này từng bước được chấp nhận rộng rãi hơn, bởi rất nhiều các tòa án và cơ quan lập pháp cấp địa phương. Đồng thời, giai đoạn này cũng chứng kiến sự phát triển của các hình thức pháp lý công nhận mối quan hệ đa dạng, ngoài hôn nhân, chẳng hạn như hợp thành có đăng ký, hoặc không có đăng ký cho các cặp đôi, bất kể giới tính của họ, tại nhiều vùng lãnh thổ trên toàn thế giới)[3]. Nhân dịp hội thảo Beyond 748 này, tôi chúc mừng Đài Loan với một tương lai cởi mở của hôn nhân và gia đình, cũng như để chúng ta suy tư rộng hơn về ảnh hưởng của phong trào hôn nhân cùng giới, đối với việc hiểu hôn nhân theo nghĩa rộng là một định chế pháp lý và xã hội.

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[1] GS. Arnold I. Shure, Trường Luật, Đại học Chicago.

[2] Ví dụ xem Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993) (thảo luận về một vài phán quyết trong quá khứ và gần đây liên quan đến hôn nhân và sự thừa nhận mối quan đồng giới).

[3] Phán quyết đầu tiên liên quan đến hôn nhân đồng giới đưa ra tại Tối cao Pháp viện là Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), kháng cáo bị bãi bỏ, 409 U.S. 810 (1972). Như tôi đã giải thích trong bài viết *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005), điều đó có nghĩa phán quyết được đưa ra trước khi có nền móng của nguyên tắc trình tự pháp luật công bằng về mặt nội dung và sự bảo vệ bình đẳng trước pháp luật mà sẽ được củng cố sau này với những lập luận có lợi cho hôn nhân đồng giới theo quy định của Hiến pháp Mỹ. Giống như nguyên đơn trong vụ J.Y. Interpretation 748 (Tòa án Hiến pháp Đài Loan), Chi Chia-Wei, đã đệ trình kiến nghị cho hôn nhân đồng giới vào năm 1986, Jack Baker và cộng sự tiếp tục theo đuổi vụ kiện cho đến khi thắng kiện. Xem bài viết *Marriage Licenses,* tr. 1759-1764 và thảo luận phía dưới.

Nhưng chia sẻ của tôi sẽ bao gồm bảo vệ những cam kết mang tính quy phạm và cũng như thừa nhận một số suy đoán của tôi cách đây vài thập kỷ chưa thực sự chính xác.

Tôi định đặt tiêu đề "The Status of Marriage" như một phép chơi chữ vì từ "status" trong Anh ngữ có rất nhiều nét nghĩa khác nhau mà tôi sẽ thảo luận trong bài viết, xin thứ lỗi nếu điều này tạo ra khó khăn trong việc chuyển ngữ bài viết sang tiếng Trung ngữ. Từ "Status" có thể hiểu là một vị trí trong hệ thống cấp bậc - địa vị cao hay thấp, một vài thiết chế hay cá nhân có vẻ có vị thế cao hơn trong khi các chủ thể khác có địa vị thấp hơn. Về mặt lịch sử, hôn nhân có một địa vị cao hơn theo nghĩa này so với các hình thức pháp lý khác thừa nhận mối quan hệ của một cặp đôi, ví dụ như thê thiếp, và trong nhiều xã hội, những người đã kết hôn được cho là có địa vị cao hơn so với những người độc thân, ly dị, ly thân hay góa. Chính việc hiểu hôn nhân là một "địa vị danh giá"[1], đánh dấu việc những cá nhân kết hôn đã trở thành người lớn, đáng trân trọng và có trách nhiệm với cộng đồng, đã tạo ra động lực cho những sự ủng hộ cũng như phản đối với việc cởi mở nhìn nhận hôn nhân cùng giới. Việc gắn với hôn nhân một địa vị cao một cách dị thường này, tôi đã hy vọng một cách nhiệt thành rằng nó sẽ suy giảm rõ rệt ở rất nhiều quốc gia mà tôi đã nghiên cứu, bao gồm đất nước của chính tôi, thế nhưng, dự đoán của tôi đã hoàn toàn sai lầm.

"Status" cũng có những nét nghĩa khác liên quan đến sự phát triển của luật hôn nhân. Sử gia pháp lý người Anh, Sir Henry Maine đã nổi tiếng phát biểu rằng, "sự chuyển dịch của những xã hội cấp tiến cho đến nay là sự xê dịch từ nhân thân tới hợp đồng"[2], khi ông bàn về sự phát triển của luật nhân - thân (law of persons) đi liền với gia đình và các thành viên của gia đình. Tại thời điểm đó, nửa sau của thế kỷ 19, hôn nhân theo pháp luật Anh - Mỹ được mô tả là hợp đồng để tiến tới một địa vị. Cụ thể hơn, lựa chọn tiến tới hôn nhân mang tính hợp đồng với mỗi chủ thể nhưng "một khi quan hệ được thiết lập, pháp luật sẽ can thiệp và buộc các bên phải có một số quyền và nghĩa vụ", những quyền và nghĩa vụ này "lệ thuộc vào phạm vi pháp luật quốc gia quy định và định nghĩa quyền, nghĩa vụ, chứ không phải dựa trên sự thỏa thuận của họ"[3]. Trong hơn một thế kỷ qua, luật hôn nhân ở nhiều nền tài phán đã dần dần cho phép chủ thể được quyền thỏa thuận về nghĩa vụ với nhau cũng như sống theo cách phù hợp với họ, thay vì là đơn thuần xác định chúng dựa trên nhân thân của họ là chồng & vợ.

Giống như Hoa Kỳ, Đài Loan cũng là một trong những nền tài phán cho phép điều này xảy ra. Như Chen Shao-Ju đã giải thích:

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[1] Tôi lấy cách diễn đạt này từ Hình thức Hôn lễ trong sách Cầu nguyện Chung của Giáo hội Anh quốc, khởi nguồn của lời thề trong hôn nhân phổ biến nhất ở các nước nói tiếng Anh, chẳng hạn như lời thề nguyện với vợ/chồng "dù gặp cảnh thuận hay nghịch, giàu hay nghèo, lành mạnh hay đau yếu…".

[2] Henry Maine, ANCIENT LAW 100 (1917).

[3] Maynard v. Hill, 125 U.S. 190, 211 (1888).

Việc thay chế định về địa vị bằng chế định hợp đồng, một trong những sản phẩm của việc hiến định hóa luật gia đình, là chủ điểm căn bản trong sự phát triển của luật gia đình Đài Loan. Vì luật gia đình được gọi là "luật nhân thân" ở Đài Loan, sự phát triển này cũng có thể được hiểu là sự hợp đồng hóa "luật nhân thân". Luật gia đình "cũ", với các quy định về thân phận, phản ánh và ghi nhận sự thống trị của giới nam. Luật gia đình "mới", được tung hô như thành tựu của dự án cải cách tư pháp theo hướng nữ quyền tự do bắt đầu từ thập niên 1990, chủ yếu bao gồm chế định hợp đồng, ưu tiên sự thỏa thuận giữa các bên, mặc dù sự tự do hợp đồng không mang tính tuyệt đối và phụ thuộc vào chế định pháp luật của từng nhân thân. Cụ thể hơn, việc loại bỏ địa vị pháp lý của giới tính trong hôn nhân đã là bước đệm và là tiền đề cho sự cởi mở đối với hôn nhân của các cặp đôi bất kể giới tính nào.[1]

Mặc dù hiện nay, tự do hợp đồng giữa các bên trong hôn nhân đã được hiểu rộng hơn, bản thân hôn nhân vẫn được hiểu với hơi hướng địa vị từ góc độ của bên thứ ba. Nói cách khác, quy định của pháp luật đối với cặp đôi (ví dụ như sự tiếp cận của họ với sự bảo vệ của pháp luật và sự áp đặt của pháp luật lên họ thông qua hạn chế quy định trong luật)[2] vẫn thường được xác định bằng cách xem xét họ có kết hôn với chủ thể còn lại hay không. Theo cách này địa vị pháp lý của hôn nhân cũng tương tự với địa vị pháp lý của một doanh nghiệp - đăng ký với nhà nước cho phép việc dễ dàng nhận diện không chỉ với các quốc gia mà còn với các bên tư nhân, tạo điều kiện thuận lợi cho quan hệ pháp lý giữa các bên, đặc biệt là trong những hoàn cảnh mà việc ký kết hợp đồng giữa các bên với tư cách cá nhân là bất khả. Ý này tôi cũng sẽ tiếp tục đề cập tới ở những phần sau.

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[1] Do đó, việc yêu cầu thành viên của một cặp đồng tính đăng ký giấy đăng ký kết hôn "Bạn nào là vợ?" không còn là vấn đề pháp lý nữa, như đã xảy ra vào năm 1971, khi Jack Baker và Michael McConnell lần đầu tiên nộp đơn xin và đã thất bại khi kháng nghị lên Tối cao Pháp viện Hoa Kỳ. Xem thêm *Marriage Licenses, 2004 Lockhart Lecture*, 89 MINN. L. REV. 1758, 1685-1686 (2005). Với tất cả những định kiến về giới tính có hiệu lực pháp lý khác về các bên trong hôn nhân đã bị coi là một vấn đề hiến định ở các quốc gia như Hoa Kỳ và Đài Loan, thì quan điểm cho rằng phải có một trong hai giới tính để kết hôn một cách hợp lý đã chấm dứt. Xem thêm Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1488 (2000). Như Thẩm phán Vaughan Walker đã lập luận, trong nỗ lực loại bỏ hôn nhân đồng giới ở California với Kiến nghị số 8 vi hiến, rằng việc loại bỏ hôn nhân đồng giới "tồn tại như một tạo tác của thời gian khi giới được xem là có thân phận khác biệt trong xã hội và hôn nhân. Thời kỳ đó đã qua… Giới không còn đóng vai trò là nền tảng của hôn nhân, hôn nhân theo pháp luật là một dạng hợp thành bình đẳng". Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 992-993 (N.D. Cal. 2010).

[2] Với sự tập trung chủ yếu vào sự bảo vệ của pháp luật đối với hôn nhân, như sẽ được thảo luận dưới đây, sẽ đúng đắn hơn khi đề cập đến sự đối xử hòa hợp như một vấn đề của luật hôn nhân và những cá nhân đã kết hôn. Mặc dù sự đối xử này là một lợi ích hay thay vào đó là một gánh nặng, sự hạn chế hoặc chế tài đối với thành viên của một cặp đôi kết hôn tùy thuộc vào hoàn cảnh cụ thể của họ.

Mặc dù nội hàm phía trên của "status" liên quan nhất đến thảo luận của tôi, một nét nghĩa khác của "status" đó là vị thế của chính thể chế hôn nhân đặt trong bối cảnh xã hội, cũng rất quan trọng, mặc dù nó có thể không thể được nhìn thấy rõ ràng. Trong xã hội ngày nay, hoặc bất cứ xã hội hay chế định nào khác, hôn nhân thuộc về hình thức thể chế nào? Ngày nay, hôn nhân có thể được xem là 1 thể chế bao gồm tất cả/ hoặc đơn thuần pháp lý, tôn giáo và xã hội - và chính cách hiểu của mỗi chủ thể sẽ ảnh hưởng đến việc họ nhìn nhận và tương tác với hôn nhân. Và cuối cùng, hôn nhân có thể được nhìn nhận là một quyền tự nhiên, một quyền hiến định, một đặc quyền mang tính dân chủ hoặc lập pháp, hoặc là một khái niệm sâu sắc hơn nhiều so với một vấn đề đơn thuần là thỏa thuận riêng tư giữa một cặp đôi.

Ngoài làm việc với nhiều nét nghĩa của "status", tôi cũng sẽ xem xét một vài nghĩa của từ "recognition" trong bài viết này, đặt trong tương quan với địa vị pháp lý của hôn nhân. Như tôi sẽ thảo luận, (recognition) theo cách hiểu là "nhận ra", dẫn chiếu đến cả những gì mang tính thân thuộc cũng như những gì là quy phạm xã hội và pháp lý theo cách hiểu là "sự thừa nhận". Việc cho phép kết hôn cùng giới tạo điều kiện cho việc thừa nhận họ dưới mọi chiều cạnh của ngôn từ - làm cho mối quan hệ của họ trở nên dễ nhận biết hơn với các thành viên gia đình, xã hội cũng như với việc áp dụng pháp luật trong mọi trường hợp[1]. Ngoài ra, hôn nhân cùng giới cũng thường được nhìn nhận là một quyền hiến định và một quyền con người, cũng như là mục tiêu cho một số thành viên của cộng đồng LGBT bởi vì nó thừa nhận phẩm giá và giá trị của các cá nhân LGBT và các mối quan hệ của họ. Các nghĩa khác nhau của "status", do đó giao thoa với các nghĩa của "recognition". Mặc dù tôi sẽ tiếp tục đề cập và nhấn mạnh đến khía cạnh thực tiễn, tôi cũng sẽ công nhận và thảo luận đến một vài khía cạnh mang tính biểu tượng quan trọng đã đóng vai trò trong sự phát triển của việc thừa nhận mối quan hệ trong vài thập kỷ vừa qua.

Tôi đã viết bài viết này về địa vị pháp lý hôn nhân với ý định nó sẽ là bản đối chiếu của một bài viết tôi đã xuất bản năm 2005 có tựa đề "Marriage Licenses"[2]. Tiêu đề của bài viết đó cũng là một phép chơi chữ. Giấy đăng ký kết hôn trong hệ thống luật Anh - Mỹ là văn bản được một nhà nước cấp cho những người cử hành hôn lễ (một thẩm phán cấp thấp nhất, thành viên của tăng lữ hoặc cơ quan có thẩm quyền khác) để họ có quyền công nhận một cặp đôi là đã kết hôn theo pháp luật quốc gia. Tuy nhiên, khi sử dụng thuật ngữ này làm tiêu đề của một bài viết đăng trên tạp san luật học, tôi đã chủ yếu không sử dụng nó như một danh từ số nhiều đi cùng một tính từ, mà như một chủ ngữ và động từ, như một câu hoàn chỉnh. Tôi lập luận rằng trong luật Hoa Kỳ

[1] Sự rõ ràng này có thể bất lợi cho một số cặp đôi vì hành vi được kỳ vọng của chủ thể mang tính lịch sử và định kiến. Có thể pháp luật không quy định nữa nhưng xã hội có thể vẫn tiếp tục áp đặt lên họ.

[2] Mary Anne Case, *Marriage Licenses, 2004 Lockhart Lecture*, 89 MINN. L. REV. 1758 (2005).

ở thời điểm những năm 1999 - 2000, chế định hôn nhân được "cấp phép" theo nghĩa nó cấp phép cho các cặp đôi được tự do hơn nhiều trong việc tự cấu trúc cuộc đời họ, so với tất cả các hình thức khác như việc thành đôi có và không có đăng ký[1]. Tôi, tư cách là một nhà nữ quyền, cho rằng điều đó đáng hướng tới, rằng đó là một sự vượt qua những cách áp dụng cứng nhắc của vai trò giới, bất kể các vai trò này có tính thứ bậc hay không và bất kể việc bất cứ giới tính nào cũng có thể vào vai trụ cột gia đình hay nội trợ vào thời điểm đó[2].

Phần trọng tâm của bài viết đó là việc tôi dự đoán rằng luật hôn nhân sẽ dần dần đi theo một quỹ đạo của luật doanh nghiệp, điều mà tôi sẽ thảo luận thêm ở dưới. Nhà nước Anh (England), vào giữa thế kỷ 19, đã độc quyền kiểm soát với địa vị pháp lý của hôn nhân cũng như của doanh nghiệp[3]. Tuy nhiên, sự kiểm soát của nhà nước đối với các doanh nghiệp nhanh chóng đượcnới lỏng. Đến cuối thế kỷ 19, ở cả Anh quốc và Hoa Kỳ, các doanh nghiệp chung đã thay thế doanh nghiệp đặc biệt - địa vị pháp lý doanh nghiệp không chỉ còn giới hạn theo sự ưu ái của nhà nước đối với một số mục đích xứng đáng. Mặc dù vậy, điều đó vẫn khả dụng cho hầu hết mọi người với đa số mục đích, không cần phải cụ thể hóa, miễn là mục đích đó hợp pháp[4].

Nhà nước ngày càng cho phép doanh nghiệp tự do hơn trong việc lựa chọn loại hình doanh nghiệp. Ngoài ra, việc giải thể một loại hình cụ thể và tái cấu trúc để sử dụng hiệu quả hơn tài sản, ngày càng trở nên khả thi, vì luật phá sản đã không còn nhấn mạnh vào nỗi xấu hổ của việc kinh doanh thất bại, mà thay vào đó là tập trung vào tạo điều kiện cho một khởi đầu mới.

Như tôi sẽ thảo luận thêm dưới đây, tôi dự đoán và hy vọng rằng các lựa chọn linh hoạt và rộng mở tương tự sẽ sớm khả dụng cho cá nhân trong việc định hình cuộc sống gia đình. Tôi đã sử dụng các nguyên tắc phân tích các quan hệ kinh doanh của trường phái luật và kinh tế của đồng nghiệp trong việc xem xét các chế định điều chỉnh quan

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1 Tôi đã giải thích rằng, ngược lại với tự do, sự riêng tư và tính linh hoạt được quy định trong các đạo luật hôn nhân ở Mỹ: Những yêu cầu về việc chung sống như vợ chồng khá điển hình của hầu hết các cơ quan đăng ký. Sự thừa nhận mang tính quy kết hoặc chức năng cũng có thể tạo ra một số yêu cầu bổ sung, ví dụ như một cặp đôi phải là một vợ một chồng hoặc được gia đình và hàng xóm công nhận là cặp đôi. *Tlđd* tr. 1774.

2 Ví dụ, xem Orr v. Orr, 440 U.S. 268, 282 (1978) (cho rằng, khi "gia đình thách thức những định kiến và người chồng phụ thuộc vào người vợ" thì người vợ có thể được yêu cầu trả tiền cấp dưỡng cho chồng khi ly hôn).

3 Đối với hôn nhân, Đạo luật 1753 để phòng ngừa tốt hơn hôn nhân giấu giếm, thường được gọi là Đạo luật Hardwicke, thông qua đó nhà nước tạo ra sự kiểm soát với hệ thống nhà thờ. Để thảo luận thêm, xem *Marriage Licenses* tr. 1767. Đối với doanh nghiệp, Đạo luật Bubble 1720, cấm tất cả các công ty cổ phần không được ủy quyền bởi hiến chương hoàng gia.

4 Xem *Marriage Licenses* tr. 1777.

hệ gia đình. Tôi tập trung vào giá trị của sự hiệu quả. Tôi hy vọng rằng việc lấy tính hiệu quả làm trọng tâm cho cách tiếp cận pháp lý với hôn nhân sẽ hữu ích và cụ thể hơn cho việc cải cách pháp luật so với việc chỉ đánh giá về phẩm giá hoặc đạo đức con người.

Đánh giá luật hôn nhân trên chiều cạnh của sự hiệu quả có ý nghĩa gì? Tôi sẽ minh họa bằng việc trích dẫn hai quan điểm liên quan đến vai trò của pháp luật trong hôn nhân, mỗi ví dụ phác họa ra bối cảnh của những tranh luận về thừa nhận pháp lý hôn nhân cùng giới. Ví dụ thứ nhất đến từ Tòa án tối cao bang Vermont, thẩm phán Denise Johnson đã tán thành một phần trong phán quyết năm 1999 của tòa rằng việc luật của bang Vermont "loại trừ lợi ích và sự bảo vệ đối với cặp đôi cùng giới khi hôn nhân khác giới được hưởng" là vi hiến[1]. Cùng lúc đó, các thẩm phán đa số một mặt cho rằng "niềm tin tôn giáo, đạo đức và chính trị sâu đậm"[2] có liên quan mật thiết đến việc cởi mở đối với hôn nhân cùng giới. Nhưng, mặt khác họ không chỉ đồng thuận để chính quyền bang có một khoảng thời gian phát triển biện pháp khắc phục mà còn cho phép cơ quan lập pháp thông qua, thay vì là hôn nhân, thì thay vào đó là một địa vị pháp lý mới gọi là chung sống dân sự, và chỉ giới hạn áp dụng với các cặp đôi cùng giới[3]. Ngược lại, Johnson cho rằng biện pháp đúng đắn là cần phải cho hôn nhân ở bang Vermont ngay lập tức cởi mở cho các cặp đôi cùng giới. Quan điểm cụ thể của thẩm phán như sau:

Vụ án này liên quan đến việc đăng ký kết hôn theo nghĩa thế tục. Lợi ích của nhà nước trong việc đăng ký kết hôn mang tính điều chỉnh… Mục đích điều chỉnh của chính sách cấp phép là tạo ra hồ sơ công khai để phân phối lợi ích, áp đặt nghĩa vụ và phân chia tài sản thừa kế. Do đó, đăng ký kết hôn chỉ đơn thuần là khởi sự của các lợi ích xuất phát từ nhà nước. Thông qua việc việc đăng ký kết hôn, nhà nước không tán thành quy chuẩn đạo đức, lối sống hay mối quan hệ mà chỉ đơn thuần xác định những cá nhân đó được quyền hưởng lợi ích của quan hệ hôn nhân[4].

Christiane Taubira, Bộ trưởng Bộ Tư pháp của Cộng hòa Pháp, người chịu trách nhiệm chèo lái luật cho phép hôn nhân cùng giới đi qua quy trình lập pháp của Pháp

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1 Baker v. Vermont, 744 A.2d 864, 867 (Ct. 1999).

2 Baker v. Vermont, 744 A.2d 864, 867 (Ct. 1999).

3 Tuy nhiên, chung sống dân sự cho các cặp đồng giới chỉ là một giải pháp tạm thời, và cuối cùng là giải pháp không thỏa đáng cho bang Vermont. Một khi các bang khác, bắt đầu với bang Massachusetts, láng giềng của bang Vermont vào năm 2004, cho phép các cặp vợ chồng thuộc bất kỳ giới tính nào kết hôn, thì cơ quan lập pháp bang Vermont đã làm theo vào năm 2009, mở cửa hôn nhân cho các cặp đôi đồng giới và ngừng khả năng gia nhập chung sống dân sự. Xem *Marriage and Civil Union Certificates*, VERMONT DEP'T OF HEALTH, tại https://www.healthvermont.gov/health-statistics-vital-records/vital-recordspopulation-data/marriage-and-civil-unions

4 Baker v. Vermont, 744 A.2d 864, 898-99 (Vt. 1999) (Johnson, J., đồng tình và bất đồng một phần).

cũng bày tỏ quan điểm tương tự. Bà cho rằng "hôn nhân dành cho tất cả" (mariage pour tous), "Cơ quan công quyền không có quyền nhận định thứ gì là tốt hoặc tốt nhất mà việc của họ là tổ chức"[1].

Tôi thấy câu nói này đã miêu tả đúng thực tếvà đồng thời cũng thấy nó nên được áp dụng như một quy phạm khi xem xét hôn nhân dưới góc độ pháp lý của nhà nước. Như đã đề cập phía trên, hôn nhân mang nhiều ý nghĩa với mỗi người. Đó là một thiết chế xã hội; nó là một thiết chế tôn giáo nó là một thiết chế văn hóa. Nhưng trong bài viết này nếu chỉ tập trung xem xét hôn nhân là một thiết chế pháp lý, tôi cho rằng hôn nhân nên là việc phân phối quyền và nghĩa vụ theo trật tự. Hầu hết các xã hội hiện đại, pháp quyền đều đã tạo ra nhiều quyền và nghĩa vụ đối với địa vị pháp lý của hôn nhân[2]. Chúng ta có thể tưởng tượng một thế giới mà mọi thứ không bị cấu trúc xung quanh hôn nhân, nơi mà hôn nhân không quan trọng đến mức độ như hiện nay với thứ được Christiane Taubira gọi là việc tổ chức. Nhưng thế giới chúng ta đang sống không phải thế giới như vậy. Chúng ta đang sống trong một thế giới mà hôn nhân được coi trọng ở cả trong nước và quốc tế, và sự phát triển tức thì của luật hôn nhân cũng phải xem xét bối cảnh đó.

I. SỬ DỤNG CÔNG CỤ CỦA TRƯỜNG PHÁI LUẬT VÀ KINH TẾ ĐỂ PHÂN TÍCH CHẾ ĐỊNH HÔN NHÂN

Bằng cách tập trung vào sự hiệu quả của chế định hôn nhân, tôi tất nhiên đang đi theo soi chiếu truyền thống của các học giả trường phái luật và kinh tế. Đôi khi tôi vẫn đùa giỡn rằng tôi có nghĩa vụ hợp đồng cần phải tiếp bước các đồng nghiệp ở trường Luật, Đại học Chicago - ngôi nhà của nhiều người tiên phong xuất sắc của trường phái luật và kinh tế[3]. Tuy nhiên, phân tích của tôi luận giải tại sao chế định hôn nhân là một thiết chế hiệu quả không hề giống với đồng nghiệp đạt giải Nobel của tôi, Gary Becker[4]. Hầu như tập trung vào việc ra quyết định trong một gia đình, công trình của

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1 *Mariage pour tous: les déclarations de Christiane Taubira à l'Assemblée nationale*, MINISTERE DE LA JUSTICE (Apr. 23, 2013), tại http://www.justice.gouv.fr/le-garde-des-sceaux-10016/archives-2013-c-taubira12869/mariage-pour-tous-les-declarations-de-christiane-taubira-30071.html.

2 Ví dụ, hãy xem xét cuộc thảo luận dưới đây và trong bài viết của Marco Wan cho hội nghị chuyên đề về tranh tụng để công nhận hôn nhân đồng giới ở Hồng Kông. Mặc dù cho đến nay các tòa án của Hồng Kông đã bác bỏ yêu cầu chung về quyền tiếp cận hôn nhân đồng giới, một số vụ kiện gần đây đã tuyên thành công các cặp đồng giới kết hôn ở nước ngoài mà được hưởng lợi từ luật Hồng Kông liên quan đến tình trạng hôn nhân.

3 Thực ra, tôi đã bắt đầu nghĩ về hôn nhân thông qua các thuật ngữ này rất lâu trước khi đến Chicago. Đại học Virginia, nơi tôi giảng dạy từ thập niên 1990, cũng đã gắn kết với trường phái luật & kinh tế. Công trình của tôi về sự tương đồng giữa chế định hôn nhân và doanh nghiệp theo thời gian là một dự án hợp tác về lịch sử pháp lý với đồng nghiệp mà tôi rất biết ơn, Paul Mahoney ở trường Luật, Đại học Virginia - một học giả về luật doanh nghiệp với cách tiếp cận của chủ nghĩa tự do với các chế định.

4 Xem *This Year's Laureate Has Extended the Sphere of Economic Analysis to New Areas of Human*

Becker,[1]xuất phát từ một thế giới phân biệt vai trò giới và mô hình ra quyết định trong gia đình của Becker là một trò chơi tối hậu, nơi mà "chồng - cha - độc tài - gia trưởng" có thể đề nghị theo kiểu "lấy hoặc không" với các thành viên khác trong gia đình.

Nguồn cảm hứng của tôi không đến từ Becker, mà từ một đồng nghiệp đạt giải Nobel khác của tôi là Ronald Coase, người được Ủy ban Nobel ca ngợi vì "cụ thể hóa các nguyên tắc để giải thích cấu trúc thể chế của nền kinh tế" thông qua việc chú ý đến "chi phí giao kết và thực hiện các hợp đồng và quản lý các tổ chức… thường được gọi là chi phí giao dịch"[2]. Tôi đã lập luận từ lâu rằng lý thuyết doanh nghiệp của Coase[3] có thể áp dụng thành công cho gia đình[4]. Lý thuyết doanh nghiệp của Coase cho rằng, cá nhân trong doanh nghiệp lựa chọn cách tổ chức doanh nghiệp phụ thuộc vào hoàn cảnh pháp lý, xã hội và việc so sánh chi phí giao dịch của các hình thức khả dụng khác nhau của tổ chức. Họ có thể sáp nhập hoặc đơn giản là giao kết một loạt các hợp đồng một - lần; họ có thể hình thành một quyền sở hữu duy nhất, một công ty hợp danh, một công ty trách nhiệm hữu hạn hoặc một hoạt động nhượng quyền thương mại. Như Coase đã nhận xét rằng, một cá nhân nhìn chung là tự do để cấu trúc các công việc kinh doanh sao cho phù hợp nhất, tương tự như vậy, cả pháp luật và xã hội hiện nay cũng có nhiều cách khác nhau để cấu trúc cuộc sống cá nhân của một người. Quy định về giới tính và chăm sóc (ví dụ như chăm sóc người già và trẻ em) và việc sinh con có thể được thực hiện bên ngoài hoặc nội hóa trong một cấu trúc gia đình được pháp luật công nhận[5]. Điều này đã đúng từ thời xa xưa, như mô tả của kinh thánh Do Thái về vai trò của việc mang thai hộ trong thời kì mười hai bộ tộc của Israel[6] và sự phát

Behavior and Relations, THE ROYAL SWEDISH ACADEMY OF SCIENCES (Oct. 13, 1992), tại https://www.nobelprize.org/prizes/economic-sciences/1992/press-release/

1 Tôi sử dụng phân tích của Becker từ Robert A. Pollak, *Tied Transfers and Paternalistic Preferences*, 78 AM. ECON. REV. 240, 242-243 (1988) và tôi phát triển một cách tiếp cận khác với Becker trong Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J OF L. & PUB. POLICY 225 (2011) mà Pollock đã bình luận trong 35 WASH. U. J OF L. & PUB. POLICY 261 (2011).

2 Xem *Press Release*, THE ROYAL SWEDISH ACADEMY OF SCIENCES (Oct. 15, 1991), *tại* https://www.nobelprize.org/prizes/economic-sciences/1991/press-release/.

3 Ví dụ xem Ronald Coase, THE FIRM, THE MARKET, AND THE LAW (1988).

4 Ví dụ xem Mary Anne Case, et al., *Pregnant Man: Amazon or Etana?*, 22 YALE J. OF L. & FEM. 207, 220 (2010); The University of Chicago, *Ronald Coase's Theory of the Firm and the Family*, YOUTUBE (Jun. 7, 2012) https://www.youtube.com/watch?v=Xho-x3ITgfM.

5 Thực ra ở Hoa Kỳ, một loạt các lựa chọn theo lý thuyết của Coase xuất hiện trong việc pháp luật thừa nhận mối quan hệ của người lớn đã khả dụng đối với quyền làm cha mẹ do có nhiều khả năng pháp lý để cấu trúc tư cách làm cha mẹ, nhận nuôi, công nghệ sinh sản mới và việc chăm sóc trẻ em thông qua hoặc không thông qua hôn nhân. Xem *tlđd*.

6 Xem Mary Anne Case, et al., *Pregnant Man: Amazon or Etana?*, 22 YALE J. OF L. & FEM. 207, 222 (2010).

triển của các chế định đối với thê thiếp và con cái của họ ở Trung Quốc thời đế quốc[1]. Đối với các gia đình, cũng như với các doanh nghiệp, chi phí và lợi ích của các cấu trúc pháp lý sẵn có sẽ ảnh hưởng đến các lựa chọn của cá nhân và xã hội. Vai trò của hệ thống pháp luật là đưa ra các mô hình vận hành tốt. "Tạo ra một lý thuyết chung cho hành vi của gia đình" bằng cách áp dụng vào nó "nguyên tắc lý trí, tối ưu hóa hành vi".

Khi tôi bắt đầu xem xét ý nghĩa của việc áp dụng lý thuyết của Coase về doanh nghiệp cho gia đình, một số nhà lý thuyết nữ quyền lúc đó đang tranh cãi về việc bãi bỏ hoàn toàn tất cả các lựa chọn giống như doanh nghiệp cho cặp đôi. Ví dụ, Martha Fineman đã lập luận rằng:

Chúng ta nên xóa bỏ hôn nhân như một phạm trù pháp lý, cũng như bất kỳ đặc quyền nào dựa trên mối quan hệ về tình dục… Sẽ không có quy tắc pháp lý đặc biệt nào điều chỉnh mối quan hệ giữa vợ và chồng hoặc xác định hệ quả có được từ tình trạng hôn nhân như luật gia đình hiện nay… Thay vào đó, tương tác giữa các đối tác giới tính phụ nữ và nam giới sẽ được điều chỉnh bởi các quy tắc tương tự mà đã đang điều chỉnh các tương tác khác trong xã hội của chúng ta, cụ thể là các quan hệ về hợp đồng và tài sản, bồi thường thiệt hại và luật hình sự.

Những người khác như Nancy Polikoff và Paula Ettelbrick, chán ghét lịch sử áp bức, phân biệt giới tính của hôn nhân cũng như xu hướng chồng chất các lợi ích hữu hình và vô hình lên các cặp đôi đã kết hôn mà loại trừ các mối quan hệ và cá nhân khác của các nhà nước và xã hội hiện đại. Họ cho rằng không phải việc đấu tranh cho việc thừa nhận hôn nhân cùng giới, mà đấu tranh cho một bước tiến rộng hơn, thừa nhận pháp lý đối với một loạt các hình thức chức năng gia đình như quan hệ chung sống trên thực tế mới nên là mục tiêu của các nhà hoạt động LGBTQ như họ[2].

Tôi có cùng quan điểm đen tối về lịch sử hôn nhân và phê phán các đặc quyền của nó như những nhà nữ quyền này. Tuy nhiên, tôi không lạc quan như họ rằng việc thừa nhận mối quan hệ, trên thực tế, sẽ có những lợi thế mang tính giải phóng mà họ đã dự đoán. Tôi quan sát thấy rằng, tòa án và cơ quan lập pháp ở Hoa Kỳ đã có xu hướng áp đặt lên các cặp đôi đang tìm kiếm sự thừa nhận, trên thực tế, một khuôn mẫu rất bảo thủ về ý nghĩa của việc trở thành một cặp đôi, chẳng hạn như yêu cầu họ phải ở cùng nhà, có tài chính chung, công khai như một cặp đôi và chung thủy về tình dục. Nói cách khác, tòa án và cơ quan lập pháp có xu hướng đưa ra các đòi hỏi truyền

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1 Ví dụ xem Lisa Tran, *The Concubine in Republican China: Social Perception and Legal Construction*, 28 ÉTUDES CHINOISES 119, 127 (2009).

2 Cả hai lý thuyết gia này đều nhấn mạnh vào các chủ đề này trong một số công trình trong nhiều năm. Ví dụ xem Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *in* William B. Rubenstein, LESBIANS, GAY MEN AND THE LAW 721, 724 (2d ed. 1997); Nancy D. Polikoff, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008).

thống mà pháp luật quy định về hôn nhân[1]. Ngược lại, cải cách luật hôn nhân ở Hoa Kỳ trong thế kỷ 20 có nghĩa là:

Những cặp đôi đã kết hôn trong xã hội không phải thực hiện những thứ bảo thủ như trên. Giấy đăng ký kết hôn giờ đây cho phép những cặp đôi khác giới được có một cuộc hôn nhân mở, được sống ở các thành phố khác nhau hay căn hộ khác nhau ở cùng một thành phố, được thỏa thuận tài chính như họ mong muốn mà không bị chất vất về các cam kết hoặc lợi ích pháp lý… Trong xã hội hiện nay, hôn nhân có thể được giải phóng hơn là bị áp bức từ định kiến giới[2].

Tôi cần phải nhấn mạnh rằng tôi đưa ra luận điểm này chỉ dựa trên pháp luật, không phải dựa trên các quy phạm xã hội vẫn đang kiềm tỏa các cặp đôi kết hôn. Tôi nhìn nhận công trình của hai đồng nghiệp khác theo trường phái luật và kinh tế ở Đại học Chicago, để tìm cách hiểu thêm về sự phát triển của luật hôn nhân thông qua các thuật ngữ của Coase. Trong một loạt các bài viết đã được họ tổng hợp trong cuốn sách *Cấu trúc kinh tế của luật doanh nghiệp* mà họ đề tặng "bố mẹ và Ronald Coase", Easterbrook và Fischel cho rằng mặc dù ngôn từ mang tính quy định đang thịnh hành, "điều khoản doanh nghiệp ở mỗi bang là một đạo luật "cho phép" người quản lý và nhà đầu tư ứng xử"[3]. Mặc dù có rất nhiều sự khác nhau trong luật, và cả trên thực tế giữa hôn nhân và doanh nghiệp, tôi thấy hiệu quả khi sử dụng cùng khuôn mẫu về doanh nghiệp mà Easterbrook và Fischel đã đưa ra, để nhìn nhận luật hôn nhân. Mặc dù Easterbrook và Fischel nhấn mạnh vào vai trò của sự chuyên môn hóa trong doanh nghiệp[4], như Gary Becker chú trọng vào sự chuyên môn hóa trong hôn nhân[5], chuyên môn hóa không phải là một cấu thành trong phân tích của tôi ở đây. Thay vào đó, tôi muốn nhấn mạnh vào cách các đạo luật điều chỉnh cả địa vị pháp lý của hôn nhân và của doanh nghiệp ngày nay cho phép những người nắm giữ địa vị này "ứng xử, thiết lập hệ thống quản trị mà không cần có sự xem xét kỹ lưỡng

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1 Một ví dụ về việc tòa án áp đặt khuôn mẫu truyền thống là Braschi v. Stahl Assocs., 543 N.E.2d 49, 54 (1989) (cấp quyền kế thừa quyền kiểm soát tiền thuê nhà cho một cặp đồng tính nam còn sống mà tòa án cho rằng có "tất cả các đặc điểm gia đình bình thường"). Ví dụ về cơ quan lập pháp là California and N.J. Domestic.

2 Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643,1665-6 (1993). Luận điểm ở đây của tôi là phản hồi trực tiếp tới Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage."*, 79 VA. L. REV. 1535 (1993) được đăng trong cùng tập của hội nghị chuyên đề.

3 Frank H. Easterbrook & Daniel R. Fischel, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991), tr. 2.

4 Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1425 (1989).

5 Ví dụ xem Gary S. Becker, *Chapter 2 (Division of Labor in Households and Families)*, *in* A TREATISE ON THE FAMILY (1981), tr. 30 - tiếp theo.

về nội dung của nhà làm luật"[1]. Nếu Becker, và các lý thuyết gia trước đó về luật doanh nghiệp (bao gồm cả Coase), khi phân tích gia đình nhấn mạnh vào mệnh lệnh và kiểm soát mang tính thứ bậc trong các thiết chế mà họ phân tích[2] thì Easterbrook và Fischel lại nhìn sự vận hành nội bộ như "tập hợp giữa các hợp đồng"[3]. Họ thấy rằng thuật ngữ này chỉ là cách viết tắt cho những sắp xếp phức tạp với nhiều loại mà những người tự nguyện liên kết trong doanh nghiệp sẽ tự giải quyết với nhau. Hình thức tham chiếu là sự nhắc nhở rằng doanh nghiệp là một cuộc phiêu lưu tự nguyện và chúng ta phải luôn quan tâm các điều khoản mà người ta đã đồng ý giao kết. Các thỏa thuận phát sinh rất đa dạng, phù hợp với sự đa dạng của các hoạt động kinh tế được thực hiện trong các doanh nghiệp[4].

Những gì Easterbrook và Fischel nhận định về doanh nghiệp, sau khi cho phép những thứ thay đổi tương ứng, có vẻ cũng đúng với hôn nhân. Tôi rất phản đối quan điểm của Tolstoy trong phần mở đầu của tiểu thuyết Anna Karenina rằng "mọi gia đình sung sướng đều giống nhau, nhưng mỗi gia đình bất hạnh lại khổ sở theo cách riêng"[5]. Dù định nghĩa gia đình không hạnh phúc là như thế nào, theo quan điểm của tôi, các gia đình hạnh phúc, cụ thể là các hôn nhân hạnh phúc đều "vô cùng đa dạng, phù hợp với với sự đa dạng" trong mong muốn và ưu tiên của các cặp đôi, cũng như sự đa dạng trong sắp xếp cuộc sống của họ. Pháp luật Hoa Kỳ ngày nay tạo điều kiện thuận lợi cho sự đa dạng này một phần thông qua việc ngày càng sẵn sàng thực thi các thỏa thuận tiền và hậu hôn nhân mà các bên tham gia hôn nhân đạt được, nhưng quan trọng hơn nhiều là thông qua việc bãi bỏ hoàn toàn các quy tắc bắt buộc dựa trên địa vị, phân biệt giới tính, chẳng hạn như được áp đặt lên người chồng và người vợ thông qua việc chồng phải che chở vợ[6]. Hầu như mọi quy tắc điều chỉnh quan hệ vợ chồng ở Hoa Kỳ ngày nay đều là quy tắc mặc định, mà vợ hoặc chồng có thể tự do thay đổi sao cho phù hợp nhất với họ.

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1 Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1417, 1425 (1989).

2 Về tổng quan sự phát triển của lý thuyết doanh nghiệp từ lý thuyết mệnh lệnh thứ bậc như Coase đến một trong các liên kết hợp đồng, xem Thomas S. Ulen, *The Coasean Firm in Law and Economics,* 18 J. CORP. L. 301, tr. 318 - tiếp theo. (1993)

3 Xem Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989).

4 Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989).

5 Leo Tolstoy, ANNA KARENINA (Rosemary Edmonds trans., 1954).

6 Để liệt kê một số quy tắc bắt chồng phải che chở vợ trong hợp đồng hôn nhân (không thể thực thi pháp luật) được ký kết vào năm 1855 bởi hai người phản đối luật hôn nhân bất bình đẳng, xem Jane Johnson Lewis, *Marriage Protest of Lucy Stone and Henry Blackwell*, THOUGHTCO. (truy cập lần cuối ngày 16/1/2020), tại https://www.thoughtco.com/marriage-protest-lucy-stone-henry-blackwell-3529568.

Pháp luật Đài Loan có vẻ đang chuyển dịch theo hướng này[1]. Như ở Hoa Kỳ, nơi những gì Ruth Bader Ginsburg làm được với Dự án ACLU về quyền của phụ nữ thực sự rất quan trọng, thì ở Đài Loan, Tổ chức Đánh thức nữ quyền cũng đóng một vai trò quan trọng trong nỗ lực "bình đẳng hôn nhân bằng cách bãi bỏ các điều khoản với đặc quyền giới cho người chồng và người cha, định hình lại tài sản hôn nhân… và thúc đẩy chấm dứt" hôn nhân[2]. Các quyết định của Tư pháp viện cũng rời xa việc pháp luật áp đặt các thứ bậc dựa trên địa vị trong hôn nhân[3]. Gần đây nhất, vào tháng 5 năm 2020, Tư pháp viện đã đảo ngược một án lệ gần đây và tuyên bố rằng hình phạt hình sự đối với tội ngoại tình là một hành vi vi hiến về tính tương xứng[4]. Tòa cũng thấy rằng quyền tự do kết hôn, một quyền được bảo đảm trong hiến pháp mà không có sự can thiệp tùy tiện của nhà nước, cũng ngày càng được coi trọng, bao gồm cả quyền của các cá nhân tự quyết định "có nên kết hôn hay không", "kết hôn với ai", "có nên ly hôn khi hai bên đồng ý hay không" và có nên hình thành và quản lý mối quan hệ hôn nhân của họ với đối phương hay không (ví dụ: mối quan hệ mật thiết giữa một cặp đôi, quan hệ tài chính, lối sống…). Hôn nhân được thiết lập dựa trên tình cảm đôi bên và việc nó có thể được duy trì một cách hài hòa và viên mãn hay không phụ thuộc vào sự nỗ lực và cam kết của cặp đôi đó[5].

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1 Như các nhà lý thuyết nữ quyền đã đúng khi nhắc nhở chúng ta, sửa đổi luật thường không đủ để thay đổi hành vi của các cặp đôi, nếu điều này không đi kèm với sự thay đổi các chuẩn mực xã hội. Xem Chen Chao-ju, *Becoming "Outsiders Within": A Feminist Social-Legal Study of Surname Inequality as Sex, Race, and Marital Status.*

2 Chao-Ju Chen, *Migrating Marriage Equality Without Feminism:* Obergefell v. Hodges *and the Legalization of Same-Sex Marriage in Taiwan*, 52 CORNELL INT'L L. J. 65, 112 (2019) ("Xuất phát đau khổ của phụ nữ đã kết hôn và ly hôn và vấp phải sự phản đối mạnh mẽ của công chúng, phong trào của phụ nữ không tập trung vào việc gia nhập mà là việc chấm dứt hôn nhân, cũng như các quyền và nghĩa vụ trong hôn nhân".) Xem thêm Lee Li-ju, *The Constitutionalization of Taiwanese Family Law*, 11 N.T.U. L. REV. 273 (2016).

3 Xem J.Y. Interpretation No. 410 (bãi bỏ dựa trên các sửa đổi bổ sung năm 1985 của Bộ luật Dân sự do quy định của hiến pháp về bình đẳng giới, án lệ trước đó năm 1966 đã quy định rằng tài sản do người vợ có được trong thời kỳ hôn nhân mà không thể chứng minh là tài sản riêng biệt hoặc tài sản đóng góp thuộc về chồng).

4 J.Y. Interpretation No. 791 (Có hiệu lực áp dụng với tội ngoại tình và rút lại cáo buộc). Bộ Tư pháp trước đó đã ủng hộ việc hình sự hóa tội ngoại tình vào năm 2002 trong Diễn giải số 554. Ngoài những lý do cho sự đảo ngược được trích dẫn trong văn bản, tòa án nhấn mạnh rằng một số lượng không tương xứng những người thực sự bị kết án về tội ngoại tình là phụ nữ, dẫn đến việc xem xét bổ sung việc bãi bỏ hình sự hóa nghĩa vụ của nhà nước trong việc xóa bỏ phân biệt giới và thúc đẩy bình đẳng giới về mặt nội dung.

5 Lấy từ một phần của J.Y. Interpretation No. 791, dẫn theo Tiffany Hsiao, *The One Not Loved Is the Other Man/Woman? A Perspective on the Decriminalization of Adultery Based on Judicial Interpretation No. 791 (Taiwan)*, LEXOLOGY (Sept. 1, 2020), tại https://www.lexology.com/library/detail.aspx?g=8a55d926-e86b4f4a-bbc5-ad0032cde5fe.

Tòa án còn cho rằng ngoài việc can thiệp vào quyền riêng tư và quyền tự chủ cá nhân (bao gồm tự chủ tính dục) và phẩm giá con người, việc hình sự hóa tội ngoại tình thậm chí có thể gây hại cho mối quan hệ hôn nhân và do đó việc tạo ra "sự hạn chế quyền tự chủ của các bên trong quan hệ hôn nhân" là vi hiến[1].

II. ƯU ĐIỂM HIỆU QUẢ CỦA HÔN NHÂN NHƯ MỘT ĐỊA VỊ PHÁP LÝ

Giả sử luật nhìn từ bên trong hôn nhân giống như một hợp đồng quan hệ mà các điều khoản được các bên tự do thỏa thuận mà không bị nhà nước can thiệp nhiều (mặc dù đôi khi cũng có thể không có hiệu lực pháp luật)[2]. Tại sao không tiếp thu gợi ý của Martha Fineman về việc bãi bỏ hôn nhân như một địa vị pháp lý, và để các bên tuân theo các quy tắc thông thường của hợp đồng, cũng như bồi thường thiệt hại ngoài hợp đồng và luật hình sự? Lý do tốt nhất mà tôi có thể nghĩ ra để không làm như Fineman là sự kém hiệu quả.

Đầu tiên, những gì mà hôn nhân ngày nay mang lại cho các cặp đôi là một loạt các quy tắc mặc định, một gói thỏa thuận. Trong số các chức năng chính của hôn nhân dân sự là một loạt các chỉ định mặc định có đi có lại - tôi chỉ định bạn, người phối ngẫu của tôi và bạn chỉ định tôi, chí ít như mặc định, là câu trả lời cho nhiều câu hỏi, bao gồm cả những câu hỏi đi hết cuộc đời như "Ai sẽ đưa ra quyết định trong trường hợp mất năng lực quyết định?" và "Ai sẽ quyết định việc xử lý hài cốt?" và "Ai sẽ thừa kế phần lớn tài sản của tôi?" Ở hầu hết các quốc gia, những chỉ định này hiếm khi còn mang tính bắt buộc. Ví dụ, những người đã kết hôn muốn tài sản của họ được truyền cho con cái của cuộc hôn nhân đầu tiên hoặc tổ chức từ thiện yêu thích của họ sau khi chết chứ không phải cho đối phương còn sống, họ có thể sắp xếp việc này thông qua thỏa thuận tiền hoặc hậu hôn nhân thích hợp. Ngoài ra, khi đang chuẩn bị cho khả năng mất năng lực do bệnh tật, bạn muốn ủy quyền chăm sóc sức khỏe của mình cho chị gái của bạn là bác sĩ, giấy ủy quyền pháp lý của bạn cho anh trai bạn là luật sư và quyết định sẽ làm gì với hài cốt của bạn sau khi bạn qua đời cho một người bạn cũ, bạn có thể làm như vậy bằng cách thực hiện các thủ tục pháp lý thích hợp. Tuy nhiên, do nhiều người dường như muốn ủy quyền cho người phối ngẫu của họ hầu hết các quyền và trách nhiệm này, chế định pháp lý hôn nhân đưa ra một gói thỏa thuận hiệu quả để họ có thể đạt được mong muốn.

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[1] J.Y. Interpretation No. 791 (Có hiệu lực áp dụng với tội ngoại tình và rút lại cáo buộc). Tòa án lưu ý rằng cá nhân bị vi phạm sẽ có khả năng tìm kiếm các chế tài dân sự, ví dụ như thông qua một vụ kiện về hành vi vi phạm quyền của người đó. Xem *Awakening Foundation, Post Conference Press Release on Interpretation* 791 (May 29, 2020), *tại* https://www.awakening.org.tw/news/5454.

[2] Thảo luận về những hạn chế trong việc thực thi pháp luật ở Hoa Kỳ, xem Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J OF L. & PUB. POLICY 225 (2011).

Việc đưa ra một bộ quy tắc mặc định như vậy cho các cặp đôi sẽ giảm chi phí giao dịch của họ. Điều này giúp trả lời câu hỏi mà Martha Fineman chưa từng đề cập chi tiết khi bà cho rằng các quy tắc hợp đồng chi phối các bên của một cặp đôi: quy tắc mặc định sẽ như thế nào nếu thiếu vắng hợp đồng rõ ràng giữa các bên của một cặp đôi? Đây là một câu hỏi đặc biệt quan trọng khi ngày nay rất ít người thực hiện hợp đồng một cách rõ ràng hoặc có khả năng sẽ thực hiện. Quan trọng hơn, điều này làm giảm chi phí giao dịch của những người khác liên quan đến cặp đôi, chi phí giao dịch sẽ đạt đến mức vô hạn trong những tình huống phổ biến trong đời sống hiện đại, khi các bên của một cặp đôi nhận thấy mình tương tác trong hoàn cảnh nào đó và với bên thứ ba nào đó mà họ không thể khả đoán hoặc kiểm soát từ trước.

A. SỰ THỪA NHẬN HÔN NHÂN GIỮA ĐÔI BỜ SINH TỬ

Hãy xem xét một hoàn cảnh tôi tình cờ quan sát được, khi đang là một hành khách trên máy bay đến thành phố New York một thập kỷ trước. Máy bay đã phải hạ cánh khẩn cấp xuống Virginia để đưa một hành khách bị ốm nặng vào bệnh viện điều trị. Bản thân hành khách đó và bạn đồng hành của cô ấy đã phản đối quyết định này. Điều này khiến tôi quay sang phía người ngồi cạnh và hy vọng rằng hai người đó không phải là một cặp đồng tính nữ. Tôi nhớ rằng trên thực tế, vào năm 2004, bang Virginia đã thông qua luật tiểu bang "Đạo luật xác nhận hôn nhân", tuyên bố là vô hiệu và không thể thi hành, bất kỳ "chung sống dân sự, hợp đồng đối tác hoặc các thỏa thuận khác giữa những người cùng giới thụ hưởng các đặc quyền hoặc nghĩa vụ của hôn nhân"[1] cho dù thỏa thuận này được thực hiện ở đâu. Các bên khác nhau vào thời điểm đó bày tỏ lo ngại rằng luật có thể can thiệp "vào di chúc, chỉ thị y tế, quyền của luật sư, quyền nuôi con và phân phối tài sản, thậm chí có thể là tài khoản ngân hàng chung". Tuy nhiên, ban dự thảo luật đã bác bỏ phạm vi áp dụng rộng như vậy. Các cử tri của bang Virginia vào tháng 11 năm 2006 đã tiếp nối dự luật này với tu chính án hiến pháp cấm tiểu bang "tạo ra hoặc công nhận bất kỳ tình trạng pháp lý nào tiệm cận cấu trúc, tính chất, ý nghĩa hoặc hiệu lực của hôn nhân cho các mối quan hệ của những cá nhân chưa kết hôn "[2].

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[1] Bộ luật Virginia § 20-45.3. Chung sống dân sự giữa những người đồng giới. Bãi bỏ theo Acts 2020, cc. 75 and 195 , cl. 1, and c. 900, cl. 2.

[2] Giáo sư luật Kerry Abrams cũng bày tỏ những lo ngại tương tự khi cho rằng "ngôn ngữ trong tu chính án có phạm vi rộng và có thể ảnh hưởng đến khả năng một người chưa kết hôn để lại tài sản cho một người khác hoặc con cái, để chỉ định bạn đời là ủy quyền y tế, hoặc thậm chí đến thăm một người thân yêu trong bệnh viện". Emily Williams, *Proposed Virginia Amendment May Strike Down More than Same-Sex Marriage, Panelists Say* (Sept. 25, 2006), tại https://www.law.virginia.edu/news/200609/proposed-virginia-amendment-may-strike-downmore-same-sex-marriage-panelists-say.

Hành khách bị ốm được đưa ra khỏi máy bay không thể nào biết trước rằng cô ấy sẽ đến bang Virginia, chứ đừng nói đến bệnh viện mà cô ấy đang được đưa đến. Ngay cả khi cô ấy đã hoàn tất tất cả các bước cần thiết và sau đó là tất cả các thủ tục giấy tờ cần thiết ở tiểu bang mà cô đang sinh sống để chỉ định một người đi cùng cô ấy và đưa ra quyết định, bản thân nó là một quy trình rườm rà, vẫn không có gì đảm bảo rằng giấy tờ này được công nhận ở bang Virginia. Nếu người bạn đồng hành của cô ấy là một người đàn ông, anh ta có thể nói rằng anh ta là chồng của cô ấy và có khả năng được chấp nhận mà không bị hỏi hoặc yêu cầu bằng chứng. Dường như có rất ít cặp đôi kết hôn dị tính ở Hoa Kỳ mang theo và phải xuất trình giấy chứng nhận kết hôn. Một người phụ nữ khác có thể may mắn hơn khi tự nhận mình là em gái một cách giả dối hơn là nhận mình là người yêu.

Ngược lại, ngay cả khi một cặp đôi đồng tính vượt qua các khó khăn trong việc thực hiện các thủ tục giấy tờ cá nhân cần thiết về quyết định nhập viện và ra quyết định y tế như trên, họ cũng thường thấy bản thân không được tôn trọng. Ở Hoa Kỳ và các nước khác, những trường hợp thiếu tôn trọng như vậy được chia sẻ công khai đã tạo ra động năng cho cải cách pháp luật.

Tại Hoa Kỳ, ngày 15 tháng 4 năm 2010, chính quyền Obama đã ban hành "Biên bản ghi nhớ tôn trọng quyền của bệnh nhân trong bệnh viện khi tiếp đón và chỉ định người ủy quyền y tế trong các trường hợp khẩn cấp"[1] sau khi một sự việc như vậy được công khai rộng rãi. Một người đồng tính nữ, khi đang ở trên một con tàu du lịch với người bạn đời đã sống chung mười tám năm và những đứa con nuôi của họ, đã ngã quỵ vì chứng phình động mạch và được đưa đến một trung tâm chấn thương Miami, Florida, nơi mà chưa đầy 24 giờ sau đó bà đã qua đời[2]. Người bạn đời ban đầu được thông báo rằng bà ấy không có quyền được cung cấp thông tin về tình trạng của bệnh nhân nếu không có ủy quyền chăm sóc sức khỏe ngay cả khi bà ấy đã gửi một bản sao ủy quyền của mình đến bệnh viện[3]. Bà ấy khẳng định rằng, việc tiếp cận thông tin và người bạn đời đang hấp hối của mình khó khăn hơn chị gái của bệnh nhân khi bà ấy đến sau đó nhiều giờ[4]. Như Tổng thống Obama đã viết khi chỉ đạo Bộ Y tế và Dịch vụ Nhân sinh xây dựng các quy tắc mới về vấn đề này, việc bệnh viện thất bại như vậy "có nghĩa là một trải nghiệm căng thẳng và đôi khi đáng sợ như vậy với bệnh nhân lại

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1 Barack Obama, *Memorandum on Respecting the Rights of Hospital Patients To Receive Visitors and To Designate Surrogate Decision Makers for Medical Emergencies*, THE AMERICAN PRESIDENCY PROJECT (April 15, 2010), tại https://www.presidency.ucsb.edu/documents/memorandum-respecting-the-rights-hospital-patients-receivevisitors-and-designate.

2 Ví dụ xem Tara Parker-Pope, *Kept From a Dying Partner's Bedside,* NY TIMES (May 18, 2009), *tại* https://www.nytimes.com/2009/05/19/health/19well.html

3 Như trên.

4 Như trên.

vô nghĩa bị kết hợp thêm những sự phẫn nộ và bất công. Và điều đó có nghĩa là trong nhiều trường hợp, họ bị buộc phải chịu đựng đau đớn hoặc thậm chí phải ra đi một mình, bị tước đi sự xoa dịu của ban đời trong những giây phút cuối cùng của họ trong khi một người thân yêu bị bỏ lại trong lo lắng và chỉ có thể đi lại trong hành lang"[1].

Trong khi số lượng người được phép thăm bệnh nhân hấp hối có thể được điều chỉnh linh hoạt tùy thuộc vào tình trạng của bệnh nhân và năng lực của bệnh viện, điều tương tự không diễn ra với những người được ủy quyền y tế khi bệnh nhân không còn khả năng ra quyết định. Nhận biết chính xác một người cụ thể được ủy quyền sẽ mang lại ưu thế hiệu quả về mọi mặt. Vì vậy, ví dụ về việc đưa ra quyết định cuối đời cho thấy, sự tập trung mang tính mô tả và quy phạm vẫn còn hạn chế này (thậm chí một số người cho là vô đạo đức) vào hiệu quả như mục tiêu chính của sự bảo trợ nhà nước về hôn nhân có thể tạo ra sự kìm hãm mạnh mẽ cho sự trượt dốc tiến tới chế độ đa thê mà những người phản đối hôn nhân cùng giới thường cảnh báo[2]. Nếu chỉ một người được công nhận, bệnh viện biết phải liên hệ với ai; không đơn giản như vậy nếu một vài người, với tầm nhìn và động cơ cạnh tranh với nhau, xuất hiện và yêu cầu thực hiện tất cả các biện pháp anh hùng để hồi sinh bệnh nhân, người khác yêu cầu bệnh nhân không được hồi sức khi không còn hy vọng hồi phục hoàn toàn.

Nếu tôi nhìn nhận đúng đắn thì chức năng chính hiện nay của hôn nhân do nhà nước bảo trợ là cung cấp một quy tắc may sẵn để cấu trúc các mối quan hệ nhất định giữa cặp đôi và bên thứ ba (ít nhất đây là phần đoạn hôn nhân khó đạt được nhất bằng các phương tiện khác, chẳng hạn như hợp đồng tư nhân), thì việc công nhận sự kết hợp

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[1] Barack Obama, *Memorandum on Respecting the Rights of Hospital Patients To Receive Visitors and To Designate Surrogate Decision Makers for Medical Emergencies*, THE AMERICAN PRESIDENCY PROJECT (April 15, 2010), tại https://www.presidency.ucsb.edu/documents/memorandum-respecting-the-rights-hospital-patients-receivevisitors-and-designate.

[2] Trong vụ Obergefell v. Hodges, Chánh án Tối cao Pháp viện Hoa Kỳ, John Roberts đã đúng đắn khi nhận định ""Điều đáng ngạc nhiên là lập luận của đa số sẽ tạo ra sức mạnh ngang nhau để yêu cầu quyền căn bản trong chế độ đa thê" và tiếp tục đặt câu hỏi, "Nếu "có phẩm giá trong mối ràng buộc giữa hai người đàn ông hoặc hai người phụ nữ tìm cách kết hôn và trong quyền tự quyết của họ để đưa ra những lựa chọn sâu sắc như vậy," tại sao lại có phẩm giá nào trong mối ràng buộc giữa ba người, khi thực hiện quyền tự chủ của mình, tìm cách đưa ra lựa chọn sâu sắc để kết hôn?" Xem Obergefell v. Hodges, 135 S. Ct. 2584, 2621-2622 (2015). Như tôi đã thảo luận trước đây, nếu Thẩm phán Kennedy đặt ý kiến của mình trong vụ Obergefell xung quanh việc Hiến pháp Hoa Kỳ cấm phân biệt giới tính, thay vì xung quanh trình tự pháp luật công bằng về nội dung và quyền kết hôn, thì thẩm phán này có thể tránh được sự chất vấn từ Chánh án Roberts. Xem Mary Anne Case, *Missing Sex Talk in the Supreme Court's Same-Sex Marriage Cases*, 84 U.M.K.C. L. REV. 673, 688 (2016). Để biết sự kiến giải sâu hơn về luận điểm phân biệt giới được áp dụng trong việc cấm hôn nhân đồng giới, xem Mary Anne Case, *"The Very Stereotype the Law Condemns:" Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1486-1490 (2000).

đa thê không thể dễ dàng được biện minh theo pháp luật hiện hành bằng những luận điểm tốt nhất đang được sử dụng để ủng hộ hôn nhân cùng giới[1]. Điều này là do phần lớn những gì giấy đăng ký kết hôn hiện cung cấp không thể đạt được một cách chuẩn chỉnh nếu có nhiều hơn hai người tham gia, chẳng hạn như việc chỉ định, mà không cần giao kết hợp đồng, thủ tục giấy tờ hoặc các thủ tục khác của một người khác mà bên thứ ba có thể tìm đến trong nhiều hoàn cảnh pháp lý khác nhau. Thay vào đó, với nhiều hơn hai người, một người gần như cần thiết cho một hình thức gần hơn với hợp đồng hoặc ít nhất là lựa chọn trong số nhiều lựa chọn mà không có lựa chọn mặc định rõ ràng[2].

Những tình huống, như được đề cập trong bản ghi nhớ của Obama năm 2010, khi một trong 2 người của cặp đồng tính chết trong bệnh viện và người kia tìm cách được ở bên giường bệnh và được ủy quyền y tế, đã thể hiện được cả những lý do tràn đầy

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[1] Mặc dù tương lai của địa vị pháp lý cho chế độ đa thê là một chủ đề nằm ngoài phạm vi của bài báo này, tôi xin lưu ý ở đây rằng các lập luận chống lại việc tạo hoặc công nhận địa vị pháp lý cho các cuộc hôn nhân đa thê thường tập trung vào khả năng "gây hại cho phụ nữ, trẻ em, cho xã hội". Ví dụ, xem Tham chiếu: Mục 293 của Bộ luật Hình sự Canada, BCSC 1588 năm 2011, đoạn 129 (thừa nhận, sau khi đệ trình và lời khai của chuyên gia rộng rãi, việc cấm hình sự đối với chế độ đa thê được áp dụng cho những người đa thê có động cơ tôn giáo từ Nhà thờ Chính thống của Chúa Giê-su Ki-tô của FLDS vì "sự e ngại có lý do về nguy cơ bị tổn hại như vậy"). Hôn nhân một vợ một chồng dưới góc độ pháp lý đã phát triển vượt ra khỏi lịch sử bất bình đẳng về việc vợ bắt buộc phải phục tùng chồng. Tuy nhiên, không có hình thức đa thê nào được pháp luật công nhận mà tôi biết vẫn chưa thực hiện một bước chuyển đổi tương tự, ngay cả khi là một vấn đề chính thức. Mặc dù chắc chắn có thể hình dung các mối quan hệ gia đình nhiều đối tác thực tế không gây "tổn hại cho phụ nữ, cho trẻ em, cho xã hội", nhưng những mối quan hệ này, vì những phức tạp liên quan khi số người vượt quá hai người, vẫn dễ hình dung hơn trong lĩnh vực của hợp đồng hơn là tình trạng được pháp luật công nhận.

[2] Tất nhiên, như những người tham gia tố tụng như chị em Burden của Vương quốc Anh, cũng như các nhà lý thuyết và hoạch định chính sách từ nhiều khía cạnh khác nhau đã nhận xét, thật sai lầm khi cho rằng hai người phải có đi có lại mong muốn chỉ định nhau mà họ cần trong quan hệ tình dục hoặc lãng mạn. Hai chị em nhà Burden, những người đã sống cả đời với nhau trong một ngôi nhà chung, lập luận rằng họ nên được đối xử vì mục đích thừa kế theo cách của những người trong một chung sống dân sự hoặc một cuộc hôn nhân. Tuy nhiên, họ đã không kiện để được cấp quyền tham gia chung sống dân sự, và các tòa án của cả Vương quốc Anh và EU đều cho rằng, dù cuộc sống và tài chính của hai chị em có gắn bó với nhau đến đâu, nhưng họ "không ở trong một tình huống tương tự" cho các cặp vợ chồng đã kết hôn hoặc đoàn kết dân sự vì họ đã "không thực hiện cam kết tài chính bằng cách tham gia vào một mối quan hệ chính thức được pháp luật công nhận". Burden and Burden kiện Vương quốc Anh (đơn đăng ký số 13378/05) tại § 49. Không có mối quan hệ chính thức nào như vậy được đề nghị cho hai chị em, vì các chung sống dân sự của Vương quốc Anh có những hạn chế về tội loạn luân tương tự như hôn nhân. Nhưng các nền tài phán khác đã thử nghiệm với các chỉ định người thụ hưởng có đi có lại hoặc đăng ký đối tác mà không yêu cầu mối quan hệ phải là vợ chồng theo bất kỳ nghĩa nào cũng như không cấm hai người họ hàng thân thiết truy cập đăng ký và có nhiều điều được nói có lợi cho việc mở rộng các tùy chọn như vậy.

tình người ấm áp và những lập luận lạnh lùng đầy tính thực tế bảo vệ công nhận hôn nhân cùng giới. Có lẽ, vì lý do này, chúng đã trở thành luận điểm chính của phong trào bình đẳng hôn nhân ở Đài Loan và các nước Đông Á khác cũng như Hoa Kỳ và Hà Lan, quốc gia đầu tiên công nhận hôn nhân cùng giới. Chúng minh họa cho quan điểm của học giả so sánh Kees Waaldijk khi xem xét quá trình phát triển của sự công nhận hợp pháp đối với các cặp đồng tính ở các nền tài phán khác nhau, rằng "quyền vào thời điểm xấu", ví dụ như đối phó với cái chết và bệnh tật, thường đến trước "quyền vào thời điểm thuận lợi" và cũng tạo ra sự đồng thuận sẵn sàng hơn, dẫn đến "phần lớn các quốc gia hiện nay có quan điểm rằng sẽ bất công (và không có tình thương) nếu loại trừ cặp đôi cùng giới khỏi sự bảo vệ của pháp luật vào những thời điểm đáng buồn như vậy"[1].

Mặc dù những trường hợp này hiện nay liên quan đến nhiều loại bệnh tật và nguyên nhân tử vong khác nhau, nhưng điều quan trọng là chúng ta phải nhớ vai trò của đại dịch AIDS trong việc thu hút sự chú ý của công chúng và dần dần dẫn tới việc pháp luật chấp nhận cách các cặp đồng tính chăm sóc nhau cho đến khi cái chết chia cắt họ. Theo học giả người Hà Lan Gert Hekma, chính những câu hỏi được đặt ra bởi cuộc khủng hoảng AIDS ("Ai là người thừa kế khi bạn đời qua đời?… "Ai có thể đến thăm tôi trong bệnh viện?" "Ai thuộc về gia đình tôi?") đã dẫn đến không chỉ 1 xã hội Hà Lan mà còn chính 1 cộng đồng đồng tính Hà Lan ban đầu hoài nghi hoặc thậm chí thù địch với hôn nhân tiến tới này. Trong bối cảnh cuộc trưng cầu dân ý gần đây về hôn nhân cùng giới của Thụy Sĩ thành công rực rỡ[2], Hekma gần đây đã nói với một phóng viên người Thụy Sĩ rằng điều khiến hôn nhân cùng giới trở nên khả thi ở Hà

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[1] Ví dụ, xem Kees Waaldijk, *More and more together: Legal family formats for same-sex and different-sex couples in European countries - Comparative analysis of data in the Laws And Families Database*, FAMILIES AND SOCIETIES WORKING PAPER SERIES (2017) 1, 42 (cho rằng "hầu hết các quyền và trách nhiệm với sự đồng thuận cao nhất… là về các tình huống mà nơi đối phương bị ảnh hưởng bởi những "thời điểm tồi tệ" nghiêm trọng khác và rằng "hầu hết các quốc gia hãy nghĩ rằng sẽ là bất công (và không từ bi) nếu loại trừ những người đồng giới khỏi sự bảo vệ của pháp luật được thiết kế cho những thời điểm đáng buồn như vậy"). Xem thêm, tóm tắt phân tích của Waaldijk và kết luận rằng "việc tiếp cận quyền sinh sản tương đối chậm chạp dường như minh chứng cho xu hướng" "thời xấu trước thời tốt" tr. 42.

[2] Dự luật chấp thuận hôn nhân đồng giới được đặt tên theo ví dụ của Pháp, "Hôn nhân cho tất cả", được thông qua với 64,1% cử tri và đa số ở tất cả 26 bang của Thụy Sĩ ủng hộ. Ở một quốc gia mà một số công dân nữ chỉ được trao toàn quyền bầu cử tại địa phương vào năm 1991 nhưng đã có quan hệ dân sự đồng tính kể từ năm 2007, luật hôn nhân mới sẽ cho phép các cặp đồng tính nhận con nuôi và công nghệ hỗ trợ sinh sản cho những cặp đôi đồng giới nữ. Ví dụ, xem *Swiss Voters Approve Same-Sex Marriage In A Nationwide Referendum*, ASSOCIATED PRESS (Sept. 26, 2021), tại https://www.npr.org/2021/09/26/1040761090/switzerland-same-sex-marriagereferendum?sc=18&f=&fbclid=IwAR1J41VPC-r-P18f1h3XhFC4gi8PiY_6EncweNAtK3pBfyk1dEcD-MOyElo.

Lan là nhận thức rằng có thể có tất cả các quyền thông qua hôn nhân cùng một lúc[1]. Tương tự, mặc dù các nhà hoạt động Hà Lan khác, chẳng hạn như những người liên quan đến tạp chí Gay Krant, đã thúc đẩy một quan điểm lãng mạn hơn, nhưng chính những điều thực tế này, chứ không phải sự lãng mạn, mà Hekma nói đã khiến anh ta kết hôn với chồng của mình[2].

Tại Đài Loan, việc thúc đẩy hợp pháp hóa hôn nhân cùng giới cũng đã được ủng hộ bởi các nhà lập pháp, nhà hoạt động và công chúng sau vụ tự sát được công bố rộng rãi năm 2016 của 1 người Pháp tên Jacques Picoux, một năm sau cái chết vì ung thư của người bạn đời Đài Loan lâu năm của ông, Tseng Ching-chao[3].

Picoux, một nghệ sĩ và giảng viên tiếng Pháp tại Đại học Quốc gia Đài Loan, đã sống ở Đài Loan từ năm 1979 và chung sống với Tseng trong 35 năm. Tuy nhiên, khi Tseng hấp hối, Picoux không được ủy quyền y tế, mà thay vào đó là gia đình của Tseng. Họ đã yêu cầu thực hiện những biện pháp hồi sức cấp cứu, điều mà Picoux khẳng định Cheng sẽ không muốn. Sau cái chết của Tseng, việc gia đình cho rằng Picoux không có quyền gì trong căn hộ của ông và Tseng, đã càng làm nghiêm trọng hơn căn bệnh trầm cảm mà cuối cùng đã dẫn tới cái chết của ông[4]. Vào năm Picoux mất, Cao Hùng đã trở thành thành phố đầu tiên ở Đài Loan cho phép các cặp cùng giới được đăng ký. Một quan chức thành phố giải thích rằng, việc đăng ký sẽ giúp liên hệ với các bên dễ dàng hơn trong các trường hợp khẩn cấp và để các bệnh viện cho phép bạn đời ra quyết định y tế[5].

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1 Xem Gert Hekma, *Interview with Salome Mueller: "Schwule und Lesben waren anfaenglich gegen die Ehe fuer alle" ("Gays and Lesbians were initially opposed to marriage for all")*, REPUBLIK (Sept. 19, 2021), tại https://www.republik.ch/2021/09/14/die-schwulen-und-lesben-waren-anfaenglich-gegen-die-ehe-fuer-gleichgeschlechtliche-paare?fbclid=IwAR2ussMQ5ZqvoN6vo4UqufmR0-M6J4NDA_MsNb-XNDfj5o8-UmRfMJheNgc. Để thảo luận thêm về ưu thế khi có mọi quyền cùng lúc, xem *tlđd* về vụ kiện ở Hồng Kông.

2 *Tlđd*. Đặc biệt là do Đài Loan vẫn chưa cấp đầy đủ quyền nhận con nuôi cho các cặp kết hôn đồng giới, điều quan trọng cần nói thêm là Hekma cũng liệt kê sự bùng nổ trẻ em đồng tính nữ là một trong những lý do thực tế khiến hôn nhân phổ biến ở Hà Lan.

3 Ví dụ xem Joe Williams, *Death of gay professor may lead to same-sex marriage in Taiwan*, PINK NEWS (Oct. 28, 2016), tại https://www.pinknews.co.uk/2016/10/28/death-of-gay-professor-may-lead-to-same-sexmarriage-in-taiwan/.

4 Trong số nhiều bài viết nói về hoàn cảnh của Picoux, xem *French ex-lecturer falls to death*, TAIPEI TIMES (Oct. 18, 2016), tại https://www.taipeitimes.com/News/taiwan/archives/2016/10/18/2003657410. Tôi cũng biết ơn Yen-jong Lee, bạn của Picoux và luật sư của gia đình Picoux vì đã trả lời câu hỏi của tôi về tình huống của Picoux và Cheng.

5 Xem Chris Horton, *Taiwan May Be First in Asia to Legalize Same-Sex Marriage*, NY TIMES (Nov. 18, 2016), tại https://www.nytimes.com/2016/11/19/world/asia/taiwan-gay-marriage-legalize.html

Tại Nhật Bản, trước khi Tòa án quận Sapporo vào tháng 3 năm 2021 đưa ra phán quyết đầu tiên của 1 tòa án Nhật Bản cho rằng, việc Chính phủ Nhật Bản không cho phép những người cùng giới kết hôn là vi hiến về quyền bình đẳng theo Điều 14 của Hiến pháp Nhật Bản[1], một số vụ kiện tụng riêng biệt của những người trong các cặp đôi cùng giới lâu năm trong các tình huống tương tự như vụ của Picoux đã diễn ra. Một người Nhật cao tuổi đã kiện em gái của người bạn đời lâu năm quá cố của mình lên Tòa án quận Osaka vào năm 2018 để đòi bồi thường những thiệt hại phát sinh từ việc ông không được tham gia tổ chức tang lễ cho người đã khuất và tham gia các quyết định liên quan đến ngôi nhà chung và công việc kinh doanh chung của họ[2]. Cặp đôi đồng tính nữ Miyuki Fujii và Rie Fukuda đã đưa vụ kiện đòi bình đẳng hôn nhân lên tòa Tokyo sau khi Fukuda được chẩn đoán mắc bệnh ung thư. Sau khi họ được thông báo chỉ các thành viên trong gia đình mới được phép đến bệnh viện thăm khám, cả hai đã nói dối rằng họ là chị em họ nhưng mối quan ngại rằng nếu Fukuda chết, Fujii có thể bị đuổi khỏi căn hộ mà họ chung sống mặc dù cô đã đóng góp tiền thế chấp vẫn tiếp tục[3].

Tại Hồng Kông, trong số rất nhiều cặp đôi đã ra tòa để được công nhận ít nhất một phần hôn nhân cùng giới mà họ đã đăng ký ở các quốc gia khác, có Henry Li Yik-ho và Edgar Ng Hon-lam, hai cư dân Hồng Kông. Tháng 1 năm 2017, họ đã kết hôn ở Luân Đôn, sau đó là một buổi lễ ban phước tại một nhà thờ ở Hồng Kông "để công khai tuyên bố cam kết của họ với nhau theo một hình thức được xã hội coi trọng và công nhận"[4]. Cuộc hôn nhân của họ không được pháp luật công nhận ở Hồng Kông, vì vậy, giống như các cặp cùng giới Hồng Kông kết hôn hợp pháp ở nơi khác, họ đã kiện để một số mặt cụ thể trong hôn nhân của họ được công nhận. Vụ kiện đầu tiên của họ được quyết định nhằm mục đích "làm rõ liệu Chính phủ Hồng Kông có chấp nhận rằng các cuộc hôn nhân cùng giới được thực hiện theo luật của các nền tài phán nước ngoài sẽ được công nhận là hôn nhân khi xem xét các mục đích chứng thực di chúc, thừa kế hay không"[5]. Mối quan tâm đặc biệt là liệu căn hộ do chính phủ tài trợ mà Ng đã mua để làm tổ ấm của họ có thể được chuyển cho Li trong trường hợp Ng qua đời

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1 Rurika Imahashi, *Marriage equality in Japan: finally within reach?*, NIKKEI ASIA (April 28, 2021), tại https://asia.nikkei.com/Spotlight/The-Big-Story/Marriage-equality-in-Japan-finally-within-reach (describing the litigation).

2 *Japanese man seeks damages after death of same-sex partner, claiming he was barred from cremation ceremony*, SOUTH CHINA MORNING POST (April 26, 2018), tại https://www.scmp.com/news/asia/eastasia/article/2143508/japanese-man-seeks-damages-after-death-same-sex-partner-claiming.

3 Rurika Imahashi, *Marriage equality in Japan: finally within reach?*, NIKKEI ASIA (April 28, 2021), tại https://asia.nikkei.com/Spotlight/The-Big-Story/Marriage-equality-in-Japan-finally-within-reach.

4 Ng Hon Lam Edgar v. Secretary for Justice [2020] HKCFI 2412 tại § 4.

5 Như trên tại § 8.

hay không. Vào tháng 12 năm 2020, vài tháng sau khi Thẩm phán Anderson Chow ra phán quyết có lợi cho Ng, Ng, người đã mắc chứng trầm cảm từ lâu, đã tự kết liễu cuộc đời mình[1]. Vào tháng 4 năm 2021, Thẩm phán Chow một lần nữa ra phán quyết có lợi cho cặp đôi, cho rằng việc từ chối các quyền sở hữu và cư trú chung của cặp đôi cùng giới trong nhà ở do chính phủ tài trợ cũng là hành vi phân biệt đối xử[2]. Sau đó, Li đã đệ đơn vụ kiện thứ ba do, sau cái chết của Ng, theo các luật sư của anh, anh "đã bị nhiều sắc lệnh trong thành phố cấm giải quyết các vấn đề phát sinh từ cái chết của bạn đời, từ việc xác định danh tính người chết và tham gia điều tra nguyên nhân cái chết, đến việc thu thập thi thể để tổ chức tang lễ, chôn cất hoặc hỏa táng"[3].

Các nguyên đơn trong hai vụ kiện ở Tòa án Tối cao Hoa Kỳ bảo vệ quyền hiến định cho các cặp đôi cùng giới, Hoa Kỳ kiện Windsor[4] và Obergefell kiện Hodges, cũng ra tòa để giải quyết các câu hỏi phát sinh với cái chết của một người trong cặp đôi[5]. Trong trường hợp của Edie Windsor, vấn đề là thuế thừa kế đối với những ngôi

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1 Xem *Same-sex partners can own subsidised housing as court overturns Hong Kong's anti-LGBT housing policy*, AFP25 (June 25, 2021), tại https://hongkongfp.com/2021/06/25/same-sex-partners-can-ownsubsidised-housing-as-court-overturns-hong-kongs-anti-lgbt-housing-policy/.

2 Ng Hon Lam Edgar v. The Hong Kong Housing Authority [2021] HKCFI 1812; HCAL 2875/2019 (June 25, 2021).

3 Xem Brian Wong, Hong *Kong widower launches legal bid for recognition after being denied right to organise his husband's funeral*, SOUTH CHINA MORNING POST (March 8, 2021), tại https://www.scmp.com/news/hong-kong/law-and-crime/article/3124582/hong-kong-widower-launches-legal-bidrecognition-after. Mặc dù Li ban đầu được tòa án cho phép để thách thức sự khăng khăng của nhà nghiên cứu bệnh học của chính phủ rằng mẹ của Ng cần phải ủy quyền cho vai trò của Li trong việc xác định và xử lý thi thể của Ng, chính quyền Hồng Kông đã tìm cách thách thức sự cho phép này, cho rằng đơn giản là có sự hiểu lầm, rằng Hồng Kông "không có chính sách phân biệt đối xử với các cặp đồng tính như cáo buộc" và đưa ra một tuyên bố xin lỗi từ nhà nghiên cứu bệnh học pháp y cấp cao, người khẳng định anh chỉ muốn đảm bảo rằng mẹ của Ng không phản đối hành động của Li, chứ không phải anh có bất kỳ điều gì. "Ý định… bất cứ điều gì để hạ thấp, thiếu tôn trọng hoặc làm giảm phẩm giá của cuộc hôn nhân giữa người nộp đơn và ông Ng". Jasmine Siu, *Hong Kong man's legal fight over late husband's funeral faces fresh challenge*, SOUTH CHINA MORNING POST (June 9, 2021), tại https://www.scmp.com/news/hong-kong/law-and-crime/article/3136665/hong-kong-mans-legal-fight-over-latehusbands-funeral.

4 133 S. Ct. 2675 (2013).

5 Kể từ thời điểm tòa án Hoa Kỳ thắng kiện về việc công nhận cặp đôi đồng giới thông qua các vụ kiện ở Tối cao Pháp viện Hoa Kỳ, tôi thấy rằng "các tòa án… đã hướng tới việc đối xử thuận lợi nhất cho những người đồng tính nam và đồng tính nữ có mối quan hệ mật thiết, lâu dài mà từ đó khía cạnh giới bị loại bỏ do cho đến cái chết, bệnh tật hoặc bỏ tù của một thành viên của cặp đôi", có lẽ bởi vì sau đó các tòa án có thể "tập trung vào tất cả sự liên kết tuyệt vời của cặp đôi mà không bị đe dọa bởi những tác động giới của cặp đôi đó". Mary Anne Case, *Missing Sex Talk in the Supreme Court's Same-Sex Marriage Cases*, 84 U.M.K.C. L. REV. 673, 680 (2016), quoting Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV.

nhà mà cô đã sống trong nhiều thập kỷ cùng với bạn đời đã khuất Thea Speyer. Mặc dù một số người trong phong trào bảo vệ quyền lợi cho người đồng tính ban đầu lo ngại rằng việc một phụ nữ giàu có tham gia kiện tụng để giảm thuế có thể không phải là nguyên đơn được đồng cảm, câu chuyện tình yêu cùng việc. Tuy nhiên, việc Windsor chăm sóc Speyer bị mắc chứng đa xơ cứng liệt cho tới những ngày cuối đời đã chiếm được trái tim của cả nước[1]. Một bộ phim tài liệu được công chiếu ngay sau khi Speyer qua đời vào năm 2009, Edie và Thea: A Very Long Engagement[2] khắc họa con đường mà cặp đôi này đã đi cùng với nhau, từ những lần gặp gỡ đầu tiên trên sàn nhảy của Greenwich Village cho tới hơn bốn mươi năm sau, khi Speyer chỉ có thể xoay người trên chiếc xe lăn có động cơ với Windsor trên đùi hoặc nắm tay bà ấy, họ vẫn khiêu vũ cùng nhau.

Jim Obergefell cũng đã chăm sóc cho người bạn đời mắc bệnh của mình cho đến khi người đó qua đời. Cũng như Windsor đã làm với Speyer[3], Obergefell đã đi cùng người bạn đời của mình, John Arthur, ngay trước khi người này qua đời, đến một địa phương, nơi không giống như tiểu bang của họ vào thời điểm đó, cho phép các cặp cùng giới kết hôn. Sau khi trở về nhà, Obergefell và Arthur đã ra tòa để yêu cầu công nhận hôn nhân của họ vì những lý do không liên quan đến tiền bạc. Yêu cầu chính của cặp đôi trước tòa là giấy chứng tử của Arthur, dự kiến sẽ được cấp trong vòng vài tuần sau khi nộp đơn kiện, sẽ liệt kê tình trạng của ông khi chết là đã kết hôn và Obergefell là người bạn đời còn sống của ông. Kết quả pháp lý thực tế sẽ là khả năng khai thuế chung và yêu cầu quyền lợi của người còn sống. Nhưng quan trọng không kém, chỉ khi Obergefell được chỉ định là bạn đời của Arthur trong giấy chứng tử của ông thì cả

1643, 1644 (1993). Một trong những chiến thắng của phong trào đồng tính năm ở Hoa Kỳ là Braschi v. Stahl Assocs., 543 N.E.2d 49, 54 (N.Y. 1989) (công nhận người còn lại của một cặp đồng tính là thành viên của gia đình người đã khuất và do đó đủ điều kiện để kế thừa quyền thuê nhà trong căn hộ do tiền thuê kiểm soát mà cả hai đã sống vì cuộc sống mà hai người chia sẻ có "tất cả các đặc điểm của gia đình thông thường").

[1] Stephanie Fairyington, *Inside the Love Story That Brought Down DOMA*, THE ATLANTIC (Feb. 14, 2014), tại https://www.theatlantic.com/national/archive/2014/02/inside-the-love-story-that-brought-downdoma/283840/. ("Câu chuyện tình yêu của cặp đôi, được ghi lại quá hấp dẫn trong [phim tài liệu] Edie & Thea, đóng một vai trò rất lớn trong kết quả".)

[2] Do Susan Muska và Gréta Olafsdóttir làm đạo diễn. Bộ phim đã làm rõ cuộc sống tình dục tích cực và thỏa mãn mà cả hai đã duy trì trong suốt cuộc đời bên nhau như thế nào, điều mà Windsor rất muốn làm nổi bật mặc dù luật sư của cô ấy đã khuyến khích cô ấy không nói công khai về tình dục trong thời gian diễn ra vụ kiện tụng. Xem thêm Mary Anne Case, *Missing Sex Talk in the Supreme Court's Same-Sex Marriage Cases*, 84 U.M.K.C. L. REV. 673, 683-4 (2016).

[3] Windsor và Speyer đã bay đến Canada để kết hôn vào năm 2007, bốn thập kỷ gắn bó với họ và hai năm trước khi Speyer qua đời, biết rằng bang New York quê hương của họ sẽ công nhận cuộc hôn nhân đồng giới ngoài tiểu bang này. Xem U.S. v. Windsor, 133 S. Ct. 2675, 2682 (2013).

hai mới có thể được chôn cất cùng nhau trong khu đất của gia đình Arthur, nơi mà tổ tiên của ông đã đặt ra các quy tắc "chỉ chôn cất và tưởng niệm giới hạn cho con cháu và vợ chồng đã kết hôn"[1]. Như Obergefell đã làm chứng, "Chúng tôi đã ở bên cạnh nhau hơn 20 năm, và chúng tôi xứng đáng ở bên cạnh nhau mãi mãi".

Ngoài những cân nhắc thực tế này, Obergefell nhấn mạnh rằng "sẽ đau đớn như thế nào trong suốt thời gian còn lại" khi "John sẽ mãi mãi được ghi là chưa kết hôn trong giấy chứng tử của anh ấy". Như ông tuyên bố trong một bản tuyên thệ, "Tôi thật sự tan nát khi nghĩ rằng [hồ sơ chính thức cuối cùng của cuộc đời anh ấy] sẽ bỏ qua sự thật quan trọng nhất của cuộc đời anh ấy - hôn nhân của chúng tôi". Obergefell giải thích thêm:

Việc chúng tôi là một cặp đã kết hôn là 1 di sản rất quan trọng đối với John và tôi. Gia đình và bạn bè hiện tại của chúng tôi đều biết chúng tôi kết hôn với nhau. Nhưng hai hoặc nhiều thế hệ con cháu của chúng tôi sẽ không biết chúng tôi là ai. Địa vị pháp lý đặc biệt của các cặp đôi đã kết hôn, thường thông qua nghiên cứu dựa trên giấy chứng tử, sẽ được công nhận mãi mãi. Tôi muốn các thế hệ con cháu của tôi, kể từ bây giờ, khi nghiên cứu lịch sử của họ, biết rằng tôi đã yêu và kết hôn với John cũng như anh ấy đã yêu và kết hôn với tôi. Họ sẽ biết rằng họ có một tổ tiên là người đồng tính, tự hào, mạnh mẽ và yêu thương.

Chỉ cho đến mới gần đây, thì nhà nước, chứ không phải bản thân gia đình hoặc một tổ chức tôn giáo, mới được duy trì thẩm quyền với hồ sơ gia phả như vậy. Và hiếm khi những người không có con cháu trực hệ lại tập trung vào vai trò nào trong gia đình mà các thế hệ tương lai sẽ thấy họ chiếm giữ. Tuy nhiên, như sẽ được thảo luận thêm bên dưới, hình thức công nhận này, đồng thời là một hình thức chứng thực, có thể là một trong những mục tiêu quan trọng nhất đối với một số cặp cùng giới muốn kết hôn, và giúp giải thích lý do tại sao hôn nhân, theo mong đợi của tôi, lại có xu hướng lấn át các hình thức khác trong việc thừa nhận mối quan hệ.

B. HÔN NHÂN NHƯ MỘT THỎA THUẬN TRỌN GÓI

Trong khi một số quyền và nghĩa vụ hiện nay gắn liền với địa vị pháp lý của hôn nhân liên quan chặt chẽ và rõ ràng đến các mục đích lịch sử của hôn nhân, thì một số khác lại không. Do đó, giấy chứng nhận kết hôn có thể được coi là tương tự như bằng lái xe, ít nhất là theo cách mà bằng lái xe được sử dụng ở Hoa Kỳ, Đài Loan và các quốc gia khác. Về cơ bản, cả giấy phép lái xe và giấy đăng ký kết hôn ban đầu đều nhằm mục đích cho phép người sở hữu tham gia vào các hoạt động được quản lý chặt chẽ, có khả

[1] Phụ lục chung tr. 28, Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013) (No. 1:13-cv-501) (trích dẫn lời khai vào phiên xét xử của Jim Obergefell).

năng nguy hiểm nhưng cũng thú vị và hữu ích cho xã hội. Cũng giống như điều kiện tiên quyết để điều khiển xe cơ giới hợp pháp là phải sở hữu bằng lái xe hợp lệ, cho đến gần đây, hôn nhân hợp lệ là điều kiện tiên quyết để tham gia hợp pháp vào hầu hết mọi hình thức hoạt động tình dục, chung sống có giấy phép, và được công nhận là có con[1]. Mặc dù hôn nhân không còn độc quyền pháp lý đối với tình dục, chung sống, sinh sản hoặc nuôi dạy con cái, nhưng giấy đăng ký kết hôn, giống như bằng lái xe, hiện đã thực hiện các chức năng khác xa so với những gì từng là trọng tâm[2]. Bởi vì giấy phép lái xe đóng vai trò như một hình thức nhận dạng ở Hoa Kỳ, tạo điều kiện cho các hoạt động đa dạng và khác xa với việc điều khiển phương tiện cơ giới như lên máy bay, đổi séc thành tiền mặt hay mua đồ uống có cồn. Ngay cả những người hiếm khi ngồi sau tay lái ô tô cũng thường xuyên thấy việc sở hữu bằng lái xe rất hữu ích. Tương tự, như Jack Baker, một thành viên của cặp đôi cùng giới đầu tiên đưa vụ việc kết hôn của họ lên Tòa án Tối cao Hoa Kỳ giải thích, "hệ thống pháp luật đã sử dụng thể chế hôn nhân như một cơ chế phân phối nhiều quyền và đặc quyền [mà] chỉ có thể có được thông qua một cuộc hôn nhân hợp pháp "trong số đó có" quyền thừa kế, đặc quyền tài sản và lợi ích về thuế", tất cả đều do nhà nước trực tiếp bảo đảm[3].

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[1] Như sẽ giải thích thêm trong *Marriage Licenses*, 89 MINN. L. REV., tr. 1769, , ở Hoa Kỳ cho đến cuối thế kỷ 20, "trong khi hôn nhân cho phép người chồng tiếp cận tình dục với vợ (không bị ràng buộc bởi luật cưỡng hiếp), thì luật hình sự lại cấm gian dâm và ngoại tình (tức là quan hệ tình dục không hôn nhân và ngoài hôn nhân), đồng tính luyến ái và quan hệ tình dục khác giới bằng miệng và hậu môn, thậm chí tiếp cận các dụng cụ hỗ trợ thủ dâm và tài liệu khiêu dâm. Kết hôn cũng được coi là điều kiện tiên quyết để được phép chung sống, với cả luật hình sự và pháp lệnh địa phương đều cấm những người chưa kết hôn chung sống". Và theo luật thông thường của Anh, một đứa trẻ sinh ra ngoài giá thú được gọi là "fillius nullius" (con của không ai) vì không đủ điều kiện để trở thành người thừa kế của cha hoặc mẹ. Xem William Blackstone, *Of Parent and Child*, *in* COMMENTARIES ON THE LAWS OF ENGLAND (1765). Tuy nhiên, ở Hoa Kỳ ngày nay, "mọi chiều cạnh được hiến pháp thừa nhận của hôn nhân hợp pháp tự do trước đây là độc quyền (quan hệ tình dục, chung sống, sinh sản, nuôi dạy con cái), dường như là một vấn đề về quyền hiến định, không còn nằm trong độc quyền của nhà nước hoặc điều chỉnh theo luật hôn nhân". *Marriage Licenses*, 89 MINN. L. REV., tr. 1769.

[2] Tất nhiên, điểm khác biệt lớn nhất giữa giấy phép lái xe và hôn nhân là để được cấp giấy phép lái xe thì ứng viên cần đạt được một trình độ nhất định về kiến thức và kiến năng. Trong khi thông thường nhà nước đòi hỏi ít hơn với những người muốn kết hôn. Ví dụ, xem Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 Law & Hum. Behav. 439 (1993). Các thử nghiệm khuyến khích hoặc ủy thác tư vấn trước hôn nhân cung cấp thông tin tương đối hiếm và dường như không tập trung vào việc cung cấp thông tin cho các cặp vợ chồng về tác dụng pháp lý của hôn nhân. Xem Utah Code Ann. 30-1-34 (2021) (đặt ra các yêu cầu đối với tư vấn tiền hôn nhân về "cam kết trong hôn nhân" và "kỹ năng giao tiếp và giải quyết vấn đề hiệu quả", đồng thời cung cấp giảm lệ phí đăng ký kết hôn cho những cặp vợ chồng nào xác nhận đã hoàn thành tư vấn đó bởi các cố vấn được chấp thuận, những người bao gồm các giáo sĩ và các chuyên gia sức khỏe tâm thần).

[3] Như đã trích trong Donn Teal, Jack Baker, THE GAY MILITANTS 284 (1971).

Ngoài ra, các tổ chức phi quốc doanh tự nguyện hoặc đôi khi bị nhà nước ép buộc, cũng cung cấp một loạt các quyền và đặc quyền khác liên quan đến hôn nhân, từ quyền lợi bảo hiểm cho bạn đời của nhân viên đến các đặc quyền dành cho bạn đời tại các cơ sở từ bệnh viện và viện dưỡng lão đến câu lạc bộ gôn và đại lý cho thuê ô tô. Như Paula Ettelbrick đã phê bình, hôn nhân "đã trở thành một cơ chế dễ dàng để người sử dụng lao động phân chia lợi ích, cho các doanh nghiệp cung cấp các khuyến mãi và ưu đãi đặc biệt, và cho pháp luật có sự phân biệt trong việc phân phối nguồn công quý ít ỏi"[1].

Tôi chia sẻ quan điểm của Ettelbrick về mức độ mà các quyền lợi, đặc biệt là những lợi ích được cung cấp thông qua một người sử dụng lao động, được cấp trên cơ sở, địa vị pháp lý của hôn nhân[2], chứ không phải do nhu cầu hoặc do nghỉ việc. Tuy nhiên, khi nhà nước sử dụng hôn nhân như một cơ chế phân phối, điều quan trọng cần nhớ là địa vị pháp lý của hôn nhân, mặc dù thường có lợi cho các cặp đôi, nhưng không phải lúc nào cũng như vậy. Ngay cả khi phân phối công quỹ ít ỏi, đôi khi hôn nhân loại bỏ người dân khỏi một số lợi ích[3], ví dụ, khi nó khiến nhà nước phải kết hợp thu nhập của họ để xác định tính đủ điều kiện. Luật thuế thu nhập của Hoa Kỳ, giống như của Đài Loan cho đến gần đây[4], có một lịch sử lâu đời về lợi ích cũng như bất lợi từ kết hôn[5]. Một trong những lập luận hiệu quả được đưa ra để chống lại DOMA,

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1 Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in William B. Rubenstein, LESBIANS, GAY MEN AND THE LAW 721, 724 (2d ed. 1997).

2 Xem Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1763-67 (2001).

3 Xem *Califano v. Jobst*, 434 U.S. 47, 54 (1977) (ủng hộ việc chấm dứt quyền lợi an sinh xã hội của một đứa trẻ phụ thuộc vào kết hôn vì "Quốc hội hợp lý khi cho rằng địa vị pháp lý của hôn nhân là một phép thử liên quan đến sự phụ thuộc có thể xảy ra").

4 Xem J.Y. Interpretation No. 696 (2015) (vi hiến yêu cầu rằng một cặp vợ chồng phải khai thuế chung khi là hình phạt hôn nhân có hiệu lực và cho cơ quan lập pháp hai năm để đưa ra biện pháp khắc phục hình phạt kết hôn này trong luật thuế).

5 Các luật thuế liên bang hiện hành của Hoa Kỳ đã loại bỏ hình phạt kết hôn đối với tất cả trừ các điểm cực đoan của thang thuế (những người có thu nhập rất cao bị đánh thuế ở mức 35% và những người đủ nghèo có khả năng đủ điều kiện nhận Tín dụng thuế thu nhập kiếm được), nhưng, trong những năm trước năm 2017, các cặp vợ chồng có thu nhập tương đối ngang nhau, cho dù họ đều là công nhân làm việc theo ca tại một nhà máy hay đều là luật sư của công ty, có xu hướng phải đối mặt với mức thuế khi kết hôn với nhau cao hơn mức họ sẽ có nếu họ còn độc thân. Xem *What are marriage penalties and bonuses?*, TAX POLICY CENTER (updated May 2020) tại https://www.taxpolicycenter.org/briefing-book/what-are-marriage-penalties-and-bonuses. Các nhà phê bình nữ quyền đối với luật thuế thu nhập liên bang của Hoa Kỳ đã nhận thấy rằng họ có xu hướng trừng phạt các cặp đôi có thu nhập tương đối bằng nhau cũng như những người có thu nhập phụ (thường là vợ) trong khi ủng hộ các cặp đôi kết hôn là trụ cột gia đình / nội trợ. Xem Edward J. McCaffery, TAXING WOMEN (1997); Martha T. McCluskey, *Taxing the Family Work: Aid for Affluent Husband Care*, 21 COLUM. J. GENDER & L. 109 (2011).

Đạo luật Phòng vệ Hôn nhân Liên bang Hoa Kỳ bị Tòa án Tối cao bác bỏ trong vụ Windsor, là các luật chống thiên vị gia đình và các quy tắc làm việc khác[1] sẽ không áp dụng cho các cặp đồng tính không được liên bang công nhận hôn nhân. Do đó, theo Thẩm phán Kennedy, "loại bỏ các cặp đôi cùng giới đã kết hôn khỏi các nghĩa vụ và trách nhiệm thiết yếu của cuộc sống hôn nhân"[2]. Các ví dụ về luật thuế và quy tắc ứng xử cho thấy một khía cạnh trong đó địa vị pháp lý của hôn nhân ngày nay giống như địa vị pháp lý của doanh nghiệp - cả hai đều dẫn đến một cách đối xử cụ thể trong luật có thể có lợi hoặc bất lợi, tùy thuộc vào hoàn cảnh; địa vị pháp lý không đơn giản chỉ là một đặc ân.

Do đó, những người vận động hôn nhân cùng giới không hoàn toàn chính xác khi họ có xu hướng gắn hàng nghìn điều luật liên quan tới địa vị pháp lý của hôn nhân với hàng nghìn lợi ích của hôn nhân; địa vị pháp lý của hôn nhân cũng đi kèm với các hạn chế và nghĩa vụ pháp lý. Nhưng địa vị pháp lý của hôn nhân đã cung cấp một gói quyền, theo nhiều chiều cạnh hiệu quả hơn nhiều so với việc cung cấp từng quyền một. Đây cũng là kết luận được đưa ra vào năm 1995 bởi Ủy ban Xu hướng Tính dục và Luật của bang Hawaii. Được giao nhiệm vụ "xem xét các lợi ích kinh tế và pháp lý chính được cấp cho các cặp đôi khác giới đã kết hôn nhưng không cho các cặp cùng giới và các lập luận về chính sách công để mở rộng hoặc không mở rộng tất cả hoặc một số lợi ích đó cho các cặp cùng giới" và sau đó với "khuyến nghị hành động lập pháp", Ủy ban kết luận rằng, "giải pháp đơn giản nhất sẽ là, sửa đổi chế định hôn nhân để cho phép hôn nhân cùng giới và mở rộng tất cả các lợi ích và gánh nặng của địa vị pháp lý đó cho các cặp đôi nếu họ muốn"[3]. Tuy nhiên, người dân Hawaii đã từ chối khuyến nghị này vào thời điểm đó và mặc dù tòa án Hawaii đã có quyết định tiên phong về ủng hộ hôn nhân cùng giới theo hiến pháp bang, các cặp cùng giới không thể kết hôn hợp pháp ở bang đó trước năm 2013.

Việc các cơ quan lập pháp cung cấp cho cặp đôi cùng giới từng lợi ích hợp pháp liên quan đến hôn nhân cũng kém hiệu quả giống như việc cơ quan lập pháp thực hiện điều tương tự, như các vụ kiện tụng gần đây tại các tòa án ở Hồng Kông đã chứng

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1 133 S. Ct., tr. 2695. Như thẩm phán Michael Boudin giải thích, khi phủ nhận sự công nhận của liên bang đối với các cặp kết hôn đồng giới, "Định nghĩa của DOMA về hôn nhân được cho là phá hoại cả luật đạo đức liên bang… và báo cáo lạm dụng.

2 133 S. Ct., tr. 2695.

3 *Report of the Commission on Sexual Orientation and the Law*, STATE OF HAWAII iii, iii-iv (Dec. 8, 1995), tại lrb.hawaii.gov/wp-content/uploads/1995_Report Of The Commission OnSexual Orientation And The Law.pdf. Ủy ban đã liệt kê trong số rất nhiều lợi ích hữu hình và vô hình của hôn nhân có sẵn như quyền lợi hưu trí theo luật, quyền lợi bảo hiểm y tế, quyền lợi thuế liên bang và tiểu bang, quyền thừa kế, hỗ trợ bạn đời, thăm bệnh viện, ly hôn, đặc quyền bí mật, hành động chết oan và quyền quyết định việc định đoạt thi thể của bạn đời. Xem *tlđd* tr. vii (chương 1).

minh. Như đã thảo luận ở trên, một cặp đôi cùng giới, Messrs Ng và Li, đã phải đưa ra ba vụ kiện riêng biệt để các mặt khác nhau của hôn nhân của họ được công nhận. Như Li đã nói khi vụ kiện đầu tiên được quyết định có lợi cho họ, "Thật là mệt mỏi, chúng tôi đã đặt ra hai lần khiếu nại chỉ cho ngôi nhà của chúng tôi"[1]. Các cặp đôi cùng giới khác kết hôn ở nước ngoài cũng đã đạt thành công tương tự trong các vụ kiện yêu cầu Chính phủ Hồng Kông công nhận các mục đích pháp lý cụ thể trong hôn nhân của họ như, các yêu cầu trong quân đội… các điều khoản chống thiên vị gia đình, từ bỏ quyền tư pháp… hạn chế nhận quà, hạn chế bồi hoàn tiền đi lại… và tội hối lộ các quan chức liên bang… và các mối đe dọa đối với các thành viên gia đình của các quan chức liên bang"[2], từ việc đánh thuế chung cho đến trợ cấp y tế và nha khoa cho bạn đời[3], và từ thị thực phụ thuộc bạn đời[4] đến trợ cấp thuê nhà[5]. Tuy nhiên, một vụ kiện của nhà hoạt động Jimmy Sham Tsz Kit cho hôn nhân cùng giới của anh ở nước ngoài được công nhận một cách toàn diện đã bị cùng một thẩm phán, Anderson Chow, bác bỏ vào đúng ngày Messrs Ng và Li giành được chiến thắng trước tòa[6]. Một năm trước đó, một cáo buộc việc Chính phủ Hồng Kông không công nhận hôn nhân cùng giới cũng như có khuôn khổ pháp lý thay thế để công nhận các mối quan hệ cùng giới là vi hiến đối với người dân cũng đã thất bại[7].

Luật sư của Jimmy Sham đã trả lời thẩm phán Chow, người bày tỏ quan ngại về việc "được yêu cầu soạn thảo luật chung", rằng "Chúng ta không nên buộc ông Sham phải ra tòa 100 lần để đấu tranh cho 100 quyền lợi - điều đó đơn giản là bất công"[8].

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1 Jasmine Siu, *Bittersweet day for Hong Kong LGBT community as court rules in favour of inheritance rights between gay couple, but rejects foreign same-sex marriage bid*, SOUTH CHINA MORNING POST (Sept. 19, 2020), *tại* Hong Kong / Society https://www.scmp.com/news/hong-kong/society/article/3102011/hong-kongactivist-jimmy-sham-loses-high-court-bid-recognise.

2 Mass. V. HHS, 682 F.3d 1, 14 at n. 8 (2012) (nêu lên thách thức đối với tính hợp hiến của DOMA do bang Massachusetts và một số công dân của bang này đưa ra).

3 Leung Chun Kwong v. Secretary for the Civil Service and Commissioner of Inland Revenue, [2019] H.K.C.F.A.19. Mặc dù người bạn đời của Leung, Scott Adams, vẫn còn sống và khỏe mạnh, nhưng Leung giải thích rằng anh ấy có động cơ để kiện đòi quyền lợi hôn nhân khi "người bạn đời lâu năm của bạn anh ấy chết trong một vụ tai nạn thể thao dưới nước, nhưng không có quyền được đảm bảo bởi hôn nhân, người bạn của anh ấy đã bị đuổi khỏi đám tang". Marco Wan, *The Invention of Tradition: Same-sex Marriage and its Discontents in Hong Kong*, 18 I•CON 539, 546-7 (2020). C. MARRIAGE RECOGNITION AT THE BORDER BETWEEN STATES.

4 QT v. Director of Immigration, [2018] H.K.C.F.A. 28.

5 Infinger, Nick v. Hong Kong Housing Authority [2020] HKCFI 329.

6 Sham Tsz Kit v Secretary for Justice [2020] HKCFI 2411.

7 MK v. Government of the HKSAR [2019] 5 HKLRD 259.

8 Jasmine Siu, *Lawyers for Hong Kong rights activist Jimmy Sham urge court to recognise his same-sex marriage*, South China Morning Post (May 29, 2020), tại https://www.scmp.com/news/hong-kong/law-andcrime/article/3086771/lawyers-hong-kong-rights-activist-jimmy-sham-urge.

Ngoài sự bất công, tôi cho rằng điều này cũng không hiệu quả và lãng phí không chỉ nguồn lực của các đương sự và hệ thống tòa án, mà còn của những người sau đó phải đưa ra các biện pháp lập pháp hoặc hành chính riêng lẻ cho mỗi lợi ích mà tòa án phát hiện ra các cặp cùng giới có quyền. Bản thân Sham đã bày tỏ quan điểm tương tự một cách màu sắc hơn. "Họ sẽ không bán cho bạn toàn bộ miếng thịt quay, nhưng sau khi cắt nhỏ thành từng miếng, họ sẽ cho phép bạn mua từng miếng một"[1].

Tất nhiên là, cũng có nhiều người không muốn mua cả một miếng thịt quay. Tuy nhiên, chỉ một hoặc hai miếng nhỏ (hoặc thực sự một số người không muốn có thịt lợn trong chế độ ăn uống của họ) nên nhiều người có thể không muốn gói thỏa thuận hiện có của hôn nhân[2] và như tôi sẽ thảo luận thêm bên dưới, pháp luật nên đáp ứng nhu cầu của họ với các lựa chọn thay thế hơn so với hầu hết các quốc gia đang làm hiện nay. Nhưng miễn là có một số lượng đáng kể người mong muốn một gói quyền và nghĩa vụ tương tự như hôn nhân, thì việc nhà nước công nhận một địa vị pháp lý như vậy cho họ là hoàn toàn hợp lý.

Trong khoảng thời gian từ năm 2005, khi hôn nhân cùng giới hợp pháp trên khắp Canada và năm 2013, khi Tòa án Tối cao Hoa Kỳ hủy bỏ DOMA, cho phép chính phủ liên bang Hoa Kỳ công nhận hôn nhân cùng giới, các cặp đôi đồng tính đã phát biểu một cách thấm thía cảm xúc của họ về những khoảnh khắc ở biên giới khi các nhân viên di trú hướng dẫn các nhóm gia đình đi cùng nhau khi đi qua biên giới. Từ Mỹ sang Canada, họ có thể làm như vậy với nhau, với tư cách 1 cặp đôi chính thức, và hành động công nhận chính thức đơn giản này có ý nghĩa sâu sắc đối với họ. Nhưng khi đến Hoa Kỳ, họ bị tách biệt với tư cách là những cá nhân không bị ràng buộc. Đối với các cặp công dân đến từ Hoa Kỳ hoặc Canada, hiệu quả trên thực tế không có gì hơn vài phút chênh lệch và khoảng cách vài feet khi băng qua biên giới, nhưng hiệu quả mang tính biểu tượng lại vô cùng mạnh mẽ.

Tuy nhiên, khả năng để hôn nhân của một người được thừa nhận khi đi qua biên giới có những hậu quả thực tế quan trọng, đặc biệt là khi có rất cuộc đời vượt qua

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[1] Jasmine Siu, *Bittersweet day for Hong Kong LGBT community as court rules in favour of inheritance rights between gay couple, but rejects foreign same-sex marriage bid*, SOUTH CHINA MORNING POST (Sept. 19, 2020), tại Hong Kong / Society https://www.scmp.com/news/hong-kong/society/article/3102011/hong-kongactivist-jimmy-sham-loses-high-court-bid-recognise.

[2] Cũng sử dụng hình ảnh ẩn dụ từ đồ ăn, Thẩm phán Ruth Bader Ginsburg đã mô tả hiệu lực của Đạo luật Phòng vệ Hôn nhân không cho các cặp đôi đồng giới "hôn nhân hoàn chỉnh" mà đơn thuần là "hôn nhân theo kiểu sữa tách kem". Xem Transcript of Oral Argument at 71, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307). Tuy nhiên, cũng giống như một số người ăn chay, những người khác lại thích sữa tách béo hơn sữa béo hoàn toàn. Thị trường tạp hóa đã học cách đáp ứng các sở thích đa dạng về thực phẩm; như sẽ được thảo luận ngắn gọn dưới đây, pháp luật nên giải quyết tốt hơn những người có sở thích nhìn nhận mối quan hệ không kéo dài hôn nhân như một lựa chọn ưu tiên.

biên giới một cách tạm thời hoặc vĩnh viễn. Nếu không có sự thừa nhận hôn nhân một cách chính thức, các cặp cùng giới đa quốc gia thậm chí có thể không tìm thấy quốc gia nào mà họ có thể xây dựng cuộc sống cùng nhau một cách hợp pháp. Đây là hiện thực mà Richard Adams người Mỹ và người tình người Úc Tony Sullivan đã trải qua. Đã quá hạn visa thăm thân để đến với Adams vào những năm 1970, Sullivan phải đối mặt với việc bị trục xuất. Nghe nói rằng một nhân viên 1 hạt ở Colorado đang cung cấp giấy phép kết hôn cho các cặp cùng giới, hai người đã có giấy phép kết hôn vào năm 1975, được một linh mục kết hôn và sau đó nộp đơn xin thị thực nhập cư theo diện hôn nhân. Phản hồi chính thức từ Cơ quan Nhập cư và Nhập tịch của Bộ Tư pháp Hoa Kỳ (INS) là cả hai đã "không xác định được rằng mối quan hệ hôn nhân chuẩn chỉnh có thể tồn tại giữa hai kẻ pê đê [nguyên văn]"[1]. Việc kháng cáo của họ đã bị bãi bỏ, cũng như nỗ lực của họ để thuyết phục Tòa phúc thẩm miễn trừ, giúp đình chỉ việc trục xuất Sullivan để anh có thể ở lại với Adams. Trước sự bất đồng quan điểm mạnh mẽ, người thẩm phán cho rằng Sullivan đã không thể hiện điều kiện cần thiết là hoàn cảnh "cực kỳ khó khăn", cũng như cho rằng Adams cũng không thể vì không tuân theo các quy tắc của INS, rằng "một người họ hàng đủ tiêu chuẩn mà sự khó khăn có thể được thể hiện" chính là Anthony Kennedy[2]. Khi ông đưa ra ý kiến đa số của mình trong án lệ Obergefell một danh sách các ý kiến của các tòa án liên bang đề cập đến hôn nhân cùng giới, Thẩm phán Kennedy đã đặt trường hợp của Adams và Sullivan lên đầu[3]. Với tư cách là một thẩm phán Tòa án tối cao quyết định một vụ kiện hiến pháp, Kennedy có nhiều quyền tự do hơn để vượt ra ngoài án lệ luật định, nhưng ông cũng thừa nhận với bản thân, Tòa án và quốc gia rằng "những góc nhìn mới và hiểu biết mới về xã hội có thể tiết lộ những sự bất bình đẳng phi lý trong các thể chế cơ bản nhất của chúng ta, mà đã từng không được chú ý và không bị chất vấn"[4].

Những hiểu biết mới này được công nhận quá muộn để Adams và Sullivan được phép sống công khai như một cặp đôi đã kết hôn, được pháp luật Hoa Kỳ công nhận, mặc dù họ đã cố gắng ở bên nhau, ở nước ngoài và cả 1 cách bí mật giữa nước Mỹ, cho đến khi Adams qua đời vì bệnh ung thư vào tháng 12 năm 2012. Chỉ sau đó, hơn bốn mươi năm sau hôn nhân của họ, Sullivan mới được Chính phủ Hoa Kỳ chính thức

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1 Robert Barnes, *40 years later, story of a same-sex marriage in Colo. remains remarkable*, WASHINGTON POST (April 18, 2015), tại https://www.washingtonpost.com/politics/courts_law/40-years-later-a-samesex-marriage-in-colorado-remains-remarkable/2015/04/18/e65852d0-e2d4-11e4-b510-962fcfabc310_story.html.

2 Sullivan v. Immigration & Naturalization Service, 772 F.2d 609, 611 (9th Cir. 1984).

3 Obergefell v Hodges, 133 S. Ct., Phụ lục A: Phán quyết của tiểu bang và liên bang về hôn nhân đồng giới (trích dẫn Adams v. Howerton, 673 F.2d 1036, (9th Cir. 1982), trường hợp đầu tiên khẳng định việc trục xuất Sullivan, bất chấp hôn nhân của anh ta với Adams).

4 Obergefell v. Hodges, 133 S. Ct. 2584, tr. 2590.

công nhận hôn nhân, nhận được một thẻ xanh cho phép cư trú và làm việc tại Hoa Kỳ, và một lá thư xin lỗi từ León Rodriguez, Giám đốc Sở Di trú và Nhập tịch Hoa Kỳ dưới Tổng thống Obama[1].

Tại Đài Loan, một số cặp cùng giới đa quốc tịch, nhưng không cùng đến từ các quốc gia công nhận hôn nhân cùng giới, vẫn gặp phải những trở ngại mà Adams và Sullivan đã gặp, vì Đài Loan cho đến nay sẽ chỉ cho phép người nước ngoài đến từ các quốc gia nơi hôn nhân của họ là hợp pháp được đăng ký kết hôn cùng giới của họ ở Đài Loan. Chien Chih - chieh, Tổng thư ký của Liên minh Đài Loan nhằm thúc đẩy quyền đối tác dân sự, gọi đây là "mảnh ghép cuối cùng còn thiếu của tấm ghép hình mà chúng ta cần hoàn thiện để đạt được bình đẳng trong hôn nhân". Ông giải thích rằng "nhiều người đã phải dùng đến thị thực du học hoặc du lịch để ở lại đây. Điều này gây ra rất nhiều lo lắng và bất định"[2]. Bởi vì Lập pháp viện đang xem xét các sửa đổi do Tư pháp viện đề xuất để nới lỏng các hạn chế đối với hôn nhân cùng giới đa quốc gia và bởi vì các tòa án Đài Loan đã bắt đầu đưa ra phán quyết có lợi cho một số cặp cùng giới đa quốc gia, chẳng hạn bằng cách chấp nhận rằng cả hai đều là thành viên của một cặp đôi thường xuyên cư trú tại Đài Loan hoặc từ chối áp dụng luật nước ngoài cấm hôn nhân cùng giới vì áp dụng luật này sẽ dẫn đến vi phạm trật tự công cộng hoặc vi phạm đạo đức của Đài Loan[3], có thể hy vọng rằng lỗ hổng nghiêm trọng này trong công nhận hôn nhân cùng giới tại Đài Loan sẽ sớm được khắc phục dứt điểm.

Đạo luật Thi hành của Đài Loan đối với Diễn giải số 748 của Tư pháp viện cho phép hai người cùng giới đăng ký kết hôn để họ có thể "tạo ra một sự kết hợp lâu dài có tính chất thân mật và duy nhất cho mục đích đã cam kết là quản lý cuộc sống chung"[4]. Việc công nhận kết hôn có ý nghĩa rất quan trọng đối với các cặp đôi xuyên

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1 Troy Masters, *United States Government says L.A. Gay Couple's 1975 Marriage is Valid*, THE PRIDE (June 7, 2016), *tại* http://thepridela.com/2016/06/united-states-government-says-gay-couples-1975-marriage-isvalid/.

2 Beh Lih Yi, *"Happily ever after" eludes Taiwan, a year after Asia's first gay marriages*, THOMPSON REUTERS (May 20, 2020), tại https://www.reuters.com/article/us-taiwan-lgbt-rights-feature-trfn/happily-ever-after-eludes-taiwan-a-year-afterasias-first-gay-marriages-idUSKBN22X03A (trình bày chi tiết các tình huống cụ thể mà một số cặp đôi phải đối mặt). Tất nhiên, vẫn còn khoảng cách trong việc thừa nhận đầy đủ các quyền của cha mẹ và gia đình cho các cặp đồng giới cần được khắc phục.

3 Keoni Everington, *Taiwan court ruling on Macau citizen opens door to international same-sex marriages*, TAIWAN NEWS (May 6, 2021), tại https://www.taiwannews.com.tw/en/news/4196648 (đề cập chi tiết kết quả trong hai vụ việc và đề xuất lập pháp của Bộ Tư pháp).

4 *Press Release on the Same-Sex Marriage Case*, CONSTITUTIONAL COURT, REPUBLIC OF CHINA (TAIWAN) (May 24, 2017), *tại* https://cons.judicial.gov.tw/jcc/en-us/contents/show/p2kdmcuv4dakqngi.

quốc gia bởi vì các cặp đôi khó thực hiện "mục đích sống chung"[1] khi bị ngăn cách địa lý. Việc công nhận kết hôn cũng quan trọng đối với biên giới quốc gia và các cơ quan quản lý xuất nhập cảnh, bởi vì, trong trường hợp không có địa vị pháp lý rõ ràng của hôn nhân[2], các cơ quan này phải đối mặt với một nhiệm vụ gần như không thể xử lý nổi và có khả năng gây đau khổ là sử dụng quyền quyết định của họ để đánh giá việc ly thân cưỡng bức nào sẽ dẫn đến "khó khăn cực đoan"[3] cho những người bị chia cắt.

C. CÁC LÍ DO VỀ KINH DOANH ỦNG HỘ CHO HÔN NHÂN ĐỒNG GIỚI

Khả năng để một cặp đồng giới cùng nhau đi qua biên giới với tư cách là bạn đời trong một mối quan hệ được pháp luật công nhận không chỉ quan trọng đối với bản thân cặp đôi mà còn với những người sử dụng lao động muốn tuyển dụng nhân tài và chuyển giao nhân tài qua biên giới tạm thời hoặc lâu dài. Đây là một trong những lý do chính khiến rất nhiều tập đoàn đa quốc gia đã đưa ra các lý do về kinh doanh ủng hộ cho hôn nhân đồng giới ở rất nhiều địa điểm khác nhau. Đơn Amicus (đơn góp ý từ bên thứ 3 ko liên quan đến vụ kiện)[4] thay mặt cho hàng trăm tập đoàn lớn đã được đệ trình lên Tòa án Tối cao Hoa Kỳ để ủng hộ những người phản đối Dự luật 8 (California)[5], ủng hộ Edith Windsor chống lại DOMA[6], ủng hộ Jim Obergefell và những người cùng đệ đơn yêu cầu hôn nhân đồng giới trên toàn quốc[7]. Trong vụ QT kiện Giám đốc Di trú[8], liên quan đến những nỗ lực, mà cuối cùng cũng thành công, của một người đồng

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1 *Act for Implementation of J.Y. Interpretation No. 748, Article 2*, MINISTRY OF JUSTICE, REPUBLIC OF CHINA (TAIWAN), *tại* https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000008.

2 Sullivan v. Immigration & Naturalization Service, 772 F.2d 609, 612 (9th Cir. 1984) ((Pregerson, J., bất đồng quan điểm) (trái ngược với Thẩm phán Kennedy, rằng "quyết định cuối cùng" của cơ quan nhập cư đối với tình hình của Sullivan và Adams đã bác bỏ tuyên bố của họ về "khó khăn cá nhân và cảm xúc tột độ chỉ là khó khăn chung và điều chỉnh cảm xúc", "Không công nhận sự căng thẳng mà Sullivan sẽ trải qua nếu anh ta buộc phải tách khỏi người mà anh ta đã sống và chia sẻ mối quan hệ thân thiết trong mười hai năm qua" hoặc thực tế là, trong khi "hầu hết những người ngoài hành tinh bị trục xuất có thể trở lại quê hương của họ với những người bạn đồng hành thân thiết nhất của họ" thì Sullivan không thể).

3 Brief of American Companies as Amici Curiae in Support of Respondents, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144), 2013 U.S. S. Ct. Briefs LEXIS 1212.

4 Một đơn amicus curiae là một đơn được gửi cho tòa án và bên gửi đơn lấy danh nghĩa là amicus curiae (người bạn của tòa) để gửi đơn đó. (Người dịch)

5 Xem Brief of American Companies as Amici Curiae in Support of Respondents, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144), 2013 U.S. S. Ct. Briefs LEXIS 1212.

6 Xem Brief of 278 Employees and Organizations Representing Employers as Amici Curiae in Support of Respondent Edith Schlain Windsor, United States v. Windsor, 133 S. Ct. 2675 (2013), 2013 U.S. S. Ct. Briefs LEXIS 1149.

7 Xem Brief of 379 Employees and Organizations Representing Employers as Amici Curiae in Support of Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 U.S. S. Ct. Briefs LEXIS 981.

8 QT v. Director of Immigration, [2018] H.K.C.F.A. 28.

tính nữ người Anh, đã chấp nhận làm việc tại Hồng Kông, yêu cầu có được thị thực phụ thuộc cho người bạn đời đồng tính nữ của mình, người chỉ có thể ở bên cô ấy ở Hồng Kông với tư cách du khách và không được làm việc, "một nhóm 15 tổ chức tài chính và một nhóm 16 công ty luật… đã nộp đơn xin nghỉ phép để can thiệp vào vụ kháng cáo" nhằm "thu hút sự chú ý của Tòa án về thực tế" rằng chính sách không công nhận "có tác dụng hạn chế nhóm lao động nước ngoài mà người sử dụng lao động có thể muốn lựa chọn và điều này sẽ ảnh hưởng xấu đến lợi ích của họ cũng như lợi ích rộng lớn hơn của Hồng Kông"[1]. Nhưng Tòa án phúc thẩm cấp cuối của Hồng Kông từ chối sự can thiệp của họ vì họ cho rằng "quan điểm của các ngân hàng và công ty luật là hiển nhiên mà không cần sự can thiệp của họ"[2].

Quan trọng, các ngân hàng đa quốc gia và các doanh nghiệp khác có quan điểm hơi khác trong việc ủng hộ công nhận hôn nhân đồng giới, so với các tổ chức khác cũng tìm cách can thiệp thay mặt cho QT như Tổ chức Ân xá Quốc tế. Chắc chắn rằng những doanh nghiệp này cũng ủng hộ quyền con người và phẩm giá của những người LGBTQ[3]. Tuy nhiên, khi họ làm như vậy, như họ đã vừa làm trong một loạt báo cáo quốc gia và đa quốc gia được xuất bản bởi Open For Business, "một liên minh các công ty toàn cầu được tổ chức như một quỹ từ thiện để thúc đẩy sự hòa nhập LGBT+"[4] họ đã nhấn mạnh đến việc các quốc gia, thành phố, khu vực và doanh nghiệp có thể trở nên thịnh vượng hơn nếu hoan nghênh và công nhận hợp pháp các cá nhân LGBTQ và các mối quan hệ của họ và tầm quan trọng của việc các công ty này có thể tuyển dụng, giữ chân, tự do chuyển nhượng và làm cho nhân viên của họ, nhiều người là LGBTQ hoặc quan tâm đến việc hòa nhập LGBTQ[5], hạnh phúc nhất có thể, Các lý do về kinh

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[1] Như trên đoạn 16.

[2] Như trên đoạn 17. Xem thêm Marco Wan, *The Invention of Tradition: Same-sex Marriage and its Discontents in Hong Kong*, 18 I•CON 539, 546 (2020).

[3] Như một nhân viên của Goldman Sachs Nhật Bản và là nhà hoạt động vì quyền của người đồng tính đã đưa nó vào một bài xã luận gần đây, viện dẫn một tuyên bố tương tự năm 2012 của người đứng đầu công ty, Lloyd Blankfein: "Về cơ bản, tự do kết hôn là một vấn đề nhân quyền. Tuy nhiên, nó cũng có thể là động năng tích cực cho hoạt động kinh doanh". Masa Yanagisawa, I*t is time for Japan to say "I do" to marriage equality*, NIKKEI ASIA (March 17, 2021), tại https://asia.nikkei.com/Opinion/It-is-time-for-Japanto-say-I-do-to-marriage-equality.

[4] Đối với các liên kết đến các quốc gia, khu vực và các báo cáo chuyên ngành khác và danh sách các công ty đa quốc gia liên quan, xem https://open-for-business.org/.

[5] Điều này nhấn mạnh vào việc làm cho nhân viên LGBT cảm thấy được chào đón vượt ra ngoài các can thiệp pháp lý và vận động hành lang. Vì vậy, vài tháng trước khi Bộ Tư pháp bắt buộc công nhận hợp pháp hôn nhân đồng giới, Giám đốc điều hành của HSBC Đài Loan đã bước vào để dẫn một nhân viên đồng tính nữ xuống lối đi cho lễ cưới của cô ấy (mặc dù sau đó không được đăng ký hợp pháp) khi cha mẹ cô ấy từ chối làm như vậy. Xem Judy Lin, HSBC Taiwan CEO walks lesbian employee down the aisle, TAIWAN NEWS (March 10, 2017), available attại http://www.taiwannews.com.tw/en/news/3113485.

doanh ủng hộ hôn nhân đồng giới cũng liên quan đến những cân nhắc thực tế thuần túy hơn, nằm trong những tiêu chuẩn đánh giá hiệu quả mà tôi đã cố gắng tập trung rất nhiều trong phân tích của mình. Như đơn được đệ trình lên Tòa án Tối cao Hoa Kỳ thay mặt cho 100 "Doanh nghiệp được xếp hạng bởi Fortune và các doanh nghiệp hàng đầu khác của Hoa Kỳ" cho thấy:

Công nhận quyền kết hôn của các cặp đồng tính không chỉ là một vấn đề hiến định. Đó là một yêu cầu trong kinh doanh. Bằng cách đối xử bất công với một nhóm, [cấm hôn nhân đồng giới] cản trở các doanh nghiệp đạt được mục tiêu lý tưởng của thị trường là hoạt động hiệu quả, đặc biệt trong việc tuyển dụng, thuê lao động và giữ chân người tài ở vị trí tốt nhất để vận hành doanh nghiệp với hiệu suất cao nhất.[1]

Trước tiên, tôi sẽ liệt kê các lý do như các doanh nghiệp đã làm, và trong phần sau đó, tiếp tục đề xuất những cách để mở rộng thêm các lý do trên mà tôi đã suy nghĩ từ lâu nay.

1. NHỮNG LÝ DO CỦA NGƯỜI SỬ DỤNG LAO ĐỘNG ỦNG HỘ HÔN NHÂN ĐỒNG GIỚI

Như phần trích dẫn ở trên cho thấy, trong đơn amicus mà các doanh nghiệp đệ trình trong các vụ kiện hôn nhân đồng giới tại Tòa án Tối cao Hoa Kỳ, cũng như trong các tuyên bố mà họ đã đưa ra liên quan đến việc công nhận hôn nhân ở các quốc gia khác, các doanh nghiệp nói chung hầu như chỉ nhấn mạnh đến vai trò của họ với tư cách là người sử dụng lao động. Do đó, tuyên bố ủng hộ của họ với hôn nhân đồng giới, một mặt bao gồm mong muốn tuyển dụng nhân tài và chuyển giao tài năng mà không có sự trở ngại hoặc phức tạp, xuyên qua các biên giới, cho dù là từ bang này sang bang khác hay từ nước này sang nước khác và tạm thời hay lâu dài[2], đồng thời mặt khác thể hiện mong muốn giảm thiểu gánh nặng hành chính của chính họ trong khi vẫn đảm bảo sự công bằng giữa các nhân viên[3]. Đơn amicus được đệ trình trong

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1 Brief of American Companies as Amici Curiae in Support of Respondents at 23, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144), 2013 U.S. S. Ct. Briefs LEXIS 1212.

2 Xem Brief of 379 Employees and Organizations Representing Employers as Amici Curiae in Support of [Obergefell] Petitioners at 33f, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 U.S. S. Ct. Briefs LEXIS 981 (liệt kê những bất lợi đối với "việc tuyển dụng và duy trì nhân viên" khi tìm cách thuê "ở những tiểu bang không cho phép cặp đồng tính kết hôn, hoặc yêu cầu nhân viên hiện tại chuyển đến các tiểu bang đó" nơi "các cuộc hôn nhân từ trước của họ sẽ không được công nhận, và nơi họ có thể mong đợi mất quyền tiếp cận một số lợi ích của nhà nước đã được hưởng trước đây").

3 Xem Brief of 278 Employees and Organizations Representing Employers as Amici Curiae in Support of Respondent Edith Schlain Windsor at 8 ff, U.S. v. Windsor, 133 S. Ct. 2675, 2013 U.S. S. Ct. Briefs LEXIS 1149 (giải thích rằng DOMA áp đặt "gánh nặng tuân thủ đối với người sử dụng lao động" "đến mức phức tạp về chi phí và hành chính không cần thiết, và bất kể… phán xét kinh doanh hoặc nghề nghiệp [đang] buộc họ phải đối xử với một lớp… nhân viên đã kết hôn hợp pháp khác với những người khác, khi… thành công phụ thuộc dựa trên phúc lợi và tinh thần của tất cả nhân viên").

vụ Obergefell thay mặt cho gần 400 tổ chức kinh doanh đã tóm tắt lập luận của các nhà tuyển dụng:

Các luật mang tính phân biệt đối xử ở cấp tiểu bang buộc các bên phải thực hiện chính sách không nhất quán trong các nền tài phán khác nhau mà chúng tôi hoạt động, mặc dù vậy, các nguyên tắc đã nêu của công ty chúng tôi hướng tới sự đa dạng và hòa nhập… Do đó, sự chắp vá của luật các tiểu bang áp dụng cho hôn nhân đồng giới làm phương hại đến lợi ích kinh doanh và quan hệ giữa người sử dụng lao động - người lao động của chúng tôi. Nếu Tòa án xác nhận quyết định dưới đây, các chi phí và sự bất định của luật hôn nhân tiểu bang không nhất quán sẽ được duy trì. Ngược lại, việc hủy bỏ các quyết định sẽ giảm thiểu chi phí, gánh nặng hành chính và cả việc chúng tôi[1] phải chuyển hướng nguồn lực từ các hoạt động kinh doanh cốt lõi.

Những gánh nặng hành chính sau đó được trình bày chi tiết trong đơn là những gánh nặng liên quan đến nhân viên, chẳng hạn như "đối phó với… hệ thống nhập cư khiến bạn đời đồng giới khó nhập cư"[2] và phản ứng với sự bất bình đẳng về thuế và lợi ích đối với những người trong các cuộc hôn nhân không được công nhận bằng "các cách đi vòng, áp đặt thêm một cách không cần thiết vào chi phí kinh doanh, trong khi vẫn không cải thiện việc phân biệt đối xử với nhân viên"[3].

Điều này, theo quan điểm khá hẹp của tôi, các lý do về kinh doanh ủng hộ hôn nhân đồng giới đã cho thấy bản thân chúng có sức hấp dẫn rộng rãi ở các nền tài phán thân thiện với doanh nghiệp khác, bao gồm cả Đài Loan, nơi mà khoảng một tháng trước thời hạn cuối tháng 5 năm 2019 để Tư pháp viện áp dụng các quyết định của Lập pháp viện để làm luật về hôn nhân đồng giới, một số công ty lớn nhất thế giới đã tham gia với các công ty có trụ sở tại Đài Loan để tán thành hôn nhân đồng giới, "không chỉ vì đó là điều đúng đắn phải làm", mà còn vì nó có thể khiến cả hai công ty và xã hội "mạnh mẽ hơn và thịnh vượng hơn"[4].

Tại Nhật Bản, Keidanren (Liên đoàn Doanh nghiệp Nhật Bản), 1 tổ chức có quyền lực mạnh mẽ, tuyên bố ủng hộ việc công nhận quyền LGBT vào năm 2017,

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1 Brief of 379 Employees and Organizations Representing Employers as Amici Curiae in Support of [Obergefell] Petitioners at 11-12, Obergefell v. Hodges, 135 S. Ct. 2584 (2015), 2015 U.S. S. Ct. Briefs LEXIS 981.

2 *Như trên* tr. 36.

3 *Như trên* tr. 40.

4 Các công ty không chỉ bao gồm Microsoft Đài Loan, người có phát ngôn viên Patrick Pan đã đưa ra tuyên bố được trích dẫn, mà còn có Google, Airbnb, Deutsche Bank, EY, Mastercard và 9 công ty khác. Xem Hugo Greenhalgh, *Multinationals see benefits in Taiwan same-sex marriage*, THOMPSON REUTERS (April 26, 2019), tại https://www.reuters.com/article/us-taiwan-lgbt-economy/multinationals-see-benefits-in-taiwan-same-sexmarriage-idUSKCN1S029C.

tiếp theo là Phòng Thương mại Hoa Kỳ tại Nhật Bản vào năm 2019, cảnh báo rằng, "sự chênh lệch về quyền hợp pháp giữa các cặp đôi dị tính và đồng tính", "khiến Nhật Bản trở thành một lựa chọn kém hấp dẫn hơn đối với các cặp đôi LGBT so với nhiều quốc gia khác đang cạnh tranh để có được tài năng tương tự"[1]. Tại thời điểm tháng 3 năm 2021, khi một tòa án Sapporo lần đầu tiên ra phán quyết ủng hộ quyền hiến định tại Nhật Bản đối với hôn nhân đồng giới, gần 150 công ty và tổ chức ở Nhật Bản, bao gồm cả Panasonic và Fujitsu, đã ký kết vào sáng kiến Doanh nghiệp vì bình đẳng trong hôn nhân[2], dẫn tới sự xuất hiện của các tiêu đề báo chí như "Doanh nghiệp Nhật Bản chào mừng phán quyết đột phá về hôn nhân đồng giới"[3].

2. MỞ RỘNG CÁC LÝ DO VỀ KINH DOANH ỦNG HỘ HÔN NHÂN ĐỒNG GIỚI

Trong nhiều thập kỷ, tôi đã tin chắc rằng các doanh nghiệp lớn và nhỏ có lợi ích hiệu quả hơn nhiều trong việc hỗ trợ công nhận hợp pháp hôn nhân đồng giới trong các nền tài phán mà họ làm hơn những gì họ đã tuyên bố. Trong khi đơn của người sử dụng lao động trong vụ Obergefell đã đúng khi nói rằng, "gánh nặng tổng hợp của chi phí hành chính và hậu quả thuế là đáng kể" thì đơn đó, theo quan điểm của tôi, bị đánh giá thấp "chi phí ước tính năm 2015 của sự bất bình đẳng hôn nhân đối với khối tư nhân [ở Hoa Kỳ] là 1,3 tỷ đô la"[4] bởi vì dường như đã hạn chế việc tính toán chi phí đối với những chi phí liên quan đến doanh nghiệp trong vai trò là người sử dụng lao động. Tuy nhiên, theo quan điểm của tôi, đề án được thực hiện để công nhận hôn nhân đồng giới là hiệu quả và tốt cho doanh nghiệp không nên chỉ dừng lại ở việc xem xét những gì liên quan đến nhân viên của doanh nghiệp đó.

Đối với nhiều loại hình kinh doanh, địa vị pháp lý của hôn nhân của khách hàng cũng liên quan như của nhân viên. Địa vị pháp lý của hôn nhân có thể quan trọng trong mọi loại của hợp đồng, từ những hợp đồng liên quan đến bất động sản (bao gồm mua, cho thuê, cho thuê lại hoặc thế chấp), bảo hiểm, ngân hàng, tư cách thành viên tổ

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1 Rurika Imahashi, *Marriage equality in Japan: finally within reach? In the only G-7 nation to prohibit same-sex unions, the mood is changing*, NIKKEI ASIA (April 28, 2021), *tại* https://asia.nikkei.com/Spotlight/The-BigStory/Marriage-equality-in-Japan-finally-within-reach.

2 Để biết thêm chi tiết, xem BME (BUSINESS FOR MARRIAGE EQUALITY) at https://bformarriageequality.net/.

3 Rurika Imahashi and Francesca Regalado, *Japan Inc. embraces landmark same-sex marriage ruling*, NIKKEI ASIA (March 18, 2021), *tại* https://asia.nikkei.com/Spotlight/Society/Japan-Inc.-embraces-landmark-same-sexmarriage-ruling.

4 Brief of 379 Employees and Organizations Representing Employers as Amici Curiae in Support of [Obergefell] Petitioners tr. 40, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 U.S. S. Ct. Briefs LEXIS 981.

chức[1], thậm chí cả hợp đồng cho thuê xe hơi[2]. Các từ bạn đời, đã kết hôn hoặc kết hôn có thể xuất hiện dưới dạng các điều khoản có hiệu lực trong bất kỳ hợp đồng nào, cho dù là do doanh nghiệp lựa chọn hay do quy định của chính phủ. Trong nhiều thập kỷ, các doanh nghiệp đã phải vật lộn với việc làm thế nào để giao dịch theo hợp đồng với khách hàng cũng như nhân viên trong các mối quan hệ đồng giới mà hôn nhân không phải là một lựa chọn khả dụng. Một số nỗ lực của họ để chỉ rõ những loại quan hệ nào đủ điều kiện tương đương với hôn nhân được cho là nực cười, như Đại học Florida đề xuất mở rộng quyền lợi cho bạn tình của nhân viên với điều kiện họ phải thực hiện một bản tuyên thệ tuyên bố rằng họ không chỉ có ý định duy trì với bạn tình vô thời hạn và mà có một số nghĩa vụ tài chính chung, nhưng họ cũng "có quan hệ không thuần túy trong 12 tháng trước đó". Khi truyền thông bắt đầu hỏi liệu điều này có thực sự có nghĩa là các bên phải cam kết rằng họ đang quan hệ tình dục hay không và cam kết như vậy sẽ được thực thi như thế nào, trường đại học đã nhanh chóng rút lui[3].

Khi một số chính phủ bắt đầu tạo cơ hội cho các cặp đồng giới được pháp luật công nhận nhưng không phải hôn nhân thì một loạt vấn đề khác đã nảy sinh đối với các doanh nghiệp. Đầu tiên, phải được xác định địa vị pháp lý nào (ví dụ như chung sống dân sự, kết hợp dân sự, chung sống, hiệp ước chung sống dân sự, kết hợp đã đăng ký, kết hợp lâu dài, quan hệ thụ hưởng có đi có lại, kết hợp lâu dài, quan hệ người lớn phụ thuộc lẫn nhau, chỉ nêu tên một số thuật ngữ tiếng Anh được sử dụng trong một hoặc nhiều nền tài phán) đủ tương đương với hôn nhân để dẫn đến hậu quả pháp lý như nhau, cả về vấn đề pháp lý hoặc quyết định kinh doanh. Sau đó, có thể cần phải sửa đổi ngôn ngữ hợp đồng để làm rõ những địa vị pháp lý bổ sung nào sẽ đủ điều kiện. Tất cả điều này có thể là một công việc cồng kềnh và tốn kém, đặc biệt là khi cùng một thuật ngữ có thể được liên kết với một nhóm quyền và nghĩa vụ hoàn toàn khác nhau giữa các nền tài phán và từ khoảng thời gian này sang khoảng thời gian

[1] Ví dụ, xem Koebke v. Bernardo Heights Country Club, 36 Cal. 4th 824 (2005) (cụ thể nỗ lực kéo dài hàng thập kỷ của một thành viên đồng tính nữ trong câu lạc bộ golf để có được đặc quyền hôn nhân cho bạn đời của cô ấy, được khởi xướng trước khi California công nhận cặp đôi, và cuối cùng đã thắng trong vụ kiện sau khi tiểu bang cho phép cả hai đăng ký làm bạn tình trong nước với tất cả các quyền của hôn nhân theo luật tiểu bang).

[2] Ví dụ như những người thuê xe từ Avis phải trả phí hàng ngày cho mỗi người lái xe ngoài người có tên trong hợp đồng thuê. "Vợ/chồng hoặc bạn đời có thể lái xe cho thuê mà không phải trả thêm phí" nhưng "[người đó] phải trả thêm phụ phí cho bạn bè và các thành viên trong gia đình muốn lái xe thuê với tư cách là một tài xế bổ sung". *Can I Add Another Driver to my Car Rental?*, AVIS, *tại* https://www.avis.com/en/help/usa-faqs/additional-driver.

[3] Xem Jack Stripling, *UF requirement for partner benefits: You must have sex*, GAINESVILLE SUN (Jan. 23, 2006), *tại https://www.gainesville.com/article/LK/20060120/News/604164525/GS.*

khác, đôi khi mô tả địa vị pháp lý về cơ bản giống với hôn nhân trong nền tài phán đó tại thời điểm đó, ở một địa vị pháp lý rất khác với hôn nhân[1].

Các quốc gia đã và đang tiếp tục có cùng một vấn đề. Ngay cả ngày nay, nhiều thập kỷ sau khi nhiều quốc gia Tây Âu bắt đầu công nhận hợp pháp cho các cặp đồng giới, tư pháp quốc tế vẫn còn tranh cãi khi phân loại địa vị pháp lý cụ thể sẵn có ở quốc gia A sẽ được quốc gia B trong Liên minh châu Âu ứng xử như thế nào. Vào năm 2013, Nghị viện Châu Âu đã đề xuất công nhận lẫn nhau về "các quan hệ kết hợp pháp lý khác nhau và các quyền của họ" như một phần trong nỗ lực tạo điều kiện thuận lợi cho việc di chuyển tự do của người lao động, nhưng luật cuối cùng đã không thông qua đề xuất sửa đổi này[2]. Như một nghiên cứu do Nghị viện Châu Âu ủy quyền đã báo cáo vào tháng 3 năm 2021, "điều bất thường là tất cả các quốc gia thành viên hiện phải công nhận người đồng giới là "một bên trong hôn nhân', nhưng "người đã đăng ký" đồng giới có thể bị (ít nhất) 6 quốc gia thành viên không công nhận"[3].

Chắc chắn luật hôn nhân cũng khác nhau về nhiều điểm giữa các nước, nhưng "sự công nhận quốc tế dễ dàng hơn nhiều đối với hôn nhân (mà mọi quốc gia đều có, dưới hình thức này hay hình thức khác)"[4]. Do đó, để cắt giảm thủ tục giấy tờ, sự bất định và phức tạp khác đối với chính phủ và cho các tổ chức tư nhân và để tạo điều kiện cho những người khác thừa nhận địa vị quan hệ, một quốc gia được khuyến cáo đạt được hiệu quả bằng cách sử dụng thuật ngữ hôn nhân thừa nhận địa vị quan hệ hợp pháp, khả dụng cho các cặp đôi đồng giới.

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1 Ví dụ về cách hai thuật ngữ khác nhau được sử dụng bởi hai nền tài phán khác nhau trong một số trường hợp có thể có hậu quả pháp lý giống hệt nhau, trong khi cùng một thuật ngữ có thể được liên kết với một loạt hậu quả pháp lý khác nhau trong một nền tài phán theo thời gian, hãy xem xét thuật ngữ "chung sống" theo luật của California. Khi lần đầu tiên được giới thiệu bởi các thành phố California, nó không có ý nghĩa pháp lý; khi được tiểu bang thông qua, ban đầu nó hàm chứa một số quyền nhỏ, nhưng đến năm 2004 về cơ bản nó tương đương với hôn nhân nhưng về tên gọi và thậm chí chính xác hơn là tương đương với cái mà luật Vermont gọi là kết hợp dân sự. Xem *Marriage Licenses* tr. 1775.

2 Ruth Lamont, *Registered Partnerships in European Union Law*, in THE FUTURE OF REGISTERED PARTNERSHIP: FAMILY RECOGNITION BEYOND MARRIAGE (2017) 497, 509.

3 Alina Tryfinidou and Robert Wintemute, *Obstacles to the Free Movement of Rainbow Families in the EU*, EUROPEAN PARLIAMENT THINK TANK (Oct. 3, 2021), *tại* https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2021)671505.

4 Kenneth McK. Norrie, *Registered Partnership in Scotland* in THE FUTURE OF REGISTERED PARTNERSHIP: FAMILY RECOGNITION BEYOND MARRIAGE (2017) tr. 250 (lập luận về sự thay đổi sắp xảy ra trong luật Scotland "trong chừng mực thuật ngữ là quan trọng, thì quan hệ đã đăng ký đó phải được gọi là "hôn nhân" một khi hôn nhân trở nên "cởi mở bình đẳng cho tất cả… không phân biệt giới").

D. NGUYÊN TẮC NUMERUS CLAUSUS VÀ SỰ HIỆU QUẢ CẮM LÀ CHẠY CỦA HÔN NHÂN

Theo quan điểm mà tôi đã đưa ra trong bài viết này, tập trung vào các thực tiễn của việc thừa nhận pháp lý, đối với tôi, dường như không phải là "bất thường", mà là dễ đoán và có thể giải thích được rằng "một bên" đồng giới có nhiều quyền tiếp cận phổ quát được các nước thành viên EU công nhận hơn là một bên đã đăng ký. Khái niệm pháp lý mang tính lý thuyết về numerus clausus, hay người Đức gọi là *Typenzwang*, có thể hữu ích ở đây. Được phát triển trong hệ hình của luật tài sản, nhưng cũng có thể áp dụng để phân tích luật gia đình và luật tổ chức doanh nghiệp, nguyên tắc numerus clausus gợi ý rằng mặc dù có thể có vô số loại hợp đồng, "luật sẽ chỉ thực thi những lợi ích phù hợp, với tư cách là tài sản và một số hình thức tiêu chuẩn nhất định"[1]. Các nhà lý thuyết thuộc trường phái luật và kinh tế đã trình bày rõ ràng nhiều cách giải thích và biện minh cho hạn chế này, nhưng nhìn chung lập luận là "numerus clausus có chức năng thúc đẩy tiêu chuẩn hóa tối ưu các quyền tài sản"[2].

Tiêu chuẩn hóa tối ưu như thế nào đối với các quan hệ gia đình đang được tranh cãi trong nhiều nền tài phán. Nhưng trước nguy cơ khái quát hóa quá mức, tôi cho rằng gần đây đã có một số điều khoản cứng nhắc để công nhận chung sống của người lớn, trong đó hôn nhân thường là hình thức pháp lý được công nhận duy nhất mà các quan hệ như vậy có thể có trong một hệ thống pháp luật nhất định, và chỉ một hình thức hôn nhân thường dành cho một cặp vợ chồng nhất định[3]. Ngay cả việc sử dụng hợp đồng, tình trạng pháp lý đã nói ở trên, cũng không phải là một lựa chọn, bởi vì hợp đồng giữa những người chung sống chưa kết hôn cho đến gần đây vẫn được coi là "hào nhoáng", có nghĩa là giống như một hợp đồng mại dâm và do đó nói chung là không thể thực thi và thực sự có thể là tội phạm[4].

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1 Thomas W. Merrill and Henry E. Smith, O*ptimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3 (2000). Merrill và Smith là một trong những người ủng hộ và bảo vệ nguyên tắc numerus clausus đối với tài sản trong nghiên cứu luật và kinh tế Anh ngữ, nhưng họ thừa nhận rằng khái niệm này đã được phát triển sớm hơn nhiều trong luật và nghiên cứu pháp lý của Đức. Tlđd tr. 4 số 6 (trích dẫn khái niệm của Bộ luật Dân sự Đức về tài sản và một số bình luận, bản văn về chủ đề này từ cuối thế kỷ 19 đến sau một thiên niên kỷ).

2 Xem Thomas W. Merrill and Henry E. Smith, O*ptimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4, 38 (2000).

3 Các hệ thống pháp luật như của Ấn Độ và Israel, nơi hôn nhân là một vấn đề của luật nhân thân và được điều chỉnh bởi quy chế của nhóm tôn giáo mà một người thuộc về, có thể quy định nhiều loại hôn nhân.

4 Xem Mary Anne Case, *Pets or Meat?*, 80 CHI. KENT L. REV 1129, 1141 (2005) (giải thích về sự phát triển của thuật ngữ "quan hệ hào nhoáng"). Xem Frederik Swennen, PRIVATE ORDERING IN FAMILY LAW: A GLOBAL PERSPECTIVE IN CONTRACTUALISATION OF FAMILY LAW - GLOBAL PERSPECTIVES 1, 8 (Springer 2015, ed. Frederick Swennen) ("Nguyên tắc *numerus clausus* đối với việc tạo thành gia đình từ lâu đã ảnh hưởng đến hiệu lực của hợp đồng giữa các bên chung sống liên quan đến quyền và nghĩa vụ tài chính của họ. Những hợp đồng như vậy được coi là trái ngược [*contra bona mores*] hơn vì họ sẽ tổ chức quan hệ tình dục ("*pretium stupri*")).

Tôi sẽ xem xét bên dưới những cách thức và địa điểm mà điều khoản dành cho quan hệ kết hợp trưởng thành đã mở rộng ra ngoài hôn nhân, nhưng bây giờ tôi nhìn nhận những ưu thế hiệu quả khi tiếp tục sử dụng và trao cho các cặp đồng giới địa vị pháp lý dễ nhận biết hơn trên toàn cầu của "hôn nhân" và "một bên". Để tóm lại thực trạng của pháp luật mà tôi đã mô tả ở trên: trong hầu hết các hệ thống pháp luật, hôn nhân giống như mạng lưới các hợp đồng từ bên trong, nhưng vẫn giống như địa vị từ bên ngoài, nhà nước và các chủ thể tư có thể nhận biết được. Chức năng kết hôn ít nhiều giống như một chiếc hộp đen[1], do nhà nước may sẵn. Một cặp đôi đăng ký kết hôn có thể tùy chỉnh nội thất của hộp đen ở nhiều chiều cạnh. Tuy nhiên, hình thức và địa vị của nó vẫn có thể nhận biết được từ bên ngoài, không chỉ bởi nhà nước và các chủ thể tư, mà còn bởi các quốc gia và hệ thống pháp luật khác[2]. Hơn nữa, ở một mức độ thấp hơn, địa vị pháp lý của hôn nhân ở một quốc gia này là hộp đen đối với các quốc gia khác - ở biên giới, họ công nhận một cặp đôi đã kết hôn mà không đi sâu vào chi tiết các thủ tục hôn nhân cụ thể hoặc chi tiết về chế độ tài sản hôn nhân.

Mặc dù hiểu biết hạn chế của tôi về thuật ngữ máy tính có thể dẫn đến việc mượn thuật ngữ trở nên sai lệch, nhưng tôi cho rằng hôn nhân trên thế giới ngày nay giống như địa vị pháp lý cắm là chạy. Chỉ là một thiết bị cắm là chạy hoặc các chế độ phần mềm trên toàn quốc, nhưng không phải là sự lựa chọn cho cặp đôi nhất định và cực kỳ phức tạp đối với các cặp đôi liên tôn, một trong hai bên có thể được yêu cầu hoặc được coi là đã chuyển đổi sang tôn giáo của bên kia. Ví dụ, ở Ấn Độ, hôn nhân của phụ nữ Ấn Độ giáo với đàn ông Hồi giáo, đôi khi bị coi là tà đạo dưới cái tên "thánh chiến tình yêu" - là chủ đề của pháp luật địa phương thù địch và sự can thiệp tư pháp, nhưng ít nhất đã được giải thiêng trong phán quyết gần đây của Tòa án Tối cao Ấn Độ[3].

Chỉ cần được kết nối với máy tính để hoạt động mà không cần hành động bổ sung, chẳng hạn như cấu hình thủ công và cũng không cần người dùng có kiến thức về phần

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1 Ở nhiều quốc gia, mức độ và lý do mà pháp luật sẽ mở hộp đen can thiệp vào hôn nhân đã thay đổi hoàn toàn trong thế kỷ trước, thường là vì hiến pháp và tư tưởng nữ quyền. Ví dụ như các hoạt động được bảo vệ trước đây như tình cảm hai người hoặc hiếp dâm một người thường được coi là thuộc quyền và nghĩa vụ của nhà nước phải can thiệp để kiểm soát, trong khi các hoạt động tình dục khác, như sử dụng các biện pháp tránh thai được bảo vệ. Xem Griswold v. Connecticut 381 U.S. 479 (1965) (cho rằng sẽ là hành vi xâm phạm vi hiến đối với quyền riêng tư của hôn nhân nếu nhà nước hình sự hóa việc sử dụng các biện pháp tránh thai của một cặp đôi đã kết hôn).

2 Mặc dù vậy, khác với doanh nghiệp, việc kết hôn không được coi là pháp nhân.

3 Xem A New Law In India Is Making It Harder For Interfaith Couples To Get Married, NPR (Sept. 10, 2021), tại https://www.npr.org/2021/09/14/1037096376/a-new-law-in-indiais-making-it-harder-for-interfaith-couples-to-get-married. Shafin Jahan v. Ashokan K.M., Crl.A 366/2018 (phát sinh từ SLP (Crl.) 5777/2017) (vụ án hôn nhân Hadiya, trong đó Tòa án Tối cao Ấn Độ đã đảo ngược việc hủy bỏ hôn nhân giữa một người đàn ông Hồi giáo và một phụ nữ Ấn Độ giáo đã chuyển sang đạo Hồi của tòa án cấp dưới).

cứng máy tính. Vì vậy, "hôn nhân" và "một bên" là các thuật ngữ chỉ địa vị pháp lý có thể được gắn vào vô số các hợp đồng tư, pháp luật và quy định của mọi ngôn ngữ, quốc gia và hệ thống pháp luật trên thế giới ngày nay và nói chung, hoạt động trơn tru như chế định luật. Vẫn có sự khác biệt căn bản giữa các quy tắc pháp lý và các vấn đề về địa vị pháp lý của hôn nhân giữa các quốc gia và giữa các hệ thống pháp luật (ví dụ như quy tắc về tuổi nhập cảnh, điều kiện xuất cảnh, chế độ tài sản hôn nhân, tính khả dụng và yêu cầu để được hưởng lợi ích nhất định theo pháp luật) cũng như có sự khác biệt giữa việc vận hành nội bộ của các thiết bị cắm là chạy. Nhưng những khác biệt này không cản trở khả năng tương tác, một phần không nhỏ bởi vì các từ "hôn nhân" và "một bên" được sử dụng phổ quát và hiện đã hệ hình cho ý nghĩa của các từ này như là thuật ngữ pháp lý trên toàn thế giới. Ngoại lệ chứng minh cho quy tắc này là hôn nhân đa thê, vốn khó được thừa nhận bên ngoài các quốc gia và hệ thống pháp luật đã ban hành trong nhiều thế kỷ. Như một vấn đề mang tính mô tả, tôi cho rằng những trở ngại đối với việc thừa nhận chế độ đa thê trong pháp luật ít nhất là do những phức tạp pháp lý được đặt ra như rào cản đạo đức[1].

Không có thuật ngữ nào khác mà theo đó các quan hệ tương tự như hôn nhân được thừa nhận ngày nay trong bất kỳ hệ thống pháp luật nào đã đạt được bất cứ điều gì giống như khả năng di động cắm là chạy của hôn nhân và chúng quá nhiều và đa dạng để bất kỳ ai có thể tiệm cận trong thời gian sớm nhất.

Nhiều người đã đề xuất rằng thuật ngữ hôn nhân dành riêng cho thiết chế tôn giáo, nhưng có một số lý do lớn để không làm như vậy[2]. Một là có nguy cơ gây nhầm lẫn

[1] Do đó, trong án lệ cổ điển từ chối công nhận ngay cả một cuộc hôn nhân Mormon đa thê có khả năng xảy ra, Hyde v. Hyde and Woodmansee, [L.R.] 1 P. & D. 130 (1866), tòa bắt đầu với tiền đề "tất cả những gì mà Tòa án của một quốc gia phải xác định là liệu có hay không thứ gọi là hôn nhân - mối quan hệ đã biết của người, kết hợp mà các Tòa án đó quen thuộc và biết cách giải quyết - đã được ký hợp đồng hợp lệ ở quốc gia khác mà các bên tuyên bố sẽ tự ràng buộc mình hay chưa" *Như trên,* tr. 134, cho rằng hôn nhân "tạo ra các quyền và nghĩa vụ lẫn nhau, như tất cả các hợp đồng đều làm, nhưng ngoài ra nó còn thể hiện địa vị. Vị trí hoặc địa vị của "chồng" và "vợ" được công nhận trong toàn bộ Kitô giáo: pháp luật của tất cả các quốc gia Cơ đốc giáo quy định về địa vị đó một loạt vấn đề pháp lý" *Như trên* và kết luận rằng "rõ ràng là luật hôn nhân của đất nước này được điều chỉnh cho phù hợp với hôn nhân Cơ đốc, và nó hoàn toàn không thể áp dụng cho chế độ đa thê". *Như trên,* tr. 135. Tôi nhấn mạnh một lần nữa rằng cơ sở đủ để tòa án Anh không công nhận hôn nhân đa thê vì tòa giải thích đó là sự phức tạp của các quy tắc pháp lý mà hệ thống pháp luật Anh chưa sẵn sàng xử lý và sẽ phải tạo ra để giải quyết hôn nhân đa thê. Về điều này, chế độ đa thê hoàn toàn không giống như hôn nhân đồng giới, ngược lại, chế độ này cực kỳ dễ thực hiện theo luật định và quan liêu, bất kể sự phản đối về mặt đạo đức hoặc chính sách nào mà nó có thể gây ra.

[2] Một phần của lập luận cho điều này là sự nhầm lẫn giữa hôn nhân tôn giáo và dân sự dẫn đến những truyền thống đức tin phản đối hôn nhân đồng giới, đặc biệt nếu họ không có truyền thống luật tôn giáo mạnh mẽ về việc thực thi và phân xử tình trạng hôn nhân, có nguyên nhân cụ thể để chống lại sự công

cho những người tham gia một buổi lễ tôn giáo về giá trị pháp lý của nhà nước hoặc luật tục. Vì lý do này, Đạo luật Lord Hardwicke ở Anh vào thế kỷ 18 đã coi việc giáo sĩ tiến hành hôn nhân mà không tuân thủ các thủ tục pháp lý trước tiên là tội phạm[1] (và ngày nay các bang ở Hoa Kỳ cũng làm như vậy); vì lý do này cần phải có giấy đăng ký kết hôn, để cấp phép cho viên chức văn thư[2]. Tương tự, những nước như Đức, mặc dù có mức độ phối kết hợp khá cao giữa nhà thờ và nhà nước, vẫn có sự phân biệt rõ ràng giữa việc kết hôn dân sự và tôn giáo; luật quy định rằng hôn nhân dân sự phải được thực hiện trước tôn giáo và bản thân hôn nhân tôn giáo không có hiệu lực dân sự[3]. Tương tự, Vương quốc Anh và nhiều quốc gia thuộc Khối thịnh vượng chung đang tìm kiếm giải pháp cho các vấn đề khi một tỷ lệ phần trăm đáng kể dân số Hồi giáo đã kết hôn của họ tham gia lễ kết hôn nikah, hoặc lễ kết hôn tôn giáo Hồi giáo, mà không đăng ký kết hôn với nhà nước và thường không nhận thức được rằng điều này có nghĩa là hôn nhân không có giá trị pháp lý dân sự[4]. Một lý do khác để giữ thuật ngữ hôn nhân đối với thể chế và pháp luật tôn giáo, sẽ được thảo luận thêm dưới đây, là các cặp đôi không có quan hệ tôn giáo ngày càng có vẻ muốn có cùng sự thừa nhận tượng trưng từ hôn nhân do nhà nước bảo trợ như các tôn giáo thể hiện trong đức tin của những người kết hôn, và những cặp đôi này theo đó sẽ mạnh mẽ phản đối việc tước bỏ thuật ngữ quan trọng mang tính biểu tượng này.

Từ chiều cạnh hiệu quả, có lẽ lý do quan trọng nhất để giữ thuật ngữ hôn nhân trong tôn giáo là vì thuật ngữ hôn nhân đã trở nên phổ biến và dễ hiểu trong luật tục.

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nhận của nhà nước đối với hôn nhân đồng giới. Ngược lại, một số có thể ít phản đối việc nhà nước công nhận các cặp đồng tính dưới tên gọi hợp danh hoặc liên minh dân sự. Để thảo luận thêm về các cách thức mà một số tôn giáo đã phụ thuộc vào tiểu bang để thực thi các quy tắc hôn nhân tôn giáo của họ, hãy xem Mary Anne Case, *The Peculiar Stake U.S. Protestants Have in the Question of State Recognition of Same-Sex Marriages*, *in* AFTER SECULAR LAW 303-21 (Winnifred Fallers Sullivan ed., 2011).

1 Xem Act for the Better Preventing of Clandestine Marriages, 1753, *26 Geo. 2,* ch. 33 (Eng.).

2 Xem Mary Anne Case, *The Peculiar Stake U.S. Protestants Have in the Question of State Recognition of Same-Sex Marriages*, *in* AFTER SECULAR LAW 303-321 (Winnifred Fallers Sullivan ed., 2011).

3 Xem FAMILY LAW IN EUROPE 297 (Carolyn Hammond & Alison Perry eds., 2d ed. 2002).

4 Harriet Sherwood, *Most women in UK who have Islamic wedding miss out on legal right*, THE GUARDIAN (Nov. 20, 2017), *tại* https://www.theguardian.com/world/2017/nov/20/women-uk-islamic-wedding-legalrights-civil-ceremony-marriage (Chi tiết của một cuộc khảo sát chỉ ra rằng, hơn 60% phụ nữ đã tổ chức lễ cưới theo nghi lễ truyền thống của người Hồi giáo không phải trong các cuộc hôn nhân được pháp luật công nhận, mặc dù hầu hết những phụ nữ này đều mong muốn và mong đợi cuộc hôn nhân của họ được công nhận và nhiều người sau này phải đối mặt với các vấn đề vì không phải như vậy). Russell Sandberg, The House of Lords on marriages and sharia law, Law & Religion UK, 24 October 2019 tại https://lawandreligionuk.com/2019/10/24/the-house-of-lords-on-marriages-and-sharia-law/ (mô tả phản ứng của Hạ viện đối với khuyến nghị trong một cuộc đánh giá độc lập vào tháng 2 năm 2018 về việc áp dụng luật sharia ở Anh và xứ Wales rằng đã tạo ra một tội hình sự "hành vi phạm tội áp dụng cho những người nổi tiếng trong các cuộc hôn nhân tôn giáo không trao quyền hợp pháp") .

Sự khác biệt đáng kể trong quan niệm của các tôn giáo khác nhau về hôn nhân và trong luật hôn nhân của các quốc gia và tiểu bang khác nhau. Nhưng, ngoại trừ chế độ đa thê ở trên, chúng thường không làm phức tạp việc thừa nhận hôn nhân xuyên biên giới hoặc sử dụng thuật ngữ hôn nhân như một thuật ngữ cắm là chạy trong hợp đồng và văn bản pháp lý khác xuyên biên giới. Nếu thuật ngữ hôn nhân bị loại bỏ trong các tôn giáo và do đó thế giới luật tục (từ các nước đến các tổ chức tư) phải tìm một thuật ngữ khác định chế mà trước đây là hôn nhân, thì khó khăn là rất lớn trong việc quy định thuật ngữ và đảm bảo việc áp dụng phổ quát và nhất quán. Chẳng hạn, người ta sẽ phải nghiên cứu sâu hơn về luật của Đài Loan để khám phá quan hệ quy định tại Điều 2 là gì[1]. Vì vậy, có vẻ như điều có lợi cho quan hệ như vậy thường được hình dung là bên trong cũng như bên ngoài như hôn nhân, mặc dù hôn nhân đồng giới. Nói một cách tổng quát hơn, việc sử dụng thuật ngữ "hôn nhân dân sự" một cách đơn giản và nhất quán để dẫn chiếu đến đại vị được công nhận trong luật tục và giải quyết được rất nhiều sự nhầm lẫn mang tính tôn giáo trên toàn thế giới.

E. ƯU THẾ HIỆU QUẢ CỦA LY HÔN

Cặp đôi đồng tính đầu tiên đưa vụ việc của họ lên Tối cao Pháp viện Hoa Kỳ là Jack Baker và Michael McConnell, vẫn ở bên nhau hơn 50 năm sau (và vẫn đang kiện để hôn nhân của họ được công nhận đầy đủ sang một thiên niên kỷ mới)[2]. Như đã thảo luận ở trên, cuộc hôn nhân của Sullivan với Adams kéo dài hơn 40 năm cho đến khi Adams qua đời. Nhưng các nguyên đơn trong án lệ lần đầu tiên để hôn nhân đồng giới được công nhận hợp pháp ở một bang của Hoa Kỳ, cặp đôi Hillary và Julie Goodridge ở Massachusetts, đã ly hôn vào năm 2009 sau gần 20 năm nhưng chỉ có 5 năm hôn nhân. Tuy nhiên, có lý do chính đáng để Chánh án Margaret Marshall đưa ra luận điểm trong vụ *Goodridge* để liệt kê quyền tiếp cận "việc phân chia tài sản hôn nhân một cách công bằng khi ly hôn [và] quyền cấp dưỡng tạm thời và vĩnh viễn" như một trong số nhiều "quyền lợi khổng lồ… chỉ có thể tiếp cận thông qua giấy đăng ký kết hôn"[3]. Theo Hillary Goodridge, "tiếp cận với sự bảo vệ thông qua việc ly hôn cũng quan trọng như việc có thể kết hôn". Cô ấy giải thích trong một cuộc phỏng vấn trên

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[1] Vì Điều 2 của Đạo luật Thực thi của Bộ Tư pháp trong Diễn giải số 748 cho phép "hai người đồng giới có thể quản lý cuộc sống cùng nhau, có sự kết hợp vĩnh viễn, thân mật và độc quyền" và vì phần còn lại của Đạo luật, ví dụ trong việc đặt ra các quy tắc cho việc áp dụng bộ luật được đề cập trở lại "quan hệ được ký kết theo Điều 2".

[2] McConnell v. United States, No. CIV.04-2711, 2005 WL 19458, 1-3 (D. Minn. Jan. 3, 2005) (vụ kiện liên quan đến việc đệ trình hoàn trả thuế chung).

[3] Goodridge v Dept. of Public Health, 798 N.E.2d 941, 955-6 (Mass. 2003).

truyền hình khi ngồi trên chiếc ghế dài bên cạnh người yêu cũ và đứa con hiện đã lớn, người đã thúc giục họ kết hôn[1], "ly hôn nghĩa là có những quy tắc… Vào thời điểm bạn điên rồ nhất, ly hôn cho bạn một cấu trúc và một quy trình và những người khác sẽ giúp bạn tháo gỡ điều này một cách công bằng nhất có thể".

Ly hôn là một khía cạnh khác của hôn nhân mà tôi nghĩ có giá trị để xem xét dưới góc độ hiệu quả hơn là từ quan điểm đạo đức truyền thống. Đây thực sự là một bước ngoặt mà luật đã tạo ra ở Hoa Kỳ, Đài Loan và các nước khác. Tôi nghĩ việc so sánh sự phát triển của luật ly hôn với luật phá sản doanh nghiệp hoặc doanh nghiệp mang tính khai sáng. Đối với ly hôn và phá sản, khung pháp lý thực sự mang nặng tính đạo đức và trừng phạt đã được phát triển để tập trung vào việc sử dụng thuật ngữ "hôn nhân", người ta có thể cho rằng địa vị của một cặp đồng tính ở Đài Loan là địa vị pháp lý "quan hệ tại Điều 2", chứ không phải là hôn nhân[2].

Quan niệm thất bại là điều đáng xấu hổ, tuy nhiên, có thể vẫn ăn sâu vào quy phạm xã hội gắn liền với kinh doanh hoặc ly hôn, không còn là một phần của pháp luật trong những lĩnh vực này. Nhà tù, nghi lễ công cộng[3] và chế tài nặng nề về tài chính không còn áp dụng với những người không thể trả nợ hoặc những người không thể giữ lời thề trong hôn nhân. Cả việc phá sản và ly hôn đều rất có thể xảy ra - chỉ bằng chứng về lỗi cụ thể mới có thể cho phép người phối ngẫu bị phản bội đòi ly hôn, vì vậy đơn kiện vỡ nợ chỉ có thể được đưa ra bởi một chủ nợ có thể xác nhận rằng con nợ đã vi phạm một hoặc nhiều "hành vi phá sản" theo luật định[4]. Cả người phối ngẫu có tội

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[1] Cả hai hình thức công nhận mang tính biểu tượng và thực tế đều là nguồn gốc khiến con gái họ khiến Goodridges tìm kiếm hôn nhân hợp pháp. Khi được sinh ra, cả cô và mẹ ruột Julie đều bị biến chứng và phải được chăm sóc đặc biệt, khiến Hillary "mắc kẹt trong phòng chờ của bệnh viện… không có mối quan hệ pháp lý nào với một trong hai người,… không thể đến thăm hoặc ra quyết định y tế". Và khi cô ấy lên ba, cô ấy hỏi cặp đôi là "Nếu hai người yêu nhau, vậy tại sao hai người không kết hôn?"

[2] Xem Chao-Ju Chen, *A Same-sex Marriage that is Not the Same: Taiwan's Legal Recognition of Same-sex Unions and Affirmation of Marriage Normativity*, 20 AUSTL. J. OF ASIAN L., Article 5, 1 (2019).

[3] Ví dụ về một số hình phạt xấu hổ được áp dụng trước đó đối với những con nợ mất khả năng thanh toán, bao gồm cả việc cưỡng bức khỏa thân ở quảng trường công cộng. Xem James Q. Whitman, The *Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841, 1873-1883 (1996).

[4] Thảo luận về những cấu thành trong sự phát triển của luật phá sản liên quan đến so sánh của tôi với ly hôn, xem Douglas G. Baird, *Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Creditor Law*, 73 U. CHI L. REV. 17, 21-31 (2006); Bruce H. Mann, REPUBLIC OF DEBTORS 228 ff. (2002); Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 STAN. L. REV. 3, 34-39 *(1986).* Tôi biết ơn Douglas Baird vì sự hỗ trợ nhiệt tình để tôi có thể phát triển sự so sánh này.

và con nợ đều không thể nộp đơn yêu cầu, mặc dù một số đơn thỉnh cầu là kết quả của sự hợp tác hoặc thông đồng giữa con nợ và chủ nợ hoặc giữa hai bên trong hôn nhân[1].

Nói chung, lỗi cho việc ly hôn hay các hành vi phá sản cụ thể đều không buộc phải có đơn khởi kiện. Mục đích của luật phá sản không phải là giảm thiểu số vụ phá sản mà là để thấy rằng tài sản được đưa vào sử dụng hiệu quả, để thấy rằng doanh nghiệp không thành công sẽ phá sản một cách nhanh chóng với mức tối thiểu, doanh nghiệp có cơ hội thành công được cấp thời gian và sự linh hoạt mà họ có thể cần để thành công. Vì vậy, những thay đổi cần thiết đã được thực hiện, luật phá sản ra đời với luật ly hôn. Tài sản được đề cập trong hôn nhân bao gồm năng lực tình dục, sinh sản và gia đình của một cặp đôi, cũng như tài sản và thu nhập của họ, và việc tái hôn ngày nay được tạo điều kiện thuận lợi hơn ở những nơi đã từng bị cấm hoặc bị phạt. Không phải ngẫu nhiên mà ngày nay khái niệm "khởi đầu mới" lại phổ biến trong cả phá sản và ly hôn[2].

III. GIỚI HẠN CỦA PHÉP LOẠI SUY GIỮA HÔN NHÂN VÀ DOANH NGHIỆP?

Vào thập niên 1990, khi tôi mới bắt đầu suy ngẫm về tương lai của luật hôn nhân, luật ly hôn ở Hoa Kỳ đã phát triển tương tự như luật phá sản doanh nghiệp như ở trên. Đây là một trong nhiều lý do sau đó tôi dự đoán rằng địa vị pháp lý của hôn nhân sẽ tiếp tục phát triển dần dần theo một quỹ đạo tương tự như địa vị pháp lý của doanh nghiệp theo luật Anh - Mỹ trong suốt mấy thế kỷ qua[3]. Tôi thấy như sau:

"Với cả hôn nhân và doanh nghiệp, thế kỷ thứ 18 là một cột mốc, khi đó nhà nước nỗ lực nhiều nhất để khẳng định quyền kiểm soát độc quyền đối với cả hai định chế… Trong trường hợp của doanh nghiệp, nỗ lực đó nhanh chóng được thừa nhận là thất bại. Nhà nước sau đó bám vào mạng lưới hợp đồng tư mà vốn từng chống lại. Kết quả cuối cùng là sự kiểm soát của nhà nước nhiều hơn so với một thế giới hoàn toàn do tư nhân đặt hàng, nhưng linh hoạt hơn nhiều so với thể chế ban đầu do nhà nước bảo trợ.

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[1] Thật vậy, những trường hợp khét tiếng về sự thông đồng giữa hai bên muốn ly hôn nhưng không có căn cứ chính đáng để làm như vậy là một trong những yếu tố thúc đẩy cải cách ly hôn không có lỗi. Để biết mô tả về một số âm mưu thông đồng điển hình, xem Nelson Manfred Blake, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 190199 (1962).

[2] Khi đưa ra nhận xét mang tính mô tả này, tôi không có ý tán thành mức độ đầy đủ mà sự mong muốn được nhận thức về một khởi đầu mới sẽ thông báo cho luật ly hôn và do đó cũng không bác bỏ nhiều đề xuất cải cách đáng suy nghĩ của nữ quyền. Xem Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994).

[3] Tôi đã đưa ra một số dự đoán này, cùng với phân tích về lịch sử phát triển của luật, trong một bài báo làm việc chưa được xuất bản được tạo ra với sự cộng tác của đồng nghiệp tại Trường Luật, Đại học Virginia. Mary Anne Case and Paul Mahoney, The Role of the State in Corporations and Marriage (1996).

Hôn nhân ở thời điểm chuyển giao thiên niên kỷ dường như là nơi doanh nghiệp đã có mặt ở thế kỷ 19 và một tầm nhìn lạc quan cho tương lai là hôn nhân đi theo quỹ đạo của luật doanh nghiệp, bám vào đối thủ cạnh tranh bằng cách tiệm cận một hệ thống các quy tắc mặc định trong đó các cặp đôi có thể cấu trúc cuộc sống của chính họ. Việc thừa nhận các cặp đồng tính tham gia hôn nhân dân sự có thể là dấu mốc quan trọng trong đi theo quỹ đạo đó[1].

Ở mức độ này, tôi đã đưa ra dự đoán. Tôi đã đúng khi xem sự phát triển của luật hôn nhân giống như sự phát triển của sự kết hợp nói chung. Một mặt, việc liên doanh không cần sự phê chuẩn của doanh nghiệp nhà nước để thực hiện một số hoạt động đặc biệt có giá trị pháp lý[2], vì vậy, một người không cần phải kết hôn hợp pháp để quan hệ tình dục hợp pháp hoặc sinh con hợp pháp. Luật doanh nghiệp nói chung cho phép một doanh nghiệp được thành lập mà không cần điều lệ từ cơ quan lập pháp. Những người kết hợp không còn phải giới hạn bản thân trong một mục đích kinh doanh hoặc doanh nghiệp đã đăng ký. Tương tự, pháp luật ở hầu hết các nước không giới hạn mục đích kết hôn của một cặp đôi - những cặp đôi không thể hoặc không muốn có con hoặc thậm chí quan hệ tình dục nói chung vẫn được tự do kết hôn[3].

Ít nhất là ở Hoa Kỳ, hôn nhân thỏa hiệp với đối thủ cạnh tranh - trong khi các cặp đôi được tạo cơ hội lớn hơn cho hợp đồng tư có hiệu lực thi hành, thì có rất ít lựa chọn thay thế địa vị pháp lý có sẵn trong luật tiểu bang và hầu hết chúng không khác biệt đáng kể so với hôn nhân trong bất cứ điều gì ngoài thuật ngữ[4]. Nhưng tôi cũng dự đoán rằng, cũng giống như nhà nước hiện đưa ra nhiều hình thức mà người ta có thể kinh doanh, bao gồm nhiều hình thức giống như địa vị pháp lý, mỗi hình thức có các quy tắc may sẵn[5], và nhìn chung đã trở nên thờ ơ với hình thức mà bất kỳ doanh nghiệp cụ

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1 Marriage Licenses.

2 Ví dụ, để khám phá Đông Ấn, như Vương quốc Anh đã thuê Công ty Đông Ấn để làm độc quyền trong thời kỳ đầu hiện đại. Xem Frank Evans, *The Evolution of the English Joint Stock Limited Trading Company*, 8 Columbia L. Rev. 339, 342, ff (1908).

3 Ví dụ, trong vụ Goodridge, án lệ đầu tiên ở Massachusetts đưa hôn nhân đồng giới đến với một bangcuar Mỹ, tòa án tuyên bố rằng "lợi ích của tiểu bang trong việc điều chỉnh hôn nhân dựa trên quan niệm truyền thống rằng mục đích chính của hôn nhân là sinh sản "đã sai". Theo đa số thẩm phán: Luật hôn nhân dân sự của chúng ta không cho phép quan hệ tình dục khác giới sinh sản giữa những người đã kết hôn trên mọi hình thức thân mật của người lớn và mọi phương thức khác để tạo dựng một gia đình. Điều 207 [Luật chung] General Laws không có yêu cầu rằng những người xin giấy phép kết hôn phải chứng thực khả năng hoặc ý định mang thai con cái của họ. Khả năng sinh sản không phải là điều kiện của hôn nhân, cũng không phải là căn cứ để ly hôn. Những người chưa bao giờ viên mãn trong cuộc hôn nhân của họ, và không bao giờ có kế hoạch, có thể kết hôn và kết hôn. Goodridge 440 Mass. 309, 331 (2003).

4 Ví dụ, quan hệ chung sống của California và các chung sống dân sự của Illinois được luật tiểu bang nhìn nhận về cơ bản giống với hôn nhân, mặc dù không được công nhận theo luật liên bang.

5 Ví dụ, công ty trách nhiệm hữu hạn và công ty hợp doanh hữu hạn.

thể nào chọn, vì vậy nhà nước sẽ đưa ra nhiều hình thức, như thực đơn để công nhận mối quan hệ của người lớn, và nói chung phát triển sự thờ ơ tương tự như hình thức mà một cặp đôi nhất định đã chọn. Như tôi sẽ kết thúc bài viết này bằng cách thảo luận, dự đoán của tôi về điều này đã sai - không chỉ thực đơn không xuất hiện ở nhiều nước như tôi đã dự đoán, hôn nhân ở Hoa Kỳ, mặc dù với mức độ nhỏ hơn các nước khác, chắc chắn vẫn được nhiều người coi là tiêu chuẩn vàng cho quan hệ.

Phản ứng ban đầu của tôi là thấy sự khác biệt so với kỳ vọng của tôi trong tương lai là địa vị pháp lý của hôn nhân trong ba mươi năm qua không chỉ là sự thất bại về khả năng khả đoán của tôi và sự tan biến của kỳ vọng mang tính quy phạm, mà còn là bằng chứng về một giới hạn đáng kể trong khả năng phân tích của phép loại suy mà tôi đã cố gắng rút ra giữa sự phát triển lịch sử của địa vị pháp lý của hôn nhân và địa vị pháp lý của doanh nghiệp. Tuy nhiên, nghiên cứu sâu hơn về thái độ đối với sự kết hợp đã cho tôi niềm tin mới vào sức mạnh của phép loại suy. Cụ thể, tôi rất muốn tìm hiểu khi đọc về "các đề xuất thiết lập một hình thức pháp lý mới mà qua đó các doanh nghiệp nhỏ ở Vương quốc Anh có thể hoạt động" như sau:

Dường như có một nhận thức trong một số cộng đồng doanh nghiệp rằng sự kết hợp mang lại uy tín và tín nhiệm. Bất kỳ hình thức mới nào cũng cần có địa vị pháp lý tương tự để trở nên hấp dẫn. Nhận thức này có vẻ kỳ lạ đối với các luật sư quen thuộc với tầm quan trọng thực sự của trách nhiệm hữu hạn và có thể không xác đáng trong nhiều trường hợp nhưng không thể bỏ qua những người xem xét cải cách nếu đó là một yếu tố thúc đẩy chính. Niềm tin giữa chủ sở hữu công ty thống nhất là các ngân hàng, nhà cung cấp và khách hàng thích giao dịch với các công ty trách nhiệm hữu hạn có thể bắt nguồn từ việc đăng ký đơn giản và tăng khả năng hiển thị và công khai thông tin. Một lần nữa, bất kỳ sự thoải mái nào được tạo ra bởi sự minh bạch rõ ràng này có thể dựa trên nhận thức sai lầm về giá trị của nó, nhưng điều này không loại bỏ tầm quan trọng của niềm tin như một yếu tố thúc đẩy giữa những người kết hợp[1].

Khảo sát các doanh nghiệp chỉ ra rằng, "lý do thường được nhắc đến nhiều nhất để thành lập [doanh nghiệp] khi có trách nhiệm hữu hạn là uy tín và tín nhiệm (50%), lý do thuế (38%) và quyền sở hữu tài sản đứng tên doanh nghiệp (26%) và các thủ tục để ưu tiên kết hợp"[2]. Hơn nữa, rõ ràng "sự thiếu hiểu biết về những gì thu được thông qua kết hợp và thực tế, những quyền và nghĩa vụ nào được tạo ra bởi các văn bản thành lập cụ thể của doanh nghiệp, cho thấy rằng chủ doanh nghiệp không quan tâm đến văn bản này trước các vấn đề phát sinh"[3].

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[1] Judith Freedman, *Small Businesses and the Corporate Form: Burden or Privilege?*, 7 THE MODERN LAW REVIEW 555, 563-564 (July 1994), tại https://www.jstor.org/stable/1096555.

[2] *Như trên,* tr. 561.

[3] *Như trên,* tr. 565.

Nếu kết quả khảo sát này hoàn toàn mang tính đại diện, thì nó củng cố sức mạnh của phép loại suy giữa sự kết hợp và địa vị pháp lý của hôn nhân hợp pháp. Ban đầu, các nghiên cứu thực nghiệm đã chỉ ra rằng những người kết hôn giống như những người kết hợp thường "thiếu hiểu biết về những gì thu được… và thực tế, những quyền và nghĩa vụ nào được tạo ra bởi địa vị pháp lý cụ thể"[1]. Tiếp theo và quan trọng hơn, cũng như "rõ ràng có rất nhiều sự kết hợp vì những lý do không phù hợp với các phân tích kinh tế hoặc pháp lý thông thường"[2], vì vậy có nhiều người kết hôn chủ yếu vì nhận thức rằng hôn nhân "tạo ra uy tín và tín nhiệm", thay vì chủ yếu xuất phát từ lý do kinh tế và pháp lý.

F. HÔN NHÂN LÀ ĐỊA VỊ XÃ HỘI VÀ BIỂU TƯỢNG SÂU SẮC

Dù quy chiếu quy phạm của tôi là gì và dù mức độ chính xác mang tính mô tả trong nhận định của Thẩm phán Denise Johnson rằng "khi cấp giấy đăng ký kết hôn, nhà nước không tán thành đạo đức, lối sống hoặc quan hệ, mà chỉ xác định những người được hưởng các lợi ích của địa vị pháp lý của hôn nhân"[3] và theo tuyên bố của Christiane Taubira rằng vai trò của nhà nước trong hôn nhân "không quyết định điều gì tốt hay xấu mà là tổ chức mọi thứ"[4], tôi phải thừa nhận rằng một tỷ lệ lớn các cặp đôi kết hôn, bao gồm cả cặp đôi đồng giới đã đấu tranh hết mình để được quyền kết hôn, coi hôn nhân là một nguồn quan trọng của sự thừa nhận, không chỉ về mặt thực tế đơn thuần mà theo nghĩa biểu trưng sâu sắc. Đối với họ, "lợi ích của nhà nước trong việc cấp giấy đăng ký kết hôn" không chỉ đơn thuần mang "bản chất mệnh lệnh"[5]. Giấy đăng ký kết hôn đại diện cho sự xác thực, cũng như sự thừa nhận. Không nơi nào tôi thấy điều này rõ ràng hơn trong lời khai tại phiên tòa của các nhân chứng nguyên đơn trong vụ *Perry*, trong đó hai cặp đôi đồng tính lập luận rằng, Dự luật 8 của California là vi hiến, mặc dù theo trưng cầu dân ý đã sửa đổi hiến pháp California để xóa bỏ quyền kết hôn của cặp đôi đồng giới sau khi Tòa án tối cao California đã công nhận quyền đó[6].

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[1] Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 Law & Hum. Behav. 439 (1993) (báo cáo về các cuộc khảo sát cho thấy mức độ hiểu biết thấp về luật hôn nhân của các cặp vợ chồng Virginia kết hôn gần đây và mức độ tin tưởng cao rằng cuộc hôn nhân của họ sẽ tránh được các vấn đề ly hôn).

[2] Judith Freedman, *Small Businesses and the Corporate Form: Burden or Privilege?*, 7 THE MODERN LAW REVIEW tr. 561.

[3] *Baker v. Vermont*, 744 A.2d 864, 898-99 (Vt. 1999) (Johnson, J., đồng tình một phần và bất đồng một phần).

[4] *Mariage pour tous: les déclarations de Christiane Taubira à l'Assemblée nationale*, MINISTERE DE LA JUSTICE (Apr. 23, 2013), tại http://www.justice.gouv.fr/le-garde-des-sceaux-10016/archives-2013-c-taubira12869/mariage-pour-tous-les-declarations-de-christiane-taubira-30071.html.

[5] *Baker v. Vermont*, 744 A.2d 864, 898-99 (Vt. 1999) (Johnson, J., đồng tình một phần và bất đồng một phần).

[6] Trong khi vụ kiện cuối cùng đã bị Tối cao Pháp viện bác bỏ vì thiếu căn cứ dưới cái tên Hollinsworth v. Perry, thảo luận của tôi xoay quanh phiên tòa ở Tòa án bang, nơi vụ án được biết đến với cái tên Perry v. Schwarzenegger, 704 F. F. Supp. 2d 921 (N.D. Cal. 2010).

Lời khai của nhân chứng không riêng biệt và có tính đại diện, mặc dù mục đích duy nhất của họ là truy đòi lại quyền để cặp đôi đồng giới ở California có thể đặt tên hợp pháp cho quan hệ của họ và từ đó có địa vị pháp lý của hôn nhân. Theo lời của nhà xã hội học Andrew Cherlin, "hôn nhân đã trở thành một chiến tích" đối với nhiều cặp đôi ở Hoa Kỳ ngày nay. Cherlin đã phân tích một cuộc thăm dò năm 2013 của Pew, trong đó, chỉ 46% cho rằng việc tiếp cận "quyền và lợi ích hợp pháp" là lý do rất quan trọng để kết hôn, với 84% là "tình yêu" và 71% là "bạn đồng hành"[1].

Trong phiên tòa xét xử vụ *Perry*, ngay cả những người ủng hộ Dự luật 8 cũng cho rằng "có sự khác biệt mang tính biểu trưng sâu sắc giữa quan hệ chung sống và hôn nhân"[2], và mỗi cặp đôi nguyên đơn đã khai rằng mặc dù quan hệ chung sống đã cho họ các quyền tương tự như hôn nhân theo luật của California, họ nhận thấy quan hệ chung sống là một chế định viên mãn sâu sắc. Sandra Stier, nguyên đơn chung sống cùng Perry, đã khai rằng "chắc chắn không có gì về quan hệ chung sống cho thấy tình yêu và sự cam kết vốn có trong hôn nhân". Cô ấy đưa ra lời khai này mặc dù định nghĩa theo luật định của California về quan hệ chung sống là "hai người trưởng thành đã chọn chia sẻ cuộc sống của nhau trong một mối quan hệ thân mật và cam kết chăm sóc lẫn nhau"[3], trong khi định nghĩa của luật hôn nhân không đề cập đến sự thân mật hay quan tâm[4]. Theo Stier, hôn nhân sẽ "khiến họ cảm thấy mình nằm trong trong cấu trúc xã hội". Hôn nhân sẽ là cách để nói với "bạn bè, gia đình, xã hội, cộng đồng, cha mẹ của chúng ta và với nhau rằng đây là cam kết trọn đời chúng ta không phải là bạn gái. Chúng tôi không phải là bạn tình. Chúng tôi đã kết hôn"[5]. Cô ấy nói, điều này sẽ khiến họ cảm thấy "tự hào" và "được tôn trọng".

Cảm xúc về địa vị thúc đẩy các cặp đôi khả đoán như vậy xuất phát từ việc trên thực tế hôn nhân là một quan hệ rõ ràng, được xã hội công nhận bên cạnh giá trị xã hội. Như nguyên đơn Paul Katami đã khai:

Kết hôn cho phép chúng tôi tiếp cận với ngôn ngữ. Tôi có thể gọi anh ấy là chồng tôi thật dứt khoát. Nó thay đổi quan hệ của chúng tôi. Chúng tôi hiện đang đấu tranh về việc gọi nhau là gì vào một số tình huống. Nhưng "chồng" thì dứt khoát. Đó là điều

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1 Andrew Cherlin, Marriage has become a Trophy, The Atlantic March 20, 2018 tại https://www.theatlantic.com/family/archive/2018/03/incredible-everlasting-institution-marriage/555320/.

2 *Như trên,* tr. 936.

3 *Cal. Fam. Code 297(a)* (West 2005)

4 Hôn nhân trong Bộ luật California vào thời điểm đó được định nghĩa là "quan hệ cá nhân phát sinh từ hợp đồng dân sự giữa nam và nữ", *như trên,* tr. 300 và những người đủ điều kiện kết hôn chỉ được mô tả là "một nam giới chưa kết hôn... và một nữ giới chưa kết hôn từ 18 tuổi trở lên, nếu không thì không đủ tư cách", *như trên,* tr. 301.

5 *Như trên,* tr. 936.

mà mọi người đều hiểu. Không có sự vi tế nào ở đây. Đó là sự tuyệt đối và cũng đi kèm với sự tôn trọng và hiểu rằng quan hệ của bạn không tạm thời, không mới, không phải là thứ có thể dễ dàng nhạt phai… Nhưng đối với chúng tôi, hôn nhân rất quan trọng vì nó củng cố mối quan hệ. Và chúng tôi có quyền tiếp cận, một lần nữa, với ngôn ngữ toàn cầu đó… Bởi vì không phải ai cũng biết chính xác quan hệ chung sống là gì... Nếu tôi kết hôn với Jeff, tôi có thể nói một cách an toàn rằng cuộc đấu tranh để chứng thực bản thân với những người khác sẽ giảm dần và có khả năng tận diệt. Tôi biết mình cảm thấy thế nào khi mọi người hỏi, "Công ty TNHH một thành viên hay Doanh nghiệp S"? Không, đó không phải đối tác kinh doanh của tôi. Đó là bạn đời của tôi[1].

Có lẽ minh chứng ấn tượng nhất cho địa vị pháp lý của hôn nhân mang tính biểu trưng sâu sắc đối với một số người hơn là địa vị pháp lý của quan hệ chung sống trong lời khai của nhân chứng trong vụ *Perry* của người Mỹ gốc Hoa Helen Zia, người đã so sánh trải nghiệm của cô ấy khi kết hôn ở California với "mùa đông của tình yêu", khi thị trưởng San Francisco lúc bấy giờ là Gavin Newsom đề nghị cấp giấy đăng ký kết hôn cho cặp đôi đồng tính mặc dù ông không có thẩm quyền pháp lý để làm điều đó để rồi kết quả là hôn nhân bị vô hiệu bởi tòa án California. Một mặt, với kinh nghiệm của cô, cần đăng ký quan hệ chung sống, ngay cả khi điều đó cuối cùng đã cho cô ấy tất cả các quyền hợp pháp trong hôn nhân. Đối với Zia, đăng ký quan hệ chung sống có chút khó khăn. Chúng tôi rất vui mừng về việc có thể đăng ký quan hệ chung sống. Chúng tôi đến Tòa thị chính. Chúng tôi đã đi đến một văn phòng mà tôi sẽ mô tả là… đó là một loại văn phòng bưu điện có mục đích, nơi tôi nghĩ rằng họ đã cấp giấy đăng ký cho chó cũng như giấy đăng ký cho quan hệ chung sống… Tôi cảm thấy như kiểu, hóa ra đây là quan hệ chung sống? Chúng tôi ra đi với một giấy chứng nhận nhỏ, giống như phiếu bé ngoan… Nhưng nó không giống như… chút nào. Đó không phải là thứ làm chúng tôi gửi thông báo cho bạn bè để mời tham dự một bữa tiệc hay bất cứ thứ gì[2].

Điều quan trọng là giấy đăng ký kết hôn thường được cấp tại các văn phòng quan trọng giống như giấy cho chó và rằng các cặp đôi có thể kết hôn mà không cần thông báo cho bạn bè hoặc tổ chức tiệc. Ngược lại, không có trở ngại chính thức nào đối với việc kỷ niệm hoặc thông báo rộng rãi việc đăng ký của một người với tư cách là quan

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[1] Lời khai của Paul Katami. Biên bản phiên tòa tr. 88-89, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

[2] Lời khai của Helen Zia, Biên bản phiên tòa tr. 235-6, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010). Việc đăng ký ban đầu này diễn ra khi tương đối ít quyền và lợi ích hợp pháp đi kèm với việc đăng ký. Nhưng ngay cả khi quan hệ chung sống trở được pháp luật thừa nhận tương đương với hôn nhân ở California, Zia cảm thấy cô ấy không có gì để ăn mừng khi cô ấy nhận được một mẫu đơn khác trong thư. Và giấy ghi "4 bạn hiện trong quan hệ chung sống ở Bang California" Lời khai của Helen Zia, Biên bản phiên tòa tr. 1277, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

hệ chung sống. Tuy nhiên, việc đăng ký trở thành bạn đời của các đối tượng phi nhân cách so với chiều cạnh nghi lễ kết hôn đã làm nhiều người băn khoăn. Ví dụ, ở Pháp, khi PACS lần đầu được giới thiệu, nó cũng được cấp tại một văn phòng phụ và không được tổ chức ở Sảnh hôn lễ hoành tráng ở Tòa thị chính của Pháp. Quá trình này có thể đã mang lại nhiều lợi ích hợp pháp, nhưng không đặc biệt hoặc dễ nhận biết. Giống như Katami, Zia đã khai rằng khi cô ấy giới thiệu người bạn đời của mình với những người khác tại các buổi gặp mặt.

Tôi không thể đếm được số lần mọi người nói, "Ồ, đối tác. Đối tác trong lĩnh vực kinh doanh nào?" Và tôi và Lia đã quen với việc phải có câu trả lời cho điều đó, đó là "Chúng ta là đối tác của nhau trong cuộc sống". Và sau đó chúng ta sẽ quen với việc quan sát vẻ mặt của họ, để xem liệu họ có hiểu hay không. Và thường sẽ chỉ là cái nhìn bối rối: Ồ, cuộc sống là công việc gì? Ý bạn là bảo hiểm nhân thọ?[1]

Ngược lại, mặc dù hôn nhân "mùa đông của tình yêu" của cô ấy, không giống như quan hệ chung sống, cuối cùng không có hiệu lực pháp lý, và mặc dù nó đã bị vô hiệu một tuần trước tiệc cưới của họ, Zia đã khai rằng nó "đã tạo ra sự khác biệt cho cha mẹ chúng tôi, làm cha mẹ của chúng tôi có liên quan đến chúng tôi. Nó đã tạo ra sự khác biệt đối với cách chúng tôi liên hệ với mọi người". Họ đã tổ chức một bữa tiệc cưới lớn và mời nhiều thành viên trong gia đình, những người này đột nhiên dường như hiểu và nhận ra mối quan hệ của họ và đưa cô ấy vào gia đình của mình với những từ ngữ quen thuộc trong gia đình[2]:

Trước khi chúng tôi kết hôn, mẹ tôi sẽ chật vật và chỉ nói, "Cô ấy là bạn của Helen". Và điều đó đã thay đổi. Mẹ tôi sẽ nói, "Đây là bạn đời của Helen" - "Đây là con dâu của tôi". Mọi người sẽ hiểu được điều đó. Cho dù họ chấp thuận hay không chấp thuận, điều đó không quan trọng. Quan trọng là họ đã hiểu rồi. Nó giống như bạn không xúc phạm vợ của ai đó. Bạn không xúc phạm mẹ của ai đó. Gia đình của chúng tôi nhìn nhận khác về nhau khác nhau nhờ hôn nhân - và tôi bắt đầu hiểu những gì tôi luôn đọc - hôn nhân là sự kết hợp của hai gia đình[3].

Zia đã khai rằng, với tư cách là con dâu, cô ấy được đưa vào gia đình trực hệ để chăm sóc cho bố chồng, tưởng niệm để tổ chức lễ tang và cáo phó[4]. Việc đưa Zia vào tổ chức gia đình giữa các thế hệ sẽ khiến Jim Obergefell hài lòng, nhưng trên thực tế,

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[1] Lời khai của Helen Zia, Biên bản phiên tòa tr. 243, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

[2] Ví dụ như "Cô Lia, giờ cô đã thực sự là cô của cháu". Lời khai của Helen Zia, Biên bản phiên tòa tr. 243, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

[3] Lời khai của Helen Zia, Biên bản phiên tòa tr. 243, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

[4] Lời khai của Helen Zia, Biên bản phiên tòa tr. 1237, Perry v. Schwarzenegger, No. 09-CV-2292 VRW (N.D. Cal. Argued Jan. 11, 2010).

điều cho phép Zia không phải là bất kỳ tư cách pháp lý hạn hẹp nào, thứ mà Obergefell đang kiện tụng, mà là địa vị xã hội và khả năng nhận biết của thuật ngữ "hôn nhân".

Ở Đài Loan, không giống như Hoa Kỳ, hôn nhân khác giới hợp pháp là vấn đề pháp định, sự kết hợp của hai gia đình, tạo ra mối quan hệ pháp lý ngoài mối quan hệ của hai vợ chồng với nhau, nhưng quan hệ theo Điều 2 mà cặp đôi đồng tính hiện có thể xác định, không chỉ hạn chế khả năng họ có quan hệ pháp lý giữa các thế hệ với con cái, mà còn không tạo ra nghĩa vụ pháp lý đối với những người ở rể, và do đó đã được mô tả là "hôn nhân đồng giới không có gia đình". Đối với một số người Đài Loan, cũng như một số người Mỹ, khả năng được hòa nhập vào gia đình là điều quan trọng, nhưng đối với những người khác, trong LGBTQ (và cả cộng đồng dị tính), đó có thể được coi là một lợi thế pháp lý để được tự do về vai trò và nghĩa vụ truyền thống của gia đình. Đối với nhóm đầu tiên, hôn nhân đồng giới không có gia đình không thể tiến xa (và không chỉ vì nó ngăn cản việc nhận con nuôi và do đó hình thành một gia đình bao gồm các thế hệ trẻ, mà còn vì nó loại trừ khả năng có mối liên hệ với tổ tiên). Bất kỳ sự vượt rào nào khỏi cấu trúc gia đình truyền thống có thể là một bước đi đúng hướng cho nhóm thứ hai. Như Helen Zia khẳng định muốn được biết đến với tư cách là vợ của ai đó. Những người khác có thể chia sẻ quan điểm của nhà lý thuyết nữ quyền đồng tính nữ Paula Ettelbrick, người mặc dù dành phần lớn cuộc đời cho những mối quan hệ gắn bó bền chặt, khẳng định, "hôn nhân, như nó tồn tại ngày nay, trái ngược với sự giải phóng của tôi với tư cách là một người đồng tính nữ và là một phụ nữ bởi vì nó chi phối cuộc sống và tiếng nói của tôi. Tôi không muốn được biết đến với cái tên "Phụ nữ-được đính kèm với người khác"[1].

G. ẢNH HƯỞNG CỦA PHONG TRÀO HÔN NHÂN ĐỒNG GIỚI ĐỐI VỚI ĐỊA VỊ PHÁP LÝ CỦA HÔN NHÂN VÀ SỰ KHẢ DỤNG CỦA CÁC HÌNH THỨC PHÁP LÝ KHÁC

Những người ủng hộ hôn nhân truyền thống nói rằng, họ phản đối hôn nhân đồng giới vì họ sợ việc thừa nhận sẽ làm suy tàn hôn nhân của người dị tính và suy giảm địa vị pháp lý của hôn nhân như một định chế[2]. Tôi đã nhấn mạnh với họ rằng, như đã xảy ra, không có nhóm nào trong ba mươi năm qua thực sự đã làm nhiều hơn để giữ gìn, nâng cao địa vị pháp lý của của hôn nhân hơn phong trào hôn nhân đồng giới. Mặc dù vậy, chính nhờ những người đồng tính mà hôn nhân vẫn được mọi người coi là tiêu chuẩn vàng cho các quan hệ tốt hơn hay xấu đi. Không có điều gì xuất phát từ phong trào hôn nhân truyền thống đã làm hồi sinh hôn nhân ở Hoa Kỳ như cách mà phong

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[1] Paula Ettelbrick, Since When Is Marriage a Path to Liberation?, in William B. Rubenstein, Lesbians, Gay Men and the Law 721, 724 (2d ed. 1997).

[2] Ở đây tôi đang đề cập đến những nhà vận động chống lại hôn nhân đồng giới, những người không có ác cảm với đồng giới, nhưng ưu tiên cam kết về địa vị pháp lý của hôn nhân trong công việc của họ, chẳng hạn như Maggie Gallagher, cựu lãnh đạo Tổ chức Quốc gia về hôn nhân.

trào hôn nhân đồng giới đã làm, dưới góc độ pháp lý (theo nghĩa là các lựa chọn thay thế cho hôn nhân ít được nói đến và ít khả dụng hơn nhiều tôi đã dự đoán cách đây ba mươi năm) và như thực tiễn xã hội, với quan niệm xã hội mọi người phải kết hôn, và kết hôn là có uy tín. Nếu tôi chưa làm như vậy, hãy để tôi làm rõ rằng tôi rất ngưỡng mộ điều mà nhà nghiên cứu Bella de Paolo đã mệnh danh là "matrimania"[1]. Trong tất cả bản văn hoa mỹ và những lập luận đầy ẩn ý trong các quan điểm khác nhau của các thẩm phán trong vụ *Obergefell*, đoạn văn thu hút sự ủng hộ nhiệt thành của cá nhân tôi là cước chú của Clarence Thomas:

Đa số cũng cho rằng hôn nhân mang lại "sự cao quý"… Tôi không chắc điều đó có nghĩa là gì. Mọi người có thể chọn kết hôn hoặc không kết hôn. Quyết định như vậy không làm cho một người trở nên "cao quý" hơn người khác. Tương tự, sẽ là nông cạn khi cho rằng những người Mỹ chọn không kết hôn sẽ thua kém những người kết hôn[2].

Mặc dù có thể có nhiều suy đoán, nhưng lập luận này vẫn quá chung chung. Tôi cũng phải thừa nhận rằng vấn đề mang tính mô tả mà phong trào bình đẳng hôn nhân đã thu hút từ các đề xuất tạo ra hình thức khác thừa nhận gia đình hợp pháp Hoa Kỳ. Hiện tại, chỉ có một số tiểu bang có lựa chọn thay thế với hiệu lực mạnh cho hôn nhân[3]. Các bang khác luôn tập trung vào việc giới hạn các lựa chọn. Xem xét thay đổi theo thời gian đối với luật áp dụng cho các cặp đôi đã đăng ký ở California với tư cách là quan hệ chung sống. Kể từ khi cơ quan đăng ký toàn tiểu bang đầu tiên có hiệu lực vào ngày 1 tháng 1 năm 2000, nhà nước đã từng bước nâng cao quyền lợi và nghĩa vụ của quan hệ đó. Kể từ tháng 1 năm 2002, quan hệ chung sống có các quyền bao gồm quyền tiếp cận các thủ tục nhận con nuôi cùng cha khác mẹ và các trường hợp tử hình oan sai, cũng như việc ra quyết định y tế, nghỉ ốm và các quyền lợi bảo hiểm, tùy thuộc vào các bên. Thay đổi gần đây nhất về quyền và nghĩa vụ, có hiệu lực từ ngày 1 tháng 1 năm 2005, đã chuyển tải hầu như tất cả các quyền và trách nhiệm ở cấp nhà nước đối với quan hệ chung sống về hôn nhân. Tuy nhiên, luật mới đưa ra lựa chọn tùy chỉnh cho quan hệ đã đăng ký trước đây. Họ giải thể quan hệ chung sống trước ngày 1 tháng 1 năm 2005 hoặc đương nhiên phải tuân theo chế độ phúc lợi và nghĩa vụ mới. Lựa chọn duy trì gói quyền và nghĩa vụ sẵn có theo chế độ trước đó không được ghi nhận. Nói cách khác, mặc dù quy mô có thể đã lớn hơn theo thời gian, quan hệ chung sống ở California vẫn phù hợp với tất cả. Không chỉ cặp đôi dị tính trẻ tuổi không

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[1] Bella DePaulo, Singlism and Matrimania, Nov 7, 2018 tại http://www.belladepaulo.com/2018/11/singlism-and-matrimania/.

[2] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[3] Để xem các lựa chọn khả dụng, truy cập National Conference of State Legislatures, Civil Unions and Domestic Partnership Statutes https://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnershipstatutes.aspx.

thể tận dụng hình thức quan hệ hạn chế hơn được cung cấp cho các cặp đôi đồng giới trước năm 2005, mà ngay cả cặp đôi đồng giới cũng không thể nữa[1].

Không giống các bang khác, California vẫn giữ quan hệ chung sống, ngay cả sau khi hôn nhân đồng giới ra đời. Bang này đã mở rộng tính sẵn có của quan hệ này để bao hàm tất cả cặp đôi dị tính mà hôn nhân là một lựa chọn, chứ không như trước đó, chỉ một người trong số họ là người cao tuổi[2]. Điều này hé lộ yếu tố quan trọng giải thích tại sao, ít nhất là ở Hoa Kỳ, dự đoán của tôi về việc phát triển thực đơn các lựa chọn cho địa vị thừa nhận quan hệ tương tự như cho các doanh nghiệp đã không phát triển như tôi đã hy vọng. Bất cứ nơi nào trạng thái quan hệ thay thế chỉ dành cho cặp đôi đồng giới, chúng đều chết yểu. Ở những nơi được áp dụng cho tất cả cặp đôi, họ thường có xu hướng duy trì như những lựa chọn, kể cả sau khi hôn nhân đồng giới ra đời, vì họ có cấu thành dị tính mạnh mẽ. Điều này diễn ra ở Hà Lan[3], Québec, và có lẽ nổi tiếng nhất ở Pháp, nơi có thực trạng về địa vị pháp lý của hôn nhân mà tôi thấy ở một chiều cạnh nào đó là hình ảnh phản chiếu của Hoa Kỳ, tôi sẽ kết thúc bằng cách tóm lược.

Điều đầu tiên là ẩn sâu ở cả Pháp và Mỹ, mọi thứ có thể phức tạp, trái ngược với những gì họ tuyên bố khi chúng ta bắt đầu so sánh những gì ủng hộ việc thừa nhận hợp pháp các cặp đồng giới theo các nước gọi là phong trào của họ. Người Pháp nói "Mariage pour tous" ("hôn nhân cho tất cả") và người Mỹ nói "Bình đẳng trong hôn nhân", nhưng khẩu hiệu của mỗi nước phù hợp hơn với phong trào của nước còn lại. Tác động của việc mở cửa hôn nhân đồng giới ở Pháp được thiết kế để đạt được bình đẳng hôn nhân (mặc dù điều quan trọng không phải là bình đẳng ngay lập tức về quan hệ và quyền tiếp cận với một loạt các công nghệ sinh sản) cho cặp đôi đồng tính. Tuy nhiên, hôn nhân dành cho tất cả mọi người thực sự có ít ý nghĩa ở Pháp. Bản thân Tổng thống François Hollande, người đã thông qua dự luật hôn nhân đồng giới thông qua cơ quan lập pháp như thành tựu chữ ký của chính quyền mình, cũng như chưa từng kết hôn với người bạn đời hơn 30 năm và là mẹ của bốn đứa con, đồng nghiệp, chính khách Ségolène Royal; cũng không phải người phụ nữ đã thay thế cô ở bên anh, nhà báo Valérie Trierweiler, người cuối cùng đã ly hôn với người chồng thứ hai vài

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1 Xem thêm Marriage Licenses, tr. 1777.

2 Xem Bộ luật Gia đình California Điều 297, sửa đổi tháng 9 năm 2019.

3 Như người Hà Lan giải thích: "Số lượng tương đối lớn các cặp đôi khác giới trong quan hệ chung sống đã đăng ký vào năm 1998… khiến người ta thấy rõ rằng cần có một chế định giống như hôn nhân mà không có biểu tượng gắn liền với hôn nhân. Do đó, chính phủ Hà Lan muốn giữ nguyên chế định quan hệ chung sống đã đăng ký vào thời điểm hiện tại". Xem Kees Waaldijk, Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands, in Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law 437, 457-58 (Robert Wintemute & Mads Andenaes eds., 2001).

năm sau khi bắt đầu mối quan hệ công khai với Hollande; cũng không phải nữ diễn viên Julie Gayet, người có mối tình với Hollande đã tạo ra kết thúc đầy bi kịch cho mối quan hệ của anh với Trierweiler, người đã sống cùng anh trong phủ tổng thống. Quan trọng hơn, việc mở cửa hôn nhân đồng giới không có nghĩa sẽ chấm dứt tính khả dụng hợp pháp hoặc sự phổ biến rộng rãi của PACS (Hiệp ước về Kết hợp Dân sự, qua đó cặp đôi đồng và khác giới có thể đăng ký để được trao các quyền và nghĩa vụ ít toàn diện hơn hôn nhân) hoặc vợ lẽ (một tình trạng thậm chí còn ít trang trọng hơn cho những người chung sống với quyền và trách nhiệm ít hơn, mà tòa án đã giới hạn cho các cặp đôi khác giới. Nhưng cơ quan lập pháp cuối cùng đã mở cửa hôn nhân đồng giới vào năm 1999, trùng hợp với sự ra đời của PACS). Sự khả dụng của PACS đối với các cặp đôi khác giới không chỉ đảm bảo sự phổ biến liên tục của nó mà còn đảm bảo sự nhất quán về mặt khái niệm đối với các nguyên tắc chống cộng sản của Pháp - không phải là một tổ chức giới hạn trong một nhóm dân chúng nhất định mà dành cho tất cả mọi người[1].

Khi những người ủng hộ hôn nhân đồng giới ở Hoa Kỳ nói về Quyền tự do kết hôn hoặc Bình đẳng hôn nhân, họ đang gửi một thông điệp riêng biệt đến hai khu vực bầu cử khác nhau. Mặt khác, để nói với những người bên ngoài cộng đồng đồng tính có thể chưa phải là người ủng hộ, những khẩu hiệu này xây dựng, không chỉ dựa trên những cam kết trừu tượng đối với tự do và bình đẳng mà dựa trên cộng hưởng rất cụ thể từng có trong lịch sử Hoa Kỳ, đặc biệt là lịch sử của Phong trào dân quyền của người Mỹ gốc Phi. Quyền tự do kết hôn là một hệ quả quan trọng của việc giải phóng cho những người trước đây là nô lệ trong thế kỷ 19; quyền tự do kết hôn với người do một người lựa chọn, thậm chí giữa các chủng tộc, được đảm bảo hiến định gần một thế kỷ sau đó. Yêu cầu chính xác là kết hôn, chứ không phải là một địa vị pháp lý khác với các quyền và lợi ích tương đương như kết hợp dân sự hoặc quan hệ chung sống cộng hưởng với sự từ chối cứng rắn của người Mỹ đối với khái niệm "tách biệt nhưng bình đẳng" trong bối cảnh quan hệ chủng tộc. Mặt khác, nói đến Quyền tự do kết hôn và Bình đẳng hôn nhân là sự tôn trọng đối với nhiều người trong phong trào đấu tranh cho quyền của người đồng tính nam và những người khác ở cánh tả Mỹ, những người nghi ngờ rằng hôn nhân đóng vai trò trọng tâm trong đời sống pháp luật Hoa Kỳ. Sự ngầm định là quyền tự do kết hôn cũng kéo theo quyền tự do không kết hôn và kêu gọi bình đẳng hôn nhân không phải là kêu gọi kết hôn mà chỉ đơn thuần lập luận rằng nếu có kết hôn thì cũng nên cởi mở tương tự cho cặp đôi đồng giới. Tuy nhiên, nghịch lý ở chỗ bình đẳng trong hôn nhân đã biến thành "hôn nhân cho tất cả" ở Hoa Kỳ.

[1] Để biết thêm, xem Mary Anne Case, Comparative Sexual Democracy.

Với kinh nghiệm của Pháp và Hoa Kỳ, dường như với tôi đặt những người ủng hộ việc duy trì hôn nhân như tiêu chuẩn vàng cho các mối quan hệ vào là một quan điểm nghịch lý. Với tôi, có lẽ cần học tập những gì Đài Loan đã làm - ngay lập tức công khai tình trạng hôn nhân cho các cặp đồng tính mà chưa đưa ra các hình thức khác. Nếu họ cũng thực hiện những gì tôi mong muốn là bước tiến tiếp theo tức thì cho Đài Loan và cung cấp đầy đủ quyền làm cha mẹ cho cặp đôi đồng giới đã kết hôn, thì nhiều khả năng họ cũng đạt được mục tiêu tối đa hóa số trẻ em được sinh ra hoặc lớn lên với bố mẹ đã kết hôn.

KẾT LUẬN

Mặc dù tôi đã viết rất nhiều về lập luận hiến định cho hôn nhân đồng giới[1], và mặc dù vấn đề này đã được thảo luận nhiều trong học giới, tại tòa án và cơ quan lập pháp, và thậm chí là truyền thông cũng tập trung vào việc xem xét hôn nhân là quyền hiến định theo hiến pháp cụ thể hoặc quyền con người theo một vài công ước. Trong bài viết này, tôi đặt những vấn đề này sang một bên. Tôi đã thể hiện nỗ lực của mình thông qua việc phân tích chức năng và sự hữu dụng của địa vị pháp lý của hôn nhân ngày nay đối với các cặp đôi và hệ thống pháp luật cũng như ưu thế khi mở cửa cho hôn nhân đồng giới. Tôi phải thừa nhận nhận rằng, quy chiếu mang tính quy phạm của tôi khi xem xét địa vị pháp lý của hôn nhân từ góc độ của sự hiệu quả nhiều hơn là phẩm giá con người chưa đủ rộng để bao hàm hết mọi chiều cạnh nhưng tôi cũng tiếp tục tin tưởng và ủng hộ cho sự hữu dụng mang tính mô tả và mong muốn mang tính quy phạm.

[1] Xem Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation* 57 UCLA L. Rev. 1199 (2010).

QUYỀN CĂN BẢN ĐƯỢC KẾT HÔN Ở ẤN ĐỘ: NHÌN NHẬN HÔN NHÂN CÙNG GIỚI QUA LĂNG KÍNH ĐẠO ĐỨC HIẾN PHÁP

Shruti Bedi*

Tóm tắt: *Hiến pháp Ấn Độ không công nhận rõ ràng quyền kết hôn là một quyền căn bản hay một quyền hiến định. Thông qua diễn giải tư pháp, quyền tự do lựa chọn trong hôn nhân đã được thừa nhận như một khía cạnh cố hữu của Điều 21 Hiến pháp. Hôn nhân như một định chế là một khái niệm dựa trên sự loại trừ. Theo cấu trúc xã hội Ấn Độ, hôn nhân cùng giới hiện không được chấp nhận. Tòa án tối cao Ấn Độ đã phi hình sự hóa đồng tính luyến ái vào năm 2018 và đã tiến một bước tích cực trong việc công nhận quyền bình đẳng của mọi người (queer). Nghiên cứu này lập luận rằng chính nhờ các diễn giải sáng tạo như vậy mà các không gian hiến pháp mới được phát triển. Thông qua lăng kính đạo đức hiến pháp - được xác định bằng các giá trị hòa nhập, thể chế hôn nhân có thể được mở rộng để bao gồm tất cả các bản dạng giới và tính dục.*

GIỚI THIỆU

Bài hát nổi tiếng "Same Love" của Macklemore & Ryan Lewis nói về sự "giống nhau" nhất định mà các cặp đôi cùng giới mong muốn trong lời bài hát.[1] Nền chính trị toàn cầu trong thế kỷ 21 được xác định đa phần bằng việc các chiến dịch bình đẳng trong hôn nhân "huy động" "ý tưởng về sự hòa nhập và bình đẳng".[2] Những phong

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1 Macklemore & Ryan Lewis, "Same Love" <https://genius.com/Macklemore-and-ryan-lewis-same-love-lyrics> truy cập ngày 4 tháng 10 năm 2021. Lời bài hát nói về sự "giống nhau" này: "Chúng ta đến từ cùng một nơi"; "Ẩn sâu bên dưới tình yêu đều giống nhau".

2 Jessica Gerrard, "Boys in Dresses: Same-sex Marriage, Children and the Politics of Equivalence" ("Những chàng trai mặc váy: Hôn nhân cùng giới, Trẻ em và Chính sách của sự tương đương") (2020) 35: 103 AFS 70.

trào này đã thúc đẩy cho nhu cầu được "bao gồm" trong các luật hôn nhân hiện hành và được đối xử "tương tự". Ruth Vanita hiểu chính xác thực trạng này khi bà cho rằng dù chính phủ có công nhận hôn nhân cùng giới hay không thì chính phủ cũng không thể kiểm soát cảm xúc yêu đương và "hiểu biết về hôn nhân" của bất kỳ người nào.[1]

Hiến pháp Ấn Độ không công nhận rõ ràng quyền kết hôn là một quyền căn bản hay một quyền hiến định. Thông qua giải thích của cơ quan tư pháp, quyền tự do lựa chọn trong hôn nhân đã được thừa nhận như một khía cạnh cố hữu của Điều 21[2] của hiến pháp. Hôn nhân với tư cách là một thể chế được coi là nền tảng của xã hội, nơi các đặc điểm văn hóa và tôn giáo của xã hội quy định tính hợp pháp của nó.[3] Chính những chuẩn mực tôn giáo và xã hội này không cho phép hôn nhân cùng giới được chấp nhận.[4] Tinh thần không khoan dung này được phản ánh trong các chính sách pháp luật của nhiều khu vực pháp lý khác nhau, nơi cấm đồng tính luyến ái.[5]

Gần đây, trong vụ *Navtej Singh Johar kiện Cộng hòa Ấn Độ*[6] (sau đây gọi là *Navtej Johar*), một tòa án hiến pháp Tòa án Tối cao Ấn Độ đã phi hình sự hóa các mối quan hệ cùng giới. Tòa cho rằng mục 377[7], Bộ luật Hình sự Ấn Độ, 1860 (IPC) đã "vi phạm các quyền căn bản được đảm bảo bởi Điều 14, 19 và 21" vì nó "hình sự hóa quan hệ tình dục tự nguyện giữa những người cùng giới thuộc cộng đồng LGBT" và

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1 Ruth Vanita, ""Wedding of Two Souls": Same-Sex Marriage and Hindu Traditions" ("Đám cưới của hai linh hồn": Hôn nhân đồng tính và các truyền thống Ấn Độ giáo") (2004) 20 J. Fem. S. Rel. 119.

2 Hiến pháp Ấn Độ, Điều 21: "Bảo vệ tính mạng và quyền tự do cá nhân - Không ai có thể bị tước đoạt mạng sống hoặc quyền tự do cá nhân của mình trừ khi luật định." Tòa án tối cao Ấn Độ đã đưa ra một cách diễn giải cực kỳ rộng mở đối với quyền căn bản được sống và quyền tự do cá nhân theo Điều 21 bằng cách đưa vào điều khoản nhiều quyền mới. Điều 21 được hình dung như một kho lưu trữ tất cả các quyền căn bản mới và đang phát triển ở Ấn Độ.

3 C. Weisbrod, "Family, Church, and State: An Essay on Constitutionalism and Religious Authority" ("Gia đình, Giáo hội, và Nhà nước: Tiểu luận về chủ nghĩa hợp hiến và thẩm quyền tôn giáo") (1988) 26 J. Fam. L. 741, 754 <https://opencommons.uconn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1145&context=law_papers>, truy cập ngày 12 tháng 10 năm 2021.

4 D. A. Gay, J. P. Lynxwiler và cộng sự, "Religiosity, Spirituality, and Attitudes toward Same-Sex Marriage: A Cross-Sectional Cohort Comparison" ("Tôn giáo, tâm linh và thái độ đối với hôn nhân cùng giới: Một so sánh chéo") (2015) Sage Open <https://journals.sagepub.com/doi/10.1177/2158244015602520> truy cập ngày 12 tháng 10 năm 2021.

5 Để biết danh sách đầy đủ các quốc gia nơi đồng tính vẫn bị đặt ngoài vòng pháp luật, hãy xem "Đồng tính: Các quốc gia nơi đồng tính là bất hợp pháp" (*BBC News*, ngày 12 tháng 5 năm 2021) <https://www.bbc.com/news/world-43822234>, truy cập ngày 13 tháng 10 năm 2021.

6 *Navtej Singh Johar kiện Cộng hòa Ấn Độ* (2018) 10 SCC 1.

7 Bộ luật Hình sự Ấn Độ, 1860, mục 377 "Các tội bất thường - Ai tự nguyện giao cấu xác thịt trái với trật tự tự nhiên với bất kỳ người đàn ông, phụ nữ hoặc động vật nào, sẽ bị phạt 1 [tù chung thân] hoặc trừng phạt giam giữ có điều kiện trong thời hạn có thể kéo dài đến mười năm và bị phạt tiền."

"phân biệt đối xử chống lại họ trên cơ sở "xu hướng tính dục" của mỗi người".[1] Phán quyết này đánh dấu đỉnh cao cuộc đấu tranh trong nhiều thập kỷ qua nhằm phi hình sự hóa tình dục không vì mục đích sinh sản giữa những người trưởng thành và công nhận phẩm giá của mọi người (queer).[2]

Bất chấp những đánh giá tiến bộ về các mối quan hệ cùng giới, câu hỏi về hôn nhân cùng giới vẫn chưa được giải đáp. Vấn đề hôn nhân cùng giới tiếp tục vấp phải sự phản đối ở Ấn Độ. Tuy nhiên, quyết định trong vụ *Navtej Johar* đã ngăn việc phủ nhận hoàn toàn sự công nhận của pháp luật đối với những cuộc hôn nhân như vậy. Khuôn khổ chống phân biệt đối xử thiết lập trong vụ *Navtej Johar* đã mở đường cho việc đạt được bình đẳng trong hôn nhân. Việc đơn thuần chỉ phi hình sự hóa các hành vi tình dục đồng thuận không hoàn toàn loại bỏ được sự phân biệt đối xử mà các cặp đồng tính phải đối mặt. Do đó, chúng tôi viện dẫn một nguyên tắc quan trọng của luật hiến pháp - đạo đức hiến pháp, ấy là "tuân theo các chuẩn mực của Hiến pháp".[3] Thông qua học thuyết tiến bộ và biến đổi về đạo đức hiến pháp này[4], những khác biệt về "bản thể" được bảo đảm đối xử và quan tâm bình đẳng theo Hiến pháp Ấn Độ. Bài viết này tìm hiểu quyền được hưởng đầy đủ các quyền hôn nhân của các mối quan hệ cùng giới, như được nhìn nhận qua lăng kính của đạo đức hiến pháp theo Hiến pháp Ấn Độ. Bài viết lập luận rằng, chính thông qua các diễn giải sáng tạo như vậy mà không gian hiến pháp mới được phát triển. Thông qua lăng kính đạo đức hiến pháp được xác định bằng các giá trị hòa nhập, thể chế hôn nhân có thể được mở rộng để bao gồm tất cả các bản dạng giới và tính dục.

BÌNH ĐẲNG TRONG HÔN NHÂN: ĐÃ CÓ ĐỦ ĐIỀU KIỆN?

Thể chế hôn nhân đã bị gắn liền với "sự phân biệt chuẩn mực của nam và nữ" theo chuẩn mực giả định của một cuộc hôn nhân.[5] Hôn nhân là một khía cạnh vô cùng quan trọng trong xã hội Ấn Độ, tạo thêm động lực cho các diễn ngôn về quyền công dân, đặc biệt là sau khi đồng tính luyến ái được phi hình sự hóa. Việc thiếu vắng những

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1 *Navtej Johar* (số 8) [643.4].

2 Akshat Agarwal, "Marriage equality in India: thinking beyond judicial challenges to secular marriage law" ("Bình đẳng trong hôn nhân ở Ấn Độ: suy nghĩ vượt ra khỏi những thách thức tư pháp đối với luật hôn nhân thế tục") (2021) Ind. L. Rev. 1, 1.

3 *Manoj Narula kiện Cộng hòa Ấn Độ,* (2014) 9 SCC 1 [75].

4 Zeeshan Ahmad, "The challenge of constitutional morality before the court" ("Thách thức của đạo đức hiến pháp trước tòa án") (*The Leaflet*, ngày 26 tháng 3 năm 2020) <https://www.theleaflet.in/the-challenge-of-constitutional-morality-before-the-supreme-court/> truy cập ngày 16 tháng 10 năm 2021.

5 Sharif D. Rangnekar, "The battle for same-sex marriage is essentially a fight for civil rights" ("Cuộc chiến cho hôn nhân cùng giới về cơ bản là cuộc chiến vì quyền công dân") (*Scroll*, ngày 1 tháng 3 năm 2021), <https://scroll.in/article/988175/the-battle-for-same-sex-marriage-is-essentially-a-fight-for-civil-rights>, truy cập ngày 16 tháng 10 năm 2021.

ràng buộc kết hợp hôn nhân sẽ dẫn đến việc bị chối bỏ các đặc quyền kinh tế và pháp lý đi kèm tình trạng hôn nhân. Các cặp đồng tính luyến ái bị từ chối những quyền và lợi ích hợp pháp như thừa kế, tiếp nối, duy trì, quyền lương hưu, quyền lợi sức khỏe.[1]

Trên thế giới, 30 quốc gia đã hợp pháp hóa hôn nhân cùng giới, cho thấy nỗ lực to lớn trong việc thúc đẩy tiến bộ các quyền của cộng đồng LGBTQ+.[2] Năm 2005, Tòa án hiến pháp Nam Phi, trong vụ *Dự án Bình đẳng đồng tính nữ và đồng tính nam và mười tám bên khác kiện Bộ trưởng Bộ Nội vụ,* cho rằng định nghĩa thông luật về hôn nhân rằng, "sự kết hợp của một người đàn ông với một người phụ nữ" là không phù hợp với Hiến pháp của đất nước.[3] Sau đó, Nam Phi đã thông qua Đạo luật Liên minh Dân sự năm 2006 cho phép các cuộc hôn nhân đồng thuận không phân biệt giới tính của mỗi người.[4] Năm 2015, Tòa án Tối cao Hoa Kỳ tuyên bố rằng các cặp đồng tính cũng có quyền kết hôn cơ bản như nhau trong vụ *Obergefell kiện Hodges*.[5] Vương quốc Anh đã áp dụng một cách tiếp cận khá thoải mái về hôn nhân cùng giới khi ban hành Đạo luật Hôn nhân (Các cặp đôi cùng giới) vào năm 2013.[6]

Hôn nhân cùng giới và không theo chuẩn giới không được công nhận tương tự theo chế độ pháp lý của Ấn Độ. Tuy nhiên, mặc dù chưa có công nhận rõ ràng nào về mặt pháp lý, cơ quan tư pháp đã đóng một vai trò chủ động trong vấn đề này. Tòa án cấp cao Madras cho rằng, thuật ngữ "cô dâu" theo Đạo luật Hôn nhân Hindu năm 1955 bao gồm cả phụ nữ chuyển giới và những người liên giới tính xác định là phụ nữ, đã mở đường cho việc giải thích tự do các điều khoản như vậy.[7] Kết quả là lễ kết

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1 Shivam Garg, "Legal Recognition of Same-Sex Marriage Rights in India" ("Thừa nhận hợp pháp về quyền hôn nhân cùng giới ở Ấn Độ') (2020) 9 CNLU LJ 158, 160.

2 Xem Saurav Kumar, "A Spectrum of Pride: Recognising Same-Sex Marriage in India" ("Một cảnh tượng tự hào: Công nhận hôn nhân cùng giới ở Ấn Độ") (*The Leaflet*, ngày 23 tháng 6 năm 2021) <https://www.theleaflet.in/a-spectrum-of-pride-recognising-same-sex-marriage-in-india/>, truy cập ngày 17 tháng 10 năm 2021. Xem thêm AFP, "Same-sex marriage now legal in 30 countries" ("Hôn nhân cùng giới đã được hợp pháp hóa ở 30 quốc gia") (*The Tico Times*, 27 tháng 9 năm 2021) <https://ticotimes.net/2021/09/27/same-sex-marriage-now-legal-in-30-countries>, truy cập ngày 18 tháng 10 năm 2021.

3 *Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs* (Dự án bình đẳng cho đồng tính nữ và đồng tính nam và mười tám người khác kiện Bộ trưởng Bộ Nội vụ) (CCT 10/05) [2005] ZACC 20; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (ngày 1 tháng 12 năm 2005), <http://www.saflii.org/za/cases/ZACC/2005/20 html>, truy cập ngày 19 tháng 10 năm 2021.

4 Đạo luật Liên minh Dân sự, 2006, <http://www.saflii.org/za/legis/consol_act/cua2006139/>, truy cập ngày 19 tháng 10 năm 2021.

5 *Obergefell kiện Hodges*, 576 U.S. 644 (2015) <https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf>, truy cập ngày 19 tháng 10 năm 2021.

6 Đạo luật Hôn nhân (Các cặp đôi đồng giới) (2013), Phần 1: Hôn nhân của các cặp đồng tính ở Anh và xứ Wales <https://www.legislation.gov.uk/ukpga/2013/30/contents/enacted>, truy cập 20 tháng 10 năm 2021.

7 *Arunkumar kiện Tổng Thanh tra Đăng ký* WP (MD) số 4125 năm 2019 và WMP (MD) số 3220 năm 2019 2019 <https://www.livelaw.in/pdf_upload/pdf_upload-360185.pdf>, truy cập ngày 20 tháng 10 năm 2021.

hôn trang trọng giữa một nam giới và một phụ nữ chuyển giới theo đạo Hindu đã được cho phép và công nhận hợp pháp. Việc mở rộng cách diễn giải điều khoản này cũng đã củng cố nền tảng cho việc xác định lại quyền hôn nhân cùng giới.[1] Quyết định này của Tòa án cấp cao Madras là kết quả của quá trình được tiếp tục bởi tòa án tối cao, đặc biệt là trong vụ *Shafin Jahan kiện Ashok K.M*,[2] nơi tòa cho rằng mọi người có quyền tuyệt đối trong việc lựa chọn bạn đời, và quyền này được bảo vệ theo Điều 21 của Hiến pháp.[3] Chandrachud J. cho rằng, "Xã hội không có vai trò gì trong việc xác định lựa chọn đối tác của chúng ta."[4] Ông tin rằng, "sức mạnh của Hiến pháp", "nằm ở sự đảm bảo rằng quyền của mỗi cá nhân trong việc xác định và lựa chọn bạn đời chia sẻ thân mật trong hoặc ngoài hôn nhân sẽ được bảo vệ."[5]

Gần đây, đã có sự gia tăng số lượng đơn kiện đòi hợp pháp hóa hôn nhân cùng giới tại các tòa án. Các cặp đôi cùng giới đã đệ đơn xin đăng ký kết hôn theo Đạo luật Hôn nhân đặc biệt và Đạo luật Kết hôn nước ngoài trước Tòa án cấp cao Delhi.[6] Tòa án cấp cao Delhi cũng đưa ra thông báo trong một PIL (Tranh tụng lợi ích công), hướng đến công nhận các cuộc hôn nhân cùng giới theo HMA.[7] Một đơn kiện tương tự từ một cặp đồng tính cũng đã đệ trình lên Tòa án cấp cao Kerala để công nhận hôn nhân cùng giới.[8] Trung ương đã phản đối những kiến nghị này tại Tòa án cấp cao Delhi trong khi tuyên bố rằng giải thích tư pháp không phải là cách để công nhận bình đẳng

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1 Kumar (chú thích 16).

2 *Shafin Jahan kiện Ashok K.M,* (2018) 16 SCC 368.

3 Sđd. [84].

4 Sđd. [86].

5 Sđd. [87].

6 [18] Karan Tripathi, "Marriage Equality for Same-sex couples: The Delhi High Court says this is not an adversarial position" ("Bình đẳng trong hôn nhân cho các cặp đồng tính: Tòa án cấp cao Delhi tuyên bố đây không phải là quan điểm đối nghịch") (Livelaw, 14 tháng 10 năm 2020) <https://www.livelaw.in/news-updates/marriage-equality-for-same-sex-couples-the-delhi-hc-says-this-is-not-an-adversarial-petition-164444> truy cập 21 tháng 10 năm 2021.

7 Meera Emmanuel, "Delhi High Court to hear pleas to recognise same-sex marriages under Hindu Marriage Act, Special Marriage Act, Foreign marriage Act together" ("Tòa án cấp cao Delhi nghe lời khẩn cầu công nhận hôn nhân cùng giới theo cả Đạo luật hôn nhân Hindu, Đạo luật hôn nhân đặc biệt, Đạo luật kết hôn nước ngoài") (*Bar & Bench*, ngày 19 tháng 11 năm 2020) <https://www.barandbench.com/news/litigation/delhi-high-court-pleas-same-sex-marriages-hindu-marriage-act-special-marriage-act>, truy cập 21 tháng 10 năm 2021.

8 Aditya AK, "Till law do us apart? Homosexual couple approaches Kerala HC seeking to register marriage under Special Marriage Act" ("Cho đến khi pháp luật khiến chúng ta xa nhau? Cặp đôi đồng tính tiếp cận Kerala HC để đăng ký kết hôn theo Đạo luật Hôn nhân đặc biệt") (*Bar & Bench*, 28 tháng 1 năm 2020) <https://www.barandbench.com/news/litigation/till-law-do-us-apart-homosexual-couple-approaches-kerala-hc-challenging-special-marriage-act>, truy cập 21 tháng 10 năm 2021.

hôn nhân vì nó thuộc quyền lực của Nghị viện.[1] Với các kiến nghị như vậy được đệ trình trước tòa, điều kiện cho bình đẳng trong hôn nhân đã được thiết lập.

BÌNH ĐẲNG TRONG HÔN NHÂN: NỀN TẢNG CỦA HIẾN PHÁP

Tước bỏ quyền kết hôn của cộng đồng đồng tính luyến ái vì xu hướng tính dục và bản dạng giới là phân biệt đối xử và trái với đạo đức hiến pháp.[2] Quyết định của tòa trong vụ *Navtej Johar* đã phủ nhận mục 377, IPC, loại trừ giới hạn về quan hệ tình dục tự nguyện giữa hai người lớn. Việc này tiếp tục tạo nền móng để phản bác nhị nguyên nam-nữ trong hôn nhân, chiếu theo vốn từ vựng ngày một tiến hóa của đạo đức hiến pháp. Mô hình truyền thống giới hạn hôn nhân chỉ dành cho người dị tính này vi phạm quyền riêng tư và quyền tự chủ, quyền lựa chọn bạn đời và quyền phẩm giá theo Điều 21, của cộng đồng người đồng tính luyến ái. Nó trái với nhiệm vụ của hiến pháp, ấy là "bình đẳng trước pháp luật" như được quy định trong Điều 14[3] và hiến pháp nghiêm cấm phân biệt đối xử trên cơ sở giới theo Điều 15[4] [5].

SỰ PHÂN BIỆT ĐỐI XỬ TRONG HÔN NHÂN LÀM SUY YẾU SỰ BÌNH ĐẲNG THỰC CHẤT

Việc một người bị từ chối quyền lựa chọn bạn đời vì lý do giới tính là trái với quyền bình đẳng.[6] Ngoài ra, Điều 15 cũng được quan tâm vì đã cấm Nhà nước phân biệt đối xử về giới tính. Thẩm phán Chandrachud trong vụ *Navtej Johar* tuyên bố rằng "việc bị loại trừ, phân biệt đối xử và bị gạt ra ngoài lề xã hội" mà các cá nhân thuộc nhóm thiểu số về giới và xu hướng tính dục phải đối mặt "bắt nguồn từ sự mất cân bằng xã hội và thành kiến phổ biến của xã hội đối với hai giới và các mối quan hệ khác

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1 Agarwal (chú thích 11) 5.

2 Paras Sharma, "The unanswered question of same-sex marriages in India" ("Câu hỏi chưa có lời giải về hôn nhân cùng giới ở Ấn Độ") (*Jurist*, ngày 9 tháng 10 năm 2020) <https://www.jurist.org/commentary/2020/10/paras-sharma-india-same-sex-marriage/> truy cập 22 tháng 10 năm 2021.

3 Hiến pháp Ấn Độ, Điều khoản 14: "Bình đẳng trước pháp luật - Nhà nước sẽ không từ chối bất kỳ cá nhân nào quyền bình đẳng trước pháp luật hoặc sự bảo vệ bình đẳng của pháp luật trong lãnh thổ của Ấn Độ."

4 Hiến pháp Ấn Độ, Điều khoản 15: "Cấm phân biệt đối xử vì tôn giáo, chủng tộc, đẳng cấp, giới tính hoặc nơi sinh - (1) Nhà nước không được phân biệt đối xử với bất kỳ công dân nào trên cơ sở hoặc vì bất kỳ tôn giáo, chủng tộc, đẳng cấp, giới tính, nơi sinh nào."

5 Thomas John, "Liberating Marriage: Same-Sex Unions and the Law" ("Giải phóng hôn nhân: Hợp nhất đồng tính và luật") trong Arvind Narrain và Alok Gupta (eds), Ấn Độ, Law Like Love: Queer Perspectives on Law (Pháp luật như tình yêu: Góc nhìn của người (queer) về pháp luật) (Yoda Press 2011) 355; Satchit Bhogle, "The Momentum of History: Realising Marriage Equality in India" ("Khoảnh khắc lịch sử: Hiện thực hóa bình đẳng trong hôn nhân ở Ấn Độ") (2019) 12 NUJS L. Rev. 1.

6 Anant Prakash Mishra, "Why same-sex marriages must be judged at the constitutional altar" ("Tại sao hôn nhân cùng giới phải được xét xử trên tế đàn hiến pháp") (*The Leaflet*, ngày 12 tháng 3 năm 2021) <https://www.theleaflet.in/why-same-sex-marriages-must-be-judged-at-the-constitutional-altar/>, truy cập ngày 22 tháng 10 năm 2021.

giới, những điều này lề hóa và loại trừ tất cả những bản dạng giới và tính dục không dị tính khác."[1] Chính sự phân biệt đối xử này đã dẫn đến làm suy yếu sự bình đẳng thực chất trong các mối quan hệ trung lập về giới cũng như hôn nhân. Điều 14 kết hợp học thuyết về phân loại hợp lý, trong đó hai điều kiện phải được thỏa mãn, bao gồm sự phân loại phải được dựa trên sự khác biệt có thể hiểu được và sự khác biệt đó có mối liên hệ hợp lý với đối tượng mà luật muốn hướng đến.[2] Sự khác biệt giữa những người trưởng thành dị tính và đồng tính luyến ái không có giá trị về mặt hiến pháp. Hạn chế hôn nhân chỉ dành cho giữa một người nam và một người nữ không phải là một đối tượng hợp lệ.[3]

Xét Điều 15, đã có tuyên bố rằng nó chỉ cấm phân biệt đối xử "trên cơ sở "giới tính" và do đó không thể được hiểu một cách rộng hơn là bao gồm cả" xu hướng tính dục"."[4] Do đó, hôn nhân cùng giới sẽ không được bảo vệ theo quy định chống phân biệt đối xử của Điều 15. Tuy nhiên, Chandrachud J. đã bác bỏ lập luận này của vụ *Navtej Johar* khi tuyên bố quyết định của mình về các mối quan hệ cùng giới vì đó là những "quan niệm khuôn mẫu về sự khác biệt giữa nam và nữ "được" sử dụng để biện minh cho sự phân biệt đối xử".[5] Ông cho rằng chính cách giải thích hạn hẹp này đã làm mất đi nội dung cơ bản của quy định cấm phân biệt đối xử của Điều 15 vì nó "không tính đến bản chất liên tầng của sự phân biệt giới tính".[6] Ông cũng cho rằng, "đồng tính nữ, đồng tính nam, song tính và chuyển giới có quyền công dân bình đẳng trong tất cả các biểu hiện của nó theo hiến pháp" và "xu hướng tính dục được Hiến pháp công nhận và bảo vệ."[7] Quan điểm này được ủng hộ bởi Tarunabh Khaitan, với ý tưởng rằng "tính toàn diện và đa nguyên là trọng tâm của Điều 15" và đó là sự ủng hộ mạnh mẽ nhất đối với nguyên tắc chống phân biệt đối xử.[8]

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1 *Navtej Johar* (chú thích 8) [489]. Cũng xem Alexandra Muller, "Health for All? Sexual Orientation, Gender Identity, and the Implementation of the Right to Access to Healthcare in South Africa" ("Sức khỏe cho tất cả? Xu hướng Tính dục, Bản dạng Giới và Thực thi Quyền Tiếp cận Chăm sóc Sức khỏe ở Nam Phi") (2016) Health & Human Rts. 195.

2 *Dipak Sibal kiện Đại học Punjab*, (1989) 2 SCC 145, [9]; *Navtej Johar* (chú thích 8) [408] (theo Chandrachud, J.), [637.2] (theo Malhotra, J.).

3 Bhogle (chú thích 34) 12.

4 *Navtej Johar* (chú thích 8) [427].

5 Sđd. [431].

6 Sđd.

7 Sđd. [378].

8 Tarunabh Khaitan, "Inclusive Pluralism or Majoritarian Nationalism: Article 15, Section 377 and Who We Really Are" ("Chủ nghĩa đa nguyên toàn diện hay Chủ nghĩa dân tộc đa số: Điều 15, Mục 377 và Chúng ta thực sự là ai"), (*Ind. Con. L. Phil.*, Ngày 9 tháng 7 năm 2018) https://indconlawphil.wordpress.com/2018/07/09/inclusive-pluralism-or-majoritarian-nationalism-article-15-section-377-and-who-we-really-are/>, truy cập ngày 23 tháng 10 năm 2021.

Quyền riêng tư và quyền tự chủ cá nhân

Tòa án Tối cao đã công nhận quyền lựa chọn bạn đời là một quyền căn bản theo Điều 19[1] và 21 của Hiến pháp trong vụ *Shakti Vahni kiện Cộng hòa Ấn Độ*[2]. Trong khi ban hành các chỉ thị để ngăn chặn các vụ giết người vì danh dự, tòa án cho rằng khi "hai người trưởng thành đồng ý chọn nhau làm bạn đời, đó là sự thể hiện sự lựa chọn của họ, và được công nhận theo Điều 19 và 21 của Hiến pháp."[3] Trong vụ *Shafin Jahan kiện Asokan K.M*[4], Tòa án Tối cao, gạt bỏ phán quyết của Tòa án Tối cao Kerala và vẫn giữ nguyên quyền lựa chọn bạn đời cũng như quyền tự chủ trong phạm vi "quyết định thân mật cá nhân".[5] Nhấn mạnh việc quyền tự quyết này được bảo đảm bởi Hiến pháp, tòa án cho rằng mỗi cá nhân có quyền xác định lựa chọn bạn đời, "trong hoặc ngoài hôn nhân" và quyền ấy được bảo vệ.[6]

Quyết định trong vụ *Puttaswamy*[7] nổi tiếng đã công nhận quyền căn bản về quyền riêng tư bao gồm quyền tự chủ đối với các lựa chọn cá nhân. Người ta cho rằng xu hướng tính dục là một thành phần quan trọng của quyền riêng tư và thuộc Điều 14, 15 và 21.[8] Cách giải thích này đã tiến thêm một bước trong vụ *Navtej Johar*, khi bình đẳng trong hôn nhân được công nhận. Chandrachud J. cho rằng một cá nhân không chỉ có quyền chọn bạn đời mà còn "quyết định" về bản chất của mối quan hệ mà cá nhân đó muốn theo đuổi.[9]

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1 Hiến pháp Ấn Độ, Điều khoản 19: "Bảo vệ một số quyền liên quan đến tự do ngôn luận, v.v... -

(1) Mọi công dân đều có quyền

(a) tự do ngôn luận và biểu đạt;

(b) tụ hợp một cách hòa bình và không vũ trang;

(c) thành lập các hiệp hội hoặc công đoàn;

(d) di chuyển tự do trên toàn lãnh thổ Ấn Độ;

(e) cư trú và định cư ở bất kỳ phần nào của lãnh thổ Ấn Độ; và

(f) bỏ qua

(g) để hành nghề bất kỳ, hoặc làm bất kỳ nghề nghiệp, thương mại hoặc kinh doanh nào"

2 *Shakti Vahni kiện Cộng hòa Ấn Độ,* (2018) 7 SCC 192.

3 Sđd. [43].

4 *Shafin Jahan* (chú thích 23).

5 Sđd. [51].

6 Sđd. [87].

7 *K.S. Puttaswamy kiện Cộng hòa Ấn Độ*, (2017) 10 SCC 1.

8 Sđd. [144-145, 298] (theo Chandrachud, J., nói cho chính mình, Khehar C.J.., Agrawal J., và Nazeer J.), [645, 647] (theo Kaul J.).

9 Sđd. [479].

Hôn nhân qua lăng kính đạo đức hiến pháp

Mặc dù thuật ngữ *đạo đức hiến pháp* không được sử dụng ở bất kỳ đâu trong Hiến pháp Ấn Độ, nhưng *đạo đức* đã được đề cập trong các Điều 19 (2)[1], 19 (4)[2], 25 (1)[3] và 26[4]. [5] Đạo đức hiến pháp là một cách tiếp cận để giải thích hiến pháp cũng như là cơ sở để thách thức tính hiệu lực của pháp luật khi đặt ra nhiệm vụ buộc nhà nước phải thúc đẩy và phát triển "trật tự các giá trị của hiến pháp".[6] Ambedkar hình dung Ấn Độ là một vùng đất được cai trị bởi "đạo đức hiến pháp" chứ không phải "đạo đức bình dân", trong đó lợi ích của nhà nước không bị điều chỉnh bởi đạo đức bình dân mà theo tinh thần của hiến pháp.[7] Trong vụ *Navtej Johar,* đa số cũng ủng hộ quyền tối cao của đạo đức hiến pháp thay vì đạo đức bình dân.[8]

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1 Hiến pháp Ấn Độ, Điều khoản 19 (2): "Không có quy định nào trong khoản (a) thuộc khoản (1) sẽ ảnh hưởng đến hoạt động của bất kỳ luật hiện hành nào, hoặc ngăn cản quốc gia đưa ra bất kỳ luật nào, trong chừng mực luật đó áp đặt các hạn chế hợp lý đối với việc thực hiện quyền được quy định bởi điều khoản phụ nói trên vì lợi ích của chủ quyền và toàn vẹn của Ấn Độ, an ninh của quốc gia, quan hệ hữu nghị với các quốc gia nước ngoài, trật tự công cộng, lễ phép hoặc đạo đức hoặc liên quan đến sự khinh nhờn tòa án, phỉ báng hoặc xúi giục hành vi phạm tội."

2 Hiến pháp Ấn Độ, Điều khoản 19 (4): "Không có quy định nào trong khoản (c) của điều khoản đã nêu sẽ ảnh hưởng đến hoạt động của bất kỳ luật hiện hành nào trong chừng mực nó áp đặt, hoặc ngăn cản quốc gia đưa ra bất kỳ luật nào áp đặt, vì lợi ích của chủ quyền và toàn vẹn của Ấn Độ hoặc trật tự công cộng hoặc đạo đức, những hạn chế hợp lý đối với việc thực hiện quyền theo điều khoản phụ nói trên."

3 Hiến pháp Ấn Độ, Điều khoản 25 (1): "Tuân theo trật tự, đạo đức và sức khỏe công cộng cũng như các quy định khác của Phần này, tất cả mọi người đều có quyền bình đẳng về tự do lương tâm và quyền tự do tuyên xưng, thực hành và truyền bá tôn giáo."

4 Hiến pháp Ấn Độ, Điều khoản 26: "Tự do quản lý các vấn đề tôn giáo - Tùy thuộc vào trật tự, đạo đức và sức khỏe công cộng, mọi giáo phái tôn giáo hoặc bất kỳ bộ phận nào trong đó đều có quyền:

(a) thiết lập và duy trì các tổ chức cho các mục đích tôn giáo và từ thiện;

(b) quản lý việc riêng của mình trong các vấn đề tôn giáo;

(c) sở hữu và mua đồ đạc và bất động sản; và

(d) quản lý tài sản đó theo quy định của pháp luật"

5 Shruti Bedi, "Constitutional Morality: Ambedkar's Progeny and India's Legacy" ("Đạo đức hiến pháp: Dòng dõi của Ambedkar và Di sản của Ấn Độ") trong Rattan Singh ed., Ambedkar's Milestones on the Roadmap of Indian Constitution (Các dấu mốc quan trọng của Ambedkar trên Lộ trình của Hiến pháp Ấn Độ) (Thomson Reuters, 2021) 39.

6 *Navtej Johar* (chú thích 8) [459].

7 Gautam Bhan, "On Freedoms Avenue" ("Trên Đại lộ Tự do") (*Indian Express*, ngày 3 tháng 7 năm 2009) <https://indianexpress.com/article/opinion/columns/on-freedoms-avenue/>, truy cập ngày 23 tháng 10 năm 2021.

8 *Navtej Johar* (chú thích 8) [128] (theo Misra, C.J.), [349, 351-352] (theo Nariman, J.), [459] (theo Chandrachud, J.)

Các mối quan hệ phù hợp với hình thức hôn nhân truyền thống được coi là được xã hội chấp nhận. Tuy nhiên, đạo đức xã hội liên tục phát triển và biến đổi, trong đó khả năng chấp nhận các phân loại cũng tiếp tục thay đổi cùng với sự thay đổi của các chuẩn mực xã hội về đúng và sai.[1] Đạo đức hiến pháp vượt ra khỏi các chuẩn mực xã hội có thể chấp nhận được của hiện tại và hướng tới tương lai.[2] Dựa trên cách hiểu này về đạo đức hiến pháp, trong vụ *Navtej Johar,* Misra C.J. cho rằng: "Trong khi kiểm tra tính hợp lệ của quy định pháp luật không hợp hiến, nếu một tòa án hiến pháp cho rằng quy định vi phạm đó vi phạm quy định của đạo đức hiến pháp, thì điều khoản phải được tuyên bố là vi hiến vì lý do thuần túy và đơn giản rằng các tòa án hiến pháp tồn tại để duy trì Hiến pháp."[3] Chandrachud J. đã củng cố niềm tin này bằng cách sử dụng quyền riêng tư cho phép một cá nhân thực hiện quyền tự chủ của mình, điều này có thể được hiểu là "một số hành vi không chỉ không còn trái đạo đức, mà quyền thực hiện chúng còn được khẳng định về mặt đạo đức."[4]

Đạo đức bình dân thông thường hoặc việc công chúng không chấp nhận một số hành vi nhất định không phải là một lý do hợp lệ cho việc hạn chế các quyền căn bản theo Điều 21.[5] Luật pháp trong thời đại ngày nay không thể tách rời đạo đức hiến pháp, và bất kỳ thể hiện tính dục tự nguyện nào giữa những người trưởng thành phải được dựa trên quyền tự quyết của cá nhân.[6] Thực thi đạo đức hiến pháp đòi hỏi các tòa án phải hoạt động như những thể chế "phản chuyên chế", bảo vệ "các quyền được bảo vệ theo hiến pháp, bất kể niềm tin của đa số".[7] Chính nhờ tinh thần này mà việc chuyển đổi hiến pháp có thể đạt được. Vì vậy, hôn nhân cùng giới với tư cách là quyền tham gia bình đẳng của công dân và quyền được sống bình đẳng được bảo vệ trên cơ sở đạo đức hiến pháp. Ronald Dworkin tin và cảnh báo rằng mặc dù các thẩm phán sử dụng tầm nhìn đạo đức để giải thích Hiến pháp nhưng việc diễn giải đạo đức này không thể dựa trên niềm tin cá nhân của họ, cũng không phải là đạo đức bình dân.[8]

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1 *John Vallamattom kiện Cộng hòa Ấn Độ*, (2003) 6 SCC 611, [33, 36].

2 Bhogle (chú thích 34) 13.

3 *Navtej Johar* (chú thích 8) [136].

4 Sđd [474]. Xem thêm David A.J. Richards, "Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution" ("Quyền tự quyết về tình dục và quyền riêng tư theo hiến pháp: Nghiên cứu trường hợp điển hình về quyền con người và Hiến pháp bất thành văn"), (1979) 30 Hastings L.J. 957., 1000-1001.

5 *Tổ chức Naz* kiện *Chính phủ (Thủ đô Delhi)*, 2009 SCC OnLine Del 1762, [79].

6 *Navtej Johar* (chú thích 8) [606].

7 Sđd [608]. Xem thêm Arvind Narrain, "A New Language of Morality: From the Trial of Nowshirwan to the Judgment in Naz Foundation" ("Một ngôn ngữ đạo đức mới: Từ Phiên tòa Nowshirwan đến Phán quyết ở vụ Tổ chức Naz"), (2010) 4 *Ind. J. Const. L*. 84.

8 Salman Khurshid, "Constitutional Morality and Judges of the Supreme Court" ("Đạo đức hiến pháp và các thẩm phán của Tòa án Tối cao") trong S. Khurshid, S. Luthra và các cộng sự (eds.), *Judicial Review:*

Luật hôn nhân thế tục của Ấn Độ

Với mỗi cộng đồng tôn giáo chịu chi phối bởi luật cá nhân về hôn nhân và ly hôn ở Ấn Độ, tồn tại rất nhiều điều luật. Các luật này bao gồm Đạo luật Hôn nhân Hindu, 1955 (HMA), Đạo luật Hôn nhân Cơ đốc giáo Ấn Độ, 1872, Đạo luật Hôn nhân và Ly hôn Parsi, 1936, Đạo luật Hôn nhân đặc biệt, 1954 (SMA) và Đạo luật Hôn nhân nước ngoài, 1969. Phần này sẽ xem xét liệu có luật nào trong số này có thể được diễn giải theo hướng có bao gồm hôn nhân cùng giới hay không.

Theo luật Hindu

Phần 5, HMA áp dụng cho người theo đạo Hindu[1] quy định các điều kiện của một cuộc hôn nhân hợp lệ bao gồm: i) các bên của cuộc hôn nhân hiện không có vợ/chồng; ii) không bên nào không có khả năng đưa ra sự đồng thuận do tinh thần không ổn định hoặc do rối loạn tâm thần, khiến một người không thích hợp để sinh sản; iii) độ tuổi tối thiểu của chú rể là 21 và đối với cô dâu là 18 tuổi; iv) các bên không thể ở trong mối quan hệ cụ thể bị cấm, hoặc mối quan hệ sapinda[2] (chung gốc gác), trừ khi phong tục tập quán cho phép một cuộc hôn nhân như vậy.[3]

Mặc dù điều luật sử dụng các điều khoản trung lập về giới vì cuộc hôn nhân giữa bất kỳ hai người theo đạo Hindu nào đều được coi trọng, mục 5 chỉ ra rằng để hôn nhân được coi là hợp lệ phải có cô dâu và chú rể. Mặt khác, các cặp đồng tính cho rằng quy định này cho phép họ tự mô tả mình là cô dâu và cô dâu, hoặc chú rể và chú rể, hoặc thậm chí là cô dâu và chú rể.[4] Tuy nhiên, lập luận này sẽ không thỏa đáng theo cách giải thích luật định và mục tiêu của HMA. Thứ nhất, HMA không cho phép các cuộc hôn nhân cùng giới ở bất kỳ điều khoản nào của đạo luật một cách rõ ràng cụ thể.

Process, Powers and Problems (Đánh giá tư pháp: Quy trình, Quyền hạn và Vấn đề) 391 (Nxb Đại học Cambridge, New Delhi, 2020).

Không giống như đạo đức hiến pháp, đạo đức bình dân "dựa trên các quan niệm chủ quan và biến đổi về "đúng và sai", khi muốn xác định liệu một luật có thể được coi là hợp lý để đạt được "lợi ích nhà nước bắt buộc" hay không, tòa án phải tính đến đạo đức hiến pháp chứ không đạo đức bình dân [*Tổ chức Naz* (số 65) [79].

1 Đạo luật Hôn nhân Hindu, năm 1955, mục 2 định nghĩa người theo đạo Hindu là bất kỳ ai theo đạo Hindu, đạo Sikh, đạo Jain hoặc đạo Phật hoặc theo bất kỳ hình thức hoặc nhánh phát triển nào của nó (chẳng hạn như Brahmo Samaj, Arya Samaj, v.v...).

2 "Sapindas" theo luật Hindu có nghĩa là khi hai người có chung một tổ tiên. Đó là một diễn đạt đặc trưng chỉ có ở luật Hindu.

3 Đạo luật Hôn nhân Hindu, năm 1955, mục 5 <https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00004_195525_1517807318992&sectionId=38571&sectionno=5&orderno=5>, truy cập ngày 23 tháng 10 năm 2021.

4 Stellina Jolly và Ritika Vohra, "Recognition of Foreign Same-Sex Marriage in India" ("Công nhận hôn nhân cùng giới nước ngoài ở Ấn Độ") (2017) 59 JILI 302, 306.

Tất cả các quốc gia cho phép hôn nhân cùng giới đều quy định cụ thể điều đó trong luật pháp của họ hoặc ủy thác nó thông qua các quyết định tư pháp.[1] Thứ hai, việc diễn giải chung các điều khoản của HMA chỉ cho thấy rằng luật pháp chấp nhận hôn nhân khác giới. Pháp luật sử dụng các từ "cô dâu và chú rể" và "vợ chồng" để mô tả các bên tham gia hôn nhân.[2] Căn cứ để ly hôn cho người vợ được nêu tại mục 13 (2), trong đó mục 13 (2) (iv) tính đến tình huống lễ kết hôn của "cô ấy" đã được thực hiện theo nghi thức trước khi "cô" tròn 15 tuổi và "cô ấy" đã khước từ cuộc hôn nhân này sau khi đạt tới độ tuổi đó và trước khi đủ 18 tuổi.[3] Các quy định về cấp dưỡng và hỗ trợ cũng bao gồm các từ "anh ấy" và "cô ấy", là biểu hiện của hôn nhân khác giới.[4]

Theo Luật Cá nhân của người Hồi giáo và Cơ đốc giáo

Người Hồi giáo Ấn Độ phần lớn chịu sự điều chỉnh của luật *Shariat*, với nhiều đối tượng được quy định theo Đạo luật áp dụng Luật Cá nhân (Shariat) của người Hồi giáo, năm 1937 (Đạo luật Shariat). Luật Hồi giáo theo truyền thống không thừa nhận quyền bình đẳng trong hôn nhân, đặc biệt là đối với những người cùng giới.[5] Điều này đã được đề cập bởi Ban Luật cá nhân Hồi giáo Toàn Ấn Độ (AIMPLB) khi phản đối tranh tụng mục 377.[6]

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1 21 quốc gia đã hợp pháp hóa hôn nhân cùng giới trên toàn quốc thông qua pháp luật. Trong số này, Úc, Ireland và Thụy Sĩ đã hợp pháp hóa hôn nhân cùng giới thông qua luật sau các cuộc bỏ phiếu trên toàn quốc. 7 quốc gia đã hợp pháp hóa hôn nhân cùng giới trên toàn quốc thông qua quyết định của tòa án - Áo, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Nam Phi, Đài Loan và Hợp chủng quốc Hoa Kỳ. 2 quốc gia Nam Phi và Đài Loan đã ban hành luật hợp pháp hóa hôn nhân cùng giới sau khi tòa án yêu cầu. Xem Human Rights Campaign (Chiến dịch Nhân quyền), "Marriage Equality around the World" ("Bình đẳng trong hôn nhân trên toàn thế giới") <https://www.hrc.org/resources/marriage-equality-around-the-world>, truy cập ngày 23 tháng 10 năm 2021.

2 Đạo luật Hôn nhân của người Hindu, 1955, mục 7 (2), 9, 13 (2), 24.

3 Đạo luật Hôn nhân của người Hindu, năm 1955, mục 13 (2) (iv) - (iv) rằng hôn nhân của cô ấy (cho dù viên mãn hay không) đã được tổ chức trước khi cô ấy đủ mười lăm tuổi và cô ấy đã từ chối cuộc hôn nhân sau khi đủ tuổi đó và trước năm mười tám tuổi.

4 Đạo luật Hôn nhân Hindu, 1955, mục 25 - "Cấp dưỡng và trợ cấp vĩnh viễn (1) Bất kỳ tòa án nào thực hiện quyền tài phán theo Đạo luật này, tại thời điểm thông qua bất kỳ sắc lệnh nào hoặc vào bất kỳ thời điểm nào sau đó, dựa trên đơn được thực hiện cho mục đích của vợ hoặc chồng, tùy từng trường hợp, ra lệnh rằng bị đơn phải trả cho nguyên đơn cấp dưỡng và trợ cấp với một khoản tiền tổng, hoặc hàng tháng hoặc định kỳ đó trong một thời hạn không vượt quá cuộc đời của nguyên đơn, tương ứng với thu nhập của chính bị đơn và tài sản khác, và nếu có, thu nhập và tài sản khác của nguyên đơn [hành vi của các bên và các tình huống khác của vụ án], tòa án cần công bằng, và nếu cần thiết, bảo đảm các khoản thanh toán bằng một khoản phí đối với bất động sản của bị đơn."

5 Bhogle (chú thích 34) 19.

6 AIMPLB trước đó đã lên tiếng phản đối khi Tòa án tối cao Delhi loại bỏ Mục 377 vào năm 2009. Tuy nhiên, đã có quyết định không tranh chấp nếu Tòa án tối cao loại bỏ Mục 377 trong vụ kiện *Navtej Johar*. Xem Saba Rahman, "Muslim Personal Law Board will not contest if SC scraps Section 377" ("Ban luật

Ngay cả Kinh Quran cũng không ủng hộ, và trên thực tế là xem thường các mối quan hệ như vậy.[1]

Theo Cơ đốc giáo, Kinh thánh coi bất kỳ hành vi đồng tính luyến ái nào là một tội lỗi.[2] Những người theo đạo Cơ đốc ở Ấn Độ chịu sự quản lý của Đạo luật Hôn nhân Cơ đốc của Ấn Độ năm 1872 (CMA), quy định rằng hôn nhân chỉ được phép cử hành giữa hai Cơ đốc nhân hoặc giữa một Cơ đốc nhân và một người không theo Cơ đốc giáo.[3] Tương tự như HMA, đạo luật này không cho phép hôn nhân cùng giới.[4] CMA chỉ cho phép cử hành hôn nhân theo "các quy tắc, nghi thức, nghi lễ và phong tục" của nhà thờ hoặc bởi các quan chức được nhà nước cấp phép theo Đạo luật[5] và do đó các điều khoản không ủng hộ hôn nhân cùng giới.

Theo Đạo luật Hôn nhân đặc biệt, 1954

Được ca ngợi là một trong những luật tiến bộ nhất, SMA cho phép mọi người lựa chọn kết hôn theo luật thế tục thay vì luật cá nhân cụ thể. Mục tiêu của SMA là tạo điều kiện thuận lợi cho hôn nhân giữa các giai cấp và giữa các tôn giáo theo luật hôn nhân tiến bộ.[6] Thay vì các nghi lễ theo phong tục, SMA cho phép hôn nhân giữa những người thuộc các nhóm tôn giáo khác nhau thông qua một nghi thức dân sự là đăng ký kết hôn trước một viên chức hôn nhân.[7] Mặc dù SMA có vẻ vẫn áp dụng cho các cặp đôi khác giới,[8] nó được coi là luật quan trọng nhất để đảm bảo bình đẳng trong hôn nhân. Mục 4 (c) quy định rằng hai người có thể kết hôn "nếu nam đủ hai mươi mốt tuổi và nữ đủ mười tám tuổi". Tuy đạo luật sử dụng ngôn từ rộng mở như "bất kỳ

Cá nhân Hồi giáo sẽ không tranh chấp nếu Tòa án tối cao loại bỏ Mục 377") (*Indian Express*, ngày 13 tháng 7 năm 2018) <https://indianexpress.com/article/india/muslim-personal-law-board-to-not -contest-if-sc-scraps-section-377-5258406/>, truy cập ngày 24 tháng 10 năm 2021.

1 Kinh Qur'an, Chương 23, Câu 5-7.

2 Bible Gateway, Leviticus 18:22 <https://www.biblegateway.com/verse/en/Leviticus%2018%3A22> truy cập ngày 23 tháng 10 năm 2021. Mặc dù một số tín đồ Cơ đốc giáo không coi đó là phiên bản chính xác của Cơ đốc giáo, hãy xem "Debating Bible Verses on Homosexuality" ("Tranh luận về những câu Kinh thánh về đồng tính luyến ái") (*New York Times*, ngày 8 tháng 6 năm 2018) <https://www.nytimes.com/interactive/2015/06/05/us/samesex-scriptures.html>, truy cập ngày 24 tháng 10 năm 2021.

3 Đạo luật Hôn nhân Cơ đốc của Ấn Độ, 1872, mục 4.

4 Đạo luật Hôn nhân Cơ đốc của Ấn Độ, 1872, mục 60. Xem thêm Jolly & Vohra (chú thích 72) 307.

5 Đạo luật Hôn nhân Cơ đốc của Ấn Độ, 1872, mục 5.

6 Agarwal (chú thích 11) 3.

7 Luật Hôn nhân đặc biệt, 1954, mục 12 - "Địa điểm và hình thức cử hành (1) Hôn lễ có thể được cử hành tại văn phòng của Viên chức Hôn nhân, hoặc tại một nơi khác trong một khoảng cách hợp lý mà các bên có thể mong muốn, dựa vào đó các điều kiện và việc thanh toán các khoản phí bổ sung có thể được quy định."

8 Đạo luật Hôn nhân đặc biệt, 1954, mục 4 (c) quy định rằng hôn nhân có thể được cử hành giữa hai người "nếu nam đủ hai mươi mốt tuổi và nữ đủ mười tám tuổi".

hai người nào", "việc cấm hôn nhân đồng tính vẫn gián tiếp được đưa vào ngôn ngữ của luật".[1]

Nội dung thế tục của SMA bắt nguồn từ Đạo luật Hôn nhân đặc biệt ban đầu, năm 1872, do người Anh ban hành, trong đó yêu cầu mọi người từ bỏ tôn giáo của họ trước khi kết hôn dân sự theo Đạo luật.[2] Các cá nhân chỉ có thể tham gia vào một mối quan hệ như vậy sau khi bị khai trừ khỏi cộng đồng của họ.[3] Tuy nhiên, SMA năm 1954 đã bỏ yêu cầu này để phù hợp với nhiệm vụ bảo vệ quyền của cá nhân trong hiến pháp.[4] Dù có những sửa đổi đáng khen ngợi như vậy, SMA vẫn chưa được coi là một đạo luật thực sự tự do ở thời điểm hiện tại.[5]

Việc SMA vẫn còn nhiều nhược điểm là không thể chối cãi, nhưng nó là đạo luật duy nhất quy định và cho phép hôn nhân giữa những người không được phép kết hôn theo luật cá nhân của họ.[6] Chính vì sự khoan dung đó mà SMA được dự đoán có thể trở thành phương tiện hướng tới hôn nhân ngoài nhị nguyên nam - nữ.

Việc có thể đăng ký kết hôn cùng giới theo SMA đã nhận được sự ủng hộ của các tòa án trong việc diễn giải luật theo hướng có lợi. Trong vụ *Danial Latifi kiện Cộng hòa Ấn Độ*[7], Tòa án Tối cao cho rằng phụ nữ Hồi giáo có thể tận dụng lợi ích của việc cấp dưỡng theo mục 125, Cr.P.C. vì luật cá nhân của người Hồi giáo không quy định về việc trợ cấp một người vợ đã ly hôn. Diễn giải kết hợp các yêu cầu về thời gian như vậy phải được thực hiện, nhất là để hiệu lực hóa các mục tiêu của những đạo luật có lợi như SMA. Vì chúng ta không phải phụ thuộc vào các yêu cầu của luật pháp cá nhân để cung cấp lợi ích hoặc tạo điều kiện cho hôn nhân thế tục, SMA có thể trở thành một động lực cho phép bất kỳ hai người trưởng thành nào kết hôn tự nguyện.[8] Tuy nhiên, cuối cùng vẫn là ý chí lập pháp sẽ mở đường cho sự bình đẳng trong hôn nhân thực sự thông qua việc ban hành một quy chế mới hoặc bằng cách sửa đổi các luật hiện hành.

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1 Agarwal (chú thích 11) 6.

2 Xem tuyên thệ được thực hiện bởi cả chú rể và cô dâu theo Văn kiện thứ hai với SMA, 1972, trước khi cử hành hôn lễ theo Đạo luật Hôn nhân đặc biệt, 1872. Xem thêm Rohit Ghosh, "Special Marriage Act: The interpretation and constitutional perspective" ("Đạo luật Hôn nhân Đặc biệt: Quan điểm diễn giải và hiến pháp") (*The Leaflet*, Ngày 23 tháng 5 năm 2018) <https://www.theleaflet.in/special-marriage-act-the-interpretation-and-constitutional-perspective/#:~:text=In%201872%2C%20the%20then%20British,the%20formalities%20of%20the%20act.>, truy cập ngày 23 tháng 10 năm 2021.

3 Để biết thêm về quan điểm này, hãy xem Perveez Mody, "Tình yêu và luật pháp: Hôn nhân tình yêu ở Delhi" (2002) 36 (1) Mod. Số 223, 240 của châu Á.

4 Sđd.

5 Agarwal (chú thích 11) 6.

6 John (chú thích 34) 362-364.

7 *Danial Latifi kiện Cộng hòa Ấn Độ*, Lệnh đơn kiện (Dân sự) 868 năm 1986 (Ngày phán quyết: 28.9.2001), <https://indiankanoon.org/doc/410660/>, truy cập ngày 24 tháng 10 năm 2021.

8 John (chú thích 34) 363-364.

Vào năm 2015, một dự luật tư nhân đã được đệ trình để chứng thực pháp lý cho các cuộc hôn nhân cùng giới, nhưng tiếc là nó đã không thực hiện được.[1]

KẾT LUẬN

Vụ *Navtej Johar* đã thúc đẩy việc công nhận quyền công dân bình đẳng theo hiến pháp, mở rộng phạm vi quyền công dân của những người thuộc cộng đồng LGBTQ+. Việc loại trừ các cặp đồng tính luyến ái khỏi hôn nhân với hậu quả là chối bỏ các lợi ích đi cùng của họ là một trường hợp phân biệt đối xử dựa trên xu hướng tính dục.[2] Với sự ra đời của văn phạm đạo đức hiến pháp và từ đó là thừa nhận quan hệ cùng giới, việc công nhận hôn nhân cùng giới là bước đi đúng hướng tiếp theo. Khi bình đẳng được nhìn nhận qua lăng kính đạo đức hiến pháp, được phân định bằng các giá trị vốn có của tính bao trùm và đa nguyên, mọi người sẽ được đảm bảo tôn trọng và công nhận bình đẳng theo hiến pháp đang dần biến đổi của Ấn Độ.

Đạo đức hiến pháp khuyến khích khoan dung với tính đa dạng, bao gồm bình đẳng trong hôn nhân. Giá trị của cá nhân phải được ưu tiên trong mâu thuẫn giữa quyền lực của nhà nước và quyền của cá nhân. Như phán quyết trong vụ *Johar*, mục đích của hiến pháp là để biến đổi xã hội của chúng ta chứ không chỉ đơn giản là để bảo tồn các giá trị tồn tại từ trước của đa số. Chính nhờ đạo đức hiến pháp mà chúng ta có thể vượt qua những yêu cầu bắt buộc của đạo đức bình dân - vốn chỉ thừa nhận hôn nhân giữa những người khác giới.[3] Hiến pháp của chúng ta, như Chandrachud J. đã tuyên bố, "nuôi dưỡng bất đồng chính kiến như là một van an toàn cho xung đột xã hội" và rằng "việc có khả năng nhìn nhận những người khác với mình là một dấu hiệu tiến hóa của chính chúng ta."[4]

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1 A. Mandhani, "Shashi Tharoor submits private members bill to scrap S.377; Jaitley, Chidambaram and Bhushan opine SC must review Kaushal Judgment" ("Shashi Tharoor đệ trình dự luật tư nhân để bãi bỏ S.377; Jaitley, Chidambaram và Bhushan opine SC phải xem lại Bản án Kaushal") (Live Law, ngày 30 tháng 11 năm 2015) <https://www.livelaw.in/shashi-tharoor-submits-private-members-bill-to-scrap-s-377-jaitley-chidambaram-and-bhushan-opine-sc-must-review-kaushal-judgment/>, truy cập ngày 24 tháng 10 năm 2021.

2 Gautam Bhatia, "Indra Sarma v. VKV Sarma: The Supreme Court on Live-in Relationships and Gay Marriage" ("Vụ Indra Sarma kiện VKV Sarma: Tòa án tối cao bàn về các mối quan hệ sống chung và hôn nhân đồng tính") (Ind. Con. L. & Phil., 30 tháng 11, 2013) <https://indconlawphil.wordpress.com/2013/11/30/indra-sarma-v-vkv-sarma-the-supreme-court-on-live-in-relationships-and-gay-marriage/>, truy cập ngày 24 tháng 10 năm 2021.

3 Abhinav Chandrachud, "Navtej Johar v. Cộng hòa Ấn Độ – Key Highlights" ("Navtej Johar kiện Cộng hòa Ấn Độ - Những điểm chính") (Ind. Con L. & Phil., Ngày 9 tháng 9 năm 2018) < https://indconlawphil.wordpress.com/2018/09/09/guest-post-navtej-johar-v-union-of-india-key-highlights/>, truy cập ngày 24 tháng 10 năm 2021.

4 *Navtej Johar* (chú thích 8) [375].

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YÊU CẦU QUYỀN BÌNH ĐẲNG HÔN NHÂN CỦA NGƯỜI LGBT+ VÀ KHẢ NĂNG THAY ĐỔI LUẬT GIA ĐÌNH ẤN ĐỘ

Akshat Agarwal, LL.M. [1]

I. GIỚI THIỆU

Tòa án tối cao Ấn Độ, với quyết định mang tính bước ngoặt trong vụ kiện *Navtej Singh Johar kiện Cộng hòa Ấn Độ*[2], đã phi hình sự hóa đồng tính luyến ái vào năm 2018 và công nhận quyền công dân bình đẳng của cộng đồng LGBT+ Ấn Độ theo hiến pháp[3]. Kể từ đó, đã có ít nhất chín đơn kiến nghị khác nhau được đệ trình trước hai tòa án cấp cao nhằm tìm kiếm sự công nhận về bình đẳng trong hôn nhân theo luật hôn nhân thế tục và đạo Hindu của Ấn Độ. Do vậy, việc phân tích mối quan hệ giữa quyền LGBT+ và luật gia đình của Ấn Độ trở nên vô cùng cần thiết. Trong vấn đề luật gia đình, bao gồm cả các quy định thế tục và quy tắc tôn giáo cá nhân, từ lâu đã có không ít tranh luận về việc luật cá nhân cần tuân theo các yêu cầu về bình đẳng giới, và mong muốn có một bộ luật dân sự thống nhất để thay thế các luật gia đình hiện hành.

Đồng thời, nhiều nhà phê bình cho rằng, các phương pháp tiếp cận truyền thống đối với quyền bình đẳng của cộng đồng LGBT+ có lẽ đã bỏ qua sự mơ hồ của các thể chế luật gia đình hiện có, và nhấn mạnh việc cần phải suy nghĩ vượt ra ngoài phạm vi pháp luật để công nhận các hình thức gia đình đa dạng khác nhau[4]. Những lập luận này không chỉ có ở Ấn Độ. Yêu cầu quyền LGBT+ trong các thể chế luật gia đình hiện có,

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[2] Navtej Singh Johar v. Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án tối cao Ấn Độ).

[3] Tôi sử dụng LGBT+ như một thuật ngữ bao trùm để chỉ sự đa dạng về danh tính và nỗ lực rộng lớn hơn cho việc đòi quyền của người thiểu số về giới và xu hướng tính dục. Tuy nhiên, tôi nhận ra rằng mình chủ yếu mới chỉ đề cập tới xu hướng tình dục. Điều này cũng là do các vấn đề về luật gia đình của người chuyển giới nói chung là khác nhau. Ví dụ: luật hiện hành công nhận các tập quán kế thừa giữa các cộng đồng người chuyển giới, xem Mayur Suresh, *Possession is 9/10th of the Body*, trong LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 378 (Luật như yêu: Góc nhìn của người (queer) về luật) (Alok Gupta và Arvind Narrain biên tập, 2011).

[4] Saptarshi Mandal, *Redefining the Same-Sex Marriage Question (Định nghĩa lại câu hỏi về hôn nhân cùng giới),* THE INDIA FORUM (DIỄN ĐÀN ẤN ĐỘ) (2021) https://www.theindiaforum.in/article/redefining-same-sex-marriage (truy cập lần cuối ngày 28 tháng 11 năm 2021).

chẳng hạn như công nhận hôn nhân cùng giới, đã chia rẽ các nhà hoạt động LGBT+ trên toàn thế giới. Một lý luận phổ biến là việc đồng hóa vào các thể chế xã hội phụ quyền hiện có sẽ bỏ qua các khả năng biến đổi căn bản. Các nhà phê bình cho rằng, sự đồng hóa như vậy ưu tiên các thể chế gia đình hiện có như hôn nhân và gia đình hạt nhân, gia đình sinh học, vốn có lịch sử lâu đời là áp bức phụ nữ, nhất là trong những hình thái gia đình khác như mối quan hệ phi hôn nhân. Tuy nhiên, các học giả về luật gia đình ở các khu vực pháp lý khác[1] đã phản đối tiền đề này, và đã chỉ ra rằng luật gia đình có thể được biến đổi như thế nào thông qua các yêu cầu về quyền của cộng đồng LGBT+. Họ xác định quan hệ cha mẹ và các mối quan hệ ngoài hôn nhân là những điểm chính của sự chuyển đổi này.

Trong khi chờ đợi một tuyên bố tư pháp chính thức về bình đẳng hôn nhân ở Ấn Độ, tôi cho rằng việc công nhận hôn nhân cùng giới có thể tác động tích cực đến các luật gia đình hiện hành ở Ấn Độ bằng cách mở rộng việc công nhận các loại hình gia đình đa dạng. Do đó, Ấn Độ có thể mô phỏng các cơ năng trong một khu vực pháp lý như Hoa Kỳ, nơi mà việc thừa nhận bình đẳng trong hôn nhân đã củng cố các lập luận hiến pháp để công nhận các hình thức phi truyền thống trong quan hệ làm cha mẹ và phi hôn nhân. Hơn nữa, quyền LGBT+ có thể trở thành điểm khởi đầu mới cho những cải cách trong luật gia đình - vốn đã gây nhiều chất vấn về sự xung đột giữa luật tôn giáo cá nhân và yêu cầu bình đẳng giới.

Tôi nghiên cứu tương tác tiềm ẩn giữa những yêu cầu về bình đẳng trong hôn nhân cho cộng đồng LGBT+ với luật về quyền làm cha mẹ. Trong phân tích của mình, tôi đặc biệt tập trung vào quyền tự do cá nhân và các yêu cầu dựa trên bình đẳng và tác động của chúng đối với luật gia đình thế tục và đạo Hindu về quyền làm cha mẹ. Điều này là bởi cả hai bộ luật đều ảnh hưởng đến phần lớn dân số của Ấn Độ

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[1] Douglas NeJaime, *Marriage Equality and the New Parenthood (Bình đẳng trong hôn nhân và quyền làm cha mẹ mới)*, 129 HARV. L. REV. 1185 (2016); Douglas NeJaime, *Before Marriage: The Unexplored History of Non-Marital Recognition and Its Relationship to Marriage (Trước hôn nhân: Lịch sử chưa được khám phá của việc công nhận phi hôn nhân và mối quan hệ của nó với hôn nhân)*, 102 CAL. L. REV. (2014); Courtney G Joslin, *The Gay Rights Canon and the Right to Nonmarriage (Quy luật về quyền của người đồng tính và quyền không kết hôn)*, 97 B.U. L. REV. 425 (2017); Macarena Saez, *Transforming Family Law Through Same-Sex Marriage: Lessons From (And to) the Western World (Thay đổi luật gia đình thông qua hôn nhân cùng giới: Bài học từ (và dành cho) phương Tây)*, 25 DUKE J. COMP. INTL. L., (2014); về mối tương quan giữa cải cách luật LGBT+ và luật gia đình, xem SAME SEX RELATIONSHIPS AND BEYOND: GENDER MATTERS IN THE EU (CÁC MỐI QUAN HỆ CÙNG GIỚI VÀ HƠN THẾ: CÁC VẤN ĐỀ VỀ GIỚI Ở EU) (Katherina Boele-Woelki và Angelika Fuchs eds., 3rd edn., 2017); Đối với các tài liệu suy đoán tác động của việc thừa nhận hôn nhân cùng giới, xem Nan D. Hunter, *Introduction: The Future Impact of Same-Sex Marriage: More Questions than Answers (Giới thiệu: Tác động tương lai của hôn nhân cùng giới: Nhiều câu hỏi hơn câu trả lời)*, 100 GEO. L.J. 1855 (2012).

(Luật Hindu cũng áp dụng cho bất kỳ ai không là người Hồi giáo, Cơ đốc giáo, Parsi hoặc Do Thái). Hơn nữa, do mức độ kết nối cao, ngay cả khi các cá nhân chọn luật thế tục, luật cá nhân dựa trên tôn giáo của họ vẫn rất quan trọng. Việc chọn tập trung vào quyền cha mẹ bắt nguồn từ việc nó là trọng tâm thay đổi tại các khu vực pháp lý khác - nơi có quyền LGBT+ được quy định trong luật gia đình.

Tôi lập luận rằng, việc công nhận quyền bình đẳng trong gia đình của cộng đồng LGBT+ và quyền được pháp luật công nhận các mối quan hệ thân mật có khả năng mở rộng dần luật làm cha mẹ của Ấn Độ. Tác động này có thể thấy rõ trong các quy luật về giám hộ, hỗ trợ sinh sản và nhận con nuôi và có thể mang lại lợi ích cho các gia đình khác giới, cha mẹ đơn thân và những người có quan hệ phi hôn nhân.

Tuy nhiên, mục tiêu của tôi không phải là nhìn vào tương lai của quyền LGBT+ hoặc luật gia đình ở Ấn Độ. Tôi ý thức rằng việc thực hiện các quyền vẫn phụ thuộc vào nhiều yếu tố khác nhau, bao gồm cả thực tế xã hội và chính trị. Thay vào đó, nghiên cứu này đóng góp một góc nhìn khác cho các cuộc tranh luận về cải cách gia đình LGBT+. Bằng cách chứng minh rằng bình đẳng hôn nhân cho các cặp đôi cùng giới có thể có khả năng thay đổi các khía cạnh khác của luật gia đình, tôi muốn vượt ra khỏi giới hạn của nhị nguyên đồng hóa hay chuyển đổi đang thống trị suy nghĩ hiện tại về quyền của LGBT+. Điều này không có nghĩa là bình đẳng trong hôn nhân là mảnh ghép cuối cùng trong câu đố về trao quyền cho cộng đồng LGBT+. Thay vào đó, nó nêu bật lý do tại sao đây vẫn là một nỗ lực quan trọng giữa một loạt các mục tiêu và có thể mang lại những kết quả tích cực cho tất cả mọi người.

Tôi cũng ý thức rằng các phương pháp so sánh đối với luật gia đình có thể có những cạm bẫy nhất định. Thực tế tình hình quốc gia và, đôi khi, thậm chí cả tiểu quốc gia ảnh hưởng nặng nề đến luật gia đình. Do đó, tôi sử dụng phương pháp so sánh trong bài viết này không phải là để vay mượn học thuyết nước ngoài, cũng như không tham gia vào lý thuyết về thay đổi xã hội và quyền của LGBT+.[1] Thay vào đó, việc sử dụng vừa phải các phương pháp so sánh giúp xem xét sự thay đổi trong các quỹ đạo

[1] Một số học giả có ảnh hưởng đã viết về vấn đề này, xem Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands* (*Thay đổi nhỏ: Con đường dẫn đến hôn nhân cùng giới đã được lát ở Hà Lan),* trong LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW 437, 437 (CÔNG NHẬN PHÁP LÝ VỀ CÁC ĐỐI TÁC CÙNG GIỚI: NGHIÊN CỨU LUẬT QUỐC GIA, CHÂU ÂU VÀ QUỐC TẾ 437, 437) (Robert Wintemute và Mads Andenæs eds., 2001); WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (THỰC HÀNH CÔNG BẰNG: CÁC LIÊN MINH DÂN SỰ VÀ TƯƠNG LAI CỦA CÁC QUYỀN CỦA NGƯỜI ĐỒNG TÍNH) (2002); YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (BÌNH ĐẲNG CHO CÁC CẶP ĐÔI ĐỒNG TÍNH: SỰ CÔNG NHẬN HỢP PHÁP CỦA CÁC ĐỐI TÁC ĐỒNG TÌNH Ở CHÂU ÂU VÀ HOA KỲ) (2002).

pháp luật và độ phổ biến của các khái niệm mới trong những khu vực pháp lý khác, buộc chúng ta phải đặt những câu hỏi tương tự về khả năng thay đổi pháp lý trong luật gia đình của Ấn Độ.

Phần II của bài viết này phân tích học thuật về tương tác giữa quyền LGBT+ và luật gia đình ở các khu vực pháp lý nước ngoài, đặc biệt là Hoa Kỳ. Trong đó, lập luận rằng các học giả đã quan sát thấy một động lực tích cực giữa các tuyên bố về quyền bình đẳng trong hôn nhân cho cộng đồng LGBT+ với việc mở rộng dần các luật gia đình như quyền làm cha mẹ để bao gồm các gia đình đa dạng. Phần III xét riêng Ấn Độ và bàn về việc các cuộc tranh luận hiện nay về cải cách luật gia đình đang bế tắc như thế nào do những tranh cãi lâu năm về một bộ quy tắc thống nhất, trong khi cộng đồng LGBT+ đã thận trọng lên tiếng về bình đẳng hôn nhân và ưu tiên công nhận các gia đình đa dạng hoặc không theo quy chuẩn. Tôi cho rằng sự năng động ở các khu vực pháp lý khác mang lại một hướng suy nghĩ mới về việc yêu cầu quyền bình đẳng trong hôn nhân của cộng đồng LGBT+ có thể trở thành điểm khởi đầu cho cải cách luật gia đình. Nó cũng có thể dần dần mở rộng sự công nhận các loại hình gia đình đa dạng khác. Để cho thấy điều này có thể xảy ra như thế nào, Phần IV xây dựng các lập luận về bình đẳng và tự do cá nhân cho bình đẳng hôn nhân dựa trên những tiến bộ quan trọng trong luật học về giới và xu hướng tính dục của Tòa án tối cao Ấn Độ. Phần V áp dụng các lập luận được xây dựng trong Phần IV về luật làm cha mẹ, cụ thể là quyền giám hộ, công nghệ hỗ trợ sinh sản và nhận con nuôi, để chỉ ra rằng bình đẳng trong hôn nhân có thể đem lại lợi ích cho cả các gia đình dị giới, cha mẹ đơn thân và những ai đang trong các mối quan hệ phi hôn nhân.

II. QUAN ĐIỂM SO SÁNH VỀ SỰ TƯƠNG TÁC GIỮA QUYỀN LGBT+ VÀ LUẬT GIA ĐÌNH

Trong khi Ấn Độ đang chờ đợi những phát triển về luật gia đình LGBT+, nhiều khu vực pháp lý khác đã có kinh nghiệm đáng kể về việc yêu cầu quyền LGBT+ trong luật gia đình. Tính đến tháng 11 năm 2021, ba mươi quốc gia đã công nhận quyền bình đẳng trong hôn nhân thông qua các quyết định của pháp luật hoặc tư pháp.[1] Một số khu vực pháp lý này cũng đã chứng kiến các vụ kiện tụng và cải cách lập pháp sau đó theo hướng công nhận quyền nhận con nuôi cũng như các quyền của cha mẹ liên quan đến sinh sản thông qua các kỹ thuật hỗ trợ sinh sản.[2] Ở một số khu vực pháp lý,

[1] Marriage Equality around the World, Human Rights Campaign (Bình đẳng trong hôn nhân trên toàn thế giới, Chiến dịch Nhân quyền) https://www.hrc.org/resources/marriageequality-around-the-world (truy cập lần cuối vào ngày 28 tháng 11 năm 2021).

[2] Xem SAME SEX RELATIONSHIPS AND BEYOND: GENDER MATTERS IN THE EU (CÁC MỐI QUAN HỆ CÙNG GIỚI VÀ HƠN THẾ: CÁC VẤN ĐỀ VỀ GIỚI Ở EU) (Katherina Boele-Woelki và Angelika Fuchs eds.,ấn bản thứ 3, 2017).

như Hoa Kỳ, sự thừa nhận quyền làm cha mẹ thậm chí còn có trước bình đẳng trong hôn nhân.[1]

Trong các bài viết về luật gia đình, tác động của các quyền này lên luật gia đình nói chung vẫn chưa được chú ý nghiên cứu nhiều.[2] Điều này là do các học giả và những người ủng hộ thường chỉ tập trung vào yêu cầu của cộng đồng người LGBT+ mà không thực hiện bước tiếp theo là xem xét về việc những yêu cầu đó có thể tương tác với luật gia đình hiện hành như thế nào. Tuy nhiên, sự tương tác như vậy là không thể tránh khỏi vì luật gia đình LGBT+ không mang tính tự trị mà nằm trong luật gia đình hiện hành.

Học giả pháp luật Macarena Saez viết về luật gia đình tương ứng, lập luận rằng việc công nhận tư pháp đối với các tuyên bố bình đẳng trong hôn nhân thông qua việc liên kết các quyền về nhân phẩm, quyền tự chủ và bình đẳng trong các tòa án quốc gia khác nhau sẽ mở ra khả năng biến đổi luật gia đình hiện hành.[3] Cô ấy đối chiếu sự tập trung vào các lập luận dựa trên quyền cá nhân (được thấy ở các khu vực pháp lý như Canada, Nam Phi, Mexico, Brazil, Bồ Đào Nha, Tây Ban Nha và Columbia) với sự nhấn mạnh vào trọng tâm hôn nhân trong luật (được thấy ở Hoa Kỳ).[4]

Ví dụ, Tòa án Hiến pháp Nam Phi trong vụ *Bộ trưởng Bộ Nội vụ kiện Fourie*[11]*,* thay vì tranh thủ quyền kết hôn theo hiến pháp, lại tập trung vào việc công nhận bình đẳng các loại mối quan hệ, từ đó liên kết phẩm giá với bình đẳng. Trong khi đó, các tòa án ở Hoa Kỳ trong các trường hợp như vụ *Hoa Kỳ kiện Windsor*[5] (Saez đang viết về quyết định về bình đẳng hôn nhân của Tòa án Tối cao Hoa Kỳ trong vụ *Obergefell kiện Hodges*[6]*)* đã liên kết phẩm giá với tình trạng hôn nhân. Saez lập luận rằng các cách tiếp cận giống như những cách tiếp cận ở Nam Phi, nhấn mạnh tự do và bình đẳng bằng cách tập trung vào sự bình đẳng của các mối quan hệ hơn là lấy hôn nhân làm trọng tâm, cho phép công nhận tính hợp pháp của các gia đình được xây dựng

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1 Xem NeJaime, Marriage Equality (Bình đẳng hôn nhân), đã dẫn số 4; Erez Aloni, *First Comes Marriage, Then Comes Baby, Then Comes What Exactly? (Đầu tiên kết hôn, sau đó đến em bé, sau đó đến chính xác là gì?)*15:1 NATIONAL TAIWAN NATIONAL TAIWAN U L REV 49 (2020).

2 Ví dụ, xem Jens M. Scherpe, *Comparative Family Law (Luật gia đình so sánh)*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW (SỔ TAY OXFORD VỀ LUẬT SO SÁNH) (Mathias Reimann và Reinhard Zimmermann eds., Ấn bản thứ 2, 2019).

3 Saez, chú thích số 4, tr. 129. [11] Saez, chú thích số 4, tr. 129.

4 Bộ Nội vụ kiện Fourie, ZACC 19, 2006 (1) SA 524 (CC) (Constitutional Court of South Africa) (Tòa án Hiến pháp Nam Phi).

5 Hoa Kỳ kiện Windsor, 570 U.S. 744 (Supreme Court of the United States) (Tòa án tối cao Hoa Kỳ).

6 Obergefell kiện Hodges, 576 U.S. 644 (Supreme Court of the United States) (Tòa án tối cao Hoa Kỳ).

khác nhau và không xoay quanh hôn nhân, bao gồm cả những gia đình dựa trên mối quan hệ phi hôn nhân.[1]

Tuy nhiên, phân tích của Saez không giải thích được việc cách các lập luận dựa trên quyền có thể tương tác với các khái niệm luật gia đình cụ thể. Các học giả pháp lý Hoa Kỳ như Douglas NeJaime, Courtney Joslin và Courtney Cahill, trong các bài viết của họ, đã chỉ ra rằng hoạt động yêu cầu quyền của LGBT+ đã và có thể ảnh hưởng đến luật gia đình trong tương lai bằng cách dựa trên sự thừa nhận mối quan hệ không chuẩn mực trong luật gia đình và tiềm năng biến đổi của các lập luận bình đẳng trong hôn nhân. Họ xác định các mối quan hệ ngoài hôn nhân và vai trò làm cha mẹ là hai điểm chính của sự thay đổi.

Theo NeJaime, lịch sử ủng hộ quyền LGBT+ ở California cho thấy cách quyền lợi trong hôn nhân được mưu cầu dựa trên lịch sử công nhận phi hôn nhân, trong đó những người ủng hộ quyền LGBT+ đã sử dụng các chuẩn mực hôn nhân để tranh luận về việc công nhận phi hôn nhân.[2] Điều này đã phần nào dẫn tới sự chuyển đổi cách hiểu pháp lý về hôn nhân từ việc dựa trên giới tính và sinh sản sinh học sang đặc trưng bởi sự đồng hành cũng như các quyền và nghĩa vụ chung.[3]

Trong khi NeJaime dựa vào những gì xảy ra trong quá khứ, Joslin mường tượng ra các khả năng học thuyết trong tương lai của luật pháp về bình đẳng hôn nhân Hoa Kỳ thông qua các quyết định như *Obergefell*. Bà lập luận rằng việc thừa nhận hôn nhân cùng giới dựa trên quyền tự chủ (xuất phát từ cả sự bảo vệ bình đẳng và các điều khoản về thủ tục tố tụng của Hiến pháp Hoa Kỳ), phẩm giá và sự thừa nhận ý tưởng của chủ nghĩa hợp hiến năng động[4] có thể góp phần vào việc thừa nhận tiềm năng của cái gọi là quyền phi hôn nhân.[19] Quyền như vậy có thể được sử dụng để truy vấn những hạn chế đối với việc công nhận các yêu cầu liên quan đến tài sản của những người sống chung và quyền làm cha mẹ của những người có quan hệ phi hôn nhân.[5]

Khi viết về những tác động của bình đẳng hôn nhân trong trường hợp làm cha mẹ, NeJaime lập luận về việc bình đẳng hôn nhân đã làm thay đổi cách hiểu về huyết thống từ việc dựa trên sinh học, giới và tình trạng hôn nhân sang ưu tiên các mối quan hệ có chủ đích và chức năng.[6] Với trường hợp các mối quan hệ hôn nhân, ông chỉ ra

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1 Saez, chú thích số 4, tr. 129.

2 NeJaime, Before Marriage (Trước hôn nhân), chú thích số 4.

3 NeJaime, Before Marriage (Trước hôn nhân), chú thích số 4.

4 Theo Joslin, chủ nghĩa hợp hiến năng động xem "hiến pháp như một học thuyết năng động phát triển để phản ánh những phát triển về luật pháp, văn hóa và xã hội". Joslin, chú thích số 4, tr. 454. [19] Joslin, chú thích số 4, tr. 447-455.

5 Joslin, chú thích số 4, tr. 481-488.

6 NeJaime, Marriage Equality and the New Parenthood (Bình đẳng trong hôn nhân và quyền làm cha mẹ mới), chú thích số 4.

việc giả định hôn nhân, rằng chồng của mẹ ruột là cha của đứa trẻ, khi được áp dụng cho các cặp đôi cùng giới, được chuyển từ việc dựa trên một giả định về thực tế sinh học sang dựa trên ý định làm cha mẹ và hoạt động như những người cha người mẹ như thế nào.[1] Điều này đơn giản là do đối với các cặp đôi cùng giới, giả định trên về mối quan hệ sinh học là không có ý nghĩa. Hơn nữa, các quyết định bình đẳng trong hôn nhân cũng báo hiệu sự bình đẳng về xu hướng tính dục trong luật gia đình, đòi hỏi phải công nhận quyền làm cha mẹ bình đẳng của các cặp đôi cùng giới giống như các cặp dị tính.

Bình đẳng cho các gia đình LGBT+ có ý nghĩa lớn đối với các kỹ thuật hỗ trợ sinh sản, vốn thường cần thiết cho việc hình thành gia đình cùng giới.[2] Việc công nhận đầy đủ quyền bình đẳng cho cộng đồng LGBT+ trên cơ sở gia đình có thể giúp thúc đẩy sự công nhận và dễ dàng tiếp cận các kỹ thuật sinh sản và dịch vụ mang thai hộ. Sự công nhận này cũng có thể mang lại lợi ích cho các gia đình không thuộc cộng đồng LGBT+, bao gồm cả các gia đình đơn thân và dị tính. Việc công nhận rộng rãi các kỹ thuật hỗ trợ sinh sản cũng giúp gia tăng công nhận về chức năng làm cha mẹ, nhất là trong trường hợp không phải cha mẹ ruột.[3] Điều này cũng mang đến nhiều lợi ích cho những người cha mẹ nuôi trong các bối cảnh khác. Do đó, với việc thúc đẩy sự thừa nhận việc làm cha mẹ dựa trên mục đích và chức năng, các gia đình cùng giới "làm lung lay các chuẩn mực đã hạn chế khả năng gia đình cho tất cả các gia đình, cả trong và ngoài hôn nhân" .[25]

Tương tự, Cahill đưa ra các lập luận mang tính học thuyết về cách *Obergefell* thừa nhận thực tế của quyền làm cha mẹ của cộng đồng LGBT+, việc bảo vệ các lựa chọn liên quan đến việc hình thành gia đình và sự công nhận bình đẳng khuynh hướng tình dục trong luật gia đình đã phá vỡ các lập luận hiện có về quy định sinh sản.[4] Từ đó, bà lập luận rằng logic của *Obergefell* có thể dẫn đến việc Công nhận quyền căn bản để sinh sản, công nhận quyền bình đẳng giữa sinh sản hữu tính và sinh sản thay thế, và thay thế vị trí đặc quyền mà giới tính thường chiếm trong quy định pháp luật.[5]

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1 NeJaime, Marriage Equality and the New Parenthood (Bình đẳng trong hôn nhân và quyền làm cha mẹ mới), chú thích số 4, tr. 1242.

2 NeJaime, Marriage Equality and the New Parenthood (Bình đẳng trong hôn nhân và quyền làm cha mẹ mới), chú thích số 4, tr. 1254-1255

3 NeJaime, Marriage Equality and the New Parenthood (Bình đẳng trong hôn nhân và quyền làm cha mẹ mới), chú thích số 4, tr. 1254-1255. [25] NeJaime, Marriage Equality and the New Parenthood (Bình đẳng trong hôn nhân và quyền làm cha mẹ mới), chú thích số 4, tr. 1265.

4 Courtney Cahill, *Obergefell and the New Reproduction (Obergefell và sinh sản mới)*, MINNESOTA LAW REVIEW HEADNOTES (TIÊU ĐIỂM ĐÁNH GIÁ LUẬT MINNESOTA) 37, 6 (2016).

5 [27]*Sđd*., tr. 7-12

Do đó, so sánh học thuật về sự tương tác giữa việc đòi quyền của LGBT+ với luật gia đình cho thấy một động lực rõ ràng về sự tương tác tích cực giữa việc thừa nhận tính hợp pháp của các gia đình LGBT+ và sự thừa nhận tiến bộ của các mối quan hệ không chuẩn mực. Vì vậy, việc thừa nhận bình đẳng trong hôn nhân trong pháp luật thường mở ra con đường để thừa nhận nhiều hơn các mối quan hệ gia đình bên ngoài đơn vị gia đình dị tính.

Những đường hướng này ở dưới dạng các lập luận dựa trên quyền, thường dựa trên các tuyên bố về quyền tự do, bình đẳng và nhân phẩm, có thể được áp dụng để mở rộng các biện pháp bảo vệ pháp lý cho các mối quan hệ gia đình đa dạng. Hơn nữa, việc thừa nhận quyền gia đình của các cặp đôi cùng giới do bản chất của mối quan hệ của họ, không dựa trên cơ sở sinh sản hữu tính, cũng dẫn đến sự linh hoạt hơn trong các quy phạm pháp luật về cách thức cấu trúc gia đình. Điều này có lợi cho những người độc thân có thể muốn trở thành cha mẹ, hoặc các cặp đôi khác giới trong mối quan hệ phi hôn nhân có mong muốn lập gia đình. Điều này cũng có thể dẫn đến việc thừa nhận các cấu hình gia đình phức tạp hơn, chẳng hạn như thừa nhận vai trò của các bậc cha mẹ chức năng, hoặc cha mẹ ruột không hôn thú trong các gia đình nhiều cha mẹ.

Một phản biện học thuật mạnh mẽ và tích cực như vậy, lập luận rằng việc đưa vào bao gồm trong luật gia đình hiện hành sẽ trao đặc quyền cho hôn nhân, với cái giá phải trả là sự công nhận của các hình thức gia đình phi quy chuẩn.[1] Điều này dẫn đến sự đồng hóa hơn là công nhận các mối quan hệ đa dạng mà những người LGBT+ có thể đang sống. Đặt vấn đề hôn nhân làm trung tâm trong pháp luật cũng liên kết tất cả các lợi ích hơn là thừa nhận sự phụ thuộc có thể hoạt động như thế nào trong các mối quan hệ khác nhau.[2] Các học giả pháp lý như Katherine Franke[3] và Melissa Murray[31] cũng đã đặt câu hỏi về luận điệu xung quanh hôn nhân cùng giới. Họ lập luận rằng, các tuyên bố về hôn nhân cùng giới đã làm giảm địa vị pháp lý và thậm chí gây hại cho các hình thức gia đình đa dạng như cha mẹ đơn thân và quan hệ cha mẹ không hôn nhân. Tuy nhiên, theo những bài viết từ NeJaime, Joslin và Cahill, nhiều mối quan tâm trong số này đã không diễn ra như dự đoán. Bình đẳng trong hôn nhân có thể dẫn đến việc các gia đình độc đáo được công nhận nhiều hơn trong tương lai.

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[1] Xem NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (HƠN CẢ HÔN NHÂN (DỊ TÍNH VÀ ĐỒNG TÍNH): ĐÁNH GIÁ CÁC GIA ĐÌNH DƯỚI LUẬT PHÁP) (2008).

[2] Nancy Polikoff, *Ending Marriage as we know it (Kết thúc hôn nhân như chúng ta đã biết)*, HOFSTRA LAW REVIEW: Tập 32: ISS. 1, Bài 9 (2003).

[3] Katherine M. Franke, *The Politics of Same-Sex Marriage Politics (Chính trị hôn nhân cùng giới)*, 15 COLUM. J. GENDER & L. 236 (2006). [31] Melissa Murray, *What's So New about the New Illegitimacy (Có gì mới về hành vi bất hợp pháp mới)*, AMERICAN UNIVERSITY JOURNAL OF GENDER SOCIAL POLICY AND LAW 20, Số. 3, 387-346 (2012).

III. SỰ BẾ TẮC TRONG LUẬT GIA ĐÌNH ẤN ĐỘ VÀ NHỮNG CHỈ TRÍCH TỪ CỘNG ĐỒNG LGBT+ VỀ BÌNH ĐẲNG TRONG HÔN NHÂN

A. Luật gia đình ở Ấn Độ: Ràng buộc luật cá nhân thống nhất-Bộ luật dân sự thống nhất

Khung luật gia đình phức tạp của Ấn Độ bao gồm cả luật gia đình thế tục và luật gia đình dựa trên bản sắc tôn giáo, nhưng do Nhà nước thực thi (luật cá nhân). Luật cá nhân cung cấp các khuôn khổ khác nhau cho các cộng đồng tôn giáo lớn của Ấn Độ, người theo đạo Hindu, đạo Hồi, đạo Thiên chúa và người Parsis. Những luật này bao gồm luật cá nhân theo luật định và không được sửa đổi và bao gồm luật tục.[1] Các cá nhân thường có thể lựa chọn luật thế tục. Ví dụ, các cặp đôi dị tính không muốn bị pháp luật điều chỉnh có thể chọn tổ chức hôn nhân theo Đạo luật Hôn nhân thế tục đặc biệt năm 1954 (SMA). Điều quan trọng là, những luật lệ thế tục như vậy cung cấp một con đường khả thi để công nhận mối quan hệ cho các cặp vợ chồng liên tôn giáo. Tuy nhiên, các khuôn khổ này hoạt động một cách tách biệt và luật gia đình tôn giáo và thế tục vẫn có tính "liên kết lẫn nhau" cao.[33] Điều này cũng có nghĩa là không luật thế tục nào cung cấp một quy tắc toàn diện điều chỉnh tất cả các khía cạnh của luật gia đình. Ngay cả những gia đình chọn luật thế tục cũng không tránh khỏi bị quản lý bởi cả luật cá nhân và luật thế tục.

Các bài viết hiện có về luật gia đình của Ấn Độ chủ yếu tập trung vào bình đẳng giới và khả năng thử nghiệm khung luật gia đình dựa trên tôn giáo của Ấn Độ thông qua các tuyên bố dựa trên quyền có trong Hiến pháp Ấn Độ.[2] Nguồn gốc của cuộc tranh cãi này có lẽ đã bắt nguồn từ quyết định những năm 1950 của Tòa án tối cao Bombay trong vụ *Bang Bombay kiện Narasu Appa Mali*[35], được giải thích là để phân cách các luật cá nhân khỏi sự giám sát hiến pháp. Tuy nhiên, theo thời gian, các tòa án đã có thái độ can thiệp nhiều hơn đối với việc xem xét kỹ lưỡng luật cá nhân với các yêu cầu về bình đẳng giới.[3] Trong những năm gần đây, với ý kiến trong quyết định của

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[1] Để có mô tả chi tiết về luật gia đình của Ấn Độ và những phức tạp liên quan của nó, hãy xem, Akshat Agarwal, *Marriage Equality in India: Thinking Beyond Challenges to Secular Marriage Law (*Bình đẳng trong hôn nhân ở Ấn Độ: Suy nghĩ vượt qua những thách thức đối với luật hôn nhân thế tục), INDIAN LAW REVIEW, Phần III (2021).

[2] [33] Sđd., Phần V.

Để có tổng quan chung về tài liệu này, hãy xem Tanja Herklotz, *Law, religion and gender equality: literature on the Indian personal law system from a women's rights perspective* (*Luật, tôn giáo và bình đẳng giới: tài liệu về hệ thống luật cá nhân của Ấn Độ từ góc độ quyền của phụ nữ),* INDIAN LAW REVIEW (ĐÁNH GIÁ LUẬT ẤN ĐỘ, 1: 3, 250-268 (2017). [35] Bang Bombay kiện Narasu Appa Mali, AIR 1962 Bom 84 (Tòa án tối cao của Bombay).

[3] Flavia Agnes, *Personal Laws* (Luật cá nhân), trong THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION (SỔ TAY OXFORD CỦA CÁCH MẠNG ẤN ĐỘ) (Pratap Bhanu Mehta và cộng sự, 2016).

Tòa án tối cao trong vụ *Shayara Bano kiện Cộng hòa Ấn Độ*[1], khi tòa án vô hiệu việc thực hành ba talaq (ly hôn) trong Luật cá nhân Hồi giáo, Nariman's J., đã làm rõ một cách đầy đủ rằng Luật cá nhân theo luật định hoặc điều lệ hóa (trái ngược với luật cá nhân chưa được điều lệ hóa) phải chịu sự giám sát của hiến pháp. Với phần lớn luật gia đình của Ấn Độ hiện đã được điều lệ hóa, một phần đáng kể của luật sẽ cần tuân theo các yêu cầu của hiến pháp.

Một vấn đề liên quan đến luật cá nhân là liệu chúng có nằm trong các bảo đảm về tự do tôn giáo theo Điều 25 của Hiến pháp Ấn Độ hay không.[2] Vì vậy, để tránh chống đối tôn giáo, những người ủng hộ hôn nhân cùng giới thường chỉ tập trung vào luật hôn nhân thế tục như một phương tiện cho sự bình đẳng trong hôn nhân thay vì thảo luận về toàn bộ luật gia đình.[3] Cũng vì lý do này mà phần lớn các thách thức tư pháp nhằm tăng cường sự bình đẳng trong hôn nhân hiện tập trung vào luật hôn nhân thế tục. Tuy nhiên, trong nhiều quyết định, Tòa án tối cao đã nhắc lại rằng các luật cá nhân dựa trên tôn giáo mà không giải quyết các vấn đề về đức tin mà chỉ liên quan đến các khía cạnh thế tục của tôn giáo thì không được bảo đảm tự do tôn giáo.[4] Do đó, không có lý do pháp lý nào ngăn luật gia đình dựa trên tôn giáo khỏi sự giám sát của hiến pháp.

Tuy nhiên, các cuộc tranh luận xung quanh việc cải cách luật gia đình vẫn còn nhiều tranh cãi. Phần lớn là do các tranh luận chính trị xung quanh việc ban hành Bộ luật Dân sự thống nhất (UCC). Điều 44 của Các nguyên tắc chỉ đạo về chính sách nhà nước trong Hiến pháp Ấn Độ[5] khiến việc xây dựng UCC trở thành một nguyện vọng hợp hiến. Tuy nhiên, các vấn đề xung quanh UCC đã được quyền của người Hindu sử dụng như một công cụ để chỉ trích các cộng đồng thiểu số, đặc biệt là người Hồi giáo, về các hành vi phân biệt đối xử trong luật cá nhân chưa được điều lệ hóa của họ.[6] Trong những năm sau khi độc lập, trong khi phần lớn luật cá nhân của người Hindu

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1 Shayara Bano kiện Cộng hòa Ấn Độ, (2017) 9 SCC 1 (Tòa án tối cao Ấn Độ).

2 Điều 25, Hiến pháp Ấn Độ.

3 Thomas John, *Liberating Marriage: Same-Sex Unions and the Law in India* (*Giải phóng hôn nhân: Hiệp hội Cùng giới và luật pháp ở Ấn Độ*), trong LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW (PHÁP LUẬT NHƯ TÌNH YÊU: GÓC NHÌN CỦA NGƯỜI (QUEER) VỀ PHÁP LUẬT) (Alok Gupta và Arvind Narrain eds., 2011).

4 John Vallamattom kiện Cộng hòa Ấn Độ (2003) 6 SCC 611 (Tòa án tối cao Ấn Độ); Sarla Mudgal kiện Cộng hòa Ấn Độ (1995) 3 SCC 635 (Tòa án tối cao Ấn Độ).

5 Điều 44, Hiến pháp Ấn Độ.

6 Việc chính trị hóa cuộc tranh luận cũng có nghĩa là các nhà nữ quyền Ấn Độ đã đảo ngược quan điểm của họ về vấn đề này, xem Aarefa Johari, *Demands for a uniform civil code are back and women's groups continue to oppose it. Here's why* (*Nhu cầu về một bộ quy tắc dân sự thống nhất đã trở lại và các nhóm phụ nữ tiếp tục phản đối nó. Đây là lý do tại sao*), SCROLL.IN (ngày 29 tháng 12 năm 2020) https://scroll.in/article/980443/demands-for-a-uniform-civil-code-are-backand-womens-groups-continue-to-oppose-it-heres-why (truy cập lần cuối vào ngày 30 tháng 11 năm 2021).

chưa sửa đổi đã được Nghị viện Liên minh hệ thống hóa thành luật định,[1] luật cá nhân của người Hồi giáo[2] đa phần vẫn chưa được sửa đổi.

Tuy nhiên, các học giả như Flavia Agnes đã chỉ ra, những lập luận như vậy đã dựa trên tiền đề sai lầm rằng luật cá nhân được điều lệ hóa của người Hindu chỉ là về giới.[45] Archana Parashar cho rằng, việc điều lệ hóa ban đầu của luật Ấn Độ giáo không phải bởi những lo ngại về bình đẳng giới mà là để đạt được mục tiêu xây dựng quốc gia và khẳng định quyền lực nhà nước đối với đời sống dân sự ở một quốc gia mới độc lập.[3] Do đó, các khía cạnh của luật Hindu, vốn gồm các giải pháp gây tranh cãi như khôi phục quyền vợ chồng và không công nhận các khái niệm tiến bộ như tài sản hôn nhân và ly hôn không có lỗi, tiếp tục vi phạm quyền bình đẳng của phụ nữ.[4]

Hơn nữa, cấu trúc liên bang của Ấn Độ với cả Nghị viện Cộng hòa và Cơ quan lập pháp bang đều có thẩm quyền đối với luật gia đình và các bảo đảm hiến pháp bất đối xứng về quyền tự trị trong các vấn đề dân sự cho một số bang ở Đông Bắc cũng là những rào cản để có một bộ luật thực sự thống nhất.[5] Đồng thời, như tôi đã lập luận trước đó, luật cá nhân dựa trên tôn giáo vẫn là những dấu ấn quan trọng về bản sắc

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1 Luật cá nhân của người Hindu đã được hệ thống hóa thành các luật như Đạo luật Hôn nhân của người Hindu năm 1956, Đạo luật về người thiểu số và người giám hộ của người Hindu, năm 1956, Đạo luật về việc cấp dưỡng và nhận con nuôi của người Hindu, năm 1956 và Đạo luật về thừa kế của người Hindu năm 1956. Tuy nhiên, những nỗ lực để hệ thống hóa luật của người Hindu đã bắt đầu từ trước khi giành độc lập. Để biết lịch sử về việc điều lệ hóa luật Hindu, hãy xem ARCHANA PARASHAR, WOMEN AND FAMILY LAW REFORM IN INDIA (CUỘC CẢI CÁCH LUẬT PHỤ NỮ VÀ GIA ĐÌNH Ở ẤN ĐỘ) (1992).

2 Trong khi Đạo luật Áp dụng Luật Cá nhân của người Hồi giáo (Shariat), năm 1937 làm cho luật Shariat có thể áp dụng cho tất cả người Hồi giáo Ấn Độ, phần lớn luật vẫn chưa được điều lệ hóa. Chỉ các vấn đề ly hôn và cấp dưỡng là đã được điều lệ hóa, xem Đạo luật Giải tán hôn nhân Hồi giáo, 1939; Đạo luật Phụ nữ Hồi giáo (Bảo vệ quyền ly hôn), 1986; và Đạo luật Phụ nữ Hồi giáo (Bảo vệ quyền trong hôn nhân), 2019.

3 Parashar, chú thích 43, tr. 264. Để xem thêm công trình học thuật phân tích các quỹ đạo của cải cách luật cá nhân, hãy xem NARENDRA SUBRAMANIAM, NATION AND FAMILY: PERSONAL LAW, CULTURAL PLURALISM AND GENDERED CITIZENSHIP IN INDIA (QUỐC GIA VÀ GIA ĐÌNH: LUẬT CÁ NHÂN, VĂN HÓA ĐA NGUYÊN VÀ GIỚI TÍNH CÔNG DÂN Ở ẤN ĐỘ) (2014); RINA VERMA WILLIAMS, POSTCOLONIAL POLITICS AND PERSONAL LAWS:

(CHÍNH TRỊ HẬU THUỘC ĐỊA VÀ LUẬT CÁ NHÂN):

COLONIAL LEGAL LEGACIES AND THE INDIAN STATE (DI SẢN PHÁP LUẬT THỰC DÂN VÀ NHÀ NƯỚC ẤN ĐỘ) (2006).

4 Xem FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA (LUẬT VÀ BẤT BÌNH ĐẲNG GIỚI: CHÍNH SÁCH VỀ QUYỀN CỦA PHỤ NỮ Ở ẤN ĐỘ) (2001). [48] Agnes, chú thích 36.

5 Agnes, chú thích số 36.

cá nhân và sự khác biệt của cộng đồng.[1] Điều này giải thích tại sao các tòa án thường do dự khi tìm hiểu các vấn đề hiến pháp xung quanh luật cá nhân, trong khi việc các thành viên thuộc các cộng đồng tôn giáo đặt câu hỏi về pháp luật của tòa án lại được coi là chính đáng hơn.[2]

Do đó, các cuộc thảo luận về UCC đã diễn ra một cách trì trệ. Một mặt, nó đã trở thành một công cụ chính trị để đe dọa các nhóm tôn giáo thiểu số. Mặt khác, có rất ít động lực hoặc lộ trình để thế tục hóa tất cả các luật gia đình theo cách đảm bảo các quyền. Trong tài liệu tham vấn về UCC, ngay cả Ủy ban Luật của Ấn Độ cũng kết luận rằng, UCC là "không cần thiết và cũng không được mong muốn ở giai đoạn này."[3] Thay vào đó, Ủy ban Luật nhấn mạnh việc giải quyết các điều khoản phân biệt đối xử trong các luật cá nhân khác nhau.

Trong bối cảnh này, yêu cầu về quyền của LGBT+ có thể là một điểm mới cho cải cách vượt ra ngoài ràng buộc của luật cá nhân - UCC, thúc đẩy các cuộc tranh luận hiện nay về luật gia đình của Ấn Độ. Luật pháp về giới tính và xu hướng tính dục của Tòa án tối cao nhấn mạnh quyền công dân bình đẳng theo hiến pháp, tạo cơ sở vững chắc cho việc thách thức các luật gia đình hiện hành.

B. Quyền LGBT+ và Luật Gia đình Ấn Độ

Hiện tại, ít nhất chín đơn yêu cầu bình đẳng hôn nhân đang được giải quyết trước Tòa án cấp cao của Kerala và Delhi. Đơn kiện trước Tòa án tối cao Kerala đã được một cặp đôi cùng giới nộp đơn yêu cầu công nhận hôn nhân của họ theo Luật Hôn nhân đặc biệt (SMA) thế tục.[4] Tại Tòa án cấp cao Delhi, bốn đơn kiện (ba đơn do một cặp vợ chồng đệ trình và đơn kiện còn lại do một nhóm người (queer)) yêu cầu công nhận theo SMA. Một đơn yêu cầu công nhận hôn nhân cùng giới của người Ấn Độ ở nước ngoài (theo luật Hoa Kỳ) theo Đạo luật Hôn nhân nước ngoài năm 1968, một

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1 Agarwal, chú thích số 32. Để có quan điểm trái ngược, xem FARAH AHMED, RELIGIOUS FREEDOM UNDER THE PERSONAL LAW SYSTEM (TỰ DO TÔN GIÁO THEO HỆ THỐNG LUẬT CÁ NHÂN) (2015).

2 Saptarshi Mandal, *Out of Shah Bano's shadow: Muslim women's rights and the Supreme Court's triple talaq verdict* (*Vượt ra khỏi bóng tối của Shah Bano: Quyền của phụ nữ Hồi giáo và phán quyết về ba chữ talaq của Tòa án tối cao*), 2 (1) INDIAN LAW REVIEW 89-107 (2018).

3 Ủy ban Luật pháp Ấn Độ, Tài liệu Tham vấn về Cải cách Luật Gia đình (2018) http://www.lawcommissionofindia.nic. in/reports/CPonReformFamilyLaw.pdf (truy cập lần cuối ngày 30 tháng 11 năm 2021).

4 *Gay couple from Kerala moves HC challenging "discriminatory" provisions of Special Marriage Act* (*Cặp đôi đồng tính nam từ Kerala làm lung lay toà án cấp cao trong thách thức các điều khoản "phân biệt đối xử" của Đạo luật Hôn nhân đặc biệt*), SCROLL.IN (28 tháng 1 năm 2020) https://scroll.in/latest/951357/gay-couple-from-kerala-moves-hc-challenging-discriminatoryprovisions-of-special-marriage-act (truy cập lần cuối vào ngày 30 tháng 11 năm 2021).

đơn yêu cầu cấp quyền công dân Ấn Độ ở nước ngoài cho người vợ/chồng cùng giới ngoại quốc của một người Ấn Độ, và các vụ kiện vì lợi ích công tìm kiếm sự công nhận hôn nhân cùng giới theo Đạo luật Hôn nhân Hindu, 1954 (HMA).[1] Tòa án tối cao Delhi đã sắp xếp các phiên điều trần, nhưng những tranh luận cuối cùng vẫn chưa bắt đầu.[2]

Chính phủ Ấn Độ, trong các đệ trình của mình, đã đưa ra quan điểm phản đối việc công nhận hôn nhân cùng giới.[3] Họ cho rằng luật học hiện hành chỉ công nhận các mối quan hệ thân mật cùng giới thông qua quyền riêng tư mà không bao gồm bất kỳ quyền nào được công nhận công khai về hôn nhân.[4] Hơn nữa, chính phủ cũng lập luận rằng luật hiện hành (bao gồm luật gia đình, dân sự và hình sự), cũng như các đặc điểm văn hóa xã hội của Ấn Độ, chỉ công nhận hôn nhân giữa một người đàn ông và một phụ nữ về mặt sinh học, và do đó nhà nước có quyền hợp pháp trong việc hạn chế hôn nhân chỉ cho các cặp đôi khác giới.[57]

Trong bối cảnh của những thách thức tư pháp này, các cuộc tranh luận xung quanh bình đẳng trong hôn nhân càng trở nên cấp thiết hơn.[5] Việc thừa nhận tính hợp pháp của các mối quan hệ không theo chuẩn giới luôn là một cuộc tranh luận sôi nổi trong phong trào quyền LGBT+ ở Ấn Độ. Trong một trong những báo cáo mang tính bước ngoặt đầu tiên về tình trạng đồng tính luyến ái ở Ấn Độ, AIDS *Bhedbhav Virodhi Andolan* đã bày tỏ nguyện vọng của cộng đồng người (queer) Ấn Độ về việc thừa nhận mối quan hệ, bao gồm quyền tiếp cận thể chế hôn nhân và quyền làm cha

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1 Vivek Diwan và cộng sự, *Happy Together: Law & Policy Concerns of LGBTQI Persons and Relationships in India* (*Cùng vui: Mối quan tâm về luật và chính sách của những người và mối quan hệ thuộc cộng đồng LGBTQI ở Ấn Độ),* CENTRE FOR HEALTH EQUITY, LAW & POLICY (TRUNG TÂM CÔNG BẰNG Y TẾ, LUẬT & CHÍNH SÁCH), 7 (2021); *Tòa án cấp cao Delhi yêu cầu Trung tâm phản hồi lời kêu gọi phát trực tiếp quá trình tố tụng đối với các đơn kiện hôn nhân cùng giới*, THE TIMES OF INDIA (30/11/2021) https://timesofindia.indiatimes.com/india/delhi-high-court-asks-centre-to-respond-to-plea-for-live-streaming-ofproceedings-on-same-sex-marriage-petitions/articleshow/88003547.cms (truy cập lần cuối vào ngày 30 tháng 11 năm 2021).

2 Sđd.

3 Bản tuyên thệ trong hồ sơ với tác giả.

4 Bản tuyên thệ trong hồ sơ với tác giả. [57]Bản tuyên thệ trong hồ sơ với tác giả.

5 Ruth Vanita, *Marriage equality is a constitutional right, do not deny it to same-sex couples* (*Bình đẳng trong hôn nhân là quyền hiến định, đừng phủ nhận quyền đó của các cặp đôi cùng giới*), THE INDIAN EXPRESS (4/11/2020) https://indianexpress.com/article/opinion/columns/marriage-rights-india-same-sexcouples-6929246/ (truy cập lần cuối vào ngày 30 tháng 11 năm 2021); Manuraj Shunmugasundaram, *In India, looking beyond the binary to a spectrum* (*Ở Ấn Độ, nhìn xa hơn nhị nguyên tới một phổ rộng*), THE HINDU (ngày 19 tháng 6 năm 2021) https://www.thehindu.com/opinion/op-ed/in-india-lookingbeyond-the-binary-to-a-spectrum/article34853466.ece (truy cập lần cuối vào ngày 30 tháng 11 năm 2021).

mẹ.[1] Báo cáo cũng nhấn mạnh sự cần thiết của việc suy nghĩ vượt lên khỏi quan hệ vợ chồng và thừa nhận các mối quan hệ không dựa trên giới tính để đảm bảo việc tiếp cận các lợi ích của Nhà nước[2]. Kể từ đó, cả các tổ chức và nhà hoạt động nữ quyền và các tổ chức người (queer) đều nhấn mạnh đến sự hòa nhập hợp pháp và công nhận đa dạng của gia đình ngoài tình trạng hôn nhân hoặc quan hệ vợ chồng.[3] Họ nhấn mạnh tầm quan trọng của thực tế cuộc sống trong các mối quan hệ LGBT+ và việc cần luật pháp giải quyết tình trạng phụ thuộc kinh tế, quyết định chăm sóc sức khỏe và bạo lực do đối tác thân mật gây nên.[4]

Tuy nhiên, các bài nghiên cứu học thuật về sự tương tác của quyền LGBT+ và gia đình còn rất ít. Điều này có thể là do cho đến gần đây, tiêu điểm chủ yếu tập trung vào việc phi hình sự hóa các mối quan hệ cùng giới hơn là đưa vào các luật gia đình hiện hành. Hơn nữa, không giống như các khu vực pháp lý như Hoa Kỳ, không có vụ kiện tụng nào về quyền làm cha mẹ của những người LGBT+ được ghi nhận ở Ấn Độ. Tuy nhiên, vẫn có một số xu hướng đáng chú ý.

Một số học giả đưa ra các lập luận hiến pháp để công nhận gia đình và đặc biệt tập trung vào luật hôn nhân đặc biệt thế tục như một phương tiện cho sự bình đẳng trong hôn nhân.[5] Đây cũng là cách tiếp cận được ưa thích trong đa số các kiến nghị. Trước đây, tôi đã chỉ trích việc tập trung vào luật hôn nhân thế tục này vì nó bỏ qua cả tính liên kết của các gia đình Ấn Độ và danh tính xen kẽ của những người LGBT+ Ấn Độ theo tôn giáo[6]. Việc đơn thuần đưa vào SMA cũng coi thường các vấn đề cơ cấu quan trọng, với SMA vẫn là một luật nặng tính gia trưởng và một tầm nhìn lỗi thời về hôn nhân.[7]

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1 LESS THAN GAY (Không bằng đồng tính nam), AIDS BHEDBHAV VIRODHI ANDOLAN (Phong trào chống phân biệt đối xử AIDS) (1991).

2 Sđd.

3 Diwan, chú thích số 53, tr. 9-13.

4 Diksha Sanyal và cộng sự, "*Family"* in *Queering the Law: Making Indian Laws LGBT+ Inclusive* ("*Gia đình" trong không chuẩn giới Luật: Làm cho luật pháp Ấn Độ và LGBT+ hòa nhập*), VIDHI CENTRE FOR LEGAL POLICY (TRUNG TÂM VỀ CHÍNH SÁCH PHÁP LUẬT VIDHI), 32-35 (2019).

5 John, chú thích 39; Nayantara Ravichandran, *Legal Recognition of Same-Sex Relationships in India* (*Sự thừa nhận hợp pháp về các mối quan hệ cùng giới ở Ấn Độ*) 5 JOURNAL OF INDIAN LAW AND SOCIETY 95 (2014). Satchit Bhogle, *The Momentum of History: Realising Marriage Equality in India* (*Khoảnh khắc lịch sử: Thực hiện bình đẳng trong hôn nhân ở Ấn Độ*) 12 (3–4) NUJS Law Review 1 (2019).

6 Agarwal, chú thích số 32.

7 Akshat Agarwal, *Upgrading India's Special Marriage Law* (*Nâng cấp Luật Hôn nhân đặc biệt của Ấn Độ*), VIDHI CENTER FOR LEGAL BLOG (ngày 21 tháng 9 năm 2020) https://vidhilegalpolicy.in/blog/upgrading-indias-special-marriage-law/ (truy cập lần cuối vào ngày 30 tháng 11 năm 2021).

Một nhóm học giả khác đã xem xét tác động lẫn nhau giữa thực tế của các mối quan hệ cùng giới, có tính dễ bị tổn thương cả về kinh tế - xã hội và dựa trên địa điểm giai cấp và đẳng cấp, với thể chế phụ quyền dị tính.[1] Báo cáo của các chuyên gia và tổ chức nghiên cứu (bao gồm cả báo cáo do tôi đồng tác giả) đã vạch ra các vấn đề và mối quan tâm khác nhau có thể sẽ nảy sinh trong khi cân nhắc đưa cộng đồng LGBT+ vào các khuôn khổ luật gia đình hiện hành.[2] Các báo cáo này cũng nhấn mạnh đến sự công nhận đa dạng gia đình và tầm quan trọng của việc cân nhắc tính dễ bị tổn thương về kinh tế - xã hội.[3] Tuy nhiên, chúng không đi sâu vào các hàm ý học thuyết cụ thể về việc thừa nhận hợp pháp các mối quan hệ như vậy.

Trong một bài luận gần đây, học giả luật gia đình Saptarshi Mandal kêu gọi các nhóm người (queer) tham gia vào các câu hỏi lớn hơn về luật gia đình của Ấn Độ.[4] Ông vạch ra các vấn đề hiện có với luật hôn nhân, chẳng hạn như việc không công nhận ly hôn đơn phương và các hạn chế khác đối với quyền tự chủ của cá nhân, những điều khiến việc hòa nhập đơn thuần trở thành một vấn đề phức tạp.[5] Thay vào đó, ông gợi ý rằng, các vấn đề như phân biệt đối xử dựa trên tình trạng hôn nhân và không công nhận các quyền như ra quyết định chăm sóc sức khỏe trong các mối quan hệ ngoài hôn nhân phải được đưa vào các cuộc thảo luận không theo chuẩn giới về cải cách luật gia đình.[6]

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[1] Sourav Mandal, *The Politics of Regulating Adult Sexuality through the Institution of Marriage: Reflections on Queer Experiences from India* (*Chính sách quản lý xu hướng tính dục người lớn thông qua thể chế hôn nhân: Suy ngẫm về trải nghiệm của người (queer) từ Ấn Độ*) trong MUTINIES FOR EQUALITY: CONTEMPORARY DEVELOPMENTS IN LAW AND GENDER IN INDIA (NHIỆM VỤ VÌ BÌNH ĐẲNG: SỰ PHÁT TRIỂN LIÊN TỤC VỀ PHÁP LUẬT VÀ GIỚI Ở ẤN ĐỘ) (Tanja Herklotz và Siddharth Peter de Souza eds., 2021); Sayan Bhattacharya, *Reading Queerness: Same-sex marriages in India* (*Xem xét không chuẩn giới: Các cuộc hôn nhân cùng giới ở Ấn Độ*) trong THE POLITICS OF BELONGING IN CONTEMPORARY INDIA: ANXIETY AND INTIMACY (CHÍNH TRỊ TRONG BỐI CẢNH ẤN ĐỘ HIỆN ĐẠI: LO LẮNG VÀ THÂN MẬT) (Kaustav Chakraborty ed., 2020).

[2] Sanyal, chú thích 62; Diwan, chú thích 53.

[3] Sanyal, chú thích 62; Diwan, chú thích 53.

[4] Mandal, chú thích 3.

[5] Mandal, chú thích 3. Luật hôn nhân hiện hành có công nhận các biện pháp khắc phục như thay đổi quyền vợ chồng vi phạm quyền tự quyết của các cá nhân không, xem Saumya Uma, *Wedlock, or Wed-lockup? A Case for Abolishing Restitution of Conjugal Rights in India (Wedlock*, hoặc *Wed-lockup? Một trường hợp bãi bỏ việc thay đổi quyền vợ chồng ở Ấn Độ*), INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY (TẠP CHÍ QUỐC TẾ VỀ LUẬT, CHÍNH SÁCH VÀ GIA ĐÌNH), Tập 35 Số 1 (2021).

[6] Mandal, chú thích 3.

Do đó, cả phong trào LGBT+ của Ấn Độ và nhiều học giả Ấn Độ đã nhấn mạnh sự công nhận đa dạng của gia đình và cảnh báo chống lại sự đồng hóa mù quáng trong hôn nhân theo luật gia đình hiện hành. Việc trình bày rõ những mối quan tâm này là có chủ đích và không phải là không có cơ sở. Trong bối cảnh của Ấn Độ, nơi luật gia đình vẫn còn bất bình đẳng và phần lớn lạc hậu với thực tế xã hội đang thay đổi, viễn cảnh hòa nhập đơn thuần chỉ có thể nhấn mạnh lại những bất bình đẳng cũ hoặc thậm chí tệ nhất là tạo ra những bất bình đẳng mới. Tuy nhiên, tôi sẽ trình bày một cách nghĩ khác về những yêu cầu về quyền của LGBT+. Tương ứng với luật gia đình, lực lượng học thuyết về LGBT+ tuyên bố rằng bình đẳng trong hôn nhân có thể trở thành phương tiện để chuyển đổi các khía cạnh của luật gia đình cho tất cả các gia đình không chuẩn mực.

IV. LẬP LUẬN HIẾN PHÁP VỀ BÌNH ĐẲNG TRONG HÔN NHÂN

Trong phần này, tôi sẽ xây dựng các lập luận tiềm năng để công nhận hôn nhân cùng giới dựa trên luật hiến pháp của Ấn Độ. Tôi suy đoán rằng những lập luận như vậy sẽ rơi vào hai phần lớn, 1) lập luận dựa trên quyền tự do cá nhân của cá nhân và 2) lập luận dựa trên bình đẳng và chống phân biệt đối xử. Tuy nhiên, trước khi xây dựng các lập luận cụ thể, tôi truy cập ngắn gọn các đặc điểm và khái niệm chính về giới và xu hướng tính dục trong luật học của Tòa án tối cao Ấn Độ.

A. Truy tìm các quyền và khái niệm hiến pháp

1. Bình đẳng và chống phân biệt đối xử

Điều 14 của Hiến pháp Ấn Độ công nhận quyền bình đẳng và được pháp luật bảo vệ bình đẳng,[1] trong khi Điều 15 cấm phân biệt đối xử với công dân trên những mặt cụ thể bao gồm cả giới tính.[2] Cùng với các quy định khác về bình đẳng cơ hội trong các vấn đề việc làm công,[3] xóa bỏ quyền không được tiếp cận[4] và bãi bỏ chức danh,[5] chúng tạo thành quy tắc bình đẳng của Hiến pháp Ấn Độ và thể hiện cam kết của hiến pháp đối với một xã hội bình đẳng. Trong những năm gần đây, các điều khoản về bình đẳng đã được diễn giải một cách rộng rãi, với một nhà bình luận nhận xét rằng chúng đã đạt được "tầm cỡ hoạt động cao".[6] Các quyết định tư pháp về giới và xu hướng tính dục đã đóng một vai trò quan trọng trong việc này.

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1 Điều 14, Hiến pháp của Ấn Độ.

2 Điều 15, Hiến pháp của Ấn Độ. Các cơ sở cụ thể khác bao gồm tôn giáo, đẳng cấp, chủng tộc và nơi sinh.

3 Điều 16, Hiến pháp của Ấn Độ.

4 Điều 17, Hiến pháp của Ấn Độ.

5 Điều 18, Hiến pháp của Ấn Độ.

6 M.P. Jain *Indian Constitutional Law* (Luật Hiến pháp Ấn Độ), 907 (Justice Chelameswar & Justice Dama Seshadri Naidu eds., August edn., 2018). [78] Sđd.

(i) Quyền bình đẳng

Cả thử nghiệm phân loại truyền thống cũng như kiểm tra biểu hiện tùy tiện đều được sử dụng để kiểm tra tính hợp hiến của luật theo Điều 14.[78] Khi áp dụng thử nghiệm phân loại, trước tiên, các tòa án xác định xem có sự phân loại hợp lý dựa trên sự khác biệt đủ điều kiện hay không và thứ hai, liệu sự khác biệt, là cơ sở của sự phân loại, có mối liên hệ hợp lý với đối tượng mà pháp luật muốn hướng tới hay không.[1]

Theo học giả pháp lý Gauri Pillai, quyết định phi hình sự hóa của Tòa án tối cao ở *Navtej* đã bổ sung thêm các khía cạnh mới cho cả hai khía cạnh của bài kiểm tra phân loại cũ.[2] Đầu tiên, bằng việc công nhận khái niệm phân biệt đối xử gián tiếp thông qua tác động không cân xứng của các điều khoản trung lập trên bề mặt, quyết định này thúc đẩy thêm quá trình kiểm tra phân loại. Hơn nữa, nó cho phép sử dụng ngôn ngữ khác biệt minh bạch để kiểm tra chính sự phân loại. Ví dụ, Chandrachud J., trong Navtej, đã đặt câu hỏi về cơ sở của việc phân loại các hành vi tình dục tự nhiên với không tự nhiên, và nhận thấy rằng sự phân loại như vậy chỉ đơn thuần dựa trên các quy tắc mang tính chuẩn hóa dị tính về các hành vi tình dục nằm ngoài định chuẩn hóa dị tính, và do đó không thể công nhận được.[81]

Thứ hai, quyết định nhấn mạnh đạo đức hiến pháp trong việc kiểm tra tính hợp pháp của mục tiêu của pháp luật. Đạo đức hiến pháp ở đây trái ngược với đạo đức công cộng hoặc đạo đức xã hội, với việc tòa án cho rằng cái trước luôn lấn át cái sau. Tòa án định nghĩa đạo đức hiến pháp là "đạo đức có các yếu tố cố hữu trong các quy phạm hiến pháp và lương tâm của hiến pháp."[3] Tòa án hiểu đạo đức hiến pháp là thúc đẩy các giá trị đa nguyên và bao trùm. Do đó, việc hình sự hóa đồng tính luyến ái dựa trên nhận thức chủ nghĩa thống trị bắt nguồn từ đạo đức thời Victoria và các giá trị đạo Judeo-Kitô giáo là vi phạm đạo đức hiến pháp.[4]

Hơn nữa, ngoài kiểm tra phân loại, một số quyết định tư pháp cũng đã công nhận kiểm tra biểu hiện tùy tiện theo Điều 14.[84]. Lý giải thích có ảnh hưởng nhất của bài

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1 Jain, chú thích 77, tr. 910.

2 Gauri Pillai, *Naz to Navtej: Navigating Notions of Equality* (*Naz đến Navtej: Định hướng các quan niệm về bình đẳng*), 12 NUJS L. REV. 3-4 (2019); Để biết những phê bình trước đó về bài kiểm tra phân loại, hãy xem Catherine A MacKinnon, *Sex equality under the Constitution of India: Problems, prospects, and ""personal laws"(Bình đẳng giới tính theo Hiến pháp Ấn Độ: Vấn đề, triển vọng và "'luật cá nhân"*), 4 (2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (TẠP CHÍ QUỐC TẾ LUẬT HIẾN PHÁP) 182, 183 (2006) [81]Đoạn 28, theo Chandrachud›s J., Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án tối cao Ấn Độ).

3 Đoạn 118, theo Misra CJI., Và Khanwilkar J., Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án tối cao Ấn Độ).

4 Pillai, chú thích 80. [84] Jain, chú thích 77.

kiểm tra này là trong *Shayara Bano*, Nariman J. định nghĩa biểu hiện tính tùy tiện là khi có "điều gì đó được thực hiện bởi cơ quan lập pháp một cách lãng phí, phi lý và/hoặc không có nguyên tắc xác định đầy đủ. Ngoài ra, khi một điều gì đó được thực hiện quá mức và không cân xứng, thì luật pháp đó có biểu hiện tùy tiện".[1] Kiểm tra biểu hiện tính tùy tiện này cũng được các thẩm phán Navtej căn cứ và dựa vào.[2]

(ii) Quyền chống lại sự phân biệt đối xử về bản dạng giới và xu hướng tính dục

Khi diễn giải về bảo đảm chống phân biệt đối xử dựa trên giới tính, Tòa án tối cao đã xem xét bản dạng giới và xu hướng tính dục như một phần của Điều 15.[3] Trong vụ *Cơ quan Dịch vụ pháp lý quốc gia kiện Cộng hòa Ấn Độ*,[4] Tòa án tối cao đã công nhận bản dạng chuyển giới và công nhận các quyền căn bản của họ. Tòa án cũng cho rằng phân biệt giới tính bao gồm cả giới và thuộc tính sinh học.[5] Điều này được giải thích như sau: "Các thuộc tính về giới bao gồm hình ảnh bản thân của một người, ý thức tâm lý hoặc cảm xúc sâu sắc về đặc điểm và bản dạng tính dục." Do đó, phân biệt đối xử dựa trên giới tính cũng sẽ bao gồm phân biệt đối xử dựa trên bản dạng giới.[6]

Mặt khác, ở vụ *Navtej*, Chandrachud's J. đưa ra quan điểm, diễn giải phân biệt đối xử về xu hướng tính dục như một phần của phân biệt giới tính vì sự phân biệt đối xử về xu hướng tính dục diễn ra dựa trên những định kiến về giới và khuôn mẫu rập khuôn vai trò giới tính, mà cuối cùng là những định kiến về giới tính, phân biệt đối xử dựa trên đó bị cấm tại Điều 15 (1).[7] Do đó, tòa án đã sử dụng nguyên tắc chống định

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1 Đoạn 55, theo Nariman J., Shayara Bano kiện Cộng hòa Ấn Độ, (2017) 9 SCC 1 (Tòa án tối cao Ấn Độ).

2 Bốn ý kiến riêng biệt trong vụ Navtej sử dụng phép thử tính tùy tiện nhưng đi đến những lý do khác nhau cho thấy Mục 377 là tùy tiện, xem Pillai, chú thích 83, tại n.13.

3 Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án tối cao Ấn Độ); Cơ quan Dịch vụ pháp lý quốc gia kiện Cộng hòa Ấn Độ, (2014) 5 SCC 438 (Tòa án tối cao Ấn Độ).

4 Cơ quan dịch vụ pháp lý quốc gia kiện Cộng hòa Ấn Độ, (2014) 5 SCC 438 (Tòa án tối cao Ấn Độ).

5 Đoạn 59, theo Sikri J., Cơ quan Dịch vụ pháp lý quốc gia kiện Cộng hòa Ấn Độ, (2014) 5 SCC 438 (Tòa án tối cao Ấn Độ).

6 Đoạn 59, Per Sikri J., Cơ quan Dịch vụ Pháp lý Quốc gia kiện Cộng hòa Ấn Độ, (2014) 5 SCC 438 (Tòa án tối cao Ấn Độ); cũng xem Justice M.B. Lokur, *Transgender Rights and Wrongs (Đúng và sai của chuyển giới) trong* SEX AND THE SUPREME COURT: HOW THE LAW IS UPHOLDING THE DIGNITY OF THE INDIAN CITIZEN (GIỚI TÍNH VÀ TÒA ÁN TỐI CAO: LUẬT PHÁP ĐANG DUY TRÌ PHẨM GIÁ CÔNG DÂN ẤN ĐỘ) (Saurabh Kirpal ed., 2020).

7 Akshat Agarwal, *"Asking Searching Questions to Forms and Symbols of Injustice": Indirect Discrimination, Intersectionality and the Principle of Anti-Stereotyping ("Đặt câu hỏi tìm kiếm các hình thức và biểu tượng của sự bất công": Phân biệt đối xử gián tiếp, tính xen kẽ và nguyên tắc chống định kiến*), IACL-AIDC BLOG (ngày 15 tháng 9 năm 2018) https://blogiacl-aidc.org/blog/2018/9/13/asking-searching-questions-to-forms-and-symbols-of-injustice-indirectdiscrimination-intersectionality-and-the-principle-of-anti-stereotyping (truy cập lần cuối vào ngày 30 tháng 11 năm 2021). [92] Nguyên tắc chống định kiến được hiểu là một phần của phân biệt giới tính trong Điều 15 (1), xem Anuj Garg kiện Hiệp hội Khách sạn Ấn Độ, AIR 2008 SC 663.

kiến để bao gồm phân biệt đối xử theo khuynh hướng tình dục trong phân biệt giới tính.[92] Mặt khác, Malhotra J. đã diễn giải phân biệt đối xử về khuynh hướng tình dục là một phần của phân biệt giới tính trên lý thuyết cơ sở tương tự, nhằm bảo vệ tình trạng bất biến và những lựa chọn cơ bản.[1] Bà lý luận rằng các cơ sở hiện có trong Điều 15 (1) thể hiện tình trạng bất biến hoặc các lựa chọn cơ bản liên quan đến quyền tự chủ của một cá nhân và là nội tại của tính cách của họ. Vì xu hướng tính dục có mối liên hệ tương tự với quyền tự chủ của cá nhân, nó có thể được biện giải như một cơ sở phân biệt tương tự thông qua lý thuyết về địa vị bất biến và các lựa chọn cơ bản.[2]

2. Tự do cá nhân

Điều 21 của Hiến pháp quy định rằng không ai có thể bị tước đoạt tính mạng và quyền tự do cá nhân của họ trừ khi luật pháp yêu cầu.[95] Điều khoản này được hiểu theo nghĩa rộng bao gồm nhiều quyền. Mặc dù Tòa án tối cao Ấn Độ hiểu Điều 21 theo nghĩa thực chứng hẹp trong những năm đầu,[3] cách tiếp cận của họ đã thay đổi theo thời gian trong những năm đầu và lên đến đỉnh điểm với sự thay đổi hoàn toàn trong vụ *Maneka Gandhi kiện Cộng hòa Ấn Độ*[4] vào cuối những năm 1970.[5]

Các quyết định thời hậu *Maneka* có đặc trưng là sự mở rộng về ý nghĩa của quyền sống và quyền tự do cá nhân, bao gồm việc công nhận các nghĩa vụ tích cực đối với Nhà nước.[6] Trong những năm 1980 và 1990, mặc dù trọng tâm chủ yếu là các quyền

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1 Đoạn 15 (2), theo Malhotra J., Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án Tối cao Ấn Độ); Để giải thích lý thuyết này, hãy xem Tarunabh Khaitan, *Reading Swaraj into Article 15: A New Deal For All Minorities* (*Đọc Swaraj trong Điều 15: Một thỏa thuận mới cho mọi người thiểu số*), 2 NUJS LAW REVIEW, 419 (2009); John Gardner, *On the Ground of Her Sex (uality) (Căn cứ vào giới tính của cô ấy),* 18 (2) OXFORD JOURNAL OF LEGAL STUDIES (TẠP CHÍ NGHIÊN CỨU PHÁP LUẬT OXFORD), 167 (1998).

2 Đoạn 15 (2) theo Malhotra J., Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án Tối cao Ấn Độ). 95 Điều 21 của Hiến pháp Ấn Độ quy định rằng không ai được tước đoạt mạng sống và quyền tự do cá nhân của mình ngoại trừ thủ tục do luật định.

3 Trong vụ AK Gopalan kiện Bang Madras, AIR 1950 SC 27, Tòa án tối cao đã diễn giải Điều 21 theo nghĩa hẹp và cho rằng điều khoản này không được kết hợp cùng với các điều khoản khác (chẳng hạn như đảm bảo bình đẳng và tự do) và không chứa bất kỳ nội dung hoặc thủ tục nào. Ở đây, tòa đã đối chiếu Điều 21 với cách tiếp cận của Mỹ về thủ tục tố tụng trên lập luận rằng bên tranh chấp Ấn Độ đã bác bỏ cách tiếp cận của Mỹ vì họ không bao gồm từ "thủ tục pháp lý" trong Điều 21. Xem Jain, chú thích 77.

4 Maneka Gandhi v. Cộng hòa Ấn Độ, AIR 1978 SC 59; Jain, chú thích 77, tr. 1159-1167

5 Trong vụ Maneka, Tòa án tối cao cho rằng quyền sống và quyền tự do cá nhân phải được giải thích theo các quy định khác của Hiến pháp bao gồm quyền bình đẳng (Điều 14) và quyền tự do (Điều 19), thuật ngữ "tự do cá nhân" phải được hiểu một cách rộng rãi, và việc tước quyền thông qua một thủ tục do luật định không thể tùy tiện mà phải công bằng và hợp lý. Jain, chú thích số 77, tr. 1159-1167.

6 Các quyền đó bao gồm quyền sinh kế, quyền được trú ẩn, quyền được chăm sóc sức khỏe, v.v..., xem Jain, chú thích 77.

kinh tế - xã hội, Tòa án tối cao cũng đã xây dựng một nền luật học ấn tượng tập trung vào quyền tự chủ, quyền riêng tư và phẩm giá con người trong những năm gần đây. Điều này có ý nghĩa quan trọng đối với các quyền về giới và xu hướng tính dục.

(i) Quyền Định hướng tính dục

Năm 2017, chín thẩm phán của Tòa án tối cao trong *vụ Justice KS Puttaswamy kiện Cộng hòa Ấn Độ*[1] nhất trí cho rằng quyền riêng tư là quyền căn bản độc lập được đảm bảo bởi Điều 21 của Hiến pháp. Chandrachud J., theo ý kiến đa số của mình (thay mặt cho bốn thẩm phán) cũng như Kaul J., trong sự đồng tình của mình, tiếp tục cho rằng xu hướng tính dục là một phần của quyền riêng tư tự nhiên bởi nó là khía cạnh cốt lõi của quyền tự chủ và phẩm giá của cá nhân.[2] Trong vụ *Navtej*, Chandrachud J. cho rằng các nhóm thiểu số tình dục được hưởng quyền riêng tư về tình dục như một phần của quyền căn bản về quyền riêng tư, bao gồm quyền riêng tư của cả không gian riêng tư cũng như khả năng điều hướng không gian công cộng theo cách riêng của họ.[3]

(ii) Quyền được ở trong mối quan hệ với một đối tác

Hơn nữa, trong các quyết định về hôn nhân giữa các giai cấp trong vụ *Shakti Vahini kiện Cộng hòa Ấn Độ*[4] và hôn nhân liên tôn giáo trong vụ *Hadiya kiện Asokan KM*[5]*,* Tòa án tối cao đã cho rằng các cá nhân có quyền lựa chọn bạn đời như một phần của các quyền căn bản của tự do và sự công bằng cá nhân. Trong vụ *Navtej*, Chandrachud J. nhấn mạnh thêm rằng quyền thân thiết hoặc lựa chọn bạn đời được dựa trên các giá trị tự chủ và tự quyết, điều mà Hiến pháp trân trọng. Tòa án nhận thấy rằng luật pháp và các thể chế xã hội phải được tổ chức theo cách không hạn chế các cá nhân tham gia vào các mối quan hệ dựa trên giới hoặc giới tính, và các thể chế xã hội đó phải cung cấp cho họ "sự thừa nhận thể chế để hoàn thiện các mối quan hệ của họ".[6]

(iii) Quyền Nhân phẩm

Các quyết định của Tòa án tối cao cũng cho rằng quyền được sống theo Điều 21 bao gồm quyền được sống với phẩm giá con người.[106] Ở cả vụ *Puttaswamy* và vụ *Common Cause kiện Cộng hòa Ấn Độ*,[7] về quyền được chết với nhân phẩm, Tòa án tối

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1 Justice K. S. Puttaswamy kiện Cộng hòa Ấn Độ, (2017) 10 SCC 1 (Tòa án tối cao Ấn Độ).

2 Theo Kaul J., Justice K. S. Puttaswamy kiện Cộng hòa Ấn Độ, (2017) 10 SCC 1 (Tòa án tối cao Ấn Độ).

3 Đoạn 59 và 62, theo Chandrachud J., Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án Tối cao Ấn Độ).

4 Shakti Vahini v Cộng hòa Ấn Độ, (2018) 7 SCC 192 (Tòa án tối cao Ấn Độ).

5 Shafin Jahan v. Asokan KM, (2018_ SCC OnLine SC 343 (Tòa án tối cao Ấn Độ).

6 Đoạn 67, theo Chandrachud J., Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án tối cao Ấn Độ). 106 Francis Coralie kiện Delhi, AIR 1981 SC 746 (Tòa án tối cao Ấn Độ); P Rathinam kiện Cộng hòa Ấn Độ, AIR 1994 SC 1844 (Tòa án tối cao Ấn Độ).

7 Common Cause kiện Cộng hòa Ấn Độ, (2018) 5 SCC 1 (Tòa án tối cao Ấn Độ).

cao nhấn mạnh rằng quyền được sống có nhân phẩm gắn liền với quyền được sống và quyền tự do. Trong vụ *Navtej*, tất cả các thẩm phán đều công nhận rằng những người LGBT+ được hưởng quyền về nhân phẩm. Misra CJI nhấn mạnh rằng vi phạm quyền tự quyết và tự chủ trong việc lựa chọn bạn tình cũng là vi phạm nhân phẩm. Nariman J. đã công nhận phẩm giá và mối liên hệ của nó với giá trị của tình huynh đệ, được đề cập trong phần mở đầu của Hiến pháp Ấn Độ. Ngược lại, cả Chandrachud J. và Malhotra J. đều liên kết phẩm giá với phân tích về quyền riêng tư của họ.[109]

Do đó, luật pháp về giới và xu hướng tính dục của Tòa án tối cao Ấn Độ đã mở rộng đáng kể quyền bình đẳng và tự do cá nhân của những cá nhân LGBT+. Ngoài ra, tòa án đã công nhận, "yêu cầu quyền công dân bình đẳng của LGBT+ Ấn Độ."[1] Điều này ngụ ý rằng cộng đồng LGBT+ không thể "bị phân biệt đối xử và họ có quyền thể hiện bản thân thông qua những lựa chọn thân mật của mình"[2]. Chandrachud J. liên kết khái niệm quyền công dân bình đẳng với "đạo đức hiến định", các chuẩn mực và giá trị của Hiến pháp đề cao quyền tự do, nhân phẩm và bình đẳng của những người LGBT+. Do đó, trong việc xác định quyền của người LGBT+, không phải văn hóa hay truyền thống, mà các giá trị của Hiến pháp mới được coi là tối cao. Theo tòa án, cách tiếp cận như vậy không chỉ đơn thuần là bảo vệ các nhóm thiểu số mà còn liên quan đến tầm nhìn hiến pháp về loại quốc gia mà Ấn Độ muốn trở thành.

Tòa án[3] biện minh thêm cho cách tiếp cận này trên nền tảng của khái niệm rộng hơn về "chủ nghĩa hợp hiến chuyển đổi", với quan niệm hiến pháp nhận thức được những bất bình đẳng xã hội cố hữu và tìm cách trở thành một "văn bản quản trị thúc đẩy bình đẳng thực sự."[4] Misra CJI coi đây là nhiệm vụ của ngành tư pháp nhà nước, để duy trì nguyên tắc chủ nghĩa hợp hiến có thể chuyển đổi và mở ra sự thay đổi trong xã hội.[5] Trong trường hợp cộng đồng LGBT+, Chandrachud J. nhấn mạnh rằng chủ nghĩa hợp hiến biến đổi, đòi hỏi các tòa án phải đặt câu hỏi về "những quan niệm phổ biến về sự thống trị của giới và giới tính" và giải quyết "sự phân cực của giới tính và sự phân đôi của giới".[115]

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1 Đoạn 156, theo Chandrachud J., và Đoạn 97, theo Nariman J., Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án tối cao Ấn Độ).

2 Đoạn 145, theo Chandrachud J., Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án tối cao Ấn Độ).

3 Phần M, theo Chandrachud J., và Phần H, theo Misra CJI., Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án tối cao Ấn Độ).

4 Đoạn 153, theo Chandrachud J., Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án tối cao Ấn Độ).

5 Đoạn 110, theo Misra CJI., Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án tối cao Ấn Độ). [115] Đoạn 153, theo Chandrachud J., Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án tối cao Ấn Độ).

B. Xây dựng các lập luận về bình đẳng trong hôn nhân

Trong việc xây dựng các lập luận cho sự bình đẳng trong hôn nhân, tôi sẽ tập trung vào quy định về hôn nhân của luật hôn nhân thế tục và đạo Hindu. Phần 4 của SMA đưa ra các điều kiện cho hôn nhân duy nhất. Mặc dù ngôn ngữ của điều khoản là trung lập, điều khoản (c) Đặc biệt đề cập đến "nam" và "nữ" trong việc quy định các yêu cầu về độ tuổi kết hôn.[1] Phần 5 của HMA đưa ra một điều kiện hôn nhân hợp lệ của người Hindu. Tương tự như Phần 4 của SMA, trong khi ngôn ngữ của Phần 5 là trung lập, điều khoản (iii) đề cập đến "chàng rể" và "chú rể" trong việc quy định các yêu cầu về tuổi kết hôn.[117] Có lập luận rằng hôn nhân cùng giới có thể có khả năng được bao hàm trong các điều khoản này thông qua cách giải thích theo luật định bằng cách mở rộng nghĩa của các thuật ngữ "cô dâu" và "chú rể".[2] Tuy nhiên, không rõ làm cách nào để các cặp đôi cùng giới có thể được đưa vào như vậy. Hơn nữa, cách giải thích như vậy cũng đi ngược lại với kế hoạch rộng hơn của pháp luật, vốn tính đến công nhận các cuộc hôn nhân trong nhị nguyên.

Do đó, với luật hôn nhân hiện hành chỉ công nhận hôn nhân theo nhị nguyên nam - nữ, tôi cho rằng các tòa án có khả năng sẽ hủy bỏ luật hiện hành trên cơ sở bình đẳng và tự do cá nhân. Tôi xây dựng những lập luận này dựa trên các khái niệm và quyền học thuyết đã được Tòa án tối cao công nhận trong luật học về giới và xu hướng tính dục.

1. Lập luận dựa trên bình đẳng

(i) Việc bị loại khỏi thể chế luật gia đình về hôn nhân vi phạm quyền bình đẳng của những người LGBT+ theo Điều 14

Các luật hôn nhân hiện hành như SMA và HMA, loại trừ các cặp đôi cùng giới khỏi định nghĩa của họ trong định nghĩa về một cuộc hôn nhân hợp lệ, đưa ra phân loại dựa trên khuynh hướng tình dục. Điều này là do họ chỉ công nhận một cuộc hôn nhân hợp lệ là giữa những người khác giới tính và loại trừ những người cùng giới tính. Ví dụ, trong khi Ravi có thể kết hôn với Sarita, anh ta không thể tiến vào một cuộc hôn

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1 Phần 4, Đạo luật Hôn nhân đặc biệt, 1954. 117 Phần 5, Đạo luật Hôn nhân Hindu, 1956.

2 Ruth Vanita, *Democratizing Marriage* (*Dân chủ hóa Hôn nhân*), trong LAW LIKE LOVE: QUEER PERSPECTIVES ON LAW 378 (PHÁP LUẬT NHƯ TÌNH YÊU: GÓC NHÌN CỦA NGƯỜI (QUEER) VỀ PHÁP LUẬT 378) (Alok Gupta và Arvind Narrain eds., 2011); Stelllina Jolly và Ritika Vohra, *Recognition of Foreign Same-Sex Marriage in India* (*Công nhận hôn nhân cùng giới nước ngoài ở Ấn Độ*), JOURNAL OF THE INDIAN LAW INSTITUTE 59 (3), 302-326 (2017). Tòa án cấp cao Madras đã theo một cách tiếp cận như vậy trong việc công nhận hôn nhân của một người phụ nữ chuyển giới với một người đàn ông bằng cách giải thích "cô dâu" bao gồm cả phụ nữ chuyển giới theo Đạo luật Hôn nhân Hindu năm 1956, xem Sreeja v. Đăng ký Tổng thanh tra, WP (MD) số 4125 of 2019 (Tòa án cấp cao Madras, ngày 22 tháng 4 năm 2019). Tuy nhiên, quyết định này không thể được mở rộng cho các mối quan hệ cùng giới vì nó vẫn hoạt động theo nhị nguyên nam - nữ.

nhân hợp pháp với Ali.[1] Do đó, hôn nhân chỉ được công nhận cho người dị tính, và không công nhận những người khác. Điều này ảnh hưởng đến những người trong cộng đồng LGBT+ và các mối quan hệ không phải khác giới của họ.

Theo vụ *Navtej*, để vượt qua bài kiểm tra của Điều 14, việc phân loại phải dựa trên sự khác biệt có thể hiểu được. Trong trường hợp này, việc phân loại không dựa trên sự khác biệt có thể hiểu được vì đặc điểm đã được coi là nội tại và là khía cạnh cốt lõi của danh tính cá nhân.[2] Việc từ chối quyền tiếp cận thể chế hôn nhân dựa trên một đặc điểm cốt lõi như xu hướng tính dục, vốn cũng đã được công nhận là quyền căn bản như một phần của quyền sống và quyền tự do cá nhân tại Điều 21, rõ ràng là phân biệt đối xử.

Giả sử có tranh luận, ngay cả khi việc phân loại được duy trì, thì việc phân loại như vậy phải có mối liên hệ hợp lý với mục tiêu của luật pháp. Loại trừ các cặp đôi cùng giới khỏi hôn nhân chỉ có một mục tiêu lập pháp duy nhất có thể là thúc đẩy một thế giới quan khác giới trong đó việc sinh sản giữa những người có giới tính sinh học được coi là bản chất của hôn nhân. Cũng có thể có một mục tiêu khác là thúc đẩy truyền thống hôn nhân là sự kết hợp giữa những người khác giới. Trong khi quan điểm đầu tiên trên những quan điểm khuôn mẫu về giới và giới tính (lý do duy nhất khiến những người khác giới kết hôn là để sinh sản), thì quan điểm thứ hai chỉ diễn giải cho những hiểu biết, nhận thức xã hội và lịch sử, bỏ qua tầm nhìn của hiến pháp. Trong vụ *Navtej*, Tòa án Tối cao đã nhấn mạnh đến đạo đức hiến pháp, các giá trị cơ bản của Hiến pháp, để xác định tính hợp pháp của mục tiêu nhà nước. Quyền công dân bình đẳng theo hiến pháp của những người LGBT+ đã được công nhận trong vụ *Navtej* là một phần của đạo đức hiến pháp. Do đó, mục tiêu lập pháp nhằm loại trừ những người LGBT+ là coi thường đạo đức hiến pháp và không thể là mục tiêu hợp lệ của nhà nước.

Hơn nữa, dưới sự kiểm tra tính tùy tiện của học thuyết bình đẳng, các hành vi được thực hiện mà không có một nguyên tắc xác định thích hợp có thể được coi là biểu hiện tùy tiện. Cách phân loại dựa trên khuynh hướng tình dục nhằm loại trừ các mối quan hệ cùng giới khỏi mối quan hệ hôn nhân dựa trên những quan niệm khác biệt của xã hội. Một thế giới quan như vậy không phù hợp với yêu cầu công dân bình đẳng của những người LGBT+ và do đó vi phạm đạo đức hiến pháp. Do đó, việc từ chối cho cộng đồng LGBT+ tiếp cận các thể chế luật gia đình như kết hôn là không hợp lý và tùy tiện.

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[1] Giả sử giới liên quan đến tên phù hợp với giới tính xác định khi sinh.

[2] Đoạn 14.5, theo Malhotra J., Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án tối cao Ấn Độ).

(ii) Việc không công nhận hôn nhân cùng giới là phân biệt đối xử dựa trên khuynh hướng tình dục và do đó vi phạm Điều 15

Trong vụ *Navtej*, tòa án đã diễn giải rằng bảo đảm chống phân biệt giới tính bao gồm bảo đảm chống phân biệt đối xử dựa trên xu hướng tính dục. Việc loại trừ các cặp đôi cùng giới ra khỏi hôn nhân là sự phân biệt đối xử dựa trên xu hướng tính dục. Xu hướng tính dục là một trong những mặt cấm phân biệt đối xử, và theo các tuyên bố hiến pháp bình đẳng của những người LGBT+, Nhà nước không được phép loại trừ họ khỏi thể chế hôn nhân. Do đó, việc loại trừ các cặp đôi cùng giới khỏi thể chế hôn nhân gia đình là phân biệt đối xử dựa trên khuynh hướng tình dục và sẽ vi phạm Điều 15 của Hiến pháp.

Vì vậy, tòa án có thể nhìn nhận việc từ chối tiếp cận các thể chế luật gia đình như hôn nhân là vi phạm bình đẳng dựa trên khuynh hướng tình dục được ghi nhận trong Điều 14 và 15 của Hiến pháp Ấn Độ.

2. Lập luận dựa trên sự tự do cá nhân

(i) Loại trừ khỏi thể chế luật gia đình, hôn nhân là vi phạm quyền căn bản về xu hướng tính dục

Các quyết định trong vụ *Puttaswamy* và *Navtej* đã cho thấy quyền có xu hướng tính dục là quyền căn bản, là một phần của quyền riêng tư cũng như một phần của quyền căn bản về cuộc sống và tự do theo Điều 21.[1] Không công nhận hôn nhân cùng giới về mặt pháp lý là phân biệt đối xử dựa trên khuynh hướng tình dục và do đó vi phạm Điều 21.

(ii) Hiệu lực hóa quyền của cộng đồng người LGBT+ được ở trong một mối quan hệ dựa trên các tuyên bố về quyền tự chủ và phẩm giá của họ, đòi hỏi phải đưa họ vào các thể chế luật gia đình, chẳng hạn như hôn nhân

Các quyết định của Tòa án tối cao ở vụ *Shakti Vahini, Hadiya và Navtej* đã cho thấy quyền được quan hệ với đối tác dựa trên quyền tự chủ và tự quyết là một phần của quyền căn bản về quyền riêng tư. *Navtej* cũng công nhận quyền nhân phẩm của những người LGBT+ do họ có quyền công dân bình đẳng. Do đó, quyền của những người LGBT+ được ở trong các mối quan hệ thân mật mà họ lựa chọn được bảo vệ bởi cả các giá trị tự chủ và phẩm giá theo Điều 21.

Do vị trí trung tâm của nó trong xã hội Ấn Độ, hôn nhân thể hiện một trong những biểu hiện thân mật nhất của việc chọn bạn đời và ở trong một mối quan hệ. Hôn nhân vẫn là một thực tế xã hội quan trọng ở Ấn Độ. Theo điều tra dân số năm 2001, 45,6%

[1] Navtej Singh Johar kiện Cộng hòa Ấn Độ, (2018) 10 SCC 1 (Tòa án tối cao Ấn Độ); Justice K. S. Puttaswamy kiện Cộng hòa Ấn Độ, (2017) 10 SCC 1 (Tòa án tối cao Ấn Độ).

dân số là những người đã kết hôn (đây là một con số rất cao bởi phần lớn dân số Ấn Độ là người trẻ).[1] Sự phổ biến của hôn nhân xã hội, việc thực hiện các nghi lễ hôn nhân mà không được pháp luật thừa nhận giữa các cặp đôi cùng giới [2] nhấn mạnh không chỉ vị trí trung tâm của hôn nhân mà cả nguyện vọng của cộng đồng LGBT+ để được tiếp cận thể chế hôn nhân. Hơn nữa, hôn nhân vẫn là đầu mối quan trọng để tạo ra các mối quan hệ gia đình như làm cha mẹ và các lợi ích khác nhau, bao gồm phúc lợi xã hội, thuế, thừa kế và khả năng đưa ra các quyết định chăm sóc sức khỏe cũng thường liên quan đến tình trạng hôn nhân.[124]

Do đó, việc pháp luật không thừa nhận các mối quan hệ của các cặp đôi cùng giới có cả tác hại về mặt thể chất và vật chất. Việc bị loại trừ khỏi hôn nhân trong một xã hội coi trọng hôn nhân khiến các mối quan hệ của người thuộc cộng đồng LGBT+ trở nên kém rõ ràng và bình đẳng. Việc không được công nhận cũng ngăn cản họ tiếp cận các lợi ích chính và các biện pháp bảo vệ pháp lý liên quan đến hôn nhân.

Tòa án tối cao Ấn Độ đã diễn giải quyền tự do và quyền dựa trên nhân phẩm là một nghĩa vụ tích cực mà Nhà nước cần phải thực hiện.[3] Hôn nhân là con đường pháp lý quan trọng nhất mà qua đó nhà nước công nhận sự lựa chọn tự chủ của những người bạn đời thân thiết và tôn trọng những mối quan hệ thân mật như vậy. Chỉ công nhận quyền của những người LGBT+ trong một mối quan hệ mà họ lựa chọn mà không thực sự đồng ý theo lựa chọn đó, thì sự thừa nhận của pháp luật về hôn nhân thậm chí sẽ làm giảm quyền tự chủ và phẩm giá trong các lựa chọn và mối quan hệ của người LGBT+. Do đó, việc loại trừ các cặp đôi cùng giới ra khỏi thể chế hôn nhân hợp pháp là vi phạm quyền tự chủ và nhân phẩm của họ. Các quyền này cũng đặt ra nghĩa vụ tích cực đối với nhà nước là phải đưa chúng vào thể chế hôn nhân hợp pháp do vai trò trung tâm của nó trong việc công nhận các lựa chọn bạn đời thân thiết. Không làm như vậy là làm mất quyền tự chủ và phẩm giá của những người thuộc cộng đồng LGBT+ và là phân biệt đối xử với những lựa chọn thân thiết của họ. Nhận thức một cách có

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1 Văn phòng Tổng đăng ký và Cao ủy điều tra dân số (Ấn Độ), Age Structure and Marital Status (Cơ cấu tuổi và tình trạng hôn nhân) (2001) http://censusindia.govin/Census_And_You/age_structure_and_marital_status.aspx (truy cập lần cuối vào ngày 30 tháng 11 năm 2021).

2 Vanita, chú thích 118; Shamayita Chakraborty, *Despite social marriage, gay couples still years for legal rights* (*Bất chấp hôn nhân xã hội, các cặp đồng tính nam vẫn cần nhiều năm bảo vệ quyền hợp pháp*), TIMES OF INDIA (25 tháng 6 năm 2019) https://timesofindia.indiatimes.com/life-style/spotlight/is-gay-marriage-areality-in-india/articleshow/69928813.cms (truy cập lần cuối vào ngày 19 tháng 12 năm 2019) [124] Diwan, chú thích 53.

3 Tòa án tối cao đã giải thích một số quyền kinh tế - xã hội như quyền ăn uống và quyền giáo dục, những quyền này đặt ra các nghĩa vụ tích cực đối với nhà nước theo Điều 21 trong việc đảm bảo cuộc sống và quyền tự do cá nhân.

ý nghĩa quyền của người LGBT+, từ đó, việc lựa chọn bạn đời dựa trên quyền tự chủ và phẩm giá của họ đòi hỏi phải đưa các mối quan hệ của họ vào thể chế hôn nhân.

Tòa án có thể nhìn nhận việc từ chối tiếp cận các thể chế luật gia đình như hôn nhân vi phạm quyền có xu hướng tính dục của người LGBT+ và quyền được ở trong một mối quan hệ dựa trên các giá trị tự chủ và nhân phẩm của họ. Do đó, việc không công nhận như vậy đã vi phạm Điều 21 của Hiến pháp.

V. KHẢ NĂNG CHUYỂN ĐỔI QUYỀN LÀM CHA MẸ Ở ẤN ĐỘ

A. Luật làm cha mẹ theo Luật thế tục và đạo Hindu

Luật cá nhân dựa trên tôn giáo chi phối các vấn đề về quyền làm cha mẹ ở Ấn Độ. Theo luật của Ấn Độ, cha mẹ được coi là người chịu trách nhiệm pháp lý về phúc lợi của đứa trẻ và được pháp luật công nhận để thay mặt đứa trẻ đưa ra quyết định được gọi là người giám hộ tự nhiên.[1] Ngược lại, khái niệm quyền giám hộ đề cập đến tình trạng thể chất của đứa trẻ và bao gồm khả năng đưa ra các quyết định hằng ngày.[2] Trong khi tất cả các luật cá nhân thường công nhận người cha là người giám hộ đương nhiên, vẫn thường có giả định ủng hộ quyền nuôi con của người mẹ đối với những đứa trẻ nhỏ hơn.[3] Do đó, mặc dù quyền giám hộ và nuôi con thường trùng nhau, nhưng không phải lúc nào cũng đúng.

Luật tôn giáo về quyền làm cha mẹ được bổ sung bởi Đạo luật Giám hộ và Bảo vệ thế tục, 1890 (GAWA), cho phép các tòa án tuyên bố một người giám hộ cho trẻ vị thành niên trong các trường hợp không còn cha hoặc mẹ còn sống.[4] Do đó, thông thường, luật pháp thế tục nhấn mạnh đến quyền của cả cha và mẹ. Tuy nhiên, các tòa án đã nhiều lần khẳng định rằng trong tất cả các vấn đề liên quan đến trẻ em, nguyên tắc về lợi ích tốt nhất của đứa trẻ là tối quan trọng và thậm chí có thể thay thế luật cá nhân hoặc luật định.[5]

Trong luật Hindu, theo Đạo luật Giám hộ và Người thiểu số Hindu năm 1956 (HMGA), người cha là người giám hộ tự nhiên được ưu tiên và người mẹ chỉ được công nhận là người giám hộ tự nhiên "sau anh ta".[6] Tòa án tối cao, trong vụ *Githa Hariharan kiện Ngân hàng Dự trữ Ấn Độ*,[7] đã công nhận nguyên tắc hiến định về bình

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1 Asha Bajpai, *Custody and Guardianship of Children in India* (*Quyền giám hộ và chăm nuôi trẻ em ở Ấn Độ),* FAMILY LAW QUARTERLY 39 (2) 441, 443 (2005).

2 *Sđd.*

3 *Sđd.*

4 Mục 19 (b), Đạo luật Giám hộ và Bảo vệ, năm 1890.

5 Bajpai, chú thích 126, tr. 443.

6 Phần 6, Đạo luật Giám hộ và Người thiểu số Hindu, 1956.

7 Githa Hariharan kiện Ngân hàng Dự trữ Ấn Độ, (1999) 2 SCC 228 (Tòa án tối cao Ấn Độ).

đẳng giới tính rằng người mẹ có thể là người giám hộ đương nhiên của trẻ vị thành niên ngay cả trong suốt cuộc đời của người cha nếu người cha vắng mặt trong cuộc sống của đứa trẻ. Từ đó, tòa án dừng lại ở việc thừa nhận các quyền làm cha mẹ của người mẹ trên các điều kiện hoàn toàn bình đẳng.[1] Tuy nhiên, đối với những đứa con ngoài giá thú, luật Hindu ưu tiên người mẹ hơn.[2] Hơn nữa, cha mẹ kế không được công nhận là người giám hộ tự nhiên.[3]

Việc mang thai hộ và kỹ thuật hỗ trợ sinh sản vẫn chưa được quy định, nhưng các đề xuất lập pháp để điều chỉnh cả hai vấn đề này đã được thông báo trong một vài năm. Điều này đánh dấu một sự đột phá mạnh mẽ so với cách thức tương đối tự do mà quy định mang thai hộ đã được áp dụng trước đây.[4] Mặc dù việc công nhận cặp vợ chồng dự định là cha mẹ của đứa trẻ là không thể tranh cãi, nhưng nhiều đề xuất quy định này được đưa ra dựa trên cơ sở ghi nhận việc bóc lột người mang thai hộ, đặc biệt là trong các thỏa thuận mang thai hộ thương mại quốc tế.[5] Ví dụ, Dự luật (Quy định) về Mang thai hộ, năm 2019, chỉ cho phép mang thai hộ cho các cặp vợ chồng khác giới bị vô sinh và chỉ cho phép một người thân ruột thịt làm người mang thai hộ.[6] Hơn nữa, dự luật cấm tất cả các hình thức mang thai hộ thương mại và chỉ cho phép mang thai hộ vị tha, tức là mang thai hộ, mà không có bất kỳ khoản bồi thường nào.[7] Do đó, các hạn chế đối với cả người có thể tiến hành mang thai hộ và người có thể là người mang thai hộ, cũng như lệnh cấm mang thai hộ vì mục đích thương mại, là nhằm giải quyết các vấn đề về bóc lột.

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1 Ủy ban pháp luật Ấn Độ, Reforms in Guardianship and Custody Laws in India (Cải cách luật giám hộ và chăm nuôi ở Ấn Độ), Báo cáo số 257 (2015) https://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf (truy cập lần cuối vào ngày 30 tháng 11 năm 2021).

2 Phần 6, Đạo luật Giám hộ và Người thiểu số Hindu, 1956.

3 Phần 6, Đạo luật Giám hộ và Người thiểu số Hindu, 1956.

4 Ngay từ năm 2005, Hội đồng Nghiên cứu Y khoa Ấn Độ (ICMR) đã ban hành Hướng dẫn quốc gia về Công nhận, Giám sát và Quy định của Phòng khám ART. Sau đó, một số đề xuất lập pháp về quy định các kỹ thuật hỗ trợ sinh sản mà trước năm 2016 phần lớn được cho phép. Xem Sneha Banerjee và Prabha Kotiswaran, *Divine Labours, Devalued Work: The Continuing Saga of India's Surrogacy Regulation* (*Lao động cao quý, công việc mất giá: Tiếp tục câu chuyện về Quy định mang thai hộ ở Ấn Độ*), INDIAN LAW REVIEW 5-1, 85-105 (2021).

5 Các nguyên tắc ICMR đã công nhận các cặp vợ chồng có ý định có con là cha mẹ. Xem thêm điều khoản Phần 7, Dự luật (Quy định) Mang thai hộ, 2019; Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker* (*Mang thai hộ thương mại ở Ấn Độ: Tạo ra một người mẹ - người lao động hoàn hảo*), SIGNS 35 (4) 969-992 (2010); Aastha Malhotra và Arshia Roy, *Reconceptualising Parenthood: A Model Regulatory Framework for Assisted Reproduction in India* (*Định nghĩa lại tư cách cha mẹ nhận thức: Khung quy định kiểu mẫu về hỗ trợ sinh sản ở Ấn Độ*), 13 NUJS L. REV. 1 (năm 2020).

6 Phần 4, Dự luật (Quy định) Mang thai hộ, 2019.

7 Phần 4, Dự luật (Quy định)Mang thai hộ, 2019.

Tuy nhiên, dự luật đã bị chỉ trích nặng nề bởi các nhà nữ quyền vì nó bỏ qua thực tế của các thỏa thuận mang thai hộ và chỉ cho phép việc mang thai hộ vị tha làm giảm giá trị sức lao động của người mẹ mang thai hộ.[1] Thay vào đó, các nhà nữ quyền đề xuất rằng dự luật nên cho phép các thỏa thuận mang thai hộ khác nhau đồng thời chỉnh đốn chúng để bảo vệ quyền của người mẹ mang thai hộ và ngăn chặn việc bóc lột kinh tế.[2] Tương ứng với dự luật mang thai hộ, Dự luật (Quy định) về Công nghệ sinh sản hỗ trợ năm 2020 chỉ xét đến những cặp vợ chồng dị tính đã kết hôn muốn có con hoặc một phụ nữ lựa chọn các dịch vụ hỗ trợ sinh sản.[3]

Theo Đạo luật Nhận con nuôi và Cấp dưỡng của người Hindu năm 1956 (HAMA), luật nhận con nuôi của người Hindu cho phép nhận con nuôi giữa những người Hindu. Đạo luật Công lý vị thành niên thế tục, 2015 (JJA) cho phép nhận con nuôi không phân biệt tôn giáo. Mặc dù chế độ nhận con nuôi theo HAMA là tương đối tự do và việc nhận con nuôi có thể được tiến hành riêng tư trong hầu hết các trường hợp mà không có bất kỳ sự tham gia nào của nhà nước, việc nhận con nuôi theo JJA được quy định rất chặt chẽ.[4] Hơn nữa, JJA là phương tiện hợp pháp chính mà thông qua đó, trẻ em mồ côi hoặc bị bỏ rơi được nhà nước nhận nuôi.[5] Mặc dù cả hai luật đều cho phép những người đàn ông và phụ nữ độc thân nhận con nuôi, khi xét đến các cặp đôi, luật chỉ xem xét các cặp vợ chồng khác giới là những cặp cha mẹ đủ điều kiện. Hơn nữa, không giống như HAMA, JJA chỉ cho phép những người đàn ông độc thân nhận trẻ em nam làm con nuôi.[6] Học giả pháp lý Sangeetha Sriram đã chỉ ra cách luật nhận con nuôi hiện hành loại trừ những cặp đôi cùng giới chuyển giới và không công nhận việc nhận nuôi con riêng, điều này ảnh hưởng đến cả các cặp LGBT+ và những người có quan hệ phi hôn nhân.[7]

Do đó, các luật hiện hành về quyền làm cha mẹ ưu tiên những người cha cũng như các mối quan hệ hôn nhân khác giới. Việc loại trừ các mối quan hệ không theo quy chuẩn xảy ra ở mọi cấp độ. Thứ nhất, luật giám hộ tự nhiên của đạo Hindu không

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1 Banerjee và Kotiswaran, chú thích 136; Neha Thirani Bagri, *A Controversial Ban on Commercial Surrogacy Could Leave Women in India with even Fewer Choices* (*Một lệnh cấm gây tranh cãi về việc mang thai hộ vì mục đích thương mại có thể khiến phụ nữ ở Ấn Độ thậm chí còn ít lựa chọn hơn*), TIME (30 tháng 6 năm 2021) https://time.com/6075971/commercial-surrogacy-ban-india/ (truy cập lần cuối vào ngày 30 tháng 11 năm 2021)).

2 *Sđd*.

3 Phần 2 (g) và 2 (x), Dự luật về Công nghệ sinh sản hỗ trợ (Quy định), năm 2020.

4 Xem Quy định về nhận con nuôi, 2017.

5 Mục 38, Đạo luật Tư pháp vị thành niên (Chăm sóc và bảo vệ trẻ em), 2015.

6 Mục 57 (4), Đạo luật Tư pháp vị thành niên (Chăm sóc và bảo vệ trẻ em), 2015.

7 Sangeetha Sriram, *Revitalizing Adoption Law in India* (*Phục hồi Luật Nuôi con nuôi ở Ấn Độ*), INDIAN LAW REVIEW (2020). Quy chế Nhận con nuôi năm 2017 công nhận việc nhận con nuôi của cha mẹ nhưng không công nhận việc nhận nuôi con riêng.

thừa nhận quyền bình đẳng của người mẹ bằng cách đặc quyền cho người cha trong các mối quan hệ hôn nhân. Hơn nữa, nó không công nhận quyền bình đẳng của cha mẹ trong các mối quan hệ phi hôn nhân bằng cách đặc quyền cho người mẹ làm người giám hộ trong trường hợp con ngoài giá thú. Thứ hai, quy định được đề xuất về các kỹ thuật hỗ trợ sinh sản và mang thai hộ loại trừ các cặp đôi LGBT+, những người có ý định làm cha mẹ đơn thân và những người có mối quan hệ phi hôn nhân. Thứ ba, luật nhận con nuôi không công nhận việc nhận con nuôi của các cặp đôi cùng giới hoặc người chuyển giới hoặc cha mẹ nhận nuôi con riêng, gây ảnh hưởng xấu đến những người có quan hệ phi hôn nhân. Vì vậy, quyền làm cha mẹ trong luật gia đình của Ấn Độ vẫn mang tính loại trừ cao.

B. Chuyển đổi quyền làm cha mẹ thông qua yêu về cầu quyền của người thuộc cộng đồng LGBT+

Tôi cho rằng, việc đòi quyền kết hôn của người LGBT+ có thể mở ra các khả năng để lập luận mở rộng luật về quyền làm cha mẹ ở Ấn Độ. Việc mở rộng như vậy có thể mang lại lợi ích không chỉ cho các gia đình LGBT+ mà còn có lợi cho những người có mối quan hệ khác giới cũng như các mối quan hệ gia đình đa dạng khác. Trong Phần IVB, tôi cho rằng các lập luận tiềm năng về bình đẳng trong hôn nhân có thể được xây dựng xung quanh cả tuyên bố bình đẳng và quyền tự do cá nhân. Tôi sẽ dựa trên những điều đó để chứng minh ý nghĩa của chúng đối với pháp luật về quyền làm cha mẹ.

Hệ quả chính của việc thừa nhận bình đẳng hôn nhân dựa trên bình đẳng khuynh hướng tình dục cũng như quyền được công nhận pháp lý các mối quan hệ dựa trên quyền tự chủ và nhân phẩm sẽ là sự công nhận rộng rãi hơn về bình đẳng gia đình LGBT+ trong luật pháp.[1] Sự thừa nhận đó nhất thiết phải vượt lên hôn nhân, vì như vậy sẽ nhấn mạnh tầm quan trọng của việc tôn trọng hợp pháp các cách thức khác nhau mà người LGBT+ tổ chức và xây dựng các mối quan hệ của họ và không loại trừ họ khỏi các thể chế luật gia đình hiện hành. Cơ bản nhất là các khái niệm rộng hơn về đạo đức hiến pháp và chủ nghĩa hợp hiến chuyển đổi đã nhìn quy định pháp luật dưới lăng kính nhị nguyên giới và định kiến về giới, bao gồm đặc quyền sinh sản hữu tính, không phù hợp với tầm nhìn đa chiều của hiến pháp. Cả việc công nhận quyền bình đẳng trong quan hệ LGBT+ và sự thay đổi trong diễn giải hiến pháp về các mối quan hệ đều mở rộng hiểu biết pháp lý về quyền làm cha mẹ.

[1] Đối với khái niệm về Bình đẳng gia đình LGBT + trong luật pháp Hoa Kỳ, xem NeJaime, Marriage Equality and the New Parenthood (Bình đẳng trong hôn nhân và quyền làm cha mẹ mới), chú thích 4.

1. Ý nghĩa đối với quyền giám hộ

Việc công nhận quyền bình đẳng trong gia đình LGBT+ sẽ đòi hỏi sự công nhận quyền làm cha mẹ của người thuộc cộng đồng LGBT+ và những yêu cầu tương ứng để thực hiện quyền làm cha mẹ của các cặp đôi cùng giới. Việc thừa nhận quyền làm cha mẹ của các cặp đôi cùng giới như vậy có thể sẽ làm lung lay những hiểu biết của chúng ta về vai trò của giới trong luật gia đình cũng như làm mất đi vị trí đặc quyền của khả năng sinh sản. Điều này có khả năng làm thay đổi định nghĩa của việc làm cha mẹ, từ việc dựa trên sinh học hoặc giới sang các nguyên tắc có chủ đích và chức năng được công nhận của việc làm cha mẹ. Hơn nữa, như NeJaime đã lập luận trong bối cảnh của Mỹ, việc chuyển sang làm cha mẹ có chủ đích và đúng chức năng có thể sẽ mang lại lợi ích cho các gia đình không hôn nhân. Điều này sẽ chuyển trọng tâm của vấn đề từ tình trạng hôn nhân sang việc mối quan hệ cha mẹ tồn tại ra sao[1]. Không lý gì với sự công nhận bình đẳng trong hôn nhân, sự thay đổi học thuyết tương tự lại không xảy ra ở Ấn Độ.

Việc công nhận quyền làm cha mẹ của các cặp đôi cùng giới không có logic đặc quyền người cha được coi là người giám hộ tự nhiên như trong luật Hindu. Bởi, một khi công nhận quyền làm cha mẹ của các cặp đôi cùng giới, khái niệm rằng nam giới và phụ nữ có vai trò nuôi dạy con cái theo giới đã bị bác bỏ. Chính những vai trò về giới như vậy là cơ sở cho việc cho rằng người cha là người giám hộ đương nhiên, hơn là quyền của người mẹ. Do đó, việc công nhận quyền làm cha mẹ của các cặp đôi cùng giới cũng tự động thoái thác bất kỳ đặc quyền nào giữa các cặp khác giới bởi nó mâu thuẫn với lý thuyết căn bản.

Hơn nữa, hiện tại, những đứa trẻ được sinh ra bởi những người không có quan hệ hôn nhân được coi là con ngoài giá thú theo luật Hindu, với người mẹ được ưu tiên là người giám hộ tự nhiên.[2] Thừa nhận rằng bản chất của mối quan hệ cha mẹ - con cái không chỉ là sự sinh sản hữu tính, mà mối quan hệ đó còn có thể được hình thành thông qua các nguyên tắc có chủ định và chức năng, như trong trường hợp của các cặp đôi cùng giới, cũng có thể thay đổi cách những đứa trẻ ngoài giá thú được xem xét. Thay vì tình trạng hôn nhân của cặp vợ chồng, trọng tâm chuyển sang ý định của cha mẹ hoặc bản chất của mối quan hệ mà cha mẹ chia sẻ với con cái. Một trong hai có thể trở thành cơ sở để khẳng định quyền của cha mẹ, vị thế bình đẳng và sự tham gia vào

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[1] NeJaime, Marriage Equality and the New Parenthood (Bình đẳng trong hôn nhân và quyền làm cha mẹ mới), chú thích 4, tr. 1250.

[2] Để biết cách xử lý chi tiết về hành vi bất hợp pháp trong luật Hindu, hãy xem Ravi Gangal và Ravi Shankar Pandey, *Illegitimacy under Hindu Law: A Case for its Abandonment*, (*Hành vi bất hợp pháp theo Luật Hindu: Trường hợp bị từ bỏ*), INTERNATIONAL JOURNAL OF LAW, POLICY AND THE FAMILY (TẠP CHÍ QUỐC TẾ VỀ LUẬT, CHÍNH SÁCH VÀ GIA ĐÌNH), 00, 1-35 (2021).

cuộc sống của đứa trẻ. Điều này có thể có ý nghĩa đối với những người có mối quan hệ phi hôn nhân có thể có con với nhau và có thể muốn được coi là cha mẹ của đứa trẻ, cũng như đối với những người cha ruột chưa kết hôn nhưng vẫn muốn đóng vai trò lớn hơn trong cuộc sống của con họ. Tất nhiên, điều này không xóa bỏ khái niệm bất hợp pháp trong luật Hindu, dù đã được lập luận một cách thuyết phục là nên như vậy,[1] nhưng cũng làm suy yếu sức ảnh hưởng của tình trạng hôn nhân đối với việc xác định mối quan hệ cha mẹ - con cái.

2. Ý nghĩa đối với quy định về các kỹ thuật hỗ trợ sinh sản và mang thai hộ

Tôi cho rằng các quyền tự chủ và phẩm giá, từ đó là quyền được ở trong một mối quan hệ, bắt buộc nhà nước có nghĩa vụ phải tạo điều kiện cho các cặp đôi cùng giới tiếp cận các thể chế luật gia đình như hôn nhân. Bởi, hôn nhân có tính trọng tâm, là một thực tế xã hội và pháp lý trong tổ chức các mối quan hệ của con người. Cách tiếp cận như vậy cũng có thể được mở rộng cho cả vai trò làm cha mẹ. Tuyên bố về quyền tự quyết của người LGBT+ sẽ bao gồm quyền quyết định có con, đây là một sự lựa chọn có tính thân mật tương tự, nếu không muốn nói là hơn, cả lựa chọn ở trong một mối quan hệ. Cùng với những yêu cầu về phẩm giá, nhà nước sẽ cần phải công nhận quyền làm cha mẹ của họ. Điều này bao gồm sự thừa nhận về mặt pháp lý đối với mối quan hệ cha mẹ - con cái mà các cặp đôi cùng giới tìm cách thiết lập và sự cần thiết của việc tiếp cận các kỹ thuật hỗ trợ sinh sản và dịch vụ mang thai hộ, vốn vẫn là trọng tâm của quá trình hình thành gia đình cùng giới. Lập luận này cũng có thể được mở rộng sang sự lựa chọn thân thiết của những người độc thân và những người trong các mối quan hệ phi hôn nhân. Quyền tự quyết định sẽ bảo vệ những lựa chọn thân mật như một phần của quyền riêng tư mà Tòa án tối cao đã công nhận là một quyền căn bản.

Phải thừa nhận rằng, quyền riêng tư không phải là tuyệt đối. Tòa án tối cao đã cho rằng để quyền có thể bị xâm phạm một cách hợp lệ, nếu đáp ứng ba điều kiện, là có sự tồn tại của một luật hợp lệ, rằng luật đó phải theo đuổi mục đích hợp pháp của nhà nước và luật đó phải tương xứng, tức là phải có mối liên hệ hợp lý giữa các đối tượng và các phương tiện được áp dụng để đạt được chúng.[2] Trong trường hợp quy định về các dịch vụ sinh đẻ, mục đích hợp pháp của nhà nước được cho là nhằm ngăn chặn việc bóc lột các bà mẹ mang thai hộ. Tuy nhiên, việc hạn chế các tiêu chí đủ điều kiện tiếp cận các dịch vụ như vậy phục vụ mục tiêu này như thế nào vẫn còn chưa rõ ràng.[3]

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1 Sđd.

2 Phần H Kết luận, theo Chandrachud J., Justice K. S. Puttaswamy kiện Cộng hòa Ấn Độ, (2017) 10 SCC 1 (Tòa án tối cao Ấn Độ).

3 Banerjee và Kotiswaran, chú thích 136, tr. 96.

Việc loại trừ các cặp đôi cùng giới, những người độc thân và những người có quan hệ ngoài hôn nhân cũng có thể bị phản đối trên cơ sở bình đẳng. Giống như việc loại trừ khỏi hôn nhân quyền tiếp cận các dịch vụ sinh sản phụ thuộc vào một thế giới quan dị tính, nơi chỉ những gia đình được hình thành thông qua sự kết hợp giữa nhị nguyên nam - nữ là hợp pháp. Tuy nhiên, vì những lý do tương tự cho việc mục tiêu đó không phù hợp với các giá trị của Hiến pháp,[1] nó cũng sẽ không có giá trị trong bối cảnh hôn nhân. Như Kotiswaran và Banerjee lập luận, không có lý do chuẩn mực nào để coi trọng các cặp đôi dị tính có khả năng nuôi dạy con cái hơn các hình thức gia đình khác.[2]

Do đó, các đề xuất lập pháp hiện có loại trừ các cặp đôi cùng giới, những người độc thân và những người có quan hệ ngoài hôn nhân sẽ có khả năng vi phạm quyền tự chủ, nhân phẩm và bình đẳng của họ theo Hiến pháp Ấn Độ.

3. Ý nghĩa đối với việc nhận con nuôi

Luật nhận con nuôi hiện hành không cho phép các cặp đôi cùng giới và người chuyển giới nhận con nuôi. Giống như các lập luận về quyền tiếp cận các dịch vụ sinh sản, việc thừa nhận sự lựa chọn thân thiết để hình thành một gia đình dựa trên quyền tự chủ và yêu cầu nhân phẩm của những người LGBT+ cũng sẽ yêu cầu nhà nước công nhận quyền tiếp cận của họ với các dịch vụ nhận con nuôi. Sự tiếp cận đó cũng có thể được chứng minh bằng các lập luận dựa trên bình đẳng thông qua quyền bình đẳng gia đình LGBT+ trong luật gia đình.

Hơn nữa, ngoài các câu hỏi về khả năng tiếp cận con nuôi, việc thừa nhận quyền làm cha mẹ của những người LGBT+ cũng sẽ dẫn đến việc thừa nhận quyền làm cha mẹ dựa trên các nguyên tắc có chủ đích và chức năng. Điều này cũng giúp củng cố các lập luận về việc công nhận nhận nuôi con riêng. Việc nhận nuôi con riêng mang lại lợi ích cho cha mẹ trong việc nuôi dưỡng trẻ em trong các mối quan hệ hôn nhân cả cùng giới và khác giới, trong đó một trong các bậc cha mẹ không có chung mối quan hệ sinh học hoặc di truyền với đứa trẻ. Việc này cho phép người cha/mẹ không phải là cha mẹ ruột vẫn có thể thiết lập mối quan hệ hợp pháp với đứa trẻ. Điều này là do sự thừa nhận quyền làm cha mẹ của các cặp đôi cùng giới được thúc tiến dựa trên tư tưởng mối quan hệ cha mẹ - con cái vượt ngoài khả năng sinh sản hữu tính hoặc sinh học. Một người trong mối quan hệ cùng giới có thể không cùng huyết thống với con họ, nhưng họ vẫn có ý định nuôi con và làm mọi thứ để họ đủ điều kiện làm cha mẹ. Logic tương tự của

[1] Xem Phần IVA.

[2] Banerjee và Kotiswaran, chú thích 136, tr. 94.

cha mẹ chức năng cũng có thể mở rộng cho cha mẹ không phải là cha mẹ ruột trong các mối quan hệ khác giới, do đó lý giải cho việc nhận nuôi con riêng.[1]

VI. KẾT LUẬN

Khi sự công nhận hợp pháp các mối quan hệ của cộng đồng LGBT+ đang tạo đà ở Ấn Độ, nhiều người quan ngại rằng bình đẳng hôn nhân chỉ mang tính đồng hóa. Thay vào đó, họ lập luận và ủng hộ việc thừa nhận đa dạng gia đình, vốn được cho là sẽ thay đổi luật gia đình hiện hành. Những cuộc tranh luận này cũng đang diễn ra trong bối cảnh rộng lớn hơn của gia đình Ấn Độ, vốn đã phải đối mặt với những câu hỏi lâu năm về tính hợp hiến của luật cá nhân dựa trên tôn giáo và mong muốn ban hành một bộ luật dân sự thống nhất.

Tôi tin rằng yêu cầu về quyền bình đẳng hôn nhân của cộng đồng LGBT+ có thể thay đổi luật gia đình bằng cách thúc đẩy sự công nhận đối với các gia đình đa dạng và không chuẩn mực. Ấn Độ có thể mô phỏng các xu hướng trong các khu vực pháp lý khác, nơi các học giả luật gia đình đã tranh luận và quan sát thấy động lực tích cực giữa việc thừa nhận hôn nhân cùng giới và sự phát triển tiến bộ của luật gia đình về các vấn đề như quyền làm cha mẹ. Hơn nữa, trong bối cảnh của Ấn Độ, quyền của cộng đồng LGBT+ có thể là điểm khởi đầu mới trong suy nghĩ về cải cách luật gia đình, vượt ra ngoài luật gia đình trì trệ hiện hành của bộ luật dân sự thống nhất về luật cá nhân.

Tôi đã chỉ ra cách bình đẳng trong hôn nhân có thể dẫn đến sự thừa nhận đa dạng về gia đình trong luật gia đình bằng cách, thứ nhất, xây dựng các lập luận cho hôn nhân cùng giới dựa trên cơ sở bình đẳng và tự do cá nhân và thứ hai, bằng cách áp dụng những lập luận này vào luật làm cha mẹ, cụ thể là quyền giám hộ, quy định về các kỹ thuật hỗ trợ sinh sản và nhận con nuôi. Để làm được điều này, tôi đã dựa vào những tiến bộ về học thuyết do Tòa án tối cao Ấn Độ đưa ra trong luật học về giới và xu hướng tính dục. Việc công nhận bình đẳng trong hôn nhân dựa trên bình đẳng gia đình LGBT+ và quyền được pháp luật công nhận các mối quan hệ LGBT+ có thể mở rộng luật làm cha mẹ để bao gồm các gia đình khác giới, cha mẹ đơn thân và những người trong mối quan hệ ngoài hôn nhân.

Các bài giảng về luật gia đình LGBT+ thường có xu hướng mô tả sự công nhận của pháp luật như một lựa chọn giữa đồng hóa và thay đổi luật gia đình hiện hành. Những lo ngại này là có cơ sở, nhưng như các học giả ở nhiều nơi khác đã chỉ ra, bình đẳng trong hôn nhân cũng có thể trở thành cách để thừa nhận các gia đình đa dạng và không theo quy chuẩn. Theo quan điểm này, bản thân sự bao hàm trở thành một công cụ để chuyển đổi.

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[1] Hiện tại, chỉ có cha/mẹ kế mới được phép nhận con riêng làm con nuôi theo Quy định về nhận con nuôi, năm 2017 được ban hành theo JJA.

HỢP PHÁP HÓA HÔN NHÂN CÙNG GIỚI Ở CANADA: MỘT CÂU CHUYỆN THÀNH CÔNG

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Cầu mong linh hồn quý giá và duy nhất của ông được yên nghỉ.

Tóm lược: *Bài viết này mô tả và bàn về các bước tiến chính dưới góc nhìn tư pháp cũng như những tiến triển về mặt chính trị và luật pháp trong việc hướng tới công nhận hôn nhân cùng giới tại Canada, quốc gia đi tiên phong trong lĩnh vực này.*

Từ khóa: *hôn nhân cùng giới, hợp pháp hóa, Canada.*

GIỚI THIỆU

Vào tháng 11 năm 2017, Thủ tướng Canada đã thay mặt người dân xin lỗi về những phân biệt đối xử trong cơ quan công quyền liên bang và Lực lượng vũ trang Canada mà cộng đồng LGBTQ2S+[2] đã phải chịu đựng trong quá khứ. Mặc dù đã được hợp pháp hóa tại 29 quốc gia, hôn nhân cùng giới vẫn bị ngăn cấm ở hầu hết các nước

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[2] * Công tố viên tại Cơ quan Công tố Canada trong Phần Luật Cạnh tranh. Giáo sư trợ giảng, Đại học Airlangga, Indonesia. Giảng viên chính, Trường Đại học Luật Thành phố Hồ Chí Minh, Việt Nam. Giảng viên thỉnh giảng, Đại học Ngoại thương, Việt Nam. Cựu giáo sư luật kiêm nhiệm tại Đại học Ottawa, Canada (2010-2013). LL.M./Nghiên cứu sinh Luật (Đại học Laval), Cử nhân Luật/Luật (Université du Québec à Montréal), Cử nhân khoa học/Khoa học Chính trị (Đại học Montreal). Từng là thư ký cho Marie Deschamps, Tòa án Tối cao Canada (2010-2011) và cũng là Cố vấn tại Chi nhánh Luật của Tòa án Tối cao Canada (2011-2013). Từng là thư ký cho Michel Robert, Chánh án Tòa phúc thẩm Quebec (2008-2009). Diễn giả công chúng từ năm 2010 về các vấn đề pháp lý khác nhau trên thế giới tại 21 quốc gia cho đến nay, trong đó có nhiều lần ở Việt Nam. Ông đã xuất bản một số chương sách và bài báo ở Úc, Canada, Pháp, Ấn Độ, Indonesia, Vương quốc Anh và Việt Nam. Là một người biết đa ngôn ngữ, ví dụ: ông đã học tiếng Việt và tiếng Hoa phổ thông (Đại học Toronto); tiếng Indonesia (Tổng lãnh sự quán Indonesia tại Toronto); tiếng Nga (Đại học McGill); tiếng Ả Rập (Đại học Montreal); tiếng Đức và tiếng Tây Ban Nha (Collège de Maisonneuve), v.v... Công trình tách biệt với trách nhiệm công việc của tác giả tại Cơ quan Công tố Canada. Các quan điểm, ý kiến và kết luận được trình bày ở đây là của cá nhân của tác giả và không được hiểu là quan điểm, ý kiến và kết luận của Cơ quan Công tố Canada hoặc Cơ quan liên bang Canada.

Từ viết tắt này có nghĩa là đồng tính nữ, đồng tính nam, song tính, chuyển giới và người queer.

trên thế giới, trong đó có một nước thậm chí không có từ nào mang nghĩa "đồng tính"[1], và lời xin lỗi chính thức của Canada hoàn toàn tương phản với hiện thực này. Canada là quốc gia thứ tư trên thế giới, sau Hà Lan (2001), Bỉ (2003) và Tây Ban Nha (2005), hợp pháp hóa hôn nhân cùng giới vào năm 2005. Mặc dù đây là quốc gia thứ tư trên thế giới cho phép các cặp đôi cùng giới kết hôn, một tác giả nhận định rằng "Canada có ảnh hưởng lớn nhất trong cuộc tranh luận quốc tế về vấn đề này"[2], bởi tiêu biểu, Canada là quốc gia đầu tiên trên thế giới cho phép người nước ngoài kết hôn đồng tính nam và đồng tính nữ trên lãnh thổ của mình. Không giống như ở Hà Lan, Bỉ và Tây Ban Nha, việc công nhận hôn nhân cùng giới trước hết là một thắng lợi về mặt pháp lý ở Canada. Do đó, trong bài viết này, chúng ta sẽ xem xét một số những quyết định quan trọng nhất của tòa án Canada, minh họa cho các bước tiến chính, cũng như những phát triển về mặt chính trị và pháp lý trong quá trình đạt tới sự công nhận đó.

Quebec, một trong mười tỉnh bang của Canada, cũng là một trong những nơi đầu tiên trên thế giới cấm phân biệt đối xử dựa trên xu hướng tính dục, cụ thể là ngay từ năm 1977 trong *Hiến chương Nhân quyền và Tự do Quebec*[3], nhưng vì sự phân chia quyền lực trong nội bộ Canada, Quebec không thể thay đổi định nghĩa về hôn nhân và do đó không thể mở rộng nó cho các cặp đôi cùng giới. Giữa chính phủ liên bang, các tỉnh bang và vùng lãnh thổ, trách nhiệm (và phạm vi quyền hạn) trong việc ban hành các quy tắc liên quan đến hôn nhân thuộc về chính phủ liên bang (quốc gia). Định nghĩa về hôn nhân là đặc quyền của chính phủ liên bang ở Canada. Các tỉnh bang và vùng lãnh thổ chỉ có thẩm quyền đối với việc cử hành hôn nhân.

Một số tác giả cho rằng một số ít quốc gia "đã hợp pháp hóa hôn nhân đồng tính ... là kết quả của các quyết định chính trị chứ không phải tư pháp. Nói cách khác, chưa có tòa án quốc gia hay quốc tế nào, chưa có tòa án nhân quyền quốc gia hay quốc tế nào coi hôn nhân cùng giới là một quyền căn bản".[4] Nhưng tại Canada, sự thay đổi về mặt lập pháp nhằm thể chế hóa hôn nhân cho tất cả "là kết quả của một quá trình lâu dài, trong đó cơ quan tư pháp và quyền lực chính trị thay phiên nhau trong cuộc đối thoại

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1 Xem Voice of North Korea của Yeonmi Park, "Shocking Facts About North Korea's Sexuality" ("Sự thật gây sốc về xu hướng tính dục của North Korea"), xem trực tuyến: https://www.youtube.com/watch?v=25h0sE_IK-o

2 Sylvain Larocque, "Reconnaissance du mariage gai: quand l'affirmation d'une Communauté mène à une révolution juridique" (Sylvain Larocque, ("Công nhận hôn nhân đồng giới: khi sự khẳng định của một cộng đồng dẫn đến một cuộc cách mạng pháp lý") (2008) 16 Bulletin d'histoire politique 3, 56 [được dịch sang tiếng Anh bởi Sébastien Lafrance].

3 C.Q.L.R., c. C-12. Đã được sửa đổi để cấm phân biệt đối xử dựa trên xu hướng tính dục, khiến Quebec trở thành nơi đầu tiên trên thế giới tiến xa đến mức này.

4 Sylvain Larocque, *Mariage gai: Les coulisses d'une révolution sociale (Hôn nhân đồng tính: Hậu trường của một cuộc cách mạng xã hội)*, Montréal, Flammarion, 2005, 279 (in nghiêng được thêm vào).

về hôn nhân cùng giới để đi tới kết luận, một mặt bằng những cân nhắc liên quan đến việc bảo vệ các quyền căn bản được Hiến pháp bảo đảm (bình đẳng, tự do tôn giáo) và mặt khác, các tính toán chính trị với những quan điểm đạo đức và luân lý."[1]

1. ỦY BAN NHÂN QUYỀN LIÊN HỢP QUỐC VÀ HÔN NHÂN CÙNG GIỚI

Các yêu cầu về hôn nhân cùng giới ở Canada thường được coi như một vấn đề về các quyền căn bản.[2] Tuy nhiên, có một số ý kiến cho rằng khả năng tiếp cận hôn nhân của các cặp đôi cùng giới không phải là quyền căn bản. Ủy ban Nhân quyền Liên hợp quốc (sau đây gọi là HRC) không cho đây là thuộc quyền con người tại một thời điểm nhất định.[3] Ví dụ, trong quyết định trong vụ *Joslin kiện New Zealand* năm 2002, HRC nêu rõ:[4]

Hôn nhân hiện nay được mọi người hiểu là chỉ dành cho những cá nhân khác giới và được công nhận như vậy trong luật dân sự của tất cả các quốc gia thành viên của Công ước. Trong những năm gần đây, một số quốc gia thành viên đã thiết lập các hình thức công nhận chính thức cho các mối quan hệ cùng giới, *không có hình thức nào trong số này được coi là hôn nhân hoặc có hiệu lực pháp lý giống vậy*. Như vậy, diễn giải rõ ràng về hôn nhân, như được nhấn mạnh bởi định nghĩa trong Điều 23, Khoản 2 Công ước quốc tế về các quyền dân sự và chính trị, là về các cá nhân khác giới.

Tuy nhiên, thực tế đã thay đổi khá nhiều sau khi quyết định này của HRC được đưa ra, tức là một số quốc gia, bao gồm cả Canada, đã mở rộng khả năng kết hôn cho các cặp đôi cùng giới, mà trong đó, các cuộc hôn nhân này có hiệu lực pháp lý tương tự như đối với các cặp khác giới. Do đó, như lập luận của Roos và Mackay vào năm 2019, "việc rời khỏi quyết định trong vụ *Joslin kiện New Zealand* có nhiều khả năng được coi là vừa hợp pháp vừa hợp lý - và do đó có nhiều khả năng xảy ra hơn"[5] ở cấp độ quốc tế.

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[1] Dave Guénette và Patrick Taillon, "La légalisation du mariage pour tous au Canada - À la jonction du fédéralisme canadien et des droits et libertés de la personne" ("Hợp pháp hóa hôn nhân cho tất cả mọi người ở Canada - Tại giao điểm của chủ nghĩa liên bang Canada và quyền con người và tự do") trong *Annuaire international de justice constitutionnelle (Niên giám Quốc tế về Công lý Hiến pháp*, 30-2014, 2015, 43. (phần nhấn mạnh và in nghiêng được thêm vào) [được dịch sang tiếng Anh bởi Sébastien Lafrance].

[2] Marie-France Bureau và Kim Désilets, "Du mariage gai à la polygamie: triomphe du droit à l'égalité?" ("Từ hôn nhân đồng tính đến chế độ đa thê: chiến thắng của quyền bình đẳng?") (2011) 89-1 Can. B. Rev. 39, 41.

[3] *sđd.*, 278-279.

[4] *Joslin v. New Zealand*, Comm. 902/1999, U.N. Doc. A/57/40, Tập II (HRC 2002), đoạn 4.11 (in nghiêng được thêm vào).

[5] Oscar I. Roos và Anita Mackay, "A Shift in the United Nations Human Rights Committee's Jurisprudence on Marriage Equality? An Analysis of Two Recent Communications from Australia" ("Một sự thay đổi trong Luật học của Ủy ban Nhân quyền Liên hợp quốc về bình đẳng hôn nhân? Một phân tích về hai thông tin gần đây từ Úc) (ngày 08 tháng 2 năm 2019), Tạp chí Luật của Đại học New South Wales, Tập 42, 2019, Tài liệu Nghiên cứu của Trường Luật Deakin số 19-07, 7.

2. BỐI CẢNH LỊCH SỬ CỦA CANADA VỀ HÔN NHÂN CÙNG GIỚI

Việc lên án đồng tính luyến ái ở phương Tây đã kéo dài một thời gian quá lâu. Năm 1965, tại Canada, George Klippert bị bắt sau khi thừa nhận có quan hệ tình dục với 4 người đàn ông và bị buộc tội khiếm nhã thô tục. Kháng cáo bản án của anh ta đã bị Tòa án phúc thẩm các vùng lãnh thổ Tây Bắc, sau đó là Tòa án tối cao Canada bác bỏ[1], và Klippert phải ngồi tù một thời gian. Trong vụ này, "có bằng chứng từ hai bác sĩ tâm thần cho thấy người kháng cáo có khả năng phạm thêm tội tình dục cùng loại với những nam giới trưởng thành đồng thuận khác."[2] Điều này nhắc cho chúng ta nhớ lại rằng cho đến năm 1973, Hiệp hội Tâm thần Hoa Kỳ vẫn coi đồng tính luyến ái là một bệnh tâm thần. Không phải lúc nào Canada cũng thoải mái về vấn đề đồng tính luyến ái. Từ năm 1959 đến năm 1968, hơn chín nghìn đàn ông và phụ nữ đã bị điều tra về các hoạt động đồng tính của họ, và ít nhất 295 người đã bị sa thải.[3]

Vào năm 1969, sau nhiều thập kỷ đấu tranh chống lại một hệ thống được coi là dị đoan, gây chia rẽ bất công và phân biệt đối xử, các cộng đồng đồng tính nam và đồng tính nữ của Canada cuối cùng đã thành công trong yêu cầu chính phủ liên bang bãi bỏ các tiêu chuẩn lên án mọi quan hệ thể xác giữa những người cùng giới tính. Vào thời điểm đó, việc phi hình sự hóa các hành vi đồng tính luyến ái thông qua dự luật Omnibus Bill[4] dường như sẽ chấm dứt những khó khăn mà họ phải đối mặt, nhưng việc này thực tế không có nghĩa cũng như không đảm bảo sự bình đẳng về kinh tế giữa các cặp đối cùng giới và dị tính. Quyền công dân của những người đồng tính không được tôn trọng khi xét tới những cặp đôi đồng tính luyến ái không được hưởng những quyền tương tự như những cặp đôi dị tính.

Vài năm sau, những hạn chế của việc chỉ phi hình sự đồng tính luyến ái trở nên rõ ràng khi nhiều cặp đôi cùng giới không thể hưởng lợi từ nhiều chương trình và dịch vụ của chính phủ trong cuộc khủng hoảng AIDS vì tình trạng pháp lý của họ. Nói một cách tổng quát hơn, khoảng trống pháp lý xung quanh tình trạng địa vị của các cặp đôi cùng giới không cho phép vợ chồng được hưởng lợi lẫn nhau trong trường hợp qua đời. Mục tiêu được phép kết hôn khi đó được coi là một phương tiện bảo vệ và đảm bảo tài sản và vật chất của họ. Hôn nhân có nhiều ưu điểm, bao gồm khả năng người nộp thuế chuyển tài sản cho vợ/chồng của mình khi qua đời hoặc hôn nhân tan vỡ. Cuộc khủng hoảng AIDS đã làm rõ nhu cầu thay đổi luật liên bang, tỉnh bang và vùng

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1 *Klippert v. R.*, [1967] S.C.R. 822.

2 *Sđd.*

3 Laura Reidel, "Religious Opposition to Same-Sex Marriage in Canada: Limits to Multiculturalism" ("Phản đối tôn giáo đối với hôn nhân đồng giới ở Canada: Giới hạn đối với chủ nghĩa đa văn hóa") (2009) Human Rights Review (Tạp chí Nhân quyền), 269.

4 Bill C-150,1st Sess., 28th Parl. 1969.

lãnh thổ của Canada sang một phân loại mới của các cặp đôi cùng giới. Cuộc đấu tranh cho hôn nhân cùng giới sau đó đã trở thành nhiệm vụ bảo vệ quyền lợi cho bạn đời của những cặp đôi này. Khi những cặp đôi này không được công nhận cũng như không đủ điều kiện kết hôn, họ không được bảo vệ bởi các tiêu chuẩn pháp lý.

3. CƠ SỞ PHÁP LÝ VÀ TƯ PHÁP CỦA CANADA VỀ HÔN NHÂN CÙNG GIỚI

Xác định các nguyên tắc và giá trị của xã hội Canada cũng như tạo cơ hội cho người dân đặt câu hỏi về những nhược điểm và hạn chế của luật pháp, *Hiến chương Canada về Quyền và Tự do*[1] (sau đây gọi là "Hiến chương") đã đóng một vai trò quan trọng trong công cuộc đấu tranh cho kết hôn cùng giới. Nhiều điều khoản của Hiến chương có lẽ và đã phát huy tác dụng trong tranh luận để hợp pháp hóa hôn nhân cùng giới. Các tiêu chuẩn pháp lý trong Hiến chương quy định rằng tất cả công dân Canada đều được hưởng các quyền và tự do như nhau. Do đó, họ cần được đối xử bình đẳng trong giao dịch với các cơ quan thể chế nhà nước. Mục 15 (1) của Hiến chương có nêu: "Mọi cá nhân đều bình đẳng trước pháp luật và có quyền được pháp luật bảo vệ bình đẳng và hưởng lợi bình đẳng từ pháp luật, không bị phân biệt đối xử, và đặc biệt, không phân biệt đối xử dựa trên chủng tộc, quốc gia hay dân tộc, nguồn gốc, màu da, tôn giáo, giới tính, tuổi tác hoặc khuyết tật về tinh thần hoặc thể chất." Cần lưu ý rằng, mục 15 không quy định rõ ràng về xu hướng tính dục như một mảng bị cấm phân biệt đối xử.

Vào cuối những năm 1990, chính quyền nhiều tỉnh bang của Canada cũng như chính phủ liên bang, trong nhiều điều luật khác nhau, đã công nhận các quyền và lợi ích của của vợ/chồng các cặp cùng giới tính trên cơ sở giống như với các cặp khác giới tính. Nhưng mãi đến năm 1995, trong vụ *Egan kiện Canada*, Tòa án tối cao Canada mới công nhận xu hướng tính dục là cơ sở cấm phân biệt đối xử tương tự như những mảng được liệt kê trong Mục 15 của Hiến chương: "Xu hướng tính dục là một đặc điểm cá nhân sâu sắc, không thể thay đổi, hoặc chỉ có thể thay đổi với cái giá không thể chấp nhận được, và do đó nằm trong phạm vi của mục 15 bảo vệ tương tự như các cơ sở đã được liệt kê."[2] Quyết định đột phá này của tòa án đã được đưa ra bởi vì chính

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[1] Hiến chương về Quyền và Tự do của Canada, Phần I của Đạo luật Hiến pháp, 1982, là Phụ lục B của Đạo luật Canada, 1982 (Anh), 1982 c. 1 (sau đây gọi là "Hiến chương").

[2] *Egan kiện Canada*, [1995] 2 S.C.R. 513, 514 (thêm chữ nghiêng). Tuy nhiên, cần phải lưu ý rằng vị trí này chính xác đã từng là vị trí của Tòa phúc thẩm Ontario ba năm trước đó, vào năm 1992, trong quyết định ở vụ *Haig kiện Canada*, 1992 CanLII 2787 (ON CA); Christy M Glass và Nancy Kubasek, "The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from Their Northern Neighbor Regarding Same-Sex Marriage Rights" ("Sự phát triển của hôn nhân đồng giới ở Canada: Bài học Hoa Kỳ có thể học hỏi từ người hàng xóm phía Bắc của họ về quyền hôn nhân đồng giới") (2008) 15 Mich J Gender & L 143, 148: "Ở Canada, các tòa án được tổ chức ở cấp tỉnh bang và cấp phúc thẩm. Mặc dù

tòa án trước đó đã quyết định, sáu năm trước, vào năm 1989, trong vụ *Andrews kiện Hiệp hội Luật British Columbia*[1], rằng mục 15 không cấm tất cả các phân biệt theo luật định, mà chỉ những điều khoản dựa trên các cơ sở đã được liệt kê hoặc các cơ sở "tương tự".

Tuy nhiên, đa số các thẩm phán đưa ra quyết định đó đã kết luận trong vụ *Egan kiện Canada* rằng "chính phủ phải được linh hoạt trong việc mở rộng các phúc lợi xã hội và không cần phải tích cực trong việc công nhận các mối quan hệ xã hội mới,"[2] cụ thể là các cặp đôi cùng giới. Một số tác giả cũng chỉ ra rằng, "nhiệm vụ nắm bắt nhiều [loại mối quan hệ] có vẻ khá phức tạp."[3] Do đó, không có gì ngạc nhiên khi vào năm 2002, hôn nhân cùng giới được một nhà luật học nổi tiếng, hiện đang là thẩm phán tại tòa phúc thẩm Quebec, mô tả, khó có thể đoán trước là sẽ xuất hiện trong thời gian ngắn.[4]

Năm 1998, Tòa án tối cao Canada đã ra phán quyết trong vụ *Vriend kiện Alberta*[5] rằng luật của tỉnh bang Alberta, nơi từ chối sửa đổi bộ luật nhân quyền của chính mình để bao gồm xu hướng tính dục, buộc phải được sửa đổi. Điều quan trọng là, tòa án đã tuyên bố trong quyết định đó rằng, "không nên sử dụng quan niệm về tôn trọng tư pháp đối với các lựa chọn lập pháp... để loại bỏ hoàn toàn một số loại hoạt động lập pháp nhất định khỏi sự giám sát của *Hiến chương*."[6] Vụ án đó là về việc sa thải một nhân viên của một trường cao đẳng tôn giáo tư nhân vì anh ta là người đồng tính. Nhân viên đó không thể phản đối quyết định của trường đại học theo luật nhân quyền của tỉnh bang Alberta vì chính phủ Alberta đã loại trừ trường trường hợp này khỏi công cụ pháp lý bảo vệ quyền con người một cách rõ ràng.

Kể từ năm 1999, các cặp đôi đồng tính phải chịu các nghĩa vụ thuế như các cặp dị tính. Một số cặp đôi cùng giới cho rằng việc họ vẫn chịu những nghĩa vụ và trách nhiệm giống như các cặp đôi khác giới nên được coi là một lập luận trong vấn đề phân biệt đối xử mà họ phải chịu. Ví dụ, các cặp đôi dị tính có thể kết hôn và sau đó được hưởng nhiều loại lợi ích khác nhau mà các cặp đôi đồng tính không được hưởng. Hôn nhân đồng tính sẽ góp phần bảo vệ các quyền dân sự và kinh tế của các cặp đôi cùng

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không có quyết định cấp tỉnh bang nào có thể tính ràng buộc đối với thẩm quyền của tỉnh bang khác, nhưng tất cả các tòa án cấp tỉnh bang đều thuộc thẩm quyền của Tòa án tối cao Canada".

1 *Andrews kiện Hiệp hội Luật British Columbia*, [1989] 1 S.C.R. 143.

2 *Sđd.,*572.

3 Bureau và Désilets, chú thích 7, 54-55 [được dịch bằng tiếng Anh bởi Sébastien Lafrance].

4 Benoît Moore, "L'union homosexuelle et le Code civil du Québec: De l'ignorance à la reconnaissance?" ("Cộng đồng đồng tính và Bộ luật Dân sự của Quebec: Từ thiếu hiểu biết đến sự thừa nhận?") Trong Jean-Louis Baudouin và Patrice Deslauriers (eds.), *Droit à l'égalité et discrimination: Aspects nouveaux* (*Quyền bình đẳng và phân biệt đối xử: Những khía cạnh mới*), Cowansville (QC), Yvon Blais, 2002 , 275.

5 [1988] 1 S.C.R. 493.

6 *Sđd.*, khổ 54.

giới. Việc công cụ hóa hôn nhân này sau đó sẽ đưa nó đến gần hơn với các nguyên tắc ban đầu của hôn nhân, tức là, hôn nhân được tạo ra để bảo vệ những thành viên dễ bị tổn thương nhất trong xã hội.

Cùng năm đó, năm 1999, Tòa án tối cao Canada, hiện với một số ít thẩm phán mới, đã áp dụng một cách tiếp cận hoàn toàn khác trong vụ *M. kiện H*. so với vụ sau, mặc dù vụ "*Egan*, giống như [*M. v. H.*], cũng liên quan đến định nghĩa khác giới của "vợ/chồng" trong luật của tỉnh bang, trong bối cảnh người kháng cáo đang muốn yêu cầu hỗ trợ vợ/chồng từ đối tác của mình sau khi mối quan hệ đồng tính nữ của họ tan vỡ. Tuy nhiên, trọng tâm tương tự của hai trường hợp không đủ để ràng buộc Tòa án với phán quyết trong vụ *Egan*".[1] Trong vụ *M. kiện H.,* Tòa án Tối cao đã mở rộng việc bảo vệ những người đồng tính chống lại sự phân biệt đối xử đối với các mối quan hệ vợ chồng thay vì giới hạn nó đối với các cá nhân. Đối với tòa án tối cao, việc từ chối các quyền và nghĩa vụ gia đình của vợ chồng đồng tính là đi ngược lại *Hiến chương*.

Vào năm 2001, cuộc chiến đòi mở rộng phạm vi hôn nhân cho các cặp đôi cùng giới vẫn chưa kết thúc, bao gồm cả những trận chiến diễn ra trước tòa án. Pitfield J. thuộc Tòa án tối cao British Columbia trong vụ án hôn nhân cùng giới, *Egale Canada Inc. kiện Canada*, đã viết, dựa trên cách giải thích nguyên bản hay lịch sử của hiến pháp Canada[2],[3] rằng ông "tin rằng các mối quan hệ cùng giới không thuộc phạm trù định nghĩa của hôn nhân"[4] trong hiến pháp Canada.[5] Theo ông, định nghĩa thông luật về hôn nhân là "mối quan hệ pháp lý giữa hai người khác giới".[6] Mặc dù tòa án có quyền thay đổi thông luật, nhưng "sự thay đổi như vậy sẽ ảnh hưởng đến những thể chế xã hội và luật pháp vốn đã ăn sâu".[7] Ông nói thêm rằng vì "Quốc hội không thể sửa đổi ý nghĩa của hôn nhân trong phạm vi [ý nghĩa được quy định trong hiến pháp Canada] nên hôn nhân vẫn sẽ tồn tại như một mối quan hệ một vợ một chồng, khác giới... coi đây là bản chất của hôn nhân cho các mục tiêu của Hiến pháp Canada, sự khác biệt giữa những người có thể kết hôn hợp pháp và những người không thể..."[8]

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1 *M. kiện H.*, [1999] 2 S.C.R. 3, khổ 75.

2 Guénette vàTaillon, chú thích 5, 46-47.

3 Jason Pierceson, "Same-sex Marriage in Canada and the United States: The Role of Political and Legal Culture" ("Hôn nhân đồng giới ở Canada và Hoa Kỳ: Vai trò của văn hóa chính trị và pháp lý") (2014) American Review of Canadian Studies (Tạp chí của Mỹ về Nghiên cứu Canada), 44 (3), 326: "Thông thường ở Canada, các thẩm phán sẽ là người diễn giải các điều khoản hiến pháp trong điều kiện xã hội thay đổi. Điều này rõ ràng là trái ngược với sức ép chủ nghĩa nguyên bản trong luật học bảo thủ của Mỹ".

4 *EGALE Canada Inc. kiện Canada (Bộ trưởng Tư pháp),* 2001 BCSC 1365, đoạn 122.

5 Xem phần 91 (26) của Đạo luật Hiến pháp, 1867, 30 & 31 Vict., C. 3.

6 *EGALE Canada Inc. kiện Canada (Bộ trưởng Tư pháp),* chú thích 26, đoạn 8.

7 *Sđd.*, đoạn 93.

8 *Sđd.*, đoạn 123.

Tuy nhiên, quyết định này của Pitfield J. là bước lùi gần nhất của các cặp đôi cùng giới phải chịu đựng tại tòa án Canada.

Như tôi có nhắc đến trước đây trong *The Justice in Judicial Activism: Jurisprudence of Rights and Freedoms in India and Canada* (*Công lý trong Hoạt động Tư pháp: Luật pháp về Quyền và Tự do ở Ấn Độ và Canada)*[1], "cách giải thích được sử dụng cho Hiến chương được thể hiện trong quyết định của Tòa án trong *Reference re Same-Sex Marriage* (*Tham khảo về Hôn nhân cùng giới*): "Lập luận dựa trên "các khái niệm bị đóng băng" là trái với một trong những nguyên tắc cơ bản nhất của diễn giải hiến pháp Canada: rằng Hiến pháp của chúng ta là một *cái cây sống*, mà theo cách giải thích *tiến bộ,* có thể đáp ứng và giải quyết các thực tế của cuộc sống hiện đại."[2] Như Lord Sankey L.C. đã nhấn mạnh trong vụ *Edwards kiện Bộ Trưởng Tư pháp Canada*, hiến pháp của chúng ta là "một cái cây sống có khả năng phát triển và mở rộng trong giới hạn tự nhiên của nó".[3] Trong trường hợp ban đầu về Hiến chương ở vụ *R. kiện Big M Drug Mart Ltd*., Tòa án tuyên bố, " [Hiến chương] nên được diễn giải một cách phóng khoáng hơn là cứng nhắc về mặt pháp luật, đáp ứng mục tiêu bảo lãnh và đảm bảo cho các cá nhân được hưởng đầy đủ lợi ích từ sự bảo vệ của Hiến chương."[4]

Năm 2003, quyết định trong vụ *Halpern*[5] của Tòa phúc thẩm Ontario tuyên bố: "Việc từ chối quyền kết hôn của các cặp đôi cùng giới làm duy trì quan điểm rằng họ không có khả năng hình thành các mối quan hệ yêu thương và lâu dài, và các mối quan hệ cùng giới là không đáng được tôn trọng và công nhận như các mối quan hệ khác giới". Tòa án đó kết luận rằng việc loại trừ vợ hoặc chồng cùng giới ra khỏi hôn nhân

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1 Chương 3 (đồng tác giả với Giáo sư (Tiến sĩ) Shruti Bedi) trong Salman Khurshid, Lokendra Malik và Yogesh Pratap Singh (eds.), *The Supreme Court and the Constitution - An Indian Discourse* (*Tòa án Tối cao và Hiến pháp - Một diễn văn Ấn Độ*), Wolters Kluwer, 2020, 76-77 .

2 [2004] 3 S.C.R. 698, đoạn 22 (thêm chữ nghiêng); xem thêm Bradley W. Miller, "Beguiled By Metaphors: The Living Tree and Originalist Constitutional Interpreting in Canada" ("Lừa bởi phép ẩn dụ: cái cây sống và diễn giải Hiến pháp nguyên bản ở Canada) (2009) 22 Can. J. L. & Jurisprudence 331, 331: "Việc giải thích hiến pháp ở Canada bị chi phối bởi phép ẩn dụ về" cây sống"; Benjamin Oliphant và Leonid Sirota, Has the Supreme Court of Canada Rejected Originalism" ("Tòa án tối cao Canada bác bỏ chủ nghĩa nguyên bản") (2016) 42 Queen's L.J. 113; Leonardo Pierdominici, Constitutional Adjudication and the Dimensions of Judicial Activism: Comparative Legal and Institutional Heuristics' ("Đánh giá hiến pháp và các khía cạnh của hoạt động tư pháp: So sánh pháp lý và thể chế Heuristics") (2012) 3 Transnat'l Legal Theory 207, 235; Sébastien Lafrance, "A Brief Overview of Quebec Civil Law and Canadian Constitutional Interpretation in Canada" ("Tổng quan ngắn gọn về Luật Dân sự Quebec và Diễn giải Hiến pháp Canada tại Canada") (2020) Viện Amicus (Úc). Nguồn: https://www.amicusins Girl.org/scholarship-series

3 1929 CanLII 438 (UK JCPC), [1930] A.C. 124, 106-107.

4 [1985] 1 S.C.R. 295, đoạn 117 (thêm chữ nghiêng).

5 *Halpern kiện Canada (Bộ trưởng Tư pháp),* 2003 CanLII 26403 (ON CA).

dân sự là trái với quyền bình đẳng và cách đối xử này là không công bằng trong một xã hội dân chủ.[1] Hai tòa phúc thẩm quan trọng ở những nơi khác trong nước cũng đưa ra kết luận tương tự. Chính phủ liên bang quyết định không kháng cáo bất kỳ quyết định nào trong số này lên Tòa án tối cao Canada, xác nhận trên thực tế tính hợp pháp của hôn nhân đối với tất cả mọi người.[2] Chính phủ liên bang đã quyết định đi trước một bước bằng cách đưa ra dự luật hợp pháp hóa hôn nhân cùng giới trên khắp Canada. Để đảm bảo tính hợp hiến của dự luật này, chính phủ liên bang cần đệ trình nó lên Tòa án tối cao Canada để nghiên cứu.[3] Tòa án tối cao của Canada đã xác nhận tính hợp hiến của dự luật này trong *Tham chiếu về Hôn nhân cùng giới*.[4] *Đạo luật Hôn nhân Dân sự*[5] cuối cùng đã được chính thức được phê duyệt vào ngày 20 tháng 7 năm 2005.

4. CHỦ NGHĨA ĐA VĂN HÓA VÀ HÔN NHÂN CÙNG GIỚI

Canada là "một quốc gia đa sắc tộc và đa văn hóa… làm nổi bật và quảng bá những dấu mốc hiện đại của mình trong việc tôn trọng sự đa dạng văn hóa và nhân quyền cũng như thúc đẩy lòng khoan dung của các tôn giáo và dân tộc thiểu số - và trên nhiều mặt, là một tấm gương cho các xã hội khác".[6] Mục 27 của Hiến chương quy định rằng, "Hiến chương sẽ được diễn giải theo cách phù hợp với việc bảo tồn di sản đa văn hóa của người Canada." Ngoài ra, *Đạo luật Đa văn hóa Canada* cũng công nhận di sản đa văn hóa của Canada và buộc chính quyền liên bang (quốc gia) phải xem xét và ủng hộ chủ nghĩa đa văn hóa trong các quyết định của mình; phần mở đầu của nó cũng "công nhận sự đa dạng của người Canada… như một đặc điểm cơ bản của xã hội Canada".[7] Tòa án tối cao Canada cũng xác nhận việc bảo vệ người thiểu số là một trong bốn nguyên tắc nền tảng của chủ nghĩa liên bang Canada.[8]

Những nguyên tắc đáng khen ngợi này, trong đó "khái niệm đa văn hóa", đối với một số người, "chưa được xác định rõ ràng"[9], đi kèm với "những giới hạn nội tại, bằng chứng là Canada từ chối đáp ứng các yêu cầu của nhiều nhóm tôn giáo phản đối việc hợp pháp hóa hôn nhân cùng giới"[10], nhưng "quyền tự do tôn giáo vẫn được bảo vệ

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1 Bureau và Désilets, chú thích 7, 41.

2 Guénette và Taillon, chú thích 6, 48.

3 Tại Canada, mục 53 của Đạo luật Tòa án tối cao, R.S.C. c. S-26, cho phép chính phủ liên bang chuyển các câu hỏi về luật hoặc thực tế lên Tòa án tối cao Canada. Họ đề xuất ý kiến, mà thực tế chính là những quyết định của tòa án.

4 [2004] 3 S.C.R. 698.

5 S.C. 2005, c. 33.

6 *Syndicat Northcrest kiện Amselem*, [2004] 2 S.C.R. 551, đoạn 87.

7 R.S.C. Năm 1985, c. 24 (Phần bổ sung thứ 4).

8 *Reference re Secession of Quebec (Tham khảo về Sự ly khai của Quebec)*, [1998] 2 S.C.R. 217, đoạn 79.

9 Reidel, chú thích 13, 278.

10 *Sđd.*, 262.

bằng quy định rằng không có quan chức có đức tin nào bị bắt buộc phải thực hiện hôn nhân cùng giới nếu làm như vậy sẽ là một sự xúc phạm đến niềm tin của họ."[1]

KẾT LUẬN

Những thách thức hiện nay được đặt ra bởi các cộng đồng không một vợ một chồng, các cộng đồng phi hôn nhân, hiện tượng chuyển giới, v.v..., tất cả đều có điểm chung là sự đa dạng và phân mảnh của danh tính.[2] Điều này sẽ dẫn tới thêm nhiều vấn đề pháp lý cần được xem xét. Điều cần lưu ý là "cho đến năm 1982, các tòa án Canada không có thẩm quyền xét xử các vụ việc liên quan đến vi phạm nhân quyền hoặc dân quyền [nhưng] *Hiến chương* đã mở rộng vai trò của cơ quan tư pháp Canada và nếu không có luật này, những người đồng tính nam và đồng tính nữ Canada sẽ không có con đường hợp pháp để yêu cầu được đối xử bình đẳng theo pháp luật.[3] Có lẽ những quốc gia khác sẵn sàng hợp pháp hóa hôn nhân cùng giới có thể quyết định, vì nhiều lý do khác nhau, đi theo những con đường khác với con đường mà Canada đã thực hiện, nhưng tác giả cho rằng con đường mà quốc gia này đã chọn vẫn hữu ích không chỉ cho các nhà nghiên cứu mà còn, có thể, đối với cả những người muốn thấy những thay đổi quan trọng như vậy đến với đất nước của họ.

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1 *Sđd.*, 263.

2 Bureau và Désilets, chú thích 7, 59.

3 Glass và Kubasek, chú thích 16, 162.

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