



FACULTY OF LAW
Lund University

Shuchen Ye

**The Ideal and the Reality of Human Rights-as
They Relate to Same-sex Marriage**

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Karol Nowak

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The Ideal and the Reality of Human Rights- as They Relate to Same-sex Marriage

Chapter One: Introduction:

1.1 Brief Introduction of Same-sex Marriage Situation

Same-sex marriage (also known as gay marriage) is marriage between two persons of the same biological sex or gender identity. Same sex cohabitation is banned or unrecognized in most of the world.¹ Forty years ago, same-sex couples were not legally accepted in any country. In the last 30 years, however, around 20% of countries have granted some rights to same sex couples, making them visible to society.² Countries that recognize same-sex marriages nationwide are Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, Spain, South Africa, and Sweden.

In, 2001, Netherlands was the first country that redefined marriage as a union of two individuals regardless of their sex. Instead of enacting a specific statute for same sex marriage, Netherlands amended the rules of marriage in their Civil Code stating that marriage could be contracted by two persons of different sex or of the same sex.³ Same-sex couples in Netherlands now enjoy almost the same rights as opposite-sex couples in marriage.⁴

Belgium became the second country that opened marriage to same-sex couples in June 2002. In 2005 Spain became the third country that amended its legislation and opened marriage to same-sex couples. Canada recognized same-sex marriage just after the Spain on July 20, 2005. South Africa, as the fifth country that allowed same-sex marriage, is an interesting case because such legal reform was triggered by courts' verdict. The Marriage Act of 1961 defined marriage as a union between a man and a woman, but in 2005 the Constitutional Court gave the legislature a year to amend the Marriage Act to include same-sex marriage.⁵ The reasoning of the Court was based on the values of human dignity, equality and freedom.⁶

Norway amended its Marriage Act in 2008 to state that "two persons of opposite sex or of the same sex may contract marriage."⁷ In 2009, Sweden amended its regulation and same-sex marriage was allowed since then. A distinctive feature of the Swedish experience is that the Swedish

¹ Macarena Sáez, *Same Sex Marriage*.

² *Ibid*.

³ Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*.

⁴ *Supra* note 1.

⁵ *Fourie and Bonthuys v. Minister of Home Affairs*, 2006 (3) BCLR 355 (CC) (S. Afr.), available at <<http://www.saflii.org/za/cases/ZACC/2005/19.pdf>> (last visited October 22, 2010).

⁶ *Ibid*, at 47.

⁷ Marriage Act, § 1 (Nor.) translated in <<http://www.regjeringen.no/en/doc/Laws/Acts/the-marriage-act.html?id=448401>> (last visited October 22, 2010).

church was in favor of the expansion of marriage.⁸ Portugal, Iceland, and Argentina were the last three countries allowing same sex marriage by passing laws in 2010.

In addition to the countries that acknowledged same-sex marriage, there are countries with federal systems where the regulation of families is a state or provincial matter, such as USA, Mexico and Brazil. Take the U.S. as an example: currently there are six states that have issued marriage licenses to same-sex couples: Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, the District of Columbia and Washington.⁹ May 2012, with the passing of North Carolina's gay marriage ban, North Carolina becomes the 29th state to use its state constitution to explicitly ban gay unions.¹⁰

On the one hand, we are witnessing the trend of legalization of same-sex marriage; on the other hand, there are still countries that criminalize sexual relations among two consenting adults of same sex. The world was reminded again of this disparity after a gay couple in Malawi was sentenced to 14 years of prison for sodomy and indecency. Malawi's President Binguwa Mutharika issued a pardon to the couple after a visit of UN President Ban Kimoon but made clear that he condemned the couple's behavior.¹¹ Between the two poles, many countries have moved or are moving from total rejection of same-sex relationships to acceptance of some sort, some may take the form of registered partnerships or civil unions; some may recognize the same-sex marriage from other countries or regions though same-sex marriage is not yet allowed by the countries or regions themselves. Countries that used to decriminalized sexual relations between individuals of the same sex have shortly thereafter seen a rise in the public debate about formal recognition of same-sex couples. At the center of the debate are the role, purpose and meaning of marriage. While some scholars claim that marriage is essentially heterosexual and the basis for societal structure, others consider the exclusion of same sex couples from marriage unfair discrimination.¹²

1.2 Research Question:

In this thesis, I will try to answer that:

1. Is same-sex marriage a human right as included in the right to marry?
2. Can those non-legal objections of same-sex marriage recognition, such as religions or culture, be justified?

⁸ For media coverage of the Swedish church support of religious same sex marriage, see *Same sex marriage suggested by board of Church of Sweden*, Stockholm News (Swed.), June 13, 2009, available at <<http://www.stockholmnews.com/more.aspx?NID=3407>> (last visited October 22, 2010).

⁹ *'Welcome to the other side of the rainbow': Washington becomes seventh state to legalize gay marriage*, Dailymail, February 13, 2012, <<http://www.dailymail.co.uk/news/article-2100739/Washington-seventh-state-legalize-gay-marriage.html>>

¹⁰ *North Carolina approves constitutional ban on gay union*, May 9, 2012, BBC NEWS, <<http://www.bbc.co.uk/news/world-us-canada-17997794>>

¹¹ Barry Bearak, *Malawi President Pardons Gay Couple*, The New York Times, May 29, 2010, at <<http://www.nytimes.com/2010/05/30/world/africa/30malawi.html>>

¹² *Supra* note 1.

3. What is the real conflict behind the implementation of same-sex marriage? If we find the problems, what could be the solutions?

1.3 Outline

The thesis is about the recognition of same-sex marriage, Chapter One is the brief introduction of the current situation of same-sex marriage legislation worldwide, and research questions, delimitation and methodology of this thesis. The rest of the thesis can be divided mainly into three parts. The first part is Chapter two, it argues that same-sex marriage is part of universal human right – right to marry. Under the Chapter two, there are three parts, the first part is about the advantage of human dignity and self-fulfillment which derived from right to marry should also be enjoyed by same-sex couples. The second part is about under the most important principle of non-discrimination rule, denying same-sex marriage is against current human rights law. The third part is discussing about states' positive obligation to recognize same-sex marriage based on the theory of “no harm” and principle of freedom and liberty.

In Chapter three, I will mention non-legal obstacles of some common implementation of same-sex marriage. Whether it is religious reason, or social or cultural reason, none of them can be used to justify the deprivation of same-sex couples' right to marry. As they are all part of cultural relativism, which I will discuss as the last part of Chapter three, and get the conclusion that using cultural relativism to deny universal human rights is wrong and can never be justified.

In the last Chapter, I will try to answer the main question of this thesis – the conflict between ideal and reality of human rights. By using same-sex marriage as the special example, the fact that same-sex marriage should be a human right but it is not in most countries makes me to think the real gap behind it. The first part of the fourth Chapter is the case study of European Court of Human Rights and U.S., especially the Proposition 8 in California. By analyzing the cases, I think the real conflict behind the human rights theory and implementation is the mainly two levels: the first level is interpretation of human rights which is caused by different cultural background, and courts play a significant job to solve the problem. The second level, however, is more complicated, as in order to fully realization a human right, it needs to be written down as a national legal right, while in such process, the democracy - the decision of majority may hinder the realization of human rights. Human rights are universal and political-free, but legal rights that derive from human rights are political-relevant, which is due to the different political system of different countries.

After finding out the real problem of implementation of human rights, the solution of the second level problem, I think, is a campaign combined with political and social element. Human rights as a theory should be taken for granted, while to fully realize it, we need to fight for it rather than doing nothing and just waiting.

1.4 Delimitation

In this thesis, I will only focus on the same-sex marriage itself, the child-adoption rights or other marriage related rights are not included, though I believe they are important to same-sex couples as well. As the fighting for the same-sex marriage is for the equality of same-sex couples, the main focus of the thesis will be on the equal right of opposite-sex couples and same-sex couples, whether what specific rights same-sex marriage should be included is not considered in the thesis.

1.5 Methodology

In order to elaborate that same-sex marriage is a human right, I will need the philosophical theory of human dignity and individualism, which are the foundation of human rights. I will also use some international human rights law to establish the legal aspect of same-sex marriage recognition, such as non-discrimination and equal rights. Political theories are also used in the thesis, such as “harm theory” to explain states’ obligation. Besides all kinds of theories, I also analyze many cases of Europe and U.S., to reveal the conflict behind the recognition of same-sex marriage, and which leads to my solution of the conflict, and some suggestion for social campaigns.

Chapter two: Same-sex Marriage as a Human Right

2.1 Right to Marry and Benefit of Marriage

Marriage exists in every culture, but when come to the definition of marriage, it varies. The essential factors of a marriage, however, always include two individuals exclusively form a family and the acknowledgement of governments. The history of marriage is very long and the idea of marriage changes a lot, but most people still believe in the glamour of marriage.

In the legal aspect, right to marry - only between a man and a woman though - is a fundamental right agreed universally. In the Universal Declaration of Human Rights, right to marry is regarded as a human right under Article 16(1), it clearly says 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.” Article 23(2) of International Covenant on Civil and Political Rights says “the right of men and women of marriageable age to marry and to found a family shall be recognized”. Also in European Convention on Human Rights, right to marry is also acknowledged as a human right, which mentioned under Article 12, that “men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” Thus, it is obviously a universal right and freedom to get married and form families.

Though what specific rights are included in a marriage is different from countries to countries, those are basic common rights married couples enjoy, they can be divided as economic benefits and expressive benefits. Economic benefits include some tax discount; inheritance and other death benefits; ownership benefits especially when two parties are separated or divorced, etc. Those benefits can be decided by contract in advance, and parties may draft the content by their own will to some extent, so one may say marriage is actually “the institution allows the ready creation of default rules for otherwise unprovided-for cases”. The expressive benefits are from official endorsement or recognition of the marital relationship. Marriage is also a public expression of commitment and announcement made by the partners to each other; they hope to get the recognition and support from the community for their relationship. While a dedicated partner of a relationship can provide for his or her other half’s future well-being through innovative use of contracts, wills and trusts, one cannot replace the benefits marriage provides in respect to social security benefits, the right to bring a wrongful death action, and being freed from summons to testify against one’s partner, to name a few examples. Such examples show the fact that individuals cannot very well imitate marriage without marriage itself.

Thus, states are under an obligation to make the marital form available in this sense, since the official recognition makes the marital statues more reliable especially in nowadays and couples can entitle their spouse rights based on it. The legal rights and benefits that accompany marriage as well as the expressions of emotional and spiritual support and public commitment of couples are one of many important and significant aspects of the marital relationship.

Other important thing individual can benefit from marriage is about child-rearing, though in nowadays, it is no longer a necessary part of marriage. Those benefits are, for example, the couple's offspring is legally accepted as their own in the country where they get married and the couple has rights and obligations towards those children. When one meets a married couple it is safe to assume that some inheritance rights are also recognized.

From social point of view, marriage is also necessary for social stability. The family is the fundamental and natural unit of society and requires the full protection from states. The family unit, however, can also be very vulnerable to social, economic, and political pressures. That is why human rights law upholds the positive right of all peoples to marry and found a family, especially the family which is based on equal and consenting marriage and tries to guard against abuses which undermine these principles. In some cases, human rights courts bolster the family unit in a higher level by imposing state obligations to keep families together and to reunify them when they have to be separated.¹³

When denying same-sex marriage, people are not just denying their right to marry but the benefit same-sex couples should get as well. While one may also argue that same-sex couples can have all those benefit of marriage, but they just cannot get the right to marry itself. To object such argument, we should also notice the benefit that come from right to marry per se. It is also the answer of the question that why people still need the marriage now if they can just living together instead. I think right to marry is not just about the legal protection of parties in a marriage but also the profound internal benefit of marriage: it means a commitment and a promise itself - it is a part of human dignity and self-fulfillment.

2.2 Same-sex Marriage Should be Included in Right to Marry

2.2.1 Human Dignity of Same-sex Couples

Human dignity is a self-valuation that each agent positively regards one's own actions on the basis of free will. Immanuel Kant held that "free will" is essential; human dignity is related to human agency, the ability of humans to choose their own actions.¹⁴ While sharing Kant's view that rights arise from dignity, Alan Gewirth focused far more than Kant on the positive obligations that dignity imposed on humans, the moral requirement not only to avoid harming but to actively assist one another in achieving and maintaining a state of "well being".¹⁵ In Gewirth's own words, "any agent, simply by virtue of being an agent, must admit, on pain of self-contradiction,

¹³ For example: *Boultif v Switzerland*, 54273/00, 02-08-2001, ruled by European Court of Human Rights.

¹⁴ O'Hara, Phillip Anthony, "Human dignity". *Encyclopedia of political economy*, (Routledge, 1999), p. 471.

¹⁵ White, Mark D, "Dignity", in Jan Peil, *Handbook of Economics and Ethics*, (Edward Elgar Publishing, 1 May 2009), p. 85.

that he ought to act in certain determinate ways.”¹⁶ Gewirth believes that every agent acts under certain principles, especially the characters of voluntariness and purposiveness.¹⁷ All human beings are equal, if you deny that someone can do actions based on one’s own free will as long as one does not hurt others, then you are denying an individual’s human dignity, because it is the foundation of being a human being. This is true even when the agent feels the action completely unworthy of one’s performance, but as long as one takes it as a free will agent, the action cannot be denied. The fact that one does, even when one is coerced to do so for fear of losing one’s life or perhaps the lives of significant others, suggests a positive evaluation, at least of oneself, as agent.¹⁸ As a rational human being, one is always capable of reflecting on one’s own purposes which should be in accordance with morality of universal human rights. This capacity can never be lost so long as the agent remains alive, the sense of dignity it engenders stays with one even in the context of having violated someone else’s basic human rights – one is still a human with dignity, so one has to be responsible for what he or she voluntarily does.¹⁹ Thus, when we talk about the human dignity in same-sex marriage, it means everyone – including same-sex couples - has the right to choose the person one loves to form a family and take the responsibility to take care the family as well with one’s free will. It occurs by choice because the responsibilities attending the marriage relationship are not imposed on the parties, but rather agreed to by the parties. To deny same-sex couples have the right to marry is against their human dignity.

2.2.2 Self-fulfillment of Same-sex Couples

Self-fulfillment is a special self-satisfaction that only two persons can get in a marriage. To some people, the absence of marriage makes they impossible to do very well and in some instances cannot do at all to get a close relationship like marriage. The usual legal bundle of rights and obligations we assign to marriage is primary interests of the parties to the marriage, while in more fundamental sense, the status of marriage for the individual participants is itself a new creation – a family. The most salient feature of a family is that the parties actually come to see themselves as a collective unit operation for their mutual benefit, and also as part of a still larger set of similarly situated persons.²⁰

Marriage is a deep internal structure of private relationship; couples share privacy of information only between them. The deep internal structure connects to individual human dignity via the opportunity it provides its participants to achieve levels of human self-fulfillment that are wholly unique and otherwise unobtainable.²¹ It is primarily the two spouses

¹⁶ Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1981), pp. 25-26.

¹⁷ Ari Kohen, *The Possibility of Secular Human Rights: Alan Gewirth and the Principle of Generic Consistency*.

¹⁸ *Supra* note 16.

¹⁹ *Ibid.*

²⁰ Vincent J. Samar, *Privacy and Same-sex Marriage: The Case for Treating Same-sex Marriage as Human Right*.

²¹ *Ibid.*

cooperating in some form of mutually satisfying activity, or even the betterment of some wider community.²²

The married person's self-affirmation of his or her new identity can be divided as two different recognitions. The first is society's external recognition that the couple has a unique identity that is different from their individual self-identities. It might be the confirmation of the whole society to your relationship; or it might be the life-long commitment, but the more important factor is that, since the marriage starts, both parties of a marriage accept a certain amount of responsibility for the other's well-being. They cannot simply just consider themselves alone. Family becomes something which is more important than both individuals together. The second is the internal positive affirmation the parties to the marriage give to their marital roles because of the opportunities it affords for aspiration-fulfillment. The latter is more important because it significantly affects the decision to enter the marriage by asking what this choice will mean, as opposed to merely living together. It is exactly another way to support one's human dignity, the reason of choosing getting into a marriage and the responsibility of sacrificing oneself into a marriage both shows the ration behind the human dignity – one of which is self-fulfillment, a natural desire a human being pursuing to get. Similarly, it also means both parties accept the social meaning of attending a marriage; they do it to show their will to get involved with the whole society and it means more to same-sex couples. When same-sex marriage is widely accepted and practiced, their act of marrying provides them a means for securing their own self-worth which get courage and approved by the society.

The human dignity and self-fulfillment that an individual can get from a marriage both derive from the love - the essential part of a marriage. "Older than our political parties, older than our school system, marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."²³ We can imagine that if a country abolishes the legislation of marriage right, it will not stop people take the "marriage-like" action - two individuals choose to start a family and promise the relationship is exclusive. Thus the argument that the reason there should be a right to marry is because states allow it is wrong, rather, it exists as a human nature which states agree and courage it. Interestingly, Justice Harlan in his dissenting opinion also argued that "the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected."²⁴ Though it is only in an idealist world that all marriages are based on the love, states still show the support of a marriage without asking why.

²² *Ibid.*

²³ *Griswold v. Connecticut*, 381 U.S. 479 (1965), at 486.

²⁴ *Skinner v. Oklahoma*, 316 U.S. 535 (1942), at 553 (Harlan, J. dissenting).

Both parties benefit from the marriage, emotionally, physically and financially and the function of marriage can be analyzed in legal or social or other aspects, but to most ordinary people, marriage is not just a collection of rights or a celebration of events, but rather “a form of daily living encompassing the mundane and the extraordinary of the people whose bond it is”.²⁵ Its contribution to human dignity and self-fulfillment sets it out as a unique social activity. States do not create “marriage” per se, but rather people generally recognize the form of marriage as a way to start a family and a way of their lifestyle, and states confirm the social idea of privacy as encouragement. That is why we say the right to marry is inborn human right, and it should not exclude same-sex couples.

Marriage is a part of human life, most people believe it will be a missing part of life if someone is not married in one’s life, then why should same-sex couples suffer? The morality of human rights demands governments to enact and enforce laws and policies aimed at preventing human beings from violating human beings or otherwise causing unwarranted human suffering²⁶ - to recognize same-sex marriage.

2.3 Exclude Same-sex Marriage against Current Human Rights Law

Recognition of same-sex marriage is not only a demand comes from philosophical or moral aspect of human rights, but also it is implied in the current human rights law – non-discrimination principle.

2.3.1 Non-discrimination on Sexual Orientation and Equality

Human rights are those rights that one has simply as a human being. As such, the nature of equality is the essence of those rights. As emphasized by the Human Rights Committee, “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”²⁷ Each person is a fully human being, thus one is entitled same human rights with the rest, any unjustified deprivation of human rights is treating such person as a non-person, or a secondary-class person, which is against the philosophical foundation of human rights. Just as stated in Article 1 of the Universal Declaration of Human Rights, “All human beings are born free and equal in dignity and rights.”

Of course, we should be clear that not all discriminations are prohibited but only those invidious discriminations, discriminations that tend to ill will or causes unjustifiable harm. Social life is full of legitimate discriminations, all societies restrict the rights of children, for example, or a distinction based on mental capacity, or a variety of restrictions on criminals based on previous criminal behavior they did.

²⁵ *Supra* note 20.

²⁶ Michael J. Perry, *Toward a theory of human rights, religion law, courts*, (Cambridge University Press, November 13, 2006), p. 65.

²⁷ General Comment No. 18, in *United Nations Compilation of General Comments*, p. 134, para. 1

Then, one has to ask oneself, whether discrimination on sexual orientation could be justified. Non-discrimination on sexual orientation is used to protect sexual minorities. Sexual minorities are those persons who are despised and targeted by "mainstream" society because of their sexuality. They are victims of systematic denials of rights because of their sexuality. Like victims of racism, sexism, and religious persecution, they are human beings who have been identified by dominant social groups as somehow less than fully human, and thus not entitled to the same rights as "normal" people, "the rest of us."²⁸

The fight for equal rights and non-discrimination on sexual orientation has gained a lot of fruit. The right to protection of non-discrimination is an explicit guarantee of equality, thus all human rights for every person, despite the myriad other differences between human beings, are guaranteed as well. As Article 2 of the Universal Declaration of Human Rights proclaims, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Though not mentioned explicitly in the Article 2, the new minority group suffering from discrimination based on their sexual orientation should be regarded as in "other status". In more recent international legal documents, the non-discrimination on sexual orientation is explicitly enumerated, for instance, article 26 of the International Covenant on Civil and Political Rights, article 2 of the African Charter on Human and Peoples' Rights. In the European context, non-discrimination on sexual orientation is extended by the case law under the Article 14 of the European Convention on Human Rights. It is in the case of *Salgueiro da Silva Mouta v. Portugal*²⁹ that the European Court of Human Rights first time emphasized that non-discrimination regard to article 14 should undoubtedly extend to a person's "sexual orientation".

Some may feel satisfied that it seems non-discrimination on sexual orientation has been recognized progressively in international or regional legal documents. We have non-discrimination on jobs hunting, waging payment, etc, but in fact it is far from fully equality - there is not right to marry for same-sex couples, and such denying is unjustified. As William Eskridge argues in *The Case for Same Sex Marriage*, once the focus of marriage is on interpersonal commitment, denying same-sex couples the right to marriage cannot be seen as anything other than denying gays and lesbians the same rights that heterosexuals enjoy.³⁰ The argument that same-sex couples do not have equal right to marry merely due to their sexual orientation is a self-conscious repudiation of human dignity by drawing an illicit line between opposite-sex marriage and same-sex marriage and

²⁸ Jack Donnelly, *Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime*.

²⁹ *Salgueiro da Silva Mouta v. Portuga*, 33290/96, 21-12-1999.

³⁰ Ronald L. Steiner, *A Commentary on the Old Saw that Same-Sex Marriage Threatens Civilization*, in Gordon A. Babst, Emily R. Gill, and Jason Pierceson (eds.), Chapter 1 of *Moral Argument, Religion, and Same-Sex Marriage: Advancing the Public Good*, (Lexington Books September 16, 2009).

making distinctions that are arbitrary or invidious.³¹ the sense of inferiority what people of colors might have when anti-miscegenation marital relationship was prevailing, is also triggered to same-sex couples when only opposite-sex couples are allowed to marry. If the society reads that validation as legitimating the relationship itself, the non-recognition of same-sex marriage itself indicates the second-class citizenship of individuals in same-sex relationships. The external justification is likely to bear negatively on the internal valuation of the participants themselves, denying the same-sex marriage is not just denying a human right, but also human being itself.

If we check the situation of discrimination on sexual orientation, it clearly indicates that homosexuality is still widely considered - by significant segments of society in all countries, and by most people in most countries - profoundly immoral.³² “The language of perversion and degeneracy is standard.”³³ Advocates of discrimination on sexual orientation often use the provision of “public morals”, which is recognized and widely used in almost every international human rights covenant as a legitimate reason to restrict or deprive certain person’s rights. The problem with such arguments is that most if not all of the groups explicitly recognized as covered by the right to nondiscrimination were at one time also perceived to be a threat to public morals.³⁴ There are so many examples we can illustrate here by pointing with some more or less randomly selected historical material, such as discrimination against black people; or as is well known - slavery - which was explicitly permitted when racial discrimination was prevailed especially in the U.S.. In fact, for purposes of taxation and legislative representation, slaves - which James Madison described in *The Federalist Papers* (Number 54) as a mixture of persons and property and thus “divested of two fifths of the man” - only counted as three-fifths of a person. And just one year after the founding of the republic, a 1790 statute confined naturalization to free white persons. This restriction remained formally on the statute books until 1952.³⁵

Women were almost universally discriminated because they were considered morally inferior to men until well into the 20th century - and in many places of the world, such attitudes still persist even when we are in the 21st century now. In all such cases, certain marks of difference came to be constructed as “permissions-to-hate,”³⁶ which is implied as an authorized permission to treat members of the group in question second-class human beings. We can take the example of the California Constitutional Convention of 1878-1879, a provision in it was proposed to prevent Chinese immigration in order to protect Californians “from moral and physical

³¹ Cass R. Sunstein, *The Right to Marry*.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ C. Vann Woodward, *The Strange Career of Jim Crow*, (New York: Oxford University Press, 2nd ed. 1966), p. 81.

infection from abroad.”³⁷ Erik Erikson's notion of "psuedospeciation" nicely captures the dehumanizing logic, which we saw in Mugabe's (unfavorable) comparison between gays and dogs also “one homosexual can pollute a Government office.”³⁸ The language of incorrigible degradation and fear of “pollution” strongly echoes the provision in the California Constitutional Convention. The details are different, but the “logic” behind such discriminations is the same. The non-discrimination campaign thus includes a central and inescapable historical element. Those whose equal rights are explicitly guaranteed protection against discrimination are members of groups that previously - but no longer - have been systematically and even officially treated as less than full rights-holding members of the political community.

If we can learn from the history of unjustified discrimination, we can conclude that the discrimination on sexual orientation will never be justified as well and the fight for equal rights is still going on. The popular beliefs about the inferiority or corruption of sexual minorities simply cannot provide the grounds of discrimination and not even mention the human rights they have been denied for long. No matter what you think of people who have different sexual orientation and how you feel they are immoral, it is only your own personal morality and you should not support the law that deprive them to have those rights which are guaranteed by the universal human rights. Members of sexual minorities are still human beings, no matter how deeply they are loathed by the rest of society. Therefore, they are entitled to equal protection of the law and the equal enjoyment of all internationally recognized human rights.

2.3.2 Civil Union and Registered Relationship as Discriminating Treatments

In some countries, while same-sex couples do not have the right to marry, they have the right to have a registered partnership or civil union. Such thing as registered partnership or civil union system, even if they are guaranteed to have all same legal rights as marriage, is still discrimination on sexual orientation. In the case involving the right to marry, a denial of either the symbolic or the material benefits of marriage would both be impermissible. The very basic valuation of equality is that, no matter what specific rights a state provides in the marriage right, it should be available also to same-sex marriage. A state could legitimately deny the symbolic benefit of marriage by using the different name; a state could also legitimately vary the material benefits of marriage by dividing different kinds of marriage. Neither of state acts above accords with the right of equality and non-discrimination. Perhaps it just shows that the state, or as in a democratic society - the majority of people, does not want to give the same expressive support to same-sex couples as to opposite-sex couples. Thus the ultimate purpose of equal protection - which is not understood by all people - to protect the orderly emergence and assimilation of new groups

³⁷ Benjamin B. Ringer, *"We the People" and Others: Duality and America's Treatment of its Racial Minorities*, (New York: Tavistock Publications, 1983), p. 590.

³⁸ *Supra* note 28.

into this country's pluralist democracy³⁹ is not fulfilled.

Human rights do not need to be earned, and they cannot be lost because one has different sexual orientation and leads a particular lifestyle even it is not accepted or understood by the society. It is exactly the wrongness we need to fix in the issue of same-sex marriage. How one leads one's life or whether one loves the person with the same or opposite sex is a private matter - as long as no one else's human rights are violated, the public morality - if there is such one in the marriage issue - should stay away. If the effects for individual self-fulfillment are the same for both opposite-sex and same-sex couples, then an equality approach should be applied - a right of access to the both symbolic and material benefits of marriage should be guaranteed by states.

Human rights rest on the idea that all human beings have certain basic rights simply because they are human, we should never forget this.

2.4 State's Obligation to Realize Same-sex Marriage

After elaborating there is right to marry of same-sex couples under current human rights law, we should then see the role of states in same-sex marriage legislation. Can states ignore the same-sex marriage recognition by non-interference principle in private life area? Do states have positive obligation to recognize same-sex marriage?

2.4.1 "Harm Theory"- States Cannot Prohibit Same-sex Marriage

John Stuart Mill articulated the original "harm theory" in *On Liberty*, where he argued that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."⁴⁰ The harm principle holds that the actions of individuals should only be limited to prevent harm to other individuals. The belief "that no one should be forcibly prevented from acting in any way he chooses provided his acts are not invasive of the free acts of others" has become one of the basic principles of libertarian politics.⁴¹

The purpose of the "harm theory" is to let every single human being achieve his or her best personality and enjoy the most freedom and liberty - as clearly elaborated in the previous part - the most important part of human rights. Such principle is also recognized by International law. The relevant principles of political, social and economic rights can be found in the documents such as the Universal Declaration of Human Rights⁴² and the International Covenant on Civil and Political Rights.⁴³ They confirm that the

³⁹ William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*.

⁴⁰ "Freedom of Speech". Stanford Encyclopedia of Philosophy. 17 April 2008. Retrieved 29 May 2011. <<http://plato.stanford.edu/entries/freedom-speech/>>

⁴¹ Ronald Hamowy, *The encyclopaedia of libertarianism*, Sage, 2008, p. xxi

⁴² Universal Declaration of Human Rights, G.A. Res. 217(A) (III), U.N. Doc. A/810 (December 10, 1948), reprinted in 43 AM. J. INT'L L. 127 (Supp. 1949)

⁴³ International Covenant on Civil and Political Rights, December 16, 1966, S. Ex. D, 95-2, 999 U.N.T.S. 171 (entered into force for the United States, September 8, 1992)

state, through its various organs, must therefore ensure that all people have the greatest possible chance for an equal opportunity to fulfill important aspects of their individual self-worth, subject only to the constraint that they not harm others.

If we apply the “harm principle” to the human rights field, from a human rights point of view, practices that add to human self-fulfillment are morally justified when they enhance the mutual dignity of all involved in the practice without denying dignity to those whose relation to the practice is not a matter of choice.⁴⁴ Thus, no one’s free acts or human rights should be prevented unless such acts or human rights violate other’s human rights. It is exactly the spirit of human rights, which is based on the individualism. Individualism is the belief that what people need is the right and the chance to be whatever kind of person they choose to be. Individualists pursue the exercise of one’s goals and desires by cherishing independence and self-reliance; they oppose extra external interference upon their own interests by society or other institutions such as the governments. They have the faith that we - all of us - need space to grow, to develop, to expand our horizons, to maximize our possibilities, to develop our own personalities, to strive for our personal best - as long as we don’t interfere with or harm other people, of course.

Developed from the foundation of individualism, human rights is a rights theory that allows each person to define their own good because they see it as self-fulfilling provided they do not harm others in the process. The reason right to marry of same-sex couples is a human right is because it provides a significant route to human self-fulfillment which can be achieved by allowing the parties to get married, the achievement that significantly satisfies their human dignity while no single harm occurs. Thus, same-sex marriage should be treated as a basic human right guaranteed equally to everybody.

Although modern legal systems have functioned on the basis of a separation between a public and a private realm, the way that the private realm has been shaped has been an entirely public affair.⁴⁵ States not only have traditionally determined a set of legally valuable relationships, but they have also defined duties and rights for each party within a relationship, which is the paradigm of the legally valued relationship - marriage. However, as I argued above, it is not states that create marriage, but rather states encourage such form of relationship by providing several legal benefits. In other words, it is a human right derived from the human nature, thus it should not only be entitled to opposite-sex couples, but also to same-sex couples. Combined with the “harm theory”, we can get the further conclusion that no one’s right to marry should be prevented by states unless it violates someone else’s human right. Are there any other person’s human rights in danger? The answer is obviously no, so one cannot help wondering, how can such power be justified?

⁴⁴ *Supra* note 20.

⁴⁵ *Supra* note 1.

States are supposed to protect everyone's human right, but by denying right to marry of same-sex couples they actually violate their human rights. Such inferior arrangements will merely validate the dominant society's bias against individuals in same-sex relationships, and continue to trumpeting heterosexual supremacy. It will do nothing for the eventual acceptance of equal marriage rights of same-sex couples. When one group of people can marry while another cannot, a social message is sent about how society values the respective groups and their acts - the reason same-sex marriage is prohibited is because it is harmful to other persons! Because social meaning is often related to self-evaluation, the difference in meaning can have a demeaning effect. For this reason, it is a serious violation of human rights to assign social meanings that suggest a normative difference of evaluation arbitrarily.⁴⁶

2.4.2 State's Obligation to Protect the Freedom and Liberty of Same-sex Couples

Freedom and liberty, as the foundation of human rights, are protected in human rights law in many aspects. The right to choose one's life partner, as one of them, is quintessentially the kind of decision which majority culture recognizes as personal and important. As a rational adult, these decisions are our own freedom and liberty to make but no one else's. It is in this context, the relevant question is not whether same-sex marriage is so rooted in our traditional culture that it should be regarded a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions that take the freedom away is actually backward to the society.

The freedom of dignity make the agent affirms that the goodness, which benefits one in the same-sex marriage, is from one's own understanding of what it is to be a fully human; and meanwhile, the goodness itself is constitutive of that understanding. Because according to Gewirth, which I mentioned before, human actions presuppose the generic feature of voluntariness and purposiveness, no human being can deny equal rights to freedom and well-being to any other human being without contradicting himself.⁴⁷ This would be particularly true when the freedom at stake does not interfere with any other person's right or, if it does, only by some assumption of facts or social conventions that would not justify the freedom being overridden, for example, when the freedom of same-sex couples to get married is denied by so-called public morality or cultural tradition. What's more, the freedom and well-being to perform the agent's own will can be seen to advance the interests of all other persons by providing others a precedent for seeking their own self-fulfillment *qua* human.⁴⁸ Consequently, every other agent stands in the same shoes and implicitly makes the same claim.⁴⁹ As there is nothing further in the way the claim is derived to separate one agent from another, the rights claim that results is universally moral, because it is derived from what is necessary to

⁴⁶ *Supra* note 31.

⁴⁷ *Supra* note 17.

⁴⁸ *Supra* note 20.

⁴⁹ Alan Gewirth, *The Basis and Content of Human Rights*.

all purposive human actions.⁵⁰ Moreover, the rights to freedom and well-being that arise from the derivation are equal rights, as they are generally the same in status and degree.⁵¹

In this sense, such freedom of dignity arises from the very nature of human beings' capability to act for purpose of self-fulfillment, which is supported by being recognized as human rights - everyone should have the freedom and liberty equally, and states have the obligation to protect it.

When we talk about the freedom and liberty of individuals in same-sex relationships and marriage, there are basically three levels. The first level is the freedom not to be interfered. In some countries, where consensual sexual behavior between two same-sex individuals is a crime, such freedom and liberty is not respected. It is also the foundational freedom and liberty we should be guaranteed as the autonomy of individuals, in particular its impact on the choices of individuals regarding sexual conduct and personal relationships.

When we extended a little bit of the first level of freedom of non-interference, we will get to the second level. The second level is the freedom and liberty of volunteer life. Individuals in same-sex relationships, like all individuals, have liberty interests in the privacy of their homes, in making decisions regarding their personal life.⁵² It is about considerations of privacy in the domestic life and the interests of individuals in choosing what type of relationships to engage in. Individuals in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. In this situation, states do not intervene, their attitude is more like in a negative way. We all know that, however, freedom is not just an absence of interference with rights, it also includes the genuine ability to exercise those rights, and such ability is what is missing in the second level, same-sex couples have the freedom to live together "secretly", while their equal legal rights are not recognized and protected by states. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Everyone should have the same freedom of marriage as long as it does not interfere with anyone else's similar freedom.

The protection of liberty has a substantive dimension of fundamental significance in defining the rights of the person. As I mentioned above and emphasize here again, individuals need to be protected from unwarranted government intrusions into a dwelling or other private places. The state is under an obligation not to interfere with the ability of individuals to make important decisions about sexual conduct and its consequences, because these matters involve choices central to personal dignity and autonomy. While at the heart of liberty is the right to define one's own concept of human dignity and the very existence of meaning, of the universe, and of the

⁵⁰ *Ibid.*

⁵¹ Vincent J. Samar, *Throwing Down The International Gauntlet: Same-sex Marriage as a Human Right.*

⁵² Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas.*

mystery of human life, states cannot satisfy individuals' demand of liberty by just non-interference, under some circumstance, there is a positive obligation of recognition by states.

Thus, in order to truly realize the right to marry of same-sex marriage, they have the third level of freedom: the freedom and liberty of the ability to retain their dignity as fully persons as well. States, on the other hand, have the obligation to respect the dignity and lives of them by recognizing same-sex marriage. The freedom of human dignity in the same-sex marriage context includes the freedom to form and nurture families with the people we choose. The most important issue of it is the legal relationship recognition - marriage. States have a positive obligation to recognize same-sex relationships as marital, because there is a link between the state's obligation of non-interference and its prior affirmative steps of recognition - the former would be inapplicable and irrelevant in the absence of the latter - states are interfering same-sex couples' freedom and liberty by refusing to acknowledge their right to marry. Everyone has a fundamental freedom to form a family with the person one loves, and we should make progress towards laws and policies and push states to recognize and respect those choices when freedom and liberty is exercised.

The components of freedom and liberty have manifold possibilities while the spirit and principle of freedom and liberty has never really changed, and as the society is changing all the time, individuals will just have more and more liberty. No one can presume to have this insight to know what will happen in the future, but by learning from the history we know, it keeps telling us that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress",⁵³ persons in every generation can just invoke the same principles we have now in their own search for greater freedom.⁵⁴

It means more to individuals in same-sex relationships than merely their legal interest in getting married, and it means more to sexual minority rights than simply the right to marry. Those relationships will be more comfortably sustained and reciprocating love will be more easily offered where personal feelings are reinforced and expectations are coordinated by marriages. A society that fails to recognize the same-sex relationships and families of individuals is a society that fails to respect their personal dignity and full humanity by denying their freedom to choose their own life. Marriage "fulfills yearnings for security, safe haven, and connection that express our common humanity,"⁵⁵ and as a result, the denial made by states of same-sex marriage rights entails a failure by states to respect the dignity of same-sex couples as individuals who have freedom and liberty to choose how to live with their lives. The voluntary association of a married couple should be respected.⁵⁶

⁵³ *Lawrence v Texas*, 539 U.S. 558 (2003).

⁵⁴ *Turner v. Safley*, 482 U.S. at 95-96.

⁵⁵ *Goodridge v. Department of Public Health*, 798 N.E.2d 941, at 955.

⁵⁶ Alan Gewirth, *Self-fulfillment*, (Princeton University Press, August 3, 1998), p. 72.

Every human being has some fundamental rights that governments must respect, right to marry as one of them is especially significant to individuals in same-sex relationships. Marriage makes two individual connected as a family, they share their emotions and life, they rely on each other to experience the happiness and bitterness of life. In many cases, same-sex couples are only permitted to enter into civil unions but not into marriage. What even worse is the fact that majority states now just leave same-sex couples' marriage issue empty in the legal aspect. Such alternative arrangements or totally ignorance cannot help but cement an imbalance between same-sex and opposite-sex couples, and it is completely against spirit of human rights to respect the greatest possibility of human dignity. If such good thing can only be enjoyed by opposite-sex couples, it is very unfair to same-sex couples.

The failure by the state to recognize the committed same-sex relationships has an impact on those individuals' ability to form and maintain intimate relationships, the fact that it benefits no one is completely not in accordance with the spirit of human rights in the no-harm context: to benefit everyone in the greatest possibility. It is in this sense, governments are prohibited from making laws or policies which benefit no one and also expected to provide a framework for every individual to achieve a better life. In the context of same-sex marriage - governments should stop ignoring or denying same-sex couples' right to marry and they have the positive obligation to acknowledge it instead.

Right to marry should also be entitled to same-sex couples, and states have the positive obligation to recognize it. Denying same-sex marriage, is denying their fundamental human right.

Chapter Three: Non-legal Obstacles to Implement Same-sex Marriage

3.1 Keep Religions Private

When the public wants to include same-sex marriage also under the protection of right to marry, the first big obstacle they meet is from religion.

For example, the Islamic views on homosexuality are formed from the writings of the Qur'an and various Hadith narrations. It is not only a sin, but a crime under Islamic law. Homosexual activity is a crime and forbidden in most Muslim-majority countries. In the Islamic regimes of Iran, Mauritania, Saudi Arabia, North Sudan and Yemen, homosexual activity is punished with the death penalty.⁵⁷

In predominantly Roman Catholic countries, changes concerning legal recognition of same-sex relationships also have been slower, especially given the Pope's declaration that the church regards homosexual acts to be "against natural law."⁵⁸ For some Christians, this-or something like this-may be a credible and therefore non-demeaning rationale: "According to the Bible, which discloses to use the will of God, same-sex unions are contrary to the will of God. Government should not affirm, by extending the benefit of law to, relationships that are contrary to the will of God."⁵⁹

One of the most impressive religious obstacles we can see is happening in U.S.: "religion is the chief obstacle for gay and lesbian political progress, and it is the chief obstacle for a couple of reasons. It is difficult to think of a more powerful social entity in American society than the church. It is a very powerful organization, and in large measure they are arrayed against the interests of gays and lesbians. Biblical condemnation of homosexuality and the teaching huge percentage of the public makes the political opportunity structure very hostile to gay interests. It is a very difficult to overcome that."⁶⁰ The foremost opponents of government's extending the benefit of law to same-sex union is the magisterium of the Catholic Church. For example, in September 2003, the Administrative Committee of the United States Conference of Catholic Bishops, in a statement titled "Promote, Preserve, Protect Marriage," argued that "What are called 'homosexual unions.'...because they are inherently non-procreative, cannot be given the status of marriage."⁶¹

Fundamentalist religious movements have largely spearheaded the traditionalist backlash against legal benefits for same-sex marriage. Some

⁵⁷ ILGA: Lesbian and Gay Rights in the World (2009)

<http://ilga.org/historic/Statehomophobia/ILGA_map_2009_A4.pdf>

⁵⁸ *Supra* note 30.

⁵⁹ *Ibid.*

⁶⁰ Judgment of *Perry v. Schwarzenegger* (later *Perry v. Brown*) by United States District Court for the Northern District of California, P.103 no.77 c,

<<http://documents.nytimes.com/us-district-court-decision-perry-v-schwarzenegger#document/p98>>

⁶¹ USCCB Administrative Conference, "Statement on Marriage and Homosexual Unions," 33 *Origins* 257, 259(2003).

claim religious law only permits heterosexual marriage. Others insist that the government's interest in marriage is solely in promoting and regulating procreation, which they argue justifies refusing marriage to same-sex partners.⁶² This backlash has resulted in legislation and constitutional provisions prohibiting a jurisdiction from giving marriage benefits to same-sex couples. In countries where civil marriage is a strictly secular process, the decision to separate officers and ceremonies is purely a political compromise. Inclusion of same-sex marriage has to compromise, most of the time, with some type of relinquishing of the symbolism relating to marriage. As we can see that in most countries, religious denominations have been a strong opposition to same-sex marriage.⁶³ Easily, however, we can find the weakness of religious obstacle that a religious based argument that same-sex unions are contrary to the will of God, is not credible when countries are established based on non-religion. The argument which is against the legal recognition of same-sex unions by the churches is all unconvincing, since legislation is on non-religious grounds where churches have no authority at all.

The religious hindrance of same-sex marriage right campaign just shows the prevailing confusion of government's roles in the marriage issue. As I elaborated above that the only reason a specific right to marry can be prohibited by governments is that there is a third party whose rights are violated or endangered. Obviously, religious disagreement is not a potent reason, especially in the situation of the current political system of the whole world when the separation of religion and politics is the majority trend. Legal scholar Douglas Laycock and religious scholar Tony Campolo, also argues that "the state should get out of the business linking legal benefits to any religious sacrament" and "leaving religious consecration a private affair".⁶⁴

Israel is an interesting case to mention here. The Israeli same-sex marriage situation is more like "a hybrid situation than a case of full invisibility or full recognition".⁶⁵ It is because that marriage is only left to religions recognized within Israel and since no secular marriage institution exists in the country, those couples who have different religious belief or people with no religion at all have to get married abroad. Civil courts have jurisdiction to hear cases of those marriage take place outside Israel.⁶⁶ Since no religion in Israel currently allows same-sex marriage, there can be no conclusion of same-sex marriages in the country. Same-sex couples, however, can get married outside Israel. A Supreme Court decision in 2006 mandated the registration of five same sex couples married in Canada.⁶⁷ The

⁶² *Supra* note 30.

⁶³ *Supra* note 1.

⁶⁴ *Supra* note 30.

⁶⁵ *Supra* note 1.

⁶⁶ *Ibid.*

⁶⁷ H.J., 3045/05 Ben-Ari v. The Director of the Population Administration in the Ministry of the Interior (2006) (Isr.) (unpublished decision), translated in <<http://www.scribd.com/doc/22564351/Ben-Ari-v-%D7%92%D7%A8%D7%A1%D7%94-%D7%A1%D7%95%D7%A4%D7%99%D7%AA-Director-of-Population-Administrationofficial-translation>> (last visited October 22, 2010).

decision stated that registration was not indicative of the validity of a marriage in Israel.⁶⁸ These couples, nonetheless, have access to the same benefits that all married couples enjoy in Israel.⁶⁹ The decision of the Court is very interesting, and it shows exactly the point I am trying to elaborate: religion is part of cultural relativism, even in a country like Israel where the whole country is religious, it should respect the universal principle of human rights – recognize the right to marry of other countries, and keep the religious restriction only within religious area – Israel. So if we follow such rule, we can get that, it is totally acceptable that one religion says that same-sex marriage is not allow by its God and no same-sex marriage should be allowed WITHIN its own sacred place, but it is not acceptable that when such religious restriction wants to extend its power into the secular area, i.e., governments’ legislation – if their political system is clearly politics and religion separated, and try to deny right to marry of same-sex couples based on their religious reasons.⁷⁰

In Norway, clerical solemnizers can refuse to solemnize a marriage if one of the parties is divorced and the previous spouse is still living or if the parties to the marriage are of the same sex.⁷¹ Similar to Norway, the Civil Union Act of South Africa allowed religious denominations to request their designated marriage officers to be exempt for conscientious reasons from registering civil unions of same-sex couples.⁷² In my opinion, such religious restriction is completely acceptable, it clearly separate the field of private and public, universal human right is protected while religious culture is reserved.

Another argument is that the name “marriage” is a ceremony inherited with religious element. Those people believe that it is an honorable estate, instituted of God and built on moral, religious, sexual and human realities. Marriage is based on a natural teleology, on the different, complementary nature of men and women—and how they refine, support, encourage and complete one another.⁷³ They do believe same-sex couples should get the equal legal rights of marriage, but their unions cannot be called as “marriage”. It is actually the main difference between married couples and registered partnerships lies in - the secular feature of same-sex unions as opposed to the religious meaning of marriage. To reply such persuaded argument, one cannot forget the principle of separation of public and private area. Everyone can hold one’s own definition of “marriage”, but when we talk about right to “marry” (but not right to “civil unions” or right to “registered partnerships”), it is not decided by you, him or her that whether such person can have it or not, because it is a human right, thus it belongs to the public area, which means such right should be protected by governments. It is very similar to the protection of freedom of expression

⁶⁸ *Supra* note 1.

⁶⁹ *Ibid.*

⁷⁰ Though I do think Israeli government failed to fulfill its obligation to recognize a non-religious marriage for same-sex couples, which I will discuss in the “3.3 Cultural Relativism Cannot Deny Universal Human Rights” Part.

⁷¹ *Supra* note 1.

⁷² Civil Union Act of 2006, Art. 6.

⁷³ William Bennett, *Leave Marriage Alone* <<http://faculty.mc3.edu/barmstro/sullivan.html>>

that “I may not agree with what you say but I will defend to the death your right to say it.” When in a country where non-religious opposite marriage are called “marriage”, it should be used on the same-sex marriages as well. Unless, however, when one day in the future, as some radical scholars argued, governments “should offer only civil recognition to all relationships, including those of heterosexual couples” and make the “marriage” a word completely religious, I will agree with the argument.

No one should take away anybody's right to marry, and no one should force any church to change any doctrine in any way. Particular religious arguments against same-sex marriage are rightly debated within the churches and faiths themselves. Religious groups should also stop intervening secular legislation of marriage and leave governments alone. What we are really asking is that when governments permit right to marry to opposite-sex couples, same-sex couples should also be treated like anybody else.

3.2 Facing the Social and Cultural Change

3.2.1 From “Traditional Marriage” to “Individualistic Marriage”

Besides the obstacle from religions, morality is also a strong objective voice hinder the legalization of same-sex marriage. Those who deny the same-sex marriage right believe marriage should be only between “a man and a woman”, and the legislation of same-sex marriage will erode the so-called “traditional marriage” and damage the sacred aspect of marriage. We often hear some people arguing that the refusal to recognize same-sex marriage is a way of protecting the marital institution itself. If same-sex marriages were permitted, “traditional marriage” itself would be endangered.

Such argument sounds plausible; however, one may ask what traditional marriage is. Marriage as limited to “one man and one woman,” far from being traditional, is actually a less common pattern than its modern defenders acknowledge. Studies by Ford and Beach, anthropologists examining cross-cultural data have confirmed that same-sex relationships of intimacy and family have existed throughout history and across cultures.⁷⁴ Such studies acknowledge that same-sex intimate behavior has never been shown to the predominant sexual activity among adults in any society. However, in about two-thirds of societies, same-sex relations were socially acceptable and not considered deviant, at least for certain members of the society.⁷⁵ Even in early twentieth century Paris, for example, provided a haven for an outstanding community of same-sex couples, both French and expatriate. The famous couple was Sylvia Beach and her lover Adrienne Monnier, the proprietors of the Shakespeare & Company bookshop, legendary in the 1920s and 1930s as a home for the likes of James Joyce and Ezra Pound.⁷⁶

⁷⁴ *Supra* note 30.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*, Gertrude Stein and Alice B. Toklas established a renowned literary and artistic salon, while nearby American journalist Janet Flanner lived with her French girlfriend

Even if we agree that there is such a “traditional marriage” culture which is almost universal practiced, how can legalization of same-sex marriage ruin it? How can sustaining and supporting heterosexual relationships and families produce a social good, while sustaining and supporting same-sex relationships and families produce a social harm? It is hard to understand the assumption that allowing two men or two women to marry somehow endangers the well-being of their opposite-sex married neighbors. If by harm, they mean that they worry that more people will choose the same-sex marriage other than “traditional marriage”, I would rather think forcing people to marry someone they do not love just because it is the “traditional way” is rather cruel. It is also very unfair to the spouses who are heterosexual and unaware of their spouse is homosexual, they cannot get fully self-fulfillment from the marriage and they do not even know why and some may even blame themselves.⁷⁷

Some also argue that same-sex marriage couples cannot have kids, so they do not need the marriage. First, such argument puts heterosexual couples who cannot or who do not want to have kids in a very awkward situation-does that mean they should not get married as well? Second, one cannot question that is restricting marriage to opposite-sex couples the least harmful means to protect procreation? Also is it the most effective way to do so? Third, the idea that marriage is only for reproduction is very obsolete and outdated. The 20th century saw a series of profound changes in the social norms that define the roles and behavior of married couples.⁷⁸ Recognition of marriage involves a much wider range of rights and privileges while the interests of children are only one of those concerned. No state require couples to have a child or pledge to have a child in order to have valid marriage, and many same-sex couples do have children through various means. The so-called “traditional marriage”, which gave priority to the social and economic interests of the family and the community, gave way to the notion of “companionate marriage,” which prioritized the emotional interests of the couple, and then to the “individualized marriage,” which emphasized personal choice and self-development.⁷⁹ Given such fundamental changes in the very nature of marriage, the impulse toward same sex marriage has become increasingly hard to resist. Those who say that same-sex marriage is an erosion of “traditional marriage” is a very superficial idea, they only see the non-essential symbolic vision of marriage, but ignore the essential part of marriage, which I mentioned above, the love, human dignity and self-fulfillment.

Georgette LeBlanc, and American heiress Nathalie Barney and the poet René Vivien also held court.

⁷⁷ For example, in China, since the whole society still have less tolerance about homosexuality, under the press from family and society, many gay men have to get a “normal” marriage. Thus, there are many women who marry homosexual husbands while have no idea about their homosexuality, and their marriage usually is not happy at all, and in some extreme cases, the wife chose to committed suicide after knowing the truth that they married a homosexual husband.

⁷⁸ *Supra* note 30.

⁷⁹ *Ibid.*

The “individualized marriage” conception challenges the assumption that the “traditional marriage” is a human universal and thus a constant across time and place, and making same-sex marriage legal will have very serious negative consequences to society and civilization.⁸⁰ The empirical survey in fact suggests that the core moral and political values of western civilization - modern liberal-democracies in particular – are exactly equality and respect for the dignity of each individual human being, thus extending legal recognition to same-sex marriage, rather than reject or denounce their claims is in accordance with the core values.⁸¹ What’s more, as Carpenter, Andrew Sullivan, and others have noted, extending the right to marriage to same sex couples is much more likely to change those couples than to change the behavior of heterosexual couples. As Carpenter has noted: “Marriage is not a reward for good behavior, but an inducement to it.”⁸² It is not the marriage that makes couples more loyal to each other, but rather the loyalty and love of couples makes marriage work. Marriage does not guarantee love but rather love guarantee marriage. Thus, we have ask ourselves that if two men or two women love each other deeply and want to get married, why denying them such right?

3.2.2 Changing Social Attitude

Some legal realists might say that “marriage” is defined by its legal terms—who can enter, when, with what legal consequences, and with what options for exit.⁸³ That is, the legal status of marriage just is whatever the state says, the concept of marriage changes as the legal terms changed by states. They give examples as when “jurisdictions moved from fault divorce to a no-fault option”, marriage also “changed from a difficult exit to a relatively easy one”.⁸⁴ This is a wrong idea as I discussed above that “there is a practice or institution called marriage that predates and underlies the (often imperfect) efforts to legislate about that status”.⁸⁵ The changing social attitude is the force pushing the change of marriage itself. By a large part of the policy debate I believe the opposition to extending marriage to same-sex couples will be old story one day as well.

As to the “panic” some people have when arguing that same-sex marriage recognition will change the marriage itself, it is not really that the same-sex marriage they are afraid, but rather, the change itself is what they are afraid. Any change in marriage opens up the possibility of any conceivable change in marriage.⁸⁶ The same “panic” occurred when interracial marriage became constitutional—a mere thirty years ago—and when women no longer had to be the legal property of their husbands. The truth is marriage has changed so many times over the last centuries. Each change has its own background, as the social attitude push it so, and every time, some people always allege it is a dangerous disintegration of marriage

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Brian H. Bix, *Everything I Know About Marriage I Learned from Law Professors.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Andrew Sullivan, *Let Gays Marry*, <<http://faculty.mc3.edu/barmstro/sullivan.html>>

itself. If we take a wider view but not just the legal history of marriage only, we will see death and life have been legally defined and redefined, sex and gender has been defined and redefined, and many other concepts have been created by laws only to be recreated by different laws. Marriage, therefore, can be changed too. However, there are limits to the process of definition and redefinition, and legal marriage must keep some relation to the social understanding of marriage. At the same time, all legal definitions must respect a framework of human rights. With these restrictions in mind, it is very persuasive to redefine marriage to include same-sex couples.

There is no such thing as the end of history. There is no final resting-place for societies. No one can stop the trend of pluralism. The ideology and philosophy of society is changing all the time, and tendency of the world is diversity and individualism. The diversity means society should be more and more tolerant to different opinions, lifestyles and valuation. The individualism means the whether a right should be entitled should be more considered on the individualist level as personal development, but not only on the collective level as whether the whole society gets any benefit, it is very important especially to the rights of minorities. Someone may invoke the principles of universal morality which might be thought of as well-founded to deny some rights of minority, but the fact is there will always be deviant minority interests. While a moralist majority may uphold rationalist understandings, there is no guarantee of this.⁸⁷ It is in this sense that, I should make myself clear, it is not wrong to hold the traditional idea of marriage or believe married couples should have the responsibility to reproduce; but it is wrong when people use their personal valuation to intervene or even deprive other people's human rights, when such rights harm no one else's rights. In *Lawrence* case, the Court explicitly adopted Justice Stevens's position in dissent in *Bowers* that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."⁸⁸ States should not be allowed to rely on vague references to traditional family values in defending the justification of its exclusionary marital policy. Majority morality is an impermissible ground upon which to justify limiting marriage to opposite-sex couples.⁸⁹

The reality of legalizing same-sex marriage in the modern world does illustrate an ironic truth: respect for those in same-sex marriage does not threaten civilization, while intolerance for such marital right or even relationships is a marker of those places where uncivilized behavior is most institutionalized. Just check countries where same-sex marriage are legal, and countries where gay people will face death penalty, it is well said.

The eventual recognition of equal marriage rights by several countries and regions was made inevitable given that the debate over same-sex marriage is taking place at a time in which "the very nature of marriage has been undergoing dramatic changes in the West, and, to some extent,

⁸⁷ *Supra* note 51.

⁸⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003), Scalia J. dissenting.

⁸⁹ *Supra* note 52.

elsewhere in the world”.⁹⁰ It is increasingly clear that the changes in the lived experience and content of marriage, concomitant changes in legal institutions of marriage, and the broader pressure toward equality in civil and political rights made it increasingly difficult for society to deny the logic of equal marriage rights.

3.3 Cultural Relativism cannot Deny Universal Human Rights

Some may argue that different religious and cultural background should be respected when people discuss whether there is a certain human right. They also claim that the human rights universalism ignores alternative cultural perspectives and the view that there should be different cultural interpretations of human rights. This raises the problem that the difference between “interpreting” human rights in a culturally specific way and undermining their universal applicability may be difficult to determine. It is well presented in the same-sex marriage issue: the cultural relativism – different religious, social or cultural interpretation of marriage versus the universal right to marry of same-sex couples.

Cultural relativism sounds like the best friend of diversity, while human rights universalism idea sounds just like the opposite, so people often use cultural relativism to fight against universal human rights. Nevertheless, if we dig more about cultural relativism, we might find that cultural relativism appears to be attractive but in fact does not make sense at all.

Cultural relativists believe the principle that we should respect ALL cultures, but it is self-contradictory, because some cultures do not respect all cultures, it is especially easy to find examples in religions. Interestingly, the principle itself has universal character – the character which cultural relativists do not really believe in.

Cultural relativists also make a value statement that there are no universal values and every culture has the same equal value - that is the true essence of diversity. However, one cannot help wondering, if there is no universal values, it also means there is no universal standards, then how could cultural relativists say that all cultural are equal based on no standard? It is even a dangerous belief when it is so obviously that some cultures are demeaning human beings and cultural relativism just gives them the justification. The mere existence of diversified cultures itself cannot justify the theory of cultural relativism is right – it just means that there are different kinds of cultural but they are not equally valued.

Cultures that endorse the violation of human rights should not get our respect, the logic derive from cultural relativism that we should respect every culture simply because it is a kind of culture is wrong. Cultural relativism fails to provide a general objection to human rights universalism.⁹¹ In order to respect cultural diversity, to the contrary of cultural relativism, what we actually need is universal human rights, since it

⁹⁰ *Supra* note 30.

⁹¹ Micheal Freeman, *Human Rights: An Interdisciplinary Approach, Chapter 9 Human Rights in the Twenty-first Century*, (Blackwell Publisher, 2002), p. 201.

requires the robust implementation of those rights – rights that needed to respect every culture not been interfered.

Let's go back to the Israeli example I mentioned above, and we can assume further that if there is a country that the leader of government is also the leader of religion, and only religious marriage in that country is allowed while the religion does not agree with same-sex marriage, does it mean the government can deny the same-sex marriage because of the religious reason? I think the answer is no, under such circumstances, the government still have the obligation to establish a non-religious marriage for same-sex couples. Because by using religious reason to deny the right to marry of same-sex couples, is also using cultural relativism to deny human rights universalism. If the concept of human rights is valid at all, then cultural relativism is invalid, since it would entail the rejection of human rights universalism – which is universal no matter what kind of culture one is from. Human rights universalism, however, entails some diversity of human rights practice, since the concept of human rights presupposes the value of autonomy, which would lead to some variation in human rights practice in different cultural and socio-economic conditions.⁹² Cultural relativism is always biased against the weak cultural minorities while respecting human rights is often the best way of protecting them. It is in this sense that, when people deprive right to marry of same-sex couples in the name of religious belief, they are wrong and such act cannot be justified. They are wrong is not because they hold their own relative cultural judgment, but because they try to use their own standard to against universal stand of human rights.

When such wrong idea of cultural relativism is used into public political life, some people may call it “majority of tyranny”. Thus we may need Rawls’ public reason theory that “citizens engaged in certain political activities have a duty of civility to be able to justify their decisions on fundamental political issues by reference only to public values and public standards.”⁹³ Or in my own words – keep the cultural relativism private.

*

These opposite reasons are not really legal issues and can never be justified. Religious or cultural reasons are all private, should not be the reason that deprive the right to marry. What is the ideal or traditional marriage is not relevant to public legislation – only right to marry per se is. Furthermore, for the argument’s sake, it is quite opposite in the fact that extending the right to marriage to same-sex couples is much more likely to change those couples than to change the behavior of opposite-sex couples.

The essential idea of human rights, again, is founded on a theory of human dignity, the focus of which must always be the individual decision-maker whose purposes determine what actions will be taken. In this sense, no matter what particular moral view that hold by individual or by majority which in the name of democratic society, must respect minimal constraints

⁹² *Ibid*, Chapter 6 *Universality, Diversity and Difference – Culture and Human Rights*, p. 124.

⁹³ John Rawls, *Stanford Encyclopedia of Philosophy*, <<http://plato.stanford.edu/entries/rawls/#PubRea>>

imposed by universal human rights, and must be articulated in a common language which affirms the rights of all people to dignity and respect. Such dignity and respect should also be guaranteed to individuals who are in the same-sex relationships.

Denial of the right to legally marry a same-sex partner, as opposed to its recognition, represents a detriment to all those who would be served by marriage. None of reasons that reject the same-sex marriage as a human right can be justified, as I argued in the two chapters above, those agreement is merely based the discrimination on their sexual orientation, and expressed in the different ways, either religious or cultural or moral, you name it. Same-sex couples find they have no choice or freedom because of the law either denies the right or just ignores the right.

What same-sex couples try to seek is the equality of everyone, the real life that they do not need to lie or hide or live as second-class citizens. Marriage is a part of the whole gay rights movement. The ultimate end of the whole same-sex marriage campaign, might be when the ever doubt of existence of the same-sex marriage be regarded as ridiculous.

Chapter Four: What We Should Do to Make Same-sex Marriage Real

There are only ten countries that have recognized same-sex marriage, and most of them are countries in Europe. It is also not surprising that most of those countries are also quite developed. Compared with cases judged by Human Right Committee⁹⁴, the legal development of same-sex marriage issue is more obvious in the European Courts of Human Rights, it might hint that the resistance of same-sex marriage legalization on the international level is much more than those more developed regional level. Meanwhile, I find U.S. is also a very interesting country to have a more detailed case study, because it is a very good example that implies the most common problem of legalization of same-sex marriage – the conflict between the court and the public opinion. President Obama showed his support of same-sex marriage recognition, while at the same time, believes that it should be decided by states itself when people in North Carolina voted against same-sex marriage. The reluctant attitude of federal government reminds me of the European Court of Human Rights, as a Court that trying to establish a human right standard – at least in Europe, also shows the hesitation on same-sex marriage issue. So in this Chapter, I will make a case study of Europe and U.S, and try to find out the real hinderance behind the realization of same-sex marriage.

4.1 Case Study of Europe and U.S.

4.1.1 European Court of Human Rights

Article 8 and article 12 in conjunction with Article 14 are the most important ones applications use at the European Court of Human Rights to allege that States have violated their human rights by denying the same-sex marriage.

Article 8 Right to respect for private and family life is mainly about individuals' private life. The Court has ruled that same-sex relationships should be regarded as a part of 'private life' within the meaning of Art.8 and part of 'family life', due to the evolving nature of family relationships in Europe (*Schalk and Kopf v. Austria*, 30141/04, §§ 92-95), "any interference with a person's sexual life and any difference in treatment based on sex or sexual orientation required particularly weighty reasons" (see *Smith and Grady*, 33985/96 and 33986/96, § 94, and *A.D.T. v. the United Kingdom*, 35765/97, § 36, *L. and V. v. Austria*, 39392/98 and 39829/98, § 38).

In 2003 in *Karner v. Austria* case, the European Court of Human Rights unanimously ruled that a homosexual who lost his tenancy when his partner died was a victim of unlawful discrimination, thus it violated Art. 14

⁹⁴ The only case worths mentioning is the *Joslin v. New Zealand* (Communication No. 902/1999, 17 July 2002). The Committee rejected the claim that excluding same-sex marriage violated the Art 23 (2) of International Covenant on Civil and Political Rights, based on the specific words of "men and women" in the content. The Committee also did not interpret too much about the Art 26: non-discrimination provision.

in conjunction with Art. 8. The Court accepted the Government's argument that the aim of the discriminatory statute could be the protection of the traditional family unit, since it is in principle, "a weighty and legitimate reason which could justify a difference in treatment". (*Karner v. Austria*, 40016/98, § 40) However, it was a rather "abstract aim, and a broad variety of concrete measures could be used to implement it." (*Karner*, § 41) The Contracting States' margin of appreciation was narrow when the different treatment is based on sexual orientation, as in this case, the "principle of proportionality" between the means employed and the aim sought to be realized did not merely require the measure chosen to be suitable for realizing the aim; it also had to be shown that it was necessary to exclude homosexual couples from the scope of the legislation in order to achieve that aim. The Court could not see that the Government had advanced any arguments that would allow such a conclusion. Thus, the Court rejected the Austrian government's argument that the law allowing eviction of same-sex partner was necessary to "protect the family in the traditional sense," and there is a violation of human right. Though the *Karner* case is not really about same-sex marriage, the principle of proportionality means same-sex couples' other rights, such as economic rights cannot be denied based on "traditional units" argument.

Article 12 is about right to marry and family, and the most important question of article 12, is what the core valuable elements of the "right to marry" are. The first case I would like introduce is *Christine Goodwin v. United Kingdom* happened in 2002, it is a case concerning a transsexual's right to marry. "The Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision." (*Christine Goodwin v. The United Kingdom* 28957/9, § 98) The traditional concept of "procreative marriage" is no longer the only value acknowledged by the Court, marriage is pure marriage as the right to choose a partner to live together, which in my opinion, is a good argument for the legalization of same-sex marriage.

Schalk and Kopf case is about a same-sex couple who tried to seek the recognition of same-sex marriage in Austria. the Court said marriage rights contained in Article 12 are now clearly not restricted to opposite-sex couples "in all circumstances" (*Schalk and Kopf*, § 61), the Court also pointed out the importance of a deliberate omission of a reference to "men and women" in the Article 9 of the Charter of Fundamental Rights of the European Union, giving all citizens the right to marry and to found a family, though meanwhile the Charter also concedes that "there is no explicit requirement that domestic laws should facilitate such marriages". (*Schalk and Kopf*, § 60) The Court's attitude towards whether there is such a right to marry of same-sex couples seems a little bit ambiguous, but I tend to understand as there is such a potential right, which will be realized in the future.

Thus it is understandable how the ambiguous attitude towards same-sex marriage right leads to the conclusion that Austrian ban on same-sex

marriages did not violate Art. 14 on non-discrimination taken in conjunction with Art.12 as well as in conjunction with Art. 8. The court did not address the possible impact of the non-discrimination of Art. 14 in conjunction with Art. 12 itself, which is consistent with the Court's reluctant will to admit the same-sex marriage right. As to the reason of no violation of Art 14 in conjunction with Art.8, the Court thinks it covers more general purpose and scope than Art. 12 (*Schalk and Kopf*, § 101), if the Court could not interpret same-sex marriage in Art. 12, it would not be harmonious if such right could be interpreted in Art.8.

The real obstacle of the Court to speak out loud the existence of right to marry of same-sex couples is the lack of "European consensus". "A broader European consensus is needed before a right to marry for same-sex couples will be recognized in Strasbourg", because "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another" (*Schalk and Kopf*, § 62) and the States may use the excuse of protection of the 'traditional' family as a 'weighty and legitimate reason which might justify a difference in treatment' of same-sex relationships. (*Karner*, § 40) Here, like many other controversial cases, the Court used the lack of "European consensus" again to justify states not recognizing same-sex marriage as "margin of appreciation". However, the Court also said in the *Goodwin* case that the margin of appreciation "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" (*Christine Goodwin*, § 99). The space of margin of appreciation of States on the same-sex marriage issue might be less in the future as the concept of "traditional marriage" might be facing more and more doubt.

Another argument which is used in the Court is the protection of minority. In the *Karner* case, the Court mentioned that the measures chosen to protect the family in the traditional sense "must also be shown that it was necessary ... to exclude certain categories of people". (§ 41) Also mentioned in the *B. and L. v. the United Kingdom* case (*B. and L v. the United Kingdom*, 36536/02, § 36), which was emphasized by the Court again in the *Schalk and Kopf* case, "National authorities...are the best placed to assess and respond to the needs of society"(§ 62), but it doesn't mean that authorities can do whatever the majority asks the society to be, because as the Court reiterates in the *Alekseyev v. Russia* case that, "it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority." (*Alekseyev v. Russia*, 4916/07, 25924/08, 14599/09, § 81) The Court's judgment about intense between the power of majority and right of minority indicates that the States cannot deny the rights of minority just because the majority cannot accept it morally if there is no real harm to them, such rule has been used to protect LGBT peoples' freedom of expression and freedom of assembly rights, I believe in the near future, states may need more "necessary" reasons to justify their exclusion of same-sex marriage in the national law just than "public morality" or "traditional culture".

Usually it was each country's own business to determine what the social concept of marriage and family is and if some groups of the society should be guaranteed the right to marry, but the European Court of Human Rights slightly to challenge that thought in its decision in *Schalk and Kopf* case. Today there are many more alternatives to become a family than in the past and today's culture of universal human rights and international legal regulation has become more and more well known, controversial rights such as right to marry may no longer be an exclusively national prerogative which can be regardless of international human rights standard.

Although the Court was not willing to explicitly recognize that under the European Convention of Human Rights there was a right for marry for same-sex couples, it did change its past interpretation recognizing same-sex couples a right to family life. It shows European systems of protection of human rights is trying to evolve from a role of guarantors of a minimal treatment of respect of human rights to a role of authentic interpreters of the concepts of human rights. With this new role, its involvement in shaping national concept of marriage and family is inevitable. The *Schalk and Kopf* case provides a good example of the current intervention of European Court in family law. By denying that a heterosexual definition of marriage is the only definition under all circumstances, the Court left the door open to revisit the decision as European countries evolve towards more comprehensive definitions of marriage.

4.1.2 U.S.

The struggling of same-sex marriage in U.S. gets a lot of attention from the rest of the world. Among those civil rights campaigns happening all over different states, the "Proposition 8" in California triggers me most interest. First is because the fact that Proposition 8 is a constitutional ballot that the majority used legally to deny the right of minority, and second is the role of courts in this human rights campaign, both the California Supreme Court and the Ninth Circuit Court of Appeals supported the right of minority and judged the Proposition 8 is unconstitutional, while both judgments still cannot stop the supporters of Proposition 8 to "protect" their "traditional marriage" and the case might be sent to the U.S. Supreme Court.

Proposition 8⁹⁵ was a ballot proposition and constitutional amendment passed in the November 2008 state elections. Its purpose was to add a new provision, Section 7.5 of the Declaration of Rights, to the California Constitution, which provides that only marriage between a man and a woman is valid or recognized in California. The proposition overturned the California Supreme Court's ruling of *In re Marriage Cases* that same-sex couples have a constitutional right to marry and restricted the recognition of marriage to opposite-sex couples only. California's State Constitution put Proposition 8 into immediate effect the day after the election.⁹⁶ The

⁹⁵ ballot title: Eliminates Rights of Same-Sex Couples to Marry. Initiative Constitutional Amendment; called California Marriage Protection Act by proponents.

⁹⁶ California Constitution Article XVIII, <http://www.leginfo.ca.gov/.const/.article_18>.

proposition, however, did not affect domestic partnerships in California, nor same-sex marriages performed before November 5, 2008.⁹⁷

After the California Supreme Court upheld the voter initiative, a suit, *Perry v. Schwarzenegger* was filed in a Federal District Court in San Francisco. It is the first ever federal case challenging laws against gay marriage, and aiming to determinate if states ban same-sex marriage are violating the constitution. The plaintiff's arguments are first marriage is a fundamental right recognized by supreme court; second, it costs serious harm to same-sex couples when such right is deprived; third, allowing same-sex couples to marry simply does not hurt anyone.⁹⁸

Meanwhile, on April 30, 2009, the members of 'Yes! on Equality' submitted a ballot initiative dubbed "California Marriage Equality Act" to the Attorney General's office aimed to repeal Article I; Section 7.5 of the Californian Constitution.⁹⁹ However, the challenge to California's gay marriage ban failed to qualify for the 2010 ballot due to lack of enough signatures.¹⁰⁰

On August 4, 2010, U.S. District Chief Judge Vaughn R. Walker overturned Proposition 8, ruling that it is "...unconstitutional under the Due Process Clause because no compelling state interest justifies denying same-sex couples the fundamental right to marry",¹⁰¹ and "proposition 8 violated the Equal Protection Clause because there is no rational basis for limiting the designation of 'marriage' to opposite-sex couples."¹⁰² The judge also directly rebutted opponents of same-sex marriage saying permitting same-sex couples to marry would not affect either the number of or stability of opposite-sex marriages.

He further noted that Proposition 8 was based on traditional notions of opposite-sex marriage and on moral disapproval of homosexuality, neither of which is a legal basis for discrimination. He emphasized that gays and lesbians are exactly the type of minority that strict scrutiny was designed to protect:

“An initiative measure adopted by the voters deserves great respect. The considered views and opinions of even the most highly qualified scholars and experts seldom outweigh the determinations of the voters. When challenged, however, the voters’ determinations must find at least some support in evidence. This is especially so when those determinations enact into law classifications of persons. Conjecture, speculation and fears are not enough. Still less will the moral disapprobation of a group or class of citizens suffice, no matter how large the majority that shares that view. The evidence demonstrated beyond serious reckoning that Proposition 8 finds

⁹⁷ John Schwartz (2009-05-26). "California High Court Upholds Gay Marriage Ban", The New York Times. Retrieved 2009-12-17.

⁹⁸ *Perry v. Schwarzenegger* (later *Perry v. Brown*)

⁹⁹ "California Marriage Equality Act". California Secretary of State.

<http://ag.ca.gov/cms_attachments/initiatives/pdfs/i808_initiative_09-0011.pdf>

¹⁰⁰ Peter Henderson, Gay marriage fails to get on California ballot. (Apr 12, 2010)

<<http://www.reuters.com/article/2010/04/12/us-gaymarriage-california-idUSTRE63B5N620100412>>

¹⁰¹ Judgment of *Perry v. Schwarzenegger* (later *Perry v. Brown*), pp. 113-114.

¹⁰² *Ibid.*

support only in such disapproval. As such, Proposition 8 is beyond the constitutional reach of the voters or their representatives.”¹⁰³

Judge Walker also confirmed lots of facts of finding in his judgment, including that “marriage is a civil but not religious matter,”¹⁰⁴ and “religious beliefs that gay and lesbian relationships are sinful or inferior to heterosexual relationships harm gays and lesbians and they are the main obstacle of recognition of same-sex marriage”.¹⁰⁵

He also defined the marriage which “is the state recognition and approval of a couple’s choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents.”¹⁰⁶

Those facts also try to clarify some misunderstanding among opponents of same-sex marriage, for example, “marrying a person of the opposite sex is an unrealistic option for gays and lesbians.”¹⁰⁷ Answer to why domestic partnerships are not enough to same-sex couples is because they “lack the social meaning associated with marriage, and marriage is widely regarded as the definitive expression of love and commitment in the United States.”¹⁰⁸ Judge Walker also noted that California's domestic partnership laws do not satisfy California's obligation to provide gays and lesbians the right to marry because domestic partnerships were created "specifically so that California could offer same-sex couples rights and benefits while explicitly withholding marriage from same-sex couples"¹⁰⁹ thus, same-sex couples could not get the same social meaning as opposite-sex couples in marriage.

Walker also summarized that the costs and harm to individuals in same-sex relationships resulting from denial of marriage to same-sex couples are mainly three parts: economic costs such as extra tax burden; mental harm caused by the belief they cannot last a long relationship and they cannot be a good parent, and social negative judgment that their relationships are not highly valued as opposite-sex relationships.¹¹⁰ All facts above just show that “gays and lesbians have a long history of being victims of discrimination and wrongful stereotype.”¹¹¹

Judge Walker then issued an injunction against enforcing Proposition 8 and a stay to determine suspension of his ruling pending appeal.¹¹² The

¹⁰³ *Ibid*, p. 26.

¹⁰⁴ *Ibid*, Finding of Fact (FF) No. 19, p. 62

¹⁰⁵ *Ibid*, FF No. 77, p. 103

¹⁰⁶ *Ibid*, FF No. 34, p. 69

¹⁰⁷ *Ibid*, FF No. 51, p. 81

¹⁰⁸ *Ibid*, FF No. 52, p. 80

¹⁰⁹ *Ibid*, p.118.

¹¹⁰ *Ibid*, FF No. 64–68, p. 92-96.

¹¹¹ *Ibid*, FF No. 74-76, p. 98-103.

¹¹² Egelko, Bob; Bulwa, Demian (August 4, 2010). *Judge strikes down ban on same-sex marriage*. San Francisco Chronicle. Retrieved August 4, 2010.

Ninth Circuit Court of Appeals continued the stay, keeping Walker's ruling on hold pending appeal.¹¹³

On December 6, 2012, the Ninth Circuit Court of Appeals started the case to decide whether to uphold Judge Walker's ruling that Proposition 8 is unconstitutional.

On February 7, 2012, in a 2–1 decision, the three-judge panel of the Ninth Circuit Court of Appeals affirmed Walker's decision declaring the Proposition 8 ban on same-sex marriage to be unconstitutional for it violated the Equal Protection Clause.¹¹⁴ Judge Stephen Reinhardt wrote the opinion and was joined by Judge Michael Hawkins. "Proposition 8 served no purpose, and had no effect, other than to lessen the status and human dignity of gays and lesbians in California, and classify their relationships and families as inferior to those of opposite-sex couples."¹¹⁵ Reinhardt wrote. The court found that the people of California, by using their initiative power to target a minority group and withdraw the right to marry which they once possessed under the California State Constitution, violated the federal Constitution. It was discovered that Proposition 8 had no purpose other than to impose the majority's private disapproval of gays, lesbians, and their relationships through the public law, and to take away from them the designation of marriage and its recognized societal status.¹¹⁶ The court declared that it is "implausible to think that denying two men or two women the right to call themselves married could somehow bolster the stability of families headed by one man and one woman."¹¹⁷

Currently, the panel continued a stay on the ruling, barring any marriages from taking place pending further appeals.¹¹⁸ The case of *Perry v. Brown* is likely headed to the U.S. Supreme Court.

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If the case was headed to the U.S. Supreme Court, what legal principles and precedent cases they might use? Here I am going to discuss what I think might be very useful to support the arguments of recognition of same-sex marriage in U.S.

U.S. Supreme Court has recognized right to marry, at least between opposite-sex couples, is a fundamental right for many times.¹¹⁹ The first time that the Court described marriage as a fundamental right in a way that played a role in the outcome of the case was in *Skinner v. Oklahoma*.¹²⁰

¹¹³ Bulwa, Demian; Fagan, Kevin; Gordon, Rachel (August 22, 2010). *Prop. 8: Appeals court puts ruling on hold*. San Francisco Chronicle.

¹¹⁴ *Prop. 8: Gay-marriage ban unconstitutional, court rules*. Los Angeles Times. 2012-02-07. Retrieved 2011-02-07.

¹¹⁵ *Perry v Brown*, p. 5, <<http://www.scribd.com/doc/80680002/10-16696-398-Decision>>

¹¹⁶ *Ibid*, p. 77.

¹¹⁷ *Ibid*, p. 63.

¹¹⁸ *Prop. 8 declared unconstitutional by 9th Circuit Court. Stay prevents same-sex marriages from resuming*. Deseret News.. Retrieved February 8, 2012.

¹¹⁹ *Supra* note 20.

¹²⁰ *Supra* note 52.

Same-sex marriage advocates parallel their right to marry with the earlier struggle to permit interracial marriage. “Like race” arguments are very strong for gay rights, because the state has pervasively and intensely discriminated against gay men, lesbians, and bisexuals for a century, and almost all of the discrimination has been irrational, if not worse.¹²¹ Witnessing the fact that majority in societies now believe the anti-miscegenation laws are unjust and rejecting the right to marry between a white to a person of color is quite ridiculous, it is normal for same-sex couples similarly seek the freedom to choose equally between male and female partners like mix-race couples did. The most famous case for interracial marriage equality is the *Loving v. Virginia*. It is a landmark civil rights case happened in 1967, the United States Supreme Court unanimously declared Virginia's anti-miscegenation statute was unconstitutional and it ended all race-based legal restrictions on marriage in the U.S.

Loving case is a significant case about equal protection and due process in the marriage issue, “to deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law.” Judge Walker also citing *Loving* case to characterize the right to marry “has been historically and remains the right to choose a spouse and, with mutual consent, join together and form a household”. He went on to say that “race and gender restrictions shaped marriage during eras of race and gender inequality, but such restrictions were never part of the historical core of the institution of marriage.”¹²²

The so-called “equal application” argument accepted in many cases permitting bans on same-sex marriage parallels an argument rejected in the U.S. Supreme Court decision in *Loving* case that a race-based ban that applies equally to blacks and whites is not a denial of equal protection because it applies to everyone. According to this, some have argued, a ban on same sex marriage applies to all persons equally, both straight and gay. It is quite strange idea because first of all, theoretically, straight people do not need same-sex marriage. Also to follow this line of argument, however, is to accept that social and legal discrimination is unobjectionable so long as it is equal, rather than to reject discrimination as wrongful in and of itself without significant justification.¹²³ The context of racism, as the Court in *Loving* to its credit found, casts a shadow over the virtue of equality in marriage discrimination, similarly, so too does the context of heterosexual supremacy cast a shadow over the principle of non-discrimination on sexual-orientation by denying the equal marriage right of same-sex couples.

The claimants in *Loving* were not asking that the state leave them alone; instead, they were seeking state recognition of their relationship. The Court concluded that the denial of that recognition, that is, the *failure* of the

¹²¹ William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection?*

¹²² Judgment of *Perry v. Schwarzenegger*, p. 115.

¹²³ *Supra* note 30.

state to act, violated the claimants' fundamental right to marry.¹²⁴ *Loving*, then, not only stands for the equal protection of same-sex couples but also two important propositions that are relevant to a due process argument on behalf of same-sex marriage. First, the liberty protected by the Due Process Clause in the context of marriage goes beyond privacy concerns that are limited to notions of non-interference,¹²⁵ states have the positive obligation to recognize. Second, the failure of states to act can constitute a violation of the fundamental right to marry.

Loving is the first case that U.S. Supreme Court ruled that the state failed to recognize a certain kind of marriage is unconstitutional as violating the equal protection. The second such case I want to discuss here is *Zablocki v. Redhail*. *Zablocki* case involved an equal protection and due process challenge to a Wisconsin statute that prohibited individuals who owed child support from marrying. The law required non-custodial parents to seek a court order before receiving a marriage license. In order to receive such a court order, the non-custodial parent could not be in arrears on his or her child support, and the court had to believe that the child(ren) would not become dependent on the State. The Court in *Zablocki* decided the case on equal protection grounds, focusing on the classification, which was the so-called "individuals who owed child support" group and created by the Wisconsin statute. The Court applied strict scrutiny because the classification burdened the fundamental right to marry.¹²⁶

Justice Marshall examined the justifications - child welfare and counseling non-custodial parents about their obligations. These justifications are defeated because as Marshall explained, Wisconsin could find other ways to achieve the interest without resorting to infringement of a fundamental right, it was not "supported by sufficiently important state interests and is closely tailored to effectuate only those interests". As the facts of this case illustrate, the court thought it would make little sense to recognize a right of privacy with respect to other matters of family life but not with respect to the decision to enter the relationship that is the foundation of the family in our society.

The harm alleged in *Zablocki* case, again, arose from the state's *indifference* toward that relationship. If we review the right to marry, as I argued above, it is not only negative liberty. Therefore, *Zablocki* case told us again that, by not recognizing some kind of marriage without sufficient justification of different treatment is unconstitutional.

Loving and *Zablocki* are cases decided by the Supreme Court primarily based on equal protection considerations rather than on substantive due process grounds. *Turner v. Safley*, therefore, is in many ways the most important Supreme Court case for the purpose of determining whether the Due Process Clause imposes on states obligations to recognize at least some intimate relationships as marital.¹²⁷ *Turner* case involved a

¹²⁴ *Loving*, 388 U.S. at 12.

¹²⁵ *Supra* note 52.

¹²⁶ *Zablocki v. Redhail*, 434 U.S. 374 (1978), at 383.

¹²⁷ *Supra* note 52.

class action suit brought by prisoners living in Missouri correctional facilities who challenged a regulation that prohibited inmates from marrying unless the prison authorities first approved.¹²⁸

The interesting factor of *Turner* case is that prisoners do not really enjoy the “right of privacy” as people with fully freedom. Thus, the government in *Turner* did not argue that there was no fundamental right to marry of them, but instead, it argued that “prisoners, because of their unique circumstances, could not avail themselves of that right.” The court, however, believed that there were some attributes of marriage that even prisoners should have: “expressions of emotional support and public commitment [that] are an important and significant aspect of the marital relationship” and that survive imprisonment.¹²⁹ The Court also pointed out that “many religions recognize marriage as having spiritual significance”¹³⁰ and that as a result “for some inmates and their spouses,... the commitment of marriage may be an exercise of religious faith as well as an expression of personal dedication.”¹³¹

Although the Court, prior to *Turner*, had explained that the right to marry was part of a broader fundamental right to privacy,¹³² it is important to note that *Turner* by necessity delinks marriage from privacy.¹³³ If prisoners do not enjoy constitutionally protected rights to privacy, then their liberty interests in marriage must flow from considerations other than privacy. No one’s liberty interests in marriage can be denied even though one is a prisoner. *Turner* is the case that most clearly supports the proposition that the state has a due process obligation to recognize at least some relationships as marital independently of equal protection considerations that go to the issue of whether the state, once it recognizes some relationships as marital, has an equality-based obligation to recognize others in the same way.¹³⁴ If prisoners, who are unable to fully enjoy the right of privacy of marriage life, cannot be denied the right to marry, one cannot wonder why states can deny same-sex marriage then?

The last case is not related to right to marry, but to non-discrimination on sexual orientation. Supreme Court in *Lawrence v. Texas* reversed *Bowers v. Hardwick* with a 6-3 decision striking down the sodomy law in Texas and, by extension, invalidated sodomy laws in thirteen other states, making same-sex sexual activity legal in every U.S. state and territory. The Courts emphasized that one’s fundamental rights cannot be taken away unless the state has a very fundamental strong compelling reason to do so and it should act with surgical precision so that it takes no more than the compelling reason justifies.

Lawrence case opinion provides advocates of same-sex marriage arguments in at least two ways. First, the Court in *Lawrence* interpreted the

¹²⁸ *Turner v. Safley* - 482 U.S. 78 (1987), at 81-82.

¹²⁹ *Ibid*, at 95-96.

¹³⁰ *Ibid*, at 96.

¹³¹ *Ibid*, at 96.

¹³² See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

¹³³ *Supra* note 52.

¹³⁴ *Ibid*.

liberty interests protected by the Due Process Clause in an expansive way.¹³⁵ It is not only related to the privacy at home and what type of private sexual conduct to engage in, but also related to the personal relationships that often accompany with sexual intimacy. The Court addressed the interests of lesbians and gay men in personal relationships, and in having their dignity and lives respected by states, should prove quite helpful to same-sex marriage proponents. Second, the Court held that majoritarian morality is an insufficient ground upon which to justify the state's regulation of sexual conduct and the relationships that arise from it, rendering suspect the argument that the ban on same-sex marriage can be justified solely on the basis of majoritarian morality.

The Massachusetts Supreme Judicial Court memorably held that there was not a rational basis for state exclusion of gay couples from civil marriage; however, most judges do not believe that opposition to marriage equality is completely irrational.¹³⁶ The California Supreme Court also applied strict scrutiny on case against Proposition 8, because exclusion of gay couples from the institution of marriage violated those couples' fundamental "right to marry," but this, too, remains the minority position.¹³⁷

To divide the class of married individuals into those with spouses of the same-sex and those with spouses of the opposite-sex is to create a distinction without meaning. 'There is no reason to believe that the disadvantaged class is different, in relevant respects'.¹³⁸ According to cases of U.S. Supreme Court, irrational prejudice plainly never constitutes a legitimate government interest, and discriminatory treatment based on it violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution.¹³⁹ No one knows when the U.S. Supreme Court would recognize the same-sex marriage as a fundamental right, but based on those precedent cases, as well as the fact that more voice are supporting for same-sex marriage, I tend to believe it will not be too long.

4.2 Legislation of Same-sex Marriage – One Aspect of the Conflict behind Ideal and Reality of Human Rights

4.2.1 The Dilemma of Courts

If we study the cases of European Court of Human Rights and U.S. courts, we might get an impression that, from the rational legal theory, there IS a right to marry for same-sex marriage. However, in reality, such right is hindered by European Court under the name of "European consensus", and denied by ballot in U.S. One cannot wonder is the courts reliably able to identify emerging recognitions of a controversial right? Should a controversial right be vindicated democratically or judicially?

¹³⁵ *Supra* note 52.

¹³⁶ *Supra* note 121.

¹³⁷ *Ibid.*

¹³⁸ *Romer v. Evans*

¹³⁹ Federal Court Rules DOMA Sec. 3 Violates Equal Protection, <<http://metroweekly.com/poliglot/2010/07/federal-court-rules-doma-viola.html>>

If we consider the attitude courts have when confronting a controversial right which has not accepted by majority of the society. We can always sense the smell of “hesitation”.

Sometimes the attitude of courts is the same as the majority of society, because Judges tend to not go against strong social opinions. As Alexander Bickel emphasized, the point is highly relevant to constitutional law, especially in the area of social reform.¹⁴⁰ Constitutional rights are generally not fully enforced because of the natural weakness of judicial institutions. For examples, the courts cannot easily investigate issues, they are not elected by people, they are not as legitimate as a parliament when they go beyond merely interpreting the law, and they are not likely to be effective in starting social reforms. It is well explained in the case of *Boutilier v. Immigration and Naturalization Service*(1967), six of nine justices ruled that "homosexuals" could be excluded and deported from the country under the "psychopathic personality" provisions of the 1952 Immigration and Nationality Act. As *Boutilier* suggests, the U.S. Supreme Court was hostile to gay people so long as they really were political pariahs and demons all over America.¹⁴¹ While most of time, the attitude of courts go a little bit further when the attitude of the society starts to change. *Romer v. Evans* - decided by a much more “conservative” bunch of Justices than those who voted in *Boutilier* or even those who voted in *Bowers v. Hardwick*¹⁴² - afforded gay people some assurance of equal protection but only after public opinion had decisively turned away from utter intolerance and toward a more tolerant, albeit not accepting, view of gay people.¹⁴³

Nevertheless, when courts go too far, it may cause problems. *Baehr v. Miike* (originally *Baehr v. Lewin*) was a case decided by the Supreme Court of Hawaii, which found the state's refusal to grant same-sex couples marriage licenses discriminatory and unconstitutional. What happened in Hawaii after the judgment was similar to what happened in California: voters in 1998 approved a constitutional amendment granting the Hawaii State Legislature the power to reserve marriage to opposite-sex couples, which it later did by passing a law that banned same-sex marriage.¹⁴⁴

When a constitutional court goes too far ahead of public opinion on a controversial right issue, it risks a tremendous popular backlash. If such a backlash occurs, it threatens not only to undo the court’s constitutional ruling, but also to undermine the independence of the court itself.¹⁴⁵ Just like what happened in Hawaii and Proposition 8, what after the temporary victory of courts is the constitutional ballot that explicitly denying same-sex marriage. Some may disagree, and use the example of South Africa to argue that the court can lead the way to recognize same-sex marriage. What we

¹⁴⁰ Alexander M. Bickel, *The Least Dangerous Branch* 64-68 (1962); Harry V. Jaffa *Crisis of A House Divided* (1959).p. 68

¹⁴¹ *Supra* note 121.

¹⁴² 470 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁴³ *Supra* note 121

¹⁴⁴ Niese, Mark (2009-02-22). *Hawaii is latest civil unions battleground*. Associated Press (Google News). Archived from the original on 2009-03-01. Retrieved 2009-03-01.

¹⁴⁵ *Supra* note 121.

cannot ignore is the background of South Africa, after emerging from the repressive apartheid regime, they adopted one of the world's most progressive constitutions which including an express prohibition of discrimination on the basis of sexual orientation.¹⁴⁶ Also, before the court suspended its order for one year in order to give parliament time to amend the marriage law to make it gender-neutral, they already initially granting same-sex couples a range of civil rights in different areas. It just proves the observation that, we cannot ignore the social background when we discuss courts' intervention of controversial right issue.

It is also implied in Canadian's history of recognition of same-sex marriage. The courts would be unwilling to change the definition of marriage in the common law unless they are convinced that the society has progressed sufficiently to accept a new definition of marriage.¹⁴⁷ As Justice Scalia ended his dissent opinion with the complaint that the Court's intervention in the so-called "culture wars" reflected raw class bias: the elite legal profession's adherence to gay rights, in contrast to the "plebeian" attitudes of elected legislators who have declined to provide broad equality rights to this excessively powerful minority.¹⁴⁸ His words may be quite aggressive, but one can still feel the conflict behind it.

We can also see the step-by-step trends of legislation of same-sex marriage in those countries where it is already legal. First, same-sex marriage legislation often evolves from form of partnership registration. Secondly, legislation on non-discrimination on sexual orientation is always before the legislation on same-sex marriage. Thirdly, in jurisdictions where there is regional legislative capacity, relationship recognition occurs sporadically before it becomes uniform.¹⁴⁹

The dilemma of courts, however, is not good news to human rights. When we talk about human rights, there is a simple basic premise underlies most of the basic items on the menu of modern rights, which is all human beings are or ought to be absolutely equal in public policy and law.¹⁵⁰ Every individual should count the same as every other individual, no matter one's gender, race, religion, etc. As Jack Donnelly perfectly concluded that human rights are "the rights that one has simply as a human being. As such human rights are equal rights, because we are all equally human beings." And these rights are "inalienable," because, whatever we do, and whatever is done to us, "we cannot become other than human beings."¹⁵¹ In general, a "right to equality" is now "regarded as an essential feature of both national law and international human rights instruments."¹⁵² Yet, in most countries, right to

¹⁴⁶ Jamie Gardiner, *Same-Sex Marriage: A Worldwide Trend?*

¹⁴⁷ Christine Davies, *Canadian Same-sex Marriage Litigation: Individual Rights, Community Strategy.*

¹⁴⁸ *Supra* note 121.

¹⁴⁹ *Supra* note 146.

¹⁵⁰ Lawrence M. Friedman, *The Human Rights Culture: A Study in History and Context*, available at <<http://pdf-ebooks.net/sample/61686/the-human-rights-culture-a-study-in-history-and-context>>

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

marry of same-sex couples is denied “legally” and their equal right is not respected due to their sexual orientation.

4.2.2 Two-level Conflict behind Same-sex Marriage Recognition

One may wonder why in reality equality based on individualism is miles away from theory. It is because in the real world there are majorities and minorities, in race, religion, sexual orientation, and so on. So here comes the problem: human rights in the Donnelly sense do not depend on majority status; they are not supposed to depend on majority status.¹⁵³ Majorities and minorities should be equal in every aspect. Because human rights are based common humanity, the basic idea that one is a human being.

So where is wrong? Why there is a conflict between the reality and idealism of human rights, especially in the same-sex marriage?

In my opinion, the conflict behind the same-sex marriage is exactly the conflict between the majority and minority. That is, it is caused during the process when the universal abstract¹⁵⁴ human rights are realized into specific legal rights legislation, which in most of cases, are decided by the majority and reflect the social attitudes of the majority, who have traditionally failed to recognize the rights of minorities without significant social and political activism.

If we analyze the conflict in more detailed by looking for solutions to it, it can be divided into two levels. The first level is the conflict between human rights and legal rights, which are two different kinds of rights with different sometimes even contradictory characters. The second level is the conflict between majority legislation and minority right recognition, which actually is a political contestation.

The universal human rights idea is based on the philosophy of individualism, which is absolutely equal on everyone and cannot be deprived by anyone, as I have mentioned for many times. However, it is such an abstract idea that in order to realize those rights, they have to be taken into the form of legal rights, which are written in national laws and protected by governments. If human rights related legal rights are consistent with abstract human rights, then there will be no conflicts at all, but it is not in reality. The problems many human rights advocates confronting is that they find when abstract human rights are interpreted into specific legal rights, it is always closely related to one’s morality, religions or cultural background. Cultural relativity, naturally, is the most common problem in this level; sometimes the relations between them are quite unfriendly. Thus, we should notice the fact that from time to time there is lack of complementarity between the human rights and legal rights due to the process of interpretation.

The solution of the first level problem is not really hard to solve, courts usually do the job to eliminate the different interpretation, especially

¹⁵³ *Ibid.*

¹⁵⁴ By “abstract” I mean, “right to marry” is clearly a human right, but as to specific content such as how old one can marry, and whether marriage between cousins is allowed etc, is not really clarified by “right to marry” itself.

courts of international or regional level. Same-sex marriage, for example, by ruling Proposition 8 unconstitutional, U.S. courts interpreted the right to marry including same-sex marriage; and European Court of Human Rights, in another way, by saying opposite-marriage is not the only form of marriage “under all circumstances”, ambiguously interpreted the possibility of same-sex couples’ right to marry.

Still, one may ask why same-sex marriage is still not a right recognized by most countries. I think, the problem of level two is more complicated and even harder to conquer, and it is the area where courts cannot really do much.

The problem is derived from the political aspect of legal rights. There is a discussion whether human rights come out of politics or it belongs at a deeper, truer level that outside politics, like Immanuel Kant said “there is nothing more sacred in the wide world than the rights of others. They are inviolable.” If let me answer that question, it does not matter at all. Because no matter where human rights derive from, the character of universal will not change, which means, human rights are politically free, no matter what kind of political system a country has, human rights of citizens in that countries are just the same as citizens of other countries. However, the way of realization of human rights, which in the form of legal rights, are quite politically relevant. That is why in different countries, people have different content of “human rights”.

The most common misunderstanding of human rights, in my opinion, is people tend to confuse and mix abstract human rights with specific legal rights. They are not exactly the same things, but they are connected – the politically free human rights are the foundation of politically relevant legal rights. When people fight for their human rights, they are actually fighting for their legal rights which are inherited from human rights. It is in this sense, human rights are expressed THROUGH politics, but that is not to say that politics decides human rights.

Then, one may wonder, whether democratic referendums that vote against human rights should be allowed? I think, referendum is merely a neutral method that used in the democratic system. By neutral I mean, there are referendum vote for human rights as well, so it is quite questionable to decide whether a referendum should be allowed based on the outcome. One does not have the right to deny another one’s human right also means one does not have the right to entitle another one’s human right, because human rights, are not decided or denied by anyone. In this sense, the role of a referendum, I think, is not for any human right, but rather, as I tried to explain, for the relevant legal right, thus the political element of referendum is inevitable. It is a quite frustrating fact to admit that, the majority just have the power to outvote minority rights.

Thus, if we go back to the same-sex marriage issue, human rights advocates find what they are facing is the power of majority. Thought it is no doubt that right to marry of same-sex couples IS a human right, in order to realize it, unfortunately, they have to overcome the disagreement of majority. It is because in modern political theory of democracy, though all

citizens are equal, political decisions is usually taken by the majority. Thus, minorities could be citizens who had been simply outvoted. Though governments have a duty to respect the human rights of every individual, democracy, however, emphasized the sovereignty of 'the people', which usually takes priority over minority interests by majority will. The democratic way of realizing human rights has a big contradiction there, since human rights are not supposed to depend on majority status, because "popular opinion on the subject is no doubt incoherent, variable, and at times illogical".¹⁵⁵

Then we might see the real conflict behind the ideal and reality of human rights: the ideal of human rights is thinking it is a legal problem, while the reality of human rights is - it is actually a political and cultural problem. Knowing what human rights are is a legal philosophical thing, claiming them is a political thing, and only after the first two stages have been resolved, that the law will follow.

4.2.3 Taking the Principle of Human Rights for Granted while Fighting for Its Full Realization

The conflicts behind human rights might makes some people start to doubt the whole idea of human rights. One might believe concepts of "human rights" are culturally and historically contingent and they are not the product of pure reason, nor are they something handed down from time immemorial; they are not the inevitable result of some facet of basic human nature.¹⁵⁶ IT IS WRONG, the veil of conflicts behind human rights may confuse people. The truth is the range and content of human rights is changing and expanded all the time, while the spirit of human rights has never been changed, it is what people born to have and cannot be denied no matter what.

Anyone who is unable to participate practically in actually and effectively determining the political good for society had only partially achieved the development of one's own virtue and freedom. If we are good moral and political beings, we should do our level best to "realize" human rights.¹⁵⁷ We should take human rights discourse, as it were, "off the shelf" and use it as a moral guide and template for political practice – in the words of the Samantha Power - an "inspiration" for "impact."¹⁵⁸ One must attend to the means for achieving human virtues as the preconditions for achieving human rights.¹⁵⁹ In practical terms, this must involve contestation – we fight for our own human rights, not just protection – wait for the governments to take care of our human rights. The idea that by highlighting the rights or virtues of individuals in words while practically defaults to the power of authority or majority is never the real way to realize human rights.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.* <<http://www.smashwords.com/extreader/read/61686/9/the-human-rights-culture-a-study-in-history-and-context>>

¹⁵⁷ John R. Wallach, *Constitutive Paradoxes of Human Rights: An Interpretation in History and Political Theory*.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

It is not about some bureaucratic elite deciding what are and what are not your human rights, it is about an open ended political process where a person can have one's input into the process.

“All this requires us to talk, to persuade, to argue, to fight the political fight, and not to rely on judicial guardians to protect us from the crows. That is exactly as it should be: what defenders of human rights need to do is sell it to the general public, not rely on judges to impose silence in the name of a truth that falsely claims to be above politics.”¹⁶⁰ Thus, I think, the best solution of the conflict is social campaigns, they and slightly radical courts judgments affect each other to change the social attitude, aim to change the legislation at last. So is to the same-sex marriage.

¹⁶⁰Conor Gearty, *Can Human Rights Survive?* (Cambridge University Press, 2006), p.98.

Conclusion: Achieving Same-sex Marriage through Political and Social Processes

The history of human rights theory, in my opinion, is how the human rights started as elite legal philosophical theory and developed now as common sense that every individual takes it for granted. The reason of the change is it is currently believed the best legal and political protection for every single human being, and the motivation of the change is the developing social attitude and idea. Human rights need to be translated into precise and carefully constructed positive national legal rights. The process is the means through which the human rights aspiration is made into real practical applications. However, one can never ignore the fact that legal rights are always affected by politics, thus, effective democratic debate and social campaign can always change the trend of the process. If someone ever doubts one as a human being has the freedom and liberty now, he or she might be regarded as absurd. However, when one is asked in more detailed question as to what extent is it legal for a government to spy on citizen's phone call and email, it might be hard to get an coherent answer, as everyone has his or her own idea of what human rights should be interpreted as into legal rights.

A human right, including right to marry, has to be grand but a little bit vague idea in order to be broad and universal on the international level. However, a vague human right, is hard to be practiced in national level, one has to lose some theoretically way of generality in order to be more accurate in reality since one has to take more detailed situation into consideration. It is no doubt that more and more content will be included into the human rights theory, in the form of more and more specific legal rights are calling for supported by national legislation, and when majority of the countries recognized a civil legal right, it then will be recognized as a human right in a more accurate way in international documents. Behind the whole circle of human rights and legal rights, is movement of the social change. Just like one cannot forget the attribution of feminism to the gender equality, the social campaign of sexual orientation equality is also taking the responsibility of struggling for equality right for sexual minority.

The mutual impact between judicial ruling and social campaign is the key element. Social attitude is changing as the social campaign ongoing, the fact that courts encourage and support the new social attitude heat the social debate, and finally, when the majority of society agree on the controversial right, "the victory is confirmed by its re-emergence in the form of a set of constitutional or basic rights to which all laws and political activity must defer".¹⁶¹

The marital institution was originally a means of licensing both sexual activities and child-rearing; and it no longer has that role. The current situation is people have a fundamental right to have intimate and sexual relationships outside of marriage, and people become parents, including adoptive parents, without the benefit of the marital form. The change of law

¹⁶¹ *Ibid*, p.71.

is outcome of change social change. It is not the law created the form “registered partnership or civil unions”, but rather, they are already practiced in society, and it is because the marriage idea has been started to change. It is the same to same-sex marriage, same-sex relationship is not a new thing that only exists for couple decades of years, but same-sex marriage is. Why? I believe it is because of awareness of the equality of sexual minority.

If we study the social movement of those countries that already legalized same-sex marriage, we may thus understand that why “lesbian and gay activists have over many years played an important role in securing same-sex marriage legislation”. Political element cannot be ignored as well since “left-wing or centre-left governments have also been a major factor in achieving same-sex marriage, while rightwing governments and religious opposition have delayed or prevented progress.”¹⁶²

As in a practical way, “in the same-sex marriage litigation, the Charter rights argument was most effective when it made liberal use of the stories of LGBT people, in particular their desires to marry and the effects of being denied expression of those desires.” I think it is because compared to abstract theoretical argument; a personal suffering story can trigger the sympathy of rest of people.¹⁶³

Waldijk's concluding advice for national activists is also very useful:

1. Think of the legal recognition of homosexuality as a number of parallel developments in more than ten different fields.
2. Think of the developments in each field as a series of many small steps
3. Look at the experiences in other countries to find out what these steps normally are, and what their standard sequence is.
4. Look at the experiences in other foreign countries to find out where, at this moment of time, political pressure for legal reform can be most effectively applied.
5. Do not try too hard to make your legal system jump; be content with it only taking steps. But do keep the system walking.¹⁶⁴

In the process of recognition same-sex marriage, what we need is more social campaign, more communication and more tolerance. The change of legalization depends a lot on the social attitude of equality, liberty and diversity. Courts are usually restricted before there is a majority acceptance of same-sex marriage, but they can help to start a democratic debate in societies and accelerate the legislation on non-discrimination and same-sex marriage together with social activists.

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¹⁶² *Supra* note 146.

¹⁶³ *Supra* note 147.

¹⁶⁴ Kees Waldijk, *Standard Sequences in the Legal Recognition of Homosexuality: Europe's Past, Present, and Future*, Australasian Gay and Lesbian Law Journal 4, no 4 1994: 50-72, p. 68.

Same-sex marriage, just like opposite-sex marriage, is a part of right to marry thus should be regarded as a human right. as a human right, it is inherent and inalienable, and it should applies to everybody, everywhere, more important, no government should be able to impair these rights, and no law can violate them legitimately. Unfortunately, it is not the reality of the most of the world, thus one cannot wonder why there is such a gap between the ideal and realistic human rights.

By separating the universal abstract human rights with national specific human-right-content legal rights, one might find the answer. It is not because there is any inherent weakness of human rights theory, but rather it is because of the process when people are implementation human rights, first in the interpretation stage when cultural relativism is involved and second in the legislation stage when political power is intervening. The best solution of the problems, as I think, is the human rights movements – social attitude can be changed by social campaign. Human rights movements always happen when there is a genuinely popular and powerful, human rights consciousness, and it also depends on a culture that is strongly individualistic and meanwhile, reinforces the very spirit of individualism. When law and society come closer to the idealism of human rights, it is because of changes in society, and the massive power of political, cultural and social developments, rather than the influence of the legal documents themselves. When majority of a society start to realize the existence of a human right, it then will move toward legalization of that right.

Same-sex marriage is a human right, yet not a legal right which is recognized by most of countries, but it will. As the very ending of the thesis, I call for everyone whoever read it, please support the same-sex marriage, it is not only for same-sex couples, but for all human beings.

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