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## The Purpose of Marriage



**T**wo or three days ago, the constitutional court of Thailand has ruled that it is not legally wrong for the law of the country which does not allow the same-sex marriage. The essence of the reason given by the court is that marriage is a natural institution that has the purpose in creating a thing which is called the family, and the family is composed of father, mother, and children. In the view of the court, the law of the country has the mission to support the thing which follows natural law. The reason why the law has stated that the person to be allowed to have the valid marriage must be the normal person who can play the role as

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part of natural process in the making of the family is so clear. Two men who need to marry or two women who need to marry do not have this property. In terms of natural law, these persons are trying to do something which is against natural law. No one can act against natural law. This is the truth. The human law in the view of the court has to follow the law of nature, and this is the reason why: (1) Even though the constitution of the country states that every person shares the same right and freedom and the law of the country must support this principle, (2) the current law of the country does not allow the same-sex marriage and this seems to be a thing which is against that principle of the shared right and freedom as said, (3) actually, this law is not against the general principle of the constitution because there is a hidden principle which is an essential part of the constitution saying deeply that the human law must follow the natural law. The protection of right and freedom by the human law must not be against the law of nature.

### *1. What is not allowed by law does not mean that you cannot do it*

I think the first point that we should start with is the very simple thing that people can understand with their common sense. We know that what is the function of the law in the human life. The law is basically needed if we need to

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live together in a thing which is called in political philosophy the political society. In the distant past when people lived in the forest, there was no law to protect people. Inside that kind of the community, anything could happen. Some man needs your daughter. He comes to your house and takes your daughter. You cannot do anything because this man has more power than you. This is an example of a thing which is called in the political philosophy the non-political community. We know that in our country at the present, there is some man who has the power more than us. But he cannot come to our house and take our daughter. The difference between the political and non-political community lies in that there is the law to protect people in the political community, and there is no such a thing in the non-political community.

The law in the political community has its foundation and history. In terms of the philosophy of law, there are two different theories of law. The first one is called the *naturalist law theory* and the second one is called the *positivist law theory*. One of the main differences between these two theories lies in that there is the influence of religion in the naturalist theory and this thing has not been found in the positivist law theory. The view that there is a kind of law which is called natural law (or the law of God) and the human law (the law created by human beings to be used in the political community) has to follow natural law comes from the natural law theory. Different communities in the world have different

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religious beliefs. So, the naturalist law theory in different countries can be different, and this depends on the fact that what is the religion adopted mainly in that country. In some naturalist theory, anything which is against the teachings of religion as given in the religious texts cannot be legal. But in some naturalist theory, something which is against the teaching of religion cannot be allowed by the human law, but something can be allowed. In England, there used to be a human law which states that homosexuality is against the law of God and for that reason those who have sex with person of the same sex has to be punished by the law of the country. But later this law has been abolished. When the gay and the lesbian people have the relationship with the same-sex people, the law of England now does not punish them. This is an example of a thing which is allowed by the law and this thing used to be prohibited by the law of the country.

One day the gay and the lesbian people come to the court and say that they need the law of the country to allow them to have a kind of marriage which is called the legal marriage, the problem suddenly arises and the court has to think how to deal with this request. In the USA, the court used to rule that the law of the state cannot give them the legal marriage for the following reasons.

(1) Even though the law of the country does not give them the legal marriage (as found in normal married people) this does not mean that two men who love each other or two

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women who love each other cannot live together as the married persons. This is the *personal* marriage that can happen and the law of the country has nothing to do with this kind of thing.

(2) To allow the same-sex marriage is the serious thing and the court needs to seriously consider this matter because the judgment of the court will turn this thing from personal matter to be the *social* matter. Anything which is legal according to the law of the country means that the whole society has to be responsible for it.

(3) The court thinks that the human law is limited in the sense that it is created by human beings which are the limited thing in terms of wisdom. But this problem can be reduced by something which is greater than human beings. In religious teaching (they mean Christianity) it is the purpose of God to create man and woman to live together and have the children. We call this thing the family. The family is the sacred thing in the sense that it has been designed by God. In the view of the court, the human law has to support the thing which is good in the eyes of God. On the contrary, the human law also has the mission to act against anything which does not follow the goodness given by God. And for this reason, the law of the USA cannot give the gay and the lesbian people the legal marriage. The essence of the thing done by the USA court (at that time) is that something can be practiced by people in the country personally and the law has

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nothing to do with this kind of thing. The gay and the lesbian people can live together as the lovers. And the law of the state would consider this as personal freedom. But the law cannot support this thing in terms of the law because doing that means the whole society agrees with this thing.

### *2. Morality and law in the view of positivist law school*

We know that there are some countries in the world where the law of the country supports same-sex marriage. And I think the philosophical ideas that make this thing happen in these countries comes from the passivist law theory. In short, the positivist says that the law should be understood as a kind of the tool created by human beings for having the well-being in their life and there is nothing more than this. In the history of the world, we always see that the change of the history does not depend on rationality alone. The reason why positivism wins naturalism in these countries may not be that positivism gives more convincing arguments than naturalism. This can be explained like the case of the change of scientific knowledge. Thomas Kuhn says that at one time in the same community, the scientific theory A has been widely adopted among the scientists, but later the scientific theory B has become the new widely accepted theory. This change has nothing to do with rationality as many people in the world would imagine. People usually think that

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scientists are the rational persons, and this means that if there is a change in science that must come from the simple fact that the new one must be more reasonable than the former one. Kuhn says in his books that majorly scientific change that happens in the history of science comes from the simple fact that at some time in the same community, there are two groups of scientists who adopt the different theories. The first is the old group which supports the old theory, and the second is the new group which supports the new theory. The victory of the new theory naturally happens according to the law of impermanence as given by the Buddha (this statement is given by me, not Kuhn.) One day, old scientists who support the old theory are all dead. When they die, the old theory also dies. And the theory which is left to exist in the community will be the new one. Kuhn says that one day the new theory will become the old one and face the same destiny like every old theory in the past.

The new generation in the West is born inside the society where political liberalism has been adopted as the new idea. When conservative people die, conservatism also dies. Legal positivism shares some main ideas with liberalism such as the law needs to support the shared values in the human life like freedom of the person. In case of Thailand, I think we can imagine that one day in the future, the thing that used to happen in the West will happen in our country. But this kind of change of the history is not a thing that I like.

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However, I fully accept that the history of the world has to follow this simple path, as the Buddha states all the time to his disciples. When I was a young teacher, there were a lot of the old professors who did not like my thought. And I know that it is not possible for me to change the mind of these old professors. But now these old professors have totally passed away (died.) It seems that my thought is more acceptable in the view of my students. This is the natural victory that happens silently along the history of human beings. Exactly, I do not like this kind of victory. *I am not a positivist. I am a naturalist.* So, the thing that I will do in this paper is to argue against the view of traditional naturalist thinkers concerning the subject of same-sex marriage. I fully know there is an easy way. *We just wait for the old things to die.* But I will not choose this way. I need to show that we can exchange the reasons and the arguments and I strongly believe that the more convincing arguments should win. This is the most beautiful victory in my perspective.

### *3. Buddhist-inspired naturalism*

I think that there can be many kinds of legal naturalism. Around twenty years ago (while I worked at the philosophy department of Chulalongkorn University) I had undertaken a research project concerning the relation between morality and law in the view of Buddhism. In the research,

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there are at least two things that I have done. First, I have explored positivism and naturalism on the relationship between morality and law. Second, I have stated that the Buddhist doctrines as given by the Buddha in the *Tipitaka* (I mean the Pali version used by Theravada Buddhism in Thailand, Myanmar, and Sri Lanka) can be interpreted to be the foundation of a thing that I call the Buddhist philosophy of law. Among the conclusions of the research, I have presented a Buddhist theory concerning the relation between the law and morality. This theory has been claimed by me to belong to naturalist school of law and I think that we can call it a *Buddhist-inspired natural law theory*. This theory consists of two principles. The first principle is called by me the *harm principle*. This principle states that Buddhism does not think that a thing which does not follow Buddhist teachings has to be prohibited by the law of the state. There is only one thing that the law has the ground to prohibit. That thing is if the action of the person in the community harms other person, the state can set up the law to punish people who have done this kind of thing. You can never kill other. The law must punish those who kill other. Note that the Buddhist harm principle that I have presented in the research shares the similar meaning with the harm principle given by John Sturt Mill. I have argued that in the Buddhist five precepts the things which are prohibited are totally concerned with the harm to others. And I have noted in the text of the research

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that in the place where the Buddha has to give the five precepts as the social morality, he does not put the precept concerning the consumption of alcoholic substances as part of social morality. I have explained that the consumption of alcoholic substances is personal matter. The five precepts given by the Buddha both as personal and social morality. Whenever the five precepts are understood by the Buddha to play the role as a personal morality, the Buddha will give it in the fullest aspect. But whenever the Buddha understands that the five precepts being to be given by him would play the role as the morality for the whole community, the Buddha will not put the last one as part of the whole. That is, in the view of the Buddha, you can never kill other, steal other's property, have sexual relationship with the wife or the husband of other, and lie to other person in such a way that they would be cheated by you. Why you can never do these things? The answer is so simple. Because these things harm other persons. You do not have freedom to harm other persons. But you can drink wine because it is your personal freedom and this thing does not harm anyone in the community. But the thing that we should understand is that what we have considered above is the Buddhist morality given by the Buddha to be the ground of Buddhist community. In Buddhist countries around the world, alcoholic substances can be sold. But this thing cannot be found in the Muslim country. The difference between Buddhism and Islam lies in that Bud-

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dhism distinguishes between personal and social freedom. When a Buddhist requests the Buddha for something that would play the role as their personal morality, the Buddha would say that to have a good life you should avoid the consumption of alcoholic substances. Buddhism (as given by the Buddha himself) clearly distinguishes between personal goodness and the goodness that would play the role as the minimal ground of the peacefulness of the community.

Note that the thing required in social morality of the Buddha is lower than the thing required in personal morality. It might be questioned that a Buddhist should consume pornography or not. If we are talking about personal morality, the answer given by the Buddha would be that it depends on you. But in terms of social morality, if there is a kind of pornography which is harmless in the sense that everyone involved in the making of pornography is happy and gets the reasonable share of money, there is no reason to prohibit this kind of pornography. This is the principle of harm that I have given in the research.

The Buddhist harm principle is based on some assumptions. That is, if the principle has been utilized under these assumptions, it is valid. The first assumption is that it applies to an adult person. The Buddha gives the clear criterion in the texts that the person of age twenty or over has been considered by Buddhism to be an adult person. This kind of person can request ordination from the community

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of Buddhist monks without the permission of parents. The consumption of alcoholic substances and harmless pornography is assumed to be valid with the adult persons in the community. Another assumption is that Buddhism treats people in the world as a free being that has their own thought and freedom to choose. Even the personal goodness given by the Buddha to people has been given by the Buddha as personal consideration. Buddhist goodness is not the command of anything, including God. In the view of Buddhadasa, the Buddha teaches the Dhamma as something that plays the role like God in theistic religion. But the Buddha never says that you must obey the Dhamma without conditions. Man has freedom to consider things in the universe including the Dhamma and chooses the best thing in their perspective. It could be possible for some Buddhist to think that killing is against the Dhamma. The Buddha never says that. And I understand the Buddha. Why we should not kill a man who comes to our home to rape our daughter, and there is nothing to protect us such as law and the police (imagine the story happens in the faraway village somewhere in the world around two thousand years ago.) Personal freedom and judgement play the important role in Buddhist ethics.

However, personal freedom in the life of a person is not absolute in the sense that in some cases the use of personal freedom of a person has to be subject to the rule of the community if we can prove that such a personal freedom will

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critically harm the person themselves. This is the second principle that I have given under the name the *critical principle*. Combining these two principles together the result would be as follows.

(1) A person enjoys personal freedom to do things that Buddhism possibly teaches that they are not good things as far as the action of the person as said does not harm other person in the community.

(2) However, a person will not be allowed by the law of the state to have the freedom to harm themselves at the critical level. A person has freedom to harm themselves if such a harm does not go to the critical level. The consumption of the bad things according to Buddhism such as alcoholic substances or harmless pornography is the thing that the law of the state has to allow. That is, a person enjoys freedom to be immoral person to some extent, that can be explained with reason. But a person has no personal freedom to act or be immoral person that the community can prove that this is the thing that would destroy your life critically. A person cannot be allowed to use some kind of drug that has the extremely bad effect to the health of the person. This is concerned with the critical harm in terms of physicality. There can be some kind of the self-harm which is not physical. The law cannot allow the person to be the slave of other people in the community. Even though a person would say that I am willing to sell my life to be the slave of the rich person for the

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reason that they will get some pleasure from treating me as a slave, this can never be allowed by the law of the state. This kind of personal freedom cannot be permitted according to the critical principle.

### *4. Same-sex marriage and Buddhist naturalism*

Applying the two principles that we have considered above to the case of same-sex marriage, the following are the things that we have to consider and seriously discuss.

(a) Two men or two women who need to marry each other like a man and a woman. What's wrong with them. According to the court in some Western countries in the past, the wrong thing is that God has commanded that a man and a woman alone can marry each other. A man cannot marry a man. And a woman cannot marry a woman. And there is some textual evidence in religious texts used in these countries (the *Bible*) which shows that God has decided to destroy the cities of the people who have sexual relationship with the persons of the same sex. This means that the sexual relationship among the gay and lesbian people is the evil, and for this reason the law of the state cannot allow them to marry like normal people.

Buddhism is not a theistic religion. The best way to look at Buddhism is to consider it as a kind of religion which David Hume calls *natural religion*. Natural religion is a reli-

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gion which states that the whole universe should be understood as a natural thing and there is no central being (which is one single powerful being like God) that plays the role as the master of things in the universe. In the view of the Buddha, there is no such a thing that we can say this is the highest master of things in the universe. Everything that we have seen in the world happens and behaves as we have seen as the result of the complicated evolution of natural things in the universe. The point from Buddhist naturalism is that there is nothing in the universe that we can say this is the *unnatural* being. According to Christianity, the gay and the lesbian people are the unnatural persons, and for this reason, the law of the state cannot allow them to have the legal marriage like the natural persons. The critique from Buddhism is:

(1) If God is the master of things in the universe, this means that the gay and the lesbian people are those who have been created by God.

(2) The person should not be held responsible for the thing that they do not choose by themselves. The gay and the lesbian people are born to be like that without their choice. If there must be some person to be responsible for the happening of the gay and the lesbian people in this world, that must be God because God is the creator of these persons. In the view of Buddhism, this kind of principle (on the one hand they say that God is the creator of all things including the gay

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and the lesbian people, but on the other hand they say that the gay and the lesbian people are the evil) is totally self-contradictory.

(b) In the view of Buddhism, the happening of the gay and the lesbian people (we use these words to refer to every kind of sex and gender which is different from the sex and gender majorly found in the world) should be best understood as the result of natural evolution. Naturalism believes that every aspect of natural things must have some certain positive function to natural world as a whole, and this is why there are the varieties of things rather than the limited things in the universe. Looking from this perspective, the gay and the lesbian people are counted by Buddhism as a kind of normal people in the world. *Anything that has the existence in the universe, in the view of Buddhism, is natural in the sense that its existence has been approved by the law of nature.* I have argued in my research concerning the cloning of human beings in Buddhist perspective that the cloned person has been considered by Buddhism as a kind of natural product. The happening of the cloned man, animals, and plants has been allowed by a law of nature which is called in Buddhist texts the *bija-niyama*. In the same way, the gay and the lesbian people have to be considered by the society and the law of the society as a kind of natural product. In terms of scientific study, if we have a doubt about the function of this kind of sexual and gender variety, the thing that the state can run all

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the time is to study. From my plain observation, I think the gay and the lesbian people that I know personally enough are not different from me and my wife. There can be good and bad persons among men. There can be good and bad persons among women. It is the same with the gay and the lesbian people. There are good and bad persons among them. In the view of Buddhist naturalism, we see no reason to treat the gay and the lesbian people as the *second-class* people who cannot have the full legal status like us who are the *first-class* citizen.

(c) In detail, we can directly question: (1) Do the gay and the lesbian people harm other people in the community. Suppose the law allows them to have legal marriage like normal (let me use this word, this does not mean that the gay and the lesbian people are not normal) people, does this thing harm other people in the community. I think the answer is so clear. In my perspective as a Buddhist, the same-sex marriage (I am talking about this thing generally like when I talk about the different-sex marriage) is the harmless personal matter. The second question that we can pose for sure is that does the same-sex marriage is an action that critically harms the gay and the lesbian themselves. I think the answer is so clear like the first question. Same-sex marriage cannot be compared with the use of seriously harmful drug or the selling of oneself to be the slave of other people in the community. We can say that these people need to marry

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from the basic feeling that can be found in me and my wife. This thing is called love. Law has some meaning in terms of psychology. When I marry my wife and the law of the country has taken part in this personal matter of me and my wife, our feeling is that the whole society knows that and this has some meaning in our life. It is not fair to say to the gay and the lesbian people that you can live together, but the law will not take part in this. In terms of the feeling, I think we are doing the unfair thing to the feeling of our fellow human beings. This cannot be accepted by Buddhism.

(d) The final thing that I would like to say in this paper is the definition of family used by the court (in many countries including Thailand.) According to this definition, God has designed the pattern of family. The pattern of family designed by God consists of a man who is born with sexual feeling that he likes a woman, with a woman who is born with the same sexual feeling like the man, and these two persons decide to live together and have the children. This definition of family is closely connected with a thing which we call in biology *reproduction*. The interpretation of the *Bible* to support this definition in some sense is a strange thing for the reason that (1) We are not the slave of God and in the *Bible* itself they say that God has created human beings from love. *Love means freedom*. If I love my children the thing that I will give them is freedom. In the same way, if the Christian doctrine stresses that man has been created by God from His

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love, the thing that God has to give us is freedom. In my opinion, this interpretation of the *Bible* seems to be outdated and weak. I encourage my Christian friends to rethink about this interpretation seriously. From the logical and empirical points of view, there can be so many definitions of family. I would like to talk about a kind of family which is set up by the Buddha. We know that in Buddhist community there are so many people living together. In a Buddhist monastery there are some persons who join the community as the male monks, and there are some women coming to join the community as a female monk. These persons live in the same community and the Buddha usually calls it as the big family. We see that these people decide to join the family not on the basis of reproduction at all. They do not have sexual relation with other. The thing that they know to be found in this kind of family is: *everyone would take care of each other*. I think the best definition of family is a place where people come to live together for the simple reason that living alone is not the good thing for the well-being of a person, and the loneliness of life as said can be solved by living together. It is normal that in some case, people who decide to join the family are man and woman who have sexual feeling towards the different sex. And in joining the family, sex counts as one important thing. Buddhism never has the problem with this fact. Even the Buddha himself used to have this kind of family, having a wife and a son (which means that the Buddha has

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passed the experience in having sex with a woman—this is so natural and Buddhist texts never see it as the strange thing.) We can imagine that in some case the persons who decide to join the family are man who loves man or woman who loves woman. During joining the family life, sex counts as an important thing for them. This is the normal thing that we can understand and I think Buddhism must have no problem with this.

Sexual feeling has its limitation. From my experience, at some point in the family life we will understand by ourselves that sex has a little meaning. The main thing that unites a man and a woman to live together as husband and wife is something which has the meaning more than sex. I think we can imagine the same thing with the gay or the lesbian couples. *Family is a place where two lonely persons will take care of each other.* Society needs to understand this. Understanding needs to be expressed in the form of some practical thing. Law is among these practical things.

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