

HIGHLIGHT SERIES



LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS IN ASIA



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Same-sex couples can use wills, powers of attorney, joint ownership and legal guardianship laws to create a limited legal framework for their relationships.

In 2017 a guidebook was published in Singapore titled *Same But Different*. In 156 pages, it details the legal framework possible for same-sex couples. It is available at Amazon and Select Books.

RoCK, the leading LGBTI civil society organization in Cambodia has drawn up a model document, the *Declaration of Family Relationship*, as a civil contract to deal with property issues and child care. It has been publicized throughout the country. Colorful ceremonies have been held for groups of couples to celebrate signing their declarations.

In China same-sex couples can become each others 'legal guardian', through a process at a government notary office. This secures property rights and the ability to make medical decisions in cases where the partner's ability is impaired. The arrangement has been possible since 2017, when it was no longer restricted to the elderly. It is rather expensive. Notaries like the extra income.

Recognition of same-sex cohabitation was proposed by the Ministry of Justice in Vietnam and exists in Israel.

1979 seems to be the beginning date for some states in the West giving legal recognition to same-sex cohabitation for specific legal rights or obligations. This started with survivor tenancy rights to rent controlled apartments (Netherlands, 1979, Sweden, 1987, New York, 1989). Cohabitation laws became common in many parts of the West for heterosexual and same-sex relationships.

The Ministry of Justice in Vietnam proposed the legal recognition of same-sex cohabiting couples for purposes of disputes over property and children. The measure was defeated in the legislature.

Israel, considered a part of Asia, recognizes "reputed couples". They enjoy similar legal rights and duties to those of legally married couples.





III

In some places where household registration systems are important, same-sex couples have been allowed to register. Registration may result in some recognition of partners for hospital visitation rights, emergency medical authorizations or access to housing. This was probably a ‘first step’ to legal marriage in Taiwan.

Registration in household registration systems became possible in Taiwan for same-sex couples before marriage was opened.

In Japan, 26 municipalities and one prefecture, covering about 14% of the population, will register same-sex couples and issue ‘partnership certificates’. Included are the cities of Fukuoka, Osaka, Sapporo and Yokohama. This innovation started in two wards within greater Tokyo, Shibuya and Setagaya, in 2015.

IV

Foreign legal same-sex relationships have been recognized for certain purposes in Hong Kong, Nepal and Thailand (and for all purposes in Israel and Armenia).

Decisions of the courts in Hong Kong have referred to foreign legal same-sex relationships (a UK civil registration, a NZ marriage) for purposes of (a) a dependant visa, granting residency and a right to work and (b) medical and other employment benefits for the foreign partner of a HK civil servant.

The Nepal Supreme Court in 2017 ruled that foreign same-sex spouses of Nepali citizens are entitled to dependent visas.

The Court of Appeal in Thailand in 2019 recognized a British same-sex civil registration in making a Thai citizen the executor/administrator of the estate of his deceased British partner.

Israel, part of Asia, has no domestic civil marriage, only religious marriage. Secular couples, mixed religious couples and same-sex couples regularly get married outside Israel. Those marriages are automatically recognized as legal in Israel when registered. The Ministry of Justice in Armenia has said foreign same-sex marriages are recognized.

The Court of Justice of the **European Union** said a legal marriage in an **EU** state had to be recognized in all **EU** states for residency and employment purposes.



Registration systems, which would grant some of the rights and obligations of legal marriage to same-sex couples, have been proposed in the Philippines and Thailand, but not yet enacted.

In 1989 Denmark introduced the first registration law. It granted most of the rights and obligations of marriage to same-sex couples who registered. The law avoided the term 'marriage' and did not include rights to adopt or to have a marriage in the state Lutheran Church. Those came later. One partner had to be a Danish citizen or permanent resident.

Registration systems were put in place in many other jurisdictions after the Danish lead, some called civil unions, registered partnerships or other names. Some had most of the rights and obligations of marriage, but others, notably the 'civil solidarity pacts' in France, had very limited rights. As of 2020, over forty countries have some kind of registration law.

A draft 'life partnership' registration law, with very limited rights, was given initial approval by the Thai cabinet in December, 2018, but no final text has been approved and the bill has never been submitted to a legislative body.

A registration bill has been introduced into the legislature in the Philippines, but not yet enacted. It was introduced by Geraldine Roman, the first elected transgender legislator in a national government in Asia. Philippines President Duterte, at times, supported the opening of marriage, but retreated and seems now to support a registration system.

Court cases seeking the opening of legal marriage have taken place or have begun in China, Hong Kong, Japan, Korea, Philippines and Taiwan.

Courts have rejected same-sex marriage cases in China, Hong Kong, Korea and the Philippines. Of these, the only decision of the highest court was in the Philippines in September, 2019, dismissing the case on procedural grounds and deferring to the legislative branch of government.

The **Constitutional Court** in Taiwan upheld equal marriage rights in 2017, and legislation implementing the decision was enacted in 2019.

The **Constitutional Court** in Thailand in 2020 rejected a petition asking for a ruling on same-sex marriage. This had happened in Taiwan when the first requests were made for a constitutional ruling.





VII Marriage

Legal same-sex marriage was opened to same-sex couples in Taiwan in 2019. The first in Asia.

Marriage was first opened to same-sex couples in the Netherlands in 2001. The following jurisdictions have same-sex marriage:

Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Israel (for foreign marriages), Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Taiwan, United Kingdom (now including Northern Ireland), United States (with the exception of American Samoa) and Uruguay.

A bill to amend the Japanese Civil Code to make the marriage provisions gender neutral was introduced in the national Diet on 3rd June, 2019, supported by the **Constitutional Democratic Party** and other opposition parties.

What are the positions of the different international human rights systems on legal recognition of same-sex relationships:

- A. The **United Nations** says that same-sex couples are entitled to equal treatment on specific matters. Decisions of the **Human Rights Committee** have supported survivor pension benefits in cases from Australia and Colombia). The **Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity** follow UN approaches. They do not call for a registration system or open marriage.
- B. The **European Court of Human Rights** in 2015 ruled that at least a registration system is required for same-sex couples, in order to satisfy equality principles. The **Parliamentary Assembly of the Council of Europe** has confirmed that states are to have “a specific legal framework providing for the recognition and protection” of same-sex unions (Resolution, Doc 14620, 2018).
- C. The **Inter-American Court of Human Rights** in early 2018 ruled that full legal marriage is required. Major countries in the Americas – Argentina, Brazil, Canada, Colombia, Mexico and the United States – had opened marriage by that time.
- D. The only regional human rights body in Asia, the **ASEAN Inter-governmental Commission on Human Rights**, has said nothing on LGBTI rights. There is no right to petition the body. It can only speak if there is agreement of all ten **ASEAN** state member representatives on the commission. Some individual representatives have been active on LGBTI issues, on their own, not in the name of **AICHR**.



Cambodia is a special case. In 2004, Revered King Father Norodom Sihanouk publicly supported opening marriage in Cambodia, after watching television coverage of the marriages authorized, without legal authority, by Mayor Gavin Newsom in San Francisco. Particularly emotional was the marriage of two pioneering American lesbian activists, now in their 80s, who had been together for over 40 years. The present king, a son of Norodom Sihanouk, is unmarried and a former ballet dancer. He is widely understood as gay.

Hun Sen, the present Cambodian head of government, has called for an ending of discrimination against gays and lesbians (having reconciled with his adopted lesbian daughter). The Constitution bans same-sex marriage. In the *UN Universal Periodic Review* in July, 2019, Cambodian representatives accepted the recommendations of Canada, Iceland and the Netherlands to legalize same-sex marriage.

VIII

The importance of rights in relation to children.

It seems that almost nowhere in Asia can a same-sex couple get secure joint legal custody for a child the couple is raising. One exception is Taiwan, where a married same-sex partner can get a 'second-parent' adoption order, if the child is the biological child of the other partner. Another exception is Israel, where both full adoption and 'second-parent' adoption are possible.

Concern with the situation of children who are already being raised in same-sex households has become a reason for supporting the opening of marriage. Mr. Justice Kennedy, who wrote the lead judgment in the 2015 *US Supreme Court* decision on marriage equality, was strongly influenced, he said, by the evidence that over 100,000 children were already living in households with same-sex parents. Those children, he said, were being denied equal protection by a ban on same-sex marriage.

The *Parliamentary Assembly of the Council of Europe*, in a comprehensive resolution in 2018, called on member states to end discrimination experienced "by both adults and children in rainbow families."

A number of stories in Asia have involved surrogacy services for gay couples. Such services seem currently banned for same-sex couples in all Asian jurisdictions.



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