STREAM READINGS

CIRCULATION OF LAW IN EAST ASIA

IGL&P
INSTITUTE FOR GLOBAL LAW & POLICY
HARVARD LAW SCHOOL

TIJ
THAILAND INSTITUTE OF JUSTICE

IGLP SCHOLARS WORKSHOP | BANGKOK, THAILAND | JANUARY 7 - 11, 2018

The Circulation of Law in East Asia

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Description

How do legal ideas, doctrines and institutions move from place to place? As "legal transplants" accepted or refused? As colonial – or neo-colonial – compulsion? Through a more complex global circulation of legal knowledge and experience? The experience of East Asian countries may be indicative. Japan, for example, was first country acknowledged as "civilized" by the West -- what did Japan really adopt, what was forced upon them – and what compromises did Western powers make in adopting Japan into their legal community? As Japan used similar legal tools in colonizing other Asian countries, how did they respond, to "westernization" by Japan to modernize their own legal systems? How do more recent experiences of legal Americanization compare with these earlier colonial moments? How to understand the multilateral circulation of legal knowledge and experience we find today among many Asian nations?

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work, worker, or workplace; notions of cost, benefit, and the allocation of value; models of justice and/or efficiency—presuppose a (gendered) division of labour in which 'reproductive' work is sharply distinguished from 'productive' work, and is largely consigned to the 'private' realm of non-market relations.

As a consequence, while work remains a deeply gendered activity with systemic adverse distributional outcomes for women, gender is assigned little analytical significance in conventional labour law discourse. Moreover, while virtually all labour regulation strategies are necessarily shaped and informed by encounters at the boundaries of the productive and reproductive realms, labour law fails to acknowledge or take account of this in large part because of a lack of any conceptual apparatus to identify and chart such encounters.

The object of this collection of essays is to consider the myriad implications for labour law—whether as a discipline, a mode of regulation, a repository of norms, or a site of political conflict—of reconceiving the terrain of work in terms which acknowledge the structural and discursive effects of the work/family boundary and reposition unpaid care work as integral to the performance and structure of productive activity. The aim is to demonstrate why and how attention to the intersection of the spheres of work and family, rather than a matter primarily of interest to women and feminist scholars, is central to the regulatory, policy, and institutional challenges which states and policymakers currently face. Here, we seek to launch this project by situating it, substantively and methodologically, within the broader context of contemporary debate around the world of work. We also provide a brief summary of the individual chapters and an account of the schematic structure within which they are located.

I WORK, FAMILY, AND 'THE HORIZONS OF TRANSFORMATIVE LABOUR LAW'[1]

All of the contributors to this volume are participants in the International Network on Transformative Employment and Labour Law (INTELL), an informal international network of scholars who, since 1994, have been engaging in transnational dialogue which seeks to identify, analyse, and respond to the conceptual, theoretical, and policy challenges posed for labour law by globalization. In 2002, a first collection of INTELL essays,

[1] See Klare, K., 'The Horizons of Transformative Labour Law', in J. Conaghan, R. M. Fischl, and K. Klare (eds.), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: OUP, 2002), 3.

Labour Law in an Era of Globalization, was published, bringing together key themes and contentions arising from such engagements. In particular, the book examined how transformations in the world of work, sometimes identified in terms of 'globalization'[2] or the 'new economy',[3] have changed the terrain upon which labour law operates and called into question the operative assumptions underpinning the rules and institutions regulating work, assumptions which have guided the activities and analyses of labour and employment lawyers and scholars for at least half a century. A central premise of many of the analyses in the collection was that the rules and institutions governing work and the concepts and assumptions underlying established approaches to the legal regulation of work might themselves contribute to the 'problem of work' in the new economy. Contributors probed the ways in which law creates and supports the evolution of workplace practices; how it tilts the playing field between workers and employers in the new economy; and how it creates advantages and disadvantages among workers in different sectors and regions.

The essays in this new collection pick up on the emerging significance of work and family issues in *Labour Law in an Era of Globalization* and take them to be of key importance in understanding, tracking, and evaluating current changes in the world of work. They consider how the terrain of 'work' is legally constituted and regulated through the creation and deployment of distinctions such as public and private, work and family, production and reproduction. In particular, they question how we classify 'workplace' issues and separate them from family, household, or 'private' concerns. They examine the ways in which these legal classifications have particular distributive outcomes, imposing differential costs, risks, and burdens on, inter alia, women and men. The essays also attempt to explain how and why the debates around the work/family divide have taken the form that they have in particular contexts and with what effects.

Work/family issues were once understood to be almost entirely concerned with women. However, increasingly, negotiating the work/family boundary is recognized as central to the regulatory challenges of the new economy. Changes in both labour markets and households have destabilized the operative assumptions of the rules and institutions governing work and social protection in fundamental rather than marginal ways. Workers are no longer presumptively male—in most industrialized states, the labour market participation of women

[2] For broader consideration of globalization in a labour law context, see essays in Conaghan et al., above, n. 1, esp., Klare, above, n. 1.

[3] For an account and analysis of 'new economy' discourse in a labour law context, see Conaghan, J., 'Labour Law and "New Economy" Discourse', *AJLL*, 16 (2003), 9.

approaches if not equals that of men. In addition, households are no longer necessarily organized around the 'nuclear family' norm: rather, they take a variety of different forms and are dynamic rather than stable over time. These transformations call into deep question both the needs and interests of workers and the capacities of households (specifically women) to provide support and labour for a broad range of essential, but 'non-market', social and economic services.

While changes in both the economy and the household have now brought them to the surface in salient ways, the issues raised at the intersection of the household and the labour market are not new. However, we think that there is now an unprecedented opportunity for critical intervention: the limits of conventional legal and social categories have created both an opportunity and a demand for the far-ranging analyses in which the authors of this collection are engaged.

II THE MANY DIMENSIONS OF THE WORK/FAMILY PROJECT

The regulatory debates around work and family encompass a broad set of issues and questions which can be approached in a variety of ways and to a range of different ends. Here we describe three different ways of thinking about work/family issues, all of which are reflected across the essays in the collection. First, analysis of work/family issues can be carried out in a variety of *modes*. Second, work/family issues can be explored across a range of *contexts*. Finally, work/family issues can be examined through the lens of the specific legal and social *issues* or *questions* that they raise.

Modes of analysis

Because legal rules and institutions help to constitute the work/family divide in multiple different ways, a variety of analytical approaches may be deployed to probe it in a labour law context. One prominent approach is *policy-driven* or *instrumental*, that is, concerned with the extent to which analysis of work and family issues can aid the development of particular policy prescriptions or help effect the realization of social, political, or economic goals. Here, a dominant policy concern is with the extent to which the organization of work can be adapted to take better account of family needs. An alternative or additional policy consideration may be the advancement of equality (particularly sex equality) goals and the extent to which current configurations of work and family thwart or inhibit equality-seeking strategies. Yet another emerging policy focus is on the extent to which legal rules and institutions are implicated in

advancing or impeding women's labour market participation, something which may be linked to gender equality but may also derive from concerns about economic competitiveness, fiscal or welfare reform, or social inclusion. Such approaches may entail an assessment, on the basis of empirical and other context-based information, of the effectiveness of legal regulation, such as its distributional implications for women, and prescribe policies and reforms accordingly.[4]

An alternative or supplementary approach is to consider issues of work/family from a *normative* perspective, that is, from a perspective which seeks to identify the norms underpinning current conceptions of work and family[5] and subject them to critical scrutiny, often from a competing normative framework. While such analysis is most often centred around equality concerns, distributive justice, and autonomy, it may also engage with a broader set of values and ethical discourses such as social, constitutional, and human rights.[6] Scholars adopting this kind of approach typically draw upon feminist and other critical analyses of equality to problematize the current state of the public/private divide and to make arguments for a better reconciliation of work and family conflicts as a necessary step to women's equality and/or to all workers' self-realization. A particular virtue of explicit normative perspectives is that they can both serve as a strong counterpoint to more narrowly instrumental engagements, especially those which are efficiency-based[7] and bring to the surface the normative dimensions of approaches, such as those prioritizing efficiency over equality, which might otherwise remain submerged.

Yet another way of approaching the work/family divide is to consider it in terms of the *functions* it serves or purports to serve. The idea here is to situate work/family issues within an analysis of the roles which work and family as institutions play, whether separately or together, within the broader context of economic, social, and political imperatives, whether they are the interests of capital or capitalism, the tenets of neo-liberalism, the impact of globalization, or the requirements of social reproduction. Such work tends to include an historical dimension and to focus strongly on processes of social and economic change, as this provides a lens through which legal and political developments in a work/family context

[4] Almost all of the essays in this volume address policy and instrumental concerns to some extent. However, see in particular essays by Asakura, Hayashi, and Owens.

[5] See e.g. essay by Chapman, in this volume.

[6] As e.g. in ILO advocacy of a right to 'decent work'. See further Owens, R., 'Decent Work for the Contingent Workforce in the New Economy', *AJLL*, 15 (2002), 209, and Conaghan, in this volume.

[7] See e.g. essay by Rittich considering the tension between equity and efficiency approaches in an international regulatory context.

But why should a hastily performed ritual make such a difference? For the purposes of our inquiry, this question opens up the subject of how imaginative representations in the law can sometimes affect the way people perceive and experience the reality of something as central to our lives as marriage. We are accustomed to viewing law as importantly shaped by beliefs and behavior, but we frequently overlook the reflexive and continuous nature of the interaction among laws, ideas, feelings, and conduct. Often mesmerized by the coercive power of law, we tend to minimize its persuasive and constitutive aspects.

In Synge's play, it is Mary Byrne who has the last word (inspired no doubt by the necessity of putting the best possible light on the situation which her own great thirst has brought about). To Michael, still fearful about Sarah's earlier threat to leave him if he doesn't marry her, she says: "And you're thinking it's paying gold to his reverence would make a woman stop when she's a mind to go?" With Sarah, whose hopes of marriage have been dashed, the rough, boozy old woman for the first time adopts a gentle tone: "It's as good a right you have surely, Sarah Casey, but what good will it do? Is it putting that ring on your finger will keep you from getting an aged woman and losing the fine face you have, or be easing your pain?" Feeling a little guilty about what has happened—but not too guilty—Mary affirms the folkways of the traveling people: "[I]t's a long time we are going our own ways—father and son and his son after him, or mother and daughter and her own daughter again—and it's little need we ever had of going up into a church and swearing."

And so, in the end, Sarah's notion of getting married is left in the ditch with the priest and the wedding ring. Why would a poor tinker, married and wedded in custom and the eyes of God, want in addition to be married by an official? It may, suggests Mary, have been the "changing of the moon." But, at the turn of the century, Ireland was changing too. And as part of that change, people like Sarah all over the world were beginning to associate legitimacy with legality.

What is Marriage?

The title of this section does not really await an answer; rather it invites further reflection on, and refinement of, the question. Let there be a set of men and women married to each other according to the rules of the legal system to which they are subject. Call this Set A. Now let there be a set of men and women cohabiting with each other in unions that are entered with some idea of duration and are openly manifested to and approved (or at least not disapproved) by the relevant community. Call this Set B (see fig. 1).

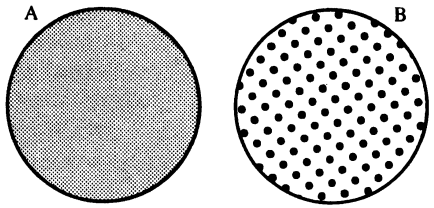

Fig. 1

In Set A, as we have defined it, marriage is whatever the legal system says it is.[17] The contents of Set B call for more lengthy comment. In constructing Set B as the set of heterosexual unions undertaken with some idea of duration and in which the partners attest to the relevant social environment (relatives, neighborhood, clan, community) that they regard themselves as belonging together, and are accepted as such, I have included behavior that a sociologist or anthropologist would be apt to describe as "marriage behavior." The element of intended duration does not mean that the unions in Set B are necessarily permanent or even enduring, nor, as this set is constructed, need the unions it contains be sexually exclusive or even monogamous. Nor is the element of legitimacy (in the sense of social approval) isomorphic with the concept of legality. I am here following the family sociologist René König in using the factors of intended duration, attestation, and legitimacy to help move past the difficulty of defining what turns a sexual relation into "marriage."[18] Nevertheless, the imprecision of these terms leaves a number of cases that will be hard to classify. In particular, the distinctions between sexual conduct which is approved and that which is disapproved are everywhere in flux. Set B is therefore a leaky set that includes a wide variety of formal and informal unions, some of which are recognized by the legal system and some not.

Notice that while it will be useful, and indeed essential, for us to distin-

17. It should not be assumed, however, that it will always be easy to determine the content of this set. The legal system may define marriage by referring to the rules of some other system, as is described in the text at note 22. Or the legal system itself may recognize more than one type of marriage, for example, "full" marriage, and marriages which have fewer legal effects than full marriage, such as the morganatic marriages of royal and aristocratic European families, or the union of male and female slaves known in Roman law as *contubernium*.

18. *König* 39. American courts have struggled heroically with this problem in trying to determine whether and when a legally recognized common law marriage has taken place. For example, a common law marriage has been held to exist after a couple had spent a few nights together in a hotel, *Madewell v. United States*, 84 F.Supp. 329 (E.D. Tenn. 1949), but not where the man suddenly died shortly after the couple checked into a hotel, *Estate of Kieg*, 140 P.2d 163 (Cal. App. 1939).

guish in theory between the set of *de jure* marriages on the one hand, and the set of *de facto* marriages or marriage-like behavior on the other, in the countries that are the principal objects of our study, the two sets overlap (see fig. 2).

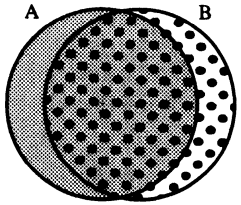

Fig. 2

The intersection of Sets A and B is the set of *de facto* unions that are stamped as legal marriages by the state, which, in the countries that concern us here, is the social control organization with a juridical monopoly over marriage and divorce. The part of Set A which does not intersect with Set B contains those men and women between whom a legal marriage bond exists, but who are not in a *de facto* union with each other. In everyday experience, then, this would include separated but undivorced couples and those couples between whom the *de facto* union but not the legal bond has been terminated by what is sometimes called a *poor man's divorce*: the departure of one of the spouses with no intent to return.

The part of Set B which does not intersect with Set A includes all those *de facto* unions as defined above which are not recognized as marriages by the legal system. In everyday experience in the countries under consideration, this would include cohabitation without compliance with the procedures established by the state for formation of a legal marriage. Here we would commonly find, for example, those cohabitants who have chosen not to marry legally, as well as those who are prevented from forming a legal marriage because of the existence of a prior undissolved legal marriage of one or both of them.[19] Set B would also include persons cohabiting in religious marriages

19. The American institution of common law marriage belongs in the domain of Set A because it is a form of legal marriage, deemed by some fourteen states to come into being when a man and a woman, legally eligible to be married, agree to be husband and wife and "hold themselves out to the world" as such. Common law marriage is, in legal theory, binding until terminated by a formal legal divorce. The same is true of marriage "by habit and repute" in Scotland (see below, chapter 6, text at note 3). In Set A, too, belong those unions converted into legal marriages by legislation of a type common in Central and South American countries, providing that stable cohabitation for a certain number of years is the equivalent of formal marriage. In Latin America, where application of the formal marriage requirement of the Council of Trent was long suspended because of the scarcity of priests, informal marriage is still very common. See José Arraros, "Concubinage in Latin America," 3 *Journal of Family Law* 330 (1963).

not recognized as legally valid by the state. This can occasionally happen, for example, in countries like France and West Germany where civil marriage is compulsory, or in divorceless Ireland, where the religious marriage of a person whose previous marriage has been dissolved by ecclesiastical annulment is not recognized as valid under secular law.

In practice, in the four countries whose law is examined in this book, the overlap between Sets A and B is considerable, as figure 2 in rough fashion suggests. Most marriage behavior in these countries still takes place within a legal framework. Ease of divorce helps keep that part of Set A which does not intersect with Set B small. But that part of Set B which does not intersect with Set A, *de facto* but nonlegal unions, has increased considerably in recent years, accompanied, as we will see in chapter 6, by the development of a new body of cohabitation law. The decreasing orientation of marriage behavior to legal norms in Western societies is so readily observable that it is perhaps unnecessary to stress that the contents of Sets A and B and their relation to each other have varied greatly from time to time and from place to place.

How wide these variations can be is plain when we stand back from our immediate historical and cultural context. In Western Europe prior to the Reformation, for example, there was *no* Set A of legal bonds created in compliance with secular norms of the state.[20] Rather, we would have to speak of those marriages recognized as such by the norms established by other social control organizations, chiefly those of canon law. Even today, many men and women in England, France, the United States, or West Germany consider themselves subject to the systems of law of the Church of England or the Roman Catholic Church, or to Islamic or Jewish law. These religious legal systems are now independent of the state, and their marriage law is not recognized by the states with which we are here concerned, except to a limited degree in England. For such persons, we must construct a Set C, the set of marriage bonds established according to the law of the religious group of one or both parties. This set may overlap but does not necessarily coincide with the sets of either legal or *de facto* marriages (see fig. 3).

In countries where religious family law is still important, such as Israel, India, and many Islamic nations, it is not normally the case that legal regulation of marriage coincides only accidentally with religious regulation. Though we are accustomed in the United States and Western Europe to systems of direct marriage regulation by the state, this is by no means the universal mode of regulation in the world today. In many pluralistic societies, where the legal system must accommodate diverse marriage practices and cultural ideals, it is

20. In the medieval world, "law" was not equivalent to the norm system sanctioned by the state, because the "state" was only one of several political organizations vying with each other for jurisdiction over various aspects of social life as well as for political power.

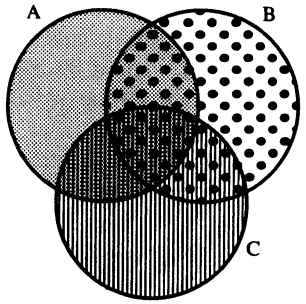

Fig. 3

useful to distinguish, as Max Rheinstein did, between the *Occidental* and *Oriental* patterns of regulation of family matters.[21] He used these terms, not in any strict geographical sense, but rather to distinguish, respectively, between those countries which treat family law questions as in principle subject to the laws of the secular state, and those which treat them as governed in principle by the customary or religious law of the groups to which the individuals involved belong.

Within the Occidental pattern, one can distinguish two major variants. The first attempts to devise legal rules that correspond to patterns of belief or behavior that are widely shared among the groups and subgroups of which the society is composed. This is the approach taken in England, France, and several other European countries. Needless to say, secular family law of this type can never fully correspond to *all* the patterns of life that actually exist in society. Thus, some countries, like the United States and Sweden, have adopted an alternative approach based on what Rheinstein called the *ideology of tolerance*. Secular family law in such countries substantially refrains from trying to articulate a common morality. It confines itself merely to defining the current outer limits of permissible diversity in family matters, (e.g., no simultaneous polygamy), while leaving maximum room for choice and avoiding value judgments other than those favoring individual liberty.

The Oriental approach to pluralism is followed in many countries where a number of well-defined religious and ethnic communities with their own settled marriage rules coexist, such as India, Indonesia, Israel, Lebanon, and most, but not all, Islamic countries.[22] One variant of this approach is exemplified by India, where Hindu, Muslim, Parsi, Christian, and Jewish religious laws concerning such matters as marriage and divorce are applied by state judges in the secular courts. The predominant model, used in Israel and in several of the Islamic countries, leaves matters of personal status to be decided by the religious or customary tribunals of the group involved. In the Oriental systems then, Set A *includes* Set C.

21. *Rheinstein*, above, note 15 at 8–10.

22. It is characteristic of these systems, where jurisdiction over family matters depends on the group affiliation of one or both parties, that complex conflict of laws and jurisdictional problems can arise when persons of different religions, groups, or nationalities are involved in the same case, or when the status of persons married or divorced in one country must be determined by the courts of another country.

The countries whose law is examined in this book long ago opted for family law enacted and applied by governmental organs and have for the most part forgotten that marriage and family matters were once left mainly to regulation by manners, custom, ethics, or religious norms. Yet legal regulation of these matters in the modern sense did not exist in pre-Reformation Europe, and they were largely ignored by the law in Roman times. One of the questions raised by the recent developments discussed in this book is whether the direction of the current period of change in the family law of all or some of the countries examined here is toward the emptying of the set of legal marriage relationships. Is it true, as a Swedish writer has claimed, that legal developments in his country have been marked by the disappearance of official interest in marriage as an institution?[23] If so, has Sweden, as has often been the case in family law, marked out the course which other Western countries sooner or later will follow?

Three further observations are in order at this point. First, the same kinds of distinctions just drawn among legal marriage, *de facto* marriage, and unions recognized as "marriages" under religious or customary laws, can also be perceived in other institutions which are both legal and social. Thus, for example, later on we will wish to distinguish among legal divorce, *de facto* termination of "marriage," and dissolution of marriage bonds under religious or customary law. Second, as we examine the effect of rapidly changing mores upon older legal norms, we will notice that as the discrepancy widens between legal rules and actual marriage behavior in society, the outline of a shadow institution of marriage within the set of *de facto* unions often becomes increasingly discernible. As the shadow of the formal institution of marriage grows in extent and importance to the point where the legal system one way or another must take it into account, the relationships among law, behavior, and ideas shift again. Finally, besides the distinction between marriage as a legal institution and marriage as a social institution, it will be useful in reading the chapters that follow to keep in mind another distinction, one

23. Jacob Sundberg, "Nordic Laws," in *Das Erbrecht von Familienangehörigen in positivrechtlicher und rechtspolitischer Sicht* (Frankfurt: Alfred Metzner, 1971), 40, commenting on the fact that directives for the reform of family law issued in 1969 by the Swedish Minister of Justice specified that future legislation should be drafted so as not to favor in any way the institution of marriage as compared with other forms of cohabitation.

lying entirely within the realm of legal regulation: the distinction in legal effect between the status of being married and the status of being unmarried. Here, too, we will see that far-reaching changes are taking place, and that a once important distinction is becoming blurred.

The Road from Rome

A book about family law, perhaps even more than books in other domains of law, has to grapple with the problem of the complex relationship of events in the world of law to widespread social practices and to what French historians call *mentalités*. As Otto Kahn-Freund once said about family law, "Here, if anywhere, the law must be seen as the outcome of social forces and as a force which in turn impinges on people in society, on their habits and their convictions."[24] Yet this is easier said than done. It is often possible to trace the emergence of legal norms and rituals to the ideas or practices of influential groups, but it is extremely difficult to determine what effect legal constructs themselves may have on attitudes or behavior. Max Rheinstein's research on divorce law and marriage behavior in a number of countries established that there is no clear and simple relationship between strict divorce law and marriage stability in a given society, nor between lenient divorce law and marriage instability.[25] His findings, which challenged widely held beliefs at the time he began his work, have been supported by later studies.[26] Such studies do not, however, shed much light on the possible long-term, indirect effects of legal norms or of abrupt changes in long-standing legal traditions.

History and legend, as well as the world around us, furnish abundant examples of the resistance of certain types of conduct to regulation by edict. Ahasuerus, who, according to the Book of Esther, laid down the unalterable law of the Medes and the Persians that the husband is the head of the household, is also said to have sent out his soldiers with whips to beat the stormy sea into submission. Legal norms, to be sure, often may have some effect on the way people think, feel, and act, but it is striking how stubbornly the forms of behavior involved in family life seem to follow their own patterns independently of the legal system.

A thousand years of marriage regulation in what is now Italy provide a case in point. At the time of the late Roman Republic and in Imperial Rome, we

24. Otto Kahn-Freund, quoted by Aidan R. Gough in "Book Review," 37 *Modern Law Review* 118 (1974).

25. *Rheinstein*.

26. Jacques Commaille, Patrick Festy, Pierre Guibentif, Jean Kellerhals, Jean-François Perrin, and Louis Roussel, *Le Divorce en Europe Occidentale: La Loi et le Nombre* (Paris: I.N.E.D., 1983).

have it on good authority that "[M]arriage was to the Romans, as to the other peoples of antiquity, a *de facto* rather than a *de jure* matter, in the sense that two people were held to be married, not because they had gone through any particular ceremony, but because they in fact lived together as man and wife."[27] It was usual, it seems, for marriages to begin with a ceremony of some sort: in Rome, instead of getting a clout in the lug, the bride might be lifted over the threshold of the bridegroom's house and presented with gifts of fire and water. Just as marriage began with the setting up of life in common, so it ended when the community of life was terminated by either spouse. Divorce was available to either party and, by the end of the late republic, we are told that it had become common, at least among the upper social classes (the only sectors of Roman society of which we have much knowledge).[28] The formation of a Roman marriage was not a legal transaction. It was a factual event which, of course, had legal consequences.

Even after the conversion of Constantine, matters did not change quickly. As Rheinstein wrote, "Full freedom to terminate a marriage was a rule so firmly rooted in the mores that it took centuries of Christian effort to replace it by the new principle of indissolubility."[29] For one thing, it took some time for this novel doctrine to be settled in the teaching of the Church itself. At first, the post-Constantine Roman legislation did no more than threaten to punish a husband who repudiated his wife without cause. The effort by the Byzantine emperor Justinian in A.D. 542 to extend penalties to divorce by mutual consent was so unpopular that it was promptly repealed by his successor.

Marriage became indissoluble only when, after centuries of striving, the Church gained jurisdiction for its own courts over matrimonial causes.[30] Once such jurisdiction was established in the various states and kingdoms which covered the territory of present-day Italy, the principle of the indissolubility of marriage became the legal norm (except for the brief period of Napoleonic rule) until a controversial national referendum introduced divorce in December 1970. To a great extent, over time, marriage behavior became oriented to canon law norms. On the other hand, all through the long period of legal indissolubility, many Italians followed the age-old custom of dissolving their unions by departure, not even bothering to take advantage of the possibility of divorce briefly introduced by French laws imposed in the course of Napo-

27. H. F. Jolowicz, *Historical Introduction to the Study of Roman law*, 2d ed. (Cambridge: Cambridge University Press, 1967), 113.

28. *Id.* at 245.

29. *Rheinstein* 16.

30. See, generally, *Rheinstein* 7–28, and below, text at note 64.

consent, has ended. Enforcement covers mutual economic responsibility and the support and upbringing of children. Obviously, fewer complications ensued in the days when each person had just one try at marriage. Then the regulation of entry into marriage was of the essence, few rules governed the ongoing marriage (not needed: the husband was in charge), and termination was unavailable in varying degrees (especially to women). Moreover, the incentive to end a relationship and to enter into a new one was cooled by the impossibility of remarriage. Marriage truly was for life, 'for better or for worse'. But the 'worse' became worse with increased emphasis on the individual and his (and more recently, her) right to happiness combined with lengthening life expectancies in general—and in particular through improved survival of wives in childbirth and through birth control.

2. The Social Purposes of Marriage

Marriage and the family served—and in many parts of the world continue to serve—as the sole legally and morally permissible harbour for sexual activity and child-rearing. This (1) assured the birth of children into two-parent families as the natural and then (pre-pill, pre-abortion) unavoidable consequence of sexual activity, (2) provided the structure for socializing children by means of role division between the marriage partners, (3) made parental role division possible by providing economic security for the stay-at-home partner through legal support obligations as well as through moral, social, and harsh legal strictures against divorce, and (5) assured old-age provision for parents through their children's reciprocal moral and legal support obligation.[51] Recognizing that traditional marriage is a good bargain for society, social customs, religious rites, and legal rules governing marriage were fairly tailored around these facts and goals, justifying a variety of legal and economic benefits and privileges for the partners to marriage. In the West, that bargain is now in question.

The chief trend that has transformed family life and law is the rapid acceleration of legal, social, and economic equality for women. Another vital trend is increasing recognition of children as separate legal actors independent from their parents.

'Intelligent Design', televangelist Pat Robertson warned town voters that they faced divine retribution: 'I'd like to say to the good citizens of Dover: If there is a disaster in your area, don't turn to God; you just rejected him from your city'. See 'Town Is Warned of God's Wrath', *NY Times*, 11 November 2005, at A16.

[51] See Karl L. Llewellyn, 'Behind the Law of Divorce', (1932) 32 *Columbia LR* 1281, 1288–94; Harry D. Krause, *Family Law in a Nutshell* (1977), 25–9; Elizabeth S. Scott, 'Marriage, Cohabitation, and Collective Responsibility for Dependency', (2004) *University of Chicago Legal Forum* 225; Michael S. Wald, 'Same-Sex Couple Marriage: A Family Policy Perspective', (2001) 9 *Virginia Journal of Social Policy & Law* 291; Brian H. Bix, 'State of the Union: The States' Interest in the Marital Status of Their Citizens', (2000) 55 *University of Miami LR* 1.

Children are now seen as entitled to their fair share of rights *vis-à-vis* their parents and society. A third factor is the modern welfare state. Society at large has ever more closely involved itself in social and economic functions that used to be the exclusive, private province of the family. The unintended side-effect is that the very act of seeking to help the family where it fails its functions or falls short, has made it less necessary for the family to fulfill its traditional tasks—such as socializing children and providing economic support for all its members, including the elderly.

Today a secular, pragmatic view of the family is spreading. An ever looser interpretation of marriage and family obligations along with decreasing everyday relevance of religions have brought similar, arguably more reason-based solutions. And as referred to above, numerous international conventions and declarations proclaimed by varying sources (such as the United Nations and the European Union), now express aspirationally universal views of what is 'good' and what is 'bad' and complement and accelerate worldwide secularization.

V. Yesterday's 'Great Debates'

In the last fifty years, reform efforts in country after country have departed from conditioning divorce on the commission by one marriage partner of a marital offense—such as adultery or cruelty—and have moved to an almost total disregard of marital fault. In the West, divorce has turned from being simply unavailable, to difficult (on fault grounds only), to easy to obtain (with uncontested and typically consensual faux-fault grounds), and now even past no-fault grounds. Today, as divorce plays in many courts, the State asks for little more than one party's unilateral decision to divorce the other. In consequence, the relevant focus of the divorce process has shifted almost entirely from status (*whether* divorce may be obtained) to the economic consequences (divorce is freely available, but not for free) and to allocating child custody and support. *Divorce, through its legal and social consequences, now all but defines the legal meaning of marriage and with that, Western family law.*

Western family law reforms of the last half century have achieved a more equitable allocation of the economic consequences of failed marriages. Between the spouses, the great shift was from periodic support (alimony) for a dependent ex-spouse to division between the ex-partners of marital property. But even in 'wealthy' countries, the problem remains that the typical marriage has produced little property to divide. And long-term, adequate spousal support is not only rarely granted but all too often beyond the obligor's capacity as he or she strives to support a new spouse, family, or lifestyle.

The Decision of Japanese Supreme Court, September 4, 2013

(http://www.courts.go.jp/app/hanrei_en/detail?id=1203)

Civil Code Article 900 If there are two or more heirs of the same rank, their shares in inheritance shall be determined by the following items:
(i) if a child and a spouse are heirs, the child's share in inheritance and the spouse's share in inheritance shall be one half each;
(ii) if a spouse and lineal ascendant are heirs, the spouse's share in inheritance shall be two thirds, and the lineal ascendant's share in inheritance shall be one third;
(iii) if a spouse and sibling(s) are heirs, the spouse's share in inheritance shall be three quarters, and the sibling's share in inheritance shall be one quarter;
(iv) if there are two or more children, lineal ascendants, or siblings, the share in the inheritance of each shall be divided equally; provided that the share in inheritance of an child out of wedlock shall be one half of the share in inheritance of a child in wedlock, and the share in inheritance of a sibling who shares only one parent with the decedent shall be one half of the share in inheritance of a sibling who shares both parents.

The decision in prior instance is quashed.
The case is remanded to the Tokyo High Court.

1. Outline of the case

In this case, with regard to the estate of P, who died in July 2001, the appellees who are P's children born in wedlock (including P's heir(s) per stirpes) filed a petition for a ruling on the division of P's estate against the appellants, who are P's children born out of wedlock. The court of prior instance determined that the part of the proviso to Article 900, item (iv) of the Civil Code, which provides that the share in inheritance of a child born out of wedlock shall be one half of the share in inheritance of a child born in wedlock (hereinafter this part shall be referred to as the "Provision"), was not in violation of Article 14, paragraph (1) of the Constitution, and concluded that P's estate should be divided based on the respective statutory shares in inheritance of the appellees and the appellants as calculated by applying the Provision. Appellant Y1 and the appeal counsel for Appellant Y2 argue that the Provision is in violation of Article 14, paragraph (1) of the Constitution and therefore void

2. Criteria for judging the consistency with Article 14, paragraph (1) of the Constitution

Article 14, paragraph (1) of the Constitution provides for equality under the law, and this provision should be interpreted as prohibiting any discriminatory treatment by law unless such treatment is based on reasonable grounds in relation to the nature of the matter. This is the case law established by the precedent rulings of this court …
The inheritance system sets rules as to who is to inherit the property of the decedent, and in order to define the inheritance system, the circumstances in each country such as the tradition, social conditions and public sentiments should be taken into consideration. Furthermore, since the modern inheritance system is closely related to the concept of a family, it cannot be defined without ignoring the rules, people's perceptions, etc. regarding marital or parent-child relationships in the country. It is left to the reasonable discretion of the legislature to define the inheritance system while comprehensively considering all these factors. The major issue disputed in the present case is, within the inheritance system defined in that manner, whether or not the distinction made by the Provision in terms of the statutory shares in inheritance between children born in wedlock and children born out of wedlock constitutes discriminatory treatment without reasonable grounds. If there is no reasonable ground for making such distinction even when the abovementioned discretionary power vested in the legislative body is taken into consideration, it is appropriate to construe that said distinction is in violation of Article 14, paragraph (1) of the Constitution.

3. Whether or not the Provision is consistent with Article 14, paragraph (1) of the Constitution

(1) Article 24, paragraph (1) of the Constitution provides that "Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis," and paragraph (2) of said Article provides that "With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters

pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes." In accordance with these provisions, Article 739, paragraph (1) of the Civil Code provides that "Marriage shall take effect upon notification pursuant to the Family Registration Act," thus adopting the principle of legal marriage and rejecting de facto marriage. Meanwhile, with regard to the inheritance system, the Civil Code was partially revised by Act No. 222 of 1947 (hereinafter referred to as the "1947 Civil Code revision"), abolishing the right to succeed to the position of the head of the family, which had been the foundation for the Japanese "family" system, and introducing the present inheritance system wherein, as a rule, the spouse and child(ren) of the deceased shall be heirs. Still, the clause providing that in the case of inheritance that commences upon the death of a family member, the statutory share in inheritance of a child born out of wedlock shall be one half of that of a child born in wedlock (the proviso to Article 1004 of the Civil Code prior to the 1947 Civil Code revision) survived and was maintained as the Provision in the existing Civil Code.

(2) The decision of the Grand Bench of the Supreme Court on 1991 (Ku) No. 143, July 5, 1995, Minshu Vol. 49, No. 7, at 1789 (hereinafter referred to as the "1995 Grand Bench Decision") took into consideration that the provisions concerning the statutory share in inheritance, including the Provision, do not require that inheritance be conducted according to the statutory share in inheritance of each heir, but function as supplementary rules to be applied in cases such as in the absence of designation of the shares in inheritance by a will. Then, according to the criteria for judgment of the same effect as those shown in 2. above, the Supreme Court accounted for the purport of the Provision, which sets the statutory share in inheritance of a child born out of wedlock as one half of that of a child born in wedlock, holding as follows: "As long as the Civil Code adopts the principle of legal marriage, the Provision gives preferential treatment to the spouse who has been in a marital relationship with the deceased and their child(ren) in terms of the statutory share in inheritance, while at the same time, it assures that a child born out of wedlock will have a certain statutory share in inheritance so as to protect such child." In conclusion, the Supreme Court ruled that the Provision cannot be regarded as going beyond the bounds of the reasonable discretion vested in the legislature and therefore it cannot be deemed to be in violation of Article 14, paragraph (1) of the Constitution. However, even under the principle of legal marriage, the issue of how to set rules for the statutory share in inheritance of a child born in wedlock and that of a child born out of wedlock should be determined by comprehensively considering the matters referred to in 2. above, and these matters change along with times. Therefore, the reasonableness of such rules should be subject to constant examination and scrutiny in light of the Constitution, which provides for individual dignity and equality under the law.

(3) With regard to important matters among those referred to in 2. above, the factual circumstances have changed as outlined below since the 1947 Civil Code revision.
A. Looking at the process of the 1947 Civil Code revision, it may be seen as the background factors that there was an ethos among people aspiring to have the legitimate descendants inherit their family estate even after the abolition of the right to succeed to the position of the head of the family that had supported the Japanese traditional "family" system, and that there was also a sense of discrimination among people toward men and women in relationships other than legal marriage and children born in such relationships, while regarding only legal marriage as legitimate marriage and respecting and trying to protect it. Furthermore, in the Diet sessions in which the revision bill was deliberated, the existence of laws in other countries at that time, which made a distinction in terms of the share in inheritance between children born in wedlock and children born out of wedlock (such as by denying shares in inheritance to children born out of wedlock), was repeatedly argued as the grounds for supporting the consistency of the Provision with Article 14, paragraph (1) of the Constitution. This suggests that these laws of other countries had an influence on the process of introducing the Provision in the existing Civil Code.
However, since the 1947 Civil Code revision, the actual state of marriage and family in Japan has changed along with the changes in social and economic circumstances, and it is said that people's perceptions of marriage and family have also changed accordingly. Although there may be differences by region or type of work, a family composed of husband and wife and their children who have not grown up became the common minimum unit to support workers' lives and the number of families of such composition increased amid the rapid economic development in the post-war period. At the same time, along with the progress in aging of the population, it has become increasingly necessary to provide security for the lives of surviving spouses, bringing about a drastic change to the significance of inheritance property, which had largely served as the means of living of the descendants. This led to the increase in the spouse's statutory share in inheritance, which is included in the partial revision to the Civil Code by Act No. 51 of 1980. Moreover, the number of children born out of wedlock had been on a declining trend until around 1979, but then it took an upward turn and has been continuing to increase until today. Since the beginning of the Heisei era (from 1989), more people tend to marry later or choose

not to marry, and the birth rate has continued to decline. Along with these trends, there has been an increase in the number of households wherein middle-aged single children live with their parents and the number of single-person households, and there has also been an increase in the number of divorces, and, in particular, the numbers of divorces and remarriages involving minor children. In view of these facts, it is said that the forms of marriage and family have greatly diversified, and people now have diversified perceptions of marriage and family accordingly.

B. There has also been a dramatic change in the situations in other countries, which had an influence on the process of introducing the Provision in the existing Civil Code as mentioned in A. above. In other countries, and in the United States and European countries in particular, there used to be a strong sense of discrimination against children born out of wedlock due to religious reasons. At the time of the 1947 Civil Code revision, a tendency to award only a limited share in inheritance to children born out of wedlock was seen in many countries, and this had an influence on the process of introducing the Provision. However, since the late 1960s, most of these countries promoted equal treatment between children born in wedlock and children born out of wedlock from the perspective of protecting children's rights and enacted laws to abolish discrimination in terms of inheritance. At the time when the 1995 Grand Bench Decision was rendered, among the major countries where such discrimination still existed, Germany enacted Erbrechtsgleichstellungsgesetz (Act on Equalization of Succession Rights) in 1998, and France enacted Loi n 屬 2001-1135 du 3 decembre 2001 relative aux droits du conjoint survivant et des enfants adulterins et modernisant diverses dispositions de droit successoral (Law No. 2001-1135 of December 3, 2001 on the Rights of the Surviving Spouse and Children Born out of Wedlock and Modernizing Various Provisions of Inheritance Law) in 2001, thereby eliminating discrimination in terms of the share in inheritance between children born in wedlock and children born out of wedlock. At present, among the United States and European countries, no country maintains a distinction in terms of the share in inheritance between children born in wedlock and children born out of wedlock, as Japan still does. Thus, such treatment can be said as being rare on a global scale.

C. Japan ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979 (Treaty No. 7 of 1979) and the Convention on the Rights of the Child (CRC) in 1994 (Treaty No. 2 of 1994). These treaties provide that children must be protected against discrimination of any kind by birth. Furthermore, as organizations affiliated with the United Nations, the United Nations Human Rights Committee was established under the ICCPR and the Committee on the Rights of the Child was established under the CRC. These committees are vested with the authority to express opinions, make recommendations, etc. to the contracting States with regard to matters such as the status of implementation of the respective covenant and convention.

As for the status of implementation of the ICCPR and the CRC by Japan in relation to treatment of children born out of wedlock, the United Nations Human Rights Committee made a comprehensive recommendation in 1993 that Japan should remove the discriminatory provisions relating to children born out of wedlock, and since then, both committees have repeatedly expressed concerns, recommended legal revision, etc. to Japan, specifically criticizing the discriminatory provisions relating to nationality, family register, and inheritance, including the Provision. Recently, in 2010, the Committee on the Rights of the Child again expressed its concern about the existence of the Provision.

D. Under the changing global circumstances as described in B. and C. above, the Japanese legal systems, etc. relating to the distinction between children born in wedlock and children born out of wedlock have also changed. In 1988, an action was brought against the requirement of making an entry of a child's relationship with the head of his/her household in his/her residence certificate. In 1994, while this case was pending before the court of second instance, the Guidelines for Handling Affairs Relating to the Basic Resident Registers were partially revised (Jichi-Shin Notice No. 233 of December 15, 1994), and, as a result, it was provided that a child of the head of the household shall be indicated simply as a "child," irrespective of whether the child is born in wedlock or out of wedlock. In addition, another action was brought in 1999 against the requirement of making an entry of the relationship of a child born out of wedlock with his/her mother or father in the family register. In 2004, after the court of first instance rendered a judgment on this case, the Ordinance for Enforcement of the Family Register Act was partially revised (Ordinance of the Ministry of Justice No. 76 of 2004), and, as a result, it was provided that a child born out of wedlock must be indicated in the same manner as a child born in wedlock, for example, the "first son/daughter." With regard to the indication of the relationship of a child born out of wedlock with his/her mother or father already entered in the family register, it was announced by a circular notice (Circular Notice Min-Ichi No. 3008 of November 1, 2004, issued from the Director-General of the Civil Affairs Bureau) that such indication should be corrected according to the new rule mentioned above upon request. Furthermore, in 2006 (Gyo-Tsu) No. 135, the judgment of the Grand Bench of the Supreme Court of June 4, 2008, Minshu Vol. 62, No. 6, at 1367, the court declared that Article 3, paragraph (1) of the Nationality Act (prior to the revision by Act No. 88 of 2008), which provided for different rules for the treatment of children born out of wedlock from that of children born in wedlock in terms of acquisition of Japanese nationality, had been in violation of Article 14, paragraph (1) of the Constitution as of 2003 at the latest. When said revision was made to the Nationality Act in response to this Supreme Court judgment, children born out of wedlock who had made a notification for acquisition of Japanese nationality before 2003 were deemed to be

entitled to acquire Japanese nationality.

E. The necessity to equalize the statutory share in inheritance of children born in wedlock and that of children born out of wedlock had been recognized earlier on. In 1979, the Counsellor's Office of the Civil Affairs Bureau of the Ministry of Justice released a draft outline of the Civil Code revision relating to inheritance as an outcome of the deliberation at the Personal Status Law Subcommittee of the Civil Law Committee of the Legislative Council of the Ministry of Justice, in which the office proposed equalization between the statutory share in inheritance of children born in wedlock and that of children born out of wedlock. In addition, said office released a draft outline of the Civil Code revision relating to the marriage system, etc. in 1994 also as an outcome of the deliberation at said subcommittee, and the Legislative Council reported to the Minister of Justice an outline of a bill for partial revision of the Civil Code in 1996, and in these documents, it was clearly stated that the statutory share in inheritance should be equalized for both categories of children. Furthermore, in 2010, the government prepared a revision bill addressing the same point as the abovementioned outlines of the bill with a view to submitting it to the Diet, but neither of them actually reached the Diet.

F…

G. Since it rendered the 1995 Grand Bench Decision, this court has ruled that the Provision is in conclusion consistent with the Constitution. However, upon rendering the 1995 Grand Bench Decision, five Justices already pointed out in their dissenting opinion that more weight should be attached to the position of children born out of wedlock, and moreover, said decision was also accompanied by a concurring opinion given by one Justice stating that the Provision which had been reasonable at the time of the 1947 Civil Code revision was becoming no longer reasonable, in view of the changes in the forms of marriage and parent-child relationship or family relationship, as well as the changes in the international circumstances. Opinions to the same effect have also been attached repeatedly by individual Justices to the subsequent petty bench judgments and decisions…In particular, the abovementioned judgment of the First Petty Bench of the Supreme Court of March 31, 2003, and rulings made by this court thereafter can be understood as barely maintaining the conclusion in favor of the constitutionality of the Provision, if the concurring opinions attached thereto are taken into consideration.

H. Some of the concurring opinions attached to this court's previous rulings mentioned in G. above pointed out that in order to revise the Provision, it was necessary to make a comprehensive decision while paying attention to the consistency with other related provisions regarding inheritance, marriage, parent-child relationship, etc. as well as to the entire framework of the family and inheritance system, and caution would be required for setting the time at which such revision was to take effect and defining the scope of application of the revised provision. On the basis of this, said opinions stated that those matters mentioned therein can be achieved appropriately through the legislative measures taken by the Diet or that the Diet was expected to take the necessary legislative measures quickly.

These concurring opinions were expressed probably because of the great impact of the circumstantial factors mentioned in E. above, that is, there were movements toward the review of the Provision intermittently since 1979 and revision bills were drafted before and after the 1995 Grand Bench Decision were rendered. Be that as it may, it is not necessarily clear which elements of the family and inheritance system are associated with the review of the discriminatory treatment against children born out of wedlock in terms of the statutory share in inheritance. The revision bill outline and the revision bill mentioned in E. above included equalization of the statutory share in inheritance between children born in wedlock and children born out of wedlock but did not aim to revise the spouse's share in inheritance or other related elements of the family and inheritance system as a means to achieve such equalization of the statutory share in inheritance. Hence, the necessity to consider the consistency with the related provisions cannot be the reason for maintaining the Provision as a given. The abovementioned concurring opinions cannot be understood as suggesting that it is impossible to declare unconstitutionality of the Provision by way of a judicial decision. In this respect, even if the Provision is declared unconstitutional by way of a judicial decision, it is still possible to achieve balance with the assurance of legal stability, as explained in detail in Section 4 below.

As mentioned in (2) above, the 1995 Grand Bench Decision also took into consideration that the provisions concerning the statutory share in inheritance, including the Provision, function as supplementary rules to be applied in cases such as in the absence of designation of the shares in inheritance by a will. However, in light of such supplementary nature of the Provision, it is not unreasonable at all to equalize the statutory share in inheritance between children born in wedlock and children born out of wedlock, and what is more, in relation to the statutory reserved share, which cannot be violated even by a will, the Provision is apparently a discriminatory rule set by law, and the very existence of the Provision has the risk of provoking a sense of discrimination against children born out of wedlock upon their birth. In consideration of these points, it must be said that the supplementary function that the Provision has as mentioned above is not a material factor in judging its reasonableness.

(4) None of the changes in various matters, etc. associated with the reasonableness of the Provision can solely be a decisive reason for judging the distinction in terms of the statutory share in inheritance under the Provision. However, giving comprehensive

consideration to circumstances such as the trends in society seen from the time of the 1947 Civil Code revision up until now, the diversification of the forms of family in Japan and the changes in people's perceptions resulting therefrom, the legislative trends in other countries as well as the content of the treaties ratified by Japan and the criticism given by the committees set up under these treaties, the changes in the legal system, etc. relating to the distinction between children born in wedlock and children born out of wedlock, and the problems, etc. repeatedly pointed out in the rulings handed down by this court thus far, it can be said to be an evident fact that respect for individuals in a family, which is a collective unit, has been recognized more clearly. Even if the legal marriage system itself is entrenched in Japan, it is now impermissible, as a result of such change in the recognition, to cause prejudice to children by reason of the fact that their mother and father were not in a legal marriage when they were born -a matter that the children themselves had no choice or chance to correct. Rather, it can be said that a notion that all children must be given respect as individuals and that their rights must be protected has been established.

Putting all points mentioned above together, it must be said that even in consideration of the discretionary power vested in the legislative body, the distinction in terms of the statutory share in inheritance between children born in wedlock and children born out of wedlock had lost reasonable grounds by the time when P's inheritance commenced as of July 2001 at the latest.

Consequently, it must be concluded that the Provision was in violation of Article 14, paragraph (1) of the Constitution as of July 2001 at the latest.

4…

5. Conclusion

For the reasons stated above, with regard to P's inheritance that commenced in July 2001, the Provision should be judged to be inapplicable because it is in violation of Article 14, paragraph (1) of the Constitution and therefore void. The determination of the court of prior instance mentioned above, which is contrary to this conclusion, was made on the basis of the erroneous interpretation of said paragraph and therefore cannot be affirmed. The arguments by Appellant Y1 and the appeal counsel for Appellant Y2 are well-grounded on this point, and without needing to make a determination on other points argued by them, the decision in prior instance should inevitably be quashed. We remand the case to the court of prior instance in order to have the case further examined.

Therefore, the decision has been rendered in the form of the main text by the unanimous consent of the Justices.

The Judgment of Japanese Supreme Court, December 16, 2015

(http://www.courts.go.jp/app/hanrei_en/detail?id=1418)

Constitution Article 14

(1) All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

Article 24

(1) Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.

(2) With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.

Civil Code Article 733

(1) A woman may not remarry unless six months have passed since the day of dissolution or rescission of her previous marriage.

(2) In the case where a woman had conceived a child before the cancellation or dissolution of her previous marriage, the provision of the preceding paragraph shall not apply.

Article 772

(1) A child conceived by a wife during marriage shall be presumed to be a child of her husband.

(2) A child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage shall be presumed to have been conceived during marriage.

State Redress Act Article 1

(1) When a public officer who exercises the public authority of the State or of a public entity has, in the course of his/her duties, unlawfully inflicted damage on another person intentionally or negligently, the State or public entity shall assume the responsibility to compensate therefor.

The final appeal is dismissed.

The appellant of final appeal shall bear the cost of the final appeal.

Concerning the reasons for final appeal argued by the appeal counsel, SAKKA Tomoshi

I. Outline of the case

1. In this case, the appellant of final appeal alleges that the provision of Article 733, paragraph (1) of the Civil Code, which prescribes a six-month period of prohibition of remarriage imposed on women (hereinafter referred to as the "Provision"), violates Article 14, paragraph (1) and Article 24, paragraph (2) of the Constitution, and accordingly, the appellant seeks damages against the appellee of final appeal under Article 1, paragraph (1) of the State Redress Act, on the grounds of the illegality of the appellee's legislative inaction, that is, its failure to take legislative measures to amend or abolish the Provision (hereinafter referred to as the "Legislative Inaction"). According to the facts legally determined by the court of prior instance, the appellee divorced her former husband in March 2008, and then remarried her current husband in October 2008. The appellant asserts that the start of her remarriage was delayed from the time that the parties desired due to the existence of the Provision, and she demands that the appellee should pay her 1,650,000 yen with delay damages accrued thereon, as compensation for the mental distress, etc. that she has suffered from such delay.

2.…

3. In response to these allegations made by the appellant, the court of prior instance held as follows. It is considered that the legislative purpose of the Provision is to avoid confusion over paternity and thereby prevent the occurrence of a dispute over a father-child relationship. This legislative purpose is reasonable, and how long women should be prohibited from remarrying in order to achieve this purpose is an issue to be decided by the Diet while adjusting the balance between said legislative purpose and women's freedom to marry. Accordingly, the Provision that prescribes a six-month period of prohibition of remarriage cannot immediately be considered to be an excessive restriction, and hence, the Legislative Inaction should not be assessed as illegal in the context of the application of Article 1, paragraph (1) of the State Redress Act. In conclusion, the court of prior instance dismissed the appellant's claim.

In summary, the appeal counsel argues that the court of prior instance made errors in interpreting Article 14, paragraph (1) and Article 24, paragraph (2) of the Constitution.

II. Constitutionality of the Provision

1. …

2. Legislative purpose of the Provision

(1)…

(2) With regard to a legitimate parent-child relationship, the current Civil Code sets out a framework for presumption of paternity by way of the following provisions: a child conceived by a wife during marriage is presumed to be a child of her husband (Article 772, paragraph (1) of the Civil Code); a husband may not rebut the presumption that a child is his child born in wedlock other than by filing an action to rebut the presumption of legitimacy (Article 775 of said Code); and such action must be filed within one year from the time the husband comes to know of the child's birth (Article 777 of said Code). This framework makes it possible to determine the legal father-child relationship at an early date. If, under this framework, a woman remarries soon after the day of the dissolution, etc. of her previous marriage and gives birth to a child, a situation could occur in which whether the child's father is her former husband or current husband cannot be determined immediately. Needless to say, should any disputes arise as to the father-child relationship under such circumstances, it would be against the interests of the child.

Article 733, paragraph (2) of the Civil Code provides that the Provision shall not apply from the delivery date if a woman had conceived a child before the dissolution, etc. of her previous marriage, thus making exceptions to the prohibition of remarriage for a woman who would not have a child that could be presumed to be a child of her former husband after remarriage. Also, Article 773 of said Code provides that if a woman who has remarried in violation of the Provision gives birth to a child, and the paternity of the child cannot be determined pursuant to the provisions concerning the presumption of paternity under Article 772 of said Code, the court shall determine paternity of the child, thus setting out a procedure for determining a father-child relationship in the situation where confusion over paternity exists. These provisions of the Civil Code are interpreted as being premised on the fact that the Provision has been enacted with a view to avoiding confusion over paternity.

(3) In light of the legislative background and the position of the Provision in the set of provisions of the Civil Code concerning a legitimate parent-child relationship, etc. as explained above, it is appropriate to construe that the legislative purpose of the Provision is to avoid confusion over paternity of a child who is born after the remarriage of his/her mother, thereby preventing the occurrence of a dispute over a father-child relationship …. In consideration of the importance of clearly determining a father-child relationship at an early date, such legislative purpose is found to be reasonable.

…

3. Then, the next question is whether or not the Provision, which prescribes a six-month period of prohibition of remarriage only for women, can be assessed as being in line with the abovementioned points in association with the legislative purpose and therefore reasonable. We examine this question below.

(1) As explained above, it is considered that the legislative purpose of the Provision is to avoid confusion over paternity and thereby prevent the occurrence of a dispute over a father-child relationship. In this respect, Article 772, paragraph (2) of the Civil Code provides that "A child born after 200 days from the formation of marriage or within 300 days of the day of the dissolution or rescission of marriage shall be presumed to have been conceived during marriage," thus estimating the time of the conception of a child by counting backwards from the time of the child's birth, and with regard to a child who is presumed, based on such estimation, to have been conceived by a wife during marriage, paragraph (1) of said Article provides that "A child conceived by a wife during marriage shall be presumed to be a child of her husband." Accordingly, in respect of a child who is born after the remarriage of his/her mother, it is possible, according to calculation, to avoid confusion over paternity by prescribing a 100-day period of prohibition of remarriage. Marriage has an important effect in that it gives a child born to a married couple the status of a legitimate child. In light of the reason why the system has been established to presume the paternity of a child born in wedlock on the basis of the clear and uniform criterion for reckoning the period that commences from the time of the birth and to determine the father-child relationship at an early date with a view to ensuring the legal stability of the child's family status, the measure to uniformly restrict women from remarrying within said 100-day period to avoid confusion over paternity can be held to be within the scope of the reasonable discretion that is given to the Diet to legislate matters concerning marriage and the family, and therefore be reasonable in association with the abovementioned legislative purpose.

Consequently, the part of the Provision prescribing the 100-day period of prohibition of remarriage does not violate Article 14, paragraph (1) of the Constitution nor Article 24, paragraph (2) of the Constitution.

. . .

The dissenting opinion by Justice YAMAURA Yoshiki is as follows.

Contrary to the majority opinion, I consider that the Provision in whole, which prescribes the six-month period of prohibition of remarriage for women, violates Article 14, paragraph (1) and Article 24, paragraph (2) of the Constitution, and the Diet's legislative inaction, that is, its failure to take legislative measures to abolish the Provision by March 2008, when the appellant divorced her former husband, should be assessed as illegal…

I. Constitutionality of the Provision

1… 2…

3. The majority opinion explains that the legislative purpose of the Provision is to "avoid confusion over paternity and thereby prevent the occurrence of a dispute over a father-child relationship." With such explanation, the majority opinion appears to try to replace the conventional legislative purpose with a new one because, due to the changes in the social circumstances such as the establishment of scientific technology for determination of a blood relationship and the abolition of the traditional family system, etc., the old-fashioned purpose, i.e. preventing confusion in a blood line, is no longer able to support the system of prohibition of remarriage. If the issue is to avoid an overlap between the periods that could cause confusion over paternity, one could reach a conclusion that 100 days would be sufficient to avoid such overlap according to simple calculation, and that therefore the Provision would be made constitutional by shortening the period of prohibition of remarriage by about 80 days. However, it was already clearly indicated at the sessions of the Imperial Diet that an overlap between the periods that could cause confusion over paternity could be avoided just by setting a period of prohibition of remarriage so that no overlap or interval would be created between the periods regarding presumption. The six-month period of prohibition of remarriage was the result of deliberation and it was not an error in calculation that needs to be corrected. When scholars take up the issue of confusion over paternity, they often discuss this issue in the context of proposing an amendment to the Civil Code by arguing, inter alia, that the six-month period of prohibition of remarriage is too long according to calculation and it therefore needs to be shortened to 100 days. However, it must not be overlooked that the present case is a case disputing the constitutionality of the system of prohibition of remarriage itself, rather than the length of the period of prohibition, and that it questions the constitutional significance of existence of the system of prohibition of remarriage, which imposes a strict restriction, despite the fact that there are other means with a lower impact.

Furthermore, in connection with the viewpoint of whether or not preventing the occurrence of a dispute over a blood relationship by means of the system of prohibition of remarriage is conducive to assuring the "interests of the child," the drafters of the Former Civil Code were worried, from the viewpoint of a man who is to marry a woman, about the possibility of the woman conceiving a child of her former husband, and they made no mention of the idea of assuring the interests of the child at the sessions of the Imperial Diet or meetings of the Investigation Committee of Codes, etc. In 1898, women did not have a right to vote, and only a limited group of men who paid a considerable amount of taxes participated in the legislation process. The Former Civil Code was enacted by the Imperial Diet under such circumstances. Both the Former Constitution and the Former Civil Code attached importance only to male children, and the first sons (who were to inherit family estate) in particular, while having no intention of considering the welfare of the second sons or female children, and in this respect, it can be said that children other than the first sons were excluded from the scope of protection. If one considers that the Former Civil Code enacted at such time, which prohibited women's remarriage after divorce, incorporated at all the viewpoint of assuring the interests of a child, such a view is too ignorant of history.

4. Nevertheless, it cannot be denied that it is reasonable to try to avoid inconsistency between a biological father-child relationship and a legal father-child relationship, and in this meaning, the legislative purpose of preventing confusion in a blood line can be deemed to be reasonable to some extent. Therefore, it is understandable for the drafters at that time, when there was no method to accurately determine a blood relationship, to have considered prohibiting women from remarrying for a certain period of time with a view to preventing women from giving birth to children having no blood relationships with the husbands they remarried. However, as UME stated, "although it is appropriate to permit remarriage as long as there is no likelihood of confusion (in a blood line)" (UME, op. cit., p. 92), it was not necessary to prohibit women's remarriage if any scientific method to determine a blood relationship was available… Now that it is possible to scientifically and objectively clarify a biological father-child relationship owing to the progress in DNA testing techniques as explained above, the necessity to prescribe a period of prohibition of remarriage as a means to achieve the legislative purpose of preventing confusion in a blood line has completely been lost, and hence, I consider the Provision in whole to be unconstitutional.

5…6…7…

8. Declaring the Provision in whole to be unconstitutional would be in line with the trends in foreign countries toward complete abolition of the system of prohibition of remarriage. More specifically, in the past, due to the absence of a scientific method to prove a father-child relationship by blood anywhere in the world, an argument that prohibition of women's remarriage is contrary to the principle of equality of sexes was not clearly voiced. Subsequently, the trends drastically changed during a period starting from discovery of the double helix structure of DNA in 1953 until the practical application of DNA testing was achieved in 1985. During this period, foreign countries abolished systems of prohibition of remarriage in succession, and today, there are only a few countries among the major countries that maintain such a system of prohibition of remarriage as that in force in Japan. As a recent example, let us take a look at the Republic of Korea, which had a legal system similar to that of Japan. In 1997, the Constitutional Court declared the system of an action to rebut the presumption of legitimacy (which is equivalent to an action to rebut presumption of legitimacy in Japan) to be unconstitutional, on the grounds that this system imposes an extreme restriction regarding the opportunity to rebut a parent-child relationship that is inconsistent with a true blood relationship and goes beyond the bounds of the legislative discretion. Following this, a legal amendment was made in 2005 to allow the husband and the mother to file an action to rebut legitimacy, and extend the statute of limitations so that this action may be filed within two years from the day the husband or the mother comes to know the grounds for rebuttal (Koh, Sang-Ryong, "Kankoku Kazoku Ho no Daikaikaku" (The great reform of the Korean Family Law), Jurist No. 1294, pp. 84 et seq.). At the same time, Article 811 of the Korean Civil Code which prescribed a six-month period of prohibition of remarriage for women was abolished, as explained as follows: "In a county where marriage is formed upon the acceptance of a notification of marriage, it is obvious that this system is virtually useless. This system rather poses the risk of bringing about a harsh consequence to women because the violation thereof is stipulated as the grounds for rescission of marriage. Accordingly, this provision was deleted through the partial amendment to the Civil Code in 2005" (Kim, Choo-Soo and Kim, Sang-Yong, "Chushaku Daikanminkoku Shinzoku Ho" (Commentary on the family law of the Republic of Korea), p. 28 (Nihon Kajo Publishing, 2007)). It was decided that if a child is born in the situation where confusion of paternity exists, the problem can be solved by filing an action to seek determination of paternity by the court (Article 845 of the Korean Civil Code; which is equivalent to an action seeking determination of paternity in Japan), in which a family court is to determine paternity based on scientific judgment, and that in some cases, blood testing and DNA testing may be implemented using samples of the parties or interested persons, to the extent that these tests do not adversely affect the health or dignity of the persons to be tested (Article 29 of the Korean Domestic Affairs Litigation Law) (Lawyers Association of ZAINICHI Koreans, ed., "Q&A Shin Kankoku Kazoku Ho Dai 2 Han" (Q&A, New Korean family law, second edition), pp. 51 and 135 (Nihon Kajo Publishing, 2015)).

Another important fact is that the Human Rights Committee and the Committee on the Elimination of Discrimination against Women of the United Nations declared that Japan's system of prohibition of remarriage violates the provisions of international treaties concerning gender equality and freedom to marry, and since 1998, these committees have requested or recommended Japan to abolish this system.

Although these facts may not be direct grounds for the constitutional interpretation in Japan, they can still be recognized as material facts that show the changes in the social situation due to which the system of prohibition of remarriage is proved to be contrary to the principle of equality of sexes that is applicable to a married couple and the family as provided in Article 24, paragraph (2) of the Constitution.

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Why Taiwan's Gay Marriage Ruling Matters

The recent ruling is a testament to Taiwan's robust democracy.

By Trevor Sutton and Brian Harding
June 01, 2017

Image Credit: Flickr/Andy Lain

On May 24, the gay, lesbian, and bisexual (LGBT) citizens of Taiwan achieved a major victory when the self-governing island's highest court, the Judicial Yuan, ruled that denying same-sex couples the right to marry violated their right to equality under the Taiwanese constitution. After decades of progress on LGBT issues in Western Europe and North and South America, one might conclude that the ruling was simply the latest domino to fall in the long march towards marriage equality.

But the ruling has a broader and deeper significance beyond changing global attitudes towards the LGBT community. It's also a testament to the robust democracy that the Taiwanese have built in a region that is often lacking in rule of law and pluralistic values.

Rising prosperity and relaxation of political controls have led to improvements on some social and political issues in many East Asian states, but LGBT rights have not moved at the same pace. Only a handful of East Asian countries allow openly LGBT citizens to perform military service, and none allows same-sex couples to adopt. Homosexual relationships remain illegal in Singapore, Malaysia, Brunei, and parts of Indonesia. And, until last week, no government granted any legal status to same-sex relationships.

The Judicial Yuan's ruling thus represents more than a victory in a local culture war. Rather, it serves as a powerful validation of an idea that until now has struggled to gain traction in East Asia: that an Asian society, acting through its own institutions and drawing on its own traditions, can affirm the basic rights of LGBT citizens and afford same-sex relationships the same dignity before the law as that granted to different-sex unions.

That Taiwan should be the first Asian polity to recognize same-sex marriage is, on some level, unsurprising. Taiwan has long been home to one of Asia's most vibrant LGBT communities, part of a dynamic social fabric in a society that has embraced diversity and the expression of minority cultural and political views. For years, Taipei has been home to Asia's largest gay pride festival, and a poll last year indicated that a slight majority of Taiwanese citizens supported same-sex marriage. The Democratic Progressive Party (DPP), which currently holds a legislative majority and the presidency, has also been supportive of LGBT rights.

The causes of Taiwanese pluralism and tolerance are multifaceted. To some extent, they have arisen organically in a society that has few restrictions on speech or social and political activities and welcomes engagement with the outside world. But another critical factor has been a conscious effort by Taiwanese authorities, especially the DPP, to develop a distinct Taiwanese political and cultural identity predicated in key part on respect for civil liberties. One notable consequence of this effort has been reform of the state educational curriculum, historically a powerful shaper of social norms, to deemphasize traditional Confucian moral guidance in favor of pluralistic values.

Yet there is another reason Taiwan is the only polity in Asia that could have produced last week's ruling: Taiwanese political elites' deep commitment to rule of law and constitutionalism, even at the expense of executive authority.

Many countries in East Asia lack an independent judiciary with authority to invalidate executive acts and legislation. Some—such as Japan, Indonesia, and Thailand—have courts with the authority to engage in judicial review, but they play a comparatively muted role in national life. Japan's Supreme Court, for example, has only struck down eight laws as unconstitutional in its 70-year history.

The Judicial Yuan, by contrast, had a central role in the liberalization of Taiwan's political system and has exhibited a zeal in defending democratic liberties and rule of law that has no equivalent elsewhere in East Asia.

Most famously, in 1990, the Judicial Yuan ordered the retirement of a large contingent of politically reactionary legislators who had not been required to face reelection for more than four decades, clearing the way for major democratic reforms. During the 1990s, the court also struck down longstanding bans on political speech, lessened the role of the military in civilian life, and enhanced procedural protections for criminal defendants.

With this perspective in mind, it's possible to view the Judicial Yuan's ruling as the product of a distinctly Taiwanese political culture anchored in respect for the rights of the individual and a government of laws rather than men. That political culture, in turn, offers a compelling argument for why the United States should conceive of its relationship with Taiwan in terms of shared values, rather than solely on the basis of strategic interests.

At a time when Taiwan is still viewed by many U.S. policymakers as a chess piece in a long-running contest with Beijing, the ruling is a necessary reminder that the island has emerged as a beacon of liberal values unlike any other in East Asia.

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Constitutional Court
Republic of China (Taiwan)

Press Release
On the Same-Sex Marriage Case

For Immediate Release
At 4 PM, May 24, 2017

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On the consolidated petitions of Huei-Tai-12674 filed by Chia-Wei Chi and Huei-Tai-12771 filed by the Taipei City Government, regarding the constitutionality of same-sex marriage, the Constitutional Court announces the J.Y. Interpretation No. 748 at 4 PM on May 24, 2017.

The rulings of the Court are as follows:

(1) The provisions of Chapter 2 on Marriage of Part IV on Family of the Civil Code do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the committed purpose of managing a life together. The said provisions, to the extent of such failure, are in violation of both the people's freedom of marriage as protected by Article 22 and the people's right to equality as guaranteed by Article 7 of the Constitution.

(2) The authorities concerned shall amend or enact relevant laws, in accordance with the ruling of this Interpretation, within two years from the issuance of this Interpretation. It is within the discretion of the authorities concerned to determine the formality for achieving the equal protection of the freedom of marriage.

(3) If relevant laws are not amended or enacted within the said two years, two persons of the same sex who intend to create the said permanent union shall be allowed to have their marriage registration effectuated at the authorities in charge of household registration, by submitting a written document signed by two or more witnesses in accordance with the said Marriage Chapter.

The main reasons of this Interpretation are as follows:

(1) For more than three decades, Petitioner Chia-Wei Chi has been appealing to the legislative, executive, and judicial departments for the right to same-sex marriage. After more than a decade, the Legislative Yuan is still unable to complete its legislative process on those bills regarding same-sex marriage. This case involves the very controversial social and political issues of whether homosexuals shall enjoy the equal protection of the same freedom of marriage as heterosexuals. The representative body is to enact or revise the relevant laws in due time. Nevertheless, the timetable for such legislative solution is hardly predictable now and yet these petitions involve the protection of people's fundamental rights. It is the constitutional duty of this Court to render a binding judicial decision, in time, on issues concerning the

safeguarding of constitutional basic values such as the protection of people's constitutional rights and the free democratic constitutional order.

(2) Those prior J.Y. Interpretations mentioning "husband and wife" or "a man and a woman", in terms of the factual backgrounds of the original cases from which they arose, were made within the context of opposite-sex marriage. Thus far, this Court has not made any Interpretation on the issue of whether two persons of the same sex are allowed to marry each other.

(3) Unspoused persons eligible to marry shall have their freedom to marry, which includes the freedom to decide "whether to marry" and "whom to marry" (*see* J.Y. Interpretation No. 362). Such decisional autonomy is vital to the sound development of personality and safeguarding of human dignity, and therefore is a fundamental right to be protected by Article 22 of the Constitution.

(4) Creation of a permanent union of intimate and exclusive nature for the committed purpose of managing a life together by two persons of the same sex will not affect the application of the Marriage Chapter to the union of two persons of the opposite sex. Nor will it alter the social order established upon the existing opposite-sex marriage. Furthermore, the freedom of marriage for two persons of the same sex, once legally recognized, will constitute the collective basis, together with opposite-sex marriage, for a stable society. The need, capability, willingness and longing, in both physical and psychological senses, for creating such permanent unions of intimate and exclusive nature are equally essential to homosexuals and heterosexuals, given the importance of the freedom of marriage to the sound development of personality and safeguarding of human dignity. Both types of union shall be protected by the freedom of marriage under Article 22 of the Constitution. The current provisions of the Marriage Chapter do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the committed purpose of managing a life together. This is obviously a gross legislative flaw. To such extent, the provisions of the Marriage Chapter are incompatible with the spirit and meaning of the freedom of marriage as protected by Article 22 of the Constitution.

(5) Article 7 of the Constitution provides, "All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law." The five classifications of impermissible discrimination set forth in the said Article are only exemplified, neither enumerated nor exhausted. Therefore, different treatment based on other classifications, such as disability or sexual orientation, shall also be governed by the right to equality under the said Article.

(6) Sexual orientation is an immutable characteristic that is resistant to change. The contributing factors to sexual orientation may include physical and psychological elements, living experience, and the social environment. Major medical associations have stated that homosexuality is not a disease. In our country, homosexuals were once denied by social tradition and custom in the past. As a result, they have long been locked in the closet and suffered various forms of *de facto* or *de jure* exclusion or discrimination. Besides, homosexuals, because of the demographic structure, have been a discrete and insular minority in the society. Impacted by stereotypes, they have been among those lacking political power for a long time, unable to overturn

their legally disadvantaged status through ordinary democratic process. Accordingly, in determining the constitutionality of different treatment based on sexual orientation, a heightened standard shall be applied.

(7) The Marriage Chapter does not set forth the capability to procreate as a requirement for concluding an opposite-sex marriage. Nor does it provide that a marriage is void or voidable, or a divorce decree may be issued, if either party is unable or unwilling to procreate after marriage. Accordingly, reproduction is obviously not an essential element of marriage. The fact that two persons of the same sex are incapable of natural procreation is the same as the result of two opposite-sex persons' inability, in an objective sense, or unwillingness, in a subjective sense, to procreate. Disallowing two persons of the same sex to marry, for the sake of their inability to reproduce, is a different treatment having no apparent rational basis.

(8) The basic ethical orders built upon the existing institution of opposite-sex marriage will remain unaffected, even if we allow two persons of the same sex to enter into a legally recognized marriage pursuant to the formal and substantive requirements of the Marriage Chapter, as long as they are subject to the rights and obligations of both parties during the marriage and after the marriage ends. Disallowing two persons of the same sex to marry, for the sake of safeguarding basic ethical orders, is a different treatment, also obviously having no rational basis. Such different treatment is incompatible with the spirit and meaning of the right to equality as protected by Article 7 of the Constitution.

(9) The authorities concerned shall complete the amendment or enactment of relevant laws in accordance with the ruling of this Interpretation, within two years after the announcement of this Interpretation. It is within the discretion of the authorities concerned to determine the formality (for example, revision of the Marriage Chapter, enactment of a special Chapter in Part IV on Family of the Civil Code, enactment of a special law, or other formality) for achieving the equal protection of the freedom of marriage for two persons of the same sex.

(10) If the amendment or enactment of relevant laws is not completed within the said two-year timeframe, two persons of the same sex who intend to create a permanent union of intimate and exclusive nature for the committed purpose of managing a life together may, pursuant to the provisions of the Marriage Chapter, apply for marriage registration to the authorities in charge of household registration, by submitting a document signed by two or more witnesses. Any such two persons, once registered, shall be accorded the status of a legally recognized couple, and then enjoy the rights and bear the obligations arising on couples.

Justice Jui-Ming Huang recused himself and took no part in the deliberation, oral arguments or the decision of this case.

Justice Horng-Shya Huang filed a dissenting opinion in part. Justice Chen-Huan Wu filed a dissenting opinion.

Context versus autonomy

In stark contrast to main-stream comparative law, some outsiders have recently developed ambitious theoretical perspectives dealing with legal irritants and at the same time irritating the main-stream. I single out three authors: Pierre Legrand, Alan Watson, and William Ewald.

From an anthropologically informed 'culturalist' perspective Pierre Legrand stresses the idiosyncracies of diverse legal cultures and irritates the European-minded consensus of comparativists with his provocative thesis that 'European legal systems are not converging'.[12] Of course, he argues, convergences are observable on the level of legal rules and institutions but the deep structures of law, legal cultures, legal mentalities, legal epistemologies and the unconscious of law as expressed in legal mythologies, remain historically unique and cannot be bridged:

> cultures are spiritual creations of their relevant communities, and products of their unique historical experience as distilled and interpreted over centuries by their unique imagination.[13]

These fundamental differences do not only exist between very distant world cultures, but between the laws of modern industrialised societies as well, and they are particularly strong between the common law and the civil law culture. Accordingly, legal transplants are exposed to the insurmountable differences of cultural organisms; they cannot survive, unchanged, the surgical operation:

> Rather, the rule, as it finds itself technically integrated into another legal order, is invested with a culture-specific meaning at variance with the earlier one. Accordingly, a crucial element of the ruleness of the rule — its meaning — does not survive the journey from one legal culture to another.[14]

This is an exciting perspective which promises new insights from an adventurous journey through deeper and darker areas of comparative law. It is a contemporary reformulation of Montesquieu's culturalist scepticism against the easy transfer of legal institutions, but with the important modification that the 'esprit des lois' is less a reflection of a national culture, but rather, of a specific legal culture. And it radically reconstructs legal transplants anew. This is done not from the author-perspective of the super-imposing legal order, but from the view point of the receiving legal culture, which is reading anew, reconstructing, recreating the text of the transplant. 'Accordingly, legal transplants are impossible'.[15]

Promising as it is, this approach is, however, vulnerable to some important objections. How will it avoid the fatal calamities of any approach to '*gesellschaftliche Totalität*', to 'totality of society' in which each legal element reflects the whole societal culture and vice versa? How will such an appeal to the

12 Pierre Legrand, 'Comparatists-at-Law and the Contrarian Challenge' (1995a) *Inaugural Lecture. Tilburg*; Pierre Legrand, 'Comparative Legal Studies and Commitment to Theory' (1995b) 58 *Modern Law Review* 262; Pierre Legrand, 'Against a European Civil Code' (1997a) 60 *Modern Law Review*; Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997b) 4 *Maastricht Journal of European and Comparative Law* 111.

13 Bhikou Parekh, 1994 cited by Pierre Legrand, 1995a, n 12 above, 10.

14 Pierre Legrand, 1995a, n 12 above, n 33; 1997b, n 12 above, 119.

15 Legrand, 1997b, n 12 above, 114. The inspirational source is of course Stanley Fish and his reader-response theory, see Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Oxford: Oxford University Press, 1989); Stanley Fish, *There's No such Thing as Free Speech* (Oxford: Oxford University Press, 1994).

totality of cultural meaning, to the ensemble of deep structures of law and to society's culture *tout court* be translated into detailed analyses of interaction between law and culture? Legrand's still rather modest efforts stand in a somewhat strange contrast to the sweeping claims of his general programme.[16] Secondly, how will he account for the manifold successful institutional transfers among Western societies that have taken place rapidly and smoothly? And thirdly, does his own transfer into legal discourse of anthropological culturalist knowledge, which presumes that legal phenomena are deeply culturally embedded, take into account fragmentation, differentiation, separation, closure of discourses that is so typical for the modern and post-modern experience?[17] Does Legrand adequately reflect the double fragmentation of global society which consists not only in polyculturalism which he speaks about but also in deep cleavages between discourses which he tends to neglect?[18]

In direct contrast to Legrand, the legal historian Alan Watson has an easy way to deal with these three objections. He provides rich historical evidence showing that transferring legal institutions between societies has been an enormous historical success despite the fact that these societies display a bewildering diversity of socio-economic structures. He explains the success of legal transplants by a highly developed autonomy of the modern legal profession.[19] He confronts functionalist comparativists with the theoretical argument that convergence of socio-economic structures as well as functional equivalence of legal institutions in fact do not matter at all. Neither does — this is his message to the culturalists — the totality of a society's culture.

These claims are based on three main arguments which deserve closer scrutiny. First, Watson asserts, comparative law should no longer simply study foreign laws but study the interrelations between different legal systems.[20] In my view, this argument reflects rightly a major historical shift in the relation between nations and their laws and is apt to reduce inflated culturalist claims. Montesquieu, in his '*esprit des lois*', could still maintain that laws are the expression of the spirit of nations, that they are deeply embedded in and unseparable from their geographical peculiarities, their customs and politics. Therefore the transfer of culturally deeply embedded laws from one nation to the other was a '*grand hasard*'. Today, due to long-term historical processes of differentiation and globalisation, the situation is indeed different. The primary unit is no longer the nation which expresses its unique spirit in a law of its own as a cultural experience which cannot be shared by

16 See Pierre Legrand, 1995a, n 12 above, and Pierre Legrand, 1996, n 9 above, for a somewhat 'schematic' attempt to sort out the differences between the civil law and the common law culture. The empirical basis for his thesis is not very strong, see Legrand, 1997b, n 12 above, 118f.

17 Jean-François Lyotard, *The Différend: Phrases in Dispute* (Manchester: Manchester University Press, 1987) speaks of hermetic closure of discourses; Niklas Luhmann, 1995, n 11 above, sees in the global society a double fragmentation: cultural polycentricity and functional differentiation; Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass: MIT, 1996) identifies within the lifeworld a multiplicity of discourses.

18 Pierre Legrand needs to explain why he sees almost unsuperable cleavages between different legal cultures while he negates similar cleavages between legal cultures on the one hand, political, economic, academic, aesthetic cultures on the other (Pierre Legrand, 1995a, n 12 above). Particularly under post-modernist claims which accentuate the fragmentation of diverse discourses (Jean-Francois Lyotard) this position is difficult to defend.

19 Alan Watson, *The Evolution of Law* (Baltimore: Johns Hopkins University Press, 1985); Alan Watson, 'Evolution of Law: Continued' (1987) 5 *Law and History Review* 537–570; Alan Watson, *Legal Transplants* (2nd ed, Georgia: University of Georgia, 1993); Alan Watson, 'Aspects of Reception of Law', (1996) 44 *American Journal of Comparative Law* 335.

20 Alan Watson (1993) *ibid* 1–21.

other nations with different cultural traditions. Rather, national laws — similar to national economies — have become separated from their original comprehensive embeddedness in the culture of a nation. And globalising processes have created one world-wide network of legal communications which downgrades the laws of the nation states to mere regional parts of this network which are in close communication with each other.[21] Therefore the transfer of legal institutions is no longer a matter of an inter-relation of national societies where the transferred institution carries the whole burden of the original national culture. Rather it is a direct contact between legal orders within one global legal discourse. This explains the frequent and relatively easy transfer of legal institutions from one legal order to the other. However, at the same time their ties to the 'life of nations' have not vanished. Although having become rather loose they still exist, but in a different form. And it must be said against Watson in his engaged polemics against mirror-theories of law and society that in spite of all differentiation and all autonomy of law we should not lose sight of the cultural ties of the laws and closely observe what happens to them when laws are de-coupled from their national roots.

Second, Watson identifies transplants as the main source of legal change.[22] The legal profession prefers to imitate and take over rules and principles from foreign legal orders rather than reacting directly to external stimuli from society. Watson traces this to the peculiarities of the legal profession who need to argue from precedent and authority. They prefer to derive their solutions from legal traditions and abhor a *creatio ex nihilo*. Again, he has a point here. However, the idiosyncrasies of the profession seem to me a secondary phenomenon. It is the inner logics of the legal discourse itself that builds on normative self-reference and recursivity and thus creates a preference for internal transfer within the global legal system as opposed to the difficult new invention of legal rules out of social issues. But once again, this preference of the legal discourse for its own products should not blind the analysis against the fact that usually in case of transplants the law reacts to external pressures that are then expressed in a recourse to foreign legal rules. And if one wants to understand the dynamics of legal transplants one must analyse those external pressures from culture and society carefully.

Third, Watson generalises from his historical materials that legal evolution takes place rather insulated from social changes, that it tends to use the technique of 'legal borrowing' and can be explained without reference to social, political, or economic factors.[23] Again, with the richness of his studies on the history of private law he scores a point against contextualists and culturalists who see law as mirroring culture and society. And his findings resonate with sociological theories about cultural evolution which reject a historical trajectory for the whole of society and identify, instead, separate evolutionary paths for different sectors of society, among them law. Indeed, legal transplants seem to be one main source for a specific legal evolution because they create variety of meaning in law. However, here again, Watson has not finished his task. In his polemics against contextualism he overgeneralises and is not willing to

21 For the debate on globalisation and law, see William Twining, 'Globalisation and Legal Theory' (1996) 49 *Current Legal Problems* 1; G. Teubner (ed), *Global Law Without A State* (Aldershot: Dartmouth Gower, 1997); Klaus Röhl and Stefan Magen, 'Die Rolle des Rechts im Prozeß der Globalisierung' (1996) 17 *Zeitschrift für Rechtssoziologie* 1; Lawrence M. Friedman, 'Borders: On the Emerging Sociology of Transnational Law' (1996) 32 *Stanford Journal of International Law* 65.

22 Alan Watson, 1993, n 19 above, 95.

23 Alan Watson, *The Making of the Civil Law* (Cambridge, Mass: Harvard University Press, 1981) 38.

scrutinise more indirect, more subtle ways of law and society interrelations.[24] He makes only one attempt when he describes the legal professional elite as the translator of general culture to legal culture. But here he identifies a surface phenomenon instead of scrutinising the links between the deep structure of different discourses.[25] How will he integrate obvious counterexamples of politically induced changes of the law, like the political transformation of American public law in the Revolution, as analysed by Ewald?[26] He seems to be obsessed with the somewhat sterile alternative of cultural dependency versus legal insulation, of social context versus legal autonomy, an obsession which he shares, of course, with his opponents.[27] The whole debate, it seems to me, needs some conceptual refinement that allows us to analyse institutional transfer in terms different from the simple alternative context versus autonomy. Hopefully, the refinement will not end up in the compromising formula that legal transfers take place in 'relative autonomy' ...

Binding arrangements in a fragmented society

The impasse of context versus autonomy may be overcome by distinguishing two types of institutional transfer which Otto Kahn-Freund suggested twenty years ago.[28] He proposed to distinguish between legal institutions that are culturally deeply embedded and others that are effectively insulated from culture and society. Legal institutions are ordered alongside a spectrum which ranges from the 'mechanical' where transfer is relatively easy to the 'organic' where transfer is very difficult, if not outright excluded. At the same time Kahn-Freund reformulated drastically the meaning of the 'organic', shifting it from the traditional comprehensive social embeddedness of law to a new selective connectivity. Legal institutions are no longer totally intertwined in the whole fabric of society and culture, their primary interdependency is concentrated on politics. Thus, institutional transfers of the organic type depend mainly on their interlocking with specific power structure of the societies involved.[29]

I would like to build on these distinctions — mechanic/organic and comprehensive/selective — modifying them, however, to a certain degree. They provide indeed the missing link in Watson's account of autonomous transplants and allow for a more sociologically informed formulation of Legrand's culturalism. They attempt to grasp what happened to the social ties of law in the great historical transformation from embeddedness to autonomy — something that I would call law's 'binding arrangements'.[30] True, Montesquieu's vision of a total

24 This argument is made forcefully by William Ewald, 'The American Revolution and the Evolution of Law' (1994) 42 *American Journal of Comparative Law* 1; William Ewald, 'Comparative Jurisprudence II: The Logic of Legal Transplants' (1995) 43 *American Journal of Comparative Law* 489, in his detailed critique of Alan Watson's work.

25 Alan Watson, 1985, n 19 above, ch 5; Alan Watson, 1987, n 19 above, 568ff.

26 William Ewald, 1994, n 24 above, uses historical studies of legal changes in the American Revolution which corroborate roughly Alan Watson's findings in the field of private law but contradict them directly in the field of public law. See also J.W.F. Allison, *A Continental Distinction in the Common Law* (Oxford: Oxford University Press, 1996) 14, questioning Watson's empirical evidence.

27 Richard Abel, 'Law as Lag: Inertia as a Social Theory of Law' (1982) 80 *Michigan Law Review* 785–809.

28 Otto Kahn-Freund, n 7 above, 298f.

29 *ibid* 303ff.

30 For this concept see Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1992) 13 *Cardozo Law Review* 1443.

union of law and national culture is no longer adequate for the formalised, technicised, professionalised law of our times which has achieved operational closure in the process of positivisation. But, where something is excluded, it often returns through a back door. Law's old connections reappear in new disguises in which they are barely discernible.

I would like to put forward four theses as to how the new ties of law look and elaborate on these in the remainder of the article:

(1) Law's contemporary ties to society are no longer comprehensive, but are highly selective and vary from loose coupling to tight interwovenness.
(2) They are no longer connected to the totality of the social, but to diverse fragments of society.
(3) Where, formerly, law was tied to society by its identity with it, ties are now established via difference.
(4) They no longer evolve in a joint historical development but in the conflictual interrelation of two or more independent evolutionary trajectories.

These four properties of law's binding arrangements share with a culturalist perspective the assumption that law is intricately interwoven with culture, but they differ when it comes to the high degree of selectivity of the bonds which excludes any talk about the 'totality of society'. They share with an autonomist perspective the assumption that it is naive to speak of law mirroring society, but they differ in their assessment of legal autonomy. Greater autonomy does not mean greater independence of law, rather a greater degree of interdependence with specific discourses in society.

What do these four properties of the new ties of law and society imply for the transfer of legal institutions? In particular, how will the transfer of continental good faith to British law be influenced by these selective bonds?

Tight and loose coupling

The new ties are highly selective. Since contemporary legal rule production is institutionally separate from cultural norm production, large areas of law are only in loose, non-systematic contact with social processes. It is only on the ad-hoc basis of legal 'cases' that they are confronted with social conflicts. They reconstruct them internally as 'cases' deciding them via the reformulation of pre-existing rules. However, as opposed to these spaces of loose coupling there are areas where legal and social processes are tightly coupled. Here, legal rules are formulated in ultracyclical processes between law and other social discourses which bind them closely together while maintaining at the same time their separation and mutual closure.[31]

Various formal organisations and processes of standardisation as well as references of law to social norms work as extra-legal rule-making machines. They are driven by the inner logics of one specialised social domain and compete with

31 For an analysis of ultracyclical processes in law and society see Gunther Teubner, 'Autopoiesis and Steering: How Politics Profits from the Normative Surplus of Capital' in R. in t'Veld *et al* (eds), *Autopoiesis and Configuration Theory* (Dordrecht: Kluwer, 1991).

the legislative machinery and the contracting mechanism.[32] This difference between loose and tight coupling has implications for the institutional transfer from one legal order to the other. Kahn-Freund's suggestion that institutional transfer may be of a 'mechanic' type or of a more 'organic' type makes sense in the light of this difference. While in the loosely coupled areas of law a transfer is comparably easy to accomplish, the resistance to change is high when law is tightly coupled in binding arrangements to other social processes.

We should be aware, however, that even in areas of loose coupling, where an institutional transfer is easier to accomplish, this is not as 'mechanical' as Kahn-Freund suggested, such as the analogy of changing a carburretor in an engine. William Ewald in his subtle critique of both legal contextualism and legal autonomism makes a forceful argument against a purely mechanical transfer. Even in those situations when the law is rather 'technical', insulated from its social context, legal transfer is not smooth and simple but has to be assimilated to the deep structure of the new law, to the social world constructions that are unique to the different legal culture.[33] Here, in the difference of legal *épistémes*, in the different styles of legal reasoning, modes of interpretation, views of the social world, Legrand's culturalist ideas find their legitimate field of application, particularly under contemporary conditions. After the formal transfer, the rule may look the same but actually it has changed with its assimilation into the new network of legal distinctions. In such situations, the transfer is exposed to the differences of episode linkages that are at the root of different legal world constructions.[34] Legal cultures differ particularly in the way in which they interconnect their episodes of conflict solution. Here, the great historical divide between common law and civil law culture still has an important role to p

Returning to our example, the famous *bona fides* principle is clearly one unique expressions of continental legal culture. The specific way in which continental lawyers deal with such a 'general clause' is abstract, open-ended, principle-oriented, but at the same time strongly systematised and dogmatised. This is clearly at odds with the more rule-oriented, technical, concrete, but loosely systematised British style of legal reasoning, especially when it comes to the interpretation of statutes. Does then the inclusion of such a broad principle in a British statute also imply that British lawyers are now supposed to 'concretise' this general clause in the continental way? Will British judges now 'derive' their decisions from this abstract and vague principle moving from the abstract to the concrete via different and carefully distinguished steps of concretisation? Will they reconstruct good faith in a series of abstract well-defined doctrinal constructs, translate it into a system of conditional programmes, apply to it the obscurities of teleological reasoning, and indulge in pseudo-historical interpretation of the motives why good faith had been incorporated into the Euro-Directive? From my impressions of British contract law I would guess that good faith will never be

32 Inger-Johanne Sand, 'From the Distinction Between Public Law and Private Law to Legal Categories of Social and Institutional Differentiation in a Pluralistic Legal Context' in Hanne Petersen and Henrik Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot: Dartmouth, 1995) 85; Gunther Teubner, *ibid*, 134ff.

33 William Ewald, n 9 above, 1943ff. For a recent comparative analysis of the deep structure of common law and civil law, Tim Murphy, *The Oldest Social Science?* (Oxford: Clarendon, 1997) 81–126.

34 See Gunther Teubner, 'Episodenverknüpfung' in D. Baecker *et al* (eds), *Theorie als Passion* (Frankfurt: Suhrkamp, 1987); and Gunther Teubner, 'How the Law Thinks: Towards a Constructivist Epistemology of Law' (1989) 23 *Law and Society Review* 727 for the relation of episode linkages to social world constructions of law.