Thai Legal Studies (2022) Vol. 2 No. 2 | 227–250
https://doi.org/10.54157/tls.261236

Application of Natural Law Doctrine in Constitutional Court Decision No. 20/2564: A Jurisprudential Analysis

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Abstract

In late 2021, the Constitutional Court of Thailand issued a decision concerning the constitutionality of Section 1448 of the Thai Civil and Commercial Code. Due to the decision, same-sex marriage remains unregulated. The Court implemented natural-law doctrines as their reasons. Natural-law theories are the primary opponents of same-sex marriage within the jurisprudential debate. This paper explores the natural-law doctrines used and presents an analysis of this constitutional decision by way of legal philosophy. Hume's Law is helpful in discerning natural-law theories. The citation of Cicero's "true law" proves to help analyse other doctrines and comment on some of the contradictions from the natural-law applications. One contradiction is the citation of Cicero's text itself, another, from the simultaneous reference of nature and tradition. Another apparent reference of natural-law doctrines the Court used is the preservation argument. Upon the subjects of marriage, natural law, and procreation, it is worthy of exploring some of John Finnis's natural-law theory and its similarity with this decision's rationales. This constitutional decision is significant from the philosophical perspective and an excellent opportunity to explore the role of the legal philosophy of the ancient Greek to the contemporary period in Thai jurisprudence.

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Keywords: Natural laws — Constitutional court — Cicero — Same-sex marriage — Jurisprudence

I. INTRODUCTION

On 17 November 2021, the Constitutional Court of the Kingdom of Thailand (CC) issued a decision concerning the constitutionality of Section 1448 of the Thai Civil and Commercial Code (TCCC). The provision specifies conditions for marriage, indicating that same-sex marriage is not permitted. The CC ruled that the provision does not violate or contravene constitutional provisions. Therefore, same-sex marriage remains legally unregulated in Thailand. A challenge was initiated by Permsub Sae-ung and Puangphet Hengkham, a legally unmarried same-sex couple who applied to register their marriage legally, but were denied. The couple petitioned the Central Juvenile and Family Court (CJFC) to reverse the decision. The CJFC in turn petitioned the CC to determine whether Section 1448 is constitutional.[1]

Section 1448 states that "a marriage can take place only when the man and woman have completed their seventeenth year of age." There are four conditions for a couple to be legally wed.[2] Of these, that people of two genders must participate was the focal point of the claim. The claimant, seeking to legalise marriage between same-sex couples, claimed that the provision violates or contradicts Articles 4, 5, 25, 26 and 27 of the Constitution. The CC deemed that Articles 4 and 5 are general provisions on human dignity, rights, liberties, intrapersonal equality, and constitutional supremacy. Article 27 relates to Article 30 of the Constitution. The latter article states the general provision of sexual equality, and the former prohibits any act leading to undue discrimination, thereby constitutionally prohibiting sexual discrimination. Article 26 serves as a provisional clause of the rule of law, rendering unconstitutional any act that excessively restricts individual liberty and rights. The CC disregarded claims related to Articles 4 and 5 and considered the rest of the aforementioned articles.

The CC justifications attempted to bolster heterosexual marriage by invalidating the concept of same-sex marriage. The CC defined marriage as a voluntary union between a man and woman for reproduction and intimate care.[3] Same-sex wedlock cannot fulfil the reproduction criterion, so cannot be considered marriage.

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[1] "แจกแจงประเด็นจากคำวินิจฉัยศาลรัฐธรรมนูญ ไม่สนข้อเสนอกฎหมาย ไม่เข้าใจสมรสเท่าเทียม" *iLaw* (3 December 2021) ["Clarifying Issues from the Constitutional Court Decision: Ignoring Laws, Misunderstanding Same-sex Marriage" *iLaw* (3 December 2021)] (Thai) <https://ilaw.or.th/node/6036>.

[2] ประสพสุข บุญเดช, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ ว่ากฎหมายครอบครัว (พิมพ์ครั้งที่ 21, สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2558) [Prasopsuk Boondej, *Explanation of the Civil and Commercial Code on the Family Law* (21st edn, Legal Education Institute of the Thai Bar Association 2015)] (Thai) 112.

[3] Thai Constitutional Court Decision 20/2564, 17 November 2021.

Reproduction is essential for repopulating society[4] to preserve the human species.[5] The reasons given for denying same-sex marriage were based on natural laws, culture, and traditions.[6] The CC also reasoned that Section 1448 was enacted according to "right reason," rendering it "true law."[7]

This paper does not critique the CC decision per se, but examines the reasons underlying it. At first glance, justifications in the decisions appear to hint at natural law doctrine. This paper analyzes the natural law doctrine used to rationalize the decision. The distinction between "*is*-" and "*ought*-" statements will be used as instruments to discern natural law doctrine in addition to intentional and unintentional references worth considering. Whether the CC's argument about species survival will also be evaluated. References to natural law doctrine may be inherently contradictory, and must therefore be used with extreme care. Apart from contradictions between natural law doctrine and its applications, especially in the CC decision, alternative usages may be beneficial, insofar as many natural law doctrines and theoretical sources exist. Finally, Finnis's natural law theory will be compared to the reasons provided in the decision.

II. DISCERNING NATURAL LAW DOCTRINES

Natural law is a concept that has existed for thousands of years. The concept is traceable to Ancient Greek philosophy. Contents of natural laws vary between different philosophers and legal theorists. However, the source of natural law remains consistent. As the name suggests, natural law derives from nature. In other words, theories suggest that "true" law may be found in nature. The aforementioned premise is primordial, whereas secondary ones differ among theorists and philosophers. Secondarily, theories suggest that natural laws are consistent with justice or other "inherent" values. Therefore, laws inherently have values.

There are two main ways to discern natural law doctrines. First, natural law doctrines state that law must be congruent with nature. Accordingly, justice or other values such as morality may also be found in nature. Therefore, there is no separation between law and nature or value. The first thesis of legal positivism—the primary opponent of natural law theory—concerns separation of law and morality.[8] If any legal reasoning refers to nature, those reasons are based on grounds of natural law doctrine. Secondly, natural law doctrines have existed for centuries. Many philosophers and

[4] ibid.
[5] ibid.
[6] ibid.
[7] ibid.
[8] Legal positivism has two main theses: separation and source theses. The former states that there is no connection necessary between law and morality. The latter states that legal validity is ultimately determined by referring to certain basic social facts; see Joseph Raz, "The Purity of the Pure Theory" in Richard Tur and William Twinning (eds), *Essays on Kelsen* (Clarendon Press 1986) 81.

theorists have attempted to identify natural laws. Any references to reasons or methodology of natural law theorists clearly pertain to natural law doctrine.

A. Distinguishing Between "Is" and "Ought"

However attractive theory may be, doctrines have shortcomings. David Hume, the eighteenth-century Scottish Enlightenment philosopher, spotted a critical fallacy in this doctrine by considering metaethics. Hume was among the "greatest enemies" of natural law.[9] He established a metaethical law of *is-ought*, stating that an *ought*-statement cannot derive from mere speculations of an *is*-statement.[10] *Ought*-statements are statements of value, that is, about what ought or ought not to be done or exist. On the other hand, *is*-statements are about what is—statements about nature. This argument is referred to as Hume's law, Hume's guillotine, or naturalistic fallacy, a term coined by the British philosopher G. E. Moore.[11] Hume's sharp dichotomies are fundamental to legal positivism,[12] especially the separation thesis.[13] Law, as a norm, or act of will, is considered an *ought*-statement located in its own realm, separate from the *is*-statement domain. Consequently, positive laws are different from, and not to be confused with, natural laws.[14] Therefore, it is reasonable to use Hume's law as an instrument to discern natural law doctrines.

The instrument indicates legal reasons referring to the realm of *is*-statements or the realm of nature. The CC decision about Section 1448 comprises many references to nature. The most obvious one is overt mention by the CC that the "basis [พื้นฐาน; *phuen than*] of law, apart from laws of nature, is congruence with tradition and customs of each society."[15] The CC explicitly states that one of the "bases" of laws is the

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[9] Sheldon Wein, "David Hume and the Empiricist Theory of Law" (1990) 9 Man and Nature (L'homme et la nature), 33, 34 <https://doi.org/10.7202/1012608ar>.

[10] David Hume, *A Treatise of Human Nature* (L. A. Selby-Bigge (ed), 2nd edition with text revised and variant readings by P. H. Nidditch, Clarendon Press 1978) 469–70 <https://doi.org/10.1093/actrade/9780198245872.book.1>.

[11] G. E. Moore, *Principia Ethica* (Dover Publication, 2004) 10.

[12] Wein "Empiricist Theory of Law" (n 9) 35. Wein argues in his article that Hume cannot be considered a legal positivist because of Hume's thought concerning the minimum content of law in his later writings.

[13] Juliele Maria Sievers, "*A Philosophical Reading of Legal Positivism*" (PhD diss, Université Charles de Gaulle—Lille II 2015) 28; Hans Kelsen, *General Theory of Norms* (Michael Hartney tr, Clarendon Press 1991) 86 <https://doi.org/10.1093/acprof:oso/9780198252177.003.0020>. Kelsen emphasises Hume's theory of *is-ought*. Kelsen states that a norm as an *ought* cannot be derived from an *is*. It is a direct reference to Hume's law.

[14] Kelsen emphasises the difference between "what *is*" and "what *ought to be*" when he criticises Alf Ross's *On Law and Justice*. He writes: "For the statements of legal science are not statements about how people actually behave. They are statements about how people ought to behave according to a certain national or international legal system;" Hans Kelsen, "A 'Realistic' Theory of law and the Pure Theory" (Luís Duarte d'Almeida tr) in Luís Duarte d'Almeida et al. (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing 2013) 200.

[15] CC 20/2564 (n 3).

law of nature. Following that reasoning, the CC also mentions that the purpose of marriage law, which must be congruent to its "bases," is to reproduce.[16]

If the nature of human beings is to procreate, the ability to reproduce is a natural fact, although some people cannot procreate. This statement falls within the realm of *is* rather than *ought*. Hume's Law will not permit referring to the fact of procreation and deriving from it an *ought*-statement that "therefore, people ought to procreate." *Philosophy of Law: A Very Short Introduction* by Raymond Wacks illustrates Hume's law and natural theory on same-sex marriage as follows:

> All animals procreate (major premise)
> Human beings are animals (minor premise)
> Therefore humans *ought* to procreate (conclusion).[17]

Kant's *Critique of Pure Reason* was influenced by Hume's philosophy[18] on the dualism between *is* and *ought*. Like Hume, Kant wrote:

> The **ought** expresses a kind of necessity and connection with grounds that we do not find elsewhere in the whole of nature. The understanding can know in nature only **what is**, what has been or what will be. It is impossible that anything in nature **ought to be** different from what in fact it is in all these relations of time; nay, if we only look at the course of nature, the **ought** has no meaning whatever. We cannot ask what ought to happen in nature, as little as we can ask what qualities a circle ought to possess. We can only ask what happens in nature, and what properties the circle has.[19]

Kant agreed with Hume on the distinction between *is* and *ought* worlds. The dualism of *is* and *ought* plays an essential role in legal philosophy, especially legal positivism due to Kantian influence on Hans Kelsen,[20] the main contributor to legal positivism and primary opponent of natural law theory. Legal positivism becomes a theoretical instrument for discerning hints of natural laws and criticising them.

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[16] ibid.

[17] Raymond Wacks, *Philosophy of Law: A Very Short Introduction* (Oxford University Press 2006) 9 <https://doi.org/10.1093/actrade/9780192806918.001.0001> [Emphasis in original].

[18] Immanuel Kant, *Prolegomena to Any Future Metaphysics: That Will Be Able to Come Forward As Science: With Selections from the Critique of Pure Reason* (Gary Hatfield tr, Cambridge University Press 2004) 10 <https://doi.org/10.1017/CBO9780511808517>. Kant famously wrote: "I freely admit that the remembrance of David Hume was the very first thing that many years ago first interrupted my dogmatic slumber and gave a completely different direction to my researches [*sic*] in the field of speculative philosophy."

[19] Immanuel Kant, *Critique of Pure Reason* (Marcus Weigelt (ed), based on Max Müller's translation, Penguin Classics 2007 [1781, 1787]) 472 (A547/B575) [Emphasis in original].

[20] Although the extent of Kant's philosophical influence on Kelsen is still under dispute, it is safe to say that Kelsen implemented Neo-Kantian argument which is to be found in Kant's epistemological philosophy rather than Kantian moral or legal philosophy. (Stanley L. Paulson, "On Kelsen's Place in Jurisprudence" included as Introduction to Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litschewski Paulson and Stanley L. Paulson tr, Oxford University Press 2002) xxix).

Kelsen's preface to *General Theory of Law and State* (*Die Allgemeine Staatslehre)* states that his method was influenced by the Kantian dualism of *is* and *ought*.[21]

However, for ethical philosophy, Kant departed from Hume and the philosophy of the first *Critique*. Kelsen felt that Kant retreated to natural law theory for ethical philosophy. He deemed Kant's *Groundwork of the Metaphysics of Morals* the "most perfect expression of the classical doctrine of natural law."[22] Kelsen also observed that Kant followed Hume to some extent and turned to natural law theory regarding ethics.[23]

Ultimately, criticizing the application of natural law doctrine means adhering to Hume's law or the naturalistic fallacy as an instrument to discern the reference of nature to law. Kelsen noted that legal positivist tradition refuses to observe nature and derive laws from it:

> The system of legal positivism discards the attempt to deduce from nature or reason substantial norms which, being beyond positive law, can serve as its model, an attempt which forever is only apparently successful and ends in formulas only pretending to have a content.[24]

B. Reference to Cicero's True Law

The CC mention of the term "true law" was another direct reference to the laws of nature. The CC explicitly stated, "True law is right reason, harmonious (in agreement) with nature."[25] The unattributed quote is from Marcus Tullius Cicero, the most prominent natural law theorist. The Roman philosopher Cicero is considered by many to be the first natural law philosopher who attempted to challenge the validity of positive laws.[26] His main argument for the theory of law concerns the connection between morality and law; he was the first to put the theory into words before Thomas Aquinas.[27]

Before further investigation, Cicero's notion of law falls within the scope of natural law theory. His identification of "true law" derives from the *is*-statement, that is, fact or existence in nature, especially human nature. This characterisation of true

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[21] Allgemeine Staatslehre (Berlin 1925) vii, cited in Alida Wilson, "Is Kelsen Really a Kantian?" in Richard Tur and William Twining (eds), *Essays on Kelsen* (Clarendon Press 1986) 37.

[22] Hans Kelsen, "Natural Law Doctrine and Legal Positivism" (Wolfgang Herbert Krauss tr), included as Appendix to Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Harvard University Press 1945, reprinted by The Lawbook Exchange 2011) 445.

[23] Hans Kelsen, *What is Justice? Justice, Law and Politics in the Mirror of Science: Collected Essays by Hans Kelsen* (University of California Press 1957, reprinted by Lawbook Exchange 2013) 205, 217–18 <https://doi.org/10.1525/9780520311336>. Kelsen compares Kant's Categorical Imperative with the Golden Rule, which Kelsen calls "empty formula."

[24] Kelsen, "Natural Law Doctrine and Legal Positivism" (n 22) 436.

[25] CC 20/2564 (n 3).

[26] Michael Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2016) 89.

[27] Frederich Schauer, "Hart's Anti-essentialism" in Luís Duarte D'Almeida et al. (eds), *Reading HLA Hart's The Concept of Law* (Hart Publishing 2013) 238 <https://doi.org/10.1093/he/9780199644704.003.0011>.

law directly conflicts with Hume's Law or the naturalistic fallacy. As mentioned, naturalistic fallacy is used as an instrument for identifying natural law doctrines. In this case, Cicero's attempt to conceptualise true law consists of deriving *ought* from *is*. In other works by Cicero, such as *On Ends*,[28] most of the theory, like other ancient ethical theories on ethics and laws, directly violate Hume's law.[29]

The quotation left unattributed by the CC was from Cicero on natural law:

> True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions . . . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely.[30]

The CC provided only the first part of the text, contemplating nature and reason without considering their characteristics. The entire text concerning true law specifies the attributes universal, unchanging, and everlasting.

The use of reason, implying natural law doctrine, was emphasized by the CC in determining "true law" or the purpose of Section 1448. As a founder of systematic natural law theory, Thomas Aquinas emphasised the use of reason and the existence of law. Aquinas stated: "It is the function of law to command and to forbid. But above we said that reason commanded. So law is some product of reason."[31] In considering reason and will in law, Aquinas wrote:

> Reason's moving force comes from will, as we have said: someone wills a goal, and because of that reason commands the things to be done to achieve it. But willing the things commanded only has the nature of law in so far as it is ruled by reason. So we can only accept the saying that the ruler's will is law on the proviso; otherwise the ruler's will is more lawlessness than law.[32]

Therefore, intentional extraction of Cicero's writing also reflects an emphasis on reason. The reference to nature and reason is at the core of natural law doctrine established by Cicero and Aquinas, the two most prominent natural law theorists. The sole quotation presented by the CC in the decision was the core reference to implementing natural law doctrine.

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[28] *On Ends* is an English title for Cicero's work: *De finibus bonorum et malorum* (lit: On the ends of good and evil).

[29] Juan Pablo Bermúdez, "Nature and the Good: An Exploration of Anient Ethical Naturalism in Cicero's De Finibus" (2011) 14(2) Pensamiento y Cultura, 145, 151–52 <https://doi.org/10.5294/pecu.2011.14.2.3>.

[30] Marcus Tullius Cicero, *De Re Publica, De Legibus* (Clinton W. Keyes tr, Harvard University Press 1928) 21 cited in Freeman, *Lloyd's Introduction* (n 26) 125.

[31] Thomas Aquinas, *Summa Theologiae,* 1a2ae. Article 1 in Thomas Aquinas, *Selected Philosophical Writings* (Timothy McDermott (ed) tr, Oxford University Press 1993) 410.

[32] ibid 411–12.

III. CONTRADICTIONS BETWEEN NATURAL LAW DOCTRINES AND THEIR APPLICATION

There are two main contradictions in citing natural law doctrines for this decision. The first is considering Cicero's passage on "true law." The statement quoted in the decision was merely an excerpt from Cicero's full thoughts about law. The entire passage might contradict CC reasoning. Secondly, despite the CC's simultaneous references to nature and tradition, or custom, these two terms are arguably not synonymous in Ancient Greek thinking about *physis* (nature) and *nomos* (law or custom).

A. First Contradiction: The Three Characteristics of "True Law"

The CC's citation "true law is right reason, harmonious (in agreement) with nature" alerts observers of jurisprudence as a reference to Cicero's natural law doctrine. However, the limited quotation does not justify or convey Cicero's core argument. It is merely the first line of his natural law theory that serves as a prologue to the central thesis; that is, characteristics of natural laws derive from nature by extracting it by reason.

Cicero put forth three characteristics of natural laws. If the latter part of the sentence is provided, the contradiction becomes apparent. The three characteristics of natural laws are universality, immutability, and eternality,[33] rendering other reasons apparently contradictory. The CC used only the first part of the passage to justify reasons and reference to nature as rationale. Were the second part included, Section 1448 must then be considered according to universality, unchangeability and eternity. The CC would be assigned the difficult task of proving that Section 1448 is universal, unchanging, and everlasting. Proof must be given of Section 1448 as "true law," which is the "right reason harmonious with nature," solely if it satisfies the three characteristics.

The CC must prove that Section 1448 of the TCCC has a universalistic character, with the law and its reasons prevailing in every state, nation, and society. In other jurisdictions, a prominent example is *Obergefell v Hodges*, in which the United States Supreme Court held that "The Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognise a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-

[33] David Fott, "Skepticism about Natural Right in Cicero's De Republica" (2014) 16 Etica & Politica 233, 245. The three characteristics of natural laws are emphasised as the explanation in Thai law books; (ปรีดี เกษมทรัพย์, นิติปรัชญา (พิมพ์ครั้งที่ 15, แก้ไขปรับปรุงโดย กิติศักดิ์ ปรกติ, โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2560) [Pridi Kasemsup, *Philosophy of Law* (15th ed, revised by Kitisak Prokati, Books and Teaching Materials Project, Faculty of Law, Thammasat University 2017)] (Thai) 148; วรเจตน์ ภาคีรัตน์, ประวัติศาสตร์ความคิดนิติปรัชญา (พิมพ์ครั้งที่ 1, สำนักพิมพ์อ่านกฎหมาย 2561) [Worajed Pakeerat, *Intellectual History of Philosophy of Law* (1st ed, Read Law 2018)] (Thai) 111.

of-state."[34] Granted the character of the Supreme Court's decision as law,[35] law in different jurisdictions directly differs from Section 1448 of the TCCC. Given that the laws in two different jurisdictions differ, both cannot simultaneously be true law.

The universalistic character of true law allows for two possibilities: First, either reasoning by the Thai CC, or U.S. Supreme Court are wrong, rendering one of them false. Secondly, the character of universality is mistaken, rendering decisions and the laws concerned true law. If the first possibility is true, then which of the two is correct by reason and nature would become pertinent. Yet it is impossible to verify either, insofar as both are true for their jurisdictions. They are positive laws in their respective legal systems. To deem both laws and decisions to be simultaneously true means accepting principles of legal positivism and rejecting natural law doctrines. According to the latter possibility, the universalistic character of true law is false. In that case, either the U.S. or Thai law is true, or true law lacks any universalistic character.

Another example of where the Thai legal system implicitly denied legal universality of marriage law was Supreme Court decision 2887/2563 on whether a defendant is excused for the crime of theft according to Section 71 of the TCCC.[36] The court must determine whether marriage between two women under U.K. law is recognised under the Thai legal system. According to Section 1459 paragraph 1,[37] Thai citizens may register a marriage under Thai or foreign laws. Section 20 of the Conflict of Laws Act B.E. 2481[38] affirms this. However, concretely, the Supreme Court applied Section 19 of the Conflict of Laws Act,[39] ultimately stipulating that the Thai legal system does not recognise the marriage. This answer confirms that within recognition by the Thai legal system, laws of other legal systems may be valid per se, but not in the

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[34] *Obergefell v Hodges* 576 U.S. 644 (2015).

[35] Kelsen states that there are essentially two types of legal norms: general and individual norms. The former refers to abstract norms that regulate and confer powers, as well as the latter's content. The latter refers to norms issued by competent agencies by general norms. Individual norms are concretised general norms, directed at specific cases and persons. (Kelsen, *General Theory of Law and State* (n 22) 134). Judicial decisions pertain to individual norms. Similarly, H. L. A. Hart's *The Concept of Law* (3rd ed, Oxford University Press 2012, p 172) states that judges create laws. On the matter of constitutional adjudication, Kelsen emphasises that decisions by constitutional institutions vested with the power of judicial review does not issue individual norms but instead general norms. Kelsen identifies that act of constitutional adjudication as a "negative act of legislation." (Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution" (1942) 4(2) *The Journal of Politics* 183, 187 <https://doi.org/10.2307/2125770>). From a legal positivistic point of view, judicial decisions are laws.

[36] "If the Offences as provided in Section 334 to the first paragraph of Section 336, and Sections 341 to 364 are committed by a husband against his wife, or by a wife against her husband, the offender shall not be punished."

[37] "A marriage in a foreign country between Thai people or between a Thai person and a foreigner may be effected according to the form prescribed by Thai law or by the law of the country where it takes place."

[38] "A marriage shall be valid when made in accordance with the form provided by the law of the country where such marriage takes place. However, a marriage between Thai subjects or between a Thai subject and a foreigner affected in foreign territory according to the form prescribed by Thai law shall be valid."

[39] "The conditions of marriage are governed by the law of nationality of each party."

Thai legal system. Within the same legal order, Thai laws recognise the validity of different legal orders from different jurisdiction. The CC cannot cite true law if universality is a prerequisite. It would be inconsistent with Thai jurisprudential tradition.

On the immutability of true law, the same example may be examined in the argument about universality of true law. Before the U.S. Supreme Court held that same-sex marriage must be licensed and recognised, the law was that it is not to be licensed or recognised in some states. However, after the decision, the laws of every state changed. This was evidence that laws are mutable through time. Indeed, Thai family law has altered more than most other categories in the TCCC as it adapted to societal changes.[40]

If true laws change, then the third and final characteristic of eternality must also be false. To support the claim, Thai legal order on family law changed repeatedly. Previous law is annulled by enacting a new law in accordance with *lex posterior derogat priori*.

Logical statements may be used to illustrate that the reference to natural law characteristics is inapplicable. Using *modus tollens* (if *p*, then *q*. Not *q*; therefore, not *p*), a syllogism may be formulated:

1. If family laws are consistent with true law, then family law must be universal, immutable, and eternal.
2. It is the case that family laws are not universal, immutable, and eternal (as demonstrated above).
3. Therefore, family laws are inconsistent with true law.

By comparison with other laws or decisions from different jurisdictions on the same matter, the contradiction with Cicero's characteristics of true law is evident. The CC apparently cited Cicero's text on the issue only partially to sidestep this clear contradiction, ultimately neutering the meaning of the quoted text.

Another aspect of the CC decision on this matter is its justification for rationality and animalistic nature. The CC stated that "Section 1448 is a provision coherent with nature . . . that is, man and woman live together as husband and wife . . . to maintain its species according to nature [ดำรงเผ่าพันธุ์ตามธรรมชาติ; *damrong paopun tam thammachat*]."[41] A subsequent sentence refers to "all living creatures [สัตว์โลก; *sat lok*]"[42] The language used in these two sentences is reminiscent of the reference to humans as living creatures akin to other animals living in the world. Had the CC

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[40] ไพโรจน์ กัมพูสิริ, คำอธิบายประมวลกฎหมายแพ่งและพาณิชย์ บรรพ 5 ครอบครัว (มหาวิทยาลัยธรรมศาสตร์ 2556) [Pairojana Kampusiri, *Explanation of Civil and Commercial Code Book 5 Family* (Thammasat University 2013)] (Thai) 6. Cited in ฉัตรชัย เอมราช "อิทธิพลของความสงบเรียบร้อยและศีลธรรมอันดีของประชาชนต่อความเสมอภาคในการสมรสของบุคคลเพศทางเลือก" (2653) 64 วารสารศาลรัฐธรรมนูญ 21 [Chatchai Emraja, "Influence of Public Order and Morality on Homosexual Marriage Equality" (2020) 21, 64 Constitutional Court Journal] (Thai) 37.

[41] CC 20/2564 (n 3).

[42] ibid.

quoted Cicero to the full extent, his definition of reason and theory on human nature in accordance with other living organisms might be helpful. In *On the Laws*, written after *On the Republic,* Cicero wrote:

> And of course reason, by which alone we excel the beasts, through which we are effective in [drawing] inferences through which we prove, disprove, discuss, demonstrate something, make conclusions—it certainly is in common differing in education, while decidedly equal in the capacity to learn.[43]

Cicero recognised that the capacity for reasoning inherent in human beings differentiates them from other animals and living creatures in the world.[44] The CC reasoning was that this capacity reduces human beings to the level of other living creatures, contrary to what Cicero argued. As a precondition for true laws, reasoning is not merely a natural characteristic of living creatures, but involves uniquely human reasoning. By classing human beings as living creatures on the same plane as other animals, with Cicero's text quoted as justification, the CC statement might be deemed conflictual and misleading.

B. Second Contradiction: Nature and Traditions

Another type of contradiction in the CC decision is in simultaneously using the terms "nature [ธรรมชาติ; *thammachat*]" and "custom [ขนบธรรมเนียม; *khanobthamniam*] and tradition [จารีตประเพณี; lae charitprapeni]" The question is whether these terms are synonymous. If they differ in meaning, then the CC may be entangled in further contradictory reasoning. The distinction is clear between *physis* (φύσις) and *nomos* (νόμος) as disputed by Pre-Socratic philosophers, especially Heraclitus. The former pertains to the "real state of things," while the latter is "arbitrary social convention."[45] However, the former term may sometimes be ambiguous in meaning. *Nomos* traditionally means "sacred custom,"[46] but can also signify "law"[47] or "ordinance made by authority."[48] According to Heraclitus, *nomos* has a subjective character, whereas *physis* is universal.[49] Nevertheless, from a legal positivist standpoint, laws are a

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[43] Marcus Tullius Cicero, *On the Laws* (David Fott tr, Cornell University Press 2014) 30.

[44] Fred D. Miller, Jr., "The Rule of Reason in Cicero's Philosophy of Law" (2014) 33(2) University of Queensland Law Journal 321, 322.

[45] Edward Hussey, *The Presocratics* (Hackett Publishing Company 1972) 123.

[46] Richard Nobels and David Schiff, "The Evolution of Natural Law" in Anne Barron et al. (eds), *Jurisprudence and Legal Theory: Commentary and Materials* (Oxford University Press 2005) 39.

[47] Lawrence B. Solum, "Natural Justice: An Aretaic Account of the Virtue of Lawfulness" in Collin Farrelly and Lawrence B. Solum (eds), *Virtue Jurisprudence* (Palgrave Macmillan 2008) 177 <https://doi.org/10.1007/978-1-349-60073-1>.

[48] Nihal Petek Boyaci Gülenç, "An Enquiry on *Physis-Nomos* Debate: Sophists" (2016) 31(1) Synthesis Philosophica 39, 40 <https://doi.org/10.21464/sp31103>.

[49] ibid 42.

human innovation.[50] It is again reminiscent of the distinction between *is*- and *ought*-statements. As the real state of things in nature, *physis* is not artificial but natural, belonging to the same realm of *is*-statement. *Nomos* has the same character as *ought*-statement; they are artificial or man-made.

In this sense, *nomos* is synonymous with the term *norm* in the language of legal positivism, especially in Kelsen's terminology. For Kelsen's legal positivism and his overall explanation of jurisprudence, a norm is an *ought*-statement declaring that "something *ought* to be or *ought* to happen."[51] Kelsen adheres to the term "law" as a legal norm. Legal norms[52] exist among many other norms, including moral ones, different in character but all *ought*-statements.[53] According to separation thesis, legal and moral norms are not in the same sphere. However, natural law theorists persist in arguing that moral norms signify no norms at all insofar as morality is not humanly created but exists in nature. This would mean that the realm of *is*-statements—the separation thesis still stands—characterizes law as *ought*-statements. Kelsen even argued for the separation of the *is*-realm from the *ought*-realm by implementing the Kantian concept of imputation (*Zurechnung*)[54] and a distinct realm from causality which is the law that governs the natural realm.[55] Causality is the law governing nature or the realm of *is*-statements. Whereas imputation is the law governing norms—the system of *ought*-statements. In other words, norms are created by human acts. In different places and times, *nomos* have different contents and different enactors.[56]

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[50] Gerhard Donhauser, "*Nomos* or Law? Hans Kelsen's Criticism of Carl Schmitt's Metaphysics of Law and Politics" in Peter Langford et al. (eds), *Hans Kelsen and the Natural Law Tradition* (Brill 2019) 373, 389 <https://doi.org/10.1163/9789004390393>. The paper presents the contrast between Hans Kelsen and Carl Schmitt on the nature of law concerning *nomos*. Schmitt argues in *Nomos of the Earth* that norm should not be translated as "law [. . .], regulation, norm, or any similar expression." See also Hans Kelsen, *Society and Nature: A Sociological Inquiry* (The University of Chicago Press 1943) 233. He differentiates *physis* as nature and *nomos* as society. See further in Jerzy Zajadło, "The Concept of *Nomos*–Some Remarks" (2020) 12 Krytyka Prawa 143, 153 <https://doi.org/10.7206/kp.2080-1084.400>.

[51] Hans Kelsen, *Pure Theory of Law* (Max Knight tr, 2nd edn, University of California Press 1967, reprinted by Lawbook Exchange 2009) 4.

[52] Brian Bix suggested that Kelsen is committed to one of two kinds of reductionism. The other type is the attempt to reduce normative phenomena to "purely empirical terms"; see Pablo E. Navarro, "The Efficacy of Constitutional Norms" in Luís Dearte d'Almerda et al., (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing 2013) 84.

[53] Kelsen, *General Theory of Law and State* (n 22) 58–59; Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Allen W. Wood tr, Yale University Press 2018) 40 <https://doi.org/10.12987/9780300128154>. Kant also argues that moral laws are "laws for what *ought to happen*."

[54] Immanuel Kant, *Metaphysical Elements of Justice: Part I of the Metaphysics of Morals* (2nd edn, John Ladd tr, Hackett Publishing Company, Inc. 1999) 17.

[55] Kelsen, *Pure Theory* (n 51) 76–81; see also Kelsen, *What is Justice* (n 23) 325.

[56] Eric Brown, "The Emergence of Natural Law and the Cosmopolis" in Stephen Salkever (ed), *Ancient Greek Political Thought* (Cambridge University Press 2009) 334. Brown identifies *nomos* with "communal norms." Although the Greek word *nomos* and the English word *norm* do not share the same origin, they share similar meanings.

Therefore, laws as norms are indirectly synonymous with *nomos,* because human acts create them.

The question turns to whether custom and tradition, as per definitions of *nomos*, is synonymous with law or norm. A disjunctive syllogism (Either *p*, or *q*; not *p*; therefore, *q*) may prove that custom and tradition are not *physis*; consequently, the opposite must be true: they are *nomos*. If they are *nomos*, they are also norms. If such is the case, then custom and tradition are not naturally constructed.

Evidently, traditions are created. They are "to be continued to be handed on, thought about, preserved and not lost."[57] If they are not continued or handed down, they are lost. Therefore, according to this characteristic, traditions cannot exist independently; they rely on human creation, recreation, and preservation. In other words, they cannot exist without human actions. Thus, traditions are not naturally constructed, but man-made. They do not exist in nature. If they are not products of nature, they are not considered *physis* but, on the contrary, *nomos*.

Since they are not the same, the CC must use only one term to avoid contradiction. If the CC persists in referring to nature, then it applies natural law theory. On the other hand, if the CC refers to tradition, then it uses historical school of law doctrines.[58] If the CC chooses the latter route, especially Friedrich Carl von Savigny's theory, a possible explanation of how laws from different jurisdictions vary may become evident.[59] However, the CC used nature as principal theme, as indicated.

By adding the element of tradition along with nature, the reasonings of the CC becomes contradictory:

> For laws to be stably enforced, they must be accepted and not violate the feelings of the people in each country. For customs and traditions which are different according to each society must render different laws. Therefore, the laws according to the customs and traditions of each country are different.[60]

Since natural or "true laws" with correct reasoning in accordance with nature have universalistic and everlasting character, claiming that traditions and customs differ according to different societies would be another direct contradiction.

This logical contradiction may be demonstrated by two sets of hypothetical syllogisms (if *p*, then *q*, and if *q*, then *r*; therefore, if *p*, then *r*).

> First:
> 1. If a law is rightful, then it is congruent with tradition.
> 2. If something is traditional, then it is man-made.
> 3. Therefore, if the law is rightful, then it is man-made.
>
> Second:

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[57] Nelson H. H. Graburn, "What is Tradition" (2011) 24(2/3) Museum Anthropology 6 <https://doi.org/10.1525/mua.2000.24.2-3.6>.

[58] Pridi Kasemsap (n 33) 337.

[59] Freeman, *Lloyd's Introduction* (n 26) 913.

[60] CC 20/2564 (n 3).

1. If the law is rightful, then it is congruent with nature.
2. If something is natural, then it is not man-made.
3. Therefore, if the law is rightful, it is not man-made.

By asserting that a law is simultaneously both traditional and natural, conclusions of the two syllogisms are mutually contradictory (correct law is man-made and not man-made).

If the CC persists in referring to Cicero, they must further investigate his emphasis on the full text on universality of true law. In *On the Laws*, Cicero wrote:

> Since that is law, we should also consider human beings to be united with gods by law. Furthermore, among those who have a sharing in law, there is a sharing in right. And for them these things are [missing text here] and they must be recognised as being of the same city—if they obey the same commander and men in power, even much more so. Moreover, they obey this celestial system, the divine mind and very powerful God, so that now this whole universe should [be] thought to be one city in common between gods and human beings.[61]

This passage emphasises the universal character of true law. If so, then logically every state and nation abide by the same law because they comprise the same nature. Consequently, Cicero could not have meant law, or "true law" in this case, as *nomos*—law as a human invention. He could only mean the law as *logos*[62] with, according to Heraclitus, *physis* as its essence.[63] If traditions and laws in accordance with nature are identical, then traditions must also be universal. They cannot vary among societies. Instead, the CC insisted that each state and country has different traditions and customs. The latter statement does not fit true law's universal character, which the CC appears to dwell on. Therefore, the CC is self-contradictory in simultaneously mentioning nature and traditions.

Comparing the nature of human beings and other living creatures in the world raises further problems. The shared commonality between humans and other animals is a tendency to survive. The CC put forth an argument about survival of species or the "security [ความมั่นคง; *khwam man khong*]" of "Thai society [สังคมไทย; *sangkhom thai*]."[64] This inevitably leads to the subject of the connection between procreation and survival. In addition, one CC judge opined that the "human is one of living creatures

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[61] Cicero, *On the Laws* (n 43) 2.

[62] Zajadło, "The Concept of Nomos" (n 50) 147. *Logos* is the Greek origin of the English term *logic* (Merriam-Webster online dictionary accessed 25 January 2022 <https://www.merriam-webster.com/dictionary/logic>). In Greek philosophy, *logos* is a term used as a tool to answer the question of "what is." (Georgia Apostolopoulou, "From Ancient Greek Logos to European Rationality" (2016) 2 Wisdom 118, 121 <https://doi.org/10.24234/wisdom.v2i7.144>).

[63] Gülenç, "Sophist" (n 48) 42. See also Worajed, *Philosophy of Law* (n 38) 45; according to Heraclitus, *logos* has a universal characteristic, which humans may acknowledge by universal rationality.

[64] CC 20/2564 (n 3).

in the world [มนุษย์ก็เป็นสัตว์โลกชนิดหนึ่ง; *manut go pen sat lok chanid nueng*] inevitably unable to contradict nature."[65]

IV. THE PROCREATION ARGUMENT: ANOTHER HINT OF NATURAL LAW DOCTRINE

One argument used in the CC decision pertains to procreation in conjunction with preservation of the human race. This argument is used in opposing same-sex marriage, which is deemed contrary to human nature as a species, with a mission to procreate and preserve the human race. The procreation argument is evident, but the preservation argument less so. However, the latter argument may be discerned after profounder speculation about the arguments. The CC linguistic usage potentially implies that the terms procreation and preservation are intertwined.

Self-preservation, or the principle of "in suo esse perseverare" from Spinoza's *Ethics*, is rudimentary to the natural law theory. Hume's theory may be employed to discern natural law doctrine from the CC decision; however, some aspect of his theory contentiously identifies natural law doctrine by referring to Hobbes's theory of the state of nature. Arguments intrinsic in natural law doctrine also appear in some legal positivist theories, especially H. L. A. Hart's. The resulting arguments raise analytical problems in jurisprudence. Disputes over procreation and marriage are central to John Finnis's argument against same-sex marriage under the influence of natural law theory. Nonetheless, both arguments fail to convince definitively, as will be discussed below.

A. The Procreation and Preservation of Human Species Argument in the Constitutional Court Decision

Arguments against same-sex marriage discuss procreation and the principle of *in suo esse perseverare*. The basic argument is usually that if same-sex marriages were legalized, this would be contrary to the law of nature, especially the nature of living beings, including humans. This argument is intrinsically related to natural law theory. In *Natural Law and the Common Law*, Richard O'Sullivan wrote:

> So, too, with animals, they have being and life and a law according to which their life is lived. So, too with man, he shares with all things the first law of all being: *perseverare in esse suo*. Everyman and every organised community of men will defend his or its existence and will be entitled to defend its existence against unjust attack.[66]

[65] Personal Opinion of Taweekiat Meenakanit, Constitutional Court Judge at p 4.

[66] Richard O'Sullivan, "Natural Law and the Common Law" (1950) 3 *Natural Law Institute Proceedings* 9, 40.

This passage finds commonality between human beings and other animals in the tendency to preserve life. Secondly, it mentions the tendency of an individual and of the "organised community." The term was phrased to include the nature of a person as individual and group of people as a collective.

The CC similarly mentioned the procreation argument repeatedly its decision. However, the aforementioned argument is directly related only to "procreation" of beings. The CC explicitly used the "procreation" argument. Regardless, the "preservation" argument may be implicit. As a reason for upholding Section 1448 and its requirements for marriage, the CC stated that the provision has the rationale to "procreate [สืบเผ่าพันธุ์; *sueb phao phan*]"[67] and to "produce new members for society [ผลิตสมาชิกให้แก่สังคม; *phalit samachik mai hai kae sangkhom*]. [68] Here, the CC explicitly referred to procreation of human lives for society. The CC indisputably upheld the procreation argument in its decision against same-sex marriage.

The CC also mentions some terms relating to the argument on preservation, as well as some other terms: the supposed reason for an exclusive union between man and woman is to "preserve the species according to nature."[69] Towards the end of the decision, the CC emphasised that the provision was posited in accordance with nature for the purpose of "continuation of the preservation of society" [สืบสานการดำรงอยู่ของสังคม; *sueb san kan damlong yu khong sangkhom*].[70]

Repeatedly, the CC also used the term "security" or "stability" [ความมั่นคง; *kwam mankhong*]. In the decision, the CC provided that the reason for enacting the provision was "considering security [. . .] of Thai society."[71] In addition, the enjoyment of rights and liberties by any individual must "not violate or endanger the security of the state, order, or good morals of citizenry."[72] Following the argument about violation of public security, the CC adjudicated that the provision also "facilitated the security of the state and strengthened the order or good morals of citizenry."[73] The latter mention of "good morals" is related to the choice of natural law doctrine as basis for morality. The former is concerned with security and public order. The condition is relevant to the case because the CC was duty-bound to adjudicate the constitutionality of Section 1448 according to the first sentence of Article 26 of the Constitution, which provides that: *"The enactment of a law resulting in the restriction of rights or liberties of a person shall be in accordance with the conditions provided by the Constitution."*

The issue here is to define these conditions. One such for enacting a law restricting rights and liberties is security, which currently includes the security of society.[74]

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[67] CC 20/2564 (n 3).

[68] ibid.

[69] ibid.

[70] ibid.

[71] ibid.

[72] ibid.

[73] ibid.

[74] วิษณุ เครืองาม, กฎหมายรัฐธรรมนูญ (พิมพ์ครั้งที่ 3, นิติบรรณาการ 2530) [Wisanu Kreangam, *Constitutional Law*, (3rd edn, Nitipanakan 1987)] (Thai) 652–53 cited in ชุติกาณจ์ สายอุตส่าห์,

In this context, *perseverare in esse suo* became a justification for Section 1448, upholding exclusively heterosexual marriage, and precluding same-sex marriage. Hume's naturalistic fallacy seems relevant here. If the essence of human beings is to procreate, this does not entail the proposition that humans *ought* to procreate. The rejection of same-sex marriage on the grounds of *perseverare in esse suo* would be an argument with dangerous consequences. Even if same-sex marriage limited the ability to procreate, it would remain moot if lack of procreative activity is dangerous per se. Hume's *An Enquiry Concerning Human Understanding* states:

> There is no method of reasoning more common, and yet none more blameable, than, in philosophical disputes, to endeavour the refutation of any hypothesis, by a pretence of its dangerous consequences to religion and morality. When any opinion leads to absurdities, it is certainly false; but it is not certain that an opinion is false, because it is of dangerous consequence. Such topics, therefore, ought entirely to be forborne; as serving nothing to the discovery of truth, but only to make the person of an antagonist odious.[75]

However, in terms of legal contents, Hume was criticised as returning to natural law doctrines,[76] to which he responded:

> Human nature cannot, by any means, subsist, without the association of individuals; and that association never could have place, were no regard paid to the laws of equity and justice. Disorder, confusion, the war of all against all, are the necessary consequences of such a licentious conduct.[77]

Notice that Hume employs a term to one used by Thomas Hobbes: "the war of all against all," when the latter referred to the "state of nature." Hobbes wrote: "Hereby it is manifest, that during the time men live without a common power to keep them all in awe, they are in that condition that is called war; and such a war, as is of every man against every man,"[78] There is an ongoing debate over whether Hobbes was a partisan of natural law tradition or legal positivism. Norberto Bobbio persuasively compromises, arguing that "Thomas Hobbes belongs, de facto, to the history of the natural law tradition" and, "de jure, to the history of legal positivism."[79] Regardless, Hobbes's theory about human nature includes thoughts on self-preservation that qualify him as a natural law philosopher, while also introducing basic principles

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"ปัญหาการจำกัดสิทธิเสรีภาพตามรัฐธรรมนูญแห่งราชอาณาจักรไทยพุทธศักราช 2560" (2561) 16(3) รมยสาร 49 [Chutikarn Saiutsa, "Problems on Limitation of the Rights and Liberties under the Constitution of the Kingdom of Thailand, B.E. 2560" (2018) 16(3) Rommayasan 49] (Thai) 54.

[75] David Hume, *An Enquiry Concerning Human Understanding* (Peter Millican (ed), Oxford University Press 2007 [1748]) 70 <https://doi.org/10.1093/owc/9780199549900.001.0001>.

[76] Hart, *Concept of Law* (n 35) 191.

[77] David Hume, *An Enquiry Concerning the Principles of Morals* (J. B. Schneewind (ed), Hackett Publishing Company 1983 [1751]) 35.

[78] Thomas Hobbes, *Leviathan* (J. C. A. Gaskin ed, Oxford University Press 2008) 84.

[79] Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition* (Daniela Gobetti tr, University of Chicago Press 1993 [1909]) 114.

derived from human nature, such as the relevant matter of peace.[80] This aspect of Hobbes's theory is related to natural law doctrine. By multi-referencing through Hume to Hobbes, it becomes evident that the CC, while using the word "security" and the reason for procreation, is committed to the core idea of natural law.

B. John Finnis's Natural Law Arguments Against Same-sex Marriage

John Finnis is labelled a natural law philosopher who has commented on same-sex marriage, referring to procreation and natural law. To oppose same-sex marriage, he presents arguments from the natural law doctrine by discerning basic goods. In addition, Finnis argues that natural law theory does not violate Hume's law and does not commit the naturalistic fallacy. He also presents a reinterpretation of Aquinas's work to avoid criticism by Hume's law:

> Aquinas considers that practical reasoning begins not by understanding this nature from the outside, as it were, by way of psychological, anthropological, or metaphysical observations and judgements defining human nature, but by experiencing one's nature, so to speak, from the inside, in the form of one's inclinations.[81]

Here Finnis distinguishes between external and internal facts. External fact should remind us of the world of *is* by referencing empirical science such as anthropology. In this way, applying Hume's law becomes accessible.

Two issues may be observed in Finnis's conception of marriage. First, one must recognise Finnis's concept of marriage and its basic goods. For Finnis, "marriage's point is twofold, procreation and friendship."[82] In addition, there is an element of parental care.[83] This analysis is useful when comparing reasons given in the CC decision. Secondly, Finnis's point is not entirely about the importance of procreation. In this way, Finnis's argument departed from the argument of preserving the human species. For Finnis, human behavior related to sexual organs must attain the "marital good." Gay couples cannot fulfil this supposed marital good, making same-sex marriage unjustifiable under natural law.[84] Finnis opined about "biological union":

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[80] Howard Warrender, "Hobbes's Conception of Morality" (1962) 17(4) Rivista Critica di Storia della Filosofia 434, 436–37; Freeman, *Lloyd's Introduction* (n 26) 97.

[81] John Finnis, *Natural Law and Natural Rights* (2nd edn, Oxford University Press 2011) 34. [Emphasis added.]

[82] John Finnis, "Marriage: A Basic and Exigent Good" in John Finnis, *Human Rights and Common Good: Collected Essays Volume III* (Oxford University Press 2011) 318 <https://doi.org/10.1093/acprof:oso/9780199580071.001.0001>.

[83] Pablo Antonio Lago, "Same-sex Marriage: A Defense Based on Foundations of Natural Law" (2018) 14(3) Revista Direito FV 1044, 1050 <https://doi.org/10.1590/2317-6172201839>.

[84] ibid.

> But the common good of friends who are not and cannot be married (for example man and man, man and boy, woman and woman) has nothing to do with their having children by each other, and their reproductive organs cannot make them a biological (and therefore personal) unit. Because their activation of one or even each of their reproductive organs cannot be an actualising and experiencing of the marital good—as marital intercourse (intercourse between spouses in a marital way) can, even between spouses who happen to be sterile—it can do no more than provide each partner with an individual gratification. For want of a common good that could be actualised and experienced by and in this bodily union, that conduct involves the partners in treating their bodies as instruments to be used in the service of their consciously experiencing selves; their choice to engage in such conduct thus disintegrates each of them precisely as acting persons.[85]

Hence, it is about the possibility of generation. Finnis thinks that voluntarily sterile couples commit the same behavior, which is not the case for involuntarily sterile couples.[86]

Finnis emphasises the basic good of marriage as procreation, more specifically when combined with secondary basic goods: friendship and parental care. The CC provided a similar analysis to justify Section 1448, defining marriage as the union of man and woman "that have a relation of husband and wife [ความสัมพันธ์ฉันสามีภริยา; *khwam samphan chan sami phariya*] . . . [and] an intimacy for caring for each other." [87] The definition emphasises the importance of marital relationships. Furthermore, the CC provided another related emphasis on the importance of familial relationships. The CC reasoned that marriage under Section 1448 purports to assist "transferal to intimacy [การส่งต่อความผูกพัน; *mi kan song to khwam phook pan*] among father, mother, brothers, sisters, uncles, and aunts."[88] Both emphases reflect Finnis's thought on the bases of marriage: intimate relations between father, mother, and children, as well as between family members. Some arguments against Finnis's conception of marital benefits follow.

The CC implied a reason for the importance of the well-being of the family and children. According to Finnis, this well-being, procreation, parental care, and familial connection should amount to a basic good. Andrew Koppelman observed that it is unclear that doing the opposite of, or refraining from attaining, basic goods is tantamount to evil.[89] Thus, it is unclear why refraining from biologically uniting for procreation should be considered evil. Would it be a moral act if a person refused to marry or participate in any sexual act? In forming a same-sex union, the partners cannot procreate, which according to Finnis would be immoral. If that is the case,

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[85] John Finnis, "Law, Morality, and 'Sexual Orientation,'" in John Finnis, *Human Rights and Common Good: Collected Essays Volume III* (Oxford University Press 2011) 340–41 <https://doi.org/10.1093/acprof:oso/9780199580071.001.0001> [emphasis in original].

[86] Mark Strausser, "Natural Law and Same-Sex Marriage" (1998) 48 DePaul L. Rev. 51, 65.

[87] CC 20/2564 (n 3).

[88] ibid.

[89] Andrew Koppelman, "The Decline and Fall of the Case against Same-Sex Marriage" (2004) 2(1) University of St. Thomas Law Journal 5, 17.

lifelong celibacy would also amount to immorality. To be moral, a person should constantly commit moral deeds and cannot remain idle. If so, all men and women should marry for reproductive purposes, but that would violate Hume's law.

Finnis attempted to elude this criticism. But his reinterpretation of Aquinas's text deriving practical reasons from external and internal elements fails on the subject of procreation. Wacks's demonstration of Hume's law in terms of same-sex marriage and procreation, discussed above, is relevant here.[90] Finnis presented an argument about biological union, in which procreation tends to make heterosexual marriage moral and homosexual marriage immoral. It is a biological *fact* that humans can procreate. This is an *is*-statement—a statement about natural reality. By insisting upon this natural fact, Finnis derived an *ought*-statement, that procreation is a basic good. To achieve this basic good, a value judgment, Finnis stated that humans *ought* to procreate. This line of argument is the same as Wacks discussed as a naturalistic fallacy, violating Hume's law through blatant speculation.[91] The CC was also prey to this fallacy.

Same-sex marriage cannot be deemed immoral without resorting to naturalistic fallacy and asserting that procreation is good. Margaret Somerville asserted that marriage is not just about the union of two adults, but also includes a third party, the child.[92] Naturally, a child requires love and care from a biological mother and father for its own sake and not in terms of the couple's right to marry. Ancillary family rights adjoin the responsibility of being parents. A child may be better off with its biological parents as a scientific fact, but this is no reason to prohibit same-sex marriage. Adèle Mercier has argued that Somerville committed a naturalistic fallacy.[93] Patrick Lee's counterargument against Mercier was that Somerville did not commit a naturalistic fallacy, but only indicated a certain basic personal ideal, with no derivation of an *ought*- from an *is*-statement.[94] If Lee was correct, then Summerville's point may be disregarded as offering a factual, rather than *ought*-statement.

In this way, arguments over the well-being of children, family, and society can result in naturalistic fallacy, such as the CC committed in its decision. The CC argued for the good of heterosexual marriage as better for children to be born in and consequently for society. Two premises of this argument may be scientifically accurate: 1) humans can procreate, and 2) being raised by their biological family is good for children, the family, and society.[95] These statements are about natural reality.

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[90] Wacks, *Philosophy of Law* (n 17) 9.

[91] Lago, "Same-Sex Marriage" (n 83) 1059.

[92] Margaret Somerville, "Same-Sex Marriage: It's about the Children's Rights, Not Sexual-Orientation" *ABC Religion and Ethics* (7 October 2016) <https://www.abc.net.au/religion/same-sex-marriage-its-about-childrens-rights-not-sexual-orientat/10096462>.

[93] Patrick Lee, "Marriage, Procreation, and Same-Sex Unions" (2008) 91(3/4) The Monist 422, 426 <https://doi.org/10.5840/monist2008913/423>.

[94] ibid.

[95] The second statement is an *ought*-statement. Considering any fact as good or bad concerns value judgment, which is the essence of an *ought*-statement. However, I am willing to grant the proposition as a fact.

However, the CC derived an *ought*-statement from *is*-statements: that people *ought* to procreate. This argument directly violates Hume's law.

As presented, many procreation arguments may be categorised as essentialist, that marriage is about procreation, marital goods (per Finnis), or the children's right to be born (per Somerville). It is reductive to insist that marriage is fundamentally about one thing or another. Another perspective, opposing essentialist claims, sees marriage as a human construction, with procreation a natural fact. It is the same aforementioned argument about the distinction between *physis* and *nomos*. If marriage is a human-constructed institution, then the essence of marriage is not to be found in nature, but by the human constructor of the institution. Therefore, the meaning of marriage may vary according to place, time, and society, changing over time.[96] The importance of marriage may shift from procreation to other values, such as rights and benefits.[97] It is certainly relevant to the case at hand, for the claimant protested against Section 1448 because the legal benefits she sought to receive were not obtainable due to legal inability to marry.

V. CONSTITUTION, CONSTITUTIONAL COURT AND NATURAL LAW

Constitutional court establishments and functions are associated with legal positivism. Kelsen put Georg Jellinek's idea of the centralised constitutional tribunal[98] into practice in 1920 and justifies the institutionalisation with his legal theory.[99] As the counterpart of natural law theory, legal positivism has long been associated with legal formalism. However, this is not the case, according to Kelsen's philosophy of law, which explicitly rejected that judges are "legal automata."[100] In adjudicating legal matters, judges must interpret laws to apply them; Kelsen stated that his Pure Theory does not indicate any mode of legal interpretation.[101] Hence, it is incorrect to assert

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[96] Perry Dane, "Natural Law, Equality, and Same-Sex Marriage" (2014) 62(2) Buffalo Law Review 291, 318.

[97] Jeffrey Kosbie, "Misconstructing Sexuality in Same-Sex Marriage Jurisprudence" (2011) 6(1) Northwestern Journal of Law & Social Policy 238, 270.

[98] Christoph Bezemek, "A Kelsenian Model of Constitutional Adjudication: The Austrian Constitutional Court" (2012) 67 ZÖR 115, 117 <https://doi.org/10.1007/s00708-012-0127-5>.

[99] Kelsen, *General Theory of Law and State* (n 22) 160. Kelsen reasoned that if every institution has the power to refuse a legal norm as a law, then it would result in a state of anarchy.

[100] Hans Kelsen, "Who Ought to be the Guardian of the Constitution?" in Lars Vinx tr, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press 2015) 186; Stanley L. Paulson, "Hans Kelsen and Carl Schmitt: Growing Discord, Culminating in the 'Guardian' Controversy of 1931" in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (Oxford University Press 2017) 526.

[101] Christopher Bezemek, "Pure Formalism? Kelsenian Interpretative Theory between Textualism and Realism" in D. A. J. Telman (ed), *Hans Kelsen in America: Selective Affinities and the Mysteries of Academic Influence* (Springer International Publishing 2016) 253–54 <https://doi.org/10.1007/978-3-319-33130-0>.

that according to legal positivism, judges must strictly adhere to wordings of laws in a legal formalistic style.

Legal positivism and natural law theory reject the idea of legal formalism. Both theories provide that judges must interpret and apply laws with some extent of value judgment. However, the idea of Kelsenian jurisprudence is congruent to constitutionalism by setting the constitution as the superior law[102] to which all subsequent laws must be subservient.[103] The same is true for Joseph Raz's constitutional theory,[104] stating that in determining the constitutionality of any law, constitutional agents must adjudicate them solely under the constitution.

However, as indicated, CC reasoning stated that the constitutional grounding of Section 1448 was not comprised of constitutional provisions. The CC referred to many natural laws, instead of emphasising the constitution, applying natural law rather than constitutional provisions. This legal reasoning, continued and extended to other constitutional issues, would render superfluous the existence of protected constitutional rights and liberties insofar as agents might disregard constitutional provisions and directly resort to what they deem natural law by any more or less arbitrary reasoning.

At the end of the decision, the CC remarked that the state should, by proper measure, introduce a new law supporting the union of people with varied sexual orientations.[105] However, reasons for the decision prove significant for any new laws. If the new law provides that same-sex marriage is legal, and if there is another petition to the CC, the CC might well judge the new law unconstitutional for the same reasons.

Proper modification means to amend the constitution to facilitate the new law. However, as mentioned earlier, CC methodology was not entirely to resort to the constitution, but directly refer to natural law. Legality or validity of law does not depend on the individual law, which would contradict Kelsen's theory of legal validity. One must regard the constitution as the supreme law of any legal system. Basing legal validity on anything other than legislated law is controversial. Neil McCormick wrote: "The insistence that all law is legislated law makes possible the view that all law is changeable, and that is an essential postulate for those who wish to reform the law."[106] Thus, the CC may also dismiss a new law's constitutionality for the same natural law-related reasons, despite constitutional amendment.

The attitude of the CC affirms this postulation. The former chief justice of the CC wrote that the task of the CC is not just as guardian of a particular constitution but

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[102] Dieter Grimm, *Constitutionalism: Past, Present, Future* (Oxford University Press 2019) 200.

[103] Hans Kelsen, "The Function of a Constitution" (Iain Stewart tr) in Richard Tur and William Twining (eds), *Essays on Kelsen* (Clarendon Press 1986) 119. Kelsen states that the function of the constitution is the grounding of legal validity. Its function is harmonious to Kelsen's overall legal theory, especially the idea of the "chain of validity"; Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd edn, Clarendon Press 2003) 105.

[104] Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries" in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 2001) 153.

[105] CC 20/2564 (n 3).

[106] Neil McCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 2003) 60.

the "constitutional identity" of Thailand.[107] Hence, the CC upholds something above the constitution. "Constitutional identity" is a vague term, interpretation of which is not limited to the content of the current constitution. The only body to identify that constitutional identity is the court. The chief justice stated that the "court is the user and the 'discoverer' of the rule of law congruent with doctrines of natural law."[108] The entity governing constitutional rules can only be "discovered" by the court. But that entity cannot be discovered within the content of a legislated constitution. Thus, the constitution is not the supreme law of the legal order; it is something else that can only be determined by the CC without any constitutionally specified criteria other than the court's reasoning and use of contradicting natural law doctrines.

Indeed, some elements of the decision contain the aura of the theory of historical jurisprudence. Beyond this decision, the attitude of the CC on the matter of "constitutional identity" is reminiscent of von Savigny's "*Volksgeist*" (national spirit). CC reasoning outside the written constitution resembled von Savigny's opposition to codification of law in Germany. However, the aim of this paper is to investigate the application of natural law, rather than the influence of historical jurisprudence.

VI. CONCLUSION

There are many elements of natural law doctrine in the CC decision on the constitutionality of Section 1448 of the TCCC. Hume's law of the *is-ought* dichotomy to distinguish naturalistic fallacies in judgement is helpful for identifying references to nature characteristic of natural law theory. We found direct references to nature that produces genders. We also found the reference to the tendency for survival as a species, which implied the use of the natural law principle *perseverare in esse suo*. From that, we identify the natural law doctrine that is extracted from Hobbes's contractual theory. The core hint of natural law doctrine in the decision is the direct quotation of Cicero's natural law theory of "true law." However, as previously noted, this quotation was incomplete. Had the CC provided the full text, direct self-contradiction would have resulted. More contradiction was inherent in the simultaneous reference to nature and culture, following the philosophy of *physis* and *nomos,* which, as discussed, are not identical. Much of CC reasoning on procreation is reminiscent of John Finnis's natural law theory. Even if the reasoning is scientifically valid, it still violates Hume's law. Finally, it was demonstrated that the Constitution is undermined by resorting to natural law; CC reasoning contradicts the principle of constitutional supremacy.

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[107] นุรักษ์ มาประณีต, "ศาลรัฐธรรมนูญแห่งราชอาณาจักรไทยภายใต้หลักนิติธรรม" in ศาลรัฐธรรมนูญ: ผู้พิทักษ์หลักนิติธรรม (สำนักงานศาลรัฐธรรมนูญ 2565) [Nulak Marpraneet, "The Constitutional Court of Thailand under the Rule of Law" in *Constitutional Court: Guardian of the Rule of Law* (Office of the Constitutional Court 2022)] (Thai) 121, 142.

[108] ibid 141.

It is unclear how protecting heterosexual marriage purportedly requires prohibiting gay marriage. Many arguments center around the concept of marriage itself. Even if all arguments for upholding the values of heterosexual marriage are true and sound, there is no indication why these should affect same-sex marriage. The CC lengthily justified heterosexual marriage, irrelevantly in responding to a petition asserting the legality of same-sex marriage.

This paper does not intend to undermine the significance of natural law doctrine or its benefits, which are evident, especially in terms of natural rights. However, as described, if natural law doctrines are used carelessly or with a specific agenda other than protecting natural or basic human rights, resulting arguments may be contradictory.

[Date of submission: 13 August 2022; Revision: 30 January 2023; Acceptance: 26 February 2023]