

A LEGAL APPROACH ON THE RECOGNITION OF SAME SEX MARRIAGE IN TAIWAN

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Abstract: The second half of 2010s could be seen as a successful era for same-sex marriage movement around the world. Following the historic landmark decision *Obergefell v. Hodges* in 2016, winning for the right to marry equally in the US, Taiwan's constitutional court issued the ruling on same sex marriage in 2017, then the law to allow it in 2019, making this island the first jurisdiction to recognize same-sex marriage in Asia. From the legal perspective, this success is a result of a long-lasting marriage equality advocacy, in which the constitutional court played a significant role to change the law in stages, adapting to the new concept of each period. Besides, a legal context with no same-sex relation forbidency before the time of legalisation on 2019 and the government's administrative acknowledgment of same-sex partnership from 2015 are favorable premises for the enactment of the law recognizing same-sex marriage.

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Introduction

The legalization of same-sex marriage in Taiwan is not an isolated occurrence, but rather part of a global trend of homosexual marriage acceptance. Many nations have passed legislation recognizing same-sex couples to varying degrees and forms, with the same goal of achieving “marriage equality”. In-depth study of the Taiwan context reveals that the legislative advocacy process on the island for same-sex marriage is part of a long-term legal reform process towards “marriage equality” that has been set out since the beginning of the early half of the last century². Particularly, a radical legislative history of marriage equality had existed since the Japanese colonization at the first half of the 20th century. As a result, in this long-lasting progress, several transitions on the marriage equality concept occurred in various reforms of marriage and family law: from inter-marriage during the Japanese colonisation³, to gender equality for women in the post-colonisation era⁴, and currently, to marriage equality for the LGBTQ community⁵.

From a legal approach, the success of the current marriage equality movement regarding same-sex marriage in Taiwan resulted from three main factors: (1) a legal context with blank space on SSM before the legalisation; (2) the administrative recognition since 2015; and (3) a long-lasting legal advocacy and constitutional mechanism.

During the toward-recognition progress, it is worth noting that, before the legalization of same-sex marriage in 2019, Taiwan had a legal context with no same-sex relationship forbidity in both civil and criminal law. Specifically, while the Civil Code leaves same-sex marriage out and solely references heterosexual marriage, the criminal code even provides provisions for sexual offenders referring to acts against both hetero-victim and same-sex victim. The Civil Code’s blank space and the criminal code’s protection of same-sex people, along with constitutional rights and freedoms, were the vital foundation for legal advocacy toward same-sex marriage on the island.

² Tai Eika, *The Discourse of Intermarriage in Colonial Taiwan*, *The Journal of Japanese Studies* 40, no. 1 (2014), p. 87-116

³ In this context, it’s the marriage between a taiwanese and a japanese.

⁴ The Civil code reform in the 90s in order to raise the status of women in Taiwan’s marriage and family regime, as a result of the Constitutional court Interpretation ruling No.365 and 452.

See more: Hoàng Thảo Anh (2020), *Khái niệm bình đẳng hôn nhân ở Đài Loan dưới góc nhìn lịch sử pháp luật*, Tạp chí Nghiên cứu Đông Bắc Á, Số 7 (233), tr.30-37. [Hoang Thao Anh (2020), *The concept of marriage equality in Taiwan: a legal historical perspective*, *Vietnam Review of Northeast Asian Studies*, No. 7 (233) July 2020, p.30-37].

⁵ See more: Hoàng Thảo Anh (2020), *ibid*

Besides, recognition in terms of administrative management since 2015 for same-sex couples has been set through the partnership registration procedure at the local Household Registration Office. Although this registration has no legal effect, it can help same-sex couples make decisions in emergency medical situations for their partners if they have an “information-sharing agreement”. This is an important stepping stone for the official recognition of same-sex marriage later on the island through the 2017 constitutional interpretation ruling and the enactment of the 2019 SSM law.

It should also be emphasized that, in legalizing same-sex marriage, Taiwan Constitutional Court played a vital role as a catalyst for the law-making process of the Legislative Yuan. Through the constitutional mechanism, the Court’s constitutional interpretation was considered as an “order” to the Legislative Yuan and the authorities concerned to issue a new law for SSM or to amend the Civil code. The constitutional mechanism, thus, has contributed to the milestones of legal reform, especially in marriage and family regime, on the island.

However, despite the efforts to promote SSM from legislative advocacy and the constitutional mechanism, the recognition process collided with the opposition from the national referendum in 2018, a step-back for SSM legalization. With a majority vote against the integration of SSM into the Civil Code, marriage equality for same-sex couples, in terms of reaching the same status as heterosexual couples, was denied. As a result, SSM can only be recognized in another “equivalent to marriage” formality and cannot be incorporated into the Civil Code to be consolidated with heterosexual marriage. That’s the reason why the SSM Act was released independently in May 2019. While marking Taiwan the first jurisdiction in Asia to legalize same-sex marriage, the Act still remain some limitations on the rights of same-sex couples.

The next part of this paper, the author will analyse in detail each factor leading to the Taiwanese SSM legalisation in 2019, and then take a short overview of the 2019 SSM Act.

1. The non-existence of forbidency regarding same sex marriage in Taiwan’s law before the legalization of same-sex marriage

1.1. The Civil Code's approach

Prior to the law enacted on May 24, 2019, same-sex couples in Taiwan were not legally recognized. Domestic marriage legislation is included in Taiwan's Civil Code, in Part IV on

Family. While subsection 1 of Chapter 2 on Marriage governs betrothal; subsection 2 of Article 980 regulates marriage as follows: “*A male or female who has not reached his or her eighteenth year of age may not conclude a marriage*”. With this exclusionary expression, the law implies that marriage can occur only between a man and a woman, and only when the age requirements are satisfied (men from full 18 years old and women from full 17 years old). The current Taiwan Civil Code takes the following stance regarding same-sex couples:

Firstly, marriage or pre-marriage relations between members of the same sex are not regulated, only the fiance-fiancee or husband-wife connection between heterosexual couples. With this approach, the law completely ignores to govern same-sex couples relations and indirectly affirms the non-recognition of same-sex marriage.

Secondly, there is no clause “*prohibiting marriage between individuals of the same sex*”, nor is there a provision saying that “*the state does not recognize marriage between persons of the same sex*”, as is the case under Vietnamese domestic marriage and family law. This premise is crucial for advocating revising Taiwan's law to recognize same-sex marriage relationships in Taiwan.

1.2. Criminal Law regarding homosexual acts

Despite changes and additions, the Taiwan Penal Code (PC) enacted in 1935 is still in force today. There are precise regulations for offenses involving sexual activities such as the object of the act, the type of behavior, the age of consent, and the age of delinquency when having sex. Accordingly, with the provisions of Article 227 of the Penal Code, sexual acts can take place between “a person” and a “man” or a “woman”; the age of consent for sexual acts regardless of homosexuality or heterosexuality is 16 years old; if sexual intercourse, precisely sexual intercourse or lewdness, occurs with a person under the age of 14, the other party will be sentenced to prison⁶.

1.3. Constitutional protection of LGBTQ's rights

The Taiwanese Constitution, also known as the "Constitution of the Republic of China," which was enacted after the Civil Code and the Penal Code in 1947, does not clearly address the concepts of "sexual orientation" and "gender identity". However, campaigners and the Constitutional Court, have relied on Articles 7 and 22 of the Constitution to defend the rights of LGBT individuals, which state:

⁶ Art.227, Taiwan criminal code

See more at: <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=C0000001>

“Article 7: All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law.”

“Article 22: All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.”

However, depending just on the preceding two points is insufficient since they cannot directly address the rights of LGBTQ individuals. As a result, Taiwanese people and the local administration have petitioned the Constitutional Court to interpret the constitution, namely articles 7 and 22 in the issues relating to the SSM. The petitions are the ground for the Constitutional Court's Interpretation No. 748 on May 24, 2017, to recognize and approve persons of the same sex to marry. This section will be discussed in-depth in Section 2.2.

1.4. Administrative recognition

Prior to the promulgation of the 2019 law on SSM, same-sex relationships were administratively recognized by some localities in Taiwan since 2015 through the “**registration of same-sex couples**” procedure, as so-called “**partnership registration**”⁷. This recognition allows same-sex couples to **register their partnership** at the local household registration office.

The partnership registration does not give rise to inheritance rights and is not recorded in the citizen's identity card as well as the household registration certificate. Furthermore, same-sex couples do not have rights stemming from marriage relationships, while there are 498 related privileges under Taiwanese law, including property rights, social welfare, and medical care⁸. Thus, partnership registration does not establish a marriage relationship and cannot replace marriage registration, so it cannot guarantee the rights of same-sex couples as legal couples. However, if there is a legal dispute, partnership registration can still prove the two parties' cohabitation relationship. In addition, registered same-sex couples can sign an information-sharing agreement that allows hospitals, courts, and law enforcement organs to access civil status registration data. Based on this agreement, they can make decisions for their partner in case of the absence of a representative or relative, such as medical decisions in emergency cases⁹.

⁷ 同性伴侶註記

⁸ "Taiwan poised to legalize same-sex marriage", Washington Blade, 11/01/2017.

<https://www.washingtonblade.com/2017/01/11/taiwan-poised-legalize-sex-marriage>

⁹ Trudy Ring, “Does Partnership Registration Mean Taiwan Is Ready for Marriage Equality?”, Advocate, 18/06/2015, <https://www.advocate.com/world/2015/06/18/does-partnership-registration-mean-taiwan-ready-marriage-equality>

The receipt of partnership registration is under the competence of the municipal government, whose primary goal is population management. As a result, partnership registration is not implemented synchronously throughout Taiwan at the same time but is somewhat dependent on local leaders' decisions at various periods. However, as of July 2017, same-sex couples registration procedures had been implemented in 18 Taiwanese provinces and cities, accounting for 94% of the national population.

Although this procedure has no legal effect, it is an administrative recognition granted by the local government to same-sex couples living together as husband and wife. It can be considered as a significant acknowledgment and a cornerstone for Taiwan to get closer to SSM recognition in 2019.

2. Towards the legalization of same-sex marriage: legislative advocacy, constitutional mechanism and national referendum

2.1. Legislative advocacy

In October 2003, Taiwan's Executive Yuan¹⁰ proposed a bill that would allow same-sex couples to marry and adopt children. However, the bill was postponed due to opposition from both the Cabinet (dominated by the ruling Democratic Progressive Party) and the Legislative Yuan (ruled by the Pan-blue coalition led by the Kuomintang)¹¹. It was not voted to pass on¹². In 2012, alongside the annual gay pride parade in Taipei, which was the largest in Asia at the time¹³, with the slogan “marriage equality”, congresswoman Yu Mei-nu, a prominent leader of the Taiwanese feminist movement and also a feminist lawyer, proposed a draft bill to the Legislative Yuan. This proposal promoted marriage equality regarding legalizing same-sex marriage by amending and supplementing Taiwan's Civil Code.

In 2013, the Taiwan Alliance to Promote Civil Partnership Rights (TAPCPR) submitted 03 draft bills for “Diversified family formation”, including a bill on marriage equality¹⁴. TACPR's “Marriage Equality Bill” is also a proposal for an amendment to the Civil Code like that of Ms. Yu Mei-nu. Accordingly, the bill allows two people to marry, regardless of gender,

¹⁰ Executive Yuan, the equivalent of the Government, is the executive power branch according to the structure stated in the Five Powers Constitution of the Republic of China, according to its founding father Sun Yat-sen.

¹¹ The Legislative Yuan, the equivalent of the National Assembly/Parliament, is the branch of legislative power according to the 1947 Five Powers Constitution of the Republic of China.

¹² Hogg, Chris, "Taiwan move to allow gay unions", BBC News, 28/10/2003, <http://news.bbc.co.uk/2/hi/asia-pacific/3219721.stm>

¹³ Aldrovandi, Martin, “*Taiwan's gays hope for a 'Marriage Revolution'*”. Deutsche Welle, (October 29, 2012) <https://www.dw.com/en/taiwans-gays-hope-for-a-marriage-revolution/a-16340759>

¹⁴ The other two bills deal with the "civil partnership system" and the "multi-person family" respectively. See more at: <https://tapcpr.org/english/about-us>

sexual orientation, or gender identity. In addition, the bill also provides an anti-discrimination provision based on sex, sexual orientation, gender identity, or gender expression in adoptions¹⁵.

On December 22, 2014, a draft amendment to the Civil Code towards legalizing same-sex marriage was considered by the Judiciary Committee of the Legislative Yuan. Amendments include replacing existing marriage provisions in the Civil Code with gender-neutral provisions to recognize same-sex marriage and allow same-sex couples to adopt children. This bill has been well received by members of the Legislative Yuan, including Ms. Yu Mei-nu of the Democratic Progressive Party (DPP), more than 20 other DPP members, two from the Taiwan Solidarity Alliance Party, one from the ruling Kuomintang (KMT) party and one from the People's Party¹⁶. However, the bill stalled, and the efforts of Taiwanese legislators officially failed in January 2016 when the Legislative Yuan's eighth term ended.

In November 2015, around two months before the general election, Presidential candidate Tsai Ing-wen (Tsai Ing-wen) announced her support for SSM¹⁷. In July 2016, several members of the Ninth Legislative Yuan stated that they would introduce the SSM bill in the Legislative Yuan at the end of the year¹⁸. By October 2016, two bills on SSM were submitted to the Legislative Yuan¹⁹.

In conclusion, from 2003 to 2016, many propositions regarding the call for recognition of SSM had been submitted to the Legislative Yuan but had never been accepted for adoption. However, it reflects the permanence and persistence of the legal advocacy on marriage equality. And, although being denied, the number of SSM supporters, which was rising year after year, presented a progressive thought spreading among the Legislative Yuan's congressmen.

2.2. Constitutional mechanism: The J.Y. Interpretation No 748

2.2.1 . Legal context

¹⁵ *Introduction of Taiwan Alliance to Promote Civil Partnership Rights*, TAPCPR, <https://tapcpr.org/english/about-us>

¹⁶ Lii Wen, "Gay marriage proposal set for review". Taipei Times, 21 December 2014, <http://www.taipeitimes.com/News/taiwan/archives/2014/12/21/2003607251>

¹⁷ Wee, Darren, "Watch: Taiwan presidential frontrunner officially endorses marriage equality". Gay Star News, 2 November 2015, <http://www.gaystarnews.com/article/watch-taiwan-presidential-frontrunner-officially-endorses-marriage-equality/>

¹⁸ Gohl, Cody. "[Marriage Equality Could Be Coming To Taiwan As Early As Next Year](http://www.newnownext.com/marriage-equality-could-be-coming-to-taiwan-as-early-as-next-year/07/2016/)". New Now Net, <http://www.newnownext.com/marriage-equality-could-be-coming-to-taiwan-as-early-as-next-year/07/2016/>

¹⁹ Gerber, Abraham (25 October 2016). "Push for same-sex marriages started by DPP and NPP". Taipei Times, <http://www.taipeitimes.com/News/taiwan/archives/2016/10/25/2003657881>

The Interpretation of Judicial Yuan No. 748 results from a constitutional review of the Civil Code 1929 on Marriage chapter, collated with the constitutional provisions relating to the right to marry between two persons of the same sex. On March 24, 2017, the Constitutional Court (also known as the Judiciary Yuan) heard the case brought by activist Chi Chia-wei (who attempted to register his marriage with his same-sex partner in 2013 but failed) and the Taipei City Government's Civil Affairs Department jointly filed. Both plaintiffs asked the Constitutional Court to interpret the constitution on the issue of gay people's right to marry. The Court consolidated the case and decided to rule on whether the existing Civil Code allows for SSM and, if not, whether it violates the provisions of the Constitution of the Republic of China regarding equal rights and freedom to marry or not.

The petitioner Chia-Wei CHI was the first person to come out as gay on Taiwanese national television in 1986²⁰. From 1986 to 2013, CHI's application for marriage registration was rejected by the Household Registration Office at Wan-Hua District of Taipei City. After exhausting ordinary judicial remedies, CHI filed a petition to the Constitutional Court in August 2015, claiming that Articles 972, 973, 980, and 982 of the Civil Code²¹, which prohibited same-sex marriage, violated the Constitution.

The second petition was from the Taipei City Government. This authority has been brought to court by same-sex couples for an administrative lawsuit because it denied their marriage registration application based on the provisions of the Civil Code. Therefore, in 2015, the Taipei City Government also asked the Constitutional Court to clarify whether "marriage is only permitted between a man and a woman" infringes on constitutionally protected freedoms and equality rights?²²

Since the nature of the legal issue raised by the two petitions above is similar, the Constitutional Court of Taiwan decided to combine the cases and proceed with the settlement through J.Y. Interpretation No. 748 on March 24, 2017. In this interpretation, the legal matter incorporated is :

“Do the provisions of Chapter II on Marriage of Part IV on Family of the Civil Code, which do not allow two persons of the same sex to create a permanent union of intimate and

²⁰ “Chi Chia-wei”, LGBT History Month, <https://lgbthistorymonth.com/chi-chia-wei?tab=biography>

²¹ Specifically, Articles 972, 973, 980, and 982 of the Taiwan Civil Code stipulate unequivocally that the formation of a prenuptial agreement (pre-marriage) and marriage can only take effect between a man and a woman.

²² “Taiwan constitutional court hears debate on same-sex marriage”, Focus Taiwan News Channel. <https://focustaiwan.tw/society/201703240029> (24/03/2017).

*exclusive nature for the purpose of living a common life, violate the Constitution's guarantees of freedom of marriage under Article 22 and right to equality under Article 7?"*²³

It can be noted that there was no direct reference to the terms “marriage” or “get married” in the legal issue determined by the Court. However, instead, the Court applied its definition as “*a permanent union of intimate and exclusive nature for the purpose of living a common life*”. The usage of the phrase mentioned above is critical in supporting the future enactment of the law, as will be discussed below.

2.2.2. Historical decision of the Constitutional Court

The trial was first reported live on Taiwanese television as an important event. Participants in the trial included lawyers for both plaintiffs, Justice Minister Chiu Tai-san (on the conservative side of the current law on marriage), and a panel of legal scholars²⁴. The Constitutional Court, after considering the legal issues raised by the two petitioners as well as the arguments of relevant parties such as the Ministry of Interior and the Ministry of Justice, ruled that: “*the provisions relating to marriage in the Civil Code are unconstitutional*”. Specifically, the holding of the interpretation stated that:

*“The provisions of Chapter II 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 purpose of living a common life. The said provisions, to the extent of such failure, are in violation of the Constitution's guarantees of both the people's freedom of marriage under Article 22 and the people's right to equality under Article 7”*²⁵.

Thereafter, the Court ordered the authorities concerned to amend or enact the relevant laws following the ruling of Interpretation 748 within two years of the Interpretation announcement. It is up to the authorities concerned to decide on the determination of the formality to achieve equal protection of the right to freedom of marriage. If the relevant laws are not amended or promulgated within the foregoing 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

²³J. Y. Interpretation No 748, <https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748>

²⁴ “Taiwan top court hears landmark gay marriage case”. BBC News. 24/03/2017. <https://www.bbc.com/news/world-asia-39376423>

²⁵ Ibid

written document signed by two or more witnesses in accordance with the said Marriage Chapter.

2.3. Oppositions from the national referendum

After the announcement of J.Y. Interpretation No. 748, there were still many opposing opinions in favor of this decision. In February 2018, the “Coalition for the Happiness of the Next Generation”, a conservative Christian group, proposed holding a referendum on the SSM issue in order to overturn the Court's decision. This proposal was approved by the Central Election Commission in April 2018 with two questions related to the SSM²⁶. In September of the same year, the advocacy group for SSM also collected enough signatures to submit two more questions related to the recognition of SSM in the Taiwan Civil Code²⁷.

In November 2018, a nationwide referendum was held in Taiwan, with 10 questions on the ballot²⁸. In which, there are five sentences related to the rights of the LGBT community such as: banning same-sex marriage (question 10), banning LGBT-specific sex education in schools (question 11), allowing another formality of recognition for same-sex couples (question 12), allowing same-sex marriage (question 14) and finally maintain sex education for LGBT people in schools (question 15)²⁹.

Of the above 05 questions, there are 03 questions submitted by the opposing party to recognize the SSM as questions 10, 11, 12, and the other two questions raised by the pro-SSM party. The results of the referendum show that the majority of Taiwanese people are still

²⁶ ["CEC passes review of same-sex marriage referendum proposals". Focus Taiwan. 18/04/2018. http://focustaiwan.tw/news/asoc/201804180011.aspx](http://focustaiwan.tw/news/asoc/201804180011.aspx)

²⁷ ["With 9,000 signatures per day, Taiwan petition for marriage equality passes referendum threshold". Taiwan News. 1 September 2018. https://www.taiwannews.com.tw/en/news/3519385](https://www.taiwannews.com.tw/en/news/3519385)

²⁸ ["The 10 referendum questions Taiwanese are voting on". CAN, 24/11/2018, http://focustaiwan.tw/news/aip1/201811240010.aspx](http://focustaiwan.tw/news/aip1/201811240010.aspx)

²⁹ **Question 10:** Do you agree that marriage defined in the Civil Code should be restricted to the union between one man and one woman?

Question 11: Do you agree that the Ministry of Education should not implement the Enforcement Rules of the Gender Equality Education Act in elementary and middle schools?

Question 12: Do you agree to the protection of the rights of same-sex couples in co-habitation on a permanent basis in ways other than changing of the Civil Code?

Question 14: Do you agree to the protection of same-sex marital rights with marriage as defined in the Civil Code?

Question 15: Do you agree in accordance with the Gender Equality Education Act that national education of all levels should educate students on the importance of gender equality, emotional education, sex education, and same-sex education?

conservative when they agree with questions 10, 11, 12 and only a minority vote in favor of questions 14 and 15.

Thus, the referendum result does not allow the inclusion of SSM in the Taiwan Civil Code so that same-sex couples can be protected as heterosexual couples while the government of Taiwan is still legally bound to have to make a law consistent with Interpretation No. 748 of the Constitutional Court. However, the referendum also allows same-sex couples to be recognized and protected in a “different form” rather than outright opposition. This is considered a “backward” step for the process of “marriage equality in Taiwan”, but not a deadlocked outcome.

With the above results, the legislative amendment of the Legislature according to Interpretation No. 748 had to give up the option of “amending and adding the SSM to the Civil Code”, and turn in the direction of “promulgating a separate law to recognize the relationships of same-sex couples” in Taiwan.

3. The Act for Implementation of J.Y. Interpretation No. 748

On February 20, 2019, the Executive Yuan introduced a bill called the “The Act for Implementation of J.Y. Interpretation No. 748”, which allows two persons of the same sex may form a “permanent union of intimate and exclusive nature for the purpose of living a common life”. In general, the Act regulates inheritance rights, medical rights and adoption rights, and adultery cases, similar to heterosexual marriage. The Executive Yuan passed the bill on February 21, 2019, and then submitted it to the Legislative Yuan for approval. The Act was officially passed by the Legislative Yuan on May 17, 2019, and took effect from May 24, 2019.

The Act does not mention the “recognition of same-sex marriage” in terms of terminology. Instead of the word “marriage” (hunyin), its content refers to a same-sex couple's relationship as a “permanent union of an intimate and exclusive nature for the purpose of living a common life”. Although “same-sex marriage” or “allowing same-sex couples to marry” are not mentioned, the Act uses the exact definition of “marriage” to describe the same-sex union and recognizes the same rights and benefits as those arising from the marriage of heterosexual couples.

3.1. General content

Similar to the marriage institution in the Taiwan Civil Code, the Act also establishes regulations on establishing a "marriage equivalent" relationship for same-sex couples - a permanent union of an intimate and exclusive nature for the purpose of living a common life. Accordingly, same-sex couples can register to form a "permanent union" at the local household registration office like the heterosexual marriage registration procedure. The registration must be made in writing, signed by two or more witnesses. Both parties must register it at the authority under the spirit of J.Y. Interpretation No. 748³⁰.

In terms of age, the Act applies equally to men and women aged 18 and over. Persons under 18 years of age must have the consent of their legal representative. This regulation is different from the Taiwan Civil Code when the age of marriage for men is from full 19 years old and for women is from full 16 years old³¹.

The formation of same-sex union would be prohibited in case of: (1) A lineal relative by blood or by marriage; (2) A collateral relative by blood within the fourth degree of kinship, except persons of collateral relative within the fourth degree of kinship by adoption; (3) A collateral relative by marriage within the fifth degree of kinship of different rank³². The union prohibitions between lineal relatives by marriage provided in the preceding paragraph shall continue to apply even after the dissolution of relations between relatives by marriage. The union prohibitions with the lineal relative by blood or by marriage set forth in the first paragraph hereof shall be applicable to persons of lineal relative by adoption after ending of the adoption relationship. Other prohibitions are similar to the institution of marriage in the Civil Code, such as the prohibition of polygamy; furthermore, if a person has been and is establishing a same-sex union, he or she is not allowed to get into a heterosexual marriage, and vice versa.

In addition, the Act also does not allow the guardian and the ward to establish a union if the guardianship still exists unless the ward's parents agree³³.

Similar provisions for "nullity of marriage", "unlawful marriage annulment", inheritance relationship, personal relationship and property relationship of the couple, and divorce, are also regulated similarly or reference to the provisions of the marriage institution in the Taiwan Civil Code.

³⁰ See Article 4, The Act for Implementation of J.Y. Interpretation No. 748

³¹ See Art.3, *Ibid*. "Persons under the age of eighteen may not form a union as stated in Article 2. A minor must have the consent of his statutory agent for forming such a union".

³² See Art.5, *Ibid*.

³³ Art.6, *Ibid*.

3.2. The level of recognition of same-sex marriage compared to heterosexual marriage

In general, the level of recognition of the Act for the "marriage" of same-sex couples is almost the same as that of heterosexual couples. The difference is that Taiwan has not legally applied the term "marriage" to the union of same-sex couples due to current social barriers. Therefore, the law still has some limitations, especially provisions related to adoption, identification of parents and children, and recognition of same-sex couples with foreign elements. Specifically :

Regarding adoption, same-sex couples can legally adopt children, but the law only allows them to adopt children directly related to the other partner. That means, among the couple, there must be one person who is the child's biological father or mother. The other person can adopt the child and thereby establish the adoptive mother's or father's relationship. Like Vietnamese law, Taiwanese law only allows one child to be adopted by a couple or a single person. Since Taiwanese law only recognizes the union of same-sex couples but does not recognize their "marital relationship", adoption without any blood relationship is impossible in the current legal framework.

In terms of parent-child identification issues, same-sex couples are unable to form a parent-child relationship using assisted reproduction methods. According to Taiwan's Artificial Reproduction Act (Chinese: 人工生殖法), assisted reproductive technology is only available to heterosexual couples. Although this technology has been accessible to same-sex couples since the 1990s, establishing a parent-child relationship between a same-sex couple and a child born through assisted reproduction is still illegal. Therefore, this relationship is not recognized.

On the recognition of same-sex couples with foreign elements, as of 2019, Taiwan only recognizes "marriage-like relationships" for couples in which one is a Taiwanese citizen, and the other are from the country where the SSM is recognized. Article 46 of the Act "Determining the applicable law to civil matters with foreign elements" (涉外民事法律適用法) states that: "*The establishment of a marriage is governed by the national law of each party*". Therefore, when a person from a country that prohibits or does not recognize same-sex marriage wants to marry a Taiwanese citizen in Taiwan, there will be barriers in terms of marriage conditions. However, by January 2021, an amendment to articles 46 and 63 of the Civil Code by the Judiciary Yuan had allowed Taiwan to recognize unions between Taiwanese citizens and

citizens of almost any other country (except Mainland China), regardless of whether the country recognizes same-sex marriage or not³⁴.

Conclusion

To conclude, although being nominated as the first jurisdiction in Asia to legalize same-sex marriage, Taiwan's law only stops at the level of “recognizing a relationship based on a union which can be consider equivalent to marriage”. Still, it has not unified the term and notion of “same-sex union” with “marriage” in the Civil Code. As a result, the rights that such union entitle to same-sex couples is far more limited than the hetero-spouses. Thus, this island still needs a roadmap to officially and fully equalize homosexual marriage with heterosexual marriage.

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³⁴ Matthew Strong (2021), *Taiwan to allow multinational same-sex marriages, but not with China*, Taiwan News, <https://www.taiwannews.com.tw/en/news/4109284>

Act for Implementation of J.Y. Interpretation No. 748

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