

An analysis of Taiwan's Enforcement Act of Judicial Yuan¹ Interpretation No. 748

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Abstract

This paper analyzes the legislative and social limits of Taiwan's Enforcement Act of Judicial Yuan Interpretation No. 748. It discusses the disputes and problems that may arise after the implementation of the law. First, although the content of the law covers most of the rights and obligations of same-sex couples, some deficiencies remain with regard to the norms of co-adoption and to the status of relatives by affinity. Second, whether the legislation favors the stability, equality, and justice, and whether it truly guarantees the freedom of same-sex couples to marry and form a family depends on the content of the law. This paper argues that a law must be sufficiently able to respond to social changes in order to successfully implement the principles of freedom and equality and rights protection under the current Constitution. Although this law has taken a major step in the direction of equal rights of marriage in Taiwan, it still needs to be adjusted on many points.

Keywords: same-sex marriage; LGBT; sexual orientation; social changes; gender; adoption.

1. Introduction

On May 24, 2017, Taiwan's Constitutional Court announced Interpretation No. 748², which ruled that the prohibition of same-sex marriage in the current Civil Code, violates the Constitution.

According to Interpretation No. 748, the Chapter 2, Marriage, Part 4 of the Civil Code "do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the committed purpose of managing a life together". These provisions are held to be in violation of Article 22 of the Constitution, protecting persons' freedom of marriage, and Article 7 of the Constitution, stating that all ROC citizens are equal. The Constitutional Court ruled that the current laws excluding LGBT people from marriage were unconstitutional and violated basic human rights. It stated that a ban on same-sex marriage was "a gross legislative flaw" and incompatible with the spirit and meaning of the freedom of marriage and right to equality. It further stated that

¹ The judicial branch in Taiwan.

² J.Y. Interpretation No. 748 (2017/05/24).

Taiwan's legislature had to amend the existing laws or pass new legislation within two years after the date Interpretation No. 748 was released, otherwise, same-sex couples would be able to register for marriage according to the current Civil Code.

On January 24th, 2018, the “Coalition for the Happiness of our Next Generation”³ (hereinafter referred to as the “CHNG”) presented the “Love home referendum”⁴ which consisted of referendums that proposed to regulate same-sex unions in a form other than marriage which approved (Case 12 referendum) the following proposition, “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?”. Therefore, the legislature had to propose relevant laws within three months after the results⁵ of the referendum were announced. Consequently, on February 21st, 2019, the Executive Yuan⁶ and the Ministry of Justice formally submitted a proposal for the “Enforcement Act of Judicial Yuan Interpretation No. 748”⁷, which promised to grant same-sex couples “equal protection of marriage freedom”. The proposal was passed⁸ on May 17, 2019. Accordingly, same-sex marriage would be determined by a “special law”. With this law that came into force on May 24, Taiwan officially became the first country in Asia to legalize same-sex marriage. The key points of the proposal include that same-sex couple can enjoy legal inheritance, medical rights, and joint adoption of blood filiation. As is the case for marriage according to the Civil Code, same-sex couples should also comply with the relevant rights and obligations of the monogamous system.

The name of this law “Enforcement Act of Judicial Yuan Interpretation No. 748” is obviously a result of political compromise. Those who oppose same-sex marriage have always demanded that the name of the law be “Partnership Act” and opposed using the term “marriage”; those who support same-sex marriage firmly insisted to name the special law “Marriage Act” and that the name and content must conform to the substantive connotation of marriage. The Executive Yuan compromised, naming it in reference to Interpretation No. 748 based on the “objective” results of the interpretation of the Constitution.

Now that the “special law” has been presented and formally passed, the government must

³ 下一代幸福聯盟(CHNG), <https://taiwanfamily.com/category/hearings>, accessed 10 March 2020.

⁴ 1) The Marriage definition referendum: <https://web.cec.gov.tw/central/cms/HearingNotice/27003>, 2) Gender equity education referendum: <https://web.cec.gov.tw/central/cms/HearingNotice/27038>, 3) Form other than marriage to regulate same-sex unions referendum: <https://web.cec.gov.tw/central/cms/HearingNotice/27029>, accessed 10 March 2020.

⁵ The referendum has been held on November 24th, the results of the referendum have been announced by the “CEC” on December 1st.

⁶ The executive branch/cabinet in Taiwan.

⁷ The Executive Yuan presented the proposal concerning same-sex marriage, <https://english.ey.gov.tw/Page/61BF20C3E89B856/60667c36-b285-493b-b8fa-d549d6b247c6>, accessed 10 March 2020.

⁸ The Legislative Yuan (the unicameral legislature in Taiwan) passed the Enforcement Act of Judicial Yuan Interpretation No. 748, <https://english.ey.gov.tw/Page/61BF20C3E89B856/06fec03d-6213-4874-8710-6fda8f121f62>, accessed 10 March 2020.

face up to its positive and negative impacts on the issue of homosexuality. Whether seen from a short or long term perspective, this has not only a theoretical dimension, but also involves numerous dilemmas in legal practice. Fundamentally, the government must face up to the legal implications and social problems which may arise from its “Enforcement Act”.

As CHIN (2018) already analyzed and discussed, a special law (in fact phased legislation) might be an effective way to provide legal protection for same-sex couples, while ensuring the preservation of traditional social values to a certain extent. Such an approach, I argued, could create a space of freedom for same-sex couples which would be gradually accepted by society. However, if a special law can be a good solution for same-sex marriage, such a law can also be a bad solution and lead to discrimination. That depends on the content of the law. Therefore, it is very important to analyze the specific content of this law, which is the purpose of this article.

It should be noted that in Taiwan’s society from a law-making perspective, marriage has always been within the stipulation of the Civil Code which underwent several amendments in this regard. In the history of Taiwan’s law, the texts of the Justices’ interpretation have never been used as the names of bills. Is it possible to satisfy the requirements of the substantive connotation of marriage by recourse to normative methods that are outside the Civil Code? How do marriages and family forms become different in the face of a shift in family formation? With regard to the definition of marriage and family, is there any room today for a breakthrough in the current legal system? From the perspective of the stability and permanence of the system, will the implementation of the special law equally promote the promise of pluralistic relations in the society or will it cause more opposition and discrimination? These questions are some of the major points that should have been explored when designing this law, and points that need to be explored now that it will be implemented.

2. The “Enforcement Act of Judicial Yuan Interpretation No. 748”

2.1 Content

The “Enforcement Act of Judicial Yuan Interpretation No. 748” (also known as “Enforcement Act No. 748”) is the first set of enforcement rules named after the Justices’ interpretation and it is also a special law for same-sex marriage. There is a total of 27 provisions⁹ which aim to achieve equal protection of freedom of marriage for same-sex couples. It defines the term “same-sex marriage” as for two people of the same sex to establish an intimate, permanent and exclusive relationship for the purpose of managing a common life. The expression, “husband and wife” never appears in the entire proposal and is replaced by “both parties”. Still, the proposal points

⁹ The total provisions of the Enforcement Act of Judicial Yuan Interpretation No. 748, <https://www.president.gov.tw/Page/294/46606/%E5%88%B6%E5%AE%9A%E5%8F%B8%E6%B3%95%E9%99%A2%E9%87%8B%E5%AD%97%E7%AC%AC%E4%B8%83%E5%9B%9B%E5%85%AB%E8%99%9F%E8%A7%A3%E9%87%8B%E6%96%BD%E8%A1%8C%E6%B3%95->, accessed 10 March 2020.

out that same-sex union is a “marital relationship”. In terms of property and inheritance, same-sex couples also follow the matrimonial property regime and the inheritance rules for couples stipulated in the Civil Code.

Concerning the issue of adoption by a same-sex couple, the Executive Yuan adapted a version of the step-family adoption rules. These, as specified in the Civil Code, also apply (*mutatis mutandis*) to same-sex couples. In other words, once married, a spouse of a same sex couple can adopt the “biological child” of the other spouse. However, “adoption of non-biological children” is not mentioned by the rule, which entails that same-sex couples cannot establish a legal parent-child relationship when they are not the child's biological or birth parent.

Other regulations, some of which are different from those of the Civil Code, that relate to spouses, to both parties, to marriage or marital relationship, and the rules derived from spouses or both parties’ relationship are also applicable. In response to social demands, the special law also expressly protects religious beliefs and other freedoms of individuals and groups which should not be affected by the law¹⁰.

2.2 A short summary of Enforcement Act’s main provisions

- (1) Elements of Foundation: Similar to those of marriage, including that both same-sex persons shall declare they are willing to enter into this partnership and complete the registration with the household administration authority with mutual understanding.
- (2) Fidelity Obligation: The purpose of marriage is permanent communal living. Both of the partners shall obey the fidelity obligation to one another. Neither party may marry or conclude a partnership with others.
- (3) Property System: It shall be agreed by both partners and specified by the scope of the Civil Code, without any specified agreement, the legal property system is applicable.
- (4) Rights and Obligations: For persons of same-sex marriage, legal registration shall be as the same as those for the persons of heterosexual marriage.
- (5) Right of Inheritance: The inheritance part of the Civil Code shall be applicable.
- (6) Dissolution of Relationship: A relationship shall be dissolved by court mediation or court settlement. It is the same for heterosexual marriage unless otherwise expressly provided.

2.3 The differences with marriage

- (1) Uniform legal age: In heterosexual marriage, the man must be at least 18 years old and the woman must be at least 16 years old. In same-sex marriage (Enforcement Act No. 748), both parties must be at least 18 years old.
- (2) No marriage contract (engagement) specification: The Civil Code stipulates that a

¹⁰ Article 26 of the Enforcement Act No. 748.

marriage contract (engagement) is not mandatory, and the parties have the right to claim damages only when it is dissolved or unfulfilled. The Enforcement Act No. 748 does not include this section.

- (3) Marriage conditions: The Civil Code stipulates that collateral relatives by blood within the sixth degree of relationship cannot get married. In the Enforcement Act No. 748, considering that same-sex couples cannot have a natural conception, there is no concern of eugenics, so the same-sex marriage is allowed between collateral relatives by blood within the fourth degree of relationship.
- (4) No surname prefix: The Civil Code stipulates that both husband and wife may keep their surname unless it is otherwise agreed in writing to prefix the spouse's surname. Enforcement Act No. 748 does not mention the "agreed upon" provision in this section.
- (5) Adoption of children with no biological relation is not possible: Adoptions in heterosexual marriage can be primarily divided into three types: 1) adoption of non-biological children; 2) adoption of a relative of a certain degree with the adequate rank. These two types are basically for couples to adopt a child, in which case the husband and wife do so jointly; 3) step-family adoption, where the husband or wife adopts the children of the other party's previous marriage¹¹. Enforcement Act No. 748 only allows step-family adoption, that is one party adopting the biological children of the other party. This provision is as stipulated in the Civil Code; however, members of same sex marriages are not allowed to jointly adopt children of third parties¹².
- (6) The relationship with the other party's family: Enforcement Act No. 748 expressly states that same-sex marital relationship does not establish a relationship with the other person's blood relatives. They do not become relatives or in-laws¹³ of the other party.
- (7) There is no obligation to maintain the spouse's parents: Article 1114¹⁴ of the Civil Code stipulates the mutual maintenance obligations of relatives. The section stipulates that when one or both of the husband's or wife's parents of either party lives in the same household, the couple shall bear the maintenance responsibility jointly. This section is not within the scope of Enforcement Act No. 748.
- (8) Dissolution of relationship: The Civil Code stipulates where one spouse is sexually

¹¹ Chapter 3 Parents and Children, Article 1073~1074 of the Civil Code, <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000001>, accessed 10 March 2020.

¹² According to the Article 1073 of current Civil Code, the adopter shall be at least twenty years older than the person to be adopted; except when the husband and wife co-adopt and either of the husband or wife is twenty years older than the person to be adopted and the other sixteen years or older than the person to be adopted, the person can be adopted. When either the husband or wife adopts the child of the other spouse, the adopter shall be at least sixteen years older than the person to be adopted.

¹³ The explanation of Paragraph 3, Article 5 of the Enforcement Act No. 748.

¹⁴ Chapter 5 Maintenance, Article 1114 of the Civil Code, <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000001>, accessed 10 March 2020.

impotent at the time of marriage and such incapacity is incurable, the other party may apply to the court for the annulment of the marriage. This section is not within the scope of application in the Enforcement Act No. 748. The divorce section of the Civil Code stipulates that reasons for a divorce petition include “where he or she has a loathsome disease which is incurable” and “where he or she has a serious mental disease which is incurable¹⁵”. In Enforcement Act No. 748, this is defined as “where one party has a major incurable disease” rather than “loathsome”. (Possible derived issues will be mentioned in section 3)

3. Unclear/unforeseen in Enforcement Act No. 748

Enforcement Act No. 748 expressly defines many norms that are the same as those of heterosexual marriages, including forms of marriage, divorce or termination of same-sex marriage and follow-up matters, inheritance, mutual maintenance obligations, cohabitation obligations, agreement of residence and matrimonial property regime. The parties to a same-sex marriage are also under considerable protection in matters such as medical care, social welfare, taxation, and litigation status. However, after scrutinizing the description and provisions of Enforcement Act No. 748, several doubts and questions that require follow-up studies or clarification especially regarding adoption and marital relationship (relationship by affinity), arise.

3.1 Adoption issues for same-sex marriage

Article 20¹⁶ of Enforcement Act No. 748 only stipulates that one party of a same-sex marriage can adopt the biological children of the other party. Other forms of adoption are not within its scope of application. “Co-adoption” and “adoption of non-biological children” are not permitted by Enforcement Act No. 748. Here the new law presents its greatest difference with marriage according to the Civil Code and this difference may lead to several problems.

First, by not allowing adoption of the adoptive children of the other party, the new law significantly reduces the form of same-sex marriage family. It can also cause severe hardship to children (the problem will be addressed below). If same-sex married couples need a “biological child” to be able to adopt, they must work through an arduous puzzle of personal values, technologies, and intermediary fertility doctors, egg and sperm donors¹⁷ (artificial reproduction),

¹⁵ Chapter 2 Marriage, Section 5 Divorce Article 1052 of the Civil Code, <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000001>, accessed 10 March 2020.

¹⁶ Article 20 of the Enforcement Act No. 748.

¹⁷ Although the Assisted Reproduction Act exists in Taiwan, the conditions of the law are stringent. The provisions of Article 11 of the law stipulate that artificial reproduction must only be performed for couples in a “husband-and-wife” relationship, one party must have received a diagnosis of infertility, a major hereditary disease, or have a medically justified reason. The artificial reproduction method can only be applied after approval by the competent authority.

or surrogates¹⁸ (surrogacy), etc. Although some same-sex couples, in order to realize their dream of parenthood, might resort to use a natural method rather than to “Reproductive Technologies (RT)”, an option that is mainly chosen by women. RTs are still highly regulated in Taiwan. The explanation of paragraph 2, Article 24¹⁹ of Enforcement Act No. 748 also expressly rules out artificial reproduction method for same-sex marriage. It must be said that a “family” of more than two members in a same-sex marriage is obviously more difficult to achieve legally than in the case of heterosexual marriage.

Imagine, for example, the following situations: A and B are same-sex partners. A has adopted a, B also adopted a child b and all four were already living together before Enforcement Act No. 748 was passed. A and B get married now that Enforcement Act No. 748 is passed. However, in this “family”, as Article 1074 and 1075²⁰ of the Civil Code are not applicable, “B cannot adopt a, and A cannot adopt b”. Even though this might not truly affect the happiness of this “family”, it still restricts the form of family organization of same-sex marriage as well as the inheritance rights of a and b. It might be objected that Enforcement Act 748 does not change the situation from what was the case before. Yet, why does Enforcement Act 748 forbid same sex couples from co-adoption? Is it because the legislators do not regard same-sex marriage as a form of family?

This also relates to the issue of foster homes, Enforcement Act No. 748 does not specify provisions for foster homes and widowing (people usually think that there are only two legal status, single or married, but there is also that of being a widow). If same-sex couples cannot be foster homes, when B dies in a car accident then b cannot continue to live with A and a. It is unlikely that such results achieve “substantial equality” and promote freedom to form a family.

Now suppose that after A and B got married, A adopted B's child b as stepchild; however, B died. A got married to C. At this point, “C cannot adopt b” because Enforcement Act No. 748 only accepts step-family adoption in a same-sex partnership and there is no blood relationship between A and b.

In summary:

- (+) Step-family adoption: When one person already has a biological child, his or her partner is allowed to adopt the child and they can raise the child as two parents.
- (–) Connection adoption: When one person already has an adopted non-biological child, the partner is not permitted to adopt the child and they cannot legally raise the child as two parents²¹.
- (–) Co-adoption: When parties in a same-sex marriage have no biological children, it is not

¹⁸ Because surrogate mothers are not legal in Taiwan, same-sex couples must spend much money, time and cost and go abroad to entrust a surrogate mother.

¹⁹ The explanation of paragraph 2, Article 24 of the Enforcement Act No. 748.

²⁰ Chapter 3 Parents and Children Article 1074,1075 of the Civil Code,
<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000001>, accessed 10 March 2020.

²¹ In heterosexual marriage, if Ms. A has adopted a and marries Mr. B, the latter can adopt a.

permitted for them as a couple to adopt a child without a blood relationship.

There is almost no provision regarding parents and children in the entire Enforcement Act No. 748. The law only permits step-family adoption, but it does not recognize any legal provisions to allow general common adoption rights in a same-sex relationship. It is assumed that same-sex couples will not or should not have children. It is to be feared that this major legal restriction runs contrary to the constitutional guarantee of the “interests or rights of children” as well as the freedom to form a family. Adoption should regard the interests of the adopted child as its first priority, but this law regulates that only one person of same-sex couples can adopt. Partners living together cannot both have a legal relationship with the child, leading to a situation in which one of them has no rights or obligations towards the child. This situation is clearly not in the best interest of children and indicates a lack of equality relative to heterosexual marriages.

In addition, although the family is usually understood in relation to marriage, family rights are also core values that cannot be reduced in the issues of marriage. In fact, family rights are core values that cannot be socially ignored. Marriage and the family constitute the foundation for the formation and development of society and are guaranteed by the constitutional system²². The composition of the family depends on whether the parties have the subjective will to reside and make a living together in addition to the objective fact that they live together; the protection of the family includes the freedom to form a family and the continued existence of the family (陳正根, 2012). Family rights are the basic right to enjoy the reunification or protection of the family. The family composed by marriage is the basic unit of society, and the Constitution guarantees that marriage is protected by society as well as by the state²³. On the basis of the international and domestic norms, it can be argued that marriage and family rights are protected at the constitutional level.

Moreover, the development of family rights as basic rights guaranteed by the Constitution refers to the legal rights enjoyed by family members with regard to the process of family formation, maintenance, and disintegration. With the change in the current situation of society, the target of family rights must be expanded. The subjects of family rights should include not only family members in familial relationships established by marriage, blood relationship, as formulated in the Civil Code, but also family members established by non-marriage, non-blood relations, which are outside of the present formulation of the Civil Code. That is, situations of intimate life relationship that meet the following conditions: mutual support and assistance among members, and a relatively consistent sense of self-identification as a family member. Thus, same-sex marriages can also be a family, and the family members of same-sex families should be subjects to and protected by family rights. Limiting the rights of same-sex couples to step-family adoption limits the way in which same-

²² J.Y. Interpretation No. 552 (2002/12/14), J.Y. Interpretation No. 554 (2002/12/27).

²³ Article 16 of La Déclaration universelle des droits de l'homme, <https://www.un.org/fr/universal-declaration-human-rights/>, accessed 10 March 2020.

sex marriages can form families.

3.2 Marital relationship (relationship by affinity) issues for same-sex marriage

According to Article 5²⁴ of Enforcement Act No. 748, same-sex marriage is not permitted with persons as defined in I, II, and III.

- I. A lineal relative by blood or by marriage;
- II. A collateral relative by blood within the fourth degree of relationship. The limit to marriage shall not be applicable to persons of collateral relative within the fourth degree of relationship by adoption;
- III. A collateral relative by marriage within the fifth degree of relationship of a different rank (different position in the family tree).

Article 5 of Enforcement Act No. 748 states that the prohibitions between relatives by marriage stated above shall continue to apply even after the dissolution of the marriage which created the relationship.

This article concerning lineal relative-by-blood or by marriage set forth in the first paragraph hereof shall also be applicable to lineal relatives by adoption after the end of the adoption relationship.

These paragraphs (I~III) are a copy of Article 983 of the Civil Code.²⁵ However, because Article 983 of the Civil Code applies only to heterosexual marriage, Article 5 of Enforcement Act No. 748 was established. The legislative reasoning behind Article 5 is to ensure that if a party had previously concluded a heterosexual marriage, it is not possible for him or her to establish a marital union with the same-sex relative-by-marriage of the former marriage. In other words, the husband (male party) may not marry his ex-father-in-law or brother-in-law and the wife (female party) marry her ex-mother-in-law or sister-in-law.

However, according to Enforcement Act 748, a relative-by-marriage relationship is not established by a same-sex marriage. What is then the purpose of prohibiting same-sex marriage with relatives by marriage of the former marriage? Furthermore, under such regulations (relationship by affinity), the former spouses of same-sex marriage seem to be able to establish the following unreasonable marriage relationship:

Mr. A and Mr. B got married after Enforcement Act No. 748 is passed and terminated the relationship based on the same law due to their unhappy marital life. At this point, Mr. A found Mr. B's father, Mr. C, to be his true love, while Mr. B falls in love with Mrs. D who happened to be Mr. A's mother. According to the explanation of Paragraph 3, Article 5 of Enforcement Act No. 748, the previous same sex marital relationship did not establish a relative-by-marriage relationship, then the restrictions of the heterosexual marriage (Article 983 of the Civil Code) and of same-sex marriage

²⁴ Article 5 of the Enforcement Act No. 748.

²⁵ Section 2 Conclusion, Marriage Article 983 of the Civil Code,
<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000001>, accessed 10 March 2020.

(Article 5 of the Enforcement Act No. 748) do not exist.

Accordingly, there is an unnecessary restriction with a contradiction when claiming that relative-by-marriage relationship cannot be established in a same-sex marriage as stipulated in the explanation of Paragraph 3, Article 5 of Enforcement Act No. 748. The relative-by-marriage relationship in the Civil Code should be applicable to same-sex marriage. It is not only for the sake of normal human relationships. The existence of the relative-by-marriage relationship is also an element to avoid conflicts of interest which exist not only in heterosexual marriages but also in homosexual marriages.

Although the reason why the legislators limit the same-sex marriage system to a relation between two persons instead of two families might be to avoid the social disputes, whether completely abandoning the legal regulation concerning “relative-by-marriage relationship” is appropriate in this case and what is the purpose of doing that are issues that still need to be addressed.

3.3 Dissolution of relationship and transnational marriage issues for same-sex marriage

The Regulation regarding dissolution of the relationship (i.e., divorce due reason in the Civil Code) includes “Where he or she has a loathsome disease which is incurable” in paragraph 1 item 7, Article 1052 and “Where he or she has a serious mental disease which is incurable” in paragraph 1 item 8, Article 1052 of the Civil Code. In Enforcement Act, this has been amended to “where one party has a major incurable disease” as a cause of dissolution of the relationship. On the whole, this is less stringent than the Civil Code, but the imprecise rules might easily result in the tendency toward abandonment. The specific reason for such regulation needs further examination.

In addition, because Enforcement Act No. 748 does not include regulation concerning transnational marriage, the current norms of the Civil Code are still applicable officially. According to Article 46 of Act Governing the Choice of Law in Civil Matters Involving Foreign Elements²⁶, the formation of a marriage is governed by the national law of each party. However, a marriage is also effective if it satisfies the formal requisites prescribed either by the national law of one of the parties or by the law of the place of ceremony. The principle adopted here is “parallel application” (the national law of both parties is also the governing law for the establishment of marriage). That is to say, the marriage is invalid unless the parties are allowed to get married according to their own national laws respectively.

Briefly speaking, the transnational same-sex marriages will present “one country, three systems” in Taiwan. If the other party is from a country where same-sex marriage is legal (26 countries, including Netherlands, Canada, and Spain), the transnational marriage can be valid. In case the other party is from a country where same-sex marriage is not legal (for example, Japan,

²⁶ Chapter VI: Domestic Relations of Article 46 of Act Governing the Choice of Law in Civil Matters Involving Foreign Elements, <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000007>, accessed 10 March 2020.

Brunei, South Korea), the transnational marriage cannot be valid. If the other party is from another country that needs to interview abroad, the marriage cannot be valid; furthermore, the partner's registration might be difficult (for example, Southeast Asia, South Asia, West Asia, Africa. It is necessary to obtain a marriage certificate issued from the foreign spouse's home country's local government, in order to apply for an interview with the foreign affairs unit of the Ministry of Foreign Affairs of Republic of China (Taiwan). After the interview is passed, the marriage documents will be further verified and the visa of the foreign spouse will be issued).²⁷

In other words, even if Taiwan implements same-sex marriage, if the law of the country of the foreign partner does not recognize same-sex marriage, the marriage may be deemed to be invalid by Taiwan.

4. On the right to family

4.1 Family right under Taiwan's Civil Code

Although family right is not clearly listed among basic rights in the constitutional provisions and supplemental provisions of Taiwan's Constitution, the fact that rights are not listed in the text of the law does not mean that they are not guaranteed by the Constitution. Family right, in terms of its status in Taiwan's Constitution, should be protected by the Article 22 of the Constitution²⁸ as marriage right is (李震山, 2004). Justice Lee Jenn-shan believes that the family, in its social and legal meaning, is the most basic unit of society that provides personal emotional, economic, and educational support. It has multiple fundamental social functions, so there is no reason for the Constitution not to guarantee family rights (林宛樞, 2013). The nature of family right is subjective and public, and people have on this basis the freedom to create various forms of family, or families of various composition. As for the existing marriage system and family form, it originated from the content of family right, but family right should also be a guarantee for new family compositions.

The relevant interpretations of family right over the years have mainly focused on restrictions on adoption (such as Interpretation No. 87 and No. 502). In terms of the essential elements of adoption, such as the provisions on the age limit of the adopter and adoptee, Interpretation No. 87 first reviewed the adopter's age limit in violation of Article 1073 of the Civil Code, according to which the adopter should be twenty years older than the adoptee. The court can be asked to revoke such limitation, but without invalidating it legally. Also, in Interpretation No. 52, when the adopters are a couple, whether the age difference shall be twenty years old is questioned. This age limit is believed to comply with the ethical norms of our nation, and to be necessary to

²⁷ Taiwan Alliance to Promote Civil Partnership Rights, <https://tapcpr.org/main-topics/marriage-equality/transnational-same-sex-marriage>, accessed 10 March 2020.

²⁸ Article 22 of the Constitution states that all other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.

keep social order and to enhance public interests. There is no contradiction with the constitutional guarantee of the people's right to freedom. Thus, the reasonable gap between the age of the adopter and the adoptee is a matter of legislative discretion. Based on the consideration of family harmony and the right to take care of children, the aforementioned regulation may still have certain flexibility when adoption is made by a couple together or one party of the couple in order to meet the actual needs of life in society. The relevant institutions shall review and amend, relaxing the age limit for the step-family's and couple's adoption. In regard of this, the family formation right of different family types is taken into consideration, and thus the family is not merely limited to the traditional marital family. In these Interpretations, it is believed that the family system is based on personality freedom and has multiple functions, such as reproduction, education, economy and culture, providing the necessary support to an individual in social life and the basis for social formation and development. Adoption is one part of the family system in Taiwan, and it confers identity for the purpose of creating a parent-child relationship, thereby forming a family ethical relationship between the adopter and the adoptee to foster, support, raise, identify and inherit. It has significant functions for the physical and mental development of the adopters and the adoptees. It is the freedom of the people to adopt children, related to the development of the personality of the adopters and of the adoptees that should be guaranteed by Article 22 of the Constitution.

Thus, there is no clear distinction of content or guarantee between the marriage and family rights and the relationship between private and family life. As the forms of marriage and family become diversified, the scope of existing marriage right and family right are too narrow to meet new needs and issues. The author believes that the modern definition of family should take both legal and social meanings into consideration in order to make the structure and operation of family evolve with the fast-changing society. As traditional families have been normally protected by the Constitution, a variety of marriages and families that are not properly protected by the Civil Code should also be protected for their "family rights" in real-life situations. Those modern families that are not made up by marriage, ties of blood or biological relationships still find a way to cohabit permanently, which has indicated family diversification in this day and age. Just as the public's attitude and views on marriage and family have been evolving over the last decades, the "objective dimension" of family rights cannot be limited to a specific "standard model". Considering the institutionalized practices of protection were derived from the "objective value order" related to basic human rights, these practices should not be taken as an excuse for posing restrictions on human rights. The right of the family should be based on the family diversification as its essence. The protection scope of family composition rights, its subjective and objective functions, and the practice of law should all take the family diversification as the core to implement the legal order with the goal of protecting rights such as "freedom of marriage" or "equitable marriage". We do not have to discard the traditional marriage or protection of family rights. We just need to adopt diversified values and develop a lenient attitude toward unconventional or non-mainstream families, while helping the legal thinking and law system to accommodate a broad variety of needs of multiple

forms of family and their family members. Hopefully this might help the relevant legislations to adapt to social trends and meet the needs of society, thus protect all types of families with its strong effect and positive influence. Therefore, to redefine the scope and content of these two rights in order to maximize their effects while preserving their uniqueness is one of the goals that Enforcement Act No. 748 and even the Civil Code should achieve. Clearly there is still rooms for many improvements in terms of Enforcement Act No. 748 and even for the Civil Code itself.

4.2 Taiwan LGBT social movement Groups' appeal for family right

For Taiwan's LGBT social movement group, the concept of "home" often refers to the deep and intimate relationships within same-sex or heterosexual couples, giving each other mutual support in life. However, due to different marital status or social discrimination, LGBT couples cannot enjoy the relevant rights, in the way heterosexual couples can. This is due in part, because such unions actually challenge the existing legal system and the cultural traditions of the patriarchal Han family. For example, same-sex couples might not be able to consent to medical care for their partner or even do not have the same rights as heterosexual couples with regard to taxes, property, inheritance, and parental rights. All these problems could be avoided as they are actually a matter of the legal recognition of these families and partners. The structure of modern families has changed, but it does not mean that the emotional connection between its members is weaker than in blood relationship or marriage.

However, non-traditional family forms are still excluded by the state's law, resulting in substantial damages to the rights of these families. Yet, a home that is not formed by a heterosexual marriage and bloodline relatives should also be treated and protected by law. The argument that supports the freedom of same-sex couple family often states that the "functions" of a same-sex family are no less valuable than those of a heterosexual family. It points out that "in real life, how people gather together to become a home often exceeds the logic of the law"²⁹, which is why the discussion should be based on the legal concept of "open family", hoping that the current legal system can make some amendments or changes to guarantee the cohabitation relationship between people, allowing them to jointly form a family (safeguarding family relationships of "two or more people"). The law should reflect and conform to the social situation and should provide a guarantee to people's agreement and consent. The legally-guaranteed "home" should be interpreted as a symbol of "happiness" and should connect families with intimate relationships. It is believed that people who married in a diversified manner guaranteed by law can allow "the blossom of diversified happiness". Such a statement is not so different from the values of "the obvious connection between family with marriage and intimate relationship ethics" inherent in our society (林宛樞, 2015).

Enforcement Act No. 748 has failed to recognize that same-sex marriage is not a mere

²⁹ 教育部人權教育諮詢暨資源中心, 〈多元成家, 我支持! 你呢?〉, <http://hre.pro.edu.tw/article/3866>, accessed 10 March 2020.

connection between two persons; but indeed creates new forms of family constitution. This failure is clearly revealed by the ways in which the provisions concerning adoption and in-law are different from the norms of the Civil Code. In consequence the rights and status of same-sex couples cannot be effectively improved. On the contrary, this law will likely augment problems.

5. Think of it in terms of multiple value

It is not only traditional core families based on monogamous heterosexual marriages that can play roles for economy, education, and emotional support; other family types can also meet the needs of people to form a “home” and assist in the realization of their personalities. Non-traditional forms of diversified families already existed in our society at the time of the formulation of the Civil Code and even before its establishment. Nonetheless, these diversified families have always been ignored and regarded as “unethical”. In Taiwan, the traditional ethics has been adopted as the default value and the heterosexual marriage has been taken as the basis for a legitimate family. Although the Ministry of Justice claims that Taiwanese law provides institutional guarantees for the people’s marriage and family, upon closer observation, it is clear that this set of guarantees is based on traditional ethical norms rather than substantive, real existing family relationships. Thus, legislators and the judicial interpretations have ignored that the traditional monogamous marriage system was originally only an external and objective form of institutional protection of family rights, rather than the real object of protection (in the beginning, the law was there to safeguard the rights of those who enter into the marriage system, not for the protection of traditional marriage itself).

However, as “family formation” is becoming a basic right that has been mentioned several times in legal discussions, and now that the existence of diversified family has received attention, some academics ask: what is the function and the purpose of the Family Act of Civil Code? Is it necessary regulate the construction of the family system only to protect the specific form of family currently recognized by the law, or can we tolerate diversified values in social development? Can we ensure as much as possible the rights of various forms of family formed by people, whether or not they are in line with mainstream values (施慧玲, 2007)?

As ethical norm the principle of the best interests for the children is the core of family right. Only when the content of a law is in accordance with the best interests of the children, can the parent-child relationship be fully guaranteed. Still, the current Taiwanese constitutional provisions, and supplementary provisions and judicial interpretations have not yet agreed to co-adoption by same-sex partners, nor to the right of Connection adoption. Yet, no study has ever shown that there is any correlation between the sexual orientation of the adopter and the best interests of the adoptee or whether or not the parent-child relationship is good. Therefore, the principle of the best interests of the child should not be used as an excuse to conclude that people of specific sexual orientation cannot be qualified adoptive parents.

6. Conclusion

Family is a long-standing group unit in the life of human societies. Nonetheless, its composition and size differed throughout history; but the family has always provided economic and emotional support, education, care, and other functions for those who had not yet become self-reliant in society. The family is not only a unit that constructs capabilities for individuals to be independent and to possess the ability to connect with society and each other, but it is also relevant to people's important fundamental rights such as privacy protection and self-actualization. Therefore, the author believes that the right to establish and maintain family relations should be protected by law in order to maintain diverse fundamental rights and interests of individuals as well as those of society as a whole.

The author believes that family right is not only a legal right which needs to be protected by law, but which also needs a constitutional guarantee to be secured. It is a non-enumerated fundamental human right within the scope of the guarantee as prescribed in Article 22 of the Constitution. However, the "standard family" in the current legal system still excludes the families established by homosexuals and their partners or／and their children.

In society, the inequality between gender and sexual orientation does not only exist in the public sphere. There are still oppressive forces of patriarchal and heterosexual hegemony in the private sphere, and such oppression is even more deeply rooted and powerful in the family's intimate relationship. Therefore, although it seems that the incompleteness of this legislation does not have serious effects on society as a whole, it will create an imbalance in legal rights and interests for the homosexual partners who are in intimate relationship or life relationship.

With the constant changes taking place in the family structure, in its legal connotation and meaning as well, the institutional guarantee of freedom of marriage are inevitably affected and impacted. We do not need to abandon traditional marriage right or family right guarantees, but we need to consider an adjustment to the existing legal view and system. The concepts of diversified value and of tolerance encourage us to embrace "diversified families" and accept non-mainstream values. Thus, the theoretical approach to constitutional basic rights should adopt a more open and accepting attitude toward diversification to face changes in society and in people's thinking. Institutional guarantees are the "objective value order" derived from basic rights, and they should not be the basis for restricting the basic rights of "new things". Therefore, the content of the system created by the laws must conform to the "constitutional order" and the spirit of the times. Only then can the law and social system actually harmonize with the constitutional norms and coexist sustainably.

The establishment of Enforcement Act No. 748 is not only meaningful for the LGBT groups but also for the entire society. From the announced law, it was hoped that the regulations of Taiwan should give same-sex couple's marital relationship the same exclusive rights and obligations as heterosexual marriages. It is certain that the Executive Yuan tried to adhere to the Justices' interpretation. It is also understandable that the government intends to reduce the controversies of the decision with a political compromise.

The author recognizes the direction and endeavors arising from this legislation and expects the government to be further aware of existing same-sex couples' families (of various family forms) that should be included in the scope of the law to protect them from oppression encountered in daily life and family. Only in a society where there is equality can all people actually practice freedoms and rights.

REFERENCES

- CHIN, S. (2018). After Interpretation No. 748 in Taiwan. *Journal of Education & Social Policy*, 5, 171-181.
- Central Election Commission. (2018). *Form other than marriage to regulate same-sex unions referendum*. Retrieved from <https://web.cec.gov.tw/central/cms/HearingNotice/27029>
- Central Election Commission. (2018). *Gender equity education referendum*. Retrieved from <https://web.cec.gov.tw/central/cms/HearingNotice/27038>
- Central Election Commission. (2018). *The Marriage definition referendum*. Retrieved from <https://web.cec.gov.tw/central/cms/HearingNotice/27003>
- Coalition for the Happiness of our Next Generation. (n.d.). 下一代幸福聯盟 (CHNG). Retrieved from <https://taiwanfamily.com/category/hearings>
- Constitutional Court, Judicial Yuan, R.O.C. (1960). *J.Y. Interpretation No. 87*. Retrieved from <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=87>
- Constitutional Court, Judicial Yuan, R.O.C. (2000). *J.Y. Interpretation No. 502*. Retrieved from <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=502>
- Constitutional Court, Judicial Yuan, R.O.C. (2002). *J.Y. Interpretation No. 552*. Retrieved from <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=552>
- Constitutional Court, Judicial Yuan, R.O.C. (2002). *J.Y. Interpretation No. 554*. Retrieved from <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=554>
- Constitutional Court, Judicial Yuan, R.O.C. (2017). *J.Y. Interpretation No. 748 [Same-Sex Marriage Case]*. Retrieved from <http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748>
- Executive Yuan, Republic of China (Taiwan). (2019). *Cabinet passes bill concerning same-sex marriage*. Retrieved from <https://english.ey.gov.tw/Page/61BF20C3E89B856/60667c36-b285-493b-b8fa-d549d6b247c6>
- Executive Yuan, Republic of China (Taiwan). (2019). *Taiwan advances rights for all with promulgation of same-sex marriage law*. Retrieved from <https://english.ey.gov.tw/Page/61BF20C3E89B856/06fec03d-6213-4874-8710-6fda8f121f62>
- HUMAN RIGHTS EDUCATION ADVISORY AND RESOURCES CENTER. (n.d.). 多元成家, 我支持! 你呢? [Diverse-family, I support! What about you?]. Retrieved from <http://hre.pro.edu.tw/article/3866>
- LAWS & REGULATIONS DATABASE of The Republic of China. (1947). *Constitution of the Republic of China (Taiwan)*. Retrieved from

<https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000001>

LAWS & REGULATIONS DATABASE of The Republic of China. (2010). *Act Governing the Choice of Law in Civil Matters Involving Foreign Elements*. Retrieved from <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000007>

LAWS & REGULATIONS DATABASE of The Republic of China. (2015). *Civil Code*. Retrieved from <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000001>

LAWS & REGULATIONS DATABASE of The Republic of China. (2018). *Assisted Reproduction Act*. Retrieved from <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=L0070024>

NATIONS UNIES. (n.d.). *La Déclaration universelle des droits de l'homme*. Retrieved from <https://www.un.org/fr/universal-declaration-human-rights/>

Office of the President Republic of China (Taiwan). (2019). *The Enforcement Act of Judicial Yuan Interpretation No. 748*. Retrieved from <https://www.president.gov.tw/Page/294/46606/%E5%88%B6%E5%AE%9A%E5%8F%B8%E6%B3%95%E9%99%A2%E9%87%8B%E5%AD%97%E7%AC%AC%E4%B8%83%E5%9B%9B%E5%85%AB%E8%99%9F%E8%A7%A3%E9%87%8B%E6%96%BD%E8%A1%8C%E6%B3%95->

Taiwan Alliance to Promote Civil Partnership Rights. (2019). *你的同性伴侶來自哪一國？* [Which country does your same-sex partner come from?]. Retrieved from <https://tapcpr.org/main-topics/marriage-equality/transnational-same-sex-marriage>

李龍(主編)(2004)。西方法學名著提要(下) [The Summary of the Famous Works on Western Law], 台北市：昭明。

李震山 (2004)，憲法意義下之家庭權 [Right to Family Life: Constitutional Aspects]，中正大學法學集刊，16， 68。

林宛樞 (2013)。同志家庭權之論述、保障與界限：《以台灣伴侶權益推動聯盟版民法修正草案》為中心 [Discourse, Protection, and Extent of Right of LGBT People to Family: in the Analysis of the Draft Amendments to Taiwan Civil Code by TAPCPR]，新竹市：清華大學法律研究所。

林宛樞 (2015)。《臺灣伴侶權益推動聯盟版民法修正草案》中的同志家庭與同志家庭權，性別平等教育季刊，70， 124 -130。

陳正根 (2012)，移民署面談工作之人權保障 [The Protection of Human Rights to Interviews in National Immigration Agency]，法學新論， 37， 58。

施慧玲 (2007)，民法親屬編之理想家庭圖像——從建構制度保障到寬容多元價值？，月旦民商法雜誌， 17， 23-24。