

Legalization of Same-Sex Marriage in Thailand: Society Steps Forward, But Policymakers Still Hesitate

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Abstract

Thailand, a country recognized as being LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer, or Questioning) friendly, is currently facing challenges regarding the legalization of LGBTQ marriage and the pursuit of equal rights for LGBTQ couples, similar to those enjoyed by straight couples. Possible guidelines in this regard have been proposed: Draft of the Civil Partnership Bill and the Bill to Amend the Civil and Commercial Code (the “CCC”) Book 5 Family. All these proposals are currently under the consideration of Parliament, and it is likely to take some time before the relevant law will be officially enacted. This article will state the proposals to legalize same-sex marriage and examine the Constitutional Court of Thailand’s decision regarding the constitutionality of Article 1448 under the CCC which is in the scope of marriage law, and provide arguments against the decision. Perhaps, it is time for Thailand to consider whether to support gender equality or refuse all the relevant requests.

Keywords

LGBTQ, Marriage, Legalization, Civil Partnership Bill, Bill to Amend the Civil and Commercial Code

1. Introduction

Johann Wolfgang von Goethe, the great German thinker, once said “*I am what I am, so take me as I am*” and similarly, Arthur Schopenhauer pronounced, “*No one can escape from their individuality.*” The emphasis on the unique being of an individual is the salt of his/her life. Denial of self-expression is inviting death. The irreplaceability of individuality and identity is grant of respect to self. This

realization is one's signature and self-determined design. One defines oneself. That is the glorious form of individuality.

The abovementioned paragraph is from the inspirational decision of the Supreme Court of India regarding the repeal of Section 377 of the Indian Penal Code which resulted in the decriminalization of same-sex relations (Johar, 2016). The decision marked a significant step forward in the recognition and promotion of the human rights of LGBTQ people not only in India but around the world. In April 2023, the LGBTQ community in India made outstanding progress as the Indian Supreme Court began hearing a series of petitions from 18 LGBTQ couples, including three who are raising children together, requesting the legalization of same-sex marriage. However, homosexuality and same-sex marriage remain banned in the socially conservative nation led by Prime Minister Narendra Modi, whose government has completely opposed the issue, arguing that it should be discussed in Parliament (Rajvanshi, 2023).

In Thailand, LGBTQ movements have been widely recognized in recent years, and Thais support the request to enact a new law or amend the relevant ones to equalize every citizen's rights in relation to marriage and family laws. A government survey revealed that over 90 percent of the population supports the draft of such a new law, reflecting a growing awareness and acceptance of LGBTQ rights in the country (Reuters, 2023). The right to adopt children together makes medical decisions on behalf of each other, and inherits from each other when one partner dies are fundamental rights that everyone deserves. At the core of this movement lies the imperative to advocate for equal rights for all individuals within a country, irrespective of their gender. The fundamental premise posits that the rights afforded to heterosexual individuals under existing marriage and family laws should be equally application to LGBTQ individuals. The key of this matter is the assertion that legal provisions governing marital and familial rights should be universally inclusive, transcending sexual orientation to ensure parity and fairness for all citizens. In light of the LGBTQ movements, it falls to the public to consider whether it is time for this country to legalize same-sex marriage in order to step forward as a modernized and civilized nation where everyone is able to live and love freely, together with the rights and protections provided under the same law.

2. LGBTQ Community in Thailand

The history of LGBTQ behaviors in Thailand has led to a complex and contradictory situation involving the outward appearance of acceptance and higher visibility of LGBTQ people than in several countries but with hostility and prejudice towards LGBTQ people as well as past institutionalized discrimination. Incidents of gender and sexual behavior not conforming to heterosexual norms have been recorded as long ago as the fourteenth century in Thailand. Thai society in the nineteenth century was relatively androgynous, in terms of clothes and hairstyles. Nonetheless, during this time, colonial Western norms of behavior and thinking started to be adopted, including the criminalization of homo-

sexuality being considered not a private matter but instead a part of social norms. After the transition from an absolute monarchy into a constitutional monarchy system of government in 1932, Thailand adopted codes and concepts relating to gender roles and sexuality as a social construction of morality. Simultaneously, gay communities were forming with homosexuality becoming visible. The rapid increase in media during the 1950s and the impact of globalization in the following decades also provided more visibility and information on gender and sexuality. This also brought about the emergence of contemporary LGBTQ activists and the development of their sexual identities (UNDP, USAID, 2014).

Thailand witnessed the first wave of outing gay men and lesbians through sensationalist press coverage in Thai and English during the 1960s. The purpose of these outings was to humiliate individuals and show them as unfit members of society. They were used as public examples of what the model Thai citizen should not be. These negative portrayals were mitigated by the emergence of LGBTQ-centered media such as gay-themed books in the 1970s and gay magazines and films in the 1980s, as well as the expansion of gay saunas and other LGBTQ enterprises in the 1990s, along with the mainstreaming of sexual and gender diversity all contributed to the modern understanding and representation of sexual orientation and gender identity in Thailand (UNDP, USAID, 2014).

Currently, Thailand is recognized as one of the world's friendliest LGBTQ destinations. Indeed, members of the LGBTQ community are not only well accepted within Thai society but also recognized as talented and creative professionals in several fields, becoming entrepreneurs, lawyers, filmmakers, athletes, and even politicians. All these professionals play a leading role in LGBTQ movements as they speak up to pursue equal rights for people in their community and can gain public attention in this regard. Thai society has come a long way, with the introduction of legal marriage for LGBTQ people gathering significant public support.

The results of a national survey conducted by the United Nations Development Program in 2019 revealed generally favorable attitudes towards LGBTQ individuals in Thailand, along with significant support for inclusive laws and policies. Despite this, the survey also highlighted persistent experiences of stigma, discrimination and violence. While 69 percent of non-LGBTQ Thais surveyed expressed generally positive attitudes towards the LGBTQ community, the study found that complete acceptance remains challenging, particularly within the family and social networks and in rural areas. The data indicated greater acceptance of LGBTQ people outside the family context. Furthermore, over 50 percent of LGBTQ respondents reported experiencing verbal harassment, 16 percent reported instances of sexual assault and around 40 percent indicated that they had pretended to be heterosexual to gain acceptance in school, work or at home (UNDP, Thailand, 2019).

In spite of the disconcerting revelations concerning stigma and discrimination, the research also illuminated several positive aspects. A substantial proportion of non-LGBTQ respondents expressed endorsement for equitable access to

services and benefits for LGBTQ individuals in Thailand. Notably, a greater number of non-LGBTQ respondents exhibited support rather than opposition to key issues such as same-sex unions and adoption rights for the LGBTQ community (UNDP, Thailand, 2019).

In response to the recent movement of the public, there are two potential proposals in this regard, namely drafting a new law separately only for the purpose of providing rights relating to marriage law for LGBTQ people or amending the CCC in the family law section in order that it be equally applied to everyone in the country.

3. Proposals to Legalize Same-Sex Marriage

3.1. Civil Partnership Bill (Senate, n.d.)

On July 8, 2020, the Thai Cabinet approved the Civil Partnership Bill, which was proposed by the Ministry of Justice to allow same-sex couples to legally register their partnership, and then submitted it to the House of Representatives Coordination Committee for consideration and approval before being forwarded to Parliament for ratification. If ratified by Parliament, Thailand would be the second region in Asia to legalize same-sex marriage after Taiwan, China (Siam Legal International, 2023).

The bill allows same-sex couples to register their relationship and introduces amendments to the CCC which will give them the same rights and privileges as straight couples. This bill will install the legal rights of all individuals of all gender orientations at an equal level. It defines “civil partners” as a consenting pair of the same gender who can choose to register their marriage pursuant to the bill¹, and states that both individuals must be at least 17 years old² to register as civil partners, and at least one of whom must be a Thai national³. Those who are younger will require permission from their parents, adopter, legal guardian, or the court⁴. However, the bill makes no provision for betrothal, which is still valid under the CCC (Prachatai English, 2020).

The bill also allows civil partners to adopt children together⁵ and gives them the power to act on behalf of their injured or dead partner in legal proceedings according to the Criminal Procedure Code⁶. It also includes a section on properties between civil partners, which is separated into personal property and property acquired after entering into a partnership⁷; civil partners can engage in the joint management of their assets accordingly. Furthermore, the bill also states that articles in the CCC relating to inheritance shall be applied to civil partners as well⁸. Nonetheless, one of the most essential matters in this relationship,

¹Civil Partnership Bill art. 3 (draft).

²Civil Partnership Bill art. 3 (draft).

³Civil Partnership Bill art. 8 (draft).

⁴Civil Partnership Bill art. 12 (draft).

⁵Civil Partnership Bill art. 41 (draft).

⁶Civil Partnership Bill art. 21 (draft).

⁷Civil Partnership Bill art. 25 (draft).

⁸Civil Partnership Bill art. 45 and 46 (draft).

namely the right to make medical decisions on behalf of their partner, is surprisingly omitted from this bill. In addition, it is still unclear whether civil partners are allowed to take their partner's last name, receive benefits from their partner's social security fund, or whether a civil partner who is a foreigner will be eligible for a marriage visa (Prachatai English, 2020).

Furthermore, the Cabinet also approved another bill to amend the CCC, which stipulates that a marriage or partnership cannot occur if one person is already the spouse or partner of another individual. Additionally, the proposed amendment includes a provision for divorce based on one spouse providing maintenance or showing commitment to another person as a wife, husband, or partner⁹. This bill also proposes that the CCC be amended to include a provision that the right to receive alimony is extinguished if the party receiving the alimony remarries or registers a civil partnership¹⁰ (Prachatai English, 2020).

These two bills are in the process of consideration and must be approved by Parliament before they come into effect. There is public concern regarding the Civil Partnership Bill as it has been criticized that a civil partnership is not equal to a marriage. Furthermore, the term "civil partner" has not previously been stated in Thai legislation, and by establishing this new term, it differentiates the meaning of spouse between straight and LGBTQ couples. This will certainly invite significant criticism as to whether the bill supports gender equality and the reason behind this legislation that differentiates marriage rights between straight and LGBTQ couples. The bill has previously been criticized by NGOs and LGBTQ rights activists for focusing mostly on property, inheritance, and the right to act on behalf of one's partner in criminal proceedings. Other rights and protections which straight couples can legally obtain are not provided for under this bill (Prachatai, 2020).

However, the abovementioned bill to amend the CCC is not the same as that proposed by the Move Forward Party¹¹ under which the terminology used in the law shall be changed from "husband and wife" to "spouse" and "man and woman" to "person" in order to allow individuals to legally marry regardless of gender and ensure they will receive equal rights, duties and protections under the same law.

3.2. Bill to Amend the CCC Book 5 Family (National Assembly of Thailand, n.d.)

While the Civil Partnership Bill is being considered by Parliament, another proposal has been submitted simultaneously. The Bill to Amend the CCC Book 5 Family was proposed to Parliament by the Move Forward Party on June 18, 2020. Parliament invited public consultation on the proposed amendments to the articles on family and marriage under Book 5 of the CCC which will allow LGBTQ couples to get married. This bill proposes that the terminology used in

⁹Bill to Amend the CCC art. 4 (draft).

¹⁰Bill to Amend the CCC art. 5 (draft).

¹¹A social-democratic and progressive opposition political party in Thailand.

the law shall be changed from “husband and wife” to “spouse” and “man and woman” to “person,” and also raises the age at which a person can legally marry from 17 to 18 years old¹². The proposed amendments will allow individuals to legally marry regardless of gender, and ensure they receive equal rights, duties, and protections provided under the law. If the bill passes, LGBTQ couples who register their marriage will be able to adopt children together, make medical decisions on behalf of each other, and in the case of one partner dying, the other can inherit from their partner and make legal decisions regarding their partner’s assets. Overall, LGBTQ couples will legally obtain the same fundamental rights as straight couples if this bill passes (Prachatai, 2020).

This bill was opened for public consultation according to Article 77 of the Constitution, which provides that prior to the enactment of every law, the State shall conduct consultation with stakeholders, analyze any impacts that may occur from the law thoroughly and systematically, and disclose the results of the consultation and analysis to the public, and furthermore to take them into consideration at every stage of the legislative process (Prachatai, 2020).

Another significant issue regarding this proposal relates to whether the current marriage law violates Article 27 of the Constitution since it limits the right to register marriage only to heterosexual couples. This can therefore be considered gender-based discrimination which obviously violates the equal rights and protections provided under the Constitution (Prachatai, 2020). Specifically, it raises the question as to whether Article 1448 of the CCC, which states that a marriage can take place only between a man and a woman, is unconstitutional.

4. Constitutional Court Decision

After an LGBTQ couple had been denied marriage registration by the district office due to the gender limitation under Article 1448 of the CCC on February 14, 2019, the couple together with the Foundation for Sexual Orientation and Gender Identity (For-SOGI) filed a complaint with the Ombudsman to rule whether Article 1448 is unconstitutional pursuant to Article 27 of the Constitution (Prachatai, 2019).

Under Article 27 of the Constitution, all persons are equal before the law and shall have rights and liberties and be protected equally under the law. This article also states that unjust discrimination against a person on the grounds of differences in origin, race, language, gender, age, disability, physical or health condition, personal status, economic and social standing, religious belief, education, or political view not contrary to the provisions of the Constitution or on any other grounds, shall not be permitted. The couple and For-SOGI, therefore, filed a complaint with the Ombudsman on the grounds that the denial of marriage registration to LGBTQ couples is discriminatory and unconstitutional. The Ombudsman later ruled that pursuant to Article 1448 of the CCC, marriage can only be contracted between a man and a woman because the law only considers

¹²Bill to Amend the CCC Book 5 Family art. 3 (draft).

the gender a person is assigned at birth. It is not considered gender-based discrimination which would be a violation of the Constitution. The Ombudsman would not file a request for the Constitutional Court ruling and dismissed the couple's complaint accordingly. The couple and representatives from For-SOGI directly filed their petition (through the Central Juvenile and Family Court) on November 22, 2019, with the Constitutional Court to rule whether Article 1448 violates Article 27 of the Constitution. The Constitutional Court accepted the petition and provided the decision in November 2021 (Prachatai, 2019).

On November 17, 2021, the Constitutional Court held that Article 1448 of the CCC defining marriage as only between a man and a woman was constitutional, following a petition filed by an LGBTQ couple seeking legal same-sex marriage. However, the Court did not prohibit the enactment of any new law in this regard¹³.

In explaining its decision, the Court initially addressed the grounds presented by the Petitioners. They referred to Article 30 of the previous Constitution of the Kingdom of Thailand B.E. 2550 (2007), which included the term "gender" in the spirit of the Constitution, stating that "persons are equal before the law and shall be equally protected under the law." Discrimination on the grounds of differences in "gender" shall be prohibited. In addition, apart from the differences between men and women, people with gender diversity were also included in this regard. Therefore, the term "gender" in the Constitution of the Kingdom of Thailand B.E. 2560 (2017) (the recent one) Article 27, paragraph 3 also included prohibition against discrimination on the grounds of differences between people with gender diversity. Secondly, the Petitioners claimed that Article 1448 of the CCC was not in accordance with the general principle of limitation of rights and liberties of persons provided under Article 26 of the Constitution¹⁴. Article 1448 granted power to the State's officers to control lawfulness pertaining to formality, which affected lawfulness pertaining to substantiality. This affected the right to found a family, which was a basic right for all Thai nationals, and same-sex life partners shall be protected in the same way as spouses in general.

Significantly, Thailand has now enacted the Gender Equality Act B.E. 2558 (2015) which is the law that protects the rights, liberties, and equality of people with gender diversity. The act of refusal to grant marriage registration to the Petitioners was therefore an unfair discrimination against people with gender diversity. Furthermore, the Petitioners referred to marriage as the ultimate ground, emphasizing its role in the formation of the family institution. In other countries, legislation has been enacted to protect the rights of individuals with diverse gender identities. By specifying that human beings only have two genders

¹³Constitutional Court decision 20/2564.

¹⁴Article 26 states 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. In the case where the Constitution does not provide the conditions thereon, such law shall not be contrary to the rule of law, shall not unreasonably impose burden on or restrict the rights and liberties of a person, and shall not affect the human dignity of a person, and the justification and necessity for the restriction of the rights and liberties shall also be specified.

ers (male and female) it did not value emotions, feelings, desires, tastes, or differences within the state of mind of each individual.

In reasoning its decision, the Court firstly stated the meaning of marriage which was the consent between a man and a woman to voluntarily live together, to have a relationship as husband and wife for reproduction of the clan, to have a bond, and to help and support each other under morals, customs, religious doctrines, and laws in each society. The Court prioritized reproduction as the most important matter in terms of the formation of a family institution. Therefore, marriage was reserved for people who were male and female as assigned at birth in order for them to be lawful spouses.

Furthermore, according to the argument presented by the Petitioners regarding the constitutionality of Article 1448 of the CCC, the Court stated that the enactment of a law resulting in the restriction of rights or liberties of persons shall not be contrary to the rule of law, shall not unreasonably impose a burden on or restrict the rights or liberties of persons, and shall not affect the human dignity of persons. Importantly, the enjoyment of such rights and freedoms shall respect the domestic laws, rights, and liberties of others, as well as customs, religious doctrines, and culture. Furthermore, it shall not affect or endanger the security of the State or public order or good morals of people. The foundation of law mostly related to the traditions and customs of each society, and such traditions and customs in Thai society only accepted marriage between a man and a woman. The provision in Article 1448 was in accordance with the state of nature and a long-standing custom. The article, therefore, was constitutional and did not violate Articles 25¹⁵, 26, and 27 of the Constitution.

The Court further reasoned that the purpose of marriage was for a man and a woman to cohabit as husband and wife to form a family institution, to have children and maintain the race naturally, to inherit property, and to pass on a deep and delicate bond between father, mother, siblings, and other relatives. Marriage between people with gender diversity may not be able to create that kind of bond. The Court provided a comparison between human beings and other creatures in terms of divergent behavior or biological characteristics that could create gender diversity, which should be categorized as another special group of people. However, the Court agreed that the enactment of specific laws for LGBTQ people could be accepted in this regard.

Lastly, the Court also admitted that Article 1448 seemed to restrict the rights and liberties of persons, although the provision was in accordance with the nature, traditions, and customs of Thailand. Another matter established by the Court, in this case, was that if gender was not specified in the marriage registration, people who were not LGBTQ might falsely apply for marriage registration in order to claim benefits from welfare or tax reduction. This would cause diffi-

¹⁵Article 25 establishes the enjoyment of rights and liberties to perform any act which is not prohibited or restricted by the Constitution or other laws, and allows any actions that do not affect or endanger the security of the State or public order or good morals and do not violate the rights or liberties of others.

culties for government officers and affect the security of the State or public order or the good morals of the people.

5. Arguments against the Court Decision

After the announcement of the decision in this case, several critical issues were brought up for discussion. Firstly, it raises the question as to whether the Court placed too much concern on having children as the main purpose of the formation of a family. Does the Court really think the majority of Thais in this generation want to get married in order to have their own biological children? In the case where a couple wants just the two of them to live together, this concept can be recognized as being a family from the Court's perspective. Secondly, it is questionable whether the Court really believes that a "delicate bond" can only be established or developed among people who are related by blood. From another perspective, a delicate bond can be developed among people who love, care, and respect each other as well, regardless of being a blood relative, and this can be seen in many adoptive families who give a new life and opportunity to their adopted child.

Furthermore, comparing human beings with other creatures in terms of gender diversity, in this case, does not sound reasonable in terms of providing equal rights for everyone in society since the outcome of the decision only relates to human beings. Accordingly, creatures will not share the consequences. In addition, regarding the possibility of falsely claiming benefits from the government by people who are not LGBTQ, this issue may be too broad to be considered in this case at the present time. If it turns out to be a problem following legalization of same-sex marriage in the future, the government can enact or revise the relevant laws and regulations to deal with it. Therefore, it might be more important for now to focus only on the rights and protections for LGBTQ people in order to support gender equality in the country.

Significantly, regarding the constitutionality of Article 1448, it might sound reasonable in terms of referring to Thai traditions and customs if this issue was brought up for discussion decades ago. However, the world changes. It is questionable whether the grounds the Court provided in the decision are in compliance with modern Thai society. It may be time for the Court to change its traditional concept of law to be more open-minded to the diversity of gender in order for the policymakers to be able to enact or revise the relevant laws and regulations to support gender equality in the nation.

6. Conclusion

The Civil Partnership Bill and the Bill to Amend the CCC Book 5 Family are currently under parliamentary consideration. On June 15, 2022, Thailand's House of Representatives approved four bills to extend the marriage rights to LGBTQ couples, including these two. The House of Representatives has set up a parliamentary sub-committee to scrutinize both bills. Since July 2022, both bills have

separately undergone revisions by the sub-committee and are ready to be sent back to Parliament for section-by-section readings and voting by the House of Representatives. According to the Thai Constitution, any bills must be approved by the House of Representatives in the second or third readings before reaching the Senate for further consideration (Fortify Rights, Thailand, 2022). Therefore, it is likely to take some time to finalize whether the enactment of a new legislation or amendment of the CCC should be implemented. According to the recent Constitutional Court decision, the Court only agreed to enact the Civil Partnership Bill, while it seems impossible to amend the CCC from the Court's perspective at this moment. There is also controversy among Thais since many agree that amendment of the CCC is the most beneficial outcome for the public since everyone will be under the same law, encouraging the concept of gender equality in the country. To legalize same-sex marriage, gender equality is the most important matter to be considered. As the prospect unfolds for every individual in a nation to establish their own family without regard to their biological gender, the citizen can anticipate a life enriched by the ability to share it with loved ones, unencumbered by obstacles rooted in outdated societal norms. The potential implementation of this progressive legal framework holds the promise of elevating the well-being of all Thais, affording them the freedom to live freely and securing equal legal protection. This transformative legal shift is poised to shape the attitudes of the next generation, empowering them to assert their identities confidently and embrace their true selves with pride. Therefore, it is time for Thai policymakers to step forward to provide basic rights and protections to enable every couple to legally marry. It is now possible in this modern world to live and love freely, and hopefully, Thailand will be the next country to legalize same-sex marriage.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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