

Marital Status and Family Establishment among Diverse Sexuality

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Abstract

While the time has been ticking, current social paradigms and movements towards an individual life, romantic emotions have been playing their crucial roles in support of our happiness and for the sake of living people's lives in the very-long term. No matter what (your) status is - whether single or married, our rights and liberties are protected by the Constitution (regardless of different jurisdictions). Meanwhile, they shall not be constitutionally discriminatory if such discrimination does not significantly impact social activities. This paper aims to define and underline how important both '*marital status*' and '*family establishment*' would be among the diverse sexuality through the lens of recognizable social perceptions and modern media. Hence, the analysis of the study points out that the Thai Civil and Commercial Code (TCCC) does not align with modern social perceptions. The study also concludes that the TCCC's objectives regarding family creation are obsolete and not responsive to the growing recognition of diverse sexuality, particularly in Thai society. The TCCC was initially drafted to affirm the formation of sexual and monogamous family institutions. It argues, however, that *reproductivity* cannot be a requirement of lawful marriage norms for a family institution. Most importantly, when one has the right to love and to be loved in pursuit of happiness, both State and family law shall respect the individual's romantic best choice as the universal saying (1) love is unconditional and (2) love always wins. Hence, Thai legal acceptance and public policy must accord unconditional love or the debated marital status by registering marriage irrespective of sexual orientation. How to successfully maintain a romantic relationship must primarily depend on what-the-couple-mutually-does in lieu of what-the-couple-is. Letting an individual choose his/her love, the State must not do so in terms of free man's romance in pursuit of virtue happiness.

Keywords: Marital status, Diverse sexuality, Thai Civil and Commercial Code, Constitutional Court of Thailand

Introduction

Professor Nobuaki Hogaku viewed this statement: “*Where there is society, there is law*”¹ (Hogaku, 2010) that each State must enforce its regulation(s) to govern many people’s social activities peacefully, the said classic saying might have implied all kinds of human’s activities must be subject to law enforcement(s). Only some of those are enforceable on a ground of jurisdictional matters and of some belief (McLachlan & Swales, 2009, p. 92), resulting in certain activities (not all) being legally enforceable. Love, for example, is unenforceable by laws (Armentrout, 2012, p. 957).

Surprisingly, online media commercially broadcasts boy-love² (TV) series in which the main actors are both guys having a romantic relationship with another guy. However, this may be repugnant to the contending perspective. When the said romance collides between the contending recognition and the liberal viewpoint, there are various arising issues such as love, marriage, family establishment, and legal recognition - all of which are still only relevant to heterosexuality. In contrast, most people worldwide are willing to recognize homosexuality (Marks, 2006, p. 33). Nevertheless, some groups may not be pleased with any same-sex romance for their personal views (Solomon, 2018, p. 2).

Typically, boy-love fictional publishing such as *the Between Us the series*, *the Cutie Pie series*, *the Love in the Air*, to name but a few, is not uncommon and sounds widespread around the globe thanks to digital advancement (Harper et al., 2016, p. 372). This stark contrast media contents [same-sex romance vs. opposite sex one] may sound challenging social attitude towards same-sex marriage and queer rights, including promoting LGBTQ+³’s legal acceptance and genuine appreciation of homosexual people, and then ‘*how the said sexual diversity is **not** still legally recognizable*’ should they be a serious, yet practical, matter that must be currently taken into account (Nava & Dawidoff, 2014, p. 3).

As many modern singers promote equal protection regardless of sexual preference, some wondered whether there are too many rights under each state’s law to confirm LGBTQ+’s fundamental rights and liberties (Brewer, 2007, pp. 58, 64, 134), which must be treated impartially. Even though various media may **not** be the romantic court of last resort, they significantly reflect what our sexual diversity at present is and, in turn, practically recognizable (Southerton et al., 2021, p. 928) even if some Thai legislation (the enforcement of which has been applied for years) is still reluctant to accept such sexual diversity in the country.

Miracle of Teddy Bear, for instance, is the first Thai boy-love drama successfully broadcasted via offline media (Thai Channel 3), which almost all heterosexual dramas usually occupy. Noticeably, this well underlines most of the current Thai attitudes towards the modern

¹ (Latin) ubi societas, ibi jus

² Yyoi or Y series

³ Lesbian; Bisexual; Transgender; Queer or still Questioning

romantic relationship and marriage that likely sounds repugnant to their conventional perceptions (Adunnawakit et al., 2022, p.69).

Additionally, there are such television programs as *ThoeY ThiaW Thai*⁴, *Talk-Ka-ThoeY*⁵, and *Take-Guy-Out-Thailand*⁶, all of which are socially acceptable. Nevertheless, applicable Thai regulations do still underscore natural law or natural entities (Pickett, 2004, p. 39). This paper is curious as to “*why the state can impose taxes or criminalize wrongdoer(s) irrespective of sexual orientation, if being LGBTQ+ is discouraged*” Ironically, among state laws such as Thai tax law, criminal one, and the (assumed) Constitution apply all people without the discrimination while only TCCC has yet to consider the LGBTQ+ differently. This paper does not argue that certain discrimination concerning both gender assignment and sexual preference can **no way** exist-as long as the natural physical traits of each gender still matter. The resulting discrimination must dully exist. Sanitary concerns and physical advantages are important to humans’ daily activities. Both restrooms (Herman, 2013, p.71) and sports competitions (Jones et al, 2017, pp. 711-712) are required to be disparate, without a doubt.

Regarding love and marriage, *why do a couple of genders and sexual orientation still matter in the digital era when both social recognition and medical advancements can be of help attain both romantic achievement(s) and family establishment (respectively) in the sense of modern attitude towards a challenging romantic open-mindedness?* (Nava & Dawidoff, 2014, pp. 70-73)

Therefore, this paper discusses the correlation among social movements, paradigm shifts, and legal acceptance, particularly in Thailand. Eventually, the paper will confirm that the TCCC should be carefully reconsidered, reviewed, and revised in light of international recognitions by proposing a concrete legal solution- whereby all kinds of a human shall be treated and protected equally by universal rights (i.e. the human right) and of course the Constitution of Thailand.

Safeguarding humans’ romantic activities under the TCCC

Like other jurisdictions, the national private law generally governs individual ‘property’ and ‘civil obligations’ (Waddams, 2003, p. vi; Mousourakis, 2012, p 183). As a civil law country, Thailand strictly follows this classical concept of the said private law by categorizing almost all civil activities into 2 aspects: personal obligation(s)⁷ [binding between

⁴ A Thai travel TV show. It comprises Thai Talented MCs whose professional performances go beyond the sexual preference

⁵ A group of talented MCs whose professional performances go beyond the sexual preference

⁶ A Thai Love dating TV program allows a guy to date another single guy. Noticeably, the term the *Take-Guy-Out-Thailand* respects universal recognition of LGBTQ+ - thereby TV Thunder -one of the most successful television production companies in Thailand- prefers to name the show the-Take-‘Guy’-Out-Thailand rather than Take-Gay-Out-Thailand.

⁷ Jus in personam

persons], and proprietary obligation(s)⁸ [affirming that one has ownership or quasi-property right over an article] (Jitmahawong, 2019, pp. 454-455). As a consequence, there is still conceptualization of some daily activities still need to be more accurate. It is whether the romantic relationship would reach an agreement.

Is love a contract?

Some may understand that ‘love’ could have been a juristic act when a passionate and an acceptance were duly made (Jinavamsa, 2021, p.76). To the Thai Supreme Court ruling No. 6083/2546 (2003), some people may consider the romantic relationship a personal obligation (jus in personam)

Mere love is not as such because a romantic offer and sequential acceptance do not statutorily constitute a legal obligation under Section 149 of TCCC unless there must be an “immediate purpose of voluntary lawful acts” (Theerawongpinyo et al, 2022, p.63).

Love cannot have an “**immediate purpose of voluntary lawful acts**” *per se* (Gulati, 2011, p 128). Otherwise, a romantic agreement may become a source of income incentivized by romantic free riders (romance scammers).

Furthermore, sexual orientation is relatively subjective while marriage sounds objective by referring to existing laws, confirmed by the Ohio Supreme Court in *Williams v. Ormsby*. Since this case confirms that ‘**love and affection**’ cannot constitute the consideration, such consideration is a pivotal element of forming an agreement under the common law contract requirement. However, Thailand - a civil law country- may have a similar view on the ground that all sorts of contracts or agreements shall be legally enforceable when all following requirements of a valid contract are satisfied:

- a) either a natural person or a legal person has both;*
- b) mutual obligations rendered with “voluntary lawful acts” and;*
- c) an immediate purpose of which is to legal enforcement (Stasi, 2015, p. 22).*

In failing to do so, an affected activity is **not** a juristic act. Only a few people can confirm that love is not a contract. Please note, the Thai Supreme Court ruling: No. 6083/2546 (2003). only defined what love is – not determined whether the said love is a contract or not, possibly because of lacking the last element (c). Accordingly, any endearment shall not be a juristic act under section 149 of TCCC.

Generally speaking, love is so alternatively called romantic ‘reason’ and ‘emotion’ upon which two persons usually develop a sentimental relationship in terms of psychology. Assume A and B were willing to be in a relationship (from now on called the relationship ‘C’) as long as they wish. Plausibly, most romantic passions like the relationship ‘C’ should not be a source of a legal obligation. Otherwise, judicial intervention (i.e., discretion) could have unnecessarily taken part in A & B’s fundamental rights and liberty. Also, the judiciary power shall not enforce a legal obligee (debtor)’s (e.g., affected A’s or affected B’s) will to do so as the court orders or as the plaintiff desires. **This is not because the ‘to love’ and ‘to be loved’ order of the court is repugnant to an obligee’s will.**However, there must not be a legal

⁸ Jus in rem

obligation as no juristic act has been constituted. Ordinary love cannot allow both affected persons to sue one another for breaching the romantic relationship, affirmed by the Ohio above case (Chow, 2019). Although a common law court handed down this case, its reasons might sound that sentimental emotion cannot give rise to a contractual obligation owing to a lack of ‘*consideration*’ through the lens of the common law of contract. In contrast, the civil law contract principle should follow its counterpart’s legal footprint due to none of the immediate purpose of voluntary lawful acts in light of Section 149 of TCCC (Gulati, 2011, p. 132).

The lawful offer and acceptance may create a romantic relationship. Even so, merely these conditions (*both the offer and acceptance are made*) are insufficient to establish the contractual relationship by which couple-to-be parties abided. Regarding a denial/request of the sentimental offer, the affected person cannot ask a competent court to enforce the counterparty’s will to comply with his/her claim. Hence, Thai law does not accept sequential restitutions and mental damages (Sirithienthong, 2008, p. 26).

Love, Marriage, and Media Portrayals

Despite the legal unenforceability of love, love itself is fundamental to marriage. Then resulting marriage becomes a primary, yet vital, social institution (Noller, 1996, p.97) as a rule of thumb; successfully maintaining love as long as any couple desires must be based on a case-by-case basis. Nevertheless, there are a few common principles where true love can likely attain the highest romantic achievement (i.e., family creation). They are, for instance, loyalty, and persistence, and require a significant period (Singer, 1916, p. 460). Both puppy love and love-at-first-sight will successfully become true love regardless of gender or sexual preference, accordingly.

With the advent of advanced media, classic commercial content- which is so attractive that several audiences usually keep watching- is associated with romantic stories across the globe. Regardless of race, language, religion, age, and gender, love is love and simply understandable. Like comprehension, an ability to maintain love does not get involved in sexual orientation or gender assignment⁹. *This paper thus raises the question, ‘Why are we all required to love somebody whose gender must be opposite’ only for achieving marital status because we have an unrestricted right to be in a relationship and create a marital status with only one with whom we determine to live the rest of our lives down the road. Connotationally, is the right to love a fundamental right or personal choice in case of deciding the one we consider the best for being a romantic safe harbor at a time (Deswal, 2022)?*

While some specific criticism may have argued *that love and to be loved* must be based on reproductivity through which a new biological child would create an ideal warm family. However, this paper contends that ‘what we do’ – *not* ‘*what we are*’ can. Thanks to medical advancement and, of course, social acceptance, both surrogacy, and adoption play significant roles in fulfilling same-sex love, marriage, and, most importantly, setting up LGBTQ+ families.

⁹ True love is not what we are; yet, it is what we (a couple) do romantically & honestly

To avoid confusing readers, item 2 above infers that (a) global media and social movements are now welcoming sexual diversity (b) traditionally, both love and marriage were the natural stratagems so as not to avoid human extinction. (c) following (b), **why do both sexual orientation and gender identity still matter in the eyes of TCCC despite medical advancements?** (d) should the conventional perception of love, marriage, and family establishment be justified by the contending view, our modern perception can be done by liberal, yet scientific, one through various online media. (as discussed below)

TCCC's legal policies toward love, marriage, and family establishment

Historical background of the Thai (heterosexual) family structure & social perceptions concerning sexual diversity before the promulgation of TCCC

Given not few ancient kinds of literature (i.e., Khunchang Kunpan, Phra Aphai Manee, Enau, etc.), they explicitly expressed the former Thai family structure that might have represented the 'polygamy' through which men (sex at birth) had more superior social status than women. As a result, a husband normally acted by an ideal man - was implicitly allowed to have more than a wife whose ranks could be varied by his sole discretion (Brooks, 2009, p. 111). The first wife would be thus more respectful and attentive than a mistress or a concubine. (Coontz, 2006, p. 3)

This paper would like to call the reader's attention to the above ancient Thai family structure and social perceptions concerning unequal social status [between a male and a female] in Thai history for the following aspects: (3.1.1) Why could polygamy be recognizable? (3.1.2) as a man could have multiple wives; each wife must be royal to a shared husband. Does this (3.1.2) sound reasonable? (3.1.3) Was there sexual diversity at that time? If so, why was it **not** considered?

Historical background of TCCC

Before B.E.2478 (1925), legally registered marriage might sound challenging in the Thai old age in which the patriarchy or the "*husband-can-do-nothing-wrong*" notion could predominantly occupy leisure and unentertaining activities between a husband and a wife. As a leader, the husband was allowed to engage in the notorious marital status where only he could spend his life wherever he wished. Consequently, his wife /wives and their child/children were considered the **miserable property** of the said husband and the father (respectively). He also took part in property arrangements between them. Whereas Thai men's behaviors and traditional husband's always-legitimate decision-making were legalized by old-fashioned regulations such as the Thai law on husband and wife in the Three Seals Law, the Thai law on heritage in the Three Seals Law, the Thai law on kidnapping a wife/wives and a child/children of other husbands in the Three Seals, and so on. According to the Thai law on husband and wife in the Three Seals Law, a husband was legally allowed to have more than a wife in official social recognition. It is safe to say that both notorious laws and social recognition – alternatively known as the patriarchy - were to justify such 'polygamy'; however, a wife having an affair (with other guys) violated the Thai law on husband and wife in the Three Seals Law (Boonrat, 2019, p. 242).

Illegitimate patriarchy

As discussed above, in case a woman could **not** have more than one husband- while a man could. This is seen that the outdated Thai law on husband and wife in the Three Seals Law was discriminatory and unjust towards women in the country at that time. Notwithstanding, ‘monogamy’ was somehow criticized by affected political elites, who preferred polygamy to monogamy, thereby they proposed that single marriage registration with multifarious unregistered wives might sound more suitable in the Thai social context (Thumchutinun, 2022, p. 473). May this paper be going to question: “*If you (he) were her – would you still be happy to know that your husband was having an affair (with another woman)? If not, why was/is the ‘polygamy’ still recognizable at that time and possibly now?*”

Given this, no matter whether the sex birth (male or female) is, how to strengthen a family or a romantic relationship had better depend on a marital capacity rather than his/her sex assignment.

Being ostentatious gay in the history of Thailand

Even if same-sex love and marriage were not vigorously debated, it did **not** mean there was none of the sexual diversity in the history of Thailand. For example, an ancient dance – in which most dancers performed males in the event of the female character(s) in ancient plays (Tawalwongsri & Charassri, 2017, p.206). Documentarily, some entertainment venue was where males could play their roles as though they are women. From 1960 to 1985, sexual diversity was unpleasantly perceived because the expression of the real identity (i.e., being a homosexual) looked inferior or abnormal. Nonetheless, global medical organizations have removed ‘homosexuality’ from the Statistical Manual of Mental Disorders (DSM) for years (Saengmaneejeeranandacha & Sonsuphap, 2019, p.5). This medical removal might imply that being a homosexual was not a mental illness, nor could it need to be curable. That is why homosexual situations in the history of Thailand was “suppressed” on the ground of Thai unacceptable social norms, cultures, and traditions last centuries (Numun, 2012, pp 59-60).

Accordingly, when referring to the term “LGBTQ+,” societies do **not** only perceive, but individuals may consider “LGBTQ+ an inferior or queer minority group of people. Being queer is just “subjective” because of the romantic emotion and the erotic passion from the perspective of individualism & libertarianism (Mosher et al., 1988, p. 414). This paper thus considers the said erotic passion for a particular activity where his/her birth gender may not be otherwise when engaging in the said activity. *Should drinking coffee and being a vegetarian be only the individual preference regarding healthiness? why should LGBTQ+ be treated differently if their activity differs from heterosexual persons? As sexual orientation is more fluid, the birth gender is more fixed. Is the romantic relationship the individual preference or activity in the context of pleasant romantic emotion? If so, why is it that a guy falling in love with a guy or a woman falling in love with a woman is incorrect? When a right to love is a part*

of the fundamental right to life under Article 21¹⁰ of the Indian Constitution. As Chief Justice Leila Seth's opinion was so touching. She opined that **“what makes life meaningful is love”** Without a doubt, eventually finding his/her true love regardless of gender is to fulfill his/her life, resulting in a single unit like a family.

Before discussing this matter more deeply, this paper must first refer to the natural law theory, which the Thai Constitutional Court has already stated on pages 6 & 7 of its ruling no. 30/2563 (2020). Nevertheless, the Court noted Section 1448¹¹ of TCCC **may** require heterosexual couples to produce their offspring(s). This does **not** mean that some heterosexual couple whose marriage has already been registered does not wish to have his/her child down the road. Then the said registered marriage would be nullified on the ground of the decision undesirable not to have their respective heir(s). On the other end of the spectrum, the said legal marriage registration between a heterosexual couple should be void when such registration is made against the **consent** of his/her heterosexual couple (Section 1458¹²) and double marriage (Section 1452¹³) **Sexual diversity cannot be a requirement that would nullify** marriage registration. Although some may have argued that same-sex couples cannot give birth to a child, the surrogacy mentioned above and the adoption will help human-survival in the case of the same-sex couple, however. Again, in a case where a certain heterosexual couple does not wish to have even a child, is his/her marriage registration still enforceable? According to the often-cited paper, named 'How Does the Gender of Parents Matter?'- which was written by Timothy J. Biblarz and Judith Stacey. This paper [confirms that “[1] **no** research supports the gender of parents matters for child well-being [2] studies have **not** shown that ... families headed by married, biological, parents are best for children' (Biblarz & Stacey, 2010, p. 17) This paper would like to question *whether the Thai Constitutional Court's reasoning or discretions are unjustifiable prejudice.*

Exasperatingly, the Court in this case did not contemplate the spirit of Thai family law and other Thai-related ones associated with sexual diversity in the country. For instance, Section 276¹⁴ of the Thai Penal Code has already been revised by criminalizing sexual assault

¹⁰ No person shall be deprived of his life or personal liberty except according to procedure established by law, nor shall any person be denied equality before the law or the equal protection of the laws within the territory of India.

¹¹ A marriage occur only when the man and woman have completed their seventeenth year. However, the Court may, in case of having appropriate reason, allow them to marry before attaining such age.

¹² **A marriage can take place only if** the man and woman **agree to** take each other as husband and wife, and such agreement must be declared publicly before the Registrar in order to have it recorded by the Registrar.

¹³ A marriage cannot take place if the man or woman is already the spouse of another person

¹⁴ Whoever has sexual intercourse with a person without their consent by coercion, an act of violence, or in the condition that such person cannot resist, or by making such person mistake the perpetrator for another person, the perpetrator shall be liable from 4 years to 20 years and fined from 80,000 to 400,000

THB

committed by all genders regardless of sexual orientation (Kanjira et al, 2019, p.3759). Meanwhile, the TCCC, by which an old-fashioned view of natural law still protects individual rights and family's legal benefits.

Nonetheless, this paper does not confirm that all social consensus is always correct without argument. "True law is the right reason, harmonious with nature ...," said Marcus Tullius Cicero. **Why has the modern nature of love and family creation not yet been accepted by the TCCC?**

Legal policies toward diverse sexuality in Thailand

I. Their history

Before 2010, queer rights could implicitly appear in ancient Thai literature as "*erotic art*," regarded as a notorious behavior. Therefore, coming out or expressing his genuine sexual orientation might be against Thai social norms (Phongphrom & Piayura, 2021, pp. 51-59). Foreseeably, heterosexual perception became a mainstream culture available both to people's lives and national ancient literature (Jackson, 2003, p. 14)¹⁵

II. Criminalized sodomy

Given this, certain *sexual sodomy was opposed to obsolete Thai law, particularly in 1900* (Ojanen, 2009, p. 10). Without a doubt, both TCCC and Penal Code still considered the civil marital status and sexual intercourses that excluded homosexual people. This refers to the traditional concept of physical intimacy where only opposite-sex persons could constitute and commit a crime relating to that. In 1956, only the Thai penal Code was successfully amended because of current Thai contexts. Anyone who is LGBTQ+ and raped by a same-sex person shall be criminalized by Thai social customs and Section (*revised*) 276 of the Thai Penal Code. It prescribes that "Whoever has sexual intercourse with a person without their consent by coercion, an act of violence, or in the condition that such person cannot resist, or by making a person mistake the perpetrator for another person, the perpetrator shall be liable from 4 years to 20 years and fined from 80,000 to 400,000 THB".

Prior to the above revision, it once said that "Whoever has sexual intercourse with a woman, who is not wife, against her will, by threatening by any means whatever, by doing any act of violence, by taking advantage of the woman being in the condition of inability to resist, or by causing the woman to mistake him for the other person, shall be punished with imprisonment of four to twenty years and fined of eight thousand to forty thousand Baht."

¹⁵ Paragraph #40

Table 1 Amendments of each Thai legislation and its detail concerning sexual preference

Postmodernism/ (Regulation)	Section	Detail
The Thai Penal Code	276	<i>Homosexual intercourse with violence and unconsent of the victim was a crime. Formerly, both opposite-sex abduction and a guy raping a girl who is not his wife was a crime, too. Accordingly, the said homosexual intercourse would be against the sexual obscene according to the former Penal Code.</i>
TCCC	1448	Still remain the same since B.E. 2519 (1976)
TCCC B.E.2550	1445;1516 (1)	<i>In line with the revised Section 276 (above) of the Thai Penal Code as well the equal protection, anybody who poses a threat to pre- & post-marriage registration shall be subject to civil liabilities.¹⁶</i>

N.B. While both prerequisite condition engagement and an adverse effect (Adultery) on the marriage registration can ask a same-sex person who violates Sections 1448 and 1445 of the TCCC to pay compensation for breaking either provision. **Why cannot same-sex couples register their marriage for equal protection before the identical law?**

III. The TCCC and its sequential absurdities

Since TCCC accords only heterosexual marriage registration, the following activities between same-sex couples are questionable, unresolvable, and odd:

- (a) Does the double marriage registration include (1) the civil partner registration and (2) another marriage registration between a male and a female? (Ojanen, 2009, pp. 95-96)
- (b) Is a couple's prior consent a prerequisite for civil partnership registration? (Ojanen, 2009, pp. 96-97)
- (c) In a case where a bisexual wishes to register his/her marriage, which law shall be applied? (either TCCC or the Civil Partnership Act)
- (d) Provided a transman or transwoman desires to register the marriage, must he or she find his/her couple who must be a transgender person to meet the requirement of section 1448

¹⁶ The Act Amending the Civil and Commercial Code Civil Procedure Code (No. 16) B.E. 2550 (2007)

of TCC? If so, will the transman be a legal wife and, thus, will the transwoman be a legal husband due to the sex-at-birth? Does it sound make sense?

(e) following (d), will the transman, under the Civil Partnership Act, be allowed to register the marriage with a female? If so, who will be the husband in this case because their sex at birth is the same according to the applicable law?

(f) Can a heterosexual person register his/her civil partner should he or she not want to register his/her marriage under TCCC? (please refer to Austria's case law: *Ratzenböck and Seydl v Austria*)

IV. Section 1448's legal elements

According to the requirement of Section 1448 of TCCC, the marriage can be registered when (i) an opposite-sex couple with his/her age is not less than (ii) 17 years. Nonetheless, there is no other requirement of the 'reproductivity' contained therein. Hence, the central policy towards legal marriage is not childbirth, as the Thai Constitutional Court mentioned on Page 6 concerning the biological generation. Therefore, this paper disagrees with this as the marital status between a husband and a wife should have been much more prioritized than childbirth. In other words, both law and the State must respect an individual's freedom to choose the one that will be his/her long-lasting love in pursuit of happiness. In failing to do (selecting the wrong couple, another couple must blame themselves for such failure, whereas the state or law shall refrain from intervening in a romantic relationship and let the individual have liberty and unrestricted right to maintain the romantic relationship as they desire. This state's action is fundamental to promote not only diversity, self-esteem, and quality of life, but also monogamous love. All of them are primarily based on what we do – not what we are [regardless of sexual orientation]. Simply speaking, both romantic relationship and family creation may be the highest happiness of human being. As long as such happiness does not worsen nor exacerbate good morals and public policies, love is foundational to marriage, family establishment, long-term quality of life, and, (most importantly), human emotional state regardless of sexual preference. Why do the State and the Constitution still try not to promote happiness by allowing anyone to freely determine, maintain and constitute his/her happiness oneself? At the same time, the applicable laws ought to draw the line at 1) what an individual can lawfully do, 2) what a state and law can statutorily govern, 3) balancing between private benefits and public ones, 4) applying various regulations in light of modern, yet legitimate, traditions, 5) affording equal protection regardless of sexual preference amidst current social diversities 6) promote human's quality of life, of love, and of long-term happiness by way of confirming marriage for all without unjust discrimination. Romantically, "marriage equality" is simply about love (Kealy-Bateman & Pryor, 2015, p. 543), and the love is *per se* fundamental to almost all activities; some of which are enforceable by law.

Table 2 Criticism of the Thai Constitutional Court's Ruling no.20/B.E. 2564 (20/2021)

Issue(s)	Page	Assessment	Rationale	Remark
1. What's the vital objective of promulgating the Thai Family Law of TCCC	6	Wrong	To encourage Thai traditional family structure, which should be based on 'monogamy' instead of 'polygamy' in line with international recognition & civilization (Thumchutinun, 2022, pp. 473-475)	Due to the equal protection between males and females, all of whom can register their marriage at once. As for childbirth, it was not its primary objective of registering marriage Yet, either marital happiness or love was/is (Hull et al., 2010, pp. 34, 36)
2. Biological or natural reproductivity is not a prerequisite requirement of registering marriage	6	Wrong	The "reproductivity may sound prerequisite to family formation" (Vignoli et al., 2013, p. 64)	Suppose 'productivity' is a pivotal requirement both in marriage registration and marital status between heterosexual couples. Will all marriage registrations be automatically void if no child is born after their marriage registration?
3. Is same-sex marriage violating the Thai public order and good morals?	7-8	Wrong	The Court did not clearly explain how same-sex marriage would adversely affect the	In the case of the former (state's stability), same-sex marriage will promote

Issue(s)	Page	Assessment	Rationale	Remark
			<p>state's stability and good morals.</p> <p>Also, the court did not refer to some legislation (e.g. Section 276 of the Penal Code). Section 276 has been revised in compliance with the Thai current social diversity. Likewise, sections 1445 and 1516 (1) of TCCC allow a couple to ask for compensation for those whose genders are identical to the plaintiff and who ruin pre and post marriage.</p>	<p>'monogamy' unless couples may allow the others' to engage in an open relationship (Green et al., 2016, p. 423)</p> <p>In addition, the registration between the couple must be made at once (please refer to 3.4.2 (a) above)</p> <p>In the event of the latter (good moral)</p> <p>The marriage is of a romantic value to 'how to successfully maintain couple's marital status' according to Section 1461¹⁷ of TCCC. It implies that both a husband and a wife must "cohabit" to ensure their marital status remains the same. Accordingly,</p>

¹⁷ Husband and wife shall cohabit as husband and wife.

Husband and wife shall maintain and support each other according to his or her ability and condition in life.

Issue(s)	Page	Assessment	Rationale	Remark
				cohabitation is marital satisfaction and communication (Thomson & Colella, 1992, p. 77). Homosexual couples can cohabit with their spouses if his or her attitude and marital behaviors are pragmatically optimistic, loyal, and persistent.
4. The Thai Constitution of Thailand B.E. 2560 (2017) is a product of the <i>philosophy of Positive Law</i> (Chitov, 2018, p. 233).	7	Wrong	The positive law is <i>per se a man-made</i> legal instrument that may have sometimes negated certain traditions in different places from the perspective of the national law (George, 2008, p. 1). For example, neither monogamy nor homosexuality was acceptable in Thai history. Nevertheless, the former is lawful according to section 1418 of TCCC (Shahabi, 2022, p. 1). Fortunately (in a decided case, <i>Baehr v. Miike</i>), the same-sex marriage's status and benefits that are asymmetrical to heterosexual one violate the equal protection	As the philosophy of positive law, the Court did underpin only a natural or biological aspect in supporting its arguments regardless of considering "social, implicit, or moral norms" They are typically parts of the positive law. (Magen, 2015, p. 24). Are the Court's arguments illegitimate constitutional discretions?

Issue(s)	Page	Assessment	Rationale	Remark
			Clause of the Hawai's Constitution (Kersch, 1997, p. 117)	
4.Sex assignment v. Sexual orientation	3, 9-10	Wrong	Sexual orientation does not imply that he or she cannot maintain the marital status with his/her spouse. In fact, "marital behavior" does matter – not the sex assignment (Adamczyk, 2019, p. 299).	Both restrooms and sports competitions must be disparate for sanitary concerns and the safety of females. However, mutual marital behavior (i.e., loyalty) does not involve sexual orientation. <i>If so, why do many heterosexual couples get divorced according to the statistic announced by the National Statistic Office Thailand in 2022 mainly due to Thailand's economic uncertainties and the pandemic. <u>Marital unhappiness matters in the case of the divorce – not sexual orientation</u> (Fineman, p. 17).</i>

Issue(s)	Page	Assessment	Rationale	Remark
3. Self-esteem v. Sexual orientation	3-4	Wrong	The said self – esteem should refer to the marital status and the individual's identity. Self-esteem is 'what we do' – not 'what we are'	Self-esteem significantly impacts how much a romantic relationship achieves (Zeigler-Hill et al., 2015, p. 118). Also, social, and parental support and self-acceptance are vital to 'promote the mental health' of anyone who wishes to come out (Elizur & Ziv, 2001, p. 129)
4. Does the 'gender' include the <i>sexual orientation</i> ?	7	Wrong	Section 1418 of TCCC was against the notorious Thai custom where a husband had multiple wives. Therefore, such 1418 requires a husband to have only a wife during their marriage registration. The term 'Genders' are a male and a female for this purpose (monogamy) irrespective of sexual preference. In line with the universal, equal protection and global recognition of Human Rights, the gender in question shall include an LGBTQ+ person (Marks, 2006, p. 33)	This section authorizes the state to register a heterosexual couple according to Section 1457 of TCCC, letting either husband-to-be or wife-to-be person is accessible to find the one that would be his or her true love in pursuit of marital happiness (Brennan, 2013, p. 332).

Issue(s)	Page	Assessment	Rationale	Remark
5. the unforgivable misconception of being LGBTQ+	7	Wrong	The Sex assignment is objective only for reproductivity; the sexual orientation is subjective for constituting marital status (Allen, 2000, p. 10).	That is why the TCCC separates the marital relationship between a husband and a wife (Section 1461-1464/1) from a parental status and their child (Section 1561-1584/1). In the case of the LGBTQ+, their marital relationship must be constituted by the TCCC when Section 1418 is being amended.
6. that the TCCC can apply only to heterosexual marriage is discriminatory to the romantic relationship of LGBTQ+	6-8	Wrong	Both criminal and tax law shall enforce all people's criminal minds and taxable capacity of generating incomes irrespective of sexual orientation. However, marital relationships primarily based on a couple's romantic capacity should be governed by another legislation. Does this sound make sense?	Adding the word 'Mutatis mutandis' in any relevant law concerning marital benefits shall be subject to section 77 ¹⁸ of the Constitution of Thailand B.E. 2560 (2017). This Latin word may "save space and to lend the comfortable

¹⁸ The State should introduce laws only to the extent of necessity and repeal or revise laws that are no longer necessary or unsuitable to the circumstances or are obstacles to livelihoods or engagement in occupations without delay to abstain from the imposition of burdens upon the public. The State should also undertake to ensure that the public has convenient access to the laws and can understand them quickly in order to correctly with the laws comply correctly.

Issue(s)	Page	Assessment	Rationale	Remark
				authority of a dead legal language” (Carr, 1940, p. 192) and vest the competent court to hand down a lawsuit within a dynamic social diversity.
7. When the Family Law and the Civil Partnership Bill govern the same subject matter (love) Is this non-discriminatory in line with the rule of law?	6-8	Wrong	Heterosexual couples need not have a common interest with same-sex couple. It is, for example, childbirth due to biological reproduction; however, surrogacy and adoption can supersede natural reproduction if the same-sex couple has a child to complete his/her family.	Section 1418 legally promotes monogamy which contravenes patriarchal polygamy. Thus, a man or a wife must register him/her marital status with another ONLY ONCE. Otherwise, the second marriage registration shall be automatically void. Perhaps, adultery may be repugnant to registered marriage between a heterosexual couple. The wrongdoer shall be the subject to civil liabilities on such grounds regardless of gender according

Issue(s)	Page	Assessment	Rationale	Remark
				to Section 1516 (1) of TCCC
8. Same-sex marriage does not exploit the Social Welfare offered by the State	10	Wrong	As long as the following social welfares have yet to be addressed properly. Why would the State get worried or concerned? (a) the Corruption; (b) the public health; (c) household debt (d) Income; Inequality; (e) Public transportation; (f) Education; (g) Environmental issues and; (h) (Covid-19) Vaccine crisis management Etc.	From Section 64 to Section 78 of the Constitution of Thailand B.E. 2560 (2017), can the state have accomplished each duty? If not, why was the state aware of the impossibility of same-sex marriage which would exploit invisible public welfare?
9. the same-sex marriage registration is not the marriage ceremony	10	Wrong	This case's critical legal issue is same-sex marriage registration, – not the marriage ceremony. However, the Court failed to pay close attention to that issue and could not distinguish the same-sex marriage ceremony from same-sex marriage registration.	The insurance policy technically covers the insured person and his/her registered spouse. Even though the Civil Partnership Act is enforced, the technical terms between a <i>partner</i> and a <i>registered spouse</i> may pose a risk to another problem for legal construction. Likewise, the term of the

Issue(s)	Page	Assessment	Rationale	Remark
				<p>‘partner’ may tend to be a casual sex partner (Regan, 1998, p. 1294); the ‘spouse’ can assure <i>both</i> same-sex couples that legal right(s) <i>and</i> benefit(s) are equal when the ‘<i>mutatis mutandis</i>’ is being added into the TCCC without declaring more specific regulation governing same-sex couples because they are unlike heterosexual ones and all kinds of the couple must be based on a common trait, which is so called as ‘love’.</p> <p>When we all have the free right <i>to love, marry, get the marriage registered</i> irrespective of sexual preference, the marriage registration must be for all under the TCCC. This procedure needs</p>

Issue(s)	Page	Assessment	Rationale	Remark
				not to enforce on different legal instruments on the common grounds between heterosexuality and homosexuality
Why is only heterosexual marriage registered as acceptable by the TCCC <u>while</u> same-sex marriage legally forced to abide by another more-specific law despite similar fundamentals? They are love and loyalty.				

Following the Constitutional Court's ruling no.20/B.E. 2564 (20/2021), Can homosexual fiction be copyrightable (Kraisiridej, 2014, p. 27) (Wood & Bartkowski, 2004, p. 60)? Since its romance media (offline and online storytelling) typically reflects 'how to find true love, self-acceptance, parental support, and understanding,' the Court should regard same-sex love and marriage by insisting that Section 1418 of TCCC on remaining the same. This paper thus calls either the court's attention or a contending person to see the below pictures whether the enforcement of the TCCC is still in compliance with modern attitudes toward sexual orientation among diversity. Finally, Section 1418 may be alternatively known as the marriage arrangement 4.0 as people are forced to choose their love whose gender must be opposite despite advanced medical technologies supporting giving birth to a child that is not an obvious requirement of Section 1418 of the TCCC. In short, all of the Constitutional Court's reasons are constitutional prejudices. Lacking authorities and scientific research supporting those arguments, they are not legitimate and of educational value to legal study/discussion.

In other words, the Thai Constitutional Court erroneously construed Section 1448 by saying that its objective was biological reproductivity. Section 1448 promotes monogamy, implying one man only has a wife through the concerned registration. This results in such registration being expected to be maintained by heterosexual capacity. In addition, the court did not mention that the pursuit of happiness stemmed from marital status. Therefore, its ruling was not consistent with our modern diversity. Section 1448 and the court's ruling may threaten to the marriage arrangement where a male is required to marry a female. This discourages self-acceptance and would lead to romantic trouble in which adultery committed by a same-sex person shall not be found guilty.

Regarding advanced medical advancement such as surrogacy and legal adoption, they can fulfill the same-sex family and, in turn, produce a qualified child down the track.

Should section 1448 be amended as proposed, an international homosexual person can develop the state's policy by paying taxes in the country. The revised section 1448 can promote equal protection and fundamental rights for all, confirming that '*true love always wins*' and '*love is unconditional*'.

Conclusion

Although love or any romantic relationship shall not reach a contract by section 149 of TCCC, it is safe to say that it is fundamental to marriage and, **most importantly**, the highest romantic achievement (family creation) in respective of the sexual orientation.

Love is an activity through which people have a free choice to emotionally commit between one another as no juristic act is being constituted— thereby, they would not betray their trust or sentimental feeling for each other. In failing to do so, neither compensations nor restitutions cannot be claimed because there was no romantic agreement where there is no legal intention that is a vital element thereof.

Following 4.2, once the love becomes more concrete, it enables any couple to create a family by registering their marriage according to section 1448.

Notwithstanding, section 1448 of TCCC allows only (1) heterosexual couples due to the biological or natural view for reproductivity. (2) those heterosexual persons whose age must be at least 17 years old unless a competent court legalizes the marriage registration. Owing to biological and social maturity, a heterosexual juvenile can ensure the court that he or she would be mature enough to take any responsibility for carrying out marital business and being either a mother or a father down the track. Otherwise, any marriage - the immature heterosexual person shall register- becomes voidable according to Section 1503 of TCCC in case his/her parent does not still give the permission associated with the marriage for biological maturation (Bundej, 2023, pp. 123-124)

This paper is, therefore, curious about why are some homosexual person that is not granted marital status with their couple. Is it because of the reproductivity? If so, can surrogacy help in the event of a same-sex family creation? Again, reproductivity is not an apparent legal requirement according to Section 1448¹⁹ of TCCC.

As a result, the state is **only** to legalize any marriage by registration according to Section 1457²⁰. In the meantime, allowing all couples to have their freedom or constitutional right to choose their own spouse complies with Section 32²¹ of the Constitution of Thailand B.E. 2560 (2017); it shall only provide effective 'Family & Child Welfare Services'. Yet, it shall not refrain from any kind of marriage arrangement (e.g., Section 1448²²)

In case, the Thai Constitutional Court would be aware of the loss of national social welfare (as mentioned on page 10 of its ruling no.20/B.E. 2564 (20/2021), Is Thailand a welfare state? Also, does Thailand have much public welfare (ironically)? About particular physical aspects both of males and females such as medical illness leave (covering Benign Prostate Hyperplasia), and maternity leave (on page 10 thereof), this paper suggests that the state should

¹⁹ A marriage can occur only when the man and woman have completed their seventeenth year. But the Court may, in case of having appropriate reason, allow them to marry before attaining such age.

²⁰ Marriage under this Code shall be effected only on registration being made

²¹ A person shall enjoy the rights of privacy, dignity, reputation, and family ...

²² Legalizing only the heterosexual marriage

add the words “mutatis mutandis”, which sounds much more practical than promulgating another more specific LGBTQ+ regulation for promoting the sexual diversity equally.

Given these reasons, the paper disagrees with the Constitution Court Ruling No. 30/2563 (2020), and argues that Section 1448 is discriminatory to LGBTQ+ people. Furthermore, if section 1448 were constitutional, what would adultery under section 1516 (1)²³ of TCCC be duly construed?

Suppose a husband later honored a guy – not a woman as his wife. Is the husband found guilty on this ground? If not, the legal construction would violate Section 4 of TCCC, which prescribes that “[t]he law must be applied in all cases which come **within the letter and spirit of any of its provisions.**” In light of the Constitution Court’s ruling No. 30/B.E.2563 (30/2020), the term ‘others’ per Section 1516 (1) must be opposite gender. This may be nonsensical when Section 276, paragraph 1 of the Thai Penal Code prescribes that “Whoever has sexual intercourse with a **person** without their consent by coercion, an act of violence, or in the condition that such person cannot resist, or by making person mistake the perpetrator for another person, the perpetrator shall be liable from 4 years to 20 years and fined from 80,000 to 400,000 THB” The revised Section 276 of the Thai Penal Code was done in the flavor of modern daily life as well as traditional sexual intercourse²⁴; however, Section 1418 of TCCC must be construed by referring to the natural law or the Thai traditions and public orders. Does it make more sense in terms of sexual diversity across the world?

*N.B. a “**person**” per Section 276 of the Thai Penal Code includes all genders; nonetheless, “**other**” per Section 1516 (1) of TCCC means only the opposite gender [Does it sound preposterous?]*

Recommendation

1. The Thai Constitutional Court must find support for its reasoning not only in national authorities but also the international ones. Otherwise, any upcoming decision would be delivered on each judicial discretion rather than legal reasons, leading both to constitutional prejudices and to the collapse of the Thai judicial system as well as legal education in Thailand. Most importantly, the Thai Constitution may be distorted by its protector – the Constitutional Court of Thailand.

²³ Section 1516. The Grounds of action for divorce are as follows:

(1) If one spouse has given maintenance to or honored another person as wife or husband, committed adultery, or had regular sexual intercourse with such other person, another spouse may enter an action for divorce;

...

²⁴ Panrada Sutthitongtae and Achariya Chutinun, "Comparative Study between Definition of Rape under Section 276 And definition of Sexual Assault by Penetration under the Second Paragraph Of section 278 by Act Amending the Criminal Code (No.27) B.E. 2562," *Ramkhamhaeng Law Journal* 11, no. 1 (January 1 - June 30, 2022): 153-154.

2. Regarding the Administrative Court, it is vested to scrutinize whether the administrative act in addition to that is in line with international recognition. Although an obligation of an international treaty is considered soft law unless the constitutional ratification has already been done, the doctrine of '*legitimate expectation*' can be another source of law where people's rights can be protected, affirmed by the Australian court in *Minister of State for Immigration and Ethnic Affairs v Teoh* in 1995

As the Hight Court of Australia stated, "The [Australian] Full Court's use of the Convention as a foundation for a legitimate expectation and the creation of an obligation to initiate inquiries and reports in conjunction with procedural fairness"

3. The enforcement of the LGBTQ+ legislation in favor of the LGBTQ+ group's interests may still be discriminatory against the group unnecessarily. Provided that the term "mutatis mutandis" is added in TCCC, any other specific law does not need to be enacted according to section 77²⁵ of the Thai Constitutional Law B.E. 2560 (2017).

4. *Are the below pictures*, through which huge fans of (Y) boy-love the series: 2gether-with-me & I-Told-Sunset-About-You were celebrating Mr. Metawin & PP- another two main actors thereof- **still against a Thai good public order or tradition from the perspective of the Constitutional Court of Thailand?**



Figure 1 Huge fans of (Y) boy-love the series: 2gether with me

Source: <https://entertain.teenee.com/thaistar/243672.html>

5. When Mr. Krit Amnuaydechorn (*PP*), who is one of the most famous Thai celebrities due to his incredible acting performance from the first-time actor in *I Told Sunset About You* (Pæl ræk ē hən đwɯ cɪ thɛx) [another Thai boy-love romantic drama], graduated from the Kasetsart University, a number of his huge fans appeared thereat and, at the same time, more-than-a-million netizens' support/congratulation (by pressing the Thumb-up or Like icon below his picture)

²⁵ The State should introduce laws only to the extent of necessity, and repeal or revise laws that are no longer necessary or unsuitable to the circumstances, or are obstacles to livelihoods or engagement in occupations, without delay, so as to abstain from the imposition of burdens upon the public. The State should also undertake to ensure that the public has convenient access to the laws and are able to understand them easily in order to correctly comply with the laws. ...



Figure 2 More-than-a-million-thumb-ups appeared at PP's graduation ceremony

Source: <https://entertainment.trueid.net/detail/01AON30P8zkW>

Table 3: What is a traditional legal concept of Thai family law and its consequence when the said concept is later abused in the sense of individualism amidst diverse sexuality?

The existing section 1418 ²⁶ of TCCC: only a heterosexual couple is allowed to register his/her marriage under TCCC	It may be <u>an arranged marriage</u> where the State can intervene in a romantic relationship where only public policy may regard the love between opposite-sex couples properly despite either couple's affectionate unwillingness.
The (<i>hopefully</i>) amended section 1418 ²⁷ of TCCC: allowing all kinds of people to register their respective marriage (love) under TCCC in pursuit of long-term happiness is paramount	It promotes <u>a love marriage</u> . Meanwhile, the State is required not to refrain from arranging any marriage; it must allow anyone to love whomever and register their (love) marriage for equal protection.
(1) Free right to love (2) Free right to get married = (3) Free right to get the marriage registered legally irrespective of sexual orientation.	

Acknowledgment

1. The Faculty of Law at Naresuan University is where I have been working and always respects its law students whose sexual orientation is subjective. Most importantly, their

²⁶ A marriage can take place only when the man and woman have completed their seventeenth year of age. But the Court may, in case of having appropriate reason, allow them to marry before attaining such age.

²⁷ A marriage can take place only two persons have completed their seventeenth year of age. But the Court may, in case of having appropriate reason, allow them to marry before attaining such age

In case of the said two persons per the first paragraph, any kind of right be benefits that grant to an opposite a sex couple shall be provided *mutatis mutandis* to same-sex couple

academic performances will always be accessed by *what-they-do* not *what-they-are* as far as their performances are still within the purview of the university's rule.

2. The ASI is one of the most **internationally** recognized journals welcoming interdisciplinary studies to be published without discrimination

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