

The Legal Recognition of Same-sex Couples' Status in China

Yutung Teng

Law School, Zhongnan University of Economics and Law, Wuhan, China

202222040868@stu.zuel.edu.cn

Abstract. The legal identification of same-sex couples refers to whether the law recognizes the legal spouse status of same-sex couples, and whether it can effectively protect the personal and property rights and interests of same-sex couples. The legal recognition of the identity of same-sex couples is an important prerequisite for protecting the rights and interests of same-sex couples. At present, the legislation on the identity of same-sex couples in our country is in a vacuum, and the attitude towards the identification of the legal spouse of same-sex couples is vague, so it is difficult to effectively respond to their rights needs in law. Combining judicial cases, existing laws and regulations, and social news, this paper reveals the rights needs and practical dilemmas of same-sex couples in China, including: the difficulty for same-sex couples to apply the provisions of de facto marriage, the dilemma of protecting spouses' personal rights and property rights, the conflict of rights in "formal marriage", etc. On this basis, this paper conducts a comparative study on the legal recognition experience of same-sex couples in various countries, attempts to present the legal recognition system of same-sex couples in various countries, and summarizes the two approaches to the identification of same-sex couples in the form of marriage incorporation and non-marriage exclusive, as well as the two legislative approaches of law revision and special law, in order to provide references for the current relevant judicial decisions and future relevant legislation.

Keywords: Same-sex couples; Spousal status; The right of spouse; Legal determination.

1. Introduction

The issue of homosexuality is a long-standing historical problem. Anthropologists have even discovered remnants of ancient homosexual practices in many primitive tribes. Plato highly praised the love between men in his "Symposium", believing that this kind of relationship was based on pure love and thus more essential than heterosexual love. Besides, Plato also found natural reasons for the existence of homosexuality in myths. Intimate relationships between men also existed in ancient China. The "Strategies of the Warring States Wei Strategies" recorded the close relationship between King Wei and Longyang Jun, and "The Song of Yue People" contains the earliest poem in Chinese literature that explicitly praises homosexual love. Some scholars analyzed the reasons why traditional Chinese ethical culture adopted a tolerant and moderate attitude towards homosexuality. Confucianism and Taoism believed that the entire universe was a large structure composed of yin and yang, so the male-female couple structure was the normal form of combination. However, it was indeed impossible to completely rule out the existence of a few male-male or female-female pairings. This way of thinking led to a philosophical and belief framework that caused traditional Chinese society to always hold a tolerant but not encouraging attitude towards homosexuality. Therefore, the phenomenon of homosexuality has existed in various historical periods, especially during prosperous and peaceful times, in a peaceful manner. Allowing the inclusion of same-sex intimate identities in the meaning of spousal identity first requires understanding the historical changes in social and family structures. Every change in family structure triggers social transformation, and the spousal relationship, as the dominant form of building a family, is inevitably deeply affected by such changes. Ulrich Beck detailed this modernity change in his book "Individualization": Early families exhibited the characteristics of communal families, and during this stage, group marriage was the main form of marriage, which manifested as shared husbands and wives within a certain range. At this time, the subject cognition of spousal identity was weak, and spousal identity had not yet been socially constructed. With the development of productivity, the emergence of clan families imposed certain

taboos on marriage, and incest was strictly prohibited, giving rise to monogamous marriage. The cognition of spousal identity began to take shape. With the transformation of the mode of production, men gradually became the main labor force in the family, and their social status significantly increased, leading to the emergence of the true patriarchal extended family. This type of family was a will community united by the "obligation of unity", and the essence of the family was reflected in the relationship of work and economy. Family members each had their own duties, and in this family structure, the common goal was the primary consideration, followed by individual will. At this stage, marriage was male-dominated monogamy, and a family could have multiple female spouses. The reproductive function of marriage became the most important function. The marital relationship at this stage became extremely stable, and the cognition of spousal identity became a social consensus, gradually evolving into an important part of social morality.

However, the industrialization-driven innovation in production methods led to the disintegration of traditional extended families, and individual families became the main family structure. Monogamous spousal identity became the mainstream social cognition. The mainstreaming of individual families indicated a further weakening of the close ties among family members, and the family gradually became a voluntary union of individuals. Individuals incorporated their interests, experiences, and plans into the family [1].

This new family form aimed to develop various types of intimate relationships, such as childless marital relationships; companionate relationships; friendship relationships for cohabitation; single-parent family relationships; reconstituted family relationships; and same-sex spousal family relationships [1]. These intermediate, secondary, or fluid forms became the new structures of the family, and the cognition of marriage and spousal identity also underwent significant changes. Among them, the global wave of legislation on same-sex intimate relationships is the most representative and influential change in the cognition of marriage and spousal identity.

The main significance of this study is as follows: Firstly, by integrating judicial cases within China, current laws and regulations, and social news, this paper focuses on analyzing the current rights demands and practical predicaments of same-sex couples in China. This is helpful for expanding the scope of research objects in human rights law in China and enriching the theory of human rights law in our country. Secondly, this paper conducts a comparative study on the legal recognition experiences of same-sex partners in various countries, summarizes and sorts out a systematic legal recognition system for same-sex partners, and bases on this makes corresponding legislative prospects. Finally, this paper demonstrates the possible supports for legal recognition of same-sex partners' identities from both theoretical and empirical perspectives, and makes relevant legislative assumptions based on the comparative study. The research on the legal identity of same-sex partners is conducive to promoting anti-discrimination legislation in China, accelerating the legal recognition process of same-sex partners' identities, and better protecting the rights of same-sex partners; at the same time, it is helpful to resolve social contradictions, promoting the construction of rule of law in China, and forming an equal, inclusive and open legal atmosphere for protecting the rights of minority groups.

2. Research Review

The legitimacy of the legal status of same-sex spouses is the premise for all arguments and also the focus of research on the legal recognition of same-sex partners in the field of law. These studies are mainly concentrated on the research of homosexual group identity, the research on human rights and basic rights, and the research on specific legalization in various countries.

2.1. Research on Homosexual Group Identity

The essentialism and constructivism in the field of sexology are the two major research paradigms for homosexual issues, and also the two important viewpoints for defining the identity of homosexual groups. Essentialism holds that sexual orientation is an irreducible natural fact, rooted in non-

historical cultural elements, and is an innate choice rather than a postnatal selection. On this basis, it believes that sexual orientation is real, essential, and pre-determined, and therefore sexual identity is also a deeply rooted basic attribute and an inborn individual characteristic that is rooted in biological mechanisms and is not shaped by the social history of the individual [2]. Constructivism holds that sexual orientation is relational and non-objective, shaped by society, and different societies and cultures have different meanings for homosexuality. Constructivism opposes the essentialist binary division of "homosexual-heterosexual" and believes that individuals shape different sexual identities in interaction with society, demonstrating a fluid characteristic.

When essentialism and constructivism have been unable to reach a conclusion on the issue of homosexual identity for a long time, Wicks' "strategic essentialism" is the product of the reconciliation of essentialism and constructivism. He still adheres to the basic viewpoints of constructivism and believes that sexual identity is not fixed, and individual sexual identity is in a process of formation, invention and reinvention. However, he also believes that sexual identity is a necessary fiction and a strategic for struggle. When sexual identity is fixed as an unselectable and unchangeable reality, the homosexual group will have the opportunity to claim rights like other minority groups, not based on natural truth, but in the political domain of power, no longer overly focusing on the truth nature of sexual identity, but paying more attention to the political significance in the actual struggle [3].

2.2. Research on Human Rights and Basic Rights

Scholars mostly argue the legitimacy of same-sex marriage from the perspectives of human rights value and basic rights. Starting from the concept of "proximity living domain", Chinese scholars analyzes the basic rule formation of the constitution and laws in this intimate pattern domain [4]. It points out that the traditional marriage and family system is the core of the legal system in this domain. Although same-sex marriage is within this domain, it has long been in a situation of being dominated, ignored and discriminated against. Now, the constitution and laws have included same-sex marriage into the rule order of marital and family relations, which reflects the value judgment of the constitution and laws and also shows the emphasis and protection of human dignity [5]. Furthermore, from the perspective of the basic rights system of the Chinese Constitution, the issue of rights protection for homosexuals is analyzed. It is pointed out that the countries where same-sex marriage is legalized all adopt an open structure or a compromise structure. The general rights clauses in these structures provide interfaces for the constitutional recognition of emerging rights. It is demonstrated that the necessity of guaranteeing the relevant rights of homosexuals through the approach of unenumerated constitutional rights [6]. Moreover, from the perspective of constitutional jurisprudence, the commonalities of the constitutional review of same-sex marriage in different countries are analyzed, namely, "how to define the meaning of marriage in the constitution", and the conclusion is drawn that from the perspective of constitutional jurisprudence, the constitutional definition of marriage should maintain abstraction and the possibility of looking towards the future [7].

2.3. Research on Experience of Legal Recognition of Same-sex Partnerships in Various Countries

At present, there are numerous studies on the experience of legal recognition of same-sex partnerships in various countries. Among them, the research on the legalization of same-sex marriage in the United States is the most extensive. These studies mainly focus on the Obergefell v. Hodges case (hereinafter referred to as the Obergefell case), which was decided in June 2015 [8]. The case ruled that all states in the United States should allow same-sex couples to register for marriage and issue certificates, becoming a milestone case for the protection of the rights of sexual minorities in the United States. Guo Xiaofei conducted a detailed analysis of the judgment of this case, especially the reasoning of the majority of justices represented by Kennedy. The justices mainly conducted reasoning through the double helix structure of due process and equal protection. Kennedy took "marriage right" rather

than "same-sex marriage right" as the starting point of his argument, which enabled him to find a series of judicial precedents that met the requirements of due process to support his viewpoint. It was also easier to meet the two requirements of "conformity with historical tradition" and "detailed description of rights" of due process. At the same time, the argument based on "marriage right" also enabled Kennedy to cleverly avoid the argument problem of whether "sexual orientation discrimination" can be classified as "racial discrimination" or "gender discrimination" and subject to strict scrutiny procedures when choosing the equal protection path, and instead adopt the minimum reasonable review standard for review [9]. This double helix reasoning structure enabled homosexuals to ultimately receive legal recognition and protection at both the basic rights and equal status levels. Wang Qinghua justified judicial activism from an empirical perspective. He analyzed the originalist, textualist and policy debate constitutional interpretation methods of the opposing justices in the Obergefell case, as well as the interpretive methods of living constitution, system interpretation and principleism of the supporting justices. Finally, he traced and re-examined judicial activism and reached the conclusion that "judicial activism not only does not exceed democracy, but actually has the function of promoting democracy [10]".

European countries were the first to legislate on the legal recognition of same-sex partnerships and their related systems are more mature and complete. The number of countries that legalized same-sex marriage is also the largest in the world. From a macro perspective, the homosexual community in Europe has experienced the stages of homosexual de-pathologization-decriminalization-legalization. Each country has also chosen different legislative models based on its own real situation. Sweden, Germany and other countries adopt the exclusive spouse system for non-marriage; the Netherlands, Spain and other countries adopt the same-sex marriage system. Currently, existing studies mainly conduct specialized analysis and comparative research on representative European countries. Although different European countries have adopted various legal recognition paths for same-sex couples, in reality, they have all achieved respect for and equal protection of the personality of same-sex couples. At the same time, this has also better confirmed that "Only when laws can reflect the respect and protection of citizens' personal freedom, personality dignity, democratic rights and freedoms, as well as various social and economic rights... can the existence of laws be considered purposeful, valuable and legal [11]."

2.4. Review of Existing Studies

Current research on the legal recognition of same-sex partner status focuses on three aspects: same-sex identity, human rights and basic rights, and the recognition experience of specific countries. The majority of research subjects are the "same-sex marriage" system itself. However, the legal recognition of same-sex partner status is not limited to "same-sex marriage". For example, most countries such as the United Kingdom, the United States, and the Netherlands have simultaneously established the same-sex marriage law system and the non-marital partner law system. The research on the non-marital partner system is relatively scarce, and the research on the same-sex non-marital recognition model is in a relatively weak position. At the same time, the research content mainly includes representative cases of "same-sex marriage", specific recognition processes, and recognition methods related to "same-sex marriage". Regarding the research on the legal recognition of same-sex partner status in China, it is relatively scarce, especially after the formal legalization of same-sex marriage in Taiwan region on May 24, 2019, there are relatively few studies on the social recognition situation, specific rights demands, and real dilemmas of same-sex partners under the new development process in China. Further investigation and research are needed. This article focuses on the current rights demands and real dilemmas of same-sex partners, systematically organizes and summarizes three legal recognition models of same-sex partner status, in order to fill the gap in the current research field and provide corresponding theoretical and practical references for the legal recognition of same-sex partner status in the future.

3. Academic Arguments on the Legal Recognition of Same-Sex Partnerships

In recent years, the gender awareness of sexual minorities in China has gradually increased, and the social atmosphere has become more tolerant. However, there have also been adverse social incidents caused by discrimination based on sexual orientation. The rights of same-sex partners need to be given due attention and protection by law. From an international perspective, most countries in Europe and America have completed the legal recognition of same-sex partnerships and established complete systems and operational models. Although Asian countries have relatively conservative social customs and a lower tolerance for same-sex partnerships, countries like Japan and South Korea have also begun to address the lack of legal protection for same-sex partners. The legal recognition of same-sex partnerships has become a consensus. Currently, the issue of legal recognition of same-sex partnerships in China is still in its infancy. The substantive advancement of this topic in China cannot be separated from solid academic support and relevant theoretical guidance.

3.1. The Dimension of Human Rights Protection

The discourse of human rights is a universal language in today's world [12]. The United Nations' Universal Declaration of Human Rights describes human rights as follows: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. All human beings are entitled to the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." As equal members of society, the legal recognition of same-sex partners is an important way to realize the value of human rights.

3.1.1. Forms of Human Rights for Same-Sex Partners

Human rights have three forms of existence: inherent rights, legal rights, and actual rights. In its original sense, human rights are the rights that people should enjoy, that is, "inherent rights". "Legal rights" are merely the legal and institutionalization of people's "inherent rights" through the use of law, so as to ensure their realization in the most effective way. Therefore, "legal rights" are actually the legal embodiment of human rights, while "actual rights" refer to the rights that people actually possess [13]. The three forms of human rights are hierarchical and inclusive, with the scope of inherent rights being greater than that of legal rights, which in turn is greater than that of actual rights.

On May 17, 1990, the World Health Organization removed "homosexuality" from the list of mental disorders in the International Statistical Classification of Diseases and Related Health Problems and the Diagnostic and Statistical Manual of Mental Disorders. In 2001, China's "Diagnostic Criteria for Mental Disorders, Third Edition" removed homosexuality from the list of mental disorders. The phenomenon of same-sex unions has long existed in the historical development spectrum. In recent years, homosexuality has gradually been de-pathologized, meaning that homosexuals are now recognized as normal social subjects and included in the scope of human rights protection. As equal subjects, same-sex partners should be legally recognized the right to autonomously enter into intimate partnerships corresponds to the "right that should exist" in the form of human rights. The legal recognition of the identities of same-sex partners institutionalizes this "right that should exist" into "legal rights", with the aim of better safeguarding the rights and interests of same-sex partners. In fact, regardless of whether our country's laws recognize and protect same-sex partner relationships or not, same-sex partner relationships do objectively exist in society, and same-sex partners naturally enjoy this "right that should exist". This "right that should exist" does not harm the interests of third parties and does not violate the law. Elevating it to "legal rights" is an important manifestation of the state respecting and protecting the freedom and equality rights of same-sex partners.

3.1.2. The Value of Protecting the Rights of Same-Sex Couples

The legal recognition of same-sex couples' identities is based on the human rights theories of freedom and equality as its legal basis. At its core, it is the respect for human dignity. As the foundation and

purpose of human rights, human rights are also necessary means for realizing and safeguarding human dignity. Those acts of opposing the human rights of the homosexual community can be regarded as hegemonic behaviors of heterosexuals driven by selfish desires, and they are an infringement upon the dignity of personality. Sociologist Li Yinhe analyzed many survey results in 1998 and estimated that 3% to 4% of Chinese people are homosexuals, with a total number of approximately 36 million to 48 million. It can be seen that the group of same-sex lovers is a group with a relatively large number but a disproportionately low overall proportion. The heterosexual group excludes the homosexual group from the marital law order based on the criterion of sexual orientation. This is a form of heterosexual hegemonic rule that violates the pursuit of human rights values of freedom and equality. The legal recognition of the identity of same-sex partners is not only aimed at protecting the human rights of the homosexual group, but also triggers the formation of a human rights protection atmosphere that respects and accommodates in society, promoting the development of the country's human rights legal construction. If we can leverage the value and influence of human rights to enable people to have a more rational and comprehensive understanding of same-sex partner relationships, it will not only better promote the protection of human rights for minority groups in our country, but also allow heterosexuals and homosexuals to "be free as all kinds of birds in the frosty sky", achieving the human rights value of equal protection of personal dignity.

3.2. The Dimension of Acknowledging Justice

The theory of acknowledging justice is a justice theory system based on acknowledging morality and oriented towards realizing the freedom of human subjects. Horneut explores justice from the perspective of avoiding humiliation and contempt. He regards "the types of recognition in modern society as the starting point for the normalization concept of justice", and considers dignity as the core of justice. He points out that the failure to receive recognition for reasonable claims is the cause of social injustice, love, legal rights and unity are three different forms of recognition [14]. Corresponding to the three dimensions of justice: the emotional dimension, the legal dimension and the value dimension. The legal recognition of the identity of same-sex couples is aimed at establishing the legal marital relationship of same-sex couples. Therefore, the issue of legal recognition of the identity of same-sex couples should be recognized as justice. Seeking theoretical support within the legal dimension of morality.

3.2.1. The Current Injustice of the Legal Recognition of Same-sex Partner Identities

The recognition model within the legal dimension is legal rights. When human subjects enter the social domain, they need to regulate and adjust social relations through law. The justice of law is the prerequisite for maintaining the good operation of society and achieving social justice. Law Recognition of the existence of same-sex couples is a reflection on how law embodies justice, and it is also a criterion for measuring whether a society is just. If the subjects can feel that they, like other members of society, are respected as legal subjects and that individuals can recognize themselves as legal individuals with equal rights in legal relations under the adjustment of law, this means that at this time the individual can generate the self-practice relationship of self-esteem. Conversely, if a person is not recognized by law and society, then he cannot obtain the status of an equal member of society, and this society is unjust. Same-sex couples are part of society. The law of our country does not clearly recognize the identity of same-sex couples, which also leads to the long-term inequality of same-sex couples in society: on the one hand, same-sex couples themselves cannot feel that they are in an equal legal position with other marital spouses and cannot exercise equal rights, which is the result of the absence of legal recognition; on the other hand, in the current situation where there is no law to rely on, the real predicament of same-sex couples is obvious to all, and the social public cannot recognize that these same-sex couples are actually legal spouses with equal rights under the adjustment of marital and family legal relations. Therefore, whether same-sex couples themselves or the public in society cannot regard same-sex couples as equal legal subjects, this is a blow to the self-esteem of same-sex couples and also reveals the injustice of recognition of law in adjusting marital and family relations.

3.2.2. The Necessity of Legal Recognition of the Identity and Rights of Same-sex Couples

The current situation of legal recognition injustice faced by same-sex couples is manifested in the form of contemptuous mode of deprivation of rights and social exclusion. Originally, same-sex couples as qualified members of the community could participate in the marital law order equally and legally, and thus reasonably expect society to meet their own rights demands. However, the injustice of legal recognition has led to the exploitation or restriction of their due marital rights and the rejection of their effective rights demands by society. The particularity of this contemptuous form lies not only in the fact that the rights and social status of same-sex couples are forcibly restricted and oppressed, but also in the feeling that he no longer has the fully qualified and morally equal status like other interactive partners. For individuals, the rejection of their effective rights demands by society means that the expectation of intersubjective recognition of the individual as a subject with moral judgment ability is harmed [14].

The legal recognition of the identity of same-sex couples helps them escape the contemptuous mode of deprivation of rights and social exclusion, enabling their intimate sexual relationships to be effectively recognized and expected within the legal system and social order. This is to better protect the subjective self-esteem of same-sex couples and promote their continuous improvement of moral responsibility capabilities in social interactions, thereby achieving cognitive respect. The theory of recognition of justice argues for the necessity of legal recognition of the identity of same-sex couples, and from the opposite perspective, it considers the injustice and harm caused by deprivation of rights and social exclusion to same-sex couples. It provides important theoretical support for the legal recognition of the identity of same-sex couples.

4. Conclusion

The legal recognition of the identity of same-sex couples is crucial for whether they can obtain the status of equal legal subjects and for whether their rights demands can be effectively guaranteed. The issue of legal recognition of the identity of same-sex couples in China is rather complex. It requires not only to address the current situation and grasp the crux, but also to summarize the actual rights demands of same-sex couples and directly address their real predicaments. At the same time, it is necessary to conduct comparative analysis and grasp the patterns, and in the process of summarizing the legal recognition system of the identity of same-sex couples, find beneficial experiences for application in our country. The legal recognition of the identity of same-sex couples should be based on a correct grasp of the social reality, draw on beneficial legal recognition experiences, and from a macro perspective, comprehensively grasp the development direction of the legal recognition of the identity of same-sex couples in our country.

The legal recognition of the identity of same-sex couples is not an imitation of Western jurisprudence, but a scientific sorting and rational analysis based on the actual situation of our country. The legal recognition of the identity of same-sex couples in China at present has its practical necessity. The laws of the mainland of China completely exclude the possibility of same-sex couples establishing legal marital relationships. Therefore, those same-sex couples who have lived together for a long time can only be friends in law, and their rights in terms of person and property are difficult to receive due protection. Same-sex couples also face the squeeze from the mainstream marriage order and social morality, which forces them to enter "formal marriage", triggering a series of social problems. In addition, the legislative differences regarding the identity of same-sex couples under the "one country, two systems" background also raise practical problems in legal application. By looking at the legal recognition experiences of same-sex couples' identity in various countries around the world, it can be found that the recognition of the legal identity of same-sex couples as legal spouses profoundly influences the cognition of the public. If the legal recognition of the identity of same-sex couples is timely, it will help improve the living environment of the LGBTQ+ community, form an equal, inclusive and anti-discrimination social atmosphere, and also help promote the development of the

rule of law in our country, build a more diverse, inclusive and open legal system, and better protect the rights of minority groups in our country.

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