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LEGISLATIVE INTERPRETATION NO. 748: EXAMINING THE HISTORY AND FUTURE OF TAIWAN'S SAME-SEX MARRIAGE LAW

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LEGISLATIVE INTERPRETATION NO. 748:
EXAMINING THE HISTORY AND FUTURE OF
TAIWAN'S SAME-SEX MARRIAGE LAW

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INTRODUCTION

Taiwan has always had two advantages that increased the odds of passing a same-sex marriage law: the political empowerment of women, and a strong economy characterized by balanced development. However, Taiwan is also part of the conservative Confucian cultural milieu of East Asia, a force that has often made it hard for the gender equality movement to gain traction — although interestingly, Confucius believed and taught that it is marriage that lies at the foundation of government. This paper examines the history leading up to the 2017 and 2019 legalization of same-sex marriage in Taiwan, a “first in Asia,” as well as current developments, criticisms, and future complications.

This paper first introduces the basics of the Taiwanese legal system, including relevant political history, the history and powers Judicial branch, and the Referendum Act. It also covers the historical development of Taiwan’s queer rights movement, beginning in the 1980’s up until 2017. It then follows how the issue of same-sex marriage finally reached the highest court in Taiwan, The Council of Grand Justices, in 2017, the two-year period following given for its implementation, and finally, the Legislative Yuan’s Enforcement Act in 2019.

The analysis delves into the legal reasoning and arguments of the Council of Grand Justice’s decision, including a brief comparative with that of United States *Obergefell v. Hodges*. The overall approach is also compared, as Taiwan did not implement the more common tried-and-true incrementalist approach utilized by the United States and several other countries in its path to marriage equality. The paper also examines current developments in Taiwanese queer family law, as a response to criticism that Legislative Note No. 748 is discriminatory in its treatment of same-sex marriage involving non-Taiwanese citizens, and in adoption and parental rights. Finally, the paper looks at barriers and complications to further progress, including a false dichotomy of East-West cultural attitudes and the institution of marital supremacy.

I. LEGAL AND HISTORICAL OVERVIEW

A. Political and Legal Foundations

i. Political History and the Taiwanese Legal System

Taiwan, or formally, Republic of China (ROC), is a self-governed island off the East coast of China. While Taiwanese politics are technically a multi-party system, it often functions like a two-party system.¹ The first dominant political party is the Chinese Nationalist Party or Kuomintang (KMT), which ruled mainland China from 1928 until 1949 when the KMT lost the Chinese Civil War and fled to the island of Taiwan to establish a then-authoritarian rule.² Following Taiwan’s democratization beginning in the mid-1980s, the second dominant party, Democratic People’s Republic (DPP) was formed in 1986, becoming KMT’s first opposition

¹ Chao-ju Chen, *Migrating Marriage Equality Without Feminism: Obergefell v. Hodges and the Legalization of Same-Sex Marriage in Taiwan*, 52 CORNELL INT’L L.J. 65, 82 (2019).

² *Id.* at 83.

party³. The KMT party held the presidency in Taiwan for over five decades before the DPP won the 2000 and 2004 presidential elections.⁴ The KMT returned to power in 2008 and in 2012. The DPP won the 2016 and 2020 presidential elections, marking the third transition of power since the country's democratization.⁵ The current President, Tsai Ing-Wen of the DPP, has continuously expressed support for marriage equality since 2005⁶, and was also the sitting president when the 2017 Interpretation and 2019 Implementation were passed.

A basic understanding of Taiwan's government system is foundational to understanding the civil rights movement that led up to the passing of the 2017 Interpretation that gave rise to marriage equality. The Taiwanese government is divided into five *Yuan* (員), or branches and divisions.⁷ Dr. Sun Yat-Sen, considered the "father" of Taiwan, coined the term 五權分立 ("wǔ quán fēn lì") to describe his system of separation of powers among five branches.⁸ Dr. Sun did this by combining the Western idea of separation of powers among the Executive, Judicial, and Legislative branches, with two of the three branches of traditional Chinese imperial governments, the Examination Yuan and the Control Yuan.⁹ The latter two branches manage the civil service system, and control the impeachments and audits of government officials and agencies, respectively.¹⁰ Most crucial to our study are the legislative and judicial branches: the Legislative Yuan, as the highest legislative organ, exercised parliamentary law-making powers, while the Judicial Yuan, as the highest judicial organ, is responsible for running the Council Of Grand Justices, upon which 14 Grand Justices sit.¹¹

Unlike the United States, Taiwan is a civil law jurisdiction.¹² As such, judicial decisions are relegated to secondary sources of law. The six primary sources of law in Taiwan are instead the Constitution, the Civil Code, the Criminal Code, the Code of Civil Procedure, the Code of Criminal Procedure, and customs.¹³ Customs are considered primary sources of law in civil matters only when no other primary source of law exists that governs the same matter¹⁴. As customs change over time, customary practices recognized in certain time periods may not be recognized in other time periods.¹⁵ Unlike common law jurisdictions, the Supreme Court in Taiwan is only utilized as the court of last resort for ordinary civil and criminal matters.¹⁶

³ *Political System*, Gov. Portal of the Republic of China (Taiwan), https://www.taiwan.gov.tw/content_4.php (last visited Feb. 26, 2023).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Political System*, Gov. Portal of the Republic of China (Taiwan), https://www.taiwan.gov.tw/content_4.php (last visited Feb. 26, 2023).

¹⁰ *Id.*

¹¹ Xiaomen Zhang, *Taiwan Legal Research Guide*, HAUSER GLOBAL LAW SCHOOL PROGRAM, <https://www.nyulawglobal.org/globalex/Taiwan.html>.

¹² Chen, *supra* note 1.

¹³ Chen, *supra* note 1.

¹⁴ Robert Wintemute, *Global Trends in Legal Recognition of Same-Sex Couples: Cohabitation Rights, Registered Partnership, Marriage, and Joint Parenting*, 15 NAT'L TAIWAN U. L. REV. 131.

¹⁵ Zhang, *supra* note 11.

¹⁶ Zhang, *supra* note 11.

B. Judicial Review

Judicial review in Taiwan currently operates similarly to that of the United States, although it has not always been that way. The 14 Da Fa Guan, or Grand Justices, of the Judicial Yuan sit on Taiwan's highest judicial authority, the Council of Grand Justices – parallel to the Supreme Court of the United States.¹⁷ The Council of Grand Justices are vested with the exclusive power of judicial review, and are responsible for the unification of interpretations of Taiwanese laws. Primarily, this includes interpretation of the Constitution as well national and local statutes, regulations, and ordinances.¹⁸ However, before the mid-1980's, the Judicial Yuan operated only to legitimize the authoritarian rule of the Kuomintang, or KMT party, and rarely declared any governmental action unconstitutional.¹⁹ It was not until the democratization of Taiwan in the late 1980's that the Grand Justices gradually began to wield their power of judicial review to “curb administrative discretion, protect personal liberty, and dismantle authoritarian corporatism”.²⁰ From the 1990s onward, the Grand Justices delivered interpretations constraining excessive executive and legislative power, invalidating laws on the grounds of unconstitutionality and reflecting contemporary democratic reforms.²¹ This crucial shift to wielding its power is in part what laid the foundation for the Judicial Yuan's interpretation of Legislative Note No. 748 in 2017.²²

C. Referendums

Referendums in Taiwan also played an essential role in the path to marriage equality. The Referendum Act, enacted by the Legislative Yuan in 2003, governs both local and national referendums, and provides an opportunity for citizens to propose national or local laws.²³ In its original enactment, the Act required any citizen-initiated referendum propositions to first collect signatures totaling 5% of the electorate – around 900,000 signatures – before it could be considered by the Central Election Commission (CEC) and qualify for a referendum.²⁴ The Act was later amended in 2019 with the additional restrictions that referendums can only be held once every two years.²⁵

Before 2017, Taiwan had held a total of three national referendums, one in 2004 and two in 2008. The 2004 referendum was held jointly with the 2004 presidential election, while the two

¹⁷ Wintemute, *supra* note 14.

¹⁸ Tay-sheng Wang, *The Legal Development Of Taiwan In The 20th Century: Toward A Liberal And Democratic Country*, 11 PAC. RIM L. & POL'Y J. 531 (2002).

¹⁹ Tay-sheng Wang and I-Hsun Sandy Chou, *The Emergence of Modern Constitutional Culture in Taiwan*, 5 NATL. TAIWAN U. L. REV. 1, 41 (2010).

²⁰ Wang, *supra* note 18, at 545.

²¹ Wang & Chou, *supra* note 19, at 22.

²² *Id.*

²³ Tim Culpan, *Taiwan referendum bill sets stage*, BBC NEWS (Nov. 28, 2003, 7:15AM), <http://news.bbc.co.uk/2/hi/asia-pacific/3245498.stm>.

²⁴ Sean Lin, *Referendum Act amendments approved*, TAIPEI TIMES (Dec. 13, 2017), <https://www.taipeitimes.com/News/front/archives/2017/12/13/200368388>.

²⁵ *Referendums to be limited to every two years from August 2021*, FOCUS TAIWAN CNA ENGLISH NEWS (June 17, 2017, 10:57PM), <https://focustaiwan.tw/politics/201906170020>.

2008 referendums were held jointly with the legislative and presidential elections.²⁶ Each of the three referendums contained two propositions each, and mostly dealt with sovereignty-related issues, such as cross-strait relations with China and United Nations membership.²⁷ However, none of these referendums met the majority support quota – voter turnout did not meet the minimum requirement of 50% — and thus the results of all six propositions were invalidated.²⁸ In 2017, the Referendum Act was revised by the Legislative Yuan.²⁹ The approved amendments lowered the voting age from 20 to 18, and also lowered the 5% threshold for initiatives to 1.5% — requiring collection of 280,000 signatures to be considered by the CEC.³⁰ This 2017 amendment of the Referendum Act would later enable several same-sex related propositions to qualify for the 2018 referendum ballot.

D. Taiwan's Historical LGBTQ Family Rights Development

Taiwan's rapid democratization in the late 20th century laid the foundation for marriage equality supporters to push for legislation protecting and giving rights to same-sex couples.³¹ In 1986, Chi Chia-Wei (祁家威), who would later become Taiwan's most prominent advocate for queer rights, became the first person in Taiwan to openly come out as gay on national television, as well as the first to petition for a same-sex marriage license.³² In 1986, he visited the notary public office of the Taipei District Court to register his marriage with his male partner before being rejected.³³ Chia-Wei then filed a petition with the Legislative Yuan, leading to Taiwan's first parliamentary debate on same-sex marriage.³⁴ When the Legislative Yuan rejected Chia-Wei's petition, he filed an appeal with the Judicial Yuan.³⁵ The judicial branch also officially rejected his petition, calling homosexuality a "sexual minority" and a "deviation...depart[ing] from social norms and morals."³⁶ As Taiwan was still under martial law in 1986, Chia-Wei's marriage petition led him to being investigated by the Taiwan Garrison Command, and he was imprisoned for 162 days before being released.³⁷ Chia-Wei would continue to petition for his marriage over the next three decades.³⁸ He attempted this through "complaints, petitions, appeals, and administrative litigation," and approached "every central government agency in Taiwan" other than the Mongolian and Tibetan Affairs Commission.³⁹

²⁶ Han Cheung, *Taiwan in Time: The dawn of the referendum*, TAIPEI TIMES (Dec. 2, 2018).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Sean Lin, *Referendum Act amendments approved*, TAIPEI TIMES (Dec. 13, 2017), <https://www.taipetimes.com/News/front/archives/2017/12/13/200368388>.

³⁰ *Id.*

³¹ Wintemute, *supra* note 14, at 131.

³² *Dayway Chief: Pioneering Marriage Equality*, TAIWAN PANORAMA (Sep. 23, 2019), <https://nspp.mofa.gov.tw/nsppe/print.php?post=165435&unit=412>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ TAIWAN PANORAMA, *supra* note 32.

³⁹ TAIWAN PANORAMA, *supra* note 32.

It was not until the 1990s that the LGBT movement in Taiwan gained any traction. The LGBT community grew against the background of a “dramatic explosion in democracy and social movements” in the 1990s.⁴⁰ Taiwan’s first nationwide gender rights organization, a lesbian organization called “我們之間” (literally “Between Us”), was formed then.⁴¹ In 1993, the first campus gay community was created at National Taiwan University called “男同性戀問題研究社” (Gay Issue Research Society), and in 1995 a group dedicated to the discussion of same-sex marriage called “同性戀人權促進小組” (LGBT Rights Promotion Task Force) was established.⁴² In 2006, Hsiao Bi-Khim, a progressive lawmaker from the Democratic Progressive Party, attempted to introduce the Same Sex Marriage Act. The bill was quickly rejected by the legislature in its early stages.⁴³

However, in the decade leading up to Interpretation 748, more progressive Taiwanese cities had begun to provide some limited recognition to same-sex couples. In 2016, the Southern city of Kaohsiung issued the nation’s first “partnership” card.⁴⁴ While not legally binding, the card could be used as proof of domestic partnership in cases such as medical emergencies.⁴⁵ The same year, public interest and support in marriage equality renewed in the aftermath of a gay professor’s suicide.⁴⁶ Jacques Picoux, a longtime Taipei resident and French professor at National Taiwan University, was denied the ability to make critical medical decisions for his Taiwanese partner of 35 years, Tseng Ching-Chao, who was dying of cancer. Following Tseng’s death, Picoux was also denied legal recognition of Tseng’s estate, and jumped off an apartment high-rise building.⁴⁷ The intense media coverage following the event increased the public’s awareness of marriage equality, which helped in bringing the issue to the Council of Grand Justices the following year.

II. OVERVIEW OF CURRENT SAME-SEX MARRIAGE LAWS IN TAIWAN

A. Judicial Yuan’s 2017 Interpretation

In 2015, Chi Chia-Wei’s yet-another-attempt to register his marriage at the Taipei City Government was rejected.⁴⁸ As with previous rejections, Chia-Wei filed an appeal with the Judicial Yuan on August 20, 2015, listing the Taipei City Government as the respondent.⁴⁹

⁴⁰ Meng-hsin Tien, *Behind Taiwan’s Same Sex Marriage Law, The 30-Year Crusade*, COMMONWEALTH MAG. (May 22, 2019), <https://english.cw.com.tw/article/article.action?id=2410>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Kaohsiung issues nation's first 'partnership card' to two women*, FOCUS TAIWAN CAN ENGLISH NEWS (Nov. 11, 2016, 9:53PM), <https://focustaiwan.tw/society/201611110022>.

⁴⁵ *Id.*

⁴⁶ Stewart Chang, *Made in Taiwan, Alternative Global Models for Marriage Equality*, 34 CONN. J. INT’L L. 143, 149 (2019).

⁴⁷ *Id.*

⁴⁸ TAIWAN PANORAMA, *supra* note 32.

⁴⁹ David KC Huang, *The Court And The Legalisation Of Same-Sex Marriage: A Critical Analysis Of The Judicial Yuan Interpretation No.748*, 14 U. PA. ASIAN L. REV. 63, 76-79 (2017).

At the same time, the Taipei City Government was also filing an appeal with the Judicial Yuan, attempting to request a “constitutional judicial review” of same-sex unions.⁵⁰ The Taipei City Government had received over 300 requests for same-sex marriage registration over the past two years, including three lawsuits filed by same-sex couples.⁵¹ This spurred their petition to the Judicial Yuan on November 4, 2015, to “give the final word” on the matter of same-sex unions – whether as a marriage or as a partnership was not specified.⁵²

As a result, the Judicial Yuan consolidated the two appeals⁵³ – which notably, made the Taipei City Government both the appellant and the respondent – and the case was heard on March 24, 2017.⁵⁴

The Taipei City Government’s main argument was that freedom of marriage is constitutionally protected, and the ban violated the right to equality enshrined in Article 7 of the Constitution, which states that all citizens “irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law.”⁵⁵

The City also suggested that the specific provision limiting marriage to a man and a woman was outdated.⁵⁶ This is found in Article 972 of Taiwan’s Civil Code (1929),⁵⁷ which states that “an agreement to marry shall be made by the male and the female parties in their own concord.”⁵⁸ The City asserted that freedom of marriage in present day cannot rest on the social understanding and customs of marriage set from nearly 90 years ago, and that the current Code was inapplicable and unenforceable under the doctrine of *clausula rebus sic stantibus*.⁵⁹

Furthermore, Article 23 of the Constitution lays out exceptions and appropriate justifications for when a fundamental right enshrined in the Constitution can be abrogated. This includes to “avert an imminent crisis, to maintain social order, or to advance public welfare.”⁶⁰ Absent these dire reasons, Articles in the Constitution cannot be restricted, and the City argued that denying same-sex couples the freedom to marry neither advanced public welfare nor maintained a social order.⁶¹

On May 24, 2017, the Council of Grand Justices promulgated their decision in Legislative Interpretation No. 748.⁶² The Court held that current law denying same-sex unions was

⁵⁰ *Id.* at 76.

⁵¹ Wintemute, *supra* note 14.

⁵² Huang, *supra* note 49, at 82.

⁵³ Huang, *supra* note 49, at 82.

⁵⁴ Huang, *supra* note 49, at 64.

⁵⁵ Minguo Xianfa art. 7 (1947) (Taiwan).

⁵⁶ Huang, *supra* note 49, at 84.

⁵⁷ Katie Hunt and Karina Tsui, *Taiwan same-sex marriage: One step closer to being first in Asia to approve measure*, CNN (May 24, 2018, 9:50AM).

⁵⁸ Huang, *supra* note 49, at 80.

⁵⁹ Chang, *supra* note 46, at 146.

⁶⁰ Huang, *supra* note 49, at 79.

⁶¹ Huang, *supra* note 49, at 86.

⁶² Judicial Interpretation No. 748, 2017 SHIZI (TAIWAN).

unconstitutional, violating Articles 7 and 22 of Taiwan's Constitution.⁶³ The Justices read these two Articles as protecting the right to equality and the right to freedom of marriage, respectively.⁶⁴

Strategically, however, the Constitutional Court did not specify whether the union was to be a marriage or civil partnership, instead leaving this "political hot potato" to the Legislative Yuan.⁶⁵ The Judicial Yuan gave the Legislative Yuan a two-year deadline to either amend or enact legislation legalizing same-sex unions, and to make the decision on the type of same-sex union that was to be legalized.⁶⁶

B. Legislative Yuan's 2019 Implementation Act

Judicial Yuan (J. Y.) Interpretation No. 748 provoked intense backlash and debate about the content of the bill that would enforce the ruling. In the two-year grace period after the decision meant for deliberation and implementation of the Interpretation, organizations opposed to same-sex marriage campaigned heavily to initiate a series of national referenda, in hopes of affirming the definition of marriage as between a man and a woman.⁶⁷ Organized primarily by Taiwan's Christian groups, the referendums were non-legally binding, but could influence how Legislative Yuan chose to enact the legislation. In 2018, under the Referendum Act, seven public-initiated propositions were approved. Along with three other government propositions, the 2018 referendum consisted of ten propositions, the largest by far in Taiwan's history.⁶⁸

The majority of voting took place in November 2018, and the referendum was overwhelmingly unfavorable to same-sex marriage. In one referendum, 72% of respondents voted against the legalization of a same-sex union.⁶⁹

In response to these referendum results, the Legislative Yuan made a strategic decision. In an attempt to comply with both the unfavorable outcomes of the referendums and the Council of Grand Justice's ruling, the Legislative Yuan decided not to amend the Civil Code. The Civil Code article holding that that marriage is between a man and women will remain unchanged, while same-sex couples will gain the right to marry separately from a new bill.⁷⁰ On May 22, 2019, two years following Interpretation No. 748, the Legislative Yuan announced the Act for Implementation of J. Y. Interpretation No. 748 (the "Act") which would enforce the legalization of same-sex marriage.⁷¹

⁶³ Juntung Zheng, *Same-Sex Marriage Development in Taiwan: Constitutional Ruling or Putting Equality to A Vote?*, GEO. J. OF INT'L AFF. (Apr. 29, 2020), <https://gjia.georgetown.edu/2020/04/29/same-sex-marriage-development-in-taiwan>.

⁶⁴ *Id.*

⁶⁵ Huang, *supra* note 49, at 65.

⁶⁶ Judicial Interpretation No. 748, *supra* note 628.

⁶⁷ *Taiwan voters reject same-sex marriage in referendums*, BBC NEWS (Nov. 25, 2018), <https://www.bbc.com/news/world-asia-46329877>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Erez Aloni, *First Comes Marriage, Then Comes Baby, Then Comes What Exactly?*, 15 NAT'L TAIWAN U. L. REV. 49, 58 (2020).

⁷¹ Act for Implementation of J.Y. Interpretation No. 748, FAWUBU FAGUI ZILIAOKU (TAIWAN).

III. ANALYSIS

A. Comparative with *Obergefell*

i. Legal Reasoning & Arguments

J.Y. Interpretation 748 is sometimes considered Taiwan's equivalent to the Supreme Court of the United States' *Obergefell v. Hodges* decision. However, while both had the effect of legalizing same-sex marriage nationwide, significant differences persist, particularly in the legal reasoning used to arrive at the decision.

Obergefell v. Hodges is fundamentally a Due Process case, and the ruling is based on both the Due Process and Equal Protection Clauses.⁷² Chief Justice Kennedy opined that the right to marry is a fundamental right "inherent in the liberty of the person" and is therefore protected by the Due Process Clause of the Fourteenth Amendment, which prohibits the states from depriving any person of "life, liberty or property without the due process of law."⁷³ It stops short of explicitly considering sexual orientation a suspect class that "require[d] heightened scrutiny."⁷⁴ The United States' incrementalist strategy, further explored in the next section, is partly responsible for the way "gay rights jurisprudence evolved as primarily an issue of due process rather than equal protection."⁷⁵ This is not unusual for the United States, as the Court took similar approaches to precedent rulings, such as *Roe v. Wade*, by focusing on the liberty of personal choice. The Supreme Court posited four distinct reasons under which the *Obergefell* decision was made.⁷⁶ First was that the "right to personal choice regarding marriage is inherent in the concept of individual autonomy;" second, that "the right to marry is fundamental because it supports a two-person union unlike any other in its importance;" third, because it safeguards children and families; and fourth, because marriage is a keystone of social order.⁷⁷

In contrast, J.Y. Interpretation No. 748 is, at its core, an equal protection case, and the Council of Grand Justices' interpretation stems fully from the law of equal protection.⁷⁸ The Grand Justices identified sexual orientation as an "immutable characteristic" that is "resistant to change," and therefore deserving of protection as "discrete and insular minority."⁷⁹ This makes the Interpretation fundamentally more expansive than *Obergefell*'s reasoning, as it effectively considers sexual orientation a protected classification.⁸⁰

Despite the separate basis upon which the Supreme Court of the United States and the Council of Grand Justices in Taiwan reached their decision, some of the substantive arguments in J.Y. Interpretation and *Obergefell* mirror one another.

⁷² *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁷³ *Id.*

⁷⁴ Chen, *supra* note 1, at 68.

⁷⁵ Chang, *supra* note 46, at 147.

⁷⁶ *Obergefell*, 576 U.S. at 667.

⁷⁷ *Id.*

⁷⁸ Judicial Interpretation No. 748, *supra* note 628.

⁷⁹ Chen, *supra* note 1, at 68.

⁸⁰ Chang, *supra* note 46, at 143.

For instance, both courts in Taiwan and the United States rejected the position that procreation is essential in a marriage, and that same-sex couples' inability to bear children is a factor.⁸¹ SCOTUS stated that "an ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State."⁸² The Council of Grand Justices similarly disagreed with the assertion that procreation is integral to marriage, as there is no legal obligation for married heterosexual couples to procreate.⁸³ Additionally, both the court Taiwanese and U.S. court were of the opinion that morality is irrelevant to the legalization of same-sex marriage. However, the Taiwanese court goes a step further by explicitly stating there exists "no linkage" between same-sex marriage and the degeneration of moral order, and that the ethical order of marriage "will remain unaffected."⁸⁴

B. Overall Approach Strategy

This section examines the overall path that the Taiwanese legal system took to arrive at this holding, comparing it to the United States' approach leading up to the ruling of *Obergefell v. Hodges* in 2015.

In issuing the Interpretation – especially in the face of and following unfavorable referendums – the Judiciary saw their role in Taiwanese society as that of leading and shaping the society.⁸⁵ Global historical trends show that, in the transition towards marriage equality, countries usually first go through a process where same-sex civil unions are allowed.⁸⁶ However, part of what made Interpretation No. 748 an outlier is that Taiwan skipped the intermediate stage of allowing same-sex unions, and went directly to the legalization of marriage.⁸⁷ In other words, it was a drastic change, and the opposite of the path taken for *Obergefell*.

In contrast, the United States' approach was much more incremental.⁸⁸ The U.S. judiciary saw their role as reflective of current society – that is, that societal attitudes must first shift before "the judiciary [can] follow with rulings that reflect the shift."⁸⁹ Advocates for marriage equality in the United States also feared the perception of judicial overreach, and thus approached their advocacy from the perspective of effecting incremental change in public opinion "through a strategy of assimilation."⁹⁰ Incremental activists aimed to showcase that gay families were just like other families, presenting themselves as equal citizens through their "assimilation into American norms of family."⁹¹ In the States, this worked over time to eliminate the strong negative stereotypes associated with the gay community and shift public opinion.

⁸¹ See Judicial Interpretation No. 748, 2017 SHIZI (TAIWAN); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁸² *Obergefell*, 576 U.S. at 669 (2015).

⁸³ Huang, *supra* note 49, at 66.

⁸⁴ Huang, *supra* note 49, at 88.

⁸⁵ Chang, *supra* note 46, at 164.

⁸⁶ Wintemute, *supra* note 14, at 136-38.

⁸⁷ Wintemute, *supra* note 14, at 136-38.

⁸⁸ Chang, *supra* note 46, at 160.

⁸⁹ Chang, *supra* note 46, at 147.

⁹⁰ Chang, *supra* note 46, at 153.

⁹¹ Chang, *supra* note 46, at 153.

The incrementalist approach has its benefits, one of which is to avoid backlash. Following *Obergefell*'s ruling, anti-LGBTQ hate crimes rose, motivated by the decision.

A data analysis in Florida showed hate crimes motivated by sexual orientation increased from an annual mean of 25% to 30% in the two years following *Obergefell*'s decision.⁹² The societal backlash would conceivably be much worse had the American judiciary taken the same swift approach as the Taiwanese judiciary, and legalized same-sex marriage earlier, before they felt that public opinion and American society was "ready." This backlash has been reflected in other progressive rulings, such as in the aftermath of *Brown v. Board of Education* and in *Roe v. Wade*. In both cases, a "period of regression" in racial and gender rights followed the decisions, as opponents accuse the Supreme Court of having overreached their role.⁹³

In part, Taiwan can perhaps afford the more proactive judicial approach as hate crimes motivated by sexual orientation have been less prevalent throughout Taiwan's history, with cultural attitudes in general being more "tolerant" or "indifferent." This may be partially attributed to the fact that, unlike many countries, Taiwan has never had anti-sodomy laws.⁹⁴ Global trends show that the decriminalization of gay sex is often the first step in the development of LGBTQ laws, followed by protections against discrimination, cohabitation rights, and finally, marriage equality.⁹⁵ Absent a history of the criminalization of same-sex relations, Taiwan's beginning baseline for public acceptance was more favorable. The more tolerant societal attitude could explain the more proactive approach that the Taiwanese judiciary was able to take, as opposed to the incrementalist approach taken by the United States.

C. Criticisms and Developments

i. Noncitizens

One of the foremost criticisms of the ruling has been the lack of access for same-sex couples to register their marriage within Taiwan if one of the partner is a nonresident foreign national, from a jurisdiction where same-sex marriage is not legal. This is governed by Taiwan's Act Governing the Choice of Law in Civil Matters Involving Foreign Elements. Article 46 of the Act states that "the formation of a marriage is governed by the national law of each party"⁹⁶⁹⁷⁹⁸. However, Taiwan will recognize a marriage between two foreigners if both partners' home countries do as well.

⁹² Shawntozi Campbell, *The Prevalence of Hate Crimes Motivated by Sexual Orientation in Florida after the U.S. Supreme Court Legalization of Same-Sex Marriages*, (Jan. 1, 2019) (unpublished Ph.D. dissertation, Nova Southeastern U.).

⁹³ Chang, *supra* note 46, at 147.

⁹⁴ Chang, *supra* note 46, at 147.

⁹⁵ Wintemute, *supra* note 14, at 134-149.

⁹⁶ Act Governing the Choice of Law in Civil Matters Involving Foreign Elements, SHIZI (TAIWAN).

⁹⁷ Aloni, *supra* note 70, at 58.

⁹⁸ *Same-Sex Couple Married After Unprecedented Court Victory*, Focus Taiwan CNA English News (Aug. 13, 2021, 7:46PM), <https://focustaiwan.tw/society/202108130016>.

Two recent cases have challenged this choice-of-law interpretation, which will likely lead to continued development in this area. In March 2021, the Taipei High Administrative Court heard *Qi Jia Wei v Household Registration Office, Daan District, Taipei City*, a case concerning a same-sex Taiwanese-Malaysian couple who were denied marriage registration as Malaysia does not recognize same-sex marriage. The Court held that Article 46 of the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements was inapplicable as it violated Article 8 of the same Act. The latter provides that foreign laws are inapplicable if the “result of such application leads to a violation of the public order or *boni mores*,” or violation of good morals.⁹⁹ Article 46’s effect of prohibiting the Taiwan-Malaysia same-sex marriage was such a violation of ethical order, and therefore inapplicable pursuant to Article 8. Although on first impression, this appeared to be a issue of discrimination on the grounds of nationality, the Taiwanese Constitutional Court approached it as sexual orientation discrimination. The Court opined that this discriminated against queer Taiwanese nationals who are partnered with foreigners whose home countries did not recognize same-sex marriage, as opposed to another Taiwanese national, or with a foreigner whose home country has legalized same-sex marriage.

The currently proposed draft amendment, if passed, would add the following provision: “However, a marriage is also effective if it satisfies the formal requisites prescribed either by the national law of one of the parties or by the law of the place of ceremony,” thereby only requiring Taiwan to have legalized same-sex marriage for the marriage to be registered.¹⁰⁰

While the impending amendment will allow Taiwanese nationals the right to have their same-sex marriage recognized with anyone – including foreigners from jurisdictions where same-sex marriage is not recognized – it stops short of recognizing the same-sex marriage of two foreigners where their home countries do not. However, the National Immigration Agency (NIA) of Taiwan has attempted to remediate some of these effects through a 2020 initiative that issues partnership certificates for foreigners – similar to what Kaohsiung City offered pre-2017 – which can be recognized for medical emergencies or agency purposes.¹⁰¹

Two months later, the Taipei High Administrative Court heard another transnational same-sex marriage case in *Ding Ze Yan v Household Registration Office*.¹⁰² Here, the Court avoided the issue of the foreign partner’s home country entirely, by holding that the Macau partner had resided in Taiwan long enough to be considered a legal resident, and thus Taiwanese law should be applied. There was therefore no need to delve into the issue of Macau’s same-sex marriage recognition.¹⁰³

D. Adoption

⁹⁹ Art. 8, Act for Implementation of J.Y. Interpretation No. 748, FAWUBU FAGUI ZILIAOKU.

¹⁰⁰ *Id.*

¹⁰¹ *National Immigration Agency, R.O.C. (Taiwan)*, NIA Initiates Same-Sex Partnership Certificate for Foreign Residents as part of Gender-Friendly Policy initiative. June 10, 2020.

¹⁰² *Ding Ze Yan v. Household Registration Office*, 2021 JUDICIAL YUAN, (Taipei High Admin. Ct. May 6, 2021).

¹⁰³ David S. Ma, *Freedom! '21: Latest Developments in Same-Sex Marriage in Taiwan*, OXFORD HUMAN RIGHTS HUB (Sept. 20, 2021).

Another limitation that has not been addressed by Interpretation 748 is limitation on parental rights for queer couples. Currently, the law governing same-sex marriage only allows a spouse to adopt the biological child of their partner, in what is often called second-parent or step-parent adoption.¹⁰⁴ Governed by Article 20 of the Act for Implementation of J.Y. Interpretation No. 748, the provision states that “in the event where one party to the union as stated in Article 2 adopts the genetic child of the other party, the provisions of Civil Code concerning adoption shall apply *mutatis mutandis*.”¹⁰⁵ This restricts two things simultaneously, banning joint adoption – in which both spouses adopt a child together – and adoption by one spouse when the other spouse is not a genetic parent.¹⁰⁶ This renders the common scenario of joint adoption, in which a queer couple adopts a child together as co-parents, impossible, as neither spouse is the genetic parent of the child.¹⁰⁷

This legal restriction allowing only second-parent adoption complicates and infringes on the rights of children, as in the instance of the biological parent's death, their spouse, the step-parent, cannot adopt the child on their own or be recognized as the child's legal guardian. Instead, this opens the possibility for the child to be “forcefully taken from their home” if their biological parent dies. From the child's perspective, while they would have two mothers or fathers, only one – their biological parent – has the legal right to “make major decisions on their behalf.”¹⁰⁸ In 2021, three same-sex couples challenged their legal right to adopt in the hopes of reaching the attention of the Judicial Yuan's Council of Grand Justices for a constitutional interpretation.¹⁰⁹ Among them were Yi-Ling and her partner of 11 years, Yi-Ju, and Yi-Ju's son. Yi-Ling became concerned about her lack of parental rights when her wife fell sick and had to undergo a biopsy. Though Yi-Ling's connection with Yi-Ju's child is profound and “more than words can express,” their relationship is legally considered that of strangers, and Yi-Ju's death could mean that Yi-Ling loses parental rights of the child.¹¹⁰ While a court has permitted Yi Ju to adopt Yi-Ling's son in the event of the latter's death, this has yet to become a nation-wide law as the Judicial Yuan has not offered a constitutional interpretation on the matter.¹¹¹

However, a comparison shows that Taiwan is not exceptional in “holding on to parental discrimination” even after the legalization of same-sex marriage.¹¹² In the United States, adoption laws are governed by the State, and vary widely. As of 2020, just 16 states and the District of Columbia allow second parent adoption or co-adoption – regardless of marital status.¹¹³ On the other end, individual states have permitted the exclusion the same-sex couples to adopt, often on the grounds of protecting religious liberty. In a most recent example, the Supreme Court of the

¹⁰⁴ Kayleigh Madjar, *Same-sex couples file adoption rights lawsuit*, TAIPEI TIMES (Apr. 2, 2021), <https://www.taipeitimes.com/News/taiwan/archives/2021/04/02/2003754958>.

¹⁰⁵ Art. 20, Act for Implementation of J.Y. Interpretation No. 748, FAWUBU FAGUI ZILIAOKU.

¹⁰⁶ Aloni, *supra* note 70, at 58.

¹⁰⁷ Aloni, *supra* note 70, at 58.

¹⁰⁸ Madjar, *supra* note 104.

¹⁰⁹ Madjar, *supra* note 104.

¹¹⁰ Madjar, *supra* note 104.

¹¹¹ Madjar, *supra* note 104.

¹¹² Aloni, *supra* note 70, at 52.

¹¹³ National Center for Lesbian Rights, *Adoption by LGBT Parents* (2020) https://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf.

United States held that a Catholic adoption agency could continue to disallow gay couples to adopt, citing the Free Exercise Clause of the First Amendment.¹¹⁴

Notably, a closer look at the global trends of marriage equality in various nations – particularly in Europe, where the first few countries that adopted same-sex marriage are – show that, not only is this unusual, but that and further progress in same-sex parenting laws are due to come. For instance, the Netherlands, which became the first country to legalize same-sex marriage in 2001¹¹⁵ and give same-sex couples the right to adopt Dutch children, still barred same-sex spouses from international adoptions – the most common kind of adoption in Europe¹¹⁶ This ban was lifted in 2005, over four years later.¹¹⁷

Prevailing parental discrimination after the legalization of same-sex marriage extends to access to Assisted Reproductive Technology (ART) as well. For instance, France legalized same-sex marriage in 2013, but also passed legislation banning same-sex parents from accessing assisted reproductive technology, including IVF, artificial insemination, and sperm donation.¹¹⁸ This was not overturned until March 2020, seven years after the legalization of same-sex marriage.¹¹⁹ If global trends are indicative, then there will likely be changes to Taiwan’s queer parenting laws in the next few years, giving same-sex couples equal access to parental rights.

E. Barriers Further Progress

i. Cultural Attitudes

An impediment to further advancement in the recognition of queer rights in Taiwan is the false dichotomy in East-West values — that is, the false association of queer rights with “Western” ideals. These ideas are driven by misconceptions from both sides, and represent a basic, monolithic, and inaccurate view of competing East-West values. Instead, this thinking is weaponized by Asian critics of marriage parity, who rely these binary notions and on a nationalist narrative to “oppose sexual orientation and gender identity rights, claiming that rights must be rejected to preserve local Asian cultures.”¹²⁰ For instance, an article published in the Singapore Journal of Legal Studies in 2008 advocated against the decriminalization of sodomy, arguing that

¹¹⁴ Tucker Higgins, *Supreme Court sides with Catholic adoption agency that refuses to work with LGBT couples*, CNBC (June 17, 2021) <https://www.cnbc.com/2021/06/17/supreme-court-sides-with-catholic-adoption-agency-that-refuses-to-work-with-lgbt-couples.html>.

¹¹⁵ Reuters, *Same-Sex Dutch Couples Gain Marriage and Adoption Rights*, N.Y. TIMES, <https://www.nytimes.com/2000/12/20/world/same-sex-dutch-couples-gain-marriage-and-adoption-rights.html>

¹¹⁶ Aloni, *supra* note 70, at 65.

¹¹⁷ *Dutch Cabinet passes bill allowing adoption of foreign children by gay couples*, ADVOCATE (June 25, 2005, 12:00AM), <https://www.advocate.com/news/2005/06/25/dutch-cabinet-passes-bill-allowing-adoption-foreign-children-gay>.

¹¹⁸ Nicole Knight, *France's New IVF Law to Cover Same-Sex Couples, Single Women*, GENERAL ELECTRIC WOMEN’S HEALTH (Mar. 23, 2020), <https://www.volusonclub.net/empowered-womens-health/frances-new-ivf-law-will-extend-coverage-to-same-sex-couples-and-single-women/>.

¹¹⁹ *Id.*

¹²⁰ Holning Lau, *Grounding Conversations on Sexuality and Asian Law*, 44 U.C. DAVIS L. REV. 773, 775 (2011).

doing so would “impose foreign western liberal or libertine values on Singaporeans.”¹²¹ Indeed, opponents of the Interpretation take the fact that Taiwan’s legalization of same-sex marriage arrived so soon — just two years — after *Obergefell*, as evidence that traditional Taiwanese culture and values are at risk of being replaced by “Western” values. In order for the queer rights movement in Taiwan, and neighboring Asian countries, to advance, we must first stop perpetuating — and eventually abolish — the reductionist idea of the East-West binary.¹²²

ii. *Marital Supremacy*

Another obstacle to further progress may be the institution of marriage itself, and what it means to have achieved “equality.”

In *Obergefell*, Justice Kennedy presents marriage as the natural choice, and the Grand Justice’s Interpretation does as well. This is a central commonality between Interpretation 748 and *Obergefell*, both of which enforce the idea of marital supremacy, and embrace and equalize “equality” with sameness.¹²³ While this may not seem like a significant obstacle or impediment on first impression, further analysis reveals the limitations of this thinking. In a 2019 article, Chao-Ju Chen wrote that, “when access to marriage becomes the measure of equality, then the right to marry becomes a mandate to marry.”¹²⁴

In the early stages of the Taiwanese queer rights movement, marriage was not considered the gold standard of equality nor the end goal. Highly influenced by Taiwan’s late 20th-century feminist movement, LGBTQ advocates were more critical towards the institution of marriage, especially as an exclusive and final goal post for achieving equality. The lesbian Taiwanese publication, *Girl Friends*, published in 1995 and 2000, examined marriage as a source of both oppression and privilege for the queer community.¹²⁵ Indeed, early feminist and gay rights movements in Taiwan were split into a diversity of viewpoints, which advocated for equality that is not based on the concept of marital supremacy. Over the 1990’s and 2000’s, Taiwan’s “diverse family movement” slowly “collapsed into a marriage equality movement ... that prioritizes marriage.”¹²⁶ A recent example is the attempted and unpassed Multiple-Person Household Bill in the 2010’s, which prioritized the idea of chosen family by allowing two or more persons to cohabit and support one another to register “as a household and as equal partners,” regardless of sexual intimacy.¹²⁷ The marriage-as-standard view has the effect of “leaving out and marginalizing [queer] people subordinated in or living outside” the institution of marriage.¹²⁸ In part, what led to the downfall of Taiwan’s pluralist, diverse-family movement in the 2000’s and 2010’s was growing opposition against LGBTQ rights that organized and focused its attention on

¹²¹ Yvonne C.L. Lee, “Don’t Ever Take a Fence Down Until You Know the Reason It Was Put up” - Singapore Communitarianism and the Case for Conserving 377A, 2008 Sing. J. L. STUD. 347, 391 (2008).

¹²² Lau, *supra* note 120, at 801.

¹²³ Chen, *supra* note 1, at 69.

¹²⁴ Chang, *supra* note 46, at 164.

¹²⁵ Chen, *supra* note 1, at 77.

¹²⁶ Chen, *supra* note 1, at 81.

¹²⁷ Chen, *supra* note 1, at 81.

¹²⁸ Chen, *supra* note 1, at 81.

marriage. Among them, the League of Taiwanese Guardians of Family Image, or LTGF, was formed in 2013.¹²⁹ LTGF's lobbying efforts prioritized marriage, with its overall purpose focused on defending traditional marriage and the immorality of allowing same-sex marriage.¹³⁰ In response, Taiwan's LGBTQ family rights movement intensified its focus on same-sex marriage, and "partnership and other forms of non-marital relationship" fell off the table.¹³¹ The legalization of same-sex marriage can even give advocates a false sense of complacency. For instance, Freedom to Marry, a gay rights activist group, announced its closure in 2015 after the *Obergefell* decision, having "achieved the goal we set out to do."¹³² The 30-member staff disbanded by the end of the year.

Now that Taiwan has also achieved the supposed end goal of marriage equality, it is essential for further progress that we actively reject marital supremacy and the ideal of marriage as the only and final destination.

CONCLUSION

Despite Taiwan's relatively short democratic history and LGBTQ rights movement, it has seen dramatic change in the past decade, leading up the Council of Grand Justices interpretation in 2017 that held the Civil Code's requirement of marriage between a man and a woman to be unconstitutional. Influenced by unfavorable public referendums, the Legislative Yuan created a new bill, the Act for Implementation of J. Y. Interpretation No. 748., through which same-sex couples can marry, without having to amend the Civil Code directly.

Compared with *Obergefell*, Interpretation No. 748's protection is more expansive, as it recognizes sexual orientation as a protected classification, while the Supreme Court of the United States approached the issue primarily as one of Due Process. Although current limitations include joint adoption and same-sex marriage between foreigners whose home country does not recognize marriage equality, changes are due to come in LGBTQ family law in Taiwan, as it will likely follow the trajectory of other countries that have first legalized same-sex marriage before letting go of foreigner and parental discrimination.

Propelled by a rapid democratization movement in the late 20th century, Taiwan's LGBTQ rights have progressed significantly since the 1980's, culminating in the 2017 Judicial Yuan Interpretation and the 2019 Act that implemented the legalization of same-sex marriage. While a triumphant victory for many, the ruling was not without its opponents, and continued progress requires focused effort on barriers both old and new. This includes dispelling the myth of gender identity rights as a Westernization and an erasure of East Asian culture, as well as rejecting and looking beyond marital supremacy to recognize that equality as sameness is not the solution for everyone.

¹²⁹ Chen, *supra* note 1, at 82.

¹³⁰ *Id.*

¹³¹ Chen, *supra* note 1, at 84.

¹³² Jess Bravin, *Its Goal Met, Gay-Marriage Advocacy Group Will Shut Down*, WALL ST. J. (July 15, 2015), <https://www.wsj.com/articles/its-goal-met-gay-marriage-advocacy-group-will-shut-down-1436952602>.