

## THE STRUGGLE FOR MARRIAGE EQUALITY AND THE NEED TO FOCUS ON TRANSGENDER RIGHTS IN TAIWAN

M. Bob Kao†

### ABSTRACT

*Marriage equality has been the primary focus of LGBTQ rights activists in Taiwan for the past decade. After numerous setbacks, same-sex marriage was finally legalized in May 2019 by the Taiwanese Constitutional Court's decision finding that limiting marriage under the Civil Code as solely between a man and a woman was unconstitutional on grounds that it violated the principles of equality and the freedom of marriage. Moving forward, while ensuring marriage equality is enforced in practice, LGBTQ rights activists in Taiwan must strategize their next steps, including combating other types of discrimination based on gender and sexual orientation and advocating for transgender rights. As a first step, the energy from the marriage equality victory and the language used by the Justices of the Constitutional Court should be utilized to advocate for the elimination of the onerous regulations for legal gender change, which currently requires transgender persons to undergo surgery to remove their reproductive organs. On a broader level, the advocacy for the LGBTQ community in Taiwan should not be limited to equality in the law but should also transform the meaning and practice of freedom and autonomy in the process. The Constitutional Court decision can serve as the catalyst for this struggle for self-determination.*

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†Ph.D. Candidate, Queen Mary University of London; J.D., University of California, Berkeley; LL.M., University College London. As a law student and lawyer in California, I worked with transgender prisoners and persons who needed assistance with gender and name changes. I would like to thank Tran Ly and Yeh In-Ru for their comments on an earlier draft, Karis Chang for translation assistance, and the editors, especially David Ostern and Anthony Carl, for vastly improving the quality of this article. All errors remain my own.

## TABLE OF CONTENTS

I.	INTRODUCTION .....	208
II.	ANALYZING J.Y. INTERPRETATION NO. 748 .....	212
	A. <i>Majority Opinion</i> .....	213
	B. <i>Concurring Opinion</i> .....	219
	C. <i>Dissenting Opinion</i> .....	220
III.	COMPETING LEGISLATIVE YUAN BILLS TO LEGALIZE SAME-SEX MARRIAGE .....	221
IV.	POST OPINION DEVELOPMENTS.....	225
	A. <i>Referendum</i> .....	225
	B. <i>Executive Yuan Bill</i> .....	227
	C. <i>Fault of the Constitutional Court</i> .....	230
V.	CHANGING GENDERS .....	232
	A. <i>Legal Requirements</i> .....	232
	B. <i>Using Interpretation No. 748 for Transgender Rights</i> . 236	
VI.	CONCLUSION .....	238

## I. INTRODUCTION

On May 24, 2017, LGBTQ<sup>1</sup> rights activists scored a major victory for equality in Taiwan.<sup>2</sup> In Judicial Yuan Interpretation No. 748 (“J.Y.

<sup>1</sup> This article uses the term “LGBTQ” to refer to sexual minorities. It chooses to leave out “I” because the nature of many of the issues intersex people face is drastically different from other sexual minorities, and it would be unfair to lump them together simply for token inclusivity. “Transgender” is used as an umbrella term for all people who cross gender boundaries, permanently or not.

<sup>2</sup> This judicial victory followed decades of social movements and failed legal challenges. For further readings on some of the history of LGBTQ rights advocacy in Taiwan, see Scott Simon, *From Hidden Kingdom to Rainbow Community: The Making of Gay and Lesbian Identity in Taiwan*, in *THE MINOR ARTS OF DAILY LIFE: POPULAR CULTURE IN TAIWAN* 67, 79 (David K. Jordan et al. eds., 2004); Yun-Hsien Diana Lin, *Lesbian Parenting in Taiwan: Legal Issues and the Latest Developments*, 14 *ASIAN-PAC. L. & POL'Y J.* 1 (2013); Josephine Chuen-juei Ho, *Queer Existence Under Global Governance: A Taiwan Exemplar*, 18 *POSITIONS* 537 (2010); Yen-hsin Alice Cheng, Fen-Chieh Felice Wu & Amy Adamczyk, *Changing Attitudes Toward Homosexuality in Taiwan, 1995–2012*, 48 *CHINESE SOC. REV.* 317 (2016); Hsiaowei Kuan, *LGBT Rights in Taiwan: The Interaction Between Movements and the Law*, in *TAIWAN AND INTERNATIONAL HUMAN RIGHTS* (Jerome A. Cohen, William P. Alford & Chang-Fa Lo eds., 2019); Ming-sho Ho, *Taiwan's Road to Marriage Equality: Politics of Legalizing Same-Sex Marriage*, 238 *CHINA Q.* 482 (2019) (published online December 21, 2018); Po-Han Lee, *Queer Activism in Taiwan: An Emergent Rainbow Coalition from the Assemblage Perspective*, 65 *SOC. REV.* 682 (2017).

Interpretation No. 748”), the country’s Constitutional Court<sup>3</sup> ruled that the Civil Code’s restriction of marriage to solely be between one man and one woman violated the Constitution,<sup>4</sup> and as a result, same-sex marriage was legalized.<sup>5</sup> The Court offered a grace period of two years for the Legislative Yuan, the Taiwanese legislature, to pass a bill enshrining this right in the law.<sup>6</sup> The Constitutional Court warned that if no law were passed within two years, same-sex marriage would automatically be legal under the existing Civil Code.<sup>7</sup>

The Legislative Yuan stalled on the issue. Though individual members from the majority Democratic Progressive Party (“DPP”)<sup>8</sup> and the nascent New Power Party (“NPP”) continued to advocate for the marriage equality bills they introduced prior to the Constitutional Court’s decision, the DPP caucus whip refused to take an active role and instead deferred to the Executive Yuan, which also has the power to introduce legislation.<sup>9</sup> Even President Tsai Ing-wen (also a DPP member), who campaigned on marriage equality in the 2014 election, remained equivocal with her support after the ruling just as she had been when similar legislation was introduced in 2016.<sup>10</sup> As President,

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<sup>3</sup> The Constitutional Court is part of the Judicial Yuan, one of the five branches of government along with the Control Yuan, the Examination Yuan, the Legislative Yuan, and the Executive Yuan. The President, popularly elected, is the head of state and appoints the presidents of each Yuan. The president of the Executive Yuan is the Premier and oversees cabinet ministries, including the Ministry of the Interior, the Ministry of Justice, and the Ministry of Health and Welfare. For an introduction of the Taiwanese governmental structure, see DAFYDD FELL, *GOVERNMENT AND POLITICS IN TAIWAN* (2d ed. 2018).

<sup>4</sup> See generally ZHONGHUA MINGUO XIANFA (中華民國憲法) [Constitution of the Republic of China] (1947) (available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000001>).

<sup>5</sup> SHIZI NO. 748 JIESHI (釋字第748號解釋) [Judicial Yuan Interpretation No. 748] (2017) [hereinafter J.Y. Interpretation No. 748] (available at [https://www.judicial.gov.tw/constitutionalcourt/EN/p03\\_01.asp?expno=748](https://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=748)).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> For a history of the Democratic Progressive Party, see DENNY ROY, *TAIWAN: A POLITICAL HISTORY* 152-82 (2002).

<sup>9</sup> Brian Hioe, *The Ball is Back in the DPP’s Court Regarding Marriage Equality in Taiwan*, NEW BLOOM, (May 25, 2017), <https://newbloommag.net/2017/05/25/marriage-equality-dpp-pressure/>; Chen Weihan, *Same-Sex Marriage: Politicians Praise Ruling, Undecided on Next Step*, TAIPEI TIMES (May 25, 2017), <http://www.taipeitimes.com/News/front/archives/2017/05/25/2003671246>.

<sup>10</sup> Jiang Ho-ching, *Tsai’s Worrisome Same-Sex Views*, TAIPEI TIMES (June 1, 2018), <http://www.taipeitimes.com/News/editorials/archives/2018/06/01/2003694087>; M. Bob Kao, *Politics Dampens Hope for Marriage Equality in Taiwan*, EAST ASIA

she could have ordered the Executive Yuan to draft and refer a bill to the Legislative Yuan, and as the DPP chair she could have persuaded her party to prioritize the issue in the legislature, but she did neither.

As a result, this afforded space and time for anti-equality activists to continue their campaign against same-sex marriage despite the Court's ruling. Opponents of same-sex marriage were able to include anti-marriage public referendum propositions to be voted on alongside the local elections in November 2018, the results of which purportedly showed that the people of Taiwan were against marriage equality.<sup>11</sup> After the referendum, some opponents of marriage equality argued that the Legislative Yuan could only pass a civil union law, and not a marriage law, to abide by the public opinion shown by the referendum.<sup>12</sup> There is, however, an argument to be made that such a law would not violate J.Y. Interpretation No. 748 because the Justices allowed the legislature to implement marriage equality as it best felt appropriate and did not specify the substantive meaning of equality.<sup>13</sup> Forced by the vote, the Executive Yuan finally introduced legislation in February 2019 for subsequent deliberation by the Legislative Yuan.<sup>14</sup> This bill, the Enforcement Act of Judicial Yuan Interpretation No. 748, included an enactment date of May 24, 2019, just meeting the two-year period mandated by J.Y. Interpretation No. 748;<sup>15</sup> it passed the Legislative Yuan on May 17, 2019, was promulgated by President Tsai on May 22, 2019, and became effective on May 24, 2019.<sup>16</sup>

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FORUM (Dec. 9, 2016), <http://www.eastasiaforum.org/2016/12/09/politics-dampens-hope-for-marriage-equality-in-taiwan/>; Bob Kao, *What's Next After Saturday's Marriage Equality Rally in Taiwan?*, KETAGALAN MEDIA (Dec. 11, 2016), <https://www.ketagalanmedia.com/2016/12/11/whats-next-after-saturdays-marriage-equality-rally-in-taiwan/>.

<sup>11</sup> Chris Horton, *Taiwan Asked Voters 10 Questions. It Got Some Unexpected Answers*, N.Y. TIMES (Nov. 26, 2018), <https://www.nytimes.com/2018/11/26/world/asia/taiwan-election.html>.

<sup>12</sup> Yu Hsiao-han & Chung Yu-chen, *Conservative Groups Slam Cabinet's Draft Bill on Gay Marriage*, CHINA POST (Feb. 21, 2019), <https://chinapost.nownews.com/20190221-515007>.

<sup>13</sup> See *infra* Part II(A).

<sup>14</sup> See Ku Chuan & Evelyn Kao, *Cabinet OKs Bill to Legalize Same-Sex Marriage*, CHINA POST (Feb. 21, 2019), <https://chinapost.nownews.com/20190221-514989> (explaining that all five branches of the government are allowed to draft legislation, but the Legislative Yuan is the only one that can pass them into law).

<sup>15</sup> SIFAYUAN SHIZI 748 HAO JIESHI SHIXINGFA (司法院釋字748號解釋施行法) [Enforcement Act of Judicial Yuan Interpretation No. 748].

<sup>16</sup> Executive Yuan, *Same-Sex Marriage Law to Go into Effect Tomorrow*, EXECUTIVE YUAN PRESS RELEASES (May 23, 2019),

Ming-Sung Kuo and Hui-Wen Chen's 2017 article<sup>17</sup> likening J.Y. Interpretation No. 748 to the watershed American racial integration case *Brown v. Board of Education*<sup>18</sup> warned that "it remains to be seen whether following J.Y. Interpretation No. 748, the [Constitutional Court] will achieve what the Court in *Brown* fell short of . . ."<sup>19</sup> *Brown* generated a great deal of political backlash in the United States, and the repercussions of that backlash were still felt decades later due to resistance by local communities and school districts, who dragged their feet in regard to integration.<sup>20</sup> Though the Legislative Yuan abided by the deadline of May 24, 2019 to formalize same-sex marriage imposed by the Constitutional Court, it also remains to be seen whether there will be obstacles blocking same-sex couples from registering their marriages and enjoying all of the rights enjoyed by heterosexual couples through legal manoeuvres or extrajudicial means.<sup>21</sup>

Now, while ensuring the continued freedom to enter into same-sex marriages after its enshrinement in black letter law, it is critical for LGBTQ rights advocates to devote their attention to determining new goals for the LGBTQ community and addressing other issues that the community faces. In addition to continuing to combat *de facto* discrimination in education and employment settings, which are already protected by anti-discrimination laws, activists must also advocate for equality in other legally unprotected areas which include, but are not limited to: public accommodations, housing, and other everyday forms of discrimination. Existing frameworks and tactics must also be re-evaluated because the prioritization of same-sex marriage in the LGBTQ rights movement is a recent phenomenon that, by itself, does not address the marginalization of feminist and queer voices that dispute the privileging of marriage, oppose the oppression

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<https://english.ey.gov.tw/Page/61BF20C3E89B856/edc61e2f-af8f-45f3-933b-682546c0e0d9>.

<sup>17</sup> Ming-Sung Kuo & Hui-Wen Chen, *The Brown Moment in Taiwan: Making Sense of the Law and Politics of the Taiwanese Same-Sex Marriage Case in a Comparative Light*, 31 COLUM. J. ASIAN L. 72 (2017).

<sup>18</sup> *Brown v. Bd. of Edu.*, 347 U.S. 483 (1954).

<sup>19</sup> Kuo & Chen, *supra* note 17, at 148-49.

<sup>20</sup> See BRIAN J. DAUGHERITY, CHARLES C. BOLTON (EDS.), WITH ALL DELIBERATE SPEED: IMPLEMENTING BROWN V. BOARD OF EDUCATION (2008).

<sup>21</sup> See Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493 (2006); Tiffany C. Graham, *Obergefell and Resistance*, 84 UMKC L. REV. 715 (2016); Adam Deming, *Backlash Blunders: Obergefell and the Efficacy of Litigation to Achieve Social Change*, 19 U. PA. J. CONST. L. 271 (2016).

of the institution of marriage, disapprove of the association of marriage and parenthood, and condemn the discrimination of non-marital relationships.<sup>22</sup>

It is time to focus on marginalized subgroups within the already-marginalized LGBTQ community, and this article argues that addressing the plight of transgender persons in Taiwan is both a necessary and good jumping-off point. Transgender persons currently face oppressive hurdles in order to change their gender, as they must undergo surgery to remove their reproductive organs if they want to be legally recognized as the gender with which they most identify.<sup>23</sup> While J.Y. Interpretation No. 748 specifically focused on the issue of same-sex marriage, the language in the majority opinion may assist in eliminating the state-sponsored violence of mandatory surgery that transgender persons face.<sup>24</sup>

Part II of this article discusses the Court's decision in J.Y. Interpretation No. 748, along with the concurring and dissenting opinions. Part III examines the same-sex marriage bills proposed by legislators, prior to the Constitutional Court judgment, and the responses by opponents of same-sex marriage and other parts of the Taiwanese government. Part IV discusses the developments subsequent to the Constitutional Court's ruling, including the anti-equality referendum and legislation introduced by the Executive Yuan. Part V discusses the legal burdens facing transgender persons who wish to legally change their genders and suggests the role J.Y. Interpretation No. 748 can play in eliminating the onerous requirements on legal recognition of transgender persons and allowing those persons to live with dignity and freedom.

## II. ANALYZING J.Y. INTERPRETATION NO. 748

J.Y. Interpretation No. 748 was handed down by the Constitutional Court on May 24, 2017, with the opinion released three months after a hearing was held on March 24, 2017 by a panel of fourteen of the fifteen Justices that comprise the Constitutional

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<sup>22</sup> *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. (forthcoming 2019).

<sup>23</sup> Chih-hsing Ho, *Taiwan*, in *THE LEGAL STATUS OF TRANSEXUAL AND TRANSGENDER PERSONS* 425, 427 (Jens M. Scherpe ed., 2015).

<sup>24</sup> *See infra* Part II(A).

Court.<sup>25</sup> This case was a consolidation of two cases that sought constitutional interpretation of the Civil Code's Marriage Chapter, which limited marriage to between a man and a woman.<sup>26</sup> In the first case, the plaintiff was a long-time LGBTQ activist, Chi Chia-Wei, who had been advocating for marriage equality in Taiwan since the 1980s.<sup>27</sup> Chi was represented by Victoria Hsu of the Taiwan Alliance to Promote Civil Partnership Rights ("TAPCPR"), which is the main public interest organization that led the fight for marriage equality.<sup>28</sup> The other plaintiff was the Taipei City Government, which received more than 300 requests for registration of same-sex marriages in two years.<sup>29</sup> As the Household Registration Office of the city government was forced to reject the requests because the law only allowed it to register marriages between a man and a woman, the city government sought guidance from the Court.<sup>30</sup> Along with the majority opinion, a concurring and dissenting opinion were also filed.

#### A. Majority Opinion

The Court framed the issue in J.Y. Interpretation No. 748 as follows:

Do the provisions of Chapter II on Marriage of Part IV on Family of the Civil Code, which do not allow two persons of the same sex to

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<sup>25</sup> J.Y. Interpretation No. 748, *supra* note 5. Justice Remington Huang recused himself because he is married to Yu Mei-nu, the DPP legislator who had been advocating for marriage equality in the Legislative Yuan. *See infra* Part III. The votes of the Justices of the Constitutional Court are not made public, but according to Article 14 of the SIFAYUAN DAFAGUAN SHENLIANJIANFA (司法院大法官審理案件法) [Constitutional Interpretation Procedure Act], two-thirds of the Justices present must agree for a constitutional interpretation to be released. Therefore, at least nine of the fourteen Justices were in full support of the majority opinion.

<sup>26</sup> Min Fa (民法) [Taiwan Civil Code] arts. 972-1090 [hereinafter CIVIL CODE].

<sup>27</sup> M. Bob Kao, *The Same-Sex Marriage Battle in Its Historical Context*, THINKING TAIWAN (Dec. 23, 2014), <http://thinking-taiwan.com/thinking-taiwan.com/the-same-sex-marriage-battle-in-its-historical-context/index.html>.

<sup>28</sup> For a history of the TAPCPR, *see* Victoria Hsiu-wen Hsu, *Colors of Rainbow, Shades of Family: The Road to Marriage Equality and Democratization of Intimacy in Taiwan*, 16 GEO. J. INT'L AFF. 154 (2015). *See also* Chen, *supra* note 22.

<sup>29</sup> Christie Chen, Chu Che-wei & Wang Yang-yu, *Taiwan Constitutional Court Hears Debate on Same-Sex Marriage (Update)*, FOCUS TAIWAN (Mar. 24, 2017), <http://focustaiwan.tw/news/asoc/201703240029.aspx>.

<sup>30</sup> For a brief overview of the arguments made by the parties, *see* David K.C. Huang, *The Court and the Legalisation of Same-Sex Marriage: A Critical Analysis of the Judicial Yuan Interpretation No. 748 [2017]*, 16 U. PA. ASIAN L. REV. 63, 76-82 (2019).

create a permanent union of intimate and exclusive nature for the purpose of living a common life, violate the Constitution's guarantees of freedom of marriage under Article 22 and right to equality under Article 7?<sup>31</sup>

Though the Marriage Chapter of the Civil Code does not explicitly define marriage as between a man and a woman, it does use the terms “man and woman,” or “husband and wife,” throughout the section of the statute.<sup>32</sup> To confirm that the provisions were only intended for heterosexual couples, the Ministry of Justice (“MOJ”) released a memo in 1994 affirming that it interpreted the Civil Code as only applicable to heterosexual couples.<sup>33</sup> The Court held that the Civil Code provisions governing marriages, which prohibited same-sex couples from marrying, were unconstitutional violations of both Article 22, which protects marriage as a fundamental right, and Article 7, the equality provision of the Constitution.<sup>34</sup> Article 7 states: “All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law;” and Article 22 states: “[a]ll other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.”<sup>35</sup>

The Court further held that:

The authorities concerned shall amend or enact the laws as appropriate in accordance with the ruling of this Interpretation within two years from the date of the announcement of this Interpretation. It is within the discretion of the authorities concerned to determine the formality for achieving the equal protection of the freedom of marriage. If the authorities concerned fail to amend or enact the laws as appropriate within the said two years, two persons of the same sex

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<sup>31</sup> J.Y. Interpretation No. 748, *supra* note 5, ¶ Issue.

<sup>32</sup> CIVIL CODE, *supra* note 26, ARTS. 972-1090.

<sup>33</sup> Memorandum from Ministry of Justice to public (May 14, 2012) (on file with author). The letter states: “In our Civil Code, there is no provision expressly mandating the two parties of a marriage be one male and one female. However, scholars in our country agree that the definition of marriage must be ‘a lawful union between a man and a woman for the purpose of living together for life.’ Some further expressly maintain that the same-sex union is not the so-called marriage under our Civil Code . . . . Many provisions of Part IV on Family in our Civil Code are also based on the concept of such opposite-sex union . . . . Therefore, the so-called ‘marriage’ under our current Civil Code must be a union between a man and a woman, and does not include any same-sex union.” *Id.*

<sup>34</sup> Constitution of the Republic of China, *supra* note 4, at art. 7, 22.

<sup>35</sup> *Id.*



2019]

## TRANSGENDER RIGHTS IN TAIWAN

215

who intend to create the said permanent union shall be allowed to have their marriage registration effectuated at the authorities in charge of household registration, by submitting a written document signed by two or more witnesses in accordance with the said Marriage Chapter.<sup>36</sup>

The “authorities concerned” referred to in the opinion is the Legislative Yuan, which was given two years by the Constitutional Court to amend the law to comply with this ruling.<sup>37</sup> As the opinion was released on May 24, 2017, the legislature had until May 24, 2019 to make the necessary amendments. Though grace periods are not unprecedented in Judicial Yuan Interpretations, the Court was not obligated to provide the Legislative Yuan with one and could alternatively have given a much more limited grace period.<sup>38</sup> It is plausible that the two-year period was a compromise by the Justices to ensure that the majority opinion would be supported by as many Justices as possible and to limit the number of concurring and dissenting opinions to one each. There was reportedly at least one more Justice who disagreed with the decision of the Court but refrained from issuing an opinion.<sup>39</sup> Other Justices were also persuaded to withdraw their separate opinions to retain the robust support of the majority opinion.<sup>40</sup> What precisely the majority had to concede is unknown, but the two-year grace period appears to be one of the likely concessions.

The majority opinion’s rationale for the grace period was that “[g]iven the complexity and controversy surrounding this case, longer deliberation time for further legislation might be needed.”<sup>41</sup> This reason appears to be suspect, as multiple marriage equality bills were already drafted before the Court opinion and were even deliberated upon in the Judiciary and Organic Laws and Statutes Committee of the Legislative Yuan.<sup>42</sup> Additionally, there was already precedent at the local level in Taiwan treating same-sex couples equally as heterosexual couples, as a majority of the local governments had been

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<sup>36</sup> J.Y. Interpretation No. 748, *supra* note 5, ¶ Holding.

<sup>37</sup> See J.Y. Interpretation No. 748, *supra* note 5.

<sup>38</sup> Huang, *supra* note 30, at 83. (“[T]he Justices are constitutionally powerful enough to unilaterally decide the proper form of the legalization of same-sex union.”).

<sup>39</sup> Kuo & Chen, *supra* note 17, at 129.

<sup>40</sup> *Id.*

<sup>41</sup> J.Y. Interpretation No. 748, *supra* note 5, ¶ 17.

<sup>42</sup> See *infra* Part III.

registering same-sex couples by this time and offering them benefits previously only available to heterosexual couples.<sup>43</sup> The first city to do so was Kaohsiung in 2015, and the practice gradually spread to eighteen of the twenty-two cities and counties in Taiwan.<sup>44</sup> The rights attached to local same-sex couple registration differ in every jurisdiction and were limited to services provided by the local government.<sup>45</sup> Nonetheless, the successful registration schemes and lack of significant opposition to them meant that the local governments were prepared to register same-sex couples for marriages from a bureaucratic standpoint.<sup>46</sup> A two-year grace period for preparation should have been unnecessary.

Another possible concession the majority may have had to make was the lack of unequivocal language in the opinion as to the form of the bill the Legislative Yuan was required to pass.<sup>47</sup> The Court deferred to the Legislative Yuan “to determine the formality for achieving the equal protection of the freedom of marriage,”<sup>48</sup> which was vague and left room for the Legislative Yuan’s discretion. The Court itself even offered possible routes, such as the “revision of the Marriage Chapter, enactment of a special Chapter in Part IV on Family of the Civil Code, enactment of a special law, or other formality.”<sup>49</sup> Chi, the TAPCPR, and their allies advocated for true equality, which in their perspective meant that same-sex couples would be able to marry using the same law as heterosexual couples—the Marriage Chapter of the Civil Code—to ensure equal protection.<sup>50</sup> Yet, the possibility of the enactment of a separate chapter in the Civil Code, or even a completely separate law, meant that the name of the union could be “civil union,” “civil partnership,” or another designation that

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<sup>43</sup> Elaine Jeffreys & Pan Wang, *Pathways to Legalizing Same-Sex Marriage in China and Taiwan: Globalization and “Chinese Values”*, in *GLOBAL PERSPECTIVES ON SAME-SEX MARRIAGE: A NEO-INSTITUTIONAL APPROACH* 197, 211 (Bronwyn Winter, Maxime Forest & Réjane Sénac eds., 2018); Liu Li-jung, Liu Kuan-ting & Evelyn Kao, *3,951 Same-Sex Couples Registered as Partners in Taiwan*, *FOCUS TAIWAN* (Dec. 9, 2018), <http://focustaiwan.tw/news/asoc/201812090004.aspx>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See generally* J.Y. Interpretation No. 748, *supra* note 5.

<sup>48</sup> J.Y. Interpretation No. 748, *supra* note 5, at 1.

<sup>49</sup> *Id.* at 3.

<sup>50</sup> Petition of Hwei-Tai-12674 filed by Chia-Wei Chi and Hwei-Tai-12771 filed by the Taipei City Government, 2017 CHINESE (TAIWAN), *available at* <https://www.judicial.gov.tw/constitutionalcourt/FYDownload.asp?fileguid=000555-NV5TV>.

eschews the term “marriage.” If the separate law were to grant equal substantive rights, having a distinct law may not be an issue. However, if the label and substantive rights differ from current marriage laws, then one may question whether marriage equality would actually be attained.<sup>51</sup>

Although the Court found that the Civil Code violated the freedom of marriage, it did not actually define the term marriage in the opinion.<sup>52</sup> Even when finding that same-sex couples also have the right to marriage, it never mandated that the right must have the same nomenclature.<sup>53</sup> The opinion also never stated that all the substantive rights must be identical for heterosexual couples and same-sex couples.<sup>54</sup> Given that the Court formulated the legal issue as about the right of “two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life,” read restrictively, the Court’s formulation does not explicitly concern the substantive rights of the two people in that permanent, intimate, and exclusive union.<sup>55</sup> Thus, one could conclude that a civil union that allows the same-sex couple to have a partnership that is permanent, intimate, and exclusive would be sufficient to meet the constitutional requirement set out by the Court. Concerns over a more restricted construction of the Court’s opinion were alleviated by the fact that, per Court order, same-sex couples would be able to utilize existing law to marry and “be accorded the status of a legally-recognized couple, and then enjoy the rights and bear the obligations arising on couples,” in the event that the legislature did not pass subsequent legislation codifying the opinion in J.Y. Interpretation No. 748 within the allotted grace period.<sup>56</sup> It is worth noting that the Court used unequivocal language when discussing the rights of same-sex couples who marry based on existing law, but left such details to the Legislature Yuan for the law it is required to pass.<sup>57</sup> When there are two options where strong language is used in one but absent in the other, one possible interpretation is that it was purposefully excluded

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<sup>51</sup> Calum Stuart, *Taiwan’s Proposal of a Separate Same-Sex Marriage Law Angers Equality Campaigners*, GAY STAR NEWS (Dec. 1, 2018, 2:50 PM), <https://www.gaystarnews.com/article/taiwans-proposal-of-a-separate-same-sex-marriage-law-angers-equality-campaigners>.

<sup>52</sup> See J.Y. Interpretation No. 748, *supra* note 5.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at ¶ Issue.

<sup>56</sup> *Id.* at ¶ 17.

<sup>57</sup> See J.Y. Interpretation No. 748, *supra* note 5.

in the latter. This absence of detail allows the legislature some degree of freedom to pick and choose which rights should be afforded to same-sex couples while still satisfying the holding of the opinion.

The Court also found that the Marriage Chapter of the Civil Code violated the equality provision of the Constitution as enshrined in Article 7.<sup>58</sup> Although sexual orientation is not explicitly listed as one of the protected classes, the Court explained that the “classifications of impermissible discrimination set forth in the said Article are only illustrative, rather than exhaustive [and] [t]herefore, different treatment based on other classifications, such as disability or sexual orientation, shall also be governed by the right to equality under the said Article.”<sup>59</sup> Consequently, discrimination on the basis of sexual orientation, in this case allowing only heterosexual couples to marry, would violate the Constitution as LGBTQ persons are an immutable, insular class, and disparate treatment that does not pass heightened scrutiny would be unconstitutional.<sup>60</sup>

Important in this reasoning was the Court’s explanation that the five classifications explicitly listed in the Constitution—sex, religion, race, class, or party affiliation—are not exhaustive.<sup>61</sup> This provided space for the Court to add sexual orientation as a class instead of treating sexual orientation discrimination as gender discrimination. This part of the opinion shows the Court’s willingness to go beyond the text to prohibit discrimination based on immutable characteristics that were not contemplated when the Constitution was drafted.<sup>62</sup>

While the Court was somewhat ambiguous in its discussion of the freedom of marriage and what it substantively entails, the Court appeared to have done the opposite when discussing the equality provision of the Constitution.<sup>63</sup> Nonetheless, the ambiguity of the Court’s opinion on the rights associated with marriage provided space for debate and multiple interpretations, which allowed opponents of same-sex marriage to repudiate legislation meant to effectuate the Court’s holding and then additionally provided these opponents with ammunition to introduce referendum propositions with the intent of

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<sup>58</sup> J.Y. Interpretation No. 748, *supra* note 5, ¶ Holding.

<sup>59</sup> *Id.* at ¶ 14.

<sup>60</sup> *Id.* at ¶ 15.

<sup>61</sup> *Id.* at ¶ 14.

<sup>62</sup> *Id.* at ¶ Holding.

<sup>63</sup> *See* J.Y. Interpretation No. 748, *supra* note 5.

passing legislation that would fulfill the Constitutional Court's order to pass legislation but in the narrowest sense possible.<sup>64</sup>

*B. Concurring Opinion*

The concurring opinion was written by Justice Huang Horng-Shya ("Justice Huang"). Kuo and Chen assert that "[the opinion] is concurring only in name . . . [as] Justice Huang dissents from not only the majority's reasoning but also the entire result."<sup>65</sup> David Huang, on the other hand, notes that "Justice Huang Horng-Shya clearly announced that she voted to legalise same-sex unions, albeit with ambiguity about the form of legislation."<sup>66</sup> The fact that Justice Huang's opinion was interpreted so disparately is not surprising, as it reads like a letter to the people of Taiwan as she specifically addresses the two sides and, at certain portions, seems to resemble more rambling than legal analysis. Though Justice Huang did ultimately say same-sex marriage should be legalized, she did not find the freedom of marriage argument convincing because she did not believe freedom of marriage can be applied to same-sex couples if the definition of marriage, which is heterosexual as supported by tradition, was not redefined by the majority opinion.<sup>67</sup> Furthermore, Justice Huang asserted that she believed men and women are inherently different, and, as the composition of same-sex marriages would lack that inherent difference, would thus be by nature different than heterosexual marriages.<sup>68</sup> Ultimately, Justice Huang appeared to find that same-sex unions, and not necessarily marriage, should be legal based on the equal right to form stable unions.<sup>69</sup> Refusing to find a fundamental right to same-sex marriage, she noted that this was a political question best left for the Legislative Yuan.<sup>70</sup> Thus, as her unwillingness to go as far as the majority and infer a constitutional right to same-sex marriage coincided with her agreement in judgment, Justice Huang might have felt compelled to differentiate her opinion in a separate concurrence.

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<sup>64</sup> See *infra* Part IV(A).

<sup>65</sup> Kuo & Chen, *supra* note 17, at 129.

<sup>66</sup> Huang, *supra* note 30, at 92.

<sup>67</sup> J.Y. Interpretation No. 748, *supra* note 5 (Huang, J., concurring).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Huang, *supra* note 30, at 93.

*C. Dissenting Opinion*

Justice Wu Chen-Huang (“Justice Wu”) wrote the dissenting opinion and held that “the freedom of marriage protected by the Constitution of 1947 is limited to heterosexual unions, and any change in the definition of marriage should be decided democratically.”<sup>71</sup> Justice Wu asserted that marriage is an institution with “deep-rooted social and cultural connotations,” and as such, it was important for the Court not to foist what was understood as a global progressive trend onto a population that might not have been socially or culturally ready to accept same-sex marriage.<sup>72</sup> In any case, Justice Wu went on to argue that viewing same-sex marriage, generally, as a global trend had its own problems, as there was no international consensus of same-sex marriage as a fundamental right—for example, only 21 out of 193 recognized countries actually afford such rights to same-sex couples.<sup>73</sup> Justice Wu also listed various international instruments including the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights, to show that none of them mandate same-sex marriage.<sup>74</sup> Thus, for the aforementioned reasons, Justice Wu found that there was no valid justification for believing that Taiwan should be obligated to legalize same-sex marriage.<sup>75</sup> Justice Wu also opined that one of the cornerstones of marriage is procreation, and as same-sex couples cannot procreate, they should not be afforded such a right.<sup>76</sup> To counter the argument that heterosexual couples may choose to not have children, Justice Wu asserted that this would be an individual choice, whereas same-sex couples would not even have the choice.<sup>77</sup> However, this justification necessarily undermines itself and underlines its own inconsistencies, because the existence of a choice not to procreate should necessarily imply that procreation is not a cognizable “cornerstone” of marriage. Unfortunately, Justice Wu was silent on this inconsistency.

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 94.

<sup>74</sup> J.Y. Interpretation No. 748, *supra* note 5 (Wu, J., dissenting). Curiously, Justice Wu also included the Japanese Constitution’s definition of marriage being between a man and a woman to justify that same-sex marriage should not be legalized in Taiwan without explaining the connection.

<sup>75</sup> *Id.*

<sup>76</sup> *See id.*

<sup>77</sup> *See id.*

### III. COMPETING LEGISLATIVE YUAN BILLS TO LEGALIZE SAME-SEX MARRIAGE

In 2016, prior to the release of J.Y. Interpretation No. 748, multiple bills legalizing same-sex marriage were introduced by various members of the Legislative Yuan.<sup>78</sup> DPP legislator Yu Mei-nu introduced the most supported bill due to the number of co-sponsors from her party.<sup>79</sup> The NPP also proposed a similar bill, which gained less attention but was perceived to be more comprehensive, as it would have amended more Civil Code articles regarding relationships between parents and children in a manner more favorable to same-sex couples.<sup>80</sup> Though the opposition Kuomintang (“KMT”) leadership was against same-sex marriage, KMT legislator Jason Hsu, who is perceived as a political maverick, nevertheless introduced his own same-sex marriage friendly legislation to the Legislative Yuan.<sup>81</sup> The three bills all proposed to amend provisions in the Civil Code. The DPP proposal, the shortest by far, amends four articles but adds a new article that would make the law applicable to same-sex couples without changing the wording of “husband and wife” or “father and mother” throughout the Civil Code.<sup>82</sup> The proposed Article 971-1 states:

Provisions regarding the rights and responsibilities of husbands and wives apply equally to parties in same-sex and different sex marriages. Provisions regarding the rights and responsibilities of fathers, mothers, daughters, and sons apply equally to the relationships of same-sex and different sex spouses to their sons and

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<sup>78</sup> Abraham Gerber, *DPP and NPP Start Push for Same-Sex Marriages*, *TAIPEI TIMES* (Oct. 25, 2016), <http://www.taipeitimes.com/News/taiwan/archives/2016/10/25/2003657881>; Christie Chen & Chen Chun-hua, *Gay Marriage Amendments Pass First Legislative Reading*, *FOCUS TAIWAN* (Nov. 8, 2016), <http://focustaiwan.tw/news/aip/201611080027.aspx>.

<sup>79</sup> 院總第1150號委員提案第19706號 [Legislative Yuan No. 1150 Legislator Proposed Legislation No. 19706].

<sup>80</sup> 院總第1150號委員提案第19699號 [Legislative Yuan No. 1150 Legislator Proposed Legislation No. 19699].

<sup>81</sup> 院總第1150號委員提案第19730號 [Legislative Yuan No. 1150 Legislator Proposed Legislation No. 19730].

<sup>82</sup> See Proposed Legislation No. 19706, *supra* note 79.

daughters, except Article 1063, which shall only apply to different sex spouses.<sup>83</sup>

The four articles this bill would have amended are Articles 972, 973, 980, and 1079-1. The current and proposed provisions are as follows:

Article 972<sup>84</sup>

*Current:* An agreement to marry shall be made by the male and the female parties in their own accord.

*Proposed:* An agreement to marry shall be made by the two parties in their own accord.

Article 973

*Current:* A male who has not reached his seventeenth year of age and a female her fifteenth may not make an agreement to marry.

*Proposed:* An underage person who has not reached the age of seventeen may not make an agreement to marry.

Article 980

*Current:* A man who has not completed his eighteenth year of age and a woman her sixteenth may not conclude a marriage.

*Proposed:* An underage person who has not completed the eighteenth year of age may not conclude a marriage.

Article 1079-1

*Current:* The court shall approve the adoption of the minor based upon the best interest of the adoptive child.

*Proposed:* The court shall approve the adoption of the minor based upon the best interest of the adoptive child. The court and adoption agency, when deciding the best interest of the child, may not discriminate based on the adoptive parents' gender, sexual orientation, gender identity, and gender expression/characteristics.

The KMT and NPP bills took a different approach and were lengthier. Instead of adding a provision like the aforementioned Article 971-1, their proposals would have amended various Civil Code provisions by changing language such as "husband and wife" to "spouses" and "father and mother" to "both parents."<sup>85</sup> The KMT and NPP proposed bills were similar in many respects, with the most

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<sup>83</sup> See Proposed Legislation No. 19730, *supra* note 81 [this provision was translated from the original Chinese by the author].

<sup>84</sup> The current versions of the following four articles are official translations, whereas the proposed language was translated from the Chinese by the author.

<sup>85</sup> See Proposed Legislation No. 19699, *supra* note 80; Proposed Legislation No. 19730, *supra* note 81.



substantial difference being a handful of articles were considered for amending in one and not the other and vice versa.

The meeting of the Judiciary and Organic Laws and Statutes Committee of the Legislative Yuan to deliberate on the three bills occurred in November 2016.<sup>86</sup> The bulk of KMT legislators unsurprisingly opposed all the bills, and even Jason Hsu, who proposed the KMT version, did not fully endorse his own bill during his introductory speech, likely due to pressure from his party leadership.<sup>87</sup> Instead, Jason Hsu said that with a majority of the legislators proposing or sponsoring at least one of the bills or otherwise indicating their support for marriage equality, it was time to have a discussion on this issue.<sup>88</sup> Despite being a vocal supporter of same-sex marriage, he failed to advocate for anything more than a discussion.<sup>89</sup>

The KMT legislators were shrewd in their opposition compared to the last round of debates on same-sex marriage in 2014, when they used spurious arguments such as “same-sex marriage would lead to bestiality.”<sup>90</sup> This time, the KMT legislators based their opposition on procedural unfairness,<sup>91</sup> demanding more public input through more than thirty public hearings to be held before the line-by-line review of the bills commenced.<sup>92</sup> DPP legislator Tuan Yi-kan accused the KMT legislators of using procedural objections as a stalling tactic for a bill they did not substantively support.<sup>93</sup> During the meeting, the KMT legislators made several motions to halt the proceedings that were rejected by votes of 5-4 of the committee members (Jason Hsu chose not to vote), which led to tantrums thrown by KMT legislators that included physically attempting to stop Legislator Yu from

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<sup>86</sup> LIFAYUAN GONGBAO DI 105 JUAN DI 95 QI WEIYUANHUI JILU (立法院公報第105卷第95期委員會紀錄) [Legislative Yuan Bulletin Volume No. 105 95th Committee Meeting Records], available at [lis.ly.gov.tw/lgcgi/lypdfxt?10509501;0001;0068](http://lis.ly.gov.tw/lgcgi/lypdfxt?10509501;0001;0068).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> M. Bob Kao, *Re-energising Taiwan's LGBT Rights Movement: The Impact of Obergefell v Hodges*, J. OXFORD CTR. SOC.-LEGAL STUD. (Oct. 28, 2015), <https://joxcsls.com/2015/10/28/re-energizing-taiwans-lgbt-rights-movement-the-impact-of-obergefell-v-hodges/>.

<sup>91</sup> Legislative Yuan Bulletin Volume No. 105 95th Committee Meeting Records, *supra* note 86.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

conducting the meeting.<sup>94</sup> In the end, the parties agreed to two public hearings.<sup>95</sup>

At the hearing, Minister of Justice Chiu Tai-san declined to back any of the bills. Although he reiterated that he supported the general idea of equality, he warned that only amending the Civil Code may cause problems because there are a multitude of other laws that have the terms “husband and wife” and “father and mother.”<sup>96</sup> This would unlikely be a major obstacle in actuality because the intent of the Civil Code amendments would have been to allow same-sex couples to have all the rights of heterosexual couples, so the provisions that still retained gendered terms would be applicable to all couples if same-sex marriage were legalized. The various executive agencies would simply need to make this clear through executive memoranda mandating this interpretation of the laws in their respective purview.

A possible reason for Minister Chiu not supporting any of the existing bills is that the MOJ was intent on pursuing the path of a civil partnership bill, which would not have been ready until February 2017.<sup>97</sup> This timing raised a serious problem because, as part of the agreement between the DPP and KMT to hold the two public hearings, the KMT promised that a bill or some version of a bill would be put to a vote by the end of the legislative session ending in December 2016.<sup>98</sup> The MOJ’s timeline allowed the KMT to argue that they could not allow a marriage equality bill to come out of committee because they would need to consider the upcoming MOJ’s bill to make an informed decision. Instead of showing party unity and solidarity with the DPP legislative caucus by supporting Legislator Yu’s bill, Minister Chiu, appointed by a DPP premier who in turn was appointed by President Tsai Ing-wen, instead made the road to marriage equality more difficult. There were no further developments of the three bills either in the committee or the Legislative Yuan before the legislative session ended in December, and the MOJ failed to introduce a bill in February 2017. The next legislative session did not begin until February 2017, and with the hearing for the J.Y. Interpretation No. 748 scheduled for March 24, 2017, there were no further actions by the Legislative Yuan.

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *See id.*

<sup>97</sup> *See* Legislative Yuan Bulletin Volume No. 105 95th Committee Meeting Records, *supra* note 86.

<sup>98</sup> *See id.*

2019]

TRANSGENDER RIGHTS IN TAIWAN

225

## IV. POST OPINION DEVELOPMENTS

## A. Referendum

Even though the Constitutional Court ruled in May 2017 that same-sex marriage must be legalized, opponents continued to erect roadblocks through initiating anti-equality propositions in the November 2018 referendum.<sup>99</sup> Referenda in Taiwan are governed by the Referendum Law, which allows individuals to propose measures to be voted on by Taiwanese citizens over the age of eighteen provided enough signatures are collected.<sup>100</sup> Out of the ten questions on the ballot to be voted on by Taiwanese citizens, five of them were related to LGBTQ rights.<sup>101</sup> Of the five, three addressed same-sex marriage.<sup>102</sup> The two anti-marriage equality propositions were initiated by conservative Christian groups in Taiwan and were as follows:<sup>103</sup>

Proposition 10: Do you agree that marriage defined in the Civil Code should be restricted to the union between one man and one woman?

Proposition 12: Do you agree to the protection of the rights of same-sex couples in co-habitation on a permanent basis in ways other than changing of the Civil Code?

Proposition 10 had 72.48% of the voters answering in the affirmative, while Proposition 12 had 61.12%.<sup>104</sup> At first glance, the population overwhelmingly did not agree with marriage equality where all couples regardless of gender composition would be able to marry using the same law. However, there were reports of misinformation and obfuscation that confused many voters who may

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<sup>99</sup> Isabella Steger, *Conservatives are Trying to Derail Marriage Equality from Becoming Law in Taiwan*, QUARTZ (Aug. 31, 2018), <https://qz.com/1371823/conservatives-are-trying-to-derail-marriage-equality-from-becoming-law-in-taiwan/> [hereinafter Steger, *Conservatives are Trying to Derail Marriage Equality from Becoming Law in Taiwan*].

<sup>100</sup> GONGMIN TOUPIAOFA (公民投票法) [Referendum Act], available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=D0020050>.

<sup>101</sup> The others were related to LGBTQ materials in sex education. See *The 10 Referendum Questions Taiwanese Are Voting On*, FOCUS TAIWAN (Nov. 24, 2018), <http://focustaiwan.tw/news/aip/201811240010.aspx>.

<sup>102</sup> *Id.*

<sup>103</sup> Steger, *Conservatives are Trying to Derail Marriage Equality from Becoming Law in Taiwan*, *supra* note 99.

<sup>104</sup> Roy Ngerng, *How the LGBT Referendums Split from Taiwanese Popular Opinion*, THE NEWS LENS (Dec. 4, 2018), <https://international.thenewslens.com/feature/lgbttaiwan/109479>.

not have been entirely clear what each measure meant.<sup>105</sup> Immediately after the results, the Constitutional Court reaffirmed the fact that J.Y. Interpretation No. 748 was still binding and any law the Legislative Yuan passes must abide by the ruling.<sup>106</sup> However, even the Constitutional Court's affirmation did not stop some opponents from continuing to argue for civil union laws instead of marriage and accusing the government of disregarding the voice of the people.<sup>107</sup>

Though the propositions passed by a large majority, the results do not necessarily mean that the voters were against LGBTQ rights.<sup>108</sup> In fact, each question captured a range of responses. While 72.48% of the voters prefer marriage to remain defined as a union between one man and one woman, this does not inform us of how many of those voters would like same-sex couples to have all the substantive rights of heterosexual couples under a different name, how many want same-sex couples to have only some of the substantive rights of heterosexual couples, and how many do not think same-sex couples should have any legal rights. It is also unclear whether these voters would like the union to be called a civil union, civil partnership, same-sex marriage, or another name. Similarly, the second question asked by Proposition 12 was also confounding. Of the 61.12% affirmative votes, it was unclear whether they want equal rights but different nomenclature, or some rights and different nomenclature. The "no" votes also would have included those who did not want any legal protection for same-sex couples and those who wanted equal rights and a change to the Civil Code itself, which were contradictory positions.

In response to these two questions, marriage equality advocates also initiated a proposal on same-sex marriage to be put on the ballot.<sup>109</sup> The proposition stated: "[d]o you agree to the protection of same-sex marital rights with marriage as defined in the Civil Code?"<sup>110</sup>

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<sup>105</sup> Isabella Steger, *How Taiwan Battled Fake Anti-LGBT News Before Its Vote on Same-Sex Marriage*, QUARTZ (Nov. 22, 2018), <https://qz.com/1471411/chat-apps-like-line-spread-anti-lgbt-fake-news-before-taiwan-same-sex-marriage-vote/>.

<sup>106</sup> Chen Chun-hua & Chi Jo-yao, *Law Cannot Contradict Constitutional Interpretation: Judicial Yuan*, FOCUS TAIWAN (Nov. 29, 2018, 2:13PM), <http://focustaiwan.tw/news/aip/201811290009.aspx>.

<sup>107</sup> Ryan Drillsma, *Conservative Groups in Taiwan Denounce Draft Same-Sex Marriage Bill*, TAIWAN NEWS (Feb. 21, 2019, 3:24 PM), <https://www.taiwannews.com.tw/en/news/3642917>.

<sup>108</sup> See Ngerng, *supra* note 104.

<sup>109</sup> Steger, *Conservatives are Trying to Derail Marriage Equality from Becoming Law in Taiwan*, *supra* note 99.

<sup>110</sup> *The 10 Referendum Questions Taiwanese Are Voting On*, *supra* note 101.

Only 32.74% of voters answered yes to this question.<sup>111</sup> The percentage of affirmative votes is drastically lower than many public opinion polls held previously that showed support for marriage equality.<sup>112</sup> Regardless of the reason for the lukewarm support, this certainly deflated the energy of many LGBTQ rights activists in Taiwan and led some to question whether Taiwan was truly the most LGBTQ-friendly country in Asia as it had been claimed for years.<sup>113</sup>

### B. Executive Yuan Bill

On February 21, 2019, in response to J.Y. Interpretation No. 748, the Executive Yuan passed a same-sex marriage bill drafted by the MOJ and referred it to the Legislative Yuan for deliberation.<sup>114</sup> The name of the bill had been in contention since J.Y. Interpretation No. 748 was released and brought back into the spotlight again after the referendum. Opponents continued to argue that it should not be called a “marriage” bill because the public was against same-sex marriage; in contrast, advocates continued to insist that it be called “marriage,” as the referendum results were not legally binding and, in any case, would not be able to override the Constitutional Court decision.<sup>115</sup> In the end, the Executive Yuan decided on the title “Enforcement Act of Judicial Yuan Interpretation No. 748” (“Enforcement Act”) to sidestep controversy.<sup>116</sup>

To show deference to the referendum results, the Executive Yuan emphasized that it chose to propose a separate bill that did not purport to change the language of the Civil Code.<sup>117</sup> Instead, the Enforcement

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<sup>111</sup> Ngerng, *supra* note 104.

<sup>112</sup> Jeff Kingston, *Asia Lags Taiwan in Accepting LGBTQ Equality*, JAPAN TIMES (June 3, 2017), <https://www.japantimes.co.jp/opinion/2017/06/03/commentary/asia-lags-taiwan-accepting-lgbtq-equality/>; Tim Rich, Isabel Eliassen & Andi Dahmer, *What Happened to Taiwan's Support for Same-Sex Marriage?*, TAIWAN SENTINEL (Dec. 3, 2018), <https://sentinel.tw/what-happened-to-taiwans-support-for-same-sex-marriage/>.

<sup>113</sup> Amber Wang, *Taiwan's Progressive Image Takes Hit After Divisive Vote*, YAHOO! (Nov. 25, 2018), <https://www.yahoo.com/news/taiwans-progressive-image-takes-hit-divisive-polls-043918113.html>.

<sup>114</sup> Sean Lin, *Cabinet Unveils Marriage Equality Bill*, TAIPEI TIMES (Feb. 22, 2019), <http://www.taipeitimes.com/News/front/archives/2019/02/22/2003710185>.

<sup>115</sup> Drillsma, *supra* note 107.

<sup>116</sup> Lin, *supra* note 114.

<sup>117</sup> Michael Garber, *Cabinet Unveils Draft Bill and Picks a Side in Taiwan's Gay Marriage Fight*, THE NEWS LENS (Feb. 22, 2019), <https://international.thenewslens.com/feature/lgbttaiwan/114212>.

Act mandated that same-sex couples may enter into same-sex marriages and referenced the relevant Civil Code provisions.<sup>118</sup> In effect, the Enforcement Act achieved the same result through reference without amending the Civil Code. While the Executive Yuan claimed that its legislative proposal would afford same-sex couple equal rights, including provisions regarding marriage, divorce, inheritance, marital property, marital duties, and domestic violence protections, there were several curious anomalies. First, Article 3 of the Enforcement Act stated that people eighteen and older would be able to enter into same-sex marriages.<sup>119</sup> This is in contrast to the Civil Code, which allows men to be married at eighteen and women to be married at sixteen.<sup>120</sup> Heterosexual women would be able to marry at a younger age than LGBTQ women after the passage of this law; this is discriminatory on its face and will surely be challenged by advocates in the future.<sup>121</sup>

Second, the Enforcement Act did not allow for same-sex couples to jointly adopt children. The only type of adoption permitted by this law is the adoption of the spouse's biological children.<sup>122</sup> The Enforcement Act is facially discriminatory because heterosexual couples are allowed to jointly adopt, and coupled with the fact that it is more likely to create harm than the minimum age requirement is, a legal challenge is probable. At the time of the introduction of the Enforcement Act, advocates noted the discrepancy on adoption rights, but for the most part did not choose to oppose it based on this difference.<sup>123</sup> It was likely that advocates wanted this bill to pass and would leave this and other potentially discriminatory aspects of the bill to be addressed through future litigation.

Third, it was unclear whether a Taiwanese citizen who wished to marry a person who only maintains citizenship of a foreign country that does not recognize same-sex marriage would be able to do so under this law. This is because Article 46 of the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements states:

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<sup>118</sup> Enforcement Act of Judicial Yuan Interpretation No. 748, *supra* note 15.

<sup>119</sup> *Id.*

<sup>120</sup> CIVIL CODE, *supra* note 26, at art. 980.

<sup>121</sup> The Executive Yuan indicated unofficially that they intend to amend the Civil Code so that the minimum age to enter into marriages for everyone would be eighteen.

<sup>122</sup> Enforcement Act of Judicial Yuan Interpretation No. 748, *supra* note 15.

<sup>123</sup> Ann Maxon, *Marriage Equality: LGBT Groups Support Cabinet Proposal*, TAIPEI TIMES (Feb. 22, 2019), <http://www.taipeitimes.com/News/taiwan/archives/2019/02/22/2003710200>.

[t]he formation of a marriage is governed by the national law of each party. However, the procedure of concluding a marriage is 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.<sup>124</sup>

The first line of the law makes it clear that if the foreign spouse is from a country that does not allow same-sex marriage, she or he would not be able to marry in Taiwan as the prerequisites for the formation of a marriage would not be satisfied. From a textual analysis, it may be possible for Article 8 of the same act to be interpreted to allow someone in this position to marry, however. Article 8 states: [w]here this Act provides that the law of a foreign State is applicable, if the result of such application leads to a violation of the public order or boni mores of the Republic of China, that law of the foreign State is not applied.<sup>125</sup>

As the law of the foreign state that prohibits same-sex marriage could be argued to in violation of Taiwan's public order, which recognizes marriage equality, one could interpret the law as inapplicable, and the foreign spouse would still be able to marry the Taiwanese citizen under Taiwanese law. However, whether this provision is interpreted to allow same-sex marriage for foreigners from states that prohibit it would be up to the discretion of the Ministry of the Interior ("MOI") when deciding whether to register such marriages as it is in charge of household registrations.<sup>126</sup> The MOI has not acted thus far, and Taiwanese citizens cannot enter into same-sex marriages with citizens of states that do not recognize same-sex marriage. The enactment date of the Enforcement Act was May 24, 2019, which was also the deadline given by the Constitutional Court.<sup>127</sup> In essence, regardless of the process, same-sex marriage in Taiwan became legal on that date. However, the battle to achieve actual equality in practice had only just begun.

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<sup>124</sup> SHEWAI MINSHI FALU SHIYONGFA (涉外民事法律適用法) [Act Governing the Choice of Law in Civil Matters Involving Foreign Elements] art. 46, available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000007>.

<sup>125</sup> *Id.* at art. 8.

<sup>126</sup> HUJI FA (戶籍法) [Household Registration Act].

<sup>127</sup> Enforcement Act of Judicial Yuan Interpretation No. 748, *supra* note 15.

*C. Fault of the Constitutional Court*

The developments described above likely occurred because of (i) the Constitutional Court's ambiguous language on how same-sex marriage can be realized in Taiwan and (ii) the two-year grace period it provided. In the hope of minimizing the number of dissenting opinions, the majority opinion may have traded away much of the potential strength of J.Y. Interpretation No 748. The Court could have either chosen not to compromise and explicitly stated that marriage equality could only take the form of an amendment of the Civil Code, or it could have not provided a two-year grace period. Either of those routes would have provided fewer opportunities for opponents to organize against effectuating the opinion because there likely would not have been enough ambiguity in the language and time respectively.

Instead, the combination of the two-year grace period and lack of instruction on the form of the law caused numerous problems after the ruling.<sup>128</sup> Without the grace period, there would not have been an opportunity for opponents to gather signatures and put their questions on the ballot for the public to vote.<sup>129</sup> While the argument of the opponents was that the people's voice matters in a democracy, it is indisputable that fundamental rights in the Constitution are guaranteed and cannot be overturned by public opinion, as the MOJ reminded the public after the referendum.<sup>130</sup> With clearer instructions from the Constitutional Court on the form of the legislation to ensure marriage equality, even if there were a grace period, opponents would not have had the excuse to ask through the referendum whether the Civil Code should be amended or whether same-sex marriage should be enshrined outside of the Civil Code.

Furthermore, without the grace period, the Legislative Yuan would have had to act expediently to comply with the Constitutional Court's ruling, and if that were the case, it is likely they would have used one of the existing bills as the basis and moved forward with the

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<sup>128</sup> See *supra* Part III.

<sup>129</sup> Nikhil Sonnad, *Taiwan's Vote against Same-sex Marriage Illustrates the Problem with Referendums*, QUARTZ (Nov. 25, 2018), <https://qz.com/1474097/taiwan-votes-against-same-sex-marriage-in-referendum/>.

<sup>130</sup> Laurel Wamsley, *Taiwan's Parliament Legalizes Same-Sex Marriage, A First In Asia*, NPR (May 17, 2019), <https://www.npr.org/2019/05/17/724222598/taiwans-parliament-legalizes-same-sex-marriage-a-first-in-asia>; Rik Glauert, *Taiwan's Same-Sex Marriage Court Ruling 'Cannot be Touched' Says Justice Minister*, GAY STAR NEWS (Nov. 30, 2018), <https://www.gaystarnews.com/article/taiwans-same-sex-marriage-ruling-cannot-be-touched-says-justice-minister/>.



2019]

TRANSGENDER RIGHTS IN TAIWAN

231

deliberations in the following legislative session in Fall 2017. Had the Constitutional Court explicitly stated that the Civil Code needed to be amended, there may not have been much debate before the amendments were passed as Legislator Yu's version would have been the preferred one due to its support in the Legislative Yuan. Instead, the drawn-out debates during the grace period resulted in the MOJ drafting its own bill to be approved by the Executive Yuan. In the end, it took almost the entire two years for the MOJ to do so, further delaying equality for same-sex couples.

In short, the ambiguity of the opinion released by the Constitutional Court caused many problems after its ruling. While the Court's holdings found that same-sex marriage is guaranteed by the Constitution and its reasoning was unequivocal at least for the equal protection argument, the subsequent implementation by the Legislative Yuan and Executive Yuan was disastrous. Perhaps the majority did not expect the grace period and lack of instruction on the form to cause as much trouble as it did. Perhaps those who wanted these concessions knew exactly what would happen if they were able to prolong and obfuscate the implementation of the ruling. Regardless of the motivations that led to the compromise resulting in few dissenting opinions, the fact is that the majority opinion, while legalizing same-sex marriage, also put up obstacles that proponents have had to address since May 2017. It is unclear whether this was the right approach instead of an uncompromised one that explicitly guaranteed the form of the legislation and mandated that it be passed forthwith, even if the trade-off would have been additional dissenting opinions. Rather than being a clear victory for marriage equality proponents, the Constitutional Court's ruling energized opponents of marriage equality, and opposition continued to take shape and grow. Instead of immediately taking steam away from their cause, the opposition generated more support from the referendum and the Legislative Yuan continued to stall. The fear, which remains to be seen, is that this opposition becomes entrenched and will continue to oppose marriage equality in practice and other demands for LGBTQ rights. Perhaps the backlash generated by the *Same-Sex Marriage* will resemble that of *Brown*.

## V. CHANGING GENDERS

## A. Legal Requirements

Even though the Constitutional Court's ruling put up roadblocks for marriage equality, same-sex marriage was ultimately legalized on May 24, 2019, making Taiwan the first Asian country to do so.<sup>131</sup> If the substantive rights of same-sex couples turn out to not be equal to those of heterosexual couples, which is the case already regarding the minimum age and adoption restrictions, these discriminatory treatments will have to be further litigated in the courts or be corrected by the legislature. This could persist for years, and in a way may resemble the situation after *Brown*. While advocates of LGBTQ rights must continue to advocate for substantive equality in marriage, it is simultaneously important to remember that LGBTQ rights are not just about marriage. The marriage debate has occupied the vast majority of the mainstream discourse on LGBTQ rights in Taiwan, but there are other struggles that need to be fought. LGBTQ rights advocates must strategize and determine what the next steps are and how to proceed systematically.<sup>132</sup>

This article argues that transgender rights needs to become a focus for LGBTQ rights activists as transgender persons are heavily marginalized in society. Transgender persons face violence and discrimination in all aspects of their lives, including housing, employment, and healthcare.<sup>133</sup> In Taiwan in particular, transgender persons also face onerous requirements in order to legally change their gender, a process which has been governed by administrative regulations promulgated by the executive agencies.<sup>134</sup> In 1988, the

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<sup>131</sup> Chris Horton, *After a Long Fight, Taiwan's Same-Sex Couples Celebrate New Marriages*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/world/asia/taiwan-same-sex-marriage.html>.

<sup>132</sup> See Leonore F. Carpenter, *The Next Phase: Positioning the Post-Obergefell LGBT Rights Movement to Bridge the Gap Between Formal and Lived Equality*, 13 STAN. J. C.R. & C.L. 255 (2017).

<sup>133</sup> See Emilia L. Lombardi, Riki Anne Wilchins, Dana Priesing & Diana Malouf, *Gender Violence: Transgender Experiences with Violence and Discrimination*, 42 J. HOMOSEXUALITY 89 (2002); Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37 (2000); Abigail W. Lloyd, *Defining the Human: Are Transgender People Strangers to the Law*, 20 BERKELEY J. GENDER L. & JUST. 150 (2005); Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83 (2008).

<sup>134</sup> Ho, *supra* note 23, at 427.

first gender affirmation surgery was allowed in Taiwan.<sup>135</sup> In order to have the surgery, one had to be diagnosed with gender dysphoria by psychiatrists, undergo a two-year evaluation period, be between the ages of twenty and forty, and officially notify a parent.<sup>136</sup> From 1988 until 2008, individuals who legally changed their gender had to undergo gender affirmation surgery and further psychiatric evaluations.<sup>137</sup> In 2008, the new rules released by the MOI no longer required gender affirmation surgery but mandated that transgender persons had to remove their reproductive organs in addition to undergoing psychiatric evaluations.<sup>138</sup> This forced sterilization has been criticized as a violation of the person's dignity and human rights.<sup>139</sup>

Nevertheless, the government did not respond to this condemnation until five years later. In December 2013, the Ministry of Health and Welfare ("MOHW") recommended that transgender persons seeking to change their gender should not have to go through psychiatric evaluations nor be subjected to surgery removing their reproductive organs.<sup>140</sup> Though this was merely the MOHW's recommendations after a consultation meeting with representatives from non-profit organization and government agencies, it was widely reported erroneously in Taiwan and abroad as an official change in the regulations.<sup>141</sup> The fact that it came from just the MOHW should have been a hint that this was not binding, as a change in regulation would require the approval of the MOI, the governmental department in charge of household registrations and identification cards, which include gender designations.

A year later, in December 2014, the MOI, under the Executive Yuan's order, finally responded to the MOHW's proposal. The MOI decided not to adopt the recommendations but asserted that more

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<sup>135</sup> *Id.*

<sup>136</sup> MINISTRY OF HEALTH AND WELFARE, MEETING RECORDS OF CONSULTATION ON GENDER CHANGE REGISTRATION DETERMINATION (Dec. 9, 2013), [http://www.istscare.org/wp-content/uploads/2015/05/20141209\\_mohw.pdf](http://www.istscare.org/wp-content/uploads/2015/05/20141209_mohw.pdf).

<sup>137</sup> Ho, *supra* note 23, at 427.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 427-28.

<sup>140</sup> Loa Iok-sin, *Ministry Supports Easing Rules on Gender-Change*, TAIPEI TIMES (Dec. 10, 2013), <http://www.taipeitimes.com/News/taiwan/archives/2013/12/10/2003578699>.

<sup>141</sup> *See, e.g.,* Derek Yiu, *Taiwan to Allow Legal Gender Changes without Transitioning. Transgender and Intersex Individuals Will Have Much Freer Choice*, GAY STAR NEWS (Dec. 9, 2013), <https://www.gaystarnews.com/article/taiwan-allows-legal-gender-changes-without-transitioning091213/>.

discussion on this issue would be necessary because while it is important to safeguard the human rights of transgender persons, social order and harmony must be maintained.<sup>142</sup> The MOI went on to state that the sentiments of non-transgender gender binary people who share public accommodations such as pools, restrooms, bath houses, and gyms with transgender persons must also be considered.<sup>143</sup> Therefore, as ordered by the Secretary-General of the Executive Yuan, the MOHW and MOI would hold further meetings before a decision is made, and the status quo that required two psychiatric evaluations and the removal of reproductive organs would be maintained in the interim.<sup>144</sup>

Transgender rights activists were understandably outraged that a policy recommendation that would have been one of the most progressive in the world in terms of legal gender change—most jurisdictions that do not mandate surgery still require psychiatric evaluations—was not being adopted.<sup>145</sup> Furthermore, the justification used by the MOI for its lack of action—i.e., the well-being and comfort of gender binary people—gave the impression that the basic human rights of transgender persons were dependent on the approval of the society as a whole.<sup>146</sup>

In response, the MOI proposed a new policy in January 2015 that removed the surgery requirement.<sup>147</sup> However, the new policy created new onerous requirements for transgender persons.<sup>148</sup> First, the applicant must obtain psychiatric evaluations by two psychiatrists and sign an agreement vowing not to change genders again, which must be filed with the Household Registration Office.<sup>149</sup> Second, the applicant must prove to a new committee composed of individuals from the MOI, MOJ, and MOHW that the person is not in a marital

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<sup>142</sup> MOI Press Release (Dec. 11, 2013), *available at* <https://www.ey.gov.tw/Page/AE5575EAA0A37D70/00ba9dcb-b6f7-4a65-8cab-5f4cc72d0054>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Joint Statement by Transgender Rights Groups* (Dec. 26, 2016), *available at* <https://www.cooloud.org.tw/node/81233>.

<sup>146</sup> *See supra* notes 142-45 and accompanying text.

<sup>147</sup> XINGBIE BIANGENG RENDINGZHI SHENQINGJI DENGJI ZUOYEYAO DIAN (性別變更認定之申請及登記作業要點) [Key Points for the Application and Registration of Gender Change Determination], *available at* [http://www.istscare.org/wp-content/uploads/2015/05/20150506\\_moi\\_1.pdf](http://www.istscare.org/wp-content/uploads/2015/05/20150506_moi_1.pdf).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

relationship and has no children.<sup>150</sup> Finally, the committee has six months to approve or reject the legal gender change.<sup>151</sup> While there would no longer be a surgery requirement, these three additional burdens do nothing to serve any purpose besides furthering arbitrary state control over an individual's body.

First, prohibiting multiple gender changes has no reasonable purpose. While some transgender persons may wish to transition from male to female or from female to male and would continue to identify as their new gender for the remainder of their lives, others may have a more fluid sense of gender identification which may also change over time. Prohibiting multiple transitions also perpetuates the notion of a gender binary that is connected by a linear line, when that may not be the case for many transgender persons.<sup>152</sup> A reasonable explanation for having this policy is to prevent fraudulent activities, which could easily be prevented through other means. In any case, "it is difficult to see why a transgender person's seeking to live in accord with his gender identity should be understood to cross a line into unlawfulness."<sup>153</sup>

Second, the requirement that one not be married most likely pertains to not allowing a married heterosexual couple to have one spouse change genders to form a same-sex marriage as there are currently no requirements that couples need to divorce if one were to change genders. This provision was likely in response to a famous case in which the MOI decided to uphold a same-sex marriage created through the gender transition of one partner, a situation the MOI may not want to face again.<sup>154</sup> However, the current legalization of same-sex marriage has thus rendered this fear of creating a same-sex marriage in contradiction of marriage statutes to be obsolete and irrelevant, and thus the requirement should be dropped.

The third requirement of not having existing children lacks any rational basis. The proposed rule may arise from the unfounded fear that a parent changing genders would be detrimental to the children's

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> See Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 273-78 (2005).

<sup>153</sup> David B. Cruz, *Transgender Rights After Obergefell*, 84 UMKC L. REV. 693, 696 (2016).

<sup>154</sup> Kao, *supra* note 27. See also Loa Iok-sin, *Transgender Couple's Marriage Valid*, TAIPEI TIMES (Aug. 8, 2013), <http://www.taipetimes.com/News/taiwan/archives/2013/08/08/2003569213>.

upbringing, similar to bogus claims made by opponents of same-sex marriage that children with same-sex parents grow up disadvantaged. In any case, this reasoning would not even be applicable if the children of the transgender individual were already adults, a distinction the requirement does not make. This is undoubtedly an overly broad restriction based on, at best, a faulty assumption, and, at worst, discriminatory animus.

After meetings with concerned groups, the MOI released a new proposal that removed the requirement that the person not have children.<sup>155</sup> Persons who are married can also transition provided that they obtain spousal consent.<sup>156</sup> The person is also allowed an opportunity to legally change back to one's original gender.<sup>157</sup> These are welcome changes, but there has been no progress on turning these proposals into law or regulation since May 2015.<sup>158</sup> As of today, legally changing one's gender in Taiwan still requires surgery for the removal of reproductive organs.<sup>159</sup>

### *B. Using Interpretation No. 748 for Transgender Rights*

The Taiwanese government has shown little interest in transgender rights. After President Tsai was inaugurated in 2016 and the Legislative Yuan had a DPP majority, both purportedly being allies of the LGBTQ community, the situation remained unchanged. There was no further action on the proposal by the MOI nor were any other new proposals introduced by the MOHW, MOI, or the Office of the President. The public and LGBTQ activists, understandably, were focused on marriage equality. Despite the high-profile appointment of Audrey Tang, a transgender person, to the Cabinet, there has not been any progress from the government to address the needs and legal barriers faced by transgender persons in Taiwan, as neither the

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<sup>155</sup> XINGBIE BIANGENG RENDINGZHI SHENQINGJI DENGJI CHULIYUANZE (性別變更認定之申請及登記處理原則) [Principles for Application and Registration of Gender Change Determination], available at [http://www.istscare.org/wp-content/uploads/2015/05/20150506\\_moi\\_1.pdf](http://www.istscare.org/wp-content/uploads/2015/05/20150506_moi_1.pdf).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Hsiaowei Kuan, *LGBT Rights in Taiwan—The Interaction Between Movements and the Law*, in *TAIWAN AND INTERNATIONAL HUMAN RIGHTS: A STORY OF TRANSFORMATION* 593, 604 (Jerome A. Cohen, William P. Alford & Chang-fa Lo eds., 1st ed. 2019).

<sup>159</sup> Lisa Hofmann-Kuroda, *As Gay Marriage is Legalized in Taiwan, Trans People Continue to Face Violence Across Asia*, *WEAR YOUR VOICE* (June 4, 2019), <https://wearyourvoicemag.com/lgbtq-identities/gay-marriage-trans-queer-asia>.

MOHW nor the MOI have held discussions on the requirements for transitioning and no legislation have been introduced to address transgender rights.<sup>160</sup>

Nevertheless, J.Y. Interpretation No. 748 may be a useful precedent for negotiations or litigation in the future to overturn the onerous requirements of changing one's gender, as it held that laws that discriminate based on sexual orientation would have to undergo heightened scrutiny.<sup>161</sup> Combined with the enumerated ban against gender discrimination, Article 7 of the Constitution would provide robust protection from discrimination for transgender persons, as they would be protected on the basis of their gender identity and sexual orientation, which are both immutable characteristics.<sup>162</sup> It is not necessary for individuals who were born with the biological sex of male or female to undergo any surgery to conform with their assigned gender, and therefore there is no important public interest that is protected by requiring transgender persons to undergo these surgical procedures either. Equal protection based on gender and sexual orientation means everyone should be able to live as their preferred gender without requiring invasive surgery. And even if there were a public interest, such as ensuring that biological men and women felt safe in public accommodations, as argued by the MOI, there are less onerous ways to effectuate it—perhaps separate changing rooms—without forcing transgender people to have surgery. The current requirements are simply a way to police the bodies of transgender persons and take away their dignity for simply wanting to live in accordance with their gender identity.

The fundamental right to marriage was interpreted in J.Y. Interpretation No. 748 to be protected by Article 22, which states that “[a]ll other freedoms and rights of the people that are not detrimental to social order or public interest shall be guaranteed under the Constitution.”<sup>163</sup> Transgender persons who wish to legally change their gender are not detrimental to social order or public interest—in

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<sup>160</sup> See Ralph Jennings, *She's Young, Transgender, and an Anarchist, and is Leading Taiwan's Drive to Become a Digital Powerhouse*, L.A. TIMES (May 9, 2017), <https://www.latimes.com/world/asia/la-fg-taiwan-digital-minister-20170419-story.html>.

<sup>161</sup> See J.Y. Interpretation No. 748, *supra* note 5.

<sup>162</sup> For a discussion of the protection of transgender persons through the Equal Protection Clause in the United States, see Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 551 (2016).

<sup>163</sup> See J.Y. Interpretation No. 748, *supra* note 5.

fact, their wish to change their gender so that it corresponds to their identity is consistent with social order and public interest. They want to be externally identified the way they do internally. It is in the public interest for people to live the way they wish, and having others treat them the way they identify is, in fact, in support of social order because it would decrease the chances of confusion. Such a freedom cannot be taken away by forcing people to undergo surgery that they may be opposed to, as it would be a fundamental violation of their dignity and body integrity.

In short, there is still a long road for the rights of transgender people in Taiwan, and those who seek to legally change their gender face unnecessary obstacles simply for wanting to have control over their bodies. Though J.Y. Interpretation No. 748 seems to explicitly address marriage equality only, the universal principles of freedom and equality espoused in the opinion can be borrowed to argue against the current onerous requirements that are not “genuinely and proportionately responding to some functional concern.”<sup>164</sup> Advocates must use J.Y. Interpretation No. 748 to fight for the rights of transgender persons in Taiwan and to move the conversation forward in terms of LGBTQ rights in Taiwan.

## VI. CONCLUSION

The road to marriage equality in Taiwan has been long and arduous. Through the dedication of people such as Chi, organizations such as the TAPCPR, and allies in the government, same-sex couples can finally marry in Taiwan. Discriminatory treatment between same-sex and heterosexual couples on issues such as adoption and foreign marriages will have to be further litigated, but the majority opinion in J.Y. Interpretation No. 748 provides a solid foundation for robust arguments. For a while, it appeared that the two-year grace period and the lack of progress by the MOJ and the Legislative Yuan was going to allow opposition against marriage equality to grow and slowly become entrenched. While the strength and span of the backlash of J.Y. Interpretation No. 748 will unlikely match that of *Brown* in the United States, one can see the similarity of the negative responses to progressive constitutional interpretations by the highest courts that protect disenfranchised people. The foundation provided by J.Y. Interpretation No. 748 also must be used to combat against other forms of discrimination based on sexual orientation and to fight for the rights

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<sup>164</sup> Cruz, *supra* note 153, at 704.



of transgender persons in Taiwan, a community that has been pushed to the margins by LGBTQ rights advocates, governmental officials, and society as a whole due to the focus on the right to marriage.

In a 2008 keynote address, transgender rights activist and law professor Dean Spade stated:

My hope is that we can begin formulating demands that seek to do more than just slightly alter regulatory norms. The demands I hear coming out of trans communities directly affected by the most severe manifestations of transphobia are transformative demands like prison abolition, access to housing and income, and universal trans-inclusive healthcare. Those kinds of demands cannot be won by lawsuits—they require deep transformation of oppressive systems. They confront the very bases of capitalism, white supremacy, body norms, and empire. We need to rethink the role lawyers play in this vision—it does not involve “winning equality” for people. It is a role that involves supporting the political movements that change these dynamics, not replacing their demands with demands for formal legal equality.<sup>165</sup>

While incremental change through negotiations or litigation is important, it must only be one part of the larger strategy to examine the system and how it fundamentally mistreats transgender persons and the greater LGBTQ community. This article has provided one small way to attempt to make the everyday lives of transgender persons in Taiwan *better* by utilizing the reasoning of the Justices in J.Y. Interpretation No. 748 to eliminate the arduous requirements for legal gender change. On a broader strategic level, lawyers and legal scholars must come together with activists and allies to ensure that not only can LGBTQ persons experience the freedom and autonomy currently enjoyed by others, but also to transform the meaning and practice of freedom and autonomy in the process.<sup>166</sup> J.Y. Interpretation No. 748 can be the catalyst for that goal.

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<sup>165</sup> Dean Spade, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 353, 373 (2009).

<sup>166</sup> For examples of possible ways to approach advocating for transgender rights and freedom, see Gilden, *supra* note 133; Dean Spade, *Laws as Tactics*, 21 COLUM. J. GENDER & L. 442 (2011); Ido Katri, *Transgender Intrasectonality: Rethinking Anti-Discrimination Law and Litigation*, 20 U. PA. J. L. & SOC. CHANGE 51 (2017); Gabriel Arkles, Pooja Gehi & Elena Redfield, *Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579 (2010); Dean Spade, *Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change*, 30 WOMEN'S RTS. L. REP. 288 (2009); PAISLEY CURRAH, RICHARD M. JUANG & SHANNON PRICE MINTER (EDS.),

240     *INT'L COMP., POL'Y & ETHICS L. REV.*             [Vol. 3:1

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TRANSGENDER RIGHTS (2006); GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).