

## The Debate over Same-Sex Marriage in Taiwan

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In May 2017, Taiwan's Supreme Court ruled that it is unconstitutional to deny same-sex couples from getting married. If the Legislative Yuan were not able to either amend the existing family laws or pass a law legalizing same-sex marriage by May 2019, then same-sex marriage will automatically become legal. This will make Taiwan the first nation in Asia to legalize same-sex marriage. In this paper, we will examine the ways in which the judicial, legislative, and executive branches of Taiwanese government have shaped the debate over this issue. There were instances where separate branches of the government either influenced or concurred with each other's policy initiatives on this issue; there were other times when one branch of the government offered an alternative or different policy initiative from the other.

Historically, Taiwan's lower courts have ruled against the rights and interests of same-sex couples. But with the Supreme Court's ruling for legalizing same-sex marriage in 2017, the judiciary became the first and only branch of government to legalize same-sex marriage. From 2006 to 2016, the Legislative Yuan has introduced several bills for legalizing same-sex marriages, but none has yet to pass the third reading to become law. The legislative bills of 2013 and 2016 amended sections on the family and inheritance rights in the civil code to legalize same-sex marriage and were intended to integrate same-sex couples into the mainstream of the institution of marriage. As for the executive branch of the government, President Tsai Ing-wen had expressed her support for the legalization of same-sex marriage during the presidential campaign of 2016. But because of strong opposition from traditionalists and the religious right, she recently said in an interview that the Taiwanese public was still divided on the issue.<sup>1</sup> Meanwhile, the Ministry of Justice, a cabinet under the executive branch of the government, had commissioned a study that recommended legalizing same-sex partnerships rather than same-sex

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<sup>1</sup> See "Same-sex marriage in Taiwan faces new hurdle after anti-gay campaigners propose referendum" (August 30, 2018) *Hong Kong Free Press*: <https://www.hongkongfp.com/2018/08/30/sex-marriage-taiwan-faces-new-hurdle-anti-gay-campaigners-propose-referendum/> (online data retrieved in August 2018)

marriages. The commissioned study of the Ministry of Justice recommended same-sex partnerships as an effort to strike the middle ground between supporters and opponents of marriage equality. Conversely, the legislative bills of 2016 and the Supreme Court's decision to legalize same-sex marriage reflected the perspective of marriage-equality advocates that the rights and freedom of LGBT individuals to marry is non-negotiable and should not be compromised. That is, the majority of the population has no right to deprive the minority from their basic human rights. This paper will examine the ways in which advocates and opponents of marriage-equality have influenced the debate in the three branches of government.

### *An Overview of Individual and Collective Activism for Legalizing Same-Sex Marriage*

In both 1986 and 1998, a pioneer of Tongzhi (同志 LGBT) rights in Taiwan, Qi Jiawei, petitioned the Taipei District Court to marry his long-time partner, Lin Jianzhong. The court denied Qi's petitions on the grounds that the marriage law was not applicable to same-sex couples. In 2013, the Office of Household Registry in Wanhua, Taipei denied Qi's request for registering his marriage. Subsequently, in 2014, Taipei's Highest Administrative Court turned down Qi's request for appealing the decision. For over thirty years, Qi has been persistent in his quest for the legalization of same-sex marriage in Taiwan (**Lin and Huang, 2017, p. 13**).

In legal cases pertaining to same-sex couples' request for adopting children, a lesbian couple petitioned the Taoyuan County District Court in 2007 to legalize their adoption of a girl whose birth mother was one of the partners' sister. Whereas the sister lacked the financial resources to raise her daughter, the woman who petitioned for adopting her niece had ample financial resources to do so. The lesbian couple were also healthy individuals who had the blessings of their parents to adopt the girl. Despite their preconditions for adoption, the judge in the district court rejected their petition on the grounds that the adoptee of the lesbian couple could potentially experience confusions in regards to her gender roles and gender identity. Furthermore, the judge mentioned that if the girl were to be teased or ostracized by her peers in school due to her family background, she would have to face the discrimination by herself. Instead of supporting the adoption and urging teachers and adults to intervene against potential bullies on the girl's behalf, the judge merely used the society's homophobic environment as a

justification for denying the lesbian couple's request to adopt the girl, suggesting that it could be potentially harmful to the child's well being and development. This case then set the legal precedent for courts to reject future LGBT couples' petitions for adopting children. **(Lin and Huang, 2017, pp. 20-21)**

In a similar vein, the district court of Shilin Taipei, in 2014, rejected a lesbian's petition to adopt her partner's biological children, based on the assumption that the adoption could put the children in media's spotlight, causing potential harm to their emotional well being. The court also cited the interpretation of grand justices of Taiwan's Supreme Court, which interpreted marriage as between a heterosexual couple. Based on the legal ruling, only the children's biological mother is legally the parent, while her lesbian partner was denied the legal recognition of parenthood, although the couple contributed equally to raising the children **(Lin and Huang, 2017, p.21-22)**. As a consequence of these series of unfavorable court rulings, the above mentioned cases galvanized the Tongzhi Movement in Taiwan to seek legal recognition of same-sex couples' right to marry and adopt children.

In an effort to advocate for the legalization of LGBT marriages, Alliance for Tongzhi Parade in Taipei, in October 2012, staged a rally with the theme of "Revolutionalizing Marriage—Marriage Equality, Diversification of Partnerships." The parade highlighted traditional bourgeois marriages' exclusion of LGBT individuals and oppression of citizens along the lines of gender, class, and sexualities. It called for a transformation of the institution of marriage and the family, so that individuals from diverse backgrounds in society can equally participate in marriage and the family on a voluntary basis **(Lin and Huang, 2017, p. 14)**.

The following year, the Taiwan Alliance for the Promotion of Partnership Rights introduced three draft bills to legalize tongzhi marriages and family diversity. The first bill amended existing laws on marriage, the family, and inheritance in the civil codes of Taiwan, Republic of China (ROC). In order to grant tongzhi married couples the same rights and obligations as their heterosexual counterparts, the amended bill replaced all the gender-specific terms such as "man," "woman," "husband," and "wife" with gender neutral terms such as "both parties" and "spouses." The amended bill gave heterosexual and LGBT married couples the same rights and obligations of sharing incomes as well as inherit their spouses' property. Tongzhi couples were entitled to the right of adopting children. Like their heterosexual counterparts,

tongzhi married couples can divorce only if both parties consent to the decision. If only one party insists on the divorce, he or she must petition the court to grant the divorce by presenting the judge with convincing reasons. If a spouse in the marriage were proven to have committed adultery, the spouse who was wronged could submit a request for compensation in court (**Lin and Huang, 2017, pp. 15-18**).

In addition to the amended bill for marriage and inheritance, the Taiwan Alliance for the Promotion of Partnership Rights introduced a second bill for legalizing partnerships between two individuals, regardless of whether the persons involved are LGBT or heterosexual. A legal partnership has similar rights and obligations as a married couple, except that a legal partner is entitled to have separate property and would not be eligible for inheritance from his or her partner unless otherwise specified in a legal agreement. Unlike a marriage, a legal partner can dissolve the cohabitating relationship without the consent of his or her partner (**Lin and Huang, 2017, pp. 16-18**).

The third bill sponsored by the Alliance envisioned a family system where several individuals without blood ties could register as a household on a voluntary basis, so that its members can take care of each other as a family unit. Similar to legal partnership between two individuals, each family member is entitled to have his or her separate property and would not be eligible for inheritance from other members of the household unless otherwise specified in a will. A member of such household can also voluntarily leave the household without the consent of other family members. But unlike legal partnerships and married couples, members of this type of household would not be eligible for adopting children (**Lin and Huang, 2017, pp. 16-18**).

Among the three draft bills submitted by the Alliance to be considered in the Legislative Yuan, only the amendment bill for revising civil codes to legalize same-sex marriages passed the first reading in October 2013. Subsequently, the legislative session ended before the amendment bill for legalizing same-sex marriage could be deliberated again to reach its final version (**Lin and Huang, 2017, p. 18**).

In an effort to oppose the legalization of same-sex marriage in Taiwan, a coalition of Christians from Pentecostal, fundamentalist, and Evangelical backgrounds allied with traditionalists of Chinese culture and religions to form the Taiwan Religious Alliance for the

Protection of Families and the Alliance for Next Generation's Happiness. After the amendment bill for legalizing same-sex marriage passed the first reading in the Legislative Yuan, both alliances jointly staged a mass demonstration to oppose same-sex marriages. The alliances objected to the replacement of "man and woman," and "husband and wife" with gender-neutral terms such as "spouses" and "both parties" in the marriage and family sections of civil codes. They insisted that only marriages between a man and a woman can raise emotionally healthy children fully accepted by the society. They also contended that the passage of the three draft bills introduced by the Alliance for the Promotion of Partnership Rights would encourage sexual liberation and promiscuity in the family and society. In opposition to the introduction of three new draft bills in 2016 by three major political parties to amend the civil codes for legalizing same-sex marriages, the anti-same-sex marriage alliances called for a nationwide referendum to settle the issue (**Lin and Huang, 2017, pp. 18-20**).

In response to the arguments and demands of the anti-tongzhi marriage coalition, marriage-equality activists began to focus on legalizing tongzhi marriages rather than concurrently advocating for legal partnerships and alternative families with multiple members. This strategy served to discredit marriage-equality opponents' claim that tongzhi marriage is equivalent to sexual liberation and promiscuity. Advocates of marriage equality urged lawmakers to amend existing marriage and family laws rather than creating a separate marriage law or legal partnerships for tongzhi couples. That way, same-sex couples could be fully integrated into the legal framework of monogamous marriages and observe all the rights and obligations of their heterosexual counterparts. With the legalization of same-sex marriage by the U.S. Supreme Court in 2015, marriage-equality advocates in Taiwan stepped up their pressure on individual legislators and political parties to be explicit in their stance on this issue. After the presidential election of 2016, the advocates urged the ruling party, the Democratic Progressive Party (DPP), to follow through with their campaign promise for marriage equality (**Lin and Huang, 2017, pp. 19-20**).

### ***Legislative Bills for Legalizing Same-Sex Marriage***

As early as 2001, the DPP government's Ministry of Justice in the Executive Yuan drafted the Human rights Basic Law. Article 6 of the proposed law stipulated that tongzhi shall have the right to establish families and adopt children. Based on the draft, the Executive Yuan, in

2003, proposed a legislative bill to legalize same-sex marriage. But it faced significant opposition by some cabinet members and legislators. **(Damm, 2011, p. 162)** Nonetheless, these attempts in the Executive Yuan created the precedent for lawmakers in the Legislative Yuan to continue the effort.

In 2006, DPP legislator, Xiao Meiqin (蕭美琴) proposed a bill titled *Same-Sex Marriage Act*. It was co-signed by 39 legislators. It cited Articles 7 and 22 of the ROC Constitution as the legal rationale for legalizing same-sex marriage. Article 7 stated that all citizens of ROC are equal, regardless of gender, race, class, religious or party affiliations. Though sexual identity was not explicitly stated as one of the categories of citizenship, the 38 co-signers interpreted the Constitution to mean that all ROC citizens are equal before the law and therefore should be protected from any type of discrimination. Article 22 of the Constitution stated that people's rights and freedom that are not detrimental to social order or the welfare of the public shall be guaranteed under the Constitution. The cosigners of the bill were confident that if gays and lesbians were to marry, they would not negatively affect heterosexual marriages and traditional families in society. As ROC citizens, tongzhi individuals, like heterosexuals, had the fundamental right to marry and establish a family with the person they love. Depriving them of this fundamental right would have relegated them to second-class citizenship. In the explanatory section of the bill, Xiao cited the trend of increasing number of countries among Western democracies toward legalizing same-sex marriages as evidence that marriage equality is consistent with universal human rights and democratic values. Though Taiwan has not been a member of the United Nations since 1971, its citizens are still members of an international community who deserve to be treated equally with dignity, regardless of their sexual identities. **(Xiao, 2006, pp. 63-64)**

The 2006 Same-Sex Marriage Bill stipulated that tongzhi individuals twenty-years of age or older should be permitted to marry and enjoy the same rights and obligations as any heterosexual married couple. Same-sex married couples should have the right to petition the court for adopting children. If a lesbian in a same-sex marriage were to give birth to a child through artificial insemination or with a person of the opposite sex, then the child should be the legal offspring of the same-sex couple **(Xiao, 2006, pp. 65-66)**. In response to the introduction of the bill in the Legislative Yuan, 23 opponents of the bill in the legislature cosigned a petition.

The opponents managed to block the passage of the bill during its first reading in the Legislative Yuan.

Six years later, in 2012, DPP Legislator Yu Meinü (尤美女) introduced another bill to change the legal age of marriage for women from sixteen to eighteen, so that it could be identical to the minimum legal age of marriage for men. This revision was based on the recommendation proposed in the UN Convention for the Elimination of All Forms of Discrimination against Women (CEDAW). Since the Legislative Yuan in Taiwan passed the CEDAW Enforcement Act in 2011, Yu's proposed bill was intended to carry out the UN recommendation. In the same bill, Legislator Yu also changed the parties that can legally marry from “man 男” and “woman 女” to “both parties 雙方.” By using the gender-neutral term 雙方, the legislative bill would enable LGBT couples to marry (**Yu, 2012, pp. 11-15**).

A year later, the Taiwanese government invited international human rights experts to evaluate the progress the government had made in its implementation of International Covenant on Civil and Political Rights and the Covenant on Social, Cultural, and Economic Rights. The results indicated that Taiwan's legal system lacked protection for both heterosexual couples who cohabitated and for LGBT couples. The only type of couples that could enjoy all the rights and benefits in Taiwanese society were heterosexual married couples. The international experts recommended that Taiwanese government should revise or enact laws to protect the rights of LGBT couples and members of non-traditional families. They also posited that the basic rights and freedom of sexual minorities to marry should not be determined by the majority of the population, since all citizens of a nation deserve equal protection under the law (**Judicial Committee, 2014, pp. 70-71**).

The International experts' recommendations provided the impetus for the Taiwan Alliance for the Promotion of Partnership Rights to introduce three draft bills to legalize tongzhi marriages and family diversity. As mentioned previously, only the bill to legalize tongzhi marriages passed the first reading in the Legislative Yuan. The bill was introduced by DPP Legislator Zheng Lijun (鄭麗君), and 21 others. It amended 82 existing laws on marriage, the family, and rights to inheritance and adoption of children. It also reiterated legal provisions in Yu's 2012 bill, raising the minimum age of marriage for women from 16 to 18. In order to grant

LGBT married couples the same rights and obligations as their heterosexual counterparts, the amended bill replaced all the gender-specific terms such as “man 男,” “woman 女,” “husband 夫” and “wife 妻” with gender neutral terminologies such as “both parties 雙方” and “spouses 配偶.” Instead of using “man” and “woman” to denote a heterosexual couple, the amended bill stipulated that any party, regardless of one’s gender or sexual identity, shall have the freedom to marry (**Zheng, 2013, pp. 209-216**).

Based on Zheng’s legislative bill, LGBT couples were entitled to the right of adopting children. Taking into consideration the gender diversity of LGBT parents, gender-specific terms such as “father 父” and “mother 母” in the civil codes were replaced by gender neutral terms such as “both parents 雙親.” By the same token, a gender-specific term, “fathers and mothers of adopted children 養父母,” was replaced by the gender-neutral term “parents of adopted children 養親.” Since the Taiwanese court system has traditionally granted the right to adopting children only to heterosexual married couples, a provision was added to the amended bill that would prohibit the courts from discriminating against LGBT couples in rendering their decisions about whether a couple should be qualified for adoption. In instances where a lesbian married couple jointly decided to have one of the parties conceive a child, both parties in the marriage shall assume the legal rights and responsibility of parenting (**Zheng, 2013, pp. 225-237**).

During the deliberation of the amended bill in the Judicial Committee of the Legislative Yuan, Deputy Minister of Justice from the Executive Yuan, Chen Mingtang (陳明堂), voiced his opposition to the amendments to marriage and the family section of civil codes for legalizing tongzhi marriages. As a cabinet member of Taiwan’s Chinese Nationalist (KMT) government, Chen, along with the majority of KMT legislators, supported a gradualist approach to legalizing tongzhi partnership or marriage. Before the society reaches a consensus about legalizing same-sex marriage, Chen argued that the government should revise relevant laws piecemeal to safeguard same-sex couples’ rights, such as laws pertaining to taxation and other social benefits. Instead of replacing gender-specific terms with gender neutral terms in the existing marriage and family laws, Chen preferred the creation of a separate law for legalizing tongzhi partnerships. According to Chen, replacing traditional gendered terms such as “husband and wife 夫妻” with the gender-neutral term “spouses 配偶” and designating “father and mother 父母” as “both



parents 雙親” would have radically altered the traditional concept and practices of marriage and the family. In traditional Chinese families and lineages, each member’s designated role is specified in terms of gender and seniority. Eliminating gender distinctions in traditional terminologies of designations in familial roles and relationships would have radically changed the nature of the family. Since the Taiwanese society is still highly polarized over the issue of marriage equality, the government should continue to study the issue, gauge public opinion, and assess the possible impact of legalization on traditional families and the society in order to gain more insights on ways to formulate a law legalizing tongzhi partnerships with adequate legal protections. Passing the amendment to the existing marriage and family laws now without a general consensus in the society would risk further polarization. In other words, Chen was warning the Judicial Committee of the Legislative Yuan that the Taiwanese society was not yet ready to accept the legalization of LGBT marriages. Concurring with Deputy Minister Chen, several legislators who opposed legalization demanded holding more public hearings and insisted that LGBT marriages should not be legalized until the majority of people in Taiwan can accept it (**Judicial Committee, 2014, pp. 77-79, 85-99**)

In response to the opposing voices for legalization, co-signers of the amendment bill invoked Article 7 of the ROC Constitution and reiterated that all citizens are born equal before the law. The right to marry is a fundamental human right, regardless of one’s background, status, or sexual orientation. The public opinion of the majority should not deprive sexual minorities’ right to marry. One of the main purposes of laws in a democratic society is to protect the rights of the minorities. Using the will of the majority to suppress the rights of sexual minorities would have betrayed a fundamental principle of human rights. The supporters of marriage equality in the Judicial Committee concurred with the assessment of the international experts in 2013, which recommended that Taiwanese government should revise or enact laws to protect the rights of LGBT couples and their right to marry. In their response to the call of deputy minister of justice for creating a new law for legalizing same-sex partnerships, proponents of marriage equality in the Judicial Committee of the Legislative Yuan compared the separate law to the separate and unequal treatment of African Americans before the Civil Rights Movement in the American South. They spoke on behalf of the tongzhi community for LGBT’s right to be fully integrated into the mainstream institution of marriage (**Judicial Committee, 2014, pp. 70-71, 85-87, 93-95**). Due to the contentious and polarized debate between legislators on both sides of the issue

and the opposition from the Ministry of Justice, the legislators were not able to negotiate a consensus in the Judicial Committee for the bill to proceed to the next stage of the legislative process (**Lin and Huang, 2017, pp. 28**).

As mentioned previously, opponents of amending marriage and family laws contended that replacing gender-specific terminologies of familial roles with gender-neutral terms would radically transform the nature of familial relationships. Taking the sensitivity of opponents' position into consideration, DPP Legislator Yu Meinü proposed a new draft bill for legalizing same-sex marriage in 2016. Instead of replacing gender-specific terminologies of familial roles with gender-neutral terms in marriage and family section of civil codes as in the 2014 amendment bill, Yu's proposed bill in 2016 added sentences that stated: "The civil codes pertaining to the rights and duties of husband and wife 夫妻 shall be equally applicable to same-sex or heterosexual married couples. The civil codes pertaining to the relationships between father, mother, son, and daughter 父母子女 shall be equally applicable to same-sex or heterosexual married couples." That way, the original gender-specific terms such as "husband and wife," "mother and father" would remain intact in the civil codes (**Yu, 2016, pp. 79-80**).

Unlike Yu's 2016 bill, the proposed bills of KMT Legislator Xu Yuren (許毓仁) and the New Power Party (時代力量) replaced the gender-specific terminologies with gender-neutral terms in sections of civil codes that pertained to marriage, the family, and inheritance (**Lin and Huang, 2017, pp. 29**). In this respect, their approach to legalizing tongzhi marriage is similar to the 2013 amendment bill. Lastly, another DPP legislator, Cai Yiyu (蔡易餘) proposed the addition of a separate chapter in the marriage and family section of civil codes to legalize same-sex marriages (**Cai, 2016, pp. 1-2**). Among the above mentioned proposed bills to amend the civil codes, Yu Meinü's 2016 proposal was the version that received the most support from the secretary-general of the judicial branch of Taiwanese government, Lu Tailang (呂太郎) (**Judicial Committee, 2016, p. 21**). Since Yu's proposal could safeguard all the rights of same-sex married couples in the family and in inheritance without changing all the gender-specific terminologies in the civil codes, it is considered the most simplistic, straightforward, and inclusive of diverse perspectives in society.

In December 2016, the Judicial Committee of the Legislative Yuan passed the initial review of the above-mentioned bills. After extensive negotiations and compromise between the drafters of the bills and other legislators in the Judicial Committee, the following were the general consensus reached on the amendment bills. To a large extent, the consensus was based on Yu's draft bill:

Incorporating Yu's addition of no. 971-1 to the civil codes in the bill, it stated that civil codes pertaining to the rights and duties of husband and wife 夫妻 or spouses 配偶 shall be equally applicable to same-sex or heterosexual married couples. The civil codes pertaining to the relationships between father, mother, son, and daughter 父母子女 shall be equally applicable to same-sex or heterosexual married couples. The revision of civil code no. 972 stipulated that marriage contract shall be set by both man and woman (男女雙方) themselves; marriage contract of a same-sex couple shall be set by both parties themselves. The amendment to civil code no. 980 stated that a legal minor who has not reached 18 years of age shall not be legally engaged. In regards to adoption, an additional clause was added to civil code no. 1079-1, which stated that the courts shall consider the best interests of an adopted child when assessing whether a person or persons should be permitted to adopt. The court system shall not use a person's gender, sexual orientation, sexual identity, or sexual traits as rationales for discriminatory practices when rendering a decision as to whether a person is qualified for adopting children. (Lin and Huang, 2017, p. 30) After the general census was reached in the Judicial Committee, the amendment bills must also pass their second and third readings in the Legislative Yuan before they can be consolidated and finalized into one bill to become law.

### **Legislative Recommendation of the Commissioned Study by the Ministry of Justice for Same-Sex Partnerships**

In response to some sectors of the public and several legislators' demand that the Ministry of Justice in the Executive Yuan produce its version of the draft bill, the Ministry, in January 2017, issued *The Report of Ministry of Justice Regarding the Implementation of Same-Sex Partnerships on the Impact in Society and Legislative Recommendations*. The report was based on the Ministry's commissioned study conducted by the Research Institute of Science,

Technology, and Law at National Tsinghua University. Though the Ministry of Justice regarded the results of the commissioned study to be the perspective of the researchers at the university rather than the opinion of the Ministry, the Ministry's publication of the research results strongly suggested that it would like the Legislative Yuan to consider the legislative option provided by the study. It recommended same-sex partnerships with the enactment of a separate law rather than amending existing civil codes to legalize same-sex marriages (**Lin and Huang, 2017, pp. 155-159**).

Thus, the researchers of the draft bill of the Ministry's commissioned study did not support amending the existing civil codes as the drafters of the 2016 legislative bills for legalizing same-sex marriages. Yet some of legal languages used in the Ministry's commissioned study proposed a separate bill that resembled the content of the above-mentioned general consensus reached by the Judicial Committee of the Legislative Yuan in December 2016. Adopting Legislator Yu's ideas in her 2016 draft bill for amending the civil codes, the draft bill of the Ministry's commissioned study stated that civil codes pertaining to the rights and duties of husband and wife 夫妻 shall be equally applicable to same-sex partners 同性伴侶. The civil codes pertaining to the relationships between father, mother, son, and daughter 父母子女 shall be equally applicable to heterosexual married couples or same-sex partners and their children. In this way, the rights of same-sex partners can be safeguarded the same way as heterosexual married couples without any disparities in legal protection. In principle, all the legal provisions in the general guidelines, chapters on debt, marriage and family relations, as well as inheritance rights in the civil codes that pertain to heterosexual married couples shall be equally applicable to same-sex partners who have registered their civil unions with the household administration. Likewise, same-sex partners shall have the same right to adopt children as heterosexual married couples. The same stipulation as the 2016 legislative bills was added in the proposed bill of the Ministry's commissioned study to prohibit the court system from discriminating against individuals or couples from adopting children based on their sexual identities, sexual orientations, or sexual characteristics (**Lin and Huang, 2017, pp. 142-157**).

Whereas the legal age for heterosexuals to marry in Taiwan is 18 for men and 16 for women, the draft bill of the Ministry's commissioned study stipulated 20 as the minimum age for same-sex couples to register for their legal partnerships. The rationale behind this is that twenty

is the age of achieving adulthood and the right to suffrage.<sup>2</sup> The commissioned study took into account the general consensus reached by several scholar-experts, the ministry-sponsored public hearings and forums, interest groups, and non-governmental organizations to create a separate bill named Same-Sex Partnership Law 同性伴侶法. According to the researchers' in-depth interviews and summaries of public discussions, the majority of participants supported granting the same rights to same-sex partners as heterosexual married couples. But some had reservations about revising the existing marriage and family laws in the civil codes to legalize same-sex marriages, because of the concern that it could fundamentally alter the traditional roles that each family member play within the context of familial relationships. In order to minimize the polarization of the society, the enactment of a separate law to legalize same-sex partnership was seen as the middle ground that the vast majority of people in Taiwan could accept. From the results of the commissioned study, naming the bill Same-Sex Partnership Law instead of Same-Sex Marriage Law could broaden the general public's support for the protection of same-sex partnerships while mitigating the negative reactions from those who opposed calling it same-sex marriages **(Lin and Huang, 2017, pp. 155-160)**.

Conversely, proponents for revising the civil codes to legalize same-sex marriage viewed the enactment of a separate law as legalized segregation of the LGBT minority from the mainstream of the institutions of marriage and the society. If a separate law for legalizing same-sex partnerships were not as comprehensive in its coverage of all the rights guaranteed to heterosexual married couples in the civil code, then it could take years of additional litigations to achieve the same rights for same-sex couples. Thus, marriage-equality advocates insisted that legal equality between heterosexual and same-sex married couples cannot be fully realized until same-sex couples' marital status and family relationships can be legitimized and integrated into the civil code pertaining to marriage and the family **(Lin, 2018, p. 8)**.

## **Legal Ruling of Taiwan's Supreme Court**

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<sup>2</sup> See Lin and Huang, 2017, pp. 143-144. As of December 2017, the legal age for suffrage in Taiwan has been lowered to 18.

After same-sex marriage activist, Qi Jiawei, petitioned to register his marriage with his partner at the Taipei city government, both Taipei city government and Qi requested that Taiwan's Constitutional Court (the Supreme Court) render a decision on the case. Analogous to the arguments made in the above-mentioned legislative bills for amending the Marriage Chapter of Civil Code introduced in 2013 and 2016, the Constitutional Court ruled that the current marriage laws violated both Article 7 and Article 22 of the ROC Constitution, which guaranteed all citizens equality before the law and the freedom of marriage, respectively. The Supreme Court's majority opinion acknowledged that all its previous legal interpretations concerning marriage were cases involving heterosexual married couples. As the first case debated in the Court involving the constitutionality of same-sex marriages, the grand justices writing the majority opinion cited the U.S. Supreme Court decision *Obergefell v. Hodges* (2015) that legalized same-sex marriage in the United States. In the U.S. Supreme Court case, the majority opinion stated that psychiatrists and other experts have only recently recognized that sexual orientation is both a normal and immutable expression of human sexuality. As such, homosexuality is not a mental disorder that needs to be cured. Taiwan's Supreme Court also stated that homosexuals, as a minority population in society, lacked the political power to secure protection of their rights through regular democratic process. As the branch of government that interprets the Constitution, the Court rendered the decision based on the protection of individual rights to decide whether to marry or not as well as whom to marry, based on its interpretation of Article 22 of the Constitution. Mindful of the separation of power between the judiciary and the legislature, the Court has given the Legislative Yuan two years to pass a law legalizing same-sex marriage. It can either pass a bill amending the Marriage Chapter of Civil Code, add a special chapter in Part IV on Family of the Civil Code, or enact a separate law for legalizing same-sex marriages (**Justices of Constitutional Court, 2017**).

In essence, the court is giving the legislature the option of either pursuing the second and third reading of the 2016 amended bills for legalizing same-sex marriages or legislating a separate law based on some of the recommendations of the study commissioned by Ministry of Justice. If the legislature could not pass a law within two years, same-sex marriages will automatically become legal as of 24 May 2019 (**Justices of Constitutional Court, 2017**). Thus, among the three branches of government, the judicial branch was the one that legalized same-sex marriage in Taiwan. Among the 15 grand justices in Taiwan's Supreme Court, the

majority voted in favor of legalizing same-sex marriages. Justice Huang Ruiming abstained from deliberating or voting on the case. Only two justices filed dissenting opinions: Justice Huang Hongxia filed a dissenting opinion in part and Justice Wu Chenhuan filed a dissenting opinion.

In the dissenting opinions of both Justices Huang Hongxia and Wu Chenhuan, they listed the Supreme Court's past legal interpretations on marriage as between a man and a woman. As literalists with strict interpretations of laws, both of them warned the justices who handed down the majority opinion that the judicial branch of government had no right or power to legislate and thereby alter the traditional legal definition of marriage. In his interpretation of separation of power between the legislature and the judiciary, Justice Wu insisted that the only legitimate way to alter the definition of marriage and legalize same-sex marriage is through a deliberative legislative process or a nationwide referendum. While Justice Huang supported a legislation for same-sex partnership to protect the rights of same-sex couples, both justices did not consider the Taiwanese society fully ready to accept the legalization of same-sex marriages. Justice Huang then urges more dialogues between opposing sides of the same-sex marriage debate to build a general consensus for the possibility of legalizing same-sex marriages in the offing (**Justices of Constitutional Court, 2017**).

## **Conclusion and Epilogue**

Comparatively speaking, the dissenting opinion of the Supreme Court reflected the recommendation of the commissioned study of Ministry of Justice for legalizing same-sex partnerships rather than marriages. Conversely, the majority opinion in the Supreme Court and the bills introduced in the Legislative Yuan were intended to legalize same-sex marriages. Taking into consideration the perspectives of the 2016 legislative bills for amending civil codes and the commissioned study of the Ministry of Justice that advocated the enactment of a separate law, the Supreme Court gave the Legislative Yuan the option of either amending the existing civil code or drafting a separate law for legalizing same-sex marriages.

As we have seen, both opponents and supporters of marriage equality have shaped the debate in the three branches of Taiwanese government. In August 2018, the Happiness of the

Next Generation Alliance, an anti-same-sex marriage group, submitted a petition to the Central Election Commission (CEC) of the Executive Yuan, with more than twice as many signatures for the referendum proposal to be put to a public vote. Approved by the CEC, the referendum will be held alongside the local elections in November 2018. The referendum asked if the voters would remove same-sex education from public school curriculum and define marriage in the civil codes as between a man and a woman. In response, marriage-equality activists also gathered enough signatures to put their question into a referendum during the forthcoming November election. It asked the voters if they would agree to amend the existing civil code in order to legalize same-sex marriages. Since the result of a referendum is legally binding, the Legislative Yuan will be obliged to enact a law that would reflect the will of the majority of the voters.<sup>3</sup> If proponents of marriage equality were to prevail in the forthcoming referendum, the Legislative Yuan will most likely pass a bill amending the family chapter of civil code to legalize same-sex marriages. If opponents of same-sex marriage were to prevail, then the legislative proposal of the commissioned study by the Ministry of Justice for legalizing same-sex partnerships with a separate bill might serve as a blueprint for same-sex civil unions in Taiwan.

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<sup>3</sup> See “Same-sex marriage in Taiwan faces new hurdle after anti-gay campaigners propose referendum” (August 30, 2018) *Hong Kong Free Press*: <https://www.hongkongfp.com/2018/08/30/sex-marriage-taiwan-faces-new-hurdle-anti-gay-campaigners-propose-referendum/> (online data retrieved in August 2018)



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