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### First Comes Marriage, Then Comes Baby, Then Comes What Exactly?

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## Article

# First Comes Marriage, Then Comes Baby, Then Comes What Exactly?

Erez Aloni \*

### ABSTRACT

*Taiwan's legalization of same-sex marriage is an event of international importance concerning the rights of LGBTQ+ individuals and partners; further, it constitutes an opportunity to examine the state of LGBTQ+ equality in Taiwan and elsewhere. To this end, through theoretical and comparative lenses, this Article asks what equality for LGBTQ+ means and what comes after marriage. It offers perspectives on the past, present, and future of the intersection of same-sex marriage and equality. Looking at the path to same-sex marriage in Taiwan, the Article argues that the Taiwanese Constitutional Court's ruling legalizing same-sex marriage maintained a line between domesticated liberty for LGBTQ+ people, on the one hand, and limits on that population's liberty to form families, on the other. The law that implemented the ruling kept this tension; hence, it enfolds discrimination against LGBTQ+ individuals, especially in the area of family formation. But Taiwan is not exceptional in holding onto parentage discrimination after legalization of same-sex marriage. The European perspective teaches that discrimination in*

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\* Associate Professor, Peter A. Allard School of Law, University of British Columbia. The idea to write this article was initiated by my participation at "Beyond 748: Same-sex Marriage and Family," a conference held at Institutum Iurisprudentiae, Academia Sinica, in October 2019. I am grateful to the institution for hosting an excellent conference that evoked many conversations that contributed to this paper, and in particular to the organizer, Dr. Cheng-Yi Huang, for his extraordinarily generous hospitality. I am indebted to the other participants and the audience for questions and discourse about substantive topics, and especially to my commentator, Shih-fang (Miho) Lin (林實芳), for her excellent and challenging feedback and to my colleague Hoi Kong for productive discussion about the title of this article. I thank the two anonymous reviewers, who provided invaluable feedback. Finally, I am extremely thankful to Janice (Yi-Chen) Lu, a JD candidate at Allard Law, for her exceptional research assistance.

*parentage remains after legalization but disappears over time. Experience from elsewhere also clarifies that the fight for equal parental rights can be difficult, and that much opposition to LGBTQ+ equality is embedded in biases related to LGBTQ+ parenting and in racism.*

*Finally, moving to explore future paths to parity, the Article contends that, for various reasons including those indicated above, marriage cannot serve as the final frontier of LGBTQ+ equality. Substantive equality in Taiwan requires, at the least, the repeal of adultery as a grounds for divorce and for civil remedies. A broader view of equality and autonomy also warrants adopting a regime in which marriage is not the only mechanism to access rights and benefits that are linked to relationships of interdependency. Likewise, creating more options for legal recognition of relationships is imperative for individuals in diverse types of relationships, and for LGBTQ+ individuals in particular. Lastly, the Article suggests that discrimination that currently exists in the area of obligations toward parents-in-law has a liberating aspect.*

*The Taiwanese experience is a teaching moment for LGBTQ+ movements and scholars around the globe. It calls on other scholars to avoid generalizations in framing paths to liberty and equality by being sensitive to local differences, and to reconsider the place of marriage as the golden standard of LGBTQ+ equality.*

**Keywords:** Same-sex Marriage in Taiwan, Marriage Equality, Incrementalism, Substantive Equality, Beyond Marriage

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## I. INTRODUCTION

Taiwan has recently legalized same-sex marriage, becoming the first country in Asia to do so. Not only is this a nationally important milestone, but it is also one that will influence neighboring states.<sup>1</sup> Yet, despite this breakthrough, the road to equality for LGBTQ+ individuals and partners in Taiwan still stretches into the distance, as current laws discriminate against same-sex couples in a few ways, especially as to rules about family relations. In this article, in order to acquire broader perspective about the past, present, and future of LGBTQ+ equality in Taiwan, I enlist the experiences of nations that have been in a similar situation.

I begin by comparing the Taiwanese Constitutional Court's (TCC, or the Court) ruling about same-sex marriage with the U.S. Supreme Court's decision in *Lawrence v. Texas*,<sup>2</sup> arguing that both share a vision of what U.S. law professor Katherine Franke calls "domesticated liberty"--"a privatized liberty right" focusing on "the right to intimacy in the bedroom."<sup>3</sup> At the same time, I contend that the TCC vision of domesticated liberty has not extended enough beyond the bedroom, leaving the legislature with the possibility of promulgating a law that still discriminates against LGBTQ+ individuals, especially in the area of family formation.<sup>4</sup>

The law that implemented the TCC ruling reflects that decision's contours. That is, the law remained within the boundaries of domesticated liberty, at one end of the spectrum, and limits on the liberty to form families, at the other. The experience of other nations, however, teaches that it is often the case that discrimination against same-sex parents remains after the legalization of same-sex marriage.<sup>5</sup> The widely accepted framework of incrementalism can be useful here: this framework, derived from the lessons of the first European countries to legalize same-sex marriage, sketches a common path toward equality for LGBTQ+ individuals. Of particular interest to Taiwan is the place of equal parentage rights in this scheme. North American and European countries have proceeded in the reverse order: in the U.S. and Canada, parentage rights came first, followed by the legalization of same-sex marriage--while in Europe parenting options were restricted for years after repeal of the marriage ban. The experience of Europe, then, is the

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1. Jennifer Lu, *Taiwan's same-sex marriage law could change the debate in Asia forever*, WASH. POST (May 20, 2019), <https://www.washingtonpost.com/opinions/2019/05/20/taiwans-same-sex-marriage-law-could-change-debate-asia-forever/>.

2. *Lawrence v. Texas*, 539 U.S. 558 (2003).

3. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1399-400 (2004).

4. See *infra* Section II. A., pp. 54-57.

5. See *infra* notes 60-63 and accompanying text (discussing the experience of the Netherlands and Belgium).

one that is more relevant to Taiwan. It teaches that discrimination in parentage remains after legalization but disappears over time. It also clarifies that the fight for equal parental rights can be difficult, and that much opposition to LGBTQ+ rights is embedded in biases related to LGBTQ+ parenting and, perhaps surprisingly, in racism and fear of immigration.<sup>6</sup>

Finally, moving to explore future paths to parity, I contend that marriage cannot serve as the final frontier to LGBTQ+ equality. Substantive equality in Taiwan requires the repeal of adultery as a grounds for divorce and as a wrongful behavior that creates civil liability. A broader view of equality and autonomy also encompasses a regime in which marriage is not the only mechanism to access rights and benefits that are linked to relationships of interdependency. Similarly, creating more options for legal recognition of relationships is imperative for individuals in diverse types of relationships, and for LGBTQ+ individuals in particular. Lastly, I suggest that the existing discrimination in the area of obligations toward parents-in-law has a liberating aspect.

The Taiwanese experience is also a teaching moment for LGBTQ+ movements and scholars around the globe. It calls on stakeholders to avoid generalizations in framing paths to liberty and equality by being sensitive to local differences--and, equally if not more important, to reconsider the place of marriage as the gold standard of LGBTQ+ equality.

The Article continues as follows. Section I discusses the TCC ruling, arguing that it reflects a tension between, on the one hand, a vision of domesticated liberty and, on the other, a wish to produce a narrow ruling focusing on marriage only. Section II analyzes the implementing legislation, arguing that this same tension is manifested in that law, as well. In Section III, the Article considers whether and to what extent the incrementalist model can serve as a baseline to guide Taiwanese progress toward equality. Section IV moves into the future, assessing what a vision for substantive equality would look like. As a broader vision for LGBTQ+ justice, it considers reform of adultery laws, the liberatory aspect deriving from lack of obligations toward in-laws, and the contours of family-law reform. Section V offers a brief conclusion.

## II. FROM THE COURT TO THE LAW

This Section examines the process that led to the Act governing the relationships of same-sex couples. Subsection A discusses the TCC's ruling, and Subsection B analyzes the law that implements the ruling.

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6. See *infra* Section III. B., pp. 63-67.

### A. *Ruling Sets the Stage for the Law*

In May 2017, the TCC issued its decision in *Judicial Yuan Interpretation No. 748 (Same-Sex Marriage Case)*, holding that a same-sex marriage ban is unconstitutional.<sup>7</sup> The Court held that the ban contravenes both the right to equality protected by Article 7 of the Constitution of the Republic of China (*the Constitution*) and the right to marry protected by Article 22.<sup>8</sup> Although being clear that the existing ban is unconstitutional, the TCC left it to the legislature to reach a decision about how to implement the ruling and gave the Legislative Yuan two years to pass the relevant legislation. The Court noted that it was for the legislature to decide whether to amend existing Civil Code provisions to include same-sex spouses in the directives that apply to husbands and wives, to enact a special chapter on family in Part IV of the Civil Code, to enact a special law, or to choose other means of legal authority (“formality,” in the words of the Court). If, in the two-year period, the legislature did not revise the law in accordance with the ruling, then same-sex couples would be able to marry in accordance with the existing directives of the marriage chapter of the Civil Code.<sup>9</sup>

The Court also left unresolved lingering questions concerning equality for same-sex couples, particularly about parental rights. Although the Court held that classifications based on sexual orientation shall be reviewed with heightened scrutiny--which might result in invalidating laws that discriminate against same-sex couples--the Court did not rule on parental rights explicitly.<sup>10</sup> The only time that the Court discussed same-sex partners as parents was in rejoinder to the argument that marriage is an institution that serves procreative unions and, thus, restricting the access to those who can procreate incidentally (different-sex couples) constitutes a justified and lawful distinction. In response, the Court held that the ability to procreate is not an essential element of marriage in Taiwan. The fact that same-sex couples are “incapable of natural procreation” (the Court’s language)--meaning, they cannot reproduce incidentally--does not constitute legitimate grounds to treat them otherwise than different-sex couples.<sup>11</sup> Aside from this

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7. Sifa Yuan Dafaguan Jieshi No. 748 (司法院大法官解釋第748號解釋) [Judicial Yuan Interpretation No. 748] (May 24, 2017) (Taiwan). See Judicial Yuan (2018). *Leading Cases of the Taiwan Constitutional Court* (vol. 1) at 187.

8. ZHONGHUA MINGUO XIANFA (中華民國憲法) [CONSTITUTION OF R.O.C.] § 22 (1947) (Taiwan).

9. J.Y. Interpretation No. 748, at para 17.

10. See Stewart Chang, *Made in Taiwan: Alternative Global Models for Marriage Equality*, 34 CONN. J. INT’L L. 143, 146 (2019) (“J.Y. Interpretation 748, on the other hand, is at its core an equal protection case that is more expansive than Obergefell in deeming sexual orientation a protected classification.”).

11. J.Y. Interpretation No. 748, at para 16. There is no reason to assume that same-sex couples cannot conceive “naturally” with one another, unless naturally means without any form of assisted

reference to reproduction and same-sex couples, the Court noted unequivocally that the only aspect that the ruling addresses is marriage; it “does not deal with any other issues.”<sup>12</sup> Chao-ju Chen interprets this statement as meaning that the Court “explicitly refused to rule on the issue of same-sex parenthood. . .”<sup>13</sup>

A comparison with U.S. jurisprudence is apt here, for the influence of U.S. courts and scholarship is evident not only by the Court’s ruling, which resembles the language and reasoning that the U.S. Supreme Court employed in its decision to legalize same-sex marriage nationwide in *Obergefell v. Hodges*,<sup>14</sup> but also by the ensuing broader discussion in Taiwan. An interesting academic debate commenced on whether the *Same-Sex Marriage Case* is the equivalent of *Obergefell* or akin to *Brown v. Board of Education*,<sup>15</sup> or, as the astute critique of Chao-Ju Chen suggests, whether the *Same-Sex Marriage Case* replicates the promarriage, noncritical tone of *Obergefell*.<sup>16</sup>

A comparison between the *Same-Sex Marriage Case* and the U.S. Supreme Court ruling in *Lawrence v. Texas* provides an interesting perspective.<sup>17</sup> It might seem surprising to juxtapose a case that legalized same-sex marriage to one that struck down sodomy laws. However, *Lawrence*, too--like the *Same-Sex Marriage Case*--walked a fine line between what Katherine Franke describes as “domesticated liberty,” on one hand, and saying nothing about parental rights for same-sex couples, on the other. Franke argues that *Lawrence* offered only “domesticated liberty” for LGBTQ+ individuals in that its ruling did not extend beyond the private domain and gave no acceptance to a more robust notion of sexual liberty that the queer community has embraced over the years.<sup>18</sup> Although I find this critique meritorious, it seems to me that even the perceived domesticated liberty that *Lawrence* provided was of little help for those same-sex couples or LGBTQ+ individuals who wished to create a family. In fact, it seems that *Lawrence*’s liberty was confined, as it were, exclusively to the bedroom. The image of an LGBTQ+ family of any kind, with or without children, living freely and publicly was not part of the vision that *Lawrence* offered. In this

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reproductive technology. Many opposite-sex couples today conceive through the use of various assisted forms, and in those instances these forms are typically not referred to as “unnatural.”

12. J.Y. Interpretation No. 748, at para. 18.

13. Chao-Ju Chen, *Migrating Marriage Equality without Feminism: Obergefell v. Hodges and the Legalization of Same-Sex Marriage in Taiwan*, 52 CORNELL INT’L L.J. 65, 89 (2019).

14. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

15. 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, 107-47 (2017).

16. Chen, *supra* note 13, at 67.

17. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

18. Franke, *supra* note 3, at 1401-04.



respect, *Lawrence* protected some sexual rights, in particular the right to choose one's intimate partner, but *not* reproductive and parental rights.<sup>19</sup>

The *Same-Sex Marriage Case* is obviously different from *Lawrence*, as it grants same-sex couples a right that is ranked higher than freedom from state prosecution of consensual sexual activity.<sup>20</sup> Nonetheless, the *Same-Sex Marriage Case*, like *Lawrence*, advocates domesticated liberty without the legal protections to expand “the domestic” to include the creation of families. Similar to both *Lawrence* and *Obergefell*, the *Same-Sex Marriage Case* uses a tone implying domesticity, discussing “unions of intimate and exclusive nature” and advocating a heteronormative perception of marriage as important “to the sound development of personality.”<sup>21</sup>

One should not take the reference to the “exclusive nature” of same-sex unions as a platitude. At the time of the decision, adultery was a punishable crime in Taiwan. It was not until May 2020 that the TCC struck down the provisions that criminalized extramarital sex. In two older decisions that upheld those provisions, the TCC defended them as “preserving the social order” and preserving “harmonious family life.”<sup>22</sup> Although this same court repealed the criminal aspect, as I discuss in Part IV, another set of adultery provisions, related to divorce and torts, still maintains adultery. When the TCC, then, deliberates about “exclusive,” it does not mean in the romantic sense, but actually preserves same-sex unions as nonmonogamous. For now, let me just point out exclusiveness as another domesticated aspect.

While the Court glorifies exclusiveness, it remains silent about kinship. And just as some courts followed *Lawrence* by upholding adoption bans (by same-sex couples),<sup>23</sup> the spirit of the law that Taiwan promulgated followed

19. For the definition of sexual rights as including “the choice of one’s sexual partners,” and for critique of the conflation between reproductive and sexual rights, see Alice M. Miller, *Sexual but Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights*, 4 HEALTH AND HUMAN RIGHTS 68, 86-88, 90-94 (2000).

20. Although the right to marry is often conceptualized as a negative right—the right to make personal choices without state intervention, state-sanctioned marriage requires more than mere nonintervention. For discussion of the nature of the right, see Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL’Y 105, 143 (2010). For a fascinating discussion on the right to marry and its origin and meaning, and in particular about the positive and negative aspects, see Michael Boucai, *Before Loving: The Lost Origins of the Right to Marry*, 20 UTAH L. REV. 69, 103-07 (2020).

21. For critical discussion of *Obergefell*’s treatment of marriage and singlism, see Erez Aloni, *Commentary on Obergefell v. Hodges*, in FEMINIST JUDGEMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 527, 530 (Kathryn M. Stanchi, Linda L. Berger & Bridget J. Crawford, eds., 2016).

22. Sifa Yuan Dafaguan Jieshi No. 552 (司法院大法官解釋第552號解釋) [Judicial Yuan Interpretation No. 552] (Dec. 13, 2002) (Taiwan); Sifa Yuan Dafaguan Jieshi No. 554 (司法院大法官解釋第554號解釋) [Judicial Yuan Interpretation No. 554] (Dec. 27, 2002) (Taiwan).

23. See *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (“Hence, we conclude that the *Lawrence* decision cannot be extrapolated to create a right to adopt for homosexual persons.”).

this domesticated liberty in which same-sex couples can enter into marriage (a traditional social and legal institution) while not having the tools to disrupt heteronormative reproductive practices. In the next section, I discuss the way this tension is manifested in the laws that regulate access to marriage and parentage in Taiwan.

### B. *From the Court to the Code*

The Court's ruling, and the two-year period for deliberation and implementation, provoked intense backlash and debate about the content of the bill that executes the ruling. As a response to the Court's decision, antigay organizations initiated national referenda aiming to affirm the definition of "marriage" as between a man and a woman, thus preventing the amendment of the Civil Code to include same-sex couples.<sup>24</sup> Opponents of same-sex marriage had a majority in the referenda, which took place in November 2018, although some controversy exists about the meaning of the results.<sup>25</sup>

In order to comply with the outcomes of the referenda as well as with the Court's ruling, the legislature opted to create a unique regime and not to amend the Code. Under these circumstances, in February 2019 Taiwan's government introduced a bill to legalize same-sex marriage.<sup>26</sup> The Enforcement Act of the Judicial Yuan Interpretation No. 748 (hereinafter *the Enforcement Act*, or *the Act*) enables same-sex couples to "form a permanent union of [an] intimate and exclusive nature for the purpose of living a common life" and to register the union at the Marriage Registration Department of the Household Administration Bureau.<sup>27</sup> Despite the mention of the Marriage Registration Department (in Article 4), these relationships are described as "Article 2 relationship" or "the relationship stipulated in the previous section" throughout the Act.<sup>28</sup> The Act avoids the term "spouses" and instead uses "parties." I discuss the different names in the next part, in the context of the incremental process.

Beyond the Code's differing locations and terminology for rules applying to same- and different-sex spouses, the Act has some directives that

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24. Chen, *supra* note 13, at 86.

25. Chao-Ju Chen, *A Same-sex Marriage That Is Not the Same: Taiwan's Legal Recognition of Same-sex Unions and Affirmation of Marriage Normativity*, 20 AUSTRALIAN J. OF ASIAN L. 1, 1 N3 (2019).

26. Sifa Yuan Shih Zih Di Cishiba Hao Jieshih Shihshing Fa (司法院釋字第七四八號解釋施行法) [Act for Implementation of J.Y. Interpretation No. 748] (promulgated May 22, 2019, effective May 24, 2019) (Taiwan).

27. Act for Implementation of J.Y. Interpretation No. 748 arts. 2, 4.

28. See, e.g., Act for Implementation of J.Y. Interpretation No. 748 art. 3 ("Persons under the age of eighteen may not form a union as stated in Article 2"); Chen, *supra* note 25, at 2 (stating that the Act "denies same-sex relationship a name and instead refers to it as an 'Article 2 Relationship'").

are distinct from those that govern different-sex spouses.<sup>29</sup> The differences loom large in three areas: parentage (adoption, assisted reproductive technology, and marital presumption), marriage with a spouse from a different country, and obligations toward parents-in-law.

When it comes to parental rights, Article 20 of the Enforcement Act explicitly restricts the application of the general rules of adoption to cases of second-parent adoption, when the legal parent is a genetic parent of the child. It is interesting that the restriction here is double: it bans joint adoption--in which both spouses together adopt a child--and it allows adoption by Spouse A only when Spouse B is the genetic parent of the child.<sup>30</sup> Thus, the common case of cross-adoption, in which one spouse adopts a child and the other applies to adopt as a co-parent, is not available to couples--because neither is a genetic parent of the child.

Concerning a Taiwanese resident's same-sex marriage to a nonresident, the marriage might not be recognized if the nonresident is from a nation that does not allow same-sex marriage.<sup>31</sup> This is because Article 46 of the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements states, "The formation of a marriage is governed by the national law of each party."<sup>32</sup> Taiwan's interpretation of this provision has been that if the non-Taiwanese partner is a citizen of a country that does not recognize same-sex marriage, then they cannot get married.<sup>33</sup> Hence, if one's partner is Canadian, then the partners can register their union in Taiwan, but if the partner is from the Philippines, for example, then Taiwan will not recognize their relationship.

Finally, the Act does not apply the same Code provisions considering

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29. For a detailed list of the ways that same-sex unions are different from different-sex couples as defined by the Code, *see* Chen, *supra* note 25, at 4-5.

30. Hence, presumably: when one adopts a child and then later marries someone of the same sex, if the new spouse wants to adopt the child, too, this would be impossible because the child is not genetically related to the legal parent (although it is unclear how the state would know whether the child was genetically related to the legal parent).

31. Chen, *supra* note 25, at 5 & N 18.

32. Shewai Minshih Falu Shihyung Fa (涉外民事法律適用法) [Act Governing the Choice of Law in Civil Matters Involving Foreign Elements] (promulgated May 26, 2010, effective May 26, 2011) (Taiwan).

33. Fa Cao (法操) [Follow], *Tonghun tongguo hou waiguo ren keyi lai Taiwan dijie tongxing hunyin ma?* (同婚通過後，外國人可以來台灣締結同性婚姻嗎?) [*After the Legalization of Same-Sex Marriage, Can Foreigners Form Same-Sex Marriage in Taiwan?*], FA CAO (法操) [FOLLOW] (May 24, 2019), <https://www.follow.tw/f01/21113/>. *See also*, Yimin Shiwu Zu Juerke (移民事務組·居二科) [Immigration Section·Second Division], *Jiao Wo Di 1 Ming!!! Yimin Shu: Di 1 Dui Kuaguo Hefa Tongxing Waiji Peiou Wancheng Shen qing Yiqin Juliu* (叫我第1名!!!移民署：第1對跨國合法同性外籍配偶完成申請依親居留) [*First One! Immigration Agency: First Transnational Legal Same-Sex Spouses Completed the Application of Residency Visa for Foreign Spouses of R.O.C. (Taiwan)*], ZHONGHUA MINGUO NEIZHENG BU YIMIN SHU (中華民國內政部移民署) [NATIONAL IMMIGRATION AGENCY] (May 24, 2019), <https://www.immigration.gov.tw/5385/7229/7238/185204/>.

obligations toward parents-in-law. In particular, Article 1114 imposes support obligations on various family members, including on “lineal relatives by blood.”<sup>34</sup> Relatives by blood, per Article 969, include “the relative by blood of his spouse”; meaning, the in-laws. If one spouse or both spouses live with the parents-in-law, then the spouses have an obligation to support the parents-in-law.<sup>35</sup> The Act, however, addresses support obligations that spouses owe to one another, yet it does not apply the directives of Articles 1114, 1115, and 1116 to same-sex spouses.<sup>36</sup> The potential meaning is that same-sex spouses, unlike their different-sex counterparts, are not legally part of the extended family, at least in terms of support obligations.

The Act, then, retained some symbolic differences between same- and different-sex marriages, as well as material differences concerning the rights, benefits, and obligations of same-sex spouses. How should we understand this, and what is next?

### III. INCREMENTALISM BEFORE AND AFTER SAME-SEX MARRIAGE

Exploring the path that other nations have taken toward equality for LGBTQ+ individuals and couples can assist in evaluating the present legal terrain, assess the viability of future actions, and suggest useful avenues for advocacy. It is worth remembering, however, when discussing the experience of other countries that the “conventional universalist view, which assumes commonality, cannot capture the differences between various same-sex marriage reforms and fails to appreciate that social change is context-specific.”<sup>37</sup> Nevertheless, analyzing general patterns toward equality, contemplated within the particular context, can still be useful, provided that such analysis takes into consideration the idiosyncrasies of each society and legal system.<sup>38</sup> To this end, Subsection A explores whether and to what extent the incremental paradigm is applicable to Taiwan. Subsection B derives particular lessons about Taiwan from the experience of European countries.

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34. Minfa (民法) [Civil Code] § 1114(1) (promulgated Dec. 26, 1930, effective May 1, 1931, as amended June 19, 2019) (Taiwan).

35. Civil Code § 1114(1).

36. Act for Act for Implementation of J.Y. Interpretation No. 748 § 22.

37. Ivana Isailovic, *Same Sex but Not the Same: Same-Sex Marriage in the United States and France and the Universalist Narrative*, 66 AM. J. COMP. L., 267, 271 (2018).

38. As Lee Badgett puts it, “[t]ransferring political lessons and experiences from one continent to another runs the risk of ignoring important cultural or social differences between countries and continents.” M. V. Lee Badgett, *Predicting Partnership Rights: Applying the European Experience in the United States*, 17 YALE J.L. & FEMINISM 71, 85 (2005).

A. *Can the Incremental Paradigm Apply to Taiwan?*

A widely accepted framework for a path toward equality for same-sex couples in other countries is the incremental model, or, as Kees Waaldijk calls it, “the law of small change.”<sup>39</sup> This paradigm is descriptive, predictive, suggestive of future actions, and potentially normative. It is descriptive because it reports the legal history, predictive because it anticipates what the next stages toward equality will be, suggestive because it purports to provide strategic advice for next undertaking, and normative because it stages marriage and equal parental rights as the final frontiers in equality for LGBTQ+ individuals and couples.

The incremental paradigm is grounded in the experience of the Netherlands (the first nation to legalize same-sex marriage) as well as other nations that followed a path similar to that country’s. Accordingly, legal history reveals a pattern of steady incremental progress leading to the legalization of same-sex marriage and equalization of parental rights.<sup>40</sup> This process typically consists of three major stages, each of which comprises several substeps. Step one begins with the decriminalization of sodomy, after which the age of consent for same-sex relationships is made the same as that for different-sex relationships. Step two includes the enactment of legislation prohibiting discrimination on the basis of sexual orientation in the workplace, housing, and perhaps also in education, and the inclusion of sexual orientation as a protected category in hate-crime laws, if they exist. Finally, the third step culminates in the state’s recognition of same-sex partnerships and parental rights, typically first by enacting marriage-alternative schemes (such as domestic partnership or civil unions) and then by lifting the ban on marriage altogether.

Based on the European experience, Waaldijk suggests that progress to the next step is contingent on the previous one.<sup>41</sup> A country cannot skip a stage. This is because any legal change that advances legal recognition and acceptance of same-sex partnerships can only be enacted and accepted by the public if this change is perceived as small or insignificant. This way, each small change leads to the next one, until the country reaches the final goals of marriage equality and equal parental rights for same-sex couples. Keeping

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39. Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATION, EUROPE, AND INTERNATIONAL LAW 437, 441 (Robert Wintermute & Mads Andenæs eds., 2001); Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569, 570-571 (2004) (Waaldijk, “Others May Follow”). For critique of the incremental model, see Aloni, *supra* note 20 at 141-48, 156-60; Badgett, *supra* note 38, at 73-76.

40. Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, *supra* note 39, at 439-41.

41. *Id.*

a small discriminatory aspect in each development also satisfies opponents of such progress. U.S. law professor William Eskridge endorses and advances the premises of the incrementalist approach by supplementing the component of public attitudes.<sup>42</sup> He proposes that incremental legal changes give greater visibility to LGBTQ+ issues so that social attitudes become more accepting of the LGBTQ+ community, thus making further advancement more possible and palatable.<sup>43</sup> Hence, for instance, as soon as antidiscrimination laws enable LGBTQ+ individuals to be more visible in their workplaces, it will be easier to change the minds of convince coworkers that same-sex partners should be covered under work-related benefits and protections. This way, each legal change is related to transformation in public attitudes, which keep shifting gradually, and thus provides support for the next change. Reaching the next stage without the support of the public might result in a backlash against rights and liberties for LGBTQ+ individuals and couples.

Taiwan did not follow all these stages squarely. To begin with, Taiwan has never criminalized sodomy among same-sex couples.<sup>44</sup> As for the second stage, Taiwan enacted some antidiscrimination protections in 2004,<sup>45</sup> and the Domestic Violence Prevention Act has covered same-sex couples since 2007<sup>46</sup>--thus satisfying a version of the second stage. When it comes to recognition of same-sex relationships, although some local governments offered registration schemes for same-sex couples, such schemes constitute a weaker type of protection than civil unions and domestic partnerships typically do, and, in any event, a registration scheme did not exist at the nationwide level.<sup>47</sup> Beside, Taiwan's final stage has a characteristic of its own. Along with other discriminatory aspects that remain, it has a unique statute that avoids the word "spouse." As Chao-ju Chen points out, "A critical and closer look at the Act quickly reveals that, despite domestic and international applause, it is a compromised piece of legislation of an unprecedented name and nature . . . that, in fact, denies same-sex relationship a name and . . . [has] legal consequences partially different from Civil Code marriage."<sup>48</sup> Hence, Taiwan's third stage is also unique in its execution and implementation.

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42. WILLIAM N. ESKRIDGE JR, EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 115 (2002).

43. *Id.*

44. Chang, *supra* note 10, at 154.

45. Kuo & Chen *supra* note 15, at 81.

46. Jiating Baoli Fangjih Fa (家庭暴力防治法) [Domestic Violence Prevention Act] (promulgated May 28, 1998, effective June 24, 1998, as amended Mar. 28, 2007) (Taiwan).

47. Ming-Sho Ho, *Taiwan's Road to Marriage Equality: Politics of Legalizing Same-sex Marriage*, 238 THE CHINA Q. 482, 486 (2019).

48. Chen, *supra* note 25, at 2.

Hence, Taiwan's path is not only unique, but when it comes to recognition of partnership rights, the change was *not* small or very gradual. As sociologist Ming-sho Ho puts it, "Taiwan's path toward marriage equality took a 'big bang' pattern in that there were available no civil union or other legal forms before the Constitutional Court struck down the existing bans in 2017."<sup>49</sup> Taiwan's example demonstrates that the paradigm of incrementalism is not always scrupulously followed, even in liberal democracies.

What, then, explains the deviation of Taiwan from the general pattern? Elaine Jeffereys and Pan Wang argue that a "combination of an active LGBT movement, multiparty strategizing and government efforts to differentiate Taiwan from the PRC in international arenas" was a major factor in Taiwan's recognition of same-sex marriage.<sup>50</sup> Similarly, Ming-sho Ho asserts that "[c]ultural endowments, international linkages, and public opinions provide partial or inadequate solution to the puzzle of Taiwan's breakthrough. One of the common shortcomings is the lack of attention to the contentious dynamics between LGBT activists and their conservative opponents."<sup>51</sup>

The lesson is that other factors may be just as important in analyzing the movement toward equality as those enumerated in theories of incrementalism. Incremental transformation in public attitudes is one of the predictive factors for change, but other issues--legal, political, organizational, and cultural--are important, too. Therefore, while some of the lessons that an incrementalist paradigm offers are still valuable, they should be taken with the caution that the incremental framework is generalized and built on the experiences of European countries and the United States, which differ from those of countries outside these regions.<sup>52</sup> Acknowledging the specific nuances of Taiwan, then, what can we still learn about its path toward same-sex marriage from the experiences of other countries and from the incremental model in particular?

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49. *Id.*

50. Elaine Jeffereys & 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, 198 (Bronwyn Winter, Maxime Forest & Réjane Sénac eds., 2018).

51. Ho, *supra* note 47, at 490.

52. Omar Encarnación calls to "'de-center' gay politics when looking at the experiences outside of the developed West . . . [in order to] get a broader understanding of the historical factors at work in the emergence of gay rights movements, together with a deeper perspective on how different social and political environments are shaping divergent outcomes with respect to the embrace of gay rights in the developing South." Omar G. Encarnación, *International Influence, Domestic Activism, and Gay Rights in Argentina*, 128 *POL. SCI. Q.* 687, 715 (2013).

### B. *The Regular European Sequence*

As to the incrementalist paradigm, the general lesson that we can derive for Taiwan is that it is common that discriminatory directives remain after each stage, even after the legalization of same-sex marriage. In fact, residual discrimination might even be useful in some sense (although clearly harmful to those who suffer it) because it prepares the public for the next stage and satisfies the opponents of progress. As the public experiences that the latest change did *not* bring harmful consequences, it becomes ready for new ones.<sup>53</sup> Gradual legal change, then, is positive, in enabling public debate and diminishing backlash, especially when its implementation comes from the legislature and not from the court.<sup>54</sup> Further, the small discriminatory residual directives will gradually disappear, according to the incremental model, as the final stage--equality for same-sex couples--is inevitable.<sup>55</sup>

The United States' history is relevant to assess the path to marriage, as both Taiwan and the U.S. made progress toward marriage equality through court decisions. To see why we can expect continued progress in Taiwan, we should turn to Europe, whose situation was more similar to Taiwan's after the *Same-sex Marriage Case*. This is because in European countries that lifted the ban on same-sex marriage, matrimony came first and equal parental rights followed. Conversely, in the U.S. and Canada, the reality of increasing numbers of households headed by same-sex parents were the catalyst for same-sex marriage.<sup>56</sup> Hence, for example, in 1995, almost 10 years before Canada legalized same-sex marriage, a Canadian court held that a ban on second-parent adoption by a same-sex couple violated the Canadian Charter of Rights and Freedoms' guarantee of equality rights.<sup>57</sup> The court then interpreted the word "spouse" in a statute concerning adoption as including unmarried same-sex partners. In the U.S., parental rights of same-sex couples were often secured before recognition of partnership rights.<sup>58</sup> Indeed, *Obergefell* relies heavily on the fact that many same-sex

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53. WILLIAM N. ESKRIDGE JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE* 230 (2006).

54. See Frances Hamilton, *Strategies to Achieve Same-Sex Marriage and the Method of Incrementalist Change*, 25 J. TRANSNAT'L L. & POL'Y 121, 152 (2015) (embracing the incremental model and arguing that change should arrive from the legislative branches as court-based interventions are likely to cause public opinion backlash and potential legislative reversal, such as the passing, by popular vote, of legislative amendments to restrict marriage to different-sex couples).

55. Badgett, *supra* note 38, at 75 (arguing that the theory of small change "impl[ies] the inevitability of change," while history actually suggests that progress in promoting tolerance toward homosexuality has not been linear).

56. GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY* 105-11 (2004) (discussing the role of parenting as a catalyst for same-sex marriage).

57. *K (Re)*, 1995 CarswellOnt 483, 23 O.R. (3d) 679 (Ont. Prov. Div.).

58. Although some informal discriminatory treatment toward same-sex couples remained after the legalization of same-sex marriage, especially as regarding assisted technology. See Erez Aloni &



couples already raised children together. As the majority states, “[M]any same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents.”<sup>59</sup>

The first lesson derived from the European experience is that same-sex marriage is often dealt with separately from (most issues relating to) same-sex parentage, and that sometimes parental rights present a more difficult struggle than the right to marry. At the same time, the European circumstances also show that, eventually, these discriminatory treatments disappear. Consider the Netherlands and Belgium. In Holland, even after the legalization of same-sex marriage, same-sex spouses could not adopt in intercountry adoptions.<sup>60</sup> In addition, the marital presumption—that is, the automatic assumption that child’s parents are the birth mother and her spouse—did not apply to same-sex couples.<sup>61</sup> Belgium had the same experience: after legalization of same-sex marriage, discrimination remained regarding presumption of paternity, second-parent adoption, and joint adoption.<sup>62</sup> These legal inequalities were corrected in later legislation in both countries.

Interestingly, the European experience also teaches that second-parent adoption is commonly less contentious than joint adoption. It is the pattern in all or most European countries that second-parent adoption was legal before joint adoption.<sup>63</sup> Taiwan’s case is not the anomaly; rather, it is the path that parental-rights law has often taken in other countries.

The experience of various countries clarifies why parental rights are often where discrimination persists. Nancy Polikoff counts three reasons for the different order of achieving equal parental rights for same-sex spouses in Europe and the U.S. First, in Europe progression toward marriage typically came through the legislature, while in the U.S. gains were often achieved through the judiciary. This function of the court matters because, at the time,

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Judith Daar, *Marriage Equality: One Step Down the Path Toward Family Justice*, 57 ORANGE CTY. LAW. 1, 22 (2015) (“However, marriage equality is only one (significant) step toward a more egalitarian family law system. Even after marriage is available nationwide to same-sex couples, such couples still face multiple legal barriers in forming and securing legal recognition for their families.”).

59. *Hodges*, 135 S. Ct. 2584.

60. Waaldijk, “Others May Follow”, *supra* note 39 at 575-75.

61. *Id.* at 575-76. In addition, there was a question about the validity of marriage when one of the partners is a citizen of a country that does not recognize same-sex marriages.

62. *Id.* at 582-83.

63. Based on the report of 23 European jurisdictions, Waaldijk finds that “[s]econd-parent adoption legislation tends to precede joint adoption legislation. This is not surprising as second-parent adoption is a less controversial issue.” Kees Waaldijk, *More and More Together: Legal Family Formats for Same-sex and Different-sex Couples in European Countries – Comparative Analysis of Data in the Laws and Families Database*, 75 FAM. SOC. WORKING PAPER SERIES 1, 106 (2017).

U.S. courts were ready to rule that, under the standard of “the best interest of the child,” same-sex parents should have equal rights—but were less willing to repeal same-sex marriage bans. Second, Polikoff contends that European legislatures have been concerned about the stability and welfare of the couples, thus allowing them to secure economic rights of marriage, while the United States “is more likely to view economic status as a private matter” and hence to give less priority to relationship rights.<sup>64</sup> Finally, the difference in adoption markets has played a role: in the U.S., there has been a shortage of adoptive parents, especially in the foster-care system, which makes it less reasonable to exclude potential adoptive parents, even if they are LGBTQ+ individuals. In Europe, conversely, domestic adoption is rarer.<sup>65</sup> Some policymakers were concerned that allowing same-sex couples to participate in international adoption would result in foreign countries’ refusal to allow adoption altogether in order to avoid adoption by same-sex couples.<sup>66</sup> These explanations, while illuminating some of the reasons that Taiwanese law discriminates against same-sex parents, do not fully clarify why the TCC, although willing to intervene in marriage, did not rule on parentage, too.<sup>67</sup>

The French experience, which may be relevant to Taiwan, adds another account for why parental rights come later and why obtaining such rights is a more difficult struggle than the right to marry. In France, the debate about equality of filiation rules has been more contentious than that about the right to marry. Until the legalization of same-sex marriage, second-parent adoption was not available for same-sex couples because only married couples could adopt. A challenge to this ban failed even on appeal to the European Court of Human Rights.<sup>68</sup> The extending of marriage to same-sex couples was accompanied by the opening of adoption by same-sex spouses—although adoption is still available only to married couples, whether same sex or different sex.<sup>69</sup> However, use of assisted reproductive technologies (ART) in France remains available to different-sex couples only.<sup>70</sup> The issue of access to ART is where the culture war lies. As Éric Fassin notes, “[T]o French commentators, it seems natural that resistance to

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64. Nancy D. Polikoff, *Recognizing Partners But Not Parents/Recognizing Parents But Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 714 (2000).

65. *Id.* at 716-17.

66. See ESKRIDGE & SPEDALE, *supra* note 53, at 112 (discussing the small number of children available for adoption in Nordic countries and exclusion from international adoption).

67. One other important distinction between the U.S. and Taiwan, when it comes to access to ART, is that in the U.S. this area is barely regulated, while in Europe and Taiwan it is a highly regulated one. Restricting same-sex couples would be highly unusual in the U.S., where there is a free market, but such regulation is more common within highly regulated systems.

68. *Gas & Dubois v. France*, 2012-II Eur. Ct. H.R. 215 (2012).

69. Isailovic, *supra* note 37, at 301.

70. *Id.* at 305; Civil Code art. 311-20.

equal rights should be strongest when it comes to adoption or reproductive technologies.”<sup>71</sup> In France, Fassin asserts, “rather than marriage, filiation speaks most loudly about race.” In the United States, race intersects the most with marriage--as shown by the history of antimiscegenation laws and, more recently, by the discussions of coupleship patterns among African-Americans.<sup>72</sup> In France, parentage intersects with racism and anxiety about immigration. As Fassin puts it, “Indeed, the French battle about kinship is not simply about the family; it is as much about the nation. Naturalizing filiation . . . is not just about heterosexuality or homosexuality; it is equally about Frenchness, that is, about whiteness in postcolonial France.”<sup>73</sup>

This seems to be a good angle to think about the Enforcement Act and its failure to equalize parental rights. Taiwan has a long and contentious history of conflating parenthood with citizenship.<sup>74</sup> It exceeds the scope of this article to consider the intersection of parentage and citizenship in Taiwan. But, in a nutshell, Taiwan had in place a “doctrine of citizenship” that, “[p]remised on the notion of the patrilineal family, . . . invested male citizens with, and deprived female citizens of, the right to create citizens of the nation through their children, making nationality-citizenship a gendered construction with the system of patrilineality built into it.”<sup>75</sup> Likewise, the work of Sara Friedman uses two seemingly unrelated stories--one from the area of immigration and one from the attempt to annul the marriage of two transgender individuals--to conceptualize how diverse sets of Taiwanese laws distribute access to citizenship rights.<sup>76</sup> Friedman’s fascinating account concludes that policy embedded across diverse legal fields serves to recognize “heterosexual marriages as the basis for citizenship claims, shoring up the desired parameters of national reproduction in the process.”<sup>77</sup> Uniting these two accounts, it is hardly surprising that same-sex parentage is the more difficult piece of legalization, and its intersection with anxiety about citizenship and immigration makes this predictable.

In conclusion, despite the globalization of same-sex marriage as a central goal of LGBTQ+ equality, and the resemblance between Taiwanese and U.S. court cases, the path toward equality is culturally and legally specific. Yet, the general pattern is one in which inequalities (which are

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71. Éric Fassin, *Same-sex Marriage, Nation, and Race: French Political Logics and Rhetorics*, 39 CONTEMP. FRENCH CIVILIZATION 281, 287 (2014).

72. *Id.*

73. *Id.* at 287-88.

74. Chao-Ju Chen, *Mothering under the Shadow of Patriarchy: The Legal Regulation of Motherhood and Its Discontents in Taiwan*, 1 NATIONAL TAIWAN UNIVERSITY L. REV. 45, 80-90 (2006).

75. *Id.* at 82.

76. Sara L. Friedman, *Stranger Anxiety: Failed Legal Equivalences and the Challenges of Intimate Recognition in Taiwan*, 29 PUBLIC CULTURE 433, 439-46 (2017).

77. *Id.* at 447.

different in each locale) often persist after the legalization of same-sex marriage, and are gradually being repealed. In France, despite the long-held and strong resistance to enabling same-sex couples to use ART, President Macron's government recently proposed a law to lift the ban.<sup>78</sup> The same will likely happen over time: gradually, as the Taiwanese same-sex family becomes more visible, existing discriminations will disappear.

#### IV. WHAT ARE THE NEXT FRONTIERS FOR EQUALITY?

In the incremental framework, the final stage in attaining equality is marriage and parental rights similar to those of different-sex couples. From this viewpoint, the incremental framework is not just a descriptive account and not merely an advocacy plan. Rather, “[t]he incrementalist account of same-sex marriage legalization is manifestly teleological--it presents marriage as the end, both literal and normative, of the LGB movement.”<sup>79</sup> Put differently, by upholding marriage as the end goal, the paradigm portrays marriage as the Holy Grail of LGBTQ+ equality. As Libby Adler contends, “By instilling the sense of a march down a clear path toward a well-lit destination, the speakers tell us what progress is. This in turn produces gays’ desire for progress within the terms of the discourse. The small steps theory describes reality accurately because it is making reality. As a consequence, all eyes turn toward marriage not because it is the only wish that the law can grant, but because runway lights point in that direction.”<sup>80</sup>

In what follows, I argue that presenting marriage and parental equality as the final aims of LGBTQ+ liberation misses not only the ways that same-sex marriage is not a panacea for many of the barriers that LGBTQ+ individuals experience but also the fact that marriage, without appropriate alternatives, can be detrimental to lives of some LGBTQ+ individuals. The discussion focuses on a few regulatory issues that might pose challenges to substantive equality: first, adultery; then, obligations toward in-laws; and, finally, family-law reform that reduces the primacy of marriage. This is not a comprehensive list for an equality agenda, just a few interesting examples.

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78. Noemie Bisserbe, *France Moves to Lift Ban on Assisted Reproduction for Female Couples*, WALL ST. J. (July 24, 2019), <https://www.wsj.com/articles/france-moves-to-lift-ban-on-assisted-reproduction-for-female-couples-11563990327>.

79. Aloni, *supra* note 20, at 155.

80. LIBBY ADLER, *GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM* 104 (2018).

### A. *Adultery*

Taiwan criminalized adultery until May 2020.<sup>81</sup> It still lists adultery as a matrimonial fault and a grounds for civil liability. There are many reasons to decriminalize adultery.<sup>82</sup> The TCC ruling that repealed it, in my opinion, is well justified. Yet, adultery remains a grounds for civil liability and a bargaining chip for divorce.<sup>83</sup> And, in any event, this cluster of legal instruments creates<sup>84</sup> stigma and disincentivizes adultery. In what follows, I will expound why decriminalizing was a good step for same-sex couples, in particular, and will explain why other adultery sanctions are detrimental to LGBTQ+ individuals.

The applicability of laws that protect fidelity vis-à-vis same-sex couples raise some interesting questions about the function of such laws. Article 17(2) of the Enforcement Act counts “consensual sexual intercourse with another person” as grounds for divorce. Therefore, adultery, as grounds for divorce, applies to Article 2 relationship. The application of the criminal provision to these relationships has been more problematic, but in any event is no longer relevant after the TCC ruling that struck down the criminal provisions.<sup>85</sup>

Yet, from an historical perspective, the argument that adultery-based

81. J.Y. Interpretation No. 748.

82. See, e.g., Alyssa Miller, *Punishing Passion: A Comparative Analysis of Adultery Laws in the United States of America and Taiwan and their Effects on Women*, 41 *FORDHAM INT’L L.J.* 425, 444-63 (2018).

83. For discussion of the availability of civil liability for adultery, see Lin Yuqi (林鈺琪), *Tongjian Chuzui Hua Hou Minshi Peichang Wenti Yanxi (通姦除罪化後民事賠償問題研析)* [*Research and Analysis of Civil Remedies after the Decriminalization of Adultery*], LIFA YUAN (立法院) [LEGISLATIVE YUAN], <https://www.ly.gov.tw/Pages/Detail.aspx?nodeid=6590&pid=196733> (last visited Sep. 16, 2020).

84. For an interesting contemporary discussion of adultery laws and their effects in the US see, Edward Stein, *Adultery, Infidelity, and Consensual Non-Monogamy*, 55 *WAKE FOREST L. REV.* 147, 157-64 (2020).

85. Article 239 of the Criminal Code states, “A married person who commits adultery with another shall be sentenced to imprisonment for not more than one year; the other party to the adultery shall be subject to the same punishment.” *Zhonghua Minguo Xing Fa (中華民國刑法)* [Criminal Code] § 239 (promulgated Jan. 1, 1935, effective July 1, 1935, as amended Jan. 15, 2020) (Taiwan). Intercourse is defined quite broadly, in a way that easily encompasses sexual acts between same-sex couples. *Ibid* art 10(6): “The term ‘sexual intercourse’ means the following listed sexual acts that are not based on rightful purposes: 1. Insertion of a reproductive organ into the reproductive organ, anus or mouth of another person or an act of making them connected. 2. Insertion of a body part or an object other than a reproductive organ into the reproductive organ or anus of another person or an act of making them connected.” Based on the literal reading of the provision, the offense is potentially applicable to same-sex couples; the Enforcement Act clarifies that provisions referring to married couples are applicable to same-sex unions unless otherwise specified. Article 24(2) of the Enforcement Act.

Chen states, “It is also unclear whether or not the crime of adultery will apply” to same-sex spouses and that its application “depends on the courts’ interpretation of ‘adultery’ or the legislature’s future decision.” Chen, *supra* note 25, at 5.

liabilities should not apply to same-sex relationships makes some sense. In the past, adultery laws had served to protect a reproductive function; that is, to prevent a situation in which an illegitimate child could be born.<sup>86</sup> But this function of adultery laws--safeguarding legitimacy--was expanded in common law over the years; nonprocreative sexual acts were added to the list of prohibited acts, indicating that adultery concerns were no longer predominantly about reproduction but about preserving the marital bond.<sup>87</sup> Considering this evolution of adultery laws, there is really no reason--beyond the tradition of applying them only to different-sex couples--to argue that these laws do not apply to same-sex couples. However, this rationale is not particularly useful and is teleological, as same-sex couples could not marry until recently, so clearly they did not fall into the ambit of this offense.

From a formal standpoint, there is no reason to think that same-sex couples should be excused from adultery provisions. In Canada, where adultery has traditionally involved vaginal intercourse, a court grappled with the question of whether extramarital sex between two women constituted adultery as grounds for divorce. The New Brunswick court held, "The consequence of infidelity, at least in the context of the *Divorce Act*, should not be confined to heterosexual spouses. To do so grants license to homosexual spouses to be sexually unfaithful and to violate vows, untrammelled by the prospect of a fault-based dissolution of their marriage. That is not equal treatment."<sup>88</sup> From a formalistic position, then, same-sex couples are no different from different-sex couples for purposes of adultery.

Nevertheless, thinking substantively about equality, adultery (in all forms) might be particularly harmful to same-sex couples. This is because, across the globe, same-sex couples adopt flexible relationships models, often not based on traditional notions of fidelity.<sup>89</sup> I am not stating that all

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86. Cf. *Orford v. Orford* 1921 Carswell Ont 272, 49 O.L.R. 15, 58 D.L.R. 251 ("my view that it is not the moral turpitude that is involved, but the invasion of the reproductive function. So long as nothing takes place which can by any possibility affect that function, there can be no adultery.").

87. See, e.g., *S.B. v. S.J.B.*, 258 N.J. Super. 151, 609 A.2d 124 (N.J. 1992) ("What is important is to define, in human terms, those acts which constitute adultery so as to give rise to a termination of the marriage. Accordingly, this court finds that adultery exists when one spouse rejects the other by entering into a personal intimate sexual relationship with any other person, irrespective of the specific sexual acts performed, the marital status, or the gender of the third party. It is the rejection of the spouse coupled with out-of-marriage intimacy that constitutes adultery.").

88. *Thebeau v. Thebeau*, 2006 NBQB 154.

89. Shieh Wen-Yi (謝文宜), Chen Wen-Long (陳雯隆) & Tseng Hsiu-Yun (曾秀雲), *Taiwan Tongzhi Changqi Banlu Guanxi de Zhengxiang Jingying Celue* (台灣同志長期伴侶關係的正向經營策略) [*A Study of the Positive Strategies Used in Long-term Same-sex Couple Relationship in Taiwan*], 23 TAIWAN SING SYUEH SYUEH KAN (臺灣性學學刊) [FORMOSAN J. OF SEXOLOGY] 53 (2017) (The researcher conducted interviews with 5 male couples and 5 female couples whose relationships had lasted more than 10 years. The results showed that those couples try to struggle free from the traditional couple relationship, to strengthen their emotional identity, and to challenge the

same-sex couples practice open relationships, and, in any event, many different-sex couples engage in extramarital affairs. Yet, several studies have documented that gay male couples adopt “more open sexual agreements and less monogamous relationships as compared with lesbian and heterosexual couples.”<sup>90</sup> A qualitative study, interviewing Taiwanese same-sex partners after a breakup, reported that 10 of the 13 couples experienced at least one instance of infidelity, tacit acceptance of sexual activity outside of the relationship, or experimentation with multiple partners. Yet, infidelity was cited as the primary reason for the breakup of only two of the sexual-minority male couples, suggesting that for sexual-minority men, infidelity is usually not a primary cause for the termination of a relationship, and that the decision to end the relationship is not taken lightly.<sup>91</sup>

Conversely, many female partners in the study mentioned infidelity as the reason for their breakup, indicating less acceptance of nonmonogamy. To clarify, studies have found that the more flexible approach toward extramarital affairs does not affect the quality of the relationships among same-sex couples, who still form strong, fulfilling partnerships.<sup>92</sup> While the study relies on a small sample--its similarly to accounts found in other places in the world, and the patterns that the interviews expose--lend support to the assertion that non monogamy is of interest to members of the Taiwanese LGBTQ+ community.<sup>93</sup>

One could argue that same-sex openness to nonmonogamy is the result of years of living without legal recognition--outside the reach of the law. One might even wish that the right to marry would transform gays from practicing “sexual liberty” to practicing “civilized commitment.”<sup>94</sup> But there is no proof that same-sex couples in countries with marriage equality are more monogamous; rather, even if marriage were to have such effect, until the time that happens, same-sex couples will likely continue stretching the boundaries of marriage.

Same-sex spouses, then, are particularly exposed to the harms of adultery-related laws. The risk of maintaining adultery as a tort cause of

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existing gender order. With a positive and assertive attitude, showing great enthusiasm and resilience, they stayed with each other, without giving up, in order to break free from traditional gender roles and create other possibilities.)

90. Jeffrey T. Parsons et al., *Non-Monogamy and Sexual Relationship Quality among Same-Sex Male Couples*, 26 J. FAM. PSYCHOLOGY 669, 669-77 (2012).

91. Wen-Yi Shieh, *Why Same-Sex Couples Break Up: A Follow-Up Study in Taiwan*, 12 J. GLBT FAM. STUDIES 257, 257-76 (2015).

92. Parsons et al., *supra* note 90, at 669.

93. M. L. Haupt et al., *Prevalence of Experiences with Consensual Nonmonogamous Relationships: Findings from Two National Samples of Single Americans*, 43 J. SEX & MARITAL THERAPY 424, 430 (2017).

94. See WILLIAM N. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996).

action and a basis of “fault” is that it will be used as a weapon by one of the spouses in the event of separation. In Taiwan there are two paths to divorce: consensual, which does not go through the court system, and judicial. In consensual divorce, Taiwanese couples bargain “under the shadow of informal norms and customs.”<sup>95</sup> This leaves the parties to decide about financial terms with minimal judicial scrutiny. In such case, the fact that adultery serves as a basis for civil action can be used as a bargaining chip, even if this cause of action is not often used. In this sense, not only might it strengthen the bargaining position of one of the partners, but it could also potentially serve to create the norm and frame the contours of the bargain. As Janet Halley reminds us, “There will almost always be some glamorous, ideologically saturated legal rules that people focus on when debating a distributional system.”<sup>96</sup> From this viewpoint, the standards of fidelity serve to communicate that “this is the norm,” and might also set the goals and expectations of partners who are bargaining about settlement. Alternatively, claiming fault will bring the divorce into the judicial divorce route, where the judge is likely to award custody of the children to the party who did not commit the fault.<sup>97</sup> Even if the spouses had tacitly accepted the practice of adultery, at the time of divorce evidence of adulterous relationships might be used as leverage to get a better settlement agreement.<sup>98</sup>

Repeal of adultery laws--primarily penal--has been controversial among women’s groups who supported same-sex marriage and, to a lesser extent, among some LGBTQ+ activists in Taiwan.<sup>99</sup> Some feminists organizations in Taiwan supported upholding adultery as a mechanism to secure a better bargain upon divorce--that is, as a tool that compensates women for other disadvantages they face under this legal system.<sup>100</sup> Others point to the fact that women were more likely than men to be convicted for adultery and that it is a form of sexual control.<sup>101</sup>

The Taiwan Alliance to Promote Civil Partnership Rights (TAPCPR), a group led by people who self-describe as “queer, feminist women,” has suggested creating a marriage alternative suitable for egalitarian relationships,

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95. I-HSUN CHOU, MANDATORY DIVORCE MEDIATION IN TAIWAN: LEGAL REGIME, JUDICIAL ATTITUDES, AND PUBLIC OPINIONS 19 (2008) (J.S.D. Dissertations, University of Chicago Law School) (on file with The University of Chicago Library).

96. JANET HALLEY ET AL., GOVERNANCE FEMINISM: AN INTRODUCTION 259 (2018).

97. *Id.* at 27.

98. In addition, the prosecution of adultery in Taiwan is highly gendered; although men have extramarital sex more often than women, the number of women convicted as the adulterer or as the co-respondent is higher than that of men. Miller, *supra* note 82, at 460. Gendered patterns could also emerge in the case of same-sex partners.

99. See Chen, *supra* note 13, at 87-88 and n. 60.

100. See *id.* at 87.

101. Jason Pan, *Decriminalize adultery, groups say*, TAIPEI TIMES (Mar. 27, 2020), <https://www.taipetimes.com/News/taiwan/archives/2020/03/27/2003733467>.



and that includes the repeal of adultery laws and fault divorce.<sup>102</sup> This is a good solution for an alternative to marriage, but it still does not engage with the rules of marriage and Article 2 relationships. Same-sex couples might be particularly susceptible to the harm of laws related to adultery. Equality for LGBTQ+ individuals and couples requires pluralistic laws that do not treat nonmonogamy negatively.

### B. *Parents-In-Law*

There is no question that, formally, the exclusion of in-law obligations vis-à-vis same-sex couples is discriminatory. In Taiwanese culture, in-laws are important. “The cultural ideal practice of co-residence of aging parents with their married sons and other family members is widely promoted in Taiwan.”<sup>103</sup> Hence, this exclusion is particularly offensive as it assumes (and reflects) that same-sex couples are not part of their partners’ extended families.<sup>104</sup>

However, the omission of in-law responsibilities potentially represents an opportunity to adopt a more substantive notion of equality. One aspect of such equality relates to the role of parents-in-law (and extended family, more generally) in patterns of assortative mating. For years, across different cultures, same-sex couples have shown that their mate-selection patterns are more heterogeneous than those of their different-sex counterparts.<sup>105</sup> That is, same-sex couples often date people who do not share similar characteristics. At the same time, relationship patterns among different-sex couples are gradually becoming more assortative--in terms of race, education, income, and wealth--including in Taiwan.<sup>106</sup>

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102. Victoria Hsiu-Wen Hsu, *Colors of Rainbows, Shades of Family: The Road to Marriage Equality and Democratization of Intimacy in Taiwan*, 16 GEO. J. INT’L AFF. 145, 154, 156-57 (2015).

103. Shann Hwa Hwang, *Family Policies in Taiwan: Development, Implementation, and Assessment*, in HANDBOOK OF FAMILY POLICIES ACROSS THE GLOBE 273, 275 (Mihaela Robila ed., 2014).

104. For discussion of the importance of parents-in-law in Taiwanese society, see, I. Altman et al., *A Transactional Approach to Close Relationships: Courtship, Weddings, and Placemaking*, in PERSON-ENVIRONMENT PSYCHOLOGY: MODELS AND PERSPECTIVES 193, 193-242 (W. B. Walsh, K. H. Craik & R. H. Price eds., 1992).

105. See, e.g., Ellen Verbakel & Matthijs Kalmijn, *Assortative Mating among Dutch Married and Cohabiting Same-sex and Different-sex Couples*, 76 J. MARRIAGE & FAM. 1, 1-12 (2014) (finding that male same-sex couples are less homogenous in mate selection in terms of age and education than different-sex couples); Christine R. Schwartz & Nikki L. Graf, *Assortative Matching among Same-sex and Different-sex Couples in the United States, 1990-2000*, 21 DEMOGRAPHIC RESEARCH 843 (2009).

106. Yen-Chun Cheryl Chen & Jui-Chung Allen Li, *Family Change in East Asia*, in THE WILEY-BLACKWELL COMPANION TO THE SOCIOLOGY OF FAMILIES 61, 67 (Judith Treas, Jacqueline Scott & Martin Richards, eds., 2004) (“The norms used to be for women to marry a man with higher status. The norms have over time weakened in Taiwan – with increasingly fewer marriages in which the husband had either the same or a higher educational attainment than the wife. . . .”). For data about and discussion of assortative mating among different-sex couples see, Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1, 43-47 (2018).

For the purpose of this essay, I only want to suggest that one reason--although certainly not the only one--that same-sex partners have been more willing to date outside race, religion, and class lines has been the side effect of being excommunicated from their families of origin. That is, the fact that the partners have not been involved with their respective in-laws--who might come from a different socioeconomic, racial, or religious background than theirs--might be a factor in the heterogeneous coupleship patterns among same-sex couples. The discussion of the conditions that lead to positive patterns of assortative mating is complicated; many factors affect people's choices of intimate partners. A study that tried to isolate whether people select their partners based on their in-laws' educational background, church attendance, and political affiliation found that the effect of in-laws on partner selection is complex. The study revealed, however, that in-laws play important roles in the selection process.<sup>107</sup> In a socialwork casework study from 1975, the author explained that individuals from supportive families tend to seek families that resemble their own. If, however, that individual "still has unresolved conflicts with his family upon leaving home for marriage or other reasons . . . [he might] seek partners with an opposite type of family in an attempt to receive what they did not have before."<sup>108</sup> The simple point--which I make cautiously, as it does not rest on strong empirical data--is that the law's exclusion of same-sex partners' duties toward parents-in-law is a formal discrimination.

The other aspect of support obligations toward parents-in-law is privatization. By placing on individual family members the obligation to support their elderly parents, the state extends the number of people who have private support obligations. In so doing, it avoids its own obligations to provide the needed expensive services of caregiving. Care for parents is an important value, and increasingly a concern for states; by shifting this responsibility to individuals, the state evades its obligation to provide its citizens with basic social safety-net security.<sup>109</sup>

In this view, on the positive side, the exclusion of same-sex couples from the duty to care for their in-laws presents an occasion to challenge the inclusion of *all* formal legal obligations in the current scheme. Rather than seeking the same treatment, this law could signal that the obligation should not exist in the first place. Likewise, the diminished role of in-laws in LGBTQ+ life may result in greater mating diversity--although I recognize

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107. Lindon J. Eaves & Peter K. Hatemi, *Do We Choose Our Spouse Based on Our In-Laws? Resolving the Effects of Family Background and Spousal Choice for Educational Attainment, Religious Practice, and Political Preference*, 92 SO. SCI. Q. 1253 (2011).

108. Arthur L. Leader, *The Place of in-laws in Marital Relationships*, 56 SOC. CASEWORK 486, 487 (1975).

109. Further, the support and care of adults often fall on women. Thus, obligations toward in-laws entrench the role of women as the main providers of unpaid care and housework.

that the law is only one instrument that creates the obligation and that cultural norms are strong, regardless. Parents-in-law could be a factor that complicates relationships. Thus, the law's exclusion of these duties might offer some opportunities for legal change.

C. *Marriage Is Not the Answer for All Individuals*

Marriage can come with a host of benefits and protections. It is a major way by which states distribute resources, and this certainly includes Taiwan. While distributing rights and benefits and imposing obligations via marriage has the advantage of efficiency, the attachment of legal directives to marriage can be harmful to single individuals, unmarried couples, and sometimes to low-income married couples.<sup>110</sup> Below, I explain how a marriage-exclusive regime excludes people in relationships of interdependence--economic and emotional--from receiving benefits solely because they are not formally married. I further argue that a lack of choice among regimes of recognized relationships is harmful for people in nonmarital relationships. Additionally, as discussed later in this section, some married couples also lose benefits under current marital regimes, particularly under those in which eligibility is based on calculation of income--especially, when both couples earn a low income. All of these instances call into question whether marriage serves as the final frontier for justice; they warrant that we envision family-law reform as part of an LGBTQ+ equality agenda.

The availability of same-sex marriage is an important issue of justice and equality. But the fact that many rights and benefits are available only through marriage--as in Taiwan--is harmful to many, and to same-sex couples in particular. Pursuant to the *Implementation of the International Covenant on Civil and Political Rights: Second Report Submitted Under Article 40 of the Covenant*, Taiwan has promulgated 498 regulations and administrative measures that apply to spouses only.<sup>111</sup> For example, spouses uniquely enjoy special protection for their matrimonial property. Or, consider the immigration area: the spouse of a Taiwanese citizen or the spouse of a

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110. See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1783 (2005) (arguing that one primary purpose of state recognition of intimate partnerships is to be able to rely on "an off-the-rack rule to structure certain relations between members of the couple and third parties.").

111. ZHONGHUA MINGUO FAWUBU (中華民國法務部) [MINISTRY OF JUSTICE, R.O.C.], THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ZHIXING QINGXING QIANYUEGUOGEN JUGONGYUE DI 40 TIAO TIJIAO DE DIERCI GUOJIA BAOGAO (《公民與政治權利國際公約及經濟社會文化權利國際公約》執行情形：簽約國根據《公約》第40條提交的第二次國家報告) [IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: SECOND REPORT SUBMITTED UNDER ARTICLE 40 OF THE COVENANT] Article 23, Provision 33 (27 Apr., 2016).

Taiwanese permanent resident may apply for residence;<sup>112</sup> unmarried couples are not entitled to this privilege.

The exclusivity of these benefits is an economic injustice to a large group of people. While cohabitation has traditionally not been prevalent in Taiwan, it is becoming increasingly common.<sup>113</sup> For instance, a review of recent research found that “the percentage of women ever having cohabited increased from 11% in the late 1990s to nearly 20% in 2004.”<sup>114</sup> Divorce rates are increasing only gradually, as a larger number of women choose not to get married at all.<sup>115</sup> Indeed, “family disputes that make their way into the legal system now include an ever-greater number of nonconjugal families.”<sup>116</sup> The upshot is, then, that a growing number of people do not enjoy the benefits and protections of marriage, even if they create other kinds of committed relationships--conjugal or nonconjugal. The fact that marriage is the only path to these privileges and protection is an LGBTQ+ issue, because the community has a rich history of building and maintaining significant partnerships outside marriage and outside family of origin.

Beside the fact that those who establish nonmarital kinships cannot enjoy a host of benefits and protections, they also lack any other choice about organizing their relationships. The system is “marriage or nothing.” However, for some people who do not want to get married, their relationships still function in ways relevant to the particular benefits at stake. Think about an unmarried couple who does not get married for ideological reasons, or a cohabiting couple who is not ready to get married; although these partners are not married, they may have created economic interdependencies.<sup>117</sup> Likewise, a couple of friends who serve critical functions in each other’s lives have no way to enjoy the protections that are attached to marriage.<sup>118</sup> The regime is binary--married, or not married--with no way to take into account the many diverse relationships that exist in the real world and that warrant state protections regardless of the lack of formal

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112. Ruchukuo Ji I Min Fa (入出國及移民法) [Immigration Act] Chapter 5 (promulgated and effective May 21, 1999, as amended Nov. 16, 2016) (Taiwan).

113. Rhiannon A. Kroeger & Pamela J. Smock, *Cohabitation: Recent Research and Implications*, in *THE WILEY-BLACKWELL COMPANION TO THE SOCIOLOGY OF FAMILIES*, *supra* note 106, at 217, 222.

114. *Id.*

115. Cheryl Chen & Allen Li, *supra* note 106, at 68.

116. Grace Shu-Chin Kuo, *The Alternative Futures of Marriage: A Socio-legal Analysis of Family Law Reform in Taiwan*, in *WIVES, HUSBANDS, AND LOVERS: MARRIAGE AND SEXUALITY IN HONG KONG, TAIWAN, AND URBAN CHINA* 222 (Deborah S. Davis & Sara L. Friedman eds., 2014).

117. *See, e.g.*, Chen, *supra* note 13, at 76-77 (discussing the critical feminist view of marriage in Taiwan and the ways the feminist movement has addressed it).

118. *See generally* LAW COMM’N OF CAN., *BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* (2001) (discussing the importance of nonconjugal relationships and proposing that these relationships will receive appropriate legal recognition).

status.

The final problem with the marriage regime is that it might have adverse financial consequences for low-income couples, including elimination or reduction of government benefits. Consider, as an example, health insurance. Taiwan has universal compulsory health insurance, governed by the National Health Insurance Act.<sup>119</sup> An unemployed spouse is considered a beneficiary dependent of the employed spouse, who is the insured.<sup>120</sup> Upon marriage, unemployed spouses must get their health care under the employed spouse's insurance plan. Insurance rates depend on monthly income;<sup>121</sup> the insurance rate of a dependent is the same as that of the insured.<sup>122</sup> Therefore, the unemployed spouse may pay a greater insurance rate upon marriage, if the insured spouse's rate is higher than what the unemployed spouse paid before marriage. Similarly, spouses may lose rental subsidies if they are married for over two years; whereas, their single counterparts can continue to enjoy the subsidy.<sup>123</sup> The point, then, is that from a substantive equality perspective, marriage will in some important circumstances not be beneficial for couples with low incomes. These couples might, then, choose not to get married as a way to avoid losing their benefits. Thus, same-sex couples with low incomes might find that marriage is not their path to equality.

The upshot, then, to borrow the words of the late Paula Ettelbrick, is that “marriage [is not] a path to liberation.”<sup>124</sup> Without reforms to domestic law, marriage might be the solution for certain same-sex couples, but it does not

119. Chuanmin Chienkang Paohsien Fa (全民健康保險法) [National Health Insurance Act] (promulgated Aug. 9, 1994, effective Mar. 1, 1995, as amended Jan. 15, 2020) (Taiwan).

120. *Id.* Article 2 and Article 10.

121. Chuanmin Chienkang Paohsien Taopao Chin E Fenjibiao (全民健康保險投保金額分級表) [NHI Insurable Income Grading Table] (promulgated and effective Feb. 7, 1995, as amended Nov. 8, 2019) (Taiwan).

122. Weisheng Fulibu Zhongyang Jiankang Baoxianshu (衛生福利部中央健康保險署) [National Health Insurance Administration Ministry of Health and Welfare], *Baofei Jisuan* (保費計算) [How Premiums Are Calculated], WEISHENG FULIBU ZHONGYANG JIANKANG BAOXIANSHU (衛生福利部中央健康保險署) [NATIONAL HEALTH INSURANCE ADMINISTRATION MINISTRY OF HEALTH AND WELFARE], [https://www.nhi.gov.tw/english/Content\\_List.aspx?n=B9C9C690524F2543&topn=46FA76EB55BC2CB8](https://www.nhi.gov.tw/english/Content_List.aspx?n=B9C9C690524F2543&topn=46FA76EB55BC2CB8) (last visited Oct. 3, 2019).

123. Ministry of the Interior R.O.C (Taiwan) promulgated a trial program (Program) on rent subsidies pursuant to “Operation Direction of Housing Subsidies for Rent for Single Youth, Newly Married Family and Family with Minor Children” (Operation Direction) on July 22, 2018. Hsiechu Tanshen Chingnien Ji Guli Hunyu Zujin Butie Zuoye Gueiding (協助單身青年及鼓勵婚育租金補貼作業規定) [Operation Direction of Housing Subsidies for Rent for Single Youth, Newly Married Family and Family with Minor Children] (promulgated and effective July 22, 2019) (Taiwan). The subsidies are only available to couples who are married for less than 2 years. However, the subsidies are available to single individuals who are between the ages of 20 and 40. Therefore, it is actually disadvantageous for married couples, since they would be ineligible for the subsidy after 2 years of marriage.

124. Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, 6 NAT'L LESBIAN & GAY Q. 14, 14-16 (1989).

work for all of them.

An expansive vision for LGBTQ+ equality that is inclusive can have two elements. One, the separating out of some of the attributes attendant on marriage; two, the development of a regime that has various options for recognition of relationships. Disaggregating some attributes requires that families' benefits and obligations be tailored based on function and not on status. Such system is based on the principles of Nancy Polikoff's "valuing all families" approach, a functional approach to recognition of relationships.<sup>125</sup> Accordingly, the law's protection of the familial unit would be contingent on the purpose of the law at stake and on the role that family members fulfill in their family, rather than on status. The second element requires that diverse types of relationships have various ways to gain legal recognition.<sup>126</sup> TAPCPR proposed a "multiple-person household rights" system that would allow both conjugal and nonconjugal partners to register their relationships and that would serve as another marriage alternative.<sup>127</sup> While Chao-ju Chen contends that this proposal "does little to undermine the privileges of conventional marriage and the inequalities within marriage,"<sup>128</sup> it represents great progress toward a menu of options. Although marriage remains an option on that menu, the fact that other options exist will reduce some of the symbolic harms of marriage.<sup>129</sup> In any event, the way to build a well-functioning menu of options is complicated, and beyond the scope of this essay. TAPCPR provides a good starting point for a vision; the particulars can be debated later.

## V. CONCLUSION

The TCC's ruling in the *Same-Sex Marriage Case* was an important step toward equality, just as *Lawrence* was. While the *Same-Sex Marriage Case* promoted a vision of domesticated liberty it did not go far enough and did not rule on essential aspects concerning parental rights. The law that followed reflects this same tension: it imposes certain obligations, like fidelity, but did not extend certain rights, like parenthood. The European experience teaches that sometimes discrimination in the area of parentage is more entrenched and harder to fight than discrimination in marriage rights; and, that the resistance to equal parental rights is often rooted in questions of

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125. See NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 126 (2008).

126. See Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 615 (2013) (suggesting the principles of and theoretical justification for a menu of options).

127. Hsu, *supra* note 102, at 156.

128. Chen, *supra* note 13, at 82.

129. See Aloni, *supra* note 126, at 620 (arguing that additional options for recognition of relationship "could help to reduce some of marriage's expressive harm.").

citizenship and race. That being said, here is the good news: that experience indicates that, under the incremental model of progress, the third stage can commence with recognition of partnership rights and, after that, deal with parenthood.

The broader lesson is that, when comparing the experience of other countries, we have to be nuanced and attentive to the differences in cultures and laws. In particular, we should look at the final frontier of equality with an eye to the particular laws concerning domestic relations, laws that often have been written with a heteronormative vision of family. Diversity of family forms, and the diversity of relationships that LGBTQ+ movements have embraced, requires a more pluralistic system than marriage or nothing. Taiwan's LGBTQ+ community could scrutinize the effect that marriage has on diverse types of individuals and families and find their way toward a more just system that respects diverse types of affiliations.

At the same time, among many lessons from Taiwan, the Taiwanese experience calls on others in worldwide LGBTQ+ movements to assess what their "final frontiers" are and what is left to win after marriage equality. As sociology professor Po-Han Lee notes, Taiwanese's "rainbow coalition has the potential to facilitate a thorough social change rather than legal reform. . . ." <sup>130</sup> Their final frontier and approach to equality has been complex. Likewise, Law Professor Stewart Chang rightly argues that "Taiwan . . . offer[s] alternative models for gay rights that has ramifications beyond marriage equality." <sup>131</sup> Indeed, there is a unique and inspiring undertone to Taiwanese activism in the area of LGBTQ+ equality. Their path tells a story that defies many conventions about the road to equality.

We should listen; there is a lot to learn.

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130. Po-Han Lee, *Queer Activism in Taiwan: An Emergent Rainbow Coalition From the Assemblage Perspective*, 65 THE SOCIOLOGICAL REV. 682, 694 (2017).

131. Chang, *supra* note 10, at 166.

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# 先是婚姻、然後是嬰兒， 再來究竟是什麼？

Erez Aloni

## 摘 要

臺灣將同性婚姻法制化之里程碑，對於LGBTQ+個人與伴侶之權利具有國際級之重要性。本次法制化更提供了一個澈底檢視臺灣與其他國家現行LGBTQ+平等情況之機會。本文通過理論與比較法之角度，討論對LGBTQ+而言，平等究竟意味著什麼，以及在婚姻合法之後，將發生哪些問題。本次合法化提供了關於同性婚姻及平等交往從過去、現在到未來之不同觀點。本文著眼於臺灣實現同性婚姻合法化之現況，認為臺灣之憲法法院一方面將同性婚姻合法化保障LGBTQ+人民之自由，另一方面卻限制了該群民眾組成家庭之自由。且在大法官解釋合法化後，執行該解釋之法律尤其在組成家庭的權利上加劇了對於LGBTQ+之歧視。不過此種於同性婚姻合法化之後，仍帶有父母身分歧視之情形並非臺灣所獨有。從歐洲法之發展情況來看，這種歧視於合法化雖仍然存在，但將隨著時間經過而逐漸消失。來自其他地區之經驗亦顯現，LGBTQ+想要爭取平等之父母與家庭權利可能困難重重，而關於LGBTQ+平等權之反對聲音則大多與涉及其家庭、育兒等權利以及種族歧視有關。

最後，在探討於未來實現平等之道路上，本文認為由於上述之各種原因，婚姻不該成為LGBTQ+平等權之最後一站。要在臺灣落實實質性平等至少應廢除以通姦作為離婚以及民事補償之理由。若從更廣泛的平等與自治之角度出發，還必須採取相關之制度，在此種制度之下婚姻不該是一般人獲得與伴侶有關權利之唯一途徑。同樣的，必須為各種類型之人民，尤其是LGBTQ+，創建更多合法確認其關係之選擇。最後，本文認為對於LGBTQ+於父母、家庭方面之歧視將與其自

由等權利密不可分。

臺灣此次合法化的經驗可供世界各地與LGBTQ+有關之運動與學者借鏡。此經驗呼籲學界於建立符合自由與平等的體制應避免忽略各該國家的差異時，並重新將婚姻視為LGBTQ+平等權最重要之一環。

**關鍵詞：** 臺灣同性婚姻、婚姻平權、漸進主義、實質平等、婚姻以外

