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First in Asia, now what?
Taiwan and marriage quasi-equality

Po-Han Lee

Introduction

On 24 May 2017, the Council of Grand Justices of the Judicial Yuan in Taiwan declared and released its famous *Judicial Yuan Interpretation No. 748*; basically, the Interpretation rules stating that the non-recognition of same-sex marriage in law was unconstitutional and thus requiring the legislators to do something about it – be it through an amendment of the Civil Code or new legislation. Thereafter, a huge debate emerged throughout the whole society in Taiwan, which had witnessed so much confrontation between supporters and opponents on that issue and perhaps felt really exhausted.

On 17 May 2019, it rained buckets in Taipei, but lots of people gathered around outside the parliament building. Not only was it the day just one week before the two-year deadline set up by the judges, but also, coincidentally, an International Day Against Homophobia, Transphobia and Biphobia. Also, on that day, the members of Taiwan's Legislative Yuan (Parliament) were scheduled to debate on how to make the judges' call a reality. Eventually they passed the so-called *Enforcement Act of Judicial Yuan Interpretation No. 748*, a compromised result out of all of the strange versions.

To be brief here, the new law grants same-sex couples 'almost the same' set of partnership and family rights that are available to heterosexual married couples under the Civil Code. When I say, 'almost the same', that means that there are certain exceptions and restrictions – for instance, the restrictions imposed on the adoption rights of same-sex married couples, the exclusion of foreign spouses whose nationality states do not legalise same-sex marriage, and so on. So, just for now, let's tentatively call it a 'Marriage Quasi-Equality Act'.

But anyway, when the third reading of the draft bill had finished and the President of the Legislative Yuan, Jia-Chyuan Su, hit the gavel at 15:29pm, the crowds waiting outside the parliament and people watching on live streaming (like myself) burst into tears. We couldn't help it. 'It was a very, very emotional moment, says a friend recalling that day, 'especially when you saw many of the parliamentary members act in a bigoted way and heard them speak against the bill.' I understand that very well; I couldn't sleep for days.

Deconstructing the 'first in Asia'

Over that week and afterwards, the news went completely viral and all the national and international press welcomed and cheered for Taiwan. Such a milestone heralds a 'post-marriage equality' era, where Taiwanese people (and even the government itself) can finally shout loud with pride: 'First in Asia!' Yet, is it the whole story? In this commentary, I aim to outline the socio-political and legal developments of marriage equality movement in Taiwan, by contextualising such a landmark achievement, which has actually taught us something about democracy.

That is, the essence of a democratic society – the reason we need one – consists of differences between citizens and agonistics between ideologies that always involve a direct, intensive engagement with institutions, rather than the principles of sameness, consensus, and representation as postulated by liberalisms (Mouffe, 2013). However, due to the Grand Justices'

desire – whether performative or not – for the set of principles of the latter, the judgement had to rely heavily upon ‘evidence-based’, ‘science-endorsed’ medical discourse, in order to justify sexual minority members’ *normality* and therefore their citizenship rights-holding status.

After all, although the ‘first in Asia’ badge for Taiwan’s same-sex marriage institution is not a fraud, it is definitely not perfect. In fact, the ‘first in Asia’ rhetoric itself is problematic. First of *what* in Asia – a country, a nation, a state? This was the question that drove the international press crazy. The UN Women could only dare to label Taiwan a ‘Province of China’ while celebrating this news (DeAeth, 2019), as if it were a victory for the Chinese when their sexual minorities struggled much in workplace and everyday life (UNDP, 2016).

How are things on the island? Let’s rewind a bit, back to the moments slightly after and before 15:29pm, on 17 May 2019. Following the legislation, the Minority Leader (Kuomintang/KMT) of the Legislative Yuan, Johnny Chi-Chen Chiang, complained, ‘it seems fun to hit the gavel...but does that really resolve the ongoing controversy?’ Frankly speaking, ‘has the society been torn apart because of marriage equality campaign?’ This is the question that many people have been asking. What makes a society untorn, we should also ask. Say, solidarity.

Thus, one has to base the question that links same-sex marriage to Taiwanese social solidarity on at least two assumptions: First, the exclusion of same-sex marriage from law – namely, only heteronormativity, which is legitimate in law – forms an integral part of Taiwanese social solidarity. Second, the conceived, imagined, felt, and perhaps desired ‘Taiwanese social solidarity’ – or, Taiwanese-ness – is a complete, crack-less unity that allows no ruptures, disruptions, and hence remodelling. This is exactly what concerns most sociologists in Taiwan, including myself (Wang & Chen, 2017; Lee, 2019).

The long road to quasi-equality

Among all of the variations, the one that was successfully passed was the draft proposed by the Executive Yuan, as mentioned at the beginning. The other two are the draft *Enforcement Act of National Referendum Proposition 12*, lobbied by the Coalition for the Happiness of Our Next Generation and proposed by Shyh-Bao Lai, a KMT member of the Legislative Yuan, and the draft *Enforcement Act of Judicial Yuan Interpretation No. 748 and National Referendum Proposition 12*, lobbied by the FaithHope&Love Foundation, and proposed by Tai-Hua Lin (Democratic Progressive Party/DPP).

Seemingly as simple as three versions to be debated over, the long road to same-sex marriage in Taiwan was nonetheless paved with many people’s blood, sweat and tears. The suicide of the National Taiwan University lecturer, Jacques Picoux, was the most recent shock on 16 October 2016. In addition to public sympathy, his death also ‘accidentally turned the page for marriage equality movement’, as commented by the Marriage Equality Coalition (formed by the Taiwan Tongzhi Hotline Association, Taiwan LGBT Family Rights Advocacy, Pridewatch Taiwan, Queermosa Awards, and the Awakening Foundation).

Among all stories, Mr Chia-Wei Chi’s struggle begs our attention as well – it was the whole reason that the Same-Sex Marriage case was brought in front of the Constitutional Court. As early as 1986, Chi applied to the Taipei District Court notary office for a marriage certificate and encountered an immediate rejection. Following his appeal to the Legislative Yuan, he was replied traumatically: ‘homosexual persons are abnormal pervert...who contravenes the public order and good morals of society’. Back then, the civil rights movement for sexual and gender minorities had just emerged.

In 1994 the Ministry of Justice ruled out all chances of legalising same-sex marriage. Again, Chi challenged that decision by applying for a certificate in 1998 and eventually made a case to the Council of Grand Justice in 2000. The case was then determined inadmissible. On 21 March 2013, he made a certificate application once again, and, when rejected, appealed to Taipei City Government's Department of Civil Affairs, who referred the constitutionality question to the Taipei Higher Administrative Court and then the Supreme Administrative Court in 2015.

The story that follows is already well known. This time Chi's case drew the attention of the whole of society. And, we might say that the Council of Grand Justice had waited for two years to proceed after Ying-Jeou Ma's KMT government was replaced by Ing-Wen Tsai's (DDP), who had claimed to be LGBTQ-friendly during the campaign. Therefore, comparing now and then, Taiwan has been transformed. The support of both the people and the media has increased, the government's position has shifted, and even the court's attitude has changed – along with greater visibility and better representation of sexual minority populations.

What happened in those years?

Undoubtedly, no success comes as a surprise. In addition to the decades-long grassroots activism and Taiwan LGBT Pride, a series of gender equity legislation, 'gender mainstreaming' policies, and the internalisation of international human rights treaties have all contributed to creating the context for same-sex marriage campaigns (Lee, 2017). In fact, the Ministry of Justice under Shui-Bian Chen's Government drafted the *Basic Law for Human Rights Protection* in 2001, which included homosexual persons' family and adoption rights, but unfortunately it did not even get into the KMT-majority parliament for consideration.

A symbolic move was the petition for three draft bills for Diversified Family Formation, written and submitted by the Taiwan Alliance to Promote Civil Partnership Rights. Though boycotted in the end in 2013, the whole package of draft bills aimed to radically amend relevant provisions in the Civil Code to make the law guarantee complete liberty and equality for all citizens who wish to form a family. Such a blueprint included not only the legalisation of same-sex marriage but also the pluralisation of family formation in law; the latter had scared many politicians away.

Prior to that, some events are worth mentioning. A draft bill for the *Same-Sex Marriage Act* was proposed on 11 October 2006 by a DPP member of the Legislative Yuan, Bi-Khim Hsiao, which was soon blocked by a group of parliament members led by Shyh-Bao Lai. Slightly earlier than the landmark judgement, in 2016, two DPP parliament members, Ching-Yi Lin and Mei-Nu Yu, had proposed to directly amend the Civil Code rather than make a new law. This time, with a majority of inter-party members' signatures, it passed the second reading.

Despite the fact that all of these attempts failed, however, they successfully grasped the attention of the public and made the marriage equality issue highly politicised. That is to say, politicisation enables a sociocultural or legal issue to be articulated with political discourse and leverage, which inevitably requires a constant engagement *with* institutions. In particular, this has become even more significant since the 2014 Sunflower Movement, after which Taiwan witnessed the emergence of new political actors, strategies, and tactics as well as the transformation of Taiwanese nationalism.

Happy days don't last. When the Constitutional Court unusually invited a bunch of experts to give testimonies, permitted the livestreaming of the public hearing, and attached an English

statement to the judgment, you understood that it is a big deal – domestically and internationally. Therefore, what followed, the anti-tongzhi National Referendum in 2018, was hence shocking. The relevant propositions won a majority of votes, including No. 10 (limiting the legal definition of marriage to opposite-sex couples) and No. 12 (protecting same-sex ‘union’ with a special law).

Whose desire for being normal?

Against all odds, due to the change in power dynamics between the marriage equality supporters and opponents, the momentum remained. Precisely, the Grand Justices should take the credit in terms of the realisation of the rights in relation to same-sex partnership and family formation. That is, the Legislative Yuan was able to take the final step to closing the debate thanks to the guidance offered in the *Judicial Yuan Interpretation No. 748*. Therefore, even with a critical eye, I was humbled when I witnessed that happen.

Yet, I cannot say that I hold no reservations. On 24 March 2017 when I watched the public hearing regarding the same-sex marriage case at the Constitutional Court, I observed that the discussion was around issues regarding homosexual people’s freedom of marriage and their right to equality. Nonetheless, to establish that rights-holding status, in their reasoning the Grand Justices spared a large space to explain how homosexuals are ‘normal’ and just the ‘same’ as heterosexuals and thus deserve equal rights and opportunities.

To do so, they aimed to establish that ‘homosexuality is not a disease’, drawing on the evidence and policy statements of the WHO, the Pan American Health Organisation, and other major international medical organisations. Thus, homosexual people can be considered as normal citizens, so their rights claims are legitimate. The implicit condition for such ‘equalisation’, however, is that the right to equality is applicable only in the circumstances in which homosexuals can be seen as heterosexuals, and this was the reason for excluding their adoption rights and reproductive justice.

The medical discourse then becomes the invisible background of a legal judgment concerning equality between citizens. Namely, whether one is worthy of respect and legal protection depends on whether they are as ‘normal’ as others. While equality is the concept that has always been linked to the principle of non-discrimination in all domains of our social and political lives, it turns out to be a smokescreen that covers a world riddled with systemic injustice when it is reduced to a rights issue that begs recognition and tolerance from the authority (Conrad, 2014).

So, what does the ‘first in Asia’ really mean for both the international and Taiwanese societies? The omission of Taiwan’s political status highlights how much the world fears messing with China; this nonetheless largely contradicts the pride that the Taiwanese government and people have felt since the constitutional decision was made. Meanwhile, doesn’t the latter’s desire to be seen by the outside world as normal, normative, and worthy of respect seem very similar to queer people’s struggles for equality? Once misunderstood because of ignorance and oppression, all you want is to get sympathy, recognition and acceptance.

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Author's profile

Po-Han Lee has just finished his PhD study at the University of Sussex, where he also works as a Tutor in Sociology and Criminology. Trained in International Law and Human Rights for more than a decade, he felt the need to see the world in a more engaging and critical way, and that is why he was 'seduced' into the world of social and political theories. In addition, he has served as editor-in-chief for *Plain Law Movement* and writes with *Queerology* and *01 philosophy*.