

**Constitutional Protection of Sex/Gender Equality:  
with the Focus on Leading Cases of Taiwan’s Constitutional Court**

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# 性/別平等的憲法保障：以司法院大法官解釋為中心

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## 摘要

臺灣的性/別平等在近年已有長足進步，足堪與憲法民主先進國家匹敵，尤其在公民與政治權利的性/別平等的面向，甚至超越許多西方的憲法民主先進國家。值得探討的是，這些性/別平等上的進步，是臺灣在經濟與社會發展成熟的進一步體現，抑或與憲法及法律制度上的改革—尤其是司法院大法官的憲法解釋—有關。為探討此一問題，本文分析臺灣在性/別平等上的法制基礎，以及司法院大法官近年所作與性/別平等保障相關的憲法解釋。

本文發現，臺灣在性/別平等上的法制基礎，已由憲法進一步延伸到國際人權公約；而司法院大法官所作與性/別平等保障相關的憲法解釋，確實相當程度地促進了性/別平等的發展。不過，這些由憲法到公約、由訴訟到法制上的進展，主要是來源於由下而上的婦女平權運動與其倡議的策略，司法院大法官仍基於相當被動、甚至時而保守的角色。本文認為，司法院大法官在性/別平等相關解釋上，還必須面對的三個重要的挑戰。首先是在性/別平等與歧視的判準上，過於形式化，而未能真正促成性/別的實質平等。其次是對私人所為的性/別歧視，遷就傳統與文化，未能使政府擔負起矯正性別歧視的積極義務。最後是對性/別隱私、性/別自主及生育決定等攸關個人人格自由發展的根本性自由權利，仍未賦予積極憲法保障的地位。相對地，消除對於婦女一切形式歧視等國際人權公約，對這三個挑戰性的議題面向，則有較為積極的回應，這也是近年婦女平權運動從憲法轉向國際人權公約倡議的重要原因。

## I. Introduction

The advancement of sex and gender equality in Taiwan has come a long way. In 2016, the first woman president was elected. The present legislature has 43 female legislators among 113 total members, up to 38.15%.<sup>1</sup> The gender ratio of civil servants is 57.9% (male)/42.1% (female) and that ratio of political appointees is 78.2% (male)/21.8% (female).<sup>2</sup> In the Constitutional Court (also known as the Council of Grand Justice), there are currently four female justices among fifteen justices, the record number in its history.<sup>3</sup> Female judges outnumber male judges in district courts at the ratio of 54.6% and intellectual property courts at the ratio of 57.1%. Yet, with judicial higher-ups, the ratio of female judges decreases: 41.1% of high courts judges are female, 44.2% of high administrative courts judges are female, 32.7% of the Supreme Court judges are female, and 33.3% of the Supreme Administrative Court judges are female. Except two female chief judges at high administrative courts and six female chief judges at district courts, there is no female chief judge at any other courts.<sup>4</sup> Outside the government, 44% of those employed in labor market are women. Fewer women (44%) are employed in industry sector, while more women (53.7%) are employed in service sector.<sup>5</sup> Literacy rates of men and women are quite close: 99% versus 97%.<sup>6</sup>

The above statistical facts evidence the present situation of sex/gender equality in Taiwan. Like other advance constitutional democracies, Taiwan's sex/gender equality has been substantially improved in recent years particularly in the aspects of civil and political equalities, but not quite so in the aspects of economic, social and cultural rights especially facing discriminations in the employment, market place and the family. To what extent has this progress –as well as shortcomings– of gender/sex equality been made by the law, the Constitution and the case laws of Taiwan's Constitutional Court (TCC)? Or rather, it has been the reflection of changes in social and economic conditions, to which the law has not contributed much?

This paper is aimed at answering this question –if only partially– by focusing particularly on TCC's leading cases of sex/gender equality. Aside from this

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<sup>1</sup> Republic of China (Taiwan), Common Core Document, the Third Report submitted under Article 19 of the Convention on the Elimination of All Forms of Discrimination against Women (December 2017), available at

<https://www.gec.ey.gov.tw/News.aspx?n=626E260E679247A7&sms=469A3095FCB700F3>, at 28.

<sup>2</sup> *Id.* at 17.

<sup>3</sup> [https://www.judicial.gov.tw/constitutionalcourt/p01\\_03.asp](https://www.judicial.gov.tw/constitutionalcourt/p01_03.asp).

<sup>4</sup> *Supra* note 1, at 35.

<sup>5</sup> *Supra* note 1, at 15.

<sup>6</sup> *Supra* note 1, at 14.

introduction, the second part of this paper discusses Taiwan's legal and institutional framework, mainly constitutional provisions and international legal instruments, under which recent case laws of sex/gender equality are dealt with, followed by the third part that focuses on TCC's case laws. The last part of the paper concludes by discussing challenges lying ahead.

## **II. Legal and institutional framework: from the Constitution to CEDAW**

The advancement of Taiwan's sex/gender equality has been developed under both domestic constitutional provisions and the recent incorporated international human rights instruments. As the following shows, domestic constitutional provisions are not as elaborate as international human rights instruments in protecting sex/gender equality, and it has been the latter, rather than the former, which has pushed forward sex/gender equality.

### **A. Constitutional provisions**

Taiwan's Constitution, the Republic of China Constitution (*hereinafter* Constitution or ROC Constitution) was promulgated in 1947. It does not have very elaborate provisions on sex/gender equality. In Article 7, the Constitution recognizes the right of equality by affirming that all citizens irrespective of sex, religion, race, class or party affiliation should be equal before the law.<sup>7</sup> It should be noted, however, that the 1947 ROC Constitution was the first among Asian constitutions to require quotas for women in electoral politics. Article 134 states that in various kinds of elections, the number of women to be elected shall be fixed, and measures prescribed by law. Owing to this provision and its subsequent implementation, since the 1950s women's presence in all legislatures has been greater than twenty percent.<sup>8</sup>

Despite the quota already stipulated in the ROC Constitution, a constitutional revision in 2005 further made changes to the electoral method of the national legislature, demanding that the number of elected female members on each party's list must not be less than one-half of the total number.<sup>9</sup> As a result, in the election of 2012 and 2016, women occupied 33% and 38% of the national legislature.

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<sup>7</sup> Article 7 of the ROC Constitution.

<sup>8</sup> Ruth Rubio-Marin & Wen-Chen Chang, *Sites of Constitutional Struggle for Women's Equality*, in ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 301-312 (Mark Tushnet, Thomas Fleiner, & Cheryl Saunders eds., 2012).

<sup>9</sup> Section 2, Article 4 of the Additional Articles to the Republic of China Constitution (amended in 2005).

In the course of constitutional reforms in the 1990s, human rights organizations and minority groups pushed forward the inclusion of a few additional provisions relating to special guarantees of minorities' rights to the Constitution.<sup>10</sup> Yet, regrettably, the provisions that were eventually included were not in the form of rights but instead in the form of policy declarations merely urging the government to take appropriate actions to protect minorities.<sup>11</sup> For example, it was prescribed that the state should “protect the dignity of women, safeguard their personal safety, eliminate sexual discrimination, and further substantive gender equality,”<sup>12</sup> provide “assistance in everyday life for physically and mentally handicapped persons,”<sup>13</sup> and “actively preserve and foster the development of aboriginal languages and cultures,” and “safeguard the status and political participation of the aborigines.”<sup>14</sup> As mere policy declarations, these provisions have not been effective in enforcing the rights of minorities.

## **B. CEDAW accession**

The Convention on Elimination of All Forms of Discrimination against Women (CEDAW), also known as the Women's Convention, first caught the eyes of Taiwan's women activists in 1988, when they were drafting the Act of the Equal Treatment of Both Sexes at Work.<sup>15</sup> Through researching foreign legal materials concerning equal rights of men and women in employment, research staffs and affiliated lawyers at the Awakening Foundation, the leading feminist organization in Taiwan, learned about the existence of the CEDAW.<sup>16</sup> Intriguingly however, they paid no special attention to the Convention. Rather, they were more interested in borrowing specific equal rights provisions from many different national jurisdictions.

After the new millennium, women organizations began referring to the CEDAW. They did not, however, directly refer to any of its provisions or principles. Instead,

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<sup>10</sup> Wen-Chen Chang, *An Isolated Nation with Global-minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan*, 4(3) N. TAIWAN U. L. REV. 203, 222-33 (2009).

<sup>11</sup> *Id.* at 210-11.

<sup>12</sup> Section 6, Article 10, Additional Articles to the ROC Constitution.

<sup>13</sup> Section 7, Article 10, Additional Articles to the ROC Constitution.

<sup>14</sup> Sections 11 and 12, Article 10, Additional Articles to the ROC Constitution.

<sup>15</sup> It was adopted by the UN General Assembly on December 18, 1979, and entered into force on September 3, 1981. CEDAW is a widely signed human rights document, and by the end of 2008, the number of its member states reached 185. See Wen-Chen Chang, *Public Interest Litigation in Taiwan: Strategy for Law and Policy Changes in the Course of Democratization*, PUBLIC INTEREST LITIGATION IN ASIA 136, 144 (Po Jen Yap & Holning Lau eds., 2010).

<sup>16</sup> The purpose of the Awakening Foundation and how it was involved with legislative drafting on the equal rights bills are available at Jen Shih Fu Nu Hsin Chih Chi Chin Hui [To Know Awakening Foundation] (Aug. 11, 2009), <http://blog.roodo.com/awakeningfoundation/archives/9728249.html>; Chang, *Supra* note 10, at 224.

“gender mainstreaming”, a key platform adopted in the fourth World Conference on Women in 1995, was most discussed and referred to.<sup>17</sup> At the time, the government was pushing for government restructuring reforms, and women organizations utilized this concept in their advocacy for establishing an independent commission on gender equality.<sup>18</sup> In the course of this policy advocacy, many women activists, particularly feminist scholars who were familiar with or individually participated in the 1995 Conference, began extending relevant issues beyond gender mainstreaming.<sup>19</sup> By inviting their overseas feminist colleagues to the discussions, they further realized the primary status of the CEDAW regarding women’s rights, and met with renowned women activists who also served as members to the CEDAW committee or the UN Commission on the Status of Women (CSW).<sup>20</sup>

In April 2004, women organizations held a workshop to call for NGOs’ participation to CSW meetings, and most importantly, to advocating the CEDAW incorporation into Taiwan.<sup>21</sup> In that summer, the National Alliance of Taiwan Women Associations (NATWA), a primary network organization that links to almost all women organizations in Taiwan took the lead in the advocacy of the CEDAW and other related mechanisms. An international conference was held among women organizations and scholars to discuss ways for Taiwan’s accession to the CEDAW and its incorporation into the domestic legal regime.<sup>22</sup> By end of August, the Taiwan Civil League for promoting CEDAW (the League for CEDAW) was formed among major NGOs concerning women’s rights, children’s rights and human rights in general.<sup>23</sup>

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<sup>17</sup> For details of the platforms, *see* Fourth World Conference on Women, Sep. 4-15, 1995, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20/Rev.1, available at <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>; Chang, *id.* at 224.

<sup>18</sup> They also requested that all ministries and government agencies adopt the idea of “gender mainstreaming” to take gender as a factor seriously in their respective government functions. While the commission on gender equality is yet to be established now as of 2009, the idea of “gender mainstreaming” has been accepted into part of government operation, and every ministry and agency has one staff responsible for gender-specific matters such as gender statistics; Chang, *id.* at 224.

<sup>19</sup> Particularly those in the Taiwanese Feminist Scholars Association, *see* Taiwanese Feminist Scholars Association, *Li Nien Tui Tung Cheng Kuo [The Achievements over the Years]*, <http://www.feminist.sinica.edu.tw/pusha.htm> (last visited Nov. 28, 2009); Chang, *id.* at 224.

<sup>20</sup> Some of those previous members of the CEDAW committee were invited to Taiwan more than once. Hanna Beate Schöpp-Schilling from Germany was a key actor among others; Chang, *id.* at 225.

<sup>21</sup> More details for how this alliance was created and began the advocacy for the CEDAW are available at Pi-Chen Ho, *Tui Tung Wo Kuo Chia Ju CEDAW Te Tse Lueh Yu Nu Li [Strategies and Efforts for Promoting Our Accession to CEDAW]* (Oct. 6, 2009), <http://www.natwa.org.tw/about3.php>; Chang, *id.* at 225.

<sup>22</sup> *See* Ho, *id.*; Chang, *id.* at 225.

<sup>23</sup> They include: NATWA, the Awakening Foundation, the Taipei Chapter of the Awakening Foundation, Chang Fo-Chuan Center for the Study of Human Right, Human Rights Program Center at Soochow University, Women’s Research Program Center at National Taiwan University, ECPAT

The League for CEDAW successfully put the CEDAW accession into the government's agenda. Several key activists in the League served as advisors for women's rights and human rights to the Executive Yuan, the cabinet office in Taiwan.<sup>24</sup> They worked to win the government's endorsement on acceding to the CEDAW. It should be noted that between 2000 and 2008, the Democratic Progressive Party, a formerly opposition party, led the government with a special focus on the protection of human rights. As part of the policy, a wide array of human rights organizations and activists were given consultative status and invited to policy discussions in the government. This made easier the advocacy for CEDAW accession. In order to broaden the support for legislative ratification, the League for CEDAW took a strategic step to expand its alliance to other NGOs.<sup>25</sup>

The victory came in the beginning of 2007. On January 5, the Legislative Yuan passed the accession, followed by presidential signature. On February 27, the Ministry of Foreign Affairs attempted to submit the accession to the Secretary-General of the United Nations for deposition. Regrettably however, the government's request was denied by Secretary-General Ban Ki-moon. Based upon the U.N. Resolution 2758 that recognized the PRC as the only legitimate representative of China to the U.N, Mr. Ban contended that Taiwan was not qualified for being a state party to the CEDAW.<sup>26</sup> Notwithstanding the defeat, the League for CEDAW continued its advocacy and further pressed for the government's draft on its initial state report. The initial state report of CEDAW was issued and reviewed in 2009, and the second state report was issued in 2013 with international review in 2014. The third state report was released in December 2017.<sup>27</sup>

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Taiwan, Taiwan Women's Film Association, the Garden of Hope Foundation, and the Taiwanese Feminist Scholars Association; Chang, *id.* at 225.

<sup>24</sup> A key person was Professor Chen, Jau-Hwa, a human rights activist and a professor of philosophy at Human Rights Program Center at Soochow University; Chang, *id.* at 225.

<sup>25</sup> They included: the YWCA of Taiwan, the National Council of Women of Taiwan R.O.C., the Collective of Sex Workers and Supporters (COSWAS), and the Press Statement Alliance for Human Rights Legislation for Immigrants and Migrants. It is interesting to note here that the ways that these NGOs discussed about CEDAW were quite different from the earlier primary groups in the League. They were more specific in referring to particular rights and provisions in the CEDAW with conflicts of rights to other women in mind rather than promoting the Convention as a whole; Chang, *id.* at 225.

<sup>26</sup> The news about this rejection was never formally released by the government. However, the women organizations have spread the news out and organized among themselves to urge the government for self compliance. Relevant information is available at CEDAW Taiwan Kuo Chia Pao Kao Chi Chuan Chia Tzu Hsun Hui Yi [CEDAW Taiwan Initial Report Symposium] (Mar. 26-27, 2009), [http://wrp.womenweb.org.tw/Func02\\_Show.asp?pid=8](http://wrp.womenweb.org.tw/Func02_Show.asp?pid=8); Chang, *id.* at 226.

<sup>27</sup> The state reports of CEDAW and the process of international review is available at <https://www.gec.ey.gov.tw/news.aspx?n=D9EB035103686D4C>. Accessed 28 December 2017.

Because the CEDAW's accession instrument was not successfully deposited with the UN Secretary General, doubts remained as to whether the process of the CEDAW accession was complete, and whether the CEDAW was ready for domestic application. In order to clear any doubts about domestic legal effect, the government decided to enact the CEDAW's Implementation Act in 2011 to formalize CEDAW's accession. The Implementation Act came into force on January 1, 2012.<sup>28</sup>

In June 2012, the government launched a project for the comprehensive overhaul of the laws and regulations according to the CEDAW provisions, for which the Gender Equality Committee of the Executive Yuan served as the main steering force. Many legal experts, human rights groups and women organizations were also invited to participate in the process. By the end of 2013, the laws and regulations that were found to be incompatible with CEDAW amounted to 228 cases in total. By May 2015, most of these incompatible laws and regulations were amended or abolished, while some of them were still under the review and deliberation of the Legislative Yuan.<sup>29</sup> In addition, a comprehensive guideline for gender equality policy was also drawn up and revised in accordance with the CEDAW provisions.<sup>30</sup>

To further implement CEDAW, the Department of Gender Equality under the cabinet has been vigorous in developing various educational programs, including the Gender Impact Assessment, gender accounting program, gender budget program, gender analysis, and the gender consciousness empowerment program.<sup>31</sup>

In Taiwan's recent incorporation of international human rights instruments, there has been a rise in the judicial reference to these international legal sources.<sup>32</sup> Yet, most references have been made to the two International Covenants on Civil, Political, Economic, Social and Cultural Rights, and less to the CEDAW. It may be because the two Covenants entail a wide range of rights whereas other conventions have much more specific targeted groups. In addition, the implementation of the two Covenants was earlier than that of other international human rights conventions, and it is only

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<sup>28</sup> Chang, *Supra* note 10, 221.

<sup>29</sup> Gender Equality Committee of the Executive Yuan, The progress of examining the law and administrative orders and regulations violating CEDAW, <http://www.gec.ey.gov.tw/News.aspx?n=1662D3186C4B2F2D&sms=08DBC3A57A112D27> (in Chinese) Accessed 22 November 2017

<sup>30</sup> Gender Equality Committee of the Executive Yuan, The Guideline of Gender Equality Policy, <http://www.gec.ey.gov.tw/cp.aspx?n=363DC330E476B467> (in Chinese) Accessed 22 November 2017.

<sup>31</sup> Gender Equality Committee of the Executive Yuan, Hsingchengyuan Soshu kochikuan T'uidong Hsingpieh Chiliuhua Shihshih Chihua (Year103-106) shuominghui ChienpaoTzuliao [行政院所屬各機關推動性別主流化實施計畫] (The materials of the press conference of the subordinate institutions of Executive Yuan promoting gender-mainstreaming project in Year 103-106), <http://www.gec.ey.gov.tw/cp.aspx?n=02A3667FED9E6B98>. Accessed 22 November 2017.

<sup>32</sup> Chang, *Supra* note 10, at 212.



natural that judges have become more familiar with the two Covenants than with other human rights conventions.<sup>33</sup>

### **III. TCC's leading cases: pushed forward by women's group and strategic constitutional litigation**

Before the 1980s, Taiwan was under rather strict social and political controls sanctioned by the imposition of the Martial Law Decree. The beginning of the 1990s eventually saw the burgeoning of civil organizations and human rights groups seeking all available venues to push forward reforms. One of the major movements was made by women's groups in utilizing strategic constitutional litigation to advance women's rights and sex/gender equality.<sup>34</sup>

#### **A. Strategic constitutional litigation in the 1990s**

The first successful public interest litigation was initiated in 1994. At the time, the Awakening Foundation and many women activists, lawyers and professors were working on a proposed revision of the Civil Code concerning equal rights of women in family. Lawyer Lo Ying-Hsueh was one collaborator among many. This project began in 1990 with the financial sponsorship from Asia Foundation. After three years, the women's groups released their first draft of the amended Code in May 1993 and held many public hearings and workshops in hope of generating public support. They also lobbied new legislators who were recently elected in the first national legislative election held in 1992.

In the midst of public advocacy and legislative lobbying, two women clients coincidentally walked into Ms. Lo's office with almost identical cases.<sup>35</sup> Both women were separated from their husbands but sought to have their children live with them.<sup>36</sup> However, according to then- Article 1089 of the Civil Code, in case of parental disagreements, the father was given the right to decide matters concerning the children.<sup>37</sup> As a result, both women lost their cases in the lower-court proceedings.

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<sup>33</sup> Ting-Chi Liu, *Kuochu Jênch'üan Kungyüeh Neikuo fahua Tui Ssufa Shihwu te Yinghsiang: I Hsingcheng Fayuan Ts'aip'an wei Kuanch'a Chunghsien* [The Impact of International Human Rights Treaties on the Judicial Practices after Their Incorporation into Domestic Law -- Focusing on the Judgments of Administrative Courts in R.O.C. (TAIWAN)], 67 (10) 78, 84 FALING YUEHK'AN [THE L. MONTHLY] (2016).

<sup>34</sup> For further discussions in a comparative view, see Chang, *Supra* note 10, at 144. See also JIUNN-RONG YEH, THE CONSTITUTION OF TAIWAN: A CONTEXTUAL ANALYSIS 218-21 (2016).

<sup>35</sup> *Id.* at 142.

<sup>36</sup> *Id.* at 142.

<sup>37</sup> *Id.* at 142.

Having heard their cases, Ms. Lo thought they presented a great test case and the timing was perhaps right for petition the Constitutional Court for an interpretation on the constitutionality of the impugned provisions in the Civil Code.<sup>38</sup> She convinced the two clients, who had never heard of constitutional petitions before, to file their constitutional petitions.<sup>39</sup>

Meanwhile, as a sign of successful legislative lobbying by women's groups, about one hundred and fifty legislators from various political parties signed a proposal to request the Legislative Yuan to bring a constitutional petition to the Constitutional Court over the constitutionality of the then Article 1089 of the Civil Code.<sup>40</sup> The Legislative Yuan quickly passed this a proposal and submitted the request on July 15, 1994.<sup>41</sup>

These constitutional petitions came to the Constitutional Court at a rather critical time.<sup>42</sup> The nine-year tenure of current justices (the fifth term) on the Constitutional Court who had served since 1985 was about to expire in the end of September 1994. The confirmation hearing of new appointees took place in late August and early September.<sup>43</sup> As part of legislative lobbying efforts, women groups held a number of news conferences and made public inquiries into those appointees regarding their position on women's equal rights in family.<sup>44</sup>

On September 23, one week before leaving the bench, the Constitutional Court issued J.Y. Interpretation No. 365, holding that the then Article 1089 of the Civil Code was inconsistent with the right to sex equality under the Constitution.<sup>45</sup> The Court demanded that said provision be amended accordingly and granted a grace period of two years before the provision would become null and void.<sup>46</sup>

The Court reasoned:

Article 1089 of the Civil Code, which stipulates that in situations of parental disagreement in exercising parental rights over that of a minor the father shall have the right of final decision, is incompatible with Article 7 of the Constitution, which

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<sup>38</sup> *Id.* at 142.

<sup>39</sup> *Id.* at 142.

<sup>40</sup> *Id.* at 142.

<sup>41</sup> *Id.* at 142.

<sup>42</sup> *Id.* at 142.

<sup>43</sup> *Id.* at 142.

<sup>44</sup> *Id.* at 142.

<sup>45</sup> *Id.* at 142.

<sup>46</sup> *Id.* at 142-43.

proclaims that both sexes are equal under the law, as does Article 9, Paragraph 5, to the Amendment in eliminating sexual discrimination. ...This Article should be amended and shall be void within two years from the day of this Interpretation. This problem should be resolved based on the premises of the principle of gender equality and the best interest of minors; in the event that such a disagreement arises, the nearest relative or a conference of relatives, or the family court decision shall have the right of final decision, unless there are extraordinary circumstances in which steps other than the normal course of action should be considered.”

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Following this ruling, the Ministry of Justice quickly drafted a revision of Article 1089 and other similar provisions in November and sent the bill to the Legislative Yuan for discussion in March 1995. The revised provisions came into force in September 1996, just before the deadline set by the Court.<sup>48</sup>

J.Y. Interpretation No. 365 and subsequent successful legislative revisions energized women’s groups and encouraged them to use constitutional litigation as part of their legal mobilization strategies.<sup>49</sup> As indicated earlier, women’s groups began their advocacy for major revisions to the Civil Code concerning women’s equal rights in 1990.<sup>50</sup> Despite support from a number of newly elected legislators across party lines, the first legislative success only came about after the constitutional ruling and the clear judicial deadline.<sup>51</sup> Hence, women groups, under the leadership of the Awakening Foundation with her associated women lawyers and professors, decided to solicit test cases to challenge major provisions in the Civil Code they sought to amend.<sup>52</sup> They published advertisements on their magazines, newsletters and websites. Meanwhile, they continued legislative lobbying on further revisions of the Civil Code and enactments of other bills concerning women’s equal rights at work and in schools.<sup>53</sup>

J.Y. Interpretation No. 410 and J.Y. Interpretation No. 452 were the result of this strategy.<sup>54</sup> The former case was brought in February 1995 by Ms. Yu Mei-Nu, a key

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<sup>47</sup> *Id.* at 143.

<sup>48</sup> *Id.* at 143.

<sup>49</sup> *Id.* at 143.

<sup>50</sup> *Id.* at 143.

<sup>51</sup> *Id.* at 143.

<sup>52</sup> *Id.* at 143.

<sup>53</sup> *Id.* at 143.

<sup>54</sup> *Id.* at 143.

woman lawyer affiliated with the Awakening Foundation.<sup>55</sup> Women groups even held a news conference before filing the constitutional petition.<sup>56</sup> This case involved the Enforcement Act of the Civil Code that failed to incorporate the previous provision in the Civil Code that was in favor of married women regarding their property or inheritance acquired before marriage.<sup>57</sup> Although the Constitutional Court did not strike down the relevant provision in the Enforcement Act, it issued a clear warning urging the legislature to undertake revision promptly.<sup>58</sup> It said:

Under the authority of Article 7 of the Constitution emphasizing gender equity, the Code was amended on June 3, 1985. ... [B]ecause the Enforcement Act did not set forth different regulations of the modification of the community property in Article 1017 of the Code, the community property, prior to the amendment of the Code in 1984 which still applied to the original regulations, belonged to the husband. A regulation that does not comply with the Constitution's ensuring of gender equality is obviously unconstitutional. In order to agree with the principle of gender equity, the portion of the Enforcement Act regarding community property that does not belong to either the husband or wife should be reviewed by the relevant authorities.<sup>59</sup>

The Legislative Yuan quickly responded to this warning and completed such a revision in less than two months.<sup>60</sup> The latter case, J.Y. Interpretation No. 452, was handled by another woman lawyer, Ms. Wang, Ju-Hsuan. It involved the former Article 1002 of the Civil Code that required wives to take the residence of their husbands.<sup>61</sup> The Constitutional Court held:

It stipulates in Article 1002 of the Civil Code that the residence of the wife shall be that of the husband and the residence of the taken-in husband shall be that of the wife; nevertheless, in case there is an agreement that the residence of the husband shall be that of the wife or the residence of the wife shall be that of the taken-in husband, the agreement shall be

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<sup>55</sup> *Id.* at 143.

<sup>56</sup> *Id.* at 143.

<sup>57</sup> *Id.* at 143.

<sup>58</sup> *Id.* at 143-44.

<sup>59</sup> *Id.* at 144.

<sup>60</sup> *Id.* at 144.

<sup>61</sup> *Id.* at 144.

upheld. ... The above law does not take into consideration that the other party of the marriage also has the right to choose the residence and does not cover specific circumstances, which is in violation of the principle of equality and proportionality of the Constitution. The above law shall become void within one year from the date of this Interpretation.<sup>62</sup>

With court victories one after another, there was a growing momentum for large-scale law reform on women's equal rights.<sup>63</sup> The revision to the Civil Code concerning women's equal rights was carried out, and landmark legislation such as the Act on Equal Rights of Both Sexes at Work was also completed.<sup>64</sup> Women's rights earned unprecedented legal recognition and women's groups –particularly the Awakening Foundation– acquired a great deal of publicity over their litigation strategy and related legislative lobbying.<sup>65</sup>

## **B. Strategic constitutional litigation since the 2000s**

As discussed above, the Awakening Foundation successfully pursued constitutional litigations in the 1990s. Legal mobilization was an important strategy for the Foundation to achieve its missions. Major laws relating to the equal rights of women were passed before 2000. In recent years, however, as a result of its institutional reorientation, the Foundation no longer sees public interest litigation as a core strategy.

One of the most recent important decisions concerning women's rights was *JY Interpretation No 666* in 2009.<sup>66</sup> In this case, the Constitutional Court applied the principle of substantive equality, holding unconstitutional a law that fined only those engaging sexual transactions for profit, but not those purchasing for sex.<sup>67</sup> Having relied on empirical studies showing a predominant number of those engaging in prostitution were women of lower social and economic status, the Constitutional

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<sup>62</sup> *Id.* at 144.

<sup>63</sup> *Id.* at 144.

<sup>64</sup> *Id.* at 144.

<sup>65</sup> *Id.* at 144.

<sup>66</sup> *JY Interpretation No 666* (2009).

<sup>67</sup> Wen-Chen Chang, *HsingPieh P'ingTêng Chih NeiHan Yü TingWei: LiangKungyueh Yü Hsienfa Chih Pi Chiao*, 43 (S) KUOLI TAIWAN TAHSUEH FAHSUEH LUNTS'UNG 771,795 (2014) [*Conceptualizing and Locating Gender Equality: ICCPR, ICESCR, and the Constitution in Comparison*, 43 (S) N. TAIWAN U. L. J. 771, 795 (2014)].

Court deemed the impugned provision a *de facto* discrimination against women and violation of sex equality.<sup>68</sup>

A rather controversial decision on women's rights was *JY Interpretation No 728* made in 2015.<sup>69</sup> In this case, a constitutional challenge was brought to the Statute Governing Ancestor Worship Guilds permitting a worship guild's internal regulation to decide whether a person would a qualified successor to a worship guild. The petitioner was a married daughter who was not permitted to be a successor, arguing that the impugned provision posed a *de facto* discrimination against women as most guilds assigned only men as successors. Unlike in above-mentioned *JY Interpretation No 666*, the Constitutional Court failed to find the *de facto* discrimination as violation of sex equality. Instead, the Court sustained the impugned provision on the grounds of the freedom of association, property rights and freedom of contract held by the founders and their descendants as "an ancestor worship guild is an association formed by the properties donated by the founders for the purpose of providing services for ancestor worship or other forms of worship."<sup>70</sup> Thus, for the Court, "even though such a disputed provision may constitute differential treatment in substance, since it is not arbitrary, it is not in conflict with the principle of sex equality embodied in Article 7 of the Constitution nor does it infringe women's right to property."<sup>71</sup>

Perhaps aware of criticism against this decision, the Constitutional Court in the last part of the interpretation urged the government to "conduct a timely review and modification of the related law to ensure that they are keeping pace with time, especially taking into consideration the State's positive duty to protect women" under Articles 2 and 5 of CEDAW that were domestically incorporated as well as other constitutional provisions.<sup>72</sup> The reference to related CEDAW provisions, however, has not put down the anger of women's group contending that the Court has yielded too much to tradition and religion.

In line with the rising demands for equal rights of minorities, the demand for recognition of same-sex marriage also caught the Constitutional Court's attention.<sup>73</sup> One gay man, Chia-Wei Chi, has sought to register his gay marriage for years. With

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<sup>68</sup> *JY Interpretation No 728* (2015) Reasoning, para. 3; Wen-Chen Chang, *The Constitutional Court of Taiwan*, in *COMPARATIVE CONSTITUTIONAL REASONING* 641, 666 (András Jakab, Arthur Dyevre & Giulio Itzcovich eds., 2017).

<sup>69</sup> *JY Interpretation No 728*.

<sup>70</sup> *Id.* Reasoning, para 2.

<sup>71</sup> *Id.* Reasoning, para 2.

<sup>72</sup> *Id.* Reasoning, para 2.

<sup>73</sup> *JY Interpretation No 748* (2017). An English official press release of a short summary of this case, is available at  
<http://jirs.judicial.gov.tw/GNNWS/NNWSS002.asp?id=267570&flag=1&regi=1&key=&MuchInfo=&courtid>.

the legal assistance by the Taiwan Alliance to Promote Civil Partnership Rights (TAPCPR)<sup>74</sup> and their leading gay rights lawyers, he lodged his case once again before the Constitutional Court. Meanwhile, facing repeated requests for same-sex marriage registration, the Taipei city government also petitioned to the Constitutional Court for clarification. The Constitutional Court consolidated these two cases, and held an oral hearing on March 24, 2017. Both pro- and anti-gay marriage groups rallied before the Court's building, and a few anti-gay marriage activists came every morning to speak out their positions.

On May 24, two months after the oral hearing, the Constitutional Court issued *JY Interpretation No 748*, unequivocally holding that the provisions in the Marriage Chapter of the Civil Code that “do not permit two persons of the same sex to create a permanent union of intimate and exclusive nature for the committed purpose of managing a life together” were “in violation of both the people’s freedom of marriage as protected by Article 22 and the people’s right to equality as guaranteed by Article 7 of the Constitution.”<sup>75</sup> To remedy such a legislative failure, the Court demanded that “the authorities concerned shall amend or enact relevant laws within two years”, and unprecedentedly, the Court added that “if relevant laws are not amended or enacted within the said two years, two persons of the same sex who intend to create the said permanent union shall be allowed to have their marriage registration effectuated at the authorities in charge of household registration, by submitting a written document signed by two or more witnesses” in accordance with the Marriage Chapter of the Civil Code.<sup>76</sup>

This was the first time that the Constitutional Court provided a direct and specific remedy for legislative omission. As it might seem as overstepping, the Constitutional Court struck a balance by yielding to the legislative authority “to determine the formality for achieving the equal protection of the freedom of marriage.”<sup>77</sup> In other words, while affirming that the equal right to marriage of gay couples was a constitutional right and must be ensured, the Constitutional Court left open for the legislature to decide what format –marriage, union, partnership, among others– of that equal protection would be and through what legislative measures –amending the Marriage Chapter of the Civil Code, adding a special chapter to the Civil Code or to enact a special law, among others– would be implemented. Only if

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<sup>74</sup> The organization’s mission statement and recent activities are available at <https://tapcpr.org/>.

<sup>75</sup> *JY Interpretation No 748* (2017). The official translation of the holding, available at <http://jirs.judicial.gov.tw/GNNWS/NNWSS002.asp?id=267570&flag=1&regi=1&key=&MuchInfo=&courtid>

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

the legislature fails to deliver, the direct remedy provided by the Court –a form of marriage for gay couples in accordance with the present Marriage Chapter of the Civil Code– would be effectuated. This balanced judicial strategy proves to be successful as pro-gay marriage groups obtained the constitutional recognition of equal right of marriage for gay couples and anti-gay marriage groups –albeit disappointed– felt that they could continue to fight for their position in the future legislative deliberations. The next day after the Constitutional Court’s decision, all rallies moved to the front yard of the legislature.

#### **IV. Conclusion: Challenges ahead**

Women’s groups and their advocacy strategies have been pivotal to the advancement of sex/gender equality in Taiwan. The strategies are not limited to litigation with the Constitutional Court, but further extended to changing the legal framework and discourse altogether. The recent incorporation of CEDAW and its further implementation clearly saw such bottom-up efforts in changing legal and institutional frameworks under which sex/gender equality are to be pursued. The attempt of women’s groups in altering legal framework of sex/gender equality may reflect dissatisfactions of women’s groups with domestic constitutional provisions and TCC’s case laws particularly in three aspects: substantive equality, private discrimination and women’s sexual and reproductive rights.

First, women’s groups have long been discontent with the rather formalistic nature of TCC’s sex/gender equality doctrine. Although the TCC has emphasized its doctrinal position on equality as “substantive” rather than “formal”, its case laws – with the exception of *JY Interpretation No 666*– show quite in the opposite. The recent decision in *JY Interpretation No 728* evidences that. Second, the TCC’s case laws have not been able to successfully deal with women’s discriminations in the private sphere, which is precisely what *JY Interpretation No 728* has been criticized for. Last but not the least, unlike courts in Western jurisdictions, the TCC has not been able to deal with any women’s reproductive privacy or rights or play any critical role in it. This has been partly due to the TCC’s conservative decision in endorsing the criminalization of adultery, failing in the recognition of individual’s sexual freedoms and particularly women’s sexual autonomy, and partly due to the rather lax abortion policies.

In contrast with the TCC’s rather conventional attitudes, the CEDAW provisions have fared better and stronger protections for women’s substantive equality, private discriminations and women’s sexual privacy and reproductive freedoms. There is little wonder that Taiwan’s women groups have strategically turned away



from the domestic constitutional provisions and the TCC and shifted to CEDAW provisions and international experts. Yet, if the TCC would like to continue its fame in advancing sex/gender equality in Taiwan, it must not escape these challenges but rather seize such a moment to work with international human rights instruments to give Taiwan's human rights a giant leap forward.