

Article

Transitional Equality in Transnational Context

Suzanne A. Kim *

ABSTRACT

The legalization of same-sex marriage in Taiwan in the past few years and emerging legal recognition for same-sex couples in Japan mark important expansions of family recognition in Asia. These developments provide an opportunity to consider the gap between formal and substantive equality in the rights of diverse families in Taiwan, Japan, and other jurisdictions. This essay examines these recent changes in family recognition in Taiwan and Japan alongside experiences of U.S. couples to generate new areas of inquiry into developing equality with full attention to a broad range of socio-legal experience.

This essay considers a framework of “transitional equality” I have discussed in the U.S. context to identify the process of families transitioning into new formal legal status categories.¹ As I have described elsewhere, when a person or class of persons obtains a new status or gains previously denied rights, “the path itself from

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1. Suzanne A. Kim, *Transitional Equality*, 53 U. RICH. L. REV. 1149 (2019).

*one legal status to another becomes critically important and may itself be impacted by race, gender, age, and other factors. The process of transitioning to a new status can be complex and burdensome in unexpected ways, and lack of attention to that process can impair persons' inhabitation of their newly acquired legal rights."*² This transitional space is one worthy of socio-legal attention in the effort to build fuller equality for diverse families. Taiwan and Japan introduce further opportunities to examine the role of marriage recognition in reflecting and constructing broader norms concerning national identity, race, ethnicity, gender, age, economic status, access to justice, and in the cultural contingency of societal inclusion and legal subjectivity.

Keywords: *Marriage, Same-Sex Marriage, Gender, Access to Justice, Constitutional Equality, Transnational, Taiwan, Japan, United States, Feminism, Discrimination, Egalitarianism, Transitional*



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2. *Id.* at 1149.

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INTRODUCTION

Recent developments in legal access to marriage for same-sex couples in Taiwan, Japan, and the United States provide an important opportunity to evaluate pathways toward a robust equality for diverse families. The legalization of same-sex marriage in Taiwan by its Constitutional Court's decision in 2017 and legislative action in 2019 marked a watershed in expansion of family recognition through marriage rights in Asia.³ Relatedly, in Japan, the only G7 country that does not fully recognize same-sex partnerships, recent unprecedented lower court recognition of marriage rights signals the potential for broader change in the legal treatment of same-sex couples throughout the country.

This essay explores how legal developments in Taiwan and Japan introduce insights into a framework of "transitional equality" I have applied in the U.S. constitutional context, focused on "the process of transitioning from one legal status category to another, its social, psychological, and legal dimensions, attendant challenges, and opportunities for fostering resilience."⁴ Since the U.S. Supreme Court's 2015 decision in *Obergefell v. Hodges*, over 293,000 same-sex couples have married in the United States.⁵ As discussed previously, "[m]any of these couples were in long-standing relationships, often for decades, prior to marrying."⁶ While nationwide access to marriage rights offers important legal protections, "robust provision of equality and justice for families must also attend to the sociolegal process of legal status transitions. This transition may go less noticed in situations representing movements into favored legal status categories, given the social progress such access promises."⁷ The process of transitioning across the marital divide itself provides an important occasion to understand experiences and opportunities for fostering greater equality within and beyond formal law in Taiwan, Japan, and the U.S.

This essay proceeds in three parts. Part I summarizes important changes in Taiwan, Japan, and the U.S. regarding marriage recognition. Part II applies a "transitional equality" framework to contrast doctrinal questions

3. 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), <https://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748>; Sifa Yuan Shih Zih 748 Hao Jieshi Shihsing Fa (司法院釋字第748號解釋施行法) [Act for Implementation of J.Y. Interpretation No. 748] (promulgated May 22, 2019, effective May 24, 2019) (Taiwan), <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000008>.

4. Kim, *supra* note 1, at 1152.

5. Christy Mallory & Brad Sears, *The Economic Impact of Marriage Equality Five Years after Obergefell v. Hodges*, UCLA WILLIAMS INST. (May 2020), <https://williamsinstitute.law.ucla.edu/publications/econ-impact-obergefell-5-years/>.

6. Kim, *supra* note 1, at 1152.

7. *Id.* at 1152-53.

that arise for same-sex couples crossing the marital border in these jurisdictions. Part III draws on this comparative context to offer a preliminary research agenda for social-legal inquiry into couples' processes of moving across the marital border in Taiwan and Japan.

I. LEGAL CHANGE

A. *Taiwan*

Taiwan broke ground in Asia in 2017 when its Constitutional Court held in Interpretation No. 748 that the country's civil code violated constitutional guarantees of "freedom of marriage" and "right to equality" by failing to allow "two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life."⁸ The Taiwan Constitutional Court (TCC) gave the legislature a two-year deadline to amend or enact laws to accord with this holding.⁹

Within Taiwan, the TCC decision prompted celebration and provoked fierce backlash, with accusations that the Court had interfered with legislative power.¹⁰ A series of referenda to curtail the impact of the Constitutional Court decision ensued. Marriage equality opponents pursued a successful referendum campaign seeking to define marriage as between a man and woman and to limit legislative recognition of same-sex couples' rights to special legislation, rather than through amendment of the Civil Code.¹¹ While only advisory, the referenda influenced the political

8. J.Y. Interpretation No. 748, *supra* note 3, at *Holding* para 1. ("The provisions of Chapter II on Marriage of Part IV on Family of the Civil Code do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life. The said provisions, to the extent of such failure, are in violation of the Constitution's guarantees of both the people's freedom of marriage under Article 22 and the people's right to equality under Article 7.")

9. The TCC left to the discretion of authorities concerned "to determine the formality for achieving the equal protection of the freedom of marriage." J.Y. Interpretation No. 748, *supra* note 3, at *Holding* para 1. The TCC also provided as a backup that same-sex couples were entitled to register their marriages, if the legislature failed to enact appropriate laws within the requisite timeline. *Id.*

10. 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 AUSTL. J. OF ASIAN L. 59, 61-62 (2019).

11. *Id.*

There were ten referendum questions on the ballot on 24 November 2018, and the turnout rate for each question ranged from 50 per cent to 55 per cent. Three of the referendum questions were related to the recognition of same-sex unions. According to art 29(1) of the Referendum Act (公民投票法), 31 December 2003, a referendum proposal is adopted if the number of valid ballots of assent exceeds the number of ballots of dissent and reaches one quarter of eligible voters. The referendum on 'the definition of marriage in the Civil Code shall be a union of a man and a women' (Referendum No. 10) passed with 72.5 per cent voting in favour of it and 27.5 per cent against it. The referendum on 'protecting same-sex couples' right to establish a permanent conjugal life relationship in forms other than the chapter on marriage in the Civil Code' (Referendum No. 12) passed, with 61.1 per cent voting in favour of it and 38.9 per cent against it. The referendum on 'protecting same-couples' right to marry

landscape, producing the legislation that was passed, shortly before the Constitutional Court's legislative deadline.¹² The Enforcement Act of Judicial Yuan Interpretation No. 748 (司法院釋字第七四八號解釋施行法) attempted to steer away from debates about whether to use the term "marriage" that had roiled public discourse by setting forth the option for "[t]wo persons of the same sex" to "form a permanent union of intimate and exclusive nature for the purpose of living a common life" (but not directly calling it "marriage"), allowing for marriage registration of such unions, and conferring many, but not all, incidents of marriage.¹³ The law was lauded as embodying Taiwan's leadership in Asia in recognizing equal family rights but was also criticized for its limitations, including in failing to confer in-law relationships, to recognize all transnational same-sex married couples, and to permit joint adoption.¹⁴ I return below to discussion of gaps in the law and emerging efforts to address them.

B. Japan

In contrast with Taiwan, held forth as a leader in Asia regarding equal marriage rights, Japan has lagged, as the only G7 country that does not recognize same-sex relationships.¹⁵ In a decision hailed as a harbinger of change, a Japanese district court in March 2021 held in an unprecedented ruling that barring same-sex couples from marriage violated the Japanese constitution's principle of equality. The Sapporo District Court held that the same-sex marriage ban violated Article 14 of the constitution, prohibiting discrimination due to "race, creed, sex, social status or family origin."¹⁶ In the court's view, like race and gender, sexuality is not a matter of individual preference; accordingly prohibiting same-sex couples from getting benefits given to heterosexual couples was unjustified and unconstitutional.¹⁷

by amending the Civil Code' (Referendum No. 14) failed, with 32.7 per cent voting in favour of it and 67.2 per cent against it.

Id. (citing XINGZHENGYUAN GONGBAO (行政院公報) [THE [EXECUTIVE] YUAN GAZETTE], Vol. 24:232, 54678-54680 (Dec. 5, 2018) (Taiwan) (calculated by Chen, Chao-ju)).

12. Ralph Jennings, *Taiwanese Reject Legalizing Same-sex Unions in Referendum* (APNews.com, Nov. 25, 2018), <https://apnews.com/article/a34cf44ef92949d8b31d84090f64cf6ad>.

13. Act for Implementation of J.Y. Interpretation No. 748 § 2, 4, 5-26.

14. I discuss pending doctrinal changes regarding adoption and transnational couples below.

15. Kanae Doi, *A Boost to Same-Sex Marriage in Japan* (Hum. Rts. Watch, Mar. 18, 2021, 11:02 AM), <https://www.hrw.org/news/2021/03/18/boost-same-sex-marriage-japan>.

16. Rachel Treisman, *In Landmark Ruling, Court Says Japan's Ban On Same-Sex Marriage Is Unconstitutional* (Nat'l Pub. Radio, Mar. 17, 2021, 10:31 AM), <https://www.npr.org/2021/03/17/978148301/in-landmark-ruling-court-says-japans-ban-on-same-sex-marriage-is-unconstitutiona>.

17. Mari Yamaguchi, *Japan Court Says Same-sex Marriage Should be Allowed* (Associated Press News, Mar. 17, 2021), <https://apnews.com/article/world-news-japan-marriage-268a4978c491c863b547f543ab25297a>.

Despite plaintiffs' claims to the contrary, the court held that banning same-sex marriage did not violate Article 24 of the constitution, protecting the right to marry, because the provision relates to heterosexual marriage only.¹⁸ The court also rejected the plaintiffs' claim for one million yen in compensation.¹⁹

The Sapporo District Court litigation is among five marriage equality lawsuits filed in Japanese district courts in 2019, with others also filed on Valentine's Day in Tokyo, Osaka, and Nagoya and another filed in Fukuoka later in the year.²⁰

The Sapporo litigation, still in the process of appeal, may signal potential legal change in the Japan. Some Japanese municipalities issue "partnership" certificates to same-sex couples, but the rights associated are limited. While permitting shared rental agreements and hospital visitation rights, they do not confer inheritance or parental rights or rights to spousal visas.²¹

While public support to LGBTQ equality has reportedly increased in Japan, the path to nationwide legal change is unclear.²² Legal scholars like Masahiro Sogabe have pointed to the unlikelihood of the Japanese Supreme Court invalidating the ban on same-sex marriage under the constitution, given its "extreme reluctance" to hold laws unconstitutional, only occurring 10 times in a little over 70 years.²³ Moreover, as Sogabe observes, the Diet possesses broad legislative discretion regarding family matters, with such discretion exercised by the controlling the Liberal Democratic Party against family diversity.²⁴ I discuss below transitional issues that may arise in the encounter with greater marriage rights in the future.

C. *United States*

Six years ago, the United States Supreme Court held in *Obergefell v. Hodges* that the U.S. constitution required nationwide access to marriage for same-sex couples. Since that time, over 293,000 same-sex couples have

18. Treisman, *supra* note 16.

19. Tessa Wong, *Japan Court Finds Same-sex Marriage Ban Unconstitutional* (Brit. Broad. Corp., Mar. 17, 2021), <https://www.bbc.com/news/world-asia-56425002>.

20. Treisman, *supra* note 16.

21. Yamaguchi, *supra* note 17.

22. According to a 2020 nationwide public opinion survey, "88 percent 'agree or somewhat agree' with the 'introduction of laws or ordinances that ban bullying and discrimination (in relation to sexual minorities)'; 'nearly 80 percent support same-sex marriage rights'; '[d]ozens of prefecture and municipal governments have passed ordinances recognizing same-sex relationships with certificates.'" Doe, *supra* note 15.

23. Masahiro Sogabe, *Status of Same-Sex Marriage Legislation in Japan*, 15 NAT'L TAIWAN U.L. REV. 1, 3-17 (2020).

24. *Id.*

married in the United States.²⁵ In my work on “relational migration” and “transitional equality,” I have identified legal and social dynamics at play in relational transitions into marriage, to locate opportunities for fostering greater equality for diverse families even under formally equal conditions.²⁶ In the U.S., the longstanding nature of many of these relationships, in a broader context of incomplete and incremental legal change, have produced particular transitional obstacles that shape experiences of equality.”²⁷ I summarize some of these obstacles below.

II. TRANSITION IN ACTION: DOCTRINAL QUESTIONS

As I have previously set forth, while movements across relationship status categories are not new, with different-sex couples routinely navigating into marital terrain, the experience of couples crossing this legal border is understudied.²⁸ As I have noted, U.S. researchers have had “little contemporary opportunity to consider this kind of status migration for same-sex couples.”²⁹ Moreover, “researchers have lacked opportunities to examine the impacts of marriage on families over time, in the context of same-sex marriage.”³⁰

As I have argued in the U.S. context, the boundary between marital and nonmarital families is “[o]ne of the most stark delineations in the law of intimacy.”³¹ Given the significance of marriage in contemporary understandings of equality, socio-legal experiences of transitions into marriage can shed light on the capacity of formal status recognition to confer justice and identify areas for improvement.³²

Taiwan and Japan offer generative opportunities in which to examine transitions into the relationship status category of marriage.³³ Scholars of Taiwanese and Japanese law, as those of U.S. law, note the salient and privileged status of marriage in law and society.³⁴ In Taiwan, the level of

25. Mallory & Sears, *supra* note 5.

26. See, e.g., Suzanne A. Kim, *Relational Migration*, 77 OHIO ST. L.J. 981 (2016); Kim, *supra* note 1.

27. Kim, *supra* note 1, at 1152.

28. Kim, *supra* note 26, at 982-83.

29. *Id.* at 983.

30. Kim, *supra* note 1, at 1165.

31. Kim, *supra* note 26, at 991-92.

32. The marital/nonmarital divide “and the accompanying privileging of marriage—has been the subject of important and sustained critique by scholars, based on the marginalizing effect that this legal framework has on nonmarital families and on individuals.” See Kim, *supra* note 26, at 985.

33. The focus of this essay is on transitional questions after formal marriage recognition, as opposed to the debate on whether to provide marriage rights. For arguments about whether to afford marriage recognition in Japan in the first instance, see, e.g., Yuki Arai, *Is Japan Ready to Legalize Same-Sex Marriage*, 16 ASIAN-PAC. L. & POL’Y J. 122 (2014).

34. See, e.g., Chen, *supra* note 10; Frank Upham, *Same-Sex Marriage in Japan: Prospects for*

political activism surrounding the gaining or barring of access to marriage rights for same-sex couples indicates the legal and societal importance of marriage. Taiwan is unique as one of the few countries to offer “marriage leave” for couples to get married.³⁵ The privileging of marriage is also reflected in the number of legal regulations and administrative measures applying only to spouses, in contrast with nonmarital partners. As Erez Aloni has observed, “Taiwan has promulgated 498 regulations and administrative measures that apply to spouses only.”³⁶ These include special protection for property and ability to apply for immigration residency.³⁷

If Japan does ultimately recognize same-sex marriage nationwide, the experiences of couples transitioning into marriage will also deserve special attention. As in Taiwan and the U.S., marriage possesses a privileged status in Japan’s social and legal system. The family registration system that requires every member of a household to adopt the same family name, Masami Tamagawa argues, “perpetuat[es] the idea of the family as the basic unit of Japanese society.”³⁸ The effort to conform families to a marital idea is reflected in Japan’s *de facto* marriage doctrine: “[E]ven if a heterosexual couple is not formally registered as married, if a couple in a *de facto* relationship are living in conditions similar to those of a couple in a legal marriage, they can receive the same social security benefits and are treated in almost the same way as a married couple.”³⁹

A. Indeterminacy from Incrementalism

From a doctrinal perspective, the U.S. relational transition experience has centered on the indeterminacy surrounding the boundaries of marriage and the meaning of marriage equality. Couples encountering marriage, especially those in longstanding relationships, confront doctrinal questions, given the long-standing uncertainty regarding the status of nonmarital relationships and the patchwork of incremental recognition of same-sex relationships.⁴⁰ As I have set forth, these issues include determining the

Change, 15 ASIAN J. OF COMPAR. L. 195, 218 (2020); see generally 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, 72-74 (2019).

35. Tiffany May & Amy Chang Chien, *For Extra Days Off, Officials Say, Couple Had 4 Weddings and 3 Divorces* (N.Y. Times, Apr. 22, 2021), <https://www.nytimes.com/2021/04/22/world/asia/taiwan-marriage-leave-scam.html>.

36. Erez Aloni, *First Comes Marriage, Then Comes Baby, Then Comes What Exactly?*, 15 NAT’L TAIWAN U.L. REV. 49, 74-75 (2020).

37. *Id.*

38. Masami Tamagawa, *Same-Sex Marriage in Japan*, 12 J. OF GLBT FAM. STUD. 160, 172 (2016).

39. Sogabe, *supra* note 23, at 8.

40. See generally Kim, *supra* note 1.

“beginning” of marriage in relation to other relationship statuses a couple might have had, a question with significant economic consequences upon dissolution; determining the relationship between prior contracts and marriage status; and confirming the validity of marriage in light of prior statuses a couple may have possessed.⁴¹

These particular questions arise largely due to the provision of intermediate statuses like domestic partnerships or civil unions or patchwork recognition of marriage across jurisdictions prior to the nationwide grant of marriage rights.⁴² Taiwan differs from the U.S. in this regard. As Holning Lau has asserted, Taiwan legalized same-sex marriage “without first going through a substantial period of time where civil partnerships (or some other alternative to marriage) were provided as a compromise.”⁴³ Lau contrasts Taiwan with Europe, in which many countries provided civil partnerships through legislation as a “so-called steppingstone [] on the path to same-sex marriage.”⁴⁴ While the U.S. is similar to Taiwan in the role of its courts in pushing legal change,⁴⁵ legalizing same-sex marriage in the U.S. followed more of a patchwork incremental approach than in Taiwan, which moved more directly to offering same-sex marriage. Japan also differs from the U.S. in terms of its pathway to marriage recognition. Notwithstanding the recent result in the Sapporo district court litigation, Japan’s recognition of same-sex relationships is limited more generally, with only several cities in Japan and several wards in Tokyo offering limited partnership certificates.⁴⁶ Due to these differences, the potential for indeterminacy arising from a patchwork or incremental recognition is less pronounced in Taiwan and Japan, than in the U.S.

B. *Indeterminacy in Parentage*

That said, indeterminacy as in the U.S. context also arises in connection with the boundary between marriage and parental rights. Taiwan, in particular, presents an important comparison point in these regards, as I explore below.

41. *Id.* at 1173-74.

42. *Id.* at 1174-75.

43. Holning Lau, *Courts, the Law, and LGBT Rights in Asia*, in OXFORD ENCYCLOPEDIA OF LGBT POLITICS & POLICY 19, 19 (Don Haider-Markel ed., 2021) (also to be published as Holning Lau, *Courts, the Law, and LGBT Rights in Asia*, in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS 9, 12 (W. Thompson ed., 2020)).

44. *Id.*

45. *Id.*

46. Lau, *Courts, the Law, and LGBT Rights in Asia*, in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS, *supra* note 43, at 11 (citing Amnesty International, *Human Rights Law and Discrimination against LGBT People in Japan* (Amnesty International, May 2, 2017), <https://www.amnesty.org/en/documents/asa22/5955/2017/en/>).

In the U.S., nationwide marriage equality has failed to secure full parentage rights for diverse families. Marriage recognition does not confer parentage rights, with “couples moving into marriage encounter[ing] a legal landscape favoring different-sex and biologically connected parents.”⁴⁷ As seen in the U.S., becoming parents in the context of marriage does not solve for incomplete parentage protection, with state law marital presumptions for parentage failing to protect fathers in same-sex couples even when the term “spouse” is substituted in for “husband” and some states reluctant to apply marital presumptions to same-sex mothers.⁴⁸

Similarly, in Taiwan, married same-sex couples lack sufficient parentage protection. The lack of marital presumption of parentage for same-sex couples impedes protection for parents, even when married.⁴⁹ Parentage rights are also insufficiently protected through adoption. While marriage brings the option to adopt, same-sex couples in Taiwan--unlike different-sex ones--are still barred from adopting jointly, with spouses only permitted to adopt the biological child of their spouse.⁵⁰ District court litigation commenced by three same-sex couples just last month seeks to challenge the bar on same-sex couples’ ability to adopt jointly as different-sex couples may.⁵¹ The plaintiffs’ goal ultimately is to obtain a constitutional interpretation by the Council of Grand Justices.⁵²

C. Indeterminacy in Meaning of Marriage Equality

The transition into marriage is shaped as well by ongoing contests over the very meaning of marriage equality itself. I discuss these questions in the contexts of the U.S. and Taiwan.

After *Obergefell*, same-sex couples faced continued resistance both legislatively and in courts to marriage rights, with “the scope of marriage equality continu[ing] to be challenged in states” in the contexts of parentage,

47. Kim, *supra* note 1, at 1177-78 (citing Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017)).

48. According to marital presumptions in state law, “historically, a man married to a woman giving birth to a child, is presumed to be the father of that child.” Kim, *supra* note 1, at 1177-78. “[E]ven if the wording of state law marital presumptions is altered to apply to a ‘spouse’ instead of just to a ‘husband,’ this revision does nothing to assist fathers in same-sex couples. And even as applied to same-sex mothers, some states’ resistance to the equal application of marital presumptions has been significant.” *Id.*

49. Chen, *supra* note 10.

50. Wu Hsin-yun & Teng Pei-ju, *Same-sex Couples Go to Court to Push for Equal Adoption Rights* (Focus Taiwan, Apr. 1, 2021), <https://focustaiwan.tw/society/202104010015>; Chen, *supra* note 10.

51. Kayleigh Madjar, *Same-sex Couples File Adoption Rights Lawsuit* (Taipei Times, Apr. 2, 2021), <https://www.taipeitimes.com/News/taiwan/archives/2021/04/02/2003754958>.

52. *Id.*

public accommodations, and employment.⁵³ As I have asserted, these challenges were driven by “cramped conceptions of marriage equality” to limit *Obergefell*’s reach.⁵⁴ Such cases included those challenging a bar to a married same-sex female couple having both of their names listed on a birth certificate of their child, challenges to provision of benefits to same-sex spouses of city employees, and an assertion of free exercise and free speech rights to justify refusal to provide services for a same-sex couple’s wedding.⁵⁵

Questions of transitional inequality arise for couples in Taiwan, given the continued indeterminacy concerning the meaning of marriage equality, including as it pertains to applying the term “marriage” to same-sex couples and the rights of transnational couples.⁵⁶ The ongoing debate over the meaning of marriage equality continues to pervade the experience of same-sex couples in Taiwan. As Chao-ju Chen has argued, the withholding of the term marriage as applied to same-sex couples in the Enforcement Act of 748 “creat[es] a legal same-sex relationship that literally has no name either in the Act’s title or in its contents, and that treats a same-sex union similarly to, but differently from, Civil Code marriage.”⁵⁷

Moreover, Taiwanese law is unique in failing to recognize marriages between a Taiwanese spouse and a spouse from a country failing to recognize same-sex marriage.⁵⁸ This restriction has posed acute hardships for such transnational couples particularly during this pandemic, separating these unrecognized couples due to entry restrictions.⁵⁹

Earlier this year, Taiwan’s Judicial Yuan approved an amendment to Article 46 of the Act Governing the Choice of Law in Civil Matters Involving Foreign Elements to permit same-sex marriage between a Taiwanese national and a spouse from other countries, regardless of whether that country has legalized same-sex marriage.⁶⁰ The Article 46 Amendment

53. Kim, *supra* note 1, at 1180-82 (describing these trends in different judicial and legislative contexts).

54. *Id.* at 1180.

55. *Id.* at 1180-82 (discussing *Pavan v. Smith*, 582 U.S. ___, 137 S. Ct. 2075, 2077 (2017); *Pigeon v. Turner*, 538 S. W. 3d 73 (Tex. 2017), *cert. denied*, 583 U.S. ___, 138 S. Ct. 505 (2017); and *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm’n*, 584 U.S. ___, 138 S. Ct. 1719 (2018) (mem.)).

56. Chen, *supra* note 10, at 62.

57. *Id.*

58. Travis S. K. Kong, Hsiao-Wei Kuan, Sky H. L. Lau & Sara L. Friedman, *LGBT Movements in Taiwan, Hong Kong, and China*, in OXFORD RESEARCH ENCYCLOPEDIAS, POLITICS 9-10 (Don. Haider-Markel ed., 2021); Ryan Drillsma, ‘We Cannot Get Married Here. But Our Life Is Here.’ *Marriage Equality in Taiwan Is Not Equal* (Ketagalan Media, June 14, 2020), <https://ketagalanmedia.com/2020/06/14/we-cannot-get-married-here-but-our-life-is-here-marriage-equality-in-taiwan-is-not-equal/>.

59. Brian Hioe, *Judicial Yuan Completes Draft Bill Lifting Restrictions on Transnational Gay Marriages* (New Bloom, Nov. 27, 2020), <https://newbloommag.net/2020/11/27/jy-draft-transnational-gay-marriage/>.

60. Matthew Strong, *Taiwan to Allow Multinational Same-sex Marriages, But Not with China*

is pending review by the Legislative Yuan.⁶¹ Judicial support for such change may be reflected by the Taipei High Administrative Court rulings in the spring to allow for transnational marriages between Taiwanese citizens and nationals of countries not recognizing same-sex marriage.⁶²

III. PROCESS OF TRANSITION: A SOCIO-LEGAL AGENDA

As discussed, transitioning couples face a range of doctrinal questions concerning the boundaries of marriage and marriage equality. These questions raise a number of what I have called “process burdens,” multidimensional factors characterizing the socio-legal experience of couples transitioning into marriage.⁶³ I raise these impacts within an intentionally broad and multidisciplinary concept of “process.”⁶⁴ Further study of these impacts in comparative context is important for understanding more fully the cultural forces shaping transitions into legal statuses and the lived experience of putatively formal equality. It is also valuable for bolstering legal change with a more robust, substantive vision of equality for diverse families across different cultural contexts.

This section suggests a preliminary research agenda. I highlight factors informing the “process of transition” that I have discussed in the U.S. context to suggest points of comparative consideration in Taiwan and Japan in relation to the U.S.⁶⁵ The process of relational transition involves a range of socio-legal factors, including legal awareness and access to justice, “costs of uncertainty,” and the interaction between formal legal status and social

(Taiwan News, Jan. 22, 2021), <https://www.taiwannews.com.tw/en/news/4109284>; *Court Revokes Decision Denying Same-Sex Marriage of Taiwanese, Foreigner* (Taipei Times, Mar. 6, 2021), <https://www.taipetimes.com/News/taiwan/archives/2021/03/06/2003753348>.

61. Keoni Everington, *High Court Paves Way for International Same-Sex Marriages in Taiwan* (Taiwan News, Mar. 5, 2021), <https://www.taiwannews.com.tw/en/news/4143043>.

62. See *Court Revokes Decision Denying Same-Sex Marriage of Taiwanese, Foreigner*, *supra* note 60 (discussing March 2021 ruling overriding the refusal based on Article 46 by the Daan District Household Registration Office in Taipei to permit a marriage by a transnational same-sex marriage of Taiwanese gay rights activist Chi Chia-wei (祁家威) and his Malaysian partner); Keoni Everington, *Taiwan Court Ruling on Macau Citizen Open Door to International Same-Sex Marriages* (Taiwan News, May 6, 2021, 6:06 PM), <https://www.taiwannews.com.tw/en/news/4196648> (discussing May 2021 ruling that same-sex marriage between Taiwanese citizen and Macau national should be recognized by Taiwan, regardless of whether Macau recognizes same-sex marriage); David S. Ma, *Freedom! '21: Latest Developments in Same-Sex Marriage in Taiwan* (Oxford Hum Rts. Hub, Sept. 20, 2021), <https://ohrh.law.ox.ac.uk/freedom-21-latest-developments-in-same-sex-marriage-in-taiwan/>. (discussing the decision in *In Ding Ze Yan v. Household Registration Office, Zhongzheng District, Taipei City*, Taipei High Administrative Court Judgment (109) Su Tzu No. 14 (6 May 2021)).

63. Kim, *supra* note 1, at 1154.

64. Kim, *supra* note 26, at 984 (seeking to “widen our understanding of the process aspects of legal status change beyond technical legal process” and to “use the term ‘process’ to include psychological and social dimensions of inquiry, in addition to legal ones.”).

65. Kim, *supra* note 1, at 1182.

norms in shaping experiences of equality.⁶⁶

In evaluating these experiences, it is crucial to identify demographic trends as a starting point to determine the roles of race and ethnicity, national identity, gender, age, and socioeconomic status in the lived experience of legal transition for diverse families. In Taiwan, as of April 2021, over 5,800 same-sex couples had registered for marriage.⁶⁷ At least two-thirds of them are unions among women.⁶⁸ Such patterns are consistent with who seeks formal legal status in the U.S., with more women than men doing so.⁶⁹ As the demographic picture continues to take shape, we should ask whether these couples in Taiwan are likely to be older, longer standing couples as they are in the U.S.⁷⁰ Moreover, how do ethnicity, race, national identity, economic status, gender, and age intersect to shape who chooses to marry and what their experiences are? For instance, given the impact of being married on health insurance rates and rental subsidies, lower income couples in Taiwan may find marriage introduces unwelcome economic effects.⁷¹ Moreover, how do current nationality constraints on marriage recognition affect the ethnic and nationality makeup of who does marry in Taiwan? How does this reflect the role of family and marriage in constructing national identity in Taiwan? What kinds of economic and other social stratification will we see in who marries in Taiwan as time passes? If marriage becomes available in Japan, we must trace similar patterns and explore these intersectional questions to address the family equality needs of families both within and outside of the marital context, as well as in the process of transitions.

A. *Access to Justice*

Doctrinal questions that arise in the transition into marriage, such those

66. *Id.* at 1182-88.

67. *Most Taiwanese Support Same-Sex Marriage Two Years After Legalization: Survey* (Overseas Cmty. Aff. Council, China (Taiwan) (OCAC), May 24, 2021), <https://english.ocac.gov.tw/ocac/eng/pages/detail.aspx?nodeid=329&pid=25709639>.

68. *Id.*

69. See Brad van Eeden-Moorefield et al., *Same-Sex Relationships and Dissolution: The Connection between Heteronormativity and Homonormativity*, 60 FAM. RELATIONS 562, 564 (2011).

70. In the United States, “[m]any of these couples were in long-standing relationships, often for decades, prior to marrying.” Kim, *supra* note 1, at 1153.

71. Aloni, *supra* note 36, at 76.

Taiwan has universal compulsory health insurance, governed by the National Health Insurance Act. An unemployed spouse is considered a beneficiary dependent of the employed spouse, who is the insured. Upon marriage, unemployed spouses must get their health care under the employed spouse’s insurance plan. Insurance rates depend on monthly income; the insurance rate of a dependent is the same as that of the insured. 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.

produced by the relationship between marriage and parentage and the contested nature of marriage equality itself, require legal awareness and often engagement with legal systems, both of which I bring under the broader mantle of access to justice. As I have argued, “[l]ack of information imposes a process burden on anyone moving into a new legal status, but may raise particular issues in the relational context. While marriage equality importantly marks equal citizenship, marriage also brings with it a host of legal expectations and obligations.”⁷²

Seeking resolution of parentage rights and questions about what marriage equality confers to a couple in a given jurisdictional context requires legal engagement. “Failure to resolve these legal questions can substantially affect the health and security of families, socially and financially.”⁷³ Impacts can be even more significant for minority families, whose family lives “might be more likely to depart from social norms against which law is structured.”⁷⁴ For instance, in the context of same-sex parents, lack of awareness about the scope of the marital presumption may result in a child lacking a legal parent if the child’s biological parent dies and is not adopted through step-parent adoption by the biological parent’s spouse. Financial consequences of marriage in Taiwan, such as impacts on health insurance and rental subsidies, require attention that may be foregone, given the force of marriage in shaping political and legal conceptions of equality.⁷⁵

The role of legal literacy and access to legal systems present two dimensions for analyzing transitional equality in the contexts of Taiwan and Japan, each as compared to the U.S. Building on the work on legal awareness in Taiwan, scholars may explore same-sex couples’ legal advice-seeking behavior in the context of family and marriage. For instance, Kuo-Chang Huang, Chang-Ching Lin and Kong-Pin Chen have identified Taiwanese people’s patterns in seeking advice from third parties or legal advisors. As they have observed, this advice-seeking behavior varies “significantly” by problem type: “problems relating to family and real property most likely involved both third-party advice in general and legal advice in particular.”⁷⁶ Further research may seek to determine lay understandings of the law of marriage as it applies to same-sex couples, and

72. Kim, *supra* note 1, at 1183.

73. *Id.* at 1185.

74. *Id.*

75. *Id.* at 1186; Nancy Polikoff characterizes marriage as imposing a “blindspot” in this regard. Nancy D. Polikoff, *Marriage as Blindspot: What Children with LGBT Parents Need Now*, in *AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS* 127, 127 (Carlos A. Ball ed., 2016).

76. Kuo-Chang Huang, Chang-Ching Lin & Kong-Pin Chen, *Do Rich and Poor Behave Similarly in Seeking Legal Advice? Lessons from Taiwan in Comparative Perspective*, 48 *LAW & SOC’Y REV.* 193, 205 (2014).

how this varies based on various socioeconomic factors.

Understanding a problem as a legal one influences one's decision to seek legal advice. As Rebecca Sandefur has observed in the U.S. context, Americans commonly do not see their problems in legal terms, even when they are.⁷⁷ Documenting the level of legal literacy for diverse families and couples in Taiwan regarding marriage and family can be valuable for advocates and policymakers to address gaps in knowledge and build public awareness. It can also guide legal reform, to the extent needed, to provide greater access to the legal system and lawyers for diverse families in Taiwan. Continuing to document the demographic patterns of marrying couples in Taiwan can help address gaps in access to the civil justice system, including access to those with cost-effective and relevant expertise among the approximately 8,000 lawyers in Taiwan.⁷⁸

Future legal change in Japan will also occasion the opportunity to consider legal awareness and access to the legal system from the perspective of marginalized families. For instance, further inquiry can bring to bear existing research regarding legal literacy in Japan on questions of such literacy among same-sex couples regarding the law of family and marriage. Annelise Riles and Takashi Uchida have noted that "[l]egal literacy in Japan certainly is high. Individual litigants represent themselves pro se in court in robust numbers."⁷⁹ How does this level of legal literacy compare for matters relevant to marginalized families like same-sex couples?

Access to the legal system for a broad range of same-sex couples seeking legal support to resolve transitional legal issues depends on availability of cost-effective legal assistance. Access to justice in Japan for diverse families crossing the marital boundary will likely intersect with preexisting debates about access to lawyers. Historically, access to lawyers, measured by number of lawyers for the population, has been comparatively lower in Japan than in the U.S.⁸⁰ More recent discussions have focused on

77. American Bar Foundation, *Civil Justice Problems are Common, Widespread, and Rarely Taken to a Lawyer* (2016), http://www.americanbarfoundation.org/uploads/cms/documents/abf_research_brief_access_to_justice_v3.pdf.

78. Ethan Michelson, *Access to Lawyers: A Comparative Analysis of the Supply of Lawyers in China and the United States*, 7 NAT'L TAIWAN U.L. REV. 224, 242 (2012).

79. Annelise Riles & Takashi Uchida, *Reforming Knowledge? A Socio-Legal Critique of the Legal Education Reforms in Japan*, 1 DREXEL L. REV. 3, 37 (2009).

80. Annamarie Sasagawa, *Lack of Lawyers is No Joke in Japan* (Tokyo Weekender, Apr. 10, 2012), <https://www.tokyoweekender.com/2012/04/lack-of-lawyers-is-no-joke-in-japan/> ("Last year, there were only 30,503 attorneys registered with the Japan Federation of Bar Associations, roughly one lawyer for every 4,160 people in Japan. The American Bar Association last year registered just over 1.2 million lawyers, which works out to one lawyer for every 250 people in the US."); R. Daniel Kelemen & Eric C. Sibbitt, *The Americanization of Japanese Law*, 23 U. PA. J. INT'L ECON. L. 269, 294-95 (2002).

"As of January 1, 2002, there were 18,917 lawyers admitted to practice Japanese law in Japan; less

the prevalence of legal need in civil family matters, like divorce, child custody, and inheritance.⁸¹ This resonates with the extent of legal need for families in the U.S., where the need for cost-effective legal assistance is acute for family law matters.⁸² Future research may inquire into the extent of the gap between legal assistance for marginalized families in light of large-scale change like nation-wide access to marriage, especially for socioeconomically diverse families in Japan.

B. *Costs of Uncertainty*

The transitional equality framework also trains our attention to “uncertainty” as a factor worthy of specific attention in the process of legal transition.⁸³ The transitional process includes “the process burden of legal uncertainty occasioned by continued discrimination, and generalized fear that marriage rights will be reversed due to backlash and ongoing changes in political climate.”⁸⁴ The drawn-out process of legislative referenda in Taiwan and the expressed intentions of some political groups to organize to repeal same-sex marriage underscore the validity of this concern.⁸⁵ Uncertainty can shape couples’ behavior in requiring couples to take additional steps, like carrying around legal status documents as proof of the validity of the recognition of their relationships.⁸⁶

Existing research on the social impacts of the marriage referenda in Taiwan can serve as a building block for further investigation of the social experience of transitioning into marriage in light of continued uncertainty surrounding the durability and scope of marriage equality. For instance, I-Hsuan Lin, Nai-Ying Ko, Yu-Te Huang, Mu-Hong Chen, Wei-Hsin Lu, and

than one lawyer for every 7,000 residents. By comparison, the ratio in the United States in 2000 was approximately one lawyer per 300 residents. Access to lawyers has been restricted by the limited number of lawyers and resulting high fees, back-logs on court dockets as a result of inadequate appropriations to fund the judicial system, high court filing fees, the absence of contingency fee arrangements, and procedural rules such as restrictive standing requirements and limited pre-trial discovery. Potential payoffs are also limited as there is no provision for punitive damages in tort law, and judges, rather than juries, determine awards.”

81. Mitsuru Obe, *Japanese Lawyers’ Problem: Too Few Cases* (Wall St. J., Apr. 3, 2016), <https://www.wsj.com/articles/japanese-lawyers-problem-too-few-cases-1459671069> (finding that as of 2015 there were 36,415 lawyers in Japan and that “[a]bout the only kind of cases on the rises are civil family matters such as divorce, child custody and inheritance. Partly this is because of rising disputes over guardianship of elderly people afflicted with dementia, a major problem in a country where more than a quarter of the population is over 65.”).

82. See generally LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 39 fig.8 (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>.

83. Kim, *supra* note 1, at 1186.

84. *Id.* at 1186.

85. Chen, *supra* note 34; Hioe, *supra* note 59.

86. Deborah H. Wald, *Practicing LGBT Family Law in a Post-“Obergefell” World: Retroactivity and the Full Faith and Credit Clause*, 38 FAM. ADVOC. 19, 19-20 (2016); Kim, *supra* note 1, at 1186.

Cheng-Fang Yen have documented increases in suicidal ideation among nonheterosexual participants after the same-sex marriage referenda in Taiwan.⁸⁷ Further research can inquire into the impact of continued indeterminacy concerning the durability and scope of marriage equality, including as it manifests in any future referenda campaigns and ongoing or potential efforts to amend marriage law with regard to transnational couples, adoption rights, the marital presumption, and in-law recognition. This discussion in Taiwan intersects with transitional equality's focus on uncertainty in relation to the literature on "minority stress" as it relates to race, ethnicity, sexual orientation, and other drivers of marginalization.⁸⁸

Identifying impacts of this indeterminacy in Taiwan can illuminate "uncertainty as a sociolegal phenomenon."⁸⁹ This examination, as I have suggested in the U.S. context, includes "detailed consideration of uncertainty's impacts," including as it concerns "relational, individual, and community effects in psychological, legal, political, and other social spheres" and ways in which uncertainty is "mediated by race, gender, education, and economic status."⁹⁰ This exploration is important for addressing in a more fulsome manner the gaps between formal and substantive equality as the law of marriage for same-sex couples develops and more couples marry.

C. *Formal Law and Social Norms: Gender Egalitarianism and Societal Inclusion*

The transitional experience into marriage also includes encounters between formal status and background social norms informing daily life.⁹¹ These can include "impacts from dominant social norms and enduring prejudice."⁹² In the context of Taiwan and Japan, I suggest two areas of

87. I-Hsuan Lin et al., *Effect of Same-Sex Marriage Referendums on the Suicidal Ideation Rate among Nonheterosexual People in Taiwan*, 16 INT'L J. OF ENVTL. RES. AND PUB. HEALTH 1, 7 (2019). The present study found that the suicidal ideation rate in nonheterosexual participants significantly increased from Wave 1 (conducted 23 months before the same-sex marriage referendums) to Wave 2 (conducted one week after the same-sex marriage referendums), whereas the suicidal ideation rate did not significantly change in heterosexual participants. The same-sex marriage referendums might specifically influence the suicidal ideation rate among sexual minority individuals in Taiwan in two ways: the campaigns against same-sex marriage before the referendums and the negative results of the referendums.

88. Kim, *supra* note 1, at 1187; see, e.g., Ilan H. Meyer & David M. Frost, *Minority Stress and the Health of Sexual Minorities*, in HANDBOOK OF PSYCHOLOGY & SEXUAL ORIENTATION 252, 252-54 (Charlotte J. Patterson & Anthony R. D'Augelli eds., 2013); Brandon L. Velez et al., *Minority Stress and Racial or Ethnic Minority Status: A Test of the Greater Risk Perspective*, 4 PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY 257, 258 (2017).

89. Kim, *supra* note 1, at 1187.

90. *Id.*

91. *Id.* at 1188.

92. *Id.*

inquiry. The first pertains to married couples' encounters with background social norms concerning gender and egalitarianism. The second pertains to the role of marriage in generating greater feelings of societal inclusion among same-sex couples and sexual minorities and its effects on producing legal subjectivity.

Gender egalitarianism. How do same-sex couples in Taiwan and Japan encounter entrenched gender norms as they pertain to family and marriage, and how may these norms be shaped in the future by same-sex couples? Same-sex couples' transitions into marriage include encounters with preexisting background norms concerning gender and gender dynamics. As Chin-Chun Yi, Wen-Hsu Lin, and Josef Kuo-Hsun Ma have observed in Taiwan, "patriarchal norms often persist within families. Many of the norms embedded in Confucian ethics still shape relations with in-laws and aging parents, inheritance of family wealth, as well as the gendered division of labor within the home."⁹³ These gendered dynamics also manifest in allocation of labor outside of the home, with 90 percent of husbands and 64.4 percent of wives working full-time.⁹⁴ Marriage and family play an important role in constructing women's roles in society. As Chen has argued, women who do not follow the dominant gender roles for women in "chronological sequence" of "filial daughter, dutiful/chaste wife, and virtuous/loving mother" are "culturally defined as a deviant with defects and [are] legally disadvantaged as such."⁹⁵ Such norms are reflected in the marginalization in the workplace of women who become pregnant or take maternity leave.⁹⁶

Marriage and family also play a crucial role in producing and reflecting gender norms in Japan. Kumiko Nemoto has observed that the "family is still characterized by a gender divide," with many women "still forced to rely on marriage for economic security because of the large gender differences in work opportunities and in wage."⁹⁷ Moreover, most women associate marriage "with the woman's shouldering all of the responsibilities related to running the house and rearing children. . . . Marriage emerges, therefore, as the antithesis to women's financial and individual autonomy and to career ambition."⁹⁸

93. Chin-Chun Yi, Wen-Hsu Lin & Josef Kuo-Hsun Ma, *Marital Satisfaction among Taiwanese Young Married Couples: The Effects of Resources and Traditional Norms*, 40 J. OF FAM. ISSUES 2015, 2016 (2019).

94. *Id.* at 2028.

95. Chao-Ju Chen, *Mothering under the Shadow of Patriarchy: The Legal Regulation of Motherhood and Its Discontents in Taiwan*, 1 NAT'L TAIWAN U.L. REV. 45, 47 (2006).

96. *Id.* at 67.

97. Kumiko Nemoto, *Postponed Marriage: Exploring Women's Views of Matrimony and Work in Japan*, 22 GENDER & SOC'Y 219, 223 (2008).

98. *Id.* at 226, 228, 234.

Marriage continues to be seen as a primary financial resource for many women, whose income and

These norms are reflected in structural and symbolic dynamics. Wei-Hsin Yu identifies the pattern of “Japanese women holding white-collar jobs and working in large firms [as] particularly likely to be pressured out of the labor force upon marriage or childbirth.”⁹⁹ The Japanese family registration system reflects this gender hierarchy. Masami Tamagawa notes that “[a]lthough not legally required, more than 90% of Japanese households choose the husband’s family name, thus strengthening the idea of the husband as the head of the household.”¹⁰⁰

As in the U.S., encounters between legally transitioning couples in Taiwan and Japan and these background gender norms deserve special attention. They present possibilities for transformation in the relationship between gender norms and marriage and family.

Societal inclusion and legal subjectivity. A second area of inquiry is the impact of marriage on feelings of societal inclusion and formation of legal subjectivity. A particular area of focus is the cultural contingency of inclusion and its relationship to marriage. As noted in the U.S., the impact of marriage on feelings of societal inclusion from access to marriage are affected by a variety of socioeconomic factors, including race and gender.¹⁰¹

Japan offers a particularly important case study of the contingency of marriage’s role in producing feelings of inclusion, given scholars’ observations about the unique form of cultural invisibility characterizing the country’s sexual minority experience. As Sobabe has argued, “while no laws prohibiting homosexual activity or explicitly discriminating against homosexuals, . . . discrimination in society is severe . . . harsher because it is hidden.”¹⁰² The existence of sexual minorities, therefore, “has become invisible.”¹⁰³ This invisibility is validated by national survey data described by Frank Upham: “Less than 20 per cent of Japanese in a national survey in 2019 said that they knew a gay person, as opposed to almost 90 per cent in the US. Perhaps more tellingly, 78.8 per cent of LGB respondents had not come out to anyone; 25.7 per cent said that they would come out if the situation was right; and 40.1 per cent replied that it is ‘not necessary to come out even if there are no obstacles.’”¹⁰⁴

wages remain lower than those of men . . . Women are also reluctant to take on the gendered burden of marriage because of their long hours of overwork at their jobs, the normalized gendered path of quitting a job on marriage and childbirth, the probable loss of financial independence, and a lack of female role models in the workplace.

99. WEI-HSIN YU, *GENDERED TRAJECTORIES: WOMEN, WORK, & SOCIAL CHANGE IN JAPAN AND TAIWAN* 179 (2009).

100. Tamagawa, *supra* note 38, at 172.

101. M. V. Lee Badgett, *Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands*, 67 J. SOC. ISSUES 316, 331-32 (2011); Kim, *supra* note 26.

102. Sogabe, *supra* note 23, at 3.

103. *Id.*

104. Upham, *supra* note 34, at 199.

The context of Japan raises the question then of how a social movement progresses from invisibility. Advocates have raised concerns previously “that potential plaintiffs may be reluctant to appear openly in court,” and advocates themselves may be reluctant to identify publicly to represent interests of sexual minorities.¹⁰⁵

Apart from these concerns, if Japan grants marriage recognition in the future, the experience of couples transitioning into marriage in a context of legal and social invisibility merits special attention. How does marriage produce recognizable legal and social subjects? Does marriage access both render sexual minorities visible as it mitigates discrimination? What is the lived experience of this encounter, especially taking into account legal and political uncertainty? These are just some of the particular questions worthy of consideration.

CONCLUSION

Moving forward, scholars of and advocates for greater rights for diverse families will greatly benefit from examining closely the experiences of legal status transition in Taiwan and Japan, in contrast with the U.S., to consider how to build more enduring forms of equality for marginalized groups. I have set forth here some doctrinal indeterminacies giving rise to particular socio-legal questions in contrasting Taiwan, Japan, and the U.S. This discussion explores some touchpoints between the framework I have posited in the U.S. context of “transitional equality” and legal development in Taiwan and Japan to map out some analytical intersections and future areas of research inquiry.

I have also explored a range of “process burdens” in the transition across the marital border, comparative analysis of which can illuminate the cultural forces shaping transitions into legal statuses and the lived experience of putatively formal equality. I have focused, in particular, on the process burdens of legal awareness and access to justice, “costs of uncertainty,” and the interaction between formal legal status and social norms in shaping experiences of equality, specifically in regard to gender egalitarianism and the contingency of societal inclusion. Taiwan and Japan present particularly salient opportunities to consider these domains.

As I have noted, future study of the demographic trends in Taiwan and Japan will help to determine the roles of race and ethnicity, national identity, gender, age, and socioeconomic status in the lived experience of legal transition for diverse families. I invite further exploration by legal scholars, policy makers, and social scientists of these questions and those pertaining to

105. *Id.*

access to justice, the costs of uncertainty, and the relationship between formal status and social norms. As I have articulated, such a focus on transitional legal experience is important to building more substantive forms of equality beyond legal form across jurisdictions in support of family diversity.



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跨國背景下之過渡性平等

Suzanne A. Kim

摘 要

臺灣近年來同性婚姻的合法化以及日本對於同性伴侶新興的法律認可，標示著亞洲對於家庭認可的重要進展。這些發展提供吾人思索臺灣、日本及其他司法管轄區對於多元家庭所提供之形式與實質平等權利間差異之契機。本文檢視臺灣與日本對於家庭承認之近期變化，並與美國伴侶之經驗相結合，以便在充分關注廣泛的法社會學經驗之前提下，在此一發展中平等之探究產生新的視野。

本文考量美國社會脈絡下「過渡性平等」之架構，以確認家庭過渡至具有法律意義下之正式地位的過程。正如同本文在其他地方所述，當一個人或一個階層的人們得到一個新地位或是得到之前被否決的權利時，「從一個法律地位到另一個法律地位的途徑本身即變得至關重要，而可能受到種族、性別、年齡和其他因素的影響。過渡至新地位的過程可能會以意想不到的方式變得複雜及繁複，且若缺乏對於該過程的關注，將會損害人們新獲得之法律權利。」此種過渡之空間值得法社會學界之關注，以致力於為多元家庭建立起更充分的平等。臺灣與日本提供更多的機會檢視婚姻之承認具有反映並建構有關國家認同、種族、民族、性別、年齡、經濟狀況、司法平等以及社會包容和法律主體之文化變遷等更廣泛之規範功能。

關鍵詞：婚姻、同性婚姻、性別、司法平等、憲法平等、跨國、臺灣、日本、美國、女權主義、歧視、平等主義、過渡性