Article

Global Trends in Legal Recognition of Same-Sex Couples: Cohabitation Rights, Registered Partnership, Marriage, and Joint Parenting

Robert Wintemute *

ABSTRACT

This article examines four global trends with regard to the legal recognition of same-sex couples: access to the rights of opposite-sex cohabiting couples, access to a registered partnership law as an alternative to marriage, access to marriage, and access to joint legal parenthood (through joint or second-parent adoption or after assisted reproduction). Developments since 2017 in Taiwan in relation to same-sex marriage and adoption by same-sex couples are then compared with these global trends. The article concludes that developments in Taiwan are entirely "normal". Other countries have allowed same-sex couples to marry, while withholding access to joint adoption, or preventing non-citizens from marrying. Taiwan's restrictions are likely to be temporary, as they have been in other countries. Full legal equality, with no exceptions, will eventually be achieved.

Keywords: *Same-sex Marriage, Lesbian, Gay, and Bisexual, Cohabiting Couples, Registered Partnership, Joint or Second-Parent Adoption*

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* Professor of Human Rights Law, King's College London, United Kingdom. This is an updated version of my presentation to the conference "Beyond 748: Same Sex Marriage and Family", Institutum Iurisprudentiae, Academia Sinica, Taipei, Taiwan, 24 October 2019.

CONTENTS

I. INTRODUCTION

The arrival of same-sex marriage in Asia, the world's most populous continent, as a result of Taiwan's 2019 legislation[1] implementing the Constitutional Court's 2017 decision,[2] was a huge step forward for Taiwan, for Asia, and for the world. But many activists were disappointed that Taiwanese law continues to discriminate, especially by excluding married same-sex couples from joint adoption of children.[3] While their disappointment is understandable, inclusion in marriage combined with exclusion from adoption has happened before: in Belgium in 2003 and in Portugal in 2010.[4] In Belgium, the discrimination lasted only three years,[5] and in Portugal only six years.[6] There is no reason why full legal equality for same-sex couples in Taiwan should not be achieved within a similar period, so by 2022 or 2025.

Taiwan's route to full legal equality can be compared with global trends regarding cohabitation rights, registered partnership, marriage, and joint parenting for same-sex couples. An examination of these global trends reveals that there is nothing unusual about the route taken in Taiwan. The 30countries that have reached full (or almost full) legal equality have taken different routes, both with regard to whether a registered partnership law must precede marriage, whether joint parenting comes before, after or at the same time as marriage, and whether equality is introduced by the highest court, the legislature, the electorate in a referendum, or a combination of these methods. I will begin by analysing global trends with regard to cohabitation rights, registered partnership, marriage, and joint parenting for same-sex couples, before considering the different routes to full legal equality, and how Taiwan's reforms to date compare with these global trends.

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1. *See* Laney Zhang, *Taiwan: Same-Sex Marriage Law Enters into Effect*, THE LIBRARY OF CONGRESS (June 18, 2019), https://www.loc.gov/law/foreign-news/article/taiwan-same-sex-marriage-law-enters-into-effect/.

2. Sifa Yuan Dafaguan Jieshi No. 748 (司法院大法官解釋第748號) [Judicial Yuan Interpretation No. 748] (2017) (Taiwan).

3. *See* 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., Article 5, 1 (2019); Douglas Sanders, *Sex and Gender Diversity in Southeast Asia*, 4 J. OF SE. ASIAN HUM. RTS. 357 (2020).

4. The Netherlands excluded same-sex couples from intercountry (but not domestic) joint adoptions between 2000 and 2008.

5. *See* Moniteur Belge, *Loi du 18 mai 2006 modifiant certaines dispositions du Code civil en vue de permettre l'adoption par des personnes de même sexe* (June 20, 2006), http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2006051844&table_name=loi (Belg.).

6. *See* Jornal Oficial, Lei n.º 2/2016 (Feb. 29, 2016), https://dre.pt/home/-/dre/73740375/details/maximized?p_auth=S06z3dSx (Port.).

II. COHABITATION RIGHTS

In most countries, law reform in relation to lesbian, gay and bisexual (LGB) persons usually involves three stages: (i) repealing any criminal prohibition of same-sex sexual activity; (ii) passing a law that prohibits discrimination based on sexual orientation in access to employment, education, housing, or other goods and services; and (iii) reforming family law so that it recognises same-sex couples and parents. Stage (ii) allows a lesbian, gay or bisexual *individual* to be open about their sexual orientation in their workplace, at their university, or in their neighbourhood, without fear of discrimination. But this kind of anti-discrimination law often assumes that LGB individuals do not have partners, because they are incapable of stable relationships. As late as 1985, Canada's Parliamentary Committee on Equality Rights saw no contradiction in recommending both an amendment to federal anti-discrimination legislation, adding "sexual orientation" as a prohibited ground, and "a consistent federal definition of common law [cohabiting] relationships" requiring that "the parties be of the opposite sex".[7] This meant protecting LGB individuals, while entrenching discrimination against same-sex couples.

The first global trend, in relation to cohabitation rights, appears to have begun forty years ago in 1979,[8] when the Netherlands inserted a sex-neutral concept of "joint household" into housing legislation,[9] intended to include (and subsequently interpreted as including) both same-sex and opposite-sex unmarried cohabiting couples. The Dutch reform gradually became more common, because legislatures and courts were frequently asked to consider why the rights and duties of unmarried cohabiting opposite-sex couples should not be extended to same-sex couples (given that this would not require any change to access to marriage). Obvious injustices became more frequent, from 1981 to 1996, as the HIV epidemic killed many tenants of apartments, whose surviving same-sex partners faced eviction, unless legislation protecting the tenant's family members was either interpreted as including the tenant's same-sex partner, or amended.

An early example of statutory interpretation came thirty years ago, in 1989 in *Braschi v. Stahl Associates*, in which the State of New York's highest court, the Court of Appeals, held that "a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional

7. CANADA PARLIAMENT, HOUSE OF COMMONS, SUB-COMMITTEE ON EQUALITY RIGHTS, EQUALITY FOR ALL: REPORT OF THE PARLIAMENTARY COMMITTEE ON EQUALITY RIGHTS., Parl., 1st Sess., at 30, 37 (33rd 1985).

8. The duration of each global trend is measured from the year it started until 2019, the year that same-sex marriage began in Taiwan, and the year of the "Beyond 748" conference.

9. Act of 21 June 1979 amending the Civil Code with respect to rent law, Stb. 1979, nr. 330 ("*duurzame gemeenschappelijke huishouding*"; "lasting joint household").

and financial commitment and interdependence".[10] In doing so, the Court of Appeals "blocked a landlord from evicting Miguel Braschi from a Manhattan apartment he shared with Leslie Blanchard for more than a decade until Mr. Blanchard died of AIDS in September 1986".[11] Ten years later, in *M. v. H.* in 1999, which involved a lesbian couple whose relationship had ended, the Supreme Court of Canada deployed the constitutional prohibition of discrimination based on sexual orientation against a clear statutory definition of an unmarried partner eligible to claim financial support as "either of a man and woman".[12] To comply with the judgment, Ontario added "same-sex partners" to its legislation in 1999,[13] while the federal level included them as "common-law partners" in 2000.[14] The Constitutional Court of South Africa went a step further in 1999 when, to avoid constitutionally prohibited discrimination based on sexual orientation, it extended (by reading in a new category) the statutory right to sponsor a married opposite-sex "spouse" for immigration to a "partner, in a permanent same-sex life partnership".[15]

The trend in national courts reached the international level in 2003. In *Karner v. Austria*, the European Court of Human Rights (ECtHR) found a violation of Article 14 (non-discrimination based on sexual orientation), taken in conjunction with Article 8 (respect for home) of the European Convention on Human Rights (EConHR), because Austria's Supreme Court had permitted the eviction from an apartment of a man whose male partner (the tenant) had died of AIDS, even though the tenant's unmarried female partner would have had a right to stay. The Court applied a strict standard of review: "Just like differences [in treatment] based on sex, differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification."[16] Austria had failed to show "that it was necessary in order to [protect the traditional family] to exclude certain categories of people-- . . . persons living in a homosexual relationship--from the scope of application of . . . the Rent Act".[17] Less than two weeks after the publication of *Karner*, the United Nations Human Rights Committee found sexual

10. Braschi v. Stahl Associates Co., 74 N.Y.2d 201, 211 (1989). For similar cases in the United Kingdom (involving different causes of death), *see* Fitzpatrick v. Sterling Housing Association, [1999] UKHL 42; Ghaidan v. Godin-Mendoza, [2004] UKHL 30.

11. *See* Philip S. Gutis, *New York Court Defines Family To Include Homosexual Couples*, N.Y. TIMES (July 7, 1989), https://www.nytimes.com/1989/07/07/nyregion/new-york-court-defines-family-to-include-homosexual-couples.html.

12. M. v. H., [1999] 2 S.C.R. 3 (Can.).

13. Statutes of Ontario 1999, chapter 6.

14. Statutes of Canada 2000, chapter 12.

15. National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs, [1999] ZACC 17 (S. Afr.).

16. Karner v. Austria, 2003-IX Eur. Ct. H.R. 199, para. 37.

17. *Id*. para. 41.

orientation discrimination violating Article 26 of the International Covenant on Civil and Political Rights (ICCPR), because Australia had denied a survivor's pension to a same-sex partner, even though an unmarried opposite-sex partner would have qualified.[18] The Inter-American Court of Human Rights (IACtHR) adopted a similar approach in 2016.[19]

III. REGISTERED PARTNERSHIP

Are cohabitation rights enough? In some countries, unmarried opposite-sex couples are not recognised at all, or only in very limited ways. This means that there are few or no cohabitation rights to extend to same-sex couples. Even in countries with extensive cohabitation rights, there might be a qualifying period of cohabitation for one to three years. To allow same-sex couples to obtain all (or most) of the rights of married opposite-sex couples immediately, after a formal registration before a public official, while continuing to exclude them from marriage, governments began to create a new, "separate but equal (or almost equal)" institution known as "registered partnership", "civil union", "civil partnership" or "domestic partnership". Thirty years ago in 1989, Denmark began this second global trend by passing a law that allowed a same-sex couple (but not a opposite-sex couple) to become "registered partners".[20] The 1989 "Danish model" gradually spread to other countries, although some preferred the 1997 "Dutch model" (a registered partnership, similar to marriage, for both same-sex and opposite-sex couples),[21] or the 1999 "French model" (a registered partnership, with considerably fewer rights and obligations than marriage, for both same-sex and opposite-sex couples).[22]

Registered partnership spread to the USA in 2000, when the Vermont legislature complied with a judgment of the Supreme Court of Vermont that required access for same-sex couples to all of the rights attached to marriage, but left it to the legislature to decide whether or not to call this package of rights "marriage", or something else.[23] At a time when no country in the world allowed same-sex couples to marry, the Vermont legislature preferred

18. Edward Young v. Australia, UN HR Committee, Communication No. 941/2000, Views adopted on 6 August 2003 (published on 18 September 2003; *Karner* not cited). *See also* X v. Colombia, UN HR Committee, Communication No. 1361/2005, Views adopted on 30 March 2007 (published on 14 May 2007).

19. Duque v. Colombia, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310 (Feb. 26, 2016).

20. Law on Registered Partnership (*Lov om registreret partnerskab*), 7 June 1989, nr. 372.

21. Act of 5 July 1997 concerning the introduction of provisions relating to registered partnership (*geregistreerd partnerschap*), *Staatsblad* 1997, nr. 324.

22. *Loi no. 99-944 du 15 novembre 1999 relative au pacte civil de solidarité* (civil solidarity pact).

23. Baker v. State, 744 A.2d 864 (1999).

to call this new package a "civil union".[24] Registered partnership reached Canada in 2002, when the legislature of Québec (which would probably have been willing to open up marriage to same-sex couples, but could not do so, because the federal level had exclusive jurisdiction over capacity to marry) amended the Civil Code by creating a new institution of "civil union", open (unlike in Vermont) both to same-sex and opposite-sex couples.[25]

As registered partnership laws became more common, the question arose whether governments have a positive obligation under international human rights law to provide an alternative to marriage for same-sex couples. In 2010 in *Schalk & Kopf v. Austria*, the ECtHR ruled for the first time that same-sex couples (like unmarried opposite-sex couples) enjoy "family life" under Article 8 EConHR,[26] but do not yet have a right to marry under Article 12.[27] As for a positive obligation to create an alternative to marriage for same-sex couples, three judges ruled that Austria had one prior to 1 January 2010.[28] The majority of four judges disagreed. Austria could not have been expected to introduce registered partnership for same-sex couples earlier than it did (on 1 January 2010).[29] But the majority did not find it necessary to rule on the existence of a positive obligation: "Given that at present [June 2010] it is open to the applicants to enter into a registered partnership, the Court is not called upon to examine whether the lack of any means of legal recognition for same-sex couples would constitute a violation of [the EConHR] . . . if it still obtained today."[30]

The question that the ECtHR left open in 2010 had to be answered in 2015, in *Oliari & Others v. Italy*, because Italy excluded same-sex couples from marriage, and had no registered partnership law. By June 2015, 24 of 47 Council of Europe member states either allowed same-sex couples to marry, or granted them access to some form of registered partnership, a "thin majority" of 51%.[31] This higher level of European consensus (higher than the 19 member states at the time of *Schalk & Kopf*[32]) helped the ECtHR to find a violation of Article 8: "the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available *a specific legal framework* providing for

24. An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 (codified at Vt. Stat. Ann. tit. 15, 1201-1207 (2003)).

25. An Act instituting civil unions and establishing new rules of filiation, SQ 2002, c 6.

26. Schalk & Kopf v. Austria, 2010-IV Eur. Ct. H.R. 409., para. 94.

27. *Id*. paras. 61-64.

28. *Id*. Joint Dissenting Opinion, paras. 9-10.

29. *Id*. para. 106.

30. *Id*. para. 103.

31. Oliari & Others v. Italy, App. No. 18766/11 and 36030/11, Eur. Ct. H.R. (2015), paras. 53-55, 178.

32. *Id*. para. 163.

the recognition and protection of their same-sex unions".[33] The "specific legal framework" does not have to be identical to marriage.[34] The ECtHR distinguished "core rights relevant to a couple in a stable and committed relationship", which the "specific legal framework" must provide, from "supplementary rights", which do not necessarily have to be provided.[35] One "core right" is a residence permit for a same-sex partner who is not a European Union (EU) citizen. n 2016, the ECtHR ruled for the first time in *Taddeucci & McCall v. Italy* that a right attached to marriage (a residence permit for an opposite-sex spouse from outside the EU) had to be extended to same-sex couples (unable to marry), who had a right under Article 14 EConHR to be treated differently from unmarried opposite-sex couples (able to marry).[36]

IV. MARRIAGE

Whether or not their country had created some form of registered partnership, same-sex couples around the world have insisted for many years that full legal equality, without discrimination based on sexual orientation, means full inclusion in all public institutions, including legal marriage.[37] But, before 2003, no appellate court in the world was willing to order a government to issue marriage licenses to same-sex couples. Claims on constitutional or other grounds were rejected by courts in the USA in 1972, in pre-Charter Canada in 1974, in the Netherlands in 1990, in Germany and post-Charter Canada in 1993, in Spain in 1994, in Hungary in 1995, and in New Zealand in 1997.[38] A preliminary victory in Hawaii in 1993 (the highest court found that the exclusion of same-sex couples from marriage was prima facie sex discrimination, which had to be justified under the Constitution of Hawaii)[39] was superseded by a constitutional amendment

33. *Id*. para. 185 (emphasis added). Under Orlandi & Others v. Italy, App. No. 26431/12, Eur. Ct. H.R. (2017), this "specific legal framework" (with a name other than marriage) may be used to recognise same-sex marriages contracted in other countries.

34. Chapin & Charpentier v. France, App. No. 40183/07, Eur. Ct. H.R. (2016).

35. *Oliari*, paras. 174, 177.

36. Taddeucci & McCall v. Italy, App. No. 51362/09, Eur. Ct. H.R. (2016), para. 98. This judgment resembles the Constitutional Court of South Africa's 1999 judgment in *National Coalition for Gay and Lesbian Equality*, above n 15.

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

38. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972); Re North & Matheson, 52 D.L.R. (3d) 280 (Man. Co. Ct. 1974); HR 19 oktober 1990, NJ 1990, 129 m.nt EAAL (Neth.); Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] Oct. 4, 1993, Neue Juristische Wochenschrift [NJW] 3058 (Ger.); Layland v. Ontario, 14 Ontario Reports (3d) 658 (Div. Ct. 1993); S.T.C., July 11, 1994 (Auto TC 222/1994) (Spain.); Alkotmánybíróság (AB) [Constitutional Court] 13 March 1995, 14/1995 (III.13.) (Hung.); Quilter v. Attorney-General (1998) 1 NZLR 523 (CA).

39. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

(adopted after a referendum in 1998), which gave the legislature the power to restrict marriage to opposite-sex couples.[40] Because same-sex marriage did not exist in any country yet, judges were clearly reluctant to order governments to introduce this reform, in the absence of an "equality experiment" in one country demonstrating that the reform would only have positive consequences.

Some country had to be the first to conduct the "equality experiment". We must be grateful to the Government of the Netherlands for its courage in doing so and starting the third global trend. The bill on opening up marriage to same-sex couples was introduced in the Dutch Parliament twenty years ago, on 8 July 1999, became law on 21 December 2000, and entered into force on 1 April 2001, when the first same-sex couples were married at Amsterdam City Hall shortly after midnight.[41] As Kees Waaldijk (Professor of Comparative Sexual Orientation Law at the University of Leiden) explained, this was "a small change", after the 1997 registered partnership law had given same-sex couples access to almost all of the rights and obligations attached to marriage.[42] The "purely" legislative route taken in the Netherlands has been followed by 16 other countries (and some other territories): Belgium in 2003; Spain in 2005; Norway in 2008; Sweden in 2009; Argentina, Iceland, Portugal and Mexico's Federal District in 2010; Denmark and New York State in 2012; France, New Zealand, Uruguay, and England and Wales in 2013; Finland, Luxembourg and Scotland in 2014; Germany and Malta in 2017.

Once the Netherlands had allowed same-sex couples to marry, demonstrating that life continued as normal, after the lives of a small minority were made easier, and that the country's famous dikes did not collapse, allowing the sea to pour in, it became easier for judges to apply the principle of non-discrimination based on sexual orientation to access to the public institution of legal marriage. The first appellate courts to order governments to issue marriage licenses to same-sex couples were the Ontario Court of Appeal in June 2003, the British Columbia Court of Appeal in July 2003, and the Supreme Judicial Court of Massachusetts in November 2003.[43] Since 2003, courts have issued decisions requiring access to

40. Baehr v. Anderson, 994 P.2d 566 (Haw. 1999).

41. Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage, *Wet openstelling huwelijk*), Stb. 2001, nr. 9. The Act resulted from a Bill introduced by the Government on 8 July 1999 (Parliamentary Papers II 1998/1999, 26672, nr. 2), adopted by the Lower House of Parliament on 12 September 2000, adopted by the Upper House on 19 December 2000, and signed into law on 21 December 2000. It entered into force on 1 April 2001.

42. *See* Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437 (Mads H. Andenæs & Robert Wintemute eds., 2001).

43. Halpern v. Canada (Att'y Gen.) (2003), 65 O.R. (3d) 161 (Can. Ont. C.A.), first marriages on

marriage for same-sex couples (based on the national or state constitution, and after legislative action in some cases) in South Africa, other US states (such as California, Connecticut and Iowa), Colombia and, in 2017, Taiwan and Austria.[44] There have also been decisions in Costa Rica and Ecuador that relied on the 2017 Advisory Opinion of the Inter-American Court of Human Rights (to be discussed below). Of course, the most influential decision at the national level was *Obergefell v. Hodges* in the Supreme Court of the United States in 2015,[45] which required equal access to marriage for same-sex couples in the 34 states in which it had yet to be introduced, either by the state legislature or the state supreme court.[46]

Of the 30 countries that have introduced same-sex marriage, 17 have done so through the "purely" legislative route, 5 have done so through the "purely" judicial route, 5 have done so through a combination of judicial and legislative action, and 3 have done so through a combination of a referendum or "postal survey" and legislative action.[47]

The question of same-sex marriage (not involving a transgender person) first reached the international level in *Joslin v. New Zealand* in the United Nations Human Rights Committee in 2002.[48] Given that only the Netherlands, among the then 189 UN member states, allowed same-sex couples to marry, it came as no surprise when the Committee concluded: "Use of the term 'men and women' . . . has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from [Article 23(2) of the ICCPR] . . . is to recognize as marriage only the union between a man and a woman wishing to marry each other."[49] Two members of the Committee, in a concurring opinion, anticipated future developments in the ECtHR: ". . . a denial of certain rights or benefits to

10 June; EGALE Can. Inc. v. Canada (Att'y Gen.) (2003), 228 D.L.R. (4th) 416 (B.C.C.A.), first marriages on 8 July; Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); *Opinion of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004), "civil unions" would not be sufficient, first marriages on 17 May 2004. *See* Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits*, 49 MCGILL L.J. 1143 (2004).

44. *See* Minister of Home Affairs v. Fourie 2005 (1) SA 524 (CC) (S. Afr.); In re Marriage Cases, 183 P.3d 384 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa. 2009); Corte Constitucional [C.C.] [Constitutional Court], April 28, 2016, Sentencia SU-214/16 (Colom.); Verfassungsgerichtshof [VfGH] [Constitutional Court], December 4, 2017, No. G 258-259/2017-9 (Austria.).

45. Obergefell v. Hodges, 576 U.S. 644 (2015).

46. *Obergefell*, Appendix B. *See* Robert Wintemute, *Same-Sex Marriage in National and International Courts: 'Apply Principle Now' or 'Wait for Consensus'?*, 2020 PUB. L. 134.

47. In 2012, same-sex marriage legislation was approved or enacted by the electorate in referendums held in Maine, Maryland, and Washington.

48. Joslin v. New Zealand, UN HR Committee, Communication No. 902/1999, Views adopted on 17 July 2002 (published on 30 July 2002). Compare C. v. Australia, UN HR Committee, Communication No. 2216/2012, Views adopted on 28 March 2017 (published on 1 November 2017; discriminatory not to recognise a foreign same-sex marriage, for the purpose of divorce proceedings, because foreign polygamous marriages that were not legally possible in Australia were recognised).

49. *Id*. para. 8.2.

Route to same-sex marriage	Countries (30)
"Purely" legislative route	17--Argentina, Belgium, Denmark, Finland, France, Germany, Iceland, Luxembourg, Malta, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, United Kingdom, Uruguay
"Purely" judicial route	5--Austria, Brazil, Colombia, Costa Rica, Ecuador
"Mixed" judicial-legislative route	5--Canada, Mexico, South Africa, Taiwan,[50] USA
"Mixed" electoral-legislative route	3--Australia, Ireland, Switzerland (2020 law likely to be confirmed after a referendum)

same-sex couples that are available to married couples may amount to discrimination prohibited under article 26 . . ."[51]

Since *Joslin*, the ECtHR has rejected complaints by same-sex couples unable to marry in *Schalk & Kopf v. Austria* in 2010, and in *Oliari & Others v. Italy* in 2015. In *Schalk*, when only 6 of 47 Council of Europe member states allowed same-sex couples to marry, the ECtHR concluded: " . . . as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State."[52] In *Oliari*, with only 11 of 47 member states having reformed their marriage laws, the ECtHR maintained this approach. Its only concession, compared with *Joslin*, was to interpret "men and women" in Article 12 EConHR as not presenting a textual obstacle to a future judgment requiring equal access to marriage: "Regard being had to Article 9 of the [2000] Charter [of Fundamental Rights of the European Union, which does not refer to 'men and women'], . . . the Court would no longer consider that the right to marry enshrined in Article 12 [of the 1950 EConHR] must in all circumstances be limited to marriage between two persons of the opposite sex."[53]

The IACtHR signalled in *Atala Riffo v. Chile* in 2012,[54] its first judgment in the area of LGB human rights, that lack of consensus might not prevent it from interpreting the American Convention on Human Rights (AConHR) as requiring equal access to marriage for same-sex couples

50. Although a referendum was held on 24 November 2018, between the Constitutional Court's 2017 decision and the 2019 legislation, its role was negative rather than positive: it rejected access to marriage through the Civil Code, but did not create an alternative route. *See* 2018 Taiwanese referendum, https://en.wikipedia.org/wiki/2018_Taiwanese_referendum (last visited Feb. 23, 2021) (Case 10, "Do you agree that marriage defined in the Civil Code should be restricted to the union between one man and one woman??", 72.48% Yes).

51. *Id*. opinion of Mr. Lallah and Mr. Scheinin.

52. *Oliari*, paras. 27, 61.

53. *Id*. para. 61.

54. Atala Riffo v. Chile, Merits, Reparations, and Costs Judgment, Inter-Am. Ct. H. R. (ser. C) No. 239 (Feb. 24, 2012).

(emphasis added):

> 92. . . . the Court points out that *the alleged lack of consensus in some countries* regarding full respect for the rights of sexual minorities *cannot be considered a valid argument* to deny or restrict their human rights or to perpetuate . . . the . . . discrimination that [they] have suffered. …
> 93. A right granted to all persons cannot be denied or restricted *under any circumstances* based on their sexual orientation. . . .

Having announced in *Atala* in 2012 that it would apply principle, rather than wait for consensus, the IACtHR did so in late 2017 in *Advisory Opinion OC-24/17 (requested by Costa Rica)*:[55]

> THE COURT, DECIDE[D] by six votes in favour to one against, that [emphasis added]:
>
> 8. Under Articles 1.1 [non-discrimination in relation to AConHR rights], . . . 11.2 [interference with private life or family], 17 [right to marry and to raise a family] and 24 [equal protection of the law without discrimination] of the [AConHR], *States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage*, to ensure the protection of the rights of families formed by same-sex couples, without discrimination in relation to those . . . formed by heterosexual couples, as established in paragraphs [226] to 228.[56]

The IACtHR recognised that political difficulties could prevent the immediate extension of marriage to same-sex couples:

> States that encounter institutional difficulties to adapt the existing provisions, on a transitional basis, and while promoting such reforms in good faith, still have the obligation to ensure to same-sex couples, equality and parity of rights with respect to heterosexual couples without any discrimination.[57]

In *Advisory Opinion OC-24/17*, the IACtHR went well beyond the

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55 . Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-discrimination of Same Sex Couples*, Advisory Opinion OC-24/17, (ser. A) No. 24 (Nov. 24 2017), https://www.corteidh.or.cr/docs/opiniones/seriea_24_eng.pdf.

56. *Id*. para. 229.

57. *Id*. para. 228.

ECtHR in *Oliari*. The IACtHR insisted that the AConHR requires access to marriage for same-sex couples, but that, on a temporary basis, access to another institution with a different name (such as "civil union"), could be sufficient, as long as the separate institution provides the same rights as marriage. The ECtHR in *Oliari* required "a specific legal framework", but neither the name "marriage", nor all the rights attached to marriage. *Advisory Opinion OC-24/17* affects (at least) the 23 countries that are parties to the AConHR. Of the 23 countries, only four already had same-sex marriage throughout the entire country (Argentina, Brazil, Colombia, Uruguay). Mexico has it in some but not all parts of the country. *Advisory Opinion OC-24/17* has inspired constitutional court decisions requiring same-sex marriage in Costa Rica[58] and Ecuador.[59] But same-sex marriage does not exist in 16 of the 23 countries: Barbados, Bolivia, Chile, Dominica, the Dominican Republic, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Nicaragua, Panama, Paraguay, Peru, and Suriname. Of these 16 countries, 4 still have laws criminalising same-sex sexual activity: Barbados, Dominica, Grenada, and Jamaica.

V. JOINT PARENTING

A same-sex couple seeking to marry does not necessarily have children or wish to have children. The right to marry and the right to become a parent, whether as an individual or jointly with a partner, are rights that overlap, but they are separate rights. The ECtHR stressed this distinction in *Christine Goodwin v. United Kingdom*, in which it ruled that a male-to-female transgender person had an Article 12 EConHR right to marry a man, even though they could not have a child with genetic input from both spouses: ". . . Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision [the right to marry]."[60]

58. Sala Constitucional de la Corte Suprema de Justicia de Costa Rica [C.S.J.] [Supreme Court of Costa Rica], Aug. 8, 2018, Res. No. 12782 – 2018 (Costa Rica). https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-875801 (8 May 2018, setting a deadline of 8 November 2019). Because of the time it took to publish the full judgment, the deadline is now 26 May 2020, *see* Luis Manuel Madrigal, *Matrimonio igualitario será legal en Costa Rica a partir del 26 de mayo del 2020*, DELFINO (Nov 26, 2018, 12:00 AM), https://delfino.cr/2018/11/matrimonio-igualitario-sera-legal-en-costa-rica-a-partir-del-26-de-mayo-del-2020.

59. Ecuador Constitutional Court (June 12, 2019), https://www.corteconstitucional.gob.ec/index.php/boletines-de-prensa/item/34-sesi%C3%B3n-del-pleno.html.

60. Christine Goodwin v. United Kingdom, 35 Eur. Ct. H.R. 18 (2002), para. 98.

If an LGB individual or a same-sex couple wishes to become the parent(s) of a child, they will have to overcome the strongest and most persistent prejudice against LGB minorities around the world: that they represent a threat to the well-being of children. Because of this prejudice, parenting equality often passes through three or four stages. The first is allowing LGB individuals to have custody of their own genetic children (often from a prior opposite-sex relationship), as in the *Atala* case in the IACtHR, or to adopt an unrelated child as an unmarried individual, as in *E.B. v. France* in the ECtHR.[61] This stage should permit courts to confront and dismiss claims that being raised by an LGB parent has negative effects on children. The IACtHR included a detailed and robust rebuttal of these claims in its *Atala* judgment.[62]

The second stage is second-parent adoption: the possibility within a same-sex couple of adopting the genetic child of one partner. This stage allows societies to address the psychological stress triggered by the idea of a child having two legal mothers or two legal fathers. The rational response is that it is generally in the best interest of a child who is being raised by two women or by two men to have two legal parents (and two sets of financial support obligations, inheritance rights, etc.), rather than only one legal parent. The ECtHR required access to second-parent adoption in *X & Others v. Austria*,[63] because it had been extended to unmarried opposite-sex couples, but not in *Gas & Dubois v. France*,[64] in which it was restricted to married opposite-sex couples, and in which there was insufficient European consensus.

Once a country has passed through the first and second stages, the third stage (joint adoption of an unrelated child) and the fourth stage (equal access to techniques of assisted reproduction, including donor insemination and surrogacy, or equal recognition of children born through such techniques in other countries) should be relatively easy. In a country that permits one member of a same-sex couple to adopt an unrelated child, and then allows the new parent's partner to apply for a second-parent adoption, it makes no sense to insist that the couple go through two adoption processes rather than one joint adoption process (unless the child is from a country that would not place her or him with a same-sex couple). In countries (like Taiwan and, formerly, Germany) that prohibit a second-parent adoption of an already adopted child, the second-parent adoption is clearly in the child's best interest, if two women or two men are in fact raising her or him. For this reason, Germany's Federal Constitutional Court struck down the ban on

61. E.B. v. France, 47 Eur. Ct. H.R. 21 (2008).
62. *Atala*, paras. 115-155.
63. X & Others v. Austria, 2013 II Eur. Ct. H.R. 73.
64. Gas & Dubois v. France, 2012-II Eur. Ct. H.R. 215.

successive adoption (second-parent adoption of an already adopted child) in 2013.[65] Once this ban is gone (as might soon be the case in Taiwan), it makes no sense not to allow a married same-sex couple to apply for a joint adoption of an unrelated child, to spare them the burden of two adoption procedures.

At the national level, the fourth global trend (towards allowing second-parent and joint adoption by same-sex couples, and therefore two legal parents of the same sex) might have started in Québec in 1991, when the new Civil Code was adopted. Article 546 (in force in 1994) provides: "Any person of full age may, alone or jointly with another person, adopt a child." Similarly, since 1995, British Columbia's Adoption Act has provided:[66] "s. 29 (1) One adult alone or two adults jointly may apply to the court to adopt a child . . . (2) One adult may apply to the court to become a parent of a child jointly with another parent." Neither Québec nor British Columbia had marriage or any form of registered partnership for same-sex couples at the time of these reforms.

Other early examples of this trend were second-parent adoption decisions by the highest courts of Vermont and New York. In *In re Adoption of B.L.V.B.* in 1993, the Supreme Court of Vermont reasoned as follows: "[O]ur paramount concern should be with the effect of our laws on the reality of children's lives . . . To deny legal protection of [the] relationship [between a lesbian mother's female partner and her child], as a matter of law, is inconsistent with the children's best interests . . . "[67] Similar reasoning can be found in *In re Jacob, In re Dana*, a 1995 judgment of the Court of Appeals of New York:

> Under the New York adoption statute, a single [unmarried] person can adopt a child . . . Equally clear is the right of a single homosexual to adopt [New York state regulations provide that '[a]pplicants shall not be rejected solely on the basis of homosexuality']. . . . [T]he . . . legislative purpose--the child's best interest-- . . . would certainly be advanced . . . by allowing the two adults who actually function as a child's parents to become the child's legal parents. . . . [An interpretation] . . . that would deny children like . . . Dana the opportunity of having [her] two [female] de facto parents become [her] legal parents, based solely on [her]

65. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Feb. 19, 2013, Judgment of the First Senate of 19 February 2013 - 1 BvL 1/11 -, paras. 1-110, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/02/ls20130219_1bvl000111en.html.

66. Statutes of B.C. 1995, c. 4, now Revised Statutes of B.C. 1996, c. 5.

67. In re Adoption of B.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993).

> biological mother's sexual orientation [lesbian] . . ., would not only be unjust under the circumstances, but also might raise constitutional concerns in light of the . . . statute's . . . purpose . . . [68]

Neither Vermont nor New York had marriage or any form of registered partnership for same-sex couples at the time of these decisions.

The New York court mentioned "constitutional concerns" if an adoption statute could not be interpreted as permitting a same-sex couple to apply for a second-parent adoption. These concerns have been addressed by the Constitutional Court of South Africa. In 2002 in *Du Toit v. Minister for Welfare and Population Development*,[69] the Court held (by 11 votes to 0) that the South African Constitution requires that an *unmarried* same-sex couple be allowed to adopt children jointly in the same way as a married opposite-sex couple. Similarly, in 2003 in *J. & B. v. Minister of Home Affairs*,[70] the Court ruled (by 9 votes to 0) that, to avoid unconstitutional discrimination based on sexual orientation, two *unmarried* women must be registered as the parents of a child born to one of them after donor insemination, as would be the case for a child born to a married opposite-sex couple after donor insemination (both the wife, a genetic parent, and the husband, a non-genetic parent, would be registered).

These examples show that, not only may marriage come before second-parent or joint adoption or assisted reproduction for same-sex couples, second-parent or joint adoption or assisted reproduction may come before marriage for same-sex couples (in countries where courts or legislatures stress the best interests of the child). These and other examples are included in the following table.

At the international level, there is as yet no decision holding that, in a same-sex couple, the child has a right to a legal relationship both with her or his genetic parent, and with her or his non-genetic parent, if second-parent adoption is restricted to married opposite-sex couples. Such a right is implicit in the IACtHR's *Advisory Opinion OC-24/17*, which requires that same-sex couples have access to all of the rights of married opposite-sex couples, even if they do not yet have access to marriage itself. And such a right could soon be declared by the ECtHR in the pending case of *A.D.-K. & Others v. Poland*,[71] in which Poland refuses to recognise a United Kingdom

Country, State or Province	Adoption before marriage	Adoption at same time as marriage	Adoption after marriage

68. In re Jacob, In re Dana, 660 N.E.2d 397, 398, 399, 405 (N.Y. 1995).

69. Du Toit v. Minister for Welfare and Population *Dev.* 2002 (10) BCLR 1006 (S. Afr.).

70. J and B v. Director General: Department of Home Affairs 2003 (5) SA 621 (CC) (S. Afr.).

71. A.D.-K. & Others v. Poland, app. no. 30806/15, Eur. Ct. H.R. (lodged on 16 June 2015). Communicated on 26 February 2019, http://hudoc.echr.coe.int/eng?i=001-192049.

Country, State or Province	Adoption before marriage	Adoption at same time as marriage	Adoption after marriage
Québec	1991		
British Columbia	1995		
Vermont	1993		
New York	1995		
England and Wales	2002		
Sweden	2002		
Spain (Aragón, Basque Country, Catalonia, Navarra)	2000, 2003-05		
South Africa	2002		
Netherlands		2000 (except international adoption)	
Spain (state Civil Code)		2005	
France		2013	
Belgium			2006
Portugal			2010
Taiwan			202?

birth certificate listing two women as the parents of a child born after donor insemination, and restricts second-parent adoption to married opposite-sex couples. A recent third-party intervention[72] argues that a judgment in favour of the British-Polish lesbian couple should overrule *Gas & Dubois v. France*, by building on *X & Others v. Austria* (second-parent adoption must be open to same-sex couples if it is open to unmarried opposite-sex couples), *Taddeucci & McCall v. Italy* (same-sex couples who are legally unable to marry must sometimes be treated differently from, and better than, unmarried opposite-sex couples who have chosen not to marry), and the ECtHR's 10 April 2019 *Advisory Opinion*[73] requiring France to recognise a legal relationship between children born through surrogacy in California and their non-genetic mother (the wife of their genetic father), by recognising the California birth certificate that lists her as a parent, by allowing a

72. *See* European Court of Human Rights, *Written Comments of FIDH, PSAL, ILGA-Europe, NELFA, and ECSOL*, submitted on 25 July 2019, https://www.ilga-europe.org/sites/default/files/AD-K%20v%20Poland%202019-07-25%20FINAL.pdf (last visisted Jan. 6, 2021).

73. Concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Advisory Opinion Request no. P16-2018-001, Eur. Ct. H.R. (April 10, 2019), requested by the French Court of Cassation.

second-parent adoption, or through some other means.

VI. Different Routes to Full Legal Equality

We have already seen above that different countries have taken different routes to full legal equality for same-sex couples. These differences relate to: (i) whether it is the judiciary, the legislature, the electorate, or a combination of these actors that requires equal access to marriage for same-sex couples; (ii) whether access to second-parent or joint adoption or assisted reproduction comes before, at the same time as, or after access to marriage; and (iii) whether a registered partnership law is a necessary intermediate step between the impossibility of registering a same-sex relationship and access to marriage. Two patterns can be observed. In Europe, some form of registered partnership law (at least at the regional level if not the national level) has been a pre-condition of access to marriage, except in Portugal. Also, in Europe, it has always been the legislature (or the legislature before or after a referendum) that has opened up marriage to same-sex couples, except in Austria. In the USA, these two patterns are reversed, mainly because of *Obergefell*. In most states, a registered partnership law did not precede access to marriage. And in most states, access to marriage was the result of action by a federal or state court, rather than the state legislature.

VII. How does Taiwan's Experience Compare with the Global Trends?

Comparing Taiwan's route to marriage equality with those of other countries, we can conclude that it is perfectly "normal". By the time of the Constitutional Court's decision in 2017, same-sex sexual activity was legal, employment discrimination based on sexual orientation was prohibited, and some local governments had introduced forms of registration (with limited rights) for same-sex couples. Equal access to marriage was the result of a combination of judicial and legislative action. It was achieved along with second-parent adoption, but without joint adoption. And a registered partnership law was not a necessary pre-condition. Each of these three aspects of Taiwan's route can be found in other countries. And Taiwan has done better than Belgium in 2003 and Portugal in 2010. In both of those countries, second-parent adoption was denied along with joint adoption. One aspect of the current situation that Taiwan shares with South Africa (putting aside joint adoption and recognition of in-laws) is a petty form of "separate but equal". In South Africa, same-sex couples may marry under the Civil Union Act, 2006, but not under the Marriage Act, 1961, which is still reserved to opposite-sex couples. In Taiwan, same-sex couples may marry

under the 2019 legislation, but not under the Civil Code, which is reserved to opposite-sex couples.

I look forward to hearing about the next steps in Taiwan's journey to full legal equality for same-sex couples, which might require additional cases in the Constitutional Court, with regard to joint adoption of children, and with regard marriage to a citizen of a country in which same-sex marriage is not permitted (including a citizen of Mainland China). When same-sex marriage began in Belgium in 2003, not only were joint and second-parent adoption excluded (until 2006), it was also the case (as in Taiwan) that only citizens of countries where same-sex marriage was possible could marry in Belgium. At the time, that meant only citizens of Belgium and the Netherlands. Belgium's general rule regarding the capacity of a non-Belgian citizen to marry (the national law of each spouse must permit same-sex marriage) was set aside by a Circular in 2004, because the foreign prohibition on same-sex marriage was seen as discriminatory and contrary to Belgium's international public order.[74] Instead, all that was required was that one spouse be a citizen or resident of Belgium.[75]

I also look forward to the influence of Taiwan on its neighbours. Just as the Netherlands (2000) influenced Belgium (2003), Spain (2005) influenced Portugal (2010), Argentina (2010) influenced Uruguay (2013), and New Zealand (2013) influenced Australia (2017), we can hope that marriage equality will soon spread from Taiwan to such East Asian countries or regions as Japan, South Korea, Thailand,[76] Hong Kong,[77] Macau and, eventually, Mainland China.

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74. *See Circulaire du 23 janvier 2004*, ETAAMB https://www.etaamb.be/fr/circulaire-du-23-janvier-2004_n2004009048.html (last visited Feb. 23, 2021).

75. Taiwan could follow the examples of Austria and Ontario (Canada), which allow visiting foreign same-sex couples to marry, regardless of their country of citizenship or residence, and without giving any prior notice.

76. *See* Pratch Rujivanarom, *New [life] partnership bill 'does not give everybody equal rights'*, The Nation Thailand (Nov. 29, 2018), https://www.nationthailand.com/national/30359548.

77. *See* QT v. Director of Immigration, [2018] 4 H.K.C. 403 (C.F.A.) (same-sex partner immigration); Leung Chun Kwong v. Secretary of the Civil Service, [2019] 22 H.K.C.F.A.R. 127 (C.F.A.) (recognition of New Zealand same-sex marriage for purpose of employment benefits and joint tax return); M.K. v. Government of Hong Kong, [2019] 5 HKLRD 259 (C.F.I.) (access to marriage or some form of registered partnership). Hong Kong's courts seem to have followed *Taddeucci* and *Orlandi*, but not yet *Oliari*. *See* Robert Wintemute, *LGB Human Rights in Europe, Taiwan, and Hong Kong*, 51 HONG KONG L.J. (forthcoming 2021).

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法律制度對於同性戀者保障之全球視野：同居權、伴侶法、婚姻與共同收養

Robert Wintemute

摘　要

本文檢視了全球四種在法律制度上承認同性婚姻內涵的趨勢，包括：同居權的賦予、伴侶法、婚姻制度以及賦予成為法律上雙親（共同收養、收養他方子女或者透過人工輔助生殖技術）等的法律制度保障。此外，本文將前開趨勢與臺灣於2017年後的對於同性婚姻承認以及現行收養制度的內涵加以比較。本文結論指出，臺灣的趨勢是完全「正常的」。其他承認同性婚姻的國家，同時禁止同性的收養以及非公民的結婚。如同其他國家的經驗，臺灣目前對於同性婚姻的法律限制可能是暫時的。因此，最終將迎來沒有例外的完全平等保障。

關鍵詞：**同性婚姻、女同性戀、男同性戀、雙性戀、同居、伴侶制度、共同收養、收養他方子女**