

## Article

# The Constitutionalization of Taiwanese Family Law

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### ABSTRACT

*Family law has long been categorized as a special field of law for it regulates the construction and operation of family, where has been identified as an altruistic, affective, and morally saturated social and legal sphere, opposite to the market or other parts of the civil society. However, the unique status of family law does not keep it out of the constitutional order, or prevent it from the appealing ideas of individual rights, freedom, and equality. In Taiwan, the Constitutional Court has issued a series of rulings declaring that family was one constitutionally protected institution and the individual rights protection as well as the principle of gender equality should be applied to family law. In addition, the Court has recognized a growing group of fundamental rights related to family and marriage, including right to marry, right to have a family, and children's rights to know their parents. The Constitutional Court's Interpretations have a great influence on Taiwanese family law development since the 1990s. This article intends to explore the relationship between the development of constitutionalism and family law in Taiwan as well as how and to what extent the Constitutional Court rulings have changed family law and the related legal/social discourses. Furthermore, this article discusses the implications of the constitutionalization of family law and the challenges to both the Constitution and family law in the future.*

**Keywords:** *Constitutionalization, Taiwanese Family Law, Gender Equality, Right to Marry, Taiwanese Constitutional Court*

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## I. INTRODUCTION

Family law has long been categorized as a special field of law. It regulates the operation of family, especially the legal relationships between family members, and has been identified as an altruistic, effective, and morally saturated social and legal sphere, in contrast to the market and other aspects of civil society.<sup>1</sup> It has been argued that family relations such as husband-wife and parent-child existed before any positive family law and thus the legal arrangement was to reflect, enforce and protect the pre-existing or current human relations.<sup>2</sup> In some countries, legal pluralism is recognized and enforced specifically in the area of family law to respect or accommodate different cultural or religious norms regarding family.<sup>3</sup> However, the unique status of family law does not keep itself out of the constitutional order, or prevent it from the appealing ideas of individual rights, freedom, and equality. It is reported that family law has been under the strong influence of judicial review and constitutional discourses in the United States and Western Europe since the 20th century.<sup>4</sup> The constitutionalization<sup>5</sup> of family law has connected the Constitution and family law, two legal fields that once seemed to be at opposite ends of the spectrum, and has had profound impact on family law and family lives. Is this trend of the “constitutionalization of family law”<sup>6</sup> a common phenomenon? Or is it something that only occurs in the western world? This article presents the constitutionalizing of family law in Taiwan to further the discussion on the development of constitutionalism in conjunction with family law and offer a perspective outside of the Western experience.

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1. Janet Halley, *What is Family Law: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 1-4 (2011).

2. CHEN CHI-YEN (陳棋炎), HUANG TZONG-LEH (黃宗樂) & KUO JEN-KONG (郭振恭), MINFA QINSHU XINLUN (民法親屬新論) [CIVIL LAW: FAMILY] 9-13 (11th ed. 2013).

3. See, e.g., Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-sex Marriage*, 75 BROOK. L. REV. 791, 812-30 (2010).

4. See, e.g., MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATES, LAW AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989).

5. “Constitutionalization” refers to the process of being included in the text of the Constitution or being incorporated into/governed by the constitutional order by way of judicial review. See, e.g., The Honorable Claire L’Heureux-Dubé, *It Takes a Vision: The Constitutionalization of Equality in Canada*, 14 YALE J.L. & FEMINISM 363, 364-68 (2002) (describing how sex equality was written into the Canadian Charter of Rights and Freedoms); Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 735 (2002) (presenting the story of constitutionalizing women’s equality by creative interpretation of the Equal Protection Clause of the Constitution of the United States where sex equality is not mentioned in the text); In addition, courts’ insistence on constitutional principles (such as fundamental rights) in individual cases may also initiate the process of constitutionalization; See, e.g., Mark Bell, *Constitutionalization and EU Employment Law*, in CONSTITUTIONALIZATION OF EUROPEAN PRIVATE LAW 137, 148-50 (Hans W. Micklitz ed., 2014).

6. David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529 (2008) (discussing the constitutionalization of American family law in the context of the United States and its implications).

In Taiwan, the development of family law had taken on a rather special route since the late 19th century. When the traditional legal system was modernized or westernized during the Japanese colonial period, family law was indeed treated by the Japanese government as an exception. Exempted from the imposition of the Japanese Codes, the laws on family and inheritance were mostly based on Taiwanese family tradition or practices.<sup>7</sup> After World War II, Taiwanese families were regulated by the Family Code of 1930 where many traditional family norms continued to be preserved and enforced. It was not until the reform starting from the mid 1990s that the patriarchal family tradition gradually faded away and the landscape of family law had radically changed.

One critical force behind the transformation of Taiwanese family law is the intervention from Taiwan's Constitutional Court. Even though "family" is not explicitly protected or mentioned in the Constitution, the Constitutional Court has issued a series of rulings declaring that family was one constitutionally protected institution and that individual rights and the principle of gender equality should be applied to family law. In addition, the Court has recognized a growing group of fundamental rights related to family and marriage, including right to marry, right to have a family, and children's rights to know their parents. The Constitutional Court's Interpretations have been a great influence on Taiwanese family law development since the 1990s. How did the process of constitutionalization take place and what were the forces behind it? What are its impact and implications? This article intends to explore the relationship between the development of constitutionalism and family law in Taiwan and examine how and to what extent the Constitutional Court rulings have changed family law and the related legal/social discourses. Furthermore, the article discusses the implications of this phenomenon and the challenges to both the Constitution and family law in the future.

Part II of this article discusses the process of constitutionalizing family law by introducing Constitutional Interpretations regarding family and how they facilitated the transformation of family law. Part III examines the forces behind the trend toward constitutionalization of family law. The author refers to political and social changes to explore the rise of constitutionalism, the reinvented Constitutional Court, and the vigorous women's movement which made the constitutionalization of family law seem inevitable. Part IV assesses the impact and implication of the constitutionalization of family law, including the triumph and predicament of legalizing gender equality

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7. Wang Tay-Sheng (王泰升), *Lun Taiwan Shehuishang Xiguan De Guojiafahua* (論台灣社會上習慣的國家法化) [*Legalization of Societal Customs in Taiwan*], 44 TAIDA FAXUE LUNCONG (臺大法學論叢) [NAT'L TAIWAN U. L.J.] 1, 26-29 (2015).

within family, as well as the positive impact and risk of recognizing marital family as a constitutionally protected institution. Part V offers the author's concluding remarks.

## II. FAMILY LAW AND JUDICIAL REVIEW: THE ROAD TO CONSTITUTIONALIZATION

“Family” is not mentioned in the text of the Taiwanese Constitution. Family related issues had also never been considered as constitutional problems in Taiwan until the issue of *J.Y. Interpretation No. 242*.<sup>8</sup> Since then the Constitutional Court have issued a string of Interpretations, extending constitutional protection to the right to family and right to marry, to gender equality within the family, and to the institutions of family and marriage by way of Article 22, the unenumerated clause of the Constitution. These Constitutional Interpretations and the mobilization in support of the constitutionalization of family law have resulted in the reconstruction in the canons and rhetoric of Taiwanese family law.

### A. *Right to Family*

#### 1. *Right to Family in the Context of Political Development*

Article 22 was first invoked by the Justices to deal with a family crisis resulting from Taiwan's unique history and political development. The petitioner, Yuan-Chen Teng had been married in Mainland China in 1940. After the KMT (the Nationalist party or Kuomintang) lost to the Chinese Communist Party in the Chinese Civil War, Teng followed the defeated KMT government to Taiwan but his wife was left in Mainland China. Since then, the political hostility across the Taiwan Strait had made it impossible for people in Taiwan to make contact with their family or friends on the other side. Teng, like many others, had to stay apart from his wife, and any contact or correspondence was unavailable and prohibited. In 1960, Teng married a

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8. Before Sifa Yuan Dafaguan Jieshi No. 242 (司法院大法官解釋第242號解釋) [Judicial Yuan Interpretation No. 242] (June 23, 1989) (Taiwan), there were several Interpretations involving family law issues made by the Justices. Those Interpretations, however, did not involve constitutional review, but only to unify judicial interpretations of family law clauses regarding adoption (Sifa Yuan Dafaguan Jieshi No. 28 (司法院大法官解釋第28號解釋) [Judicial Yuan Interpretation No. 28] (Dec. 16, 1953) (Taiwan) and Sifa Yuan Dafaguan Jieshi No. 32 (司法院大法官解釋第32號解釋) [Judicial Yuan Interpretation No. 32] (Mar. 26, 1954) (Taiwan)), incest (Sifa Yuan Dafaguan Jieshi No. 12 (司法院大法官解釋第12號解釋) [Judicial Yuan Interpretation No. 12] (Dec. 20, 1952) (Taiwan) and Sifa Yuan Dafaguan Jieshi No. 34 (司法院大法官解釋第34號解釋) [Judicial Yuan Interpretation No. 34] (Apr. 28, 1954) (Taiwan)), and divorce (Sifa Yuan Dafaguan Jieshi No. 18 (司法院大法官解釋第18號解釋) [Judicial Yuan Interpretation No. 18] (May 29, 1953) (Taiwan)).

Taiwanese woman and started a new family. In the late 1980s, as Taiwan underwent political and social changes, the once considered invincible barrier between Taiwan and China began to break down. In 1987, four months after Taiwan's martial law was lifted, the long-separated family members were allowed to resume contact or even visit one another. While many people rejoiced, such dramatic political development brought unexpected trouble to Mr. Teng. Upon learning of the fact that her husband was married to another woman in Taiwan, Teng's wife in China filed a lawsuit asking the Taiwanese court to invalidate Teng's marriage with his Taiwanese wife. According to Article 985 of the Family Code, bigamy was prohibited, and the spouse of the first marriage had the right to seek invalidation of the second marriage through litigation according to Article 992. For the courts, as long as the marriage between Teng and his wife in China was valid, the judges could only annul his marriage in Taiwan. It should be noted that Teng's story was not just one isolated case but the tip of the iceberg; many other marriages with the same problem might be invalidated.<sup>9</sup>

Intended to protect his family in Taiwan, Teng filed a petition to the Grand Justices, asserting that his fundamental right was infringed. Closely watched by the media and many anxious families, the Justices issued *J.Y. Interpretation No. 242*, recognizing the fundamental right to family by way of Article 22 and holding that Teng's predicament deserved special consideration for protecting his right. In other words, although the family law's ban on bigamy was declared constitutional, its application on cases such as Teng's was ruled unconstitutional for it violated the newly recognized right to family. The Justices argued that people like Teng were forced to separate from their spouse indefinitely as the result of the Civil War. Since those people had no knowledge of the circumstances of their spouse in China, sharing a family life was therefore impossible. It was concluded that under those extraordinary circumstances, enforcing the ban

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9. Lin Chu-Chih (林菊枝), *Haixia Liangan Zhi Zhonghun Wenti* (海峽兩岸之重婚問題) [*The Problem of Bigamy in Taiwan and Mainland China*], in JIAZUFA ZHUWENTI-CHEN CHIH-YEN XIANSHENG QIZHI HUADAN ZHUHE LUNWENJI (家族法諸問題—陳棋炎先生七秩華誕祝賀論文集) [THE PROBLEMS OF FAMILY LAW-ESSAYS IN HONOR OF PROFESSOR CHI-YEN CHEN] 1, 6-12 (Editorial Committee for Festschrift in Honor of Prof. Chi-Yen Chen's 70th Birthday ed. (陳棋炎先生七秩華誕祝賀論文集編輯委員會), 1990); Chen Hwei-Syin (陳惠馨), *Cong Dafaguan Huiyi Di 242 Ji Di 362 Hao Jieshi Kan Woguo Yifu Yiqi Hunyin Zhidu Zhi Kunjing* (從大法官會議第242及第362號解釋看我國一夫一妻婚姻制度之困境) [*Dilemma of Monogamy: No. 242 and 362 as Interpreted by the Council of Grand Justice*], in GUYOU FAZHI YU DANGDAI MINSHI FAXUE-TAI TONG-SCHUNG JIAOSHOU LIUZHONG HUADAN ZHUSHOU LUNWENJI (固有法制與當代民事法學—戴東雄教授六秩華誕祝壽論文集) [TRADITIONAL LEGAL SYSTEM AND MODERN SCIENCE OF CIVIL LAW-ESSAYS IN HONOR OF PROFESSOR TAI TONG-SCHUNG] 367, 379-80 (Editorial Committee for Festschrift in Honor of Prof. Tong Schung Tai's 60th Birthday ed. (戴東雄教授六秩華誕祝賀論文集編輯委員會), 1997).

on bigamy had led to the infringement of these individuals' right to family.

The issue of *J.Y. Interpretation No. 242* kept many marriages legal and many families intact, and allowed the whole country to breathe a collective sigh of relief.<sup>10</sup> Although it created an exception to the monogamy rule, it was only limited to these extreme cases. On the other hand, the recognition of the right to family began the process of integrating family law into the constitutional order and marked the moment when family law embarked on the route of constitutionalization.

## 2. Right to Adopt

According to Article 1073 of the Family Code of 1930, the adoptive parent must be at least twenty years older than the adopted child. Any adoption violating the requirement of minimum age difference was, according to Article 1079-1, null and void. The Constitutional Court was asked to review Article 1073 by a petitioner who was too young to adopt her three teenage stepchildren. In 2000, the Constitutional Court issued *J.Y. Interpretation No. 502*. While the Court implied that there was a fundamental right to adopt, it upheld the provision in question on the ground of respecting traditional family ethics. However, the Justices indicated that some special consideration should be made in the cases of stepparent and married couple adoption in order to maintain family harmony and the adopted children's interests. It was thus suggested that the age difference requirement should be relaxed in the above cases.<sup>11</sup> Seven years after the issue of this Interpretation, the Justices' suggestion was taken by the legislature and an additional section was added to Article 1073, lowering the age difference requirement from twenty years to sixteen years in the cases of stepparent adoption and where the other adoptive parent has fulfilled the twenty year age difference requirement.<sup>12</sup>

In 2013, the Court was asked to review another restriction on adoption. According to Article 65 of the Act Governing the Relations Between People of the Taiwan Area and Mainland China Area, "where any of the people of the Taiwan Area adopts any of the people of the Mainland China Area, a court shall not approve such adoption in the following situations in addition to the situations provided for in Paragraph 5 of Article 1079 of the Civil

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10. Tai Tong-Schung (戴東雄), *Ershiba Nian De Laogong Zenme Meile? Cong Teng Yuan-Chen Zhonghun Chexiao an Tanqi* (二十八年的老公怎麼沒了? 從鄧元貞重婚撤銷案談起) [*Why Did She Lose Her Husband? Discussing the Case of Yuan-Chen Teng*], 34 FAXUE CONGGAN (法學叢刊) [CHINA L.J.] 25, 25-35 (1989).

11. Sifa Yuan Dafaguan Jieshi No. 502 (司法院大法官解釋第502號解釋) [Judicial Yuan Interpretation No. 502] (Apr. 07, 2000) (Taiwan).

12. Minfa (民法) [Civil Code] § 1073, para. 1 (promulgated Dec. 26, 1930, effective May 1, 1931, as amended May 23, 2007) (Taiwan).

Code: 1. Where any of the adoptive parents already has a child or an adopted child. . . .” The petitioners of two separate cases were both Taiwanese citizens who wished to adopt children from Mainland China. One petitioner was denied the application to adopt his Chinese wife’s child from her previous marriage, and the other was prohibited from adopting an orphan from Mainland China, because the petitioners both had children of their own. The petitioners argued that their fundamental right to adopt had been deprived and took their cases to the Court. In *J.Y. Interpretation No. 712*, the Court invoked Article 22 of the Constitution to recognize the right to adopt as fundamental, claiming that adoption was important to the institution of family because it established parent-child relationship and the development of the relation of education, nurturing, support, belonging and inheritance. The Court then discussed whether the provision had violated the principle of proportionality. The restriction, aiming to protect social security and stability by preventing unlimited numbers of people entering Taiwan from Mainland China by way of adoption, was deemed legitimate and reasonable by the Justices in most cases. But the case of stepparent adoption, that is, the adoption of Chinese spouse’s children by the Taiwanese spouse, again convinced the Court to make an exception for the compelling state interests of marital happiness and family harmony. The Justices thus declared the provision unconstitutional as applied in stepparent adoption.

#### B. *Right to Marry*

After *J.Y. Interpretation No. 242*, the Justices continued to explore the constitutionality of the ban on bigamy in a less extraordinary context. In *J.Y. Interpretation No. 362*, issued in 1994, the Justices recognized the fundamental right to marry in reviewing the ban on bigamy in the Family Code. The petitioner was married to a man after his prior marriage was dissolved by a binding court order. However, when the divorce case was later reopened and the judgment was tossed, the petitioner suddenly found her marriage bigamous and void. She turned to the Court arguing that her fundamental right had been infringed. Although the right to marry was recognized, the Justices upheld the prohibition on bigamy for maintaining the monogamy system. Nevertheless, the Court believed that the petitioner’s case, where the petitioner acted (married) in good faith and in trust of an official divorce decree, should be considered as one of the “special circumstances” to be exempted from the legal restriction. The Court then ordered that the ban on bigamy should cease to apply to people like the petitioner in order to protect their fundamental right to marry. *J.Y. Interpretation No. 362* was seriously criticized for the exception was



considered too broad and undermined monogamy.<sup>13</sup> Such critique was obviously heeded by the Justices, for the exception rule was tightened in *J.Y. Interpretation No. 552*, requiring both parties of the second marriage to be innocent and acting in good faith to be exempted. This exception rule announced by the Justices was later written into the Family Code in the amendment of 2007.<sup>14</sup>

### C. *Protecting the Institution of Marital Family*

In *J.Y. Interpretation No. 552*, the Court not only affirmed that the right to marry was fundamental, it also declared that monogamy was protected by the Constitution for the reason that the institution was “. . . to maintain the personal and ethical relationship between husband and wife and to realize the principle of equality between men and women, thereby preserving the social order . . .”. Since then, the Justices have upheld several laws and regulations to protect the constitutionally recognized marital family. For example, in *J.Y. Interpretation No. 554*, the Court upheld the criminal adultery law<sup>15</sup> to sustain the institutions of marriage and family. One year later, the Justices issued *J.Y. Interpretation No. 569*, allowing the law prohibiting one from initiating a private prosecution against his/her spouse<sup>16</sup> to stand in order to maintain marital relations and harmonious family life.

Since the marital family is such a vital institution worthy of constitutional protection, the Justices have granted greater latitude for the legal arrangements that favored married couples. In *J.Y. Interpretation No. 647*, the Justices examined the Estate and Gift Tax Act that gave gift tax exemptions to married couples. The petitioner argued that the law discriminated against couples who lived together but were not legally married. The Court rejected the claim and found the law did not violate the Equal Protection Clause because in this case, the legislative discretion that “involves redistribution of the nation’s financial resources, the promotion of public interests and the implementation of national policy” deserved greater

13. For scholarly discussion, please see Lee Ling-Ling (李玲玲), *Lun Hunyin Zhi Ziyou Yu Zhonghun-Shiping Sifayuan Dafaguan Huiyi Shizi No. 362 Jieshi* (論婚姻之自由與重婚—試評司法院大法官會議釋字第三六二號解釋) [*A Study on Marital Freedom and Bigamy-Comment to Interpretation 362*], 10 DONGWU FALU XUEBAO (東吳法律學報) [SOOCHOW L. REV.] 93, 98-106 (1997); See also Teng Shyue-Ren (鄧學仁), *Xiandai Zhonghun Wenti Zhi Xinjie* (現代重婚問題之新解) [*New Perspectives on Modern Bigamy*], 12 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 100, 104 (1996); Chen, *supra* note 9, at 414-20.

14. Civil Code § 988, subpar. 3, and § 988-1 (amended 2007).

15. Xing Fa (刑法) [Criminal Code] § 239 (promulgated Jan. 1, 1935, effective July 1, 1935, as amended Jun. 18, 2014) (Taiwan).

16. Xingshi Susong Fa (刑事訴訟法) [The Code of Criminal Procedure] § 321 (promulgated Jul. 28, 1928, effective Sept. 1, 1928, as amended Feb. 4, 2015) (Taiwan).

judicial deference, and such a tax exemption was necessary to protect the institution of marriage. It is worth noticing that at the end of the Interpretation, the Justices suggested the legislature provide those “cohabitating heterosexual couples” some legal protection. But such legal protection should be limited to “the extent not to disparaging marriage institution” and other related public interests.<sup>17</sup> Although the Justices seemed to sympathize with people in de facto relationships, preservation of the current marriage institution was obviously the primary concern of the Constitutional Court. Later in another Court ruling, *J.Y. Interpretation No. 696*, the Court dealt with a complaint regarding the “marriage penalty” tax.<sup>18</sup> According to the Income Tax Act, married couples had to file joint tax returns. They often ended up paying higher taxes than two identical single people with the same incomes would have to pay. The Court invalidated this marriage penalty tax clause on the ground that it harmed the marriage institution by discriminating against those who were married.

Since *J.Y. Interpretation No. 242*, the marital family has gradually secured an entrenched constitutional status constructed by the Constitutional Court. Therefore, protecting the marriage institution has carried more weight than a competing state interest in justifying the infringement of individual rights. In addition, the Justices were willing to allow the marriage to claim privilege in terms of resource allocation and legal protection all in the name of defending the vital institution of marital family.

#### D. Gender Equality

Although the Court recognized the marital family as a constitutionally protected institution, it did not endorse all traditional family values or practices. In fact, one significant effect of the constitutionalization of family law was its official departure from traditional patriarchal values.

The primary source of family regulation in contemporary Taiwan is the Family Code, Part IV of the Civil Code,<sup>19</sup> first enacted in 1930 in China and imposed on Taiwan in 1945 by the KMT government.<sup>20</sup> The Family Code of

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17. Sifa Yuan Dafaguan Jieshi No. 647 (司法院大法官解釋第647號解釋) [Judicial Yuan Interpretation No. 647] (Oct. 09, 2008) (Taiwan).

18. Suodeshui Fa (所得稅法) [Income Tax Act] § 15, para. 1 (promulgated and effective Feb. 17, 1943, as amended Dec. 30, 1989, current version as amended Jul. 27, 2016) (Taiwan).

19. The Civil Code consists of five Parts. Part IV is entitled: Qinshu (親屬) [Family]. In this article, I use “Family Code” to refer to Part IV of The Civil Code.

20. In 1896, Japan took Taiwan as its first colony. The Japanese colonial government imposed its version of the modern legal system on Taiwan, which sustained most traditional family norms and customs. In 1945, the Kuomintang (“KMT”) government from Mainland China took over Taiwan and brought with it the newly established Chinese legal system, including the Civil Code of 1930. WANG TAY-SHENG (王泰升), TAIWAN FALUSHIH DE JIANLI (台灣法律史的建立) [THE ESTABLISHMENT OF TAIWANESE LEGAL HISTORY] 343, 345-49 (1997).

1930, regulating people's domestic lives, including marriage, parent-children relationship, and kinship, was a combination of patriarchal tradition and modern ideas.<sup>21</sup> While the ideas of individual rights and gender equality were somehow incorporated into this modern version of family law,<sup>22</sup> many elements of traditional family norms and practices still remained and enforced. Such a modernized patriarchal version of legal arrangement played an active role in sustaining these traditional family practices in the gradually industrialized and individualized Taiwanese society, until it was eventually struck down by the Constitutional Court.

The core of the patriarchal norms lies in the prosperity and prolonged duration of the paternal family, a hierarchy structured by gender, generation and age.<sup>23</sup> The 1930 Family Code ordained the father/husband as the head of the household and the final decision-maker. For example, a husband was entitled to manage marital property, a combination of his own and his wife's assets,<sup>24</sup> and he had the right to decide marital domicile.<sup>25</sup> Children should bear their father's name and the father was deemed the primary parent.<sup>26</sup> The role of the wife/mother was to submit to and assist her husband, as consistent with the traditional norms as well as the family law. There was no doubt that the 1930 Code assumed and reinforced the norms of traditional gender-structured family.

In 1994, the Justices were asked to examine the constitutionality of Article 1089 of the Family Code, which provided fathers the right to have the final say on matters concerning his children.<sup>27</sup> The Justices struck down this provision for its discrimination against the mother. In this landmark ruling, *J.Y. Interpretation No. 365*, the Justices began by declaring that the family unit was not immune from the Constitutional guarantee of gender equality. The law favoring the father over the mother in terms of parental

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21. *Id.* at 373-74.

22. For example, the Civil Code of 1930 granted daughters equal rights to inheritance, a legal arrangement known as the change of traditional family norms and practices where sons should be awarded all of the inheritance and none would be left for their sisters who married out of the family. See Lee Li-Ju (李立如), *Sifa Shencha Zhi Biaoshu Gongneng Yu Shehui Biange-Yi Xingbie Pingdeng Yuanze Zai Jiating Zhong De Luoshi Wei Li* (司法審查之表述功能與社會變革—以性別平等原則在家庭中的落實為例) [*The Expressive Function of Judicial Review and Social Change*], 37 TAIDA FAXUE LUNCONG (臺大法學論叢) [NAT'L TAIWAN U. L.J.] 31, 43-44 (2008).

23. MARGERY WOLF, *WOMEN AND THE FAMILY IN RURAL TAIWAN* (1972).

24. Civil Code § 1018 (promulgated and effective Dec. 26, 1930, repealed 2002).

25. Civil Code § 1002 (promulgated and effective Dec. 26, 1930, repealed 2002).

26. Civil Code § 1089 (promulgated and effective Dec. 26, 1930, repealed 1996).

27. Civil Code § 1089 of 1930 provided: "parental rights and duties concerning minors, unless specified by other statutes, shall be borne by both parents. Should there be disagreement in the exercise of parental rights and duties, the father shall be accorded the right of final decision. In cases where one of the parents becomes incapable of exercising these rights, the spouse shall assume the duties. Should it be the case that both parents are incapable of exercising parental rights, the next capable person shall assume those duties".

rights, as the Justices identified, manifested the traditional family norms of the 1930s, when the traditional norms were prevalent and the Constitution had not even been adopted.<sup>28</sup> Although there might be social or cultural conditions to support the patriarchal law in the 1930s, the Justices argued that such conditions were no longer present in Taiwan. Based on the fact that the access to education and employment for men and women have been “virtually indistinguishable”, the Court found the law failed to reflect the reality of gender relations in the present day, and created a discrepancy between men (the father) and women (the mother). In conclusion, the Court announced the provision unconstitutional for it constituted a violation of gender equality guaranteed by the Constitution. Nevertheless, the Court did not invalidate the law right away. It instead declared a two-year deadline for the Congress to amend the law.<sup>29</sup>

The Court’s ruling made headlines in news for it proclaimed the radical change of family law and gender relations within the family.<sup>30</sup> The Justices’ insistence on the principle of gender equality over traditional patriarchal norms was well received and especially hailed by feminists.<sup>31</sup> In response, the legislature took action to amend the law. By the end of 1996, the deadline ordered by the Court, a new version of Article 1089 was passed, providing that both parents enjoy the same parental rights and shall settle disputes by themselves or in courts if necessary.<sup>32</sup> It was seen as a victory and a huge encouragement for women’s rights activists. Not only was their cause now endorsed by the Constitutional Court, their strategy to take the battle to Constitutional review proved effective and successful.<sup>33</sup>

Another important Interpretation came in 1996, announcing the marital property rules of the Family Code of 1930 unconstitutional. Under the

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28. Sifa Yuan Dafaguan Jieshi No. 365 (司法院大法官解釋第365號解釋) [Judicial Yuan Interpretation No. 365] (Sept. 23, 1994) (Taiwan).

29. *Id.*

30. Chen Yong-Fu (陳永富), *Minfa Fuquan Youxian Tiaokuan Dafaguan Huiyi Zhi Weixian* (民法父權優先條款 大法官會議指違憲) [*The Grand Justices Declared the Patriarchal Clause of the Family Code Is Unconstitutional*], LIANHEBAO (聯合報) [UNITED DAILY NEWS], Sep. 24, 1994, at 1.

31. Funu Xinzhi Jijinhui (婦女新知基金會) [Warm Life Association for Women & Awakening Foundation], *Pijing Zhanji Lai Shixian Minfa Xiufa Cai Kaishi* (披荆斬棘來釋憲 民法修法才開始) [*The Revision to the Family Law Has Just Begun*], 149 FUNU XINZHI (婦女新知) [AWAKENING] 2, 2 (1994) (in response to the issue of J.Y. Interpretation No. 365, the feminist groups applauded the Interpretation for promoting legal reforms, but also criticized the Justices’ setting up a two year deadline instead of invalidating the unconstitutional provision immediately).

32. Civil Code § 1089 (promulgated and effective Dec. 26, 1930, amended 1996).

33. Chen Chao-Ju (陳昭如), *Gaixie Nanren De Xianfa-Cong Pingdeng Tiaokuan, Funu Xianzhang Dao Shixian Yundong De Fuyun Xianfa Dongyuan* (改寫男人的憲法—從平等條款·婦女憲章到釋憲運動的婦運憲法動員) [*Rewriting a Male Constitution-Constitutional Mobilization by the Women’s Movement from the Gender Equality Clause and Women’s Charter to the Constitutional Litigation Movement*], 52 ZHENGZHI KEXUE LUNCONG (政治科學論叢) [POL. SCI. REV.] 43, 72-75 (2012).

default marital property regime of the 1930 family law, property acquired by the married couple during the marriage (except for gifts or inheritances), was presumed to belong to the husband, unless the wife could prove otherwise.<sup>34</sup> Such legal assumption again reflected the patriarchal ideology on gender roles within the family: the husband as the breadwinner and the wife as the homemaker. The marital property rules were amended in 1985. The new rule allowed husband and wife to claim separate ownership of the property acquired during the marriage. In addition, property that could not be proven to belong to either the husband or the wife would be presumed to be joint property. However, the Enforcement Act for the Family Law (of the Civil Code), providing *ex post facto* effect for selected clauses of the Family Code, failed to extend to the marital property regime, and therefore allowed the patriarchal rule to apply to the marital property acquired before 1985. In *J.Y. Interpretation No. 410*, the Justices ruled that such legislative inaction had resulted in gender inequality between husband and wife even after the marital property rules had been changed. The Court thus urged the legislature to fill the void in order to keep the family law in line with the Constitution.

Although *J.Y. Interpretation No. 365* had compelled the legislature to amend the Family Code in 1996, the amendment only covered certain provisions concerning parental rights.<sup>35</sup> Many provisions enforcing patriarchal norms remained unchanged. Feminist activists and lawyers thus again submitted another petition to the Constitutional Court, hoping to further propel the legal change.

The result was *J.Y. Interpretation No. 452*, issued in 1998, where the Court struck down the marital residence clause. Traditionally, a bride was not merely married to her husband, but married *into* her husband's family, becoming a new member of her husband's family and of course had to physically move into the husband's household.<sup>36</sup> The 1930 Family Code codified such practice in Article 1002, stipulating that the wife shall take the husband's residence as hers. In other words, the law designated the

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34. Civil Code § 1017, paras. 1, 2 (promulgated and effective Dec. 26, 1930, repealed 2002).

35. Civil Code § 1089 of 1996 amendment provided: "the parents shall jointly exercise their rights and assume their duties in regard to their minor child, unless otherwise provided by law. If one of them can not exercise such rights, the rights shall be exercised by the other party. If the parents can not assume the duties jointly, the duties shall be assumed by the parent who has the ability to do so. If there is inconsistency between the parents in the exercise of the rights in regard to the grave events of the minor child, they may apply to the court for the decision in accordance with the best interests of the child. Before the decision of the preceding paragraph, the court shall give the minor child, the authorities concerned, or the social welfare institution a hearing".

36. Thomas Fricke, Jui-Shan Chang & Li-Shou Yang, *Historical and Ethnographic Perspectives on the Chinese Family*, in SOCIAL CHANGE & THE FAMILY IN TAIWAN 22, 28-30 (Arland Thornton & Hui-Sheng Lin eds., 1994); Chin-Chun Yi & Ying-Hwa Chang, *Change of Family Structure and Marital Power in Taiwan*, in FAMILIES, HUMAN RESOURCES AND SOCIAL DEVELOPMENT 135, 138 (Hsiao-Hung Nancy Chen, Yia-Ling Liu & Mei-O Hsieh eds., 1995).

husband's residence as the matrimonial domicile. Thus, should the wife insist on taking up a separate residence, or simply disagree with her husband's decision of relocation, she would be found in violation of the duty of cohabitation, deserting her husband and bearing the fault for divorce. The same risk had never become the husband's problem, since the domicile rule favored the husband over his wife and not the other way around.

The gender biased domicile rule had a minor change in the 1985 amendment, an early attempt to promote gender equality in family law.<sup>37</sup> However, this government-initiated amendment did not depart from the entrenched patriarchal tradition. The legislature instead kept the patriarchal rule as default and added an exception clause allowing the spouses to opt out of the legal default by their mutual agreement in the name of gender equality. Since the patriarchal rule remained as default, and it had to take the couple's agreement to invoke the exception, the wife's subordination in family law remained.

The petitioner of *J.Y. Interpretation No. 452*, Mrs. Su, was one victim of such legal discrimination. After marriage, Su and her husband moved in with her mother. Nine years later, the husband was not happy about the living arrangement and moved to his parents' house. Two years later, when Su and their children moved into a new apartment, intending for a nuclear family, the husband appeared and requested Su and the children to move in with him and his parents. Su refused. The husband then filed a lawsuit accusing Su of violating the duty of cohabitation. Despite the wife arguing that her husband had agreed to live with her family first but then left, and her husband having also agreed to buy the new apartment where she and her children had just moved in, the district court and the court of appeal both ruled against the wife for violation of the marital duty of cohabitation. The reason for both decisions was simple—the wife failed to stay in their marital domicile i.e., the husband's residence. Since by law the husband had the right to decide marital residence, it did not matter whether or not the husband had agreed to living with the wife's family or buying the new apartment. The law here was loud and clear—the husband decided where the married couple should live, and the wife must obey and follow.

In *J.Y. Interpretation No. 452*, the Justices found such a rule was against the equal protection clause. Again a deadline was set, allowing one year for

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37. One of the four goals of this amendment was set to "implement equality between men and women". LIFA YUAN MISHUCHU (立法院秘書處) [THE SECRETARIAT OF THE LEGISLATIVE YUAN], FALU AN ZHUANCHI NO. 79-MINFA QINSHU BIAN BUFEN TIAOWEN XIUZHENG JI MINFA QINSHU BIAN SHISHINGFA XIUZHENG AN (SHANG CE) (法律案專輯第七十九輯—民法親屬編部分條文修正及民法親屬編施行法修正案(上冊)) [SPECIAL ISSUE ON LAW NO. 79-AMENDMENT OF PART OF FAMILY CODE, PART IV OF THE CIVIL CODE AND ENFORCEMENT LAW FOR PART IV, FAMILY LAW OF THE CIVIL CODE (VOL. I)] 3 (1985).

the legislature to act. In 1998, before the deadline expired, the legislature passed a new marital domicile rule, providing that the domicile should be decided by the agreement of the husband and wife, and any dispute on this matter could be settled in court.<sup>38</sup>

#### E. *Children's Right to Know Their Parents*

According to Article 1063 of the Family Code, a child born to a married woman was presumed to be a child of the marriage, and such presumption could be rebutted only by the presumed father or the mother, within one year after learning the presumed father was not the biological father of the child. Once the deadline was missed, or the legal parents refused to act on it for any reason, the child would be stuck with the presumption and had no chance to establish legal parent-child relationship with the biological father. The predicament here was that the presumed father might be away, or refuse to support the child after realizing that the child was not his, while the birth father had no legal obligation to support the child. Even if the birth father was willing to raise, or had raised, this child, he would have no way to claim parental rights.<sup>39</sup> Either way, the child was left in limbo. The problem faced by children born into such circumstances had been known for some time and even made news.<sup>40</sup> But it had never been politically important enough to garner a response from either the administration or the legislature.

This problem was finally resolved by the Constitutional Court. In *J.Y. Interpretation No. 587*, issued in 2004, the Justices announced that children's right to know and be cared for by their parents was constitutionally protected, citing Article 7 of the Convention on the Rights of the Child.<sup>41</sup> The legal hurdle faced by those who wished to establish paternity with their biological father was found by the Justices as "inconsistence with the right to personality and the right to litigate of the Constitution".<sup>42</sup> Although the

38. Civil Code § 1002 (promulgated and effective Dec. 26, 1930, amended 1998).

39. Tai Yu-Zu (戴瑀如), *Zinu Xueyuan Renzhiquan De Shijian* (子女血緣認知權的實踐) [Implementing a Child's Right to Identify His/Her Blood Filiations], 83 TAIBEI DAXUE FAXUE LUNCONG (臺北大學法學論叢) [TAIPEI U. L. REV.] 161, 169 (2012).

40. Wu Ming-Yi (吳明儀), *Baonu Tiao Tianqiao Mangfu Bei Qisu* (抱女跳天橋莽父被起訴) [The Man Attempted to Jump Off Footbridge with His Young Daughter was Prosecuted], PINGGUO RIBAO (蘋果日報) [APPLE DAILY] (May 17, 2003), <http://www.appledaily.com.tw/appledaily/article/headline/20030517/52245/>.

41. For further discussion, please see Yosoh Kure (吳煜宗), "Ertong Quanli Gongyue" Yu Taiwan Qinzifa-Zaifang Zinu Zhi Qi Chuzi De Quanli Yu Shizi No. 587 Jieshi (《兒童權利公約》與台灣親子法—再訪子女知其出自的權利與釋字第587號解釋) [The Impact of the Convention on the Rights of the Child Made to Taiwan's Family Law—To Review the Rights thereof with the Constitutional Interpretation No. 587], 8 TAIWAN GUOJIFA JIKAN (臺灣國際法季刊) [TAIWAN INT'L L.Q.] 151, 179-84 (2011).

42. Sifa Yuan Dafaguan Jieshi No. 587 (司法院大法官解釋第587號解釋) [Judicial Yuan

Justices chose to strike down a judicial precedent here instead of Article 1063 of Family Code, it implied that Article 1063 was unconstitutional and had to be revised accordingly. This Interpretation indeed set the process of legal change in motion. Three years after the Interpretation, Article 1063 of the Family Code was revised. The new law allows the child to challenge the presumption of his or her legitimacy in court and thus cleared the way to establishing parent-child relationship with the biological father.<sup>43</sup>

### III. THE FORCES BEHIND THE CONSTITUTIONALIZATION

Since the issue of *J.Y. Interpretation No. 242*, several individual rights related to family and the institution of marital family have been recognized as fundamental and protected by the Constitution, and family law development has been directed by the constitutional principles and Interpretations. Taiwanese family law, a legal body that had been regarded as local, private, and often traditional and exceptional, has been constitutionalized by way of judicial review. In order to better understand this legal phenomenon, some important questions need to be asked: Why and how did the Constitutionalization of family law happen? What are the social and legal forces behind such a trend? Who are the major players and what role did they play in the process of constitutionalization? This part tries to answer these questions by discussing how the social and family changes, the women's rights movement and the development of the Constitutional court underpinned the trend of constitutionalization of Taiwanese family law in the 1990s.

#### A. *Social and Family Change*

In traditional Taiwanese villages, most people were attached to lands and their families. The traditional families were the cornerstone of the society. People's lives and their identities were construed by their roles and status in the family.<sup>44</sup> However, since the 1960s, economic growth has changed Taiwanese society economically, socially and culturally.<sup>45</sup> Industrialization and urbanization have brought many farmers away from rural villages to cities for job opportunities.<sup>46</sup> It meant that many individuals left their extended families and acquired economic and social independence.

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Interpretation No. 587] (Dec. 30, 2004) (Taiwan).

43. Civil Code § 1063 (promulgated and effective Dec. 26, 1930, amended 2007).

44. WOLF, *supra* note 23.

45. Albert I. Hermalin, Paul K. C. Liu & Deborah S. Freedman, *The Social and Economic Transformation of Taiwan*, in SOCIAL CHANGE & THE FAMILY IN TAIWAN, *supra* note 36, at 49, 61-86.

46. Arland Thornton, Thomas Fricke, Li-Shou Yang & Jui-Shan Chang, *Theoretical Mechanisms of Family Change*, in SOCIAL CHANGE & THE FAMILY IN TAIWAN, *supra* note 36, at 88, 99-100.



Families became smaller in size and lighter in influence upon individuals.<sup>47</sup> The hierarchical structure of the family was no longer as stable or taken for granted. The family was still an important social institution but gradually lost its strong grip on individuals and the society. People's lives were no longer structured around their families. They instead spent more time in schools, workplaces, or other social groups, with their peers. This trend moved Taiwan from an agricultural, traditional and vertical society into an industrial, modern and horizontal society.<sup>48</sup> The rapid economic growth not only had great impact on social and familial structure, but also the cultural and political aspects of Taiwan. When Taiwan transformed into a relatively horizontal society that was individual-centered and mobile, ordinary people had more self-control over their lives. Taiwanese people got to exercise the power of choice which their parents and grandparents did not have: they were freer to choose their spouses,<sup>49</sup> occupations, who to associate with, and choose a life as they pleased.

Choice and freedom have magical powers. Once people have a taste of them, they would demand more. Taiwanese people quickly found that their desire for and pursuit of personal choices and freedom were contained by the legal system imposed by the KMT authoritarian regime. It was especially so in the matter of family, the basis of social stability and control. The 1930 Family Code insisted on reflecting and enforcing traditional family norms in order to preserve traditional family structures and maintain social order. The law endorsed patriarchal norms and kept women in a subordinated status within the family to support the welfare system.<sup>50</sup> Following the traditional norms on gender roles, where the husband should provide for the family and the wife/mother assumes the role of caretaker,<sup>51</sup> the 1930 law required that the husband had the right to decide where to live,<sup>52</sup> how to manage family property,<sup>53</sup> and how to raise children who bear his surname.<sup>54</sup> In short, the

47. Mei-Lin Lee & Te-Hsiung Sun, *The Family and Demography in Contemporary Taiwan*, 26 J. COMP. FAM. STUD. 101, 103 (1995).

48. LAWRENCE M. FRIEDMAN, *THE HORIZONTAL SOCIETY* 3-15 (1999).

49. Arland Thornton, Jui-Shan Chang & Hui-Sheng Lin, *From Arranged Marriage toward Love Match*, in *SOCIAL CHANGE & THE FAMILY IN TAIWAN*, *supra* note 36, at 148, 153-57.

50. See, e.g., Yih-Jiunn Lee & Yuen-Wen Ku, *East Asian Welfare Regimes: Testing the Hypothesis of the Developmental Welfare State*, 41 SOC. POL'Y & ADMIN. 197 (2007).

51. 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, 65 (2006); See also Li Ting-Hsin (李庭欣) & Wang Shu-Yung (王舒芸), "Shanba" Ganxiu? "Yuba" Buneng? Yu Zhaogu Ruojiruoli De Yuyingjia Baba (「善爸」甘休? 「育爸」不能? 與照顧若即若離的育嬰假爸爸) [An Exploratory Study on Fathers' Use of Paid Parental Leave in Taiwan], 28 TAIDA SHEHUI GONGZUO XUEKAN (臺大社會工作學刊) [NTU SOC. WORK REV.] 93, 102 (2013).

52. Civil Code § 1002 (promulgated and effective Dec. 26, 1930, repealed 2002).

53. Civil Code §§ 1018, 1019 (promulgated and effective Dec. 26, 1930, repealed 2002).

54. Civil Code § 1059 (promulgated and effective Dec. 26, 1930, repealed 2007) (in 2007 amendment, Article 1059 was revised by providing the children's surname is decided by the

law reinforced the gender hierarchy within the family where the husband/father was the head of the family while the wife/mother was the subordinate. Such traditional legal framework became problematic when many mothers/wives began to assert their equal rights and freedom of choices.

Despite drastic changes in society and family, family law hardly budged. The growing gap between the 1930 family law and society might be attributed to the entrenched traditional values as well as the authoritarian political system which did not respond to the people's voice. Until the 1980s, the KMT government kept a tight grip on Taiwanese society. People's speech were censored, unauthorized association was prohibited, and any attempt to promote democracy was suppressed.<sup>55</sup> Since the "million-year-Congress" was controlled by the ruling party and functioned more like a rubber stamp,<sup>56</sup> the legal system was often ignorant of the social and cultural change. With the increasing sense of self-empowerment and legal entitlement, people became impatient and angry by the fact that their grievances had been mostly falling on deaf ears. Like a lid unable to hold a boiling pot, social movements, in the forms of demonstration, protest, or so-called "self relief", blossomed in Taiwan from the mid-1980s.<sup>57</sup> Frustrated with the subordinate status within and without the family, feminist activists took an important part in social movements to advocate for equality and legal changes. One of the strategies to change the legal status quo was to take their cases to the Constitutional Court and seek relief.<sup>58</sup>

Social change did not only challenge traditional Taiwanese family values and practices, but also the relationship between family and the state. The rapid economic growth since the 1960s had earned Taiwan the title of

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agreement of their parents).

55. Yeh Jiunn-Rong (葉俊榮), *Cong Guojia Fazhan Yu Xianfa Bianqian Lun Dafaguan De Shixian Jineng-1949-1998* (從國家發展與憲法變遷論大法官的釋憲機能—1949-1998) [Function of Constitutional Interpretation by the Council of Grand Justices in the Context of National Development and Constitutional Change-1949-1998], in MINZHU ZHUANXING YU XIANFA BIANQIAN (民主轉型與憲法變遷) [DEMOCRATIC TRANSITION AND CONSTITUTIONAL CHANGE] 253, 258-59 (2003); Winston Hsiao, *The Development of Human Rights in the Republic of China on Taiwan: Ramifications of Recent Democratic Reforms and Problems of Enforcement*, 5 PAC. RIM L. & POL'Y J. 161, 177-83 (1995).

56. Liao Da-Chi (廖達琪), "Xiangpi Tuzhang" Ruhe Zhuanbian Wei "Hedong Shihou"-Lifa Yuan Zai Taiwan Minzhuhua Guocheng Zhong Jiaose Zhuanbian Zhi Tanjiu (1950-2000) (「橡皮圖章」如何轉變為「河東獅吼」—立法院在台灣民主化過程中角色轉變之探究 (1950-2000)) [How Does a Rubber Stamp Become a Roaring Lion-The Case Study of the Transformation of the Taiwanese Legislative Yuan's Role During the Process of Democratization (1950-2000)], 17 RENWEN JI SHEHUI KEXUE JIKAN (人文及社會科學集刊) [J. SOC. SCI. & PHIL.] 343, 352, 357-58 (2005).

57. Ming-Sho Ho, *Understanding the Trajectory of Social Movement in Taiwan (1980-2010)*, 39 J. CURRENT CHINESE AFF. 3, 5-8 (2010).

58. See *infra* notes 66-78 and text accompanied.

one of the “Asian tigers”.<sup>59</sup> Such growth was supported by the so-called productivist welfare capitalism, where “social policy is strictly subordinate to the overriding policy objective of economic growth”.<sup>60</sup> To maximize economic growth, the state heavily relied on the stable family and gender relations to shoulder most of the responsibility of social welfare.<sup>61</sup> However, rapid economic development came along with social/family changes. The decreasing birth rate and increasing divorce rate signaled the demographic shift and the reconstruction of norms on family and gender relations.<sup>62</sup> Families became smaller, and in the sense of pooling resources, weaker. The traditional extended families, which consist of three or more generations, were on the decline.<sup>63</sup> Instead, the nuclear family with parents and their young children had become the norm, while the number of unconventional households, such as single parents with children,<sup>64</sup> married couples without children, or even one person households had been on the rise.<sup>65</sup> In addition, as a result of low fertility and the rising life expectancy, the aging population caused great concern and required response from the state and society.<sup>66</sup> All the above demonstrated that the modern Taiwanese family had grown out of its traditional capacity and mission to assume the primary (or the only) responsibility of caring for the old and the young, or to serve as the safety net of social security. With the fast changing face of the family and the relationship between individual, family and the state, the Constitutional Court soon found itself, often urged by the feminist activists and lawyers,

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59. Samuel P.S. Ho, *Economics, Economic Bureaucracy and Taiwan's Economic Development*, 60 PAC. AFF. 226, 229 (1987).

60. Ian Holliday, *Productivist Welfare Capitalism: Social Policy in East Asia*, 48 POL. STUD. 706, 708 (2000).

61. LIN WAN-I (林萬億), FULI GUOJIA-LISHI BIJIAO DE FENXI (福利國家—歷史比較的分析) [WELFARE STATE-A COMPARATIVE HISTORICAL ANALYSIS] 272-74 (1994).

62. Wan-I Lin & Shin-Yi Yang, *From Successful Family Planning to the Lowest of Low Fertility Levels: Taiwan's Dilemma*, 3 ASIAN SOC. WORK & POL'Y REV. 95, 96-99 (2009).

63. Chao-Nan Chen & Hui-Lin Lin, *Examining Taiwan's Household Types and Their Functions from the Perspective of Parents' Living Arrangement*, 42 TAIWAN ECON. FORECAST & POL'Y 149, 154 (2011).

64. Chien-Chung Huang, *Socioeconomic Trends in Single-Parent Families in Taiwan, 1980-1995*, 2 NTU SOC. WORK REV. 217, 229-32 (2000); ZHONGHUA MINGUO NEIZHENGBU (中華民國內政部) [MINISTRY OF THE INTERIOR, R.O.C.], MINGUO 90 NIAN TAIMIN DIQU DANQIN JIATING ZHUANGKUANG DIAOCHA FENXI (民國90年臺閩地區單親家庭狀況調查分析) [THE SUMMARY ANALYSIS OF THE STATISTICS OF SINGLE-PARENT FAMILY IN 2011], <http://www.mohw.gov.tw/CHT/DOS/DisplayStatisticFile.aspx?d=43190> (last visited Aug. 21, 2016).

65. For the statistics regarding married couple without children and one person households in Taiwan, please see *Population Status of 1990 Population and Housing Census (Table 5)*, NAT'L STAT., R.O.C. (TAIWAN), <http://eng.stat.gov.tw/public/Attachment/547155557W75YTOV0.pdf> (last visited Sept. 30, 2015). For the 2010 statistics, please see *Household Status: Household Type of Ordinary Households (Table 69) in the Abstract Report of 2010 Population and Housing Census*, NAT'L STAT., R.O.C. (TAIWAN), <http://ebas1.ebas.gov.tw/phc2010/english/51/369.pdf> (last visited Sept. 30, 2015).

66. Wan-I Lin, *The Coming of an Aged Society in Taiwan: Issues and Policies*, 4 ASIAN SOCI. WORK & POL'Y REV. 148, 149-51, 155-60 (2010).

acting as an arbiter of the reconstruction of family law.

### B. *Women's Rights Movement*

Taiwan's modern feminist movement began in the early 1970s with the "New Feminism".<sup>67</sup> In 1982, Yuan-Chen Lee and her feminist colleagues published the "Awakening Magazine" to advocate women's rights and self-awareness. The Awakening Magazine and its later establishment of "the Awakening Foundation" have played an important role in Taiwan's feminist movement.<sup>68</sup> The last half of the 1980s and early 90s witnessed Taiwan's rapid political and social transformation. During this period, more organizations emerged to advocate women's right and gender equality and had great influence in social policy.<sup>69</sup>

Many women's experiences and life stories convinced feminist activists that gender equality would never become reality in Taiwan unless the patriarchal family code was reformed.<sup>70</sup> Two strategies were adopted by feminist groups to overturn the traditional family law: lobbying Congress for legal reform and challenging the constitutionality of family law provisions discriminating against women.<sup>71</sup> In 1993, the Awakening Foundation and the Warm Life Association for Women, joined by scholars, judges and lawyers, put together a bill known as the Bill of Awakening-Warm Life to amend the Family Code.<sup>72</sup> In order to push the bill through, women's groups launched campaigns for public awareness and support: speeches, town hall meetings and demonstrations were held, signatures collected, and a hotline was set up.<sup>73</sup> The mobilization was to place pressure on Congress as well as the Ministry of Justice, the administrative agency in charge of Civil (Family)

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67. DORIS T. CHANG, WOMEN'S MOVEMENT IN TWENTIETH-CENTURY TAIWAN 107-10 (2009).

68. Hsiao-Chin Hsieh & Chueh Chang, *The Development of the Women's Movement and Women's/Gender Studies in Taiwan*, in GENDER, CULTURE & SOCIETY: WOMEN'S STUDIES IN TAIWAN 21, 25-26 (Wei-Hung Lin & Hsiao-Chin Hsieh eds., 2005).

69. Tsai-Wei Wang, *The Women's Movement in Contemporary Taiwan: An Overview*, 7 J. I-SHOU U. 419, 421 (2000).

70. WANG YA-KO (王雅各), TAIWAN FUNU JIEFANG YUNDONGSHI (台灣婦女解放運動史) [THE HISTORY OF WOMEN'S LIBERATION MOVEMENT IN TAIWAN] 154-58 (1999).

71. Chen, *supra* note 33, at 72-74.

72. Yu Mei-Nu (尤美女), *Cong Fuyun De Falu Gaige Tan Nuxing Zhuoyi Faxue De Bentu Shijian* (從婦運的法律改革談女性主義法學的本土實踐) [Discussing The Practice of Feminist Legal Theory in Taiwan from Legal Reform of Women's Rights Movement], in XIANDAI SHENFENFA ZHI JICHU LILUN-TAI TONG-SCHUNG JIAOSHOU QIZHI HUADAN ZHUSHOU LUNWEN JI (現代身分法之基礎理論—戴東雄教授七秩華誕祝壽論文集) [THE FUNDAMENTAL THEORY OF CONTEMPORARY FAMILY AND SUCCESSION LAWS-ESSAYS IN HONOR OF PROFESSOR TAI TONG-SCHUNG] 15, 32-34 (Editorial Committee for Festschrift in Honor of Prof. Tong Schung Tai's 70th Birthday ed. (戴東雄教授七秩華誕祝賀論文集編輯委員會), 2007).

73. Yun Fan, *Taiwan: No Civil Society, No Democracy*, in CIVIL SOCIETY AND POLITICAL CHANGE IN ASIA 164, 180-81 (Muthiah Alagappa ed., 2004).

Code revision, in order to adopt the egalitarian version of family law.

While campaigning for family law reform in the society, feminist groups and lawyers were also busy taking another route: challenging the constitutionality of the patriarchal family law.<sup>74</sup> For years, feminist lawyers had been representing women to fight for equal rights in courts. It was not surprising to find that court rulings were almost always disappointing, since the Family Code explicitly favored fathers over mothers, and husbands over wives.<sup>75</sup> In 1994, with the help of feminist groups and lawyers, Chiu-Jung Liang and Pei-Chun Chang, two mothers who were denied equal parental rights, filed petitions for the review of Article 1089 of the Family Code, a typical patriarchal rule recognizing the father as the primary parent over the mother. At the same time, 147 Congressmen filed a separate petition asking the Justices to rule on the same issue. In response, the Justices issued *J.Y. Interpretation No. 365* declaring Article 1089 unconstitutional for its violation of the constitutional guarantee of gender equality.

The Justices' ruling was a victory for the petitioners as well as the women's rights movement. The Justices' order made the once reluctant Congress pass an amendment to Article 1089 in 1996. More importantly, the cause advocated by women's rights groups was officially recognized as a constitutional mandate. Since the patriarchal family practice was pronounced in conflict with the Constitution, an overhaul of the Family Code appeared to be inevitable. Under such pressure, Congress placed high priority on family law reform and the bill drafted by the feminist groups, along with several others, proposed by the Ministry of Justice and individual Congressman, was finally introduced in the Congress.<sup>76</sup>

It is fair to say that women's rights movement was one critical driving force behind the constitutionalization of family law. After all, it was women's rights groups who advocated and redirected the family law discourse to "(women's) rights talk" and "gender equality". It was also the feminist groups and lawyers who took family law cases to the Constitutional Court, an unfamiliar but worthy venue to argue for gender equality and push

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74. Peng Yen-Wen (彭滄雯), *Jieyan Hou Taiwan Funu Yundong Huigu Yu Zhanwang* (解嚴後臺灣婦女運動回顧與展望) [*A Review and Prospect of the Post-Martial-Law Women's Movement in Taiwan*], 18 DI SAN BUMEN XUEKAN (第三部門學刊) [THIRD-SECTOR REV.] 15, 18 (2012).

75. Yu Mei-Nu (尤美女), *Woguo Xingbie Pingdeng Yundong De Qujing-Susong Yu Lifa Pufu Qianjin* (我國性別平等運動的取徑—訴訟與立法匍匐前進) [*Gender Equality Movement in Taiwan-Crawling Ahead by Litigation and Legislation*], in XING PINGDENG LUNZHENG-MAIJINNONG FANGTAI YANJIANG JI (性平等論爭—麥金農訪臺演講集) [SEX EQUALITY CONTROVERSIES-FORMOSA LECTURE SERIES] 138, 147-48 (Chen Chao-Ju (陳昭如) ed., 2015).

76. Yu Mei-Nu (尤美女), *Taiwan Funu Yundong Yu Minfa Qinshubian Zhi Xiuzheng* (台灣婦女運動與民法親屬編之修正) [*Women's Rights Movement and the Revision of Family Code in Taiwan*], 90 WANGUO FALU (萬國法律) [FT L. REV.] 4, 10, 17 (1996).

for legal change.<sup>77</sup> This effort to engage constitutional adjudication paid off, since the impact was both direct and profound. After *J.Y. Interpretation No. 365*, feminist activists continued to bring their cases before the Justices. The judicial strategy again brought positive results. In *J.Y. Interpretation No. 410* and *J.Y. Interpretation No. 452*, the Justices struck down another two family law clauses. These Interpretations upholding gender equality over traditional family norms and practices provided the critical thrust to make legal change move forward. After several rounds of revisions, the Taiwanese Family Code has completely departed from patriarchal norms and embraces egalitarian ideology.

As discussed above, since the 1990s, family law change was one primary goal of the women's rights movement in Taiwan. Two strategies have been employed by the feminists in order to pursue legal change: lobbying the legislature and challenging the law in court. The latter contributed directly to the constitutionalization of family law. Although the Justices' timely intervention successfully moved the family law reform forward, the Court's reading of gender equality has been criticized as failing to recognize women's de facto subordination in their families due to the actual burden as the wife/mother as well as their lack of bargaining power.<sup>78</sup> Since the 21st century, feminist groups seemed to draw back on the constitutional/judicial approach.<sup>79</sup> Nevertheless, the constitutionalization of family law has made the constitutional jurisprudence and discourse essential to family law development and family law is officially part of the constitutional order. More importantly, within the constitutional order, the legal system could no longer keep women in subordination in the name of family.

### C. *The Active/Prudent Constitutional Court*

In the 1980s, Taiwan experienced drastic political and social change. People began to question the authoritarian regime for its suppressive social control and its ignorance to social needs and injustice. The lift of martial law

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77. Chen Chao-Ju (陳昭如), *Guohui He Fayuan De Kuaiman Zhijian-Cong Bijiao Guandian Sikao Taiwan Fuyun De Falu Gaige Celue* (國會和法院的快慢之間—從比較觀點思考臺灣婦運的法律改革策略) [*Between Congress and Court-Thinking about the Feminist Strategy of Legal Reform from Comparative Perspective*], in XING PINGDENG LUNZHENG-MAIJINNONG FANGTAI YANJIANG JI (性平等論爭—麥金儂訪臺演講集) [SEX EQUALITY CONTROVERSIES-FORMOSA LECTURE SERIES] 170, 174-79, 181-83 (Chao-Ju Chen (陳昭如) ed., 2015).

78. Lee Li-Ju (李立如), *Hunyin Jiating Yu Xingbie Pingdeng-Qinshufa Bianqian De Guancha Yu Fansi* (婚姻家庭與性別平等—親屬法變遷的觀察與反思) [*Family and Gender Equality-A Critical Assessment on Family Law Reform*], 95 ZHENGDA FAXUE PINGLUN (政大法學評論) [CHENGCHI L. REV.] 175, 187-98 (2007).

79. Chen, *supra* note 77, at 181-87.

in 1987 marked a critical moment of Taiwan's transition to democracy. However, lifting martial law alone did not solve the problem of representation: most members in the Legislative Yuan, the National Assembly, and the Control Yuan were elected in Mainland China decades ago; they had kept their seats indefinitely only because the KMT government decided to hold reelections until the KMT "recovered" Mainland China. The ruling party's decision even acquired the Justices' approval in *J.Y. Interpretation No. 31*, issued in 1954.<sup>80</sup> Thirty years later, despite overwhelmingly political and social pressure for democratization, members of this "million-year-Congress" refused to step down. Under these circumstances, the Court was called upon, by the Congress (the Legislative Yuan) itself, to the rescue. At this critical moment, the Grand Justices issued *J.Y. Interpretation No. 261*, urging national elections to be held to replace those never-reelected representatives. In other words, the Justices officially pronounced the legitimacy of constitutional democracy and helped pave the way for Taiwan's democratization.<sup>81</sup> In doing so, the Justices' own institutional legitimacy was significantly strengthened. Since then, the Justices have been playing a major role in shaping Taiwan's new constitutional democracy.<sup>82</sup>

Not only did the Justices assist the political transition to democracy, the Constitutional Court has been actively enforcing constitutional guarantees to protect people's fundamental rights ever since.<sup>83</sup> Before democratization, most petitions came from government agencies, rather than individual citizens, and the Justices did not have much chance to conduct judicial review. In fact, in most of the authoritarian period, the Justices acted more like a legal council to the government than the interpreter or adjudicator of the Constitution. However, the Court's docket gradually changed along with people's growing awareness of rights and the emergence of social movements. The percentage of citizen's petitions to challenge the constitutionality of statutes, administrative rules or government conduct, has been surging.<sup>84</sup> The Justices themselves also contributed to such

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80. Dennis T. C. Tang, *Judicial Review and the Transition of Authoritarianism in Taiwan*, in CHANGE OF AN AUTHORITARIAN REGIME: TAIWAN IN THE POST-MARTIAL LAW ERA 439, 448-54 (Taiwan Studies Promotion Committee of Academia Sinica ed., 2001); Jiunn-Rong Yeh, *Changing Forces of Constitutional and Regulatory Reform in Taiwan*, 4 J. CHINESE L. 83, 89-90 (1990).

81. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 144-48 (2003).

82. Wen-Chen Chang, *The Role of Judicial Review in Consolidating Democracy: The Case of Taiwan*, 2 ASIA L. REV. 73, 79-80 (2005).

83. Yeh, *supra* note 55, at 282-88.

84. Su Yeong-Chin (蘇永欽), *Dafaguan Jieshi Yu Taiwan De Shehui Bianqian-Hexianxing Kongzhi De Lingyige Mianxiang* (大法官解釋與台灣的社會變遷—合憲性控制的另一個面向) [*Interpretations of the Grand Justices and Social Changes in Taiwan—Another Aspect of Controlling Constitutionality*], in HEXIANXING KONGZHI DE LILUN YU SHIJI (合憲性控制的理論與實際) [THE

development by issuing *J.Y. Interpretation No. 177*, allowing the petitioner's case to have a retrial if the Constitutional ruling was in the petitioner's favor.<sup>85</sup> Before 1985, less than 15% of the Interpretations were issued in response to citizen's petitions.<sup>86</sup> However, between 1985 and 2003, more than 73% of the Interpretations resulted from petitions filed by citizens.<sup>87</sup> Such a trend continues to this day.<sup>88</sup> As the number of citizen's petitions rapidly increases, fundamental rights issues become the focus of Constitutional Interpretations.<sup>89</sup> Furthermore, a significant number of statutes, administrative rules or government actions has been ruled unconstitutional by the Justices.<sup>90</sup> Along with democratization, the Constitutional Court has departed from the role as the government's legal

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THEORY AND PRACTICE OF CONTROLLING CONSTITUTIONALITY] 271, 284-91 (1994).

85. Weng Yueh-Sheng (翁岳生), *Tan Sifa Shencha Zhidu De Fazhan-2010 Nian 4 Yue 29 Ri Yu Guoli Zhongxing Daxue Huisun Jiangzuo Yanjiang Shilu* (談司法審查制度的發展—2010年4月29日於國立中興大學惠蔭講座演講實錄) [*The Development of Judicial Review-The Lecture for Hui-Sun Chair of Chung-Hsing University at April 29, 2010*], 7 XINGDA FAXUE (興大法學) [CHUNG-HSING U. L. REV.] 1, 19-20 (2010); Wu Hsin-Hua (吳信華), *Lun Dafaguan Jieshi De "Xiaoli"-Jichu Jiegou De Liqing Yu Tixihua De Guancha* (論大法官解釋的「效力」—基礎結構的釐清與體系化的觀察) [*Effects of the Grand Justice Judicial Interpretation-Definition of Basic Structure and Systematic Observations*], 25 DONGWU FALU XUEBAO (東吳法律學報) [SOOCHOW L. REV.] 1, 28-31, 39 (2014).

86. In the period from July 1948 to September 1985, 28 Interpretations were issued in response to citizen's petition among 199 Interpretations. Sifa Yuan Dafaguan (司法院大法官) [Justices of the Constitutional Court, Judicial Yuan], *Di Yi Jie Zhi Di Liu Jie Dafaguan Zuocheng Jieshi Zhi Tongji Shujubiao* (第一屆至第六屆大法官作成解釋之統計數據表) [*The Statistic Table of Interpretations Issued by the 1st to 6th terms of the Justices*],

<http://www.judicial.gov.tw/constitutionalcourt/uploadfile/E100/%E7%AC%AC%E4%B8%80%E5%B1%86%E8%87%B3%E7%AC%AC%E5%85%AD%E5%B1%86%E5%A4%A7%E6%B3%95%E5%AE%98%E4%BD%9C%E6%88%90%E8%A7%A3%E9%87%8B%E4%B9%8B%E7%B5%B1%E8%A8%88%E6%95%B8%E6%93%9A%E8%A1%A8.htm> (last visited Sept. 2, 2015).

87. From October 1985 to 2003, 271 Interpretations were issued in response to citizen's petition in a total of 367 Interpretations. *Id.*

88. In the period of 2008-2014, citizen's petitions have contributed around 96 percent of all petitions, and more than 83 percent of Interpretations were generated from petitions filed by citizens. Sifa Yuan Dafaguan (司法院大法官) [Justices of the Constitutional Court, Judicial Yuan], *Tongji Ziliao-Nianbiao* (Minguo 99,100,101,102 Yu 103 Nian) (統計資料—年表 (民國99、100、101、102 與 103 年)) [*Statistics-Chronological Table* (2010, 2011, 2012, 2013 and 2014)], <http://www.judicial.gov.tw/constitutionalcourt/p05.asp> (last visited Sept. 2, 2015).

89. In recent years, in the period from October 2003 to September 15, 2008, more than 77 percent of Constitutional Interpretations featured fundamental rights issues. For the relationship between Grand Justices' Interpretations and human rights, please see generally Lee Chien-Liang (李建良), *Renquan Weihuzhe De Liushi Huigu Yu Shidai Tiaozhan-Shitan Dafaguan Renquan Jieshi De Fanduoshu Kunju* (人權維護者的六十回顧與時代挑戰—試探大法官人權解釋的反多數困局) [*60 Year Retrospect and the New Challenge as Human Rights Guardian-Exploring the Counter-Majoritarian Difficulty of Grand Justices' Interpretations of Human Rights*], in XIANFA JIESHI ZHI LILUN YU SHIWU (DI LIU JI) (XIA CE) (憲法解釋之理論與實務 (第六輯) (下冊)) [CONSTITUTIONAL INTERPRETATION THEORY AND PRACTICE, VOL. 6, PART II] 467, 473, 546-49 (Liao Fort Fu-Te (廖福特) ed., 2009).

90. It is reported that from October 1994 to September 2003, the percentage of unconstitutional findings was about 37.5%. Between October 2003 to August 31, 2005, the percentage rose to 47.2%. Chang, *supra* note 82, at 85.



council and reinvented itself into “the guardian of fundamental rights”.<sup>91</sup> In protecting individual’s fundamental rights, the Justices have paid special attention to criminal procedure rights, freedom of speech, freedom of association and due process of law, which had been suppressed during the authoritarian era. Moreover, the Court even looked beyond the Bill of Rights to recognize some fundamental rights which were not enumerated in the Constitution. The Court uses Article 22, the unenumerated clause, as the springboard to “new rights” in order to further promote individuality and human dignity, to respond to social and technological changes, and to incorporate international human rights into the Constitution. The Justices’ rather positive attitude in invoking the unenumerated clause was important in the constitutionalization of family law, since the rights regarding family or marriage were not listed in the Constitution. Over the years, the Constitutional Court has recognized several individual rights, such as the right to family, right to marry and right to adopt, as fundamental.

On the other hand, the Court’s active role was carried out in a rather subtle and prudent fashion, which helped reduce conflicts with the legislature and cultivate respect and compliance from other branches.<sup>92</sup> For example, when the Court pronounced a law unconstitutional, it did not always invalidate the law right away. The Justices might set up a deadline for the legislature to amend the law in accord with the Constitution. Such practice, as Professor Jiunn-Rong Yeh suggests, has created “an extended space for political compliance with constitutional adjudications”.<sup>93</sup> The “deadline-setting” strategy has been employed by the Justices across the board, including in family law cases. For example, in the two major Constitutional Interpretations on family law, *J.Y. Interpretation No. 365* and *No. 452*, the Court struck down two important family law provisions and yet provided a two year and a one-year deadline respectively, allowing the legislature some time and space to comply and revise the law. Eventually, the legislature met both deadlines and passed new provisions that would satisfy

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91. Weng Yueh-Sheng (翁岳生), *Woguo Xianfa Susong Zhidu Zhi Zhanwang* (我國憲法訴訟制度之展望) [*The Prospect of Constitutional Litigation in Taiwan*], ZHONGYANYUAN FAXUE QIKAN (CHUANGKAN HAO) (中研院法學期刊 (創刊號)) [ACADEMIA SINICA L.J. (INAUGURAL ISSUE)] 1, 13, 17 (2007).

92. Yeh Jiunn-Rong (葉俊榮), *Sifayuan Dafaguan Fuqixian Xianfa Jieshi De Denxi* (司法院大法官附期限憲法解釋的分析) [*An Analysis of Council of Grand Justices Interpretations Imposing Compliance Deadlines*], in MINZHU ZHUANXING YU XIANFA BIANQIAN (民主轉型與憲法變遷) [DEMOCRATIC TRANSITION AND CONSTITUTIONAL CHANGE] 323, 358-62 (2003).

93. Yeh Jiunn-Rong (葉俊榮), *Weixian Zhengzhi-Sifayuan Dafaguan Fuqixian Weixian Jieshi De Shizheng Fenxi* (違憲政治－司法院大法官附期限違憲解釋的實證分析) [*The Politics of Unconstitutionality-An Empirical Analysis of Judicial Deadlines and Political Compliance in Taiwan*], in 2011 SIFA ZHIDU SHIZHENG YANJIU (2011司法制度實證研究) [2011 EMPIRICAL STUDIES OF JUDICIAL SYSTEMS] 1, 9-21 (Chang Yun-Chien (張永健) ed., 2013).

constitutional mandate. The Court's prudence helped prevent possible tensions with the legislature and abrupt changes in people's domestic relations.

The Court's effort to keep legal stability and self-restraint was demonstrated in their as-applied unconstitutional rulings and other practices.<sup>94</sup> In *J.Y. Interpretation No. 242, No. 362 and No. 552*, the Court upheld the ban on bigamy in general, but ruled the provision unconstitutional only when it applied to special circumstances. In *J.Y. Interpretation No. 712*, the Court again allowed the restriction on Taiwanese adopter to adopt Chinese citizens and children, but found it unconstitutional when it applied to cases between Taiwanese adopters and their Chinese spouses' children. Such rulings showed that the Court carefully weighed government interest against the fundamental rights and tailored its ruling to what the cases actually called for. In addition, the Court did not always render clear-cut decisions. It sometimes gave warnings or instructions to encourage compliance and avoid future conflicts.<sup>95</sup> In *J.Y. Interpretation No. 502*, while the Court upheld the age difference restriction on adoption, it suggested that the legislature should consider relaxing the age difference requirement in cases of stepparent adoption and married couples' joint adoption. The law eventually changed, albeit not immediately. In the 2007 amendment to the Family Code, two exceptions to the age difference requirement for adoption were added. The bar was lowered from 20 to 16 years for joint adoption and stepparent adoption, as the Justices had strongly suggested.<sup>96</sup>

Judicial review would not matter much if there was no respect from other government branches and, most critically, trust from the people. Over the years, the Taiwanese Constitutional Court's effort to establish itself as the

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94. For discussion on such practice by the Constitutional Court, please see Chang Chia-Yin (張嘉尹), *Sifayuan Dafaguan Shixian Zhidu De Lishi Fazhan Yu Xianfa Jichu* (司法院大法官釋憲制度的歷史發展與憲法基礎) [*The Historical Development and Constitutional Foundations of Judicial Review in Taiwan*], in XIANFA JIESHI ZHI LILUN YU SHIWU (DI BA JI) (SHANG CE) (憲法解釋之理論與實務(第八輯)(上冊)) [CONSTITUTIONAL INTERPRETATION THEORY AND PRACTICE, VOL. 8, PART I] 115, 155-57 (Liao Fort Fu-Te (廖福特) ed., 2014).

95. For the admonitory decisions (*Appellentscheidungen*), please see generally Yang Tzu-Hui (楊子慧), *Xianfa Fayuan Fagui Weixian Shencha Zhi Caipan Leixing Yu Xiaoli-Yi Deguofa Wei Zhongxin, Bing Tan Woguo Zhi Gaige* (憲法法院法規違憲審查之裁判類型與效力—以德國法為中心, 並談我國之改革) [*The Variants and Effects of the Judicial Review by the Constitutional Court—An Examination of the Constitution Review in Germany and the Reform in Taiwan*], 43 CHUNGCHEN DAXUE FAXUE JIKAN (中正大學法學集刊) [NAT'L CHUNG CHEN U. L.J.] 191, 215-30, 262-63 (2014).

96. Civil Code § 1073 (promulgated and effective Dec. 26, 1930, amended 2007); Kuo Jen-Kong (郭振恭), *Lun Xiuzheng Hou Zhi Shouyangfa* (論修正後之收養法) [*Discussion on New Adoption Law*], 3 GUOLI KAOHSIUNG DAXUE FAXUE LUNCONG (國立高雄大學法學論叢) [NAT'L U. KAOHSIUNG L.J.] 103, 107-08 (2007).

guardian of the fundamental rights has cultivated public support. The confidence of the public, in turn, reinforced the effectiveness of the Constitutional Interpretations, and helped the Court to incorporate family law, an unfamiliar and unconventional territory of judicial review, into the constitutional order. Supported by society, the Court's active, and yet cautious, practice has strengthened its claim for legitimacy, which has provided the one indispensable condition for family law's constitutionalization.<sup>97</sup>

#### IV. THE IMPACT OF CONSTITUTIONALIZATION—IMPLICATIONS AND CHALLENGES

##### A. *Legal Change and Judicial Review*

The most significant and immediate impact of the Constitutionalization of family law is its formal departure from patriarchal norms. The 1930 Family Code was once revised in a government initiated amendment in 1985 in order to “catch up with the economic and social development”.<sup>98</sup> However, the 1985 amendment was at best half-hearted in terms of legalizing gender equality since it continued to cling to the traditional patriarchal structure and practices. Despite the vigorous feminist advocacy and the growing gap between social needs and patriarchal rules, the legislature and administration were reluctant to stop endorsing certain traditional family norms and to undergo legal reform.<sup>99</sup>

It was not until the issue of *J.Y. Interpretation No. 365* by the Constitutional Court that the family law reform was finally set in motion. Since the Court struck down Article 1089 of the Family Code and ordered amendment within two years, the Ministry of Justice, the agency responsible for drafting the amendment to the Family Code, submitted a three staged reform proposal on family law to the legislature.<sup>100</sup> It was planned that the first stage was to review and amend those provisions regulating parental child relationship, including Article 1089, to equalize the mother's and father's parental rights. With the pressure of the deadline, the legislature

97. Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805 (2011).

98. ZHONGHUA MINGUO LIFA YUAN (中華民國立法院) [LEGISLATIVE YUAN OF R.O.C.], 74 LIFA YUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE] 11, 107 (May 10, 1985).

99. Yu, *supra* note 76, at 6.

100. Shee Amy Huey-Ling (施慧玲), *Lun Woguo Minfa Qinshubian Zhi Xiuzheng Fangxiang Yu Lifa Yuanze-You Ershi Shiji De Chengguo Zhanwang Ershiyi Shiji De Lantu* (論我國民法親屬編之修正方向與立法原則—由二十世紀的成果展望二十一世紀的藍圖) [*The New Directions for Amendment and the Legislating Principles of Family Law in Taiwan*], 3 CHUNGCHEN DAXUE FAXUE JIKAN (中正大學法學集刊) [NAT'L CHUNG CHEN U. L.J.] 163, 165-70 (2000).

passed the amendment in September 1996.

According to the three-staged reform proposal, marital property rules were planned to be reviewed in the third stage.<sup>101</sup> It meant these provisions and related laws would not be discussed before 1999. However, the intended schedule changed due to the issue of *J.Y. Interpretation No. 410* in July 1996. Upon the Court's strong urging, the legislature added Article 6-1 to the Enforcement law for Part IV, Family Law of the Civil Code in September 1996, much earlier than planned, allowing the 1985 amendment to apply to those who got married before 1985 to protect the wives' property right.

The issue of *J.Y. Interpretation No. 452* again sped up the timetable proposed by the Ministry of Justice. In 1998, the Justices struck down the domicile rule of the Family Code. This time, the Justices gave only a one-year window for revision, thus the administration had to speed up the drafting process and therefore the legislature was able to pass the amendment of 1998 before the deadline expired.<sup>102</sup> Pressed by the Constitutional Court's rulings and women's groups' advocacy and lobbying,<sup>103</sup> the administration as well as the legislature realized an overhaul of the whole Family Code was inevitable and there was a sense of urgency to revise those provisions with prima facie gender discrimination. As a result, the 1998 amendment was followed by two more rounds of reform in 2002 and 2007, revising the provisions regulating marital property and those involving the relationship between parents and children respectively.

After several amendments beginning from the late 1990s, the landscape of Taiwanese family law was completely different from its original version in 1930. Certainly the Interpretations were not the only force behind the legal reform, but the Court's rulings did provide the decisive thrust to the traditional paradigm of family law. Not only did the Court declare the patriarchal family law unconstitutional, it successfully used deadlines or recommendations to encourage and urge the other branches to

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101. *Id.* at 170.

102. Wang Ju-Hsuan (王如玄), *Minfa Qinshubian Di Er Jieduan Xiufa Jiyao-Yi Fuqi Zhusuo Ji Shanchu Jinzhi Xiangjianzhe Jiehun Guiding Wei Zhongxin* (民法親屬編第二階段修法紀要—以夫妻住所及刪除禁止相姦者結婚規定為中心) [*The Second Stage of the Family Code Amendment-Focusing on the Provisions of Marital Domicile and the Prohibition against Marriage between Adulterous Couples*], 2 QUANGUO LUSHI (全國律師) [TAIWAN B. J.] 65, 66 (1998).

103. During this period of time, the women's rights groups focused on reforming the marital property rules of the Family Code. The endeavor included, but was not limited to, lobbying the Congress. Please see Wang Ju-Hsuan (王如玄), *Xin Xiuzheng Fuqi Caichanzhi Jieshao Jianlun Minjian Tuanti Xiufa Yundong Zhi Jiazhi Panduan Yu Fansheng* (新修正夫妻財產制介紹兼論民間團體修法運動之價值判斷與反省) [*An Introduction of the New Marital Property Regime and the Reflection on the Movement of Family Law Reform*], 88 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 266, 266-67 (2002); see also ZHONGHUA MINGUO LIFA YUAN (中華民國立法院) [LEGISLATIVE YUAN OF R.O.C.], 91 LIFA YUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE] 123, 125-26 (Apr. 24, 2002).

constitutionalize the family law. Since then, Constitutional principles, especially gender equality, has replaced the traditional patriarchal ideology to govern the development of family law. The Constitution has become the guideline of the Family Code amendments and other newly enacted family laws.<sup>104</sup>

### B. *The Rise of Constitutional Discourse and Rights Talk*

The impact of the Constitutionalization of family law in Taiwan manifests in the legal change as well as the underlying discourses and expressions of family law. Discourses, as Michel Foucault defines, are “historically variable ways of specifying knowledge and truth. They function as sets of rules, and the operating of these rules and concept in programs, which specify what is or what is not the case”.<sup>105</sup> In this sense, discourses carry and produce social meanings. They constitute, transmit, as well as undermine power.<sup>106</sup> Thus, the change of dominating discourse in the field of family law signifies the shift of power and norms in family law and family relations.

#### 1. *The Constitutional Discourse on Family*

Before constitutionalization, the dominant family law discourse featured traditional morality, associated with Taiwan’s family values and ethics.<sup>107</sup> The traditional structure and practices of family was bonded by a strong sense of responsibility and morality. Gender inequality within the family, according to traditional moral discourse, was not a matter of discrimination but a natural and ethical order where men and women should join together but assume different roles and tasks. Traditional family values and structures were to ensure family harmony and prosperity, which should be the primary

104. E.g., the recently acted Family Proceedings Act explicitly claims its legislative purpose is to “. . . realize Constitutional Principles of protecting fundamental rights, human dignity and substantive gender equality . . .”. ZHONGHUA MINGUO LIFA YUAN (中華民國立法院) [LEGISLATIVE YUAN OF R.O.C.], 100 LIFA YUAN GONGBAO (立法院公報) [LEGISLATIVE YUAN GAZETTE] 36, 77 (Dec. 12, 2011).

105. CAROLINE RAMAZANOGLU, UP AGAINST FOUCAULT, EXPLORATIONS OF SOME TENSIONS BETWEEN FOUCAULT AND FEMINISM 19 (1993).

106. See MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL. 1: AN INTRODUCTION (1978).

107. Regarding the traditional Confucian legacy and its influence on family law discourse, please see Chen Hwei-Syin (陳惠馨), *Biandong Zhong De Renlun Zhixu Yu Falu Zhixu-Cong Qinshufa Zhong Fuqi Jian De Guanxi Tanqi* (變動中的人倫秩序與法律秩序—從親屬法中夫妻間的關係談起) [The Changing Order of Human Relationship and Law-From the Relationship of Spouses in Family Law], 21 TAIDA FAXUE LUNCONG (臺大法學論叢) [NAT’L TAIWAN U. L.J.] 327, 342-56 (1991); Shu-Chin Grace Kuo, *A Cultural Legal Study on the Transformation of Family Law in Taiwan*, 16 S. CAL. INTERDISC. L.J. 379 (2007) (discussing the rhetoric of family law reform in light of the legal transplant theory and the trend of globalization).

concern over any individual's own desire or self-fulfillment. In other words, women's subordination was necessary in view of family tradition and morality. This traditional discourse remained hegemonic even after Taiwan transformed into an industrial society, until it was contested by the feminist discourse.

The feminist discourse criticized the traditional/moral family law discourse of discriminating against women and contended that the so-called natural family order was in fact never natural or neutral.<sup>108</sup> To empower women, the feminist discourse advocated women's rights and gender equality. Although the feminist discourse was gaining recognition and support along with Taiwan's drastic economic, social and political change, it was fighting an uphill battle. Compared to the feminist discourse that seemed to bring uncertainty to the family, the traditional/moral discourse seemed safe and normal in defending the status quo, which was supported by the government, traditionalists, and those who benefited (in reality or in their imagination) from the traditional family system.

After the Constitutional Court issued a series of Interpretations protecting gender equality, the constitutional discourse quickly became another powerful narrative of family law. Ignoring ideas of the dichotomy between market/state and family<sup>109</sup> or the family law exceptionalism,<sup>110</sup> the Court declared that family law, as other fields of law, should be included in the constitutional framework and therefore all the constitutional principles and guarantees should apply. According to constitutional discourse stated in *J.Y. Interpretation No. 365, No. 410, No. 452 and No. 457*, even though women's subordination within the family was once supported by social norms and customs in the traditional society, it had been outdated by the late 1990s. The gender discriminatory family law could not be justified in contemporary Taiwan, nor could it survive the constitutional review. It is worth noting that the Court did not find fault with traditional discourse as the feminist discourse did loudly. Instead, it merely suggested that the traditional discourse no longer fit today's society. Such an attitude appeared to be

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108. Liu Yu-Hsiu (劉毓秀), *Nanren De Falu, Nanren De "Guo" "Jia", Ji Qi Tuibian De Qiji-Yi Minfa Qinshubian Ji Qi Xiuzheng Weili* (男人的法律, 男人的「國」「家」, 及其蛻變的契機—以民法親屬編及其修正為例) [*Men's Law, Men's State and Family-The Family Code and Opportunity of Changing: The Case of Family Code Amendment*], 20 TAIWAN SHEHUI YANJIU JIKAN (台灣社會研究季刊) [TAIWAN: A RADICAL Q. IN SOC. STUD.] 103, 109-46 (1995).

109. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (discussing and arguing the reconstruction/transcending of the dichotomy between the family and market, along with the other two dichotomies between state and civil society and between male and female).

110. Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753 (2010) (exploring the origins and manifestation of the legal order that identify family law as special and exceptional).

disappointing to some feminists.<sup>111</sup> The Justices were criticized for being, naively or deliberately, obtuse to the patriarchal society.<sup>112</sup> In a different light, however, the Justices' discourse might be seen as a pragmatic approach, compared to feminist critique. The rather sympathetic or benign view on the traditional family norms might be chosen by the Court to ease out, instead of defeat, the traditional discourse. Meanwhile, the Justices continued to strike down family law provisions discriminating against women to prevent the risk of falling back to the traditional discourse or reinforcing the status quo that a pragmatic discourse often bears.<sup>113</sup> Besides, the fact that the constitutional narrative was itself authoritative in the legal system, the pragmatic approach might help to cultivate wider support from the society. Moreover, the constitutionalized discourse of family law had the power to redefine family law issues from being viewed as exceptional, personal even somehow frivolous, to the newly recognized constitutional issues that were highly political, vital and fundamental.

## 2. *Rights Talk for Women and Children*

One essential feature of the constitutional discourse is “rights talk”, to assert family members' individual rights. As the constitutional discourse prevailed, the concept of individual rights had become the focus of family law. For example, according to the traditional discourse, the focus of marital domicile rule was never about “individual right”, but about “obligations” or “responsibility”.<sup>114</sup> Since a wife was married into her husband's family, it was the wife's obligation to submit herself to her husband's family while the husband's obligation was to provide a suitable place to reside. The 1930 Family Code merely codified such practice to require the wife to take the husband's domicile as hers. On the other hand, according to the constitutional discourse presented in *J.Y. Interpretation No. 452*, marital domicile rule was all about the individual right to choose one's residence. It is in this vein the Justices explained why they struck down the 1930 family

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111. See, e.g., Rei Wen-May (雷文玫), *Xingbie Pingdeng De Weixian Shencha-Cong Meiguo Nuxing Zhuyi Faxue Kan Woguo Dafaguan Jize Youguan Nannu Shizhi Pingdeng De Jieshi* (性別平等的違憲審查—從美國女性主義法學看我國大法官幾則有關男女實質平等的解釋) [*Judicial Review on Gender Equality-Focusing on the Interpretations Regarding Gender Equality from the Perspective of the American Feminist Legal Theory*], in XIANFA JIESHI ZHI LILUN YU SHIWU (DI ER JI) (憲法解釋之理論與實務(第二輯)) [CONSTITUTIONAL INTERPRETATION THEORY AND PRACTICE, VOL. II] 123, 145-46 (Lee Chien-Liang (李建良) & Chien Tze-Shiou (簡資修) eds., 2000).

112. Lee, *supra* note 22, at 61-63.

113. See, e.g., Xin He & Kwai Ng, *Pragmatic Discourse and Gender Inequality in China*, 47 LAW & SOC'Y REV. 279 (2013) (presenting courtroom dialogs in China to argue that Chinese judge's pragmatic discourse eventually reinforce and reproduce the patriarchal norm).

114. CHEN CHI-YEN (陳棋炎), HUANG TZONG-LEH (黃宗樂) & KUO JEN-KONG (郭振恭), MINFA QINSHU XINLUN (民法親屬新論) [CIVIL LAW: FAMILY] 23-25 (10th ed. 2011).

law domicile rule, because it did “not take into consideration that the other party[wife] of the marriage also has the right to choose the residence . . .”. In order to meet the constitutional requirement, new family law had to embrace rights talk. The underlying theme of family law had shifted from glorifying family ethics and obligations to protecting personal dignity, individual rights and equality.

The constitutional rhetoric paid special attention to those family members whose rights were often ignored or deprived in the traditional/moral discourse: women (i.e., the wife, mother and sometimes daughter) and children. Women’s subordination in law became intolerable as the constitutional discourse redefined the marital relationship: the husband and wife were equal, at least before the law and courts, regarding their claim of individual rights. In other words, they should be equal partners in marriage.

As rights talk gradually permeated family law, children’s relationships with the state and their parents were examined and reviewed in a new light. It has been argued that children’s rights include the so-called “quasi-civil rights” to be free from state interference, and the “dependency rights” to be protected and assisted by their parents or the state.<sup>115</sup> However, because of children’s immaturity and dependency, the children’s rights talk was relatively vague or even controversial.<sup>116</sup> While children’s best interest doctrine was accepted by the Taiwanese legal system, especially in the contexts of custody disputes and child protection,<sup>117</sup> children’s rights,

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115. Annette Ruth Appell, *Uneasy Tensions between Children’s Rights and Civil Rights*, 5 NEV. L.J. 141 (2004).

116. See Pamela Laufer-Ukeles, *The Case against Separating the Care from the Caregiver: Reuniting Caregivers’ Rights and Children’s Rights*, 15 NEV. L.J. 236 (2014); see also Barbara Bennett Woodhouse, “Out of Children’s Needs, Children’s Rights”: *The Child’s Voice in Defending the Family*, 8 BYU J. PUB. L. 321 (1994). For discussion on Children’s rights in Taiwan, please see Shee Amy Huey-Ling (施慧玲), *Lun Woguo Ertong Renquan Fazhi Zhi Fazhan-Jiantan Luoshi* “*Lianheguo Ertong Quanli Gongyue*” *Zhi Shehui Yundong* (論我國兒童人權法制之發展—兼談落實「聯合國兒童權利公約」之社會運動) [Developments of Children’s Rights Legislation in Taiwan—Also on Local Social Movements for the Realization of the UN Convention on the Rights of the Child], 14 CHUNGCHEN DAXUE FAXUE JIKAN (中正大學法學集刊) [NAT’L CHUNG CHEN U. L.J.] 169, 172-92 (2004); HSU YUE-DIAN (許育典), JIBEN RENQUAN YU ERSHAO BAOHU (基本人權與兒少保護) [FUNDAMENTAL RIGHTS AND CHILD PROTECTION] 59-60, 72-80 (2014).

117. Liu Hung-En (劉宏恩), *Lihun Hou Zinu Jianhu Anjian* “*Zinu Zuijia Liyi Yuanze*” *De Zaijianshi-Shi Pingxi 2013 Nian 12 Yue Xiuzheng Zhi Minfa Di 1055 Tiao Zhi Yi Guiding* (離婚後子女監護案件「子女最佳利益原則」的再檢視—試評析二〇一三年十二月修正之民法第一〇五五條之一規定) [Reviewing the Best Interest of the Child Standard in Taiwanese Custody Decisions—Discussing the 2013 Amendment of Article 1055-1 of the Civil Code], 234 YUEDAN FAXUE ZAZHI (月旦法學雜誌) [TAIWAN L. REV.] 193, 193-95 (2014); Rei Wen-May (雷文玫), Yi “*Zinu Zuijia Liyi*” *Zhiming-Lihun Hou Fumu Dui Weichengnian Zinu Quanli Yiwu Xingshi Yu Fudan Zhi Yanjiu* (以「子女最佳利益」之名—離婚後父母對未成年子女權利義務行使與負擔之研究) [In the Name of “the Best Interests of the Child”—A Study of Child Custody in Divorce Decisions], 28 TAIDA FAXUE LUNCONG (臺大法學論叢) [NAT’L TAIWAN U. L.J.] 245, 251-73 (1999).



despite the recent incorporation of the U.N. Convention on the Rights of the Child (“CRC”),<sup>118</sup> still had a murky status in the Taiwanese Family Code.

Nevertheless, the emerging constitutional discourse acknowledged the child as a holder of constitutional rights. In *J.Y. Interpretation No. 587*, the Constitutional Court, citing CRC Article 7, recognized children’s constitutional right to know their parents against the interests of family integrity and parental privacy, and thus granted children the right to challenge the presumption of paternity. In addition, children’s personality rights and personal freedom were recognized and invoked in *J.Y. Interpretation No. 664*, where the Justices struck down some provisions of the Juvenile Proceeding Act which provided the juvenile court the capacity to place juveniles who frequently skives or runs away from home in the juvenile detention house.<sup>119</sup> In order to protect the juvenile’s personality rights, the Court declared that “to protect the physical and mental health of children and juveniles, and to foster the healthy development of their character, the state bears the obligation to provide special care”.<sup>120</sup> It is worth noting that the Court seemed to use children’s personality right to incorporate both children’s needs and entitlement.<sup>121</sup> Children’s rights talk thus has the potential to transcend the current dominant discourse regarding children and family—the best interests of the child doctrine and to reconstruct the legal status of children.

### C. *The Entrenched Institution of Marital Family*

As discussed above, the recognition and protection of family members’ individual rights is one distinctive feature of the constitutional discourse of family law. But this is not the whole story of the constitutionalization of family law in Taiwan. Another half of the story involved the entrenched status of the institution of marriage and family. In *J.Y. Interpretation No. 552*, the Court granted the marriage institution with constitutional protection and emphasized its close relation with the family system. Later in *J.Y.*

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118. In 2014, the legislature passed the “Implementation Act of the Convention on the Rights of the Child” to incorporate the “Convention on the Rights of the Child”. Despite the name and title of the convention, some argue that the convention was not exactly a legal document, but a compromise between children’s best interests and parental rights. See Barbara Bennett Woodhouse & Kathryn A. Johnson, *The United Nations Convention on the Rights of the Child: Empowering Parents to Protect Their Children’s Rights*, in *WHAT IS RIGHT FOR CHILDREN?* 7, 7-18 (Martha Albertson Fineman & Karen Worthington eds., 2009).

119. Sifa Yuan Dafaguan Jieshi No. 664 (司法院大法官解釋第664號解釋) [Judicial Yuan Interpretation No. 664] (July 31, 2009) (Taiwan).

120. *Id.*

121. *J.Y. Interpretation No. 664*; Sifa Yuan Dafaguan Jieshi No. 702 (司法院大法官解釋第702號解釋) [Judicial Yuan Interpretation No. 702] (July 27, 2012) (Taiwan) (Lo Chang-Fa, J. (羅昌發大法官), Xietong Yijianshu (協同意見書) [Concurring Opinion]).

*Interpretation No. 554*, where the Court upheld criminal adultery law, the Justices placed “marriage” and “family” together to emphasize the constitutional protection of the marital family.<sup>122</sup> In *J.Y. Interpretation No. 696* and *No. 712*, the Justices affirmed the constitutional protection of marital family and used it as the authority to strike down marriage penalty tax clause and a restriction on adoption.

### 1. *The Constitutionally Recognized Marital Family*

Some have complained that the constitutionalization of family law has led to the wane of moral values that were essential to sustain durable family bonds.<sup>123</sup> The ideas of trust, responsibilities, fidelity or even sacrifice, according to some communitarian scholars, have been overshadowed by the prevailing constitutional discourse promoting the concepts of individual rights and freedom.<sup>124</sup> However, such discontent might be eased somehow in Taiwan, since the notion of preserving marriage and family has been recognized as a Constitutional mandate by the Justices.

However, to protect marital family does not mean to preserve the traditional family. The Court in fact redefined and restructured the family as it constitutionalized the family law. According to the Justices, the institution of marriage was considered worthy of constitutional protection, because “the purposes of the monogamous marriage are to maintain the personal and ethical relationship between husband and wife and to realize the principle of equality between men and women, thereby preserving the social order, and the institution is thus protected by the Constitution”.<sup>125</sup> Thus, in the mind of the Justices, the constitutionally protected marital family protected a different image to the traditional family. Under the guidance of the Constitution, the marital family has to be monogamous and equal, rather than hierarchically structured, since the institution of marriage “lies in the freedom of personality, with such social functions as to maintain ethical order of human relationship, gender equality, and raise children”.<sup>126</sup> The laws reflecting traditional image of women’s subordination within the marital family would not survive judicial review, because this part of the

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122. Sifa Yuan Dafaguan Jieshi No. 554 (司法院大法官解釋第554號解釋) [Judicial Yuan Interpretation No. 554] (Dec. 27, 2002) (Taiwan) and the reasoning of J.Y. Interpretation No. 554.

123. See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1820-22 (1985); see also William C. Duncan, *Constitutions and Marriage*, 6 WHITTIER J. CHILD & FAM. ADVOC. 331, 335 (2007).

124. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 12 (1991); see also MILTON C. REGAN JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 67-69 (1993).

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

126. The reasoning of J.Y. Interpretation No. 554.

traditional family was not comparable to the Justices' portrayal of the marital family. In the same vein, children's complete subordination to parents, which had been taken for granted under traditional family values, was also not in the picture of the modern marital family recognized by the Court.

On the other hand, when it came to maintaining family harmony, monogamy, and family ethics, the Court had little problem allowing restrictions on individual rights. For example, the criminal adultery law, which claimed to enforce marital fidelity and monogamy, survived the Court's test of proportionality and was upheld by the Constitutional Court over the claim of sexual freedom.<sup>127</sup> Moreover, in the name of the marital family, the Court has approved the state to curb individual rights such as the right to adopt and right to sue.<sup>128</sup>

## 2. *The Protection of Marriage and Its Challenges*

As granting constitutional protection to the marital family would help keep a balance between rights talk and preserving the marital family, it bears a risk of hindering the development of family law, especially the legalization of other types of intimacy such as same-sex marriage. In *J.Y. Interpretation No. 647*, the Court upheld a gift tax exemption clause applying only to the gifts between husbands and wives. The petitioner argued that the exemption discriminated against couples who lived together but were not legally married since they had the same difficulty of separating finances or properties as married couples often encounter. The Justices rejected the discrimination claim by arguing that the clause was necessary to protect the marriage institution. Nevertheless, at the end of the opinion, the Justices suggested the legislature provide some protection to de-facto relationship and cohabitation due to their resemblance to legal marriage. But the Justices carefully limited such protection to heterosexual couples and only to the extent that it would not harm the marriage institution and other public interests.

The Justices' attitude toward marriage and other forms of intimacy raises concerns: Has the entrenched status of marital family placed a cap on the future development of family law? Specifically, would the legalization of same-sex marriage or cohabitation be blocked or hampered by the present constitutional discourse? After all, the Constitution functions as a pre-commitment device to lock in critical values and doctrines to control later government actions.<sup>129</sup> It was because gender equality has been

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127. J.Y. Interpretation No. 554.

128. J.Y. Interpretation No. 502 and Sifa Yuan Dafaguan Jieshi No. 569 (司法院大法官解釋第569號解釋) [Judicial Yuan Interpretation No. 569] (Dec. 12, 2003) (Taiwan).

129. Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*,

enshrined in the Constitution that those traditional family laws reinforcing women's subordination would not pass the constitutional review. Moreover, the expressive elements of the Court's Interpretations address not only the legal system, but also society. Since the Constitution encompasses the most fundamental legal norms of the state, the constitutional narrative often carries a tremendous weight of legitimacy to construct legal culture and social norms.<sup>130</sup>

Starting in *J.Y. Interpretation No. 365*, the Constitutional discourse facilitated the redirection of family norms in favor of gender equality. On the other hand, *J.Y. Interpretation No. 554*, where the Justices upheld the criminal adultery law, has become a convenient excuse for the administration to brush off the call for de-criminalizing adultery,<sup>131</sup> even though the Interpretation did not express, explicitly or otherwise, any disapproval of the de-criminalization of adultery. Since the Justices have repeatedly stressed that the marital family was a constitutionally protected institution, any proposal to challenge the monopoly status of the marital family or to change the elements of marriage may find it is imposed a handicap by the constitutional discourse.

#### D. *Between the Constitution and the Family*

In the last 25 years, constitutionalization has changed Taiwanese family law in many levels as discussed above. In addition to inserting constitutional principles into family law, the process of constitutionalization has raised some basic issues on family law jurisprudence.

##### 1. *Constitutionalization and Family Values*

Since the Constitutional Court announced that family law should be governed by constitutional doctrines, women and children's subordination

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38 N.Y.U. J. INT'L L. & POL. 707, 709-10 (2006); YEH JUUN-RONG (葉俊榮), ZHENXI XIANFA SHIKE (珍惜憲法時刻) [CONSTITUTIONAL MOMENT] 19-20 (2000).

130. Lee, *supra* note 22, at 57-60.

131. *E.g.*, in response to the Concluding Observations and Recommendations to the Initial Reports of the Government of Taiwan on the Implementation of the International Human Rights Covenants, urging the Taiwanese government to abolish the criminal adultery law, Ministry of Justice declared that since the criminal adultery law was declared constitutional in *J.Y. Interpretation No. 554*, there may not be an urgent need to revise the law. Although the Ministry of Justice did not rule out the possibility of decriminalizing adultery, it is obviously not in the agenda of the agency any time soon. Zhonghua Minguo Fawubu (中華民國法務部) [Ministry of Justice, R.O.C.], *Jiu Tongjianzui Shifou Chuzuihua, Fawubu Tichu Shuoming* (就通姦罪是否除罪化·法務部提出說明) [*The Response of Ministry of Justice to the Issues of De-criminalization of Adultery*], FAWUBU WANGZHAN (法務部網站) [THE WEBSITE OF MINISTRY OF JUSTICE] (Mar. 14, 2013), <http://www.moj.gov.tw/public/Attachment/331417585826.pdf>.

could no longer be tolerated, even in the name of the special “needs”: to maintain family bonds or to respect tradition. Some scholars are worried that the constitutionalization has taken the morality and family values out of family law and thus resulting in the loss of its function of protecting durable family bonds.<sup>132</sup> However, new family law under the constitutional guidelines is not free of values or morality. The rhetoric of “individual autonomy vs. family values” is the product of the myth that family values or morality could only mean the patriarchal norms and nothing more.<sup>133</sup> In fact, as the Taiwanese Justices defined marriage as one institution that is based on “the freedom of personality, with such social functions as the maintenance of the order of human relationships, and gender equality, and the raising of children”,<sup>134</sup> a “new” set of family morality, celebrating gender equality, honoring personal dignity, and protecting children, has emerged. It proposes and emphasizes a better balance between individual autonomy and family/caregiving obligations,<sup>135</sup> which supports, rather than undermines, the institution of family.

Because the law no longer defers to the patriarch’s authority within the family, the privatization of family law was to be expected.<sup>136</sup> In order to comply with the gender equality clause of the Constitution, the revised family law leaves family matters to the agreement between the husband/father and wife/mother. Married couples are now free to make decisions on marital domicile, family finance and child-rearing or custody issues. Should any dispute arise, the legal system offers mediation and court intervention to resolve the problem. The increasing judicial intervention in family matters has been described by some scholars as a movement of “turning the family law into public law”.<sup>137</sup> Nevertheless, even though the legal system has shifted from reinforcing patriarchal norms to promoting equality and the best interests of the child, marriage or family has never ceased to be regarded as a social institution. The growing privatization and judicial intervention are two sides of the same token—to protect the rights

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132. Carl E. Schneider, *Family Law in the Age of Distrust*, 33 FAM. L.Q. 447 (1999); Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 338, 406 (2002) (arguing the constitutional jurisprudence is unfit to solve family issues, especially the parent-child relationship).

133. Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 228-29 (1997); Jane C. Murphy, *Rule, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111 (1999).

134. J.Y. Interpretation No. 554.

135. Martha Minow, *All in the Family & in All Families: Memberships, Loving and Owning*, 95 W. VA. L. REV. 275 (1993).

136. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (1992).

137. TAI YEN-HUEI (戴炎輝), TAI TONG-SCHUNG (戴東雄) & TAI YU-ZU (戴瑀如), QINSHUFA (親屬法) [FAMILY LAW] 2-3 (2012); Shee, *supra* note 100, at 170-73.

and interests of individual family members, especially the vulnerable ones.<sup>138</sup>

## 2. *Constitutional Jurisprudence and the Future of Family Law*

In the eyes of the Justices, the constitutional guarantee of gender equality means formal equality, requiring equal treatment of men and women in law. In accordance with such formal equality jurisprudence, the legislature has eliminated most formally different treatments based on sex in the amendments to family law. It also replaced the terms of “husband” and “wife” with a gender neutral term of “spouses” to avoid any hint of gender discrimination. However, the sameness in legal treatment does not exactly equalize men and women within the family.<sup>139</sup> It is true that by law the husband/father and wife/mother now have equal say on family matters. But as long as the power structure and social/economic conditions continue to compel women to act as the primary caregiver at home and men as the ideal worker in the labor market, it would not be surprising to find that most married couples would “agree” to stay in line with the traditional gender roles.<sup>140</sup> In other words, the principle of formal equality guarantees equal footing and honors individual’s choices but does not recognize that women’s choices, especially family-related ones, are often under great influence of gender ideology and traditional norms.<sup>141</sup> Therefore, gender equality will never be achieved unless the gender power structure, constructed with resource allocation, gender ideology and social norms, is recognized, tackled and changed.<sup>142</sup> The worse scenario of having a gender neutral family law is that after the formally different treatment has been erased from the law, women’s de facto subordination would become invisible or be regarded as women’s own individual choice.

As formal equality doctrine alone often fail to deal with the structure of dominance, it is necessary to recognize substantive equality as the

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138. Lee Li-Ju (李立如), *Fa Buru Jiamen? Jiashifa Yanbian De Falu Shehuixue Fenxi* (法不入家門? 家事法演變的法律社會學分析) [*Between the State and the Family? A Study of Recent Taiwanese Family Law Development*], 10 CHUNGYUAN CAIJING FAXUE (中原財經法學) [CHUNG YUAN FIN. & ECON. L. REV.] 41 (2003).

139. Regarding the sameness/difference debate among feminists regarding family and work, please see Joan Williams, *Do Women Need Special Treatment? Do Feminist Need Equality?*, 9 J. CONTEMP. LEGAL ISSUES 279 (1998).

140. Lee, *supra* note 78, at 193-98; Chen Chao-Ju (陳昭如), *Haishi Bupingdeng-Fuyun Xiufa Gaizao Fuquan Jiating De Kunjing Yu Weijing Zhi Ye* (還是不平等—婦運修法改造父權家庭的困境與未竟之業) [*Still Unequal-The Difficulties and Unfinished Business of Feminist Legal Reform of the Patriarchal Family*], 33 NUXUE XUEZHIFUNU YU XINGBIE YANJIU (女學學誌—婦女與性別研究) [J. WOMEN’S & GENDER STUD.] 119, 143-44 (2013).

141. Kathryn Abrams, *Ideology and Women’s Choices*, 24 GA. L. REV. 761 (1990).

142. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 46-62 (1987).

constitutional mandate.<sup>143</sup> In fact, according to Amendment 10 Paragraph 6 of the Constitution, “the State shall protect the dignity of women, safeguard their personal safety, eliminate sexual discrimination, and further substantive gender equality”, substantive gender equality is exactly what the Taiwanese Constitution guarantees.<sup>144</sup> In addition, in 2011 Taiwanese legislature had passed the “Enforcement Act of Convention on the Elimination of All Forms of Discrimination against Women” to integrate the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) into the Taiwanese legal system. CEDAW has required the states to eliminate all forms of gender discrimination, not only in law and policy, but also in all matters public and private.<sup>145</sup> The Constitutional Court’s equality jurisprudence had been restricted to formal equality until *J.Y. Interpretation No. 666*, where the Justices considered the constitutionality of a law that punished prostitutes but did not punish their “customers”. Although the language of the law was not gender specific and thus might have passed the formal equality test, the Justices not only questioned the different treatment between the prostitutes and the clients, but also recognized the fact that the prostitutes were more likely to be women and the clients to be men. The Court therefore led to the conclusion that the law discriminated against women and violated the gender equality clause of the Constitution.<sup>146</sup> *J.Y. Interpretation No. 666* appeared to show signs of a shift in the Court’s equality jurisprudence. By recognizing the indirect discrimination (or de facto discrimination),<sup>147</sup> the Court took a step toward a substantive approach

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143. Susan B. Boyd, *The Impact of the Charter of Rights and Freedoms on Canadian Family Law*, 17 CAN. J. FAM. L. 293 (2000) (exploring how the Canadian Supreme Court’s substantive approach of interpretation of the equality guarantee influences the development of Canadian family law); Joanna Radbord, *Lesbian Love Stories: How We Won Equal Marriage in Canada*, 17 YALE J.L. & FEMINISM 99 (2005) (arguing that the substantive approach of equality adopted by the Canadian Court has helped the same-sex marriage to be recognized and legalized in Canada).

144. *Id.*

145. Chang Wen-Chen (張文貞), *Fan Qishi Yu Guojia Yiwu (反歧視與國家義務) [Anti-Discrimination and the Obligation of the State]*, in XIAOCHU DUI FUNU YIQIE XINGSHI QISHI GONGYUE (消除對婦女一切形式歧視公約) [CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN] 97, 100-01, 103, 122-27 (Chang Wen-Chen (張文貞) & Kuan Hsiao-Wei (官曉薇) eds., 2015) (arguing that the meaning of “equality” in CEDAW includes both substantive equality and formal equality).

146. Sifa Yuan Dafaguan Jieshi No. 666 (司法院大法官解釋第666號解釋) [Judicial Yuan Interpretation No. 666] (Nov. 6, 2009) (Taiwan); For discussion on the Court’s equality jurisprudence, please see Liao Bruce Yuan-Hao (廖元豪), *Fa Chang Bufa Piao Weixian-Baozhang Ruoshi Zhi “Shizhi Pingdeng” Zhonghuo Dafaguan Jiachi? (罰娼不罰嫖違憲—保障弱勢之「實質平等」終獲大法官加持?) [Punishing Prostitutes but not the Person Pays for Sex Is Unconstitutional-Do Justices Finally Endorse Substantive Equality to Protect the Disadvantaged Groups?]*, 2010 (GONGFA TEKAN (公法特刊) [SPECIAL ISSUE OF PUBLIC LAW]) TAIWAN FAXUE ZAZHI (台灣法學雜誌) [TAIWAN L.J.] 43, 46-47 (2010).

147. *J.Y. Interpretation No. 666* (Hsu Tzong-Li, J. (許宗力大法官), Xietong Yijianshu (協同意見書) [Concurring Opinion]).

to equality. Unfortunately, later in *J.Y. Interpretation No. 728*, a case regarding women's right of succession,<sup>148</sup> the Justices seemed to fall back to the formal equality approach. The Court upheld a provision of the Act for Ancestor Worship Guild that resulted in discrimination against female offspring in succession because "the disputed provision does not formally proscribe gender as a classification to determine the status of the successor . . ."<sup>149</sup> In the opinion, the Court mentioned Amendment 10 of the Constitution and two articles from CEDAW and advised the legislature to review and revise the Act in order to step up its obligation to protect women and further substantive gender equality. But at the end of the day, it was the formal approach of gender equality that prevailed in this recent ruling. Although such an approach is helpful in eliminating any explicit gender discrimination in law, the formally equalized family law would have rather limited influence on deconstructing or reconstructing the gender roles/identities or structures that have been deeply rooted in the society.

In addition to gender relations, another imminent family law issue, which would be affected by constitutional jurisprudence, is the scope of family law and the future of the institution of marriage and family. Taiwanese family law has regulated and protected family relations based on marriage and parent-child relationship, in other words, family members are defined as those who are related by blood or by marriage. This traditional image of family is supported by the norms of human relation or ethics and recognized by family law. However, recently the traditional definition of marriage and family has been challenged by the other types of intimate association or nontraditional families. For example, the widespread marriage equality movement has challenged family laws to recognize same-sex marriage.<sup>150</sup> In some countries, the legal debate over same-sex marriage has had to be solved by way of Constitutional adjudication. For example, in 2015, amid the fierce debate over the legalization of same sex marriage, the United States Supreme Court issued *Obergefell v. Hodges*,<sup>151</sup> a landmark

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148. In *Sifa Yuan Dafaguan Jieshi No. 728* (司法院大法官解釋第728號解釋) [Judicial Yuan Interpretation No. 728] (Mar. 20, 2015) (Taiwan), the Court was called upon to review a provision of the Act for Ancestor Worship Guild, providing that for those guilds which were set up prior to the Act was in effect, it was up to the bylaw of the guild to decide who was the qualified successor. Since most of these guild bylaws only recognized male offspring as qualified successor, the petitioner argued that the provision violated the Constitutional guarantee of gender equality for allowing such discriminatory bylaws to stand.

149. *J.Y. Interpretation No. 728*.

150. E.g., please see William N. Eskridge Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275 (2013); Christy M. Glass & Nancy Kubasek, *The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from Their Northern Neighbor Regarding Same-Sex Marriage Rights*, 15 MICH. J. GENDER & L. 143, 160-73 (2008); Conor O'Mahony, *If a Constitution Is Easy to Amend, Can Judges Be Less Restrained? Rights, Social Change and Proposition 8*, 27 HARV. HUM. RTS. J. 191, 205-07 (2014).

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



decision which held that the fundamental right to marry is guaranteed to same-sex couples by the Due Process Clause and the Equal Protection Clause of the United States Constitution. In Spain, even after the bill amending the Civil Code to recognize same-sex marriage was passed in 2005, the controversy did not end until the Constitutional Court upheld the same-sex marriage statute constitutional in 2012.<sup>152</sup> In Taiwan, family law is facing the same challenge. As same-sex marriage bills have been introduced to Congress and at least one petition has been filed to the Constitutional Court to review the marriage clause of the Family Code,<sup>153</sup> the Justices' attitude is critical. As discussed above, the Justices have read the fundamental right to marry and the institution of marriage and family into the Constitution. Would the Justices extend the right to marry to same-sex couples as the United States Supreme Court recently did? Would same-sex marriage be excluded from the definition of marriage and even seen as a threat of harming the marriage institution, and therefore not be accommodated into the constitutional order?<sup>154</sup> The issue of same-sex marriage, in fact, is only the tip of the iceberg of the future challenges for family law. When people's intimate relationships have grown out of the traditional image of marriage and family, it is time to look at the family law critically and ask: what purpose the family law should serve? Should the family law remain supportive of only the traditional and singular version of marriage and family institution? Or should family law protection be extended to a diverse set of intimate relationships and forms of family? These are surely important issues in family law. As family law has been constitutionalized, these are also imminent issues of the Constitution

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152. José María Lorenzo Villaverde, *And the Story Comes to an End: The Constitutionality of Same-Sex Marriage in Spain*, in SAME SEX COUPLES: COMPARATIVE INSIGHTS ON MARRIAGE AND COHABITATION 13 (Macarena Sáez ed., 2015).

153. By November 2015, two bills legalizing same-sex marriage have been introduced to the Legislative Yuan. One is sponsored by Legislator Yu Mei-Nu (尤美女), and the other by Legislator Cheng Li-Chiun (鄭麗君). ZHONGHUA MINGUO LIFA YUAN (中華民國立法院) [LEGISLATIVE YUAN OF R.O.C.], *Lifa Yuan Yian Guanxi Wenshu-Yuan Zong No. 1150, Weiyuan Tian No. 14506* (立法院議案關係文書—院總第1150號委員提案第14506號) [*The Related Document of Legislative Proposal-Yuan Zong No. 1150, No. 14506 proposed by the Legislator*], [http://lci.ly.gov.tw/LyLCEW/agenda1/02/pdf/08/02/14/LCEWA01\\_080214\\_00011.pdf](http://lci.ly.gov.tw/LyLCEW/agenda1/02/pdf/08/02/14/LCEWA01_080214_00011.pdf) (Dec. 19, 2012); ZHONGHUA MINGUO LIFA YUAN (中華民國立法院) [LEGISLATIVE YUAN OF R.O.C.], *Lifa Yuan Yian Guanxi Wenshu-Yuan Zong No. 1150, Weiyuan Tian No. 15359* (立法院議案關係文書—院總第1150號委員提案第15359號) [*The Related Document of Legislative Proposal-Yuan Tsung No. 1150, No. 15359 proposed by the Legislator*] (Oct. 31, 2013), [http://lci.ly.gov.tw/LyLCEW/agenda1/02/pdf/08/04/07/LCEWA01\\_080407\\_00058.pdf](http://lci.ly.gov.tw/LyLCEW/agenda1/02/pdf/08/04/07/LCEWA01_080407_00058.pdf); Sung Hsiao-Hai (宋小海) & Chen Yi-Ting (陳逸婷), *Zheng Tonghun 29 Nian Qi Jia-Wei Er Ti Shixian* (爭同婚29年 祁家威二提釋憲) [*After 29 Years of Advocating Same-Sex Marriage, Mr. Chia-Wei Chi Once Again Filed His Petition to the Constitutional Court*], COOLLOUD (苦勞網) (Dec. 24, 2014), <http://www.cooloud.org.tw/node/81195> (Mr. Chi Chia-Wei (祁家威), with the help from gay rights organization, has filed a petition to the Constitutional Court in Dec. 2014).

154. The reasoning of J.Y. Interpretation No. 647.

including the questions of how to define the relationship between the state and the family? How to regulate the change of family law? Whether or how to protect the family/intimacy and the individuals within or without it?

#### V. CONCLUDING REMARKS

The phenomenon of the Constitutionalization of family law was part of a larger trend of the growing awareness and assertiveness of rights among average citizens and an increase in judicial activism. Feminist groups in particular have seized the opportunity to press for legal change, taking family law cases to the Constitutional Court to challenge the traditional legal framework that had long subordinated women and failed to respond to social and family change. In 1994, the Court struck down a provision of the Taiwanese Family Code that favored the father's parental rights over the mother's on the grounds of equal protection. Several other provisions in the same statute manifesting similar discrimination have been ruled unconstitutional since, and these Constitutional Interpretations have steered family law in the direction of fuller gender equality. In addition, the Court has read several individual rights, as well as the protection of marital family, into the Constitution.

While the Constitutional Court deserves credit for facilitating the decline of patriarchal rules, its equal protection jurisprudence may have insisted too much on a pair of principles that might hinder further progress. The first is formal quality. The current statute, following the Court's jurisprudence, requires married couples to decide all domestic affairs—including children-related matters—by mutual agreement. This gender-blind bargaining model, however, fails to take into account the social reality of Taiwanese families, especially in the context of gender interaction. Although gender inequality is no longer endorsed by the law, spouses still must bargain in the shadow of traditional norms and family practices, which by and large still place women in a weak bargaining position. The new bargaining model might appear fair and neutral, but there is no "veil of ignorance" when husband and wife bargain across the dinner table. In the end, women might find themselves fighting alone against the power imbalance embedded in the structure of marriage and family. The judiciary has thus far shown little sympathy for such a plight.

In a second line of rulings, the Court upheld the criminal penalty against adultery, tax exemption for married couples, and a statute prohibiting spouses from bringing private prosecution against each other, mainly because it saw marriage and family as constitutionally protected institutions. In articulating the essence of such institutions, the Court has defined marriage and family in accordance to tradition and legal formality,

seemingly endorsing the current legal monopoly of heterosexual marriage and the nuclear family. For social activists advocating the legal recognition of unmarried cohabitants—same-sex couples in particular—the Court’s emphasis on protecting a traditionally and narrowly defined marriage institution has created an unfavorable legal environment, though not necessarily a constitutional impediment.

As Taiwan has grown into a horizontal and diverse society with an aging population, gender equality, marriage equality, and the allocation of responsibility between family and state have become pivotal issues of family law and the Constitution. These issues are neither isolated nor separate. Instead, they are manifestations of a greater and imminent need for the reconstruction of family law. That is, to recreate a legal framework to accommodate intimate relationships beyond marital family, protect the dependent and the vulnerable, and celebrate substantive equality, individual dignity and durable relationships. The radical reform of family law requires a forum where extensive dialogues could be conducted with a fair moderator and legal infrastructure. If the first wave of the constitutionalization of family law, as this article has discussed, has directed the family law away from of its patriarchal past, the next wave of constitutionalization of family law would call for building a family law for the future. This time, the Constitution, interpreted and guided by the Constitutional Court, is not merely the arbiter of disputes regarding family relations, but a platform to assist developing new family laws and redefining the relationship among individuals, family, and the society.

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# 臺灣家庭法制的憲法化

李 立 如

## 摘 要

傳統以來，家庭法被認為是一個特別的法領域，其所規範者為滿足人們基本生理心理需求的家庭，因此傳統上家庭法制所彰顯的價值為利他、關愛、與人倫秩序，而與一般強調公平正義的法領域有所不同。在臺灣法制現代化（西化）的過程中，家庭法制也的確保留了傳統性別秩序與家族制度的價值觀念與習俗。不過，從1990年代開始，隨著社會變遷與民主轉型，司法院大法官針對民法親屬編與相關家庭法制作出一連串的憲法解釋，不但宣告憲法平等原則在家庭中亦有適用，更肯認家庭權與結婚自由等基本權利，家庭法制因此產生重大的變革。本文探討臺灣家庭法制憲法化的背景、動力與過程，尤其是憲法解釋如何影響家庭法制的發展，以及家庭法的價值與論述如何在憲法秩序之中重新形塑。此外，本文也指出臺灣家庭法制憲法化的發展對於憲法與家庭法兩者所帶來的挑戰與課題。

**關鍵詞：** 憲法化、臺灣家庭法、性別平等、憲法解釋、家庭權