

THE COURT AND THE LEGALISATION OF SAME-SEX MARRIAGE: A CRITICAL ANALYSIS OF THE JUDICIAL YUAN INTERPRETATION No.748 [2017]

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ABSTRACT: *This thesis studies Judicial Yuan Interpretation No.748 [2017], which is commonly known as the first legalisation of same-sex marriage in Asia. The Taiwanese legalisation of same-sex marriage was not decided by the congress (Legislative Yuan) by a majority vote; on a contrary, it was decided by the constitutional court (Judicial Yuan) in Judicial Yuan Interpretation No.748 [2017]. In its court order recognising same-sex “unions,” the Judicial Yuan established a period of no more than two years during which the Legislative Yuan must settle the precise form of legalisation that such recognition of same-sex “unions” will take. Hence, the Legislative Yuan must decide the form of legalisation, either same-sex “marriage” or same-sex “civil partnership,” in no more than two years, and will accordingly face public acceptance or criticism of its decision. In other words, the Judicial Yuan legalised same-sex “unions” in light of its ideological attitudes but strategically avoided being criticised by the mass public.*

1. INTRODUCTION

The first legalisation of same-sex marriage in Asia was decided by the supreme judicial body of Taiwan, the Judicial Yuan, through *Judicial Yuan Interpretation No.748 [2017]*. The case was first appealed by Chi Chia-Wei on 20 August 2015¹ and subsequently appealed by the Taipei City Government on 4 November 2015.² The two appeals were consolidated by the Judicial Yuan, and the conditional leave was granted on 10 February 2017.³ The case was heard on 24 March of the same year,⁴ and the judicial decision

¹ SHIZI NO. 748 JIESHI (釋字第 748 號解釋) [Judicial Yuan Interpretation No. 748] App'x (2017).

² *Id.*

³ Judicial Yuan Proclamation (司法院新聞稿) No.106-015 (Feb. 10, 2017).

⁴ *Id.*

rendering the illegalisation of same-sex “unions” as unconstitutional was held and promulgated on 24 May.⁵

Taiwan’s Judicial Yuan is known for its judicial assertiveness,⁶ and its precedents imply that it is *de facto*⁷ and *de jure*⁸ the sole constitutional organ that enjoys the power of the last word in politics – e.g., the Justices dismissed Taiwan’s authoritarian congress for peaceful democratisation in *Judicial Yuan Interpretation No. 261* [1990] and struck down as unconstitutional the Additional Articles of the Constitution of R.O.C. (1999) in *Judicial Yuan Interpretation No. 499* [2000]. Hence, it is not a surprise in Taiwan when the Judicial Yuan orders the Legislative Yuan to legislate whatever the Court has decided, and we can also discover this pattern in Taiwan’s same-sex marriage case.⁹ The Justices held:

This Court thus orders that the authorities concerned shall amend or enact the laws as appropriate in accordance with the ruling of this Interpretation, within two years after the announcement of this Interpretation. It is within the discretion of the authorities concerned to determine the formality (for example, amendment of the Marriage Chapter, enactment of a special Chapter in Part IV on Family of the Civil Code, enactment of a special law, or other formality) for achieving the equal protection of the freedom of marriage for two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life.¹⁰

However, public opinion polls in Taiwan between 2012 and 2017 show that the Justices’ decision does not enjoy wide public support,¹¹ because public opinion in relation to the legalisation of same-sex marriage is sharply divided. The Judicial Yuan’s precedents suggest that the Court is supposed to apply the political

⁵ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017).

⁶ TOM GINSBURG, JUDICIAL REVIEWS IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 106-157 (Cambridge University Press 2003).

⁷ E.g., SHIZI NO. 261 JIESHI (釋字第261 號解釋) [Judicial Yuan Interpretation No. 261] (1990); SHIZI NO. 499 JIESHI (釋字第499 號解釋) [Judicial Yuan Interpretation No. 499] (2000).

⁸ Compare MINGUO XIANFA art. 7 (1947) (Taiwan) with MINGUO XIANFA art. 171 (1947) (Taiwan).

⁹ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017).

¹⁰ *Id.*

¹¹ See generally VALERIE J. HOEKSTRA, PUBLIC REACTION TO SUPREME COURT DECISIONS 12-15 (Cambridge University Press 2003).

question doctrine,¹² but the Justices here chose to make a concrete decision;¹³ this thesis considers this aspect as a sincere and attitudinal decision on the part of the Justices.¹⁴ Nevertheless, the Justices made a strategic decision¹⁵ that leaves “the formality for achieving the equal protection of the freedom of marriage”¹⁶ to “the authorities concerned,”¹⁷ i.e., the Legislative Yuan. In other words, the Justices decided only on the legalisation of same-sex unions,¹⁸ but strategically left the political hot potato to the Legislative Yuan, which is obliged to make a decision between the legalisation of same-sex marriage and that of same-sex civil partnerships.

2. THEORETICAL INSIGHTS

According to Alan Carter, morality implies freedom because there is no moral problem if a person has no free will to make decisions.¹⁹ Hence, the German criminal law accordingly regards any conduct without freedom as a human tool²⁰ (Menschliches Werkzeug), i.e., indirect perpetration (Mittelbare Täterschaft).²¹ However, it is obvious that in the modern era freedom is sometimes considered a threat to morality, and the dilemma between freedom and morality described by Carter is this:

If freedom lacks value, then the problem of morality seems to require no answer. On the other hand, if one’s personal freedom does have value, and if we are to take moral prescriptions seriously, then

¹² E.g., SHIZI NO. 328 JIESHI (釋字第328 號解釋) [Judicial Yuan Interpretation No. 328] (1993); see SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Huang Horng-Shya, partial dissenting); SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Wu Chen-Huan, dissenting).

¹³ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017).

¹⁴ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (Cambridge University Press 2002) (asserting that “the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices”).

¹⁵ See generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 1-21 (CQ Press 1998).

¹⁶ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Alan Carter, *Morality and Freedom*, 53 *PHILOS. Q.* 161, 161 (2003).

²⁰ IRYNA MARCHUK, *THE FUNDAMENTAL CONCEPT OF CRIME IN INTERNATIONAL CRIMINAL LAW: A COMPARATIVE LAW ANALYSIS* 205 (2014).

²¹ *Id.*

it appears that we need to provide some answer to the question of what could justify discounting that value. And were we able to do so, we would have provided an answer to the problem of morality. This implies that if we want to justify moral principles, then we need only consider the worst case, namely, when it is accepted that the freedom to choose is valuable.²²

The “worst case”²³ this thesis has proposed to justify moral principles in relation to the legalisation of same-sex marriage is to question whether morality constitutes the cause of legal discrimination, i.e., is it just to discriminate against lesbian, gay, bisexual, and transgender (LGBT) individuals legally under moral hazard concerns? In other words, is society, through its legislative institutions, entitled to constitutionally legislate a discriminatory law in accordance with morality?²⁴ As far as this thesis is concerned, morals form the source of law, as illustrated by Hans Kelsen,²⁵ but not the source of lawful discrimination.

There is no doubt that the concept of “marriage” in accordance with morals is a derivative of heterosexuality, as the concept is often associated with a societal need to establish stable and legal unions for the purpose of procreation and child rearing. However, Chris Beasley, Heather Brook, and Mary Holmes indicate that heterosexual marriage seems to be only a natural preference, because procreation is never deemed a requisite of marriage.²⁶ Hence, the moral sense of marriage, which narrows the definition to heterosexual marriage, reflects the sexual preference of the majority of people and raises a legal and constitutional question: the derivatives for the majority on the basis of heterosexuality are legally and safely protected as an “institution,”²⁷ but the absence of an equal institution ensuring derivatives for the minority, which is based upon

²² Carter, *supra* note 19, at 163.

²³ *Id.*

²⁴ *But see* R v. Secretary of State for the Home Department ex p Simms [2000] 2 AC 115 (Lord Hoffmann, holding that “Parliament can, if it chooses, legislate contrary to fundamental principles of human rights”).

²⁵ HANS KELSEN, PURE THEORY OF LAW 62-63 (Max Knight trans., University of California Press 1967).

²⁶ CHRIS BEASLEY ET AL., HETEROSEXUALITY IN THEORY AND PRACTICE 28-29 (2012).

²⁷ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Wu Chen-Huan, dissenting).

homosexuality, has traditionally been deemed legally acceptable.²⁸ On what grounds can such a great *de jure* inequity be rationalised?

Moreover, in modern societies and at least in terms of most developed countries, both heterosexuality and homosexuality are lawful, in both essence and behaviour, so the legal dilemma continues: how can the law provide no protection for lawful behaviour? When a heterosexual couple becomes engaged, the law provides them with the institution of marriage.²⁹ However, when a homosexual couple becomes engaged, the law provides them nothing *de jure* and forces them to maintain their relationship *de facto*. Both sexual preferences and behaviours are lawful, but why does the law treat them unequally?

As far as this thesis is concerned, the legalisation of same-sex marriage is not so much a claim to the freedom of marriage as a claim to equality,³⁰ i.e., that LGBT individuals should be regarded as equal to the majority of the people *de jure*, irrespective of sexual preference.³¹ Unless the law stipulates against homosexuality, in the same manner that the law prohibits incest, marriage should not be restricted to heterosexual couples. In other words, whether LGBT people are entitled to freely marry is not the core of the matter; the heart of the issue, according to this thesis, is by what ground the freedom to marry should be limited to heterosexuality.

3. STATISTICAL INSIGHTS

As a matter of fact, Taiwanese public opinion in relation to the legalisation of same-sex marriage is sharply divided, and it can be read differently: either support for or opposition to the legalisation of same-sex marriage constitutes at least one-third of the population in Taiwan, and it also depends on how such legalisation is defined. For example, a public opinion poll conducted by the Ministry of Justice³² showed that support for legal protection of same-sex marriage

²⁸ *Id.*

²⁹ THE LAW & SOCIETY READER II 339 (Erik Larson & Patrick Schmidt eds., 2014).

³⁰ *Mock Constitutional Trial No.2* (Nigel N.T. Li, concurring), 253 TAIWAN L. J. 91, 106-107 (2014).

³¹ *Id.*

³² ROC Ministry of Justice, *Baozhang Tongxing Banlu Quanyi Fangshi Zhi Minyi Diaocha* (保障同性伴侶權益方式之民意調查) [Public Opinion Poll in Relation to the Form of Legal Protection of Sam-sex Unions] 3 (Dec. 29, 2015).

comprised 56.3 per cent³³ of the total population in December 2015; however, only 35.3 per cent of the population supported the legalisation of same-sex “marriage,” along with 21 per cent of the population that only supported the legalisation of same-sex “civil partnership.”³⁴ Nevertheless, most of the public opinion polls listed in Table 1 have not differentiated the legalisation of same-sex marriage from civil partnership. Hence, these surveys in effect were precisely polls in relation to the legalisation of same-sex “unions,” rather than polls on the legalisation of same-sex “marriage.”

³³ *Id.*

³⁴ *Id.*

Table 1: Public Opinion Polls on Legalisation of Same-Sex Marriage, 2012–2017

Public Opinion Poll	Support	Oppose	N/A
TVBS Poll Center (Apr. 2012) ³⁵	49%	29%	21%
China Times Poll Center (Aug. 2012) ³⁶	56.2%	31.3%	12.5%
United Daily News Poll Center (Dec. 2012) ³⁷	55%	37%	8%
Academia Sinica (Apr. 2013) ³⁸	52.5%	30.1%	17.4%
TAPCPR (Jul. 2013) ³⁹	52.75%	37.06%	10.19%
Taiwan Foundation of Democracy (Dec. 2014) ⁴⁰	54%	44.6%	1.4%
Ministry of Justice (Dec. 2015)	56.3%	31.7%	11.6%
Taiwan Public Opinion Foundation (Nov. 2016) ⁴¹	46.3%	45.4%	8.3%
Nationalist Party (Nov. 2016) ⁴²	51.7%	43.3%	5%
Apple Daily (May 2017) ⁴³	34.34%	55.85%	9.81%

(Source: Compiled by the author)

Most of the public opinion polls in relation to the legalisation of same-sex marriage mislead us into concluding that Taiwan is ready

for anti-discrimination laws in regard to LGBT people; however, this is not at all the case. According to the 2015 Ministry of Justice poll,⁴⁴ the ratio of the supporters of same-sex marriage and civil partnership to total population was 56.3 per cent, which is approximately equal to results from other polls before 2016. However, the ratio dropped dramatically to 34.34 per cent⁴⁵ only one day after the promulgation

³⁵ *Guoren Dui Tongxinglian Kanfa Mindiao* (國人對同性戀看法民調) [Public Opinion Poll in Relation to the Public Attitude towards Homosexuality], TVBS POLL CENTER (April 2012), http://www1.tvbs.com.tw/FILE_DB/PCH/201204/5lge5lexqf.pdf [https://perma.cc/3Q8C-KBVF].

³⁶ *Guoren Dui Tongxing Hunyin Hefa Hua De Kanfa Diaocha* (國人對同性婚姻合法化的看法調查) [Public Opinion Poll in Relation to the Public Attitude towards Same-sex Marriage], CHINA TIMES POLL CENTER (Aug. 23, 2012), <http://mypaper.pchome.com.tw/miss33lin/post/1323171374> [https://perma.cc/U642-BSPZ].

³⁷ *Mindiao: Tongxing Hunyin: Yes; Zinu Tongzhi: No* (民調: 同性婚姻: Yes, 子女同志: No), UNITED DAILY NEWS (Dec. 3, 2012), <https://vision.udn.com/vision/story/7645/737364> [perma.cc/7GQ2-BFFJ] [hereinafter *Public Opinion Poll: Same-sex Marriage: Acceptable; Children as LGBT Individuals: Unacceptable*].

³⁸ Chang Ying-Hwa et al., *Taiwan Social Change Survey 2012, Phase 6, Wave 3*, ACADEMIA SINICA 308 (2013).

³⁹ *Guanjian De Shi Nian, Guanjian De 1/4: Tongxing Hunyin Fangdiao Jieguo Shuoming* (關鍵的十年, 關鍵的1/4: 同性婚姻訪調結果說明) [The Crucial Decade and the Key Quarter Vote: An Interpretation of the Public Opinion Poll in Relation to Same-sex Marriage], UNITED DAILY NEWS POLL CENTER 5 (2013) [https://perma.cc/CJ7J-ARDK].

⁴⁰ “*Tongzhi Hunyin Hefa Hua*” *Zuixin Diaocha: 2X Sui Minzhong Gaoda 84% Zhichi* (「同志婚姻合法化」最新調查: 2X歲民眾高達84%支持) [The Latest Public Opinion Poll in Relation to the “Legalisation of Same-sex Marriage”: Supported by 84% of the Citizens in the Age Group of 20 to 29], SETN (Dec. 8, 2014), www.setn.com/News.aspx?PageGroupID=1&NewsID=51829&PageType=1 [perma.cc/C5MG-8Q73].

⁴¹ Yen Chen-Kai, *Hunyin Pingquan Zuixin Mindiao: Ting Tong Fan Tong Shi Jun Li Di, 40 Sui Yi Xia Ting Tong Ju Duo* (婚姻平權最新民調: 挺同反同勢均力敵, 40歲以下挺同居多) [The Latest Public Opinion Poll in Relation to the Equality of Marriage: Support and Opposition Are Roughly the Same, Citizens under 40 Prefer the Equality of Marriage], STORM MEDIA (Nov. 28, 2016), www.storm.mg/article/194927 [perma.cc/UJD4-DRLT].

⁴² John Wang, *Guo Min Dang Gongbu Mindiao: 53% Zancheng Tongxing Hunyin Li Zhuanfa* (國民黨公佈民調: 53%贊成同性婚姻立專法) [The Nationalist Party's Public Opinion Poll: 53% of Citizens Prefer a Special Law for Same-sex Marriage], UNITED EVENING NEWS (Nov. 28, 2016), <https://www.ettoday.net/news/20161128/819415.htm> [https://perma.cc/4AZ9-BS7K].

⁴³ *Tonghun Shi Xian Yuyin Mindiao* (同婚釋憲語音民調), APPLE DAILY (May 25, 2017), <https://tw.appledaily.com/headline/daily/20170525/37662089> [perma.cc/DT4W-A2RJ] [hereinafter *Public Opinion Poll through Phone Calls in Relation to the Judicial Yuan's Decision over Same-sex Marriage*].

⁴⁴ ROC Ministry of Justice, *supra* note 32.

⁴⁵ *Public Opinion Poll through Phone Calls in Relation to the Judicial Yuan's Decision over Same-sex Marriage*, *supra* note 43.

of *Judicial Yuan Interpretation No.748* [2017]. The public opinion poll conducted by *Apple Daily* on 25 May 2017 reminds us that there is a gap between the legalisation of same-sex marriage and that of civil partnership. In other words, the supporters of civil partnership—21 per cent of the population—do not accept the legalisation of same-sex marriage, and they might not stand for protection of same-sex marriage, as indicated by the *Apple Daily* poll.

Another public opinion poll conducted by Taiwan Public Opinion Foundation in December 2016 supports the aforementioned argument. It indicated that 56 per cent of the population opposed any alteration of the traditional definition of marriage defined by the Civil Code (1929), and 37.8 per cent of the population supported it.⁴⁶ In addition, 44 percent of the population preferred a special law for same-sex unions, and 43.9 per cent of the population were in opposition.⁴⁷ In other words, the majority of Taiwanese still preferred to distinguish homosexual unions (by special law) from heterosexual marriages (by traditional civil law). As far as this thesis is concerned, this still constitutes discrimination; however, only 25.5 per cent of the population agrees.⁴⁸

The ongoing controversy in Taiwan about these issues can also be read by the poll conducted by the *United Daily News* in December 2012. It reported that 55 per cent of the population supported the legalisation of same-sex unions, but 61 per cent of the population confessed that they would not accept their children being LGBT.⁴⁹ According to the poll conducted by the Academia Sinica in April 2013, 69.1 per cent of the population agreed that Taiwanese parents would be disappointed with LGBT children,⁵⁰ and 53.7 per cent held that it is unacceptable for LGBT lovers to kiss each other on the street.⁵¹ However, 51.6 per cent accepted public kissing by heterosexuals.⁵²

⁴⁶ Cheng Hong-Bin, *Tai Wan Min Yi Min Diao: 56% Min Zhong Fan Dui Tong Hun Min Fa Hua* (台灣民意民調：56%民眾反對同婚民法化) [Taiwan's Public Opinion Poll: 56% of the Citizens Are Opposed to the Legalisation of Same-sex Marriage via the Civil Code], UNITED DAILY NEWS (Dec. 26, 2016), <https://video.udn.com/news/617825> [<https://perma.cc/3HFD-TRNW>].

⁴⁷ *Id.*

⁴⁸ Wang, *supra* note 42.

⁴⁹ *Public Opinion Poll: Same-sex Marriage: Acceptable; Children as LGBT Individuals: Unacceptable*, *supra* note 37.

⁵⁰ Chang Ying-Hwa et al., *supra* note 38.

⁵¹ *Id.* at 308.

⁵² *Id.*

Table 2: Immediacy of Legalisation of Same-Sex Marriage, 2016

Public Opinion Poll	Support	Oppose	N/A
Taiwan Public Opinion Foundation (Nov. 2016) ⁵³	22.9%	70.7%	6.4%
Nationalist Party (Nov. 2016) ⁵⁴	21.4%	63.6%	15%

(Source: Compiled by the author)

Table 2 displays Taiwan's public opinion, in November 2016, about the immediacy of legalisation of same-sex marriage. Polls conducted by the Taiwan Public Opinion Foundation and the Nationalist Party showed that at least two-thirds of the total population in Taiwan did not consider the legalisation of same-sex marriage as an urgency.⁵⁵ However, when the polls are scrutinised according to nuances in the Chinese language, they should be interpreted as applying to the immediacy of legalisation for same-sex unions, in general. In other words, the polls ask whether it is urgent to protect same-sex unions, and the answer from the Taiwanese majority is negative, i.e., the lack of legal protection is currently acceptable.

⁵³ Cheng, *supra* note 46.

⁵⁴ Wang, *supra* note 42.

⁵⁵ Cheng, *supra* note 46; Wang, *supra* note 42.

Table 3: Analysis of the Legalisation of Same-Sex Marriage by Age, 2013⁵⁶

	<20	20-29	30-39	40-49	50-59	>60
Consent	28 (75.68%)	103 (77.44%)	122 (71.76%)	98 (50.78%)	91 (45.73%)	36 (22.93%)
Dissent	9 (24.32%)	30 (22.56%)	48 (28.24%)	95 (49.22%)	108 (54.27%)	121 (77.07%)
Chi-square Test: $\chi^2=139.721$; $p=0.000 < 0.05$						

(Source: ROC Ministry of Justice)

However, an associative analysis by age shows that the young generation clearly prefers the legalisation of same-sex unions,⁵⁷ though it is unclear whether they support the legalisation of same-sex marriage or that of civil partnership, because the public opinion poll conducted by the Ministry of Justice in December 2013 made no distinction between the two forms of legalisation.

4. METHODOLOGY

One of the main arguments within Taiwan about the legalisation of same-sex marriage⁵⁸ can be identified as a metaphysical debate in relation to the problem of universals⁵⁹, i.e., is same-sex marriage actually marriage? Such a legal dispute about

⁵⁶ ROC Ministry of Justice, *Taiwan Tongxing Hunyin Fazhigua Zhi Diaocha Yanjiu* (台灣同性婚姻法治化之調查研究) [A Study of Legalisation of Same-sex Marriage in Taiwan] 64-70 (2003).

⁵⁷ *Id.*

⁵⁸ This is illustrated by comparing SHIZI NO. 748 JIESHI (釋字第748號解釋) [Judicial Yuan Interpretation No. 748] (2017) with its appendix.

⁵⁹ See generally GONZALO RODRIGUEZ-PEREYRA, RESEMBLANCE NOMINALISM: A SOLUTION TO THE PROBLEM OF UNIVERSALS 31-42 (2002).

“nominalism”⁶⁰ somehow reveals a fundamental problem of Taiwan’s civil law system: the law, which is based upon principles only, is too abstract, so that Taiwanese jurists must begin with a debate on the precise definition of marriage in accordance with the Civil Code (1929).⁶¹ However, if we apply common law rules of interpretation⁶² to Taiwan, the core of *Judicial Yuan Interpretation No. 748* [2017] is revealed autonomously without being mired in philosophical difficulties. Hence, this thesis rests on the application of common law rules of interpretation developed in England and Wales⁶³ and accordingly interpreted in *Judicial Yuan Interpretation No. 748* [2017].

It is somehow absurd for legal professionals to argue whether same-sex marriage is banned by the present law or not. It is inconceivable to even think that jurists in common law countries would argue whether statutory legislation “implies” the consent to same-sex marriage or not, rather than applying the presumption against an alteration to common law.⁶⁴ However, this happens in civil law countries such as Taiwan. The lack of precise rules of interpretation can enrich the development of legal theories, but it also lowers the stability of law and sometimes confuses the core of the case.

Moreover, this thesis studies *Judicial Yuan Interpretation No. 748* [2017] through judicial behaviourism, applying both the attitudinal and the strategic models to interpret the Justices’ adjudication accordingly.

5. THE INTERESTED PARTIES

The interested parties in *Judicial Yuan Interpretation No. 748* [2017] were Chi Chia-Wei, the Taipei City Government, the Ministry of the Interior, and the Ministry of Justice. Due to the institutional design of the constitutional judicial review, the Judicial Yuan not only hears appeals in civil, criminal, and administrative cases from

⁶⁰ See generally *id.*

⁶¹ See text accompanying note 58.

⁶² See generally ALISDAIR A. GILLESPIE & SIOBHAN WEARE, *THE ENGLISH LEGAL SYSTEM* 38-64 (6th ed., Oxford University Press 2017).

⁶³ See generally *id.*

⁶⁴ NEIL DUXBURY, *ELEMENTS OF LEGISLATION* 36-39 (2013).

the inferior courts,⁶⁵ i.e., the Civil and Criminal Divisions of the Supreme Court and the Supreme Administrative Court, but also grants compulsory advisory opinions to the government agencies both *ex ante*⁶⁶ and *ex post*.⁶⁷ As such, it is sometimes difficult to identify both the appellant and the respondent in accordance with the Constitutional Interpretation Procedure Act (1948/1993):

When a government agency, in carrying out its function and duty, has doubt about the meanings of a constitutional provision; or, when a government agency disputes with other agencies in the application of a constitutional provision; or, when a government agency has questions on the constitutionality of a statute or regulation at issue;⁶⁸

When an individual, a legal entity, or a political party, whose constitutional right was infringed upon and remedies provided by law for such infringement had been exhausted, has questions on the constitutionality of the statute or regulation relied thereupon by the court of last resort in its final judgment;⁶⁹

Judicial Yuan Interpretation No. 748 [2017] consisted of two related appeals. The first appeal, requested by the Taipei City Government,⁷⁰ was categorised as a compulsory advisory opinion. In this case, the Taipei City Government was the appellant, but there was no respondent by nature. Hence, both the Ministry of the Interior and the Ministry of Justice were identified as the agencies concerned. However, the second appeal was based upon the *Supreme Administrative Court Adjudication, 103 Trial No. 521* [2014], i.e., *Chi Chia-Wei v. Taipei City Government*;⁷¹ thus, both the appellant and the respondent were clear.

⁶⁵ See SHIZI No. 371 JIESHI (釋字第371號解釋) [Judicial Yuan Interpretation No. 371] (1995) (establishing the leapfrog appeal to the Judicial Yuan).

⁶⁶ See e.g., SHIZI No. 365 JIESHI (釋字第371號解釋) [Judicial Yuan Interpretation No. 365] (1994) (requesting a guidance regarding to the amendment of the Civil Code (1929) in advance).

⁶⁷ See e.g., SHIZI No. 342 JIESHI (釋字第342號解釋) [Judicial Yuan Interpretation No. 1994] (2017) (requesting a decision in determining the law-making procedure of the congress after an act in dispute is enacted).

⁶⁸ Constitutional Interpretation Procedure Act of R.O.C. § 5 (1948/1993).

⁶⁹ *Id.*

⁷⁰ Sifa Yuan Dafaguan Jieshi No. 748 (司法院大法官第 748 號解釋) [Judicial Yuan Interpretation No. 748] App'x, May 24, 2017 (Taiwan).

⁷¹ Please be aware that *Chi Chia-Wei v. Taipei City Government* is not Taiwan's official citation form of the case. The official citation form is: Zuigao Xingzheng Fayuan (最高行政法院) [Supreme Administrative Court], 103 Trial No. 521 [2014].

5.1. The Appellant and the Respondent

It is notable that the Taipei City Government was both the appellant and the respondent in *Judicial Yuan Interpretation No. 748* (2017). The appeal was filed by Chi Chia-Wei because of its disallowance of same-sex marriage registration according to law;⁷² however, the City Government was also the appellant by requesting a constitutional judicial review with regard to same-sex marriage.⁷³ According to the Taipei City Government, it had received more than 300 requests for same-sex marriage registration in two years' time, and they held this human rights event as non-negligible.⁷⁴ Hence, the Taipei City Government expected the Judicial Yuan to "give the final word."⁷⁵

There is no doubt that the Taipei City Government stands for same-sex marriage, though it must reject same-sex marriage registration under rule of law. The City Mayor, Ko Wen-Je, enunciated that the appeal of constitutional judicial review indicates the "gesture"⁷⁶ of the City Government on same-sex marriage. Such a political gesture on human rights issues and rule of law is typically Taipei style; in *Judicial Yuan Interpretation No. 618* [2006], the City Government also rejected the petition under rule of law, but encouraged the petitioner, Xie Hong-Mei, to sue the City Government for discrimination.⁷⁷

The main argument about same-sex marriage submitted by the City Government asserted that the freedom of marriage is

⁷² Taipei High Administrative Court Adjudication, 102 Suit No.931 [2014]; Supreme Administrative Court Adjudication, 103 Trial No.521 [2014]; Shizi No. 748 Jieshi (釋字第 748 號解釋) [Judicial Yuan Interpretation No. 748] (2017).

⁷³ SHIZI NO. 748 JIESHI (釋字第 748 號解釋) [Judicial Yuan Interpretation No. 748] App'x (2017).

⁷⁴ Chu Tse-Wei et al., *Tonghun Shixian An: Bei Shi Fu: Yin Wujie Chansheng Duili* (同婚釋憲案 北市府：因誤解產生對立) [About the Constitutional Judicial Review in Relation to Same-sex Marriage, Taipei City Government: The Opposition Roots in the Misunderstanding], CENTRAL NEWS AGENCY (Mar. 24, 2017), <http://www.cna.com.tw/news/asoc/201703240183-1.aspx> [perma.cc/HEA5-RJH3].

⁷⁵ *Id.*

⁷⁶ Jiang Yu-Kuei, *Tong Hun Shi Xian Mai Da Bu: Ko Wen-Je: Zhe Shi Yi Zhong Tai Du* (同婚釋憲邁大步 柯文哲：這是一種態度) [The Constitutional Judicial Review in Relation to Same-sex Marriage Is A Big Step Forward: Ko Wen-Je: This Is A Gesture], NOW NEWS (May 24, 2017), <https://www.nownews.com/news/20170524/2536079> [perma.cc/74TM-H47R].

⁷⁷ SHIZI NO. 618 JIESHI (釋字第618號解釋) [Judicial Yuan Interpretation No. 618] (2006).

constitutionally protected⁷⁸ and “[a]ll the freedoms and rights enumerated in the preceding Articles shall not be restricted by law except by such as may be necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare.”⁷⁹ But the freedom of marriage is *de jure* restricted to heterosexual marriage by the Civil Code (1929): “An agreement to marry shall be made by the male and the female parties in their own concord.”⁸⁰ In other words, Article 972 of the Civil Code (1929) deprived LGBT individuals of the freedom to marry because the freedom to choose a spouse in a same-sex marriage is *de jure* excluded.⁸¹

Moreover, the Taipei City Government argued that it is unconstitutional to ban same-sex marriage in accordance with Article 23 of the Constitution.⁸² The City Government applied the doctrine of *clausula rebus sic stantibus*, asserting expressly that the freedom of marriage that rests on the social understanding of marriage nearly 90 years ago is disproportional;⁸³ the City Government hinted that the civil law is out of date.⁸⁴ Based on the principle of proportionality,⁸⁵ the City Government doubted the legality of the definition of marriage provided by Article 972 of the Civil Code (1929), because the prohibition against same-sex marriage cannot “advance public welfare” and has nothing to do with “social order.”⁸⁶ Hence, the freedom to marry cannot be restricted to heterosexual couples.⁸⁷

Finally, the Taipei City Government asserted⁸⁸ that the ban against same-sex marriage is incompatible with the principle of

⁷⁸ Compare MINGUO XIANFA art. 22 (1947) (Taiwan) with Shizi No. 552 Jieshi (釋字第552號解釋) [Judicial Yuan Interpretation No. 552] (2002).

⁷⁹ See MINGUO XIANFA art. 23 (1947) (Taiwan) (stipulating the principle of proportionality).

⁸⁰ Minfa (民法) [Civil Code of the R.O.C.] § 972 (1929) (Taiwan).

⁸¹ Compare Minfa (民法) [Civil Code of the R.O.C.] § 972 (1929) (Taiwan) with Minfa (民法) [Civil Code of the R.O.C.] § 982 (1929/2007) (Taiwan) (applying the doctrine of *noscitur a sociis* that the term of agreement to marry implies the term of marriage).

⁸² SHIZI NO. 748 JIESHI (釋字第 748 號解釋) [Judicial Yuan Interpretation No. 748] App’x (2017).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ MINGUO XIANFA art. 23 (1947) (Taiwan).

⁸⁶ *Id.*

⁸⁷ Sifa Yuan Dafaguan Jieshi No. 748 (司法院大法官第 748 號解釋) [Judicial Yuan Interpretation No. 748] Appendix: Chi Chia-Wei’s Petition, May 24, 2017 (Taiwan).

⁸⁸ *Id.*

equality embodied in the Constitution.⁸⁹ Article 972 of the Civil Code (1929) has deprived LGBT people in Taiwan of the freedom to marry and directly constitutes discrimination against them.⁹⁰

5.2. *The Appellant Chi Chia-Wei*

Chi Chia-Wei was the first person in Taiwan to have publicly identified himself as LGBT,⁹¹ and he has fought for same-sex marriage in Taiwan for 30 years.⁹² His registration of same-sex marriage was rejected by the Wanhua Household Registration Office of Taipei on 22 March 2013,⁹³ and the petition for reconsideration was dismissed on 29 May.⁹⁴ He subsequently appealed to the Taipei High Administrative Court and the Supreme Administrative Court; however, both appeals were dismissed.⁹⁵

In *Taipei High Administrative Court Adjudication, 102 Suit No.931* [2014], Judge Hu Fang-Xin held that same-sex marriage is literally excluded by the Civil Code (1929) because the Code provides the meaning of the words within the statute. In other words, the High Administrative Court had no power to modify the meaning of marriage decided by the legislature. Moreover, the Court held that Article 23II of the International Covenant on Civil and Political Rights (1966) does not imply or hold any basis for the legitimisation of same-sex marriage. Hence, the Court dismissed the appeal.⁹⁶

In *Supreme Administrative Court Adjudication, 103 Trial No.521* [2014], Judge Huang He-Wen affirmed the decision in *Taipei High Administrative Court Adjudication, 102 Suit No.931* [2014]. He further indicated that the Court interpreted the Civil Code (1929) in accordance with the purposive rule⁹⁷ and found same-sex marriage

⁸⁹ MINGUO XIANFA art. 7 (1947) (Taiwan).

⁹⁰ SHIZI NO. 748 JIESHI (釋字第 748 號解釋) [Judicial Yuan Interpretation No. 748] App'x (2017).

⁹¹ *Id.*

⁹² AFP, *Chi Chia-Wei Eyes End to 30-Year Gay Marriage Fight*, TAIPEI TIMES (May 14, 2017), <http://www.taipeitimes.com/News/taiwan/print/2017/05/14/2003670568> [perma.cc/P2NA-TKBY].

⁹³ SHIZI NO. 748 JIESHI (釋字第 748 號解釋) [Judicial Yuan Interpretation No. 748] App'x (2017).

⁹⁴ *Id.*

⁹⁵ Taipei High Administrative Court Adjudication, 102 Suit No.931 [2014]; Supreme Administrative Court Adjudication, 103 Trial No.521 [2014].

⁹⁶ Taipei High Administrative Court Adjudication, 102 Suit No.931 [2014].

⁹⁷ See generally *R v. Secretary of State for Health ex parte Quintavalle* [2003] UKHL 13, <https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd030313/quinta-1.htm>

incompatible. It seems that the Court read marriage as common law, so that same-sex marriage cannot be deemed lawful because of the presumption against an alteration to common law:⁹⁸ “[S]tatutes are to be interpreted in the light of the common law. . . . [S]tatutes are not presumed to make any alteration in the common law further, or otherwise, than the act does expressly declare.”⁹⁹ Hence, the Court also dismissed the appeal.¹⁰⁰

Chi Chia-Wei appealed the *Supreme Administrative Court Adjudication, 103 Trial No.521* [2014] on 20 August 2015. His main argument¹⁰¹ rested on the principle of equality embodied in the Constitution.¹⁰² He asserted that Article 7 of the Constitution (1947) presumes against discrimination unless and until it is proved necessary;¹⁰³ hence, he requested that the legal definition of marriage be subject to strict scrutiny¹⁰⁴ for the sake of equal protection.¹⁰⁵ Moreover, he linked the legalisation of same-sex marriage with the international standard of human rights, persuading the Justices to override the definition of marriage provided by the Civil Code (1929).¹⁰⁶

However, there were many paradoxical assertions within Chi Chia-Wei’s instrument of appeal. He argued that there is no written restriction against same-sex marriage provided by the Civil Code (1929) when he blamed the courts for misinterpretation; yet he later altered his argument and claimed that the prohibition of same-sex marriage stipulated by the Civil Code (1929) constitutes discrimination against homosexual orientation.¹⁰⁷ Moreover, he

[<https://perma.cc/NG94-DALT>].

⁹⁸ DUXBURY, *supra* note 64.

⁹⁹ GUSTAV ADOLF ENDLICH, A COMMENTARY ON THE INTERPRETATIONS OF STATUTES 173 (Lawbook Exchange 2006) (1888).

¹⁰⁰ Supreme Administrative Court Adjudication, 103 Trial No.521 [2014].

¹⁰¹ SHIZI NO. 748 JIESHI (釋字第 748 號解釋) [Judicial Yuan Interpretation No. 748] App’x (2017).

¹⁰² Compare MINGUO XIANFA art. 7 (1947) (Taiwan) with MINGUO XIANFA art. 23 (1947) (Taiwan).

¹⁰³ NIGEL N.T. LI (李念祖), ANLI XIANFA III: RENQUAN BAOZHANG DE NEIRONG (案例憲法III (下) — 人權保障的內容) [CONSTITUTIONAL CASE STUDIES III: THE MERIT OF HUMAN RIGHTS PROTECTION], BOOK 2 476-478 (2006).

¹⁰⁴ SHIZI NO. 748 JIESHI (釋字第 748 號解釋) [Judicial Yuan Interpretation No. 748] App’x (2017).

¹⁰⁵ CHUCK STEWART, HOMOSEXUALITY AND THE LAW: A DICTIONARY 185 (2001).

¹⁰⁶ SHIZI NO. 748 JIESHI (釋字第 748 號解釋) [Judicial Yuan Interpretation No. 748] App’x (2017).

¹⁰⁷ *Id.*

persuaded the Justices to legalise same-sex marriage in Taiwan in order to meet the international human rights standard by telling the Justices that only one-tenth of the countries in the world had legalised same-sex marriage.¹⁰⁸ It was even more problematic that after he devoted space and energy to arguments based on international law, he later argued that the Constitution is supreme and international law is inferior.¹⁰⁹

5.3. *The Agencies Concerned*

On a strict view, there is no attorney general in Taiwan because the Prosecutor General of the Republic of China does not “fill the role of legal advisor”¹¹⁰ to the government. However, the Ministry of the Interior, as the prime agency concerned in *Judicial Yuan Interpretation No. 748* [2017], requested an advisory opinion provided by the Ministry of Justice and directly “[deferred] to the MOJ’s opinions on the constitutionality of the Marriage Chapter.”¹¹¹ Hence, the advisory opinion¹¹² served as the main argument of the agencies concerned, and the Ministry of Justice was thus directly involved.

The first argument of the Ministry of Justice was based upon the presumption against an alteration to common law.¹¹³ It asserted that the definition of marriage embodied in the Civil Code (1929) has been established by custom and ethics for thousands of years, and the Code simply respects that tradition.¹¹⁴ Hence, the definition of marriage in the Code definitely excludes same-sex marriage.¹¹⁵ In addition, the Ministry of Justice argued that the definition of marriage established by custom and ethics demands respect and constitutes a

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ GABRIELLE APPLEBY, THE ROLE OF THE SOLICITOR-GENERAL: NEGOTIATING LAW, POLITICS AND THE PUBLIC INTEREST 35 (2016); STEVE WILSON ET AL., ENGLISH LEGAL SYSTEM 52 (2014).

¹¹¹ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017).

¹¹² SHIZI NO. 748 JIESHI (釋字第 748 號解釋) [Judicial Yuan Interpretation No. 748] App’x (2017).

¹¹³ See generally DUXBURY, *supra* note 64.

¹¹⁴ SHIZI NO. 748 JIESHI (釋字第 748 號解釋) [Judicial Yuan Interpretation No. 748] App’x (2017).

¹¹⁵ *Id.*

common law right,¹¹⁶ and the Civil Code (1929) does not serve to alter any common law right unless it clearly says so.¹¹⁷

The second argument of the Ministry of Justice indicated that the freedom to marry is not a constitutional right until the Justices say it is, because nothing in the Constitution addresses the issue.¹¹⁸ Moreover, in accordance with precedent, the Justices have never granted the freedom to enter into same-sex marriage.¹¹⁹ Therefore, the Ministry of Justice cast strong doubt on the legality of same-sex marriage in Taiwan.¹²⁰

The third argument of the Ministry of Justice rested on the “mischief rule.”¹²¹ According to the Constitution, “All citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law.”¹²² However, the Ministry of Justice argued that it is irrational to allege that the Constitution permits same-sex marriage because the aforementioned constitutional Article only intends to protect gender equality between men and women;¹²³ the term “sex” adopted in the Constitution is “men (Nan) and women (Nu).” Hence, the Ministry of Justice asserted that there are no equality rights of same-sex marriage found in the Constitution.¹²⁴ The presumption of constitutional protection for same-sex marriage implies the presumption of Chinese acceptance of LGBT individuals in the 1940s, which is not true.

Finally, the Ministry of Justice asserted that same-sex marriage is not yet a universal value in Taiwan; thus, it is premature to acknowledge same-sex marriage as a constitutional right.¹²⁵ Moreover, international law imposes no obligation on countries to legalise same-sex marriage, so it is disproportional to legalise same-sex marriage at this point.¹²⁶ In other words, the Ministry of Justice

¹¹⁶ Minfa (民法) [Civil Code of the R.O.C.] § 1 (1929) (Taiwan).

¹¹⁷ SHIZI NO. 748 JIESHI (釋字第 748 號解釋) [Judicial Yuan Interpretation No. 748] App’x (2017).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See generally* Heydon’s Case [1584] 3 Co Rep 79.

¹²² MINGUO XIANFA art. 7 (1947) (Taiwan).

¹²³ Sifa Yuan Dafaguan Jieshi No. 748 (司法院大法官第 748 號解釋) [Judicial Yuan Interpretation No. 748] App’x, May 24, 2017 (Taiwan).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

disagreed with granting a constitutional right that is not yet deemed a universal value in Taiwan.¹²⁷

6. JUDICIAL YUAN INTERPRETATION NO.748 [2017]

Judicial Yuan Interpretation No. 748 [2017] was appealed by Chi Chia-Wei on 20 August 2015¹²⁸ and by the Taipei City Government on 4 November 2015.¹²⁹ The two appeals were consolidated by the Justices, and conditional leave was granted on 10 February 2017.¹³⁰ The case was heard by 14 of the 15 Justices¹³¹ on 24 March 2017,¹³² and the decision was promulgated on 24 May.¹³³ The Justices held unconstitutional the pertinent provisions of the Civil Code (1929) in relation to marriage and said:

The provisions of [. . .] the Civil Code do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life. The said provisions, to the extent of such failure, are in violation of constitution's guarantees of both the people's freedom of marriage under Article 22 and the people's right to equality under Article 7.¹³⁴

The reasoning of *Judicial Yuan Interpretation No.748* [2017] began with Chi Chia-Wei's long march towards the legalisation of same-sex marriage.¹³⁵ The Justices affirmed that "[f]or more than three decades, Chia-Wei Chi has been appealing to the legislative, executive, and judicial departments for the right to same-sex marriage."¹³⁶ However, "after more than a decade, the [Legislative Yuan] is still unable to pass the legislation regarding same-sex marriage"¹³⁷ and "it is still uncertain when these bills will be

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Judicial Yuan Proclamation (司法院新聞稿) No.106-015 (10 February 2017).

¹³¹ See SHIZI NO. 748 JIESHI (釋字第748號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Justice Huang Jui-Ming applying disqualification due to his wife's political preference that she is the congresswoman who promotes the bill of same-sex marriage in Taiwan).

¹³² Judicial Yuan Proclamation (司法院新聞稿) No.106-015 (10 February 2017).

¹³³ SHIZI NO. 748 JIESHI (釋字第748號解釋) [Judicial Yuan Interpretation No. 748] (2017).

¹³⁴ *Id.*

¹³⁵ SHIZI NO. 748 JIESHI (釋字第748號解釋) [Judicial Yuan Interpretation No. 748] Reasoning ¶ 8 (2017).

¹³⁶ *Id.*

¹³⁷ *Id.* at ¶ 9.

reviewed on the floor of the [Legislative Yuan].”¹³⁸ Hence, the Court justified its political intervention and issued a court order for same-sex marriage:

The authorities concerned shall amend or enact the laws as appropriate, in accordance with the ruling of this Interpretation, within two years from the announcement of this Interpretation. It is within the discretion of the authorities concerned to determine the formality for achieving the equal protection of the freedom of marriage. If the authorities concerned fail to amend or enact the laws as appropriate within the said two years, two persons of the same sex who intend to create the said permanent union shall be allowed to have their marriage registration effectuated at the authorities in charge of household registration, by submitting a written document signed by two or more witnesses in accordance with the said Marriage Chapter.¹³⁹

It is obvious that the Justices prefer the legalisation of same-sex unions, but we do not know the type of legalisation that they prefer—same-sex marriage or civil partnership. However, it can be reasonably asserted that the Justices deliberately made a strategic decision¹⁴⁰ that leaves “the formality for achieving the equal protection of the freedom of marriage”¹⁴¹ to “the authorities concerned,”¹⁴² i.e., the Legislative Yuan. The evidence is actually provided by the Justices themselves. If the Justices are capable of issuing a court order that authorises LGBT individuals to “have their marriage registration effectuated at the authorities in charge of household registration, by submitting a written document signed by two or more witnesses”¹⁴³ when “the authorities concerned fail to amend or enact the laws as appropriate within the said two years,”¹⁴⁴ then the Justices are constitutionally powerful enough to unilaterally decide the proper form of the legalisation of same-sex unions. In other words, they did not want to make a firm decision on the form

¹³⁸ *Id.*

¹³⁹ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017).

¹⁴⁰ *See generally* EPSTEIN & KNIGHT, *supra* note 15.

¹⁴¹ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

that legalisation would take and thus strategically ordered “the authorities concerned”¹⁴⁵ to do so.

Moreover, the Justices not only described *Judicial Yuan Interpretation No. 748* [2017] as a case with “the very controversial social and political issues of whether homosexuals shall have the autonomy to choose whom to marry, and of whether they shall enjoy the equal protection of the same freedom of marriage as heterosexuals,”¹⁴⁶ but they also indicated the legal ground for judicial intervention: concerning human rights, the Judicial Yuan has the jurisdiction to scrutinise even legislative omissions:¹⁴⁷

[T]he timetable for such legislative solution is hardly predictable now and yet these petitions concern the protection of people’s fundamental rights. It is the constitutional duty of this Court to render a binding judicial decision, in time, on issues concerning the safeguarding of constitutional basic values. [. . .] For these reasons, this Court [. . .] has made its best efforts in granting review of these petitions and, after holding oral hearing on the designated date, has made this Interpretation to address the above constitutional issues.¹⁴⁸

It appears that the Justices attempted to communicate with their audiences¹⁴⁹ through their ruling, and we may also identify whom they aimed to communicate with.¹⁵⁰ When the Justices defend judicial intervention in a case that involves political controversy, their audience is not the general public¹⁵¹ (because it is unnecessary to explain “the principle of mutual respect among governmental

¹⁴⁵ *Id.*

¹⁴⁶ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] Reasoning ¶ 10 (2017).

¹⁴⁷ See generally WU GENG (吳庚), XIAN FA DE JIE SHI YU SHI YONG (憲法的解釋與適用) [THE INTERPRETATION AND APPLICATION OF THE CONSTITUTION] 408-419 (2004) (applying the German legal principle of intensivierte inhaltliche Kontrolle and the Schumannsche Formel).

¹⁴⁸ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] Reasoning ¶ 10 (2017).

¹⁴⁹ See generally LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 25-49 (2006).

¹⁵¹ *Id.* at 46-47.

¹⁵² *Id.* at 60-72.

powers”¹⁵²), but the Legislative Yuan.¹⁵³ Furthermore, it is also unnecessary to discuss the counter-majoritarian difficulty¹⁵⁴ unless the audience is the law society.¹⁵⁵ Hence, the Justices in *Judicial Yuan Interpretation No. 748* [2017] considered the Legislative Yuan and the law society as their crucial audiences, and we posit that the reason is based upon statistics: Taiwanese public opinion in regard to the legalisation of same-sex marriage is divided, so the Justices could not obtain public support under such a circumstance.¹⁵⁶

The Justices’ statement in *Judicial Yuan Interpretation No. 748* [2017] not only reflects their political concern but also exposes their preference for same-sex unions; when public opinion is divided, the Judicial Yuan’s precedents suggest either the application of the political question doctrine¹⁵⁷ or procedural dismissal¹⁵⁸ (Beschluss). Nevertheless, in this ruling the Justices did not follow these patterns, and it is likely that legalisation of same-sex unions was their policy preference.¹⁵⁹

Those prior [Judicial Yuan] Interpretations mentioning “husband and wife” or “a man and a woman” were made within the context of opposite-sex marriage, in terms of the factual backgrounds of the original cases from which they arose. [. . .] Thus far, this

¹⁵³ SHIZI No. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] Reasoning ¶ 10 (2017).

¹⁵⁴ Cf. Vicki C. Jackson, *Federalism and the Court: Congress as the Audience?*, 574(1) ANN. AM. ACAD. POL. SOC. SCI. 145, 145-157 (2001) (indicating the influence of a legislature to a supreme court so that the court shall consider the legislature as its audience).

¹⁵⁴ SHIZI No. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Wu, Chen-Huan, dissenting); see also ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 9-22 (1986); see also Or Bassok, *The Two Counter-majoritarian Difficulties*, 31 ST. LOUIS U. PUB. L. REV. 333 (2012) (showing “the deep influence of public opinion polls on American constitutional thought by analysing two versions of the counter-majoritarian difficulty”).

¹⁵⁵ BAUM, *supra* note 149.

¹⁵⁶ See Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13(2) UNIV. PA. J. CONST. LAW 283, 283-284 (2010) (asserting that the courts can disregard the criticism based upon the counter-majoritarian difficulty “if public opinion [. . .] comes [sic] in line with the judicial view”).

¹⁵⁷ E.g., S SHIZI No. 328 JIESHI (釋字第328號解釋) [Judicial Yuan Interpretation No. 328] (1993).

¹⁵⁸ E.g., Judicial Yuan Dismissal Resolution No. 1166 [2001] (Chi Chia-Wei’s first appeal to the Judicial Yuan against the prohibition of same-sex marriage).

¹⁵⁹ See generally SEGAL & SPAETH, *supra* note 14 (arguing that the decision-making processes of the U.S. Supreme Court are based on the justices’ attitudes and values instead of “plain meaning, intent of the framers (or legislators), precedent, and balancing”).

Court has not made any Interpretation on the issue of whether two persons of the same sex are allowed to marry each other.¹⁶⁰

The first announcement of the Justices in *Judicial Yuan Interpretation No. 748* [2017] was that the decision in this case was given *per incuriam*, and it is over-interpretative to assert that the Court's precedents constituted any protection against the prohibition of same-sex marriage.¹⁶¹ Moreover, the Justices affirmed that the Civil Code (1929) provides no space for same-sex marriage in accordance with the *noscitur a sociis* doctrine that the term of agreement to marry implies the term of marriage.¹⁶² In other words, the Justices upheld that same-sex marriage is legally banned in Taiwan, which establishes this controversy as a constitutional issue, and the *interpretatio authentica* of such a circumstance is reserved exclusively for the Judicial Yuan.¹⁶³ Hence, the Justices affirmed that:

Unspoused persons eligible to marry shall have their freedom of marriage, which includes the freedom to decide “whether to marry” and “whom to marry.” [. . .] Such decisional autonomy is vital to the sound development of personality and safeguarding of human dignity, and therefore is a fundamental right to be protected by Article 22 of the Constitution. [. . .] Furthermore, the freedom of marriage for two persons of the same sex, once legally recognized, will constitute the bedrock of a stable society, together with opposite-sex marriage. The need, capability, willingness and longing, in both physical and psychological senses, for creating such permanent unions of intimate and exclusive nature are equally essential to homosexuals and heterosexuals, given the importance of the freedom of marriage to the sound development of personality and safeguarding of human dignity. Both types of union shall be protected by the freedom of marriage under Article 22 of the Constitution.¹⁶⁴

The main reason the Justices preferred same-sex unions rests on “the sound development of personality and safeguarding of human

¹⁶⁰ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] Reasoning ¶ 11 (2017).

¹⁶¹ *Id.*

¹⁶² *Id.* at ¶ 12.

¹⁶³ Compare MINGUO XIANFA art. 171 (1947) (Taiwan) with MINGUO XIANFA art. 173 (1947) (Taiwan).

¹⁶⁴ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] Reasoning ¶ 13 (2017).

dignity,”¹⁶⁵ by which they disagreed with the legal classification of “permanent union of intimate and exclusive nature”¹⁶⁶ between heterosexuality and homosexuality. Such an opinion should not be overinterpreted; it does not mean that the Justices found no difference between the two; however, it surely means that the Justices did not consider the “permanent union of intimate and exclusive nature”¹⁶⁷ as an exclusive right for heterosexual couples.¹⁶⁸ We hold that this was the Justices’ sincere and attitudinal¹⁶⁹ decision. The Justices held that:

The current Marriage Chapter only provides for the permanent union between a man and a woman, without providing that two persons of the same sex may also create an identical permanent union. This constitutes a classification on the basis of sexual orientation, which gives homosexuals relatively unfavorable treatment in their freedom of marriage.¹⁷⁰

The “ideological attitudes and values of the [J]ustices”¹⁷¹ can be read by the Justices’ interpretations of Articles 7 and 22 of the Constitution of 1947. The two Articles state nothing with respect to the right to same-sex marriage; Article 7 provides that “[a]ll citizens of the Republic of China, irrespective of sex, religion, race, class, or party affiliation, shall be equal before the law;”¹⁷² and Article 22 stipulates that “[a]ll other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.”¹⁷³ However, the Justices interpreted that “[t]he five classifications of impermissible discrimination set forth in [Article 7] are only illustrative, rather than exhaustive. Therefore, different treatment based on other classifications, such as disability

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at ¶ 15.

¹⁶⁹ See generally LAWRENCE S. WRIGHTSMAN, *THE PSYCHOLOGY OF THE SUPREME COURT* 109-132 (2006) (explaining the attitudinal model which proposes that “judges’ decisions are based on the facts of the case but only ‘in light of the ideological attitudes and values of the justices’”); see also SEGAL & SPAETH, *supra* note 14 (asserting that “the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices”).

¹⁷⁰ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] Reasoning ¶ 15 (2017).

¹⁷¹ SEGAL & SPAETH, *supra* note 14, at 86.

¹⁷² MINGUO XIANFA art. 7 (1947) (Taiwan).

¹⁷³ *Id.* art. 22.

or sexual orientation, shall also be governed by the right to equality under the said Article.”¹⁷⁴ Moreover, the linkage between Article 22 and same-sex marriage is that “[g]iven its close relation to the freedom of personality and human dignity, the freedom of marriage promised by Article 22 of the Constitution is a fundamental right;”¹⁷⁵ thus “the provisions of the Marriage Chapter are incompatible with the spirit and meaning of the freedom of marriage as protected by Article 22 of the Constitution.”¹⁷⁶ In other words, the right of same-sex marriage in Taiwan is a constitutional right created by (or, at least, interpreted by) the Justices¹⁷⁷ because the Constitution stipulates nothing at all.

Based upon this judge-made constitutional right to same-sex marriage, the Justices affirmed that prohibition of same-sex unions is unconstitutional¹⁷⁸ for the following three reasons:

1. The Justices asserted that “sexual orientation is an immutable characteristic that is resistant to change.”¹⁷⁹ Hence, it is incorrect to deem homosexuality a disease.¹⁸⁰ On a contrary, it is appropriate to classify LGBT individuals into a sort of “ethic and social” minority that requires affirmative action measures¹⁸¹ in order to fulfil the genuine equality provided by the Constitution.¹⁸²

2. The Court disagreed with the assertion that procreation is integral to an essential definition of marriage because there is no such legal obligation for heterosexual couples.¹⁸³ Hence, it is surely irrational¹⁸⁴ to burden homosexual couples with

¹⁷⁴ SHIZI NO. 748 JIESHI (釋字第748號解釋) [Judicial Yuan Interpretation No. 748] Reasoning ¶ 14 (2017).

¹⁷⁵ *Id.* at ¶ 15.

¹⁷⁶ *Id.* at ¶ 13.

¹⁷⁷ *See* SHIZI NO. 185 JIESHI (釋字第185號解釋) [Judicial Yuan Interpretation No. 185] (1984) (holding that the Justices’ decision “shall be binding upon every institution and person in the country, and each institution shall abide by the meaning of these interpretations in handling relevant matters,” i.e., judge-made constitutional law).

¹⁷⁸ SHIZI NO. 748 JIESHI (釋字第748號解釋) [Judicial Yuan Interpretation No. 748] (2017).

¹⁷⁹ *Id.* at ¶ 15.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at ¶ 16.

¹⁸⁴ *See generally* CCSU v. Minister for Civil Service [1985] 1 A.C. 374 (Lord Diplock holding that the doctrine of irrationality “applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”).

procreation. *Vice versa*, it is inequitable to prohibit same-sex unions because of the impossibility of procreation.¹⁸⁵

3. The Justices could not find a linkage between the degeneracy of moral order and the legalisation of same-sex marriage¹⁸⁶ because, as far as this thesis is concerned, the Justices replaced “the concept of moral order” by “that of moral order within heterosexual marriage,”¹⁸⁷ i.e., disguised displacement. The Justices did not answer the question of whether or not legalisation of same-sex marriage may lay bare the moral bankruptcy of the entire society, yet they asserted that “the basic ethical orders built upon the existing institution of opposite-sex marriage will remain unaffected, even if two persons of the same sex are allowed to enter into a legally-recognized marriage.”¹⁸⁸ Hence, it is disproportional to prohibit same-sex unions.¹⁸⁹

In a nutshell, *Judicial Yuan Interpretation No.748* [2017] comprised both sincere and strategic decisions. It is likely that the Justices sympathised with LGBT individuals and thus sincerely preferred the legalisation of same-sex marriage. The Justices may be criticised in light of the countermajoritarian difficulty¹⁹⁰ when public opinion in Taiwan is divided, but they did not apply the political question doctrine.¹⁹¹ Moreover, the Justices even attempted to pacify opponents of same-sex marriage with the following words:

This Interpretation leaves unchanged the party status as well as the related rights and obligations for the institution of opposite-sex marriage under the current Marriage Chapter. This Interpretation only addresses the issues of whether the provisions of the Marriage Chapter, which do not allow two persons of the same sex to create a permanent union of intimate and exclusive nature for the purpose of living a common life together, violate the freedom of marriage

¹⁸⁵ SHIZI No. 748 JIESHI (釋字第748號解釋) [Judicial Yuan Interpretation No. 748] Reasoning ¶ 16 (2017).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ SHIZI No. 748 JIESHI (釋字第748號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Wu Chen-Huan, dissenting); see also BICKEL, *supra* note 154; Bassok, *supra* note 154.

¹⁹¹ *E.g.*, SHIZI No. 328 JIESHI (釋字第328號解釋) [Judicial Yuan Interpretation No. 328] (1993).

protected by Article 22 and the right to equality guaranteed by Article 7 of the Constitution.¹⁹²

However, we also note that the Justices avoided deciding the legal form of legalisation for same-sex unions—either “marriage” or “civil partnership.”¹⁹³ As indicated earlier, public opinion in Taiwan¹⁹⁴ in regard to the legal form of same-sex unions is divided,¹⁹⁵ so the Justices could not obtain public support under such a circumstance.¹⁹⁶ Hence, we observe how the Justices avoided being criticised in light of the separation of powers argument¹⁹⁷ and the countermajoritarian difficulty;¹⁹⁸ they justified their judicial behaviour voluntarily, by which we posit that they made the decision in *Judicial Yuan Interpretation No.748* [2017] under political pressure.

7. JUDICIAL OPINIONS

There were two additional judicial opinions submitted in *Judicial Yuan Interpretation No.748* [2017]: the partial dissenting opinion of Justice Huang Horng-Shya¹⁹⁹ and the dissenting opinion of Justice Wu Chen-Huan.²⁰⁰ Both opinions implied a preference for the application of the political question doctrine,²⁰¹ because both argued that the definition of marriage must be decided by democratic

¹⁹² SHIZI No. 748 JIESHI (釋字第748號解釋) [Judicial Yuan Interpretation No. 748] Reasoning ¶ 18 (2017).

¹⁹³ *Id.* at ¶ 17.

¹⁹⁴ Cheng, *supra* note 46; Wang, *supra* note 42.

¹⁹⁵ ROC Ministry of Justice, *supra* note 32.

¹⁹⁶ See Dorf, *supra* 156 (asserting that the courts can disregard the criticism based upon the countermajoritarian difficulty “if public opinion [. . .] comes [sic] in line with the judicial view”).

¹⁹⁷ See SHIZI No. 748 JIESHI (釋字第748號解釋) [Judicial Yuan Interpretation No. 748] Reasoning ¶ 10 (2017) (affirming that the court complies with “the principle of mutual respect among governmental powers” unless in the event of legislative omission).

¹⁹⁸ See *Id.* (asserting that the court must fulfill its constitutional duty to “render a binding judicial decision, in time, on issues concerning the safeguarding of constitutional basic values”).

¹⁹⁹ *Id.* Huang Horng-Shya, partial dissenting.

²⁰⁰ *Id.* Wu Chen-Huan, dissenting.

²⁰¹ E.g., SHIZI No. 328 JIESHI (釋字第328號解釋) [Judicial Yuan Interpretation No. 328] (1993); SHIZI No. 419 JIESHI (釋字第419號解釋) [Judicial Yuan Interpretation No. 419] (1996).

means.²⁰² However, Justice Huang Horng-Shya voted for the legalisation of same-sex unions, albeit without indicating the precise form;²⁰³ and Justice Wu Chen-Huan clearly opposed the legalisation of same-sex marriage without mentioning his opinion about the legalisation of same-sex civil partnerships.²⁰⁴

7.1. *Partial Dissenting Opinion of Justice Huang Horng-Shya*

As far as this thesis is concerned, the partial dissenting opinion of Justice Huang Horng-Shya²⁰⁵ was not so much a judicial opinion as sentimental propaganda. It began with a theatrical and sensational proclamation that “we are all brothers and sisters who live together in Taiwan, and all of you are my preciouses”²⁰⁶ Some might say that (female) Justice Huang Horng-Shya was simply expressing a maternal view; however, this does not constitute a judicial opinion under normal expectations.²⁰⁷ Moreover, this partial dissenting opinion²⁰⁸ seems to be a political statement as to how difficult it was to render a judicial decision under public pressure, which implies the Justices’ awareness of the division of public opinion, i.e., Justice Huang Horng-Shya’s *obiter dictum*, “all of you are my preciouses.”²⁰⁹ Nevertheless, the unusual dissonance between the expected formality of a judicial opinion and Justice Huang Horng-Shya’s partial dissenting opinion does not depreciate the value of her points.

²⁰² Compare SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Huang Horng-Shya, partial dissenting) with SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Wu Chen-Huan, dissenting).

²⁰³ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Huang Horng-Shya, partial dissenting).

²⁰⁴ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Wu Chen-Huan, dissenting).

²⁰⁵ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Huang Horng-Shya, partial dissenting).

²⁰⁶ *Id.* (Author’s translation).

²⁰⁷ Please do not consider this description as sexual discrimination against female judges; I completely have no intention to do so. However, Justice Huang Horng-Shya speaks in a sensational tone of voice in her dissenting opinion, which is very rare in the legal archives. Its tone is that of a letter written by a mother, which is unfortunately a common approach that Taiwanese politicians have consistently applied in politics.

²⁰⁸ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Huang Horng-Shya, partial dissenting).

²⁰⁹ *Id.*

Justice Huang Horng-Shya clearly announced that she voted to legalise same-sex unions, albeit with ambiguity about the form of legalisation.²¹⁰ She argued philosophically that change is an everlasting principle of the universe, thus change is normal and constancy is abnormal.²¹¹ Based on this idea, she argued, apparently with the mass public as her intended audience, that everything changes as time goes on, including the concept of marriage, so that we should accept and bless same-sex unions.²¹²

However, Justice Huang Horng-Shya disagreed with the majority opinion in regard to the freedom of marriage.²¹³ She noted that it is entirely illogical to apply the freedom of marriage to same-sex marriage if the Judicial Yuan fails to redefine “marriage” in *Judicial Yuan Interpretation No. 748* [2017]²¹⁴, i.e., there would be no freedom of same-sex marriage if the definition of marriage remained unchanged. Furthermore, she doubted whether the Justices had the authority to redefine “marriage,”²¹⁵ and it appears that Justice Huang Horng-Shya preferred the application of the political question doctrine²¹⁶ to the concrete judicial decision.

Justice Huang Horng-Shya also asserted that it is untrue to claim that there is no difference between heterosexual and homosexual unions.²¹⁷ Hence, it is inequitable to demand that the law in relation to heterosexual marriage should be the same as the law in relation to homosexual unions.²¹⁸ One of the examples provided by Justice Huang Horng-Shya was that she did not directly consider the distinction between male and female as sexual discrimination unless the distinction was unreasonable.²¹⁹ In other words, she held that the distinction between same-sex unions and heterosexual marriage does not directly constitute an infringement against equality.²²⁰

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *E.g.*, SHIZI NO. 328 JIESHI (釋字第328號解釋) [Judicial Yuan Interpretation No. 328] (1993); SHIZI NO. 419 JIESHI (釋字第419號解釋) [Judicial Yuan Interpretation No. 419] (1996).

²¹⁷ SHIZI NO. 748 JIESHI (釋字第748號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Huang Horng-Shya, partial dissenting).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

7.2. Dissenting Opinion of Justice Wu Chen-Huan

The dissenting opinion submitted by Justice Wu Chen-Huan shows that he strongly opposed the legalisation of same-sex marriage,²²¹ though we do not know whether he also opposed the legalisation of same-sex civil partnerships.²²² Justice Wu Chen-Huan obtained his doctorate (S.J.D.) at Bond University, Australia, and he served as a chief prosecutor before being appointed as a Justice. Hence, it is not surprising that in accordance with his career background he preferred the legal opinion submitted by the Ministry of Justice.²²³

Justice Wu Chen-Huan held that the freedom of marriage protected by the Constitution of 1947 is limited to heterosexual unions, and any change in the definition of marriage should be decided democratically.²²⁴ He argued, in accordance with *Schalk and Kopf v. Austria* [2010] ECHR 1996 and *Vallanatos and Others v. Greece* [2013] ECHR 1110, that marriage is an “institution”²²⁵ with “deep-rooted social and cultural connotations which may differ largely from one society to another.”²²⁶ Hence, it is irrational to legalise same-sex marriage in accordance with a global trend.²²⁷ Moreover, Justice Wu Chen-Huan asserted that the Constitution does not recognise same-sex marriage, and all of the Judicial Yuan’s precedents were decided on the basis of heterosexual marriage.²²⁸

As an expert in international law, Justice Wu Chen-Huan provided substantial citation from that field to support his argument that the legalisation of same-sex marriage is not yet an international

²²¹ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Wu Chen-Huan, dissenting).

²²² See *Id.* (arguing in accordance with *Vallanatos and Others v. Greece* [2013] ECHR 1110 and *Oliari and Others v. Italy* [2015] ECHR 716 that the legalisation of same-sex civil partnership is obligated only when a country establishes the civil partnership system, e.g., *Vallanatos and Others v. Greece*; or when the right of same-sex unions is acknowledged by the constitution, e.g., *Oliari and Others v. Italy*).

²²³ Cf. BAUM, *supra* note 149 (suggesting that the prosecutors within the Ministry of Justice may be the main judicial audience of Justice Wu Chen-Huan in SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017)).

²²⁴ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Wu Chen-Huan, dissenting).

²²⁵ *Id.*

²²⁶ *Schalk and Kopf v. Austria* (2010) ECHR 1996.

²²⁷ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Wu Chen-Huan, dissenting).

²²⁸ *Id.*

standard of fundamental rights.²²⁹ He also provided a list of the countries that have legalised same-sex marriage and doubted whether it is reasonable to consider legalisation as an international standard²³⁰, i.e., there are only 21 out of 193 countries that have legalised same-sex marriage, which cannot constitute a standard.²³¹

8. CONCLUSION

Judicial Yuan Interpretation No. 748 [2017] opened the gate for the legalisation of same-sex unions in Taiwan; however, it did not determine the precise form of legalisation,²³² and we still do not know whether Taiwan will legalise same-sex “marriage” or same-sex “civil partnership” before the given judicial deadline for a legislative change, i.e., 23 May 2019.²³³ The Judicial Yuan’s court order only extends to the legalisation of same-sex unions (sincere decision) but leaves the political hot potato to the Legislative Yuan (strategic decision).²³⁴ If the official form of legalisation of same-sex unions angers the public, the Legislative Yuan will bear the criticism, rather than the Judicial Yuan.

We believe that the theories presented in Section 2 (Theoretical Insights) mirror how the Justices read the same-sex marriage case, though they did not express their real views. In reading the reasoning presented in *Judicial Yuan Interpretation No. 748* [2017], we can discover that the Justices were not interested in the definition of marriage, nor the debate as to whether the Civil Code (1929) effectively prohibited same-sex marriage or not.²³⁵ The Justices’ attention was always very clear: this is nothing less than an issue of human equality.²³⁶ Hence, the Justices responded to the principle of equality²³⁷ and linked up the freedom of marriage²³⁸ with

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] Reasoning¶ 17 (2017).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017).

²³⁶ *Id.*

²³⁷ MINGUO XIANFA art. 7 (1947) (Taiwan).

²³⁸ *Id.* art. 22.

this principle,²³⁹ thus holding unconstitutional the prohibition of same-sex marriage because it constitutes clear discrimination against LGBT individuals.²⁴⁰

However, the partial dissenting opinion of Justice Huang Horng-Shya²⁴¹ and the dissenting opinion of Justice Wu Chen-Huan²⁴² both suggested applying the political question doctrine because of the countermajoritarian difficulty.²⁴³ This implies that both Justices disagreed with the legalisation of same-sex marriage outside the context of legislative action.²⁴⁴ If the majority in Taiwan really preferred the legalisation of same-sex marriage, the Legislative Yuan would naturally take over the problem and there would be no need for the Judicial Yuan to make any concrete decision at all.

²³⁹ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] Reasoning ¶¶ 15-16 (2017).

²⁴⁰ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017).

²⁴¹ *Id.* Huang Horng-Shya, partial dissenting.

²⁴² *Id.* Wu Chen-Huan, dissenting.

²⁴³ BICKEL, *supra* note 154; Bassok, *supra* note 154.

²⁴⁴ SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Huang Horng-Shya, partial dissenting); SHIZI NO. 748 JIESHI (釋字第748 號解釋) [Judicial Yuan Interpretation No. 748] (2017) (Wu Chen-Huan, dissenting).