

The Role of Judicial Remedy in the Fight for Same-sex Marriage in Taiwan

A Case Study of the Constitutional Interpretation of Same-sex Marriage in Taiwan

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Abstract—This paper determines the constitutionality of same-sex marriage in Taiwan from the perspective of constitutional human rights. Then, according to the types and institutional basis of Taiwan's judicial remedy, it further demonstrates the reasons why judicial remedy can promote the legalization of same-sex marriage. This article uses comparative analysis to elaborate the unique role of judicial remedy in the process of equality of same-sex marriage in Taiwan compared with legislative remedy and administrative remedy. Finally, it explains that the victory of equality in same-sex marriage in Taiwan benefits from Taiwan's democratic and equal judicial remedy system. The success of legalization of same-sex marriage in Taiwan has made people realize the important role of judicial remedy system in the development of social legislation and the protection of human rights.

Keywords—same-sex marriage; judicial remedy; constitutional interpretation; judicial proceedings

I. INTRODUCTION

On May 24, 2017, Taiwan's judicial body issued a ruling or "constitutional interpretation," declaring that the "prohibition of marriage between two persons of the same gender" in Taiwan's current civil law violates the provisions of Taiwan's constitution on the protection of marriage freedom and equal rights. On February 21, 2019, Taipei City Government adopted the draft of the interpretation and implementation law No. 748 and sent it to Taiwan's legislature for deliberation. On May 17, 2019, same-sex marriage in Taiwan has been legalized, when the draft interpretation and implementation law No.748 was adopted. Taiwan's gay activism began in the early 1980s, and after more than 30 years of struggle, gays and lesbians finally gained the right to legally register their marriages. But before that, homosexual groups in Taiwan took various means to seek relief of rights. The constitutional interpretation of same-sex marriage is the biggest victory on the road to same-sex marriage equality in Taiwan.

II. THE CASE OF SAME-SEX MARRIAGE CONSTITUTIONAL INTERPRETATION

A. Brief Introduction of the Case

Qi Jiawei, the first person to come out publicly in Taiwan, was refused to apply for same-sex marriage to Taipei Household Registration Office in 2013. After exhausting judicial remedies, he appealed to the judiciary of Taiwan for constitutional interpretation on August 20, 2015, arguing that the relevant provisions of Taiwan's civil law prohibiting same-sex marriage were unconstitutional. In addition, in November 2015, the Taipei City Government submitted the interpretation of the same claim to the judicial authorities. Then, the judiciary of Taiwan subsequently took the case and held a seminar [1] [3]. On May 24, 2017, Taiwan's chief justice issued constitutional interpretation No. 748 on same-sex marriage, announcing that certain provisions of marriage in Taiwan's civil law violate constitutional rights, such as the right to equality and freedom of marriage. Furthermore, the Judiciary, based on the constitutional duties, issued a statement of reasons on the content of Constitutional Interpretation No. 748, in the light of the intent of Judicial Interpretation Nos. 585 and 601, and asked the Legislation to complete the relevant legislative work within two years based on the content of the interpretation [4].

B. Reasons

Through the discussion of the meeting of the Chief Justice, the reasons for the ruling are summarized as follows:

- The right to marriage as a basic human right is protected by the Constitution.
- The court has always explained the definitions of "monogram and wife" and "one man and one woman" in the perspective of traditional heterosexual marriage. There is no explanation for whether or not same-sex marriage can be done.
- The existing marriage chapters in the Taiwan Civil Law are all provisions on heterosexual marriages, and the law does not yet have provisions on same-sex marriage.

- Article 22 of the Constitution respects the freedom of basic human rights. Marriage freedom belongs to the basic human rights. Freedom of marriage includes "marriage or not" and "freedom of choice of marriage objects".
- Homosexual couples live together and form close, exclusive and permanent unions with each other. It does not affect the application of existing laws to heterosexual marriages, nor does it change the social order under the construction of heterosexual marriages; moreover, homosexual marriages protected by law have the same function as heterosexual marriages in maintaining social stability.
- Article 7 of the Constitution protects the people of the Republic of China from enjoying equal rights in law. Those with different sexual orientations should also be protected by the Constitution [5-7].
- Homosexuality has long been de-pathogenic, is an immutable personal trait and should be subject to equal protection under article seventh of the Constitution.
- In the provisions on marriage in existing civil law, fertility is not a necessary condition for the conclusion of a marriage, nor is it a condition for the invalidity or revocation of a marriage. The result of the inability of homosexuals to have children naturally is no different from that of heterosexuals who are objectively unable to have children or who do not want to have children subjectively. Therefore, it is unreasonable to treat same-sex marriage differently on the grounds that it is not natural to have children.
- To regulate the content and form of homosexual marriage, and to regulate its compliance with the rights and obligations of the marriage during and after its termination, does not affect the existing social ethical order. On the grounds that same-sex marriage is not conducive to maintaining the social ethical order under the heterosexual marriage system, homosexuals are not granted the right to marriage, which is inconsistent with the intention of Article 7 of the Constitution to guarantee people's equal rights.

The above nine points of view are the justifications given by the justices for the appeal and the judgment of the court concerned before the appeal. According to Taiwan's Constitutional Interpretation System, the justices discussed the application of law in same-sex marriage according to their powers [8]. Based on the Constitution, they argued that same-sex couples should enjoy the right to freedom of marriage.

III. JUDICIAL REMEDY

A. *The Concept of Judicial Remedy*

Judicial remedy means that the infringed person brings a lawsuit to the judicial organ to remedy his own rights

according to law. Judicial remedy is called the last barrier of rights protection, the core of legal remedy, and constitutes an important pillar of modern rights remedy system. The highest judicial organ in Taiwan is the "Court of Judiciary", which handles the power of legal interpretation, judicial power, disciplinary power and judicial administration. Compared with the mainland of China, Taiwan's judicial organs not only have jurisdiction, but also have the right to interpret the Constitution and laws.

B. *The Characteristics of Judicial Remedy*

Judicial remedy has the following characteristics: extensive scope, passive way of raising, legality of procedure, mandatory result and final effect. Its own characteristics determine the importance of judicial relief in rights relief. "Without remedy, there are no human rights." The characteristics of judicial remedy determine that it becomes the ultimate guarantee of human rights remedy compared with administrative remedy and legislative remedy. Judicial organs rely on a series of fair and rigorous procedures, as well as the personality charm and professional expertise of judges to a large extent, to ensure their neutrality, objectivity and impartiality; it is incomparable to other organs, including administrative organs.

C. *Types of Judicial Remedies*

Judicial remedy is passive in its way of initiation, mainly through judicial litigation and judicial interpretation. Judicial litigation includes administrative litigation, civil litigation, criminal litigation and constitutional litigation. Judicial interpretation refers to the interpretation made by the supreme judicial organ of the state on the specific application of law in the process of applying the law, including judicial interpretation and procuratorial interpretation. As a dynamic way of protecting rights, the combination of judicial proceedings and judicial interpretation is a legal protection mechanism that adapts to the dynamic development of society. In countries and regions where the "constitutional interpretation" mechanism is established, the "constitutional interpretation" mechanism provides impetus for the implementation and application of the Constitution.

D. *Advantages of Judicial Remedy*

The advantages of judicial remedy can be analyzed by comparing it with legislative remedy and administrative remedy. First, legislative remedy refers to the act that the legislature establishes and guarantees rights by promulgating legal documents. Legislative remedy, because of its unique implementation procedure, does not necessarily synchronize the promulgation and implementation of specific laws with the changes of social forms. In terms of timeliness, legislation lags behind the protection of rights. In terms of proposals and adoption procedures, it is not conducive to the protection of minority group's rights. Second, administrative remedy refers to that when a common citizen is subjected to illegal or improper administrative punishment by the state administrative organs, in order to remedy his infringed interests or rights, he requests the relevant administrative organs to cancel or change the illegal and improper

administrative acts according to law. Administrative remedy is not only likely to have the hidden danger of local protectionism, and in addition, in administrative relief, the administrative organs mostly use the existing legal documents as the sole basis for judgment, which makes the adjudicator lack subjective initiative. In the process of judicial remedy, both judicial litigation and judicial interpretation have the independence of adjudication and compulsory effect, which enables judges to judge fairly in the discretion of specific cases, to maximize the protection of the legitimate rights and interests of both parties in litigation, and to reflect the human rights protection function of judicial remedy. At the same time, judicial adjudication can promote the development of legislation and improve the real-time protection of rights through judicial precedents and judicial interpretation. Finally, judicial remedy has the function of human rights protection. Judges in both judicial proceedings and judicial interpretation have the independence of adjudication, which enables judges to judge fairly in the process of adjudication and maximize the protection of the lawful rights and interests of both parties. At the same time, judicial adjudication can promote the development of legislation and improve the real-time protection of rights through judicial precedents and judicial interpretation.

IV. WAYS OF JUDICIAL REMEDY

A. *Judicial Proceedings*

In Taiwan, in addition to administrative litigation to adopt the system of the second instance being the final, civil litigation and criminal proceedings have adopted a level three third-instance system. In Taiwan, Local Courts, High Courts and Supreme Courts are established from the bottom up. As a primary trial organ at the grass-roots level, the High Court receives appeal cases against the judgment of the Local Court, and the Supreme Court mainly receives retrial cases and some cases which are specially provided for by law. Generally speaking, the application principle of litigation procedure is three-level final trial system, but the two-level final trial system is adopted in the cases that are tried by summary procedure. Judicial proceedings are an important way for citizens to take judicial remedies. In Taiwan, according to the Law on the Trial of Cases by the Chancellor of the Judicial Court, when people's rights protected by the Constitution are infringed illegally, they can initiate lawsuits according to the law. If the petitioner has doubts about the law or order applicable to the final judgment and believes that it is in conflict with the Constitution, he may appeal to the judicial court for constitutional interpretation. This provision further improves Taiwan's judicial relief system and broadens the way for the people to safeguard their rights.

In the process of equal rights for the same sex in Taiwan, several special draft laws on same-sex marriage have been put forward. However, due to the characteristics of Taiwan's legislative procedures and principles, the way of deliberating on the same-sex marriage laws has been rather bumpy and has not been passed smoothly. Qi Jiawei, Taiwan's first public marriage equality fighter, has said that it is difficult to

achieve marriage equality through legislative procedures, and only rely on "judicial" operations. Since 1986, homosexuals in Taiwan have repeatedly advocated equal rights in marriage through judicial litigation. Even if the application for litigation has been rejected many times, they still try to exhaust judicial trial-level procedures to safeguard their rights and interests.

B. *Constitutional Interpretation System*

Under the influence of Sun Yat-sen's Five-power Constitutionalism, Taiwan pays attention to the construction of its own constitutional and judicial system. Up to now, it has not only a perfect judicial system, but also a constitutional interpretation system (hereinafter referred to as the constitutional interpretation system). The constitutional interpretation system, legislative system and judicial system are independent of each other and interact with each other. They all promote the development of Taiwan's legal system. In Taiwan, the meeting of the justices of the Judicial Court is a special organ for constitutional interpretation. The justices of the Judicial Court perform the power of constitutional interpretation according to the Constitution. In the process of constitutional interpretation, both the Council of justices and the justices themselves are relatively independent. They are independent of other organs in the constitutional system and beyond the party. Constitution is the only objective criterion of constitutional interpretation system. In the activities of constitutional interpretation, the justices enjoy the right of independent interpretation through collective discussion at the meeting of the justices, without interference from any organ or individual. In order to balance the relationship between the power of constitutional interpretation and legislative power, the justices should follow three principles in the process of constitutional interpretation: first, the matters of interpretation should be limited to the provisions of the Constitution. Secondly, it is neither possible to replace legislative acts with interpretative acts, nor to erode the legislative power of the legislature. Thirdly, the legislative discretion of legislators should be respected. Legislative activities should have full discretion under constitutional circumstances. The establishment of constitutional interpretation system not only helps to explain the constitutional provisions and supplement the omissions of the constitution, but also helps to carry out the procedure of constitutional review and guarantee the legislative guiding position of the constitution.

Taiwan's democratic constitutional system attaches great importance to the protection of human rights. Taiwan's No.748 "Constitutional Interpretation Case" concerning same-sex marriage relies on the constitutional interpretation system under democratic constitutionalism from the appeal procedure to the adjudication procedure. Over the past 30 years of the development of Taiwan's homosexual affirmative movement, homosexual groups have fought for the right to same-sex marriage through various means, but the results are unsatisfactory. Even though homosexual behavior is gradually accepted and respected by Taiwan society, the right to same-sex marriage has not been recognized and protected by law because of the lack of legal

basis. It can be said that the appeal for interpretation of the Constitution is the last choice for Taiwan's homosexual groups to fight for same-sex marriage. The system of interpretation of the Constitution provides the last judicial guarantee for homosexual groups to fight for the right to marriage.

V. THE ROLE OF JUDICIAL REMEDY

A. Convenient Ways of Safeguarding Rights

Judicial remedy itself is passive. As far as judicial proceedings are concerned, there is no judgment without appeal; as far as constitutional interpretation is concerned, there is no explanation without appeal. Judicial relief only stipulates negative conditions in the initiation procedure, that is to say, if the rights of the parties are infringed, if the rights need to be safeguarded through judicial relief means, only need to apply actively to obtain relief opportunities. Judicial relief is the most equitable means of relief, giving every one equal treatment. Judicial remedy is more direct and convenient than legislative remedy and administrative remedy in homosexuals' pursuit of marriage rights. As the highest level of law, the Constitution guarantees the equality of human rights, which also makes homosexual groups in the process of seeking judicial relief reasonable and legal. In short, the legalization of same-sex marriage in Taiwan is the direct result of judicial relief.

B. Highlighting the Rights of Homosexual Groups

In the process of equal rights for homosexuals in Taiwan, various ways have been used to appeal to the public to respect and tolerate homosexuals. Taiwan is a prosperous region of homosexual culture in Asia. Literary and artistic works on homosexual themes emerge in endlessly. There are many speeches and demonstrations in support of equal rights for the same sex in Taiwan's democratic and enlightened society under the rule of law. On the road of equal rights for homosexuals in Taiwan, homosexuals not only pursue social tolerance and recognition, but also pursue equal treatment and protection of the law. Through judicial remedy, the appeals of homosexuals can be clearer. The remedy process always focuses on the rights of petitioners, highlighting the rights of all homosexuals.

C. The Guiding Significance of Judicial Remedy

Judicial remedies may not only produce judicial decisions with legal effect, but also create new judicial interpretations. A written judicial decision or judicial interpretation is of guiding significance to the adjudication of similar cases in the future. At the same time, judicial opinions issued by judicial organs will also affect the trend of legislative activities. Prior to the introduction of Constitutional Interpretation No. 748, most cases of same-sex marriage litigation were rejected by the courts. Because the right to same-sex marriage is not protected by law, there are no judgments or rulings supporting the registration of same-sex marriage in Taiwan's history. Moreover, the administrative organs accepting marriage registration cannot accept the registration of same-sex marriage because of the

lack of legal basis. In addition, the legislature needs to go through many legislative procedures for the enactment of a new law, and take all-round consideration, which makes many legislative proposals on same-sex marriage have been aborted. It is worth mentioning that judicial remedies include appeals for constitutional interpretation from the Lord Chancellor. Constitutional interpretation not only has the effect of law-making and law-amending, but also has the final characteristic. The Constitutional Interpretation No. 748 requires the same-sex marriage legislation to be completed within two years, which directly promotes the establishment of the same-sex marriage legislation, but also marks that any previous provisions prohibiting or opposing same-sex marriage are unconstitutional and no longer have legal effect.

D. Higher Media Exposure

The news media is the sharp weapon of social propaganda. No matter what form of media exposure, it has the function of promoting social communication. First of all, the principle of judicial openness enables the process and results of judicial relief to enter the public perspective through the media. Because the final judicial judgment or judicial interpretation is to go through different stages of judicial trial-level relief, the reports on the process of judicial relief are continuous in stages. Secondly, the controversial focus of some cases is more conflicting and has greater social influence. If the media use the court game process of the case as the reporting material, it can bring more traffic and topics. Taking Taiwan's gay marriage constitutional interpretation case as an example, the court review frequency of the case is uploaded on the social media website. The public can not only understand the whole process of constitutional interpretation case comprehensively through video, but also understand the views of all parties in the court debate. Finally, media coverage can influence the views and attitudes of the public towards a social problem and have social influence. Taiwan's homosexual Affirmative Movement adopted judicial remedies, which not only won the victory in the legal sense, but also made homosexual marriage social tolerance and acceptance with the help of media reports. Since the promulgation of Constitutional Interpretation No. 748 by the Judicial Court, the referendum on the same-sex marriage law has been passed smoothly, and promoted the early promulgation of the special law on same-sex marriage.

VI. CONCLUSION

Taiwan's homosexuals have tried all kinds of ways to fight for the right to marriage, and finally won equal protection of same-sex marriage by law through judicial relief. The characteristics of judicial remedy determine its role in the affirmative movement, but the success cannot be achieved without Taiwan's good judicial system, let alone the persistent efforts of homosexuals. As the bottom line of human rights protection, justice protects social fairness and justice.

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