

**The Interpretation and Application of the Crime of Adultery
After Same-Sex Marriage Case: From the J.Y. Interpretation
No. 554 to No. 748**

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Abstract

The unveiling of the Judicial Yuan Interpretation No. 748 (hereafter No. 748), in which the Constitutional Court affirmed the right to marriage of same-sex couples, has pushed for many legislative amendments in relevant areas of law, the result of which has been a profound impact on the existing social order. The crime of adultery under the Article 239 of the Criminal Code is already feeling that impact, with its existence and application facing new challenges. This article argues that, since the No. 748 has made it abundantly clear that it only addressed the equal protection of the freedom of marriage for same-sex couples and “does not deal with any other issues,” the Interpretation itself could not lead to the conclusion that the crime of adultery had been decriminalized. Furthermore, as the Interpretation repeatedly states that the recognition of same-sex marriage will not “alter the social order established upon the existing opposite-sex marriage”, the Interpretation seems to imply that behind different-sex marriage and same-sex marriage stand different values and interests. On top of that, when we take Court’s view in the Judicial Yuan Interpretation No. 554 into account, we will come to an inevitable conclusion that, since the crime of adultery binds marriage and its reproductive function, the social order the crime of adultery has sought to protect is one that was constructed by different-sex marriage, and thus the social order created by the now legalized same-sex marriage falls outside the scope of the crime of adultery. At this point in time, it would be too hasty to say that the legal

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interest the crime of adultery aims to protect have extended to that of the same-sex couples after the No. 748. As to the argument that adultery committed by persons under different-sex marriage and same-sex marriage should both be penalized under the crime of adultery, the result of such expansion is merely formal equality. To escape the dilemma, we must look further into the necessity of punishment of this particular crime. This article will review the legislative and judicial aspect of the current discussion on and controversies surrounding the crime of adultery, and analyze how the ordinary courts might react to the No. 748. Finally, the article will present recommendations.

Keywords: judicial judgement, crime of adultery, act of adultery, connection of male and female reproductive organs, *nulla poena sine lege* (no penalty without a law), J.Y. Interpretation No. 748, J.Y. Interpretation No. 554, same-sex marriage