

Towards Juristocracy? The Case of Taiwan

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Abstract

In 2017, the Constitutional Court of Taiwan issued Interpretation No. 748, declaring part of Taiwan's Civil Code, which in essence prohibits same-sex marriage, unconstitutional. This Article tries to anatomize this decision through the prism of judicial politics, suggesting that the Taiwan Constitutional Court is a political, but not necessarily partisan, court. For starters, this decision seems to be a paradigmatic example of the judicialization of politics with the acquiescence of the political branches. In fact, one crucial function of judicial review is to solve thorny issues for politicians who face constituencies with antithetical stances. Second, this is another important case of judicial lawmaking. As mentioned above, the TCC designated a two-year deadline for legislators to amend the Civil Code, and provided its own solution for marriage equality if the legislature fails to do so. This is not the first case of judicial lawmaking. The third point that merits elaboration is the manipulation of separate opinions. In this case, the Justices refrained from issuing personal opinions, with the exception of only two dissents in this highly controversial case. Finally, explicit constitutional engagement is another feature of this decision. One plausible explanation of this unusual citation is the controversial nature of same-sex marriage. That is, encountering this vexing issue, the TCC endeavored to buttress its reasoning by citing a world-known decision. Notably, this Interpretation is not the only decision in which the judicialization of politics has taken place. The political maelstrom that engulfed the DPP government in the early 2017 set the stage for Interpretation No. 748. This decision demonstrates the political savvy of

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the TCC, which has applied a myriad of strategies to secure compliance. This by no means indicates that the TCC is a partisan tribunal, which is evident from the nearly unanimous votes of the ruling. It does suggest, however, that judicial politics plays a role in the process of decision-making.

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