

With different jurisprudence applied, could the precedent on
same-sex marriage have been changed?

การใช้หลักนิติศาสตร์ที่แตกต่างกันสามารถเปลี่ยนแปลงแบบอย่างการ
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นิสิตในหลักสูตรนิติศาสตรบัณฑิต

คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย ถนนพญาไท แขวงวังใหม่ เขตปทุมวัน กรุงเทพฯ 10330

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Abstract

This article concerns the infamous ruling No.20/2564 of the Thai Constitutional Court, where the court refused to declare the restriction of marriage form to only of male-female binary under Section 1448 of the Civil and Commercial Code unconstitutional. Instead, the court affirmed the constitutionality of the Section and endorsed a solid affirmation of the integrity between male-female binary value and marriage. Most importantly, the ruling set a precedent that other form of marriage, such as, same-sex marriage is illegitimate and thereby justify that its constitutionality is rather impossible to recognized. This article aims to identify what influenced the court to adopt such a decision and explores an effective solution to prevent this type of ruling. The authors argue that the answers should resort to jurisprudential analysis, given that the Thai Constitutional Court itself applied various jurisprudential concepts to establish the legitimacy of the judgment. Concepts representing each jurisprudence used in this article are John Finnis's Basic Form of Human Good, representing the natural law jurisprudence; Jeremy Bentham's utilitarianism, representing the reductivity thesis in legal positivism; and Hans Kelsen's Pure Theory of Law, representing the normativity thesis in legal positivism.

Keyword : same-sex, marriage, jurisprudence

บทคัดย่อ

ศาลรัฐธรรมนูญวางบรรทัดฐานการสมรสในประเทศไทยในคำวินิจฉัยศาลรัฐธรรมนูญที่ 20/2564 โดยวินิจฉัยให้มาตรา 1448 แห่งประมวลกฎหมายแพ่งและพาณิชย์นั้นเป็นอันชอบด้วยรัฐธรรมนูญมาตราดังกล่าวระบุให้การสมรสหมายถึงเฉพาะแต่การสมรสระหว่างหญิงและชายเท่านั้น คำวินิจฉัยศาลรัฐธรรมนูญเช่นนี้จึงทำให้บรรทัดฐานรูปแบบการสมรสจำกัดอยู่ภายใต้กรอบความหมายของมาตรา 1448 เท่านั้น บทความนี้มุ่งศึกษาหลักการและเหตุผลที่ทำให้ศาลรัฐธรรมนูญวินิจฉัยเช่นนั้น โดยศึกษาผ่านการนำทฤษฎีจากสำนักกฎหมายต่าง ๆ ได้มาวิเคราะห์เพื่อหาข้อสรุปว่าหลักการดังกล่าวนี้มีผลต่อศาลรัฐธรรมนูญให้วินิจฉัยในลักษณะดังกล่าวหรือไม่อย่างไร โดยทฤษฎีที่เลือกนำมาศึกษาวิเคราะห์นั้น ได้แก่ทฤษฎีกฎหมายธรรมชาติผ่านหลักการคุณค่าพื้นฐานของมนุษย์ (จอห์น ฟินนิส) และทฤษฎีกฎหมายบ้านเมืองผ่านหลักอรรถประโยชน์นิยม (เจเรมี เบนธัม) และหลักบริสุทธิ์ของกฎหมาย (ฮันส์ เคลเซิน)

คำสำคัญ : เพศเดียวกัน, การแต่งงาน, นิติศาสตร์

Introduction

14th February 2020 was the day when a lesbian couple was denied their marriage registration, prompting the challenge to the Thai legal system pertaining to the adherence to the same-sex marriage concept. The couple later became the applicants in the groundbreaking case challenging the constitutionality of Section 1448 of the Civil and Commercial Code (*hereinafter* - ‘Section 1448 CC’)—the clause that restricts marriage to only heterosexual couples. The result, on the contrary, was disappointing given that the constitutionality of the provision was affirmed. The ruling was publicly introduced and was met with public infuriation, because the door to the legality of same-sex marriage was slammed shut by the judiciary. Had the court ruled the Section 1448 CC unconstitutional, such a binary-restrictive provision would have been void, with the amended, non-restrictive one, enacted.² Instead, the male-female binary form of marriage became precedent, pushing the legality of same-sex marriage out of grasp. The authors, therefore, ask what influenced the court to set such a precedent by resorting to the jurisprudence that the court applied—natural law and legal positivism.

The answer shall bring us to understand not only the flaw of the court’s judgment but, most importantly, how the jurisprudence application contributed to such flaw which will then lead us to the solution. The authors first analyze the ruling with natural law jurisprudence where the meaning of marriage is narrow and exclusive due to the confinement to the John Finnis’ Basic Form of Human Good principle. Then, the ruling is examined through the lenses of reductivity and normativity thesis under positivism jurisprudence, where both lenses drew distinctions and different results. In the reductivity thesis, Jeremy Bentham’s Utilitarianism helps us understand the necessity of the court to decide in favor of the community in order to sustain the level of gross happiness. While in the normativity thesis, Hans Kelsen’s Pure Theory of Law points out the court’s narrow interpretation with regards to the constitution’s value of equality.

Natural law jurisprudence and its non-convergence on same-sex marriage

Natural law jurisprudence contends that there is a necessary relation between law and morality and that morality can be derived from nature.³ These are two general premises of natural law jurisprudence. The former is usually dismissed by modern natural law philosophers

² The Constitution of Kingdom of Thailand 2017, Section 5.

³ Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009) 122,125-6; วรเจตน์ ภาคีรัตน์, *ประวัติศาสตร์ข้อความคดีนิติปรัชญา* (พิมพ์ครั้งที่ 2, อานกฤษฎา 2561) 336.

who consider natural law only as creating moral obligations.⁴ The latter, however, is the most important premise, as both modern and archaic natural law philosophers believe in a set of moral values being the foundation to examine certain subjects. In other words, an attachment to superior value is still a dominant feature of natural law jurisprudence, which undoubtedly shapes the meaning of marriage and the law governing marriage in this case.

Similar to other natural law philosophers, Finnis seeks a set of superior values, which he calls the basic form of human good (*hereinafter* – ‘basic good’).⁵ He defines basic good as a set of universal values that outline everything one reasonably aspires in life.⁶ Consequently, basic good governs actions, and also, undoubtedly, marriage, including the enactment of law thereof. Most importantly, as Finnis regards marriage as an act of basic good value, the focal point of this chapter is how such a good concept demarcates between what is and what is not marriage and why same-sex marriage falls short of such concept.

Finnis’s basic good governs the definition of marriage by attaching the definition of marriage to Procreation (discussed below). So on, an emphasis limits marriage to only heterosexual couples, while other forms of marriage, i.e., same-sex marriage are excluded. The exclusion is strong and absolute as the exclusion is two-fold.

First, Procreation refers to the biological union of female and male genitals⁷ and thus excludes non-heterosexual forms of marriage given that they could not possibly engender the above-defined union.

Second, Procreation is regarded as an indispensable requirement for the ability to produce children and for parental care.⁸ Finnis’s notion of parenthood is also linked to his reference that the children of Procreation are an icon of the non-fungibility persons and of their families.⁹ Hence, it is necessary for children to be given birth to by their biological parents and other methods, e.g., an adoption cannot be the substitute. Accordingly, parenthood can only exist once the couple fulfills in giving birth to their own biological child. As only

⁴ Ratnapala, (n 3) 123.

⁵ John Finnis, *Natural Law and Natural right* (Paul Craig ed, 2nd edn, Oxford University Press, 2011).

⁶ *ibid* 97.

⁷ John Finnis, *Law, Morality, and ‘Sexual Orientation’* (The Collected Essays of John Finnis: Volume III: Human Rights and Common Good, Oxford University Press, 2011) 338.

⁸ Pablo Antonio Lago, ‘Same – sex marriage: a defense based on foundations of natural law’ (2018) 14 *Revista Direito GV* 1050 < https://www.researchgate.net/publication/330891375_Same-sex_marriage_a_defense_based_on_foundations_of_natural_law> accessed 15 March 2023. See also John Finnis, *Law, Morality, and ‘Sexual Orientation’* (n7) 340.

⁹ John Finnis, *Marriage: A Basic and Exigent Good* (The Collected Essays of John Finnis: Volume III: Human Rights and Common Good, Oxford University Press, 2011) 395.

heterosexual couples can provide biological childbirth, only their male-female binary form of marriage is capable of leading to parenthood. This in turn strengthens the exclusivity in the definition of marriage as it attaches the necessary link between marriage and parenthood, resulting in an inevitable monopoly of parenthood by heterosexual couples.

Both folds of exclusion show the limitation of natural law jurisprudence to adhere to same-sex marriage given that it is always more necessary for actions to adhere to superior values, like the Procreation in this case, than to accept other important values, such as diversity in forms of marriage. Furthermore, by resorting to natural facts as a prerequisite for Procreation, definition of marriage is limited to only one that is heterosexual.

The Constitutional Court ruling No. 20/2564 is no different from Finnis's concept of marriage. Therefore, it is unsurprising that the ruling rather protects the constitutionality of Section 1448 CC, which only grants heterosexual couples access to marriage. The court defined marriage as the union of male and female,¹⁰ which were distinguished by their biological genitals,¹¹ The test for male and female based on their genitals is much evident in Judge Udom's individual opinion, for the genital test is not to be relied only on when the genital itself cannot serve as a sex indicator – for example, individual with hermaphroditism who concurrently have both the male and female genital.¹² This binary separation associated with the genital test naturally restricts marriage to exist only in the form of heterosexual. In other words, Section 1448 CC only allows the “male-and-female” form of marriage. It could be said that the court set conditions for marriage in a way that did not differ from Finnis's Procreation and used the same basis as that of Finnis – the natural facts.¹³

Further similarity could be drawn when the court mentioned an association between marriage, children bearing and parental care. Children bearing and parental care are regarded as a subsequence of *marriage*. Therefore, with the incapability to marry, same-sex couples are regarded incapable of bearing children and parental care. In other words, only heterosexual couples are capable of such things, as they are the only ones who could comply with the definition of marriage. This resembles the second fold exclusivity laid down by Finnis, as previously mentioned.

¹⁰ (2021) TH Const Ct 20/2564, 8.

¹¹ *ibid* 7.

¹² TH Const Ct 20/2564 (Udom S.) (separate opinion), 3 – 4.

¹³ TH Const Ct (n 10), 8; (Virulh S.) (separate opinion), 3; (Noppadon T.) (separate opinion), 2; (Taweekiet M.) (separate opinion), 5; (Chiraniti H.) (separate opinion), 2.

To conclude, the ruling shows that the court set a precedent for legitimate marriage in ways that resemble Finnis's concept of Procreation i.e., the definition of marriage is confined to two-fold exclusivity. To the court, it is impossible for same-sex marriage to fall within the term, given its reliance on natural facts. This eventually leads to the same-sex couple's incapability of bearing children and to provide parental care. With natural law jurisprudence, the court's decision will once again accentuate the immutability of the reliance on natural facts and the superior set of values like Procreation. This, thus, leaves no place for other values like same-sex marriage to exist. To be able to set the precedent in favor of same-sex marriage, it is a foregone conclusion that the court must avoid applying the natural law jurisprudence.

Utilitarianism Positivist and the service for community's happiness

In the previous chapter, the court applied natural law jurisprudence and attached themselves to a superior set of values, which later led to an unsuccessful result by setting a precedent against same-sex marriage. However, not only the application of natural jurisprudence contributes to such a result. The ruling also shows the court's position as the protector of the community's happiness. This indicates the court's application of utilitarianism. In the next chapter, the authors will analyze the ruling through the lens of Jeremy Bentham's utilitarianism and answer how this application will result in the same conclusion as when applying the natural law jurisprudence.

Jeremy Bentham was a British positivist philosopher who shared the same thought of law as a command of sovereign.¹⁴ He classified law into two jurisprudences, namely, expository and censorial jurisprudence.¹⁵ This offers two different, but clear focuses where Bentham put most of his effort into the development of utilitarianism in censorial jurisprudence. He vested his confidence in utilitarianism to the level that he attested that neither individual nor natural rights could be a justification for how the government exercised its authority as utilitarianism could.¹⁶ In this way, Bentham offered a completely different basis for the court to apply from that of Finnis, as he denied any justification with natural elements.

¹⁴ Ratnapala, (n 3) 32.

¹⁵ Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* 234 cited in วรเจตน์ ภาคีรัตน์, *ประวัติศาสตร์ข้อความคิดนิติปรัชญา* (n 3) 376.

¹⁶ H.L.A. Hart, 'Utilitarianism and Natural Right' *Essays in Jurisprudence and Philosophy*, (2nd edn, Oxford University Press, 1985) 181-2.

In brief, the principle of utility was founded upon a fundamental concept that humans were born under the governance of the two sovereigns: pleasure and pain.¹⁷ Pain and pleasure reign over every decision in our lives and we thereby must “seek pleasure and shun pain.”¹⁸ Bentham laid an abstract equation to demonstrate the interplay of the two motives—“sum up all values of all the pleasures on one side, and those of all the pains on the other”.¹⁹ No attempt is made in this work to solve such an abstract equation. Only one point does the authors wish to point out. That is, based on this equation, a conduct is considered to conform with the principle if it provides more pleasures and is one that achieves “the greatest happiness of the greatest number.”²⁰ The adherence to the greatest happiness principle also manifests itself as a fundamental for legislations. In particular, Bentham demonstrated the relationship between law and society by suggesting that a legislator should prioritize public goods and base their reasoning on general utility.²¹ For this reason, one must apply the principle of utility to identify what is genuinely good for the community in order to generate the greatest happiness for society.²²

The court in the Constitutional Ruling No.20/2564 primarily took into account the preservation of the interests of heterosexual couples, purportedly regarded as the majority of the Thai community.²³ The court’s act of communitarian-based is comparable to that of Bentham’s utilitarianism as both aim for the greatest favor for the majority i.e., the greatest happiness. To the authors’ surprise, the ruling, however, contradicted Benthamite perspective, given that his principles had been previously used elsewhere to decriminalize homosexual sex. In his *Offences Against One’s Self: Paederasty Part 1* essay, Bentham argued that there was no justification for treating same-sex partners with such severity, for their consensual sexual acts did not produce any “pain”.²⁴ On the contrary, such a sexual activity generated the “greatest pleasures”.²⁵

¹⁷ Jeremy Bentham, *The theory of legislation* (Oceana Publications, 1975) 1.

¹⁸ *ibid.*

¹⁹ Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (J.H. Burns and H.L.A. Hart ed, Methuen & Co. 1982) 40.

²⁰ *ibid.* 14.

²¹ Jeremy Bentham, *The theory of legislation* (n 17) 1.

²² *ibid.*

²³ TH Const Ct (n 10),10; (Taweekiet M.) (separate opinion), 6.

²⁴ Jeremy Bentham ‘Offences Against One’s Self: Paederasty Part 1’ *Journal of Homosexuality* (The Haworth Press,1978) 389-390.

²⁵ *ibid.*

The different results between the ruling and Bentham's principle are that one is against and one is in favor of the homosexuality spectrum. What causes such a rift is underneath the utility principle itself – the perseverance for greatest happiness, which inevitably means that the majority interest must be protected. In the ruling, the court expressed deep apprehension towards potential ramifications of recognizing the rights of same-sex couples towards the Thai community.²⁶ This concern was immensely expressed in the revision of Section 1448 CC under Section 27 of the Constitution (*hereinafter* – 'Section 27 Cons. '), the clause concerning person equality and gender equality. To the court, proclaiming unconstitutionality would be an act of unfairness towards heterosexual couples as the court viewed that their rights would be negatively impacted.²⁷ Budget concerns were raised as to the potential reduction in the effectiveness of the welfare system's operations.²⁸ As heterosexual couples are seen as the majority of Thai community,²⁹ the aforementioned disadvantages are seen even in a more negative light; such that the advantages from recognizing same-sex marriage is certainly trumped by this greater loss that the heterosexual couples would face. These factors led the court to the sole conclusion that they must affirm the constitutionality of Section 1448 CC to protect the interests of heterosexual couples, given that they are the mass majority in the Thai community. Therefore, by applying utilitarianism, the precedent set by the court does not always favor progressive ideals like same-sex marriage. Instead, utilitarianism fosters a relation between quantity, majority, and minority and offers an excuse to go against the minority under the guise, or more so an excuse, of serving the community. In the present case, where heterosexual couples are the majority of a society, the interests and pleasures of homosexual couples are comparably minor and must in principle always be compromised or even disregarded in order to promote the greatest happiness of the community.

Utilitarianism creates the necessity to align with the interest of the majority. This would ultimately result in favoring the interests of the majority over those of the minority which completely disregards how unfair it may seem or how much it may violate the rights of certain groups. The limitations of utilitarianism are addressed in Hart's *Essay on Jurisprudence* that this approach not only regards an individual's pleasure as the same as the greater pleasure of such individual, but also as replaceable without restriction by the greater pleasure of others.³⁰

²⁶ TH Const Ct (n 10) 10.

²⁷ *ibid.*

²⁸ TH Const Ct (n 10) 10; (Taweekiet M.) (separate opinion), 5-6.

²⁹ TH Const Ct (n 10) 10; (Taweekiet M.) (separate opinion), 6.

³⁰ Hart, (n 16) 202.

John Rawls, who proposes the Theory of Justice as an alternative to utilitarianism, refers to utilitarianism as prioritizing only in maximizing the pleasures of society without regard for the equitable distribution of such satisfaction among individuals.³¹ These arguments tend to be positive indeed in this case.

To conclude, the ruling, on a certain level, shows a defect of utilitarianism. The application of utilitarianism leaves the court's protection on the number of people. Therefore, by applying utilitarianism as a basis for setting the precedent, the court is at risk of determining which group is the majority of society as the court's protection is available only for such the majority group. At the same time, in determining such a question, the court affirmatively made it so that the minority be subject to the majority in terms of their interests. Utilitarianism benefits same-sex marriage only if same-sex marriage couples are the majority of society; in such way that their interests take up the most volume in the whole interest-equation. Unfortunately, this is not applicable to the case since same-sex couples are the minority. To be able to set precedents which protect the rights of minorities such as the marriage right of same-sex couples, the court should avoid applying utilitarianism, the reductivity thesis in the positivism jurisprudence. Because, it would not be any different than rolling a dice to gamble whether these people are the majority of society.

Hans Kelsen and the Pure Theory of Law

In previous chapters, in considering whether the ruling will be beneficial for same-sex couples, the court relied on facts in the present world—either the natural facts, according to natural law jurisprudence or social phenomenon, according to utilitarian-positivism. Hans Kelsen's Pure Theory of Law offers a completely different aspect given that legal validity, according to Kelsen, is a matter of value, not fact.³² Thereby, even though both Bentham and Kelsen are positivist philosophers, their proposed theories diverse significantly on their approaches. Their different approaches to law as a social phenomenon or value is described as the reductivity and normativity thesis. Bentham belongs to the former, while Kelsen belongs to the latter. This certainly sets Kelsen apart in having a different approach pertaining to same-sex marriage in this case.

³¹ John Rawls, *Theory of justice* (5th edn, Harvard University Press, 1973) 26.

³² วรเจตน์ ภาคีรัตน์ (n 3) 466. ; Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie Litchewski Paulson & Stanley L. Paulson tr, 1st edn, Clarendon Press 1992) §4, xxxii.

The Pure Theory of Law proposes that the norm is a valid legal norm once it complies with a certain set of rules.³³ This proposition results in the hierarchy of norms, making the legal system a hierarchical structure³⁴ as each lower norm is promulgated in accordance with a higher norm, and such higher norm accords with an even higher one, and so on.³⁵ Thereby, the constitution is the highest representation of the level of positive law³⁶ as it governs both procedurally and substantively how the norm is to be created.³⁷ Therefore, every norm must be in congruence with the constitution. Regarding the question of same-sex marriage, according to this jurisprudence, the task of the constitutional court is to decide whether the content of same-sex marriage is in congruence with the Constitution of the Kingdom of Thailand.

The court followed the Pure Theory of Law approach to review the congruence of the norm pertaining to this question. In this case, where no issue in procedural regards was presented to the court, the court, hence, only decided in a substantive manner whether Section 1448 CC was unconstitutional with Section 25-27 of the Constitution per the Applicants' request. The most important revision is the one under Section 27 Cons., as such a section contains two relevant subsections: the first subsection refers to person equality, and the other refers to equality between males and females.

To the court, Section 1448 CC recognizes only a male-female form of marriage, a recognition in line with Section 27 Cons..³⁸ The court was unaware that in the same regard the statute may only align with the second subsection given that the statute does not break any binary equality value of the constitution, but might not align with the first subsection of Section 27 Cons. which refers to person equality. Had the court, conversely, taken more of the first subsection into account, Section 1448 CC would have been proclaimed as unconstitutional. The reason is that the first subsection of Section 27 Cons. offers broader sense of equality as it refers to equality among persons, not only equality between males and females. Section 1448 CC., thereby, would have been unconstitutional as it offers marriage legitimacy only to males and females with heterosexual orientations, whereas people in the other spectrums are denied the right to marriage.

³³ Hans Kelsen, (n 32) § 28.

³⁴ *ibid* §§ 28,31(a).

³⁵ *ibid* §§ 4,28.

³⁶ *ibid* §31(a).

³⁷ *ibid* §31(a).

³⁸ TH Const Ct (n 10), 9 – 11.

This ruling, hence, shows that the court's sole focus on the second subsection of Section 27 Cons., which eventually diverts the court's perception from accepting a broader sense of equality. This in turn means that the court was unaware binding itself to the notion that equality is only for male-female binary. An application of Kelsen's Pure Theory of Law would have offered the court an opportunity to proclaim the unconstitutionality of Section 1448 CC. But of course, only if the court had reminded of the first subsection of Section 27 Cons., a stipulation that offers a broader sense of equality. In this case, an outcome was unsuccessful and was against same-sex marriage since the court confined itself to a narrow sense of equality. Thus, the frame for a norm to be validated was narrowed down to an extent that the other spectrums, i.e., same-sex marriage could no longer be congruent with such boundary. An outcome in support of same-sex marriage would have been achieved if the court had been more aware of the broader sense of equality stipulated clearly in the first subsection of Section 27 Cons.

It must be reminded that, with respect to utilitarianism, the court ruled that Section 1448 CC aligned with Section 27 Cons. given that an interest of heterosexual couples who were regarded as the majority must be well-preserved as mentioned in Jeremy Bentham's chapter. This can well be evidenced for, whereas utilitarianism places the protection of homosexual couples on social phenomena and could not overturn the restrictive binary form of marriage; the purity of the law from sociological fact proposed by Kelsen offers legitimacy to other forms of marriage. In other words, Kelsen's Pure Theory of Law acts as an effective legal technique for the court to utilize in supporting same-sex marriage, only that in this case, the court failed to utilize it. To conclude, normativity legal positivism is indeed the most proper jurisprudence for the court to apply in supporting same-sex marriage, granted that the court is aware of the broader sense of equality stipulated in the Constitution.

Besides the conclusion of the most proper jurisprudence for the court to apply, which is an answer the authors seek, there are some points the authors believe are worth mentioning in order to offer a clearer and more genuine perspective of the solution. Only an application of proper jurisprudence itself may not be sufficient to support same-sex marriage. Even applying the normativity-positivism jurisprudence, the court still arrived at a precedent where no support is offered for same-sex marriage. This may be associated with the fact that a constitutional court decision contains a discretionary and political element,³⁹ where judges'

³⁹ *The guardian and the constitution: Hans Kelsen and Carl Schmitt on the limits of constitutional law* (lars vinx tr, Cambridge University Press, 2015) 13.

backgrounds have significant influence in conducting a ruling or a precedent. These judges' backgrounds may influence the preference for the court to apply themselves to jurisprudence as well; for example, the reductivity-positivism where utilitarianism is involved. This jurisprudence, discussed in Bentham's chapter, is recommended to be avoided for its unreliability in protecting the rights of the minority; however, by avoiding such an application, the court may face the counter-majoritarian difficulty, a connotation referring to a countering with the will of people.⁴⁰ Therefore, constitutional design may be taken as an additional solution as well, apart from a proper application of jurisprudence proposed by the authors.

Conclusion

The court ruled and set precedents according to their application of legal jurisprudence. An application of natural law jurisprudence is demonstrated by a strong attachment to natural facts or the Procreation. This attachment limits the court from recognizing other forms of marriage other than a binary male-female form, so the recognition of same-sex marriage as legitimate marriage is impossible according to this jurisprudence. An application of utilitarianism in reductivity-positivism brings uncertainty to protecting minority rights as it limits the court's decision to only favoring the majority. In this case, where the court viewed same-sex couples as the minority, the result was that not only did the court affirm a binary male-female marriage as a singular form of legitimate marriage, but also affirm the interests of heterosexual couples over those of the others. The applications of these two jurisprudences are, thus, to be avoided. The most proper jurisprudence is the normativity-positivism represented by Hans Kelsen's Pure Theory of Law, as this jurisprudence attaches the court to neither natural facts nor social phenomena; in fact, it shows how a same-sex marriage norm can obtain its validity in the legal system. Such validation can be accomplished once the court utilizes a broad sense of protection stipulated in the constitutional section. In this case, same-sex marriage could have gained its validity if the court had used the first subsection of Section 27 of the Constitution, the person equality clause, as a frame of content validation. This can be adopted in order to create a precedent that is more favorable to the minority by enhancing their rights. Additionally, constitutional design may be proposed to enhance efficiency in applying the proper jurisprudence.

⁴⁰ Barry Friedman, 'The History of the Countermajoritarian Difficulty, Part Four: Law's Politics.' (2000) University of Pennsylvania Law Review, 971, 984 <<https://doi.org/10.2307/3312839>> accessed 24 May 2023.