

Hard Cases before the Constitutional Court: Balance between Leading and Following the Majority

Jau-Yuan HWANG
Justice, Taiwan Constitutional Court
September 18, 2023

I. Statement of the Problem

Upon exercising the power of constitutional review, Constitutional Courts or Supreme Courts may receive cases presenting difficult issues for decisions. These cases often invite the Court to sail into uncharted waters, as judicial decisions of such hard cases are not clearly dictated by existing constitutional provisions or rules. Further, the Court may find the law or regulation under review unconstitutional, despite strong public support. A court decision to strike down such laws always runs the risk of angering the legislative and even the popular majority. In this scenario, the task before the Court not only involve value judgments on thorny constitutional, political, social and/or moral issues, but a delicate balance between judicial independence and democratic ideals. Should the Court stick to the constitutional principles? Or, should the Court defer to the will of the majority? Are there institutional options available to accommodate both?

In the following presentation, I will argue there are indeed several institutional options to accommodate both, unless otherwise prohibited by the Constitution. Most options are associated with the invalidity and remedial parts of decision: Whether and when the unconstitutional laws lose binding force? Who, the Court or the political branches, are to repair the unconstitutionality, and how?

II. Four Options on the Merit

The first option is to issue a warning, instead of an express declaration, of unconstitutionality. The Court may further instruct the political branches to correct the constitutional defects. Since the said request is without legally binding force, the political branches still retain the autonomy on when and how, and even whether, to amend the laws in dispute. Being all bark and no bite, this option gives the political

branches ample room for setting their own agenda and even making choices on the merits. In the case that the degree of unconstitutionality is not obvious or severe, the Court may find this option attractive and worth a try.

The Court's second option is to make a "simple declaration of unconstitutionality" (or "declaration of incompatibility with the Constitution"), and demand the political branches to repair the unconstitutionality, say, within a certain period of time. Technically speaking, the political branches are under a constitutional obligation to fix the unconstitutionality problem, pursuant to the court decision. Nevertheless, the law in dispute might remain intact and effective indefinitely, if the political branches choose not to amend or repeal it. For the democratic mechanisms, this option does bite, but with little pain.

The third option is the "suspended declarations of invalidity." It is obviously more painful for the democratic mechanisms than the above two options. The Court may strike down an unconstitutional law, while allowing the law to retain force for a certain period of time (*e.g.*, within the two years after the court decision). By the end of the said period, the political branches are constitutionally obligated to repeal or amend the law. Otherwise, the unconstitutional law will eventually lose its binding force upon expiration of this temporary period. In other words, the Court suspends its decision's effect on the invalidity of the unconstitutional law and waits for the responsive actions of the political branches. Generally speaking, this remedial device would still allow the democratic mechanisms to come out with their own solutions, to a certain extent, in correcting the unconstitutionality.

The fourth option concerns the use of judge-made law. In some cases, the Court might need to craft its own solution to fill the normative vacuum left by its decision annulling the existing laws, either after the said grace period or immediately after its decision. Apparently, this is the most aggressive mode of judicial intervention posing the most direct conflict with democracy. To reconcile with the democratic process, the Court may want to employ this option only as a fallback or backup solution. On one hand, the Court had better give the democratic mechanisms to develop its own solution first, say, within a certain period of time. Only after the democratic mechanisms fail to produce a solution in line with the Court's decision within the timeframe, then comes into play the Court's own remedy. On the other hand, the Court's fallback remedy could serve as final assurance that the constitutional mandate will be realized in the end.

The above four options are not mutually exclusive. In practice, they may be combined and employed at the same time, contingent on the circumstances of various cases. For example, option four may be combined with option two to create an ultimate

constraint, while leaving the democratic mechanisms sufficient room for self-correction.

No doubt, framing the most optimal, if not the best, judicial decision for a hard case requires a careful *ad hoc* determination based upon the totality of circumstances. Factors that may be considered by the Court include prudential concerns, time constraint, institutional capacity, implementation costs, availability of resources needed, degree of unconstitutionality, and others.

III. Interpretation No. 748 (2017) of Taiwan Constitutional Court

Allow me to use Taiwan Constitutional Court's decision on the same-sex marriage case as example to further illustrate my arguments.

Back in 2016, legalization of same-sex marriage was a hotly debated issue in the Taiwanese society on the whole. Opinion polls conducted then indicated Taiwanese people were equally divided on this issue. Despite several legislative proposals, Taiwan's Legislative Yuan (the parliament) had remained deadlocked for years. Around the end of 2016, Taiwan Constitutional Court (TCC) decided to grant review of two petitions, both asking for constitutional recognition of same-sex marriage. Finally, the ball was in the Justices' court.

Against the said backdrop of highly divided public opinions and a deadlocked parliament, the TCC issued the Interpretation No. 748 in May 2017 that recognized same-sex marriage in Taiwan. The TCC declared unconstitutional the Civil Code's *failure* to allow same-sex marriage, while upholding its provisions for opposite-sex marriage. This amounted to declaring the legislative *inaction*, instead of legislative restriction, unconstitutional. Thus, such legislative vacuum had to be filled. However, the TCC decision did not mandate the immediate recognition of same-sex marriage in Taiwan by its own decision, as compared to the *Obergefell v. Hodges* (2015) decision of the Supreme Court of the United States. Instead, the TCC adopted a two-step remedy approach for realization of the equal right to marriage for same-sex couples. First, the TCC gave the legislature a two-year grace period to fill this legislative vacuum. On the *form* of law for such remedy, the legislature still had the discretion to either "amend the Civil Code" or "enact a special statute" for recognition of same-sex marriage. However, on the *substance* of law, the TCC mandated the legislature provide the institution of marriage, and not merely non-marriage civil union or partnership, for same-sex couples.

In the second step, the TCC crafted its judge-made law as fallback remedy. In case that the legislature failed to provide a statutory remedy within the said two-year grace period, then any same-sex couple was entitled to applying for marriage registration with the Household Registration Administration, pursuant to the TCC's Interpretation No.

748. This backup remedy amounted to a constitutional assurance with teeth.

The aftermath in the political process demonstrated the TCC's carefulness was well-grounded. About eighteen months after the said decision and in the referendums held in November 2018, over 67% of voters rejected the option of amending the Civil Code for recognition of same-sex marriage, while over 61% supported the adoption of a special statute. In late February, 2019, the Executive Yuan (the Cabinet) finally submitted a draft bill of special statute to legalize same-sex marriage in Taiwan. The legislature adopted this bill, and the new statute took effect on the last day of the said two-year grace period set by the TCC decision.

Through the legalization process of same-sex marriage in Taiwan, undoubtedly the TCC decision of Interpretation No. 748 did play a crucial role of anchoring the equal right of marriage for same-sex couples under the Constitution in Taiwan. However, the TCC decision led the development not by a one-shot order. Instead, the TCC adopted a more and balanced approach that tipped in favor of such recognition and eventually pushed the political branches to move ahead. As a result, the tide of public opinions also gradually turned towards genuine acceptance of same-sex marriage. An opinion poll conducted in May 2023 showed 62.6% of the people surveyed believed same-sex couples should have the equal right to marriage, up from 37.4% in a similar poll conducted in 2018 before the said special act was passed. It should be safe to say that the constitutional right of equal marriage for same-sex couples is supported not only by the majority of the Taiwan Constitutional Court, but by the majority of the Taiwanese people.

IV. Reflections and Conclusions

Constitutional review is not a matter of pure judicial nature. In the words of Hans Kelsen, a Constitutional Court exercising the power of abstract review is indeed a "Negative Legislator" when declaring a law unconstitutional and null and void. In modern times, many Constitutional Courts even wield the power, in practice or authorized by the Constitution, to craft judge-made rules in order to fill the normative vacuum left by their decisions striking down an unconstitutional law. In this sense, a Constitutional Court may further play the role of a "Positive Legislator," though preferably in the supplementary or standby capacity. In the case of Supreme Courts exercising the power of concrete review, a court decision holding a law unconstitutional *on the face* would have to address the similar concerns facing the Constitutional Courts. The order to end racial segregation with "*all deliberate speed*" in the decision of *Brown v Board of Education II* (1955) indicated the similar concerns shared by the Supreme Court of the United States facing hard cases. All things considered, in exercising the

power of constitutional review, Constitutional Courts and Supreme Court may have to think and act in the legislators' shoes.

Judicial independence in the realm of constitutional review does not necessarily presuppose the strong form of invalidating the unconstitutional laws, *i.e.* retroactive or immediate invalidation of unconstitutional laws. The ostensibly weaker form of invalidation or remedial decisions, including the abovementioned "warning of unconstitutionality," "simple declaration of unconstitutionality," "suspended declarations of invalidity," "judge-made law as fallback remedy" and other devices of similar effects, may also have the merit of being employed. On the surface, these options display the Court's prudential concerns to the democratic process. They encourage and facilitate, rather than foreclose, more public debates. They allow the democratic mechanisms to develop their solutions to hard cases. Thus, the democratic mechanisms may still have their final says to a certain extent, even if not full-scale. On the other hand, these options may also induce the Court to weigh in the direction of declaring more laws unconstitutional with less hesitation, in lieu of dismissing cases or deferring their review to a later date.

Between simply following the will of majority and boldly leading the society towards the Court's own ideals, there should be a wider spectrum of varied options. Constitutional Courts or Supreme Courts indeed wield the power and have the institutional potentials to strike a more nuanced balance for goods of both constitutionalism and democracy.