Constitutional Dialogue in Common Law Asia

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Introduction

In the last decade, 'dialogue' has become a commonplace metaphor in constitutional discourse. This term was popularized by Peter Hogg and Allison Bushell[1] in a seminal article where they argued how Canadian judges are engaged in a collaborative conversation with the legislature over the optimum level of human rights protection within the constitutional state. The metaphor has however travelled across the oceans and has since entered the legal vernacular of other common law systems that have also adopted Bills of Rights under which legislatures are able to respond to, or reverse, judicial decisions, without resorting to constitutional amendments or popular referendums. In the United Kingdom, Tom Hickman and Alison Young have explored how the interplay of Sections 3 and 4 of the Human Rights Act 1998 (UKHRA) has allowed the English courts to forge a constitutional partnership with the legislature and the executive.[2] In the same vein, in New Zealand, Petra Butler has also discussed how its national courts can use the New Zealand Bill of Rights Act (NZBORA) to enhance the deliberative decision-making process of the legislature.[3] Although Australia does not have a federal Bill of Rights, Julie Debeljak[4] and Leighton McDonald[5]

[1] Peter Hogg & Allison Bushell, 'The Charter Dialogue Between the Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75.

[2] Tom Hickman, *Public Law after the Human Rights Act* (Oxford, Hart Publishing 2010); Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford, Hart Publishing 2009). See also Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge, Cambridge University Press 2009) though one must note that Kavanagh has reservations about the utility of this 'dialogue' metaphor.

[3] Petra Butler, 'Human Rights and Parliamentary Sovereignty in New Zealand' (2004) 35 *Victoria University Law Review* 341.

[4] Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Rights and Responsibilities: Drawing the Line between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9. See also R M W Masterman, 'Interpretations, Declarations and Dialogue: Rights protection under the Human Rights Act and Victorian Charter of Human Rights and Responsibilities' [2009] *Public Law* 112.

[5] Leighton McDonald, 'New Directions in the Australian Bill of Rights Debate' [2004] *Public Law* 22. See also Scott Stephenson, 'Constitutional Reengineering: Dialogue's Migration from Canada to Australia' (2013) 11 *International Journal of Constitutional Law* 870.

have explored how in those individual Australian states that have enacted state-level human rights instruments, that is Victoria and the Australian Capital Territory, the judiciary and their respective state governments can equally pursue this constitutional dialogue.

Common to these constitutional systems is the adoption of various creative structural mechanisms that expressly confer upon the respective national courts the right to interpret and apply fundamental human rights norms, while preserving the legislature's right to disagree with and/or reaffirm its views in the course of ordinary politics.

One must however note at the outset that while dialogic review is most commonly discussed in these common law systems where weak-form review[6] was first conceived, the existence of these structural mechanisms is not a prerequisite for a dialogic approach to constitutional discourse to occur. Even in constitutional systems, like the United States, where strong-form review is the norm, such that the courts are empowered to invalidate legislation and have the final word on constitutional understandings, its Supreme Court has exercised its 'passive virtues'[7] to abstain from constitutional controversies or has ruled in a minimalistic fashion so as to provide the legislative/executive branches with the constitutional space to disagree.[8] The spacious text in most Bills of Rights permits divergence on a litany of issues, and provides a framework for the political communities to disagree and struggle over the documents' meanings.[9] Where the judiciary facilitates but does not foreclose the constitutional debate for the electorate and its representatives, the processes of constitutional interpretation become more dynamic, and a dialogue between the judicial and political branches of government on constitutional meaning can ensue.

Notably too, discussions on dialogic review have primarily focussed on common law constitutional systems in the West. This book will thus seek to fill the lacuna in the literature by analysing three common law systems in Asia, that is Hong Kong, Malaysia, and Singapore. In particular, these three jurisdictions are former British colonies that continue to observe common law norms and traditions; their respective judiciaries are generally

[6] Weak-form review refers to a form of judicial review in which judges' rulings on constitutional questions are expressly open to legislative revision in the course of ordinary politics. See Mark Tushnet, 'Weak Form Judicial Review and "Core" Civil Liberties', (2006) 41 *Harvard Civil Rights-Civil Liberties Law Review* 1.

[7] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, New Haven, Yale University Press 1986) 115–98.

[8] Cass Sunstein, *One Case at A Time: Judicial Minimalism on the Supreme Court* (Cambridge, Harvard University Press 1999).

[9] Barry Friedman, 'Dialogue and Judicial Review' (1993) 91 *Michigan Law Review* 577, 654.

empowered under their written constitutions to invalidate legislation for perceived rights-violations, and their respective Constitutions also do not include any structural devices that enable the local legislatures to reverse or avoid a constitutional decision they disagree with, except via a constitutional amendment.

I argue that in the three common law Asian constitutional systems under study, that is Hong Kong, Malaysia, and Singapore, even though their respective Constitutions do not provide for structural devices that enable the local legislatures to reverse or avoid a constitutional decision they disagree with, the courts can still apply judicial techniques and canons of interpretation that foster a debate with the political branches of government on constitutional values.

In essence, constitutional dialogue is an observable practice of routine institutional interaction whereby the pursuit of legislative objectives can be 'constructively modified (from a rights perspective), but not impeded, by judicial input into the law-making process'.[10] This dialogue is sustained by a constitutional culture committed to instantiating a political order that negotiates the polarities of deference and disagreement.

Chapter 2 of this book will begin by explaining *why,* as a constitutional theory, dialogic review is normatively superior to the opposing alternatives of legislative or judicial supremacy. On one side, we can find judicial sceptics who champion legislative supremacy as they consider judicial review undemocratic.[11] At the other end of this constitutional continuum, we find legislative sceptics who argue in favour of judicial supremacy, as they doubt the capacity of the political branches of government to be sufficiently stable or impartial to serve as the ultimate arbiter of constitutional rights.[12] This chapter will seek to defend the normative value of dialogic judicial review against critics on both ends of this spectrum.

Chapter 3 will continue with a brief overview of the constitutional history in Hong Kong, Malaysia, and Singapore. The focus of this chapter will be on the constitutional structures and traditions the respective jurisdictions inherited from the British and the major constitutional developments since decolonization.

[10] McDonald (n 5) 28.

[11] Jeremy Waldron, *Law and Disagreement* (Oxford, Clarendon Press 1999); Adrian Vermeule, *Law and the Limits of Reason* (Oxford, Oxford University Press 2008).

[12] Larry Alexander & Fredrick Schauer, 'On Extrajudicial Constitutional Interpretation' (1997) 110 *Harvard Law Review* 1359; Trevor Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford, Oxford University Press 2001); Jeffrey Jowell, 'Parliamentary Sovereignty under the New Constitutional Hypothesis' [2006] *Public Law* 562, 579.

Chapter 4 will examine the judicial crises that had occurred in each of the three jurisdictions in which monumental constitutional confrontations between the legislature/executive and the judiciary went on to shape and impact the current constitutional relations between the co-ordinate branches of government.

This above investigation into the interplay of law and politics in Asia will set the stage for my analysis in Chapter 5 of how these Asian courts, notwithstanding the absence of the structural mechanisms found in the UKHRA or NZBORA, can still engage in a collaborative conversation with their respective legislatures on rights-protection. The focus of this chapter is on the development of judicial techniques and canons of interpretation that allow courts to preserve the right of the legislature to disagree with the courts' decisions using the ordinary political processes, such that an override via a constitutional amendment can be avoided and any adverse backlash from the political branches reduced. This dialogic form of judicial review is politically more efficacious in common law Asia as each of the three territories has been governed by the same ruling party/coalition since decolonization, and will continue to be so governed for the foreseeable future.[13] In essence, where the judiciary operates within a constitutional system dominated by a semi-permanent party/coalition in government, the pursuit of a dialogic form of judicial review is also the politically expedient way for the courts to engage in a valuable but less confrontational colloquy with the political institutions about the requisites of a constitutional democracy. Techniques to be discussed in Chapter 5 include the judicial observance or recognition of one or more of the following sub-constitutional norms/practices: (1) provisional or advisory determinations in constitutional matters; (2) administrative review; (3) common law liberties or statutory rights that are reversible by the ordinary political process; (4) procedural constitutional rules; (5) rational basis review of legislative actions; and (6) delayed declarations of invalidity.

Chapters 6 to 9 will be a comparative study on how these judicial techniques and canons of interpretation can be applied in four core constitutional areas: (1) freedom of expression; (2) freedom of religion; (3) right to equality; and (4) criminal due process rights. Each chapter (from Chapters 6 to 9) will be a comparative focus on one of the above topics. These chapters

[13] Since the establishment of the Hong Kong Special Administrative Region, an informal coalition of political parties and independent legislators that usually supports the agenda of the Hong Kong executive government (the pro-establishment camp) has been able to command an overall majority of the seats in the Legislative Council. Malaysia has been ruled by the same political coalition since its independence, that is the Alliance Party which was renamed Barisan Nasional (National Front) in 1974. The People's Action Party has been the ruling party in Singapore since its independence and the party has controlled over 90% of the elected seats in Parliament since 1968.

will examine and critique the case law and examine how these cases can be reconsidered or re-decided in view of the dialogic form of judicial review that I propose.

This book will essentially demonstrate how dialogic judicial review can take place in common law Asia. This mode of judicial review promotes a form of deliberative democracy, a model which eschews the rule of judges as philosopher kings, but also one that holds the promise of transformative change beyond the confines of the ballot box.