PO JEN YAP, CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA (Oxford University Press, 2015)†

*Reviewed by Yvonne Tew**

Over the last two decades, scholars have theorized new models of constitutional review that avoid conferring on the courts the final word on constitutional understandings. Scholars have identified this form of constitutionalism variously as the "Commonwealth model of constitutionalism,"[1] "weak-form judicial review,"[2] the "parliamentary bill of rights model,"[3] and "dialogic judicial review."[4] Discussions of this model of review, however, have focused primarily on Commonwealth systems in the West—such as Canada, the United Kingdom, New Zealand, the Australian Capital Territory, and the State of Victoria in Australia—with little attention paid to Asia. Po Jen Yap's new book, *Constitutional Dialogue in Common Law Asia*, fills this void by exploring a dialogic model of judicial review in three Asian common law systems: Hong Kong, Malaysia, and Singapore. Yap argues that dialogic review is the most attractive approach to constitutional review, both normatively and pragmatically, and his work raises thought-provoking questions about the extent to which the dialogic model is the "constitutional ideal"[5] for these Asian legal systems.

The book begins by undertaking a defense of dialogic review as normatively superior to legislative or judicial supremacy.[6] Because the legislature and judiciary are equally fallible institutions, Yap argues, both institutions should make independent determinations with regard to rights protection. He defends dialogic judicial review as "the constitutional ideal that mediates the extremities . . . of judicial and legislative supremacy."[7]

All three of Yap's chosen jurisdictions have common law systems derived from British legal traditions, but with written constitutions that empower their judiciaries to invalidate legislation for rights infringements.[8] Chapters 3 and 4 examine these constitutional systems and the judicial crises they have experienced. Confrontations

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1. STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE (2013).

2. Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003).

3. ALISON YOUNG, PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHTS ACT (2009).

4. 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)*, 35 OSGOODE HALL L.J. 75 (1997).

5. PO JEN YAP, CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA 8 (2015).

6. *Id.* ch. 2.

7. *Id.* at 8.

8. *Id.* at 3.

between the judiciary and the political branches have transpired in each of these dominant party systems.

Shortly after China regained sovereignty over Hong Kong, for example, the Hong Kong Court of Final Appeal asserted the power to declare invalid any legislative acts of the National People's Congress of China if inconsistent with Hong Kong's Basic Law.[9] The Standing Committee of the National People's Congress responded by issuing an interpretation overturning the court's decision. Malaysia's constitutional crisis occurred in 1988, involving the impeachment and removal of the head of the Malaysian judiciary and two other judges of the Supreme Court for judicial misconduct following several decisions that had frustrated the executive. Singapore's judicial crisis arose after the apex court ruled that the executive's decision to preventively detain a person had to have an objective basis; it was not enough for the executive to be subjectively satisfied that the detainee posed a threat to national security.[10] This decision was swiftly overturned by the Singapore government through a series of constitutional and statutory amendments. The risk of such political reprisals leads Yap to conclude that judges should strive to avoid provoking the ruling party, which might respond by overruling judicial decisions through constitutional amendments or extralegal methods.[11]

Courts should therefore employ dialogic tools, Yap argues, that consciously preserve the right of the legislature to override judicial decisions using the ordinary political process. Chapter 5 examines such "sub-constitutional" doctrines "subject to statutory modification or reversal."[12] These include advisory opinions, administrative review, common law norms or statutory rights, procedural constitutional rules, rational basis review, and delayed declarations of invalidity. The subsequent chapters in the book explore how these judicial techniques can be applied in practice. In Chapter 6, on freedom of expression, Yap explores the development of common law doctrines for defamation and contempt of court, and suggests that executive restrictions on public assemblies should be subject to proportionality review. Chapter 7 argues for a balancing model for religious freedom. As an example of applying this model dialogically, Yap proposes that the Malaysian civil courts should require a clear-statement rule from state legislatures before ceding jurisdiction to the religious courts. Chapter 8 argues that courts should scrutinize equality infringements using a sliding scale. In the case of sexual orientation discrimination, for example, Yap advocates that Hong Kong courts apply strict scrutiny, but suggests that courts in Singapore and Malaysia should apply the lower standard of rational basis review until such time as their legislatures

9. Ng Ka Ling v. Dir. of Immigration, [1999] 2 H.K.C.F.A.R. 4 (H.K.).
10. Chng Suan Tze v. Minister for Home Affairs, [1988] 2 SING. L. REP. 132 (Sing. C.A.).
11. YAP, *supra* note 5, at 78.
12. *Id.* at 79.

become open to more heightened scrutiny.[13] In Chapter 9, Yap discusses a due process challenge to the mandatory death penalty for drug trafficking offenders in Singapore,[14] arguing that the apex court could have issued a delayed declaration of invalidity, which would have given the government discretion to reassess the scope of punishment.[15]

As a thoughtful, serious engagement with constitutional review in Asia, Yap's book adds value to the field by extending the debate on dialogic review to three under-explored jurisdictions and by showing how courts can use various dialogic techniques methodologically.

The book's focus on Hong Kong, Malaysia, and Singapore as potential sites for dialogic review might initially seem surprising. Unlike the Western jurisdictions in which interest in the "Commonwealth" model has grown, none of these Asian constitutions has any structural devices that enable the legislature to reverse or avoid a judicial decision it disagrees with, except through constitutional amendment. The bills of rights adopted in Canada, New Zealand, and the United Kingdom expressly allow the legislature to have the final word on the continued operation of legislative provisions despite an adverse declaration by the courts. By contrast, as Yap acknowledges,[16] the courts of Hong Kong, Malaysia, and Singapore are empowered by their constitutions to invalidate unconstitutional legislative or executive conduct with no provision for an ordinary legislative majority override. These constitutions—like most constitutions of the twentieth century[17]—specifically charge the courts with judicial oversight over the political branches. Why then invoke a weaker form of judicial review for these Asian judiciaries?

Dialogic review, Yap argues, treats the courts and the political branches as "participants in an enduring constitutional colloquy," which in turn forms "the essence of a constitutional dialogue between co-equal branches of government."[18] On Yap's account, courts and the political branches of government are "collaborators in a common enterprise to promote public welfare."[19]

This vision appears undeniably appealing. But a dialogic relationship is possible only if each branch of government is mutually committed to maintaining such a collaborative discourse and cooperating in a joint enterprise of governance.

In each of these Asian systems, which have been governed by a dominant ruling party since independence, the powerful political branches of government have little incentive, if any at all, to be committed to a dialogic relationship with the courts. Judicial efforts to preserve the legislature's ability to reverse the court's decisions is

13. *Id.* at 185.
14. Yong Vui Kong v. Pub. Prosecutor, [2010] 3 SING. L. REP. 489 (Sing. C.A.).
15. YAP, *supra* note 5, at 219–20.
16. *Id.* at 3.
17. *See* SAMUEL ISSACHAROFF, FRAGILE DEMOCRACIES 158 (2015).
18. YAP, *supra* note 5, at 105.
19. *Id.* at 106.

unlikely to be perceived by the legislature and executive as an effort by a "co-equal" branch to foster productive constitutional dialog. Instead, such judicial acquiescence is likely to be viewed simply as an indication of expected deference from the weakest branch. The balance of power in these dominant ruling party systems is skewed overwhelmingly in favor of the political branches. In such circumstances, a more robust role for the courts does not detract from democracy; rather, it enhances the judiciary's ability to play its part effectively as a true co-equal branch of government. Yap believes that weak form review mitigates the counter-majoritarian difficulty by allowing elected representatives "to respond to any perceived judicial errors."[20] Yet criticism regarding democratic legitimacy in these Asian states has not been directed at the courts' use of judicial review, but has instead typically been prompted by the manner in which the political branches have wielded their expansive power—for instance by using the political process to pass repressive laws or to prevent the courts from exercising judicial review.

Yap also defends dialogic review as "politically more efficacious."[21] He writes:

> [I]f the judiciary consciously preserves the right of the legislature to disagree with the court's decision via the use of the ordinary political processes, such that an override via constitutional amendment can be avoided, any strain on the inter-branch relations and any potential backlash from the dominant ruling government could equally be minimized.[22]

But deliberately granting the legislature the ability to overrule the courts using ordinary statutory power cuts both ways: a dominant ruling government might well do so—with ease and minimal political consequences—precisely because the political "stakes are so much lower."[23] "If the legislature is displeased intensely by a judicial decision," Yap writes, "their disapproval can be more easily channelled into *ordinary* law."[24] Indeed, a dominant party in government would face little difficulty passing ordinary statutes to restrict the scope of rights. The Malaysian government's passing of contentious security laws, pushed through during late night parliamentary sittings, is only a recent example of a ruling coalition's capacity and willingness to harness the political process for expedient ends.[25] Instead of cultivating a culture of constitutionalism, a weaker model of judicial review in ruling party systems is likely to furnish the

20. *Id.* at 223.
21. *Id.* at 57.
22. *Id.*
23. *Id.* at 78.
24. *Id.*
25. *See, e.g.*, Thomas Fuller, *Malaysia Revives Detention Without Trial with New Law*, N.Y. TIMES (Apr. 7, 2015), http://www.nytimes.com/2015/04/08/world/asia/malaysia-resurrects-detention-without-trial-alarming-government-critics.html; *Malaysia Approves Security Law amid Warning It Could Lead to Dictatorship*, GUARDIAN (Dec. 3, 2015), http://www.theguardian.com/world/2015/dec/04/malaysia-approves-security-law-amid-warning-it-could-lead-to-dictatorship.

executive with an expectation of judicial submissiveness. Nor is it apparent when such judicial deference should end; on Yap's account, the upshot seems to be that courts avoid any robust assertion of judicial power indefinitely so long as they face significant constraints from political actors.[26]

A further problem with leaving final constitutional determinations to the political branches is that it risks allowing the government to claim a cloak of constitutional legitimacy for its actions. According to Yap, judicial determinations that can be reversed only through constitutional amendment foreclose the democratic process from correcting judicial errors.[27] In practice, however, it is the ruling party's overemployment of the amendment process in Malaysia and Singapore that has attracted concern.[28] More than fifty constitutional amendment acts, amounting to approximately 700 individual amendments, have been passed in Malaysia since its independence in 1957,[29] while Singapore has passed more than forty amendments acts in its half-century of statehood.[30] In response, the Malaysian Federal Court has gone as far as to suggest that the parliament cannot enact constitutional amendments that violate the constitution's basic structure.[31] My point is simply that the courts should not always deliberately avoid exercising their power to invalidate legislation that manifestly violates constitutional guarantees—a power explicitly imparted to them as part of their constitutionally prescribed role. Courts have a constitutional obligation to point consistently in the direction of constitutionalism, even, or especially, in the face of executive and legislative dominance.[32] In practice, this could be done through the development of sub-constitutional norms, but also, if necessary, through the exercise of judicial review to strike down unconstitutional actions.

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26. *See* YAP, *supra* note 5, at 78 (arguing that courts in a dominant party state should avoid a "robust judicial reading of the Constitution" that may provoke the government and precipitate a constitutional crisis).

27. *Id.* at 224.

28. *See* ANDREW HARDING, THE CONSTITUTION OF MALAYSIA 103 (2012). Until the 2008 elections in Malaysia, when it lost its two-thirds legislative majority for the first time, the ruling coalition possessed a majority in parliament sufficient to adopt almost any amendment it proposed. In Singapore, the dominance of the People's Action Party, which still maintains more than a two-thirds legislative majority, has meant that the government can amend the Singapore constitution "at will and has done so regularly." LI-ANN THIO, A TREATISE ON SINGAPORE CONSTITUTIONAL LAW 244 (¶ 04.052) (2012).

29. Cindy Tham, *Major Changes to the Constitution*, MALAYSIAN BAR (July 17, 2007), http://www.malaysianbar.org.my/echoes_of_the_past/major_changes_to_the_constitution.html.

30. THIO, *supra* note 28, at 244 (¶ 04.052).

31. Sivarasa Rasiah v. Badan Peguam Negeri, [2010] 2 MALAY. L.J. 333, ¶ 7 (Fed. Ct. of Malay.).

32. *See* DAVID DYZENHAUS, THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY 4 (2006); *see also* H.P. Lee, *Constitutionalized Emergency Powers*, *in* EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY 393, 410 (Victor Ramraj & Arun Thiruvengadam eds., 2010) (arguing that expecting courts to wait for a change of political climate before they act more robustly is "akin to asking judges to display courage when such a display is not necessary").

Consider apostasy in the religious freedom context. In the Malaysian case of *Lina Joy*,[33] the Federal Court held that a Muslim could not convert out of Islam without obtaining a certificate of apostasy from a sharia court, ruling that apostasy is a matter for the religious courts to decide. Yap recommends that civil courts impose a jurisdictional clear-statement rule that individual Malaysian states[34] "confer jurisdiction expressly by an ordinary legislation on the syariah courts before the jurisdiction of the civil courts is ousted."[35] The upshot of Yap's approach is that state legislatures need merely make clear their intended intrusion on an individual's constitutional religious freedom for apostasy to be a matter exclusively for the sharia courts to decide.[36] This has crushing implications for people who wish to leave Islam. In several states, they may be fined, imprisoned, and whipped;[37] in others, mandatorily detained for rehabilitation.[38] Given the immense consequences of conferring on sharia courts the sole adjudicatory power over individuals regarded as apostates, final determination of such a matter should not be left to individual state legislatures—particularly in the context of Malaysia's growing Islamization.[39] Recognizing that issues like these implicate constitutional rights such as religious freedom in a fundamental way need not mean that the religious courts' jurisdiction is deprived of effect.[40] Malaysian civil courts have properly deferred certain Islamic personal and family law matters to the sharia courts' jurisdiction. But when constitutional issues are involved, the civil courts should not decline jurisdiction in situations that would deprive individuals of any meaningful forum to adjudicate their constitutionally guaranteed rights. [41]

The discourse regarding constitutional adjudication in the Asian legal systems of Hong Kong, Malaysia, and Singapore is still developing. Courts in these dominant ruling party systems have a central

33. Lina Joy v. Majlis Agama Islam Wilayah Persekutuan, [2007] 3 ALL MALAY. REP. 693 (Fed. Ct. of Malay.).

34. The Malaysian federation consists of thirteen states, each of which has an individual state government, and three federal territories.

35. YAP, *supra* note 5, at 153.

36. *Id.* at 156. *See* FED. CONST. art. 11(1) (Malay.) ("Every person has the right to profess and practice his religion . . . ."); *id.* art. 121(1A) (specifying that civil courts do not have jurisdiction over "any matter within the jurisdiction of the Syariah courts").

37. *See, e.g.*, Administration of the Religion of Islam and the Malay Custom of Pahang (Amendment) Enactment, No. 4 of 1989, § 185 (Malay. Pahang). Similar penalties are specified in the state legislation of Perak, Terengganu, and Malacca.

38. For instance, in the Malaysian states of Sabah and Kelantan, converting from Islam can result in detention for up to thirty-six months. Under these circumstances, obtaining a certificate of apostasy is a practical impossibility.

39. *See, e.g.*, JOSEPH CHIYONG LIOW, PIETY AND POLITICS: ISLAMISM IN CONTEMPORARY MALAYSIA (2009).

40. *Cf.* YAP, *supra* note 5, at 151 (arguing that Sharia courts are tasked with adjudicating religious matters and that their decisions would always impinge on the scope of Muslims' religious freedom).

41. *See also* Lina Joy v. Majlis Agama Islam Wilayah Persekutuan, [2007] 3 ALL MALAY. REP. 693, 737 (Fed. Ct. of Malay.) (Malanjum, J., dissenting) (emphasizing that when "constitutional issues are involved especially on questions of fundamental rights as enshrined in the Constitution it is of critical importance that the civil superior courts should not decline jurisdiction by merely citing Article 121(1A)").

role to play in articulating and safeguarding core constitutional principles. Yap's book makes a valuable contribution to the field by showing how courts can develop sub-constitutional norms to promote constitutionalism. Insofar as courts in these Asian states are able to cultivate greater rights protection through the use of dialogic tools, they should do so. Sometimes, however, a more robust role for the judiciary is necessary to invalidate actions that are manifestly inconsistent with constitutional guarantees. In these circumstances, there is value in the judiciary making an authoritative declaration to protect fundamental constitutional principles. Yet regardless of which view one holds, Yap undoubtedly offers an important account of dialogic review in Asia that engenders and advances the debate in thoughtful and challenging ways. For pushing the boundaries of the discourse surrounding these Asian common law systems, Yap's work is a deeply welcome contribution to comparative constitutional law and theory.