Dynamic Democratic Dialogue

Author : Asanga Welikala

Date : April 5, 2017

Alison L. Young, **Democratic Dialogue and the Constitution** (2017).

In recent years, the cornucopia of academic commentary on dialogic constitutionalism (or cognate terms like democratic dialogue) has been one of the richest and most creative in constitutional theory and comparative constitutional law. The debate has benefited from celebrated contributions from some of the world's best-known constitutional thinkers, as much as from fresh thinking by younger scholars. The current debate began as a response to the institutional innovation, and later as a theoretical discourse, within some Commonwealth countries that adopted parliamentary bills of rights, although arguably the embryo of the model has an older pedigree in the Commonwealth tradition (e.g., the "manner and form" provisions of s.5 of the Government of Ireland Act 1920 or s.29 of the Ceylon (Constitution) Order in Council 1946). The development of the dialogic model has since also engaged distinctive practical challenges of different global regions, from North and South America, to Europe, Africa, and Asia. Within its broad rubric therefore it has not only embraced both common law and civilian systems as well as the developed and developing worlds, but also found diverse theoretical articulations serving a wide range of quite different constitutional challenges and contexts. Professor Alison L. Young's recent book, *Democratic Dialogue and the Constitution*, is the latest and one of the most rigorous contributions to this already highly sophisticated debate over dialogic constitutionalism.

For those for whom at least the more extreme claims of the two counterposed models of legal and political constitutionalism hold little attraction and practical utility, dialogic constitutionalism has an almost intuitive appeal as a *modus vivendi*. In forcing institutional parity and dialogue between the judiciary and the political branches—rather than the supremacy of one or the other—it seems to both meet the requirements of representative democracy and the protection of normative principles, when societies are confronted with legitimate and reasonable but deep disagreements over matters of constitutional significance. It empowers the judiciary adequately to make authoritative statements about the scope of constitutional rights, while simultaneously maintaining the role of legislatures as forums of democratic deliberation and decision-making. The dialogic model also enhances the scrutiny of elected executives, by demanding equal emphasis on parliamentary as well as judicial forms of accountability. In eschewing strong-form judicial review, it addresses the democratic deficit of legal constitutionalism (the counter-majoritarian difficulty), and in abjuring the untrammelled parliamentary supremacy of political constitutionalism, it accommodates liberalism's counter-majoritarian principles in the protection of individuals and minorities. In short, it sets to work the ideal institutional model for the principled negotiation of constitutional disputes in democracies, whether over rights or questions of a more general nature.

Even though some of the initial excitement with the novelty of the model has receded with the realisation of its limitations over time, it continues to exert a powerful appeal on constitutional theorists and designers. This is so for a number of reasons, of which perhaps the most obvious is that dialogic constitutionalism allows us an escape from some of the more otiose abstract debates over the normative superiority of legal or political models, through an alternative model of constitutionalism that is not merely convenient but also highly normatively defensible.

But especially in the developing world and the international practice of post-conflict or post-

authoritarian constitution-making since the end of the Cold War, after a lengthy period of doctrinal dominance of a very strong-form model of legal constitutionalism—and then increasing anguish over its many failures in application—democratic dialogue offers fresh avenues of thinking for constitutional design. Liberal legal constitutionalism's underestimation of the power of local histories, politics, and cultures, explains at least in part the many miscarriages of radical attempted constitutional transfigurations in non-Western societies. The less prescriptive and more flexible model of dialogic constitutionalism, by giving equal attention to the political as to the legal, has the potential to better serve these societies by articulating a coherent theory which can inform rights protection and democratic deliberation, checks and balances, and help resolve the often-elusive question of the appropriate balance between constitutional rigidity and flexibility.

And at least for some who are skeptical of the aptness, and fearful of the consequences, of revolutionary constitutional transitions, the sense of balance, restraint, proportion, and deliberation that is implied by a dialogic mode of constitutional decision-making points to the great first-order virtue of constitutional politics that Edmund Burke, following Cicero's idea of *artifices officiorum*, classically enunciated as 'prudence.' To simplify, the Burkean notion of prudence is essentially that constitutional questions are not only about legal principles, rights and duties, but equally importantly about political considerations of peace and order, and indeed contextually about the historical and cultural ethos of a society. In addressing the relation between (legal) idealism and (political) realism, Burke's thought retains its crispness today because any sensible methodology of contemporary constitutional theorising must surely be equally and simultaneously attentive to both abstract norms as well as practical realities. By bringing the three branches of the state into dialogue rather than defiance, dialogic constitutionalism seems to promote prudence in defining, structuring, disciplining, and ultimately reconciling the relationship between law and politics.

Alison Young's *Democratic Dialogue and the Constitution* begins with a deconstruction of some of the idler assumptions that serve the current debate, exposing the conceptual instability of existing theorizations of dialogic as well as legal and political models of constitutionalism. The central problem here is that it has become necessary to over-determine the distinction between legal and political models, so as to make space for the dialogic model in between. Her analysis demonstrates how this "runs the risk of either providing an artificial divide between extreme forms of legal and political constitutionalism, leaving a middle ground for democratic dialogue, or pushing all accounts of constitutionalism into the middle ground, subsumed into accounts of democratic dialogue." (P. 32.) This suggests that "democratic dialogue is either ubiquitous or non-existent." (P. 30.) The explanation for this, Young argues, is that we see the distinction between legal and political models as one of control: we seek to categorize a constitutional system as belonging to one or other model by looking to whether legal-judicial or political-legislative controls have the final say on constitutional issues.

Young rejects this misleading approach, asking instead the question whether dialogue is different because of its dynamic rather than static nature. That is, dialogue is distinctive because it draws upon the foundational assumptions and values of the other two models in a dynamic way, but accords either set of values an equal importance and neither a relative superiority. The critical distinguishing feature of the theory of democratic dialogue Young offers is that its starting premise is not control but *institutional interaction*. Assuming that institutional interaction rather than conflict is better able to protect both rights and democracy, Young's account demonstrates how dialogue can draw on both legal and political models in determining when the relative power of the different values ought to prevail when institutions interact.

In establishing the advantages of democratic dialogue, Young elaborates two forms of 'inter-institutional interactions': 'constitutional counter-balancing' (guaranteeing roles for both judiciary and legislature in the settlement of constitutional issues while ensuring no override for either) and 'constitutional

collaboration' (incentivizing judicial and legislative institutions to work together by drawing on their intrinsic strengths and weaknesses). The central merit of dialogic constitutional design is that *constitutional counter-balancing* facilitates *constitutional collaboration* between courts and parliaments, thus maximizing both rights-protection and democracy.

Perhaps the book's forte is that it goes beyond the protection of constitutional rights (which has tended to dominate the existing literature) to discuss democratic dialogue as a general model of constitutionalism that serves such ends as participatory and deliberative democracy, checks and balances, and stability and evolution, providing as it does so an elaborate normative framework for democratic dialogue. Beyond the UK and European contexts that are then discussed in the last chapters of the book, it succeeds admirably – and with an impressive display of theoretical and empirical scholarship – in establishing democratic dialogue as: "a particular form of constitutional design; as a distinct method of protecting human rights; a theory which advocates a particular way in which institutions should exercise their powers when determining rights-issues; and as a means of providing an accurate description of constitutional reality." (Pp. 33-34.)

Alison Young's views are the product of many years of research, reflection, and writing on the major issues of constitutional theory and comparative constitutional law that are tackled in great length, depth, and texture in this book. Despite the clarity of her exposition, it is a work of huge complexity and nuance, which promises to reward a more unhurried reading than was the basis for this brief initial assessment. There is little doubt it will generate much erudite commentary in the future. It would certainly be too early to characterize the book as a culmination of her work, but this latest iteration is an extremely persuasive exposition of a very refined theory of democratic dialogue as a general and heuristic model of constitutionalism. As such it would likely become a much-cited and influential work, especially as the UK enters a period of major constitutional change if not upheaval surrounding Brexit. It remains to be seen, however, whether constitution-makers in the world beyond the West would have the imagination to engage with her important insights, and indeed, the mettle to jettison the depleted constitutional technology from the 1990s to which many are still wedded.

Cite as: Asanga Welikala, *Dynamic Democratic Dialogue*, JOTWELL (April 5, 2017) (reviewing Alison L. Young, **Democratic Dialogue and the Constitution** (2017)), https://intl.jotwell.com/dynamic-democratic-dialogue/.