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Responsive Judicial Review—Democracy And Dysfunction in the Modern Age

Hon'ble Dr. Justice DY Chandrachud

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BOOK REVIEW

RESPONSIVE JUDICIAL REVIEW—DEMOCRACY AND DYSFUNCTION IN THE MODERN AGE

— Hon'ble Dr. Justice DY Chandrachud*

I. INTRODUCTION

Professor Rosalind Dixon presents an engaging analysis of the theory of judicial review in *Responsive Judicial Review — Democracy and Dysfunction in the Modern Age*. Dixon's work is the intellectual successor to John Hart Ely's *Democracy and Distrust*,[1] which envisaged judicial review in the United States as a constitutional necessity to counteract malfunctions within the political process. Accordingly, Dixon adopts a comparative and sociological method of inquiry into constitutional theory and builds upon Ely's work. Some of her notable contributions that find elucidation in the book include (i) diversifying Ely's theory from his exclusive focus on the US; (ii) expanding Ely's understanding of when democratic values are considered to be at stake;[2] (iii) espousing a "thicker" conception of the representation-reinforcement theory of judicial review;[3] and (iv) focusing on "judicial capacity" to effect constitutional reform, as opposed to a normative critique of judicial legitimacy.[4]

Dixon's work proceeds according to the hypothesis that the State has a pre-existing democratic constitutional system that requires courts to make choices about constitutional construction and implementation.[5] A "thin" notion of democracy, as proposed by Ely, emphasises the judicial protection of the political process through free and fair elections and competition between political parties. Thin constitutionalism, which has been the area of study of several scholars, was advocated most recently by Professors Mark Tushnet and Bojan

* Dhananjaya Y Chandrachud, Chief Justice, Supreme Court of India.

1 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (HUP 1980).

2 Rosalind Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (*forthcoming*), 17.

3 Dixon (n 2) ch 2: Constitutions and Constructional Choice, pts D–E.

4 Dixon (n 2) 99.

5 Dixon (n 2) 14.

Bugaric in their book *Power to the People*.[6] In contrast, a "thick" notion of democracy stresses the judicial protection of commitments to democratic deliberation and the protection of minority rights.[7] Dixon's core argument for a responsive theory of judicial review combines the need for "thick" and "thin" conceptions of judicial review encompassing competitive and deliberative understandings of democracies and the inevitability of disagreements within them.[8] Her views echo the work of several scholars, particularly those studying post-colonial constitutions in the global south, for a "thick" conception of constitutionalism helps shape the state's constitutional discourse and regulate its institutions.[9] A comprehensive overview of the debates over these conceptions would exceed the scope of Dixon's book and, consequently, this review. However, her book provides a unique perspective on balancing both conceptions in order to evolve a nuanced approach towards judicial review.

Dixon's work draws on experiences from many jurisdictions, including Australia, Brazil, Canada, Colombia, Fiji, Germany, Hong Kong, India, Israel, Korea, Pakistan, Singapore, South Africa, the UK, the US, and New Zealand. The sheer breadth of her comparative exercise of constitutional theory makes the book a must-read for academic scholars and practitioners who turn to courts to litigate critical questions of constitutional law. The book addresses the full spectrum of arguments and socio-political restraints that result in a morphed form of judicial review in at-risk democracies.[10]

Dixon, a self-professed "neo-Elyian"[11] identifies three primary risks to democratic dysfunction which can be addressed through a robust conception of judicial review: (i) anti-democratic monopoly power; (ii) democratic blind spots; and (iii) democratic burdens of inertia. It is often argued by legal scholars that for judicial review to be considered legitimate, it must be confined to a literal interpretation of the text of the constitution. It is thus voiced that judges, as unelected legal technicians, should limit the scope of their judicial review. Any diversion from this purported standard of legitimacy is questioned, even if it comports with constitutional values. While this approach has legal and political justification, it tends to belittle the counter-majoritarian role that has been envisaged for courts in several constitutions. To find a middle ground, Dixon argues that judicial review should principally be 'weak-strong' in nature—sufficiently strong to overcome democratic blockages and weak enough to allow scope for reasonable disagreement.[12] She successfully moves beyond the

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6 Mark Tushnet and Bojan Bugaric, *Power to the People: Constitutionalism in the Age of Populism* (Oxford UP 2021).

7 Dixon (n 2) 47.

8 Dixon (n 2) 46.

9 Tarunabh Khaitan, 'Constitutional Directives: Morally-Committed Political Constitutionalism' 82(4) Modern Law Review (27 March 2019).

10 Dixon (n 2) ch 3: Defining Democracy and Democratic Dysfunction.

11 Dixon (n 2) 3.

12 Dixon (n 2) 8.

dichotomies that view judges as either heroes or political stooges in the arena of legal and political constitutionalism[13] in evolving a nuanced framework for legitimate and responsive judicial review. Judges work within political contexts and institutional limitations. Thus, an all-or-nothing approach to judicial review may run the risk of mistakenly placing the entire burden of heralding progressive values on the judiciary.

In this book review, my aim is to engage with a few of Dixon's ideas through my experience at the Indian Supreme Court. As a judge of the Indian Supreme Court, I am constrained to not comment on several matters that could embellish themes generated around democracy-reinforcing judicial review. However, I hope to provide the reader with my perspective from an academic focus and invite further engagement with Dixon's critical piece of scholarship.

II. CRITIQUE OF ELY'S REPRESENTATION-REINFORCEMENT-BASED VIEW AND TOWARDS A "THICKER" CONCEPTION OF DEMOCRACY

In Chapter 2, Dixon addresses the debates on constitutional construction and interpretation over contested questions of social rights, unconstitutional amendments, liberty, and privacy of citizens. The chapter can provide scholars and practitioners with a bird's eye view of the debates that have characterised the conceptions and philosophies of judicial review. She particularly highlights Ely's conception of representation-reinforcement. Specifically, Ely argues for a 'thin' understanding of democracy when it comes to protection of judicial review. While the political process is subject to judicial oversight, the judiciary should refrain from intervening in politically contested conceptions of rights and freedoms, save and except for the protection of "discrete and insular minorities".

Dixon addresses the primary assumption in Ely's postulate—that of a "well-functioning democracy".[14] A comparative lens demonstrates that this conception is a protean concept that may be influenced by various factors, such as the age of the democracy, its political system, geo-political affairs, and eco- nomic systems. After analysing the causes underlying democratic dysfunction, consolidation of political power and the consequent backlash against judicial independence, Dixon postulates,

> To be useful as a guide to constructional choice, therefore, any contemporary account of judicial representation-reinforcement must be both broader and more qualified than that offered by Ely himself: it must combine thin and thick

[13] Dixon (n 2) 10–11.
[14] Dixon (n 2) 57.

> understandings of democracy, acknowledge the inevitability of disagreement about the precise scope of these understandings and take a broad view of ways in which democratic commitments of this kind may be threatened in a contemporary, comparative setting.[15]

Dixon's views on the role of judicial function represent a commitment to a 'thicker' understanding of judicial review. The Indian Constitution at its birth envisaged an aspirational polity that could upend structures of caste, gender, class, religion, and colonial economic subjugation. Constitutional amendments were frequently effected to fundamental rights after obtaining special majorities in both the houses of Parliament. Unlike the relatively recent South African Constitution, a stated protection for sexual minorities or a graded approach to socio-economic rights such as healthcare does not find constitutional articulation in India. A thin understanding of judicial review would relegate the function of constitutional courts to merely interpreting the text as it is given. This approach would eliminate several progressive movements that were legitimised by the intervention of the constitutional courts in India.

A thicker conception of judicial review is critical, not only for the protection of discrete and insular minorities but also for marginalised groups in exclusionary spaces, such as women in the workforce. I have had occasion to hear two constitutional challenges to the process of recruitment and conferment of permanent commission to women (akin to regularisation) in the Indian armed and naval forces.[16] A thin conception of democracy and judicial review would potentially place the issue of the constitution protecting against indirect discrimination within the realm of reasonable disagreement, thereby excluding judicial review. Similarly, when the Indian Supreme Court recognised the right to privacy as inherent in the constitutional framework, several state actors challenged this understanding. However, its articulation rendered legitimacy to various civil society movements and parliamentary legislation advocating for data privacy and protection. Furthermore, a thicker conception of judicial review finds constitutional legitimacy in several post-colonial constitutions.[17] Even in the global North, courts often do not confine themselves to the precepts of thin constitutionalism. Dixon evolves a nuanced approach between the extremes of a progressive and pragmatist outlook to judicial review and legitimacy and moves the conversation forward.

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15 Dixon (n 2) 53.

16 *Lt. Col. Nitisha v. Union of India*, 2021 SCC OnLine SC 261; *Babita Puniya v Union of India*, (2020) 7 SCC 469.

17 Tarunabh Khaitan, 'Constitutional Directives: Morally-Committed Political Constitutionalism' (2019) 82(4) Modern Law Review.

III. DEMOCRATIC BURDENS OF INERTIA AND THE EFFECTIVENESS OF RESPONSIVE REVIEW

The chapters in which Dixon presents her understanding of democratic dysfunction and the judicial response to counter them provide a closely reasoned fabric. Dixon's ideas and theories find resonance in India where the Supreme Court shares constitutional jurisdiction with the state High Courts, in tandem with appellate jurisdiction over a wide range of legal disputes. This dual function exposes judicial review to questions of constitutional construction and importance at every turn, not just specifically when benches of five or seven judges are constituted for the purpose of determining a question of constitutional importance.

One of the stand-out features of Dixon's book is her focus on the question of the capacity of the judiciary for the outcomes they produce. She traces this capacity from the spectrum of detecting dysfunction,[18] countering dysfunction,[19] evaluating the success of judicial intervention,[20] and elaborating on the necessary preconditions for responsive judicial review[21] which include judicial independence, political tolerance for judicial review, support structure for constitutional litigation, and finally, jurisdiction and effective remedial tools.[22]

Indian courts are called upon to address the burdens of administrative inertia. As her core argument, Dixon espouses weakening the finality of orders as a measure to enhance responsiveness.[23] Weakening the finality of orders is not to be confused with the abdication of strong remedies when the circumstances warrant the same. Dixon has advocated for a balanced approach to the identification of the strength of the rights and the corresponding remedies. While Dixon's theory is currently focused on the legislative burdens of inertia,[24] the questions before courts are complex. Most recently, I was a part of the bench that oversaw the issues of pollution in Delhi[25] and of governance over the second wave of the COVID-19 pandemic in India.[26] Exigent issues, particularly those involving health and climate emergencies, require executive action. When these issues are presented before the court, the burdens of inertia may be attributable to administrative inaction. The courts, by eliciting justifications from the executive, can facilitate a responsive approach to judicial review.

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18 Dixon (n 2) 100.
19 Dixon (n 2) 105.
20 Dixon (n 2) 109.
21 Dixon (n 2) 116.
22 Dixon (n 2) 122.
23 Dixon (n 2) 169.
24 Dixon (n 2) 14.
25 *Aditya Dubey v Union of India*, WP (C) 1135/2020 (Supreme Court of India).
26 *In Re: Distribution of Essential Supplies and Services during Pandemic*, SMWP(C) 3 of 2021 (Supreme Court of India).

I was a part of the bench that had initiated a *suo motu* oversight over the management of the second wave of the COVID-19 pandemic in India. The Bench addressed four broad issues— supply of medical oxygen, medical infrastructure, availability of essential drugs, and vaccination policy. As the Court dealt with these issues, it was critical that the channels of emergency aid were not clogged due to orders passed by the Supreme Court, which did not have the expertise or resources to determine triage in a health emergency. At the same time, the Court could not abdicate its constitutional duty to protect public health in the context of the right to life and equality. Thus, in a collaborative exercise of jurisdiction along with several High Courts that were addressing issues particular to their region, the Indian Supreme Court exercised a dialogic oversight over systemic issues by demanding justifications. This dialogue was critical from the perspective of democratic deliberation in a time of crisis. In this case, Professor Sandra Fredman's idea of a "Bounded-Deliberative"[27] model of judicial review was deployed where executive policies were analysed from a baseline understanding of constitutional and human rights. The executive was given adequate time to respond and recalibrate, much like Dixon's "weak-strong" approach to remedies which are "delayed but coercive or supervisory" in nature.[28]

On the flip side, I would also like to highlight that such issues must be treated with caution, particularly because of several criticisms of the long-term effects of the Supreme Court's intervention, which Dixon highlights[29] in the *Mid-day Meal*[30] case. Too prescriptive or interventionist an approach may have downsides despite the best of intentions. In her analysis of 'Structural Social Rights', Dixon analyses the decision of the South African Constitutional Court in *Grootboom*[31] where the Court relied on the constitutional text to direct the Government to take 'reasonable measures' towards the progressive realisation of the right to housing and health care. In this analysis, she rightly points to several backlogs and gaps in the implementation of the government's commitment to provide formal housing.[32] However, these issues concerning implementation may be symptomatic of a broader issue. Scholars have argued that social rights may be conceptually deficient for effective judicial protection.[33] Thus, in testing this argument further, they may engage with Dixon's approach to responsive judicial review and the tensions with public interest litigation in India. A responsive approach to judicial review must also evolve a nuanced stance towards intervention, lest the courts become forums

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27 Sandra Fredman, 'Adjudication as Accountability: A Deliberative Approach' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford UP 2013).

28 Dixon (n 2) 162.

29 Dixon (n 2) 83.

30 *People's Union for Civil Liberties v Union of India*, (2011) 14 SCC 129.

31 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

32 Dixon (n 2) 80.

33 Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Oxford UP 2018).

of quasi-governance. Scholars have criticised the court management of topical issues of policy and governance through public interest litigation.[34] While some concerns can be refracted from the lens of constitutional rights, they involve choosing between competing values and considerations of public good. Today, almost all public interest litigation invokes the violation of constitutional rights, while terms such as 'constitutional morality' are bandied as a panacea for hard, technical problems. It is not sufficient that a case brings to the forefront a circumstance of human suffering; it has now become necessary to view this suffering through the prism of the violation of human rights. Such issues as a development project without environmental clearances, a lack of housing for the poor, the need for new roads, and animal welfare are all now cast in the mould of a violation of *individual* dignity protected by Article 21. The Indian Supreme Court consists of thirty-four judges; meanwhile, the lawyers arguing human rights cases comprise a small pool. Nevertheless, the freedoms articulated by the Court must belong to all citizens. The structure of such litigation may result in skewed outcomes or contribute to greater legislative inertia. That said, Dixon's work provides guidance to litigants and judges in better calibrating remedies.

IV. CONCLUSION

Dixon's book, which is reflective of intellectual depth in analysing comparative political processes, invites scholars from jurisdictions across the world to engage with her theory. For obvious reasons, no singular theory is likely to be capable of encompassing all of the institutional and socio-political context of judging. However, scholarly contributions like Dixon's are immensely helpful to judges who draw on the work of our peers in other jurisdictions to preserve our fidelity to the constitutional framework.

Dixon's argument could be taken forward by a scholarly exposition on the judiciary's articulation of specific rights which heralds its parliamentary recognition. Since independence, the Indian Supreme Court has recognised several key rights, and such recognitions are key stepping-stones towards the construction of legal regimes that can guarantee their enforceability. For instance, in the *State of Uttar Pradesh v Raj Narain*,[35] the Supreme Court recognised the right to information held by the government as a fundamental right on par with the freedom of expression. Following its repeated reiteration by the court, including several decisions compelling the government to disclose documents, the Parliament enacted the Right to Information Act in 2005, establishing a robust framework for citizens to demand government documents. While section 3 of the Act establishes the legal right to information, the title of the Act is the most significant indicator of the creation and cementing of the new right.

[34] Anuj Bhuwania, *Courting the People— Public Interest Litigation in Post-Emergency India* (Cambridge UP 2017).

[35] (1975) 3 SCR 333.

As another example, the decisions in *Mohini Jain v State of Karnataka*[36] and *Unnikrishnan v State of Andhra Pradesh*[37] recognised the right to education as a facet of the right to life under Article 21. This move provided a stimulus to the national discourse and the widespread grassroots movements advocating for a statute to secure the educational aspirations of millions of children. It reached fruition with the adoption of the eighty-sixth constitutional amendment which crystallised the right to education as a fundamental right. The resulting Right to Education Act seeks to give meaningful effect to this right. As these examples demonstrate, decisions recognising rights can propel public and political discourse and begin to change the mindsets of those who are entrusted to bring about constitutional and legal change. Such decisions may also outline the preliminary contours of the rights and commit the legal system to a minimum standard of individual freedoms which require protection. Moreover, court decisions may not always result in the kind of backlash that was witnessed in the US following *Roe v Wade*.[38]

Most recently, I was a part of a nine-judge Bench of the Indian Supreme Court in *K S Puttaswamy v Union of India*[39] which recognised the right to privacy. The judiciary articulated this right from an interpretation of the Constitution as a living document that had to adapt to the realities of the digi-tal world. Such an articulation contributed to civil society movements and par- liamentary debates on data protection. Similarly, the right to die with dignity[40] has spurred the parliamentary process concerning a euthanasia regulation bill.

Dixon provides path-breaking scholarship on the subject. The task is now open for scholars and commentators to juxtapose these instances with Dixon's ideas and further contribute to an academic study of the judicial role, its legitimacy, and its effectiveness.

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36 (1992) 3 SCC 666.
37 (1993) 1 SCC 645.
38 410 US 113.
39 (2017) 10 SCC 1.
40 *Common Cause v Union of India*, (2018) 5 SCC 1.