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COURTS AND THE GLOBAL SEARCH FOR DEMOCRATIC RESILIENCE

—Tom Gerald Daly*

When Ros Dixon publishes a book, it's time to sit up and take notice. When she publishes two books in quick succession, it's time to engage with an entire project. In last year's book on abusive constitutional borrowing, co-authored with David Landau,[1] Dixon explored the dark side of legal globalisation and the migration of ideas, examining how the norms and forms of liberal-democratic constitutionalism can all too easily be used to undermine democracy.

In this forthcoming book, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age*, Dixon takes a more optimistic tack, revisiting, expanding, and challenging the seminal work of John Hart Ely on representation-reinforcing judicial review, which presented judicial review as legitimate when policing against erosion and distortion of the political process through incumbents' suppression of democratic participation and systematic disempowerment of minorities. (Dixon also revisits works such as Nonet and Selznick's *Law and Society in Transition*.) As such, the book lies at the centre of an expansion of neo-Elyian thought, which includes Stephen Gardbaum's recent work on a new form of comparative political process theory (CPPT).[2]Dixon's work is a vital contribution to a comparative constitutional field that is grappling with what comes next for judicial review as a technology of democratic governance in a global context where democracy is under acute pressure.

Dixon's approach to the subject returns to the leading theoretical critiques of judicial review, focusing on six principal case studies: the US, UK, Canada, India, South Africa, and Colombia. Thus, Dixon sets out a framework for reconceptualising the role of judicial review as a 'responsive' form of review to address what she presents as three key dimensions of democratic dysfunction: (i) *anti-democratic monopoly power*, where institutional and electoral strength is accumulated at one site; (ii) *democratic blind spots*, where legislatures overlook relevant considerations, the impact of legislation in concrete cases, or potential alternative measures; and (iii) *democratic burdens of inertia*, where

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1 Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford UP 2021).

2 See a recent Debate Symposium in Volume 18, Issue 4 of the *International Journal of Constitutional Law* (December 2020), dedicated to Gardbaum's framework, including a response by Dixon.

blockages in the political process lead to unjustified delays in meeting democratic demands for constitutional or systemic change.

A deeply normative project, seeking both to provide theoretical justification for and practically inspire a recalibration (if not an expansion) of democracy-reinforcing judicial review, this work will spur a much-needed discussion about the role of courts as democratic safeguards in a world where liberal democracy is under acute challenge, at war with itself, questioning its fundamental purposes, and under pressure globally.

In this Symposium contribution, my aim is simply to offer some reflections on points of convergence and divergence between Dixon's work and my own, as well as situating this thought-provoking work within larger shifts in the comparative constitutional law literature.

I. POINTS OF CONVERGENCE AND DIVERGENCE

Dixon and I agree on many points. We both see courts as indispensable institutions in a constitutional democracy. We view the counter-majoritarian role of courts as legitimate, especially in contexts where systemic functioning of the liberal-democratic system is under pressure. We see a need to move beyond the somewhat artificial distinctions between 'weak' and 'strong' judicial review as totalising models. We also appear to share a view that, to some extent at least, the longstanding debate between legal constitutionalism and political constitutionalism is a zombie debate that has limited relevance for today's democratic challenges—or, at least, requires very significant re-thinking and nuance. Regarding courts' roles in protecting democracy and addressing dysfunction, we agree that much can be learned from broad comparative enquiry that includes democracies of different hues and vintages.

Where we seem to diverge is in how we view courts' capacity to correct defects in democracy as a matter of degree, how possible it is to craft adjudicative frameworks that can apply globally, and how we approach comparative methodology in addressing these questions.

II. HEROES OR ZEROES?

In a recent paper on judicial review and democratic decay, Jan Petrov discerns five groups of theories related to their proponents' strength of belief in courts' capacity to protect democracy:[3]

1) strong believers who see courts as major saviours of democracy;

[3] Jan Petrov, 'Is Resistance Futile? Countering Democratic Decay the Judicial Way', survey article for the panel 'Strategic Courts and Democratic Backsliding', International Society of Public Law (ICON-S) annual conference, 7 July 2021, p. 2.

2) weak believers who see courts as speed-bumps slowing down democratic decay;

3) neo-Elyian theorists who see courts as guardians of the political process;

4) non-believers I who see courts as insignificant actors incapable of protecting democracy;

5) non-believers II who see courts as a part of the problem rather than the solution.

Dixon might be viewed as falling most squarely into groups (2) and (3), but her recognition of group (5) reflects the subtlety of her framework. In Chapter 1, she sets out a "Sometimes View of the Promise of Judicial Review". Rightly observing that constitutional scholarship has had a tendency to coalesce into an 'everything' and 'nothing' perception of courts and their capacities, she draws a stark contrast between the 'heroic' view of courts—epitomised in the Dworkinian figure of a judicial Hercules—and perceptions of judges as "deeply unheroic in character", "inevitably shaped by the broader political context", and demonstrating "little capacity to protect and promote democratic political processes or norms".

According to Dixon, reality often lies somewhere between these two extremes, with judges constrained by their political and institutional contexts (including the nature and extent of their formal powers), their self-conception of their role as democratic actors, and their vulnerability to error. That said, she sees courts as having meaningful roles to play due to their "distinctive institutional training and vantage point", which can empower them to address key blockages and inertia in the democratic system as well as counter or at least slow down the erosion of the 'minimum core' of democracy (which, in her framework, comprises three dimensions: regular, free, and fair multi-party elections; political rights and freedoms; and a range of institutional checks and balances).

I must confess to being quite surprised to find myself placed in the "nothing" camp as Dixon sees it. It is true that, especially in my book *The Alchemists*, I look at various roles accorded to courts in young democracies—which have clear resonance with democracies more generally—and emphasise courts' limitations as agents of democratic protection and democracy-building. I identify exaggerations and distortions in the perceptions of courts as democracy-builders, as purveyors of social justice, as positive legislators, as public educators, as programmable technology, and as the last line of democratic

defence.[4] I take the view that courts' impact in many of these areas have been overstated and that law and courts can often do little if democratic breakdown is inevitable.

Notwithstanding my views on courts' limitations, my fundamental view, as set out in the book, is as follows: "To say that courts cannot achieve everything does not mean that they can achieve nothing". I fully recognise that there are core roles courts can play. Focusing on courts' multiple roles as engines of democratisation, I argued that courts should expend their institutional capital on adjudication that furthers three key objectives: shaping the electoral system, addressing authoritarian-era laws, and building themselves as institutions. My core contention was that courts would have to strategically adopt deferential postures with regard to other matters (eg economic governance, social and economic rights) in order to 'store' their power for use when needed; nevertheless, in terms of their core roles, they should not limit themselves to staying within the 'tolerance level' of the political branches or engage in 'strategic deference'.

In *Democracy and Dysfunction*, addressing democracies of all stripes—as opposed to young democracies exclusively—Dixon offers a similar argument in the sense of prioritising the issues that courts should address. However, she retools rather than rejects strategic deference by suggesting that courts should tailor the strength and scope of their decisions to the nature of the democratic blockage at issue.

In other words, Dixon's position and my own have much more in common than may appear at first blush. Indeed, I somewhat regret the full title of my own book, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*, as it has nourished a misconception that my argument is relentlessly sceptical of courts' capacities or even anti-courts in its normative posture. In truth, what animates my argument in the book are two central concerns: first, that it is unfair to overburden courts with expectations that they cannot meet, and second, that an excessive focus on courts (or faith in courts), based on exaggerated views of their capacities, needlessly 'builds in' fragility into the democratic system. I see this position as a realist and sympathetic approach to the judicial role worldwide.

III. HORSES OR ZEBRAS?

In practical terms, this question of faith versus fact drives us toward a clearer picture of cleavages in the broad church of comparative scholars who accept some form of legal constitutionalism as legitimate—especially the

[4] Tom Gerald Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (Cambridge UP 2017) ch 7.

constraining and disciplining power of judicial review. Divergences in degree and perception ultimately seem, to my mind, intimately connected to the empirical foundations used to build our theories of judicial review. Do we pay excessive attention to courts whose adjudicative roles, dexterity, and achievements are unusual or exceptional and, thereby, paint an unrealistic portrait of the judicial role? In other words, are the main courts that inform our theoretical frameworks horses (common) or zebras (rare)?

As indicated above, in elaborating her novel theoretical framework for judicial review, Dixon focuses on six principal case studies: the US, the UK, Canada, India, South Africa, and Colombia. Undeniably, all six courts have been highly influential globally, perhaps presenting a pantheon of global judicial archetypes. However, that influence can cloud our vision: a better question may be how representative of common global experience are these courts? In my own view, based on the evidence as I understand it, these courts are anomalies. They operate in somewhat exceptional democratic contexts featuring extremely old constitutions (US, Canada), uncodified constitutions (UK), distinctive forms of transformative constitutionalism (India, South Africa, and Colombia), serious societal conflict (Colombia), post-conflict (South Africa), and young(ish) democracy (South Africa and Colombia).

One might argue that the contextual differences across these case studies permits them to represent the diversity of the democratic experience globally—and that can be accepted, to some extent. However, it is hard to see much replication of their totemic status, whether in their domestic setting or in international comparative law. They are the skyscrapers in the skyline, drawing our attention away from the fact that most edifices in the global court-scape are mid-sized and somewhat less remarkable, notwithstanding the very real global transfer of governance power to courts over the past 80 years.

What might seem like methodological quibbling really matters in the construction of normative theories concerning the judicial role. One of my central arguments in *The Alchemists* was that we simply pay too much attention to these global anomalies, distorting our view of courts' capacities in general. My methodological response to this problem was to provide a granular, context-focused analysis of a powerful but not totemic court, the Supreme Federal Court of Brazil, which served as a counter-balance to the more exaggerated portraits of judicial greatness found in the literature, with the hope that, over time, others would add their own accounts of other courts outside the global pantheon.

Dixon, of course, cannot be accused of acting as an unthinking cheerleader for the benefits of judicial review. In fact, she takes care to emphasise the limits of responsive review and leavens her analysis of the main case studies with wide-ranging references to jurisprudence from states around the globe, such as Israel, Turkey, Venezuela, Ecuador, Bolivia, Sri Lanka, Malaysia, and Kenya.

She recognises in her introduction that, despite their institutional advantages, courts will not "always, or even mostly" succeed in performing the role of addressing democratic dysfunction, and many will opt for a more constrained role.

Yet, in her defence of courts playing a significant role in addressing democratic dysfunction, two features of her framework stand out: first, she offers that judges must have the right mix of legal and political skills to identify democratic blockages as well as figure out how and when judicial intervention might be helpful; moreover, she recognises that not every judge will be capable of carrying out this task. Second, she suggests that "by providing a clearer template and justification for review of this kind, the book may increase the number of judges capable of doing so successfully".

According to my view, few judges are, in fact, capable of such a difficult task. Furthermore, success in this task is extremely difficult to measure. From Dixon's argument one can get a sense that the overall perception of courts' capacities is still deeply influenced by the judicial stars that represent her main case studies, and her suggestion that taking this task is up to the individual judges worldwide (or courts as an institution). When the anomalous courts remain at the centre of our comparative universe, it is difficult to see other courts clearly: instead, they invariably appear as reflecting different dimensions of the stars they orbit or are perceived as themselves being the exception to a global norm.

IV. DEMOCRATIC CONTEXT AND DEMOCRATIC THREATS

A third point of reflection concerns the relationship between Dixon's framework for responsive judicial review and democratic context. Although Dixon's introduction expressly indicates that her framework relates to "both at risk and well-functioning democracies", she sees responsive review as requiring courts to meet specific minimal preconditions: "implicit institutional realism, political independence and support, remedial power, and support within civil society". Furthermore, she argues, in order to offer the possibility of responsive judicial review, a court must take an approach to review "that is quite carefully calibrated to respond to evidence of blockages within a democratic constitutional system".

Some of these preconditions appear far from minimal in today's world. Applying them to the six main case studies alone raises questions as to whether they are fully met in the contemporary state of their democratic and judicial systems. To take just three of the six main case studies, for instance, Dixon makes no mention of debates concerning the political independence of

the US Supreme Court and its tarnished public support,[5] the perceived "crisis of legitimacy" facing the Indian Supreme Court (including questions surrounding its independence and abdication of its constitutional role),[6] or the intensifying debate surrounding the legitimacy of the UK Supreme Court's limited review powers.[7] . It is vital not to overstate this precarity, but it does appear essential to grapple with these contemporary developments when elaborating a global, future-focused reconceptualisation of courts' roles.

An allied point concerns the identification of the principal challenges facing democracy today. Dixon convincingly lays out the key factors of democratic dysfunction, relating to (i) anti-democratic monopoly power, (ii) democratic blind spots, and (iii) democratic burdens of inertia. That said, in her introduction, the author admits that her focus is on democratic blockages that arise from the operation or inertia of the legislature, leaving the issue of executive aggrandizement—both 'organic' and anti-democratic—at the periphery of the analysis, despite being recognised as one of the central problems facing constitutional democracy worldwide.[8]

Additional contextual shifts that have reshaped the environment in which courts operate include the shift from yesterday's information scarcity and judicial review of censorship to today's information overload and distortion of the epistemic and associational bases on which any viable democracy rests, as well as the ascendance of populist narratives that paint judges as elite actors frustrating the popular will—which, of course, renders any attempt at remedial action grist to the populist mill. As Aileen Kavanagh observes, the Elyian view of judges is as "democratic referees" or even technocratic "mechanics", presupposing a distance and objectivity regarding partisan politics that populist narratives clearly frustrate or deny.[9]

Beyond these contextual challenges, whether courts can, in truth, successfully achieve responsive judicial review is evidently difficult to judge and connects with central questions in the longstanding debate concerning legal constitutionalism and a robust role for courts. Certainly, identifying systemic threats to the democratic minimum core requires courts to overcome many

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5 See eg Stephen Breyer, *The Authority of the Court and the Peril of Politics* (Harvard UP 2021).

6 See eg Anuj Bhuwania, 'The Indian Supreme Court in the Modi Era' in TG Daly and W Sadurski (eds), *Democracy 2020: Assessing Constitutional Decay, Breakdown and Renewal* (International Association of Constitutional Law 2020).

7 See Paul Craig, 'Judicial Review, Methodology and Reform' (forthcoming, *Public Law*, January 2022).

8 See Tarunabh Khaitan, 'Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism' (2019) 17(1) International Journal of Constitutional Law 342.

9 See Aileen Kavanagh, 'Comparative Political Process Theory' (2020) 18(4) International Journal of Constitutional Law 1483.

epistemic, situational, and perceptive limitations, not least the tendency to reduce complex polycentric problems to narrower legal questions.

Regarding the argument for carefully calibrating judicial review, in *The Alchemists*, I wrote,

> "We cannot fully plan for judges to have the perceptive delicacy, adjudicative dexterity, political nous, and flair for strategic thinking required to pull off effective jurisprudence of the highest quality. Nor can we design judges to adhere to any one conception of the judicial role. The likes of England's Lord Coke, the US Justice Brandeis, Ireland's Judge Walsh, Brazil's Justice Pertence, and India's Raj Khanna are born, not made. Dworkin's Judge Hercules—who can always find the 'right' answer—does not exist".

Importantly, Dixon recognises the messy reality that courts are human institutions, where principles of legality, professionalism, and collegiality can be interpreted in various ways depending on the particular perspective of the individuals appointed. Nonetheless, it is difficult to escape the inherent judgement in her account that judges who eschew taking on the role of responsive review are somehow failing in their role.

A 'sometimes' roster of perceived successes might also need to be balanced against the risk of action that exacerbates democratic weaknesses. While Dixon does urge courts to be mindful of the risks of responsive review, these risks are, again, often extremely difficult to assess. Consider the Supreme Federal Court of Brazil's judgment of 2007, striking down a law introducing electoral thresholds for parties to enter Congress on the basis of protecting political plurality: some scholars view it as having blocked necessary reform in order to address democratic blockages linked to party-system fragmentation,[10] yet we now see that very fragmentation viewed as a constraint on President Bolsonaro's worst assaults on the democratic system.[11] Time can change our view of a specific decision and its effects. That said, in terms of what is being protected or guarded, the vision of democracy presented by even the democratic minimum core—combining thick and thin, competitive and deliberative elements—remains deeply contested.

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[10] Daly (n 4) 203–05.

[11] See Juliano Zaiden Benvindo, 'Is Polarization Necessarily Bad? Lessons from Latin America' Int'l J Const L Blog (22 September 2021).

V. POST-JURISTOCRACY, INSTITUTIONAL PLURALISM AND THE INDISPENSABLE INSTITUTION

As the world's most powerful courts encounter serious difficulties and the challenges facing liberal democracies worldwide continue to deepen, there seem to be two main paths for scholars and practitioners: rejectionism, where the entire project of post-1945 court-centric legal constitutionalism is disavowed as a failure and where the central aim is to de-centre courts in our constitutional frameworks, and reformism, where the capacities and purposes of courts as meaningful actors are reviewed, reconceptualised, and recalibrated. As ever, the debate on courts' capacity to shore up democracy's deficiencies is one combining faith and fact, the evidence always lying in tension with our dominant perception of courts and judges. Dixon's stimulating work presents a reformist vision that is sure to re-energise the debates on judicial review and constitutional democracy. Courts remain an indispensable institution to any constitutional democracy; nevertheless, I see very real danger in placing undue emphasis on courts as a central mechanism for addressing malfunctions. I would ultimately agree with Kavanagh and Prendergast that we need to take a broader view of the institutional universe when searching for ways to remedy democracy's defects, that perhaps courts' clearest role is in "protecting—not perfecting—democracy",[12] and that even that protective role is limited. Courts are most effective when these limitations are accepted.

[12] Kavanagh (n 9) at 1489, citing David Prendergast, 'The Judicial Role in Protecting Democracy from Populism' (2019) 20 German Law Journal 245, 246.