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ON DIXON’S RESPONSIVE THEORY OF JUDICIAL REVIEW: HOW RESPONSIVE CAN THE RESPONSIVE MODEL BE?

—Mariana Velasco-Rivera*

In *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age*, Rosalind Dixon sets out an ambitious project that puts apex courts at the front and centre of the effort to preserve and enhance constitutional democracy. As part of this endeavour, such courts would be engaged in what she terms responsive judicial review. This form of review “encompasses two broad ideas about the relationship between judicial review and the value of ‘responsiveness’”. First, Dixon suggests that “judicial review should seek actively to protect and promote the capacity of a democratic constitutional system to respond to the needs and aspirations of democratic majorities”. Second, in proceeding along those lines, “courts should also be responsive to their own institutional position and role, including limits on their capacity and legitimacy”.¹ According to Dixon, the responsive approach can be achieved by “combining reliance on weak and strong modes of review when seeking to counter democratic blind spots and burdens of inertia—i.e., a combination of time-sensitive and coercive remedies with less prescriptive modes of review”, which could manifest in numerous forms: strong rights, weak remedies; weak rights, strong remedies; strong rights, weak precedent; weak-strong/strong-weak remedies.² Regardless of the combination, one of the main aims is to create the opportunity for a judicial-legislative dialogue on constitutional questions.

Since the book is comparative in nature, Dixon stresses the need to be open about the ‘local’ influence that domestic contexts have in any work that, like hers, seeks to develop and provide accounts that are general and global.³

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¹ Rosalind Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (forthcoming 2023) 143.

² *ibid* 160–69.

³ *ibid* 13.

In that spirit, Dixon presents her book as a work of constitutional theory and constitutional comparison that endeavours to inform and explain the role that judicial review may have for democratic preservation and enhancement, inviting scholars around the world to explore the scope and limits of the model she proposes.⁴ In this brief review essay, I will focus on what I understand to be a key challenge for the general implementation of Dixon's model. Specifically, the aim of creating a judicial-legislative dialogue. I will illustrate this challenge through a discussion of Mexico's constitutional experience regarding the right to abortion in the period between 2007-2022.

In 2007, Mexico City's legislative assembly reformed the local criminal code and health law to decriminalise abortion during the first trimester of pregnancy. In particular, the new regulation redefined "the crime of abortion as the interruption of pregnancy after the twelfth week, and established that prior to that time, voluntary abortion would be part of the health services granted free of charge by the state".⁵ The Ombudsman and the Attorney General brought a case before the Supreme Court (in abstract review) against that piece of legislation on the grounds that, among other things, allowing access to abortion violated the right to life of the unborn.⁶ The Supreme Court rejected the constitutional challenge primarily based on two arguments. First, the Court asserted that the determination of whether abortion should be a crime falls under the jurisdiction of state (or local) level legislatures. Second, the Court noted that the federal constitution did not codify a right to life and, as such, there were no constitutional grounds to argue that the decriminalisation of abortion violated it.⁷ In line with Dixon's model of responsive judicial review, that second argument likely responded to the fact that the Supreme Court was aware that, in a country where the vast majority of people identify as Catholic, determining the scope and nature of the right to life would be a contentious matter that would likely produce a democratic backlash.⁸

Nevertheless, the decision caused exactly what the Court was likely trying to avoid. After the judgement was rendered, sixteen out of thirty-two state legislatures swiftly moved to adopt constitutional amendments at the state level to recognise the right to life from the moment of conception⁹—making any attempt to liberalise access to abortion politically and legally harder to justify.

⁴ *ibid* 13–14.

⁵ Alejandro Madrazo & Estefania Vela, 'The Mexican Supreme Court's (Sexual) Revolution' (2011) 89 *Tex L Rev* 1863, 1874.

⁶ Suprema Corte de Justicia de la Nación, *Acción de Inconstitucionalidad 146/2007 y su acumulada 147/2007*, *Novena Época*, 28 August 2008.

⁷ For a discussion of the court's decision, see Madrazo and Vela (n 5) 1874–77.

⁸ Dixon (n1)159.

⁹ These amendments took place between December 2008 and December 2010. See Grupo de Información en Reproducción Elegida, 'Constituciones que Protegen la Vida desde la Concepción' (*GIRE*) <<https://gire.org.mx/plataforma/constituciones-que-protecten-la-vida-des-de-la-concepcion/>> accessed 6 March 2022.

Nowadays, more than a decade after the Supreme Court's decision, the effects of that backlash are still felt. Abortion remains criminalised in most of the country (22 out of 32 states). In addition to Mexico city, only very recently (between 2019-2022), after long fought battles by feminist groups, states began to move towards the decriminalisation of abortion (up to the 12th week of pregnancy): Oaxaca, Hidalgo, Veracruz, Baja California, Baja California Sur, Colima, and Guerrero.¹⁰ Many have interpreted these changes as a direct response to the 2021 Supreme Court decisions that found unconstitutional the criminalisation of abortion (in the state of Coahuila) and the protection of life from the moment of conception (in the state of Sinaloa), which "called into question the constitutionality of similar prohibitions nationwide".¹¹ Under Dixon's model such changes could be understood as a result of the constitutional dialogue that her model seeks to create. However, as I will argue below, the 'responsiveness' of judicial review, at least in this case completely depends on the political will of the state legislatures.

Be that as it may, the Supreme Court was likely aware of the context in which its 2008 decision upholding Mexico City's abortion regulation was being handed down. Importantly, by concluding that the determination of whether abortion should be considered a crime belonged to state legislatures, the Supreme Court allowed the issue to be democratically decided. That is to say, by rendering such a decision, the judges wagered on the capacity of the constitutional system to respond to a divisive issue in a way that took into account the "needs and aspirations" of democratic majorities.¹² In a traditional representative system, what could be a better expression of those "needs and aspirations" than a constitutional amendment, which would normally require more than a simple majority to be adopted? Under Dixon's responsive judicial review approach, a judgement that catalyses a democratic debate that leads to a constitutional amendment would be regarded as an example of the democratic reinforcement role that judges should perform (in other words, the promotion of a

¹⁰ Melissa Ayala, 'Opinion | This Is for All the Girls Who Grew Up Thinking Abortion Meant Death or Jail' *The New York Times* (New York, 21 September 2021) <<https://www.nytimes.com/2021/09/21/opinion/mexico-decriminalize-abortion.html>> accessed 7 March 2022; Grupo de Información en Reproducción Elegida, 'Circunstancias en las que puedo abortar en México sin riesgo de ser sancionada.' (*GIRE*<<https://gire.org.mx/blog/abortar-en-mexico/>> accessed 22 September 2022.

¹¹ Karina Suárez, 'La Suprema Corte de México declara inconstitucional la protección de la vida desde la concepción' (*El País México*, 10 September 2021) <<https://elpais.com/mexico/2021-09-10/la-suprema-corte-de-mexico-declara-inconstitucional-la-proteccion-de-la-vida-desde-la-concepcion.html>> accessed 7 March 2022; Natalie Kitroeff and Oscar Lopez, 'Abortion Is No Longer a Crime in Mexico. But Most Women Still Can't Get One.' *The New York Times* (New York, 8 September 2021) <<https://www.nytimes.com/2021/09/08/world/americas/mexico-abortion-access.html>> accessed 7 March 2022; Natalie Kitroeff and Oscar Lopez, 'Mexico's Supreme Court Votes to Decriminalize Abortion' *The New York Times* (New York, 7 September 2021) <<https://www.nytimes.com/2021/09/07/world/americas/mexico-supreme-court-decriminalize-abortion.html>> accessed 7 March 2022.

¹² Dixon (n 1) 143.

deliberative and responsive form of democratic politics).¹³ This is so, because in line with Aileen Kavanagh's work, for Dixon, both "the process of legislation and judicial review are therefore best understood as 'collaborative' or inter-connected in nature, rather than following any strict separation between legal and political authority".¹⁴ In this context, the local constitutional amendments recognizing the right to life from the moment of conception could be understood as the product of the inter-connection between the legislative and judicial process that Dixon refers to.

The reaction of Mexico's state legislatures to the 2008 Supreme Court decision on abortion, however, presents at least two challenges that are not necessarily addressed by Dixon's model. From a responsive judicial review perspective, one could argue that the constitutional amendments adopted by several Mexican states were the materialisation of the kind of constitutional dialogue between courts and legislators that would ideally take place when there is reasonable disagreement on constitutional questions.¹⁵ One could imagine that there can be reasonable disagreement over the question of whether the right to life should be understood as enforceable even though it is not recognised in the constitutional text. Amending local constitutions to explicitly recognise the right to life could then be seen as how the issue was settled after a process of democratic deliberation. But even under that understanding (which, as will be argued below, would attribute a deliberative character to the relevant amendment processes that they may not have had), the Supreme Court's decision, while not precluding the expression of disagreement, did increase the difficulty for future democratic majorities to do away with restrictions to abortion. Put differently, can we really understand those constitutional amendments as a desirable outcome, even though, by protecting life from the moment of conception, the amendments tightened the local legal frameworks that criminalised abortion, making the path towards decriminalisation more difficult for future democratically elected legislatures?

Even though, at face value, those constitutional amendments could be interpreted as a democratic response to a decision where the Supreme Court was simply unable to act according to the needs and aspirations of democratic majorities and anticipate the widespread public disapproval that would follow, this does not seem to have been the case. Those amendments were seemingly adopted as a result of a top-down decision by the leadership of the parties *Partido de la Revolución Institucional* (PRI) and *Partido Acción Nacional* (PAN)—which then still controlled the majority of state legislatures.¹⁶ According to this example, Dixon's underlying assumption regarding

¹³ Dixon (n 1) 140.

¹⁴ *ibid.*

¹⁵ Dixon (n 1) 130.

¹⁶ La Redacción, 'El trabajo sucio de Beatriz Paredes' (*Proceso*, 30 November 2009) <<https://www.proceso.com.mx/nacional/2009/11/30/el-trabajo-sucio-de-beatriz-paredes-20777.html>> accessed 7 March 2022.

democratic politics appears to be one of ideal party systems and constitutional amendment/legislative processes that are open, deliberative, and democratic. To be sure, whether such amendments indeed reflected the majority's views about abortion is an empirical question. Nonetheless, it would be a mistake to assume that simply because they are part of the constitutional text, those modifications came about as the result of a deliberative process.

As a general matter, in the case of Mexico, such an assumption would be especially problematic because constitutional amendments respond to a logic opposite to that which Dixon assumes. As I have explained elsewhere,¹⁷ constitutional amendments in Mexico are frequently 'arbitrary' in the sense that they are adopted without offering any clear indication (for example, in the preamble) of the reasons for their adoption, and when they do offer reasons, the reasoning is often contradictory or deficient. The arbitrariness of amendments becomes worse when taking into account that, as a general rule, they are not the result of deliberative processes but of highly centralised and opaque constitutional decision-making.¹⁸ In this sense, a question arises about the qualitative difference between a decision taken by a group of judges not democratically elected and a decision that was taken at the top of a party that is probably responding to very particular interest groups (such as the church). Is the latter necessarily better (or more democratic) than the former, particularly when the effect is to place the issue outside the scope of ordinary legislative majorities? Additionally, and most importantly, from a responsive judicial review perspective, could the amendments adopted in such a context be considered the result of a dialogue between courts and legislatures?

Lastly, as mentioned above, since 2019 there has been trend of states that have begun moving toward the decriminalisation of abortion (up to the 12th week of pregnancy). Many have interpreted the most recent changes as a direct response to the 2021 Supreme Court decisions that found unconstitutional the criminalisation of abortion (in the state of Coahuila) and the protection of life from the moment of conception (in the state of Sinaloa), which under Dixon's model could be understood as a result of the constitutional dialogue that in her model should ideally take place. While this may have an element of truth in some of the cases (as is, perhaps, the case of Colima), it would be mistaken to completely attribute these changes to the 2021 Supreme Court decisions alone. Doing so would mean ignoring long-fought battles for the right to abortion by local feminist groups. It still remains to be seen whether the remaining 22 state legislatures that criminalize abortion have the political will to engage in the

¹⁷ Mariana Velasco-Rivera, 'Reformas Constitucionales Arbitrarias', *El Estado de Derecho en el México Contemporáneo* (El Colegio de México, forthcoming 2022).

¹⁸ Mariana Velasco-Rivera, 'Why Mexico Keeps Amending Its Constitution: Secrets of a Cartel Democracy' (Doctoral Thesis, Yale University, 2019); Mariana Velasco-Rivera, 'Constitutional Rigidity: The Mexican Experiment' (2021) 19 *International Journal of Constitutional Law* 1042.

dialogue that, under Dixon's model, should ideally take place, and proceed to reform their restrictive constitutional and/or legal frameworks on abortion in line with the Court's rulings. Otherwise, the influence of the Supreme Court ruling beyond Coahuila and Sinaloa will only become possible through further litigation. Note that in this case, state legislatures other than that of the states of Coahuila and Sinaloa could simply ignore the ruling, as they are not legally bound to comply with it. Taking into consideration the Supreme Court's decision together with the states' restrictive constitutional and legal frameworks on abortion, the disagreement regarding the protection of the right to life and the scope and limits of reproductive rights is evident. Nevertheless, from the legislatures' perspective, in this case, there is little incentive to engage in a dialogue with the Supreme Court. President López Obrador clearly signalled that he, and hence, his party (which as of October 2021 controlled sixteen out of thirty-two legislatures),¹⁹ is not willing to engage in any dialogue regarding this issue. When asked about his opinion on the Court's ruling, he refused to talk about it, saying that the decision should be respected and that politicians should not take sides because there are clashing positions on the issue.²⁰

From a responsive judicial review perspective, a naïve observer could conclude that the absence of antagonism in the President's position suggests that, unlike in 2008, this time around the Supreme Court was able to read the "needs and aspirations" of current democratic majorities despite the existing disagreement. Such an interpretation could be strengthened when contrasting López Obrador's reaction with President Iván Duque's contentious reaction against the recent Colombian Constitutional Court's decision that decriminalised abortion until the twenty-fourth week of pregnancy. President Duque claimed that the decision would contribute to the promotion of abortion as a contraceptive measure and could make abortion a recurring and regular practice in Colombia²¹—an argument commonly used by pro-life groups. However, it would ultimately be a mistake to interpret the absence of explicit antagonism by political actors and/or the absence of democratic backlash in Mexico in 2021 as a sign that the Supreme Court was able to read the "needs and aspirations" of democratic majorities. Given the states' restrictive constitutional and legal frameworks on abortion, the *status quo* works in favour of the conservative agenda. Therefore, there is no need to engage in any dialogue with the Supreme Court. In this context, how responsive can the responsive judicial

¹⁹ Guadarrama M, Valdés F and Lambarri A, 'Informe Legislativo 2022' (Instituto Mexicana para la Competitividad 2022) <https://imco.org.mx/wp-content/uploads/2022/05/Documento_InformeLegislativo_202220601.pdf> accessed 6 October 2022.

²⁰ Ana Cucalón, 'AMLO: Decisión de la Corte de México sobre el aborto debe ser respetada' (CNV, 8 September 2021) <<https://cnnespanol.cnn.com/2021/09/08/decision-corte-supre-mexico-despenalizar-aborto-respetada-amlo-trax/>> accessed 7 March 2022.

²¹ Santiago Torrado, 'Iván Duque rechaza la despenalización del aborto y la equipara a "una práctica anticonceptiva"' (El País, 22 February 2022) <<https://elpais.com/internacional/2022-02-22/ivan-duque-rechaza-la-despenalizacion-del-aborto-y-la-equipara-a-una-practica-anticonceptiva.html>> accessed 7 March 2022.

review model be when legislatures can simply turn a blind eye to judicial decisions?

The success of the model of responsive judicial review seems to heavily depend on the political will of the actors that are supposed to engage in the judicial-legislative dialogue that the model aims at. If that is the case, the practical challenge I see has to do with the contexts in which the model seems to be more likely to function properly.

From the outset, Dixon is very clear that without judges that “enjoy a meaningful degree of independence, political and civil society support, and remedial power”²² and a thick understanding of democracy, courts may become tools for eroding rather than enhancing or protecting democratic constitutional commitments. Yet, as we know, in contexts where constitutional democracy is at risk of erosion/decay, as organs that are able to prevent or slow down decay, capturing courts has become an essential part of the anti-democrat toolkit. Accordingly, in contexts of democratic backsliding it can be particularly difficult for courts to remain uncaptured. Dixon is, of course, keenly aware of this which is why she considers that judges need to be strategic and carefully calibrate their responses (through the different combinations of weak and strong responses) to avoid confrontation. Calibrating responses to avoid retaliation, however, may be in and of itself an impossible game in non-ideal circumstances. Given the vulnerable position in which courts tend to be when trying to resist authoritarian efforts and preserve democracy, it is likely that in such contexts it would be particularly difficult to effectively deploy the model of responsive judicial review. In other words, those contexts where responsive judicial review would be needed the most, are those places where perhaps it would be more difficult to effectively deploy it.

If the model of responsive judicial review is more likely to work properly in relatively healthy democracies (where the legislative branch, in fact, would be willing to engage in dialogue with courts in good faith) than in contexts where it is needed the most, there is an opportunity to further develop the model to make it work in less favorable contexts. Dixon has done a remarkable job setting a solid foundation for scholars to embark on such an endeavor.

²² Dixon (n 1) 3.