



2023

## Introduction: A New Frontier in Comparative Judicial Review

Amal Sethi

Follow this and additional works at: <https://repository.nls.ac.in/nlsir>

---

### Recommended Citation

Sethi, Amal (2023) "Introduction: A New Frontier in Comparative Judicial Review," *National Law School of India Review*. Vol. 34: Iss. 2, Article 13.

Available at: <https://repository.nls.ac.in/nlsir/vol34/iss2/13>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in National Law School of India Review by an authorized editor of Scholarship Repository. For more information, please contact [library@nls.ac.in](mailto:library@nls.ac.in).



## INTRODUCTION: A NEW FRONTIER IN COMPARATIVE JUDICIAL REVIEW

—Amal Sethi

Indian constitutional democracy has experienced fundamental changes in recent years, both formally and informally.<sup>1</sup> Moreover, the COVID-19 pandemic significantly contributed towards this transformation.<sup>2</sup> As always, the Indian Supreme Court has found itself deeply entangled in these issues. Criticisms of the Supreme Court occur at either end of the spectrum. Some writers have argued that the Supreme Court has gone too far,<sup>3</sup> while others have criticised it for not going far enough.<sup>4</sup> In last year's volume of this law review, an article argued that Indians are too dependent on the Supreme Court for every facet of life and that there is a dire need to change this situation.<sup>5</sup>

Against this background, the *National Law School of India Review* decided to publish a special volume on Rosalind Dixon's forthcoming manuscript, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age*. Dixon's book draws on John Hart Ely's political process theory devised in the American context. The book charts a normative framework called 'responsive judicial review' to guide the working of constitutional or appellate courts (hereinafter 'courts') in the comparative context. Dixon's core argument is that in cases where the meaning of constitutional language is uncertain, courts should interpret that uncertain language to counter three broad risks to democracy: (1) sources of monopoly of power, (2) democratic blind spots, and (3) burdens of inertia. While engaging in such decision-making, Dixon cautions courts to be mindful of their institutional limits and the potential for their decisions to give rise to new threats to democracy.

Through this special volume, the *National Law School of India Review* invited contributions from ten varied contributors worldwide, including the

---

<sup>1</sup> Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India' (2020) 14(1) *Law & Ethics of Human Rights* 49, 49-95.

<sup>2</sup> Rahul Mukherji 'Covid vs. Democracy: India's Illiberal Remedy' (2020) 31(4) *Journal of Democracy* 91, 91-105.

<sup>3</sup> Anuj Bhuwania, 'The Curious Absence of Law in Migrant Workers' Cases' (*Article* 14, 16 June 2020) <<https://www.article-14.com/post/the-curious-absence-of-law-in-india-s-migrant-workers-cases>> accessed 24 September 2022.

<sup>4</sup> Gautam Bhatia, 'Judicial Evasion and the Status Quo: On SC Judgments' *The Hindu* (10 January 2019).

<sup>5</sup> Amal Sethi, 'Taking the Constitution Away from the Supreme Court of India' (2021) 33 (1) *National Law School of India Review* 1, 1-30.

current Chief Justice of the Indian Supreme Court, to respond to Dixon's 'responsive judicial review'. Finally, the volume concludes with a response from Dixon to all ten contributors. Though the individual contributions have been arranged alphabetically, some common threads appear throughout the volume.

The first and possibly most significant for readers of this journal is Dixon's framework's application in India. Two contributions focusing on India – an article by Chandrachud J. and another from Sindhu – both articles broadly maintain that Dixon's model is a viable framework for the Indian Supreme Court to adopt. Chandrachud J. highlights how in recent years (including during the COVID-19 pandemic), the Supreme Court has, on a few occasions, engaged in the type of decision-making Dixon's framework requires with positive outcomes. This, shows the potential for Dixon's framework to achieve wider applicability in India. In contrast, Sindhu's contribution on India provides a sobering take on the framework's application in India. Sindhu cautions that much groundwork in Indian constitutional thought must be undertaken before using Dixon's framework as a blueprint for India. Nevertheless, Sindhu claims that the Supreme Court's adoption of Dixon's framework could result in a more restrained approach to public interest litigation (PIL) cases dealing with socio-economic rights. Sindhu adds that, at the same time, a more robust approach to the protection of individual civil and political rights would be seen from the Supreme Court. These potential effects raised by Sindhu suggest further exploration of Dixon's framework in the Indian context, considering that the bulk of criticism directed towards the Supreme Court is based on its aggressive approach to socioeconomic PIL cases and its timid (or evasive) approach to protecting individual civil and political rights.

Comparable to Chandrachud J. and Sindhu, other contributions in this volume discuss the possibility of transplanting Dixon's framework to countries such as Italy (De Gregorio), the UK (Wheatle), Germany (Kotzur), Mexico (Rivera), and the USA (Katz). A critical take on transplanting Dixon's framework in the comparative context comes from Daly, who questions whether courts in countries such as India, the USA, and the UK have the prerequisite conditions to engage in responsive judicial review. As Daly mentions, 'debates concerning the political independence of the US Supreme Court and its tarnished public support, the perceived crisis of legitimacy facing the Indian Supreme Court, or the intensifying debate surrounding the legitimacy of the UK Supreme Court's limited review powers' question how far Dixon's framework can be implemented in some of the leading jurisdictions where scholars might argue for her framework to be transplanted.

By engaging in these multi-jurisdictional assessments, contributors to this volume have also opened other frontiers for the application of Dixon's theory – at least beyond the ones explicitly discussed in the book. For example,

Katz's response focuses on applying Dixon's framework to the intense debates on partisan gerrymandering in the USA – one of the most significant obstacles to meaningful political participation. Likewise, De Gregorio offers a unique consideration of Dixon's framework by applying it to a case of physician-assisted suicide in Italy. By Dixon's own admission, important suggestions for expanding the scope of her framework have come from contributions examining the application of the model to the judicial supervision of executive decision-making. In this context, Casey analyses Dixon's framework in the growing instances of legislative delegation to the executive and executive control over bureaucracies. Wheatle and Chandrachud J. study individual cases from the UK (Prime Minister Boris Johnson's decision to prorogue the parliament) and India (executive governance during the second wave of the COVID-19 pandemic).

Beyond these works, the most common theme across many contributions of the volume are questions regarding Dixon's model relating to both the substantive component of the framework and its negative externalities. Perhaps the most considerable doubt concerning Dixon's substantive framework comes from Tamir, who questions whether Dixon is 'Ely-stretching.' While Tamir sees a genuine theoretical foundation for Ely's original theory in America, he wonders whether there is enough theoretical backing in Dixon's comparative framework, which he believes propounds a rather expansive role for courts in democracy protection. In addition, though not questioning the substantive framework suggested by Dixon, Rivera shows the downsides of even modest applications of Dixon's framework. Using a contentious abortion case from Mexico, Rivera demonstrates how a 2008 decision of the Supreme Court of Mexico on the right of access to abortion resulted in legislative backlash and only pushed back the debate on access to abortion in Mexico. Similarly, Casey cautions that Dixon's focus on democratic protection can blind judges to the kind of reverse effects Rivera describes. Casey also argues that Dixon's model can divert judges' attention from other political risks to the common good.

The contributions in this volume offer a humbling lesson. Constitutional scholars are extremely focused on the limits of courts' actions, which comprise a large part of their work. As Wheatle and Daly note, however, a vast opportunity for protecting democracy exists even outside the courts. In this context, while acknowledging that courts remain an indispensable institution in any constitutional democracy, Daly sees danger in placing undue emphasis on courts. He urges us to take a broader view of the institutional universe when searching for ways to remedy democracy's defects.

For comparative constitutionalists, a vital takeaway from this volume is how to ensure that a comparative work has global and domestic appeal. In her response to contributors, Dixon suggests a strategic reason for linking her framework to Elyian discourse in the USA rather than developing a framework

from scratch. Though acknowledging some of the downsides of this reality, she notes how the USA and Europe remain important venues for the development of constitutional theory. She adds that without connecting one's theoretical contributions to debates in these jurisdictions, it is difficult for those ideas to become part of a broader debate about constitutional construction. At the same time, Dixon mentions how it is essential to ensure that these universal debates speak directly to existing domestic narratives.

Dixon's observations in her book provided significant inspiration for the choice of contributors we invited. As the editor of this volume, I hoped to see how scholars from different jurisdictions view Dixon's universal framework. Moreover, I was curious to see how they framed these debates in their respective jurisdictional contexts. In this regard, it was stimulating to see how Chandrachud J. and Sindhu discuss Dixon's framework at an extremely doctrinal level, helping us understand the debate in doctrinal terms. This perspective is vital for India considering the lack of penetration of scholarly work and legal debates centring around Supreme Court doctrine. Comparably, Kotzur does an excellent job linking Dixon's work to Peter Häberle's canonical work in the German context. Kotzur shows how Dixon's framework implicitly builds upon Häberle's "open society of constitutional interpreters" model. Unlike India, Germany does not suffer from a lack of academic influence over the development of constitutional law. This is unsurprising, considering that the Federal German Constitutional Court has many academics on its bench, and many judges have full-time academic roles along with their judicial responsibilities. Nevertheless, in Germany, legal debates are localised. Thus, exercises such as the ones Kotzur engaged in with his response are vital.

The volume ends with Dixon's reply to some of the critical issues raised by contributors. Dixon meticulously engages with the contributors' points, acknowledging the limits of the framework while modestly defending its importance. Regarding critiques of the framework's application, Dixon states that courts can play an essential role in protecting democracy. Under conditions of sufficient independence, political support, and remedial power, courts can defend democracy by complementing and intersecting with other vital actors in democratic protection, such as political parties. Similarly, judges using Dixon's framework must combine active review and calibrated restraint. A mix of pragmatic skills on the part of judges is also needed, including social consciousness and political awareness. Furthermore, a judge applying Dixon's framework should understand the relationship between constitutional claims and democratic values on the one hand and a court's institutional legitimacy and capacity on the other. Dixon concedes that the framework is not easy to apply and is burdensome for judges – but we should not let the perfect be the enemy of the good.

I hope that this special volume adds to our collective knowledge of the role of courts and provides a springboard for richer future debates.