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A RESPONSIVE THEORY OF JUDICIAL REVIEW—A VIEW FROM INDIA

—Jahnavi Sindhu*

The study of judicial review in comparative constitutional law is often perplexing. At one level, the theory on judicial review has kept up with global developments, with scholars seeking to answer how judicial review can go beyond its traditionally understood role to address contemporary challenges.[1] At another level, the age-old debate of whether judicial review by unelected judges should exist at all in a constitutional democracy rages on.[2] This paradox is partly attributable to the fact that the study of judicial review has splintered into the study of judicial review of specific issues that arise in a constitution, such as the judicial review of socio-economic rights, judicial review of constitutional amendments, and judicial review of matters relating to federalism and democracy, with little attention to whether and how they all fit together to form a cohesive theory of judicial review.

India is perhaps the perfect site to observe this paradox. The Indian judiciary has expanded its jurisdiction over time. The Court's role is no longer limited to striking down legislative or executive action but also includes evaluating the constitutionality of constitutional amendments and passing directions, bordering on policy-making, in a diverse range of matters. In fact, most issues of governance find their way to the Supreme Court for a decision.[3] Despite this extensive role, the Court regularly doubts its legitimacy to carry out its prescribed role in the Constitution - to strike down state action challenged as violating fundamental rights on grounds of the Judiciary's democratic deficit or

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1 See David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 UC Davis L Rev 1313; Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (Univ Chicago P 2018); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge UP 2013). See also Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton UP 2009); Katherine Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' [2010] Int'l J Const L 385.

2 E. Delaney, 'The Federal Case for Judicial Review' [2022] Oxford Journal of Legal Studies; Giuliano Amato, Benedetta Barbisan, and Cesare Pinelli (eds), *Rule of Law vs. Majoritarian Democracy* (Bloomsbury 2021).

3 See pt II of this article; Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 Washington University Global Studies Law Review 1.

limited competence.[4] However, there has been little attempt in Indian scholarship to reconcile these contradictory positions on judicial review.

Professor Rosalind Dixon's new book, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age*, is a rich and vital contribution to the debate on judicial review, which transcends silos in scholarship to offer a cohesive theory of judicial review across issues while remaining mindful of the diversity of contexts across jurisdictions.

Dixon builds on the tradition of 'responsive judicial review' scholarship that began with the work of John Hart Ely.[5] Ely's scholarship emphasised that judicial review is necessary to protect the minimum core of democracy.[6] Ely's work was rooted in the American context and was thus geared to specific dysfunctions observed in American politics. Dixon's theory, which is broader in scope, looks at democratic dysfunction in both well-functioning democracies and relatively dysfunctional democracies in the context of the specific challenges they face today. Dixon stresses that the traditional role of the judiciary is to "give effect to the text of a written constitution", relying on constitutional interpretation that engages modalities such as the history, text, and structure of a constitution.[7] However, when these modalities "run out", the court turns to consider broader constitutional values to aid in constitutional construction.[8] In exercising this kind of interpretive choice, the court ought to be guided by the need to counter risks to democratic responsiveness; in other words, they should seek "to counter risks of anti-democratic monopoly power and democratic blind spots and burdens of inertia".[9] At the same time, while exercising these functions, the court should be conscious of its own competence and legitimacy, as well as the risk of "democratic backlash" and the "reverse burden of inertia" owing to its decisions.[10] The court can also strategically promote legitimacy by varying standards of review, remedies (weak or strong) as well as tone and narrative.[11]

Dixon refers to instances from the Indian Supreme Court's jurisprudence on social rights, unconstitutional constitutional amendments, and LGBTQI rights as illustrations of responsive judicial review. Indeed, in many of these cases, we see the Indian Supreme Court employ strategies that Dixon advocates

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4 V. Narayan and J. Sindhu, 'A Historical Argument for Proportionality under the Indian Constitution' (2018) 2 (1) Indian Law Review; A. Chandra, 'Proportionality in India: A Bridge to Nowhere' (2020) 3(2) University of Oxford Human Rights Hub Journal; T. Khaitan, 'Beyond Reasonableness' (2008) 50(2) Journal of India Law Institute.

5 J.H. Ely, *Democracy and Distrust* (Harvard UP 1980) 102.

6 R. Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age*.

7 P. Bobbitt, *Constitutional Fate*: *Theory of the Constitution* (Oxford UP 1982).

8 Dixon (n 6) Introduction.

9 See Dixon (n 6) ch 2.

10 See Dixon (n 6) ch 7.

11 See Dixon (n 6) ch 8.

as a component of responsive judicial review. These include the variation of standards of review, deference, constitutional avoidance, and the employment of strong or weak form remedies. Owing to this familiarity, Dixon's argument is likely to resonate with Indian academics, lawyers, and judges. I argue that this instinct is largely correct, and Indian constitutional law can greatly benefit from Dixon's theory of responsive judicial review. Specifically, I argue that there is value in analysing the Indian judiciary's role from the perspective of responsive judicial review where constitutional construction does not provide a ready answer. This includes issues such as addressing legislative dysfunction (I) and reining in the court's public interest litigation jurisprudence (II). On the other hand, I caution that, in the context of civil and political rights, responsive judicial review may result in the weakening of judicial review owing to certain unique pathologies in judicial reasoning in India (III).

I. ADDRESSING LEGISLATIVE DYSFUNCTION THROUGH RESPONSIVE JUDICIAL REVIEW

Ely's representative reinforcement theory was aimed at preventing electoral and institutional monopolies. In particular, he advocated for judicial review to check whether "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."[12] While Ely's scholarship was focused on analysing the *outcome* of laws for such a result, a growing body of scholars have argued that judicial review must also examine the political process that legislatures have followed for signs of exclusion and dysfunction.[13]

The legislature is the only organ of government where diverse voices are represented. While exercising its functions, the legislature must respect and realise the right of political equality, in that diverse voices are heard and engaged with during deliberation and the legislature analyses whether statutes or executive action violate fundamental rights. It is pertinent to note that the Indian judiciary often applies deferential standards on the ground that the legislature must be presumed to have understood and deliberated on the needs of the people.[14]

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[12] J.H. Ely (n 5) 102.

[13] S. Gardbaum, 'Comparative Political Process Theory' (2020) 18(4) *ICON*; Ittai Bar-Siman-Tav, 'The Puzzling Resistance to Judicial Review of the Legislative Process' (2011) 91 Boston UnivLR 1915; SR Ackerman, Stefanie Egidy, and James Fowkes, *Due Process of Lawmaking: The United States, South Africa, Germany and the European Union* (Cambridge UP 2015).

[14] See pt III of this article; *Charanjit Lal Chowdhuri v Union of India* AIR 1951 SC 41; *Ram Krishna Dalmia v S.R. Tendolkar* AIR 1958 SC 538 (on reasonable classification and presumption of constitutionality); *A.K. Roy v Union of India*, AIR 1982 SC 710 (upholding preventive detention even after the recognition of the due process under art 21 in *Maneka Gandhi v Union of India* (1978) 1 SCC 248 : AIR 1978 SC 597); *N.B. Khare v State of Delhi* AIR 1950 SC 211 (upholding externment on grounds of subjective satisfaction); *Babulal Parate v State of Maharashtra* AIR 1961 SC 884 : (1961) 3 SCR 423; *Madhu Limaye v SDM, Monghyr* (1970)

In the Indian context, the functioning of the legislative bodies—and Parliament, in particular—has been a matter of consistent interest and critique.[15] The productivity of legislative bodies is usually measured through the number of laws passed in a session as opposed to the quality of deliberation. More recently, legislative dysfunction has come under scrutiny because of laws frequently being railroaded through Parliament. There have been reports of subversion of procedures that are meant to facilitate deliberation, such as the rule requiring the circulation of copies of bills two days before the introduction of the bill, publishing a list of business or agenda in advance so as to pass a bill on the same day as its introduction.[16] Another example of subversion is the enactment of bills as Money Bills even when they do not satisfy the definition that the Constitution stipulates to bypass the Upper House.[17] Finally, laws for which the Government may not find easy support are passed via the 'voice vote' mode. In a voice vote, members orally communicate their vote, and a sense is taken of whether there are more 'ayes' or 'noes' with little clarity on whether the law actually received a majority of the votes. The contentious agricultural reform laws passed in September 2020 are a good illustration of this practice where the Chairman of the Upper House called for a voice vote despite members seeking an actual counting of votes.[18] This practice was repeated in December 2021, this time both in the Lower House and Upper House, to pass the Electoral Laws (Amendment) Bill 2021, which allows the Election Commission to verify electoral rolls based on AADHAAR (national biometric identity cards).[19] Scholars have argued that the proposed linkage poses grave risks to the right to privacy and the right to vote by allowing the disenfranchisement and profiling of voters.[20] None of these implications were

3 SCC 746 : AIR 1971 SC 2486 (upholding s 144 of the CrPC giving broad discretion to the Executive to determine when prohibitory orders on gatherings should be imposed). See also See P.K. Tripathi, *Some Insights into Fundamental Rights* (University of Bombay, 1972) where he critiques the reasonable classification test; K.G. Kannabiran, *Wages of Impunity: Power, Justice and Human Rights*, (Orient Longman 2004); S. Shankar, *Scaling Justice: India's Supreme Court, Anti-Terror Laws, and Social Rights* (OUP India 2012).

15 Subhash C. Kashyap, *Our Parliament* (2001); M.R. Madhavan, Parliament' in *Rethinking India's Public Institutions* (OUP 2017) 81; Kaushiki Sanyal, 'Who Gains from Parliamentary Disruption' (2015) 50(35) Economic and Political Weekly.

16 M. Verma, 'Diminishing the Role of Parliament: The Case of the Jammu and Kashmir Reorganisation Bill,' (2019) 54(45) Economic and Political Weekly.

17 See art 110 of the Constitution. When a Bill is passed as a Money Bill, the Upper House can only recommend amendments that may or may not be accepted by the Lower House; Arvind P. Datar and Rahul Unnikrishnan, 'Making a Money Bill of It' *Indian Express* (Delhi, 12 January 2016); S. Parthasarathy, 'Trickeries of the Money Bill' *The Hindu* (Delhi, 11 April 2019).

18 See rr 252–54 of the Rules of Procedure and Conduct of Business in the Council of States, which together provide that once a member asks for actual counting, the Chairman shall proceed with the same. It is pertinent to note that the Parliament was forced to repeal these laws following concerted protests by for farmers more than a year on the outskirts of Delhi.

19 'Election Laws (Amendment) Bill Passed in Lok Sabha Amid Din' *Indian Express* (Delhi, 20 December 2021).

20 See for instance, V. Bhandari, 'Why the Electoral Reforms Bill is a Problem' *The Hindu* (Delhi, 21 December 2021).

properly debated or assessed by Members of Parliament owing to the speed with which the measures were introduced and pushed through Parliament within one day. Moreover, the Speaker of the Lower House and Chairman of the Upper House reportedly did not allow time for Members to speak or seek clarifications.

Such manoeuvres have greatly weakened the Parliament and impeded it from performing its independent function of deliberation and serving as a check on the Executive. Given India's common law background, there is a school of thought that the court cannot review the happenings of the Indian Parliament, both due to considerations related to the separation of powers as well as an ostensible prohibition in the text of the Constitution.[21]

However, responsive judicial review envisages the separation of powers as a dynamic concept—where the judiciary may step in to check specific functions of the legislature that were not traditionally understood to be functions that the judiciary checks.[22] Indeed, even if the separation of powers is understood as a separation of functions, the checking of the exercise of these functions does not mean the usurpation of these functions.[23] On the other hand, judicial review can serve as an effective deterrent of the abuse of power and promote better deliberation in Parliament.[24]

As Vikram Aditya Narayan and I have argued previously, the Indian judiciary can undertake judicial review of the legislative process in a "direct" or "indirect" manner.[25] Direct judicial review of the legislative process refers to the court finding a law unconstitutional on the grounds of a violation of procedure.[26] For instance, the striking down of a law on the grounds that it was wrongly classified as a Money Bill and thus bypassed the Upper Chamber would qualify as direct judicial review.[27] Constitutional construction supports such an outcome.[28] First, a reading of the Indian Constitution would reveal that judicial review is the rule and not the exception, with extensive jurisdiction

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21 Art 122 states "[t]he validity of any proceedings in the Legislature of a State shall not be called in question on the ground of any alleged irregularity of procedure" See notes 28 to 31 and accompanying text.

22 David Landau, 'A Dynamic Theory of Judicial Role' (2014) 55 BCL Rev 1501.

23 See generally, A. Kavanagh, 'The Constitutional Separation of Powers' in D. Dyzenhaus & M. Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016).

24 Mattias Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1(2) European Journal of Legal Studies.

25 V. Narayan and J. Sindhu, 'A Case for Judicial Review of Legislative Process in India?' (2020) 53 VRÜ/World Comparative Law 358, 383-401.

26 V. Narayan and J. Sindhu (n 25) 383.

27 Indeed, the dissenting opinion in *K.S. Puttaswamy v Union of India* (2019) 1 SCC 1 found such a violation. It is pertinent to note that the majority ruling on this point, finding that the law satisfied the definition of a Money Bill, has been doubted in *Roger Mathew v South Indian Bank Ltd* (2020) 6 SCC 1 and has been referred to a larger bench for reconsideration.

28 See references to constitutional construction in Dixon (n 6).

being granted to the Supreme Court and High Court[29] and judicial review being expressly barred in respect of certain provisions.[30] Article 122 of the Constitution does not serve as a blanket prohibition against courts inquiring into matters of procedure but is limited to irregularities in procedure and pertains to the procedure devised by Parliament, as permitted by Article 118.[31] It does not pertain to parliamentary procedure prescribed in the Constitution itself—such as the rule of majority voting, definition of Money Bills, disqualification of members, and rights of legislators.[32] For instance, the use of voice votes which cannot ascertain whether a law in fact has majority support amounts to a violation of Article 100 of the Constitution, which states that all questions in Parliament must be decided by majority vote.[33]

In the same vein, the Indian Supreme Court has held that the Article 122 does not bar the court from examining illegalities in procedure, which are distinct from mere irregularities in procedure.[34] The Court has yet to provide an exhaustive list of what actions qualify as illegalities, but has indicated that irregularities go to the root of the matter and those which affect a substantive right or constitutional provision would qualify.[35] In a recent instance, the Court set aside the suspension of members of a state legislative assembly for a year as arbitrary and violating the fundamental right to equality guaranteed under Article 14.[36] Dixon's theory of responsive judicial review can also help flesh out the illegality versus irregularity distinction set forth by the court – a transgression of procedure would amount to an 'illegality' if its transgression harms a characteristic feature of representative democracy. For instance, in the aforementioned case, the Supreme Court found that the suspension of members for a year instead of only the legislative session to be an illegality as it would result in the constituency being unrepresented in the Assembly for a year without cause.[37]

In indirect judicial review, the court does not strike down a law because of a violation of parliamentary procedure alone. Instead, the absence of or poor

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[29] See arts 32, 131-9, 143, 225-8 of the Constitution of India.

[30] For instance, arts 243-O, 262, 363. See the opinion of Justice Chandrachud in *K.S. Puttaswamy v Union of India* (n 27) [1069]; V. Narayan and J. Sindhu (n 4) 70-73.

[31] Art 118(1) states, "Each House of Parliament may make rules for regulations, subject to the provisions of this Constitution, its procedure and the conduct of its business."

[32] See arts 110, 190, and 194 of the Constitution of India as illustrations.

[33] It is pertinent to note that the provision for a voice vote provided for in parliamentary rules cannot override constitutional provisions as art 118 stipulates that procedural rules devised by Parliament are subject to the provisions of the Constitution. In fact, the rules of procedure also provide that when a member asks for a division of the votes following a voice vote, the chairman and speaker are obligated to ensure the counting of votes. See V. Narayan and J. Sindhu (n 25) 393–94.

[34] *Raja Ram Pal v The Speaker, Lok Sabha* (2007) 3 SCC 184.

[35] *Ashish Selar v Maharashtra Legislative Assembly* 2022 SCC OnLine SC 105.

[36] *Ashish Selar v Maharashtra Legislative Assembly* (n 35).

[37] *Ashish Selar v Maharashtra Legislative Assembly* (n 35).

quality of deliberation in the legislature that is often brought about when parliamentary procedure is subverted becomes a relevant factor while examining the constitutionality of the law. The court can make deliberation a factor in judicial review in two ways. First, the court can refuse to apply deferential standards of review, such as reasonable classification and reasonableness, and deferential principles such as the presumption of constitutionality that lower the burden on the State to defend the constitutionality of their actions.[38] These principles are premised on the notion that the legislature, having deliberated and heard diverse voices, best understands the needs of the electorate and that such decisions ought not to be interfered with.[39] In indirect review of legislative process, the court factors in how deliberative and participative the process of lawmaking was before electing to apply deferential standards.[40] This approach is especially important in the Indian context where there is a tendency to apply deferential standards of review or stricter standards of review deferentially.[41]

The second way in which indirect judicial review can take place is by factoring in whether justifications of the constitutionality of an act were deliberated by the legislature when the court reviews the proportionality of a restriction. Article 13 of the Indian Constitution declares that the State shall make no law that violates fundamental rights, thus signalling an obligation on the legislature to consider the constitutionality of a law and its impact on fundamental rights before passing the law.[42] The purpose of judicial review is to evaluate the State's justifications defending the constitutionality of the law.[43] In this regard, the proportionality test, which the Indian Supreme Court is moving towards as the dominant standard of review, can be particularly appropriate in discharging the Court's function of judicial review. The proportionality test, as opposed to other standards employed by the Indian Supreme Court, provides an accurate set of questions that address the constitutionality of a measure which the legislature must consider at the time of law-making, and the judiciary must ask at the stage of judicial review. While undertaking

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38 V. Narayan and J. Sindhu (n 25) 394-99.

39 *Charanjit Lal Chowdhuri v Union of India* (n 14) [Mukherjea J]; *State of Bombay v F.N. Balsara* AIR 1951 SC 318.

40 See V. Narayan and J. Sindhu (n 25) 397-9.

41 See V. Narayan and J. Sindhu (n 4); A. Chandra (n 4); T. Khaitan (n 4).

42 In this regard, see for instance *Malpe Vishwanath Acharya v State of Maharashtra* (1998) 2 SCC 1 : AIR 1998 SC 602 ("Social Legislation is treated with deference by the Courts not merely because the Legislature represents the people but also because in representing them the entire spectrum of views is expected to be taken into account. The Legislature is not shackled by the same constraints as the courts of law. But its [sic] power is coupled with a responsibility.") In fact, one of the crucial arguments against judicial review in the United States is based on the premise that there is an obligation on the Legislature in the American Constitution to evaluate the constitutionality of legislation which the Court cannot interfere with. See JB Thayer, 'The Original and Scope of Judicial Review' (1893) 7(3) Harvard L R 129135. Thayer's seminal albeit dated work is often cited by the Indian Supreme Court to justify judicial restraint. For a recent example see *Rajeev Suri v DDA* 2021 SCC OnLine SC 7 .

43 See V. Narayan and J. Sindhu (n 4)

the proportionality analysis, the court can determine whether the legislature considered and deliberated what the legitimate aim of a measure was, the suitability of the measure, whether it is the least restrictive measure, and its proportionality with respect to the impact on the right it implicates.[44] The proportionality test has gained prominence in case law in Articles 19 and 21 in India as well as acceptance from the Government as the test to follow to determine constitutionality. Most recently, during the debate on the Electoral Laws (Amendment) Act, 2021 discussed above, the Law Minister sought to defend the legislation by asserting that the linking of electoral rolls to the national ID was proportionate.[45] The court, while employing a proportionality analysis, ought to consider whether the legitimacy, suitability, necessity, and proportionality of a measure were in fact meaningfully debated in the legislature or even during stakeholder consultations. An absence of these deliberations gives cause to the court to strike down the impugned legislation.

Judicial review of legislative process in India can serve as a pertinent illustration of Dixon's theory of responsive judicial review- such review is not considered a part of the traditional role of the judiciary under the Indian Constitution, but its need is felt considering the prevailing acute dysfunction in the Legislature. While the power to review illegalities in procedure may not emerge directly from the constitutional text, it is in line with the mandate of judicial review under the Constitution to prevent abuse of power by the State.[46] Moreover, indirect judicial review safeguards the legitimacy of judicial review as it does not result in overruling the legislature's determination of constitutionality, which is often the objection to judicial review in India; instead, it entails reviewing the reasons provided by the State.[47] Finally, direct and indirect judicial review of a process can mitigate claims of judicial illegitimacy or democratic backlash since it is not a final decision -if a law is struck down on the grounds of non-compliance with procedure or solely on the grounds of non-deliberation, the legislature is free to pass the law again after rectifying the defects in procedure and non-deliberation.[48]

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[44] For an explanation of these steps that constitute the proportionality test, see D. Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57(2) Univ of Toronto LJ.

[45] However, the Law Minister did not explain how the proportionality test was satisfied and this instance therefore cannot qualify as deliberation meriting deference.

[46] See the dissenting opinion of Justice Chandrachud in *K.S. Puttaswamy v Union of India* (n 27) [1066-8, 1076] examining the commitment of judicial review in the Indian Constitution.

[47] D. Kyritsis, 'Constitutional Review in a Representative Democracy' (2012) 32(2) Oxford JLS; Ely, *Democracy and Distrust* (n 5) 102-3.

[48] The judiciary will also be free to consider the law on substantive grounds once the law is passed in a procedurally sound manner.

II. REINING IN THE COURT'S PUBLIC INTEREST LITIGATION MOVEMENT

The Indian Supreme Court's move toward enforcing socio-economic rights (as part of the broader "Public Interest Litigation (PIL) movement" in 1970s) is an early example of responsive judicial review that could have benefited from the theory provided by Dixon. Under the Indian Constitution most socio-economic rights such as the right to nutrition, health, and just and humane work conditions, are housed in Part IV of the Constitution, referred to as Directive Principles of State Policy. Article 37 stresses that it is the duty of the State to apply the principles in the making of laws, but these principles are not enforceable by Courts. The distinction between enforceable and non-enforceable rights was adopted since the beginning of the drafting of the Indian Constitution and was based on, and tracks, the distinction between positive and negative rights in constitutional theory.[49] This distinction is rooted in the idea that the judicial enforcement of positive rights such as right to work or nutrition would require the court to devise positive remedies, such as spelling out a minimum wage or defining the minimum standard of nutrition which, requires the court go into questions of policy-making and budget allocations, all matters in which the court lacks competence.[50] The members of the Constituent Assembly while rendering these socio-economic rights unenforceable (owing to concerns of judicial incompetence) expected them to nonetheless be a priority for the legislature.[51]

That the Legislature and Executive in India have been unable to discharge this responsibility is well documented. The Court responded to this burden of inertia and state apathy by enforcing socio-economic rights through its PIL movement where it read basic rights—such as the right to food, the right to housing, and the right to water—as a part of the right to life under Article 21, which is enforceable under the Indian Constitution.[52] The Court argued that these bare necessities are an important component of the right to live with dignity.[53] As Dixon notes, many of the initial cases in the PIL movement dealt with grave violations of basic rights, such as the closure of ration shops during

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[49] See discussion in negative and positive rights in Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton UP 2009).

[50] See for instance, B.N. Rau, 'Preliminary Notes on the Fundamental Rights' in Shiva Rao, *The Framing of India's Constitution, Select Documents* II 33 (Indian Institute of Public Administration 1966). See Sindhu and Narayan, 'A "Weak" Justification for Justiciability of Socio-Economic Rights' (unpublished, on file with the author).

[51] Constituent Assembly Debates, 19 November 1948; See Sindhu and Narayan (n 50).

[52] *Olga Tellis v Bombay Municipal Corpn* (1985) 3 SCC 545; *Narmada Bachao Andolan v Union of India* (2002) 10 SCC 408 : AIR 2000 SC 3751, *People's Union for Civil Liberties v Union of India* (2011) 12 SCC 675.

[53] *Francis Coralie Mullin v UT of Delhi* (1981) 1 SCC 608 : AIR 1981 SC 746

famine-like conditions,[54] the prevalence of bonded labour,[55] and the eviction of slum dwellers without notice and rehabilitation.[56] Against this backdrop, the Court's move beyond the textual prohibition of enforcement of positive rights to protect human dignity as a response to democratic inertia was met with public approval, and helped the Court gain sociological legitimacy.[57]

However, five decades after the inception of the PIL movement, the picture appears quite different, and the Court appears to have lost sight of the textual prohibition of enforcement of socio-economic rights as well as its rationale in two important respects. First, the Court's PIL movement has traversed well beyond basic socio-economic rights to include issues of corruption and governance.[58] Some of these issues may merit intervention to protect the "minimum core of democracy".[59] However, the Court now pays little attention to the nature of the claim before it in a public interest litigation petition before choosing to intervene.[60] Furthermore, on occasion, the Court has issued directions that conflict with fundamental rights. Recent examples include the Court's order mandating the playing of the national anthem in cinema halls,[61] the Court mandating an exercise to identify illegal immigrants in the State of Assam in a petition that was filed seeking better treatment for persons detained under the Foreigners Act,[62] and the Court opining in favour of evicting protestors blocking roads, considering the inconvenience caused to the public.[63] According to a recent study, a majority of PIL petitioners now belong to privileged classes[64] and there is little effort to accord priority to petitions that concern disadvantaged classes.

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54 See orders passed in *People's Union for Civil Liberties v Union of India* (2011) 12 SCC 675 over the course of 16 years.

55 *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161.

56 *Olga Tellis v Bombay Municipal Corpn* (1985) 3 SCC 545.

57 U. Baxi, *The Indian Supreme Court and Politics* (Eastern Book Company 1985).

58 For the phases of the PIL movement see Shyam Divan 'Public Interest Litigation' in S. Choudhry, M. Khosla and P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016).

59 See Dixon (n 6).

60 See *Lawyer's Voice v Union of India*, Writ Petition (Criminal) 142/2019 order dated May 8, 2019 where the Supreme Court issued notice in a petition seeking criminal investigation into funding activities of an NGO; *Wildlife First v Ministry of Forest & Environment* WP (Civil) 109/2008, order dated 13.02.2019 where the Court directed the eviction of tribal persons from forest land; *MC Mehta v Union of India*, Writ Petition (Civil) 10329/2015, order dated 2.9.2019, where the Court laid down guidelines on parking.

61 *Shyam Narayan Chouskey v Union of India* 2016 SCC OnLine SC 1411 which the court later walked back.

62 See orders in *Harsh Mander v Union of India*, Writ Petition (Civil) 1045 of 2018. See also G. Bhatia, 'The NRC Case and the Parchment Barrier of Article 21' (*Indian Constitutional Law And Philosophy*, 26 April 2019) <https://indconlawphil.wordpress.com/2019/04/26/the-nrc- case-and-the-parchment-barrier-of-article-21/> accessed 10 January 2022.

63 *Amit Sahni v Commr. of Police* (2020) 10 SCC 439 : 2020 SCC OnLine SC 808.

64 P. Chitlakar and V. Gauri, 'The Recent Evolution of Public Interest Litigation in the Indian Supreme Court' in S. Krishnaswamy and others (eds), *A Qualified Hope: The Indian Supreme Court and Progressive Social Change* (Cambridge UP 2019) 77–91, 85.

Second, as Dixon notes, the Court regularly issues positive directions or guidelines in such cases despite lacking the institutional competence to do so. Unsurprisingly, these directions are then difficult to implement on the ground. In certain cases, the Court has also usurped Executive functions. For instance, in the *Midday Meal Scheme case* cited by Dixon, the Court appointed its own Commissioners to implement its directions of grant of ration and midday meals which likely impeded the Government from building capacity on the ground.[65]

While expanding its jurisdiction, the Court appears to have presented itself with only two options: either to not intervene at all or intervene by taking over government functions to ensure enforcement of these rights.[66] In contrast, a theory of responsive judicial review would allow a more nuanced and considered approach— the court would be correct in expanding judicial review in the face of state apathy or inertia but would also have to factor in its limitations in terms of legitimacy and competence, which concerned the members of the Constituent Assembly.[67] While it is appropriate for the judiciary to address democratic inertia by requiring the government to respond as to why deprivation of life and dignity is taking place,[68] instead of devising positive remedies, the judiciary can require the government to come up with a plan to be enforced.[69] The judiciary will then have more legitimacy to impose strong form remedies to ensure that the government complies with the plan that it submitted and address further inertia through follow-up hearings as well as sanctions such as costs if the orders are not implemented.[70]

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[65] The approach of the Court in the midday meal case was notably not followed in *Swaraj Abhiyan v Union of India* (2018) 12 SCC 170. In this case, the Court dealt with a petition seeking relief of rations in states where there were drought-like conditions. The Petitioner also sought the appointment of court commissioners to monitor the implementation of the Court's orders. The Court refrained from granting this prayer on the ground that the State had provided for such authorities to ensure implementation under the National Food Security Act 2014 but these positions remained vacant. The Court passed orders to ensure that these vacancies were filled.

[66] J. Sindhu and V. Narayan, 'The Supreme Court Has Failed in Its Duty in Handling of Migrant Cases' (*The Quint* 18 May 2020) <https://www.thequint.com/voices/opinion/supreme-court-migrant-workers-crisis-no-judicial-review-high-courts-show-way-coronavirus-lockdown> accessed 10 January 2022.

[67] On how constitutional interpretation can support such a position, see J. Balkin, *Living Originalism* (Harvard UP 2011).

[68] See *Distribution of Essential Supplies and Services During the Pandemic, In re* (2021) 7 SCC 772 the Supreme Court's order with respect to the Government's COVID-19 vaccine policy, where the Court sought data from the Government about the Government's purchase orders and persons vaccinated till date, which led the Government to modify its vaccination policy to make it more equitable, serves as an important illustration of how the Court can respond to democratic inertia in matters of individual rights without transgressing its own limitations of legitimacy and competence.

[69] See, generally, Katherine Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' [2010] Int'l J Const L 385.

[70] See orders passed in *Swaraj Abhiyan v Union of India* (2018) 12 SCC 170. Sindhu and Narayan (n 50).

Given the solidification of the Court's PIL movement over time, it is difficult to put the genie back in the bottle. However, it is still possible for judges on an individual level to adopt an approach informed by responsive judicial review by analysing whether a petition involves a fundamental right or a fundamental issue relating to the minimum core of democracy before intervening, and by justifying the remedy employed, especially when choosing a strong remedy, such as passing positive directions.

III. CASES OF PERSONAL AUTONOMY AND DIGNITY

It is useful to recall that normative accounts questioning the legitimacy of judicial review first originated in the United States—where ironically enough judicial review is not expressly provided for in the Constitution.[71] In such a constitutional system, a compelling argument can be made against judicial review as being democratically illegitimate.[72] Accordingly, normative accounts that carve out a role for judicial review often argue that judicial review must be broadly in line with public opinion or conscious of democratic backlash.[73] Dixon's theory also helps provide room for judicial review in such constitutions with limited or restricted provisions of judicial review.

The Indian Constitution, however, is distinct from the American Constitution in the context of civil and political rights, at the very least.[74] Judicial review is not only expressly provided for but is provided as a fundamental right.[75] Additionally, the Indian Supreme Court has recognised the enforcement of fundamental rights as its duty.[76] Moreover, the principle that judicial review must largely align with majoritarian interests goes against the transformative nature of the Indian Constitution, where the Constitution was to beget changes in society.[77] In fact, the Indian Supreme Court has signalled that it need not wait for majoritarian sentiment to catch up but instead must provide protection to human dignity from majoritarian sentiment and stereotypes.[78] In the same vein, the Court has held that it must ask searching questions of the

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71 M. Tushnet, 'Thayer's Target: Judicial Review or Democracy' (1993) 88 Nw U L Rev 9, 17.

72 Indeed, there is copious scholarship on the counter-majoritarian difficulty posed by judicial review in the United States. For a survey of this scholarship see, S.B. Prakash & J.C. Yoo,'The Origins of Judicial Review' (2003) 70(3) 887, 894-898.

73 See R.A. Dahl, *Democracy and its Critics* (Yale UP 1989). Terri Peretti, 'An Empirical Analysis of Alexander Bickel's The Least Dangerous Branch' in Kenneth Ward and Cecilia Castillo (eds), *The Judiciary and American Democracy* (State University of New York Press 2006).

74 See the rights provided in pt III of the Indian Constitution.

75 Art 32.

76 *State of Madras v V.G. Row* AIR 1952 SC 196; *State of Punjab v Khan Chand* AIR 1974 SC 543; *Om Kumar v Union of India* (2001) 2 SCC 386; *Shayara Bano v Union of India* (2017) 9SCC 1.

77 See G Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins 2019).

78 *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 : AIR 2018 SC 4321.

government in matters of liberty and equality.[79] However, paradoxically, there exists an opposing stream of precedent in India that advocates weak standards of review,[80] deference,[81] and factoring in public opinion as grounds for avoiding or reversing decisions.[82] This stream is not based on an interpretation of the Indian Constitution but relies on normative theories of judicial review grounded in other jurisdictions such as the United States, irrespective of their compatibility with the Indian Constitution.[83] The choice of these conflicting streams, which can lead to diametrically opposite results on a given question of fundamental rights, makes the position of judicial review in India extremely uncertain. In this context, it becomes necessary to fully appreciate Dixon's argument along with its caveats to analyse how the argument would work within the framework of the Indian Constitution.

Dixon argues that matters of dignity and autonomy such as LGBTQI rights, transgender rights, and abortion are suitable for responsive judicial review on the ground that their recognition and enforcement is hindered by democratic inertia. Notably, however, Dixon also argues that matters of democratic inertia ought to be mediated through varying standards of review, weak form remedies, and deference and deferral to mitigate potential democratic backlash or reverse inertia.[84] Dixon also notes that questions of values such as constitutional morality are subject to reasonable disagreement.[85] Thus Dixon suggests the Court act with discretion on these issues keeping in mind the potential of democratic backlash and reverse inertia. However, it is possible that a constitution may settle these issues differently and legitimise intervention by the judiciary in matters of personal autonomy and dignity precisely because of the court's counter majoritarian nature. To be sure, Dixon's argument accounts for this difference-throughout the book, Dixon puts forth the caveat that questions regarding the judicial role must first be answered through the text, history, and structure of the constitution, and also points out that in certain cases the counter-majoritarian force of the judiciary is necessary, especially when there is a question of irreversible harm to individual rights.[86] In this context, there can be no quarrel with Dixon's argument and its application to India. However, owing to the peculiar persistence of conflicting precedent on the judicial role in India, which can lead the Court to opposing results, it becomes necessary to clarify how Dixon's argument concerning responsive judicial review, namely, variation

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79 *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1; *State of Maharashtra v Indian Hotel & Restaurants Assn* (2013) 8 SCC 519 : AIR 2013 SC 2582.

80 See *Chiranjit Lal Chowdhuri v Union of India* AIR 1951 SC 41; *Ram Krishna Dalmia v S.R. Tendolkar* AIR 1958 SC 538.

81 See Narayan & Sindhu (n 4) 52-55.

82 *Kantaru Rajeevaru v Indian Young Lawyers Assn* (2020) 2 SCC 1.

83 On how this precedent made it to India see Narayan & Sindhu (n 4) 57-62.

84 See Dixon (n 6) ch 7.

85 Dixon (n 6) ch 4.

86 See Dixon (n 6) Introduction, ch 4, and ch 7.

of remedies and deference, ought to work within the contours of the Indian Constitution.

As Dixon notes, the answer to the scope of judicial review under the Indian Constitution is best derived from an interpretation of the Indian Constitution.[87] Take, for instance, Article 32 of the Constitution, which provides for the enforcement of fundamental rights as a fundamental right and grants the Court the discretion to choose and modulate remedies best suited to the case.[88] This discretion ought to be interpreted to mean the discretion to choose the remedy that is *best* suited to achieving the enforcement of the right in question and not a blanket discretion to choose weaker remedies that do not secure this result, in the absence of any justification.[89] Similarly, in light of potential backlash, Dixon suggests that the court ought to decide the case on the narrowest grounds. However, in a transformative constitution, the court would be violating its duty if it were to retreat from a decision that is legally legitimate on the ground of backlash that is widely felt but not reasonable. Instead, the court can make use of dialogic review to engage with the government on how to increase awareness to reduce backlash and to ensure that the government brings any potential violence under control.[90] Finally, on the question of standards of review and deference, the court ought not to apply weak standards of review (as it often does) without justifying why the same is compatible under the relevant constitutional provision and with the facts of the case.[91] A possible justification would be a finding that the legislature has sufficiently deliberated the constitutionality of a law such that the court ought not to substitute these findings of the legislature.[92] However, given previous Indian precedent on deference, it is crucial to clarify that deference does not imply that the court simply accept the reasons provided by the legislature owing to the legislature's

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87 On the method of constitutional interpretation see P. Bobbitt, (n 7); C. Chandrachud, 'Constitutional Interpretation' in S. Choudhry, M. Khosla and P.B. Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016).

88 Art 32(2); In fact, the provision was amended to ensure discretion of remedies to the Supreme Court, see Constituent Assembly Debates, 9 December 1948.

89 For instance, in *Anuradha Bhasin v Union of India* (2020) 3 SCC 637 : AIR 2020 SC 1308, the Court failed to strike down the internet shutdown imposed in Jammu and Kashmir, which became the longest internet shutdown in a democracy, despite finding that the Government was wrong to not produce the orders before court and that strict standards of proportionality had to be applied. Instead of striking down the measure, the Court, without explanation, passed a direction to the Government to produce the orders and review the situation. The internet in the region was only restored a year after the Court's decision.

90 This technique ought to have been applied in the face of protests against the decision of theCourt in *Indian Young Lawyers Assn v State of Kerala* (2019) 11 SCC 1 allowing the entry of women into the Sabarimala Temple. Instead, the Court agreed to review its decision, See *Kantaru Rajeevaru v Indian Young Lawyers Assn* (n 82).

91 A good example of a considered approach to standards of review is the Court's decision in*State of Gujarat v Shri Ambica Mills Ltd*. (1974) 4 SCC 656 : AIR 1974 SC 1300, where the Court held that in matters of economic decisions promoting welfare (unlike identity-based classifications) the State government should have more leeway to make classifications so as to first determine the success of the welfare measure.

92 See notes 38 to 45 and accompanying text.

democratic legitimacy; whether deference should be accorded depends on the strength of these reasons offered by the legislature.[93] Similarly, the court cannot simply defer on the ground that the case concerns sensitive matters such as that of national security; instead, the State must explain what sort of sensitive information will be impacted or affected if the court ventures into the particular question at hand.[94]

IV. CONCLUSION

As Dixon notes, judicial review is often viewed from an all-or-nothing perspective. However, as constitutions become more complex in an effort to anticipate all forms of dysfunction and abuse, one clear and definitive answer on how judicial review must work in a constitutional system is no longer possible. Dixon's new book can serve as a useful blueprint on how to combine a principled and pragmatic approach while applying judicial review to mitigate risks to democratic responsiveness while remaining conscious of the court's own competence and legitimacy. This blueprint is poised to be built on by scholars in the years to come. In many ways, the Indian Constitution provides an excellent example of how judicial review can vary across issues such as civil and political rights, socio-economic rights, and judicial review of legislative process and thus is a perfect site to test Dixon's theory. However, the gaps in academic literature in India on the contours of the judicial role and its legitimacy under the Indian Constitution must first be addressed to ensure that a theory of responsive judicial review does not become a theory promoting unguided discretion on the part of the judiciary.

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93 Aharon Barak, *Proportionality Constitutional Rights and their Limitations* (Cambridge UP 2012), 396–99.

94 Cora Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 Leg Stud 1.