National Law School of India Review

Volume 34 | Issue 2 Article 11

2022

Responsive Judicial Review and Multipolar Constitutional Theories

Se-shauna Wheatle

NLSIR

RESPONSIVE JUDICIAL REVIEW AND MULTIPOLAR CONSTITUTIONAL THEORIES

—Se-shauna Wheatle

Dixon's exposition of modern democratic dysfunction and responsive judging arrives at an opportune time, in which both newer and more established democracies are experiencing considerable challenges to their democratic norms and structures.[1] Dixon contributes to the growing literature on this topic by offering a careful definition and catalogue of the ills plaguing modern democracies alongside reflections on the legitimacy and effectiveness of institutional responses. In particular, the book approaches the issues of the legitimacy of judicial review and the practical application of responsive judicial review with remarkable comparative breadth. I will begin this brief article by outlining and assessing the core arguments of the book. Next, I will situate the book within commentary that proposes a 'multipolar' vision of the constitution—neither legal nor political, neither juristocracy nor exclusively majoritarian. I end by drawing on a UK case study—the UK Supreme Court decision in *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland*[2]—that reflects the operation of responsive review (and multipolar constitutionalism, in general) in action.

I. DEMOCRATIC DYSFUNCTION AND RESPONSIVE JUDICIAL REVIEW

Dixon identifies three types of democratic dysfunction: anti-democratic monopoly power, democratic blind spots, and democratic burdens of inertia. Anti-democratic monopoly power strikes at the minimum core of democracy by attacking commitments to free and fair multi-party elections, political rights

[1] Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA L Rev 78; Mark Graber, Sanford Levinson, and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford UP 2018); Tarunabh Khaitan, 'Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism' (2019) 17 International Journal of Constitutional Law 342.

[2] 2020 AC 373 : 2019 UKSC 41.

and freedoms, and institutional checks and balances.[3] The latter two forms of democratic dysfunction—democratic blind spots and democratic burdens of inertia—overlap with other constitutional and human rights values. Democratic blind spots occur when legislatures enact laws that create "unintended or unanticipated limitations on constitutional protections".[4] Such 'blind spots' are often the effect of the limited perspective of legislative bodies that do not sufficiently reflect the range of perspectives and experiences of the diverse groups in society. This phenomenon is a democratic failing in the sense that it indicates the limited representativeness of the legislative body; however, the effects can include substantive harm to the constitutional rights of groups within society and to the fundamental constitutional values of the state. Legislative burdens of inertia represent a failing at the other end of the legislative process: they indicate a failure to legislate, to act. However, again, the impact can extend to dignitarian harms and the stagnation of constitutional protection and development.

The responsive theory of judicial review calibrates the scope and intensity of judicial review according to the legal and political context. In particular, responsive judicial review encourages judges to determine the level of scrutiny of governmental activity in part by considering evidence of democratic dysfunction and the necessity for the judicial arm of the state to apply a corrective to such dysfunction. This judicial approach is not limited to engaging with the present circumstances and past actions of government that undermine democracy; importantly, it is also sensitive to the future and to the potential governmental (and societal) reaction to the court's intervention. It accordingly requires judges to contemplate the risk of 'democratic backlash' to their decisions. This sensitivity is critical to democracy reinforcement as such backlash could itself trigger democratic dysfunction and undermine the legal and political legitimacy of the court.[5]

The responsive theory of judicial review also offers distinct adjudicative benefits. An internal effect of this approach to judging is that it can provide guidance to judges in making evaluative choices in contentious cases.[6] It may also produce an external advantage in the court's interface with outside observers and audiences. Responsive judging can add legitimacy to the court's decisions as well as to the court itself as an institution. While judicial review sceptics may encourage a view of the court as an anti-democratic body, adjudication that seeks to respond to threats to democracy and protect the mechanisms and processes of democracy encourages a perception of the court as an instrument of, rather than an impediment to, democracy. Legitimacy-reinforcement would be further strengthened by the element of responsive

---

3 Rosalind Dixon, *Responsive Judicial Review—Democracy and Dysfunction in the Modern Age* (unpublished—on file with author) ch 3.

4 Dixon (n 3) ch 3.

5 Dixon (n 3) ch 4.

6 Dixon (n 3) ch 4.

judging that advises judges to condition their interventions according to the legal and political culture. The belief that judges should be mindful of the legal and political culture in which they operate is not unique to the responsive theory; it also features in other theories of constitutional adjudication and judicial review.[7] If judges are minded to rebuff the anti-democratic (in the thin or thick sense) actions of political actors, a judicial refusal to act due to legal and political constraints, or a decision to act founded on legal or political reasoning and with a view to what is considered acceptable in the domestic political culture, is likely to improve the reception of the decision and the perception of the court.

II. MULTIPOLAR THEORIES OF JUDICIAL REVIEW

The responsive theory of judicial review joins an expanding genre offering a multipolar view of judicial review in constitutional democracies. Polarised views advance an image of judicial review as either an illegitimate imposition on politics and constraint on to democracy or a wise apolitical defence of constitutional values and human rights. The exact shape of polarised views differs from jurisdiction to jurisdiction. In the UK, they are typically represented by the divide between legal and political constitutionalists.[8] The political constitutionalist view bemoans what it sees as a growing judicial encroachment on political issues; this position is currently dominantly represented by academics and practitioners of the Judicial Power Project.[9] Regarding other jurisdictions, Dixon offers the example of commentators who describe judges as being at the mercy of the political context, with "little capacity to protect and promote democratic political processes or norms".[10] The other pole is represented by scholars who adopt a rosy, optimistic vision of constitutional judging. As Dixon explains, this view is "often associated with Ronald Dworkin's hypothetical judge 'Hercules'".[11] This view sees judges as operating above the fray, making legal decisions on principle without the contaminating influence of political considerations, thus lending itself to advocacy for strong judicial review with a wide scope of influence. These two poles then represent disparate (extreme) views on the legitimacy of judicial review. Unfortunately, each camp's perceptions of the other's position have become so crystallised and the debate has become so polarised that descriptions of one model from the opposing view are arguably caricatures.[12] Moreover, there is a growing realisation that neither polarised view represents the reality of judicial review. Briefly stated, judges

---

[7] See, eg, dialogue theory and models of judicial deference.

[8] See, eg, Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007). TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (OUP 1993).

[9] Dixon (n 3) ch 1.

[10] Dixon (n 3) ch 1.

[11] Dixon (n 3) ch 1.

[12] Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30 King's Law Journal 43.

are neither heroes insulated from political considerations, nor are they merely agents of politics.

Multipolar theories have sought to identify the weaknesses of dichotomised framing, including caricatures that misrepresent either view, the polarisation of debate which prevents meaningful dialogue and identification of common ground, and a failure to capture and respond to the realities of the dynamics that influence and result from judicial review in modern constitutional democracies. Among such theories, I would place the idea of collaborative constitutionalism advanced by Aileen Kavanagh, Alison Young, and Eoin Carolan.[13]

However, one critique of such theories is that they have a tendency to focus on institutions and procedures rather than individuals and values. Kavanagh's theory, for instance, emphasises the examination of inter-institutional interactions, arguing that "institutional relationships lie at the heart of what constitutions do".[14] Responsive judicial review itself builds on Ely's proceduralist theory, which encourages the use of the judicial process to expand democratic representation. Theories of constitutionalism, including theories of judicial review, ought to be more 'people-centred'[15] and 'value-centred'. At its core, constitutionalism should be viewed as the protection of the personhood, dignity, and freedom of the individual within society.[16] Moreover, the objective of some multipolar theories (that is, moving away from the polarisation of views) would be better served by shifting the focus from institutions and institutional interests and towards the values underpinning the constitution and the people to be served by the constitution. A continued focus on institutions and procedures, rather than values and people, can lead to the re-entrenchment of institutionally driven positions.

---

[13] Alison Young, *Democratic Dialogue and the Constitution* (Oxford UP 2017); Eoin Carolan, 'Dialogue Isn't Working: The Case for Collaboration as a Model of Legislative-Judicial Relations' (2015) 36 Legal Studies 209; Aileen Kavanagh, 'Recasting the Political Constitution: From Rivals to Relationships' (2019) 30 King's Law Journal 43.

[14] Kavanagh (n 12) 63.

[15] This argument reflects elements the arguments for 'people-centred' international development (see, eg, Christian Aspalter, 'Towards a More People-Centered Paradigm in Social Development' in Surendra Singh and Christian Aspalter (eds), Debating Social Development: Strategies For Social Development (Casa Verde Publishing 2008); David C. Korten, 'Steps Toward People-Centred Development: Vision and Strategies' in *Government-NGO Relations in Asia: Prospects and Challenges for People-Centred Development* (Macmillan 1995)) and is to be distinguished from the understanding of populism as a form of 'people-centred' anti-elitism (see Cédric M. Koch, 'Varieties of populism and the challenges to Global Constitutionalism: Dangers, promises and implications' (2021) 10 Global Constitutionalism 400, 406).

[16] For a discussion of models of constitutionalism, see N.W. Barber, *The Principles of Constitutionalism* (OUP 2018), ch 1. Barber proposes a positive model of constitutionalism, which "acknowledges the need for constitutional structures to guard against abuses of power—it is not utopian—but is focused on creating a strong state able to work for the good of its people" (p 19).

In the specific context of democratic dysfunction and the responsive theory of judicial review, issues are perceived as democracy-based, and the solutions are posed in procedural terms. Legislative blind spots and burdens of inertia tend to capture the effects of legislation (or lack thereof) on marginalised or disadvantaged groups. While these effects can certainly be construed as failures of democracy, there is some discomfort with framing these issues as issues of democracy. The effects—and to some extent, the cause—of the harm are dignitarian in nature. Moreover, the 'democratic' framing runs the risk of distancing the action and inaction of the legislature from the true impact of legislative (in)activity. Further, democratic framing serves to proceduralise (or over-proceduralise) what are, at their core, substantive issues. Again, this argument does not deny that there is a democratic or procedural component to the dysfunction addressed; the blind spots of perspective that sometimes trigger constitutionally harmful legislation or the failure to respond to calls for change do, to some extent, reflect democratic flaws. However, perceiving and assessing these flaws as *primarily democratic* risks obscuring the true nature of the cause, the impact, and some of the potential solutions to addressing these failings.

III. PROROGATION AND INSTITUTIONAL MONOPOLY: *MILLER, CHERRY* AS RESPONSIVE JUDICIAL REVIEW

Dixon rightly notes that the current risks to democracy often involve political leaders adopting "measures that erode democratic commitments to democratic pluralism and competition".[17] The attempt of the UK Prime Minister to prorogue Parliament for five weeks in advance of the UK's planned departure from the European Union is cited as one such attempt to impair democratic competition and accountability.[18] In this section, I agree that the prorogation represented a challenge to the democratic minimum core and argue that the UK Supreme Court's decision in *Miller, Cherry* that the prorogation was unlawful fits Dixon's model of responsive judicial review, while also broadly falling within a multipolar understanding of constitutionalism.[19]

The *Miller, Cherry* case arose in extraordinary political and constitutional circumstances. In June 2016, a referendum was held on the UK's continued membership in the European Union, the result of which was a 52% to 48% vote in favour of leaving the EU. By agreement between the UK and EU and according to statutes passed by the UK Parliament, 'exit day' was set, following two extensions requested by the UK, as October 31, 2019. However, in the

---

17 Dixon (n 3) ch 2.

18 Dixon (n 3) ch 2. Dixon also invokes the PM's misrepresentations to the public and attacks on the media. However, this article focuses squarely on the prorogation and its challenge in the courts.

19 *R (Miller) v Prime Minister and Cherry v Advocate General for Scotland* 2020 AC 373 : 2019 UKSC 41.

months prior to the UK's scheduled exit from the EU, the UK and EU had yet to agree on a withdrawal agreement setting out the terms of their future relationship. While the Prime Minister expressed that he was determined to leave on exit day regardless of the existence of a withdrawal agreement, it was clear that the majority of the House of Commons would prefer a further extension rather than a 'no deal' exit. It was against this backdrop that, at the end of August 2019, the Government advised the Queen to prorogue Parliament for a period of approximately five weeks, from early September to mid-October 2019. To put this decision into perspective, a typical prorogation lasts approximately 10 days.

Businesswoman and activist Gina Miller and a cross-party group of MPs applied for a judicial declaration that the Prime Minister's advice to the Queen was unlawful. The Government argued, in the first place, that the issue was not justiciable; the Government maintained that the only appropriate accountability mechanisms for the PM's advice to the Queen were political and to be exercised by Parliament. Secondly, the Government presented evidence that the prorogation was necessary to prepare a new Queen's Speech and lay out the Government's legislative agenda for the next session of Parliament. However, the UK Supreme Court rejected these arguments and declared the advice unlawful and the prorogation accordingly "null and of no effect".[20]

The *Miller, Cherry* decision has been critiqued in some quarters on the grounds that it undermines the political constitution and displaces political norms in preference for legal standards.[21] *Miller, Cherry* has therefore become a flashpoint in the debates between legal and political constitutionalism, as well as the perceived judicialisation of the constitution. On the contrary, however, the judgment actually reflects the features of multipolar views of the constitution. I argue elsewhere that it fits the description of collaborative constitutionalism; in other words, it represents neither legal nor political constitutionalism but, rather, the idea of the institutions of state working cooperatively to ensure the fulfilment of the fundamental values of the constitution.[22]

At the same time, the decision represents a judicial response to unprecedented democratic dysfunction. The prorogation of Parliament was arguably an attempt to undermine the institutional pluralism and accountability that form part of the minimum core of democracy. As Dixon observes,

---

[20] *Miller, Cherry* (n 19) para [69].

[21] John Finnis, 'The Unconstitutionality of the Supreme Court's Prorogation Judgment' (*Policy Exchange*, 2019) <https://policyexchange.org.uk/publication/the-unconstitutionality-of-the-supreme-courts-prorogation-judgment/> accessed 30 August 2022, pp 12-13.

[22] Se-shauna Wheatle, 'A Collaborative Approach to Constitutional Accountability' in Matthew Flinders and Chris Monaghan (eds)., *Questions of Accountability: Prerogatives, Power and Politics* (Hart Publishing 2023) (forthcoming).

> "Parliaments…play a crucial role in supervising the exercise of executive power by a democratic government. Attacking the strength, independence or functioning of a legislature, therefore, offers governments a powerful way to expand democratic power—or erode the pluralism, competition and contestation inherent in a system of democratic checks and balances".[23]

The Court itself recognised the importance to democracy of institutional checks, arguing that, "the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model".[24]

While the prorogation's restriction on institutional balancing was temporary, the constitutional impact would have been profound. In particular, the prorogation would have had the effect of preventing parliamentary scrutiny of government activity surrounding the UK's departure from the EU.[25] It would also limit the opportunity for Parliament to perform its legislative function of passing new primary legislation, particularly statutes to give effect to the EU withdrawal, during the prorogation period.[26]

The Supreme Court's decision that the prorogation was unlawful can correspondingly be viewed as an attempt to maintain constitutional accountability through institutional checks and balances. In the words of the Court,

> "The effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. Indeed, if Parliament were to be prorogued with immediate effect, there would be no possibility of the Prime Minister's being held accountable by Parliament until after a new session of Parliament had commenced, by which time the Government's purpose in having Parliament prorogued might have been accomplished".[27]

The need for scrutiny of the Government by the legislature was heightened by the fact that the UK was about to embark on perhaps the most fundamental constitutional change in decades. The departure from the EU would affect the sources of law, individual rights, and the relationship between the component nations of the country.

---

23 Dixon (n 3) ch 3.

24 *Miller, Cherry* [48].

25 *Miller, Cherry* [56]–[57]; A. Sinclair and J. Tomlinson, 'Eliminating Effective Scrutiny: Prorogation, No Deal Brexit, and Statutory Instruments' (*UK Const L Blog*, 4 September 2019) <https://ukconstitutionallaw.org/> accessed 30 August 2022.

26 Sinclair and Tomlinson, ibid.

27 *Miller, Cherry* [33].

Within a politically charged atmosphere, affected by the dynamic of the judiciary stepping in to regulate the interactions between the political branches, the decision was inevitably vulnerable to backlash. However, the Court responded to that danger by carefully sculpting the scope and intensity of its review. The boundaries of this review were limited in three ways. First, the court adopted a carefully calibrated standard of review that allowed room for the Government to exercise reasonable judgement:

> "…a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive".[28]

Second, the court emphasised the exceptional circumstances that gave rise to the case in that the opening paragraph noted that the facts were unusual and likely to arise only once. The exceptional nature of the case also filtered into the application of the standard of review. The Court explained that even if the prorogation decision frustrated or prevented Parliament's constitutional functions without reasonable justification, "*the court will intervene if the effect is sufficiently serious to justify such an exceptional course*".[29] The wording therefore suggests that if the effect is not 'sufficiently serious', the court will decline to intervene.

Third, the court refused to engage with an alternative ground of challenge to the PM's advice—that the motive for prorogation constituted an improper purpose.[30] Accordingly, it declined to take the more intrusive step of inquiring whether the Prime Minister's "purpose in seeking a prorogation of such length at that juncture was to prevent Parliament from exercising its legislative functions, so far as was possible, until the negotiations had been completed".[31]

IV. DEMOCRATIC BACKLASH?

Despite what was arguably a carefully tailored review, the momentous impact of the court's ruling triggered vigorous criticism from some commentators and institutional backlash from the Government. The Government responded to the perception of expansive judicial power epitomised in *Miller, Cherry* by launching a review of the scope of judicial review (Independent Review of Administrative Law). This review has been followed by the enactment of the Judicial Review and Courts Act 2022 which contains provisions

[28] *Miller, Cherry* [50].
[29] *Miller, Cherry* [50] (emphasis added).
[30] *Miller, Cherry* [54] and [58].
[31] *Miller, Cherry* [53].

limiting the ambit of judicial supervision of the lawfulness of administrative action. The Act includes an ouster clause that would narrowing the court's supervisory jurisdiction over tribunal decisions, even in cases where the tribunal has made an error of law.[32] Specifically, the Supreme Court's conclusion that it had cognizance over the legality of Parliament's prorogation led the Government to devise a legislative bar to the justiciability of the dissolution of Parliament in the Dissolution and Calling of Parliament Act 2022.[33] The Act's Explanatory Notes make explicit reference to the *Miller, Cherry* decision, explaining,

> "Clause 3 further provides that a court or tribunal cannot consider the limits or extent of those powers. This is to address the distinction drawn by the Supreme Court in *Miller v The Prime Minister, Cherry and Others v The Advocate General for Scotland* [2019] UKSC 41 as regards the court's role in reviewing the scope of a prerogative power, as opposed to its exercise. It seeks to clarify that neither is justiciable in the context of decisions relating to the dissolution of one Parliament and the calling of another".[34]

The Government's response may be understood either as a form of 'democratic dialogue' or democratic backlash. The former is a response that could "help 'maintain the democratic responsiveness of constitutional meaning', or allow the court to 'recalibrate its decision making—taking social and political forces into account'".[35] On the other hand "[d]emocratic backlash...involves disagreement that is widespread, deeply felt but not necessarily reasonable in nature. Instead of focusing on encouraging constitutional reinterpretation by courts, it also focuses on a project of democratic retaliation—or an attack on courts as institutions".[36] On their own, the Judicial Review and Courts Act and Dissolution and Calling of Parliament Act could arguably be viewed as dialogue rather than backlash. However, they have been joined by a Bill of Rights Bill 2022 which proposes to repeal the Human Rights Act 1998. The Bill includes provisions that seek to narrow the scope of rights, such as the right to private and family life, and the capacity for courts to provide remedies for rights violations. Specifically, the Bill would remove the obligation for courts to interpret legislation consistently with rights guaranteed by the European Convention on Human Rights and restrict the court's ability to award damages, to find violations of the right to private and family life and to allow appeals

---

[32] Judicial Review and Courts Act, s 2. This section also reverses the UK Supreme Court decision in *R (Cart) v Upper Tribunal* (2012) 1 AC 663 : 2011 UKSC 28.

[33] Independent Review of Administrative Law Report, 41–56.

[34] Dissolution and Calling of Parliament Act Explanatory Notes, para 21.

[35] Neal Devins and Louis Fisher, *The Democratic Constitution* (2nd edn, Oxford University Press 2015) 224 cited in Dixon (n 3) ch 6.

[36] Dixon (n 3) ch 6.

against deportation.[37] The restrictions relating to persons subject to deportation speak not only to the institutional aspect of democratic dysfunction, but also to dignitarian harm to minoritized and marginalized groups.

On balance, while the Government's response to *Miller, Cherry* itself could tentatively be considered dialogue rather than backlash, paired with the proposed Bill of Rights Bill, there is mounting evidence of democratic backlash and democratic dysfunction in the UK. The steps being taken by the Government to resist the reach of judicial supervision, cumulatively, appear to be an attack on courts and an attack on the equal application of human rights across society. Thus, Mark Elliott has argued that the objectives behind 'the Government's wider project [including human rights and judicial review reforms] concerns not the so-called restoration of parliamentary sovereignty or the strengthening of democracy, but the entrenchment of a form of executive hegemony — one that smacks of authoritarian resistance to scrutiny and is antithetical to the best traditions of the British constitution.'[38]

V. CONCLUSION

Among the substantial contributions of Dixon's study is a sustained articulation of the relationship between the legitimacy of judicial review and the phenomenon of the decay of constitutional democracy. Understanding these connections is key to accurately diagnosing the risks posed to democracy and the contributions that courts can make to reinforcing the core of democratic constitutionalism. By rejecting polarised models of judicial review, responsive judicial review encourages judicial decision-making [and analysis of judicial decisions] that is sensitive to prevailing political and legal conditions. If there is evidence of democratic dysfunction and judicial intervention could assist in buttressing democratic values, there is a heightened case for the legitimacy of judicial review and for more intense levels of scrutiny. This conception of judicial review notably has both pragmatic and principled elements, and this is undoubtedly one of its advantages. For it is likely that the response to democratic dysfunction in modern democracies will require a combination of such pragmatism and principle-based reasoning.

---

[37] Bill of Rights Bill 2022, cls 1, 8, 18 and 20.

[38] Mark Elliott, 'The UK's (new) Bill of Rights' (Public Law for Everyone Blog, 22 June 2022) <https://publiclawforeveryone.com/2022/06/22/the-uks-new-bill-of-rights/> accessed 30 August 2022.