

Reading Group, autumn 2023

Masaryk University, Faculty of Law

“While we might doubt the general net benefit of judicial review, we might have some prudential reasons to support it. That is, it might be rational to support judicial review if the institutional particularities of judicial institutions, compared with those of political branches, render courts more sensitive to rights considerations in general. But this judgment will be contingent on specific institutional comparisons and cannot be made in abstraction from the particular circumstances in a particular country.”

Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights* (2002)

- Convenor:** Zuzana Vikarská (zuzana.vikarska@law.muni.cz)
- Format:** 12 x 90-minute seminars (online / hybrid)
+ self-study of up to 40 pages per week
- Timetable:** Monday evenings 18:00 – 19:40, online and/or room 253
- Annotation:** This course aims to inspire PhD students, as well as highly motivated undergraduates, to read recent works in the field of constitutional law and political science, to think about matters presented therein, and to discuss them in a small group with an interactive setting. Active class participation is expected from all students.

In the autumn of 2023, we will explore the concept of judicial review from a comparative perspective, reading a very recent book by **Rosalind Dixon**, *Responsive Judicial Review* (OUP 2023). More references will be provided to those interested in further readings.

Every class will be **moderated by one of the students**. Three days before our meeting (i.e. the previous Friday by 18.00), the moderator shall submit a **one-pager** with some reflection questions to our virtual classroom in MS Teams. All students are welcome to respond to this one-pager already before class and add further questions.

Week 1: **Monday 2 October** 2023, 21 pages + 27 minutes of audio

Dixon, Introduction, p. 1-21 + **interview** with the author, available at: <https://is.muni.cz/go/interview-Dixon>

The first chapter provides an overview of the structure of the book and its key arguments, as well as its relationship to the work of John Hart Ely in *Democracy and Distrust*, and theories of responsive law and regulation, dialogue, and weak review. It points to the key democratic blockages constitutional courts can help counter, as well as create, and how this should inform courts' approach to construction, including in the context of constitutional implications, doctrines of proportionality, stare decisis, and remedies.

+ if you are not yet familiar with Wojciech Sadurski's article *Judicial Review and the Protection of Constitutional Rights*, you might want to read it :)

Week 2: **Monday 9 October 2023**, 34 pages

Dixon, Chapter 2: Constitutions and Constructional Choice, p. 25-58

This chapter outlines the idea of constitutional constructional choice, and the role of constitutional values (including democracy) as potentially informing that process of choice. It discusses Ely's own understanding of these questions, as well as the criticisms and limits of Ely's account, and suggests that democracy and sources of democratic dysfunction need to be understood in ways that build on but go beyond the ideas set out in *Democracy and Distrust*. It considers the range of "comparative political process theories" that engage in this task, and situates the idea of responsive judicial review within this broad school of ideas.

Week 3: **Monday 16 October 2023**, 33 pages

Dixon, Chapter 3: Defining Democracy and Democratic Dysfunction, p. 59-91

This chapter explores foundational debates about the scope of commitments to democracy in a constitutional system. It also explores "thin" notions of competitive democracy that focus on a "minimum core" notion of democracy, as well as "thicker" notions of democracy that comprise a broader set of commitments to rights and deliberation, but also norms subject to reasonable disagreement. Having defined democracy in this way, the chapter goes on to explore the three democratic risks to which a theory of responsive judicial review is directed, namely the risks of anti-democratic monopoly power, democratic blind spots, and burdens of inertia, and explains and illustrates each concept. It shows how these blockages can arise in at risk and well-functioning democracies, as well as the interconnection between the various blockages.

Week 4: **Monday 23 October 2023**, 33 pages

Dixon, Chapter 4: The Scope and Intensity of Responsive Judicial Review (part 1), p. 95-127

This chapter explores how the ideas set out in Chapters 2 and 3 translate into potential doctrinal guidance for courts in the context of judgments about the intensity and scope of judicial review. Specifically, it explores debates about constructional choice and the making of constitutional implications, and the application of doctrines of proportionality and US-style tiered review. It suggests that the legitimacy of constitutional implications will depend on an amalgam of legal and political factors, and the degree to which implications respond to threats to the "democratic minimum more" or urgent, systemic, and irreversible risks to human dignity. It further shows how attention to risks of electoral and institutional monopoly, democratic blind spots, and burdens of inertia can usefully inform the application of tests of this kind.

Week 5: **Monday 30 October 2023**, 16 pages

Dixon, Chapter 4: The Scope and Intensity of Responsive Judicial Review (part 2), p. 127-142

Week 6: **Monday 6 November 2023**, 38 pages

Dixon, Chapter 5: Democratic Dysfunction and the Effectiveness of Responsive Review, p. 143-180

This chapter explores the degree to which courts are able effectively to identify and counter the relevant three risks to democracy, but also the preconditions for judicial review of this kind. It notes the challenges courts face in identifying democratic dysfunction, but also the principles and sources they can draw on in doing so – including principles of publicity and reversibility, and evidence provided by legislative trends, opinion polls, amicus briefs, and comparative developments. It notes the institutional strengths of courts in responding to democratic blockages, but also the necessary degree of legal authority, remedial power, judicial independence, and political support for judicial review for courts to play a role of this kind. The chapter also notes the additional challenges facing courts as they seek to counter risks of political monopoly.

Week 7: **Monday 13 November 2023**, 23 pages

Dixon, Chapter 6: Risks to Democracy: Reverse Inertia, Democratic Backlash, and Debilitation, p. 181-203

This chapter explores the inevitable limits to a court's actual and perceived legitimacy, and the risks this can pose to a constitutional system's overall democratic responsiveness. It explores the idea of reverse burdens of inertia, democratic backlash, and democratic debilitation as relevant forms of risk, and illustrates each by reference to examples found in earlier chapters. It notes the differences as well as similarities between these different risks to judicial review, and the degree to which they depend on reasonable versus unreasonable disagreement, and involve courts predicting the impact of their decisions on their own institutional position versus broader electoral outcomes.

Week 8: **Monday 20 November 2023**, 38 pages

Dixon, Chapter 7: Towards Strong-Weak / Weak-Strong Judicial Review and Remedies (part 1), p. 204-228

This chapter considers the notion of strong versus weak judicial review, and the idea of responsive judicial review as a combination of strong and weak remedies and rights-based reasoning. It provides a taxonomy of different forms of judicial weakness, both formal and informal, and explores the role of narrow reasoning, delayed or non-coercive remedies, and weakened norms of stare decisis in reducing the finality of judicial decisions. It further argues that the type and degree of judicial non-finality should match or be responsive to the specific blockage a court is seeking to counter, and risk of reverse inertia, backlash, or debilitation it is seeking to counter. Hence, the chapter proposes different combinations of strong-weak and weak-strong judicial review. It also explores how, in order to promote true dialogue about constitutional norms, weak-strong review must encourage real not just rhetorical dialogue with isolators, and contain incentives for legislative action that translate into a form of "penalty default" logic.

Week 9: **Monday 27 November 2023**, 14 pages

Dixon, Chapter 7: Towards Strong-Weak / Weak-Strong Judicial Review and Remedies (part 2), p. 228-241

Week 10: **Monday 4 December 2023**, 26 pages

Dixon, Chapter 8: A Responsive Judicial Voice: Building a Court's Legitimacy, p. 245-270

This chapter explores the notion of a responsive judicial “voice,” or how choices about judicial authorship, narrative and tone may influence the public reaction to a court decision, and thus both its political and sociological legitimacy. It notes the significance to the acceptance of judicial decisions of the background of a judge, and the relationship between that background and that of parties or broader actors disappointed by the decision. It further suggests that courts should make conscious choices to assign responsibility for judicial opinion writing in light of this, and adopt a tone and approach to reasoning that shows respect to losing parties, and draws on a range of narratives likely to appeal to diverse audiences—including those persuaded by more local and global norms or appeals. Finally, the chapter notes the degree to which these various forms of responsive judging, or judicial statecraft, may be used in service of pro- and anti-democratic ends, and hence must be approached with caution by those committed to democratic responsiveness.

Week 11: **Monday 11 December 2023**, 10 pages

Dixon, Chapter 9: Conclusion: Toward a New Comparative Political Process Theory?, p. 271-280

This chapter concludes the book by restating the core ideas in earlier parts, and considering the degree to which they offer principles that all judges, in all countries, can usefully turn to in the process of constitutional choice. Constitutional theory, it suggests, must inevitably be adapted to the specific constitutional context. And the best way to engage in adaptation of this kind is through a truly collaborative cross-national constitutional dialogue. But constitutional principles can still have relevance across a range of constitutional contexts. And while responsive judicial review, and judging, assume a quite high degree of judicial skill – including an appreciation of both legal and political context, and norms of legitimacy – there are many notable judges who have demonstrated this level of skill in recent decades. One judge sensitive to notions of responsive review can also help encourage responsiveness on the part of an entire court. And the hope is that, by providing an explicit blueprint for review of this kind, the book itself may contribute to judicial capacity to engage in review of this kind.

Week 12: **Monday 18 December 2023**

discussion with the author and/or public presentation of the book we've just read? (TBD)

Literature:

- Rosalind **Dixon**, *Democracy and Dysfunction in the Modern Age* (OUP 2023); <https://academic.oup.com/book/45587>
- Wojciech **Sadurski**, *Judicial Review and the Protection of Constitutional Rights*, *Oxford Journal of Legal Studies*, Vol. 22, No. 2 (2002), p. 275-299
- for more sources, **see MS Teams** – references for further reading will be shared throughout the semester!