

Review of Dixon and Landau's *Abusive Constitutional Borrowing*

Tom Ginsburg*

Borrowing has been a central topic of inquiry and debate in comparative law since at least Alan Watson's work on legal transplants.¹ Legal scholars trace the spread of ideas and institutions, debate how much borrowing has occurred, and offer accounts about what might explain it. Social scientists, too, have found the spread of legal institutions and ideas irresistible for analysis, and the large literature on diffusion has focused on both cause and effect.² For the most part, both of these literatures assume that borrowing is, at least some of the time, functional, and thus can be explained in terms of the benefits it provides to the system as a whole. Indeed, a kind of developmentalist flavor pervaded some of the comparative law debates, with deeply embedded assumptions of progress and evolution pushing legal systems towards convergence. Comparative law was a field of high modernism.³

However, our era is one in which democratic backsliding and autocratization has become a central concern. Assumptions of progress have been cast aside. As Dixon and Landau show us in this important new book, the agents of democratic decline are just as capable of borrowing legal ideas and institutions

* University of Chicago Law School. Leo Spitz Professor of International Law.

1 Alan Watson, *Legal Transplants: An Approach to Comparative Law*, 1d (Georgia: University of Georgia Press, 1974).

2 Everett M Rogers, *Diffusion of Innovations*, 1d (New York: Free Press of Glencoe, 1962); Zachary Elkins & Beth Simmons, "On Waves, Clusters, and Diffusion: A Conceptual Framework" (2005) 598:1 *The ANNALS of American Academy of Political and Social Science* 33.

3 Annelise Riles, ed, *Rethinking the Masters of Comparative Law*, 1d (Oregon: Hart Publishing, 2001).

from abroad as were those who sought democratic entrenchment. The political appeal of the new autocrats is not autochthony, in which a local law should be produced locally as a reflection of romantic nationalism; rather they accept the idiom of universal norms, but insist on local power to interpret and wield them. Indeed, Dixon and Landau show us that many of these regimes use universal norms to leverage their rhetorical attacks at international institutions. In doing so, they utilize the language of liberal constitutional democracy against itself, a kind of legal jiu-jitsu in which democratic rhetoric is used to undermine democracy.

Reading Dixon and Landau's account of the abuse of democratic institutions might drive one to despair or to drink. Judicial review, constitutional rights, the constituent power, human rights law, hate speech laws and gender quotas have all been turned around in the service of authoritarian entrenchment. American scholars have had a long debate about taking the constitution away from the courts to create a more political form of constitutionalism, but Dixon and Landau show us that even the Canadian model that has so enamored scholars can be abused when applied to other contexts. And solutions seem tricky; there is no magic bullet that can address abusive borrowing.

The study turns our attention to a central and enduring issue in the study of institutions. For the most part, scholars have looked at the institutions of constitutional democracy in isolation; we study constitutional courts, judges, legislatures, elections, judicial councils and others. But of course the operation of any of these may be dependent on them all. Interaction effects abound. Furthermore, there is a dynamic quality to assessing constitutional democracy. Assumptions made at one time might not play out in a different era, and certainly not a different context. These points suggest a focus on a single system and its dynamics may provide more analytic leverage than studying a particular institution.⁴

4 See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019).

Most of all, the study points out that normative constitutional design is everywhere and always built on deep empirical assumptions. For the most part these have not been tested. Our state of constitutional knowledge is deeply limited, notwithstanding lots of ink spilled. We do not even have a sense of what we can and cannot know.⁵

To understand how these issues play out, consider the evolution of constitutional courts over the past three decades, a period in which the institution has expanded dramatically to eclipse systems in which a single apex supreme court has the final power of judicial review. The logic of judicial empowerment had a political rationale, but also a deep empirical assumption built in. That empirical assumption can be summarized as “No purse, no sword; no problem”.⁶ Courts, by their nature, were the “least dangerous branch” of government, and hence their empowerment provided little risk. Indeed, providing an insulated constitutional actor to guard the constitution seemed a prudent thing to do in the era of the distrust of political power. The assumption was that insulation would provide for an apolitical approach to constitutional adjudication. This in turn rested on a further assumption, which was that there was sufficient capacity for such adjudication to operate, both in terms of human capital and the requisite cultural conditions.

There were good theoretical reasons for some of the design decisions that were taken with regard to constitutional courts. The idea to concentrate judicial review was attractive in many contexts, especially when ordinary judges had been tainted by association with the prior regimes. So we can understand the logic of the adoption, which was based on an empirical assumption: giving the power of judicial review to ordinary judges would slow the transition to a democratic constitutional order. Concentrating it in a new institution would insulate judicial review from political influence, at least in the short term, providing for a faster and more complete democratic transition.

5 Tom Ginsburg, “Constitutional Knowledge” (2018) 2:1 KNOW: A Journal on the Formation of Knowledge 15.

6 The reference is to Alexander Hamilton, “Federalist No. 78” in Clinton Rossiter, ed, *The Federalist Papers* (New York: New American Library, 1961).

Whether true insulation is possible or desirable in the abstract, in many countries, constitutional courts became another power center, and highly politicized. There is a somewhat universal logic at play: any institution exercising political power will attract attempts by politicians to control it. It is no surprise that Viktor Orban's first target after consolidating constitutional power was the constitutional court; in a single act he erased all the celebrated jurisprudence of the prior court and appointed a new one with loyalists. Similarly, under the 1997 Constitution of Thailand, the constitutional court was a kind of lynchpin institution involved in many other appointments. A decade later, the court sided squarely with the military against the elected government of Thaksin Shinawatra. And as Dixon and Landau show us, these courts can easily become agents of backsliding.⁷

The rise, capture, and critique of constitutional courts finds its parallel in many other areas as well. Dixon and Landau do us a service in documenting these abuses. Figuring out how to move forward is more tricky. As a general matter, when engaging in normative constitutional design, what is perhaps needed is a clear statement of empirical assumptions, and then an empirical basis for assessing the probability that the desired results will actually play out. This requires specifying the conditions for institutional success, and tracing the system-level dynamics of reinforcement and resilience. In turn, such an approach would help us identify and critique abusive borrowing, while promoting more constructive borrowing.

Dixon and Landau have provided a wonderful service for our field in identifying and naming the phenomenon of abusive borrowing. The next steps are a more systematic analysis of the *dynamics* that allow such abuses to occur, and a catalogue of strategies to prevent them. Here, however, we are only at the beginning of the inquiry. What is clear to me after reading this superb book is that much of the effort of academic lawyers in the comparative field is not helping us much: the work is, in Dixon and Landau's terms, too formalist and

7 Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021) at 6.

not realist enough. Only the broad lens approach of the kind they take can really help us figure out what principles we should be using in constitutional design.