# Abusive Constitutional Borrowing as a Form Politics by Other Means

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I would like to think of myself as one of the proverbial groomsmen of this outstanding book. During a meeting in a nice café in Coogee Beach, Sydney, back in 2017, I challenged Rosalind Dixon and David Landau to write a book that would share their unmatched knowledge on the increasingly common phenomenon David Landau had identified in an earlier article —"Abusive Constitutionalism". [1] A few years later, Dixon and Landau's *Abusive Constitutional Borrowing* offers probably the most complete account written to date by scholars of comparative constitutional law on what has been termed as "democratic backsliding", "constitutional capture", "autocratic legalism", "stealth authoritarianism", "abusive constitutionalism" and other such two-word phrases, describing the challenging times for liberal constitutional values and for constitutional democracy more generally in an increasing number of countries worldwide.[2] Earlier works (including, notably, by Landau himself) on this hot-

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1 David Landau, "Abusive Constitutionalism" (2013) 47:1 UC Davis Law Review 189–260.

2 See, e.g., Kim Lane Scheppele, "Autocratic Legalism" (2018) 85:2 University of Chicago Law Review 545–583; Mark A Graber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press, 2018); Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press, 2019); Tom Ginsburg & Aziz Z Huq, *How to Save a Constitutional Democracy* (Chicago: University of Chicago Press, 2019); Rosalind Dixon & David Landau, "1989–2019: From Democratic to Abusive

button topic have already identified this phenomenon: the simultaneous reliance on, yet effective hollowing out of, core concepts of constitutionalism to advance an anti-democratic and often illiberal political platform. However, no other work offers as analytically sharp, comprehensive, and genuinely comparative an account of the various techniques, strategies, and manipulations drawn upon by a-democratic leaders and governments to advance their assault on democracy (and on liberalism more generally) while they continue to adhere to the formal symbols, institutions, and procedures of constitutionalism and the rule of law.

Anyone who reads this book must admire the authors' mastery of the subject matter, their careful treatment of key concepts in constitutional theory and in constitutional jurisprudence, as well as their superb comparative research and writing skills. Capturing the book's full richness in a short commentary of this type is no easy matter. The authors provide a near-dizzying array of examples of abusive constitutional borrowing from literally across the globe, considerably expanding our understanding of the scope of this phenomenon well beyond the now widely documented, possibly even over-studied cases of Poland, Hungary, and Venezuela. [3] In a nutshell, Dixon and Landau suggest that "legal globalization" (here understood as an expansion of what has been termed "the migration of constitutional ideas" and "the renaissance of comparative constitutional law")[4] has offered a wide repertoire of possibilities for cynical, ill-

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Constitutional Borrowing" (2019) 17:2 International Journal of Constitutional Law 489–496; Rosalind Dixon & David Landau, "Abusive Judicial Review: Courts Against Democracy" (2020) 53:3 UC Davis Law Review 1313–1387.

3 The array of examples the authors discuss is impressive. A fascinating case that the authors could have perhaps devoted more attention to is Hong Kong, where an uneasy "one country, two systems" principle splits the constitutional authority between mainland China and the government of Hong Kong as a Special Administrative Region (SAR). Over the last decade, China has been advancing an aggressive controlling agenda over the SAR, drawing on a set of legal and constitutional maneuvers that appear very relevant to the authors' discussion.

4 See Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014); Sujit Choudhry,

intentioned borrowing of the *form* of given liberal-democratic concepts and institutions without commitment to the *substance* of these concepts or institutions. So the ease with which various constitutional ideas travel these days is not aiding exclusively the spread of liberal-democratic constitutional values, but may also help facilitate malign practices aimed at limiting these values. The authors show how such abusive constitutional borrowing can take the form of "sham, selective, a-contextual and anti-purposive" borrowing. Deploying these modes of abusive borrowing, regimes and leaders that pursue such form-over-substance strategy aim to maintain legitimacy through apparent compliance with the formal requirements of democratic constitutionalism without letting that compliance restrict their ability to substantively subvert the constitutional system to advance their self-serving, a- or anti-democratic agenda. For example, regimes that are interested in hollowing out the substantive core of, say, apex courts with the power of judicial review, do not disband the judicial system, shut down the constitutional court, or abolish the practice of judicial review altogether. Rather, they "capture" that seemingly liberal-democratic institution and effectively implement measures such as court packing, tightened political control of judicial appointments, newly introduced mandatory retirement age for serving judges, curtailing the jurisdictional wings of courts, threatening harsh reaction to unwelcome acts of judicial activism, and so on. Subservient courts, legislatures, and administrative agencies, too, may (and often do) engage in this abusive borrowing practice, relying on anything from selective or distorted citation of foreign jurisprudence to legitimize rulings that support illiberal, anti-democratic policies, to the expansion of concepts such as libel, public safety, blasphemy, lèse-majesté, or treason, to smear, restrict, or silence hitherto legitimate political opposition.

The repertoire of abusive constitutional measures the authors document makes it hard for the reader not to be astonished by the creativity of a new wave of illiberal and a-democratic regimes, parties, and leaders in dozens of countries worldwide. But not all such actors share similar motives, agendas, or the ability

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ed, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2009).

to circumscribe liberal democracy at will. Perhaps some more nuance in differentiating among the various types of political actors that push the current assault on liberal democracy would have been helpful here, possibly coupled with more attention to the concrete worldviews, ideational platforms, or political ambitions that drive these political power-holders. Some appear to be ideology-light autocrats who cling to power; others are opportunistic politicians purporting to represent the political, economic and cultural hinterlands in their respective polities; and yet others are ideologues, ranging from right wing communitarians, or sectarian religionists to all out Schmittian reactionaries who see extreme nationalism as a just weapon against liberal democracy and its supposedly hollow cosmopolitanism.

The book's main aim is illustrative; it tells a timely and disturbing story that will interest experts and non-professionals alike. As a largely descriptive project (in the more prescriptive Chapter 8, which I address briefly below, the authors discuss various means to stop or tame abusive borrowing), there is little to quibble with here on either the explanatory or the normative front. However, as with any other great scholarly work, *Abusive Constitutional Borrowing* does raise some afterthoughts on trends and phenomena closely related to the practices examined in the book.

First is the issue of the novelty or distinctiveness of the phenomenon (and some of its shorter and simpler scholarly precursors) analyzed here. Leaving aside the hard-to-prove extent of actual inter-jurisdictional diffusion / emulation / borrowing (the authors do not purport to establish causality or to "prove" borrowing in any social scientific way), one could plausibly argue that hollowing out — but not an all-out abolition — of symbols and institutions of the rule of law has characterized dozens of semi-authoritarian regimes throughout the 20th century. Likewise, it is readily identifiable in territories occupied by democratic regimes, from French-controlled Algeria to Britain's rule of Northern Ireland in the pre-Good Friday Agreement era, and to Israel's ongoing legal and military domination of the West Bank. In these and other similar settings, a thin, formal understanding of "courts", "legal process", "judicial independence", and "justice" continued to exist for decades even though, substantively, none

resembled the understanding of the same concepts in the occupying country itself. In other settings, a minimalist, Schumpeterian notion of democracy as characterized by the existence of routine, relatively free elections without much attention to other, thicker dimensions of democratic governance has been one of the most widely accepted definitions of democracy long before the rise of contemporary form-over-substance borrowing. Of course, few reasonable observers, certainly not this reviewer, would equate the democratic backsliding in Hungary, Poland, or Turkey to that in the United States. But the fact remains that in the United States — the hallmark of democratic governance for many — there exists systemic disenfranchisement of voters, mostly on racial and socio-economic basis; rampant influence of money in politics consistently backed by legislation and by Supreme Court rulings; and blatant politicization and partisanship in judicial appointment processes despite talk about judicial independence. The question, then, is whether this phenomenon is *qualitatively different* from what we know has taken place elsewhere (and if so, how?) or is it more of a question of degree? Could it even be simply the fact that constitutional borrowers in the many countries the authors consider are just not nearly as good as established democracies are in concealing their preference for formal over substantive democracy?

A second question concerns the apparent mismatch between the "us first" rhetoric and the increasingly common opting out of global constitutionalism practice that accompany it, and constitutional borrowing aimed at formally complying with universal standards of democracy and human rights. Regimes that practice abusive constitutional borrowing do not subscribe to a blatantly defiant North Korea-like practice that eschews the global order or takes the constitutional domain lightly. Given the amount of energy that goes into subverting the constitutional domain, the actors who push for such subversion must assume that constitutional institutions and constitutional practices matter a great deal. At the very least, such actors see the importance of formally adhering to international norms and standards of democratic constitutionalism while advancing a local version of these norms that depletes them of real content in practice. In fact, maintaining a façade of compliance without the substantive

dimension of it is precisely the essence of the exercise. So one must assume that regimes engaging in abusive borrowing think international legitimacy matters.

At the same time, ethno-nationalist parties in Europe — many of which operate in historic bastions of democracy — advance an anti-EU agenda and exclusionary policies that resent diversity, ignore minority rights, and call for restrictive immigration policies. So-called "Euro-skeptic" parties in many European countries from Finland to Greece preach for cutting ties with the EU and for implementation of "us first" policy preferences. Nationalist governments in countries such as India, Israel, and Malaysia have successfully advanced controversial legal changes aimed at privileging one religion or ethnic group (Hindus in India; Jews in Israel; Muslims in Malaysia) over others in bold defiance of acceptable norms of equal citizenship. The government of Hungary and Poland repeatedly emphasize the Christian nature of their respective polities; members of the Visegrád Group (Hungary, Poland, the Czech Republic, and Slovakia) have explicitly rejected EU policies and subsequent ECJ rulings on pan-European immigration and refugee settlement. Russian and Turkish courts defy liberalizing ECtHR rulings, portraying these rulings as running against these respective countries' constitutional traditions. The Philippines under Duterte withdrew from the International Criminal Court (ICC); Venezuela withdrew from the Inter-American Court of Human Rights; and the United States under Trump pulled out of the ICC, the Trans-Pacific Partnership (TPP), UNESCO, and the Paris Agreement (aka the Paris climate accord).[5]

Even in established democracies, populist voices invoke anti-constitutional convergence rhetoric. On multiple occasions, former British Prime Minister Theresa May expressed her support for the UK opting out of the European Convention on Human Rights (ECHR), and stated that her 2020 electoral campaign would be based on a motto of freeing the UK from the jurisdiction of the ECHR. "The ECHR can bind the hands of parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals — and does nothing to change the attitudes of governments

5 See Ran Hirschl, "Opting Out of 'Global Constitutionalism'" (2018) 12:1 Law & Ethics of Human Rights 1–36.

like Russia's when it comes to human rights", May said. "So regardless of the EU referendum […] if we want to reform human rights laws in this country, it isn't the EU we should leave but the ECHR and the jurisdiction of its court".[6] In the same spirit, May went on record stating that: "we should do even more to restrict the freedom and the movements of terrorist suspects when we have enough evidence to know they present a threat, but not enough evidence to prosecute them in full in court. And if human rights laws get in the way of doing these things, we will change those laws to make sure we can do them".[7] Rejectionist discourse against elements of global constitutionalism has taken place in other pertinent contexts, notably in American constitutional discourse. Well before the Trump years, fierce debates took place over the desirability and legitimacy of reference to foreign precedents — often reflecting the supposedly international liberal constitutional rights canon — in constitutional interpretation. In short, alongside abusive constitutional borrowing that pays formal dues to universal constitutional expectations, a parallel discourse of explicit rejection and opting out of global constitutionalism and its norms, institutions, and practices takes place.

This leads to a third question, concerning the prescriptive part of the book. In Chapter 8 ("Can Abusive Borrowing be Stopped?"), Dixon and Landau move to offer a brief account of what they think may be done to tame or even eliminate abusive borrowing. They consider some creative designs to prevent court packing or jurisdictional curbing of court authority, alongside types of entrenched representation quotas, and assertive international monitoring. Interestingly they call for "abuse proofing" of ambivalent concepts such as

6 Theresa May, "Home Secretary's Speech on the UK, EU and Our Place in the World" (Speech delivered to the Institute of Mechanical Engineers in central London, 25 April 2016), online: <www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world>.

7 Christopher Hope & Gordon Rayner, "Theresa May: I'll Tear Up Human Rights Laws so We Can Deport Terrorists", *Daily Telegraph* (6 June 2017), online: <www.telegraph.co.uk/news/2017/06/06/theresa-may-will-not-let-human-rights-act-stop-bringing-new/>.

"constitutional pluralism" (that allows recalcitrant regimes to disregard the EU), bans on "militant/anti-democratic parties" (that may serve to outlaw perfectly legitimate opposition), or the "unconstitutional constitutional amendment doctrine" according to which constitutional courts may nullify constitutional amendments if they appear to run against a core, sine qua non, constitutional norm. They consider a constitutional entrenchment of constituent power that include an expansive definition of who the "people" are, and what constitutes their meaningful participation in the political process. The authors are aware of the questionable relevance of scholarly tinkering with concepts of liberal democracy but maintain nonetheless that discussing them is meaningful.

Ultimately, creative as these suggestions are, they cannot escape three core truths that hover over the entire liberal-democratic impotence in dealing with abusive constitutional borrowing. First, it is hard to deter professional constitutional distorters by additional constitutional norms, which are as susceptible to manipulation and intentional hollowing out as the original norms they intend to protect. Second, the greater the spread of global constitutionalism and its discourse, norms, and institutional agencies, the greater the likelihood it will trigger an "us first" impulse of dissent, resistance, and withdrawal. Third, discordant constitutional orders and disharmonic constitutional identities (to borrow Gary Jacobsohn's terminology) generate recurrent clashes between universal and particular visions of the good society, modern and traditional ways of life, and liberal and conservative worldviews. A disproportionally high number of countries that have experienced stints of democratic backsliding suffer from precisely such systemic tensions that run deeper than any constitutional designs, and are easily exploitable by opportunistic ethno-nationalist politicians and governments.

The hallmark of every outstanding work is its ability to generate further questions and to propel the discourse in a given field to new levels. Dixon and Landau's *Abusive Constitutional Borrowing* does precisely that. Over the last decade, social scientists, political theorists, and constitutional scholars alike have offered many accounts of the threats to democratic government and to liberal constitutional values posed by populist and autocratic trends worldwide. If one

is limited to reading single treaties detailing the significance of comparative constitutional law in understanding these trends, *Abusive Constitutional Borrowing* is easily that book to read. As Dixon and Landau show, some of the shrewdest governments, parties, and leaders in the world today invest tremendous energy in subverting the constitutional order to suit their a-democratic interests and illiberal agendas. More than anything else, then, this compelling new book illustrates how any successful attempt to understand one of the most important political phenomena of our time must acknowledge the fluidity of the law/politics distinction, and ultimately accept the conceptualization of constitutional law as a form of politics by other means.