Assessing "Abusive Constitutionalism" in a Complex Political Universe

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Rosalind Dixon and David Landau are two of the ranking experts on comparative constitutional law in the world. They are also, perhaps not coincidentally, worried about the attacks that are taking place throughout the world on what might be termed liberal constitutionalism. "Illiberal constitutionalism" is now a genuine analytical category, meriting an essay of its own in the *Oxford Handbook of Comparative Constitutional Law*.[1] To be sure, it is difficult to define that notion exactly; perhaps we are tempted to quote American Supreme Court Justice Potter Stewart's famous comment about defining pornography: "we know it when we see it".[2] So Dixon and Landau offer a quite minimalist definition, focusing on a process of free elections and, importantly, both the possibility and reality of a peaceful turning over of power by one political party to its opposition if that is the electorate's wish. Very early on, the express their belief (and fear) that "would-be authoritarians [engage in abusive constitutionalism] by making changes that tilt the electoral playing field

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1 See Li-Ann Thio, "Constitutionalism in Illiberal Polities" in Michel Rosenfeld and Andras Sajo, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 133–152. No doubt an updated version of this essay would have many new examples to discuss.

2 *Jacobellis v Ohio*, 378 US 184 (1964).

heavily in their favor".[3] They do not build in strong notions of "separation of powers" or even the constitutional guarantee of a variety of liberal rights.

Still, whatever definition one might use of "illiberal constitutionalism", it is hard to gainsay that the "liberal constitutionalism" has come under attack throughout the world.[4] Proponents of "illiberal constitutionalism", sometimes (and controversially) identified as "populists", seem to be on the rise. Though many examples could be given, Hungary and Poland often lead the list, in large part because each had seemed to be one of the great "success stories" following the collapse of the Soviet empire in 1989; each seemed to embrace liberal constitutionalism and to vindicate the optimistic readings of world events offered by someone like Francis Fukayama. That certainly is no longer the case. And the countries giving cause for concern reach far beyond these two Central European countries with a total population of less than 50,000,000. (Indeed, Hungary is well under 10 million). But consider, say, India under the Modi government or Brazil under Bolsanaro. None of the world's most populous countries can easily be described as instantiating "liberal constitutionalism". And one can certainly wonder where one would place the contemporary United States even in the absence of Donald J. Trump in the White House. I have argued for many years that it is a fallacy to view the United States Constitution as "democratic", and the now widely-recognized dysfunctionality of the American constitutional order is scarcely likely to abate simply because Joseph R. Biden was able to prevail against a notably incompetent and nearly sociopathic Donald Trump.

But Dixon and Landau are not writing a general book about the rise of illiberal forms of constitutionalism, however much that is surely the context of their concern. Instead, they write about a specific technique that is increasingly

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3 Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021) at 23 [Dixon & Landau, *Abusive Constitutional Borrowing*].

4 See generally Mark A. Graber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018).

common on the part of illiberal constitutionalists. That is the "borrowing" from ostensibly liberal democracies of particular aspects of their own system, albeit, in the case of the borrowers, to be used for distinctly illiberal ends. They emphasize, as does Kim Lane Scheppele in her own important work (amply cited by Dixon and Landau) that old-fashioned coups featuring military takeovers and proclamations of dictatorial power are increasingly rare. Modern coups, as in Hungary and Poland, involve the clever use of constitutional powers in order to place an authoritarian party, including, of course, their leaders, into entrenched power, basically impregnable to ordinary electoral accountability even though elections will in fact continue to be held and opposition parties allowed to compete. One often hears, with regard to the behavior of those accused of wrongdoing, that the real problem is not their behavior was illegal, but, instead, the fact that they were taking advantage of what are "perfectly legal" options, at least in the view of lawyers (and, often, judges) sympathetic to their ends.

Recall that Oliver Wendell Holmes invited us to look at law—and to analyze its practical meaning—from the perspective of the egoistic "bad man", interested only in maximizing his individual welfare and looking at law simply as a mechanism for achieving his particular ends. As the American movie actress Mae West once said, when someone said "Goodness gracious", in response to a gown that she was wearing, "Goodness had nothing to do with it". So it is for the bad man. But, and this is the all important point, that doesn't mean that the bad man is necessarily breaking the law. Indeed, if he can afford to hire "the best lawyers" in town, and to find compliant judges, there is a good chance that he will be vindicated. So it is no small matter to realize that just as the Devil can happily quote scripture when it is useful to the cause, so can the bad men and their lawyers easily make use of parts of liberal constitutions for their own nefarious ends.

One way of reading, and profiting from, the book is to treat it simply as an encyclopedic survey of various techniques of bad-faith borrowing, a set of warnings on why we should not be complimented (or fooled) when an authoritarian makes use of what we might like to believe is our own ostensibly

fine (liberal) constitution. There is, so to speak, a "deconstructionist" edge to the book, whereby we are called upon to realize that what in one context might well be a means of safeguarding our own favorite liberal values can, in a different context, be used for decidedly different ends. What Dixon and Landau promote is a certain kind of "hermeneutics of suspicion". Things are not always as they are alleged to be, and the lessons taught by "comparative constitutionalism" can, in the wrong hands, become a source of great evil instead of enlightenment based on "best practices". Techniques make sense, ultimately, only against a background of shared value commitments as to what they are in fact being used to achieve. But, as we know from countless "mad scientist" movies, even the most benevolent techniques can be seized and misused by those who don't share those commitments.

Much of their book focuses on the role of the judiciary. They are suitably ambivalent, however, about their assessment of given ways of structuring the judiciary. "Judicial independence" from a would-be tyrant is to be cherished. But can judges in fact be "too independent", free from any genuine accountability to the political system? If, as they demonstrate throughout the book, context is ultimately more important than abstract forms, then Mark Tushnet's well-known admonition, "it all depends",[5] may ring especially true. They devote a chapter to considering the attractions to some authoritarians regimes of so-called "weak-form judicial review", often based on Canada's famous Article 33 "notwithstanding clause"[6] that, at least in theory, offers a method for legislatures to push back against what they view as judicial overreach. A similar process is now the subject of vigorous debate in Israel.

What exactly should one think of this migration of an important concept from Ottawa to Jerusalem? Dixon and Landau offer as one of their criteria for "abuse" the treating of an idea or process "acontextually", which seems clearly correct. But, of course, to appreciate fully any given context may take deep and

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5 See, *e.g.* Mark Tushnet, *Taking the Constitution Away from the Courts* (New Jersey: Princeton University Press, 1999).

6 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 33.

time-consuming study, and even then it is almost certainly the case that differences of opinion (and evaluation) will remain. Nominalists — or specialists in a particular country — will always take the field against generalists, each making good arguments against the other. Each of us must ultimately find our own "Goldilocks" points between the endless rabbit holes of specificity and the dangers of potentially facile generalization drawn from otherwise valuable "large-n" studies. I suspect that most readers will probably agree with the moral of most of the stories that Dixon and Landau tell, drawn from an impressive array of examples from around the world; but most doesn't mean all, and there will inevitably be good faith disagreement about the identity of potential heroes or villains in given countries.

This may simply be another way of recognizing that the most pervasive challenge in the field of "legal studies" in the degree to which one can genuinely separate positivist "legal analysis" from "politics" and one's own normative political commitments. As already noted, this book is written from a perspective entirely committed to the importance of liberal constitutionalism, a commitment that I happily share. But I do wonder what the reaction might be from those who are equally committed to alternative regimes not only in Hungary or Poland, but also in Singapore or Israel. One of their chapter titles is "Can Abusive Borrowing Be Stopped?"[7] From one perspective, the answer is "of course", if there are no longer incentives on the part of would-be authoritarians to engage in the practice. Otherwise, why would one expect such borrowing to cease, especially if its proponents can point to "successes" in reinforcing their hold on power? Joseph Schumpeter famously defended entrepreneurial capitalism's propensity to engage in "creative destruction", leaving in its wake the shattered businesses and dreams of a prior economic reality. So is "abusive borrowing" in its own way a form of the "creative destruction" of liberal institutions that become viewed, perhaps reasonably, as sclerotic? And if we are indeed referring to "populist movements" that rely on forms of ballots instead of bullets to place leaders in power, then we must recognize that millions of

7 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 3, ch 8.

voters can be led to share the disillusionment in a liberal status quo and to prefer instead the disruptions and outright destruction of established institutions and conventions.

For me, the most interesting chapter (among many) was Chapter 6, which addressed "the abuse of constituent power".[8] The explanation is simple: my own essay in *Constitutional Democracy in Crisis?* was titled "The Continuing Specter of Popular Sovereignty and National Self-Determination in an Age of Political Uncertainty".[9] It suggested that the most truly influential 20th century political figure was not, say, Lenin, but, instead, Woodrow Wilson. It was he who defined World War I as a crusade legitimizing "democracy" and "national self-determination". To put it mildly, both of those concepts are what political theorists describe as "essentially contested". Unlike most concepts in political theory, however, arguments are not confined to seminar rooms and academic conferences. Instead, wars can be fought and people killed in the name of "self-determination" by a singular "people". "We the People" is, to put it mildly, not a self-defining term. Indeed, the Supreme Court of the United States notoriously held, in the *Dred Scott*[10] case, that only white persons were genuinely envisioned as being part of the American polity. That decision was overturned in the Fourteenth Amendment, but it took a war that killed 750,000 people to procure the amendment, and the true meaning of "the American people" remains contested even in 2021. (That is one of the meanings of Trumpism.)

But even if we could agree, with regard to any given piece of territory, who comprised "the people" within it (as against, say, only "residents"), that would scarcely resolve the identity of who could legitimately claim to speak for that people. The idea of constituent power, traceable both to Sieyes during the French Revolution and a number of British revolutionaries of the mid-17th

8 Dixon & Landau, *Abusive Constitutional Borrowing*, *supra* note 3, ch 6.

9 Sanford Levinson, "The Continuing Specter of Popular Sovereignty and National Self-Determination in an Age of Political Uncertainty" in Mark A Graber, Sanford Levinson & Mark Tushnet, eds, *Constitutional Democracy in Crisis?* (New York: Oxford University Press, 2018) 651.

10 *Scott v Sanford*, 60 US (19 How) 393 (1857).

century, was ultimately a claim to sovereignty, the ability to create brand new constitutional forms and, concomitantly, to ignore or brush aside any existing legal constraints. As Carl Schmitt would most notably argue in the 20th century, a truly sovereign people stood above any legal constraints that they might have created at an earlier time to apply to the *constituted powers* of governmental officials. Everything is potentially up for grabs when the constituent power, to borrow from Thomas Hobbes, awakens and reasserts its sovereign authority. Such assertions can be used, as in Venezuela (and other Latin American countries) to engage in drastic constitutional overhauling, where, incidentally, one might agree that the prior constitution had outlived its usefulness. Still, one might have been startled to hear Hugo Chavez, in his initial inaugural address in 1999, state, "I swear in front of my people that over this dying constitution I will push forward the democratic transformations that are necessary so that the new republic will have an adequate Magna Carta for the times".[11] He was, of course, almost completely successful in killing the existing constitution; what is more is that recourse to notions of "constituent power" has remained a constant in Venezuelan politics under his successor Nicolas Maduro. Dixon and Landau assess the recourse to "constituent power" in a variety of countries in Latin America, as well as Fiji.

But one is left to wonder whether *any* recourse to notions of "constituent power" or "popular sovereignty" will be open to charges of abuse. As the great American historian Edmund Morgan argued in his book *Inventing the People,*[12] the notion is not only subject to endless dispute, but also available to be used by political opportunists and demagogues to justify their own rise to power. The problem, of course, is that there may be no neutral definitions of opportunism or even demagoguery. Americans tend to regard "the Founders" in almost reverential terms; from a British perspective, however, they were accurately regarded as demagogic populists encouraging popular secession from the

11 Hugo Chavez, "Presidential Inauguration Speech" (delivered at the Caracas Congressional Hall, 2 February 1999).

12 Edmund S Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W W Norton & Co, 1988).

completely legitimate British Empire. (The Americans, recall, were not, as were Native Americans, the victims of settler imperialism; they *were* the settler imperialists who, for whatever reason, became alienated from their Monarch and Parliament.) As Dixon and Landau note, one of the most interesting — and controversial — uses of the theory of "constituent power" is to validate the declaration by judiciaries that given constitutional amendments, though formally valid, are nonetheless unconstitutional because they violate the inchoate constitution established by "the people" to control their political agents (who proposed or ratified the amendment in question). Is that "abusive constitutionalism" or its vindication? Are we confident that we can always tell the difference?

This review has touched on only selected aspects of the extraordinarily well-informed and insightful overview offered by Dixon and Landau. It deserves both close reading and extended discussion, both for its analytic acuity and its undoubted relevance to what is going on around us at present throughout the world.