

BOOK REVIEWS

Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy

Rosalind Dixon & David Landau

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In the post-war era of the twentieth century, the victorious Allies spread their liberal democratic ideals as a preventative measure against the development of authoritarian regimes which had ravaged the world twice in fifty years.¹ This period was referred to as the ‘end of history’ with other ideologies increasingly negated in favour of liberal democracy.² As many nations across the world transitioned towards liberal democracy, the borrowing of constitutional doctrines across jurisdictions became commonplace. Many scholars regarded it as a change for the better.³ As Rosalind Dixon and David Landau argue in *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*, not all constitutional borrowing protects or advances the ideals of a liberal democracy.⁴ In fact, Dixon and Landau argue that some instances of constitutional borrowing are ‘abusive,’ where regimes create a façade of legitimacy, lent from democratic ideals, while simultaneously implementing anti-democratic changes to the constitution.⁵

Abusive Constitutional Borrowing demonstrates how would-be authoritarian regimes ‘borrow’ liberal democratic constitutional techniques and twist them to their advantage. The structure of the book is cumulative in nature, with the ideas of each chapter building on the previous ones. This structure introduces each concept and then provides specific examples of its use, helping to establish a highly persuasive argument that demonstrates the abusive forms of constitutional borrowing throughout the world.

¹ Jon Elster, ‘Forces and Mechanisms in the Constitution-Making Process’ (1995) 45 *Duke Law Journal* 374, 368–9.

² See Francis Fukuyama, *The End of History, and the Last Man* (Hamish Hamilton, 1992).

³ Ibid.

⁴ Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, 2021).

⁵ Ibid 11.

The text addresses a gap in the literature surrounding constitutional borrowing by critically analysing its proliferation, rather than merely praising its globalised nature as other scholars have done.⁶ This book is clear and well-structured in addressing the tension between the promotion of democratic constitutional norms, and the potential for these norms to have an anti-democratic effect when borrowed. The intention of the book is not necessarily to provide a solution to the issues of abusive constitutional borrowing, but to highlight and raise awareness of their existence. Dixon and Landau state that discussing the issues of abusive constitutional borrowing may be the first step towards resolving them.

The first three chapters serve as an introduction and define the parameters of Dixon and Landau's analysis, while signposting how constitutional borrowing can be abused. In chapter three, Dixon and Landau distinguish 'abusive' constitutional borrowing from pro-democratic borrowing, as that which has a 'significant negative impact on democracy.'⁷ This narrows the focus of their analysis to the most egregious threats to democracy, allowing for greater clarity. Dixon and Landau adopt a thin definition of liberal democracy, which extends only to include free and fair elections, rather than an expansive definition which may have additional requirements such as the doctrine of separation of powers.⁸ This has the effect of further narrowing the scope of their analysis and allowing ease of comparison across jurisdictions with diverse forms of democracy.

The subsequent chapters focus on specific examples of abuse involving constitutional rights, judicial review, and constituent power. Chapter four analyses the constitutional borrowing of doctrines surrounding individual rights.⁹ Here, Dixon and Landau detail how laws against hate speech have developed in Canada and other Western European countries to prevent a repeat of the animosity which developed in Nazi Germany.¹⁰ Similarly phrased laws in Rwanda have instead been used to subvert democracy by prosecuting political opponents and non-government organisations speaking out against the Rwandan regime. Memory laws are also commonplace in Western Europe, making it illegal to deny the occurrence

⁶ Ibid 3.

⁷ Ibid 37.

⁸ Ibid 23.

⁹ Ibid 56.

¹⁰ Ibid 59.

of historical events such as the Holocaust.¹¹ In Poland, the government have used this precedent to justify laws preventing accusations of crimes against humanity against the Polish government. These laws subvert democracy by constricting the public's ability to criticise the government and are only accepted in the international community because they rely on the precedent of the memory laws of other Western European countries.

The chapter also considers how the extension of Hungarian voting rights to ethnic Hungarians outside the country has been used to support the nationalist government.¹² This doctrine is borrowed from the push across Europe for constitutional protection of voting rights regardless of ethnicity.¹³ Dixon and Landau emphasise how the Hungarian government presents the changes as a pro-democratic method of protecting the right to vote, thus gaining support to expand voting rights both domestically and internationally. Instead, it permits ethnic Hungarians outside the country to vote, overwhelmingly in favour of the nationalist regime.¹⁴

Dixon and Landau then look at examples of how the judiciary has been weakened or consumed by regimes in Venezuela, Cambodia, and Thailand.¹⁵ Governments in these countries often accuse the judiciary of overreach to justify constricting their ability to check the executive, or making constitutional alterations to the judicial appointment process, allowing political allies to form a majority. Once weakened, the courts affirm legislative expansion to executive power, providing it with an additional sense of legitimacy derived from the universal doctrine of the separation of powers.¹⁶

Chapter six considers the doctrine of constituent power, which is the principle that democratic power ultimately stems from the will of the people.¹⁷ Dixon and Landau demonstrate how the principle had been used

¹¹ Ibid 62.

¹² Ibid 67.

¹³ Ibid 66.

¹⁴ Dixon and Landau point to the government receiving 95% of the expat vote, compared to 43% of the domestic vote: (n 4) 67. See Gabriela Balassa, 'Hungary's Good and Bad Voters' (*Euractive*, 27 February 2014) <<https://www.euractiv.com/section/elections/opinion/hungary-s-good-and-bad-voters/>>

¹⁵ Dixon and Landau (n 4) 81.

¹⁶ Ibid 98.

¹⁷ Ibid 116.

for pro-democratic effect in Columbia, where the will of the people was sufficient to replace the constitution with a democratic model after a civil war.¹⁸ This contrasts the application of this principle by the democratically elected regimes in Venezuela and Ecuador, who instead use it to justify radical constitutional change including the removal of term limits.¹⁹

Finally, the book revisits its earlier observations and questions whether these adverse practices of constitutional borrowing can be prevented.²⁰ Chapter eight does little to suggest potential remedies for the status quo, however, Dixon and Landau suggest that beginning a conversation about the potential for abuse may be the first step in reforming the practice of legal globalization.

One critique of *Abusive Constitutional Borrowing* stems from the thin definition of democracy used as a starting point for analysis, which defines democracy only as requiring free and fair elections. The premise of the book is that liberal democratic principles can be subverted by regimes hiding behind widely used constitutional doctrines. Yet, Dixon and Landau seemingly ignore the likelihood that states which satisfy this thin definition but go no further to achieve democracy are more likely to suffer constitutional democratic abuse. Thus, the idea that states with safeguards such as a robust separation of powers, or institutions enforcing principles of administrative law are less susceptible to abusive constitutional borrowing is not addressed in this book. This omission may lead to an overstating of the severity of abusive constitutional borrowing. Additionally, some of the jargon used throughout the book, which had been defined in earlier works of both authors, makes it difficult at times for the reader to comprehend the specific point of the authors.²¹ Therefore, the book could be improved by elaborating on these concepts at its beginning.

Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy shines a new light on this area of literature. Dixon and Landau's analysis highlights the threat of abusive constitutional borrowing and begins a conversation about the blissful ignorance with which constitutional globalization is viewed. This book

¹⁸ Ibid 120.

¹⁹ Ibid 121.

²⁰ Ibid 176.

²¹ See the use of 'democratic minimum core': Dixon and Landau (n 4) 19.

represents a shift in the narrative by suggesting that the proliferation of democratic ideals is not sufficient to ensure the spread of democracy and that the claims of any government purporting to uphold these values through constitutional change should be met with critical analysis, not mere celebration. It is hoped that this book is extensively discussed by academics and read by students to promote discussion on legal globalization, and the threats that accompany it.

*Jackson Cacciatori**

* BEc/LLB student at the University of Tasmania and member of the *University of Tasmania Law Review* Editorial Board in 2022.

