Abusive Borrowing In Asia? A Reply To Commentators

Rosalind Dixon* & David Landau**

In *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*,[1] we outline a worrying trend– the increasing use by would-be authoritarian actors of liberal democratic constitutional norms to justify anti-democratic forms of constitutional change. This form of "abusive borrowing" is not new. But as both Abeyratne and Thiruvengadam note in their generous responses to the book, it is increasing in scope and salience. Indeed, it is now arguably one of the central techniques of modern authoritarian leaders.

Why does abusive borrowing of this kind occur? First, there is an increasing consensus in political theory, and international governance, in favour of democracy. Second, that consensus is also relatively superficial and formalistic in nature. Either proponents of democracy disagree about what democracy entails in substance, or else they agree, but are reluctant to enforce more substantive, contested variants. Abusive borrowing also trades directly off this formalism or formalist self-restraint: It seeks to retain the form of liberal democracy, but without the substance, and thereby to undermine both international and domestic opposition to the erosion of substantive democratic norms. And as both commentators note, it is a phenomenon that can be observed in a wide range of countries worldwide – not just the constitutional "usual suspects". Indeed, the book documents its relevance to recent constitutional developments in the United States, Hungary, Poland, Bolivia, Brazil, Ecuador, Fiji, India, the Philippines, Rwanda, Thailand, Turkey, Venezuela, among others.

I. Scope of the Phenomenon

Abeyratne nonetheless raises two related questions about the scope of the phenomenon: whether all the cases we identify involve the abuse of liberal democratic norms, as opposed to broader legal norms. This might be a question about the boundary between abusive constitutional borrowing and what Alvin Cheung

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1 Rosalind Dixon & David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (2021).

has termed "abusive legalism".[2] Related to this, he asks whether some examples involve the autochthonous development of abusive legalism, without any discernible element of borrowing.

A leading example, according to Abeyratne, is the use of the "unconstitutional constitutional amendment" (UCA) doctrine by the Thai Constitutional Court – though, on the logic of his account, one might add to that list the use of similar doctrines by the constitutional courts of Bolivia, Ecuador or Venezuela.

We agree with Abeyratne that, unlike some of the other norms we canvas (e.g., constitutional rights), the origins of this doctrine are somewhat less clearly liberal democratic. The doctrine is often associated with the distinction between primary and secondary constituent power – or the idea that there is a distinction between the unconstrained nature of constituent power and the (legally constrained) nature of *constituted power*.[3] Carl Schmitt, who helped develop the idea of constituent power, was a quintessentially non-liberal thinker.[4] But there is also a growing association between the UCA doctrine and commitments to democracy and democratic constitutionalism.

In Latin America, for example, the doctrine is generally associated with the decisions of the Supreme Court of Costa Rica and Constitutional Court of Colombia, in contexts where both courts relied on it to strike down amendments that would have undermined democratic pluralism and constitutionalism. In South Asia, the origins of the doctrine likewise lie in commitments to liberal rights (such as rights to property) and liberal democratic commitments to limited government and the rule of law. At least in a modern context, therefore, invoking the doctrine carries with it an implied invocation of this same liberal democratic telosand the attendant degree of sociological and political legitimacy.

As to whether certain ideas develop in a purely domestic context, without reference to or learning from the outside world, this seems increasingly unlikely. With the potential exception of those in North Korea, most appellate lawyers and judges today have some knowledge of comparative experiences – either through formal education, global conferences, peer interactions or access to online legal material. Truly "new" ideas, which have no link or connection to those found elsewhere, are increasingly rare.

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[2] Alvin YH Cheung, *An Introduction to Abusive Legalism* (unpublished manuscript) <https://osf.io/preprints/lawarxiv/w9a6r/>.

[3] Yaniv Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures', in *The Foundations and Traditions of Constitutional Amendment* 23 (Richard Albert, Xenophon Contiades & Alkmene Fotiadou eds, 2017).

[4] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1922) (George Schwab tr, 1988); Marin Loughlin, 'The Concept of Constituent Power', 13 Eur J Pol Theory 218 (2014); Joel I Colón-Ríos, 'Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia', 18 Constellations 365 (2011).

One thing Abeyratne notes in this context, which we welcome, is that the book provides one a useful tool for distinguishing abusive borrowing from other misuses of democratic constitutional norms – i.e., the notion of the "democratic minimum core". This notion of democracy is one we derive both from an overlapping consensus among political and constitutional theorists about what, at minimum, constitutional democracy requires or entails. It also reflects an "overlapping consensus" among extant democracies about the kinds of practices required to maintain democracy – or the overlap in actual constitutional practices and arrangements among "free" democracies worldwide. Hence, it consists of a commitment to: (1) regular free and fair multi-party elections; (2) political rights and freedoms; and (3) the set of institutional checks and balances necessary to realize the other commitments, in practice.[5]

Using this approach, we are able to distinguish between developments that threaten the minimum core of democracy versus more contestable, context-specific democratic constitutional commitments. In the *NJAC Case*,[6] for example, the Supreme Court of India struck down attempts to "reform" the system of judicial appointments in India to give a greater role to the political branches of government. This was a hard case for the democratic legitimacy of judicial review: on the one hand, the context for these changes was an attempt by Modi to centralize power and undermine the independence of a range of fourth branch institutions. This suggested the value, for democracy, of constraining any attempt further to undermine the independence of institutions such as the Supreme Court.

But on the other hand, there is a good democratic argument for some form of periodic government input into the process of judicial appointment, and because of this, most constitutional systems allow greater scope than the Indian model for political input into the system of judicial appointments. While concerning, the relevant changes did not immediately threaten the democratic minimum core, and hence were beyond what we mean by the idea of "abusive constitutional borrowing".

Similarly, while some of the Court's motives for invalidating the relevant changes may have been open to question, the decision itself was not abusive in

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[5] Rosalind Dixon & Landau, 'Competitive Democracy and the Constitutional Minimum Core', in *Assessing Constitutional Performance* 268 (Tom Ginsburg & Aziz Huq eds, 2016); *See also* Rosalind Dixon & David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment', 13 Int'l J Cons L 606, 634 (2015); David Landau & Rosalind Dixon, 'Constraining Constitutional Change', 50 Wake Forest L Rev 859 (2015); Rosalind Dixon & Landau, 'Competitive Democracy and the Constitutional Minimum Core', in *Assessing Constitutional Performance* 268 (Tom Ginsburg & Aziz Huq eds, 2016); David Landau & Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy', 53 UC Davis L Rev 1313 (2019); Rosalind Dixon, 'Responsive Judicial Review: Democracy and Dysfunction in the Modern Age' (Forthcoming 2022); *Compare* Tom Ginsburg & Aziz Z Huq, *How to Save a Constitutional Democracy* (2018).

[6] *Supreme Court Advocates-on-Record Assn* v *Union of India*, (2016) 5 SCC 1.

nature because it did not attack the democratic minimum core. It may however have reflected a degree of "judicial self-dealing."[7]

II. Constraining Abuse? The Promise and Limits of Democratic Constitutional Design & Monitoring

While welcoming our diagnosis of the problem, both Abeyratne and Thiruvengadam express skepticism about the likely effectiveness of our proposed response – i.e., a combination of better constitutional design and more effective international monitoring and sanctioning. Abeyratne put it this way: "*Dixon and Landau's exhaustive account of the various means through which liberal democracy can be subverted, and the increasing sophistication of would-be authoritarians, left me with the sense that abusive constitutional borrowing cannot be conquered through better monitoring and designing smarter norms. Rather, it seems that we face an endless game of whack-a-mole: for every illiberal or anti-democratic move that is thwarted, a new wrinkle emerges from the authoritarian playbook*".

The most promising response to this problem, Abeyratne suggests, is to focus on the structural features of democracy most likely to produce would-be authoritarian leaders. For example, Abeyratne points in this context to a system of ranked-choice (or preferential) voting as one tool that can make democracy more representative. We agree wholeheartedly with the substance of his proposal. Indeed, elsewhere one of us has argued (with Anika Gauja) that it is the combination of continent policy choices, compulsory and ranked choice voting in Australia that is largely responsible for defeating the rise of illiberal populists or anti-constitutional populist parties and politics.[8]

But we do think that Abeyratne overlooks the intersection between these ideas and our proposals about constitutional design. Electoral systems, for instance, can be monitored and protected by a range of institutions – including generalist and specialist courts and electoral monitoring institutions. In the book, we propose the idea of spreading the responsibility for protecting the existing electoral system across a range of different institutions of this kind. Similarly, electoral systems and regulations are often one of the prime targets of efforts at abusive constitutional change.[9] One of the design responses to abusive constitutionalism, therefore, involves the attempt to give additional entrenchment

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[7] Po Jen Yap & Rehan Abeyratne, 'Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia', 19 Int'l J Const L 127 (2021).

[8] Rosalind Dixon & Anika Gauja, 'Australia's Non-populist Democracy? The Role of Structure and Policy', in *Constitutional Democracy in Crisis*? 395 (Mark A Graber, Sanford Levinson & Mark Tushnet eds, 2018).

[9] Dixon & Landau (n 1); *See also* Dixon (n 5).

to electoral regulation – within a system of "tiered" constitutional design.[10] Constitutional and electoral design, in other words, go together: one reduces the chance of electoral success for would-be authoritarians, the other guards against the danger of self-entrenchment by way of amendment to the electoral system.

Thiruvengadam raises another challenge for our attempt to suggest more effective international monitoring and sanctioning of abusive constitutional borrowing. He suggests that both colonialism and imperialism cast "a long shadow" over the idea of both liberalism and international monitoring, and anyone seeking to defend these ideas has to "confront that past squarely".

There are several responses to this. First, while we are committed liberal democrats, our project is focused on defending the minimum core of democracy, not thicker, more liberal variants of the democratic ideal. And a commitment to self-government has long served as a key basis for resisting imperial rule, rather than an instrument for its expansion.

Second, we agree completely with Thiruvengadam that effective international monitoring requires rethinking how that monitoring is done. As Thiruvengadam notes, international institutions such as the United Nations have a mixed record in holding countries in the Global North to account for human rights, and other international law violations. This means that many international institutions lack credibility in the Global South. It also gives would-be authoritarians an obvious narrative to turn to in deflecting international critique: the language of double standards or selective enforcement. And would-be authoritarians *can and do* invoke this language as a basis for deflecting international critique.

Strengthening international monitoring, therefore, means increasing both the willingness and capacity of international institutions to monitor abusive cases, but also broader cases of breach of international norms.

Third, we agree with Thiruvengadam that our call to reimagine liberalism means re-imagining it across as well as within the nation-state.[11] Creating a more egalitarian, post-colonial form of liberalism requires accounting for the challenges of poverty and inequality on a national and global scale. And it means accounting for the variety of ways in which markets fail, including in the context of existential challenges such as climate change, and more recently, a global pandemic.[12]

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[10] Dixon & Landau (n 1); *See also* Rosalind Dixon & David Landau, 'Tiered Constitutional Design', 86 Geo Wash L Rev 438 (2018).

[11] Dixon & Landau (n 1) 193. *See also* Rosalind Dixon & Richard Holden, *From Free to Fair Markets: Liberalism after COVID* (Forthcoming 2022).

[12] Arun K. Thiruvengadam, 'Fortifying Liberal Constitutional Democracy in Our Times: Reflections on "Abusive Constitutional Borrowings" ', J Ind L & Soc at 4 (2022).

For constitutional law, it also means imagining a more transformative, "fair markets" or democratically liberal model of constitutionalism.[13]

However, there may also be a danger to a complete embrace of Thiruvengadam's call for a post-colonial response to the problem of abusive constitutional borrowing. The language of decoloniality has powerful normative appeal: it invokes past injustice and calls for the creation of a more just and equal world-order. We are both deeply committed to that project. But it is also a discourse that can be exploited by would-be authoritarians for abusive ends – to deflect legitimate criticism of their own efforts to attack the democratic minimum core, domestically. This kind of abusive borrowing of anti-colonial, anti-imperial discourse can also have a powerful effect – precisely because it has such deep normative foundations and appeal. The same will be true for the discourse of transformative constitutionalism.

What we need, therefore, is a nuanced approach to the rhetoric of post-colonial, transformative constitutional politics. In some cases, it may reflect an effort to resist self-interested and illegitimate forms of international interference, and hence merit the strongest possible support. But in others, it may need to be nuanced by attention to the pro-democratic motives of international actors, and their desire to bolster and support localized efforts to resist abusive constitutional change.

Good motives are not enough to legitimate "outsider" forms of constitutional intervention. But they are a necessary starting point for legitimate outsider intervention.[14] The key question is whether international monitoring and sanctioning are ultimately constructive or destructive for democracy in the Global South.

If monitoring adversely affects democratic self-government, we should call it out for what it is – imperialist self-interest, or well-meaning colonialist imposition. But if it instead helps bolster it, we should embrace it as a potentially useful tool for strengthening democratic constitutionalism in the Global South. No international effort can replace the need for domestic mobilization in support of democracy, from either a principled or pragmatic perspective. But it may help contribute additional resources, media attention or credibility to this effort, in ways that should be embraced rather than rejected by those committed to a truly transformative model of democratic constitutionalism.

Abusive constitutional borrowing, therefore, should be understood in ways that are sensitive to the post-colonial critique – but also nuanced enough to protect against the risk that the critique itself may be subject to abusive borrowing.

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[13] *See* Dixon, *Fair Market Constitutionalism*.

[14] Rosalind Dixon & Vicki C Jackson, 'Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests' 48 Wake Forest L Rev 149 (2013).

Both Abeyratne and Thiruvengadam are alive to this danger and provide exactly this kind of nuanced treatment. But it is important to emphasize the point – lest scholarly critique becomes a tool for real-world repression.