Abusive Constitutional Borrowing: The Latest Legal Iteration of a Political Crisis

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In *Abusive Constitutional Borrowing: Legal Globalization & The Subversion of Liberal Democracy*, Rosalind Dixon and David Landau have made a significant and sobering contribution to the comparative constitutionalism literature.[1] The book combines analytical clarity with granular detail drawn from case studies worldwide to show how would-be authoritarians pretend to be liberal democrats while simultaneously undermining the structures and values of liberal democracy. Dixon and Landau conclude by providing high-level, conceptual responses to abusive borrowing. They call for more sophisticated external monitoring of this practice, more conscientious design and dissemination of liberal democratic norms to guard against their subversion, and a critical re-examination of what is meant by liberal democracy.

In this symposium essay, I begin by situating the book within comparative constitutional scholarship, highlighting three signal contributions to the extant literature. I then offer two minor critiques—on the Thailand case study and on the origins of the basic structure doctrine, respectively—before taking up the authors' invitation to reflect more broadly on the state of liberal democracy and the nature of the threats facing it. My main takeaway is this: while Dixon and Landau impressively expand and apply the constitutional toolkit to safeguard liberal democratic institutions and norms, they—and all of us—are ultimately up against a *political* problem. That is, no matter how abuse-proof a liberal democracy is designed to be, illiberal, authoritarian leaders are likely to find new ways to undermine it. Liberal democracy, then, needs liberal democrats to develop a winning political strategy, one that keeps the anti-democratic forces at bay through the ballot box.

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

I. Abusive Constitutional Borrowing - A Major Conceptual and Contextual Advance

As Landau and Dixon note in their introduction, liberal democracy appeared to be hegemonic in the 1990s and early 2000s. Following the "third wave" of democratisation at the end of the Cold War,[2] the number of "free" countries and liberal freedoms expanded worldwide.[3] This hegemony was evident in the literature too, as references to the "almost irresistible tide"[4] of constitutional democracy or the "end of history"[5] captured the prevailing, triumphant zeitgeist.[6] But over the past 15 years or so, liberal democracy has at least stagnated and is likely in decline. The United States, Hungary, Poland, Bolivia, Brazil, Turkey, India, Sri Lanka, and the Philippines, among others, have moved in an illiberal, authoritarian direction.[7] The Freedom House index since 2005 has measured fifteen consecutive years of decline in the percentage of countries rated "free".[8] A distinctive feature of this democratic decline, as Steven Levitsky and Daniel Ziblatt have explained, is that would-be authoritarians have undermined democracy in piecemeal and incremental ways.[9] By contrast, during the Cold War, "three out of every four democratic breakdowns" occurred in "spectacular fashion" through coups d'état.[10] Thus, while the countries listed above remain ostensibly democratic, they have suffered from "backsliding",[11] "erosion",[12] or "rot".[13] The hybrid regime, which combines features of democracy and authoritarianism,

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2 Samuel P Huntington, *The Third Wave: Democratization in the Late 20th Century* (University of Oklahoma Press 1991).

3 Dixon and Landau (n 1) 2.

4 Huntington (n 2) 20.

5 Francis Fukuyama, 'The End of History?' (1989) 16 *National Interest* 3, 4 (arguing that the world was not only witnessing the end of the Cold War, "but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.").

6 Yascha Mounk, *The People vs. Democracy: Why Our Freedom is in Danger & How to Save it* (Harvard University Press 2018) 4.

7 Dixon and Landau (n 1) 2; Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) 26-30, 46-47.

8 Sarah Repucci and Amy Slipowitz, 'Freedom in the World 2021: Democracy Under Siege' (Freedom House, 2021) 2 <https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege> accessed 27 July 2021.

9 See Steven Levitsky and Daniel Ziblatt, *How Democracies Die: The International Bestseller: What History Reveals about Our Future* (Penguin 2018) 3-6; Tom Ginsburg, Aziz Z Huq and Mila Versteeg, 'The Coming Demise of Liberal Constitutionalism?' (2019) 85 University of Chicago Law Review 239, 244.

10 Levitsky and Ziblatt (n 9) 3.

11 See Nancy Bermeo, 'On Democratic Backsliding' (2016) 27 Journal of Democracy 5; Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP 2019) 14-29.

12 Levitsky and Ziblatt (n 9) 9.

13 See Sanford Levinson and Jack M Balkin, *Democracy and Dysfunction* (University of Chicago Press 2019) 105-38.

is increasingly common—more numerous than absolute monarchies, single-party regimes, or military dictatorships.[14]

Abusive Constitutional Borrowing fits within a genre of scholarship that has emerged in recent years, seeking to diagnose, explain, and reverse the apparent downward trend in liberal democracy. While scholars disagree as to the relative weight of the causal factors for the decline, most point to growing economic inequality,[15] cultural backlash,[16] and governance failures of neoliberal, technocratic elites[17] for the predicament into which liberal democracy has fallen. The severity of the current predicament is also contested. Is democracy "in crisis"?[18] Or is it merely experiencing a cyclical "market correction"?[19] Whatever the scale, the effects appear to be clear and relatively consistent across jurisdictions. Executive power has been aggrandised, with fewer checks and balances and less accountability than in prior years.[20] Dixon and Landau's past scholarship has shown how mechanisms for constitutional change—such as amendment and replacement procedures—have been used for "abusive" ends,[21] as well as how courts have been captured or sidelined, reducing their ability to exercise meaningful judicial review.[22]

Building on their previous scholarship, the authors in this book seek to describe and theorise a particular method through which liberal democracy is subverted. They argue that there is an overlooked "dark side" in this "increasingly dense age of comparative constitutional law", which they refer to as "abusive constitutional borrowing."[23] The term refers to "the appropriation of liberal democratic constitutional designs, concepts, and doctrines in order to advance authoritarian projects."[24] One of the central insights of the book, therefore, is that while

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[14] Eric C Ip, *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions* (Cambridge University Press 2019) 4.

[15] See generally Rosalind Dixon and Julie Suk, 'Liberal Constitutionalism and Economic Inequality' (2018) 85 University of Chicago Law Review 369; Ganesh Sitaraman, *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic* (Vintage 2017).

[16] See Pippa Norris and Ronald Inglehart, *Cultural Backlash: Trump, Brexit, and Authoritarian Populism* (2019).

[17] See Mounk (n 6) 69-70.

[18] Jack M Balkin, 'Constitutional Crisis and Constitutional Rot', in Mark A Graber, Sanford Levinson, and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018) 13.

[19] Zachary Elkins, 'Is the Sky Falling? Constitutional Crises in Historical Perspective', in Mark A Graber, Sanford Levinson, and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (OUP 2018) 49, 65.

[20] See Tarunabh Khaitan, 'Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism' (2019) 17(1) International Journal of Constitutional Law 342.

[21] David Landau, 'Abusive Constitutionalism' (2013) 47UC Davis Law Review189.

[22] David Landau & Rosalind Dixon, 'Abusive Judicial Review: Courts against Democracy' (2020) 53 UC Davis Law Review 1313.

[23] Dixon and Landau (n 1) 3.

[24] ibid.

the *practice* of liberal democracy has been eroded, the *language* of liberal democracy remains hegemonic. Thus, what is distinct about abusive constitutional borrowing is that it decouples democratic designs, concepts, and doctrines, from their liberal constitutional teleology.[25] For instance, fundamental rights are often placed in liberal democratic constitutions for the protection of minorities or other vulnerable groups, but through abusive constitutional borrowing, such rights can be deployed in the service of an authoritarian regime or to discriminate against the very groups they were originally intended to protect.

A second contribution the book makes to the literature is to sharpen the test for whether a particular act counts as abusive constitutional borrowing. Dixon and Landau opt for a thin definition of democracy and more robust definitions of abuse and borrowing. They define democracy through a "minimum core" of free and fair elections, a minimum level of political competition, and background conditions enabling the exercise of political rights and freedoms as well as a functioning electoral system.[26] This definition provides Dixon and Landau with a large set of examples from which to draw, while sidestepping thorny political theory debates that would arise if a thicker conception of democracy was advanced. By contrast, they define abuse in thicker terms; namely, changes to liberal democracy must be "intentionally anti-democratic" to be considered abusive.[27] Abusive borrowing requires both the appropriation of constitutional designs, structures or norms with a "clear liberal democratic teleology" and "significant anti-democratic effect[s]."[28] As a result, changes to the constitutional order that inadvertently erode liberal democracy are excluded, as are those shifts that are merely bad policy, which are often conflated with measures that subvert the liberal democratic order.

Third, the authors present detailed case studies, often drawn from lesser-known constitutional systems, to illustrate each type of abusive constitutional borrowing they examine. For instance, in the context of abusive constitutional rights, Dixon and Landau discuss hate speech laws in Rwanda, where Paul Kagame's regime used hate speech laws, ostensibly designed in response to the country's history of ethnic violence, to target political opposition parties.[29] On abusive judicial review, they discuss the administration of Rafael Correa, who as President of Ecuador replaced the Constitution and took control of the country's Constitutional Tribunal. As a result, the Tribunal did not stand in Correa's way when he pursued anti-democratic moves, including a referendum that substantially weakened judicial independence.[30] The use of these case studies, alongside more prominent examples such as Poland, Hungary, and Venezuela, not only

[25] ibid 18-19.
[26] ibid 24.
[27] ibid 27-28.
[28] ibid 36.
[29] ibid 61-62.
[30] ibid 94-95.

contributes additional depth and nuance to the analysis, but also informs readers of constitutional developments of which they might have been unaware.

II. Abusive Constitutional Borrowing as Constitutional Politics

Under Dixon and Landau's sharp formulation, abusive constitutional borrowing requires intentional changes to designs, norms or structures that have a clear democratic teleology, resulting in significant anti-democratic effects. In a book as ambitious and global in scope as this one, there are inevitably some case studies and doctrines that do not fit neatly into the authors' framework. I focus on two in this section: abusive judicial review in Thailand and the basic structure doctrine.

A. Judicial Review in Thailand: Abusive Borrowing or Politics by Other Means?

The Thai case study, as the authors note, is a complex one, as the country has a checkered history of democratic rule. Since the mid-twentieth century, Thailand has veered between democratic governments and military rule. Even elected governments have generally conformed to a peculiar "Thai-style democracy" in which the King, military, and business elites form a close-knit network that controls the major institutions.[31] Of the many constitutions that Thailand has cycled through over the past few decades, the one that most clearly broke out of this pattern and resembled a liberal democratic model was the 1997 Constitution.[32] The 1997 Constitution, among other things, included fundamental rights and created new administrative and constitutional courts to enforce them. The rise of Thaksin Shinawatra, a businessman turned populist politician, from Northern Thailand—outside the usual elite circles—led to the 1997 Constitution's demise. Thaksin became Prime Minister following the 2001 elections. Though he was corrupt, hostile to the press, and accused of serious human rights violations, including extrajudicial killings, Thaksin's anti-poverty, healthcare, and other socioeconomic policies proved popular among rural communities.[33] A military coup in 2006 removed Thaksin from power and led to the installation of a new constitution in 2007. It reversed many of the liberal reforms introduced by the 1997 Constitution, including a return to a partially appointed

[31] Khemthong Tonsakulrungruang, 'Thailand's Unamendability: Politics of Two Democracies' in Rehan Abeyratne and Bui Ngoc Son (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021) 173-76.

[32] ibid; Tom Ginsburg, 'Constitutional Afterlife: The Continuing Impact of Thailand's Post-political Constitution' (2009) 7 International Journal of Constitutional Law 83.

[33] Dixon and Landau (n 1) 106-07.

(rather than elected) Senate.[34] Thaksin's sister, Yingluck Shinawatra, became Prime Minister following democratic elections in 2011. Her government introduced amendments to the 2007 Constitution that would make the Senate fully elected—as it was under the 1997 Constitution—and reduced legislative oversight of the treaty-making process.[35] The Thai Constitutional Court struck down both these amendments as unconstitutional.

Dixon and Landau characterise these and other judgments that have stymied the constitutional changes proposed by Thaksin or Yingluck as examples of abusive judicial review. They concede that the Shinawatras, particularly Thaksin, had their warts and note that the Court's intent in these judgments was not necessarily anti-democratic: its judges may have believed they were guarding against corrosive populism. Nonetheless, they argue that the evidence points to judicial bad faith.[36]

While I largely agree with their analysis of the events in Thailand and their characterisation of the Court's interventions as "abusive", I am less convinced that this is an example of abusive constitutional *borrowing*. Instead, it seems like another iteration of "Thai-style democracy",[37] where the Court is engaging in politics by other means. The Constitutional Court, as an elite, conservative institution, appears to have used the unconstitutional constitutional amendments doctrine to entrench the military-backed 2007 Constitution. It is difficult to see how its judgments violate a democratic minimum core or subvert liberal democratic norms or structures when none of those elements existed in the 2007 Constitution. While the 1997 Constitution arguably placed Thailand within Dixon and Landau's definition of democracy, it survived less than a decade and did not entrench a liberal democratic order that could then be subject to abusive constitutional borrowing.

In short, Thailand has long oscillated between democratic and authoritarian rule. Referring to the Court's interventions in this saga as "abusive constitutional borrowing" muddies both the idiosyncratic nature of Thai constitutional politics and Dixon and Landau's hitherto clear concept.

B. Is Basic Structure a Liberal Democratic Doctrine?

In their chapter on the "Abuse of Constituent Power", Dixon and Landau focus largely on the norm and practice of unconstitutional constitutional

[34] ibid 108; Bjoern Dressel, 'Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand' (2010) 23 Pacific Review 671.

[35] Khemthong Tonsakulrungruang, 'Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict' (2016) 26 Washington International Law Journal 247, 261-63; Dixon and Landau (n 1) 109.

[36] Dixon and Landau (n 1) 109-12.

[37] Tonsakulrungruang (n 31).

amendments (UCA). The origins of UCA, as Yaniv Roznai has shown, can be traced back several hundred years to the Enlightenment-era French theorist Emmanuel Joseph Sièyes. Sièyes developed the now ubiquitous distinction between the omnipotent *constituent* power that creates the constitution and the lesser, *constituted* power, which operates within the framework established by the constitution.[38] Building on this insight more than a century later, the German theorist Carl Schmitt argued that a constitution's core identity—representing the fundamental decisions of the constituent power—could not be destroyed or removed by amendments.[39] Meanwhile, in the early twentieth century at the other end of the world, Meiji Japan and the Qing dynasty in China developed the concept of "kokutai" or "guoti" respectively, referring to the pre-legal form and values of the state that were beyond the reach of constitutional amendments.[40]

Thus, the roots of UCA as a norm are varied and not especially liberal or democratic. However, over the past few decades, UCA became an increasingly common feature in constitutional design. Explicit unamendability, where the written constitution proscribes amendments to parts of the constitution, and constitutional "tiering",[41] in which different amendment rules apply to different parts of the constitution, are now part of the liberal constitutional playbook and have arguably obtained, in Dixon and Landau's words, a "clear liberal democratic teleology."[42]

This teleology is not so evident, however, with respect to UCA *judicial doctrines*. The notion that courts can strike down duly enacted amendments for violating an unwritten constitutional core or basic structure is widely accepted today, even if it has not quite become a global norm.[43] From its beginning in *Kesavananda Bharati v State of Kerala* (1973),[44] courts in Bangladesh, Pakistan, Malaysia, Taiwan, Kenya, Colombia, Peru, and Belize, among others, have adopted judicial doctrines akin to the basic structure doctrine, while many other countries' judiciaries have considered or discussed it.[45]

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[38] See generally, Emmanuel Joseph Sièyes, 'What is the Third Estate?' in Oliver W Lembcke and Florian Weber (eds), *Emmanuel Joseph Sièyes: The Essential Political Writings* (Brill 2014).

[39] See generally, Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press 2008).

[40] Ryan Mitchell, ' ''State Form" in the Theory and Practice of Constitutional Change in Modern China' in Rehan Abeyratne and Bui Ngoc Son (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021).

[41] Rosalind Dixon and David Landau, 'Tiered Constitutional Design' (2018) 86 George Washington Law Review 438.

[42] Dixon and Landau (n 1) 36.

[43] *See* Yaniv Roznai, 'Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea' (2013) 61 American Journal of Comparative Law 657; Richard Albert, Malkhaz Nakashidze and Tarik Olcay, 'The Formalist Resistance to Unconstitutional Constitutional Amendments' (2019) 70 Hastings Law Journal 639.

[44] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

[45] Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017) 47-69.

In practice, UCA judicial doctrines have, at best, a mixed record in upholding liberal democracy. Dixon and Landau detail how UCA doctrines have been put to abuse ends, particularly in the context of presidential elections in Latin America.[46] They conclude that the doctrine is worth keeping in a limited form, as it has protected democratic values or structures in "some key cases", such as the 2010 Colombian re-election case, where the Constitutional Court prevented Alvaro Uribe from amending the Colombian Constitution to remove the two-term limit and pursue a third consecutive term as President.[47] However, they concede that given the "high empirical risks of abuse", the doctrine might have to be "reworked."[48]

Dixon and Landau are admirably clear-sighted in their close, contextual analysis of UCA doctrines. But as with the Thailand case study, the judicial practice of UCA does not fit particularly well within their framework of abusive constitutional borrowing. Specifically, the liberal democratic bona fides of the basic structure doctrine, both as it initially emerged and as it has subsequently developed, are questionable. Begin with *Kesavananda*. While the Indian Supreme Court introduced the basic structure doctrine, it also upheld the 24th Amendment to the Indian Constitution, which gave Parliament—controlled by the populist, authoritarian-leaning Prime Minister Indira Gandhi—plenary power to amend the Constitution, including fundamental rights provisions.[49] The 24th Amendment also effectively overruled the Court's judgment in *Golak Nath v State of Punjab* (1967).[50] *Golak Nath* had ruled that Parliament could not enact constitutional amendments that violated fundamental rights. But in *Golak Nath*, too, the Court's bark was worse than its bite—the Court limited its judgment to future constitutional amendments, rather than those at issue in the case.

Dixon and Landau, in previous work, have defended the Indian Supreme Court's apparent passivity in these cases as part of a judicial deferral strategy. In their account, the Court was building a body of precedent, along with institutional credibility, in these early judgments to counter anti-democratic amendments more directly in future cases.[51] One such case was *Indira Nehru Gandhi v Raj Narain* (1975).[52] It concerned the constitutionality of the 39th Amendment, which insulated the 1971 election from judicial review and rendered past proceedings arising out of that election—including an Allahabad High Court

[46] Dixon and Landau (n 1) 131-36.
[47] ibid 131-32, 196.
[48] ibid 196.
[49] *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.
[50] *C Golak Nath v State of Punjab* AIR 1967 SC 1643 : (1967) 2 SCR 762.
[51] Rosalind Dixon and David Landau, 'Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment' (2015) 13 International Journal of Constitutional Law 606; Rosalind Dixon and Samuel Issacharoff, 'Living to Fight Another Day: Judicial Deferral in Defense of Democracy' (2016) Wisconsin Law Review 683.
[52] *Indira Nehru Gandhi v Raj Narain* 1975 Supp SCC 1 : AIR 1975 SC 2299.

conviction against Indira Gandhi for election fraud—null and void. The Supreme Court upheld Indira Gandhi's 1971 election victory but struck down the 39th Amendment. Dixon and Landau have argued that, while the Court upheld the election result, it also conveyed a "warning" to Indira Gandhi "about the limits of her power to rule without judicial supervision."[53]

The events that followed are well known and do not necessarily align with Dixon and Landau's account. Gandhi declared a state of Emergency (1975-77) in which the Supreme Court notoriously failed to stand up to her democratic abuses.[54] What ultimately ended the Emergency was a popular mandate against her government. Gandhi lost the 1977 election in a landslide to the Janata Party, and though she returned to power in 1980, she avoided committing further electoral hijinks. What accounts for this shift? Given the Court's unwillingness to confront Gandhi directly and her contempt for the judiciary—she punitively transferred High Court justices during the Emergency and promoted Justice AN Ray to Chief Justice ahead of more senior judges who ruled against her in *Kesavananda*—it appears that she was more chastened by the electoral loss than a potential Supreme Court decision against her.

More broadly, even if the Supreme Court in the 1970s and 80s aimed to thwart some of Indira Gandhi's more populist moves, it appears to have done so, as Anuj Bhuwania has argued, only to claim the populist mantle and extraordinary powers for itself. Indeed, Bhuwania shows that significant parts of Indira Gandhi's agenda, which she failed to accomplish during the Emergency period, were later carried out by sympathetic judges in the Supreme Court, like PN Bhagwati.[55] This includes, among other things, the creation of Legal Aid, and the elevation of the Directive Principles of State Policy to an almost coequal standing to fundamental rights—a shift that Gandhi attempted to bring about through the 42nd Amendment, which was invalidated by the Supreme Court in *Minerva Mills v Union of India* (1981) for violating the basic structure.[56]

On this account, the Supreme Court's use of the basic structure doctrine is largely motivated by the preservation and, in some cases, the augmentation of judicial power.[57] I have argued elsewhere that these institutional prerogatives best explain Court's judgment in *Supreme Court Advocates-on-Record Assn v Union of India* (2016).[58] In that case, the Court held that the constitutional

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[53] Dixon and Landau (n 51) 618.

[54] *ADM Jabalpur v Shivakant Shukla* (1976) 2 SCC 521.

[55] Anuj Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (CUP 2017) 21-35.

[56] *Minerva Mills Ltd v Union of India* (1980) 3 SCC 625 : (1981) 1 SCR 206.

[57] Madhav Khosla, 'Constitutional Amendment' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) ("Judicial power…has dominated democracy-based basic structure challenges.") 243.

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

amendment and the legislation creating a National Judicial Appointments Commission (NJAC) were unconstitutional. The Court ruled, *inter alia*, that the NJAC—which divided the judicial appointment among justices, political actors, and "eminent persons"—violated judicial independence, which is a part of the Constitution's basic structure. In the second and third "Judges' Cases", the Court had ruled that a "collegium" of senior justices, led by the Chief Justice, would have the ultimate say on appointments to the higher judiciary.[59] The NJAC judgment held that judicial independence under the basic structure required judges to play a leading role in appointments. Because judges would occupy only three out of six places on the NJAC, the Court concluded that the Commission unconstitutionally undermined judicial independence. The judgment has been heavily criticised,[60] as it neither offers a convincing explanation as to why the Constitution requires judges to have the final word on appointments nor addresses the serious flaws with the collegium system. Rather, the NJAC Judgment appears to be motivated mainly by institutional self-interest: the Supreme Court was unwilling to relinquish its monopoly over appointments to the higher judiciary.[61]

Such "judicial self-dealing" is not limited to the Indian context.[62] Recent invocations of the basic structure or similar UCA doctrines in other Asian jurisdictions, including Bangladesh, Pakistan, and Malaysia, also involve the protection of judicial power and judicial appointments or removal processes from political interference.[63] Whether these uses of UCA are normatively defensible from a liberal democratic perspective depend on the relevant political and institutional context—as Dixon and Landau stress in the book. However, referring to the normatively undesirable judicial interventions as abusive constitutional borrowing assumes that the doctrine was once a core tenet of liberal democracy that has been subverted. A better view is that, from the outset, the doctrine has primarily served the interests of judicial power, which in turn can be put towards pro-democratic or anti-democratic ends.

III. Towards a Political Solution to Abusive Constitutional Borrowing

After illustrating the various forms and methods of abusive constitutional borrowing, the authors conclude with a wide-ranging discussion on how to

[59] *Supreme Court Advocates-on-Record Assn v Union of India* (1993) 4 SCC 441 : AIR 1994 SC 268; *Special Reference No 1 of 1998, In re* (1998) 7 SCC 739 : AIR 1999 SC 1.

[60] Arghya Sengupta, 'Judicial Primacy and the Basic Structure: A Legal Analysis of the NJAC Judgment' (2015) 48 Economic & Political Weekly 27.

[61] Rehan Abeyratne, 'Upholding Judicial Supremacy in India: The NJAC Judgment in Comparative Perspective' (2017) 49 George Washington International Law Review 569, 613.

[62] Po Jen Yap and Rehan Abeyratne, 'Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia' (2021) 19 International Journal of Constitutional Law 127.

[63] See generally ibid; Yvonne Tew, *Constitutional Statecraft in Asian Courts* (OUP 2020).

combat this practice. Here, two of their proposals stand out. First, they note that monitoring by transnational and international actors is too formalistic, based on clearly defined standards or criteria that are applied in an acontextual and piecemeal manner. They propose what I consider a welcome and overdue move towards "global legal realism", in which external monitors are more closely attuned to the relevant context and developments on the ground.[64] Under a global realist approach, these monitors would be better placed to spot and call out the decoupling of the form and substance of liberal constitutional designs, norms, and structures that is central to abusive constitutional borrowing.

Second, they propose that norms should be made "abuse-proof" such that they cannot be co-opted for illiberal or anti-democratic purposes. For instance, the notion of constituent power based on popular will has been subverted by authoritarians who hold sham referendums to make changes in the name of "the people". To guard against this abusive practice, Dixon and Landau call for further conceptual work to define "the people" and for the development of thicker international rules on referendums.[65] These are bold proposals, pitched at a high level of abstraction, that will require further research to become realised in practice. But Dixon and Landau have provided a valuable framework for understanding abusive constitutional borrowing and structuring legal responses thereto.

But are legal responses sufficient in this context? 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 derailed 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. Hence, while external actors should call out abusive constitutional changes and norms should be abuse-proofed where possible, the ultimate solution is to remove would-be authoritarians from power or, better yet, to prevent them from assuming power in the first place. So how can that be achieved? This is a big question—beyond the scope of this symposium paper—but here are some preliminary thoughts.

In multi-party parliamentary systems, unified opposition movements involving strange bedfellows may be necessary to remove well-entrenched incumbents. This is precisely what happened in Israel recently, where a motley coalition, comprising far-right, centrist, and Arab parties, came together to remove Prime Minister Netanyahu from power after twelve years.[66] Similarly, in Hungary, the

[64] Dixon and Landau (n 1) 182-86.

[65] ibid 193-200.

[66] Ari Rabinovitch, 'Explainer: Who's Who in Israel's New Patchwork Coalition Government' (Reuters, 15 June 2021) <https://www.reuters.com/world/middle-east/whos-who-israels-new-patchwork-coalition-government-2021-06-13/> accessed 13 July 2021.

opposition parties have formed a "United Opposition" to challenge the incumbent Fidesz-KDNP alliance headed by Prime Minister Orban in the 2022 parliamentary elections.[67] Given the BJP's increasing dominance at both the central and state-level governments in India, such a coalition might be needed to displace Prime Minister Modi in the next general election.

Several would-be authoritarians, such as Narendra Modi, Rodrigo Duterte, and Donald Trump, ascended to power even though they and their parties received far less than a majority of the popular vote. To prevent such leaders from obtaining political power, therefore, liberal democracy needs to be more representative. Ranked-choice voting—which allows voters to rank the candidates in order of preference and favours candidates who appeal to a broader swath of the public—is a promising alternative in this respect to the first-past-the-post system that has long dominated elections in India, the Philippines, the United States, and many other democratic countries.[68]

With strategic political alliances and more representative electoral rules, liberal democrats stand a better chance of defeating would-be authoritarians at the polls. But even then, they must convince a majority of the public that liberal democratic values are worthy of support. As Dixon and Landau urge in the book's final paragraph, supporters of liberal democracy must encourage vigorous debate and contestation about its very nature. This journey may lead to "uncomfortable places", but it may also yield more lasting political solutions to the present morass.[69]

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[67] Lili Bayer, 'Hungarian Opposition Unites in Bid to Unseat Viktor Orbán' (*Politico*, 20 December 2020) <https://www.politico.eu/article/hungary-opposition-unites-in-bid-to-unseat-orban/> accessed 13 July 2021.

[68] On the potential benefits of ranked-choice voting in India, see Tarunabh Khaitan, 'Ranked-Choice Voting System could Deepen Democracy, Prevent Polarisation' (*The Indian Express*, 8 May 2019) <https://indianexpress.com/article/opinion/columns/general-elections-lok-sabha-polls-first-past-the-post-fpp-system-bjp-5715812/> accessed 13 July 2021.

[69] Dixon and Landau (n 1) 208.