

Rosalind Dixon/ David Landau, *Abusive Constitutional Borrowing. Legal Globalization and the Subversion of Liberal Democracy*, Oxford University Press, New York 2021, £85.50, ISBN: 9780192893765.

Legal rules, ideas and institutions travel around the world. The fruitful debate around legal transplants, a polemic metaphor about law's diffusion that captured the imagination of comparative legal scholars since the 1970s, is at the core of this book's approach to recent practices of constitutional borrowing. As the authors acknowledge, the discussions about how law travels is complex in light of the multiple theoretical insights that have structured the conversation. With an abridged but solid account of this literature, the book sets the stage to explain one of the main problems of constitutional borrowing in our current times: the appropriation and deployment of liberal democratic constitutional materials in the advancement of authoritarian projects in different countries around the globe. In light of this open discussion about the relationship of legal borrowing and constitutional law, Dixon and Landau have written a book that speaks to audiences interested in several fields –comparative law, legal theory and constitutional law.

The first three of the eight chapters of the book clear out the main categories that the authors use in their analysis. The first one shows the main paradox that structure comparative constitutional scholarship in the present, which is the simultaneous presence of liberal democratic rhetoric and democratic backsliding around the globe. Gathering part of their previous insights published in different articles in recent years, the authors hold that this is a main feature of contemporary authoritarian projects. Blatant violations of the rule of law, like military coups, are less common than four decades ago. Current and would-be authoritarians now use liberal democratic rhetoric to justify and legitimate their actions, making it more difficult for the international community to detect how they open the paths toward authoritarianism. New authoritarianisms wear liberal democratic garment.

The second chapter brings to the fore the concept of abusive constitutionalism and its relationship with democracy. The authors embrace a thin concept of democracy –a democratic minimum core that entails free, regular, fair and minimally competitive elections that respect political rights of the parties involved- and argue that abuse of liberal democratic constitutional materials occur when leaders, political parties or jurists use them to undermine this minimum concept of democracy. The third chapter, which closes the first theoretical part of the book and sets the stage for further analysis, focuses on the comparative law dimension of the argument, i.e. abusive constitutionalism is fueled by practices of borrowing that turn liberal democratic materials into inputs that seek to hide or legitimize authoritarian maneuvers of political leaders. In this chapter, the book offers a useful typology. There are four ideal types of abusive constitutional borrowing. (i) Sham borrowing, where actors borrow liberal democratic materials that they do not intend to put into effect. (ii) Abusive selective borrowing, where actors borrow part of norms, ideas, and materials leaving aside other parts thus achieving anti-democratic effects. (iii) Abusive acontextual borrowing, where foreign norms are applied to new contexts and actors know

that materials will have an anti-democratic effect. And, finally, (iv) anti-purposive borrowing, where materials are decoupled from their original purpose and achieve anti-democratic ends. Hence, by the end of the third chapter, the reader has a clear picture of the theoretical underpinnings of an argument based on the democratic minimum core, the idea of abusive constitutionalism and practices of borrowing.

In the next four chapters, the book focuses on a rich set of examples that highlight how different regimes in several regions of the world have used liberal democratic constitutional materials to undermine the democratic minimum core. Chapter 4 underscores the abuse of memory laws, political rights and environmental rights in Rwanda, Poland, Russia, Hungary, Fiji and Ecuador. Chapter 5 focuses on court cooptation and abusive judicial review in Venezuela, Cambodia and Thailand. The abuse of constituent power is the focus of Chapter 6, where Dixon and Landau contrast the pro-democratic use of the doctrine in Colombia with its anti-democratic effects in Venezuela and Ecuador. Finally, Chapter 7 closes this second part of the book by revisiting the classical tension between law and politics that emerges in doctrines about popular constitutionalism, a discussion that in some scenarios have encouraged political participation, but that in places like Hungary and Poland have been used to overcome judicial oversight of executive and legislative processes. In these four chapters, the authors deploy their four ideal types of abusive constitutional borrowing to show that these categories are useful to detect how constitutional scholars should not be fooled by authoritarian actors' use of liberal democratic rhetoric.

In the final and concluding chapter, the book offers a set of strategies that could stop or at least discourage abusive constitutional borrowing. First, scholars and global organizations that evaluate rule of law performance should be more aware about the contexts of different countries around the world. This could avoid rushing into conclusions that, in some cases, have praised the adoption of liberal democratic materials, gender rights in Rwanda for example, without assessing the effects of such borrowing in the overall picture of the advancement or retreat of democracy. Second, international overseeing institutions in different regions around the world –Europe, Latin America, Africa– could strengthen their mechanisms to sanction or criticize abusive constitutional borrowing. Finally, awareness in the design of constitutional materials, especially linking formal rules with purposes, might prevent abusive borrowing.

The richness of the theoretical construction of the argument and the painstaking presentation of examples from different countries constitute the main contributions of this ambitious book that tackles one of the most complex issues that constitutional law scholars consider the challenge of our times, i.e. new authoritarianisms. A standard reading of the book will highlight how it offers an analytical toolkit that will be useful for mainstream liberal democratic constitutional scholars who want to protect constitutionalism from the corruption of authoritarianism. Though valuable, I also think that a more critical approach toward the argument of the book could foster a reading that will focus on the current state of legal and constitutional theory, its *Zeitgeist*. In this regard, I would suggest that the book is even more important if we ask, what is the possible motivation driving contemporary

constitutional scholars' efforts to come to grips with authoritarianism through the lenses of constitutionalism?

In one of the most brilliant passages of the book, the authors swiftly acknowledge that one difficult existential conundrum in their project to promote or save liberal constitutionalism is the “disenchantment with the performance of liberal democratic regimes [...] which has fueled illiberal or anti-democratic currents in many countries” (p. 204). I would like to ponder over the problem of disenchantment of liberal democratic constitutionalism, but not only because of its effects, but also because of the impact that such effects have had in the analytical toolkit of mainstream constitutionalism. The term “abuse” or “abusive” echoes the criticisms of social jurists in the late nineteenth and early twentieth century against the reigning individualism and formalism of a specific mode of legal thought anchored in liberal private law and deduction. The “abuse of deduction” –coined by Gény– and the “abuse of rights” –coined by Louis Josserand– highlighted how classical legal tools accepted by past generations of jurists had gone awry in the twentieth century. Judges used deduction to conceal political choices in a complex world of rising industrialization, while powerful actors used private law rights to legitimize arbitrariness and inequality against weak parties.¹ The charge of abuse was symptomatic of a new generation of legal thinkers, who believed that old categories and methods were problematic because they were not adapted to a new social world drifting away from individualism, and thus jurists had lost faith in the explanatory and justifying power of such categories for solving their conflicts. The new generation of jurists was disenchanted.

Is something similar happening today with constitutionalism? The book shows that the globalization of liberal democratic constitutionalism was a consequence of the end of the Cold War. Several countries around the world adopted judicial review, enacted new constitutions with generous bills of rights and used constitutionalism as a main tool to achieve democratic transitions.² After the consensus around this goal disappeared, the purpose and contents of liberal democracy disintegrated into many political projects that were not faithful with the *Zeitgeist* of the 1990s. Hence, the hard question of the book is if we can overcome disenchantment of constitutionalism with the same tools that social jurists used one hundred years ago to reenchant private law: criticizing formalism (lip service to liberal democracy) and reconnecting purpose with legal texts (decrying abuse). However, we live in a post-realist legal world and we know that the problem with this strategy is that it is possible to read out multiple purposes or policies within a single legal rule, especially when we lack political consensus. Can this book's analytical tools contribute to the recovery of a political consensus that will stabilize constitutionalism's meaning and

1 See generally: Gonçalo de Almeida Ribeiro, *The Decline of Private Law. A Philosophical History of Liberal Legalism*, Oxford, 2019; Duncan Kennedy, The Disenchantment of Logically Formal Legal Rationality in *Hastings Law Journal* 55 (2004), p. 1031.

2 Bruce Ackerman, *The Future of Liberal Revolution*, New Haven, 1992.

foster democracy around the globe? Is it desirable? I believe these questions underlie this fantastic book.

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