

# FORTIFYING LIBERAL CONSTITUTIONAL DEMOCRACY IN OUR TIMES: REFLECTIONS ON ‘ABUSIVE CONSTITUTIONAL BORROWINGS’

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In this short review, I seek to engage with the recently published work – ‘Abusive Constitutional Borrowing: Legal Globalisation and Subversion of Liberal Democracy’ – by the scholars Rosalind Dixon and David Landau (hereafter, ‘Dixon-Landau’).<sup>1</sup> The book impressively builds on their previous work written individually as well as collaboratively across more than a decade. Instead of a conventional book review, which seeks to summarise and carefully engage with the full work, I will, instead, use the book as a take-off point for a discussion of the primary purpose identified by the authors: the safeguarding and preservation of liberal constitutional democracy.

Although published recently, the book has already been the subject of numerous discussions in online workshops, and several reviews are no doubt forthcoming. In one published symposium around the book, four leading scholars from the field of comparative constitutional law – all based in North America – have offered praise and endorsement of its central argument, while also noting weaknesses and suggesting further lines of research for their overall project.<sup>2</sup> Each of the four scholars recognizes that the book is an enormously rich and original contribution to the field of comparative constitutional law. Following suit, I want to, at the outset, commend the authors for their great industry in drawing

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<sup>1</sup> Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization & the Subversion of Liberal Democracy* (OUP 2021) (“Dixon-Landau”).

<sup>2</sup> Tom Ginsburg, ‘Review of Dixon and Landau’s *Abusive Constitutional Borrowing*’ (2021) 7 *Canadian Journal of Comparative and Contemporary Law* 1-5; Ran Hirschl, ‘Abusive Constitutional Borrowing as a Form Politics by Other Means’ (2021) 7 *Canadian Journal of Comparative and Contemporary Law* 6-13; Sanford Levinson, ‘Assessing “Abusive Constitutionalism” in a Complex Political Universe’ (2021) 7 *Canadian Journal of Comparative and Contemporary Law* 14-22; Mark Tushnet, ‘Review of Dixon and Landau’s *Abusive Constitutional Borrowing*’ (2021) 7 *Canadian Journal of Comparative and Contemporary Law* 23-48.

examples from every inhabited continent of the world and the tremendous groundwork that must have been involved in developing that base of knowledge and research. This by itself is a stupendous task, and one that takes years if not decades to marshal. Each author is individually well known in the field of comparative constitutional law, and by combining their talents, they have brought out a book that is justifiably attracting superlatives in review symposia.

With that said, I will, in the rest of this review, seek to engage with what I take to be the principal theme of Dixon-Landau's book: the preservation and revival of liberal democratic constitutionalism. This, in my reading, is the concern that animates much of the extensive research done across continents to show how authoritarian leaders are undermining liberal constitutional democracy, often by using similar tactics. In the final paragraph of the book, Dixon-Landau assert as follows:

*"Those – like us – who are deeply invested in defending liberal democracy should encourage robust contestation about its nature. Open debate about the strengths and weaknesses of existing liberal democratic constitutions may take us to uncomfortable places, and even lead us to re-examine some commitments. It should be bounded at least by an unwavering insistence on the protection of the democratic minimum core. This contestation is ultimately the best long-term antidote to the threat posed by the empty and subversive mimicry of abusive constitutional borrowing."*<sup>3</sup>

In this review, I will take up the invitation to engage in "robust contestation" by taking the discussion to "uncomfortable places" and asking for the re-examination of some basic commitments. For this, I will engage with some strands of the argument adopted by the authors (principally in their final chapter), but for the most part, I will be going beyond their argument in the book. In doing so, I am not seeking to address Dixon-Landau specifically (whose work shows an awareness of much of what I will be addressing), but the wider group of constitutional democrats that they see themselves as representing and addressing through this book. I count myself as someone "deeply invested" in defending aspects of "liberal constitutional democracy" even as I remain mindful of its historical ties to deeply problematic phenomena (including colonialism) and its blind spots (including economic inequality).

## I.

I seek to make four principal points, and I will proceed to each of them by turn. The first point is about the contested nature and history of liberalism as a political and legal concept. Dixon-Landau repeatedly emphasise that they

<sup>3</sup> Dixon-Landau (n 1) 196.

are aware of the contested nature of the concept of liberalism and are careful to advance a specific vision that is informed by what they term 'the democratic minimum core'. However, I seek to draw attention to a different aspect of such contestation. For someone located in a postcolonial nation in the Global South, calls to safeguard 'liberalism' give rise to mixed feelings. This is in part because some of the thinkers we associate most with political liberalism in the modern age – John Locke, Jeremy Bentham, James Mill and John Stuart Mill, Thomas Macaulay – were also active promoters and supporters of colonialism. As Uday Mehta has powerfully demonstrated, while these men were 'liberal and progressive thinkers', they also "endorse[d] the empire [and thereby colonialism] as a legitimate form of political and commercial governance; who justif[ied] and accept[ed] its largely undemocratic and nonrepresentative structure; ... and who fashion[ed] arguments for the empire's at least temporary necessity and foreseeable prolongation."<sup>4</sup>

Reading through Dixon-Landau's conception of a 'democratic minimum core' (described at several places in the book, but explained in Chapter 2 in some detail), I was reminded of this passage from Mehta's work, where he too seeks to draw the essence of liberalism's tenets, before making a connection to the experience of colonialism:

*"[T]here is therefore a striking irony in the writings by British political thinkers from the late eighteenth to the late nineteenth century that deal with the British Empire. We rightly think of liberalism as committed to securing individual liberty and human dignity through a political cast that typically involves democratic and representative institutions, the guaranty of individual rights of property; and freedom of expression, association, and conscience, all of which are taken to limit the legitimate use of the authority of the state. Moreover, at least since the mid-nineteenth century, liberal theorists have tended, though by no means universally, to champion the right of minorities .... In general, liberals have looked with favor on the idea of national self-determinism – though often they have done so without reflecting deeply on the wellsprings of nationalism and the imperatives of nationhood under conditions of modernity. In terms of its mood or culture, as distinct from its doctrine, liberalism has often had a flavor of romanticism that allows the subjective to tilt in an anarchist breeze by insisting that the seeds of social good stem from individual and even eccentric initiative. These claims are of course not the exclusive reserve of liberals, and conservatives can rightly argue that they share in the defense and promotion of many of these accolades. Nevertheless, the irony of the liberal defense of the empire stands, because in some at least*

<sup>4</sup> Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (University of Chicago Press 1999) 2.

*intuitively obvious sense, that defense vitiates what we take liberalism to represent and historically stand for.”<sup>5</sup>*

Several other scholars have followed in Mehta’s footsteps and vividly shown the truth of his claim that “liberal association with the British Empire was extended and deep.”<sup>6</sup> In their conclusion, Dixon-Landau specifically address one issue that they cast somewhat intriguingly. On page 180, they identify the issue of populist leaders deploying “anti-imperialist critiques or charges of hypocrisy, arguments for example that the rule of law is just a mask to favour powerful states”. I note this history of liberalism to assert that while populist leaders are themselves being hypocritical in advancing this claim, the claim itself has a long historical pedigree and is founded in historical fact. One of the great defenders of the rule of law, the English Marxist historian, E.P. Thompson, does so by specifically accounting for the great damage done to the concept of the rule of law by colonial exploitation of the term.<sup>7</sup>

Imperialism does cast a long shadow on the concept of liberalism, and anyone seeking to defend it has to confront that past squarely. This is the burden that post-colonial leaders like Nehru had to carry for long. This is also the reason why in the contemporary era, post-colonial constitutions that based their foundation on certain values that are associated with liberalism – freedom, the autonomy of the individual and individual rights – are charged with having continued colonial forms and habits of rule. In many post-colonial societies, defenders of these values have to contend with the baggage of colonial legacies, which makes it harder to campaign for values associated with liberalism – values that very often predate liberalism itself and, as Mehta insightfully notes, are neither liberalism’s invention, nor its exclusive preserve.

## II.

This brings me to my second point, on the state of international institutions and the supranational system that seeks to uphold liberal constitutional values in the third decade of the 21<sup>st</sup> century. At several places in the book, and specifically in the conclusion, Dixon-Landau argues that there is a clear role for transnational actors such as the Inter-American Court, or the Venice Commission. What is striking to me is the omission from their analysis of important supranational institutions like the United Nations, (including the Security Council) and other

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<sup>5</sup> *ibid* 3-4.

<sup>6</sup> *ibid*; See also Keally McBride, *Mr Mothercountry: The Man Who Made the Rule of Law* (OUP 2016) (documenting the life and work of Sir James Stephen and his son, Sir Fitz James Stephens, and tracing the “emergence of the system of international law and power inequality that is in place today”).

<sup>7</sup> E.P. Thompson, *Whigs and Hunters: The origin of the Black Act* (Pantheon Book New York 1975) 266.

central institutions of the post World War II consensus around the need for maintaining international peace and avoiding wars.

To a reader who may wonder why the colonial history that I referenced earlier is relevant, it is important to emphasise that that kind of paradoxical commitment to liberal values and deeply illiberal imperial projects continues to be in evidence in the contemporary moment. Notable events across the past three decades which demonstrate this linkage include: the first Gulf War in the early 1990s; and the invasions of Afghanistan and Iraq in the aftermath of September 11, 2001. These events indicate that the links between ideas of liberalism and projects of civilizational reform which seek to bestow the gifts of democracy upon lands that were perceived as lacking their prerequisites, continue in our age. Priyamvada Gopal has argued that in the aftermath of September 11, 2001, many vaunted liberals rushed to justify the US interventions in Iraq and Afghanistan on grounds (to emancipate the unfree 'other') that are very familiar to colonised people around the world.<sup>8</sup> A similar tendency is evident in the justifications offered on behalf of 'liberal interventionism' to justify, for instance, the actions of President Obama in Libya. The repeated failure of transnational institutions and actors to hold powerful violators of international law to account may have done irreparable damage to the image and authority of international law. Dixon-Landau focus in some detail on the violations of international law by national actors across the world. Yet, it is the impunity of powerful nations – typically the US but often supported by other nations – which does far greater damage to the legitimacy of the international order and system. Since the book was written, the attitude and conduct of international institutions in dealing with the global pandemic and the continuing challenge posed by climate change only reinforce the impression of a broken system that refuses to rein in the most powerful actors. The failure to evolve common policies to tackle the pandemic and find ways of distributing vaccines equitably – not only because of a moral imperative but also because it affects the potential survival of the human species against what scientists tell us will be waves of such pandemics – deeply exposes the current crisis of our institutions.

### III.

Speaking from the standpoint of domestic debates about liberal constitutional democracy within the Global South, an issue that has severely damaged the authority and legitimacy of liberal constitutional democracy is the evident failure to tackle ever-widening trends of economic inequality. Dixon-Landau specifically mention this in their concluding chapter, and each has written separately about socio-economic rights in various Global South jurisdictions. Liberalism

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<sup>8</sup> Priyamvada Gopal, 'Renegade Prophets and Native Acolytes: Liberalism and Imperialism Today' in Graham Huggan (ed.), *The Oxford Handbook of Postcolonial Studies* (OUP 2016) 200.

has historically been sanguine about the side effects of rampant capitalism, and this weakness has become more pronounced in recent decades. The post-colonial constitutions of countries like India and post-apartheid South Africa were lauded for evolving constitutional orders that sought to respond to foundational social, economic and cultural problems in their societies by innovatively adapting liberal constitutional ideas to incorporate socio-economic rights within their constitutions. Yet, a persistent critique of these constitutional orders has been their failure to live up to their professed objectives of eradicating poverty and tackling destitution. Many postcolonial societies in the Global South made strong commitments to creating Welfare States, but the pandemic has sharply exposed the wide gap between aspiration and reality in such nations, decades after many of them adapted 'transformative' constitutions. The actual policies of governance adopted across the Global South in the second half of the Twentieth Century are now the subject of much criticism. The typical diagnosis is that original commitments to liberalism were substituted by visions of neoliberalism as a result of the capture of constitutional institutions by those who promoted a reckless version of capitalism. This point has been made by many scholars; I focus here on this succinct analysis by Dhawan and Randeria:

*"Neoliberalism has meant the free movement of capital along with ever more restrictions on the movement of people with few resources as powerful nation states increasingly strengthen their boundaries. Emerging new forms of subalternization render illegible, unintelligible, and illegitimate the perspectives of oppressed and marginalized groups in the global south. Many in the postcolonial world therefore experience current processes of neoliberal globalization, which reinforce structural disparities and intensify inequalities both within and between societies of the north and south, as a recolonization of their futures. The fruits of decolonization – parliamentary democracy, economic and social justice, civil and political rights – remain accessible to an elite minority in postcolonial societies, whereas the vast majority is engaged in a struggle for survival, dignity and enfranchisement. ... Ending their subalternization entails the insertion of disenfranchised individuals and groups into the enabling institutional structures of democracy, rights and justice, even as these must be purged of their exclusionary legacies in order to accommodate the interests and demands of those prevented from inhabiting them so far. Herein lies the challenge and responsibility of transnational politics in a postcolonial world."*<sup>9</sup>

<sup>9</sup> Nikita Dhawan and Shalini Randeria, 'Perspectives on Globalization and Subalternity' in Graham Huggan (ed), *The Oxford Handbook of Postcolonial Studies* (OUP 2016) 580-81.

#### IV.

My final point relates to probing the longer histories and trajectories of individual national cultures of liberal constitutional democracy. This is not necessarily a comparative project, though comparative experiences can and should inform this inquiry, which will necessarily have to be focused on singular national contexts.

While Dixon-Landau's focus in this work is not on countries such as the US or the UK (although they do turn to instances of 'abusive constitutional borrowings' in them in the final section), I want to suggest that the crisis of liberal constitutionalism in these polities must also be on the agenda of a discussion that seeks to salvage or fortify liberal constitutional democracy. That crisis has much longer historical roots. While the current phase of populism and authoritarianism has revealed the deep fissures in constitutionalism in these societies, those problems predated our times. The contemporary moment may only have more sharply revealed those fault lines and founding defects, but cannot be said to have created them. To provide a single example, I rely on the work of the US constitutional scholar, Sanford Levinson, whose works from the 1980s onwards have drawn attention to foundational defects in the US constitutional order.<sup>10</sup> Much of the wrecking of US constitutional culture engineered by Donald Trump exploited issues known to have existed for decades, if not across a century. Similarly, in the case of India, the ferment of constitutionalism under Prime Minister Modi's tenure since 2014 can be traced at least to the creation of the Hindu right-wing organisation, the Rashtriya Swayamsevak Sangh (RSS) in the 1920s. There is a disturbing tendency among journalists to identify current populist leaders with contemporary problems, often losing sight of the deep fissures that existed since the time of the founding of the Indian Constitution.<sup>11</sup> Indeed, the rise of some forces of populism can be traced to foundational choices in constitutions that sought transformative goals, but were hobbled by design choices that have produced the results we see around us. Critics of 'constitutional idolatry'<sup>12</sup> warn us to avoid adopting rosy images of constitutional orders and urge us to engage with constitutions as flawed human constructs that need to be constantly tuned to adapt to current realities. Defenders of liberal constitutional democracy need to use this crisis to conduct the searching re-examination of basic premises suggested by Dixon-Landau. I would urge such a re-examination to extend further back

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<sup>10</sup> Sanford Levinson, *Constitutional Faith* (Princeton University Press 1986); Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People can Correct it)* (OUP 2006).

<sup>11</sup> My initial thoughts on this issue, as part of ongoing work, are to be found in: Arun K Thiruvengadam, 'The Intertwining of Liberalism and Illiberalism in India' András Sajó, Stephen Holmes and Renáta Uitz (eds), *Routledge Handbook of Illiberalism* (2022), pp. 736-752.

<sup>12</sup> Brian Christopher Jones, *Constitutional Idolatry and Democracy: Challenging the Infatuation with Writtenness* (Edward Elgar 2020).

into colonial history and to grapple with the questions relating to the legitimacy of the international order that I have set out earlier.

I conclude by reiterating my belief that this is an important work both for comparative constitutional scholars and for those interested in gaining a full understanding of specific national cultures of liberal constitutional democracy. I have identified four issues that I hope will advance the broader goals identified by Dixon-Landau in this book. My motivations are similar to other scholars who are sympathetic to the purposes of liberal constitutionalism but have argued that “we need to expand our constitutional imagination in ways that allow us to look beyond liberalism – not rejecting liberalism per se, but realizing its limitations and developing conceptual tools that can help us transcend them.”<sup>13</sup>

My final point is on the gracious and insightful response by Dixon-Landau to the first draft of this review.<sup>14</sup> I agree and endorse all the points they make in their response, and wish to add to one specific aspect identified by them:

*“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 also 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 powerful effect – precisely because it has such deep normative foundations and appeal. The same will be true for the discourse of transformative constitutionalism.”<sup>15</sup>*

I could not agree more and will mention two examples – one from a quarter century ago and one that is current – to show that this is a very real danger. In the early 1990s, leaders such as Mahathir Mohammed of Malaysia and Lee Kuan Yew of Singapore deployed the rhetoric of ‘Asian Values’ – with heavy doses of anti-colonial and anti-imperialist content – to deflect criticisms of the way their regimes curbed the human rights of their own citizens

<sup>13</sup> Michael W Dowdle and Michal A Wilkinson, ‘On the Limits of Constitutional Liberalism: In Search of a Constitutional Reflexivity’ in Michael W Dowdle and Michael A Wilkinson (eds), *Constitutionalism beyond Liberalism* (Cambridge University Press: Cambridge 2017) at p 33. This book as a whole is useful for anyone seeking to rethink the fundamental postulates of constitutionalism from a broad perspective as its several contributors challenge conventional thought by exploring the experiences of a diverse group of nations, including some in the Global South.

<sup>14</sup> Rosalind Dixon and David Landau, *Abusive Borrowing in Asia? A Reply to Commentators*, *J Ind L & Soc* (2022).

<sup>15</sup> *Ibid.*

domestically.<sup>16</sup> In contemporary India, J. Sai Deepak's recent work – *India that is Bharat: Coloniality, Civilisation, Constitution* – seeks to invoke the discourse of 'Decoloniality' to justify an approach to interpreting the Indian constitution in ways that would support majoritarian Hindu nationalist ideas and causes.<sup>17</sup> Both strategies employ the force of anti-colonial rhetoric and tools to justify the suppression of rights and liberties of individual Asians in post-colonial Asia. Such a danger is clear, present and urgent. Dixon-Landau are right to diagnose this as a form of abusive constitutionalism, and to caution us against such invocations of anti-colonial rhetoric.

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<sup>16</sup> Anthony Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory*, (Cambridge University Press 2001).

<sup>17</sup> J. Sai Deepak, *India that is Bharat: Coloniality, Civilisation, Constitution* (Bloomsbury India 2021).