
Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment: A reply to Rosalind Dixon and David Landau

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As Rosalind Dixon and David Landau observe in their article, “Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment,”¹ the breakdown of constitutional democracy is a central feature of contemporary politics. Yet it is important to remember that this phenomenon is as old as democracy itself. For comparative constitutional law, what is important is a shift in *how* the breakdown of democracy tends to occur. As I have argued elsewhere, historically, the paradigmatic example of democratic breakdown was a military *coup d’état* that seized power and overthrew a civilian government in blatant contravention of the existing constitutional order.² This was later joined by the *self-coup* or *autogolpe*, whereby democratically elected presidents remained in power unconstitutionally and escaped the confines of term limits and/or electoral losses, for example, by declaring a state of emergency that suspended many of the constitution’s provisions, and then amending parts of or rewriting entirely the constitution by decree or convening an extra-constitutional constituent assembly.

However, as Nancy Bermeo observes, the prevalence of *coup d’états* and *autogolpes* declined steeply with the end of the Cold War, because of the strong international disincentives and the widespread presupposition that democracy is now “the only game in town.”³ What has partially replaced them is *democratic backsliding*, whereby a democratically

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¹ Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CONST. LAW 606 (2015).

² Sumit Bisarya & Sujit Choudhry, *Regional Organizations and Threats to Constitutional Democracy from Within: Self-Coups and Authoritarian Backsliding*, in THE RULE OF LAW AND CONSTITUTION BUILDING: THE ROLE OF REGIONAL ORGANIZATIONS 183 (Raul Cordenillo & Kristin Sample, eds., 2014), available at http://www.idea.int/publications/rule-of-law-and-constitution-building/upload/rule_of_law_chapter_8.pdf.

³ Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5 (2016).

elected government or president uses legal means to manipulate rules and institutions to remain in power in future electoral cycles, *inter alia* with respect to electoral system design, election administration, political party regulation, presidential term limits, civil and political liberties, and independent institutions such as constitutional courts and agencies. Democratic backsliding is sometimes termed *authoritarian backsliding* when the democratic regime under threat replaced a prior authoritarian regime to which it may revert.

To be sure, democratic backsliding is also far from new; the disintegration of Weimar, and the rise of Nazi Germany, historically stands as the central case of this kind of capture of democracy from within, and serves as the genesis for the idea of militant democracy.⁴ But the fact that democratic backsliding has now emerged as a major form of democratic breakdown, in response to changes in the international environment and the diffusion of democracy as a norm of governance, provides the broader context for Dixon and Landau's article. Their principal contribution is to link democratic backsliding to an older debate about judicial review of constitutional amendments where there is no textual basis for doing so. On their account, "abusive" constitutional amendments are central techniques for democratic backsliding, and are often enacted to overrule judgments finding the same actions unconstitutional, and judicial review of such amendments is justified on the basis that it safeguards democracy from itself, a point that Sam Issacharoff has also made.⁵ But on their account, the assertion of such a judicial power carries a potential danger—that courts could overreach and second-guess constitutional amendments which do not pose an existential threat to constitutional democracy. Comparative materials, they argue, could mitigate this risk, by facilitating a judicial "gut check" in the dialogic tradition of comparative constitutional engagement, to ascertain which constitutional provisions are truly essential to what the Supreme Court of India has called a basic structure that is a constitutive element liberal democratic constitutional order.⁶

In this brief comment, I want to engage Dixon and Landau on two points. First, I want to suggest that comparative constitutional law should premise its analysis of the problem of democratic backsliding not on the problem of unconstitutional amendments, but rather on a broader inventory of the various legal tools used by autocrats that enable democratic backsliding, which encompasses the abuse of the power of constitutional amendment but extends well beyond it. Second, I think the more likely scenario is not that courts will overreach, but rather that they will fail to call democratic backsliding by its name, which in turn raises important strategic questions for courts on whether to embrace the power to declare constitutional amendments and on what basis, or to calibrate the combination of justification and judicial control differently.

It is natural for Dixon and Landau to focus on the judicial review of constitutional amendments without any textual foundation to do so, because it represents the

⁴ Sujit Choudhry, *Resisting Democratic Backsliding: An Essay on Weimar, Self-Enforcing Constitutions, and the Frankfurt School* (Unpublished).

⁵ Samuel Issacharoff, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* (2015).

⁶ See Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation* 74 *INDIANA L.J.* 819 (1999); Vicki Jackson, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2009).

ultimate assertion of judicial power. Proposals to relax or remove presidential term limits are the most visible and common example of constitutional amendments in the service of democratic backsliding, having generated constitutional conflict in recent years across Sub-Saharan Africa (Burkina Faso, Burundi, Cameroon, Chad, Congo Brazzaville, Democratic Republic of Congo, Gabon, Guinea, Malawi, Namibia, Niger, Nigeria, Rwanda, Senegal, Togo, Uganda, and Zambia) and Latin America (Colombia, Ecuador, Honduras, Nicaragua, and Venezuela). But an alternative research strategy would begin with a basic definition of a consolidated democracy, which is marked by political competition and the alternation of power, and which generates norms of self-restraint on the part of the executive. Democratic backsliding occurs when political competition is impaired, and the checks on executive power are undermined. The idea would be to reason inductively and empirically from comparative practice to develop a taxonomy of the policy levers of democratic backsliding and the legal sites where it occurs, and to build a theory of the judicial role in these contexts on that foundation.

The South African constitutional system is a particularly promising case study. The African National Congress (ANC) has been in power continually since it won South Africa's first post-Apartheid election over two decades ago in 1994, and since then has held control at the national level and in most provinces. As I have argued elsewhere, the ANC has sought to perpetuate its dominant status through a variety of techniques that are characteristic of so-called dominant party democracies, e.g., India under the Congress Party and Mexico under the Institutional Revolutionary Party (PRI).⁷ These measures, *inter alia*, are the manipulation of electoral systems to fragment opposition political parties; the capture of independent institutions designed to check the partisan abuse of public administration; the erosion of federalism as a resource for political competition that enables opposition parties to derive the political benefits of incumbency; and the subordination of the democratically elected parliamentary wing of the party to the unelected non-parliamentary wing.

Specific instances of the ANC's attempt to entrench its dominant status have come before the Constitutional Court of South Africa in recent years. These cases have involved the removal of a ban on floor-crossing which permitted the ANC to recruit legislators from other parties; a parliamentary rule limiting the right to initiate bills by minority political parties; the extension of the term of office of the Chief Justice of South Africa by the President; the abolition of an independent anticorruption authority that had investigated the President and his associates; the appointment of the independent Director of Public Prosecutions, and the ability of the ANC to block a secret vote on a motion of non-confidence in President Zuma brought by opposition parties.⁸ What bears mention here is the variety of legal contexts in which these cases

⁷ Sujit Choudhry, "He had a mandate": *The South African Constitutional Court and the African National Congress in a Dominant Party Democracy*, 2 CONST. CT. REV. 1 (2009), available at <http://www.constitutionalcourtreview.co.za/wp-content/uploads/2015/10/2009-Article-1-Sujit-Choudhry.pdf>.

⁸ United Democratic Movement v. President of the Republic of South Africa (No. 2) 2003 1 SA 495 (CC) (floor-crossing); Oriani-Ambrosini, MP v. Sisulu, MP Speaker of the National Assembly, 2012 (6) SA 588 (CC) (minority political party right to introduce bill); Justice Alliance of South Africa v. President of Republic of South Africa & Others, 2011 (5) SA 388 (CC) (extension of appointment of Chief Justice); Democratic Alliance v. President of the Republic of South Africa & Others, [2012] ZACC 24, 2013 (1) SA

arose. The floor-crossing case (*United Democratic Movement I*) turned on a challenge to a constitutional amendment; but the others turned on constitutional challenges to an internal rule of the Parliament of South Africa (*Oriani-Ambrosini*), a statutory delegation of a constitutionally vested appointment power (*Justice Alliance*), the statutory framework governing an anticorruption authority (*Glenister*), the exercise of a statutory appointment power (*Democratic Alliance*) and the interpretation of the Constitution (*United Democratic Movement II*).

Constitutional amendment, although certainly present, is not where the legal action has been. And so not surprisingly, the terrain of legal argument has been very broad, with parties invoking a variety of traditional public law doctrines, such as rationality review, the non-delegation doctrine, and the good faith application a statutory appointment power inflected by broader concerns of constitutional structure, as well as the interpretation of constitutional provisions such as the Bill of Rights, those granting minority political party rights in the legislative process, and governing votes of non-confidence. I have argued that traditional doctrines should be reimagined to respond to the particular problem of the abuse of power by dominant party democracies, and set out an extended explanation of, justification for them: anti-domination, anti-capture, anti-centralization, and anti-usurpation.⁹ The salient point here is that *United Democratic Movement I* was the one case that raised the problem of constitutional amendment, squarely and centrally. I suggest this is not a contingent detail particular to the South African case; rather, it raises deeper questions about how courts should apprehend, and exercise their role in checking, democratic backsliding. Across a broad variety of constitutional systems that have experienced and face the risk of democratic backsliding, we should likewise expect to see a diverse range of legal contexts extending beyond constitutional amendment as sites of conflict and contestation over the fate of democracy. Substantive checks on the constitutional amendment power, albeit important, are accordingly not sufficient as legal responses to the full array of mechanisms employed by would-be autocrats.

Bermeo has recently made a parallel observation from the standpoint of comparative politics to which constitutional lawyers should pay heed. She argues that democratic backsliding requires that we recognize that “democracy is ‘a collage’ of institutions” that is “put together piece by piece, and can be taken apart the same way.” This poses a great challenge for scholars of democratization, who have “focused on clear cases of democratic collapse” as opposed to “slow slides toward authoritarianism.” Political scientists must come to grips with this reality “or risk their own slide into irrelevance.”¹⁰ Comparative constitutional law must too ensure that its viewfinder encompasses high profile, dramatic conflict over constitutional amendments but extends beyond it to ordinary constitutional law, administrative law, and statutory

248 (CC) (appointment of Director of Public Prosecutions); *Glenister v. President of the Republic of South Africa & Others*, [2011] (3) SA 347 (CC) (independent anticorruption authority); and *United Democratic Movement v. Speaker of the National Assembly*, [2017] ZACC 21 (opposition motion of non-confidence).

⁹ Choudhry, *supra* note 7.

¹⁰ Bermeo, *supra* note 3, at 14.

interpretation, less it fail in its mission to provide sufficient resources to identify and control these abuses of public power.

This insight shapes the lessons to be drawn from Hungary, perhaps the most visible example of democratic backsliding in contemporary times. As Kim Scheppele has perceptively remarked, the Hungarian reversion to authoritarian rule has occurred through a very large number of individual constitutional amendments, which if taken on their own, would not raise red flags on the basis that they fall outside the scope of a basic structure common to constitutional democracies.¹¹ Nonetheless, in aggregate, they clearly have undermined the democratic character of the Hungarian constitutional order. Hungary poses a challenge for Dixon and Landau, because of their focus on the substantive acceptability of constitutional amendments considered in isolation. However, I would suggest that on their account, Hungary is a relatively easy case because of the way in which the separate constitutional amendments were visibly, and publicly, linked closely with each other over a compressed timeframe as part of an overall project of constitutional transformation. Far more challenging for them would be lower visibility, *non-constitutional* change pursued in a more incremental way. South Africa, not Hungary, is the case that should stimulate reflection on how constitutional law should recognize and respond to abuses of public power that are part of a process of democratic backsliding.

Dixon and Landau advocate for the strongest possible form of judicial review—the power of courts to review on substantive grounds, without any textual basis, the constitutionality of constitutional amendments that threaten democracy—a super-majoritarian judicial power. Their concern is that courts asserting this power may go too far by second-guessing constitutional amendments that do not rise to the level of posing a threat to the constitutional order, and that comparative materials can serve as anchors to check judicial over-reach by helping courts to induce what is truly fundamental, basic or essential to a constitutional system.

Their interesting proposal presupposes that a court recognizes and is willing to assert its special role in protecting democratic constitutionalism from itself. The Colombian Constitutional Court is probably the best example of an apex court that conceives of its function in this way, as the reasoning in its two judgments on presidential term limits illustrates. The Hungarian Constitutional Court, in the period in between the coming to power of the Fidesz regime and the adoption of the Fourth Amendment, also stands as another example as it self-consciously and expressly attempted to stem the tide of democratic backsliding, as Scheppele has explained.¹²

However, the orientation of the Colombian and Hungarian constitutional courts is likely quite exceptional. Thus, the real risk may not be overreach, but under-reach. Consider the Supreme Court of India, which Dixon and Landau hold out as an example of an apex court that has asserted its role to check the power of constitutional

¹¹ Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists do not Work*, 26 GOVERNANCE 559 (2013).

¹² Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions can Strengthen Peak Courts at Times of Crisis*, 23 TRANSNAT'L & CONTEMP. PROBS. 51 (2014).

amendment in the service of constitutional democracy, and which has also overreached. The leading case where the Court stood in the way of the antidemocratic use of the constitutional amendment process is the *Indira Gandhi* election case.¹³ The Supreme Court struck down the 39th Amendment to the Constitution of India, which had two key features. First, it withdrew the jurisdiction of the ordinary courts over the conduct of elections of the Prime Minister and the Speaker of the Lok Sabha, authorized Parliament to enact a law to vest authority over electoral disputes with respect to these two individuals in another body, and immunized that law from constitutional challenge. Second, the amendment provided that no law made prior to its adoption applied to the election of the Prime Minister and Speaker, and that any court order declaring such an election void was itself void and of no effect.

The Court struck down the 39th Amendment on the basis that democracy was an essential feature of the Indian constitution and that the amendment jeopardized free and fair elections. But only one Justice (Justice Beg) impugned the amendment on the basis that it had been enacted to validate Indira Gandhi's election, and to entrench the power of the majority Congress Party—that is, it was motivated by personal and partisan political ends. The other Justices (Chief Justice Raj, Justice Matthew, Justice Khanna) also held the amendment to be unconstitutional on the basis of democracy but on different grounds. One line of reasoning held the amendment to be unconstitutional because it declared Gandhi victorious while at the same time repealing the law pursuant to which she could have been elected; the absence of a law pursuant to which her election could have occurred raised a formal deficiency in the constitutional amendment. The narrow applicability of the amendment to two political officeholders was another formal deficiency, because a basic feature of law is its generality. The other line of reasoning held that free and fair elections in a democracy required the judicial resolution of electoral disputes, which the amendment contravened.

Thus, most of the justices in *Indira Gandhi* relied on formal and procedural conceptions of democracy, rather than on a direct attack on the motives underlying the amendment itself. I would suggest that these justices made a strategic calculation that the formal and procedural notions of democracy offered a narrower and safer basis for the Court's ruling, which may have preserved the Court's institutional capital by not provoking a direct confrontation with Gandhi. But this may have come at the cost of establishing a direct link between the Court's judgment and the way in which the constitutional harms of the 39th Amendment were understood in the broader constitutional politics. So there was a tradeoff and a choice to be made between these imperfect alternatives.

South Africa presents another example of a similar set of judicial choices and tradeoffs. In the cases I set out above, the dangers of a dominant party democracy was presented to the Constitutional Court by litigants in order to encourage it to be particularly alert to a broader pattern of the conduct whereby the ANC was entrenching its

¹³ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp. SCC 1; Sujit Choudhry, *How to Do Constitutional Law and Politics in South Asia*, in *UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA* 18 (Mark Tushnet & Madhav Khosla, eds., 2015).

dominant status through the abuse of public power. The case for framing the argument this way is that it would allow the Court to call into a question an implicit assumption it applied in many cases—that South Africa is a consolidated liberal democracy in which political competition and the alternation of power serve as an additional check, above and beyond judicial review, on the abuse of political power, and that courts could therefore leave some kinds of issues to the political process. However, while the Constitutional Court *has* increasingly shown a willingness to check the abuse of public power by the ANC government, it did so without resort to a substantive theory of its role in preventing democratic backsliding. Theunis Roux has argued this enabled the Court to preserve its institutional independence against the risk of backlash by a powerful government.¹⁴

Let me conclude by linking the pervasiveness of means short of constitutional amendment in democratic backsliding, and an unwillingness of some—perhaps most—apex courts to call these abuses of public power by their name. It could very well be that inviting courts to assert the ultimate power of judicial review over constitutional amendments, and to use the most politically charged justification for doing so, is strategically unwise in fraught political contexts where the very political forces that create the risk of backsliding also pose a risk to the court itself. But principle need not yield to pragmatism in every circumstance. An easier context for the court to use this kind of justification could be cases where the power of judicial review is relatively normal and not exceptional—that is, the traditional terrain of constitutional and administrative law and statutory interpretation and not the substantive review of constitutional amendments. Indeed, perhaps courts should forestall the ultimate clash over constituent power by focusing their energies on these kinds of cases. The dialogic engagement with comparative materials could assist courts in grappling with these dilemmas.

¹⁴ Theunis Roux, *The South African Constitutional Court's Democratic Rights Jurisprudence*, 5 CONST. CT. REV. 33 (2014), available at <http://www.constitutionalcourtreview.co.za/wp-content/uploads/2015/08/Democratic-Rights-in-Jurisprudence.pdf>.