Can Abusive Constitutionalism Be Checked?

Author : Michael B. Coenen

Date : October 26, 2015

David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 51 **Wake Forest L. Rev.** (forthcoming, 2015), available at SSRN.

Changes to constitutional law do not always further beneficial ends. Sometimes, in fact, they do the opposite, with political actors utilizing mechanisms of constitutional law-making to consolidate their powers, entrench themselves in office, marginalize opposition, and otherwise undermine basic democratic values. Under these circumstances, a constitution can find itself in the perverse position of enabling rather than constraining abusive governmental action—subverting the very principles that it was originally intended to promote.

Comparative constitutional scholars have puzzled over the question of how to prevent "abusive constitutionalism" of this sort. To date, they have focused largely on mechanisms of *constitutional amendment*, considering ways in which an existing constitutional regime might structure its internal rules of change so as to frustrate a would-be autocrat's anti-democratic amendment efforts. For example, timing requirements and supermajority voting procedures might render undesirable amendments especially difficult to enact; "eternity clauses" might safeguard essential provisions of a constitutional text against the threat of repeal; and the doctrine of "unconstitutional constitutional amendments" might empower courts to invalidate some forms of anti-democratic action after the fact. In these and other ways, amendment-restricting devices might manage to prevent at least some abusive amendments from ever taking effect.

These are important tools, which have enjoyed some measure of success in the real-world. But, as Professors David Landau and Rosalind Dixon point out in their wonderfully thought-provoking article, *Constraining Constitutional Change*, even a fail-safe set of constraints on the amendment process cannot eliminate the specter of abusive constitutional change. Looming in the background is the alternative and more daunting possibility of wholesale *constitutional replacement*—the outright rejection of an old constitutional order (including its amendment rules) in favor of a brand-new constitutional regime. Where amendment rules threaten to foil a would-be autocrat's abusive constitutional ambitions, that official might simply choose to take the replacement route instead.

All of which sets the stage for Landau and Dixon's inquiry, namely the question whether "courts and constitutions might deploy doctrines constraining constitutional replacement." (P. 2.) Put differently, Landau and Dixon explore the extent to which existing legal safeguards against the threat of abusive constitutional amendment might be adapted to confront the threat of abusive constitutional replacement. This possibility has received only limited attention in the existing scholarly literature. Landau and Dixon convincingly demonstrate that it deserves much more.

Landau and Dixon begin their analysis by successfully rebutting two threshold objections to their project, one theoretical and the other practical. Beginning with the theoretical objection, Landau and Dixon note that "constitutional replacement is usually seen as being an act by 'the people' outside of existing legal or constitutional rules," in which case courts or other old-regime institutions might have no justifiable grounds for injecting themselves into the process. (P. 6.) That objection, Landau and Dixon suggest, may prevail as applied to a genuine exercise of the "constituent power." But the real prospect of abusive constitutionalism suggests that not all replacement-related efforts will qualify as such. Replacement processes, just like amendment processes, "can be manipulated in order to serve the agendas of authoritarian actors and parties," and when that is so it will at least be "open to dispute, or argument, as to whether a set of particular elected leaders, or popular political leaders, can legitimately claim to speak for a majority of citizens, or the people as a whole." (P. 6.) Even accepting that courts and other institutional actors should defer to a genuine expression of the popular will, not all attempts at constitutional replacement will in fact reflect such an expression in the

first place.

But even if we accept the legitimacy of legal constraints on the replacement process, we can still question their practical value. Replacement efforts, in contrast to their amendment-based counterparts, directly challenge the foundations of a prior constitutional regime. That being so, one might wonder why the proponents of these efforts would have any reason to care whether a court or some other institutional actor has declared them to be acting extra-legally. But Landau and Dixon have a persuasive response to this objection as well: abusive efforts at replacement, they point out, "tend[] to occur during periods of high political turmoil," such that "restraints on constitutional change," though by no means guaranteed to work, might valuably "act as a 'speed bump' in order to slow abusive processes." Even just by slowing things down a little, legal intervention might prove "critical in allowing opposition actors to organize and prevent the anti-democratic change." (P. 7.) Of course, the extent of a constraint's influence will depend on a host of political factors, including the power and popularity of a replacement movement's proponents, as well as the institutional standing of the actors attempting to enforce the constraints. But where the conditions are right, legal intervention, though by no means all-powerful, may nonetheless exert real influence on the ultimate outcome of the crisis.

As Landau and Dixon are quick to observe, it hardly follows from these points that replacement-oriented constraints will always succeed, much less that they should in fact be used. (Among other things, one might worry that replacement-related constraints would too often function to frustrate beneficial forms of constitutional change, in which case the game might not be worth the candle.) But the authors do at least claim to have demonstrated, rightly in my view, that replacement-related constraints should not be dismissed as either "per se normatively unjustifiable" or as bound "inevitably [to] fail." (P. 7.) And that observation in turn prompts the remainder of their analytical inquiry, in which Landau and Dixon sort through the various mechanisms by which courts and other constitutional actors might attempt to constrain replacement-oriented constitutional change.

One mere jot cannot do justice to the depth and sophistication of Landau and Dixon's work on this score, so I'll just note that the analysis here struck me as nuanced, insightful, and richly informed by real-world case studies. The breadth of their case studies is particularly impressive: the authors draw insights from constitutional transitions in Bolivia, Colombia, Hungary, South Africa, Venezuela, and Zimbabwe, among others. What emerges from their efforts is a rich and detailed analytical framework that invites and facilitates future scholarly investigations of constraints on constitutional change. In developing this framework, moreover, Landau and Dixon offer a number of interesting thoughts along both practical and theoretical dimensions, weighing the respective "pros" and "cons" of the individual techniques they identify and speculating as to the conditions under which each of these techniques is most likely to succeed.

To give a flavor of their analysis, Landau and Dixon at one point compare the possibility of policing replacement *ex ante,* via the enactment of "replacement clauses" that define and regulate the "constituent power," to that of policing replacement *ex post*, via the development of a judge-made "unconstitutional constitutional replacements" doctrine. The former, they suggest, is preferable to the latter in terms of clarity and popular legitimacy, but the latter is preferable to the former in terms of its flexibility and adaptability to changed circumstances. Landau and Dixon also imagine ways of distinguishing between valid and invalid attempts at constitutional replacement. This inquiry, they suggest, would benefit from increased "engagement with transnational norms," whose independent status might help to "bolster[] the effectiveness of either textual or judge-made" constraints (P. 21.), and whose limited scope might help to limit the "overuse" of those constraints in particular cases. (P. 14.)

Their arguments on these and other points111 do not purport to be definitive. But they offer a fresh set of insights on the problem, while teeing up a variety of important questions for future investigation. The discussion thus hits the sweet-spot between being interesting and valuable in its own right and opening up useful new avenues for subsequent work.

Perhaps the most important takeaway of their project is this: any serious attempt to confront the dangers posed by abusive constitutionalism must attend to *both* amendment- and replacement-related processes, recognizing that the

relationship between the two is anything but static. A system designed exclusively to withstand the threat of abusive constitutional amendments might not so much thwart anti-democratic constitutional efforts as it will simply channel those efforts in a replacement-focused direction. As Landau and Dixon put the point, "restrictions on amendment might . . . increase the incentives for political actors to rely on processes of replacement, where such processes are not similarly constrained." (P. 2.) If that is true, then it further raises the stakes of the inquiry. The greater the prevalence of amendment-related constraints, the greater the likelihood of abusive constitutional replacements. This renders all the more pressing the questions that Landau and Dixon have raised.

Cite as: Michael B. Coenen, *Can Abusive Constitutionalism Be Checked?*, JOTWELL (October 26, 2015) (reviewing David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 51 **Wake Forest L. Rev.** (forthcoming, 2015), available at SSRN), http://conlaw.jotwell.com/can-abusive-constitutionalism-be-checked/.