The Migration of Constitutional Ideas

Edited by **Sujit Choudhry**

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THE MIGRATION OF CONSTITUTIONAL IDEAS

The migration of constitutional ideas across jurisdictions is rapidly emerging as one of the central features of contemporary constitutional practice. The increasing use of comparative jurisprudence in interpreting constitutions is one example of this. In this book, leading figures in the study of comparative constitutionalism and comparative constitutional politics from North America, Europe, and Australia discuss the dynamic processes whereby constitutional systems influence each other. They explore basic methodological questions which have thus far received little attention, and examine the complex relationship between national and supranational constitutionalism – an issue of considerable contemporary interest in Europe. The migration of constitutional ideas is discussed from a variety of methodological perspectives – comparative law, comparative politics, and cultural studies of law – and contributors draw on case studies from a wide variety of jurisdictions: Australia, Hungary, India, South Africa, the United Kingdom, the United States, and Canada.

SUJIT CHOUDHRY is Associate Professor in the Faculty of Law and Department of Political Science at the University of Toronto. He has written widely on comparative constitutional law, and in constitutional law and theory more generally.

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This idea for this book emerged in the way that the best ideas do – in scholarly conversation. The migration of constitutional ideas has emerged as one of the dominant features of contemporary constitutionalism. For my colleagues at the University of Toronto, this shift in constitutional practice has meant that sustained and deep comparative engagement increasingly permeates our research and teaching. However, we have all come to realize that the practice of comparative constitutional law has outgrown the conceptual apparatus that legal actors and scholars use to make sense of it. The need for a reconceptualization of the discipline is urgent. This volume marks an important contribution to that task.

The papers for this volume were initially presented at an international conference held at the University of Toronto in October 2004. Jennifer Tam worked her usual organizational wizardry to make the conference a success. Richard Simeon, Alan Brudner, Karen Knop, and my former Dean Ron Daniels served as panel chairs, and helped to stimulate a lively discussion.

As the conference papers became an edited collection, I accumulated more debts. David Dyzenhaus provided valuable advice on tying the papers together into an integrated volume. Saad Ahmad, Bernadette Mount, and Robert Leckey provided superb editorial assistance. Finola O'Sullivan and Jane O'Regan at Cambridge University Press have been extremely professional and collegial, and have been a model of patience as this project neared completion.

I owe particular thanks to three close friends and colleagues. David Schneiderman is a sounding-board for most of my ideas, and paid me an enormous intellectual complement by agreeing to contribute to this volume. Dean Mayo Moran, also a contributor, has been unwavering in her support for this project from the outset, and was pivotal in

shaping my understanding of this volume as a coherent whole. Finally, my former Dean Ron Daniels (now Provost at the University of Pennsylvania), through his inspirational academic leadership, is the individual who made this volume possible. I dedicate this volume to him.

1

Migration as a new metaphor in comparative constitutional law

SUJIT CHOUDHRY

The politics of comparative constitutional law

Usually judges ask the questions, but on this night the roles were reversed. The occasion was a public conversation between United States Supreme Court Justices Breyer and Scalia, answering questions posed by constitutional scholar Norman Dorsen.[1] The topic was the 'Constitutional Relevance of Foreign Court Decisions' to the Court's constitutional case law. For a court routinely called upon to address the most divisive issues in US public life, judicial citation practices hardly seem worthy of a rare evening with two of its most distinguished members. Yet the auditorium was packed, with hundreds more watching over a live video feed.

Court observers knew that the event merited close attention. The backdrop was the Court's increasing use of comparative and international law – both described as 'foreign' to the US constitutional order – in its constitutional decisions over the previous decade. This practice – which I term the migration of constitutional ideas – has deeply divided an already divided Court, along the same ideological lines which have polarized its jurisprudence. Breyer and Scalia are the leading figures in this ongoing jurisprudential drama, although other Justices have joined the debate. Their initial skirmish, in *Printz*,[2] arose in a challenge to federal attempts to 'commandeer' state officials to deliver federal

Thanks to Norman Dorsen, Mayo Moran, Ira Parghi, and David Schneiderman.

[1] There are two transcripts of this conversation, a verbatim record from American University and an edited version in the *International Journal of Constitutional Law* – I cite both as appropriate. A conversation between U.S. Supreme Court justices (2005) 3 *International Journal of Constitutional Law* 519; Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University Washington College of Law, available at http://domino.american.edu/AU/media/mediarel.nsf/0/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument.

[2] *Printz* v. *United States*, 521 US 898 (1997).

programmes. Breyer suggested that the constitutionality of this practice in European federations was relevant to the Court's analysis, while Scalia, delivering the opinion of the Court, declared 'comparative analysis inappropriate to the task of interpreting a constitution'.[3] The battle quickly moved to the interpretation of the Bill of Rights, principally in cases involving the death penalty. In dissenting judgments in denials of *certiorari* to challenges to the 'death row phenomenon' (*Knight*,[4] *Foster*[5]), Breyer invoked the unconstitutionality of lengthy waits on death row in other jurisdictions as 'relevant and informative',[6] 'useful even though not binding',[7] and as material that 'can help guide this Court'.[8] Justice Thomas, speaking for the majority, suggested that the citation of foreign jurisprudence indicated a lack of *legal* support in domestic materials,[9] and equated it with the imposition of 'foreign moods, fads or fashions on Americans'.[10]

Advocates of the migration of constitutional ideas, however, appear to have gained the upper hand. In *Lawrence* v. *Texas*,[11] where the Court struck down the criminal prohibition of sodomy and departed from its earlier holding in *Bowers* v. *Hardwick*,[12] Justice Kennedy's majority judgment cited decisions of the European Court of Human Rights to illustrate 'that the reasoning and holding in *Bowers* have been rejected elsewhere'.[13] Although it is possible to read *Lawrence*'s citation of European jurisprudence narrowly as a refutation of *Bowers*' claim that the prohibition of sodomy was universal in Western civilization, the better interpretation is Michael Ramsey's, who argues that the citation 'suggests that constitutional courts are all engaged in a common interpretive enterprise'.[14] Scalia, now in dissent, stated that the discussion of European case law was 'meaningless dicta'[15] and 'dangerous dicta'[16] because 'foreign views'[17] were not relevant to the interpretation of the US Constitution. And last spring in *Roper*,[18] the debate over the migration of

[3] *Ibid.*, at 2377. [4] *Knight* v. *Florida*, 528 US 990 (1990).

[5] *Foster* v. *Florida*, 537 US 990 (2002). [6] *Knight*, at 463. [7] *Ibid.*, at 528.

[8] *Foster*, at 472. [9] *Knight*, at 459. [10] *Foster*, at 470. [11] 539 US 558 (2003).

[12] 478 US 186 (1986). [13] *Lawrence*, at 2483.

[14] Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing before the Subcommittee on the Constitution, of the House Committee on the Judiciary, 108th Cong., 2d Sess. 568 (2004) (statement of Michael Ramsey); see also M. Ramsey, International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence* (2004) 98 *American Journal of International Law* 69.

[15] *Ibid.*, at 2495. [16] *Ibid.* [17] *Ibid.* [18] *Roper* v. *Simmons*, 543 US 551 (2005).

constitutional ideas was joined again. In finding the juvenile death penalty unconstitutional, Justice Kennedy (for the majority) reviewed a range of foreign sources and declared that they, 'while not controlling our outcome, ... provide respected and significant confirmation for our own conclusions'.[19] Scalia's dissent continued his series of escalating attacks on the Court's comparative turn. He accused the majority of holding the view 'that American law should conform to the laws of the rest of the world' – a view which 'ought to be rejected out of hand'.[20]

The Court's increasingly acrimonious exchanges over the citation of foreign sources had shed more heat than light. Justices advocating the migration of constitutional ideas had failed fully to justify this emergent interpretive practice – that is, to explain why foreign law should count. The evening (after oral argument in *Roper*, but before it was handed down) presented a rare opportunity for clarification. Although Breyer and Scalia both referred to foreign law, their focus appeared to be on comparative materials – that is, either judgments of other national courts, or international courts interpreting treaties not binding on the United States (e.g. the European Court of Human Rights, interpreting the European Convention on Human Rights) – as opposed to international legal materials which do bind the United States. Dorsen raised this issue at the outset, and Scalia rightly responded that the burden of justification squarely rested on the proponents of its use. As he noted, proponents and opponents of the use of comparative law agree that it is not 'authoritative' – i.e., that it is not binding as precedent. But as Scalia noted, the question then is what work foreign law *is* doing: 'What's going on here? ... if you don't want it to be authoritative, then what is the criterion for citing it? ... Why is it that foreign law would be relevant to what an American judge does when he interprets [the US Constitution]?'[21]

Scalia's retort shifted the persuasive onus to Breyer, and highlighted that his colleagues on the Court had offered casual and under-theorized responses to this fundamental question. Breyer did little that evening to advance his case. He began strongly, stating that he 'was taken rather by surprise, frankly, at the controversy that this matter has generated, because I thought it so obvious'.[22] The reason for comparative

[19] *Ibid.*, at 1200. [20] *Ibid.*, at 1226. [21] A conversation, 522–5.
[22] Transcript of Discussion.

engagement was that these materials were cited by advocates before the Court, and 'what's cited is what the lawyers tend to think is useful'. Now this begs the question of *why* these materials are useful. Breyer offered a pragamatic rationale, suggesting that foreign courts:

> . . . have problems that often, more and more, are similar to our own. They're dealing with . . . certain texts, texts that more and more protect basic human rights. Their societies more and more have become democratic, and they're faced not with things that should be obvious – should we stop torture or whatever – they're faced with some of the really difficult ones where there's a lot to be said on both sides . . . If here I have a human being called a judge in a different country dealing with a similar problem, why don't I read what he says if it's similar enough? Maybe I'll learn something . . . [23]

So foreign judgments are a source of practical wisdom to the tough business of deciding hard cases where the positive legal materials run out. As Breyer put it, he was 'curious' about how other courts tackled similar problems.[24] Scalia pushed back, asking why judges should cite such cases, according normative status to their reasoning. Read the cases, 'indulge your curiosity! Just don't put it in your opinions', he said.[25] When faced with this argument on an earlier occasion, Breyer's response was simply to think 'All right'.[26] Having failed to explain why the Court should cite comparative case law, Breyer, by his own admission, became 'defensive' and opined that comparative engagement was about 'opening your eyes to things that are going on elsewhere'.[27] To cite comparative jurisprudence is to demonstrate an educated, cosmopolitan sensibility, as opposed to a narrow, inward-looking, and illiterate parochialism. However, demonstrating worldliness is hardly adequate justification for a major shift in the Court's constitutional practice.

A lot is at stake in Breyer's failure to respond to Scalia's challenge. As Alexander Bickel explained over forty years ago, in liberal democracies which have opted for written constitutions enforced by unelected courts, the power of judicial review is a form of political power which cannot be legitimized through democratic accountability and control.[28] So courts

[23] *Ibid.* [24] A conversation, 534. [25] *Ibid.* [26] Transcript of Discussion.
[27] *Ibid.*
[28] *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press, New Haven, CT, 1986).

must legitimize their power through both the processes whereby they determine whether issues come before the courts and the reasons for their judgments, somehow distinguishing adjudication from other forms of political decision-making. The various features of legal reasoning – *stare decisis*, for example – are more than just the means through which courts arrive at decisions. They define and constitute the courts' unique institutional identity. The very legitimacy of judicial institutions hinges on interpretive methodology. So courts *must* explain why comparative law should count. And if courts do not, judicial review is open to the charge of simply being politics by other means, cloaked in legal language, and subject to attenuated democratic control.

This is not a problem unique to the United States. As Alan Brudner wrote recently:

> . . . those who interpret local constitutional traditions take a lively interest in how their counterparts in other jurisdictions interpret their own traditions and in how international tribunals interpret human-rights instruments whose language is similar to that of their own texts. This interest, moreover, is a professional one. Comparative constitutional studies are valued, not as a leisurely after-hours pastime, but for the aid they give to judicial . . . interpreters of a national constitution.[29]

In each and every country where the migration of constitutional ideas is on the rise, the demands of justification must be met. This is true even for countries such as South Africa, whose Constitution provides that courts 'must consider international law' and 'may consider foreign law' in interpreting its Bill of Rights.[30] Although international law asserts its supremacy over the South African legal order, the South African Constitution only directs courts to 'consider' it, raising the question of *how* exactly it should be considered. And with 'foreign law' (i.e., comparative law), the additional question is why and under what circumstances courts should engage with it at all.

To be sure, the charge that comparative engagement is somehow undemocratic has gained widespread currency in US legal circles, albeit for an entirely different set of reasons with particular resonance in that

[29] *Constitutional Goods* (Oxford University Press, Oxford, 2004), p. viii.

[30] Constitution of the Republic of South Africa, s. 39(1).

country.[31] Contra Bickel, the argument made is that judicial review *is* a democratic practice in the United States. The constitutional text was popularly ratified, and so as Paul Kahn puts it:[32]

> ... the primary work of the Supreme Court is to construct and maintain an understanding of our polity as the expression of the rule of law ... our own Supreme Court ... [is] engaged in the unique enterprise of maintaining the belief in American citizenship as participation in a popular sovereign that expresses itself in and through the rule of law ...

To Americans, judicial review is legitimate because they view 'the Court as the voice of the Sovereign People'. Chief Justice John Marshall made this point brilliantly in *Marbury* v. *Madison*.[33] Moreover, federal judges, as Chief Justice Roberts pointed out in his confirmation hearings, 'are appointed through a process that allows for participation of the electorate' since both 'the President who nominates judges' and 'Senators who confirm judges are accountable to the people'.[34] For its opponents, the migration of constitutional ideas poses two threats to the democratic character of judicial review, from within and without the US constitutional order.

First, comparative engagement feeds into fears regarding judicial activism. For Scalia, the democratic character of judicial review not only justifies it, but sets limits on its content and scope. In particular, it counsels originalism, with courts serving as modern-day agents of the constitutional framers. Foreign law – whether comparative or international – on the originalist view, 'is irrelevant with one exception: old English law', which served as the backdrop for the framing of the constitutional text.[35] Now Scalia quickly concedes that originalism is no longer the exclusive method of US constitutional interpretation. The Eighth Amendment, for example, has been interpreted as incorporating 'evolving standards of decency that mark the progress of a maturing

[31] R. Posner, No Thanks, We Already Have Our Own Laws, *Legal Affairs*, July/August 2004.

[32] P. Kahn, Comparative Constitutionalism in a New Key (2003) 101 *Michigan Law Review* 2677 at 2685–6; see also K. Kersch, The New Legal Transnationalism, The Globalized Judiciary, and the Rule of Law (2005) 4 *Washington University Global Studies Law Review* 345.

[33] 5 US 137 (1803).

[34] Confirmation Hearing on the Nomination of John G. Roberts, Jr to be Chief Justice of the United States: Hearing before the Senate Committee on the Judiciary, 109th Cong., 1st Sess. 158 (13 September 2005) (statement of John Roberts).

[35] A conversation, 525.

society'.[36] Even here, though, Scalia argues that to maintain the democratic character of judicial review, the Court must rely on '[t]he standards of decency of American society – not the standards of decency of the world, not the standards of decency of other countries that don't have our background, that don't have our culture, that don't have our moral views'.[37] To retain its democratic legitimacy, the US practice of judicial review must fix its gaze firmly inward, not outward, taking cues from US political institutions and values.

The only theory of constitutional interpretation which permits comparative engagement, for Scalia, is one where the judge looks 'for what is the best answer to this social question in my judgment as an intelligent person', based on the 'moral perceptions of the justices'.[38] For Scalia, this would mean that constitutional adjudication is no more than the imposition of judicial policy preferences. Scalia sharpened this objection by suggesting that judges working with this theory cite comparative law selectively, such that '[w]hen it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree we don't use it'.[39] In his confirmation hearings, Chief Justice Roberts made the same point, testifying that 'looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there'.[40] Citing comparative law permits courts to achieve desired results while pretending they are engaged in a legal enterprise. For example, Scalia suggested that while the Court cited foreign law in *Lawrence* to expand the scope of liberty, it failed to cite comparative materials in its abortion jurisprudence *because* foreign courts have construed reproductive rights more narrowly than have US courts. In sum, the citation of comparative case law 'lends itself to manipulation',[41] or what Judge Posner has referred to as 'judicial fig-leafing',[42] designed to obscure the reality of judicial choice. And although he clearly disagrees with Scalia on the propriety of comparative citation, Breyer accepts that it is wrong for judges to 'substitute their own subjective views for that of a legislature'.[43]

The second objection to the migration of constitutional ideas is that it facilitates the erosion of US sovereignty by the forces of globalization.

[36] *Ibid.* [37] *Ibid.*, 526. [38] *Ibid.* [39] *Ibid.*, 521.
[40] Confirmation Hearing on the Nomination of John G. Roberts, Jr (13 September 2005).
[41] A conversation, 531. [42] Posner, No Thanks. [43] A conversation, 539.

The concern is not about the imposition of the elite social, political, and economic views of the judiciary on the US people. Rather, the fear is that comparative citation turns courts into agents of outside powers – international public opinion, international organizations, and even foreign governments – to thwart the will of the US public. Roger Alford has coined the term 'international countermajoritarian difficulty' to capture this idea.[44] As Alford writes, '[u]sing global opinions as a means of constitutional interpretation dramatically undermines sovereignty by utilizing the one vehicle – constitutional supremacy – that can trump the democratic will'.[45] By contrast, constitutional adjudication which relies on sources internal to US constitutional culture is for that reason legitimate. As one questioner from the floor at the Breyer and Scalia session put it, 'these [i.e., non-US] legal materials have no democratic provenance, they have no democratic connection to this legal system, to this constitutional system, and thus lack democratic accountability as legal materials'.[46]

An important part of this argument is the elision of the distinction between international law binding on the United States and comparative materials which are not. Although their claims to authority in domestic legal orders are totally different, the two are nonetheless referred to together in the literature as 'international norms', 'international values', or 'international sources'.[47] As Breyer said on an earlier occasion, 'my description blurs the differences between what my law professors used to call comparative law and public international law. That refusal to distinguish (at least for present purposes) may simply reflect reality'.[48] Harold Koh uses the term 'transnational law' to conjoin the international and the comparative.[49] What binds these hitherto distinct bodies of law together is that they are from outside the United States and are viewed as threats to US sovereignty. Into this broad category fall the decisions of United Nations bodies, international treaties (including those to which

[44] R. Alford, Misusing International Sources to Interpret the Constitution (2004) 98 *American Journal of International Law* 57 at 59.
[45] *Ibid.*, 58. [46] A conversation, 540–1.
[47] See e.g. Alford, Misusing International Sources.
[48] S. Breyer, The Supreme Court and The New International Law, speech, 97th annual meeting of the American Society of International Law, available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04–04–03.html.
[49] The Globalization of Freedom (2001) 26 *Yale Journal of International Law* 305 at 306.

the United States is a signatory), the decisions of international human rights bodies and tribunals, and the judgments of foreign courts.

Although not part of Scalia's talk, this criticism is central to popular criticism of the Court's turn to comparative sources. Quin Hillyer wrote in the *National Review* that the reference to European case law in *Lawrence* was 'subversive', because it would lead to a loss of US sovereignty.[50] In criticizing this position, Tim Wu describes this fear as the Court '*obeying* foreign commands'.[51] Chief Justice Roberts has picked up on this criticism as well, testifying that '[i]f we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he's playing a role in shaping a law that binds the people in this country. I think that's a concern that has to be addressed'.[52]

Opponents of the migration of constitutional ideas have confronted Breyer and his colleagues with a dilemma. They have defined the terms of debate: on one horn of the dilemma, comparative jurisprudence is legally binding. On the other horn, it is not. But either use is illegitimate. If comparative materials are binding, the Court is acting as an agent of foreign authorities. If it is not, comparative citation is window-dressing for judicial legislation. These arguments were the case to meet that evening. Breyer desperately needed to avoid the dilemma by challenging this way of framing the problem, but failed miserably. Even worse, faced with Scalia's objection that the comparative engagement is part of a political agenda, Breyer effectively agreed. One reason for citing the case law of other national courts, said Breyer, was to consolidate judicial review in transitional democracies:[53]

> ... in some of these countries there are institutions, courts that are trying to make their way in societies that didn't used to be democratic, and they are trying to protect human rights, they are trying to protect democracy ... And for years people all over the world have cited the Supreme Court, why don't we cite them occasionally? They will then

[50] Q. Hillyer, Constitutional Irrelevance: Forfeiting sovereignty for sodomy, *National Review Online*, 7 July 2003.

[51] T. Wu, Foreign Exchange: Should the Supreme Court care what other countries think?, *Slate*, 9 April 2004.

[52] Confirmation Hearing on the Nomination of John G. Roberts, Jr (13 September 2005).

[53] Transcript of Discussion.

> go to some of their legislators and others and say, 'See, the Supreme Court of the United States cites us.' That might give them a leg up ...

Other members of the Court have joined Breyer in offering this crude, over-blown, realpolitik justification. Justice O'Connor thus remarked that citing the case law of other national courts 'will create that all-important good impression. When US Courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced'.[54] Justice Ginsburg pushed this line of thinking even further, suggesting that this interpretive practice promotes comity on other fronts, which is valuable 'because projects vital to our well being – combating international terrorism is a prime example – require trust and cooperation of nations the world over'.[55]

The retreat into realism and the failure of US judges fully to articulate and justify their participation in the migration of constitutional ideas are linked. Judicial realism is fueled by the poor fit between traditional legal categories and the emerging phenomenology of comparative constitutional argument. This is reflected in the difficulty that judges and scholars have faced in simply trying to describe what is taking place. Proponents assert that foreign case law is not 'binding' or 'controlling'[56] but then cannot explain how or why it is used instead. To say that courts 'rely upon' or 'use' foreign jurisprudence because it is 'useful' or 'helpful', or that US courts should 'construe [the US Constitution] with decent respect'[57] for comparative jurisprudence, does not explain why or how such jurisprudence is helpful. Nor, on a deeper level, does it seek to justify the appropriateness of seeking that kind of help.

In short, the practice of comparative constitutional law has outgrown the conceptual apparatus that legal actors use to make sense of it. It is the responsibility of the bench, the bar, and the academy to respond. The failure to do so until now has had severe costs. In a remarkable series of resolutions in the US House of Representatives and Senate, US legislators from the Republican Party have begun to challenge the Court's

[54] S. O'Connor, remarks, Southern Center for International Studies, available at http://www.southerncenter.org/OConnor_transcript.pdf.

[55] R. Ginsburg, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication (2004) 22 *Yale Law and Policy Review* 329 at 337.

[56] A conversation, 524, 528 (words of J. Breyer).

[57] H. Koh, International Law as Part of Our Law (2004) 98 *American Journal of International Law* 43 at 56.

cosmopolitan turn.[58] The proximate cause for the political reaction is identified in every legal text as *Lawrence* v. *Texas*, which struck a political nerve. But in contrast to Scalia's criticisms in that case, which alleged judicial activism, the dominant concern voiced in Congressional resolutions has been the perceived threat to US sovereignty. This argument was made most clearly in a 2005 Senate resolution, which states that the 'inappropriate judicial reliance on foreign judgments, laws, or pronouncements threatens the sovereignty of the United States'. Such reliance is inappropriate because it contradicts the Court's institutional role in the US constitutional scheme: 'to faithfully interpret the expression of the popular will through the Constitution.' As a consequence, the resolution states that 'judicial interpretations regarding the meaning of the Constitution . . . should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States'.[59]

Hearings on the 2004 House resolution provide a window into the political fallout from the Court's inarticulate comparative turn.[60] Representatives sounded the alarm in the language of popular sovereignty. The use of foreign law was described by Republican legislators as an 'alarming new trend',[61] a 'disturbing line of precedents'[62] which 'undermines our democracy'[63] and is 'quietly undermining the sovereignty of our nation'.[64] Representative Chabot, opening the hearings, argued that that US constitutional interpretation relied on popular consensus, and 'the relevant consensus behind American law is

[58] The three leading resolutions are the Reaffirmation of American Independence Resolution, H. Res. 568, 108th Cong., 2d Sess. (2004) which died in the Judiciary Committee in 2004, and H. Res. 97 and S. Res. 92, which were introduced in the 1st session of the 109th Congress in 2005. Indeed, legislators have gone so far as to propose legislation to prohibit the Court from citing foreign materials. See e.g. Constitution Restoration Act of 2004, H. R. 3799, 108th Cong., 2d Sess. (2004) and Constitution Restoration Act of 2005, S. 520, 109th Cong., 1st Sess. (2005).

[59] S. Res. 92, 109th Cong., 1st Sess. (2005).

[60] Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing before the Subcommittee on the Constitution, of the House Committee on the Judiciary, 108th Cong., 2d Sess. 568 (March 25, 2004).

[61] *Ibid*., words of Representative Steve Chabot (R-OH). [62] *Ibid.*

[63] *Ibid*., words of Representative Stanley Bachus (R-AL).

[64] *Ibid*., prepared statement of Representative J. Randy Forbes (R-VA).

not a world consensus, but rather the consensus of those in the United States on the meaning of the words used in the Constitution and legislation when originally enacted'.[65] The problem with recent 'decisions of the United States Supreme Court that are based, at least in part, on selectively cited decisions drawn by a variety of foreign bodies'[66] is that '[t]he American people have had no opportunity to vote on any of these laws'.[67]

Indeed, Representative Ryun went one step further, equating the citation of foreign materials with foreign interference in the United States' internal affairs. He suggested that 'the Supreme Court, in using the laws passed by these countries to interpret and rewrite American laws, are achieving ... foreign interference in our government'.[68] The next, absurd move in this line of argument is the truly paranoiac fear that foreign courts could draft their judgments maliciously to harm the United States, in the hope that a US court would cite that judgment. Asked Representative Forbes, 'My big concern is that there could very well be countries out there who are hostile to this country ... How will our justices know who our enemies are today; will they be our enemies today; will they be tomorrow? When the decision was decided in that country, were they hostile or not?'[69] Jeremy Rabkin, testifying as an academic expert in the hearings, stoked these fears in his answer: 'This is not hypothetical. It is not remote. It's not implausible. This is where we are right now ... I think they are absolutely trying to infiltrate into our judicial system this idea that our judges need to listen to what their judges say, and we should say no to that.'[70]

Democratic representatives did little to respond effectively. They described the resolution as a threat to judicial independence and the separation of powers. Thus, Representative Schiff said that the resolution was part of 'a trend that concerns me, and that is the deterioration of the relationship between the Congress and the courts', and 'a shot across the bough [*sic*] of the judiciary'.[71] The resolution, because it purported to pass judgment on the Court's decisions, was 'a violation of the separation

[65] *Ibid.*, words of Representative Steve Chabot (R-OH). [66] *Ibid.*
[67] *Ibid.*, prepared statement of Representative Jim Ryun (R-KS). [68] *Ibid.*
[69] *Ibid.*, words of Representative J. Randy Forbes (R-VA).
[70] *Ibid.*, testimony of Jeremy Rabkin, Professor of Government, Cornell Unversity.
[71] *Ibid.*, words of Representative Adam Schiff (D-CA).

of powers, and at worst, an attempt at intimidation'.[72] Entirely absent from Democratic defences of the Court was a *substantive* response to the Court's comparative turn. To a large extent, the failure of the Democrats is a function of an underlying judicial failure. Since the Court had not equipped them with the intellectual resources and argumentative framework to respond, Democrats were forced back to a formal, institutional defence of the Court. The unfortunate effect of standing on constitutional structure was to elevate the stakes and to shut down public discussion of the Court's reasoning, when in fact the legitimacy of the Court's judgments requires an active public discussion on precisely the issue of interpretive methodology.

Situating the migration of constitutional ideas in the discipline of comparative constitutional law

The gap between the intellectual architecture of constitutional law and the increasing speed of the migration of constitutional ideas poses a challenge not only to courts engaged in this practice, but also to the academics who study it. The migration of constitutional ideas across legal systems is rapidly emerging as one of the central features of contemporary constitutional practice. The migration of constitutional ideas occurs at various stages in the life-cycle of modern constitutions. The use of foreign law in constitutional interpretation is but one example. Another is the use of foreign constitutions as models in the process of constitution-making. Moreover, the migration of constitutional ideas occurs not only across national jurisdictions, but also between the national and the supranational level. The most prominent example of the latter is the process surrounding the drafting of the European Union's Draft Constitutional Treaty, which drew heavily upon the constitutional traditions of member states both for specific institutional prescriptions and, indeed, for the very idea of constitutionalism itself as a way to understand and describe the character and content of that project.

The migration of constitutional ideas has been identified to a limited extent at a descriptive level. But many basic conceptual issues have received almost no attention in the large and growing critical literature

[72] *Ibid.*, words of Representative Jerrold Nadler (D-NY).

on comparative constitutional law. For example, the existing literature has not addressed systematically the methodology of constitutional migration, nor the normative underpinnings of this enterprise. This lack of attention is all the more surprising given that comparative constitutional law is rapidly emerging as a major field within legal scholarship, as evidenced by two new case books,[73] and a dedicated journal.[74]

A brief review of some recent book-length studies on the cutting-edge of comparative constitutional scholarship quickly illustrates how the migration of constitutional ideas is not yet a central concern of the discipline. These important works fall into two broad categories. The first set, which includes Mitchel Lasser's *Judicial Deliberations*[75] and Peter Oliver's *The Constitution of Independence*,[76] consist of in-depth case studies of a handful of carefully selected constitutional systems in order to compare and contrast how they respond to common problems. The second set, which includes Trevor Allan's *Constitutional Justice*[77] and David Beatty's *The Ultimate Rule of Law*,[78] sets out universalist theories of constitutional law which direct constitutional courts to converge on common interpretations. Although they raise and address important questions, neither set explores the migration of constitutional ideas.

Consider the first body of work. In *The Constitution of Independence*, Oliver asks how the former British colonies of Australia, Canada, and New Zealand achieved constitutional independence from the United Kingdom through entirely legal means, via enactments of the Westminster Parliament. The difficulty is that under the doctrine of parliamentary sovereignty, the Westminster Parliament could theoretically repeal the enactments whereby independence was granted. Achieving total constitutional independence while respecting constitutional continuity seemed impossible. The doctrine of parliamentary

[73] V. Jackson and M. Tushnet, *Comparative Constitutional Law* (Foundation Press, New York, 1999); N. Dorsen *et al.*, *Comparative Constitutionalism: Cases and Materials* (Thomson/West, St Paul, MN, 2003).

[74] The *International Journal of Constitutional Law*.

[75] *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press, Oxford, 2004).

[76] *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, Oxford, 2005).

[77] *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2001).

[78] (Oxford University Press, Oxford, 2004).

sovereignty accordingly pushed colonies toward legal revolution, in order to establish an autochthonous source of constitutional title.

Oliver's richly documented and insightful analysis suggests that the answers offered by constitutional actors in the former colonies point to a reconceptualization of parliamentary sovereignty. What is of salience is how Oliver frames his subject of inquiry and his method of analysis. Oliver seeks to untangle and explain differences and similarities, observed and unobserved, between three constitutional orders, in order to interrogate basic assumptions about the relationship between parliamentary sovereignty, constitutional independence, and legality. Oliver engages in the *static* comparison of different legal orders, examining them as separate legal entities in isolation from one another. What Oliver is not interested in, and hence does not study, is whether these legal orders interact and influence one another, if at all. Thus, Oliver in effect describes four related but separate sets of conversations – amongst respective constitutional actors within Australia, Canada, and New Zealand over how to reconcile constitutional continuity with constitutional independence and amongst British legal actors over the same question. What Oliver chose to not explore is the additional question of how constitutional ideas regarding these fundamental constitutional questions migrated across the three former colonies.

Now let us move to the second body of work. In *Constitutional Justice*, Allan is explicitly universalist, setting out a constitutional theory framed around 'the basic principles of liberal constitutionalism', which is 'broadly applicable to *every* liberal democracy of the familiar Western type'.[79] His analysis shuttles back and forth between theoretical discussions of abstract principles of justice which, on Allan's account, inhere in the very idea of liberal democratic constitutional order, and judicial decisions drawn from a range of actual liberal democratic regimes in the common law world. The link between the two is intimate, since constitutional interpretation within particular jurisdictions 'is inevitably dependent' on 'more abstract principles of legitimate governance'.[80] Because of the tie between universal constitutional theory and adjudication within particular constitutional orders, Allan offers a narrative of legal convergence. As he writes, '[a] general commitment to certain foundational values that underlie and inform the purpose and

[79] Allan, *Constitutional Justice*, preface. [80] *Ibid.*

character of constitutional government ... imposes a natural unity on the relevant [common law] jurisdictions'.[81] Accordingly, 'these (common law) jurisdictions should, to that extent, be understood to *share* a common constitution'.[82]

Because of its extensive reliance on comparative materials, Allan's work counts as an important piece of comparative constitutional scholarship. What are worth dwelling on are the mechanisms of constitutional convergence in Allan's account. One obvious mechanism is constitutional theory itself, which sets a benchmark against which the particular decisions of specific common law jurisdictions can be assessed. If, as Allan suggests, deviations from this model are 'legal errors, reflecting failures to understand the full implications of the rule of law',[83] then the common constitutional theory can serve as a reason for courts to *correct* those legal errors. But Allan's account would also suggest that comparative materials which correctly apply his constitutional theory could also serve this role. Indeed, given that jurisdictions are engaged in a shared constitutional project, there is no reason against the citation of foreign cases. Allan is clearly receptive to the migration of constitutional ideas. But since *Constitutional Justice* is primarily a work of normative constitutional theory, Allan does not squarely address this question.

So where does this leave us? The migration of constitutional ideas still remains relatively unexplored in the vast and growing literature on comparative constitutional law. Detailed case studies of common issues across a small set of legal orders have consisted of static comparisons of different constitutional systems, but have not examined how and why constitutional ideas have migrated across systems. Normative constitutional theorists have set out universal accounts of liberal democratic constitutionalism, have called for those accounts to inform constitutional interpretation across jurisdictions, and are open to comparative engagement. They have not, however, examined how the migration of constitutional ideas figures into their narratives of convergence. To be sure, the existing literature addresses important questions. But the premise of this volume is that the field should go in new directions, and that the migration of constitutional ideas is desperately in need of serious academic attention.

[81] *Ibid.*, p. 4. [82] *Ibid.*, p. 5. [83] *Ibid.*

Comparative law and legal transplants

This volume also intervenes in a recent debate among comparative law theorists over legal transplants, sparked by Alan Watson's famous argument.[84] Boiled down to its essentials, Watson claimed that (a) legal transplants consist of transferring rules between legal systems, (b) such transfers are the primary engine of legal change, (c) the fact of widespread transfer suggests there is no close relationship between law and the broader society, and finally, (d) the discipline of comparative law should be oriented toward the study of transplants. In his well-known response, Pierre Legrand suggests that Watson's claims all rest on an underlying error – his reliance on an incorrect concept of a legal rule. For Legrand, laws are not merely 'bare propositional statement[s]', as Watson assumes, but rather 'an incorporative cultural form ... buttressed by important historical and ideological formations',[85] 'the frameworks of intangibles within which interpretive communities operate and which have normative force for these communities'.[86] Consequently, 'interpretation is ... the result of a particular understanding of the rule that is influenced by a series of factors ... which would differ if the interpretation had occurred in another place or in another era'.[87] Thus, a legal rule consists of 'both the propositional statement as such and its invested meaning – which jointly constitute the rule'.[88] Legal transplants could only occur if both the rule and its context could be transferred between legal systems, an exceedingly unlikely prospect. In its new context, a legal rule 'is understood differently by the host culture and is, therefore, invested with a culture-specific meaning at variance with the earlier one'.[89] In other words, it becomes a different rule. Legrand concludes that ' "legal transplants" are impossible'[90] and that 'at best, what can be displaced from one jurisdiction to another is, literally, a meaningless form of words'.[91]

Legrand's critique of Watson is nested in a larger theory of the purpose of comparative law.[92] It is an explicit response to the functionalist

[84] *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, Edinburgh, 1974).

[85] P. Legrand, What 'Legal Transplants' in D. Nelken and J. Feest (eds.), *Adapting Legal Cultures* (Hart Publishing, Oxford, 2001), p. 55 at p. 59.

[86] *Ibid.*, p. 65. [87] *Ibid.*, p. 58. [88] *Ibid.*, p. 60. [89] *Ibid.* [90] *Ibid.*, p. 57.

[91] *Ibid.* p. 63.

[92] P. Legrand, The Same and the Different in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, Cambridge, 2003), p. 240.

impulse, embodied most explicitly in the work of Zwiegert and Kötz, to identify sameness across legal systems. In their famous formulation, 'legal systems give the same or very similar solutions, even as to detail, to the same problems of life' and 'the comparativist can rest content if his researches through all the relevant material lead to the conclusion that the systems he has compared reach the same or similar practical results'. By contrast, they contend, 'if he finds that there are great differences or indeed diametrically opposite results, he should be warned and go back to check again whether the terms in which he posed his original questions were ... purely functional, and whether he has spread the net of his researches quite wide enough'.[93] Basil Markesinis has expressed similar views.[94] The point of these scholars is to explain away diversity, 'to be *above* diversity, to be intrinsically diversity-free'.[95] Instead, Legrand calls for difference in response to the urge for convergence. In his view, comparative lawyers should:

> ... resign themselves to the fact that law is a cultural phenomenon and that, therefore, differences across legal cultures can only ever be overcome imperfectly ... [T]hey must purposefully privilege the identification of differences across the laws they compare lest they fail to address singularity with scrupulous authenticity. They must make themselves into *difference engineers*.[96]

If comparative law is about difference, to Legrand, it would appear that legal transplants are not worthy of serious study. But as James Q. Whitman perceptively notes, it is possible to separate the study of transplants from the call for convergence. As he writes in direct response to Legrand:

> ... we must be careful not to slip into the error of believing that legal practices can be so rooted in their 'cultures' that they can never be transplanted ... [I]n raising doubts about the 'transplantation' of legal institutions, we run the risk of neglecting what is unquestionably a fundamentally important issue: legal systems *do* permit

[93] K. Zweigert and H. Kötz, *Introduction to Comparative Law*, T. Weir translator (3rd rev. edn, Oxford University Press, Oxford, 1988), pp. 39–40.
[94] *Foreign Law and Comparative Methodology: A Subject and a Thesis* (Hart Publishing, Oxford, 1997), p. 6.
[95] Legrand, The Same and the Different, p. 248. [96] *Ibid.*, p. 288.

> transcultural discussion and transcultural change. Indeed, they undergo transcultural change all the time.[97]

A case in point is the law of sexual harassment, which has been borrowed by Western European legal orders from the United States. The result has been 'a sexual harassment law that is strikingly different from its US model', since 'the new European sexual harassment law focuses on *dignitary* interests in a way that its US model does not'.[98] To be sure, legal rules are 'being more deeply transformed than the metaphor is capable of conveying'.[99] But to acknowledge that legal rules change as they migrate is far from Legrand's assertion that legal transplants are logically impossible. As Whitman concludes, '*some* kind of borrowing is surely taking place and we need *some* account of what is going on'.[100]

David Nelken's response to Legrand likewise accepts that his views on legal transplants are 'incontrovertible, but also unhelpful', for baldly to state that legal transplants cannot 'reproduce identical meanings and effects in different cultures'[101] directs the field away from the facts on the ground – i.e., 'that legal transfers are possible, are taking place, have taken place and will take place'.[102] Indeed, legal transplants are often deliberately sought after by the receiving legal order. Constitutional transitions, for example, have often looked to comparative constitutional materials as the engines of domestic constitutional change, as 'geared to fitting an imagined future'.[103] And so if Legrand wants comparative law 'to concentrate here mainly on how best to preserve existing differences, we would surely be missing the point'.[104]

The migration of constitutional ideas and dialogical interpretation

What Legrand has accomplished is to illustrate the inaptness of the legal transplant metaphor. But the shortcoming of a single metaphor is not a good reason to abandon metaphors altogether. As Kim Lane Scheppele

[97] The Neo-Romantic Turn in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, Cambridge, 2003), p. 312, pp. 341–2.
[98] *Ibid.*, p. 342. [99] *Ibid.* [100] *Ibid.*
[101] D. Nelken, Comparatists and Transferability in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, Cambridge, 2003), p. 437 at p. 442.
[102] *Ibid.*, p. 443. [103] *Ibid.* [104] *Ibid.*, p. 444.

notes in her contribution to this volume, '[m]etaphors matter in shaping thought, and so it is crucial to get the metaphors right for highlighting key features of the matter under discussion'. Metaphors highlight some features of phenomena, while casting shadow on others. So the challenge is to locate the right metaphor.

Unfortunately, the inadequacies of the idea of legal transplants in the world of comparative law are matched by its counterpart in comparative constitutional law, 'constitutional borrowing'. The dominance of this metaphor was confirmed by the devotion of a symposium to constitutional borrowing in the leading journal in the field, the *International Journal of Constitutional Law*.[105] Yet at the same time, the fact that only one article squarely endorsed constitutional borrowing (in South Africa), while the other contributions described the failures of constitutional borrowing in specific contexts, argued for the impossibility and illegitimacy of constitutional borrowing as a general matter, and advanced the claim that borrowing does not capture the full range of uses to which comparative constitutional materials are used, inadvertently highlights that the metaphor may have outlived its usefulness.

Scheppele catalogues the deficiencies of constitutional borrowing, each of which is redressed by the metaphor of migration. Ideas which are borrowed carry no implicit promise of return, although the idea of borrowing seems to require it. Migration does not carry the implication that constitutional ideas will necessarily be returned by the recipient jurisdiction. Moreover, it grants equal prominence to the fact of movement of constitutional ideas across legal orders, as well as to the actual ideas which are migrating.

[105] (2003) 1 *International Journal of Constitutional Law* 177–324, the relevant articles are: B. Friedman and C. Saunders, Editors' Introduction, p. 177; D. Davis, Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience, p. 181; L. Epstein and J. Knight, Constitutional Borrowing and Nonborrowing, p. 196; Y. Hasebe, Constitutional Borrowing and Political Theory, p. 224; W. Osiatynski, Paradoxes of Constitutional Borrowing, p. 244; C. Rosenkrantz, Against Borrowings and Other Nonauthoritative Uses of Foreign Law, p. 269; K. Lane Scheppele, Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence Through Negative Models, p. 296. For other related discussions see V. Jackson, Comparative Constitutional Federalism and Transnational Judicial Discourse (2004) 2 *International Journal of Constitutional Law* 91; W. Eskridge, United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism (2004) 2 *International Journal of Constitutional Law* 555; D. Law, Generic Constitutional Law (2005) 89 *Minnesota Law Review* 652.

Borrowing inaccurately connotes ownership on the part of the lender and hence ongoing control on the part of the source constitutional order over use by the recipient jurisdiction of that which has been borrowed. In contrast, the migration of constitutional ideas does not necessarily connote control on the part of the originating constitutional order. Indeed, the migration of constitutional ideas may occur without the knowledge or permission of the source jurisdiction. Migration is often covert and illicit.

Moreover, borrowing implies both that ideas are a positive influence and that they must be used 'as is', without significant modification or adaptation. But the metaphor of migration explicitly opens the door to a wider range of uses for constitutional ideas, and for the outcomes of the process of comparative engagement. Although the metaphor of borrowing does not preclude the possibility of adaptation and adjustment, the metaphor of migration is more amenable to this turn of events. Constitutional ideas may change in the process of migration. It is understood that the process of migrating changes that which migrates. Indeed, given the centrality of migration to the contemporary practice of constitutionalism, the truly interesting question is why and how such changes take place.

Finally, while borrowing shares the functionalist impulse of legal transplants, the migration of constitutional ideas encompasses a much broader range of relationships between the recipient jurisdiction and constitutional ideas. Neil Walker aptly summarizes the benefits of the migration metaphor in his contribution to this volume:

> Migration ... is a helpfully ecumenical concept in the context of the inter-state movement of constitutional ideas. Unlike other terms current in the comparativist literature such as 'borrowing', or 'transplant' or 'cross-fertilization', it presumes nothing about the attitudes of the giver or the recipient, or about the properties or fate of the legal objects transferred. Rather, as we shall develop in due course, it refers to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos.

Now to be sure, transplants or borrowings as traditionally understood are possible. However, the actual place of comparative materials often

does not fit well within a narrow functionalist account of constitutional convergence. Indeed, it is possible to take both constitutional difference and comparative engagement seriously. Difference is an inherently relative concept – one constitution is only unique by comparison with other constitutions that lack some characteristic which this constitution possesses. The Notwithstanding Clause in the Canadian Charter of Rights and Freedoms, for example, was a unique innovation in constitutional design because other bills of rights did not contain such a provision.[106] Since difference is defined in comparative terms, a keener awareness of the particular can be sharpened through a process of comparison. Comparative engagement, far from necessarily directing courts and legal actors toward constitutional convergence, can instead reinforce moments of constitutional difference.

Elsewhere, I have termed this use of comparative materials as 'dialogical'.[107] Dialogical interpretation in constitutional adjudication is an example of the type of comparative engagement that lies outside the framework of constitutional borrowing, but which falls within the scope of the migration of constitutional ideas. The goal is to use comparative materials as an interpretive foil, to expose the factual and normative assumptions underlying the court's *own* constitutional order. First, comparative materials are engaged to identify the assumptions embedded in positive legal materials. But in the process of articulating the assumptions underlying foreign jurisprudence, a court will inevitably uncover its own. By asking *why* foreign courts have reasoned a certain way, a court engaged in process of discursive justification asks itself why *it* reasons the way *it* does. And so the next move is to engage in a process of justification. If the assumptions are different, the question becomes

[106] S. 33 of the Constitution Act 1982.

[107] Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation (1999) 74 *Indiana Law Journal* 819 at 835; The Lochner Era and Comparative Constitutionalism (2004) 2 *International Journal of Constitutional Law* 1 at 52. My dialogical model of comparative constitutional interpretation is similar to Vicki Jackson's 'Engagement Model'. See V. Jackson, Constitutional Comparisons: Convergence, Resistance, Engagement (2005) 119 *Harvard Law Review* 109. As Ernie Young suggests, however, the actual reasoning in *Roper* is far from a model of comparative engagement: E. Young, Foreign Law and the Denominator Problem (2005) 119 *Harvard Law Review* 148. Similarly, Jeremy Waldron observes that '[o]ne of the most frustrating things about Roper, however, is that no one on the Court bothered to articulate a general theory of the citation and authority of foreign law'. J. Waldron, Foreign Law and the Modern Jus Gentium (2005) 119 *Harvard Law Review* 129 at 129.

why they are different. Comparative engagement highlights the contingency of legal and constitutional order, and opens for discussion and contestation those characteristics which had remained invisible to domestic eyes. Conversely, if the assumptions are similar, one can still ask whether those assumptions ought to be shared. The types of reasons offered will vary depending on the culture of constitutional argument in the jurisdiction of the interpreting court, and may encompass constitutional text, structure, history, precedent, and normative considerations.

Finally, the court is faced with a set of interpretive choices. A court may be able to justify the similarity with, or the difference between, the assumptions underlying its own constitutional order and a foreign one. Comparative engagement, then, leads to a heightened sense of legal awareness through interpretive clarification and confrontation. But the identification and attempted justification of constitutional assumptions through comparison may lead a court to challenge and reject those assumptions and search for new ones. In cases of constitutional similarity, a court may reject shared assumptions and may strike out in a new direction based on radically different premises. In cases of constitutional difference, a court may determine a difference to be unfounded, and may rely on comparative jurisprudence as the engine of legal change.

Frank Michelman has recently applied the dialogical method in an insightful comparison of the US and South African jurisprudence on affirmative action on the basis of race. US constitutional doctrine treats racial affirmative action as deserving of the highest constitutional scrutiny, and has rendered it unconstitutional in all but a narrow range of circumstances. The benign motivation underlying such racial classifications does not operate to save them. South African constitutional doctrine, by contrast, would appear to be open to treating racial affirmative action with considerably less suspicion, relying precisely on a notion of objective dignity which replicates the distinction between benign and invidious classifications which the US courts have rejected. Michelman asks: 'Is there a lesson for us? Might American jurists do well to take heed of the South African way and follow suit?'[108] Michelman

[108] Reflection (Symposium: Comparative Avenues in Constitutional Law Borrowing) (2004) 82 *Texas Law Review* 1737 at 1758. For another example of the application of the dialogical method of interpretation, see G. Jacobsohn, The Permeability of Constitutional Borders (2004) 82 *Texas Law Review* 1763.

traces South African constitutional doctrine to a 'consensually ascribed constitutional project ... of racially redistributive social transformation.'[109] US doctrine sounds in a different key, because of 'the tenacious streak of self-reliant individualism in our ideological soul'.[110] Against that backdrop, the South African jurisprudence should not be applied by US courts, because it is not 'compatible with American self-understanding'.[111] However, comparative engagement is fruitful, since '[b]y our comparative encounter with the emergent South African doctrine ... we ... clarify our picture of ourselves'.[112]

The dialogical method of comparative engagement may equip US courts to respond to Scalia's challenge. It may help the leaders of the US Supreme Court's comparative turn to reject the dichotomy between binding and non-binding uses of comparative materials, opening up the space for a third option which accords comparative materials a distinctive legal significance without raising the fears of judicial activism or threats to US sovereignty. The Court may itself be heading toward this understanding. Consider the following passage from *Roper*:

> *These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity.* Not the least of reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply *underscores the centrality of those same rights within our own heritage of freedom.*[113]

Viewed through the lens of dialogical interpretation, the Court's recourse to comparative materials can be understood as forcing the Court to identify and challenge the assumptions underlying US constitutional doctrine. The argument made by the majority was that the taking of a life of a juvenile is a disproportionate punishment for a capital offence because juveniles have diminished culpability owing to their vulnerability to influence and their susceptibility to immature and irresponsible behaviour. Until *Roper*, US constitutional law had reached the opposite conclusion. But comparative law opened up *US* legal doctrine to an alternative way of understanding *US* constitutional commitments – by

[109] *Ibid.*, 1760. [110] *Ibid.*, 1761. [111] *Ibid.*, 1758. [112] *Ibid.*
[113] *Roper*, at 1200 (emphasis added).

articulating a different viewpoint of the appropriate theory of punishment in a constitutional democracy. The question for the Court was whether this viewpoint resonated within US constitutional culture and was coherent with an intelligible and persuasive interpretation of constitutional doctrine and a textual guarantee which is 'central to the American experience and . . . to our present-day self-definition and national identity'. Hence comparative law simply 'underscored the centrality of those same rights within *our* [i.e., US] heritage of freedom'.

This volume: exploring the migration of constitutional ideas

The dialogical approach to the use of comparative materials is but one way of understanding the migration of constitutional ideas. The chapters in this volume tackle this phenomenon from a diverse range of methodological perspectives. Moreover, they draw on a rich range of constitutional practice. Together, the chapters fill a major gap in the critical literature. The focus on case studies was a conscious choice. A major impetus for the volume is that the practice of the migration of constitutional ideas has outpaced the theoretical frameworks through which scholars have hitherto approached the study of comparative constitutionalism. To recast our theories of comparative constitutional law, we must therefore turn to a detailed study of constitutional practice. As a consequence, many of the chapters draw on detailed examples from a wide variety of jurisdictions (e.g. Hungary, India, Canada, South Africa, Hong Kong, the European Union) on a diverse range of subject-matters (e.g. same sex marriage, freedom of expression, anti-terrorism legislation, judicial independence). A richer account of constitutional practice will serve as fodder for the theoretical reconceptualization of the discipline.

The volume is divided into four parts: The methodology of comparativism; Convergence toward a liberal democratic model?; Comparative constitutional law, international law and transnational governance; and Comparative constitutional law in action – constitutionalism post 9/11.

Part I: The methodology of comparativism

The globalization of the practice of modern constitutionalism has had a dramatic impact on the legal academy, by reinvigorating the study of

comparative constitutional law. The first part of the volume will address basic issues such as what the point of comparative inquiry is, and how that enterprise is to be undertaken, by bringing to bear the differing disciplinary perspectives of comparative law and comparative politics. These two disciplines take different approaches and offer different conceptual tools to explain the migration of constitutional ideas.

For students of comparative politics, as Ran Hirschl argues (On the blurred methodological matrix of comparative constitutional law), the goal of academic inquiry is both to describe observed patterns of constitutional phenomena and to explain their causes. Against this benchmark, Hirschl carefully reviews the legal literature on comparative constitutionalism, suggesting that it comes up short. The principal difficulty is that legal studies of comparative constitutionalism lack methodological rigour because they have failed to deploy the social scientific research methods of controlled comparison, research design, and case selection that are necessary to draw causal inferences. By contrast, Hirschl argues, scholars of comparative politics have successfully used a variety of case selection methodologies to explain the political origins and consequences of the recent spread of written constitutions and bills of rights. Hirschl concludes by suggesting that inference-oriented principles of case selection may likewise help scholars to explain why, when and how the migration of constitutional ideas occurs.

Mark Tushnet (Some reflections on method in comparative constitutional law) provides a striking contrast to Hirschl. Whereas Hirschl argues that legal studies of comparative constitutionalism have been methodologically deficient, Tushnet defends the existing literature and the methods it has employed, and situates the academic study of comparative constitutional law firmly within the mainstream of legal scholarship. Tushnet observes that the academic study of comparative constitutional law has not been methodologically innovative because it has relied on a series of well-established methods used in the study of comparative law. Tushnet suggests that despite its lack of methodological originality, the existing literature has nonetheless yielded intellectual dividends. There are three principal comparative law methodologies: normative universalism, functionalism, and contextualism. He then instructively distinguishes simple contextualism from expressivism. Tushnet provides a conceptual map of these methodologies with concrete illustrations from the academic literature on comparative constitutional

law. For each example, he explains what useful insights these studies have revealed. Rather than arguing for the superiority of one methodology over another, he suggests that each approach has its benefits and limitations.

If Tushnet's chapter provides a taxonomy of the distinctively legal approaches to comparative constitutional law found in the academic literature, Lorraine Weinrib (The postwar paradigm and American exceptionalism) also works from within a legal perspective, but proceeds from the practice of courts. Her target, however, is American exceptionalism – i.e., the refusal of many US courts and justices to engage in comparative analysis. American exceptionalism flows from the premise that constitutional judicial review is undemocratic and illegitimate, and views the migration of constitutional ideas as a form of judicial activism that further undermines the legitimacy of judicial review. Weinrib contrasts American exceptionalism with the 'postwar juridical paradigm' of rights protection, a common constitutional model she claims is found in a wide variety of liberal democracies (e.g. Israel, Canada, and Germany). This model views judicially enforced constitutional rights as crystallizations of inherent human dignity and comparative constitutional analysis as a natural by-product of the shared constitutional template that transcends jurisdictional boundaries. In other words, Weinrib provides an empirical account to back up Allan's narrative of constitutional convergence. While the dominant view is that the postwar model is totally foreign to the US experience, Weinrib argues that the rights-based conception has a pedigree in the decisions of the Warren Court, which themselves influenced constitutional courts in other countries. Recent debates over reference to comparative materials have been unnecessarily acrimonious as a result of the view that there are two competing conceptions of constitutionalism, only one with roots in US legal and political experience.

Part II: Convergence toward a liberal democratic model?

Lorraine Weinrib has offered a powerful model of comparative constitutional law that makes three controversial claims. First, the migration of constitutional ideas through judicial borrowings has facilitated the emergence of a common constitutional model for constitutions in a variety of jurisdictions. Second, the adoption of the

post-Second World War constitutional model has precipitated the convergence of constitutional analysis across both common law and civil law jurisdictions. Third, this emerging constitutional conversation has not, for the most part, involved the United States. The chapters in this section engage with each of these points.

Jeff Goldsworthy (Questioning the migration of constitutional ideas: rights, constitutionalism and the limits of convergence) challenges Weinrib's descriptive and normative accounts of constitutional convergence. He asks two questions: whether convergence toward a common constitutional model is a good thing, and whether judicial interpretation should serve as a vehicle for convergence. Goldsworthy answers both questions in the negative. Pointing to the diversity of institutional arrangements surrounding judicial review in England, New Zealand, and Canada, Goldsworthy suggests that significant variations continue to distinguish different liberal democratic constitutions. He also suggests that diversity and experimentation in constitutional design enable adaptation to differing political and cultural circumstances. Finally, Goldsworthy argues against convergence through constitutional interpretation. He asserts that such an interpretive stance fails to take seriously the constraints that text imposes on the legitimate role of the courts in elaborating constitutional meaning.

Michel Rosenfeld and András Sajó (Spreading liberal constitutionalism: an inquiry into the fate of free speech rights in new democracies) also argue against the existence of convergence, focusing on the case of free speech in Hungary. Free speech makes for an interesting case study because it is valued by many versions of liberal constitutionalism. Rosenfeld and Sajó use the Hungarian case to explore the contribution of the transplantation of liberal constitutional norms to the spread and consolidation of liberal constitutionalism. They pose a series of questions. Is the importation of such norms sufficient to pave the way to liberal constitutionalism, or must certain preconditions prevail or become developed prior to any successful transplantation? Can the importation of liberal constitutional norms have a significant impact notwithstanding the concurrent importation of non-liberal constitutional norms? Does the outcome of transplantation depend more on the nature of the rights and/or the approach to these imported rights, or more on contextual issues relating to conditions in the importing countries? The Hungarian case suggests two conclusions: that the importation of liberal free speech

norms can be linked to the implantation of liberalism to some degree, but also that historical, cultural, political, and institutional factors play an important part in determining the viability, scope, and possible depth of any possible adaptation of imported constitutional norms, which speaks to Whitman's concerns. It also suggests the need to take a longer-term view of the project of liberalism, as the authors argue that apparently illiberal influences can be co-opted into the service of liberalism.

Jean-François Gaudreault-DesBiens (Underlying principles and the migration of reasoning templates: a trans-systemic reading of the *Quebec Secession Reference*) addresses the possibility of constitutional convergence across the divide between the common law and civil law worlds, as Weinrib suggests has occurred. He argues that most students of comparative constitutionalism have assumed this divide to be an insurmountable barrier to the migration of constitutional ideas. In particular, while it is often supposed that unwritten legal principles can migrate freely among common law jurisdictions, it is also presumed that the centrality of text to legal reasoning in civilian systems makes them impervious to such arguments. Gaudreault-DesBiens argues, however, that this view is based on a caricature of the civil law tradition. Properly understood, the civil law tradition holds that legal texts are always based on underlying and unwritten legal principles on which courts may rely to supplement textual provisions. Indeed, unwritten principles may even provide courts a justification for refusing to follow explicit textual provisions in a given case. He argues, counter-intuitively, that this interpretive methodology has in fact migrated from the civil law into the common law world of Canadian public law. His principal example is the judgment of the Supreme Court of Canada in the *Quebec Secession Reference*, often offered as the leading example of unwritten, *common law* constitutionalism.

Finally, Brenda Cossman (Migrating marriages and comparative constitutionalism) takes up the claim that the US constitutional system is impervious to comparative influence. As a case study, she examines the impact of the Canadian jurisprudence on same sex marriage in the United States. Cossman agrees with Weinrib that the judgments will have little or no direct impact on US legal developments because of US exceptionalism. She argues, however, that the denial by US courts of the validity of Canadian marriages on US soil constitutes itself a form, albeit a thin one, of recognition: if same sex marriage is valid in Canada, it is no

longer *unthinkable* in the United States. She suggests, further, that a narrow focus on the migration of constitutional doctrine misses out on the important role that cultural representations of foreign constitutional developments play in US constitutional debates. Cultural representations of same sex marriages of Americans that have taken place in Canada are significant interventions in US constitutional debates around same sex marriage because they reconstitute the very nature of the gay and lesbian subject, and the very nature of marriage. Cossman's conclusion is that comparative constitutionalism needs to broaden its methods beyond formal sources of constitutional law to encompass a cultural studies dimension.

Part III: Comparative constitutional law, international law and transnational governance

Whereas many of the chapters explore the migration of constitutional ideas across national jurisdictions, Mayo Moran and Mattias Kumm enter this debate from a different angle. International law (especially international human rights law) increasingly serves as a source of constitutional ideas for domestic legal orders through judicial interpretation. Moran and Kumm accordingly address the question of constitutional migration through the lens of traditional models for the reception of international law into domestic law.

Mayo Moran (Inimical to constitutional values: complex migrations of constitutional rights) approaches this issue by linking two hitherto unconnected debates. The first is the use of international and comparative law in domestic constitutional adjudication, and the second is the use of domestic constitutional law in private law adjudication. Both phenomena tend to occur in the same jurisdictions, such as South Africa. Moran suggests that this is not surprising, since both rely on a conception of legal sources that rejects the traditional fixation with the presence or absence of binding sources of law. Constitutional practice points to a more nuanced and complex theory of legal sources – one where the *values* of international and comparative law exert some kind of mandatory effect upon domestic constitutional law, and where the *values* of constitutional law exert a comparable effect on domestic private law, even when international and constitutional legal rules do not apply directly. She terms this effect 'influential authority'.

Mattias Kumm (Democratic constitutionalism encounters international law: terms of engagement) makes a similar point, albeit by focusing exclusively on the migration of constitutional ideas from international law. Kumm suggests that debates over the place of 'binding' international law in domestic constitutional adjudication have proceeded, unhelpfully, on an all-or-nothing basis. As an alternative, he suggests a differentiated approach within domestic constitutional doctrine directly to engage with the reasons offered by proponents and opponents of the use of international law in domestic adjudication. These are formal concerns relating to the idea of international legality, jurisdictional concerns relating to subsidiarity, procedural concerns relating to participation and accountability, and substantive concerns relating to individual rights. Different treaties would be treated differently. Moreover, constitutional doctrine would shift from rules of conflict to rules of engagement. Kumm finds these elements in the jurisprudence of the European Court of Human Rights and the European Court of Justice. He then applies this framework to suggest that UN Security Council anti-terrorism resolutions do not have a strong claim to be applied in domestic courts, because of procedural concerns regarding UN Security Council decision-making.

Moran and Kumm assess the legitimacy of importing constitutional ideas from international law from within the standpoint of domestic constitutional law. David Schneiderman and Neil Walker address a slightly different question of legitimacy, asking whether the conceptual lens of constitutionalism has migrated and should migrate to the international legal realm to serve as a normative standard for transnational governance. Schneiderman (Constitution or model treaty? Struggling over the interpretive authority of NAFTA) explores this issue in the context of the North American Free Trade Agreement (NAFTA), where the very idea of referring to NAFTA as a constitution has been a source of political controversy. Commentators writing in the vein of political economy have invoked the language of constitutionalism because NAFTA's protections for investors replicate and expand upon protections for property rights typically found in domestic constitutions. International lawyers have resisted the application of a constitutional framework of analysis to NAFTA, emphasizing NAFTA's continuity with existing international treaties. Schneiderman argues that the language of constitutionalism should migrate to NAFTA, because it provides a

normative framework through which to assess the legitimacy of restrictions that NAFTA imposes on democratic decision-making.

Neil Walker (The migration of constitutional ideas and the migration of *the* constitutional idea: the case of the EU), by contrast, suggests that the use of the language of constitutionalism at the transnational level in the European Union (EU) raises problems of legitimacy, instead of resolving them. At the domestic level, Walker suggests that the migration of constitutional ideas has been challenged on the grounds of democratic legitimacy and cultural specificity. He argues that in the EU context, the challenge of democratic legitimacy, although on its face a challenge even more profound than in the national context, is on reflection still significant but not decisive against the legitimacy of constitutional migration. But he also argues that the question of the specificity of the EU legal culture, though superficially *less* of a problem than in the traditional intra-state context because it owes its legal pedigree to national systems, actually presents a more fundamental and resilient set of problems whose resolution remains a matter of deep and long-term uncertainty. The migration of constitutional ideas to the EU carries with it the migration of *the* constitutional idea to the EU as a fully constitutional polity. This would challenge the view that the EU is a partial and relational supranational polity.

Part IV: Comparative constitutional law in action – constitutionalism post 9/11

The final set of chapters examines the migration of constitutional ideas in the wake of 9/11, as a lens through which to explore the themes developed in the earlier chapters. Constitutionalism post 9/11 raises acute dilemmas for liberal democratic constitutions. The challenge posed by mass terrorism arguably threatens the survival of liberal democratic constitutional orders. Legal responses to terrorism accordingly can be viewed as acts of constitutional protection and preservation. But those very same responses often put considerable strain on the rule of law. The problem is that compliance with the rule of law may impede the effectiveness of responses to terror, arguably jeopardizing the very existence of the constitutional order itself. This shared dilemma has fuelled the migration of constitutional ideas, as jurisdictions search for the right balance between the promotion of security and respect for

legalism. Accordingly, 9/11 has forced the development and elaboration of Weinrib's shared constitutional model in the context of the 'war on terrorism'. It illustrates how this shared model is developing, quite literally, through comparative conversation, and is therefore a test-case for her empirical claims of constitutional convergence. Constitutionalism post 9/11 is worth examining closely for another reason. As Kim Lane Scheppele and Kent Roach demonstrate, post 9/11, the constitutional ideas which have migrated are often actually anti-constitutional ideas. And so, whereas the migration of constitutional ideas has typically been associated with enhanced respect for human rights and the rule of law, post 9/11 it has arguably resulted in their dilution. Constitutionalism post 9/11 therefore raises the question of whether constitutional convergence is an unqualified good – with strong suggestions from this volume for the persuasiveness of negative responses.

Kim Lane Scheppele (The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency) opens this section by exploring the tension between the requirements of international law and domestic constitutional law in the war on terror. Typically, international law is viewed as a source of constitutional ideas to enhance domestic constitutional protections, as is the case with the law of international human rights. But Scheppele argues that in the war on terror, international law has been a source of anti-constitutional ideas. In particular, UN Security Resolution 1373 obliged member states to criminalize terrorism, without defining it or requiring that states comply with human rights norms. This gap has been filled by the enforcement practices of the Security Council's Counter-Terrorism Committee, which has pushed states to adopt measures raising serious questions about the repression of political dissent, the arbitrariness of executive power, and the bypassing of judicial determinations of fact that have become characteristic of terrorism prosecutions around the world. Scheppele also argues that one should not mistake convergence for constitutional borrowing in the traditional, horizontal sense of one state borrowing from an equal other, since the adoption of common legal frameworks in her case study has resulted from international pressure exerted vertically by the Counter-Terrorism Committee of the UN Security Council.

In contrast, Kent Roach (The post-9/11 migration of Britain's Terrorism Act 2000) argues that the migration of constitutional ideas

in the anti-terrorism field has been marked by the surprising resilience of national jurisdictions against anti-constitutional ideas from other jurisdictions. Roach's principal focus is the impact of the United Kingdom's Terrorism Act 2000 on the drafting of anti-terrorism legislation in the former colonies of Australia, Canada, Hong Kong, Indonesia, South Africa, and the United States. The Act's definition of terrorism reflects one view of the correct balance between anti-terrorism policies and the constitutional value of free speech. Roach's argument is that precisely because of the United Kingdom's status as a former colonial power, the constitutional ideas contained in the British statute had a much greater impact on these jurisdictions than corresponding US legislation. But the constitutional politics of each jurisdiction had the effect of significantly narrowing the scope of the definition of terrorism. The lesson is that even in the anti-terrorism context, domestic law, politics, and history collaborate to ensure that the migration of constitutional ideas does not necessarily produce convergence.

The final chapter is from Oren Gross ('Control systems' and the migration of anomalies), who explores the history of 'control systems', whereby imperial powers such as the United Kingdom and France applied an emergency regime to a dependent territory, while purporting to maintain a state of legal normalcy in the controlling territory itself. The hope is that the situation of legal exception would not migrate across territorial boundaries and contaminate the normal legal order in the controlling territory. However, history has taught us that emergency mechanisms have had a tendency to migrate across territorial boundaries. For example, the curtailment of the right to silence in Northern Ireland eventually found its way into ordinary criminal legislation, and the use of torture in Algeria by French forces made its way into France. And so the stern lesson for constitutionalism post 9/11 is the inability to restrain the migration of constitutional (or anti-constitutional) ideas across territorial boundaries within a single control system – a cautionary tale for the United States, in light of the interrogation techniques it has employed in Guantanamo Bay and Iraq.

Conclusion

Roger Alford has recently written that 'there is a remarkable absence of any serious attempt to square' the migration of constitutional ideas with

constitutional theory.[114] Our discipline is out of step with the phenomenology of a rapidly developing constitutional practice, and so has lost its ability to describe and make sense of a shift in the culture of constitutional argument. The goal of this volume is to tackle that task.

What is distinctive is how we address this challenge. Alford proceeds from established theories of constitutional interpretation in the US constitutional order, and attempts fit the increasing comparative engagement by the US Supreme Court within those theories. This is a top-down approach which takes existing ways of thinking about constitutional practice as a given. By contrast, we begin from the bottom up. The task of the constitutional theorist is to identify the reasons offered by courts and other legal actors for the recourse to comparative materials, and to weave those justifications into coherent accounts. Constitutional theories emerge from and seek to justify our interpretive practice. By working from the ground up through case studies drawn from a broad variety of jurisdictions, this volume is a preliminary step in recasting the conceptual apparatus of comparative constitutional law. And so the next step is for scholars to build upon this work, and further to enrich both our accounts of the migration of constitutional ideas and the theories we develop to explain and justify it.

[114] R. Alford, In Search of a Theory for Constitutional Comparativism (2005) 52 *UCLA Law Review* 639 at 641. Also see R. Alford, Roper v. Simmons and Our Constitution in International Equipoise (2005) 53 *UCLA Law Review* 1.

PART I

The methodology of comparativism

2

On the blurred methodological matrix of comparative constitutional law

RAN HIRSCHL

These are relative heydays for comparative constitutional law scholarship. After a near century of embedded parochialism and intellectual stalemate, the field has recently seen a certain renaissance. From comparative inquiries of constitutional transformation to sophisticated analyses of comparative constitutional jurisprudence, the field has made a tremendous leap forward over the last few years. Even the US Supreme Court – perhaps the last bastion of parochialism among the world's leading constitutional courts – has recently joined the comparative-reference trend. But in spite of the growing interest in comparative constitutional systems, too little has changed in the epistemology and methodology of comparative constitutional law. Fundamental questions concerning the very purpose and rationale of comparative inquiry (and how that enterprise is to be undertaken) remain largely outside the purview of mainstream constitutional law scholarship.[1] Genuinely comparative, problem-driven, and *inference-oriented* scholarship is still difficult to come by. More specifically, comparative constitutional law scholarship produced by legal academics often overlooks (or is unaware of) basic methodological principles of controlled comparison, research design, and case selection. The chapter addresses this lacuna by contrasting the approaches of legal academics and political scientists to the same sets of comparative constitutional

I thank Sujit Choudhry and Ayelet Shachar for their very helpful comments on earlier drafts of this chapter.

[1] See e.g. V. Jackson and M. Tushnet (eds.), *Defining the Field of Comparative Constitutional Law* (Praeger, Westport, CT, 2002). While illuminating in many respects, none of this volume's chapters, its bold title notwithstanding, addresses the issue of methodology in the study of comparative constitutional law.

phenomena. It suggests that while the study of comparative constitutional law by legal academics has contributed significantly to the accumulation of knowledge through the development of novel concepts and thinking, it has, for the most part, fallen short of advancing knowledge through tracing causal links among pertinent variables, let alone contributing to theory building through substantiation or refutation of testable hypotheses.

The discussion proceeds in three parts. I begin by identifying four types of scholarship labelled as comparative in the field of constitutional law. Only one of these categories of comparative studies draws upon controlled comparison and inference-oriented case selection principles in order to assess change, explain dynamics, and make inferences about cause and effect through systematic case selection and analysis of data.

In the second part, I proceed to identify and elucidate basic principles of controlled comparison and inference-oriented case selection often drawn upon by social scientists studying constitutional law and courts. The deployment of such principles is crucial for scholarship that seeks to *explain* – not merely to classify, describe, criticize, or endorse – comparative constitutional phenomena. I subsequently illustrate the successful application of these principles in a few recently published and genuinely comparative works dealing with the political origins of judicial review and judicial behaviour.

I conclude by suggesting that while there are many valuable approaches and methods to study comparative public law, the aspiration to make valid causal claims, let alone advance robust normative claims, warrants adherence to more methodologically rigorous principles of case selection and research design. Attention to, and reliance on, such inference-oriented principles of case selection may help scholars studying the migration of constitutional ideas to make valuable causal claims as to why, when, and how such migration is likely to occur. It would also allow the field as a whole to move beyond the multiple-description method commonly deployed in comparative legal analyses toward the next level of comparative inquiry: causal inference through controlled comparison.

Four types of comparative inquiry

In the field of comparative constitutional law the term 'comparative' is often used indiscriminately to describe what are, in fact, four different types of scholarship.

The first and most basic of these four types is free-standing, single-country studies that are mistakenly characterized as comparative mainly because they concern a country other than the author's own. Still common in doctrinal comparative law circles, this genre of scholarship often takes the form of interesting yet quite idiosyncratic aspects of constitutional law such as freedom of religion in Guatemala, the right to die in Bulgaria, or standing rights in Kazakhstan, with little or no reference to comparable constitutional practices in other countries. Some of these works tend to confuse foreign law with comparative law, essentially studying the former while professing to study the latter. In its more taxonomical guise, this thread of scholarship assesses the genealogy of a given country's constitutional system, and its compatibility with somewhat anachronistic classifications of 'legal traditions', 'family trees for legal systems', and the like. Basic methodological considerations pertaining to case selection are often overlooked; the sole justification for most of these single-country studies is more often than not the author's acquaintance with the constitutional system about which he or she is writing. A few of these studies have an eye to existing case studies that others have already researched. Others provide thorough, encyclopaedic-like knowledge of certain aspects of constitutional law in the examined polity.[2] At its best, this type of scholarship may contribute to the mapping and taxonomy of the still under-charted terrain of constitutional law worldwide.

A second, and increasingly fashionable, enterprise within the field of comparative constitutional law is geared toward self-reflection or betterment through analogy, distinction, and contrast. This type of comparative reference is often derivative of jurists' near permanent quest for what they deem the *right* or *just* solution for a given constitutional challenge their polity has been struggling with. It echoes, in some cases more than in others, comparative law's traditional quest for finding 'the best' or most suitable rule across legal systems. The underlying assumption here is that whereas most relatively open, rule-of-law polities face essentially the same set of constitutional challenges, they may adopt quite different means or approaches for dealing with these challenges. By

[2] See e.g. D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, Duke University Press, Durham, NC, 1997); L. Sólyom and G. Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press, Ann Arbor, 2000).

referring to constitutional jurisprudence and practices of other presumably similarly situated polities, we might be able to gain better understanding of our own set of constitutional values and structures and enrich, and ultimately advance, a more cosmopolitan or universalist view of our constitutional discourse. At a more concrete level, constitutional practice in a given polity might be improved by emulating pertinent constitutional mechanisms developed elsewhere.[3] Likewise, comparative constitutional law has been offered as a guide to constructing new constitutional provisions and institutions, primarily in the context of 'constitutional engineering' in the post-authoritarian world or in ethnically divided polities.[4]

In practice, this type of comparative work usually takes the form of reference by judges and legal academics to constitutional jurisprudence or practices of other countries. More often than not, these studies refer to established constitutional democracies such as the United States, Germany, Canada, etc. Within legal academia, this type of comparative reference often takes the form of critical commentaries on contentious supreme court rulings, drawing upon, *inter alia*, the alternative dealing of apex courts of other jurisdictions with roughly equivalent problems. However, the most obvious manifestation of the comparative reference genre is what scholars have identified as the ever-accelerating trend towards inter-court borrowing and the establishment of a globalized judicial discourse.[5] Constitutional courts worldwide increasingly rely on comparative constitutional jurisprudence to frame and articulate their own position on a given constitutional question. This phenomenon is particularly evident with respect to constitutional rights jurisprudence. As Sujit Choudhry noted, '[c]onstitution interpretation across the globe is taking on an increasingly cosmopolitan character, as comparative jurisprudence comes to assume a central place in constitutional adjudication'.[6]

[3] See e.g. M. Tushnet, The Possibilities of Comparative Constitutional Law (1999) 108 *Yale Law Journal* 1225.

[4] The literature here is too vast to cite. A representative work of this genre is A. Reynolds (ed.), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford University Press, Oxford, 2002).

[5] See A.-M. Slaughter, A Typology of Transjudicial Communication (1994) 29 *University of Richmond Law Review* 99; A.-M. Slaughter, *A New World Order* (Princeton University Press, Princeton, NJ, 2004).

[6] S. Choudhry, Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation (1999) 74 *Indiana Law Review* 819 at 820.

While increasingly fashionable and certainly more 'comparative' than free-standing, single-country studies, the comparative reference approach is still lacking in methodological coherence. All too often, it is pursued (primarily by judges, I should note) through an eclectic, at times even scant and superficial, reference to foreign constitutional jurisprudence – typically rights jurisprudence. Case selection is seldom systematic, and it rarely pays due attention to the context and nuances that have given rise to similar or alternative interpretation or practice of constitutional norms. In short, from a methodological standpoint, we have yet to encounter a coherent theory of inter-court constitutional borrowing.

Comparative scholarship has more to offer than self-reflection or normatively driven advancement of cosmopolitan values through comparative reference. Comparison is a fundamental tool of scholarly analysis. It sharpens our power of description, and plays a central role in concept formation by bringing into focus potential similarities and differences among cases.[7] This end is precisely the rationale of a third (and arguably more sophisticated) type of comparative inquiry that is meant to generate rich concepts and analytical frameworks for thinking critically about constitutional norms and practices. This is done mainly through a quest for detailed understanding of how people living in different cultural, social, and political contexts deal with constitutional dilemmas that are assumed to be common to most modern political systems.

More often than not, the third type of comparative scholarship takes a universalist tone, emphasizing the broad similarity of constitutional challenges and functions across relatively open, rule-of-law polities. By studying various manifestations of and solutions to roughly analogous constitutional challenges, our understanding of key concepts in constitutional law such as separation of powers, statutory interpretation, or equality rights, to pick a few common examples, becomes more sophisticated and analytically sharper. *Concept formation through multiple description* is the methodological approach this guise of comparative study often adheres to.

[7] D. Collier, The Comparative Method: Two Decades of Change in D. Rustow and K. Erickson (eds.), *Comparative Political Dynamics: Global Research Perspectives* (Harper Collins, New York, 1991), p. 105.

This approach serves as the organizing principle of most leading textbooks in comparative constitutional law.[8] Each chapter in Vicki Jackson and Mark Tushnet's *Comparative Constitutional Law*, for example, is devoted to an exploration of a major aspect or concept of modern constitutional law as it manifests itself in a few pertinent polities. A similar organizing principle is applied in David Beatty's *The Ultimate Rule of Law*, where the author devotes chapters to comparative judicial interpretation of concepts such as liberty, equality, and proportionality.[9] The same methodological rationale underlies recent collections of 'country essays' on themes such as judicial independence;[10] gender equality;[11] constitutionalism in the Islamic world;[12] and transition from authoritarian to constitutional democratic regimes in Eastern Europe or Latin America.[13]

Recent works dealing with innovative strategies for mitigating the tension between constitutionalism and democracy provide a good substantive illustration of the concept formation through multiple description approach. From the Canadian Charter's 'limitation' and 'override' clauses to the New Zealand Bill of Rights' 'preferential' model of judicial review to the British Human Rights Act 1998's 'declaration of incompatibility', the new constitutionalism world has become a living laboratory of constitutional innovation. Drawing upon a comparative description of mechanisms adopted throughout the world of new constitutionalism, comparativists in Canada and Britain, for example, have been able to enrich the conversation concerning the questionable democratic credentials of constitutionalism and have succeeded at

[8] See e.g. V. Jackson and M. Tushnet, *Comparative Constitutional Law* (Foundation Press, New York, 1999); N. Dorsen *et al.*, *Comparative Constitutionalism: Cases and Materials* (Thomson/West, St Paul, MN, 2003); D. Kommers *et al.*, *American Constitutional Law: Essays, Cases, and Comparative Notes* (2nd edn, Rowman & Littlefield, Lanham, MD, 2004).

[9] D. Beatty, *The Ultimate Rule of Law* (Oxford University Press, Oxford, 2004).

[10] See e.g. P. Russell and D. O'Brien (eds.), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University Press of Virginia, Charlottesville, 2001).

[11] See e.g. B. Baines and R. Rubio-Marn (eds.), *The Gender of Constitutional Jurisprudence* (Cambridge University Press, New York, 2005).

[12] See e.g. N. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (State University of New York Press, Albany, 2001).

[13] Two good examples of this genre are W. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* (Praeger, Westport, CT, 2000) and H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press, Chicago, 2000).

bringing new life to the somewhat exhausted debate in the United States concerning the counter-majoritarian difficulty.[14]

Drawing upon the same rationale for comparative work, recent studies have successfully generated a more nuanced concept of inter-court borrowing of constitutional ideas by introducing a distinction between positive and negative borrowing. The former type of borrowing pertains to judicial reliance on foreign constitutional concepts as a tool for improving the borrowing polity's own constitutional practices; the latter emphasizes explicit distinction and contrast from other polities' imperfect constitutional experiences as a means for justifying a given polity's advanced constitutional practices.[15]

Another example of 'concept thickening through multiple description' work is provided by recent comparative analyses of constitutional provisions and jurisprudence concerning 'positive' social and economic rights (e.g. the right to basic housing, education, health care).[16] By expanding our knowledge of the various possibilities to advance progressive notions of distributive justice through constitutional and interpretive innovation in Belgium, India, Hungary, or South Africa, such comparative studies not only elevate the level of sophistication in discussing the concept of positive constitutional entitlements, but also inject new life into the near-moribund issue of welfare rights in North American constitutional law.

In short, the vast majority of high-quality comparative constitutional law scholarship produced by legal academics over the past decade has contributed tremendously not only to the mapping and taxonomy of the new constitutionalism world, but also to the creation of pertinent conceptual frameworks for studying comparative constitutionalism. Indeed, one should never underestimate the significance of the 'concept formation through multiple description' level of comparative inquiry. We acquire a far more complex, nuanced, and sophisticated understanding of what, say, 'solids' or 'mammals' mean by studying the

[14] See e.g. J. Hiebert, New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights? (2004) 82 *Texas Law Review* 1963.

[15] S. Choudhry, The *Lochner* Era and Comparative Constitutionalism (2004) 2 *International Journal of Constitutional Law* 1; K. Scheppele, Aspirational and Aversive Constitutionalism: The Case For Studying Cross-constitutional Influence Through Negative Models (2003) 1 *International Journal of Constitutional Law* 296.

[16] See e.g. M. Tushnet, Social Welfare Rights and the Forms of Judicial Review (2004) 82 *Texas Law Review* 1895.

variance and commonality among exemplars within their respective categories. As is well known, Charles Darwin's expeditions to the Galapagos on the Beagle (1832–6) were initially driven by a modest attempt to collect and identify new species of plants and animals unknown to scholars in nineteenth-century Europe. Darwin's various findings served as the basis for his *Origin of Species* and the development of one of the most influential theories of the modern era.

However, while the systematic accumulation of facts, multifaceted descriptions of specific phenomena, and the development of thick concepts and thinking frameworks are all indispensable to the advancement of knowledge, the key distinguishing mark of what King, Keohane, and Verba called a unified logic of scientific inquiry is *making inferences about cause and effect* that go beyond the particular observations collected.[17] Whereas the third category of comparative scholarship does a good job of assessing the scope, extent, and nature of certain pertinent phenomena, it provides merely limited 'methodology proof' explanations as to the origins and causes of such phenomena.

The fourth type of comparative studies attempts to move beyond the level of thick description and concept formation toward the ultimate goal of social inquiry: *theory building through causal inference*.[18] It is based on the notion that a good theory requires clarifying concepts *as well as* offering causal explanations for observed phenomena. Since their birth as autonomous academic disciplines, the social sciences have always been influenced by diverse approaches to social inquiry. Granted, the joint inference-oriented goal of quantitative and qualitative methods in the social sciences is not uncontested. However, the aspiration to *explain*, rather than merely describe, social (including legal) phenomena through the validation or refutation of prepositions about the world is common to all core quantitative and qualitative, behaviouralist and historical-interpretive approaches to social inquiry used in disciplines such as sociology and political science, let alone in generally more positivist disciplines such as social psychology and economics.[19]

[17] G. King *et al.*, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton University Press, Princeton, NJ, 1994).

[18] *Ibid.*, p. 8.

[19] See e.g. H. Brady and D. Collier (eds.), *Rethinking Social Inquiry: Diverse Tools, Shared Standards* (Rowman & Littlefield, Lanham, MD, 2004); D. Laitin, The Perestroikan Challenge

Such inference-oriented (quantitative and/or qualitative) research in the social sciences requires: (1) formulation of testable hypotheses, models, or arguments concerning possible causal links among well-defined variables; (2) confirmation or disconfirmation of these hypotheses, models, or arguments through pertinent research design, data collection and analysis; and (3) generation of conclusions that are likely to be true, based largely on inductive inference. Controlled comparison and methodologically astute case selection and research design is a critical tool in accomplishing these goals. It is precisely due to its traditional lack of attention to principles of controlled comparison and case selection that comparative constitutional law scholarship produced by legal academics, its tremendous development in recent years notwithstanding, often falls short of advancing knowledge in the manner sought after by most social scientists.[20]

Principles of case selection in inference-oriented comparative studies

Experimental research, statistical analysis of large data sets ('large-N'), and systematic examination of a small number of cases ('small-N') are the three major ways of causal inference and theory testing within the scientific approach to the study of politics and society.[21] The third category – small-N studies – is by far the most prevalent type of inquiry employed by scholars of comparative constitutional law and politics. In the following pages, I explain the logic of the basic principles of research design and case selection foundational to the small-N method of theory testing through comparative inquiry. These principles are: (i) the 'most similar cases' principle; (ii) the 'most different cases' principle; (iii) the 'prototypical cases' principle; (iv) the 'most difficult cases' principle; and (v) the 'outlier cases' principle. While prominent legal scholars do

to Social Science (2003) 31 *Politics & Society* 163; S. Tarrow, Bridging the Quantitative-Qualitative Divide in Political Science (1995) 89 *American Political Science Review* 471.

[20] A notable exception to this observation is the genuinely theory-oriented, economic analysis of constitutionalism. See e.g. R. Cooter, *The Strategic Constitution* (Princeton University Press, Princeton, NJ, 2000); or the symposium on Economic Analysis of Constitutional Law (2002) 3 *Theoretical Inquiries in Law*.

[21] For further discussion see King *et al.*, *Designing Social Inquiry*; Brady and Collier, *Rethinking Social Inquiry*; I. Shapiro *et al.* (eds.), *Problems and Methods in the Study of Politics* (Cambridge University Press, Cambridge, 2004).

occasionally follow one or more of these five principles, the vast majority of legal scholarship in the field of comparative constitutional law, and comparative law in general, either is unaware of these principles, or simply overlooks them. I illustrate the logic of these causal inference-oriented case selection principles through a discussion of a few comparative works that study the political construction of judicial review. My aim is to demonstrate how adherence to these simple principles of case selection may elevate the field of comparative constitutional law beyond the third type of comparative examination – concept formation through multiple description – to the next level of comparative inquiry: causal inference through controlled comparison.

The 'most similar cases' logic

Initially put forth by John Stuart Mill in *A System of Logic* (1843), and later refined and applied to the social sciences by a number of authors in the 1960s and 1970s, the 'most similar cases' research design (Mill's 'method of difference') and 'most different cases' research design (Mill's 'method of agreement') serve as two standard case-selection principles in inference-oriented, controlled comparison in qualitative, 'small-N' studies.[22] According to the 'most similar cases' approach to selecting comparable cases, researchers should compare cases that have similar characteristics, or cases that are matched on all variables or potential explanations that are not central to the study, but vary in the values on the key independent and dependent variables. By controlling for variables or potential explanations that are not central to the study, the most similar cases principle helps 'isolate' the great significance of the variance on the key independent variable in determining the variance on the dependent variable, thereby allowing for partial substitute for statistical or experimental control. What is more, because the most similar cases principle suggests that comparable cases should be selected so as to hold

[22] See A. Przeworski and H. Teune, *The Logic of Comparative Social Inquiry* (Wiley-Interscience, New York, 1970); A. George and T. McKeown, Case Studies and Theories of Organizational Decision Making (1985) 2 *Advances in Information Processing in Organizations* 21; C. Ragin, *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies* (University of California Press, Berkeley, 1989); A. Lijphart, Comparative Politics and Comparative Method (1971) 65 *American Political Science Review* 682; S. Verba, Some Dilemmas of Political Research (1967) 20 *World Politics* 111.

constant non-key variables while isolating the explanatory power of the key independent variable, this approach is the most adequate for a diachronic, cross-time comparison within the same polity (e.g. a study of the impact of a certain change through a pre-change/post-change comparison).

An effective 'real life' application of the most similar cases logic to the study of comparative constitutional law and politics is provided by Tom Ginsburg's *Judicial Review in New Democracies*.[23] The book examines the evolution of independent constitutional courts during early stages of democratic liberalization in post-authoritarian polities. In a nutshell, Ginsburg argues that the establishment of constitutional review in new democracies is largely a function of politics and interests, not a reflection of macro-cultural or societal factors. Specifically, judicial review may provide 'insurance' for self-interested, risk-averse politicians who are negotiating the terms of new constitutional arrangements under conditions of political deadlock or systemic uncertainty.

To substantiate this argument, Ginsburg turns to an exploration of the rarely discussed establishment of constitutional courts, and the corresponding judicialization of politics, in three new Asian democracies: Taiwan, Mongolia, and Korea. All three countries share a roughly similar cultural context. Each country underwent a transition to democracy in the late 1980s and early 1990s. Newly established constitutional courts in all three countries have struggled to maintain and enhance their stature within political environments that lack an established tradition of judicial independence and constitutional supremacy. Despite these commonalities, there has been a significant variance in judicial independence among the three countries.

In Taiwan the democratization process was governed by a single dominant party (KMT) with an overwhelmingly powerful leader (Chiang Kai-shek). The result has been a very gradual constitutional reform and the evolution of a relatively weak and politically dependent court (the Council of Grand Justices). In Mongolia, the former Communist Party was in a strong position during the constitutional negotiation stage but was nonetheless unable to dictate outcomes unilaterally because of a newly emergent set of opposition parties. This has resulted in the 1992

[23] T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, Cambridge, 2003).

creation of a 'middle of the road', quasi-independent court (the Constitutional Tsets). By contrast, in Korea, constitutional transformation took place amidst embedded uncertainty stemming from political deadlock among three parties of roughly equal strength. As a result, in 1988, a strong and relatively independent constitutional court emerged as political insurance against electoral uncertainty.

The requirement that comparable cases be selected so as to hold non-key variables constant while isolating the explanatory power of the key independent variable makes the most similar cases approach adequate for a diachronic, cross-time comparison within the same polity (e.g. a study of the impact of a certain change through a pre-change/post-change comparison). Because the comparison is done between two consecutive periods within the same polity (i.e. the general pertinent context is held constant), the researcher is able to control for possible intervening variables and explanations other than those he or she wishes to emphasize.

The significant methodological advantage of the most similar cases principle is illustrated by recent works that advance the strategic approach to the study of judicial behaviour. According to this approach, judges are not only precedent followers, framers of legal policies, or ideology-driven decision-makers, but also sophisticated strategic decision-makers who realize that their range of decision-making choices is constrained by the preferences and anticipated reaction of the surrounding political sphere.[24]

In a recent study, Gretchen Helmke draws upon a diachronic, cross-time study of judicial behaviour in Argentina to demonstrate this argument. While Argentine Supreme Court judges showed little will to resist the state's governing military junta at its zenith (1976–81), a significant increase in antigovernment decisions occurred between 1982 and 1983 when it became clear that the days of the military regime were numbered. Likewise, the judges' willingness to issue antigovernment decisions was relatively high during the years of weak democracy in Argentina (1983–9) primarily because the judges did not face a credible

[24] W. Eskridge, Reneging on History? Playing the Court/Congress/President Civil Rights Game (1991) 79 *California Law Review* 613; C. Clayton and H. Gillman (eds.), *Supreme Court Decision-Making: New Institutionalist Approaches* (University of Chicago Press, Chicago, 1999); L. Epstein and J. Knight, Towards a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead (2000) 53 *Political Research Quarterly* 625.

threat. However, as Carlos Menem became increasingly popular and as it became more likely that he would get re-elected, the percentage of antigovernment decisions declined.[25]

As is well known, in 1993 Russian President Boris Yeltsin reacted to an over-active involvement of the Constitutional Court in Russia's political sphere by signing a decree suspending the Constitutional Court until the adoption of a new constitution – an act that marked the demise of the first Constitutional Court and its controversial Chair, Valerii Zorkin, and brought about the establishment of the second Constitutional Court. Drawing upon a controlled comparison of the dockets of the first and second Constitutional Courts, Lee Epstein *et al.* show that in a marked departure from the first Court era where the docket was dominated by politically charged federalism and separation of powers cases, in the years following the constitutional overhaul, the second Russian Constitutional Court resorted to the 'safe area' of individual rights jurisprudence and tended to avoid federalism separation of powers disputes.[26] Through a classic application of the 'most similar cases' principle to two consecutive periods of time within the same polity, the researchers effectively illustrate another aspect of the strategic approach to judicial decision-making: harsh political responses to unwelcome activism or interventions on the part of the courts have a chilling effect on judicial decision-making patterns.

The 'most different cases' logic

According to the 'most different cases' approach to selecting comparable cases, researchers should compare cases that are different on all variables that are not central to the study but match in terms that are, thereby emphasizing the significance of consistency on the key independent variable in explaining the similar readings on the dependent variable. As we have seen, selecting comparable cases according to the most similar cases principle effectively emphasizes the explanatory power of an

[25] G. Helmke, The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy (2002) 96 *American Political Science Review* 291. See also, G. Helmke, *Courts under Constraints: Judges, Generals, and Presidents in Argentina* (Cambridge University Press, Cambridge, 2005).

[26] L. Epstein *et al.*, The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government (2001) 35 *Law & Society Review* 117.

independent variable or variables that *vary* across the compared cases. In contrast, selecting comparable cases according to the most different cases principle effectively emphasizes the explanatory power of key independent variables with *similar* readings across the compared cases.

In a recent article I explored the crucial secularizing role of constitutional jurisprudence in three countries facing a deep secular-religious divide – Egypt, Israel, and Turkey.[27] These three countries have witnessed a considerable increase in the popular support for, and influence of, theocratic political movements. At the same time, these three countries differ in their formal recognition of, and commitment to, religious values. For example, Art. 2 of the Egyptian Constitution, as amended in 1980, states that principles of Muslim jurisprudence (the *Shari'a*) are *the* primary source of legislation in Egypt, while Israel defines itself as a 'Jewish and Democratic' state; conversely, modern Turkey characterizes itself as secular, adhering to the Western model of strict separation of state and religion. Accordingly, there are considerable differences in the interpretive approaches and practical solutions adopted by the three countries' respective high courts in dealing with core religion and state questions. Egypt's Supreme Constitutional Court has developed its own moderate 'interpretation from within' of religious rules and norms. The Israeli Supreme Court has tackled the tension between these conflicting values by curtailing the jurisprudential autonomy of religious courts and tribunals, and by subjecting their jurisprudence to general principles of administrative and constitutional law. The Turkish Supreme Court, on the other hand, has opted for the outright exclusion of religious values and policy preferences from legitimate political discourse. Despite these dissimilarities, there are striking parallels in the way constitutional courts in these and other similarly situated countries have positioned themselves as important secularizing forces within their respective societies.

While *different* in many pertinent respects, the increased popular support for principles of theocratic governance in all three countries, along with the threat these principles pose to the cultural propensities and policy preferences of local secular elites, resulted in a *similar* transfer of fundamental 'religion and state' questions from the political sphere to

[27] R. Hirschl, Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales (2004) 82 *Texas Law Review* 1819.

the constitutional courts. Drawing upon their disproportionate access to, and influence over, the legal arena, political power-holders representing secular voices in these and other polities facing deep divisions along secular/religious lines aim to ensure that their secular liberal views and policy preferences are less effectively contested. The result has been an unprecedented judicialization of foundational collective identity (particularly 'religion and state' questions) and the consequent emergence of constitutional courts as important guardians of secular interests in these countries.[28]

'*Prototypical cases*'

The logic of the 'prototypical cases' principle is fairly intuitive. If a researcher wishes to draw upon a limited number of observations or case studies to test the validity of a theory or an argument, these should feature as many key characteristics as possible that are akin to those found in as many cases as possible. Unlike the a-systematic case selection in most freestanding, insular, single-country studies of constitutional law, a prototypical case serves as a representative exemplar of other cases exhibiting similar pertinent characteristics. Theories that pass the tests posed by prototypical cases are therefore likely to 'travel' well, applying widely to other, presumably analogous, cases.[29] The key aspect that makes studies of prototypical cases methodologically superior to what political scientists call 'country/area studies' is the applicability of the findings derived from prototypical cases to other, similarly situated cases. In that respect, the underlying logic of the prototypical cases principle is that of 'reasoning by analogy'. That is, 'if two units are the same in all relevant respects, ... similar values on the relevant explanatory variables will result in similar values on the dependent variable'.[30]

Comparative observations of prototypical cases served as the methodological basis for the seminal work of pioneering legal sociologists

[28] Two interesting variations on the 'most similar' and 'most different' case selection principles are offered in G. Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* (Princeton University Press, Princeton, NJ, 2003), and in L. Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Context* (Johns Hopkins University Press, Baltimore, 2001).

[29] S. Van Evera, *Guide to Methods for Students of Political Science* (Cornell University Press, Ithaca, 1997), p. 84.

[30] King *et al.*, *Designing Social Inquiry*, pp. 209, 212.

such as Henry Maine, Emile Durkheim, and Max Weber.[31] In its more contextualist guise, analysis of prototypical cases resembles what Clifford Geertz termed 'thick description' – a thorough, nuanced analysis of a single case that exhibits as many archetypal characteristics as possible.[32] In this way, such studies may yield illuminating 'ethnography-like' accounts of constitutional transformation in given polities.[33]

An effective illustration of the application of the prototypical cases principle is provided by Martin Shapiro's *Courts: A Comparative and Political Analysis* – the first thorough application of Robert Dahl's theory of courts as political institutions to the study of comparative public law in support of political regimes' legitimacy.[34] Common characteristics and images of court systems worldwide (e.g. judicial independence, judicial selection processes, perceptions of impartiality and procedural fairness, appellate processes, etc.) are politically constructed to support political hierarchy, stability, and legitimacy.

In order to illustrate the applicability of his 'courts as political institutions argument' in diverse legal contexts, Shapiro analyses the main institutional, jurisprudential, and socio-legal characteristics of four prototypical cases, each representing a major and distinct legal tradition. The English legal system is selected as a prototypical case of a common law system characterized by a political construction of judicial independence and the image of judicial impartiality. France and Italy serve as prototypical illustrations of how judges in civil law systems, who are commonly perceived as bound by pre-existing rules, adjust their jurisprudence to accord with regime interests. Imperial China provides a prototypical illustration of the political construction of Confucian ethics and non-litigious mediation in Asian law. Finally, the Ottoman Empire is illustrative of a decentralized political system resulting in a jurisprudential mosaic of secular and religious jurisprudence, as well as appellate-less

[31] See e.g. H. Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (Oxford University Press, Oxford, 1959); E. Durkheim, *The Division of Labor in Society* (Free Press, Glencoe, IL, 1964); M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (University of California Press, Berkeley, 1978).

[32] See Description: Toward an Interpretive Theory of Culture in C. Geertz, *The Interpretation of Cultures: Selected Essays* (Basic, New York, 1973).

[33] See K. Scheppele, Constitutional Ethnography: An Introduction (2004) 38 *Law & Society Review* 389.

[34] M. Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, Chicago, 1981).

'kadi justice' in Islamic jurisprudence, reflective of the absence of central political authority. Shapiro's conclusion is blunt: despite the variance in the legal cultures and traditions within which they operate, judicial tribunals in each of these prototypical cases, and by extension in many other cases, reflect and promote broad socio-political interests.

Another illustration of the 'prototypical cases' principle is provided by Mitchel Lasser's *Judicial Deliberations*.[35] Lasser's book presents a study of inter-country differences in judicial discourse and argumentation styles. He proposes that these differences reflect divergent ideological frameworks and national meta-narratives, not merely well-rehearsed doctrinal distinctions among broad categories of legal traditions. His three case studies – the French *Cour de cassation*, the US Supreme Court, and the European Court of Justice (ECJ) – are prototypical of civil law, common law, and supranational law systems, respectively. The *Cour de cassation*, Lasser argues, adheres to a formalistic or 'grammatical' style of argumentation, whereby little or no reference is made to extra-judicial interpretive means, extra-textual arguments, etc. This is reflective, *inter alia*, of France's unified institutional and ideological framework founded on both explicitly republican notions of meritocracy and managerial expertise, and the French legal system's long-term emphasis on control and hierarchy and professionalism. The US judicial system, by contrast, derives its legitimacy from a more argumentative and engaging, 'hermeneutic' style of judicial discourse that frequently resorts to extra-textual discursive contexts and interpretive means. This is reflective of the decentralized, multi-focal nature of the US judicial system and the more deliberative or democratic political ethos within which it operates. Finally, Lasser argues that the ECJ's judicial discourse – a prototypical case of supranational constitutionalism – features elements of both the French 'grammatical' approach and the US 'hermeneutic' approach. This is reflective of the ECJ's hierarchical, French discursive structure on which the court was originally patterned, as well as its inherently fractured, transnational political and legal context.

'Most difficult' cases

Single observation research is not necessarily detrimental to causal inference. Indeed, it may even support it. Consider the contribution of

[35] M. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press, Oxford, 2004).

the 'most difficult case' principle to the substantiation of arguments made in a small-N or a single-country study. The 'most difficult case' principle is based on an idea known in formal logic as *ad absurdum*. According to this principle, our confidence in the validity of a given claim, or in the explanatory power of a given hypothesis, is enhanced once it has proven to hold true in a case that is, *prima facie*, the most challenging or least favourable to it. In a more moderate fashion, 'if the investigator chooses a case study that seems on *a priori* grounds unlikely to accord with theoretical predictions – a ''least likely'' observation – but the theory turns out to be correct regardless, the theory will have passed a difficult test, and we will have reason to support it with greater confidence'.[36] Conversely, if a claim or a hypothesis does not survive a 'most likely' or a 'most favourable' case, its plausibility is severely undermined. In short, a single crucial case may either positively validate a claim or, conversely, 'score a clean knockout over a theory'.[37]

An effective application of the 'most difficult case' principle helped make Gerald Rosenberg's *The Hollow Hope* one of the most influential works on the question of the impact of landmark court rulings.[38] As Rosenberg suggests in his polemic against the prevalent 'dynamic court' approach, the US Supreme Court's role in producing social reforms (at least in the domains of racial desegregation and abortion) has been far less significant than conventional wisdom would suggest. In fact, hostile opposition forces were able to neutralize the Court's seemingly ground-breaking, and widely celebrated, ruling in *Brown* v. *Board of Education*, at least in the decade following the decision. The limited progress eventually made after the ruling was, argues Rosenberg, due to a shift in political forces that had everything to do with the changing economic role of African-Americans and their own extra-legal activism – changes that had little to do with the Supreme Court's ruling. Moreover, courts lack independent enforcement and implementation powers and are therefore institutionally constrained in their efforts to bring about social change; their decisions can be fairly easily stymied if met by strong political opposition. Therefore, courts may effectively produce significant social

[36] King *et al.*, *Designing Social Inquiry*, p. 209.

[37] H. Eckstein, Case Study and Theory in Political Science in F. Greenstein and N. Polsby (eds.), *Handbook of Political Science* vol. 7 (Addison-Wesley, Reading, MA, 1975), p. 127.

[38] G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, Chicago, 1991).

reform only when extra-judicial political factors are conducive to change, or when market forces offer positive incentives to induce compliance. By drawing upon the surprisingly limited direct effects of the most widely celebrated ruling in the history the US Supreme Court, Rosenberg was able to utilize the 'most difficult cases' strategy to lend credence to his counter-intuitive arguments.

Charles Epp's influential work on rights revolutions provides another illustration of an effective use of the 'most difficult cases' logic.[39] Epp suggests that the impact of constitutional catalogues of rights may be limited by individuals' inability to invoke them through strategic litigation. Hence bills of rights matter to the extent that a support structure for legal mobilization – a nexus of rights-advocacy organizations, rights-supportive lawyers and law schools, governmental rights-enforcement agencies and legal aid schemes – is well developed. In other words, while the existence of written constitutional provisions is a necessary condition to effective protection of rights and liberties, it is certainly not a sufficient condition. The effectiveness of rights provisions in planting the seeds of social change in a given polity depends largely upon the existence of a support structure for legal mobilization, and, more generally, hospitable socio-cultural conditions.

In order to establish this broad claim, Epp engages in a comparative study of rights revolutions in several countries, most notably the United States, India, and Canada. The rights revolution in the United States occurred through a series of landmark Supreme Court rulings between 1961 and 1975, and was largely contingent upon concerted pressure from well-organized rights advocates. In India, by contrast, 'the interest group system is fragmented, the legal profession consists primarily of lawyers working individually, not collectively, and the availability of resources for noneconomic appellate litigation is limited'.[40] Canada presents a 'most difficult case' for Epp's thesis as it offers, *prima facie*, a simple, straightforward explanation for the origin of the Canadian rights revolution – the 1982 adoption of the Charter of Rights and Freedoms. However, Epp's analysis suggests that Canada's rights advocacy and

[39] See C. Epp, Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms (1996) 90 *American Journal of Political Science* 765; and C. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, Chicago, 1998).

[40] Epp, *The Rights Revolution*, p. 95.

rights litigation rates, as well its 'support structure for legal mobilization', started to gain momentum in the early 1970s – a decade prior to the adoption of the Charter.[41] Here too, a rights revolution was largely contingent on the growth of a support structure for legal mobilization, not merely on the formal protection of rights through constitutional provisions.

'Outlier cases'

Outlier cases occur where the outcome is poorly explained by existing theories but may be explained by a newly identified explanation. In such cases, the values on the dependent variable are high (i.e., the result occurs frequently or in a significant fashion) while the known causes or existing explanations are absent (i.e., there ought to be another explanation).[42] This case selection principle is designed to lend credence to a novel explanation for a given phenomenon through the initial negation of alternative explanations for that phenomenon. It draws upon a basic principle of formal logic according to which, as long as an explanation or cause for a given outcome is not proven irrelevant, it remains a possible explanation for that outcome. Conversely, negating the viability of a possible cause for a given outcome increases our confidence in other possible explanations for that phenomenon. Using the outlier cases principle, our confidence in a given explanation increases by selecting a case or cases that do not feature any alternative explanation for the studied phenomenon other than the new explanation we wish to establish. In short, selecting a number of outlier cases that cannot be explained by existing theories helps substantiate the new cause, explanation or argument through the *a priori* elimination of alternative explanations.

Consider the following example of the 'outlier cases' logic in action. The constitutionalization of rights and the corresponding establishment of judicial review are widely perceived as power-diffusing measures often associated with liberal or egalitarian values. As a result, constitutionalization is portrayed by conventional theories of constitutional transformation as reflecting a polity's 'pre-commitment' against its members' own

[41] Epp, Do Bills of Rights Matter? [42] Van Evera, *Guide to Methods*, pp. 86–7.

imperfections or harmful future desires,[43] and/or a polity's convergence with an all-encompassing, post-Second World War thick notion of democracy and universal prioritization of human rights and judicial review.[44] From a more functionalist standpoint, constitutionalization is often portrayed as reflecting a general waning of confidence in technocratic government and a consequent desire to restrict discretionary powers of the state. According to this thesis, constitutional courts tend to be more powerful in polities requiring them to police federalism or separation of powers boundaries.[45] Constitutionalization may also reflect an attempt to mitigate tensions in ethnically divided polities through the adoption of federalism and other power-sharing principles.[46] According to institutional economics and public choice theories of constitutional transformation, the constitutionalization of rights and the establishment of judicial review increase economic predictability and efficiently mitigate systemic collective-action problems such as co-ordination, commitment, and enforcement.[47]

Unfortunately, however, none of these prevalent theories of constitutional transformation is based on a genuinely comparative systematic or a detailed analysis of the political vectors behind any of the actual constitutional revolutions of the past two decades. What is more, none of these theories account for the great variance in the timing, scope, and nature of constitutional reform. The applicability of some of these theories (e.g. the federalism/consociationalism theory of constitutionalization) is limited to a small number of countries in the first place. More

[43] See e.g. J. Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (rev. edn, Cambridge University Press, Cambridge, 1988); and S. Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press, Chicago, 1995).

[44] The most prominent proponent of this view is Ronald Dworkin. See e.g. *A Bill of Rights for Britain: Why British Liberty Needs Protection* (Chatto & Windus, London, 1990); and *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge, MASS, 1996).

[45] See M. Shapiro, The Success of Judicial Review and Democracy in M. Shapiro and A. Sweet, *On Law, Politics, and Judicialization* (Oxford University Press, Oxford, 2002).

[46] The works that propose various versions of this 'consociational' approach are too numerous to cite. Some of the most prominent exponents of this line of thought are Donald Horowitz, Arend Lijphart, and Yash Ghai.

[47] See e.g. D. North and B. Weingast, Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England (1989) 49 *Journal of Economic History* 803; B. Weingast, Constitutions as Governance Structures: The Political Foundations of Secure Markets (1993) 149 *Journal of Institutional and Theoretical Economics* 286.

importantly, if we apply any of these constitutional transformation theories to any given 'new constitutionalism' polity, it is hard to see why members of that polity chose to embark upon the post-Second World War constitutional supremacy model in the year they did, and not earlier. Likewise, if a given polity indeed requires efficient mitigation of systemic collective-action problems, how can we explain the fact that earlier attempts to resolve these problems through constitutionalization in that polity have failed? Furthermore, conventional theories of constitutional transformation tend to focus exclusively on explaining constitutional change, while overlooking constitutional stalemate. These theories ignore human agency, and the fact that legal innovations require legal innovators – people who make choices as to the timing, scope, and extent of legal reforms.

To address this lacuna, I devoted a substantial portion of a recently published book to a comparative study of the political origins of constitutionalization in established democracies.[48] Specifically, I suggest in *Towards Juristocracy* that judicial empowerment through constitutionalization in many 'new constitutionalism' countries resulted from self-interested actions taken by hegemonic, yet threatened, socio-political groups fearful of losing their grip on political power. Constitutionalization may provide an effective solution for influential groups who possess better access to, and influence upon, the legal arena, and who, given serious erosion in their popular support, may seek to entrench their policy preferences against the growing influence of 'peripheral' groups and interests. Such a strategic, counter-intuitive self-limitation may be beneficial to threatened elites and power-holders when the limits imposed on rival elements within the body politic outweigh the limits imposed on themselves. Strategic, self-interested legal innovators – threatened political elites in association with economic and judicial elites who have compatible interests – determine the timing, extent, and nature of constitutional reforms. Judicial empowerment through the constitutionalization of rights is often not a reflection of a genuinely progressive revolution in a polity; rather, it is evidence that the rhetoric of rights and judicial review has been appropriated by certain groups to bolster their own position in the polity.

[48] R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, Cambridge, MASS, 2004).

Without debating the substantive merits of the 'hegemonic preservation' thesis, case selection was a crucial aspect of my project's design.[49] At a first glance, the possibilities for case selection seem endless. Around the globe, in more than eighty countries and in several supranational entities, fundamental constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries. The countries that have hosted this expansion of judicial power stretch from the Eastern Bloc to Canada, from Latin America to South Africa, and from Britain to Israel. This spate of constitutional reform reflects a number of common constitutionalization scenarios.

From an empirical perspective, the majority of constitutional revolutions over the past few decades represent five common scenarios. First, constitutionalization may stem from political reconstruction in the wake of an existential political crisis (e.g. the adoption of new, post-Second World World constitutions in Japan in 1946, in Italy in 1948, in Germany in 1949, and in France in 1958). Likewise, constitutionalization may stem from de-colonization processes (e.g. India in 1948–50), or may be derivative of a transition from authoritarian to democratic regimes (e.g. the constitutional revolutions in newer democracies in Southern Europe in the 1970s, and in Latin America in the late 1980s and early 1990s). Additionally, constitutionalization may reflect a 'dual transition' scenario, in which constitutionalization is part of a transition to both a Western model of democracy and a market economy (as with the numerous constitutional revolutions of the post-communist and post-Soviet countries). Finally, the incorporation of international and trans- or supranational legal standards into domestic law is another possible explanation for constitutionalization (e.g. the passage of the Human Rights Act 1998 in Britain, which effectively incorporated the provisions of the European Convention on Human Rights into British constitutional law).

Each of these types of constitutional reform poses its own puzzles for scholars of public law and judicial politics. It is the 'no apparent

[49] For a discussion of the merits of this thesis see e.g. L. Goldstein, From Democracy to Juristocracy (2004) 38 *Law & Society Review* 611; M. Graber, Constructing Judicial Review (2005) 8 *Annual Review of Political Science* 425. For additional discussion see J. Klabbers, Book Review: Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2005) 16 *European Journal of International Law* 160; M. Rush, Review: Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004) 14 *Law & Politics Book Review* 552.

transition' scenario of constitutional revolutions, however, that I find the most intriguing from a methodological standpoint. In this 'none of the above' category, constitutional reforms have neither been accompanied by, nor resulted from, any apparent fundamental changes in political or economic regimes.[50] The constitutional revolutions in Canada (1982) and Israel (1992–5), for example, provide nearly ideal testing-ground for identifying the political origins and consequences of the constitutionalization of rights and the fortification of judicial review. The two countries have undergone a major constitutional reform over the past two decades. However, unlike many former Eastern Bloc countries, for example, these dramatic constitutional changes have neither been accompanied by, nor resulted from, major shifts in political regime. As such, by selecting these 'no apparent transition' cases it is possible to disentangle the political origins of constitutionalization from other possible explanations (reconstruction, independence, democratization, incorporation).

Moreover, these cases provide an effective response to efficiency-driven explanations for constitutionalization as mitigating problems of information, credible commitment, and effective enforcement; it is unclear why any of these polities chose to adopt such efficient mechanisms precisely at the time they did, and not earlier. Likewise, these cases offer a cogent response to the broad 'democratic proliferation', 'constitutionalization in the wake of the Second World War', and 'constitutionalization as pre-commitment' theses. In both cases, it is unclear why members of the Canadian or Israeli public decided to pre-commit themselves against their own imperfections or harmful future desires precisely in 1982 (Canada) or in 1992 (Israel), and not a decade earlier or later. In short, none of the broad explanations accounts for the precise timing of the recent constitutional revolutions in Canada and Israel.

But there is even more to selecting these cases. When studying the political origins of constitutionalization (as well as the political origins of other institutional reforms), it is important to take into account events that did *not* occur and the motivation of political power-holders for not

[50] Some examples would be the constitutional revolution and the corresponding fortification of judicial review in Sweden (1979), Egypt (1980), Canada (1982), New Zealand (1990), Israel (1992), Mexico (1994), and Thailand (1997).

behaving in certain ways. In other words, the political origins of constitutional reform cannot be studied in isolation from the political origins of constitutional stalemate and stagnation. By studying the origins of constitutional stagnation in the pre-constitutionalization era in Canada and Israel, we are able to compare a series of 'no cause/no effect' observations (at least with respect to the new explanation and independent variable) with a series of combined 'cause and effect' observations. The very selection of these three outlier cases, therefore, helps substantiate the hegemonic preservation thesis both by *a priori* elimination of other possible explanations and by establishing controlled comparison of 'cause and effect' cases versus 'no cause/no effect' cases.

Towards a unified study of the migration of constitutional ideas

'We are all comparativists now' appears to have become the motto of jurists worldwide. From a relatively obscure topic studied by the devoted few, comparative constitutionalism has emerged as one of the more fashionable subjects in contemporary public law scholarship. Over the last decade there has been a dramatic increase in the number of constitutional lawyers who pay attention, closer or remoter, to constitutional law and politics abroad. There has also been a dramatic increase in the number of books on comparative constitutional systems published by top academic presses. New and established journals are devoted to the advancement of academic discourse on the subject. Top ranked law schools now regard courses on comparative constitutionalism as essential additions to the curriculum. With this upsurge in interest and attention, the field of comparative constitutionalism has made a tremendous leap forward over the last few years. However, the field continues to lack coherent methodological and epistemological foundations. Its greater potential for theory building remains largely unfulfilled.

Detailed taxonomy, let alone the formation of sophisticated concepts, is a fundamental element of any academic inquiry. It is of great significance to the study of the yet under-charted terrain of comparative constitutional law. What is more, adherence to quasi-scientific, inference-oriented principles of research design is certainly not the only valuable mode of social, let alone legal, inquiry. Any type of academic inquiry that advances our knowledge and understanding of the

enterprise of public law in a meaningful way – be it qualitative or quantitative, normative or positivist, descriptive or analytical – is potentially of great value. Accordingly, adherence to inference-oriented principles of research design and case selection is not required as long as one does not profess to determine causality or to develop explanatory knowledge. However, intellectual integrity warrants that when one aspires to establish meaningful causal claims or explanatory theories through comparative inquiry, one follow inference-oriented, research design and case selection principles. Neither advanced knowledge of the epistemological foundations of social inquiry nor mastery of complex research methods is required. As we have seen, adherence to a few basic inference-oriented case selection principles such as the 'most similar' and 'most different' cases, the 'prototypical' cases, the 'most difficult' cases, and the 'outlier cases' logic fills this gap.

Closer attention to, and more frequent deployment of, such inference-oriented case selection principles would be of particular value in the study of the transnational migration of constitutional ideas. After all, despite the general agreement that a large-scale migration of constitutional ideas has been taking place, we still know precious little about the actual extent of this phenomenon, let alone why, when, and how such migration has been occurring or is likely to occur. Which polities and courts are more receptive to transnational migration of constitutional ideas than others, and why? Which types of constitutional controversies are more conducive to inter-court borrowing? What is the impact of the migration of constitutional ideas on methods of constitutional interpretation and reasoning? What interlinks can be identified between the triumph of democracy, the emergence of an economic and cultural 'global village', and the transnational migration of constitutional ideas? What accounts for the variance in scope, nature, and timing of various countries' convergence to the constitutional supremacy model? Why is the migration of constitutional ideas happening, and who are its main agents and advocates? These and other pertinent questions seek to explain and to determine causality, not merely to map or to describe certain phenomena. Comparative studies that address such questions must pay close attention to methodological concerns and follow inference-oriented research design and case selection principles.

To be sure, reliance on comparative research in the quest for explaining variance in legal phenomena across polities is not foreign to

the legal discipline. Explanation, not merely description or taxonomy, has long been a main objective of evolutionist and functionalist approaches to legal transformation, and to comparative law more generally.[51] It has also characterized the Law and Economics movement, as well as the emerging trend toward empirical legal scholarship. There is no apparent, *a priori* or systemic reason why the study of comparative constitutional law could not engage in a more explanation-oriented mode of scholarship. However, despite the remarkable leap forward the field of comparative constitutional law has made over the last decade, most leading works in the field still lag behind the social sciences in their ability to use controlled comparison to trace causal links among pertinent variables. Causal inference, arguably the ultimate goal of scientific inquiry – quantitative or qualitative, positivist or hermeneutical – remains largely beyond the purview of comparative constitutional law scholarship.

This may be explained by a number of reasons, beyond the genuine concern of some legal historians and anthropologists with context, meaning, and contingencies. Chief of these reasons is traditional doctrinal boundaries, trajectories of academic training, and the different epistemologies of social and legal inquiry. After all, there is still a persistent resistance in the legal academy to the notion that law operates not only as a semi-autonomous professional universe with its own rules and rationales but also as a site of social struggles and political strife, as well as to the idea that courts are a part of the political system, not a thing apart. This doctrinal separation of law and politics has not passed over most scholars of constitutional law – perhaps the most observably political branch of law. Whereas legal academics studying constitutional law tend to draw upon a court-centric case law approach, most social scientists treat constitutional law as politics by other means.

Part of the problem is reflective of the embedded difficulties in studying foreign constitutional systems. Studying comparative constitutionalism is a serious undertaking, a labour of love for this and other authors; but still a difficult, labour-intensive and time-consuming endeavour. Akin to socio-cultural anthropology, it requires a tremendous

[51] For a general survey of the evolutionist tradition in comparative law see e.g. P. Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press, Cambridge, 1980). For a general survey of the functionalist tradition in comparative law see e.g. M. Graziadei, The Functionalist Heritage in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, Cambridge, 2003).

investment of one's material and intellectual resources. The comparativist's basic toolkit must include pertinent linguistic and legal skills; detailed knowledge of foreign legal systems, jurisprudence, and legacies; familiarity with basic comparative methodologies, quantitative and/or qualitative; the ability to remain constantly informed about often underreported constitutional developments overseas; cultural sensitivity; and the willingness to spend lengthy periods of time doing field work under less than dazzling conditions. Academic positions in this area are scarce. Clearly, comparative constitutional law, fashionable as it has become, is not one of those quick return, 'jump on the bandwagon' academic fields.

A significant part of the problem, however, is reflective of the generally blurred, not to say underdeveloped, methodological matrix of comparative constitutional law. Too many constitutional comparativists still adhere to a convenient 'cherry picking' approach to case selection while overlooking (or being unaware of) basic methodological principles of controlled comparison and research design frequently drawn upon in the social sciences. Continuous reliance on such an asystematic and methodology-light practice of research design and case selection does not serve the cause of serious theory building well. Indeed, it is precisely due to its traditional lack of attention to principles of controlled comparison and case selection that comparative constitutional law scholarship produced by legal academics – progress in recent years notwithstanding – often falls short of advancing knowledge in the manner sought after by most social scientists.

Perhaps the time is ripe for scholars of comparative constitutional law further to release themselves from traditional doctrinal constraints, and contribute more significantly to theory building through the deployment of more methodologically rigorous methods of research design and case selection. Such a convergence would not only help bridge the gap between constitutional theory and constitutional politics. It would also create a more unified and coherent enterprise of comparative constitutional law.

3

Some reflections on method in comparative constitutional law

MARK TUSHNET

Why study comparative constitutional law? For a scholar, of course, the value seems obvious: more knowledge is generally better than less. Others have a more instrumental interest. They might want to know whether studying comparative constitutional law might improve our ability to make domestic constitutional law. Responding to that inquiry requires some examination of how we can actually *do* comparative constitutional law.[1]

I confine my attention to questions implicated in doing comparative constitutional law *as law*. There is of course a large field of comparative studies of governmental organization, conducted by political scientists as well as by lawyers, and some of that field overlaps with the field of comparative constitutional law. But, there is also one large difference between the fields. Comparative constitutional law involves doing law. And, as I have learned, it is quite difficult to be comfortable in doing law in more than one legal system. Even when language barriers do not intervene, legal cultures do. For example, I have been persuaded – despite my initial scepticism – that Australian constitutional culture is far more formalist than US constitutional culture. It is less open to what seem to me the inevitable intellectual challenges from those influenced by US

[1] There is a large literature on the methods of comparative law generally. The more general field, though, has included discussions of matters that I personally find not terribly interesting, such as the classification of legal systems into families and the phenomenon of borrowing by one legal system or tradition from another. For examples of writing in comparative constitutional law on the latter topic, see L. Henkin and A. Rosenthal (eds.), *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Columbia University Press, New York, 1990); Symposium on Constitutional Borrowing (2003) 1 *International Journal of Constitutional Law* 181–324.

legal realism and its legacy. As a result, constitutional doctrines in Australia, such as those dealing with the allocation of authority between the national and the state governments, are more stable than similar doctrines in the United States, even doctrines framed in language that seems parallel to that used in the Australian cases. These and similar differences in constitutional cultures complicate the task of doing comparative constitutional law, perhaps to the point where the pay-off in any terms other than the increase of knowledge is small.

I think it useful to identify two ways of doing comparative constitutional law, as a preliminary to criticizing and deepening them to suggest a third method. Without insisting that they are sharply different, I call the first two methods *normative universalism* and *functionalism*.[2] These two methods involve efforts to see how constitutional ideas developed in one system might be related to those in another, either because the ideas attempt to capture the same normative value or because they attempt to organize a government to carry out the same tasks. In that sense, these methods can help identify when constitutional ideas migrate. I call the third method *contextualism*. This method comes in two variants, which I call *simple contextualism* and *expressivism*. Simple contextualism insists that constitutional ideas can only be understood in the full institutional and doctrinal context within which they are placed. *Expressivism* takes constitutional ideas to be expressions of a particular nation's self-understanding. Both of these methods raise questions about the coherence of the idea that constitutional ideas can migrate (without substantial modification) from one system to another. Each of these four methods has different – sometimes dramatically different – implications for the analysis of whether and how constitutional ideas migrate from one constitutional system to another.

It may be worth noting that legal scholars attracted to normative universalism are likely to be influenced by normative jurisprudence and political theory, that those attracted to functionalism are likely to be influenced by political scientists, and that those attracted to contextualism are likely to be influenced by anthropologists. And, here yet another

[2] There is a sense in which normative universalism and functionalism are variants of a more general universalism, as will become clear below. I have been unable to devise labels that preserve a parallelism in formulations, though.

complexity intrudes. Not only will the scholar of comparative constitutional law have to be comfortable in more than one constitutional system; he or she may think it helpful to be comfortable with a discipline other than law that seems likely to illuminate comparative constitutional questions in the way the legal scholar finds useful.

Normative universalism emerges primarily from the dialogue between those who study comparative constitutional law and those who study international human rights. The idea is simple: constitutionalism itself entails – everywhere – some fundamental principles. Some of those principles involve human rights: the protection of some universal human rights, such as rights to political participation, to equal treatment under the law, to freedom of conscience and expression, and, to many human rights advocates, much more. Others involve structures of government. Here the list is typically shorter: independent courts for sure, perhaps some version of the separation between law-enactment and law-execution (another aspect of the separation of powers), and little more.

Universalists study comparative constitutional law to identify how particular constitutions instantiate those universal principles. By comparing different versions, we can better understand the principles themselves. Then, we might be able to improve a domestic system's version of one or another principle by using that enhanced understanding to modify it.

Three examples from free speech law, two controversial, the other not, illustrate the universalist method in comparative constitutional law. The uncontroversial one is the law of sedition, which is a criminal offence consisting of criticism of existing government policies. Over the past century, the US Supreme Court has grappled with the problem of reconciling the law of sedition with the First Amendment's protection of free expression. Its sustained attention to the problem has yielded two conclusions. The first is widely accepted. Government efforts to suppress speech critical of its policies must be treated with extreme scepticism, captured variously in formulations like 'clear and present danger' or 'intended to and likely to cause imminent lawless conduct'.[3] The latter formulation indicates the second conclusion we can draw from the US

[3] *Dennis* v. *United States*, 341 US 494 (1951) (the most recent version of the 'clear and present danger' test in the United States); *Brandenburg* v. *Ohio*, 395 US 444 (1969) (the 'imminent lawless action' test).

sedition cases. The problem of seditious speech, analysis has shown, is only one aspect of a broader problem – how can governments regulate speech that, they fear, will cause people to break the law?

Governments around the world have confronted the problem of seditious speech, and all governments must deal with the problem of speech that increases the risk that laws will be broken. Comparative constitutional study allows us to examine the different ways in which they deal with the problem. And, most scholars and many constitutional courts believe, something like the US approach is the best one available. The European Court of Human Rights, for example, has dealt with cases arising out of Turkey's often violent confrontation with the Kurdish separatist movement there. One, decided in 2000, involved a newspaper article by the president of a major labour union, in which the author said that 'not only the Kurdish people but the whole of our proletariat must stand up against' the nation's anti-Kurdish laws and policies.[4] The Court wrote that 'there is little scope [in the applicable international human rights law] for restrictions on political speech', but that governments could limit free expression when a speech 'incite[s] to violence against an individual, a public official or a sector of the population'.[5]

The law of personal libel provides a second example. Here the United States has adopted a notably stringent rule restricting the circumstances under which a person the Supreme Court calls a public figure can recover damages for the publication of a false statement that injures his or her reputation. The category of public figures is a large one in the United States, including leaders of large private corporations and prominent football coaches and celebrities as well as politicians.[6] Public figures can win only actual damages, which are usually relatively small, and even then only if they show that the false statements were made by someone who knew they were false or at least made a conscious decision to ignore finding out whether they were true or false.[7]

[4] Case 23556/94 *Ceylan* v. *Turkey* [2000] 30 EHRR 73 at para. 8. [5] *Ibid.* at para. 34.

[6] See B. Singer, The Right of Publicity: Star Vehicle or Shooting Star? (1991) 10 *Cardozo Arts & Entertainment Law Journal* 1.

[7] The term the Supreme Court uses is that the false statements must be made with malice, but the decisions make it clear that the term refers, not to some mental state like *having it in for the public figure*, but rather to knowledge of the statement's falsity or wilful disregard of its truth or falsity.

Not surprisingly, other constitutional courts regularly confront libel questions brought by public figures. They have reached a range of conclusions, but none is nearly as restrictive of recovery as is the United States. For example, Australia uses a test of reasonableness. One major formulation was offered in a case brought by a member of New Zealand's Parliament who had been the nation's Prime Minister:

> [A] defendant's conduct ... will not be reasonable unless the defendant had reasonable grounds for believing that the imputation [of something that damages reputation] was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable ...[8]

Many in the United States find our domestic law of libel unsatisfactory.[9] Universalist scholars of comparative constitutional law suggest that looking at the solutions that other constitutional democracies have come up with would help us develop a better law of libel.

The most controversial example involves the regulation of hate speech. Proponents of more extensive regulation of hate speech in the United States often refer to transnational constitutional norms – the existence of hate speech regulation in Canada,[10] the existence in some international human rights treaties of a *duty* to regulate hate speech[11] – in defending the proposition that hate speech regulation should not be treated as unconstitutional under the First Amendment to the US

[8] *Lange* v. *Australian Broadcasting Corp.* (1997) 189 CLR 520, HCA (opinion of Brennan CJ).

[9] See D. Anderson, Is Libel Law Worth Saving? (1991) 140 *University of Pennsylvania Law Review* 487; see also J. Penzi, Libel Actions in England, a Game of Truth or Dare? Considering the Recent Upjohn Cases and the Consequences of 'Speaking Out' (1996) 10 *Temple International & Comparative Law Journal* 211 (comparing English and US libel laws).

[10] See e.g. *R.* v. *Keegstra* [1990] 3 SCR 697, SCC.

[11] International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171, Art. 20(2) ('Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'); International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, in force 4 January 1969, 660 UNTS 195, Art. 4(a) (states parties '[s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination').

Constitution.[12] They argue, quite rightly, that the fact that modern liberal democracies do in fact regulate hate speech without descending into totalitarian tyrannies where the government engages in extensive thought control shows that the mere existence of hate speech regulations is compatible with general norms of free expression. They conclude that hate speech regulation in the United States could be adopted without risking anything other than making the United States more like Canada – not, in their view, an obviously bad thing.

Again, this exemplifies the universalist use of comparative constitutional law. According to universalists, general principles of free expression and human dignity come into play when someone makes a speech castigating a racial, religious, or national group. Examining how a number of nations have worked out accommodations between those principles might be useful in developing the contours of any nation's domestic law dealing with hate speech.

The functionalist approach to comparative constitutional law is similar to the universalist one to the extent that it tries to identify things that happen in every constitutional system that is the object of study. So, for example, every democratic nation has to have a mechanism in place for going to war or for dealing with domestic emergencies that threaten the nation's continuing existence. But, the functionalist analysis goes, democratic nations should be careful about going to war, and about determining that a truly grave emergency exists. Functionalists believe that examining the different ways in which democratic nations organize the processes of going to war and declaring emergencies can help us determine which are better and which are worse processes.

Consider the constitutional regulation of the declaration of emergencies.[13] We observe that constitutions vary in the degree to which they specify both the circumstances justifying the invocation of emergency powers and the procedures for doing so. The US Constitution, for example, is extremely spare on both counts. It authorizes the invocation

[12] See e.g. M. Matsuda, Public Response to Racist Speech: Considering the Victim's Story (1989) 87 *Michigan Law Review* 2320 at 2341–8 (describing the development of international human rights law in connection with hate speech); J. Powell, As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society (1998) 16 *Law & Inequality* 97 at 147–50 (discussing *Keegstra*).

[13] I use this as my example because there is more scholarship on the question than on the question of going to war.

of emergency powers backhandedly, by identifying the circumstances under which the procedural mechanism for challenging the legality of executive actions – the writ of habeas corpus – can be eliminated. The writ can be suspended, according to the Constitution, 'in cases of Rebellion or Invasion' when, in those cases, 'the public Safety shall require it'.[14] The Constitution does not specifically set out procedures for suspending the writ, although the location of the Suspension Clause in the article dealing with congressional powers has led to the essentially universal conclusion that Congress must authorize the suspension of the writ. In contrast, the Spanish Constitution deals with emergency powers in great detail. The executive government can declare an emergency, pursuant to a specific authorization from the legislature, which must remain in session while the state of emergency is in effect. The initial authorization cannot exceed thirty days, and can be renewed for another thirty-day period.[15] Other aspects of the declaration of emergencies are to be regulated by a framework statute.[16]

A functionalist would examine questions like these: does detail as to circumstances and procedures encourage participation by the legislature and the executive in decision-making? Or, on the contrary, does detail provide the executive with additional resources for arguing that the constitution authorizes unilateral executive action? For example, do the Spanish provisions run the risk that an executive will plausibly claim that it is necessary to extend the emergency beyond the period authorized by the legislature because circumstances have developed that require a long rather than a short emergency period? Does lack of detail encourage political negotiation between the legislature and the executive, or, on the contrary, does it give the executive the resources to argue that its action is constitutionally permissible because the action is not expressly prohibited by the constitution? Does a constitutional requirement that the legislature participate in the declaration of an emergency limit the number of occasions on which emergencies are declared? Or, on the contrary, does such a requirement encourage the executive to go over the legislature's head, appealing to the people to repudiate a legislature that is unable to recognize and respond to the emergency the nation faces? These questions indicate that functionalists will look to how

[14] US Constitution, Art. I §9. [15] Spanish Constitution 1978, Art. 116(3), (5).
[16] *Ibid.*, at Art. 116(1).

constitutional provisions actually operate in real-world circumstances, and will draw inferences about good constitutional design from the constitutional provisions that work best according to the functionalist's normative standards.[17]

As the example of war-making and emergencies suggests, functionalists tend to focus on issues of government structure. With respect to federalism, for example, a functionalist might ask: What forms of federalism best accommodate the diversity in a nation's regions? Can federalism be adapted to deal with diversities that are not tied closely to geography? Belgium's experiment with an incredibly complex set of federalist institutions – some geographic, some linguistic – layered on to each other might provide some insights into these questions.[18] Drawing on work by political scientists, functionalists consider whether presidential or parliamentary systems are better vehicles for achieving the goals a nation's people set for themselves.[19]

Both the universalist and functionalist methods are flawed, though. Put most generally, their difficulty is that they operate on too high a level of abstraction. We can assume that there *are* universal principles of liberty and justice, for example, but we can be reasonably confident that such principles are not fully captured in general terms such as *free speech* or *equality*. The free speech principle, whatever it is, is likely to be extremely complex, sensitive to the circumstances presented by particular problems. The law of freedom of expression must deal with forms of expression that involve words alone, words coupled with symbols, symbols alone, and actions whose social meaning is understood to be communicative. It must deal with expression that is thought to cause

[17] A good example of functionalist analysis, informed, though not entirely driven, by comparative constitutional study is B. Ackerman, The Emergency Constitution (2004) 113 *Yale Law Journal* 1029 (proposing the adoption of a framework statute in the United States that would require increasingly large congressional majorities for the extension of declarations of emergency). L. Tribe and P. Gudridge, The Anti-Emergency Constitution (2004) 113 *Yale Law Journal* 1801 respond to Ackerman's proposal with arguments that in the first part of the response are functional and in later parts are, roughly speaking, expressivist.

[18] For a description, now somewhat outdated, see A. Alen, B. Tilleman, and F. Meersschaut, The State and Its Subdivisions in A. Alen (ed.), *Treatise on Belgian Constitutional Law* (Kluwer, Boston, 1992), p. 123.

[19] B. Ackerman, The New Separation of Powers (2000) 113 *Harvard Law Review* 633 (2000). For an extraordinarily unpersuasive attempt to respond to Ackerman, flawed precisely by its failure to understand the functionalist approach, see S. Calabresi, The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the US Constitution (2001) 18 *Constitutional Commentary* 51.

harm by persuading listeners of the rightness of the claims made, by structuring the environment in which listeners evaluate *other* claims, or by triggering responses without engaging a listener's cognitive capacities. It must deal with harms ranging from assaults on dignity to threats to national survival. And, of course, it must deal with political speech, commercial speech, sexually explicit speech, and many other varieties of expression. With so many variables going into the structure of the free speech principle it may well be that a nation's experience with the cases thrown up in its history will be substantially more illuminating of the underlying principle than other nations' experiences with their histories.

A parallel point holds for issues of government structure. Consider, for example, the question of going to war. Separation-of-powers systems might be leery of giving a president the power to initiate substantial military engagements, because, as William Treanor has pointed out (drawing on the views held by the framers of the US Constitution), a single person may be reckless in seeking to obtain honour in military operations.[20] Members of the legislature, in contrast, gain little individually from authorizing military operations, and so may be more cautious than a president.

Clearly, though, this argument depends on the precise structure of a nation's separation-of-powers system, and in particular on the relation between the president as party leader and the president as commander-in-chief. Contrast two separation-of-powers systems. One, resembling the US system through most of its history, involves a president who is associated with and is nominally the leader of one of two major political parties, but those parties are really coalitions of diverse factions, not all of which benefit from the programmes the president advances. In such a system, even a legislature controlled by the president's party might resist presidential war-making initiatives because of divisions internal to the president's party. The other separation-of-powers system, similar to that in the United States today, has the president as the leader of an ideologically coherent, unified party. When the president's party controls the legislature, resistance to presidential war-making initiatives will be low.

[20] W. Treanor, Fame, the Founding, and the Power to Declare War (1997) 82 *Cornell Law Review* 695.

Contextualism, a third approach to comparative constitutional law, emphasizes the fact that constitutional law is deeply embedded in the institutional, doctrinal, social, and cultural contexts of each nation, and that we are likely to go wrong if we try to think about any specific doctrine or institution without appreciating the way it is tightly linked to all the contexts within which it exists. Contextualist comparative studies come in many forms – ethnographic and historical, for example. My concerns in this book lead me to present contextualism in a relatively thin way.

For present purposes, I limit my discussion of the contextualist approach to its focus on the *institutional* and *doctrinal* contexts of specific doctrines.[21] Constitutions combine substantive norms, such as commitments to free speech and equality, with institutional arrangements, such as federalism and parliamentary government. The substantive norms are implemented within the institutional arrangements, and particular institutional arrangements are sometimes more compatible with some interpretations of the substantive norms than with others.[22]

The hate speech issue provides a good example of why institutional contexts matter.[23] The arguments for hate speech regulation operate on the level of principle – free expression and equality. Those arguments typically overlook the institutional context within which hate speech regulations are implemented. One principle – among many – that

[21] For a somewhat more complete description of the effects of these contexts, see M. Tushnet, Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action (2004) 36 *Connecticut Law Review* 649 from which the next paragraphs are drawn.

[22] My thinking about this question has been influenced by my colleague, V. Jackson, and in particular her argument that federalism might consist of discrete packages of institutional arrangements. See V. Jackson, Narratives of Federalism: Of Continuities and Comparative Constitutional Experience (2001) 51 *Duke Law Journal* 223; V. Jackson, Comparative Constitutional Federalism and Transnational Judicial Discourse (2004) 2 *International Journal of Constitutional Law* 91. I emphasize that my observations are only influenced by her analysis, that she has not indicated whether she agrees with my observations, and that I actually disagree with aspects of her argument about federalism.

[23] As Daniel Halberstam has shown, failure to attend to institutional contexts is a major flaw in one of the important references to comparative constitutional law in US adjudication, Justice Stephen Breyer's attempt in *Printz* v. *United States*, 521 US 898 (1997), to enlist German federalism to explain why the US Supreme Court's 'anti-commandeering' principle is not compelled by the existence of a federal system. D. Halberstam, Comparative Federalism and the Issue of Commandeering in K. Nicolaïdis and R. Howse (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, Oxford, 2001), p. 213.

(everywhere) guides the interpretation of constitutional protections of free expression is that those protections are designed to counteract a tendency on the part of government officials to overreact to perceived threats to order. Criminal law enforcement is much more highly centralized in other constitutional systems than it is in the United States. Great Britain's hate crime statute requires that prosecutions be authorized by the Attorney-General, a single official.[24] Even in Canada's federal system, criminal law enforcement is centralized in each province's Attorney-General.[25] The risk of abusive prosecutions for hate speech is reduced by this centralization and the attendant responsibility for, and public visibility of, decisions to prosecute. Compare the United States, where thousands of local district attorneys have the power to initiate and carry prosecutions through.[26] The way the US federal system is organized increases the risk that clearly inappropriate prosecutions for hate speech will be brought. And, finally, that risk is relevant to determining whether a domestic constitutional provision protecting free expression should be interpreted to permit or prohibit criminal hate speech regulations. The institutional context of criminal law enforcement in the United States and elsewhere must be taken into account in determining how to interpret the *substantive* commitment to free expression.[27]

The doctrinal context matters as well. Here we can reconsider the earlier example of libel law. Cast in the most general terms, libel law provides the structure for accommodating interests in speech with interests in reputation, the latter an aspect of human dignity. Note, though, that in the United States the interest in speech is of constitutional magnitude, while the interest in reputation is merely one of

[24] Race Relations Act 1976, s. 5A(5) (continuing a requirement introduced in the Race Relations Act 1965).

[25] Constitution Act 1867, s. 92(14) (allocating criminal law enforcement to provinces); Criminal Code of Canada (RSC 1985, c. C-34) (giving provincial attorneys general primary law enforcement authority).

[26] In general, state attorneys lack the power to displace local prosecutors except in highly limited circumstances.

[27] My argument deals with criminal enforcement of hate speech regulations. Other contexts involve much more decentralized decision-making even in Canada and the United Kingdom, e.g. in connection with hate speech regulations by school boards and government employers. It might be, then, that Canadian and British commitments to free expression might permit criminal hate speech regulation but ought not be interpreted to authorize non-criminal regulations.

policy.[28] The accommodation of interests in the United States *must* give greater weight to the interest in speech than to the interest in reputation. In contrast, in Great Britain and Australia, neither the interest in speech nor that in reputation is of constitutional magnitude. There the common law can develop in ways that give 'appropriate' weight to both interests. And, finally, in Germany both the interest in speech and the interest in reputation as an aspect of human dignity are of constitutional magnitude. The balancing of interests in Germany will necessarily be different from that in the United States because the underlying constitutional provisions differ.

Affirmative action law in the United States and India illustrates the importance of doctrinal context as well.[29] The Indian Supreme Court has found affirmative action programmes constitutional, but it has required that such programmes exclude what it calls the 'creamy layer' of the beneficiary class. The creamy layer consists of members of subordinated castes who have achieved sufficient status – mostly measured by income – that their inclusion in affirmative action programmes would give them an unneeded and unfair boost. Some proposals for designing affirmative action programmes in the United States have suggested that the 'creamy layer' concept should migrate from India to the United States. Yet, that migration might well be blocked by US affirmative action doctrine. The reason is that India, but not the United States, treats compensatory and rectificatory justice as permissible justifications for affirmative action. Affirmative action in India is designed to overcome existing patterns of discrimination and the history of subordination associated with the caste system. The US Supreme Court has held that governments cannot justify affirmative action programmes by pointing to what the Court calls societal discrimination,[30] and that even understood in compensatory terms affirmative action programmes may be adopted only by government agencies that have themselves engaged in discriminatory practices for which the programmes are an appropriate remedy.[31] Broader affirmative action programmes are constitutionally permissible

[28] That is, as a matter of US constitutional law, a state could abolish its tort of libel entirely, leaving people with no recourse whatever for damage to reputation caused by entirely false statements of fact.

[29] For more detail, see Tushnet, Interpreting Constitutions Comparatively.

[30] See *Wygant* v. *Jackson Board of Education*, 476 US 267 (1986).

[31] This proposition is supported by dicta in *Adarand Constructors* v. *Pena*, 515 US 200 (1995).

only when, and to the extent that, they advance an interest in achieving diversity in some public programme, such as education and perhaps public employment, where diversity promotes the programme's basic goals.[32]

How does the 'creamy layer' idea fit into US constitutional doctrine? In a word, badly. The reason is that the idea is associated with notions of compensatory and rectificatory justice: members of the creamy layer do not need the compensation or rectification of a condition associated with affirmative action programmes, because, by whatever means, they have already received the necessary compensation and adjustment of position. In addition, being a member of the creamy layer does not disqualify a person from adding some diversity to a public programme. In short, US constitutional doctrine makes membership in the creamy layer irrelevant to any of the constitutionally permissible rationales for affirmative action. The idea, treated as a potential migrant into US law, would be blocked at the entry-gate by existing constitutional doctrine.

Expressivism is a different, perhaps even more comprehensive, version of contextualism. For an expressivist scholar, constitutional law – doctrines and institutional arrangements – are ways in which a nation goes about defining itself. Preambles to constitutions may be particularly useful for an expressivist. So, for example, the Preamble to the Irish Constitution of 1937 is an especially rich text for these purposes. The Preamble states:

> In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred,
>
> We, the people of Eire,
>
> Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial,
>
> Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation,
>
> And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations,
>
> Do hereby adopt, enact, and give to ourselves this Constitution.

[32] *Grutter* v. *Bollinger*, 539 US 306 (2003).

The Preamble's opening words and its later reference to Jesus Christ identify the nation with Christianity, and its use of the terms *final end* and *prudence, justice, and charity* show that the nation is specifically Roman Catholic. The document also looks backward in a powerful way, with its references to *centuries of trial* and a *heroic and unremitting struggle*. And, finally, the formulation 'give to ourselves' states a relationship of self-donation and acceptance between the people of Ireland and their Constitution that embeds the 1937 document in the nation's ongoing identity.[33]

An expressivist approach to comparative constitutional law would contrast the self-understandings found in the constitutional documents of different nations. For example, such an approach might point to the differences in self-understanding expressed in Canada's *Burns* decision and the *Stanford* decision in the United States. In the former, the Supreme Court significantly modified a prior holding to impose rather severe restrictions on the power of the national government to extradite a fugitive from the United States charged with a capital crime, unless the government obtained assurances that the death penalty would not be imposed.[34] The theme that the Canadian government had taken the lead in international discussions and implementation of human rights ran through the Court's opinion. So, for the *Burns* Court, Canada's self-understanding as a leader on human rights *led to* the constitutional doctrine the Court articulated. In *Stanford*, the US Supreme Court applied a constitutional standard referring to 'evolving standards of decency' in the context of the death penalty by insisting that the relevant standards of decency were those of the people of the United States, not those of the wider international community.[35] An expressivist analysis could use these cases to distinguish between the outward-looking self-understanding of Canada and the inward-looking one of the United States.

My discussion of what we can learn from comparative constitutional law offers some cautionary notes, not knock-down arguments against its

[33] One could engage in a similar analysis of the preambles to the Constitutions of the United States and South Africa, and of the 'post-amble' of the interim Constitution of South Africa, with its discussion of 'National Unity and Reconciliation'. Constitution of the Republic of South Africa 1993, chapter 15, final paragraphs.

[34] *United States* v. *Burns* [2001] 1 SCR 283, SCC.

[35] *Stanford* v. *Kentucky*, 492 US 361 (1989).

use in domestic constitutional interpretation. Sometimes it is said that comparative law can bring to mind possibilities that might otherwise be overlooked or thought too utopian to be considered as part of a real-world constitution. Comparative law, the thought is, can help us rid ourselves of ideas of 'false necessity', the sense we might have – grounded in our own experience because that is the only experience we have – that the institutions and doctrines we have are the only ones that could possibly be appropriate for our circumstances.

Combining contextualism with the insight that comparative study can raise questions about whether some arrangements that seem necessary to us are actually false necessities may have more subversive implications for the comparative enterprise than it might seem initially. The difficulty is that contextualism might lead us to see that the arrangements are indeed necessary, given the complete context within which they are set. The question is the extent to which the constraints imposed by a nation's legal institutions and arrangements, the constraints imposed by its doctrinal history, the constraints imposed by its legal culture, and so on down the list of constraining factors, intersect in a way that reduces the set of choices (be they institutional, doctrinal, or whatever) to one – that is, to the one that is actually in place.[36] I doubt that this question can be answered in the abstract, or generally.[37] I believe, though, that the comparative inquiry must be sensitive to all the contexts to which contextualism directs our attention.[38]

More precisely: contextualism in both its versions raises challenges to the idea that comparative study can help identify false necessities. The first version suggests that these institutions and doctrines might not be 'false' in some strong sense because they may be so tightly integrated that no significant changes are possible. Expressivism suggests that a nation *has* a (single) self-understanding that its constitution expresses. Yet, these challenges should not be given more weight than they properly bear. All we know about the doctrines and institutions of law tells us that

[36] Notice that this concern is entirely compatible with the proposition that no single set of constraints is all that constraining. Doctrine can be flexible and substantially open, e.g., and institutional arrangements in themselves might not place strong limits on the possibilities. Rather, the concern is that adding one loose set of constraints to another, and to yet another, reduces the options substantially.

[37] Although I must note that my intuition is that the answer will quite frequently be that the cumulative constraints are indeed quite substantial.

[38] And that many comparative exercises are not sufficiently sensitive to all those contexts.

doctrines and institutions can accommodate much more change than we might think. We have discovered that we can tinker with a wide range of doctrines and institutions without transforming in the short run what we regard as constitutional fundamentals. And, as time goes on, our understanding of what those fundamentals are can itself change, sometimes in response to prior tinkering.

Similarly, it is a mistake to think that a nation has a single self-understanding. Doctrines and institutions might seem true necessities to an expressivist who says, 'Well, this is the way we (or they) are'. But, even within a nation's constitution and constitutional traditions, 'who we are' is often – perhaps always – contestable and actively contested. In contrast to the inward-looking self-understanding articulated in *Stanford*, for example, there is another, outward-looking self-understanding that can be found in US constitutionalism. One way to make the point is to refer to the self-understanding expressed in the passage of the Declaration of Independence invoking the duty (perhaps prudential, perhaps principled) to show 'a decent respect to the opinions of mankind' by explaining to the world the reasons for our actions under some circumstances. Another is to invoke the statement made in 1630 by John Winthrop that the land to which he and his colleagues were migrating would become a 'city upon a hill' for the world to emulate, a sentiment echoed by US leaders throughout history.[39] The Supreme Court invoked the same self-understanding at the conclusion of its 2005 decision finding it unconstitutional to subject to the death penalty offenders who were juveniles when they committed their offences:

> Over time, from one generation to the next, the Constitution has come to earn the high respect and even, as Madison dared to hope, the veneration of the American people . . . Not the least of the reasons we honor the Constitution, then, is because we know it to be our own. It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.[40]

[39] Ronald Reagan invoked and elaborated on the phrase in his farewell address to the nation on 11 January 1989, which referred to the United States as a 'shining city upon a hill'. Available at http://www.ronaldreagan.com/sp_21.html, visited on 5 July 2005.

[40] *Roper* v. *Simmons*, 543 US 551 (2005) at 1200.

Contextualism's challenge to the comparative enterprise, though serious, need not be fatal. The challenge does suggest that the study of the migration of constitutional ideas must be done with great caution – more caution, I think, than can be found in much of the literature on 'borrowing' constitutional ideas. Perhaps the true object of study should be the way in which those constitutional ideas that do migrate are transformed as they cross the border, or, alternatively, the way in which ideas that seem to have migrated have deeper indigenous roots than one might think, deeper even than the prevalence of citations to non-domestic sources would indicate.

In the end, Justice Louis Brandeis' observation, 'If we would guide by the light of reason, we must let our minds be bold',[41] may provide the best defence for doing comparative constitutional law. Or, as Claude Lévi-Strauss notably put it, ideas, like food, are 'good to think'.[42] For scholars, that probably should be enough. Those who address themselves to policy-makers, including judges, and the policy-makers themselves, should be appropriately cautious about what they believe they can learn from the study of comparative constitutional law.

[41] *New State Ice Co.* v. *Liebmann*, 285 US 262 (1932) at 311 (Brandeis J dissenting).

[42] C. Lévi-Strauss, *Totemism*, R. Needham translator (Beacon Press, Boston, 1963), p. 89. I note that Lévi-Strauss almost certainly deliberately omitted the word 'with' that most readers seem unconsciously to insert in his phrase.

4

The postwar paradigm and American exceptionalism

LORRAINE E. WEINRIB

> It is easy to treat the written instrument as the paramount consideration, unmindful of the part played by the general law, notwithstanding that it is the source of the legal conceptions that govern us in determining the effect of the written instrument.[1]

Introduction

The Constitution of the United States provided the inspiration for the rights-protecting constitutions of liberal democracies throughout the world. Yet the constitutional systems developed or newly established since the Second World War now differ from their US precursor. These systems have come to share a sophisticated legal paradigm that facilitates – indeed, perhaps necessitates – comparative engagement. The constitutional jurisprudence of the United States stands apart from this shared legal paradigm. Recently, prominent US judges and politicians have crossed swords on the issue of comparative reflection. This debate raises an important question: how should US scholars and judges define the relationship of their Constitution to the constitutional systems of liberal democracies that operate within the postwar constitutional paradigm?[2]

To broach this subject one must consider the rancorous history of US constitutionalism over the last half century and beyond. Two competing

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[1] Sir O. Dixon, The Common Law as an Ultimate Constitutional Foundation (1957) 31 *Australian Law Journal* 240 at 241.

[2] The implications of the postwar constitutional paradigm extend to both transnational and international rights-protection. The latter is beyond the reach of this chapter.

constitutional conceptions vie for supremacy, each with its own view of fundamental principles, institutional role, and comparative engagement.[3] A rights-based conception favours comparative engagement, regarding other constitutional systems as repositories of methodological direction, illuminating example, and theoretical reflection. The other, an indigenous, historically fixed conception, regards such engagement as unnecessary and perhaps even subversive.

The rights-based conception was dominant during the era of the Warren Court. This conception animated the pervasive influence of the US Bill of Rights upon other liberal democracies since 1945, shaping their foundational principles, institutional roles and ongoing development. Within this conception, the protection of rights guaranteed as the embodiment of fundamental principles stands as the great achievement of US constitutionalism through its integration of substantive Enlightenment principles and common law method. The constitutional text, while comprehensive and authoritative, was understood to reflect its particular time and place so as to give abstract expression to, but not exhaust, these principles. The judiciary stands as their guardian, applying them to problems as they arise in a changing society within a changing world. The constitutionalism that emerges from this conception is both stabilizing and dynamic. This is the conception that, in a more developed stage, now animates the constitutional systems of postwar liberal democracies and, with the necessary adjustments, the international rights-protecting instruments as well.

The indigenous, historically based constitutional conception challenged and ultimately destabilized the Warren Court. This is a self-enclosed, self-sufficient set of ideas, established when revolutionary forces severed America from its colonial roots and purportedly fixed its social values. The Constitution stands as the indigenous textual amalgam of US experience, its great achievement being the entrenchment of popular sovereignty as the expression of a self-governing people. Constitutional exceptionalism is thus not merely a matter of judicial preference; it is necessary to protect the legal character of judicial review. Comparative engagement by US jurists is thus as illegitimate as interpretation that

[3] L. Weinrib, Constitutional Conceptions and Constitutional Comparativism in V. Jackson and M. Tushnet (eds.), *Defining the Field of Comparative Constitutional Law* (Praeger, Westport, CT, 2002), p. 3.

departs from concrete historical understanding, traditional values, and specific textual direction. Legislatures, not courts, serve as the guardians of the constitutional order. The Constitution inhibits change absent the demonstration of pervasive consensus or formal amendment.

The human rights revolution in the aftermath of the Second World War provides an enlarged perspective on these competing conceptions. The collapse of democratic governance in Germany endangered all nations and all people. An unimaginable toxic brew of totalitarianism, Nazism, racism, genocide, and imperialism inflicted incalculable human suffering until subdued by arduous and prolonged military intervention. Consensus developed that an integrated set of international and domestic safeguards could militate against such crisis in the future. This thinking ultimately produced a particular conception of constitutional ordering, to stabilize democracy and safeguard equal citizenship and respect for inherent human dignity as supreme or higher law.[4] This conception now stands as the foundation of the postwar constitutional state.

The principles championed in the war reverberated long after the end of hostilities. They inspired the formal reconstruction of the defeated and failed nation states. Less obviously, they took root in the constitutional systems of the victor nations as well. Principles coalesced into a sophisticated juridical paradigm, which adapted and combined deeply rooted legal precepts in both common law and civil law to the pressing challenge of governing diverse, egalitarian, postwar democracies. Comparative engagement produced this juridical paradigm and remains necessary to its continued vitality.

The postwar constitutional paradigm has extensive reach and deep transformative power. One can discern its basic structure within seemingly unrelated and unconnected legal systems. It reoriented interpretation of old constitutions and influenced the development of unwritten constitutional traditions. It shaped the text and interpretation of new and renovated constitutions. Its strongest transformative effect has been to establish fundamental principles at the core of the modern

[4] Supreme law constitutions are formal, written constitutional instruments, partial or comprehensive, having the status of supreme law and for that reason requiring judicial review. Higher law constitutions entail a self-binding by the state to fundamental norms, in a less formal way, e.g. by special statutes or revered instruments laying down the fundamental values of the state.

constitutional state, with the highest priority accorded to the notions of dignity and equality.

The postwar constitutional conception came to frame the thought and practice of the Warren Court, which in turn influenced the constitutional development of many other countries. Eventually, as noted, it ceded to the competing constitutional conception that regards the US Constitution as indigenous, historically fixed, and textually circumscribed – and therefore exceptional. Now that the postwar constitutional conception and its juridical paradigm have reached a higher level of sophistication and wide acceptance outside the United States, they have attracted the attention of the US Supreme Court as well as scholars and politicians. Our globalized world fosters interaction and the development of international law. On a variety of issues – the death penalty, freedom of speech and religion, legal rights, equality and privacy, for example – the divergence of US jurisprudence from the norms of other rights-protecting systems (and its coincidence with those of less reputable regimes) has been exposed in particularly striking ways.

Moreover, the powerful logic of the postwar juridical paradigm has re-entered US constitutional analysis, having the effect, for example, of instituting a more demanding rational basis analysis.[5] The acrimonious quality of the objections to comparative engagement expressed in recent US judgments suggests that much more is at stake than the question of rather weak references to the practices of other countries in various areas of law.[6] It appears that the battle between the two competing conceptions has once again been engaged.

The time may be ripe, therefore, to reconsider the postwar constitutional conception and its juridical paradigm, both of which so clearly structured the work of the Warren Court. This exercise may contribute to a deeper understanding of the US Constitution's history, text, institutional roles and fundamental principles than does the competing exceptionalist conception. It may also illuminate the debate as to the utility, desirability and propriety of comparative engagement.

In this chapter I focus, in the light of the postwar constitutional conception and its juridical paradigm, on two interrelated strands of the

[5] *Atkins* v. *Virginia*, 536 US 304 (2002); *Lawrence* v. *Texas*, 539 US 558 (2003); *Roper* v. *Simmons*, 125 S Ct 1183 (2005). See also the dissents in *Bowers* v. *Hardwick*, 478 US 186 (1986) (per Blackmun J) and *McClesky* v. *Kemp*, 481 US 279 (1987) (per Brennan J).

[6] See e.g. the dissents in *Atkins*, *Roper*, and *Lawrence*.

purported justification for the exceptionalist constitutional conception with which it competes. In the first strand, the Constitution stands as the unique product of the US founding, so that constitutional interpretation operates within the parameters of US constitutional tradition and history. Deference to past and present expressions of the people shape legal reasoning about constitutional rights. In the second strand, any deviation from such deference invites subjective and unaccountable judicial preference to reign supreme. The classical exemplar of this danger is the *Lochner* case.[7] Recoiling from the perceived judicial hubris of Peckham's majority opinion, courts and commentators in the United States have endorsed Holmes's extreme deference to majoritarianism, history, and tradition.

The postwar constitutional conception demonstrates the vulnerability of both strands in this argument. The growing development of a transnational culture of rights suggests an alternative to the conception of rights-protection as the unique product of US experience. The postwar juridical paradigm provides a safe haven from both popular sovereignty, history and tradition, on the one hand, and judicial subjectivity, on the other. In this paradigm, the abstract ideas of equal citizenship and respect for human dignity – ideas based on human *personhood* – give structure to a legal frame that is regulative of all exercises of state authority.

Moreover, the traditional reading of *Lochner* is mistaken in asserting, as the sole corrective to Peckham's majority opinion, Holmes's policy of deference to majority, history, and tradition. Rather, we should take up the neglected reasoning of Harlan, who carefully examined the impugned limitation of freedom of contract and found it justified as an exercise of the traditional police power of the state. In this remarkable judgment, he provided the historical root within US constitutional law for the postwar constitutional conception, anticipating such elements integral to its juridical paradigm as purposive reading of the constitutional right and normative justification of limits on rights.

This chapter develops these themes. The following section traces the emergence and legal structure of the postwar constitutional paradigm. The next section traces the features of this juridical paradigm within the Warren Court. The final section revisits the legitimacy of the Warren Court's constitutional methodology, by arguing that Harlan's

[7] *Lochner* v. *New York*, 198 US 45 (1905).

dissent – the road not taken, as it were – delineates the legal ordering now acknowledged to be the precursor of the postwar paradigm. The conclusion draws out some of the implications of the overall argument. For example, this reassessment of Harlan's opinion would not merely enrich the recent revisionary examination of the *Lochner* crisis and its resolution; it would also vindicate as juridical even the most controversial judgments of the Warren Court. If the postwar constitutional paradigm were to be recognized as an integral part of US constitutional legal structure, the door would open to comparative constitutional engagement in the further development of that paradigm within the distinctive contours of US constitutional law.

The postwar constitutional paradigm

The postwar constitutional paradigm is the juridical consequence of the defeat of Nazism. The atrocities of the Second World War solidified the view that the basic structure of liberal democracy must stand on a new principle. Henceforth, liberal democratic ordering would not merely define and stabilize the exercise of state power through majoritarian machinery but would give legal priority to equal citizenship and respect for inherent human dignity. Hannah Arendt identified the substantive content, special legal status, and transnational dimension of the postwar rights revolution in these words:

> . . . human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity . . .[8]

Re-conceptualization of the basic structure of liberal democracy has ensued in the domestic sphere of the nation state and reverberated at the regional and international levels. New legal arrangements have proliferated, designed to protect equal citizenship and respect for inherent human dignity, the basic components of personhood in the modern constitutional state. This shared remedial project has broken down hitherto impermeable boundaries between separate sovereign legal systems and blurred hitherto sharp distinctions: between written and unwritten constitutions; between new and old constitutions; between

[8] H. Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich, New York, 1973), p. ix.

constitutions based on common law and those based on civil law; between constitutions for unitary states and constitutions for federal states; between the roles of constitutional and supreme courts; and between international and domestic legal systems.

The rights-protecting instruments adopted in the aftermath of the Second World War share a constitutional conception that transcends the history, cultural heritage and social mores of any particular nation state. Viewed retrospectively after the tragedy of the Second World War, this conception has the remedial purpose of building the primacy of equal citizenship and inherent human dignity into the basic structure of liberal democracy. Viewed prospectively, it characterizes the postwar nation state as the state of its citizens, transcending their shared or diverse ancestry, ethnicity, and religion.[9]

These instruments effectuate their remedial purposes through an institutional framework, including judicial review and possible invalidation of legislation, dedicated to rights-protection as well as other constitutional principles, such as the rule of law, the separation of powers and stable democratic governance. The value structure and corresponding institutional framework are taken to comprise 'an objective value order'.[10] The state's responsibility is both negative and positive: to prevent or remedy breaches of this order and to forward its development.

To secure the constitutional principles as higher or supreme law, rights guarantees displace any presumption of the constitutional validity of legislation or state action. These guarantees impose duties, capacities and incapacities on government by disciplining every exercise of state power, whether by elected officials or under their auspices.

Accordingly, the specific rights guaranteed to individuals as legal subjects – the so-called 'subjective rights' – crystallize the more objective abstract constitutional principles of equal citizenship and inherent human dignity. Accordingly, the state must treat each person over whom it holds power as an end, not a means, by respecting his or her full and equal humanity and opportunity for self-fulfillment. The individual is

[9] D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, Duke University Press, Durham, NC, 1997), p. 47; C. Starck, Constitutional Interpretation in C. Starck (ed.), *Studies in German Constitutionalism* (Nomos Verlagsgesellschaft, Baden-Baden, 1995), p. 47 at pp. 63–4.

[10] L. Weinrib, Dignity as a Rights Protecting Principle (2004) 17 *National Journal of Constitutional Law* 235.

understood as a self-determining social creature embedded in a complex mesh of private and public arrangements, not as an atomistic unit. No received wisdom justifies the state's failure to respect personhood, whether it derives from national or religious tradition, the accepted understanding of the common or public good, or the approval of elected bodies holding temporary power.

While constitutional principles inform the analysis of the scope and strength of rights claims, they do not function as concrete rules that mechanically dictate uniform results for similar questions wherever or whenever they arise. Given the considerable diversity in the historical, cultural, and social contexts in which these principles must flourish, different legal systems will produce different results. The caveat is that this variety must reflect justifiable constructions of the underlying principles.

For example, the German Basic Law stipulates that human dignity is inviolable and protects this principle from formal constitutional amendment. It also specifically guarantees freedom of expression as an aspect of that dignity. In upholding legislation that prohibits Holocaust denial as nonetheless justified, the German Constitutional Court accommodated both the objective principle of human dignity and the subjective right to freedom of expression by rooting the legislation in German history:

> The historical fact itself, that human beings were singled out according to the criteria of the so-called 'Nuremberg Laws' and robbed of their individuality for the purpose of extermination, puts Jews living in the Federal Republic in a special personal relationship vis-à-vis their fellow citizens; what happened [then] is also present in this relationship today. It is part of their personal self-perception to be understood as a part of a group of people who stand out by virtue of their fate and in relation to whom there is a special moral responsibility on the part of all others, and that this is part of their dignity. Respect for this self-perception, for each individual, is one of the guarantees against repetition of this kind of discrimination and forms a basic condition of their lives in the Federal Republic. Whoever seeks to deny these events denies vis-à-vis each individual the personal worth of [Jewish persons]. For the person concerned, this is continuing discrimination against the group to which he belongs and, as part of the group, against him.[11]

[11] 90 BVerfGE241, Judgment of 13 April 1994, in Kommers, *ibid.*, p. 386.

Other constitutional states may or may not present the historical or social context necessary to justify such an encroachment on freedom of speech.

In the postwar constitutional paradigm, courts vested with constitutional jurisdiction function as special guardians of foundational constitutional principles, including the rule of law, the separation of powers, the democratic function, and the specific rights that the constitution guarantees. Adjudication of rights claims serves to protect these constitutional principles against inimical legislation and state action. Judicial protection of fundamental rights therefore does not encroach upon political prerogatives, but restrains the legislative authority of elected bodies to their electoral mandate, which is temporally delimited and subordinated to constitutional principles.

Even though the postwar paradigm reconfigures the disposition of state authority to the primacy of constitutional principles, the judiciary is not to treat rights as absolute negations of otherwise plenary state authority. Nor is there a simple transfer to the courts of the political power or prerogatives withheld from elected representatives. Rather, the legitimate and complementary institutional strengths of legislatures, the executive, and the courts operate co-operatively within the overarching framework of the objective normative order. The 'counter-majoritarian difficulty' that notoriously agitates the constitutional law of the United States and renders 'strict construction' a presidential election issue and a litmus test for judicial appointment thus has relatively little purchase.

Within this co-operative structure, elected representative bodies continue to act as responsible and representative policy-makers, both empowered and constrained by the Constitution. The executive acts in compliance with a rich understanding of the rule of law. The judiciary oversees this compliance. It also oversees fidelity to the substantive strictures contained in the constitutional principles, including higher or supreme law rights guarantees. To this end, the judiciary develops and applies appropriate doctrinal tests and onuses, assesses the strength of arguments in the light of the requirements of the objective legal order, and examines the specific and concrete effects of impugned state action by testing the evidentiary record, with recourse to expertise and data, for relevance and reliability. Especially helpful when fresh institutional, methodological or substantive questions arise in a domestic context are insights and analysis presented by social movement groups as well as

from the parallel operation of other rights-protecting systems, both national and international.

Constitutional adjudication remains a juridical exercise, tightly constrained by an established legal methodology that reflects the higher or supreme law status of the system of rights-protection. Judges do not apply their preferred personal or political views or theories of justice. The comparative examination of foreign material illuminates the analytic possibilities made available by the existence of a family of constitutions that are variants of the same postwar model. This material has no authoritative status, however.

The interpretative method is purposive, delving into text, doctrinal and statutory development, history, and theory to forward the core constitutional principles that inform the particular guarantee.[12] This conceptual framework for analysis displaces arid textual parsing of individual elements without reference to the whole.

The detailed content of all or any constitutional precepts did not crystallize at one fortuitous moment in the past. Thus historical intent or understanding of constitutional text lacks dispositive interpretative authority. Instrumentally retrospective ascriptions of historical intent are wholly without merit. Speculation as to how those who lived in the past might have decided questions now posed in modern contexts stands on even weaker ground.

In the postwar juridical paradigm, the determination of whether a right has been infringed requires a two-stage analysis. In the first stage, the onus is on the claimant to show that the state has infringed a subjectively held right. If an infringement is found at the first stage, the state then has the opportunity, in the second stage, to demonstrate that this *prima facie* violation of the claimant's right is justified. Individuals are not viewed as bearers of a miscellany of particular rights, no one of which can be infringed, but as equal citizens within a coherent system of rights that forms an objective normative order. The rights claimant is thus not an isolated autonomous actor whose maximal liberty registers as the highest constitutional aspiration. Rather, each citizen participates in a chosen and/or given community within a complex social structure of equal citizens whose inherent human dignity the state must respect. The judicial function is to evaluate whether the state's encroachment on the

[12] A. Barak, *Purposive Interpretation in Law* (Princeton University Press, Princeton, NJ, 2005).

right violates the constitutional principles of equal citizenship and inherent human dignity, of which the specific guarantees are important but not exhaustive exemplars.

Accordingly, in the first stage of argument, the state may assert a narrower scope for the right and/or deny its infringement. In the second stage, it may assume the onus of justifying encroachments on the particular subjective rights, i.e., to establish that the encroachment forwards the core constitutional principles. This mode of justification replicates the legal framework of the police power, which arose in the early days of the positive liberal state.[13] The state thus participates in the reasoning process that sustains the constitutional order, instantiated by the specific guarantees.

The separated, sequenced consideration of rights-infringement and justification in the argument of litigated rights claims makes possible this important shift in onus, which ensures that the state has an active role in constitutional development by the judiciary. It also gives legal expression to the relationship between the subjective rights and the objective normative order within the postwar constitutional model. On the one hand, the subjective rights stand as instantiations of an objective normative order based on the principles of equal citizenship and respect for inherent human dignity. On the other, these rights cede if and when the state demonstrates that encroaching on the right promotes the principles that inform the objective normative order from which the rights spring. This legal structure and sequence of legal argument reflects the idea that the objective normative order generates both the crystallized rights and the grounding of justification for their limitation.

As a precondition to its justification argument, the state must establish that its encroachment is the product of the regular channels of law-making, thus ensuring fidelity to the rule of law as well as to democratic legitimacy and accountability.[14] This legality test, prompted by the familiar 'by law' and 'prescribed by law' stipulations in modern constitutional instruments, is satisfied when the impugned measure

[13] E. Freund, *The Police Power: Public Policy and Constitutional Rights* (Callaghan, Chicago, 1904); C. Bacon and F. Morse, *The Reasonableness of the Law: The Adaptability of Legal Sanctions to the Needs of Society* (G. P. Putnam's Sons, New York, 1924).

[14] In the Canadian context, the tests for justifying limitations on rights were developed in *R.* v. *Oakes* [1986] 1 SCR 103; on the test and early applications see L. Weinrib, The Supreme Court of Canada and Section 1 of the *Charter* (1988) 10 *Supreme Court Law Review* 469.

resulted from a representative, accountable, deliberative public process and is embodied in, or authorized by, an accessible and intelligible legal instrument.[15] In common law jurisdictions, a legal rule produced by the principled elaboration of the common law also suffices. In contrast, an exercise of power that lacks these formalities, or that fails to convey to rights-holders a reasonable assessment in advance of the rules applicable to a particular situation or course of action, or that is inaccessible for one reason or another, will fail this test.

Failure to pass these tests bars the state from proceeding to substantive justification analysis. In result, all members of the political community benefit by the safeguards afforded by the adherence to the rule of law and democratic engagement when fundamental rights are at issue. These rules motivate more care in the legislative process, to ensure the possibility of reaching the substantive justification stage. The increased measure of deliberation, consultation, media and public attention ensures that public policies reflect a wider range of interests, deeper understanding of expert opinion and social data, and respect for the constitutional principles implicated. The postwar constitutional paradigm thus shapes and co-ordinates the exercise of all public authority; it does not regard the executive and the legislative arms of the state as free actors to which the courts, as guardians of the constitutional order, must defer.

In the substantive justification exercise, focus turns to conflicts between subjective rights, abuse of rights, and considerations of the public good. Analysis encompasses the normative grounds that inform the entire constitutional order.[16] The determination of justifiable limits on rights excludes the possibility of the full abrogation of the rights

[15] M. Delmas-Marty, The Richness of Underlying Legal Reasoning in M. Delmas-Marty (ed.), *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions* (Martinus Nijhoff Publishers, Dordrecht, 1992) p. 319 at pp. 323–4: accessibility (to the citizen), sufficient precision, and clarity (so that the citizen can foresee the consequences of given action) are the 'three qualitative requirements' necessary for democratic legality.

[16] See e.g. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4 Annex, nos. 15–18; R. Marcic, Duties and Limitations Upon Rights (1968) *Journal of International Commission of Jurists* 59 at 61; J. Rawls, *Political Liberalism* (Columbia University Press, New York, 1993), pp. 358–9; A. Kiss, Permissible Limitations on Rights in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981) p. 290 at p. 310; P. Sieghart, *The International Law of Human Rights* (Clarendon Press, Oxford, 1983) pp. 88, 91.

contrary to the constitutional principles, because, as noted, the permissibility of limiting subjective rights flows from the principled foundation common to both the rights and their justified limitations. Abrogation connotes discontinuity, which in earlier stages of development of the postwar constitutional conception was permissible in times of emergency or through formal amendment or regime change. More recently, this conception has expanded to embrace these contingencies as well.[17]

The state does not satisfy its onus of substantive justification by merely asserting plenary political authority, promotion of the public good, fidelity to traditional moral values or social roles, or financial constraints. This is not a balancing exercise. Justification requires connection to the core constitutional principles through a sequence of analytic steps that maintain the primacy of the constitutional principles, even when a particular crystallization of these principles must cede. The compendious name for this methodology is proportionality analysis, which entails four sequential, mandatory tests.[18]

Proportionality analysis begins by ascertaining the actual objective of the impugned enactment or action, which becomes central to the tests that follow. Bringing together the relationship of the subjective right to the core constitutional principle and the prior proof of 'prescription by law', just described, the state's onus here is to establish that the actual, democratically espoused objective of the impugned measure is of sufficiently high importance to warrant superseding the infringed right. Objectives inconsistent with the constitutional principles do not pass this test. Nor do purposes concocted for the courtroom, since they would lack the requisite democratic and legal legitimacy.

[17] L. Weinrib, Constitutionalism in an Age of Rights – A Prolegomenon (2004) 121 *South African Law Journal* 278.

[18] The proportionality principle has become the central analytic feature in judicial review of rights-protecting instruments and emerging systems of common law rights protection. See E. Ellis, *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, Oxford, 1999); N. Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (Kluwer Law International, London, 1996); G. de Búrca, Proportionality and *Wednesbury* Unreasonableness: The Influence of European Legal Concepts on UK Law (1997) 3 *European Public Law* 561; J. Schwarze, *European Administrative Law* (Sweet & Maxwell, London, 1992), ch. 5. For a comparative analysis from the US vantage point, see V. Jackson, Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on 'Proportionality', Rights and Federalism (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 583.

Next, the state must establish that the impugned law (or state action) logically forwards this objective. This test weeds out measures that could not plausibly carry forward their sufficiently important objective. It also has the effect of narrowing the range and generality of objectives that can be successfully asserted in the earlier test of objective: highly laudable objectives often lose their plausibility as actual aspirations when the chosen means of implication is clearly inadequate or points to another motivation.

The primacy of the constitutional principles is further enforced by the stipulation that the encroachment, having passed both the test of its objective and its means of effectuating that objective, cannot intrude on the right more than necessary. This stipulation ensures that the justification process circumscribes the encroachment to the extent possible.

Finally, the state, having established a sufficiently important objective, rationally pursued with minimal impairment of the right, must demonstrate that the desired and actual benefit of the impugned measure at large exceeds the detriment visited upon the rights-holder. This final stage, situated as the last in the sequenced set of mandatory tests, in which the state bears a sustained onus, materializes only upon satisfaction of the earlier, non-balancing tests, and operates to support the right claimant's position, not that of the state.

The justification stage of the postwar juridical paradigm thus provides the constitutional principle significant protection even when the crystallized right must cede. Adjudication does not open the doors to arguments that would limit or deny rights on the basis of considerations that can be inimical to the constitutional principles, such as custom, tradition, popular morality, cost, majority preference, or majority benefit. Calculations of social utility do not enter into the analysis. Commentators have thus strikingly labelled the effect of this legal structure of rights and justified limitation as limiting the range of the permissible limitation of rights.[19] Any limitation of the permissible limitation has the effect of enlarging the enjoyment of the guaranteed rights and freedoms.

[19] L. Weinrib, Canada's Charter of Rights: Paradigm Lost? (2002) 6 *Review of Constitutional Studies* 119 at 143–5, 150–7; G. Robbers, *An Introduction to German Law* (Nomos, Baden-Baden, 1998).

The postwar constitutional state's primary aspiration is to create stable institutions that work co-operatively to advance the widest application of the various constitutional principles. Working examples operate in many domestic contexts and at the international level as well. The postwar paradigm is a work in progress, a constitutional structure that must be *expounded*; it cannot be reduced to a text, to be merely interpreted according to historical intent, understanding, or social values:

> The development of the constitutional state can be understood as an open sequence of experience-guided precautionary measures against the overpowering of the legal system by illegitimate power relations that contradict its normative self understanding.[20]

In the next section, I briefly consider selected judgments of the Warren Court. My purpose is to illuminate, from the enlarged perspective of comparative constitutional law, the strong parallels between the structure of reasoning in these much maligned cases and that of the postwar constitutional paradigm, as I have just described it. This section prepares the way for the argument outlined in the introduction to this chapter and developed in detail in the last section of this chapter: that the reasoning in Harlan's dissent in *Lochner*, based on the traditional police power jurisprudence of the early modern state, is the precursor of the postwar constitutional paradigm embedded in the analysis of the Warren Court. While this argument may be novel to the non-comparativist, it simply discloses within US constitutional history a progression evident in many other legal systems in the same period. This linkage challenges the claim to dominance of the indigenous, historical conception of US constitutional law as the only approach that can safeguard the juridical character of constitutional analysis.

The postwar paradigm and the Warren Court

The US Supreme Court generated the most venerable example of the postwar constitutional paradigm. The Warren Court extrapolated substantive imperatives from domestic constitutional instruments, drawing out Enlightenment principles embraced by the framers of the

[20] J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, Cambridge, 1996), p. 39.

Constitution and later affirmed by the post-Civil War amendments. In the shadow of the struggle against Nazism, the Court invoked the principles endangered and denied in Europe. Read purposively, the constitutional text offered ample foundation for realizing equal citizenship and respect for inherent human dignity.

The Warren Court's challenge was distinctive. US constitutional analysis had not confronted the many practices inimical to fundamental constitutional principles, including the racial legacy of slavery. Moreover, the constitutional text was open to a reading by which the rights stipulated enjoyed absolute protection, impractically unlimited in their defined scope and unrelated to one another. No directive connected the subjective rights to an objective normative order; stipulated purposive interpretation of the rights to forward the principles of that order; or narrowed limitation of rights to strict justification standards. Judicial review itself was not textually explicit, so that even this long-standing practice inferred from the legal supremacy of the Constitution left the Court vulnerable to the charge that it failed to defer to legislative bodies holding plenary power based on majoritarian support and preferences.

Under these circumstances the work of the Warren Court was both heroic and controversial. The comprehensive and coherent conception of constitutionalism that I outlined in the previous section had not yet received the decades of multi-jurisdictional elaboration and reflection that allow us now to recognize its distinctive structure of legal argument and interlocking institutional roles. Drawing on the legal tools at hand and working from first principles, the Court, as it were, constructed a vessel in mid-voyage without a blueprint. This work, in turn, inspired elaboration elsewhere of both the postwar constitutional conception and its juridical methodology. Ironically, the juridical methodology of the Warren Court succumbed at home to criticism grounded in a competing constitutional conception that insisted upon US exceptionalism to maintain institutional legitimacy, while this same methodology flourishes in liberal democracies elsewhere as the prevailing juridical model of rights analysis.

The Warren Court's most celebrated decisions manifest all the basic elements of the postwar juridical paradigm. In *Brown*, for instance, purposive interpretation promotes the principles of equal citizenship and inherent human dignity, in contrast to earlier jurisprudence that supported the state's authority to construe the public good in line with

custom and tradition that postulated the existence of 'natural' social hierarchies.[21] The war against Nazi racism demonstrated such values and hierarchies to be inimical to liberal democracy and perversions of any notion of equality. Accordingly, the Court rejected the authority of such material. This rejection turned attention to the original intent as to the meaning of the Fourteenth Amendment. Close examination of the historical record determined that it was not dispositive. The social context relevant to the validity of the claim to equal access to mandatory, public education as a constitutional right depended upon the social context of the claim, not the social context of the genesis of the controlling constitutional text.

Looking to modern America as the relevant social context, the Court found that compulsory education, financed through taxation, laid the foundation for the most basic individual responsibilities and public functions of citizens, including appreciation of culture, preparation for professional training, military service and social adjustment. The Court emphasized the dependence of good citizenship and personal self-fulfillment on public education, describing it as 'perhaps the most important function of the state and local governments'.[22] This being the case, the Fourteenth Amendment required access to public education without discrimination. Even in comparable facilities, racial segregation generated psychological harm, regardless of intention, in young people who internalized the state's assessment of their inferiority as individuals and as members of US society.

[21] *Brown* v. *Board of Education*, 347 US 483 (1954); contrast *Dred Scott* v. *Sandford*, 60 US 393 (1857) at 426:

> No one, we presume supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favour than they were intended to bear when the instrument was framed and adopted ... If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption.

Also contrast *Plessy* v. *Ferguson*, 163 US 537 (1896), which in upholding racial segregation in public transportation held that the Fourteenth Amendment's guarantee of equality did not negate the state's authority to promote the public good according to 'established usages, customs, and traditions of the people' (at 551) – the latter reflecting natural social hierarchies.

[22] *Brown*, *ibid.*, at 493.

In general, the postwar case law of the Warren Court demonstrates the transition from the indigenous and historically fixed conception of the US Constitution to the rights-based conception, which demanded not only a new way of thinking but also a new vocabulary. Members of the Court insisted that their subject matter and methodology was not drawn from the *Lochner* Court.[23] They could not state, more positively, that their approach engaged a new constitutional conception, in which the various textual elements no longer operated as a miscellaneous set of restrictions on otherwise plenary state authority. So understood, the constitutional text demanded strict construction, as is appropriate for exceptions from norms. Invocation of traditional values, historical understandings, and precedent thus served the purpose of preserving the constitutional principle of sovereignty of the people through deference to their past preferences. In the rights-based constitutional conception, in contrast, liberty was plenary, illustrated by past cases in which the Court had forwarded fundamental freedom of the mind and the body, within the family and in social ordering, chosen and given. Accordingly, encroachments on liberty had to fall unless justified.

These judges did not have the vocabulary to invoke a normative objective order standing beyond the Constitution's specific language. Instead they referred to 'the very essence of constitutional liberty and security' and to the 'basic values "implicit in the concept of ordered liberty" '.[24] Similarly, they invoked 'penumbras', 'emanations' and 'zones of privacy' for the methodology now described as purposive interpretation.[25]

Loving v. *Virginia*, the ruling that invalidated the prohibition against racially mixed marriages, replicates the two-stage sequence of analysis that is the methodological signature of the postwar constitutional conception. Having rejected the controlling authority of traditional values, historical authority, original intent, and natural – i.e., God-given – social hierarchies, the Court turned to purposive interpretation.[26] It

[23] *Griswold* v. *Connecticut*, 381 US 479 (1965) at 481–2; cf. *Roe* v. *Wade*, 410 US 113 (1973) at 117, where the majority begins by quoting cautionary language from Holmes J's dissenting opinion in *Lochner*.

[24] *Griswold*, *ibid*., at 484 (per Douglas J, quoting *Boyd* v. *United States*, 116 US 616 (1886) at 630), 500 (per Harlan J, quoting *Palko* v. *Connecticut*, 302 US 319 (1937) at 325).

[25] *Ibid*., at 484: the 'penumbras' on the enumerated rights are 'emanations from those guarantees that help give them life and substance' (per Harlan J).

[26] *Loving* v. *Virginia*, 388 US 1 (1967), citing the trial judge's conclusion that 'God ... placed [the various races] on separate continents' (at 3).

described the Fourteenth Amendment's broad, organic purposes. It treated neither the right in issue (purposively derived) nor the state's authority (based on the police power) as absolute, separated the two stages of legal analysis, shifted the onus in the transition from the first stage to the second stage, and rejected rational basis deference, emphasizing the heavy burden of justification for a classification drawn on race. The freedom to marry one's chosen partner in life free of such a classification constituted 'one of the vital personal rights essential to the orderly pursuit of happiness by free men',[27] one of the 'basic civil rights of man'.[28]

Justice Blackmun's majority opinion in *Roe* v. *Wade* provides another finely tuned example of the postwar juridical paradigm.[29] As in *Brown*, the pertinent historical analysis drew on legal history, not on reconstructions of historical intentions, invocations of traditional values, or acceptance of social hierarchies as natural. So examined, restrictive abortion laws lacked the requisite historical pedigree for constitutional status. They arose in nineteenth-century enactment, rather than the common law contemporaneous to the writing of the constitutional text. Purposive reading of the constitutional text sought out an abstract, Enlightenment-based understanding of fundamental principles 'implicit in the concept of ordered liberty'. Crystallized in legal form as rights and freedoms protected by supreme law, the claimed freedom from restrictive abortion laws pertained to the mind and the body. It encompassed the intimate physical, familial, and social relationships that encompass procreation, contraception, family relationships, child rearing and education, by which we constitute our lives.

The Court did not concoct a right to privacy. Rather, it offered this compendious term to capture the many facets of constitutionally protected 'liberty' in a nation that was moving forward on two trajectories that were often in tension – increasing regulation and enlarged commitment to equal citizenship and inherent human dignity.

[27] *Ibid.*, at 12. This language draws into purposive interpretation the language and Enlightenment values of the Declaration of Independence: 'Life, Liberty, and the Pursuit of Happiness.'

[28] *Ibid.*, quoting *Skinner* v. *Oklahoma*, 316 US 535 (1942) at 541, overturning *Buck* v. *Bell*, 274 US 200 (1927).

[29] Above note 23.

This protected sphere was beyond the reach of the state unless it could justify encroachment as an exercise of its police power, here the protection of life, morality, and health. The fact of encroachment was clear: the Court listed a number of specific and direct harms produced by the restrictive law, including physical, psychological, familial, social, and economic damage. The majority took these harms seriously, because, even though pregnant, the claimant's right to life went beyond mere continued existence to include direction of her own ends, absent justification for state regulation.

The dissenting justices, in contrast, by assuming lesser or lost personhood, rejected the basic principles underlying the postwar constitutional conception. For Justice Rehnquist, conception rendered the woman a 'mother', detached from the thick web of aspirations and responsibilities that constructed her individuality and social roles, including duties to dependants.

Contrasting views of the fetus' status also delineate the centrality of the postwar constitutional conception's notions of personhood to the analysis. To Blackmun, the fetus was subordinate to the pregnant woman to the extent of its dependency upon her, as reflected in common law and statute, including the impugned statute. To Rehnquist, in contrast, the fetal position was stronger, reflecting traditional values and natural social hierarchies that dedicated female bodies to reproduction and, by a wide range of public policies, to the construction of full male personhood.

Blackmun's analysis demonstrates how the postwar conception of personhood generates its distinctive juridical paradigm. The analysis presupposes the pregnant woman's full personhood, including her right to life and to health. The onus then shifts to the state to establish that its legislated restriction upon abortion is prescribed by law and narrowly drawn to forward purposes encompassed by its traditional police power. The stages of pregnancy frame the analysis because both the woman's and the fetal claims must be adjusted to acknowledge viability, when fetal dependence upon gestation notionally abates. The fetal claim cannot extend to full personhood, however: the legislature had itself accorded it lesser status.[30]

[30] The state's claim on behalf of the fetus cannot extend beyond the democratic legitimacy of the enacted restriction, which permitted abortion when the pregnant woman's life was endangered, did not punish abortion as murder, and did not punish her as principal or as accomplice.

The state's three asserted purposes required separate analysis. The morality claim – suppressing illicit sexual conduct – was dismissed as overbroad since the restriction applied to both married and unmarried women. In the nomenclature of the postwar constitutional paradigm, it failed both the rational connection and minimal impairment tests. Repudiation of traditional morality as a legitimate basis for limiting constitutional rights marks an important point in the transition from the traditional police power analysis to the postwar constitutional paradigm.

The state's health purpose fared better. In early pregnancy, when abortion poses no danger to health, the only justifiable restriction was one that relegated the abortion decision to the woman and her medical adviser, to ensure consideration of all health concerns. At viability, however, the state could promote fetal life, but not at the expense of the gestating woman's life or health. Such an effect would be an abrogation, not a justified limitation of her rights.

The Warren Court case law demonstrates other features of the postwar constitutional paradigm. The death penalty cases, for example, demonstrate recourse to comparative engagement.[31] This type of comparative engagement is another facet of the normative objective order, which delineates the full scope of constitutionalism, not merely the selective concretization that occurs in the formulation of even the most comprehensive constitutional text.

The Warren Court's achievement was to recognize and implement a rights-based conception to the US Bill of Rights. Its critics appealed to a constitutional order not merely based upon, but circumscribed by, an aged written and comprehensive constitution legitimated by the national birth struggle, by its cherished constituent process, by its resilience through a civil war, and by the scope it allows to popular sovereignty. They did not attack the Warren Court's core principles, however; arguments rejecting equal citizenship and respect for human dignity had lost their respectability, notwithstanding their deep historical roots. Rather, the critics stressed institutional legitimacy, condemning as illicit activism the judicial invalidation of statutes to protect 'unwritten' or 'non-interpretive' rights. They depicted the judges as indulging in elitist and personal judicial preferences, usurping the democratic prerogative to

[31] See *Furman* v. *Georgia*, 408 US 238 (1972); *Coker* v. *Georgia*, 433 US 584 (1977); see also *Trop* v. *Dulles*, 356 US 86 (1958).

make law and set policy, and thus betraying the sovereignty of the people, particularly when they overruled both long-standing and recent precedent.[32]

This critique depicts constitutionalism as facing two bleak alternatives. Either it preserves legal character by replicating the Constitution's historically fixed meaning, its incorporation of traditional values, and its deference to popular sovereignty, or it deteriorates into subjective preference. The postwar constitutional conception generates a juridical methodology that eludes these tendentious alternatives. As explained in the previous section, judicial legitimacy is safeguarded in the purposive forwarding of the objective normative order, the interpretation of constitutional provisions in the light of fundamental principles, and the disciplined sequencing of argumentation and onus in the determination of a justifiable limit upon crystallized guarantees.

Much of the critique hinges on repudiation of the perceived judicial excess of the *Lochner* Court, which appeared to demand flight from law to politics. In the next section, I argue that repudiation of the *Lochner* Court's perceived excesses required not a flight from law to politics, but a deeper engagement in law.

Lochner and the postwar constitutional paradigm

Of particular significance in the controversy generated by the Warren Court's acceptance of the postwar rights-based constitutional conception and its development of its juridical paradigm is the lingering trauma generated by the *Lochner* case, which, perhaps more than any other decision, symbolized the need to safeguard US constitutional law and theory from illegitimate judicial activism.[33] For the Warren Court to pose the same danger was tantamount to saying that one could not distinguish between the protection of rights and freedoms purposively derived from the Constitution's objective, fundamental principles, on the one hand, and the discredited overzealous protection of substantive values at the

[32] *Brown* reversed *Plessy* v. *Ferguson*. See also *Minersville School District* v. *Gobitis*, 310 US 586 (1940), repudiated by *West Virginia State Board of Education* v. *Barnette*, 319 US 624 (1943); *Korematsu* v. *United States*, 323 US 214 (1944), repudiated by *Takahashi* v. *Fish & Game Commission*, 334 US 410 (1948) and *Oyama* v. *California*, 332 US 633 (1948).

[33] Above note 7.

expense of legislative prerogatives in Peckham's majority *Lochner* opinion, on the other.

The spectre of illegitimate judicial activism in the mode of *Lochner* led over time to a variety of proposed safeguards that circumscribed judicial review, including rejection of constitutional development without formal constitutional amendment, highly deferential rational basis review, neutral principles, original intent, traditional morality, regard for process over substance, the passive virtues, judicial deference, and inter-institutional dialogue. Recently expressed antipathy to comparative engagement serves the same function.

The voluminous literature revisiting *Lochner*, especially the re-examination of the police power as its constitutional lynchpin, suggests that its days of vilification may be numbered.[34] It is no longer satisfactory to regard the infamous Peckham judgment as the work of an elite, self-promoting, and callous judiciary. Reflecting upon the afterlife of its juridical paradigm in other legal systems with similar and different constitutional structures would provide added insights.

Such reflection would begin by noting the striking relationship between the police power analysis and the postwar juridical paradigm. In many legal systems, the police power jurisprudence stands as the precursor of the postwar juridical paradigm with respect to the justification for limiting rights. The particular legal question that *Lochner* posed, within US constitutional law, was how to integrate traditional police power analysis into the complicated structure of constitutional law, including common law liberties, legislative powers and federalism. The more general question was how to deal with the social transformation caused by the industrial revolution.

On the one hand, the common law rights to property and freedom of contract, taken to be constitutionalized through the Fourteenth Amendment, occupy the space that in the postwar paradigm is filled by the crystallized subjective guarantees. On the other hand, the police power vests in the legislature the authority to subject those rights to narrowly drawn limits as justified on certain substantive grounds. The

[34] See e.g. O. Fiss, *History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888–1910* (Macmillan Publishing Co., New York, 1993); S. Siegel, Book Review: Let Us Now Praise Infamous Men (1995) 73 *Texas Law Review* 661; H. Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers* (Duke University Press, Durham, NC, 1993).

judge's task is to ensure that the right cedes only to legislation that legitimates this displacement. This so-called limitation on limitation stipulation is what makes a right a right. In fact, the grounds applicable under the police power – safety, health, morals, and the general welfare of the public – replicate the standard list of concerns deemed sufficiently important to supersede rights in many postwar rights-protecting instruments at the national and supranational levels.[35]

The legitimacy of this exercise in justification derives from the fact that, under both the police power and the postwar paradigm, the justifying grounds coincide with the state's most fundamental constitutional principles. In the postwar model these principles include equal citizenship and respect for inherent human dignity; the basis for limiting specific rights in the name of these fundamental constitutional principles is that the former are the historically crystallized instantiations of the latter. A similar though not identical relationship exists between the right to contract and the superordinate objectives of the police power. These objectives refer to the minimal capacities of personhood that must be presupposed in and preserved through the institution of private property and the exercise of each person's freedom of contract. The police power thus supplies the indicia of equal citizenship and human dignity applicable to a regime of common law liberties, regarded as constitutionalized through the Fourteenth Amendment.

The three opinions in the *Lochner* case differ in their construction of the relationship between liberty of contract and the exercise of legislative authority to protect health under the police power. Peckham and Holmes each emphasize a different pole of this relationship. Only Harlan, in this respect anticipating the postwar constitutional paradigm, brings these poles together.

Peckham's matches the most expansive view of liberty to the most restricted view of the police power. Absent a right to enter into contracts on terms agreeable to both employer and employees, legislatures would acquire unbounded powers. To avoid this danger to all rights, Peckham endorses liberty as the norm, any restriction of which must be justified under the police power by exceptional circumstances, for example,

[35] See e.g. the grounds for limitation on rights set out in Arts. 8(2), 9(2), 10(2) and 11(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 222.

emergency, imminent danger, or the complete absence of volition.[36] The survival of individual liberty is contingent on the state lacking power to protect persons deemed able to take care of themselves. The ordinary contractual relationship of employer and employee must therefore lack any public dimension, i.e., must create no possibility of private or public harm.

Harlan's dissenting judgment shares Peckham's solicitude for freedom of contract but not as a categorical absolute. While liberty remains the norm, it cedes to justified exercise of the inherent power – possessed by all governments – to deal with dangers to the well-being of all citizens. Harlan thus identifies the police power with the 'fundamental conditions of civil society', by which the state protects the life and health of its citizens from the injurious exercise by any citizen of his or her own rights, i.e., the normative objective order noted earlier.[37] Harlan, unlike Peckham, extends his analysis beyond abstract legal categories to ascertain whether the state has satisfied its onus of justification. He considers the empirical conditions that the impugned statute addresses, citing medical treatises and statistical data in other industrializing countries to verify the legislature's asserted objectives and the connection between those objectives and its regulatory measures, thus anticipating the proportionality analysis outlined earlier.

The legal structure of this opinion is closest to the postwar juridical paradigm. For Harlan, the legislative state is aligned to the original purpose of the Fourteenth Amendment, because its public values, sustained both through rights protection and the police power, are essential to civil society constituted by a community of equal citizens as individual rights-holders. Accordingly, he tests the claims as to legislative means and ends against available social science knowledge, including comparative material from other industrialized countries. His judgment anticipates the formal two-stage analysis of the postwar juridical

[36] Examples include involuntary labour, situations of emergency posing imminent danger to life or property in hazardous labour contexts – such as mines or smeltering operations – and personal liberty posing danger to public health, e.g. a risk of serious contagion.

[37] Here we see the same structure as in the Canadian hate speech analysis: see *R.* v. *Keegstra* [1990] 3 SCR 697. In *Keegstra*, the Supreme Court of Canada found an infringement of freedom of expression rights (s. 2(b) of the Canadian Charter of Rights and Freedoms), but the majority held that this was a permissible limitation on rights using the proportionality analysis developed by the Court in *R.* v. *Oakes*. See L. Weinrib, Hate Promotion in a Free and Democratic Society: *R. v. Keegstra* (1991) 36 *McGill Law Journal* 1416.

paradigm – in which analysis of the right precedes analysis of the state's proffered justification for limiting the right – as well as many of its individual component steps. Had this judgment become the template for constitutional analysis, the constitutional jurisprudence of the United States would not have gone as far down the path of exceptionalism.

Finally, Holmes' judgment turns Peckham's upside down, effacing contractual liberty for the sake of an unrestricted operation of the police power in accordance with 'the natural outcome of a dominant opinion'.[38] The liberty guarantee does not possess the priority of a norm, displaced only by the state's justified exercise of its police power. Rather, it is subordinated to ordinary majoritarian preferences. Fundamentality does not reside in purposive interpretation of the right and justification informed by the same principles as those crystallized by the right. Instead, fundamentality resides in the democratic process that forges 'fundamentally differing views' into public policy, permissibly ranging from the 'paternalism and the organic relation of the citizen to the state' (a reference to Harlan's presuppositions) to *laissez faire* (a reference to Peckham's presuppositions). The Constitution is not 'intended' to favour one view or the other. Questions of economic theory, including that before the Court, go to the electorate not to the courts.

What place does the Fourteenth Amendment's guarantee of liberty hold in Holmes' constitutional conception? It is not a constitutional norm, displaced exceptionally only by law-making justified as protection against abuse of rights that undermines pre-eminent public interests. On the contrary, the dominant opinion is what serves the public interest. Liberty protection is not 'natural'; that term is reserved for the product of democratic processes that forge public policy. Liberty, despite the express protection it enjoys under the Constitution, stands as the exception, not the rule. It does not even enjoy *prima facie* constitutional significance. It prevails when 'a rational and fair man necessarily' would conclude that the statute infringed principles labelled fundamental 'by the traditions of our people and our law'. History, nationhood, and public opinion (mediated through majoritarian processes, however defective) circumscribe liberty.

Holmes's comments draw the contours of the constitutional conception that supports US constitutional exceptionalism. The Constitution's

[38] *Lochner*, at 76.

rights-protecting function is aligned to fixed national and traditional values embodied in law, thereby precluding purposive analysis of rights claims as subjective entitlements of equal citizens entitled to respect for their inherent human dignity. This approach, at least to an outsider, brings to mind the majority opinions in *Dred Scott* and *Plessy*. Anticipating the marketplace of ideas metaphor that informs the US approach to speech rights, this dissent also precludes the considerations of truth, harm, and equality that have become integral to the analysis of justified limitation upon guaranteed rights within the postwar constitutional paradigm. Further, Holmes' judgment also foreshadows the categorical, historically oriented delineation of the scope of constitutional rights and the deferential rational basis test in equality analysis, which has moved many of the issues successfully litigated as equality claims in democracies that subscribe to the postwar constitutional paradigm into a less generous analysis based on privacy.

In contrast, in its treatment of fundamental principle, analytic paradigm, institutional roles, and openness to social science and to legal developments in other countries, the Harlan dissent stands as a precursor of the postwar constitutional paradigm. This dissent demonstrates the deep roots as well as the great analytic power of this juridical paradigm within US constitutional history by providing the juridical connection between the *Dred Scott* and *Plessy* dissents and the legal analysis of the Warren Court. It thus stands as one of the first models of the genesis of the modern constitutional state.

Conclusion

Constitutional conceptions organize our understanding of our particular domestic constitutional arrangements. They illuminate fundamental principles, institutional functions, structure of argument, comparative analysis, and modes of constitutional development. By delineating alternative constitutional universes, they demonstrate that appeals to national history, traditional values, and popular sovereignty need not circumscribe substantive commitments, undermine co-operative institutional fidelity to fundamental principle, or preclude comparative engagement. Transnational experience and insights can enrich our constitutional conceptions and the juridical paradigms that these conceptions generate, especially in the repudiation of pervasive denial

of equal citizenship and inherent human dignity regardless of time or place.

The focus of this chapter has been the postwar constitutional conception and its companion juridical paradigm, which have taken root in liberal democracies around the world since the demise of Nazism. The constitutional jurisprudence of the United States provided a much-admired, widely emulated, and still influential early delineation of this conception and its juridical paradigm. Current constitutional thinking in the United States tends to accord little understanding or sympathy to that jurisprudence. Recent objection by some US judges, academics, and political leaders to even the weakest reference to other national and international rights-protecting systems' understanding of fundamentality, practice, or analysis replicates this pattern.

The present chapter underlines the importance of the comparative analysis of constitutions. Comparative constitutional law helps us understand the strengths and weaknesses of various historical and operating systems. By flexing our constitutional imaginations, comparative engagement offers a window onto puzzling contrasts and intriguing commonalities. The contrasts bring forward important questions that otherwise remain unexamined and unquestioned. The commonalities astonish us, because they teach us that domestic legal systems are not – and likely never were – as disassociated as we assume or would prefer to believe. These commonalities also demonstrate the stubborn resilience and intellectual force of legal modes of reasoning abandoned, even vilified, at home but flourishing elsewhere.

Comparative engagement need not, indeed cannot, dilute the distinctiveness of our own legal systems. On the contrary, such engagement takes us back to the genesis and forward to the possible lines of development of the most inscrutable constitutional system of all – the one that frames our own lives.

PART II

Convergence toward a liberal democratic model?

5

Questioning the migration of constitutional ideas: rights, constitutionalism and the limits of convergence

JEFFREY GOLDSWORTHY

Introduction

It is widely accepted that the migration of constitutional ideas through judicial borrowings has facilitated the emergence, in a variety of jurisdictions, of a common liberal democratic model of constitutionalism. In her contribution to this volume, for example, Lorraine Weinrib describes a postwar constitutional paradigm or model that is produced by the cross-fertilisation of ideas from many jurisdictions.[1] In her account, this new paradigm is characterised mainly by the method that judges use to determine the validity of laws alleged to infringe constitutionally guaranteed rights. Starting from the premise that these rights are never absolute, this method involves determining whether a law does infringe a right, and, if so, whether it is consistent with the rule of law, and justified by its pursuit of a sufficiently important objective in a rational and proportional fashion, consistently with deeper principles of equality and dignity.[2]

I believe that the phenomenon of judicial borrowing, in the service of an emerging cosmopolitan model of constitutionalism, goes much further than this. Weinrib is concerned with constitutions that explicitly protect rights but permit them to be restricted in some cases. Within that framework, some method is needed to determine the scope of the rights and the validity of restrictions imposed on them, and judicial borrowings have helped courts develop a sensible method. For reasons I will mention

[1] L. Weinrib, The postwar paradigm and american exceptionalism, this volume.

[2] *Ibid.*, pp. 89–98.

later, none of this strikes me as very controversial.[3] I will discuss, instead, judicial borrowings that go far beyond the methodology used to interpret and apply existing rights. These include borrowings that have influenced the addition of new rights to constitutions, and of new institutional safeguards designed to enhance democracy or judicial independence, or to make constitutional amendment more difficult. These more radical migrations of constitutional ideas are merely touched on, *en passant*, in Weinrib's discussion.[4] They raise the question of just how far the migration of ideas can legitimately be taken.

I begin with the assumption that there is a liberal democratic model of constitutionalism, originally inspired by the US Constitution, that is increasingly regarded as desirable around the world.[5] The essential elements are:

1. democratic elections for the legislature, and (if separate) the head of the executive government;
2. guarantees of individual rights;
3. an independent judiciary with: (a) authority to enforce constitutional requirements, including guarantees of individual rights; and (b) exclusive authority to conclusively settle legal disputes in general; and
4. a requirement that constitutional provisions can only be changed (if at all) by some special, democratic procedure, which requires a broader consensus and more careful deliberation than the procedure for ordinary legislation.

I will call this the 'common model' of liberal democratic constitutionalism. I assume that many of the principles commonly associated with the 'rule of law' are included in the second and third elements.

It is well known that this model has been adopted in most countries that have achieved independence since the Second World War.[6] But my interest on this occasion lies not in the formal adoption of new constitutions, but in ways that judges have reshaped existing ones, by adding to them elements of the common model, or by expanding or strengthening elements that they already include.

[3] See text to note 22 below. [4] Weinrib, The postwar paradigm, pp. 85–7.
[5] Weinrib accepts that the postwar paradigm she describes was inspired by one conception of US constitutional law: *ibid.*, pp. 84–5.
[6] See D. Beatty, *The Ultimate Rule of Law* (Oxford University Press, Oxford, 2004), ch. 1.

There can be no doubt about the reality of this phenomenon. Judges in many countries have been proactive in enhancing the constitutional protection of democracy, individual rights, and judicial independence. Judicial activism in the United States since the 1950s, which has expanded guarantees of democracy and individual rights, is too well known to need discussion. In France, the Constitution of 1958 did not confer power to enforce fundamental rights on the Constitutional Council, but in a series of activist decisions in the 1970s, the Council conferred that power on itself.[7] In the 1990s, the Supreme Court of Israel is widely believed to have radically changed the national Constitution by converting two Basic Laws into judicially enforceable guarantees of rights, contrary to the intentions of the Knesset that enacted them.[8] In India, the Supreme Court over many decades has dramatically extended the scope of many rights, forbidden amendments that would alter the 'basic structure' of the Constitution, and required that new judicial appointments only be made according to the advice of the Chief Justice.[9] The Canadian Supreme Court recently purported to discover an unwritten constitutional principle of judicial independence, which goes much further than the express provisions which protect that principle.[10] In Australia, the High Court in the 1990s extended the principle of judicial independence so that it protects most state as well as federal courts, and purported to discover an implied freedom of political communication in a Constitution whose founders chose not to include a bill of rights. In New Zealand, the Court of Appeal in the 1990s added new remedies to a statutory Bill of Rights that was not intended to include them, and arguably was intended not to include them.[11]

[7] A. Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford University Press, New York, 1992).

[8] Discussed in A. Harel, The Rule of Law and Judicial Review: Reflections on the Israeli Constitutional Revolution in D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Hart Publishing, Oxford, 1999), p. 143.

[9] See S. Sathe, *Judicial Activism in India* (2nd edn, Oxford University Press, Delhi, 2002).

[10] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, SCC.

[11] J. Allan, The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson From New Zealand in T. Campbell, K. Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford University Press, Oxford, 2001), p. 375. But for a contrary view, see P. Rishworth, The Inevitability of Judicial Review Under 'Interpretive' Bills of Rights in G. Huscroft and I. Brodie (eds.), *Constitutionalism in the Charter Era* (LexisNexis Butterworths, Markham, ON, 2004), p. 233.

These developments and proposals are based on the creative interpretation, or perhaps in some cases pseudo-interpretation, of the constitutions in question, either directly or indirectly influenced by constitutional doctrines and judicial decisions in other countries. Even when such doctrines and decisions are not expressly cited, the influence of the postwar 'rights revolution' that is currently sweeping the globe is usually apparent.

It is not possible in this chapter to examine all the particular developments previously mentioned, describe the ways in which they were influenced by foreign constitutional jurisprudence, and decide whether or not they were justified, either legally or morally. All that will be attempted here is an elucidation of the conceptual and normative framework within which such an examination should proceed. I will discuss the role of creative judicial interpretation of written constitutions in bringing them closer to convergence with the common model of liberal democratic constitutionalism. I will argue that whether convergence achieved in this way is desirable depends on the answers to two questions.

The first question is whether such a convergence is desirable in itself. This depends partly on the nature of the common model, and how much room it leaves for variation. It also depends on the nature of any society that might contemplate fully adopting the model: doing so might be desirable for some, but not others. I will argue that it is too early to announce the 'end of history', and presume that we have settled on some ideal constitutional arrangement that best suits all societies. For example, tensions between democracy and judicial review have not yet been conclusively resolved, and differences in social and cultural circumstances must be taken into account. There is still much value in diversity and experimentation, and different arrangements may continue to suit different cultures and legal traditions.

The second question is whether, even if some convergence is desirable, it should be brought about by courts through creative constitutional interpretation or pseudo-interpretation. I will argue that the extent to which a court is entitled, legally and morally, to change its nation's constitution through interpretation is limited. Its primary duty is to interpret the constitution as it stands, and leave substantive change to the prescribed amendment process, provided that this process is acceptable on grounds of political morality (i.e., it is democratic, and not excessively

onerous). Of course, judges necessarily exercise law-making discretion when (as is often the case) the constitution is ambiguous, vague, internally inconsistent, or insufficiently explicit. In doing so, they may find it instructive to consult the constitutional jurisprudence of other countries whose judges have wrestled with similar problems. Foreign jurisprudence may be useful for other purposes as well. But it does not follow that the judges may change the meaning of provisions that are determinate, or add spurious 'implications' that are tantamount to amendments. In general, substantive judicial amendment in the guise of interpretation violates the courts' legal and moral obligation of fidelity to the constitution. But in exceptional circumstances, a court might be morally permitted to violate its legal obligation.

The 'end of history'?

Is it now indisputable that all the elements of the common model are desirable, and should be adopted wherever possible? An affirmative answer might seem to imply that, in the development of constitutionalism, we have reached the 'end of history', having settled on a particular model of liberal democratic constitutionalism that is no longer subject to serious challenge.[12]

One problem is that these elements are so unspecific, and capable of being implemented in so many different ways, that it is not clear that it makes much sense to speak of them as constituting a particular 'model'. This is most obviously true of the first element: democratic elections for the legislature and the head of the executive government. There are many different ways of structuring these branches of government, and of organising elections. For example, presidential systems are very different from parliamentary ones. But the same is true of the other elements.

Few people would deny the desirability of judicial independence. It is important that legal disputes be decided by judges whose independence from political and other extraneous influences is beyond question. But it is extraordinarily difficult to formulate a workable definition of 'legal disputes' for this purpose. In many jurisdictions, certain kinds of controversial legal questions are decided by administrative tribunals, and there may be perfectly good reasons (concerning expertise, expense, and

[12] Cf. F. Fukuyama, *The End of History and the Last Man* (Hamilton, London, 1992).

expedition) for not referring them to courts, and even for restricting judicial review of tribunal decisions. Again, various different kinds of independence can be conferred on courts. At a minimum, the executive government should not be able to dismiss the judges at will, or penalise them by reducing their salaries (except as part of a general, non-discriminatory reduction in public service remuneration in the interests of austerity). But should they be appointed for life, or only for fixed terms? Should the government be able to reward them through re-appointment, or 'promotions' from lower to higher courts? Should it be able to confer non-judicial functions on them, either in their capacity as individuals, or in their official capacity as judges? Should their salaries be set by an independent tribunal? Should they be appointed only by or with the consent of such a tribunal (or perhaps existing judges)? With respect to many of these questions, it may be better in some countries to leave protection of judicial independence to political prudence and custom, rather than to attempt to impose rigid legal rules.

Special democratic procedures for altering constitutions can also vary enormously, and include referenda, supermajorities in the legislature, special constitutional conventions, and in federal systems, the assent of some fixed proportion of state or provincial governments, legislatures, or electorates. Whether particularly important constitutional provisions should be permanently entrenched, and made unamendable, is a debatable question. The choice of an amending procedure obviously depends on the individual circumstances of the country concerned.

The judicial enforcement of human rights can be implemented in a variety of ways. Should only 'first generation' or 'negative' rights – as opposed to socio-economic rights – be protected? Should they be protected only by a special constitutional court, through 'abstract', pre-enactment review of legislation, or by ordinary courts in whatever 'concrete' litigation arises post-enactment between real parties? Should judicial 'enforcement' be confined to creative statutory interpretation, and declarations of incompatibility, as in Britain? Should legislatures have the authority to pre-empt or override judicial invalidation, as in Canada? Here, too, the differences between alternative systems of rights protection are so substantial that it probably makes little sense to speak of a 'common model' of constitutionalism.

The judicial enforcement of constitutional rights remains more controversial than the other elements of the so-called common model.

A number of political and constitutional theorists – admittedly, a dwindling number – continue to resist the 'rights revolution' that is sweeping the globe, by denying that this is necessarily desirable. My own opinion is that it may be highly desirable, or even essential, for the preservation of democracy, the rule of law, and human rights in some countries, but not in others. In some countries, a history of rampant corruption, populism, authoritarianism, or bitter religious, ethnic, or class conflicts may make judicially enforceable bills of rights desirable. Much depends on culture, social structure, and political organization.

I will not say much about this here, because the arguments are so well known. I regret the contemporary loss of faith in the old democratic ideal of government by ordinary people, elected to represent the opinions and interests of ordinary people.[13] According to this ideal, ordinary people have a right to participate on equal terms in the political decision-making that affects their lives as much as anyone else's, and should be presumed to possess the intelligence, knowledge, and virtue needed to do so.[14] Proponents of this ideal do not naively believe that such a method of government will never violate the rights of individuals or minority groups. But they do trust that, in appropriate political, social, and cultural conditions, clear injustices will be relatively rare, and that in most cases, whether or not the law violates someone's rights will be open to reasonable disagreement. They also trust that over time, the proportion of clear rights violations will diminish, and 'that a people, in acting autonomously, will learn how to act rightly'.[15] Strong democrats hold that where the requirements of justice and human rights are the subject of reasonable disagreement, the opinion of a majority of the people or those elected to represent them, rather than of a majority of some unelected elite, should prevail. On this view, the price that must be paid for giving judges power to correct the occasional clear injustice is that they must also be given power to overrule the democratic process in the much greater number of cases where there is reasonable disagreement and healthy debate. For some, this is too high a price.

[13] I apologise if the term 'ordinary people' seems patronising. I simply cannot think of an equally serviceable alternative.

[14] This position is most ably defended by J. Waldron, *Law and Disagreement* (Oxford University Press, New York, 1999), Part III.

[15] R. Dahl, *Democracy and Its Critics* (Yale University Press, New Haven, CT, 1989), p. 192.

What explains the loss of faith in this ideal? I am aware of possible 'agency problems': failures of elected representatives faithfully to represent the interests of their constituents. In many countries, where authoritarianism, corruption, and nepotism are rampant, this is a major problem. But I suspect that the real reason for this loss of faith, in countries such as Britain, Canada, Australia, and New Zealand, lies elsewhere. In these countries, a substantial number of influential members of the highly educated, professional, upper-middle class have lost faith in the ability of their fellow citizens to form opinions about important matters of public policy in a sufficiently intelligent, well-informed, dispassionate, impartial, and carefully reasoned manner. If I am right, the main attraction of judicial enforcement of constitutional rights in these countries is that it shifts power to people (judges) who are representative members of the highly educated, professional, upper-middle class, and whose superior education, intelligence, habits of thought, and professional ethos are deemed more likely to produce enlightened decisions. I think it is reasonable to describe this as a return to the ancient principle of 'mixed government', by re-inserting an 'aristocratic' element into the political process to check the ignorance, prejudice, and passion of the 'mob'. By 'aristocratic', I mean an element supposedly distinguished by superior education, intellectual refinement, thoughtfulness, and responsibility, rather than by heredity or inherited wealth.

The obvious rejoinder is that the attraction of judicially enforceable rights has more to do with the procedures that judges follow – procedures that promote more impartial and carefully reasoned decision-making – than the personal qualities of the judges. Of course there is something to this, but I doubt that it is the major factor. If the main problem were deficiencies in the deliberative procedures of elected legislatures, then the most obvious remedy would be to improve those procedures to promote more careful, well-informed, and dispassionate reasoning. Judicial enforcement of rights would be a fall-back position, to be resorted to only if such reforms were unsuccessful. But few advocates of judicial enforcement approach the issue in that way.

A more persuasive rejoinder is that in countries such as Canada and Britain, the old democratic ideal has not been abandoned, because judges have not been given ultimate authority over questions of rights. Canada's famous 'notwithstanding' clause ensures that legislatures continue to

possess ultimate legal authority over most of these questions, while in Britain, Parliament is free to choose whether or not to accede to judicial declarations of incompatibility. If an 'aristocratic' element has been added to the political process, its function is merely to improve the quality of the 'dialogue' over human rights, and not to impose its will on the legislature. There is much to be said for this rejoinder, some of which I have said myself on another occasion.[16] But to return to an earlier point, this rejoinder contradicts the assumption that there is a single, common model of liberal constitutionalism. The US model of judicial review is no longer the only alternative to a system of untrammelled legislative supremacy. The new 'hybrid' models pioneered in Canada and Britain allocate much greater responsibility for protecting rights to courts, without altogether abandoning the principle of legislative supremacy. They offer the possibility of a compromise that combines the best features of both the traditional British model of legislative supremacy and the US model of judicial supremacy by authorising courts to pronounce on the consistency of legislation with protected rights, while preserving the legislature's authority to have the last word.[17]

These hybrid models are experiments that may or may not work. It is already being suggested that in practice, they may collapse into something like the US model of judicial supremacy.[18] But even if this is right, continued experimentation with different constitutional models is surely desirable. Convergence on a common model of liberal constitutionalism might be dangerously complacent, driven by a reluctance to contemplate the possibility of error. Indeed, it may be desirable that some liberal democracies persist with their commitment to legislative supremacy, based on what I have called the old democratic ideal. In the conduct of any experiment, it is important to have controls: cases where no change is made, that provide baselines for comparing the

[16] J. Goldsworthy, Judicial Review, Legislative Override, and Democracy in T. Campbell, J. Goldsworthy, and A. Stone (eds.), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, Oxford, 2003), p. 263. See also Jeremy Waldron's reply to my argument: Some Models of Dialogue Between Judges and Legislators in Huscroft and Brodie, *Constitutionalism in the Charter Era*, pp. 7, 35–9.

[17] See J. Goldsworthy, Homogenizing Constitutions (2003) 23 *Oxford Journal of Legal Studies* 483.

[18] M. Tushnet, New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries (2003) 38 *Wake Forest Law Review* 813; M. Tushnet, Weak-Form Judicial Review: Its Implications for Legislatures (2004) 2 *New Zealand Journal of Public & International Law* 7.

results of the experiment in other cases. Australian advocates of a bill of rights often assert that, as one of the few countries still lacking one, it is being left behind as the rest of the world advances to a higher stage of constitutionalism. But its stubbornness may be a positive virtue. Australia persists with the old democratic ideal that perhaps – who knows? – will ultimately be vindicated. It might turn out that Australia is able to maintain as good a level of human rights protection, and possibly even a higher level, as those that have embraced the common model or the new hybrid models, without having to compromise its robust democracy. (It has often been observed that rights are better protected in many liberal democracies that lack a bill of rights than in the United States.) Admittedly, this would be extremely difficult to prove, because proof would depend on normative as well as empirical judgments.[19] And even if proved, its significance would remain open to dispute. For example, it could be argued that Australia would have done even better had it adopted one of the other models. Or it could be argued that Australians had 'piggy backed' on countries with judicially enforceable rights, by borrowing principles and doctrines pioneered and developed by activist lawyers and judges in those countries.

Judicial creativity

Even if it were desirable for all countries to adopt some common model of liberal democratic constitutionalism, would it be desirable for this to be achieved by judicial decision rather than formal constitutional amendment?

This question raises issues of both law and political morality. To what extent does the judges' legal authority to interpret a constitution include authority to change it? In what circumstances would they be morally justified in going beyond their legal authority in order to change it? And if in some circumstances they would be morally justified in doing so, should they lie about what they were doing? Should they disguise legally illegitimate change as legally legitimate interpretation?

There are basically only two strategies by which a written constitution can be changed through interpretation. The first is to give new meanings to its existing words, and the second is to add to those words, by

[19] Normative judgments are always involved in any assessment of how well rights are protected.

purporting to discern unexpressed norms that are somehow implicit in it. In appropriate circumstances, each can be justified as clarifying the constitution's true meaning, rather than as changing it. A new meaning might be the true meaning, which judges previously failed to recognise, and a purported implication might be a genuine one. But each strategy can also be used radically to change the constitution's meaning. It is notoriously difficult to distinguish interpretation that is faithful to the constitution as it is from pseudo-interpretation that really involves changing it. In the second and third sub-sections below, I discuss these two strategies.

Legal authority to change constitutions through interpretation

It would be naive to think that interpretation and change are two entirely different activities, which never overlap. In law, the concept of interpretation embraces two processes, concerned with two different kinds of meaning. The first is a cognitive process that aims to reveal or clarify meaning that, despite being previously obscured, was genuinely possessed by the legal text all along. The second is a creative process that modifies or adds to the meaning that the text previously possessed.[20] Extremist theories of legal interpretation acknowledge only one of these processes, and deny the other. Extreme 'formalist' theories, now disparaged as 'fairy tales', acknowledge only the cognitive process, as if legal texts, however poorly drafted, contain at least latent answers to every question, which merely await judicial discovery. Extreme 'realist' theories acknowledge only the creative process, as if texts possess no meaning at all until an interpreter breathes life into them. Both theories are implausible. Courts engage in both processes, sometimes in the course of interpreting the same provision. An interpretation often reveals or clarifies meaning that was there all along, but, sometimes, it also legitimately adds to or modifies that meaning.

In many cases it may be debatable whether an interpretation reveals or changes meaning. For example, when courts correct an obvious drafting error, to give a provision the meaning it was plainly intended to have, notwithstanding its garbled literal meaning, it is not clear whether they

[20] R. Dickerson, *The Interpretation and Application of Statutes* (Little, Brown, Boston, 1975), pp. 2–5 and ch. 3.

are changing, or clarifying, the provision's true meaning. But interpretation is more clearly tantamount to legitimate change in the following two situations.

First, the courts sometimes correct the failure of the language used in an old constitution to achieve its purposes in the modern world, because of social or technological developments that its founders did not anticipate. An uncontroversial example is the provision in the US Constitution vesting exclusive power in Congress to raise and maintain 'Armies' and 'a Navy' and to regulate 'the land and naval Forces'.[21] When military aircraft were developed, it would have defeated the provision's obvious purpose if Congress had been denied the power to raise an air force. It is generally accepted that in such cases, the courts may adopt a purposive rather than a literal interpretation, by stretching a provision's literal meaning incrementally, in order to give effect to what the provision originally meant, in a broad sense of 'meant' that is informed by its purpose. Note that in this situation, the way in which other constitutions have been interpreted is irrelevant: interpretations are guided by the original purpose of the provision in question.

Second, judges must decide any constitutional dispute that is properly brought before them, even if the constitution does not provide a complete answer to it, due to an ambiguity, vagueness, inconsistency, or 'gap'. The judges cannot wash their hands of a dispute and leave the disputants to fight it out in the street. Judges must therefore have authority to resolve indeterminacies and gaps in the constitution, thereby supplementing it, by resorting to their own notions of good government. A good deal – perhaps most – of what is called 'constitutional law' consists of general doctrines, methodological principles, and interpretations of specific provisions that are consistent with, but not required by, either the text of the constitution or what is reliably known of its founders' intentions. This perfectly legitimate, and indeed necessary, part of constitutional law is, like the common law, the creation of the judges.

This judge-made constitutional law includes most of the decisions that interpret and apply abstract constitutional rights, which are always more or less vague principles of political morality. It therefore includes the methodology that courts must employ in striking an appropriate balance between protected rights and legitimate, countervailing values.

[21] US Constitution, Art. I, § 8.

Constitutions rarely if ever prescribe a particular interpretive or analytical methodology. Since judges must necessarily go beyond the constitution itself in order to develop an appropriate methodology, there is no good reason why they should not take into account how similar provisions in other constitutions have been interpreted and applied. They may learn much from the experiences of other countries, and from the moral and political insights of foreign judges. This is why I said at the outset that nothing in Weinrib's account of the migration of her 'postwar paradigm', which is largely methodological, strikes me as very controversial.[22] I suspect that she is right to think that the US Constitution is not inconsistent with US courts also adopting the paradigm.

The willingness of judges to consult constitutional interpretations in other countries must depend partly on the extent to which they believe their constitution to be indeterminate. This, in turn, depends on the richness of the domestic materials that, in their opinion, influence the constitution's meaning. For example, originalists, who believe that the meaning of the constitution is determined partly by its founders' intentions, feel constrained by a richer body of domestic materials (because it includes evidence of original intent) than do strong non-originalists.[23] Originalists believe that these domestic materials must be exhausted before any judicial borrowing from comparative jurisprudence is justified. The debate over originalism is therefore crucial to the relevance of comparative jurisprudence in constitutional interpretation. I will later defend a moderate version of originalism.

Most constitutional lawyers would agree that the concept of interpretation extends to these two kinds of incremental change. But controversy breaks out when authority is attributed to the courts to bring about more radical changes to the constitutions they are charged with interpreting. It is often difficult to know whether such an authority is being attributed to them. When it is claimed that in some legal system, by official or general consensus, there is a convention that judges have authority to change the constitution through interpretation, the extent of the supposed authority is usually left vague. It might be confined to the kinds of incremental change previously discussed. But it is not always left

[22] See text to note 3 above.

[23] Although it is possible to argue, to the contrary, that such evidence rarely helps to resolve indeterminacies, and may sometimes compound them.

vague. Joseph Raz has recently argued that in interpreting an old constitution, judges should not confine themselves to 'conserving' interpretations, which attempt to clarify its current meaning. They should also engage in 'innovative' interpretations, which change its meaning – even when it is determinate – in the interests of justice or good government.[24] He apparently regards courts in most jurisdictions as having legal, as well as moral, authority to do this, by virtue of their long-standing practices of doing so with the acquiescence of the other branches of government.[25]

One major problem with Raz's thesis is that courts rarely, if ever, say they are changing a constitution.[26] I am not aware of any appellate court judge who has claimed to possess legal authority to do so. Even in cases where it seems that they are changing the constitution, they do not claim to be doing so. They do not say, for example: 'although the constitution currently means *x*, we believe that justice (or good government) would be better served if it meant *y*, and therefore we have decided to change it'. Instead, they usually take great pains to demonstrate that their interpretation is faithful to the constitution as it is. Even when judges purport to enforce unenumerated, implied principles, they usually claim to have found those principles in the constitution, not added them to it.[27]

The main reason that judges do not claim legal authority to change constitutions, except in the incremental ways previously mentioned, is that such a claim would be difficult to reconcile with the fourth element of the common model: the requirement that the constitution only be changed by a special democratic procedure, often involving a referendum or special majority within the legislature. Any judges who claimed authority to change the constitution would be vulnerable to criticism for usurping the authority of its amendment procedure, in violation of their duty of fidelity to law. Note that a law is something with a meaning – its

[24] J. Raz, On the Authority and Interpretation of Constitutions: Some Preliminaries in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, Cambridge, 1998), pp. 152, 177, 180–1, 182–3, 186 and 189.

[25] See J. Goldsworthy, Raz on Constitutional Interpretation (2003) 22 *Law and Philosophy* 167 at 175.

[26] The remainder of this paragraph, and the following paragraph, is taken from *ibid.*, at pp. 176 and 178–9.

[27] J. Goldsworthy, Implications in Language, Law, and the Constitution in G. Lindell (ed.), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, Annandale, NSW, 1994), p. 150.

meaning is part of what it is – and to change its meaning is therefore to change the law. It makes little sense to forbid any change of words except by some special procedure, but to permit their meanings to be changed by some other procedure.

Original meaning

Even in the theoretical literature, there is surprisingly little support for the proposition that judges have legal authority to change a constitution when it has a determinate meaning. Of course, political scientists often maintain that judges regularly change constitutions through interpretation, but they are rarely subtle enough to distinguish between different kinds of change, or interested in the extent to which the judges have legal authority to do so. Among legal theorists, non-originalists supposedly hold that judges may give new meanings to, and thereby change, constitutional provisions. But most of them would more accurately be classified as moderate originalists.[28] Dworkin himself has said: 'The important choice judges and other interpreters of the Constitution must make ... is not between the original understanding and some other method of interpretation but between reductive and abstract versions of the original understanding'.[29] Dworkin's defence of controversial Supreme Court decisions is frequently based on the proposition that, because the founders intended to enact abstract moral principles, judges today must give effect to their own judgment of what those principles require, regardless of the founders' hopes or expectations, which have no legal status or force. The founders' 'semantic' intentions are legally binding, but their 'expectation' intentions are not. I take this distinction to be relatively uncontroversial. Dworkin does not argue – and indeed would deny – that judges today have legal authority to change the principles that the founders enacted.[30]

[28] J. Goldsworthy, Interpreting the *Constitution* in Its Second Century (2000) 24 *Melbourne University Law Review* 677 at 695–7; J. Goldsworthy, Dworkin as an Originalist (2000) 17 *Constitutional Commentary* 49.

[29] R. Dworkin, Jurisprudence and Constitutional Law in L. Levy, K. Karst, and J. West (eds.), *The Encyclopedia of the American Constitution* (MacMillan, New York, 2002) 1505 at 1508.

[30] See Goldsworthy, Dworkin as an Originalist, Part IV.

Even hard core non-originalists seldom argue that the courts are legally authorised to change the meanings of constitutional provisions by interpretation. Instead, they usually claim either:

1. that the meaning of a constitution is independent of the founders' intentions; that it is therefore limited to the meanings of its words, according to contemporary rather than historical understandings; and that judges are at liberty to resolve indeterminacies in the meanings of its words by resorting to contemporary values (I will call this position 'non-originalist literalism'); or
2. that the meaning of a constitution is governed by broad values and purposes as well as by its words; that these spontaneously evolve along with changes in social needs and values; and that judges merely ascertain what its current meaning is, without themselves being the agents of change.[31] Dworkin disparages this claim as 'hardly even intelligible', but it has often been advanced.[32] (I will call this position 'non-originalist purposivism'.)

Both claims have deeply counter-intuitive consequences. They massively increase the indeterminacies of constitutional provisions, and therefore the scope for judicial creativity. For example, consider the opening words of s. 51 of the Australian Constitution, which confers on the national Parliament most of its legislative powers. These words grant power to make laws 'for the peace, order, and good government' of the Commonwealth with respect to the subject-matters listed.[33] Read literally, this phrase might appear to limit Parliament's powers by authorising judges to invalidate legislation that, in their opinion, is contrary to the peace, order and good government of the nation. But when the Constitution was enacted in 1900, the phrase was understood

[31] An Australian judge once said that although constitutional concepts need to grow and develop to meet contemporary needs, this does not mean that an individual judge is free to change them in accordance with his own moral beliefs: 'discerning growth is not the same thing as making changes'. See V. Windeyer, *Some Aspects of Australian Constitutional Law: J. A. Weir Memorial lecture at Edmonton, on March 13, 14, 1972* (University of Alberta, Institute of Law Research and Reform, Edmonton, Alberta, 1973), pp. 36 and 38.

[32] R. Dworkin, Comment in A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, Princeton, NJ, 1997), pp. 115, 122, discussed in Goldsworthy, Dworkin as an Originalist, 76.

[33] The same phrase is also used in s. 91 of the Canadian Constitution.

by lawyers to have the opposite meaning. The Privy Council had previously decided that it did not impose judicially enforceable limits upon the legislative powers they granted.[34] It was a stock phrase, routinely used by the Imperial Parliament in many colonial constitutions to confer unlimited, plenary power with respect to the subject-matters listed. Such power might be subject to other limits, but was not intrinsically limited by the words of the grant.

The Australian Constitution does not include anything like a bill of rights granting judges broad authority to invalidate legislation that (in their opinion) violates human rights. Given that the Constitution itself requires any amendment to be approved by the voters in a referendum, one would surely expect a referendum to be held before the judges could acquire such authority. But not so, according to the theory of non-originalism. The founders included the phrase 'for the peace, order and good government of the Commonwealth' in s. 51. They did not intend that phrase to limit the Parliament's powers, but their intentions are either irrelevant or, at best, not binding. The legal meaning of the phrase either is confined to its literal meaning, which (fortuitously) connotes the opposite of its intended meaning, or is whatever meaning best accords with contemporary values and purposes from time to time. Either way, the judges are required to interpret the phrase in the light of their understanding of contemporary values and purposes, rather than in the light of its established meaning in 1900. It follows that any judge who believes that contemporary values and purposes would best be served if judges could invalidate legislation inconsistent (in their opinion) with human rights should interpret the phrase 'peace, order, and good government' as authorising them to do so. The judges are therefore entitled to interpret the phrase as granting them precisely that broad authority to invalidate legislation, on human rights grounds, that the founders intended to withhold. There is no need for formal amendment by the democratic process of referendum, because the words themselves do not need to be changed.

Much more needs to be said to clarify and defend a theory of moderate originalism.[35] But I take the conclusion of the last paragraph to be a

[34] *R.* v. *Burah* (1878) 3 App Cas 889, PC; *Hodge* v. *The Queen* (1883) 9 App Cas 117, PC; *Powell* v. *Apollo Candle Co. Ltd* (1885) 10 App Cas 282, PC; *Riel* v. *The Queen; ex parte Riel* (1885) 10 App Cas 675, PC.

[35] For further details, see J. Goldsworthy, Originalism in Constitutional Interpretation (1997) 25 *Federal Law Review* 1; Goldsworthy, Interpreting the *Constitution*.

reductio ad absurdum of non-originalism. And if it is unacceptable when applied to a sweeping, general phrase such as 'peace, order and good government', which applies to all legislative powers, then surely it is equally unacceptable when applied to more specific words, defining particular powers or rights, when they too have a clear, original meaning.

It follows that judges have legal authority to give a new meaning to a constitution's words only if:

1. those words lack a reasonably clear meaning or content, even after admissible evidence of original semantic intention has been consulted, and the judges are entitled to rectify the indeterminacy;
2. because of social or technological developments that its founders did not anticipate, the words can only fulfil their original purpose if the courts stretch their literal meaning incrementally; or
3. the words were previously interpreted contrary to their original, intended meaning, and the judges are entitled (after giving due weight to the principle of *stare decisis*) to correct the error.

Only in the first case is it appropriate for the judges to take into account the way that similar words in other constitutions have been interpreted. The interpretation of abstract rights, whose content is usually more or less vague, is an example.

Implied principles

This disposes of the first of the two strategies by which a constitution can be changed through interpretation, namely, by giving new meanings to its existing words.[36] But what of the second strategy, which involves adding to those words, by purporting to discern unexpressed norms that are somehow implicit in the constitution? These may include unwritten, general principles that are regarded as 'underlying' the constitution, in the sense that its purpose is to implement them. Sometimes these are described metaphorically as 'structural' principles, which are part of, or define, some normative 'structure' that the constitution was intended to establish.

There can be no doubt that implications can sometimes be justified: the content of constitutions, like all laws, and indeed all communications,

[36] See the introductory remarks to this section, above.

is never completely explicit. Full comprehension of their meaning inevitably depends partly on an understanding of purpose, illuminated by contextual information, and on background assumptions that are taken for granted.[37] Just as indeterminacy gives rise to a superstructure of judge-made law built on the constitutional text, inexplicitness leads to a substructure of unwritten, purposive principles being excavated beneath the text. But both endeavours can be taken too far, if they are not properly theorised.

Implications are very difficult to explain and justify except in terms of original intent. By definition, they are not expressed by the constitution's words, and it is very rare for legal implications to be logically entailed by express words. It follows that non-originalist literalism is able to account for very few legal implications, which is a reason to reject it.[38] Most implications depend on some ingredient in addition to the words of the text, which is usually taken to be their purpose, or implicit intention. In law, most implications are justified (or rationalised) by the argument that they are practically necessary to fulfil some such purpose or intention. There is no good reason why the experience of other constitutional democracies, including the way their constitutions have been interpreted, should not be taken into account in determining whether something really is or is not necessary to achieve such purposes. But the purposes themselves must be found within the constitution itself, understood in the historical context of its enactment. Otherwise they are extraneous purposes that are foisted on the constitution.

Strictly speaking, words do not have purposes: only the people who use them do. And it is natural to think that where a constitution is concerned, the relevant people are those who founded it. It is true that judges could attribute to a constitution whatever purposes they believe it ought to have, or whatever purposes they believe a majority of their fellow citizens currently think it has (assuming the judges are capable of distinguishing between these possibilities). In other words, implications might be explained in terms of non-originalist purposivism.[39] But this would confer on judges an almost boundless power to make sweeping constitutional changes through pseudo-interpretation. If judges can 'discover' in a constitution whatever is practically necessary for it to

[37] Goldsworthy, 'Implications in Language', p. 150. [38] See the text following note 30 above.
[39] *Ibid.*

achieve certain purposes, and these purposes can change according to the judges' perceptions of contemporary values, then in effect the judges can add to the constitution anything that is practically necessary to fulfil (their perceptions of) contemporary values – without any formal amendment being required.[40] That surely cannot be right.

But the massive transformative potential of implications is not confined to non-originalist purposivism. There are dangers even if judges attempt to be guided by a constitution's original and enduring purposes. Consider the following form of argument:

1. The founders intended the constitution to achieve x;
2. The founders did not expressly include y in the constitution, because they believed that y is unnecessary to achieve x;
3. The founders were wrong: y is necessary to achieve x;
4. Therefore, the constitution includes y by implication.

One obvious danger is that the necessity alleged in step 3 may be false. It is all too easy for judges to attribute necessity to a norm that is at best desirable. In Australia, for example, an implied freedom of political speech was held to be implied on the ground that it is 'necessary' to ensure that voters are able to make a genuine choice in electing members of Parliament, as required by the Constitution.[41] But there is no necessity here at all, as is obvious from the existence of many flourishing democracies that have had no judicially enforceable right to free speech. Freedom of speech, sufficiently ample to enable genuine electoral choices to be made, has been effectively protected by cultural traditions and by the democratic process itself. That is why the implied freedom escaped the notice of Australian lawyers and judges for the previous ninety years. It would undoubtedly be legitimate for a court, in enforcing express provisions requiring that the people directly choose their representatives, to invalidate legislation restricting political communication so severely that it prevents them from doing so. But there is no necessity to go one step further, and derive from those provisions an implied freedom that is then applied independently of them, to invalidate any laws deemed to infringe the freedom, whether or not they prevent genuine electoral choices.

[40] See Goldsworthy, Interpreting the *Constitution*, 677, 690.
[41] *Australian Capital Television Pty Ltd* v. *The Commonwealth* (1992) 177 CLR 106, HCA.

But even if step 3 is granted, the conclusion of this form of argument is startling. The founders' supposed error is taken to show, not that the constitution needs to be amended to correct a deficiency, but that it already includes something that was deliberately excluded from it, because it ought to have been included. If this reasoning is sound, then again, almost anything could in principle be added to a constitution, particularly if the founders' purposes are pitched at a very abstract level (such as 'the founders intended the constitution to achieve democracy, or justice, or good government'). This violates the principle that a constitution's deliberate omissions are entitled to just as much respect as its actual provisions.[42] The same goes for the founders' deliberate decisions to implement certain principles only by particular means or to a partial extent. Such decisions should be respected as careful accommodations of competing purposes, and not brushed aside as imperfect expressions of larger purposes. Judges are bound not only by the founders' ends, but by the means they chose to achieve those ends. Otherwise the constitution is just a set of abstract objectives, which the judges can choose to implement in any way they think fit.

The founders may have declined, or failed, to expressly include some norm that now appears necessary to achieve one of their purposes for a number of different reasons, including (but by no means limited to):

1. They regarded it as so obvious that it could be taken for granted and did not need to be spelled out (or: they themselves took it for granted, and therefore did not consciously advert to it);
2. They failed to consider the question because it arises for practical purposes only in very unusual situations, which they could not reasonably be expected to have foreseen and expressly provided for. But had they done so, they would probably have included the norm;
3. They failed to consider the question because they were too busy, or insufficiently astute, to do so, but had they considered it, they would probably have included the norm;
4. They failed to consider the question, but had they done so, they would probably not have regarded the norm as necessary to achieve their purposes (which may partly explain why it did not occur to them);

[42] The Hon. M. Gleeson, *The Rule of Law and the Constitution* (ABC Books, Sydney, 2000), p. 70.

5. They did consider the question, and chose not to include the norm because they did not regard it as necessary to achieve their purposes.

In the first case, an implication is plainly justified: indeed, this is the paradigm of a legal implication. The power of judicial review under the Australian Constitution is an example. In the second case, an implication is arguably justified, because it is unreasonable to require law-makers to deal with highly unusual situations that they could not reasonably be expected to have foreseen, provided that they probably would have approved of the implication.

On the other hand, in the fifth case, an implication seems plainly unjustified: the founders' supposed mistake should be corrected by formal amendment. Otherwise, as previously explained, it would be almost impossible to maintain any distinction between interpretation and amendment. I would reach the same conclusion in the fourth case.

The most problematic case is the third. To what extent should the courts correct the founders' failure to anticipate and provide for a problem that they should have anticipated? When interpreting statutes, judges are often reluctant to rectify legislative failures of this kind, preferring to leave this to the legislature itself. But when dealing with a constitution, there are two reasons for judges to be more creative: first, the difficulty of making a formal amendment; and, second, the potentially grave consequences of the constitution failing to achieve its purposes, including the danger of constitutional powers being abused, of the federal system or the democratic process being subverted, and so on. Many judicial decisions recognising implied inter-governmental immunities have been cases of this kind. On the other hand, there is an obvious risk of this reasoning justifying extensive rewriting of the constitution, especially if the founders' purposes are pitched at a very abstract level.

The main lesson is that the plausibility of any implied principle depends heavily on the original, enduring purposes of the constitution, and on persuasive evidence or reasonable conjecture as to why the founders neglected expressly to include or fully to implement the principle in question. No other approach seems capable of providing a plausible theoretical account of implications, or of preserving a meaningful distinction between implication and outright amendment. Originalism therefore proves indispensable once again.

Moral authority to change constitutions through interpretation

As well as suggesting that judges have legal authority to change the constitution, Raz insists that they sometimes have moral authority to do so. Because constitutional decisions are moral decisions, which have to be morally justified, judges should not always be faithful to a constitution's existing meaning. Instead, they should be open 'to its shortcomings and to injustices its application may yield in certain cases, which leads to openness to the need to develop and modify it'.[43]

As we have seen, mandatory amendment procedures usually circumscribe how constitutions may lawfully be changed. The prohibition of substantive change by other means surely applies to judges as well as other government officials. It follows that judges who change the constitution, other than incrementally for the limited purposes previously described, are open to criticism for (a) usurping the authority of the prescribed amendment procedure, and (b) violating their duty of fidelity to law. Since these amendment procedures are usually democratic ones, such judges can also be criticised for (c) flouting the principle of democracy, or popular sovereignty, and (d) straying beyond their legal expertise into the realm of politics. If the constitution is a federal one, whose amendment procedure requires the assent of a specified majority of the states or provinces, the further charge might be added of (e) undermining a fundamental guarantee of federalism. Judges who change the constitution surreptitiously, without claiming any authority to do so, are vulnerable to the additional criticism of (f) deceit.

These are powerful moral reasons for judges not to evade the prohibition on constitutional amendment other than by the prescribed procedure. In countries whose constitutions (including their amendment procedures) are democratic and tolerably just, judges would presumably be morally justified in disobeying that prohibition only in rare cases, to mitigate grave injustice. This is because in such countries, there should be a presumption that the constitution ought morally to be obeyed, especially by judges whose sworn duty is to uphold it. If judges openly flouted the constitution, they would set an extremely dangerous precedent that the other branches of government might be tempted to follow. Consequently, in those rare cases in which judges might be

[43] Raz, 'Authority and Interpretation of Constitutions ', pp. 178 and 180–1.

morally justified in changing the constitution to mitigate extreme injustice, it would usually be morally incumbent on them to do so surreptitiously, by pretending to interpret it in a legally permissible, conserving manner. In other words, the judges would be required to lie. According to Justice Antonin Scalia, this is how judges occasionally 'updated' the American Constitution in days of old, before non-originalism became widely accepted as legitimate:

> . . . they did it in the good old-fashioned way: they lied about it. Nowadays it is no longer necessary to lie – which is not a good thing if you believe, as I do, that hypocrisy is the beginning of virtue.[44]

There are many ways of lying about what a constitution means. Here are some: (a) claim that a word or phrase in the constitution originally meant what the historical evidence indicates it did not mean; (b) claim that the founders had an intention or purpose that they did not have, and purport to prove it by manipulating the historical evidence; (c) claim that the founders took some norm for granted, and therefore did not bother expressly to mention it, when this is very unlikely given their historical context; (d) assert that something is necessary to achieve one of the founders' actual purposes, when in fact it is not necessary, but merely desirable at best.

There are examples of cases that arguably involved a 'noble lie'. In 1967, the Supreme Court of India held that the 'fundamental rights' set out in the Constitution could not be diminished by any constitutional amendment.[45] In 1973, the Court repudiated that decision, but held instead that the 'basic structure' of the Constitution could not be lawfully amended.[46] Section 368 of the Constitution provides that it can be amended by an absolute majority of the total membership, and a two-thirds majority of those present and voting, in both Houses. It makes no mention of any substantive limit on the power of amendment, and evidence of the founders' intentions strongly suggests that none was intended. According to Professor Sathe's illuminating book *Judicial Activism in India*,[47] most of the leaders of the Independence movement, who helped frame the Constitution, believed firmly in parliamentary

[44] Justice A. Scalia, Romancing the Constitution: Interpretation as Invention in G. Huscroft and I. Brodie, *Constitutionalism in the Charter Era*, p. 339.
[45] *Golaknath* v. *Punjab* AIR 1967 SC 1643, SCI.
[46] *Kesavananda Bharati* v. *State of Kerala* AIR 1973 SC 1461, SCI. [47] Above note 9.

supremacy, including supremacy in amending the Constitution.[48] Nehru himself said:

> No Supreme Court and no judiciary can stand in judgment over the sovereign will of Parliament representing the will of the entire community ... And if it comes in the way, ultimately the whole Constitution is a creature of Parliament.[49]

According to Sathe, both the 1967 and 1973 decisions were condemned by almost all expert commentators, who insisted that the Court's function 'was to say what the Constitution provides, not to say what it should provide'.[50]

Could it be that the Court discovered a genuine implication in the Constitution? After all, its decision could plausibly be defended as protecting fundamental purposes that the founders themselves intended the Constitution to serve. The difficulty is that the founders plainly did put their minds to the need to protect individual rights, judicial independence, and the rule of law, and they took steps to do so. Their failure to protect those things from constitutional amendment was not the result of oversight or inadvertence. Their decision to entrust the power of amendment to special majorities in Parliament may, with hindsight, be regarded as misguided, but it was carefully considered and very deliberate. There is no firm basis here for a genuine implication. As previously observed, judges are legally bound by the founders' chosen means, as well as by their ends.

Sathe describes the 1973 decision as 'doubtless an attempt by the Supreme Court to rewrite the Constitution'.[51] He later observes that Indian judges in such cases 'take political decisions while denying that they do so'.[52] Yet he himself approves of this pretence, at least in the 'basic structure' case. He explains how the 1973 decision came to be vindicated by subsequent events during the Emergencies of the mid-1970s. Prime Minister Indira Gandhi and her government attempted to use their overwhelming majority in the Indian Parliament to amend the Constitution by removing some crucial checks and balances. The basic structure doctrine then appeared to many, including some of its severest critics, to have been a wise innovation.[53] Those who had previously

[48] *Ibid.*, pp. 3, 37. [49] Quoted in *ibid.*, p. 37. [50] *Ibid.*, pp. 66, 71, 73 and 257, quote at 257.
[51] *Ibid.*, p. 70. [52] *Ibid.*, p. 158. [53] *Ibid.*, pp. 73–7.

dismissed warnings about the danger of unchecked majoritarianism to the rule of law now had concrete proof of its reality.[54]

Given India's problems of widespread corruption and communal conflict, which constantly threaten individual rights and the rule of law, the Court's success in preserving constitutional safeguards would seem to have made an invaluable contribution to the nation's welfare, even if it involved a 'noble lie'.

How often do judges lie, either nobly or otherwise? How often are they justified in lying? Just how high do the stakes have to be? It is possible to argue that the noble lie, or half-truth, can be justified not only as an exceptional response to extraordinary exigencies, but as a standard routine in the judicial repertoire. Supposedly sophisticated, tough-minded 'realists' or 'pragmatists' sometimes portray constitutional adjudication as far-sighted statesmanship, a branch of High Politics rather than humdrum law, in which legal requirements must be weighed against other important considerations, and the constitution boldly reshaped if justice or good government so demands. The statesman (or -woman) must take legal formalities, including the allocation of institutional authority to change the constitution, into account. But he or she is not bound by them, even if, as a matter of prudence, he or she must often pretend to be.

This is not the occasion to take on the pragmatists.[55] I merely submit that the collective weight of the many moral reasons against judges changing a constitution, contrary to the prescribed amendment procedure, is surely so heavy that it can be outweighed only by extremely powerful considerations that are likely to arise only in exceptional circumstances.

Conclusion

When constitutions are indeterminate, as they often are, judges have discretion to make constitutional law. For example, this is usually the case when they interpret and apply provisions that guarantee rights,

[54] *Ibid.*, p. 77.

[55] See the entertaining exchange between Larry Solum and Jack Balkin, in which Balkin defends a pragmatic 'high politics', and Solum a neo-formalist theory of constitutional adjudication: *Legal Theory Blog* (http://lsolum.blogspot.com), 17, 18 and 20 May 2003, and *Balkinization* (http://balkin.blogspot.com), 17 and 18 May 2003.

which are invariably abstract and vague. When judges exercise such discretion, it may often be instructive for them to consult the constitutional jurisprudence of other countries whose judges have wrestled with similar problems. Foreign jurisprudence may be relevant in other situations too. For example, any argument that an implied principle is necessary to fulfil one of the constitution's purposes (such as federalism, democracy, or the separation of powers) could possibly be tested by reference to experience in other countries whose constitutions have the same purpose. If they get by perfectly well without the principle in question, then its necessity is doubtful.

To the extent that judges can legitimately be guided by what appears to be international 'best practice', some degree of convergence towards a common model of liberal democratic constitutionalism may result. But there are limits to the relevance of foreign jurisprudence, and the potential for legitimate convergence. Judges are rarely free, either legally or morally, to develop their constitutions as they see fit. They are not 'statesmen', appointed to fill the shoes of the founders, and continue the task of constitution-making as an ongoing enterprise. Their principal obligation is one of fidelity to the constitution as it is, including whatever procedure is prescribed for amendment. I have argued that this obligation includes fidelity to the original meaning of the constitution's express provisions, and, when considering alleged implications, fidelity to both the ends and means agreed upon by the founders. Any other approach, particularly the purported discovery of implications, threatens to obliterate the distinction between legitimate interpretation and illegitimate amendment. A non-originalist theory of 'unwritten principles' (if there is one) can only be a blank cheque for judges to rewrite the constitution.

In extraordinary circumstances, judges may be morally justified in lying about a constitution's true meaning. But in reasonably stable, tolerant, and democratic countries, these circumstances are, hopefully, rare.

6

Spreading liberal constitutionalism: an inquiry into the fate of free speech rights in new democracies

MICHEL ROSENFELD AND ANDRÁS SAJÓ

Introduction

The second half of the twentieth century saw a proliferation of transitions from authoritarianism and colonial rule to constitutional democracy in virtually every corner of the world. This phenomenon started shortly before mid-century with Germany, Japan, India, Pakistan, and Israel, and continued several decades later with Greece, Portugal, and Spain. In the late 1980s and early 1990s, it spread through Central and Eastern Europe, followed by the repudiation of dictatorship in several Latin American countries. These various transitions were inspired by, and drew upon, various constitutional traditions, such as the US, British, French, and later, the German. Throughout this process, constitutional norms were 'exported' by established constitutional democracies and 'imported' into new democracies. Some norms were undoubtedly liberal, while others were not.

In this chapter, we assess the contribution of the transplantation of liberal constitutional norms to the spread and consolidation of liberal constitutionalism. Is the mere importation of such norms sufficient to pave the way for liberal constitutionalism? Or must certain preconditions prevail, or develop subsequently, for transplantation to succeed? Can importation of liberal constitutional norms have a significant impact notwithstanding the concurrent importation of non-liberal constitutional norms, such as those based on communitarian values, social-welfare objectives, or ethnocentric conceptions of citizenship?

A full assessment of the exportability of liberal constitutionalism is fraught with difficulties. A principal difficulty is that there is no agreement on the meaning of liberalism, much less on what rights or values are liberal or on what counts as a liberal interpretation or application of

fundamental constitutional rights. The liberal label has been pinned on philosophers as diverse as John Locke, Benjamin Constant, John Stuart Mill, and John Rawls. Moreover, even the most liberal of constitutional democracies, such as France or the United States, have promoted illiberal constitutional norms or interpreted liberal norms in illiberal ways. Finally, to a significant extent, liberalism is defined less by a set of fixed characteristics than by its struggle against illiberalism.

Given these difficulties, we confine our inquiry to rights to freedom of speech, which are core rights within all versions of liberalism. Moreover, all forms of illiberalism are ultimately bound to suppress or significantly curtail these rights. We evaluate the fate of imported free speech rights in Hungary, as an example of countries that have recently shifted from authoritarianism to constitutional democracy. The second section offers a quick outline of the general contours of liberalism, the place of free speech within liberalism and the dynamics between liberalism and illiberalism. The third section considers key aspects of the free speech doctrines of the United States and Germany, the former more liberal than the latter, but both having considerable influence in post-communist Hungary. The fourth section provides a critical appraisal of Hungary's free speech jurisprudence since 1989, focusing on hate speech, defamation of government officials, and disparagement of national symbols. The final section examines whether any general conclusions can be drawn from Hungary's import of free speech rights. The question is whether the outcome of transplantation depends more on the nature of the rights and/or the approach to these imported rights, or on contextual issues relating to conditions in the importing country.

Core liberalism, free speech rights, and the dynamic between liberalism and illiberalism

Liberalism is both methodologically and ideologically individualistic. Methodologically, in that the individual provides the measure of all social and political things. Ideologically, in that justice and the good are ultimately to be sized for the individual. For example, if a religion requires communal rituals and prayers, its needs could be met either through collective rights extended to the relevant religious community, or through individual rights of freedom of religion, worship, and assembly. A liberal envisions freedom of religion rights in the latter way,

and interprets these rights, whenever they are not explicitly specified as collective ones, as being individual in nature.

There is no consensus within liberalism concerning the legitimate contours of fundamental individual rights. For example, libertarian-liberals believe that formal equality is sufficient to secure individual autonomy for all, while egalitarian-liberals argue that meaningful autonomy requires a guarantee of minimum welfare rights. But all liberal theories share a common view of core free speech imperatives, and only disagree with respect to issues at the margins. This convergence around free speech rights, moreover, greatly enhances the value of focusing them when assessing the importation of liberal constitutional rights in formerly authoritarian polities. Whereas consideration of other liberal rights may be muddied by intra-liberal controversies, focus on free speech greatly minimizes that danger.

John Stuart Mill defended extensive free speech rights, based on his conviction that uninhibited exchange of ideas contributes to discovery of the truth, and that truth is bound to contribute to the greatest good of the greatest number. Truth is discovered gradually and empirically through unconstrained discussion of all ideas, including those that may eventually prove false. Consistent with this optimistic and progressive outlook, speech is never purely self-regarding, and always does more good than evil – even proven falsehoods force proponents of the truth to hone and invigorate its expression and diffusion – so long as it does not incite violence. So long as speech is likely to lead to more speech rather than to violence – for example, 'fighting words' or direct exhortations to violence – it will do more good than harm. Hence Millian liberalism calls for what would be later called 'a free marketplace of ideas'.

Justice Oliver Wendell Holmes shared Mill's belief that suppressing speech is bound to do more harm than good, but for an altogether different reason. Whereas Mill was confident in the march of progress, Holmes was sceptical that truth would gradually emerge. Nevertheless, Holmes was a staunch proponent of the free marketplace of ideas because he feared that government regulation of speech in the absence of reliable standards for sorting truth from falsehood would almost inevitably cause more harm than good. In short, both Millian optimists and Holmesian pessimists firmly believe that extensive free speech rights must be afforded protection for the greatest good of the greatest number.

Liberalism provides a core conception of the proper scope of free speech rights: government should refrain from regulating or punishing all speech except speech that amounts to an incitement to violence. The reasons for supporting this core conception may vary from one version of liberalism to the next, and some versions, such as egalitarian strands of liberalism, may require additional protections to equalize the weight of the competing voices vying for expression in the marketplace of ideas. Nevertheless, all versions of liberalism promote conceptions of free speech rights that converge at their core, even if differences remain at the margins.

Finally, liberalism is not only a philosophy and ideology, but also a movement. As a movement, liberalism struggles against illiberalism, that is, against all those philosophies, ideologies, practices, and institutions that are inconsistent with it. It is clear that totalitarian and authoritarian regimes are illiberal, and the liberal struggle against them may require nothing short of revolution. Illiberalism, however, is not the exclusive preserve of such regimes. Indeed, even liberal democracies are prone to being to varying degrees illiberal. For example, many liberal democracies have not provided full equality to women, or extended certain rights to homosexuals. In addition, some liberal democracies adhere to certain republican, paternalistic, or communitarian norms that are inherently illiberal.

Most polities, including liberal democracies, experience an ongoing struggle between liberalism and particular manifestations of illiberalism. This struggle sets up a dynamic whereby liberalism as a movement not only stands for something but also stands against particular illiberal obstacles that prevent the full deployment of liberalism. Though liberalism will often overcome the illiberal obstacles that stand in its way, it can also happen that illiberal norms become strong enough to force liberalism to retreat. There are many examples of liberal progress and expansion as polities that initially reserved liberal rights exclusively for heterosexual men now extend them to both women and homosexuals. But even in liberal democracies such as the United States, certain liberal rights, such as abortion rights, have somewhat retreated since they were constitutionally enshrined in 1973, and it is not inconceivable that they will become much more restricted or even virtually eliminated in the future.

The dynamic between liberalism and illiberalism is important for purposes of assessing the import and export of liberal constitutional

norms. From the standpoint of imports, the success or failure of implantation or adaptation should not be necessarily determined by comparing how extended liberalism is in the importing and exporting countries. Particularly when the importing country has just emerged from authoritarian rule, a better gauge would be whether the importation of a liberal constitutional norm has meaningfully extended liberalism within the importing country.

Liberalism and free speech doctrine in the United States and Germany

Although US free speech jurisprudence is more liberal than its German counterpart, both afford extensive protection to freedom of speech and of the press and are thus amply consistent with the requirements of a liberal society. US freedom of speech is the optimal example of a liberal right, and as the paramount right within the US constellation of constitutional rights,[1] it both anchors and serves as the paramount symbol of the most liberal of liberal societies. In contrast, German free speech is distinctly less liberal. In Germany, free speech is not paramount; it must be balanced against other rights whenever conflicts arise.[2] Moreover, liberalism is but one of the several normative pillars that shape the German constitutional order. Thus, for example, liberal aims must be harmonized with those flowing from the principle of social justice enshrined in Art. 20 of the Basic Law.[3] And the interpretation of freedom of expression may require the reconciliation of liberal and social justice objectives.[4]

Building upon the Millian and Holmesian conception of liberalism, extensive free speech rights are essential to the achievement of individual autonomy for both the (public) citizen and the private person. The citizen, on the one hand, achieves autonomy through democratic self-government and hence requires extensive and free political speech rights. The private person, on the other hand, needs room to carve out a sphere

[1] See L. Bollinger, *The Tolerant Society: Free Speech and Extremist Speech in America* (Oxford University Press, New York, 1986).

[2] See D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, Duke University Press, Durham, NC, 1997), pp. 415–16.

[3] See generally P. Kunig, The Principle of Social Justice in U. Karpen (ed.), *The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law* (Nomos, Baden-Baden, 1988), pp. 187–204.

[4] *Ibid.*, p. 202.

of individual autonomy allowing for largely unhindered pursuit of self-fulfillment, calling for extensive free non-political speech rights, including freedom of artistic expression, scientific inquiry, religious expression, etc.[5]

From the standpoint of liberalism, with its confidence in the individual's rational capacities and propensity for the pursuit of enlightened self-interest, the best way to optimize free political and non-political speech is through maintenance of a vigorous free marketplace of ideas. The free economic market envisaged by Adam Smith, on which the marketplace of ideas is modelled, was expected to channel self-interest and individual economic pursuit into the economic good of all. Similarly, the marketplace of ideas, in its Millian conception at least, is supposed to lead to the triumph of the best ideas through open exchange and uninhibited discussion of all ideas. Moreover, just as the free economic marketplace cannot be completely unconstrained – for example, it cannot properly function in the face of significant monopolies – the marketplace of ideas cannot countenance the free utterance of all conceivable expression. Consistent with liberal presuppositions about the individual, rationality, and collective engagement with ideas, all ideas ought to be freely expressed so long as they are not unduly likely to thwart further speech. Specifically, all speech should be protected except speech that incites to violence or that poses 'a clear and present danger'.

US free speech doctrine overwhelmingly conforms to this liberal canon, and thus serves as a veritable model of constitutional liberalism. In particular, US free speech extends much greater protection to hate speech than do other major constitutional democracies, only allowing the banning of hate speech that 'incites to violence', whereas other democracies permit speech that 'incites to hatred' against a racial, ethnic, religious group, etc. to be prohibited. US free speech also affords extensive protection to defamation of public officials and bans criminalization of desecration of national symbols, such as the burning of the US flag in political protest.

Although German protection of political speech is extensive and that of non-political speech quite broad and expanding in recent years,[6] it falls

[5] Though conceptually sound, the distinction between political and non-political speech may not be always easy to draw in practice.

[6] *See* E. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States* (Praeger, Westport, CT, 2002), pp. 231, 237.

short of the liberal ideal set by its US counterpart. The reasons for this difference are manifold. First, there are important textual differences between the two constitutions. The US First Amendment is cast in absolutist terms, providing that 'Congress shall make no law ... abridging the freedom of speech, or of the press ...'.[7] In contrast, Art. 5 of the German Basic Law, which affords free speech rights, provides for explicit limitations. Thus, Art. 5(2) provides, in part, that free speech rights 'are limited by ... the provisions of law for the protection of youth and by the right to inviolability of personal honor'.[8]

Second, the German Basic Law sets a hierarchy of constitutional values in relation to which all rights must be interpreted and harmonized. Chief among these is human dignity, enshrined in Art. 1; others, in addition to the considerations mentioned in Art. 5(2), include social justice;[9] militant democracy;[10] and the right to 'free development of one's personality'.[11] Conforming to these values may require departure from liberal ideals. For example, though dignity implies autonomy, it cannot be confined to liberal autonomy. Accordingly, group defamation against a historically disadvantaged minority that does not amount to incitement to violence or pose any 'clear and present danger' may not contravene liberal autonomy standards, but does run afoul contemporary German standards of human dignity.[12]

Third, there are historical, cultural and other contextual differences between Germany and the United States reflected in their respective free speech jurisprudence, and which account in part for less liberal outcomes in Germany. Perhaps the most dramatic of those differences stems from Germany's traumatic experience with Nazi totalitarianism in the past century. German free speech doctrine has shown little tolerance for anti-Semitic speech, in contrast to the ample tolerance for such speech under US free speech doctrine.[13] Liberal ideology holds that irrational anti-Semitic speech is best handled through exposure and rational refutation. In the aftermath of the Holocaust, however, Germans may well be justified in the belief that liberal free speech doctrine may not suffice to guard against the recurrence of extremism within their polity. These differences between German and US free speech jurisprudence are vividly

[7] US Constitution, First Amendment. [8] German Basic Law, Art. 5 (1949).
[9] *Ibid.*, Art. 20. [10] *Ibid.*, Art. 21. [11] *Ibid.*, Art. 2.
[12] See discussion of hate speech, below. [13] See the discussion of hate speech, below.

illustrated by the contrasts relating to the respective ways in which the two countries handle the three subjects that are our principal focus. In addition to differing in how they regulate hate speech, Germany affords far less protection to defamation of public figures than does the United States. Finally, although the two countries reached similar results in their respective flag desecration cases, German doctrine affords greater protection to national symbols.

US free speech doctrine is clearly more liberal than its German counterpart. But does that also mean that the United States is more liberal in *relative terms* of the struggle of liberalism against illiberalism? It is plausible that in view of its authoritarian past and much more deeply rooted illiberalism, Germany is unlikely to become more liberal in absolute terms through a *laissez-faire* attitude. For Karl Popper, the 'paradox of tolerance' is that tolerance of the intolerant may facilitate a takeover by the latter.[14] Paradoxically, it may be that anti-liberalism towards authoritarianism may be a better weapon in the fight of liberalism against illiberalism in formerly authoritarian polities such as Germany or Hungary. Germany may end up being as liberal as the United States in spite of not fully embracing the latter's *laissez-faire* free speech philosophy. And this would clearly have far-reaching implications for assessing the 'importation' of liberal constitutional norms in formerly authoritarian polities. To better evaluate how this may play out, let us turn to how Germany and the United States respectively handle hate speech, defamation of public figures, and desecration of national symbols.

Hate speech

The United States. The current 'incitement to violence' hate speech standard was established by the US Supreme Court in *Brandenburg* v. *Ohio*.[15] Moreover, two subsequent cases have come to typify the US approach to hate speech.[16] The first involved a proposed march by Neo-Nazis wearing SS uniforms with swastikas in Skokie, a suburb of

[14] See K. Popper, *The Open Society and its Enemies* (5th edn, Routledge, London, 1966), pp. 265–6 n. 4.

[15] 395 US 444 (1969).

[16] The following discussion draws upon M. Rosenfeld, Hate Speech in Constitutional Jurisprudence: A Comparative Analysis (2003) 24 *Cardozo Law Review* 1523.

Chicago with a significant Holocaust survivor population. The march was clearly meant to incite hatred against Jews, but the courts struck down municipal efforts to prohibit the march as unconstitutional based on their conclusion that such a march would not by itself amount to an incitement to violence.[17]

The second case is *RAV* v. *City of St Paul*,[18] which involved the burning of a cross – an act inextricably linked to the Ku Klux Klan, one of the most virulent and violent white supremacist organizations in the United States – on the lawn of a black family by white extremists. A municipal ordinance that had criminalized cross-burning because it incited racial hatred was found unconstitutional, *inter alia*, because it failed to meet the 'incitement to violence' standards. This holding was reaffirmed in a subsequent cross-burning case, *Virginia* v. *Black*,[19] where the Court recounted the role of cross-burning in the context of the history of the Ku Klux Klan, and noted how it was used to intimidate blacks and was frequently followed by violence leading to serious injury or death. But the Court held that such intimidation is constitutionally punishable only if the person delivering the intimidating message intends to place 'the victim in fear of bodily harm or death'. Accordingly, cross-burning cannot be prohibited across the board, as it may on occasion be performed to reinforce the white supremacist ideology among Ku Klux Klan members or merely to humiliate, anger, or demean blacks rather than to instil in them the fear of death.

From the standpoint of liberalism in absolute terms, the *Skokie* case, *RAV* and *Black* are equivalent. From the standpoint of the struggle between liberalism and illiberalism, however, the first of these cases differs significantly from the latter two on contextual grounds. The Neo-Nazis who sought to march in Skokie were an insignificant marginalized group with no persuasive sway. Suppression of their speech would have undoubtedly done more for them than tolerance of it. Combination of the pernicious Neo-Nazi message with its virtually total lack of influence on those it was meant to persuade amounted to a nearly perfect example of the great virtues of extensive free speech rights.[20]

[17] See *Smith* v. *Collin*, 436 US 953 (1978); *National Socialist Party of America* v. *Village of Skokie*, 432 US 43 (1977).

[18] 505 US 377 (1992). [19] 538 US 343 (2003).

[20] It is significant in this respect that Jews were advocates on both sides of the Skokie controversy. See Rosenfeld, Hate Speech, 1538 n. 55.

The context of the two cross-burning cases is, however, altogether different. Because of the pervasive nature of racism, the long history of oppression and violence against blacks in the United States, and the frightening associations evoked by cross-burning, the situations in *RAV* and *Black* cannot be equated with that surrounding the *Skokie* case. Unlike the Neo-Nazi message which largely fell on deaf ears, the burning cross in *RAV* was meant to intimidate middle-class blacks who had moved into a racially mixed neighbourhood that had formerly been overwhelmingly white. Although most whites undoubtedly found the cross-burning repulsive, racial integration of residential neighbourhoods is still opposed by significant numbers of whites. Thus the latter may have disagreed with the form of the cross-burning message, but not with its content.[21] Arguably, therefore, allowing cross-burning may hinder rather than advance the struggle against racist illiberalism.

Germany. As mentioned, in Germany free speech rights must be balanced against other rights and set against a constitutionally enshrined set of values. In the case of hate speech, whereas in the United States the speaker's autonomy rights remain paramount so long as no incitement to violence is involved, in Germany, the speaker's autonomy rights must be weighed against the dignity and personality rights of those targeted by the particular hate speech utterance involved. This is illustrated by the 1994 *Holocaust Denial Case*,[22] where right-wing extremists indirectly challenged the constitutionality of a law prohibiting Holocaust denial. The German Constitutional Court upheld the constitutionality of the challenged prohibition, among other reasons, on the ground that Holocaust denial robbed German Jews of their individual and collective identity and dignity and that it threatened to undermine the rest of the population's duty to maintain a social and political environment of which Jews and the Jewish community can feel themselves an integral part.

Under German law, consistent with the 'incitement to hatred' constitutional standard, criminal liability can be imposed for such incitement and for attacks on human dignity against individuals or groups determined by nationality, race, religion, or ethnic origin.[23]

[21] *Ibid.*, 1540–1. [22] 90 BVerfGE 241 (1994).

[23] See F. Kubler, How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights (1998) 27 *Hofstra Law Review* 335 at 344.

Group defamation or defamation of individuals based on their group affiliation constitutes a clear affront to the defamed party's dignity and personality interests. Accordingly, the 'incitement to hatred' standard seems perfectly suited to the German Basic Law's concern with striking a proper balance between free speech, on the one hand, and dignity, on the other.

To the extent that considerations of dignity, personality, and group identity require curbing the scope of free speech rights, German free speech doctrine is clearly less liberal in absolute terms than its US counterpart. Indeed, communitarian concerns are in tension with liberalism, and, as already alluded, dignitarian concerns are only partially reconcilable with liberal ones. In terms of the struggle between liberalism and illiberalism, however, the picture is less clear. To be sure, the *Holocaust Denial Case* involved protection of dignity and collective identity interests that are not inherently liberal in nature. Read against the historical experience of Jews during the Third Reich, and in terms of the fear of a return to authoritarianism, however, intolerance of denial of the Holocaust seems entirely justifiable as part and parcel of the struggle of liberalism against illiberalism in Germany.

Defamation of public figures

The United States. Based on the standard laid down in *New York Times* v. *Sullivan*,[24] the United States protects false and defamatory statements about public figures published in the press unless made with 'actual malice', that is, with knowledge of their falsity or with 'reckless disregard' concerning their truth.[25] In its famous dictum, the Court emphasized that 'debate on public issues should be uninhibited, robust, and wide-open'.[26] Considerations of honour, dignity and integrity of the public officials under attack cannot be invoked to limit public debate. Moreover, the fact that maliciously false statements remain beyond constitutional protection evinces concern less about the public official involved[27] than with the fact that knowingly false statements in no way advance public debate.

[24] 376 US 254 (1964). [25] *Ibid.*, at 279–80. [26] *Ibid.*, at 270.

[27] E.g. a negligent false accusation in a major newspaper to the effect that a public official is dishonest, which is protected speech, seems no less (unfairly) devastating than a similar charge made with actual malice.

The rule laid down in *New York Times* v. *Sullivan* and supplemented by similar rules relating to public figures in other contexts, such as that involving crude and demeaning parody of a controversial religious minister who frequently appeared in the national media,[28] clearly conforms to the liberal ideal. A maximum of speech is guaranteed and the public figure's autonomy rights are not unduly abridged given that such figures possess means that private persons lack, including significant access to the media to present their views.

Germany. German constitutional protection of defamation of public figures is far more limited than in the United States. This emerges clearly from the *Mephisto* case,[29] decided a few years after *New York Times* v. *Sullivan*. *Mephisto* involved a satirical novel based on the career of an opportunistic actor who was successful during the Third Reich. The actor was dead but his heirs obtained an order prohibiting distribution of the novel on the ground that it dishonoured his good name and memory. The German Constitutional Court held that the order in question did not violate the free speech rights of the author of the novel.

In the 1980s and 1990s the German Constitutional Court moved away from the deferential stance it adopted in *Mephisto* and began giving increasing weight to free speech concerns balanced against other constitutional rights and values.[30] Thus, in the 1982 *Campaign Slur Case*,[31] a candidate from one of Germany's two major mainstream political parties denounced the other as a Neo-Nazi party in the course of an election campaign. The Constitutional Court characterized the denunciation as an expression of opinion on a public matter rather than as a false factual assertion and held that opinion statements on issues of public concern have almost unlimited protection. Notwithstanding this greatly expanded protection of speech, the German Court was not about to embrace the liberalism of the US Supreme Court. Indeed, in the *Political Satire Case*,[32] with facts reminiscent of those in *Hustler*, the German Court concluded that a parody that depicted the famous German right-wing political figure Franz-Joseph Strauss as a pig copulating with another pig in judicial robes was not protected speech in

[28] See *Hustler Magazine* v. *Falwell*, 485 US 46 (1988) (crude sexual parody claimed to have inflicted actionable emotional distress: unanimous court rejected claim on grounds that satirists and cartoonists would otherwise be unduly inhibited).

[29] 30 BVerfGE 173 (1971). [30] See Eberle, *Dignity and Liberty*, pp. 209–10.

[31] 61 BVerfGE 1 (1982). [32] 75 BVerfGE 369 (1987).

spite of constituting artistic speech. This was because the depicted bestiality deprived Strauss of his dignity rights. In this case, therefore, the dignity interests involved were held to outweigh the freedom of artistic interests at stake.

Two brief observations seem warranted on the state of German jurisprudence on the defamation of public figures. The first is that the trend to liberalization which started in the 1980s and accelerated in the 1990s can be plausibly interpreted as meaning that the farther a formerly authoritarian polity moves away from its authoritarian past, the more it may feel comfortable in liberalizing its free speech jurisprudence. The second, not unrelated to the first, concerns whether in the context of liberalism's struggle against illiberalism, lesser tolerance of defamation of public figures can ever serve to enhance rather than to inhibit a trend toward greater liberalism. Although no clear-cut answer to this query emerges, one should acknowledge the possibility that there may be circumstances in which orchestrated vicious defamatory propaganda by partisans of a return to authoritarianism against political leaders committed to liberal democracy may serve the cause of illiberalism. If that is the case, depriving such defamation of constitutional protection may contribute to the fight against illiberalism.

Desecration of national symbols

United States. Loyalty to, and respect for, national symbols such as the flag and the national anthem have important communal implications as they reinforce the unity of the nation and solidarity among its citizenry. Notwithstanding this, and in spite of strong popular opposition to desecration of revered national symbols, the US Supreme Court held that flag desecration to express political dissent is constitutionally protected speech in *Texas* v. *Johnson*.[33] The decision provoked a broad-based outcry and prompted the US Congress to adopt a law banning flag-burning while adhering to the constitutional constraints articulated in *Johnson*. This new federal law was struck down as unconstitutional in *United States* v. *Eichman*.[34]

Protection of flag-burning and the desecration of national symbols for purposes of symbolic political expression are fully consistent with liberal

[33] 491 US 397 (1989). [34] 496 US 310 (1990).

ideology. It privileges the individual over the group, and is consistent with the conception of the polity as a free association of citizens rather than as an organic or communally bound whole. Arguably, moreover, permitting expressive desecration of national symbols can serve to reinforce the associational bonds of the vast majority of the citizenry, so long as the latter disagree with the desecration but believe in the virtue of tolerating the latter's expressive act.

Germany. It is a crime in Germany to insult the country or its federal order or to disparage the German flag, coat of arms, or national anthem.[35] These prohibitions are consistent with the German Basic Law's adherence to 'militant democracy'.[36] Indeed, just as militant democracy seeks to strengthen democracy by allowing the banning of political parties with anti-democratic aims,[37] a well-functioning democratic society needs a stable and respected governmental order that can effectively protect fundamental rights and promote public civility.

The German Constitutional Court affirmed these values, but nonetheless vacated a conviction for flag desecration in the *Flag Desecration Case*.[38] The lower court had convicted those responsible for a book jacket of a collection of antimilitary essays. The collage on the jacket depicted people urinating on the German Flag during a military swearing-in ceremony. The Constitutional Court held that the book jacket contained an artistic expression which was entitled to broad though not absolute protection. Instead, the Court held that freedom of artistic expression had to be balanced against the need for respect of national symbols meant 'to appeal to the citizens' sense of civic responsibility'. Significantly, the book jacket was not meant as an attack on Germany's national civic order, but instead as a work of art critical of the military.

Germany's jurisprudence regarding national symbols is consistent with its blend of liberalism, dignity-based values, and communitarianism. Because authoritarian regimes usually exploit national symbols to command loyalty and conformity, it seems highly unlikely that greater protection of such symbols might be enlisted in the struggle of liberalism against illiberalism. Unlike authoritarian regimes, however, Germany

[35] German Criminal Code, Art. 90(a).

[36] *See* N. Dorsen *et al.*, *Comparative Constitutionalism: Cases and Materials* (West, St. Paul, MN, 2003), p. 821.

[37] See e.g. *Socialist Reich Party Case*, 2 BVerfGE 1 (1952).

[38] 81 BVerfGE 278 (1990).

accommodates a fair amount of criticism, parody, and irreverence toward national symbols through implementation of its balancing test.

In the end, though German constitutional protection of free speech rights conforms less to the liberal ideal than does its US counterpart, it does leave ample room for liberal values. Furthermore, with Germany's authoritarian past in mind, that country's limitations on hate speech and constraints against defamation of public figures can be viewed as weapons in the struggle of liberalism against illiberalism. Also significant is that as authoritarianism has receded further into the past, German free speech jurisprudence has become more expansive and accordingly more in tune with liberalism in the absolute meaning of the term.

Liberalism, illiberalism and freedom of speech in Hungary

We chose the free speech jurisprudence of Hungary to illustrate how a new constitutional regime handles liberal rights. We will focus on the jurisprudence of the Hungarian Constitutional Court (HCC), but we will also consider statutory developments and the practice of the ordinary courts. It is quite common in analyses regarding the spread of liberalism to look at the apex of the legal pyramid and make wide-ranging generalizations about a legal system on the basis of supreme court or constitutional court ('high' courts) decisions. These evaluations are based on the assumption that the 'high' courts dictate the ordinary courts' jurisprudence. Such assumptions are particularly problematic in countries like Hungary, where the HCC's jurisdiction is limited to the abstract review of laws and has no direct power to determine the decisions of the ordinary courts. It is, therefore, important to look beyond the HCC's jurisprudence and consider the understanding of ordinary courts regarding free speech.

We will consider the fundamental legislative changes regarding free speech, the related general concept of free speech, and will test the broad concept of freedom of speech with development in the three specific areas of speech protection, namely, restrictions on hate speech, defamation of public figures, and disparagement of national symbols or attacks on 'national identity'. This is followed by an assessment of the developments regarding free speech in Hungary since the transition from authoritarianism.

The emergence of free speech in Hungary

There was no free speech in communist Hungary. The press was a tool of the Communist Party. Dissident voices and government criticism were persecuted and even prosecuted under an overbroad provision of the Criminal Code that sanctioned incitement.

The transition to democracy in Hungary was a negotiated one. As part of the transition agreements between communists and their opponents, freedom of speech was recognized in 1989 as part of amendments to the 1949 communist Constitution. The requirement that press activities be subject to license was repealed, and the criminal provision on incitement 'against the government, public and constitutional order' was replaced with 'incitement against communities'. Beginning in 1989 public debates suddenly became robust; the private press flourished[39] and provoked polemics in matters of public interest, among others harsh criticism of government officials. After many years of censorship and self-censorship, unfettered speech was a favourite of the emerging new political and cultural elite and there was little concern about possible limits to speech.

The fully amended Constitution in its 1990 version guarantees 'freedom of opinions' (i.e., freedom of speech) and freedom of the press. Like other fundamental rights, freedom of speech can only be restricted by an Act of Parliament, and its essential content cannot be violated. These constitutional provisions were interpreted to mean that constitutional rights can be restricted only under certain conditions. This was taken for granted by the HCC, which relied for this 'liberal interpretation' on the German doctrine and practice of proportionality.

The Press Act of 1986 remained in force but most of its provisions that enabled censorship were abolished. In contrast, the libel provisions of the Civil Code of 1959 remained in force. The Civil Code provides, in accordance with the Constitution, that 'personality rights' are to be protected, including the right to good reputation. The Civil Code provides various remedies against defamation, including injunction and damages. The Civil Code also contains provisions that provide for a right of rectification if an untrue statement regarding a person, including a non-defamatory one, is published in the press. There is no defence of public interest or good faith in such cases: where the press is unable to

[39] The important exception is broadcasting, discussed below.

prove that the publication is true, it shall publish a statement declaring that the fact was 'falsely alleged'. The provisions of the Criminal Code regarding criminal libel remained fundamentally unchanged.

The concept of freedom of speech according to the Constitutional Court

The HCC expressed its position regarding freedom of speech at the first opportunity.[40] The speech theories adopted in the decision are a strange mixture of the US and German positions, resulting in a curious blend of two different liberal traditions. Moreover, the concept of free speech is understood in the context of the German conception of state obligations; according to this doctrine of the German Constitutional Court, the state has the duty to promote in a positive manner the use of fundamental rights, at least by enabling the rights-holders to rely on their rights, including the positive protection of free speech.[41]

In this first free speech case the HCC addressed the constitutionality of the 'instigation against community' provisions, which were substantively agreed upon during the roundtable negotiations.[42] The matter was politically charged, since shortly after the collapse of communism anti-Semitic speech emerged openly in public discourse, albeit accompanied by very little actual violence.

The HCC approached free communication both as an individual right and as a social process, and located its strategy relating to speech in that context. In carving out the relevant universe of discourse it stated that free speech is not simply an individual ('subjective') right:

> The State's duty 'to respect and protect' fundamental rights is not discharged in relation to individual rights by merely refraining from their violation, but that it also encompasses the requirement to secure the conditions necessary for their realization. People exercise their fundamental rights so as to serve their individual freedoms and personal wants. But what the State is required to do in order to

[40] The judge of first instance referred an incitement case to the HCC in October 1991. The HCC rendered its decision on 26 May 1992.

[41] *Lüth* 7 BVerfGE 198 (1958); *Blinkfüer* 25 BVerfGE 256 (1969); B. Schlink, German Constitutional Culture in Transition in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* (Duke University Press, Durham, NC, 1994).

[42] 30/1992 (V.26.) AB hat.

> perform its guaranteeing function, in addition to securing individual subjective rights, is also to protect the values and life situations in themselves, that is, to protect them not merely in connection with certain individual wants, and to relate to them in connection with other fundamental rights.[43]

This position clearly reflects German concerns regarding the function of the state as a promoter of rights – hardly a traditional liberal concern. The consequence is that the state has the duty to secure the conditions for the creation and maintenance of a democratic public opinion. As the Court held in its Decision 30/1992: 'For this reason, the constitutional boundary of the freedom of expression must be drawn in such a way that in addition to the individual's subject[ive] right (the freedom of expression), the formation of public opinion, and its free formation – indispensable values for a democracy – are also considered.'

Although the HCC found that the state must contribute to the free formation of ideas, it was concerned with subjecting the free formation of a public opinion to its own rules. The HCC declared that it should avoid intervention into the communication process; such intervention would preclude the free formation of public opinion.[44] This resulted in endorsing a free speech position that is principally in line with contemporary US and European approaches: 'it is not the content to which the basis of the right of free expression relates. Every opinion, good and bad, pleasant and offensive, has a place in [the] social process [of communication]'.[45]

In many regards the HCC adopted an absolutist theory of speech going beyond the US Supreme Court's position, i.e., it claimed that all speech is protected. The 1992 decision implies that there is no content whatsoever, not even obscenity or fighting words, that is excluded. Such an absolutist position reflects concerns for individual self-realization – and perhaps an experience of abuse that the judges experienced during communism. The state cannot prohibit expression on the basis of the content or form of the speech at stake. Speech can, however, be limited if it conflicts with

[43] *Ibid.* Except if otherwise stated all HCC case citations are translated by the authors.

[44] This attitude did not preclude the HCC from dictating the organizational structures for radio and television that would allow the formation of a self-ruling public opinion. The reason given was the need to address distortion of such freedom due to monopolies.

[45] 30/1992 (V.26.) AB hat.

other rights as well as with the constitutional order that the HCC has to protect.

The HCC was well aware of the tensions that emerged in the political transition which 'are undoubtedly exacerbated if people can give vent with impunity before the public of their hatred, enmity and contempt of certain groups'.[46] But 'the unique historical circumstances give rise to another effect ... only through self-cleansing may a political culture and a soundly reflexive public opinion emerge [from authoritarianism].'[47] Hence the strategic conclusion that bars criminalization of group libel: 'The denigrative language must be answered by criticism.'[48] The HCC choose to apply the speech norms of an already tolerant open society. This concept seems to be inspired by Jürgen Habermas' communication theory:[49]

> [I]t is individual expression of opinion, further the public opinion formed by its own rules, and related to it, the opportunity of the formation of an individual's opinion built upon as broad a knowledge as possible which are what the Constitution protects. The Constitution guarantees free communication – as an individual behavior and social process – and it is not the content to which the right to free expression relates ...
>
> ... Where one may encounter many different opinions, public opinion becomes tolerant, just as in a closed society an unusual voice may cause a much greater disruption of public peace. In addition, the unnecessary and disproportionate restriction of the freedom of expression reduces the openness of society.
>
> The Constitutional Court takes note of the historical circumstances of certain cases. The recent change of political system is inevitably accompanied by social tensions. These tensions are undoubtedly exacerbated if people can give vent with impunity before the public to their hatred, enmity and contempt of certain groups.
>
> But the unique historical circumstances give rise to another effect ... Only through self-cleansing can a political culture and a soundly reflexive public opinion emerge ... But criminal sanctions must be applied for the protection of other rights and only when unavoidably necessary, and they should not be used for shaping

[46] *Ibid.* [47] *Ibid.* [48] *Ibid.*

[49] See e.g. J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, W. Rehg translator (MIT Press, Cambridge, 1996).

public opinion or the manner of political discourse. This latter option is that of a paternalistic approach.[50]

Hate speech and the clear and present danger test

From the very beginning, the HCC found the criminalization of incitement against national ethnic or religious groups to be constitutional and held that prohibition of denigration of such groups was unconstitutional.[51]

The HCC, contrary to the US Supreme Court, relied on balancing and proportionality. It recognized that *in principle* free speech has an especially high ranking among fundamental rights. In the process of defining the proportionality of a restriction on speech imposed by the criminal law, the HCC also considered whether there is any lesser restriction available (in some of its formulations the criminal sanction applied to speech must be absolutely necessary). The more distant or speculative the reason for restriction is, the more important it has to be in order to justify a limitation of freedom of speech.[52] Incitement to hatred against groups of people may result in intolerance that is contrary to maintenance of the democratic order. This warrants turning to criminal law as a last resort, particularly since the wording of the crime of incitement is precise enough to avoid abuse.

Notwithstanding the concern with the social consequences of its decision, the HCC came to the conclusion that, on balance, the

[50] Quoted after L. Solyom and G. Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press, Ann Arbor, 2000), pp. 236–7. The translation of the cited 30/1992 AB hat. decision has been reviewed by the authors.

[51] Art. 269 of the Criminal Code as adopted in 1989 sanctioned 'incitement [uszítás] to hatred against the Hungarian nation or any nationality, or against any national, religious, or ethnic group, or any group of the population in front of a large audience' ('incitement'). Further, s. (2) stated 'One who in front of a large public gathering uses an offensive or denigrating expression against the Hungarian nation, any other nationality, people, creed or race, or commits other similar acts, is to be punished for the offence by imprisonment for up to one year, corrective training or a fine' ('denigration').

[52] Even in its formative, apparently more liberal (actively rights enforcing) period the HCC did not always respect its anti-speculative attitude towards evils that might result from unrestricted use of rights. In 51/1991 (XI.19.) AB hat. soldiers were denied the right of collective petition, because the HCC found that there is a *possibility* of abuse here that *might* lead (facilitate) the crime of subordination. This is a politically motivated instance of authoritarian thinking.

criminalization was unconstitutional, since existing civil remedies sufficed.[53] But it would be unfair to accuse the HCC of not being aware of the special sensitivities of previously oppressed and persecuted minorities:

> In addition to those most extreme of the harmful consequences of incitement to hatred, demonstrated by current as well as historical experiences, those everyday dangers must also be borne in mind which accompany the unbridled expressions of ideas and thoughts capable of arousing hatred. These are the occurrences which prevent certain communities from living in harmony with other groups.[54]

As quoted above, the 1992 HCC decision on hate speech expressly refers to the consequences of racial supremacy and hatred. These considerations justify the narrowly construed ban on incitement to hatred. But to the HCC, not even the cumulative effects of denigration of racial, ethnic, and religious groups would justify criminal group libel. In this regard, the HCC considered only the impact of the defamatory hate speech on public order and found that impact to be a remote one.

Thus, Habermasian speech liberalism – speech as a condition of a communicative community of free and equal participants – survived in HCC jurisprudence, at least in the hate speech area. Whether it contributed to freedom of communication and enabled the formation of a space for democratic discourse, or enabled the uninhibited growth of hate speech and social intimidation, is a different matter; and even if it did the latter, there might be compelling pragmatic considerations and values in support of the HCC's choice. Our concern is different. In a country where racism became a rather serious concern, did the uninhibited discourse space assumption of liberalism survive 'realities', and if so, in what form and at what cost in terms of compromises? It is noteworthy that the decision was animated by fundamentally liberal assumptions regarding speech, in that the HCC accepted that an uninhibited marketplace for ideas is to be respected. For a theory of transfer of constitutional liberalism the question is: is a liberal position

[53] In practice, however, several attempts were made to use civil law courts, but these were rejected in most cases for lack of standing as the defamatory statement was not found to be addressed to the plaintiff.

[54] 30/1992. (V.26.) AB hat.

(in this case the 'discourse-liberalism') sustainable in a transition society or does it unwittingly promote illiberalism?

The HCC's liberal ruling made it unlikely that group libel could be made criminal and imposed serious limits on using criminal law against the spreading of Nazi and racist ideologies.[55] Animated by the HCC's ambiguous reference to 'clear and present danger', the ordinary courts concluded that calling 'Jews' a group 'conspiring against the Hungarian nation' and chanting by hundreds at football matches that 'the trains are ready for Auschwitz' remain beyond the reach of the criminal law. Given Hungary's troubled past – the enactment of Nuremberg-type race laws and the involvement of the Hungarian government authorities in the deportation of the Jews during the Second World War – and strong racist prejudice among a sizeable minority and the numerous incidents involved, the acquittals and non-prosecutions caused public outrage.

Even the criminal provisions regarding incitement (including racist incitement) are interpreted with a strong free speech bias. Indeed, the criminal courts have adopted the clear and present danger requirement that the 1992 HCC decision is mentioned as *not* being the decisive test. Nevertheless, the ordinary courts treat the 1992 HCC decision as if it found incitement criminal only if it results in a clear and present danger. Consistent with this, ordinary courts have routinely acquitted public propagators of racism.

Responding to the rise of hate speech, the socialist-liberal coalition that controlled Parliament between 1994 and 1998 and again from 2002 attempted twice (1997 and 2001) to criminalize hate speech by according a broader meaning to incitement. These efforts were declared to be unconstitutional. Likewise, in 2003 the term 'denigration' was replaced with 'instigation' (disparagement) in the hope of capturing more hate speech. In 2004, the criminalization of instigation was held to be unconstitutional because it did not result in a clear and present danger of disruption of public peace.[56] Criminal group libel defined as 'humiliation

[55] The HCC's jurisdiction is limited to determine the constitutionality of legal norms. The HCC cannot rule on the constitutionality of the decisions of the ordinary courts, though in principle the Supreme Court might find on appeal that a decision of a lower court applies the law improperly by disregarding the proper constitutional meaning of a statute. Ordinary courts do refer to certain interpretations of the Constitution provided by the HCC, but these references are mostly generic, or not particularly accurate, as the judicial interpretation of incitement indicates.

[56] 18/2004 (V.25.) AB hat.

violating human dignity directed against racial ethnic etc. groups' was also found unconstitutional for it again failed to pose a clear and present danger to fundamental rights.

Defamation of public figures

Liberal individualism stands for robust speech, especially on public affairs. This consideration had a considerable impact on European democracies, which historically had a paternalistic attitude that tended to protect individuals against all possible annoyance.

As mentioned, the HCC was committed to treating speech as a constituent element of democracy and social openness. Accordingly, in its second major free speech case, the HCC found that the criminalization of the communication of false statements that defamed public officials was unconstitutional.[57] The defence of truth was only available if the judge found the reference to the contested fact was required by public or actual private interest; the speaker was liable for criminal libel irrespective of his knowledge regarding the truth of the statement or his bona fide efforts to find out the truth. With strong emphasis on the negative impact of traditional authoritarianism that used criminal law to protect public trust in authorities, the HCC found the law unconstitutional, because it prescribed punishments which were more severe than in criminal libel cases involving private individuals, when the reverse should be true. It was also unconstitutional for allowing the punishment of value judgments in public matters, and for not drawing a distinction between negligence and recklessness. In the case of public figures, democracy requires that free speech be less restricted in relation to protection of their personality rights. This is necessary in order to enable the citizens to participate in social and political processes without fear. Once again the HCC reiterated that even in transition periods there is no need to rely on criminal law for the protection of social peace, as to do so would be paternalistic.

But the HCC set limits on the scope of protected criticism of public figures. In this respect, the decision relies heavily on the jurisprudence and positions of the European Court of Human Rights (ECtHR)[58] and refuses to go in the direction of *New York Times* v. *Sullivan*. Thus,

[57] 36/1994 (VI.24.) AB hat. [58] Case 9815/82 *Lingens* v. *Austria* [1986] ECHR 7.

opinions might be libellous in view of considerations of dignity and reputation. Exaggerated opinions are protected in public affairs, but degrading and insulting opinions are not, even if directed at public institutions. Deliberate falsity or violation of professional standards would deprive the speaker of privilege.[59]

The HCC's view regarding the special need for criticism of government officials to remain exempt from punishment was endorsed by the ordinary courts. Nevertheless, following the Hungarian Supreme Court's strongly held position in favour of personality rights, and the pre-1989 protections against libel embodied in the Civil and the Criminal Codes, the ordinary courts moved away from a robust protection of offensive criticism of authorities. In civil defamation cases the ordinary courts moved away from giving preference to freedom of expression. Especially in libel cases with conservative politicians as plaintiffs, it took restrictive positions on speech in the name of protecting personality rights – including in at least one important case reliance by the Supreme Court on a precedent from the communist period regarding personality rights.

The press is held responsible (mostly in retraction cases) for reporting public events in which public figures were allegedly defamed. Furthermore, opinions are increasingly characterized as factual statements, thus imposing a heavy burden of proof on those who criticize government officials. The decisions of the Hungarian courts stand in contrast to the ECtHR's liberal treatment of press liability.[60] Hungarian courts tend to interpret the rules on retraction in a restrictive way, compromising free press rights in favour of personality rights. Moreover, in 2003, for the first time in the history of the Third Hungarian Republic a political activist journalist was sentenced to jail (suspended on appeal). He repeatedly published deliberate lies regarding a liberal MP, claiming that the latter collaborated with the communist secret service when in fact he was given a life sentence for his heroic stance during the 1956 Hungarian Revolution.[61] Viewed according to US standards, the corresponding defamation case involved reckless disregard of the truth.

[59] 18/2000 (VI.6.) AB hat.

[60] Especially Case 38432/97 *Thoma* v. *Luxembourg* [2001] ECHR 240.

[61] Note that prison sentences for calumny are not unheard of in post-communist countries. Hundreds of prison sentences were handed down in the last ten years in Romania with actual jail terms in a few cases. (See also, Case 28114/95 *Dalban* v. *Romania* [1999] ECHR 74.)

In contrast, especially in criminal libel cases there is a tendency to qualify a statement as opinion and not a statement of fact. This diminishes the likelihood of severe punishment of speech.

Desecration of national symbols

In 2000 the criminalization of both the disparagement of national symbols and the use of totalitarian insignia were held to be constitutional.[62]

The protection of national symbols is particularly relevant in determining how liberal constitutional values might coexist with conflicting principles animated by nationalist sentiments. In apparent contrast to the 'totalitarian insignia' decision, there was no fundamental right or clear and present danger to the public order involved, which would have made protection by criminal law necessary and proportionate. The prohibition of disparagement of national symbols is very common in Europe and the HCC was unusually keen to refer to this by emphasizing that 'criminalization is not a Hungarian specialty'. The HCC referred to the *Otto-Preminger* case,[63] one of the least liberal ECtHR decisions. In *Otto-Preminger*, freedom of expression was restricted in the name of the *presumed religious sensitivities* of the population.

Given the HCC's commitment to its 1992 decision, the only reason the HCC could offer for its finding of constitutionality was that national symbols are extremely *important*, as they figure expressly in the constitution, and 'allow the individual to express her belonging to the Hungarian nation and state. These symbols are the symbols of a country that regained its independence only recently'. Interestingly, transition away from oppression leads in this case to a non-liberal argument. The alternative to liberalism, however, is not authoritarianism but primarily communitarianism: 'Pluralism is *only one* [emphasis added] of the essential criteria of democracy. Democracies are characterized by the existence of institutions and symbols that represent the unity of the country; these are not beyond criticism but are in certain

[62] 13/2000. (V.12.) AB hat.; 14/2000. (V.12.) AB hat.

[63] Case 13470/87 *Otto-Preminger-Institut* v. *Austria* [1994] ECHR 26 (upholding Austrian courts' finding that information announcing that a movie with blasphemous content will be shown is offensive to Catholics, who are the overwhelming majority in the country).

regards beyond the pluralism of opinions that is to be protected constitutionally.'[64]

The criminalization of the public display of the symbols of totalitarian regimes, such as the red star (communism) and swastika (Nazism), also took place in 1993 and it was part of an attempt by the then ruling conservative government to delegitimize the Socialist Party, which was then in opposition but with good chances of winning the upcoming elections.[65]

The HCC refused to tackle the ban in the days of the subsequent socialist government, which refused to repeal the law because it also dealt with Nazi insignia. Only in 2000, after a centre-right government came to power, did the HCC decide to rule on the constitutionality of the criminal provision. The HCC stated that constitutionally permissible restriction of speech begins where there is a danger to public peace, i.e., where the prohibited behaviour is not only the expression of a political opinion which might be correct or incorrect, but also endangers public peace by offending the dignity of political communities committed to democracy. According to the HCC, the restriction is consistent with what is deemed 'necessary in a democratic society'. The HCC had to take into consideration the *historical circumstances*, notably the transition to democracy. Historical circumstances may necessitate restrictions of fundamental rights, although the sheer fact that Hungary underwent a regime change does not justify jettisoning constitutionalism. This attitude was apparently further legitimized by the ECtHR in its *Rekvényi* decision, which was only a few months old at that time.[66] In *Rekvényi* the ECtHR found that certain restrictions on the political rights of members of the armed forces are justified in a transitional democracy:

> [44] Given Hungary's peaceful and gradual transformation towards pluralism without a general purge in the public administration, it was necessary to depoliticize, *inter alia*, the police ... so that the public should no longer regard the police as a supporter of the totalitarian regime but rather as a guardian of democratic institutions ...
>
> [46] ... In view of the particular history of some Contracting States, the national authorities of these States may, so as to ensure the

[64] 13/2000. (V.12.) AB hat.
[65] The Socialist Party was the successor of the Communist Party that ruled in the Soviet period.
[66] Case 25390/94 *Rekvényi* v. *Hungary* [1999] ECHR 31.

> consolidation and maintenance of democracy, consider it necessary to have constitutional safeguards to achieve this aim by restricting the freedom of police officers to engage in political activities and, in particular, political debate.[67]

The HCC abandoned its 1992 position even more clearly as it declared that opinions which are not compatible with the values of the Constitution are not protected under the freedom of opinion clause of the Constitution. This implies content-based discrimination, which the 1992 decision clearly condemned. The argument of the HCC points towards militant democracy. The decisive point for the HCC is that the display of the symbols creates fear. It intimidates those who suffered injustice under the different totalitarian regimes as the display of symbols makes one haunted by visions of the repetition of the monstrosities associated with totalitarian ideas. Notwithstanding this departure from the HCC's 1992 decision, this position may be correct. Liberal arguments and liberalism apply in the specific historical context, and arguably a limited liberalism is needed in order to sustain the liberal regime.

Assessing the fate of free speech liberalism in Hungary

To sum up the fate of free speech liberalism in Hungary, one might conclude that originally the HCC stood for a German (rights-promoting) approach combined with the (non-German) assumption that government shall not interfere in a robust public debate in a transitional democracy, though Parliament, close to governmental interests and more traditional values, was not ready to implement the liberal programme in all regards. The HCC's position was not always followed by the ordinary courts, except where the latter's needs for legal certainty called for it. The HCC eventually accepted certain non-liberal restrictions on speech, thus fragmenting its free speech jurisprudence.

The free speech decisions of the HCC gained respect among foreign liberal commentators,[68] and the commitment to liberal values in those

[67] *Ibid.*, paras. 44–6.

[68] K. Scheppele and H. Schwartz, in particular, were impressed with the decisions of the HCC. K. Scheppele, Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments in W. Scdurski, M. Krygier, and A. Czarnota (eds.), *Rethinking the Rule of Lawafter Communism: Constitutionalism, Dealing with the Past, and the Rule of Law* (CEU Press, Budapest, 2005); K. Scheppele and A. Örkény, Rules of Law: The Complexity of Legality

cases is undeniable. Does this mean that a handful of judges can impose liberalism on a political regime in transition? This would be quite remarkable, if true, especially because in many other regards, these same judges took illiberal positions, or at least were concerned with a variant of liberalism where 'objective' dignity pervades individual self-determination and autonomy to the detriment of political liberalism. Furthermore, even if one incorrectly assumes that the judges sitting on the HCC were liberals, this assumption could not be extended to the Hungarian political elite, electorate, and society. This is not to say that Hungarians are particularly anti-liberal, or more intolerant than other societies in Central Europe. Nonetheless, seventy to eighty years of authoritarianism does not make a society particularly committed to individual autonomy or to minimal government, although long periods of oppression make people long for freedom as a 'lack of constraints'. This latter concern explains the early popular success of liberal positions, including in the area of speech.

On closer reflection, the HCC decisions indicate that the implementation of liberalism in Hungary has not been a linear event, but a set of parallel, only partly interrelated developments, where liberal ideology does not preclude illiberal solutions. Further, the cultural endorsement of liberal values represented in foreign models lost its attractiveness in an increasingly nationalist-conservative and nationalist communitarian social and political culture. This narrative raises two important considerations related to different theories regarding legal transfers:

1. The imposition of liberalism has to be understood as a long-term project. The traditionalism of society and of the judiciary contributes to the erosion or restructuring of imported liberalism.
2. Liberalism is multi-layered. Elite considerations – related to the liberal expectations of the European institutional elite that has strong impact on Hungary given Hungary's dependence on 'Europe' (European Union, Council of Europe, etc.) – has meant that liberalism has transformed the interaction of all elite legal players (HCC and the legislative branch). But the impact of the HCC on the operation of the

in Hungary in M. Krygier and A. Czarnota (eds.), *The Rule of Law after Communism: Problems and Prospects in East-Central Europe* (Ashgate, Brookfield, VT, 1999); H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press, Chicago, 2002).

ordinary courts is limited. Moreover, in other respects, illiberal (partisan) political interests have prevailed.

Erosion of the liberal position

The issue is to what extent liberalism as permissiveness was sustainable, given the interests of the government of the day to limit criticism and the resurfacing of old models of law and order based on authority. There was a real tension regarding freedom of speech after 1990 as traces of conservative authoritarianism became characteristic of the first conservative government.[69]

The HCC stood up against these legislative trends using liberal arguments, though it supported the conservative government on broadcasting while using liberal rhetoric. Surprisingly, the liberalism of the early speech cases started to erode in matters of prior restraint or censorship. In 1996 the HCC upheld the criminalization of the distribution of unauthorized printed material.[70] In 1997, in a case concerning the powers of the public prosecutor to seize libellous, pornographic, and other unlawful materials as a preliminary measure without full ex post judicial control, the provision was found to violate the right to self-determination as libellous materials were seized without regard to the position of the victim.[71] But only two of the nine judges considered the prosecutorial seizure to be unconstitutional when the action is intended to protect public morality or group reputation where there is no specific danger.

With the renewal of the composition of the HCC in 2000, additional exceptions to free speech protection were carved out (national symbols, totalitarian insignia). By that time, an increasing number of ordinary court decisions ruled against speech critical of public figures. The latest HCC decision departing from robust speech was an ex ante constitutional review of a proposed amendment to the Civil Code that would have introduced into Hungarian law a version of the French right of

[69] The authoritarian touch was most clearly shown in the legislation to protect the respectability of the government. It was the Prime Minister who, being upset by constant opposition and press criticism, asked for the codification of anti-government libel rules which followed pre-war criminal law and ideas of respect to authority (see above). There was also some personal continuity with pre-war illiberal traditions.

[70] 2269/B/1991 AB hat. [71] 20/1997 (III.19.) AB hat.

reply.[72] The amendment was proposed by the conservative majority in Parliament that was concerned with an alleged liberal-leftist domination of the press that resulted in constant criticism of government figures. The right of reply is characterized by the HCC as not amounting to an excessive restriction on editorial freedom. But the draft law was found to be disproportionate, because the right of reply would be granted even in case of unpleasant opinions, it bore elements of vagueness, and it authorized fines.

These decisions apparently prove that the Court was moving away from a liberal understanding of free speech. However, a few weeks after the symbols decisions the HCC found the criminalization of scare-mongering unconstitutional.[73] Here again there was extensive reference to continental solutions, which were narrower than the vague Hungarian definition. The HCC seized the opportunity to bring its theory of discourse in line with contemporary developments in communications technology, out of a concern with public peace in an *open* information society. There is no talk about the danger of scare-mongering in a transition society with limited self-governing capacities. In the information age public opinion is formed in new ways. Although new technologies increase the potential danger of scare-mongering, the web and new forms of interaction between citizens and the state enable a better possibility for rectification and create better chances for fact finding.

In light of the decisions finding unconstitutional the criminalization of 'scare-mongering' and the instigation of hate speech (in 2004), it would be wrong to state that the HCC is shifting away from the liberal values which prevailed in the early years, especially because the early Court had no opportunity to set the limits to the freedom that it had established.[74]

[72] 57/2001 (XII.5.) AB hat. The decision analyzes US free speech at great length claiming that at the level of principles the European practice corresponds to the US one as defined in *New York Times* v. *Sullivan* notwithstanding practical divergences exemplified in the *Skokie* case. The decision refers to *Red Lion Broadcasting Co.* v. *FCC*, 395 US 367 (1969) upholding right of reply in broadcasting and finds *Miami Herald Publishing Co.* v. *Tornillo*, 418 US 241 (1974) to carve out an election related exception to *Red Lion*'s reply rule.

[73] 18/2000 (VI.6.) AB hat.

[74] Perhaps the HCC simply wanted to express its fundamental disagreement with the government of the day, and the logic of a complex set of decisions required that the HCC should take a liberal position in order to reach a predetermined result. A second possibility is path-dependency: the early decision endorsed liberalism and courts are reluctant to abandon openly founding precedents.

The 'drifting away' thesis has prevailed until recently among many commentators. It is consistent with the traditional wisdom about the fate of a political liberalism too weak to sustain itself after the victory of elites in moments when people coming out of strong oppression are unusually concerned about freedom. Drifting away also converges with the assumption that in the new democracies there is little long-term popular interest in liberty, given the history of oppression and lack of a civil liberties culture due to the absence of civil society.

The scare-mongering and hate speech decisions indicate that the picture is more complicated and that thinking about liberal values in countries with new liberal constitutions does not follow simple, linear or clear trends. It is true that the HCC decisions which stick to the original embrace of liberalism are about relatively minor points, and that the practices of the ordinary courts lend support to the 'drifting away' thesis. The difficulty with the drifting away theory is that it disregards contrary trends, for example, those resulting from adherence to a formalistic concept of the rule of law sustained, among others, by professional interests of the legal-judicial establishment and those resulting from 'Europeanization'.

Multi-layered liberalism

Legal support of liberalism in a less than liberal environment – in ten years the word 'liberal' became a standard pejorative term in the language of both socialists and conservatives – has to be further qualified. A theory of uneven and inconsistent, very context-bound application of liberal constitutional values is perhaps more appropriate than the 'drifting away' thesis. The HCC is quite communitarian in many other areas, although it uses a liberal rhetoric in freedom of religion and abortion/euthanasia matters, in the sense that the decisions emphasize the importance of autonomy and self-determination. However, the above decisions find these considerations to be of lesser importance than the dangers of abuse of the rights of the fetus.[75] Free exercise of religion as an individual matter ends up in supporting political choices that grant privileges to certain established churches.

[75] 37/1992 (VI.10.) AB hat.; 17/1993 (III.19.) AB hat.

Even if the protection of free speech has moved away from the US conception, inching closer to the German conception which balances speech against other constitutional values such as personality rights, there is no reason to question the sincerity of the HCC's belief that it did push towards a liberal concept of free speech. The HCC demonstrated a special interest to identify itself with certain basic tenets of liberalism taken in a very special transition situation. Liberalism was not simply window dressing, not only part of a grand scheme aiming at international recognition with a view to enhancing the HCC's prestige and power domestically, and it cannot be explained simply by the short-lived attractiveness of liberalism at the time of transition. The HCC wanted to maximize its power and liberalism offered a means to do so. But reliance on liberalism was limited by power politics. Once its power was established, the HCC no longer needed to confront society and politics with liberal values. A minimum of liberal values became built into key institutions in the meantime. Given the changing cultural environment, and the increased acceptance of non-liberal values, the HCC was not ready to push the liberal agenda further into civil liberties. So long as these values do not become blatantly anti-liberal or are thus socially understood and so long as they do not drive legislation, the HCC is not forced to opt for or against liberal constitutionalism.

An interesting division of labour and a resulting legal parallelism developed. The HCC remains the repository of liberal values, allowing the ordinary courts to rewrite free speech rules in more restrictive ways except in the case of racist speech. Ordinary courts reinterpreted civil law and criminal law rules to restrict free speech in favour of personality rights inuring to the benefit of government officials and institutions. The HCC, at least tacitly, endorsed this by providing an ideology according great importance to personality rights and exempting more and more areas of communication from stringent free speech requirements. This, again, is not simply the result of a lesser liberalism of the HCC or of society: it simply follows from the constitutionally limited role of the HCC in shaping the legal system, especially as far as ordinary adjudication is concerned.

To be sure, even the HCC had illiberal trends from the beginning, as demonstrated in many areas, including free speech in broadcasting. Government control over broadcasting raised the most politically sensitive situation among all the speech cases because maintenance of

government control over broadcasting was paramount for maintaining power – much more important than the theoretical possibility of punishing defamatory statements against political figures. In this regard the same early HCC that stood up for free speech decided broadcasting cases consistently in favour of the then ruling conservative government. The rulings are written in a liberal language endorsing all the guarantees necessary to create a pluralist broadcasting system completely free of government interference, and endorse pluralism and balanced presentation. Nevertheless, having voiced all the concerns present in the respective decisions of the German Federal Constitutional Court, the HCC concluded that the apparently unconstitutional system in place in Hungary at the time of the decision, that enabled government control, is to be kept in force.[76]

Scholarly analysis that relies on empirical material is often limited by the narrowly framed empirical basis of the study. Legal transplantation studies are often limited to analysis of the jurisprudence of the Constitutional Court or Supreme Court. 'Where the central role of constitutional courts in building the rule of law is over emphasized, there the ordinary courts have a strong tendency to disappear from the story entirely.'[77] This leads to misleading analyses. Even if the HCC judges were liberals – which is far from the case – they were completely non-representative of the ordinary judiciary, in terms of their values and in terms of their readiness to implement undeniably present liberal constitutional values in the context of ordinary legal matters. Analysis of constitutional court decisions to determine the nature of legal transformation is bound to perpetuate an elitist liberal victory myth. In centralized constitutional adjudication systems, the constitutional court is almost hermetically sealed and has limited or no means to exercise control over the rest of the judiciary. This is exactly the case in Hungary, where the HCC has no means to influence ordinary court decisions except through its persuasiveness. This division of labour explains the odd co-existence of

[76] BVerfGE 12, 205 (1961); BVerfGE 31, 314 (1971); BVerfGE 57, 295 (1981); BVerfGE 73, 118 (1986); BVerfGE 74, 297 (1987); BVerfGE 83, 238 (1991).

[77] Z. Kuehn, Making Constitutionalism Horizontal – Three Different Central European Strategies for Theory in A. Sajó and R. Uitz (eds.), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven Publishers, Utrecht, 2005). For a similar trend in other post-communist countries see W. Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts In Post-Communist Europe in a Comparative Perspective* (Kluwer Law International, The Hague, 2003).

the liberal constitutional surface with other non-liberal trends. The record of the ordinary Hungarian courts in matters affecting free speech clearly indicates the complexity and contradictions of liberal constitutional accommodation.

The ordinary courts in Hungary sporadically cite one or another position of the HCC but, as the use of the 'clear and present danger' test in racial incitement cases suggests, the reference is selective.[78] In hate speech, the ordinary courts gradually adopted a position where inciting racist statements is only found criminal where they pose a clear and present danger of violence. In both criminal and civil cases concerning the criticism of public figures, courts do refer to the HCC and ECtHR, although in a few politically very sensitive cases the fact that the victim of the defamation was a high-standing official was taken into consideration against the defendant. Further, in libel cases of public figures there is a strong emphasis on the primacy of personality rights, with the consequence that the ordinary courts are increasingly inclined to find defamatory opinions too offensive or wanton.

The picture regarding liberalism in the free speech area might seem contradictory, but it would be more adequate to call it 'dynamic' and inconclusive. Furthermore, the liberal elements represented in a line of HCC cases should be considered as one layer in a multidimensional setting of political freedoms.

It should be added that courts do not operate in a social vacuum and free speech is not seen as a high value in society. One should not exaggerate the direct impact of HCC decisions on law, society, and politics. In the pre-eminently non-liberal HCC decision on the protection of national symbols, the position of the HCC is very close to prevalent communitarian public attitudes, themselves very close to those of the US public in matters of flag-burning. The main difference might be that the HCC is less willing to resist public and personal sentiments for the sake of free speech than was the US Supreme Court.

Conclusion

The fate of free speech rights in Hungary since the transition from socialism to democracy over fifteen years ago proves one thing above all.

[78] See under Hate speech and the clear and present danger test above.

Even where there is clear proof of 'importation' of liberal constitutional norms, the impact of such importation on the constitutional jurisprudence and legal culture of the importing country is anything but simple or straightforward. But the Hungarian experience with respect to free speech rights does yield two important findings. First, it is clear that importation of liberal free speech materials can be linked to a certain degree of implantation of liberalism, both in absolute and relative terms (i.e., combating illiberalism rooted in the country's authoritarian past). Second, it is plain that historical, cultural, political, and institutional factors play an important part in determining the viability, scope, and possible depth of any possible adaptation of imported constitutional norms.

Turning to the first of these two findings, though the HCC seems to have become less liberal in its free speech jurisprudence after a remarkably liberal initial period, the fact remains that Hungary has made net liberal gains in the past decade and a half. In other words, in spite of the ebb and flow of its constitutional jurisprudence and of the possible net retreat since the early days of the HCC, Hungary's present-day free speech jurisprudence remains committed to liberal speech principles. Furthermore, when viewed in the context of the struggle against illiberalism, many of the HCC decisions that may seem to retreat from liberalism in absolute terms could well be interpreted as necessary to thwart the thrust or return of illiberal authoritarian trends. And to that extent, present-day Hungary may be closer to the Germany of the 1960s than to that of the 1990s.

Concerning the second finding, whereas it is unquestionable that institutional, cultural and historical factors significantly affect the fate of liberal constitutional imports, it is not always clear how these factors ultimately play out. For example, if the ordinary courts were institutionally bound rigorously to follow HCC precedents, then the former courts could not be significantly less liberal than the latter court.[79] But then, would the HCC become less liberal because of pressures that now need not be brought to bear in view of the present-day ordinary courts' dilution of liberal norms? More generally, given the dynamic nature of liberal and illiberal trends in today's Hungary, it is difficult to

[79] In case they are, an openly dual system emerges, as it seems to be the case in the Czech Republic. See Kuehn, 'Making Constitutionalism Horizontal'.

predict the longer-term effects of liberal importations. Will Hungary, like Germany, become more liberal as its authoritarian past recedes further in the past? Or could selective representations of Hungarian history and culture, which had both liberal and illiberal components, stand in the way of such a trajectory?

Finally, these uncertainties are compounded by external factors that become increasingly important in the realm of transnational and international relations in which Hungary is embedded, including those relating to the European Union and the Council of Europe. Perhaps, Hungary will have to become more liberal better to fit in a liberal Europe.

In sum, there is little doubt that importation of liberal constitutional norms can contribute to increased liberalism and reduced illiberalism, although the success is context bound. How or how much, however, remains an open question.

7

Underlying principles and the migration of reasoning templates: a trans-systemic reading of the *Quebec Secession Reference*

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Introduction

One of the most common assumptions in the field of comparative law is that modes of reasoning are so intrinsically intertwined with particular legal traditions, be it the common law or the civil law, that they simply cannot migrate from one tradition to another. Because they are entangled with basic jural conceptions with which they form the thickest layer of each tradition, 'reasoning templates', as I will call them, are presumed to be sedentary.[1] The legitimate caution with which legal transplants involving either substantive or procedural norms are approached tends to reinforce that attitude. As a result, little attention is paid to what goes on in the 'other' tradition. For example, the growing common law literature on the judicial use of underlying constitutional principles generally ignores the civilian experience with the use of such principles. Its study would notably show that, in the civil law tradition, principles may sometimes allow for the sterilization of explicit legal prescriptions, which could shatter the common law myth of the passive civilian judge.

I mention this particular example because underlying constitutional principles provide an interesting starting point for studying the various ways in which constitutional ideas migrate. Due to their open-textured nature, which, by definition, requires their contextual individuation, principles may indeed serve as guises through which substantive or

[1] Legrand aptly describes the relation between these traditions' archetypal law modes of reasoning as one involving a measure of incommensurability. This, however, does not necessarily prevent all epistemic interactions between the traditions. See P. Legrand, *Le droit comparé* (Presses universitaires de France, Paris, 1999), pp. 81–99.

procedural ideas migrate. However, my goal in this chapter is not to examine potential situations where a given principle migrates from one jurisdiction to another. Rather, I want to explore the hypothesis that legal traditions may subtly converge in the way they approach cases, and achieve this through a certain form of reasoning that is induced by an increased judicial reliance on principles.[2] As such, principles become both vectors of conveyance (of ideas) and of convergence (of traditions). This chapter will suggest that a migration of 'reasoning templates' is at least *possible* across legal traditions, through conscious or unconscious processes. I will verify this hypothesis through a study of the *Quebec Secession Reference*,[3] a Canadian case that is often referred to as a leading example of the revival of 'common law constitutionalism', but that can also be read as an example of such a migration. A trans-systemic reading of that case will suggest that what may actually have migrated is a *method* of approaching the relationship between constitutional text and unwritten principles, out of the civil law context in which it developed, into the common law world of Canadian public law. After having contextually examined the *Secession Reference* and the reactions it triggered, I will look into the civilian conception of the nature, scope, and function of underlying principles. I will then expound a trans-systemic vision of constitutions as iterations of an overarching *jus commune* which allows for a reconciliation of constitutional texts and underlying principles.

Underlying constitutional principles and the *Secession Reference*

Following the 1995 referendum on sovereignty, where only a narrow majority of voters opted for maintaining the federal link between Quebec and Canada, the Canadian government launched a series of initiatives aimed at both strengthening the unity of the federation and clarifying the legal framework applicable to an eventual provincial secession. This last problem was referred to the Supreme Court of Canada, which was asked, *inter alia*, to answer whether, under the Canadian Constitution, Quebec could unilaterally secede from Canada. By referring this issue to the

[2] On this reliance, see, *inter alia*, A. Barak, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy (2002) 116 *Harvard Law Review* 16.

[3] *Reference re Secession of Quebec* [1998] 2 SCR 217, SCC (hereinafter the '*Secession Reference*').

Court, one of the objectives of the federal government was to counter a longstanding sovereigntist contention that Canadian law would no longer be applicable to Quebec should Quebecers express the will to secede from Canada and, on that basis, should the government of Quebec unilaterally declare the province's independence. A supporting argument for this claim was that since the Canadian Constitution is silent on whether or not a province can secede from the federation, it does not prevent a seceding province from doing so.

Some remarks are warranted on the broader context in which this last argument was made and on the sources of Canadian constitutional law. It bears noting that although the Canadian Constitution is mostly in written form, it also contains unwritten norms.[4] Thus, in keeping with the British tradition that heavily influenced it, Canadian constitutional law is not *per se* averse to common law constitutionalism.[5] Moreover, in addition to explicit norms as well as to implicit, but legally binding ones, the existence of constitutional conventions arising out of practice can be judicially acknowledged, but courts cannot enforce them because of their alleged inherently political nature.[6] For its part, the argument that the Canadian Constitution is silent about a potential provincial secession was grounded on the absence of any explicit constitutional provision *directly* addressing this situation. Silence, however, is an ambiguous concept, and deciding that a silence exists inevitably requires a prior interpretation. To the extent they are available, explicit textual elements are relevant to this interpretive process. In the *Secession Reference*, the most immediately relevant provisions were the ones governing constitutional amendments. Two main options were open. There was, first, the general amending formula, which may be resorted to when no other particular formula is applicable, and which requires the approval of both chambers of the federal Parliament and of the legislative assemblies of two-thirds of the

[4] See s. 52(2) of the Constitution Act 1982 (RSC 1985, Appendix II, Number 44), enacted as Sch. B to the Canada Act 1982 (United Kingdom), Ch. 11. The Canadian constitution is not included in one single document, nor is the definition given to the expression 'Constitution of Canada' in s. 52(2) exhaustive: *New Brunswick Broadcasting Co.* v. *Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319, SCC (where the implicit norm of parliamentary privilege is recognized constitutional status).

[5] The first paragraph of the preamble of the Constitution Act 1867 (RSC 1985, Appendix II, Number 5) essentially provides that Canada's federal constitution is to be 'similar in Principle to that of the United Kingdom'.

[6] *Reference re Resolution to amend the Constitution* [1981] 1 SCR 753, SCC.

provinces representing 50 per cent of the population.[7] The second alternative would have imposed a much higher threshold, by demanding that a provincial secession be approved by both houses of the Parliament and by all provincial legislatures.[8] Some scholars supported the first option on textual grounds – the absence of a provision explicitly dealing with an amendment induced by a secession attempt – and out of a preoccupation with democracy – if a majority of the residents of a province democratically expressed their will to secede, it would be dubious to resort to the most stringent amending formula to counter their will. On the contrary, others opined that the second option should prevail, essentially because the cumulative effects of a province's secession on the Canadian constitutional order would touch a certain number of things that can only be amended through unanimity. In the end, although the Supreme Court decided that the secession of a province requires, as a matter of principle, a formal constitutional amendment, it declined to say which specific formula would be applicable, preferring to say that '[t]he amendments necessary to achieve a secession could be radical and extensive'.[9]

Two main views about the receptivity of the Canadian legal order to an attempted secession and the role of constitutional texts in regulating secession were expressed. The federal thesis was that the secession of a province raises a strictly legal problem, the solution of which is entirely governed by the explicit text of the constitution. On the other hand, sovereigntists argued that secession is an intrinsically political act that can only trigger an extra-juridical solution, which led them to conclude that such an exceptional event stands outside the bounds of the constitution. Although the Supreme Court dismissed the sovereigntist contention, it also rejected the purely textual interpretation advocated by the federal government, opting instead for a redefinition of the scope of its mission, describing it as the identification of the legal framework in which a democratic decision about secession can be made.

In doing so, the court linked democratic theory with constitutionalism, and legitimacy with legality. This was mainly achieved by a reliance on the principles underlying the Canadian Constitution. These principles were said to 'inform and sustain the constitutional text: they are the vital

[7] Section 38 of the Constitution Act 1982. [8] Section 41 of the Constitution Act 1982.
[9] *Secession Reference*, para. 84.

unstated assumptions upon which the text is based'.[10] Inherent to the structure of the Constitution, '[t]he principles *dictate* major elements of the architecture of the Constitution itself and are as such its lifeblood'.[11] The Court also noted that, because of their participation in a constitutional *structure*, they 'function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other'.[12] It further observed that '[t]he individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole'.[13] Moreover, as basic postulates of the Canadian constitutional order, they are normative and may in some circumstances give rise to general or specific substantive legal obligations, the effect of which will be to limit government action. As a result, both courts and governments are bound by them.[14]

In essence, these principles serve an adaptive purpose in allowing constitutional interpretation to avoid sclerosis.[15] As the Court pointed out, they have to be observed and respected because of their role in the 'ongoing process of constitutional development and evolution of our Constitution as a ''living tree''' capable of growth and expansion within its natural limits.[16] This metaphor expresses a longstanding rejection of originalist methods of interpretation in Canadian constitutional law. While the text of the Constitution sets up a framework that guarantees some measure of legal certainty – hence the Court's insistence on the primacy of the constitutional text over underlying principles[17] – it can be envisaged neither as predetermining nor as encapsulating specific and conclusive solutions to all constitutional problems that may possibly arise over the years.

The underlying principles that were deemed relevant in the *Secession Reference* were federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. As has been noted, '[a]lthough nowhere spelled out as the first principles [of the Constitution], all these principles are supported by some aspects of the constitutional text'.[18]

[10] *Ibid.*, para. 49. [11] *Ibid.*, para. 51. Emphasis added. [12] *Ibid.*, para. 49.
[13] *Ibid.*, para. 50. [14] *Ibid.*, para. 54. [15] *Ibid.*, para. 52.
[16] *Ibid.*, para. 52 (quoting *Edwards* v. *A.-G. of Canada* [1930] AC 114 at 136, PC).
[17] *Ibid.*, para. 53.
[18] K. Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, Toronto, 2001), p. 139.

However, the strategy employed by the Supreme Court to justify their status in the Canadian legal order is slightly more complex than this account could lead us to believe and is therefore worth a brief stop. While the principle of federalism was justified by relying on a blend of textual, structural, historical, and sociological arguments, the principle of democracy was found to be essentially grounded on structural and historical considerations. For their part, the principles of constitutionalism and the rule of law were buttressed by structural, textual, and philosophical arguments. Last, the principle of the protection of minorities was defended on textual and historical grounds. Interestingly, the historical compromises explaining the presence of explicit provisions protecting minority rights were understood by the court, through what will later be called an 'amplifying deduction', as highlighting a broader concern for the protection of such rights.[19] As must be noted, the multiplicity of sources relied upon by the court in view of supporting its findings about the status of the Constitution's underlying principles clearly departs from a strict precedent-based analysis.

That being said, the Supreme Court found that these underlying principles could serve as a springboard to impose more specific obligations. Faced with the possibility of a provincial secession, the court drew from two of them, federalism and democracy, a reciprocal duty to negotiate constitutional changes to respond to a clear provincial repudiation of the existing constitutional order.[20] The Court stated that the democratic principle confers a right on each participant in the federation to *initiate* constitutional change. Comforted in its assumption by the fact that the Constitution Act 1982 '*gives expression* to this principle', the Court went on to say that 'the existence of this right imposes a corresponding duty on [these] participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces'.[21] This raises the question of the content and judicial enforceability of such a duty. The Court answered it by referring again to underlying principles, stating that the precondition for that 'duty to negotiate' to arise is the presence of a 'democratic [expression] of a desire for change'. It argued in this respect that the legitimacy of such a desire would be dependent on obtaining a clear majority on a clear referendum

[19] *Secession Reference*, para. 80. [20] *Ibid.*, para. 88. [21] *Ibid.*, para. 69. Emphasis added.

question. Thus, a clear repudiation by Quebec of the existing constitutional order would 'place an obligation on the other provinces and the federal government to *acknowledge and respect* that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed'.[22] This, however, was interpreted as imposing upon the federal and the other provincial governments no legal obligation 'to accede to the secession of a province, subject only to negotiation of the logistical details of secession'.[23]

Most importantly, the Supreme Court refrained from characterizing this duty to negotiate as judicially enforceable. Although the Court referred to it as being legal in nature, it also noted that some constitutional rules, such as conventions, carry only political sanctions. This would also be the case with the constitutional duty to negotiate: leaving its enforcement to political actors and, ultimately, to the electorate,[24] the Court expressly stated that it would have 'no supervisory role over the political aspects of constitutional negotiations'.[25] This idea that the enforcement of constitutional obligations deemed to be of a legal nature is not the exclusive domain of courts of law is interesting. Although it is trite to say that all branches of the state have the duty to enforce the constitution, as interpreted by the judiciary, it is equally clear that in a common law jurisdiction where the principle of constitutionalism prevails (as opposed, say, to one where parliamentary supremacy does), what constitutional law is, what it means, and what its reach is soon become the quasi-exclusive province of the judiciary. The legislative and executive branches of the state are under the obligation to act in conformity with the constitution, but the compatibility of their actions with the constitutional framework is ultimately determined by courts of law on the basis of criteria that these courts have themselves elaborated. The supreme judicial interpretation of the constitution is thus conflated with *the* interpretation of the constitution, which practically leaves very little room to the other branches of the state tangibly to exercise any putative role of co-interpretation. By expressly confirming that non-judicial actors can be vested with the exclusive power to determine whether a particular constitutional obligation characterized not only as broadly normative, but as legally binding has been discharged, with no

[22] *Ibid.* Emphasis added. [23] *Ibid.*, para. 90. [24] *Ibid.*, para. 101. [25] *Ibid.*, para. 100.

judicial supervision possible, the Supreme Court of Canada has adopted a much more polycentric and much less court-centered conception of constitutional law than is usual in common law jurisdictions.

That being said, the Court's reliance on underlying principles in the *Secession Reference* was not completely unheard of. The year before, it found that the reduction of provincial judges' salaries as part of a deficit-reduction programme unconstitutionally infringed the principle of judicial independence.[26] The existence of that principle had been recognized in previous cases, but two elements of the court's opinion in the *Provincial Judges* case proved especially contentious. First, the court narrowly grounded the principle of judicial independence on the preamble of the Constitution Act 1867, which provides that Canada has 'a constitution similar in Principle to that of the United Kingdom', instead of grounding it on a broad and purposive reading of the whole set of constitutional texts. Reducing the constitutional foundation of this principle to such a narrow compass left supporters of a well-tempered but principled usage of such principles dissatisfied. Indeed, not only was the link established between the preamble of the Constitution Act 1867 and the principle of judicial independence perceived as proceeding from a dubious historical reconstruction, but the sole reliance on this preamble to ground that principle was criticized as unduly reductive of the genesis and nature of structural principles.[27] While such a reduction could have appeased those sceptical of common law constitutionalism, it did not, essentially because of the second, and by far the most controversial, feature of the *Provincial Judges* case – the court's finding that the process of determining judicial remuneration must involve independent commissions, which would make salary recommendations that provincial legislatures could refuse only if they could demonstrate the rationality of their refusal. Thus, on the sole basis of an underlying principle, the Supreme Court imposed upon provincial governments a constitutional duty to create administrative structures working at arm's length with them. Several observers were astonished both by the reach of that

[26] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3, SCC.

[27] For such a critique, see : J. Leclair and Y.-M. Morissette, L'Indépendance Judiciaire et la Cour Suprême: Reconstruction Historique Douteuse et Théorie Constitutionnelle de Complaisance (1998) 36 *Osgoode Hall Law Journal* 485.

decision and by the consequences that could apparently flow from unwritten constitutional principles.

The Supreme Court's opinion in the *Secession Reference* did not defuse their scepticism. However, the two cases are noticeably different, the *Secession Reference* paradoxically being much bolder and more cautious than the *Provincial Judges* case. It is bolder in that while it alludes to textual provisions to support the existence of underlying principles, these principles are justified and described in a way that depicts them as being much more free-standing than purely text-based. While the principle of judicial independence could hardly enjoy the constitutional status it was given absent the preamble of the Constitution Act 1867, the principles identified in the *Secession Reference* are structural in the truest sense of the word, as they are characterized as broader, latent, norms, which may be given a certain number of manifest, textual expressions, but which are independent of these expressions. However, this free-standing stature is only relative, as the said principles must inevitably be individuated against the horizon formed by constitutional texts and the historical and political contexts in which they emerged.[28] On the other hand, the court's opinion in the *Secession Reference* is more cautious than its judgment in the *Provincial Judges* case, in that the normative and remedial consequences flowing from the underlying principles identified are much less intrusive upon the government's domain. The constitutional duty to negotiate in good faith merely imposes upon governmental actors an obligation of means as opposed to an obligation of results, to use civilian terminology. Although these actors are probably expected to make their best efforts to understand the other parties' position, to avoid adopting purely opportunistic behaviours, and to be ready to make reciprocal concessions, they are under no duty to reach any agreement if, even after dutifully abiding by these behavioural obligations, they conclude that they just cannot reach one. Moreover, their administrative structure and functioning is in no way upset as a result of the imposition of that duty. The intensity of such a constitutional obligation simply cannot be compared with that imposed in the *Provincial Judges* case, where governmental actors were ordered to create an entirely new *structure* supposedly mandated by the Constitution.

[28] *Ibid.*, at 502.

Although the *Provincial Judges* case had sparked an embryonic debate on the use of underlying principles in Canadian constitutional law, it is really the *Secession Reference* that ignited a full-fledged scholarly reflection on this topic. While a good number of scholars welcomed the Supreme Court's opinion in the *Secession Reference* as a sound and shrewd one overall,[29] others expressed puzzlement, and in some cases outright opposition, at the Court's grasp of the interplay between underlying principles and the explicit text of the Constitution.

Unsurprisingly, the ambiguity and indeterminacy associated with the use of underlying principles drew a lot of attention. Some scholars noted that principles that can reasonably be said to arise by necessary implication from explicit constitutional provisions should not be a cause for concern, as opposed to those derived from the preamble of the Constitution Act 1867.[30] Indeed, the definition and normative force of the latter are less clear, thereby raising potential problems from the standpoint of the legitimacy of judicial review.[31] The normative force of underlying principles was indeed characterized as 'equivocal', a qualification informed by the uncertainties concerning the principles' definition (are they broad standards generating specific rules or enshrined pre-Confederation common law?[32]), enforceability (can a court of law enforce them?), circumstances of application (when and how do they apply?[33]), and abstract nature.[34]

While underlying principles' ambiguity and indeterminacy incited several commentators to warn that they should be used cautiously, many of them acknowledged that their use could be appropriate in the right circumstances. Others were much more negative, however. For example, drawing on a sharp distinction between law and politics, one opined that resort to these principles is dangerous because of their inherent arbitrariness, the potential for unlimited judicial powers their use

[29] For my own evaluation, see J.-F. Gaudreault-DesBiens, The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives about Law, Democracy, and Identity (1999) 23 *Vermont Law Review* 793.

[30] R. Elliot, References, Structural Argumentation and the Organizing Principles of Canada's Constitution (2001) 80 *Canadian Bar Review* 67 at 95.

[31] *Ibid.* See also W. Newman, Grand Entrance Hall: Back Door of Foundational Stone? The Role of Constitutional Principles in Construing and Applying the Constitution of Canada (2001) 14 *Supreme Court Law Review* (2nd) 197 at 239.

[32] J. Leclair, Canada's Unfathomable Unwritten Constitutional Principles (2001–02) 27 *Queen's Law Journal* 389 at 405.

[33] *Ibid.*, at 397–409. [34] *Ibid.*, at 410.

opens up, and, somewhat paradoxically, the risk of creating an unprincipled jurisprudence.[35] The fear of an arbitrary use of principles is not entirely unrelated to another feature of the *Secession Reference* that proved quite controversial, i.e., the fit of its particular type of principle-based reasoning within the broader Canadian common law tradition. Indeed, several scholars, and not all of them *a priori* opposed to the type of reasoning adopted in the *Secession Reference*, noted that this case effected a departure from usual modes of common law reasoning. For instance, Leclair observed that there is a clear distinction between recognizing constitutional status to common law rules repeatedly applied by courts and extracting from such precedents abstract principles allowing for the creation of novel obligations.[36] While supporting the reliance on underlying principles in case of necessity, Walters acknowledged that the way the Supreme Court approached principles in the *Secession Reference* went beyond any traditional common law view of unwritten fundamental law.[37] In the same vein, Choudhry and Howse remarked that the Court did not use principles as aids to interpretation, as is normally the case at common law, but to augment the Constitution, which led them to distinguish between ordinary and extraordinary constitutional interpretation.[38] On a more negative note, Jamie Cameron noted for her part that '[u]nstated assumptions which might be considered vital cannot claim the pedigree of text or the supreme status it confers'.[39]

To summarize, if an embryonic consensus ever emerged after the *Secession Reference*, it probably revolved around the following three ideas: (1) that strict textualism is generally too rigid and inconclusive to provide alone a foundation solid enough to decide such a hard case;[40] (2) that, while sometimes legitimate, and maybe even necessary in exceptional circumstances, reliance on underlying principles as sources of constitutional law should be done with moderation; and (3) that privileging more clearly

[35] See generally J. Cameron, The Written Word and the Constitution's Vital Unstated Assumptions in P. Thibault, B. Pelletier, and L. Perret (eds.), *Essays in Honour of Gérald-A. Beaudoin: The Challenges of Constitutionalism* (Éditions Yvon Blais, Cowansville, Qc, 2002), p. 89.

[36] Leclair, Unfathomable Constitutional Principles, 405.

[37] M. Walters, The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law (2001) 51 *University of Toronto Law Journal* 91 at 105ff.

[38] S. Choudhry and R. Howse, Constitutional Theory and The Quebec Secession Reference (2000) 13 *Canadian Journal of Law and Jurisprudence* 143 at 155–7.

[39] Cameron, Unstated Assumptions, p. 91.

[40] E.g. see *ibid.*, p. 92; Newman, Grand Entrance Hall, 204–5.

text-related, structural principles, as the Supreme Court did in the *Secession Reference*, reflects a more cautious understanding of unwritten fundamental principles than that adopted by the same court in the *Provincial Judges* case. But the court's opinion also drew some criticism. First, the principles relied upon by the court had no, or very little, pedigree in Canadian constitutional law.[41] Second, the Supreme Court ignored the explicit text of the potentially applicable amending provisions without clearly and convincingly justifying why it did so. Third, the court's affirmation of the legal nature of underlying constitutional principles and its announcement that the constitutional obligation derived from them would not be judicially sanctioned, at least in a secession context, was perceived as dubious, if not absurd, from a common law standpoint.

From a traditional common law standpoint, there may indeed be something bizarre about the *Secession Reference*. The rest of this chapter will seek to provide a tentative answer to the following question: where does this perceived bizarreness come from? I will argue that reading the *Secession Reference* trans-systemically might show that what may have migrated in this case is a *method* of approaching the relationship between constitutional texts and unwritten principles, out of the civil law context in which it developed, into the common law world of Canadian public law. Looking at the way principles are understood in the civil law tradition could therefore shed some light on the perceived awkwardness of their use in the *Secession Reference* from a common law perspective.

Principles in the civil law tradition

The dissociation between norms and rules has taken a special significance in the civil law tradition due to the experience of codification. That distinction, which only seeks to reflect a continuum from more general norms to more specific ones, is encompassed by that established between

[41] As Fabien Gélinas observed, the formal notion of validity privileged in the common law tradition has been elaborated through the *stare decisis* rule, which somehow hardened a more ancient, already existing, principle, to the effect that respecting precedents is preferable as a matter of principle. See F. Gélinas, Les Conventions, le Droit et la Constitution du Canada Dans le Renvoi sur la 'Secession' du Québec : le Fantôme du Rapatriement (1997) 57 *Revue du Barreau* 291. This *habitus*, in the Bourdieusian sense, may explain why even common lawyers who cannot be characterized as positivist hard-liners have expressed surprise at the Supreme Court's emancipation of the Constitution's underlying principles from past constitutional precedents.

'general principles of law' (or 'super-eminent principles') and expressly codified rules,[42] which, due to their level of generality, may nevertheless impose standards that are often quite close to those implied by general principles. General principles of law are recognized as a complementary source of law in the civil law tradition (despite uncertainties about their exact identity) and are commonly relied upon by courts in both private law and public law cases.[43] As will be seen, the rich scholarly reflection they have provoked focuses not so much on their standing in the theory of sources, but rather on their role in legal interpretation, and on their potential use by courts of law. For that very reason, examining them might be of interest to common lawyers, and may help break a few stereotypes about the actual role of judges in the civil law tradition. It is especially likely to happen given the fact that general principles of law have been called 'cacophonic' in respect of their origins, rank, and actual value in the normative hierarchy,[44] and of the justifications invoked in support of them.

A clarification must be made before going further. Not every principle relied upon by courts of law in civilian jurisdictions can technically be characterized as falling into the category of 'general principles of law'. Indeed, there are several other principles which have been identified on an *ad hoc* basis, as either deriving from the structure of a specific legal instrument, or from a normative description of a given legal framework. Some of these principles are too intrinsically linked to that particular structure or framework to be characterized as general principles of law – think, for example, of the principle of federal loyalty that has been 'read in' to the Constitution of Germany by that country's Constitutional Court in reference to the country's federal structure. To some extent, general principles could be characterized as being systemic in nature, while other types of principles not deserving that characterization will generally be sub-systemic. They may be sub-systemic, but they are no less important, especially when they are recognized a constitutional status. Even when principles do not technically qualify as 'general' ones from the perspective of some theory of the formal sources of law, the intellectual

[42] E. Le Roy, Norme in A.-J. Arnaud *et al.* (eds.), *Dictionnaire Encyclopédique de Théorie et de Sociologie du Droit* (LGDJ, Paris, 1993), p. 401, at p. 403.

[43] There may be variations between the different civil law jurisdictions, as between the different historical eras of the civil law tradition.

[44] M. Delmas-Marty, *Pour un Droit Commun* (Seuil, Paris, 1994), p. 84.

processes by which they are identified and justified are essentially the same as those presiding over the discovery of general principles of law. More specifically, all principles, be they general or not, point to problems relating to interpretation, and to the judiciary as a norm-creating institution. So the comments that I will make hereunder concerning general principles of law apply *mutatis mutandis* to other types of principles that cannot be so characterized from a technical angle. 'General principles of law' will thus serve as a springboard for a broader reflection on principles.

General principles of law are often said to be premised on a belief in the logical unity of the legal system and on a presumption of legislative consistency and rationality. However, raising doubts about the contemporary accuracy of this archetypal description, Zagrebelsky argues that the role of principles has shifted:

> [P]rinciples, which at one time were the ultimate expression of the logical unity of the legal system, are now called upon to perform a *constitutive task*, namely the articulation of a common normative matrix allowing for the dialogical unity of the law of complex societies, supported by the institutional architecture of the constitutional state. Because of this, principles cannot originate in the rules, but must have their own autonomous origin and validity.[45]

Autonomous does not mean value-free, however. It is indeed recognized and accepted that general principles of law are not, and cannot be, value-free. They at the same time speak to the moral aspirations of the legal order, to the technical imperatives of that order, as well as to the political philosophy of the state.[46] That is to say that they find their source or their legal basis both within the positive legal order (domestic and international) and outside of it. They may therefore end up serving as vectors of integration of international norms into a domestic legal order, or of ideas initially belonging to another system of law into that domestic legal order. The norms of these other systems are often integrated, wholly or in part, in the process of determining the meaning of a legal norm in that domestic positive legal order.[47] In that, they help the migration of normative ideas, be they constitutional or not.

[45] G. Zagrebelsky, Ronald Dworkin's Principle-based Constitutionalism: An Italian Point of View (2003) 1 *International Journal of Constitutional Law* 621 at 636.

[46] Delmas-Marty, *Pour un droit commun*, p. 83. [47] *Ibid.*, p. 122.

This observation points to the relation that exists between general principles of law and legal interpretation. Although the acceptance or rejection of principles, especially unwritten ones, as legitimate sources of law[48] speaks to one's vision of legal interpretation and concept of law, it is important to acknowledge that it is not so because principles intrinsically vest legal interpreters with any discretion – actually, their very individuation presupposes a *pre-existing* discretion – but because the meta-norms they embody, which bind that discretion, are by nature destined to transcend any positive legal structure from which they may be induced, or to force the recognition of the porosity of that structure or of the whole legal order if the principles so identified are inspired by initially non-positive values or ideals. As has been noted, '[p]rinciples are not norms closed in on themselves and are not even – as "critical" positivism would have it – norms that call into play the discretion of the interpreter because of their communicative imperfection. They refer to something beyond themselves and are, therefore, open by nature, not by defect'.[49] Thus, general principles of law are not only elaborated in the 'symbolic field of values'; they feed themselves in that field.[50] They are therefore linked to culture, and, in that, they form an implicit cultural code that produces and frames legal consciousness. Both as reflections of the law understood as a discursive practice constitutive of meaning which combines reason, aspirations, myths, and memory, and as outcomes of this practice, they participate in the institution, reproduction, and stabilization of the legal culture in which they arise. And since culture is first and foremost about the production of meaning, they end up forming a relatively stable, albeit heterogeneous, horizon of meaning to which legal actors might refer when needed. Such a need is more likely to arise when there is a crisis, political or legal, or when abuses, of individuals or institutions, take place. General principles then serve to regenerate the law. As such, the relative stability that they help maintain should not be understood as the mere perpetuation of the *status quo*.

[48] It is on purpose that I do not talk of 'formal' sources, an idea that is increasingly perceived by leading civilian theorists as an epistemological obstacle. See P. Jestaz, Source Délicieuse ... (Remarques en Cascades sur les Sources du Droit) (1993) 92 *Revue trimestrielle de droit civil* 73; P. Amselek, Brèves Réflexions sur la Notion de 'Sources du Droit' (1982) 27 *Archives de philosophie du droit* 251.

[49] Zagrebelsky, Italian Point of View, 637.

[50] Delmas-Marty, *Pour un Droit Commun*, p. 78.

It is often said that general principles are 'discovered'. If so, this must mean that they already exist somewhere, the question being where? This further means that the process leading to their discovery cannot so easily be reduced to mere arbitrariness. By what process are general principles of law found? Delmas-Marty sums up quite well the most common approach, when she speaks of a method of 'amplifying deduction' (*déduction amplifiante*), by which the judge:

> [A]nalyzes a text, or a set of texts, to extract, by amplification, a principle from which he or she then draws concrete applications, sometimes later enshrined in new rules of law. The judge literally discovers or reconstructs the general principles, which means that he does not invent them, impregnated as they are of a history the judge should not re-write in absolute freedom. It is the community of jurists who recognizes or rejects the legitimacy of the principle discovered by the judge.[51]

In that context, the other judges will obviously play a central role, but scholarly opinion or *doctrine* will also significantly contribute to the acceptance and sedimentation of the principle so discovered. This idea of sedimentation is important because it draws attention to the debates that inevitably precede the acceptance of a principle as such. In that sense, the audiences to which judges metaphorically speak indeed constitute a very important safeguard against arbitrariness.

That being said, while the recognition of general principles of law is often dependent upon the presence of some explicit features in the legal order, other types of principles may show a higher degree of autonomy. They are then drawn from societal culture at large. This partly explains why, in exceptional cases, the recognition of some of these principles may eventually result in a superficial contradiction of a seemingly explicit rule – I will return to this when I examine the relation between principles and explicit law, in light of what principles may allow to do to explicit law. Their origins are, thus, quite diverse. They might be distilled from past practices, cases, or scholarly opinion, in which case they can be said to have historical origins, or they can be inferred from positive legal structures, in which case they have a systemic-structural nature. They can also be borrowed from other legal systems, as is evinced by the dynamic

[51] *Ibid.*, p. 85. My translation.

of reciprocal appropriation that is currently taking place between the national constitutional courts of European states and Community judicial organs. Last, they can be appropriated by courts from normative systems that are non-legal from a positivist standpoint, which raises the 'conversion question', that is, the problem of the conditions under which social values can be converted into legal norms.[52] One thing must always be borne in mind, however: even when they emanate from normative systems other than the positive law, and even when they are said to be 'transcendent', that transcendence cannot, and should not, be understood, in a jusnaturalistic way. As one author puts it:

> [A principle] is a positive law norm, a judicial, cultural, invention; it does not proceed from some transcendent, absolutely perfect, body of norms that would prosper in an idyllic harmony. The principle confronts other juridical norms, upsets the order instituted between them, and, pursuing the subversion further, imposes rights and duties unheard of before. As the law itself, it is a phenomenon of authority which is in no way more ideal and absolute than the human will.[53]

That being said, the legal *status* of general principles of law remains 'troubling', as was aptly said.[54] Indeed, they are sometimes on par with ordinary legal norms (in which case they generally serve to fill gaps), and sometimes above them (when they are recognized a constitutional status). As such, they may serve a corrective or directive function.[55] For instance, in France, the *Conseil constitutionnel* has declared some unwritten principles as having a *valeur constitutionnelle*. Such has been the case, over the years, of the principle of the individualization of penal sentences, the principle of political pluralism as a means to concretely ensure the effectiveness of freedom of opinion and expression, the principle of academic freedom, the principle of the independence of administrative tribunals, etc.[56] The *Conseil d'État* has for its part recognized as general principles the basic rights of the accused, which include the circumstantial right to appeal a decision even when a statute

[52] See J. Merryman, Comparative Law Scholarship (1998) 21 *Hastings International and Comparative Law Review* 771 at 779–80.

[53] P. Morvan, *Le Principe de Droit Privé* (Éditions Panthéon-Assas, Paris, 1999), p. 63. My translation.

[54] Delmas-Marty, *Pour un Droit Commun*, p. 87. [55] *Ibid.*, p. 86.

[56] See, generally L. Favoreu *et al.*, *Droit Constitutionnel* (6th edn, Dalloz, Paris, 2003), p. 123.

precludes such possibility.[57] Other principles that clearly inspire adjudication are those of proportionality, of rationality, of predictability, of fair trial, of non-retroactivity, of non-discrimination, of normative intelligibility, and of precision.

Their *nature* is equally troubling, which is why one single definition cannot encompass all of them, and why they do not relate to any single 'rule of recognition' that would receive a blanket application. This further explains why they are often described in metaphoric terms. They are thus said to be 'supporting beams', 'figureheads of a juridical system',[58] or, as was done in the *Secession Reference*, 'major elements of the architecture of the Constitution itself and are as such its lifeblood'.[59] Absent an all-encompassing definition of general principles of law, the feature that makes them significantly different from other types of norms is that 'they come to bear on a legal decision only as a result of a judge's asserting that the principle exists and that it has a particular weight in the circumstances of the case. Principles and their weights in particular contexts are not "declared"'.[60] In other words, general principles of law do not have to pass a pre-determined test of identity before being judicially acknowledged as existing. One might argue that previous judicial recognition, historical distillation, structural corroboration, or even longstanding scholarly acceptance could serve this function, but then we would end up with several possible rules of recognition available to judges, which would somehow contradict the very role Hart attributes to *the* rule of recognition in a given legal order.[61] Moreover, since it is clearly accepted that general principles of law may be derived from extra-legal norms, it follows that it is almost ontologically impossible to identify a criterion that, alone, would consistently be referred to for the purpose of determining the 'legal' nature of an alleged general principle of law. As such, the use of underlying principles, as this concept is understood in a civilian perspective, inevitably challenges the belief that law is limited, or can be limited. Principles are, by nature, open to extra-legal normativity and therefore to internormativity. Their mere

[57] Delmas-Marty, *Pour un Droit Commun*, p. 86.
[58] C. Stamatis, *Argumenter en Droit. Une Théorie Critique de L'argumentation Juridique* (Publisud, Paris, 1995), p. 228. My translation.
[59] *Secession Reference*, para. 51.
[60] G. Fletcher, Two Modes of Legal Thought (1981) 90 *Yale Law Journal* 970 at 978.
[61] See, generally H. Hart, *The Concept of Law* (2nd edn, Oxford University Press, Oxford, 1994).

recognition by courts of law, absent any specific, predetermined and consistently applied rule of recognition, is enough for the aspiration, the ideal, or the social norm they are deemed to embody to take on a legal dimension, this, as a result of the intrinsic and immediate performativity of that judicial recognition. And when Delmas-Marty argues that it is the community of jurists who, ultimately, validate the specific uses to which they are put, she merely draws our attention to the fundamentally hermeneutic nature of principles which ensures that, in a democratic state, pure arbitrariness will not be tolerated.

The relative autonomy general principles of law enjoy vis-à-vis legal enactments in the civil law tradition, their super-eminent nature, somehow explains the impact they can have on the texts with which they interact. Morvan observes in this respect that principles operate at two levels.[62]

First, they may serve, in an instrumental capacity, as vectors of conveyance of norms between a given legal order and another one, or between different sub-systems of the same legal order.[63] This is an important function, but not the most significant one. Indeed, and this may come as a surprise to many common lawyers, the most fundamental and drastic way in which principles operate is by sterilizing imperative legal prescriptions. Principles can either allow a judge formally to disregard such prescriptions or to expand their scope to such an extent that neither their literal sense nor the sometimes avowed legislative intention behind them will be recognizable anymore. Thus, an implicit general principle may, for all practical purposes, render a more specific, explicit norm entirely ineffective, and this, even if it was open to the court so using the principle to apply the construction rule to the effect that specific enactments prevail over more general ones, and, if I may add, over implicit norms. However, such a *contra legem* function is not one that, as a matter of principle, shocks the conscience of civilian lawyers.[64]

That being granted, the idea of a *contra legem* use of an unwritten principle raises the problem of the margin of autonomy that the judiciary enjoys in respect of the legal texts it is bound to consider. Fully answering this question is beyond the scope of this chapter. However, two brief

[62] Morvan, *Le Principe de Droit Privé*, p. 550ff. [63] *Ibid.*, pp. 649–90.

[64] For a Canadian example of the sterilization function of general principles, see *Doré* v. *Verdun* [1997] 2 SCR 862, SCC.

remarks are warranted. First, recognizing, as the civil law does, that judges have the latitude to 'discover' principles, even if this discovery process is a relatively constrained one, can only lead to the conclusion that these legal actors are vested with the power to create general norms, given the nature of principles, and, therefore, that they have the power to compete with the legislator or, if we are in the constitutional area, with the constituent power.[65] This, to say the least, shatters the myth of the passive civilian judge.

The second remark is of a more technical nature: the possibility of applying a principle *contra legem* relies on a prior decision taken by the judge, i.e., that the text under interpretation does not provide sufficient resources to solve the case at bar in a satisfying manner, and even if the text in question could clearly provide a technical solution to the case, this is nevertheless rejected as unsatisfying. But if a text that could actually offer a solution to the case is deemed insufficient, this means that the judge found that it somehow contained a gap. The question therefore becomes: what is a gap? Kelsen has probably given the most lucid definition of what constitutes a gap, a concept that he found in any event extremely problematic. According to him, a gap exists:

> [W]hen the organ responsible for applying the law considers regrettable, from the standpoint of juridical policy, the absence of a specific norm [that would speak directly to the case at bar], and thus rejects the idea of applying the law in force, even if such an application would logically be possible, on the ground that applying it would be unfair or unjust as a matter of juridical policy.[66]

In other words, a gap exists when, for considerations external to the text itself, applying that text would, in the interpreter's judgment, lead to unsatisfying results. As is the affirmation that a text is clear, the conclusion, explicit or implicit, that a text contains gaps constitutes an assertion of judicial authority.[67] This means that the gap is, literally, created by the judge. The next question is how? It is often said that general principles are essentially used to fill gaps. While not incorrect,

[65] H. Kelsen, *Théorie Pure du Droit*, C. Eisenmann translator (Bruylant & LGDJ, Brussels and Paris, 1999), p. 250.

[66] *Ibid*., p. 246. My translation.

[67] See M. van de Kerchove, Le Sens Clair d'un Texte: Argument de Raison ou d'Autorité? in G. Haarsher and L. Ingber (eds.), *Arguments d'Autorité et Arguments de Raison en Droit* (Éditions Némésis, Brussels, 1988), p. 291.

this account is nonetheless incomplete. Indeed, principles may play a significant role in justifying interpretations *contra legem*. As was noted by Perelman, an interpreter who wants to avoid applying a relatively clear enactment in a given case will restrict its scope by introducing a general principle which will create a *contra legem* gap.[68] Morvan aptly concludes that in such a case, '[t]he law is not silent, but is willingly silenced to leave space to the principle'.[69] Thus, first and foremost, principles do not fill gaps, they create them. All this is neither unusual nor unacceptable in a civil law context, especially given the fact that principles are often associated with the deeper aspirations or purposes of the legal system. Their origin, identity, or scope may trigger debates, but their potential *contra legem* function is hardly contested in the abstract, for it is the principle's vocation to supplant other legal norms.[70]

The constitution as an overarching *jus commune*

Wittgenstein remarked that 'the limits of my language are the limits of my world'.[71] A complex apprehension of the problems posed by underlying principles implies a reflection on the language of constitutional law. But what is the language of constitutional law? Could it be that constitutional law's textual expression poses the limits of constitutional law's language? It seems to me that this last question must be answered in the negative.

While it is trite to say, at a meta-theoretical level, that the language of constitutional law is composed of norms, are these norms to be conceived of only through a textual prism? I do not believe so, as this would be confusing norms, on the one hand, with some of their potential expressions, be they explicit principles, standards, or rules, on the other. Second, reducing what we understand by 'the language of constitutional law' to what is said in constitutional texts is symptomatic of the application to *the* law as a field of inquiry, and to the field of constitutional law in particular, of an analytical model that is unduly

[68] C. Perelman, *Logique Juridique: Nouvelle Rhétorique* (2nd edn, Dalloz, Paris, 1979), p. 48.
[69] Morvan, *Le Principe de Droit Privé*, p. 640. My translation.
[70] *Ibid.*, p. 644.
[71] L. Wittgenstein, *Tractatus Logico-Philosophicus* (Gallimard, Paris, 1961), no. 5.6, p. 86. My translation.

narrow. This analytical model is the one that is generally applied to mere *laws* (or *statutes*).

The problem is especially likely to arise in common law contexts, where a *summa divisio* is established between judge-made common law and statutory enactments of legislative origin. Since the latter is said to derogate from the former and because it is viewed as a command of the sovereign,[72] it is subject to more text-bound, or restrictive, rules of interpretation. This begs the question of the appropriateness of applying this model to constitutional texts. As Strauss observed, denouncing the tendency, or what he calls the 'usual reflex', of examining US constitutional texts as if they were statutory ones:

> Conventionally we think of legal reasoning as divided into common law reasoning by precedent on the one hand, and the interpretation of authoritative texts on the other. Constitutional and statutory interpretation, while of course different in many respects, are viewed as forms of the latter and fundamentally different from the former. In fact, constitutional interpretation, as practiced today in this country, belongs on the other side of the line.[73]

Although this tendency may not be as strong in other common law jurisdictions where, for example, literalist theories of interpretation are marginal at best, it is still always present to some extent. This may possibly be attributed to a more or less conscious resilience of the idea, anchored in the above-mentioned *summa divisio*, that all enacted legal texts share a similar and exceptional nature because they all derogate from the common law. In other words, it allows for the flourishing of a mindset under which the whole idea of an enacted legal text is conceived of in a monolithic rather than in a protean manner. This mindset entails serious consequences. First, it prevents the recognition of different hierarchical statuses amongst enacted legal texts, statuses which may be related to the *function* they play in the legal order. Second, it is likely to further prevent texts with a more essential function and thus a higher hierarchical status from being interpreted in actual cases with due consideration for the special function they play in the legal order.

[72] On the 'command theory' of interpretation, under which a text is binding because it has been enacted by an authoritative source, see D. Strauss, Common Law Constitutional Interpretation (1996) 63 *University of Chicago Law Review* 877 at 885–8.

[73] *Ibid.*, at 889.

Such a problem is less likely to arise in the civil law tradition where distinctions are made at the outset between different types of enacted legal texts. Be they made expressly or implicitly, these distinctions soon become part of the mindset of any civilian jurist. A civil code is not a statute in the common law sense of the word. It is not a text that derogates from the *jus commune* represented in the latter tradition by the aggregate of precedents forming the common law. A civil code *is* the *jus commune*, from which particular laws may derogate or not, but which in any event is deemed to express the foundational norms applicable in a given field of law, precisely because it is to be treated, on the basis of an express provision or not, as *jus commune*. A civil code in a civilian jurisdiction is thus not subject to the rules of interpretation that are normally applicable to particular legislation (i.e., to common law *statutes*). While its text is and remains important, the interpretation of a civil code should never be unduly text-bound, for several of the provisions of such a code only reflect specific applications of broader pre-existing norms, including general principles of law. Therefore, a civilian code cannot encompass all the norms deemed to be comprised in the civil law.[74] Methodologically speaking, it can aptly be characterized as a *grille de lecture*,[75] which means that it cannot be reduced to a mere set of diktats. An important consequence of considering a legal enactment only as a specific expression of broader unwritten principles is that the repeal of that enactment does not have the effect of creating a complete legal vacuum, or, so to say, a 'lawless' legal order. This is one of the basic presuppositions behind the enactment of a civil code: if the code was to disappear, no legal vacuum would be created since general principles of law and customs would continue to exist and could still be recognized and applied by courts of law.[76] While any civil code seeks to be as exhaustive or complete as possible, it attempts to do so on the basis of a prior understanding that it only constitutes one expression of the civil law, that it can be supplemented (and even contradicted) by (unwritten)

[74] F. Allard, L'impact de la *Charte Canadienne des Droits et Libertés* sur le Droit Civil: Une Relecture de l'Arrêt *Dolphin Delivery* à l'Aide d'une Réflexion sur les Sources du Droit Civil Québécois (2003) *Revue du Barreau. Numéro spécial* 1 at 34. For a recognition of that principle by the Supreme Court of Canada, see *Cie Immobilière Viger* v. *Lauréat Giguère Inc.* [1977] 2 SCR 67.

[75] G. Samuel, Can the Common Law Be Mapped? (2005) 55 *University of Toronto Law Journal* 271 at 286.

[76] Allard, L'impacte de la *Charte*, 36.

general principles of law and customs, and, thus, that it is, by definition, incomplete. This is true as well of any legal order, which cannot, and should not, be depicted as a finite given, as it is first and foremost a constantly evolving construct. As Stamatis observes: 'Full of possibilities, the legal order is potentially larger than its historically concrete normative crystallizations; it is also an order of liberty as well as an order of security and constraint.'[77]

Therefore, a distinction can, and must, be established between legal texts the function of which is provide the *jus commune*, and other types of legal texts, i.e., particular laws (or, in common law terminology, 'statutes'). From this follows a normative consequence of considerable significance: the interpreter's relation to the text of each type of enactment cannot, and should not, be the same when interpreting the former and the latter. Thus, if the function of a civil code is to provide the *jus commune* in the field of private law, it is arguable that a constitution, in a regime where the doctrine of constitutionalism applies in one form or another, expresses an even higher level of *jus commune*, as it lays out the foundations of the legal order itself. Adapted to a common law setting, such an approach only reinforces the idea expressed by Strauss that the best way to explain constitutional law interpretation is by reference to the common law rather than to statutory interpretations. And it is not unduly redundant here to signal that *jus commune* precisely means 'common law'.

The conflation of constitutional texts with other forms of legal texts is not only likely to prevent jurists from fully grasping the role that underlying principles play in a legal system, as it interferes with the interpreter's relation to the constitutional text; it also represents a serious obstacle in understanding the different layers of legal normativity that an instrument that can reasonably be characterized as positing some form of *jus commune* may incorporate. It bears remembering here that the Supreme Court of Canada refused in the *Secession Reference* any supervisory role over the political aspects of negotiations conducted after a winning referendum for the sovereigntist side. Although it is arguable that it is only these political questions, however defined, that are deemed non-justiciable by the court, as opposed to the whole constitutional duty to negotiate and, *a fortiori*, the underlying principles from which it

[77] Stamatis, *Argumenter en Droit*, p. 232. My translation.

stems,[78] a deeper analysis is needed and, again, a detour toward the civil law tradition might prove informative. That detour will point to the somewhat different, and possibly less prosaic, relation that the civil law tradition entertains with norms, when compared with the common law.

I want to emphasize here that while the enforceability of rights or duties is as important from a civil law perspective as it is from a common law standpoint, the civil law still remains more open to aspirational or symbolic norms, the formal or practical enforceability of which are either non-existent or rather infrequent. The civil law indeed understands legal normativity as allowing for the cohabitation of both commandments and broader aspirations that do not necessarily require a formal judicial sanction. This is why a legal obligation can exist without being formally enforceable by a court of law. Two examples will illustrate this point.

First, in its classification of obligations, the civil law recognizes three types of obligations.[79] At opposite ends of the spectrum, one finds the civil obligation, which is fully enforceable by courts of law, and the moral obligation, whose enforcement solely depends on the conscience of the debtor. This would be the case of the general obligation to help one's fellow human beings. In between stands the natural obligation, which does not give its creditor any right of action in justice but which nevertheless entails some legal effects. One is that if the debtor wilfully performs this type of obligation, he cannot recover what he paid under the pretext that he had no obligation to do so.[80] Some codal provisions may explicitly provide for situations giving rise to natural obligations and map out their legal effects,[81] but courts can also acknowledge the existence of natural obligations in some circumstances.[82] The second example is that of civil obligations that are expressly spelled out in a particular legal enactment, even though the legislator knows very well that they are exceptionally relied upon by their potential beneficiaries, if they ever are, and are thus rarely enforced by courts of law. Such is the case of 'good Samaritan' obligations to come to the aid of anyone whose

[78] See, in particular, paras. 101–2 of the *Secession Reference*.

[79] See generally, J. Brierley and R. Macdonald, *Quebec Civil Law: An Introduction to Quebec Private Law* (Emond Montgomery, Toronto, 1993), pp. 382–3.

[80] See e.g. Art. 1534 of the Civil Code of Québec (hereinafter 'CCQ').

[81] Such as in the case of unlawful gaming and wagering (Art. 2630 CCQ) and in the case of the suretyship of a natural obligation (Art. 2340 CCQ).

[82] J. -L. Baudouin and P.-G. Jobin, *Les Obligations* (5th edn, Yvon Blais, Cowansville, Qc, 1998), pp. 24–5.

life is in peril unless one has a valid reason not to do so.[83] Even if it knows that breaches to such obligations are rarely sanctioned judicially, the legislator nevertheless opts for explicitly inserting them in a code or some other instrument of equivalent importance, thereby gambling on the social performativity of the provision and hoping that the aspiration enshrined in that provision will make its way into societal culture. These aspirational provisions will generally be found in enactments that, explicitly or implicitly, can be said to partake in the jurisdiction's *jus commune*, as opposed to mere particular enactments, i.e., statutes in common law terminology. All this to say that someone who, being consciously or not influenced by the civil law, approaches a constitution as expressing a higher form of *jus commune* is less likely to consider the idea of a non-justiciable legal obligation as an absurdity.

Conclusion

It is now time to weave together the most relevant observations made about the civil law's approach to principles and legal normativity in general, on the one hand, and the *Secession Reference*, on the other.

In the civil law tradition, questions pertaining to the pedigree of judicially recognized underlying principles are not of critical importance, especially if one understands the concept of pedigree as solely referring to judicial precedents. The manner in which the existence and the use of these principles are justified is extremely significant, but, clearly, their particular pedigree does not play the central role it may play in common law jurisdictions. The criterion for determining the 'fit' of an underlying principle in the civil law tradition is in that sense more lenient than in the common law tradition. In that respect, the Supreme Court's method of identification of principles in the *Secession Reference* is possibly closer to a civil law than to a common law approach.

As to the interplay between the underlying principles and the text of a constitution, I have observed that the civilian judge using a principle enjoys a very substantial margin of autonomy, which may even allow him to ignore an explicit provision that could technically be relied upon to

[83] For example, see Art. 2 of Quebec's Charter of Human Rights and Freedoms (RSQ, c. C-12). The civil liability of the Samaritan is only engaged if the harm that may result from his actions is due to his intentional or gross fault (Art. 1471 CCQ).

solve the case. Recall here that the Supreme Court's opinion in the *Secession Reference* was criticized for having ignored the text of the Canadian Constitution by failing to explain why the provisions governing amendments could not alone regulate a potential provincial secession. It is probably true that the Court failed to discharge its burden of justification in that regard. However, this problem is distinct from the one raised by the distance that the Supreme Court allowed itself to take vis-à-vis the text of the Constitution. How can this be explained? While the principles identified by the Court are to some extent supported by the text of the Constitution, the Court makes it clear that they pre-exist that text, in that the latter is envisaged as a *mere elaboration* of the former, or of the Constitution's underlying logic.[84] It is thus no surprise that the Court states that '[t]he principles *dictate* major elements of the architecture of the Constitution itself . . . '.[85] At the very least, the text is said to 'giv[e] expression'[86] to these principles, even though it may constrain the normative consequences susceptible of being drawn from them – hence the recognition of the primacy of textual norms when solely relying on them can solve the case. But how to reconcile this last statement with the Court's refusal strictly to apply any of the relevant – and potentially determinative – provisions governing constitutional amendments? This refusal was moreover accompanied by a reiteration of their eventual application at the post-negotiation stage, a negotiation supposedly mandated by a constitutional duty derived from the Constitution's underlying principles themselves. Undeniably, the Court did choose to add a duty to negotiate when it had the option strictly to adhere to the textual requirements set forth in either one of the two potentially applicable amending provisions. In this respect, merely saying that the case was 'extraordinary' has only a weak explanatory value. Although it is impossible to deny that the case was indeed exceptional, there must certainly be a reason explaining why its so-called 'extraordinariness' led the Court to depart from the text of the

[84] In the *Provincial Judges* case, note 26 above, para. 83, the majority opinion used the same idea of a textual elaboration of pre-existing principles: 'The specific provisions of the *Constitution Acts, 1867 to 1982*, merely "elaborate that principle [of judicial independence] in the institutional apparatus which they create or contemplate": *Switzman v. Elbling*, [1957] S.C.R. 285 (S.C.C.) at p. 306, *per* Rand J.'

[85] *Secession Reference*, para. 51. Emphasis added. [86] *Ibid.*, para. 69.

Constitution by refusing to apply one of the amending provisions, and to choose another path.[87]

Two explanations can be contemplated. First, it may be that none of the amending provisions was deemed clear enough to solve the problem at hand. Surely, no provision clearly referred to secession. However, most of the consequences of a provincial secession on the Canadian legal order were governed by one of them, i.e., the most stringent one. Thus, a reasonably 'clear' provision could have been relied upon to preside over a constitutional amendment, even a 'radical and extensive' one, to use the Court's own words.[88] The second explanation, and in my view the more probable one, brings us back to the related ideas of principles dictating the architecture of the Constitution and of a text merely giving expression to these principles. These ideas indicate both the precedence and the pre-eminence of the principles. They reveal the relative superficiality of the Court's affirmation of the primacy of the text over underlying principles. In truth, it is as if this primacy had been made conditional upon the text's ability to be in keeping with the constitution's underlying principles. From this perspective, principles should be understood as policing potential applications of the text, even if this implies superficially ignoring that text's 'clear' and imperative prescriptions. To provide an example drawn from the civil law, a party may have the contractual right to do something, but that party must take special care to exercise that right reasonably. Absent such care, and if the party's unreasonable exercise of her contractual right causes damages, she could be held liable under the doctrine of abuse of rights[89] – another oxymoron from a traditional common law standpoint. What bears noting is that under such an approach, the application of an explicit provision must always respect a kind of 'inner morality', to use a Fullerian expression,

[87] Choudhry argues that the extraordinariness of the *Secession Reference* lies in the Supreme Court's amendment of the Canadian Constitution, under the guise of interpretation, in a situation where formal amendment procedures lacked, for historical and political reasons, the neutrality they needed to legitimize a ruling strictly based on them. He further argues that this amendment was extra-legal in that the Supreme Court, in performing it, took a role formally attributed to political institutions. See S. Choudhry, Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?, on file with author.

[88] *Secession Reference*, para. 84. It is to be noted that the Court alluded to the possibility of adjudicating on the issue of the amending formula should a 'yes' vote on Quebec's sovereignty occur.

[89] See, in Canadian civil law, *Houle* v. *Canadian National Bank* [1990] 3 SCR 122, SCC.

which certainly encompasses the general principle of law *summum jus summa injuria*.[90] This is essentially what the Supreme Court did when it refused to adopt a technical reading of the Constitution's amending provisions, which would have amounted to letting the manifest text of the Constitution entirely occupy the normative space available at the expense of the latent morality of that Constitution.[91] Under this angle, the *Secession Reference* has an 'extraordinary' dimension from a constitutional standpoint not so much because it raised the issue of secession, but because the strict application of either one of the relevant amending provisions could have contradicted the very principles discovered and expounded by the Court. Such a purposive reading, which in my view reveals a conception of interpretation that treats the text of the Constitution as a mere expression of an overarching form of *jus commune*, is closer to civil law than to common law reasoning.[92]

A last feature of the civil law tradition that is relevant in view of complexifying our understanding of the *Secession Reference* is that tradition's recognition that obligations can still entail juridical effects, and thus be legally binding, even when they are not always judicially enforceable. Indeed, that tradition is possibly more open than the common law to the idea of positing in major legal enactments, such as civil codes or constitutions, norms that seek to enshrine broad aspirations rather than obviously prescriptive, sanctionable duties.[93]

[90] R. Domingo, J. Ortega, and B. Rodríguez-Antolin, *Principios de Derecho Global: Aforismos Juridicos Comentados* (Editorial Aranzadi, Elcano, Navarra, 2003), p. 232.

[91] Prior to the Supreme Court's opinion in the *Secession Reference*, Frémont and Boudreault had predicted with considerable foresight that the court could use underlying principles to address the question of secession and to prevent the constitution from negating itself through a blind reliance on its text. See J. Frémont and F. Boudreault, Supraconstitutionnalité Canadienne et Sécession du Québec (1997) 8 *National Journal of Constitutional Law* 163 at 202.

[92] Poole has correctly noted that common law constitutionalism presupposes a belief in common law's 'exceptionalism', i.e., 'that the common law [as opposed statutory law] is unique in that it necessarily constitutes a higher order of law-making'. See T. Poole, Back to the Future? Unearthing the Theory of Common Law Constitutionalism (2003) 23 *Oxford Journal of Legal Studies* 435 at 439. In order to avoid any confusion, I want to stress that although my own vision of constitutions as expressions of a higher form of *jus commune* may be construed as promoting 'common law constitutionalism', this is just an incidental effect of a different claim about the type of interpretation of a particular type of text – constitutional ones – and of its relation to principles.

[93] While I acknowledge that theoretical debates about the nature of legality in the common law tradition go beyond this relatively reductionist distinction between aspirations and judicially sanctionable duties, the centrality of adjudication in all accounts of that tradition, whether that centrality operates as an implicit assumption or is expressly theorized, cements for all practical

Again, it seems that the Supreme Court's opinion in the *Secession Reference* reflects this broader conception of legal normativity.

In the end, it is hard to avoid the conclusion that there appears to be some connection between the civilian approach to underlying principles and legal normativity and the Supreme Court of Canada's mode of reasoning in the *Secession Reference*. That connection may be as much the product of a deliberate choice made out of strategic concerns informed by the case's high legal and political stakes – the openness of the civil law to a certain type of reasoning being perceived in that context as advantageous in order to achieve a certain outcome – as that of an unconscious adoption of one tradition's reasoning template by a structurally bijural court. Indeed, the fact that the Supreme Court is composed, albeit unequally, of 'pure' common lawyers and of jurists from a mixed legal background may have played a role in the migration of a civil law reasoning template into a common law environment, especially considering that this Court is the ultimate appellate court for all Canada and, as such, hears both common law and civil law cases. In such a context, the hypothesis of a moderate legal acculturation of all its members at the contact of the 'other' tradition cannot be discarded outright. This highlights the interest of inquiring into a possible subterranean influence of civil law conceptions and approaches in Canadian public law. But is such a migration of reasoning templates from one tradition to another possible only in a bijural or mixed legal order with centralized judicial organs? Even if this was true, this phenomenon would still be open for inquiry in a number of legal orders, such as the European Union, for example. Moreover, this limit does not detract from the fact that the trans-systemic reading of the *Secession Reference* proposed in this chapter seems to confirm the possibility of a migration of reasoning templates in some circumstances.

The subversive nature of this finding should not be underestimated. If a legal tradition is viewed as a structure for the production of meaning,

purposes this association between the legal nature of a norm and its judicial enforcement. For instance, Perry defines the common law 'as the institutionalized process of adjudication itself, rather than as the body of relatively stable (but nonetheless constantly changing) dispute-settling standards which emerge from the process'. See S. Perry, Judicial Obligation, Precedent and the Common Law (1987) 7 *Oxford Journal of Legal Studies* 215 at 257. On the inherent 'preto-centricism' of that legal tradition in the particular context of a theory supportive of common law constitutionalism, see T. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2001).

especially because of the particular modes of reasoning it encapsulates, the hypothesis of a migration of reasoning templates is undeniably subversive, as it is this structure itself which may end up being transformed through its encounter with legal otherness. Ultimately, it is the epistemology of the traditions involved which may undergo a process of *métissage*. But, at a deeper level, the questioning of *what* is migrating inevitably leads to an interrogation of *who* is migrating, for the successful migration of a reasoning template may evidence another type of migration, one that is internal to jurists themselves, one that allows them to envisage their own legal *épistemè* as a cultural construct open to reconsideration, one that authorizes them to acknowledge, following Rimbaud's injunction, that 'I is another'.

8

Migrating marriages and comparative constitutionalism

BRENDA COSSMAN

In the season finale of *Queer as Folk*, Showcase's television series about the sexual exploits of five gay men, the gang travels to Toronto from their home in Pittsburgh.[1] While there, Michael and Ben – the show's most mainstream couple – decide to get married. They go to city hall, get a marriage licence and, in front of friends and family, exchange their wedding vows. They all head back home, but not before they have to cross the US border, where Michael and Ben have their first newlywed encounter with the US state, specifically, US customs officials, who refuse to recognize their marriage. Their travelling companions are all duly outraged that the couple cannot fill in one customs card (only one per family). Michael's mother then attempts her own transgressive border crossing, and in so doing, performs her own outrage:

Customs officer [reading Deb's form]: The purpose of your visit to Canada was 'to experience the greatest joy I've ever known seeing my gay son marry his lover'.

Deb: You got a problem with that, [looking at officer's nametag] Butz?

Officer Butz: As I explained to your son, the government of the United States doesn't recognize gays gettin' married.

Deb: But you do recognize Britney Spears getting loaded and married one night and having it annulled the next morning. Or two total strangers getting married for a million fucking bucks on television. Is that the sanctity of marriage that you assholes are protecting?

Michael: Ma!

I would like to thank Sujit Choudhry, Annelise Riles, and Karen Knop for their comments, and B. J. Wray for her research assistance.

[1] *Queer as Folk*, Season Four, Episode 14. Original air date, 18 July 2004.

Deb: Well, what is this shit? Not letting you back into your own country. Like your marriage doesn't count. You know, if it's good enough for Canada and the Queen of fucking England, it's good enough for Butz.
Officer Butz: Ma'am, do you like smoked salmon?
Deb: What does that have to do with anything?
Officer Butz: Because if you don't shut up, you're gonna spend the rest of your life in Nova Scotia.

The statement is made: the United States is hypocritical in its defence of marriage and regressive in its refusal to recognize same sex marriage.

But beyond this fairly simplistic message of righteous indignation, the episode is illustrative of many of the cultural flows and transnational migrations of same sex marriage. Arjun Appadurai, in *Modernity at Large*, identifies several dimensions of transnational cultural flows, including ethnoscapes, mediascapes, and ideoscapes – the movement of people, media representations, and ideas – which he suggests are no longer confined by particular nation states, but always on the move, circulating in multiple directions in the global economy.[2] I borrow this idea of the transnational cultural flow of people, images, and ideas as a way of framing the comparative dimensions of same sex marriage in Canada and the United States, specifically, to consider the multiple forms or dimensions of same sex marriage. There are at least three dimensions to migration: actual same sex marriages, cultural representations of these marriages, and constitutional ideas about same sex marriage. And some of these are migrating more than others. In this chapter, I argue that Canadian constitutional ideas about same sex marriage have not been migrating to the United States – at least not in terms of explicit judicial borrowings. Rather, because of the association of comparative constitutional law with judicial activism, I suggest that any such migration is likely to be minimal. In fact, Canadian same sex marriage jurisprudence is more likely to occur as a negative or anti-model – that is, as an example of a path better not taken. However, the chapter argues that the emerging analysis of the migration of constitutional ideas needs to develop alternative and perhaps more subtle modes of inquiry to capture the ways in which constitutional ideas may be migrating in the absence of explicit judicial borrowings. The migration of same sex marriages and its cultural

[2] A. Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (University of Minnesota Press, Minneapolis, 1996).

representations are changing the cultural landscape within which constitutional challenges will occur and constitutional doctrine will develop. I argue that the emerging field of the migration of constitutional ideas, as well as comparative constitutionalism more generally, needs to supplement its doctrinal analysis with the lens of cultural studies that can appreciate the multiple migrations of same sex marriages.

The migration of constitutional ideas

The migration of constitutional ideas generally refers to the idea of explicit judicial borrowings, that is, the ways in which domestic courts increasingly look to foreign jurisdictions for the evolution of constitutional norms and principles. However, in the context of same sex marriage, this dimension of migration may prove to be the least significant. While there are many interesting points of comparison between constitutional developments around same sex marriage in Canada and the United States, so far constitutional migration and borrowing is not one of them. It may still be too early to write a travelogue, but so far, the Canadian same sex marriage cases have travelled very little. There has been very limited explicit migration of constitutional ideas about same sex marriage.

The leading Canadian case on same sex marriage is *Halpern* v. *Canada (Attorney General)*[3] in which the Ontario Court of Appeal struck down the opposite sex definition of marriage as unconstitutional and held that marriage should be redefined to include two persons to the exclusion of all others. While three other courts – including one appellate court – had previously reached similar results,[4] the Ontario Court of Appeal ruling in *Halpern* made its remedy effective immediately. The same day as the ruling was issued, municipal officials at Toronto City Hall began to issue

[3] (2003) 225 DLR (4th) 529, Ont. CA.

[4] See *Halpern* v. *Canada (Attorney General)* (2002) 28 RFL (5th) 41, Ont. Div. Ct, in which the Ontario Divisional Court similarly struck down the opposite sex definition of marriage, but suspended the declaration of unconstitutionality for two years. *EGALE Canada Inc.* v. *Canada (Attorney General)* (2003) 225 DLR (4th) 472, BCCA in which the British Columbia Court of Appeal declared the common law definition of marriage unconstitutional, substituted the words 'two persons' for 'one man and one woman', and suspended the declaration until 12 July 2004 (the expiration for the suspension in the original *Halpern* case). In *Hendricks* v. *Quebec* [2002] RJQ 2506, Qc Sup. Ct, the Quebec Superior Court similarly held that the opposite sex definition enacted in a federal law seeking to harmonize federal law with the Quebec Civil Code was unconstitutional, and similarly declared the remedy suspended for two years.

marriage licences. The decision was in effect the first to authorize same sex marriage in Canada. While the decision has been extensively cited in the Canadian jurisprudence, as province after province comes to recognize same sex marriage,[5] it has not yet travelled much beyond its national borders.

In *Goodridge* v. *Department of Public Health*,[6] the majority of the Supreme Court of Massachusetts held that the opposite sex definition of marriage violated the liberty and equality provisions of the Massachusetts Constitution. The Court redefined civil marriage as 'the voluntary union of two persons as spouses, to the exclusion of all others', but stayed the entry of the judgment for 180 days 'to permit the Legislature to take such action as it may deem appropriate in light of this opinion'.[7] There are three brief references to *Halpern* in *Goodridge*. First, there is a mention of *Halpern* in a footnote as one of several examples of an appellate court addressing same sex marriage. The footnote does not distinguish between cases that decided for or against same sex marriage, but simply lists appellate court cases that have addressed it. Second, there is a passing reference to *Halpern* as an example of courts not completely deferring to legislatures on the question of same sex marriage, but, rather, of scrutinizing the ban on same sex marriage in light of state constitutional provisions. There is a third, more substantive reference in the remedy section, where the Court refers to the *Halpern* remedy with approval, stating: 'In holding that the limitation of civil marriage to opposite sex couples violated the Charter, the Court of Appeal refined the common-law meaning of marriage. We concur with this remedy, which is entirely consonant with established principles of jurisprudence empowering a court to refine a common law principle in light of evolving constitutional standards.'[8]

[5] Many courts have since agreed with this ruling. See *Dunbar* v. *Yukon Territory* 2004 YKSC 54, YT SC; *W.(N.)* v. *Canada (A.G.)* 2004 SKQB 434, SK QB; *Vogel* v. *Canada (A.G.)* [2004] MJ No. 418, MB QB; *Boutilier et al.* v. *Canada (A.G.)* [2004] NSJ No. 357, NS SC; *Pottle & French*, Dec. 21, 2004, Nfld SC, Justice Green.

[6] *Goodridge* v. *Department of Public Health*, 798 NE 2d 941(2004). [7] *Ibid.*

[8] *Ibid.* Following the decision in *Goodridge*, the Senate presented a Bill entitled An Act Relative to Civil Unions, US, SB 2175 (2003) to the Supreme Court of Massachusetts for an advisory opinion on the constitutionality of a civil unions alternative to marriage. In *Re Opinions of the Justices to the Senate*, 802 NE 2d 565 (2004), the majority of the Court held that as a matter of first impression, the Bill violated the equal protection and due process provisions of the state Constitution. The opinion did not cite *Halpern*, although several of the briefs submitted did

One possible explanation for the limited reference to *Halpern* in *Goodridge* is timing. The Ontario Court of Appeal had not yet decided *Halpern* when the briefs in *Goodridge* were filed. As a result, there is no reference to the appellate court decision in these briefs, although there are a few limited references to the Divisional Court decision in several of the briefs.[9] However, this timing explanation does little to explicate the similar paucity of references to *Halpern* in the subsequent cases.

In Washington State, two courts have ruled that the state prohibition on same sex marriage is unconstitutional. In *Anderson* v. *King County* and *Castle* v. *State of Washington*, two judges of the Washington Superior Court each held that the prohibition violated the privileges and immunities clause of the state Constitution.[10] In *Anderson*, there was one sentence referring generally to developments in other jurisdictions: 'many courts as well as legislatures across the United States, Canada and Western Europe have given new recognition to ''gay rights'', including key developments in the area of same sex marriage.'[11] In *Castle*, there was no reference to Canadian or other foreign same sex marriage developments. In *Hernandez* v. *Robles*, the New York Supreme Court held that the prohibition on same sex marriage violated the equal protection and due process provisions of the New York State Constitution.[12] There is again in this case but a passing reference to *Halpern*. The Court quotes *Halpern* with approval on the circularity of the argument that marriage has always been defined as opposite sex:[13]

mention it. See *Brief of Civil Rights Amici Curiae*, 2004 WL 433502 and *Brief of Interested Party/ Amicus Curiae Gay and Lesbian Advocates & Defenders*, 2004 WL 433508.

[9] See *Brief of Plaintiffs-Appellants*, 2002 WL 32364784 which mentions the Divisional Court decision in a footnote, and *Brief of Amici Curiae International Human Rights Organizations et al.*, 2002 WL 32364775, which focuses on international and comparative law developments in same sex relationship recognition, and includes reference to all three of the Canadian same sex rulings at the time: *Halpern*, *Egale*, and *Hendricks*.

[10] *Anderson* v. *King County*, 2004 WL 1738447 (2004); *Castle* v. *State of Washington*, 2004 WL 1985215 (2004). By agreement, the matter in *Anderson* was stayed pending review of the Washington Supreme Court.

[11] *Anderson*, *ibid.* [12] 794 NYS 2d 597 (2005).

[13] *Halpern* was cited in the arguments submitted before the Court. E.g. the Memorandum of Law in Support of the Plaintiff's Motion for Summary Judgment, referred to this passage in *Halpern*. The Memorandum also stated, at p. 46: 'In the past year, Courts in Canada likewise recognized the right to marry for same sex couples under the Canadian constitutional Charter, resulting in access to marriage for same sex couples in four Canadian provinces so far.' In the footnote, *Halpern*, *Egale*, and *Hendricks* are each cited. Available at http://www.lambdalegal.org/binary-date/LAMBDA_PDF/pdf/346.pdf.

'[A]n argument that marriage is heterosexual because it ''just is'' amounts to circular reasoning. It sidesteps the entire analysis.'[14] There is no other reference to *Halpern* or the other Canadian cases in the decision.[15]

In the California marriage cases, the California Superior Court similarly held that the prohibition on same sex marriage violated the state Constitution. These cases arose from the actions of San Francisco Mayor Gavin Newsom, who on 10 February 2004 announced that same sex marriage would be permitted in San Francisco. Within days, hundreds of same sex couples were being married at San Francisco City Hall. On 11 March, after more than three thousand couples were married, the California Supreme Court issued an injunction against any further marriages, and declared its intention to rule on whether the city had acted outside of its jurisdiction in issuing the licences. In August, the Court held that the city had in fact acted outside of its jurisdiction, but deferred the question of the constitutionality of California laws prohibiting same sex marriage. In September, the cases challenging the constitutionality were consolidated into a single proceeding, the *Marriage Cases*. In March 2005, Superior Court Judge Richard Kramer held that California's opposite marriage law is not rationally related to a legitimate state interest, and, therefore, violates the equal protection provisions of the state Constitution.[16] In his ruling, there is no reference to *Halpern* or any other foreign law. A group had attempted to file an *amicus* brief specifically bringing the Canadian same sex marriage developments to the attention of the Court, but the trial judge did not grant them *amicus* status.[17]

The cases in which US courts have struck down the prohibition on same sex marriage thus have very limited references to Canadian same sex marriage developments in general and to *Halpern* in particular. In my view, this is neither coincidental nor an oversight. The United States has not been a net importer of constitutional ideas. As Lorraine Weinrib argues, the United States is not in the game.[18] It is perhaps the most

[14] *Hernandez*, at 45 citing *Halpern* at para. 71.

[15] In a notable oversight, *Halpern* is excluded from the list of authorities on Westlaw. See Table of Authorities, 86 Cases Cited in *Hernandez* v. *Robles*, 2005 WL 363778.

[16] *In re Coordination Proceeding, Special Title [Rule 1550(c)] Marriage Cases*, 2005 WL 583129 (2005).

[17] The International Human Rights Clinic of the University of Toronto will again attempt to file an *amicus* brief as the case goes to appeal.

[18] Lorraine Weinrib, The Postwar Paradigm and American Exceptionalism, this volume.

ardent advocate of legal particularism, priding itself in the idea that it has nothing to learn from away. In the US constitutional context, constitutional borrowings are then a one-way street, from the United States away, not away to the United States. It is possible to find increasing exceptions to US exceptionalism.[19] There is an increasing debate about US exceptionalism and the role of comparative materials in US constitutional law.[20] Some justices of the US Supreme Court have shown an increasing willingness to cite foreign law.[21]

However, in the area of gay and lesbian rights, these exceptions may in the end only serve to reinforce the norm. Consider *Lawrence* v. *Texas*,[22] in which the majority of the US Supreme Court overruled *Bowers* v. *Hardwick*[23] and struck down Texas' sodomy law. The opinion, written by Justice Kennedy, referred to several rulings of the European Court of Human Rights in support of the majority ruling:

> To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United*

[19] American exceptionalism is used to refer to the particular nature of American particularism. As Matthew Raalf describes in A Sheep in Wolf's Clothing: Why the Debate Around American Exceptionalism is Spectacularly Ordinary (2004) 73 *Fordham Law Review* 1239 at 1245–6: 'Exceptionalism can be defined by the assertion that "the United States Constitution is unique and that the experience surrounding it is unique"'. Implied in this definition is the belief that exclusively domestic sources should be used to interpret the Constitution. Reference to other nations, for the exceptionalist, contradicts this belief' (citing L. Blum, Mixed Signals: The Limited Role of Comparative Analysis in Constitutional Adjudication (2002) 39 *San Diego Law Review* 157).

[20] On the debate regarding the use of comparative materials in US constitutional law, see generally Raalf *ibid.*; Blum *ibid.*; V. Jackson, Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on 'Proportionality,' Rights and Federalism (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 583; S. Harding, Comparative Reasoning and Judicial Review (2003) 28 *Yale Journal of International Law* 409; D. Fontana, Refined Comparativism in Constitutional Law (2001) 49 *UCLA Law Review* 539; M. Tushnet, Transnational/Domestic Constitutional Law (2003) 37 *Loyola of Los Angeles Law Review* 239.

[21] Tushnet, *ibid.* at 245, e.g., argues that references to non-US constitutional law have become more frequent in recent years. This trend can be seen in the more recent decision of *Roper* v. *Simmons*, 543 US 551 (2005) in which the US Supreme Court struck down the juvenile death penalty. Justice Kennedy, writing for the majority, cited various international and comparative law sources, noting 'we acknowledge the overwhelming weight of international opinion against the juvenile death penalty ... The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our conclusions'.

[22] 539 US 558 (2003). [23] 478 US 186 (1986).

> *Kingdom*. See *P.G. & J.H. v. United Kingdom,* App. No. 00044787/98, & ¶ 56 (Eur. Ct. H.R., Sept. 25, 2001); *Modinos v. Cyprus,* 259 Eur. Ct. H.R. (1993); *Norris v. Ireland,* 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11–12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.[24]

This reference has been subject to scathing critique. Justice Scalia, a consistent critic of the use of comparative materials, wrote in his dissent in *Lawrence*:

> Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct ... The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since 'this Court ... should not impose foreign moods, fads, or fashions on Americans.' *Foster v. Florida*, 537 US 990, n. ... (2002).[25]

It has also been criticized by the usual conservative suspects, such as Robert Bork, who has called it an episode in an 'absurd turn in our jurisprudence'.[26]

This hostility toward the use of comparative materials reflects a more general constitutional methodology focused on original intent and textualism.[27] It is based on the idea of US constitutional sovereignty and particularism, that is, on the idea that only US sources are relevant in

[24] *Lawrence* v. *Texas*, at 577. [25] *Ibid*., at 598.

[26] R. Bork, Whose Constitution Is It, Anyway?, *National Review,* 8 December 2003, p. 37. See also R. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press, Washington, DC, 2003).

[27] See R. Alford, In Search of a Theory for Constitutional Comparativism (2005) 52 *UCLA Law Review* 639 at 649, describing originalism as generally opposed to the use of comparative materials:

> Originalists warmly embrace constitutional comparativism, provided it elucidates a better understanding of original intent. Thus, originalism embraces the use of historical comparative material, but rejects the use of contemporary material. Contemporary comparativism is suspect because it constitutes a subset of a much larger body of material that originalists reject in their conception of constitutionalism. For an

interpreting the US Constitution. While its proponents oppose the use of comparative constitutionalism in any and all contexts,[28] the hostility towards any judicial reliance on transnational norms of constitutional understanding is heightened in the context of gay rights and same sex marriage because of the extent to which comparative constitutionalism has been identified by its opponents with judicial activism. As Gary Jacobsen has noted, the opponents have argued that: 'Judges will expand the scope of their constitutional field of vision in order to legitimate outcomes that would otherwise be defeated if confined to domestic sources. Judges who open their constitutional borders to the importation of foreign legal materials are, it is claimed, activists who have discovered yet another means to avoid the constraints of text and intention.'[29] In Scalia's words: 'What these foreign sources ''affirm,'' rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.'[30]

It is, then, not particularly surprising that the courts may shy away from the comparative exercise on the issue of same sex marriage. Since same sex marriage is already marked by the allegation of judicial activism, constitutional borrowings will only make the matter worse. Legitimating same sex marriage within the US constitutional tradition requires that courts maintain their distance from foreign sources and avoid constitutional borrowings. Ironically, this may lead to *Halpern* travelling not in support of same sex marriage, but against it. It is an example of what Sujit Choudhry has called an 'anti-model' of comparative constitutionalism.[31] Only those who oppose *Halpern* and same sex marriage will deploy it as an example of the perils of judicial activism. For

originalist, Supreme Court jurisprudence that embraces contemporary comparativism reflects an 'insidious appeal [to] internationalism' (citing Bork, *ibid.*).

[28] Justice Scalia is a consistent opponent of the use of comparative materials, in decisions ranging from background checks for handguns (*Printz* v. *US*, 521 US 898 (1997)), to the death penalty for the mentally retarded (*Atkins* v. *Virginia*, 536 US 304 (2002)), and the death penalty for minors (*Roper* v. *Simmons*).

[29] G. Jacobsen, The Permeability of Constitutional Borders (2004) 82 *Texas Law Review* 1763 at 1816.

[30] Scalia in *Roper* v. *Simmons*, at 1229.

[31] See S. Choudhry, The *Lochner* Era and Comparative Constitutionalism (2004) 2 *International Journal of Constitutional Law* 1 at 3 (arguing that *Lochner* is the paradigmatic case of the anti-model in comparative constitutionalism), citing H. Klug, Model and Anti-model: The United States Constitution and the 'Rise of World Constitutionalism' (2000) *Wisconsin Law Review* 597.

example, we see Justice Scalia, who believes that 'comparative analysis [is] inappropriate to the task of interpreting a constitution',[32] referring to *Halpern* in his dissent in *Lawrence* as an example of the floodgates of the judicial recognition of gay rights. Scalia writes:

> The Court today pretends that it possesses a similar freedom of action, so that we need not fear judicial imposition of homosexual marriage, as has recently occurred in Canada (in a decision that the Canadian Government has chosen not to appeal). See *Halpern v. Toronto*, 2003 WL 34950 (Ontario Ct. App.); Cohen, Dozens in Canada Follow Gay Couple's Lead, Washington Post, June 12, 2003, p. A25. At the end of its opinion – after having laid waste the foundations of our rational-basis jurisprudence – the Court says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' *Ante*, at 17. Do not believe it.[33]

Scalia, the great non-comparativist, here relies on a foreign source as a precedent not to be followed. *Halpern* is deployed as the anti-model, as the place not to go.

The idea of *Halpern* travelling as an anti-model can be seen in some of the US same sex marriage case law in which the courts have upheld the prohibition. For example, in *Morrison* v. *Sadler*, the Indiana Court of Appeals held that the ban on same sex marriage did not violate the state Constitution.[34] *Halpern* again makes an appearance as an anti-model. The Court quotes with approval an article in which a conservative commentator critiques the Canadian same sex marriage cases:[35]

> Additionally, recent scholarly commentary from Canada supports our position in this case. Our neighbors to the north also have been struggling with the same-sex marriage issue in recent years, leading to several decisions that have required recognition of such unions, including *EGALE Canada Inc. v. Canada*, [BC Ct App, 2003] 225 D.L.R. (4th) 472, and *Halpern v. Toronto*, [Ont Ct App, 2003] 225 D.L.R. (4th) 529. One commentator, however, has taken strong issue with the decisions in *EGALE* and *Halpern*, as well as in *Baker* and *Goodridge*,

[32] *Printz* v. *US*, at 921. [33] *Lawrence* v. *Texas*. [34] 821 NE 2d 15 (2005).
[35] *Ibid.*, citing M. Stewart, Judicial Redefinition of Marriage (2004) 21 *Canadian Journal of Family Law* 13 at 132.

> and their treatment of the same-sex marriage issue, concluding that these courts 'did an unacceptable job with their performance of the very tasks that lie at the heart of judicial responsibility in virtually every case'.

The opinion quotes several lengthy passages from the article's critique of the reasoning in both *Halpern* and *Goodridge*, particularly in relation to the rejection of the marriage as procreation argument.[36] The Court of Appeal concludes that '[t]his article is fully reflective of our position', holding that marriage is intended to promote responsible procreation by opposite sex couples. The Canadian decisions, alongside the *Goodridge* decision, are thus again deployed as an anti-model, but this time, through a critique of the decisions as indefensible even within their own jurisdictional framework.

In *Standhardt* v. *Superior Court ex rel. County of Maricopa*,[37] the Court of Appeals of Arizona rejected the constitutional challenge to the state prohibition on same sex marriage. The Court makes only a passing reference to developments in other jurisdictions, including one citation to *Halpern* and *EGALE* in a footnote.[38] The relevance of these international developments, however, was rejected by the Court:

> ... same-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty ... Despite changing attitudes about both homosexuality and the attributes of 'family,' no state in this Nation has enacted legislation allowing same-sex marriages. To the contrary, Congress and the majority of states, including Arizona, have enacted legislation in recent years explicitly limiting marriage to opposite-sex unions.[39]

[36] E.g. the Court quotes Stewart, *ibid.*, at 47: '[A] central and probably preeminent purpose of the civil institution of marriage (its deep logic) is to regulate the *consequences* of man/woman intercourse, that is, to assure to the greatest extent practically possible adequate private welfare at child-birth and thereafter. The opinions simply avoid this point when they say that marriage law does not require an intent or ability to procreate to stay married; they miss the States' point that marriage's vital purpose in our societies is not to mandate man/woman procreation but to ameliorate its consequences.'

[37] 206 Ariz. 276 (2003). [38] *Ibid.*, at note 11.

[39] *Ibid.*, at para. 26. In *Lewis* v. *Harris*, 2003 WL 23191114 (2003), a New Jersey Court upheld the New Jersey prohibition on same sex marriage. There was no reference to the Canadian case law at all. It is worth noting, however, that although the decision was issued on 5 November 2003, several months after *Halpern* was decided, it was heard prior to the *Halpern* decision.

The Canadian cases are thus used somewhat differently in the decisions that uphold the ban on same sex marriage and those that strike the prohibition. In the anti-same sex marriage cases, the Canadian cases are deployed as an anti-model, that is, as an example that does not apply, and as a path that should not be followed. In some cases, legal particularism is deployed; in *Standhardt*, the message is that we (Americans/Arizonians) have done it differently here. In other cases, the reasoning in the cases is attacked (*Morrison*). In yet others, they simply stand as an example of where not to go (Scalia in *Lawrence*). By way of contrast, the cases in favour of same sex marriage largely avoid or downplay the Canadian cases, including at most a passing reference. *Goodridge*, the first of the pro-same sex marriage cases decided after *Halpern*, included the most extensive references – a grand total of two. The two cases since *Goodridge* have further downplayed or ignored the Canadian case law, preferring instead to use *Goodridge* as precedent. In this way, same sex marriage becomes not a foreign import but rather a made in the United States product. Despite the differences, both sets of cases can be seen as a performance of US exceptionalism. In the pro-same sex marriage cases, same sex marriage can only be legitimated if it is dissociated from the comparative constitutional project. It must grow organically from inside the United States, not be imported from outside. In the anti-same sex marriage cases, same sex marriage is marked with the comparative brush as a way of discrediting any claim to US constitutional legitimacy.

There may be other more subtle ways in which the constitutional ideas of *Halpern* and Canadian same sex marriage will travel. Its reasoning may be influential without being cited. We may be able to find it in the convergence of constitutional norms and principles. But, to understand the complex ways in which same sex marriage is migrating, we need to develop a more subtle and multidimensional analysis that takes the other dimensions of the transnational flow of same sex marriage into account, namely, the transnational flows of people and cultural representations. To the extent that comparative constitutionalism simply focuses on constitutional doctrine, as articulated by the courts, or within constitutional debates within the political sphere, it will fail to capture this migration.

Migrating marriages

> I don't care what the US government says. My partner Phillip and I are legally married under Canadian law. We've put our nation on notice: We're coming home and we are legally married.
>
> Reverend Troy Perry[40]

Like Ben and Michael in *Queer as Folk*, Americans are coming to Canada, obtaining marriage licences, getting married, and attempting to take their marriages home with them. In the first six months of legalized same sex marriage in Canada, a very significant proportion of the marriages occurring in Toronto were between Americans. Between 10 June and 30 September 2003, 757 marriages licences were issued to same sex couples; 247 of these licences were issued to couples from the United States.[41] In Windsor, Ontario – a border city – as of August 2004, 141 same sex marriage licences have been issued, 102 licences of which were issued to US couples.[42] This phenomenon was briefly usurped by the San Francisco mayoral civil disobedience in 2003, when thousands of same sex couples descended upon the San Francisco city hall to get married. However, after these marriages were stopped by judicial injunction, the only legal weddings in the United States are now in Massachusetts and are only available to state residents. As a result, many Americans continue to travel to Canada as a same sex marriage destination.

While many of these individuals have managed to have their marriages announced in the Style section of the *New York Times* – the ultimate sign of societal arrival – the legality of these marriages is another matter entirely. The recognition of foreign marriages is a familiar problem in conflicts of laws, with a well-established set of doctrinal rules and exceptions. As a general rule, marriages that are valid in the jurisdiction in which they are entered are recognized as valid marriages, unless there is a valid public policy reason to do otherwise. In the context of Canadian same sex marriages, the overwhelming jurisdictional response is likely to

[40] Quoted in J. Prout, MCC Head Weds: Urges Americans to Marry in Canada to Force Change at Home. Available at http://www.365gay.com/newscontent/071603perryweds.htm.

[41] Toronto Marriage License Statistics, 3 October 2003. As provided by the Legislative Department of the City of Toronto to the law firm McGowan Elliott and Kim.

[42] D. Barbati, Tying the Windsor Knot, *Metro Times Detroit*, 4 August 2004.

be a refusal to recognize these marriages. The federal government and thirty-seven of the states have passed DOMAs, that is, Defence of Marriage Acts that specifically ban the recognition of same sex marriages obtained in another state. In addition, some states have begun to amend their state constitutions specifically to prohibit the recognition of same sex marriage. These states will likely rely on their DOMAs, and constitutional amendments, as well as the exceptions in conflicts of laws rules to prevent the recognition of same sex marriages entered into in Canadian provinces. Nevertheless, these conflicts of laws cases are rapidly becoming another doctrinal site where courts will have to grapple with the legal implications of Canadian same sex marriage.

At the time of writing, there are only two reported cases of US same sex couples who were married in Canada seeking legal recognition of their marriages in the United States. Both of these efforts were unsuccessful. Yet, in both cases, there are traces of migration of Canadian same sex marriage. In *Re Kandu,*[43] a lesbian couple who had married in Canada filed a joint Chapter 7 bankruptcy petition. Lee Kandu and Ann Kandu had married in British Columbia on 11 August 2003. In October, Lee Kandu filed a petition for relief under Chapter 7, and listed Ann Kandu as a joint debtor. According to the provisions of the bankruptcy law, only married individuals can be listed as joint debtors. As a result, the court filed an Order to Show Cause for Improper Joint Filing of unmarried individuals. On 25 March 2004, Ann Kandu died. Lee Kandu subsequently defended her debtor filing, and challenged the federal Defense of Marriage Act as unconstitutional. The bankruptcy court rejected the constitutional challenge, holding that the Defense of Marriage Act did not violate the Debtors' Tenth, Fourth or Fifth Amendment rights. The debtor also argued, and the court rejected, that the doctrine of comity should be applied to validate her same sex marriage. The court held that the doctrine of comity is voluntary, and where a foreign law is in conflict with a domestic law, 'a court must prefer the laws of its own nation'.[44] Notwithstanding the refusal to recognize the marriage, the court did state: 'The Debtors were legally married according to the laws of British Columbia, Canada.'[45] The court was forced to recognize that the same sex marriage was legally valid in the jurisdiction in which it was entered. This is a somewhat paradoxical way for same sex marriages to migrate – a forced recognition of the legality of same

[43] 315 BR 123 (2004). [44] *Ibid.*, at 133. [45] *Ibid.*

sex marriage in another jurisdiction while denying its legality in the couple's own jurisdiction.

A similar form of non-recognition is found in the second case of *Hennefeld* v. *Township of Montclair*, in which a same sex couple married in Canada sought a disabled veteran property tax exemption.[46] A county board of taxation denied the couple the exemption, and the couple appealed. The Tax Court of New Jersey rejected their appeal, holding that Canadian marriage law could not be afforded comity in New Jersey. There is in *Hennefeld* a similar recognition of the validity of the same sex marriage in Canada. 'On October 22, 2003, the Plaintiffs were legally married under Canadian law in the city of Niagara Falls, Ontario Canada.'[47] In considering the plaintiffs' argument that the doctrine of comity requires the recognition of this marriage, the Court again stated that 'it is undisputed that Plaintiffs were legally married under Canadian law.'[48] However, following *Kandu* the Court held that where there is a conflict between the foreign law and the domestic law of New Jersey, it is the latter that must prevail.[49] The Court held that New Jersey law does not recognize same sex marriage,[50] and therefore, the plaintiffs' Canadian marriage could not be afforded comity. Yet, as in *Kandu*, *Hennefeld* constitutes a judicial acknowledgement of the legitimacy of Canadian same sex marriage in Canada.

While the net effect in both of these cases is to preclude the recognition of Canadian same sex marriage on the basis that it is in conflict with state or federal law which does not recognize same sex marriage, these decisions nevertheless contain a kernel of recognition, and thus a modality of migration. Even though the courts refuse to

[46] *Hennefeld* v. *Township of Montclair*, 2005 WL 646650 (2005). [47] *Ibid.*, at 1.

[48] *Ibid.*, at 5.

[49] The Court considered the New Jersey decision in *Lewis* v. *Harris* which rejected the constitutional challenge to the prohibition on same sex marriage, and the subsequent Legislative response which introduced a domestic partnership regime for same sex couples while insisting that this domestic partnership was a status entirely distinct from marriage.

[50] In this regard, the Court also pointed out the provisions of the domestic partnership regime dealing with the recognition of partnerships entered into in other states:

> the Legislature, in providing that '[a] domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of this State, which is valid under the laws of the jurisdiction under which the partnership was created, shall be valid in this State,' *N.J.S.A.* 26:8A–6 (c), could not have intended to include *marriage* within the terms *domestic partnership, civil union,* or *reciprocal beneficiary relationship,* and therefore could not have intended to recognize same-sex marriages entered into outside of New Jersey.

recognize the claims – to extend the rights and responsibilities of marriage to same sex couples – they are forced to acknowledge the speakability of same sex marriage. Judith Butler argues for the importance of bringing something within 'the domain of the sayable': 'To embody the norms that govern speakability in one's speech is to consummate one's status as a subject of speech.'[51] The prohibition on same sex marriage is analogous to Butler's analysis of the contradictions inherent in explicit forms of censorship: 'The regulation that *states what it does not want stated* thwarts its own desire ... Such regulations introduce the censored speech into public discourse, thereby establishing it as a site of contestation, that is, as the scene of public utterance that it sought to preempt.'[52] In the context of same sex marriage, each utterance of same sex marriage, through the constitutional and private law challenges of US gay activists, partially constitutes same sex marriage as coherent, as speakable, as part of the domain of the sayable. Each utterance in turn helps to constitute gay and lesbian subjects as marriable subjects. The recognition of the validity of Canadian same sex marriage represents a discursive shift or slippage, in which the idea of 'same sex marriage' is no longer an oxymoron but rather becomes a contested legal concept with which the courts are forced to engage. It is a kind of imaginary migration, a migration of that which can now be imagined in law, even if it does not cross the conceptual or national borders into actual legal commensurability. These challenges will continue, as US same sex couples continue to come to Canada to marry, and try to take their marriages home with them. And even where they are unsuccessful, there is a way in which these Canadian same sex marriages are migrating into US conflicts of laws.

While the overwhelming jurisdictional response is likely to continue to be non-recognition, at least one jurisdiction has broken from the ranks. New York State has affirmed that it will recognize the validity of same sex marriages, provided that they are valid in the jurisdiction where they were performed. In a legal opinion issued on 3 March 2004 the Attorney General of New York stated that New York law presumptively requires the recognition of marriage validly entered in another jurisdiction.[53]

[51] J. Butler, *Excitable Speech: A Politics of the Performative* (Routledge, New York, 1997), p. 133.
[52] *Ibid.*, p. 130.
[53] Opinion of the Attorney General, 3 March 2004. Available at http://www.oag.state.ny.us/press/2004/mar/mar3a_04_attach2.pdf. Similar opinions have been issued by Patrick Lynch,

Similarly, in a letter dated 8 October 2004, the New York State Comptroller Alan Hevesi stated that the retirement system of New York 'will recognize a same sex Canadian marriage in the same manner as an opposite-sex New York marriage, under the principle of comity'.[54] While constitutional challenges to the prohibition on same sex marriage continue, New York State will recognize Canadian same sex marriages. Canadian same sex marriages are travelling, then, to at least one jurisdiction, where they will be recognized on par with opposite sex marriages.

The migration of Canadian same sex marriages into US law will continue, as gay activists continue to encourage Americans to marry in Canada and struggle to bring these marriages home.[55] The border crossings will continue to be uneven and ambivalent. While some jurisdictions will officially recognize the migration, others will continue to try to block it. Yet, even in the face of official non-recognition, the legitimacy of Canadian same sex marriages will continue to seep into US law. Each time the courts are forced to recognize the validity of Canadian same sex marriage in Canada, gay and lesbian legal subjectivity is being reconstituted in modest yet significant ways. Same sex married couples may still be border dwellers – they may still inhabit the space beyond the national border, beyond actual legal recognition. Yet as border speakers they are beginning to inhabit a space within the national imaginary.

Migrating cultural representations

Ben and Michael's transnational marriage in *Queer as Folk* is illustrative of a third dimension of the migration of same sex marriage, namely, the transnational flow of cultural representations of same sex marriage. *Queer as Folk* is a US cultural production, shot in Toronto (posing as Pittsburgh), and aired in both US and Canadian markets. It is a US

Attorney General of Rhode Island, 17 May 2004 (in response to legalization of same sex marriage in Massachusetts stated that Rhode Island would recognize any legal marriage performed in another state unless it was against public policy) and Richard Blumental, Attorney General of Connecticut, 17 May 2004 (same sex marriages performed in Massachusetts are not invalid under Connecticut law).

[54] Letter from Comptroller Alan Hevesi, 8 October 2004. Available at: http://www.samesexmarriage.ca/docs/USA/NY_Hevesi.pdf.

[55] See e.g. the gay activists in the United States organizing Civil Marriage Trail, beginning on Valentine's Day 2004, encouraging US same sex couples to travel to Canada to marry.

production performing the Canadian same sex marriage scene, projecting it back on a broader largely US audience. The marriage episode was produced precisely because the show was shot in Toronto. The show's producers credit their awareness of the marriage issue to time spent in Canada while shooting the series. Producer Ron Cowen stated: 'It certainly made an impression upon us as Americans living in a foreign country that gay people have certain rights we don't have back home.' While the episode was shot months before couples in San Francisco began to say 'I do', and President Bush threw his support behind the Federal Marriage Amendment (FMA) – a proposal to amend the US Constitution to ban same sex marriage – it aired in the midst of the Congressional debates on the FMA. It represented a cultural intervention in the social and political debates around same sex marriage, spilling over into public sphere debates. Social conservatives were appalled at the show, and wasted no time in condemning it.

Queer as Folk is itself caught up in the transnational cultural flows of mediascapes, ideascapes, and ethnoscapes; of people, representations, and ideas travelling back and forth and in between the here and there of same sex marriage. Americans living temporarily in Canada, attuned to Canadian same sex marriage, deciding to represent Americans travelling to Canada to get married and travelling back to the United States; a representation which is then aired in the United States and becomes an intervention in the same sex marriage debates. There is here a kind of dizzying transnational cultural flow and with it, a blurring of national demarcations of the location of same sex marriage. The message is one of same sex marriage as located in Canada, and as not crossing the US border. Yet, it is also a message of real marriages not respecting borders, of the real meaning of marriage as love and commitment coming home with Ben and Michael, despite the official non-recognition. The cultural representation is not unlike the transgressive impact of the recognition/non-recognition of marriage in the conflicts cases – of simultaneously recognizing the validity of Canadian same sex marriage while denying its US legitimacy. Canadian same sex marriage does and does not migrate.

The way in which same sex marriage is depicted in these transnational cultural representations is also worth examining. The episode was a performance saturated with the rhetoric of normalization. When Ben proposes, Michael is initially ambivalent. During his moment of doubt,

he talks to his best friend, Brian, and the two perform the same sex wedding debate as it plays out within the gay and lesbian community.

> Brian: We're queer. We don't need marriage. We don't need the sanction of dickless politicians and pederast priests. We fuck who we want to, when we want to. That is our God given right.
>
> Michael: But it's also our God given right to have everything that straight people have. Because we're every bit as much human as they are.[56]

According to Michael, same sex couples have the same need, the same desire, and the same entitlement for the institution of marriage as opposite sex couples. This is a performance in the same basic ideas – constitutional ideas – animating the constitutional challenges to the prohibition on same sex marriage: choice, intimacy, dignity, and equality. It is a debate that comes squarely down on the side of marriage. Despite Brian's principled opposition, he nevertheless comes around to make sure that his best friend's nuptials are appropriately celebrated, throwing the couple a party.

The marriage episode was also a performance intended to produce a dichotomy between Canada the good and the United States the bad/regressive/hypocritical for its refusal to recognize the realness of Ben and Michael's marriage – the realness of all same sex marriages. Paradoxically, it was also a performance in the deterritorialization of marriage, namely, the idea that beyond borders, or in spite of borders, the marriage is/was real. All this despite the fact that it was not actually a real marriage, but a performance of a marriage.

Queer as Folk is not alone in the transnational cultural flows of cultural representations of same sex marriages. There are the wedding announcements in the *New York Times*, which often include a US couple married in Toronto. There was the issue of *Bride Magazine* that included a focus feature on same sex marriage. There are the endless human interest/news stories in print, cable, and digital media of US same sex couples getting married in Canada. It is not just same sex marriages that are migrating, but also the representations of these marriages that are migrating. These representations constitute a not insignificant intervention in the political, legal, and constitutional debates around same sex marriage, as they begin to reconstitute the very nature of the gay and

[56] Note 1 above.

lesbian subject, and the very nature of marriage. These representations are helping to shape the cultural landscape within which marriage and same sex marriage are given meaning; indeed, these representations are shaping the landscape within which the constitutionality of same sex marriage will be given meaning.

Comparative constitutionalism needs to broaden its lens to include a cultural studies dimension, to capture the ways in which culture shapes the constitutional landscape within which rights will be articulated. In the context of globalisation, this cultural studies dimension is required to allow attention to the transnational cultural flows of people, representations, and ideas. This broader lens allows us to see that notwithstanding the US hostility to constitutional borrowings, Canadian constitutional ideas about same sex marriage are migrating. However, they are doing so through the migration of marriages and through the migration of cultural representations of these marriages. It is these migrations that are producing a new imaginary. Gay men and lesbians are being reconstituted as legitimate sexual citizens, with a valid claim to the privileges of membership. Marriage is being reconstituted as an institution about stability, commitment, and choice, rather than religion and reproduction. And although both of these sets of ideas are contested, they are setting the stage for the constitutionalization of same sex marriage. Ideas about same sex marriage are migrating across jurisdictions, and they are influencing the development of constitutional ideas, but not quite in the way that comparative constitutionalism and its focus on doctrinal borrowings might imagine.

Conclusion

In the final scene, the *Queer as Folk* episode closes on newlyweds Michael and Ben having sex, with a lingering shot of the wedding bands on their fingers. A jarring punk version of *Over the Rainbow* plays in the background. Producer Lipman says of the scene:

> ... what happened was the music forced you to hear the song that you've heard a zillion times in a new way. The lyrics, what they're saying is 'somewhere over the rainbow, birds can fly, why can't I?' and what you're seeing is these two men who are married, who have rings. Basically, they are saying 'We are here, gay marriage is here and

> whatever happens, ultimately, you're going to have to recognize it, world.' And you look at that in a new way with the song.[57]

The scene is perhaps the most normalized gay sex ever represented – it is not only marital sex, it is the scene of consummation, the very thing that makes a marriage real, that transforms it from contract to status. In an extraordinary transformation of the representation of gay sex as promiscuous, threatening, disrupting the social order – here, in a double reversal, gay sex makes gay marriage real. Alongside the jarring music, the viewer is asked to re-imagine a world in which gay marriage simply is. It is this transformation of interpretative space, of the cultural meaning of gay and of marriage, that comparative constitutionalists must consider. Indeed, comparative constitutionalists may need their own 'Over the Rainbow' moment, through which they can look at themselves and their enterprise in a new way that recognizes the multiple ways in which constitutional ideas travel beyond and back again.

[57] T. Bone, 'Queer as Music', *Gay & Lesbian Times*.

PART III

Comparative constitutional law, international law and transnational governance

9

Inimical to constitutional values: complex migrations of constitutional rights

MAYO MORAN

Introduction

Even in the last stronghold of domestic law – the constitutional sphere – constitutional law is increasingly comparative and transnational in scope. The theory, however, is struggling to keep pace with this aspect of contemporary practice. In no small part this is because of how the use of comparative and transnational sources points up the poverty of the traditional account of sources of law and legitimacy. The traditional account of the sources of law and legal authority is highly spatialized – essentially positivistic in nature, it imagines mutually exclusive 'bodies' of rules, delineated in terms of both subject-matter and jurisdiction and presided over by a conflict-like adjudicative process.[1] According to this account, drawing sources from beyond any of the relevant borders inevitably raises questions of legitimacy. The concept of legal ideas 'migrating' is in this way inherently threatening to the traditional account. As long, however, as ideas from elsewhere appear in a purely persuasive guise, their invocation may have some semblance of consistency with the traditional account.

Recently, however, courts have been inclined to find that some non-binding legal sources, drawn from across traditional boundaries, may also give rise to a more demanding effect. So, legal rules that lack force or are not binding may nonetheless possess a kind of mandatory effect that cannot be explained as persuasive authority. This is apparent in many

[1] I discuss the spatialized conception of this account in Shifting Boundaries: The Authority of International Law in *New Perspectives on the Divide between National and International Law* (forthcoming). My thinking about the significance of the geographical imagination for legal theory owes much to S. Waddams, *Concepts and Categories: Dimensions of Private Law* (Cambridge University Press, Cambridge, 2003).

invocations of international and transnational law but it also appears elsewhere. However, the least controversial illustration of this 'influential authority' is found in the distinctive effect that constitutionalized human rights exert on private or common law. Thus courts commonly insist that while constitutionalized human rights do not apply directly to private or common law, they nonetheless exert a distinctive kind of mandatory effect that courts *must* respect in articulations of private or common law. And because this mandatory effect cannot be understood either in terms of binding decision rules or in terms of purely persuasive authority, it is a kind of migration that poses a fundamental challenge to the traditional balkanized account of legal authority. There is no more powerful illustration of this challenge than when these migrating values exert their most extreme effect – preventing the enforcement of formally valid rights in private common law.

Examining this estoppel-like effect thus provides important insight into an alternative account of legitimacy and authority in law and reminds us of the significance of that alternative for comparative and transnational law – indeed for any legal practice poorly rendered in the spatialized confines of the traditional account. In this sense then the migration of constitutional values into private law is vital to a fuller understanding of the transposition of norms across traditional doctrinal and jurisdictional boundaries. So we should not be surprised at the deeper connection it is also possible to observe between the migration of constitutional values into private law and the eroding significance of legal borders more generally. In this respect then it is no accident that domestic legal systems that embrace the significance of constitutional values for private law are also open to other kinds of migrations. And the United States provides a powerful illustration that the inverse also holds. There, the commitment to the view that legal authority is constituted by sharply delineated – according to subject-matter or jurisdiction – sets of mutually exclusive rules helps explain both the resistance to allowing that constitutional values exert any necessary effect on private law and the resistance to drawing on other kinds of legal resources across traditional jurisdictional borders.[2]

[2] Although I do not elaborate the point here, there is also arguably a relation between this and what a US conflicts scholar once described to me as the 'balkanized' terrain of private law which generates complex conflicts rules that apply between states.

Recognizing how constitutional law serves as a source of influential authority across the traditional public-private divide is thus integrally related to allowing that other non-binding legal resources – be they comparative, transnational, or international – exert a range of significant effects on domestic law. This is because, despite their many differences, these phenomena both partake of a view of legal authority that departs in vital ways from the rule-based preoccupations of the traditional account. And so, examining the estoppel-like effect that constitutional values can exert on private or common law helps to illuminate a particularly significant kind of migration and provokes us to imagine a more integrative account of legal authority.

Complex migrations: constitutional values within the domestic legal order

One of the pressing questions within contemporary constitutional orders has been how to understand and construe the relationship between the constitutional order and the rest of the legal system. This question – or rather set of questions – has grown in contemporary importance, in part perhaps because of recent processes of constitutionalization in a number of jurisdictions. Thus, courts in jurisdictions such as Canada, South Africa, Germany, and Great Britain, to name but a few, have puzzled over a set of questions about the relationship between the constitutional order and the rest of the legal system. And in so doing, of course, the much older approach in the United States serves as one very important element of the analysis. In order to explore this issue and its larger theoretical significance for trans-boundary legal analysis, I will begin by exploring the approach to the constitutional-private law relation that newly constitutionalized democracies are increasingly adopting. And their deliberations on the matter, as it turns out, are themselves characterized by deep engagement with comparative and transnational legal resources. I then contrast this approach with that taken in the United States. This contrast makes it possible to glean some deeper lessons about the underlying conceptions of legal authority. And these lessons play out in significant ways in the ability of a legal system to draw on resources from beyond the spatial and doctrinal confines that are so central to the traditional account. However, before we examine the nature of the

traditional account, let us examine the emerging conception that is more hospitable to the concept of migrations of legal resources and ideas.

The influential authority of constitutional values

As noted above, there is a sharp divide between common law jurisdictions that hold that constitutional law exerts a distinctive kind of effect on private law and those that do not. In contrast with the United States, which adopts the latter position, recently constitutionalized regimes such as those found in Canada, South Africa, and, to some degree, the United Kingdom have adopted the view that constitutional rights generate the kind of distinctive demands that I have termed influential authority. Let us briefly examine how this has manifested itself before turning to its most extreme manifestation – the estoppel effect.

In countries such as Canada and South Africa, the recent cases concerning the relation between the constitutional order and the rest of the legal system are explicitly and quite deeply comparative, often engaging in detailed analysis of the approaches taken by other jurisdictions. Moreover, the theoretical and scholarly literature is, if anything, even more comparative than the jurisprudence.[3] Thus, courts and commentators draw on a transnational judicial and academic

[3] On this debate generally see e.g. L. Weinrib and E. Weinrib, Constitutional Values and Private Law in Canada in D. Friedmann and D. Barak-Erez (eds.), *Human Rights in Private Law* (Hart Publishing, Oxford, 2001), p. 43; Justice A. Barak, Constitutional Human Rights and Private Law also in *Human Rights in Private Law*; M. Moran, Authority, Influence and Persuasion: *Baker*, Charter Values and the Puzzle of Method in D. Dyzenhaus (ed.), *The Unity of Public Law* (Hart Publishing, Oxford, 2003). The issue has received very significant attention in the United Kingdom, in particular: M. Hunt, The 'Horizontal Effect' of the Human Rights Act [1998] *Public Law* 423–43; G. Phillipson, The Human Rights Act, 'Horizontal Effect' and the Common Law: A Bang or a Whimper? (1999) 62 *Modern Law Review* 824; N. Bamforth, The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies (1999) 58 *Cambridge Law Journal* 159; R. Buxton, The Human Rights Act and Private Law (2000) 116 *Law Quarterly Review* 48; W. Wade, Horizons of Horizontality (2000) 116 *Law Quarterly Review* 217; J. Morgan, Questioning the 'True Effect' of the Human Rights Act (2002) 22 *Legal Studies* 259; N. Bamforth, Understanding the Impact and Status of the Human Rights Act 1998 within English Law, *NYU Hauser Global Research Papers*, 2004. As discussed below, even in the United States, both comparativists and mainstream commentators have found it profitable to look beyond their own jurisdiction. Mark Tushnet's work is relevant here but perhaps the best example is found in Stephen Gardbaum's article: The 'Horizontal Effect' of Constitutional Rights (2003) 102 *Michigan Law Review* 387; M. Tushnet, The Issue of State Action/Horizontal Effect in Comparative Constitutional Law (2003) 1 *International Journal of Constitutional Law* 79.

conversation in order to forge responses within domestic constitutional orders. This basic problematic in these cases concerns the relationship between constitutional rights and private or non-constitutional law and it implicates methodological questions that frequently but not invariably overlap with substantive ones.[4] In the common law jurisdictions that are the primary focus of this chapter, the most important methodological question concerns the relationship between the constitutional regime and common or judge-made law. Substantively, the most difficult questions revolve around the relationship between constitutional law and the law governing private relations. In many common law jurisdictions these issues overlap because private law tends to have a common law source.[5] In order to provide a sketch of the general position that these constitutional orders have taken on the question of the relations of the constitutional order to the rest of the legal system, I will not focus on these questions but simply note that in fact there is considerable complexity in the question itself.

Although the question of the relation between a constitutional regime and the rest of the legal system is not a new one, it has lately gained prominence. In part this is due to the recent expansion of a distinctive form of constitutionalism that views the constitution as composed of both distinct rights that individuals can assert against the state and a set of interconnected substantive values which manifest their effect throughout the legal system. This is certainly most clearly articulated in the German model but also runs through the family of rights-protecting documents that came into being in the aftermath of the Second World War.[6] One noteworthy feature of this system is found in its conception of the way that constitutional values 'radiate' throughout the rest of the legal system. The idea that non-binding sources of law may exert a distinctive kind of mandatory force certainly did not spring into being with post-War constitutionalism. Nonetheless, it does serve as the

[4] Because of the relative paucity of cases to date, the differing answers that might be given to these various questions tend not to be disentangled. This is particularly true of the questions that implicate both private and common law. For an insightful analysis of the many different questions implicated in the rubric of horizontal effect, see Gardbaum, Horizontal Effect.

[5] There are many counter-examples here, including South Africa, in which private law is largely civilian and codified, as it is in Quebec, Louisiana, and elsewhere.

[6] For a discussion of the post-War model see Lorraine Weinrib's contribution to this volume, The Postwar Paradigm and American Exceptionalism.

most doctrinally explicit example of the phenomenon. And while the idea of the influence of mandatory values can be traced back through older cases on public policy,[7] the constitutionalized source of these 'new' mandatory values gives added strength and legitimacy to that much older idea.

The view that has generally been accepted by courts in Canada, the United Kingdom, and South Africa is that constitutional human rights do not generally apply directly to private interactions between purely private parties nor to common law directly.[8] So individuals cannot recover damages against other individuals acting in a private capacity by claiming violations of rights to freedom of expression or equality. Instead, constitutionalized human rights matter to private relations in a rather different way. They may, for instance, affect the appropriate scope of the private law causes of action. Thus, courts in Canada, the United Kingdom, and South Africa have all considered the impact of the law of libel and defamation on the right to freedom of expression where the allegations of libel or defamation concern public figures.[9] It is up to courts, they all insist, to ensure that the private law of libel and defamation is developed in light of the overarching importance of the constitutional guarantee of freedom of expression. A similar approach is also apparent elsewhere. For instance, the House of Lords ruled that the right to privacy under the European Convention on Human Rights (Art. 8) was relevant to the law of confidence and privacy. Though the Convention right was not directly applicable, it did give rise to a 'reasonable expectation of confidence' that expressed itself through the traditional cause of action in private common law.[10] Similarly, the right to equality may be relevant to determining the kinds of agreements a

[7] I discuss this effect in detail in Influential Authority and the Estoppel-Like Effects of International Law in H. Charlesworth, M. Chiam, D. Hovell, and G. Williams (eds.), *The Fluid State: International Law and National Legal Systems* (Federation Press, Annandale, 2005).

[8] See e.g. *RWDSU* v. *Dolphin Delivery* [1986] 2 SCR 573, SCC and *Hill* v. *Church of Scientology of Toronto* [1995] 2 SCR 1130, SCC in Canada; *DuPlessis* v. *De Klerk* (1996) (3) SA 850, CC in South Africa; *Campbell* and *Douglas and Zeta-Jones* v. *Hello! Magazine* [2001] QB 967, CA in the UK. There are of course some common law jurisdictions that do not follow this approach, including most prominently the Republic of Ireland where the Constitution itself provides that constitutional rights may be the basis of a direct cause of action.

[9] See e.g. *Hill*. In other jurisdictions, see *DuPlessis* v. *De Klerk*; *Douglas and Zeta-Jones*; *A v. B* [2003] QB 195, CA. The foundational case here is of course the US Supreme Court decision in *New York Times* v. *Sullivan*, 376 US 254 (1964).

[10] *Campbell* v. *MGN Limited* [2004] UKHL 22, HL.

court might be called upon to enforce or the form of deference extended to the exercise of political choices by public authorities.[11]

In such cases, constitutional rights do not validate or invalidate the relevant legal acts because they do not directly apply – they have no *force* in the realm of private or common law. And since the traditional view equates force and effect, this ought to mean that these rights also lack effect. But the constitutional rights/private law cases make it clear that the traditional equation between force and effect is by no means inevitable. In fact, the absence of force and presence of effect is constitutive of the relationship between constitutional human rights and private common law. Thus it is not simply that it is open to judges to look to such rights if it seems significant or useful. As Baroness Hale noted in *Campbell*, courts not only can but *must* look to constitutionalized human rights in elaborating private common law. So the rubric of persuasive authority is not apt because rather than simply granting judges the *power* to look to them when elaborating private common law, such rights actually impose an *obligation* to do so. As I have argued elsewhere, it is for this reason that the relationship between constitutionalized human rights is best conceptualized as the paradigmatic example of a distinct 'influential' form of authority.[12]

But if the obligations that such rights impose on private and common law adjudication do not take the form of a 'rule' dictating an outcome, then how are they manifest? The mandatory quality of influential authority does distinguish it from purely persuasive authority but they also share an important feature: both operate in the relatively open-textured processes of deliberation and justification. What influential authority demands is that the influential source be respected, attended to, and considered in decision-making and justification.[13] Further, since constitutional rights are not directly implicated when their authority is influential, it is not constitutional *rights* but constitutional *values* that necessarily influence the shape of private and common law. So when constitutionalized human rights exert

[11] *Canada Trust Co.* v. *Ontario Human Rights Commission* (1990) 69 DLR (4th) 321, Ont. CA; *Jane Doe* v. *Toronto (Metropolitan) Commissioners of Police* (1989) 58 DLR (4th) 396, Ont. Gen. Div.

[12] Moran, Authority, Influence and Persuasion.

[13] Though these are not best conceived as watertight categories, for even notionally persuasive sources may exert themselves in a fashion that approaches the insistence of influential authority and the like.

influential authority on private or common law, what they demand is attentiveness to and respect for the core or fundamental values of that constitutional order. Thus while legal resources often appear as applicable decision-rules, the constitutional-private law relation draws our attention to the fact that this does not exhaust the range of their possible effects. These effects, as that relation illustrates, may also extend well outside the force field of direct application, giving rise to mandatory values that decision-makers in the legal system *must* respect. And it is this disaggregation of force and effect that threatens the traditional picture's exclusively rule-based doctrine of sources, in the process eroding the borders that are so vital to its account of legitimacy.

The outer limit: the estoppel-like effect of constitutional values

The influential authority of constitutionalized human rights typically plays out as the requirement that courts interpret other law in a manner that maximises consistency with fundamental constitutional values.[14] So the openness of private common law, especially but not exclusively in its explicit invocation of 'value terms' like reasonable, legitimate, and unjust, must be construed to give maximum effect to the values of constitutional human rights.[15] And in many cases this is sufficient to ensure the foundational normative consistency that the constitutional order requires. However, courts are also occasionally confronted with cases in which no plausible interpretive strategy will avoid conflict with the fundamental values of constitutionalized human rights. This has arisen in cases where courts have to consider whether they can enforce racially discriminatory terms of private agreements, such as racially restrictive covenants or discriminatory trusts. Across varying jurisdictions, contemporary courts typically refuse to enforce such private arrangements. But the cases are seen as rather puzzling. However, recognizing the basic estoppel-like

[14] Moran, Authority, Influence and Persuasion, pp. 418–25, discussing *Hill* v. *Church of Scientology of Toronto* and *De Klerk* v. *Du Plessis*.

[15] Barak, Constitutional Human Rights, p. 11. Dyzenhaus stresses a similar point regarding the fundamental values that together constitute what Fuller called the 'internal morality of the law': D. Dyzenhaus, The Juristic Force of Injustice in D. Dyzenhaus and M. Moran (eds.), *Calling Power to Account: Law, Reparations and the Chinese Canadian Head Tax Case* (University of Toronto Press, Toronto, 2005), ch. 11. For the implications of this for view for the meaning of 'reasonableness', see M. Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press, Oxford, 2003).

structure of the effect of constitutional values on private law yields insight, not only into the cases themselves but also into just how and why norms migrate, both within legal systems and beyond their borders.

Controversies over the extent to which courts should enforce private arrangements that seem to cut against core legal values are by no means new. Nor, it should be noted, are the 'core legal values' themselves stable and unchangeable, at least if one looks to judicial articulations of that idea.[16] Racist private agreements were generally viewed as enforceable well into the twentieth century. Following the end of the Second World War, however, courts in common law countries at least began to question whether they could continue blandly to enforce such agreements. Thus across several common law jurisdictions, courts were confronted with the prospect of implicating themselves in the enforcement of discriminatory private agreements. As will be discussed below, the US Supreme Court decision in *Shelley* v. *Kraemer* can thus profitably be understood as part of a larger context of judicial repudiation of involvement in discrimination.

It is useful to begin by briefly examining the much older estoppel-like idea which common law courts invoked when they insisted that they could not give their imprimatur to certain kinds of acts, notwithstanding their formal validity. Because estoppel goes to the question of whether rights can be enforced rather than to whether they exist, it is often described as 'a shield not a sword'. So estoppel bars the enforcement of rights, but neither necessarily entails the denial of the relevant rights nor

[16] The nineteenth century, for instance, witnessed significant change in the attitude to separation agreements. Where once such agreements were viewed as contrary to public policy, courts came around to the view that even if divorce were undesirable, quiet settlement was preferable to the scandal that attended public suits: Waddams, *Dimensions of Private Law*, p. 200. Similarly, when racial discrimination was the norm, courts routinely enforced racially discriminatory contracts and wills: *ibid.*

And even while judicial enforcement of private racial discrimination was being called into question, sex discrimination continued to be treated as unproblematic and remains a matter of uncertainty in some jurisdictions at least. This is particularly the case in the United States, perhaps due to the complex status of sex discrimination under the Fourteenth Amendment's Equal Protection Clause. The issue has had particular salience in trust law: K. Voyer, Continuing the Trend Toward Equality: The Eradication of Racially and Sexually Discriminatory Provisions in Private Trusts (1999) 7 *William & Mary Bill of Rights Journal* 943; J. Colliton, Race and Sex Discrimination in Charitable Trusts (2003) 12 *Cornell Journal of Law and Public Policy* 275. Indeed, it is striking that in an important English case on racist charitable trusts that I shall discuss presently, *Re Lysaght*, the court struck out the clause that limited eligibility for medical scholarships to those 'not of the Jewish or Roman Catholic faith' but did not even consider nor apparently hear argument on the restriction of the scholarships to students 'of the male sex': [1966] Ch 191, Ch D.

serves as the basis of an action on its own.[17] It is based on the court's inherent power to prevent misuse of its procedure and is typically invoked in two general types of situations.[18] The most common form of estoppel arises when something in the relationship between the parties makes it unfair to enforce strict legal rights. Promissory estoppel is perhaps the most prominent illustration of this 'bilateral' form of estoppel. More relevant here, however, is the second general category of 'institutional' estoppel cases. In these cases, the enforcement of legal claims is barred not because of the interaction between the parties but because of the integrity of the legal system. So estoppel may also arise when the enforcement of strict legal rules threatens to bring 'the administration of justice into disrepute'.[19] This is the reason why a hit man could not sue for enforcement of a contract to kill someone.[20] Courts in such cases tend to rely on a 'limiting', essentially estoppel-like, use of public policy to justify refusing to enforce the strict terms of such a contract, however perfect the compliance with formalities.

As noted above, during the period after the Second World War, courts in the common law world started to hold that they could not simply enforce racist agreements. Thus, in the contractual setting, courts began to refuse enforcement of racist agreements such as restrictive covenants, typically on the ground that they were contrary to public policy. And in the charitable trust context, courts employed venerable doctrinal resources in a new way when they began to strike out racist provisions on the ground that enforcement of them would be impossible. And in these early cases we see courts beginning to take apart the force of legal rules and their effect and to shift away from positivist conceptions of authority.

The estoppel effect and the erosion of the traditional picture: common law origins

An early British example of the changing attitude to enforcing racist private agreements is found in *Re Dominion Students Hall Trust*.[21] That

[17] 28 *American Jurisprudence 2d* (West, Eagan, MN, 2000), Estoppel and Waiver § 1.
[18] *Hunter* v. *Chief Constable of the West Midlands* [1982] AC 529, HL. [19] *Ibid.* at 536.
[20] See for instance M. Furmston (ed.) *Cheshire, Fifoot and Furmston's Law of Contract* (14th edn, Butterworths, London, 2001), pp. 405–410; S. Waddams, *The Law of Contracts* (4th edn, Canada Law Book, Toronto, 1999), pp. 399–416.
[21] [1947] Ch 183, Ch D.

case involved a restriction that prevented non-white students from residing in a hostel for students from the dominions. Evershed J struck out the colour bar, finding that the word 'impossible' should be given wide significance in this context. The later case *Re Lysaght*[22] comes closer to acknowledging the special problems posed by racist trusts. It involved scholarships to the Royal College of Surgeons of England restricted to male, British-born subjects who were not Catholic or Jewish. Buckley J does note that racial and religious discrimination is now 'widely regarded as deplorable', but this is not in his view sufficient to make it contrary to public policy.[23] Here, however, the trustees were 'unalterably opposed' to carrying out the religious discrimination. So because the discriminatory gift would fail, he concludes that the insistence on discrimination must be struck. But he does acknowledge that ordinarily if a trustee objects to carrying out the terms of the trust either new trustees will be appointed or the trust will fail. The court's unwillingness to adopt either of these courses reflects the fact that only the background unacceptability of discrimination can explain the court's refusal to follow the ordinary rules of trusts.[24]

Against this backdrop of rather oblique reasoning in charitable trust cases, the 1945 decision of the Ontario High Court in *Re Drummond Wren* seems remarkable.[25] In that case, Mackay J concluded that a racially restrictive covenant that prohibited the transfer of the subject land 'to Jews, or to persons of objectionable nationality' was void because it was contrary to public policy.[26] This estoppel-like effect arises, he suggests, when the court is faced with enforcing any agreement which is 'against the public good'.[27] In contrast with the English trust decisions, *Drummond Wren* is unusually candid both about the estoppel-like role of public policy and about the sources that infuse public policy. Mackay J's reasoning suggests that in addition to enshrining discrete rights and

[22] Above note 16. [23] *Ibid.*, at 206.

[24] Indeed, it is telling that it is controversial to allow a trust to fail rather than to operate in a non-discriminatory manner. An example is found in *Evans* v. *Abney*, 396 US 435 (1970) in which a divided US Supreme Court upheld the Georgia court's refusal to reform a racist trust with the result that the property reverted to private ownership. *Evans* is the exception, however, for like the cases discussed in the text, most courts allow trusts to continue in existence, in essence by refusing to construe racism as a paramount intention of the testator: see e.g. Colliton, Race and Sex Discrimination, 280; *Canada Trust*, discussed below.

[25] [1945] 4 DLR 674. [26] *Ibid.*, at 675.

[27] *Ibid.*, at 676, quoting 7 *Halsbury* (2nd edn, Butterworths, London, 1932) pp. 153–4.

obligations, the legal system is also committed to certain mandatory values which therefore figure in, amongst other things, what kinds of private agreements a court can enforce. And in identifying the mandatory values which the court is bound to respect, Mackay J draws on non-binding legal norms as vital sources. The complexity of these migrations is apparent in the fact that in identifying the sources of public policy Justice Mackay begins with the San Francisco Charter, which Canada had signed and ratified. He quotes the preamble on the 'dignity and worth of the human person' along with the articles which pledge universal respect for all 'without distinction as to race, sex, language, or religion'.[28] He also notes the similar terms of the Atlantic Charter. He then turns to domestic sources which, he explicitly acknowledges, lack force. They are relevant he insists because of how they infuse the meaning of public policy.[29] It is on this basis that he reasons that a racist contract cannot be enforced because it offends the most fundamental commitments of the contemporary legal order. And he arrives at this conclusion by drawing together legal norms and other sources across traditional doctrinal and jurisdictional boundaries. *Drummond Wren* thus illustrates the interconnectedness of these various kinds of migrations: the implicit rejection of the underlying positivism of the traditional picture is what makes possible both the frank acknowledgement of the effect that public values have on private law and simultaneously enables the much more expansive doctrine of sources apparent in the reasoning on public policy.

Given the way that these interrelated aspects of *Drummond Wren* challenge the traditional conception of legal authority and binding law, one would have forecast a tumultuous legacy. And in the 1949 decision in *Re Noble and Wolf*, a unanimous Ontario Court of Appeal did uphold a very similar racially discriminatory covenant and in so doing, reasserted a much more balkanized picture of law.[30] In fact, *Noble and Wolf* rejects *Drummond Wren*'s reasoning precisely because of the rebuke it poses to the traditional doctrine of sources. For instance, Hogg JA complains that the international law sources 'do not seem to have been made a part of the law of this country'.[31] In a repudiation of any reliance on migration, he insists that '[t]here can be no justification for expanding the principles of public policy in this country by reference to the public policy of

[28] *Ibid.*, at 677. [29] *Ibid.*, at 674, 677. [30] [1949] 4 DLR 375, Ont. CA. [31] *Ibid.*, at 399.

another country'.[32] And this 'applies as well to the principles and obligations set forth in international covenants or charters, such as the United Nations Charter, until such time as they should be made a part of the law of the land'.[33] Yet history has vindicated *Drummond Wren*, not the traditional spatialized conception of *Noble and Wolf*.[34]

Constitutionalized public policy estoppel: *Canada Trust*

In these early cases concerning racist private acts, courts had to rely on common law tools such as public policy to draw in the values of the larger legal system. As we have seen, even in these cases, the underlying nature of the reasoning is premised on some move away from the traditional account of legal authority. This is apparent both in the idea that legal rules in certain circumstances emanate a kind of value that is not attributable solely to their binding force and in the doctrine of sources that similarly disaggregates binding force and mandatory effect. *Drummond Wren*, as we have seen, provides a powerful illustration of both of these elements and reminds us of their interconnection. Indeed, in that case Mackay J specifically notes a potential link between his use of public policy and the effect of constitutionalized rights. And as it turns out this link was powerfully illustrated in a post-constitutional Canadian case which develops the kind of complex cross-border reasoning that we saw at work in *Drummond Wren*.

In *Canada Trust Co* v. *Ontario (Human Rights Commission)*,[35] post-Charter Ontario courts had to consider the contemporary validity of the 'Leonard Foundation Trust', an explicitly racist charitable trust established in 1923. The trust provided educational scholarships but excluded from its benefit those who were 'not Christians of the White Race'. It was formally valid and had been in operation for many decades. However, when it finally came before the courts, the primary question was whether its terms violated public policy. When it was set up in 1923, the terms 'would have been held to be certain, valid and not contrary to any public policy'.[36] The trial judge held that since the trust suffered from

[32] *Ibid.*, at 399, quoting *Fender* v. *St John-Mildmay* [1938] AC 1 at 25, HL.
[33] *Ibid.*, at 375, 399.
[34] See e.g. G. van Ert, *Using International Law in Canadian Courts* (Kluwer Law, The Hague, 2002), at pp. 278–9.
[35] (1990) 69 DLR (4th) 321, Ont. CA. [36] *Ibid.*, at 336.

no positive defect at the time of its formation, it must be upheld as valid. However, the Ontario Court of Appeal unanimously held that when a settlor asks a court to enforce a trust, that enforcement is limited by '*current* principles of public policy under which all races and religions are to be treated on a footing of equality'.[37] And once again public policy is the product of complex migrations across doctrinal and jurisdictional boundaries – it is 'gleaned from a number of sources, including provincial and federal statutes, official declarations of government policy and the Constitution'.[38] So the Court draws on the provincial human rights code, other legislation and policy, and especially the provisions of the Charter that guarantee equality rights and multiculturalism. Moreover, it links these to international instruments, citing the International Covenant on Civil and Political Rights (ICCPR),[39] the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[40] and the Convention on the Elimination of All Forms of Discrimination against Women.[41] And like *Drummond Wren*, Tarnopolsky JA explicitly states that these sources are being invoked for their influential authority, not as decision-rules. So public policy, even in its estoppel-like posture, is infused with values from domestic constitutional law and from international law which the court must respect, even to the point of denying enforcement of certain kinds of private arrangements. In this sense then, *Canada Trust* represents the logical conclusion of the reasoning in *Drummond Wren* under a constitutional regime. And the clear power of constitutional values to exert a demanding effect notwithstanding a lack of force lends added legitimacy to a particularly important kind of cross-border normative travel and thus signals the decline of the traditional picture. And it is largely this that makes possible another set of cross-jurisdictional conversations about the influence of constitutional values. Before examining the shape these conversations take in contemporary South Africa, however, let us briefly examine the

[37] *Ibid.*, at 335 (Robins JA) (emphasis added). [38] *Ibid.*, at 351.

[39] International Covenant on Civil and Political Rights, New York 16 December 1966, in force 23 March 1976, 999 UNTS 171.

[40] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, in force 4 January 1969, 660 UNTS 195.

[41] Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, in force 3 September 1981, 1249 UNTS 13.

counter-image represented by the US experience as it has played out in the legacy of the important decision in *Shelley* v. *Kraemer*.

The traditional paradigm: the legacy of *Shelley* v. *Kraemer*

In 1948, three years after *Drummond Wren* was decided, the US Supreme Court was confronted with a similar but more egregious case involving racially restrictive covenants. The cases, which were joined at the Supreme Court, involved neighbours who sought to prevent the sale of property to black purchasers or who sought the eviction of black property owners. Chief Justice Vinson noted that unlike ordinary restrictive covenants, these covenants 'are directed toward a designated class of persons', a class 'defined wholly in terms of race or color'.[42] Equality in the ownership and enjoyment of property, he also pointed out, was an essential pre-condition to the realization of other basic rights which the Fourteenth Amendment was designed to protect.[43] Nonetheless, since the Amendment like the rest of the constitution is directed only to state and not private action, the Court concludes that 'the restrictive agreements standing alone cannot be regarded as a violation' of any Fourteenth Amendment rights. Thus, for instance, to the extent that compliance with the restrictive covenants is accomplished by voluntary adherence, the Fourteenth Amendment cannot reach it. Here, however, the purposes of the agreements were secured by judicial enforcement by state courts. In each case, Chief Justice Vinson notes, the judicial enforcement of the restrictive covenants through the common law of the states 'bears the clear and unmistakable imprimatur of the State'.[44] So the Supreme Court finds that the Fourteenth Amendment prevented state enforcement of racially restrictive covenants.

Though *Shelley* understandably focuses on the constitutional reasons for disallowing judicial enforcement of racist agreements, the deep links to common law public policy estoppel are apparent in its companion case, *Hurd* v. *Hodge*.[45] In that very similar situation, the Supreme Court held that federal courts could not enforce racially restrictive agreements notwithstanding the inapplicability of the Fourteenth Amendment. In his reasons, Vinson CJ stated that not only would such enforcement deny rights protected by the Civil Rights Act 1866, it would also 'be contrary to

[42] 334 US 1 (1948) at 10. [43] *Ibid.*, at 10. [44] *Ibid.*, at 20. [45] 334 US 24 (1948).

the public policy of the United States'. This conclusion rests on the fact that '[t]he power of the federal courts to enforce the terms of private agreements is at all times subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes and applicable legal precedents'.[46] So *Hurd* is actually the first case which explicitly infuses public policy with the underlying principles and values of the constitutional order. In this it forms a link between the purely common law approach of *Drummond Wren* and the constitutionalized approach in *Shelley*. And the estoppel-like nature of this understanding of public policy (paralleling *Drummond Wren*) is apparent in the conclusion this demands: 'Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.'[47] As we shall see, however, the underlying basis of this approach has since been repudiated, at least insofar as it concerns the effect of constitutional imperatives on private law.

Given that *Shelley* drew on the authority of the Fourteenth Amendment as its justification for refusing to order enforcement of the racially restrictive covenant, one might have expected that the kind of migration that it contemplates would be relatively unproblematic, particularly in contrast with the much more fluid conception of boundaries and sources contemplated in *Drummond Wren*. Yet *Shelley* is routinely described as one of the most troublesome and controversial US constitutional law cases,[48] 'a conceptual disaster area'.[49] In fact, as Stephen Gardbaum notes, 'the Court seems to have affirmed the consensus opinion among mainstream commentators that *Shelley* should be confined to its facts'.[50] It is, in essence, viewed as a mistake.

The post-*Shelley* treatment of racially discriminatory charitable trusts is illustrative. In the United States no court since 1975 has upheld a racially discriminatory charitable trust.[51] Indeed, parties themselves are generally unwilling to argue for the validity of the discriminatory

[46] *Ibid*., at 34–5. [47] *Ibid*., at 35.

[48] R. Epstein, Classic Liberalism Meets the New Constitutional Order: A Comment on Mark Tushnet *Essay* (2002) 3 *Chicago Journal of International Law* 455 at 459.

[49] For the classic critique, see C. Black, Foreword: 'State Action', Equal Protection and California's Proposition 14 (1967) 81 *Harvard Law Review* 69 at 95. More recently, Stephen Gardbaum has described *Shelley* as 'easily the Court's most controversial state action case': Gardbaum, Horizontal Effect, 414. See also, Tushnet, State Action/Horizontal Effect.

[50] Gardbaum, Horizontal Effect, 414. [51] Colliton, Race and Sex Discrimination, 276.

provisions.[52] But the difficulty of finding a justification for the refusal to enforce such trusts reflects both the uneasy status of *Shelley* and deeper related hesitation about the implications of the Fourteenth Amendment for private law. Thus, in the absence of administration by public trustees, US courts often look back to the old tools of trust law like impossibility or impracticability. For instance, in *Coffee* v. *William Marsh Rice University*,[53] the founding documents specified that the university was for the benefit of 'white inhabitants' of Texas. Eventually, however, the trustees of the university asked to be able to admit students without regard to colour. The Court of Civil Appeals for Texas upheld a jury verdict in favour of this use of the *cy-près* doctrine, noting that it would be 'impossible or impractical' for a university to engage in racial discrimination. Similarly, in other cases courts point to 'social change' and associated legal change as the reason why they cannot, for instance, enforce racial housing restrictions in charitable trusts.[54] In fact, recent cases actually seem more reluctant to invoke the background effect of the Fourteenth Amendment than older ones.[55] And while courts do point to public policy as an important reason why racist restrictions on charitable trusts cannot be upheld, they are strikingly timorous about looking to the Fourteenth Amendment of the Constitution as an important source of the values that infuse public policy.[56]

Thus, the US context reveals the unwillingness to allow that constitutional values migrate, even into the domain of private law. In this, the approach more closely resembles *Noble* v. *Wolf* than *Drummond Wren*. Though some of the difficulties may be due to how *Shelley* described the relationship between the Fourteenth Amendment and private law, the Court's actual reasoning is compatible with a range of possibilities. Indeed, it seems arguable that the legacy of *Shelley* reveals as much about the persistence of the traditional picture of legal authority as it does about the actual reasoning in the case. And though it is beyond the purview of this chapter, one important illustration of this is found in

[52] *Ibid*., at 287. [53] 408 SW 2d 269 (Tex. Civ. App.1966).

[54] *Colin McK. Grant Home* v. *Medlock*, 349 SE 2d 655 (SC App. 1986) referred to in Colliton, Race and Sex Discrimination, 284.

[55] Compare e.g. *Home for Incurables of Baltimore City* v. *University of Maryland Medical System Corporation*, 797 A 2d 746 (Md. 2002) with *Bank of Delaware* v. *Buckson*, 255 A 2d 710 (Del. Ch. 1969).

[56] See e.g. *Home for Incurables, ibid.*

the more general resistance of US courts to foreign and to international materials. Indeed, this resistance has become an important theme of academic commentators both inside and outside the United States. Thus commentators have noted the extent to which the United States is increasingly out of step with the robust judicial engagement with foreign and international materials that prevails elsewhere.[57] These debates are also prominent in the Supreme Court itself. At the same time that other countries around the world are treating international law, whether formally binding or not, as an important source for domestic law, the Supreme Court is divided over whether it is ever appropriate to give weight to foreign law or to non-binding international law.

An illustration can be found in the recent decision in *Roper* v. *Simmons*, which concerned the constitutionality of the imposition of the death penalty on juveniles. A majority of the Court found that the juvenile death penalty violated the Eighth and Fourteenth Amendments. The Court was presented with extremely strong arguments based on the use of foreign and international sources. And while the majority did give some weight to such sources, the terms on which it did so are strikingly timorous. The stark reality, the majority points out, is that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.[58] It is fair to say, the majority states, that the United States now stands alone in a world that has turned its face against the juvenile death penalty.[59] Despite this, however, the majority is cautious, even defensive about the use of the foreign or international materials. It is careful to note that such sources are 'not controlling', a clear declaration that despite reference to cross-border sources, they too are still committed to the traditional spatialized account of sources. Indeed, the dominance of this traditional account on the Supreme Court, at least, is evident in the fact that the majority feels moved to insist that referring to foreign or international materials does not 'lessen our fidelity to the Constitution'.[60]

[57] See e.g. Madam Justice L'Heureux-Dube, The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court (1998) 34 *Tulsa Law Review* 15; V. Jackson, Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on 'Proportionality,' Rights and Federalism (1999) 1 *University of Pennsylvania Journal of Constitutional Law* 583.

[58] *Roper* v. *Simmons*, 543 US 551 (2005). [59] *Ibid.* [60] *Ibid.*, at 28.

Much more could be cited in support of this thesis but the basic point is clear. The fidelity to the traditional account of legal authority that has made the legacy of *Shelley* so troubling and controversial in the United States also provokes hostility to other kinds of boundary-crossings. So underlying both the resistance to foreign and international law and the refusal to allow that constitutional imperatives have any significance beyond the 'force field' of their direct application is the old balkanized picture of legal authority. The same rule-focused account of authority that seems to make unthinkable the most plausible account of *Shelley* – that constitutional rights exert distinctive demands on private law – also helps to explain the resistance to foreign and international sources that do not impose decision-rules on US courts. It is telling in this sense that while *Shelley* is seen as a mistake at home, it is viewed as uncontroversially correct in many other jurisdictions that look to the United States debate. Nor is it surprising that the debate on the legacy of *Shelley* in the United States is remarkably internal even while other similar constitutional orders struggle with exactly the same question. In stark contrast to the US approach, however, the terms on which these other jurisdictions do so are noteworthy for how attentive they are to the deliberations of courts and commentators in other similar systems. Here too we see the link between these apparently unconnected kinds of migrations, a link that ultimately implicates the underlying conception of legal authority.

The South African example: border crossings in *De Klerk*

There is perhaps no better illustration of this link and its underlying theoretical significance than is found in the decision of the Constitutional Court of South Africa in *De Klerk* v. *Du Plessis*.[61] *De Klerk* represents the rejection of the traditional spatialized account of legal authority and a significant shift towards a more integrative understanding. In no small degree this is apparent in the fact that borders, both doctrinal and jurisdictional, are conceived in a very different way than in the traditional spatialized account. *De Klerk* thus provides a particularly powerful illustration of what we saw in the above cases that concern the influential authority that constitutional rights exert over private law. Indeed, it is

[61] (1996) 3 SA 850, CC.

particularly explicit in *De Klerk* that the same shift away from the spatialized picture of legal authority that makes it possible to conceive of the influential authority of constitutional rights also opens up a whole variety of other doctrinal and jurisdictional boundaries.

De Klerk concerned whether the constitutional guarantee of freedom of expression could serve as a defence to a defamation action. Because of the timing of the relevant publications, the case raised questions about the retroactivity of constitutional guarantees as well as about the 'horizontal' application of constitutional rights to private actions. The Court held that the operation of the Constitution was not retroactive or retrospective. A majority also held that constitutional rights did not apply horizontally, that is, directly to private relations.[62] But the opinions explicitly note that these conclusions about the temporal and doctrinal scope of the Constitution are subject to precisely the kind of estoppel-like limits at work in *Canada Trust*, *Drummond Wren*, and of course the US case of *Shelley* v. *Kraemer*.[63] Indeed, a number of the judges describe the existence of these estoppel-like limits as vital to their conclusions on retroactivity and horizontality. And the limits they describe are strikingly similar to the estoppel-like effect that we saw at work in *Canada Trust*, *Drummond Wren*, and *Shelley*, as well as *Hurd*. Thus, for instance, after concluding that the Constitution is not retrospective, Kentridge AJ continues:

> But we leave open the possibility that there may be cases where the enforcement of previously acquired rights would in the light of our present constitutional values be so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis.[64]

Mahomed DP is even more insistent on these estoppel-like limits, explicitly noting that he 'would emphasize' this qualification. Indeed, for him the common law would simply 'fossilize' the unfair privilege of the past were it not for the capacity of public policy to preclude judicial enforcement of certain legal claims.[65] This is simply part, he suggests, of a much broader effect which ensures that the common law is revitalised by the infusion of constitutional values. Ackermann J also addresses the worry about perpetuation of the invidious past in similar terms, noting

[62] *Ibid.*, at para. 98. Justice Kreigler dissented on this point. [63] Above note 42.
[64] *De Klerk*, para. 20. [65] *Ibid.*, paras. 85–6.

'the indirect radiating effect of the Chapter 3 rights on the postconstitutional development in the common law and statute law of concepts such as public policy, the *boni mores*, unlawfulness, reasonableness, fairness and the like'.[66]

The reasoning of the Constitutional Court in *De Klerk* stands as a repudiation of the salience of the traditional model for understanding the relationship between the constitution and private or common law. The Court explicitly acknowledges the distinctive influential authority that fundamental constitutional rights possess and notes how they exert that authority throughout the legal system. Further, though mandatory values typically assume an interpretive posture, the Court also insists that those values will also place some principled limits on what a court can countenance and enforce. And the Court explicitly emphasizes that this may entail the estoppel-like consequence that previously acquired rights could not be enforced. As in the cases discussed above, public policy is also invoked here as the vehicle that enables the Court to refuse to enforce claims that violate the basic values of the constitutional order.

But as we noted in cases like *Drummond Wren* and *Canada Trust*, the very conception of authority that makes it possible to articulate this relationship between public and private law simultaneously erodes the centrality of borders elsewhere. So here too we see that the shifting conception of doctrinal boundaries is accompanied by related rethinking of how other borders are conceived. Nothing makes this so evident as the treatment of the long-standing focus of the traditional picture – the jurisdictional border. So in stark contrast to the deeply internal world that we find in the legacy of *Shelley*, *De Klerk* is actually striking for precisely the opposite reason. All of the opinions in *De Klerk* devote considerable attention to analyzing how other jurisdictions have approached both the question of the relationship between private law and constitutional rights and the question of retrospectivity.[67] For instance, Kentridge JA discusses the Canadian case law on retrospectivity in detail.[68] The discussion of horizontality is even more comparative. Again, as one illustration, Kentridge JA discusses in detail the United

[66] *Ibid*., para. 110.

[67] The South African Constitution explicitly empowers courts to use foreign law and mandates recourse to international law in the articulation of the relevant constitutional guarantees: Constitution of the Republic of South Africa 1996 (Act 108), s. 39(1).

[68] *De Klerk*, paras. 21–4.

States (referring to *Shelley*'s holding with approval though noting it has been criticized), Ireland, Canada, and Germany.[69] The same deep engagement with other jurisdictions is also apparent in the other judgments on the issues of both horizontality and retrospectivity. The detailed analysis of the German approach to horizontality by Ackermann J is but one example among many in this case.[70] So what we have in *De Klerk* is anything but a balkanized picture of law, for not only does the Court insist that the migration of constitutional values throughout the legal system is absolutely vital, it also draws heavily on comparative and international law in reaching this conclusion. The declining absolute significance of borders and associated fact of complex migrations is, in this sense, central to *De Klerk*.

As noted above, *De Klerk* is by no means alone in combining the erosion of the border between public and private law along with the erosions of other borders that are central to the traditional picture, particularly that between jurisdictions and between the national and international spheres. In addition to the very similar conjunctions that we see in *Drummond Wren* and *Canada Trust*, the secondary literature is, as noted above, also extremely comparative in nature. However, before closing I would like to briefly advert to one perhaps more apt illustration. The 1995 decision of the Supreme Court of Canada in *Hill* v. *Church of Scientology* concerned the relationship between the common law of libel and the Charter. As in *Canada Trust*, *De Klerk*, and many other cases discussed above, the Court found that the Charter exerted a distinctive kind of mandatory effect on private common law. And once again in *Hill* we see the complex doctrine of sources that accompanies this shift away from the traditional conception of authority. So for instance, the Court refers law reform proposals in Australia, Ireland, and the United Kingdom. It also engages in an extremely detailed analysis of the 'actual malice' rule from *New York Times* v. *Sullivan*.[71] It then goes on to examine the treatment of the actual malice rule in the United Kingdom and Australia and to discuss the international law reform efforts noted above. In contrast with the opinion of the Supreme Court of the United States in *Roper* v. *Simmons*, here there is no defensiveness or caution regarding the comparative exercise. Instead, as in *De Klerk, Drummond*

[69] *Ibid.*, paras. 31–41, e.g., though the discussion also continues elsewhere such as paras. 58–61.
[70] *Ibid.*, paras. 91–107. [71] *Hill*, paras. 122–33, 137–9.

Wren, and *Canada Trust*, the comparative and international materials are discussed in a straightforward, matter-of-fact way. As much as anything else, it is this vital difference in posture that signals the shift away from the old spatialized conception of legal authority – a shift that is critical to the many kinds of migrations that characterize this debate.

Conclusion

The question of the migration of norms across traditional doctrinal boundaries is ordinarily seen as unrelated in any significant way to the many other kinds of boundary-crossings that are also underway. Yet it is anything but accidental that all of these borders are eroding at the same time. Examining the important estoppel effect of constitutional values on private law amply demonstrates this. Increasingly, constitutional regimes are suggesting that constitutional values exert a distinctive kind of influential authority over private law and common law. But the very terms of this relationship which of necessity disaggregates force and effect and simultaneously posits that effects and not simply rules may be mandatory poses a serious challenge to the traditional account of legal authority. That account, tied as it is to the unique salience of binding rules demarcated by jurisdictional and doctrinal boundaries, is fundamentally undercut by the idea that constitutional values can exert influential authority over private law. And because in such circumstances the traditional account comes to seem inapt as an understanding of legal authority, we also witness the declining significance of the many other boundaries implicated in the traditional account. This is apparent in the fact that where it is possible to conceive of the influential authority of constitutional law, the traditional doctrine of sources is for that very reason in retreat. And it is that retreat that also makes possible a much more extensive set of migrations including the migration, as we have seen, of constitutional ideas.

10

Democratic constitutionalism encounters international law: terms of engagement

MATTIAS KUMM

Introduction

There is a tension inherent to the idea of constitutional self-government, as it is understood by many constitutional lawyers, and the claims to authority made by international law.[1] That tension has long been covered up by the fact that international law covered merely a relatively narrowly circumscribed domain of foreign affairs, was solidly grounded in state consent, and generally left questions of interpretation and enforcement to states. Much of contemporary international law no longer fits that description. International law has expanded its scope, loosened its link to state consent, and strengthened compulsory adjudication and enforcement mechanisms.[2] Not surprisingly, one of the most pressing questions of contemporary constitutional law is how

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[1] For the proposition that law generally makes a claim to authority, see J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, New York, 1979), p. 30. For the claim that this is also true for international law see M. Kumm, The Legitimacy of International Law: A Constitutionalist Framework of Analysis (2004) 15 *European Journal of International Law* 907.

[2] These kinds of changes are widely described as involving a shift to international law as governance. See J. Weiler, The Geology of International Law – Governance, Democracy and Legitimacy (2004) 64 *ZaöRV* 547. See more generally B. Kingsbury, N. Krisch, and R. Stewart, The Emergence of Global Administrative Law (2005) 68 *Law & Contemporary Problems* 15.

to think about the relationship between the national constitution and international law.[3]

In the first decades of the twentieth century, jurisprudential debates among international lawyers thinking about the relationship between national and international law focused on whether the legal world exhibits a monist or a dualist structure.[4] Under a monist conception of the legal world, international and national law constitute one vertically integrated legal order in which international law is supreme. Dualists insist on the conceptual possibility, historical reality, and normative desirability of a non-monist conception of the legal world. Under a dualist (or pluralist) conception of the legal world, different legal systems on the national and international levels interact with one another on the basis of standards internal to each legal system.

The debates between monists and dualists have generally subsided. As is often the case with academic debates, the debate did not end with victory for one side by way of a generally recognized knock-down argument. The debate just withered away, as doubts arose about the fruitfulness of the question. After the Second World War a more pragmatic, doctrinally focused approach gained ground. Most post-Second World War international law textbooks spend a couple of pages providing a historic overview of debates concerning monism and dualism, point out that practice is pragmatic and not adequately described by a radical version of either, and then move on to engage with specific aspects of domestic practice.[5]

[3] See e.g. A. Aleinikoff, Thinking outside the Sovereignty Box: Transnational law and the US Constitution (2004) 82 *Texas Law Review* 1989; J. Rubenfeld, Unilateralism and Constitutionalism (2004) 79 *New York University Law Review* 1971.

[4] The classical literature on the monist side includes the Vienna School with H. Kelsen, *General Theory of Law and State* (Harvard University Press, Cambridge, MASS, 1945), pp. 363–80; A. Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Vólkerrechtsverfassung* (Mohr, Tübingen, 1923); H. Lauterpacht, *International Law and Human Rights* (Praeger, New York, 1950); and G. Scelle, *Précis de Droit des Gens: Principes et Systématique*, vol. II (Sirey, Paris, 1934). Leading dualists include H. Triepel, *Völkerrecht und Landesrecht* (CL Hirschfeld, Leipzig, 1899) and L. Oppenheim, *International Law: A Treatise* (Longman, London, 1905).

[5] See e.g. I. Brownlie, *Principles of Public International Law* (5th edn, Oxford University Press, Oxford, 1998), p. 34: 'These and other writers express a preference for practice over theory, and it is to the practice that attention will now be turned.' See also L. Damrosch *et al.*, *International Law: Cases and Materials* (4th edn, West, St. Paul, MN, 2001), p. 160: 'By the late twentieth century the dualist-monist debates had largely subsided, as particular states adopted their own variants of one school or another, and did so not from jurisprudential persuasion but from their own historic, political and constitutional commitments.' R. Geiger, *Grundgesetz und Völkerrecht* (3rd edn, Beck, Munich, 2002) declares the theoretical debate irrelevant for the

This post-Second World War pragmatic style of thinking about the relationship between national and international law is mostly focused on an analysis of constitutional doctrine as it has emerged as a matter of domestic legal practice. But the emphasis on doctrine and practice as opposed to jurisprudential theory should not obfuscate the fact that the approach taken is in an important sense dualist. The relationship between national and international law is generally taught and written about as the *foreign relations law of the state*, as it has been set out *in the constitution* and reflected in constitutional practice. The very idea that that the national constitution is decisive for generating the doctrines that structure the relationship between national and international law is dualist. This is true, even where the constitution determines that international law is part of the law of the land.[6]

How the constitution manages the interface between national and international law varies across constitutional jurisdictions. But notwithstanding significant variance across constitutional democracies, the basic structure of post-Second World War constitutional doctrines tends to be similar.[7] National constitutions typically assign a status to international law within the domestic hierarchy of norms giving rise to specific *conflict rules*. Typically international law is assigned a lower status than the constitution but is at least on par with ordinary statutes. This means that a statute enacted prior to the entry into force of a duly ratified treaty, for example, is trumped by the treaty, but the treaty in turn is trumped by a provision of constitutional law. Furthermore these doctrines tend to assign a status to international law that depends on its *source*. Treaties are assigned one rule, customary international law is assigned

resolution of practical questions and then goes on to discuss the 'concrete interdependence' between the different legal orders (at p. 14).

[6] Even if a constitution determines that international law is to be the supreme law of the land, it is still committed to dualism if the supremacy of international law is determined by virtue of a national constitutional rule. Only if the national constitutional rule was merely declaratory and not constitutive would it reflect a monist conception of the world of law. For debates in the Netherlands of this kind, see M. Claes and B. de Witte, Report on the Netherlands in A.-M. Slaughter, A. Sweet, and J. Weiler (eds.), *The European Court and National Courts: Doctrine and Jurisprudence* (Hart Publishing, Oxford, 1998), p. 171 at p. 173.

[7] For a comparative overview concerning the rules governing treaties, see F. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (Sweet & Maxwell, London, 1987). For an overview concerning customary international law, see L. Wildhaber and S. Breitenmoser, The Relationship between Customary International Law and Municipal Law in Western European Countries (1987) 48 *ZaöRV* 163.

another.[8] Furthermore there are typically judicially developed rules determining whether a treaty is self-executing or directly effective and can thus be judicially enforced without further implementing legislation. There are also rules of construction typically requiring domestic statutes to be interpreted so as to avoid a conflict with international law if possible.

This way of thinking about managing the relationship between national and international law is still relevant to contemporary scholarship and practice. Yet much innovative contemporary writing on the relationship between national and international law no longer focuses on these doctrines. With the spread of liberal constitutional democracy after the end of the Cold War and with the spread of constitutional courts and international courts and tribunals,[9] national courts have widely begun to engage international law in new ways. An important line of contemporary scholarship[10] is finely attuned to this practice, in which national courts engage international courts and tribunals in ways that are not captured by traditional doctrinal frameworks. Just as the debates between dualists and monists at some point became unreal in a world where courts were in fact crafting doctrines grounded in national constitutional law to engage international law, today the practice of many national courts seems to have made the doctrines and categories of the

[8] Interestingly there is no agreement on whether customary international law should have a higher or a lower status than treaties in domestic law. In Germany, e.g., customary international law generally trumps statutes, whereas treaties occupy the same position as statutes (requiring the application of the last in time rule in case of conflict (see Geiger, *Grundgesetz und Völkerrecht*, pp. 167, 176). In the United States, by contrast, treaties have the same status as congressional legislation, whereas there is a debate whether customary international trumps state law or not. There is agreement, however, that customary international law enjoys a *lower* status than congressional legislation (see *Restatement of the Law (Third), The Foreign Relations Law of the United States* (American Law Institute, St Paul, MN, 1987), paras. 115 and 111(d)). The European Court of Justice accords the same status to both treaties and customary international law; see Case C-162/96, *Racke* v. *Hauptzollamt Mainz* [1998] ECR I-3655 (concerning the *rebus sic stantibus* rule as it applies to the unilateral suspension of trade concessions of an EEC/Yugoslavia Cooperation Agreement).

[9] See R. Alford, The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance (2000) 94 *American Society of International Law Proceedings* 160.

[10] See e.g. A.-M. Slaughter, Judicial Globalization (2000) 40 *Virginia Journal of International Law* 1103 and A Typology of Transjudicial Communication (1994) 29 *University of Richmond Law Review* 99; K. Knop, Here and There: International law in Domestic Courts (2000) 32 *New York University Journal of International Law and Politics* 501; C. L'Heureux-Dubé, The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court (1998) 34 *Tulsa Law Review* 15; J. Martinez, Towards an International Judicial System (2003) 56 *Stanford Law Review* 429.

post-Second World War constitutional doctrinalists seem unreal. And just as the doctrinalists after the War emphasized the normative virtues of pragmatism and realism, the contemporary scholars emphasize their keen focus on what is actually going on and embrace the discursive and deliberative nature of the practice they are describing.

What has been missing in these debates, however, is a well-developed normative framework for thinking about the relationship between national and international law. Even though there are good reasons to have left behind the fruitless debates between monists and dualists, there are high costs associated with an anti-theoretical stance. Those who adopt an anti-theoretical attitude are prone to make one of three mistakes. The first is to get lost in the historical intricacies of a particular political tradition of separation of powers in foreign affairs and emphasize a certain statesmanlike pragmatism that is most likely guided by the unstated presuppositions of such a tradition. Context matters, but it will remain unclear what matters and why without an adequate normative framework to guide engagement with it. The second is to get carried away by a cosmopolitan enthusiasm for international law that is perhaps the *déformation professionelle* of the international lawyer. The third is unqualified enthusiasm for non-hierarchical deliberative networks whose activities transgress traditional doctrinal categories, perhaps the prejudice of choice for scholars attuned to postmodern sensibilities. What is generally missing is the reflection on *the commitments of principle that underlie the tradition of democratic constitutionalism and connecting these to the constitutional doctrines that define the terms of engagement between national and international law*. Only after clarifying the relevant normative concerns is it possible to provide an assessment of these practices with a view to guiding their further development.[11]

The purpose of the following section of this chapter is to get a better understanding of the relevant normative concerns that any set of doctrines that manage the interface between national and international law needs to reflect to be normatively convincing. The purpose of the third section is to provide some examples that illustrate how a better understanding of these concerns can help explain, assess, and guide the

[11] For some important groundwork concerning the use of comparative arguments, see S. Choudhry, Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation (1999) 74 *Indiana Law Journal* 819.

practice of national courts in concrete contexts. Here the chapter will focus on cases addressing the relevance of human rights treaties to domestic rights litigation, on the one hand, and the enforcement of Security Council decisions in the domestic context, on the other. Whereas the first example illustrates the mechanism by which migration of constitutional ideas occurs from the international to the national level, the second example illustrates how appropriate doctrines can help prevent the migration of unconstitutional ideas from the international to the national level, while securing engagement with international law. The concluding section briefly describes some structural features that any set of doctrines managing the interface between national and international law that is attuned to the normative concerns developed here is likely to exhibit.

A constitutionalist model: four principles of engagement

How then should citizens in liberal constitutional democracies engage international law? What are the relevant normative concerns? The following presents a framework for thinking about the moral concerns that any set of doctrines governing the interface between national and international law ought to take into account and reflect.

At the heart of the model are four distinct moral concerns, each captured by a distinct principle.[12] These principles are the *formal principle of international legality, the jurisdictional principles of subsidiarity, the procedural principle of adequate participation and accountability, as well as the substantive principle of achieving outcomes that are not violative of fundamental rights and are reasonable.*

The principle of international legality establishes a presumption in favour of the authority of international law. The fact that there is a rule of international law governing a specific matter means that citizens have a reason of some weight to do as that rule prescribes. But this presumption is rebutted with regard to norms of international law that violate to a sufficient extent countervailing normative principles relating to jurisdiction, procedure or outcomes. To put it another way: *Citizens should regard themselves as constrained by international law and set up domestic political and legal institutions so as to ensure compliance with international*

[12] The following discussion draws heavily on Kumm, Legitimacy of International Law, 918–27.

law, to the extent that international law does not violate jurisdictional, procedural, and outcome-related principles to such an extent that the presumption in favour of international law's authority is rebutted. When assessing concerns relating to jurisdiction, procedure, and outcome, each of the relevant principles can either support or undermine the moral force of international law in a particular context.

When citizens in constitutional democracies accept the constraints imposed by an international law that is legitimate as assessed under this approach, they are not compromising national constitutional commitments. Instead, such a respect for international law gives expression to and furthers the values that underlie the commitments to liberal constitutional democracy, properly understood.

Given their pivotal role, the content of these principles deserves some further clarification. Such clarification would ideally occur both in the form of a rich set of examples that illustrate the practical usefulness of the framework in concrete contexts and in a more fully developed theoretical account of each of these principles. But here a brief further description of each of these principles will have to suffice.

Formal legitimacy: the principle of international legality

The first principle is formal and establishes a *prima facie* case for the duty to obey international law. The principle of international legality generally requires that addressees of international law should obey it.[13] International law establishes a *prima facie* duty to obey it and deserves the respect of citizens in liberal constitutional democracies simply by virtue of its being the law of the international community. International law serves to establish a fair framework of co-operation between actors of international law[14] in an environment where there is deep disagreement about how this should best be achieved. In order for international law to achieve its purpose, those who are addressed by its norms are morally

[13] For a more in depth discussion of the idea of the international rule of law as an argument for national courts to enforce international law over national law as well as a discussion of countervailing concerns related to reciprocity and flexibility, see M. Kumm, International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model (2003) 44 *Virginia Journal of International Law* 19–32.

[14] For an extensive discussion, see T. Franck, *Fairness in International law and Institutions* (Oxford University Press, New York, 1995).

required generally to comply, even when they disagree with the content of a specific rule of international law.[15] There is *a prima facie duty of civility* to comply with even those norms of international law that the majority of national citizens believe to be deficient.[16] Otherwise international law has no chance of achieving its purpose.

A commitment to the principle of international legality says nothing about the proper scope of international law. It certainly provides no grounds for some international lawyer's enthusiasm for expanding the reach of international law to as many domains as possible. Nor does it make a fetish of legality by suggesting that legal forms of dispute resolution are superior to other forms. But it does suggest that once a norm of international law has come into existence, its very existence provides a reason to comply with it. In this sense it establishes a presumption in favour of compliance with international law.

In the European world at the beginning of the twentieth century Max Weber could claim that formal legality could replace charisma or tradition as *the* source of legitimacy.[17] After the Second World War, such a thin notion of legitimacy has been gradually replaced by the considerably richer idea of constitutional legitimacy. To be fully legitimate, more is required of a rule than just its legal pedigree. Formal legality matters, but it is not the only thing that matters. More specifically, there is a range of other concerns that provide countervailing considerations and suggest that under certain circumstances the presumption in favour of the legitimacy of international law can be rebutted. These concerns are related to a more substantive commitment to liberal-democratic governance. Concerns about democratic legitimacy should best be understood as concerns about three analytically distinct features of international law. These concerns are related to jurisdiction, procedure, and outcomes, respectively. The presumption in favour of compliance with international law can be overridden by reasons of sufficient weight relating to jurisdiction, procedure, or outcome. Once there are such reasons, citizens in a constitutional democracy ought to

[15] The idea of a duty to support the international rule of law is in some sense analogue to what Rawls has called the natural duty to support a just constitution. See J. Rawls, *A Theory of Justice* (Harvard University Press, Cambridge, MASS, 1971), pp. 333–42.

[16] According to Rawls there is a 'natural duty of civility not to invoke the faults of social arrangements as a too ready excuse for not complying with them'. *Ibid.*, p. 355.

[17] M. Weber, *Wirtschaft und Gesellschaft* (Mohr, Tübingen, 1922).

think of themselves as free to deviate from the requirements of international law. In these cases, citizens have good reasons to conceive of themselves as free to generate and apply the independent outcomes of the domestic legal and political process.

Jurisdictional legitimacy: the principle of subsidiarity

The first of those three concerns is captured by the *principle of jurisdictional legitimacy or subsidiarity*. Subsidiarity is in the process of replacing the unhelpful concept of 'sovereignty' as the core idea that serves to demarcate the respective spheres of the national and international.[18] The principle of subsidiarity found its way into contemporary debates through its introduction to European constitutional law in the Treaty of Maastricht. It ought to be conceived as an integral feature of international law as well.

In Europe it was used to guide the *drafting* of the European Constitutional Treaty signed in October 2004. It is a principle that guides the *exercise* of the European Union's power under the Treaty. And it guides the *interpretation* of the European Union's laws. As such, it is a structural principle that applies to all levels of institutional analysis, ranging from the big-picture assessment of institutional structure and grant of jurisdiction to the microanalysis of specific decision-making processes and the substance of specific decisions.

At its core the principle of subsidiarity requires any infringements of the autonomy of the local level by means of pre-emptive norms enacted on the higher level to be justified by good reasons.[19] Any norm of international law requires justification of a special kind. It is not enough for it to be justified on substantive grounds, say, by plausibly claiming that it embodies good policy. Instead the justification has to make clear what exactly would be lost if the assessment of the relevant policy concerns was left to the lower level. With exceptions relating to the protection of minimal standards of human rights, *only reasons connected to collective action problems* – relating to externalities or strategic standard

[18] J. Jackson labelled a similar idea 'sovereignty-modern'. See J. Jackson, Sovereignty-Modern: A New Approach to an Outdated Concept (2003) 97 *American Journal of International Law* 782.

[19] For a discussion of how the principle of subsidiarity operates, see M. Kumm, Constitutionalizing Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union (forthcoming, 2006) 12 *European Law Journal*.

setting giving rise to 'race to the bottom' concerns, for example – are good reasons to ratchet up the level on which decisions are made. And even when there are such reasons, *they have to be of sufficient weight to override any disadvantages connected to the pre-emption of more decentralized rule-making*. On application, subsidiarity analysis thus requires a two-step test. First, reasons relating to the existence of a collective action problem have to be identified. Second, the weight of these reasons has to be assessed in light of countervailing concerns relating to state autonomy in the specific circumstances. This requires the application of a 'proportionality test' or 'cost-benefit analysis' that is focused on the advantages and disadvantages for ratcheting up the level of decision-making. This means that on application, this principle, much like the others, requires saturation by arguments that are context sensitive and most likely subject to normative and empirical challenges. Its usefulness does not lie in providing a definitive answer in any specific context. But it structures inquiries in a way that is likely to be sensitive to the relevant empirical and normative concerns.

There are good reasons for the principle of subsidiarity to govern the allocation and exercise of decision-making authority wherever there are different levels of public authorities. These reasons are related to sensibility towards locally variant preferences, possibilities for meaningful participation and accountability, and the protection and enhancement of local identities that suggest the principle of subsidiarity ought to be a general principle guiding institutional design in federally structured entities. But the principle has particular weight with regard to the management of the national-international divide. In well-established constitutional democracies, instruments for holding accountable national actors are generally highly developed. There is a well-developed public sphere allowing for meaningful collective deliberations, grounded in comparatively strong national identities. All of that is absent on the international level.

The principle of subsidiarity is not a one-way street, however. Subsidiarity-related concerns may, in certain contexts, strengthen rather than weaken the comparative legitimacy of international law over national law. If there are good reasons for deciding an issue on the international level, because the concerns addressed are concerns best addressed by a larger community, then the international level enjoys greater jurisdictional legitimacy. The idea of subsidiarity can provide the

grounds for strong claims about the *desirability for transnational institutional capacity-building* in order effectively to address collective action problems and secure the provision of global public goods. And even though the principle generally requires contextually rich analysis, there are simple cases. The principle can highlight obvious structural deficiencies of national legislative processes with regard to some areas of regulation.

Imagine that in the year 2010 a UN Security Council Resolution enacted under Chapter VII of the UN Charter imposes ceilings and established targets for the reduction of carbon dioxide emissions aimed at reducing global warming. Assume that the case for the existence of global warming and the link between global warming and carbon dioxide emissions has been conclusively established. Assume further that the necessary qualified majority in the Security Council was convinced that global warming presented a serious threat to international peace and security and was not appropriately addressed by the outdated Kyoto Protocol or alternative treaties that were open to signature, without getting the necessary number of ratifications to make them effective. Finally, assume that a robust consensus had developed that permanent members of the newly enlarged and more representative UN Security Council[20] were estopped from vetoing a UN Resolution, if four-fifths of the members approved a measure.

Now imagine a powerful constitutional democracy, such as the United States, has domestic legislation in force that does not comply with the standards established by the Resolution. The domestic legislation establishes national emission limits and structures the market for emission trading, but goes about setting far less ambitious targets and allowing for more emissions than the international rules promulgated by the Security Council allow. Domestic political actors invoke justifications linked to life-style issues and business interests.[21] National cost-benefit

[20] Assume that current proposals had become law and that it included as new permanent members an African state (Nigeria or South Africa), two additional Asian states (Japan and India or Indonesia), a South American state (Brazil), and an additional European state (Germany), as well as five new non-permanent members.

[21] For an argument of this kind in respect of the US position on the Kyoto Protocol, see B. Yandle and S. Buck, Bootleggers, Baptists and the Global Warming Battle (2002) 26 *Harvard Environmental Law Review* 177 (contending at 179 that 'the Kyoto Protocol would have been a potentially huge drag on the United States' economy' while producing minimal environmental benefits.)

analysis, they argue, has suggested that beyond the existing limits, it is better for the nation to adapt to climate change rather than incur further costs preventing it. After due deliberations on the national level, a close but stable majority decides to disregard the internationally binding Security Council resolutions and invokes the greater legitimacy of the national political process. Yet, assume that the same kind of cost-benefit analysis undertaken on the global scale has yielded a clear preference for aggressively taking measures to slow down and prevent global warming along the lines suggested by the Security Council Resolution.

In such a case, the structural deficit of the national process is obvious. National processes, if well designed, tend to reflect values and interests of national constituents appropriately. As a general matter, they do not reflect values and interests of outsiders. Since in the case of carbon dioxide emissions there are externalities related to global warming, national legislative processes are hopelessly inadequate to deal with the problem. To illustrate the point: the United States produces approximately 25 per cent of the world's carbon dioxide emissions, potentially harmfully affecting the well-being of peoples worldwide. Congress and the EPA currently make decisions with regard to the adequate levels of emissions. Such a process clearly falls short of even basic procedural fairness, given that only a small minority of global stakeholders is adequately represented in such a process.[22] It may well turn out to be the case that cost-benefit analysis conducted with the national community as the point of reference suggests that it would be preferable to adapt to the consequences of global warming rather than incur the costs of trying to prevent or reduce it. In other jurisdictions, the analysis could be very different.[23] More importantly, cost-benefit analysis conducted with the global community as the point of reference could well yield results that

[22] Procedural requirements to take into account external effects in cost-benefit analysis have in part been established to mitigate these concerns. See e.g. B. Kingsbury, N. Krisch, and R. Stewart, The Emergence of Global Administrative Law, New York University, ILIJ Working Paper 2004/01, available at: http://www.iilj.org/papers/2004/2004.1.htm (last consulted 10 January 2005); R. Stewart, Administrative Law in the Twenty-First Century (2003) 78 *New York University Law Review* 437.

[23] E.g. the island of Tuvalu, situated in the Pacific Ocean, is in danger of disappearing entirely. On this issue, the Governor General of Tuvalu addressing the UN General Assembly on 14 September 2002 stated the following: 'In the event that the situation is not reversed, where does the international community think the Tuvalu people are to hide from the onslaught of sea level rise? Taking us as environmental refugees, is not what Tuvalu is after in the long run. We want the islands of Tuvalu and our nation to remain permanently and not be submerged

would suggest aggressive reductions as an appropriate political response. The jurisdictional point here is that *the relevant community that serves as the appropriate point of reference for evaluating processes or outcomes is clearly the global community*. When there are externalities of this kind, the legitimacy problem would not lie in the Security Council's issuing regulations. Legitimacy concerns in these kinds of cases are more appropriately focused on the absence of effective transnational decision-making procedures and the structurally deficient default alternative of domestic decision-making.

The principle of subsidiarity, then, is Janus faced. It serves not only to protect state autonomy against undue central intervention; it also provides a framework of analysis that helps to bring into focus the structural underdevelopment of international law and institutions in some policy areas. In these areas, arguments from subsidiarity help strengthen the authority of international institutions engaging in aggressive interpretation of existing legal materials to enable the progressive development of international law in the service of international capacity-building.[24]

Procedural legitimacy: the principle of adequate participation and accountability

One reason why national law is thought to enjoy comparatively greater legitimacy than anything decided on the international level is the idea that the core depositories of legitimacy are electorally accountable institutions. On the national level, legislative bodies constituted by directly elected representatives make core decisions. There are no such institutions on the international level. Customary international law is generated by an ensemble of actors including democratically legitimate and illegitimate governments, unelected officials of international institutions, judges and arbitrators, scholars, and NGOs. Treaties, on the other hand, are legitimate to the extent and exactly because they tend

as a result of greed and uncontrolled consumption of industrialized countries.' Available online at http://www.un.org/webcast/ga/57/statements/020914tuvaluE.htm.

[24] See for the judicial interpretation of customary law in this respect E. Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency in E. Benvenisti and M. Hirsch (eds.), *The Impact of International Law on International Cooperation: Theoretical Perspectives* (Cambridge University Press, Cambridge, 2004), p. 85.

to require national legislative endorsement in some form or another. Some claim that problems arise when treaties create institutions in which unelected officials in conjunction with other actors may create new obligations which, at the time the treaty was signed, were impossible to foresee.[25] National law is superior because it tends to be parliamentary law, which is law authorized by a directly representative institution.

Many things would need to be said to address this claim. I will confine myself to two core points.

First, even on the national level, parliament as the traditional legislative forum has lost significant ground in the twentieth century in constitutional democracies. Parliament is no longer considered as the exclusive institutional home of legitimate decision-making on the domestic level. On the one hand, this is linked to the emergence of the *administrative state*. For what generally are believed to be good reasons, the turn to the administrative state in the first half of the twentieth century has involved significant delegation of regulatory authority to administrative institutions of various kinds. Whether in the area of monetary policy, anti-trust policy, or environmental policy, many of the core decisions are no longer made by parliament. This is generally justified on diverse grounds ranging from the expertise of decision-makers to the greater possibilities of participation for the various stakeholders involved and the like.[26] The argument that this is of little significance because legislatures retain the possibility to legislate whenever there is the requisite majority to do so is not irrelevant. But as a matter of institutional practice and of political realism, the effective control over administrative decision-making that exists in virtue of such a possibility is modest.[27] On the other hand, liberal constitutional democracies have developed in the second half of the twentieth century to include *constitutional courts* with the authority to strike down laws generated by the legislative process on grounds of constitutional

[25] For the argument that the US constitutional tradition has endorsed a more embracing approach, see D. Golove, The New Confederalism: Treaty Delegations of Legislative, Executive and Judicial Authority (2003) 55 *Stanford Law Review* 1697.

[26] See e.g. R. Stewart, The Reformation of American Administrative Law (1975) 88 *Harvard Law Review* 1667 at 1760–90 (describing how this promotes interest group competition and representation in the administrative process itself).

[27] T. Lowi, Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power (1987) 36 *American University Law Review* 295 at 321–2 (criticizing broad, unaccountable, discretionary power held by modern administrative agencies).

principle. And constitutional courts have engaged in such a practice more or less aggressively in many jurisdictions. In many jurisdictions, they enjoy more public support than any other political institution as a result.[28] The reasons generally invoked to justify judicial review of legislative decisions are well rehearsed. They include the comparative advantage of securing the rights of individuals against inappropriate majoritarian intervention, concerns that are particularly pertinent with regard to groups disadvantaged in the political process as well as other instances in which political failures of various kinds suggest a comparative advantage for judicial review of another actor's decisions. It is important to take note of a bad argument for judicial review. Judicial review is not generally justified because the necessary supermajority for constitutional entrenchment has determined that a specifically circumscribed right ought to be protected. To the extent that this argument casts constitutional courts as the mouthpiece and mechanical instrument of legislative self-restraint as defined by the constitutional legislature, it is misleading at best. In most jurisdictions, a core task of constitutional courts is to interpret highly abstract constitutional clauses invoking equality, liberty, freedom of speech, property, or due process. Courts in many jurisdictions engage in elaborate arguments of principle about why this or that policy concern ought to take precedence over competing concerns in a particular context. To that extent constitutional courts can only be understood as political actors in their own right. If it is desirable for there to be such an actor, it can only be because of widely held beliefs about the comparative advantage of the judicial process over the ordinary political process across the domain that falls within the constitutional jurisdiction of the court.[29]

It turns out that any robust version of majoritarian parliamentarianism cannot be understood as the ideal underlying contemporary political

[28] See generally, C. Tate and T. Vallinder, The Global Expansion of Judicial Power: The Judicialization of Politics in C. Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power* (New York University Press, New York, 1995), p. 1 at p. 5 (describing the worldwide expansion of judicial power in several jurisdictions and dubbing it 'one of the most significant trends in late-twentieth century and early-twenty-first-century government'.)

[29] R. Hirschl, Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend (2002) 22 *Canadian Journal of Law and Jurisprudence* 191 (arguing that the availability of a constitutional framework that encourages deference to the judiciary and the existence of a political environment conducive to judicial empowerment have helped bring about a growing reliance on adjudicative means for articulating, framing, and settling fundamental moral controversies and highly contentious political questions).

practice in liberal constitutional democracies. Instead, there is a predominance of a more pragmatic approach. That approach does take seriously concerns relating to checks and balances, accountability, participation, responsiveness, transparency, and so on.[30] But over the whole spectrum of political decision-making, constitutional democracies allocate decision-making authority to a wider range of decision-makers than a robust parliamentarianism is willing to acknowledge. This draws attention to two points of significance for assessing the comparative legitimacy of international and national law. First, much of international law that is in potential conflict with outcomes of the national political process competes with national rules determined either by administrative agencies or constitutional courts, suggesting that the argument from democracy has less bite at least in such cases. And even if international law does compete with the outcomes of the national parliamentary process, the domestic example suggests that under some circumstances the outcomes of a non-parliamentary procedure may be preferable over the outcome of a parliamentary procedure. Given that the prerequisites for meaningful electorally accountable institutions on the international level are missing, the absence of electorally accountable institutions on the international level is insufficient to ground claims that the international legal process is deficient procedurally.

But *the absence of directly representative institutions on the transnational level and the difficulty of establishing a meaningful electoral process on the global level*[31] *is one of the reasons why the principle of subsidiarity has greater weight when assessing institutional decision-making beyond the state than within a national community*. It is not surprising that in well-established federal systems, concerns about jurisdictional issues are typically less pronounced. A well-developed national political process involving strong electorally accountable institutions, a cohesive national identity, and a working public sphere on the national level lower the costs of ratcheting up decision-making. In the European Union, on the other

[30] For such claims in the context of the legitimacy of the European Union, see A. Moravscik, In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union (2002) 40 *Journal of Common Market Studies* 603–24.

[31] Those arguing for a global democracy include D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press, Cambridge, 1995). See also R. Falk and A. Strauss, On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty (2000) 36 *Stanford Journal of International Law* 191.

hand, European elections do not mean much since the Commission in conjunction with the Council – consisting of members of the executive branch of member state governments – remain largely in control of the legislative agenda. Limiting the scope of what the European Union can do is regarded as a core concern. It ought to be at least as much of a concern when it comes to international law.

But even when international law plausibly meets jurisdictional tests, it could still be challenged in terms of procedural legitimacy. The *principle of procedural legitimacy* focuses on the procedural quality of the jurisgenerative process. Electoral accountability may not be the right test to apply, but that does not mean that there are no standards of procedural adequacy. Instead the relevant question is whether procedures are sufficiently transparent and participatory and whether accountability mechanisms exist to ensure that decision-makers are in fact responsive to constituents' concerns. The more of these criteria that are met, the higher the degree of procedural legitimacy. In many respects, mechanism and ideas derived from domestic administrative law may be helpful to give concrete shape to ideas of due process on the transnational level.[32] Furthermore, principles and mechanisms described by the European Commission's 2001 White Paper[33] could also provide a useful source for giving substance to the idea of transnational procedural adequacy. Yet it is unlikely that the idea of procedural adequacy as it applies to the various transnational institutional processes will translate into a standard template of rules and procedures comparable to, say, the US Administrative Procedure Act. When it comes to assessing procedures as varied as dispute resolution by the World Trade Organization's Dispute Settlement Body (DSB), UN Security Council decision-making under Chapter VII or prosecutions under the newly established ICC, a highly contextual analysis that takes seriously the specific function of the various institutions will be necessary.

[32] See e.g. R. Stewart, US Administrative Law: Model for Global Administrative Law, New York University, IILJ Working Paper 2005/7, available at: http://www.iilj.org/papers/documents/2005.7Stewart.pdf (last consulted 10 January 2005).

[33] The European Commission's White Paper on European Governance (2001), available at: http://europa.eu.int/comm/governance/white_paper/index_en.htm.

Outcome legitimacy: achieving reasonable outcomes

The final concern is related to outcomes. Bad outcomes affect the legitimacy of a decision and tend to undermine the authority of the decision-maker.[34] Yet an outcome-related principle has only a very limited role to play in assessing the legitimacy of any law. Principles related to outcomes only play a limited role because disagreements about substantive policy are exactly the kind of thing that legal decision-making is supposed to resolve authoritatively.[35] It is generally not the task of addressees of norms to re-evaluate decisions already established and legally binding on them. This is why the legitimacy of a legal act can never plausibly be the exclusive function of achieving a just result, as assessed by the addressee. Were it otherwise, anarchy would reign. But that does not preclude the possibility of having international rules that cross a high threshold of injustice or of costly inefficiency being ignored by a national community on exactly the grounds that they are deeply unjust or extremely costly and inefficient. What needs to be clear, however, is that any *principle of substantive reasonableness* is applied in an appropriately deferential way that takes into account the depth and scope of reasonable disagreement that is likely to exist in the international community. In particular, where jurisdictional legitimacy weighs in favour of international law and international procedures were adequate, there is a strong presumption that a national community's assessment of the substantive outcome is an inappropriate ground for questioning the legitimacy of international law and denying its moral force.

The constitutionalist framework applied: illustrations

What exactly follows for how national courts ought to engage international law? On the one hand, the principle of international legality establishes a presumption in favour of the authority of international law. The fact that there is a rule of international law

[34] For a sceptical view that considerations of justice should play a core role in assessing the legitimacy of international law, see T. Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, New York, 1990), p. 208.

[35] To some extent that is also true about questions of procedure and jurisdiction, that the approach sketched here opens up for evaluation. But there is a difference of degree between them. Questions of procedure or jurisdiction often provide a focal point for consensus even when an agreement on outcomes cannot be reached.

governing a specific matter means that citizens have a reason to do as the rule prescribes. But this presumption is rebutted with regard to norms of international law that seriously violate countervailing normative principles relating to jurisdiction, procedure, or outcomes. To put it another way: *Citizens should regard themselves as constrained by international law and set up domestic political and legal institutions so as to ensure compliance with international law, to the extent that international law does not violate jurisdictional, procedural, and outcome-related principles to such an extent that the presumption in favour of international law's authority is rebutted.* When assessing concerns relating to jurisdiction, procedure, and outcome, each of the relevant principles can either support or undermine the legitimacy of international law. As the discussion has shown, it is not necessarily the case that jurisdictional and procedural concerns will weigh in favour of national decision-making, though often that will be the case. When citizens in a constitutional democracy comply with legitimate international law, citizens are not compromising constitutional principles. Instead they are complying with the demands of principle that underlie the best interpretation of the liberal constitutional tradition they are part of.[36]

What then are the institutional implications of a constitutional model? How would citizens, committed to a constitutionalist approach, structure their domestic institutions with regard to international law? What should the terms of engagement between national and international law be?

Here there are no quick and easy answers. In part this is because each jurisdiction has, as its starting point, its own tradition and institutions addressing foreign affairs which would need to be carefully developed within their own constitutional framework. In part it is because a great deal of additional work would need to be done to analyze how these concerns play out in various areas of international law. On application, there is no 'one size fits all' solution.

The following can do little more than provide some illustrations concerning the kind of practices that courts thinking about the enforcement of international law might engage in.

[36] With regard to the loss of self-government this entails, Neil MacCormick's point on the loss of sovereignty applies: Sovereignty is not 'the object of some kind of zero sum game, such that the moment X loses it Y necessarily has it. Let us think of it rather more as of virginity, which can in at least some circumstances be lost to the general satisfaction without anybody else gaining it': N. MacCormick, Beyond the Sovereign State (1993) 56 *Modern Law Review* 1 at 16.

The constitutional duty to engage: the domestic relevance of international human rights treaties

International human rights instruments are generally treaties. The International Covenant on Civil and Political Rights, the Inter-American Covenant and the European Convention of Human Rights, to name just some of the most important instruments, were adopted following the same international and domestic legal rules as, for example, treaties concerning the diplomatic and consular relations of states[37] or the banning of land mines.[38] The status of treaties in domestic law is conventionally addressed by domestic constitutions and generally recognized doctrines. Though specific constitutional provisions and doctrines relating to the status of treaties in domestic law vary, in many constitutional jurisdictions treaties have the same force as domestic statutes.[39] This means that when there is a conflict between a statute and a treaty, the provision enacted later in time prevails (the *lex posterior* or last in time rule). Furthermore there is often a recognized rule of interpretation according to which national statutes are to be interpreted so as to not conflict with treaties, if possible.[40] A national constitution, by contrast, typically is believed to establish the supreme law of the land. The constitutional provisions trump treaties in case of conflicts. Furthermore rules of constitutional interpretation that require taking into account treaty law tend to be less universally accepted. A Kelsenian argument relating to the hierarchy of norms frequently finds resonance: lower ranking law (statutes or treaties) should not be used to guide the interpretation of higher-ranking law (constitutional law).[41]

[37] Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, in force 24 April 1964, 500 UNTS 95 and Vienna Convention on Consular Relations, Vienna, 24 April 1963, in force 19 March 1967, 596 UNTS 261.

[38] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997, in force 1 March 1999, 2056 UNTS 577.

[39] See note 7 above, examining the position in Belgium, Denmark, France, Germany, Italy, the Netherlands, and the United Kingdom.

[40] *Murray* v. *The Charming Betsy*, 6 US 64 (1804).

[41] See in the US context, e.g., R. Alford, Misusing International Sources to Interpret the Constitution (2004) 98 *American Journal of International Law* 57 at 62 (finding 'anomalous' that a treaty that has the same status as federal statutes under the Supremacy Clause should inform constitutional interpretation, even when it can be overridden by a statute later in time).

Yet this doctrinal framework says next to nothing about the actual relevance of human rights law to domestic legal practice. On the one hand, human rights treaties are rarely treated like statutes in domestic law, even when they are deemed to be self-executing. On the other hand, they have an important role to play in informing national constitutional rights practice in other ways.

It should not be surprising that human rights treaties are not treated like ordinary statutes or ordinary treaties. First, they are atypical as treaties in a way that weakens the case for their judicial enforcement. The core difference is jurisdictional: unlike other treaties, human rights treaties do not function to solve specific collective action problems relating to co-ordination, externalities, strategic standard setting, and the like. They do not have the kind of purpose that treaties relating to arms control, greenhouse gases, trade, or diplomatic relations have. The reasons for entering into a human rights treaty are of a different sort. First, there are reasons that are linked to *traditional ideas of national interest* and *quid pro quo* bargaining. States submit to impose on themselves certain obligations because of the benefits they believe to be getting when other states do the same. Such reasons include (a) the belief that promoting human rights in other states may help prevent war and further democratic peace, (b) the view that human rights help support stability and prevent civil war, which would itself produce a flood of immigrants and regional security problems, and (c) the position that supporting prosperity and open markets in other states also benefits domestic corporations and consumers.[42] Second, liberal democratic elites in newly converted democratic countries that have experienced state failures, authoritarianism, or totalitarian governments in the twentieth century may have an incentive to use international law to *entrench their positions for the purpose of domestic struggles*. Freshly minted democratic elites may fear resurgence of non-democratic forces and use commitments to international law and human rights in particular as a strategy to lock in the commitment to democratic and human rights-friendly institutions and increase the costs for non-democratic forces to exit those arrangements.[43] Third, states could wish to give expression to a national

[42] D. Golove, Human Rights Treaties and the US Constitution (2002) 52 *DePaul Law Review* 579 at 605 and 606.

[43] A. Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe (2000) 54 *International Organization* 217 at 228.

identity, part of which is *the commitment to a global community* structured around universal values, perhaps also to enhance their reputation as a member in good standing of the global community.[44]

When a state violates a specific rule of a human rights treaty, it is not generally the case that another state's interests are directly affected. Once a state ignores the very idea of limitations on public authority in the name of human rights or manifestly and persistently violates them, there may be a concerns relating to stability, emigration, civil war, etc. But when it comes to fine-tuning the limits and guidance that public authorities receive from the idea of human rights in relation to their citizens, there is no reason to think that national institutions in a constitutional democracy are unfit ultimately and authoritatively to determine these rules for themselves. All this suggests that there are *jurisdictional* reasons for human rights treaties not to play much of a domestic role as a quasi-statutory instrument. Because the primary role of international human rights treaties is not to establish specific co-ordinates for inter-state relations, their specific enforcement is less of a concern to the realization of an international rule of law.

Yet human rights are regarded as the moral foundations on which post-Second World War legal and political life has been constructed. *Outcome-related reasons* suggest that international human rights treaties should be elevated in a way that, say, treaties addressing international postal delivery are not. Even if human rights treaties were treated by national courts as domestic statutes, this would not adequately reflect the expressive and practical function of human rights in domestic constitutional practice. Legislatures could simply enact a new statute later in time. It is widely believed that constitutionally entrenching human rights and empowering a judiciary to strike down a piece of legislation deemed unconstitutional is an important institutional mechanism to ensure the respect of those rights.[45] The domestic protection of human rights by a treaty that is enforced as a statute

[44] A. Chayes and A. H. Chayes, *The New Sovereignty* (Harvard University Press, Cambridge, MASS, 1995), pp. 27–8. For a recent overview of literature on why states obey international law, see O. Hathaway, Do Human Rights Treaties Make a Difference? (2002) 111 *Yale Law Journal* 1935.

[45] Some constitutions, however, also provide for the possibility of a legislative override that falls short of the requirement to amend the constitution. See S. Gardbaum, The New Commonwealth Model of Constitutionalism (2001) 49 *American Journal of Comparative Law* 707.

thus not only provides too much, it also provides too little protection. The typical doctrines applicable to treaties governing their status in domestic law thus turn out to fit badly.

In practice human rights treaties often provide *both more and less* protection domestically than they would if they were enforced as statutes. They function to *guide and constrain the development of domestic constitutional practice*. Besides having played an important role in the *drafting* of national constitutions in the last decades, human rights treaties also play a central role in the context of *interpretation* of national constitutional provisions.[46] They are being referred to as persuasive authority.[47] There is a good reason for this. International human rights treaties establish a common point of reference negotiated by a large number of states across cultures. Given the plurality of actors involved in such a process, there are epistemic advantages to engaging with international human rights when interpreting national constitutional provisions. Such engagement tends to help improve domestic constitutional practice by creating awareness for cognitive limitations connected to national parochialism. At the same time, such engagement with international human rights law helps to strengthen international human rights culture generally.

Human rights treaties can be relevant to the domestic interpretation of constitutional rights in weak and strong ways.

First, international human rights can be relevant in a weak way by providing a *discretionary point of reference for deliberative engagement*. This is the way that some recent US Supreme Court decisions have referred to international human rights law. In *Roper* v. *Simmons*, Justice Kennedy, writing for the Court, used a reference – not to specific international human rights instruments,[48] but to an international

[46] For a helpful overview see T. Franck and A. Thiruvengadam, International Law and Constitution-Making (2003) 2 *Chinese Journal of International Law* 467.

[47] Persuasive authority as understood here refers to any 'material ... regarded as relevant to the decision which has to be made by the judge, but ... not binding on the judge under the hierarchical rules of the national system determining authoritative sources'. See C. McCrudden, A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights (2000) 20 *Oxford Journal of Legal Studies* 499 at 502–3.

[48] He could have cited Art. 6(5) of the International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 172 as well as Art. 4(5) of the Convention of the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3 and Art. 37(a) of the American Convention of Human Rights, San Jose, Costa Rica, 22 November 1969, in force 18 July 1978, 1114 UNTS 123. These obligations were

consensus more generally – as a confirmation for the proposition that the Eighth Amendment prohibition of cruel and unusual punishment prohibits the execution of juvenile offenders. And in *Grutter* v. *Bollinger* the Court made reference to a treaty addressing discrimination issues[49] to provide further support for the claim that the Equal Protection Clause does not preclude certain affirmative action programs. In the United States, engagement with international human rights, to the extent it takes place at all, is regarded as discretionary. It is something a federal court facing a constitutional rights question may or may not find helpful under the circumstances.[50] And even when engagement takes place, the existence of international human rights law governing a question does not change the balance of reasons applicable to the correct resolution of the case. Reference to international human rights merely has the purpose to 'confirm' a judgment or 'make one aware' of a possible way of thinking about an issue. In this way, the US courts and indeed much of the literature do not distinguish between the use of foreign court decisions concerning human rights and references to international human rights law. Both have a modest role to play as discretionary points of reference for the purpose of deliberative engagement.

Second, international human rights law can be relevant to constitutional interpretation in a stronger sense. Instead of leaving it to the discretion of courts, some constitutions *require* engagement with international human rights law. A well-known example of a constitution explicitly requiring engagement with international human rights law is the South African Constitution. It establishes that the Constitutional

not binding on the United States as treaty obligations, because the United States has either not signed (Rights of the Child Convention), signed but not ratified the treaty (in case of the American Convention) or signed and ratified the treaty but with reservations concerning the juvenile death penalty (the case of the ICCPR). Having signed two of these treaties and failing to meet the 'persistent objector' requirements, the United States was, however, under an obligation to comply with this prohibition as a matter of customary international law.

[49] *Grutter* v. *Bollinger*, 539 US 306 (2003) at 345. (O'Connor in a concurring opinion citing the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women); International Convention on the Elimination of All Forms of Racial Discrimination, New York, 21 December 1965, in force 4 January 1969, 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, in force 3 September 1981, 1249 UNTS 13.

[50] Even the strongest supporters of transnational deliberative engagement on the court insist on that point: see Justice S. Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Knopf, New York, 2005), p. 180.

Court 'shall ... have regard to public international law applicable to the protection of the rights' guaranteed by the South African Constitution.[51] Whereas engagement with the practice of other constitutional courts is merely discretionary,[52] engagement with international human rights law is compulsory. Moreover, a clear international resolution of a human rights issue may be treated not only as a consideration relevant to constitutional interpretation, but as a rebuttable *presumption* that domestic constitutional rights are to be interpreted in a way that does not conflict with international law. The existence of international human rights law on an issue can change the balance of reasons applicable to the right constitutional resolution of a case.

Such an approach has been adopted, for example, by the German Constitutional Court. Unlike the South African Constitution, the German Constitution makes no specific reference to international human rights law as a source to guide constitutional interpretation. Under the German Constitution, treaty law, once endorsed by the legislature in the context of the ratification process, generally has the status of ordinary statutes. Yet, in a recent decision concerning the constitutional rights of a Turkish father of an 'illegitimate' child that had been given up for adoption by the mother, the Constitutional Court developed a doctrinal framework that exemplifies how international human rights can be connected to constitutional interpretation in a strong way.[53] In *Görgülü* a lower court had decided the issue in line with the requirements established by the European Court of Human Rights (ECtHR) as interpreter of the European Convention of Human Rights, granting certain visitation rights to the father. The lower court schematically cited the necessity to enforce international law in the form of the ECtHR's jurisprudence and held in favour of the father. On appeal, the higher court dismissed the reliance on the ECtHR on the grounds that the ECtHR as treaty law ranking below constitutional law was irrelevant for determining the constitutional rights of citizens. The Constitutional Court held *both* approaches to be flawed. Instead it held that 'both the failure to consider a decision of the ECtHR and the enforcement of such a decision in a schematic way, in violation of prior

[51] See Art. 35 of the South African Constitution.
[52] The Court 'may have regard to comparable foreign case law'. *Ibid.*
[53] *Görgülü* v. *Germany* (2004) 2 BvR 1481/04.

ranking [constitutional] law, may violate fundamental rights in conjunction with the principle of the rule of law'. Instead the Court postulated a constitutional duty to engage: 'the Convention provision as interpreted by the ECtHR *must be taken into account* in making a decision; the court must at least *duly consider* it'.[54] The Court even held that there was a cause of action available in case this duty to engage was violated: 'A complainant may challenge the disregard of this duty of consideration as a violation of the fundamental right whose area of protection is affected in conjunction with the principle of the rule of law.'[55] Beyond the duty to engage the European Convention when interpreting the Constitution, the Court also had something to say about the nature of that engagement: international law, and especially the international human rights law of the European Convention, establishes a *presumption* about what the right interpretation of domestic constitutional law requires. 'As long as applicable methodological standards leave scope for interpretation and weighing of interests, German courts *must give precedence* to interpretation in accordance with the Convention.'[56] This presumption does not apply in cases where the Constitution is plausibly interpreted to establish a higher level of protection than the ECtHR. The standards established by the ECtHR provide a presumptive floor, but not a presumptive ceiling.

This is not the place to analyze the relative merits of the weak and strong ways of engaging with international human rights law in the context of domestic constitutional interpretation, even though this is where the interesting questions lie. Nor is it the place to analyze the differences in the legal, political, and cultural contexts that explain and, to some extent, justify the differences in approach of the US Supreme Court and German Constitutional Court. Here the point was to illustrate how specific features of human rights treaties give rise to a specific set of characteristic domestic judicial practices that bear only a tenuous connection to the standard doctrinal framework governing the application of treaties in domestic law. The specific features of these domestic judicial practices are better explained, justified, and challenged in terms of jurisdictional, procedural, and outcome-related considerations of the kind that the constitutionalist model focuses on.

[54] *Ibid.*, para. 62 (emphasis added). [55] See *ibid.*, para. 30. [56] *Ibid.*, para. 62.

Precluding the migration of unconstitutional ideas? Constitutional rights and the domestic review of decisions by international institutions

Is it appropriate for acts by international institutions to be subjected to national constitutional scrutiny? International institutions, from the European Union to the United Nations, have an increasingly important role to play in global governance. States have delegated authority to these institutions in order more effectively to address the specific tasks within their jurisdictions.[57] These institutions make decisions that directly affect people's lives. Increasingly this gives rise to situations in which constitutional or human rights of individuals are in play. When these decisions are enforced domestically, should national courts apply to them the same constitutional rights standards they apply to acts by national public authorities?

Here there are two opposing intuitions in play. One focuses on the nature of the legal authority under which international institutions operate. International institutions are generally based on treaties concluded between states. These treaties are accorded a particular status in domestic law. If these treaties establish institutions that have the jurisdiction to make decisions in a certain area, these decisions derive their authority from the treaty and should thus have at most the same status as the treaty as a matter of domestic law. Since in most jurisdictions treaties have a status below constitutional law, any decisions enforced domestically must thus be subject to constitutional standards.

The opposing intuition is grounded in functional sensibilities. Constitutions function to organize and constrain domestic public authorities. They do not serve to constrain and guide international institutions. Furthermore, international institutions typically function to address certain co-ordination problems that could not be effectively addressed on the domestic level by individual states. Having states subject decisions by international institutions to domestic constitutional standards undermines the effectiveness of international institutions and is incompatible with their function. So both the function of the domestic constitution and the function of international institutions suggest that

[57] T. Franck (ed.), *Delegating State Powers: The Effect of Treaty Regimes on Democracy and Sovereignty* (Transnational Publishers, Ardsley, NY, 2000).

domestic constitutional rights should not be applied to decisions by international institutions at all.

In its recent *Bosphorus* decision,[58] the European Court of Human Rights had to address just this kind of question, and it did so developing a doctrinal framework that can serve as an example of the application of the framework presented here. To simplify somewhat, the applicant, Bosphorus, was an airline charter company incorporated in Turkey, which had leased two 737-300 aircraft from Yugoslav Airlines. One of these Bosphorus-operated planes was impounded by the Irish government while on the ground in Dublin airport. By impounding the aircraft, the Irish government implemented EC Regulation 990/93, which in turn implemented UN Security Council Resolution 820 (1993). UN Security Council Resolution 820 was one of several resolutions establishing sanctions against the Federal Republic of Yugoslavia in the early 1990s designed to address the armed conflict and human rights violations taking place there. It provided that states should impound, *inter alia*, all aircraft in their territories in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia. As an innocent third party that operated and controlled the aircraft, Bosphorus claimed that its right to peaceful enjoyment of its possessions under Art. 1 of Protocol 1 to the Convention had been violated.[59]

The ECtHR is, of course, not a domestic constitutional court, but itself a court established by a treaty under international law. But with regard to the issue it was facing, it was similarly situated to domestic constitutional courts. Just as the UN Security Council or the European Union – the two international institutions whose decisions have led to the impounding of the aircraft – are not public authorities directly subject to national constitutional control, neither are they directly subject to the jurisdiction

[58] Case 45036/98, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi* v. *Ireland* [2005] ECHR 440.

[59] Art. 1 of Protocol 1 to the Convention reads:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

of the ECtHR. Just as only national public authorities are generally addressees of domestic constitutions, the ECtHR is addressed to public authorities of signatory states.

The Court began by taking a formal approach: at issue were not the acts of the European Union or the United Nations, but the acts of the Irish government impounding the aircraft. These acts unquestionably amounted to an infringement of the applicant's protected interests under the Convention. The question is whether the government's action was justified. Under the applicable limitations clause, government's actions were justified if they struck a fair balance between the demands of the general interest in the circumstances and the interests of the company.[60] Government's actions have to fulfill the proportionality requirement. It is at this point that the Court addresses the fact that the Irish government was merely complying with its international obligations when it was impounding the aircraft. The Court held that compliance with international law clearly constituted a legitimate interest. The Court recognized 'the growing importance of international co-operation and of the consequent need to secure the proper functioning of international organizations'. But that did not automatically mean that a state could rely on international law to relieve itself completely from the human rights obligations it had assumed under the ECtHR. Instead the Court 'reconciled' the competing principles – ensuring the effectiveness of international institutions and the idea of international legality, on the one hand, and outcome-related concerns (the effective protection of human rights under the ECtHR), on the other – by establishing a doctrinal framework that strikes a balance between the competing concerns.

The Court held that state action taken in compliance with international legal obligations is generally justified 'as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides'.[61] If an international institution provides such equivalent protection, this establishes a *general presumption* that a state has not departed from the

[60] See *Bosphorus*, para. 149.

[61] *Ibid.*, para. 155. *Bosphorus* further develops the ECHR's case law in this respect: see Case 13258/87, *M. & Co.* v. *Federal Republic of Germany* (1990) 64 DR 138 and Case 21090/92, *Heinz* v. *Contracting States also Parties to the European Patent Convention*, (1994) 76A DR 125.

requirements of the Convention when it merely implements legal obligations arising from membership in such an international institution. If no equivalent human rights protection is provided by that international institution, the ECtHR will subject the state action to the same standard as it would if it were acting on its own grounds, rather than just complying with international law. When a general presumption applies, this presumption can be *rebutted* in the circumstances of the particular case, when the protection of Convention rights was *manifestly deficient*.[62]

Under the circumstances, the Court first established that the international legal basis on which the Irish government effectively relied was the EC Regulation that implemented the UN Security Council Resolution and *not* the UN Security Council Resolution itself, which had no independent status as a matter of domestic Irish law. It then engaged in a close analysis of the substantive and procedural arrangements of the European Community as they relate to the protection of human rights. Given in particular the role of the European Court of Justice (ECJ) as the enforcer of last resort of human rights in the European Community, the ECHR concluded that the European Community was an international institution to which the presumption applied. Since this presumption had not been rebutted in the present case, it held that the Irish government had not violated the Convention by impounding the aircraft.

This approach may be generally satisfactory with regard to legislative measures taken by the European Community and reflects sensibilities towards constitutionalist principles. But in an important sense it dodges the issue. In this case the European Community itself had merely mechanically legislated to implement a UN Security Council Resolution. And it is very doubtful that the ECtHR would have held that UN Security Council decisions deserve the same kind of presumption of compliance with human rights norms as European decisions. It is all very well to say that European citizens are adequately protected against acts of the European Community generally. But this just raises the issue what adequate protection amounts to when the substantive decision has been made *not* by European Community institutions, but by the UN Security Council. How should the ECJ go about assessing, for example, whether EC Regulation 990/93, which implemented the UN Security Council Resolution, violated the rights of Bosphorus as guaranteed by the

[62] *Bosphorus*, para. 156.

European Community? Should the ECJ, examining the EC Regulation under *the European Community's* standards of human rights, accord special deference to the Regulation on the basis that it implemented UN Security Council obligations?

There is no need to make an educated guess about what the ECJ would do. The ECJ had already addressed the issue. Bosphorus had already litigated the issue in the Irish courts before turning to the ECtHR. The Irish Supreme Court made a preliminary reference to the ECJ under Art. 234 ECT, to clarify whether or not European Community law in fact required the impounding of the aircraft, or whether such an interpretation of the regulation was in violation of the human rights guaranteed by the European legal order. In assessing whether the regulation was sufficiently respectful of Bosphorus' rights to property and its right freely to pursue a commercial activity, the ECJ ultimately applied a proportionality test.[63] The general purposes pursued by the Community must be proportional under the circumstances to the infringements of Bosphorus' interests.

How then is it relevant that the EC Regulation implemented a UN Security Council Resolution? Within the proportionality test the Court emphasized that the EC Regulation contributed to the implementation at the Community level of the UN Security Council sanctions against the Federal Republic of Yugoslavia. But, unlike the ECtHR, the ECJ did not go on to develop deference rules establishing presumptions of any kind. Instead the fact that the EC Regulation implemented a Security Council decision was taken as *a factor* that gives further weight to the substantive purposes of the Regulation to be taken into account. The principle of international legality was a factor in the overall equation. The purpose to implement a decision by an international institution added further weight to the substantive purpose pursued by the regulation to persuade the Yugoslav government to change its behaviour and help bring about peace and security in the region. But a generous reading of the decision also suggests that beyond formal and substantive considerations, jurisdictional considerations were added to the mix: the Court emphasized the fact the concerns addressed by the Security Council concerned international peace and security and putting an end to the

[63] Case C-84/95, *Hava Yollari Turizm ve Ticaret Anonim Sirketi* v. *Minister for Transport, Energy and Communications and others* [1997] ECR I-2953, paras. 21–6.

state of war. The particular concerns addressed by the UN Security Council went right to the heart of war and peace, an issue appropriately committed to the jurisdiction of an international institution such as the United Nations. Jurisdictional concerns, then, give further weight to the fact that the United Nations had issued a binding decision on the matter. Under these circumstances the principle of international legality has particular weight. The Court concluded: 'As compared with an objective of general interest so fundamental *for the international community* . . . the impounding of the aircraft in question, which is owned by an undertaking based in . . . the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate.'[64]

Within the framework used by the ECJ, both the principle of international legality and jurisdictional considerations were factors that the Court relied on in determining whether, all things considered, the EU measures as applied to Bosphorus in the particular case were proportionate. Outcome-related concerns did not disappear from the picture. Indeed within proportionality analysis substantive concerns – striking a reasonable balance between competing concerns – framed the whole inquiry and remained the focal point of the analysis. But what counts as an outcome to be accepted as reasonable from the perspective of a regional institution such as the European Union is rightly influenced to some extent by what the international community, addressing concerns of international peace and security through the United Nations, deems appropriate. Though it may not have made a difference in this particular case, sanctions by the European Union enacted under the auspices of the UN Security may be held by the ECJ to be proportionate, even when the same sanctions imposed by the European Union unilaterally may be held to be disproportionate and thus in violation of rights.

The approaches by the ECtHR and the ECJ both reflect engagement with the kind of moral concerns highlighted above. The ECtHR's more categorical approach is preferable with regard to institutions such as the European Union that have relatively advanced human rights protection mechanisms. With regard to such an institution, a presumption of compliance with human rights seems appropriate, preventing unnecessary duplication of functions and inefficiencies. Yet even when such a

[64] *Ibid.*, para. 26 (emphasis added).

presumption does not apply, there are still concerns relating to the principle of international legality in play. Here the kind of approach taken by the ECJ in *Bosphorus* seems to be the right one.

But the case of UN Security Council resolutions may help bring to light a further complication. It is unlikely that UN Security Council Resolutions would be held by the ECtHR as deserving a presumption of compatibility. Procedurally UN Security Council decisions involve only representatives of relatively few and, under current rules, relatively arbitrarily[65] selected states. Their collective decision-making is frequently, to put it euphemistically, less than transparent.

Council resolutions enacted to combat terrorism in recent years in particular illustrate the severity of the problem.[66] These resolutions typically establish the duty of a state to impose severe sanctions on individuals or institutions believed to be associated with terrorism. Assets are frozen and ordinary business transactions made impossible because an individual or an entity appears on a list. The content of the list is determined in closed proceedings by the Sanctions Committee established under the Resolution. Until very recently this internal procedure did not even require a state which wanted an entity or individual to be on the list to provide reasons.[67] If a state put forward a name to be listed, it would be listed, unless there were specific objections by another state. There is no meaningful participatory process underlying UN Security Council resolutions, and there is no process within the Sanctions Committee that even comes close to providing the kind of administrative and legal procedural safeguards that are rightly insisted upon at the domestic level for taking measures of this kind.

These deficiencies are not remedied by more meaningful assessments during the implementation stage in Europe. The implementation of the Council Resolution by the European Union[68] does not involve any procedure or any substantive assessments of whether those listed are

[65] The UN Security Council composition, particularly with regard to the permanent members, reflects post-Second World War standing in the international community. Current reform proposals are focused on creating a more representative body by including a stronger South American, Asian, and African presence.

[66] See K. Lane Scheppele, The Migration of Anti-Constitutional Ideas: The Post 9/11 Globalization of Public Law and the International State of Emergency in this volume.

[67] A weak reason giving requirement has been established by UN Security Council Resolution 1617 (2005).

[68] See Commission Regulation (EC) 881/2002.

listed for a good reason. Implementation is schematic. The fact that a name appears on the list as determined by the UN Security Council is regarded as a sufficient reason to enact and regularly update implementation legislation. As the Sanctions Committee of the UN Security Council decides to amend the list of persons to whom the sanction is to apply, the European Union amends the implementation Regulation, which is the legal basis for legal enforcement in member states, accordingly.[69] European Union member states have frozen the assets of about 450 people and organizations who feature on this list.

Furthermore there is no administrative type review process and no alternative legal review procedures that provide individuals with minimal, let alone adequate, protection against mistakes or abuse by individual states that are represented in the Sanctions Committee. The only 'remedy' available to individuals and groups who find their assets frozen is to make diplomatic representations to their government, which can then make diplomatic representations to the Security Council Sanctions Committee to bring about delisting, if the represented member states unanimously concur.

Clearly the serious deficiencies that exist on the level of political procedures in this context ought to be incorporated into the ECJ's framework for assessing human rights violations by implementation measures concerning UN Security Council resolutions of this kind. This, at least, would be required by the principle of procedural adequacy within the constitutionalist model developed here. And it could easily be done. For so long as there are serious procedural inadequacies underlying the international decision-making process, any weight assigned to the principle of legality within proportionality analysis should be regarded as neutralized by countervailing procedural concerns.

When applied to cases that have been percolating through the European Court system in recent years, this would no doubt significantly undermine the enforcement of sanctions as required by the UN Security Council resolutions. Yet the effect of forceful judicial intervention is

[69] See e.g. Commission Regulation (EC) 1378/2005 of 22 August 2005 amending for the fifty-second time the original implementation Regulation (EC) 881/2002. In order to satisfy the reason giving requirement under Art. 253 of the ECT the Commission stated only: 'On 17 August 2005, the Sanctions Committee of the United Nations Security Council decided to amend the list of persons, groups and entities to whom the freezing of funds and economic resources should apply. Annex I should therefore be amended accordingly.'

likely to be salutary. If the Court were to strike down as incompatible with European human rights the significant infringement of individual interests without adequate procedural guarantees, this would create an incentive for European actors to use their political clout to help significantly improve the procedures used by the Sanctions Committee to decide whom to list and when to de-list and strengthen their hand in doing so: if these demands are not met, the sanction regime would simply not be fully implementable on the domestic level. States would have to establish independent review mechanisms that fulfill minimal requirements. In this way European courts enforcing European human rights regimes would help preclude the migration of unconstitutional ideas from the international to the regional and national level while providing political actors with the right incentives to use their influence to improve the procedures of global governance.

Yet the European Court of First Instance in the first[70] of many cases[71] that have been filed to have reached the merits stage[72] has shied away from taking such a step. Instead, unlike either the ECJ or the ECtHR, it adopted a straightforward monist approach. It began stating the trite truth that UN Security Council resolutions were binding under international law, trumping all other international obligations. But it then went on to derive from this starting point that 'infringements either of fundamental rights as protected by the Community legal order ... cannot affect the validity of a Security Council measure or its effect in the territory of the Community'.[73] The only standards it could hold these decisions to were principles of *jus cogens*, which the Court held were not violated in this case.[74] It can be hoped that on appeal to the ECJ and

[70] Case T-306/01, *Yusuf* v. *European Council* [2006] All ER (EC) 290, [2005] All ER (D) 118 (Sep), CFI. See also Case T-315/01.

[71] There are approximately fifteen such cases on the Court's docket.

[72] See e.g. Case T-229/02 and Joined Cases T-110/03, T-150/03 and T-405/03.

[73] Case T-306/01, para. 225.

[74] There are traces of constitutionalist thinking evident in the Court's innovative understanding of *jus cogens*. The Court acknowledged that the right to access to the courts, e.g., is protected by *jus cogens*, but that as a rule of *jus cogens* its limits must be understood very broadly. In assessing the limitations the Court essentially applies a highly deferential proportionality test attuned to the principles of the constitutionalist model: given the nature of the Security Council decision and the legitimate objectives pursued, given further the Security Council's commitments to review its decisions at specified intervals, in the circumstance of the case the applicants' interest in having a court hear their case on the merits is not enough to outweigh the essential public interest pursued by the Security Council (see paras. 343–5). Even if the

possible further review by the ECtHR the constitutionalist sensibilities of these Courts will incline them to strike down the EC implementing legislation as incompatible with European human rights guarantees.[75] Taking international law seriously does not require unqualified deference to a seriously flawed global security regime.[76] On the contrary, the threat of subjecting these decisions to meaningful review could help bring about reforms on the UN level. The very prospect of having the decision reviewed by the ECJ has already helped mobilize the discussion of reform efforts at the UN level. If these efforts bear fruit it can be hoped that the ECJ will have reasons not to insist on meaningful independent rights review of individual cases.

Conclusions: the techniques and distinctions of graduated authority

Constitutionalist principles establish a normative framework for assessing and guiding national courts in their attempt to engage international law in a way that does justice both to their respective constitutional commitments and to the increasing demands of an international legal system. There are three interesting structural features that characterize any set of doctrines that reflect a commitment to the constitutionalist model.

First, such courts take a significantly more *differentiated* approach than traditional conflict rules suggest.[77] Treaties are not treated alike, even if

approach taken by the Court to *jus cogens* is promising and defensible, the results it reached are not.

[75] One reason for the reluctance of the European Court of First Instance to adopt anything other than a monist position is the introduction of Art. I-3 s(4) of the Constitutional Treaty, which establishes 'the strict observance and the development of international law, including respect for the principles of the United Nations Charter' as a European Union objective. The Constitutional Convention that drafted the Constitutional Treaty was deliberating these clauses in the context of what was widely regarded as the blatant disregard of the United States for international law and the United Nations specifically in the context of the Iraq war, which generated mass demonstrations in capitals across Europe, including London, Rome, and Madrid. The Constitutional Treaty is unlikely to be ratified in the present form, following its rejection in French and Dutch referenda, but its provisions may still exert a moral pull that informs the interpretation of the current law of the European Union. A commitment to international legality, in particular in the security area, may well have become a central part of a European identity.

[76] See the contribution in this volume by Scheppele, The Migration of Anti-Constitutional Ideas.

[77] See also M. Riesman, The Democratization of Contemporary International Law-Making Processes and the Differentiation of their Application in R. Wolfrum and V. Röben (eds.), *Developments of International Law in Treaty-Making* (Springer, Berlin, 2005), p. 15.

constitutionally entrenched conflict rules suggest they should be. Instead doctrines used are sensitive to the specific subject-matter of a treaty and the jurisdictional considerations that explains its particular function, as the example of human rights treaties has illustrated. Furthermore the example of the ECtHR engagement with international institutions illustrated how outcome-related considerations are a relevant factor for assessing the authority of its decisions.

Second, the kind of doctrinal structures that come into view suggests a more *graduated authority* than the traditional idea of constitutionally established conflict rules suggest. The doctrinal structures that were analyzed in the examples illustrated *a shift from rules of conflict to rules of engagement*. These rules of engagement characteristically take the forms of a duty to engage, the duty to take into account as a consideration of some weight, or presumptions of some sort. The old idea of using international law as a 'canon of construction' points in the right direction, but does not even begin to capture the richness and subtlety of the doctrinal structures in place. The idea of a 'discourse between courts' too is a response to this shift. It captures the reasoned form that engagement with international law frequently takes. But it too falls short conceptually. It is not sufficiently sensitive to the graduated claims of authority that various doctrinal frameworks have built into them. The really interesting questions concern the structures of graduated authority built into doctrinal frameworks: who needs to look at what and give what kind of consideration to what is being said and done.[78]

Finally the practice is jurisprudentially more complex than traditional models suggest. The traditional idea that the management of the interface between national and international law occurs by way of constitutionally entrenched conflict rules that are focused on the sources of international law is deeply committed to positivist legal thinking. It suggests that the

[78] There are two other ways in which the 'discourse between courts' paradigm is not helpful. It downplays the significance of the distinction between international law and foreign law. Outside of the area of human rights the reasons supporting judicial engagement with foreign law are generally considerably weaker than the reasons supporting engagement with international law. Not surprisingly, in many jurisdictions these differences are reflected in the different doctrinal structures concerning engagement with international law. Furthermore the idea of 'discourse between courts' is too court focused. The spread of constitutional courts and international courts and tribunals clearly is a factor that furthers the tendencies described here. But this shift is not just about courts engaging other courts. It is about courts engaging the various institutions that generate and interpret international law.

national constitution is the source of the applicable conflict rules. Furthermore these constitutional conflict rules are themselves typically organized around the 'sources' of international law: treaties and customary international law are each assigned a particular status in the domestic legal order. Both ideas are seriously challenged by actual practice that is attuned to constitutionalist thinking. That practice suggests that moral principles relating to international legality, jurisdiction, procedures, and outcomes have a much more central role to play in explaining and guiding legal practice. These principles are not alien to liberal constitutional democracy, appropriately conceived. And they are not alien to international law. But their legal force derives not from their canonical statement in a legal document. Their legal force derives from their ability to make sense of legal practice and to develop it further in a way that fulfills its promise of integrity.

11

Constitution or model treaty? Struggling over the interpretive authority of NAFTA

DAVID SCHNEIDERMAN

At its inception in 1987, Ronald Reagan heralded the Canada-US Free Trade Agreement (CANUFTA) as a 'new constitution' for North America.[1] This was not merely an agreement about managing trade interdependence. Rather, President Reagan signalled this was a project with grander political and cultural objectives. It was no great leap, then, to envisage CANUFTA's successor, the North American Free Trade Agreement (NAFTA), as being even more constitution-like, expanding and deepening continent-wide constitutional commitments. The intuition carried greater force in light of NAFTA's new investor-state dispute mechanism, granting foreign investors the ability to sue state parties directly in order to enforce NAFTA's investment chapter (Chapter Eleven). For scholars writing in the Canadian tradition of political economy, it was easy to connect the dots, just as President Reagan had suggested. A steady stream of scholarly production (to which I have modestly contributed) has examined linkages between these new sorts of transnational constraints and domestic constitutional ones.[2] Upon

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[1] D. Cameron (ed.), *The Free Trade Deal* (James Lorimer & Company, Toronto, 1988), pp. i–xviii.

[2] See H. Arthurs, Governing the Canadian State: The Constitution in an Era of Globalization, Neo-Liberalism, Populism, Decentralization, and Judicial Activism (2003) 13 *Constitutional Forum* 60; S. Clarkson, *Uncle Sam and Us: Globalization, Neoconservatism and the Canadian State* (University of Toronto Press, Toronto, 2002); S. McBride, Quiet Constitutionalism in Canada: The International Political Economy of Domestic Institutional Change (2003) 36 *Canadian Journal of Political Science* 251; S. Gill, Globalisation, Market Civilisation, and Disciplinary Neoliberalism (1995) 24 *Millenium: Journal of International Studies* 399; I. Robinson, The NAFTA, the Side Deals, and Canadian Federalism: Constitutional Reform

examination, it becomes apparent that a number of NAFTA's investment disciplines even mirror rights available within national constitutional regimes, more particularly, an expansive US version.[3] So this is a politico-cultural project with a particular genealogy. Writers have hypothesized about the implications of this 'new constitutionalism' for North America, and the potential enfeebling of Canadian legislative authority that would unfold over time. The emphasis in this work, which I will label 'constitutionalist', has been on preserving the particular, the local, or the national in the face of pressures for further continental integration.

The migration of the idea of constitutionalism to the regional and transnational spheres has been resisted by others. These scholars and authors, usually writing from a perspective internal to international economic law, prefer to emphasize the modest scope of NAFTA's reach. These authors maintain that NAFTA goes no further than to institutionalize a limited set of constraints voluntarily consented to by the governments of sovereign states. The normative regime that emerged, admittedly, transcends difference and builds bridges across legal cultures, but this is solely for the purpose of advancing economic prosperity and national harmony[4] – it is decidedly not for the purposes of building a new constitutional order. Nor are its driving principles drawn from any particular national tradition. Rather, they mirror international law principles as they have developed over the last century or so. Indeed, NAFTA has a distinguished pedigree, building upon investment dispute practices traceable back at least to the eighteenth-century Jay Treaty. Lastly, these strictures, they maintain, are better understood as modelled not upon constitutional litigation but upon private commercial arbitration, a mode of dispute resolution that de-politicizes investment disputes. The emphasis here, which I call 'internationalist', is on the

by Other Means in R. Watts and D. Brown (eds.), *Canada: The State of the Federation 1993* (Institute of Intergovernmental Relations, Kingston, ON,1993); D. Schneiderman, NAFTA's Takings Rule: American Constitutionalism Comes to Canada (1996) 46 *University of Toronto Law Journal* 499; D. Schneiderman, Investment Rules and the New Constitutionalism (2000) 25 *Law & Social Inquiry* 757.

[3] V. Been and J. Beauvais, The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International 'Regulatory Takings' Doctrine (2003) 78 *New York University Law Review* 30; Schneiderman, Investment Rules.

[4] D. Kennedy, New Approaches to Comparative Law: Comparativism and International Governance (1997) *Utah Law Review* 545 at 546.

universal and the transcendent in the face of resistance by self-seeking states and national citizenries.

The purpose of this chapter is to contrast these two styles of argumentation. Admittedly, the lines of division are a little more complex than suggested here, but they represent well the parameters of a debate, at least in English-speaking North America, that divides into one of these two camps: the constitutionalist and the internationalist. One resists the homogenizing and integrationist thrust of international economic law; the other promotes a regime that transcends the local and infuses the 'rule of law' into inter-state commercial behaviour. The first, working in the tradition of political economy, embraces the idea that global rules of trade and investment are appropriately the subject of political contestation; the second envisages a transnational regime seemingly above politics but yet not approaching the constitutional in scale or in scope.

For internationalists, one of the core missing pieces in the constitutionalist account is a *demos* – there appear to be no sovereign people constituting this new legal order who have agreed to bind themselves together far into the future. The Canadian general election of 1987 aside,[5] the absence of this *demos* is precisely the point constitutionalists of Canadian origin wish to underscore. For constitutionalists, NAFTA's constitutional project is illegitimate because it purports to do via international trade and investment treaties what never likely could be done via the auspices of constitutional reform,[6] that is, to 'lock in' state capacity so as to limit the redistributivist capacity of the state.

Pierre Bourdieu described legal disputes as 'interpretive struggles' over the control of legal text.[7] The process of 'naming' in law is a form of social production, for it 'creates the things named', Bourdieu claimed.[8] The prize to be won in legal contests, then, was to place one's interpretive

[5] In 1987, Canadians indirectly endorsed the Progressive Conservative Party's agenda for a Canada-US free trade agreement by returning a majority of Conservatives to Parliament (170 of 295 seats). A greater percentage of votes, however, was registered with parties that were opposed to the agreement: the Conservatives received only 43 per cent of the electoral vote while the Liberals and NDP, both opposed to the deal, received over 50 per cent of the election returns. See G. Doern and B. Tomlin, *Faith and Fear: The Free Trade Story* (Stoddart, Toronto, 1991), p. 238.

[6] R. Grinspun and R. Kreklewich, Consolidating Neoliberal Reforms: 'Free Trade' as a Conditioning Framework (1994) 43 *Studies in Political Economy* 33.

[7] P. Bourdieu, The Force of Law: Toward a Sociology of the Judicial Field (1987) 38 *Hastings Law Journal* 805 at 818.

[8] *Ibid.*, at 838.

stamp on legal text. Though Bourdieu was describing trial processes involving combative legal professionals facing off in juridical arenas, his insights apply equally in this context. The contest between constitutionalists and internationalists over the interpretation of NAFTA is better understood as one over control of interpretation of the text. According to the constitutionalist narrative, NAFTA's legitimacy should be called into question. For internationalists, the deepening and widening of NAFTA through future accords, like the currently stalled hemispheric Free Trade Agreement of the Americas (FTAA), are more likely assured if doubts about NAFTA's legitimacy are removed. The stakes in this interpretive struggle, then, are quite high.[9] Insofar as internationalists resist the constitutional analogy, paradoxically, they understate the capacity of NAFTA to discipline states externally and to shift cultural and political values within states in the direction of economic liberalism.

The chapter proceeds as follows. In the first section, I trace the intellectual origins of the constitutionalist approach to the tradition of Canadian political economy. This intellectual tradition lays the groundwork for the constitutionalist critique, briefly summarized in the second section, which took hold after the passage of CANUFTA and then NAFTA. In the third section, I identify three arguments advanced by internationalists in response to the constitutionalists. In the course of this discussion, I develop constitutionalist rejoinders to each of the internationalist claims that lend support to the argument that the migration of constitutional ideas to the transnational level makes the most sense of recent developments.

One of the disagreements between constitutionalists and internationalists concerns claims about the migration of constitutional ideas of a particular kind, namely, the internationalization of the principles of US constitutional law. Constitutionalists, as mentioned, have identified parallels between investment rules and a dominant version of US

[9] See R. Howse and K. Nicolaïdis, Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far in R. Porter, P. Sauvé, A. Subramnanian, and A. Zapetti (eds.), *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium* (Brookings Institution Press, Washington, DC, 2001), pp. 227–52. It is noteworthy that the protagonists in the debate over the future of Europe are seemingly reversed. Constitutionalists seek to legitimate at the same time as they theorize the European enterprise. Standing in for the internationalists are those who see Europe merely as an inter-state order. This, admittedly, is to simplify things. For the complex variety of positions presently represented in the European debate, see N. Walker, Europe's Constitutional Momentum and the Search for Polity Legitimacy (2005) 3 *International Journal of Constitutional Law* 211.

constitutional law associated with the limited state,[10] a proposition which many internationalists fiercely resist.[11] The movement of local law to the transnational plane is not the principal focus of this chapter. It merely is one element (albeit a significant one) in the debate as it is being framed here. Moreover, I have addressed these matters more directly elsewhere.[12] It is worth noting, nonetheless, that this movement represents another trajectory for analysis of the migration of constitutional ideas.

Intellectual origins of the constitutionalist approach to the tradition of Canadian political economy

The Canadian tradition in political economy has undoubtedly helped to fuel constitutional discourse around NAFTA. One usually traces its origins to the work of Harold Adams Innis, the iconoclast professor of political economy at the University of Toronto from the 1930s to the 1960s. Innis' singular contribution was to outline and apply the 'staples' approach to economic history. A uniquely Canadian innovation,[13] the staples thesis emphasizes the significance of raw commodities, like cod and fur, to early Canadian economic development. Innis documented the construction of a national infrastructure – centred around the St Lawrence seaway – for the movement of these commodities to international markets. This required the investment of capital principally from non-domestic sources. The ability of Canada to make payments on these investments was dependent entirely on the global market for staples, and these markets proved to have a great deal of volatility.[14]

[10] There are other versions, like that of the energetic state associated with the commonwealth era, that are not offered as the global gold standard. See e.g. J. Hurst, *Law and the Conditions of Freedom in Nineteenth-Century United States* (The University of Wisconsin Press, Madison, 1956); W. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (University of North Carolina Press, Chapel Hill, 1996).

[11] There appears to be less resistance to describing the Uruguay-round GATT in these terms. See authors referred to in note 47 below.

[12] See e.g. Schneiderman, NAFTA's Takings Rule; Schneiderman, Investment Rules and the New Constitutionalism; and David Schneiderman, Property Rights, Investor Rights, and Regulatory Innovation: Comparing Constitutional Cultures in Transition (2006) *International Journal of Constitutional Law* 4 at 371.

[13] M. Watkins, A Staple Theory of Economic Growth in W. Easterbrook and M. Watkins (eds.), *Approaches to Canadian Economic History: A Collection of Essays* (McClelland and Stewart Limited, Toronto, 1967), pp. 49–73 at p. 49.

[14] H. Innis, Government Ownership and the Canadian Scene in M. Innis (ed.), *Essays in Canadian Economic History* (University of Toronto Press, Toronto, 1956), pp. 81–6.

Canada's staples economy, at bottom, resulted in a 'crippling pattern of commercial dependency that shaped the fundamental condition of Canadian development'.[15]

Political economy working in the shadow of Innis took a decidedly critical turn,[16] resulting in prodigious intellectual output sensitive to the vagaries of Canada's reliance on foreign capital. This work also suggested new national policies directed at dampening some of the negative effects of volatile markets on a vulnerable Canadian public. These strands came together in the 1968 Canadian Task Force on Foreign Ownership, led by University of Toronto economist Mel Watkins. The Commission report noted that levels of foreign ownership in Canada were 'significantly higher than that for any other economically developed country and higher than for most of the underdeveloped countries'.[17] Controls over foreign investment, directed particularly at investment originating from the United States, emerged as the preferred policy tool. This would be achieved through the instrumentality of foreign investment screening under the auspices of Canada's Foreign Investment Review Agency.

The Canadian political economy tradition emphasizes the role of the state in facilitating a 'defensive expansionism'.[18] The rise of John A. Macdonald's 'national policy' exemplifies the use of tariff barriers to promote economic development as a device to countervail the loss of British preferences and access to US markets after the civil war. Yet the discourse of free trade also has played a critical role in the Canadian political tradition. As Innis maintained, 'export trade has been fundamental to the economic life of Canada since its discovery'.[19] From Laurier's failed reciprocity initiative to the successful 1935 trade initiative with the Roosevelt government, opening borders to trade with

[15] D. Drache, Introduction: Celebrating Innis: The Man, the Legacy, and Our Future in D. Drache (ed.), *Staples, Markets and Cultural Change: Selected Essays* (McGill-Queen's University Press, Montreal, 1995), pp. xiii–lix at p. xxii.

[16] M. Watkins, Politics in the Time and Space of Globalization in W. Clement and L. Vosko (eds.), *Changing Canada: Political Economy as Transformation* (McGill-Queen's University Press, Montreal, 2003), pp. 3–24 at p. 5.

[17] Report of the Task Force on the Structure of Canadian Industry, *Foreign Ownership and the Structure of Canadian Industry* (Queen's Printer, Ottawa, 1968), p. 300.

[18] H. Aitken, Defensive Expansionism: The State and Economic Growth in Canada in Easterbrook and Watkins (eds.), *Approaches to Canadian Economic History*, pp. 183–221 at p. 221.

[19] H. Innis, Notes and Memoranda: The Rowell-Sirois Report (1940) *Canadian Journal of Economics and Political Science* 562 at 564.

the United States has long been a goal of successive Canadian governments, both Liberal and Conservative. Though the intellectual roots of the movement are traceable back to classical economic thought, we should look to the research output and final report of the Royal Commission on Economic Union and Development Prospects for Canada as catalyzing the initiative that would ultimately lead to NAFTA.[20] The initial impetus for the Royal Commission, its Chairman Donald S. MacDonald admits, was to enhance internal trade within Canada. The Commission, instead, embarked on a course that led to the finding that Canada was better off taking a 'leap of faith' by seeking freer trade with the United States.[21] This would be in Canada's best economic interests, both in respect of existing resource industries and as a market for new 'value added' goods and services.[22] Think tanks, such as the C.D. Howe Institute, and peak business organizations like the Business Council on National Issues, added energy to the impetus by producing background papers, lobbying government officials, and engaging public opinion.[23] The election of the Brian Mulroney-led Conservative government furnished the political push for the movement to take hold in official Ottawa. According to Lusztig, Mulroney strategically seized the free trade initiative at the same time as he commenced constitutional negotiations resulting in the failed 1987 Meech Lake Accord. In so doing, he forged a new political coalition between both Western-based and Quebec-based Conservatives that would keep the Progressive Conservatives in power for much of the 1980s.[24] Negotiations for a bilateral agreement with the United States together with constitutional negotiations internal to the federation were initiated shortly after the Royal Commission Report was released.[25]

[20] Royal Commission on Economic Union and Development Prospects for Canada (Chair: Donald S. MacDonald), *Report, Volume 1* (Supply and Services Canada, Ottawa, 1985), pp. 323–445.

[21] See G. Inwood, *Continentalizing Canada: The Politics and Legacy of the MacDonald Royal Commission* (University of Toronto Press, Toronto, 2005).

[22] D. MacDonald, Leap of Faith in L. MacDonald (ed.), *Free Trade: Risks and Rewards* (McGill-Queen's University Press, Montreal, 2000), pp. 48–54 at p. 51.

[23] D. Langille, The Business Council on National Issues and the Canadian State (1987) 24 *Studies in Political Economy* 41.

[24] M. Lusztig, *Risking Free Trade: The Politics of Trade in Britain, Canada, Mexico, and the United States* (University of Pittsburgh Press, Pittsburgh, 1996), pp. 93–4.

[25] R. Lipsey, D. Schwanen, and R. Wonnacott, Inside or Outside the NAFTA? The Consequences of Canada's Choice, *C.D. Howe Institute Commentary*, June 1993, pp. 21–2.

It was Canada's deep and long-term dependency on US markets that helped to move business leaders and government officials in the direction of the free trade initiative. First, Canadian negotiators hoped that it would finally provide a means of managing and resolving trade disputes with Canada's largest market for its goods. 'The FTA responded as much to a management crisis as to an economic imperative in Canada-U.S. relations,' writes Hart.[26] Second, as Richard Lipsey frankly admits, it was part of a 'policy package of liberalizing the whole Canadian economy, exposing it more fully to market forces'.[27] All of this, Lipsey writes, was 'in line with the world-wide movement to concentrate government in its areas of core competence'.[28] The rhetoric of free trade advocates was decidedly internationalist. The initiative, they emphasized, was but part of a larger multilateral strategy being played out at the GATT. Similar issues around intellectual property, investment, and trade in services were on the agenda there as well.[29] Opposed to this new internationalism was what they called a 'nationalist opposition' – '[q]uixotic, emotional, and exaggerated'. This was a movement '[r]ooted in fear of the unknown, its shrillness reflect[ing] a lamentable lack of seriousness in the day-to-day public debate'.[30]

If CANUFTA was primarily about imposing rule-of-law disciplines on trading partners with unequal economic power, internationalists maintained, it left Canada 'free to follow policies that are completely different from those followed by the United States on any matter whatsoever, so long as it applies these policies equally to Canadian and US firms operating in Canada'.[31] According to Lipsey's and others' accounts, this idea of national treatment (or non-discrimination) was the treaty's central organizing principle. As regards CANUFTA's other strictures, such as the investment disciplines in Chapter Eleven, internationalists painted a distorted picture. I turn to a discussion of these rules in the next part.

[26] M. Hart, The Road to Free Trade in L. MacDonald, *Free Trade*, pp. 3–34 at p. 24

[27] R. Lipsey, The Canada-U.S. FTA: Real Results Versus Unreal Expectations in L. MacDonald, *Free Trade*, pp. 99–106 at p. 102.

[28] *Ibid.*

[29] Lipsey, Schwanen and Wonacott, Inside or Outside, p. 25.

[30] M. Hart with B. Dymond and C. Robertson, *Decision at Midnight: Inside the Canada-US Free Trade Negotiations* (UBC Press, Vancouver, 1994), p. 67.

[31] R. Lipsey, The Free Trade Deal and Canada's Sovereignty: Are the Fears Justified?, *C.D. Howe Institute Trade Monitor*, November 1988, p. 2.

The constitutionalist critique

State sovereignty is being ever more fragmented by the new constitutional order represented by NAFTA's investment chapter. There is an ensemble of different disciplines at work in Chapter Eleven, but the focus here is on NAFTA's 'takings rule'. This is the rule prohibiting expropriations and nationalizations, both direct and indirect, and measures tantamount to expropriation and nationalization. The modern variant of the rule, as it developed in the early twentieth century, was intended to capture the acquisition of title to property by states. Today, the rule concerns measures that so impact on an investment interest that they are equivalent to a taking.[32] Regulatory changes that '[go] too far', in Justice Oliver Wendell Holmes' famous words, are intended to be caught by the rule.[33]

The prohibition on regulatory takings has been invoked by investors to challenge reformist measures that impair a variety of different investment interests. There were reports that a proposed public auto insurance plan in Ontario and the cancellation of contracts to transfer public property into private hands (Toronto's Pearson Airport), triggered threats of NAFTA disputes.[34] I have documented how major US tobacco companies threatened to challenge under NAFTA Canadian federal government proposals mandating the plain packaging of all cigarettes sold in Canada.[35] More recently, NAFTA's takings rule may have prompted the government of New Brunswick to reject a legislative committee proposal recommending the adoption of a public auto insurance scheme for the province. Exorbitant rates paid to private auto insurers were a principal election issue in 2003. Premier Bernard Lord subsequently struck an all-party committee to consider appropriate legislative responses. In its final report, the Committee recommended that the province adopt a public auto insurance plan. The Committee made the recommendation in the face of evidence from the Insurance Bureau of

[32] T. Wälde and S. Dow, Treaties and Regulatory Risk in Infrastructure Investment (2000) 34 *Journal of World Trade* 1.

[33] *Pennsylvania Coal* v. *Mahon*, 260 US 393 (1922). A more modern-day formulation is offered by lawyer and arbitrator Yves Fortier: a taking occurs when a state 'crosses the line'. See Caveat Investor: The Meaning of 'Expropriation' and the Protection Afforded Investors Under NAFTA, *ICSID News*, vol. 20, no. 1, Summer 2003.

[34] The former, under the earlier incarnation of the rule in the Canada-US Free Trade Agreement.

[35] Schneiderman, NAFTA's Takings Rule.

Canada (the peak lobby organization) and a commissioned legal opinion from the prestigious Canadian law firm McCarthy Tétrault LLP that US-based private auto insurers could seek compensation for the taking of their investment interests under NAFTA's Chapter Eleven.[36] The Lord government rejected the Committee's recommendation, though, without specific reference to NAFTA's chilling effects.[37]

Panel rulings have told us a few more things about NAFTA's takings rule.[38] First, all variety of interests are protected by investment rules – not only property owners but also those who hold expectations under contract, even shareholders. We also know that takings will include non-discriminatory regulations (measures that do not target foreign investors but that are facially neutral) and even (oddly) measures falling 'within an exercise of a state's so-called police powers'.[39] However, only measures that are 'substantial enough'[40] or 'sufficiently restrictive'[41] can give rise to a compensable taking, including measures inconsistent with 'specific commitments' made to investors by regulating governments.[42] NAFTA's rule will catch not only instances of outright seizure of property (the easiest case) but also 'incidental interference' with an investment which has the effect of depriving owners of a 'significant part' of the 'use or reasonably-to-be-expected economic benefit of property'.[43] Compensable expropriations must amount to a 'lasting removal of the ability of an

[36] Legislative Assembly of New Brunswick, Select Committee on Public Auto Insurance, Final Report on Public Auto Insurance in New Brunswick, April 2004.

[37] S. Shrybman and S. Sinclair, Public Auto Insurance and Trade Treaties, *Briefing Paper: Trade and Investment Series (Canadian Centre for Policy Alternatives)*, vol. 5, no. 1, June 2004, online at http://www.policyalternatives.ca/documents/National_Office_Pubs/brief5–1.pdf; L. Peterson, International Treaty Implications Color Canadian Province's Debate over Public Auto Insurance, *INVEST-SD: Investment Law and Policy Weekly News Bulletin*, 11 May 2004, available at http://www.iisd.org/pdf/2004/investment_investsd_may11_2004.pdf (accessed 23 August 2004).

[38] I discuss these panel rulings in more detail in Taking Investments Too Far: Expropriations in the Semi-Periphery in M. Cohen and S. Clarkson (eds.), *Governing Under Stress: Middle Powers and the Challenge of Globalization* (Zed Books, London, 2004), pp. 218–38.

[39] *Pope & Talbot Inc and the Government of Canada, Interim Award.* 2000 (26 June). (2001) 13 *World Trade and Arbitration Materials* 19, para. 96.

[40] *Ibid.* [41] *Ibid.*, para. 102.

[42] *In the Matter of an International Arbitration Under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules: Methanex v. United States of America* (13 August 2005) at Part IV, Chapter D, para. 7, at http://www.state.gov/documents/organization/51052.pdf.

[43] *The United Mexican States v. Metalclad Corporation* (2001) 13 *World Trade and Arbitration Materials* 219, para. 31.

owner to make use of its economic rights', though the deprivation may even be 'partial or temporary'.[44]

The characterization of NAFTA as 'constitutional' can hardly be resisted any longer. It has been accepted by at least one panel member in the *S.D. Myers* case. Bryan Schwartz, in a separate opinion, describes trade agreements like NAFTA as having 'an enormous impact on public affairs in many countries' and goes on to liken these agreements to 'a country's constitution' for they 'restrict the ways in which governments can act and they are very hard to change'. Moreover, debates within Congress over granting trade promotion authority to George W. Bush confirm that the object of the takings rule, at least from the US perspective, is to replicate disciplines available to citizens of the United States under the Fifth and Fourteenth Amendments.[45] Investment protections, Senator Gramm noted, 'were modeled on familiar concepts of American law, [and they] became the standard for protection of private property and investment around the world'.[46]

Internationalists' response to the constitutionalists

The migration of a constitutional framework of analysis to NAFTA has most been resisted by internationalists.[47] Instead, they have emphasized

[44] *S.D. Myers, Inc. and Government of Canada, Partial Award* (2001) 40 *International Legal Materials* 1408, para. 283.

[45] D. Schneiderman, Congress and Empire: Taking Investment Rules Global, unpublished (2005); M. Poirier, The NAFTA Chapter 11 Expropriation Debate. Through the Eyes of a Property Theorist (2003) 35 *Environmental Law* 851.

[46] US Senate 2001, 21 May 2002, p. S4595.

[47] Others, however, have acknowledged constitutional dimensions to the Uruguay-round GATT overseen by the World Trade Organization (WTO). E.-U. Petersmann, The WTO Constitution and Human Rights (2000) 3 *Journal of International Economic Law* 19, heralds the WTO as advancing a new global human rights-protecting paradigm. J. McGinnis and M. Movsesian, The World Trade Constitution (2000) 114 *Harvard Law Review* 511, liken the operation of the WTO to the Madisonian design of the US Constitution, aimed at disciplining self-interested state activity that undermines global well-being. This is despite the fact that the WTO regime rightly is described as 'only a very modestly constitutionalised entity'. N. Walker, The EU and the WTO: Constitutionalism in a New Key in G. de Búrca and J. Scott (eds.), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing, Oxford, 2001), pp. 31–57 at p. 50. For more skeptical views, see J. Alvarez, Constitutional Interpretation in International Organizations in J.-M. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations* (United Nations University Press, Tokyo, 2001), pp. 104–54; and D. Cass, *The Constitutionalization of the World Trade Organization* (Oxford University Press, Oxford, 2005).

three readings of the trade deal that lessen the significance of its constitutional aspirations. First, it is said, these strictures reflect international law principles and so are not in the nature of constitutional law; second, the practice of entitling investors to sue under international treaties is of longstanding practice in international law, traceable back to the eighteenth-century Jay Treaty; and third, these disputes are not in the nature of constitutional quarrels but are better understood as modelled upon a private commercial arbitration model. I now turn to a discussion of each of these claims.

International law

International law might be thought of as more solicitous toward private property and investment interests than some national legal systems. Internationalists, therefore, have looked to customary international law[48] as reflecting an underlying international consensus, developed over the last one hundred years or so, that provides the scaffolding for NAFTA and the modern investment treaty regime.[49] If not previously a customary rule of international law, it is argued in the alternative, the content of a takings rule – including a prohibition on regulatory takings – has unmistakably risen to the level of customary law. This is by virtue of more than two thousand bilateral investment treaties that have been signed over the past two decades.[50]

We are cautioned, nevertheless, about rushing to embrace new customary international law emerging out of treaty practice.[51] We should be certain, for instance, that state conduct giving rise to purported

[48] Identified as a source of international law in the authoritative Statute of the International Court of Justice, Art. 38(1)(b).

[49] *Pope & Talbot Inc. and the Government of Canada, Award on Damages* (31 May 2002), available online at http://www.naftalaw.org. The panel in *Pope & Talbot* had regard to the rules of customary international law in so far as they incorporated the concepts of 'fair and equitable treatment' and 'full protection and security' in NAFTA, Art. 1105. They did not address the takings rule, per se, however, applying similar considerations as did the panel would lead to the conclusion that the NAFTA takings standard reflects customary international law.

[50] A. Gunawardana, The Inception and Growth of Bilateral Investment Promotion and Protection Treaties (1992) 86 *American Society of International Law Proceedings* 544; S. Hindelang, Bilateral Investment Treaties, Custom and a Healthy Investment Climate: The Question of Whether BITs Influence Customary International Law Revisited (2004) 5 *Journal of World Investment and Trade* 789.

[51] M. Shaw, *International Law* (5th edn, Cambridge University Press, Cambridge, 2003), p. 92.

custom is independent of treaty obligations and not merely evidence of treaty compliance[52] – not necessarily the case here. Even if one were to concede that the content of a takings rule is encompassed by customary international law, the basic content of that law is too vague to be of much guidance. What, after all, is a measure 'tantamount to' a taking? For this reason, the law in this area has been critiqued for being 'at best difficult to understand and apply and certain to lead to inconsistent judgments about the content of the law, and at worst incoherent and internally inconsistent'.[53]

Others admit that customary international law does not reveal a consensus concerning many of the issues raised by NAFTA's takings rule.[54] It is considered 'uncertain' that customary international law has evolved to the point that any new rules will have emerged out of the investment treaty regime.[55] This is due, in part, to the variety and divergence in standards of protection[56] and to the unevenness in bargaining power between negotiating states.[57] These relationships, Alvarez notes, hardly reflect 'a voluntary, uncoerced transaction'.[58]

Internationalists may prefer to avoid having to identify an international consensus around takings. Instead, it may be advantageous to argue that investment disciplines rise to the level of 'general principles of

[52] *North Sea Continental Shelf Cases* [1969] ICJ Rep. 3, para. 76.

[53] A. T. Guzman, Saving Customary International Law, draft, 15 June 2005, p. 13, available online at SSRN, http://papers.ssrn.com/sol3/papers.cmf?abstract_id=708721.

[54] R. Dolzer, Indirect Expropriation of Alien Property (1986) 1 *ICSID Review – Foreign Investment Law Journal* 41; R. Dolzer, Indirect Expropriations: New Developments? (2002) 11 *New York University Environmental Law Journal* 64; A. Guzman, Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties (1998) 38 *Virginia Journal of International Law* 639; M. Sornarajah, *The International Law on Foreign Investment* (2nd edn, Cambridge University Press, Cambridge, 2004); A. Masa'deh, *Investment & Competition in International Policy: Prospects for WTO Law* (Cameron May, London, 2003). Or it may be more accurate to say that multilateral dissensus around these questions post the First World War replaced the dominant consensus among capital exporting states. See C. Lipson, *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (University of California Press, Berkeley, 1985), ch. 1.

[55] Sornarajah, *ibid.*

[56] *Ibid.*, pp. 205–6; cf. Shaw, *International Law*, pp. 747–8.

[57] Sornarajah, *ibid.*, p. 206; Guzman, Saving Customary International Law.

[58] J. Alvarez, Remarks (1992) 86 *American Society of International Law Proceedings* 550 at 552. The requirement of *opinio juris*, or belief by a state that it is required by law to behave a certain way, speaks to this psychological element in customary international law (Shaw, *International Law*) which these authors argue may be a missing element. The failure to secure a multilateral agreement on investment at the OECD also underscores the absence of consensus around the takings rule and related disciplines in NAFTA.

law recognized by civilized nations'.[59] The intention behind general principles, writes Oppenheim, is 'to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of States'.[60] This notion, attentive to the transference of local law to the international plane – what Santos calls 'globalized localism'[61] – perhaps better captures the process that internationalists aim to describe. Capital-exporting states have long attempted to claim as international law idealized versions of their own domestic legal arrangements.[62]

Yet internationalists also claim that investment rules are 'non-national' law – they are 'neutral as to nationality and legal tradition'.[63] This is a false universality, recalling Bourdieu's notion that we be attentive to 'the repressed economic and social conditions of access to the universal'.[64] There was more candour about this in the early part of the twentieth century. The standards of 'civilization', it was said, were best represented by US legal rules rather than 'the crudest municipal practice'.[65] Elihu Root, co-author of the general principles standard in the Statute of the International Court, understood that it was the 'great rules of justice' embodied in the US Constitution – premised on the idea of limited governmental power – that were being conscripted into international standards for the treatment of foreigners. The US Constitution was 'a standard for the morality and the conscience of the world', Root proclaimed, which gave expression to the 'eternal laws of justice and liberty'.[66]

[59] Also identified as a source of international law in the authoritative Statute of the International Court of Justice, San Francisco, 26 June 1945, in force 24 October 1945, TS 993, Art. 38. The principle of just compensation, for instance, was declared a general principle of law in the *Case Concerning the Factory at Chorzó (Indemnities)*, PCIJ, Ser. A, No. 19, 1929.

[60] L. Oppenheim in H. Lauterpacht (ed.), *International Law: A Treatise*, Vol. 1 (8th edn, Longman, London, 1955), p. 29.

[61] B. Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (2nd edn, Butterworths LexisNexis, London, 2002), p. 179.

[62] Lipson, *Standing Guard*, p. 20.

[63] T. Carbonneau, The Ballad of Transborder Arbitration (2002) 56 *University of Miami Law Review* 773 at 803, 805.

[64] Bourdieu, The Force of Law, 65.

[65] E. Borchard, The 'Minimum Standard' of the Treatment of Aliens (1939) 33 *American Society of International Law Proceedings* 51 at 61, 54.

[66] See E. Root, *Addresses on Government and Citizenship* (Harvard University Press, Cambridge, MASS, 1916), pp. 500–1. Morris Cohen later would deride Root in a memorable essay for elevating these assumptions about the sanctity of property and contract into 'eternal

Despite claims that international law now eschews this colonialist legacy, Knop finds that contemporary practice tends to have 'the same discriminatory effect'.[67] This is borne out by the work of Rudolf Dolzer.[68] Having failed to locate the source for a new indirect takings rule in customary international law or in treaty practice, Dolzer resorts to the doctrine of general principles. As in the early twentieth century, he surveys 'typical liberal' constitutions (a relatively small-n sample of the US, UK, French, and German national legal systems) that purportedly reveal 'identical positions' in regard to permissible restrictions on the use of property. Among the problems with this exercise in transnational justice, as in earlier generations, is that it conveniently reflects only the position of capital-exporting states. By declining to consider alternative constitutional arrangements for the protection of property, Dolzer outlines a constitutional order of investment law that serves only to justify the established order of things.

The Jay Treaty

Internationalists like to point to the antecedent roots of NAFTA's Chapter Eleven in 'classical international law'.[69] That is, arbitral mechanisms for the resolution of disputes between aliens and states, it is said, are traceable back to practices in the eighteenth and nineteenth centuries. The 'roots of investor-State arbitration ... run deep', writes Barton Legum.[70] Oft-cited in this regard is the 1794 Jay Treaty between Great Britain and United States, which aimed to provide a set of mechanisms for resolving a number of outstanding disputes following the American revolution, among them, 'compensation for debts'.[71] As access

principles': M. Cohen, The Legal Calvinism of Elihu Root in M. Cohen, *Law and the Social Order: Essays in Legal Philosophy* (Transaction Books, New Brunswick, NJ, 1982), p. 14.

[67] K. Knop, Reflections of Thomas Franck, Race and Nationalism (1960): 'General Principles of Law' and Situated Generality (2003) 35 *New York University Journal of International Law and Politics* 437 at 456.

[68] Dolzer, Indirect Expropriation of Alien Property; Dolzer, Indirect Expropriations: New Developments?

[69] J. Crawford, Affidavit (28 June 2004), sworn in *The Council of Canadians et al. v. Canada*, Ontario Supreme Court of Justice, Court File No. 01-CV-208141, para. 43.

[70] B. Legum, Federalism, NAFTA Chapter Eleven and the Jay Treaty of 1794, *ICSID News*, Vol. 18, No. 1, Spring 2001.

[71] J. Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, Vol. 1 (Government Printing Office, Washington, DC, 1898), p. 275.

to courts was blocked by state legislation, the Jay Treaty's Art. VI established a mechanism for the settlement of debts owed to British creditors by citizens of the United States. A five-person Commission was to be appointed[72] with authority to take into account 'all claims ... according to the merits of the several cases, due regard being had to all the circumstances thereof, and as justice and equity shall appear to them to require'.[73] The Commission was quickly inundated with claims totaling US $25 million, significantly exceeding the sum set aside by Congress (US $300,000) and stretching the life of the Commission well beyond its eighteen-month mandate. Nevertheless, the Commission's life was short lived, because of the unpopularity of the Jay Treaty in public opinion, aggravated by pending claims made by creditors charged with high treason during the revolutionary period.[74] Ultimately, the United States settled these claims with the payment of a lump sum in the amount of US $2.7 million to the Secretary of the Treasury in London.[75]

The historical experience under the Jay Treaty, Legum argues, reveals that, at a minimum, the framers of the US Constitution contemplated arbitral mechanisms for the resolution of disputes between individuals and foreign states. Legum even goes so far as to claim that there is 'significant overlap in both subject matter and procedure' between the Jay Treaty Commission and NAFTA Chapter Eleven.[76] The novelty, therefore, of NAFTA's Chapter Eleven has been 'overstated':[77] 'While bilateral investment treaties and ICSID (International Centre for Settlement of Investment Disputes) are relatively recent developments, international arbitration addressing similar subjects has existed for centuries.'[78] The comparison, however, is overdrawn, as are connections to international law. As Schwarzenberger notes, the claims under Art. VI 'had only an indirect connection with international law'. These private debts were more appropriately the subject of municipal law, but remedies had been foreclosed through retributive state legislation. In which case, all that the Treaty did was to incorporate municipal law while adding the

[72] Two by the United States and two by Great Britain, the fifth by the unanimous vote of the other four.
[73] Moore, *History and Digest*, pp. 276–7. [74] *Ibid.*, p. 289. [75] *Ibid.*, p. 298.
[76] Legum, Federalism, NAFTA.
[77] B. Legum, The Innovation of Investor-State Arbitration Under NAFTA (2002) 43 *Harvard International Law Journal* 531.
[78] Legum, Federalism, NAFTA.

'overriding criteria of "justice and equity" '.[79] What the Treaty did, in other words, was to mimic results that would have been forthcoming under US private law if states had not blocked access to courts. By contrast, NAFTA's Chapter Eleven seeks to avert municipal law and the application of the law by the courts of that municipal jurisdiction. It has little to do with local courts being made inaccessible to foreign investors.

Another important distinguishing feature in which the NAFTA regime diverges from its antecedents, which to his credit Legum acknowledges,[80] is the prospective scope of NAFTA. The arbitral commission under Jay's Treaty, and that of the modern Iran-US Claims Tribunal, are retrospective in scope. The special commission contemplated a limited set of claimants coming before arbitrators with claims bounded by a determinate period of time. Though the scope of these claims can be quite broad – as in the Iran-US claims process – they are not intended to bind future generations and limit legislative action not yet contemplated.

Legum insists, nevertheless, that the subject-matter of these disputes is the same – that there is 'significant overlap', as he puts it.[81] Yet, again, this hardly appears correct. The scope of covered investments is far broader than anything contemplated in the earlier special commission. The definition of 'investment' in NAFTA and other investment treaties is broad enough to include most any kind of economic interest, 'even a single share of stock'.[82] The kind of government activities caught by NAFTA scarcely resemble those for which the arbitral commissions was established in 1783. Not only are national treatment and most favoured nation treatment mandated, but a prohibition on performance requirements (the preference of local labour, goods, and services) limits state activity in ways that go beyond the sorts of redress contemplated in the past. Lastly, NAFTA's takings rule is intended to catch not only outright takings of title but also a broader cache of regulatory takings. According to some NAFTA panels, these measures need not even be discriminatory – they need not target alien wealth. So long as they significantly impair reasonably-to-be-expected economic benefits, then compensation under

[79] G. Schwarzenberger, *International Law as Applied by Courts and Tribunals*, Vol. IV: *International Judicial Law* (Steven & Sons Limited, London, 1986), p. 34.

[80] Investor-State Arbitration, 536. [81] Legum, Federalism, NAFTA.

[82] S. Alexandrov, Introductory Note to ICSID: Lanco International Inc. v. Argentine Republic (Preliminary Decision on Jurisdiction of the Arbitral Tribunal) (2001) 40 *International Legal Materials* 454 at 454.

NAFTA will be due.[83] The object here, as it is in national constitutional systems like that of the United States, is to tame state regulatory activity far into the future. Successful claims, working in combination with threatened litigation, can reasonably be expected to chill regulatory innovation. If the object is not to roll back the regulatory state it is, at least, to ensure that the state interferes with markets no more than is necessary. In this way, the argument from history is correct but draws on the wrong model. Here, the more appropriate analogue is eighteenth-century Madisonian constitutional design.[84]

The private law model

The third response to the constitutionalist claim is that the regime of rules for the protection of foreign investment is not in the nature of constitutional law but is better understood as structured on the private law model of commercial arbitration. This is a model intended to resolve disputes rather limited in scope, *in camera* and *ad hoc*, with little or no national judicial oversight. This model more accurately reflects NAFTA's stated objectives: to create a 'predictable commercial framework for business planning and investment' (from the NAFTA preamble). The arbitral process, Carbonneau writes in typical internationalist style, operates on its own terms and serves 'exclusively commercial objectives'.[85] This is in contrast to the constitutional model, which might cover a wide range of actionable conduct, drawing on precedent and constitutional practice, and with oversight by a permanent judicial body with requisite independence. This kind of oversight, Alvarez notes, requires a 'meaningful, long-term political commitment involving substantial resources and extensive efforts to provide transparency that ... is not now apparent'.[86]

[83] Schneiderman, Taking Investments Too Far.

[84] The more apt approach is that adopted by McGinnis and Movsevian. They apply Madisonian design considerations but to the wrong model: the constitutional architecture of the WTO. See McGinnis and Movsevian, The World Trade Constitution.

[85] The Ballad of Transborder Arbitration, 775.

[86] J. Alvarez, The New Dispute Settlers: (Half) Truths and Consequences (2003) 38 *Texas International Law Journal* 405 at 412.

Internationalists insist that the investor-state dispute mechanism has as its objective the 'depoliticiz[ation]' of investment disputes.[87] No longer will these disputes be mediated through inter-state channels and commercial interests sacrificed on the altar of diplomacy and comity. Rather, the investor-state dispute mechanism privatizes disputes so that these commitments may be credibly enforced. So while admitting that every NAFTA Chapter Eleven case has both 'commercial and non-commercial elements', Brower prefers to characterize the regime with reference only to the stated intention of the parties, as revealed by the NAFTA preamble.[88]

NAFTA, without question, purports to be a commercial treaty. This is made plain by the economic subjects that are intended to be covered by it. Chapter Eleven, moreover, entitles investors to sue to enforce only some of NAFTA's disciplines, not all of them. We must also be attuned, however, to NAFTA's effects. It is in this realm that NAFTA's constitutional dimensions are better ascertained. These effects can discerned as having both 'outside' and 'inside' dimensions. From the outside, NAFTA's Chapter Eleven and its takings rule, in particular, exhibit the features of a constitutional property clause. This has been confirmed by most NAFTA panels which have addressed the subject of the takings rule.[89]

Internal effects are perhaps harder to discern. Only a few NAFTA rulings have been released, with only one panel finding a taking (the *Metalclad* case, mentioned below). One can, nevertheless, readily discern some of the constitution-like parameters of the takings rule.[90] In order to take better stock of NAFTA's effects, what is required is an audit of government policy as it has been developed within departments of health or the environment or transportation at both the national and sub-national levels. This work – as in the example of abandoned public auto insurance in New Brunswick – remains to be done. There are, in addition, associated internal effects that can be identified. I have argued

[87] Carbonneau, The Ballad of Transborder Arbitration, 779; K. Vandevelde, The Political Economy of a Bilateral Investment Treaty (1998) 92 *American Journal of International Law* 621.

[88] C. Brower, Investor-State Disputes Under NAFTA: The Empire Strikes Back (2001) 40 *Columbia Journal of Transnational Law* 43 at 72.

[89] D. Schneiderman, Taking Investments Too Far. But see *Methanex*, note 42 above.

[90] See text associated with notes 34–37 above.

in other work, for instance, that the Supreme Court of Canada has conscripted constitutional interpretation as a vehicle for the promotion of market values – a model which valorizes market relations of free and mutual exchange – and that this has pushed Canada further in the direction of the culture of limited government.[91] One NAFTA panel conjoined assessment of NAFTA's external impact with consideration of internal constitutional law. In the *Metalclad* case,[92] the panel offered interpretations about limits to constitutional authority in the United Federal States of Mexico. Mexico maintained that the municipality of Guadalcazar, in refusing to authorize construction on the site of a hazardous waste facility which Metalclad was seeking to rehabilitate, was acting wholly within its constitutional jurisdiction. This was disputed by Metcalclad's expert on Mexican law (a 1994 law graduate of the University of Arizona who was pursuing a Master of Laws in Monterrey). The panel mysteriously preferred Metalclad's interpretation. According to the panel, the municipality had no constitutional authority even to take into account environmental concerns in the issuance of a municipal construction permit. This was despite the express language of the Constitution – the municipality had jurisdiction to 'control and supervise' land use – and state law authorizing the municipality to take into account environmental impacts in the issuance of municipal construction permits. Here, NAFTA interpretation resulted in the distortion of Mexican constitutional law. The effects of this interpretation, however, will likely be confined to the external sphere.

Internationalists will, on occasion, admit that their end-game is to impose investment disciplines on all state action – an internal effect with unabashed constitutional aspirations. Vandevelde, for instance, would prefer to have investment treaties 'protect all investment in the host state' regardless of whether it is foreign or national: 'This would ensure genuine

[91] D. Schneiderman, Exchanging Constitutions: Constitutional Bricolage in Canada (2002) 40 *Osgoode Hall Law Journal* 401. See also H. Arthurs, The Administrative State Goes to the Market (and Cries 'Wee, Wee, Wee' All the Way Home) (2005) 55 *University of Toronto Law Journal* 797; G. Garvey, *Constitutional Bricolage* (Princeton University Press, Princeton, NJ, 1971).

[92] *The United States* v. *Metalclad Corporation* (2001) 13 *World Trade and Arbitration Materials* 219–66.

investment neutrality and create a host state constituency in support of an enduring liberal investment regime.'[93] The decidedly internationalist authors, Michael Hart and William Dymond,[94] also admit their objective is to impose the disciplines of the Fifth and Fourteenth Amendments of the US Constitution on all governments, making them 'a critical part of the architecture of rules and procedures for governing the global economy'.[95] They describe this as a means by which 'the governed ... hold governments accountable'.[96] If internationalists achieve these internal aims, the transformative impact of investor rights will have been complete, and the legal gains secured in the post-1989 environment locked-in far into the future.

Conclusion

The object of this chapter has been to address the question of whether it is appropriate to assess modern investment treaty practice, as evinced by NAFTA, with reference to a constitutional model. In this regard, has constitutionalism migrated to the transnational sphere? I began by tracing the origins of the constitutionalist approach in Canada and outlined briefly some of the main constitutionalist claims. One commonly hears three related arguments in response to the constitutionalists and these I associate with the internationalists. I addressed each of these arguments in turn: that NAFTA disciplines mirror international law principles; that the eighteenth-century Jay Treaty incorporated similar commitments and disciplines and serves as a model for present-day rules; and, lastly, that the dispute settlement mechanism is best understood as modelled not upon constitutional design but upon private contractual arrangements. Only the constitutionalist account, I have argued, captures the fulsome objectives served by investment rules disciplines.

As I have suggested, the interpretive stakes here are quite high. This is not merely a debate over appropriate descriptors, but one over alternative futures. The very legitimacy of the regime of investment rules, and not

[93] Vandevelde, Political Economy, 639.

[94] M. Hart and W. Dymond, NAFTA Chapter 11: Precedents, Principles, and Prospects in L. Dawson (ed.), *Whose Rights? The NAFTA Chapter 11 Debate* (Centre for Trade Policy and Law, Ottawa, 2002), pp. 128–70.

[95] *Ibid.*, p. 168. [96] *Ibid.*, p. 170.

only NAFTA, is at stake. To the extent that the constitutionalist argument takes hold, at least in Canada, present and future trade and investment treaties may be imperilled. The internationalist claims about the more modest scope of NAFTA help to lay the foundations for future commitments along similar lines. Having the support of government as well as influential editorial pages, internationalists may remain reasonably confident that their side continues to prevail in public opinion,[97] though the internationalist penchant for name-calling hints at unacknowledged anxieties.[98] To the extent that investment rules continue to be the subject of political contestation and national publics become more literate about their intended and unintended effects, the regime also remains under threat. Should the constitutionalist critique take hold in government or in sources of leading public opinion, state treaty behaviour could be modified, resulting in the readjustment of the investment rules regime. This likely helps to explain the departure from NAFTA standards in the 2004 US-Australia trade and investment treaty. The absence of an investor-state dispute mechanism can be explained, in part, by the opposition to such investment rules emanating from civil society invoking the discourse of the constitutionalists.[99] Stalled negotiations over the FTAA might be explained along similar lines. Economic globalization's future may be partly determined by the extent to which citizens are convinced by either set of claims.

[97] According to public opinion analysis undertaken by Wolf and Mendelsohn, 'a large plurality of Canadians currently support both globalization and further trade agreements'. See R. Wolf and M. Mendelsohn, Values and Interests in Attitudes toward Trade and Gloablization: The Continuing Compromise of Embedded Liberalism (2005) 38 *Canadian Journal of Political Science* 45 at 61.

[98] See e.g. Hart with Dymond and Robertson, *Decision at Midnight*, p. 67.

[99] Schneiderman, Congress and Empire; A. Capling and K. Nossal, The Rise and Fall of Chapter 11: Investor-State Dispute Mechanisms in the North American Free Trade Agreement and the Australia-United States Free Trade Agreement (2004), at http://post.queensu.ca/%7Enossalk/papers/Capling-Nossal_Chapter_11.pdf.

12

The migration of constitutional ideas and the migration of *the* constitutional idea: the case of the EU

NEIL WALKER

Introduction: beyond inter-state migration

How, if at all, do two increasingly topical debates – one concerned with the 'migration' of constitutional ideas and the other with the constitutionalization of supranational entities such as the European Union (EU) – connect? This is no simple question. Even if restricted to the traditional domain of inter-state movement, the debate on the migration of constitutional ideas is complex and contentious both empirically and normatively. It is empirically complex because the sources of the migrating constitutional ideas tend to be diffuse, hidden, or rhetorically overstated, and their reception mediated by and their meaning more or less subtly adjusted within the recipient legal system, both at the initial point of political and judicial interpellation and in their subsequent legal-cultural re-embedding. It is normatively contentious because there are such strong and well-rehearsed *prima facie* arguments both for and against migration – most of which, moreover, seem resistant to conclusive empirical proof or refutation – and, therefore, much disagreement about the circumstances and conditions, if at all, under which migration is acceptable or desirable.

The migration of constitutional ideas may be a 'good thing' where it counters parochial tendencies within national constitutional law, providing alternative models of constitutional virtue against which the domestic model can be evaluated, or, even if the most basic norms and ends of the recipient order are not challenged, supplying a broader range of constitutional techniques in the search for the optimal means towards the realizations of these norms or ends.[1] Furthermore, where a

[1] B. Freedman and C. Saunders, Symposium: Constitutional Borrowing; Editors' introduction (2003) 1 *International Journal of Constitutional Law* 177.

universalist system of political morality is subscribed to, migration may be seen not just as an attractive option, but as a necessary path to convergence of national systems if universal constitutional justice is to be universally achieved.[2] But the migration of constitutional ideas may also be a 'bad thing'. In its deference to expertise or wisdom located in or articulated through external juristic sources, it may pay insufficient respect to the democratic sovereignty of the receiving system. That danger is exacerbated if migration operates through the indirect channel of 'undemocratic' judges, providing them with an arsenal of interpretive aids and justificatory arguments for creative interpretation of vague or ambiguous constitutional texts, rather than through the direct channel of the texts themselves and the legislative assemblies or constitutional conventions who are their collective authors.[3] Relatedly, migration may be undesirable to the extent that it is insensitive to national cultural particularity – to the specific legal doctrines, instruments, practices, and assumptions which have evolved or been crafted to fit particular national circumstances.[4]

When transposed to the supranational context, and to the EU in particular, this empirical and normative complexity is compounded, but the questions which emerge from that complexity remain interesting ones. To recall the question posed in the opening sentence, it is here claimed that there *is* an intelligible connection between the migration debate and the European constitutional debate. Indeed, the present chapter argues that the change of site from state to EU level alters the register and balance of arguments for and against migration in significant ways, and, if anything, the migration metaphor and the trends to which it refers pose an even more urgent challenge to received understandings of supranational constitutionalism than of state constitutionalism. Before we can pursue that hypothesis in detail, however, we must deal with a preliminary objection which would dispute the basic premise of 'connectedness' and so render inquiry void *ab initio*. That objection

[2] T. Allen, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, Oxford, 2001).

[3] See e.g. J. Goldsworthy, present volume, and Homogenizing Constitutions (2003) 23 *Oxford Journal of Legal Studies* 483; C. Harlow, Voices of Difference in a Plural Community in P. Beaumont, C. Lyons, and N. Walker (eds.), *Convergence and Divergence in European Public Law* (Hart Publishing, Oxford, 2002), pp. 199–224.

[4] P. Legrand, Public Law, Europeanization and Convergence: Can Comparativists Contribute? in Beaumont, Lyons and Walker (eds.), *Covergence and Divergence*, pp. 225–56.

holds that so profoundly distinctive is the transnational system that we are making a category mistake even to raise the question of migration in such an unfamiliar setting – that the EU is simply not the type of entity to which or from which we can meaningfully conceive of the migration of constitutional ideas taking place.

As supranational systems such as the EU are historically derived from, and on one view still owe their legal pedigree and *pouvoir constituant* to, these national systems,[5] then, it may be contended, there is a sense in which *nothing* is truly indigenous to the supranational – that all sources have 'migrated' from elsewhere. Far more so than national constitutional systems, the EU order is constitutionally Janus-faced. Like all national systems, it is, at least in principle, susceptible to external influence – to migration from other constitutional orders, although until now its underdeveloped constitutional self-understanding has restricted such influence.[6] Unlike most national systems, however, it is also deeply susceptible to internal influence, to the reception of constitutional ideas from the already constituted sovereign states which make up the EU. And even if we reject the extreme position which would continue to view the EU as a purely 'inter-national' construct, the objection of lack of settled domicile still holds. For if we concede the evolved autonomy of its now '*supra*-national' legal order, this remains only a 'relative autonomy' from national origins and from the constitutional sensibilities located at these national origins.

Accordingly, the literature on the nature of the European supranational order is replete with references to the way in which it overlaps or interlocks with national systems,[7] and so remains an inherently partial and 'relational'[8] system. For a mix of mutually reinforcing authoritative,

[5] See e.g. T. Schilling, The Autonomy of the Community Legal Order: An Analysis of Possible Foundations (1996) 37 *Harvard International Law Journal* 389.

[6] See e.g. C. Kakouris, Use of the Comparative Method by the Court of Justice of the European Communities (1994) 6 *Pace International Law Review* 282.

[7] For a strong doctrine-based analysis, see K. Lenaerts, Interlocking Legal Orders in the European Union and Comparative Law (2003) 52 *International and Comparative Law Quarterly* 873. More theoretically, this insight is common to the constitutional pluralist (see e.g. N. MacCormick, *Questioning Sovereignty: Law State and Nation in the European Commonwealth* (Oxford University Press, Oxford, 1999)) and the multi-level constitutionalism literature (see e.g. I. Pernice, Multilevel Constitutionalism in the EU (2002) 27 *European Law Review* 511) on the EU.

[8] N. Walker, Postnational Constitutionalism and the Problem of Translation in J. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge University Press, Cambridge, 2003), pp. 27–54.

functional, cultural, and institutional reasons, the EU's legal order, unlike that of the classic Westphalian state, cannot be understood, even in ideal typical terms, as an isolated, self-sufficient monad, whether in unitary or federal mode. In terms of authority, it is a key feature of the new European legal space that neither the EU nor the states possess uncontested final authority, or *kompetenz-kompetenz*, for all the matters with which they are concerned. Nor, crucially, is there a single point or procedure of uncontested final authority situated outside and overarching both state and supranational orders able to resolve their competing claims. Rather, supremacy or sovereignty over matters of legal notice in the territories of the EU is split, sometimes co-operatively and sometimes competitively, between the EU and national levels.[9] A closely related point is that, functionally, the reach of the EU remains limited. It may have advanced far from its origins as a customs union flanked by certain closely specified additional areas of economic integration to become, today, a polity of 'open and undetermined legal goals'.[10] However, unlike the states, in the face of the rival credentials of the other level or site of authority, it does not even make the claim to be a comprehensive polity – one concerned at least in principle with *all* the collective affairs of its citizens to the exclusion or marginalisation of other political structures. Rather, even on its own terms, it is a textually created and so textually limited entity, and must share the plenitude of legal authority over its territory with national sites (and, increasingly, other supranational or international sites). Moreover, it must do so not in accordance with a mutually exclusive apportionment of capacity, but in a complex pattern of functional interdependence.[11]

Culturally, too, the EU does not purport to exhaust the political identities, allegiances, and aspirations of its members, which also continue to sound at national and other levels. And institutionally, these other relational dimensions are reflected and reinforced through a

[9] See e.g., N. Walker, Late Sovereignty in the European Union in N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing, Oxford, 2003), pp. 3–32.

[10] M. Maduro, Where to Look For Legitimacy? in E. Eriksen, J. Fossum, and A. Menéndez (eds.), *Constitution Making and Democratic Legitimacy* (ARENA, Oslo, 2002) pp. 81–110 at p. 82.

[11] On the overlapping and interdependent nature of competences, see G. de Burca and B. de Witte, The Delimitation of Powers Between the EU and its Member States in A. Arnull and D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford University Press, Oxford, 2002), pp. 201–22.

thick pattern of 'bridging mechanisms'[12] linking the legal and political organs, tasks, and methodologies of the supranational site to other sites, again predominantly but by no means exclusively national sites. In many ways, these bridging mechanisms resemble the interdependent and integrative structures of modern co-operative federalism – with the crucial difference of the absence of an uncontested final authority. So, in addition to most sectors of competence being shared rather than within the exclusive remit of national or supranational authorities, we find, for example, that absent a system analogous to federal district courts, national courts remain responsible for much of the interpretation and enforcement of European law; that with the European Commission continuing to resemble more an administrative college than a traditional state executive, national governments and administrations remain responsible for much of the application and execution of supranational law; and that amidst resilient concern and controversy over the extent of the legitimate mandate of the directly elected European Parliament, national parliamentarians are increasingly[13] involved in monitoring the quality and competence of European legislation.[14]

If we pause for a moment to examine the meaning of the term 'migration', we can see that the empirical difficulty in mapping movement in constitutional ideas to and from a clearly delimited supranational sphere is grounded in a conceptual difficulty. Migration, according to the *Oxford English Dictionary*, refers to the process of movement 'from one habitat to another'. This is a helpfully ecumenical concept in the context of the inter-state movement of constitutional ideas. Unlike other terms current in the comparativist literature such as 'borrowing', 'transplant', or 'cross-fertilization',[15] it presumes nothing about the attitudes of the giver or the recipient, or about the properties or fate of the legal objects transferred. Rather, as we shall develop in due course, it refers to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by giver or receiver,

[12] S. Weatherill, *Law and Integration in the European Union* (Clarendon, Oxford, 1995), chs. 4 and 5.

[13] See note 78 below.

[14] For a good overview of these institutional features in the immediate pre-Constitutional Treaty phase, see S. Weatherill, *Cases and Materials on EU Law* (6th edn, Oxford University Press, Oxford, 2003), Part I.

[15] P. Birkinshaw, *European Public Law* (Butterworths, London, 2003), ch. 1.

accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos. However, the term migration *does* presume the existence of discrete sites and of boundaries between these discrete sites, with legal space mapped onto territorial space. There must, in other words, be a sense of a 'here' and a 'there' between which movement takes place. The idea of a legal system all of whose concepts are 'immigrants' (even if some are by now long-term immigrants and fully domiciled), whose 'habitat' is ill-defined and whose relational boundaries are not marginal but central to its *raison d'être*, sits awkwardly with the migration metaphor.

Nevertheless, this is not enough to vindicate the claim that the migration metaphor is categorically inappropriate. Rather, precisely *because* it has to be stretched in new ways, the migration metaphor remains useful in highlighting the nature and extent of the differences between national and supranational systems as regards the movement of constitutional ideas. In particular, while the empirical complexities introduced by the supranational dimension inevitably also affect the normative issues at stake in the movement of constitutional ideas, they do so in ways which the migration metaphor can help place in sharp relief. As we shall see in the sections that follow, the two main challenges to the legitimacy of the migration of constitutional ideas – the question of democratic legitimacy and the question of cultural specificity – do not fail to signify, but rather take on a very different significance in the EU context. This is especially so in the light of the emergence of a Constitutional Treaty for the EU in October 2004[16] – even if the successful ratification and implementation of this first serious attempt at a documentary constitution is an increasingly unlikely prospect.[17]

Two arguments are developed in order to tease out that different significance. First, the challenge of democratic legitimacy, although on

[16] Treaty Establishing a Constitution for Europe, OJ 2004 No. C310, 16 December 2004.

[17] While as of July 2005, thirteen of the twenty-five member states had effectively ratified, the referendum defeats in France and the Netherlands in late May and early June had plunged the whole process into crisis. The Constitutional Treaty provides for its entry into force no earlier than 1 November 2006, but only in the event of the deposit of instruments of ratification by all twenty-five member states; see Art. IV-447 of the Constitutional Treaty. In response to the two 'no' votes, the European Council in June 2005, rather than terminate the ratification process, announced a period of further reflection of one year and an extension of the ratification deadline until mid-2007 (previously Autumn 2006).

the face of it even more profound in the EU context than in the national context, is on deeper reflection on no account decisive against the legitimacy of migration. Second, and in reverse, the question of the specificity of the EU legal culture, though superficially *less* of a problem than in the traditional inter-state context, suggests on closer consideration a more fundamental and resilient set of problems that challenge the very idea of European constitutionalism and whose resolution remains a matter of profound and long-term uncertainty.

Democracy and constitutional migration in the EU

Why should the argument from democracy pose such a vigorous challenge to the migration of constitutional ideas in the EU context? The answer has to do with the already weak democratic credentials of the EU. The sheer scale of the EU, the legislative and executive power invested in an unelected college (the Commission), the prevalence of a technocratic and output-orientated conception of governance in the historical roots of the common market project and carried over in the design and working culture of the Commission and in and around other key organs and institutions, the complexity and illegibility of the overall institutional complex, the low salience of many EU issues in national settings, the modest public profile of the Parliament, the lack of robust pan-European political parties, and – connected in complex chains of cause and effect to all of these – the lack of, or weakness of a European *demos* self-understood as a political community of common attachment and engagement, all contribute to this.[18] For some too, the unelected European Court of Justice (ECJ) judges exacerbate this problem. The ECJ has been an important supplementary architect in the making of the supranational system, designating to itself a key role in defining the remit of the EU broadly and expansively[19] through its key jurisprudence on sovereignty, direct effect, implied powers, etc.[20]

On this view, a licentious approach to the migration of constitutional ideas from other systems to the EU, particularly if mediated through the

[18] See e.g. J. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, Cambridge, 1999), ch. 8.

[19] See e.g. Harlow, 'Voices of Difference'.

[20] See e.g. P. Craig and G. de Burca, *EU Law: Text, Cases and Materials* (3rd edn, Oxford University Press, Oxford, 2002), chs. 7 and 8.

already powerful ECJ, promises to make a bad situation worse. There are at least four reasons, however, why we should not rush to that conclusion. On account of the quasi-federal mediating role of the ECJ, the relative openness of the new Constitutional Treaty-making process, its emphasis upon relatively context-independent measures of institutional design, and the necessarily different articulation of democracy as a principle at the supranational level, the democratic dangers of the migration of constitutional ideas may in the final analysis be less pressing than at the national level. What is more, these various arguments are largely self-standing, and so even if the new Constitutional Treaty falls victim to political circumstances, those arguments (i.e., one and four, and to some extent three) which are independent of that new initiative will retain their significance.

In the first place, if we look at the actual long-term dynamics of constitutional migration to the EU level through the judicial medium, in many ways it has been sensitive to key democratic concerns about the composition and powers of the EU. As already noted, reflecting its origins as a classic international treaty, the EU has been historically inward looking. From the outset, its Janus-faced quality may have been technically evident, as it has always been prepared to draw in some measure from the principles of third country legal orders,[21] and even from the international legal order,[22] but far more significant has been its dependence on national sources. So much so, indeed, that according to one former President of the ECJ, recourse to the comparative law of the member states has not simply been an occasional aid to interpretation, but internalized as a normal method of interpretation of Community law.[23]

Perhaps the best known example of this has been the development of an explicit doctrine of reliance on national constitutional traditions in developing human rights protection at the European level.[24] In response to early German concerns that nationally guaranteed rights in matters

[21] See e.g. M. Hilf, The Role of Comparative Law in the Jurisprudence of the Court of Justice of the European Communities in A. de Mestral (ed.) *The Limitation of Human Rights in Comparative Constitutional Law* (Yvon Blais, Cowansville, Qc, 1986).

[22] See e.g. P. Pescatore, International Law and Community Law – A Comparative Analysis (1969) 6 *Common Market Law Review* 177.

[23] J. de Wilmars, Le Droit Comparé dans la Jurisprudence de la Cour de Justice des Communautés Européennes (1991) 110 *Journal des Tribunaux* 37.

[24] See Craig and de Burca, *EU Law*, ch. 8.

such as legal certainty, due process, and economic freedom were in danger of being eclipsed by Community rules,[25] the ECJ, first, in *Stauder*[26] and then, more explicitly, in *Internationale Handelsgesellschaft*,[27] argued that the general principles underpinning Community law included respect for fundamental rights as inspired by the constitutional traditions held in common by the member states. The message conveyed by the ECJ was that national courts should have no reason to fear a system of supranational rule committed to the very substantive principles they espoused. While initially sceptical,[28] in due course the Federal Constitutional Court came to accept the presumptively sound and so authoritative nature of the ECJ's commitment to fundamental rights.[29]

The idea of recourse to national constitutional traditions as a basis for respect of fundamental rights and other general principles of EU law has gradually become embedded both in the case law[30] and in the treaties themselves,[31] and through this and similar devices we can observe many other instances of the ECJ using 'internal comparativism' as a mediating device. To take but three examples amongst many,[32] we see this in a cautious and incremental approach to the imposition of non-contractual liability on the public authorities of the member states for breaches or non-implementation of EU law,[33] in an attitude to non-discrimination on the basis of gender which accords with the less expansive of the available national formulae,[34] and in an approach to the legal privilege of documents and to the doctrine of confidentiality in EU judicial and

[25] See e.g. Case 1/58, *Stork* v. *High Authority* [1959] ECR 17; Joined Cases 36/59, 37/59, 38/59 and 40/59, *Geitling v. High Authority* [1960] ECR 423.

[26] Case 29/69, *Stauder* v. *City of Ulm* [1969] ECR 419.

[27] Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125; see also Case 4/73 *Nold* v. *Commission* [1974] ECR 491.

[28] *Internationale Handelsgesellschaft mbH* v. *Einfuhr und Vorratstelle für Getreide und Futtermittel* [1972] CMLR 177.

[29] Case 2 BvR 197/83, *Re Wunsche Handelsgesellschaft* [1987] 3 CMLR 225.

[30] See e.g. Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029.

[31] See in particular Arts. 6(2) and 46 of the Treaty on European Union.

[32] For detailed analysis, see Lenaerts, Interlocking Legal Orders.

[33] Joined Cases C-6/90 and C-9/90, *Francovich and Others* [1991] ECR I-5357; Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77, *HNL and Others* v. *Council and Commission* [1978] ECR 1209.

[34] Case C-249/96, *Grant* v. *South West Trains Ltd* [1998] ECR I-621.

quasi-judicial proceedings which respects the common floor of existing national solutions.[35]

This is not to suggest, of course, that the ECJ has somehow discovered the golden mean in its efforts to draw upon diverse national constitutional traditions. The epistemological basis of such a conclusion, hinted at in some of the more expansive rhetoric of the Court's supporters,[36] remains obscure and wishful. Rather, it is to accept the more balanced view of one current judge of the ECJ that the Court's use of the comparative approach has to be understood at least in some part as an exercise in 'psycho-diplomacy',[37] seeking to negotiate a balance between 'the concern "not to give up" when confronting national divergences and that of respecting, in the interests of the "acceptability" of Community law in the domestic legal orders, the national sensitivities and the differences which exist in the legal conceptions and constitutional traditions of the Member States'.[38] If much of the concern about the democratic deficit of the EU concerns the danger that the plural democratic traditions of the member states may be eroded by a gradually homogenizing centre, then the legitimacy sensitivities and sensibilities of the supranational judiciary, and their relative openness to national ideas, must in some measure be seen as a counterweight to this.[39] In this regard, moreover, we can hardly accuse the judges of acting beyond their proper remit. In terms of central-local relation, the EU exhibits at least some of the tendencies of a federal order, and the judges thus have no choice but to act, like their national counterparts, as federal umpires seeking compromise solutions to what is a perennial tension between the two levels. The fact that they draw on *constitutional* materials in so doing is merely indicative of the resilience of the autonomous constitutional pedigree of the 'lower level' in a unique supranational configuration.

[35] Case 155/79, *AM and S* v. *Commission* [1982] ECR 1575.
[36] See e.g. Hilf, The Role of Comparative Law. [37] Lenaerts, Interlocking Legal Orders, 906.
[38] *Ibid.*
[39] Migration is not always one way. To take one well-known example, the doctrine of 'proportionality', with strong origins in German law, was first adopted by the ECJ, and then in a further phase of migration, 'received back' from the EU (and also from the Council of Europe's European Court of Human Rights) by other national systems such as the English system. This also raises questions of democratic legitimacy for the *state* (see e.g. Harlow, Voices of Difference), but is not the immediate concern of this chapter.

In the second place, with the advent of the (Constitutional) Convention on the Future of Europe in 2002[40] and the conclusion, after some delay, of the Constitutional Treaty in 2004, the EU constitutional debate became more inclusive, the opportunities to draw upon national constitutional traditions more explicit, the context within which they were drawn upon more holistic – as materials in the reconsideration of the EU system as a whole rather than, as previously, mere incremental building-blocks towards or accretions upon a system with unforeseeable or uncontrollable consequences for the whole. The representation for the first time of both national (fifty-six) and European (sixteen) parliamentarians, alongside national executive (twenty-eight) and European Commission (two) representatives, together with the consultation of civil society and the adoption of a more open method of deliberation than the traditional Treaty-revising Intergovernmental Conference, helped both to broaden the decision-making base and to ensure a stronger national voice in proceedings. It followed that within the Convention, unlike the traditional Intergovernmental Conference mechanism (which, in the present process, lost its initiative role but retained the power of final decision)[41] where the drafting is done by the Council's secretariat and the national offices of the Presidency of the Council – and so dominated by EU law experts – the natural reference point of debate was *national* constitutional traditions.[42]

Many examples could be given of this national influence – sometimes explicitly stated and at other times implicit in the constitutional mind-set and in the sense of constitutional permissibility of the delegates.[43] In some cases, the national template or templates were drawn upon to argue successfully for a new departure, as with the specification of a catalogue of different categories of competences as between Union and member states, including a long list of shared or concurrent competences,[44] drawing on the German tradition, or as in the broadening and strengthening of the European Parliament's role in the legislative

[40] For the Convention Draft Treaty, subsequently amended by the IGC, see OJ 2003 No. C169, 18 July 2003.

[41] As required under the existing Treaty amendment formula; Art. 48 of the Treaty on European Union.

[42] J. Ziller, National Constitutional Concepts in the New Constitution for Europe (2005) 1 *European Constitutional Law Review* 247.

[43] For extensive discussion, see *ibid.* [44] Art. I-14 of the Constitutional Treaty.

procedure,[45] reflecting a more general European constitutional tradition in which the default position is full parliamentary involvement in all species of law-making. In other cases, national traditions helped argue for the consolidation of the existing constitutional settlement, as with the decision to endorse and give full legal status to the EU's declaratory Charter of Fundamental Rights of 2000,[46] itself explicitly drawn both from individual national traditions and the collective European tradition of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms and the 'Social Charters'[47] adopted by the Council of Europe and the Union respectively. In other cases still, one constitutional model evident in some national constitutional traditions was preferred to an alternative evident in other national traditions. For example, the Convention rejected the pure Kelsenian idea, known in many continental traditions, of the legal system as a single hierarchy of norms, with all rules deriving their validity from higher rules in a single chain of authority. Instead, reflecting the way in which different institutions reflect the sometimes rival claims of different 'estates'[48] within the European legal order, a variation of the model of incomplete hierarchy familiar to the United Kingdom and French systems is retained, with '[n]on-legislative acts',[49] namely, regulations, decisions, or recommendations, sometimes deriving their authority directly from specific institutions, most prominently the European Council, and the Council, rather than as strictly delegated or implementing measures flowing from

[45] Arts. I-20, I-34 and III-396 of the Constitutional Treaty.

[46] OJ 2000 No. C364, 18 December 2000, p. 1.

[47] Preamble to Part II of the Constitutional Treaty.

[48] See G. Majone, Delegation of Regulatory Powers in a Mixed Polity (2002) 8 *European Law Journal* 319. According to the author, a distinctive feature of the EU constitutional order is that the different institutions do not represent different government functions, as in the classic separation of powers model of modern state constitutionalism, but rather, as in the mediaeval model of the mixed polity, different estates or constituencies – with the Commission representing the pan-European interest, the Parliament the interests of the European people(s) and the Council (comprising ministerial level representatives of member states) and the European Council (comprising heads of state or government) the interests of the member states. The argument may exaggerate both the distinctiveness of these institutional identities, on the one hand, and the extent to which national constitutional schemes follow a strictly functional model of differentiation, on the other, but inasmuch as it captures something of the pronounced institutional pluralism of the EU and the resilient tensions as to its underlying purpose and driving force which that pluralism reflects, it helps explain why the development of a single hierarchy of norms has proved so elusive.

[49] Art. I-35 of the Constitutional Treaty.

primary '[l]egislative acts'[50] made under the combined deliberation and authority of the Commission, Council, and European Parliament.

Clearly, the EU Constitutional Convention, no more than any of its national predecessors, should not be mistaken for an exercise in ideal participatory democracy.[51] Yet the fact remains that it afforded a serious opportunity for the consideration of the lessons of diverse constitutional traditions in a context which sought to be reasonably inclusive of and responsive to the diversity of European constituencies. In formal terms at least, therefore, its democratic and deliberative credentials were certainly *no worse* than many national predecessors. What is more, built into the final clauses in Part IV of the Constitution is provision for use of the inclusive Convention method for future amendments,[52] so avoiding the entrenchment of current conventional wisdom against the possibility of democratic reconsideration in the future.

It might be argued, nevertheless, that to affirm the Convention's democratic status on these grounds is to confuse form with substance; that the Convention's relatively open and deliberative procedure and style, although apparently subjecting national constitutional solutions to rational inquiry and selective adaptation, in fact provided no proof against the weight of national constitutional traditions and their capacity to insinuate themselves inappropriately into the supranational settlement. On this view, the debate was skewed from the outset, the constitutional legacy providing a foundational bias – a pre-democratic closure or narrowing of deliberative possibilities – which the Convention and the resulting text could not overcome.

Yet this deeper objection may be answered by our third argument, according to which the democratic credentials of the Constitutional Treaty are reinforced by the nature of its focal concerns. The primary emphasis within the Constitutional Treaty – with the notable exception of the Charter of Fundamental Rights in Part II – as with most documentary constitutions, was on general institutional design rather than the elaboration of substantive constitutional doctrine. General institutional design is the theme of Part I of the Constitution – its leading

[50] Art. I-34 of the Constitutional Treaty.

[51] For an overview of the Convention process, see C. Closa and J. Fossum (eds.), *Deliberative Constitutional Politics in the EU* (ARENA, Oslo, 2004).

[52] Art. IV-443 of the Constitutional Treaty. Although a simplified revision procedure without resort to the Convention mechanism is also provided for under Arts. IV-444 and IV-445.

part and, aside from Part II and the brief Part IV (General and Final Provisions), the only part to be subject to detailed overall[53] consideration in the Convention, and, indeed, *the* only part to be subject to significant innovation by the Convention and the subsequent IGC.

Arguably, institutional design provisions have a peculiarly disembedded quality which allows them a distinctive role in the transfer of constitutional ideas. They have a predominantly functional significance – they are a means to an end, a framing mechanism and architecture for the legal and political system as a whole. Unlike substantive juridical concepts in human rights, review of administrative action, public liability, etc., whose meaning and implications are always and immediately contingent on their deep interpretive fit with other substantive concepts of the legal system in question and always and immediately expressive of the quality of that fit, with institutional design measures it is easier for the constitutional engineer to draw a conceptual bright line between the rule and its application. That is to say, institutional measures, while clearly not value-neutral in their implications,[54] are primarily value-instrumental rather than value-expressive.[55] And particularly where the institutional design system as whole is under review rather than just its discrete parts, the instruments can be considered, in particular configurations, as mechanisms towards the realization of certain distinctive values rather than as fated to carry the meaning-freight of an already existing structure of values.

So, to return to some of the measures discussed above, the discussion of a competence catalogue, or a strengthened Parliament, or a new hierarchy of legal instruments could be conducted, and for the most part was conducted, with a view not to the meaning which each of these

[53] Part III on the Policies and Functioning of the Union is by far the longest Part – covering 322 of the 448 Articles and dealing with most of the substantive doctrine traditionally included in the Treaties. But with important exceptions in areas such as freedom, security and justice, and common foreign and security policy, this body of doctrine remained largely ignored in the Convention debates and unaltered by the drafters.

[54] *Pace* some version of process-based constitutional theory. See e.g. J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, MASS, 1980). For critique, see e.g. J. Waldron, *Law and Disagreement* (Oxford University Press, Oxford, 1999), ch. 13.

[55] Although institutional terms, and the provisions which bear these terms, can clearly also have a metonymic quality, symbolizing larger systems of government and the constitutional ethos supposedly underpinning such systems of government – as in the idea of *parliamentary or presidential* government.

measures had for the political value system or systems in which such mechanisms were already found, but to their constitutive (together with other parts of the revised institutional architecture) meaning in the quite different context of the European legal order. In other words, just because of their independent instrumental significance, these and other institutional design proposals could be treated as a functional tool-box for the redesign of a separate system and the furtherance of the values associated with that system, rather than concepts whose meaning at the point of arrival would remain heavily dependent upon a deeper context of application at the point of departure.

Accordingly, and not just because of the inclusiveness of the Convention and the vigilance of representatives of different national traditions in ensuring against the emergence of any dominant tendency,[56] it is difficult to conceive of the process of institutional innovation as being illegitimately mortgaged to any particular national tradition, or indeed to any particular cluster or mix of national constitutional traditions. This is not to be complacent about the migration of institutional measures in general. In the post-Second World War decolonization context and, to a lesser extent, in the post-Cold War context of the 1990s, there are many examples of knowing or unknowing constitutional imperialism, of the suggestion or actual transfer of particular instruments or of an institutional framework lock, stock, and barrel from one context to another without regard or with ill-regard to the recipient context – where the instruments singly or as a package are reified as the 'one best way' rather than examined for their variable contribution to different conceptions of constitutional value and political community.[57] However, the crucial point is that this need not be the case, and in the context of a reasonably inclusive, ecumenical, and destination-orientated rather than source-orientated debate between diverse constitutional traditions, has not been the case in the current EU debate or, indeed, in any likely resumption of that debate in the event of the failure of the present initiative.

Fourth and finally, beyond the uncertainties of the new Constitutional Treaty, a more general conceptual point can be made about the migration

[56] See Ziller, National Constitutional Concepts.

[57] See e.g. R. Elgie and J. Zielonka, Constitutions and Constitution-Building: A Comparative Perspective in J. Zielonka (ed.), *Democratic Consolidation in Eastern Europe*, Vol 1: *Institutional Engineering* (Oxford University Press, Oxford, 2001), pp. 25–47.

of constitutional ideas to the supranational domain which reinforces the sense that this process need not carry a democratic danger.[58] Even at state level, that democracy be accepted as a key value of political community has no necessary implications for its optimal form of constitutional articulation. The meaning of democracy – to what extent it is more or less concerned with underlying virtues of autonomy, dignity, participation, responsiveness, fairness, equal respect and concern, collective belonging, interest aggregation, and so on – is contested, and different conceptions of the optimal balance of these virtues may well have different constitutional consequences, without the disfavoured solutions deserving to be branded as 'undemocratic'. At the supranational level, the institutional ramifications of the democratic commitment are even more intricate. Here it is not only a matter of reasonable disagreement over what democracy means in view of the even more fundamental political values to which it is instrumental, and of diverse calculations as to how this meaning and these more fundamental political values should best be translated into a single, exhaustive constitutional frame. The fact that the EU is an incomplete and relational polity – that it is a means of treating collective action problems in the economic and social domain which increasingly escape the control of individual democratic states but that it nevertheless continues to operate alongside states and to affect and be affected by their capacity to act – entails that its constitutional articulation of the value of democratic primacy will necessarily be a more open-ended and multifaceted exercise. More specifically, its commitment to democratic primacy must be qualified in two ways to take account of its special situational attributes. First, the fact that its functional role is more partial and speaks to a secondary form of loyalty and identity means that both the supply and the demand for the sociological sense of political community – of a *demos* capable of supporting direct democratic forms and common projects – will be more restricted at the EU level than in the classic Westphalian state, and even the contemporary post-Westphalian state. Second, such political capacity as it does possess should be exercised in a way which is not detrimental to,

[58] See N. Walker, Culture, Democracy and the Convergence of Public Law: Some Scepticisms about Scepticism in Beaumont, Lyons and Walker (eds.) *Convergence and Divergence*, pp. 257–72.

and if possible enhances, the continuing democratic credentials of the states with which the supranational polity is so intimately related.

One finds, indeed, that an influential range of European constitutional theory *does* argue that democracy primacy should be a more, or at least differently, qualified virtue in the supranational theatre than in its statist habitat, even if all but the most committed Eurosceptics would deny that the current absence of strong preconditions of democratic will formation in the European context requires us to rewind to some 'golden age' of nation state democracy. In some cases, an urgent institutional priority is accorded to finding new and imaginative forms of democratic voice rather than simply seeking to recreate the institutional forms of state democracy at the supranational level. From this perspective, there should be less concentration[59] on the search for general and holistic solutions in the name of the collective *demos* (in recognition that both the supply of and demand for this is restricted) and more upon participative and deliberative structures within particular transnational communities of interest or attachment addressing specific and diverse EU-related policy issues.[60] In turn, this shades into another approach, variously exemplified by prominent commentators such as Weiler, MacCormick and Scharpf, who, while also confirming the continuing importance of democracy as a value and as a guiding principle of institutional design, suggest that absent a thick nation state-style *demos* at the European level and a comprehensive political project to which it is directed, we should place

[59] But, arguably, not complete indifference, since the solution to Europe's collective action problems does require some common sense of a European public good, and the degree of mutual sympathy and trust required to commit to put things in common to the extent necessary to achieve that public good. See e.g. N. Walker, The EU as a Constitutional Project, Federal Trust Online Paper 19/04, 3 November 2004. Holistic democratic requirements, therefore, subsist *alongside* the requirement for adequate voice and participation in particular policy domains – a point which the literature on the diversity of the EU's democratic requirements tends to ignore or underplay.

[60] See e.g. O. Gerstenberg and C. Sabel, Directly-Deliberative Polyarchy: An Institutional Ideal for Europe? in C. Joerges and R. Dehousse (eds.), *Good Governance in Europe's Integrated Market* (Oxford University Press, Oxford, 2002); E. Eriksen and J. Fossum (eds.), *Democracy in the European Union: Integration Through Deliberation?* (Routledge, London, 2000); P. Schmitter, *How to Democratize the European Union ... And Why Bother?* (Rowman & Littlefield, Lanham, MD, 2000); R. Bellamy and D. Castiglione, Legitimizing the Euro-'Polity' and its 'Regime': The Normative Turn in EU Studies (2003) 2 *European Journal of Political Theory* 7; see also, and relatedly, the 'comitology' and 'new governance' literature, in particular C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Hart Publishing, Oxford, 1999); J. Scott and D. Trubek, Mind the Gap: Law and New Approaches to Governance in the EU (2002) 8 *European Law Journal* 1.

more emphasis upon other fundamental virtues of governance. These may be defined in terms of expertise, negotiated consensus,[61] and other 'output-oriented'[62] and effectiveness-centred values, or even, to turn the absence of a strong *demos* into a explicit virtue, in terms of supranationalism's structural opportunity to curb the nationalist or majoritarian excesses of state democracy through the cultivation of transnational tolerance and mutual recognition.[63]

The instant point is not to arbitrate between these theoretical perspectives. Rather, it is to caution that the constitutional design implications of a democratic commitment at the supranational level might look rather different, and less directly committed to classic representative forms, than at the national level. It follows that, insofar as the migration of democracy-conditioning or democracy-constraining, and at any rate democracy *qualifying*,[64] constitutional instruments is seen to carry a presumptively anti-democratic tariff at the national level, it need not attract the same tariff at the supranational level, where there may be arguments additional to those available at the national level in favour of the contemplation and adaptation of such instruments.[65]

Constitutional culture and constitutional migration in the EU

As noted earlier, first impressions suggest that the cultural argument against the migration of constitutional ideas in the context of the EU would be less compelling than the democratic argument. This is so for the simple reason that the EU is often viewed as a kind of cultural *tabula rasa* – or, to repeat a phrase, as a legal and political space all of whose sources have 'migrated' from elsewhere. If this were the case, there would be no indigenous culture to disturb, betray, or misrecognize. If all is

[61] MacCormick, *Questioning Sovereignty*.

[62] F. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, Oxford, 1999).

[63] Weiler, *The Constitution of Europe*, chs. 7 and 10.

[64] A key point of contention in constitutional theory concerns what constitutes a limitation upon democracy and what, instead, is merely a constituent premise or precondition of democracy. See e.g. Waldron, *Law and Disagreement*, ch. 13.

[65] One can imagine, e.g., that were one to endorse Weiler's championing of the importance of a strong rights regime to curb nationalist and majoritarian excesses in the member states (see text to note 62 above), this could argue in favour of looking to norms and interpretive practices drawn from non-European rights regimes to supplement the EU Charter of Fundamental Rights in Part II of the Constitutional Treaty and the European Convention on Human Rights.

immigration, then any new wave or trickle of migrant ideas would simply go into the melting pot and add to the multicultural mix.

However, such a view is an exaggeration. It is one thing to agree that the EU lacks the deep-layered cultural formations of the typical nation state. It is quite another to assert that it lacks anything by way of culture – in the sense of a distinctive set of practices and attitudes which themselves form an organic whole (however loosely and open-endedly conceived) whose specificity and integrity has to be taken into account when new ideas and practices are introduced. So it has been persuasively argued that the EU already does possess a distinctive legal and political culture of sorts,[66] made up of the institutional forms and judicial, political, and administrative attitudes which structure the operation of its political system. One indirect indication of this distinctiveness, indeed, is that the ECJ has moved away from its early practice of making overt use of comparative law sources drawn from the member states, preferring now to view, and to be seen to view, these sources as aids to the further development of an autonomous legal culture rather than as the constituents of a hybrid legal culture.[67] Neither should we be surprised that a distinctive supranational legal and political culture has emerged. The history of national politics and nationalism is one of complex mutual causation and reinforcement of shared practices,

[66] Although this has been a 'relatively neglected' (F. Snyder, The Unfinished Constitution of the European Union: Principles, Processes and Culture in Weiler and Wind (eds.) *European Constitutionalism*) field, recent studies have begun examining the ways in which European judges, lawyers, clerks, and officials and transnational law firms operating within the institutional and juridical environment of the EU are forging a distinctive set of attitudes and practices: see e.g. Snyder *ibid.* A. von Bogdandy, A Bird's Eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective (2000) 6 *European Law Journal* 208; H. Schepel and R. Wesseling, The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe (1997) 3 *European Law Journal* 165.

[67] Lenaerts, Interlocking Legal Orders, 874–6. It is clear that comparative sources are still significant, as evident in the regularity with which they are cited in the Opinions of the Advocates General, and, indeed, as is institutionalized in the working practices of the Court's research and documentation service. The key point, however, is that there has been a shift in the self-understanding and self-presentation of these sources as clearly *external* sources. Indeed, even at the high tide of explicit internal comparativism, the ECJ never deferred to the constitutional authority of any particular national system, and unlike the Advocates General, rarely made explicit reference to particular national judgments or doctrines as opposed to general reference to common constitutional traditions: see B. de Witte, The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process in Beaumont, Lyons and Walker (eds.) *Convergence and Divergence*, pp. 39–57 at pp. 39–42.

loyalties, and world-views, on the one hand, and established institutional forms, on the other. Culture, then, is never ontologically prior, but always as much constructed as constructive. And after fifty years of institutional development in the EU, there is inevitably a level of constructed culture – a set of ways of thinking about, practicing, and presenting politics and the regulation of the political sphere which are adapted to the specific demand and aspirations associated with the EU polity – even if this legal and political culture is largely limited to institutional and interest elites and does not penetrate deeply into the fabric of European society(ies).

What we are alluding to here, indeed, in positing a separate legal and political supranational culture, is no more than we would expect in terms of institutional and attitudinal identity from the specificity of the European polity as a partial and relational polity. In the previous section, it was argued that these distinctive features of the Europolity challenge the conceptual foundation of the democratic critique of the migration of constitutional ideas. In the present section, we seek to turn the implications of polity distinctiveness on its head, arguing that it is precisely the *sui genericity* of the Europolity which sharpens the cultural argument for viewing the migration of constitutional ideas to the EU with caution.

We have to be careful, however, to specify the limits within which this critique can be made. As we have seen, cultural distinctiveness and the attendant possibility of the illicit migration of constitutional ideas and the pre-emption of supranational democratic deliberation is not really an issue at the level of institutional design. Particular institutional mechanisms have an instrumental or functional versatility which allows them in propitious circumstances to be reflexively adapted to quite different and novel ends, and in the particular context of the EU, the palpably distinct design needs of a supranational polity, the competitive balance of national traditions, and, more recently, the opportunity for holistic deliberation supplied by the Constitutional Convention, has indeed provided suitably propitious circumstances.

Cultural distinctiveness becomes an issue if we turn away from the institutional rules[68] and concentrate instead on certain aspects of the

[68] Which does not mean that these institutions cannot have an expressive significance (see note 54 above), but only that their main function is instrumental.

'expressive'[69] dimension of constitutionalism. By this we mean the way in which constitutions provide *models* of political community, in the double sense of seeking to provide a representation of the type of community to which they refer, and a standard by which that community should judge itself.[70] Constitutions thus always offer the 'people a way of understanding themselves as political beings',[71] which is in part depiction and in part benchmark and aspiration. To take an elementary example, the republican form of the French or the US Constitution both reminds and persuades the peoples of these countries of the distinctive character of their political community. Or, at a more detailed level, the commitment of the post-apartheid South African Constitution to a framework of justiciable rights both in the classic 'first generation' negative civil and political freedoms and in 'second generation' positive welfare claims signifies the co-equal importance of liberty and equality in the new order – both as initial commitment and ongoing project.[72]

To the extent that the text and associated doctrine of a constitution may impact directly upon and help shape and refine a people's self-understanding as a political community, in addition to providing a background instrumental resource in constructing a suitably 'customized' system of government, the source of the devices through which this expressive constitutional capacity is articulated becomes important. If these expressive devices are simply transferred from one constitutional context to another, without proper consideration of the distinctiveness of the kind of political community they seek to express, then the danger exists that a mode of self-understanding appropriate to one political community is sought to be imposed on a quite different type of political community – even though it neither plausibly depicts the kind of self-understanding present in the recipient community nor is capable of articulating the kind of aspirations appropriate to that community. In such a scenario, migration can give rise to perverse consequences, with the alien graft of constitutional self-understanding either failing to take in the new environment, or doing so in a way which shapes the native

[69] M. Tushnet, The Possibilities of Comparative Constitutional Law (1999) 108 *Yale Law Journal* 1225.

[70] See Walker, The EU as a Constitutional Project.

[71] Tushnet, Possibilities of Comparative Constitutional Law, 1228.

[72] See e.g. S. Chambers, Democracy, Popular Sovereignty, and Constitutional Legitimacy (2004) 11 *Constellations* 153.

political culture in unintended ways and threatens to bring a new form of constitutional self-understanding inappropriate to native circumstances.[73]

The expressive function of constitutions can operate at the level of the constitution as a whole or in particular provisions. In the context of the EU, it is arguable that the aspect of constitutional migration most vulnerable to the charge of cultural inappropriateness is that which operates on the most abstract level of all – namely the *very idea of the EU as a fully constitutional entity*. That is to say, it is the forms of self-understanding implicit in the very notion of an entity being of the sort which is appropriately conceived of as a fully documentalized constitutional entity, as in the precarious contemporary experiment, and the migration of *that* idea to the EU, which most threaten the cultural integrity of the EU as a *sui generis* configuration.

This might seem a counter-intuitive hypothesis. After all, it is precisely the move from the implicit constitutionalism of the early years of the EU to the project of explicit documentary constitutionalism in the Constitutional Convention and its aftermath that has allowed a candid root-and-branch self-assessment rather than the kind of incremental, *ad hoc* and low-profile migratory drift which might threaten to transform the recipient constitutional culture without adequately holistic reflection or justification. Yet for all its potential to stimulate reflection, and, relatedly, to mobilize a deeper sense of community,[74] the current constitutional moment in the EU contains more disquieting possibilities.[75] For when borrowing and adapting the concept of documentary constitutionalism, the EU is doing more than drawing upon a tool-kit of design concepts, and a procedure for stimulating internal reflection upon and engagement with the polity. It is also assuming for itself a particular trope of political community, one with strong statist connotations,

[73] E.g., the US formal separation of powers doctrine, resonant of its traditional self-understanding as a state vigilant against the dangers of tyranny and faction, was arguably a significant factor when exported to Latin American countries in the transformation of liberal constitutional forms into presidential dictatorships: see B. Ackerman, The New Separation of Powers (2000) 113 *Harvard Law Review* 633.

[74] Or rather, to *initiate* a process of mobilization of a deeper sense of community. See Walker, The EU as a Constitutional Project; and Europe's Constitutional Momentum and the Search for Polity Legitimacy (2005) 3 *International Journal of Constitutional Law* 211.

[75] See J. Weiler, In Defence of the *Status Quo*: Europe's Constitutional *Sonderweg* in Weiler and Wind (eds.) *European Constitutionalism*, pp. 7–26.

suggestive of an exhaustive rather than a partial polity, and a unitary and self-contained rather than a relational structure of authority.

It could be argued, nonetheless, that even the most resilient figurative meanings can change, and in assuming the discourse of constitutionalism, the EU need not acquire any of its statist trappings. Indeed, it could be pressed, the purpose of the Convention's relatively open and deliberative method drawn from the tradition of documentary constitutional *process* was precisely to guard against the statist ambition drawn from the tradition of constitutional *substance*. Moreover, this purpose is vindicated in the final text, with its retention of many of the relational features of the EU order and – through an explicit acknowledgement of respect for the national identities and fundamental political and constitutional structures of the member states,[76] strong affirmation of the principle of (textually) conferred powers as the sole basis of the EU's jurisdiction,[77] a more precise specification of competences, a Charter of Rights duly circumscribed to guard against indirect 'competence creep', a fuller operationalization of the concept of subsidiarity through the early involvement and new monitoring function of national Parliaments in the legislative procedure,[78] a first granting of a right of withdrawal on the part of the member states,[79] etc. – the provision of a more institutionally secure sense of the partial nature of the EU Constitution.

Yet the idea of constitutionalism considered figuratively, as a master trope of political community, runs deeper than any textual balance sheet, its implications for the political culture of the EU arguably both more subtly penetrative and with longer-term ramifications than can be discerned from a documentary freeze-frame. For all that much of the detail of the constitutional debate was premised upon the continuing integrity of national constitutional orders and the need to avoid the move to a state-like European Union, much of its powerful imagery and rhetoric, particularly the regular invocation by leading players in the Convention of the idea that this was Europe's very own 'Philadelphian

[76] Art. I-5(1) of the Constitutional Treaty. [77] Art. I-11 of the Constitutional Treaty.

[78] Art. I-11(3) of the Constitutional Treaty; see also Protocols 1 (on the role of national Parliaments in the EU) and 2 (on the application of the principles of subsidiarity and proportionality) annexed to the Constitutional Treaty.

[79] Art. I-60 of the Constitutional Treaty.

moment'[80] – a founding event for the continental polity to match *the* founding moment of modern national constitutionalism over 200 years previously – explicitly draws upon the state analogy. And this is but the surface of a deeper 'figurative logic', or epistemic sense, associated with constitutionalism, an extended set of significations which are built into the very grammar of constitutional thought and which cannot easily be avoided, however forcefully the novelty of context and needs is pleaded and however vigilantly it is guarded. By way of illustration, let us look at two aspects of the new figurative logic ushered in alongside the basic idea of documentary constitutionalism, and at how these should at least give us pause for thought before concluding that the specificity of the EU as a partial and relational polity is not endangered by the immigration of the language of constitutionalism.

In the first place, documentary constitutionalism has arguably encouraged a sense of comprehensiveness of design absent in the earlier implicit constitutionalism of the EU. Just as state constitutions provide a final point of reference for the regulation of all public authority within the territorial domain of the signified polity, the newly documented EU constitutional order, despite its stress on the continuing sphere of autonomy of the states, shows some ambitions towards a similar ordering power for the entire EU territory. To take two examples already mentioned, both the empowerment of national Parliaments in the application of subsidiarity and the granting of a right of withdrawal to individual member states involve a deep presupposition that, just as with classic federal state polities, it is within the gift of the overall constitutional order to lay down normative rules for institutions of locally autonomous constitutional orders (national Parliaments) or to decide upon a right (withdrawal) which had previously arguably been implicit in that local autonomy. So, although on the surface these are normative provisions respectful of local autonomy, their very inclusion in the settlement provides an implicitly centralizing answer to the question *on whose authority* this local autonomy is respected.

The tension between formal supranational constitutional authority and state-empowering substantive conditions is particularly acute in the

[80] The President of the Convention, Valery Giscard D'Estaing, led the way in a number of public pronouncements. See e.g. his Henry Kissinger lecture in Washington on 11 February 2003, available at http://ue.eu.int/pressdata/EN/conveur/74464.PDF.

case of withdrawal. One early proposal in the Convention proceedings from a statist perspective, indeed, claimed that as it was a sovereign right retained by member states, the right to withdrawal, if its inclusion within the Constitutional Treaty was at all appropriate, must be absolute, immediate, and unilateral.[81] Tellingly, however, under the pressure of negotiation in the name of the constitutional collective, the measure finally approved was not so uncompromising. While it provides a mechanism by which the member states retain a unilateral right to withdraw, this is suspended for at least two years during which a negotiated settlement must be sought between the withdrawing state and the European Council. It is in effect a 'hybrid'[82] measure, situated somewhere between a state primacy model and the federal control model more typical of *secession* from a constitutional state than withdrawal from a mere international organisation.[83]

To take a final example of the infiltration of a logic of comprehensive design, the new constitutional order introduces a much denser set of rules for the regulation of the key 'intergovernmental' player in the new order, namely, the European Council,[84] than had previously been the case, including the introduction of a long-term presidency of that institution.[85] Arguably, the European Council, unlike the more venerable Council (of Ministers), has until now been no more than a lightly institutionalized version of the EU's diverse constituent power base in the member states. The European Council largely stood *outside* the institutional order because it was in effect the informal quotidian version of the formal IGC – the member state governments self-conceived as ultimate authors and regulators of the EU.[86] Now, though again it is clear

[81] Draft Constitution proposed by Professor Dashwood of Cambridge University, submitted by Peter Hain, then Minister for Europe of the United Kingdom; see http://register.consilium.eu.int/pdf/en/02/cv00/00345en2.pdf.

[82] R. Friel, Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution (2004) 53 *International & Comparative Law Quarterly* 407 at 424.

[83] *Ibid.*, at 422–8. This is not to suggest that the model of federal-level control is uncontested in all federal states. With particular reference to the example of Canada, and the issue of the secession of Quebec, see S. Choudhry and R. Howse, Constitutional Theory and The *Quebec Secession Reference* (2000) 13 *The Canadian Journal of Law & Jurisprudence* 143.

[84] Arts. I-21 and I-22 of the Constitutional Treaty.

[85] Art. I-22(1) of the Constitutional Treaty.

[86] Although the European Council met regularly from 1974 onwards, the institution was not acknowledged within the Treaty framework until the Single European Act of 1987.

that if we concentrate on the substance of the measures the European Council is quite significantly empowered relative to the other institutions in the new settlement – the Commission in particular – it is, finally, like the other institutions, very much *inside* the constitutional order, a constituted rather than a constituting authority. As in the other examples, the Constitutional Treaty, though in substance respectful of local autonomy, in form draws upon a wider state-based tradition of constitutional capacity to arrogate to itself an increasing authority to regulate power within the European constitutional configuration – a formal presumption which may pave the way for different substantive outcomes in the subsequent development of the constitutional *acquis*.

In the second place, and in some respects underpinning the first tendency, the adoption of the language of constitutionalism promises to substantiate a previously largely abstract feature of the European proto-constitutional order, namely, its Janus-faced quality. As noted earlier, in its earlier stage of implicit constitutionalism, the constitutional gaze of the EU faced inwards towards the member states rather than outwards towards other polities. Again, the deep figurative logic of documentary constitutionalism has changed this, and has made the European constitutional order genuinely Janus-faced.

A fascinating tale can be told of how the geopolitical events unfolding alongside the drafting of the Constitutional Treaty, in particular the post-9/11 assertion of US military power culminating in the invasion of Iraq without UN approval, affected the thinking of the drafters and caused them to concentrate more on Europe's external authority. Yet while these events doubtless were important, a further aspect of the figurative logic of constitutionalism – its Westphalian legacy as a form of power establishing the polity as a player in the international arena as much as it configures it internally – was arguably the *sine qua non* of this new external concern.[87] Again, there are important textual indicators; for example, in the express conferral of a single legal personality on the Union;[88] in the creation of a Union Minister for Foreign Affairs assisted by a diplomatic service;[89] and in the introduction of a 'solidarity' clause[90] which 'clearly carries with it the implication of internal cohesiveness

[87] G. de Burca, The Drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness? (2004) 61 *Washington and Lee Law Review* 555.
[88] Art. I-7 of the Constitutional Treaty. [89] Art. I-28 of the Constitutional Treaty.
[90] Art. I-43 of the Constitutional Treaty.

against external threats'[91] – an initiative which echoes the EU's growing preoccupation with wide-ranging security measures against global terrorist threats.[92] Again, however, the more significant implications may be long term. As many local units of federal states have discovered,[93] the need to conduct external transactions more extensively and to strengthen external authority can lead to a secular consolidation of power in the centre and a greater pressure to regulate the polity as an integrated whole – a trend towards which these measures, as well as those discussed under the rubric of a more comprehensive regulation of the internal sphere, can be seen as an early contribution.

Conclusion

One other possible implication of a new Janus-faced constitutionalism is worth mentioning. The migration of the very idea of documentary constitutionalism would mean that the ECJ, as it gradually altered its self-perception from manager of a shifting and precarious *modus vivendi* between the supranational and the constituent national legal orders to fully fledged Constitutional Court, *might* due to that new self-understanding, and also the more specific cues provided by the Constitutional Treaty's novel embrace of familiar constitutional forms such as a Bill of Rights and a competence catalogue, become more likely to consider the detailed jurisprudence of other non-EU constitutional courts in these areas. In turn, if and when it ever came to resemble a state Constitutional Court in its pattern and degree of institutional and cultural embeddedness, the more regular democratic and cultural concerns familiar to the inter-state level concerning the translatability of particular substantive doctrines honed in 'foreign' rather than 'local' cultural soil would begin to assume a direct relevance. Again, we can only speculate what the long-term results would be. What we can be sure of, and what this last possibility reflects in microcosm, is that the migration of the

[91] de Burca, The Drafting of a Constitution, 579.

[92] See D. Chalmers, Constitutional Reason in an Age of Terror, NYU Global Law Working Papers 06/04.

[93] Indeed, it was precisely this fear of 'federal creep', and its exacerbation in an EU which remains largely blind to the distribution of power within member states and tends to treat all areas of overlapping competence as the 'foreign affairs' – and so federal-level – responsibility of member states, that led the German Lander to argue in the Constitutional Convention for a strict competence catalogue as a way of recovering or consolidating land-level powers.

constitutional idea *tout court* to the European level, whether attained in the current process or at some future point, would have profoundly ambivalent and uncertain implications for the capacity of the European order to respond to the collective aspirations of the European people(s). On the one hand, formal constitutionalization offers a new platform for collective reflection and engagement, and for the contextually appropriate exploitation of the rich tradition of constitutionalism.[94] On the other hand, that rich tradition contains a legacy that is subtly but perhaps dangerously immodest in the face of the peculiar requirements of a partial and relational polity – and this may indeed be an important contributory factor in the increasing popular disaffection with the Constitutional Treaty and in the expression of that disaffection in a nationalist register.[95] Unless all key institutions and constituencies remain alive to these dangers, the state of EU constitutionalism, *if ever* successfully documented, may drift towards that of a constitutional state.

[94] On how this might be beneficial re fundamental rights, see e.g. note 62 above.
[95] Note 17 above.

PART IV

Comparative constitutional law in action – constitutionalism post 9/11

13

The migration of anti-constitutional ideas: the post-9/11 globalization of public law and the international state of emergency

KIM LANE SCHEPPELE

In this book, we collectively retire the idea of 'constitutional borrowing' and put in its place the idea of 'constitutional migration'.[1] Metaphors matter in shaping thought, and so it is crucial to get the metaphors right for highlighting key features of the matter under discussion. And 'migration' gives us tools to think with that 'borrowing' cannot. After all, constitutional ideas migrate back and forth across international boundaries, like other transnational flows. Borrowing implies something far more rigidly organized.

Nonetheless, the metaphor of borrowing is still the most commonly used image in the field of comparative constitutional law. The prevalence of the idea of 'borrowing' has brought with it a sense that there are national stocks of constitutional knowledge that are lent out in a neighbourly way like cups of sugar from house to house. But the borrowing metaphor seems patently misleading as a description of the way that constitutional ideas actually move in transnational legal space. First, ideas are not 'borrowed' with the implicit promise that they will be returned. Then, constitutional constructions are not owned in the way that 'borrowing' implies, with use of the object temporarily given to a

An earlier version of this chapter was presented at the conference on The Migration of Constitutional Ideas at the University of Toronto in October 2004. I am grateful to the participants in that conference for helpful feedback and to Sujit Choudhry's editorial guidance in preparing this manuscript for publication. I would also like to acknowledge the extraordinary research assistance of Karen Lantz, who has become a real expert on Security Council Counter-Terrorism Committee reports. Serguei Oushakine always reminds me why ideas matter.

[1] For my general critique of the idea of constitutional 'borrowing', see K. Scheppele, Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence Through Negative Models (2003) 1 *International Journal of Constitutional Law* 296.

non-owner while the real owner retains certain superior rights. Finally, the idea of 'borrowing' always signals that something positive is being transferred without alteration, which takes attention away from the cases in which one country draws negative implications from another country's experience or from the cases in which ideas are irredeemably altered as they move.

In this chapter, though, I want to use the new metaphor of 'migration' to call attention to a different problem with the borrowing metaphor. Borrowing implies that the transfer of things that are borrowed is accomplished through a voluntary bargain among rough equals, different only in their propertied relation to the thing in question. One may borrow a cup of sugar from a neighbour, but it strains the borrowing metaphor to say that the government has borrowed your money from you when it requires you to pay taxes, even though it gives some back in benefits. One may borrow a book from a friend, but the borrowing metaphor seems odd in describing the action taken by a parent in removing a forbidden toy from a child. In short, borrowing implies that the borrower and the borrowee are at eye-level with each other in a social and legal hierarchy and that their consensual borrowing agreement cannot be suddenly changed into a one-sided fiat. (If one side defaults on the borrowing agreement, then that is different – but the force I reference here presumes no misconduct.) Once an element of unequal power creeps into the discussion (as in the state-citizen or parent-child relationship), the consensual world of metaphorical borrowing must be replaced with a metaphor that captures (or at least is neutral with respect to) the issue of the hierarchical relationship between parties.

On this point, as on so many others, the idea of migration works much better. First, in ordinary parlance, the idea of migration is used both for voluntary migrants as well as for those pushed from one place to another by economic or political factors. 'Forced migration' is in fact a species of migration, after all. Then, migration allows for the idea that the migrant may gain new protections by leaving the initial jurisdiction (think of asylum claims) or may break free of initial constraints to live a wholly new life elsewhere (think of taking out citizenship in the new and better place). Both of these possibilities call attention to the limited claims that the initial jurisdiction can make on those who move outside. Finally, migration implies that the migrant has ideas of his or her own about how travel will bring about change in his or her life – something that may

become a bit strained in the context of ideas (which may not have 'ideas of their own' in any literal way) but it nonetheless captures something crucial. Constitutional ideas do not have any obligation of fidelity to their place or shape of origin; they can be altered in transit, refigured in their allegiances, changed beyond recognition as they respond to new circumstances.

The metaphor of borrowing blocks thinking about any of these things; migration opens up the metaphorical field for contemplating greater transformations, different sorts of power relations at different points in the migratory process, and a broader range of connections between the migrant and the context. Migration is an idea that allows consideration of greater flexibility, larger networks of relation, more complicated connections between points of origin and points of destination that occur in the world of legal ideas. Migration as a metaphor should open our minds in the field of comparative constitutional law.

Once we reframe the field of constitutional ideas in terms of migration, it is no longer inevitable that the primary legal ideas on the move are only *domestic* and *constitutional* legal ideas moving from place to place. Instead, we can see that domestic ideas from fields of legal doctrine other than *constitutional* law may be part of this picture because they too may migrate into other fields, including into and out of constitutional law itself. In addition, *international* legal ideas are on the move too, ideas that have their primary home in international law but that may be brought into domestic law because of the legal, moral, or political press of international law and international institutions on domestic legal institutions. Constitutional law may be both one of the sources of migratory ideas and one of the major recipients of them, but we should use the idea of *migration* to expand our sense of where such ideas may come from into constitutional law and where such ideas may move to out of constitutional law.

In fact, if we limit ourselves to the field of vision of peer contact among equal states, we may well ignore the fact that states may share constitutional ideas in common because each of the states is separately influenced by international forces. State-to-state 'borrowing' is only part of the field of transnational legal influence that tends to produce similarities across national legal regimes.

In this chapter, I will focus on the relationship between international and domestic law. And, as I will argue, countries may have constitutional

(or, in my case, *anti-constitutional*) ideas in common not because they are learning directly from each other, but instead because they are independently influenced by a set of legal principles coming from above and beyond any of them as legal globalization increases.

Legal globalization is not new. Until the last few years, international influences on domestic constitutions have been most strongly felt in the area of human rights. The story of how this occurred is a familiar one: an international human rights movement with many domestic adherents in particular places worked to elaborate the international system as well as to bring those international norms into domestic constitutional law. The results of their efforts have been nothing short of transformative, with new constitutional regimes around the world eagerly adopting variants of international human rights conventions as domestic constitutional bills of rights, enforceable by domestic courts. As a result, for example, Hungarian constitutional jurisprudence may share a family resemblance with South African constitutional jurisprudence not just because the Hungarians and South Africans may have been in direct contact 'borrowing' from each other, but because constitutional drafters and constitutional judges in both places were each separately influenced by international human rights treaties and their elaborations through international case law, professional commentary, and international human rights practice.

That *first* wave of public law globalization of international human rights is now being countered by a *second* wave of public law globalization. Since 9/11, the UN Security Council and regional bodies have quickly developed *international security law* to create an international web of mechanisms for battling terrorism. But international security law, unlike international human rights law, has teeth. Given the UN Security Council's powers to sanction non-complying countries, international security law is immediately a more serious business than the international human rights monitoring system, which relies primarily on naming and shaming without the associated sanctioning power. International security law can be mandated by the Security Council in a manner not available to the human rights community.

Following from the resolutions of the UN Security Council after 9/11, nearly every country in the world has changed its laws to comply with the new international security regime. And, as I will argue, many of these changes have produced anti-constitutional effects. The migration of legal

ideas in the area of international security law has attempted to undermine the constitutional solidarity of countries, many of which eagerly adopted international human rights law in the last great migration of legal ideas. When legal ideas migrate, as security-law ideas have done since 9/11, the effect is not always toward increased constitutional entrenchment. The first wave of public law globalization happened to occur in the area of human rights, thereby bolstering constitutional efforts within states and giving many the impression that international law necessarily supported the constitutionalization of state power. But the second wave of public law globalization is occurring in a very different field, one that has a tendency to undermine constitutional structures and protections. The relationship between international law and constitutional law, then, is not straightforward, simple, or unidirectional. In addition to exploring this new relationship between international and domestic constitutional law after 9/11, my chapter also alerts analysts of constitutional similarity to a major conceptual danger: confusing symptoms of similarity with their causes. The fact that a great many constitutional systems have moved in the same direction does not necessarily mean that they arrived at that convergence by state-to-state contact or 'borrowing' in the traditional sense. In the anti-terrorism campaign that has gripped the world after 9/11, as I will show, a great many countries have passed a great many laws with a great many similarities. And these laws have constitutional implications – centralizing power in the hands of executives within systems of otherwise divided government, increasing ease of surveillance of publics, truncating due process guarantees, changing the role of the military in civil life, and restricting individual rights of liberty, speech, association, and privacy. But, as I will argue, the similarities have appeared across the international field not because ideas moved from one constitutional system to another, being carried over at the level of nation-to-nation contact or being traded among a set of transnational but fundamentally domestic actors with common views. Instead, the similarities in the anti-terrorism context can be traced to common directives emanating from international organizations. As a result, what may look like cross-national migration in its symptoms may instead be more hierarchical in its causes, where those who want to spread the anti-terrorism campaign to new locations take advantage of a vertical relationship between international and domestic legal systems.

Comparativists who work solely within the nation-to-nation framework of 'borrowing', therefore, may well miss the way that international law enters our subject and alters it. As we think about the various ways that constitutional ideas can 'migrate', then, I hope to put on our agenda the possibility that a focus on purely national processes can miss what happens beyond this level and that the metaphor of migration, with its possibilities for highlighting inequality, force, and transformation in movement, will serve us better in comprehending our common subject. And so – to international law (in the next section) and its domestic by-products (in the third section).

International mandates after 9/11

After the 9/11 attacks, the system of international organizations was quickly mobilized. An extraordinary burst of international exhortation and law-making occurred, particularly within the United Nations. On 12 September 2001, the UN General Assembly adopted Resolution 56/1 through which it condemned the terrorist attacks and called urgently for the international community 'to prevent and eradicate acts of terrorism'.[2] That same day, the UN Security Council passed Resolution 1368[3] in which it called the attacks 'a threat to international peace and security' and exhorted the international community to fight terrorism.[4]

But it took less than three weeks for the UN Security Council to respond to the 9/11 attacks in an unprecedented manner that has had a serious impact on international constitutionalism. On 28 September 2001, with hardly any recorded debate,[5] the Security Council passed Resolution 1373,[6] a far-reaching and essentially legislative resolution that,

[2] UN Doc. A/RES/56/1. [3] UN Doc. S/RES/1368 (2001).

[4] As Nicholas Rostow has noted, there is a longstanding tension between the General Assembly with its general jurisdiction and the Security Council with its more specific jurisdiction to deal only with matters involving international peace and security. To prevent confusing overlap of jurisdiction, Art. 12(1) of the UN Charter prohibits the General Assembly from making recommendations about a subject over which the Security Council has asserted its jurisdiction. N. Rostow, Before and After: The Changed UN Response to Terrorism Since 9/11 (2002) 35 *Cornell International Law Journal* 475 at note 11. As a result, once the Security Council started being active in this area after 9/11, the General Assembly was barred from acting.

[5] Such debate as exists in the public record can be found in UN Doc. S/PV.4385. It consists only of the chair's introduction and the vote. One cannot even tell from the public record who initiated the resolution, but most observers believe that it was the United States.

[6] S/RES/1373 (2001).

for the first time in the Security Council's history, used binding authority under Chapter VII of the UN Charter[7] to require all member states to change their domestic laws in very specific ways. In particular, Resolution 1373 *decides* (its most mandatory language) that member states shall take extraordinary measures to monitor and intercept the international system for financing terrorist attacks. This includes directing states to criminalize the collection of funds to be used in terrorist acts, to freeze all economic resources of persons who are involved in terrorism as well as of those entities which are 'directly or indirectly' controlled by such persons, and to prohibit their nationals from making any funds available to persons who may be involved in terrorism.

The resolution further '*decides*' (again, that mandatory language) 'that all states shall ... refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts' and further includes the more active requirements that a state act to suppress recruitment of members into terrorist organizations and to eliminate the supply of weapons to such groups. States must take 'necessary steps to prevent the commission of terrorist act', '[d]eny safe haven to those who finance, plan, support or commit terrorist acts', '[p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories', 'ensure that any [such] person ... is brought to justice', and 'ensure that ... such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflect the seriousness of such terrorist acts'. The resolution also requires states to '[a]fford one another the greatest measure of assistance in connection with criminal investigations' and to '[p]revent the movement of terrorists or terrorist groups by effective border controls'. This part of the resolution reaches deeply into the domestic laws of states, into the areas of criminal justice and procedure which often tend to have constitutional implications.

After further encouraging all states to share information, ratify the treaties on offer through the UN system to fight terrorism and crack down on the use of refugee status by migrants to ensure it is not being used to allow international movement of terrorists, the resolution establishes a committee within the structure of the Security Council to

[7] Chapter VII of the UN Charter gives the Security Council the power to order states to adopt measures under pain of sanctions.

monitor compliance with these mandates. States were given ninety days – until the end of December 2001 – to report to this committee with their progress. As a result of this resolution, many states in Autumn 2001 struggled to enact broad anti-terrorism laws that covered criminalization of terrorism offences, methods for halting terrorism financing, ways to share information both domestically and internationally among police and security agencies, strategies for detecting and rooting out terrorists within their jurisdictions, and methods for cracking down on the migration of peoples in case some terrorists should be found among them.

Not surprisingly, strong similarities emerge across the laws that were passed in a huge flurry in Autumn 2001 and Spring 2002: the US Patriot Act, the Canadian Bill C-36, the British Anti-Terrorism Act, the Indian Prevention of Terrorism Act, the two German security packages, changes in the Chinese Criminal Code, the law reorganizing the intelligence services in Argentina, new laws ranging from Criminal Code modification to changes in border security in Australia, creation of new criminal offences against state security in Uzbekistan, the establishment of a special police force in Yemen, a sweeping new anti-terrorism law in Belarus. And the examples could be multiplied. But virtually all of the laws criminalize terrorism, ease restrictions on surveillance on domestic publics, increase monitoring of financial transactions, beef up the security services, make it easier to monitor and prosecute those who may be associated, however loosely, with suspicious persons and groups, and use immigration law to crack down on non-citizens. Given that this is what Resolution 1373 ordered states to do, the similarities are not coincidental.

What is more surprising, however, is that Resolution 1373 ever passed in the first place. As international law scholars who have followed the Security Council have noted, Resolution 1373 meant that 'the Security Council starts legislating'.[8] As Paul Szasz observed:

> With its recent resolution to counter the treat of terrorism, the United Nations Security Council broke new ground by using, for the first time, its Chapter VII powers under the Charter to order all states to take or to refrain from specified actions in a context not limited to

[8] P. Szasz, The Security Council Starts Legislating (2002) 96 *American Journal of International Law* 901.

> disciplining a particular country. It has long been accepted that intergovernmental organizations (IGOs) cannot legislate international law.[9]

But, as Szasz then went on to say, in this case the Security Council did just that.

Before Resolution 1373, the Security Council had limited the use of its Chapter VII mandatory powers either to impose sanctions on a particular state (requiring all other states to join them) or to issue an edict with regard to the conduct of a specific state. It had used its optional jurisdiction under Chapter VI to urge states to take more general actions, such as protecting children and civilians or urging humanitarian compliance. In this latter case, the Security Council would 'call upon' all states to take a particular course of action, but it could not – unless it acted under Chapter VII – *require* them to do so. Resolution 1373 broke new ground by adding a mandate to a general instruction and requiring all states to take specific actions in their own domestic law. Resolution 1373 began a wholly new process of international legislation.

While Resolution 1373 forms the centerpiece of the UN Security Council's efforts to fight terrorism, other resolutions fill in the broader picture of the Security Council's fundamentally legislative approach. Before 9/11, al Qaeda-related terrorism was in the Security Council's sights, and the Security Council had passed Resolutions 1267 and 1333.[10] Resolution 1267 singled out the Taliban government (as was more typical for Security Council resolutions) and imposed sanctions on it unless it expelled the international terrorists operating inside Afghanistan. The resolution set up a Sanctions Committee of the UN Security Council to monitor these sanctions and also to maintain a list of those persons and groups whose assets could be frozen. Resolution 1333 took this approach a step further under Chapter VII by prohibiting states from selling weapons or providing military assistance to the Taliban government of Afghanistan as long as it harboured terrorist training camps. These were typical sorts of resolutions for the Security Council before 9/11 – singling out a particular state for sanctions and only requiring actions from all member states in order to enforce this narrowly tailored objective.

[9] *Ibid.*, at 901.

[10] UN Security Council Resolution 1267, 15 October 1999, UN Doc. S/RES/1267 (1999). UN Security Council Resolution 1333, 19 December 2000, UN Doc. S/RES/1333 (2000).

But this sanctions regime against the Taliban government of Afghanistan also changed into something more legislative after 9/11 with the passage of UN Security Council Resolution 1390. This resolution extended the sanctions that had previously been imposed against a state, Afghanistan, to 'Osama bin Laden, members of the al Qaeda organization and the Taliban and other individuals, groups, undertakings and entities associated with them'.[11] This also moved the Security Council away from its previous concern only with states to a concern with a network of individuals that operated within states. The mandate to the international community was to freeze the assets of those on the UN Security Council Sanctions Committee list, as well as to block their international movement and to prevent their getting any weapons. With this, the sanctions regime moved beyond the disciplining of states to the disciplining of individuals. In international law, individuals had been the subjects of protection under international human rights and humanitarian law. But they had not previously been the focus of the Security Council and its mandatory jurisdiction. International security law had burst the bounds of state-to-state relations by targeting specific individuals regardless of their citizenship and location.

The use of the sanctions list got a further boost from UN Security Council Resolution 1455, which called upon states to help compile names of those who might be possible Taliban and al Qaeda members.[12] And how would the Sanctions Committee determine whether to add these suggested names to the list? Neither this resolution, nor any of the previous ones, indicated what sort of proof would be necessary to add an individual or group to the list. It is a matter of controversy among experts on Islamist terrorism just which groups are 'associated' with al Qaeda and which are freelance operations; it is even more of a matter of controversy which individuals are true-believing fellow travellers and which individuals are merely in the general vicinity without guilty knowledge. The UN Sanctions Committee process for determining who should be a target of sanctions by states is not transparent either in its standards of evidence generally or in defining the standard of proof that must be met for listing a specific individual more particularly. But as soon as names are added to the list, member states of the United Nations

[11] UN Security Council Resolution 1390, 28 January 2002, S/RES/1390 (2002), at point 2.
[12] UN Security Council Resolution 1455, 17 January 2003, S/RES/1455 (2003), at point 4.

are obliged immediately to freeze the assets of the named individuals, to keep them from getting weapons, and to prevent their further movement.

Yet another resolution of the Security Council, Resolution 1456, further required that 'States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to extradite or prosecute'.[13] But this resolution left open the definition of 'terrorist acts' and delegated the process of determining such things to the member states. While all prior anti-terrorism resolutions had been silent on the subject of human rights compliance, Resolution 1456 mentioned human rights for the first time. But the language of the resolution did not make it the Security Council's job to inquire into rights protection. In fact, Sir Jeremy Greenstock, first chair of the Counter-Terrorism Committee (CTC) of the Security Council, overtly rejected the idea that the Security Council had any responsibility for ensuring human rights compliance while it pushed states to combat terrorism:

> The Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of the interaction with human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States' reports and take up their content in other forums.[14]

[13] UN Security Council Resolution 1456, 20 January 2003, S/RES/1456, at point 3.

[14] United Nations, Counter-Terrorism Committee, Terrorism and Human Rights (quoting Sir Jeremy Greenstock), at http://www.un.org/Docs/sc/committees/1373/human_rights.html (last visited 28 July 2005). This quote has until recently been the only entry under Human Rights on the Counter-Terrorism Committee's webpage. One might reasonably conclude that the signal being overtly sent to member states seeking to comply with Resolution 1373 is that they do not have to worry much about compliance with human rights norms. In a later meeting, however, Sir Jeremy Greenstock apparently said that the CTC is giving a prominent role to human rights, but the only reference available for this statement is found in a first-hand report of a special meeting where the comment was apparently made orally. International Bar Association, Task Force on Terrorism, *International Terrorism: Legal Challenges and Responses* (Transnational Publishers, Ardsley, NY, 2003), p. 31. In July 2005, the website was updated to add a stronger statement on rights from UN General Secretary Kofi Annan: 'We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights.'

In short, the second wave of public law globalization was going to proceed as if the first had not already occurred.

The Security Council has remained active in the anti-terrorism area, setting up a Sanctions Compliance Monitoring Team in Resolution 1526 to ensure that states were in fact freezing assets and preventing weapons from getting to people and groups identified on the Security Council list as terrorists.[15] It also bolstered the expertise and resources available to the CTC in Resolution 1535, passed in April 2004.[16] In Resolution 1535, the Security Council set up a third committee to deal with aspects of terrorism in an essentially legislative resolution forbidding states from assisting Security Council-listed organizations and individuals in acquiring nuclear, chemical, or biological weapons. The resolution further required states to adopt domestic regulations that tracked the movement of such materials and specified who shall have access to them.

In October 2004, the sanctions list was expanded, perhaps without limit, when the Security Council adopted another resolution that had been proposed by the Russian Federation after the tragic Beslan school hostage-taking.[17] Resolution 1566 set up a task force to study expanding the list of terrorist groups and individuals beyond the Taliban, al Qaeda, Osama bin Laden, and their associates. This move clearly envisioned expanding the listed terrorist groups beyond those clearly responsible for the attacks of 9/11 to those responsible for terrorist attacks elsewhere (for example, 'terrorists' among the Chechens, Basques, Uighurs, Palestinians, Tamils, or other groups with separatist or nationalist aspirations). Such an expansion would, among other things, permit any state whose local conflicts could be made to fly under the banner of international terrorism to enlist the international community on the state side of that local conflict. If the Security Council expands its list of terrorist individuals and groups, we may well see the Security Council brought into the defence of existing states against insurgent proto-states, since the insurgent proto-states, for obvious reasons, will not have Security Council representation.

From our review of what has happened in the international area since 9/11, then, we can see a new picture emerging of the relationship between

[15] UN Security Council Resolution 1526, 30 January 2004, S/RES/1526 (2004).
[16] UN Security Council Resolution 1535, 26 March 2004, S/RES/1535 (2004).
[17] UN Security Council Resolution 1566, 8 October 2004, S/RES/1566 (2004).

international and domestic law. With Resolutions 1373 and 1540, the Security Council mandated that all UN member states change their domestic laws in very particular ways to ensure the realization of international agendas. This was not done through the usual treaty mechanisms of the United Nations, where conventions are put out for signature and bind only those states that choose to ratify them.[18] Instead, the Security Council has directly required that all member states of the United Nations change their laws in particular ways. The difficulty, as we will see in the next section, is that the changes required do not necessarily comport with domestic constitutional standards and values. As I will show, the actions of the UN Security Council created pressures for the migration of anti-constitutional ideas.

Constitutional constraint and the creeping state of emergency

What did states actually do in response to this international pressure? The immediate result – at least on paper – was both fast and far-reaching. All of the 191 member states of the United Nations filed reports with the CTC, most by the first deadline at the end of 2001.[19] Virtually all countries have by now filed second reports, most have submitted a third, and some are on their fourth or fifth reports. And these reports show that virtually all member states of the United Nations have changed their laws since 9/11 to comply with Resolution 1373 and other terrorism resolutions.[20] States vary, of course, in their extent of active co-operation

[18] In fact, the convention mechanism was short-circuited after 9/11 because the International Convention for the Suppression of the Financing of Terrorism that would have provided a global framework for stopping the flow of money to terrorists had already been opened for signature. At the time that Resolution 1373 was passed, covering much of the same territory in its opening paragraph, only four states had ratified the terrorism financing convention. Resolution 1373 essentially made the terrorism financing convention international law by international legislation.

[19] Reports of UN member states to the CTC are posted on the CTC's website. The reports can be found at http://www.un.org/Docs/sc/committees/1373/submitted_reports.html.

[20] Of course, reading the country reports to the CTC, while a good starting point, cannot alone reveal either what concretely pushed a state to take specific measures to fight terrorism or indicate what the relationship is between legislation and official state policy, on the one hand, and actual action, on the other. Taken together with other sources of evidence – constitutional frameworks, domestic reports, assessments of international human rights organizations, news stories, and accounts from domestic NGOs – the CTC reports can start to tell us what concretely has occurred since 9/11 though they are not the final world on what has actually happened 'on the ground'.

with the anti-terrorism campaign. Some even make efforts to resist Security Council pressure. But the reports make clear that almost all states are at least attempting to appear to comply with Resolution 1373 and its associated mandates. The new laws tend to raise common questions.[21] And many of these questions are constitutional ones – in the general sense that they implicate separation of powers and rights protections, the traditional ground of constitutionalism.

While national constitutions differ in particulars, constitutionalism as a transnational ideology has a set of common principles spread by the first wave of public law globalization. Governments that see themselves as deeply constitutionalist tend to build these principles into their domestic constitutions, though there are often local practices that customize the principles for particular political contexts. Anti-terrorism responses implicate the most basic of these constitutionalist principles – separation of powers, which ensures that exercises of state power are checked and controlled, and protection for rights, which sets limits in the way that the state can treat individuals.[22] While many limitations on rights are implicated in anti-terrorism campaigns, I will here concentrate on two in particular that implicate procedural fairness: (a) the requirement of clarity in the prohibitions of the criminal law so that people know precisely which actions would generate criminal penalties; and (b) the requirement that individuals be given a hearing and an opportunity to confront the evidence against them before they are deprived of their rights. Most constitutionalist systems contain protections for these elementary principles, and so as I analyze what different states have done to respond to the UN Security Council Framework for fighting terrorism, I will not reference specific state constitutions, but concentrate on these widely accepted ideals instead.[23]

[21] I cannot cover all 191 states and their reports in this chapter; what I am doing is selecting states whose responses are indicative of typical sorts of problems with the enforcement of Resolution 1373. My account is not a statistical report: even one state disrupting constitutional protections or violating human rights norms to comply with the anti-terrorism campaign is alarming enough. But I have tried to include a range of countries with a variety of different responses so that the reader of this chapter can see how different countries have responded to common pressures.

[22] A useful overview of constitutionalist principles can be found in J.-E. Lane, *Constitutions and Political Theory* (Manchester University Press, Manchester, 1996), especially ch. 1.

[23] This is not to say that such a detailed country-by-country analysis should not be done. Within the confines of a short chapter, it will be impossible to both detail the new legislation and show in detail how it does or does not fit within that particular country's constitutional framework.

The UN Security Council Framework requires states to criminalize terrorism, as well as various ancillary activities like aiding and abetting, providing material support to and collaborating with terrorists. The UN framework also requires states to identify particular individuals within their boundaries for targeted actions (particularly freezing assets) as well as to collect more information about international terrorism to pass on through international channels. Because these mandates tend to implicate prosecutors and intelligence agencies, the immediate effect of the new laws that accomplish these things is typically to strengthen the hand of executives, often to the detriment of parliaments and courts. These mandates also tend to focus exclusively on fighting terrorism, without requiring that measures also comply with human rights norms. Changes in the separation of powers and in protections afforded by rights tend to raise constitutional questions within the scope of domestic constitutions. The anti-terrorism laws passed in the wake of 9/11 bear substantial similarity to the general invocation of emergency powers, in which strengthening executive power and restricting rights in the name of a more urgent case are signature features. The responses of states to the UN Security Council resolutions indicate that the 'war on terrorism' is being fought not through the law of war or through ordinary criminal law, but instead through the invocation of emergency powers in domestic law. Unlike ordinary states of emergency, however, this co-ordination of emergency responses across many countries at once creates an internationally sponsored and managed state of emergency that is more global in its contours than the typical lone-country emergency. I call the post-9/11 legal framework an 'international state of emergency' because states are pushed by international law to invoke emergency powers. And emergency powers pose real threats to constitutionalism.

To see how this dynamic works, we will briefly explore two features of the international state of emergency: the expansion of administrative discretion in criminal law through the use of vague new criminal statutes on terrorism and the limitations imposed on individual rights through the freezing of assets of suspected terrorists without judicial process. Both

I will therefore paint with a somewhat broader brush here and refer to these basic principles that tend to find expression in virtually every constitutional tradition, albeit in different specific ways.

infringe rights and both tend to concentrate more power in the hands of executives.

Criminalizing terrorism

The Security Council's resolutions after 9/11 did not in fact solve the key conceptual problem in fighting terrorism that had blocked a general anti-terrorism treaty before 9/11: the absence of any international agreement on what constitutes terrorism. Resolution 1373 asks states to criminalize 'terrorism' precisely *without* providing a common definition. As a result, the resolution leaves this matter up to each state.

While it is by now a commonplace to say that 'one man's terrorist is another man's freedom fighter', the conceptual problems surrounding the definition of terrorism are not just matters of personal perspective in the way that that quotation suggests. Instead, they engage fundamental questions about the legitimation of state power by contrast with the powers of non-state groups, about the difficulty of separating worthy and unworthy causes in international struggles, and about the way in which justifiable challenges to state authority can be distinguished from unjustifiable ones. In short, the definition of terrorism is centrally about justification and legitimation of particular forms of political action.[24]

Terrorism has an irreducibly political nature. Many definitions of terrorism specify that those labelled as terrorist have to have a political motive for what they do. Murdering someone for personal gain is not generally considered terrorism; doing the same thing for the purposes of leveraging the release of political prisoners is. But once political motivations enter into the equation, it becomes very difficult to separate illegitimate terrorism from legitimate political dissent. Burning an effigy of the president may be considered peaceful protest by one regime, and it

[24] The UN High-Level Panel report attempts to get around these issues by pinpointing the hallmark of terrorism as the deliberate targeting of civilian populations rather than, as most domestic laws now indicate, carrying out violent actions with a particular sort of political motivation. Report of the Secretary General's High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Common Responsibility* (United Nations, 2004), available at http://www.un.org/secureworld/report3.pdf, at paras. 158–64. This would be a neat way around the terrorism conundrum, but there is no sign that the CTC is encouraging that sort of definition in member states. In fact, the CTC's website does not even reference the High-Level Panel's discussion. See http://www.un.org/Docs/sc/committees/1373/definition.html.

may be considered dangerous violence by another. The danger with many definitions of terrorism is that they can easily sweep constitutionally protected political dissent into the same category with illegitimate violence. And the fact that there is no general agreement about which is which prevents adoption of a uniform definition of terrorism that would cabin the offence and make predictable what actions would count as terrorism.

One could solve the problem by defining certain specific violent actions that tend to be associated with terrorism – like hijacking airplanes, poisoning water supplies, exploding car bombs – as terrorist actions, when done to influence the conduct of a state or international organization. This would have the advantage of making clearer what is prohibited and would limit terrorism offences to particular, egregious actions. But even when states had criminalized specific activities like this before 9/11, the Security Council pressed them after 9/11 to criminalize a general offence called 'terrorism' over and above such lists of specific crimes.

Since states were left to come up with a definition of terrorism on their own, the results were quite varied. Many of the definitions were quite vague, which gives more power to those who would interpret these new laws. The enforcement of criminal law tends to be tasked to prosecutors within the executive branches of most countries, if not at the initial investigative stage then at least by the time that decisions are made to prosecute. The vague criminalization of terrorism therefore tends to affect constitutional balances of power by lodging more discretion in the hands of executives.

Some non-constitutionalist states seized on the requirement to define terrorism as a criminal offence by sweeping virtually all political dissent into the mix. Vietnam, for example, reported to the CTC that it was already complying with Resolution 1373 because it had the following definition of terrorism in its Penal Code:

> Article 84. Terrorism.
> 1. Those who intend to oppose the people's administration and infringe upon the lives of officials, public employees or citizens shall be sentenced to between 12 and 20 years of imprisonment, life imprisonment or capital punishment.[25]

[25] As translated in the CTC report submitted by Vietnam, 31 January 2003, S/2003/128.

Vietnam's definition clearly blurs the search for terrorists with the condemnation of all political dissenters. But there is no sign that the CTC resisted this definition.[26]

Brunei had also already criminalized terrorism before 9/11, it dutifully reported to the CTC. According to the Internal Security Act 1984, a terrorist is defined as 'any person who ... by the use of any firearm, explosive, or ammunition acts in a manner prejudicial to the public safety or to the maintenance of public order or incites to violence or counsels disobedience to the law or to any lawful order'.[27] Here, too, terrorism is assimilated to political dissent.

China reported that it, too, had already covered terrorism in its criminal law, since Art. 249 of the Criminal Law punished the provocation of ethnic hatred and discrimination, Art. 294 punished crimes of 'organizing, leading or actively participating in a criminal underworld organization', and Art. 300 dealt with 'the use of superstitious sects, secret societies and evil religious organizations to sabotage the implementation of the law'.[28] The international community might be forgiven for thinking that China's criminal law ran rather roughshod over religious groups and had an unnervingly vague sense of what constituted an 'underworld criminal organization'. And the fact that China reported these sections of the Criminal Code as covering the offence of terrorism provides insight into China's sense of the political threat posed by certain forms of association. Nonetheless, China did amend its Criminal Code at the end of 2001 to add a number of new offences, including the offence of 'endanger[ing] public security by causing fires, floods or explosions or disseminating poisonous or radioactive substances or contagious-disease pathogens, or employing other dangerous means' (Art. 114) and of leading 'a terrorist organization' (Art. 120).[29]

One can see the difficulty with 'contracting out' definitions of terrorism, as it were. Countries given the encouragement to define

[26] The website for the CTC does not publish the responses back to specific countries. We cannot know for certain, then, whether the CTC objected. Given Vietnam's later reports, however, it does not appear that they were challenged in their broad definition of terrorism. Instead, the CTC apparently asked Vietnam to make sure to criminalize the activities of those who plotted within Vietnam to commit terrorist crimes abroad and not just domestically. Vietnam, CTC Report, 15 December 2003, S/2003/1171.

[27] Brunei Darussalam, CTC Report, 19 May 2003, S/2003/552.

[28] China, CTC Report, 27 December 2001, S/2001/1270, at 7.

[29] Addendum to China's CTC Report S/2001/1270, 10 January 2002, S/2001/1270/Add. 1.

terrorism in their own ways invariably connect the global instructions with local realities on the ground. And the results are not particularly encouraging for human rights.

Even in countries with more substantial constitutional traditions, definitions of the new terrorism offences can be quite sweeping and indiscriminate. For example, after 9/11, France instituted a new offence of 'pimping for terrorism' by an Act of 18 March 2003.[30] This offence can be charged against anyone who fails to substantiate the source of income that supports his or her lifestyle, when that person also is closely associated with persons who are suspected of engaging in terrorist acts. The assumption behind the law is that those with no accountable means of support must have gotten their income from terrorist activity if they have terrorist associates. The offence does not require demonstration that the charged person him- or herself has committed or plans to commit terrorist acts. Anyone in the vicinity of a suspected terrorist with suspicious amounts of money can be swept into this net.

Britain's current definition of terrorism was enacted as part of its Terrorism Act 2000,[31] and it too sweeps broadly. Terrorism is defined as the use or threat of actions that involve serious violence to a person or property or that creates a serious risk to public health and safety, when those actions are 'designed to influence the government or to intimidate the public . . .' and are 'made for the purpose of advancing a political, religious or ideological cause'.[32] Though this definition went into effect just before 9/11, Britain has been very active through the Commonwealth of Nations in promoting this definition for other countries in its orbit once the UN Security Council mandated the criminalization of terrorism in every member state. A similar definition was therefore adopted by Vanuatu,[33] for example – and other small Commonwealth countries, like Belize,[34] followed suit. The problem, of course, is that this broad definition leaves enormous prosecutorial discretion in the hands of the government.[35]

Canada criminalized terrorism for the first time after 9/11. Bill C-36 was rushed through the Canadian Parliament to meet the deadline set by

[30] France, CTC Report, 29 March 2004, S/2004/226, at 16. [31] 2000 c. 11.
[32] *Ibid.*, s. 1(1) and (2). [33] Vanuatu, CTC Report, 28 April 2003, S/2003/497, at 9.
[34] Belize, CTC Report, 25 April 2003, S/2003/485, at 3.
[35] For further analysis of this definition and its dangers, see C. Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (Oxford University Press, Oxford, 2002) at pp. 20–30.

Resolution 1373. While the new definition of terrorism limited the offence of terrorism to a specific list of crimes, making the set of activities covered by terrorism more clearly defined than in other countries we have seen, the law created an offence of terrorism that required proof that the act was carried out 'in whole or in part for a political, religious or ideological purpose, objective or cause'.[36] As Kent Roach has argued, proof of motive is not customarily required in Canadian criminal law and criminalizing motive poses a very real danger of infringing the very political, religious, or ideological beliefs that would otherwise be protected as matters of individual conscience or as subjects of free expression.[37] Also, the very breadth of the sweep of 'motive' gives substantial prosecutorial discretion to the government, particularly since the bill also both created investigative hearings in which those involved in terrorism investigations could be compelled to testify about what they know and permitted preventive detention of suspected terrorists.

So far as anyone can tell from the CTC's reaction,[38] it has not condemned any of these definitions. But it has tried to push countries that have not criminalized terrorism into doing so, even over resistance. Mexico, for example, indicated in its first report to the CTC in 2001 that it could clearly handle all crimes that might amount to terrorism within its current Criminal Code without explicitly calling terrorism a crime as such, especially if one took into account the provisions for conspiracy, aiding and abetting, and criminal association. But since Mexico was one of those few countries that reported the CTC questions along with its answers in its later reports, we can see that the CTC specifically pressed Mexico to criminalize 'recruitment for the purpose of carrying out terrorist acts regardless of whether such acts have actually been committed or attempted'.[39] Mexico responded that such people could be punished as accomplices under the current Penal Code. By the time of

[36] Anti-terrorism Act 2001, Part II.1 (83.01(1)).

[37] K. Roach, *September 11: Consequences for Canada* (McGill-Queens University Press, Montreal, 2003), pp. 25–8.

[38] We know from the CTC's statements about its own procedures that it reviews each of these reports individually and writes specific questions back to the country at issue. Sometimes it is possible to see what the CTC asked because the country organizes its next report as answers to numbered questions. But while the CTC posts country reports on its website, it does not post its own questions on the website, so it is impossible to tell how harsh the CTC is with countries that use the anti-terrorism campaign for purposes which are not necessarily those of the CTC.

[39] Mexico, CTC Report, 1 August 2002, S/2002/877, at 10.

the 2003 CTC report, however, Mexico reports having criminalized the recruitment of members to terrorist groups. It also added the new offences of threats to commit terrorism, conspiracy to commit terrorism, and the concealment of terrorist activities.[40] This appears to be as clear an indication as any that Mexico was pressured by the CTC to do this. We can also see in the CTC reports from Mexico that, in direct response to CTC request, Mexico changed the minimum sentence for a terrorism offence from two years to eighteen years.

Similarly, while Austria's 2001 report to the CTC indicated that it could surely punish all terrorist acts under its present Penal Code without difficulty even though there was no specific offence of terrorism, by 2003, Austria had amended its Criminal Code specifically to criminalize terrorism.[41] Brazil also reported that it had no specific terrorism offence in its 2001 CTC report, but by its 2002 report, it had a draft law before the Parliament that would establish terrorism as a separate crime.[42] Belgium, too, started by reporting that it had no specific offence of terrorism on its books, but by its 2004 report it noted that it had enacted a law on terrorism that added terrorism offences to the Criminal Code.[43]

Resolution 1373 clearly pushed a number of countries to criminalize terrorism that otherwise would not have done so. But the CTC also seems to have placed an international imprimatur on definitions of terrorism that sweep up political dissidents, minority religious practitioners, and those who simply hang around with suspicious people, along with those who might actually commit heinous terrorist acts. Resolution 1373 might have required all countries to criminalize terrorism, but the variety of definitions indicates that Resolution 1373 did not succeed in installing a common framework for fighting terrorism. Instead, the global mandate dissolved into a series of local agendas, justified back to the centre as responses to an international directive.

Against this background of local agendas, we can then understand why some countries reacted so strongly to the mandate given by the Security Council's response to 9/11. Some countries have used the opportunity to criminalize terrorism (or further to entrench their pre-existing

[40] Mexico, CTC Report, 10 September 2003, S/2003/869.
[41] Austria, CTC Reports, 26 December 2001, S/2001/1242; 29 August 2002, S/2002/969; 6 March 2003, S/2003/276.
[42] Brazil, CTC Reports, 27 December 2001, S/2001/1285; 19 July 2002, S/2002/796.
[43] Belgium, CTC Report, 27 February 2004, S/2004/156, at 4.

definitions of terrorism) and to justify the existence of sweeping, politically tinged crimes as a response to Resolution 1373. In this way, the second wave of public law globalization has provided a rationale for countries to broaden their criminal laws, at the expense of basic constitutionalist guarantees like clarity of notice and the reduction of administrative discretion. The drive to develop general laws on terrorism also has the effect of strengthening the executive branch relative to other parts of government, and of giving parties in power ways of marginalizing the political opposition. Not all countries have used their laws in this way, of course. For example, Britain and Canada clearly have lively oppositions that have been gaining on the parties in power as the war on terror has persisted. But in places without such democratically resilient institutions, like China, Vietnam, or Brunei, anti-terrorism laws pose a very real threat to the political opposition. The press toward using emergency and emergency-like powers to fight terrorism has created the migration of anti-constitutional ideas, just as the first wave of public law globalization produced a migration of constitutional ideas.

Freezing assets, bypassing courts

Perhaps the largest number of changes in the post-9/11, post-Resolution 1373 world have been made to procedures that countries have in place for being able to freeze or seize terrorist assets. Resolution 1373 requires states be able 'immediately' to freeze the assets of those on the UN Sanctions Committee list. If there is a lengthy court process that must take place before assets can be frozen, then such processes cannot operate 'immediately'. As a result, there has been a press from the CTC out to the UN member states to find ways to freeze and even seize assets bypassing domestic judicial intervention. This pressure implicates two sorts of constitutional safeguards – protection for private property and the basic constitutionalist safeguard that no one shall be deprived of rights without an opportunity to confront the evidence that is the basis for the deprivation.

How can the CTC demand that states freeze the assets of individuals immediately and without prior review by a court? Recall that the UN Security Council Sanctions Committee creates lists of terrorist groups or individuals without disclosing the evidence on which the listing is based or even the process through which evidence is assessed. The CTC has

been asking states to take these lists and immediately freeze that person's or group's assets anywhere in the world. The problem, of course, is that neither the Sanctions Committee nor the CTC has anything like a procedure for individualized hearings to determine that those placed on the UN lists are who the Sanctions Committee believes them to be or that the assets so frozen would be used to assist any terrorist plot. There is simply no process at all through which an individual or group can contest this designation and the states asked to freeze assets are not given any evidence to assess whether the request is justified.

The demand that states freeze assets immediately has been complied with (at least as noted in the CTC reports) quite widely. Most states have found a way to freeze assets of individuals while bypassing their domestic courts. Usually, the freezing is done through an executive order (which means that the executive is able to suspend the right of property without any semblance of judicial process) or pursuant to a statute that delegates to the executive the power to enforce Security Council resolutions.

In the United States, the President is generally delegated by Congress the power to act through executive order directly to enforce UN resolutions. For example, one such delegation reads:

> . . . the President may, to the extent necessary to apply such measures [authorized by the UN Security Council under its Chapter VII powers], through any agency which he may designate, and under such orders, rules, and regulations as may be prescribed by him, investigate, regulate, or prohibit, in whole or in part, economic relations or rail, sea, air, postal, telegraphic, radio, and other means of communication between any foreign country or any national thereof or any person therein and the United States or any person subject to the jurisdiction thereof, or involving any property subject to the jurisdiction of the United States.[44]

Other countries have even more direct lines of enforcement for UN Security Council resolutions. For example, France reports that requests to freeze assets of terrorist suspects are automatic.[45] Names pass directly from the Security Council Sanctions Committee to French banks which have a standing order without intervening command of the French

[44] Economic and Communication Sanctions Pursuant to United Nations Security Council Resolution, 22 USC § 287c (1977).

[45] France, CTC Report, 10 March 2003, S/2003/270, at 8.

government to freeze all assets of those on the UN lists. As Spain noted in its 2003 report to the CTC, a system of 'automatic reception of international treaties' makes it 'not necessary . . . to adopt an internal law in order for these treaties to produce a direct effect in our system'.[46] And once Spain signed the convention on terrorism finance, which overlapped the requirements of Resolution 1373 exactly in this area, no further action of a domestic court was necessary to freeze assets of specific individuals. In Bulgaria, the list of those against whom freeze orders could be issued was passed from the Security Council's Sanctions Committee to the Bulgarian Council of Ministers which ordered the specific freezes on the proposal of the Minister of the Interior, bypassing both courts and Parliament.[47]

Some countries give those whose assets are frozen a right to judicial review after the fact. For example, Belize passed a statute in Autumn 2001 delegating to the foreign minister the power to freeze assets at the request of the Security Council's Sanctions Committee, but allowed an appeal to the Supreme Court to have these freeze orders set aside.[48] Brazil adopted a law that made publication of Security Council resolutions in the country's *Official Gazette* automatic, thereby making them domestic law.[49] But all individual freeze orders are still 'subject to due process' after the fact.[50] However, by the time of Brazil's 2004 report, it noted it was working on a process to make freeze orders from the Security Council even more automatic.[51]

The demand for immediate freezes of assets of individuals and groups has produced some push-back from states like Venezuela and Mexico, which claimed at first that they could not freeze assets without a judicial order and that they could not get a judicial order without evidence that could be presented to a domestic judge that the person or group whose assets are frozen had violated a law.[52] Mexico, in particular, was pressed though direct questions from the CTC on its policy of not allowing assets of suspected terrorists to be frozen if the suspected terrorist could prove

[46] Spain, CTC Report, 9 June 2003, S/2003/628, at 4.
[47] Bulgaria, CTC Report, 9 June 2003, S/2003/632, at 3.
[48] Belize, CTC Report, 27 December 2001, S/2001/1265, at 3–4.
[49] Brazil, CTC Report, 19 July 2002, S/2002/796, at 6. [50] *Ibid.*, at 7.
[51] Brazil, CTC Report, 14 April 2004, S/2004/286, at 17.
[52] Mexico, CTC Report, 27 December 2001, S/2001/1254, at 5–6.

the assets were legally acquired.[53] But, after several reports attempting resistance to the CTC, both Venezuela and Mexico found a way to freeze assets without having to show any individualized proof to a domestic judge.[54]

As we can see through these examples, many countries have been moving – largely because they have been pushed – toward freezing assets of suspected terrorists simply on the say-so of the UN Security Council's Sanctions Committee, without any intervening domestic judicial process that could check either whether a suspected terrorist really is the person the Sanctions Committee believes him or her to be or whether the assets really belong to him or her. This is clearly a retreat from constitutionalist principles and from procedural guarantees that ensure constitutionalist norms apply to the limitation of rights. Not surprisingly, in light of what we saw in the earlier section on definitions of terrorism, it happens that restrictions on rights are directly associated with new powers wielded by domestic executives. And this is the hallmark of emergency government – where reasons of state (now internationalized) are given for concentrating power in the executive and limiting the rights of individuals.

Conclusions

Since 9/11 in general and subsequent to Resolution 1373 in particular, there has been a flurry of terrorism-related law-making around the world. Many of the laws look similar and many of these laws have constitutionalist implications. We have focused primarily here on two involving procedural rights (a) to have clear advance notice of criminal prohibitions and (b) to be able to challenge one's deprivation of rights in advance in an individualized hearing. As we have seen, many states have stepped outside constitutionalist principles in the name of following a newer, higher law – the new international security law. But the new international security law has produced the state-by-state invocation of emergency powers that tends to limit individual rights and to concentrate powers in the executive.

[53] Note 40 above, at 9 where the CTC is quoted as asking Mexico, 'Does article 29 [of the Federal Organized Crime Act] mean that lawfully acquired assets belonging to terrorists cannot be frozen?' with the clear implication being that this was not good enough.

[54] Note 41 above at 7; Venezuela, CTC Report, 30 July 2003, S/2003/774, at 11.

The mechanism that has brought about this migration of anti-constitutional ideas has not been the state-to-state borrowing of legal ideas, but instead the top-down imposition of legally binding international norms adopted by the UN Security Council through detailed oversight by the CTC. Pressuring countries to criminalize terrorism and to find ways to seize and freeze assets without the cumbersome procedure of domestic judicial approval, the CTC has made it abundantly clear to states that they should take shortcuts in their respect for rights in order to show fidelity to international security law in the anti-terrorism campaign. Along the way, the CTC does not appear to mind if executives amass increased powers. In fact, the CTC may well prefer it because strong executives who cannot be second-guessed by any other domestic institution are more predictable partners for the CTC.

While few states have declared formal states of emergency after 9/11, the slide into qualities characteristic of states of emergency shows that the anti-terrorism campaign is taking a toll on constitutional governance. Of course, not all states had strong frameworks for checks on powers or for protection of rights before 9/11 – and those states that started without a strong constitutionalist orientation have often been quickest to comply with the CTC mandates in the most abusive ways. This alone should have cautioned against world law-making in the way that the Security Council did it; it was an absolutely predictable consequence of Resolution 1373 that it would legitimate power grabs and rights violations in those places that had anti-constitutional inclinations in the first place. But even among those states that have traditionally had strong constitutional frameworks, most have found themselves invoking domestic emergency powers to fight terrorism.

Since 9/11, then, we have seen the development of a new legal framework for fighting terrorism. The UN Security Council has provided the concrete mandates; individual states have adapted these mandates in the context of their local politics. The result may have been a boost in the ability of the world community to fight terrorism through an integrated plan, but this fight is not always fought within constitutionalist guidelines. Moreover, local agendas often dominate the international one, making the 'war on terrorism' a convenient cover for some governments to carry out their own problematic security programmes under cover of international approval. Because so much of the fight against terrorism is going on within states using their own domestic law,

the urgency of the anti-terrorism campaign has translated into a weakening of the hold of constitutionalist principles around the world. The 'international state of emergency' which has substituted for the law of war as a framework for the anti-terrorism campaign has, unfortunately, none of the guarantees provided by international humanitarian law. Indeed, it relies on the collective weaknesses of constitutional regimes rather than on their collective strengths.

As we think about the migration of constitutional ideas, then, it is important to remember two more general lessons that the foray into international security law illustrates. First, the apparent similarity of many domestic legal provisions may not be a sign of state-to-state borrowing. Instead, each state may each be responding separately to common external pressures. And second, it is not just constitutional ideas that migrate, but it may well be anti-constitutional ideas as well.

14

The post-9/11 migration of Britain's Terrorism Act 2000

KENT ROACH

The terrorist attacks of 11 September 2001 have resulted in the expansion of anti-terrorism laws throughout the globe. The international and domestic reaction to these attacks constitute a type of horrible natural experiment in the migration of constitutional and anti-constitutional ideas. In this chapter, I will attempt to provide insight into the complexity of the migration of constitutional ideas with respect to anti-terrorism laws by examining the influence of the definition of terrorism in Britain's Terrorism Act 2000 on the post-9/11 development of anti-terrorism laws in Australia, Canada, Hong Kong, Indonesia, South Africa, and the United States, as well as the role that domestic law, politics, and history played in producing variations in the definition of terrorism in each country.

As Kim Lane Scheppele argues in her contribution to this collection,[1] international law, and in particular the UN Security Council Resolution 1373, helped shape the worldwide expansion of anti-terrorism laws after the 9/11 terrorist attacks. At the same time, as Professor Scheppele notes, Security Resolution 1373 made no attempt to define terrorism and a universal definition of terrorism has so far eluded the international community. A failure to define terrorism in international law allowed various local agendas to enter into the definition of terrorism. Although, as Professor Scheppele suggests, the local agenda sometimes helped produce more repressive laws, at other times, it restrained the new international mandate to combat terrorism.

[1] The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency.

The countries examined in this chapter provide some evidence of the complex and contradictory effects of the interaction of local agendas and the new international mandate to criminalize terrorism. Canada and South Africa both expanded the definition of terrorism in response to anxieties about economic security, but at the same time concerns about compliance with constitutional bills of rights in both countries resulted in new exemptions for protests and strikes that are not found in the Terrorism Act 2000. Both countries also used definitions of terrorism taken from international law that are more restrained than alternative definitions inspired by the Terrorism Act 2000 and South Africa recognized its history with a broad exemption for freedom fighters. In Hong Kong, the definition of terrorism reflected the importance of protests to its political culture, as well as concerns about preserving the one country, two systems accommodation with China. The US Patriot Act rejected the British requirement of political or religious motive in part because of the strong protections for freedom of religion and freedom of speech provided in its Bill of Rights. Indonesia rejected the same motive requirement for different reasons, relating to concerns about discrimination against Islam. These examples suggest that migration of anti-constitutional ideas about how terrorism should be defined was not inevitable or unstoppable. Each country had some freedom to make choices about its own definition of terrorism.

Each country examined in this chapter, however, did not start from scratch when it came to the difficult task of defining terrorism. The definition of terrorism in the Terrorism Act 2000[2] played an important role as many countries struggled to define terrorism without any explicit guidance from Security Council Resolution 1373 and helps explain the similarity of the definition of terrorism in many anti-terrorism laws, particularly in Commonwealth countries. Prior to 9/11, the Terrorism Act 2000 represented the state of the art in anti-terrorism laws. It had a very broad definition of terrorism that went beyond killing and bombings

[2] The Terrorism Act 2000 (c. 11) was also influential in terms of broad offences, including those proscribing membership in terrorist organizations and in terms of investigative powers including powers of preventive arrest. The influence of its definition of terrorism, however, will be the focus of this chapter both because of the overriding importance of this issue and because of the failure of Security Council Resolution 1373 to define terrorism. Some of the other influences of the Terrorism Act 2000 in Australia, Canada, Indonesia, and the United States are examined in K. Roach, The World Wide Expansion of Anti-terrorism Laws after 11 September, 2001 (2004) 116 *Studi senesi* 487.

to include serious property damage and serious disruption of electronic systems. It was what was at hand when other countries started their hurried process of drafting new anti-terrorism laws in responses to 9/11 and Security Council Resolution 1373. A number of scholars have employed the idea of 'bricolage'[3] or working with what is at hand in describing the borrowing of constitutional ideas. The bricolage concept seems particularly helpful when describing the type of urgent law-making that occurred after 9/11.

Another concept, that of the 'chain novel', used by Ronald Dworkin to describe the common law method of law-making,[4] is also helpful in describing how variations on the Terrorism Act 2000 made by other countries were subsequently incorporated into legislation by other countries. For example, Australia, Hong Kong, and South Africa all drew on Canada's important variations on the Terrorism Act 2000, both in terms of broadening the definition of terrorism, and also in creating exemptions for protests and strikes. Each country's variation on the definition of terrorism produced an expanding pool of resources that were at hand when other countries drafted their own anti-terrorism laws. The resources for bricolage expanded over time as different countries wrote their own instalment in a continuing chain novel of new anti-terrorism laws.

This chapter will demonstrate not only the important influence of the Terrorism Act 2000, but also the lack of influence of the US Patriot Act. In other words 'other People's Patriot Acts'[5] reflected much more the British than the US example. This may suggest that the bonds of Britain's former but formal empire may still be significant when it comes to the transmission of constitutional ideas. It may also be another example of US exceptionalism, in this case US law that defined terrorism in a very legalistic and complex manner.[6] Because of its complexity and the

[3] M. Tushnet, The Possibilities of Comparative Constitutional Law (1999) 108 *Yale Law Journal* 1225; D. Schneiderman, Exchanging Constitutions: Constitutional Bricolage in Canada (2002) 40 *Osgoode Hall Law Journal* 401.

[4] R. Dworkin, *Law's Empire* (Harvard University Press, Cambridge, Mass., 1986).

[5] This is an evocative phrase used by Professor Scheppele to communicate with a US audience. See K. Scheppele, Other People's Patriot Acts: Europe's Response to September 11 (2004) 50 *Loyola Law Review* 89.

[6] On US legalism see R. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, Cambridge, Mass., 2001).

growing unpopularity of US anti-terrorism efforts, the Patriot Act did not provide good material for either bricolage or writing a chain novel.

Britain's Terrorism Act 2000

The Terrorism Act 2000 was enacted with all-party approval before 9/11 as a means to consolidate and expand on various anti-terrorism laws that were enacted, initially as emergency measures, to deal with the terrorist violence of the Irish Republican Army. Section 1(1) of the Act distinguishes terrorism from other crimes by providing that the proscribed harms be 'designed to influence the government or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious or ideological cause'. The law also defines governments and public to include those from a foreign country.

The requirement that a terrorist action attempt to intimidate the public is a quite common method used in domestic and international laws to distinguish terrorism from other crimes. The requirement that terrorists act for the purpose of advancing a political, religious, or ideological cause is less common and more problematic. Political or religious motive requirements go against the traditional criminal law principle that the accused's motive is not an essential element of an offence.[7] It requires police and prosecutors to collect evidence about a terrorist suspect's religion or politics if they are to prove the essential elements of a terrorism offence. The ambit of what constitutes a political or ideological cause is also not certain. Defenders of the law argued that it would not apply to a nurses' strike because such a strike would be undertaken as part of a 'trade dispute' as opposed to a 'political, religious or ideological cause',[8] but it is entirely possible that trade unions could be found to act for political or ideological causes.

The origins of Britain's requirement that terrorism be committed for a political, religious, or ideological motive are interesting and, given the US rejection of such a requirement, somewhat ironic. Before 2000, Britain

[7] *R.* v. *Kingston (Barry)* (1995) 2 AC 355; *United States of America* v. *Dynar* [1997] 2 SCR 462, SCC.

[8] See the arguments by Labour Member of Parliament Charles Clarke as quoted in C. Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (Oxford University Press, Oxford, 2002), p. 22.

defined terrorism as 'the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear'.[9] The reference to the use of violence 'for political ends' can be seen as a motive requirement although perhaps a more limited one than the reference to political, ideological, and religious objectives. Lord Lloyd in his 1996 review of British anti-terrorism legislation expressed concerns that the existing definition might not catch some forms of terrorism and expressed approval for the following working definition of terrorism used by the Federal Bureau of Investigation (FBI) in the United States:

> The use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public or any section of the public, in order to promote political, social or ideological objectives.[10]

As Professor Clive Walker notes, however, the FBI's definition of terrorism was used 'for jurisdictional, budgetary and other administrative purposes' and not 'as a legal term of art on which liberty depends'.[11] The definition of terrorism in US law both before and after 9/11 was less vague than the FBI's working definition and it makes no reference to political or religious motives, factors likely to attract critical scrutiny under the First Amendment of the US Bill of Rights.

Under the United Kingdom's Terrorism Act 2000, a politically or religiously motivated use or threat of action designed to influence any government or intimidate the public will constitute a terrorist activity if it:

(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person's life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or

[9] Prevention of Terrorism (Temporary Provisions) Act 1989, s. 20(1).
[10] Lord Lloyd's report, Inquiry into Legislation against Terrorism, Cm 3420, 1996, at para. 5.22.
[11] Walker, *Guide to Anti-Terrorism Legislation*, p. 21.

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.[12]

These prohibited acts are broadly defined in an attempt to include modern forms of terrorism such as the use of biological or chemical poisons or disruptions of computer systems. As will be seen, the reference to serious interference with electronic systems was modified in subsequent Commonwealth Acts. Perhaps because the definition does not itself create a criminal offence, there was no requirement that the accused intentionally cause the prohibited acts.

In short, the definition of terrorism in the Terrorism Act 2000 is notable for its breadth. It applies not only to politically motivated violence that was the focus of previous British anti-terrorism legislation, but also to politically or religiously motivated serious property damage or serious disruptions of an electronic system. As will be seen, this broad definition of terrorism became something of a starting point when many countries enacted new anti-terrorism laws in response to 9/11 and Security Council Resolution 1373.

The United States

The US Patriot Act became law on 26 October 2001 after being rushed through Congress with overwhelming majorities of 357–66 in the House of Representatives and 98–1 in the Senate. Surprisingly, given its enactment so soon after the trauma of religiously motivated terrorism on 9/11 and the British precedent, none of the definitions of terrorism in the Patriot Act contains any reference to terrorism being politically or religiously motivated. Both international and domestic terrorism are defined under the Patriot Act as 'acts dangerous to human life' that would violate federal or state criminal laws and which 'appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination or kidnapping'.[13] This definition does not require proof of political or

[12] Terrorism Act 2000, s. 1(2).

[13] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, § 802 amending 18 USC §§ 2331

religious motive and it does not include destruction of property or disruptions of electronic systems or essential services.

The US definitions of terrorism are broad, but are generally articulated in more precise language than that used in the Terrorism Act 2000.[14] The focus under the Patriot Act was on criminal acts that are violent and dangerous to human life as opposed to politically or religiously motivated property destruction or interference with electronic systems. Although law enforcement agencies such as the FBI may include political or religious motive in their operative definition of terrorism, such motive requirements are not found in the Patriot Act. Despite US declarations of war against Islamic terrorism, the United States did not use the definition of terrorism in the Patriot Act as a vehicle to denounce political and religious extremism.[15] Although it is possible to find strong criticisms that the Patriot Act defines terrorism in overly broad terms,[16] these criticisms themselves partake of the same insularity as the Patriot Act because they demonstrate no awareness of the broader definition of terrorism in the Terrorism Act 2000.

The immigration law amendments of the Patriot Act define terrorism in a broader manner than the above criminal law amendments. Under immigration law, terrorism includes not only threats to life and health, but also the use of dangerous devices '(other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property'. In addition, terrorism under US immigration law can include soliciting funds, gathering information, or providing material support for what one knows or reasonably ought to know will be terrorist activities. Moreover, a non-citizen can be prevented entry to the United States for endorsing or

(international terrorism) and 3077(1) (domestic terrorism), Pub. L. No. 107–57, 115 Stat. 272 (2001).

[14] The US definition is broader than the British in one respect. It only requires that the acts 'appear to be intended' to influence governments or coerce populations whereas s. 1(b) of the Terrorism Act 2000 requires that the acts be 'designed to influence the government or to intimidate the public'. The US definition, however, requires the influence to be done 'by intimidation or coercion' while the British definition does not.

[15] On the connections between political and religious motive requirement and the concept of militant democracy that denounces political and religious extremism, see K. Roach, Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses in A. Sajó (ed.), *Militant Democracy* (Eleven International Publishing, Utrecht, 2004).

[16] See e.g. A. Romero, Living in Fear: How the US Government's War on Terror Impacts American Lives in C. Brown (ed.), *Lost Liberties: Ashcroft and the Assault on Personal Freedom* (The New Press, New York, 2003), p. 122.

espousing terrorist activities or for being a member of an organization that endorses or espouses terrorism.[17] David Cole has argued that 'for citizens, terrorism has a limited definition that roughly corresponds to common understandings of the phenomenon, whereas for foreign nationals, Congress has labeled as "terrorist" wholly nonviolent activity . . .' including ideological exclusion based on support for terrorism or membership in groups that support terrorism.[18]

Both the broader definition of terrorism covering aspects of non-citizens' political and religious activities and the rejection of political and religious motive requirements under the criminal law may be explained in part by the broad free speech rights of US citizens and the more limited rights of non-citizens outside the United States.[19] The existence of different definitions of terrorism in criminal and immigration laws sets up a possibility for a migration of constitutional ideas within a particular jurisdiction. One of Professor Cole's main messages is the danger of draconian and anti-constitutional ideas used in immigration law migrating towards criminal laws used against citizens.[20] The migration of constitutional ideas about terrorism can occur both within and between jurisdictions.

The definition of terrorism in the Patriot Act has not to my knowledge shaped the definition of terrorism in the laws of other countries.[21] The reasons for the Patriot Act's lack of influence are both practical and ideological. Practically, the Patriot Act is almost unreadable to someone not schooled in the intricacies of US law and with ready access to a cross-referenced computer database of predicate offences found in countless laws.[22] It would be impossible and embarrassing for foreign law-makers

[17] Patriot Act, § 411(a), amending 8 USC §1182(a)(3)(B)(iii)(V)(b).

[18] D. Cole, *Enemy Aliens* (The New Press, New York, 2003), p. 58.

[19] Compare *Brandenburg* v. *Ohio*, 395 US 444 (1969) with *Kleindienst* v. *Mandel*, 408 US 753 (1972).

[20] Cole, *Enemy Aliens*. See also A. Macklin, Borderline Security in R. Daniels, P. Macklem, and K. Roach (eds.), *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press, Toronto, 2001), pp. 383–405.

[21] But see H. Roque, The Philippines: The Weakest Link in the Fight Against Terrorism? in V. Ramraj, M. Hor, and K. Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge University Press, Cambridge, 2005) for suggestions that the Patriot Act has influenced some draft anti-terrorism laws in the Philippines.

[22] As William Banks has noted: 'The Patriot Act is hardly a code for fighting the war on terrorism, nor one for saving the United States homeland from another attack. Instead, it is an amalgam of often unrelated pieces of authority, most of which simply amend existing laws, and the larger share of which are unremarkable complements to existing authority.' W. Banks,

to attempt to duplicate this welter of laws. Ideologically, the very name of the US Patriot Act is off-putting to foreigners, as is the torrent of criticisms levelled against other parts of the Patriot Act and the abuses at Guantanamo Bay and Abu Ghraib. The Patriot Act was not a good source for either emergency bricolage or a part of a chain novel when other countries began to write their own anti-terrorism laws.

Canada

Canada introduced its Anti-Terrorism Act in Parliament on 15 October 2001 and enacted it within the ninety-day reporting time established by Security Resolution 1373. Before this time, terrorism was not defined as a separate crime in Canada and Canadian officials drew heavily on the definition of terrorism contained in the Terrorism Act 2000. At the same time, Canada did not simply rewrite the British definition into its Criminal Code. In some respects, Canada broadened the British definition and in other respects it tightened it. In both cases, the changes can be explained by domestic law and politics in Canada.

The main definition provides that terrorism is an act or omission committed:

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside of Canada, and

ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,
(B) endangers a person's life,
(C) causes a serious risk to the health or safety of the public or any segment of the public,

United States Responses to September 11 in Ramraj, Hor, and Roach, *Global Anti-Terrorism Law and Policy*, p. 492.

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of [lawful] advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C).[23]

This definition follows the British definition in requiring proof that the accused was acting for a political, religious, or ideological cause. This aspect of the bill became controversial in Canada after the bill was introduced in Parliament. A broad range of civil society groups including those representing Muslim groups in Canada criticized the bill.[24] Concerns were raised that reference to political and religious motives could facilitate a process of singling out those who may share the political and religious beliefs of terrorists. Such criticisms were taken seriously by the Liberal government of Canada, which prides itself on its openness to new Canadians. The criticisms also had resonance in s. 15 of the Canadian Charter of Rights and Freedoms, which contains a broad guarantee of equality rights, and s. 27 of the Charter, which mandates that Charter rights 'shall be interpreted in a manner consistent with the preservation of the multicultural heritage of Canadians'. On 20 November 2001 an amendment was introduced adding a subsection providing that 'for greater certainty, the expression of a political, religious or ideological thought, belief or opinion' would not come within the above definition of terrorism 'unless it constitutes an act or omission that satisfies the criteria of that paragraph'. The legal meaning of this addition is far from clear, but its political meaning is clear. The government was responding to criticism that the political and religious motive requirement might burden legitimate political and religious activity.[25]

[23] Criminal Code of Canada (RSC 1985 c. C-34), s. 83.01(b), as amended by SC 2001 c. 41.

[24] K. Roach, *September 11: Consequences for Canada* (McGill-Queen's University Press, Montreal, 2003), ch. 3.

[25] For arguments that Canada should also have added a non-discrimination or anti-profiling provision to its anti-terrorism law, see I. Cotler Thinking Outside the Box in Daniels, Macklem and Roach, *Security of Freedom*, p. 119; S. Choudhry and K. Roach, Racial and Ethnic

The Canadian definition of terrorism expanded on the British definition. The reference to influencing governments was expanded to compelling domestic and international organizations and even 'a person' to act. The idea that terrorism could include actions against corporations was underlined by the controversial expansion of the British reference to serious interference with electronic systems to include serious interference with all essential services, facilities, or systems, whether public or private. In this way, Canada moved from older definitions of terrorism that focused on attempts to overthrow the government through violence to broader neo-liberal definitions of terrorism that included attacks on corporations. The Canadian definition also expanded the British concept of intimidation of the public to include the intimidation of the public with respect to its security, including its 'economic security'. The novel and vague concept of economic security may have reflected concerns in Canada that terrorism would disrupt border flows with the United States, which had already provided in the Patriot Act[26] for extra resources to be devoted to 'Protecting the Northern Border'. Canadian economic insecurities helped produce a problematic new constitutional idea that terrorism included actions against private corporations and threats to economic security.

At the same time as the drafters of the Canadian bill expanded on the British definition of terrorism, they were sensitive to the impact that the law could have on activities protected under the Canadian Charter of Rights and Freedoms. The Canadian bill added a new exemption for 'lawful advocacy, protest, dissent or stoppage of work' that was not intended to endanger life or cause serious risk to public health or safety. No such exemption appears in the British law, in part because the British definition of terrorism only protected electronic systems and not all essential public and private services, and in part because Britain had a less robust tradition of constitutional protection of free speech. The initial Canadian attempts to exempt lawful protests and strikes did not satisfy Canadian unions, civil liberties groups, and others who argued that the fact that a strike or a protest violated some law did not mean that it should be considered an act of terrorism.[27] The government responded to

Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability (2003) 41 *Osgoode Hall Law Journal* 1.

[26] Patriot Act, Title IV(A).

[27] E.g. see many of the essays in Daniels, Macklem and Roach, *Security of Freedom.*

these concerns by amending the bill to delete the requirement that protest must be lawful. As will be seen, the Canadian experience both in expanding the definition of terrorism to include serious disruptions of essential public or private services and providing exemptions for strikes and protests would be repeated in other countries.

The Canadian law took a more restrictive approach than the British law with respect to property damage. The British law applied to all serious damage to property whereas the Canadian law only applied to property damage that endangered life or public health and safety. The Canadian definition of terrorism also required that the prohibited harms be committed intentionally whereas the British definition was silent on the issue and the US Patriot Act only required that acts of terrorism appear to be intended to influence governments or intimidate the public. The Canadian concern with intent likely reflects concerns that the courts might require proof of subjective fault under the Charter, as they had for other serious crimes including war crimes and murder. Despite the fact that it was enacted after the Human Rights Act 1998, the British Terrorism Act 2000 did not demonstrate the same concerns about consistency with rights protection instruments as the Canadian law.[28] The level of rights protection in domestic law played a role in shaping both the British and Canadian definitions of terrorism.

Canada enacted a second very complex definition of terrorism that applied to various acts committed outside of Canada, but only to the extent necessary to implement ten international conventions relating to terrorism on subjects such as hijackings and bombings.[29] Such acts would probably already be covered by Canada's broad definition of terrorism because that definition, like the Terrorism Act 2000, applied to acts committed outside of the domestic jurisdiction. Nevertheless, Canada's alternative definition of terrorism was designed to indicate in a visible manner Canada's commitment to implementing various international conventions against terrorism. Canada, more than Britain or the United States, wanted to demonstrate that its anti-terrorism efforts were required by international law.

[28] Section 118 of the Terrorism Act 2000 was, however, included to reverse burdens placed on the accused to evidential burdens, as required by an early case decided under the Human Rights Act 1998. *R.* v. *Director of Public Prosecutions, ex parte Kebilene* [1999] 3 WLR 972, HL.

[29] Criminal Code of Canada, s. 83.01(a).

In 2002, a third definition of terrorism came on the scene when the Supreme Court of Canada interpreted an undefined reference to terrorism in Canada's immigration law. The Supreme Court declined to read in either of the existing statutory definitions of terrorism, but instead selected a definition of terrorism taken from part of the 1999 International Convention on the Suppression of the Financing of Terrorism. The third definition was more limited because it only applied to acts 'intended to cause death or serious bodily injury to a civilian' when designed 'to intimidate a population or to compel a government or an international organization to do or abstain from doing any act'. The focus was on harm to humans and there was no requirement of political or religious motive or application to attempts to compel persons and corporations to act. Although it noted that Canadian legislatures were free to adopt a different version, the Supreme Court pointedly commented that its international law inspired definition 'catches the essence of what the world understands by "terrorism" '.[30] In contrast to the Patriot Act, Canada now defines terrorism much more narrowly, not more broadly, in its immigration law than in its criminal law. In this case, international law exercised a restraining influence on the definition of terrorism.

Although the migration of constitutional ideas is usually associated with the movement of ideas and concepts between jurisdictions, migration can also occur within jurisdictions. The migration of constitutional ideas between criminal and immigration law about what is acceptable in the anti-terrorism contexts deserves close and critical attention.[31] The Canadian example of the judiciary reading in a narrower definition of terrorism into Canadian immigration law than Parliament included in Canadian criminal law also reveals how the separation of powers can facilitate competition about constitutional ideas and resistance to broad definitions of terrorism.

Australia

Australia seemed prepared to move as quickly as Canada to enact new anti-terrorism legislation, but an election in November 2001 delayed the

[30] *Suresh* v. *Canada* [2002] 1 SCR 3, SCC, para. 98.
[31] Cole, *Enemy Aliens*; Macklin, Borderline Security.

introduction of new anti-terrorism legislation until March 2002. As in Canada, the Australian drafters relied heavily on the Terrorism Act 2000, both for historical reasons such as the Commonwealth connection with Britain and for practical reasons relating to the need to work quickly with what was at hand.

As first introduced, the Australian definition of terrorism would only have required proof that the act was done with the intention of advancing a political, religious or ideological cause and that it:

1 involves serious harm to a person; or
2 involves serious damage to property; or
3 endangers a person's life, other than the life of the person taking the action; or
4 creates a serious risk to the health or safety of the public or a section of the public; or
5 seriously interferes with, seriously disrupts, or destroys, an electronic system.[32]

This definition was almost a carbon copy of the British definition. Australia originally left out requirements of influencing governments or intimidating populations and included a Canadian-style exemption for 'lawful advocacy, protest or dissent' that was not intended to endanger life, health or safety.

The initial requirement that protests and strikes must be lawful to be exempted from the broad definition of terrorism sparked concerns in civil society and eventually led to the deletion of the word 'lawful'. In this respect, Australia repeated the Canadian experience despite the fact that it does not have a constitutional bill of rights.[33] A Senate Committee in Australia received 431 public submissions on the bill and concluded that 'there is no compelling reason why Australian legislation should reach further than legislation enacted in the United Kingdom, United States or Canada . . .'.[34] In June 2002, the government amended the bill to delete

[32] Security Legislation Amendment (Terrorism) Bill 2002, introduced 12 March 2002.

[33] But for arguments that Australia's anti-terrorism laws infringe rights more because of an absence of a bill of rights see G. Williams, The Rule of Law and the Regulation of Terrorism in Australia and New Zealand in Ramraj, Hor, and Roach, *Global Anti-Terrorism*, pp. 535–7.

[34] Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and Related Bills* (2002), at 39.

the requirement that exempted protests and strikes be 'lawful' and to require that there be an intent to coerce a government or influence it by intimidation or to intimidate the public. In this case, the migration of constitutional ideas contributed to reductions in the definition of terrorism.

As they had in Canada, Muslim and Arab groups expressed concerns that the 'definition of terrorism will take on a religious, bigoted tone and it could mean that the Muslim community here will become unjustified targets of interference and hostility from the state authorities'.[35] Nevertheless, the requirement for proof of political or religious motive was retained without even the Canadian qualification that the expression of religious or political belief would not on its own constitute terrorism. The Australian government was less invested in multiculturalism than was the Canadian government.

The Australian law added to the British definition of terrorism by defining electronic systems to include:

> i an information system; or
> ii a telecommunication system; or
> iii a financial system; or
> iv a system used for the delivery of essential governmental services; or
> v a system used for, or by, an essential public utility; or
> vi a system used for, or by, a transport system.[36]

The Australian additions meant that the reference to seriously disrupting electronic systems now amounted to something very close to the Canadian reference to all essential public or private services, systems or facilities.

The Australian experience in defining terrorism demonstrates the chain novel effect. Australia added to the British reference to electronic systems while also borrowing an exemption for protests and strikes taken

[35] *Ibid.*, at 27–8. For arguments that the motive requirement could discriminate on the basis of political or religious belief see M. Head, 'Counter-Terrorism' Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights (2002) 26 *Melbourne University Law Review* 666 at 671; S. Joseph, Australian Counter-Terrorism Legislation and the International Human Rights Framework (2004) 27 *University of New South Wales Law Journal* 428 at 433–4.

[36] Security Legislation Amendment (Terrorism) Act 2002 (No. 65 2002), s. 100.1(2).

from Canadian law. In the end, its definition was not identical to either Britain's or Canada's, but was clearly influenced by both.

Hong Kong

Unlike Canada and Australia, Hong Kong is no longer a member of the Commonwealth since China resumed sovereignty in 1997. Nevertheless, the British Terrorism Act 2000 played an important a role in the crafting of post-9/11 anti-terrorism laws in Hong Kong. Hong Kong responded to Security Council Resolution 1373 by introducing the United Nations (Anti-Terrorism) Bill in its legislative council in April 2002. The authorities were determined to enact the bill because China had already enacted its own new anti-terrorism measures in December 2001 and faced June 2002 deadlines for reporting back to the United Nations Counter-Terrorism Committee.[37] Even major powers such as China were influenced by their international reporting obligations.

Hong Kong's new law defined terrorist activities as actions or threats that:

> (A) causes serious violence against a person;
> (B) causes serious damage to property;
> (C) endangers a person's life, other than that of the person committing the action;
> (D) creates a serious risk to the health or safety of the public or a section of the public;
> (E) is intended seriously to interfere with or seriously to disrupt an electronic system; or
> (F) is intended seriously to interfere with or seriously disrupt an essential service, facility or system, whether public or private.[38]

These prohibited harms followed those in s. 1 of the Terrorism Act 2000 with the exception of the addition of the reference to essential public or private services taken from the Canadian law. The expansion of the original reference to electronic systems through the Canadian, Australian, and Hong Kong laws further demonstrates the chain novel effect.

[37] S. Young, Enacting Security Laws in Hong Kong in Ramraj, Hor, and Roach, *Global Anti-Terrorism*, pp. 371–6.
[38] United Nations (Anti-terrorism measures) Ordinance 2002 (Cap. 575), s. 2(1).

The Hong Kong definition was not a carbon copy of the British definition. Amendments were introduced after the bill was introduced to tighten the definition by requiring that the accused cause violence or property damage or intend seriously to interfere with essential services or electronic systems.[39] Similarly Hong Kong amended its anti-terrorism bill to tighten the original requirement found in s. 1(b) of the Terrorism Act 2000 that actions be 'designed to influence the government' to require, in a manner similar to the Australian legislation, that the actions be 'intended to compel' the government. In 2004, Hong Kong revisited its original definition of terrorism and, following the Canadian example, inserted a requirement that all the proscribed harms and threats must be committed with intent.[40] The British law served as the template, but the former colonies were not shy about sharpening its definition of terrorism.

The Hong Kong anti-terrorism law also followed s. 1(c) of the Terrorism Act 2000 by requiring that the above actions be committed 'for the purpose of advancing a political, religious or ideological cause'. The requirement of proof of political or religious motive was less controversial in Hong Kong than in Canada or Australia and the final legislation did not include the somewhat symbolic statement in the Canadian law that the expression of political, religious, or ideological beliefs or opinion would not generally come within the definition of terrorism.[41] This failure to pick up the hesitant Canadian qualification may reflect the relative homogeneity of Hong Kong as opposed to Canada. At the same time, the Australian legislation also failed to pick up the Canadian qualification even though Australia, like Canada, is a nation of immigrants with a small indigenous minority. Here the importance of domestic law can play an explanatory role. Canada has recognized both equality rights and its multicultural nature in its Constitution while Australia had not. Politics should not be forgotten. The governing Liberals in Canada rely on the votes of various minority communities while John Howard's government has found opposition to immigration to be a winning political issue.

[39] See Young, Security Laws, p. 377 criticizing the British references to 'involves' violence or property damage or 'designed' to interfere with an electronic systems as 'imprecise language ... unfamiliar to the criminal law'.

[40] The United Nations (Anti-Terrorism Measures) Amendment Ordinance 2004 (No. 21 of 2004), s. 3.

[41] Criminal Code of Canada, s. 83.01(1.1).

The Hong Kong bill also contained a Canadian-style exemption for advocacy, protest, dissent, or industrial action. Unlike the Australian bill, the Hong Kong bill was introduced without the controversial requirement that the protest must be lawful to qualify for the exemption from the definition of terrorist activities. The Hong Kong exemption was also broader than the final Canadian exemption because it applied not only to serious disruptions of essential public or private services, but also to actions that created a serious risk to public health or safety.[42] Hong Kong's expansion of the exemption for protests and strikes reflects a political culture in which protests are very important and serve as a substitute for direct democracy.[43] It also belies claims that anti-terrorism laws in the East would inevitably be more draconian than those in the West.[44]

The definition of terrorism in Hong Kong's 2002 anti-terrorism legislation re-surfaced the next year in a draft of a Security Bill that was proposed as an attempt to satisfy the obligation that China secured in Art. 23 of the 1990 Basic Law that Hong Kong would enact laws prohibiting treason, sedition, subversion, and secession. As I have suggested elsewhere, the proposed Security Bill contained old visions of security inspired by Chinese criminal law and new visions of security as represented by the expansive definition of terrorism found in the Terrorism Act 2000.[45] The security bill prohibited the use of 'serious criminal means' as a means to achieve secession or subversion. Serious criminal means were defined to include any act which:

> (a) endangers the life of a person other than the person who does the act;
> (b) causes serious injury to a person other than the person who does the act;
> (c) seriously endangers the health or safety of the public or a section of the public;

[42] The Canadian exemption does not apply if the protesters intend to cause a serious risk to public health or safety.

[43] C. Petersen, Hong Kong's Spring of Discontent in F. Hualing, C. Petersen, and S. Young (eds.), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (Hong Kong University Press, Hong Kong, 2004), p. 46ff.

[44] On the flaws of this Asian values thesis see V. Ramraj, Terrorism, Security and Rights: A New Dialogue [2002] *Singapore Journal of Legal Studies* 1; Roach, Militant Democracy.

[45] K. Roach, Old and New Visions of Security: Article 23 Compared to Post-September 11 Security Laws in Hualing, Petersen, and Young, *National Security*.

(d) causes serious damage to property; or
(e) seriously interferes with or disrupts an electronic system or an essential service, facility or system (whether public or private).[46]

This definition tracks closely the definition of terrorism in Hong Kong's 2002 anti-terrorism law. A major and ominous change, however, was the omission of the broad exemption for protests, strikes, and industrial actions.

The omission of the exemption for strikes and protests reveals both the complexity and contingency of the migration of constitutional ideas within and between jurisdictions. In its anti-terrorism law, Hong Kong borrowed a protest and strike exemption from Canada and made it its own by going beyond Canada in protecting protests and strikes that threatened health and safety. In contrast, the Security Bill gravitated back to the British model in the Terrorism Act 2000 by not including any exemption for protests and strikes. The migration of constitutional ideas is a selective process that can be the site for conflict. The drafters of Hong Kong's Security Bill picked the more restrictive aspects of British anti-terrorism law while deliberately not picking the more libertarian parts of either Canada or Hong Kong's anti-terrorism laws.

It would be an overstatement to conclude that the import of a broad British-influenced definition of terrorism or the omission of a Canadian-influenced exemption for protests and strikes led to 500,000 people protesting the Security Bill in the streets of Hong Kong on 1 July 2003 or the government's subsequent decision to withdraw the Security Bill. Nevertheless, it is striking that the omission of an exemption for protests helped inspire a massive protest that played an important role in the decision to withdraw the Security Bill. The Hong Kong experience underscores that there is no inevitability to the migration of constitutional or anti-constitutional ideas.

Indonesia

Indonesia responded to 9/11 by proposing a draft anti-terrorism law that defined terrorism as actions 'having political background and or motives'

[46] National Security (Legislative Provisions) Bill, proposed amendment of Crimes Ordinance, Cap. 200, s. 2A(b).

and:

> 1 causing danger and the threat of danger to other persons' lives;
> 2 destroying property;
> 3 removing personal freedom; or
> 4 creating a sense of fear in society at large.[47]

This broad definition followed the Terrorism Act 2000 by distinguishing terrorism from ordinary crime by requiring proof of political motives. At the same time, this draft did not follow the British example by including religious motives as a distinguishing feature. Indonesia as the world's most populous Muslim country was sensitive to singling out religious motive as a factor in terrorism and less inclined to viewing Islam with some of the suspicion that might have motivated some of the post-9/11 references to religious motive.

The initial Indonesian draft also followed the Terrorism Act 2000 in broadly defining terrorism to include both threats to life and property, but it also went beyond even that definition in the vagueness of the references to 'threats of danger', 'removing personal freedom' and 'creating a sense of fear in society at large'. At the same time, the latter phrase may have been inspired by reference to the intimidation of the public in the Terrorism Act 2000, as well as other anti-terrorism laws. In any event, this initial draft was withdrawn after civil society groups expressed concerns that it could result in similar abuses as occurred under the Soeharto regime. The withdrawal of the initial Indonesian draft, like Hong Kong's security bill, belies claims that the migration of broad definitions of terrorism was inevitable.

Indonesia proclaimed a temporary anti-terrorism regulation six days after the Bali bombings on 12 October 2002 killed 202 people and this was confirmed by the legislature as law early in 2003.[48] Section 5 of this Act repudiated the inclusion of political motive in the withdrawn draft by providing:

> The criminal acts of terrorism regulated in this Government Regulation in Lieu of Legislation are neither politically criminal acts nor criminal acts relating to political crimes nor criminal acts with

[47] For further discussion of the withdrawn draft see Roach, Militant Democracy, pp. 195–7.
[48] See generally H. Juwana, Indonesia's Anti-Terrorism Law in Ramraj, Hor, and Roach, *Global Anti-Terrorism*, p. 295.

> political motives nor criminal acts with the political objective of obstructing an extradition process.[49]

Although this provision was in part designed to ensure that other states would not refuse to extradite people for trial on terrorism charges in Indonesia,[50] it also represented an attempt to affirm that in the new democracy of Indonesia, people will not be prosecuted on the basis of their political motives and ideology. There were other precedents for Indonesia's rejection of the relevance of political motives in defining terrorism. Article 1(2) of the 1999 Arab Convention for the Suppression of Terrorism defines terrorism as 'any act of violence or threat thereof, whatever its motives or purposes, that occurs in execution of an individual or collective criminal undertaking, and is aimed at sowing fear among people . . . '. In addition, the penal codes of various Arab states[51] and Pakistan[52] all define terrorism without reference to the idea of political and religious motive. Unfortunately, there seems to be a clash of world views over whether political and religious motives should be the defining feature of terrorism.

The idea that terrorism should be defined in a non-discriminatory manner was advanced by s. 2 of the Indonesian law. It declared that the purpose of the law was 'to strengthen the public order and safety by remaining committed to upholding the laws and human right[s], without discriminating in respect of ethnicity, religion, race or class'.[53] The reference to non-discrimination responded to widespread concerns in Indonesia that the US-led war on terrorism was targeting Islam and countries with Muslim populations.[54] It was an attempt by Indonesia to distinguish itself from Western excesses in the war against terrorism.

[49] Government Regulation in Lieu of Legislation of the Republic of Indonesia No. 1/2002 on Combating Criminal Acts of Terrorism, from the English translation available at http://www.law.unimelb.edu.au/alc/indonesia/perpu_1.html.

[50] This was a real concern given US suspicions about Indonesian courts and US practices of extraordinary rendition and detention of some suspected terrorists.

[51] L. Welchman, Rocks, Hard Places and Human Rights: Anti-terrorism Law and Policy in Arab States in Ramraj, Hor, and Roach, *Global Anti-Terrorism*, pp. 587–9.

[52] Anti-terrorism (Amendment) Ordinance 1999, s. 5.

[53] Indonesian Regulation, note 49 above.

[54] Professor Juwana states that the people of Indonesia were 'suspicious that the Law will give rise to authoritarian government and the revival of the military. In addition, people were afraid that Indonesia had joined an American-led war against Islam, not terrorism'. He adds that for the Indonesian public, 'the US and Australia have lost their persuasiveness and moral

At the same time, however, the Indonesian law embraced a broad definition of terrorism, as is the post-9/11 norm. Section 6 provided the following offence, subject to punishment by life imprisonment or death:

> Any person who intentionally uses violence or the threat of violence to create a widespread atmosphere of terror or fear in the general population or to create mass casualties, by forcibly taking the freedom, life or property of others or causes damage or destruction to vital strategic installations or the environment or public facilities or international facilities.

Like the definition of terrorism in s. 1 of the Terrorism Act 2000, this definition applied to both the use and threat of use of violence and property damage. Likewise, it required intimidation of a population. The Indonesian law drew on the Canadian law by having an explicit requirement that acts of terrorism be committed intentionally and by applying to interference with critical infrastructures. Although Indonesia emphatically rejected the political and religious motive requirement in the Terrorism Act 2000, it also followed the pattern set by its broad definition of terrorism.

South Africa

In response to apartheid era abuses, South Africa commenced a process of revising its security laws long before either the enactment of the Terrorism Act 2000 or 9/11. In 2000, the South African Law Commission produced a draft bill that applied to property damage and disruptions of essential services, but did not require proof of political or religious motive.[55] This draft was criticized for not making allowance for the proof of criminal fault and for using overbroad and vague terms.[56] In 2002, the Commission produced another draft anti-terrorism bill that drew heavily

authority because their anti-terror efforts are perceived to be inconsistent with their prior human rights sermons to Indonesia'. Juwana, Indonesia's Anti-Terrorism Law, pp. 299–300.

[55] South African Law Commission Discussion Paper 92 (Project 105) 2000.

[56] See C. Powell, South Africa's Legislation Against Terrorism and Organized Crime [2002] *Singapore Journal of Legal Studies* 104 at 112ff.

on the Terrorism Act 2000 and related Canadian legislation in its definition of terrorism. It required proof of political or religious motive and provided an exemption for lawful protests and strikes.[57]

As in Canada and Australia, unions and other groups in civil society objected to the requirement that protests and strikes would have to be lawful to be exempted from the broad definition of terrorism that included serious interference with essential public and private services. As in Canada and Australia, these protests were successful and led to the eventual deletion of the requirement that strikes and protests must be lawful to be exempted from the definition of terrorism.[58] It is interesting that both the Australian and South African governments did not learn from the Canadian experience, as the Hong Kong government did, and omit the controversial requirement that any protest and strike must be lawful from the start.

The Law Commission had proposed a limited exemption for conventional military action in accordance with customary and conventional international law that was quite similar to the exemption provided in Canadian legislation. The law as eventually enacted, however, contained a more robust 'freedom fighter' exemption that provided:

> Notwithstanding any provision of this Act or any other law, any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law, especially international humanitarian law . . . shall not, for any reason, including for purposes of prosecution or extradition, be considered as a terrorist activity.[59]

No similar exemption appears in the other anti-terrorism laws examined in this chapter. South Africa looked to regional instruments from the

[57] South African Law Commission Review of Security Legislation (Terrorism: Section 54 of the Internal Security Act, 1982 (Act No. 74 of 1982)) (Project 105) 2002.

[58] Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004 (Act No. 33 of 2004), s. 1(3). See also C. Powell, Terrorism and Governance in South Africa and Eastern Africa in Ramraj, Hor, and Roach, *Global Anti-Terrorism,* p. 562 n. 42.

[59] Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004, s. 1 (4).

African and Arab world[60] as opposed to British or Canadian law for a freedom fighter exemption that better fit its own history and circumstances.

Other parts of South Africa's definition of terrorism follow the Terrorism Act 2000 more closely. South Africa followed the British law by including substantial damage to property in its list of proscribed harms without the Canadian qualification that the property damage must present some threat to human safety or health. The Law Reform Commission had proposed the Canadian qualification, but the law as eventually enacted followed the British model of applying to all substantial property damage and not being subject to the exemption for protests and strikes. This opens up the possibility that politically motivated destruction of public or private property could be defined as terrorism. In this respect, South Africa was not haunted by its past, which saw sabotage charges extensively used against the African National Congress.

The South African law also followed the British law and rejected Canada's variations on it by not requiring that the accused intentionally commit the long list of proscribed harms. The Canadian focus on intention reflected concerns that Canadian courts might add terrorism to the list of crimes which because of their severe stigma and penalty require subjective fault. Such concerns seem not to have been present in either Britain or South Africa.[61]

In a dramatic example of the chain novel effect in the migration of constitutional ideas, South Africa produced the longest list of proscribed harms so far. The South African version of harms to electronic systems or essential services applies to any act that:

> vi) is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system or the delivery of any such service, facility or system, whether public or private, including, but not limited to –

[60] Art. 3 of the 1999 Organization of African Unity Convention on the Prevention and Combating of Terrorism and Art. 2(a) of the 1998 Arab Convention for the Suppression of Terrorism both exempt armed struggles against colonialism, foreign occupation and aggression for the sake of liberation and self-determination from their definitions of terrorism.

[61] But for arguments that South African courts might follow Canadian precedents and require subjective fault for terrorism offences, see K. Roach, A Comparison of South African and Canadian Anti-Terrorism Legislation (2005) 18 *South African Journal of Criminal Justice* 127. Such arguments depend on the migration of constitutional ideas through the judiciary.

(aa) a system used for, or by, an electronic system, including an information system;
(bb) a telecommunication service or system;
(cc) a banking or financial service or financial system;
(dd) a system used for the delivery of essential governmental services;
(ee) a system used for, or by, an essential public utility or transport provider;
(ff) an essential infrastructure facility; or
(gg) any essential emergency services, such as police, medical or civil defence services.[62]

What started as protection for electronic systems in the Terrorism Act 2000 became protection for all essential public and private systems, services and facilities in Canada's 2001 law. Hong Kong's 2002 anti-terrorism law combined both the British reference to electronic systems with the Canadian reference to essential public and private services. In the same year, Australia added a non-exhaustive list of specific examples of what type of infrastructure was meant to be included in its reference to electronic systems. In 2004, South Africa borrowed from all the above countries to provide protection for electronic systems and essential services, including a non-exhaustive list of examples of the infrastructure protected that borrowed from but went beyond the example used in the Australian law. With each instalment, the chain novel definition of terrorism incrementally expanded.

South Africa extended the definition to include two new clauses, declaring as acts of terrorism acts that:

> vii) causes any major economic loss or extensive destabilization of an economic system or substantial devastation of the national economy or a country; or viii) creates a serious public emergency situation or a general insurrection in the Republic.

The South African law does not define a serious public emergency or a general insurrection in the Republic, but the concepts are found in s. 37 of the South African Constitution, which defines and restricts emergency powers in response to apartheid era abuses. In this way the South African

[62] Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004, s. 1 (xxv)(a)(vi).

Constitution may discipline a vague phrase that would have raised alarms bells in almost any country.

The inclusion of major economic harms as a form of terrorism is striking and problematic. South Africa followed Canadian law in providing that intimidation of the public includes threats to 'economic security'[63] with the added gloss that the causing of 'feelings of insecurity' was one of the elements of terrorism. Security is a vague phrase that is not found in the Terrorism Act 2000. Canada introduced this vague term into the chain novel and made it even vaguer by the inclusion of 'economic security'. South Africa accepted this part of the chain novel and added the concept of 'feelings of insecurity' to make the concept broader and vaguer still.

Perhaps in recognition of each country's dependency on foreign capital, the Canadian and South African laws go farther than most in defining economic harm as a form of terrorism and in giving corporations the same protection as the state enjoys against terrorism. The inclusion of compulsion of persons, combined with references to economic security and property damage, allows some illegal acts against corporations to be treated as acts of terrorism. These aspects of the Canadian and South African law demonstrate the migration of neo-liberal constitutional ideas.

The South African definition of terrorist activities follows the Terrorism Act 2000 by requiring proof of political, ideological, or religious motive with South Africa adding a reference to a 'philosophical motive, objective, cause or undertaking'.[64] This fits into the pattern observed above of each country adding a few words to the definition of terrorism as part of its contribution to the chain novel.

South Africa differs from Britain, Australia, or Canada by making an intent to 'threaten the unity and territorial integrity of the Republic' an element of its definition of terrorism.[65] This phrase may reflect a deep

[63] There is some dubious precedent for including economic security within a definition of terrorism. Section 2(2)(h) of South Africa's Terrorism Act 1967 (No. 83 of 1967) included the causing of substantial financial loss to any person within wide presumptions that a person had engaged in the offence of participation in terroristic activities. For criticisms that this presumption clause amounted to a conclusive deeming clause expanding the crimes of terrorism beyond its proper reach, see A. Mathews, The Terrors of Terrorism (1974) 91 *South African Law Journal* 381.

[64] Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004, s. 1 (viii)(c).

[65] *Ibid.*, s. 1(viii)(b)(i).

South African ambivalence about federalism,[66] but it also begs the question of why Canada, which in 1970 experienced violent cell-based terrorism in the cause of Quebec sovereignty, did not include a similar requirement. One reason may be the democratic legitimacy of the contemporary movement for Quebec sovereignty.

These interesting minor variations on the major theme of expansive definitions of terrorism demonstrate the continued importance of domestic politics, law, and history in filling in the details of how each country defines terrorism. At the same time, the broad definition of terrorism in the Terrorism Act 2000 has had a huge influence in establishing the foundation for many countries' post-9/11 definitions of terrorism.

The South African law also has alternative definitions of terrorism taken from various international conventions against terrorism.[67] These definitions are in a functional sense superfluous given the primary broad definition of terrorism inspired by the Terrorism Act 2000. Nevertheless, they are designed to demonstrate South Africa's commitment to international law. They may also provide an example of a less broad and more proportionate approach to defining terrorism when South Africa's extremely broad definition of terrorism is subject to judicial review. Multiple sources of law can inspire competition between different definitions of terrorism.

Conclusion

This chapter has tried to provide insight into the complexity of the migration of constitutional ideas by focusing on how a number of countries defined terrorism in their post-9/11 laws. The concept of bricolage or working with what was at hand can help explain the important influence of the broad definition of terrorism found in Britain's Terrorism Act 2000 on post-9/11 anti-terrorism laws in Canada,

[66] India has included a similar requirement of 'intent to threaten the unity, integrity, security or sovereignty' of the country in its definition of terrorism. Prevention of Terrorism Act, 2002 (Act No. 15 of 2002), s. 3, repealed and replaced with The Unlawful Activities (Prevention) Amendment Ordinance 2004, s. 15, which has a similar definition of terrorism.

[67] Protection of Constitutional Democracy Against Terrorist and Related Activities 2004, Chap. 2 containing various convention offences against financing of terrorism, use of explosives, hostage taking, harm to internationally protected persons and hijacking.

Australia, Hong Kong, and South Africa and the broad similarity in the definition of terrorism in each country. At the same time, however, these countries did not simply borrow the British definition of terrorism. They adapted that definition to particular circumstances in light of their domestic history, politics, and law. For example, Canada responded to concerns about compliance with its constitutional Bill of Rights and the concerns of its multicultural community with exemptions for protests and strikes and the expression of political and religious beliefs. Each country's variations on the basic definition of terrorism expanded the resources that other countries could draw upon. Hong Kong, for example, accepted many of the Canadian variations, only to reject the exemption for protests and strikes in the proposed Security Bill that the government was eventually required to withdraw. South Africa accepted some but not all of the Canadian variations, but also provided its own instalment in the continuing chain novel of anti-terrorism laws by providing a robust freedom fighter exemption that reflected its own particular history. Constitutional ideas about what constitutes terrorism migrated from the British Terrorism Act 2000, but each receiving country added its own variations.

The Terrorism Act 2000 had much more influence abroad than the US Patriot Act, but its influence did not go unchallenged. The United States ignored the Terrorism Act 2000 when it re-defined terrorism in the Patriot Act and instead built on the complex architecture of existing US federal and state laws. The criminal law amendments of the Patriot Act actually defined terrorism in a more limited and more precise manner than the Terrorism Act 2000 and did not attempt to distinguish terrorism from other crimes on the basis of political or religious motive. Indonesia even more explicitly rejected the political and religious motive requirement, drawing not on the Patriot Act, but on African and Arab regional instruments that consciously defined terrorism as acts committed regardless of their motives. For very different reasons, the world's most populous Muslim country and the United States both defined terrorism in a manner that avoided explicit reference to politics or religion.

Resistance to the broad definition of terrorism in the Terrorism Act 2000 also came from other sources. The Supreme Court of Canada studiously avoided this precedent and the Canadian legislative definitions of terrorism when, in 2002, it read in a more limited definition of terrorism taken from an international convention into an undefined

reference to terrorism in Canadian immigration law.[68] Although both the Canadian and South African legislatures used large parts of the definition of terrorism in the Terrorism Act 2000, they also used alternative definitions of terrorism taken from various international conventions against terrorism. International law here provided a resource for more restrained definitions of terrorism than those found in the Terrorism Act 2000 and its progeny. One of the fascinating features of comparative anti-terrorism law is its complex blend of international, regional, and domestic sources of law.

The migration of constitutional ideas about what constitutes terrorism is an undeniable phenomenon in the post-9/11 world. Students of comparative anti-terrorism law must be attentive to how ideas developed at international, regional, and domestic levels will migrate within and across jurisdictions. At the same time, attention should also be paid to the adaptation of migrating ideas to local circumstances. In none of the many definitions of terrorism examined in this chapter has there been a simple borrowing of laws; each country placed its own variations on broad definitions of terrorism in accord with its own law, history and politics. Sometimes, local circumstances expanded the definition of terrorism to encompass neo-liberal concerns about economic security and the protection of corporations, but at other times they restrained the definition of terrorism by adding exemptions for protests and strikes, the expression of religious and political belief and for freedom fighters that are not found in the Terrorism Act 2000.

[68] *Suresh* v. *Canada*. The Patriot Act also defined terrorism differently under criminal and immigration law, albeit with a broader definition applying to non-citizens.

15

'Control systems' and the migration of anomalies

OREN GROSS

Introduction

The focus of this volume is the migration of constitutional ideas across international borders and national jurisdictions. Many of the chapters presented here also focus on the positive influences of such migration, be it through charting the course for aspirational constitutionalism or supplying negative benchmarks for aversive cross-constitutional influence.[1] This chapter looks instead to influences that, while taking place across borders, occur within a single 'control system' such as Great Britain and Northern Ireland or France and Algeria. The chapter uses the context of emergency regimes to sound a word of caution about certain aspects of legal or constitutional copying.[2] Specifically, the chapter looks at concrete examples of the collapse of mechanisms that were designed to maintain different yet connected marketplaces of constitutional ideas segmented from each other.

In theory, one part of a control system – the controlling territory – applies an emergency regime to the dependent territory. At the same time, a putative normal legal regime is maintained in the controlling territory itself. The two legal regimes apply contemporaneously. The dependent territory becomes an anomalous zone in which certain legal rules, otherwise regarded as embodying fundamental policies and values

I wish to thank Colm Campbell and Sujit Choudhry for their insightful comments on earlier drafts of this paper. Of course, the usual caveats apply.

[1] For discussion of these concepts, see K. Scheppele, Aspirational and Aversive Constitutionalism: The Case for Studying Cross-constitutional Influence Through Negative Models (2003) 1 *International Journal of Constitutional Law* 296.

[2] For further expanded discussion of these themes, see O. Gross and F. Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, forthcoming 2006).

of the larger legal system, are locally suspended.[3] However, the claim is that the two realities and the two concomitant legal regimes – that of emergency applicable to the dependent territory and that of normalcy applicable to the controlling territory – are maintained separately and do not affect each other. Maintaining a regime of legal exception in the dependent territory does not adversely affect the form and content of the normal legal order that governs the controlling territory.

However, experience shows that geographic boundaries are permeable, rather than integral, when emergency powers are concerned.[4] Gerald Neuman has already demonstrated that 'anomalous zones' threaten to subvert fundamental values in the larger legal system.[5] The belief in our ability to use the politically, legally, socially, and geographically constructed anomaly in order to contain the exercise of emergency powers and confine their use to that territory may, therefore, be misguided.

Migration 1: fundamental shifts – legislative schemes

The codification of martial law

Martial law has traditionally been the basic emergency instrument of common law systems. The concept of martial law has always been rather vague as were its operative and implementation guidelines, leading one scholar to observe that: 'at the very outset of a study of martial law one is bewildered by the haze of uncertainty which envelops it. The literature of the subject ... is replete with dicta and aphorisms often quoted glibly as universal truths, whereas they are properly limited to some particular significance of the term "martial law".'[6]

Originally, the term 'martial law' was often identified with what is known today as military law, i.e., a system of military justice that is designed to guarantee discipline and order in the army and the governance of the military. One response to the abuses by the Stuart Kings, who resorted to the 'justice of martial law' as a means to punish

[3] G. Neuman, Anomalous Zones (1996) 48 *Stanford Law Review* 1197 at 1201.
[4] A. Luckham, A Comparative Typology of Civil-Military Relations (Winter 1971) *Government and Opposition* 5; M. Raskin, Democracy Versus the National Security State (Summer 1976) *Law and Contemporary Problems* 189 at 200.
[5] Neuman, Anomalous Zones, 1227–8, 1231–3.
[6] C. Fairman, *The Law of Martial Rule* (2nd edn, Callaghan and Co., Chicago, 1943), p. 19.

civilians, even with death, using irregular procedures,[7] was the adoption by Parliament in 1628 of the Petition of Right, under which martial law was to apply only to soldiers. In fact, even with respect to soldiers martial law was only to be applied in wartime.[8] Another context in which 'martial law' was invoked early on was that of military rule established and operated during a belligerent occupation by an army over an occupied territory. The Duke of Wellington's statement that military law and martial law were 'nothing more nor less than the will of the general' referred, in fact, to such a regime of military government outside England proper.[9] With time 'martial law' came to stand for a vast array of non-statutory, extraordinary powers that are aimed at dealing with special violent crises.

Since the defeat of the French fleet at Trafalgar and prior to the First World War no war came close to England's shores. Domestically, socio-economic, political, and legal developments have been marked by smooth evolution without much friction and discontent. An entrenched distrust of the executive added further incentive against the institutionalization of emergency powers. When combined with the common law's distaste for elaborate legislation it comes as little surprise that the common law's main emergency powers mechanism – martial law – was not codified.

While martial law was unused in Britain since 1800, the practice of exercising martial law powers to ensure law and order was a familiar part of the British colonial experience.[10] The two legal regimes were applied

[7] F. Munim, *Legal Aspects of Martial Law* (Bangladesh Institute of Law and International Affairs, Dhaka, 1989), p. 12.

[8] Fairman, *Martial Rule*, pp. 9–18; M. Hale, *The History of the Common Law of England* (F.B. Rothman, Littleton, CO, 1987), p. 34; Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, Chicago, 1979), p. 400; G. Dennison, Martial Law: The Development of a Theory of Emergency Powers, 1776–1861 (1974) 18 *American Journal of Legal History* 52.

[9] C. Fairman, The Law of Martial Rule and the National Emergency (1942) 55 *Harvard Law Review* 1253 at 1258–9.

[10] A. Bradley and K. Ewing, *Constitutional and Administrative Law* (13th edn, Longman, London, 2003), p. 608; C. Townshend, Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800–1940 (1982) 25 *Historical Journal* 167; D. Holland, Emergency Legislation in the Commonwealth (1960) *Current Legal Problems* 148; A. Simpson, Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights (1996) 41 *Loyola Law Review* 629; D. Konig, 'Dale's Laws' and the Non-Common Law Origins of Criminal Justice in Virginia (1982) 26 *American Journal of Legal History* 354 at 363; B. Simpson, The Devlin Commission (1959): Colonialism, Emergencies, and the Rule of Law (2002) 22 *Oxford Journal of Legal Studies* 17; N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press,

contemporaneously by the British government. While martial law was used frequently to ensure law and order in the colonies, a putative normal legal regime was maintained in England. The territories that were subjected to colonial rule became anomalous zones in which certain legal rules, otherwise regarded as embodying fundamental policies and values of the larger legal system, were locally suspended. However, the belief was that the two realities and the two concomitant legal regimes – that of emergency applicable to the dependent territory and that of normalcy applicable to the controlling territory – could be maintained separately and did not affect each other. Maintaining a regime of legal exception in the dependent territory did not adversely affect the form and content of the normal legal order that governed the controlling territory.

Within days of the outbreak of the First World War, a sharp break from the centuries-old tradition of martial law took place. Lulled by extended periods of relative security and peace, the English were rudely awakened to an entirely different reality. This led them to move from one extreme – the absence of any statutory structure dealing with emergency powers – to the other extreme of promulgating draconian legislative measures allowing broad discretion and almost unlimited powers to the government. This transformation was accomplished by the passage into law on 8 August 1914 of the Defence of the Realm Act 1914 (DORA). DORA was a general statutory scheme of wartime government.[11] It institutionalized emergency powers in England. In fact, it was nothing short of 'a form of statutory martial law'.[12] Preparing for the war, the British army demanded explicit statutory powers rather than contenting itself with the amorphous, uncodified concept of martial law. If the army were to take extreme measures to save the nation, it wanted to be certain that its officers would not have to contend with the uncertain legal

Ann Arbor, 2003); B. Semmel, *Jamaican Blood and the Victorian Conscience: the Governor Eyre Controversy* (Houghton Mifflin, Boston, 1962); G. Dutton, *Edward John Eyre: The Hero as Murderer* (Penguin, New York, 1977); *Phillips* v. *Eyre* [1870] 6 QB 1, Ex. Ch.

[11] A. Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (Clarendon Press, Oxford, 1992), p. 5; C. Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton University Press, Princeton, NJ, 1948), pp. 153–70; C. Cotter, Constitutional Democracy and Emergency: Emergency Powers Legislation in Great Britain since 1914, PhD dissertation, Harvard University (1953).

[12] C. Townshend, *Political Violence in Ireland: Government and Resistance Since 1848* (Clarendon Press, Oxford, 1983), p. 183 (quoting a memorandum of 19 July 1920, CAB 21/109).

consequences of their actions and to hope for a post-war legislative act of indemnity. The emergency powers had to be explicit and broad.

DORA was a new feature of English law. Yet, it was based on a well-established precedent. The source for imitation and adoption was the sweeping legislative scheme of governmental powers then existing in Ireland.[13] Emergency measures applied by the British army outside England found their way into the English legal system.

DORA empowered the British government 'during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm'.[14] It was, in fact, a sweeping enabling act that granted the government not only executive-type emergency powers but also legislative-type powers. With the power to make regulations that were different from parliamentary legislation in name only, Cabinet dictatorship substituted for parliamentary democracy without much resistance. Law-making became a matter for Cabinet rather than Parliament. As the war went on, additional broad delegations of power from Parliament were made available to the government. Throughout the war the vast majority of British legislation came in the format of governmental regulations promulgated under DORA, leading Clinton Rossiter to conclude that 'the fiat of the Cabinet was the law of England'.[15] Governmental regulations sought to regulate such areas as dog shows, supply of cocaine to actresses, and the opening hours of pubs.[16] DORA ushered into British history the first example of a 'delegated dictatorship'.[17]

The increased powers vested in the cabinet and the limited supervision over its actions led to a previously unheard of invasion of individual liberties and freedoms by the government. Yet, analyzing the British experience during and after the First World War, Clinton Rossiter argues that 'the return of peace was followed shortly by the re-establishment of the normal pattern of British government'.[18] He notes that governmental structures and institutions returned to their prewar character, as did most

[13] Simpson, *Odious*, p. 6.
[14] S. 1; Rossiter, *Constitutional Dictatorship*, pp. 153–70; J. Eaves, *Emergency Powers and the Parliamentary Watchdog: Parliament and the Executive in Great Britain 1939–1951* (Hansard Society, London, 1957), pp. 8–9.
[15] Rossiter, *Constitutional Dictatorship*, p. 157.
[16] C. Campbell, *Emergency Law in Ireland, 1918–1925* (Clarendon Press, Oxford, 1994), p. 11.
[17] Rossiter, *Constitutional Dictatorship*, pp. 156–9. [18] *Ibid.*, p. 171.

individual freedoms and liberties. Regulations made under DORA were either repealed or allowed to expire without being extended or incorporated in a subsequent statute and given permanent character. DORA itself lapsed with the declaration on the termination of the war, made official on 31 August 1921.

Despite this optimistic assessment, the British experience during the war dealt the final blow to the traditional common law conception of non-institutionalized emergency powers. It also established a precedent that became the benchmark for future emergency legislation not only in wartime but also in times of peace. Whereas in 1914 the situation and powers of reference for governmental emergency powers had been those of normalcy and regularity and the relatively limited use of martial law, DORA and the broad authority granted to, and exercised by, the Cabinet during the war became the reference for future crises.

The attraction of DORA to the government and its agencies did not disappear with the end of the war. On 29 October 1920, before DORA expired, Parliament passed the Emergency Powers Act (EPA), dealing with the production, supply, and distribution of essential materials and services.[19] EPA allowed the Crown to proclaim a state of emergency. The government was empowered 'to make regulations for securing the essentials of life to the community' that might confer upon the agents of the Crown 'such powers and duties as His Majesty may deem necessary for the preservation of the peace, for securing and regulating the supply and distribution of food, water, fuel, light, and other necessities, for maintaining the means of transit or locomotion, and for any other purposes essential to the public safety and the life of the community'. The government was empowered to provide, by way of subsequent regulations, for trial by courts of summary jurisdiction of persons who violated the provisions included in such regulations. EPA explicitly provided that: 'The regulations so made shall have effect as if enacted in this Act ...'. Apart from a loose limitation on the power to issue regulations under EPA, concerning the purposes for which such regulations may be issued, EPA included few limitations on the broad governmental law-making power. With the passage of EPA, Britain came to have its own permanent legal institution of constitutional dictatorship.

[19] Emergency Powers Act 1920; D. Bonner, *Emergency Powers in Peacetime* (Sweet & Maxwell, London, 1985), pp. 223–70.

EPA's significance went far beyond the scope of regulating economic activity since, with its enactment, peacetime Britain institutionalized governmental crisis management.[20] Like DORA, EPA was not the result of calm discussion, calculation, and assessment. The government of the day was faced with the prospect of a general strike and with an ongoing coal miners' strike. At that moment the government invoked its successful experience with emergency powers during the war and suggested that Parliament adopt a 'peacetime DORA'.[21] The precedent set by DORA made the passage of EPA seem more 'natural', less threatening and less revolutionary. A wartime measure set the legal and political precedent, and no less importantly set the state of mind of the citizenry, legislators, and government members, so that a similar measure could be adopted during a time of relative tranquility. Prime Minister Lloyd George explicitly argued that the new Act would be a substitute for DORA. The passage from DORA to EPA, from a wartime emergency legislation to a statutory emergency mechanism operating in time of peace, was a very smooth one.

Thus, the appearance of the total war and the new realities created by it – both with respect to the scope and imminence of threat to the warring parties and the more radical measures needed in order to mobilize the whole society in order to face the emerging challenges and avert destruction on a scale previously unimaginable – brought about a revolutionary change in the treatment of emergency powers under English law. With the enactment of DORA the slow process of departure from the traditional concept of martial law turned into a fast and open retreat. DORA – nothing short of 'a form of statutory martial law'[22] – institutionalized emergency powers in England and transformed them into broad delegated powers granted to the executive by Parliament.

The curtailment of the right to silence in the United Kingdom

On 25 August 1988, in response to escalating terrorist attacks – including the 20 August bombing in County Tyrone of a military bus that left eight

[20] Rossiter, *Constitutional Dictatorship*, p. 175; W. Willoughby and L. Rogers, *An Introduction to the Problem of Government* (Doubleday, Garden City, NY, 1921), p. 97.
[21] Rossiter, *Constitutional Dictatorship*, p. 174.
[22] Townshend, *Political Violence in Ireland*, p. 183.

British soldiers dead and twenty-eight injured[23] – the British government decided to adopt a series of security measures. The package included a measure to limit the right to silence of suspects and defendants – a well-established right – both with respect to their interrogation by the police and with respect to their silence in court during trial.[24] The government's argument for the proposed measure was that the wide and systematic lack of co-operation with the police by those suspected of involvement in terrorist activities in Northern Ireland was critically hampering interrogations.[25] The factual background against which the new limitations on the right to silence were introduced, as well as specific declarations made by senior public officials, created a clear impression that the measures were designed to bolster the state's powers needed to wage a comprehensive war on terrorism in Northern Ireland. Explaining the reasoning behind the government's decision, the Northern Ireland Secretary of State, Tom King, emphasized: '[I]t will help in convicting guilty men. I don't think it will undermine standards of justice. In Northern Ireland, *the whole system of justice is under sustained attack by terrorists* and their aim is to destroy the whole system. They intimidate and murder witnesses and judges and they train people not to answer any questions at all.'[26] In the past, debates about the right to silence and its

[23] S. Lohr, I.R.A. Claims Killing of 8 Soldiers As It Steps Up Attacks on British, *New York Times*, 21 August 1988, p. A1.

[24] C. Hodgson and R. Hughes, King Curbs Right To Remain Silent, *Financial Times*, 21 October 1988, p. 28. See generally F. McElree and K. Starmer, The Right to Silence in C. Walker and K. Starmer (eds.), *Justice in Error* (Blackstone Press, London, 1993), p. 58 at p. 60; L. Levy, *Origins of the Fifth Amendment: The Right Against Self-Incrimination* (2nd edn, Macmillan, London, 1986), pp. 13–24; J. Wood and A. Crawford, *Right of Silence: The Case for Retention* (Civil Liberties Trust, London, 1989); S. Easton, *The Case for the Right to Silence* (2nd edn, Ashgate, Aldershot, 1998), pp. 1–3; M. MacNair, The Early Development of the Privilege Against Self-incrimination (1990) 10 *Oxford Journal of Legal Studies* 66; R. Maloney, The Criminal Evidence (N.I.) Order 1988: A Radical Departure from the Common Law Right to Silence in the U.K.? (1993) 16 *Boston College International & Comparative Law Review* 425 at 427–8; G. Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (3rd edn, Stevens & Sons, London, 1963), pp. 37–57.

[25] *Hansard*, HC, vol. 140, ser. 6, col. 184, 8 November 1988 (comments of Tom King, Secretary of State for Northern Ireland).

[26] E. Moloney, Britain Seeks To Abolish Key Civil Liberty in Ulster: London's Move Aimed at Thwarting IRA, *Washington Post*, 21 October 1988, p. A1 (emphasis added). See also C. Hodgson, Plan To Curb Right to Silence Approved, *Financial Times*, 9 November 1988, p. 15; F. Cornish, Keeping Terrorism's Advocates Off British Air, *New York Times*, 13 November 1988 (Letters to the editor); The Viscount Colville of Culross, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1984*, Cm 264 (1987), p. 51.

scope have focused on the claims that the right was abused by criminals – and attempts to curtail the right or limit it have failed whenever made. In 1988, the shift in focus to the struggle against professional terrorists – specifically targeting the Irish Republican Army and other paramilitary groups in Northern Ireland – paved the way to such curtailment.[27] The measures were supported on the assumption that they were going to target an easily definable group and be limited in their geographic application to Northern Ireland. Claims that similar measures might eventually find their way into the criminal law and procedural rules of the rest of the United Kingdom received little attention.[28]

Despite repeated declarations and assurances to the effect that the new limitations were meant to strengthen law enforcement authorities in their fight against terrorism, once the Criminal Evidence (Northern Ireland) Order 1988 was approved – it was approved as an Order in Council, forsaking traditional legislative procedures – its language was not confined to acts of terrorism. As Susan Easton notes, the use of the Order in Council procedure: 'could not be justified on emergency grounds and its use would seem to rest on either the low significance attached to the change or the desire to circumvent public debate. The right to silence, which symbolised the assertion of the common law and Parliamentary sovereignty against the use of prerogative power ... was effectively extinguished by this procedure.'[29] Moreover, the Order was not enacted within the framework of emergency legislation that already existed in Northern Ireland, but rather as ordinary criminal legislation.[30] Any mention or indication of the Order's relation to terrorist acts disappeared. The Order's jurisdiction and the restrictions it set on the right to silence were not limited to those suspected of serious crimes related to terrorism, but were expanded and interpreted as relating to

[27] O. Gross, On Terrorists and Other Criminals: States of Emergency and the Criminal Legal System in E. Lederman (ed.), *Directions in Criminal Law: Inquiries in the Theory of Criminal Law* (Tel Aviv University, Tel Aviv, 2001), p. 409.

[28] S. Greer, The Right to Silence: A Review of the Current Debate (1990) 53 *Modern Law Review* 709 at 716–17; E. Rees, Guilty by Inference, *Guardian*, 11 April 1995, p. 11.

[29] Easton, *Right to Silence*, pp. 68–9; J. Jackson, Recent Developments in Criminal Evidence (1989) 40 *Northern Ireland Legal Quarterly* 105; M. Mansfield, Reform That Pays Lip Service to Justice, *Guardian*, 6 October 1993, p. 22; A. Ashworth and P. Creighton, The Right of Silence in Northern Ireland in J. Hayes and P. O'Higgins (eds.), *Lessons from Northern Ireland* (SLS, Belfast, 1991), p. 117 at pp. 122–5.

[30] Easton, *Right to Silence*, p. 69.

every criminal suspect or defendant in Northern Ireland.[31] The Order was 'a clear extension of the emergency regime into the ordinary criminal law'.[32]

Denouncing the Thatcher government's decision to ban radio and television broadcasting of interviews with persons connected to certain organizations,[33] the Labour Party's spokesman on Northern Ireland, Kevin McNamara, blamed the government for using Northern Ireland as 'an experimental laboratory for draconian measures'.[34] Six years after beginning its 'experiment' regarding the right to silence in Northern Ireland, the British government decided that the time was ripe to extend the experiment to the rest of the United Kingdom.

In November 1994, Parliament passed the Criminal Justice and Public Order Act (CJPOA).[35] Sections 34 to 37 of the Act reproduced, almost verbatim, the relevant provisions of the 1988 Northern Ireland Order.[36] In fact, when proposing and explaining the new Act, the British Home Secretary relied specifically on the Northern Irish example. Once again, the government claimed that the new legislation was necessary because terrorists were abusing the right to silence. Thus, in a speech to the annual convention of the Conservative Party on 6 October 1993, Home Secretary Michael Howard announced: 'The so-called right to silence is ruthlessly exploited by *terrorists*. What fools they must think we are. It's time to call a halt to this charade. The so-called right to silence will be abolished. The innocent have nothing to hide and that is exactly the point

[31] A. Vercher, *Terrorism in Europe: An International Comparative Legal Analysis* (Clarendon Press, Oxford, 1992), pp. 121–5; G. O'Reilly, England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice (1994) 85 *Journal of Criminal Law and Criminology* 402 at 425.

[32] F. Ni Aolain, The Fortification of an Emergency Regime (1996) 59 *Albany Law Review* 1353 at 1384.

[33] These measures were introduced as part of the anti-terrorism package in 1988. G. Zellick, Spies, Subversives, Terrorists and the British Government: Free Speech and Other Casualties (1990) 31 *William and Mary Law Review* 773 at 775–82; C. Whitney, Civil Liberties in Britain: Are They Under Siege?, *New York Times*, 1 November 1988, p. A18.

[34] A. Phillips, Gagging the IRA: Thatcher Imposes a Controversial Crackdown, *Maclean's*, 31 October 1988, p. 34.

[35] P. Tain, *Criminal Justice and Public Order Act 1994: A Practical Guide* (Longman, London, 1994).

[36] J. Jackson, Curtailing the Right of Silence: Lessons from Northern Ireland (1991) *Criminal Law Review* 404 at 405–6; P. Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (Clarendon Press, Oxford, 1997), pp. 247–70; C. Blair, Miranda and the Right to Silence in England (2003) 11 *Tulsa Journal of Comparative & International Law* 1 at 12–18.

the prosecution will be able to make ...'[37] As with its Northern Ireland prototype, CJPOA was presented as part of a more comprehensive plan against terrorism and organized crime. As with the Northern Ireland Order, these new limitations on the right to silence were incorporated into criminal legislation and were expanded to apply to every suspected offender, not just those accused of terrorist activities. Gareth Peirce explained the shift from terrorism-focused legislation to ordinary criminal law:

> [B]etween this announcement to the Tory Party Conference last autumn [by Michael Howard], and the announcement of the new Criminal Justice Bill some weeks later, came Hume-Adams and revelations of government contacts with the IRA. Suddenly 'terrorism' might not be in existence for very much longer. The Criminal Justice Bill ... switched its terminology to 'professional criminals', invoking them instead of terrorists as the excuse, and proposed the end of the right to silence for us all.[38]

The significant change, in comparison to 1988, was the intensity of objections expressed in 1994 against CJPOA.[39] However, the opponents of the proposed legislation found themselves fighting an uphill battle, opposing the provisions that they had not previously contested in the case of Northern Ireland.[40] Those who did not object when the 1988 Order curtailed the right to silence in one part of the United Kingdom could not oppose successfully setting the same limitations on their own rights at home. The right to silence, which in the past had been considered one of the basic tenets of the English criminal justice system, no longer enjoyed such status in 1994. The damage that this right had suffered in Northern Ireland six years earlier undermined it in other parts of the country.[41] The British public had been hearing debates on curtailment of the right to silence for over half a decade. It came to accept

[37] A. Travis, Right to Silence Abolished in Crackdown on Crime, *Guardian*, 7 October 1993, p. 6 (emphasis added); see also H. Mills, The Queen's Speech: Tougher Policies Aimed at Helping Victims of Crime, *Independent*, 19 November 1993, p. 6; C. Brown and P. Davies, Ministers Want Silent Suspects To Be Filmed, *Independent*, 18 February 1992, p. 2; A. Travis, Labour Attacks Justice Bill over End of Right to Silence, *Guardian*, 12 January 1994, p. 6.

[38] G. Peirce, Now for Some Civil Rights, *Guardian*, 19 October 1994, p. 22. See also M. Howard, Protection for the Silent Majority, *Independent*, 19 October 1994, p. 19.

[39] Easton, *Right to Silence*, p. 69.

[40] Editorial, The Judges' Fourth Front, *Guardian*, 20 January 1994, p. 21.

[41] Peirce, Civil Rights, p. 22.

that this right might be limited without causing grave harm to the nation's democratic character, and it could no longer be convinced that one of the most important individual rights was at stake.

The influence of the struggle against Northern Irish terrorism on the ordinary criminal system was not confined to legislation in the context of the right to silence. A similar trend can be identified in judicial decisions.[42] Initially, judges in Northern Ireland gave narrow construction to the provisions of the Order of 1988. This was the case even in the context of defendants who were charged with criminal involvement in terrorist activity.[43] Soon enough, however, the courts adopted a more prosecution-friendly approach.[44] The shift in judicial attitude can be traced to cases dealing with individuals who were charged with attacks on police officers or military personnel in Northern Ireland. Such defendants were brought before what are known as the Diplock courts – special jury-less courts that had been established in 1973 to deal exclusively with grave offences of a terrorist nature ('scheduled offences').[45] When English courts, dealing with 'ordinary decent criminals', came to interpret and apply CJPOA, they found an already existing case law that had developed with respect to practically identical provisions in Northern Ireland. The fact that such case law developed against a special security context was mostly left unmentioned.[46]

[42] For analysis see Gross, Terrorists and Other Criminals; K. Cavanaugh, Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom (2003) 35 *Cornell International Law Journal* 491 at 500–5.

[43] Easton, *Right to Silence*, p. 86; Jackson, Curtailing the Right to Silence, 410–11; Justice Society, *Right of Silence Debate: The Northern Ireland Experience* (Justice, London, 1994), pp. 23–5.

[44] See e.g. *R.* v. *McLernon* [1990] 10 NIJB 91, BCC; *R.* v. *Kane, Timmons & Kelly* (Cr. Ct., N. Ir., Mar. 30, 1990); *R.* v. *Murray* (Cr. Ct., N. Ir., Jan. 18, 1991); *R.* v. *Martin & Others* (Cr. Ct., N. Ir., May 8, 1991); *Murray* v. *DPP* [1994] 1 WLR 1, HL; Justice, *Right of Silence Debate*, pp. 25–35; J. Jackson, Inferences from Silence: From Common Law to Common Sense (1993) 44 *Northern Ireland Legal Quarterly* 103 at 105–12.

[45] J. Jackson and S. Doran, *Judge Without Jury: Diplock Trials in the Adversary System* (Clarendon Press, Oxford, 1995); D. Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (Cobden Trust, London, 1983); Lord Lowry, National Security and the Rule of Law (1992) 26 *Israel Law Review* 117.

[46] See e.g. *R.* v. *Cowan* [1995] All ER 939, CA; R. Munday, Inferences from Silence and European Human Rights Law [1996] *Criminal Law Review* 370 at 371.

Migration 2: practices – interrogation in depth in Finchley?

The early 1970s saw the emergence of persistent allegations of torture and inhuman and degrading conduct against persons undergoing interrogation by the Royal Ulster Constabulary (RUC) and army interrogators in Northern Ireland. Such allegations came on the heels of the government's launching of a massive internment campaign designed to curtail recent waves of violence. Soon after the internment campaign had been initiated, allegations began surfacing that the internees were being systematically tortured. Public outrage over the allegations led the Home Secretary to appoint a committee, headed by the British Ombudsman, Sir Edmund Compton, to investigate allegations of physical brutality by the security forces in one police barracks (Holywood) against persons interned on 9 August 1971. Despite its narrow mandate and in spite of some serious procedural obstacles to its work,[47] the Compton Committee's report concluded that RUC interrogators had resorted to an 'interrogation in depth' of some of the internees whose cases were reviewed. 'Interrogation in depth' consisted of the combination of some or all of five techniques of disorientation and sensory deprivation. The practice of interrogation in depth was described subsequently as amounting to 'physical ill treatment', 'brutality', 'inhuman and degrading treatment', and even 'torture' by various governmental committees, the European Court and Commission of Human Rights.[48]

What is significant for our purposes here is that interrogation in depth and the five techniques were not invented with the Northern Irish internment campaign. Their origins can be traced to the colonial days of the British Empire. The five techniques used against internees in Northern Ireland – i.e., in a part of the United Kingdom that is, to

[47] I. Brownlie, Interrogation in Depth: The Compton and Parker Reports (1972) 35 *Modern Law Review* 501.

[48] See e.g. M. O'Boyle, Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. the United Kingdom (1977) 71 *American Journal of International Law* 674; N. Rodley, *The Treatment of Prisoners Under International Law* (2nd edn, Clarendon Press, Oxford, 1999), pp. 90–5; O. Gross, 'Once More unto the Breach': The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies (1998) 23 *Yale Journal of International Law* 437 at 469–73; F. Ni Aolain, The Emergence of Diversity: Differences in Human Rights Jurisprudence (1995) 19 *Fordham International Law Journal* 101 at 115–17.

paraphrase Margaret Thatcher, 'as British as Finchley'[49] – have previously been used in British colonies and dominions such as Kenya, Cyprus, Palestine, Aden, British Cameroon, and Malaya.[50] They were incorporated into the Joint Directive on Military Interrogation in Internal Security Operations Overseas.[51] When military interrogators were faced with the need to perform interrogations in Northern Ireland, they had available to them a well-defined set of instructions designed to deal with insurrections, riots, and emergencies abroad. That RUC interrogators resorted to similar techniques is also not at all surprising. The internment campaign was carried out during the period of militarization of the conflict in Northern Ireland.[52] The army rather than the police was in charge and dictated modes of operation against the terrorists. The RUC itself was no ordinary police force to start with. It has always been a semi-military police force with close links to the British army.[53] In addition, the five techniques were considered by interrogators as highly effective (compared with interrogation in which no physical force was used). It would have been surprising to find RUC members resorting to conceivably less effective interrogation techniques than their colleagues from the army when the two were engaged in similar interrogations. The collaboration of the two organizations and, at the same time, the professional competition between them practically made this outcome inevitable. Thus it came to be that interrogation methods that were originally employed abroad came to be used in the United Kingdom. As Lord Gardiner forcefully put it,

> The blame for this sorry story, if blame there be, must lie with those who, many years ago, decided that in emergency conditions in Colonial-type situations we should abandon our legal, well-tried and

[49] See http://cain.ulst.ac.uk/othelem/chron/ch81.htm#Nov (quoting a speech delivered by Margaret Thatcher, the British Prime Minister, in the House of Commons, on 10 November 1981).

[50] Brownlie, Interrogation in Depth; Simpson, Usual Suspects, 706–7.

[51] The full text of the Directive is reproduced as an appendix to the *Report of the Committee of Privy Counselors Appointed to Consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism*, Cmnd 4901 (1972) (the Parker Report).

[52] F. Ni Aolain, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Blackstaff Press, Belfast, 2000), pp. 29–44.

[53] C. Ryder, *The RUC: A Force Under Fire* (rev. edn, Mandarin, London, 1997); M. Farrell, *Arming the Protestants: The Formation of the Ulster Special Constabulary and the Royal Ulster Constabulary* (Pluto Press, London, 1983).

> highly successful wartime interrogation methods and replace them by procedures which were secret, illegal, not morally justifiable and alien to the traditions of what I believe still to be the greatest democracy in the world.[54]

Migration 3: constitutional attitudes – from *l'Algérie française* to *la France algérienne*

The phenomenon of torture that has originally been used in the controlled territory coming to be applied in the controlling territory can also be demonstrated in the context of the Algerian War of 1954–62. However, the continued French attempt to maintain dual regimes – normalcy in France and emergency in Algeria during the relevant period – had an even more important effect on the French regime. The French entanglement in the protracted war in Algeria was the main reason not merely for changes in the composition of the French government, but also for a seismic shift in the French constitutional regime with the demise of the Fourth Republic and the creation of the Fifth Republic and its new Constitution, both shaped in the image of General de Gaulle. While it cannot be doubted that the Fourth Republic had its share of internal problems and difficulties, none was as destructive as the Algerian War.[55]

By the end of the 1950s, France had lost most of its assets abroad, being forced to relinquish Vietnam (in 1954), Tunisia and Morocco (in 1955), and its (at least self-perceived) status as a leading global power. The war in Algeria – an area that was considered by most Frenchmen to be as French as France itself – put much more at stake than actual physical territory.[56] From a military perspective, Algeria was regarded as protecting the southern flank of France against Islamist threats extending

[54] Quoted in Vercher, *Terrorism in Europe*, p. 67.

[55] J. Bell, *French Constitutional Law* (Clarendon Press, Oxford, 1992), pp. 10–12; W. Laqueur, *Europe in Our Time: A History, 1945–1992* (Viking, New York, 1992), p. 370; A. Horne, *A Savage War of Peace: Algeria, 1954–1962* (Viking, New York, 1977); E. O'Ballance, *The Algerian Insurrection, 1954–62* (Faber, London, 1967); J. Talbott, *The War Without a Name: France in Algeria, 1954–1962* (Knopf, New York, 1980); I. Lustick, *Unsettled States, Disputed Lands: Britain and Ireland, France and Algeria, Israel and the West Bank-Gaza* (Cornell University Press, Ithaca, NY, 1993).

[56] T. Smith, *The French Stake in Algeria, 1945–1962* (Cornell University Press, Ithaca, NY, 1978); R. Aron, *France, the New Republic* (Oceana Publications, New York, 1960), p. 44.

from the Middle East. Losing Algeria was also seen as the last nail driven into the coffin of French grandeur. The existence of one million Frenchmen in Algeria (the *pieds noirs*) seemed to make a separation all the more improbable. Furthermore, many on the left wing of the political spectrum feared that the loss of Algeria would break the Fourth Republic itself. As Pierre Mendès-France observed in 1957: '[T]he Algerian drama and the crisis of the republican regime are one and the same problem.'[57] To keep Algeria French was therefore necessary in order to preserve the regime.[58]

A significant portion of the French population considered Algeria to be an inseparable part of the Republic. These sentiments were widely shared and were not merely the domain of right-wing groups such as the Poujadists and the Indépendants or the pieds noirs and military personnel stationed in Algeria. Under French law Algeria was an integral part of metropolitan France. It was claimed that 'the Mediterranean runs through France like the Seine through Paris'.[59] Fighting the war in Algeria, France found itself in a state of acute schizophrenia: on the one hand, it regarded Algeria as French territory, an integral and inseparable part of France. On the other hand, the territory in question was clearly separated from the territory of metropolitan France. The majority of the population involved, more than eight million Muslims, was fundamentally different in its ethnicity, culture, tradition, and religion. The perceived necessities of the conflict, augmented by feelings of superiority over the 'enemy', often led the authorities to treat Algerians in a manner starkly at odds with entrenched French values.[60] Actions and activities that would not have been thinkable in France proper were implemented routinely in Algeria. Algeria might have been considered French; the Algerians were not. This distinction between territory and its residents made it possible to justify the panoply of harsh measures taken by the French army as designed to ensure that Algeria remained a part of France.

On 3 April 1955, responding to internal political considerations as much as to the situation in Algeria itself, the government of Edgar Faure

[57] Lustick, *Unsettled States*, p. 253. [58] *Ibid.*, pp. 252–8.

[59] H. Roberts, *Northern Ireland and the Algerian Analogy: A Suitable Case for Gaullism?* (Athol Books, London, 1986), p. 49

[60] R. Maran, *Torture: the Role of Ideology in the French Algerian War* (Praeger, New York, 1989), p. 76.

applied an emergency regime to Algeria.[61] A policy of repression ensued and was coupled with the twin policies of 'pacification' and 'intégration' (of Algeria into metropolitan France). As repression and pacification continued, the French schizophrenia concerning Algeria intensified. While the French government sought to maintain Algeria French, its agents – the armed forces – had used methods and actions, most notoriously torture and extrajudicial killings of prisoners, in complete contradiction of French values and established practices.[62]

As allegations of systematic use of torture and ill-treatment by the French forces in Algeria intensified, so too did criticisms against such practices. Much of the criticism concentrated on the fear that the methods used in Algeria would come to be applied in France against political adversaries.[63] Reflective of this sentiment is the following warning, sounded in December 1957 by Robert Delavignette, a former member of the Committee for the Safeguard of Rights and Freedoms that the French government had established to ensure the legality of military operations in Algeria:

> That which is true for Algeria may very soon be true for France . . . The most serious problem is not the atrocities themselves, but that as a result of them the state is engaged in a process of self-destruction. What we are witnessing in Algeria is nothing short of the disintegration of the state; it is a gangrene which threatens France herself . . . [64]

The use of torture by the French army especially during the Battle of Algiers was openly admitted by General Jacques Massu – the military commander who conducted the French military operations – after the war.[65] Despite orders issued from Paris condemning excesses against human dignity, and although Massu himself argued that torture had never been institutionalized in Algeria, persistent reports and personal accounts depicted a different picture. One indication of the actual state of affairs was given in a report prepared in March 1955 by Roger Wuillaume, Inspector General in Algiers, where it was suggested that

[61] *Ibid.*, p. 243.
[62] See e.g. P. Aussaresses, *The Battle of the Casbah: Terrorism and Counter-terrorism in Algeria, 1955–1957* (Enigma, New York, 2005).
[63] Lustick, *Unsettled States*, p. 253. [64] Quoted in Horne, *A Savage War of Peace*, p. 234.
[65] *Ibid.*, p. 196. See also J. Massu, *La Vraie Bataille d'Alger* (Plon, Paris, 1971); Maran, *Torture*, p. 98.

some forms of violence that had been employed by the security forces in Algeria ought to be institutionalized to reflect a reality where their employment during interrogation had become prevalent.[66] While this suggestion had not been adopted by the authorities, it was quite apparent that torture continued to be widely exercised in Algeria. Accounts of gruesome methods of interrogation used by French forces as well as reports concerning the 'disappearance' of large numbers (according to some accounts several thousands) of detainees who died under interrogation or who refused to talk[67] were added to several individual cases that came to be known to the public – most notably the 'suicides' of Ben M'hidi and Ali Boumendjel, the torture under interrogation of Henri Alleg, and the disappearance of Maurice Audin.[68] The last two were particularly disturbing to the French public as the victims were Europeans rather than Algerian Muslims. Torture practices that had been used against Algerian Muslims were thus extended to Europeans in Algeria suspected of supporting the Front de Liberation Nationale (FLN).

Indeed, the effect of torture did not remain geographically bound. Once the threshold of violence and dehumanization had been crossed, it was extremely hard to step back. An intoxicating sense of power, coupled with a growing sense of frustration at the inability to stop the FLN in its tracks and at the lack of gratitude by the French people and their government for the work carried out by the army in Algeria, and a growing disrespect for legal niceties were the legacies of that part of the Algerian experience. They led eventually to the permeation of the practice of torture into France itself. The French police, locked in a fierce struggle with the Algerian community in France and *l'Organisation de l'Armée secrète* (the OAS) – a secret right-wing organization, established in January 1961 in order to resist granting independence to Algeria, which employed terrorist acts such as assassinations (including several failed attempts on the life of Charles de Gaulle) to further its cause[69] – resorted increasingly to violent methods, including torture and murder, against its 'enemies' in France itself.[70]

[66] Horne, *A Savage War of Peace*, p. 197. [67] *Ibid.*, pp. 198–202.
[68] Aussaresses, *Battle of the Casbah*, pp. 132–47; Horne, *A Savage War of Peace*, pp. 202–3; H. Alleg, *The Question* (Braziller, New York, 1958).
[69] A. Harrison, *Challenging De Gaulle: the O.A.S. and the Counterrevolution in Algeria, 1954–1962* (Praeger, New York, 1989).
[70] Horne, *A Savage War of Peace*, p. 500.

Significantly, the use of torture was not the only element of lawlessness to spill over from Algeria into France. The Algerian conflict bred an atmosphere of lawlessness in the ranks of the French army. The army was given, practically, a free hand to implement its policies. Every aspect of daily life in Algeria was deemed to affect French national security, and was a legitimate subject for military control. The revolutionary struggle in Algeria was to be subdued by means of total war and total strategy. French career officers serving in Algeria believed that theirs was a mission to save not only Algeria, but France itself from the suicidal policies made by cowardly politicians who cared more about world opinion than about the security and the needs of the republic. For many military officers the government in Paris was not only remote but also out of touch with reality. For them, Algeria, not France, was reality and term of reference. Parliamentary debates and political quibbles were unreal and unnecessary. Force, decisiveness, power, and ruthlessness were the solution to France's malaise.[71]

In early 1958 it seemed that a coup to overthrow the government and do away with the invertebrate Fourth Republic was imminent. Reflective of the spirit of the times was an article written in December 1957 by Michel Debré – who later became Prime Minister under de Gaulle and the primary drafter of the Constitution of the Fifth Republic – in which he stated that: 'To abandon French sovereignty is to commit an illegal action, in other words such an action places all those who take a part in it in the category of outlaws, and all those who oppose those outlaws by whatever means are acting out of legitimate defence.'[72] When the government of Pierre Pflimlin was invested on 13 May 1958, a violent riot broke out in Algiers, staged by French pieds noirs assisted by military commanders. The riot resulted in the forming of a Committee of Public Safety headed by the top commanders of the French forces in Algeria, Generals Massu and Salan. This unchallenged revolt was soon followed by the establishment of similar local Committees throughout mainland France. On 24–25 May, the Algerian rebellion spread to Corsica, as Committees of Public Safety replaced the ordinary civilian authorities on the island. Invasion of the mainland by paratroopers seemed to be a matter of days away. This threat of imminent invasion and the realization that the army would not defend Paris led to the submission to the rebels'

[71] Lustick, *Unsettled States*, pp. 259–60. [72] Quoted *ibid.*, p. 263.

demands. On 1 June 1958, de Gaulle was invested as Prime Minister and was given emergency powers (including the power to prepare the new Constitution for the Fifth Republic) for a period of six months during which the National Assembly was dissolved.[73] Crisis did not lead to the assumption of emergency measures in order to protect the existing regime, but rather contributed to the replacement of that regime in a process that reflected a spirit of unconstitutionality. The army, used to getting its way in Algeria, attempted to import its policies of coercion to the mainland. More importantly, the Algerian exigency left its fingerprints on the new constitutional and political arrangement carved out for France.

The apparent difficulties inherent in the party politics of the Fourth Republic, the perceived necessities of the Algerian struggle, and the unique personality of General de Gaulle combined together to shift the constitutional focus under the new Constitution of 1958 to the President of the Republic. The war in Algeria returned de Gaulle to the political forefront and paved the way to vesting the Executive with substantially more powers than before. '[T]he main innovation constituted by ''the wholly unprecedented regime'' of the Fifth Republic [was] the re-establishment of state prerogative power, embodied in the President of the Republic.'[74] The overall effect of the constitutional change was the strengthening of the President at the expense of the National Assembly, giving the former additional powers and facilitating executive initiative in policy-making and shaping the direction of the republic in internal as well as external affairs.

The Algerian War did not create the apparent weakness of the French executive under the Fourth Republic, nor was it the first demonstration of the instability of the French government. After all, in the twelve years of the Fourth Republic no less than twenty-three governments served in

[73] Lustick, *Unsettled States*, p. 271.

[74] J. Hayward, The President and the Constitution: Its Spirit, Articles and Practice in J. Hayward (ed.), *De Gaulle to Mitterrand: Presidential Power in France* (New York University Press, New York, 1993), pp. 38, 36, 73. See also J. Rohr, *Founding Republics in France and America: A Study in Constitutional Governance* (University Press of Kansas, Lawrence, 1995), p. 46; D. Pickles, *The Fifth French Republic: Institutions and Politics* (3rd edn, Methuen, London, 1965); B. Clift, Dyarchic Presidentialization in a Presidentialized Polity: The French Fifth Republic in T. Poguntke and P. Webb (eds.), *The Presidentialization of Politics: A Comparative Study of Modern Democracies* (Oxford University Press, Oxford, 2005); N. Atkin, *The Fifth French Republic* (Palgrave Macmillan, New York, 2005).

France, with the longest term in office of any of them just short of seventeen months.[75] Yet, the war emphasized these institutional and structural inadequacies. In that sense it served as a catalyst for change.[76] The problem of Algeria, seen against the background of a prolonged inability to take decisive actions due to sharp political schisms, led to the sense that, 'in order to solve the Algerian mess, a sort of dictatorship [was] necessary'.[77] When the Constitution of the Fifth Republic was drafted, the place of the President in the political life of France was still indeterminate. Whether France would be ruled by a sort of a modern constitutional monarch or whether the president would become merely 'a sort of supreme adviser and supreme arbiter' was unclear.[78] The personality and prestige of Charles de Gaulle and the circumstances of the war in Algeria led the republic towards the former. As Raymond Aron put it: 'As long as de Gaulle is there, the time is not normal ... When a man has full power, when he is accepted by everybody, when he is recognized by everybody as being a man of wisdom and virtue and greatness and all the rest, he can do anything, even draft the Constitution of the Fifth Republic.'[79] The Constitution of the Fifth Republic introduced into France a 'Roman dictatorship with full freedom [for the citizens]'.[80] Yet, this dictatorship was understood to be a temporary, exceptional arrangement 'because it require[d] a dictator and an abnormal situation, that is, a situation in which the crises [were] so acute that the deputies [were] pleased to leave the responsibility to someone else. Acute crisis, however, is not a permanent feature of French political life ...'.[81] However, the strong magistracy, re-introduced in France as a direct result of the Fourth Republic's difficulties in dealing with an external crisis, became a permanent feature of the French political and constitutional systems. This crisis element of government became an enduring invariable even when 'normalcy' was restored to France.

Nowhere is this clearer than in the context of Art. 16 of the Constitution of the Fifth Republic. Article 16 invests sweeping emergency

[75] Bell, *French Constitutional Law*, pp. 10–12. [76] Aron, *France, the New Republic*, pp. 19–20.
[77] *Ibid.*, p. 38.
[78] *Ibid.*, pp. 24–5; Bell, *French Constitutional Law*, pp. 14–15; Hayward, The President and the Constitution, pp. 42–50.
[79] Aron, *France, the New Republic*, p. 25. [80] *Ibid.*, p. 30. [81] *Ibid.*, pp. 30–1.

powers in the President of the Republic.[82] The President is empowered to take 'any measures required' in the event that the 'institutions of the Republic, the independence of the nation, the integrity of its territory or the fulfillment of its international commitments are gravely and immediately threatened and the regular functioning of the constitutional public authorities is interrupted'. Article 16 represents a sharp break with the French tradition of the state of siege: an *ex ante* detailed constitutional and statutory scheme dealing with emergency powers. Article 16's sweeping language and the loose and open-ended guidelines that it sets for the exercise of emergency powers by the president, together with the concomitant impracticality of effective constitutional checks on presidential exercise of such immense powers, stand in clear contrast to previous detailed arrangements in this area. Article 16 does not establish any more normative guidelines for governmental conduct in the face of future emergencies than martial law does in the English system. Article 16 represents de Gaulle's 'grandiose conception' of the presidency according to which the president's judgment as to what the nation needs in any given situation, including a state of emergency, ought always to take precedence and not be limited by purely legalistic constraints and considerations.[83] And while it may be based on an 'existential rationale' – allowing the president to take extraordinary measures when the republic faces a 'life-and-death struggle for survival'[84] – Art. 16 is in no way limited to such extreme occasions.

Large segments of the French population on all sides of the political spectrum, at the first stages of the Algerian conflict, and parts of the right wing all the way to the very end of the conflict and beyond, believed that control over Algeria was compatible with maintenance of normalcy in France itself. France could maintain Algeria French and at the same time maintain the French soul of fundamental values of democracy, liberty, freedom, and individual dignity, intact. They were wrong. Norms of conduct and values prevailing among the French forces and settlers in Algeria could not be stopped from flowing back into metropolitan

[82] F. Hamon, *L'article 16 de la Constitution de 1958: Documents Réunis et Commentés* (La documentation française, Paris, 1994); M. Voisset, *L'article 16 de la Constitution du 4 Octobre 1958* (Librairie générale de droit et de jurisprudence, Paris, 1969); P. Leroy, *L'organisation Constitutionnelle et les Crises* (Librairie générale de droit et de jurisprudence, Paris, 1966).

[83] Hayward, The President and the Constitution, p. 46.

[84] B. Ackerman, The Emergency Constitution (2004) 113 *Yale Law Journal* 1029 at 1037–8.

France. If France was normalcy, and Algeria the exception of crisis, attempts to distinguish between the two domains, applying norms of normality in one while adhering to concepts of emergency in the other, have failed. Moreover, insofar as the two spheres grew closer together, it was the sphere of exigency that set the tone and prevailed over notions of normality. Events in Algeria set the national mood in France and were prominent on the political agenda of that country. In order to gain the upper hand in the 'savage war of peace' in which the country found itself embroiled, France cast off some of its constitutional, political, and legal traditions, replacing them with others that were derived from the realities of the struggle. France became as much a part of 'Algeria' as Algeria was a part of France.

The extent to which Algeria has become part of France has been most recently demonstrated by the ethnic riots that erupted in Paris on 27 October 2005 following the accidental death of two teenagers in an electrical sub-station in a Paris suburb, and which soon spread to 300 cities and towns across France – the worst domestic riots in that country since the student riots of 1968. By 14 November, more than 8,000 vehicles had been burnt by the rioters and more than 2,760 individuals had been arrested.[85] The riots have been a clear manifestation of the failure of France to integrate second and third generation African and Arab immigrants, many of whose families came over to France from Algeria and other North African countries. To a country that had previously refused to accept cultural, racial, and ethnic differences among its citizens the recent crisis was, fundamentally, a crisis of identity.[86]

On 8 November, two days after the worst night of rioting, which left more than 1,400 burnt cars across France, the French Cabinet declared a state of emergency, empowering departmental prefects to impose curfews, and allowing the police to set up roadblocks, conduct house searches, prohibit public assembly, and put people under house arrest. Curfew breakers would be liable to up to two months' imprisonment.[87]

[85] P. Naughton, France Extends Emergency Powers to Contain Riots, *Times Online*, 14 November 2005.

[86] A. Sage and C. Bremner, France Tries to Restore Its Image After Ethnic Revolt, *Times Online*, 15 November 2005.

[87] S. Freeman and C. Bremner, France Declares State of Emergency, *Times Online*, 8 November 2005.

The legal basis for the new decree was the 3 April 1955 law that had been introduced in the context of the Algerian War.[88] That law has been rarely used and then mostly outside France proper as in 1984 when it was employed to counter violence in New Caledonia. The 1955 law was invoked in France itself only once, in 1961, and then too in the context of the Algerian War and the Generals' revolt.[89] Yet, fifty years after its enactment, the *Loi instituant un état d'urgence* was used to introduce an emergency regime in much of France itself, including the capital. Denouncing the new measures, an editorial in *Le Monde* suggested: 'Exhuming a 1955 law sends to the youth of the suburbs a message of astonishing brutality: that after 50 years France intends to treat them exactly as it did their grandparents.'[90]

Under Art. 2 of the law of 1955, a declared state of emergency can be in effect for an initial period of up to twelve days. That period can be further extended only by law. Thus, on 14 November, less than one week after the introduction of the state of emergency, the French Cabinet decided to seek legislative approval for the extension of the emergency police powers for an additional period of three months.[91] At the time of writing, both the National Assembly and Senate were expected swiftly to pass the necessary legislation. According to the French government's spokesman, President Chirac had told the Cabinet that the emergency powers were 'strictly temporary and will only be applied where they are strictly necessary'.[92] These powers were, however, necessary in order to 'accelerate the return to calm'.[93] Both claims can be questioned. First, experience has demonstrated that temporary emergency measures have the proclivity of becoming permanent and normalized.[94] Second, the claim that the emergency measures are necessary runs contrary to statements made as early as 8 November (*prior* to the going into effect of the new emergency decree) by the Chief of the National Police, Michel Gaudin, announcing that 'the

[88] See note 61 above and the accompanying text.
[89] See note 73 above and the accompanying text.
[90] G. Smith, France's Moment of Truth, *Globe and Mail*, 9 November 2005, p. A1.
[91] Agence France Presse Wire, French Emergency Powers Must Be Extended By New Law, 14 November 2005.
[92] Naughton, France Extends Emergency Powers.
[93] S. Rotella, France: State of Emergency Invoked to Quell Unrest, *Miami Herald*, 9 November 2005, p. A17 (quoting President Chirac).
[94] O. Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional? (2003) 112 *Yale Law Journal* 1011 at 1073–5, 1089–90.

intensity of this violence is on the way down',[95] and to clear evidence that shows a marked fall-off in the level of violence. Indeed, despite the fact that some thirty municipalities have been placed under nightly curfews for unaccompanied children under 16, and two temporary banning orders for public gatherings were imposed in Paris and Lyon, most prefects have not used their new emergency powers, casting some doubts about the necessity of extending those extreme measures.[96]

Epilogue: Guantanamo and beyond

Separation between normalcy and emergency along geographic lines has once again been resorted to in the wake of the terrorist attacks of 11 September 2001. Operation Enduring Freedom resulted in several hundred individuals suspected as al Qaeda or Taliban fighters being detained by the United States at its naval base at Guantanamo Bay. The base is leased by the United States from Cuba. Some of the detainees petitioned for writs of *habeas corpus*. For the most part, courts hearing the cases ruled that they lacked jurisdiction to hear such claims. The courts anchored their position in the fact that the claimants were non-resident aliens and that the military base at Guantanamo Bay was outside the territorial jurisdiction of the United States.[97] Eventually, the US Supreme Court held that aliens captured abroad and detained at Guantanamo Bay may challenge their detention under the federal *habeas* statute, ruling that individuals held in custody 'in violation of the Constitution or the laws and treaties of the United States' may apply to the courts for a writ of *habeas corpus* to secure judicial review of their detention.[98] The Court did not clarify, however, the nature of the relief that they may receive and what rights they may have that can be protected by such proceedings.[99] For our purposes here the significant element is the Bush administration's argument that foreign nationals held at Guantanamo, who were captured by the military outside the United

[95] J. Gecker, France Imposing Curfews under Emergency Law as Rioting Spreads to Hundreds of Towns, *Associated Press*, 8 November 2005.

[96] Agence France Presse Wire, French Emergency Powers.

[97] *Rasul* v. *Bush*, 215 F Supp. 2d 55 (DDC 2002); *Coalition of Clergy* v. *Bush*, 189 F Supp. 2d 1036 (CD Cal. 2002); *Hamdi* v. *Rumsfeld*, 296 F 3d 278 (4th Cir. 2002); *Al Odah v. United States*, 321 F 3d 1134 (DC Cir. 2003).

[98] *Rasul* v. *Bush*, 124 S. Ct. 2686 at 2692 (2004).

[99] Compare e.g. *Khalid* v. *Bush*, 355 F Supp. 2d 311 (DDC 2005) and *In re Guantanamo Detainee Cases*, 355 F Supp. 2d 443 (DDC 2005).

States, were not entitled to the protection of the Constitution as they were held by the US military outside the sovereign territory of the United States.[100] This argument, which was accepted by the lower courts, disregarded the fact that the United States exercised complete effective control over its military base at Guantanamo Bay, adopting instead the view that Guantanamo Bay was foreign territory. Thus, the anomalous nature of Guantanamo – demonstrated in the 1990s in the context of detention of Haitian and Cuban refugees[101] – has been invoked once again. The argument was that different rules applied to the territory of the United States and to Guantanamo and that no US court could review actions taken in Guantanamo, leading Lord Steyn to characterize Guantanamo as a 'legal black hole'.[102]

The war on terror has also sparked debate about the desirability of using torture to obtain information from suspected terrorists when such information may be critical to foiling future terrorist acts.[103] One set of particular allegations that have surfaced in this context, and which invokes geography as a means to separate normalcy from emergency and counter-terrorism, concerns the practice of rendition. Such torture-by-proxy entails contracting the torture services of other countries by sending suspected terrorists to countries where they would be subjected to torture and the information extracted as a result would then be made available to intelligence agencies of Western countries, without those countries' agents getting their hands dirty in the process.[104]

[100] See e.g. N. Lewis, Judge Extends Legal Rights for Guantánamo Detainees, *New York Times*, 1 February 2005, p. A12.

[101] S. Greenhouse, As Tide of Haitian Refugees Rises, US Uses Cuban Base, *New York Times*, 30 June 1994, p. A3; J. Kifner, Flight from Cuba: The Refugees, *New York Times*, 23 August 1994, p. A17.

[102] J. Steyn, Guantanamo Bay: The Legal Black Hole (2004) 53 *International & Comparative Law Quarterly* 1.

[103] See e.g. S. Levinson (ed.), *Torture: A Collection* (Oxford University Press, Oxford, 2004); A. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press, New Haven, CT, 2002), pp. 131–63; O. Gross, Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience (2004) 88 *Minnesota Law Review* 1481; H. Koh, A World Without Torture (2005) 43 *Columbia Journal of Transnational Law* 641; M. Strauss, Torture (2004) 48 *New York Law School Law Review* 201; L. Seidman, Torture's Truth (2005) 72 *University of Chicago Law Review* 881; J. Waldron, Torture and Positive Law: Jurisprudence for the White House (2005) 105 *Columbia Law Review* 1681.

[104] D. Campbell, September 11: Six Months on: US Sends Suspects To Face Torture, *Guardian*, 12 March 2002, p. 4; R. Chandrasekaran and P. Finn, US Behind Secret Transfer of Terror Suspects, *Washington Post*, 11 March 2002, p. A1; V. Haddock, The Unspeakable: To Get at the Truth, Is Torture or Coercion Ever Justified?, *San Francisco Chronicle*, 18 November 2001,

A former CIA Inspector General, Fred Hitz, was quoted to say: '"we don't do torture, and we can't countenance torture in terms of we can't know of it." But if a country offers information gleaned from interrogations, "we can use the fruits of it."' A more candid statement was made by a soldier: 'We don't kick the shit out of them. We send them to other countries so they can kick the shit out of them.'[105]

This attempt to keep a veneer of legitimacy while also separating the two realities – at home and abroad – can also be seen in two legal opinions given across the Atlantic. A memo written on 19 March 2004, by Jack Goldsmith, an Assistant Attorney-General and today a Harvard Law School professor, to Alberto Gonzales, then the counsel to the president and today the US Attorney-General, concluded by suggesting that Art. 49 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, did not preclude 'the temporary relocation of "protected persons" (whether illegal aliens or not) who have not been accused of an offense from occupied Iraq to another country, for a brief but not indefinite period, to facilitate interrogation'.[106] Clean language that masks the illegal reality of torture by proxy. Similarly, the British Court of Appeals ruled that the Secretary of State was entitled to rely on evidence which might have been obtained

p. D1; W. Pincus, Silence of 4 Terror Probe Suspects Poses Dilemma for FBI, *Washington Post*, 21 October 2001, p. A6; D. Priest and B. Gellman, US Decries Abuse but Defends Interrogations, *Washington Post*, 26 December 2002, p. A1; S. Grey, America's Gulag, *New Statesman*, 17 May 2004, p. 22; D. Jehl and D. Johnston, Rule Change Lets C.I.A. Freely Send Suspects Abroad, *New York Times*, 6 March 2005, p. A1; J. Mayer, Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program, *New Yorker*, 14 February 2005, p. 106; P. Heymann, Civil Liberties and Human Rights in the Aftermath of September 11 (2002) 25 *Harvard Journal of Law and Public Policy* 441 at 453–4; R. Jamieson and K. McEvoy, State Crime by Proxy and Juridical Othering (2005) 45 *British Journal of Criminology* 504 at 516–17; The Committee on International Human Rights of the Association of the Bar of the City of New York and the Center for Human Rights and Global Justice, New York University School of Law, Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions', 29 October 2004, available at http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf. Also compare *O.K.* v. *Bush*, 377 F Supp. 2d 102 (DDC 2005) and *Al-Anazi* v. *Bush*, 370 F Supp. 2d 188 (DDC 2005) with *Abdah* v. *Bush* 2005 WL 589812 (DDC 2005).

[105] Both quoted in Priest and Gellman, US Decries Abuse. While the relevant paragraph uses [expletive], I have made the reasonable assumption as to what the actual word was.

[106] Memorandum for A. Gonzales on Permissibility of Relocating Certain 'protected Persons' from Occupied Iraq, 19 March 2004, reproduced in K. Greenberg and J. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, Cambridge, 2005), p. 367 at p. 380.

through torture 'by agencies of other states over which [the Secretary] had no power of direction' when deciding whether to certify a foreign national as a terrorist suspect subject to detention under the Anti-terrorism, Crime and Security Act 2001, provided that the Minister 'neither procured the torture nor connived at it'.[107]

If, as this chapter demonstrates, the belief in our ability to use the geographically constructed anomaly in order to isolate and contain the exercise of emergency powers and confine their use to that territory is misguided, the ability to maintain the distinctions that have been drawn along geographic boundaries in each of these 'war on terror' examples is highly questionable.

[107] *A* v. *Secretary of State for the Home Department* [2005] 1 WLR 414, CA.

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