

■ BOOK REVIEW

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Travel-log of a New Metaphor The Migration of Constitutional Ideas, Sujit Choudhry (Ed.), Oxford University Press

Usage of constitutional principles and decisions across borders is at the very least more transparent but assumedly more frequent than it used to be. This increase of attention given to constitutional development elsewhere has led to a significant rise in academic analysis of legalese in the realm of constitutional law. Also because studies focused primarily on the direct usage and indirect influence of older constitutions on emerging statutes, the metaphor of constitutional 'borrowing' was invoked among others to try and describe the process of constitutional influence across borders.

As Sujit Choudhry, the Editor of 'The Migration of Constitutional Ideas' observes, this metaphor and others, such as that of legal transplants, are inapt to capture the various layers of the process. Together with sixteen authors he sets out on a journey through the thick of comparative constitutional law – and comparative constitutionalism – to make a case for the metaphor of migrating constitutional ideas. While the choice of seven Canada based, four US based and one Europe based professor is not exactly a globe-spanning affair, the book covers the following wide range of issues:

Choudhry sets the sails for the voyage by highlighting the shortcomings of the borrowing metaphor, pin-pointing the lack of reciprocity, the lack of accommodation for possible adjustments and the inadequacy to describe the multi-layeredness of the process. Citing a contributor to the volume, Neil Walker, Choudhry defines the path of constitutional migration as one that "*presumes nothing about the attitudes of the giver or the recipient, or about the properties or the fate of the legal objects transferred* □ *rather* □ *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.*" It encapsulates much of what Choudhry has earlier referred to as the 'dialogical' method of comparative engagement.

In the book's first part on the methodology of comparativism, Ran Hirschl sets out the shortcomings of comparative efforts in the field: he calls the lack of depth, particularly the need for an increase of explanations for reasons *why* comparisons are undertaken "methodology-light". Highlighting in particular transdisciplinary efforts and the approaches in ethnographic studies, Hirschl urges more transparency but also more efforts to explain the underpinnings of

constitutional migration. Choosing cases, Hirschl insists, should not be a matter of "cherry-picking" but rather following basic methodological principles such as controlled comparison and research design. Comparative law's methods are reflected by Mark Tushnet with a guided tour through functionalist and contextualist approaches to comparativism. He crosses paths with Hirschl in that he also highlights anthropology, notably by invoking Claude Lévi-Strauss on the positive influence of ideas. Lorraine Weinrib provides an insightful trip into the postwar paradigm and the emergence of American exceptionalism. She highlights the comparison friendly environment of rights based conceptions vis-à-vis a more historically fixed conception, which could deem such undertakings subversive. In analyzing the Warren Court, Weinrib takes on the 1905 *Lochner v New York* decision of the US Supreme Court to show how the social transformation of the industrial revolution transformed the police power analysis. The shift is most obvious in the dissenting opinion of Judge Harlan, who uses comparative material to underline his stance.

Convergence toward a liberal democratic model is the theme of the book's second part, which opens with an inquiry by Jeffrey Goldsworthy. While pointing out that few constitutions prescribe a method of interpretation and therewith leave sufficient space to accommodate migrated ideas and concepts, Goldsworthy calls into question the legitimacy of judges to actually "change" constitutions but underlines their role in adding to the common model of liberal democratic constitutionalism.

Examining the contributions of liberal constitutional norms to the spread and consolidation of liberal constitutionalism, Michel Rosenfeld and András Sajó explore decisions on hate speech and defamation of public figures by the US Supreme Court and the German Federal Constitutional Court, which are partly reflected in one of the first decisions of the Hungarian Supreme Court in this field, which shows traces of both US and German influence. They juxtapose the question of what liberalism is, with illiberalism and detect the underlying dynamics. In his contribution on the underlying principles of reasoning templates, Jean-Francois Gaudreault-Desbiens points to the particularities of judicial reasoning, which are embedded in a country's legal tradition. He discerns the emergence of principles and how they are distilled from broader legal rules. Furthermore, Gaudreault-Desbiens uses this process also to look at possible differences in the generating of principles in the common and civil law cultures. The final piece of the liberal democratic section is an in-depth analysis by Brenda Cossman of gay couples at the border of two legal rationales: on the Canadian side they can marry, on the US side they could only for a while and the validity in some cases is still being tested. Cossman details the cases on both sides of the border and uncovers the covert migration of judicial reasoning through newspaper articles.

The relationship between comparative law and international law is the focus of the journeys undertaken in part three. Mayo Moran sets out by venturing into the influence of constitutional principles on private law, a border that is frequently crossed but rarely analysed. Based on the assumption that constitutionalism comprises not only distinctive individual rights against the state but also substantive values, Mayo points out the permeation of the private realm by these values in cases of racial discrimination, most notably in the South

African ruling of *De Klerk v Plessy*. All borders are eroding, Mayo holds. Mattias Kumm looks at the terms of engagement between constitutions and international law, which have been dramatically increased through so-called governance. The way in which constitutional courts employ international law denotes a shift toward more engagement, which is particularly obvious in the influence of international human rights treaties on constitutional interpretation. NAFTA's influence on partner countries is examined by David Schneiderman who observes that the treaty has built bridges across legal cultures. Finally, Neil Walker takes on the Janus-faced EU constitutional order and places the discussion on the constitutionalization of the European Union together with the migration of constitutional ideas. The processes are intertwined, their legitimacy hinges on issues of democracy as well as constitutional culture.

Migration in the time and age of anti-terrorism evokes all sorts of associations and forms the final part of the book's journey: Kim Lane Scheppele describes how the first wave of globalization in public law – human rights – is now being followed by a second wave, which focuses on anti-terrorism measures. The similarities between the various laws passed in the aftermath of the attacks on New York and Washington have vast similarities, which are also due to their base in directives of international organizations. Just before those laws had to be passed, Britain adopted a Terrorism Act in 2000, which has migrated considerably since then, as Kent Roach analyses in his contribution. The degree of migration and subsequent legal inclusion depends on national circumstances. In the Canadian case the limits of migration were set by the Charter of Rights and Freedoms, whereas Hong Kong showed a clear influence of its Commonwealth history and Chinese ties. South Africa is yet another approach, as its history necessitated the inclusion of an exemption for freedom fighters. Finally, Oren Gross review emergency regimes alongside geographic lines. Apart from the inception of martial law in Britain and the application of 'interrogation in depth' in the Northern Ireland conflict, Gross also highlights the permeation of torture into France due to the state of emergency in Algeria. Gross pointedly concludes with a reference to another regime of emergency rule and "normalcy" – the legal black hole, as Lord Steyn has called it, also known as Camp Delta or Guantanamo Bay.

As Sujit Choudhry rightly remarks – and some authors echo this sentiment – the theory of constitutional law is out of step with the developments that have taken place in the last years. This calls for increased efforts to square practical application and methodology. One possibility is the metaphor of migration. It is a convincing one, as its flexibility and ability to explain the various layers underneath the process of traveling constitutional principles and judgments appear suitable. While the journey undertaken very aptly covers the multitasking features of comparative constitutional law and comparative constitutionalism, it does not cover the methodological part at a depth, which it set itself out to do. While Hirschl touches off the right issues and places solid direction posts, the follow up would have necessitated engaging with the sociological, anthropological and other sciences that Hirschl appears to have had in mind.

Migration of constitutional ideas, like any other migration stirs a discussion over the degree of inclusion: the spice of the new arrival is warmly welcomed but how to accommodate the "migrant" to local – that is national – culture and

preferences remains still a question-mark. While the book tries to add on to the process of inclusion in some ways – note particularly Kent Roach's piece on the cross-influence between terrorism legislation – the also important question of modes of contextualization of judgements receives comparatively little attention.

Frequently the authors point to the dynamic effect of constitutional migration, in particular to the "subversive" nature of the process. The book only touches though on the question that lingers between the various dynamics of migrating constitutional ideas and the struggle involved in contextualizing them: identity. One of the recurring "big" themes, it seems to be the issue that is coated over by the celebratory mold of diversity and imported zest. What do constitutional migrants actually add to the question of who we are and where we stand? As Mark Tushnet points out that "who we are" is oftentimes contested in constitutional discourse. Brenda Cossman succinctly frames the "we" and "they" in the debate over gay marriage. Her article also underlines an important feature of migrants: their function as a negative model. Rulings by Canadian Courts on gay marriage are rejected by US Courts and a direct reference is only made – in some cases tellingly only via a newspaper article – to argue against the stance taken "elsewhere." Along those lines it is also important to note Kim Lane Scheppele's warning sounds over the migration of anti-constitutional ideas, as has happened in the drafting and passing of anti-terrorism legislation.

A well-traveled log is presented; while the authors seem to have done their own bit of trekking between the various contributions, there could have been a bit more of migration towards to shores, particularly the hailing of methodology in other fields, which is not followed up with the inclusion of specialists from that field, seems a bit of a lost hiking opportunity.