

# The competing effect of national uniqueness and comparative influences on constitutional practice

*Zaid Al-Ali and Arun K Thiruvengadam*

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## 33.1 Introduction

This chapter focuses on theoretical, historical and recent trends in constitutional drafting with a particular focus on how local context and characteristics that are unique to particular countries interact with comparative influences. The latter have played a major role in shaping significant domestic constitutional decisions. This historical fact continues to be manifested in contemporary constitutional cultures. We examine the effect of forces of globalization and other phenomena that have led scholars to suggest that we are in an era of convergence of constitutionalism. Our analysis shows that even as there is a movement towards similar constitutional institutions and principles, significant differences lead us to doubt that the moment of convergence is imminent. Our chapter analyzes these questions by focusing in particular on the experiences of postcolonial constitutions and recent events in the Arab region.

## 33.2 Theoretical and historical background

The question of the portability of basic legal institutions and ideas across legal systems and cultures has been called 'one of the grand old topics of comparative law' (Langbein, 48) and continues to be a contested issue in our times. Dating back to the eighteenth century, philosophers such as Savigny and Montesquieu argued that there is an inherent relationship between the laws of a state and its society. Montesquieu, for instance, declared that:

[the political and civil laws of each nation]. . . should be so closely tailored to the people for whom they are made, that it would be pure chance [un grand hazard] if the laws of one nation could meet the needs of another . . . (Montesquieu, book I, ch. 3).

Scholars of comparative law have been influenced by such thinking, and have traditionally undervalued the importance, and viability, of law's ability to travel across boundaries. One example is the work of Otto Kahn-Freund on comparative legislation, which, while conceding that laws move across jurisdictions in some contexts, contends that in most contexts, law is so

deeply embedded in a nation's life that transplantation is rendered impossible (Kahn-Freund). By contrast, other scholars who have focused on the historical evolution of legal systems have noted that each of the four major exporters of Western law in the modern era—France, Germany, the United Kingdom and the United States of America—had, in its primary stage, drawn heavily from existing foreign models. They argue that this makes the reception of law an integral element of the evolution of all national legal systems of the Western tradition.<sup>1</sup>

The scholar who has arguably produced the largest body of scholarship on law's ability to travel is the Scottish legal historian, Alan Watson. Watson's historical writings are focused on Roman law, and he documents, in minute detail, the spread of Roman law by a process of legal transplantation throughout continental Europe. He demonstrates that the very same rules of contract can operate in the very different eras of Julius Caesar and the medieval Popes, of Louis XIV, of Bismarck and of the twentieth-century welfare state (see generally Watson, 1974; Watson, 79).<sup>2</sup> Based on these findings, Watson's argument is that history has shown that because of the nature of the legal profession, legal change in European private law has taken place largely by transplantation of legal rules. Therefore, law is, at least sometimes, insulated from social and economic change. Watson's ideas have been contested by several scholars including, most famously, Pierre Legrand, and this has given rise to a rich and sophisticated body of literature analyzing the basic terms of this debate, much of which is beyond the scope of our focus.<sup>3</sup> For our purposes, it is relevant, as Ewald has noted, that Watson's theories are based principally on his investigations of Roman law, and specifically of Roman *private* law. Ewald therefore contends that Watson cannot claim that his theory holds good either for non-Western cultures, or even for European *public* law. In fact, Watson himself has been careful to note that his conclusions are properly applicable to the development of private law (Watson 1977, preface).

The question that then arises is: can and does public law exhibit tendencies similar to those asserted for private law in its capacity to travel across jurisdictions? In this respect, the following statement of Christopher Osakwe, one of the co-authors of a leading text on comparative law, would seem particularly apposite:

The problems of the comparability of laws are particularly acute in the area of public law. Public law, more than private law, is infused with indigenous political, social and economic realities. Much more than private law, public law is closely linked to national tradition. Whereas nations are more inclined to borrow building blocks from the outside in the process of erecting their private law, they prefer to re-invent the wheels on which their public law is constructed. Public law reflects an inner relationship—a sort of spiritual and psychical relationship—with the people over whom it operates. This historical contact between public law and national identity is not readily transplantable from one country to another (Osakwe, 876).

Osakwe's statement suggests that one would expect to find public law regimes developing very differently around the world, responding to a potentially varied range of internal stimuli.

- 1 This insight is particularly evident in the work of the Canadian scholar, Patrick Glenn. See in particular, Glenn.
- 2 For a bibliographic listing of Watson's scholarly output and a comprehensive overview of his approach to legal transplants, see Ewald; for an insightful analysis contrasting the views of Kahn-Freund and Watson, see Stein.
- 3 For a good overview of this debate, see Nelken. For an overview of the Watson–Legrand debate from the perspective of constitutional law, see Frankenburg.

However, a survey of constitutional developments across the twentieth century suggests that this has not been the case. Indeed, comparing constitutional regimes across the 192 nations that are members of the UN in the contemporary world reveals a remarkable degree of similarity in terms of constitutional institutions and ideals. In the survey that follows, we examine how two of these have become particularly widespread: written bills of rights and the institution of judicial review.

At the dawn of the twentieth century, very few nations had adopted written constitutions. The dominant model of constitutionalism was not the American model characterized by a strong court with wide powers of judicial review, but instead, the model of legislative supremacy exemplified by the British (parliamentary sovereignty) and French (legislative supremacy) models (Gardbaum). Prior to World War II, few courts had the power to review the constitutionality of national legislation for violation of fundamental rights.<sup>4</sup> This, however, changed after the War. Countries that adopted the new model, with its emphasis on bills of rights and judicial review, included: Germany (1949), Italy (1948), Japan (1947), Spain (1978), Portugal (1982), Greece (1975), Cyprus (1960), Turkey (1961) and Belgium (1984).

The end of World War II also signalled the end of colonialism, and led to the creation of new states in Asia and Africa, many of which adopted bills of rights and judicial review as integral parts of their model of constitutionalism. For instance, the Constitution of India (1950) created a strong Supreme Court with wide powers of judicial review.<sup>5</sup> While some nations in Africa also adopted this model (including Nigeria, Uganda, Kenya, Botswana and Zambia), many other countries (including Ghana, Liberia, Ethiopia, Malawi and Tanzania) decided to continue with the British model of legislative supremacy. However, starting from the mid-1980s, many African countries began a series of measures of constitutional reform with the result that more than 20 new constitutions were adopted across Africa, most of which now contain bills of rights and courts with powers of judicial review (Alston).<sup>6</sup> Similarly, recent years have witnessed several countries in Asia (including Taiwan, South Korea and Mongolia) undergoing constitutional reforms designed to confer wider powers of judicial review on courts (see generally Ginsburg).

Likewise, many countries in Latin America—a region with a long history of constitutions and constitutionalism—have contemporary constitutions that contain bills of rights and provide for judicial review. It is worth noting that most of these countries retain several aspects of the civil law tradition in their legal systems, thereby raising doubts about the supposed impossibility of transfers between different legal traditions. Since the collapse of the Soviet Union in 1989, a ‘burst of constitutionalization’ (Gardbaum) has occurred in Central and Eastern Europe. Many of these nations have also opted for judicial review and bills of rights.<sup>7</sup> Our analysis finds empirical support in recent scholarly findings showing that of the 106 national constitutions that have been adopted since 1985, every one contained a written bill of rights, and all but five established a mode by which rights can be reviewed (Stone Sweet).<sup>8</sup>

<sup>4</sup> Gardbaum records the following instances: Ireland (judicial review was established under its 1937 Constitution); the constitutional courts in Austria (1920–33) and Czechoslovakia (1920–38); Spain (1933–36); and Weimar Germany (more in theory than in actual practice).

<sup>5</sup> For an analysis of the impact of foreign constitutional models on the drafting of the Constitution of India, see generally Austin.

<sup>6</sup> On constitutionalism in Africa, see generally Ihonvbere.

<sup>7</sup> For details of the constitution-making processes employed in these and other countries in the region, see generally Elster; Arato.

<sup>8</sup> See also Law & Versteeg.

At the beginning of the second decade of the twenty-first century, as one surveys the legal and constitutional landscape of the world, one is struck by its relative homogeneity, both in terms of existing legal traditions and extant constitutional structures. With the disappearance of the 'socialist' legal family, the homogeneity of existing legal traditions has increased. Taken together, civil and common law cultures cover 70 percent of the population of the world, in over 62 percent of the legal jurisdictions of the world (Koch, 2).<sup>9</sup> From a constitutional point of view, as the survey indicates, courts wielding powers of judicial review can be found in virtually every corner of the globe. Ran Hirschl has insightfully described how courts in jurisdictions as diverse as Canada, Russia, Hungary, Israel, South Africa, New Zealand, Peru, Turkey, Chile, Trinidad and Tobago, Madagascar, Zimbabwe, the Philippines, Thailand, Pakistan and Fiji are becoming 'crucial political decision-makers', harkening a 'global transition to juristocracy' (Hirschl 2002, 217, 218)<sup>10</sup>

In highlighting the rapid spread of bills of rights and judicial review, we do not take a normative position on this trend. This phenomenon has found strident critics and supporters amongst a diverse range of scholars from across the world. Scholars have also argued against understanding these trends in simplistic terms, as pointing to the triumph of liberal democracy and other universalistic ideals. As Morton Horwitz has shown, the move towards judicial review around the world can be viewed as a distrust of the very institutions that constitute democracy, and a move towards institutions that are independent of democratic politics (Horwitz).

Our focus, instead, is on other constitutional actors, such as those involved in drafting constitutions, to see how much they are influenced by foreign and comparative models. Given that constitution-making is bound to be focused on questions of national identity and indigenous issues, one expects that local factors will predominate, but our survey suggests that the forces of harmonization also have a role to play in such processes. The rapidity with which nations around the world have adopted bills of rights suggests that constitution-makers have indeed looked beyond their borders for inspiration and for content.

We also focus on the potentially harmonizing role that judges exercising strong judicial review in nations across the world can play when they look to each other's practices, and seek to emulate them in their home jurisdictions. Courts will particularly be susceptible to the tendency of looking to each other as it is a part of most legal traditions to look to past practices for evolving solutions to problems that confront them. On the other hand, pressures to decide important issues of national importance by looking inward into their local legal tradition will act as a countervailing force against the impulse of engaging in cross-judicial dialogue, or being a recipient of cross-judicial transplants.

Our analysis will also engage with an emerging body of scholarship that has debated the correct terminology for discussing constitutional transplants (the consensus is in favour of the metaphor of 'migration' over that of 'borrowing') and whether the effect of these trends points to a convergence in constitutional ideals (see Choudhry 2006; Perju).

Convergence of and foreign influence on constitutional ideas has today become a fact of life. Certain concepts, including fundamental rights and the separation of powers, have become the cornerstone of constitutional thought throughout most countries. Despite this

<sup>9</sup> Koch relies on an online survey of World Legal Systems maintained by the University of Ottawa at <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-commonwealth.html>. (last visited Oct 5, 2003).

<sup>10</sup> See also Hirschl 2004.

universality, a survey of a number of constitutional systems and the manner in which they evolved over time shows that convergence has proceeded differently depending on the political system in place. The cornerstones have somewhat different shapes in different nations. A tension can be discerned between an outward (i.e. essentially theoretical) and an inward (i.e. as reflected in the details of the applicable laws, regulations and practices, which are not always in conformity with the constitutional text) perspective on constitutional rights. Indeed, an outward commitment to universal principles sometimes masks an inward legal framework that conflicts violently with those same principles. With increased democratization, the outward/inward tension essentially disappeared within most constitutional systems; outward commitments to fundamental rights were more adequately reflected within national legal systems. However, that tension was replaced by a new phenomenon: with increased democratization has come a commitment by some national constitutional systems to principles that do not necessarily conform with universal principles, thus establishing a firm limit to convergence. These issues are discussed in greater detail below.

### 33.3 Constitutional migration and national uniqueness in practice

#### 33.3.1 *External and internal convergence*

##### 33.3.1.1 Introduction

Each of the world's countries has a unique history that has impacted its value system. Language, religion, geography, economic and political circumstance influence those principles that are common to the inhabitants of individual countries and to the members of individual nations. Nevertheless, as the concept of the nation state spread and established itself in all parts of the world during the nineteenth and twentieth centuries, a large number of the constitutional texts that were designed to govern those territories were similar in the wording, concepts and format that they adopted. Many emerging constitutional orders were merely following the precedents that had been established in the United States and France. In other parts of the world, colonialism, and the fact that many of those texts were either directly written or inspired by European officials and scholars, played its part. The individuality of many post-colonial countries (although not all, see below) was either ignored or repressed in the process.

In the post-colonial period, that practice was continued, albeit not always for the same reason. Many new constitutions established a narrative based on freedom, human development and generous (often merely aspirational in nature) social rights. A distinction must be drawn, however, between countries such as India, where elites had acquired an extraordinary degree of autonomy during the constitution-drafting process and were motivated by a desire to democratize their country, and regimes that were mainly motivated by a desire to monopolize power for extended periods of time. Despite their non-democratic tendencies, the latter were nevertheless mindful of the need to maintain some form of international and internal legitimacy. As a result, they formally maintained many of the same concepts and norms (sometimes even strengthening the wording in their respective texts) while putting in place mechanisms and institutions that they hoped would concretize their hold on power. In other words, world constitutions converged with Western liberal principles, but to varying extents only, depending essentially on the political system in place. Others engaged in external convergence (e.g. on fundamental rights) but avoided internal convergence (on the separation of powers).

## 33.3.1.2 Fundamental rights under post-colonial constitutions

Many of the constitutional frameworks that emerged in the twentieth century made sure to pay lip service to the notion of human rights in their fundamental texts, while at the same time enacting legislation that would allow for the spirit of those same rights to be routinely violated. In many (although not necessarily all) cases, this type of framework was enacted in a deliberate attempt to maintain the capacity to violate rights that had been developed by colonial frameworks. In Iraq, all of the constitutions that were drafted since nominal independence was granted in the 1920s included provisions that guaranteed the protection of a certain number of rights, while at the same time subjecting those same rights to future legislation and therefore (given the constitutional framework) to the will of an unelected government.<sup>11</sup>

By way of example, Iraq's post-colonial constitutional texts were all permeated with extensive social and economic rights including the right to work, free health care and education.<sup>12</sup> Freedom of expression, religion and association as well as the right to human dignity were also, in theory, guaranteed by all of Iraq's fundamental texts. They were, however, usually followed by the prescription that these should be exercised 'within the limits of the law', without any clear indication as to what types of limits could be established by legislation. Even where there was no constitutional authority to do so, Iraq's governing authorities still legislated a large number of measures that curbed the enjoyment of specific rights.<sup>13</sup> A similar trend can be identified in many other post-colonial constitutional frameworks. The Kingdom of Morocco has revised its constitutional framework on a large number of occasions since independence, but on each occasion it has maintained wording guaranteeing freedom of expression<sup>14</sup> and complete equality between all citizens,<sup>15</sup> rights that were routinely violated.

<sup>11</sup> Iraq was a constitutional monarchy (and proceeded under the 1925 Constitution drafted under the British Mandate) from 1925 until 1958. From 1958 to 1970, a series of non-democratic military and political transfers of power took place, many of which resulted in short-lived interim constitutions (including the 1958, 1964 and 1968 Constitutions). The 1970 Interim Constitution remained in force until the war in 2003, which resulted in the 2004 Transitional Administrative Law (yet another interim constitution). A new permanent constitution was drafted in 2005 and entered into force in 2006.

<sup>12</sup> Iraq's 1964 Constitution provides for due process rights (Article 20 to 25), the right to free education (Article 33) and free health care (Article 36).

<sup>13</sup> For example, although Article 22(a) of the 1970 Interim Constitution provided, without the possibility for future legislative limitations, that '[t]he dignity of man is safeguarded. It is inadmissible to cause any physical or psychological harm', Decree 59 (1994) provided that the punishment for theft was hand amputation, while Decree 115 (1994) provided that abandoning military service was punishable by ear amputation (Article 1).

<sup>14</sup> See for example, Article 9(b) of the 1996 Constitution of the Kingdom of Morocco, which provides that all citizens shall enjoy 'freedom of opinion, of expression in all its forms, and of public gathering'. That same right was readopted virtually unchanged in Article 25 of the 2011 Constitution. The Moroccan authorities have nevertheless curbed the free expression of ideas throughout the post-colonial period.

<sup>15</sup> Article 5 of the 1996 Moroccan Constitution provides that Moroccans are all 'equal before the law' and does not allow for any restriction. Article 19 of the 2011 Constitution is more explicit, providing that: 'Men and women enjoy, in equality, the right and freedoms of civil, political, economic, social, cultural and environmental character, set out in this Title and elsewhere in this Constitution.' Nevertheless, Article 475 of the Moroccan penal code provides that 'where a minor is kidnapped or raped and marries her abductor or rapist, the latter cannot be criminally prosecuted [...]'. Article 475 was applied in the case of one 16-year-old girl in March 2012 who was raped and forced to marry her rapist, who then escaped prosecution. The girl later committed suicide.

The Hashemite Kingdom of Jordan offers similar guarantees and has applied limitations to the application of those guarantees.<sup>16</sup>

### 33.3.1.3 The separation of powers and judicial independence

A similar trend was established in relation to those same countries' governance structures, which often played lip service to democracy and to the separation of powers but were typically designed to maintain one-party, or even one-man rule. Pursuant to a 1952 military *coup d'état* that was principally motivated by a desire to end foreign interference, corruption and social inequality, a 'Constitutional Declaration' was issued in Egypt that established a 'Revolutionary Command Council', an unelected and unaccountable body that was dominated by the military and controlled the country over the coming period. That model was replicated in a large number of countries, including in Iraq. That country's 1970 Interim Constitution (which contained a far more detailed and generous section on fundamental rights than all of Iraq's previous constitutional frameworks) provided that the country is a 'sovereign people's democratic republic' (Article 1), but also provided for the existence of a 'Revolutionary Command Council'. The Council was accountable only to itself (Article 40) and was defined as the 'supreme institution in the State' (Article 37), which enjoyed both full legislative and executive authority (Article 42). The first parliamentary elections that were organized pursuant to the 1970 Constitution took place in 1980. Other post-colonial constitutions established similarly anti-democratic institutions, while at the same time promising to liberate their local populations from inequality.<sup>17</sup>

Likewise, many post-colonial regimes understood the need to preach judicial independence while at the same time ensuring that the courts remained firmly under the control of the executive. Iraq's 1970 Interim Constitution contained a single provision on the judiciary, which granted and withdrew independence in practically the same breath. Article 60(a) provided unambiguously that 'the judiciary is independent' but added that the judiciary 'is subject to no other authority save that of the law'. Given that the 1970 Interim Constitution provided that the (unelected and unrepresentative) Revolutionary Command Council enjoyed both executive and legislative power (Article 42), the judiciary was effectively under the control of a small group of individuals who had granted themselves unlimited power over

<sup>16</sup> Article 15 of the 1952 Jordanian Constitution provides that: 'The State shall guarantee freedom of opinion. Every Jordanian shall be free to express his opinion by speech, in writing, or by means of photographic representation and other forms of expression, provided that such does not violate the law.' One such law that criminalizes the act of insulting the king has been applied regularly against pro-democracy activists, including in March 2012 when more than 30 protesters were detained.

<sup>17</sup> Morocco has maintained, throughout its modern constitutional history, a strongly monarchical system of government, in which the king has executive, legislative and judicial authority. The 2011 Constitution maintains much of this same system, with some commentators arguing that it merely codifies much of what was previously customary, effectively preventing any significant reduction in the monarch's powers in the future. See 'A Critical Analysis of the 2011 Moroccan Constitution', Driss Maghraoui, International IDEA (forthcoming 2012). Syria's 1973 Constitution maintained that all citizens were equal before the law (article 25(3)) and also provided that the Socialist Arab Ba'ath Party was the 'leading party in society and in the state' (article 8). Thus, the right to equality was violated by the fact that only Ba'ath Party members enjoyed access to high public office.

the state.<sup>18</sup> A number of other post-colonial constitutions have also subjected judges to the will of the executive while at the same time professing adherence to the principle of judicial independence.<sup>19</sup>

### 33.3.2 *Increased democracy as an instrument of convergence*

#### 33.3.2.1 Introduction

The wave of democratization that came prior to, during and after the fall of the Soviet Union brought with it a strong convergence of constitutional ideas in many countries that had hitherto only adopted some of the external features of liberal constitutionalism. Democracy, or the free expression of popular will within the confines of a particular political system, has led to a convergence of constitutional cultures, and has also pushed many apart. When allowed to make their own democratic choices, nations are more likely than not to opt in favour of a separation of powers that guarantees a genuinely independent judiciary, and of a system of government that protects the rights of the individual.

At the same time, several factors have been working against convergence during this same period. Firstly, although democratization has progressed apace in many of the world's regions, vested interests within each individual country often work against full democratization as a way to maintain access to power. That dynamic has led to many outdated practices being maintained in several countries (see below). Secondly, when allowed to freely express their will, nations often favour the application of illiberal principles or choose to adopt a system of government that does not entirely conform with mainstream liberal principles (e.g. religiously inspired sexual discrimination; see below). That trend has become particularly acute as an increasing amount of former colonies have transitioned to more democratic systems of government. As they become free to express their independent will, they often choose to confine themselves within a set of rules that are deeply rooted in local culture, and which sometimes sanction discrimination on the basis of sex, race or even social class.

<sup>18</sup> The 1970 Interim Constitution was in conformity with Iraqi tradition on this point: although judges were nominally independent under the 1925 Constitution (Article 71), the entire functioning of the courts was to be determined by law (Article 70) and judges themselves were to be appointed by the king (Article 68); under the 1958 Interim Constitution, judges were also nominally granted independence but the judicial sector was to be organized by law (Article 23), under a system in which the unelected government was granted legislative power (Article 21).

<sup>19</sup> The 1973 Syrian Constitution provided that 'The judicial authority is independent. The President of the Republic guarantees this independence with the assistance of the Higher Council of the Judiciary' (Article 131) and provides that 'The President of the Republic presides over the Higher Council of the Judiciary. The law defines the method of its formulation, its powers, as well as its internal operating procedures' (Article 132). The 2011 Moroccan Constitution provides that judges are independent of the legislative power and of the executive (Article 107) and even provides significant detail as to what constitutes interference in judicial affairs and what should be done in case of such interference (Article 109). At the same time, the 2011 Constitution establishes a High Judicial Council that oversees the judicial sector and ensures that judicial independence is respected (Article 115), and notes that the Council is 'presided by the King' who amongst other things nominates five of its members.



### 33.3.2.2 A greater adherence to checks and balances, including judicial independence

As noted above, Western nations generally converged towards similar constitutional norms as a result of a number of factors, not least that they share many of the same cultural and political values and are generally free to express them. Since the end of the post-colonial period, they have been joined by a number of non-Western nations that have used constitutional learning as a means to remedy the democratic deficit and other flaws in their own constitutional designs. Politicians, jurists and various stakeholders have looked to other countries as sources of inspiration while trying to construct their own national pacts. Most famously perhaps, South Africa's constitutional negotiators turned to experts from several countries, including Germany, for lessons that could be useful in constructing various sections of their own charter, though the drafters also asserted that they kept those advisers at arm's length so that the new constitution could be described as autochthonous. Former Soviet bloc countries, motivated by the prospect of European Union membership, naturally looked towards Western liberal traditions for inspiration in redesigning their own constitutional frameworks. In the post-colonial world, countries such as India took an early lead in developing democratic traditions and institutions; those that underwent a period of totalitarian rule also eventually adopted many of the features of democratic rule in their own national charters. This applies to a number of African, Latin American and (more recently, and at the time of writing still somewhat tenuously) Arab countries.

As comparative constitutional culture has become more democratic, a number of points of convergence have emerged. In particular, outside Western liberal circles that had already adopted many of these principles in the past, world constitutions moved to prevent the predominance of unrepresentative and unelected executives by institutionalizing political competition, regular elections and a genuine system of checks and balances (including an independent judiciary), as well as a commitment to respecting fundamental rights. Iraq is a case in point: following an extended period of dictatorial rule, the 2006 Constitution provides for regular multi-party parliamentary elections (Article 56), the indirect election of a president (Article 70) and the nomination by the president of a prime minister from the largest parliamentary bloc (Article 76). Iraq's 2006 Constitution also firmly separates powers and establishes a number of checks on the exercise of executive power. The concept of parliamentary oversight was established and the mechanism through which oversight is to be exercised was also codified in the Constitution. Thus, the Board of Supreme Audit (Iraq's supreme audit institution) is for the first time protected by the 2006 Constitution, which guaranteed it 'financial and administrative independence' (Article 103(1)).<sup>20</sup> Insofar as the protection of fundamental rights is concerned, the incidence of external influence between nations that have sought to turn a page after a period of abuse is particularly acute. For example, a direct line can be drawn between the limitation clauses that are included in Germany's Basic Law, the Canadian Charter of Rights and Freedoms, South Africa's 1996 Constitution and Kenya's 2011 Constitution (Sarkin).

On the notion of judicial independence, approximately 60 percent of the world's constitutions have now established judicial councils in some form or another, as a means to insulate courts from the political process and interference. Judicial councils are typically responsible for appointments, budgetary issues and training, including continued legal education. Many

<sup>20</sup> Constitutional Legitimacy In Iraq: What role local context?, Zaid Al-Ali.

of those countries that have opted for the establishment of judicial councils drew heavily from developments in OECD (Organisation for Economic Co-operation and Development) countries.<sup>21</sup> Kenya's 2011 Constitution is a recent example: it provides for the establishment of a Judicial Service Commission, which is responsible for 'promot[ing] and facilitat[ing] the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice' (Article 171). The difficulty for each country has been to establish rules and procedures within the context of existing traditions and working methods in a way that is likely to increase independence from political interference. By way of example, after a century-long tradition of abandoning the judiciary to the mercy of unelected executives, Iraq's 2006 Constitution establishes a Higher Judicial Council, which is solely responsible for managing judicial affairs (Article 91).

Despite this development, major flaws have undermined the progress that has been made. First, a significant number of constitutions still grant significant control over judicial affairs to unelected and unrepresentative executives, including in relation to appointments (a crucial issue).<sup>22</sup> Secondly, even where a council is established and granted nominal independence, a lack of detail often opens the door to political interference. For example, Iraq's 2006 Constitution leaves the Higher Judicial Council's composition and its rules of operation to future legislation (Article 90).<sup>23</sup> The constitutional drafters could not come to an agreement on this issue, and left the matter to the ordinary political process in the hope that the parliament's complicated composition will prevent the passage of a law that will allow for the Council to be politicized.<sup>24</sup> This absence of a clear body of rules has contributed to a monopolization of decision-making power within the judiciary. A single judge is the head of the Higher Judicial Council (which does not have a clear decision-making process) and the Federal Supreme Court, which has opened the door to political influence.<sup>25</sup>

### 33.3.2.3 The increased codification of processes and establishment of independent agencies

In addition to all of the above, comparative constitutional culture has in fact moved in a new direction of late. Setting aside a, by now outdated, belief that constitutions should be devoid of detail to ensure flexibility and longevity (Elkins, Ginsburg & Melton), an increasing amount of constitutions include significant detail on issues including the legislative process,

<sup>21</sup> See *Judicial Appointments and Judicial Independence*, United States Institute of Peace (January 2009), available at [www.usip.org/files/Judicial-Appointments-EN.pdf](http://www.usip.org/files/Judicial-Appointments-EN.pdf) (accessed 23 May 2012).

<sup>22</sup> See for example Article 98 of Jordan's 1952 Constitution (updated in 2011) according to which: 'Judges of the Civil and Sharia Courts shall be appointed and dismissed by a Royal Decree in accordance with the provisions of the law.'

<sup>23</sup> Jordan's 1952 Constitution is even sparser on this issue. Its Article 98(2) merely provides that: 'A Judicial Council responsible for matters related to civil judges shall be established by a Law'. Morocco's 2011 Constitution also provides for the establishment of a High Judicial Council (Article 113), which is presided over by the King (Article 115). The 2011 Constitution does not include any detail in relation to how the Council should take its decisions and what role and power the King will dispose of in that context.

<sup>24</sup> At the time of writing, the Iraqi parliament had not passed any legislation relating to the Council, which is therefore still governed by Coalition Provisional Order 35 (2003).

<sup>25</sup> *Failing oversight: Iraq's unchecked oversight*, International Crisis Group, Middle East Report Number 113 (26 September 2011).

financial decentralization and the electoral process. Research on how nations organize their budgetary processes has found remarkable similarities between a significant amount of countries.<sup>26</sup> Although that convergence has mostly been among members of the OECD, the systems that are in place in those countries have started spreading to post-colonial countries as well.<sup>27</sup>

Another important example is the increasing popularity of independent commissions to manage elections, particularly in countries that have or are transitioning from a period of autocratic rule. Reforms in the Arab region since popular uprisings began in December 2010 are particularly relevant: Tunisia, Egypt, Libya and Jordan have all now established their own independent commissions. Also, Iraq has had its own electoral commission since 2004.<sup>28</sup>

Once again, although these reforms were motivated by a desire to bridge the gap between democratic theory and practice, significant progress remains to be made. Political realities on the ground have meant that the progress that has been made remains tenuous for now. At the time of writing, Tunisia, Egypt and Libya have not adopted their own permanent constitutions, so it remains to be seen to what extent their respective electoral commissions' independence will be protected. Iraq provides an important lesson learned in that regard: although the 2006 Constitution nominally protects its independence and provides that it is 'subject to monitoring' by the legislature, poor drafting by the constitutional drafting committee in 2005 created a number of loopholes for the executive to exploit, ultimately resulting in a 2010 Supreme Court decision, which held that although the commission is to be monitored by the legislature, it should be 'attached' to the council of ministries (which has come under the control of a particular political alliance).<sup>29</sup> The concept of independent commissions was thereby undermined, and the credibility of future elections has been put at risk.

#### 33.3.2.4 The re-emergence of local values and norms in constitutional texts as inspired by each country's starting point

Although increased democracy has meant a greater adherence to some of the universal principles set out above and to a consolidation of a number of mechanisms, it has also contributed to a re-emergence of local values that have by now taken root in constitutional culture, and in a way that does not always conform with these same universal principles, or even with Western liberal values. Even where the principle of irrevocable individual rights is nominally accepted, it can sometimes nevertheless be subject to interpretation or qualification according to local values, which are sometimes considered to be of a higher order than constitutional law. In particular, religious values that have been elevated to the level of constitutional principles have in some countries (but not all) translated into official and enduring sexual discrimination. At other times, divided societies have struggled to define their parameters of coexistence and in the process have established governance mechanisms that place group rights over individual rights.

<sup>26</sup> The Legal Framework for Budget Systems, An international comparison, OECD Journal on Budgeting, Volume 4, No. 3 (2004).

<sup>27</sup> Since it was amended in 2011, the Jordanian Constitution includes similar detail in relation to how its annual state budget law should be passed (Article 112).

<sup>28</sup> By virtue of Coalition Provisional Authority Order 92 (2004).

<sup>29</sup> Federal Supreme Court, Decision 88 (2010).

During the post-colonial period, popular forces in the Arab region struggled for greater representation in government against unrepresentative elites. Those same popular forces called for the institution of a more democratic form of government in which local values (in particular, religious values) would play a significant role under the constitution. Although the previous ruling elites made some concessions in that regard over time (in particular, in Egypt), large segments of the population were not satisfied. Since the beginning of the Arab uprisings in December 2010, the inclusion or reinforcement of Sharia in the region's constitutions has since become a *cause célèbre* for those same people, and an important debate is ongoing as to what the implications might be, in particular on the principle of non-discrimination against women. As democracy has increased, so have the calls for constitutional reform in favour of a model that places less emphasis on universally accepted principles and more on religion. In 1999, religious values also inspired El Salvador to amend its constitution so as to recognize that rights extend to 'every human being since the moment of conception'.

Also, as increasing numbers of post-colonial countries emerge from periods of autocratic or of minority rule, redistributive politics tend to find their way into constitutional texts, typically through generous social and economic rights and sometimes through the institution of financial transfers between provinces. Iraq provides a dramatic example of how (quasi) democracy plays a role in the evolution of constitutional rights. Iraq's 2004 interim constitution, which was mainly drafted behind closed doors by a small number of American and Iraqi-American jurists and political scientists who were appointed by the US and UK occupation authorities, did not include the types of social and economic rights that Iraqis had been accustomed to seeing in their constitutions (although it did provide for an explicit right to bear arms, a principle that was alien to Iraqi constitutional culture; Article 17) (Diamond, 141–5). Iraq's 2006 permanent Constitution, which was the product of a deeply flawed but partially democratic drafting process, included perhaps the most generous economic and social rights that Iraq has seen to date (including the rights to health care, to a safe environment, to free education, to work and to practise sports). The same phenomenon has been noted in Latin America, where recent constitutional drafting processes involving representatives of disenfranchised masses produced texts that were for the first time heavily slanted towards social and economic rights (Brinks & Forbath).

### 33.3.3 Courts as agents of constitutional migration

Courts have been making references to, and relying upon, judicial decisions from foreign jurisdictions dating back to the beginning of the modern era. Though there is evidence of trans-judicial influence among countries in Continental Europe dating back to the eighteenth century,<sup>30</sup> the practice appears to have gained widespread currency during the period of British colonialism and in territories that were subjected to the common law (Lester). Perhaps colonial habits of referring to judicial decisions from other countries seeped into the legal cultures of former colonies and lingered beyond the age of empire, with the result that judges in a number of former colonies continue to make extensive use of foreign law in their contemporary decision-making (Saunders).<sup>31</sup>

<sup>30</sup> Glenn, 275, notes that judges in eighteenth-century Italy resorted to this practice.

<sup>31</sup> See generally Drobnig & Erp (detailing how judiciaries in several former colonies have continued to apply or defer to judicial authorities from the former colonial power several years after the grant of formal independence).

In respect of former colonies, the pressure to cast off the imperialist past and establish strong foundations of indigenous constitutionalism has acted as a counter to the historical reasons favouring trans-judicial influence. Nevertheless, two factors have ensured that the many nations that became independent from colonial rule in the mid-twentieth century have remained connected with 'global dialogues' about constitutionalism. First, a predominant majority of the countries that obtained freedom from colonial rule adopted the constitutional models and structures of their former colonial masters (often at the behest of the colonial powers who, of course, believed that their own forms of government were the best).<sup>32</sup> Second, many of these former colonies adopted language from the emerging corpus of international human rights law in the aftermath of World War II directly into their independence constitutions, thereby creating more opportunities for dialogue among judges from different countries.

Our survey in the first section of this chapter noted how widespread written bills of rights and judicial review have become since the middle of the twentieth century. Many of the newly instituted constitutional and supreme courts sought to draw upon the jurisprudence of their more established counterparts, often with a view to emulating important facets of their constitutional jurisprudence. Lorraine Weinrib has argued that these and other factors in the aftermath of World War II resulted in a 'post-war paradigm' of domestic constitutional law that relies extensively on comparative engagement. Weinrib identifies Germany and Canada as countries that fall within this category but asserts that it includes courts in other liberal democracies that have embraced the emerging jurisprudence of human rights (Weinrib).

In recent years, a number of additional factors have contributed to an increase in trans-judicial influence. A selective list of these contributory factors would include: i) the greater quantity of comparative constitutional jurisprudence as a number of constitutional and supreme courts have built up their corpus of domestic constitutional law over several decades; ii) the similarity in issues that such courts are asked to decide upon, which makes trans-judicial influence more natural and logical (these issues include construing the ambit of freedoms of speech, religion, reproduction, privacy; language rights of minorities; equality issues; constitutional limits on punishment; rights of accused; and the ambit of war and emergency powers of the executive); iii) the greater access to foreign judicial decisions due to the internet and the willingness of courts to translate their decisions into English; iv) the increasingly global nature of legal education, which causes law students (who are future lawyers and judges) to be exposed to the constitutional jurisprudence of other nations in their domestic contexts, and to more sustained levels of interaction when they study in other jurisdictions in exchange and post-graduate programmes; and v) the increasing interaction among judges of different nations at specially organized conferences and through inter-court exchanges that are held at regular intervals in several jurisdictions (see generally Rahdert).

It is therefore not surprising that the practice of trans-judicial influence in the specific area of constitutional adjudication is now widespread. Judges in several countries in Asia, Australia,

<sup>32</sup> Although this appears to have proved viable in a few countries (India is one such example), in the majority of postcolonial states, such efforts proved disastrous, and the independence constitutions had to be subsequently revised to account for local political, social and economic conditions and structures. Go (2003) notes that 'at least 91 countries' became free from Western colonial rule in the twentieth century, all of which went on to adopt constitutions of their own, usually based on that of their former colonial masters—as many as 65 percent of these countries had to substantially rewrite and revise their constitutions in later years.

Africa, Europe, North America and South America engage with foreign and comparative law decisions from other countries in considering questions of domestic constitutional law (McCrudden; Markesinis & Fedkte). A number of scholars have identified the creative and multiple ways in which foreign decisions are actually used in constitutional adjudication by judges across nations (Markesinis & Fedkte; Tushnet 1999).

In recent years, the use of foreign and comparative decisions has attracted controversy and considerable scholarly commentary in several jurisdictions, most notably in the United States. Judges of the US Supreme Court and an army of scholars have cast doubt on the use of comparative law by raising a number of objections: that the practice is undemocratic as it vests great discretion in judges with respect to the foreign decisions they can cite in support of their results; that such use is unprincipled, haphazard and lacking in method (Perju; Halmai). Critics of the use of foreign law echo the sentiments expressed by Montesquieu and Osakwe on the uniqueness of domestic constitutional law regimes. Similar skepticism has been expressed by judges in Australia and Singapore, albeit for different reasons (Thiruvengadam). Analysis of the debate over the use of foreign law reveals that the disagreement is often over far more fundamental differences in approaches to constitutional interpretation, and the way protagonists conceive of the proper role of judges as actors within a constitutional system in relation to the relative powers of other constitutional actors such as legislators and members of the executive. There is a clear correlation between judges whose self-perception of the legitimate role of judges is relatively narrow and a reluctance to refer to or use foreign law in domestic constitutional interpretation.

In the rest of the world, however, the use of foreign decisions as persuasive authority has been relatively uncontroversial. Detailed studies show that judges in Canada, India and South Africa have made extensive use of foreign decisions. What is more, this is typically done in ways that do not undermine the important local issues that arise. Scholars have demonstrated that engagement with foreign decisions has been used to enhance particular aspects of their domestic constitutional culture (Choudhry; Roy).

### 33.4 Conclusion

In recent years, several scholars have drawn attention to the forces of globalization that have an increasingly discernible impact on what were once considered domestic constitutional ideals and principles (Law; Tushnet 2009). The question that then arises is whether we are living in or heading towards an era of convergence. Scholars have warned us about the dangers of viewing this question in simplistic terms, and are sanguine about its implications (Goldsworthy; Scheppele).

Our analysis provides support for the argument that constitutional ideas today are more similar at a macro level than they were at the beginning of the twentieth century. Yet, despite this overall similarity in constitutional institutions and principles, our analysis equally shows that there is great divergence and difference in the details of the constitutional systems of different countries, lending support to the proposition that 'globalization does not entail uniformity' (Tushnet 2009, 987).<sup>33</sup> As globalization continues to interact with increased

<sup>33</sup> This is also the conclusion of scholars who have closely studied significant recent constitutional developments, such as the drafting of Bills of Rights that occurred in Canada, South Africa and Northern Ireland. See Anne Smith (2011), 'Internationalization and constitutional borrowing in Bills of Rights', 60 *International and Comparative Law Quarterly* 867–93.

democratization, particularly at a local level, constitutional processes and judicial borrowing are likely to continue to converge but within the framework of a more determined articulation of local values in constitutional texts.

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