DECODING THE NUANCES OF THE NORMATIVE PRACTICE OF CONSTITUTIONAL BORROWINGS

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ABSTRACT

Constitutions are not produced in isolation. Rather, they draw on the form, texts and experiences of other constitutional systems of the world. As such, constitution-making is an application of comparative constitutional law. The process of constitution-making includes both the process for making a new constitution or amending an existing constitution as well as the substantive decisions about the design, form and content of the new or amended constitution [i]Behind the contours of these constitutional texts, are the most important and persuasive political actors and forces of a given society.

A good constitution drafting process must balance the interests of different groups and communities. The various actors that are said to be a part of the drafting process include the judiciary, political leaders, academicians and the participation of public. This paper aims to explore the processes employed in the making of constitutions by resorting to a comparative analysis to understand the role played by influencing actors in the same and primarily focusing on the aspect of constitutional borrowings in the methodology of drafting while also focusing on tracing the history of transplantation of constitutional ideas.

Keywords: Comparative Constitutional Law, Constitutional Borrowings, Transplanting of Constitutions, Constitution Making, International Law, Constitution Drafting, United States Constitution, French Declaration of Rights, Bill of Rights, Modern Common Law States, Indian Constitution

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INTRODUCTION

Constitution-making, traditionally the hallmark of sovereignty and the ultimate expression of national self-determination, is increasingly becoming an object of international law. Two traditions and concepts of constitution-making are regularly distinguished. According to the first 'revolutionary' tradition, constitution-making stands for the foundation of an entirely new order. Making a new constitution eradicates the old political system and establishes the rules and institutions of a new one. The second tradition presents a more 'evolutionary concept of constitution-making', which is understood as being the incremental juridification of politics and as the ongoing process of limiting the powers of the existing and persisting government. [ii]

Patterns can be identified across constitution-making exercises, allowing for comparative approach to determine the best possible set of rules and institutions for particular context. [iii] As a part of these approaches, borrowing is inevitable because there are a limited number of general constitutional ideas and mechanisms that have been floating around for some time. In contemporary times, no one can begin to write a constitution from scratch. Borrowing takes place when drafters of new constitutions encounter a particular problem and look to other constitutions for solutions. "Reading across any large set of constitutional texts, it is striking how similar their language is; reading the history of any nation's constitution-making, it is striking how much self-conscious borrowing goes on," suggests Robert E. Goodin. [iv]. This paper explores the aspect of constitutional borrowings in depth as a frequently applied method of constitution drafting.

Contemporary constitution-making has emphasized the process as opposed to the content of the resulting Constitution. Comparative experience demonstrates a range of processes to draft and adopt a new constitution. We shall move on to a discussion of the various actors involved in the process who play a key role in drafting constitutions.

ACTORS IN THE PROCESS OF CONSTITUTION-MAKING

The choice of which actors must be given preference is often informed by the context and constitutional tradition of the polity, the desire for public involvement in constitution-making and considerations of legitimacy. Firstly, there are those who believe that constitution-making is 'a pre-eminently political act'. 'It is a decision-making process carried out by political actors,

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responsible for selecting, enforcing, implementing, and evaluating societal choices.[v] Secondly, in a small but significant number of cases, courts have played a key role in the otherwise political processes of constitution-making. [vi] Judiciaries have become increasingly important actors in constitution-making and democracy-building, whether a state seeks to strengthen democracy or transition from undemocratic to democratic rule. Since the 1970s, constitutional transitions in a wide variety of states around the world have sought to empower the judiciary. These include the well-known examples of Colombia, Hungary and South Africa, as well as lesser- known examples across all world regions (e.g. southern European states such as Spain and Portugal, virtually all Central and Eastern European states, Latin American states such as Brazil and Uruguay, and Asian states such as Indonesia, Mongolia and South Korea). In these contexts, a strong, independent judiciary that can act as the guardian of the constitution has been viewed as essential to achieving a constitutional framework that departs from authoritarian modes of governance and embraces democratic governance centred on the rule of law. [vii]

Thirdly, many constitutional theorists maintain that the process of constitution-making is critical in making a constitution "matter." They argue that the best constitution-making process is one where the people divorce constitutional drafting and ratification as much as possible from pre-existing, ordinary rules and institutions by encouraging the "people" to directly act through irregular mechanisms such as referendums and constitutional conventions. This irregular expression of popular sovereignty – what is termed as "popular constitution-making" – ensures that the constitution will transcend ordinary politics through generating general public's self-accountability and therefore limit future legislative and executive action and also greatly reduce the extent of litigation by bringing in the facet of public satisfaction. However, the massive wave of constitution-making in post-communist Europe and Asia in the late 1980s and early 1990s suggests serious problems with this approach.

The most profound observation that one makes is that the most successful and legitimate post-communist constitutional orders were established without engaging in popular constitution-making. Instead, these countries made wide use of ordinary political mechanisms - including parliaments - in the construction of robust constitutional orders. On the other hand, another noticeable pattern that emerges is that post-communist nations that have side-lined ordinary political institutions and rules in pursuance of favouring the mechanisms of popular constitution-making in creating constitutional orders have actually been far less successful in

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building constitutions that constrain government activity. Post-Soviet constitutional developments are a good tool to help understand and explain the dangers of popular constitution-making. Russia, in particular is a paradigmatic example. After two years of parliamentary constitution-making, Russian President Boris Yeltsin, locked himself in a battle with parliament to control the fate of Russia, and drew on the language of popular constitution-making to single- handily sideline existing rules and institutions. After winning a referendum in which more than 50% of the voters declared their support for Yeltsin, he called an appointed constitutional convention, disbanded the parliament, and dispersed the Constitution Court. He then went on to ratify his own personally drafted authoritarian constitution. Other countries in the former Soviet Union soon followed this model. The Russian example shows how popular constitution-making can allow charismatic individuals to reassert dictatorship. In the absence of unwritten conventions or rules, the extra -legal mechanisms of popular constitution-making can help charismatic leaders claim the mantle of popular legitimacy and assert dictatorship. Ergo we see that it can be argued that constitutional theorists should appreciate the essential role that ordinary and pre-existing political institutions and rules – even ones tainted by association with a prior regime[viii] – can play in the construction of legitimate constitutions while a plethora of arguments can be advanced on the other side laying greater importance on other actors involved in the process such as the participation of public and judicial bodies.

TRACING THE HISTORY OF CONSTITUTIONAL BORROWINGS

Ideas originate in one place and time, travel to other places along unpredictable routes; often they are discarded, but sometimes they are embraced and/or applied. Such was the case with the "original" idea of constitutionalism. It developed in Western Europe, particularly in England, at that time as a reaction against absolutism. The idea travelled, with religious dissenters and political immigrants, to British colonies in North America, where it was applied in practice. With the adoption of the United States Constitution in 1789, which was the first officially ratified constitution of the world, the American government was entrusted with grants of power limited by checks and balances among the branches of government, and between the federal and the state governments. Governmental power also was limited by the rights and freedoms retained by the citizens, placed parallel against the powers retained by the state, who could use formal institutions for the redress of their grievances against the state. Other salient

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features of the American constitution included the fact that it is a written constitution, with a rigid procedure for amendments and strongly propagated within itself comparatively newer concepts of citizen rights and judicial review.

This idea of constitution-making then returned to Europe. England embraced the idea of limited government rights as opposed to individual rights, but when the supremacy of Parliament was established in the late eighteenth century, it rejected the separation of powers and the idea of having a written constitution.

In continental Europe, the idea engulfed by the American constitution was misunderstood and distorted.[ix] The essence of the American constitution was the limitation on all powers including the sovereign power of the people as represented in the legislative body. The first words of the U.S. Bill of Rights "Congress shall make no law . . ." elucidate that the purpose of the Bill was to limit not to strengthen the legislative body. [x]

The French Declaration of Rights of 1789, by contrast, took steps to strengthen the role of the legislature. Thus, French constitutional history began with the idea of people's sovereignty located in the popular will and manifested in and by the legislature. The Europeans from the beginning misunderstood American constitutionalism as people's sovereignty rather than a limitation on the very concept of sovereignty. This very phenomenon was also most responsible for the failure of many European observers to grasp the true meaning of American constitutionalism. The power that some philosophes wanted to give the people was the same power they thought the kings had usurped: the power that the political and legal philosophers of the time called "sovereign".

Although the American concept of popular sovereignty was misunderstood in eighteenth century Europe, many political philosophers of that time nonetheless were eager to borrow such American ideas as natural equality. The idea of equality, however, was also distorted.

For example, in 18th century Germany, equality of economic opportunity and equality before law were accepted, but political equality was left almost completely unaddressed.

All in all, by the 19th century, the ideas encompassed by the American constitution were out rightly rejected in Europe. [xi]

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The American experience nonetheless has motivated many foreign constitutionalists to reconsider possibilities for their own future if not directly borrow ideas from the American model. Abraham Lincoln's contemporary and ally Benito Juarez of Mexico and the second generation of 19th century constitutional nationalists, Jose Rizal of the Philippines and Sun Yat Sen of China have all been influenced by the ideas ingrained in the American constitution by its drafters. The Australian Constitution which came into force in 1901 was strongly influenced by the US Constitution, while at the same time preserving Westminster traditions and the British monarchy. It adopted a federal system similar to the US, with a senate that represented the states.

Over its history, the influence of the American constitution has waxed and diminished. Democratizing countries often chose the more centralized, consolidated British or French models. [xii] However, to further comprehend the nuances of the practice of constitutional borrowings, let us supplement this with more modern examples of constitutional borrowings and a cognizant understanding of the dynamics of constitutional borrowings.

MODERN STATES WITH BORROWED CONSTITUTIONS

In contemporary times, many countries of the world have reassembled and reorganized themselves by incorporating new features from borrowings. For instance, the early 1990's saw the unprecedented negotiation of a new dispensation in South Africa, resulting in profound changes to the country's social, political and economic structures.[xiii] Many of these changes are codified in the interim Constitution (the "IC"), including an entrenched justiciable Bill of Rights, which became the supreme law of the land on April 27, 1994. The inclusion of justiciable rights was a unique event since the constitutions adopted in 1910, 1961 and 1983 all provided for parliamentary supremacy. [xiv] *The legal system in apartheid South Africa was a mixture of statute and hybrid common law, largely comprised of Roman-Dutch law and elements of English law.*[xv] The drafters also referred to the provisions of other countries while drafting their "Bill of Rights", specifically the German Basic Law (1949), the Canadian Charter of Rights and Freedoms (1982), and the Chapter on Fundamental Human Rights and Freedoms in the Constitution of the Republic of Namibia (1990).

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In some situations, however, borrowing does not always lead to betterment. Kenya's constitution for example, was destined to fail. It was deliberately designed to fail. As James Orengo said, they borrowed the worst features of other constitutions and the result was a machine without rhyme or reason. They borrowed the American Presidential System but ignored the checks and balances that make the president accountable to people. They borrowed the parliamentary system of Britain but none of the parliamentary practices that make the system effective. They borrowed the Bill of Rights from the Universal Declaration of Human Rights but added in all the exceptions to the rights that were common in Stalinist countries.

On the contrary, a very successful example of constitution borrowings can be seen in India itself. The father of the Indian Constitution, Dr. BR Ambedkar himself said - "There is nothing to be ashamed of in borrowing. It involves no plagiarism. Nobody holds any patent rights in the fundamental ideas of a Constitution." After intense scrutiny, it turns out that our founding fathers liberally chose what features to embed into our Constitution and in many cases remoulded them to suit diverse local realities. For starters, India borrowed its parliamentary system of government from the British. What follows is the primacy of the rule of law, the legislative procedure, cabinet system, parliamentary privileges, bicameralism (Lower and Upper House of Parliament). While the United Kingdom today allows for dual citizenship, India borrowed the idea of single citizenship from them. Beyond ideas emerging from the British Constitution, India also borrowed heavily from the Government of India Act, 1935, passed by the British Parliament—a Constitution of India of sorts formulated by the British for India. Among other things, the bill highlighted the role of the Governor, Judiciary, Public Service Commission and other critical administrative details like the Federal system.

These are indeed facets we borrowed, but unlike the British version of what they thought best suited India like separate electorates for minorities, the framers of the Indian Constitution did away with it.

When the Constituent Assembly first convened on December 9, 1946, then Interim President of the Constituent Assembly Sachindananda Sinha urged all delegates in attendance to study the United States Constitution, drafted in 1787. He called it "the soundest and most practical and workable republican constitution in existence." However, he advocated no "wholesale adoption, but for judicious adoption of its provisions." Dr Rajendra Prasad eventually replaced Sinha. Dr BR Ambedkar was also heavily influenced by the US Constitution. Before he began

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work as the Chairman of the Drafting Committee, he submitted a proposal titled the United States of India, which espoused among other things, greater federalism which gave states a lot more power—a model of the US federal system of government. The very idea of Fundamental Rights was borrowed from America's Bill of Rights. Even our preamble, which begins with "We the people"—a phrase which confers ideas of equality—came from the US Constitution. Go further and compare the two preambles and the language used is distinctly similar. Concepts of the rule of law, independence of the judiciary, judicial review of acts by legislative bodies, and the process of impeachment came from the US Constitution.

Irish scholar Cathal O' Noramin once wrote in the 1963 Indian Yearbook of International Affairs, "perhaps the Irish Constitution's greatest claim to future fame will depend on the extraordinary influence which its Directive Principles had on the Constitution of India." Article 45 of the Irish Constitutions, states: "the principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas exclusively and shall not be cognizable by any court under any of the provisions of this Constitution." India adopted its Directive Principles of State Policy from this provision, as Article 37 of the Indian Constitution states: "The provisions contained in this part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country, and it shall be the duty of the state to apply these principles in making laws."

While the British and Americans influenced the principle of federalism that India adopted, it is Canada, which shares the closest link with India. Canada in 1867 and India in 1950 adopted a form of government broadly similar in principle to the Westminster model prevalent in England, but with the modification that they added onto a parliamentary framework a federal component. This combination of parliamentary and federal principles of government was necessitated by social and regional diversities characterising these two countries. The similarities extend to the fact that "both are parliamentary and federal democracies, and both have institutionalised judicial review of constitutional matters.

The distribution of state power in India is divided along the lines of three lists—Union List, State List and Concurrent List—as espoused in the Seventh Schedule of the Indian Constitution. While the first two outlines the jurisdiction of the Union and State government power respectively, the Concurrent list includes subjects that give powers to both the Centre and State governments like education, family planning, population control, protection of

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wildlife, etc. This is an idea we have borrowed from the Australian Constitution, which lists them as "concurrent powers" under Section 51 of its Constitution. Both the Commonwealth (equivalent to the Union government in India) and States can legislate on these subjects, although federal law prevails in the case of inconsistency. It's the same case in India. Besides this, we also borrowed ideas of freedom of trade between states and national legislative power to implement treaties, even on issues outside the jurisdiction of the Centre from Australia.

The ideas of liberty, equality and fraternity, popularised by the French Revolution, laid the basis for the formulation of not just the fundamental rights, but the very freedom struggle itself. Even popular ideas of sovereignty and the republic, which India adopted, owes a lot to French political tradition.

The Emergency powers vested with President of India are on the pattern of similar powers conferred on the President of German Republic according to Article 48 of Weimer constitution of Germany. Nonetheless, these powers were later battered by Hitler when he came to power and assumed dictatorial authority.

Lastly, India extensively borrowed from other Constitutions as well. From South Africa, for example, we have adopted a similar legislative procedure involved in passing constitutional amendments requiring 2/3 majority and electing members to the upper house based on proportional representation by the State legislatures. From Japan, meanwhile, we borrowed ideas on the procedure of making laws. While our founding fathers borrowed ideas for the Constitution, the framing and execution of its provisions was driven by Indians to suit our realities. [xvi]

DYNAMICS OF THE LEGITIMACY OF CONSTITUTIONAL BORROWINGS

During the period of decolonization, the adoption of a constitution was perceived as proof of the ability of self-governance, and thus a precondition of independence. Many postcolonial countries consciously adopted models similar to those of their former colonial power, particularly when independence came as a result of negotiations and peaceful agreement. This helps explain why the English model of government has been more influential than the

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American model. Although the United States radiated the idea of constitutionalism, England has spread a specific constitutional design—the Westminster model. After all, Great Britain had more colonies than other countries. [xvii]

A person engages in borrowing when, in the course of trying to persuade someone to adopt a reading of the Constitution, that person draws on one domain of constitutional knowledge in order to interpret, bolster, or otherwise illuminate another domain. It is, in other words, an interpretative practice characterized by a deliberate effort to bridge disparate constitutional fields for persuasive ends. Across many institutions legal actors engage in constitutional borrowing for a range of purposes and with complex effects, some apparent and others less obvious. What is interesting to us is that virtually all discussion surrounding instances of borrowing has concerned the substantive appropriateness of the specific appropriation and not the practice itself.

Borrowings are considered to be as legitimate as any other mode of persuasion. Questions of legitimacy surround all exercises in constitutional borrowing because they involve exchanges between potentially incompatible domains of legal knowledge. A key to identifying an act of borrowing, therefore, lies in the nature of an opponent's possible response. [xviii]Another justification provided for the legitimacy of borrowings is that borrowing is a form of interpretation. Borrowing augments formal modalities of interpretation, such as those arising from text, history, structure, precedent, or animating principles [xix]

Perhaps the most common method of borrowing of legal ideas, in whole or piecemeal, from one context to another is “transplantation”. Despite the fact that comparative constitutional law is a form of comparative law, practice of comparative constitution-making has thus far largely ignored the rich debates in comparative law on the topic of legal transplants. These debates can illuminate our understanding of how constitutional doctrines and ideas travel. [xx]

Importing an idea into a new domain is tempting when the idea possesses a track record of success in the sense that it seems defensible, has proven useful, or, quite apart from its demonstrated utility, enjoys support among specialists or the public. A prominent instance of transplantation is culminated in *Planned Parent- hood of South-eastern Pennsylvania v. Casey.*[xxi] There, use of the "undue burden" test heralded a newly sensitized attitude toward the competing challenges presented when a state regulates an individual's decision to abort an unwanted foetus. That formulation replaced the more protective, but less elegant trimester

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framework fashioned by *Roe v. Wade*[xxii]. These constitutional ideas have also travelled and been transplanted into the legal reasoning provided by courts while ruling on cases of reproductive rights in other countries across the world. [xxiii]

CONCLUSION

Constitutional borrowing serves as an important rule of law in studying comparative constitutional law. The success of such a practice cannot be simply be assumed because it has historically been a legitimate method of constitution drafting. It needs to be measured in terms of whether or not constitutional ideas which have travelled from various cultures and political-economic scenarios have been well integrated and transplanted into the new social setting. One of the major shortcomings of borrowing constitutional propositions from other national constitutions is that the true essence of a provision gets diluted or might get lost in its applicability to a different political setting. In order to avoid this weakening of principles, sufficient caution must be exercised, and the process of transplantation must only be carried on by specialised agencies and representatives of state interests. It is pertinent that these borrowed ideas be carefully adjusted and adapted to suitably function in the new national context. Another major shortcoming of borrowings is that it leads to loss of feeling of belongingness and nationalism. Critics of this method maintain the argument that borrowing is an ineffective method of drafting constitutions since the lack of originality in the most celebrated and fundamental text of the land will lead to suppression of the patriotism and unquestionable respect for the laws of the land. In Georg Hegel's view, borrowed constitutions are unsustainable because they lack not only sufficient self-consciousness but also the special character that elevates constitutions above the normal course of human events. He further believed that since borrowed constitutions are both un-self-conscious and unexalted, they not only are destined to fail, but are also unlikely even to cause meaningful societal change. But constitutional borrowing has its defenders, who argue that, while blind copying is inappropriate, judicious borrowing may benefit nations that have yet to solidify their political institutions. [xxiv] Keeping this in mind, there is no substantive conclusion that can be given for studying various instances of constitutional borrowings. It can only be said that such practice is pre-destined in the modern era and its avoidance cannot be seen as pragmatic option.

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