How and Why 'Ideas Travel' in Migration Law and Policy

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The Oxford Handbook of Comparative Immigration Law

Introduction

This chapter provides an introduction to the study of comparative immigration law through the lens of diffusion. Immigration law is typically understood as the last bastion of sovereignty, a policy area shaped primarily by domestic forces; diffusion scholarship, by contrast, emphasizes processes of inter-jurisdictional learning and emulation. The diffusion perspective invites us to ask how and why 'ideas travel' across jurisdictions and to trace the complex ways in which states are *interacting* with one another in shaping their own borders and membership boundaries. We refer to diffusion as the process through which policy choices in one country affect those made in other countries, and the resulting spread and adaption of law and policy across jurisdictions. The phenomenon has been studied across various disciplines, including law, political science, sociology, international relations, and public policy. Surprisingly, scholars of immigration have only recently begun to systemically explore patterns of diffusion, "borrowing," and mutual learning, and their influence on our understanding of policymaking in this highly charged area of public life.

In Part 1, we take transdisciplinary approach to identify several explanatory mechanisms and provide a categorization of rationales that may lead law and policymakers to look "elsewhere" as they contemplate which changes and policies to adopt "here."[1] There is a rich literature on the range of methods and approaches that inform the study of diffusion, crossing disciplinary boundaries and increasingly relying on both qualitative and quantitative analysis.[2] Building on these insights, our focus in this chapter is on tracing and explaining how and why certain immigration policies "travel" across borders, under what circumstances, and in response to what challenges. Where relevant, we also identify the key actors and moments of change. Our contribution aims to shed light on the typically underexplored and understudied interjurisdictional dimensions of immigration law and policymaking.[3]

In Part 2, we set out several case studies to contextualise and illustrate the themes discussed in Part 1. The study of diffusion typically highlights the interests of states; we complement this by considering the interests of those most impacted by these policies, namely, prospective migrants. Our illustrative examples will be divided into two main categories.

First, we elaborate on patterns of diffusion that create a "race to the top" from the perspective of would-be entrants, granting them choice among potential destination countries when the latter compete to "lure" sought-after migrants, including the highly skilled, and, increasingly, deep

[1] For comprehensive accounts of the challenges faced by judges, lawyers, and scholars when engaging in comparative analysis in the context comparative constitutional law or international law, see e.g., Hirschl 2014; Linos 2018.

[2] The list is too comprehensive to cite fully. In this Handbook, see [cross reference to relevant chapters in Parts I and II]. See also footnotes 5 and 6 below for influential contributions.

[3] Important exceptions to this general trend are found in the works of, among others, Ghezelbash 2018; Lambert, McAdam and Fullerton 2013; Shachar 2006; Shachar 2022; Szigeti, 2021.

pockets as well (Shachar and Hirschl 2014). We then shift the focus to the diffusion of restrictive border control policies which create a "race to the bottom" as states compete to deter asylum seekers and other "undesirable" migrants. Here, we will trace the spread of legal techniques that strive to, as official policy documents explain, "push the border out" as far as possible and thus stop migrants before they reach the territories in which they seek to make protection claims. Such "shifting border" policies (Shachar 2020) are used to deter unauthorized movement by air, sea, and land. While originating in policies of rich global north countries, today's "gatekeepers" of global mobility are often immigration officials of global south countries. A classic example is Morocco's border guards who are keeping the line at Ceuta and Melilla, Spain's enclaves in North Africa (Infantino 2017). Such "outsourcing" of responsibility and legal culpability is achieved through a complex network of bilateral and multilateral agreements with various degrees of formality (Gammeltoft-Hanson 2011; Shachar 2022, 975-977). In addition to policies that stretch the border outward, the regulation of movement also bleeds inward, deep into the territory. To capture these different spatial and temporal aspects, our analysis highlights the spread of *pre-arrival* and *post-arrival* strategies to deter uninvited arrivals. Visa controls, carrier sanctions, maritime interception, airborne interdiction, "zones of protection," and the growing reliance on transit countries or even countries of origin to block movement are examples of the former, whereas detention, fast-track and accelerated asylum procedures, temporary protection, and offshore processing, demonstrate the latter.[4] Finally, we step back in time to explore what we refer to as *historical antecedents*. This section traces the spread of Chinese exclusion laws across white settler societies in the late 19th and early 20th century to demonstrate that diffusion has been occurring for as long as states have been attempting to exclude certain migrants while seeking to draw others. By exploring past, present, and emergent future trends of the diffusion of migration laws and policies, we gain insights into core developments, and arguably injustices, baked into the current system of regulation of cross-border mobility in a world of severe inequality. We also highlight the importance and significance of academic research in this space and its centrality to understanding immigration law as inter-actional and multi-player policy arena rather than operating in "splendid isolation."

1. Categorizing Diffusion Mechanisms

Our focus in this chapter is on exploring how and why different countries, or some other levels of governance (including subnational and supranational actors, and increasingly, delegated or 'deputized' third parties), adopt, borrow, and emulate, with local variation, immigration law and policy innovations introduced by their counterparts. Scholarly work examining diffusion is rich and comprehensive in scope. It spans multiple disciplines, including political science, public policy, international relations, and legal studies.[5] While rooted in different disciplinary frameworks, all these approaches focus on the spread of policy, law and other innovations across jurisdictional boundaries.[6] Taking a transdisciplinary approach, our interest lies in highlighting the importance of this branch of scholarship in helping to identify, analyse, and comprehend recent trends in comparative immigration law and policymaking.

[4] In the European context, some of these pre-arrival policies are captured under the rubric of externalization. For a concise overview and working definition of externalization migration controls, see Frelick, Kysel, Podkul 2016.

[5] See e.g., Simmons and Elkins 2005; Linos 2013; Mossberger and Wolman 2003; Cook-Martin and FitzGerald 2019; Dolowitz and Marsh 1996; Watson 1974, Graziadei 2009.

[6] While there is a long tradition of comparing different approaches and methods within the social sciences (see, e.g., Marsh and Sharman 2009; Newmark 2002; Graham, Shipan and Volden 2013), legal scholarship has generally lagged behind.

Various mechanisms drive diffusion today.[7] Here we attempt to aggregate these mechanisms into five broad categories: efficiency, prestige as source of influence and legitimacy, coercion, co-operation and competition.[8] At the outset, it is important to note these various mechanisms rarely work in isolation, with most instance of diffusion driven by a combination of these various considerations.

Diffusion can be motivated by *efficiency*. Transfers operate as a means for speeding up the policy development *process*. Transfers provide a way of dealing with problems quickly and at a lower cost than trying to come up with innovative local responses. Miller describes this in its purest form as 'a drafter who when confronted with a new problem pulls a solution from elsewhere off the shelf of the library to save having to think up an original solution' (Miller, 2003, p. 845). More often, however, polices are adapted and modified to meet local conditions and needs. Transfers can also be a tool for achieving efficient policy outcomes— and better outcomes that would be possible if relying solely on domestic innovation (Bennett, 1997, p. 226, Mattei, 1994). As we discuss further below, the policy goals of wealthy liberal democracies are converging when it comes to migration control. On the one hand they seek to attract the 'best and brightest' migrants, while seeking to deter unwanted arrivals such asylum seekers and irregular migrants. Examining and learning from how other states have tried to achieve these goals makes sense from an efficiency perspective. That is not to say, however, that 'borrowed' policies will achieve their desired outcome. Both the quality of information relied on in the transfer process, as well as differences in institutional and legal structures can result in the 'failure' of imported law or policy (Dolowitz and Marsh, 2000; Braun and Gilardi, 2006; Ghezelbash 2018).

When a new policy is introduced, the fact that it has been tried-and-tested elsewhere can help bring legitimacy and quiet potential opposition to it. Here, the *prestige* of a proposed model or its proponents (Ajani, 1995, p. 110) matters. Legal scholars have referred to such transfers as 'legitimacy-generating transplants' (Miller, 2003, p. 854-867), while international relations scholars use the term emulation, which is defined 'as the process whereby policies diffuse because of their normative and socially constructed properties instead of their objective characteristics' (Gilardi 2012, p. 475). The reputation of the model being emulated or the jurisdiction it comes from is used to garner support for the new policy – both within government and with the broader public.

Diffusion can also involve various degrees of *coercion*.[9] In its most extreme form, transfers can be forced upon a state through military conquest or expansion. But far more often, coercion occurs through more subtle means, such as economic or diplomatic pressure or incentives. Legal, public policy and diffusion scholars have observed that the distinction between imposed and voluntary transfers is not a binary distinction, but that transfers can be viewed as being spread across a spectrum with completely voluntary transfers at one end, and completely coercive transfers at the other (Dolowitz and Marsh, 2000; Cohn, 2010; Lavenex and Uçarer 2004; Tsourapas 2017).

Diffusion can also be driven by *co-operation* or *competition.* Both mechanisms fall under the broader concept of strategic adjustment, which occurs when 'actual or anticipated changes in the

[7] Scholars proposed various competing typologies from different disciplinary angles. See e.g., legal approaches (Cohn, 2010; Graziadei, 2006; Miller, 2003; Sacco, 1991; Watson, 1996), public policy (Dolowitz and Marsh, 1996; 2000) and international relations (Braun and Gilardi, 2006; Sharman, 2008) and political sociology (Cook-Martin and FitzGerald 2019)

[8] This typology is adapted from Ghezelbash 2014.

[9] This mechanism has also been described using the language of leverage: see Cook-Martin and Fitzgerald 2019.

policies of other countries push a government to adapt accordingly' (Fitzgerald and Cook-Martin 2014, pp. 26-7). Cooperative transfers take place where states coordinate or harmonise their policies in order to secure common goals. Governments are increasingly aware of the fact that effective management of borders requires the coordination of policy responses across multiple states and stakeholders. This has given rise to formal arrangements such as the EU's Common European Asylum System (CEAS) and the Schengen Borders Code.[10] This cooperation and resulting diffusion has also taken place through more informal mechanisms, such as Regional Consultative Processes (RCPs). Recent years have seen the proliferation of RCPs across the globe – which provide an opportunity for states with similar interests and background to discuss, share and coordinate migration and asylum policies and exchange 'best practice' models (Thouez and Channac, 2006).

Competitive transfers occur when states react to changes in policies in other jurisdictions in a bid to obtain a competitive advantage. In the migration space, as already noted, the interests and goals of states are increasingly converging. On the one hand states are competing to attract the best and brightest migrants and those with substantial resources to invest in their host society. Shachar has noted that in this competitive environment, policy emulation is to be expected (Shachar, 2006). This is because of an assumption on the part of immigration policy makers that unless they match the conditions of admission and settlement offered by other comparable nations, they will lose out in the global race for talent – giving rise to what we label the 'race to the top'. One the other hand, states also appear to be increasingly seeing themselves in direct competition with one another to deter 'undesirable' entrants such as asylum seekers and unauthorised migrants (Ghezelbash 2018, p 28). When one state introduces restrictive border control measures, other states may feel pressure to follow suit, or even outdo those measures. There is evidence of national policymakers engaged in transnational closed-door forums such as the Inter-Governmental Consultation on Asylum, Refugee and Migration Policy, expressing the concern that their respective country's immigration policies will be perceived as the 'weakest link' or 'open to abuse,' further contributing to a ratcheting up of more restrictive policies and interjurisdictional learning.[11] The result is a 'race to the bottom' where states introduce increasingly punitive deterrent measures at the cost of protection outcomes for refugees. In contrast to the cooperative transfers discussed above, transfer aimed at attracting and deterring would be migrants are the result of 'non-cooperative action taken by fiercely competitive jurisdictions' (Shachar, 2006, p.156).

In the following section, we explore a number of case studies that illustrate how these competitive dynamics having played out in the immigration and asylum policy space, with a particular focus on the mechanism of competition as one of the primary drivers of diffusion.

2. Diffusion in action

(a) Race to The Top

In 1967, Canada introduced its 'point system,' a novel and influential set of admission criteria for the highly skilled. The point system was explicitly designed by the Canadian government as a 'selective immigration policy … [that] must be planned as a steady policy of recruitment based on long-term considerations of economic growth' (Marchand 1966, p. 12). This policy was

[10] Receptions Conditions Directive (2013/33/EU); Qualifications Directive (2011/95/EU); Asylum Procedures Directive (2013/32/EU); Dublin Regulation (604/2013/EU); EURODAC Regulation (604/2013/EU); Shengen Borders Code 399/2016/EU).

[11] For further discussion, see Irvin 2011.

crafted by top immigration bureaucrats who became increasingly aware of the urgent need to adopt selection criteria that no longer relied on racial and national origin preferences. In response to these changed circumstances, the policy innovation they introduced was to develop 'merit-based immigration policies' that are facially neutral.[12] Archival records reveal that its drafters were aware of the point system's potential to become a 'striking example to the world' (Elrick 2021, p. 9). Until then, immigration admissibility to desired destination countries such as Canada, the United States (prior to the 1965 landmark amendments to the Immigration and Nationality Act of 1952) and Australia (which only abolished its White Australia policy in 1973) had been defined mainly in reference to racist national origin categories. While the United States was the first country to formally include skills-based migration preferences in its national immigration law and policy, Canada's point system with its elaborate grid for assessing human capital proved a precursor. It sparked a global race for talent whereby advanced industrial countries and emerging knowledge centres are trying to outbid one another in an effort to attract highly skilled migrants to their respective jurisdictions in order to gain, or retain, a relative advantage (Shachar 2006). The point system is designed to attract the best and brightest worldwide according to their merit and talent. The more countries that join the race, the greater the choices for would-be migrants who possess the required skills set. Once the global race for talent has begun, the pressure to engage in targeted recruitment increases, as no country wants to be left behind. As Shachar's account demonstrates, these competitive immigration regimes, privileging highly skilled migrants, reveal quite vividly that a nation's immigration policy cannot be understood as fully insulated from or oblivious to the actions of other countries. When it comes to luring those with desired skills and talents, modern states 'cannot live in splendid isolation' (Shachar and Hirschl 2013). Instead, they must take into account the selective migration initiatives of other comparable countries. Immigration policymakers are thus required to engage in a multilevel game in devising their talent-focused migration initiatives. They must address domestic stakeholders as well as respond to (or preferably pre-empt) the competitive recruitment efforts by their international counterparts. In this dynamic interaction, immigration policymakers tend to engage in 'borrowing'—or simply 'importing' and adjusting to their respective needs—the innovations of their competitors.[13]

The points system is a tool used by governments to select the most 'desirable' migrants from the broader pool of applicants (Ghezelbash 2014). Under the system, governments identify individual characteristics that they value most, giving each a weighted numerical value. The more important a factor is thought to be, the higher the score assigned to that attribute. Applicants must accumulate a minimum number of points to be considered for entry. While points-based systems primarily focus on human capital attributes that contribute to economic success and social integration, more recent incarnations of the policy sometimes take a hybrid approach, also which also incorporate employment/demand-based factors.[14] This can include for example, awarding bonus points for job-offers and for occupations subject to labour shortages.

[12] In practice, these facially neutral criteria have indeed transformed the source countries from which skilled migrants arrive and increased racial diversity, however, these policies are tilted toward sorting that occurs along occupational and human-capital classifications, which in turn replicate socioeconomic, gendered, and racialized inequalities in attainment of the requisite indicators of 'talent' and 'merit.'

[13] This section is based on Shachar 2006.

[14] States have adopted two general approaches to attracting the best and brightest skilled migrants. These can be broadly classified as 'immigration/human-capital driven' or 'employment/demand driven' (Chaloff and Lemaitre 2009; Boeri et al 2012). The immigrant driven approach focuses on the immigrant's human capital attributes and does not necessarily require a job offer. The employment driven approach is more geared to addressing immediate skilled shortages, with entry generally linked to having secured a job offer. The United States relies primarily on the

The system's transparency makes it attractive for prospective migrants as it allows them to accurately assess their own chances of being able to immigrate (Yale-Loehr and Hoashi-Erhardt, 2001). Additionally, some point systems provide a direct path to permanent residence, adding a competitive edge to the countries that offer what Shachar has termed the 'talent-for-citizenship' exchange (Shachar 2006). This provides greater certainty for applicants as compared to demand-driven systems under which the path to permanent residence is linked to maintaining employment with the nominating employer. In the United States, which relies primarily on employment driven admission routes, highly skilled migrants entering on an H1-B employment visa, for example, may have to wait for years in limbo until their 'number comes up' in order to secure a green card, especially if they hale from an emerging technology giant such as India which has an enormous backlog.

From the perspective of governments, the points system is attractive as it provides a relatively objective criteria against which governments can identify and select the most qualified prospective migrants from a broader pool of applicants. While there is some variation, the core criteria typically include educational attainment (the highest number of points is awarded for a PhD degree, then, in declining order, a Master's degree, Bachelor's degree, Associate degree, and so on), linguistic capacity in the receiving country's official language(s), work experience, age, arranged employment (where relevant) and related categories. As with any other system, there is a degree of discretion built into the point test and their design may reflect certain biases. While they have opened up important entry channels for skilled migrants from the global south and increased racial diversity, these systems have also been criticized for their tilt toward occupational, work and income criteria that generally favour male applicants (Boucher 2016). To address these concerns, several countries nowadays require an annual evidence-based gender-based analysis which disaggregates immigration data according to gender, as well as other intersectional criteria such as age and country of citizenship (Government of Canada, 2022). Recent studies have shown that point-based systems are altogether more effective in attracting highly skilled migrants than employment driven policies (Czaika and Parson 2017).

Having clarified the key features of the 'Canadian model', we now turn to explore its diffusion. As mentioned earlier, Canada introduced its points system in 1967, after having devised its contours informally through case-processing by high level immigration officials (Hawkins, 1989, p. 39; Elrick 2021). Australia followed suit in 1979, and New Zealand in 1992. As these new policies were adopted, direct references were made to the Canadian model in legislative debates and public statements of government officials. Since the early 2000s, various incarnations of the points-based system have been adopted around the world. Prominent examples include the United Kingdom, Czech Republic, the Netherlands, Denmark, Austria, Singapore, Hong Kong, Japan, and China. Several other countries had contemplated the adoption and adaptation of such point systems to recruit highly skilled immigrants. Prime among them are Germany and the United States, each of which developed its own variant of the point system but eventually did not pass them into law. In terms of mechanisms driving diffusion, efficiency and competition certainly appear to be the main drivers of the diffusion of the points-based model. However, considerations of prestige also play an important role. Germany's proposal relied heavily on the Canadian model, which was recently touted by the OECD as an international 'best practice' (OCED 2019). In the United States, government officials have gone to lengths to frame proposals which ultimately were unimplemented as being modelled on Canada's and Australia's 'merits-based' systems for

employment driven approach, whereas most other countries have opted either for the immigration driven approach, or, increasingly, hybrid combinations of the two.

selecting migrants (Chishti and Bolter, 2019). In doing so, government officials and commentators attempted to gain legitimacy and support for the proposal based on the esteem in which that model is held. This was the case despite the fact that the point-based system that was considered in the United States actually deviated quite significantly from the selection policies used in Australia and Canada, as it relied more heavily on employment driven considerations and set an extremely high passage mark. Economists calculated that if Americans were put to the merit-based test, only "about 2 percent of American citizens 18 or older would rack up the [required] points need to be considered for a visa" (Bui 2017). Counter to the logic of the classic point system model, this ultimately failed proposal would have impeded immigration to the United States rather than facilitated it.

(b) Race to the bottom

While the global race for talent has seen a growing number of countries open their doors, selectively, to a more diverse pool of highly skilled migrants, when it comes to 'unwanted' entrants, we see a competitive dynamic driving the diffusion of *restrictive* migration and border control policies around the world. States are increasingly viewing themselves in direct competition with other states to *deter* asylum seekers and unauthorised migrants more broadly from attempting to reach their territory. When one state introduces restrictive laws, other states feel pressured to follow suit. This is based on a belief that asylum seekers and migrants are rational actors who choose destinations based on a comparative evaluation of the stringency of control measures used by governments. Whereas in the context of the race to the top, states have relative freedom and choice to design their policies (while mindful of other countries' innovations and emulations), policy choices in the context of border exclusion are formally more restrained because of the need to navigate additional constraints, including international human rights and refugee law. Beyond these legal constraints there are additional expectations in the eyes of the public, at least in most democracies, that migration laws should not be overtly discriminatory (Ellermann, 2020). For immigration policymakers, this leads to a pressing trilemma (Shachar 2022): (1) the surge (real, perceived or anticipated) of movement of 'undesired' migrants, including asylum seekers from the world's poorer and less stable countries; (2) the moral and legal demands arising from the offering of international protection undertaken by countries committed to the values of human rights, rule of law, and democracy; and (3) the rise of anti-immigrant sentiment and political anxiety among voters due to a purported loss of control over borders, generating a 'defensive reflex in recipient countries' (Cassella 1988, 187). These competing vectors are impossible to square, and so the trilemma has generated a range of 'instruments of evasion.'[15]

When one states develops a legal or policy innovation that meets the shared goal, while ostensibly abiding by the shared constraints, other states are likely to follow. The legion of instruments of evasion we discuss in the remainder of this chapter reveal that countries belonging to the richer club of nations in the global north are proactively learning from one another through interjurisdictional 'borrowing' and cross referencing of rights restricting migration policies.

Increasingly, these policies and practices are delegated to global south countries and their border guards, often through bilateral or multilateral 'agreements,' 'accords' or 'memorandums of understanding' whose legal status is unclear, and as a result, difficult to challenge before a court of law. Such patterns of emulation and 'deputation' are unlikely to disappear any time soon and involve strategies that deter refugees from reaching richer destination countries in the global

[15] For further discussion, see Shachar 2022; Ghezelbash 2020.

north and concurrently strip them from the rights and protection that would have been activated upon arrival. As such, refugees are prevented from activating legal protection mechanism that are based on territorial presence. What makes this policy arena particularly interesting to explore in the context of diffusion is the fact that refugees hold a special legal status: states responses in this context are formally limited by the *non-refoulment* obligations and other protections set out in the Refugee Convention and human rights treaties.[16] When one jurisdiction devises an innovation that ostensibly complies with those obligations under international law, while achieving the goal of 'regaining control over borders,' other jurisdictions have quickly followed suit.

Instruments of evasion that 'migrate' from one jurisdiction to another are legion when it comes to restrictive border control policies targeting asylum seekers and undocumented migrants more generally. States have long imposed post-arrival controls aimed at deterring would be asylum seekers and other undocumented migrants—and facilitating their prompt removal. The geographic location of control measures and their temporal application, have however, been pushed out, both spatially and temporally, targeting the asylum seekers *before* they reach a state's territory – whether at the border, in transit countries, or their country of origin. These remote or extraterritorial controls form part of what Ayelet Shachar has termed 'the shifting border' (2020).

(b)(1) Post-Arrival measures

States have adopted a suit of common practices which place restrictions on asylum seekers and other migrants who have managed to reach their territory. These aim to facilitate prompt removal, as well as acting as a deterrent for future arrivals. One such policy is long-term (and often) mandatory immigration detention for those who enter the state without authorisation, which is perhaps one of the most widely used control measures. Administrative immigration detention is used in almost all states of the global north (Mainwaring and Cook 2018; Ghezelbash 2018), but increasingly in states in the global south (Flynn 2014). The application of the policy has expanded over the years from targeting arrivals upon entry for the time taken to undertake health and security checks, to blanket mandatory detention policies covering the entire period it takes to process the applicants visa request.

States have also made restrictive changes to refugee status determination procedures used to identify individuals entitled to protection. The Refugee Convention and the various widely ratified human rights treaties do not provide explicit guidance on how asylum processes should be run, with the choice of means of implementation left to the discretion of states. States have exploited this ambiguity by implementing fast-track and expedited procedures aimed at accelerating decision-making and removal for specific categories of asylum seekers. These generally involve shortening deadlines for assessing and appealing asylum applications and/or simplifying the process by removing procedural safeguards or limiting access to review (Ghezelbash 2021). By eroding and removing procedural safeguards, states can summarily exclude individuals without a meaningful opportunity to have their claims heard. European countries have been using accelerated procedures since the 1980s (Hailbronner 1993). Recent years have seen their rapid spread across the globe. They are now widely used in Europe, the United States and Australia (Ghezelbash 2021). They have also been a handful of attempts at

[16] *Convention relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33(1); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force generally 26 June 1987) 1465 UNTS 85, art 3; *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts 6, 7.

implementing the policy in states in the global south.[17] As they have spread, they have become more restrictive. The categories of persons targeted by fast-track policies have increased to the extent that some jurisdictions have made 'fast-track' the default while the regular asylum process has almost disappeared. At the same time, there has been a gradual erosion of the procedural rights afforded in the procedures, and a reduction in time limits for lodging claims and having them assessed.

'Safe third country' policies are another exclusionary tool that has diffused widely in recent years. These have taken various forms but are all based on the principle that an asylum seeker can be denied access to protection because they should or could access protection in another state. Frowin Rausis has documented the diffusion of such policies through the 'safe country policies dataset' (SACOP) which has coded the relevant laws from 195 states from 1951-2021 (Rausis 2022).

The diffusion of safe third country policies is another example of how restrictive measures expand over time to deny protection to larger and larger categories of asylum seekers. It initially manifested as the 'first country of asylum' principle, which allowed states to deny applicants who have already been granted protection in another country. Austria was the first to introduce such a policy in 1968, and it has since spread to at least 75 other countries (Rausis 2022). 'Safe third country' policies go further, excluding applicant who have some form of connection to third country where they may have been able to seek protection. Switzerland was the first adopter in 1979, and it is now used in approximately 70 countries. Another technique, the designation of 'safe country of origin', allows the rejection of an asylum application where the applicant originates from a country which is deemed to be safe. This policy emerged in 1990 and has since been adopted in more than 35 countries. The spread of these policies had not been restricted to the global north; it now operates in many countries across South America, Africa, the Middle East and Asia (Rausis 2022).

As these policies have spread their scope has expanded to exclude a broader set of asylum seekers. First, the standard of what constitutes a 'safety' has been significantly watered down. Earlier incarnations of the policy required that safe third countries be signatories to the Refugee Convention and have in place effective domestic legal frameworks for refugee protection. More recently, states are being deemed safe on the basis that they provide informal or de facto protection. The degree of connection required between the asylum seeker and the third country has also been significantly reduced over time. While at first a person needed to already have been granted protection in the third country, this was expanded to include situations where a person had a substantial connection to and right to enter or reside in a third country. This was subsequently further watered down to capture situations where a person had a weak or coincidental connection (Rausis 2022). An example of the latter is found in the now suspended and terminated 'Asylum Cooperation Agreements' (ACAs) that the United States signed bilaterally with El Salvador, Guatemala, and Honduras, which had merely required that asylum seekers pass through a third country to create an obligation that they first seek asylum there. The latest 'invention' in this growing catalogue of instruments of evasion has seen some states completely drop the need for any connection between the asylum seeker and the country to which they are removed, using a practice that has been labelled the 'safe fourth country' principle (Bar-

[17] See, for example, the Presidential Decree No 1182 in Ecuador which sought to introduce strict time limits for lodging asylum claims and appeals, which was struck down by the Ecuadorian Constitutional Court in 2014: Meili 2017, p. 365.

Tuvia 2018). These are closely related to the offshore processing policies discussed further below.

States have also eroded the status that is afforded to those found to be in need of protection. Traditionally, states have granted those found to be in need of protection permanent visas. Recent years, however, have seen states such as Australia, Denmark, and more recently, the United Kingdom shift to awarding certain refugees temporary protection only. While temporary protection has historically been used as an exceptional measure by many states in the event of mass influx situations, some states are now using it as the default as a tool of deterrence.

(b)(2) Pre-Arrival Controls

Pre-arrival controls involve various techniques of regulating the movement of people *before* they reach the destination country. This concept, enthusiastically embraced by governments worldwide, entails screening people 'at the source' or origin of their journey, and then again at every possible checkpoint along the way (Shachar 2020). Passports and visa controls offered early, and still prevalent, building blocks in states effort to reach beyond their territorial borders in an to attempt to regulate who may enter their countries (Torpey 2000; Zolberg 1997). Carrier sanctions are another such strategy. Asylum seekers and others without proper documentation are prevented from boarding ships or planes through carrier sanctions. These are steep financial penalties imposed on carriers that transport those who do not have authorisation to enter the country. These penalties effectively outsource border control to private actors and are applied nowadays as a matter of course by almost all countries operating a visa regime. EU regulations mandate that member countries impose carrier sanctions and prescribe minimum and maximum penalties to be applied.[18] Carrier sanctions are by no means new. It can be argued that they trace their origins to the landing tax and tonnage restrictions used in the mid-19th century (a topic to which we return in the final section of the discussion) which were also enforced by way of penalties against the owner and/or master of the ship. Such carrier sanctions are no longer limited to sea-bound travellers. Airborne carrier sanctions were introduced in the 1980s and are now implemented throughout the world. Their widespread diffusion has been documented in the 'determinants of international migration' (DeMig) database, which also documents how these policies have become increasingly restrictive over time (DeMig 2015)

Another trend is the diffusion and increasing 'normalisation' of maritime interdiction and push-back policies. These involve intercepting boats at sea, and returning passengers to their point of departure. These policies have attracted litigation, as we explain below, and are sometimes justified with claims that *non-refoulement* obligations do not operate extraterritorially.[19] In the alternative, push-backs are sometime accompanied by cursory screening for protection claims. These pay lip service to international obligations, while in practice screening out almost all asylum seekers. An analysis of the data in relation to ship-board processing carried out by the United States and Australia demonstrates that less than 1% of asylum seekers subject to the policy have been 'screened in' and given the opportunity to put forward an asylum claim.[20]

In 1981, the United States has developed one of most influential instruments of evasion that has since travelled the globe: maritime interdiction strategies to stop and turn back migrants before they reach territorial waters. As Bernard Ryan patently put it, such action is taken to 'prevent sea-borne migrants from reaching their intended destination.' (Ryan 2010, 22). In the post-1951

[18] Directive 2001/51/EC supplementing Article 26 of the Convention implementing the Schengen Agreement.
[19] For critical analysis of such claims, see Ghezelbash 2018, p. 144-6.
[20] See Dastyari and Ghezelbash 2020, 24.

Refugee Convention era, the United States was the first country among wealthy rule of law societies to adopt such maritime interdiction and push back policies. From the 1980s onward, the US Coast Guard began interdicting asylum seeker vessels (at the time, escaping from Haiti), and continues to carry out maritime interdiction and push-back activities in the Caribbean to this day. This 'direct return' policy was challenged before the U.S. Supreme Court in *Sale v. Haitian Centers Council*.[21] In its ruling, the Court concluded it could offer no legal remedy to the refugees who were interdicted on the high seas. The U.S. Supreme Court in *Sale* has since operated as a 'regressive precedent' (Shachar 2022, 973-974). Just as progressive ideas about human rights can travel across border, so too can restrictive policies and regressive precedents. Once a reputable legislature or court adopts a restrictive policy or regressive precedent, other jurisdictions may take guidance by treating the regressive precedent as a persuasive authority, especially if the respective court holds prestige and thus grants legitimacy to measures that are otherwise legally and morally contentious. As commentators have noted, '[w]hat made *Sale* particularly damaging was not only the judgement per se, but the fact that it came from the United States, the erstwhile leader of the modern refugee regime' (Frelick, 2014). Australia is a case in point. It followed suit in 2001, briefly suspending the policy in 2007, before resuming again in 2013. In both countries, the exact nature of operations has evolved over the years. At times, intercepted asylum seekers have been subject to cursory screening for protection claims, while at other times they have been summarily returned. While once seen as outliers, other states have since followed the US and Australia in engaging in push backs. This includes Italy's push-backs to Libya in 2008 and 2009,[22] and more recently the push-backs carried out by Greece in the Eastern Mediterranean (Keady-Tabbal and Mann 2020). The United Kingdom is also now considering intercepting and returning boats in the English Channel.

Offshore processing is another way that states have sought to block asylum seekers from accessing their territory. The policy involves transferring asylum seekers to a third country or external territory to have their claims for protection assessed. The approach allows states to pay lip service to their obligations under international law – by providing an opportunity for asylum seekers to have their claims processed but ensures that this occurs *beyond* the states borders and free from the constraints of domestic legal safeguards. Again, the United States was the first to adopt such a policy, using the US-controlled territory of Guantanamo Bay as an offshore processing site since 1991 (Dastyari 2015). Although better known in recent times as an exceptional space created to exclude enemy combatants from the standard protections of the US justice system, Guantanamo was used first as a holding and processing centre to bar interdicted asylum seekers from accessing these same legal protections. The US policy provided the blueprint for Australia's offshore processing policies used between 2001-2007. As Ghezelbash has documented, senior US policy makers were directly involved in providing high level briefings that informed the design of Australia's approach (Ghezelbash 2018). Without an external territory analogous to Guantanamo Bay, the Australian government entered into bilateral agreements with Papua New Guinea and the tiny Pacific Island state of Nauru to host the processing centres. Under these early incarnations of the policy in the United States and Australia, those countries maintained full responsibility for processing asylum claims and resettling those found to be in need of protection.

[21] Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993). For a differing interpretation, see Hirsi Jamaa and Others v. Italy, App. No.27765/09, 2012 Eur. Ct. H.R. 198–200

[22] The ECtHR found that these operations violated the ECHR in *Hirsi Jamaa v Italy* [GC] App No 27765/09 (ECtHR, 23 February 2012).

More recently, as the policy diffused further, it has evolved with states seeking to wash their hands of any obligations towards asylum seekers they transfer offshore. Australia adopted such an approach in 2013, when it concluded new memorandums of understanding with Nauru and Papua New Guinea, which shifted the responsibility for processing and settling asylum seekers to those countries. This approach, now referred to as the 'Australian model,' has eventually circulated back to the United States when it entered the controversial ACAs with Guatemala, Honduras and El Salvador in 2019.

The United Kingdom, too, is currently attempting to offshore their responsibilities in this manner. The newly passed Nationality and Borders Act includes provisions that allow for the removal of individuals to a safe country while their asylum claim is pending. In April 2022, the UK announced that it had concluded a deal with Rwanda for certain asylum seekers to be transferred there. Like Australia's arrangements with Nauru and Papua New Guinea, Rwanda has accepted responsibility for processing asylum claims and proving ongoing protection. The Australian model not only offered a conceptual framework for these developments, but Australian officials also appear to have played an influential role in influencing the UK's decision to emulate Australia's approach. These diffusion actors included Australia's former foreign minister, Alexander Downer, who was earlier involved in establishing Australia's offshore processing policy and was later appointed to lead the review of the UK's Border Force in February 2022. He had been very vocal in the media on the need for the UK to follow Australia's approach, and the Policy Exchange think tank, which he chairs, published a report in that same month recommending the introduction of both boat push-backs and offshore processing in the UK (Policy Exchange, 2022).[23] Australian political strategist, Lynton Crosby also appears to have been a key player in facilitating the diffusion of offshore processing to the UK. As the Federal Director of the Liberal Party of Australia, Crosby played a central role in implementing Australia's offshore processing policy in 2001. As a trusted advisor to Prime Minister Boris Johnson, he appears to have actively advocated for the UK to follow a similar path (O'Grady 2022).

At the time of writing, the UK's plans to send asylum seekers to Rwanda are on hold due to pending legal challenges in the European Court of Human Rights. Nonetheless, the UK's attempt to follow the lead of Australia and the United States in pursuing offshore processing is concerning. If the UK succeeds in implementing the policy, there is a real risk that this will give the green light for other states, particularly in Europe, to follow suit. Denmark has been actively considering similar arrangements for a number of years. It passed enabling legislation in 2018, and has also been engaging in negotiations with Rwanda as a potential partner. Austria has also recently signalled its desire to pursue offshore processing arrangements. The risk is that we will see a domino effect, with more and more states following the so called Australian model.

This is a concerning development given the well documented dark side of Australia's offshore processing policies (Gleeson and Yacoub 2021). They have inflicted devastating physical and psychological damage on asylum seekers, and created endemic social problems in the communities of Nauru and Manus Island which have hosted Australia's offshore camps. At the same time, the policy has been exorbitantly expensive, with estimates placing the cost at more than AUD$1 billion a year, raising serious questions about the long-term sustainability of Australia's approach. Australia's offshore processing policy has repeatedly been condemned by

[23] Although it is important to note that the report suggested using overseas UK territories rather than third countries as offshore processing sites.

various UN bodies as violating international law. As more countries follow its lead, this will greatly undermine international refugee protection.

When wealthy states transfer responsibility for refugee protection to less developed and less stable states with far fewer resources, this undermines the principle of responsibility sharing which is a fundamental pillar of the international refugee protection regime. Such practices have been described as 'responsibility dumping' in contrast with the vision of responsibility sharing (Linos and Chachko 2022). If states with the most resources do not offer access to asylum in their territory, it is difficult to expect those with fewer resources to do so. The result is that more and more states are blocking asylum seekers from accessing their territory. Wealthy liberal democracies, which in earlier periods were willing to invest the resources and political capital required to uphold the international refugee protection regime, have changed course since the 1980s. These countries are increasingly relying on sophisticated shifting borders and rights restricting policies, just as they actively learn from one another as they seek new or 'perfected' strategies to make the arrival of 'spontaneous' refugees close to impossible. The various pre-arrival and post arrival strategies we have just described do much of the work of keeping out refugees, more so than the more visible and more often discussed border walls (FitzGerald 2019). The overall result is that, in contrast with the spirit and commitment formed in international refugee law and human rights more generally, we are witnessing a 'race to the bottom' in terms of protections offered to those in immediate danger. They are blocked prior to arrival and their mobility is obstructed, creating a situation whereby those with the most acute need of protection may no longer be able to cross borders to access safety.

The danger is that the diffusion patterns that 'transfer' restrictive measures across jurisdictional lines may lead to almost complete exclusion, as global north countries close the door to 'unwanted' migrants, including refugees and others in desperate need for international protection As more jurisdictions adopt measures like maritime interdiction, push-backs and safe third- and fourth-country policies, which act to block access of asylum seekers to their territories, the pressure mounts on other jurisdictions to do the same. With the surge in North-South 'outsourcing' deals, the number and range of nations participating in this 'race to the bottom' increases. If this trend continues, the brunt of responsibility will fall on countries that are already overburdened with refugees or ill-equipped to offer procedural or substantive protections to asylum seekers while at the same time allowing richer countries to remove themselves from the outcomes of these harmful polices. Various non-governmental and civil society actors operating at the national, subnational, and supranational levels have galvanized to express their objections to such policies and to work to counter these trends.

These 'counter-forces' are also engaged in processes of advocacy across borders. Human rights experts from Australia (including one of the authors of this contribution) have, for example, testified against the offshoring measures now encoded in the new UK Nationality and Borders Act 2022. There is also current litigation before the ECtHR that seeks to establish 'proxy' jurisdiction and as a result, accountability and responsibility, in cases of 'pull-backs' whereby, as in the pending case of *S.S. and Others v. Italy*, the issue at stake is the responsibility of Italy for its assistance to the Libyan coast guard in intercepting and returning migrant to Libya. The case has attracted several influential third-party interveners, including Amnesty International, Human Rights Watch, the International Committee of Jurists, and the European Council on Refugees and Exiles. While the ECtHR has in the past offered an alternative to *Sale*, most prominently in the *Hirsi Jamaa and Others v. Italy* decision, recent years have seen a more restrictive line of jurisprudence emerge from Strasbourg. The concern is if Europe goes down the

path of the 'Australian model', the implications may be devesting for the institution of asylum and those whose basic safety and dignity it is designed to uphold.

(c) Historical Antecedents: Race-based Exclusion Laws

Shifting our gaze to an earlier period, it becomes clear that states have been monitoring and emulating border control policies for as long as they have been trying to exclude certain migrants from their territories. One of the first examples of this phenomenon was the diffusion of race-based immigration control measures across the United States and the British Empire's Anglophone dominions of Canada, Australia, New Zealand and South Africa in the late nineteenth and early twentieth century. While these laws predated the Refugee Convention and other human rights treaties, lawmakers did face other constraints, including formal bilateral trade treaties and informal diplomatic considerations limiting the ability of governments to enact overtly discriminatory immigration laws (Ghezelbash 2017). When an innovation was found that achieved the policy goal of restricting the immigration of certain races, while ostensibly couched in non-discriminatory terms, it very quickly spread across other jurisdictions.

The first suit of laws that were adopted specifically targeted Chinese immigration. Two policies diffused during this period – landing taxes on arrivals and passenger per ship restrictions, which limited the number of newcomers from China that ships could carry based on a proportion of the vessel's tonnage. This later restriction was ostensibly justified on health and safety grounds, expanding a pre-existing non-discriminatory safety measure to a tool for excluding Chinese migrants. By 1885, all the Australian colonies, New Zealand and Canada were using a combination of both the landing tax and tonnage restriction. Individual US states had also adopted landing taxes, however an attempt by the Federal government to introduce tonnage restrictions was vetoed by President Rutherford Hayes, as it was seen as violating the Burlingame Treaty that the United States had signed with China in 1868 which created an express right for freedom of movement between the two countries.

The progressive increase in the landing tax and tonnage restriction demonstrates the competitive dynamics at play across these jurisdictions. As each jurisdiction tightened restrictions, others immediately adjusted their policies to match or outdo those restrictions. Between 1855 and 1888 the landing tax across the Australian and New Zealand colonies increased from £10 per Chinese arrival to as high as £100 (Ghezelbash 2017, p. 241). Similarly, tonnage restrictions were initially set at 1/10, were increased to as high as 1/500 in the Australian colonies by 1888 (Ghezelbash 2017, p. 241). This dramatic increase was in part fuelled by the US government's decision to abrogate the Burlingame Treaty in 1882 and the passage of the Chinese Exclusion Act which effectively barred Chinese immigration to the United States. Prohibited by Britain from implementing a similar blanket exclusion, the Anglophone dimensions instead tightened the tonnage restriction to effectively achieve the same goal.

Around the turn of the 20th century, race-based restrictions began being expanded to cover a variety of other 'non-white' immigrants. One of the key tools that diffused during this period was the literacy or dictation test. While varying in content and form, these tests generally required an immigrant to be able to fill out a form, or read or write a passage in a prescribed language in order to gain entry. The benefit of this approach was that states could ostensibly claim they were not targeting or overtly discriminating against certain nationalities, but the flexibility of the test and the way it was administered allowed them to do exactly that. The origins of the literacy test can be traced to its use as a tool to disenfranchise black voters in the southern American states (Lake and Reynolds 2008). Prohibited by the 14th and 15th Amendments to the US Constitution from disenfranchising voters on the basis of race, these states turned to the use of literacy tests as

an ostensibly non-discriminatory tool to achieve this goal.[24] The utility of the literacy test as a tool for racially-based immigration exclusion under the guise of facially-neutral measures was immediately recognised by immigration restrictionists in the United States. In 1896, an immigration bill containing a literacy test passed both the House and the Senate, but was ultimately vetoed by President Grover Cleveland. The proposal, however, came to the notice of (at the time) self-governing British colonial territory of Natal in South Africa, which became the first government to use the literary test as tool for race-based immigration exclusion in 1897. The Colonial Office, seeing the value of the flexible literacy requirements for immigration that made no explicit mention of race or colour, began promoting the 'Natal Formula' as a model for other British colonies. The policy soon spread throughout the Australian and South African colonies, New Zealand, and later adopted through legislation in the United States in 1917 and Canada in 1919. These took a variety of forms and varied in their stringency. For example, while the United States and Canada simply required entrants to be literate in any language, the Australian test required a person to write out a dictation in any 'European language' (and later 'any prescribed language') chosen by an officer.

Recent years have seen a resurgence of the use of language testing as a tool of immigration exclusion, particularly in the context of linguistic and integration tests for family-based migration. Saskia Bonjour has documented the diffusion of such policies across European states (2014). First adopted by the Netherlands in 2015, Austria, Denmark, France Germany and the UK shortly followed suit. Justified in the name of promoting integration, these policies have clear racialized (and gendered) as well as national origin undertones, although obviously not explicit as in the past.

Conclusion

We have traced in this chapter the diffusion of immigration policies that have both facilitated and restricted access to well off countries. Traditionally sought of as the bastion of sovereignty and plenary power, immigration law is a particularly fruitful arena in which to examine how and why 'ideas travel' across jurisdictional lines, countering the prevent assumption that it is primarily a domestic, rather than nested and interconnected, policy arena whereby decisions taken by countries impact their counterparts.

The existing literature on immigration law and policymaking has primarily been focused on global north countries. The diffusion of more restrictive laws to the global south, on the one hand, and the adoption on competitive skills-based migration pathways by emerging economic powerhouses such as China, on the other, may indicate that the tide is finally turning. In today's world, it is impossible to engage in comparative immigration law and policy (whether as a scholar or practitioner) without considering the global scope of the studied phenomenon in a world where ideas, like people, are constantly crossing borders.

[24] The first state to adopt such an approach was Mississippi in 1891, followed by South Carolina in 1898, North Carolina in 1999, Alabama in 1901, Virginia in 1901 and Georgia in 1908 (Lake and Reynolds, p 62).

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