Constitutional transfer: The IKEA theory revisited

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Text books and articles on comparative constitutional law, regardless of their focus or methodological orientation, suggest that constitutions all over the world, at least most of them, come in the form of a single written document that deals with rights and principles, values and duties, organizational provisions, and one or the other type of judicial review. One might infer that most constitutional items that are part and parcel of the theoretical study and practices of constitution making have been standardized; they appear to circulate like marketable goods among the participants of the transnational disciplinary discourse and framers—the constitutional elites, experts, and consultants. One may assume, therefore, that constitutions, though always entangled in a specific local context and informed by its particular political and socioeconomic power constellations and historical traditions, have undergone a process of "globalization." In this article I want to discuss how such globalization of mindsets and texts comes about. Therefore, I reintroduce the IKEA theory so as to reconstruct how constitutional ideas and norms, institutions and arguments, are transferred from local contexts to what I call the "global constitution" and from there to a host environment. The concept of constitutional transfer requires a brief discussion of the (im)possibility of legal "transplants" and of the risks and side-effects of such transfer.

1. Global constitution and global constitutionalism

Whoever travels from one constitutional regime to another will return with impressions that are generally sustained by the prevailing views in the field of comparative

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constitutionalism.[1] Constitutions across national boundaries, language barriers, epistemic communities, political constellations, and cultural contexts appear to share the same vocabulary, follow similar institutional paths, contain comparable elements, and share a basic design. Read ten constitutions and you know them all, at least you know the most common varieties of constitutional construction. Such will be the implicit message of the hasty traveler: globalization has streamlined the practices and results of the framing, amending, and, albeit to a lesser degree, interpreting of constitutions.

Whoever observes the protests of social movements, NGOs, and solitary activists against G8 conferences or the politics of transnational institutions, such as the World Bank, the International Monetary Fund, or the World Trade Organization, will invariably register appeals to human rights. The language of rights, though not necessarily the accent—to dignity, physical integrity, free speech, the prohibition of torture, or decent living conditions—quite obviously transgresses national boundaries and refers to a global vocabulary and grammar. Comparable to the lingua franca of human rights, protesters against climate change, wars, or the overindebtedness of Third World countries invoke a similar globally shared vocabulary and grammar when appealing to values—such as solidarity, peace, or justice—and the corresponding legal duties. By the same token, in the realm of theory and doctrine, the participants in political-legal discourses call for transnational legal solutions when dealing with the rules of warfare, the appropriation and exploitation of natural resources, the protection of the common heritage of mankind, the unequal trade relations between metropolitan and peripheral countries, the dangers of organized crime and international terrorism, or the scandal of child labor.[2] Accordingly, they either descriptively diagnose the

[1] *E.g.*, Walter F. Murphy & Joseph Tanenhaus *Comparative Constitutional Law* (MacMillan Publ.: New York 1977); Vicky C. Jackson & Mark Tushnet *Comparative Constitutional Law* 2nd ed. (Foundation Press: New York 2006); Norman Dorsen et al., *Comparative Constitutionalism: Cases and Materials* (West Group: St Paul 2003); Mark Tushnet ed., *Comparative Constitutional Federalism, Europe and America* (Greenwood: Westport 1990); James O'Reilly ed., *Human Rights and Constitutional Law* (Round Hall: Dublin 1992); Douglas Greenberg et al., *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford Univ. Pr: Oxford UK 1993).

[2] David Held et al., *Global Transformations* (Polity Press: Cambridge UK 1999), ch. 1. For a systems-theoretical perspective of a "global constitution" as a constitution of a world state or a global-governance regime, see Andreas Fischer-Lescano, *Globalverfassung. Die Geltungsbegründung der Menschenrechte* (Velbrück: Weilerswist 2005). From a related systems-theoretical perspective, other authors have observed a plurality of civil constitutions encompassing global network structures; see Gunther Teubner, Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, 1 (2003); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts* (Suhrkamp: Frankfurt am Main 2006). A discourse-theoretical account of a politically constituted world society without a world government is presented by Jürgen Habermas, Eine pluralistische Verfassung für die Weltgesellschaft? 3 *Kritische Justiz* (2005), 222; and Hauke Brunkhorst, Die Legitimationskrise der Weltgesellschaft—Global Rule of Law, Global Constitutionalism und Weltstaatlichkeit, in Mathias Albert & Rudolf Stichweh eds., *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung* (Verlag für Sozialwissenschaften: Wiesbaden 2007), 63.

existence or prescriptively call for the establishment of a global, universal, or cosmopolitan constitutional regime.[3]

In this article I intend to keep aloof from these theoretical debates, if only for the time being. The "global constitution" is neither introduced here by analogy with a national constitution writ large as an "emerging universal" constitutional system, nor do I diagnose the existence or advocate the desirability of a novel type of trans-, inter-, or supranational constitution as the result of some adaptation of national constitutions to global requirements.[4] Rather than joining the recent competition between grand narratives, I start from the more modest claim of the "IKEA theory"[5] of constitutional (and legal) transfer. According to its central tenet, the global constitution is created by or rather emanates from processes of transfer and functions as a reservoir or, for that matter, a supermarket, where standardized constitutional items—grand designs as well as elementary particles of information—are stored and available, *prêt-à-porter*, for purchase and reassemblage by constitution makers around the world.

2. The Watson/Legrand Controversy

For quite some time, mainstream comparatists have comfortably pursued a unitary project by confirming their belief in a cross-culturally coherent body of (constitutional) law, downplaying differences, proceeding with an eye toward convergence, claiming that there is a significant degree of congruence between social problems and their legal solutions,[6] and arguing that the areas of agreement and overlap clearly

[3] *See* Jeff Dunoff & Joel Trachtman eds., *Ruling the World? Constitutionalism, International Law and Global Government* (Cambridge Univ. Pr: Cambridge 2009); P. Philipp Allott, The Emerging Universal Legal System in Janne Nijman & André Nollkaemper eds., *New Perspectives on the Divide Between National and International Law* (Oxford Univ. Press: Oxford 2007) 63; David Held, *Democracy and the Global Order* (Polity Press: Cambridge UK 1995); Daniele Archiburgo, *The Global Commonwealth of Citizens. Toward Cosmopolitan Democracy* (Princeton Univ. Press: Princeton NJ 2008).

[4] Anne Peters describes the various processes of adaptation in her impressive article on "The Globalization of State Constitutions," in Nijman/Nollkaemper, *supra* note 4, 251. I will return to her globalization scenario later with my "odd details" analysis. At this point, it may suffice to state that globalization is likely to increase both the convergence and divergence or difference of national constitutional regimes. See Horatia Muir Watts, Globalization and Comparative Law, in Mathias Reimann & Reinhard Zimmermann *The Oxford Handbook of Comparative Law* (Oxford Univ. Pr: Oxford 2006), 579, 586–588; Jonathan Friedman, Being in the World: Globalisation and Localisation , 7 *Theory Culture & Society* (1990), 311 and Gunther Teubner, Rechtsirritationen: Zur Koevolution von Rechtsnormen und Produktionsregimes in Günter Dux & Frank Welz (eds.) *Moral und Recht im Diskurs der Moderne: Zur Legitimation gesellschaftlicher Ordnung* (Leske & Budrich: Opladen 2001), 351.

[5] I first introduced the idea of the IKEA theory with regard to postsocialist constitution making in Central and East European countries, in Günter Frankenberg *Autorität und Integration. Zur Grammatik von Recht und Verfassung* (Suhrkamp: Frankfurt am Main 2003), 124–132.

[6] *E.g.*, Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (Tony Weir trans., Oxford Univ. Press 3rd ed. 1998).

outweigh significant contextual and functional varieties.[7] Given this project, it does not come as a surprise that comparatists have only recently addressed the question of why and how constitutions, though genealogically, ideologically, and, in practice, more often than not linked to particular nation-states, have come to share universal or global features.

The IKEA theory, far from solving this puzzle, is meant, first, to set into relief, albeit with a grain of irony and metaphorically, the availability of a supranational reservoir of constitutional information and parts; and second, to direct the analysis toward an answer to the question why and how constitution makers are influenced by, borrow from, and, in turn, modify the elements of the global constitution. The third and more difficult step leads to the transfer of law—a process, activity, and problem—for which the discourse on comparative law has generated a variety of terms: "legal transplants," "reception," "borrowing," "adaptation," "mutation," "influence," "evolution," and, more recently, "migration."[8] These terms, I believe, are not "only words" but signifiers of rather different theoretical approaches and interpretations, at times deployed casually, at others defended with religious zeal.

In the beginning there was a fundamental controversy, a collision of two antagonistic disciplinary projects: legal history versus legal philosophy; and a clash of epistemic cultures: modern versus postmodern. Its appeal depended to no little degree on the protagonists' initial polemics, misunderstandings, and misrepresentations. Ignited by Pierre Legrand's critique of Alan Watson's "legal transplants,"[9] the controversy has been carried on in the discourse on comparative constitutional law ever since.[10]

After setting up comparative law as an "independent academic discipline" based on the investigation of the relationship between legal systems, and elaborating on the perils and virtues of a comparative approach, Watson introduces "the strangest paradox" of (private) law. From a mainly historical perspective, complemented by civil law jurisprudence, he confronts the notion of law as an emanation of both "the spirit of the people" informed by historical experience and legal transplants.[11] He goes

[7] From the impressive body of literature, see only Norman Dorsen et al. eds., *Comparative Constitutionalism: Cases and Materials* (West Group: St. Paul, Minn. 2003); Mathias Reimann, The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century, 50 *Am. J. Comp. L.* 671, 690 (2002); Bruce Ackerman, The Rise of World Constitutionalism, 83 *Virginia L. Rev.* 771 (1997). For a critical perspective see Ruti Teitel, Comparative Constitutional Law in a Global Age, 117 *Harv. L. Rev.* 2570 (2004).

[8] Sujit Choudhry ed., *The Migration of Constitutional Ideas* (Cambr. Univ. Press: Cambridge 2006).

[9] Alan Watson, *Legal Transplants. An Approach to Comparative Law* (Scottish Academic Press: Edinburgh 1974) [hereinafter: *Legal Transplants*]; Pierre Legrand, The Impossibility of 'Legal Transplants', 4 *Maastricht Journal of European and Comparative Law* 111 (1997); Alan Watson, Legal Transplants and European Private Law—Ius Commune Lectures on European Private Law, vol 4.4 *Electronic J. of Comp. Law* December 2000—http://www.ejcl.org/ejcl/44/44-2.html.

[10] *E.g.*, Michele Graziadei Comparative Law as the Study of Transplants and Receptions in Mathias Reimann & Reinhard Zimmermann eds., *The Oxford Handbook of Comparative Law* (Oxford Univ. Pr: Oxford 2006), p.441 ff.; Sujit Choudhry ed., *The Migration of Constitutional Ideas*; and recently Morton Horwitz, Constitutional Transplants, *Theoretical Inquiries in Law*, vol. 10 (2009)— http:/www.bepress.com/cgi/viewcontent.cgi?article9.

[11] Watson, *Legal Transplants*, 1.

on to identify numerous examples of transplants in the areas of contract, torts, and property, travelling from the Ancient Near East to Greece and Rome and from there to Scotland, England, Holland, and other countries. Borrowing plus adaptation, we learn, has been the formula for "the usual way of legal development."[12] By way of illustration, Watson compares several provisions from the Laws of Eshnunna and the Babylonian Code of Hammurabi with Exodus concerning the goring of persons or animals by an ox and deduces from the similarities in style and substance that the provisions "probably . . . share an ultimate common source." From rules dealing with matrimonial property that travelled from the Visigoths via Spain to California he infers that "legal transplants are already to be found in remote antiquity and were probably not uncommon."[13] Watson also bases his transplant theory on less exotic phenomena and instances such as the selective or sweeping reception of Roman Law, Justinian's *Corpus Juris Civilis,* its basic rules, systematic structure, and scientific elaboration in the legal regimes of several European host countries, as well as on the (Puritan) treatment—with significant variations—of the Bible as a source of law.

In the closing chapters of his book Watson offers a list of general reflections on legal transplants that he combines with a few cautionary considerations. On the one hand, he argues that "the transplanting of individual rules or of a large part of a legal system is extremely common" and "socially easy." From this he infers that it is, "in fact, the most fertile source of development" and accounts for the "astounding degree" to which "law is rooted in the past."[14] On the other hand, he introduces authority in law as an important variable intervening in any transplanting process,[15] and, in the end, he finds "the mixture" more fascinating than the very act of borrowing.

Against the fairly sweeping message of Watson's transplant thesis, Pierre Legrand launches an equally sweeping attack. Reformulating Montesquieu's skepticism concerning the simple transfer of legal institutions, Legrand submits Watson's formalism and comparative functionalism to a biting critique. He challenges what may be characterized as legal solipsism; namely, "the nomadic character of rules"[16] and then deconstructs the double equation of "law-as-rule" and "rules-as-propositional-statements" by differentiating between the a-contextual meaning emerging from the wording of a rule and the context-dependent meanings ascribed to a rule in the process of application by the interpretive community. Quite persuasively, he argues that this latter process constitutes the ruleness of a rule—or, we might add, the meaning of a right, principle, or even preamble—and does not survive the displacement from one legal regime to another.[17] The original meaning gets lost in translation, or rather: repetition.[18] Legrand overstates his point, somewhat, by concluding: "[W]hat can be

[12] Ibid., at 7.
[13] Ibid., at 24.
[14] Ibid. at 95.
[15] Ibid. at 96 and passim.
[16] Legrand, The Impossibility of 'Legal Transplants', passim.
[17] Ibid. at 117–120.
[18] *See* Eva Hoffman *Lost in Translation* (Minerva: London 1991).

displaced from one jurisdiction to another is, literally, a *meaningless* form of words. To claim more is to claim too much. In any *meaning-ful* sense of the term, 'legal transplants,' therefore, cannot happen."[19]

As a consequence of his questionable assumption that the meanings of rules are solely determined by local context, he proposes to move away from *l'énoncé* to *l'énonciation.* This is to say, he demonstrates how repetition is conditioned by a particular epistemological framework, by epistemic conventions and a specific *mentalité,* and how repetition, due to the historical-cultural context and power struggles, always involves the repression[20] of alternatives.

In his reply to these charges, Watson does not really rise to the occasion. First, he simplifies Legrand's point by implicitly restating his view of law as rule: "Where a written statutory law is the same within two countries, its judicial interpretation may well differ because of tradition and ways of legal thinking."[21] Consequently, he concedes the truth of the trivialized version of the transplant critique that "a transplanted rule is not the same thing as it was in its previous home."[22] Second, rather than addressing his opponent's proposal to move from bare text to context, from similarity to difference, and to leave off mechanical analogies, synthetic visions, and unitary thinking in comparative legal studies,[23] he claims to find no substance in the transplant critique. Watson, in a somewhat surprisingly defensive move, points toward a "sub-text," charging that Legrand is opposed to the notion of a common civil code for the European Union. Although this may be quite true,[24] Watson overlooks that it is not the EU but the theory and method of comparative law which is at issue here.

Regardless of what Watson and Legrand may have intended and still may intend with their comparative projects, they certainly did and still do polarize the field of comparative legal studies. And Legrand deserves credit for criticizing "the positivism of the factual"[25] by highlighting that the transfer of law cannot be taken merely as a factual given but implies considerable problems with which the theory and method of legal comparison must deal.

[19] Legrand, The Impossibility of 'Legal Transplants', 120

[20] Concerning the connection between repression and repetition, Legrand refers to Gilles Deleuze, *Différence et répétition* (Presses Universitaires de France: Paris 1968), 139.

[21] Watson, *Legal Transplants and European Private Law*, 2.

[22] Ibid., and Alan Watson, *Law Out of Context* (Univ. of Georgia Press: Athens GA 2000), 1.

[23] Legrand, The Impossibility of 'Legal Transplants', 122–124; see also Günter Frankenberg, Critical Comparisons: Rethinking Comparative Law, 26 *Harv. Int'l Law Journal*, 411, 453 (1985).

[24] Pierre Legrand, Against a European Civil Code, 60 *Modern Law Review* 44 (1997), and, for a critique of the Common Core of European Private Law project, Günter Frankenberg, How to Do Projects With Comparative Law: Notes From an Expedition to the Common Core, in Mauro Bussani & Ugo Mattei eds., *Opening Up European Law* (Stämpfli Publishers: Berne 2007), 17.

[25] I am indebted to Kelly L. Grotke for directing me toward Husserl's critique of the positivist "superstition of the fact" (*Aberglaube der Tatsache*); *see* Edmund Husserl, *Philosophie als strenge Wissenschaft* [1911] (Klostermann: Frankfurt 1981).

Watson tends to receive support for his transplant thesis from the functionalist camp,[26] from authors defending the unity of law and the convergence of legal regimes, and from the champions of "the factual approach."[27] Somewhat surprisingly, Gunther Teubner, the most important protagonist of systems theory within the citadel of law, always arguing for functional differentiation, the fragmentation of legal discourses, and legal pluralism, also came to Watson's defense[28] with his opposition to Legrand's culturalism, contextualism, and the implication of a totalizing perspective on law. Contrary to Watson, however, Teubner stresses that transplants or, rather, "irritants" do not infiltrate a legal system as compact units but set in motion a long and turbulent series of reactions that both reshape the host legal system and the transferred law.[29] So, in the end, he appears to be not all that hostile toward a contextual approach.

Generally speaking, Legrand found more support for his contextualism and antiformalism, at least when stripped of the impossible transferability thesis.[30] He may claim to have contributed greatly to the deconstruction of the organicist transplant metaphor as well as a richer phenomenology of legal transfers. His opposition to the legal-transplant thesis withstands the observation of "numerous successful institutional transfers"[31]—that "legal transfers are possible, are taking place, have taken place and will take place"[32]—since the term "transfer" avoids the naturalist fallacy and, therefore, can hardly be misunderstood as a synonym for "transplant."

Card-carrying members of the contextualist movement and other comparatists, quite frankly or if pressed, do not deny that laws and constitutions, institutions and ideas, may move from one context to another.[33] Therefore, some authors have recently suggested that "migration" might be a more apt term—more apt than transplant, that

[26] For the functionalist method and the factual approach, *see* Zweigert & Kötz *An Introduction to Comparative Law*, 32, and Ralf Michaels's subtle reinterpretation of functionalism: The Functional Method of Comparative Law, in Reimann & Zimmermann eds., *The Oxford Handbook of Comparative Law*, 339.

[27] For the factual approach, *see* Rudolf Schlesinger ed., *Formation of Contracts—A Study of the Common Core of Legal Systems*, 2 vols. (Dobbs Ferry NY: Oceana 1968); Rodolfo Sacco Legal Formants: A Dynamic Approach 39 *Am J Comp L* (1991), 1 and 342, and the protagonists of the Common Core of European Civil Law project. For the basic texts and a critique, *see* Frankenberg, How to Do Projects with Comparative Law, 33–47.

[28] Teubner, Rechtsirritationen.

[29] Annelise Riles Comparative Law and Socio-Legal Studies, in Reimann & Zimmermann, *supra* note 25 at 796.

[30] *See* only William Ewald Legal History and Comparative Law 7 *Zeitschrift für Europäisches Privatrecht* (1999), 553; Gerhard Dannemann Similarities and Differences? in Reimann & Zimmermann, *The Oxford Handbook of Comparative Law*, 383 and 414. Michele Graziadei offers a highly differentiated view of "transplants" and prefers to refer to them as "transfer": Comparative Law as the Study of Transplants and Receptions, in Reimann & Zimmermann, *The Oxford Handbook of Comparative Law*, 441. *See also* David Nelken, Comparatists and Transferability, in Pierre Legrand & Roderick Munday eds., *Comparative Legal Studies: Traditions and Transitions* (Cambr. Univ. Press: Cambridge 2003), 437.

[31] Teubner, Rechtsirritationen.

[32] Nelken, Comparatists and Transferability, 442.

[33] *See* the contributions to Esin Örücü & David Nelken eds., *Comparative Law. A Handbook* (Hart Publ: Oxford/Portland 2007).

is[34]—and have praised it as "a helpfully ecumenical concept in the context of the interstate movement of constitutional ideas," equally amenable to "all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos."[35] One wonders, though, whether "transfer" does not qualify as an even more ecumenical concept. Both "migration" and "transfer" refer to movements, capture a wider variety of uses than, say, "transplant" or "borrowing," and qualify such movements as problematic rather than socially easy, as artificial rather than natural or organic. In contrast to "migration," the term "transfer" also keeps at a greater distance from spatial connotations and is more open to the varieties of conscious and unconscious movements, all reasons why I prefer to hold on to this term.

3. The IKEA theory of constitutional transfer

Proponents of both migration and transfer can easily accommodate the movement of constitutional items from one context to another to Edward Said's "travelling theory," which helps to paraphrase and illustrate the IKEA theory of legal and constitutional transfer. Said writes:

> Like people and schools of criticism, ideas and theories travel—from person to person, from situation to situation, from one period to another. Cultural and intellectual life are usually nourished and often sustained by this circulation of ideas, and whether it takes the form acknowledged or unconscious influence, creative borrowing, or wholesale appropriation, the movement of ideas and theories from one place to another is both a fact of life and a usefully enabling condition of intellectual activity.[36]

As regards the travels of theory Said distinguishes four stages[37] that may elucidate the problems of legal/constitutional transfer. In the following, I will modify his account along the lines of the IKEA theory as it seems helpful to identify the processes and practices of how constitutional ideas, norms, institutions, and opinions come to be transferred to and then contained in the global reservoir and from there to a new "host" environment.

(1) The first step of Said's account refers to "a point of origin." He prudently weakens the originalist assumption, though, by taking into consideration that the point of origin may only "seem like one" and by qualifying and deprivileging it as a "set of initial circumstances." Prudence is indeed apposite as constitutional history teaches us that points of origin are hard to pin down. The formula of "a government of laws

[34] Notably Sujit Choudhry ed., *The Migration of Constitutional Ideas* (Cambridge Univ. Press: Cambridge 2006).

[35] Neil Walker, The migration of constitutional ideas and the migration of *the* institutional idea: the case of the EU, in Choudhry, *The Migration of Constitutional Ideas*, 316, 320–321.

[36] Edward Said, *The World, the Text, and the Critic* (Vintage: New York NY 1983), 226.

[37] *Ibid.*, at 226227.

and not of men," for instance, ritually ascribed to the Constitution of Massachusetts (1780), appears to date from Aristotle's political philosophy. More darkness yet overshadows the origin of the concept of the German "Rechtsstaat" that is attributed to Immanuel Kant, Adam Müller, and the fairly unknown jurist Ludwig Harscher von Almendingen.[38] The originality of the Belgian Constitution (1831), which is considered one of the lead constitutions of the nineteenth century influencing the Greek, Italian, Prussian, and other constitutions, does not withstand closer textual scrutiny. Forty percent of its provisions can be traced to the Dutch Constitution (1815), 35 percent to the French Charte constitutionnelle (1814/1830), and 10 percent to the revolutionary French Constitution (1791) plus English constitutional law, leaving an "original" balance of roughly 15 percent.[39]

Furthermore, the conservative proponents of originalism in United States constitutional interpretation have—unwillingly—done their best to deconstruct the very notion of an original, "fixed and knowable meaning" of texts and intents.[40] Therefore, I propose to handle the "point of origin" with caution as it may be fictitious and always already preceded by some "before"—at least after the last three decades of the eighteenth century when modern constitutions came into existence and the constitutional state experienced its historical breakthrough. This is not to deny more recent constitutional innovations, such as the human right to asylum of the German Basic Law or the archetype of socialist program constitution.

(2) As a second step in the transfer process, any constitutional item has to be decontextualized, to wit, isolated from the circumstances of its production and prepared for transfer. It has to be shock-frozen and packaged, so to speak, for the transgressing of time, space, and context—for the "passage through the pressure of various contexts as the idea moves from an earlier point to another time and place where it will come into a new prominence."[41] Decontextualization amounts to more than a mere taking-out of a given context and subsequent displacement. The flash freezing and packaging is meant to highlight that constitutional transfers usually imply that the items to be transferred are, first, reified as marketable commodities, then formalized, that is, stripped of their contextual meanings, and, finally, idealized as meaning what they are meant to mean and functioning in the way they are meant to function. Reification, formalization, and idealization, I argue, are the necessary conditions of entry into the IKEA warehouse as a universally or globally accessible and applicable constitutional commodity.[42]

[38] Günter Frankenberg, Art. 20 Abs. 1-3 (Rechtsstaat) in *Alternativkommentar zum Grundgesetz*, 2nd ed. (Luchterhand: Neuwied 2001), 1, and Frankenberg, *Staatstechnik—Perspektiven auf Rechtsstaat und Ausnahmezustand* (Suhrkamp: Frankfurt 2010), ch. III.

[39] See Kerstin Singer, *Konstitutionalismus auf Italienisch* (Niemeyer: Tübingen 2008).

[40] See only Lucinda E. Carter & Laura Tulloch, *Originalism and Ancestor Worship: True or False?* (2008), and Dennis J. Goldford, The American Constitution and the Debate over Originalism (Cambr. Univ. Press: Cambridge 2005).

[41] Said, *The World, the Text, and the Critic*, 227.

[42] In this process of decontextualization, the scientific community as well as the media play a crucial role.

Thus, the French Déclaration of 1789 travels not as a political manifesto or as one of the many competing revolutionary projects[43] but, stripped of the surrounding debates and its basically programmatic character, as "the thing with rights,"[44] suggesting that the catalogue contained actionable legal entitlements. Likewise, British- or German-style rule of law is rarely received as a "contested concept."[45] On the contrary, bereft of its local, theoretical, and doctrinal elaborations and controversies; of the structural (and not only semantic) indeterminacy of its principles; and of the implementation problems and deficits, the rule-of-law idea has proliferated in its idealized version as a universally applicable, context-neutral concept, and "universal human good."[46] By the same token, the constitutional complaint guaranteed in article 93, section 1, of the German Basic Law became a marketable commodity and traveled great distances due to its reputation as an effective instrument for the protection of fundamental rights—and more effective than the certiorari system—because it went largely unnoticed that, annually and quite regularly, fewer than 2 percent of the actual complaints have been crowned with success.

(3) The third step in the transfer process leads from the local context to the global reservoir or constitutional IKEA center, which, in a different theoretical register, could be described as a collective constitutional consciousness memory or even as global constitutionalism. One should note, however, that integration into this reservoir actually does not happen as a discrete phase or step because it only concludes the decontextualization process by distinguishing as marketable those items that have passed a threshold test and excluding those that have not. Constitutional items that have passed or that might pass this test abound, notably, the basic architecture of legislated constitutions; their status as higher law; or their content, including rights catalogues, schemes of government, institutions for protecting the constitution (judicial review) as complemented by doctrines of judicial self-restraint and political questions, and so forth. Constitutional elites, legal consultants, and political activists may then shop in the IKEA center for ideas and institutions, norms and doctrines, arguments and ideologies fabricated and tested in other national or regional contexts. They have the choice between finished products and inspirational ideas requiring a higher degree of constructive elaboration.

Items relating to constitutional design, content, and method perceived as not being amenable to idealization because of their context-specificity and -dependence do not pass the threshold test and are excluded from—or, rather, are not considered for admission to—the global reservoir. In comparative studies as well as constitutional

[43] Documented and analyzed by Marcel Gauchet, *Die Erklärung der Menschenrechte. Die Debatte um die bürgerlichen Freiheiten 1789* (Rowohlt: Reinbek 1991)

[44] A reference to Emily Dickinson's poem Hope—"Hope is the thing with feathers."—Emily Dickinson, *The Complete Poems* (Little Brown: Boston 1924).

[45] Neil MacCormick, Der Rechtsstaat und die Rule of Law, *Juristenzeitung* (1984), 65/66 and Walter B. Gallie, Essentially Contested Concepts, 56 *Proceedings of the Aristotelian Society* (1955–56), 169.

[46] Brian Z. Tamanaha, On the Rule of Law—History, Politics, Theory (Cambridge Univ. Press: New York 2004), 137–141.

history, they deserve special attention as these "odd details" encapsulate local traditions, struggles, anxieties, and visions. Such is the case with the U.S. right to keep and bear arms under the Second Amendment. Though dating back to King Henry II's Assize of Arms in the twelfth century and despite its English common law pedigree, it is intimately connected with the controversies during the constitutional framing era concerning a federal standing army and the colonists' distrust of oppression and their fear of governmental maladministration, which led them to prefer a well-regulated militia. The intensely contested[47] Second Amendment qualifies as an odd detail not only historically, as the specifically American way to balance military and political power of the people, states, and the nation,[48] but also structurally, by means of the combination of a justificatory clause with an operative clause.[49]

Constitutional items that resist decontextualization can also be found outside the hemisphere of western constitutionalism. The Vietnamese Constitution of 1992 portrays a unique and complex economic structure—"a multi-component economy functioning in accordance with market-mechanisms under the management of the State and following a socialist tradition" (article 15). State-run, cooperative, family, private, and foreign enterprises are alloyed on the constitutional level with a mixed cluster of heterogeneous values and guarantees.[50] This peculiar constitutional amalgam hinges on the decision of the Vietnamese political cadres in the early 1990s to open up the planned economy for private initiative and foreign investors while preserving both its socialist core and family tradition.[51]

Oddity is not always easy to identify.[52] Whereas some constitutions contain clauses whose oddity seems evident, others call for careful comparative study. An example of the former category is the abolition of untouchability by the Constitution of India (1947), which failed, however, to eradicate the social practice of ostracizing and segregating usually minority groups by regarding them as "ritually polluted."[53] This

[47] From *United States v. Cruikshank* 92 U.S. 542 (1875) until *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Court has agonized over its meaning(s). See also Mark Tushnet, *Out of range: Why the Constitution can't end the battle over guns* (Oxford Univ. Press: Oxford 2007).

[48] *E.g.*, Garry Wills, *A Necessary Evil. A History of American Distrust of Government* (Simon & Schuster: New York 1999).

[49] Eugene Volokh, The Commonplace Second Amendment, 73 *N.Y.U. L. Rev.* 793 (1998).

[50] Connecting the dominant state sector (art. 19) with the collective sector (art. 20), the family economy (arts. 21, 64, 66, 67), the private sector (arts. 23, 57,58), and the sector open to foreign investment (art. 25).

[51] For a detailed account of the legal and economic reform in Vietnam, *see* Michael Blecher & Günter Frankenberg, Doppelstaat und plurales Recht - Anmerkungen zur Rechts- und Wirtschaftsreform in Vietnam, in *Zeitschrift für Zivilprozeß International*, vol. 2. (1997), 379–394.

[52] Oddity is also a treacherous label and calls for sensitivity to the transformation of a nonmarketable, local item into a clause or institution that serves a regional or intermediary market, such as the obligation of adult children to provide for their parents (Uzbekistan, Russia, Kazakhstan, Viet Nam, etc.) or the right to get married and have a family (Albania, Armenia, Viet Nam, etc.).

[53] India, Report of the Commissioner for Scheduled Castes and Tribes (Manager of Government of India Press: New Delhi 1970–71); Girdhar Behari Sharma, Law as an Instrument for Abolition of Untouchability: Case of Rajasthan, *Economic and Political Weekly* 10 (1975), 635–641.

clause simply does not make sense outside the Hindi regime of scheduled castes and tribes in India, Bangladesh, Pakistan, and Sri Lanka. A less evident context-dependent instance is illustrated by the "deviant legislation" recently introduced into the German Basic Law (article 72, section 3) and by a comparable clause of the Iraqi Constitution empowering the regional authorities to amend the application of national laws outside the exclusive powers of the federal government (article 117, section 2). Both provisions are intended to strengthen or, at least, to appease the German states or, respectively, the Iraqi regions. Whereas federalist schemes are, as a rule, designed to separate rather than duplicate legislative competences, these anomalous clauses are symptomatic of unresolved power struggles between the federal and the state/regional governments and hardly suitable commodities for transfer.

One may assume that more-baroque constitutions are more open to the particularity of context and, therefore, lend themselves to the odd details. This is certainly true for the extremely elaborate Constitution of India; the Constitution of Brazil (1988), which contains a comprehensive economic, welfare, and labor regime;[54] and the Constitution of the Swiss Cantons (1874), with its remarkably detailed provisions, in particular, for business and trade—for example, the prohibition of the sale of spiritual beverages by migrant dealers. However, even in constitutions that follow the "short and dark" maxim[55] one may discover items that deviate from global constitutionalism and resist easy transfer—such as the rare combination of an external federalism concealing an internal unitary and Prussian structure in the German Imperial Constitution (1871); the renunciation of war in article 9 of Japanese—or, rather, the MacArthur—Constitution (1947); or the constitutional exclusion of idiots from royal succession in Tonga.[56]

Odd details disrupt the generally accepted or, at least, imitated standards and routines of constitution making. In that sense, they function as subversive elements that evade the reach and rules of the global grammar of constitutionalism and introduce a local accent informed by a particular national history, religion, or tradition, or by specific political experiences, power constellations, and, more often than not, unresolved conflicts.[57]

(4) In a fourth constructive step, the purchased/imported globalized items have to be re-contextualized in and adapted to a new or "host" environment.[58] There, whatever

[54] Listing in great detail the rights of urban and rural workers, such as the normal working hours and "paid weekly leave, preferably on Sundays" (art. 7 XIII and XV).

[55] The origin of the short-and-dark requirement is rather obscure itself, see Günter Frankenberg, Comparing Constitutions: Ideas, ideals, and ideology—toward a layered narrative, 4 I.CON 439/440 (2006).

[56] "No person shall succeed to the Crown of Tonga . . . who is insane or imbecile." (art. 35 of the Act of Constitution of Tonga).

[57] The theme of conflicts figures quite prominently and openly in the preambles of many constitutions, as for instance in the Interim Constitution of the Sudan (2005) that refers to the "longest running conflict in Africa" and its "debilitating" effects.

[58] For an early comment on recontextualization, *see* J. Denis Loanjunais, *Vues politiques sur le changement a faire à la Constitution de l'Espagne à fin de la consolider spécialement dans le Royaume de Sicily* (Paris 1821), who argues that for the Cádiz Constitution of 1812, which he moderately criticizes, to be adequate for the situation in other European countries (such as the Kingdom of Sicily) numerous modifications would have to be made.

is transferred meets with "conditions of acceptance or, as an inevitable part of acceptance, resistance."[59] These conditions determine the "grand hazard"[60] of any legal as well as constitutional transfer—either its rejection or the seldom smooth, often rough and lengthy recontextualization of the transferred "objects" within their new cultural-legal setting. Recontextualization involves a process of unfreezing and unpacking, set in motion by a more or less complex and tangible series of introductory, adaptive, modifying moves in the course of which the imported information is subject to reinterpretation, redesigning, and *bricolage*.[61] Again in line with Said's travelling theory, "the now full (or partly) accommodated (or incorporated)"[62] constitutional item, once inserted in the new constitutional framework by framers and consultants and put to use under the new circumstances by the new epistemic community of academics, courts, and bureaucrats, undergoes a process of transformation "by its new uses, its new position in a new time and place."[63]

This open-ended phase of recontextualization is vastly simplified under the transplant thesis and bears very little resemblance to the transplanting of an organ, let alone a tomato plant.[64] For the constitutional elites and their experts, when going about the reassembling of the imported items, must operate without knowing the original master plan or its meaning and may, at best, rely on fairly unreliable, abstract instruction manuals provided by global constitutionalism—less reliable even than IKEA's operating instructions.

Moreover, transfers, if not rejected outright, establish a semiotic relationship between the sender and the recipient that is usually kept in the dark. Finally or rather first and foremost, transfers come with considerable risks, as seasoned IKEA shoppers are well aware of. The gravest risk consists in an immune reaction of the host culture to a nonadaptable constitutional import rendering futile the efforts of transfer.[65] The more common and less dramatic risk of a bad fit, if manageable at all, entails complex, complicated, and time-consuming adaptations to the constitutional culture of the host, adverse political power constellations or an already existing constitutional framework. Finally, the risk of "missing links"—institutional parts, doctrinal screws, ideological hooks, and the like—may require a return to the IKEA center, unless the missing parts can be fabricated on-site, before the construction or adaptation can be

[59] Said, *The World, the Text, and the Critic,* 227.

[60] Montesquieu, *De L'Esprit des Lois* (Geneva 1748) book 1, ch. 3. See also Otto Kahn-Freund, On the Uses and Misuses of Comparative Law, 37 *Modern L. Rev.* (1974), 1/6, and Eric Stein, Post-Communist Constitution-Making: Confessions of a Comparatist (Part I), *Jean Monnet Chair Papers—The European Policy Unit at the European University Institute* (San Domenico/Florence 1992), 25.

[61] Which may be translated as "tinkering" to convey the makeshift, do-it-yourself character. For a theoretically elaborated concept of "*bricolage*" as a method of "wild thinking," *see* Claude Lévi-Strauss, *The Savage Mind* (Univ. Chicago Pr: Chicago 1966), 16–32.

[62] Said, *The World, the Text, and the Critic,* 227.

[63] *Ibid.*

[64] Watson uses the tomato plant to illustrate his transplant thesis.

[65] Odd details may manifest a focused immune-reaction concerning a specific item or aspect.

completed. At any rate, a simple assembling of the imported parts/information generally does not provide the desired results but involves a great deal of improvisation and *bricolage.*

And in the end, the new constitution or constitutional element, because recontextualization is likely to produce a variety of results depending on which information is selected, which item is purchased, and how it is processed, may be a modified replica at best. More likely it will seem either a pastiche[66] or a form of serious parody that emulates the textual model with deference and respect for the original or a hybrid, creating, whether naïvely or consciously, a novelty[67] out of a medley of different ingredients—rather than a genuine copy of the original.

To start the analysis of transfer results with the preamble of the U.S. Constitution credits its status as an icon of constitutional prose that succinctly captures the spirit of modern constitutionalism in the "We the People." formula and therefore has the charm of tradition and concision.[68] Despite its religious connotations and implicit references to the historical context, the preamble is widely reputed to be, at least on the surface, a thoroughly secular and universally applicable text,[69] even if "just beneath this godless surface flows the force of a pure revelation."[70] Despite its elitist origin, the invocation of the absent collective has contributed to its high democratic esteem, to its aura as the ultimate source of popular authority. In the course of constitutional history, "We the People" has become one of the most prominent items in the global reservoir of constitutionalism,[71] copied and pasted[72] by numerous constitution makers from Albania to Costa Rica, from Liberia to East Timor. The constantly travelling "We the people" formula reappears as a modified replica, for example, in the Constitution of Argentina (1863)—"We, the representatives of the people of the Argentine Nation"—and in the Swiss Constitution (1999)—"We the Swiss People and Cantons." It is recurrently implored throughout the Constitution of Papua New Guinea (1975). The South African "We the People of South Africa" (1996) leans toward a pastiche that

[66] For an elaboration of the term, see Frederic Jameson, Postmodernism or the Cultural Logic of Capitalism (Duke Univ. Press: Durham 1991).

[67] The term was introduced by Eric Stein to describe the result of "ignorance of foreign patterns and a romantic, parochial conception of the specificity of local conditions" that may "prevent functional transfers"; *see* Stein, Post-Communist Constitution-Making , *supra* note 42 at 25 and *id.*, Uses, Misuses—and Non-Uses of Comparative Law, 72 *Northwestern L. R.* (1977), 198.

[68] "We the People of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

[69] See Hannah Arendt, *On Revolution* (The Viking Press: New York 1963); Ulrich Rödel, Helmut Dubiel, & Günter Frankenberg, *Die demokratische Frage* (Suhrkamp: Frankfurt am Main 1989); Mitchell Meltzer *Secular Revelations. The Constitution of the United States and Classic American Literature* (Harv. Univ. Press: Cambridge MA & London 2005).

[70] Meltzer, *Secular Revelations*, 2.

[71] It has to be noted, though, that numerous countries, such as Armenia, Austria, Belgium, Pakistan, and Niue, did not follow the "We the People" road.

[72] E.g. Cindy Skach, We, the Peoples? Constitutionalizing the European Union, 43 *JCMS* 149 (2005).

emulates with respect, one may assume, the American original. A hybrid[73] imagining of a democratic polity yet to be established and a people yet to be united is illustrated by the post-Taliban Constitution of Afghanistan (2004). The phrase "We the people of Afghanistan" introduces a lengthy preamble that inaugurates the Islamic Republic and offers a medley of ethnicity, tradition, democracy, and, above all, religion. Within the framework of a constitutional monarchy, the Cambodian "We the people" (1993) parodies the democratic American ancestry. The preamble invokes, among other points of interest, the Angkor civilization and an imaginary "Island of Peace" and then yields to a text that qualifies as a strategic, at best naïve and novel conjoining of the popular We-rule with the monarchic I-rule.

Needless to say, that by shuttling from one strange context to another "We the People," like a chameleon, will constantly change its accent and meaning. Despite the repetition or modification of the American propositional formula, constitution makers elsewhere invoke—and constitution readers infer—a historically, politically, and socially different "We" depending on the respective national-cultural environment. The proliferation of the simple, if loaded, "We the People" formula, we may conclude, testifies against the possibility of constitutional "transplants." It illustrates the varieties of constitutional transfer and the art of *bricolage*, the different constitutional styles and the attribution of meanings, that leads to varying results depending on the "contextual" forces at work.

As distinct from preambles, which are generally, albeit unduly, dismissed as merely decorative and marginal elements, rights catalogues, in conjunction with democracy and the rule of law, hold a secure status as central chapters in the book of liberal constitutionalism.[74] While constitutions can do without a preamble,[75] they cannot possibly get away without a sufficiently elaborated bill of rights and rule-of-law principles.

The French Déclaration, with its verdict that a society neither guaranteeing rights nor establishing the separation of powers does not have a constitution,[76] along with numerous other constitutional instruments, political pamphlets, and philosophical theories have proliferated the idea of rights and generated an indomitable—partly innovative, partly transferred—rights-making activity. Many of the problems of life in society—domination, discrimination, political participation, poverty, access to education, and the like—for which rights are meant to provide the answer (even if

[73] A transfer operation leading to a hybrid is analyzed by Michael S. Gal, The 'Cut and Paste' of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant, 9 *EJL Reform* (2007).

[74] As illustrated by the blueprint for constitution making submitted by Albert P. Blaustein, *Framing the Modern Constitution: A Checklist* (Rothman & Co: Littleton 1994).

[75] As is demonstrated by the constitutions of Austria, Belgium, Denmark, Finland, and Botswana. In constitutional monarchies there is either no preambling "We" or the "We" refers to a monarch still symbolically embodying the people.

[76] "Toute Société dans laquelle la guarantie des Droits n'est pas assurée, ni la separation des Pouvoirs determinée, n'a point de Constitution." (art. 16 Déclaration des Droits de l'homme et du citoyen, August 26 1789).

they may also be part of the problem)[77] tend to transcend political, economic, sociocultural settings. That is why the drafters of rights catalogues, so as not to reinvent the wheel, are tempted to glean norms, doctrines, and institutions relating to rights from the global constitution. Again, it would be naïve to assume that all these items are "transplanted" like tomatoes. While rights standardize both the problems of life in society as well as their legal answers in a manner that appears conducive to their transfer across national boundaries, rights also change their meaning in the process. "First Amendment" guarantees and rights to equality, from country to country, come with different doctrinal overhead, regimes of exceptions, and varying connotations depending on whether they appear in secular polities, religious states, or socialist "people's democracies."

That "transfer" means more than "transplant" is also illustrated by the rather spectacular adoption by the English Parliament, contested by a divided Tory opposition, of the Human Rights Act in 1998, which basically incorporated the European Convention on Human Rights (ECHR) into a constitutional regime widely believed to be unwritten.[78] Official recognition of the European Court of Human Rights' jurisprudence as a source of inspiration for the interpretation of the act ended a long resistance against the Convention and the Court in Strasbourg carried on by the greater part of the English political and juridical elite who seemed to have forgotten that the ECHR of 1950 was significantly shaped by their country-fellows. In the end, the HRA was accepted by part of the political elite as a "lawyer's provision for lawyers,"[79] thus changing the "original meaning" of the ECHR, while religiously repeating the two-tiered rights structure, to wit, setting out the right in the first paragraph and limiting it in the second in the name of an interest of the general public: national security, public safety or economic well-being, prevention of disorder and crime, protection of health and morals, and of the rights and freedoms of others.[80] Moreover, the "homecoming" of the ECHR in the guise of the HRA has triggered a process of "juridification" of the British Constitution—a process of adaptation on the part of the host culture arguably underscored by European integration and globalization.[81] This process, though, on its face, a clear case of "transplant," illustrates the complex problems of recontextualization. And it has not even come to an end yet, as is illustrated by the recent discussion concerning the desirability of a Supreme Court.[82]

The wholesale adoption of a rights catalogue is only one way of tapping the global constitutional reservoir. In a less conspicuous manner, national constitutions may

[77] David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton Univ. Press: Princeton 2005).

[78] H. Barnett, *Constitutional and Administrative Law* 5th ed. (Cavendish: London 2005) , 8.

[79] James Young, The Politics of the Human Rights Act, 26 *Journal of Law and Society* 27, 37 (1999).

[80] The British Institute of Human Rights, *Briefing on the Human Rights Act*, 16 May 2006—www.blink.org.uk/docs/bihr_hra_briefing.pdf.

[81] See Peters, "The Globalization of State Constitutions," 275.

[82] Documented by Gernot Sydow, Der geplante Supreme Court für das Vereinigte Königreich im Spiegel der britischen Verfassungsreform 64 *ZaöRV* (2004) 66-67, and Peters, "The Globalization of State Constitutions."

declare the Universal Declaration of Human Rights as binding within the national legal regime[83] or give priority to other international human rights instruments.[84] Yet, other national constitutional documents explicitly defer more broadly to international law[85] or provide, more narrowly, for the interpretation and application of the national rights catalogue in accordance with the Universal Declaration of Human Rights.[86]

Most constitutions follow the general systematic structure of general principles relating to fundamental rights; personal (or civic) rights; political freedoms; and economic, social, and cultural rights. As a matter of consequence, they share a body of basic rights as well as a corresponding set of limitations. Despite the semblance of similarity of the propositional statements referring to the global constitution, one should bear in mind that rights, once contextualized, are instilled by their local interpreters with a variety of specific meanings according to the epistemological assumptions (*Vorverständnis*) and conventions of the respective epistemic communities.

5. Epilogue

To validate the existence a global constitutional reservoir, more examples of transfer could be added to the list. At this point, it may suffice to summarize that, contrary to a widespread belief, constitutions are not "largely invented"[87] by societies. To be more precise, they are, by and large, constructed by constitutional elites and experts on the basis of transnational transfers, involving a great deal of *bricolage*. So, the interesting question is not really whether legal transplants are possible (they are not), but *how* legal transfer happens. Or rather: What happens when it does happen? Which sort of semiotic relationship is established, how are constitutional items de- and recontextualized, and, most importantly, which elements are excluded for what reasons from a transfer. So, this brief epilogue to my rather cursory notes on the IKEA theory should actually be read as a prologue to more in-depth comparative studies on constitutional transfers and odd details.

[83] *E.g.*, the Constitution of Andorra (1993). For a more nuanced treatment see Peters, "The Globalization of State Constitutions," 260–266.

[84] *E.g.*, the constitutions of Albania (1994), the Czech Republic (1992), and Slovakia (1992).

[85] *E.g.*, the constitutions of Belgium (1994), the Netherlands (1983), and Switzerland (1999).

[86] Title II ch.1 art. 5, of the Romanian Constitution (1991).

[87] S. F. C. Milsom *Historical Foundations of the Common Law* (London 1969), p. ix, quoted approvingly by Watson, *Legal Transplants*, *supra* note 9 at 8.