

Edited by
Günter Frankenberg



ORDER FROM TRANSFER

Comparative
Constitutional
Design and
Legal Culture



Studies in
COMPARATIVE LAW AND
LEGAL CULTURE SERIES



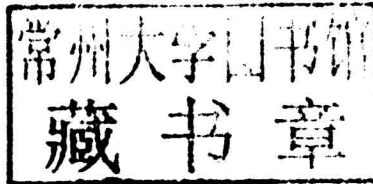
Order from Transfer

Comparative Constitutional Design and
Legal Culture

Edited by

Günter Frankenberg

*Professor of Public Law, Legal Philosophy and Comparative Law,
Goethe University, Germany*



STUDIES IN COMPARATIVE LAW AND LEGAL CULTURE

Edward Elgar

Cheltenham, UK • Northampton, MA, USA

© The Editor and Contributors Severally 2013

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2013932984

This book is available electronically in the ElgarOnline.com Law Subject
Collection, E-ISBN 978 1 78195 211 5



ISBN 978 1 78195 210 8

Typeset by Columns Design XML Ltd, Reading
Printed and bound in Great Britain by T.J. International Ltd, Padstow

Order from Transfer

STUDIES IN COMPARATIVE LAW AND LEGAL CULTURE

Series Editor: Vernon Valentine Palmer, *Tulane University, USA*

In today's shrinking world it's important to extend our horizons and increase our knowledge of other people's laws. This series publishes in-depth volumes covering various aspects of private and public law in diverse legal traditions. Additionally, it seeks to encourage improved techniques and methods of comparative legal research, including the use of interdisciplinary studies. Individual volumes may deal with the law and culture not merely of well-known and frequently studied countries, but also with lesser-known, mixed, religious, and plural systems of the world. The focus ranges from important aspects of legal history, culture, and institutions to local experience and evolving legal trends.

Contributors

Helena Alviar García is Dean and Professor for Constitutional Law and Public Policy, Law and Development, Latin American Law and Institutions, Feminist Theory and Critical Theory at the Universidad de los Andes in Bogotá (Colombia). She is the author of numerous publications in these areas, most recently: *Feminismo y Crítica Jurídica: El análisis distributivo como alternativa crítica al legalismo liberal* (Siglo del hombre Editores, Ediciones Uniandes, 2012; co-author: Isabel Cristina Jaramillo Sierra).

Upendra Baxi, now Emeritus Professor of Law at the University of Warwick and Delhi, was Vice Chancellor of the University of Delhi and of South Gujarat. He has contributed widely to comparative constitutional studies, the social theory of human rights, sociology of law, and adjudicatory leadership. His most recent works include *The Future of Human Rights* (Oxford University Press, 2002) and *Human Rights in a Posthuman World: Critical Essays* (Oxford University Press (India), 2007).

Philipp Dann, Professor of Public and Comparative Law at Justus Liebig University Giessen, Germany, is the author of *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany* (Cambridge University Press, forthcoming 2013) and “Federal Democracy in India and the European Union: Towards Transcontinental Comparison of Constitutional Law” (2011) 44 *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America* 160.

Julia Eckert, Professor of Political Anthropology at the University of Bern, specializes in legal anthropology, the anthropology of the modern state, conflict theory, and social movements. Her current research interests are in the anthropology of crime and punishment; changing notions of responsibility and liability; security; democracy and citizenship and the transnationalization of legal norms. Recent publications on these issues are *Law against the State: Ethnographic Forays into Law's Transformations* (Cambridge University Press, 2012); “Theories of Militancy in Practice: Explanations of Muslim Terrorism in India” (2012)

36(3) *Social Science History Journal* 47; and “Subjects of Citizenship” (2011) 15(3–4) *Citizenship Studies* 309.

Günter Frankenberg teaches public law, philosophy of law and comparative law at the Goethe University in Frankfurt; he is an associate member of the Cluster of Excellence “Normative Orders” at the Goethe University. His publications in these areas include: “Critical Comparisons – Re-Thinking Comparative Law” (1985) *Harvard International Law Journal*; *Die demokratische Frage [The Democratic Question]* (Suhrkamp 1989, co-author); *Autorität und Integration [Authority and Integration – The Grammar of Law and Constitutions]* (Suhrkamp, 2003); *Normalizing the State of Exception [Staatstechnik]* (Suhrkamp, 2010) (forthcoming 2013). As visiting professor he has taught at the law schools of Harvard University, Boston University, Tulane University, University of Pennsylvania and Phnom Penh. In the 1990s he participated as a legal consultant in law- and constitution-making projects in Central and Eastern European countries.

Roberto Gargarella, Dr. jur., University of Chicago, is a researcher at CONICET, University of Buenos Aires and CMI, Norway and Professor at the University of Buenos Aires and the University of Torcuato Di Tella (Argentina). He is the author of *The Legal Foundations of Inequality: Constitutionalism in the Americas* (Cambridge University Press, 2010) and *Latin American Constitutionalism* (Oxford University Press, forthcoming 2013).

Felix Hanschmann teaches Constitutional and Administrative Law at the Goethe University Frankfurt. His publications include “Das Verschwinden des Grundrechts auf Datenschutz in der Pluralität von Rechtsregimen” in Nele Matz-Lück and Mathias Hong (eds), *Grundrechte und Grundfreiheiten im Mehrebenensystem* (New York and Heidelberg, 2011) 293; “State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches” in Armin von Bogdandy and Rüdiger Wolfrum (eds), *Max Planck Yearbook of United Nations Law* (vol. 9, Leiden and Boston, 2005) 579 (co-authors: Armin von Bogdandy, Stefan Häußler and Raphael Utz).

Jennifer Hendry is a lecturer at the University of Leeds School of Law and the deputy director of the Centre for European Law and Legal Studies. Before joining Leeds, she wrote her doctoral thesis on the topic “Unitas in Diversitate? On Legal Cultures and the Europeanisation of Law” at the European University Institute (EUI) in Florence. She holds an LLB (Hons) in Law and German from the University of Glasgow and

an LLM in Law and Society from the University of Edinburgh. During summer 2011 she was a visiting research fellow at the University of Sydney's Department of Philosophy. Her main research interests are in the areas of legal, social and political theory, and in comparative law and legal studies, specifically on the concepts of legal culture and legal pluralism. She is currently writing on issues of legal translation and transfer, and is a principal investigator on an interdisciplinary international research network focusing on "spaces of indigenous justice." Her publications include: "The Double Fragmentation of Law: Legal System-Internal Differentiation and the Process of Europeanisation" in D Augenstein (ed), *Integration through Law Revisited: The Making of the European Polity* (Ashgate, 2012); and "Governance, Proceduralisation & Justice: Some Challenges to the Legal Paradigm" (2008) 19(3) *Law & Critique: Special Issue on Governance, Civil Society & Social Movements* 345.

Stefan Kadelbach teaches Public Law, European Law and International Public Law at the Goethe University in Frankfurt (Germany); he is co-director of the Wilhelm Merton Centre for European Integration and International Economic Order and principal investigator at the Cluster of Excellence "Formation of Normative Orders" of the Goethe University. Recent publications include *Recht ohne Staat? Zur Normativität nichtstaatlicher Rechtsetzung* (editor with K Günther; Campus, 2011) and *Europarecht* (editor with M Zuleeg and R Schulze; 2nd edn Nomos, 2010).

Nora Markard is a postdoctoral research associate at the Collaborative Research Center 597 "Transformations of the State" at the University of Bremen, on leave as a visiting fellow at Columbia Law School for 2012/13. She holds a law degree from Free University Berlin, an MA in International Peace & Security from King's College London, and a Ph.D. in law from Humboldt University Berlin, where she co-founded the Humboldt Law Clinic: Human Rights. She also studied at the Sorbonne and visited the University of Michigan during her Ph.D. Her research areas stretch from human rights law, refugee law and international criminal law to comparative constitutionalism and law and gender. Recent publications include *Kriegsflüchtlinge* (Mohr Siebeck, 2012), a *Parallel Report to the 5th Periodic Report of the Federal Republic of Germany on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2011, co-authored for the Humboldt Law Clinic), and "Asylrecht: Der Stand der Dinge" (2012) *Merkur* 28.

Ralf Michaels is Arthur Larson Professor of Law, Duke University; he teaches Comparative Law, Conflict of Laws, and Law and Globalization. Selected publications include “Global Legal Pluralism” (2009) 5 *Annual Review of Law and the Social Sciences* 243; *Beyond the State – Rethinking Private Law* (edited with Nils Jansen; Mohr, 2008); “The Functional Method of Comparative Law” in *The Oxford Handbook of Comparative Law* (M Reimann and R Zimmermann eds, Oxford University Press, 2006).

H Kwasi Prempeh, Professor of Law at Seton Hall University School of Law, Newark, New Jersey (USA), where he teaches constitutional law and comparative constitutionalism, among others. His current scholarship focuses on the challenges of building constitutionalism in Africa’s emerging democracies. He received his Dr. jur. degree from Yale University, where he served as a teaching fellow and an editor of the *Yale Law Journal*. He also holds graduate and undergraduate degrees from Baylor University, Texas, and the University of Ghana, respectively. He was a 2011 Reagan-Fascell Democracy Fellow at the National Endowment for Democracy, Washington, DC. His scholarship has been published in a number of law and social science journals, including the *International Journal of Constitutional Law*, the *Journal of Democracy*, and *Tulane Law Review*. Selected publications include “Presidents Untamed” (2008) 19(2) *Journal of Democracy* 109; “Africa’s Constitutionalism Revival: False Start or New Dawn?” (2007) 5(3) *International Journal of Constitutional Law* 469; “Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa” (2006) 80(4) *Tulane Law Review* 1239.

Ruth Rubio Marín holds a Chair in Constitutional and Public Comparative Law at the European University Institute in Florence, Italy. Formerly, she was Professor of Constitutional Law at the University of Seville, Spain, and a member of the Faculty of the Hauser Global Law School Program at New York University. She has taught at several other academic institutions including Columbia Law School and Princeton University where she was selected as a Fellow for the Program in Law and Public Affairs at Princeton University in 2000–2001. Her interests include migration, minority rights, citizenship, gender justice and transitional justice, areas which she addresses mostly from constitutional, human rights and political theory angles. She is the author and editor of several books, including *Immigration as a Democratic Challenge* (Cambridge University Press, 2000); *The Gender of Constitutional Jurisprudence* (co-editor with Beverley Baines; Cambridge University Press, 2004); *What Happened to the Women? Gender and Reparations for*

Human Rights Violations (ed, Social Science Research Council, New York, 2006); *The Gender of Reparations: Subverting Sexual Hierarchies while Redressing Human Rights Violations* (ed, Cambridge University Press, 2009); *The Struggle for Female Suffrage in Europe: Voting to Become Citizens* (co-editor with Blanca Rodríguez-Ruiz; Brill, 2012) and *Migration and Human Rights* (ed, Oxford University Press, forthcoming 2013).

Margrit Seckelmann, Ph.D. (Dr. jur.), MA, is a senior research fellow and the head of administration at the German Research Institute for Public Administration Speyer. After her studies in history and literature (MA) and law (First State Exam) in Heidelberg and Berlin, she completed her Bar Exam (Second State Exam) in Berlin and her Ph.D. in Law (Legal History) in Frankfurt. Apart from her work at the institute, she also teaches Administrative Law as well as Constitutional and Administrative History at the German University of Administrative Sciences in Speyer. Selected publications include “Autonomy and Accountability” in Sjur Bergan et al (eds), *Leadership and Governance in Higher Education. Handbook for Decision-Makers and Administrators* (Berlin: Raabe, 2012) A.3, 1–24; “From the Paris Convention of 1883 to the TRIPs Agreement of 1994: The History of the International Patent Protection as a History of Propertization?” in Isabella Löhr and Hannes Siegrist (eds), *Intellectual Property Rights and Globalization (comparativ, vol. 21 (2011))* 46–63; “Observations from Germany” in Eberhard Bohne and Charlie Karlsson (eds), *Repositioning Europe and America for Economic Growth: The Role of Governments and Private Actors in Key Policy Areas* (Münster: LIT, 2010) 351–8; *Industrialisierung, Internationalisierung und Patentecht im Deutschen Reich, 1871–1914* (Frankfurt am Main: Klostermann, 2006).

Timo Tohidipur, Ph.D. (Dr. jur.), is a Postdoctoral Research Assistant and Lecturer at the Institute for Public Law, Goethe University in Frankfurt (Germany), where he teaches German Constitutional Law, European Law, Theory of Law, Migration and Refugee Law. Recent publications include “Iran und die Narrative west-östlicher Begegnung” (2012) 45(2) *Kritische Justiz* 178; “Europas Grenzschutzregime” in Martin W Möllers and Christoph van Ooyen (eds), *Migration: Europäische Grenzpolitik und FRONTEX* (2012) 41; “Border Controls at Sea: Requirements under International Human Rights and Refugee Law” (2009) 21(2) *International Journal of Refugee Law* 256 (with Andreas Fischer-Lescano and Tillmann Löhr).

Preface

“Order from Transfer” may have an all too positive ring. Order keeps anarchy at bay and structures social interactions. Transfer moves beyond the horizon of the national everyday. This, however, is not the reading intended here. The title is only meant to suggest that normative orders – constitutional and legal regimes, etc. – are works of construction; and transferred information is used in the process of their making by whoever contributes as maker. Order from transfer neither implies that order is good, nor does it suggest it is evil. Far from precluding or predetermining any questions regarding the nature of an order, the focus on order is only meant to prepare them: how power is allocated and wealth distributed in a society; whether women are discriminated against; which social groups are disfranchised; whether privilege is camouflaged and the subaltern silenced, etc.

To grasp the importance and impact of import/export, borrowing, adaptation, migration, etc. in the constitutional and legal realm it may be helpful to suspend the ultimate decision on whether an order so designed and then established is good or evil (for whom) and, first, look at the situation of transfer – military occupation, colonial rule, post-colonial nation-building, post-socialist reconstruction, economic hegemony or a plurality of competing legal regimes – analyze the transfer process, and *then* return to a critical assessment of the order based on transferred information. Transfer might turn out to be an interesting “take” on the alchemy of truth and deceit, struggle and deliberation, vision and *Realpolitik* in constitution-making.

“Order from Transfer” is a multi-jurisdictional project. It focuses on how constitutions (and laws) in different regions of the world are designed and applied, and how the designers and appliers get hold of their building materials, rearrange and apply them. Once it has been settled that constitutions neither fall from heaven nor spring from the mind of one or the other genius, analyzing constitutional transfers seems to be a sensible option. For this reason the authors here peacefully assembled look from different angles at the import and export of information relating to constitutions: ideas and ideologies, institutions and norms, doctrines and arguments, practices and conventions.

The subtitle promises studies in comparative constitutional design. This calls for a brief explanation. Since the early days of modern constitutionalism, the “making” of constitutions has always already conveyed that they are “not found.”¹ They neither fall from heaven nor are they revealed in a mysterious way to founders. Instead, they are drafted, framed, created, constructed, and, yes, designed. The term “constitutional design” has been contested as technocratic or a misleading metaphor; it has been rejected or replaced by “process.” And many comparatists preferred or returned to “making.”

The architectural concept “design” shifts the attention from the authors of the document and their legitimacy to the making of the document and, more importantly, highlights specific elements of the drafting: the temporal dimension (process), the purpose of the venture (principles, ideology, its premeditation, plan), and the construction or fabrication of an intellectual product based on the available, to a large extent transferred, information. “Framers” accomplish their task usually by drafting a political conception – however ideological or, as it may turn out in the future, ineffective – which contains an institutional arrangement for the shared and separated exercise of power, selects a catalogue of rights to be guaranteed, and distinguishes values fundamental enough to warrant constitutional protection. Like an architect’s drawing, sketch or plan, constitutional designers, consultants or engineers produce a more or less detailed intellectual product that delineates the contours and form, and lays down the structures and institutional framework of a normative order. Therefore “design” characterizes quite appropriately what happens when constitutions are made. According to the standard dictionaries,² design captures with a fair amount of precision how constitution-making works and is anything but a misleading figure of speech or far-fetched analogy. Accordingly, the contributors to this book were invited, while being under no obligation, to join the conversation about constitutional design.

This book is the result of an inspiring workshop held in September 2011 after which the participants returned to their comparative studies and wrote their contributions to the pathways, politics, and semiotics of constitutional-legal transfer, their analyses of transfers in specific situations (legal pluralism; colonialism; post-conflict) and how transfers

¹ Hannah F Pitkin, “The Idea of a Constitution” 37 *Journal of Legal Education* 167–9 (1987).

² See “design” in *The American Heritage Dictionary of the English Language*, 4th edn (Houghton Mifflin Co, 2009).

“played out” with regard to specific relationships, such as gender/sex, pregnant woman/embryo/state, and geopolitical mapping (center/periphery).

“Order from Transfer” is an interdisciplinary project. From different theoretical and methodological perspectives, and with different political agendas, some authors ask how transfer can be conceptualized, others trace how constitutional “items” are taken out of a cultural-political-legal context (de-contextualization) and introduced into a different one (re-contextualization). All in all, contributions to constitutional and legal theory, anthropology, legal history and doctrine, post-colonial theory and feminism, normative approaches and empirical analyses are conjoined in this book and continue the conversation we had at a workshop in September 2011, a conversation which Ruth Rubio Marín joins with her chapter in this book.

“Order from Transfer” is also intended to be a critical project. It challenges not only the legal-formalist and positivist conception of “constitution” and “law,” but, more importantly, the center/periphery dichotomy, the ethnocentric bias as well as gender/sex subtext still characterizing much of the work done in comparative constitutional law.

The transfer thesis (or “IKEA theory”) is presented in the introductory chapter, “Constitutions as Commodities: Notes on a Theory of Transfer” (Günter Frankenberg), which elaborates the commodity theory of constitutional items on the one hand and the (non-)marketability of certain constitutional items on the other hand. This thesis is challenged by the contributions in the first part, introduced by Timo Tohidipur. Margrit Seckelmann qualifies IKEA from a historical perspective, Ralf Michaels from a complex comparative-global law perspective.

Part II, “Ordering Gender,” addresses aspects of constitutions that reveal gendered language, structure and reasoning. This part is introduced by Helena Alviar García. Nora Markard then analyzes the constitutional ordering of gender/sex, while Ruth Rubio Marín focuses on constitutional visions of women in abortion cases which traveled from Germany to Portugal.

In Part III, “Ordering Pluralism,” the transfer thesis is confronted with insights from and into legal-pluralist regimes from the vantage point of legal anthropology (Julia Eckert) and legal theory (Jen Hendry). They demonstrate how transfers are shaped from within and without.

Part IV, “Ordering the Postcolony,” combines Upendra Baxi’s scathing comments on the IKEA transfer theory with H Kwasi Prembeh’s challenge to the widespread interpretation of the imperial presidency in many African countries as being attributable to the transfer of traditional forms of rulership.

Stefan Kadelbach introduces Part V, “Ordering Hegemony.” Philipp Dann analyzes international influence on post-conflict constitution-making in East Timor, Iraq and the Sudan, whereas Felix Hanschmann reconstructs in detail how the German colonial experience left its imprint on German citizenship law.

The last part turns to questions of how Europe was ordered in the constitutional laboratory of the nineteenth century (Günter Frankenberg) and how Europe contributed (or not) to the ordering of Latin America. Helena Alviar García demonstrates how constitutional ideas – i.e. the social function of property – traveled long distances (also from Europe) to Colombia and affected the chances for progressive reform. Roberto Gargarella reconstructs the mixing of constitutional models in Latin America; he analyzes how social rights were grafted upon liberal-conservative constitutions.

Neither the September 2011 workshop nor this publication would have been possible without our generous sponsors: the Fritz Thyssen Foundation and the Cluster of Excellence ‘Formation of Normative Orders’ at the Goethe University in Frankfurt. For the organization of the workshop and the preparation of this publication I have to thank Helena Lindemann, Cara Röhrner, and Yasmina Aznaï. Petra Czoik, Asmaa El Idrissi and Lisa Tuchscherer provided valuable research assistance. Tara Gorvine from Edward Elgar Publishing deserves credit and thanks for encouraging us to submit this collection of essays for publication. We are grateful to Virginia Williams and Elizabeth Clack for supporting the project during the production process. We are grateful too for our readers’ critique.

Frankfurt, December 2012
G.F.

Contents

<i>Contributors</i>	vii
<i>Preface</i>	xii
Constitutions as commodities: notes on a theory of transfer <i>Günter Frankenberg</i>	1
PART I TRANSPLANT, TRANSFER, MIGRATION, ETC. – ONLY WORDS? PROBLEMS OF THEORY AND METHOD	
1 Comparative constitutional studies and the discourse on legal transfer <i>Timo Tohidipur</i>	29
2 Clotted history and chemical reactions – on the possibility of constitutional transfer <i>Margrit Seckelmann</i>	36
3 “One size can fit all” – some heretical thoughts on the mass production of legal transplants <i>Ralf Michaels</i>	56
PART II ORDERING GENDER – COMPARING THE CASTING AND RECASTING OF WOMEN AND GENDER RELATIONS IN CONSTITUTIONAL CONTEXTS	
4 Gender structures and constitutional law <i>Helena Alviar García</i>	81
5 Private but equal? Why the right to privacy will not bring full equality for same-sex couples <i>Nora Markard</i>	87
6 Legal transfer of women and fetuses: a trip from German to Portuguese abortion constitutionalism <i>Ruth Rubio Marín</i>	120

PART III ORDERING PLURALISM – ALTERNATIVE NORMATIVE ORDERS CHALLENGING THE STATE-CENTEREDNESS OF CONSTITUTIONALISM	
7	Legal pluralism and normative transfer <i>Jennifer Hendry</i> 153
8	Who is afraid of legal transfers? <i>Julia Eckert</i> 171
PART IV ORDERING THE POSTCOLONY – CONSTITUTIONAL BREAKS, CONTINUITIES, AND HYBRIDS	
9	“Ordering” constitutional transfers: a view from India <i>Upendra Baxi</i> 189
10	Constitutional autochthony and the invention and survival of “absolute presidentialism” in postcolonial Africa <i>H Kwasi Prempeh</i> 209
PART V ORDERING HEGEMONY – CONSTITUTIONAL MOMENTS IN OCCUPIED TERRITORIES AND COLONIES	
11	Constitution-making in occupied countries <i>Stefan Kadelbach</i> 237
12	International influence on post-conflict constitution-making <i>Philipp Dann</i> 243
13	German citizenship and its colonial heritage <i>Felix Hanschmann</i> 261
PART VI ORDERING EUROPE – EUROPE ORDERING. CONSTITUTIONAL TRANSFERS TO LATIN AMERICA IN THE NINETEENTH AND TWENTIETH CENTURIES	
14	Constitutional transfers and experiments in the nineteenth century <i>Günter Frankenberg</i> 279
15	Leon Duguit’s influence in Colombia: the lost opportunity of a potentially progressive reform <i>Helena Alviar García</i> 306
16	Constitutional grafts and social rights in Latin America <i>Roberto Gargarella</i> 322
	<i>Index</i> 349

Constitutions as commodities: notes on a theory of transfer

Günter Frankenberg

1. CONSTITUTIONS AS COMMODITIES

Constitutional information comes packaged and refers to institutions, norms, principles, doctrines, and ideologies. And for more than two centuries, not counting the crucial influence of previous basic laws or *leges fundamentales*, it has crossed national boundaries, social-cultural contexts, and the limits of epistemic communities. Such information has reappeared for application within different constitutional regimes and different political constellations, resulting from the dynamics of social struggles and accommodating specific economic conditions. And the overall result, given the innumerable variations at play, is striking. Constitutions come for the most part in the form of a written document and contain the legal ground rules for life in society: rights and principles, values and duties, provisions for the organization of government and, with regard to the operative quality of the document, ascertaining its authority, openness to interpretive change or legislative amendment, shifting between stability and flexibility. From this general picture I have inferred¹ that most constitutional items – shorthand for ideas and institutions, ideals and ideologies, norms and arguments, doctrines and theories – which are part and parcel of reasoned elaboration in doctrine and theory, of comparative analysis and practical constitution-making have been standardized and circulate like marketable goods among the participants of the local, regional, and transnational

¹ This chapter is based on two earlier publications in which I introduced and elaborated the IKEA theory of legal/constitutional transfer: Günter Frankenberg, “Verfassungsgebung in Zeiten des Übergangs” in idem, *Autorität und Integration. Zur Grammatik von Recht und Verfassung* (Suhrkamp Verlag 2003) 115–35; and Günter Frankenberg, “Constitutional Transfer: The IKEA Theory Revisited” (2010) 8 *International Journal of Constitutional Law* 563–79.