# Index

abortion *see* legal transfer of women and fetuses  
*Abortion I* 124–9, 131, 139–40, 145, 149  
*Abortion II* 130–35, 136–7, 138, 142–6, 142, 149  
Acosta, Alberto 339  
Adams, John 9, 29  
adaptation  
  adaptability of formal solutions 72–3  
  shortcomings 74  
  and standardization as complementary strategies 68–70  
adjudicative time 204–6  
*A.D.T. v United Kingdom* 94–5  
Afghanistan 22, 24, 239–40  
Africa  
  colonialism 201  
  constitutions 196  
  exceptionalism 213  
  imperial presidency *see* constitutional autochthony and postcolonial Africa  
OHADA 73–4  
transfer processes of authoritarian policies of national integration 10  
Agamben, Giorgio 202  
Alamán, Lucas 335  
Albania 18, 24  
  Constitution 18, 22  
Alexy, Robert 141  
Americas *see* Latin America; United States (US)  
Anglo-Eurocentric constitutionalism *see under* constitutionalism  
Ankersen, Thomas T. 306, 313–14  
Arab Spring 43, 201, 202  
Arendt, Hannah 273–4  
Argentina 329, 330  
  Constitution 16, 22, 112  
  reform 333–4, 343  
Aristotle 9, 29  
Armenian Constitution 18  
Artigas, José 328  
Australia  
  East Timor 247–8  
  ‘recognition space’ in respect of native title 168–9  
  Torrens system of land registration 70  
Austria 287, 292, 305  
  abortion constitutionalism 122  
  monarchic constitutionalism 297  
*Banda Oriental* (Artigas) 328  
Banda, President 212  
Bangladesh Constitution 18  
  basic laws/leges fundamentales 1  
Belgium 282  
  Constitution 10, 283, 291  
  constitutional monarchy/1831  
  Constitution 288–90, 291, 296, 297  
Bilbao, Francisco 328  
Blaustein, Albert 13  
Bolivian Constitution 333, 334, 336  
Bosnia/Bosnia-Herzegovina 239, 244–5, 260  
Bourdieu, Pierre 181, 195  
*Bowers v Hardwick* 96  
Brazil Constitution 17  
  reform 333–4  
*bricolage* approach 8, 25, 43, 138, 148, 294  
  re-contextualization: risks and side effects of *bricolage* 19–24, 25  
  imported information/rules subject to *bricolage* 19, 22, 60, 74
Order from transfer

BROWN v BOARD OF EDUCATION 107
Bulgaria 238–9
Burma 202
Busia, Kofi 224
Butler, Judith 182
Bülow, Oscar von 36–7
Camargo, Alberto Lleras 318
Cambodia 22, 240
Cameroon 89
Canada
  Canadian Charter equality clause 105–6
CASEY 97
Catholic Church 112, 327–8
abortion, 121, 141
in Colombia 307, 319–20
Charter of Fundamental Rights of the
EU 32, 47–9
European Court’s safeguarding role 50
good administration, right to 49–50
incorporated into TEU 48
influencing European and national
courts 49
and member states 48–9
right to marry 102
Chile 330
  Constitution 322, 328, 329, 330, 334
China 74–5, 76
citizenship and privacy see under
privacy
Colombia
  Constitution 298, 328, 329, 330
equality provisions in 84, 85
property as a social function 308, 319
reform 333–4
social responsibility 307–8
cultural feminism/different reasoning
of men and women 85
Leon Duguit’s influence in 313–21
liberal explanation/historical and
cultural inequality 84–5
neutral legislation insufficient 85
local comparative law explaining
legal transformation’s
ineffectiveness 309–10
pregnancy, protection during 85
social function of property 306–21
de-individualizing constitutions to
include ideas of social duties
310–11
local historical context 311–15
recontextualizing again: from
Duguit to the Catholic Church
319–20
recontextualizing locally the social
function of property 315–18
socialist feminism/lack of economic
opportunities for female
caregivers 85–6
socialization of reproductive work 86
trends characterizing feminist legal
reforms 84–6
women’s position in Colombia 84
pregnancy 85
colonization and de-colonization
163–4, 201
citizenship see German citizenship
and its colonial heritage
colonial governors 225–8
conservatism 327
post-colonial state-building 240–41
see also constitutional transfers and
experiments in the 19th century
commodification
conditions to transform legal/
constitutional units to
commodities 10–11
for transnational usage 1, 2
Common Core of European Private Law
project 32
‘Comparative Constitutional Law,
Gender Equality and
Constitutional Design’ (Williams)
82–3
comparative constitutional studies 2, 4,
29–35, 189–90, 193
approaching comparative
constitutional studies 29–30
complexity of legal transfer 30–33
differences in international settings
of constitutional law and
transfer 32–3
different degrees of influence 31
Index

scope of debate 33–5
study of comparative law in Europe 32
conservatism *see under* Latin America
constitutional autochthony and postcolonial Africa 10, 209–33
African exceptionalism 213
is African presidentialism ‘African’? 220–25
constitutional autochthony as defence of absolute presidency 221
constitutional norms/traditions of African kingship 221–5
cultural explanation 212–14, 220
empirical implausibility of cultural explanation 220–21
failure of ‘African culture’ thesis to account for colonial project 225–8
single indigenous national culture highly contestable 221
introduction of democratic/constitutional reforms in 1990s 210–11, 212
judicial review 210
political search for constitutional autochthony 214–20
Anglophone states 214–15, 226
Francophone states 214–15, 219–20
Ghana’s Republican constitution/absolute presidency 215–19
other countries following Ghana’s presidentialism 219–20
postcolonial president as successor to the colonial governor 225–8
powers of governors 226–8
presidential power in Africa constitutionally installed in 1960s 210
essence of absolute presidentialism 222
political costs/disaster of absolute presidentialism 211–12
powers and privileges 211, 212, 222, 229
presidential term-limit provisions 210–11, 212
prevalence and reach 209, 211
why absolute presidentialism persists in Africa 228–33
limited goals of democratic constitutional reform 229–30
need to unpack past legislative/administrative bequests 233
retention of existing law during constitutional change 230–33
constitutional law
comparative *see* comparative constitutional studies
and gender structures *see* gender structures and constitutional law
constitutional time 203–4, 205, 208
constituent time and constituted time 203–4
constitutional transfers *see* transfers constitutional transfers and experiments in the 19th century 279–305
constitutions not only national phenomena 281–2
experiment and tenure 291–5
France as model for experimental constitutionalism 291–4
patterns of constitutional instability 294–5
numbers of new constitutions 279
origin and originality: initial circumstances for constitutional monarchs 283–90
Cádiz – a historical compromise 286–8
civilizing the revolution – France 283–6
deconstructing originalism in Belgium 288–90
pathways and transfers 295–305
Cádiz compromise in transfer 297–300
constitutionalism à la Charte 297
transferring constitutional monarchy 295–6
plurality, agenda and sources of 19th century constitutionalism 300–305
constitutionalizing the ‘great transformation’ 300–302
different lines of constitutional development and transfer 304
ideological strands and projects of constitutionalism 303–5
importance of constitutions 300–301
legacy of French Revolution 301–2
side-effects of the ‘great transformation’ 301–2
consitutionalism 1, 2
Anglo-Eurocentric 2, 15
commodification for transnational usage 1, 2
conservatism see under Latin America
18th century 301
internationalized 237–8, 241
see also international influence on post-conflict constitution-making
liberalism 2
in Latin America see under Latin America
odd details rejected as incompatible with the liberal paradigm 15, 17
rights catalogues, democracy and the rule of law 22–3
modern 21
19th century see constitutional transfers and experiments in the 19th century
postcolonial see under ordering; constitutional transfers
radicalism see under Latin America
rights-based idea of forms of popular sovereignty articulating 202
movement-based 201–3
normative foundations 198–9
social 335–6
constitutions and bill of rights, rule of law and democracy 22–4
central function as ‘facilitation framework for conflicts’ 41–2, 45
as commodities see IKEA theory of legal transfer
constitution-making Germany see German citizenship and its colonial heritage
international law see international influence on post-conflict constitution-making; occupied countries, constitution-making
constitutional information, nature of
1
‘framework’ for legal transfer, constitutions and institutions forming 47
generic rights/similar basic values in constitutional texts 56, 81
global character of emerging world of national constitutions 76–7
global constitution see global/globalized constitution
integrating citizens into a nation 45
legal systems, fundamental information about 45
mixed constitutions 335–6
modern idiom, option of 21, 25
occupied countries see occupied countries, constitution-making
reconstructed rather than invented 2
symbols
constitutional transfer as transfer of symbols 45
symbolic function of constitutions and transfer 53
usual contents of 1
as written documents 1
see also constitutionalism; individual countries
contextualism 4, 7
Contrat Social (Rousseau) 291, 294
Costa Rican Constitution 22, 333
Council of Europe 32
Court of Justice of the EU see European Court of Justice/European Courts
‘Creative Force of Jurisprudence, The’ (Kohler) 36
Index

Croatia 245
Cuba 298, 333
culturalism 64–6
culture 185
conflict of 171–2
meaning of 44
pragmatic notion of 174
transmissions of cultural inheritance 193
Czechoslovakia 202
plan to transfer Swiss Federal system 20
de-contextualization, transfer as 10–12, 59, 191–2
formalization 11, 15, 59
globalization to re-contextualization, via 9
idealization 11, 15, 59
laws as text vs laws as propositional statement 61–2
reification 10–11, 15, 59
Delmas-Marty, Mireille 51, 155
democracy 11
consolidated democracy 20
and constitutions 22–3
democratic competition 180, 184
direct democracy, mechanisms for 336
in India 181
as international principle 237, 241, 256
law reform 75
‘militant democracy’ 65–6
parliamentarianism and democracy 14, 279, 301, 303–4, 305
participatory democracy 241
representative democracy 14, 336
and rights catalogues 22–3
demosprudence 206–7
Denmark
good administration, right to 50
legal process/substantive (material)
ideal type tradition 50
Díaz-Polanco, Héctor 341
dignity
and abortion 125–6
and sexual orientation 101–2
dogmatic principles (jurisdiction) 45
Douglas-Scott, Sionaidh 155
Dudgeon v United Kingdom 92–3, 95, 97, 98
Duguit, Leon see under Colombia
East Timor 240
Constitution 22, 210
constitution-making, partial external influence on 246–8, 250, 259
Constitutional Commissions 258
Security Council Resolutions 255, 256, 260
UNTAET 246–7, 259
Easton, David 45
Echeverría, Julio 339–40
Ecuador
Constitution 328
reforms 333, 337–40
Elias, Norbert 184
epistemological assumptions see
preconceptions (Vorverständnis)
equality
gender
and constitutions see gender
structures and constitutional law
dimensions of 87–8
discrimination against homosexuals 100–102
intersecting with other social inequalities 88
right to be different 100
right to be treated as equal to something else 90–91
marriage, right to 102–3
marriage, same-sex 105–11
federalism as equality motor 111–13
privacy vs equality 113–15
privacy vs equality and the role of dignity 100–102, 115–17
Eritrea 240
European Convention on Human Rights (ECHR) 24, 32
age of consent 93
equality guarantee (Art 14) 93, 94–5
Order from transfer

interpretation and ‘margin of appreciation’ doctrine 51–2
private life, right to respect for (Art 8) 93, 94
recognized in TEU 48
right to marry (Art 12) 102–3
European Court of Human Rights (ECtHR) 24
‘margin of appreciation’ doctrine 51
privacy
emancipatory dimension of free decision-making 101
right to privacy restricted to an autonomy in non-public sphere 101
strong privacy approach in protecting sexual orientation 92–5, 96
right to family life for same-sex couples 103
right to marry 102–3
European Court of Justice/European Courts 48
administrative culture of member states, influencing 50
and Charter of Fundamental Rights of the EU 49
safeguarding role 50
member states’ administrative culture, influencing 50
sexual orientation discrimination 113–14
European Union (EU)/Europe
abortion 120–22
Charter of Fundamental Rights see Charter of Fundamental Rights of the EU
Commission influencing member states’ administrative culture 50–51
constitutionalizing austerity 207
EU law pressure on domestic law as an irritant 61
EU not a homogeneous constitutional entity 32
good administration, right to 49–51
ius commune establishing idea of basic similarity 32
limited authorization 50–51
services in the internal market 51
study of comparative law in 32
transfer of information over a ‘bridge’ formed by EU 53
‘value laboratory’, institutions of EU as 41, 49–51
vertical constitutional transfer within a supranational organization 35
see also constitutional transfers and experiments in the 19th century
external influence see international influence on post-conflict constitution-making

Federalist Papers 29–30
‘figuration’ 184, 185
Fiji 95
Finland 238–9
First International Congress of Comparative Law (1900) 30
Fitzpatrick, Peter 183
formalism 58, 59, 62–3, 66–7
formalization 11, 59
Fourie 106–7
France 282, 287
abortion constitutionalism 122
Charte constitutionelle 289, 290, 292–3, 296, 297
colonies 214–15, 262, 270
Conseil constitutionnel 12, 122
constitutional monarchy/1791 Constitution 283–6, 289, 290, 291, 294, 295–6, 297, 303, 328
Déclaration 23, 291, 284, 285, 286, 289, 294
experimental constitutionalism, as model for 291–4
formalist ideal type tradition 50
French Revolution 281, 284, 288, 291, 303, 327
legacy of 301–2
good administration, right to 50
parliamentarianism and democracy, towards 305
violations of constitution 300

functionalism 33–4, 58, 59, 62–3
instrumentalism 63–4
culturalist critique 64–5
fundamental/human rights 24, 45
Charter of Fundamental Rights see Charter of Fundamental Rights of the EU
constitutional traditions of EU member states 48–9
in contemporary constitutions 81
ECHR see European Convention of Human Rights (ECHR)
equality see equality
European fundamental rights 48
see also Charter of Fundamental Rights of the EU
gender equality provisions in contemporary constitutions 81–6
as international principle 237, 241, 256
law reform 75
and the rule of law 34–5
sexual orientation see same-sex couples
transfer affecting 46, 47
UDHR 87, 201
see also under individual countries

Gadamer, Hans Georg 43
García, Helena Alviar 13
Geertz, Clifford 52, 185
gender see under equality
gender structures and constitutional law 81–6
affirmative action provisions 82
in Colombia see Colombia
context determining how commodities travel 84–6
gender equality provisions in contemporary constitutions 81–2
marriage 82
pregnancy, protection during 82, 85
Geneva Conventions 239, 255

German citizenship and its colonial heritage 261–75
imaginings of ‘others’ 265–71
distinction between ‘natives’ and ‘citizens’ 266
‘mixed marriages’ 266–71
lasting repercussions: reconceptualization of citizenship law 271–5
post-colonial theories and German jurisprudence 261–5

Germany 70
abortion see legal transfer of women and fetuses

Basic Law
free development of one’s personality 101, 103, 114, 116, 126
protection of the family 132
protection of marriage 103, 114
right to life 125
citizenship and colonialism see German citizenship and its colonial heritage
civil law 47, 53
civil partnerships 103–4, 113–15
benefits equality/financial discrimination 114–15

Constitution 45, 50, 124, 282
fundamental rights/right to equality 46, 47, 50, 54, 103
important legal issues requiring acts of parliament 47, 53–4
right to privacy restricted to an autonomy in non-public sphere 101
sovereignty of the people/will of the people 47, 53
Constitution, Weimar 125, 311, 323
constitution-making process after Second World War 238, 243
Federal Constitutional Court (FCC) 12, 20, 46, 47
abortion see legal transfer of women and fetuses
discrimination and marriage 104–5
discrimination and same-sex partnerships 114
German governmental bodies responsible for integration marriage as different-sex union 103–4 protection of gender identity 104 protection of homosexuals from outing 96 same-sex sexual activities and right to private life 95–6 formalist ideal type tradition 50 fundamental rights 46, 47, 50, 54, 103 duties owed to fetuses 124–5 as guidelines and impulses for state action 125 good administration, right to 50 legal positivism and descending steps of the legal order 42 'militant democracy' 65–6 monarchic constitutionalism 297 Rechtsstaat 9, 11–12, 47, 54 historical context 12 predictability of legal decisions/‘margin of appreciation’ doctrine 51–2 Ghana 215–20, 224, 229–30 adoption of customary protocol and symbols 221–2 Akan 221, 224 Constitution, current 231 continuity during successive regimes 231–2 Presidential powers 217–19, 233 Republican Constitution Fundamental Principles 218–19 influence of First Republic 232–3 replacing Westminster constitution 215–17 Gilissen, John 288–9 Giudice, Michael 161 global/globalized constitution 2, 34 essential elements of the modern constitution 13 globalization as increasing hybridization/pluralisation of culture and laws 35 modern global law rooted in European/Christian law of nations 35 and rights catalogues 23–4 human rights and rule of law 34–5 globalization 9, 29 and Anglo-Eurocentric constitutionalism 2 locally entrenched items defying 2 and developing countries 77 global constitution see global/globalized constitution global product lines 73–4 as increasing hybridization/pluralisation of culture and laws 35 of laws 35 metaphors 41 of the modern idiom 13 transformation 74–5 glocalization: alternatives to liberal-western paradigm 2 good administration in EU, right to 49–51 Goodridge 108 Greece 282 Constitution 296 monarchic constitutionalism 297 Griffiths, John 157, 158–9, 161 Grimm, Dieter 44 Guatemala 333 Hague Convention (1907) 239 Hague Regulations 255 Haiti Constitution 16, 23, 296 revolution 298 Halpern v Canada 105 Hamilton, Alexander 29 Hegel, GWF 265 HJ (Iran) 89–90 Hong Kong 99 Hottinger, Julian 252 human rights see fundamental/human rights Human Rights Committee 93 Hungary 238–9 German Federal Constitutional Court model opposed 2 hybridization 173–4
<table>
<thead>
<tr>
<th>Index</th>
<th>357</th>
</tr>
</thead>
<tbody>
<tr>
<td>globalization as increasing hybridization</td>
<td>35</td>
</tr>
<tr>
<td>and replication 173, 182</td>
<td></td>
</tr>
<tr>
<td>subversion as extreme form of hybridization</td>
<td>173</td>
</tr>
<tr>
<td>idealization 11, 59</td>
<td></td>
</tr>
<tr>
<td>odd details not amenable to</td>
<td>15</td>
</tr>
<tr>
<td>IKEA 68–76</td>
<td></td>
</tr>
<tr>
<td>IKEA theory of legal transfer</td>
<td>1–26, 58–62, 189, 191–6</td>
</tr>
<tr>
<td>constitutions as commodities</td>
<td>1–26, 62</td>
</tr>
<tr>
<td>critique of the unitary project: from transplant to transfer 3–8</td>
<td></td>
</tr>
<tr>
<td>merchants of transfer 15, 25–6</td>
<td></td>
</tr>
<tr>
<td>different limitations and uses, some commodities prone to producing 84, 88–9</td>
<td></td>
</tr>
<tr>
<td>as four-stage process 59–61</td>
<td></td>
</tr>
<tr>
<td>de-contextualization, transfer as</td>
<td>see de-contextualisation, transfer as</td>
</tr>
<tr>
<td>defying transfer: odd details</td>
<td></td>
</tr>
<tr>
<td>odd details</td>
<td></td>
</tr>
<tr>
<td>global constitution, transfer as inclusion in 12–15, 25, 58, 59–60, 62</td>
<td></td>
</tr>
<tr>
<td>initial circumstances of transfer 8–10</td>
<td></td>
</tr>
<tr>
<td>re-contextualization see re-contextualization</td>
<td></td>
</tr>
<tr>
<td>as collective constitutional consciousness/memory 192–5, 203</td>
<td></td>
</tr>
<tr>
<td>19th century 295, 300</td>
<td></td>
</tr>
<tr>
<td>US Constitution/‘We, the People’, prominence of 22, 194, 202–3</td>
<td></td>
</tr>
<tr>
<td>and instrumentalist, culturalist and formalist transplants 62–7</td>
<td></td>
</tr>
<tr>
<td>local context determining strength and force of rights/rights protection 84–6</td>
<td></td>
</tr>
<tr>
<td>politics of naming 191–6</td>
<td></td>
</tr>
<tr>
<td>from ‘reception’ to IKEA: different approaches to legal transfer 37–40</td>
<td></td>
</tr>
<tr>
<td>IKEA as post-modern concept 38</td>
<td></td>
</tr>
<tr>
<td>success of IKEA in the consumer market/success of legal transplants 59, 68–73</td>
<td></td>
</tr>
<tr>
<td>adaptability of formal solutions 72–3</td>
<td></td>
</tr>
<tr>
<td>‘best solutions’ and ‘good enough solutions’ 70–72</td>
<td></td>
</tr>
<tr>
<td>standardization and adaptation as complementary strategies 68–70</td>
<td></td>
</tr>
<tr>
<td>threshold test excluding some transfers 14–15, 195–6</td>
<td></td>
</tr>
<tr>
<td>and Watson’s theory 66–7</td>
<td></td>
</tr>
<tr>
<td>see also possibility of legal transfer/transplant, debate on In Re Marriage 109, 110</td>
<td></td>
</tr>
<tr>
<td>India 24</td>
<td></td>
</tr>
<tr>
<td>Constitution 17, 18, 201, 205</td>
<td></td>
</tr>
<tr>
<td>dowries and divorce 174–86</td>
<td></td>
</tr>
<tr>
<td>same-sex sexual activity, equality, and privacy 99</td>
<td></td>
</tr>
<tr>
<td>Supreme Court 205–6</td>
<td></td>
</tr>
<tr>
<td>adjudicative leadership 206, 207</td>
<td></td>
</tr>
<tr>
<td>assuming appearance of new social movement 207</td>
<td></td>
</tr>
<tr>
<td>demosprudence 206–7</td>
<td></td>
</tr>
<tr>
<td>Social Action Litigation 206–7</td>
<td></td>
</tr>
<tr>
<td>women’s human rights 75</td>
<td></td>
</tr>
<tr>
<td>see also ‘ordering’ constitutional transfers</td>
<td></td>
</tr>
<tr>
<td>Indonesian Constitution 18</td>
<td></td>
</tr>
<tr>
<td>information</td>
<td></td>
</tr>
<tr>
<td>constitutions</td>
<td></td>
</tr>
<tr>
<td>containing fundamental information about legal systems 45</td>
<td></td>
</tr>
<tr>
<td>nature of constitutional information 1</td>
<td></td>
</tr>
<tr>
<td>encountering receiver’s preconceptions see preconceptions (Vorverständnis) transfer</td>
<td></td>
</tr>
<tr>
<td>capturing the compactness of transferred information 8</td>
<td></td>
</tr>
</tbody>
</table>
legal/constitutional transfer as transfer of information 40, 41–5, 52–4
receiving information irritating receiving system 46–7
transferred laws/dogmatic principles as 45
units of information transferred via ‘bridges’ 53
institutional isomorphism 39
meaning 40
and ‘small world theory’ 43
instrumentalism see under functionalism
interlegality 177–9, 182–3, 185
International Covenant on Civil and Political Rights (ICCPR) 93
international influence on post-conflict constitution-making 243–60
categories of external influence 244–5
external influence, legality 254–7
external influence, legitimacy of 257–9
legality and legitimacy of external influence 245, 246–54
East Timor see East Timor
Iraq see Iraq
Sudan see Sudan
International Monetary Fund 12, 259
international organizations/institutions as ‘bridges’ 53
neutrality 241
Iran 89
Iraq 239–40
constitution-making, partial external influence on 248–50, 258–9
Security Council Resolutions 255, 256–7, 260
TAL 248–9, 257
Irish Constitution 15
irritation/irritant 38, 41, 42
foreign rule functioning as an irritant 61
transfer comparable to an irritation process 53

Italy 238–9, 305
abortion constitutionalism 122, 126
Constitution 296
constitutional instability 294
revolutionary movements 296

Japan 238, 243
judicial role 201, 203
adjudicative time 204–6
courts and justices as apparatuses of state power 207
Indian demosprudence 206–7
interpretation varying according to traditions 6
judicial review 12, 14, 20
doctrine of abstract judicial review 196
Latin America
judicial reform initiatives 343
jurisdictions dependent on executive branch 334

Kant, Immanuel 9
Kaunda, President 212, 230
Kazakhstan Constitution 18
Kelsen, Hans 197, 224
Grundnorm 159
Kennedy, Duncan 311
Kenya 18, 212, 213–14, 220, 230
Constitution 18
Kohler, Josef 36, 53
Kosovo 239–40

Laskey, Jaggard and Brown v United Kingdom 93–4
Latin America, constitutional grafts and social rights in 123, 322–48
constitutional ‘grafts’, ‘transplants’ and ‘rejections’ 323–6, 342–8
innovations and the social framework 345–7
judicial reform initiatives 343
radical constitutional project influence beyond political institutions 347–8
social rights not implemented in 20th century 344–5
Index

constitutional traditions in the Americas 326–9
difficulty of enforcing social rights 322–3
pact between liberals and conservatives, exclusion of radicalism 329–32
re-emergence of radicalism: new waves of constitutional reform 332–6
reform during societal crisis of 1930s 333
reform at end of 20th century 333–5
social rights as political objectives 323
substantive constitutional and social change 322–3
three ‘bodies’ or constitutional traditions in the Americas 326–9
Latour, Bruno 67
law
Bible as source of law 5
as ‘clotted politics’ 44
‘combined law’ 183
constitutional law
comparative see comparative constitutional studies
and gender structures see gender structures and constitutional law
as emanation of spirit of the people 5
fragmentation 74
as laboratory 41–2
‘law as literature’ movement 41
law-as-rule 6, 11–12
laws as text vs laws as propositional statement 61–2
travelling across legal borders 33
social significance of law see under legal anthropology
as subject and object of legal transfer and the framework 53
Law, David 56
law reform
cost of law reform 70–71
economies of scale in law reform 68–73
adaptability of formal solutions 72–3
‘best solutions’ and ‘good enough solutions’ 70–72
standardization and adaptation as complementary strategies 68–70
globalization 76–7
IKEA theory developed see IKEA theory of legal transfer
matching law reforms 73–4
‘one size fits all’ 56–8, 59
capitalist ideology underpinning 62
instrumentalist failure 63–4
rejection of concept by comparative lawyers 56–7
successful as a formalist conception 58
Lawrence v Texas 96–7, 98, 99, 100, 101–2, 105, 110, 111
Lebach 96
Lectures on the History of Philosophy (Hegel) 265
legal anthropology 67, 154
and legal transfers 171–86
constellations and figurations 179–81
foreign and autochthonous laws 171–2
interlegality 177–9, 182–3, 185
normative effect of different legal orders on people 171
pragmatics of norms 181–4
replication and hybridization 173, 182
social significance of law 172
transculturation 174–7, 182–3
‘vernacularization’ 172–3, 182
legal culture/legal cultures 44
core principles forming fundament of legal culture 45
as historical genesis of legal institutions/’clotted history’ 40–7, 52
margin of appreciation doctrine as means of reconciling 51–2
permanent process of the 'fabrication of order', legal culture as 45–6
reliability of law/citizen's trust in law central to 52
transplants threatening integrity of legal cultures 65
legal hermeneutics 44–5
legal history vs legal philosophy 4–7, 33–4
legal influence 38–9
legal pluralism 4, 183, 193
contestability as fundamental to plurality 156–7
distinguishing transfer 165–70
instrumental approaches 160–61
malleability of concept 156, 157
meaning 155, 157
and normative transfer 4, 153–70
colonial project/originary colonizing violence 163–4
movement of legal norms between closed legal/normative orders 154–5
negotiating boundaries 162–5
ordering pluralism 155–63
as opposite of legal monism or centralism 157
ordering pluralism 155–63
self-regulation 159, 160
strong legal pluralism 159–60
weak legal pluralism 158–9
when legal pluralism comes into existence 156–7
legal realism: metaphors 41
legal solipcism 39
legal transfer see transfer
legal transfer of women and fetuses 83, 120–50
abortion constitutionalism 121–3
Catholic tradition and right to life 121, 123, 125, 141
forms of protection of unborn life 127–8
Germany 124–35, 147–50
Abortion I 124–9, 131, 139–40, 145, 149
Abortion II 130–35, 141, 142–6, 149
indications models 120, 123, 129–30, 131, 138–9
liberalization of abortion in Europe 120–21
normative visions of women underlying arguments of judges 83
periodic model or time-phase solutions 120,122–3
Portugal: respecting life and responsible women 135–50
proportionality 136–7, 140, 148
US abortion constitutionalism 121–2, 138, 142
legal translation 167–8
legal transplantation 166
Legrand, Pierre 4–7, 25, 33–4, 61–2, 63, 172
culturalist approach to legal transplants 64–5, 77
legal institutions developing in evolutionary way 39
legal transplant debate with Watson 4–7, 33–4, 61–2, 63
only meaningless form of words transferred 6, 39, 53
rules embedded in a specific context with specific meaning 39, 65
transplants threatening integrity of legal cultures 65
Lester, Lord 51
Leung 99, 102
Levitt, Peggy 173
liberal constitutionalism see under constitutionalism
Liberian Constitution 22
Libya 240
Loewenstein, Karl 66
Loving v Virginia 107, 110, 111
Luhmann, Niklas 54, 164–5
autopoietic systems 167–8
Luxembourg Constitution 15
MacKinnon, Catherine 117
Madison, James 16, 29, 223, 328
Maine, Henry 193
Malawi 212, 230
Mamdani, Mamood 228
Index

margin of appreciation doctrine 51–2
marriage 82
and equality see under equality
right to marry in EU 102–3
same-sex see under same-sex couples
Maruko 113–14
Marx, Karl 199, 294
Massachusetts Constitution 9
Max Planck Institute for Public
international Law 253
May, Karl 265
Mayntz, Renate 43, 54
Mazrui, Ali 219
Melberg, Arne 199
Merry, Sally 75, 173
metaphors 41
Mexico 298, 299, 330
Constitution 322–3, 328, 335
reform 340–42
revolution 311
Meyer, John W 40
Michaels, Ralf 35, 166
migration 38, 41
and inter-state movement of
constitutional ideas 7–8
‘military humanism’ 207
mimesis
in constitutional ‘transfers’ in late
modernity 197–200, 202–3
forms of 199–200
theories of 199–200
Moi, President 212
monism 156–7, 159, 161–2, 164
Montesquieu, Charles-Louis de
Secondat 6, 29, 283, 286
Müller, Adam 9
Namibia 240, 242
naming, politics of 190, 191–6, 200
Napoleon Bonaparte 292, 293, 294, 305
National Coalition 98, 99, 100–11
Naz Foundation 99, 102
Nepal 202
Netherlands 262, 282
Basic Law 288–9
colonies 270
constitutional instability 294
Nigeria 213, 220, 223, 230
Nkrumah, Kwame 202, 215–20,
221–2, 224, 232
normative transfer see legal pluralism
and normative transfer
Norway 282
Nyerere, Julius 213, 222, 224, 230
occupied countries,
constitution-making in 237–42
internationalization of domestic
(dis-)order 237–8
democracy, human rights, rule of
law as international principles
237
norms deriving from UN Charter
237
post-colonial state-building 240–41
post-conflict state-building 238–40
problems 241–2
legality of internationalized
constitutionalism 241
measuring domestic legitimacy
241–2
odd details/oddities 190–91
as alternative constitutional visions 2,
15–18
and anti-hegemonic rebellion 2
defying transfer 15–19
no reliable criteria to distinguish from
globalized items 18–19
as non-marketable phenomena 2,
17–18
not amenable to reification,
formalization or idealization 15
OECD 259
OHADA 73–4
Olsen, Fran 46–7
‘one size fits all’ see under law reform
‘ordering’ constitutional transfers
189–208
mimesis and originality in
constitutional ‘transfers’ in late
modernity 197–200
rights-based idea of
constitutionalism (RBC)
198–9
strong and weak Euro-authorship
claims 197–8
theories/forms of mimesis 199–200
‘originary’ elements in postcolonial constitutionalism 200–207
fusion of constitutional time 203–4
movement-based RBC 201–3
new lifetimes of adjudicative time 204–6
towards demosprudence 206–7
threshold concerns 189–91
Ortiz, Fernando 182
Pakistan Constitution 18, 202
Paraguay 334
Parsons, Talcott 44
Pashukanis, Eugene 190
Pearson, Noel 168–9
Perry v Brown 109–10, 113
Peru 334
Constitution 298, 328
Planned Parenthood of Southeastern Pennsylvania v Casey 121
Poland 283
Portugal 300
abortion see legal transfer of women and fetuses
sexual orientation discrimination 118
possibility of legal transfer/transplant, debate on 36–47, 181
Watson/Legrand debate 4–7, 33–4, 61–2, 64–5
Prada, Raúl 336
preconceptions (Vorverständnis) 21, 25
analysis leading to understanding of a ‘deeper semantic’ 43–4
information encountering preconceptions 43
Prempeh, H Kwasi 10
Pretty 101
privacy
emancipatory dimension of free decision-making 101
equality and role of dignity, vs 100–102
feminists against separation of public and private spheres 91
meaning as domesticity 117
as protecting a private space 91, 92, 101
as a sphere of non-intervention and secrecy 91
as a sphere of private intimacy and autonomy 101, 117
right to a private life denying full citizenship 83, 88
same-sex marriage
privacy vs equality 113–15
right to marry/right to recognized form of partnership 102–5
sexual orientation/homosexuality
ECtHR’s approach 92–5
equality vs privacy approaches to sexual orientation 115–17
FCC approach 95–6
US approach 96–8
professional networks 47
as a ‘bridge’ 53
property, social function of see under Colombia
Prussia 287, 304, 305
Constitution 296
monarchic constitutionalism 297
Puerto Rico 298
radicalism see under Latin America
Randolph, Edmund 11
Rawlings, Jerry 230
‘reception’ 4, 31
characterizing grand/classic narrative of legal system development 37
Savigny-Thibaut debate on reception of law 192–3
from ‘reception’ to IKEA: different approaches to legal transfer 37–40
Rechtsstaat see under Germany
re-contextualization 19–24, 46
adding context-specific meaning 60
political resistance/ideological concerns 20, 61
results from re-contextualization 21
risks and side effects of transfers 20, 21–4, 60–61
Reference re Same-Sex Marriage 105–6
reification 10–11, 59
Index

replication 173, 182
Ricoeur, Paul 43, 199–200
rights-based idea of constitutionalism see under constitutionalism
Riles, Annelise 67
Romer v Evans 110
Roe v Wade 121, 122, 131, 142, 150
Romania 238–9
Constitution 296
Rousseau, Jean-Jacques 283, 291, 294, 328
Rückert, Friedrich 265
rule of law 11–12, 203
condensed into five essential elements 12
as international principle 237, 241
law reform 75
and ‘margin of appreciation’ doctrine 51
and rights catalogues 22–3
human rights see under fundamental/human rights rules
differing judicial interpretations of statutory law 6
embedded in a specific context with specific meaning 39
nomadic character 6
original meaning lost in repetition 6
as propositional statements 6
receiving meaning from inspiration by foreign legal systems 65
Russia 287, 305
Constitution 18
failed transfer of German-style judicial review 20
monarchic constitutionalism 297
Said, Edward 8–9, 19, 59, 190, 261, 284, 307
same-sex couples
de-criminalization of same-sex sexual activity 92–102
discrimination against homosexuals 100–102
equality framework providing full citizenship participation 83, 88
equality vs privacy approaches to sexual orientation 115–17
obstinate IKEA goods 117–19
religious beliefs 110, 118
same-sex marriage 102–15
equality 105–11
federalism as equality motor 111–13
privacy: right to some sort of partnership 102–5
privacy vs equality 113–15
sexual orientation between right to privacy and to equality 89–92
Saudi Basic Law (Constitution) 16
Savigny, Friedrich von 5
Savigny-Thibaut debate 192–3
Schalk and Kopf 102
Schlegel, Friedrich 265
Schlesinger Jr, Arthur 209
Schmitt, Carl 202, 205
Schuppert, Gunnar Folke 41–2
Seidman, Robert 228, 230–31
self-determination
limitation on foreign influence 255–6
occupied countries 237–8
post-colonial state-building 240–41240
separation of powers 203
Belgian constitution 283
in contemporary constitutions 81, 302
Euro-American in origin 198
French Déclaration 23, 291
sex equality 87
sexual orientation
homosexuality/same-sex couples see same-sex couples
transsexuals 104, 116
Sicily 282, 300
’small world theory’ 43
Smend, Rudolf 45
social media 43
social rights in Latin America see under Latin America
South Africa
Bill of Rights, sexual orientation provisions in 106
Constitution 201
constitutional reform, marginal influence on 245, 260
Constitutional Court 98, 106–7
demosprudence 206
discrimination 106–7
marriage 106–7
polygamous customary marriage 107
Muslim marriage 107
same-sex marriage 106–7
same-sex sexual activity and equality 98
Spain 262, 305, 311
conservatism 327
constitutional instability/change 294, 296
constitutional monarchy/1812 Cádiz Constitution 282, 286–8, 290, 295
Cádiz compromise in transfer 297–300
monarchic constitutionalism 297
violations of constitution 300
Spirit of the Laws (Montesquieu) 29, 283, 286
Sri Lanka Constitution 18
standardization 68–70
subversive reception/subversion 2
of German approach to abortion by Portugal 123, 138, 139, 148
subversion as extreme form of hybridization 173
Sudan 240
constitution-making, partial external influence on 250–54, 258, 259, 260
IGAD 251–2
National Constitution review commission 253–4
non-African states represented at talks 252
UN and Max Planck Institute 253
Sumbeiywo, General Lazaro 252
Sweden
good administration, right to 50
legal process/substantive (material) ideal type tradition 50
Swiss Confederation Constitution 15, 22
systems theory 38, 39–40
actor-centred perspective enriching 54
central activity of social systems as the production of ‘meaning’ 42
Luhmannian 54
Teubner, Gunther 61
textualism/formalism 7
Tonga Constitution 16
Toonen 93
transculturation 174–7, 182–3
transfers
complexity of legal transfer 30–33
constitutions and institutions forming ‘framework’ for legal transfer 47
as de-contextualisation see de-contextualisation, transfer as defying transfer: odd details see under odd details described by variety of terms 4, 31, 38 metaphors 41
designing institutions and procedures by reflection and choice 31
difficulties of successfully/effectively transferring constitutional law 33
distinguishing transfer 165–70
legal transfer 168–70
legal translation 167–8
legal transplantation 166
as ecumenical concept 7–8, 83
hermeneutical problem, legal/constitutional transfer as 43
as inclusion in the global constitution 12–15
information, legal/constitutional transfer as transfer of 40, 41–5, 52–4
constitutional transfer as transfer of symbols 45
legal transfer 41–3
methodological questions 43–5
initial circumstances of transfer 8–10
irritation process, comparable to 53
Index

Latin America see Latin America, constitutional grafts and social rights in leading to constitutional change and a law-making procedure 46–7
merchants of 15, 25–6
and migration 7–8
in 19th century see constitutional transfers and experiments in the 19th century
normative transfer see legal pluralism and normative transfer
‘ordering’ constitutional transfers see ‘ordering’ constitutional transfers
‘point of origin’ 9
possibility of constitutional transfer and clotted history 36–55
possibility of legal transfer/ transplant, debate on see possibility of legal transfer/transplant, debate on purposeful legal transfer and formal structures 46
re-contextualization: risks and side effects of bricolage 19–14
requirement for ‘staff’ from legal and political systems 54–5
and rights-making 23–4
risks and side effects of transfers 20, 21–4
transfer as an ecumenical concept 7–8
and transplant 37–8
transplants concept as pillar of unitary project 3
fragmentation 74
global scale of transplants 58
and IKEA theory see IKEA theory of legal transfer
‘one size fits all’ concept 56–8
possibility of legal transfer/transplant, debate on see possibility of legal
theories of transplant 58–9
culturalism 64–6
formalism 66–7
instrumentalism 63–4
threatening integrity of legal cultures 65
and transfer 37–8
transfer/transplant, debate on see possibility of legal transfer/transplant, debate on as two-stage process 59
Watson’s transplant thesis see Watson, Alan; Legrand, Pierre see also transfer
transsexuals 104, 116
travelling theory 10, 19, 190, 307
Treaty of the European Union (TEU) 48, 49
unitary project, critique 3–8
United Kingdom 292
colonies 214–15, 262, 270–71
conservatism 327
common law 33
case law system/stare decisis 42
right of self-defence 16
constitution/constitutionalism 24, 289, 294
towards parliamentarianism and democracy 303–4, 305
discrimination and homosexuality 116
Human Rights Act (1998) 24
legal process/substantive (material) ideal type tradition 50
rule of law 11–12
historical context 12
United Nations
Charter 237
self-determination 240, 241
peace-keeping powers 240
personnel, expertise of 241
responsibility for non-self-governing territories 241
settlement of internal conflict 240
state-building missions 239–40
East Timor
Constitutional Commissions 258
Security Council Resolutions 255, 256, 260
UNTAET 246–8, 259
United States  
abortion 121–2, 138, 142  
American Revolution 281, 298  
case law system/stare decisis 42  
civil unions 107–8  
Constitution see United States Constitution  
Declaration of Independence 284  
Iraq 248–50, 258, 259, 260  
legal culture, reliability of law/citizen’s trust in law central to 52  
race discrimination 107  
right to marry 109  
Supreme Court 12, 206  

United States Constitution 11  
First Amendment 23–4  
as ‘ideal’ liberal type of constitution 329  
Preamble 11, 21–2  
Fifth Amendment 109  
Second Amendment (right to bear arms) 16–17  
Spartan constitutional model 322  
Universal Declaration of Human Rights (UDHR) 87, 201  
Uruguay 333  
USAID 12  
Uzbekistan Constitution 18  

Venezuela 298, 333  
‘vernacularization’ 172–3, 182  
Vietnamese Constitution 17–18, 196  
Vinogradoff, Paul 193  
Vorverständnis see preconceptions (Vorverständnis)  

Watson, Alan  

anti-functionalist and anti-instrumentalist 66  
formalist challenge 66–7  
legal rules detached from society 66  
institutions as social constructs 39  
legal transplant debate with Legrand 4–7, 33–4, 61–2, 63  
Weber, Max 44, 193, 199  
West-Eastern Divan (Goethe) 265  
western-liberalism see Anglo-Eurocentric constitutionalism  
Western Sahara 240  
Wolfenden Report 95, 97  
women  
abortion see legal transfer of women and fetuses  
dowries and divorce in India 174–86  
equality provision see gender structures and constitutional law rights  
and dowry and maintenance in India 177, 178  
global currency of women’s rights 184  
human rights in India 75  
Islam 180  
struggle by women’s movements for 180  
World Bank 12, 63, 71  
‘Doing Business’ Reports/one size fits all in business regulation 56  

Young, Iris 161–2  
Yugoslavia 245  

Zambia 212, 230