

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.

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