Reflecting Various Practices

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Legal Transfer

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A. Introduction

Laws[1] neither fall 'from heaven' as lawmakers' ingenious insights nor grow organically from the soil of local culture. While brilliant ideas and context are crucial for the construction of laws, they may be more adequately understood as products of the confluence of information – some local, some that has travelled from elsewhere. In the following, the focus will therefore be on how legal information travels – or as it is described here: how it is transferred. The concept of transfer is meant to make comparatists sensitive to the different ways legal items, such as rights and values, organizational provisions and doctrines, are converted into standardized information and over time become products or commodities on the global or regional markets where elites, politicians, social movements, and legal consultants shop for inspirational legal ideas, 'commanding' constitutional models, efficient bankruptcy regulations, progressive family laws, or mechanisms to cope with corruption already tested someplace else.

Legal transfer is understood here to operate as part of world-making. First, it will be shown how the information needed to design or revise laws is gleaned from foreign contexts, and how it arrives in a new setting not in its pristine form or design but *always already* processed intensely

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1 'Laws' is used here as a summary of the items amenable to transfer, like statutes, rules, doctrines, principles, arguments, cases, institutions, systematics, etc. I am indebted to Katrin Seidel, Felix-Anselm van Lier, and Marie-Claire Foblets for their thoughtful comments on a previous version.

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on the way. Second, whether selected with care or haphazardly borrowed, imported in good faith or imposed with brute force, the translation and application of legal information to a new environment invariably presupposes intense modification and adaptation, which is here referred to as 'bricolage' in order to accentuate the aspect of ad hoc tinkering, in contrast to planned, systematic legal engineering.[2] Third, it will be shown below that transfer entails considerable hazards. Since the process of transfer is open-ended and unpredictable, the final result never simply brings forth the initial item but reproduces a fragment, cut-out, hybrid, modified copy, or 'pastiche' that imitates the norm, argument, or institution to be transferred. Transfer calls for an analysis that pays special attention to contexts and cultures, risks and side-effects. Fourth, while the process of decontextualization may be read as another globalization story, this narrative receives a critical twist if the focus is shifted to items that resist transfer and call for an answer to why and which kind of legal information remains context-bound.

B. From 'Transplant' to Transfer

The concept of 'legal transplant', introduced in 1974 by the legal historian Alan Watson from a basically functionalist perspective,[3] has been adopted without much theoretical ado, especially by comparatists with a historical or economic mindset.[4] Yet a return to *The Spirit of the Laws* might curb the career of this surgical term, which hardly complies with Montesquieu's (and other comparatists') observation that '[laws] should be so specific to

2 Claude Lévi-Strauss, *The Savage Mind* (University of Chicago Press 1966).

3 Ralf Michaels, 'The Functionalist Method of Comparative Law' in: Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006), 339-382.

4 E.g. Morton Horwitz, 'Constitutional Transplants', Theoretical Inquiries in Law 10 (2009), 535-560; Ugo Mattei, 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics', International Review of Law and Economics 14 (1994), 3-19; Jonathan M. Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process', American Journal of Comparative Law 51 (2003), 839-885. For a differentiated view: Michele Graziadei, 'Comparative Law as the Study of Legal Transplants' in: Reimann and Zimmermann (n. 3), 441-475; Vivian Grosswald Curran, 'Cultural Immersion, Difference and Categories in U.S. Comparative Law', American Journal of Comparative Law 46 (1998), 43-92; and Pier Giuseppe Monateri, 'Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition', Hastings Law Journal 51 (2000), 3-72.

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the people for whom they are made, that it is a great coincidence if those of one nation can suit another',[5] or with any comparative style privileging the analysis of concrete cultural-social circumstances over abstract general concepts. Situating the 'transplant' in this field of diverse comparative approaches elucidates its functionalist pedigree and limits.

From a less traditional and more contextual perspective, '[t]he moving of a rule or a system of law from one country to another'[6] neither resembles an organ transplant nor captures with passable precision what happens when legal information travels. A transplanted kidney is removed from one body and relocated to another one, whereas a 'transplanted' civil code neither emigrates from one nor settles in a new 'body of norms'. It remains in its cultural setting and is only imitated, adapted, doubled, cloned elsewhere. Hence, 'transplant' is a limping metaphor which invites wonky associations and analogies. First, it obscures just *what* is transferred. Laws and systematics, doctrines and arguments, rights and values, institutions and programmes, degrees and curricula – virtually anything qualifies for travel. However, each item does not migrate *en bloc* qua organ but as text or knowledge, that is *information*. Second, 'transplant' conceals that legal information, when transcending borders between legal systems and interpretive communities, is not reduced to its basic structure (atom-like) but remains layered. It can be described as the layered interplay or narrative of propositions, structures, decisions, mentalities, experiences, case histories, and so forth,[7] a good deal of which gets lost in translation or gets transformed in 'translation chains'.[8] The fragmentary nature of 'transplants' and the very selectivity of the process are profoundly misrepresented by the organicist analogy. Third, the technical term 'transplant' is based on a doubly formalist reduction: law is reduced to rules and rules are brought down to their propositional content.[9] This way, law is transformed from

5 Charles-Louis de Secondat Montesquieu [1748]. *The Spirit of the Laws* (Garnier Frères, 1961), 295.

6 Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974), 20.

7 Günter Frankenberg, 'Comparing Constitutions. Toward a Layered Narrative', International Journal of Constitutional Law 4 (2006), 439-459; Grosswald Curran (n. 4); Geoffrey Samuel, 'Taking Methods Seriously', Journal of Comparative Law 2 (2007), 94-119.

8 Richard Rottenburg, *Far-Fetched Facts: A Parable of Development Aid* (Cambridge University Press 2009).

9 Pierre Legrand, 'The Impossibility of "Legal Transplants"', Maastricht Journal of European and Comparative Law 4 (1997), 111-124; Pierre Legrand, 'What "Legal Trans-

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a cultural artefact to an ensemble of words stripped of most of their contextual connotations. Fourth, in comparative practice, 'transplant' favours the presumption of similarity and projects of convergence. The concept is flanked by a unitary theory of law that guides comparatists to overestimate the (desired) harmonizing effect of 'transplants' and therefore to overlook how even unifying law ends up in new divergences.[10] Thus, the transplant thesis misses a great deal of law's peculiar properties, that it is produced 'somewhere in particular'[11] and offers instead a fairly uniform and deficient model of how and why laws travel – or why they do not.[12] In short: 'Translations are more delicate than heart transplants.'[13]

In contrast, 'legal transfer' alerts comparatists to a *problematic* phenomenon[14] that may be 'extremely common' but is anything but 'socially easy'.[15] Moreover, it supports a more contextual approach that focuses on comparison as practice and a theory of law constituting it as a cultural artefact.[16] By choosing this term, one dismisses the 'naturalism' of legal transplants as well as the solipsism of the notion of a 'nomadic character of rules'.[17] Directing the attention on what happens when transfer happens at least implicitly favours the analysis of differences[18] rather than the search for similarities,[19] and moves away from thinking in terms of congruence and convergence or looking for 'common cores' or 'universal' categories, theories, and histories of law.[20] Finally, transfer captures the *commodity*

plants"?' in: David Nelken and Johannes Feest (eds.), *Adapting Legal Cultures* (Hart Publishing 2001), 55-70.

10 Nursel Atar, 'The Impossibility of a Grand Transplant Theory', Ankara Law Review 4 (2007), 177-197.

11 Thomas Nagel, *The View from Nowhere* (Oxford University Press 1989).

12 For a critique of transplant thesis, see Legrand (n. 9). See also contributions to Günter Frankenberg, *Order from Transfer. Comparative Constitutional Design and Legal Culture* (Edward Elgar Publishing 2013); Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar Publishing 2016).

13 Raimundo Panikkar, 'Is the Notion of Human Rights a Western Concept?', Diogenes 30 (1982), 75.

14 Graziadei (n. 4).

15 Watson (n. 6), 7, 96.

16 Frankenberg (n. 12).

17 Legrand (n. 9).

18 Legrand (n. 9); Monateri (n. 4); Samuel (n. 7).

19 Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press 1998).

20 Even if 'legal transfer' may not put to rest the semantic variety or overcome the polarization of the discursive field. For a more explicit analysis and further references, see Frankenberg (n. 12); Günter Frankenberg, *Comparative Constitutional Studies.*

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s*tructure* of the exported/imported legal information as a product that comes with standardization.

C. The Grammar of Legal Transfer (I): Concepts and Typologies

As regards laws' travels, a dazzling array of concepts[21] and a remarkable diversity of typologies[22] coincide with a salient scarcity of explanatory theories. This deficit testifies to (a) the narrow focus on specific events, such as the introduction of company law in Vietnam, the Argentine law on hazardous waste, or the legal protection of investment in Brazil;[23] (b) a generally descriptive orientation, such as tracing historical paths of influence[24] rather than venturesome explanatory ideas or the recognition of contingence; (c) reliance on what 'the author knows best', i.e. the 'settled knowledge'[25] covering the domestic terrain with all its 'dangerous incorrectness'[26] – knowledge shaped by experience, habit, familiarity, and lack of curiosity, which is not exposed to further critical and competent inquiry and therefore tilts towards ethnocentric depictions of the foreign as other;[27] (d) reliance on quantitative methods and a spatial lag model to analyse the diffusion and 'presence' of 108 constitutional rights after World War II;[28] (e) a combination of all or some of the features discussed above.

Between Magic and Deceit (Edward Elgar Publishing 2018), 111-191; see also Barry Friedman and Cheryl Saunders, 'Editors' introduction', International Journal of Constitutional Law 1 (2003), 177-403.

21 To name only the most commonly used terms: influence, inspiration, reception, diffusion, migration, borrowing, exportation/importation, adoption, adaption, proliferation, translation, transposition, imposition, octroy, transplant(ation), and transfer.

22 See Graziadei (n. 4); Miller (n. 4); Jean-Frédéric Morin and Edward Richard Gold, 'An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries', International Studies Quarterly 58 (2014), 781-792.

23 Miller (n. 4).

24 Watson (n. 6).

25 Karl Popper, *The Myth of the Framework* (Routledge 1994), 156.

26 Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective', Feminist Studies 14 (1988), 575-599.

27 Teemu Ruskola, *Legal Orientalism—China, the United States and Modern Law* (Harvard University Press 2013).

28 Benedikt Goderis and Mila Versteeg, 'The Diffusion of Constitutional Rights', International Review of Law and Economics 39 (2014), 1-19.

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Typologies follow – albeit with variations and often implicitly – Max Weber's method of carving out ideal-types.[29] If one disregards the pitfalls of determining the motivations and intentions of recipients and donors, and suspends the vexing distinction between voluntary and non-voluntary transfers, the following ideal-types plausibly capture dominant patterns:

Imposition characterizes the coerced import of foreign laws in imperialist settings like military occupation or under colonial regimes.[30] Japan's MacArthur Constitution (1947) figures as the standard example for direct or imperialist imposition. The rather more common 'indirect imposition'[31] relies on negative political, economic, or other sanctions to ascertain 'voluntary' compliance.[32] In the context of asymmetric international relationships, this ideal-type can barely be distinguished from *contractualization*, when governments bargain with one another about the application of legal rules. 'One state will typically promote its own legal rules as constituting the common standard governing a particular issue-area … [and offer] compensation or side payments in another issue-area.'[33]

In contrast to externally dictated transfers, *imitation* or *emulation* appears to follow the logic of functionalism that still dominates comparative law.[34] When legal institutions are confronted with problems, they look for better solutions elsewhere, functionalists tend to argue. Whoever wants to encourage foreign investment might import well-reputed investment protection schemes (such as Vietnam in 1992 or South Africa in 2015).[35] A country coping with a congested criminal justice system might find the US practice of plea-bargaining worth adopting despite its evident flaws.

29 Miller (n. 4); Morin and Gold (n. 22).

30 Upendra Baxi, 'Postcolonial Legality' in: Henry Schwartz and Sangeeta Ray (eds), *A Companion to Postcolonial Studies* (Oxford University Press 2001), 540-555; Upendra Baxi, 'The Colonial Heritage' in: Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003), 46-75; Upendra Baxi, 'Colonial Nature of the Indian Legal System' in: Indra Deva (ed.), *Sociology of Law* (8th edn, Oxford University Press 2005), 41-83; Lauren Benton, *Law and Colonial Cultures. Legal Regimes in World History* (Cambridge University Press 2002).

31 Morin and Gold (n. 22), 782.

32 Graziadei (n. 4).

33 Morin and Gold (n. 22), 782.

34 Frankenberg (n. 12).

35 See Peter-Tobias Stoll, Till Patrik Holterhus and Henner Gött, *Investitionsschutz und Verfassung* (Mohr Siebeck 2017).

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Drawing lessons from other countries' experience[36] may misfire, though, and does not always turn out to be cost-saving.[37] For instance, imported legal education projects in Brazil not only failed but actually consolidated the authoritarian regime because they lacked the corresponding liberal ideological frame and institutional basis.[38] The controversy over whether *prestige* motivates imitation,[39] at least in states undergoing political transformation,[40] or whether prestige is a largely empty category, need not be decided here. If not prestige, then certainly authority plays a significant role in legal transfer. The French *Code civil* or the German *Bürgerliches Gesetzbuch* were widely considered to be authoritative legal sources. Likewise, the nineteenth-century German professoriate and the elite law schools of the United States served as models for imitation.

Regulatory competition[41] is defined by the adoption of foreign rules and institutions, degrees and expertise in order to improve the position of one's country or oneself in a competitive world. Regulatory regimes or items (notably degrees and expertise) may enhance reputational or instrumental gains, depending on whether they are meant to generate legitimacy (decorating an authoritarian regime with rule of law, like Sadat's Egypt in 1971), procure economic rent (attracting investment, as in Vietnam, see above), or provide social capital and positions of influence, for instance for graduates of foreign masters programmes.[42]

D. The Grammar of Legal Transfer (II): Modalities and Pathways

In default of an established methodology, the export and import of legal information may be described in analogy to Edward Said's 'traveling theory'[43]

36 Richard Rose, 'What is Lesson-drawing?', Journal of Public Policy 11 (1991), 3-30.
37 Miller (n. 4).
38 David Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development', Yale Law Journal 82 (1972), 47.
39 Graziadei (n. 4), 458; Rodolfo Sacco, *Introduzione al Diritto Comparato* (5th edn, UTET 1993), 148.
40 Miller (n. 4).
41 Morin and Gold (n. 22).
42 Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago University Press 2002).
43 Edward W. Said, *The World, the Text, and the Critic* (Vintage 1983).

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or in terms of a commodity theory of law.[44] Said discerns four stages that, if translated into the legal domain according to the rules of the grammar of comparative practice, illustrate the pathways, risks, and side-effects of legal transfer. One can indeed analytically distinguish four moments of the transfer process:[45] a point of origin, the complex decontextualization of legal information, the inclusion in (or rejection from) the global reservoir or market, and finally the thorny recontextualization at the receiving end that involves bricolage and yields a variety of outcomes. The phases or moments of transfer outlined here are not to be taken as a strict sequence of discrete steps but as turns in the many possible pathways for the export and import of laws and constitutions.[46] As a matter of fact, if a set of initial circumstances cannot be pinned down – not even analytically – or calls for extensive (comparative) research or a critique of misleading originalist assumptions, the sequence moving from decontextualization via globalization to recontextualization may have to be reversed.

1. Initial Circumstances of Transfer

Originalist assumptions should be prudently weakened, though, as the starting point may only 'seem like one' – there is almost invariably a *before*. It is preferable to de-privilege origin and argue it down to a 'set of initial circumstances'[47] when and where legal transfer could plausibly have begun. The 1831 Belgian Constitution, though widely regarded as one of the leading and original constitutional documents of nineteenth-century Europe, supplies an ironic comment on originalism: the intensive transfer activity of its designers left only 5 per cent of the text that could be classified as 'original', i.e. not gleaned from other constitutions.[48] Similarly, the origins

44 Frankenberg (n. 12); Frankenberg 2016 (n 12); Ralf Michaels, '"One Size Can Fit All" – Some Heretical Thoughts on the Mass Production of Legal Transplants' in: Günter Frankenberg (ed.), *Order from Transfer. Comparative Constitutional Design and Legal Culture* (Edward Elgar Publishing 2013), 56-78.

45 Regardless of whether the material is taken from civil, criminal, or (as for instance in the following) constitutional law.

46 This also means that 'grammar' is not to be understood as a set of prescriptive, systematic rules.

47 Said (n. 43).

48 Frankenberg (n. 20), 173-176.

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of the French *Déclaration* are shrouded by the plurality of genealogies;[49] incidentally, Korean constitutionalism also attests to the ambiguity of origin.[50]

2. Decontextualization

For the most part, comparatists agree that transfer presupposes that legal items have to be isolated from the formative conditions of their production and processed in order to transcend borders and contexts.[51] In the absence of transfer rules prescribed by an authoritative grammar, *decontextualization* can be circumscribed metaphorically: the items have to be stripped, shock-frozen, and packaged for the transgression of time, space, and culture – or 'skeletonized'.[52] In terms of a commodity theory,[53] which takes its cues – not its epistemology – from Marxism, decontextualization implies the standardization of legal information as marketable items, a process that presupposes three overlapping analytical operations:

Reification transforms 'live' and contested ideas into objects by divesting them of their historical background, sociocultural environment, and political-legal controversies. Cases travel without their 'case history', rules without their diverse interpretations, and institutions without the background story of their construction. Thus, the 'rights of Englishmen', once reified, migrated as traditional rights or rights reserved for nationals.[54] The German Federal Constitutional Court was reduced to its competencies and institutional structures and exported/imported as a model of judicial review.

49 Marcal Gauchet, *La révolution des droits de l'homme* (Gallimard 1989).

50 Chaihark Hahm, 'Conceptualizing Korean Constitutionalism: Foreign Transplants or Indigenous Tradition?', Journal of Korean Law 1 (2001), 151-196.

51 'The institutional structures and normative patterns generated in the formative experience of one nation become blueprints autonomous of the particular circumstances of their birth …' Saïd Amir Arjomand, 'Constitutions and the Struggle for Political Order', European Journal of Sociology 33 (1992), 39-82.

52 Clifford Geertz, *Local Knowledge. Further Essays in Interpretive Anthropology* (3rd edn, Basic Books 2000), 170-172.

53 For a different description of this process as 'vernacularization', see Sally Engle Merry, 'Legal Transplants and Cultural Translation: Making Human Rights in the Vernacular' in: Mark Goodale (ed.), *Human Rights: An Anthropological Reader* (Wiley-Blackwell 2009), 265-302.

54 E.g. the (Virginia) Act of May 1776, quoted by William F. Swindler, '"Rights of Englishmen" since 1776: Some Anglo-American Notes', University of Pennsylvania Law Review 124 (1976), 1091.

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Formalization reduces norms to bare texts, which is to say to propositional statements bereft of the interpretive debates and epistemic conventions that bestow them with meaning. Likewise, institutions are scaled down to the statutory provisions supplying the propositional state of their organizational arrangement and functions. For example, the prohibition laid down in the 1947 Italian Constitution against 'reorganiz[ing] under any form whatsoever, the dissolved Fascist party' (Art. XII), once formalized, inspired bans on extremist organizations within aversive constitutional schemes elsewhere but did not suppress neofascist temptations in Italy.

Idealization transforms the appearance of legal information from *is* to *ought*. Norms and doctrines are presented as actually meaning what they *ought* to mean. Institutions are displayed as operating efficiently according to the official plan. In this way, the idealized object is enshrouded by normativist, ideological, or mythical narratives, such as 'the government of laws and not of men' (Art. XXX Constitution of Massachusetts 1780).

The long-distance travels of 'We the People' perfectly illustrate the three aspects of how legal information is standardized. Once disconnected from the imaginary United States-ean We, reduced to the propositional content, and severed from its background assumptions, the formula serves globally as a founding myth that elites from Afghanistan to Zaire almost invariably fall back on to enhance their legitimacy as *pouvoir constituant*. Likewise, decontextualization has initiated the transfer of a variety of very diverse items of legal information, such as the systematics of the *Codex Justinianus*, the principle of proportionality, rights catalogues, the concept of 'good faith', curricula and degrees of legal education, courtroom etiquette, and the notion of 'cruel and unusual punishment'.

3. Transfer as Globalization

Having been extracted from a specific (local) context, legal information may be transferred to the global space, where lawmakers select from a variety of maxims of design, concepts and arguments, institutional patterns, catalogues of rights, cluster of values, and more. In contrast to narratives of global law and normative visions of a law of humanity,[55] the global is con-

55 Philip Allott, 'The Emerging Universal Legal System' in: Janne E. Nijman and André Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press 2007), 63; David Held, *The Global Covenant*

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ceptualized here as a space, turning the focus on the archival aspect (storage centre, arsenal, or showroom),[56] where decontextualized and marketable legal items are registered, stored, and displayed. In contrast, the concept of a global network[57] accentuates the exchange of ideas and services. As a global arsenal (or consciousness), 'legal IKEA' contains the results of myriads of transfers while remaining silent over items not included or rejected. Inclusion and exclusion depend on a threshold test. Once legal information has passed through the three-pronged process of decontextualization and turned into a standardized commodity, it attains the appearance of universal, global, or at least regional applicability ('appearance' meaning that a new coating provided by political technology and the ideology of expertise is grafted onto legal information), and receives from the community of drafters, advisers, engineers, and scholars the seal of quality reserved for the modern idiom and its shiny parts.

While commodified items may look harmless, they are anything but innocent. They may transport colonial baggage, political projects, hegemonic intentions, ethnocentric perspectives, economic imperatives, human tragedies, hopes, and disappointed expectations. A perfect exemplification of IKEA-style globalization is the ambitious Comparative Constitutions Project[58] established in collaboration with Google Ideas. It contains an enormous dataset ready to be downloaded anywhere and anytime. One might call it global bookkeeping of constitutional provisions, digitalized and decontextualized, but it is nevertheless very useful as a tool for further research and interpretation.

Merchants of transfer – political elites, legal consultants, non-governmental organizations (NGOs), scholars, the media, etc. – visit the global showroom (internet) and shop for a complete legal regime or code, or for smaller items, like a rationale for an insolvency law, a balancing test, or rules of plea bargaining. Standardization does not preclude the avail-

(Cambridge University Press 2004). For global narratives, see Bruce Ackerman, 'The Rise of World Constitutionalism', Virginia Law Review 83 (1997), 771-797; Anne Peters, 'The Globalization of State Constitutions' in: Nijman and Nollkaemper (n. 55), 251-308.

56 Depending on the theoretical perspective, it may also be referred to as a global reservoir, showroom, supermarket, or consciousness. See Günter Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited', International Journal of Constitutional Law 8 (2010), 563-579.

57 Michaels (n. 44).

58 See https://www.constituteproject.org/content/about?lang=en/, accessed 25 October 2023.

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ability of a plurality of models. To deal with race-based discrimination, Bangladesh, India, Sri Lanka, Canada, and other countries have picked different samples on display in the global showroom: they range from equality doctrines to affirmative action to criminal sanctions for discrimination.

In one of the darker corners, autocrats can find varieties of authoritarian constitutions and emergency regimes.[59] Unless suffering imposition, customers have the choice between finished products *prêt à porter* and disassembled parts to be reconnected later, or very abstract, inspiring ideas that require a high degree of constructive elaboration.

Once deposited on the shelves of the market, globalized legal items generally refer neither to their (original) production site nor to the production process. Decontextualized and globalized legal information hardly ever comes with sufficient, in-depth background information about the local prerequisites, socioeconomic forces, conflicts, etc. that infiltrate the application of laws and affect the operation of institutions. Globalized items usually do not mention that expertise and experts are needed to set institutions 'in motion' and to guide the application of norms. Unlike medication, they remain silent over risks and side-effects. Where contextual information is or could be available, it is rarely heeded, because legal consultants and reformers operate within fairly rigid time-limits and political constraints, not to mention the constraints set by cultural-legal ignorance and lack of institutional imagination. Customers come to the showroom with an engineer's mindset rather than the disposition of an anthropologist or culture-conscious legal critic.

4. Recontextualization: Risks and Side-effects

Finally, at the end of the 'translation chain',[60] globalized items have to be *recontextualized*, i.e. *adapted* to a new (host) environment; one could also say turned into the native or ordinary language, i.e. 'vernacularized'[61] in their new life-world. There, whatever is being transferred meets with 'conditions

59 Helena Alviar García and Günter Frankenberg (eds), *Authoritarian Constitutionalism* (Edward Elgar Publishing 2019); Günter Frankenberg, *Authoritarianism. Constitutional Perspective* (Edward Elgar Publishing 2020); Victor V. Ramraj and Arun K. Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge University Press 2009).

60 Rottenburg (n. 8).

61 Merry (n. 53).

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of acceptance or, as an inevitable part of acceptance, resistance'.[62] These conditions determine the 'grand hazard'[63] of any legal transfer: rejection or recontextualization within the new legal-cultural setting.

Recontextualization presupposes the unfreezing and unpacking of the received items. Thereafter, any imported information is subject to reinterpretation, redesign, and bricolage.[64] The simple reassembling of the imported parts/information usually does not provide the desired results. A great deal of improvising and experimenting is required when the now fully (or partly) accommodated (or incorporated) idea has to be inserted in the new legal framework and then put to use under the new circumstances by the new epistemic community – courts, governmental agencies, legal scholars, social movements, legal consultants, and more. Thereby, any imported item undergoes a process of transformation 'by its new uses, its new position in a new time and place',[65] especially because it does not come with a master plan for the efficient functioning of an institution or the smooth interpretation and application of norms and doctrines. Legal transfer is 'a craft of place', performed by craftspeople who reassemble the decontextualized information.[66]

The deficit of contextual information accounts for the considerable risks and side-effects. *Immunoreactions* that block the transfer and recontextualization completely are rare but not unheard of. They occur especially under three circumstances: First, the commodified item simply does not make sense in the new setting, because there is no method or expertise in place to decode its message for proper readjustment. Second, the transferred item meets with unrelenting political opposition. This happened, for instance, in 1920 to the plans to transfer the Swiss federal system to (former) Czechoslovakia, and to the export of the US model of legal education mentioned above. Third, immunoreactions are also likely to occur when the operative logic of the transferred items remains obscure or misunderstood and institutions do not even remotely work as expected. Thus, the imported abstract judicial review of laws did not work in postsocialist Russia.

62 Said (n. 43), 227.
63 Montesquieu (n. 5).
64 Comprising a series of introductory, adaptive, modifying, improvisational moves that may be translated as 'tinkering' to convey its makeshift, do-it-yourself character. For a theoretically elaborated concept of bricolage as a method of 'wild thinking', see Lévi-Strauss (n. 2), 16-32.
65 Said (n. 43), 227.
66 Geertz (n. 52), 167.

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Bad fit is a more common transfer result if the package contains information that cannot be adequately decoded or adapted. Similarly, transfer may qualify as a *missing link* problem if important information for putting a transferred item into practice is not available. Unlike immunoreactions, bad fits and missing links do not create unsurmountable problems but send the bricoleurs either back to the drawing board for institutional redesigning or normative tinkering, or else to the global showroom to shop for additional or different information to accommodate certain existing power constellations or cultural dispositions.

5. Recontextualization: Results

The open-ended process of de- and recontextualization[67] is likely to produce – not a genuine copy of the 'original' item but – a diversity of results, as is illustrated by the mutations of the 'We the People' formula or the variations of law-rule. At best, the end-product turns out to be a modified replica, a respectful or ironic imitation or pastiche of different styles or models.

It is characteristic of a *modified replica* that one of its elements is changed (or dropped altogether) or another one added while preserving the general sense and logic of the item, like 'We the representatives of the people of the Argentine nation'. The formula turns into a *hybrid* if the imagination of a democratic polity and the invocation of a collective (We) – both yet to be established – are blended with a concept from a different political tradition or context to form a novel type or inspire a new imagination. The post-Taliban Constitution (2004) – 'In the name of Allah … We the people of Afghanistan' – places the imaginary democratic We into an ethnically fragmented setting and combines it with a unifying religious conception. If not for the religious connotation, the notion of an Afghan people would not resonate on the ground.

In the framework of a constitutional monarchy (Cambodian Constitution 1993), assuming good faith on the part of the designers, We the People qualifies as a *naïve novelty* grafting the popular We-rule onto the monarchic I-rule, thus trying to tap the magic of democratic constitutionalism while preserving traditional monarchy. The bad faith interpretation would treat

67 Open-endedness and bricolage are hugely simplified by the transplant metaphor.

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the Cambodian formula either as an ironic imitation or as a respectful pastiche, depending on the framers' mindset and motives.

E. Defying Transfer, Resisting Globalization

Any theory trying to explain how legal information is turned into a market product and transferred needs to be corrected as far as it suggests that globalization invariably streamlines any legal idea and practice. Comparative studies bring to the fore that not all legal information travels.[68] From a distance, these items appear odd[69] or strange; up close, they remain unfamiliar. At any rate, they defy standardization. Identifying and understanding them calls for a complex hermeneutic that avoids the pitfalls of ethnocentrism and Western hegemony.[70] In comparative practice, odd items have to be brought very close and kept very far away.[71] Their strangeness has to be deciphered – not domesticated. Unless treated as legal information that is inferior to the kind one is familiar with, i.e. othered,[72] these strange items, if submitted to scrutiny, betray the influence of local traditions and experiences and reflect social struggles, political anxieties, and visions.

1. Identifying 'odd details'

Items resisting commodification – odd details – pose riddles. By the same token, it is perilous to identify and analyse them. Not always rough, unpolished, and strange, but peculiar and withdrawn, they flunk the threshold test to globalization, as it were, because they deviate from global standards and run against what mainstream scholars regard as the orthodoxy and

68 Frankenberg (n. 20), 136-151.

69 I refer to them as 'odd details' not to suggest any derogatory connotation, but to stress the fact that they disrupt the global narrative and are in that sense *quite different*.

70 Frankenberg (n. 12), 77-112.

71 Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973), 3-70.

72 Othering is defined here as a comparative practice in which, through discursive routines of theory and method, foreign laws are perceived and interpreted as inferior to hegemonic (Western) legal regimes. See Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in: Carry Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press 1988), 271-313; Robert J. C. Young, *White Mythologies: Writing History and the West* (Routledge 1990).

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critics as the ideology of 'Western law'.[73] Three categories can be distinguished, albeit tentatively.

a) Historical Idiosyncrasy

History may be an obstacle to marketability if legal information is perceived as being inextricable from the historical situation of its creation. In terms of history, oddity is basically synonymous with obsolete, passé, no longer useful. Its meaning or logic can only be decoded and fully understood within the historical context. For instance, during the revolutionary epoch, constitutional elites put a cap on rulers' stipends to curb *ancien régime*-style luxury and executive greed.[74] Meanwhile, the practice of monetary compensation of officeholders is regulated more discretely by statutory law.

Not only constitutions but also criminal codes and civil codes testify to quite different regulations that are today considered obsolete due to the passage of time. For example, that husbands were entitled to determine their wives' breastfeeding period (Prussian General Civil Code 1794) was very much indebted to the era of patriarchal prerogatives one would now consider out-of-date. Likewise, the differentiated ordinances regulating in great detail the periods and garments of mourning bear witness to a premodern regime of disciplinary mechanisms. 'Quite different' and 'obsolete' may mean, though, that certain practices are abolished, as for instance hideous forms of criminal punishment,[75] only to be replaced by sanctions that appear less drastic and cruel but still cause damage beyond compare, notably sensory deprivation and other practices of 'modern' torture.

73 Regarding the ideology or 'white mythology' of Western law, see Renj David, 'On the Concept of Western Law', Cincinnati Law Review 52 (1983), 126. 'As Westerners, we have an ideal: a society is ruled, so far as is possible, solely by law. In French, we write the word "law" with a capital letter .... Our ideal is to have the law reign'.

74 French Constitution of the Consulate (1799), Title IV, nos. 39 and 43; Constitution of Haiti (1805) Art. 1 (20).

75 E.g. Ancient Rome: being sewn into a sack with animals and thrown off a cliff; China: death by 1,000 cuts (Ling Chi), banned in 1905; England: drawing and quartering, from 1352 on a statutory penalty for men accused of high treason, abolished in 1867. For more examples see Michel Foucault, *Discipline and Punish. The Birth of the Prison* (2nd edn, Vintage Books 1995); Edward Peters, *Torture* (University of Pennsylvania Press 1996); Jeremy Waldron and Colin Dayan, *The Story of Cruel and Unusual* (MIT Press 2007).

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b) Cultural Specificity

Legal information is not likely to pass the threshold test for inclusion in the global reservoir if it is (or appears to be) too context-specific, i.e. so intensely bound to its cultural-epistemic environment that it would simply not make sense elsewhere. Disregarding the notorious 'crazy laws' of the states of the US,[76] such items are conspicuously overdetermined by the practices, mores, and idiosyncrasies of the community at the local production site. They encapsulate local knowledge,[77] for instance as vernacular entitlements or prohibitions. If practised over time and considered 'law' by the community or relevant local actors, these norms may constitute customary law.[78]

Cultural specificity seems to be a necessary condition of constitutional preambles as well as of criminal codes to the extent that they are meant to protect the collective identity. Rwanda's commemoration of the genocide is elevated from the standard accounts, similar to the Iraqi Constitution, which grafts a biblical story onto the commodified 'We the People': 'We are the people of the land between two rivers, the homeland of the apostles and prophets [,] … pioneers of civilization.… Upon our land the first law made by man was passed' (Preamble of the Constitution of Iraq 2005). The cultural context is encoded in normative aspirations, notably those of constitutions and criminal law,[79] such as the principles of a 'harmonious society' (Arts. 8 and 9 Constitution of Bolivia), the concept of Gross National Happiness (GNH) (Art. 9 (2) Constitution of Bhutan), the obligation of government authorities in the Netherlands to promote saving and 'keep the country habitable' (Art. 21 Constitution of the Netherlands), or legal rules of ethical conduct, like the prohibition on slaughtering cows and calves in India.

Cultural specificity is a particularly treacherous label. Other than the fact that an item has *not yet* been exported or imitated elsewhere after bricolage,

76 It is illegal in Alabama to drive blindfolded, in Colorado to keep a couch on the porch, in Delaware to sell dog or cat hair, in Kentucky (for women) to marry more than three times, in Oregon to go hunting in a cemetery, in South Dakota to sleep in a cheese factory, and in Oklahoma to wrestle a bear, to take just a few examples.

77 Greetz (n. 52).

78 John Comaroff and Simon Roberts, *Rules and Processes. The Cultural Logic of Dispute in an African Context* (Chicago University Press 1981).

79 Today's Constitution of Thailand mandates that the 'standard of morality for persons holding political positions, government officials and State officials at all levels shall be in conformity with the established code of morality' (Art. 270).

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there are no reliable criteria to distinguish global(ized) items from legal information that resists the pull of global constitutionalism or globalization in general. The resistant items might travel in a specific region. Especially with regard to cultural strangeness, one is left with the *appearance* of deepened context-dependence, as regards India's epic constitution spanning almost 500 pages, by far surpassing even its lengthiest counterparts (in Myanmar, Brazil, and Papua New Guinea); or the sixty-year gestation period of the 1992 Saudi Basic Law, which directs attention to a specific local, political-religious constellation that is not likely to be reproduced elsewhere. At the intersection of history, politics, and culture, one could locate Haiti's paradoxical provision that 'All men are born, live and die there free and French' (Art. 3 Constitution of 1801).

c) Political Deviance

Unlike historical obsolescence and cultural idiosyncrasies, *rejection* from the global constitution follows a political logic. The showroom remains closed for items that defy, provoke, or subvert the dominant ideology and practice of law-rule and thus the hegemony of the liberal paradigm. Political deviance resists the dynamic of globalist colonization. The revolutionary 1805 Constitution of Haiti challenged the liberal notion of 'colour-blindness' and turned against colonial racism: regardless of their skin colour, all 'Haytians shall hence forward be known only by the generic appellation of Blacks' (No. 14). Conversely, the Jim Crow laws carried forward the institution of slavery by requiring racial segregation in the southern states of the United States until 1965. The infamous 'separate but equal' doctrine justifying this practice[80] was shared by the apartheid regime of South Africa, but would be excluded from transfer today as a political (and historical) oddity. Rather forcefully, Bolivia asserted a 'deviant' political project: 'We have left the … neo-liberal State in the past. We take on the historic challenge of collectively constructing a Unified Social State of Pluri-National Communitarian Law' (Preamble, Constitution 2009). Few other countries, if any, would dare confront the hegemons with such audacity.

80 *Plessy v. Ferguson* 163 U.S. 537 (1896).

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Political deviance/resistance has many faces. Apart from institutional designs, like Nigeria's 'peculiar', 'bizarre', or 'irregular' federal system,[81] it shows particularly in attacks on the columns of Western constitutionalism: secularity, neutrality, formal equality, and private property. To begin with *secularity*: unless they feature concepts of the divine state or a state religion or church, modern constitutions stay away from the transcendent.[82] After revolutionary moments or in times of transition, political elites take recourse to prefabricated religious materials, however, to buffer and sanctify their mandate as *pouvoir constituent*. They invoke the presence of the Most Holy Trinity (Ireland 1937/2015) or Supreme Being (Haiti 1805), or better yet: the protection of Divine Providence (US Declaration of Independence 1776) or hope for 'the guiding hand of God' (Constitution of Papua New Guinea 1975). On a lighter note, the breeze of transcendence refreshes the traveller in Tonga: 'Since it appears to be the will of God that man should be free as He has made all men of one blood therefore shall the people of Tonga and all who sojourn or may sojourn in this Kingdom be free forever' (No. 1 Constitution of the Kingdom of Tonga 1875).

As long as law, law-rule, and constitutionalism are standardized within the liberal paradigm, socialist legality qualifies as a prototypical political deviant. Socialist institutions, doctrines and ideas as well as social rights are shelved, if at all, in a corner for commodities with production damages. Legal IKEA would hardly display the provision '[that] work is remunerated to its quality and quantity … [and that] the social economic system … has thus eliminated unemployment and the "dead season"' (Art. 45 Cuban Constitution 1976). Likewise, the limitation of daily work hours, a thirteenth salary, and the rules that wages have to be paid weekly and that workers should be granted rest (preferably on Sundays), as laid down in Brazil's 1988 social-democratic Constitution (Art. 7, sec. XV), run against the standard of reality-blindness set by liberal constitutionalism.

81 Rotimi T. Suberu and Larry Diamond, 'Institutional Design, Ethnic Conflict Management, and Democracy in Nigeria' in: Andrew Reynolds (ed.), *The Architecture of Democracy* (Oxford University Press 2009), 400-446.

82 An interesting mélange is provided by the Constitution of the People's Republic of Bangladesh (1972), which proclaims the 'high ideal of secularism' (Preamble and Arts. 8 (2) and 12) and professes to eliminate 'communalism' and 'abuse of religion' to privilege the (secular) state, while declaring Islam as state religion (Art. 2A).

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2. The Oddity of a Right to Bear Arms

Identifying odd details meets with the charge that, once again, it is the Global South that produces bizarre laws and needs to be civilized. An analysis of the Second Amendment of the US Constitution might clarify that oddity is also a Northern phenomenon. It is here where history, culture, and politics intersect: 'A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.' After allocating competences and installing checks and balances, the US Constitution, or rather the Federalists, tried to placate the distrust that may befall people in a federal system with the Second Amendment. Who exactly the bearer of these rights should be, and what purpose the arms-bearing was and is meant to serve, has been contested ever since. A grammatical reading privileges the institution of a well-regulated (i.e. trained and disciplined) militia as the point of reference. Bearing arms has distinctly military connotations. Historically, the Second Amendment appears to draw from at least two very different traditions. The institutional guarantee of a militia and the accessory rights of militiamen can be traced back to the Assize of Arms of King Henry II (1181), ordering freemen to provide for arms and military gear. In the practice of the early settlers and the colonial charters, these rights mutated into a duty that all 'able-bodied men' owed to their community.[83] History also offers a reading of the Second Amendment as granting individual rights: the common law right to self-defence, dating back to the 1689 Bill of Rights. Hence, the 1776 Constitution of Pennsylvania looked in both directions and referred the right to bear arms to 'the defence of themselves and the state' (Art. XIII). The US Supreme Court first privileged the institutional reading in several rulings; only recently, with a slim majority in *District of Columbia v. Heller* (2008), has the individual right come to triumph.[84] The very peculiar American way of balancing the military and political power of the people, states, and the nation qualifies as a unique specimen – an odd detail – by virtue of its history and structure, its controversial interpretation, and mainly the myth of the US as a gunfighter nation.

83 See the 1780 Constitution of Massachusetts: 'The people have a right to keep and to bear arms for the common defence' (Art. XVII).

84 *District of Columbia v. Heller* 554 U.S. 570 (2008). Despite J. Stevens's rather well-founded dissent, this reasoning was later pursued undauntedly in *McDonald v. Chicago* 561 U.S. 742 (2010) and *Caetano v. Massachusetts* 577 U.S. 14-10078 (2016).

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This historical, cultural, and political oddity is not derogated by half a dozen other provisions that carry forward a basically nineteenth-century project: Liberia's Constitution of 1847 follows the communitarian line and defines collective defence as the subject of protection and purpose. In 1853, the right reappeared in the Argentine Constitution as the obligation 'to bear arms in defense of the fatherland and of this Constitution' (Part I, sec. 21). Statutory rules in Switzerland and Nicaragua correspond to this purpose. Article 10 Constitution of Mexico (1917) entitles citizens 'to have arms of any kind in their possession for their protection and legitimate defense, except such as are expressly forbidden by law, or which the nation may reserve for the exclusive use of the army, navy, or national guard', and specifies that 'they may not carry arms within inhabited places without complying with police regulations'. The 1976 Cuban Constitution guarantees the 'right to struggle through all means including armed struggle' (Art. 3(2)), but qualifies it as a right to resistance 'against anyone who tries to overthrow the political, social and economic order'. Article 38 of Guatemala's Constitution (1985) comes close to the individualist reading of the Second Amendment: 'The right to own weapons for personal use, not forbidden by law, in the person's home, is recognized.... The right to bear arms, regulated by the law, is recognized.' Today's Constitution of Haiti (1987) is instructive insofar as it grants every citizen 'the right to armed self-defense, within the bounds of [his] domicile, but has no right to bear arms without express well-founded authorization from the Chief of Police' (Art. 268-1). These provisions send forth several messages: first, in most cases the right to keep and *bear* arms (or the corresponding duty) serves a public purpose; second, as a means of self-defence it is limited to the home; third, the personal use of firearms is generally subject to legal regulation. No other constitution sports the right to bear arms *in public* as an individual fundamental right, thus the comparative view confirms the oddity of the Second Amendment.

3. Local, Regional, Global Items of Law

The analysis of legal transfer and of items resisting transfer is burdened with the difficulty of differentiating, with sufficient certainty, between marketable and non-marketable items, between hybrids complementing and modifying the modern idiom and information deviating from its standard

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varieties. Instead of overrating categories, the analysis of oddity may turn out to be the domain for clarifying the 'foreign' and how it is related to the own/familiar.[85] Searching for odd details may liberate comparative studies from the straightjacket of unitary thinking, challenge the narrative of globalization, and instigate the 'insurrection of subjugated knowledges',[86] that is, of an autonomous kind of juridical knowledge production whose validity does not depend on the approval of the established regimes of thought.

F. Merchants of Transfer

Legal transfer does not 'just happen'; it is promoted by agents and agencies, institutions and organisations. It is difficult both to specify what they do and to determine who or which they are. The merchants of transfer are recruited from the 'small worlds' of elites, advisors, committees and commissions, social movements, and NGOs with a legal agenda. They populate the expertise networks within and without academia, parliaments, courts, corporations, and the media in a world of struggle.[87] Their influence should not be overrated, because quite often they see their proposals rejected or revised as they go through recontextualization and bricolage – and because they sometimes get entangled in 'palace wars'.[88] Despite the process of commodification, an expert's advice, a 'checklist' or model provided by a consultant, or a draft law or constitution may bend the course of the legal reform, codification, or constitutional debate in a country and manipulate it for the benefit of a hegemon.[89]

85 Judith Resnik, 'Constructing the "Foreign" – American Law's Relationship to Non-Domestic Sources' in: Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (Oxford University Press 2015), 437-471.

86 Michel Foucault, *Power/Knowledge* (Pantheon Books 1980), 78-108.

87 David Kennedy, *A World of Struggle. How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

88 Dezalay and Garth (n. 42); Tom Ginsburg, 'Constitutional Advice and Transnational Legal Order', Journal of International, Transnational, and Comparative Law 2 (2017), 5-32.

89 See the analysis of a paradigmatic adviser by Harshan Kumarasingham, 'A Transnational Actor on a Dramatic Stage – Sir Ivor Jennings and the Manipulation of Westminster Style Democracy: The Case of Pakistan', Journal of International, Transnational and Comparative Law 2 (2017), 55-84.

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The merchants of transfer who populate the transnational networks, tapping the global reservoir as well as contributing to its contents, may simultaneously profess to be 'originalists' and claim to disregard foreign laws and doctrines in their judicial practice. They are people who pursue projects alongside their work of making decisions, securing investment, mobilizing protest, or strategizing foreign policies. Whether operating top-down, bottom-up, or sideways, their legal ideas and arguments usually come as collateral moves, unless of course they are involved in an official capacity in deciding cases, controversies, or lawmaking disputes. Merchants of transfer are likely to regard themselves as experts, yet they are always bricoleurs, too. They may travel as frequent flyers and reside in palaces of global expertise, but in the end they have to 'work by the light of local knowledge'.[90]

90 Geertz (n. 52), 167.

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