

## Unity

Theoretical Aspects of a major Transfer of Law and legal Staff (p. 13)

The unification of the German states in 1990 was accompanied by a major transfer of law and a remarkable transfer of legal staff. The legislation which followed in the train of the unification was extraordinary in its dimensions. It does not, however, present fundamentally new problems for the evolutionary theory of social systems. The role of conscious, intentionally planned political action as well as the efficiency of legislation – both striking aspects of German unification – can reasonably be taken into consideration by the theory. The challenging question is how western administrative law could settle down and survive in the »niche« consisting of the heritage of the former GDR, despite the fact that citizens in Eastern Germany for the most part have little understanding of the principles of western administrative law. The phenomenon of such a weak structural coupling between communication systems and individual mind was possible because of the lack of any alternative. People in Eastern Germany can use the new law because it is managed by a professional legal staff, and they depend on the utilization of the new law even if they scarcely understand it and even if they do not accept that it is just law. The evolutionary theory of social systems can explain why there is little probability of alternatives in spite of weak structural coupling. Therefore the theory must observe not only the communication systems but also the coordination that has grown up on the basis of the new communication systems and that has led to an evolutionary path which limits other possibilities.

**Manfred Aschke**

## Round-Trip Ticket

The Swiss Civil Code in Turkey (p. 33)

The young republic of Turkey of 1922 was obliged by an international convention to establish a modern legal system. Very quickly the Swiss Civil Code was translated and enacted in Turkey. This article traces the fate of Swiss marriage law within Turkish society and shows how the newly imported law was largely ignored and disregarded by the people. Even many special legislative acts in the

following years were not successful at enforcing the new marriage rules. In 2001 a revision of the Turkish(-Swiss) Civil Code took place which once again referred to contemporary Swiss law. Though the legal transfer from Switzerland to Turkey seems clearly to have failed, it has had some impact on the evolution of Turkish law.

**Mahidé Aslan**

## Legal Transfer (p. 38)

In 1905 the historian Georg von Below published a book on the reasons for the reception of Roman law in Germany. The 19th century theories on reception worked with certain distinctions which are analyzed and interpreted by M. Th. Fögen and G. Teubner. Especially prominent were two pairs of distinctions: (1) »inside/outside«, whereby the relation of the legal system and its »environment« is addressed, and (2) »necessary/contingent«, which may be translated as loose or intensive coupling of the legal system with other social systems. In contrast to von Below, one can nowadays hardly speak of legal transfers as such. Rather – as one learns also from the articles of M. Aschke and M. Aslan – so called legal transfers appear as processes of border-crossing by which legal norms undergo a re-signification at their new location.

**Marie Theres Fögen, Gunther Teubner**

New Forms of Contract as Legal Transfer  
Anglo-American Provenience of Leasing as a legal  
Topos (p. 46)

Modern business is characterized by new forms of contracts which are usually not regulated by statutes or codifications. The relatively spontaneous appearance of these new forms of contract is part of present changes in the doctrines of the law of obligations and the concept of contracts as such. According to a prominent opinion these changes are due to a general »Americanisation of law«. In an analysis of the German law on financial-leasing this assumption is put to the test and is confronted with the concept of transfer which it implies. In particular, cross-

border-contracts reveal the function of transporting normative economic expectations into the law. Some crucial questions are put: What kind of border is being discussed in the concept of legal transfers? Can the crossing of these borders be understood as a phenomenon of transition or as founding acts of law? Where exactly are the borders which law has to transgress so that one can speak of a »new law of leasing contracts«?

**Federico Gonzalez del Campo**

Report from the Swiss Workshop (p. 58)

This year's symposium of »The European Forum of Young Legal Historians« (Lucerne, May 2005) was dedicated to the problem of »Legal Transfer in History«. The report reveals the rather broad spectrum of lectures dealing with transfer phenomena in ancient law up to the legal history of the 20th century. To some extent the presentations included neighbouring disciplines and their political, sociological, philosophical and historical arguments. It was noteworthy that the theoretical basis was often wanting, e. g. lectures on ancient law were exposed to a problematic relationship between their subject and the relatively modern concept of transfer. Often the concept of transfer was so vaguely framed that quite different and contradictory but also thought-provoking conclusions and questions were posed; for apart from its legal function, the question is posed as to what role the transfer of law plays in an ideological, economic or academic context.

**Jana Lachmund**

Transfers  
Modern Discourses on State and Family (p. 62)

The longing for legitimacy always precedes the construction of any particular foundation of modern society. This essay examines the desire for theoretical foundations in its relation to the issue of legitimate origins. The individualistic configuration of the modern conception of legitimacy is determined by the concurrence of the individual's problem of becoming a person and the question of

how society is possible. Various performances of transfer are shown to be central to the modern discourse, Immanuel Kant's philosophy of law and social philosophy. Emancipation, independence, self-determination, sovereignty – the essay suggests that modern reason is a construct of transfers.

**Claudius Messner**

Academic Freedom  
Reflections on a German and Japanese Discourse  
(p. 74)

Academic freedom in Japan has been constitutionally guaranteed only since the close of the Second World War. In the first authoritative commentary on the constitution one discovers an explicit allegation of German commentary literature on the subject of academic freedom. Obviously, there is a general assumption of analogy in the fundamentals of academic freedom in both countries. However, a closer look reveals not only individual but also structural differences in the matter. Whereas German legal sciences have attempted to liberate academics in the late 60s from a historically rooted idea of the »fundamental law of the German university«, especially with Schlink and Roellecke, academic freedom in Japan is seen until today as a result of the combination of freedom of thought and the autonomy of the university. Behind this dogmatically rather foggy construction lies an idea of the moral superiority of the university-professor over normal people. Japanese dogmatics is therefore filled with social-ethical elements. In the face of the privatization of all Japanese universities, academic freedom – which is guaranteed by the constitution – proves itself too weak in the political-juridical debate on account of its dogmatic lack of focus.

**Kenichi Moriya**

Transfer of German administrative Law to Switzerland  
Semantics and social Structure of an »Academic Adoption« (p. 87)

German administrative law is a product of the foundation of the German Reich in 1871, which on the one hand was orientated towards a national jurisdiction and on the other took account of the comparative horizon of related »Culturstaaten«. The result was a paradox: a legal field both enhanced national borders in a very distinct way and was at the same time capable of stepping across borders. This essay investigates the semantic coupling of academia and nation following the example of Fritz Fleiner, especially his »Institutionen«. When Fleiner came back from Germany to Switzerland, his administrative law became »adopted« there and was spread by his sity lectures and his »pupils«. As easily as the coupling of legal science and university outwith the nation-state was achieved, so problematic proved the connection to politics, which let itself get distracted by the academic debate on the establishment of administrative courts, but nevertheless offered continuing resistance.

**Roger Müller**

Validity  
The Path from Custom to positive Law (p. 100)

The transition to a written form of law, as also the mass reproduction and dissemination of statutory enactments, are decisive preconditions for the emergence of positive law. This process of »positivisation« is here understood as a process in the course of which the conception of law and the conditions for its acceptance change. Legal norms will increasingly be accepted as binding or »in force« because a formal enactment and the command of a legislator to obey the norm stand behind them. If throughout the entire early modern period legal theory saw in the actual usage of a norm the

necessary precondition for its binding force, the gradual change to a positivistic understanding of law is first realised at the level of the law of evidence. Step by step the demands for proof of the validity of a legal norm are heightened in the legal cases, in which a party relies upon a printed or at least a recorded legal norm. In this way the form of the tradition of the legal norm takes on a new meaning: Legal norms which have a written tradition or are contained in an authorised collection of enactments have a higher chance of being accepted by the court.

**Thomas Simon**

»The Offence is always at the Forefront ...«  
The Trials against Members of the Rote Armee  
Fraktion (RAF) (p. 138)

When analyzing the trials against the members of the RAF and the 2nd of June Movement, one notices to what extent they are a political issue and a reflection of conflicts in German society. At the same time the field reveals a considerable need of research. This remains true despite the abundance of literature concerning terrorism in Federal Germany, given the tendency merely to reproduce existing knowledge. It is in fact the »Myth RAF« and the widespread stereotypes of »terrorists« – the unbridgeable polarizations and the mutual insinuations and resentments – that have impeded a more sophisticated analysis and the necessary contextualization. Against this background divergent positions, here relating to the prosecutions against members of the RAF and the 2nd of June Movement, are contrasted. There are four questions at the centre of this essay: 1. »State enemy No. 1« or just »ordinary criminals«? 2. Is it individual or organized crime? 3. Is the trial unprejudiced or is there a prejudgment of the defendant? 4. Is there equal treatment or are sharpened conditions in force?

**Gisela Diewald-Kerkmann**