

Legal Mutation
Genesis and Evolution of Law
in the Transnational Sphere (p. 14)

In order to cope with transnational law, we have to abandon hierarchical legal models which, up to the present, have dominated western legal discourse. In the emergence of a new world society, law is undergoing a mutation. This mutation is here understood as a new form of interaction with legal texts. While law has been interpreted until now with regard to *auctoritas*, i.e. to an external reference (e.g. God, the King, the Pope, the Legislator), this mode of interaction with the legal text can no longer grasp new normative phenomena which in the recent literature have been subsumed under the concept of transnational law. The authors take inspiration from the Jewish model of interpretation of legal texts – as an example of an alternative and more adequate approach to global legal phenomena – and try to elaborate this argument on the basis of European private law.

Marc Amstutz, Vaios Karavas

Why do Clocks run differently in Japan?
Remarks on a Concept of Cultural Transfer (p. 33)

The analysis of transfer remains one of the most fruitful and promising strategies when coming to terms with the complexities of cultural development in the modern, globalizing world. However, notwithstanding its many promises, analyses of transfer are based on a set of unspoken assumptions. The present short discussion of two of these basic assumptions leads to a plea to overcome notions of geographical »origins« and concepts of »derivative discourse«; and to a plea to overcome bilateralism through the practice of embedding transfers within a global historical perspective.

Sebastian Conrad

The Weak Law
Contaminations and Legal Cultures (p. 39)

In the last decade the subject of »legal transplants« has been taken over by practical »western« lawyers mainly involved in projects of »exporting« their own legal systems. What this article contends is that rules are not self-expressive; institutions need to communicate, and so the law is, in a way, wrapped in a narrative. The present article focuses on these aspects because of the problems raised by the process of commodification of legal rules, as is suggested by the words import and export of legal models, especially in relation to former Socialist countries. The author maintains that the process of importing and exporting rules and institutions is an almost unconscious process of integrating them into the ideology of the borrowing system. Thus the meaning of the borrowed institutions depends solely on the struggle among the formative elements in the receiving system, which almost always will produce something different from the original. But the author also believes that the ideology of a system is very often not merely a local product but a contamination of several local traits by foreign ones. In more general terms, the actual legal world is more a »world of contaminations« than a world split into different families.

Pier Giuseppe Monateri

Colony as an Exception
A Hypothesis on Transfer (p. 52)

This essay deals with the theme of transfer from a colonial perspective. How did legal transplants work in Italian colonies? What was really colonial law and what does the word transfer mean? Transfer, in the Latin form *transferre*, means transport, but also transcribes, translates and hence adapts change. For the Italian jurists the difference of colonial space and African »barbarism« required an organization of power free from the rules of the state of law, founded on a pre-modern legal pluralism and on an authoritative paternalism of executive power. The colony lived in a different temporal space. It still belonged to the world of the Ancient Regime, a world that legal modernity brought back from the past and

used to represent the colony as a difference, as a space of exception.

Luigi Nuzzo

The Alien
Acquisitive Prescription in the Judicial Practice of
Imperial Russia in the XIXth Century (p. 59)

In early Russian law there is a period of limitation of actions. Acquisitive prescription appeared for the first time in the Statute Book of the Russian Empire in 1832. This institution was transferred to Russian law from the *Code Napoléon*, but without its prerequisites, namely legal cause and good faith. The fact of a direct borrowing from the *Code Napoléon* contradicts the common view of the Russian Statute Book as a systematized version of older Russian legislation. Acquisitive prescription in the Statute Book is a typical example of a legal transplant. It became a very widespread means of acquisition of property belonging to someone else. But the legal consciousness of Russian peasants resisted the application of acquisitive prescription. In consequence it remained problematic in the Russian legal order up to the Revolution of 1917.

Anton D. Rudokvas

In the Laboratory
Observations of Legal Transfer in the
European Constitutional Treaty (p. 70)

The European Constitutional Treaty and the European Charter of Fundamental Rights (Title II of the Constitutional Treaty) currently challenge the legal orders of the member states. Transfer processes are to be expected, e. g. due to the adoption of the »right to a good administration« by the European Charter of Fundamental Rights, the development of which will be presented in more detail. This paper tracks the way in which this legal principle developed from a structural condition for the granting of development aid (»good governance«) into a central category for the description of European minimum standards for government and administration. To provide some perspective, possible »reactions« by the legal orders

of the member states, particularly of Germany and France, are sketched. Following up this point, considerations on the transfer of laws are pursued and a situational view of the communication among legal orders is advocated. In order to illustrate this approach, analogies between legal interactions and chemical reactions are drawn.

Margrit Seckelmann

L'institution de la vie en images
Reflections on Pierre Legendre's Theory of Law
as an Institution (p. 92)

The French legal historian, psychoanalyst and jurist Pierre Legendre has developed an unusual legal theory. At its heart lies the concept of law as an institution. It is the function of law to institutionalise life in the world. The law thereby acts as the central agent between the transcendent and the subject in our societies. Performing this function, it draws on the media of staging and imagery. This article presents the essential features of Legendre's theoretical construct. It emphasises the aspects in which it contrasts with established concepts of institution and law by assuming the institution as given at any time, and accordingly by placing the law at the constitutive centre of society. It argues that the price paid by such an understanding is an intensification of the problem of transcendence in law. Its thesis is that Legendre's strategies in responding to this problem, namely processes of visualisation and ontological arguments, become absorbed in tautologies and hence risk the explanatory value of his entire legal theory.

Oliver M. Brupbacher

The »Good Herdsman« as a Constitutional Figure
A Tragedy on Defending Law with Pierre Legendre,
Michel Foucault and Carl Schmitt (p. 111)

Ever since Hobbes, the modern state figures as a complex artistic product, which establishes *exterior* safety and welfare in perpetuity and leaves its citizens alone as representing the *inside*, in an impartial and thus incontestably rational way. But precisely the latter is not the

case. As soon as »the distinction between the inside and the outside is generally acknowledged, the superiority of the inside over the outside, and thus the superiority of the private over the public, is decided« (Carl Schmitt). The state can only succeed in regaining broad »legitimacy« by a convincing display of its competence in all spheres. The metaphor of the »good herdsman« therefore seems very helpful. As a result of its rather neutral image, it is bound to present things in a »biopolitical« optic. It tries desperately to integrate materially what ideally is doomed to failure. This ideal picture of the »good herdsman« destroys the chances of each of its profane worldly images.

David R. Wenger

Citizenship

Running through recent Literature (p. 129)

The topic of citizenship in recent debate is at the centre of many reflections. The stories of citizenship that emerge are manifold for the problems faced, the research methods applied, and the disciplines involved. The essay aims to depict this complexity by the cross-reading of four recent works on citizenship that differ in approach, purposes, spatial and temporal area and nationality of author. The limits and the possibilities of a concept that speaks of inclusion and exclusion, of identity and difference, of status privileges and of new rights, emerge in a journey that reaches from pre-modernity to post-modernity.

Luciano Nuzzo