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Translating German Administrative Law: The Case of Finland

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Legal translations

The language of comparative law is replete with terms referring to ways in which legal norms and ideologies move. While an overview of these is not appropriate in this article, I will take up one recent suggestion that I find particularly illuminating. Máximo Langer has proposed the term »legal translation«, through which he hopes to highlight the fact that legal norms rarely remain unchanged when they are taken over by another legal system. Legal norms need to be adjusted to their new legal, social, political, economic and cultural environments. The »translator« of the norm, legal institution or legal ideology does, in fact, much of the same work as a translator (or a reader) of a novel or a poem. When works of literature are read or translated by a person belonging to another cultural sphere, the original texts assume different meanings – although their essential meanings will often remain the same. »Legal practices and institutions may be transformed«, Langer emphasizes, »when translated between legal systems either because of the decisions of the reformers (translators) or structural differences between the original and receiving legal systems (languages).«¹

This article is about »translating« a particular legal ideology from German into Finnish law. As practically everywhere in the West, Germany was the primary source of legal reception in late nineteenth-century Finland.² In this text I look at a group of »legal translators« who imported a package of German legal ideas into the Finnish legal landscape. The package of ideas that I address is called »administrative law« (German: *Verwaltungsrecht*; Swedish: *förvaltningsrätt*; Finnish: *hallinto-oikeus*).³ I show that the »heroes« of this story – Robert Hermanson (1846–1928), Leo Mechelin (1839–1914) and K. J. Ståhlberg (1865–1952),⁴ all politicians and professors of law – did not merely import foreign ideas into their own country, they also carefully mapped these ideas onto a different political environment.

1 See M. LANGER, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, in: *Harvard International Law Journal* 45 (2004) 1–64, 64.

2 For Finland, see H. PIHLAJAMÄKI, A. PYLKKÄNEN, *Suomalainen oikeustiede eurooppalaisessa traditiossa* [Finnish legal scholarship in

the European tradition], Helsinki 1997.

3 »Importation« is another tempting catchword to refer to the movement of legal practices, norms and institutions. Importation stresses the activeness of those actually in charge of selecting the »import products« and »selling« them to their domestic (or other markets). The legal histories of culturally peripheral countries,

such as Finland and Sweden, are full of such importers and, in the nineteenth century, German legal science turned into one big export product. Active »exporters« of legal ideas are no rare birds, either; one need only think of the eagerness with which a host of Western law schools are currently expanding their businesses in China. Speaking in terms of legal imports and exports enables one to consider legal scholars' ever-present need to win new terrain by introducing new theories and viewpoints, and coining new concepts. This »survival of the fittest«, the need to accumulate »scientific capital« on the »field« has been aptly analyzed by P. BOURDIEU (see, for instance, his *Science of Science and Reflexivity*, Chicago 2004). I will, however, leave the subject of legal imports and exports for another occasion. The advantage of »legal translations« is that this catchword captures »translators'« needs to accommodate the object of translation into new circumstances.

4 No modern biography of Mechelin exists, but see the articles in G. VON BONSDORFF ym., *Leo Mechelin 1839–1914: Helsingin herra, valtiollinen vaikuttaja ja Suomi-kuvan luoja* [Leo Mechelin 1839–1914: the lord of Helsinki, the influential statesman and the creator of Finland's image] Helsingin kaupungin museo, Helsinki 1989. On Ståhlberg, see Y. BLOMSTEDT: *K. J. Ståhlberg – valtiomieselämäkerta* [K. J. Ståhlberg – a biography of a statesman], Helsinki 1969 and J. INHA, *Elämä ja oikeus: K. J. Ståhlberg oikeusajattelijana* [A life and the law: K. J. Ståhlberg as a legal thinker], Helsinki 2004.

As my footnotes show, the questions of *Rechtsstaat* and the history of administrative law have not been left unresearched in Finnish scholarship. In fact, many of these problems have been hotly debated and are considered to be crucial to national self-understanding.⁵ The *Dogmengeschichte* of Finnish administrative law is also well-known,⁶ however scholars other than professional legal historians have primarily taken up the pioneering work in this area.⁷ Legal historians will hopefully take up the task of relating these results to the general picture that has emerged in recent decades on nineteenth-century topics, such as the birth of the modern legal profession and the modernization of private and criminal law. The history of public law in the twentieth century also needs more attention. This article is, needless to say, only a brief overture to the kinds of problems that might be of interest in future research.⁸

*The point of departure:
administrative law emerges in Germany*

German administrative law was built on the ashes of *Polizei-recht*, »police law«. ⁹ Michael Stolleis summarizes the early nineteenth-century German development as follows: As a result of economic liberalism, the scope of administration was reduced. Rapid technological innovations and structural demographic changes also called for specialization in administration. The old, all-encompassing concept of »police« no longer described the new situation. While the relationship between the ruler and his subjects in the *ancien régime* was essentially political, the relationship between state power and citizens in the nineteenth-century was increasingly conditioned by the division of political power and law. In other words, a political relationship became a legal one. It was up to the new branch, administrative law (*Verwaltungsrecht*), to provide the actual details of this relationship. Administrative law not only served the interests of the state but also demarcated the limits of bourgeois rights.¹⁰

Stolleis shows step-by-step how *Policeywissenschaft* turned into *Policeyrecht* in the early decades of the nineteenth century and how the latter gradually evolved into administrative law in the modern sense of the term around mid-century. In Stolleis' account of the German experience, each developmental phase

5 See e.g. the works of Osmo Jussila and Hannu Tapani Klami mentioned below.

6 Kaarlo Tuori's work has been fundamental, see footnote 27.

7 L. Björnes' monumental *Nordiska rättsvetenskapens historia* [The history of Nordic legal scholarship] I–IV, Lund 1995–2007 is a notable exception.

8 I wish to thank Professor Kaarlo Tuori and Dr. Mia Korpiola for their insightful comments on a draft version of this article. I take, however, full responsibility for the conclusions and for any possible errors.

9 Covering a huge area of social phenomena, police law did not evolve simply into administrative law; instead, the remnants of *Polizei-recht* were divided between

many modernizing legal disciplines during the nineteenth century. In recent decades, the international literature on *Policey* has grown so immense that it would be hopeless to try to cram any meaningful portion into a footnote.

10 M. STOLLEIS, *Geschichte des öffentlichen Rechts in Deutschland*, Zweiter Band 1800–1914, München 1992, 263–264.

closely mirrors changes in the political sphere and in the history of scholarship. Thus, because of the specialization of knowledge, the old »police science« was no longer capable of providing an umbrella for all specialized knowledge concerning such things as economic or demographic phenomenon. No longer helpful, *Polizeywissenschaft* needed to go.

Robert von Mohl's *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaats* (1832/33) established the concept of *Rechtsstaat* in German legal language. Von Mohl's new strategy was to link contemporary police regulations with constitutional precepts. The postulates of the constitutional states, which could only take the form of a *Rechtsstaat*, had to be reflected in everyday administrative actions, as the absolutist relationship between ruler (*Obriegkeit*) and subject (*Untertan*) changed into a legal relationship between state power and citizen. The new teachings were developed first and foremost in the universities of the »constitutional« states, such as Bavaria, Württemberg, Baden, Hessen-Darmstadt, Saxony and later also Prussia and Austria. As Stolleis has shown, the development of public law was strongest in the constitutional states »which were sufficiently large, had a division of power, guarantees based on rule of law, freedom of the press, organized administration and well-functioning universities.« By contrast, non-constitutional states, which often lacked these features, had difficulty developing public law as a branch of legal scholarship.¹¹

*The framework of Finnish administrative law:
developing conceptions of Rechtsstaat*

The connection between state forms, *Wissenschaftsgeschichte* and the development of law that Stolleis describes are much less clear in the case of Finland. Nineteenth-century Finland had not gone through bourgeois revolutions or a development towards constitutionalism.¹² Finnish legal scholarship was a late-comer, originating only around the mid-nineteenth century.¹³ Because of this lateness, there was very little domestic tradition in the way of reception of the powerful German *Begriffsjurisprudenz*.

The basic state organs were in place in the grand duchy, but Finland's relations with the Russian central power turned out to be far from clear. Was the Grand Duchy of Finland a *Rechtsstaat*? This question is tricky and demands some elaboration. According

11 STOLLEIS (n. 10) 258–259, 263, 318.

12 Having formed the eastern half of the Kingdom of Sweden for six centuries, Finland had been annexed to Russia in 1809 as one result of the Napoleonic wars. The practical administration was in the hands of the strong Finnish senate, and the laws concerning the Grand Duchy of Finland had to be approved by the Finnish

Diet. The governor-general represented the emperor in Finland. According to the model inherited from the Swedish period, the Diet was organized into four estates: the nobility, the bourgeoisie, the clergy and the peasantry. The Diet was not convened between 1809 and 1863, »the stateless night«. Before 1886, the estates had no right to initiate legal reforms, but could »petition« the emperor for

them, which was slower and more cumbersome.

13 See H. T. KLAMI, *Oikeustaistelijat: Suomen oikeustiede Venäjän valan aikana* [The legal activists: Finnish legal scholarship during Russian rule], Porvoo 1977; L. BJÖRNE, *Brytningstiden: Den nordiska rättsvetenskapens historia, Del II: 1815–1870* [The time of change: The history of Nordic legal scholarship, part II: 1815–1870], Lund 1997, 199–203.

to the conventional definition, a *Rechtsstaat* is a state which limits the scope of its own functions by law. On the other hand, the rights and duties of the citizens of a *Rechtsstaat* are defined by law. This was precisely the conception of *Rechtsstaat* that emerged in nineteenth century German discussions and spread forcefully to all corners of the Western world.

Whether Finland was ruled by law as a true *Rechtsstaat* depended essentially on whether the Grand Duchy was seen as a separate state within the Russian empire or not. The Finnish »legal activists« or »legal scholars« who used law as a weapon for Finland's autonomy came to argue that, although the emperor was an autocratic ruler in Russia, his functions as the grand duke of Finland were limited by the Finnish constitution. The whole argument evolved around the interpretation of the czar's declaration that had been made to the Finnish estates at the Diet of Porvoo in 1809 after Finland had been annexed to Russia. At Porvoo, Emperor Nicholas I declared that he would »uphold Finland's constitution.« Later, in the latter part of the century, Finns began to interpret this statement as referring to the late eighteenth-century Swedish constitutions. Their Russian counterparts denied this interpretation, claiming that the Emperor had talked in vague terms according to contemporary parlance and had not referred to any specific laws. Therefore, according to the Russians, the czar could now legislate at will concerning Finland. This was denied by Finnish legal activists, since laws concerning Finland had to be approved by the Finnish Diet.

The argument flared up after Finnish law professor Leo Mechelin published his *Précis du droit public du Grand-Duché de Finlande* in 1886, in which he developed his view of Finland's constitutional position. Mechelin became known as one of the foremost defenders – or inventors¹⁴ – of Finland's constitutional position within the Russian Empire. As a politically-oriented person, he was more interested in the constitutional relations between the highest state organs than in the mundane details of administrative law.¹⁵ Mechelin spread the view that Emperor Alexander I had not incorporated Finland into Russia in 1809, but that the annexation had constituted a union of the Grand Duchy of Finland and the Russian Empire.¹⁶ Mechelin defined the Grand Duchy as a constitutional *Rechtsstaat*, governed by the grand duke. Although the powers of the Emperor of Russia were unlimited, his powers

14 On the »invention of Finland« in the mid- and late eighteenth-century historical and legal discussions, see O. JUSSILA, *Maa-kunnasta valtioksi: Suomen valtion synty* [From province to state: The establishment of Finland as a state], Porvoo 1987.

15 See INHA (n. 4) 143.

16 L. MECHELIN, *Précis du droit public du Grand-Duché de Finlande*, Helsinki 1886, 5. Mechelin

used his extensive foreign relations to propagate his views of Finland as a state, which explains why the *Précis* was first published in French, an unusual language of publication for a Finnish scholar at the time.

as the Grand Duke of Finland were limited by Finnish laws and were to be »exercised according to the manner established in the fundamental laws.«¹⁷

The booklet was soon translated into various European languages, including Russian in 1888. The imperial court master, K. F. Ordin, took up the challenge, defending the Russian position in various writings, while Mechelin wrote his own responses. Many others – Russians and Finns, lawyers and historians – took part in the lively discussions of the late 1880s and the 1890s. The arguments were then used for more practical purposes during what Finnish historiography knows as »the years of oppression«, the russification periods of 1899–1901 and 1905–1917.¹⁸

*The founding fathers of Finnish administrative law:
Hermanson and Ståhlberg*

Because of the legal problems inherent in the definition of the emperor's position as the grand duke, defining the relationship between constitutional law (*statsförfattningsrätten*) and administrative law was also crucial. Two different solutions were offered: the more conservative but politically more realist one by Robert Hermanson and the more liberal but less realist one by K. J. Ståhlberg.

Hermanson, the first of two founding fathers of Finnish administrative law, was careful in his wording: »constitutional law [*statsförfattningsrätten, Staatsverfassungsrecht*] is that part of the legal order which is concerned with the highest power, or the legal relationship between the monarch and the people.« Administrative law (*förvaltningsrätt, Verwaltungsrecht*), then, covered »that part of the legal order which dealt with the administrative power's use by the one invested with public power.« But the crucial part of Hermanson's construction is that »administrative law is that part of a state's legal order, according to which a public authority can perform in administrative affairs. Thus, all such questions are excluded from administrative law, which have to do with the monarch's use of administrative power.«¹⁹

This raises the question: Was the emperor excluded from Hermanson's concept of *Rechtsstaat*? No, he was not quite *legibus solutus*. Hermanson states that the monarch's powers are »limited by a law, which entrusts the people with political rights« (*inskränkt*

17 MECHELIN (n. 16) 26.

18 O. JUSSILA is the leading scholarly authority on these questions. His views are conveniently summarized in *Suomen suuriruhtinaskunta 1809–1917* [The Grand Duchy of Finland 1809–1917], Helsinki 2004, 241–295.

19 R. HERMANSON, *Anteckningar enligt Professor R. F. Hermansons föreläsningar öfver inhemska förvaltningsrätt* [Notes according

to Professor R. F. Hermanson's lectures on domestic administrative law], Helsinki 1898, 17.

genom en lag, som tillerkänner folket politiska rättigheter). Hermanson is, however, still very much limited by the *ancien régime* notion of *Staatsräson*,²⁰ which fits poorly into the modern positivistic concept of public law.²¹ For Hermanson, the state existed »because of the goals, the interests, which can be considered to be those of society.« The goals need to be shared by all of society's members. It was difficult to determine, however, exactly what these values were. The most important one of them was, nevertheless, maintaining what was right.²²

Although Hermanson still defined the state using the old conceptual apparatus of the *Polizeistaat*, his concept of *Staatszweck* was already starting to resemble the idea of *Rechtsstaat*, much the way von Mohl had proposed four decades earlier. The reason of state – together with natural law and religion – had been an instrument by which the absolutist power of the monarch had always been limited.²³ By Hermanson's time, natural law and religion had lost their practical relevance. Hermanson was also not quite ready to adopt the concept of *Rechtsstaat* available in the »legal supermarket« that German scholarship provided for the rest of the Western world.

Hermanson's reluctance to embrace this central framework of a modern constitutional *Rechtsstaat* becomes understandable when we place his legal thinking in the context of his political views. Hermanson, unlike some more radical colleagues, took it for granted that the Russian Emperor held the highest position of power in Finland ever since Russia had conquered and annexed it in 1809. According to the more radical, alternative view, the Russian emperor governed Finland as its grand duke. From a legal point of view, the difference was significant. As emperor, the Russian ruler had »in principle a general power, although it could be in some ways limited.«²⁴

The emperor was, in Hermanson's view, an old world *ancien régime* absolutist ruler – a realist view of a positivist legal thinker. The power of »public administration« (*offentlig myndighet*) was fundamentally different because it was »a right limited to certain capacities.« All exercise of power within the state belonged to the wielder of the highest power, unless such a power was specifically and by law given to a representative of public administration.²⁵

When Ståhlberg, another grand old man of Finnish public law and, later, the first President of the Republic, published the first

20 On *Staatsräson*, see M. STOLLEIS, *Geschichte des öffentlichen Rechts in Deutschland*, Erster Band, München 1988, 197–200.

21 According to Stolleis, »[d]ie Staatszwecklehre schrumpfte zusammen zum (inhaltsleeren) Satz

von der Allkompetenz.« He refers to Gerber, who declared the need to cleanse *Staatsrecht* »of all non-legal stuff that belonged to ethical and political considerations« in his *Grundzüge eines Systems des deutschen Staatsrechts* (3. edition, 1880, 237). See STOLLEIS (n. 10) 334.

22 HERMANSON (n. 19) 3–4.

23 See M. STOLLEIS, »Staatsräson«, in: *Handwörterbuch zur Deut-*

schen Rechtsgeschichte IV, Berlin 1990, 1826–1832. Hermanson develops his view on *Staatsräson* at length in his earlier article »Om juridisk konstruktion i statsrätten« [On legal construction in state law], in: *Juridisk tidskrift i Finland* 1878–1879, inspired by P. LABAND'S *Das Staatsrecht des deutschen Reiches* (1876–1878).

24 HERMANSON (n. 19) 29.

25 HERMANSON (n. 19) 29.

major textbook on Finnish administrative law in 1913, many things had changed. Ståhlberg dropped the concept of *Staatszweck* and the idea of *Rechtsstaat* now clearly prevailed. Ståhlberg described the relationship between the *Rechtsstaat* and its link to the rule of law in public administration as follows:

»The requirement of legality, which [...] characterizes the modern *Rechtsstaat*, concerns all administrative measures. They can touch the citizens' sphere of rights only insofar as law, be it an actual parliamentary statute, decree, or a rule of customary law, authorizes thereto. In the same way, an individual has the right to demand from the administration only that to which he is entitled.«

Ståhlberg's vision of the Finnish *Rechtsstaat* was a vision of »statutory positivism«, of true modern *Gesetzespositivismus*. He argued that as the sanctioning of legal rules increasingly came to happen through the parliament, »so this parliament will protect the individual's sphere of rights.«²⁶

This definition of the *Rechtsstaat* and its relation to a modern administrative state is of German pedigree and of Ståhlberg's teachers Gerber, Paul Laband and Georg Jellinek.²⁷ However, Ståhlberg would not have been able to use the German ideas in Finland had Mechelin's conception of a real union between Russia and Finland not been so widely accepted in Finland at the time Ståhlberg wrote his treatise on Finnish administrative law.

Modern administrative law could not exist without the modern *Rechtsstaat* as its protective shell. But did such a shell truly exist? The answer to this question would have depended on who was asked. If we could put the question to a contemporary Russian expert in constitutional matters, the answer would be in the negative. Ordin and other Russian participants in the debate on Finland's constitutional nature would not have hesitated to label Ståhlberg's administrative law as a castle in the air or, at best, a legal fiction. The Finnish legal experts, from Robert Hermanson to Ståhlberg, might have differed as to the exact nature of Finland's position vis-à-vis Russia, but they were serious about their view that the grand duke could not be *legibus Finlandiae solutus*.

The idea of *Rechtsstaat* was not completely senseless. Starting from the 1860s, the legal system of the Grand Duchy of Finland was rapidly modernised. The whole package of private law for a liberal state was passed in the 1860s and 1870s²⁸ and criminal law was reformed in 1889. The major deviation from the general European trend was that, despite the efforts of liberal-minded legal

26 K. J. STÅHLBERG, Suomen hallinto-oikeus: Yleinen osa [Finnish administrative law: The general part], Helsinki 1913, 323–324.

27 For a thorough treatment of the German influences on early Finnish public law, see K. TUORI, Valtionhallinnon sivuelinorganisaatiosta I: Julkisoikeudellinen tutkimus komiteatyypisten elinten asemasta Suomen valtio-organisaatiossa, 1. nide, Teoreettinen

ja historiallinen tausta [On the organisation of temporary organs in state administration: A study in public law on organs resembling committees within Finland's state organisation, first part, theoretical and historical background], Helsinki 1983, 10–41.

28 See J. KEKKONEN, Merkantilismista liberalismiin [From mercantilism to liberalism], Helsinki 1986.

professionals, no procedural reforms in the liberal nineteenth-century spirit were introduced in Finland. As elsewhere in Scandinavia, private law was never codified but was reformed by piecemeal legislation.²⁹

It was clear by the late nineteenth century that statutory positivism was viable as a legal ideology, as statutory law already covered a broad area of Finnish law. This was not only true for private and criminal law but also for the development of administrative law, which now joined the modernisation trend.

Conclusions

How can the emergence of Finnish administrative law in the writings of Hermanson, Mechelin and Ståhlberg be understood from the point of view of legal translations? As other scholars have already made clear, recent German scholarship on administrative law was imported to Finland by the founding fathers, particularly Ståhlberg. This new administrative law was an adaptation of the teachings of conceptual jurisprudence to that left hanging by the dissolution of the *Policey* in the emerging *Rechtsstaat*, as Stolleis has shown. What I have tried to argue in this article is that the importation of the German ideas of *Verwaltungsrecht* required that a stand be taken on the concept of *Rechtsstaat*, without which the former could not function. The concept of *Rechtsstaat* was far from self-evident in a state ruled by the Russian Emperor, the Grand Duke of Finland.

The idea of *Rechtsstaat* was in its inception in the writings of Hermanson. He attached the idea to the workings of the administrative machinery of the Grand Duchy of Finland, but was careful not to give the impression that the autocratic Emperor was limited by laws, be they fundamental or of another kind. The administrative law of Hermanson did not, then, cover all administration in Finland. The all-encompassing idea of *Rechtsstaat* demanded that the Emperor be drawn into its sphere, with all ensuing limitations of power. This solution was proposed by Mechelin, who introduced the idea of a real union between Russia and Finland; although the Emperor ruled Russia free from legal constraints, as Finland's grand duke he was bound by the Finnish constitutions and laws. Hermanson, who was more politically conservative, was reluctant to embrace Mechelin's constitutional

²⁹ It would be tempting to account for the lack of private law codification as resistance to russification. However, this is not a good explanation, since all Nordic countries left their private law uncodified.

radicalism. Ståhlberg was different in that, like many other Finnish legal scholars of his generation, he accepted Mechelin's basic constitutional views. Ståhlberg, following the German models, built his scholarship of administrative law on this structure.

What does this brief story of the emergence of administrative law as a branch of legal scholarship in one the most peripheral corners of Europe teach us? First, it provides another example of the interdependence of the *Rechtsstaat* and administrative law, which Stolleis develops in reference to Germany in his *Geschichte des öffentlichen Rechts in Deutschland II*. Second, the Finnish experience shows how much administrative law depended on the *Rechtsstaat*, so much so that administrative law could not appear fully-fledged and all-encompassing until the *Rechtsstaat* had been invented. Third, the Finnish case represents a prime example of a legal fiction. The Finnish *Rechtsstaat* was a fiction or, in other words, it was an invention of the Finnish scholars and far from an undisputed legal fact. As we have seen, not even all Finnish legal scholars embraced this idea, not to mention their Russian colleagues. Just how unclear Finland's constitutional position was became obvious during the russification periods of 1899–1903 and 1905–1917.

Hermanson, Mechelin and Ståhlberg all acted as translators of German ideas of *Rechtsstaat*. Theirs was not a work of simply transplanting ready-made ideas onto new soil. Instead, they took the German raw material and moulded it to fit the environment of the Grand Duchy. This environment posed challenges of a predominantly political nature and led to a form of legal rope-dancing. These challenges required, from Hermanson's point of view, taking the emperor's autocratic position into consideration; in the case of Mechelin, the invention of a story about the real union between the Empire and the Grand Duchy and, in the case of Ståhlberg, the combining of administrative legal scholarship with Mechelin's constitutional invention.

Albeit resting on the unstable basis of a fictive *Rechtsstaat* and, thus, hanging as a castle in the air, the work of the »founding fathers« of public and administrative law produced lasting consequences. It was no fiction that the Finnish administrative state had begun to expand and modernise rapidly at the end of the nineteenth century. When the old structures of the *ancien régime* tumbled down, new ways of conceptualizing the administrative

reality were needed in Finland, just as in other Western countries. By the time Finland became independent in 1917, it already had modern scholarship on administrative law that was capable of taking up the task of systematizing and interpreting the expanding administrative apparatus of the newly-founded republic.

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