

The Concept and Juridical Nature of Transfer of Duties of Public Servants: Leaving behind the Legacy of “*besonderes Gewaltverhältnis*” for Taiwan

Shwu-Fann Liou *

Abstract

Ever since the ground-breaking Interpretation No. 187 in 1984, the Grand Justices have in a series of Interpretations gradually made inroads into the various areas under the traditional “*besonderes Gewaltverhältnis*”. Specifically, the Grand Justices have in the process identified those legal relationships that have a direct external aspect thus shall be provided with judicial remedies, among which the most important one being the legal relationship between the public functionaries and state. These developments have not only rectified the pre-existing passive attitude held by the administrative courts, but also contributed to the better protection of the status of public servants, in particular in terms of their access to judicial remedies. However, the “serious impact” test taken in Grand Justices Interpretations, as well as the approach in the current public functionary protection system, still follows a dichotomy between “the basic relationship” (“*Grundverhältnis*”) and “the management relationship” (“*Betriebsverhältnis*”), in accordance with which a personnel decision that does not involve an administrative act (*Verwaltungsakt*) is immune from administrative litigation. This approach is detrimental to the development of the administrative act doctrine, and contradicts the principle that internal administrative decisions are also subject to the protection offered by the fundamental rights and other constitutional norms. However, signs of change have been shown in more recent constitutional interpretations with regard to

*Associate Research Professor, Institutum Iurisprudentiae, Academia Sinica.

E-mail: sfl@gate.sinica.edu.tw

relations between the detainee and the detention authorities (Interpretation No. 653), between the inmate and the prison authorities (Interpretation No. 691) and between the student and the universities (No. 684), in which the Grand Justices did not apply the “serious impact” test. In the above light, this article intends to discuss the juridical nature of transfer of duties as the concept has been developed in doctrines and practice in Germany, with an aim to eradicating the remaining influences of the “*besonderes Gewaltverhältnis*” doctrine in the administrative law of Taiwan, as identified above. Among the types of “transfer of duties”, emphasis is put on inter-agency “reassignment order” (*Versetzung*) and intra-agency “transfer of duties” (*Umsetzung*).

Keywords: public service duties, transfer of duties, inter-agency reassignment order (*Versetzung*), intra-agency transfer of duties (*Umsetzung*), intra-agency administrative measures, intra-agency personnel orders, promotion, secondment, *besonderes Gewaltverhältnis*