Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte

Rechts Rg geschichte

Rechtsgeschichte

www.rg.mpg.de

http://www.rg-rechtsgeschichte.de/rg5
Zitiervorschlag: Rechtsgeschichte Rg 5 (2004)

Rg 5 2004 300 – 303

Abstracts

Governance by Solidarity? (p. 13)

References to solidarity are all but omnipresent. This high regard for solidarity is closely related to the important role which solidarity plays as a resource of the welfare state and its inclusive policies. Social insurance and the trade unions as components of the political system stood in the foreground for over a century. In an age in which globalisation intensifies the problems of stability in the welfare state, this organised solidarity also begins to falter. At the same time more basic variants of solidarity are gaining importance. The small networks of daily life, which are distant from functional systems, are increasingly coming within the range of perception of the »new welfare state« and could be planned and consumed as elements of reorganising strategies – with once again new problems appearing on the horizon.

Gerd Bender

The Contract between the Generations (p. 21)

Amid the general sense of helplessness, an old remedy might help: what are social politics the politics of? It is a simple question: »who helps whom – and why?« This question is only relevant to someone who believes that mankind by nature depends on help and cannot survive without it. Individuals need to be helped in a double sense, both actively and passively, through give and take. Egoism is a kind of disease and one which takes a heavy toll. It forces mankind to permanently calculate costs and benefits.

A booming economy cannot replace justice between the generations. If there are less children born, and neither the number of people in work nor productivity increase, then a smaller number of these children will have to make the contribution of those that have not been born, no matter whether pensions are paid from capital accumulation or directly from income, organised privately or in a system of social solidarity.

Social politics is subject to ever increasing pressure for legitimation. As long as competition between the political systems of East and West dominated international relations, the German welfare-state was used as proof of the superiority of the western political system. Now that there is no longer a socialist alternative, the western world seems ever more tempted to give up the model of the social-market economy in favour of the old capitalism. But this is a fatal error, for in the long run the market economy can function only in the context of a functioning social order.

Norbert Blüm

Infinite Solidarity? (p. 29)

»Solidarity is the readiness to behave altruistically within a community« – by so defining »actual« solidarity, this article seeks to delimit it from »institutionalized« solidarity and commences by discussing how the two forms relate to each other. It then addresses contemporary threats to solidarity, the aim being to illustrate one of these potential threats by taking a look at some examples of legally institutionalised solidarity. It is the threat that an increasing universalisation of egalitarian principles could dissolve the boundaries of those reference groups that might be necessary to solidarity.

Alexander Graser

Doing Things with Solidarity (p. 35)

Solidarity constitutes an instrument for resolving social conflict within a community on the basis of an alternative model to that promoted by economic liberalism. The principal community relevant for this purpose is the state. It is to the state that national constitutions entrust the task of developing solidarity at a vertical and horizontal level, which is to say to create a system of social welfare and to mould the market. This model of the state does not create an obstacle to the current process of globalisation, but rather permits it to centre upon a new relation between the north and south of the world. By contrast, the European constitution – in line with an economically liberal approach to globalisation – is hostile to the role of the state. This fosters mechanisms of redistribution of wealth only by means of fiscal intervention and in addition furnishes a vision of the free market which is no more than politically correct.

Alessandro Somma

Whoever says Solidarity wants Something (p. 49)

»Solidarity« can only have the meaning social communication attributes to it over time. The word occurs in the 19th century when former structures are conceived as being in crisis. The invocation of solidarity was meant to call upon a feeling of unity and support against internal and external threats. The workers' movement, the Church's social doctrines, social reforms, civil and constitutional theory (including their authoritarian offshoots), all refer to the notion of solidarity. Using the term was always meant in an educational, a demanding, a normative way. Most of the concrete demands based upon this concept are nowadays basic elements of national and European constitutional and social law. Thus the question whether »solidarity« should serve as the necessary moral completion of formal law remains unanswered. But the fact that the word today no longer finds a common consensus indicates that its zenith is already passed.

Michael Stolleis

The Falls of Rome
Contingency, Causality and Emergence
as a Problem of History (p. 58)

The article deals with the different views of history which we can find behind the many interpretations of the fall of Rome from late antiquity to modern times. These interpretations of historians and non-historians differ in relation to the distinction between contingency and necessity. Within the dominant frame of cause and effect the question of why Rome fell remains unanswerable on principle; and thus it constitutes a phenomenon of emergence in a certain sense. However, even after rejecting theoretical frameworks of causality that question is still raised by many while any answer would only lead to further questions. After all, it seems that the end of a historical appearance remains to be unreachable or unreceivable in the same way as its beginning. Therefore, the question of why Rome fell will always be asked again as long as history and historiography last.

Michael Kempe

Decline
A Note to Felix Dahn's »Fall of Rome« (p. 76)

The essay takes a new look at Felix Dahn's bestseller »Ein Kampf um Rom« in the context of his thinking as a legal historian and philosopher.

Jan Philipp Reemtsma

From Tally to Ticker Tape
Ends and dead Ends on the Way to a globalized
Commercial Law (p. 107)

The transnational law merchant or *lex mercatoria* claims to have its roots in a medieval law merchant, whose growth is said to have been facilitated by the commercial revolution of the eleventh and twelfth centuries, when mercantile law in the West supposedly came to be viewed as an integrated, developing system – a body of law. This concept of a medieval *lex mercatoria* meshes well with the notion of the universal character of commercial law, which has gained considerable influence through the work of Levin Goldschmidt. His thesis continues to influence the current debate without ever having been tested thoroughly. However, the nature of the medieval law merchant can only be divined by having recourse to those sources which are constantly quoted but rarely consulted: the *Little Red Book of Bristol, Fleta* and Gerard Malynes' *Consuetudo vel Lex Mercatoria: Or, The Ancient Law-Merchant*. It can be shown that the medieval law merchant was not so much a system of mercantile practice or commercial law as an expeditious procedure especially adapted for the needs of men who could not tarry for the common law.

Kent D. Lerch

»The Spirit of Law« in Jhering's »Spirit« and Jhering's »Means«, Part 1 (p. 128)

150 years of glory and respect for two great books like Jhering's »The Spirit of Roman Law« (1852 sqq) and »Law as a Means to an End« (1877 sqq) call for a small celebration in 15 stages. The familiar quotations from Jhering's vigorous texts on »the last causes of law« are still used in the present debate. Hence the reason for a celebration seems to be clear (Ch. 1.). A view into Jhering's time and his environment reveals the problems (in 2. and 3.). The idealistic systems had fallen. Empiricism, realism, positivism etc. obscured and disquieted jurisprudence. The dogmatic Jhering quite easily copes with this challenge without a real turning point and new methods (4.). His ambitious fundamental works have some difficulty. Jhering's way of looking at problems must be emphasized in advance. He has to find a way between the cult of logic and the cult of fact (5.). He tries to mediate and to save the »ethical system of planets« (*Spirit*) and to combine freedom *and* necessity, reason *and* nature *and* God for the sake of jurisprudence. Therefore he speeds up the old metaphysics of substance to a graded development (6.). Which steps for what? He builds a grandly planned but flawed »General theory of law« (7.). Problem and solution are dependent on their time (8.). Notwithstanding this, a view of the rich concrete themes in *Spirit* and *Means* amply repays all the effort (9.–15., in: Rg 6 [2005] forthcoming).

Joachim Rückert

Historical Community
A critical Notion's Use in National and European Law (p. 150)

Over the last decade there has been an increasing use of the term »Geschichtsgemeinschaft«, meaning »historical community«, in German legal science. The reasons for this lie mainly in the advancing process of European integration. The development of the European Union from a group created to tackle economic and technical problems to a political union with an ever more comprehensive list of competences (social policy, employment, asylum, migration, police, justice, foreign policy – as well as a common security and defence policy), the penetration of the law of the member states by European law which claims superiority and obligatory force, and finally the abolition of the principle of majority rule in the community law for decision-making in the Council of the European Communities, have brought the problem of the legitimacy of the decisions of the Commission, the Council, the European Court of Justice and the European Parliament starkly to the fore. That is why there is a demand for a strong collective European identity that gives a sense of belonging and solidarity, which should find its basis in a common European history. The article examines the use of the term »Geschichtsgemeinschaft«. It identifies the holistic, static and ontological understanding of history that dominates legal discourse and criticises this understanding from the point of view of the theory of history and epistemology.

Felix Hanschmann

La société mondiale sans dehors
Clôture circulaire de l'espace et du droit (p. 163)

L'article développe l'idée de sociospatialité et interroge les conditions de clôture d'espaces sociaux et de stabilisation de leurs frontières séparant l'intérieur (d'une socialité) de son extérieur. Le concept de clôture oecuménique et la différenciation de différents types d'»oikoumenç« sont là au centre de l'analyse. La société mondiale d'aujourd'hui apparaît alors comme une »oecoumène« d'un type particulier. En effet, elle représente la première oecoumène sans frontières et sans environnement. Elle est coextensive avec l'habitat sphérique de toute l'humanité: ses frontières sont celles de la communication sociale, laquelle est désormais sans dehors.

Les étapes de l'évolution vers ce stade d'oecouménisation de la communication sont identifiées et décrites comme celles d'une sphérisation de la terre, de la société et du droit. La *Doctrine du droit* kantienne joue un rôle déterminant dans l'analyse de ce processus. Sphérisation de l'habitat, positivisation du droit comme fondement de l'entrée de tous dans un ordre juridique mondial, intelligibilisation de la spatialité sociale désignent des développements concomitants. La clôture circulaire de l'espace est le corrélat d'une clôture circulaire du droit et d'une disparition du dehors de la société mondiale.

Jean Clam

Late Justice
Consequences of Nationalistic Enthusiasm (p. 190)

The war criminals of World War II had speedy trials in the former socialist countries. Only those perpetrators who had succeeded in leaving their countries before the victory of the anti-fascist alliance were spared the death penalty. Some of them could live for decades peacefully in their new homelands – especially in both Americas. For decades Argentina was a safe haven for European war criminals. This was also the case with Dinko Šakić who had been a commander of the notorious Ustasha-camp Jasenovac for several months in 1944. After the international recognition of the Republic of Croatia at the beginning of 1992, Šakić seemed to have felt utterly at ease and drew considerable attention upon himself – by giving interviews (on TV and in newspapers) and scandalous comments about the Ustasha-regime – so that eventually the Croatian legal institutions started dealing with him. Having established the existence of a founded suspicion that Dinko Šakić as the commander of Jasenovac camp on the territory of the »Independent State of Croatia« allegedly committed a criminal offence, a war crime against the civilian population as defined by Article 120, Paragraph 1 of the Basic Criminal Law of the Republic of Croatia, the investigation judge issued a decree on April 21, 1998 and subsequently Šakić's extradition was requested from the Republic of Argentina. The county State Attorney filed the indictment on December 14, 1998 and the trial at the Zagreb County Court began on March 15, 1999 and was terminated after 56 days of trial. The judgement was pronounced on October 1, 1999: Šakić was found guilty on all charges but two and sentenced to the highest punishment of 20 years in prison. The verdict and the penalty were confirmed by the first and second Appeals Chamber in 2000.

Dunja Melčić

No-Man's-Land (p. 207)

In his essay of 2003 Giorgio Agamben advanced the theory that the state of exception was the fundamental political strucure of our days. It is characterized by an executive power supplanting constitutional elements. Failing to mention Ernst Fraenkel, he quotes – in parts with the exact wording – Fraenkel's theory of the »Dual State«, and goes further than this theory on the characteristics of the Dual State by attributing to the state of exception a legal vacuum in the meaning of an »extra-legal field of action«. Evidence for this theory is taken from barely convincing historical and literary material and is not supported by a clear analysis of legal notions. Agamben's response to the political and legal dilemma of the dominating power of the overblown executive, by developing a »purpose-free« realisation of a »pure law«, can only be the fruit of Agamben's purely aesthetic point of view, trying to implant Benjaminian Messianity into post-modern realities.

Ilse Staff