On the Possibility to measure Solidarity (p. 14)

The author proposes to verify the hypothesis implicit in the title of the study: whether solidarity present in a social order is measurable in the sense that it is possible to verify the presence of more or less solidarity and therefore the compatibility of solidarity and other principles, in particular that of the free market. In the first part of the study the author defines the notion of solidarity which he intends to inform his own research, specifically a system of social protection, but different from that utilized in investigations of a sociological or historical character. He excludes, therefore, the protection of health from his own field of research, considering this inspired by principles in part diverse from those which inform other compartments of the social security order. He then deals with the central theme of the study, evaluating the »quantity« of solidarity present in the pension systems, both public and complementary, and in the forms of tutelage for the conditions of general need in the labour market. Having received a positive reply to the question posed in the title, the author finally passes in review the normative principles in regard to solidarity present in the text of the Constitution for Europe in the recently signed treaty, concluding with a positive note on the possibility – where supported by political will and capacity – that from this text the presence of solidarity in the social orders of the continent will be reinforced.

Gian Guido Balandi

»No longer« and »Not yet«
The Retreat from Tradition and Modernity in the Search for an appropriate Solidarity in Social Security (p. 29)

Traditional forms of solidarity, especially those deriving from family structures, have been widely considered obsolete and as an impediment to economic development, especially in the context of third-world development and social politics, and have thus been replaced by governmental forms of social security. In the meantime Europe seems to be moving in the opposite direction: here the social (welfare) state is being dismantled, since the level of welfare benefits and claims on the economy seem to be causing an economic decline. The essay treats facts and assumptions about the importance of family-solidarity in the social politics of third world countries and attempts to establish a connection with the debates in Europe on the relation between the state and traditional forms of solidarity.

Franz von Benda-Beckmann

Solidarity and Identity (p. 40)

Solidarity, despite being overladen with the ideological concepts of the 60s of the 19th century, has lost so little of its propagandist effect that it has now become the headline of Chapter IV of the European draft constitution. The notion itself has come down from Roman law, but as the expression of common liability within a restricted group it became a basic feature of the old European social order. The link to corporatively experienced issues of the ancien régime and to the roman legal concept through the French Revolution paved the way for solidarity as leitmotif to enter the common currency of politics in the 19th century. The exclusion always immanent in the concept of solidarity led in Germany after 1933 not only to an ideological but also to a juridical deeply anchored collective order, and one which survived the end of the War and formed one of the basic features of the succession state of the German Reich.

Jürgen Brand

Solidarity Chilled (p. 62)

Solidarity is challenged by globalisation. This is reflected in the recent literature on the subject, in particular when it comes to extreme positions. At one end of the spectrum there is old-fashioned republicanism (Münkler), and at the other end advanced systems theory (Stichweh). Whereas republicanism is convincing in its observation of the weakening of the communitarian bonds of civil society and the normative failures of globalisation, systems theory is convincing in generalizing the concept of solidarity and adjusting it to the problem of the normative integration of the global society. The price that systems theory has to pay for this gain is a very general but at the

same time very weak concept of solidarity which has lost any critical normative distance to existing society. On the other hand, the price old fashioned republicanism has to pay for its overburdening with value commitments is a total loss of explanatory force and complexity when it comes to the problems of global solidarity. Maybe a critical approach which is able to generalize the normative claims of solidarity and to combine it with the sociological insights of systems theory can reduce the price paid at both extremes.

Hauke Brunkhorst

The Principle of Solidarity (p. 67)

The present period is marked by the projection on to a transnational level of the categories of thought which have carried the expansion of capitalism in each country which is called »developed«. Like all the juridical notions which have accompanied this development of industrial capitalism, solidarity was born and developed in a national juridical setting, and it is in this setting that it will therefore be necessary to situate it in order to understand its place in the juridical constructions of the providential state. But while the principle of solidarity is thus rooted in the experience of national legal systems, its future will depend on the fate reserved for it at an international level. The mechanisms of solidarity are today menaced by the destabilisation of the national settings where they have flourished. However, this setback in the cause of national solidarities could paradoxically lead to the affirmation of the principle of solidarity at the international level.

Alain Supiot

Coincidences, Cases and Formulae
The Emergence of synallagmatic Contracts (p. 84)

The construction of the consensual contract in Roman law is certainly one of the most important achievements in the history of private law. But how and under which structural conditions did the consensual contract come into being? Its invention eliminated most of the characteristics of earlier forms of obligation, such as the ritualistic and formalistic elements. It thereby allowed totally new legal agreements and transactions. But at the same time the new type of consensual contract maintained one specific feature of private law: the *formula* or *actio*. With this observation, the present article discusses the possibilities and limitations of evolutionary processes in law.

Marie Theres Fögen

The Constitution of the Experiment in Modernity (p. 101)

The question whether freedom of religion requires permitting the slaughter of animals in accordance with Islamic rites – a question which was the subject of a decision by the German Federal Constitutional Court in 2002 – is an example of the general problem how the law and the constitution of a modern, secular society can deal with the Sharia, a theonomous law which claims authority by divine revelation. The genetic links between western christianity and the development of the foundations of modern society in Europe do not provide evidence of the incompatibility of Islam and modernity. But they do emphasize that the tensions resulting from the immigration of 3 million muslims in Germany are a great challenge for the constitutional order. A modern constitution of the Western European and North-Atlantic type, such as the german constitution (Grundgesetz), does not allow the dissolution of the tensions between secular law and individual religious autonomy unilaterally in favour of the secular law. This kind of tension is by no means unknown in modern society. Functional differentiation and individualization are core characteristics of modern society. But in view of the challenge by Islam and other challenges, such as ecological problems, we can ask if the »experiment in modernity«, the project of the Enlightenment, is destined to fail because of the dissonance and the lack of understanding between the partial systems of the society. This question is the starting point to outline evolutionary processes of integration in modern society. In this context the constitution proves to be an important tool of integration. Controversies about the scope of validity claimed by the partial systems are matters of constitutional law. The modern constitution is a specific form in which modern society describes itself as a unity by

insuring »practical concordance« between colliding freedoms and claims of validity. In the conflict of modern ethical principles of animal protection and Islamic rules of slaughter, freedom of religion demands respecting the Islamic communities' own path to knowledge and authority, notwithstanding the possibility that the arguments and the results may be unacceptable from the point of view of modern, scientifically based thinking. That is the crucial point in the decision of the Federal Constitutional Court. On the other hand, the constitution demands to be strictly respected in its core principles. Both freedom and respect for the core principles of a modern constitution form a basis for a social learning process which can contribute to a productive relationship between Islam and modernity.

Manfred Aschke

»The Spirit of Law« in Jhering's »Spirit« and
Jhering's »Means«, Part 2 (p. 122)

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. See for Ch. 1. to 8.: Rg 5 (2004) 128–149. Notwithstanding this, a view of the rich concrete themes in *Spirit* and *Means* amply repays all the effort (Ch. 9. and 10.). Our awareness has to be free of Jhering's jest in his seriousness and of the deceiving gunpowder smoke of his and his reader's conversion (in Ch. 11.). Jhering assumed a double task of jurisprudence on a fairly plain, scarcely original and entirely continuous basis. There was no need for a new juristic religion. His polemics are not important, but his method of creating juristic concepts (Ch. 12.) and his belief in a practical reason, which he justifies in his *Means* with ethics as a perfect example (Ch. 13.). His jurisprudence engages in a twofold task with new precision, empirical insight and normative judgement (Ch. 14.). And the celebration comes to its conclusion (Ch. 15.).

Joachim Rückert

Poets and Judges
The Dilemma of Judging in the 18th Century
(p. 143)

At the centre of Kleist's comedy *The Broken Jug* procedural questions are found, which are as pivotal for evidence and procedural law (both of which were undergoing crucial transformations at the end of the 18th century) as they are decisive for the genre-poetical definition of comedy. The legal comedy is, unlike tragedy, less weighted down by material questions and is therefore more attentive to procedural aspects. Along with legal norms, and above all actual legal procedures, it presents a stage for morality and politics – a stage for dealing with damaged symbolic authority as well as for the attempt to re-establish it. The following analyses will investigate the role played by the performative practice of judgement within the framework of the representation of law, as staged by Kleist in correspondence with contemporary discussions of legal reform. The Kantian judgement of taste (*Geschmacksurteil*) thereby proves to be fundamental for the ›aesthetic turn‹ in the ongoing reconfiguration of the penal process according to the principle of immediacy. Kant is also central for the crisis of rule-based decision-making in literary theory, which anticipates this reconfiguration.

Thomas Weitin

Via Appia, Route Nationale, Autobahn …
Mobility and Demarcation with Rome as Point of
Reference (p. 161)

Somebody who is speeding on motorways or in high-speed trains through Europe generally will not feel in the mood to think about historical reasons for technical infrastructures like roads or tracks. In everyday life these infrastructures seem to go without saying. Even in the realm of planning there is – after a short period of lively debates – a silent consent. Therefore this essay seeks the unquestioned conditions of infrastructural planning and representation with reference to the Roman Empire. How far do modern infrastructures of mobility and demarcation refer to ancient models? In modern times *translatio imperii et studii* sought always to find technical solutions for the construction of nations, states and empires. This

paper shows, with many examples, in which way physical remains *and* discourses which could be traced back to Rome, took part in the moulding of European infrastructures of traffic and of boundaries.

Axel Doßmann

The History of Criminal Justice
A Survey of Recent English and Irish Works (p. 181)

This review article discusses studies on the history of crime and the criminal law in England and Ireland published during the last few years. These reflect the ›history of crime and punishment‹ as a more or less established sub-discipline of *social* history, at least in England, whereas it only really began to flourish in the german-speaking world from the 1990s onwards. By contrast, the *legal* history of the criminal law and its procedure has a strong, recently revived academic tradition in Germany that does not really have a parallel in the British Isles, whose legal scholars still evidence their traditional reluctance to confront penal subjects.

Thomas Krause