Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte

Rechts Rg geschichte

Rechtsgeschichte

www.rg.mpg.de

http://www.rg-rechtsgeschichte.de/rg11
Zitiervorschlag: Rechtsgeschichte Rg 11 (2007)

Rg 11 2007 238 – 241

Abstracts

A different history of time (p. 12)

Rather than being the subject of history, time is commonly assumed to be a condition for history. Even if it is the subject of historical studies, time is primarily associated either with philosophy or with chronology. This might give rise to the illusion of a meta-historical time: a time that can only be intellectually recognised or technically measured. Yet if history claims to differ from common sense, it has also to determine its own epistemological premises. The notion of »meaning« might be considered as crucial in the study of time. The traditional and still predominant concept, going back to Max Weber, regards meaning as grounded in the subject. Accordingly, meaning is identified with subjective intentionality, being a function of the relation between aims and means. The dichotomy of subject/object, which underlies this point of view, is also responsible for the attribution of time either to the subjective or to the objective sphere. However, this may be a function of historical self-descriptions which provide plausibility by reducing the complexity of the social world. The article tries to offer an alternative that rejects ontology and replaces the commonplace concept of rationality by that of self-reference. It thus enables us to conceive time in operative terms as a dimension of the social world, in which the production of temporal differences produces historically variable forms of time.

Jani Kirov

How to get rid of history to gain time
Preliminary reflections towards a theory of historical times (p. 16)

The modern concept of history – its unity and universality – is an unquestioned and dominant social and cultural construction for understanding the past. At the same time, it seems to be an inevitable condition for the variety of all possible histories and therefore also for the unity of history as science. The following essay calls this into question, since the problem is actually the reverse: The predominant term of history obstructs the possible variety of time relations inside the historical reflections and negates time. Therefore the famous question »Why history?« has to be transformed into the heuristic question »How to get rid of history to gain time?«. However, this questioning of history does not lead to a postmodern discharge of history but to a temporal reflection of what time and historical times could mean. With an interpretation of Niklas Luhmann's thoughts on the relation between a theory of time as movement or measurement and a theory of time as horizon, the essay emphasises the temporal category of the present as a key-word for the theory of history. It only makes historical sense to speak of the past (experience) and the future (expectation) as qualities of time if they are set in relation to a specific present with a particular horizon of time.

Arnd Hoffmann

Chaos, rhythms and choices – Models of biological time and their consequences (p. 26)

Time by itself is an interesting topic in biological systems, but when it comes to modelling biology, the abstracted representation of time within a mathematical model is a construction surprisingly prone to ambiguities, counterintuitive phenomena and arbitrary decisions. Identifying different scenarios in which the theoretical representation of time is an issue helps us to understand more about concepts of time, biological complexity and the process of modelling itself. This article tries to describe how the process of modelling corresponds to the selection of a particular time scale from a whole range of time scales contributing to a biological system; how the fundamental units of time in biology, rhythmic oscillations, are dependent on the interaction with other rhythmic systems; how a step from a continuous to a discrete time (i. e. a change of the conceptual representation of time within a model) can greatly enhance the range of dynamic behaviours within the model.

Marc-Thorsten Hütt

The dehistoricisation of legal and life sciences.
A parallel development (p. 46)

In this article I am investigating scientific theories and schemata of classification that are eliminating time and contingency in their explanations in favour of laws

and classifications that are timelessly valid. The function of timeless validity is to guarantee legitimacy for a discipline and its methods. This is shown in several aspects:
1. Legal encyclopedias and the concept of natural history
2. Myths of origin and bodies of law
3. Paradigmatic validity of classifications
4. Darwin's theory of evolution
5. The syllogism in jurisprudence
6. Mechanistic explanations in biology

By eliminating time and contingencies in explanations researchers try to escape history and to reduce the human body to its physiology. I try to show that this has also consequences for law as a discipline and that there is and has been a parallel development in biology, medicine and law.

Eva Maria Engelen

A protracted process?
On social governance and its laws (p. 56)

The insight that law is conceived to be positive, i. e. the fact that law can and will be changed by and through the actions of the political actors, has been one of the most important factors in the history of legal differentiation. This factor gained even more in importance once the concept of the positivity of law was combined with the concept of the democratic welfare state and with its ambitions of social control. This article tries to reconstruct the historical dynamic of this structural cluster. Starting with the major changes which occurred in the positivity of law during the second half of the 19th century, the stimulations and constraints determining this process of accelerated legal production leading up to the current era of globalization are identified. However, the common assumption that globalization heralds the end of the secularistic dynamic of legalization is disputed; it will be shown that a new regulatory mix of international and national law, of self-produced legal regimes with global ambitions and of an even more intensified national regulation, seems rather more plausible.

Gerd Bender

Ἰαύω
To sleep or not to sleep (p. 66)

The verb *ἰαύω* occurs frequently in the Iliad and Odyssey. It is usually translated as »to sleep« or »to spend the night«. Surprisingly, though, *ἰαύω* as used by Homer also clearly indicates an active behaviour and even the contrary of sleeping. David Daube closely analyses the texts concerned to discover the complete spectrum of the word's meaning to solve the riddle. It is a piece of work very typical of Daube's love of words and hermeneutics. Special thanks go to Calum Carmichael who transcribed the article from the manuscript left by David Daube and gave us the permission to publish it.

David Daube

Overthrowing tyrants, punishing rebels
Law and violence in Renaissance interdicts (p. 76)

Violence with spiritual weapons, violence with temporal weapons: as contemporaries well knew, the Renaissance popes' exercise of political power was characterized by a double violence. The overthrow of tyrants and the punishment of rebels were the chief aims of excommunication and interdict. Those weapons were actually first steps towards a declaration of a »just« war. This essay analyses how those arguments were developed, concentrating in particular on the censures of Sixtus IV against Florence (1478) and Venice (1483) and on the excommunications and interdicts levied by Julius II on Bologna (1506) and Venice (1509). In addition, the article expands on the defences that some lawyers constructed against those arguments, positing another truth against the truth of the papal laws. By this means they emphasised their dissent from the papal laws while themselves making use of the law. The »war of writings« caused by Paul V's interdict against Venice (1606) produced a history of interdicts as a necessary tool for the defence, making explicit the opposition of *ius* and *vis*, that is to say, a critique of law's violence.

Angela De Benedictis

No property without law?
The conception of property in Hume and Rousseau (p. 94)

The current German debate on property as a fundamental right is dominated by a perspective in which property is exclusively formed by positive law. This perspective can, however, be questioned by contrasting it with the conceptions of property developed by Hume and Rousseau. For both conceptions, though otherwise entirely divergent, coincide in refuting the purely positivistic approach: whereas Hume regards property primarily as a result of pre-legal social conventions, Rousseau forms his idea of property in the context of the *volonté générale*, thereby conceiving of property as a post-legal phenomenon.

Ino Augsberg

Das Erbrecht in weltgeschichtlicher Entwickelung (1824–1835) by Eduard Gans (p. 110)

Das Erbrecht in weltgeschichtlicher Entwickelung, although unquestionably the most ambitious work of Eduard Gans, has hitherto been generally neglected by scholars. While some parts of it are quite well known because of their polemical arguments against Savigny's »Historical School of Law«, the way Gans tried to develop his own project of a »philosophical« history of succession law has received far less attention. This voluminous work, which encompasses the history of human civilisation from Ancient China and India up to the Middle Ages, relies on Hegel's conceptualisation of world history as a key for interpreting the documents containing the law of succession of the most relevant nations. However, this is not applied consistently throughout, suggesting that, despite seeming to be a homogeneous study, his *Erbrecht* was a work-in-progress with three main stages of composition. In the most Hegelian part of his work – vol. 2: *Das Römische Erbrecht* – Gans manages to reconcile his philosophical approach with his juridical background. In the introduction and in the first chapter he follows the historical course of the Roman legislation on inheritance and succession from ancient times prior to the *XII Tabulae* up to Justinian's codification, whereas in the remaining five chapters he attempts to reconstruct the whole system of the Roman law of succession from a dogmatic point of view. While in the former case the systematic principle was drawn from Hegel's lectures on the Philosophy of History, in the latter case Gans followed current academic practice in reconstructing the Roman law of succession in a systematic way, nevertheless stressing that such a system could not satisfy the ethical needs of reason.

Corrado Bertani

Legislation in wartime
The doctrine of plenipotentiary power in Europe (p. 139)

This article analyses the system of delegated legislation and »plenipotentiary powers« in wartime at the turn of the twentieth century from a European perspective. In France, Germany, England and Italy one finds, with differing formalities, particularly during the First World War, a recourse to delegated legislation or legislative capability which redefined the limits between the legislative and executive power, moving the fulcrum of their equilibrium in the direction of the latter. Contemporary legal science, including such authors as Carl Schmitt, Carré de Malberg and others, examined the significance, both juridical and political, of a phenomenon which characterises the principal European states – at least as regards Germany and Italy – on the threshold of their experience of totalitarianism.

Carlotta Latini

Science of Law – Science of Man (p. 159)

It is really bizarre: desperately seeking justice, we ended up with law. There is a radical and brutal separation between an imagined world – justice – and the world of that which happens – judges laying down the law. This separation, alienation, autonomy has not had any consequences on the functionality of the latter. Revolutions are not really concerned about law, and in the end the utopian struggle for justice reaches its dénouement not only in a *Code civil*, but also in a *Code de procedure civile*. Law always wins out over justice. At the same time law

remains intangible: all justifications will only touch the law like water on an oily surface. There is no adherence. It is slippery in the world of jurists. Watch your step! It is really bizarre to imagine that justice and doctrine and science – and other transcendent ideas – could enlighten a well oiled machine that functions in a radical and exclusive mode: one could be right – or the other. The machine always spits out one decision – or another decision. The machine of law is perhaps the greatest producer of uncertainty. And this is its most obvious secret – and its modernity. It is really bizarre. Because law, in its old way of judging cases between parties, because law, in its endless power of the one or the other interpretation, because law at the end is the result of the imagination, the constructions, the poetries of the legal-workers. In this sense, man, the character of man, returns into the discourse about jurisprudence and into the jurisprudential discourses themselves.

Rainer Maria Kiesow

Deep Inside the Bramble Bush:
Complex Orders and Humanities (p. 172)

In this article, Hayek's theory of spontaneous complex orders – created to challenge state intervention in the market domain – is used to defend the independence of humanities against the currently dominant scientism, which is seen as an attempt to destroy the standards of the humanities and replace them with standards derived from the so-called »hard sciences«. Hayek and his successors have shown us that the social sciences in general and law in particular have to be conceived with reference to the historicity of institutions, as evolutionary orders displaying creativity, rhythm and antagonism. Their main conclusion has been that models which can be used for understanding and manipulating human orders are either more complex than or as complex as the phenomenon under study. This proves that philology and classical human studies are better suited to understanding cultural orders – including law – than modern scientific model-building. It follows that the pretension of modern scientism is illegitimate and that, conversely, the claim of the humanities to maintain their own standards becomes entirely legitimate.

Pier G. Monateri