Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte
Journal of the Max Planck Institute for European Legal History

Rechts Rg geschichte

Rechtsgeschichte
Legal History

www.rg.mpg.de

http://www.rg-rechtsgeschichte.de/rg27
Zitiervorschlag: Rechtsgeschichte – Legal History Rg 27 (2019)
http://dx.doi.org/10.12946/rg27/432-434

Rg 27 2019 432 – 434

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»The narrow ways of English folk«

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messbare Zahl bipolarer rechtserzeugender Vereinbarungen zwischen Privatrechtssubjekten. Alles in allem gleicht dieses Regelwerk den hier analysierten »Lebensadern unserer Gesellschaft«: Es wird geschaffen, um gesellschaftliche Abläufe zu strukturieren, Konflikte auszuschließen oder jedenfalls in geordneter Form wieder zu lösen. Es ist ein System, das von Spezialisten gepflegt wird, auf dessen Funktionsfähigkeit Unzählige vertrauen, selbst wenn sie es nur hin und wieder nutzen. Seine Kosten werden überwiegend von den Steuerzahlern getragen, aber auch von denen, die zur Tragung von Prozesskosten verurteilt werden. Wie im Straßenverkehr oder auf den Datenautobahnen gibt es in der Justiz Staus, fehlende Pünktlichkeit, Katastrophen und Unfälle, Fehlurteile genannt. Wo die Probleme überhandnehmen, werden Finanzmittel zur Vermehrung von Justizpersonal eingesetzt. Der Rechtsstaat, so heißt es, soll so verlässlich sein wie die Züge in der Schweiz oder in Japan. So wie der Einzelne auf die Leistungen der materiellen Infrastruktur ist auch der Staatsbürger im Rechtsstaat auf pünktliche und unparteiische Justiz angewiesen. Der Anspruch auf Rechtsschutz (Art. 19 Abs. 4 GG) ähnelt, jedenfalls in der Struktur, dem Anspruch auf Nutzung von Infrastruktursystemen. Einen Anspruch auf Sicherheit und Güte der Leistung gibt es nicht.

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Warren Swain

»The narrow ways of English folk«*

At the turn of the 20th century, in his poem »The Old Australian Ways«, AB »Banjo« Paterson observed that the »narrow ways« of the English »are not for such as we«. He was not talking about the law, but his remarks do speak to lawyers. More than twenty years ago, Bruce Kercher's *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* provided an important account of the ways in which Australian law diverged from English law in the very early decades of the colony. By contrast, the relationship between Australian and English private law since the early colonial period has attracted relatively little attention. The absence of comment on the subject is even more surprising given that Australian historiography, as chronicled by Lunney, has long ago abandoned the pretence that the history of Australia can only be understood through the lens of the British. *A History of Australian Tort Law 1901–1945* fills some of the gap in the history of private law in Australia by looking at the law of tort in the first half of the twentieth century. At the core of this book, Lunney addresses a crucial idea about the development of private law in Australia that is all too pervasive. This orthodox narrative suggests that until the post-war period, private law in Australia was largely a carbon copy of English law. The reality was more nuanced. English law was, of course, important, but this is not to say that Australian judges were never prepared to depart from the English version of the common law. This development was partly due to the way in which Australian lawyers of the period viewed precedent. As Lunney explains, »A commitment to both the universality of the common law in the Empire / Commonwealth, and the capacity of Australian lawyers to contribute to that common law for the greater good, underpinned their views as to how English authority was to be applied in Australia« (2). Lunney's key point is that Australian judges did not just apply English law in an unmodified form. There was a degree of innovation,

* Mark Lunney, A History of Australian Tort Law 1901–1945. England's Obedient Servant? Cambridge: Cambridge University Press 2018, xxiv + 286 p., ISBN 978-1-108-42331-1

and some of those innovations were significant. The story that Lunney describes is just as likely to be true in other areas of private law. It certainly fits with the history of contract law in Australia as well as in other colonies, like New Zealand.

Lunney wisely chooses to concentrate on aspects of tort doctrine rather than providing a comprehensive account of the law of tort during this period, which would be both dull and unnecessary. Two chapters focus on the history of defamation, and others variously consider liability for the acts of third parties, psychiatric injury, liability of the state and other public or quasi-public bodies, and environmental damage. A further chapter looks at the impact of tort law on sporting and recreational activities.

Statute is one obvious way in which Australian tort law came to differ from that in England. The federal structure of Australia's legal system further complicated the adaptation of tort law. For example, some states introduced legislation on defamation, whilst others (like Victoria) did not. There are other illustrations of the same phenomenon. The Law Reform (Miscellaneous Provisions) Act 1944 (NSW) contained provisions on psychiatric injury which went further in allowing recovery than was possible in the common law in England or in the rest of Australia. However, whereas legislation is important in the way that Australian lawyers adapted English law or even built their own jurisprudence, it is but part of a wider question. Some attempts to shape the direction of the law in Australia can be seen as a matter of pure doctrinal analysis. This is something that is also evident in the case law on psychiatric injury. Yet this is still only part of the story. One of the most interesting aspects of Lunney's approach is the way in which legal developments are explained against a backdrop of local conditions. Resistance on the part of judges towards imposing liability on public bodies for failure to repair roads was controversial, but it was particularly pertinent in Australia because a contrary result was perceived to be a threat to nation-building. Equally, Australian conditions could result in the law moving in the opposite direction. Bush fires were, and are, a potent threat. As a result, judges were less uneasy about imposing liability on the state railway operators for fires caused by trains.

There is a good deal of detail in the book which cannot be covered in a short review. Lunney succeeds in his stated aim of highlighting the importance of Australian lawyers in the development of the law of tort in ways that were »distinct and innovative«. In his conclusion he identifies two major factors. The first, which is procedural, is often overlooked. It concerns the prevalence of jury trials in tort actions. The second factor that he identifies is the Australian environment. This has already been touched on. The idea covers more than just the natural environment. It was also a matter of community values. Lunney illustrates the point with reference to the relative paucity of litigation over sporting activities.

This monograph ought to encourage others to delve into the history of private law in Australia and indeed in other Commonwealth countries. Further lines of inquiry are hinted at. Lunney mentions the role of legal culture and focuses on academic culture especially. This begs the question of what the particularly characteristics of Australian legal culture are. By the period covered in this book, judges had trained and practiced in Australia. These men were brought up in the traditions of English law even if they operated at one step removed from it. Different Australian states may also possess their own legal cultures. The failure in New South Wales to completely fuse Equity and common law until comparatively recently has consequences to this day. It would be interesting to consider whether there are other differences in substantive law that can be explained in much the same way. Certainly, there was no significant body of Australian legal literature until comparatively recently. John Salmond, who was a law professor in Adelaide and then in New Zealand, published his *The Law of Torts* in 1907, but the book did not contain much discussion of non-English authorities. This may explain the continued hold of English legal ideas, but it does not account for the differences. Then there is also the question of Australian nationalism and identity, which Lunney touches on in chapter 2. In constitutional law, there was a decisive change in the approach of the High Court once those who were not involved in the federation process retired. To what extent do the claims of an Australian legal identity wax and wane, and how much do individual judges matter in this process? Lunney's study ends with the Second World War. This period and the immediate post-war years would see a decisive change in the relationship between Australia and its former coloniser. Yet as late as 1948 Sir Owen Dixon, unquestionably the leading Australian judge of his

generation, could assert that »[d]iversity in the development of the common law … seems to me to be an evil«. *A History of Australian Tort Law 1901–1945* begins to set the record straight by showing that Australian tort law had a character of its own and that, in important respects, this was a reflection of the wider society in which it operated.

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Valeria Vegh Weis

»Haz lo que digo y no lo que hago«*

Policing Transnational Protest se publicó en 2017, cuando Julian Assange gozaba aún de asilo político, tal como describe Brückenhaus en una de las muchas páginas del libro en las que conecta pasado y presente. Los iniciáticos acuerdos entre potencias europeas para la cooperación policial contra anti-colonialistas y comunistas a comienzos del siglo XX, conforme Brückenhaus, muestran un claro paralelo con las alianzas entre los países dominantes de la actualidad contra migrantes y disidentes políticos (216–217).

Efectivamente fue el año 2012 cuando Assange recibió asilo en la embajada ecuatoriana en Inglaterra. En pleno siglo XXI, Ecuador – en acuerdo con otros países posicionados como anti-imperialistas – había devenido así en un lugar seguro o »safe haven« frente al accionar de las agencias de seguridad de los máximos poderes occidentales que buscaban la inmediata detención del creador de Wikileaks. Luego, Ecuador cambió su rumbo político y ya en abril de 2019 autorizó a la policía inglesa a ingresar a su embajada y detener a Assange, convirtiendo al mundo actual en un lugar donde ya no es posible escapar a la vigilancia policial de las potencias globales.

Esta nueva composición global evidencia entonces un escenario un tanto más hostil del que existía cuando Brückenhaus escribió el libro. En su obra – excelentemente articulada, entretenida y didáctica – describe la realidad europea de la primera mitad del siglo XX, cuando se vivía una expansión constante de alianzas nacionales para consolidar redes de vigilancia policial internacionales en el marco de un difícil escenario de guerras mundiales e intentos por controlar las protestas anti-colonialistas y organizaciones comunistas. Sin embargo, incluso en ese difícil contexto, las confrontaciones comunismo vs. capitalismo, soberanías nacionales vs. alianzas globales y países Aliados vs. del Eje, permitían la configuración de »safe havens« en uno u otro lugar del mundo, de acuerdo con el devenir de la composición de fuerzas. Juzgando el caso de Assange, el mundo actual parece ofrecer redes de colaboración policial aún más extendidas, que no permiten la subsistencia de espacios seguros fuera de su control.

Brückenhaus marca otro elemento doloroso que vincula pasado y presente: la doble vara o el »Haz lo que digo y no lo que hago«. Siguiendo la historia de personajes claves tales como Savakar, el Club Indio-Egipcio, Saad Zaghloul o M.N. Roy, el autor expone cómo las potencias europeas hacían gala de su respeto exacerbado por el Estado de Derecho pero sólo puertas adentro. Afuera, en las colonias, las garantías y derechos reconocidos en instrumentos legales nacionales e internacionales eran sistemáticamente violados en pos de preservar el dominio europeo en el nuevo mundo y obstaculizar la

* Daniel Brückenhaus, Policing Transnational Protest: Liberal Imperialism and the Surveillance of Anti-colonialists in Europe, 1905–1945, New York: Oxford University Press 2017, 320 p., ISBN 978-0-19-066001-7