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SUMMA

THE SECURITY INTEREST LAW IN THE IUS COMMUNE

PÉTER BÓNIS

The early Middle Ages was an age without jurists. Without jurists and jurisprudence there cannot be a legal system based on rational decision rules. The jurists of the early twelfth century realised the need of rational legal system, but they had no jurisprudence to draw upon. Justinian's law fell into oblivion, and the Digest, the most important part of the Justinianic law was completely missing from the customary practices. The first teachers of Roman law had a task of huge difficulty: building a new legal system without any historical continuity. There was no continuity between ancient Roman law and medieval *ius commune*. This article aims to give a comprehensive survey on how the glossators succeeded in the realization of a new law in the field of the guarantees of the obligations in European legal history.

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THE STRUCTURE OF NATURAL LAW THINKING

GÜNTHER ELLSCHEID

The paper analyses two kinds of natural law doctrine as attempts to provide powerful (consent-generating) and fruitful (substantive) legal arguments that go beyond and morally evaluate positive law. Abstract formulations of natural law follow the structure of either the Decalogue or declarations of human rights. Their abstractness can lead to a lack of substantive content; therefore one should look for different ways in which they can be concretized. The second type of natural right arguments, suggested by Maihofer and others, refers to the „nature of things" as a methodological tool to overcome the separation between „is" and „ought". Through a critical analysis of the "nature" of higher education and its possible impact on its regulation as an example, it is suggested that doctrinal legal scholarship at its best is nothing else but concrete natural law.

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CARL SCHMITT AND THE QUESTION OF THE INTER STATES CONFLICTS

GÁBOR KARDOS

Roughly the study can be divided into two main parts. The author in the first part of his study (1-3) gives a detailed analysis of Carl Schmitt's concept of "concrete" international order and international law. According to Schmitt, international relations are essentially conflictual and they cannot be explained by abstract legal theories. The Schmittian theory can be used not only in the frame of nation states, but it has some force of plausibility in our post-national age. The second part of the study (4-7) shows the legal means to be used in international conflicts, including diplomacy, adjudication and mediation.

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„EMBRYO-FRIENDLY" METHODS? THE STATUS OF IN VITRO EMBRYOS IN RELATION TO EMBRYONIC STEM CELL RESEARCH

ZOLTAN NAVRATYIL

The essay aims to highlight the controversies surrounding the status of in vitro embryos in connection with embryonic stem cell research. Following the introduction the article divides into two main sections. The first part provides a brief overview of the theories about the moral and legal problems concerning foetal or embryonic life and argues that ethical dilemmas cannot be solved by creating neutral terminology regarding human in vitro embryos. The second part of the article deals with the alleged „embryo-friendly" techniques to produce stem cells without harming embryos. It illuminates (1) the researches with adult stem cells and the significance of „induced pluripotent stem cells", (2) the possibility of producing human admixed (chimera) embryos, (3) the technique of blastomere separation and finally (4) the „altered nuclear transfer". In addition the essay overviews how scientific development may challenge the legal conception of human embryos and shines a light on the glaring discrepancies between biological facts and legal regulation.

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ON THE ART OF THE CONSTITUTIONAL INTERPRETATION IN CANADA

MÁTÉ PAKSY

It is needless to say that scholarly studies on Canadian law can contribute to our understanding of complex and culturally unique legal systems. The author analyses the origin of Canadian constitutionalism which is without any doubt the British common law. He argues that the Canadian way is different from American constitutionalism. This difference becomes evident if one compares the American and Canadian theories of interpretation of the Constitution. The nature of the constitution of these political communities is different as well. Canada has a relatively new constitution and the art of its interpretation gives more liberty to the Canadian judges than to their American colleagues. The metaphor of the "living tree" – originating from the legal practice of the Privy Council – expresses well this freedom which is justified because it is the very intent of the Canadian founding fathers. In addition, this liberty is justified politically, too, since a given decision of the constitutional judges is nothing but a starting point for a dialog with the legislation and, by this way, with the entire civil society.

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LEGISLATION AND PARLIAMENTARISM IN JAPAN A HISTORICAL APPROACH

CSABA GERGELY TAMÁS

Japan's first written constitution was the Meiji Constitution, or the Constitution of the Imperial Japan which entered into force on 29 November 1890. It was the first modern written constitution of Asia based upon Prussian traditions. The Emperor was the sovereign, was sacred and inviolable and was regarded as the religious head of the state-religion Shinto. The Meiji Constitution contained detailed provisions on the bicameral Imperial Diet, but in fact the Meiji era was about strong Cabinet and weak Diet. The legislative power was carried out by the Emperor with the consent of the Diet.

In the post-war period, the Shőwa Constitution was promulgated in November 1946, which established a constitutional monarchy, including the Emperor-as-symbol system and the bicameral National Diet, consisting of the House of Representatives and the House of Councillors, both directly elected, became the highest organ of state power and the sole law-making organ of State.

The paper gives and an overview how the current parliamentary democracy has been born focusing overwhelmingly on the constitutional regulations. I cover both the era of the Meiji Constitution and post-war period. I focus primarily on the constitutional relations and separation of powers between the Emperor, the Cabinet and the Parliament, but the role of foreign influences; Chinese and Eastern traditions are also taken into account. In my view, current Japan cannot be interpreted without the Meiji-period and the ancient historical-social factors.

PRESCRIPTION? RETROACTIVE LEGISLATION?
Traps in Law and the Neutrality of Legal Technique

Csaba Varga

Eventually, the new Transitory Rules to the Basic Law Art. 2/1 excludes presciption for those "crimes specified by the law and committed against Hungary or persons in the name, interest or consensus of the party-state during the communist dictatorship which, running counter the criminal law in force at the time of the deed committed, were not prosecuted for political reasons". In its execution, the Law No. CCX of 2011 specifies the circle of both the deeds and those who may have committed them as to be considered within the former provision. As the paper's argument holds, any such posterior declaration by the legislator is only legitimate when drawing Ernst Fraenkel's classical line between two sides of the same dictatorial state: the normal one with prescription period passing on and the abnormal one when the state degenerated into criminal perpetrator where prescription cannot even begin. Accordingly, specification ought not to involve further selection from within the latter' domain, for it would necessarily embody legal policy consideration with the strive for its retroactive validation. At the same time it is to be noted that the line between retro- and pro-activity so much as the prohibition of analogy in criminal and tax matters with the underlying principles of *nullum crimen/nulla poena sine lege* are elevated to almost catechistic heights exclusively in Europe, as an after-effect of feudal miserability once caused by the abusive practice of Christian princes as absolutistic monarchs, only broken by the French revolution. Albeit as means–even if counter proposed mostly for their in-built technique–they are neutral, can serve various ends, and are to be justified as a curative measure especially when former legislation is systematically abused. Or, as the old *sagesse* holds, the instrumental principle of »*lex non reagit*« may not prevail over the fundamental validity of the tenet »*salus rei publicae suprema lex esto*«.

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PROBLEMS OF PRACTICING OF SOVEREIGNTY IN ANTARCTICA IN THE VIEW OF INTERNATIONAL PUBLIC LAW

Erzsébet Csatlós

Antarctica has been a place for peaceful scientific cooperation since long as the division of the territory had been successfully prevented. However, the changes of law of the sea in the last two decades highlighted some hidden problems which challenge the legal system and the legal situation of the continent and its marine area. The main problem is that the sovereignty issues of the Antarctica is in focus again despite the fact that it seemed to be settled in 1959. Those States which aimed to divide the territory plays the major role in decision making process concerning the affairs of the region and as new economic potential has emerged in those maritime zones which belong to the continent, these States are keen on deciding: shall the Antarctica be maintained for only scientific

purposes only or shall it be open for economic investments? As a matter of fact, even the existence of maritime zones is a question to be answered, so as the owner of the right to practice sovereignty over them, not to mention those issues which question the good functioning of the Antarctic Treaty System.

The present essay aims to examine those sovereignty and jurisdictional issues which are highlightened by recent development of the law of the sea and the ones which origins from the base of the system.

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COMPETITION LAW AND ARBITRATION IN THE EUROPEAN UNION

Borbála Tünde Dömötörfy

The relationship of competition law and arbitration seems quite contradictory in Europe. Is the reason of this that the enforcement of competition law focused on public? It is true only in a historical approach, because the Commission is trying to raise the significance of the private litigation of antitrust claims in the last one and half decade.

So what are the barriers? To answer this question the article examines the related area from a broader perspective. It is unquestioned that merchants prefer arbitration against litigation at national courts. Antitrust claims arise mostly in the interest of large commercial enterprises who prefer arbitration. Considering the unregulated status of arbitration in the European Union, it might be a great barrier of the spread of private enforcement. There are more and more cases before arbitral tribunals currently and there are many inconsistencies in the practice.

Considering the role of alternative dispute resolution in international trade, this messy situation shall be cleared. A regulation of the underlying issues might improve the recent situation. For example by deleting the exclusion of arbitration from the scope of Regulation Brussel I. Nevertheless this might be only a partial resolution. There are two main problems which prevent arbitration in competition law cases: the lack of regulation of amicus curiae intervention by competition authorities and the lack of a possibility for preliminary ruling by the arbitration courts.

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THE FAILURE OF THE PROTECTED ENTRY PROCEDURE END OF DIPLOMATIC ASYLUM?

Árpád Szép

The essay based on recent developments in Switzerland deals with the issue of diplomatic asylum. After clarifying the most important definitions and expression on the field (international protection, asylum, refugee, diplomatic asylum, territorial asylum and constitutional asylum) it assesses the process as the territorial asylum has gain field over

the diplomatic asylum. A snapshot is given on the recent approach of the states to the question of asylum provided at embassies and consulates.

The problem of the access to the asylum procedure without entering the territory of the country of asylum to gain territorial asylum is taken into consideration, and also the possible solution, the so called protected entry procedure. The protected entry procedure is based on the idea that the asylum-seeker with valid need for international protection can apply for asylum at the embassy or consulate, his or her request will be transferred to the asylum authority of the country of the embassy or consulate and based on the assessment of the asylum authority he or she will be given an entry visa or his or her request will be denied. This will be beneficial for the applicant and the country of asylum as well. However the protected entry procedure failed as the states did not provided such a procedure, or if they did they terminated it quite soon after the initiation.

The essay tries to find the answers why the states terminated their protected entry procedures and states that the reason is the fact that the overwhelming majority of the applicants did not have valid need for international protection and the authorities are overburdened by such unfounded claims. Considering these factors the essay concludes that the termination of protected entry procedures does not mean the end of diplomatic asylum although it will be used in high-profile cases without any detailed and enforceable administrative procedure.