

ABSTRACTS

„Social solidarity“ and land reform in the 20th century: the international reception of Léon Duguit’s theory of law

By *Andreas Timmermann*, Berlin

The great influence of european law theories is characteristic for Latin American history of law. In many cases Spain has played an important role conveying these doctrines. The reception of *Léon Duguit*, first in Spain then in Latin America is to that point. His theory of “social solidarity” meets with a big response from Spain, where constitutional reform and land reform during the Second Republic (1931-1936) are highly influenced by the french author. The concept of “social solidarity” in general and the “social function” of individual rights in particular then inspired constitutional and land reform in Colombia (1936) as well as the following legislation in both countries. Under new circumstances the constitutional reforms of 1978 (Spain) and 1991 (Colombia) came back to the theory of “social solidarity”.

This article explains how the theory of “social solidarity” has become less relevant in Spain the more the matter of land reform receded into the background and other social challenges came to the front. Therefore it is easy to understand why the interpretation of “social solidarity” and “social function” according to Colombian constitution and legislation differs from the Spanish pattern. In Colombia land reform is still an essential factor of social policy and legislation.

Floor Crossing and Nascent Democracies – a Neglected Aspect of Electoral Systems? The Current South African Debate in the Light of the Indian Experience

By *Clemens Spieß* and *Malte Pehl*, Heidelberg

Despite the vast literature on constitutional engineering for nascent democracies in changing societies covering almost all aspects of electoral systems as potentially beneficial for or detrimental to democratic consolidation and/or regime stability, the question whether floor crossing should be allowed or anti-defection regulations should be imposed has attracted less than overwhelming scholarly attention.

This is striking, since the problem of defections has haunted numerous post-colonial societies and still is of great significance as regards the bulk of the Third Wave democracies. Floor crossing can seriously alter the party political power configurations in a given polity with sometimes devastating consequences for regime stability and/or democratic accountability. Defections were, for example, for the most part responsible for the decline of Congress dominance in India from the late 1960s onwards, and the recent passing of legislation to permit floor crossing in South Africa was brought about by and has resulted in a strange coalition of the ANC and NNP – the latter being the party whose antecedent had invented and implemented apartheid - thus reinforcing the image and political structure of the country as an emerging one-party dominant state.

However, floor crossing is also not necessarily always undesirable. Where constituency systems entail the election of representatives as individuals, the 'freedom of conscience' may be an essential part of the principle of primary accountability.

A comparison between India, which had started her democratic career with no constitutional provision to prohibit floor crossing and had introduced an anti-defection law in 1985 ruling out individual defections but still permitting en bloc defections, and South Africa, where an initial anti-defection clause had been gradually undermined in the course of 2002 to the point that floor crossing is now possible at all three legislative levels within specified time frames, can thus be a telling exploration as to a) what the Indian experience may hold as a lesson for the current debate in South Africa, and b) as to what extent the difference in the two respective electoral systems (a simple plurality constituency system in India and a closed list proportional representation system in South Africa) proscribes a different approach to the debate of floor crossing vs. anti-defection laws anyway.

Promoting Democracy Through Regional-International Instruments: The Role of Commonwealth Africa Judiciary

By *Kaniye S.A. Ebeku*, Port Harcourt / Nicosia

African countries are still mostly underdeveloped today, a major reason for which is the corruption of its dictatorial leaders. The wealth of the country is stolen by self-appointed leaders and stashed away in private bank accounts abroad. This results in a situation where, while the rest of the world is developing, poverty is burgeoning in African countries. To reverse this situation, Africans have resolved to pursue sustainable development through democratic governance. This is in line with current trends in the world community. In demonstration of the new resolve to pursue democracy, a number of declarations and agreements have been made in recent times at the regional level committing the continent to democratic tradition. While this represents a major step, it must be recognised that

without implementation the whole idea will be a pipe dream. Implementation may require political will, and, perhaps, an institutional framework – an implementation body. Even so, the judiciary, as an organ of government concerned with implementation/enforcement of laws has an important role to play at the domestic level. In the past, it seems (Commonwealth Africa) judges had contributed in some way in encouraging dictatorial governments. This article argues that in light of the recent regional-international instruments on democracy, judges should play the role of promoting and sustaining democracy in Africa.

Indigenous collective land and resource rights: the Awas Tingni Decision of the Inter-American Court of Human Rights

By *Margret Carstens*, Berlin

In August 2001, the Inter-American Court of Human Rights, in a precedent-setting decision, declared that Nicaragua violated the human rights of the Awas Tingni Mayagna (Sumo) Indigenous Community. The Court ordered the government to recognize and protect the community's legal rights to its traditional lands, natural resources, and environment. Nicaragua now must adopt, pursuant to article 2 American Convention, the legislative, administrative, and any other measures necessary to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities in accordance with their customary law, values and customs in its domestic law. Although the Court imposed upon Nicaragua the duty to demarcate and title the Awas Tingni territory within fifteen months, this compliance period expired and Nicaragua had still failed to take decisive action. For this reason, on January 16, 2003, the Awas Tingni Community filed a complaint in the Appellate and Supreme Courts of Nicaragua. The later is being asked to order Nicaragua to finally comply with the 2001 Inter-American Court decision. Despite these implementation problems, the Awas Tingni decision has sent a clear message to all member states of the Organisation of American States that have not yet adequately addressed the rights of indigenous peoples. The Awas Tingni case and decision not only revived the important legal and political discussion in respect of indigenous collective rights, resource exploitation by multinational corporations and the role of the state but also the 2001 legal precedent holds the potential to further the transformation of international law into an ever more meaningful and effective instrument for addressing the human rights concerns of indigenous peoples in the Americas and worldwide.