

# Latest Issue of RabelsZ: Vol. 79 No 2 (2015)

The latest issue of “Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law” (RabelsZ) has recently been released. It contains the following articles:

**Jürgen Basedow:** *Das Zeitelement in der richterlichen Rechtsfortbildung – Einleitung zum Symposium* (The Time Dimension in Judicial Law-Making – Introduction to the Symposium)

*Wherever the law changes it must be determined which fact situations and disputes are still governed by the old law and which are covered by the new. Legislation often deals with this question in transitional provisions of a new statute which may be very detailed. Where the change in the law is due to new orientations of judicial practice, the answer must be given by the courts. National traditions and the procedural framework may have an impact on the respective answers. The overall question splits into several sub-questions: Will a court confine the effect of its new case law to future cases, excepting the pending case from its judgment? Has the new orientation of the court a retroactive effect on analogous cases? To what extent will courts explain the change in jurisprudence by reference to statutes which have been adopted but not yet taken effect? This and the following papers dealing with these questions were presented and discussed at a comparative law conference held at the Institute on 14 June 2014.*

**Hannes Rösler,** *Die Rechtsprechungsänderung im US-amerikanischen Privatrecht – Aufgezeigt anhand des prospective overruling* (Case Law Changes in U.S. Private Law – Prospective Overruling)

*The article deals with the practice of prospective overruling, an innovative method of U.S. law whereby a judgment does not have retrospective effect, but – like statutory law – only applies to future events. This doctrine was declared constitutionally unobjectionable in the Sunburst Oil decision of the U.S. Supreme Court in 1923, which explains why state courts continued with the practice of prospective overruling. On the federal level, prospective overruling*

was used for the first time in the 1954 *Brown v. Board of Education* case ending school desegregation. The next step was the U.S. Supreme Court's test developed in *Chevron Oil* in 1971. According to the test, courts have to consider three factors: First, whether the decision to be applied non-retroactively establishes a genuinely new rule, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; second, whether retrospective application would further or retard the operation of that rule; and third, whether retroactivity could produce substantially inequitable results. Many state courts still apply the *Chevron Oil* test regarding their own state laws. However, the U.S. Supreme Court abandoned the *Chevron Oil* test in *Harper* in 1987. The ambiguities and uncertainties that exist with prospective overruling can be explained by the not entirely clear Leitbild of the judge, who when deciding in favour of a solely future application of law acts like a legislator. The article evaluates these developments in the context of the jurisprudential views on the role of a judge in the U.S. legal system and compares them with German law.

**Helge Dedek**, *Rumblings from Olympus: Das Zeitelement in der (Fort-)Bildung des englischen common law*

(Rumblings from Olympus: Adjudication and Time in the English Common Law)

*In this article, I endeavour to render an account of various temporal aspects of judicial decision making: the judicial anticipation of future statutory reform, the retrospective effects of judicial decisions, and the possibility of rulings that have exclusively prospective effects (so-called "prospective overruling"). All three aspects are interconnected through their respective links to the same theoretical and constitutional themes – most importantly, the problem of reconciling the function of adjudication first with the constitutional principle of parliamentary sovereignty in a common law system, and second with the theoretical explanation of the decision-making process as the creation of law within the boundaries of precedent and legal principle. Since the days of Bentham's polemics, the specifically temporal implications of these classic problems of common law theory have been discussed. However, unlike some Continental jurisdictions, as Lord Rodger of Earlsferry pointed out, England and Wales never developed a comprehensive discourse on matters concerning the relationship between law and time; instead, temporal aspects have, in a more*

*pointillist and haphazard fashion, been treated in the context of the various discussions surrounding the abovementioned fundamental problems. Different aspects have received different degrees of attention: whereas the anticipation of statutes through judge-made law has been discussed only rarely, a much larger number of judicial and scholarly comments exist with regard to the questions of adjudicatory retrospectivity and the possibility of prospective overruling. While traditionally the retrospective effects of judgements have been accepted and explained as being inherent in the nature of the adjudicative process, only recently, in 2005, did the House of Lords make clear that it lays claim to the constitutional power to issue non-retrospective rulings, and that neither the nature of judicial decision making nor the principle of parliamentary sovereignty would stand in the way of thus employing the technique of prospective overruling.*

**Felix Maultzsch, *Das Zeitelement in der richterlichen Fortbildung des deutschen Rechts* (The Time Dimension in Judicial Law-Making in Germany)**

*The anticipated application of legal norms which are not yet in force and the retroactive effect of changes in case law receive increasing attention in recent German legal discourse. Both phenomena pose the question of whether a solution that is considered to be normatively appropriate for the future can be applied to past facts already. This concern has to be balanced with aspects of legal certainty and the protection of legitimate expectations. Furthermore, the rule of law principle may militate against the anticipated application of legal norms and, reciprocally, in favor of a retroactive effect of changes in case law. Against this background, anticipated application and retroactive effect seem to be defensible, if the respective legal norm or the new line of case law do not, by themselves, change the pertinent normative assessment, but merely trace a factual or normative change that has already taken place in society. In addition, both the problem of anticipated application and of retroactive effect may be approached by identical doctrinal means. A so called substantive law approach (*sachrechtliche Lösung*) addresses the anticipated application and the protection against retroactive effect within the framework of substantive private law. This approach accords well with the role of the judiciary in the German legal system and is therefore applied rather frequently. In contrast, the so called conflict of laws approach (*intertemporalrechtliche Lösung*) comprises*

*a self-contained anticipated application of legal norms which are not yet in force or a self-contained protection against retroactive effects of changes in case law. This approach is at odds with the orthodox view of the judiciary in Germany and, therefore, is practiced only cautiously.*

*Notwithstanding these common principles, the current doctrine of retroactive effect of changes in case law does not seem to be fully convincing. It rests on the assumption that a retroactive effect is typically necessary because the courts do merely articulate the best picture of the law based on arguments and principles. However, private law is deployed to an increasing extent to shape society and the courts assume an active part in this transformative process. In that course, the idea of a mere improved legal judgment is threatened to become a fiction. Therefore, the German Federal Supreme Court should be more attentive to the risks that are inherent to far-reaching changes in case law. This could be achieved, primarily, by a strengthened judicial self-restraint, especially with regard to changes in case law. If this solution is discarded as unrealistic, one should, alternatively, consider a better protection against retroactive effects which could be achieved, inter alia, by the means of prospective overruling.*

**Susan Emmenegger**, *Das Zeitelement in der richterlichen Fortbildung des schweizerischen Rechts* (The Time Dimension in Judicial Law-Making in Switzerland)

*“Law must be stable and yet it cannot stand still.”<sup>106</sup> In both the common law and the civil law systems courts are faced with the challenge to reconcile the principle of legal certainty, including the reasonable reliance on the existing state of the law, and the principle of legal rightness which requires a correct application of the law in an ever changing world. This article explores two areas of judicial decision-making in which this challenge arises:*

*(1) The role of new statutes which have not entered into force at the time of the judicial decision, and (2) the effect of a decision to overrule a precedent on pending cases.*

*The first question regards judicial rulings in cases where a new (statutory) law is in the making but has not yet been formally enacted. Should the judges take these developments into account and if so, under what conditions? The answer*

*of the Swiss Supreme Court and the Swiss scholarly writing is that future law is to be considered in the judicial interpretation and gap-filling if the future law does not contain a fundamental change but rather stays in line with the legislative perspective of the existing law. It is also unanimously held that the principle of legality bars the courts from a direct and formal application of the future law before its formal entry into force.*

*There is less unanimity between the Swiss Supreme Court and the Swiss doctrine with regard to the second question, namely, the effects of an overruling of judicial precedents. When the Supreme Court overturns a precedent, it will generally apply its new reasoning to the case at hand, thus accepting the retroactive nature of its ruling. The balancing of the principle of legal certainty against the principle of legal rightness is a process which precedes the court's decision regarding the alteration of its current case law. If the principle of legal certainty is considered to be of prevailing weight, the Supreme Court will abstain from an overruling. Instead, it will announce its doubts with regard to the existing case law, thereby proceeding to a sort of informal prospective overruling. A considerable part of the Swiss scholarly writing is critical of the Supreme Court's stance. It proposes a set of intertemporal rules which turn on the reliance of the parties in the stability of the existing case law. Whenever a court reaches a "better understanding" of the law, it should proceed to an overruling. However, the retroactive effect would be mitigated if the reasonable reliance of the parties warrants protection – which is almost always true for the party in the pending case. As a result, the intertemporal rules lead to a formal prospective overruling, at least concerning the party which is taking part in the proceeding.*

*Both the judicial and the scholarly model require the balancing of contradictory interests, and in both cases this balancing allows the court to take the intertemporal dimension of judicial decision-making into account. Therefore, the principal challenge is not so much to determine which model should be applied, but rather to ensure that the two interests in question are balanced in an adequate manner. Having said this, one should keep in mind that – just as in the case of a judicial overruling – the model of judicial intertemporal rules proposed by the doctrine would have to be substantially more adequate than the model favoured by the Swiss Supreme Court to address the issue of contradictory interests arising in connection with a judicial overruling.*

**Bertrand Fages, *Das Zeitelement in der richterlichen Fortbildung des französischen Rechts***

(The Time Dimension in Judicial Law-Making in France)

*Under French law, the principle of legal certainty operates both against the anticipated application of legal norms and in favor of the retroactive effect of changes in case law. Although exceptions to these two positions are occurring more frequently, they still remain largely unpredictable.*

**Imen Gallala-Arndt, *Die Einwirkung der Europäischen Konvention für Menschenrechte auf das Internationale Privatrecht am Beispiel der Rezeption der Kafala in Europa – Besprechung der EGMR-Entscheidung Nr. 43631/09 vom 4.10.2012, Harroudj ./.* Frankreich** (The Impact of the European Convention on Human Rights on Private International Law as Illustrated by the Reception of Kafala in Europe – Reflections on ECHR, Harroudj v. France (No. 43631/09, 4 October 2012))

*On 4 October 2012, the European Court of Human Rights (ECHR) rendered a decision dealing with Kafala. This Islamic law-based institution is an undertaking of an adult person to support and educate a minor without creating a formal parent-child relationship. Since adoption, as understood in western legal systems, is prohibited in most Muslim jurisdictions, Kafala is employed as a substitute. The Court considered the French conflicts-of-law rule (Art. 370-3 para. 2 of the Civil Code) prohibiting adoption of foreign children whose national laws prohibit the institution as compatible with Article 8 of the European Convention on Human Rights.*

*This essay considers the decision of the Court as a positive contribution to the issue of the impact of Human Rights on private international law. After recalling briefly the general terms of the relationship between human rights and private international law, the essay examines the status of Kafala outside and inside the European context. It also deals with the reception of Kafala in France.*

*The Court considered that a relationship founded on the Kafala may be protected under Article 8 of the Convention if requirements of continuity and stability are met. Nevertheless it recalled that Article 8 contains no right to adoption. This position of the Court is in line with its case-law on similar issues:*

*given relationships should be protected as part of the respect of family life. The court however did not recognize any right of the applicant to convert the relationship in question into a determined legal relationship such as a parent-child-relationship. Two arguments were decisive for the decision of the court: lack of consensus among state-parties concerning the reception or the status of Kafala and recognition of Kafala by the relevant international instruments as a suitable alternative to adoption. As far as the first point is concerned the essay contends that the Court was mistaken in its appraisal of other state-parties regulations on Kafala as only France specifically prohibits the conversion of Kafala to adoption.*