

## Abstracts

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### 100 issues with critique and inspiration. Retfærd 1975-2003

PETER BLUME

This article celebrates issue no. 100, a remarkable achievement taking into consideration that Nordic lawyers are not known as great readers and that Retfærd moves outside the main stream of law journals. Emphasis is put on issues 50 to 99 as the prior issues have been dealt with in an article in no. 50.

There is no main or dominating theme in these issues but legal theory is particularly well represented. Women's law seems to have lost some ground and it is viewed as a problem that private law is almost absent. Contributors evenly represent the Nordic countries but there are significantly more men than women (276-142) It is critically observed that most articles have only one author.

This article mainly considers the contributions to legal theory. Retfærd is one of the leading Nordic journals in this field without itself having a specific theoretical position (in contrast to its origins in Marxist legal theory). The contributions are viewed under different headings: what is law, the potential of law, is law autonomous, legal culture, and miscellaneous. Together these articles provide much inspiration for future reflections.

The journal has a future. There will be many challenges, e.g. from the information society, from globalization, from multiculturalism, just to mention some developments known today. – So, some day someone will look at no. 100-199!

## Retfærd and the women

KIRSTEN KETSCHER

In Retfærd's early days Marxism and women's law stood against each other. In the article the author relates some personal impressions from the days of the early editorial board.

Contrary to Marxism, women's law survived and flowered as a legal discipline. Over the years and also today women as authors,

editorial members, as well as women's law articles have been part of Retfærd's profile. The author is however critical towards the fact that the gender perspective not to a greater extent is mainstreamed in editorial practice as part of the general project of developing legal science.

## A Legal Strategy for the New Century

LARS D. ERIKSSON

Many law faculties are still primarily training institutions for judges. In this article this practice is questioned. Law is today more dependent on policy norms than ever before, but these norms evade all the traditional methods of interpretation that lawyers use when interpreting rules and principles. Policy norms presuppose an argumentation about goals and means alien to the interpretation of rules and principles.

This has resulted in a lot of problems, first and foremost in environmental law. But as a

consequence lawyers in general have had great problems to handle so called collective interests such as e.g. public order, national security, public health etc, which are neither rules nor principles.

In a situation when law, morals and politics are increasingly intermingled lawyers are often more or less unable to act in a rational way. They are prisoners of an old outdated legal paradigm.

Because of that, we need a new legal strategy for the new century.

## Legal concepts and principles and the fragmentation and denationalisation of law

THOMAS WILHELMSSON

(General) legal concepts and principles (allgemeine Lehren in the German tradition) has been an important subject of the legal strategic debate in Retfærd. The paper discusses the changing structure and role of such concepts and principles in the face of an increasing fragmentation of law, connected with several societal tendencies (late modern society's ethical and epistemological uncertainty, the development of micropolitics and new communication structures as well as internationalisation and europeanisation). These tendencies are pushing law towards a more situation-oriented approach, to which the idea of a very general systematic structure of rules is not very well suited. A traditional

general part of the law of obligations and a (European) civil code with a broad general part are not in line with the requirements of law in late modernity. The legal concepts and principles, elaborated by legal doctrine, should rather be part of small stories of legal development than of a comprehensive and static legal structure. A conceptually creative legal doctrine can be an important participant, together with the legislator, the courts and other relevant actors, in an ongoing storytelling of legal strategic relevance. The legal concepts and principles used in this discourse have become and have to become more openly and explicitly value- and policy-oriented.

## Rettferdighet og menneskesyn – Refleksjoner over menneskets natur som forutsetning for jurisprudens

ERIK FRIIS FÆHN

This article on i »Justice and human nature« presents reflections on the relationship between legal positivism and natural law. The author recognizes with Herbert Hart that these positions are not mutually exclusive. The author also adopts the view that any descriptive analysis of law or justice presupposes

an understanding of the normative, internal point of view of the members of a society.

The breakdown of the clear boundary between description and valuation is not the end of the discussion, however, but the beginning. And there will be a number of presuppositions that need to be revised, even if the

ambition of an empirically orientated legal science is maintained.

The author claims that Norwegian legal thinking unfortunately has refrained from recognizing that this breakdown has taken place at all. The article consequently has two objectives, in part explaining why the boundary between description and valuation no longer holds, and in part reflecting on the importance of different presuppositions about human nature, and of a concept of responsibility.

The article is highly critical of the reductionist legal positivism of Norwegian legal theorists such as Torstein Eckhoff and Nils Kristian Sundby for assuming that individuals are governed by internalized obedience to norms (as entities or matters of fact). They exclude the possibility of strategic or rational choice from their analysis. Human nature is consequently defined with a view to optimizing a political system from above, with no room for moral autonomy or responsibility.

Freedom is only something which is permitted.

Erik Friis Fæhn will defend his doctoral thesis in the fall of 2003. The thesis is entitled "No Obligation to Obey: A Treatise on Jurisprudence – the Normative Character of Legal Science". Fæhn analyzes closely the scientific foundations of the works of Alf Ross, Sundby and Eckhoff, and presents their theories as integrated systems where a number of highly disputable assumptions are made with little or no discussion. The works of Ross represents a high point, while later works are marked by a declining consciousness of the original connection with Logical Positivism. Fæhn reviews in particular anglo-american jurisprudence as an alternative approach, and outlines a sharp distinction between a liberal political system and the functionalistic approach which dominated the Norwegian political system for most of the 20. Century.

## Hägerström och skandinaviska rättsrealismen – En ideologikritisk analys av en anti-ideologisk riktning

STEFAN THORPENBERG

The present changes of the research landscape will give a more complex financial situation. In the new situation the Swedish "teacher's assumption", which give the owner rights to the researchers at the university, can be questioned due to the many collaborations with different social and economical interests. This article is investigating the value of Axel Hägerström's philosophy of rights, often cal-

led "value nihilism", to be used in the present situation – from a perspective of ideology critique. The original "value nihilism" seems to depend on a specific academic ideology, built on the modern view of the researcher's role being close to a socially independent civil servant. The use of value nihilism, and the more up-to-date social constructivist approach, in owner right question seems to be

difficult today. Instead the insight from value nihilism that all norms are produced in a social context, should lead to a conscious choice of norms due to what will serve the needs of society in the long run. It therefore seems to be important to hold on to the role of the researcher as an independent civil servant and

criticizer of society, and to keep the Swedish "teacher assumption" as is. The reason for the latter is that it seems to be a risk for researchers otherwise not having the same intensive interest for new inventions, which can harm a future development of society.

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