

teoría & derecho

REVISTA DE PENSAMIENTO JURÍDICO

TRANSFORMACIONES EN LA DOCENCIA Y EL APRENDIZAJE DEL DERECHO

SUMARIO

DEBATE

Transformaciones en la docencia y el aprendizaje del Derecho

Artículos de:

José García Añón

Richard Grimes

Rafael Verdera y Javier Palao

María Lucía Torres y Beatriz Londoño

Javier de Lucas

ESTUDIOS

Un sistema integral de solución de conflictos de derecho privado (¿tienen solución los males endémicos de la justicia civil?) (Vicente C. Guzmán Fluja)

Discrecionalidad judicial. Causas, naturaleza y límites (Juan B. Etcheverry)

El «discurso del odio» en el sistema norteamericano y europeo. Tratamiento del racismo y la xenofobia en el proyecto de reforma del código penal (Margarita Roig)

Cine documental y derechos humanos: de esquimales a militares (Mario Ruiz Sanz)

Seguridad pública y seguridad jurídica en Iberoamérica. Una aproximación (Victor Moreno Catena)

Presupuestos metodológicos de la dogmática de la omisión: una reflexión desde el pensamiento de Von Wright (Tomás S. Vives Antón)

TEMAS DE HOY

El modelo español de reclamación de honorarios por el abogado (Alexandar Petrovich)

Análisis sobre determinados aspectos del derecho a la asistencia letrada al detenido (Elena López Berberana, José Francisco Ruiz Martínez, Eduardo Catalán Blázquez y Salvador Guerrero Palomares)

VARIA

Sobre Grundlagen und grenzen der analogie in bonam partem im strafrecht (Jacobo López Barja de Quiroga)



tirant lo blanch

REVISTA SEMESTRAL. JUNIO 15/2014

SUMMARY

DISCUSSION

Transformations in the training and learning of Law

Directed by José García Añón

| | |
|--|-----|
| Introduction..... | 9 |
| Clinical Legal Education as a Challenging Element?..... | 12 |
| <i>José García Añón</i> | |
| Clinical legal education and problem-based learning: an integrated approach to study fit for purpose?..... | 34 |
| <i>Richard Grimes</i> | |
| The Master's degree in legal practice and the training of barristers according to the law 34/2006, on access to the legal profession: reflections and proposals..... | 68 |
| <i>Rafael Verdera and Javier Palao</i> | |
| Tools for protecting the public interest in Latin America: the design of high impact litigation from the Clinical Legal Education..... | 92 |
| <i>María Lucía Torres and Beatriz Londoño</i> | |
| Understanding and training in Law from the Cinema..... | 108 |
| <i>Javier De Lucas</i> | |

STUDIES

| | |
|--|-----|
| A comprehensive system of conflict solutions in Private Law. (Do the endemic problems of civil justice have solution?)..... | 126 |
| <i>Vicente C. Guzmán Fluja</i> | |
| Judicial Discretion. Causes, Nature and Limits..... | 148 |
| <i>Juan B. Etcheverry</i> | |
| The «hate speech» in the US and the European system. Treatment of racism and xenophobia in the draft Criminal code reform..... | 172 |
| <i>Margarita Roig</i> | |
| Documentary and Human Rights: From Eskimos to Military..... | 218 |
| <i>Mario Ruiz</i> | |
| Public Security and Legal Certainty in Latin America: an approach..... | 248 |
| <i>Victor Moreno Catena</i> | |
| Methodological presumptions of omission dogmatics: a reflection from Von Wright's thinking..... | 258 |
| <i>Tomás Vives Antón</i> | |

TODAY'S ISSUES

| | |
|--|-----|
| The Spanish Model for Attorney Fees..... | 278 |
| <i>Aleksandar Petrovich</i> | |
| An analysis on concrete issues regarding the right to legal assistance of detainees..... | 302 |
| <i>Elena López Berberana, José Francisco Ruiz Martínez, Eduardo Catalán Blázquez and Salvador and Guerrero Palomares</i> | |

VARIA

| | |
|--|-----|
| Grundlagen Und Grenzen Der Analogie In Bonam Partem Im Strafrecht..... | 331 |
| <i>Book Review by Jacobo López Barja De Quiroga</i> | |

TRANSFORMATIONS IN THE TRAINING AND LEARNING OF LAW: CLINICAL LEGAL EDUCATION AS A CHALLENGING ELEMENT?

José García Añón

ABSTRACT

In this paper the transformative role of clinical legal education and its function in the current law changes is described. From the analysis of the main educational, legal and social changes, the elements of this approach in the process of training lawyers are shown.

KEYWORDS

Clinical legal education, innovative learning, lawyers training

CLINICAL LEGAL EDUCATION AND PROBLEM-BASED LEARNING: AN INTEGRATED APPROACH TO STUDY FIT FOR PURPOSE?

Richard Grimes

ABSTRACT

In this paper is explained, the nature of experiential learning that is, studying through the application of theory to practice. Then how this approach to education can be integrated into the wider curriculum through the use of problem-based learning (PBL) and identify the benefits and challenges of doing so. It is used a case study, a description and analysis of how one particular law school uses clinic and PBL as the principal means of instruction and how this may represent not only an innovative departure from how law is conventionally learnt but also a positive one in terms of supporting student learning. Finally I ask and attempt to answer the question, to what extent is such a model transferable across jurisdictions and particularly in both the Common and Civil Law worlds.

KEYWORDS

Clinical Legal Education, Problem Based Learning

THE MASTER'S DEGREE IN LEGAL PRACTICE AND THE TRAINING OF BARRISTERS
ACCORDING TO THE LAW 34/2006, ON ACCESS TO THE LEGAL PROFESSION:
REFLECTIONS AND PROPOSALS

Rafael Verdera Server

Javier Palao Gil

ABSTRACT

The system established to regulate the access of Law graduates to the professions of barrister and solicitor has been discussed in Spain for decades. Finally, in 2006 a law determined that such access should be done taking an exam, which should be preceded by a specific training course, designed as a master organized by the universities. This paper analyzes this training course, also known as "Master en Abogacía" (Master's degree in Legal Practice). It begins with an introduction to the models of legal profession and training of lawyers, and also shows its complex legal framework, its structure and functions, the noticeable diversity among the staff and the students also, and finally the Internship and a Master's dissertation. The paper ends with a reflection on the access exam and its adjustment to the Master's content and dynamics.

KEYWORDS

Master's degree, Access to legal profession, Practice of legal profession, Practice of legal profession, Lawyers' training, Access exam

TOOLS FOR PROTECTING THE PUBLIC INTEREST IN LATIN AMERICA: THE DESIGN OF HIGH IMPACT LITIGATION FROM THE CLINICAL LEGAL EDUCATION

María Lucía Torres Villareal

Beatriz Londoño Toro

ABSTRACT

Clinical legal education is a pedagogical model of legal education that for many years was implemented in Law Schools in the United States and more recently, in Latin America, becoming increasingly important, because it raises a twofold objective: to teach students, from the actual practice of law, the application of the knowledge acquired throughout his career and provide legal services to vulnerable communities, defending the public interest and human rights and projecting the social character of the profession. To do this, clinics should make use of a number of tools to materialize its objectives, such as high impact litigation, strategic alliances and other instruments that pursue similar objectives. This model implies a change in the concept of law, in its teaching, learning and in the practice, as the basis of pedagogical and social elements, so the challenges are many; however, the balance is very positive, revealing that it is a movement that tends to advance in the region, in different areas of law, with a common goal: the social transformation.

KEY WORDS

Clinical Legal Education, Strategic Litigation, Human Rights, Strategic Alliances, Public Interest, Teaching Model.

UNDERSTANDING AND TRAINING LAW FROM THE CINEMA

Javier de Lucas

ABSTRACT

This paper contributes to reflect on the didactic in Cinema at the University, on the University and the Cinema. Some reasons are said to take into account how Cinema is an appropriate tool within the high-education training, and with this aim, it should be noted the utility of Cinema in the training of jurists. In particular, when the Cinema becomes a didactic tool only if its history and technique has been learned. So on, it explains how Cinema has contributed to the raising of a critical consciousness, regarding the current crisis. This is, the utility of Cinema in relation to the creation of an active citizenship able to tackle the message of fear. Mainly, when creating a critical citizenship is a mandatory task of the University.

KEYWORDS

Cinema, History of cinema, Law, Jurists, high education training

A COMPREHENSIVE SYSTEM OF CONFLICT SOLUTIONS IN PRIVATE LAW

(Do the endemic problems of civil justice have solution?)

Vicente C. Guzmán Fluja

ABSTRACT

An examination of Rules of Civil Procedure, both Civil and Common Law, reveal that, even nowadays, Civil Justice shows significant problems related to slowness, expensive costs, inefficacy and inefficiency. These aspects affect directly the right to access to Justice in order to obtain a fair solution of the controversy.

The solution proposed to confront these obstacles will come from a double perspective: a) The evolution of civil procedure from a more flexible and adaptable to circumstances perspective. A case by case formula will bring a better way to resolve controversies, strengthening the *"judicial case management"*, and leading parties to negotiate and agreed on the terms before of the trial; b) Considering the importance of ADR regarding access to Justice and displaying them on a well-organized way, that will focus on utility to citizenship.

Developing a Comprehensive Dispute Resolution System, as a public policy, to facilitate the right to access to Justice and a more adequate and fair solution to the controversies. However, this is not an easy task, it is unavoidable to approach it. For that purpose, we considered different experiences on Comparative Law: *"Multi-Door System"*, *"Court-annexed ADR"*, *"multi-opened"*, analyzing their advantages and disadvantages, and their potential for improvement. From a similar point of view, regarding future trends of civil procedure which present an interesting convergence.

KEY WORDS

Dispute resolution, Civil procedure, Access to justice, Multi-door courthouses, Multi-tracks, Case management conferences.

JUDICIAL DISCRETION. CAUSES, NATURE AND LIMITS

Juan B. Etcheverry

ABSTRACT

This paper proposes to enlighten the role and scope of discretion in judicial decisions. To that end, we will go into the causes of judicial discretion, into the explanation of its nature and into the determination of its boundaries or limits. We will maintain, on the one hand, that some space for judicial discretion is inevitable because it is impossible for a legal system to determine only one legal answer to every possible case. On the other hand, we will also claim that some kind of judicial discretion is not only inevitable but also desirable to allow judicial systems to achieve its goals. We characterize judicial discretion as the decision between open alternatives that judges must make. These discretionary decisions shouldn't be confused with arbitrary decisions because the first ones always should be based on reasons that can justify them. Further on, we will claim that discretionary judicial decisions are not just new legislation created with any help or guide by law. These decisions are institutionally limited by legal principles, precedents, different legal rules of interpretation, purposes of the rules, etc. They are also different from ordinary legislation because they are binding only for a single case. Finally, we will explain that the area that goes on from the rules to its purposes could be better explained from virtue jurisprudence. This theories have the ability to explain the area between the institutional limits to a discretionary judicial decision and the results of the decision that institutionalize which is the correct answer to the case.

KEY WORDS

Judicial discretion, Arbitrariness, Legal indeterminacy, Virtue-jurisprudence

THE "HATE SPEECH" IN THE U.S. AND THE EUROPEAN SYSTEM. TREATMENT OF RACISM AND XENOPHOBIA IN THE DRAFT CRIMINAL CODE REFORM

Margarita Roig Torres

ABSTRACT

The memory of the Holocaust has influenced European countries to regulate crimes that sometimes collide with the core of freedom of expression. Thus, a contrast between the conception of this fundamental right in the U.S. system and the continental is clear, especially regarding judicial interpretation of "fighting words". However, even in regimes like the German model with a "militant democracy" ("*streitbare Demokratie*"), materials limits are set to punish racist or xenophobic behavior, so that mere "denial" is not punished, since it would collide head-on with that fundamental right. The criminal code reform gathers in one article all forms of promoting or inciting hatred, discrimination, violence or hostility, due to racist or discriminatory motives and punished actions are extended, according to Sentence 235/2007, on 7th November, of the Spanish Constitutional Court and following several European directives, with some influence of German law. The result is a list of offenses that are not always suited to the dictates of the principle of proportionality.

KEY WORDS

Racism, Racist Crimes, Discrimination, Draft Criminal Code Reform, Freedom of Expression, Article 510 of Spanish Criminal Code.

DOCUMENTARY AND HUMAN RIGHTS: FROM ESKIMOS TO MILITARY

Mario Ruiz Sanz

ABSTRACT

The relationship between human rights and cinema has been always closer. From its earliest years, documentary has become a benchmark to report abuses against human rights all around the world. In this paper, we find a historical panoramic about what images and sounds have been to the contemporary culture in relation to human rights. From the end of XXI Century until today, through the films, the possibilities developed by the documentary and its technological evolution, as well as the consequences and influence on the audience, are comprehensively explained. Sometimes, the filmic dissemination of a perceived objective truth showed by a camera is confused with credibility, in a kind of cinema which is often spread through alternative methods to the traditional ones, like ITs.

KEYWORDS

Documentary, Films, Human rights, Truth, Credibility

METHODOLOGICAL PRESUMPTIONS OF OMISSION DOGMATICS: A REFLECTION FROM VON WRIGHT'S THINKING

Tomás S. Vives Antón

ABSTRACT

The matter of this article is the examination of some questions about omissions (if they are only "not actions", if they are something or better nothing, if they are or not actions etc.) from the Philosophy of von Wright.

The analysis concludes that the projection of von Wright's concept of omission over social life is a dangerous mistake.

KEY WORDS

Omission, Forbearance, Action, Normativity, Free will, Determinism, Ordinary language, Constitutional rights.

THE SPANISH MODEL FOR ATTORNEY FEES

Aleksandar Petrovich

ABSTRACT

The objective of this investigation is to identify the problems arising within the procedure itself as well as analyzing jurisprudence in each case. With this in mind, two extremes are analyzed: (1) characterization or dismemberment of the alleged damages to the actual claim proceedings and (2) evaluation of situations occurring in the actual practice, within the proceedings at court.

This investigation examines the casuistry in claim proceedings, under the deduction that this model still is subject to inefficiencies. First, the Judicial Clerk, assigned by the Spanish legislator as having the exclusive task of carrying out the procedure, does not assume the task correctly, reason why the proceedings take excessive time. Second, there is little certainty and assuredness in the valuation of the representation by the attorney, as well as the calculation of fees for each one of the items. The criteria of the Judicial Clerk is sometimes subjective, as supported by consultations with the Bar Association, and as sometimes we also can deduct from jurisprudence; in consequence the results are in prejudice of calculations of items in the invoice. And thirdly, once the accounts have been clarified, in many cases, the attorney may not be able to be paid the total or a partiality of the fees.

KEYWORDS

Claim Attorney's Fees, Attorney Invoice, Legal Service Contract, Legal Service Estimate, Retainer, Retaining fee, Contract, Agreement, Right to reject the Attorney's Invoice, Professional Fees Criteria, Items fees incorrect, Excessive fees, Real fees for the Attorney's representation, Execution order money owed, Payment order.

ANALYSIS ON CONCRETE ISSUES REGARDING THE RIGHT TO LEGAL ASSISTANCE OF DETAINEES

Elena López Berberana

José Francisco Ruiz Martínez

Eduardo Catalán Blázquez.

Salvador Guerrero Palomares (Coord.)

ABSTRACT

According to the request of the Board of the Bar Association of Malaga to its Criminal Law Section, members of the executive committee conduct a thorough analysis about the current situation regarding legal assistance to detainees, the legislation that regulates and jurisprudence applicable in this regards. This study focuses on the eternal tension among defense lawyers, the members of the security forces, and the state in relation to the statement of the police delivered to the lawyer who assists a detainee, and also the possibility that the lawyer holds a prior interview with the detainee. The analysis carried out by the Criminal Law Section transcends a comment purely practical to a more theoretical research about the basic constitutional right to counsel, reaching the case-law of the ECHR, and the rules recently adopted by the European Union under the Stockholm Programme.

KEYWORDS

Legal assistance, Statement to the police, Rights of detainee, Police statement, Rights of detainees, delivering of statement, Prior interview