

## Book Review - Grenzen als Thema der Rechts- und Sozialphilosophie (Borders as a Juridical and Social Philosophical Theme)

By Thorsten Bonacker\*

[Winfried Brugger / Görg Haverkate (eds.), *Grenzen als Thema der Rechts- und Sozialphilosophie* (Borders as a Juridical and Social Philosophical Theme), *Archiv für Rechts- und Sozialphilosophie*, Beiheft 84. Franz Steiner Verlag. Stuttgart 2002, 218 pages, € 50]

"Borders matter," – that's the way the border conception boom of the last years within the social sciences can be briefly summarized. Two main reasons lie at the heart of the rising interest in borders. On the one hand, the border concept refers to a paradox of social constructions: whether something is defined by its border or defines itself by its border. Hegel pointed this out in his *Wissenschaft der Logik*, according to which a border means "the reference, by which something, and something else as well, is and is not."<sup>1</sup> On the other hand, various processes of social change within a society can be described as a shifting, removal or reinvention of borders. Encompassing both points, the following, widely accepted thesis in the discourse on borders has emerged: borders are produced by society and thereby contingent. That is why they can be – and increasingly are – controversial, changeable, and subject to politicization.

The Brugger and Haverkate publication takes up this discussion on social borders and deals with the meaning of borders in law as well as from a juridical and social philosophical point of view.

An interesting bunch of colourful flowers that should have been more tightly bound is the result. The book is published as a supplement of the *Archiv für Rechts- und Sozialphilosophie*, resulting from a conference of the German Section's *Internationale Vereinigung für Rechts- und Sozialphilosophie* held in Heidelberg 2000. It represents a documentation of the conference rather than a well planned volume and is,

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\* Juniorprofessor at the Centre for Conflict Studies at the Philipps-University of Marburg.

<sup>1</sup> GEORG W.F. HEGEL, *WISSENSCHAFT DER LOGIK I – WERKE BAND 5*, 136 (1969).

according to the editors' short foreword, grouped in three sections: (1) rights theory; (2) law of medicine; and (3) state and society theory. Each of these themes is linked, in various ways, to the conceptualization of borders. The range of contributions includes chapters which directly treat the border concept and chapters which barely have a reference to the original focus of the publication.

There are three aspects at the centre of the volume: Normative problems in reasoning, conceptual problems of construction and the description of the change of borders within modern societies. Normative problems in reasoning associated with juridical and moral norms derive from constitutive borders. The borders are encountered in the contradictions between the reasoning supportive of norms and the normative concepts themselves. In his - quite too extensive - contribution, Jochen Tauplitz (Mannheim) illuminates this point with the example of patients' autonomy, which includes as well the right to self-determination *and* the danger of self-damage. Rainer Forst (Frankfurt), in his worthwhile chapter, exhibits the normative concepts paradox with the concept of tolerance. Starting from the deconstructive reading of the paradox, he addresses the paradox that emerges between the concept of tolerance and the ability of pluralistic societies to deliver on its promise. Briefly stated, the problem with invoking tolerance is that it is only possible to demonstrate tolerance towards a person who passes over borders and who is, thus, himself intolerable. Forst tries to solve this fundamental problem by grasping reflexively the concept of tolerance and involving the right to justification. According to him, tolerance does not encounter a border until the right to justification is refused. By this deliberative solution, the problem's sharpness is avoided elegantly. Tolerance has to be claimed in cases when justifications are of no use and violence is obvious. Otherwise, tolerance threatens to become a kind of good-will one should have when meeting foreigners.

Increasingly, not to say permanently, we are meeting foreigners. Thomas Gutmann (Munich) points out in his contribution with Luhmann that it does not seem to be plausible anymore after the separation of the system of interaction and of society to speak of the similarity of life-worlds and widely spread solidarity. According to Luhmann, the community spirit vanishes when functional borders replace segmentary borders. But in opposition to Luhmann, Gutmann argues that this is problematic because solidarity is a "social fact" (135), perhaps best exemplified by the post-mortem donation of organs. Like Forst in search of a new and kind of border-sensitive argumentation of tolerance, Gutmann chooses an argumentation that identifies duties to offer aide to foreigners. In the end, the well-founded thesis is that such a duty to help exists and is legally translated *via* processes of "mandated choice."

According to Ursula Wolf (Mannheim) borders are barriers that should be surmounted only for good reason – as exemplified by the case of cloning. After profound weighing, Wolf answers “no” to the question whether there are moral, and by that, absolute, borders in acting that have to be respected by law. Matthias Kaufmann (Halle) states in his informative contribution as well that such borders always are made socially and for that reason they are also inherently revisable. Consistently, he asks for the function of absolute borders for law, in brief: of taboos. Realizing the functional necessity, on the one hand, and the contingency of taboos on the other hand, he concludes by favouring the ban on torture as a taboo infringing of rights. In this way he acknowledges the necessity of taboos as well in a positive law and simultaneously deals with them pragmatically by accepting exceptions.

Regarding the conceptual construction problems of legal theory, Kaufmann at the same time advocates indirectly that we should not think of legal theory from the border or exceptional case of law, but from the normal case. In this, Erhard Denninger (Königstein) comes to a similar conclusion and demands, following Derrida, more modesty in rights theory in view of the constitutive limitations of legal theory. Josef Isensee (Bonn), on the other hand, finds here an *ultima ratio*, i.e. an “unwritten necessity law of the state” (72) from such a limitation.

When borders are constructed socially, they are at the same time changeable. Several contributions to the book describe such a change of borders. They show as well that the advantage of the concept of borders, contrary to the globalisation theory, is that they focus the ambiguity of this change. Parallel to phenomena of debordering, phenomena of rebordering can be observed. Udo di Fabio (Munich) proves this in his worthwhile chapter with the example of the changing meaning of political borders in Europe. Matthias Kettner (Frankfurt) propounds, in light of the debordering by the media, the plausible thesis that such a debordering leads in the same measure to an enclosure as to new disclosures from the information society. Norbert Horn (Cologne) likewise holds that state law does not lose significance by economic processes of debordering but that its meaning is merely changing, e.g. as a guarantor for the enforcement of transnational and international law. Finally, Massimo La Torre (Catanzaro) asks for the meaning of citizenship as an instrument of border regulation for the integration of political societies and calls for an understanding of citizenship as a condition rather than as a result of integration.

Altogether, the publication contains some exciting and advanced contributions. Still the impression of a certain arbitrariness remains. The editors could have prevented this with an introduction which puts the contributions in a wider context of interdisciplinary border studies. Additionally, that would have contributed to the overcoming of disciplinary borders.