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Conference Report: 40th Annual Meeting of the Arbeitskreis für Überseeische Verfassungsvergleichung

By *Konrad Vossen** and *Tanja Herklotz***

This year's annual meeting of the *Arbeitskreis für Überseeische Verfassungsvergleichung* took place on July 3 and 4, 2015 at the University of Potsdam.¹ Titled “The Rule of Law in a Global Context”, the conference addressed a wide array of issues: the rule of law in national legal systems, the bilateral rule of law promotion, the role of human rights law in development cooperation and the rule of law in international institutions like the UN and the World Bank. Equally diverse was the list of speakers, comprising a wide range of scholars from PhD candidates and postdocs to university professors from various academic fields. As a highlight of the conference Professor *Sérgio Costa* from Freie Universität Berlin gave this year's Herbert Krüger Memorial Lecture. In line with the conference's approach to see law in a broader context, he shared his thoughts on the sociological role of law as “relay” in Latin America. The conference was accompanied by an online symposium on *Völkerrechtsblog* where some speakers presented their arguments and allowed readers to join the virtual debate through comments.

The first session of the conference dealt with the rule of law in different national contexts, namely in India, Latin America and the European Union. *Tanja Herklotz* gave a talk on “Religious Personal Laws, the Women's Movement and the Higher Judiciary in India”. She looked at religion based family law in India (generally referred to as personal law) through a gender lens and focused on the interpretation of these laws through the Indian higher judiciary. She explained that many of these (codified or uncodified) regulations for Hindus, Muslims, Christians and Parsis contain aspects that contradict the constitutional principle of equality between men and women and that the women's movement has long campaigned for a reform of the personal law system. Big legislative changes in this area, such as the introduction of a Uniform Civil Code, do however seem unfeasible. In this situation of legislative reluctance, the Indian judiciary has sometimes functioned as a quasi-legislator. Though never declaring the personal law system as such to be unconstitutional, various personal law provisions have been interpreted in a way that accommodated gender-just

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1 The conference was generously sponsored by the Prof. Herbert Krüger Stiftung.

tice. *Herklotz* called this a step-by-step activism and argued that in the delicate context of personal laws, this strategy might actually be more efficient in order to achieve change without provoking a communal backlash.

Shifting the focus to Latin America, *Julio Cesar Pereira* analysed the legal status of culture in the Brazilian constitution and its potential role as a means to promote socio-economic development in the region. Arguing that social change in Brazil has often been brought about by amendments to the Brazilian Constitution, *Pereira* focused on a recent constitutional amendment, which anchored a national cultural system (nationales Kultursystem) in Art. 215 and 216 of the Brazilian constitution. Stressing that this amendment was partly brought about by the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, *Pereira* emphasised that international organisations can play a major role in promoting a socio economic approach towards culture, rather than viewing culture as a mere luxury good. Despite these important normative changes, he argued that the term ‘culture’ remains rather vague, making it hard to handle as a legal concept grasp from a legal point of view. He subsequently outlined the main features of the federal system for the promotion of culture established in the wake of this constitutional amendment. A core instrument here could be a tax refund system that incites private actors to support cultural projects. But *Pereira* pointed out the risks of such an approach as well: funding that focuses merely on economic hubs and on mass culture. This is why he retained a rather pessimistic stance as to what extent the new instruments might really promote cultural diversity as a factor of socio-economic development in Brazil.

Turning to Europe, *Lutz Römer* analysed a specific legal problem of the Dublin III regulation. According to one of the regulation’s core rules, asylum seekers can be sent back to the country legally responsible for the examination of the asylum claim. However, courts have made exceptions from this possibility with reference to human rights guarantees in the European Convention on Human Rights (ECHR) as well as European Union Law. *Römer* argued that these exemptions are not consistent when looked at in detail: On the one hand, the European Court of Human Rights (ECtHR) applies an individual analysis of potential violations of human rights in each individual case. On the other hand, the European Court of Justice (ECJ) applies a coarser legal test, looking only at systemic deficiencies in the destination country. This discrepancy creates specific problems for the national judge, who is bound by both interpretations. To *Römer*, the solution to this problem is to be found in Art. 52 (3) of the Charter of Fundamental Rights of the European Union. This article stipulates the guarantees of the European Convention on Human Rights in its interpretation through the ECHR as an absolute minimum. *Römer* subsequently formulated a fundamental critique of the ECJ’s jurisprudence on the matter. Accordingly, he reasons that national judges should apply the legal test developed by the ECtHR when deciding individual cases.

The session on the rule of law in national contexts ended with *Sérgio Costa’s* Herbert Krüger Memorial Lecture – a highlight of the conference. His lecture was titled “Law as a Relay – Experiences from Latin America” (Das Recht als Relais – Erfahrungen aus Südamerika) and argued for a paradigm shift away from the transistology approach in polit-

ical science. When describing a processes of transition from authoritarian regimes to democratic ones, the classical paradigms of transistology and consolidation, *Costa* argues, do not go far enough, as they turn a blind eye to the role of law in social processes. He criticised the models under methodological point of views (societal processes need time) as well as from a theory of power perspective. To *Costa*, the law's role in relation to social processes can be aptly visualised as an electric relay. He explains this theory by drawing firstly on Chatterjee's distinction between citizens and populations and secondly on Greenstein's three dimensions of power, i.e. social, institutional and discursive power. Just like an electric relay, law can act as an anchor between these different powers in various ways: it can interconnect the power circuits, modulate power, block excessive flows of power or stay in an idle state. *Costa* illustrated his thesis with two examples from the Latin American context: land reform laws in Columbia and anti-racism laws in Brazil. Concluding, he stressed the eminent role of law as a product as well as a connecting element of the manifold manifestations of power in the context of democratisation that must not be neglected by scientific research. The rule of law to him is a "never-ending work in progress".

The second day of the conference began with a session on the rule of law in the context of development cooperation. This session was special as many of the speakers drew on practical experiences in international organisations or in development programmes in the Global South. *Andrea Kramer* described a justice and prison reform programme in Bangladesh, commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ). The programme tackles the problem of overcrowded prisons and aims at fostering political Human Rights and fighting corruption. *Kramer* explained that the majority of prisoners in the severely overcrowded prisons are held in pre-trial detention regardless of the severity of the offence of which they are accused. There is also an enormous backlog of cases pending before the judiciary, access to legal aid is unaffordable for many, there are severe problems of financial resources and there is no systematic data on who is in prison for which (alleged) offence and since when. The project attempts to tackle these problems at various levels and with a variety of methods: It supports dispute settlement bodies other than state courts, it fosters restorative justice and it trains mediators who work on a local level. It employs "paralegal services" to go to the prisons in order to collect data and work on statistics about the inmates. The paralegals also teach prisoners about their rights and contact family members. The programme further provides for rehabilitation projects for former prisoners. In *Kramer's* opinion the programme provides a successful example of a project that started on a small scale, dealing with the situation in only five prisons and then extended to a project involving 40 prisons and other state and society actors.

The next talk in this session was delivered by *Oliver Meinecke* who spoke on the rule of law in the context of the fight against poverty – the first of the Millennium Development Goals. The two areas – poverty and the rule of law – are directly linked. Today's definitions of poverty, for instance, are multidimensional in the sense that they do not only draw on a certain per capita income, but also refer to rule of law aspects such as rights, freedom and participation in society. However, poor people do not per se benefit from the rule of law.

Hence, projects to foster the rule of law need to specifically take poverty into account. *Meinecke* shows that this can happen on different levels: in the area of legislation (taking poor people's situation into account in the drafting process), in the area of the judiciary and administration (making access easier, tackling corruption) and in the area of civil society (fostering civil society organisations, informing about human rights). *Meinecke* explained that in rule of law programmes which Germany carries out in other countries, two principles play a fundamental role: firstly, openness towards other legal conceptions and systems that have evolved in a different cultural context (Modelloffenheit) and secondly, significance of legal pluralism (Berücksichtigung von Rechtspluralismus). *Meinecke* demonstrated these points with a case study on a GIZ project in Zambia that aims at fostering women's rights in a context of customary law and encourages judges of local courts to apply human rights standards and the principle of fairness in their decision-making.

After two case studies from the South Asian and the African context, *Florian Hoffmann* put the regional focus on Latin America. In his talk titled "Human Rights and Development: Revolution or Regression?" he drew on a case study from Brazil. As other South American countries, Brazil has experienced a "rights revolution", i.e. the exponential rise of litigation-driven judicial intervention into different political fields. *Hoffmann* analysed whether from a development perspective the rights revolution has had positive effects. While on the one hand, legal rights and their judicial enforcement produce bottom-up remedies, foster empowerment and allow participation, on the other hand, they also bring about problems: asymmetries in access to justice and maybe even a re-distribution of public goods towards the rich rather than the poor. *Hoffmann* elaborates that the litigation revolution in Brazil has led to a shift in the judicial approaches towards certain rights. For instance, social human rights have long been interpreted in a merely programmatic way. This changed in the early 2000s, as can be demonstrated when analysing the jurisprudence on the right to health where civil society movements such as the AIDS movement have litigated strategically and successfully for certain rights.

The last talk of this session dealt with the new policy and procedure framework of the World Bank. *Susanne Skoruppa* engaged very critically with this framework, which is an outcome of an evaluation and reform process that the World Bank is currently going through. Nowadays, she stated, the World Bank defines itself as a knowledge bank and this requires change in the way that the bank organises itself. The new Policy and Procedure Framework (P&PF) is part of this change. It regards, for instance, the various fields of responsibility, the question of a database for documents and the unification of working definitions. The new framework has been worked out by the World Bank's law department and divides regulations in four different categories: Policy, Directive, Procedure and Guidance. *Skoruppa* pointed out that there is also opposition against the new policy framework among the staff and demonstrated the difficulties of the internal policies of a giant organisation such as the World Bank. Lastly she connected the P&PF to the broader ambition of the World Bank of "a world free of poverty" and asks which impact the new framework would have on the individuals in the Global South.

The third and last session of the conference dealt with the rule of law and international organisations. *Theresa Reinold* opened the session with an analysis of African (sub)regional organisations' responses to unconstitutional changes of government. Concentrating on the examples of the African Union (AU) and the Economic Community of West African States (ECOWAS), *Reinold* demonstrated that the organisations' approach to changes of government in their member states is twofold. On the one hand, they systematically reject coups d'état against sitting governments and ban perpetrators of unconstitutional changes of government from participating in subsequent elections. On the other hand, their democracy promotion efforts clearly display an incumbency bias, as some regimes are being held in power in cases of contested or unconstitutional elections. *Reinold* regards the first strategy a rather consistent commitment of the organisations to some elements of the organisations' democracy promotion framework. Nevertheless, the insistence on conformity with constitutional procedures sometimes also frustrates efforts to advance popular sovereignty. As many African countries are lacking a functioning system of democratic competition, a coup d'état might sometimes be the only way of removing repressive regimes from power. Hence, *Reinold* opines, a more differentiated approach towards such coups d'état might be appropriate. The second approach that the organisations apply is far less invasive. Rather than applying the same arsenal of measures, they make use of a common practice of brokering power-sharing agreements that allow governing regimes to stay in power. To *Reinold*, this practice neither strengthens the rule of law, nor does it contribute to fostering a culture of healthy democratic competition in Africa.

Looking at the broader picture, *Hannah Birkenkötter* shared her thoughts on the rule of law at the international level. She pointed out that nowadays the notion of rule of law is extremely en vogue in the practice of international organisations. Concentrating on the United Nations (UN), *Birkenkötter* depicted this trend in a significant number of recent UN programs and resolutions. She argued that while the mere prominent existence of this notion in these documents inevitably makes it relevant for researchers on international law, its content remains vague. Using the 2005 World Summit Outcome and the 2012 General Assembly (GA) resolution on the rule of law as examples, *Birkenkötter* concluded that despite the GA's rather formalistic approach, the concept of the rule of law remains unclear. She further argued that considering the notion's meaning at the national level, the conceptual core of the notion of rule of law at the international level must be seen in its power-containing function. Several perspectives can be distinguished in this regard. These include internal perspectives focusing on the division of powers within international organisations as well as external constellations comprising states or, as the famous "Kadi-Constellation" showed, international organisations and individuals. For *Birkenkötter*, this diversity in fields of application makes it difficult to develop a uniform approach. However, the containment of specific particular interests can be identified as a common theme.

In his presentation "From Leviathan to Global Governance by Information", *Michael Riegner* focused on informational activities of international institutions as a challenge for the rule of law in international relations. In the information age, the World Bank, the UN

and many other international organizations increasingly govern through information. By collecting and disseminating data, indicators, public performance evaluations and reports, international institutions incentivise political reforms, generate policy-relevant knowledge and structure discourse – in short, they exercise cognitive authority. This trend is reflected in the sources of international institutional law, which constitutes international institutions as more and more autonomous informational actors next to states, and also starts granting information rights, such as access to information, to individuals. *Riegner* analysed the body of relevant law and proposed to structure and evaluate it on the basis of three general principles of an international institutional law of information. This law already captures many influential information activities and conveys a measure of legal checks and balances on them, but overall remains ambivalent as of now in making global governance of information both legitimate and effective.

Lastly, *Norman Weiß* used his contribution on the rule of law in international organisations to draw some final conclusions from the conference. As *Michael Riegner's* presentation had shown, international organisations nowadays exert power in evermore various ways. This requires mechanisms of power containment, which could be provided by a rule of law discourse. Highlighting *Hannah Birkenkötter's* contribution, *Weiß* stressed the multiplicity of contexts in which this can become relevant. Elaborating on this, he argued in detail that states, as well as international organisations and their organs can be distinguished among the addressees of the notion's commitments. *Weiß* opined that this deduction must be placed in the broader context of the juridification of international relations and must not spare international organisations as important actors in this field. This has important impacts. Internally, the increasing dynamic of rule of law centred discourses influences organs such as the Security Council, traditionally seen as reserves of uncontained power. Externally, as *Theresa Reinold's* contribution had shown, the promotion of rule of law in national contexts can be identified as one of the major fields of operation of international organisations nowadays.