

Book Project - Executive Summary

1. Title

Human Rights Meet Legislation – Cross-Cultural Political and Legal Perspectives. With Case Studies on the Death Penalty and Immigration Policies

2. Author

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3. Summary of the Project

Human rights as a form of global positivist law have often challenged existing local value systems and dominant dogmas, where the intersections among global principles, normative propositions and local experiences occur that may prompt the creation of new communicative concepts of law inspired by a democratic reason with a consciousness of rights and difference (Galindo 1995: 135). In particular, against the backdrop of a worldwide recognition of cultural plurality, core values of human rights have gained universal validation in the positivist and *jus cogens* spheres reflected in the establishment of human rights regimes as a form of world polity (Meyer et al. 1997). Here the construction of Law in form of prescriptive propositions has undoubtedly enjoyed cross-cultural consensus and acceptance. Still, the existence of a variety of regulatory systems with different legal activities and respectively different participations in justice and rights protection at national and local levels shows that the construction of the concept and theories of law often reflects the manifestation of dominant cultural, social, political and economic values, norms and ideologies. It follows that different social, political and legal cultures as well as different economic circumstances produce different legal practices.

This project investigates the relationship between human rights and the factors law and culture affecting the implementation of these rights into legislation in the US, European and Chinese polities and societies. As international human rights law influences the development of domestic legal regimes, its interpretation, application and implementation vary according to different political, socio-economic and cultural contexts. Whereas certain human rights have enjoyed a position of utmost importance in the legislation process, others often encounter difficulties to get

articulated and implemented appropriately. Even if certain human rights categories become entrenched in domestic constitutional laws, the practice and effects of their implementation vary according to different legal and political contexts. Through two case studies examining specific human rights legislation and implementation practices (the death penalty issue in China and the United States; immigration law and the migrant right to work in Germany and Great Britain), this project aims to illuminate both the empirical and theoretical relationship between human rights, law and culture and to strengthen our understanding about those ambiguities and contingencies of human rights practices manifested in different legal cultural settings and governance structures. It will also examine how the dialectic processes between global principles and local legal practices affect and possibly reshape domestic culture and hence give new impulses to the application of human rights. In particular, supported by interdisciplinary (philosophical, political, sociological, legal, anthropological, and socio-psychological) methodologies and different levels of analysis for the detection of possibly relevant variables (for example, human rights as a world polity system, consciousness of rights, access to law, attitude towards the law and the State authority, the role of jurists, political and economic calculations and so on), the empirical findings serve not only to uncover and explain the interlacement of international norms, culture and law (on the one hand, Confucian, libertarian and European social welfare contexts, and common law, civic and socialist law, on the other). They also contribute to the construction of a solid theoretical framework with systematic explorations of a ranking order of relevant variables and their interplay and variations in specific circumstances. The major questions are as follows: 1) How have human rights as international norms been articulated and implemented in different legal systems and legislation processes? 2) To what extent does law as a cultural element influence the practices of human rights? 3) How has the legislation and implementation process reshaped the political and cultural identity and influenced existing governance structures and processes at different levels? 4) What are those circumstances and conditions that help contribute to a (un)favourable functioning of certain variables with what effects?

As to methods and the expected gain of this project, the two case studies backed by cross-cultural perspectives will ensure empirical depth and variation, while the interdisciplinary (philosophical, political, sociological, legal, anthropological, and socio-psychological) approaches will ensure comparative measures. Thus, theoretical refinement can be reached from this comparison. It will enhance insights into the relationship between human rights, law and culture and the dealing with the common challenge of fostering unity in diversity. Its results will provide much needed knowledge of use to academicians and practitioners (policy-makers and activists alike) to develop appropriate approaches and strategies that are theoretically informed and sensitive to diverse domestic contexts.

4. Project description

4.1 Existing research

The study of human rights, culture and their issues from diverse disciplinary perspectives has gradually moved away from the polarized debate between universalism and cultural relativism and shifted its attention to a more locally, concretely focused subject and a more culturally sensitive discourse. That is, scholars attempt to contextualize human rights, hoping to interpret them in a more appropriate manner. Supported by their ethnographic field research, anthropological studies for example have elucidated the multiple conjunctions of culture/rights (rights versus culture, a right to culture, rights as culture and culture as analytic to rights) and helped construct a better theoretical framework of human rights and culture (Cowan et al. 2001; Merry 2001). Studies of international politics have noted the changed attitudinal paradigm in international relations focusing on cooperative global security and shown how national actors and non-governmental organizations can be instrumental in defending and promoting human rights (Hasenkamp 2004: 545; Mertus 2009). Some political and cultural scientists have also developed cross-cultural perspectives trying to *reconstruct* prevailing theories of human rights and to trace the linkages between constitutional values on the one hand and the concepts, ideas, and institutions that are central to various traditions, on the other (An-Na'im 1995; Ibhawoh 2000).

Furthermore, international law studies have enriched our understanding about the controversial nature of human rights as well as the relationship between the effectiveness of human rights regimes and the behavior of states. Campbell observes that positivization of human rights increases their utility but compromises their moral status (Campbell 1999). Hafner-Burton/Tsutsui address the question of compliance and find that governments' legal commitments to human rights treaties mostly have *no* effects on the world's most terrible repressors (Hafner-Burton/Tsutsui 2007). Kennedy even considers the legal regime of human rights as a whole does more to produce and excuse violations than to prevent and remedy them (Kennedy 2002:118).

In particular, socio-psychological and sociological studies have systematically explored not only the structure and the social anchoring of the organizing principles of personal and governmental involvement concerning human rights, but also the interface between law and social institutions in specific governance structures and processes at different levels (Spini / Doise 1998; Licht et al. 2005). Woodiwiss for example demonstrates how the global human rights regime can accommodate Asian patriarchy, while Pacific Asia is itself adapting by

means of an „enforceable benevolence“, as the development of labor law regimes shows (Woodiwiss 1998).

Despite a variety of fruitful explorations of human rights and culture from different approaches and with different issues in focus, many investigations have largely been carried out in disciplinary isolation or/and concurrence among research programs. Sociologists working in organization theory, for instance, have developed a powerful set of arguments about the role of norms and culture in international life that pose direct challenges to realist and liberalist theories in political science (Finnemore 1996: 325). Efforts are still needed to systematically theorize the relationship between human rights, law and culture by adopting interdisciplinary and cross-cultural perspectives in order to grasp the complexity of the social environment within which states act and law, as a cultural element, evolves. In particular, a solid theoretical framework with regard to the intersection of global regimes and local experiences can only be established through the collection and in-depth analysis of comprehensive empirical data in different political and socio-cultural contexts. Bjornstol notes for instance that human rights law is still a new field of study in China and little research has therefore been done on its impact (Bjornstol 2009). Also, with regard to the question of human rights measurement in terms of principle, practice, and outcomes of government policy, Landman stresses the need for continued provision of high quality information at the *lowest* level of aggregation, sharing information and developing an ethos of replication, and long term investment in data collection efforts (Landmann 2004). Moreover, despite many ground breaking empirical international legal studies (the first generation), a second generation of empirical studies is needed that aims to clarify the mechanics of law's influence. According to Goodman/Jinks, this second generation should generate concrete, empirically falsifiable propositions about *the role of law* in state preference formation and transformation (Goodman/ Jinks 2004).

It is in this spirit of interdisciplinarity and a more differentiated focus-setting for empirical data collection and analysis this project will chart. A robust cluster of empirical studies involving diverse methods (legal, political, sociological, anthropological, socio-psychological, and educational) will be carried out that will not only address the research deficits mentioned above. It will also account for many ways in which the diffusion of social and legal norms occurs and different cultures of legal governance interact.

4.2 Aims and goals

HRML will first significantly enhance insights into the relationship between human rights, law and culture and the dealing with the common challenge of fostering unity in diversity, what Germany

as key member of the European Union, the United States and key actors in Asia are confronted with. It pursues clearly several primary scientific goals: to collect comprehensive empirical data, to analyse systematically and critically those gathered data and to assess and refine the designed multi-disciplinary theoretical framework in explaining the relation between human rights, law and culture in different polities and societies. Its research results will provide much needed knowledge of use to academicians and practitioners (policy-makers, NGOs communities, interested audiences and the general public etc.) in developing appropriate approaches and strategies that are theoretically informed and sensitive to diverse domestic contexts.

4.3 Themes of case studies

The themes of two case studies, their objectives, methods, the reason why the case study is chosen and the outline are described below:

Case study 1: The right to life / the death penalty issues in China and in the United States

Why is it unthinkable to abolish the death penalty in China as an emerging superpower with autocracy and in the United States, one of the advanced democracies in the world? What are those dominant and common understandings of law and public opinion that justify it? The objective of this case study is to understand the intrinsic relationship between the functioning of traditional norms (libertarian principles in the United States, for example), an authoritarian and patriarchal role the state is expected to play and political contingency. At the same time, it will demonstrate the possibilities citizenship education, international dialogues, practical reasoning, and transnational activism may play in China and in the United States. The case study will use document analysis, interviews and surveys.

Case study 2: Migrant rights to work and immigration law and policies in Germany and Great Britain

Germany has made a breakthrough in its immigration law and policies since 2004. Still, it struggles with the supranational harmonisation of immigration control and a national veto on regulation. Similarly, the UK has refined its managed migration through the establishment of a point-based system. However, its dubious policy measures involving the introduction of a temporary cap to stop immigration flow and the treatment of asylum seekers and refugees have prompted criticisms not only from business, but also from human rights organizations. The case study aims to demonstrate how concurrent factors interact (the dominance of material law in the German legal system, national identity, instrumental calculation, traditional attitudes toward

immigrants, participation of migrant communities, support for European integration, British Elitism and etc.) in the legislation and implementation practices. It will also show how specific political and economic preferences have dominated these processes and explain why some migrant groups remain disadvantaged. The case study will use the interpretative method for document and interview analysis.

4.4 Outline

Chapter 1: Introduction

Chapter 2: Human rights, law and culture – a genealogical and intersectionist assessment

Chapter 3: Explaining human rights, legal and cultural practices – a multi-disciplinary theoretical framework

Chap. 4: The death penalty in China and the United States

Chapter 5: Immigration law and the migrant right to work in Germany and Great Britain

Chapter 6: General findings and conclusions

5. Work plan

5.1 Planned preparation measures and work steps

- A field research in Shanghai (Shanghai Academy of Social Sciences) and in Beijing for expert interviewing was conducted in September/October 2011;
- Academic exchanges and feedbacks during the conference stay in the States (March/April 2012), particularly regarding the death penalty issue in the US;
- Expert-interviews with German and British migration and integration officers (June 2012).

5.2 Time schedule

Jan. – June 2012:

- The writing of chapter 2, 3 and 4 (the elaboration of a multidisciplinary theoretical framework from a cross-cultural dimension (European, American and Confucian understanding of human rights and law); the establishment of an adequate research

design; continuous empirical data assessment; the carrying-out of the first case study from a comparative perspective (analysis of human rights legislation and implementation practices and the identification of the role of existing legal cultures, governance structures as well as further relevant factors that favoured or handicapped the success of each variant in a given political and legal context).

July – Aug. 2012: the writing of chapter 5, introduction and concluding remarks (the carrying-out of the second case study; review of the first three chapters after the first peer-reviewing process carried out by the publisher Palgrave (NY); assessment of the empirical findings.

September 30, 2012: the submission of the whole manuscript to the faculty of human sciences / Otto-von-Guericke-Universität; the beginning of the *Habilitation* assessment procedures at the faculty.

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