# Conference Report: 39th Annual Meeting of the Arbeitskreis für Überseeische Verfassungsvergleichung

By *Martin Wortmann*[*]

This year's annual meeting of the *Arbeitskreis für Überseeische Verfassungsvergleichung* took place on July 4 and 5, 2014, at the Bucerius Law School in Hamburg. As usual, mainly young scholars at the PhD or Postdoc level presented parts of their work. In addition, this year's Memorial Lecture was held by Professor Isabel Feichtner, and Professor Markus Kotzur from the University of Hamburg shared his thoughts on the role of comparative constitutional law in a globalized world.

The first session dealt with regional constitutional developments in Latin America. Ximena Soley discussed the activist character of the Inter-American Court of Human Rights (IACtHR). She generally praised the Court's extensive human rights language as a powerful tool in times of transition, and its efforts to addresses structural challenges and gross violations of human rights. One of the characteristics of the activist jurisprudence is the collective dimension of reparations, for example concerning street children or indigenous peoples killed in Guatemala as a consequence of state-sponsored violence. Soley argues that this experience with IACtHR case law proves that Martti Koskenniemi's critique against human rights' alleged individual bias is not entirely convincing, at least with regard to the regional human rights system in Latin America. However, in spite of these achievements, Soley expressed legitimacy concerns about recent trends in the Court's activism. She referred, first, to Uruguay's amnesty laws which had been found to be in violation of the Convention – even though the respective amnesty law had been confirmed twice by referendum. Second, she was worried that the Court was moving away from gross violation of human rights, such as forced disappearances or torture, towards rights over which there is wide disagreement. She exemplified her concern with reference to a case where the Court held that Costa Rica's social security system must finance in-vitro-fertilization. Taking a legitimacy perspective, Soley concluded that self-determination and local differentiation are important values that are endangered by the road recently taken.

Taking a focus on procedural issues, Katrin Merhof analyzed the Oroya case where the Inter-American Court of Human Rights dealt with a collective claim filed by a *non-indigenous* community arguing that the contamination caused by a metallurgical complex constitutes a violation of their environment-related human rights. Merhof went into the question why, so far, almost all collective claims of this kind had been filed on behalf of *indigenous* communities. She raised a couple of hypotheses why that could be the case: First, indigenous communities might be easier identifiable to satisfy the procedural requirements set by the IACHR to avoid an *actio popularis*. Second, indigenous communities might actually be

* Research fellow at Justus Liebig University, Giessen

more seriously affected by huge emitting projects. Third, indigenous rights are sometimes less effectively enforced at the national level, so that the role of the regional human rights court is to complement these national deficits. Finally, it might be true that case law concerning indigenous rights is better known – and that CSOs are more willing to take up cases affecting indigenous peoples. Whether or not these hypotheses are true is subject to a future research project.

Vipasha Bansal opened the next session on Law and Politics in India. She analyzed attempts to enforce access to water for slum dwellers in Mumbai through the lenses of citizenship. Starting from the observation that Hindus in Mumbai's informal settlements are able to use their political power to enforce their right to have access to water, Muslims are more often ignored, given that they are a minority and that their votes and voices often go unheard. Bansal analyzed how law and politics sometimes work to exclude those who hold legal citizenship and thus deny what had been framed as "hydraulic" citizenship: a factual, political connection with the city that goes beyond a mere legal status.

Taking a more doctrinal perspective, Florian Matthey-Prakash analyzed recent developments concerning the right to education in India. From the very beginning, the Indian constitution contained a Directive Principle, which obliged the states to provide for free and compulsory education. In 2002, the Indian parliament amended the Constitution and defined this duty as a Fundamental Right to Free and Compulsory Primary Education – education thus clearly became a justiciable right. In his presentation, Matthey-Prakash asked whether this "normative upgrade" implies any tangible benefits. One obstacle seems to be that those children who would benefit most from such a justiciable right come from less well-to-do families who are for financial or other factual obstacles often unable to approach India's High Courts and Supreme Courts to enforce their rights. Matthey-Prakash shed light on some alternative and innovative mechanisms beyond individual litigation and focused on the instrument of Public Interest Litigation (PIL). PIL enables civil society organizations to approach the courts, which can then define the contents of the right to education on an abstract level, detached from individual cases. The courts can then also assess the effectiveness of the state's implementation measures, including those that give individuals agency "below" the court level – for instance, grievance and participatory mechanisms as are included in the Right to Education Act of 2009.

After these insights on regional developments in Latina America and India, the next speaker touched upon legal questions of the postcolonial global order. Franz Ebert looked at the impact policies of International Financial Institutions (IFIs) have on international labor standards. He thus covered a topic that has not only been controversially discussed with regard to developing countries, but that is at present also relevant for the European financial crisis. Ebert explained where conditionalities of the International Financial Institutions had negative impacts on labor standards and how these organizations operated as global "deregulators". However, he also emphasized the need to differentiate: Some institutions, such as the IFC or MIGA, are at times even promoters of labor standards, and in response to all-out

attacks against the IMF he observed that the Fund is sometimes more susceptible to pro-labor pressure than generally believed.

Markus Kotzur gave the opening presentation on Saturday morning and shared some reflections on the role comparative constitutional law should play in a globalized world. Entities and legal orders at different levels – such as states, regional and international organizations – are increasingly inter-connected: where formerly different constitutional orders existed, the distinction between internal and external affairs becomes widely obsolete. We now have what has been called World Internal Law (*Weltinnenrecht)*. His claim is that comparative constitutional law should not only be seen as a methodological tool to compare different national legal systems, but as an instrument to analyze and understand how these different entities/orders are connected (*Verbund*). Kotzur reminded his audience of some oft-discussed functions and critiques of comparative constitutional law. Instead of purely functionalist and Western-based comparisons, Kotzur pleads for a contextualized approach to comparative law that also captures this new global *Verbund*. He proposed a road-map for comparative lawyers, based on Constantinesco's triad: knowing (*feststellen*), understanding (*verstehen*) and comparing (*vergleichen*). Applying Constantinesco's road-map to comparative constitutionalism in a global *Verbund* means that one must, first, gather information about the subject of the research question, which includes, where necessary, the facts surrounding the respective connection between different orders (*knowing*). Second, a lawyer must understand the various legal orders within their institutional, political, cultural etc. context, a task that can usually better be fulfilled by academics than practitioners (*understanding*). Finally, the comparison must be carried out based on these conceptual groundworks, including the respective context, and such a comparison should not only look for similarities but also differences (*comparing*).

The last topic area dealt with problems of law and development. Cecilia Oliveira used the example of the "zero hunger program" to demonstrate the changing concept of security and sustainable development in Brazil. She explained how these concepts had changed during the second half of the 20th century up to the Millennium Development Goals Summit in the 21st Century, which introduced a new political approach to governance, social rights, and security interventions. The term security is now widely used in modern politics and international relations, with food security being just one of many examples. Oliveira emphasized that the term "security" is not simply a descriptive noun, but rather a principle or idea that "does something", by changing for example the focus of law and politics. In order to better understand what the concept of "food security" actually does in Brazil, Oliveira analyzed legal tools and administrative procedures created in order to increase access to nutritious food, such as in the context of the "zero hunger program". In her conclusion, she worried that, even though the concept of security should create more freedom, e.g. the freedom from hunger, reliance on security-concepts might instead lead to the creation of a "security state".

The implementation stage, i.e. the creation of legal tools to implement certain development-related concepts and principles, is where Martin Wortmann started his presentation.

Going beyond the question whether or not human rights bind states or international organizations in their development-related policies, he suggested to dive into the depth of international administrative law, and to look at the role administrative instruments such as Impact Assessments (IAs) might play in the implementation of individual and collective rights. These are instruments to generate and process knowledge and manage potential risks for human rights. Wortmann suggested analyzing these instruments both from a doctrinal perspective, e.g. by looking at how competences, procedures, or review mechanisms are regulated, and from a theoretical perspective, which helps to better understand how administrative law deals with uncertainty and risk. UN human rights bodies, many International Financial Institutions, NGOs and academics regard Impact Assessments and related instruments as promising tools to make decisions more responsive to human rights, interests and needs. In this vein, many commentators claim that we need more human rights-related impact assessments – and a clearly stated obligation to conduct these IAs before, during and after the implementation of a development-related project or policy. However, *Wortmann* raised the question whether the main deficit of impact assessments and comparable instruments to implement individual and collective rights really is a lack of efficiency. Rather, IAs themselves could do more harm than good: As a knowledge-generating instrument, they might lead to institutional instead of individual empowerment, they might be open to abuse by private interests and could, in the end, even change the human rights discourse from an accessible rights-based to a rather technical and expert-driven managerial approach.

A highlight of the annual conferences is the Herbert-Krüger Memorial Lecture, which was this year given by Isabel Feichtner, who made the case for a transnational "law of conflict of natural resources". The global fight for natural resources poses a tremendous challenge that is not adequately captured by current international economic law. In contrast with other goods, natural resources are not renewable, their extraction causes high ecological and social costs, and rights over natural resources have largely been distributed during colonial times and according to colonialists' interests. By treating natural resources like any other good, international economic law is unable to resolve distributive conflicts over natural resources. Especially developing countries had tried to set the basis for such a "law of natural resources" in an attempt to establish a New International Economic Order (NIEO) and a principle of Permanent Sovereignty over National Resources (PSNR). However, these attempts were rejected by industrialized countries. Instead, a transnational economic law emerged, with only a marginal number of special norms for natural resources. It is based on the assumption that conflicts can be resolved through privatization, investment protection and the reduction of trade barriers. Feichtner emphasized that these assumptions were not helpful to resolve or mitigate distributive conflicts, and a main deficit is that distributive justice does not play any role at all. Instead, a modern law of natural resources that is able to resolve conflicts should recognize distributive justice as the central idea for the regulation of natural resources. Domestically, the distributive conflicts must be resolved

through democratic procedures, and in interstate relations, a politization would be the right way ahead, as exemplified by the WTO waiver system.

This last point was taken up by discussant Sigrid Boysen. Public international law had established a substantive disparity, given that it decides for a strict separation between the political and the economic sphere: Formal sovereign equality exists side-by-side with flagrant substantive economic inequality. PSNR, for example, had tried to re-connect the two spheres, but failed. Boysen completely agreed with Feichtner's analysis and normative proposal to establish institutions that guide and govern distributive conflicts based on fairness principles. However, she reminds that these goals will be hard to implement due to the "metaphysics of the market".

In his concluding remarks, Brun-Otto Bryde expressed mixed feelings. On the one hand, he observed that many evaluations were extremely critical and outlooks quite negative. On the other hand, he happily acknowledged the growing number of young German lawyers dedicated to constitutional law in the global south and issues of global justice in the postcolonial order.