

Preface

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The issue of human rights receives considerable attention in social and political practice and constitutes an inexhaustible theme in legal, political, and social sciences. Moreover, the framework of human rights offers useful guidelines for international comparison of standards and practices in various social and political fields. However, the concept itself remains contested and (re)gains its meanings through the context of its usage and the theoretical underpinnings of the respective debate. In the case of Africa, the unresolved tension between different universalistic and particularistic viewpoints further contributes to the complexity of the debate. This volume aims to offer new insights into the on-going and constantly changing discussion on human rights.

Therefore, the five articles selected for this special issue on *Human rights and Africa* deal with topics, which are currently of high relevance and include a variety of human rights issues: refugee rights in Kenya, women's rights and gender in southern Africa, HIV/AIDS in South Africa, the debate on Rule of Law and Responsibility to Protect in the SADC region, and corporate apartheid-era human rights violations in South Africa. This list, obviously, is not exhaustive and shall serve only as a sample, a *Stichprobe*, to point to the richness and the omnipresence of human rights in current discourses among scholars as well as practitioners. The regional focus of this issue is laid on Southern Africa and Kenya due to the regional specialization of the authors on the southern and eastern part of the continent.

Despite each study being context-specific and bound to particular local circumstances, there are various links not only among them but, furthermore, also to international debates on human rights. This is also the case where strong commonalities between the approaches of the individual authors become visible. One recurrent theme to be found in all articles is embedded in the continuing discussion around the discrepancies between human rights in theory and their appropriation, redefinition, and (lack of) application in practice. The tension inherent in such a dialectical

relationship between different concepts and dimensions of human rights is, moreover, reflected in the title of the issue: *Human Rights and Africa: Between Theory and Practice*. In their approaches, the articles connect different levels of human rights application and practice, reaching from the local, national, sub-regional, regional, and continental, up to the global level. These interconnections reveal the controversies between internationally adopted norms, values and procedures and their interpretation at the local levels. Further, all of the articles highlight roles of different actors in the human rights discourse and concentrate mostly on the performance of the national state as one of the crucial stakeholders.

Whether with respect to Kenya, Zimbabwe, or South(ern) Africa, the national state is being made (co-)responsible for the prevalence of human rights abuses and controversies. The authors seem to agree that despite the involvement of diverse local social and political actors who focus their work on human rights approach “from below”, the “ordinary people” still have to patience themselves and “wait” for a full implementation of those human rights that they should enjoy on the basis of states’ ratifications of various declarations and documents. This waiting might be lengthy and time-consuming, as the picture chosen for the cover of this issue illustrates, where the queue of voters is waiting to cast their ballot in the Malawi 2009 National General Elections. However, the same picture points to the crucial importance of local agency, the internalization and renegotiation of human rights values and norms at the local level, and the rejection of a simple imposition of human rights from above.

We strongly believe that not only the mixture of respective topics in this issue of the *Stichproben* but also the multitude of style and form of the selected articles will catch the attention of our readers. Apart from more “traditional” articles, the issue also includes a research note (by Rita Kesselring) and a policy paper (by Henning Melber). All articles are based on (field) research conducted by the authors and thus skillfully link their theoretical knowledge with practical experiences.

Henning Melber’s contribution deals with most recent developments in the area of human rights. It analyses two prominent complementary concepts, the Responsibility to Protect (RtoP) and the Rule of Law (RoL). The paper starts from an international perspective and pictures RoL as a global responsibility, then offers a closer look at the sub-regional/local level by

using South Africa's policy practices as well as the developments within the SADC Tribunal as selected case studies. These examples illustrate the risks the absence of a firm commitment to the RoL as a necessary element in and a focus on the protection of human rights can bring along. Melber illustrates that the portrayed discrepancies between theory and practice in South Africa only serve as one among many possible case studies around the world and that they cannot be analyzed and understood in isolation but only within an interconnected global network.

These aspects are further linked to some policy-related challenges, which might include e.g. the thin line between legitimate and undue interference of the international community due to geo-strategic interests and the importance of local capacity- and institution-building or selective application of international law and double standards. Here, a significant question of interest is who actually holds the power of definition when it comes to the application or non-application of international laws and norms. The international human rights framework is used throughout the whole paper as the ultimate guiding principle against which the RoL is measured. However, Melber is aware that the implementation and protection of the normative frameworks and adherence to the RoL will not solve all arising human rights issues but at least "it will facilitate strategies to find solutions in the interest of ordinary citizens who seek protection from the abuse of power" (p. 29).

Against the backdrop of dominant (neo)liberal (feminist) rights discourse, Judith Van Allen engages with the implications of a more transformative discourse in relation to women's rights in Southern Africa. Setting her analysis in the historical framework of anti-colonialist and anti-apartheid struggles and drawing on insights from the U.S.-based New Left and the radical women's liberation movement (WLM), Van Allen argues against legal centralist approaches to women's rights and explains that activism for women's rights based on a too narrow understanding of individual formal rights needs to be expanded in order to reflect women's lived experiences. Turning to the example of the regional action-oriented research organization Women and Law in Southern Africa (WLSA), Van Allen explains the complexity that underlies gender-related work with respect to law. WLSA's approach builds on the concept of "gender relativity", which, contrary to "gender neutrality" that would aim to "make women to be

men", takes into consideration the complexity of needs emerging from overlapping and intermingling social constructions of gender and simultaneously reviews the changing dynamics of gender-related spaces of power and control in kinship and family. In her historicized understanding of women's struggles and the consideration of the intersections of customary and statutory law, Van Allen argues that the transformative spaces that, for example, emerge out of WLSA's work contribute to the strengthening of women's agency instead of relying on the construction of women as victims: "Gender relativity creates a space in which African women can construct differently powerful selves, drawing not on male constructs of power and autonomy, but on historical and contemporary narratives of African female power, including the power of mothers, narratives that are not available to (most) Northern women and not generally acknowledged within the discourse of women's rights" (p. 47).

In his article on the South Africa-based Treatment Action Campaign (TAC), Oliver Human analyses the contradictions inherent in the human rights discourse using the example of the organization's struggle for the accessibility of anti-retroviral drugs. The human rights based approach adapted by TAC, which was formed in 1998 in the course of protests against the government's (lack of) HIV policy, allowed the organization to challenge both the government's reluctance to act and the power of pharmaceutical companies. In combination with a scientifically informed approach, the rights rhetoric of the TAC tackled several levels of the official HIV discourse in South Africa. This multi-faceted strategy has been both praised and criticized by international as well as South African scholars. The author discusses both sides of the debate by referring to a Foucauldian critique of human rights. In analyzing both the assumptions and the effects of the scholars' argumentations, he argues for a polyvalence of human rights discourse, which can be appropriated for both the perpetuation of dominant interests as well as the challenging of dominance. In relation to the TAC, Human shows that it is necessary to engage with both the restrictive and the enabling dimensions of the respective rights discourse on a theoretical and a practical level.

Rita Kesselring's research note deals with corporate apartheid-era human rights violations before U.S. Courts. In her contribution to this issue, she

analyzes currently on-going processes in U.S. courts and highlights the political and legal controversies around victimhood in today's South Africa. She sheds light on a so far rather neglected research topic, corporate responsibility of international companies that had backed and profited from the crime of apartheid. Through a selection of case studies very rich in detail, she skillfully establishes connections between the present and the past, the global and the local, the theory and the practice. As Kesselring states, after the first 1994 democratic elections and Mandela's coming to power, "the business" was encouraged to stay, or come back, and participate in the reconstruction of a new South Africa. Kesselring highlights the prominent role of selected South African civil society organizations in writing global legal history in terms of corporate liability for breaches of international human rights law. As no company was ever prosecuted for apartheid-era human-rights violations by the South African judiciary, victims across South Africa organized in civil society groups such as the Khulumani Support Group and started to organize and demand legal action against non-South African multinational companies in U.S. Courts based on the so-called U.S. Alien Tort Statute, which has proven to be a unique mechanism worldwide in addressing these issues. The Statute gives foreign citizens the right to sue in U.S. Federal Courts over violations of international law, whether they arose in the United States or abroad. To explain the application of this unique instrument in full detail, Kesselring refers to its history and illustrates interesting insights not only into the central topic of the article – apartheid-era victimhood in South Africa – but also into other relevant cases, which made use of this mechanism. This comparative perspective enables her readers to understand more profoundly the difficulties, ambiguities and challenges connected to pushing for the formation of international human rights law. As the author concludes, in all its ambivalence, the Alien Tort Statute has had the power to enforce liability for strengthening the dignity of human beings, and has strengthened international human rights against corporate abuses.

Eva Freudenthaler illustrates her understanding and perception of human rights on the basis of a concrete example by taking her readers into the two biggest Kenyan refugee camps Kakuma and Dadaab and by portraying the often precarious situation of mostly Somali and Sudanese refugees situated there. As the other authors in this issue, she is intrigued by the discrepancy

between theory and practice of human rights. She analyses this incongruity through some selected rights, such as the principle of *non-refoulement* and the freedom of movement obliging the refugees to stay in camps. Her detailed case study is full of revealing insights based on her own field research in Kenya. She portrays, for example, the daily concerns of camp-based refugees, including insecurity, violence, or police harassment. The author further explores the changing roles and strategies of different actors involved in refugee protection such as the Kenyan State or UNHCR Kenya. Freudenthaler explains why the employed strategies in Kenya have so far proven to be counter-productive and how they render refugees even more dependent and protract their status-quo situation. Nevertheless, many of the camp- and urban-based refugees have found their way to work around the restrictions placed by the government and towards their right to employment and got engaged in various spheres of informal economy. Freudenthaler concludes that the reasons for the weak implementation of certain refugee rights in Kenya are multifold, ranging from global developments towards more restrictive refugee policies, down to the individual level and motivation of involved actors.

We hope that the contributions below will find a broad readership among both scholars and practitioners and inspire further discussions relevant to 'human rights between theory and practice'.