

Toward a Juris-cultural Studies of Human Rights

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Abstract

This special issue grew out of an advanced seminar on Cultural Studies that I guest-taught at the National University of Singapore in 2018, where there has been a long-time engagement with interdisciplinary teaching and learning in the field of Cultural Studies through NUS's Asian Research Institute (and more recently through the university's Department of Communication and New Media). The essays collected here represent a collection of sincere efforts to reframe political and ethical crises through a unified framework that can be called *juris-cultural studies of law and rights*. By "juris-cultural," I refer to a genre of critical cultural analysis that investigates the mutually constitutive nature of law and culture, through dissecting "law as culture" in which cultural signifying practices are traceable to the presence or absence of legal norms, as well as through "culture as law" in which the contested meanings of cultural communities, their practices and politics, can shape or even dictate social norms and regulations. It is both a political language and a method that avoids separating law and culture but confronts their uneasy entanglements. The essays are united by a common critical method of combining critical legal theory with a cultural critique of law. Each essay centers on a particular court case, and performs critical reading of the legal logics and reasoning alongside a broader attention to social and cultural ideologies and power relations that overdetermine the outcome of the court judgment. The insights produced by such a method will hopefully present to readers an innovative approach adequate to the task of bringing the problems of rights, legal subjectivities, and critical justice squarely to the doorsteps of Cultural Studies.

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For a long time, human rights have been a persistent object of analysis by important social scientists and thinkers, such as Bryan Turner, Will Kymlicka, Armatya Sen, Boaventura de Sousa Santos, Martha Nussbaum, Jürgen Habermas, Janet Halley, Patricia Williams, Jack Donnelly, Malcolm Waters, and many others. Using institutional, discourse, and critical approaches, sociologists, political scientists, historians, anthropologists, international relations scholars, and of course many legal scholars, have critiqued the human rights enterprise (see, e.g., Claude and Weston, 1992; Donnelly, 1999; Downing and Kushner, 1988; Foweraker and Landman, 1997; Freeman, 2011; Ishay, 2007; Kymlicka, 2001. McCamant, 1981; Moyn, 2010; Turner, 1995; Vincent, 1986; Waters, 1996). Yet before the 1970s, almost all academic work on human rights was provided by legal scholars and lawyers, with most work appearing in law journals. Concurrently throughout the 1970s and 1980s, surveys on the teaching of human rights in universities found an overwhelming dominance of the legal perspective (Kennedy, 2002).

By contrast, the intervention of critical cultural theory into human rights theories and debates, especially through a critical engagement with law as a highly technical kind of cultural practice, has been relatively rare (see Coombe, 1998a, 1998b, 2001; Erni, 2012, 2019). In contemporary cultural studies, visible efforts have only recently been made. Two special collections, both published in *Cultural Studies*, come to mind. Sara Knox and Cristyn Davis's (2013) special issue "The Force of Meaning: Cultural Studies of Law" raised two central concerns about law: law as mythic and law as brute force, that is, law as explained as symbolic violence (as exemplified in the essays collected in the special issue on TV program *24*, in the film adaptation of *To Kill a Mockingbird*, in torture as entertainment) and law as peremptory blindness to explanation (as represented by essays on the indecency code, the torturing of Gul Rahman, rape laws, transphobia in law). But are these two themes, being themselves central to almost the entire apparatus of philosophical critique of law, from Fitzpatrick, Derrida, to Foucault and De Sousa Santos, germane to the field of cultural studies? In many ways, this edited collection is better understood as a culturalized study of law.¹ For a "Cultural Studies of law," we would need to attend to the specificity of how Cultural Studies conceives of the determinations of power and war of positions and how its own lukewarm reception of law as a field of force has left the legal determination of social totality unexamined and under-theorized. Seen in this way, this collection did not so much offer a meta-reflection of the relations between Cultural Studies and law, as to exemplify a series of well executed analyses of the culturalization of law.

Jaafar Aksikas and Sean Johnson Andrews (2014) add that the approach by Knox and Davis is firmly grounded in the culturalist tradition of Cultural Studies – indeed many of the essays cite Thompson, who – we agree – is essential to understanding the law as both cultural ideology and symbolic practice. The issue provides clear evidence of this process in the case of the way

¹ From the perspective of legal scholarship, Menachem Mautner (2011) lists nine types of entanglements between law and culture, including the historical school in seeing law as national culture, law as constitutive of social relations, the legal system as a distinct cultural system, the law and anthropology approach, the legal culture approach, the legal consciousness approach, the law and popular culture approach, intellectual property law, law and multiculturalism, legal branches/doctrines that constitute the law/culture nexus, law and development, and law as an autopoietic system (that considers law as a unique constructivist epistemology). To this list, one would add the law and literature approach, law and social movement approach, and law and Cultural Studies approach. Across these variants – which obviously overlap – scholars and commentators may take a normative, critical, or dialectical stance on the law/culture relation.

legal definitions (and court interpretations) of decency, rape and torture are interpenetrated by cultural discourses of race, gender, subjectivity and sovereignty. The methodologies deployed also reflect a complex interrelation between media representation, transnational social movements, historical context and the development of civil law, legal precedent and questionable forms of enforcement (pp. 754–755).

Aksikas and Andrews themselves edited another collection in 2014, also published in *Cultural Studies*, which was entitled “Cultural Studies and the juridical turn.” They opened the collection by asserting that the whole concept of “the rule of law” (that ascribed that all of us, including the powerful and privileged, are equally bound by the law and the contracts we enter into) has been called into serious question by legal realists since the early twentieth century. They took the example of labour law and pointed out that “in order to uphold any sense of democratic freedom of choice – particularly in the case of labour contracts – [we need] to produce a legal theory that would look beyond equality in the letter of the law and try to look at how the law actually worked in practice. And this, in turn, required looking at the present distribution of wealth and power and the way the law helped reinforce and reproduce (and was reproduced by) both” (p. 747).

Agreeing with Knox and Davis, Aksikas and Andrews took a step further by forging “a theory of law and culture that can both describe and explain their interrelated efficacy in terms of what Raymond Williams called ‘the real order of determinations’” (p. 754). By that they mean keeping a focus on the neoliberal conjuncture, where “the law has been assigned a peculiarly central place and given a special form of efficacy and potency, one which we call ‘the juridical turn’” (p. 755). They deem this juridical turn as a hegemonic moment in U.S. culture, where “the law itself is seen as superior to other social bonds, especially those based on reciprocity, trust or common cultural belief” (p. 755). Their collection of essays was aimed at explaining the efficacy of the law despite and because of the cultural contradictions of neoliberal capitalism, in order to interrogate the ways in which laws “are all legitimated through cultural narratives and moral registers almost completely disconnected from the juridical claims and policy arrangements they help justify” (p. 756).

The two collections by Knox and Davis (2013) and Aksikas and Andrews (2014) are very good steps to enjoin Cultural Studies with the philosophical and critical theoretical focus on the “real order of determinations” (Aksikas and Andrews, p. 754), which would help the field to foreground as well as problematize the important questions of justice, freedom, legal determinations, rights, and so on. In this way, they also join scholars such as Balakrishnan Rajagopal, who is among a few who offer a detailed examination of the encounter between a new sensibility to reconstruct international law by legal practitioners in post-World War II times and the emergence of a new discourse of development-based social movement aimed at addressing issues of growth and poverty in the Global South (Rajagopal, 2003a, 2003b, 2005, 2006, 2007). Another important figure is Boaventura de Sousa Santos, a Marxist sociologist, whose analysis of the World Social Forum (WSF), among other things, utilizes left thinking linked to Latin American cultural theories, so as to rethink the organizational changes in the WSF to address global social justice concerns (de Sousa Santos, 2002, 2006, 2007a, 2007b, 2015, 2016). Finally, many of these exciting developments were captured in my recent book *Law and Cultural Studies: A Critical Rearticulation of Human Rights* (2019). At this point, it would be instructive to address more directly why a legal turn in Cultural Studies is increasingly needed to address the complexity of the law/culture entanglement.

Why does Law Matter for Cultural Studies?

It goes without saying that Cultural Studies and Human Rights practices have different genealogies. Whereas the former is grounded in anti-foundational philosophy, critical sociology, critical theory in the humanities, and interpretive social sciences, the latter is deeply influenced by Kantian philosophy, natural law, positive law traditions, and social movement literature. While there are philosophical incompatibilities between them, there are also intellectual and political synergies. To date, however, intellectual dialogue or interdisciplinary/institutional collaboration remain very rare across the divide.² Over the past ten years or so, I, along with other scholars such as the ones mentioned above, have begun to chart the ground for including legal discourse and power in the critical forms of contemporary cultural studies.

In many ways, there is a need to respond to the fact that many have expressed dissatisfaction about the relevance of Cultural Studies. The myriad forms of intellectual and political interventions that have been made under the broad rubric of Cultural Studies, it has been said, have promulgated at best a discourse of general dissent, but at worst a space for self-reproduction (see Grossberg, 2010, 2018). Whatever “success” there is for Cultural Studies in engendering new intellectual formations in and outside of universities, it is generally tainted by a nagging lack of clarity or ethical force. Joanna Zylińska (2002) puts it this way:

[W]hile the more overtly articulated political questions shape the Cultural Studies agenda, ethics seems to be its hidden, unrecognised and uncalled-for other. Whenever ethics does make an appearance in Cultural Studies, it risks being reduced — even if mainly by press commentators and supporters of the traditional model of “excellence” in education — to either moralism or “victim recognition.” (see also Zylińska, 2005)

As for me, the story I tell dates back thirty years ago, when I was profoundly struck by a lecture Stuart Hall gave at the 1990 Cultural Studies Now and in the Future conference in Illinois, when he talked about the marginality of critical intellectuals in “making real effects in the world” (1992, 284). At that time, Hall spoke in part in response to the HIV/AIDS crisis in the United States and worldwide. If the crisis, at its deeply despairing moment in 1990, both biomedically and politically speaking, ushered in Hall’s own despair (when he said, “Against the urgency of people dying in the streets, what in God’s name is the point of cultural studies?” (284)), then what are the choices for cultural studies today when confronted by all of the political violations we see in front of us? If Hall explicitly refuses to let Cultural Studies off the hook (of its political and theoretical obligations), this cannot be explained by any reluctance to recognize the innovations Cultural Studies has brought to the political field and the enterprise of theory, but it can be explained perhaps by the urgent need to metamorphose the very notion of Cultural Studies as a type of practice in the world. Put more explicitly, I think the problem is in part how to recharacterize Cultural Studies *after* the exuberant proliferation of its own spaces. In academic corridors at least, is Cultural Studies a newly remodelled humanities

² Perhaps, it is because of the elusiveness in law and culture that Rosemary Coombe (1998a) insists that “[t]he relationship between law and culture should not be defined ... An exploration of the nexus between law and culture will not be fruitful unless it can transcend and transform its initial categories” (21) (see also Coombe, 2001).

discipline, a consciousness-raising flagship operation on behalf of politics in the streets, or a new form of applied research? Or can it be a reformulated type of discipline built on the advancement of pragmatic justice through a tripartite investment in critique, professional training, and public participation? I am certainly not the first person to ask this kind of question about Cultural Studies, but over the years I have been asking a specific question: In an era of increasing violence and injustice, whether state-based or perpetrated by private actors, how will Cultural Studies clear a space for a parallel intellectual and political engagement with human rights law as a global professional, interdisciplinary, and pragmatic humanitarian practice? My own personal experience and encounter with the intellectual and advocacy debates around human rights, which began in the late 1990s, has profoundly shaped my own rethinking of Cultural Studies and its theoretical as well as political import.¹

Facing the problem of Cultural Studies' apparent lack of relevance, we may be compelled to ask what is *after* Cultural Studies as we know it today, by abandoning those elements of the field that lead to mere self-reproduction, thus relinquishing a certain barrier to other critical impulses. Larry Grossberg (2010, 2018) has continuously called for a necessary "relocation" of Cultural Studies in relation to the pressing conjunctural struggles. To do so, he argues, would require us to not only practice Cultural Studies conjuncturally but also reinventing Cultural Studies itself — its theories and its questions — in response to conjunctural conditions and demand. It is for this reason, I think, that Cultural Studies (along with many other critical paradigms and practices) needs to step up to the challenge of providing analyses of the very significant struggles and changes taking place within many national formations as well as on a transnational scale. Without an understanding of what is going on, Cultural Studies cannot contribute to envisioning other scenarios and outcomes, and the strategies that might take us down alternative pathways. This collection, and the larger project of legal-cultural articulation behind it, attempts to open up such a door for a new and engaging kind of scholarship to flow.

A Collection of Juris-Cultural Studies Works

This special issue mainly grew out of an advanced seminar on Cultural Studies that I guest-taught at the National University of Singapore in 2018, where there has been a long-time engagement with interdisciplinary teaching and learning in the field of Cultural Studies through NUS's Asian Research Institute (and more recently through the university's Department of Communication and New Media). The essays collected here also represents my own ongoing teaching effort of graduate students in my home department at Hong Kong Baptist University. It represents a collection of sincere efforts to reframe political and ethical crises through a unified framework that can be called *juris-cultural studies of law and rights*. They are united by a common critical method of combining critical legal theory with a cultural critique of law. Each essay centers on a particular court case, and performs critical reading of the legal logics and reasoning alongside a broader attention to social and cultural ideologies and power relations that overdetermine the outcome of the court judgment. The insights produced by such a method will hopefully present to readers an innovative approach adequate to the task of bringing the problems of rights, legal subjectivities, and critical justice squarely to the doorsteps of Cultural Studies.

No doubt it is important to keep a critical stance toward all restrictive forms of power that deny recognition of differences and promote an ideology of state neutrality. On this latter item, it is important to recognize that the kind of authority that can impose its own will on how social, economic, and cultural resources are distributed in society while claiming a transcendent position of neutrality is the kind of authority that must be demystified. Hei Ting Wong's essay,

precisely, attempts to demystify Singapore's Public Order Act that puts restrictions of "political assembly." She argues that to understand this law, and the specific discussion of it in the case of *Chee Soon Juan and others v Public Prosecutor* ([2012] SGHC 109), requires us to decipher the power struggle between the government and opposition through the politics of space. More specifically, the legal logic explicated in the court case turns out to reveal the underlying cultural logic of place-making and meaning-granting of particular spaces by a conflicting set of stakeholders.

Commonly, many of us share an understanding that law isn't the same as objectivity, objectivity isn't the same as neutrality, neutrality isn't the same as fairness, and fairness isn't the same as justice. Yet in liberal societies where many of us live, most people, as if in a permanent suspension of belief, accept the law as a more or less coherent process or protocol. Many of us are willing to risk our cultural security so as to trade for the possibility of justice and empowerment. What is the consequence of it? In "Killing with No Punishment," Angus Siu-cheong Li dissects the injustice inhered in police power in his critical reading of the Limbu Case that took place in 2009 in Hong Kong. The Limbu Case was about an ethnic Nepalese named Dil Bahadur Limbu who was shot dead by a police constable on a hillside, which resulted in controversies around issues such as the police's excessive use of force, discretionary policing, and racial profiling in Hong Kong. Framed in the objective, legalistic, and bureaucratic procedures of the coroner's inquest regarding Limbu's death, the killing of Limbu was defined as a permissible killing. Why was the killing "reasonable"? What legal subjectivity is displayed in the inquest, especially through shifting the law enforcement officer's legal positionality? This essay makes an especially strong contribution to analysing what is going on within legal institutions, something that Cultural Studies rarely approaches.

What is also important here is to recognize that the problem of doctrinalism — or the assumption that legal principles are the essence of law, or its only source of value — need to be replaced by an understanding of the radically contingent nature of legal interpretations in real court situations.² This connects with the tradition within critical legal studies in which it is argued that legal interpretivism is something *already* built into law itself (Erni, 2019). But what if this liberal notion goes awry? In her paper, Adhvaidha Kalidasan examines an incidence of an Islamophobic court interpretation of an Indian woman's religious conversion and marriage to a Muslim man. In her reading of the "Hadiya case," which was well known throughout India in 2016-2017, she reveals the fairly blatant mix of Islamophobic and patriarchal ideologies that infuse the current political conditions of India. At the time when India's diversity with regard to language, religion and ethnicity under the right-wing political regime has been put under question, human rights of women and religious minorities have been seriously attacked. The doctrine of Hindutva ideology spreads like wildfire from everyday practices to court interpretation of rights. Kalidasan's essay provides a conjunctural reading, also from within the courtroom.

It bears repetition that law is never lived as pure abstraction, although it must be possible for us to identify its conceptual specificity to be able to say anything about it at all. No doubt, law is text, speech, practices, system, ideology, institutions, and social order all at once. Indeed, it is simply preposterous to separate law and culture conceptually. Law is not something that is external to, and therefore inserted into, culture. Rather, law *is* a culture, a set of experiences, and a cluster of institutions and practices that cannot be detached from the wider formations from which they emerge. One of the influential areas of public cultural life that must be scrutinized carefully in relation to law is public opinion. Both Baey Shi Chen and Gao Xueying begin their investigations of their specific law cases by canvassing the public opinion that in

many ways provided a sort of pre-verdict to the human rights struggles concerned. Baey focuses on how ideological tensions arose between the law, politics, and public opinion in Singapore via a landmark 2014 ruling that upheld the constitutionality of Section 377A of the Penal Code. This law, which criminalizes sex between men in Singapore, has long demonstrated a kind of “tyranny of the majority,” which in turn entwines a mix of conservative family and Judeo-Christian ideologies that not only reinforced longstanding prejudices against the LGBT community but also deprived them of their rights. The court case became a battleground for the split of public opinion between conservative and liberal pro-humanist camps, itself reflective of the forked social development in Singapore between pathways of traditionalism and modernization/liberalization. In this context, Baey asks how the LGBT minorities can possibly build “rights capital” for greater equity through challenging Western patriarchal notions of gender and kinship relations within Eurocentric knowledge construction. In a similar way, Gao wants to search for a more humanistic way of untangling women from legalistic restrictions over their bodily integrity. Like Baey, Gao points out the damaging power of public opinion on abortion rights in the U.S. through which, since legalization in 1973, many TRAP laws (Targeted Regulations of Abortion Provisions) have been enacted to impose burdensome restrictions of abortion clinics. Through her reading of the 2016 case *Whole Women’s Health v. Hellerstedt*, Gao found that public opinion over reproductive right in the U.S. is closely related to religious culture and feminist activism, and the divided opinions are themselves reflective of intense ideological manipulation. Finding a way to loosen up the undue burden put on the providers of abortion, Gao argues, is not only a way to restore women’s right to privacy, it can also help to redirect U.S. political culture toward more commitment to moral responsibility, however fragile the commitment may be.

Speaking in genealogical terms that have become household ideas in Cultural Studies, Raymond Williams (1983) famously called culture “one of the two or three most complicated words in the English language” (87). Equally notably, Clifford Geertz (1988) added that “culture is a deeply compromised idea I cannot yet do without” (10). Being sensitive to contexts, signifying meanings, and practices, culture is essentially an ever-changing concept. The same can be said of law: it is complicated and deeply compromised. In Peter Fitzpatrick’s (2005) words, law is “a moving horizon—the horizon both as a condition and quality of law’s contained existence, and the horizon as opening onto all that lies beyond this existence” (9). Put in another way that would be more congenial to cultural applications, we can say law is at once determinate of social order and is in constant response to it. In Samra Irfan’s essay, she faces the problem of the “complicated and deeply compromised” nature of culture and law squarely. Against the global outcry over the horrific case of gang rape in India, the case of *Mukesh & Another Vs State of NCT of Delhi and others* (also known as the *Nirbhaya* gang rape case), Irfan asks some very tough questions: what good social impact can capital punishment possibly bring, either to the rapist or to society at large? From a socio-legal and cultural perspective, does capital punishment for the rapist add to the safety measures for women in India? Taking a human rights approach, Irfan combs through the human rights jurisprudence in India as well as the international human rights laws, and traces arguments that return again and again to how the law should cover the right of the offenders, so as to prepare the ground for rethinking the controversy of capital punishment.

The essays included in this collection exemplify some important efforts that, I believe, can inject new energy into Cultural Studies and raise the latter’s social and political relevance. In other words, they help to realize the importance of what can be called a “juris-cultural turn” in Cultural Studies. By “juris-cultural,” I refer to a genre of critical cultural analysis that investigates the mutually constitutive nature of law and culture, through dissecting “law as

culture” in which cultural signifying practices are traceable to the presence or absence of legal norms, as well as through “culture as law” in which the contested meanings of cultural communities, their practices and politics, can shape or even dictate social norms and regulations. Similar to Naomi Mezey’s (2003) “law as culture as law,”³ the designation of the “juris-cultural” hopefully presents a language that avoids separating law and culture but confronts their uneasy entanglements. It is hoped that there is value in this theoretical jargon, as it is worth thinking about what this theorizing might mean for legal scholarship that undertakes the task of tackling the complexity of society, history, economics, and culture and worth asking what Cultural Studies might do for legal studies. A “juris-cultural studies” is possible, which can help to capture the varieties of critical research concerning social justice.

³ Naomi Mezey (2003) uses the interesting phrase “law as culture as law” to emphasize “the mutuality and endless recycling between formal legal meaning-making and the signifying practices of culture, demonstrating that, despite their denials and antagonisms, these processes are always interdependent” (51).

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¹ I came into contact with human rights debates through an interdisciplinary program at Columbia University. In 1999, I held a Rockefeller Fellowship that enabled me to participate in Carol Vance’s then newly established Program on Gender, Sexuality, Health, and Human Rights. The program was an intellectual enterprise established by Vance to engage with the multiple forms of social, political, cultural, and postcolonial wars against non-normative genders and sexualities. This enterprise culminated in the weekly seminars, which saw participation from feminists, representatives of community groups, critical-minded staff and graduate students, and human rights advocates, analysts, and practitioners. While very few of those participants directly allied themselves with Cultural Studies *per se*, the discussion in the weekly seminars intersected tacitly with it by means of a shared critical sensibility, a more or less common academic vocabulary drawn from a broad Marxist, feminist, subalternist, and postmodernist ethos, and finally, a crypto-critique of the relevance of Cultural Studies itself. As our discussion began to take shape around a complicated set of concerns brought about by theories of gender and sexuality, the various forms of public health practices that contoured international body politics, and the community-based activist-oriented critique, the discussion was also frequently dominated by a human rights legal perspective. A rights-based discourse in formal legalistic terms, as well as in the more informal terms of oppositional critique of law, was not only leading our discussion, it effectively colonized it. I mentioned earlier the presence of a crypto-critique of the relevance of Cultural Studies. The inadequacy of Cultural Studies, in using its analytical tools to speak about the problematics at hand, became a tacitly agreed-upon fact among the participants. The “shame,” if you will, was subtly cast in the form of Cultural Studies’ lack of institutional knowledge of, or strategic political capital in, either rights-based discourse or legal-based intervention. The tacit or hidden agreement about the seeming irrelevance of Cultural Studies, while not manifesting in any direct attack on Cultural Studies, nevertheless silenced it. To me, the experience was one of intellectual reinvigoration via a strange form of (self)silencing.

Mostly, I remember feeling very uneasy about a certain kind of self-assurance of political certainty. I felt that human rights were too easily taken as a rallying point to either express various modes of injury or to attack various forms of nationalism that inflict those injuries. Yet at the same time I was immensely seduced by the rights discourse and international law. I felt that those were clearly blind spots in Cultural Studies' whole theoretical apparatus for thinking through questions of power and politics. That a complicated engagement through an oscillation between scepticism and seduction was conducted via (self-)silencing, convinced me that Cultural Studies somehow must render itself more "relevant" without sacrificing its anti-reductionist stance.

² In his classic book that in my mind helped to inaugurate the "cultural turn" in legal scholarship, *The Cultural Study of Law: Reconstructing Legal Scholarship* (1999), Yale law professor Paul Khan explains an "epistemic crisis" dating back to the first half of the twentieth century in US legal studies, which seriously challenged the traditional doctrinal approach to law and the legitimacy of its knowledge claims. Khan's most important point is his observation of how quickly and successfully legal studies absorbed and co-opted the crisis. The legal realist movement, which broke the myth of the autonomy of law, introduced an epistemic crisis through the rise of a new empirical social science of law. The two major strands of legal realist practice, according to Khan, were the modern paradigms emerging from the law and economics movement and the critical legal studies movement. By attacking the knowledge claims of the doctrinalists – both judges and law academics – these two movements forced a new understanding of law through a different vocabulary and a different set of explanatory rules from those deployed by the practitioners themselves.