



Comparative Criminal Law in Context

Lecturers:

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What is this course about?

This is a Janus-faced course: this is at the same time a traditional criminal law course and it is not. Its aim is to explore a few (but not all!) fundamental issues in criminal law, in a decidedly social context. It also aims to look at these fundamentals comparatively. The basic idea of the course is that institutions of criminal law are social and cultural constructs, and so are the cognitive schemes we lawyers use when making sense of them and applying them in our daily lives.

The purpose of the course is thus to move both the lecturers and student beyond the comfort zone of “this is the law in this country” discussion on black letter criminal law, and provide a second-order discourse the social, cultural and cognitive embeddedness of core concepts of criminal law.

Who should take this course?

This is a relatively advanced course for students with keen interest in criminal law. Familiarity with basic theoretical concepts of criminal law (in the student’s own jurisdiction) as well as a good command of English is necessary.

Course design

Each class is centred around a single topic. Each topic is introduced by the careful analysis of a case study. The case studies will be prepared as student presentations (maximum two students per presentation).

Materials

All relevant literature (required and recommended) is available in the reader, which is accessible on the moodle page of the course. As the course progresses, we will make the ppt presentations and/or outlines also available there.

Attendance Policy

Regular attendance is required. Attendance will be recorded.

Assignments

Students will be required to read the compulsory reading material. The recommended readings are aimed at students with particular interest in the topic. The reading of this is voluntary. Students will also be required to select a case study and prepare a student presentation as well as a written outline about the case.



A completed presentation and outline relieve the student from the requirement to submit an essay at the end of the term.

Exam, Evaluation and Grading

To complete the course, students will be required to submit an essay. Submission deadline is the end of the term. Topics and further details, including a detailed grading policy will be made available on the moodle page of the course at the beginning of the term. The grade received for the essay will constitute the final grade, except for those who have completed an assignment during the course. The latter will be graded based on the quality of the presentation and the outline.

Syllabus

Day 1. (11 September)

1. On The Identity of Criminal Law 1. Legal Culture and Criminal Law as Discourse

Required reading:

George P. Fletcher (1987): *The Universal and the Particular in Legal Discourses*. Bingham Young University Law Review, pp. 335-351.

2. On the Identity of Criminal Law 2. Criminal Law Between *Dogmatik* and Criminal Policy

Required reading:

Manrique, Maria Laura, Navarro, Pablo E. and Peralta, Jose M. (2017): *Criminal Law and Legal Dogmatics*. In.: Journal of Constitutional Theory and Philosophy of Law 31 (1) <https://doi.org/10.4000/revus.3806>

Case Study: The Criminalization of Incest

Required reading:

BVerfGE 120, 224-273

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2008/02/rs20080226_2bvr039207.html

Stübing v. Germany (no. 43547/08) 13 April 2012

<https://hudoc.echr.coe.int/fre?i=001-110314>

Day 2. (12 September)

3. Theories of Criminalization 1. Is a Comprehensive Theory of Criminalization Necessary?

Required reading:

Hörnle, Tatjana (2014): Theories of Criminalization. in: Dubber, M; Hörnle, T. (eds): *The Oxford Handbook of Criminal Law*. Oxford University Press, Oxford. pp.

4. Theories of Criminalization 2. The Moral Foundations of Criminal Law

Required reading:

Hart, H.L.A (1963): *Law, Liberty and Morality*. Stanford University Press, Stanford.

Recommended reading:



Dworkin, Gerald (1999): *Devlin Was Right: Law and the Enforcement of Morality*. William and Mary Law Review, 40(3) pp. 927-946.

Case Study: The Criminalization of BDSM

Required reading:

R. v. Brown (1993) All ER 75

Day 3 (13 September)

5. Theories of Criminalization: Criminal Law as Ultima Ratio: The Boundaries Between Criminal Law and Regulatory Offenses

Required reading:

Tadros, Victor (2010): *Criminalization and Regulation*. In : R.A. Duff et al. (eds.): *The Boundaries of Criminal Law*. Oxford University Press, Oxford. pp. 163-190.

Recommended reading:

Lacey, Nicola (2004): *Criminalization as Regulation*. In: C. Parker et al. (eds.): *Regulating Law*. Oxford University Press, Oxford. pp. 143-167.

6. Theories of Criminalization: Criminalization as a Social and Cultural Process

Required reading:

Lacey, Nicola (2016): *The Search of Criminal Responsibility. Ideas, Interests, Institutions*. Oxford University Press, Oxford pp. 1-25; 135-172. (the chapters “In Search of Criminal Responsibility” and “Explaining the Shifting Alignment of Ideas of Responsibility in the Vortex of Interests and Institutions”)

Case Study: The Criminalization of Market Abuse

Required reading:

Grande Stevens v. Italy (no. 18640/10) 4 March 2014

Day 4 (14 September)

7. The Concept of Criminal Responsibility 1. Criminal Responsibility Without Mental Element: Strict Liability in Criminal Law?

Required reading:

Duff, Anthony (2007): *Answering for Crime. Responsibility and Liability in the Criminal Law*. Hart Publishing, Oxford. pp. 229-263. (The chapter “Strict liability and strict responsibility”)

8. The Concept of Criminal Responsibility 2. Criminal Responsibility and AI

Required reading:

Hildebrandt, Mireille (2008): *Ambient Intelligence, Criminal Liability and Democracy*. In: *Criminal Law and Philosophy* 2(2). pp. 163-180.

Case study: The Criminal Responsibility of Minors

Required reading:

Commissioner of Police v Caldwell [1982] UKHL 1 (19 March 1982)

Regina v. G and another (Appellants) (On Appeal from the Court of Appeal (Criminal Division)) [2003] UKHL 50



Day 5 (15 September)

9. Excuses: Individualized versus Objective

Required reading:

George P. Fletcher, *The Individualization of Excusing Conditions*, 47 S. Cal. L. Rev. 1269 (1974).

10. Excuses: Socialization and Moral and Legal Responsibility

Required reading:

Fletcher, George P (2002): *Liberals and Romantics at War: The Problem of Collective Guilt* in: Yale Law Journal, May 2002. p. 1524.

<http://www.yalelawjournal.org/article/the-storrs-lectures-liberals-and-romantics-at-war-the-problem-of-collective-guilt>

Case Study: Killing Under Duress

Required reading:

Erdemović (IT-96-22) (selected parts)

<http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf>

Donoghue (or McAlister) v Stevenson, [1932] All ER Rep 1; [1932] AC 562; House of Lords [1932] A.C. 562

Case Study: “honour killings”

Required reading:

BGH, 20.02.2002 - 5 StR 538/01

11. Conclusion