

SSC 3049 Comparative Human Rights Law

Overview

For many, human rights are the foundation of a decent society. A society that does not uphold human rights is unjust. Those whose rights have been violated deserve redress and compensation. And it is troubling that the international human rights system does not really work as it should. For others human rights are a mask for privilege. Wittingly or unwittingly, they serve the agenda of progressive elites. They empower judges over democracies, western values over non-western values and individuals over communities. Who can be surprised that international enforcement of human rights does not work? How could it be otherwise? States never had, and never will have, an interest in protecting distant strangers. The truth might be somewhere in the middle. It is clear that human rights involves something precious, a legacy to be conserved, a consciousness of the value of human life that should not be abandoned, but the doctrine of human rights has by now accumulated a wide range of tensions, contradictions and dysfunctionalities that will need to be addressed if human rights are to remain relevant in the 21st Century. This course aims to give the student an “advanced introduction” into the interdisciplinary field of human rights. While this course has a legal emphasis, it is not just a revision of the positive law, it delves into the theoretical grounds and practical consequences of the law.

Learning objectives: An advanced law course can seldom be instruction of what the rules say. That would be trivial or misleading. Trivial because anybody can just go to the internet and read the rules. Misleading, because quite often rules do not have an indisputable fixed meaning, they are open to multiple interpretations.

An advanced law course will try to reveal tensions inherent in the law and foster a high level of critical thinking into the relative merits and demerits of different possible ways of understanding legal texts. Due to this, it is very important that students’ inquiry does not stop at the level of finding out that “there is no one answer”, students must try to identify for example the range of possible answers and the degree to which one answer is better than another and why.

Prerequisites

International law (SSC 2024) is an ideal prerequisite for this course, but introduction to law (SSC

1007) plus two of the following courses can also satisfy the prerequisite: conflict resolution (SSC 2037), law and society (SSC 2027) rights of the child (SSC 2042), globalization and inequality (SSC 2046) and history of political thought (SSC 2039).

Lectures

The course will have 6 lectures. The topics, times and locations of these lectures will be made available through ELEUM.

Teaching Method

The teaching method is PBL. Students are encouraged to make a diversity of types of learning goals. These may include:

- Trying to solve a problem.
- Carry out a certain task.
- Understanding the material.
- Dividing up the material before class and having peers report on it.
- Identifying the pros and cons of a possible law or policy.
- Debating a polemical issue.

Materials

Students need to buy Moeckli, Daniel, et al. (eds.), *International Human Rights Law*. Oxford: OUP (last Edition). [Hereinafter Moeckli]. This is a very basic book which will provide a common background over which to discuss the case law. You will notice that the book's general description of the law does not fully predict how judges will react to concrete cases, it mainly serves as a contextual backdrop for discussions. Polemical articles (often from extreme ideological perspectives) will also be part of the readings in order to provide ideological context for in-class discussions. These can be found in the internet freely available, links will also be provided.

Attendance

There will be two tutorials per week. A minimum of two absences is admitted. In case of three absences, you can contact the course coordinator for an extra task to compensate. Exceptions will be made for special circumstances. For this contact the course coordinator. Students are expected to attend the lectures also.

Assessment

The grading will be divided as follow:

- 20% student presentations on the institutions week [week 4]. □
- 60% final exam [in exam week].

Re-sits are possible as per UCM policy for students with an overall grade of less than 5.5. Re-sits replace the prior grade.

Blackboard (ELEUM)

This course manual, the e-readers, announcements and assignment will be placed on ELEUM. Please check Blackboard regularly.

Contact information

You can contact the course coordinator at gustavo.rosemena@maastrichtuniversity.nl

TASKS

[Post discuss week 1] The death penalty.

Most Europeans would assume that the death penalty is prohibited by human rights. They would be surprised to find out that things are not that clear. Depending on where you are, the death penalty may be either prohibited or permitted under certain conditions. A look at the United States shows some indecision in this regard. Look at the cases *Troy v. Georgia* and *Furman v. Georgia*. They show how courts change opinion in a reasoned manner, but also the uncertainties regarding their interpretation of human rights.

Read before week 3: Moeckli Chapters 4, 5, and 6.

- Moeckli, Chapter 9.
- (US) *Troy v. Georgia*;
- (US) *Furman v. Georgia*.
- Edward Fesser, *In Defense of Capital Punishment*

Pre week 1, post week 2 [Hate speech]

Many believe that free speech has limits. A commonly accepted (but not universally accepted) limit is hate speech. Yet there are differing conceptions of what counts as hate speech. For example, is this hate speech?



Moeckli, Chapter 11.

(US) *Brandenburg v. Ohio*;

(UN) *Faurisson v. France*;

(ECtHR) *Palomo Sanchez and others v. Spain*;

"There is no such thing as free speech" an interview with Stanley Fish

[Pre week 2, post week 3] Discrimination

Equality and non-discrimination are one of the most important rules of international human rights law. According to more than one author equality is really the foundation of human rights law. But does not equality have limits? Maybe some innocent inequality may need to be tolerated in order to allow for other goods. Here are a few pictures that illustrate what presumably is innocent discrimination (or not discrimination at all):



Moeckli, Chapter 8;

- (UN) *Saada Adan v. Denmark*;

- (ECtHR) S.A.S. v. France.
- (US) *Magner v. Gallagher*.
- Robert Levy, *Libertarianism and the Right to Discriminate*

[Pre week 3, post week 4] Institutions

During this week students will use Moekli to explain one of five different human rights institutions: the United Nations, the African, American and European systems of human rights protection. Students should address at least the following issues:

- What are the powers of this institution?
- Can it make binding decisions?
- What is special about it in contrast to other institutions?

Everybody must read: Buergenthal, T. (2006). The evolving international human rights system. *The American Journal of International Law*, 100(4), 783-807. More guidelines will be posted in ELEUM.

[Pre week 4, post week 5] Positive obligations

In the liberal tradition, human rights have traditionally been “negative rights”. Rights that the state should *not intervene* with your freedoms. Although this vision still has *philosophical* and *ideological* adherents, it has been largely rejected the level of official decision-making. The modern consensus is that human rights often imply also positive obligations. Why this is so is easy to see. Why should the law prohibit people from being killed, but then not do anything to help those dying? Why should the law protect people’s property, but then not do anything to help the poor? Even then, courts are notably indecisive as to how far to extend positive obligations. Sometimes courts are more generous, other times more conservative. Why might this be so?

- Moekli Chapter 7,
- (ECtHR) *Goodwin v. the United Kingdom*,
- (ECtHR) *Sentges v. the Netherlands*
- (ACHPR) *SERAC v. Nigeria*.
- Roger Scruton, *How do we decide which human rights should be protected in law?*

[Pre week 5, post week 6] Human Dignity, paternalism and autonomy

Many expect the concept of “human dignity” to play a key foundational role in human rights. The grounds of rights is the dignity that every single human being has. Nonetheless, it happens that dignity is interpreted in many different ways. The more traditional conceptions of dignity are very “moral”, they involve substantial taboos about what may and may not be done. The more modern conceptions of dignity tend to reduce dignity to autonomy. Dignity means, that every person should be able to decide for himself what he or she wants to do, without regards as to whether the action is regarded by some as dishonorable or repulsive. It is difficult to know where to stand in this discussion. While some may worry that the old idea of dignity is simply a tool to advance a conservative agenda, there are cases where many will

want to appeal to it, for example, to protect people from themselves (paternalism), or to put limits on what the state may do.

- (GER) BVerfG, 1 BvR 357/05;
- (UN) Wackenheim v. France,
- (ECtHR) Pretty v. the United Kingdom.
- Steven Pinker, *The Stupidity of Dignity*

[Pre week 5, post week 6] Politics and HR

Most people think that human rights and democracy go hand in hand like peanut butter and hagelslag. Things are much more complicated. Occasionally a choice needs to be made between human rights and democracy. It is sometimes one or the other. Think about it like this: in the end of the day, human rights are interpreted and applied by judges. So while normally polemical issues would be resolved by the popular vote, if they are framed as human rights, judges will have the last word. It seems that in principle we should not have to choose between human rights and democracy. It is pointless to try to differentiate between democracy and populism, lest we should start to define populism as democratic decisions we don't like. We should be able to respond to the claims of minorities *and* majorities. But this seems impossible.

- Obergefell v. Hodges (main opinion and adissenting opinion by Roberts J);
- (IACtHR) Gelman v. Uruguay;
- Lochner v. New York (dissenting opinion Holmes J).
- Santiago Zabala, *The difference between right and left-wing populism*