COMPARATIVE HUMAN RIGHTS (LL209)

Course duration: 54 hours lecture and class time (over three weeks)

Summer School Programme Area: Law

LSE Teaching Department: Department of Law

Lead Faculty: Dr Kai Möller (Dept. of Law)

Pre-requisites: Introduction to legal methods or equivalent.

INTRODUCTION AND OVERVIEW

This course offers an introduction to comparative human and constitutional rights law. The first part introduces the students to the structure and basic doctrines of human rights law and to the nature and methodology of comparative law. The following parts cover a range of important and controversial issues in human rights law: abortion; euthanasia and physician-assisted suicide; “deviant” sexual practices; same-sex marriage; religion in the public sphere; hate speech and denial of the Holocaust; obscenity and blasphemy; socio-economic rights; terrorism and human rights. These topics are approached by studying and comparing judgments from various influential courts all over the world, including the U.S. Supreme Court, the Canadian Supreme Court, the South African Constitutional Court, the European Court of Human Rights, the U.K. Supreme Court, and the German Federal Constitutional Court. The courts’ decisions serve as a springboard for a critical discussion of the respective rights issue.

The scheme of lectures – which may be subject to minor revisions – will be as follows:

I. Introduction
   1. Introduction to Human and Constitutional Rights Law
   2. Introduction to Comparative Law

II. Life and Death
   3. Abortion
   4. Euthanasia and Physician-Assisted Suicide

III. Sexuality
   5. “Deviant” Sexual Practices: Sodomy, Sado-Masochistic Sex and Incest
   6. Same-sex Marriage

IV. Religion
   7. Religion in the Public Sphere: Muslim Dress, Crucifixes, and the Ten Commandments

V. Freedom of Expression/Speech
8. Hate Speech and Denial of the Holocaust
9. Obscenity and Blasphemy

VI. Contemporary Challenges
10. Socio-Economic Rights
11. Terrorism and Human Rights

VII. Cross-Cutting Issues and Revision
12. The Future of Comparative Human and Constitutional Rights Law

READINGS

Essential readings
This course is mainly case-based; most of our work will consist of a critical engagement with judgments of constitutional and human rights courts all over the world. For every lecture, a course pack containing shortened versions of the relevant judgments will be made available to the students via the Moodle website for this course. Furthermore, additional readings will be set in support of lectures and as preparatory reading for the classes.

Reference books (it will not be necessary to purchase these)

ASSESSMENT

Formative
In preparation for the summative assessments, students will be set a short essay to submit on Friday of week one, with feedback given on Tuesday of week two. In addition, students will receive formative feedback on in-class presentations during the session.

Summative
Students will be set one summative piece of coursework comprising an essay of 1,500 words on one of a number of set themes, the essay will be worth 50% of the overall grade. The deadline for this work will be Friday of week two. The other aspect of the summative assessment for the course will take the form of an unseen two hour long examination on the final day (Friday of week three), the exam is worth 50% of the overall grade. The precise time and location of the exam will be circulated during the programme. Results will be released to students within a week of the exam.

TEACHER
Dr Kai Möller is an Associate Professor of Law in the Department of Law. Before joining the LSE in 2009, he was a Junior Research Fellow and previously a Lecturer in Jurisprudence at Lincoln College, University of Oxford. He holds M.Jur., M.Phil. and D.Phil. degrees from Oxford and a PhD in law from Freiburg University. His research is in the areas of comparative human and constitutional rights law, constitutional theory, and legal and political theory. His book The Global Model of Constitutional Rights was published by Oxford University Press in 2012 (paperback edition 2015). In 2014, he was shortlisted for the UK Law Teacher of the Year award.

LECTURE 1: Introduction to Human and Constitutional Rights Law

This lecture will introduce the students to the main doctrines and concepts of human and constitutional rights law. We will start by studying and comparing several important bills of rights, including the U.S. Bill of Rights, the Canadian Charter of Rights and Freedoms, the South African Constitution, the German Basic Law, and the European Convention on Human Rights. We will then examine the structure of the rights contained in these documents, including some of the central doctrines that courts have developed to interpret them (in particular the principle of proportionality and the doctrine of balancing); furthermore we will consider some issues regarding the adequate interpretative methodology (originalism, living tree, living instrument).

LECTURE 2: Introduction to Comparative Law

This lecture provides an introduction to comparative law, with a special focus on the nature and purpose of comparative human and constitutional rights law. Several approaches will be introduced and discussed, including the question of whether human and constitutional rights law should now be seen in a global context, with courts around the world contributing to a “common law of human rights” (McCrudden).

LECTURE 3: Abortion

There are few issues in constitutional law and politics that are as divisive and controversial as abortion. In this lecture we will study and compare the judgments of two highly respected courts that reached diametrically opposed conclusions on this issue. The U.S. Supreme Court decided in its famous case of Roe v. Wade (1973) that women have a constitutional right to abortion. At around the same time (1975) the German Federal Constitutional Court held that the right to life contained in the Basic Law requires that abortion be illegal and, indeed, punishable. While both courts later added important qualifications to their approaches, the basic principles laid out in these two judgments are still adhered to. The lecture will introduce the students to the case law on abortion and will critically analyse and compare the two courts’ approaches.

LECTURE 4: Euthanasia and Physician-Assisted Suicide

This lecture addresses the topic of whether or under what conditions people are entitled to control their own death. Can the state legitimately take the view that it must protect all life and therefore prevent people from taking their own life, refusing medical treatment, or receiving assistance with their suicide? Different courts have reached different conclusions on this issue: while the U.S. Supreme Court and the European Court of
Human Rights ruled against a right to assisted suicide, the Canadian Supreme Court has recently reached the opposite conclusion. The lecture will introduce the students to these important decisions and scrutinise the reasons for and against the assumed right to die.

**LECTURE 5: “Deviant” Sexual Practices: Sodomy, Sado-Masochistic Sex, and Incest**

States often criminalise sexual practices that a majority of the population consider to be immoral or harmful to the “moral fabric of society”. This lecture will address the issue of the enforcement of morality through the lens of the human rights protection of sodomy (anal sex), sado-masochistic sex, and incest. While today, most people in the Western world would hold that there is a right to gay sex, there is much less of a consensus regarding sado-masochistic practices and considerable opposition to a protection of incestuous relationships. What is/should be the role of public attitudes in human and constitutional rights law? What is/should be the role of the protection of morals? We will address these issues by engaging with judgments from Germany, the United States, South Africa, and the European Court of Human Rights.

**LECTURE 6: Same-sex Marriage**

On the issue of same-sex marriage, the Western world has gone through a remarkable transition in the last two decades: while until the 1990s, the idea of same-sex marriage seemed absurd to most people, by now many (though by no means all) senior courts in the Western world have given it protection as a human right, with the U.S. Supreme Court’s recent (2015) judgment in *Obergefell v. Hodges* being the most famous of these cases. The questions that will be discussed in this lecture include: How can we make sense of change in constitutional meaning, especially such fast change? Does it matter that the drafters of most constitutions would have considered a human right to same-sex marriage unthinkable? Should there be a right to same-sex marriage, or is it right to some form of civil partnership sufficient? Are there legitimate reasons based on tradition, religion, or family values that would allow a state to limit marriage to opposite-sex couples?

**LECTURE 7: Religion in the Public Sphere: Muslim Dress, Crucifixes, and the Ten Commandments**

A few decades ago, many people thought that the role of religion in the public sphere would inevitably decline further and further, until it was bound to disappear. Many developments have proved them wrong. Since 9/11 many people have become increasingly aware of and uncomfortable about Muslim dress in the public sphere, such as, in particular, the Islamic headscarf or the burqa. Furthermore, while some states – such as Turkey and France – have been trying to push private exercises of religion out of the public sphere, other states are actively bringing (majority) religious practices into the public sphere, for example by requiring schools to display Christian crosses or crucifixes, or by displaying the Ten Commandments in legislatures or courtrooms. This lecture will introduce the students to a wide range of cases from the United States Supreme Court, the Federal Constitutional Court of Germany, the U.K. Supreme Court, and the European Court of Human Rights. We will scrutinise the judgments in order to assess whether the courts have developed a coherent framework on the issue of religion in the public sphere.
LECTURE 8: Hate Speech and Denial of the Holocaust

In principle, everyone is in favour of freedom of speech or freedom of expression; but does this right protect “hate speech” (that is, speech that insults persons or groups on grounds such as their race or sexual orientation), and does it protect genocide denial, in particular denial of the Holocaust? The United States Supreme Court has traditionally followed a very expansive understanding of free speech, whereas in Europe and Canada courts have been much more willing to allow restrictions on the right. The lecture will introduce students to some important cases on this issue and will then go on to analyse some of the complexities around the protection of hate speech.

LECTURE 9: Obscenity and Blasphemy

To what extent does freedom of expression protect pornography that is insulting or degrading to women and that may potentially contribute to discrimination or even violence against them? Is it permissible to limit obscene expression even when there is no clear and direct link to harm, such as in the case of digitally produced child pornography (that is, child pornography that is produced without the involvement of real children)? Is it permissible to protect religious believers from expression that insults their religion – think of the Danish cartoons or Charlie Hebdo? We will discuss these and other questions by studying and analysing judgments from Canada, the United States, and Europe.

LECTURE 10: Social Rights

Traditionally, human and constitutional rights have been regarded as imposing mainly negative obligations on the state, that is, obligations to abstain from doing certain things (such as censoring speech, torturing, or arbitrarily imprisoning). Increasingly, however, rights are also held to have a positive dimension (in that they create duties to protect, or positive obligations). Furthermore, there is a trend towards including social rights in constitutions, such as rights to food, water, housing, or healthcare. This lecture will contrast the approach to rights adopted in the U.S. (where both positive obligations and social rights are rejected at the level of the federal constitution) with the one under the European Convention on Human Rights (which accepts positive obligations but not social rights) and the South African Constitution (which contains a broad protection of social rights). We will inquire into the different philosophies underlying these approaches, and consider some of the strengths and weaknesses of the expansive approach under the South African constitution.

LECTURE 11: Terrorism and Human Rights

This lecture will look at the limits that human and constitutional rights impose on a state’s fight against terrorism. In particular, it will deal with rights that are absolute, such as the right to freedom from torture and inhuman or degrading treatment or punishment (Article 3 ECHR) and arguably, at least under certain circumstances, the right to life. The moral puzzle about absolute rights is that these rights prohibit certain acts even in circumstances when performing the act could prevent a catastrophe. A widely discussed example in this context is the ticking bomb scenario: would it be permissible to torture a terrorist if this was the only way of preventing a catastrophic terrorist attack that would kill thousands of innocent people? One of the cases we
will look at in this lecture is a famous German case regarding a law that allowed the shooting down of a plane in a 9/11 situation. Does the shooting down of the plane violate the rights to life of the innocent passengers aboard the plane?

LECTURE 12: The Future of Comparative Human and Constitutional Rights Law

In this lecture, we will look back at the course and return to some of the questions raised in the first two lectures: to what extent is law a suitable tool for protecting human and constitutional rights, and what is the contribution that comparative law can make to debates about rights? We will address these issues in light of the topics covered. The lecture will also serve as a revision session, and students will have the opportunity to ask questions about the course or the exam.

Credit Transfer: If you are hoping to earn credit by taking this course, please ensure that you confirm it is eligible for credit transfer well in advance of the start date. Please discuss this directly with your home institution or Study Abroad Advisor.

As a guide, our LSE Summer School courses are typically eligible for three or four credits within the US system and 7.5 ECTS in Europe. Different institutions and countries can, and will, vary. You will receive a digital transcript and a printed certificate following your successful completion of the course in order to make arrangements for transfer of credit.

If you have any queries, please direct them to summer.school@lse.ac.uk