

Human Rights and Criminalization

Doctoral Thesis Research

Background

International human rights law stands as a critical common international framework that can be applied across a range of modern dilemmas. The preamble to the UDHR proclaims human rights to be the “foundation of freedom, justice and peace in the world... as a common standard of achievement for all peoples and all nations.”¹

Despite this broad claim, little systematic analysis exists in the literature of the application of international human rights law to one of the most intrusive tools of the state – that of criminalization. In English language, commentators such as Bengoetxea and Jung,² Seibert-Fohr,³ Ashworth,⁴ and O’Flaherty,⁵ review aspects of human rights law and criminalization, yet none conduct an in-depth analysis of the range of human rights jurisprudence that pertain to criminalization.

Conversely, within criminalization theory, many initiatives aimed at developed a normative theory of criminalization frequently fail to discuss human rights and criminalization.⁶ Where legal theorists have attempted to integrate a human rights discourse into criminalization theory, they have often not grappled seriously with the framework and lessons of international human rights law. Rather, many criminalization works are completed in isolation from developments in the jurisprudence of international human rights law; preferring instead theories based in welfare rights, and deontological moral rights or claim rights.⁷

These *lacunae* provide a fertile area for enquiry – both as regards the exact approach of international human rights law to criminalization, as well as the potential of international human rights law reasoning and concepts to strengthen criminalization theory.

Research Question

The project sets itself the question whether international human rights law merely reframes criminalization theory, or rather has the potential to add new dimensions to criminalization theory. This

¹ United Nations, 1948. Universal Declaration of Human Rights, General Assembly resolution 217A (10 December 1948). UN Doc. A/810, 71.

² Bengoetxea, J., Jung, H., 1991. Towards a European Criminal Jurisprudence? The Justification of Criminal Law by the Strasbourg Court. *Legal Studies*, 11(3), 239-280.

³ Seibert-Fohr, A., 2009. *Prosecuting serious human rights violations*. Oxford: Oxford University Press.

⁴ Ashworth, A., 2013. Positive Obligations in Criminal Law. Oxford: Hart Publishing, Ch.8.

⁵ O’Flaherty, M., Higgins, N., 2015. International Human Rights law and “Criminalization.” *Japanese Yearbook of International Law*, 58, 45-70.

⁶ See, for example, Duff, R.A., Farmer, L., Marshall, S.E., Renzo, M., Tadros, V. (eds), 2014. *Criminalization: The Aims and Limits of the Criminal Law*. Oxford: Oxford University Press

⁷ In the Anglo-American tradition, theorists that have applied the conceptual tools of human rights to the development of theories of criminalization include David Richards and Joel Feinberg. See Richards, D.J., 1979. Human Rights and the Moral Foundations of the Substantive Criminal Law. *Georgia Law Review* 13, 1395-1446; and Feinberg, J., 1984-8. *The Moral Limits of Criminal law: Harm to Others; Offense to Others; Harm to Self; Harmless Wrongdoing*. Oxford: Oxford University Press. The continental law tradition is able to draw upon the rights-based theory of Feuerbach. See Dubber, M.D., 2005. Theories of Crime and Punishment in German Criminal Law. *The American Journal of Comparative Law* 53, 679-708. In addition, more recent work also explores the place of rights in contemporary criminal theory, including with a continental focus. See Simester, A.P., Du Pois-Pedain, A., Neumann, U. (eds), 2014. *Liberal Criminal Theory. Essays for Andreas von Hirsch*. Oxford and Portland: Hart Publishing.

requires an in-depth cross-disciplinary study and work at the interface of legal practice and theory, in a manner accessible to both criminal law theorists and international human rights lawyers.

Research Approach

In order to set a practicable area of inquiry, the project focuses on a key reference point within each field.

With respect to criminal law theory, the project relies in particular on the work of Joel Feinberg, in his four volume book “The Moral Limits of the Criminal Law”.⁸ Feinberg is chosen as an important reference point due to his use of welfare interest rights in conjunction with harm-based theory, as well as the extensive and detailed analysis he accords to the criminalization of a large number of specific acts. Both of these factors support effective comparison with international human rights law concepts and reasoning. In so far as Feinberg’s work is focused, however, primarily on Anglo-American systems, the thesis also attempts to integrate perspectives from the Germanic system, which applies different, broadly liberal, theories, such as the *Rechtsgut* principle.⁹ It makes reference, in particular, to recent work which proposes an approach that combines the *Rechtsgut* principle and harm theory,¹⁰ as well as an analysis of the rights of others in continental criminalization theory.¹¹

With respect to international human rights law, the project focuses on analysis of a broadly representative cohort of 77 cases from the European Court of Human Rights that pertain to criminalization. The cohort reflects the dual interaction of human rights with criminal law through both the ‘shield’ and ‘sword’ function of human rights.¹² As noted by Françoise Tulkens, “...human rights have both a defensive and an offensive role, a role of both neutralizing and triggering the criminal law.”¹³ Prior to examining the ECHR criminalization case cohort, the project reviews intersections between crime and criminalization within international human rights law as a whole, across the United Nations, Inter-American and European human rights systems. This enables identification of five key human rights obligations through which criminalization cases are framed. The project also reviews the five specific criminalization obligations contained in international human rights treaty wording.¹⁴ The project further reflects on criminalization outcomes from the EHCR cohort with those from the findings of United Nations human rights treaty bodies.

In order to compare the approach of international human rights law to criminalization with that of criminalization theory, the project undertakes a systematic classification of the ECHR case cohort. This is achieved using a taxonomy of underlying concepts and reasoning; categories of criminalization outcome; ECHR article invoked; and the nature of the act examined, using the International Classification of Crime for Statistical Purposes.¹⁵ A focus on the underlying concepts and reasoning employed by the European Court helps, so far as possible, to facilitate a comparison between ‘free-

⁸ Feinberg, J., 1984-8. *The Moral Limits of Criminal law: Harm to Others; Offense to Others; Harm to Self; Harmless Wrongdoing*. Oxford: Oxford University Press.

⁹ Birnbaum, J., 1834. Über das Erforderniß einer Rechtsverletzung zum Begriffe des Verbrechens. In: Abegg, J., et al. (eds.), *Archiv des Criminalrechts*, Neue Folge. Halle: C. A. Schwetschke; and Binding, K., 1872. *Die Normen und ihre Übertretung*, Volume I, 1st Edition. Leipzig: W. Engelmann. The *Rechtsgut* principle, in essence, limits justified criminalization to the protection of fundamental legal goods.

¹⁰ Ambos, K., 2013. Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Laws: A First Contribution towards a Consistent Theory of International Criminal Law. *Oxford Journal of Legal Studies* 33 (2), 293-315.

¹¹ See Hörnle, T., 2014. Rights of Others in Criminalisation Theory. In: Simester, A.P., Du Pois-Pedain, A., Neumann, U. (eds), 2014. *Liberal Criminal Theory. Essays for Andreas von Hirsch*. Oxford and Portland: Hart Publishing.

¹² Tulkens, F., 2011. The Paradoxical Relationship between Criminal Law and Human Rights. *Journal of International Criminal Justice* 9, 577-595, p.577. Tulkens notes that this phrase is commonly attributed to Christine Van den Wyngaert.

¹³ *Ibid.*, p.579.

¹⁴ ICERD Article 4, CAT Article 3, OP-CRC-AC Article 4, OP-CRC-SC Article 3, and CPED Articles 4 and 25.

¹⁵ United Nations Office on Drugs and Crime, 2015. International Classification of Crime for Statistical Purposes. Available from: http://www.unodc.org/documents/data-and-analysis/statistics/crime/ICCS/ICCS_English_2016_web.pdf [Accessed 12 August 2017].

standing' autonomous criminalization theory, and contingent, case-driven, European Court decisions.

Research Outcomes and Significance

The outcomes of the research consist of semi-quantitative data on the ECHR case cohort that provide a picture of the type of acts that the European Court finds acceptable or not for criminalization. Outcomes also include identification of the most common concepts and grounds of reasoning employed by the European Court in reaching criminalization conclusions. Together, these outcomes allow identification of which grounds of reasoning may most commonly support which type of criminalization decision by the Court. These data are able to provide an answer to the question as to whether international human rights law merely reframes criminalization theory, through a detailed description of similarities and differences between the approach of the European Court to criminalization, and that of the theory of Joel Feinberg, within the broader criminalization theory context.

Based on the research outcomes, the project proposes starting points for possible contributions that international human rights law might make to the criminalization theory of Joel Feinberg, taking into account, in particular, the nature of rights within both Feinberg's theory and international human rights law. Options proposed are cognisant of wider developments within criminalization theory.

The significance of the project includes the fact that it represents the first in-depth characterisation of criminalization within a contemporary international human rights law system. The methodological approach to human rights case analysis and classification developed by the project provides a key legal-analytical tool for monitoring trends in case law, such as trends within international human rights jurisprudence towards permissiveness or restrictiveness in criminalization matters. The inter-disciplinary nature of the research further demonstrates the potential for gains in criminal theory to be achieved by cross-fertilisation of ideas and concepts from other fields of legal study.