



LUDWIG-
MAXIMILIANS-
UNIVERSITÄT
MÜNCHEN

INSTITUTE FOR PUBLIC POLICY AND LAW
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enhancing life through governmental paternalism

Enhancing Life Course No. 2: “Morality Policy and Constitutional Law”

Original Title: Moralpolitik und Verfassungsrecht
Course Type: Basic Seminar (“Grundlagenseminar”)
Semester: Summer Semester 2017 / Winter Semester 2017/18
Instructor: Dr. Christoph Krönke

Introduction

The modern State has set itself various tasks related to the enhancement of the lives of its citizens. Ever since the first active governmental contributions to solving the “social question”, the State has been gradually (re-)assuming the overall responsibility (“Globalverantwortung”) for society’s social, economic and cultural development. Today, maintaining extensive social security systems, the establishment of comprehensive public health programs, the implementation of strict consumer protection laws and anti-discrimination legislation in the private sector as well as creating incentives for commercial enterprises to take on social responsibility seem to be “must-haves” for every “good government”.

This change of governmental responsibilities does not only relate to the *quantity* of government tasks. There is also a change with regard to the *quality* of government responsibilities. Governmental activities are not limited to protecting or promoting the citizens’ rights and legally recognized interests (such as life, health, personal autonomy or property) any more. Governments adopt more and more measures and regulations with regard to *ethically* controversial questions, and it seems that their activities increasingly aim at society’s *moral well-being*, not only at the citizens’ physical integrity or economic welfare. Several EU directives provide, for example, that discrimination based on gender, age, disability, sexual orientation, religion, belief, racial or ethnical origin is prohibited in the context of professional or commercial transactions related to the access of goods or services. In Germany, the legislation implementing these directives (in particular: the General Equal Treatment Act) provoked stark criticism in legal scholarship – maybe not so much because of the interference with the rights of the people and companies addressed by those rules, but rather because of the strategic goal of the regulation to establish a general social envi-

ronment in which discrimination is “not ok”. Proposals for bans of sexualized adverts seem to support similar non-discrimination policies. These forms of “morality policy” give rise to numerous questions of law and political philosophy, e.g. as to the relationship between state and society or the difference between law and morality.

The course “Morality Policy and Constitutional Law” seeks to examine several examples of “morality policy” from the perspective of constitutional law and legal philosophy, starting with a discussion of the relationship between **law and morality** in general (1.) and under the German constitution in particular (2.).

The first three examples of “morality policy” which will be examined are located in the field of **bioethical regulation**. Regulating stem cell research (3.), predictive genetic diagnosis (4.) and assisted reproduction (5. and 6.) requires a balancing of delicate legal positions (human dignity, right to personal autonomy, right to family) with equally delicate ethical implications.

The following four topics will focus on questions of **sexuality**. First we will examine the contemporary case law of both the German Federal Constitutional Court (7.) and the US Supreme Court (8.) with regard to equal treatment of heterosexual and homosexual couples. Moreover, we will discuss the constitutional limits of penalizing conduct which is an expression of a person’s sexuality (9.). The next topic covers the legislative revocation of convictions based on § 175 of the German Criminal Code, which was in force until 1974, banning “fornication between men” (10.). Furthermore, we will discuss the legal limitations applicable to the banning of sexualized adverts in public spaces (11.)

The last area of “Morality Policy” to be examined in the course is the field of **business and economic ethics**. First we will discuss the governmental protection from discrimination in private business relations, in particular under the German General Equal Treatment Act (12.). We will then turn to fundamental legal questions of implementing social considerations (e.g. compliance with the ILO conventions on child labour and workers’ rights all along the chain of production and supply) into the public procurement of works, goods and services (13.). Finally, we will consider whether the certification of “good companies”, as practiced in the United States already, could and should be adopted in Germany as well (14.).

Structure of the Course

The course will be taught as a basic seminar (“Grundlagenseminar”), eligible for second year law students. Within the first three months of the summer semester 2017 (or the fall semester 2017/2018), each of the participants will prepare a written seminar paper (55.000 characters), dealing with one of the following specific sub-topics:

1. Law and Morality
2. Ethical Neutrality of the German Basic Law?

3. Contemporary Questions of Regulating Stem Cell Research
4. Constitutional Problems related to Predictive Genetic Diagnosis
5. A Right to Assisted Reproduction (Germany)
6. A Right to Assisted Reproduction (Other European Countries)
7. Equal Treatment of Heterosexual and Homosexual Couples (German)
8. Equal Treatment of Heterosexual and Homosexual Couples (United States)
9. Penalization of Sexuality
10. Undoing Discrimination: Legislative Revocation of Convictions based on § 175 of the German Criminal Code
11. Banning Sexualized Adverts
12. Protection from Discrimination in Private Business Relations
13. "Buying Social Justice" – Principles of Social Procurement
14. Certification of "Good Companies"

Usually, the seminar papers are due in the last weeks of the semester. The students have the opportunity to thoroughly discuss their topics with the course instructor. As the students deal with quite specific topics, there is no general mandatory reading list. It will form part of the rating of each paper whether or not the student has managed to cover the relevant scholarly writings and case law.

In the last week of the semester, the students will give presentations on their topics in front of the entire class and the course instructor. There will be a plenary discussion of each presentation for about 30-45 minutes respectively.

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