Immigration and Criminal Law

Santa Clara Law School

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Course Introduction and Objectives

Immigration has long been linked to crime and social disorder. In countries which experienced high levels of immigration in the late 1800s and early 1900s, newcomers were perceived with suspicion and were accused of bringing disruption, social unrest and criminality to the hosting societies. In the United States, for instance, the Chicago School was an important site where those claims were tested. Such representation of immigrants as a source of social, economic and cultural threat for the receiving societies and as a dangerous class is often articulated in contemporary public discourses and media reports about immigration. This may explain why immigrants are quickly identified as outlaws and potential offenders, and why recent policies have emphasised this parallel.

This course will address the position of non-citizens in contemporary penal policies and practices. It will explore how those public perceptions are imprinted in the everyday practices of the criminal justice system. It will also assess the so-called convergence of immigration law and criminal law regimes, and its impact on contemporary policies and practices to police foreigners.

Course Structure

First Session: Criminal law and citizenship/immigration status

In this session we will discuss which role, if any, should immigration status have in national criminal law systems. In this regard, we will discuss communitarian approaches to criminal law, in particular Antony Duff’s, to assess the virtues and disadvantages of making citizenship central to criminal law. We will also examine the pitfalls of constructing a criminal law for citizens using modern legislation on anti-terrorism as a case in point.

Second Session: Criminalization: Immigration offences

States in the west are increasingly appealing to the criminal law to deter migrants from choosing these countries as their destinations. In this session, we will discuss the reasons for criminalizing breaches to immigration laws. Should criminal law be used to police migrants? Are there legitimate reasons for criminalizing immigration law-breaking? Who are the ‘immigrants’, ie Are criminal law provisions aimed at foreigners, in general, or at certain groups of foreigners?

Third Session: Foreigners before the courts

Because the criminal law procedure is generally more protective than other legal proceedings – such as administrative or civil ones – it can be argued that bringing non-citizens before the criminal courts will place them on an equal footing with same legal rights as citizens. Yet, research done on the criminal justice system shows that holding immigrants criminally accountable contribute to perpetuate inequalities, instead of ensuring equal treatment. During this
session, we will examine the general patterns of immigration prosecutions and the criminal proceedings involving people accused of immigration crimes.


Fourth Session: Punishing non-citizens: criminal punishment and administrative detention

Several academics have alerted about the over-representation of non-citizens in European seclusion centres in the last few decades. This session will examine reasons for this trend and assess whether race, social class and status play a role in this outcome. We will also explore the function of reclusion more generally, by looking at the functional and institutional commonalities between the prison and the immigration detention centre.

Fifth Session: Deportation and removal

In modern times, the protection against deportation – or non-deportability – is one of the distinctive features of citizenship. As opposed to citizens, foreign nationals can be expelled. Deportation is a collateral consequence of a criminal punishment and, as we have seen in previous sessions, one of the purposes of punishment, at least in extra-legal terms. In the United States, the increasing number of criminal offences which have been classified as ‘aggravated felony’ have significantly expanded the pull of deportable foreigners on grounds of criminal convictions. In Britain, non-citizens convicted to at least one year imprisonment are automatically subject to deportation. In this last session we will look at how expulsion in times of globalization is caught up in-between a technique of ‘population transfer’ and as one of the last bastion of state sovereign powers.

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- European Court of Justice, Judgement of 28 April 2011. Hassen El Dridi. Case C-61/11
- Padilla v Kentucky 130 US S. Ct. 1473 (2010) (on deportation as consequence of criminal conviction and failure of legal counsel to advice on this matter)