

COMPARATIVE  
EQUALITY AND  
ANTI-DISCRIMINATION  
LAW

CASES, CODES,  
CONSTITUTIONS, AND COMMENTARY

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# COMPARATIVE EQUALITY AND ANTI-DISCRIMINATION LAW:

CASES, CODES, CONSTITUTIONS, AND  
COMMENTARY

*by*

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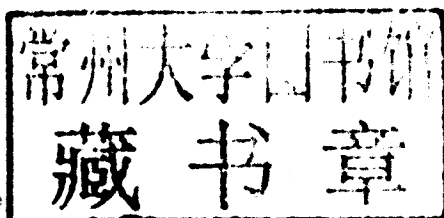
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## PREFACE

### Why Study Comparative Equality Law?

This casebook is the first of its kind to examine the development of laws around the world grappling with social inequality based on human differences. By taking a comparative approach, we hope to contribute to a richer and more nuanced understanding of the meaning of equality, both as a legal principle and a practical discourse. This casebook, then, is not designed to compare in any explicit way different kinds of inequalities. While this might be necessary at certain points, comparing, for example, gender inequality with religious inequality, is precisely not the object of this book's comparative approach. Rather, our approach adopts the more traditional object of comparative law's study of foreign or multiple legal systems. That is, by bringing together the study of equality with the study of multiple legal systems, we are interested in understanding how equality is embedded in different legal systems around the world. We are interested in understanding what kinds of cultural, social and historical forces shape and have shaped inequality, in particular national contexts; what kinds of relationships the law has had to these inequalities; how different legal systems conceptualize equality, and how these conceptualizations have changed over time; and finally, how current laws on equality are being challenged, reformed, and reimagined.

Will legal reforms based on the principle of equality both nationally and internationally continue to march forward, only to eclipse the grounded insights of all the peoples and organizations struggling for real equality? Or can these reforms be made to truly reflect the needs, desires, and political imaginations of those historically and presently waved aside by the law? Will the proliferation of new technologies, new legal discourses, new forms of social contact, new modes of exclusion (along side their enduring precedents) render obsolete the ideal of equality, or provide us with increased opportunities to give it new meanings? Will we sacrifice the growing international sensibility in the US to legal formalism, or allow it to teach us how social differences of sexuality, race, gender, age, class, nation, religion, ability (the list can go on) challenge, and thus enrich, democratic life?

We also adopt the spirit of comparative law's methodological origins. Comparative law's pursuit of the knowledge of various legal systems necessitated an interdisciplinary approach, in contrast to more doctrinally-based legal study. In his article, "Nothing New in 2000? Comparative Law in 1900 and Today",<sup>1</sup> David Clark finds that the basic concepts and aims of comparative law that give the field such methodological richness today have not changed much in the past century. Comparative law has always relied on legal history and the social sciences to understand legal developments in context, even as it aspired to become a pure science. It has also always been

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1. 75 *Tulane Law Review* 871, 893-895 (2000).

concerned with analyzing public law, even as issues of governance and community have been generally overshadowed by concerns with private law. And finally, it has always preferred selective rather than total legal rapprochement, even as it gravitates towards a unitary vision of the world. At its heart, although definitely not always in practice, comparative law has tried to understand law in social, cultural and historical context, has pursued questions of public good, and has been sensitive to the dangers of universalism. Indeed, *The Oxford Handbook of Comparative Law*<sup>2</sup> identifies over a dozen different kinds of approaches that have informed comparative law; sketches out subject areas spanning succession law to antitrust law, labor law to constitutional law; and outlines how comparative law is diversely engaged by scholars and practitioners in the Americas, Europe, and East Asia.

Pierre Legrand, in his article “How to Compare Now” argues for what he calls “‘deep’ comparative inquiries”, and makes the important observation that “the practice of comparative legal studies should reveal a proclivity on the part of the comparatist towards an acknowledgement of ‘difference’.”<sup>3</sup> He suggests that centering the problem of difference is perhaps the only way to do a truly comparative legal project. Or perhaps it is only by an attempt to address the social reality of difference, and all the tragic and unjust effects it has had in ordering the various national cultures of the world, that the comparative legal project can hope to have value. Thus, always returning the comparative analysis to questions of marginalization and exclusion that social differences have historically produced, we depart from comparative law’s conflicted investments in a harmonizing worldwide legal system. We do not propose or even ask the question of a universal principle of or global system of rules on equality. Rather, we put forth the more humble exploratory task of understanding the age-old relationship between law and equality, what it is and what it could be in our time of globalization, by highlighting the existing legal pluralism underwriting equality across various national borders.

There are several compelling reasons why the study of comparative equality law emerges with unprecedented urgency today.

The first is historical. It is undisputable that populations constituted according to varying types of difference—racial, ethnic, gender, sexual, and religious, to name a few—have gained nominal legal recognition. Post-war international norms now codified in well-known conventions like the Convention on the Elimination of All Forms of Discrimination Against Women provide the world’s nations with specific ideals of equality that many have incorporated into their domestic laws. In mature democracies such as the United States and France, anti-discrimination law and popular discourse have decades-long elaborations of how to enforce and effectively provide for equal rights and national status for its various minorities. More recent constitutional democracies like India, Brazil and South Africa display similar efforts, but with the benefit of the many lessons learned from failed

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2. Mathias Reimann and Reinhard Zimmermann, eds., Oxford University Press, 2006.

3. *Legal Studies*, vol. 16, no. 2 (1996)

legal strategies of their older peers. And still other more nascent nations articulate constitutional provisions for equality so that they might be included in the international community. Legal equality for minorities has become a standard measure of a nation's political legitimacy and a testament to the genuineness of a nation's democratic spirit. Thus, examining these various visions and legislations of equality across national borders for the kind of legal landscape of equality that emerges there is to try to put our finger on the present state of laws effecting minority populations as well as to grasp at an historical sense of why equality remains as important today as it did during times when official exclusion, discrimination and domination of minorities went largely unchallenged.

The second is ethical. Mature, recent, and nascent democracies alike struggle to provide for real equality, albeit in different ways and for different reasons. Perhaps it is because we live in a world in which democratic capitalism for the most part goes unchallenged that it is easier to find comfort in the sameness of official declarations of equality than it is to find inspiration in the differences in struggles against inequality. An import-export model of comparative analysis risks becoming too comfortable with similarities that can lead only to the crudest expectations of legal reform, and loses sight of the reality that in order for equality to have traction on the ground we must insist on different legal cultures, strategies and visions. And so we caution throughout against the tendency of comparative law's attention to national similarities and differences to fold over into importing and exporting law, especially with respect to exporting legal approaches to equality from the global North to the global South. Instead, with each glimpse of a nation's laws in the materials that follow, we hope that their differences from each other open up both new and old questions about what real equality might be, in a particular time, in a particular place.

But even more than this, we hope that they provoke a more worldly curiosity about the cultural specificities and historical legacies that each of these completely local articulations of equality issue forth, for those specificities and legacies are also reflected in the roots and routes of the many minorities struggling for equality here. This casebook attempts to bring home the ethical implications of thinking globally about equality. In order to improve the capacity for American law to shift social, cultural and political institutions that continue to either actively or passively perpetuate inequalities, we should look to other nations' laws and histories for lessons we might learn. For example, India's incorporation of Sharia law in adjudicating issues of gender difference might at least provide American law with interesting questions about how we negotiate religious pluralism through a First Amendment secularism, as well as gender discrimination through formalized equal protection doctrine. There are a host of other examples: from the South African prohibition of "unfair discrimination" to the British balance between freedom of religious worship and a State religion; from the Canadian justification for affirmative action to the German view of hate speech; and from the Turkish position on religious expression in public places to the Mexican Supreme Court's reliance on

equality to permit abortion. Which is to say, even if it does not seem feasible to simply transplant another nation's doctrine or analysis into ours, gaining a knowledge about these other legal approaches opens up questions for us that might not have occurred to us otherwise.

Lastly, the third reason is practical. Courts are increasingly looking towards jurisprudence outside their national systems for guidance on how to negotiate the issues arising from our increasingly multicultural societies. Although this remains a minority position in the US, the role of "foreign" law in our Supreme Court's decision making is a lively controversy. And other countries, such as Brazil, India and South Korea have more long-standing traditions of a transnational jurisprudence. These legal developments are, no doubt, a result of committed people and vibrant political organizations who continue to fight the world over for what the promise of equality might deliver in the everyday lives of marginalized men, women and children. When one scratches the surface of the cases, laws and scholarship contained in this book, we see the labor of this tireless commitment. And it is in order to contribute to these efforts that we invite a comparative study of equality law that might make more accessible new strategies, discourses, partnerships, and knowledge.

As the reader works through the casebook, we suggest some general questions that might help to guide a comparative analysis.

1. How exactly does a particular nation define, analyze and justify its particular notion of equality?
2. How does one nation's notion of equality resonate with another's? And how does it depart?
3. What are the shortcomings of each, and how does identifying these shortcomings perhaps yield points of reconsideration and reform?
4. Is this comparison helpful for thinking about new definitions, strategies, analyses and justifications? If yes, why? If no, why not?
5. Who are the individuals or people of these cases? What is their biography or history? What are the cultural and social contexts in which they are making their claims of equality?
6. What is the political history of a particular nation's legal system? And how does equality fit into this history? How does the substantive equality issue (religious, gender, or employment for example) emerge from and shape the legal notion of equality? And the cultural or social understanding of equality?
7. And finally, what other information would we need to have a fuller understanding of a particular nation's equality jurisprudence? To make a comparison more productive, or explain why a comparison perhaps might not be appropriate?

The opening chapter of the casebook introduces a discussion about the meaning of equality. What have commentators on the human condition said about equality, hoped for equality? What of these various articulations of equality, spanning centuries and continents, makes sense to us today? From this introductory chapter, we move into a more focused examination



of how the ideals of equality have been legally determined. In contrast to social and cultural notions of equality, the law must articulate clear definitions, procedures and standards for how equality will be guaranteed and remedied. What are the procedural requirements, standards of proof, and evidentiary rules in a particular legal system that enables an experience of inequality to be turned into a legal claim, into a justiciable issue? These, we will see, differ from nation to nation, and provide a prerequisite knowledge of a particular legal system before moving on to more substantive issues.

The chapters then shift to the development of equality in various parts of social life. Chapters III and IV engage two issues among the most heavily litigated in the wake of mid-twentieth century civil rights and decolonization movements: employment discrimination and affirmative action. In educational and employment settings around the globe, we see the legal development of equality through notions like proportionality, historical redress, and merit. We see the interface between race and class, gender and identity, and difference and assimilation—all further complicating but adding to the possibility of discovering deeper legal commitments to equal distribution of socio-economic opportunities.

In Chapters V and VI, we encounter the reach of law in the name of equality into issues traditionally regarded as those of the private sphere: marriage and reproduction. Legal approaches to discrimination and equal treatment within these contexts are cast in terms of nature, happiness, health and national values. Less about equal socio-economic opportunity, and more about equal recognition of various kinds of human intimacies, these chapters reveal how various nations struggle to negotiate in their laws fundamental definitions of what life, family and political community are and should be.

Then, in Chapters VII, VIII and IX, we move on to the difficulties of guaranteeing equality in societies built on various liberties of self-expression, whether religious, personal, or political. Secularism, extremist ideologies, and public displays of personal bigotry all push on the limits of the liberal ideal that individuals are free to be and express who they are to the extent that it does not encroach on another's freedom or a state's obligation to its governed. These materials compellingly raise core questions about a nation's political structure and how we understand the relationship between the state and civil society, between the public domain of cultural expression and government regulation of it, between human singularity and the kinds of constraints a society places on individuals equally, perhaps at the expense of a meaningful diversity that allows an individual to flourish as a unique person. Finally, we close with Chapter X, which outlines more explicitly how issues of political organization between local agencies, intermediary governments, and national or supranational institutions effect legal articulations and enforcements of equality.

The source materials presented here are, obviously, only fragments of the legal knowledge on equality. They are clearly delimited by our own institutional and national locations, as well as our scholarly areas of interest. They are even more delimited by our linguistic abilities. But even

if our language was not limited to a mono-, bi-or tri-lingualism, the field of equality law is unevenly translated and published, with translations of laws written outside of the Romance languages sorely missing. (This is not even to raise the question of translations of customary law). And even within the dominant languages, there will always be the problem of whether 'equality' in English means the same thing as the French term, 'égalité', or the Japanese term, 'byodoo', or the German term, 'gleichheit', or the Arabic term, 'mousawaa'. These difficulties, we think, are an invitation to scholars and students interested in issues of equality to support and develop multi-lingualism and study-abroad programs in liberal arts and legal education. Our knowledge and legal practice depends on it.

We hope that these fragments cohere into a constellation of legal forms of equality that directs interested readers towards any number of research projects and legal cases that wait to be undertaken. These are the cases and materials that tarry at the margins of the constitutional law classroom, and at the margins point us towards more nuanced and engaged understandings of diversity, social justice and democratic equality to come.

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