**Comparative Equality & Anti-Discrimination Law**

**Berkeley Law – Fall 2020**

**Professor David Oppenheimer**

**Syllabus (as of 7/24/20)**

**Course Description**:  
Comparative Equality & Anti-Discrimination Law uses a problem-based approach to examine a global view of anti-discrimination law, comparing US, European, and other national, regional and international legal systems, including those of India, Brazil and South Africa. The course covers 8 topic modules:

1. Theories and sources of equality and anti-discrimination law;
2. Employment discrimination (race, sex, age, disability, LGBTQ+);
3. Sexual harassment/violence;
4. Affirmative action (race, caste, origin)/gender parity;
5. Marriage equality (race, same-sex);
6. Hate Speech;
7. Disability rights; and
8. Secularism and the rights of religious minorities.

The course is open to graduate students in any field at UC Berkeley.

The class will meet for 75 minutes, twice a week for 14 weeks, on Zoom. Office hours will be by appointment, on Zoom.

Most of the reading will be from a casebook, ***Comparative Equality and Anti-Discrimination Law*** (3d ed. 2020). You can [purchase it from the publisher](https://www.e-elgar.com/shop/usd/comparative-equality-and-anti-discrimination-law-third-edition-9781788979207.html) (Edward Elgar, in the UK) for a discounted price of $68 USD (softcover) or $40 USD (e-book), or you can buy it for full price ($85 USD) from Amazon.

Some of the reading will be from ***The Global #MeToo Movement*** (2020). You can [purchase a copy from the publisher](https://www.fastcase.com/store/fcp/global-me-too/) or Amazon for $16, or [download a copy for free](https://www.globalmetoobook.com/).

Some of the course material will be delivered through an edX web-based course. The course materials mix brief lectures with simulated dialog, video and audio recordings of group discussions, debates, and interviews with 36 scholars and activists from six continents. This material is provided through Stanford University’s edX portal at an access fee per student of $75. To enroll in the Stanford materials [go to this link](https://comparativeequality.org/webcourse).

Students will be required to write a 15-20 page paper, which will satisfy the “Option-1” portion of the writing requirement for the JD degree. The paper must compare how two national/legal systems approach a particular problem of inequality. Students will be required to meet individually with Professor Oppenheimer a minimum of four times, (1) to discuss their topic selection by September 9, (2) to discuss their research progress and preliminary outline by October 7, (3) to discuss their in-class presentation of their research by October 28, and (4) to discuss my written comments at least one draft by November 13.

Papers will be due on the last day of the semester (December 17).

Special Rules for Option 1 courses: Because this is an Option 1 writing course, these rules apply:

1. All students in the class will receive a rigorous research and writing experience;
2. I will provide written feedback to all students on at least one draft during the semester and all students must revise the draft in response to my feedback for a final grade;
3. I may not give students a 1-unit 299 (independent study) for adding to their paper to fulfill the writing requirement. This is not allowed under the writing requirement policy;
4. Even if some students write a 30-page paper (which is a requirement of Option 2 of the writing requirement), I cannot award those students Option 2 credit for the course**.**

During the first eleven weeks of the semester we will focus on the readings and edX materials, with occasional discussion of students’ research on their paper topics. During the final three weeks of the semester we will focus on your papers, with presentations of student research, sometimes in breakout rooms. Draft papers must be shared with the other students in the class.

**Class meeting time:**

Class meets on Mondays and Wednesdays from 11:15-12:35. Optional “podium time” will follow most Monday classes.

**Attendance:**

Students are expected to attend all classes, with video on. Absences will be excused for good cause. Students who must miss a class session will be required to review the recording of the class. Accommodations to the video-on requirement will be provided for good cause, with recognition that having one’s video on increases engagement. Students who cannot attend class because of time zone constraints will be accommodated.

**Grading:**

The grade will be based 90% on the research paper and 10% based on class participation. Students who cannot attend class because of time zone constraints will be accommodated.

**Reading and web-based viewing assignments**

**Class 1: Monday August 17**

**Introduction to Comparative Equality Law**

**Reading: Pages 1-27 (equality as equal citizenship, as neutrality, as anti-subordination)**

**Web Course Viewing: Video Class 1 (Introduction to Comparative Equality Law)**

**Problem/Discussion Topic:** We will introduce ourselves, and discuss two problems to which we will return on a number of occasions; the problem of the head scarf restrictions in French schools, and the problem of affirmative action in US colleges and universities.

As you begin the reading, and view Class 1 of the Web Course videos, ask yourselves the following: **(I have highlighted the problems we are most likely to discuss in class.)**

* In the US the Nazi party is permitted to march through a community of Holocaust survivors, while in France a fashion designer who made anti-Semitic remarks while drunk was convicted of a crime. Why the difference?
* In France, both the state and private actors are forbidden from inquiring about a person’s race, and major anti-racism organizations support the ban, while in the US the government and private actors routinely collect and publish racial identification data. Why the difference?
* In several European countries there are gender quotas for participation on the boards of publicly listed corporations, while in the US there are no such quotas, and most boards have few women. Why the difference?
* **In Brazil, India and South Africa there are quotas for university admissions for previously excluded groups, while in the US such quotas are prohibited. Why the difference?**
* **In many parts of Europe women are prohibited from wearing headscarves for religious reasons, while in the US such restrictions are prohibited. Why the difference?**
* In some countries, the right to same-sex marriage includes the right to adopt, but in others it does not. Why the difference?

We will return to these questions over the course of the semester.

**Class 2: Wednesday August 19**

**Theories of Equality Law**

**Reading: Pages 27- 53 (equality as equal treatment, as accommodation, as diversity, intersectionality, reparative equality)**

**“**[**A Racial Awakening in France**](https://www.nytimes.com/2020/07/14/world/europe/france-racism-universalism.html)**,” (NYT 7/16/20)**

**Problem/Discussion Topics:** We will begin by considering a debate suggested by two of the reading excerpts, by the Rev. Dr. Martin Luther King, Jr. and Justice Antonin Scalia.

*In his March on Washington speech Dr. King stated that America had given Black Americans a bad check, which came back marked “insufficient funds,” and that he was in Washington to cash the check. In the case of Adarand Constructors v. Pena, Justice Scalia wrote that under the U.S. Constitution “there can be no such thing as either a creditor or a debtor race.” We will debate the question raised by these two statements – Does the reading and viewing support the following proposition: The United States owes an unpaid debt to Black Americans?*

We will then discuss how the reading and Monday’s viewing informs discussion of the comparative treatment of (1) hate speech, (2) the collection of racial identification data, and (3) gender quotas for corporate boards.

**Learning outcomes:**

At the conclusion of week 1, students will be able to:

* Articulate and critique multiple analytical approaches to equality and anti-discrimination issues;
* Discuss the impact of the Holocaust and slavery on how Europeans and Americans approach issues of formal and substantive equality.

**Class 3: Monday August 24**

**Sources of Equality Law**

**Reading: Pages 54-70 (international law of equality, US equality law)**

**Web Course Viewing: Class 2: Sources of Law and Theories of Equality**

**Class 3 Discussion Topics:** This week’s classes will introduce many of the major sources of equality law that we'll discuss in this course—including the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Acts in the United States, and European Union directives (as interpreted by the European Court of Justice) and the European Convention on Human Rights (as interpreted by the European Court of Human Rights) in Europe.

**Discussion Question:**

**Should proof of discrimination require proof of intent? Or, should a disparate effect be sufficient to prove discrimination?**

**Class 4: Wednesday August 26**

**Sources of Equality Law**

**Reading: Pages 71-85 (European equality law)**

**Class 4 Discussion problems:**

Consider the following questions:

* Should the word “race” be removed from the German Constitution?
* **What events in European history may help explain the French and German aversion to recognizing race as a legitimate form of identification? How does U.S. history differ from European history on this question?**
* **Which groups (if any) should be given accommodations in order to achieve substantive equality? How should we choose whom to accommodate? What values are we expressing in choosing to provide accommodations?**
* The readings on accommodation focus on sex and disability; what about religion -- should religious minorities be accommodated? If so, in what way, to what degree, and why?
* **What about poverty; should we provide special accommodations to the poor? With regard to poverty, why did the opening and closing excerpts in Chapter 1 concern poverty and equality? Is income inequality a legal problem?**

**Learning outcomes:**

At the conclusion of week 2, students will be able to:

* Identify several important sources of equality law in the United States and European Union legal systems;
* Articulate and critique multiple analytical approaches to equality and anti-discrimination issues;
* Compare U.S. and European legal doctrine on formal and substantive racial equality;
* Discuss the impact of the Holocaust and slavery on how Europeans and Americans approach issues of formal and substantive equality.

**Class 5: Monday August 31**

**Employment Discrimination Law**

**Reading: Pages 86-110 (Employment Discrimination/US)**

**Web Course Viewing: Video Class 3 (Employment Discrimination 1)**

**Discussion Questions for class 5**

These discussion questions are organized around the question of how we define and prove racial discrimination.

Please come to class prepared to discuss the following questions:

* Is it racist to ask people to identify themselves by race?
* Should discrimination against a majority be treated differently that discrimination against a minority?
* Should employment discrimination be a crime?

**Class 6: Wednesday September 2**

**Employment Discrimination Law**

**Reading: Pages 110-125 (Employment Discrimination/US)**

**Web Course Viewing: Video Class 4 (Employment Discrimination 2)**

**Discussion Question for class 6**

Please come to class prepared to discuss the following questions:

* Is adverse differential treatment of older workers properly seen as “age discrimination,” or is it better understood as “intergenerational solidarity?”
* Consider the role of psychology in understanding, and proving, employment discrimination;
* Consider the role of statistics in understanding, and proving, employment discrimination.
* Why is there so much judicial resistance to recognizing intersectional discrimination?
* Why is there so much judicial resistance to recognizing implicit bias?

**Monday, September 7 is a holiday. Honor Labor.**

**Class 7: Wednesday September 9**

**Employment Discrimination Law**

**Reading: Pages 126-162 (Employment Discrimination/Europe)**

**Web Course Viewing: Video Class 5 (Employment Discrimination 3)**

**Discussion Question for class 7**

Please come to class prepared to discuss the following problems:

* How do the US and EU differ in their approach to enforcing employment discrimination law?
* Why does EU law prohibit employment discrimination?
* What is the paradigm for a US or an EU approach to employment discrimination?

**Learning outcomes:**

At the conclusion of class 7, students will be able to:

* Discuss the kinds of evidentiary proof required for European and U.S. employment discrimination cases;
* Compare, with examples, the criminal, common law and civil law approaches to employment discrimination.
* Analyze a basic employment discrimination case under U.S. and European law;
* Compare the analytic approaches of the U.S. Supreme Court, the European Court of Justice, and the European Court of Human Rights;

**Class 8: Monday September 14**

**Employment Discrimination Law**

**Reading: Pages 163-176 (Employment Discrimination/Brazil & India)**

**Discussion Question for class 8**

Please come to class prepared to discuss the following problems:

**TBD**

**Class 9: Wednesday September 16**

**Employment Discrimination Law**

**Reading: Pages 184-205 (Employment Discrimination/South Africa & Israel)**

**Discussion Questions for class 9**

* Discuss the historical and social reasons why South Africa’s legal approach to discrimination differs from the U.S. or European approach.
* What makes discrimination “unfair”?
* Is unfair discrimination different in the South African context than the US context?
* Who would be protected from discrimination if US law prohibited unfair discrimination?
* Is the Israeli preference among employers for military veterans an example of intentional discrimination or adverse impact/effects discrimination?

**Class 10: Monday September 21**

**Harassment Law (US/UK) (Race and Religion)**

**Reading: Pages 223-240**

**Web Course Viewing: Video Class 6 (Employment Discrimination 4)**

**Discussion Questions for class 10**

* What is the relationship between prohibitions on sexual harassment and prohibitions on workplace bullying? Which approach is more likely to be effective?
* Should all hostile work environments be illegal under the U.S. approach to discrimination law? Are they?
* Is racial or religious harassment fundamentally different than sexual harassment?

**Class 11: Wednesday September 23**

**Harassment Law (US and Global Sexual Harassment)**

**Reading: Pages 206-222 (Sexual Harassment)**

**Plus, reading from *The Global #MeToo Movement*, pages 1-15 (Catharine MacKinnon).**

**Discussion Questions for class 11**

Please come to class prepared to discuss the following:

* Why did the U.S. Supreme Court view Meritor Saving’s conduct as sex discrimination?
* In a section omitted from the casebook, Justice Rehnquist wrote that testimony about Vinson’s “dress and personal fantasies” . . . “[was] obviously relevant?” Why?
* How is the #MeToo movement changing social views about sexual harassment?
* Given the Faragher/Ellerth defense (note 3, p. 211) who enforces anti-harassment law in the United States – courts, or employers?

**Class 12: Monday September 28**

**Harassment Law (US and Global Sexual Harassment 2)**

**Reading from *The Global #MeToo Movement*, pages 19-35 (Jessica Clarke/US), 63-72 (Isabel Jaramillo/Colombia), 341-349 (Karen O’Connell/Australia), 399-408 (Saru Jayaraman/US), and 445-457 (Lauren Edelman/US).**

**Discussion Questions for class 12**

Please come to class prepared to discuss the following:

* Do you agree with the French argument that concern about sexual harassment contributes to the existence of a glass ceiling?
* How would you respond to the argument that U.S. sexual harassment law is more concerned with business efficiency than sex-based inequality?
* Does concern about sexual harassment as a violation of dignity advance the cause of equality for women?
* Why does Professor Clarke believe that journalism will be more effective in addressing sexual harassment than law?
* Does Professor Jaramillo agree?
* Does Professor O’Connell agree?
* What can be done to protect people who complain about sexual harassment from defamation suits?

**Class 13: Monday October 5**

**Affirmative Action**

**Reading: Pages 241-270 (Affirmative Action in US Universities)**

**Web Course Viewing: Video Class 7 (Affirmative Action in US/UK)**

**Discussion Questions for class 13:**

Please come to class prepared to discuss the following:

* What role did institutions other than the parties have in influencing the Supreme Court’s decisions in Bakke and Grutter?
* Can you articulate a different justification for affirmative action, other than diversity?
* Why is affirmative action so controversial?

**Class 14: Wednesday October 7**

**Affirmative Action**

**Reading: Pages 280-283, 291-301, 302-306, 308-312, 312-320, 321-328 (Global Affirmative Action, EU/France/South Africa/Brazil/India)**

**Web Course Viewing: Video Class 8 (Affirmative Action in France) and Video Class 9 (Affirmative Action in South Africa, India, Brazil and Colombia)**

**Discussion Questions for class 14:**

Please come to class prepared to discuss the following:

* *Does the name we give affirmative action policies affect the way we think about them; does it matter whether we call them “special measures (international treaties), “compensatory action” (Brazil), “positive measures” (parts of Europe) “positive action” (other parts of Europe), “positive discrimination” (still other parts of Europe), “parity” (Europe and beyond), “reservations” (India), “diversity management” (U.S., increasingly elsewhere) or “reverse discrimination” (by some in the U.S.)?*
* *What is the difference (if any) between “promoting diversity” and “affirmative action?”*
* *Are plans like the Sciences-Po plan and the Texas 10% plan properly described as “race-neutral”?*
* In comparing the affirmative action programs in higher education in the U.S., South Africa, India, France, and Brazil, how are the justifications different?
* Why is affirmative action less controversial in Brazil or South Africa than the U.S. or France?

**Class 15: Monday October 12**

**Parity Democracy**

**Reading: Pages 348-361 (Global Parity Democracy)**

**Web Course Viewing: Video Class 10 (Gender Parity)**

**Discussion Questions for class 15**

Please come to class prepared to discuss the following:

* Should gender quotas be viewed differently than racial quotas?
* Is there a “business case” for gender parity on corporate boards? If there is, does it justify state action requiring parity?