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Comparative Human Rights Law

Expression, Association, Religion

Volume 1

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To Martha
Y.A.M.S., M.O.S.

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Preface

The Aim of This Book

This book is intended to introduce American law students to variations in approaches to human rights in several of the more important legal systems of the world. The key word in the previous sentence is “introduce.” The subject is so vast, and the range of relevant law so great, that a comprehensive discussion of the subject would require many volumes. Nonetheless, it is possible even in a relatively brief work to provide a sense of the ways different societies provide legal protections for their members.

This work is intended to permit comparisons, but its brevity required focusing its coverage. Therefore, the cases in this work are drawn from only four legal systems; the hope is that the possibility of gaining some overall sense of the workings of each of these systems compensates for the narrowness of this approach. Selection was dictated by three factors. First, there seemed to be no point in considering cases from countries where the courts are either ignored or lacking in independence. Second, allowing for the first consideration, it was crucial to examine a variety of legal systems. Finally, it was necessary to focus on systems from which case reports were available in English. Accordingly, the legal systems addressed in this work are the Japanese system, showing the approach of a developed, non-Western country; the European human rights system, illustrating rights thinking in a system sharing with the United States many values regarding the relationship between individuals and society; the Indian system, interesting because it reflects the work of an active and fairly effective court system operating in a developing, non-Western country; and, finally, the United States’ system, with which students are likely to be most familiar and which can provide a benchmark.

Again, to facilitate comparison, only a limited number of rights are addressed, even taking into account the companion volume to this one. All are

so-called first generation rights, addressing civil and political protections; all were chosen from among those that seem so basic as to be essential to any system of rights protection.

This volume addresses freedom of expression and association and rights regarding government interaction with religion. The freedom of expression is basic to protecting political liberty and ensuring a responsive government; in a sense, all other rights depend on it. Beyond this political element, thought control suppresses human flourishing, and restrictions on literary, religious, philosophical and other types of expression with no political elements amount to thought control. Political action is impossible without a right to associate; conversely, totalitarian systems are careful to control all associations. Looking beyond the political again, association is necessary for almost all forms of successful human interaction, and its restriction correspondingly can impoverish existence. Finally, the scope of freedom of religion affects one of the more obvious points of potential friction between an individual and society and is a significant indicator of a particular legal system's assumptions about the place of individuals in that system.

The first chapter of this book provides introductions to the legal system of Japan, to the European human rights system, and to India's legal system. These brief discussions are aimed at explaining to students the structure of each of those systems, and the importance of judicial opinions in them. The following chapters address the rights listed above.

It should be noted that, while all cases from the European Court of Human Rights and the Supreme Courts of India and the United States are available from English-language data bases, decisions of the Supreme Court of Japan are available in English only in a limited selection on that Court's website and also from translations made for various purposes and published, the cases being selected for translation according to the translator's criteria. Since the editor does not read Japanese, it is possible that significant Japanese cases do not appear in this work; nonetheless, the discussion is believed to be reasonably complete.

The Book's Structure

This book includes a relatively small number of lightly-edited—and therefore, in many cases, lengthy—excerpts from judicial decisions, a limited number of notes providing information regarding particular legal systems' treatment of issues not adequately addressed in any decision, and an appendix of legal instruments relevant to decisions making up the book. It therefore differs

from many casebooks in its lack of textual material, its omission of questions intended to provoke thought, and in the necessarily limited scope of the issues raised by the decisions set out. It may be useful to explain why the book was structured in this way.

The series of which this book is a part aims at providing relatively short books which may be used to focus discussion in comparative law classes on particular topics. Since books in this series cannot be lengthy, editors do not have the luxury of resolving doubts by including material not deemed to be essential. That fact, in turn, forces editors to decide what exactly is essential in the context of particular works.

The subject of this book is comparative human rights, so it is obviously essential to present cases addressing a range of rights from a range of different legal systems. While, as noted above, the length of the book limits both the number of rights and the number of legal systems which may be addressed, one possible way of dealing with this circumstance would have been to include much shorter excerpts from a greater number of cases, as well as explanatory textual material. That approach, however, would have worked against what seemed to be a second essential element of the book.

That element relates to the purposes of the study of comparative law. While one such purpose is of course to convey to students the differences in substantive law between systems, there are others which are also important. One of those additional purposes is to permit students to get a sense of the styles of legal reasoning used in different legal systems. What sorts of arguments are legitimate? What counts as a conclusive argument? Yet another purpose is to permit students to reflect upon the unarticulated assumptions underlying each legal system—ideas about how the world works seen as so fundamental in each system that they do not require explanation, or indeed, as so very basic that it would never occur to judges that there was any other way to think about legal issues. These latter aims cannot be achieved if students are provided only with snippets of decisions setting out rules of law, but omitting either a description of the facts different courts saw as crucial to their decisions or those courts' own explanation of their reasoning about the facts. While textual materials and leading questions following cases might provide information to students on those subjects, that approach would seem to defeat the purpose of a casebook—that is, to force students themselves to read cases carefully in order to understand all that each case can teach. But if a short book is to present excerpts from cases long enough to permit students to see how different courts reason about difficult human rights issues, and to include as well the language of the legal instruments with which those courts must work, it cannot include many cases. And, while this means that coverage cannot be very great, that is inevitable anyway if human rights issues from a

number of countries are to be addressed in a work of approximately 200 pages. (This is clear if one considers how long a casebook would have to be to comprehensively address all matters relevant only to the Bill of Rights and Reconstruction Amendments in the United States Constitution.) When all of these factors are taken into account, what has resulted is this casebook. It is hoped that this reasoning makes sense.

Usage Conventions

To permit readers to avoid having to adjust to different arrangements of material in different cases, it seemed helpful to make some rules of usage. They are:

First, where the original documents reproduced here employed British rather than American spelling, the spelling has *not* been altered.

Second, bracketed material has been inserted by the editor, generally to summarize important but lengthy portions of a document, occasionally to add explanatory material too important to be left to footnotes.

Third, regarding footnotes, please note that most of those in the documents reproduced in this work have been omitted. Those footnotes which have been retained are numbered consecutively in each document, without regard to their original numbering. Footnotes by the editor are indicated by lower case letters.

Fourth, please note that case naming conventions and citation formats necessarily vary from jurisdiction to jurisdiction. Japanese cases are, when possible, named according to the label attached to them on the website of the Supreme Court of Japan, and are cited by case number, date of decision and reporter in which they appeared (except when the website does not name that reporter). Cases not taken from the Supreme Court's website are named and cited as they were in the source from which they were taken. Cases from the European Court of Human Rights are cited to the official reports of that court; earlier decisions are therefore cited by their number within Series A of that court's publications and by date of decisions; later cases, appearing in the volumes entitled *European Human Rights Cases*, are cited to those volumes, which are abbreviated E.C.H.R. Cases from the Supreme Court of India are, when possible, cited to the Supreme Court Reports, abbreviated S.C.R., and to the Supreme Court sections of the All-India Reporter, abbreviated A.I.R.(S.C.). Occasionally, however, Indian citations are to the All-India Reporter Supreme Court Weekly, abbreviated A.I.R.(S.C.W.), to the

Supreme Court Journal, abbreviated S.C.J., or to Supreme Court Cases, abbreviated S.C.C. There is also one citation to the Federal Court Reports, abbreviated F.C.R., reporting decisions of the highest court of pre-independence India.

It was necessary to decide how to deal with the texts of legal instruments discussed in the book. The basic approach taken was to reproduce only the sections/articles of the various Constitutions/statutes/treaties relevant to the cases decided, instead of attempting to present the entirety of each instrument; where cases refer to an entire instrument but not to any of its component sections/articles, e.g. “The ABC Statute of 2006” instead of “Section 28 of the ABC Statute of 2006,” nothing is reproduced. Where a case cites a section/article itself having little to do with human rights and the thrust of which is clear from the discussion, that section/article is not reproduced; such sections/articles are marked with an asterisk(*) the first time they are cited in each case or other discussion, but not especially designated otherwise. Finally, where a section or article is not reproduced in the appendix, but is quoted verbatim in the case or other discussion which refers to it, that section or article is marked with two asterisks (**) the first time it appears, and not otherwise marked. All other sections/articles mentioned in the discussions which follow appear in the Appendix.

Translations

The translators of Japanese cases taken from the website of the Japanese Supreme Court are indicated to the extent that information is provided on the website. The translators of Japanese cases taken from copyrighted works are indicated to the extent that information is provided in those works. Some of the separate opinions from European Court of Human Rights decisions are described on that court’s website as translations, but that website does not provide the name of the translator; since the translations appear on that website, however, they are presumably official.

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