

University of San Diego School of Law

Fall 2018

Comparative Law

Pierre Legrand

Abstract

Following upon some preliminaries, this course is structured around three key problematics.

Firstly, the course addresses the place of foreign law on the U.S. legal scene against the background of globalization [**SECTION I**]. While foreign circumstances are more present than ever in cases coming before U.S. appellate courts on account of increasing economic, political, and institutional interdependence on the world stage, there is strong resistance, cutting across conservative/liberal lines, on the part of many U.S. judges, commentators, and legislative assemblies to the practice of U.S. cross-references to foreign law. What must be the normative reach of foreign law in the United States? Arguments from constitutionalism and democracy are examples of the claims that will be canvassed.

Secondly, the course considers various interpretive hurdles necessarily arising from any U.S. legal interaction with foreign law [**SECTIONS II-VI**]. How much understanding of foreign law must a U.S. lawmaker, judge, teacher, or lawyer achieve before advertence to it becomes legitimate? For example, how “cultural” must U.S. legal analysis of foreign law make itself in order to prove creditable? Can U.S. understanding of foreign law ever manage to avoid ethnocentric bias? Is the fact that foreign law exists in a foreign language an obstacle to meaningful U.S. knowledge? Are there methodological keys that can optimize the acquisition of foreign knowledge? Such questions will be approached from an interdisciplinary perspective.

Thirdly, the course investigates selected topics allowing for practical and in-depth familiarization with the difficulties and opportunities attendant upon the interplay between U.S. and foreign law [**SECTION VII**]. The treatment of privacy laws in Europe and in the United States and proof of foreign law in U.S. courts are among the illustrations that may be examined.

Outline and Readings

PRELIMINARIES

I. FOREIGN LAW AT HOME

II. (EPISTEMIC) CHALLENGES

A (MAJOR) CONSTRAINT

A (CONSTANT) DANGER

A TEMPTATION

FOR DIFFERENCE (WITHIN LIMITS?)

SPECULATION, ALL

III. THE ORTHODOXY (BECAUSE ONE MUST)

IV. A HISTORY OF CRITIQUES, BRIEFLY

V. AFTER “FALSE EXITS”: CRITIQUE, OTHER-WISE

VI. PRELIMINARIES, REVISITED

VII. SELECTED TOPICS

A. Privacy Laws (France/Germany/United States)

B. Human Rights: A Case of the Glocal

C. Making Sense of Home

D. Proof of Foreign Law in U.S. Courts

E. Europeanization of Law, or Uniformization Interrupted

F. Econometrics

SUPPLEMENTARY READING (OPTIONAL)

(In the outline below, all reading materials can be downloaded from www.pierre-legrand.com. Kindly go to the page of the website entitled “Comparative Law”.)

PRELIMINARIES

“Thinking *That*”.

A French Statute (French and English).

A French Judgment (French and English).

A Photograph (Nice, France, 23 August 2016).

Truth? A Cartoon (*New Zealand Herald*, Auckland, NZ, 6 January 2011).

A Note on Glocalization.

I. FOREIGN LAW AT HOME

1. Richard Posner, “No Thanks, We Already Have Our Own Laws”, *Legal Affairs*, July/August 2004, pp. 40-42.

2. Vicki Jackson, “Yes Please, I’d Love to Talk With You”, *Legal Affairs*, July/August 2004, pp. 43-46.

(Additional references include *Kirtsaeng v. John Wiley & Sons* (2013); *Lozano v. Alvarez* (2014); *Stanford v. Kentucky* (1989); *Printz v. United States* (1997); *Atkins v. Virginia* (2002); *Lawrence v. Texas* (2003); *Bowers v. Hardwick* (1986); *Roper v. Simmons* (2005); *Graham v. Florida* (2010); Laurence Tribe; Teemu Ruskola; Mary Ann Glendon; Bruce Ackerman; Cass Sunstein; Steve Calabresi; Eugene Volokh; various Supreme Court Justices speaking/writing extrajudicially; and some state legislative assemblies.)

II. (EPISTEMIC) CHALLENGES

A (MAJOR) CONSTRAINT

3. Jorge Luis Borges, “Averroës’ Search”, in *Collected Fictions*, transl. by Andrew Hurley (New York: Penguin, 1998 [1947]), pp. 235-41.

A (CONSTANT) DANGER

4. Martin Heidegger, “A Dialogue on Language”, in *On the Way to Language*, transl. by Peter D. Hertz (New York: Harper Collins, 1971 [1959]), p. 45.

A TEMPTATION

5. Alain Badiou, *Ethics*, transl. by Peter Hallward (London: Verso, 2001 [1993]), pp. 18-29.

FOR DIFFERENCE (WITHIN LIMITS?)

6. George Steiner, *Errata* (New Haven: Yale University Press, 1988), pp. 1-5.

7. Richard A. Shweder, "'What About Female Genital Mutilation?' and Why Understanding Culture Matters in the First Place", in Richard A. Shweder, Martha Minow & Hazel R. Markus (eds), *Engaging Cultural Differences* (New York: Sage, 2002), pp. 216-51.

8. Abdulmumini A. Oba, "Female Circumcision as Female Genital Mutilation: Human Rights or Cultural Imperialism?", (2008) 8/3 *Global Jurist*.

SPECULATION, ALL

9. H. Patrick Glenn, *Legal Traditions of the World*, 5th ed. (Oxford: Oxford University Press, 2014): Back Cover & Page Facing Table of Contents.

10. Excerpts from "A Fresh Start for Comparative Legal Studies?", (2006) 1 *Journal of Comparative Law* 100.

11. James Q. Whitman, "A Simple Story", [2004/4] *Rechtsgeschichte* 206 [a review of H. Patrick Glenn, *Legal Traditions of the World* (Oxford: Oxford University Press, 2000)].

III. THE ORTHODOXY (BECAUSE ONE MUST)

12. Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law*, 3d ed. transl. by Tony Weir (Oxford: Oxford University Press, 1998), pp. 1-62 & 356-63: Excerpts & Full Text.

13. James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Oxford University Press, 1991), p. 1; Michael Bogdan, "On the Value and Method of Rule-Comparison in Comparative Law", in Heinz-Peter Mansel *et al.* (eds), *Festschrift für Erik Jayme* (Munich: Sellier, 2004), pp. 1233-42; David S. Law, "Generic Constitutional Law", (2005) 89 *Minnesota Law Review* 652, pp. 659-61; Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (Oxford: Oxford University Press, 2010), pp. 1 & 178-83.

IV. A HISTORY OF CRITIQUES, BRIEFLY

14. Günter Frankenberg, "Critical Comparisons: Re-thinking Comparative Law", (1985) 26 *Harvard International Law Journal* 411.

15. George P. Fletcher, "The Universal and the Particular in Legal Discourse", [1987] *Brigham Young University Law Review* 335.

16. Jonathan Hill, "Comparative Law, Law Reform and Legal Theory", (1989) 9 *Oxford Journal of Legal Studies* 101.

17. Susan Millns, [Review of Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law*, 3d ed. transl. by Tony Weir (Oxford: Oxford University Press, 1998)], (1999) 48 *International & Comparative Law Quarterly* 982.

18. Ruti Teitel, "Comparative Constitutional Law in a Global Age", (2004) 117 *Harvard Law Review* 2570 [a review of Norman Dorsen *et al.*, *Comparative Constitutionalism: Cases and Materials* (St. Paul, MN: West, 2003)].

19. Richard Hyland, *Gifts* (Oxford: Oxford University Press, 2009), pp. 63-74 & 94-113 [with "Noted Publications", (2009) 4/2 *Journal of Comparative Law* 309].

20. Simone Glanert, "Method?", in Pier Giuseppe Monateri (ed.), *Methods of Comparative Law* (Cheltenham, U.K.: E. Elgar, 2012), pp. 61-81.

V. AFTER "FALSE EXITS": CRITIQUE, OTHER-WISE

21. "Paradoxically, Derrida: For a Comparative Legal Studies", (2005) 27 *Cardozo Law Review* 631, pp. 645-54.

22. "Heidegger", in David S. Clark (ed.), *Encyclopedia of Law and Society*, vol. II (Los Angeles: Sage, 2007), pp. 700-01.

23. Martin Heidegger & José de Acosta: Excerpts.

24. "Gadamer", in David S. Clark (ed.), *Encyclopedia of Law and Society*, vol. II (Los Angeles: Sage, 2007), pp. 617-18.

25. Hans-Georg Gadamer: Excerpts.

26. Jacques Derrida: Biographical Note.

27. *L'Etranger* (and Its Englishes)/*Die Verwandlung* (and Its Englishes, Too).

28. Simone Glanert & Pierre Legrand, "Foreign Law in Translation: If Truth Be Told...", in Michael Freeman & Fiona Smith (eds), *Law and Language* (Oxford: Oxford University Press, 2013), pp. 513-32.

29. "Siting Foreign Law: How Derrida Can Help", (2011) 21 *Duke Journal of Comparative & International Law* 595.

30. Tracing the French Statute on Religious Dress at School, (2011) 21 *Duke Journal of Comparative & International Law* 595, pp. 626-29.

31. Tracing the French Statute on Religious Dress at School (Detail).

32. Jacques Derrida: Excerpts.

33. "Comparative Legal Studies and the Matter of Authenticity", (2006) 1 *Journal of Comparative Law* 365, pp. 374-93.

34. "Comparative Law", in David S. Clark (ed.), *Encyclopedia of Law and Society*, vol. I (Los Angeles: Sage, 2007), pp. 220-23.

VI. PRELIMINARIES, REVISITED

VII. SELECTED TOPICS

A. Privacy Laws (France/Germany/United States)

35. James Q. Whitman, "The Two Western Cultures of Privacy: Dignity Versus Liberty", (2004) 113 *Yale Law Journal* 1151.

36. James Gordley, "When Is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States", (2007) 67 *Louisiana Law Review* 1073.

B. Human Rights: A Case of the Glocal

37. Jack Donnelly, "The Relative Universality of Human Rights", (2007) 29 *Human Rights Quarterly* 281.

38. Mark Goodale, "Toward a Critical Anthropology of Human Rights", (2006) 47 *Current Anthropology* 485.

39. Lila Abu-Lughod, "Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others", (2002) 104 *American Anthropologist* 783.

40. Günter Frankenberg, "Human Rights and the Belief in a Just World", (2014) 12 *International Journal of Constitutional Law* 35.

C. Making Sense of "Home"

41. *McLoughlin v. O'Brian*, [1983] A.C. 410 (H.L.).

42. *Attia v. British Gas Plc*, [1988] 1 Q.B. 304 (C.A.)

43. *Markesinis and Deakin's Tort Law*, 7th ed. by Simon Deakin, Angus Johnston & Basil

Markesinis (Oxford: Oxford University Press, 2012), p. 136.

D. Proof of Foreign Law in U.S. Courts

44. *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624 (2010).

45. "Proof of Foreign Law in U.S. Courts: A Critique of Epistemic Hubris", (2013) 8/2 *Journal of Comparative Law* 344.

E. Europeanization of Law, or Uniformization Interrupted

46. "European Legal Systems Are Not Converging", (1996) 45 *International & Comparative Law Quarterly* 52.

47. Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences", (1998) 61 *Modern Law Review* 11.

48. Leone Niglia, "Taking Comparative Law Seriously — Europe's Private Law and the Poverty of the Orthodoxy", (2006) 54 *American Journal of Comparative Law* 401.

F. Econometrics

49. Ralf Michaels, "Comparative Law by Numbers? Legal Origins Thesis, *Doing Business* Reports, and the Silence of Traditional Comparative Law", (2009) 57 *American Journal of Comparative Law* 765.

50. Katharina Pistor, "Rethinking the 'Law and Finance' Paradigm", [2009] *Brigham Young University Law Review* 1647.

51. Holger Spamann, "Empirical Comparative Law", (2015) 11 *Annual Review of Law and Social Science* 131.

52. "Econocentrism", (2009) 59 *University of Toronto Law Journal* 215.

53. Sally Engle Merry & Summer Wood, "Quantification and the Paradox of Measurement: Translating Children's Rights in Tanzania", (2015) 56 *Current Anthropology* 205 [with "Comments"].

SUPPLEMENTARY READING (OPTIONAL)

54. "Negative Comparative Law", (2015) 10/2 *Journal of Comparative Law* 405.

55. "Law's Translation, Imperial Predilections and the Endurance of the Self", (2014) 20/3 *The Translator* 290.

56. "Foreign Law in the Third Space", (2012) 4 *Juridikum* 32.

57. "Foreign Law: Understanding Understanding", (2011) 6/2 *Journal of Comparative Law* 67.

58. "On the Singularity of Law", (2006) 47 *Harvard International Law Journal* 517.

59. "The Same and the Different", in Pierre Legrand & Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003), pp. 240-311.

60. "The Impossibility of 'Legal Transplants'", (1997) 4 *Maastricht Journal of European & Comparative Law* 111.

Assessment

The assessment will take the form of a final "take-home", 3-hour examination worth 100% of the grade. This examination will consist of one question. Your typescript should number 9 to 10 pages of double-spaced text in 12-point standard typeface within the usual margins. Your typescript **must** feature a reasonable number of references to class materials. If you so wish, you may also mention other documentation. You are at liberty to refer to your class notes by indicating, if possible, the day of the relevant class. All references can be included in the body of the text or presented by way of footnotes. You need not follow any particular citation model. Typescripts will be anonymized before they are sent to the instructor for marking. For the sake of fairness to other students, typescripts that are submitted late or fail to meet the requirements will be penalized at the instructor's discretion.

The final examination will be circulated at the end of class on Friday, 14 September 2018. Your typescript will be due via e-mail by Tuesday, 18 September 2018 at 12h00 noon (San Diego time).