

IED

Ecole de droit de la Sorbonne

Université de Paris I

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Comparative Law II

Instructor: Professor Pierre Legrand (<pierre_legrand@mac.com>).

Summary of the Course: Building on the *acquis* of Comparative Law I, this course offers an in-depth investigation of what it means to research foreign law. In particular, it probes how information about foreign law gets constructed and disseminated.

Timeline: Second Semester.

Mode of Instruction: This course consists of ten one-hour lectures pre-recorded in English via the Zoom platform. Students can listen to these lectures at their leisure. Readings are assigned in connection with the lectures, which students are invited to consider in preliminary fashion in advance of the lectures and review at greater length after the lectures. In addition, this course consists of eight one-hour meetings to take place live via the Zoom platform. The Zoom link regarding the eight meetings will be communicated in due course via the IED. The meetings are planned for March and April. Their precise dates and times will be communicated in due course via the IED. Readings are assigned in connection with the meetings, which students are invited to consider in preliminary fashion in advance of the meetings and review at greater length after the meetings. Meetings are understood as discussion forums affording opportunities to revisit (and further probe) the lectures. Students will be invited to raise their questions and to answer the instructor's. Active participation in the meetings – including through the opening of the Zoom camera – is strongly encouraged. All reading materials, whether concerning the lectures or the meetings, can be downloaded from <www.pierre-legrand.com> at the page "IED".

Assessment: There will take place a final, "take-home" examination consisting of one general question inviting a personal and critical response. The examination will be made available on the occasion of the last meeting. Students will have two weeks to type a 2,000-word essay, which they will then proceed to submit via e-mail. Although students are strongly encouraged to write in English, they retain the option to write in French. The decision to write in either language will be neither rewarded nor penalized. Specifically, errors of grammar or syntax in English will not be sanctioned. Also, students are free to structure their answer by way of a classical French outline ("*plan*") or not. Again, the decision to proceed either way will be neither rewarded nor penalized. Finally, students are free to operate in the first-person singular as is the practice in anglophone countries ("I think that..."; "In my view, ..."). This approach, however, remains entirely discretionary.

Learning Objectives

The principal aims of this course are to:

- Understand and critically assess the process whereby information about foreign law is produced as knowledge.

- Understand and critically assess the principal ideologies and discourses underlying comparative interventions in law.
- Understand and critically assess the salient theoretical pitfalls attendant upon research into foreign law.
- Understand and critically assess the protocolar choices required to be made by comparatists-at-law.
- Understand how to conduct critical comparative research about law.

Lectures

1. To Compare and to Compare Laws

2. Comparison as Differentiation

A. Six Differences – and Two General Observations

i. Laws and Worlds: Excerpt from Ellul's [Document 1]

ii. Laws *inter se*: Excerpts from Leibniz's and Tarde's [Document 2]

iii. Understanding and Laws: Excerpts from Gadamer's, Heidegger's, and Derrida's [Document 3]

A Note on Gadamer (PL, "Gadamer", in David S. Clark [ed.], *Encyclopedia of Law and Society*, vol. 2 [Thousand Oaks, CA: Sage 2007], pp. 617–18) [Document 4]

A Note on Heidegger (PL, "Heidegger", in David S. Clark [ed.], *Encyclopedia of Law and Society*, vol. 2 [Thousand Oaks, CA: Sage, 2007], pp. 700–1) [Document 5]

A Note on Derrida (PL, unpublished) [Document 6]

iv. Inscription and Laws (Word/World): Excerpts from Legendre's, Derrida's, and Beckett's [Document 7]

3. Comparison as Differentiation, Once More

v. Language and Laws: Excerpts from Various English Translations of *L'Etranger* and of *Die Verwandlung* [Document 8]

Simone Glanert and PL, "Foreign Law in Translation: If Truth Be Told...", in Michael Freeman and Fiona Smith (eds), *Law and Language* (Oxford University Press 2013), pp. 513–32 [Document 9]

vi. Comparatists *inter se* (At the Bodleian – or Elsewhere)

vii. On Goodman, Foucault, Derrida, Breyer, and Glendon (PL, summarizing PL, *Negative Comparative Law: A Strong Programme for Weak Thought* [Cambridge University Press 2022], pp. 233–35) [Document 10]

viii. The Case for Empowerment

B. Not Badiou, but Steiner (Excerpts from Badiou's [Document 11] and from Steiner's [Document 12])

C. Three French Examples

i. The Headscarf [Document 13]

ii. The Burkini [Document 14]

Kimberley Brayson, "Of Bodies and Burkinis: Institutional Islamophobia, Islamic Dress, and the Colonial Condition", (2019) 46 *J. L. & Society* 55 [Document 15]

iii. The Handshake [Document 16]

D. This and That (PL, summarizing PL, *Negative Comparative Law: A Strong Programme for Weak Thought* (Cambridge University Press 2022), pp. 238–45) [Document 17]

E. Jorge Luis Borges, "Averroës' Search", in *Collected Fictions* (Andrew Hurley trans., Penguin 1998 [1947]), pp. 235–41 [Document 18] + A Note on Incommensurability (PL, unpublished) [Document 19]

4. Comparison as Invention

A. The Glenn Controversy [Documents 20, 21, and 22]

B. A Note on Invention (PL, unpublished) [Document 23]

C. Invention, Applied – Female Dress [Document 24]

D. Invention, Applied Again – "King Lear" (and Excerpt from Derrida's) [Document 25]

E. Excerpts from Gadamer's, Heidegger's, and Beckett's [Document 26]

F. A Note on Entitlement (PL, unpublished) [Document 27]

5. Comparison as Enculturation (The Double Bind)

A. Comparatists

i. Acosta, Gadamer, and Heidegger [Document 28]

ii. Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 3d ed. (Tony Weir trans., Oxford University Press 1998) [Document 29] + Document 30

B. Law-Texts

i. Religious Dress

a. French Judicial Decision – *Ghazal* [Document 31]

b. US Judicial Decision – *Cheema* [Document 32]

c. Canadian Judicial Decision – *Multani* [Document 33]

ii. French Law of Termination of Contract (PL, unpublished) [Document 34]

C. Culture, Then

Roy Wagner, *The Invention of Culture*, 2d ed. (University of Chicago Press 1981), pp. 1–16 [Document 35]

PL, “Comparative Legal Studies and the Matter of Authenticity”, (2006) 1/2 J. Comp. L. 365, pp. 374–93 (On Culture) [Document 36]

[*contra*: Zweigert & Kötz (On Offer and Acceptance) – Document 37 / Excerpts from Michaels *et al.* – Document 38]

6. The Orthodoxy’s Positivism: A Strong Critique

- A. Excerpts from Zweigert & Kötz’s [Document 39]
- B. Excerpts from Kischel’s (and Frankenberg’s) [Document 40]
- C. Excerpts from Gordley’s [Document 41]
- D. Excerpts from Watson’s and Markesinis’s [Document 42]

7. The Orthodoxy’s Cartesianism: A Strong Primordial Critique

- A. PL, “Paradoxically, Derrida: For a Comparative Legal Studies”, (2005) 27 Cardozo L. R. 631, pp. 645–54 (Kötz as Descartes) [Document 43]
- B. Excerpts from Heidegger’s [Document 44]

8. After Davos – Gadamer’s Hermeneutics

Collected Excerpts from Gadamer’s [Document 45]

9. After Davos – Derrida’s Deconstruction

Collected Excerpts from Derrida’s [Document 46]

10. The Culturalist Advantage

- A. James Q. Whitman, “The Two Western Cultures of Privacy: Dignity Versus Liberty”, (2004) 113 Yale L.J. 1151 [Document 47]
- B. 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 L.R. 1073 [Document 48]

Meetings

1. Comparison as Differentiation

PL, “The Guile and the Guise: Apropos of Comparative Law as We Know It”, (2021) 16 Asian J. Comp. L. 155 [Document 49]

2. Comparison as Invention

PL, “What Is That, To Read Foreign Law?”, (2019) 14/2 J. Comp. L. 294 [Document 50]

3. Comparison as Enculturation (The Double Bind)

PL, “Negative Comparative Law: The Sanitization Enterprise”, (2023) 10 Revista de Investigações Constitucionais/J. Constitutional Research 13 [Document 51]

4. The Orthodoxy's Positivism: A Strong Critique

PL, "Kischel's Comparative Law: *Fortschritt ohne Fortschritt*", (2020) 15/2 J. Comp. L. 292 [Document 52]

5. The Orthodoxy's Cartesianism: A Strong Primordial Critique

Simone Glanert, "Method?", in Pier Giuseppe Monateri (ed.), *Methods of Comparative Law* (Elgar 2012), pp. 61–81 [Document 53]

6. After Davos – Gadamer's Hermeneutics

Simone Glanert, "The Interpretation of Foreign Law: How Germane Is Gadamer?", in Simone Glanert and Fabien Girard (eds), *Law's Hermeneutics: Other Investigations* (Routledge 2017), pp. 63–79 [Document 54]

7. After Davos – Derrida's Deconstruction

PL, "Siting Foreign Law: How Derrida Can Help", (2011) 21 Duke J. Comp. & Int'l L. 595 [Document 55]

8. The Culturalist Advantage

PL, "Negative Comparative Law and Its Theses", (2021) 16/2 J. Comp. L. 641 [Document 56]

The Tool-Box, Then [Document 57]