

University of San Diego School of Law

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Comparative Law

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Abstract

Most courses in law school are about local law. This course is different: it focuses on foreign law. Obviously, foreign law matters to all local lawyers operating on the international scene, for example in international business or in international arbitration. And just as evidently, foreign law can be very important within local law also. Quite apart from the obvious matters of law reform and legal scholarship, a huge quantity of legal situations arising locally involve foreign law. Think of a contract entered into in Johannesburg governed by German law or of a deceased person from Vancouver bequeathing real estate in France or of the victims of a massive chemical explosion in India suing in U.S. courts. More controversially, there are those (including, prominently, some U.S. Supreme Court Justices) who claim that, in an age of so-called “globalization” when local law is more interconnected with foreign law than ever before, local law ought to derive inspiration from foreign law, for instance in constitutional litigation involving the rights of sexual minorities, the death penalty, or life imprisonment without parole. This course applies itself critically to this debate and discusses to what extent foreign law can or must act as persuasive authority locally. In addition, it considers at length two related questions, both of them primordial. First, what are the issues to which a local lawyer must be attuned in getting to know foreign law? Secondly, what must be done in order to optimize meaningful understanding of foreign law? As regards both matters, various theoretical topics are addressed from a resolutely indisciplined perspective and some case-studies are considered. No prior knowledge of foreign law or of a foreign language (or of another discipline) is required or assumed.

Learning Objectives

The principal aims of this course are to:

- Understand and critically assess the rationales underlying comparative interventions in law.
- Understand and critically assess the salient theoretical pitfalls attendant upon the comparison of laws.
- Understand and critically assess the protocolar choices required to be made by comparativists.

- Understand and critically assess the principal ideologies and discourses within the field of comparative law.
- Conduct critical comparative research about law.

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1. Bringing Foreignness Into Play

A. *Lawrence, Roper, and Graham* [Document 1]; Posner [Document 2]

B. *Bodum* [Document 3]

2. Comparison as Differentiation

A. Six Differences — and Two General Observations

i. Laws and Worlds: Ellul [Document 4]

ii. Laws *inter se*: Leibniz, Gadamer, and Tarde [Document 5]

- A Note on Gadamer [Document 6]

iii. Understanding and Laws: Gadamer, Heidegger, and Derrida [Document 7]

- A Note on Heidegger [Document 8]

- A Note on Derrida [Document 9]

iv. Inscription and Laws (Word/World): Deleuze and Derrida [Document 10]

v. Language and Laws: *L'Etranger/Die Verwandlung* [Document 11]

- Simone Glanert and PL, "Foreign Law in Translation: If Truth Be Told..." [Document 12]

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

vii. Goodman, Foucault, Derrida, and Others (PL, summarizing PL, *Negative Comparative Law: A Strong Programme for Weak Thought* [Cambridge University Press 2022], pp. 233-35 [Goodman, Foucault, Derrida]) [Document 13]

viii. The Case for Empowerment

B. Not Badiou, but Steiner [Documents 14 and 15]

C. Three French Examples

i. The Headscarf [Document 16]

ii. The Burkini [Document 17]

- Kimberley Brayson, “Of Bodies and Burkinis...” [Document 18]

iii. The Handshake [Document 19]

D. This and That [Document 20]

- PL, “The Guile and the Guise...” [Document 21]

E. Borges and A Note on Incommensurability [Documents 22-23]

3. Comparison as Invention

A. The Glenn Controversy [Documents 24, 25, and 26]

B. How to Read [Document 27]

C. A Note on Invention [Document 28]

D. Invention, Applied – Female Dress [Document 29]

E. Invention, Applied Again – “King Lear” (and Derrida) [Document 30]

F. Beckett [Document 31]

G. A Note on Entitlement — and on Rots [Document 32]

4. Comparison as Enculturation

A. The Double Bind

i. Comparativists

a. Acosta, Gadamer, and Heidegger [Document 33]

b. Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 3d ed. (Tony Weir transl., Oxford University Press 1998) [Document 34] + Document 35

ii. Law-Texts

a. Religious Dress

i. French Judicial Decision – *Ghazal* [Document 36]

ii. U.S. Judicial Decision – *Cheema* [Document 37]

iii. Canadian Judicial Decision – *Multani* [Document 38]

b. Termination of Contract (France) [Document 39]

B. Culture, Then [Documents 40 and 41]

[*contra*: Zweigert & Kötz – Document 42 / Michaels *et al.* – Document 43]

5. Positivism, Its Deposition – and the Case for a Strong Culturalism

A. The Orthodoxy's History and Its Theory [Documents 44, 45, 46, and 47]

B. From Descartes to Heidegger (Through Davos) [Documents 48, 49, and 50]

C. From Method to Tracing, With Derrida [Documents 51, 52, and 53]

D. Tracing, Applied and Contested [Documents 54 and 55]

6. After All

A. My Equipment [Document 56]

B. Endgame [Document 57]

Attendance Policy

Attendance is expected in all scheduled classes. Not only do the American Bar Association and the University of San Diego School of Law require attendance, but your presence in class is deemed important to your overall understanding of the material. After you have missed two (2) meetings without convincingly justifying either absence with the instructor, the instructor will send you a written notice. If you then miss a third meeting, the instructor reserves the discretion to require you to prepare and submit a written or oral report on a subject related to the course, or lower your final grade, or withdraw you from the course in line with relevant institutional regulations. The instructor reserves the discretion to count a late arrival to class or an early departure from class as an absence.

If required, compassionate accommodation will be made with specific reference to the Covid pandemic.

Assessment

The assessment will take the form of a final “take-home” examination worth 100% of the grade. This examination will consist of one question. Your typescript should number approximately 8 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 fail to meet the requirements will be penalized in line with law school regulations.

The calendar regarding the assessment will be confirmed on the occasion of the first class.