

University of San Diego School of Law

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Comparative Law

Pierre Legrand

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, a number of 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. US Lawyers, Their Foreignness

B. US Law, Its Foreignness

i. *Lawrence, Roper, and Graham* [Document 1]

- Posner [Document 2]

ii. *Bodum* [Document 3]

2. Comparison as Differentiation

A. Five Differences

i. Leibniz and Tarde [Document 4]

ii. Gadamer, Heidegger, and Derrida [Document 5]

- A Note on Gadamer [Document 6]
- A Note on Heidegger [Document 7]

iii. *World/Word* [Document 8]

iv. *L'Etranger/Die Verwandlung* [Document 9]

- S. Glanert & PL, "Foreign Law in Translation..." [Document 10]

v. Goodman, Foucault, Derrida, Breyer, and Glendon [Document 11]

B. Steiner, Not Badiou [Documents 12 and 13]

C. Three French Examples

i. The Headscarf [Document 14]

ii. The Burkini [Document 15]

- K. Brayson, “Of Bodies and Burkinis...” [Document 16]

iii. The Handshake [Document 17]

D. This and That [Document 18]

- PL, “The Guile and the Guise...” [Document 19]

E. Borges and A Note on Incommensurability [Documents 20-21]

3. Comparison as Invention

A. The Glenn Controversy [Documents 22, 23, and 24]

B. How to Read [Document 25]

C. A Note on Invention [Document 26]

D. Invention, Applied – Female Dress [Document 27]

E. Invention, Applied Again – “King Lear” [Document 28]

F. Not ROT (**R**epresentation, **O**bjectivity, and **T**ruth) – Gadamer, Heidegger, and Beckett [Document 29]

4. Comparison as Enculturation

A. The Double Bind

i. Comparativists

a. Acosta [Document 30]

b. Zweigert & Kötz [Documents 31 and 32]

ii. Law-Texts

a. Religious Dress

i. French Judicial Decision – *Ghazal* [Document 33]

ii. US Judicial Decision – *Cheema* [Document 34]

iii. Canadian Judicial Decision – *Multani* [Document 35]

b. Termination of Contract (France) [Document 36]

B. Culture, Then [Documents 37 and 38]

[*contra*: Zweigert & Kötz – Document 39 / Michaels *et al.* – Document 40]

5. The Orthodoxy's History and Its Theory [Documents 41, 42, 43, and 44]

6. From Descartes to Heidegger (Through Davos) [Documents 45 and 46]

7. From Method to Tracing, With Derrida [Documents 47, 48, 49, 50, and 51]

8. Tracing, Applied

A. PL [Document 52]

B. Culturalism, Not Positivism [Documents 53 and 54]

9. Current Issues

A. "Transplants" and Decoloniality (And Glocalization, Too) [Documents 55 and 56]

B. Econometrics [Documents 57 and 58]

C. Constitutionalism [Document 59]

10. Endgame [Document 60]

Attendance Policy

Attendance is expected in all scheduled classes. Not only do the American Bar Association and the University of San Diego require attendance, but your presence in class is deemed important to your overall understanding of the material. You may therefore miss no more than two (2) meetings. After you have missed two (2) meetings, the instructor will send you a written notice in line with institutional regulations. 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 this course, or lower your final grade, or withdraw you from the course. The instructor reserves the discretion to count a late arrival to class or an early departure from class as an absence.

Assessment

The assessment will take the form of a final "take-home" examination worth 100% of the grade. This examination will consist of one (1) question. The question will be sent to you electronically via e-mail at the set time. Your answer **must** be typed and sent electronically via e-mail by the set time. Your typescript should number approximately 2,000 words of double-spaced text in twelve-point (12-point) 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. References can be included in the body of the

text or presented by way of footnotes or endnotes. You need not follow any particular citation model. You may refer to your classnotes (with an indication of the relevant date, if possible). Typescripts that fail to meet the requirements or that are submitted late will be penalized at the instructor's discretion. The final "take-home" examination will take place on Saturday, 2 July 2022.