

University of San Diego School of Law

Fall 2020

Comparative Law

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First Readings

(All reading materials can be downloaded from www.pierre-legrand.com. Kindly go to the website page entitled “Comparative Law”.)

First Class : Tuesday, 18 August
Second Class: Thursday, 20 August
Third Class: Friday, 21 August

The first three classes will seek to address the items listed on the course outline under “Preliminaries” and Section I (“Foreign Law at Home”).

Under “Preliminaries”, familiarize yourself with documents 1-6. They consist of a French statute, a photograph taken on a beach near Nice (France) on 23 August 2016 nearly three weeks after a municipal ordinance had been enacted effectively prohibiting women from wearing the so-called “burkini”, and a French judgment. Observe how “they” do things differently elsewhere, and reflect on the document entitled “Foucault & Borges on Thinking *That*”. Proceed to situate yourself vis-à-vis the *New Zealand Herald* cartoon from 6 January 2011. Does the concept of “truth” help to solve the kind of cultural conundrum that the drawing emphasizes? This image captures many of the issues (and much of the tension) that the course will address. Read the *New York Times* on Starbucks in Europe, and ask yourself whether it makes sense to talk about “globalization”.

Section 1 of the course, “Foreign Law at Home”, focusses on two case-studies featuring U.S. law. Each illustration raises the matter of the normative relevance of foreign law in the United States. The first example concerns citation of foreign law in U.S. courts. Consider documents 7-8. What are Richard Posner’s best two arguments against foreign law being invoked by U.S. judges? What do you think of Vicki Jackson’s rejoinder? The second example involves proof of foreign law in U.S. courts. Read documents 9-11. As regards the *Bodum* case, whose camp are you in? Do you favour Chief Judge Easterbrook and Judge Posner’s stance, or do you rather find merit in Judge Wood’s objections?

Looking Ahead

On the assumption that we are willing to allow foreign law to carry some normative weight as a matter of U.S. law — as appears reasonable for students of “comparative law” — and because we are prepared to accept that it makes sense to take foreign law seriously for other reasons also, we have to turn our attention to some of the main (epistemic) challenges that the study of foreign law will inevitably raise. This is the focus of Section II of the course. What are the difficulties concerning the acquisition of knowledge that Borges’s, Heidegger’s, and Badiou’s texts illustrate (documents 12-14)? Now, examine the excerpt from Steiner’s autobiography (document 15), and assess the major lesson that he is trying to impart. Can Steiner and Badiou (document 14) be reconciled? Can Steiner be applied to the issue that Shweder and Oba analyze (documents 16-17), or are there limits beyond which Steiner will not help even the most enthusiastically-minded comparativist? What is Shweder’s message concerning legal/cultural regulation? And what is Oba’s argument? Then, consider the Glenn materials (documents 18-20). There are three documents to be found under the sub-heading “Speculation, All”. These texts basically consist of various reviews (or excerpts) regarding Glenn’s *Legal Traditions of the World*.

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The cast of characters is as follows. Michel Foucault (1926-1984) continues to be an extraordinarily influential French philosopher worldwide more than thirty years after his death. For his part, Jorge Luis Borges (1899-1986), an Argentine writer, remains one of the best-known storytellers and essayists of the XXth century. Richard Posner (1939-) is a distinguished U.S. legal academic, most famously associated with the law-and-economics movement. He was a judge on the U.S. Court of Appeals for the Seventh Circuit from 1981 until 2017. Vicki Jackson (1950-) teaches law at Harvard. Alain Badiou (1937-) is a leading contemporary French philosopher. Martin Heidegger (1889-1976) continues to be regarded as one of the most important — and controversial — thinkers in the history of German philosophy in particular and of modern philosophy in general. George Steiner (1929-2020) was a well-known U.S. (although French-born and European-based) professor of comparative literature and a literary critic. Richard Shweder (1945-) is an anthropologist at the University of Chicago. Abdulmumini Oba teaches law at the University of Ilorin in Nigeria. Patrick Glenn (1940-2014) was for many years a law professor at McGill University in Montreal, Canada, and a world-famous comparatist. James Q. Whitman (1957-) teaches comparative law at Yale.