

Comparative Law

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Fall 2014
Mon/Wed/Fri. 1:15 p.m. –
2:30 p.m., Room MMR
Office Hours: Mondays
2:45 p.m. - 5 p.m.
or by appointment

Introduction

Comparative Law has a rich tradition. Indeed, the comparative approach was used in Plato's *The Republic* and Aristotle's classic work *Politics*. In *Politics*, Aristotle reviewed over 150 constitutions of Greek and other city-states to identify (what he believed to be) the best form of government. The comparative approach can also be found in such classic works as Thomas Hobbes' *Leviathan*, John Locke's *Two Treatises of Government*, and Alexis de Tocqueville's *Democracy in America*. There has been scholarship on the influence that the Iroquois played on the specific individuals now called the "Founding Fathers" and the similarities shared with the structure of the Iroquois Confederation, probably completed by 1525, by the U.S. Constitution. We trace humankind's attempt to weaves together a "mosaic of history".

The field of Comparative Law is quite diverse. It includes the study of macro-level systems such as international law, the law of the North American Free Trade Agreement and other bilateral and regional trade agreements around the globe (numbering more than 300) as well as European Union law. It also includes the study of micro-level systems such as common law and civil law approaches, Islamic law, and indigenous legal systems. Despite this diversity, the goal of Comparative Law remains constant - to provide a basis for critical comparisons between legal systems and legal cultures.

Comparative Law is unique among law school courses because it is a method of study rather than a body of rules. For this reason, it has been described as an intellectual activity with law as its object and comparison as its process. Its underlying methodology involves the use of comparative analysis - that is, how to look at diverse norms, rules, and institutions from a comparative perspective. Because it provides a point of comparison, the study of comparative law is useful to students, practitioners, legislators, and judges.

This course has several goals. It seeks to teach students about the comparative method. It then seeks to introduce students to a number of different legal systems, international and domestic. Through this course, students will gain a greater awareness of the diversity of law and legal institutions. They will also gain a better understanding of the U.S. legal system through the readings and class discussions.

But, we live in a global world with an emerging transnational legal order. This trimester's course benefits from the participation of law professors and lawyers from other countries where possible. They will each bring their own legal cultures and foreign experiences to this course.

Course Requirements

Students shall write a research paper. The research paper may be submitted as a scholarly writing paper or as a non-scholarly writing paper. This option must be indicated at the beginning of the semester. Scholarly writing papers have different requirements than non-scholarly writing papers. Please speak with your Legal Skills professors concerning the requirements and citation formats. Students must submit via email to Professor Cooper a brief summary, bibliography, and skeleton outline of their respective proposed research papers by 11:59 p.m. on October 17, 2014. Failure to do so will result in a lower grade for the paper. Students must be prepared to make a presentation about their respective paper topics and research during class time for twenty minutes starting Wednesday, November 12, 2014. The paper is due by 5 p.m. on the last day of classes for the fall trimester 2014. The paper must be printed and submitted to Faculty Support Services (225 Cedar Street, 3rd floor) and date/time stamped and signed by a member of the Faculty Support Services team (on the front page of the paper). If these procedures are not followed, the grade for the final paper will be negatively affected. The final paper will count for 70% and the presentation will count for 10% of the course grade.

Class participation is an integral component of this course. Class participation includes the following: (1) attendance; (2) punctuality; (3) preparation; and (4) professionalism. Students are expected to attend class regularly, to be punctual, and to be fully prepared to discuss the readings. Accordingly, class participation will count for 20% of the course grade. There are push points as part of the grading system in this course.

Course Materials

Required:

COMPARATIVE LAW COURSE READER (available at www.follett.com)

Course Outline and Readings

I. An Introduction to Comparative Law

Monday, September 15

Introduction to the Course/Discussion of Course Themes

Required Reading:

John C. Reitz, *How To Do Comparative Law*, 46 AM. J. COMP. L. 617 (1998)

Wednesday, September 17

Comparative Law – Legal Anthropology or Macro Economics?

Required Reading:

Eric Hershberg & Fred Rosen, *Turning the Tide*, in *LATIN AMERICA AFTER NEOLIBERALISM: TURNING THE TIDE IN THE 21ST CENTURY* 26-48 (2006) (edited by Eric Hershberg & Fred Rosen).
 James M. Cooper, *Competing Legal Culture and Legal Reform: The Battle for Chile*, 29 *MICH. J. INT'L LAW* 501 (2008).

Friday, September 19

The Comparative Method Applied to Domestic Problems

Required Reading:

Greenspan v. Slate, 12 N.J. 426 (1953)
 Knight v. Florida, 528 U.S. 990 (1999)
 Roper v. Simmons, 125 S. Ct. 1183 (2005) (excerpts)

Monday, September 22

An Introduction to Comparative Politics

Required Reading:

Ricardo Hausmann, *Prisoners of Geography*, *FOREIGN POL'Y.* 45 (Jan/Feb 2001), available at http://www.hks.harvard.edu/fs/rhausma/editorial/fp01_prisoners_geog.htm (last visited on Sept. 6, 2011).
 Lawrence E. Harrison, *Culture Matters*, *NAT'L INTEREST* 55 (Summer 2000), available at <http://nationalinterest.org/article/culture-matters-680> (last visited on Sept. 6, 2011).

Short lecture on Scholarly Writing Requirement by Professor Roberta Thyfault.

Wednesday, September 24

Film: Our Brand is Crisis

Required Reading:

Joshua Keating, *Bolivia's Lithium-Powered Future*, *FOREIGN POLICY*, Oct. 21, 2009.
 José R. Cárdenas, *Democracy in Bolivia survives – for now*, *FOREIGN POLICY*, Apr. 12, 2010, available at http://shadow.foreignpolicy.com/posts/2010/04/12/democracy_in_bolivia_survives_for_now (last visited on Jan. 2, 2011).
 Stephen Johnson, *Shouts and Whispers at the Defense Ministerial of the Americas*, Nov. 26, 2011, available at http://shadow.foreignpolicy.com/posts/2010/11/26/shouts_and_whispers_at_the_defense_ministerial_of_the_americas (last visited on Jan. 2, 2011).
 Rudi Colloredo-Mansfeld, *Book Review: El Alto, Rebel City: Self and Citizenship in Andean Bolivia*, Sian Lazar, 33 *POLAR: POL. & LEGAL ANTHROPOLOGY REV.* 386 (Nov. 2010).

Friday, September 26

Film: Our Brand is Crisis (Part II) – DVD on Reserve at CWSL

Law Library.

II. Macro Level Studies

Monday, September 29 *Public International Law I: Sources and Process*

Required Reading:

Steven Ratner, *International Law: The Trials of Global Norms*, FOREIGN POL'Y 65 (Spring 1998).

James M. Cooper, *Justice continues to be trumped by the concern for world order*, GLOBE AND MAIL, July 2, 1993, A14.

Wednesday, October 1 *Public International Law II: The Use of Force and the Right of Self-Determination*

Required Reading:

James Cooper, *State of the Nation: Therapeutic Jurisprudence and the Evolution of the Right of Self-Determination in International Law*, 17 BEHAVIOURAL SCIENCES & THE LAW 607 (1999).

Friday, October 3 *World Trade Organization – From GATT to the Development (Doha) Round*

Required Reading:

Raj Bhala & James Cooper, *A world trade round gone bad*, SAN DIEGO UNION-TRIB., June 3, 2011, available at <http://www.utsandiego.com/news/2011/jun/03/a-world-trade-round-gone-bad/> (last visited on July, 24, 2014).

James M. Cooper, *Spirits in the Material World: A Post-Modern Approach to United States Trade Policy*, 14 AM. U. INT'L L. REV. 957 (1999).

Monday, October 6 *World Trade Organization Dispute Resolution and MERCOSUR, Trans-Pacific Partnership, ALBA, and the Stumbling Blocs of Regional Trade Organizations*

Required Reading:

James Cooper, *U.S. not the only trading game for Latin America*, SAN DIEGO UNION-TRIB., Sept. 28, 2008, available

at http://www.signonsandiego.com/uniontrib/20080928/news_1z1e28cooper.html (last visited on July 24, 2014).

James Cooper, *Look south, not just east: Re-engaging Latin America*, SAN DIEGO UNION-TRIB.,

Dec. 14, 2005, *available*

at http://www.utsandiego.com/uniontrib/20051214/news_lz1e14south.html (last visited on July 24, 2014).

John Ragosta, et al., *WTO Dispute Settlement is Flawed and Must be Fixed*, 37 INT'L LAWYER 697 (2003).

Wednesday, October 8 *20 Years of NAFTA*

Required Reading:

James M. Cooper, *The North American Free Trade Agreement and Its Legacy on the Resolution of Intellectual Property Disputes*, 43 CAL. WEST. INT'L L. J. 155 (2012).

Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POLICY IN INT'L BUS. 391 (1993).

Friday, October 10 *Legal Systems Without Enforcement: NAFTA Side Agreements (on Labor and the Environment)*

Guest lecture by Cesar Luna, Esq.

Required Reading:

Metales y Derivados, North American Commission for Environmental Cooperation Final Factual Record, SEM-98-007, Feb. 7, 2002, *available at* <http://www.cec.org/files/pdf/sem/98-7-FFR-e.pdf>

Monday, October 13 *NAFTA Chapter 19 and 20 Dispute Resolution and Chapter 11 Investment Dispute Resolution*

Required Reading:

Daphne Eviatar, *The NAFTA Edge*, AMERICAN LAWYER, 80 (October 2005).

Chapter 11, *Canada-Mexico-United States: North American Free Trade Agreement* (Dec. 17, 1992), 32 I.L.M. 605 (1993) (Chs. 10-22).

Methanex Corp. v. United States, Award, 44 I.L.M. 1345, 17(6), August 3, 2005).

Exxon owed \$1.6 bn by Venezuela for 2007 nationalization, BBCnews.com, Oct. 9, 2014, *available at* <http://www.bbc.com/news/business-29561345> (last visited on Oct. 9, 2014).

Mobil Venezolana de Petróleos Inc. v. Bolivarian Republic of Venezuela, ICSID/World Bank, Oct. 9, 2014, *available*

at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC4952_En&caseId=C256 (last visited on Oct. 9, 2014).

Wednesday, October 15 *International Criminal Law*

Required Reading:

Massieu v. Reno, 91 F.3d 416 (3d Cir. 1996); United States v. Alvarez-Machain, 504 U.S. 655 (1992); Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004); United States v Noriega, 117 F.3d 1206 (11th Cir. 1997).

Friday, October 17 *Special Tribunal for Lebanon – International Criminal Law*

Guest Lecture Colonel Linda Strite Murnane, Chief, Court Management Support Services for the Special Tribunal for Lebanon, Leidschendam, The Netherlands

Note: By 11:59 p.m. on October 17, students must submit the outlines and preliminary bibliographies for their respective papers for the course. Students are expected to have met or communicated with Professor Cooper to confirm their respective topics.

Monday, October 20 *An Introduction to the European Union: A Brief History*

Required Reading:

Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).
 Van Gend en Loos [1963] E.C.R. 1
 Costa v. ENEL [1964] E.C.R. 585

Wednesday, October 22 *European Union Law*

Required Reading:

James Cooper, *Questioning Europe's Promise*, SAN DIEGO UNION-TRIB., Feb. 3, 2005, available at http://www.signonsandiego.com/uniontrib/20050203/news_lz1e3cooper.html (last visited on Sept. 12, 2014).

A Pop History of the European Union, THE GLOBALIST, Oct. 29, 2013, available at <http://www.theglobalist.com/pop-history-european-union/> (last visited on Oct. 9, 2014).

III. Globalization and the International Rule of Law

Friday, October 24 *An Introduction to Legal Pluralism*

Required Reading:

The Constitution of the Islamic Republic of Afghanistan (2004), *available at* <http://www.embassyofafghanistan.org/page/constitution> (last visited on Oct. 23, 2014).
 The Constitution of Iraq (2005), *available at* http://www.iraqinationality.gov.iq/attach/iraqi_constitution.pdf (last visited on Oct. 23, 2014).
 Nafay Choudhury, Reconceptualising Legal Pluralism in Afghanistan, *WINDSOR REV. LEGAL & SOC. ISSUES* 21 (2010).
 Rachel Sieder, The Judiciary and Indigenous Rights in Guatemala, *5 INT'L J. CONST. L.* 211 (2007).
 Moritz Hartmann, Review Essay: “Lost in Disordered Clouds: Transnational Legal Pluralism and the Regulation of Global Asymmetries” – Mireille Delmas-Marty’s Ordering Pluralism (2009), *11 GERMAN L. J.* 1025 (2010).

IV. Micro Level Studies

Monday, October 27 *The Common Law/U.S. Legal Culture*

Required Reading:

Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000)
 Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001)
 Will Carless, *Justice for Sale, Part One: Arbitration Purgatory*, Voice of San Diego.com, May 20, 2014, *available at* <http://voiceofsandiego.org/2014/05/20/justice-for-sale-part-one-arbitration-purgatory/> (last visited on Oct. 1, 2014).
 Will Carless, *Justice for Sale, Part Two: Ignoring the Law*, Voice of San Diego.com, May 23, 2014, *available at* <http://voiceofsandiego.org/2014/05/23/justice-for-sale-part-two-ignoring-the-law/> (last visited on Oct. 1, 2014).

Wednesday, October 29 *An Introduction to the Civil Law Tradition*

Required Reading:

Rivera v. Flav-O-Rich, 876 F. Supp. 373 (D.P.R. 1995)
 United States v. Acosta-Martinez, 252 F.3d 13 (1st Cir. 2001)
 Richard B. Cappalli, *At the Point of Decision: The Common Law’s Advantage Over the Civil Law*, *12 TEMP. INT’L & COMP. L.J.* 87 (1998).
 JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* (Third Edition), 1-33.

Friday, October 31 *Horizontal Problem-Solving Mechanisms/Usos y Costumbres*

Required Reading:

Convention Concerning Indigenous and Tribal Peoples in Independent Countries, *entered into force* Sept. 5, 1991, *reprinted in* *28 I.L.M.* 1382 (1989)

State of Washington v. Guthrie, 77 Wn. App. 678 (1995)

Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126 (November-December 1995)

Robert Yazzie, “Hozho Nahasdlii” - *We Are Now In Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117 (1996).

Kimberly Inksater, *Transformative Juricultural Pluralism: Indigenous Justice Systems in Latin America and Human Rights*, 60 J. LEGAL PLURALISM (2010), available at <http://www.jlp.bham.ac.uk/volumes/60/inksater-art.pdf> (last visited on Sept. 21, 2014).

Donna Lee Van Cott, *Legal Pluralism and Informal Community Justice Administration in Latin America*, Informal Institutions and Latin American Politics Conference, April 24-25, 2003, available at <http://www.nd.edu/~cmendoz1/datos/papers/vancott.pdf>.

Leila Chirayath, Caroline Sage & Michael Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, July 2005, available at http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf (last visited on Aug. 2, 2008).

V. The Convergence of Law

Monday, November 3 *Comparative Corporate Governance*

Required Reading:

“Seen and Not Seen”: *System Friction and the Battle Over Corporate Governance*, in TRENDS IN WORLD TRADE POLICY: ESSAYS IN HONOR OF SYLVIA OSTRY (edited by Alan Alexandroff) (2006).

Monday, November 10 *Legal Transplantation U.S.-Style*

Required Reading:

ALAN WATSON, LEGAL TRANSPLANTS: *AN APPROACH TO COMPARATIVE LAW 21* (2nd, edition, 1993).

R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law*, 58 INT’L ORG. 103 (Winter 2004).

VI. Student Presentations

Wednesday, November 12 *Student Presentations of Works in Progress and The Caracas Consensus*

Required Reading:

John Williamson, *From Reform Agenda*, FINANCE & DEVELOPMENT, September 2003, at 10.

Friday, November 14 *Student Presentations of Works in Progress*

Required Reading:

Joel D. Hirst, *A Guide to ALBA*, AMERICAS QUARTERLY, available at <http://www.americasquarterly.org/hirst/article> (last visited on Nov. 7, 2014).

The travails of ALBA, ECONOMIST, Oct. 18, 2014, available at <http://www.economist.com/news/americas/21625792-more-successful-latin-americas-populists-have-become-more-pragmatic-travails-alba> (last visited on Nov. 7, 2014).

Declaration on the Establishment of a New Economic Order, Adopted by the U.N. General Assembly, May 1, 1974. G.A. Res. 3201 (S-VI), 6 (Special) U.N. GAOR, 6th Spec. Sess. Supp. No. 1, at 3, U.N. Doc. A/9559 (1974); reprinted in 3 I.L.M. 715 (1974). Acuerdo para la aplicación de la alternativa bolivariana para los pueblos de nuestra América y el tratado de comercio de los pueblos (“ALBA”), April 29, 2006 found at <http://www.alternativabolivariana.org/modules.php?name=Content&pa=showpage&pid=516>. Agreement between the President of the Bolivarian Republic of Venezuela and the President of the Council of State of Cuba, for the Application of the Bolivarian Alternative for the Americas, Dec. 14, 2004, available at <http://www.mltoaday.com/Pages/NLiberation/Cuba-VenezPact.html/>.

Monday, November 17 *Student Presentations of Works in Progress*

Wednesday, November 19 *Student Presentations of Works in Progress*

Monday, November 24 *Convergence, Clash, and Alternatives for a New International Economic Order*

Required Reading:

Francis Fukuyama, *The End of History?*, 16 NAT’L INTEREST 3 (Summer 1989)

Samuel Huntington, *The Clash of Civilizations?* 72 FOREIGN AFF. 22 (Summer 1993)

End of Course