COURSE DESCRIPTION

Comparative Law


Overview: A general introduction to the nature of law and legal institutions outside the United States and to the comparative method of studying law. Our principal focus is on the civil law tradition in Europe, Latin America, and East Asia and on selected countries’ characteristic legal structures and processes. We may also review the importance of indigenous law traditions in Latin America and Asia, as well as the American lawyer’s practical problems in pleading and proving foreign law. Since European Union law is based on the legal tradition of civil law countries, the comparative law course is a valuable foundation for those taking EU law.

Description

CHAPTER 1. INTRODUCTION TO COMPARATIVE LAW
A. Major Legal Traditions in the Contemporary World
   1. Legal Traditions
   2. Origins and Spread of the Civil Law Tradition
   3. The Islamic Legal Tradition
   4. The Hindu Legal Tradition
   5. The Variety of African Legal Systems
   6. A Theory of Legal Tradition
   7. Further Reading about the Major Religious and Non-Western Legal Traditions
B. Comparison of the Common Law and the Civil Law
   1. The Comparative Studies of Sir William Blackstone
   2. Comparative Study of Law in the United States
   3. Convergence and Divergence of the Civil Law and the Common Law
   4. The Western Legal Tradition
   5. Harmonization or Diversity
C. Origins and Objectives of Comparative Law
   1. Origins
   2. Objectives and Uses
   3. Comparative Legal Practice
   4. Scientific Explanation in Comparative Law
   5. The Comparison of Japanese Law
D. Law and Development
   1. Exporting the Rule of Law
   2. The Role of Law in Asia
   3. Advantages and Disadvantages of the Rule of Law
E. Methods of Comparative Law
   1. Functionalism
   2. Legal Transplants
3. Ideal Types
4. Rhetoric and Culture
5. Law and Economics
6. Law as Legal Systems

F. A First Look at the Civil Law Tradition
   1. Roman Tort Law: Delict and Quasi-Delict
   2. A Louisiana Case

G. Research in Foreign and Comparative Law

CHAPTER 2. LITIGATING CASES WITH FOREIGN PARTIES OR FOREIGN LAW ISSUES IN AMERICAN COURTS

A. Pleading or Judicial Notice: Approaches to Recognition of Foreign Law Issues
   1. The Fact Approach in Practice
   2. Treating Foreign Law as “Law”
   3. Failure to Plead or Prove Foreign Law
   4. Federal Practice

B. Proving Foreign Law: Expert Witnesses and Other Sources
   1. The Use of Experts and Documents
   2. Lésion Corporelle in French Law
   3. Shubun in Japanese Law
   4. The Court Appointed Expert or Special Master
   5. Resolution on Appeal

CHAPTER 3. ROMAN LAW IN THE CIVIL LAW TRADITION

A. The Roman Civil Law, Canon Law, and Commercial Law Subtraditions

B. The Roman Civil Law Legacy
   1. Constitutional History
   2. Sources of Law: Substance and Procedure
   3. Familia and Patria Potestas
   4. Property
   5. Civil Litigation
   6. Justinian and the Corpus Juris Civilis
   7. Patria Potestas Revisited I
   8. Torts and Lex Aquilia
   9. Contracts
   10. Inheritance Law and the Legitima Portio
   11. Criminal Law and Procedure

C. Law and Government in Medieval Europe
   1. The Decay of Roman Law
   2. Law in the Early West European Kingdoms
   3. The Germanic Roman Empire and the Roman Church

D. Revival of Roman Law
   1. The Role of the University
   2. Legal Humanism
CHAPTER 4. CANON LAW, COMMERCIAL LAW, AND THE RECEPTION OF THE JUS COMMUNE IN EUROPE BEFORE THE REVOLUTION

A. Canon Law
1. The Church, Universities, and Canon Law
2. Gratian’s Decretum
3. Jurisdiction over Persons and over Subject Matter
4. Papal Government
5. Codex Iuris Canonici
6. A Canon Law Case
7. Natural Law

B. Commercial Law
1. The Law Merchant
2. Partnerships and Contracts

C. Reception of the Jus Commune in Europe
1. Demand for Academic Lawyers
2. A Jus Commune Case
3. Processes of Reception
4. Reception in Iberia
5. Patria Potestas Revisited II
6. Resistance to Roman Law in England

CHAPTER 5. THE LEGAL TRADITIONS OF LATIN AMERICA

A. Law in Precolonial Latin America
1. The Incas and Their Legal System
2. The Aztecs and Their Legal System
3. Legal Pluralism and Indigenous Law

B. The Development of Law in Colonial Latin America
1. Spanish Conquest of the Aztecs
2. Spanish Conquest of Peru
3. European Settlement and Control
4. The Importance of Courts
5. The Judiciary in Brazil
6. Women and Family Law in Spain and Colonial America
7. Church and State and Their Indian Policy
8. Colonial Indian Legal Culture
9. Litigious Indians in Peru
10. Indigenous Rulers
11. Indian Cases in Church and Royal Courts
12. The General Indian Court

CHAPTER 6. THE INTELLECTUAL REVOLUTION AND LEGAL SCIENCE

A. The Intellectual Revolution
1. The Importance of Lawyers and Judges in the Revolution
2. Replacement of the French Parlements with the Tribunal of Cassation
3. Elements of the Intellectual Revolution
4. Natural Law
5. Natural Law and Reason in Public Law
6. Ideology of the French Civil Code
7. The French Civil Code and Its Drafting
8. Contract Law in the French Civil Code  
9. French Legal Institutions and Codes  
10. The Revolution in Italy  
11. The Revolution in Spain  
12. The Revolution in Latin America  
13. Creole Lawyers and Their Constitutions and Codes  
14. The Latin American Style  

B. German Legal Science  
1. Legal Scholars  
2. German Law Faculties and Aktenversendung  
3. The Historical School of Law  
4. Ideology of the German Civil Code  
5. The Elements of Legal Science  
6. Pandectists  
7. The German Civil Code and Its Drafting  
8. The Influence of German Legal Science  
9. Introduction to Law Courses  
10. The Juridical Act: Declaration of Intention  
11. Patria Potestas Redefined  

CHAPTER 7. THE LEGAL TRADITIONS OF EAST ASIA  

A. Law in East Asia Prior to the Nineteenth Century  
1. The Hindu-Buddhist Tradition and Law in the Kingdom of Siam  
2. The Imperial Chinese Tradition  
3. The Rule of Law in Imperial China  
4. Resolving Private Disputes in Imperial China  
5. Contract Use in Imperial China  
6. The Confucianist Tradition in Yi Korea  
7. Japan’s Ambivalent Legal Tradition  
8. Inquisitorial and Adversarial Proceedings in Tokugawa Japan  
9. Tokugawa Indirect Governance and Village Identity  

B. Reception of European Law in East Asia  
1. Codification and Legal Science in Meiji Japan  
2. The Meiji Constitution  
3. Adaptability of Western Law in Japan  
4. Legal Authority of the Head of Household  
5. Taiwan and Korea under Japanese Colonial Rule  
6. Westernization and Judicial Reform in Siam (Thailand)  
7. Indonesia under Dutch Colonial Rule  

Learning Outcomes  

Reasoning and Analysis  
- Learn the various types of legal reasoning that involve interpretation and use of codes, statutory rules, and prior case decisions in civil law countries compared to in the United States.  
- Distinguish levels of law, including a constitution, codes, and statutes and how their interaction affects legal analysis.  
- Differentiate between the logic of inductive and deductive reasoning.
• Understand how a policy or policies influence legal interpretation.
• Examine how history, various social science empirical methods, and the comparative method create knowledge about past civilizations.
• Understand the premises of legal positivism, natural law, and sociological jurisprudence.

Knowledge and Research
• Consider the use of Latin in law and the origins of civil law legal rules.
• Learn about the origins, objectives, and methods of comparative law.
• Review civil litigation with foreign parties or foreign law issues in American courts, an important aspect of current economic and cultural globalization.
• Understand that other countries, especially those influenced by the civil law tradition, approach procedure with different premises that affect the way judges and lawyers handle cases.
• Gain familiarity with the cultural history of Europe, Latin America, and East Asia and the dominance of European law in world history.

Communication
• Develop oral fluency by speaking in class about comparative law issues and taking an oral mid-term examination.

Organization of Information and Collaboration
• Develop an integrated outline of course material, class discussion, and outside reading to prepare for a written examination in the subject matter.

Conflict Resolution
• Understand the importance of culture and language in resolving conflict or disputes.

Professional Ethics
• Learn the special ethics for a lawyer that involve competent and diligent representation of a client with a foreign law problem whose own ethics or values may deviate from those of the lawyer.

Notes

1. Class participation is a factor in your final grade. Excellent participation will increase your final grade by one grading category. In general, please read the next 25 to 30 pages for the upcoming class period. Review the Notes and Questions in the course book, some of which we will discuss in class.
2. My office hours are on Wednesdays from 3:15 to 4:15.
3. The final examination will consist of three hours of essay questions based on all the book’s chapters. The exam is scheduled for Wednesday, December 4, at 1:30 pm.
4. LL.M students with a foreign law degree have the option instead of the final exam of writing a ten-page paper on a comparative law topic reviewed with the professor. It will be due no later than the last day of exams, December 13.