

**Comparative Law
Law 818**

**Fall 2013
TR 8-9:20 2211 Law**

Professor Kathryn Hendley
Offices: 410 North Hall (263-2025)
office hours: by appointment
email: khendley@wisc.edu

9101Law Building (263-5135)
office hours: 11-12 pm Wednesdays
website: available via moodle.wisc.edu

COMPARATIVE LAW

Course Description: As we look around the world, law exists in every country. But law does not work in the same way in every country. In this course, we will be exploring how law differs as we move across geographic boundaries. Our exploration will include a number of different legal traditions. Not just our own common law system, but also civil law, Islamic law, Hindu law, and Far Eastern law. We will ask how societal expectations of law change depending on its historical legal tradition and whether globalization is having the effect of blurring these distinctions. We will explore the basic legal institutions – such as constitutions, courts, judges, juries, regulations, lawyers – in a variety of contexts. We will ask how the role of lawyers shifts depending on the institutional and cultural contexts. Our focus will be less on the details of the substantive law of any single country and more on the underlying institutional infrastructure.

Course Expectations:

Writing Assignments: There are four types of writing assignments. More information about these assignments is available on the course website.

- **Readings Papers:** Students are required to write 3 short essays (3-4 pages) reflecting on the readings for class sessions (the “Readings Papers”). A schedule will be prepared to divide up the courses among the students. Though students should do all the readings and be prepared to discuss the material in class, on the days when a student is “on,” s/he will be expected to submit a “Reading Paper” in which s/he reacts to the assigned material. Readings Papers must be turned in at the beginning of the class period for which the readings being discussed are assigned.
- **Research Memo or Research Paper:** Law students are required to prepare a succinct memo (6-8 pages) using non-U.S. English-language legal sources (in English translation) in response to hypothetical legal problem set in China. If students have foreign language proficiency, then they can propose their own topic. Those students who want to satisfy their requirement for advanced legal writing through this class will have to turn in two drafts of the paper. Non-law students are required to write a substantial research paper (20-25 pages) on a topic to be mutually agreed-upon by the student and the instructor. Due by Friday, December 6th, at 5pm.
- **Report on Public Lecture:** Students are required to attend a public lecture on campus that focuses on law or legal issues in a non-U.S. setting and to write an essay (4-5 pages) reflecting on the topic of the lecture and their reaction to the argument made by the lecturer. The essay needs to incorporate at least one outside source, such as a newspaper article, law review article, or foreign regulatory or statutory material. Reports must be submitted within two weeks of the date of the lecture attended.

- **Reflection Essay:** In lieu of a final exam, students are required to write an essay that responds to a question posed with the goal of synthesizing the themes of the course.

Attendance: Students are expected to attend class regularly and to take part in class discussions and group exercises. Please notify the professor by email before class if you are going to be unable to attend and detail the reason. Failure to attend class regularly will be taken into account in the class participation portion of the grade. The class participation grade will be based primarily on the level of participation on the days when students turn in their Readings Papers. In addition to a grade on the paper itself, students will also receive a grade for their participation effort. We will also have several in-class exercises for which attendance and participation is expected.

Grades: Final grades will be calculated on the following basis: Readings Papers (30%), Research Memo/Paper (25%); Report on Public Lecture (10%); Reflection Essay (15%); Class Participation (20%).

Readings: The bulk of the readings are available in a Course Reader. The remainder are in *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, by John H. Merryman and Rogelio Perez-Perdomo, 3d ed. (Stanford Univ Press, 2007).

Part 1: Comparing Legal Traditions – Culture, Politics & Institutions

September 3: Comparing How People Experience Law

Engel, "Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand," 30 *Law & Social Inquiry* 469, 480-511 (2005)
Shaw, "Moscow Hit with Burst of Road Rage," *Moscow Times*, 8 July 2008
Rosenthal, "Chinese Street Justice: A Fender-Bender Becomes a Journey Down the Path of Least Resistance," *New York Times*, October 22, 2000
Timmons and Kumar, "India Steadily Increases Its Lead in Road Fatalities," *New York Times*, June 7, 2010
Cohen, "If Kant Were a New York Cyclist," *New York Times*, Aug. 4, 2012

September 5: Western Legal Traditions – Common and Civil Law

Merryman, *The Civil Law Tradition*, pp. 1-5, 20-33, 56-60, 80-85 (skim 6-19, 48-55)
Sample provisions on sources of law from civil law countries (Austria, Spain, Iraq)
Kagan, *Adversarial Legalism*, pp. 6-16
Opinion of the German Reichsgericht in the Matter of G., Defendant-Appellant v. St., Plaintiff-Respondent, 1st Civil Division, RGZ 103, 82, 1921
McCutcheon v. MacBrayne Ltd., 1 W.L.R. 125 (1964)
Liptak, "Foreign Courts Wary of U.S. Punitive Damages," *New York Times*, March 26, 2008
Liptak, "Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa," *New York Times*, April 12, 2009

September 10: Islamic Legal Traditions

Guest Speaker: Professor Asifa Quraishi-Landes, Law School
Sharafi, "Who Says *Shari'a* Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism," *Berkeley Journal of Middle Eastern & Islamic Law*, vol. 1, pp. 163-177

September 12: Mixed Legal Traditions

Glenn, *Legal Traditions of the World*, pp. 302-13, 336-7
Wong, "A Chinese Virtue is Now the Law," *New York Times*, July 2, 2013
Yu Hua, "When Filial Piety Is the Law," *New York Times*, July 8, 2013
van Notten, *The Law of the Somalis*, pp. 3-10, 137-144, 175-186
Gettleman, "Anarchy-Cursed Nation Looks to Bottom-Up Rule," *New York Times*, Aug 18, 2008
In re the Estate of Jacob Manasseh Meyer, Malayan Law Journal, vol. 1 (1938)
Frantz, "Ancient Secret System Moves Money Globally," *New York Times*, Oct. 3, 2001

September 17: The Impact of Colonialism on Pre-existing Legal Traditions

Guest Speaker: Professor Mitra Sharafi, Law School
Rocher, "The Creation of Anglo-Hindu Law" in *Hinduism and Law: An Introduction*, pp. 78-88
Agnes, "The Supreme Court, the Media and the UCC Debate in India" in *The Crisis of Secularism in India*, pp. 294-315
Polgreen, "South Africa debates law to support tribal law," *New York Times*, June 16, 2012

September 19: Finding the Law for Non-US Jurisdictions – Group Project

See course website for assignment.

Part 2: Comparing Legal Systems

September 24: The “Rule of Law”: Comparing Conceptual Understandings of ROL DONE

Fuller, *The Morality of Law*, pp. 33-41, 46-90

Chukwumerije, “Rhetoric Versus Reality: The Link Between the Rule of Law and Economic Development,” *Emory International Law Review*, vol. 23, pp. 399-414, 2009

Hendley, “‘Telephone Law’ and the ‘Rule of Law’: The Russian Case,” *Hague Journal on the Rule of Law*, vol. 1, pp. 241-243, 257-262, 2009

“Order in the Jungle – Economics and the Rule of Law,” *The Economist*, March 15, 2008

Non-Law Students: Deadline for Submitting Topic for Research Paper

** Paragraph on “Rule of Law” Due to Hendley’s email (khendley@wisc.edu) by 5pm on Wednesday, September 25

September 26: Group Exercise on the “Rule of Law”

ABA Rule of Law Initiative: <http://www.abanet.org/rol/>

Nossiter, “Islamists in North Mali Amputate Man’s Hand,” *New York Times*, Aug. 9, 2012

Povoledo & Fountain, “Italy Orders Jail Terms for 7 Who Didn’t Warn of Deadly Earthquake,” *New York Times*, Oct. 22, 2012

Herszenhorn, “Anti-Putin Stunt Earns Punk Band Two Years in Jail,” *New York Times*, Aug. 17, 2012

Fuller, “Thai Court Gives 10-Year Sentence for Insult to King,” *New York Times*, Jan. 22, 2013

Daley, “Who Owns This Land? In Greece, Who Knows?” *New York Times*, May 28, 2013

Zimbabwe Police Defy Order to Free Lawyer, Group Says,” *New York Times*, March 18, 2013

Barboza, “In China, Checklist for a Home Seller: First, Get a Divorce,” *New York Times*, March 8, 2013

Urbina, “Despite Red Flags About Judges, a Kickback Scheme Flourished,” *New York Times*, March 9, 2009

Fathi, “Many Try To Run, But Few Will Be Allowed,” *New York Times*, May 9, 2009

Erlanger, “France May Make Mental Violence a Crime,” *New York Times*, February 26, 2010

October 1: Evaluating Indicators of How Law Works

DONE

Bach, “Justice by the Numbers,” *New York Times*, August 10, 2010

Berkowitz, Pistor & Richard, “Economic Development, Legality, and the Transplant Effect,” *European Economic Review*, vol. 47, pp. 165-195 (2003)

Ginsburg, “Pitfalls of Measuring the Rule of Law,” *Hague Journal on the Rule of Law*, vol. 3, pp., 269-280, 2011

Check out the World Bank’s website assessing the level of the “rule of law” in countries around the world: http://info.worldbank.org/governance/wgi/mc_countries.asp [this page allows you to plug in the countries or regions of the world that most interest you]

Take a look at the World Bank’s “Doing Business” project. Then read the critiques of it.

<http://www.doingbusiness.org/>

<http://www.doingbusiness.org/rankings/> [explore the various indicators]

Fauvarque-Cosson and Kerhuel, “Is Law and Economic Contest? French Reactions to the *Doing*

Business World Bank Reports and Economic Analysis of the Law,” American Journal of Comparative Law, vol. 57, pp. 811-824, 2009

Davis, Kingsbury, and Merry, “Indicators as a Technology of Global Governance,” *Law & Society Review*, vol. 46, pp. 71-75, 90-95, 2012

Check out the World Justice Project which endeavors to measure rule of law around the world:

<http://worldjusticeproject.org/> ; <http://worldjusticeproject.org/rule-of-law-index>

Check out the indices on corruption on the Transparency International website:

http://www.transparency.org/policy_research/surveys_indices/cpi

Check out the indices on law-related issues on the Global Integrity website:

<http://www.globalintegrity.org/report>

October 3: Institutionalizing the Rule of Law Around the World DONE

Guest Speaker: Melissa Hooper, Director, ABA field office in Moscow (via skype)

Carothers & de Gramont, “The Prickly Politics of Aid,” *Foreign Policy*, May 21, 2013

Roesler, “The Ethics of Global Justice Lawyering,” 13 *Yale Human Rights & Development Law Journal*, pp. 185-97, 209-24 (2010)

Upham, “Mythmaking in the Rule-of-Law Orthodoxy,” in *Promoting the Rule of Law Abroad*, pp. 75-101

Puckett, “‘We’re Very Apolitical’: Examining the Role of the International Legal Assistance Expert,” *Indiana Journal of Global Legal Studies*, vol. 16, pp. 293-310, 2009

“The History of CEELI, the ABA’s Rule of Law Initiative, and the Rule of Law Movement Going Forward,” *Minnesota Journal of International Law*, vol. 18, pp. 304-310, 313-317, 321-322, 325-329, 337-339, 2009

Norland, “Afghan Equality and Law, but With Strings Attached,” *New York Times*, Sept. 24, 2010

Part 3: Basic Rights – Variations in How They Are Framed and Understood

October 8: International Law

Guest Speaker: Professor Alexandra Huneus, Law School

Damrosch, Henkin, Murphy, Smit, *International Law: Cases and Materials*, pp. 2-54

October 10: Constitutions and Constitutionalism

Guest Speaker: Professor Alexei Trochev, Political Science, Nazerbaev University, Kazakhstan
Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, pp. 30-33, 38-39

Jiang Qing & Daniel Bell, “A Confucian Constitution for China,” *New York Times*, July 10, 2012

Lombardi, “Constitutional Provisions Making Sharia ‘A’ or ‘The’ Chief source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?” 28 *American University International Law Review*, pp. 737-50, 764-74

US constitution: <http://www.usconstitution.net/const.html>

German constitution (Basic Law): <http://www.iuscomp.org/gla/statutes/GG.htm>

Stalin’s Report on the Draft Constitution (1936)

1977 USSR Constitution, part II:

<http://www.departments.bucknell.edu/russian/const/77cons02.html>

1977 USSR Constitution, arts. 173-174:

<http://www.departments.bucknell.edu/russian/const/77cons07.html#IX>

Iraqi constitution:

<http://www.washingtonpost.com/wp-dyn/content/article/2005/10/12/AR2005101201450.html>

Part 3: Resolving Disputes – Formal and Informal Institutions

October 15: Supranational Courts [readings available on course website]

Guest Speaker: Alexandra Huneus, Law School

Alter, “The New Terrain of International Law: Courts, Politics, Rights” (2013)

Madsen, “The Protracted Institutionalisation of the Strasbourg Court: From the Diplomacy of Law to Integrationist Jurisprudence” in, *The European Court of Human Rights between Law and Politics*, pp. 43-60.

Huneus, “Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights,” *Cornell International Law Journal* (44) 493-533 (2011).

October 17-22: Resolving Disputes – The Basic Dynamics

Film: *The Story of Qiu Ju*

Felstiner, et al., “The Emergence and Transformation of Disputes,” *Law & Society Review*, 15:3-4 (1980-81), pp. 631-49

Galanter, “Why the Haves Come Out Ahead,” *Law & Society Review*, 9:1 (1974), summary from *Law & Society: Readings on the Social Study of Law*, pp. 687-88

Joseph, “A Paradise for Those Who Take Offense,” *Int’l Herald Tribune*, Jan. 31, 2013

Hendley, “Resolving Problems Among Neighbors in Post-Soviet Russia,” *Law & Social Inquiry*, 36:2, pp. 233-59, 2011

October 24: Informal Mechanisms of Resolving Disputes

Gulliver, “Dispute Settlement Without Courts: The Ndendeuli of Southern Tanzania,” *Law in Culture and Society*, pp. 24-49

Feifer, *Justice in Moscow*, pp. 103-129

Wagatsuma and Rosett, “The Implication of Apology: Law and Culture in Japan and the United States,” *20 Law & Society Review* 462-69, 478-96 (1986)

Rosenthal, “For a Fee, Chinese Firm Will Beg Pardon for Anyone,” *New York Times*, Jan. 3, 2001

Powell, “After A.I.G., ‘I’m Sorry’ Is Still Elusive,” *New York Times*, May 20, 2013

Tabuchi & Maynard, “Toyota President Apologizes,” *New York Times*, October 3, 2009

Lagerberg & Kus, “Global Survey Sheds Light on Perceptions of International Arbitration,” <http://www.acica.org.au/downloads/International%20arbitration%20FINAL%20sept%2025%2007.pdf>

Miller, “Negotiating with Modernity: Amish Dispute Resolution,” *22 Ohio State Journal on Dispute Resolution*, pp. 477-80, 493-509

October 29: Judicial Independence – What Does It Mean?

Cohn & Kremnitzer, “Judicial Activism: A Multidimensional Model,” *Canadian Journal of Law & Jurisprudence*, vol. 18, pp. 337-353, 2005

Mugeli, “Judicial Independence in China: A Comparative Perspective,” 54 *Acta Juridica Hungarica* 40 (2013)

Cheesman, “How an Authoritarian Regime in Burma Used Special Courts to Defeat Judicial Independence,” 45 *Law & Society Review* 201 (2011)

October 31: Courts – Common Law & Civil Law

Merryman, *The Civil Law Tradition*, pp. 86-90, 121-22

Bogdan, *Concise Introduction to Comparative Law*, pp. 104-110, 142-145

Blankenberg, “Changes in Political Regimes and Continuity of the Rule of Law in Germany,” in *Courts, Law & Politics in Comparative Perspective*, pp. 256-65

Burnham & Maggs, *Law and Legal System of the Russian Federation*, pp. 50-51, 62-64, 73-81, 394-7

Howard, “Just Medicine,” *New York Times*, April 2, 2009

**** Non-Law Students: Deadline for Submitting Outline & Bibliography for Research Paper****November 5: Courts – Islamic Law & Mixed Systems**

Oba, “Religious and Customary Laws in Nigeria,” 25 *Emory International Law Review* 881 (2011)

Flow-chart of Nigerian judicial system

MacFarquhar, “A Battle for Syria, One Court at a Time,” *New York Times*, March 13, 2013

Bennett, “Re-introducing African Customary Law to the South African Legal System,” *American Journal of Comparative Law*, vol. 57, pp. 1-31, 2009

Barfield, “Culture and Custom in Nation-Building: Law in Afghanistan,” *Maine Law Review*, vol. 60, pp. 347-373, 2008

November 7: Judges – Systems of Selection and Retention

Merryman, *The Civil Law Tradition*, pp. 34-38, 114-16, 122-24

Sample, Hall & Casy, “The New Politics of Judicial Elections,” *Judicature*, 94:2, pp. 50-57, 2010 [<http://newpoliticsreport.org/>]

Guarnieri & Pederzoli, *The Power of Judges*, pp. 18-27, 34-39

Ulc, *The Judge in a Communist State*, pp. 5-19, 61-69

O’Brien, “The Politics of Judicial Selection and Appointments in Japan and Ten South and Southeast Asian Countries,” in *Appointing Judges in an Age of Judicial Power*, pp. 355-73

Garoupa and Ginsburg, “Guarding the Guardians: Judicial Councils and Judicial Independence,” *American Journal of Comparative Law*, vol. 57, pp. 103-134, 2009

“Can Justice Be Bought?” *New York Times*, June 15, 2011

November 12: Judicial Review in Comparative Context

Hirschl, “Beyond the American Experience: The Global Expansion of Judicial Review,” in *Marbury Versus Madison: Documents and Commentary*, pp. 129-53

Ngenge, “International Influences and the Design of Judicial Review Institutions in Francophone Africa,” 61 *American Journal of Comparative Law*, pp. 433-60 (2013)

Stone Sweet, *On Law, Politics, & Judicialization*, pp. 184-208

“Iran: Who Holds the Power? Guardian Council,” BBC News

http://news.bbc.co.uk/2/shared/spl/hi/middle_east/03/iran_power/html/guardian_council.stm

November 14: Judicial Review in Practice

Socialist Reich Party Case (West Germany)
Communist Party Case (Russia)
Lustration Case (Czech and Slovak Republics)
The Turban Case (Turkey)
On War Crimes and Crimes Against Humanity (Hungary)

** **For those seeking advanced writing credit: First Draft of Research Memo Due in Class**

November 19: Lawyers

Merryman, *The Civil Law Tradition*, pp. 102-11
Schlesinger's Comparative Law, pp. 629-654, 684-706
Silver, "What We Don't Know Can Hurt Us," 43 *Akron Law Review*, pp. 1009-25
Persky, "Despite Globalization, Lawyers Find New Barriers to Practicing Abroad," *ABA Journal*, November 2011
Timmons, "Outsourcing to India Draws Western Lawyers," *New York Times*, August 4, 2010
Meili, "Cause Lawyering for Collective Justice: A Case Study of the *Amparo Colectivo* in Argentina," in *The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice*, pp. 383-408
Ahmed, "Fighting for the Rule of Law: Civil Resistance and the Lawyers' Movement in Pakistan," 17 *Democratization*, pp. 492-513 [skim pp. 492-501 to remind yourself of the political context; read pp. 501-13 more carefully]

November 21: Case Study – The Chinese Legal Profession

Guest Speaker: Professor Sida Liu, Department of Sociology
Liu, "Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market," *Law & Society Review*, vol. 42, pp. 771-804, 2008
Liu, "Lawyers, State Officials, and Significant Others: Symbiotic Exchange in the Chinese Legal Services Market," *China Quarterly*, pp. 276-93 (2011)
Liu & Halliday, "Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers," 45 *Law & Society Review*, pp. 831-64

November 26: Politicized "Justice"

Film: "A Trial in Prague"
Nonet and Selznick, *Law & Society in Transition*, pp. 29-52
Kavan, *Love and Freedom*, pp. xi-xv, 55-65, 87-97, 103-14, 164-82

December 3: Juries & Other Forms of Lay Participation in Decision-Making

Krause, "Judge v. Jury," *ABA Journal*, June 2007

Kaminer, "The Tortuous Trials of the Idle Juror," *New York Times*, October 1, 2010

Abdullaev, "A Jury Is Better Than a Judge," *Moscow Times*, June 1, 2006

Feifer, *Justice in Moscow*, pp. 80-83

Barry, "In Russia, Jury Is Something to Work Around," *New York Times*, November 15, 2010

Yue, "The Lay Assessor System in China," *International Review of Penal Law*, vol. 72, pp. 51-56 (2001)

Kutnjak Ivkovic, "Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals," *Cornell International Law Journal*, vol. 40, pp. 430-453 (2007)

Katsuta, "Japan's Rejection of the American Criminal Jury," *American Journal of Comparative Law*, vol. 58, pp. 497-524, 2010

December 5: Administrative Law – Variations in Regulatory Schemes

Guest Speaker: Professor John Ohnesorge, Law School

Kagan, "How Much Do National Styles of Law Matter," in *Regulatory Encounters*, pp. 1-13

Aoki & Cioffi, "Poles Apart: Industrial Waste Management Regulation and Enforcement in the United States and Japan," in *Regulatory Encounters*, pp. 33-55

Law in Japan: A Turning Point, pp. 276-301

Holley, "A Japanese Career Path Gets Rocky," *Los Angeles Times*, April 16, 1997

Tieman, "Rules or Principles: Is It Time to Throw Out the Rule Books?" *Financial Times*, October 20, 2006

- ** **December 6 – 5pm: Final Draft of Research Memo or Research Paper Due in Hendley's Law School Mailbox by 5pm on Friday, December 6, 2013.**

- ** **December 6 – 5pm: Final deadline for submitting Reports on Public Lectures. They are due within two weeks of the event attended. If the event is towards the end of the semester, then you must complete the essay by December 6th.**

- ** **December 14 – 4pm: Deadline for Submitting Reflection Paper to the Front Office of the Law School (5th Floor)**