

Introduction to comparative law

Syllabus

Approved by the Academic Council
of the Basic Higher Education Programme
19.06.2018, prot. № 4.

1. Course Description

a. Title of a Course

Introduction to comparative law

b. Pre-requisites

The course is targeted at first-year undergraduate law students who are expected to have successfully completed the undergraduate courses on foreign legal history and legal theory. Students are expected to learn essential legal English vocabulary through study of European and Russian legal history, listening to lectures, engaging in disputes, and preparing final written essay.

c. Course Type (compulsory, elective, optional)

Elective

d. Abstract

This introductory course on comparative law theory is designed especially for undergraduate first-year students who are genuinely interested in studying foreign jurisdictions and legal systems and possess a solid knowledge of English but have an educational background limited only to the very first two modules of the first-year curriculum at the faculty of law.

2. Learning Objectives

The course aims at introducing the students the major approaches of 'traditional' comparative law, its functions, aims, methods and history. It also intends to survey the main features of the major legal families of the world (civil law, Anglo-American common law, non-Western legal traditions in Asia, Sharia, and mixed jurisdictions), so that the students would have the 'map' of the world's legal systems. Finally, the course introduces comparative legal studies of today's globalized world with extended methods of 'postmodern' comparative law (contextualised approach to legal systems and institutes).

3. Learning Outcomes

After completing the course students are expected to be able to:

- define basic concepts of comparative law discipline;
- explain how comparative law can be used to understand different legal systems of the world;
- distinguish and identify key features and institutes of the major legal system (including mixed jurisdictions);
- review and summarize recommended academic papers;
- coherently state and reason one's own theses in English regarding the issues of the course.

4. Course Plan

Lesson 1. What is comparative law.

1. The meaning of the term "comparative law":
 - a) the origin of the term "law", the concept of "law";
 - b) the meaning of "comparative law" in different legal traditions.
2. History of Comparative Law: Antiquity, Middle Ages, Modern Times.
3. Current Situation of Comparative Law
4. Key Concepts of Comparative Law (the legal system, the legal family).
5. Functions of Comparative Law (cognitive, epistemological, descriptive geographical, unification and etc.). The correlation between comparative law and other legal sciences.
6. The concept of the methodology of comparative law. Kinds of comparisons: synchronic and diachronic, internal and external, micro and makro comparison, non-judgmental and evaluative.
7. The correlation between comparative method and other methods of legal analysis:
 - a) historical-legal method; b) formal-logical (textual) method; c) functional method.
8. Sociological methods in comparative legal study.
9. Guidelines in comparative legal study.

Lesson 2 – The Anglo-American common law system: introductory notes.

1. English law. The place and role of the common law in the modern world. The history of the emergence of the common law. Customary law of the Anglo-Saxons. Norman Conquest. The Saxon and Norman systems of land ownership. The influence of the Westminster courts' on the formation of common law. The role of the Court of Chancery: the emergence of equity rule." Edward Coke. "*Commentaries on the Laws of England*." by William Blackstone. Reform of the XIX and XX centuries.
2. The principle of Stare decisis. Binding precedent. Ratio decidendi and obiter dictum. "Creative" cases and cases of interpretation. The ratio of the constitutional, statutory, regulatory and case law.
3. Rule of Law. The doctrine of parliamentary sovereignty. Evolution of the English parliamentary system. Constitutional reform 1998-2009. Reform of the judicial system. Devolution process.
4. Law of the United States of America: a general overview. American constitutional tradition. Case Marbury v. Madison (1803). System of constitutional clauses as fundamental principles of the American system of law. Commerce clause. The system of constitutional cases. Analysis of Plessy v. Ferguson (1896) and the abolition of its Brown v. Board of Education (1954) as an example of a landmark case. Basic schools in constitutional interpretation: Originalist and other schools.
5. Particularities of the legal education and the legal profession in England and the United States.

Lesson 3 – Key legal institutes of the English common law.

1. Property law. Types of property in common law family and their difference from the corresponding analogues in the civil law. The concept of property rights and their difference from real rights in civil law family. The concept of the title. The ways of acquiring property rights. Ownership of the land – freehold and leasehold. Land transactions and the transfer of rights. Future interest in things. Ways to protect property rights.
2. Tort law. Kinds of torts. Negligence torts, property torts. Some doctrines of tort law (proximate cause, etc.). Liability torts. Types of liability in tort law. Ways of protection. Certain specific types of torts (trespass, malpractice, diffamation). The difference of the institutions of torts law in common and continental legal families. Comparison of tort liability in the Russian law (Chap. 59 of the Civil Code) with the definite institutions of tort law.
3. Contract law. The place contract law in the common law system. Approaches to the contract, the doctrine of Law and Economics. Concept and types of contract. Elements of the contract. Counter-satisfaction. Estoppel. Performance of the contract. Termination of the contract. Breach of a contractual obligation. Express and implied term of contract. Methods of interpretation of the contract. Liability for breach of contract. Warranties. Ways of protection. Comparison of the individual institutes of the Russian contract law with the institutions of the common law.

Lesson 4 – The civil law system.

1. The historical roots of the civil law family. Division of the law into private and public. Community of basic legal institutions of the European countries. Place of the Constitution and the constitutional supervision in the European legal systems. Modern trends of European constitutionalism. The main sources of law: the current trend. The correlation between law and case with the similar forms of fixation of law in modern European legal systems.
2. EU law, national and communitarian legislator. The principle of implied powers, subsidiarity. The Treaty of Lisbon. National and European jurisdictions.
3. Reception of Roman law, pandect and institutional systems. The system of Russian law in the family of private civil law. National and universal features in private law in Europe. An overview of Europe and the world maps from the spread of various models of private law. The draft European Civil Code. Branches of law related to the modern model of welfare states in Europe.
4. Freedom of contract and its limits. Paternalistic restrictions on freedom of contract. Conclusion of the contract. Terms of the contract. Grounds for recognizing the contract null and void. The concept of unjust enrichment. Tort concept. Property rights – particularities in national models. Inheritance and Family Law.

Lesson 5 – French law.

1. French legal history. *Coutumes*, reception of Roman law by South France. French civil schools. The French civil code and its development in XIX-XX centuries. French constitutional history.
2. The primary sources of law. Unwritten law: custom. The concept of custom: the material and the psychological moments. The place of the custom in modern positive law. The correlation between the laws and customs: custom «secundum lege» (established by law), custom «praeter legem» (above the law), custom «contra legem» (contrary to law). Secondary sources of law. Judicial practice, administrative practice. Civil courts of first instance. The courts of the first instance: *Le Tribunal de Grande Instance*. The main courts with exclusive jurisdiction of first instance: *Le Tribunal de Justice, les juges de paix*.
3. Institutional system of French civil law. French Civil Code of 1804: drafting history, enactment, institutional system of civil law. Contractual right - the division of contracts on exchange and binding. Modern trends in French property law. Reception of French civil law since the early 19th century (with particular reference to Russian law).

Lesson 6. – German law.

1. Features of German legal history.
2. History of the German constitutionalism. The primacy of the Constitution (*Grundgesetz*, the Basic Statute) in the German law. An overview of the Constitution. The direct effect of the Constitution, the case *Elfes* (1957) and *Luth* (1958) system of constitutional immunity of democracy. Constitutional principles (Art. 20). Land constitutional courts. Administrative law in Germany. Procedural law and the system of courts of Germany.
3. History of the German private law. The Civil Code of 1896 (*Bürgerliches Gesetzbuch* - BGB) and its impact on private law in Germany and beyond. The historical connection of the German and Russian private law. Fundamentals of Obligations Art. 242 BGB. Current trends in the German law of obligations, the reform of 2002. The system of legal entities in German law, in comparison with Russian system entities. Characteristics of institutions of property law in Germany. Features of German marital and family law.
4. German legal education and the legal profession.

Lesson 7. – Mixed Jurisdictions (Hybrid legal systems).

1. The concept of a mixed jurisdiction or hybrid legal system.
2. The law of Quebec. Dualistic legal system: the influence of common law and civil law systems. Codification of civil law in 1866 and 1991, the interplay of the laws of Quebec with the federal law of Canada.
3. The law of South Africa. Influence of the Roman-Dutch law and the English common law.

4. The law of Israel. The influence of Jewish law and the law of the Ottoman Empire. The law of the State of Louisiana in the United States. The influence of law in France and the common law.

Lesson 8. – Muslim law and Sharia.

1. Approaches to Islamic law as a religious phenomenon and legal phenomenon. The concept of sharia, its definition and structure. The concept of ijtihad and fiqh. Fiqh - Islamic legal doctrine and Islamic law in an objective sense. The main sources of fiqh. The ratio between religious (Quran and Sunnah) and rational (analogy, "excluded interests," istihsan et al.) sources of law.
2. Doctrine as the leading source of Islamic law. Basic classification, theoretical constructs and concepts of Islamic law. The basic principles of fiqh and Islamic law. The reflection in it the religious principles and the legal nature of Islamic law.
3. Development of the Islamic concept of the state (caliphate) within the Islamic legal doctrine (fiqh). Violation of Sharia as a religious sin and offense in the legal sense, religious and "secular" sanctions for violations. Criteria for classification of offenses: the nature of the violated rights and strengthening accountability measures in the major sources of fiqh. Three categories of offenses: hudud, qisas and ta'zir.
4. Sharia justice as the leading institute in the Islamic states and Islam as a normative system. Islamic thought as the leading principle of justice. Principles of organization of the sharia court. Requirements for the qadi (Sharia judge). The implementation of the principle of equality in the organization and operation of the Shariah court. Powers of Sharia judge.
5. Islamic and Western legal culture: confrontation and interaction.

Lesson 9. – Chinese and Japanese legal tradition and its change.

1. Traditional Chinese law. The influence of Confucianism. Socialist Chinese law. The influence of the legal system of the USSR. The role of the law. "Chinese-Soviet" model of a crime. Economic modernisation of China and its impact on Chinese law. The Legal System of the People's Republic of China today.
2. Traditional Japanese law. The value of customs. Meiji Revolution of 1868. The impact of the legal systems of Germany and France before WWII. The influence of the United States right after 1945.

Lesson 10. – Global comparative law.

1. Legal Transplants: historical development in continental Europe, during and after colonialism, in non-colonial countries.
2. Fading state borders. The end of state? The role of public and private international law. Convergence and transnationalism vs. regionalism.
3. Comparative law and development. Development and the rule of law. The critics of 'law and development'.
4. Comparative law as an open subject.

5. Reading List

a. Required

- Practice and Theory in Comparative Law. Eds. Maurice Adams, Jacco Bomhoff. Cambridge: Cambridge University Press, 2012. [Electronic resource]. – Available at: <https://proxylibrary.hse.ru:2190/legacydocview/EBC/977167?accountid=45451>

b. Optional

- Caenegem R.C. van. European Law in the Past and the Future: Unity and Diversity over Two Millennia. Cambridge: University Press, 2002. [Electronic resource]. – Available at: <https://ebookcentral.proquest.com/lib/hselibrary-ebooks/detail.action?docID=147337>
- Dicey A. An Introduction to the Study of the Law of the Constitution. London: Macmillan, 1889. [Electronic resource]. – Available at: <https://archive.org/details/introductiontos04dicegoog>)
- Menski W.F. Comparative Law in a Global Context: The Legal Systems of Asia and Africa. Cambridge: Cambridge University Press, 2006. [Electronic resource]. – Available at: <https://ebookcentral.proquest.com/lib/hselibrary-ebooks/detail.action?docID=256622>
- Reimann M. The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century // American Journal of Comparative Law. 2002. №. 4. Pp. 671-700; [Electronic resource]. – Available at: <https://www.jstor.org/stable/41616734>
- Reimann M., Zimmermann R., The Oxford handbook of comparative law. NY: Oxford university press, 2006. [Electronic resource]. – Available at: <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199296064.001.0001/oxfordhb-9780199296064>
- Reitz J. How to Do Comparative Law // The American Journal of Comparative Law. 1998. Vol. 46. №. 4. Pp. 617-636. [Electronic resource]. – Available at: <https://www.jstor.org/stable/840981>
- Rivera J.S. The Scope and Structure of Civil Codes (Ius Gentium: Comparative Perspectives on Law and Justice). 2013. [Electronic resource]. – Available at: <https://ebookcentral.proquest.com/lib/hselibrary-ebooks/detail.action?docID=1698409>
- Slapper G., Kelly D. English legal system. London, 2011. [Electronic resource]. – Available at: <https://ebookcentral.proquest.com/lib/hselibrary-ebooks/detail.action?docID=4890832>
- Steiner E., French Law: A Comparative Approach Oxford: Oxford university press, 2010.
- Vogenauer S. An Empire of Light? II: Learning and Lawmaking in Germany Today // Oxford Journal of Legal Studies. 2006, vol. 26, № 4, p. 627–663 [Electronic resource]. – Available at: www.jstor.org/stable/4494561
- Zoller E. Introduction to Public Law: A Comparative Study. Nijhoff Publisher, 2006. [Electronic resource]. – Available at: <https://ebookcentral.proquest.com/lib/hselibrary-ebooks/detail.action?docID=468538>

6. Grading System

The overall learning outcome will be assessed on the basis of lecture attendance and the final written test of 20 questions each student is expected to write during the final class of this course. The testing questions will refer to all topics of the course and will draw primarily, but not exclusively, on the essential readings.

The formula of the evaluation is as follows: final mark = 0,5 (cumulative) + 0,5 (test).

The cumulative evaluation is based on attendance, active participation and in-class discussion during seminars. The students will be evaluated on their performance during the seminars. Each student is expected to attend all the seminars and lessons and being prepared on the topic of the lesson in advance. The students must have previously studied in depth the assigned material. The knowledge of the students will be also assessed in class through written tests (close and/or open questions), as well as on the ground of his/her active/inactive participation in class discussions. A proactive participation will be positively evaluated as well as asking inherent questions and make analytical comments about the assignments.

The criteria for the final testing are as follows:

	8-10 points	6-7 points	4-5 points	1-3 points	0 points
Criteria:	Number of correct	Number of	Number of	Number of	Number of

	answers: 8-10.	correct answers: 6-7.	correct answers: 4-5.	correct answers: 1-3.	correct answers: 0.
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Questions of the final test are to be compiled on the basis of the following example:

1. Which legal system does not exist in the contemporary world?

A) Common law;

B) Civil law;

C) Hybrid legal system;

D) Roman law.

7. Guidelines for Knowledge Assessment

All assignments (including the final exam) are graded on the scale of 0-10. Midterms and current controls consist of:

7.1 Attendance policy

It is imperative that students attend classes. Participation in lessons and seminars is mandatory, except in case of a medical emergency (e.g. sickness). Students will need to provide evidence for missing class (doctor's note). If evidence is provided, the missed class is considered as an excused class. If no evidence is provided immediately before or after the class, the missed class is counted as an absence. Late arrivals will be considered as absences if the delay is more than 30 minutes. Participation implies that students are on time, have studied the assigned material in advance and work actively.

If students are absent for many classes, they receive a penalty on their final grade. If students are absent:

- for the 10% of the classes, they receive a penalty of 1 point on their overall grade (out of) for that course.
- for the 20% of the classes, they receive a penalty of 3 points on their overall grade (out of) for that course.
- for the 30% of the classes, they receive a penalty of 5 points on their overall grade (out of) for that course.
- for the 40% of the classes, they receive a penalty of 7 points on their overall grade (out of) for that course.

7.2 Additional course policies

Late papers will not be accepted unless there are serious legitimate reasons. Provision of a signed medical note is required, and notice must be given prior to the deadline.

7.3 Plagiarism

Dishonesty and plagiarism are NOT admitted in this course. Cheating and plagiarism cases will be sanctioned. Works affected by plagiarism will be considered null and void. If you report a sentence or a passage taken by someone else's work or by your own past works, you must cite the source/s. References and citations must be comprehensive and in a standard citation style (APA, MLA, Harvard, etc.). Please, pay attention to grammar, spelling, and punctuation.

8. Methods of Instruction

The instructor proposes an interactive mode of giving lectures similar to readings in American law schools. Students are expected to read essential literature before attending lectures, they will be asked questions in order to check their comprehension. The syllabus will be accompanied with essential glossary. From the very beginning of their legal education students are encouraged to make use of the electronic resources of HSE, as many recommended papers are available at the data bases HSE is subscribed to.

Classes will be structured as participative lectures in order to stimulate class discussion. This course uses interactive educational technologies (problematic lectures, Socrates method, work in small groups, interactive seminars; brainstorming sessions). Students are expected to be well prepared, they must carefully study the materials indicated before the seminar. Students are expected to spend 12-14 academic hours of house reading, researching, and preparation per week.

Every lesson will be followed by the correspondent seminars as specified in this program. In order to be prepared for lessons, it is necessary to use the sources and legal acts enlisted in this syllabus. To prepare for the seminar, it is necessary to study carefully the material assigned during the lesson.

9. Special Equipment and Software Support (if required)

The following equipment is essential to make teaching and learning comfortable and efficient:

- Personal computer (equipped with Microsoft Windows 10) with Internet access;
- Multimedia projector with remote control.