PANEL II. FOREIGN LEGAL SYSTEMS: TO TEACH OR NOT TO TEACH?

Moderator: Professor Julian Conrad Juergensmeyer, Georgia State University
Panelists: Professor Maria Kenig-Witkowska, Faculty of Law and Administration, University of Warsaw; Professor Stuart Cohn, Levin College of Law, University of Florida; Dr. Ewa Gmurzyńska, director of the Center for American Law Studies, University of Warsaw, University of Florida; Roman Rewald, esq., Weil, Gotshal & Manges, Witold Kowalczyk, student, Faculty of Law and Administration, University of Warsaw

Professor Julian Conrad Juergensmeyer, Moderator:

Good Morning. I think it is time for us to start. In fact, we are running a little bit late and I would like to remind you that this panel has more panelists than the other panels so we have been given some extra time. With the time we have been given, we can spend 15–17 minutes per person including introductions. Since you have been given bio sketches of all of our panelists, I am not going to give detailed introductions. So, fellow panelists, please, forgive me if I make your personal introduction extremely short and refer the attendees to those bios.

I am Julian Juergensmeyer. I am delighted to be here today as a University of Florida Law School emeritus professor and as Professor and Ben F. Johnson Chair in Law at Georgia State University in Atlanta, Georgia. That is the State of Georgia, not the Republic of Georgia! These days it is even harder to keep them apart because due to recent elections the State of Georgia is often referred to as Republican Georgia!

Our panel's topic this morning is "FOREIGN LEGAL SYSYTEMS: TO TEACH OR NOT TO TEACH". I am not good at predicting the future but I predict that everyone is going to say "yes" because most of us make our living teaching foreign law. So we will see if I turn out to be right or wrong but what I think we are really going to emphasize the most is that, given that we all agree that we should teach foreign law, how should it be taught.

I will start with a few basic observations. What are the justifications for teaching foreign law? I have made a list but it is not designed to be in depth or exhaustive but just some reasons that we might be thinking about at the beginning.

The first one is the equivalent of art for art's sake, i.e. learning for learning sake. Dean Jerry, I enjoyed very much your beginning comments on the previous panel that our job is simply to teach and educate, not to look at the market. So, I would still maintain that one reason to teach foreign law is to make lawyers more educated about the world. It seems very strange to me that one could call one's self an educated lawyer and know only one's own legal system. Yes, I realize we legal educators cannot ignore the market for legal services, although I think it is

sometimes shocking how much we pay attention to it. In the U.S. we have almost weekly articles in newspapers and on the Internet giving advice on what undergraduate and graduate college students, including law students, should or should not choose as a major or specialization and advising current or potential students in regard to the "good" areas of specialization to choose. Guess, how they define "good". "Good" means what major or specialization will result in students making the most money when they graduate. So, my first thought is that it is worth teaching foreign law in order to have lawyers who are comprehensively educated members of society.

My second reason for teaching foreign law is that I think the best way to understand one's own legal system is by knowing something about other legal systems. I think when a student takes a comparative law or a comparative legal systems course or follows a curriculum such as that provided by the University of Warsaw's Center for American Law Studies, the student ends up learning even more about his own legal system than about the foreign legal system, just because in trying to understand someone else's legal system you learn about your own.

A third justification for the study of foreign law is to search for better approaches to legal issues. No legal system is perfect. What answers do other systems give? Can they be adapted to improving one's own legal system? Law reform and modernization are constant and demanding issues in all countries.

A fourth consideration is the need to train lawyers to advise clients in regard to the law of other countries. The increasing pace of economic and political globalization is making this an urgent need. Thus far, our emphasis in this regard is primarily on training lawyers to recognize situations in which the client may need to seek the assistance of foreign lawyers. But I think now we need to consider educating lawyers to practice in more than one country or legal system. Just to give a couple of interesting examples, the University of Houston has just started a program on Canadian-American law. Their students can choose to have four years of law school instead of three years. At the end of the fourth year, the student is qualified to take the exams to become a Canadian lawyer and a Texas lawyer. At Georgia State University, we are starting a new LL.M. Program for foreign lawyers and if the proper curriculum is followed, the foreign graduate of that Program will be eligible to take the Georgia Bar exam and if successful, will be admitted to practice in our state.

Again, I think the thing we can do best in this panel is to answer the question: how is it best to teach foreign law? That is what many of our panelists are going to respond to. The traditional way was through comparative law courses, which were really comparative legal systems courses. Sometimes they were taught by visiting foreign professors. Another approach is to attempt to make a course specific comparison. I teach property law and I always spend a couple of days in my American property law course teaching French property law just to give the students more perspective. Still, another approach is what we called for-

eign enrichment courses at the University of Florida College of Law where we brought foreign professors to teach a specific subject – not comparative law in general – but to teach comparative property law, comparative urban law, comparative criminal law, etc.

Also the American model of summer programs abroad is one that we have used a great deal. Those programs are controversial in some ways in terms of how much they actually accomplished from a learning stand point but certainly the model is very popular. Finally, LL.M. programs, to which I have already made reference, are a very popular way for students to learn about more than one legal system.

In regard to the various approaches to teaching foreign law, I must say that I think we are present at a Law School which has done an internationally recognized great job with its foreign law programs. The Center for American Law Studies is only one example of the foreign law programs available to students at the University of Warsaw's Faculty of Law and Administration. The University of Warsaw should be considered, and is, a model for every institution in the world in this regard.

I will now call on our distinguished panelists for their contributions. Once again, I warned you I am not going to say much about each of them. Our first panelist is Professor Maria Kenig-Witkowska from the University of Warsaw. Maria is deputy director of the International Law Institute here. I have had the pleasure of working for several years with Maria. I saw her a few days ago in Barcelona, a year ago in Istanbul, a year before she was in Atlanta. So, it is great to be here again with you, Maria, and I am going to turn it over to you. By the way, I am going to ask our panelists' forgiveness in advance for asking you to stick to the 15 minutes that was scheduled for each of us.

Professor Maria Kenig-Witkowska, Faculty of Law and Administration, University of Warsaw:

Julian, thank you very much for your kind introduction, it is very touchy you still remember me from Atlanta, thanks a lot. Before I start with my remarks, I would like to thank Dr. Ewa Gmurzyńska, Head of the Center for American Law Studies, for her kind invitation. I consider it a privilege to be invited for the 15th anniversary of the Center, and it is a pleasure to be with you today. I would like to wish you the best luck and many successes for next 15, 30, 45 years, and then we will see.

When I was talking to Dr. Gmurzyńska about one of the questions that should be answered by the panelists, we agreed that the most interesting issue was to teach or not to teach, which could then be continued as: to learn or not to learn foreign law. We considered this short Shakespearian question the right one, simple to answer, and a very inspiring for the panelists. This is why I decided to elaborate on this question in my humble intervention.

Yes, the answer is unconditionally yes, yes, yes. We do need to teach foreign law and we need to learn foreign law as well. One of the reasons, which have been already mentioned by Julian, is the interest of our students. One may compare the list of enrollment to the course of American Law, British Law, French Law, etc. with the list of candidates; and one will see that there are more of them than places. This looks very optimistic for the future of the Center. As far as I know, Polish students appreciate very much the certificate of the American School of Law, which helps them in their career, even if they have just learnt relatively small portion of the American legal system.

My short remarks will be based on my career in academic profession, teaching law in Poland. I teach European and international law, as well as environmental law. I also have some experience as a visiting professor abroad, including the U.S. universities in Atlanta and Gainesville, where I had the pleasure to teach the EU environmental law. At the very beginning of my teaching activities there, I have quickly realized that American students have perceived European Union as a political entity, somehow similar to the United States of America. When I was lecturing, I managed to find for them some points of reference in both systems, in order to be able – by them – to compare legal acts of the EU environmental law with federal legislation in the U.S. Eventually, I had to give them a short course on the EU institutional law and a short course on international environmental law, just to show them where the system is coming from and what is the place of the EU legal order in the normative system of international relations.

To conclude this part of my observation, I would say that before we start teaching foreign law, meaning European law abroad, we have to take it as a prerequisite for further teaching to provide the students with some kind of an entry course of the EU and the EU legal system.

Now, to the basic question – how to teach foreign law abroad?

Julian has already mentioned that – we have to use comparative law methods, what brings us to the topic of the role of comparative law. First, if you do not mind, I would like to comment on some elements of comparative law methodology, which is the act of comparing the law of one country to that of another. The comparison can be broader than two laws and more than two systems. The comparison can be even more than law and of course more than wording. What I learned from my experience is that for students it is important to show them how the law fits into the culture and how the law drives and influences social relations. So, we must look at the law not only as on a formally written text. We need to underline the social structure of law to understand better, what the law really is and how it actually functions within the society. This has been already discussed in the first panel. It is what Mr. Wardyński was saying, that it is never too little sociology and never too little of substractural foundation of a law. Of course, it is a very broad category – substructural forces – meaning history, geography, customs, philosophy, ideology, religion, etc.

Conclusions of this part of my remarks are that it is clear that comparative law needs to take the right position and the right place as an important legal discipline. It also links to the relatively new research movement that we can observe nowadays – which is law and economics. Dean Giaro has just mentioned in the first panel the importance of this approach to legal science, and to the so-called critical legal science approach, which started already in Poland.

Allow me now to pass on to the point, which is using comparative methods in international public law. I would like to mention the new tendencies in the international public law, which is called comparative international public law. The shortest answer to the question why to teach it is because the jurisprudence of international courts is creating and executing international law, which is, as we all know a normative system of international relations. It is obvious that the so-called foreign law in this field of law does not exist; international courts are only using national laws and national jurisprudence in interpreting international law. International courts, academics, practitioners, as well as national courts, are increasingly, and that is very visible, seeking ways to identify and interpret international law by engaging in the comparative analysis of various national court decisions. This emerging phenomenon, because it is really an emerging field of research, one can name as a comparative international public law, which tries to combine international law as a matter of substance with comparative law as a matter of process.

We all know about the role international court decisions play in the international law doctrine of sources, under which they provide evidence of the States' practice, being subsidiary means for determining international law. This is why we should teach foreign law and we should teach foreign jurisprudence. Academics, practitioners and national and international courts frequently identify and interpret international law by engaging in a comparative analysis of how domestic courts have approached the issue. We know examples as the famous Pinochet case, and decisions of the International Court of Justice and the International Criminal Tribunal concerning former Yugoslavia, just to name a few. As for methodology, comparative international public law faces as many problems as comparative law itself, including the difficulty in finding and understanding decisions in foreign languages and unfamiliar legal systems. Again, that is why we should learn foreign legal systems.

Let me, at the end, refer to the question why to teach my favorite international environmental law. The simplest answer is because it rules international governance of global environment. I hope that everybody is familiar with term *international governance of global environment*, which gradually replaces the term *international environmental law*, which can be understood as diplomacy mechanisms, as response measures aimed at steering social systems towards preventing, mitigating and adapting to the risks posed to environment. Although the international treaties making process continues to play a key role in mitigating anthropogenic and environmental changes, it now constitutes a part, if not the

biggest part, of a wider system of private and public governance initiative operating on multiple levels, starting from international, via regional, to national and even communities level. This is why we should teach international environmental law and even more, we should teach a foreign domestic law on environment since it constitutes a part of international governance of global environment.

Thank you very much, I hope I did not take too much time.

Professor Julian Juergensmeyer, Moderator:

Thank you. Our next panelist is my friend and former colleague, Stuart Cohn, from the University of Florida Law School. Stu has served as a Dean for International Programs at the University of Florida. I am sure that makes you realize how important he has been in the life and the success of the Center for American Law Studies here at the University of Warsaw. In fact, Stu – am I correct? – you have taught each of the 15 years in the Center (turns to Professor Cohn who nodded). That is right – I think that deserves a round of applause. (applause). So now – Professor Cohn.

Professor Stuart Cohn, Levin College of Law, University of Florida:

Thank you very much Julian. I appreciate your remarks Julian and opening our panel, as well as making fine points that you gave, because it totally changed all my remarks. I have to say I have been preparing notes in the meantime to figure out what I might say which you already have not covered. So, thank you for that. I would also like to say, as a personal note, that one of the reason that I was attracted to the University of Florida number of years ago was because of the faculty members like Professor Juergensmeyer. He was there before I even came to interview at the University. I read his biography and saw his great interest in the international matters and development of the Cambridge-Warsaw program which I believe – correct me if I am wrong, Julian – was the only law school in America to have a program in Eastern Europe. Is that correct? Actually, I understand that Harvard had one of the first programs but they dropped it and the University of Florida took it over. Julian was very much responsible for that. I would also like to share what Professor. Kenig-Witkowska said in terms of thanks to Dr. Gmurzyńska for putting together this conference. I also would like to thank her in my former capacity of 12 years as an associate dean for the international programs, working with her closely for the Center for American Law Studies here in Warsaw. She has done an absolutely outstanding job over those years – she is the one responsible for having made this program such a success. I also want to personally thank for all the efforts she has done, as well as thank Agnieszka who has been also wonderful in that regard. Thank you very much if I can say that publicly, Ewa.

Yes, Julian is right, I suppose most of us in this panel, if not all of us, will say yes, it is important to teach international law. This is like the question: to teach or not to teach. I have been very privileged to be able to teach in number of foreign countries over the last 20 years and I suppose, like every panelist here, I have been

personally enriched in ways that are immeasurable by my own personal experience in teaching in foreign countries. I have learned as much as I had been able to give out. I have learned from students, I have learned from my colleagues, I have learned about different systems of law and I can tell you personally that it had certainly enriched my own teaching back in the United States. I even enriched my research by understanding of what the practice of law and teaching of law is all about, so from a personal stand point it is certainly something that I think is very important. I would say that it is probably a thought of everyone in this panel. Although, as teachers we are professionally enriched by this experiences I want to change the focus of my remarks a little bit from teachers to students. Dean Jerry talked about earlier that we regard students and senses of our market and so the question is do the students regard foreign law teaching as important as we do? Do they see the importance that it has, the fundamental reasons that Julian and Maria talked about. Do they see it, do they understand it, do they realize it as we do?

I will say that from my personal experience – there is quite a difference between European students and American students. In my experience, European students have much greater understanding of the importance of studying foreign law. In part, that is because European students are surrounded by a number of different countries. They have to deal with it on a fairly regular basis. So, it is quite natural for them to realize that they need to have an understanding of their neighbors and the legal systems of their neighbors. But also it is fairly easy for the European students to understand the importance of the United States law. Their lives are entirely dominated from time to time by the United States institutions or the United States products – Microsoft, Amazon, Google,. All of the things that in today's technology we have been talking about, places to eat, etc. I walk around Warsaw and what do I see: Subway, Pizza Hut, Kentucky Fried Chicken, McDonald's and, of course, all kinds of businesses that students here in Warsaw and Europe constantly are familiar with. And, of course, not least – all major American law firms which are located in Warsaw and in other major capitals in Europe. So, I think it is fairly easy for the European students to realize the importance of understanding the Unites States and other foreign legal systems, in the way that Professor Maria Kenig-Witkowska has talked about.

What about the United States students? I will say that, with some exceptions, this is not the same case. Generally speaking, I have to say – and I am sorry to say it actually – that the factors that are present in Europe are not present in the United States. So consequently, it is a much more difficult test for us in the United States to get our students motivated to take courses that are offered to them, to take advantage of the opportunities of the foreign study that are offered to them and to listen to us as we expand to them the importance of understanding legal systems of another countries and understanding foreign law. They listen to us and, of course, they take notes because it might be on the exam. But I have a sense that it is like taking medicine. It is something they have to listen to and ok, but that is not really

internalized. Despite of our efforts, the whole importance of studying foreign law is really not internalized by American students. And, of course, we are not helped by our Supreme Court, several members of which have substantially questioned the value of looking at foreign law to answer domestic questions. It seems to me like totally irrational point of view but it was publicly stated and announced by some members of our Supreme Court. So, we are not helped by that.

This Hamlet question that Ewa has posed for us: "to teach or not to teach?", might not be so important if the globalization that we have been talking about this morning was leading to some kind of a harmonization of law. If our legal systems became more harmonious, maybe it is not so important that we focus on foreign systems so much, but that has not been the case. Despite the movement of globalization, there are still significant, substantial differences that exist among our foreign systems. We just simply can say – well, it is not so important because it all will be the same in time. Even in my own field, my field is business law, company law, securities, one would think that we would have much greater confluence of ideas and commercial practice because, after all, commercial practice cross the international boundary and should start look pretty much the same. It has not happened. So even in my field it is still extremely important to understand foreign systems and to have our students understand foreign systems. Let me just give a few examples.

When I am teaching here in Warsaw, and I have been privilege to teach Center for American Law Studies program since its inception. It is something that I very much enjoy because of the high quality of the program and the high quality of the students that I have had a chance to meet here. When I teach here, and I teach usually something connected with business law area, one of things that I speak about, and many of you are familiar with, is the fact that we do not have a national corporate law in the United States. I think we are, as far as I know, the only country in the world, that does not have a unified national corporate law. Our corporate law, because of the constitutional history, is something that is determined by states. Each state has its own corporate law. So consequently, with 50 states we have 50 different corporate laws. That would be ok if they were harmonious, but they are not. The law of Delaware is not the same as the law of Florida. The law of Florida is not the same as the law of New York, the law of New York is not the same as in California, etc.

So when I make this point one of the immediate reactions I get from the students here in Warsaw and when I teach in another countries is the same – this sounds chaotic. How can one possibly practice corporate law in the United States with this kind of arrangement? One of the articles that I assigned to the students is by Professor Roberto Romano at the Yale University. She wrote an article called "The genius of American Corporate Law". In the article she talks about the fact that we do not have a national law but she sees it as a positive, she sees it as a major advantage. The major advantage which I happen to agree with, is

that each of the states is constantly looking at other states to see what are the best commercial practices, the best corporate laws that could possibly be developed to meet the changing commercial world. What we have in a sense is an experimental laboratory among 50 states in which we look at the laws of the other states and see – should we adapt those?

I am very involved for example in the law reform in Florida and I can tell you that we spend the great deal of time looking at the laws of Delaware, New York, Ohio and other states – should we change our laws to look like theirs. Those states are looking at us and we are constantly changing laws to improve our commercial law to meet changing commercial conditions. So we do not see it as a disadvantage, we see it as an advantage.

So then I ask my students – what about the European Union? I know that there have been efforts in the European Union to create a single company law. Is that a good idea? And that is where we stop and have a discussion. That is the kind of comparative discussion that Professor Kenig-Witkowska was talking about. Because, if we look at it in the light, then is it a good thing to have a single European company law or is it better that each country continues to develop their own company law in ways that reflect their own particular culture, their own particular commercial practices, their own particular business community? It is a kind of a question that I think is valuable from the standpoint of teaching in a foreign country.

Let me talk about the United States. When I teach in the United States and I try to incorporate some foreign law for the United States students, it is a little more difficult because they do not immediately see the importance of it. But one of this subjects is "at will employment". In the United States most of our employees, except those who are members of a labor union, are called "at will employees", meaning they can be fired at any time for any reason. There are some constitutional protections that they have, so they cannot be fired for reasons that are constitutionally invalid, such as race, religion or something like that but in other cases an employee can be fired at any time, without any reason. There is no job security for an "at will employee". I asked my American students how many of you have been "at will employees" and many of them have raised their hand and it is accepted, it is something quite natural, it is just simply the way it is. And then, I asked the foreign students who were sitting in my class is this so in your country and they, of course, remarked that it is not that way at all. There is much more job security, the employees are treated in much different way, which opens up the discussion. My American students for the first time are saying: "we think there is something really valid and valuable about looking at foreign systems and looking at the employment practices in foreign system". That has always have been a valuable discussion to me and I particularly enjoy the fact that I will have foreign students in my class who are able to really remark very strongly about how they find the American employment practices, so adverse to employment protections that they have in their country.

There are other examples that I could give but simply as a matter of time, I will not, but there are number of examples that I like to use in my class in the United States where I point out the advantages of looking at what is happening in Europe or another countries. What I really wish, is that we would be able to do more to motivate our U.S. students to have the same appreciation for foreign law as I think exists in Europe, at least that has been my impression. We do a lot in the U.S. and Julian has mentioned some things we do. We do a lot, we do bring in foreign teachers to the University of Florida, for example. We have programs that we bring in foreign instructors and we have been very fortunate to have instructors from Warsaw such as: Professor Maria Kenig-Witkowska, Professor Tomasz Giaro and Professor Wojciech Kocot, who came to the University of Florida and taught in our program. But there is so much more I wish we could do and when they come I wish they had the kind of class sizes that are traditional with other classes. But still, it is hard for us to get our students to be totally motivated to take those kind of courses.

So what can we do? Do we have an answer to this? It is not "to teach or not to teach?", the question is how do we motivate our students to participate in that. One idea that has been thrown around and has been talked about is to require all of the professors to create some portion of their course devoted to the international comparative aspects. This is very similar to what happened about 20 years ago when professional responsibility and ethics became very important subjects and we were all told "add some element of ethics into your course". It did not work because all of us teach subjects that are usually so broad that we have very little time to incorporate additional materials and I do not think it will work in the international area as well. So to ask every faculty member to spend at least some time to incorporate foreign materials into their course I do not think is the answer. I think one answer will be technology. I think one answer will be an increasing use of technology to have cross-Atlantic type courses where faculty does not have to travel physically to each others' institutions but we can use technology to enhance teaching opportunities. We can have classes in which we have both – Polish and American students in the same class but obviously in different classrooms and on different sides of the Atlantic but learning the same material at the same time and talking to each other about various problems.

I think technology could be a way to reach some of this gap and to make at least American students appreciate more their foreign colleagues. Finally, and it is not too modest proposal, I would like to see the Bar exam have some questions which are foreign law oriented. Our law students are very goal oriented and their goal is to eventually get out of law school and pass the Bar exam. But there is nothing in the Bar exam that talks about foreign law, that talks about foreign legal systems, that asks them anything that they would need to know beyond American rules on evidence, American rules of criminal law, etc. Would not that be nice, would not that be refreshing if we had some portion of every Bar exam devoted to foreign law, just as we now have some portion of every Bar exam devoted to

a professional responsibility which is something new? When I took the Bar exam that was not a subject but we now have that as a required Bar subject. Would not it be nice if we had some portion of the American Bar exam and I really do not know what the Bar exam is like here in Poland but perhaps, the same would apply here. Would not it be refreshing if every student who studies for the Bar exam also wanted to study what are the differences in the European Union between a directive and regulation? What trade changes do we have in the United States with Mexico and Canada as a result of NAFTA – The North American Free Trade Act? What is the difference between the International Court of Justice and the International Criminal Court? What is the difference in their jurisdiction? How does a U.S. company protect its patterns and trade marks in Europe, in Africa, in China? This kinds of questions are very fundamental and would not that be nice if these were part of the Bar exam?

So I want to thank you for this opportunity, Dr. Gmurzyńska, for allowing me to speak and I thank all the panelists as well.

Thank you very much.

Professor Julian Juergensmeyer, Moderator:

Thank you Stu. That was very interesting and I, frankly, had not thought about putting foreign law issues on Bar exams. That is a very clever and thought provoking idea. Our next panelist is Dr. Ewa Gmurzyńska, Director of the Center for American Law Studies. I took public speaking course once and first rule of introducing people is never say that someone needs no introduction because then you have to go ahead and introduce them. But if one could say someone needs no introduction, it is our next panelist and JoAnn Klein reminded me that this is a very special day for Ewa, since she is not only celebrating the 15th anniversary of the Center and the graduation of this year's class but also her book "*The Role of Lawyers in Dispute Resolution*" has been published today.

Dr. Ewa Gmurzyńska, director of the Center for American Law Studies:

Actually, my book is at the printer right now, so it will be ready and published in a few days. Thank you very much Professor Juergensmeyer and, well, I am not going even to attempt to answer the question "to teach or not to teach comparative law?" because it is obvious for me since for almost 16 years we have promoted teaching foreign law to the Polish students. If I would say "no", then 16 years of my professional life would be wasted since I strongly believe that is very important.

I am going to make my very short remarks in a narrower view to talk about two programs in terms of teaching comparative law – the program of the Center for American Law Studies and another spin-off of that program, but this in a minute. I just would like to say that things do not happen in life without a reason. I say that because the Center did not happen in an empty space, in the middle of nowhere land. Twenty five years ago we had free elections in Poland, which opened incredible opportunities. We celebrated this event 10 days ago and we

hosted also President Barack Obama. One of the reasons why the Center was created almost 16 years ago was because we did have free elections. I just would like to mention from historical point of view that the ties of the University of Florida with Polish institutions, including the University of Warsaw, were very close for many years and they started with the Cambridge-Warsaw program in seventies. Then the University of Florida organized at the University of Warsaw and at the Polish Chamber of Commerce the conferences in 70' and 80' on East-West Trade. During that time we did not have a market economy, so extensive trade really did not exist between Poland and the U.S. or Poland and the so-called WEST through all these years, but for many, many years the University of Florida consistently organized those conferences, even though hope for change at this time was pretty small. Then when the political changes occurred at the beginning of the nineties the University of Florida was involved in one of the biggest and the most important transformations in Poland – development of local government, working mainly with Professor Michal Kulesza. The Center did not happen without a reason. It was a consequence of political and social change, but also many years of collaboration with the University of Florida and its presence in Poland through the worst political times.

I am going to make a short remark why it is important to have centers like ours and I also would like to mention that the University of Warsaw established other centers. The British Law Center, which has been actually the first one and has been opened 20 years ago, so we sort of took a path of our British colleagues from the British Center, and then other programs are with the University of Poitiers, Bonn and also we do have programs of Italian and Spanish Schools of Law. Now, when we look at the map of Poland right now, several major universities have programs similar to ours e.g. the Jagiellonian University, the University of Gdańsk, the Catholic University in Lublin, the Wroclaw University. Fortunately, this kind of teaching is becoming more and more popular in Poland. I said fortunately because this systemic approach to teach foreign law is very important and gives Polish students different perspective to look at law.

What are the benefits? First of all, it is an economical benefit. When a Polish student wants to go to the United States for an LL.M. Program, it is very costly, usually it costs around 30–40 thousand dollars which is unaffordable for most students. Our program is a one-year program and it is not an LL.M. but it could be compared to it, since it is a very comprehensive program which includes 190 hours of teaching. The obvious benefit is also that all classes are taught by American professors, so we sort of have a little bit of America here. The UF professors are bringing to our students not only the knowledge on the merits in particular fields of law but also the methodology, teaching methods and certain rules and culture which are applied at the U.S. law schools – attendance, participation and preparation for class, which in some cases is hard to follow at the University here. We are trying to introduce those rules and follow American methodology and

also ethical standards. So the implementation of the program has its challenges which concern, among others, to answer the question how much of the culture together with the legal knowledge you can bring to another environment, but the benefits for both, the students and the faculties of both universities, considerably outweigh those concerns.

I would like to talk a little bit about another program which could not exist, coming back to my thought that things do not happen without a reason, without creation of the Center for American Law Studies. It is our recent program, the program that both Universities are very proud of. It is called PAJRAP – Polish-American Judicial Research Assistance Program. This is a very interesting initiative which is based on a three party agreement between the University of Florida, the University of Warsaw and the Ministry of Justice. According to the Article 1145 of the Polish Code of the Civil Procedure, Polish courts may submit to the Ministry of Justice a request for legal information concerning foreign law. Based on this provision we developed PAJRAP. Because of the globalization and the fact that more and more cases in the Polish courts have foreign component, the judges need information about American law in the field such as family law, in field of property law, in field of corporations and general provision of the civil law. This program, in fact, is a clinical program which involves students at this side of the Atlantic – Polish students who are graduates of the Center for American Law Studies and involves American students on the other side of the Atlantic and, of course, the law professors who are supervising the work of the students. When a Polish court has a question about American law it approaches the Ministry of Justice, the Ministry of Justice passes this question to us, to our program and again it is a question about legal information not the advice and with our team consisting of American and Polish students and professors, we prepare the research. Obviously, this program could not exist without comparative component and knowledge of both systems. This kind of program shows in real life the effect of globalization of the world. Can you imagine a UF student in Gainesville working to help to find the appropriate law to be applied by Polish judge in the city of Radom or Krosno? Going further, we can imagine similar program of helping American judges to research Polish law. So the answer for me is very easy – yes, we do need to teach foreign law at the University of Florida and at the University of Warsaw because the global world is a matter of fact. The question here is a little different. No whether should we teach but can we afford this kind of programs on bigger scale? Can we afford it with sort of mass education we do have at the Warsaw law school with over 6.000 students, to educate elite groups of students, if I can use that unpopular phrase, in our "egalitarian" world. So if students are really smart and bright and they are interested in comparative law and they want to learn more and they want to be involved, should we create this kind of program even if it costs more than regular classes for 80 or 100 students? My answer to this question is yes – even if it is designed for a small group of students, it is the

obligation of our academic institutions not only to educate as many as possible, but also to educate those who in the future will be the elite of our countries. I am hoping you will give some thought to this question and I am leaving it open for the discussion. Can and should we afford to teach foreign and comparative law in this limited in numbers types of programs? This is just one example but my colleague Rafał Morek will talk about moot court competitions in the second part of our conference. So with that I am going to leave the floor.

Thank you.

Professor Julian Juergensmeyer, Moderator:

Thank you, Ewa. Our next panelist is Roman Rewald who I have had the privilege of knowing for many years and I am delighted to get to be on the panel with you again. Roman is a very important member of this panel, in my opinion. I am sure others will agree, because normally we end up sort of hypothesizing a role model of what we are talking about. But Roman is present and he is the best role model I know for teaching and the practice of foreign and comparative law. He is both an American lawyer and a Polish lawyer, well known in Warsaw for his international representations. We are especially pleased and honored to have Roman as a member of our panel.

Roman Rewald, esq., Weil, Gotshal & Manges:

Thank you very much. Yes, I had the privilege of going through both Polish law school's full program and a J.D. degree in Michigan – full program. That gives me a unique view on differences in education and what we can do afterwards. If you allow me, I will stick to my role as a practitioner. If I look at the question "to teach or not to teach", the answer is obvious – yes, but the remaining question is how to teach?

Let me just elaborate on the fact that I have been educated in the U.S. and I have a practitioner's view of differences between the American approach to law and the European Union's, Poland's particularly, approach. Actually, if we are talking about international law or foreign law in Europe, we are talking mostly about the United States, because looking at the EU as a whole, it is difficult to talk about foreign law when we are within the EU, and the EU law is quickly becoming harmonized. Looking at teaching Chinese law as foreign law is probably too early. Australia does not interest us that much, so only American law is the law that is really foreign, that needs to be considered in light of the international treaty between the U.S. and Europe that is coming up. I am going to address that issue at the end.

So I will speak about the EU law and American law, which are the ones that we need to compare. From that point of view, whether it is important to teach American law in Europe and the answer to the initial question is again yes – but how?

At the law firm, if we have a candidate who has an LL.M. diploma, and is an LL.M graduate from a university in the United States, we need to determine

whether this person can compete with other people who do not have that education. I would say that an LL.M. does not impress us that much because there is a great difference between the LL.M. (one-year master degree) and J.D. (full three-year law studies) programs. I completed the J.D. program and from that program we can bring something to Poland from the American point of view, because at the J.D. program you learn how to think like a lawyer in the first year of law school. This is a teaching instrument that makes you a lawyer in the first year. That instruction is denied to people who only take an LL.M. program. The LL.M. programs are one-year long and yes, in certain schools and states you can get an LL.M. and thereafter, take the bar exam and become a California lawyer or New York lawyer, which is fine. We have people like that in our firm. Would that give you an instant job? Probably not.

Let us look at the program that Ewa Gmurzyńska is administering at the University of Warsaw, here in Poland, which we are supporting. Tomasz Wardyński and his firm are also supporting this program. This is a very good program. Would graduation from this program guarantee a job in a law firm like mine or Tomasz's? Probably not. But it would distinguish you from other people who are competing for the same position and that is important because we understand that this person who comes to us with their application has a knowledge that is way beyond the regular law student's.

This program shows passion and for me legal profession is a matter of passion. If you are enthusiastic about your legal profession then certainly, you are going to be a good lawyer. If you are not zealous, you better be doing something else and take your legal education, as we discussed in this morning panel, as a good preparation for activity in society and go somewhere else, go to administration, go to other professions. But to be a lawyer you have to have passion about this profession. I think the University of Warsaw's program is very good. I am very glad to hear about the second program Ewa Gmurzyńska is starting because I have a war story about it that I will very quickly tell you about.

It was in the middle of the 90's and I had to register a foundation in Poland which was established by a foundation registered in Delaware. So, we filed all the applications for the registration indicating that the founder was a Delaware foundation, and we did not get any response for three months. So we went to the court. At that time it was not easy, but we did it anyway and we found out that the good judge had decided to determine whether or not this Delaware foundation was properly registered. So what did the judge do? She asked the Ministry of Foreign Affairs to send her the whole copy of the Delaware Company Code. After two months, she received the whole text of the law on her desk. Then she noticed that it was in a foreign language – in English – so she sent it back and asked the Ministry for a translation of this entire body of law. It was obviously an absolute misunderstanding of the situation because there is no way that a reading of this whole law would answer whether this registration was proper or not. So when we

found out about it, we finally resolved the issue by having a friendly American lawyer who was licensed in Delaware write an opinion that this foundation was properly registered in the United States. A program like this one would probably avoid these types of misunderstandings and make our practice much easier.

From the point of view of the employer, the law firm, what are we looking for in a candidate? Professor Giaro told us in a previous panel that we have a substantial globalization of the approach to corporate law by the expansion of the American corporate concept. It is happening all over the world. So first of all, yes, we have to look at the American way of doing business in contracts and in many other areas, but most important for law students is to understand the litigation part. American litigation is based on the concept of a jury trial and, therefore, it uses certain, very important procedural instruments which do not exist in Europe. Because of the jury trial, a lawyer must explain to a group of peers, people who are not lawyers, very complicated legal concepts. There are many ways of doing that. The way that American law protects that message to the non-lawyers is by making sure the evidence is not biased or prejudicial. For this purpose, there exists a whole body of evidence rules. The evidence rules in the United States are designed to protect juries against being bombarded by prejudicial, tainted evidence which could result in an incorrect decision. The whole field of evidence law is very important in the United States, but not so important in Europe, where the fact finder and law finder is a legally educated lawyer, judge, and he/she should be able to distinguish what is prejudicial and what is not.

Also, we need to understand the second, very important, procedural instrument which is discovery. In order to have evidence which would be properly presented to the jury, we have to have discovery. We have to get our evidence often from the opposing side. So, the whole system of rules around discovery is also very much built up in the United States and does not exist in Europe.

The third issue I will try to address in my presentation is the approach to witnesses in litigation. The American approach is that we go to a witness and we find out (discover) what the witness will say, because we need to know what will be said in court. For an American lawyer to go to court and ask a witness a question that he or she does not know the answer to in advance from discovery, is a major mistake. In Europe it is different. We cannot approach a witness in advance and, therefore, at a trial in the court we are guessing what the witness is going to say. This is a substantial difference.

Why are those issues important? They are important because international arbitration has switched from being just arbitration deciding who is right and who is wrong by a couple of specialists or common men or women, into a very much judicial process. Procedures of international arbitration are pretty much dominated by American and British lawyers, so all the people who are from Europe and are faced with an international arbitration may be surprised with the arbitrators' request for discovery. They may be surprised also by the evidence rules, with

which they are not familiar. Therefore, familiarity with the American approach in litigation could be crucial for Polish or other European lawyers to decide whether or not to go into international arbitration and how to prepare for it. This is a matter which cannot be overlooked and underappreciated.

You do not need to know the evidence rules like an American litigator, you do not need to know American discovery like the lawyers in American law firms, who would fight on every step as to whether particular evidence is discoverable or not. You need to know that such institutions exist and to understand the process. Only then you can better advise your client whether or not to get involved in international arbitration and whom to select as arbitrators. If you select common law arbitrators, they are going to be pushing for discovery and evidence rules. If you select European arbitrators, you may have different approach. So, teaching basics of both systems is very important and understanding American approach to litigation is very important.

Understanding American difference in jurisdiction is also very important. You have to understand that in Delaware, company law is a bit more liberal than in other states and that is something that could be useful for the client when you advise your client how to approach the issue of American and Polish or American-European relationships.

That brings me to the TTIP – the Transatlantic Trade and Investment Treaty which is coming up. I am sort of flabbergasted that so very few people talk about it in Poland, because this is going to be a revolution. The removal of the restrictions and regulations and differences which are existing between Europe and United States is going to open the markets on both sides to unprecedented sizes. TTIP is basically designed to remove custom barriers because they are the most damaging in the day-to-day relationships. There are differences in regulatory approaches to accomplish the same goals. Both, the United States and European societies, have the same goals – environment, protection of people, protection of labor. But they are being protected with totally different and incomparable instruments. If you unify them, if you put them together, trade between the U.S. and Europe is going to increase dramatically and that may happen in two years or so, and that is going to lead to further harmonization. So, sooner or later the encroachment of the corporate system of America – which Professor Tomasz Giaro was talking about – is going to be increased many times over, all because of the free movement of both goods and services between these two major economies. This is a great reason why common law should be taught to the extent that it is understood by an average law graduate.

The last subject (very close to Ewa Gmurzyńska and me, since we have been trying to promote mediation in Poland) is that you need to understand how a lawyer in any U.S. jurisdiction is going to respond to you if you are going to make a request for mediation. A lot of people mix mediation with arbitration or just with negotiation and, therefore, by learning foreign law, you also can learn how

disputes are being resolved in the United States. The United States is ahead of all the other jurisdictions in mediation, so you need to know it that in learning about the American approach to litigation and dispute resolution, in general, mediation is quite important. So, if a request comes from the United States when the TTIP treaty is already established, when there is a huge movement of goods and services between the United States and Poland and a counsel requests that a dispute should be mediated, you as a lawyer, educated in foreign law, should know what they mean by mediation and you can respond positively and have better resolutions.

So with that positive thought I will just sit down. Thank you very much.

Professor Julian Juergensmeyer, Moderator:

Thank you very much, Roman. That was quite interesting. So now we come to our last panelist, Witold Kowalczyk, and I think he is an appropriate person to end this panel. We have had the practitioner's perspective and now we are going to have a student's perspective and, of course, remember, academics – students are our clients. I would like to call to your attention that he is not an ordinary student – he is a Polish student, French student, and British law student and so we are very pleased to have Witold as a member of our panel.

Witold Kowalczyk, Student WPiA UW

Thank you very much for this introduction Professor Juergensmeyer. I also would like to thank Dr. Ewa Gmurzyńska for inviting me here and allowing me to share my thoughts and views on the use of comparative law as well as on the teaching foreign law at our law schools from a student's perspective. My main contention is that foreign law should, of course, be taught to students at law school and, going one step further, that it is necessary and mandatory to learn about comparative and foreign law.

I would like to address three points supporting this contention. The first one will be a presentation of some general reasons supporting the necessity to learn foreign law nowadays. The second answers the question of how it should be taught or how it can be taught to students. The third will focus on a question of using comparative law by judges. Since some students will in their future pursue a career as a judge, this point will prove useful to them.

Moving now to the first point. As it has been already pointed out, there are some general advantages and benefits of learning comparative law. I would now like to go a bit further than that and address an actual necessity that we have nowadays to use comparative law. We can see that such a necessity exists for three main reasons. First, we observe today a growing regionalization and globalization of the law, which has been mentioned previously. Its result is that some areas of law which 50 years ago were restricted only to national law, nowadays are completely governed by regional or international acts. Looking at the European Union, we have some branches of law which used to play an important role in national laws and that currently do not exist anymore.

The example of the EU law shows us the importance of comparison which allowed to create it. If we take a look at a European regulation or a European directive, we can say this is EU law, but if we take a step back, we actually see that the way in which that law was created was through the unification and convergence of initially diverging legal systems. We have regulations which both manage to encompass the differences of the common law and the civil law systems. So, in fact, in order for the modern lawyers and students to understand, interpret and work on such European regulations, it is mandatory to have knowledge of foreign laws and different legal systems. When looking at a specific regulation or a judgment of the European Court of Justice, we can see that although the court refers to the EU law, the specific question might concern a particular mechanism of English law which does not exist in other legal systems. This mechanism has to be somehow put together with the European law and the court will have to answer the question of how this English regulation should be viewed in terms of the European law. So for any lawyer in Poland, France or Germany it is mandatory, in order to understand such a "European" judgment, to look at English law and have at least some general knowledge of what English law says on this particular matter.

Furthermore, it is important to underline that beyond the on-going globalization of the law we experience also an already existing globalization of almost any other area of our lives – technology, commerce, trade, communication. All these areas are not subject nowadays to any national limits. This is a reality that lawyers and students that will go on and practice as judges or as lawyers will have to face in even more and more situations which are beyond the limits of one particular country. For example marriages, foreign international trades, foreign investments, etc. Those situations, in order to properly address them, will require the lawyers to have some knowledge of foreign law.

Finally, I would like to point out that lawyers nowadays should embrace, in my opinion, the most far-reaching unification of law as possible in order to eliminate those barriers that still exist between various national systems and which still lead to some hindrances in international commerce or trade or in other areas of life.

Coming to my second part, I would like to address the question of how we should teach foreign law. The main way of teaching it is by comparing. We start from one point that we already know and we go further to explore some other systems. We can also see nowadays, especially here at the University of Warsaw, that there are a lot of opportunities to study foreign law. We have the American, English, German, French, Italian and Spanish schools and students are free to choose a system they like and learn about it. In my opinion, however, we should also go a bit further and introduce compulsory classes which will be mandatory for every student and where every student will have to learn about some general aspects of comparative of law. To give you an example, when I was studying

in Paris we had a compulsory class. One year of comparative law. In the first semester there was a general presentation of what comparative law is along with a general overview of Japanese, Russian, Islamic law as well as Indian law. The second semester focused exclusively on common law and on the law of contracts in England. That class turned out to be very beneficial because even if I had the opportunity to study Indian law, I would probably never take it because it is not something that I might find useful in Poland or in Europe but actually, it offers you a more valuable perspective than one would initially expect.

Just to give you an example, there was a part of the course on Indian law which referred to the relationship and the reluctance of India to adopt international human rights treaties. That reluctance came mainly from the fact that the cultural and the historical background and approach to human rights in India is a lot different than in Europe. The following example will, I think, summarize this idea in the best possible way: we can say that in Europe when we look at every human right treaty, we quickly identify that the fundamental right, which is offered the most far-reaching protection, is the right to life. If you look at Indian culture and its law, the will to protect human life is not so strong and not so important. Indian culture is not so attached to the "sanctity" of the human life as we are here in Europe. There is, in turn, a far more important respect for the environment and for the connection of the human with nature. Therefore, the approach of India to international human rights treaties was to adopt them, because everyone is adopting them, but they do not actually believe that the rights protected in those treaties are the rights that should be protected. It makes you think that it is interesting to know that but actually, when you go further, it is kind of a fascinating thing to learn that a country with 1 billion citizens, that is 1/7 of the world's population, does not actually view human rights the same way we do in Europe and that this country would not extend the same protection to human life as we would.

Comparative law allows you to see the source of such cultural and legal differences which, in my view, are essential to any kind of legal career. For instance coming to mediation, if you look at the Japanese law, you will find there a very strong need to mediate a case and almost no cases go to trial. Almost all the cases are decided by mediation. Of course, it is a deeply cultural thing based on history but it offers you some valuable perspective on how to address the issues we have with mediation here in Europe.

So in order to answer the question as to how we should teach foreign law, I believe that such classes should be compulsory, they should be included in the compulsory curriculum of every law school and also that they should be, if possible, included as early as possible, during 1st and 2nd year, in order not only to have students which start to learn foreign law as soon as they master their own legal system, but in order to have students that learn foreign law along with their national system. Students that adapt to a world which is more and more unified

and more and more global and where law itself is becoming more and more global and offers more an international perspective than it used to.

Coming finally to the third point which is linked with some personal research that I have previously done, I would like to address the question of using comparative law and using foreign law by judges. I noticed that there is a question which has oftentimes led, especially in the U.S., to a heated debate between legal scholars as well as between the different justices of the Supreme Court. This question was: whether it is legitimate, whether American judges should refer to foreign cases and to foreign law when ruling on their own national cases? This question involves a lot of problems with the legitimacy of such foreign law uses – is an American court or a French court allowed constitutionally to refer to foreign cases and to foreign law when such law is clearly not considered as an actual source of law in the court's country. This problem has led to many controversies but there are actually many benefits of such uses by judges.

First of all, when we look at the ruling of the judge, whether it is in common law or civil law, the judge is for one thing interpreting the law, he is giving a meaning to some terms which are obscure, not clear in the law, but he is also a lawmaker, especially in common law but also we can see it over the European Union with the European Court of Justice, and also in some civil law countries. If we want to introduce changes, inspired by foreign law, into our national systems, those changes can be better achieved by judges which are more dynamic lawmakers as they interpret the law on a case-by-case basis. Hence, if we think of introducing a particular American regulation into Polish law, we can do so in a more dynamic and effective way by judges rather than by legislation.

The other argument that can be given in favor of such uses by judges is linked to the question that in fact all legal systems, or most of them, face the same dilemmas and problems. They have rules which may different but still address the same problems and it is natural in some way to refer to other countries and to what was decided in foreign courts in order to solve our national problems. We can see that especially in the area of public law and human rights where, for instance, the European Court of Human Rights refers to the case law of other human rights courts in the same way as many constitutional tribunals refer to the case law of other constitutional tribunals when ruling on a particular public law case. The same happens also within private law. When we look at the practice of the European Court of Justice in the 80' and 90' in Europe, where the European competition law was not very developed, there were frequent references to the U.S. anti-trust law and to the judgments to the U.S. Supreme Court in order to, in fact, create European rules on competition. Now I'm not saying everything was transferred directly from the U.S., there were some changes that were made but the U.S. and Japan were a source of inspiration in the creation of the European standards of competition law.

So in fact, there can be many benefits to such a practice and it can be clearly said that judges referring to comparative law have a broader perspective on a case and it also allows them to justify a given solution by saying that not only is this the way we do it in our country but also this is how other countries do it. The judgment hence gains an extra justification for the actions of the court.

Furthermore, as regards the question of the legitimacy of courts referring to foreign law it has to be said that in Poland, in the U.S. or wherever in the world, courts never make a judgment based only on the law. They always refer to other cases and they always refer to legal scholars – articles, books, etc. If such a reference to scholarly work can be made and is legitimate, then there is no reason to say that foreign courts' judgments will not have that legitimacy. Especially, if the case that is being dealt with is similar or even identical and especially, if the foreign judgment concerned a particular rule of law which is identical in another legal system. We often find legal systems which basically share the same rules and have almost identical provisions in their civil or criminal codes. It seems therefore natural to refer to foreign solutions. And on that I would like to conclude. Three main points should be kept in mind. Teaching comparative law to students is not only a benefit and advantage but it is also necessity and it should be mandatory to teach students foreign law in today's global world. That teaching, in my opinion, should be done by introducing mandatory classes that maybe would not allow students to be lawyers in another country but would offer a broader perspective and allow them to become better lawyers in their own country. And thirdly, as it has been underlined, there are some positive effects on the future careers when one would like to become a judge, there are many reasons to use foreign law when ruling on a case.

Professor Julian Juergensmeyer, Moderator:

Thank you, Witold. That was very good. I am sorry that a certain Justice of the U.S. Supreme Court is not here to be educated. I am afraid that we do not have time for discussion now, so I would like to thank the audience and speakers and invite you for the break.