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The Broad, Human Sweep of Law

Vincent D. Rougeau
Boston College Law School, vincent.rougeau@bc.edu

Vlad F. Perju
Boston College Law School, perju@bc.edu

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The Broad, Human Sweep of Law

Hot Topics interviewed BC Law Dean Vincent Rougeau and Law Professor and Clough Center Director Vlad Perju in November 2012 about the lecture series on jurisprudence at the BC Clough Center for the Study of Constitutional Democracy. A wide-ranging discussion ensued. This is a transcript of the entire conversation. To read an abridged version, see BC Law Magazine at www.bc.edu/lawalumni. For more about the Clough Center, visit http://www.bc.edu/centers/cloughcenter/.

*How does the Clough Center’s focus on constitutional democracy give BC Law an opportunity to engage in interdisciplinary conversations concerning self-government in the US and throughout the world?*

**PERJU:** The study of constitutional democracy can only be interdisciplinary. It has to include the study of law just as it has to include the study of economics, of history, of philosophy, of sociology, of theology, and of everything else. In that sense, the Clough Center’s impact on the life of the Law School is manifold. It brings some interdisciplinarity to the Law School and allows it to draw on its strength and contribute to the larger conversation within the University.

**ROUGEAU:** The Clough Center also feeds nicely into the Law School’s mission. It reminds us at the Law School and University about the broad, human sweep of law. You can’t really understand law or constitutional democracy without understanding a lot of different areas of intellectual life and how they impact the human person and self-government in a democracy.

**PERJU:** Law is special. Law is the medium for the transmission of normative messages in society. There is a way in which all the other insights from history, from philosophy, fit into law
and legal reasoning. We know that is the case and we know the richness of legal thought to be there, but there is a very interesting way in which, institutionally, this would play out. I mean, if you look at the discourse in law schools over the past few decades, you can see the rise of economic rationality, the rise of law and economics, which, while it has done some wonderful things, has also tended at times to narrow the set of concerns that become part of legal argument. One of the strengths of our Law School is that it enables people to engage in this broad humanistic inquiry, to recover some of that richness of legal thought and tradition.

Why is comparative study important?

**PERJU:** I tell my students that studying different legal subjects in the twenty-first century, without taking a comparative approach, is educational malpractice. It has become quite difficult to study environmental law without looking at international environmental law, and for a long time, it has been very difficult to study antitrust without looking at the global implications of antitrust. But one thing that characterizes the past ten or fifteen years is the way in which the global international comparative dimension has had an impact on the heart of the sovereign, and that is constitutional law. That is so to the extent that now even mainstream courses in constitutional law have a comparative dimension. This is understandable; it is very hard to understand constitutional democracy without having some insight into the experiences in self-government of people elsewhere.

Law is really this combination of contingency, of stuff that happens, of history, and of an ideal. Even though the ideal might be the same everywhere—which is a community of people who govern themselves—at times it seems they have conflicting values of equality and liberty. Can you have a free community of equals? The great Rousseau question—the question you see across societies and that constitutional democracies have been trying to answer. But the particular shape of the laws, of the legal regime, of the experiences that the people have in the process of trying to figure if such a community is possible, really depends on the historical circumstance or where they’re coming from. In that sense, understanding the richness of the promise of constitutional democracy really requires that we have significant global dimension.
ROUGEAU: It is essential for our students to understand that constitutional democracy is a global project with origins around the world and that there are different approaches to creating a government by the people and for the people. Increasingly, we see in this country a movement away from what I would call a relatively parochial understanding of the democratic project we’re engaged in. There are unique aspects to each country’s experience with constitutional democracy. But this is a world where so many of the everyday things we deal with are products of global phenomena, where communication is instantaneous around the globe, and where problems are being solved in the context of constitutional democratic systems that may have different understandings of the importance of ideas like equality.

What does equality really mean and how is it translated through this process of self-government? Obviously, different countries have come to different answers. In the United States, where we often have very divergent views within our own democracy of what equality is supposed to mean, it’s helpful to be able to look abroad, analyze what has been done elsewhere, compare the circumstances, compare the results, and think about whether or not those experiences have lessons to teach us. There’s often resistance to that approach, but it’s breaking down. In the Supreme Court, for instance, a group of justices are looking abroad more often than ever in the past. That’s wonderful.

PERJU: What we’re witnessing now is this window that might shut at some point in the future. If you look, for example, at the constitutional discourse and the constitutional scholarship, you have, on the one hand, this great debate about the use of foreign law, and, indeed, some justices have become very vocal in that debate. But if you look at where constitutional scholarship has been going, it has been more towards the past. At a time when so much constitutional development elsewhere is on issues such as constitutional design or the nature of the executive, democratic presidentialism, and economic rights, there are very strange ways in which provincialism manages to resurface.

ROUGEAU: You’re right, there is this push, pull. I hope it is pulling us into a more cosmopolitan understanding of constitutionalism and democracy and law.

PERJU: Absolutely, and one that is sufficiently broad to welcome inquiries into parts of the world that traditionally have not been at the heart of the constitutionalist project. It matters
enormously, for example, what is happening now in China. If you see where the brilliant graduates of Chinese universities are going nowadays, it seems it is no longer into economics, because they think they have figured that out. They more and more turn towards law and government, because they know that sooner or later the political system will have to be reformed and they want to understand how to do that.

Latin America is another example, and one where one has to proceed with caution, where one has to understand the importance of culture and the different ways of doing things. At the same time, one has to have in mind the fact that the ideals of equality and freedom, regardless of the form they might take in a particular culture, might be enough to allow us at least to communicate, understand, or participate in a way that is nuanced and respectful of others’ attempts at self-government.

Bringing our students to this task, making them aware of the importance of this project at this moment in time, is enormously interesting. Enrollment, for example, in courses like European law and comparative constitutional law, is really going up. One of the attractions of our law school is a very strong team of international comparative law faculty.

American law has always been self-referential. How is globalization changing that?

ROUGEAU: There’s been this tendency in the United States to view our way of doing things as, obviously, particularly important for us and what’s happening externally is not. Some of that makes sense when you look at the size of the country and the differences within the country. I mean, just trying to define our own constitutional experiment with any coherence has been a difficult task and has involved some pretty dramatic events, like wars. My impression over the last twenty to thirty years is that something has changed. Part of it may be demographic. The country now is more open to the world than it’s ever been. Yes, we’ve always had waves of immigrants, but they were from relatively limited places. Now immigrants are coming from everywhere around the globe. For the first time, the country is starting to see itself as a different kind of place that is more connected not only to Europe but also to Latin America and Asia in ways that are profound and potentially transformative for the nation. It takes a long time for those kinds of changes to work their way into the law, but, as we were discussing earlier, culture
is essential in understanding law and constitution and democracy. As we identify in the United States major cultural and demographic change, we probably can anticipate changes that will take place in the work we do.

PERJU: That is right. Conceptions of identity and culture are fluid; they’re dynamic and always changing. Being in the Law School and in the legal profession, we are able to witness this in the most fascinating of ways. We see signs of the changes everywhere we look. At the same time, we’re able to shift things somewhat so it’s not as if we are players in somebody else’s script. We can orient things, we can decide what’s interesting and what’s not interesting, what to do and what not to do. This is a wonderful opportunity institutionally to sort of track the substance of developments we see with the globalization turn.

The Clough Center’s conference in October offered comparative and historical perspectives on the 2012 election. What were the key takeaways in the context of what you’ve been discussing here?

ROUGEAU: For the first time there is a self-reckoning in the United States amongst the political chattering classes that we’ve got to think about government in the context of a population that thinks of it in a different way. A lot of the discussion has been around ethnic and racial groups and how they voted. That may be a bit simplistic. We need to be thinking about what these groups want from the political system. What is the dynamic of all these groups living together and asking for things that may be new to the American understanding of how government works?

PERJU: Designing institutions that remain responsive to this diversity is the fundamental question. You see it everywhere you look—in Latin America, Africa, and Europe. Keeping these institutions responsive seems to me the critical challenge.

One thing that happens in a totalitarian state—I was born in Romania so I have some knowledge about it—is that when you move, institutions do not move; they do not respond. [Political theorist] Hannah Arendt actually understood this very well; she wrote about the loneliness of
living in a totalitarian system because there is a way in which individuals do not have the power to shape the social spaces that they inhabit. So when you move, the institution doesn’t move or it might retaliate; it might move if it retaliates against you. So how can you make public institutions responsive to demands of the citizens? How can you make the language of law, the language of politics respond to the demands of people who sometimes frame their demands in all sorts of ways? How can legal thought adapt itself to allow for the translation of these claims in ways that these institutions can then be responsive? Going forward, this is a very important question. It is a question that is heightened by the greater diversity that societies such as this one have or the increasing diversity in countries such as France or Germany, where the issue is not always put in this way. It is always presented as a social issue: What do we do about immigration? Think about the natures of the institutions you have built. Think about the way that these institutions can learn from past experiences. Think about political experimentalism.

ROUGEAU: Mobility really changes the notion of citizenship and membership. We see immigration as the force that’s changed things, but it’s really so much bigger than that. It is this idea of diversity really. In a very diverse population, can institutions respond when they were designed for a very different kind of population and a very different set of circumstances? Even here in the United States we see the difficulty, for instance, of getting congress to legislate, partially because there are so many conflicting demands on the legislators. There is almost a kind of stasis; they just can’t function. We haven’t really found the catalyst to reimagine how that institution is supposed to work. I think that will be a big challenge in the years ahead for this country as it is in Europe as well.

PERJU: I hope that the Clough Center and the Law School can really participate in that debate. Moving forward I can imagine that we might have specific programs or projects, such as rethinking political representation or understanding corruption. Part of the reason why congress is in this state is structural corruption in the way in which money has managed to shape and reshape political interests.
Why did the Clough Center lecture by death penalty scholar David Garland, a professor at New York University and formerly at Edinburgh University in Scotland, make many people in the room sit up and start to rethink the death penalty in this country?

PERJU: Here is somebody who is trained both as a lawyer and sociologist, who has spent much of his career in the United Kingdom, and who then came to New York not long ago to teach. He has written some of the most insightful and interesting work on the nature of punishment and the nature of the death penalty here in the United States. He is an outsider in the classical sense. But he has managed to give us some of the most interesting perspectives on the US death penalty. For example, he analogized the states that still have the death penalty with lynching by tracing the history of a phenomenon, by thinking about it as sociologists typically do, in a very complex, interesting way. That is what the Law School community found so appealing about the lecture. I hope going forward that the Law School will do similar things with interdisciplinary events and approaches.

ROUGEAU: Another fascinating thing about his lecture was how he was able to critique democracy within the United States. He said there seems to be a view at times in the US that more democracy is better without real thought given to the risks of allowing more people to participate in the decision-making process and without some sort of check on what could become mob rule. That connects directly to the historical experience of lynching in the south. The state fails to apply the law and allows the mob to create its own law based on passion. We often attack institutions in the United States by saying they’re not democratic enough. Well, perhaps that’s a good thing. Perhaps the way to deal with some unique cultural problems within American life would be to remove democracy from certain kinds of functions. Take, for example, the idea of electing judges in certain courts. Why is that necessarily a good idea? Why is that application of more democracy good? Could we ever have a conversation—and I hope we could in the context of the Clough Center and the Law School—about making a strong case that sometimes less democracy is a better way for the state to function. And in a more moral, just, and fair sense, how do you protect minorities, how do you protect those accused of crimes? Fuller democracy may not be the best way to do that. It was interesting to see people react to the notion that we in the United States sometimes overvalue our democratic credentials, that we think getting more people involved is always better. Well, it’s not. Here is someone who comes in and gives us data
and tells us, it’s actually not working for you and maybe you should rethink this. But we don’t generally have those conversations in the public sphere. It’s great that we can have them at the university.

PERJU: For a very long time, Europeans have looked at the developments in the United States and tried to call on their American friends to remember that constitutional democracy is not democracy, it is constitutional democracy. There is a way in which reason and passion should be combined. Now what exactly is the right way to do that is a very difficult question. It is a difficult question everywhere, but particularly so in law. In law, we teach about legal rules that have distilled the wisdom of the ages. Students are introduced to the profession of law through the study of contracts and torts and property and other common law subjects that are about the accumulated wisdom ossified in legal doctrine. These are creative tensions at the heart of the American soul.