

2. What Is Comparative Law For ?

The functions of comparative law are very much debated.

For some, comparative legal research is justified only when it serves a practical purpose. For others, comparative law is important no matter what its practical impact is.


Among the most common practical purposes to which comparative law might lend itself, one may list comparative law as:

- (1) an aid to lawyers and private parties;
- (2) an aid to domestic and supra-national legislators;
- (3) a contribution to the unification/harmonization of the law;
- (4) as a tool of interpretation;
- (5) as a matter of legal education.

2. What Is Comparative Law For ?


(1) Comparative Law as an Aid to Private Parties

Comparative law might be useful to lawyers and private parties, to make them understand the dangers and benefits associated with particular jurisdictions and particular laws.



Under English and US law, consideration is a requirement for the validity of a contract. Consideration might be defined as the exchange of benefits and detriments by the parties.

Especially in long-term contracts, parties often need to adapt their original agreement to the supervening change of circumstances.



In common law, agreements to modify a contract by changing the obligations of one party only (e.g., by agreeing a discount or an extension of the delivery dates), are invalid because of their lack of consideration.

In civil law legal systems, these contracts are valid.

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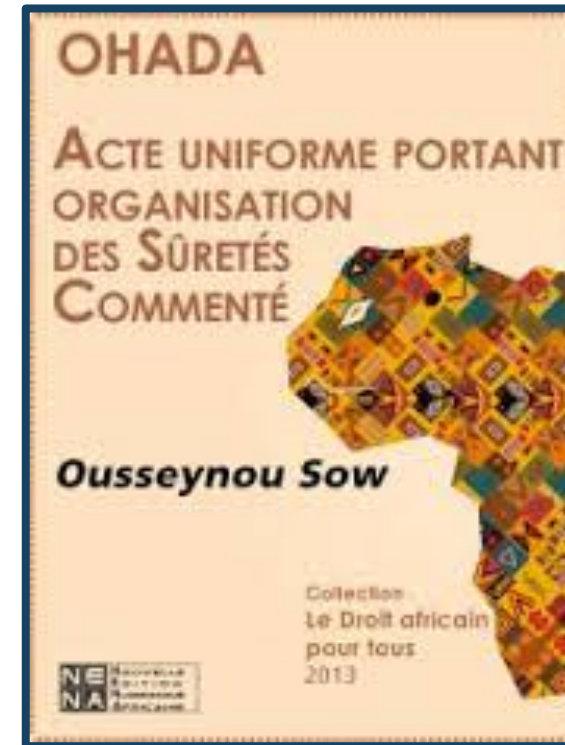
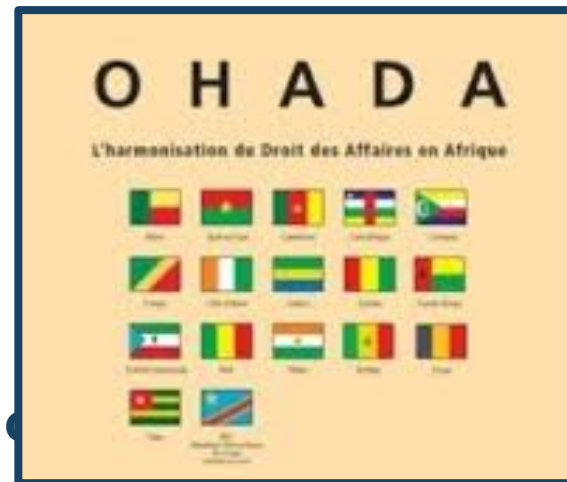
(2) Comparative Law as an Aid to Legislators

Comparative law might be useful to legislators, to confront themselves with, and choose among, the available models.



Acte Uniforme portant organisation
des procédures collectives
d'apurement du passif (AUPC)

Adopté en septembre 2015



2. What Is Comparative Law For ?

(3) Comparative Law as a Contribution to the Unification / Harmonization of the Law

Comparative law might be useful for drafting of uniform texts, drawing common solutions, and taking inspiration from other experiences.



United Nations Convention
on Contracts for the
International Sale of Goods



Treaty on the Functioning of the European Union, Art. 340(2):
“In the case of non-contractual liability, the Union shall, in accordance with the **general principles common to the laws of the Member States**, make good any damage caused by its institutions or by its servants in the performance of their duties”.

2. What Is Comparative Law For ?

The proportionality principle emerged in Germany in the 1950s.

It was adopted by the European Court of Justice in the 1970s, by the European Court of Human Rights in the 1980s and by a GATT/WTO panel in 1989.

At the national level, it was imported by the Canadian Supreme Court in the mid-1980s, promoted by the Israeli Supreme Court's judge Aharon Barak in the 1990s, and adopted by the South African Constitutional Court since 1995.

Hans Kutscher
(German
Constitutional
Court > ECJ)

Pierre Pescatore
(ECJ > GATT)

Claus-Dieter
Ehlermann
(Germany > EU
Commission >
WTO panels)

Jochen Frowein
(Germany >
European
Commission on
Human Rights)

2. What is Comparative Law For ?

(4) Comparative Law as a Tool of Interpretation

Swiss Civil Code, art. 1: “2. If no statutory provisions can be found, the judge must apply customary law, failing which he must decide according to the rule he would, were he a legislator, decide to adopt. 3. In so doing the judge must follow accepted doctrine and tradition”.

Hoge Raad
9 Oct. 1992

- Sindell v. Abbot Labs (Ca. 1980)

BGH 18 Jan. 1983

- McKay v. Essex Health Authority [1982]

White v. Jones
[1995]

- German case law and doctrine

Fairchild v.
Glenhaven Funeral
Servs. Ltd. [2002]

- German doctrine

Greatorex v.
Greatorex [2000]

- BGH 11 May 1971

2. What is Comparative Law For ?

(4) Comparative Law as a Tool of Interpretation

Courts have always used comparative law: *Paquete Habana* (1900).

The increase in recent years of judicial cross-jurisdictional borrowing might be explained in light of two factors:

1. the enrichment of data available online and in a vehicular language;
2. judges' increased familiarity with English;
3. the desire to be aligned with similarly-minded legal systems.

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(4) Comparative Law as a Tool of Interpretation



House of Lords

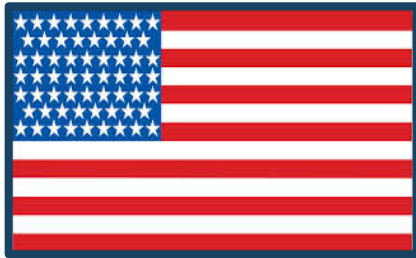
Limited caseload; access conditioned upon a leave
Judicial opinions delivered by each individual judge



White v. Jones [1995] – recovery of pure economic loss caused by professional negligence
References to «other common law countries» and to «civil law countries, notably Germany» (and France)

2. What Is Comparative Law For ?

(4) Comparative Law as a Tool of Interpretation



U.S. Supreme Court

Limited caseload; access conditioned upon a leave
Majority opinion, plus concurring or dissenting opinions
delivered by individual judges

SUPREME COURT OF THE UNITED STATES

Syllabus

ROPER, SUPERINTENDENT, POTOSI CORREC-
TIONAL CENTER *v.* SIMMONS

CERTIORARI TO THE SUPREME COURT OF MISSOURI

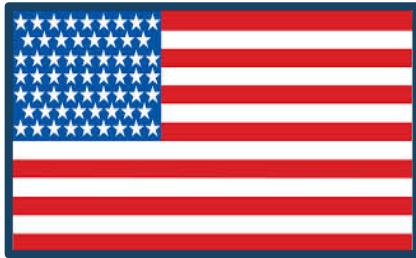
No. 03-633. Argued October 13, 2004—Decided March 1, 2005

Roper v. Simmons (2005), Majority Opinion

(Kennedy J) – juvenile death penalty: “Article 37 of the UN Convention on the Rights of the Child, which every country in the world has ratified, save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18 [...] [I]t is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty”.

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CERTIORARI TO THE SUPREME COURT OF MISSOURI

No. 03-633. Argued October 13, 2004—Decided March 1, 2005

Roper v. Simmons (2005), Dissenting Opinion (Scalia J) – juvenile death penalty: “The basic premise of the Court’s argument – that US law should conform to the laws of the rest of the world – ought to be rejected out of hand. [...] The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners’ views as part of the reasoned basis of its decisions. To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry”.

2. What Is Comparative Law For

THE COMMON CORE
OF EUROPEAN PRIVATE LAW

(5) Comparative Law as a Matter of Legal Education

For some, comparative law is important no matter what its practical uses are.

For those, comparative law is an essential tool for legal education.

Through comparative law, lawyers and students – that is, the future generation of lawyers – can learn to respect others' legal cultures and understand their own law better.

Further, comparative law makes one aware that the currently operative rule in any place is only one of several possible solutions available. In this light, comparative law provides an effective antidote to ethnocentrism and to the uncritical faith in one's own legal solutions.



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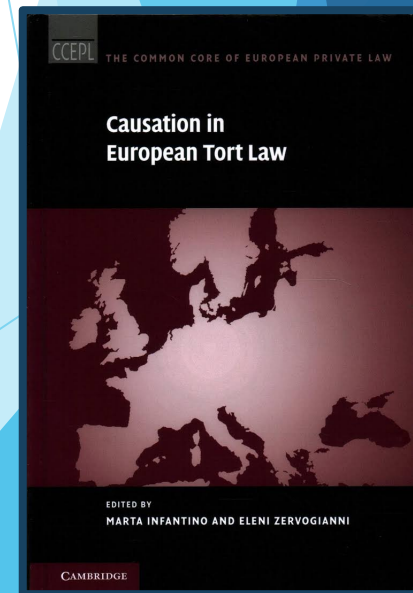
THE COMMON CORE

OF EUROPEAN PRIVATE LAW

(5) Comparative Law as a Matter of Legal Education

While pregnant, Ruth is prescribed a drug in order to prevent miscarriage. Ruth carries the pregnancy safely and gives birth to Elaine. When Elaine is nine years old, she is diagnosed with cancer. It turns out that Elaine's cancer has been caused by the drug which Ruth took during pregnancy. For Ruth it is impossible to figure out the manufacturer of the drug that she had consumed. Therefore, she, on behalf of Elaine, sues Pharmaceutical Inc., which at the time Ruth took the drug, accounted for 70% of the national market of the drug. Assuming that conditions for product liability were met, will Pharmaceutical Inc. be held liable and, if yes, to what extent?

Part I – Purposes and Methods of Comparative Law

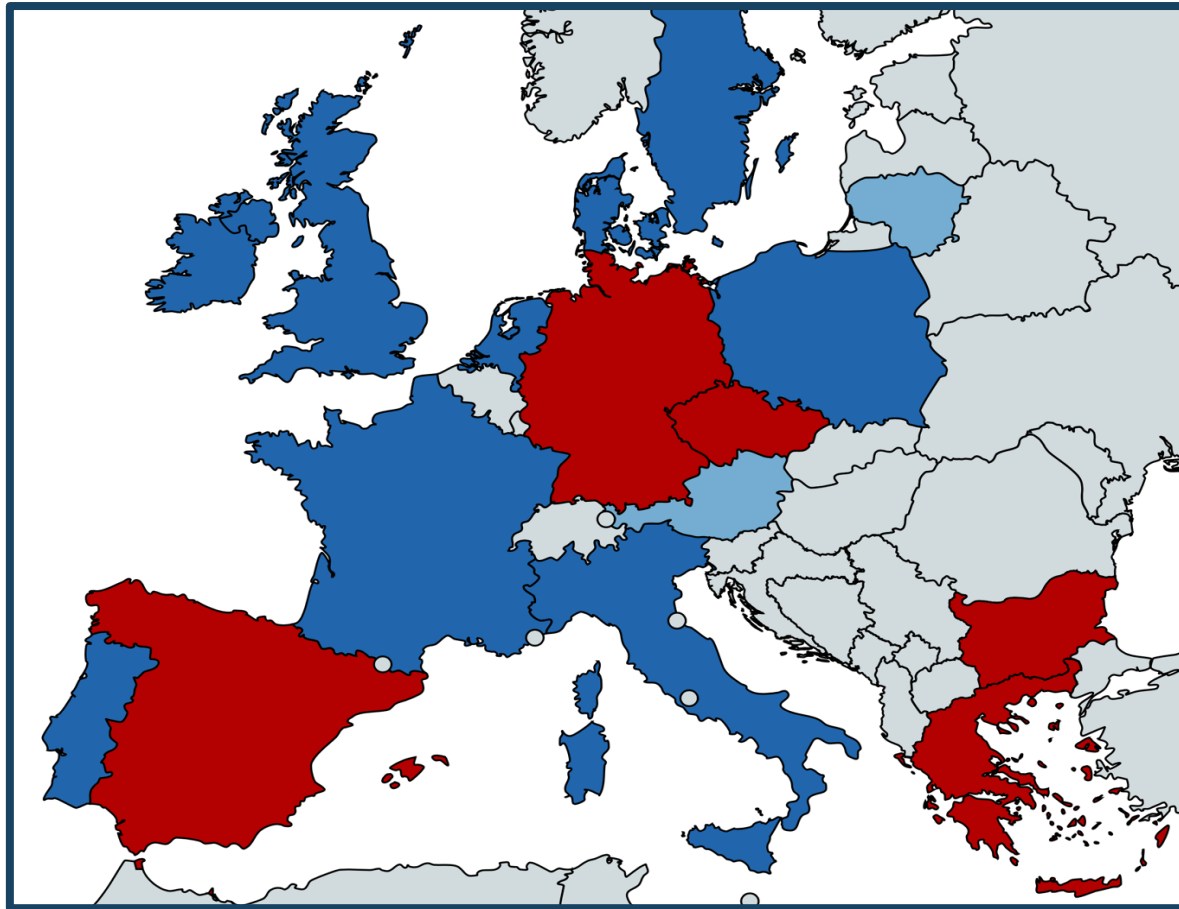


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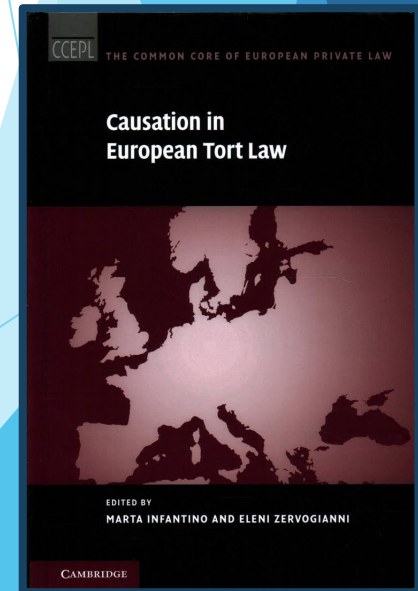
THE COMMON CORE

OF EUROPEAN PRIVATE LAW

(5) Comparative Law as a Matter of Legal Education



AT	1
BG	0
CZ	0
DE	0
DK	1
EN	0,5
ES	0
FR	1
GR	0
IE	1
IT	1
LT	0,5
NL	1
PL	1
PT	1
SE	1



2. What Is Comparative Law For ?

(5) Comparative Law as a Matter of Legal Education

In this light, comparative law's main value lies in its being a tool of knowledge.

Knowledge of others – of others' legal principles, rules, approaches, models and attitudes.

But also knowledge of ourselves – of our legal history and identity, and of the many ways in which these history and identity shape our own perspective about the law.

Part I – Purposes and Methods of Comparative Law

