

Comparative Law

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Structure of the Introduction

What is Comparative Law?

Definition; Neighbouring Areas; History of Comparative Law: I. Early Examples II. Professionalisation; Legal Families & Recurring Themes

Why do Comparative Law?

Who does Comparative Law?

19th Century Professionalisation

1804

French Civil Code adopted

1869

Société de législation comparée founded

1900

First International Congress of Comparative Law, Paris

1924

International Academy of Comparative Law founded

Global Influence of the French Civil Code

Adopted in 1804, the Napoleonic Code (Code Civil) had an influence that proved instrumental in the development of comparative law in Europe during the 19th century.

Direct Application

Initially implemented in territories conquered by Napoleon, including Belgium, Luxembourg, parts of Germany (e.g., Rhineland), Italy, and later adopted by countries like Louisiana (USA) during their formative years.

Colonial Diffusion

Extended to French colonies and territories in Africa, Asia (such as Indochina/Vietnam), the Caribbean, and the Pacific, where it often formed the basis of their post-colonial legal frameworks.

Indirect Influence

Influenced the civil codes of other nations, including the Netherlands, Spain, Portugal, and their respective former colonies in Latin America, as well as countries in Eastern Europe.

Comparative Law in Meiji-Era Japan

1

Early French Influence

Following the Meiji Restoration (**1868**), Japan embarked on rapid modernization. French legal scholars, notably Gustave Boissonade, hedlped drafting Japanese civil and criminal codes.

2

Dominant German Model

By the late 19th century, Germany's legal system, with its comprehensive public law and systematic civil code, became the primary model for the new Japanese codes, including the Civil Code of **1898**.

3

Synthesis and Adaptation

Japanese legal scholars meticulously studied various Western legal systems, adapting concepts to fit Japan's unique cultural and social context.

The Société de législation comparée (1869)

Fostering Research

Dedicated to the systematic study and analysis of diverse legal systems, starting with the collection of foreign legal documenttion.

Promoting Exchange

Created a crucial forum for jurists to share knowledge, discuss legal developments, and build international networks.

Influencing Reform

Created by 'liberal lawyers', with professor Laboulaye as its first president, the *Société* aimed to inform national legal reforms by drawing lessons from the successes and challenges of foreign jurisdictions.

Raymond Saleilles at the 1900 Paris Congress

The Paris Congress was organised by the *Société de législation comparée*, around 3 key issues: general theory of comparative law; method; teaching comparative law. Raymond Saleilles, a prominent French jurist, outlined key theoretical propositions for comparative law at the inaugural conference.

Search for Common Principles

Saleilles argued that comparative law should go beyond mere observation to discover shared legal concepts across different jurisdictions, aiming to bridge national legal systems and identify universal legal truths.

Tool for Legal Reform

He championed comparative law as an essential instrument for modernising national laws, allowing legislators to learn from the successes and failures of other legal systems and improve their own legal frameworks.

Towards Legal Harmonisation

A key goal was to facilitate the gradual harmonisation or even unification of private law, particularly in areas like commercial law, to foster international relations, trade, and legal certainty.

Scientific Methodology

Advocated for a rigorous, scientific approach to comparative legal study, moving beyond anecdotal comparisons to systematic analysis of legal institutions and their social, economic, and historical context.

The International Academy of Comparative Law (1924)

The International Academy of Comparative Law was founded to institutionalise and further develop comparative legal studies on a global stage, building on the momentum of earlier initiatives.

Formal Establishment

Constituted in 1924 in The Hague, it provided a permanent structure for the burgeoning discipline, moving beyond ad hoc conferences to a sustained academic endeavour.

Promoting Global Dialogue

Dedicated to fostering the comparative study of national legal systems, it serves as a crucial platform for international legal scholars to exchange ideas and research findings.

Organising World Congresses

The Academy organises quadrennial International Congresses of Comparative Law, which are pivotal events for advancing comparative law scholarship and its practical applications.

Shaping Legal Harmonisation

Its work contributes to the understanding and potential harmonisation of legal principles across jurisdictions.

Recurring Themes in Comparative Law

Comparative law scholarship often grapples with concepts that are part of a shared theoretical framework.



Legal Pluralism

The recognition that multiple legal orders (state, customary, religious, indigenous) can coexist and interact within a single society or geographical space.



Legal Transplants

The study of how legal rules, institutions, or concepts are transferred from one legal system to another, and the challenges and adaptations involved in their integration.



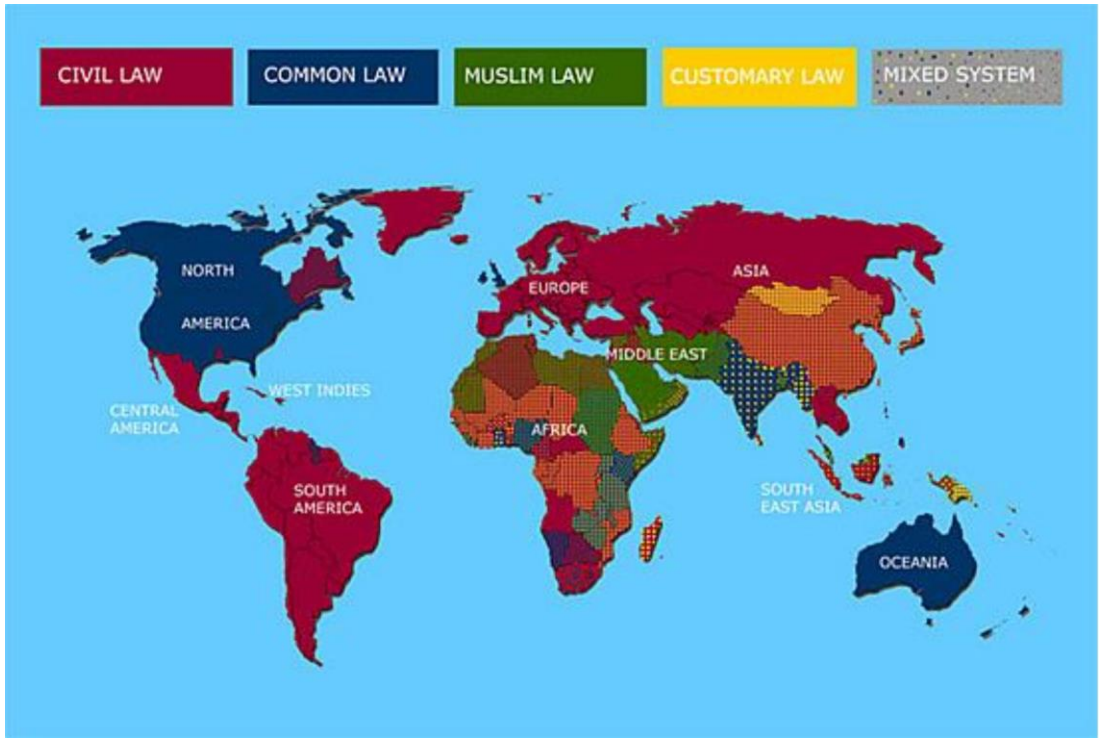
Functionalism

A supposedly dominant methodology in comparative law that compares **legal solutions to similar problems** across different jurisdictions, focusing on the practical social and economic functions rather than just formal rules.



Eurocentrism

A critical perspective on the historical tendency of comparative law to **disproportionately focus on and prioritise European legal traditions**, at the expense of others.



Legal Taxonomies, Legal Families

Relying on macro-comparison, Comparative Law uses a taxonomy grouping legal systems around shared characteristics. Such classifications have come under criticism.

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What Is Comparative Law For?

Historical Ambition

Global unification of law?

Modern Goals

Understanding legal diversity

Practical Applications

Improving legal systems



Who Does Comparative Law?



Scholars

Academic research and theoretical development



Practitioners

Judges, lawyers using comparative arguments



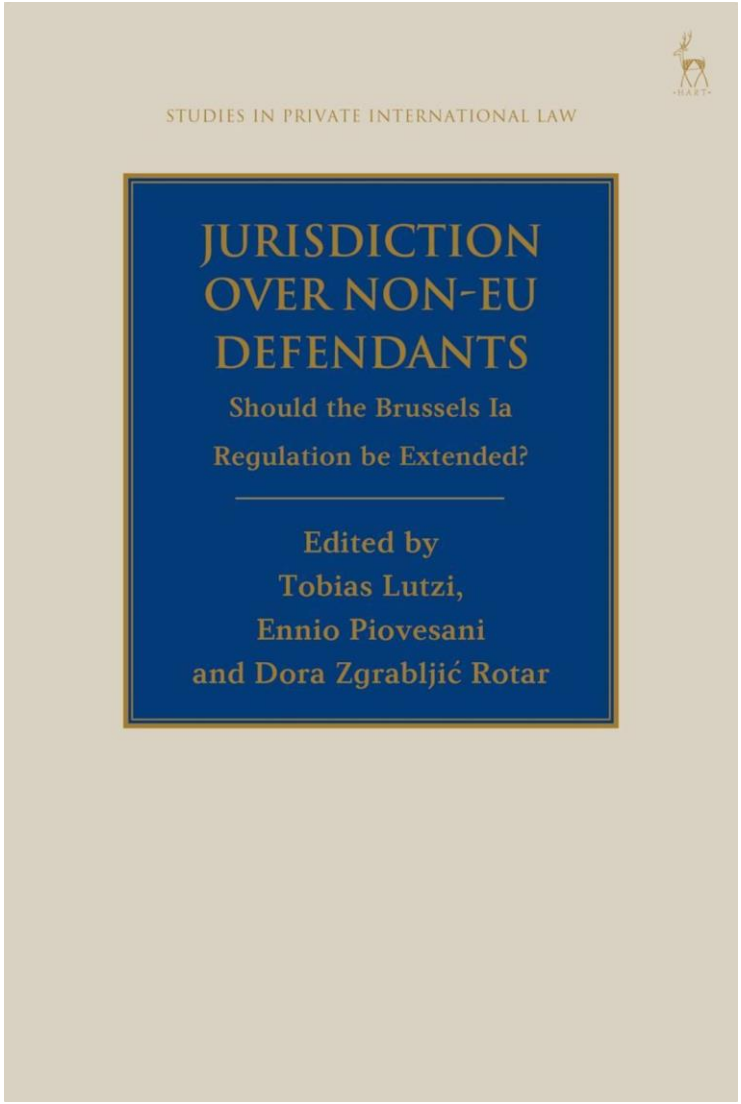
Lawmakers

Legislative reform and policy development



Students

Understanding legal systems better

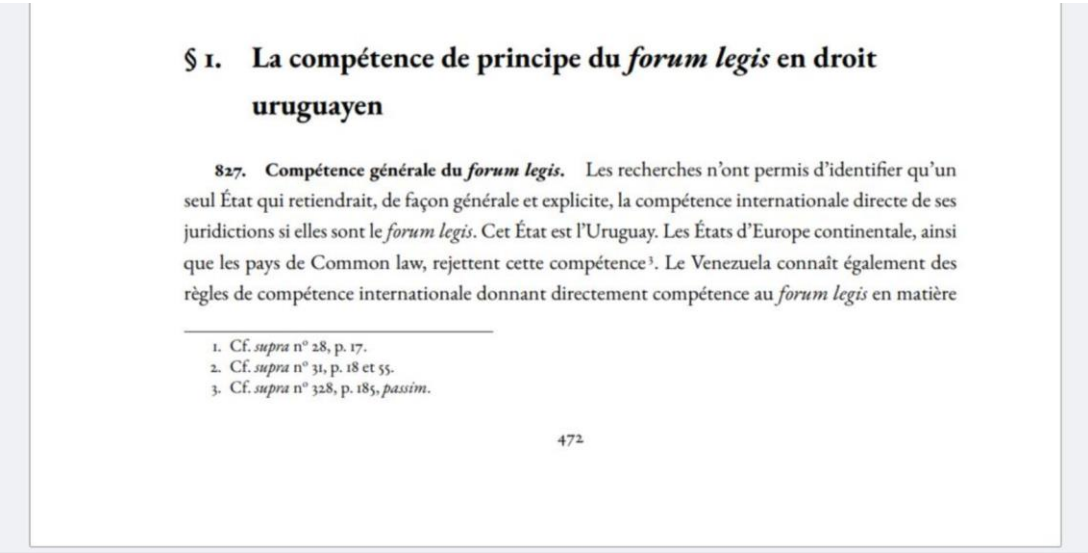


A Collective Research Project

National Reports written after a questionnaire, general report reaching conclusions based on the national reports, thematic chapters addressing a specific issue.

Individual Research

Using comparative material to study a particular topic.



§ 1. La compétence de principe du *forum legis* en droit uruguayen

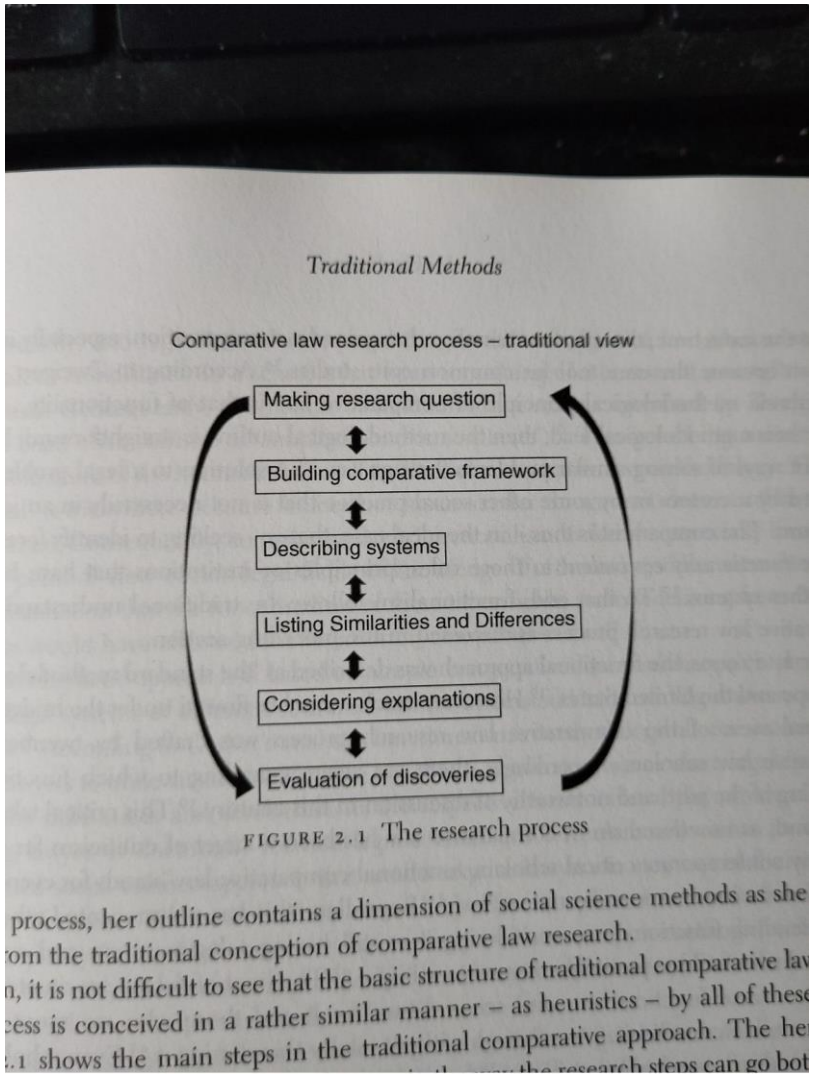
827. **Compétence générale du *forum legis*.** Les recherches n'ont permis d'identifier qu'un seul État qui retiendrait, de façon générale et explicite, la compétence internationale directe de ses juridictions si elles sont le *forum legis*. Cet État est l'Uruguay. Les États d'Europe continentale, ainsi que les pays de Common law, rejettent cette compétence[3]. Le Venezuela connaît également des règles de compétence internationale donnant directement compétence au *forum legis* en matière

1. Cf. *supra* n° 28, p. 17.
2. Cf. *supra* n° 31, p. 18 et 55.
3. Cf. *supra* n° 328, p. 185, *passim*.

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B. Saunier, *Le forum legis à la lumière des droits français, allemand et européen*, PhD dissertation, 2024.

'Traditional' Comparative Legal Enquiry



Traditional Methods

Comparative law research process – traditional view

FIGURE 2.1 The research process

process, her outline contains a dimension of social science methods as she
om the traditional conception of comparative law research.
n, it is not difficult to see that the basic structure of traditional comparative la
cess is conceived in a rather similar manner – as heuristics – by all of these
.1 shows the main steps in the traditional comparative approach. The he
the research steps can go bot

The traditional research process as seen by J. Husa (in the *Cambridge Handbook*, p. 21).

Use of Comparative Law in Judgments: US Supreme Court, *Lawrence v. Texas*

In **Lawrence v. Texas (2003)**, the US Supreme Court invalidated a Texas statute criminalising same-sex intimacy. The majority opinion cited decisions by the European Court of Human Rights as evidence of evolving legal standards.

Use of Foreign Precedents: The Majority Opinion by Kennedy

'To the extent *Bowers* [the leading precedent] relied on values we share with a wider civilization, **it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere**. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. See *P. G. & J. H. v. United Kingdom*, [...] ¶ 56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.'

Criticism: The Dissenting Opinion by Scalia

'Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because foreign nations decriminalize conduct. The *Bowers* majority opinion never relied on "values we share with a wider civilization," [...] but rather rejected the claimed right to sodomy on the ground that such a right was not 'deeply rooted in this Nation's history and tradition,' [...]. *Bowers*' rational-basis holding is likewise devoid of any reliance on the views of a "wider civilization" [...]. **The Court's discussion of these foreign views** (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) **is therefore meaningless dicta**. Dangerous dicta, however, since "this Court . . . should not impose foreign moods, fads, or fashions on Americans." Foster v. Florida, 537 U. S. 990, n. (2002) (Thomas, J., concurring in denial of certiorari).'

Understanding US Supreme Court Opinions

Majority Opinion

This opinion represents the official decision of the Court, joined by more than half of the justices. It sets binding precedent that lower courts must follow.

Plurality Opinion

When no single opinion is supported by an absolute majority of justices, a plurality opinion is issued. It decides the case but its reasoning is not binding precedent.

Concurring Opinion

A justice who agrees with the final outcome of the majority decision, but for different legal reasons or to add further insights, writes a concurring opinion.

Dissenting Opinion

Written by one or more justices who disagree with the majority's decision and/or reasoning. Dissents do not carry legal weight but can influence future cases and legal thought.

The Relevance of Foreign Legal Materials in US Constitutional Cases



Justice Stephen Breyer

> [I]f the lawyers find an interesting and useful foreign case, and if they refer to that case, the judges will likely read it, using it as food for thought, not as binding precedent.



Justice Antonin Scalia

> [D]o we just use foreign law selectively? When it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree we don't use it.

South Africa's Constitutional Approach

South Africa's Constitution contains a Bill of Rights in Sections 7-39. Section 39(1) of the Constitution guides the interpretation of its Bill of Rights:

> When interpreting the Bill of Rights, a court, tribunal or forum—
>
> 1. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> 2. must consider international law; and
> 3. may consider foreign law.

Use of Comparative Law by the CJEU and ECtHR

Both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) employ comparative legal analysis to inform their decisions.

Court of Justice of the European Union (CJEU)

The CJEU often draws upon common constitutional traditions and general principles of law shared by Member States.

> "Fundamental rights form an integral part of the general principles of law, the observance of which it ensures.
>
> In safeguarding these rights, **the court is bound to draw inspiration from constitutional traditions common to the member states,** and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states.
>
> Similarly, international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law."
>
> — *Nold v. Commission* (1974), 13

European Court of Human Rights (ECtHR)

The ECtHR uses comparative law to identify a "European consensus" among Member States regarding human rights standards. This consensus is crucial for interpreting the European Convention on Human Rights (ECHR) dynamically and for determining the "margin of appreciation" afforded to states in their implementation of Convention rights.

> The latest survey submitted by Liberty in the present case shows a continuing international trend towards legal recognition [following gender re-assignment].[...].
>
> In [a later case], the Court's judgment laid emphasis on the **lack of a common European approach** as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. [...] the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. [...] The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the **clear and uncontested evidence of a continuing international trend** in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."
>
> — *Goodwin v. the UK* (2002), 84-85

Use of Comparative Law in Judgments: Conseil d'Etat, 4 April 2014, 362785

The French *Conseil d'Etat* had to rule on an alleged age discrimination. Air traffic control officers who had to retire at 57 claimed they were being discriminated given the general retirement age and postponement possibility for comparable occupations.

> While some countries, such as New Zealand, do not set any specific age limit for air traffic control officers, and several European countries, including Spain and the Scandinavian countries, have set an age limit of 65 for such officers, the Member States of the 'Central European Functional Airspace Block', established on the basis of Article 5 of Regulation No 551/2004 of 10 March 2004 on the organisation and use of airspace in the single European sky, to which France belongs, have all adopted age limits for air traffic controllers that derogate from the general rule and are below 60 years of age; These limits vary between 55 and 58 years of age in Belgium, Germany and the Netherlands. An age limit of 57 has been set within the European Organisation for the Safety of Air Navigation (Eurocontrol). Finally, the age limit is set at 56 in the United States and 60 in Italy, Russia and China.

Comparative Law in French Institutions

Comparative law is put in practice at several key French institutions.

Sénat

The Senate's comparative law division analyses foreign legal systems and best practices at the request of senators. The resulting reports are published and available online.

Cour de cassation

The 'Service de documentation, des études et du rapport' at the *Cour de cassation* conducts comparative studies.

Conseil d'État

The *Conseil d'État* is the highest administrative court, and it also provides expert legal advice to the government (both functions are separated). It has a comparative law unit.



2025

– LÉGISLATION COMPARÉE –

NOTE

sur

LA COMMANDE PUBLIQUE

Allemagne – Royaume-Uni – États-Unis

Cette note a été réalisée en mai 2025 à la demande
de la Commission d'enquête sur les coûts et les modalités effectifs
de la commande publique et la mesure de son effet d'entraînement sur
l'économie française

DIRECTION DE L'INITIATIVE PARLEMENTAIRE
ET DES DÉLÉGATIONS

SÉNAT

Comparative Law at the French Senate

Public Procurement

'At the behest of the Special Committee for investigating the costs and procedures of public procurement and the extent of its knock-on effect on French economy, the Comparative Law Division conducted a study on public procurement law in three countries: Germany, the United Kingdom and the United States.'

French 2024 Constitutional Amendment

A Response to *Dobbs*

The US Supreme Court's June 2022 *Dobbs v. Jackson Women's Health Organization* decision overturned *Roe v. Wade* and eliminated the federal constitutional right to abortion. In reaction, France explicitly enshrined the 'guaranteed freedom' to abortion within its constitution.

The amendment was adopted on March 8 2024. Article 34, section 4, now reads: "Statutes shall lay down the conditions under which the woman's guaranteed freedom to have a voluntary interruption of pregnancy is exercised."

A Summary of the Introduction

1

What is Comparative Law?

Comparative Law is the study of similarities and differences between legal orders. Even though there is a long history of comparing laws, Comparative Law only achieved recognition as an autonomous field of study around 1900. It can be distinguished from neighbouring disciplines such as legal theory, legal history, legal sociology or international law.

2

Why do we compare Laws?

Comparative has many functions.

Some are purely 'scientific': Comparative Law gives a better understanding of foreign laws as well as one's own law.

Others are more 'normative': Comparative Law is a tool for national reform or global unification of the law.

3

Who compares Laws?

Anybody can study Comparative Law.

Scholars conduct academic research on the theoretical aspects of Comparative Law and

Judges and practicing lawyers use comparative law arguments.

Lawmakers are interested in foreign law as a source of inspiration.

Students can only benefit from learning about Comparative Law!