COMPARATIVE PRIVATE LAW – SOLUTIONS

1. Answer to question I (20 points)

The functional method goes back to the work of one of the founding fathers of comparative law, **Ernst Rabel**, at the beginning of the 20th century, and was elevated to **orthodoxy** and at the same time made into object of **endless controversy** half a century ago by the influential Handbook of Comparative Law of **Zweigert and Kötz**.

The method is labelled as 'functional' because its main postulate is that two legal phenomena – two solutions, two rules, two institutions, two concepts – **can only be compared** in a meaningful way **if they share the same function**.

The **specific (functional) commonality** that the comparatist takes as point of departure for comparing operates in comparative law as tertium comparationis. It plays in law comparison the role that the **property being compared** (the size, the weight, the colour) plays when comparing physical objects: no comparison, in fact, is possible without a tertium comparationis, that is, without establishing the terms in which the objects are being compared.

In truth, the expression tertium comparationis is –although universally used– particularly **inept**: tertium, third, would **suggest that the term of comparison belongs to the same nature of the compared objects**, which of course is not the case: in law, for instance, the compared realities are solutions, rules, institutions or concepts; the 'tertium comparationis', the comparison yardstick, instead, **one of their properties**: within the functional method, namely, their presumed function.

The main assumption on which the functional method rests is that **legal systems tend to be confronted with the same problems and therefore contain elements** – solutions, rules, institutions and concepts – **which, despite all their differences, have equivalent functions**. This is the postulate of functional equivalence.

This assumption, when elevated to postulate, is not free from problems. It tends to ignore that both the **law and the societal problems that the law addresses are shaped by history and culture**, and that therefore legal phenomena can be **specific to one culture even in their function**. This is particularly obvious in the **fields of law that tend to be more culturally specific**, like **marriage and family law**.

Out of this assumption arises a so-called praesumptio similitudinis: the presumption that the compared systems **not only address the same problems, but have the same aims in addressing them**, even if they do it in different ways. The presumption is often carried further,

as assuming that **the solutions themselves, or the institutions to which they belong**, tend to be similar. In any case, it is clear that such a presumption **does not apply to the legal structures** through which such solutions or institutions are articulated.

The main objection to this presumption is, again, its **obliviousness to the culturally inflected** nature of many sectors of the law and, ultimately, of the law itself. Together with this, the fact that the law often functions by searching a balance between **contradictory aims** (so, in the law of inheritance, largely between the interest of the family and the freedom of the owner). This latter is a lesser objection, in that the functional **method can certainly be accommodated** to incorporate these tensions.

2. Answer to question II (20 points)

Sub-question 1

Under English law the court must answer the questions whether **there was breach of contract**, and whether the harm complained of is **sufficiently closely connected** to the breach of contract to justify the award of damages.

Under the contract, UI should have unsealed the ventilator when the hopper was erected. The omission thereof resulted in a breach of contract. Thus, at first look, a breach of contract seems to be given. However, not each breach of contract leads to damages under English law. For damages to be awarded, the **damage must not be too remote**.

The damage would not be too remote if it was the **natural consequence** of the breach i.e., if it was damage which would arise in the usual course of things if there was such a breach, or if it could reasonable be assumed that both parties, at the time of the making the contract, considered that such damage could arise from a breach of the contract.

One could argue in various ways:

Alternative a):

Damage was **too remote** because one may say that it was impossible to foresee that the pigs would die from the omission to unseal the ventilator – this was not the usual course of things if there was such a breach.

Alternative b)

Damage was **not too remote.** The parties were aware of the fact that problems with the ventilation could result in the food going mouldy which ultimately would harm the pigs' health, which means that the type of harm was ***foreseeable***. This is enough for the test to be satisfied. This is not altered by the fact that at the time of the making of the contract, the parties did not explicitly contemplate that the breach of contract would lead to the death of the pigs.

One may go further and argue that the damage was not too remote because airing is so important that it is evident that something bad may happen to the pigs' food that would harm the pigs if there is no proper ventilation – depending on further facts the parties knew of which, however, we are not aware of based on the short description of this case.

One would, e.g., have to check whether the parties, when they concluded the contract, were aware of the length of time the food for the pigs would be in the hopper and other conditions that may influence the food's storage (what kind of food is being stored, is it moist or dry etc.); depending on such factors the breach of contract may – in the contemplation of the parties - ***cause only minor health issues*** if the pigs' food is in the hopper only for a short period of time

and therefore, prima facie, make death as a result from eating bad food seem to be too remote a consequence.

However, one could also argue that the parties may have been ***aware of the fact that the pigs would fall ill or at least suffer indigestion from eating food which is stored without proper airing***.

Sub-question 2

Yes, Art. 74 of the CISG seems to contain such a criterion. However, it has also been stated that Art. 74 CISG rather embodies the civil law principle of adequate causation. This means that there is no consensus on this point. However, it is important to see that Art. 74 CISG must be **interpreted autonomously** and not in the light of any given domestic law.

Sub-question 3

It seems that the criterion of foreseeability in English law is similar to the civil law principle of adequate causation which both aim at limiting liability when damage occurs and this is outside of what people normally expect to happen. This may indicate that this principle belongs to the common core of private law.

3. Answer to question III (20 points)

Negative answer: No, interpretation is above all a partnership between the judge and the Parliament

A necessary partnership

The interpretation of the law is a team effort between the legislator and the judge. By definition, the **law is abstract, impersonal: it considers legal categories only**. The law **cannot provide for everything** and, above all, it should not. The temptation for the legislator to govern everything, to foresee everything, must be resisted. In other words, the legislator must not try to provide for every particular case.

Thus, there is a **partnership** between the Parliament and the judge, especially the Court of cassation, as it is in charge of a **unified interpretation of the law**. But the Court can never make decisions that would have a general scope, beyond the case.

Grounds:

- **art. 5 of the Civil Code** "In the cases that are referred to them, judges are forbidden to pronounce judgment by way of general and regulatory dispositions."
- **art. L 411-1 of the Judicial Code** "There is one single Court of cassation for the whole Republic."

An efficient partnership

The meaning of the provisions of the Civil Code, whose wording has not changed, is **modified by interpretation, according to changing circumstances and needs**. It is up to the jurisprudence, through the voice of the judge, to enshrine this **evolution**.

This is why certain articles of the Civil Code have remained untouched since 1804: the interpretation of the Court of Cassation has allowed those texts adopted by the Parliament to last. Moreover, the **Court has long maintained a high regard for Parliament** and the choices it is entitled to make.

Example no. 1:

art. 1240 of the Civil Code: "Every act whatever of man that causes damage to another, obliges him by whose fault it occurred to repair it."

This article involves three core notions: **fault, prejudice and causal link**. At no point does the law define fault, damage or the causal link between the two. This is the **job of the judge** and it has **adapted these notions to the new needs of society**.

Case examples: In 2010, the Court of cassation **created the prejudice of anxiety for asbestos victims**; in 1951, the Court agreed to sanction fault by omission ; in 2009, the Court has eased the burden of proof for the causal link in the distilbène case.

Example no. 2:

art. 6 of the Civil Code "One may not by private agreement derogate from laws that concern public order and good morals."

This article involves a **framework notion, good morals/bonnes moeurs**. The legislator only mentionned the expression "good morals" and it is **up to the judge to decide** what is good morals and what is bad morals.

Case examples: Civ. 1st, March 13, 2007 (the Court refused to recognize same-sex marriage) or Civ. 1st, Mai 4, 2017 (the Court refused to recognize gender neutral).

Positive Answer: However, yes indeed, interpretation can sometimes lead to rivalry/competition between the judge and the legislator

A necessary rivalry

What to do when the Civil Code is incomplete? The **Court of Cassation has to fill in the gaps itself**. In this case, interpretation can become pure creation and the Court temporarily takes the place of Parliament. The **Court creates law but considers that it remains mere interpretation**.

Ground:

Art. 4 of the Civil Code "A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient may be prosecuted for being guilty of a denial of justice."

Example:

art. 1242 §1 of the Civil Code "We are responsible not only for the damage caused by our own act, but also for that which is caused by the acts of persons for whom we are responsible, or by things that are in our custody."

Originally, this article served no purpose. It was an example of the style of the drafters of the Code: it was only a **concern for pedagogy**, a perfect example of transition.

This article **makes the link between what precedes** (1240 and 1241, i.e., liability for fault), **and what comes after**, (i.e., liability for things and vicarious liability/liability for the acts of others). It had no legal force.

But the Court interpreted this provision to create a general principle of liability for things (Teffaine 1896 and Jand'heur 1930) and a general principle of vicarious liability (Blieck 1991).

A dangerous rivalry

Judges in France are not elected; they have no legitimacy to represent the people. The **separation of judicial and legislative power** must remain. Otherwise, the system will eventually lack predictability and the stability of the law will be challenged. That is why it should never be forgotten that Parliament always has the power to break case law.

Example no. 1:

Civ. 1st, September 22, 2014. A first instance judge asked the Court of Cassation for its opinion: when a **female couple went abroad to request assisted reproduction**, is it possible to establish parentage by the way of adoption? What should prevail? The French prohibition (assisted reproduction is prohibited for female couples in France) or the interest of the child? The **Court decided to allow adoption**. With this interpretation, the Court undermines the strength of the Public Health Code which prohibited assisted reproduction for female couples.

Example no. 2:

Full Court, November 17, 2000, **Perruche**. Without saying so, **the Court agreed to compensate for the birth itself**. This decision shocked all the authors and the **Parliament had to intervene with a law** of 2002: art. 1 "No one may claim a prejudice by the mere fact of his birth."

4. Answer to question IV (20 points)

Sub-question 1

The three main principles are:

- liability only for **fault and unlawfulness**
- liability only for **absolutely protected rights** (exclusion of compensation for pure economic loss)
- liability only in case of (intentional or negligent) **violation of a statutory rule**

Sub-question 2

a) Since 1945, **all state authority** in Germany has been **subject to fundamental rights**. The fundamental rights are not only defensive rights against the state, but also form an **objective order of values and norms that binds all state power**. Therefore, the courts must also **observe** fundamental rights when **applying** simple statutory law and **take them into account** when **interpreting** the law.

The protection of these rights can be enforced also against court decisions via the **constitutional complaint open to any citizen** who finds that her or his fundamental rights have been violated by a court, also within the realms of a civil law suit.

b) Fundamental rights are of particular importance as an **objective system of values** in the context of general clauses and indeterminate legal concepts, because they open up a **wide range of interpretation** for the practitioner of the law. Since the legislature grants the courts leeway in these cases, the courts are particularly **obliged to include the fundamental rights of the private individuals affected by the judgement** in their interpretation and application.

Sub-question 3

One example is the **Lüth**-case of 15th of January 1958:

Erich Lüth, the director of the Senate of Hamburg, had asked **publicly to boycott a film** of Veit Harlan, who had been a known **film director for the national socialists** and had shot propaganda and racist films; Lüth was sued for injunction and later sued for **damages on the basis of § 826 BGB**.

The **Civil law courts** decided that Lüth was **liable for damages** under the heading of § 826 BGB, since the criticism **led to a boycott** of the film and thus to an **economic loss** for the film company.

The German Federal Court held that the **constitutional complaint was justified for violation of the freedom of speech (art. 5 GG)**: The influence of the value-system of the basic rights is clearest in those rules of private law which are **mandatory** ("zwingendes Recht") and form

part of ordre public in the wide sense, i.e. those rules which in the public interest apply to private legal relations whether the parties so choose or not. Such provisions, being **functionally related and complementary to public law**, are especially exposed to the influence of constitutional law. 'General clauses', such as § 826 BGB, by which human conduct is measured against extralegal standards such as 'proper conduct' (gute Sitten), allow the courts to respond to this influence since in deciding what is required in a particular case by such social commands they must start from the value-system adopted by the society in its constitution at that stage of its cultural and spiritual development. The general clauses have thus been rightly described as '**points of entry**' for basic rights into private law.

5. Answer to question V (20 points)

Definition customary law:

Customary law defines as **social practices, accepted as obligatory by a jural community, and which is understood as a pervasive order**. It provides the **regulatory framework for several spheres** (family, neighbourhood, the business of merchant banking, or international diplomacy). Customary law is **not made it is transmitted as oral law**. It tends to pursue a **collectivist approach** (from the duties of the individuals to the social community, common property).

The relation between customary law and the law:

- "Problems" and critiques from European Legal Scholars point of view:
  - Custom is **changeable** and apparently **purposeless**.
  - Western idea of justice is predicated on an assumption that courts apply a fixed and certain code of rules known to the whole population in advance. Missing with CL.
  - It is defined as '**primitive law**'.
- A **positivistic perspective** of **European Legal Scholars**, which especially arise during the **nineteenth century**, leads to a negative opinion about custom law, which means that rules derived from custom could not be **a truly 'legal' order**.
- Law is seen as a **command of the sovereign**, which from European perspective means it is **rational and purposeful**.

Anthropology and customary law:

- Comparative law and African customary law around the 1950s (**classifying laws into family groups**)
- The study of custom has been **dominated by social anthropology**.

Substance of the rules:

- **liberal generalizations** = accounts of laws governing e.g., marriage, succession, land tenure
- **problems**: e.g., difficult to trace a sort of general description because there are infinite possibilities and variations, e.g., North Africa = subject principally to Islamic Law / sub-Saharan Africa = subject principally to customary law.

Colonial Law and Customary Law "in Action":
Courts decided according to the Western values and legal principles to guarantee certainty and uniformity. On the other hand, customary laws were applied only as matters of exception.

Transformation into Western forms:

- **Recognition** as a sort of the **core** of customary laws but according to the „European civilisation"
- This meant for Europe and the colonies: customary law as a sort of **matter of fact** (for example witness had to be called to prove the existence of a specific custom)
- Problem: **time-consuming**, **absence of uniformity and certainty**
- Solution: **Transcribing** customary laws; **creating authoritative texts**, e.g., Code of Zulu. However, the reduction of oral law to writing effects a **change not only to form but also to content**.

Decolonization:

- From oral to written law to oral Law
- Problems with Translations
- Legal Terminology
- Exceptions: Ethiopia (Amharic) Tanzania (Swahili)

Extra points:
Berlin Conference 1884/1885 and the partition of Africa; development of legal anthropology