Comparative Private Law
Examination Fall Term 2022
WITH SOLUTIONS

NB: All parts have equal weight (20%); students can obtain 12 points in each part; apart from essentials, there is the possibility, as indicated, to obtain supplementary points for detailed (and right) answers that go beyond the essential elements.

NB: Please answer all the questions!

FIRST PART (16.5%)

Consider the following text: "Under this new viewpoint, the task of comparative law is less to indefinitely collect exhumed laws than to formulate a natural –that is, rational– classification of juridical types, of branches and families of law" (Gabriel Tarde, Le droit comparé et la sociologie, in Congrès international de droit comparé tenu à Paris du 31 Juillet au 4 Août 1900, Procès Verbaux des Séances et Documents, 1905, 439–440).

Explain the occasion out of which this text emerged, its importance for the history of comparative law, and its position towards the preexisting tradition of comparative studies. Describe the intellectual roots of Tarde's 'law families' proposal, its historical importance and its shortcomings.

The text, by Gabriel Tarde, professor at the Collège de France and one of the fathers of legal sociology, belongs to the proceedings of the **first International Congress of Comparative Law** (Congrès International de droit comparé), celebrated in Paris in 1900, the year of the Paris Universal Exhibition. The conference, organised by Raymond Saleilles and Édouard Lambert, gathered prominent comparatists, especially francophone, to discuss **methods, purposes and vision for the discipline**: it can be considered a **foundational moment** in its history.	2
In the Congress**, the former tradition of compared legislation (législation comparée)** that had dominated in comparative studies for decades and informed the foundation of the Société française de législation comparée, **came under assault.**	1
This was a tradition focused on legislation, aimed at **compiling legislative materials** with the purpose of **reforming and improving national legislation** in a path towards **legal convergence**, in the interest of **commerce and the peaceful coexistence of nations.**	1
This tradition was now rejected as **lacking method, and therefore scientific character**: it rarely compared, but **merely described** foreign legal regimes; and the resulting descriptions, which covered an **arbitrarily large number of countries**, were **superficial, sketchy and unsatisfying**.	1

The 'legal families' proposal as first step towards a scientification of comparative law is not just a spontaneous occurrence of Tarde and his contemporaries: it borrows heavily: (i) from **biology's phylogenetic categories** of kingdom, class, order, family, genus, and species; (ii) from **linguistics, which had with great success by then sorted most known languages into families**, groups of languages descended from a common ancestral language (so, the modern languages descended from Latin, and Latin itself descended together with Greek, Old High German and other ancient languages, from a common Indo-European root).	1
In the programme presented by Tarde and many other participants in the Paris Congress, classifications of nations in families from the point of view of their legal traditions are **no longer just a means to organise the exposition of different legal systems**: a proper taxonomy of legal systems became the primary task of comparative law and the **necessary point of departure for scientific law comparison.**	1
The comparison with biology and linguistics, though, suffices to envision the limitations of this method regarding the law. **Unlike biology**, though, which is shaped by the blind forces of mutation, evolution and natural selection, **and language**, which is shared by a community and develops mostly as a common, spontaneous tradition, the evolution of the law is exposed to a **much more decisive influence of individuals and individual decisions** that can drastically change its shape and bring it closer to another family – most typically, through so-called **'legal transplants'**.	2
This brings an element of **arbitrariness** to most classifications of legal families, since their identification and the classification of specific national laws within them depend on the criteria one chooses as relevant.	1
Both the identification of the main families and the inclusion of national traditions in one or another often show traces of more or less unconscious nationalistic bias (cf. for instance the rise of the opposition between English and Continental law, as a result first of the hostility of French scholars like Édouard Lambert and then of British imperialism itself) and are occasionally even **ethnic-tinged** (cf. Zweigert's otherwise unjustifiable 'Far Eastern' legal family).	1
These defects are exacerbated by the inevitably **hierarchical** organisation of legal traditions in “parent” and “affiliated” and by the role played by **colonialism** in this hierarchisation since the method was first proposed.	1
TOTAL	**12**

SECOND PART (16.5%)

Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256: The defendant, the Carbolic Smoke Ball Company, placed an advertisement in a newspaper for their products. They stated that any person who purchased and used their product but still contracted influenza despite properly following the instructions would be entitled to a £100 reward. *“£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the influenza after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, shewing our sincerity in the matter.”* The claimant, Mrs Carlill, thus purchased some smoke balls and, despite proper use (she used the smoke balls for two weeks and continued to use them as prescribed thereafter), contracted influenza. She then attempted to claim the £100 reward from the defendants.
The defendants contended that they could not be bound by the advert as it was an invitation to treat rather than an offer; that the advert was mere “puff” and lacking true intent; that an offer could not be made “to the world”; that the claimant had not technically provided acceptance; that the wording of the advertisement was not clear enough (the time was not fixed), and that there was no consideration, as necessary for the creation of a binding contract in law.

Question: If you had been Mrs Carlill’s barrister, how would you have argued in her favour?

I would have argued that the advertisement amounted to a **legally binding offer** for a unilateral contract by the defendants: The advertisement’s own claim to sincerity (**depositing money in a bank account**;) **negated the company’s assertion of lacking intent.**	3
Furthermore, there is **no rule that an offer could not be made to the world.**	1
The wording **albeit vague** to a certain extent was nevertheless **sufficiently clear** to bind the defendants:	2
A **valid meaning is for instance** that one is **warranted free from catching this epidemic, or colds or other diseases caused by taking cold, whilst using this remedy after using it for two weeks**.	2
In completing the conditions stipulated by the advertisement, Mrs Carlill provided **acceptance of the offer**.	1
Furthermore, by doing what the company had asked for, Mrs. Carlill had also **provided consideration (used the smokeball properly**;) because what the advertisers wanted was to **create confidence by making the public actually use the balls** and test them to show others that they actually worked and not only buy them;	2
the advertisers got, therefore, something from the actual use; this is **an advantage which is enough to constitute a consideration.**	1
TOTAL	**12**

<u>THIRD PART (16.5%)</u>

In our journey through American law, both private (contract/tort/property) and governmental regulation of private economic relations we have spoken of the term “precedent.”

Define the conventional meaning of the term. Consider the extent to which the cases that we have studied observe that meaning or somehow redefine it.

NB: There are more points in the model answer (15), in order to allow diverging answers to the very open question.

The conventional meaning of the term precedent is **that courts are bound to follow the decisions of previously decided cases.**	1
By so doing the legal system is infused with **continuity** and **predictability.** Legal actors can adhere to the extant decisions of courts and guide their conduct accordingly.	1
While in principle courts largely follow earlier cases, **adherence to precedent is not absolute.** In the first place, there are disputes in which there is no precedent, where the case is one of first instance. This means that there is no previously decided case on point.	1
That was the situation that faced the Supreme Court of New York **in *Pierson v. Post (1805).*** There was no case which determined the point at which a huntsman obtains property in a wild animal. The court reviewed commentators on the law from as far back as Justinian to what was for them the present to come to a determination of what the law should be. In addition to the commentators, they considered concepts of administrative and economic efficiency in determining how to decide the case.	1
That said, the case itself, once decided, provided a precedent which was applied to the possession of a baseball **two centuries later in *Popov v. Hyashi (2002)*.** The court applied the precedent in *Pierson*, likening a baseball to a wild animal even though the connection might seem to some as tenuous at best.	1
Moreover, judges are not infallible and **precedents were always subject to review** if the court which was asked to apply it regarded the case as wrongly decided. We cited Chief Justice Vaughan in *Hole v. Horton (1673)* who opined that judges should not follow wrongly decided cases “for that were to wrong everyman having a like cause because another was wronged before.” Likewise, Lord Mansfield noted “The law of England would be a strange science indeed if it were decided upon precedents only. **Precedents serve to illustrate principles and to give them a fixed certainty.” *Jones v. Randall* (1774).**	2
In applying existing case law, we noted **that courts were willing to distinguish cases even though arguably the distinctions between them were minor**. Chief Justice Roberts concurring in the Affordable Care Case, ***National Federation of Independent Business v. Sebelius (2012)***, narrowed considerably the understanding of the Commerce Clause which established the Federal government’s ability to regulate commerce between the states.	2

Ever since the New Deal and the case of ***Wickard v. Filburn (1942)***, Congress's power to regulate was read expansively. The Chief Justice believed the ACA "promoted" rather than "regulated" commerce, and therefore joined with 4 other justices finding that Congress had exceeded its Commerce Clause power.	1
We also noted both in public and private law the Supreme Court overturned precedent, most recently in *Dobbs v. Jackson Women's Health Organization (2022)* which explicitly discarded *Roe v. Wade (1972).* However, the Court in constitutional cases more often tends to distinguish cases rather than overturn them, meaning that cases are reinterpreted. An example observed was the way in which ***Brown v. Board of Education (1954)* rejected the notion of "separate but equal" established in *Plessy v Ferguson (1896)*** with regard to segregated transport could apply to public school education.	2
In conclusion, the concept that courts follow the decisions of previously decided cases remains the norm in order to foster continuity and predictability. However, precedent is not inviolate. American courts are prepared to modify or reverse it when judges believe that a decision requires reconsideration.	
TOTAL	**15**

FORTH PART (16.5%)

1. What are the main features of the German civil Code (BGB)? Please explain the (historical) reason of these features!

The German civil Code is very **theoretical in its structure, uses abstract terms and concepts** and has a very **technical language**.	3
The main reasons for these characteristics are: The Code was written and prepared by **law professors**; the Code was influenced by **pandectistic manuals** (for didactic and academic use); the technicalities of private law were considered to provide **for a free space for the individual without or with very limited public intervention**.	3
In detail: ***Professors**: Legal theory in private law is key for academic analysis of law.* ***Pandectism:** pandectistic manuals intended to present the "current Roman law" (Roman law of the 19th century) in a very systematic way and introduced terms and concepts to divide the complex subject matter into different parts and fields.* ***Free space:** Savigny had the idea that by creating a private law system that could function "on its own", individual freedom could be sustained: if the law itself gave the answers to private lawsuits, no public intervention was needed, thus the individual freedom was protected.*	+ 3 SP
Total	**6 + 3**

2. In what respect can fundamental rights be relevant for the solving of private law cases under German law? Explain the leading case "Lüth" and give the main facts and arguments!

In principle, fundamental rights are rights against the state and against the abuse of power by the state; as the judiciary is part of the state – it constitutes one of the three powers in the state – the **application of the law by the judiciary must be in conformity with fundamental rights**.	2
Thus, a judgement that does not take into account the individual fundamental rights of both parties can be considered a **violation of fundamental rights by the judiciary**. In the Lüth-case, the German Federal Constitutional court considered **that fundamental rights form an objective asset of values** that must be respected **by any public power** (and not only by the legislator when drafting the statutes).	3
Thus, also the **judiciary**, when interpreting and applying the legislative statutes, must consider the **fundamental rights at stake and has to avoid violating individual fundamental rights**.	1
In detail: *The Lüth-case has its name from Erich Lüth, the director of the Senate of Hamburg, who had publicly asked to boycott a film of **Veit Harlan, who had been known as a film director for the national socialists and shot propaganda and racist films**. Lüth was sued for injunction and later for damages on the basis of § **826 BGB (damage against** public policy). The civil courts (and also the Federal court) held Lüth liable for damages because of the boycott. The Federal Constitutional court decided **that Lüth's constitutional complaint was justified for violation of the fundamental right of the freedom of speech (art. 5 GG / Basic Law)**. The objective value- system of basic rights should have been considered also by the civil courts, especially when interpreting the general clauses, such as **"public policy" or "proper conduct" (two different translations for "gute Sitten")**. The general clauses have thus been described as **"points of entry" for fundamental rights into private law**.*	5 SP
Total	**6 + 5**

FIFTH PART (16.5%)

Is case law subject to Parliament in France? (Be sure to organize your answer into two distinct parts!)

Notice for corrector:

The following example is not the only way to organize the answer, but it is important that students mention the following ideas:

- articles 4 and 5 of the Civil Code (source of law?) (3 points)
- the traditional respect for Parliament (2 points)
- the need to fill gaps in the law and by doing so to create law (2 points)
- the possibility for the legislator to always break a case law (2 points)
- the new powers of the judge, particularly in matters of fundamental rights (constitution or treaties) (3 points)

Students are expected to give examples of case law (not all of them) and to know the relevant articles. The examples can help to get supplementary points as indicated below.

PART I: Yes, in principle, case law bows to Parliament	
Case law is still not officially a source of law. The judge can never make decisions that would have a general scope beyond the case (art. 5). It is a reminder of legicentrism (the idea that everything revolves around the law, that the law is perfect and that it reflects exactly the will of the people). That's why a reversal of case law is, in principle, retroactive: the judge is not supposed to create something, he only applies and interprets the law. Therefore, a reversal of case law can be applied retroactively.	1
Example: *Civ. 1st, October 9, 2001, "the case law interpretation of the same rule at a given time cannot be different according to the time of the facts under consideration and no one can claim an acquired right to a fixed case law" (facts in 1974, reversal in 1998 in which the Court of Cassation created a duty to inform on exceptional risks of treatment).*	**2 SP**
The judge's mission is to apply the law and not to change it. It is not for the judge to rule on social debates. These are issues for the French Parliament, for the people or at least its representatives. Therefore, there it is futile to go to the judge if you are not satisfied with the law and hope to see it changed.	2
But the reverse is possible, if Parliament is not satisfied with a case law, it can break it. Judges in France are not elected; they have no legitimacy to represent the people. The separation of judicial and legislative power must remain.	2

Examples - *Civ. 1st, March 13, 2007 (the Court refused to recognize same-sex marriage)* - *Civ. 1st, Mai 4, 2017 (the Court refused to recognize gender neutral)* - *Art. 1, Law of March 4, 2002 (without saying so, the Court agreed to compensate for the birth itself in the Perruche case, Full Court November 17, 2000. This decision shocked all the authors and the Parliament had to intervene with a law: art. 1 "No one may claim a prejudice by the mere fact of his birth."*	**2 SP**
Part II: No, by exeption, case law competes with parliment	
What to do when the Civil Code is incomplete? The Court of Cassation has to fill in the gaps itself.	1
There is no other choice. If not, this would be a denial of justice. Therefore interpretation becomes pure creation and the Court temporarily takes the place of the Parliament.	1
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."	2
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).*	**2 SP**
Who checks whether laws comply with international treaties ratified by France? Not the Constitutional Council (it refused to do so in 1975), but the ordinary judge. If the law was enacted before the treaty, there is no problem. We held that by ratifying the treaty, the legislature overruled the earlier law. However, if the law is passed after the treaty was enacted, the question is whether the judge should respect the law passed by the parliament or the treaty. The courts have decided in favor of the treaty, demonstrating a new power against Parliament. The Court of Cassation has gone even further, accepting a proportionality test to determine whether the application of the law to a specific case (rather than the law itself) violates an international treaty.	1

Finally, the Court of Cassation also plays a role in reviewing the constitutionality of laws. In 2010, the PQC (Priority Question of Constitutionality) came into force, which makes it possible to request a review of the constitutionality of a law during litigation. The judge is involved because there are two filters before the question reaches the Constitutional Council: the lower courts and the Court of Cassation. Of course, it is not the judge who ultimately decides whether the law is repealed or not, but by reviewing the conditions, the judge has gained a new power.	1
Grounds: - art. 55 of the Constitution which states that, subject to reciprocity, treaties have a higher force than laws; - Joint benches, January 24, 1975, Jacques Vabre: the Court of cassation decided that it does not matter whether the law is prior or subsequent to the treaty, the judge has to control it; - Article 61-1 of the Constitution (creates the priority question of constitutionality).	**1**
Example *Civ. 1st, December 4, 2013 (proportionality test, the Court stated that a marriage that has lasted 22 years cannot be annulled without violating the right to privacy of article 8 CECH).*	**1 SP**
Total	**12 +7**

SIXTH PART (16.5%)

Australia law and Aboriginal people: illustrate the importance of the Mabo v Queensland (No 2) (1992) and of Native Title Act 1993:

The High Court of Australia, in the **landmark judgment Mabo v Queensland (No 2) (1992)**, has acknowledged the **pre-existing native title rights and interests of the Meriam people in Murray Island.** The Meriam people were the traditional owners of the Murray Islands in the Torres Strait.	2
The Court recognised that Murray Islands and Australia were not **"terra nullius"**. The Court also recognised that the indigenous people, **"who lived in Australia for thousands of years, enjoyed lands according to their own laws and customs"**. The consequence of this judgment was **the overturning of the doctrine of terra nullius (land belonging to no one) as it was claimed by the British Government for the colonisation of Australia.**	3
The High Court of Australia affirmed the existence of the native title for all Indigenous people in Australia prior to the establishment of the British Colony of New South Wales in 1788. **This recognition of pre-existing land rights incorporated the doctrine of native title into Australian legislation**.	1
Native title is often described as a **"bundle of rights" in the land.** It depends on the native title holders' traditional laws and customs as well as the Australian law's capacity to recognise the rights and interests they hold.	1
With the Native Title Act 1993, the Australian Parliament recognised the rights and interests of Aboriginal and Torres Strait Islander people in land and waters according to their traditional laws and customs.	1
Native titles are **inalienable (inalienable freehold titles)**. The native title may be claimed in zones such as vacant (or unallocated) Crown land; parks and public reserves; beaches; some leases; land held by government agencies; some land held for Aboriginal and Torres Strait Islander communities; reefs, lakes, rivers.	1
For the native title claimant, some conditions must be met: **1. Rights and interests possessed under the traditional laws currently acknowledged and traditional customs currently observed by the relevant Indigenous people** **2. Indigenous community must have a "profound connection" with the area in question through those traditional laws and customs.** **3. The rights and interests are recognised by the common law of Australia.**	3
Possible supplementary points: *History of Australian colonization (from 1770): 1-2 points* *1901 "Australian Commonwealth Act": 1 point* *2nd half of the 20th century: the rise of the identity of the Indigenous community (Aboriginal culture and values): 1-2 points* *Process of a native title claimant application: 1 point.*	max. 2 SP
TOTAL	**15 + 2**