Les Fiches de la Corpo

Les Fiches de la Corpo

Chers étudiants, ça y est, le semestre touche à sa fin. Mais pour bien profiter de l'été et éviter les rattrapages, la case des partiels semble inévitable !

Depuis maintenant 85 ans la Corpo Assas accompagne les étudiants dans tous les domaines de la vie universitaire, et vous propose notamment des Fiches de cours. Ces condensés de cours guideront, encadreront et rythmeront vos révisions des partiels. Ils ne sauraient évidemment se substituer aux exigences universitaires de recherche personnelle.

Effectivement, ces fiches sont là pour vous orienter, elles sont faites par des étudiants et ne remplacent pas une présence assidue en cours et en TD ainsi que l'apprentissage régulier et approfondi des différentes matières.

Si jamais il vous venait des questions, n'hésitez pas à nous envoyer un message sur la page Facebook Corpo Assas ou à contacter Iris de Laporte, Apolline Thevaux, Pauline Deslandes et Erykah Il.

➢ **Comment valider votre année ?** Pour les L1 :

Il faut tout d'abord rappeler que toutes vos notes se compensent. Pour valider de la manière la plus simple votre année, il vous faut valider vos blocs de matières fondamentales mais aussi vos blocs de matières complémentaires. Cependant, le calcul peut s'avérer plus complexe...

Chaque fin de semestre est marquée par des examens qui constituent l'épine dorsale de la validation de votre année. Bon nombre d'autres possibilités vous sont proposées pour engranger un maximum de points et limiter ainsi l'impact de vos partiels. Chacun de vos chargés de TD va vous attribuer une note sur 20 à l'issue du semestre. Vos TD de matières fondamentales comptent donc autant que l'examen écrit, lui aussi noté sur 20. Cet examen s'effectue en 3h et nécessite un exercice de rédaction. Sur un semestre, une matière fondamentale peut donc vous rapporter jusqu'à 40 points. Seuls 20 points sont nécessaires à la validation de la matière. Pour valider votre bloc de fondamentales, il vous faut donc obtenir 40 points en additionnant vos notes de TD et vos notes aux partiels. Si toutefois vous n'obtenez pas ces 40 points, vous repasserez en septembre,

lors de la session de rattrapage, la ou les matières que vous n'auriez pas validée(s).

Attention : le passage par septembre annule votre note de TD obtenue dans la matière. Pour les L2 :

Le principe est similaire, à la différence qu'il y a plus de matières fondamentales et plus de matières complémentaires.

Conclusion simple : travailler toutes les matières un minimum en mettant l'accent sur les TD et les matières fondamentales (les plus gros coefficients) vous permettra de maximiser vos chances de valider votre année du premier coup et ainsi éviter l'écueil des rattrapages de septembre.

➢ Système de compensation et session de septembre

Si, au sein même des unités d'enseignement, les matières se compensent, les blocs peuvent aussi se

compenser entre eux à la fin de l'année. Ainsi, si vous obtenez une moyenne générale sur l'année de 10/20, votre passage est assuré.

En cas d'échec lors des sessions de janvier et de juin, une seconde chance vous est offerte en septembre.

Attention, contrairement aux idées reçues, les rattrapages ne sont pas plus faciles, ils sont connus pour être notés plus sévèrement. Toutes les matières des blocs non validés où vous n'avez pas eu la moyenne sont à repasser. S'il s'agit d'une matière à TD, la note de TD est annulée (même si vous avez été défaillant), de sorte que la note obtenue en septembre compte double (8/20 revient à 16/40). Les points d'avance acquis lors de l'année (points au-dessus de la moyenne lors de la validation d'un bloc) sont valables après les rattrapages et permettent donc la compensation finale comme décrite précédemment.

A noter que le jury peut vous accorder quelques points pour l'obtention de votre année, notamment dans le cas d'un étudiant sérieux en TD... A bon entendeur !

Pour les L1, le passage en deuxième année peut aussi se faire en conditionnel, pour cela il vous faut valider les deux unités d'enseignement fondamental et une unité d'enseignement complémentaire tout en sachant que l'autre unité complémentaire sera à repasser en L2.

AVERTISSEMENT

Il est important de rappeler que les Professeurs et Maitres de conférence ne sauraient être tenus responsables d'une erreur ou d'une omission au sein des fiches de cours proposées, puisque ces dernières sont comme dit précédemment, réalisées, relues et mises en page par des étudiants appartenant à la Corpo Paris II.

Le Professeur dont le cours est l'objet n'en est pas l'auteur donc même s'il autorise sa diffusion, il ne cautionne en aucun cas son contenu. En conséquence de quoi, la Corpo Paris II ne certifie en aucun cas la concordance des fiches avec le cours d'amphithéâtre.

Seul le cours dispensé à l'oral en amphithéâtre est utilisé comme référence pour les examens, sauf précision donnée expressément par le Professeur. Il donc est impératif de ne manquer aucun cours magistral afin d'obtenir les meilleures notes possibles aux examens. Les fiches présentées ici ne sont qu'une aide et ne correspondent en aucun cas au cours complet.

REMERCIEMENTS

La Corpo Paris II souhaiterait remercier sincèrement l'intégralité des professeurs ayant permis et autorisé la diffusion de ces fiches de cours et d'avoir ainsi offert aux étudiants une aide précieuse à la réussite de leur examens.

HISTORY OF THE EUROPEAN LEGAL SYSTEM

Introduction :

- **European:** a geographical notion, as a geographical quantity. But this order is not a clear notion. It represents 750 000 0000 million people. It is a political and economic entity. The European system has supranational, intergovernmental decision-making.
  There is also an approach to Europe that is more cultural. Languages and traditions arrived mostly in Latin, German, Scandinavia. There is homogeneity in Europe.

- **Europe:** itself refers to Europa. It also refers to the princess. In the Greek methodology, Europe was adopted by Zeus. He carried Europa across the sea in 1602.

Law is a changing object and law is effective or influenced by various forces or interests or aspects.

Ubi societas ibi jus: "where is society there is law". (it is from Cicero, De Legibus).
It means that law and society are indivisible. Law is necessary to every society, to maintain peace and harmony. Law is the basis for any society.

- **Legal system:** a group of legal rules enacted to solve the issues occurring between the members of a given society.
  Some of them are more influential than others. They appear as the cornerstone of civil life, at the different scales of different countries or continents. By the efficiency of the legal system. Sometimes it is composed of colonization. They arrived in the course of history. For instance, the USA have received their legal system from Great Britain but today their legal institutions are imitated, they have spread outside their own country, like Japan.

Frederic William Mattland (1850-1906) wrote a famous book in Common law about the procedure. He said that the old rules still apply. Nowadays, the law, even our reforms, always carry the legacy of their past, in their present time.

The European legal tradition is composed of Civil law and Common law. Civil law is traditional in Europe while common law is typical of the British system and then it spread across the ocean, and to the USA mostly.

1. Similar features

First, they shared similar features: it involves judges, legislators, law professors, customary law. These important elements are in both systems.
There is basically a prominent influence of case law in the common law system.

1. Families or Group of Law

Families of law refer to the process of classification of the legal system based on the genetic approach. It means that some features have passed from one society to another either by enlargement or exploitation of a minatory conquest. They are asking about the transformation of one system to another country. In this notion of group, the classification refers to geographical criteria and not genetic. At first

sight, these criteria seem more neutral but they are not that objective (compulsive abuse). Ex: during the cold war, the communist law was western Europe ⇒ a geographical notion and not a neutral notion.

Platoon, who lived in the IVs et Vs century, in the longest dialogue he wrote, described the political institutions. The purpose of Platoon was to compare all the systems and to be aware of all the great cities and then to make a list of the different governments, then give the ideal political system given by all the differences of the political system. Aristotle (IVs century) in one of his works on politics compared the constitution of space, he collected a collection of 153 States and has a comprehensive picture that he can get. He wanted to explain what the best form of government is. A great balance that can provide peace and harmony in the society.

- **Law of the 12 Tables >** cooperation between Roman and Greek on different materials. The materials were influenced by the Greeks. But we never have the law of the 12 Tables.

They were the complete set of the Roman law in the, it was a major work which was a basis of the development of the law.

- **Common law:** law of the Christian Church, new interpretation of the law.
- **The canonize, as well as the legists:** specialists of Roman law in the Middle Ages express their ideas.
- **Humanism:** based on the human mind is capable of understanding almost everything.

Hugo Grosius and , these two majors, developed the notion of natural law which they call *jus naturale*, the nature of each theme in their work. And on these themes, there is the human being.

- **The natural law:** the set of rules that are common to all the things of the world.

And this natural law (general, universal law) is opposed to positive law (each society). Rules of law are just or unjust. In the background of the positive law, there is natural law. The rule of law has just to be compared to comparative law. This comparison. The enlightenment of the reign philosophers reshelved these theories about commitment.

One major work on this topic was made by Montesquieu: *Esprit des Lois, In the spirit of the law*. He explained this phenomenon linked to these specific settings. Each legal system reflects the setting of socie. In the 1900 century, history was used as a tool to create a story of the nation of each country. Ex: In France, in 1900 they developed the theories of their ancestors. The idea that the Gaelic were the ancestors was about classing history into a single origin. There was progress to this origin to liberalism and in a way, it was a complete ideological religion. Two trends sub counters wanted to conquer and to. In the national approach, many sub counters offered a European perspective based on the common legal tradition of the legal history, the roman law. Several jurists develop this idea that the common feature connected all the European countries in roman law.

The comparison of the European legal system.

Three majors: see powerpoint.

They produced studies that insight the European legal history which has really begun in the 1900 century. These works defined the European legal culture and their sense of awareness and differences. To set a point, this position developed on something different in a sensitive approach. It is a good example: Rodolf Darest that has being gathered in the *L'Ecole d'histoire du droit.* His project was to make it available to the French leader, he wanted to give a translation into French of the many monuments in the European legal system: Dutch, Italian, Spanish. He wanted to make these laws available to the French jurists to straighten the idea. He wanted to bring France and Germany together.

He claimed that all the European countries share the same ideas about justice. It is because all the European countries herited from all the Romans and the Greeks. It is the image of strong European unity. And this unity was opposed to other legal systems outside Europe and these other legal systems were considered less efficient and provided with perverlant. And his result to his work was to create a soap unity. The legal system is opposed to culture. Perhaps in a negative way, they were presented as not good for the European legal system. He didn't want to oppose the European legal system to others. They were centralized and eventually request into the growth of centric series. The idea of Darest was not, to hence the European legal system. Europe was built only on the European legal system. It grows racist and anti-Semite. He relies on a combination of specific innovation, which is still central, especially in the cultural research but the notion of cultural mixing and it is part of the dynamic of the system. There is a lot of legacy from the Greeks and the romans, but these legacies mustn't be considered as the only source, there are a lot of influences.

CHAPTER 1: THE ANTIQUE FOUNDATION

In the European legal tradition, it is a specific way of regulation of conflicts. Whereas in other legal systems, law is one of the aspects of cultural and religious life. All legal systems consider law as a component of a border system which covers all social life. Law it is one of the components.

The civil and common law are built on a special way of law: **thune of its one, regulate social relationship**. Indeed, the sign that law is the most important tool to solve a conflict is the fact that both common systems have commended, they have produced a legal science which is based on Greek antic foundation because many of the definitions of the law that we use in our days come from the Greek and the romans.

• The Greek legacy

Greece was first admired for its contribution to human philosophy. They invented the concepts that were later developed in Arabic and European cultures. There are legal concepts. It is impossible to develop all the legal concepts that the authors have created.

A/ Several major characters:

1. Heroes

The best represented of these heroes: Pericles.

In the Vs century, he was a general of Athens and Orato and the Vs century is considered as the great century of democracy.
What makes him a hero?

- He led the army during a famous war between Athene and Sparta and led the victory to Sparta.
- He was a great general and he promoted art and culture.
- He created a center of arts and intellectual life. He is also the one who develops archeological art. He refreshed it to citizens and **equality (political philosophy).** Citizenship is not restrained.

He was a populist, he gave citizens access to public policies and to political lives.

The division of the Empire, it was divided about the general of the army, they were called *The diadochoi,* and they found a lot of monarchies.
First of all, settle in Egypt, known also as Lagos. The last dynasty was the Italian dynasty founded in Turkey. The Empire itself was fragile because of the vast territory, impossible to control because of the weakness of the powers. They were constantly fighting with one another. It was a turning point because the campaign increased between east and west and they allowed Greek civilization to spread outside Greece.

2. Philosophers

The first one is Socrate (470-399).

As he did not write anything we know his ideas thanks to his students. We also know about his life, he was condemned to death by his own city because he refused to participate in public worship and it was considered as an opposition to the city. Under this rule of law, he was denied the job of poverty, and did not participate in public worship. He refuses to escape the city because he said he wanted to comply with the decision of the judges. It is the paradox of the death of Socrates. **He considered himself sufficient.**

The second philosopher was Plato (428-348).

He was the one who offered to escape from prison. In his book, Plato follows, even if the death penalty was unfair destroying the condemnation was destroying the city, because judging the decision of the court was the decision of the judges. Plato claimed that rebuilding the tension was an unjustified act of rebellion.
If we want to sum up, according to Plato responding to an unjust sentence, **the sentence cannot be escaped because it will be unjudged.** Plato's works are about all the aspects of philosophy. For instance, metaphysics, ... He developed a famous allegory, **the allegory of the cave**, especially in the book of the *Republic*. Plato says that everything on earth is no more than a shadow, a perfect reflection of the world's ideas, he compares the human being to the people living in the cave. The shadow of the world. Ideas include a general concept for instance beauty or also concrete animal men.
Aristotle (384-322) also left a mark on the philosophers of his mind but also multiple colors in Asia.

Plato and Aristotle were considered the two founders. **Plato represented rationalism whereas Aristotle represented imperialism**, which was practical knowledge. Aristotle did not only write philosophy or philosophical treaties, but he also wrote about physiology, and he made classifications about all the things in the world. His basic point is that observing two various things. Observation was the key to Classification. You can find the similarities and the differences. For example, the concept of a three is different from other trees. His approach philosophically was totally different from Plato's, as he derived from the concrete observation of the world. Only ideas were able to be explained, allowing to reach the general reason. It was the basis of **systematization**. In Europe, the organization relies on these methods created by Aristotle.

3. Reformers

To make different changes, the result of the law to establish democracy. Indeed, since these reformers, democracy has always been framed by the social approach and the regulars. The concept of the law was **recurring conflicts between aristocracy and the people.** Aristocracy was a minor class and they wanted the law to be written down. It was at the basis of these majors' reforms.

1. **<u>First of these reformers was Lycurgus</u>**, the founder of the Constitution of Sparta.

- **The collective interests of the city were given priority over the individual interest of citizens even at the cost of their life.**
- A reform of Lycurgus of extreme equality. Lycurgus nationalized their land; it didn't have strict ownership a→ the equality among the citizens. **There was no ownership, a society of the land, not someone that owned the land.** They brought in food and drink monthly. So, they have their meals with each other. The city took the boys when they were 7 and put them in a sort of military structure. This pattern of social-economic influenced some of the actors of the civil revolution. In the 9th century, there was a group of monarchies, which was called the society of the equal.

1. <u>Draco</u>

Because they were not written down and just for only a small group of specialists, there was never certainty about the judgment. Draco decided to set the rules on tablets that were in a public place called the Agora. These laws were for one and for all, which means that any changes and for any violations were more difficult. In a democracy, these rules of law were very harsh and this is why the word draconian refers to such rules, draconian rules of law.

1. **<u>Then the third reformer is Solan (640-538)</u>** (who reforms the institutions of the city).

Draco was the first to published the law and Solan really developed the Athenian democracy thanks to his reforms.

- Opening public institutions to all citizens (assembling, and court of justice).
- Seisachteia "shaking off burdens" ⇒ the remission of debts, social justice. Intended to allow all Athenians who could not repealed their debts, and there were cansold and releasing of all enslaved Athenians.

1. <u>The fourth reformer was Cleisthenes.</u>

The reforms were intended to change the complicated organization of Athene. Athens was organized based on tribes. There is a unity of the citizens, depending on their tribes, Cleisthenes wanted to make a group with some people to create unity and the means that **he offered to create the unity → one assembly gathering all the citizens voting the laws and the public policy.** The basis of the reforms was the insomnia iso = quality + nomos: law, so it means equality before the law. So, unity was achieved thanks to the **principle of equality.** Cleisthenes separated the population into groups, equal members. Each deme: administrative division of the population, an equal number of the population.

Deme : administrative division of the population

It was the very strategic economic strata of the city.
The last aspect of these reforms is ostracism.

Ostracism: temporary exclusion, a procedure that was decided against citizens meant to be dangerous because they were too popular.

So, the democracy chooses that being too popular can be dangerous for the city because it can threaten the quality and the unity of the city. This sanction was against a citizen who did not commit any offenses or any act threatening, he did not act in a dangerous way. So, the name of ostracism refers to a small piece of an object . They were expelled from the city with their family for 10 years with no possessions in the city.

B/ Several major political and legal concepts

Political and legal concepts are important because Greece has formed a conception of the actual institution.

Some Greek words in Modern languages

- **Politics:** *polis*: city. Politics has to do with the politics of the city

- **Democracy:** *demos*: people + kratas ⇒ power, government

a. Equity

It has been developed by **Aristotle.** He has shown the distinction between the two kinds of equality: **arithmetic equality and proportional equality**

- **Proportional equality**

Law is aimed at the research of equality. But this equality is geometric/ proportional equality. That means that the law gives everyone what he is or what he is entitled to, **depending on what he does in society according to his rank or place.** This works for everything, for objects, for honors, for punishments and it is known as distributive justice because it allocated the functions, the honors.

Natural law for the Greeks was the **lawyer who was there when humans arrived.** Natural law, not ever natural law, was created silverly. The differences between various statuses are according to the natural law. The purpose of human law should not change the natural law. Human law wanted to make all the rules work harmoniously.

- **Arithmetic equality**

The other equality is arithmetic equality, it works in other circumstances regardless of rank and status. It is commutative justice; the rule is the same for everybody. If you cannot pay you can't buy. It is based on objective reality. These two aspects are the problem of a lot of
Political specialization.

b. political classifications

Forms of government Plato, *The Republic, The Laws*

In these two books, Plato analyzes the two forms of government. On this occasion, he describes the **ideal state**. This political analysis is framed in the border approach of the society. Society can be divided into 3 groups namely

- **the workers**
- **the warriors** (the soldiers who protect the city)
- **the rulers** (who govern the city)

And for Plato, it must be the one who is educated and understands the city. The three groups are not on the same level: the workers are the lowest, the warriors are in the middle and the rulers are on the top.

According to Plato, democracy was not the best form of government, he rejected it because in this system, those who were in charge had no idea how to govern a democracy. Aristocracy is the government by the best and according to Plato, it was the best thing of government, "Government by the best".
Modified or even generate forms and a general form of democracy is a timocracy "Government by the honorable" and it should be distinguished from oligarchy "Government by the few" that was two forms of government which degenerate the city. According to him, democracy and theocracy evolved in tyranny. The poor people are against the rich people and then they choose the kind of champion around them who takes control of the institution for their own benefit. Because the poor are not educated enough, so they named a champion who takes the control of the city, known as a tyrant.
Aristotle described the types of government and said the different methods. These qualifications rely on 3 forms of government as Aristotle defined as a normal form of government. And these **3 forms of normal government are controlled by the one who owns the power**.

- **the monarchy** = rule by only one person who rules the city
- **the aristocracy** = the government by the best, a group of people
- **polity (politeia)** = many people.

- Tyranny, a perverted form of monarchy
- oligarchy, a perverted form of aristocracy
- democracy, a perverted form of politeia .

Aristotle described a **cycle of political changes**, and claims that a natural process relies on the observation of nature. According to him, the first at the beginning of the city was the **monarchy**, so the Kings were chosen among men of great virtues.
The analysis of Aristotle has been a form and for the Middle Ages. Thomas Aquin considered that the best form of government is the monarchy. A brief overview shows how the content of the world has evolved and now the way we consider a democracy is very different (evolution of the notion).
Roman law has played a determining role in the formation of many legal systems, and it has been a crucial element in the formation of the civil law traditions. In the expression, civil law traditions are the **roman law**. The *jus civile*, the civil law was the law of the citizens, as defined by the Romans, and the other domination of the civil law is Germanic of the European system.
13 centuries of Roman law:

- **Archaic law**: between 8th and 5th centuries BCE
- **Classical Roman law:** 2nd BCE to the 2nd CE
- **Late Roman law** to IIIrd to VIth century CE: complications of the Emperor Justinian (482-565) between 529 and 533

- ## Roman legacy

They represent the, not only for the law. The classical period has reduced many achievements and it is a period when the Greek period has a lot of influence. They developed this approach of law based on their pragmatic genius and the Romans really invented their own approach to the law thanks to their It

remains Roman law was rediscovered in Europe at the end of the XIth C influenced the civil law traditions and the development of science reassignment.

A/ Overview of Roman history

- The first period is the **monarchy** to 8th c BCE to 509th BCE
- Then the **Republic** is from 509th BCE to 31 BCE
- And the **Empire** is to 27th BCE to

1. Kingship (753 to 509 BCE)

What we know relies on the writing of authors, Greek and Roman authors, especially **Virgil and Plutarch**. And they used to live mostly several centuries after Kingship. The ancient historian invented their past. What they wrote of the archaic period was pure **invention**, they wanted to create heroes and legends. There is no possibility to know who is right and who is wrong. And we know that **Romulus and Remus** founded Rome and Romulus assassinated his brother and became the first king. We know from the historians that then Rome became a Republic.
The secret boundaries of the city mean that death was the secret boundaries of the city; This is the reason why it was forbidden to bury dead people inside the city. The military economy was practiced outside. Only the military period was permitted when there was a **consequential military victory**.

The major concept was the **imperium** through human history, and it was a key concept during the Middle Ages in European history. In the Middle Age, the emperors, the kings, and the Pope struggled to get it, to have this **supreme power**.
They watched the bird's flight, and they interpreted **the natural phenomenon**. They were considered messages of the gods. The kings can consult the Gods to know if an action would succeed or not. This secret power gives the king this **unrestricted power**, involving military and judicial command. He could raise the armies and command the armies.

Forum: the political place of Rome

The fasces

The **two symbols** are the curule seat, fixed at the top of the charrette. He probably used to sit on this curule seat, so this seat is linked to the imperium. Then it is the Toga praetexta. A symbol of authority. And later in the Roman Republic, it was the sign of high-ranking citizens, and it became one of the political symbols. All these symbols were kept. **The Imperium was at the end of the European kings**, they had absolute power and had the support of the people, but they had no consideration to the aristocracy that wanted to participate in the power. So, they decided to rebel. That is probably why they are described as tyrants.

2. The Republic (509-31 BCE)

Patricians, *patres* which are the "fathers" = head of the family.

The Revolution was led by patricians, *patres* who are the "fathers" = head of the families. They wanted **to have access to the power, to assign the imperium, to illustrate the magistrate.** And this elected magistrate was for one year and belonged to the patricians. Aristocracy was directly involved in the

affairs of the city. That is why it monopolized the city until the Vth century BCE. They were the only holders of the charges and they decided to control the government of the city. **The goal was to represent the people in their entirety.** They called it a *Res publica*, a public thing. The political power was held by everybody and not by a single person, not by a King.
3 types of institutions:

- **Popular assemblies.** These assemblies voted the laws and elected a magistrate:

  - magistrates. They were elected for one year by the assemblies and they were elected to run the city. There were many types of magistrates. The censors who were responsible for counting the population, like to make groups of people by the various assemblies because they built the people among the different assemblies.

  - consuls, they had the supreme power so the imperium.

➢ *Auctoritas :* from *augere* "to increase"

➢ The plebeians, *plebs* = all those who were not patricians.

➢ *Nobilitas* = elite of the city. patricians + plebeians

➢ Clientship/ patronage = relationship between a man of wealth and influence

- **Senate**, which was composed of the elite of the population. Its function was to give its agreement to every political project. It was given in the Revolution of the *senatus consultes*. The Senate had no power of decision, but it had the major political tool which is *auctoritas* which is also a fundamental concept in the Middle Ages**,** from *augere* "to increase", a legal act. The Senate had the power to increase the efficiency of a political act. This means that even if the Senate did not vote the law, its *auctoritas* the assembly who voted the law.
  When the Senate refused the *auctoritas*, the law was not adopted, it was very important in the institutions. This political regime of the Republic was praised by many political persons, especially Greek, they admired the regime, and it was very harmonious and well-balanced. The citizens were represented by the assemblies. The magistrate was in charge of the executive power.
  It was considered as a good balance between aristocracy and democracy. In the Vth century, the minority was composed of the patricians and this situation gave rise to social conflict with the rest of the free citizens. And the rest of the free were the plebeians, plebs = all those who were not patricians. It has no social-economic meaning, they were all those who were not plebeians. You can be plebeians and not wealthy. In Rome, there were rich plebeians. At the beginning of the IIIth century BCE, they decided to stop joining the army, to stop making war for the city of Rome and they remained there until the patricians accepted all their demands: institutions for the plebeians especially.
  → There was a political opening. They manage to act in political life. This access of the pleb should not be understood as a democratization of the regime. It did not turn the Roman Republic into a democracy. It was still a governing elite. The power was still in the power of the elite, but it was bigger. The patricians and the plebeians formed the *nobilitas* = elite of the city. patricians + plebeians
  They had land property military skills, and authority thanks to their participation in political life. Another aspect was clientship/ patronage = relationship between a man of wealth and influence,

and another free man who is a client, and who acknowledges his dependence on the patron. In exchange, he supports his client in court, in a process for example. The freeman helps the patron in his private or public life. The patron explained how to vote, and the client voted for the patron. A patron affirms his authority in how many clients he has. In Rome, it was one of the aspects of the social relationship that was part of political life. The duration of teacherships was limited to 6 months.

3. The Empire (27 BCE-476 BCE)

There was never a woman empire but, there has been **a woman empire**. All the institutions of the Republic but in each one, he claims to be the first. He defined himself as a princess and become a royal title. Prince is the first. So, Octavian did not call himself Emperor but Princess. So, the 284 CE. So, because he was the first or the head of all the Roman institutions, Octavian received all the political power. And he received this power for life. And this is the difference because in Republic the magistrates have the power for 1 year. Especially the *auctoritas*, and the *auctoritas* which he received from the Senate. It refers to the fact, the *auctoritas* from the Senate.
Although he received **the title imperator**. Imperator has turned into Emperor, it is a military number, he was considered like the head of the emperor. Despite the fact, that they are still working for the citizens, they did not accept this denomination. One major difference between the principate and the monarchy was the fact that is no dynasty principle because the regime **was still a Republic.** To have this principle, they adopt their successor, adoption. A kind of legitimate dynasty really appears but it was not really considered as cherched. In the middle of the Empire developed in economics and politics, and it was until the Vth century. In the IIIrd century, the situation deteriorates in the provinces. And the reason was the German invasion. And this German invasion turned the power into a military regime. Indeed, the Germans put pressure on the Empire and therefore the price of the armies increased, and the military can also be all the military. Modern colors have named this type of power. ***Dominium***, dominate refers to the natural power. After a period of peace, wealth turned into a military regime and was called a dominant. The old institution of the Republic was no longer efficient, and they were replaced by intern legions: the court of the government relied on the administration.

The public system became so complex, so difficult to manage. In 2026, they decided to divide **the empire's power into two**: 2 emperors and 2 journaling emperors.
The tetrarchy: the government of 4 because the political power was divided between 2 emperors and 2 journaling emperors because the bureaucratic system was impossible to handle It became political and at this moment **two emperors:** one in the East, one in the West. From that moment, both emperors have had their own autonomous century.

376: but the power was maintained in the V c, il was called rise and tea empire but it was perverted with Greek culture. The split between the two-part of the government. As the Occidental part was more influenced by Latin culture.

The development of Christianity develops within the political empower. In the IVth century, the emperor conserves time was conf by society. The Addict of Milan in 314 establish tolerance about *imperior*, and it was the end of persecution. Theodesis the Ist who made the royal se state of *imperior*:

Chapter 2: The formation of the civil law tradition

After the fall of the rem empire on the 5 th c, new pops of German origins settled in Europe; they became more visible (they had already settled). They brought with them their own customary laws that were mixed up with the already existing Roman rules of law. This combination formed what is known as vulgar roman law = ordinary, popular. Roman law did not disappear but it was mixed with the customary

laws of the German population. The classical roman law was rediscovered in Europe at the end of the 11 th c, especially the compilations of Justinian from the 5 th c. canon law also developed and increased and both the roman law and the canon law became prominent and formed a unit known as utrumque ius = the 2 laws or 2 legal system, and they are also known as "learned law" or "scholarly law" ⇒they were both written in Latin and therefore they required a specific education in order to get access to the text.

• The medieval period

A/ The customary laws

- customary law is a long-established usage accepted by the population of a given territory.

The authority of the customary law derives from its long existence, but also from the unanimous consent of the community, it is oral and flexible. As it's not written down; it is also often unclear or uncertain. The feudal system was based on the personal relationship of a vassal and his landlord and it developed in the frame of a fiefdom; an estate held by a vassal: territorial, but it was also based on rural agricultural domains that were run by a landlord (not a vassal). These rules were produced by the combination of various elements taken from the local culture (German, Norman, Celtic, roman, Gallo-roman) but also on the legal practices of the landlords= feudal law. The practices of the traders = lex mercatoria "commercial law", and the laws issued for the cities, laws of the town dwellers = urban statutes.
answers pb.
In the 12 th c, this complicated system became inefficient and this is why customary laws began to be written down.
The movements began in southern Europe: Italy and south of France. In these areas, customary rules were written upon request of the city authorities or of the local rulers. The process of writing down was supervised by these authorities.
Customary law remained the main source of law in the MA.

B/ The royal law

In the MA, the kings started to develop their power by claiming their authority over the landlords. Until the 11 th c, they were in competition with several very influential landlords who often had more power than the king himself. And the power in the feudal system is mostly military. Instead of resorting to war and fighting with the landlords, the kings from the 11 th c and onwards rather resulted to justice and law. They developed royal courts and offered them to their subjects and encouraged them to resort to these courts because they were more efficient than the courts of the landlords. Until the end of the 11 th c, the kings only rarely acted as legislators. From the 12 th c onwards. Things started to change: the change was prompted by the rediscovery of Roman law. Indeed, the kings appointed scholars trained in roman law called the legits, jurists trained in Roman laws. For instance, they quoted Ulpian "quod principi placuit legis habet vigorem = "what is pleasing to the prince has the force of law". With this new approach to their authority, the kings issued more statute laws and many of them were intended to maintain peace in the kingdom. In fact, one of the main problems of the MA was the endemic violence in the society.
Instead of violence: royal jurisdictions to settle conflicts. They prohibited wars between lords at specific times. ex : prohibited to fight on Sundays, a religious calendar was used.
The competition between the church and the king started in the 11 th c with pope Gregory the 7 th and the German emperor Henri 4 th : it started with the investiture controversy. The spiritual power of the pope was considered more important than the secular power of the emperor. The conflict evolved into a debate about who owned supreme power over Christianity and it lasted until the 14 th century (most of the pop of Europe was Christian).
One episode took place in the 13 th c: between the French king and the pope. Innocent III who resorted to Roman notions in order to fight the French kings.

C/ The learned or scholarly law: roman law and canon law

This denomination derives from the fact that roman and canon law were written in Latin, and therefore, it required specific skills. Also, their content was more technical than other medieval sources of law: required a high level of education.

a. Roman law in the Middle ages

The Roman compilations of Justinian were rediscovered in the middle of the 11 th c in Italy, and this major cultural event prompted the creation of universities. They were first created in Italy: the first one ever was created in Bologna in the 11 th century, then in France, Spain and England during the 13 th century.
The teaching consisted in the reading of the roman sources of law, portions of the compilations, and explaining the Latin words, grammar and syntax. This method is known as the gloss (Greek = glossa = tongue, language) and the scholars who resorted to this method were the glossators = it was a work of translation and explanations. Each glossator learned the work of those before him and added to it. At the end of the 13th century, one of the greatest jurists of the MA: Accursius, offered the final collection of commentaries and glosses that were scattered. His work is known as the glossa ordinaria (the ordinary gloss) or the Magna glossa (great gloss). It gathers 1 and a half centuries of interpretations.
This is why roman law was referred to as ius scriptum = written law and it was considered as an instrument for peace and stability.
For scholars, roman law was the masterpiece of human intelligence ratio scripta "written reason, well-argued opinion".

b. Canon law

It is the law of the Christian church, and Christianity developed in the frame of the Roman empire. Therefore, it influenced the roman culture which also influenced the Christian church, indeed, as an institution, Christian church was built on roman concepts and it maintained some of the roman empire's administrative structure during the MA.
Besides, the church produced its own law, canon law, based on religious sources. Canon law = mixture of roman
cultures and influences and specific Christian rules. It derives from 3 types of sources:

- Scriptures : gospels, works of the Fathers of the Church ex: Augustine who wrote the city of God
- The decisions of the councils : assemblies of bishops issuing regulations about the dogma and the interior discipline (canons)

- The decretals = letters from the popes, usually sent in response to a question asked by a bishop when he has a problem in his district that he cannot solve→ becomes a general
rule. These sources increased (especially councils and decretals), therefore, it was felt necessary to collect these sources and arrange them in a systematic work:

- The Decree of Gratian (decretum gratiani) around 1140: they gathered 4000 texts of canon law arranged in order to provide an explanation for the possible contradictions between the provisions .
- 5 other official collections were produced between the 13 th and the end of the 15 th century .

All of them together formed the corpus iuris canonici and in the faculties that thought canon law, scholars were also taught roman law (many common aspects: marriage, criminal law...) + education were the same.

D/ The medieval legal science

1) The ius commune

In the MA, the combo of roman law and canon law formed the ius commune which literally means Common law but it is never translated in order to avoid confusion with the Common law system. It is also referred to as utrumque ius "the one and the other law". Roman law and canon law were studied at all faculties throughout Europe. It was considered a universal or general law. And this universal law, ius commune was opposed to the ius singulare or ius proprium meaning "special or particular law", it was the law specific to a country or to a profession eThis notion also referred to the laws specific to a city or to a domain: everything that was not roman or canon law.

The essence of the medieval law is pluralism ⇒ historically the fragmentation of the territory resulted in the fragmentation of the law at the scale of a territory or a group of individuals. Roman law was in a sense a teaching law: it remained in the universities, faculties, whereas canon law was also applicable law, apart from being a teaching law. Both laws combined and influenced each other. Canon law developed outside the faculties in the Middle Ages.

Legal classifications:

They found this system in antique texts provided by the romans. They resorted to the same methods as scientists so they created those classifications and the medieval jurists took them and adapted them to the context. They resorted to distinctions:

- Public vs private
- General vs special
- Common vs specific
- Absolute vs relative
- Movable vs immovable

~ public law ~

In this realm they provided many concepts:

- Majestas "majesty"
- Auctoritas, potestas, imperium

They all refer to sovereignty and provide the idea that the power must be in the hands of those who are at the top → pope, emperor and king. Each of them claimed to be the sovereign ⇒ Constant fights between them in order to be recognized as such.

The scholars of the ius commune also developed their interest in criminal law. It was developed when assessing the degree of the misconduct and the severity of the

punishment, taking into account the intention was a means to take in account the responsibility and the punishment.

~Process law~

Specific procedure = inquisitorial procedure inspired from the roman. The judge leads the trial from beginning to end, and has a central role. The procedure was based on an investigation.

The medieval scholars developed process law according to the principles of Roman law. They made use of the rezoning by analogy which requires certain conditions: that there was a similarity between the standard case and the specific case, but it also required that in both cases, the justification of the rule was the same: it was called the ratio legis. For instance, parents have a maintenance obligation for their children, this obligation is justified by the

child's survival: this civil obligation imposed by the roman law does not exist between brothers and sisters (they should help each other on the basis of natural obligation): the analogy works although the sit are diff.

~Private law~

Major changes were introduced and they are still in operation nowadays.

2 examples:

- Realm of tort law: the roman law had no general principle on tort law, there was just a number of well- defined injuries. On the other hand, several theoretical texts in the MA say that when the property unjustly taken is restored, only then can the sin be forgiven: decree of Gratian 12 th c: used in canon law. Th. Aquinas then said that there has to be an equivalent compensation instead of giving back the stolen property in the 13 th c. + principle of liability.

- Principle of consensus in contract law: consensualism means that any contract/binding agreement is binding and enforceable whatever the way it came . A list was established:

enforceable, and outside of it, there were also formless contracts that were called nude
Canonists considered that breaking one's word was a sin: break of contract became a punishable offense. This reasoning became the general rule. This obligation is summarized in the Latin phrase pacta sunt servanda "agreements must be kept".
Sources of medieval law in Europe
Pluralism:

- Customary laws of the lords and of the cities
- Statutes laws of the kings
- Legal practices of the merchants

iura propria

- Roman law
- Canon law

ius commune

- on one side (commune): a unitary system used by scholars all over Europe,
- on the other side a mosaic of many laws: iura propria.

All of them formed separate jurisdictions with their own courts and their own legal systems.

• The Early Modern period (16 th c-18 th c)

This new system favored the development of particular laws.
Even customary laws that were oral by nature were written down during the 15 th century under the control of the kings. The role of the kings developed. Besides, Latin was replaced by vernacular languages. The jurists started to write in their own language.
At the same time, a second revival occurred in the frame of legal humanism: a philosophical trend that emerged in France and spreads in Europe. Notion of ius commune disappeared but Roman law didn't.

A/ The resurgence of local rights

The idea of an ius commune applicable beyond the boundaries of the various states was no longer accepted. For instance, the French jurist Charles Dumoulin in the 16 th c refused the idea that the roman law would be the common legal system in France.
Promoting the notion of nations in the law-making process.
The process resulted in a great improvement of the customary laws. Thanks to the writing down, the inconsistent or obsolete rules were discarded. Also, the rules with a small territorial jurisdiction were discarded. Only the large districts were taken into account.
Since customary rules had become accessible and certain, some jurists specialized in their analysis. They created their own legal science. It was similar to the roman legal science.

Some of these jurists were so influential that they created specific programs. In France, several faculties of law offered French law courses.
Pothier (17-18 th c), professor of French law at the University of orleans. He compared the customary laws of the south of France inspired from the rom law, and the cust laws of the north: he gave a global picture.

B / The role of legal humanism

Second revival of roman law initiated by Andrea Alciato (16 th century) taught at the university of Bourges: he trained Cujas and Doneau for instance and they spread his teaching all over continental Europe. It was based on this desire of increasing the knowledge in all the fields possibly available. Legal humanism tried to resort to the knowledge and make use of it in order to better understand the legal sources in roman times.

These scholars wanted to accurately reflect the genuine ideas of the roman jurists, and catch their spirit. The method was born in French; they called it the mos gallicus "the French way" as opposed to the mos italicus "the Italian methods" (= gloss).

Legal humanists are behind many significant advances in law. In the MA it was an idea of universal order, but in the early modern period, it focused on individuals indulged in reason and absolute rights. It derives either from the religious order provided by god or from the social contract. And the French scholar Hugues Donau developed this idea that each human has rights inherent to the person (life, freedom, honor, security) vs rights on objects (ownership). Dutch author: Hugo Grotius (16 th c): De iure belli ac pacis "about the laws of war and peace" (1625).

C/ The rise of legislation

The 16 th c was marked by serious crises and wars, a major event was the breakdown of the Christian unity with the schism between Catholics and protestants. This split meant the collapse of the medieval idea of the Christian republic = republica Christiana refers to a community based on a single political unity. During the MA, there was this idea that Christian community was a kind of republic
Faith was no more the foundation of unity, even if it was an incent unity, instead it was a cause of conflict and violence.

c. The development of royal law

From the 16 th c onwards, the affirmation of royal sovereignty had consequences on the legislation among sources of law. The French jurist Jean Bodin developed the notion of sovereignty in his major work: The six Books of the Republic in 1576. In this work, Bodin defines sovereignty: it lies in "the power of making and breaking law": emphasis on the power of the king to do so.
Bodin refers to 2 roman sayings:

- "the prince is not bound by the law": princeps legibus solutus est: Bodin considers that there are fundamental laws that cannot be changed or abrogated by the king: the rules of divine and natural law
- "What pleases the prince has the force of law": quod principi placuit legem habet vigorem: the king decides what are the enforceable rules: they have precedents above all other sources of law.

Things began to change in the 17 th -18 th c: the purpose of legislation was no longer to reform the law but to organize
in a systematic way the available rules: it meant that legislation dealt with only one topic as fully as possible. For instance, this was the case in France under the reign of Louis 14 in France with the issuing of ordinances by his minister Colbert. 2 important ones:

- Ordinance about civil procedure (1667)
- Ordinance of criminal procedure (1670)

Works realized a synthesis of roman law and local law. It was based on a method called usus modernus Pandectarum "modern use of the digest" (appeared from the 16 th c onwards): in these countries roman law was used as an operative source of law mixed with local laws.
Conclusion:
Modern times are characterized by the construction of legal unity: contrast with legal pluralism in the MA. The construction of legal unity in modern times was a means of creation of a national identity: it is the moment when national states emerged and wanted to express their identity to a specific national law. Instead of the notion of universalism in the Christian faith that prevailed in the MA, modern time preferred to enforce the states based on their nations, and they can resort to a specific law. Unity is based on this national legal unity. Jus commune was no longer accepted: instead, territoriality prevailed through the development of legislation that was closely associated with the king's power.

d. The law in modern legal thought (16-18 th c)

Although the states and the kings claimed to build legal unity during the early modern period, legal pluralism remained.
In fact, customary laws never disappeared during this period.

1. The evolution of the notion of Natural law

In antiquity and during the MA, it was a common belief that law existed before the laws: it means that it was assumed that there existed a natural order of the world created by the gods in antiquity or by god in the MA: it was called natural law: existed before human beings. It was opposed to positive law: ius positum or lex posita = human law. Positive law was named positive because it was put in Latin = posita = established by human beings.
William of Ockham in the 14 th century and he provided a new approach: according to him, human law was not the continuation, reformulation of divine law, it was by itself a legal creation.
Law was considered an instrument of power which built the institutions rather than simply acknowledging their existence.

2. The theories of the social contract

The notion of social contract is as old as philosophy itself. According to it, the political and moral obligation depend on an agreement of all the members to form the society in which they live. Socrates resorted probably to a similar idea although he did not named it social contract when he explained why he had to remain in prison and accept the death penalty.
The expression social contract was invented in the 14 th c by a bishop: Nicolas Oresme: he wrote about almost all topics: math, astronomy, music, philosophy. He translated Aristotle and Augustine and he is the one who invented the metaphor of the world like a clock. He's the one who wrote for the 1 st time the expression of the social contract. But in his view not
yet a pol notion: a link between the king and his subject but it was a link/pact of submission or subjection/ never intended to serve as a criticism against the royal authority.
Then in the 16 th c during religious wars, the notion of social contract was used by the opponents of monarchy = the Monarchomachs that claimed that when the king became a
tyrant, he broke the contract between his ppl = he was no longer legitimate.
It became the central notion in 18-19th c with 3 philosophers: Hobbs, Locke et Rousseau:

- Hobbs: <u>The Leviathan</u> 1651: refers to a sea monster. Hobbs use3s this metaphor for the state. In this works, Hobbs summarizes that in the state of nature, men were lonely and had to fight with each other all the time in order to survive: it was a war of all against all (bellum omnium contra omnes)!; The social contract was invented in order to stop the wretched condition.
- John Locke: wrote Two treatises of the civil government (1690) in which he displays the functioning and the limits of the civil state. According to him, men were equals and were expected to behave respectfully with each other and submit to the will of God. The social contract in his view was a means of protection of the unalienable rights of nature, purpose of the state = protective function. According to Locke, the state relied on 2 main notions: consent given by all human beings to create society, and trust ; confidence in the political authority to ensure safety and security.
- JJ. Rousseau: social contract 1761: philosopher who has influenced the most the French revolution in 1789 by promoting the supremacy of legislation. The starting point of his reasoning is a paradox: in the state of nature, men were lonely and isolated ⇒ they did not master the language and therefore they were unable to think (language allows ideas and conscience = his idea). He said they were like "stupid and narrow-minded animals" = uncivilized.
- Montesquieu: L'Esprit des Lois 1758:

Separation of powers:

Legislative, executive and judicial. Separation = sign of an enlightened monarchy as opposed to despotism.

The formation of Roman law

Ancient times (8th to the 3r c. BCE)

The ancestral custom is mostly about family law. During this period, criminal law was dictated by the Lord to the Kings, and it was named ***Fas* vs *ius***.

Fas was the divine law whereas *ius* was the law made by the human being.
This notion of *ius* was created by the **prince**, use was different from fazes.
During the Republic, they published the knowledge of the law. And especially, practice these perfumes of care, they were called **prudence**. And they have an odd whim, especially for the fact that they were educated. Encourage the citizens to be better, help the citizen to be better, they were virtuous citizens, and they have to be exemplary. One major event was **the revolution of the plebeians in the IIIth century**, the plebeians made this revolution because they wanted to participate in human life.
Law of the Twelve Tables (450 BCE).

The Classical period (IIth to the IIIth c C)

Ius honorarium with honor which means "public office".
The jurists develop their ideas in the most creative way. It was very admired by the scholars later. These formulas were created by **the praetor who is a magistrate in charge of the trials.** The *legis actiones* = legal actions were very rigid and complicated based also on litigation, specific words in the proper order, it required **the rules of a lawyer.** Instead of this very rigid system, the precedent procedure consisted of a formula, a very simple sentence
Jurisprudence means the doctrine, legal science, opinion of the *juris consult*, the judges, the judgment.
Hadrian asked Julian to close the content of the edit and it became the **perpetual edict** (around 130 CE).

Legal saying:
"A doubt of his guilt, when there is guilt, the defendant cannot be dictated"

Here the emphasis is on the fact that when an abounding **judgment is issued it cannot be changed.** Also, these jurisconsults develop the jurisdiction or juris notion that we still use today. For example, in the theory of hidden indivisible effect, if the object has an indivisible effect, the payer can have his money back. The Romans developed and **invented legal fiction and relies on the notion of presumption of paternity.** They are still used today.
Pater is est which means that the father is the one (indicated by marriage)
Nowadays, children who are born inside and outside marriage have the same right.
The notion of presumption of death
For the Romans, the legal notion of absence, allows their relatives to enjoy the estate of the missing person.

The late period (3rd c – 6th c CE)

They became the main source of law, named constitution, these constitutions received from lawgiver or from a judge more and more static law responses. The first text was the Code of Theodosius (438 CE).

- **The Digest (533)=** "what is distributed", of the *jurisconsults*, by extension it refers to a work made by factors. It is arranged in 15 books; it is a collection of the opinions of the jurisconsults.

- **Institutes (533)** (cf. Gaius 2nd c C)
- **Code (534)**
- **Novels (565)**

These compilations are really the basis for our knowledge of Roman law.

The Roman definition of law and justice

The jurist Paul realized that the word *ius* has multiple meanings:

- *Aequum et bonum* "what is fair is good"
  Celsius said that the law was

- *Ars boni et aequi* "the art of the good and the equitable"
  Expertise and the meaning part is close to science
  Cicero

These definitions relied on a concrete and critical approach and show how complicated it is to have a clear definition of law.
From the activity of the one who is in charge. The praetor delivers court actions to the parties and thanks to these actions the parties could get compensation. Never a Latin equivalent but this expression that characterizes the common law system suit classical Roman law.

Suum cuique tribuere "to give each one his due"

A famous Roman jurist Ulpian said that *suum cuique tribuere* "to give each one his due". In this manner, **the law creates social maintenance based on equal proportional equality.** Based on Aristotle and his interesting ideas of justice.
Justice is the goal of any law.

Ex: I pay my taxes perhaps because I can consider that it is important to participate in the life of the State and it is for the common good. I am considered as a "just" member of the community. I don't know how to escape the taxes. So, either way, I pay my taxes, it is not important to know why I pay my taxes
The rule of law doesn't explain to me why I should pay my taxes.

Justice defines proper conduct, but the law is the means to achieve **proper conduct**. They have been widely received by the European legal system; they resumed in the thought of Thomas Aquinas in the XIIIth century, he considered that there was no difference between law and taxes and that a **law cannot be valid**.
Emmanuel Kant identified law as a capacity of compelling so the idea is that **the rule of law is different from the moral rule** because the rule of law is to get by the state, and you cannot escape. It is a complaint and the moral rule does not.

Law (According to Emmanuel Kant): a capacity of compelling

The command of the **legitimated authority**, Hens Kelsen

In the Middle Ages, the combination of Roman law and canon law formed the *ius commune* **"general law". Confusion with the common law and civil law.** *Ius commune* or *utrunque ius* "the one and the other law". These *ius commune* universal law was opposed to the *ius singular* or the *ius proprium*

"special/particular law". **Specific law, w**as the law specific to a country or to a profession: For instance, the law of the merchant.
There were many laws, as we have seen **the essence of medieval law is pluralism**. The fragmentation of the territory is reported in the fragmentation of the law. **So this fragmentation of the law occurred at the scale of territory or at the group of individuals. Roman law remained** in the universities, in the faculties, it was a **teaching law.** It was a teaching law too, but canon law was thought to be more applicable, everyday in legal life. Both laws combined and influenced each other.
The Roman jurists classified and adapted **the medieval contest.** They resorted to **binary distinction**: public vs private or general vs special, common vs specific, absolute vs relative, movable vs immovable in the priority law. So, these classifications borrowed, **a new tool**
Several concepts and notions such as *auctoritas*, *protestas,* and *imperium* all refer to **sovereignty**.
Each of these characters claimed to be the sovereign, meaning that he was ruling all the universe, and there were constant fight between the kings and the imperious.

From the end of Middle Ages performed changes and presented a new face, were eliminated and instead of representing a community, **it became an instrument built around the authority of the king** Cugas and Doneau spread their teaching, so **the second revival started in France and spread all around Europe.** The project of these scholars, philosophy, literature, and psychology ⇒ a movement called **legal humanism and roman law**.

All the knowledge in all the fields that were possibly **poetry literature**. All these aspects were required to read a lot, to make the world better, develop the human man in order to ameliorate **human community**. **Human humanism tries to resort to the knowledge above literature to make** use of this language, instead of reading the human law, the use of knowledge, instead of studying and commenting, these scholars paid attention to the content of the roman text. They claimed to explain the rules of the common law but instead, they changed the meaning of the roman law **these scholars tried to accurate the ideas**.

Broder history and because these methods were born in France it was called the *mos gallicus* = the French way. It opposed to the Italian way (*mos italicus* = the Italian way) which was the medieval reading of the law. With these new methods, roman law changed, and the purpose was **to contextualize the ancient text.**
The idea of **natural law** replaced the **divine law** which was created by God and legal humanism makes a lot of changes.

Based on a single unity, there was this idea that Christian community was a kind of **Republic.** the split between Catholics and protestants ⇒ Faith was **no longer a question of unity** , faith was the cause of **violence.** The medieval and the German emperor met with the strong reaction of the European kingdom. This idea that **the Pope has the European power**, was clearly, About a century and a half, constitutionally violent. The 13 years 'war was between **the Catholics Habsbourg** (Spain, Holy Empire) **+ Pope vs Protestant Kings** (Northern Europe) **+ France**. A war between Catholics with Pope and on the other side Northern Europe. France decided to fight the Hasbourg. Peace gradually returned in the XVth century. In 1639, **the peace of Westphalia** put an end in the struggle between the cities in Europe. **A series of treaties were signed in 1868:** equality of the Christian religion.
Jean Bodin defined **the notion of sovereignty** in this major work of **the Six books of sovereignty**. Republic means government not Republic in our modern sense. It defined serenity in the work of making the law. He refers to two roman senses: **the Prince is not bombed by the law**. Well here Bodin considers that there are fundamental laws that cannot be changed by the rulers and cannot be abrogated either. These **fundamental laws** are the law of divine and natural law.
Also, **the Prince cannot change the law of the nation**. Finally, he cannot abrogate the constitutional rules of the will.

Bodin refers to, *quad principi piacuit legem habet vigorem* **"What pleases the prince has the force of law**". So what he decides have the force of law.

The theory of Bodin, these are the main features of **absolutism**, the kind of royal power in which the King decides for everything.
In the XVIth century, this theory did not match with, regarding the status law. In fact, private law stays **poorly given by customary law**. Things start to change in the XVIIth XVIIIth centuries no longer to reform the law but **to organize in a systematic way the available rules** meant that legislation dealt with only one topic and this topic was dealt as fully as possible. For instance, it was the case in France, in Louis the XIVth and Golbert. Very important ordinance about civil procedure in 1667 and ordinance about criminal procedure. A qualified step about, well organized, efficient and they combined very sources of law, customary law, opinion of the jurists, decision of the higher report in France, which is Parliament, that does not refer to what we call **the highest and the issued decision**. They were all put together to **create new rules** contained in societies. And by the same time, these two ordinances were two major signs of the **threat of the royal power**. And in a way there are small qualification. There were very well organized. It can be observed everywhere in the continental Europe, imperial states developed their own legislation as a means of **parament**. Each own legislation and the rulers of this state resorted to more and more of the jurists as **political counselors**. Had an approached-on authority based on of law of statute law because issuing was of the very existence of the state. The German jurist capacity of issuing statute law. The same trend toward several classifications gave birth to the **first code in the XVIIIth century in Bavaria, Austria, Prussia.** Those sentences were based on a method of *usus modernus pandectarum* "**Modern use** of the Digest", from the XVIth century

Conclusion

Modern times were marked by **the construction of legal unity** (instead of legal pluralism in the Middle Ages). In Modern Times the construction of a **national modernity** and it is the period where the National State emerged and wants **to express their identity through national law**. Instead of universalism especially in the Christian faith. Enforced the State based on their **nation**. **Classification of law.**

- Of law Early European period. Especially of the private law so this **legal pluralism** remained in the way really criticized in the XVIIIth century.
- Of the enlightenment movement. The high number of **customary laws succeeded** in the royalty.

This pluralism reached witness to the past and many jurists and philosophers wanted to abolish this legislation to prevail on **the social contract**. It means that it was issued that there existed **a natural order of the world created by the God** of the entity. Natural law was the law that existed before human beings and natural law is the law created by God/the gods; **Positive law is the human law**. Positive law is the translation of *ius positum, of lex posita*. **Created by God.**
Natural law was there **before human beings**, so it was decided by God, the gods, combined law. Positive law was to match the natural law, the expectations of the natural law, positive law of human beings, which was **a reformulation of the divine law**.
Society existed through a **human reaction**. It was considered **an instrument of power**. Issuing rules of law was a sign of a will of their own, that **they could not act by themselves**. They could create their own rules of law and not just acknowledge it. **Natural law was no longer an objective law**. It was a subjective right with plural rights in reference to these rights deriving from human nature. These new theories were **all ideas of providentialism** that were no longer considered relevant.
It's the idea that law reflects the providence of what is necessary, the expression of the **private providence**. This theory was meant to be abandoned.
So the XIVth century was a really turning point in the thought of the jurists because from this moment, jurists started to consider that **they could create rules.** It remained in the frame of the **new conception.** The idea that it was not defined by the unconditional will was a major change in philosophy.

The expression social contract was invented in **Nicolas Cre**, not yet **a pact of submission** or required polit when the King became intolerant, he **broke the contract**, and he was no longer legitimate and for many of these.
Again, here this notion of **social contract** was very specific to the context of war, and it was in a way the writing. Express a strong and violent proposition that was not yet **a central proposition** and it became. First, **Thomas Hobbes** wrote *The Leviathan* in 1651 it refers **to a sea monster,** he uses this metaphor to represent the State. The social contract was the solution. **T**he State was **the institution of all the will in one single will.** So, the social contract was **not a contract between the King and the Subject. All moved from multiplicity to unity.**

The **main goal** of the government was **to protect society**, the main protection of the human right of individuals.
Safety and security. Consent and trust.

Jean Jacques Rousseau wrote *the Second Contract.* Rousseau said that **only society brings civilization and organization** because it implies language, exchanges, and sculpture. Leaving the society liberty and Rousseau even said that becoming **a slave to despotic claims**. So, the alternative is either **to be lonely or free** without knowing it **or leaving society**

Indivod and the main expression of the social contract is legislation because it derives from **general will**, focuses on **the idea of sovereignty**. As a ghost, in a despotic system. In the constitution, there is **no separation**, and, in this case, there are **no contract power**.

Distinguished the three powers. Expression of sovereignty and expression of the social contract.

CHAPTER 3: THE COMMON LAW TRADITIONS

The expression common reflected laws still **operative customary law** or **the law of the merchants**. Maybe this domination was chosen by **imitation of the canonist** who opposed the *ius commune* and the *ius approprieria*, meaning particular rights limited to a group of people. Perhaps, common law was chosen to have the *ius commune* because it was **a general law**.

C**ivil law** is rather based on civilization, civil features. It is fast Christianization and under both respects, it is under contract, marked by a very wild, and federalism, whereas **common law** appeared early and was able to crystalize quickly.
Customary law: referred to the English traditions, a system in which legal unity is obtained by case law, instead of statute law.

• The origins of the common law tradition

A/ The beginnings of the Common Law

a. The political and territorial organization

England experienced **self-government**, a self-administration from small townships to large entities like the Normans. This type of government provided an example of London under the Xth century and **the development of the common law**.
These organizations progressively replaced and **separated the independent kingdoms** which were established in the Vth century. There were county courts, directed by **the local officer**. It played an important role in this picture, there has been activity in **small kingdoms.**

e. Historical context

The Norman Conquest of England is **the Battle of Hastings** (14/10/1066).
William the Conqueror in Britain, Norman aristocracy came from Normandy and France. And by bringing this new elite, the King also introduced the new language and the new culture⇒ the **language of legislation** changed from old English to **Latin** and the new ruling class ignored the earlier legislation. They brought their own social customs. In fact, the legal practice of Northern France has a great **influence** on English law.
The English King enjoyed a powerful authority over laws. And the priority of the King was much more influential in France and monarchy and kingship was much more important, due to the conceptual notion of **power**. So, in the century, there was non-common law applicable but **a multiplicity of legislations.**

They all have their own rules, in the XIth century. The common law system really started with **the parliament of Henri II**.

f. Common law in royal context

Was obtained thanks to the important role of judges, they managed to prevail from the matter and thanks to the development of royal justice. Qualification. XIIth. 2- or 3-years. First, decisions for usually settled by **the sheriffs the local officers**. So royal judges claimed to settle matters not only in **civil law** but also in the **eyes of the people**. The system was based on a refunded procedure, **the writ**.

Initially, they refer to the writ royals to give to **legal officers**. It was an order by the king, information from the King to the subject was also ruled in the rules of justice. The writ was an **authorizatio**n given by the chancellor to the sheriff. The counselor was the one who produces the. The local. The nature of the claimed, the survived appearance. So, it was ordered that explain the legislation, the claim, and the order to secure **to answer the plaintiff**.
And the moment at which the defendant should be brought to the court, to the visit of the judges. Sort of security the royal court, the defendant, brought by the court. So, these writs must be brought, but also, they must **pay** for the writ.

In the mid-century, of a **returnable writ**, the order must be written with an **endorsement** stating what has been done so the system was based on the order of the chancellors, and they must send back, the way it was settled. It introduced a **competition** between royal courts and feudal courts (neglected the claims perhaps because they were able to settle because they have something to do). They will **neglect these duties**, so the royal court stood in competition with feudal laws, printed to settle the cases, and judges it properly. The King will give the court **fees** and not the. This system was a benefit for the individual because all the soudain they could **resolve feudal lords** who wanted to get the court fees, who **stopped** doing their fees. As the number of which has increased and became available as a matter of **rights**. In fact, they were as many actions as possible than the writ, that is why it increased so much. Every time it was

The common law system records the Roman law by the praetor who delivered **everyday actions**. Likewise, the scope of royal justice developed thanks to an **increasing number** of writs. The King

offered to join his royal judges in his tools but the needs for the jurisdictions as the number of the trial of the Juris. A permanent court. Civil obligations between the King subject and the decision given on a **case-by-case basis**. The one who wanted that case, by Westminster gave his decision on a case-by-case basis.
The common bench of private matters. And the king's bench of public matters the interest of the crown. There is only **one court of law at Westminster** and then it was split between the common bench and the king's bench. This Westminster socializes in **a centralized juridical system**, removing and replacing them in rules of law. So, the purpose was to make **customary laws.** And these royal's rules will **be common** to all subjects in the kingdom.

So, the Westminster court in order to bring **unity** and also to **centralized** justice. The success of royal justice is undeniable it offered to the mitigations, and it secured private ownerships. Therefore, **this royal justice was so successful.**
And indeed, common law is, there is **a strong connection** between kingship and the law of the land who form the basis of the land. SO, the English State derived from the ownership, common law, the Kings. Of his subject to establish **his political authority** but he also created, were the instruments of this strong royal authority.
Eventually, the government has been frozen at the end of the XIIth century, The Provisions of Oxford is **a set of rules**. It is another feature of the monarchy. But that he always had the laws who wanted to participate to the government, to the absolute power of the king, the fight between the King and the Parents because they wanted **to be consulted by the king to be part of the royal government** and in 1238 has to accept a 15 members council to advise the King and oversea the to a standing party. And the council, the 15 members were under the supervision of the parliament and the **session of the parliament** was to be held three times a year, professional aspects, to advise the King, the council, and the mandatory session of the parliament at least three times a year.

It had a significant effect on the common law. The effects have to do with the fact that **the previsions of Oxford have limited**, with the number of writs. Aristocrats said that it enforced the power of the royal port, the local court. They considered that the **competition wasn't fair**, the king constantly needs more, the power of the royal court of law at **the expense of the fees** attached to the legislation. They wanted to stop the presentation, the court of law. The ordonnance of Oxford was **to limit the writ of the Government court**, decided that there will be not. Confirmed the importance of the common law of the land considering that it was **detrimental to the land**. But at the same time, are so important regarding the common law system. It was in a way, freezing the constitution of new writ and an act of the common law

- **The influence of roman law**

Civil law and common law share **a common basis,** they were both influenced by the common law. There was the **first reception of roman law** that took place in the XIIIth century in the

William the Conqueror Lanfranc appointed him as an archbishop of the community. He had a **significant influence** on the activity of Birmingham, were strengthened in **common law** like in all ecclesiastics, and was able to establish **the content of roman law in Great Britain**. Thanks to the Roman law tools, William was able to control new roles of prior, in the process of, probably the first to introduce the roman legal culture in Rome and introduce the teaching of roman common law in the XIIth century.

The first teacher was **Zacharius**, an interim. For these poor people Digest and the Code of Justinian, it is called as. **Roman law was not ignored**, roman law was successfully acclimatized in Great Britain, and it provided a **method**. The language was very different from those of common law. And especially

because according to the language, language, and Latin. **The Roman language** was introduced in England. Enlarge the common law from roman and common law. And his work show.
The content of the work was shaped on **the institute of Justinian** it was influenced in its presentation, in its structure but its essence was English, the institute of, **the common basis on Prediminus**. Under the shaping of Roman law but also on the common law system. Both rely on decisions in **the organization of law**, the unalignment of the right is the consequence of the suit. The process allegation end with the **unalignment**. In the civil law traditions,
Of the right, these rights enforce both processes. The same importance of **delegation** of the first step of the right. Therefore, **action and procedure** are important parts of **Bracton's work.** Similarities. The statement, the process is not the same, it was a question fighting, the pretorian law, whereas in England it was a means of power for the King, and it was criticized by **the strong power of the King.** The notebooks, **2,000 abstracted English law cases** (Plea rolls). The first reception of Roman law. Even if Roman law was received in England, it was not a unique source to Roman law, the content of the Roma, **the law always remained,** the third reception like the century, like **the continent**

The first reason was the **decrease of the common law**, and this decrease of the common law **the teaching**
Two royals, maintain the teaching of the roman law because roman law was **full of concepts** regarding politics and many of these concepts supported **a strong authority of the king**, so kings and royal families considered useful conditions, they could be familiar with the political concept that could be used **in favor of a strong dynasty of strong power**. The matters. So, it was helpful, and it helped to keep in contact with civil law tradition *ju*, **common law traditions**. Perhaps another reason has to do with the economic system in the XVIIIth century. Two formalists and perhaps **this freedom space of the studies of common law**. It was always taught and in roman also with **the reduced compliment**, it was not ignored, imprinted. And an explanation is that in antiquity a present it was mostly military, all Island of. It remained **limited.**

- **The influence of Common law**

Arrived in Great Britain during the Roman Empire and spread across the British isle but with **the coming of the Saxons People Paganism**, until the VIth century, **the Pope Gregory the Great** organized **the conversion** of England again and Christian faith threw out the English society. **Integrity.**
During the Middle Ages of the common law, **work from continental Europe** and the **commentaries** during **the decree These decretals** were studied in England and there were schools of common law built in different cities of England, and scholars spread in these schools and the **influence of common law**; many of these scholars became advisors of the Kings.
Many students, **lecture** in common law in Italy, France, or Germany, **exchanges of scholars.** And therefore, Common law is also about **practical aspects of common law and theoretical notion**, and they commented the special **continental scholars**.
In this manner, they developed the methods created by the scholar's masters incorporated in the training **These degree chancers**, in this manner influenced the common law system so they were closed to the **political power and role of advisors** as kings. The authority of the King, especially because the judge court punished the people with several **sanctions** but more **lenient** with members of the church, who have privileges. No death penalty and no sanctions at all. This reprint was **unfair and an abuse of power** mostly because the church court was supposed to deal with religious matters or clings involving men. To judge the people and are supposed to be **judges by jurisdiction**.

Henri II shoots the Constitution of Clarendon (1164)
These texts put **an end to the privileges** of the land.
And the King, **Thomas Becket Arc Canterbury**, considered that these texts **infringed on the privileges of the church**, and because of this opposition, he had to go to **exile in France**.

Alexander the III supported the views of **Thomas Becket**, it underlined the privileges of the church, it became **international**. It was a **conflict between the King and the Pope**. **Excommunication** heavy political consequences, the worst punition. The King accepted the venue of Thomas Becket and this even. And the conflict

And the Pope that he is at the head of the community, the **specific leader of the community**, was **a major crisis** between the church and the King. In fact, viable means of **improvement of the legal rules** so the legal rules of canonists were still advantaged. So now

- ## Evolution of the Common Law

A/ Common Law seconded from royal authority

These reforms have a significant **effect on the English common law**, they extended the interpretation of the roman, available writs. After the provision, after the mid-century, **writ only for similar cases** after 1258. But the council refused these new writs. So, **after 1258**, There were **no more** writs created by the king. One of the important rules in the European System: is **the rule of precedent or president.**

The precise meaning of the **common rules** by the concrete explanation. A decision that provides the true meaning of the **legal rule**. Therefore, it is followed by **real meaning**. But the main problem is that it relies on **the opinion of the judges**, not taking rules of law. And because they are not rules of law, they can be disposed of. Ex: A brother of a half-blood cannot succeed in the estate of the half-brother. A rule drowns to the federal law. It was a **long-lasting decision.** So, these rules cannot be changed or ignored by the court but what if one judge considered that this rule is determinantal of early modern society of the XVIIIth century.
What is still valid in society? This rule of law is detrimental?

There are not always **convert terms** and these examples show how the legal system must combine the old traditions and the rules of law. And the changing of adapting, and new **expectations of society**. The law and the opinion.
And in this context, the motivation of the change is the ***ratio decidendi***. This ratio, this motivation provides the basis for the decision, and it is what makes the decision the precedent or not. So, for example, if the motivation is well-argued and convincing, he will consider that the new rule is reliable and that the decision is a precedent. So, judges have opinions and
It is not attached to the judgment; it is not attached to the judgment itself but to **the opinion of the judges** which is explained by the ratio. The opinion of the judges is set out in the *ratio decidendi*, it has a **true real legal value**, but some are perceptive. There are additional reasons, not entirely reliable. For example, the judge on what he believes 14 years ago. Only

*Rat**io** decidendi :* this motivation provides the basis for the decision, and it is what makes the decision the precedent or not

It was merely a notice it appeared gradually in **the wake of the yearbooks** and in fact thanks to that, the **prevision of the cases** was more and more accurate and more achieved. The judges had a certain power of **description** in the order of the president. For example, the judge could dismiss, a dictum something said in passing, that has no mandatory value. He could consider that it has not **ration but a dictum**. Also, we could resort to a technic of the **distinction**, which consists in pointing out the case and the precedent. So, the judge will then qualify the case that he has to judge so he will argue that he **might have a precedent**, but it is not the case. So, the judge could judge the precedent as **irrelevant**. It was reported with determination. To meet and it is still one of the pillars, there are voices in our days asking

for a **less stringent**, the principle exist also in the **common law tradition**, in the case of a well-established case, which is more. In the **civil law system**, **one single decision** issued by the supreme court can be considered a precedent. Whereas in the common law system, it is not **one single decision** in the supreme court.

C/ Equity

a. The rise of equity

The need for **equity** derives from the desire for the effect.

In the common law system, well they turn to the king who had the **duty to all the subjects**. The king was a **fountain of justice** in Middle Ages and his motive is gone to many countries in Europe. So, the litigants turned to the King, by the chancellors of the. It was held until the XVIth century before the **reform of the church** working with the chancellors. They performed the chance of. The counselor judge **based on equity** and not based on common law. Settle the case, so the judge based on the equity. The keeper of the king.

According to the moral values, of the rulers, in a way, he was the one who put into practice **all the moral values of the king**.

And equity developed with the chance of. During the XVth century, the new system spread coming under **the chanceries**. The court of chanceries was in the palace but then in the municipal court, in the chance. Equity has taken full rule of a new branch of **English Law**. In the XVIIIth century, it was a **new branch of equity**. This new set of legal rules was intended to bring **flexible situations**, situations that could not find an answer in the common law system. For instance, the procedure, allowed the judge to perform or not a specific act. And the court **aspect active manner**. So instead of punishing the past need. Thanks to this injunction, to do something or not do something and prevent conflict. Also, the judges could ask the litigants to appear. First, developed in the **frame of the equity system**, in the court of a chancer. The litigant will make **the statement**. This gave rise to a new type of prosecution called **the suit**.

Whereas the regular trial in common law relies on the **action**. The suit was in defense of **interest and not rights**. Decreases rather than judgments. It was written and **not inquisitorial** without a jury. The court is involved in investing in the case. The role of the court is primarily a **proportional referee**. So, the judge has a procedure, it is **more impartial and in defense**. It relied on technical aspects totally **different from the common law court**. The activity of groceries is in the competition of common law court and common law in which system should prevail in the 70s century.

b. This conflict between common law and equity

- The political aspects

This autonomy of the common law court of the litigant. The case will be judged in **an objective manner**. there was this **risk of kinship** on the powers of the parliament. The alleged threat affected the common law court, this risk **was more important** because of the kings. And among these kings, there was **the Stuart dynasty** (1603-1714)

- English Civil War

There was **radical politics** and the second king of the dynasty, **Charles the First, tried** to strengthen the power of the king without resorting to the parliament. For instance, he rules the tax's connection and in the rule traverse. This **policy** was in a civil war in the mid-century, **between the crown and parliament**. These wars resorted **to the parliament and King Charles the First**.
This fight and the **victory of the parliament** was a brief period of the **Republic commonwealth of England,** but this did not last very long which was a period of Republic. Then, there was the restoration of the Crown, but then a 2nd war, The Glorious Revolution (1688-1689). Two major political crises ended with the limitation of power and **the bill of rights** which was imposed on the King.

The Bill of Rights is a very important element of the **English Constitution**: set the basic civic right of the British people. One of the English for instance the freedom of speech, or the right to vote, and they submitted the power of the king, of the parliament; it was subordinated to the rule of law.
These contexts of crisis considered **equity** as a threat to parliament and the court of law because the growing importance of groceries takes place during the **importance of crisis**.

The question of the power of the king and the mid to the crown to earn the **power of the parliament and the court of groceries** was founded on this complicated context. It is one aspect regarding the aspects of the King of the parliament.

c. The legal aspects of the conflict

It was a dispute between two people: **Edouard Coke** (who was chief justice of the King's Bench (Common Law)) and **Thomas Egerton**, (Lord Eilesmere, Chancellor (Equity))

What was it about?

The counselor quoted the idea was no longer **complimenting the legal system** but in terms of conflict with the court. In fact, he was **not satisfied** with the decision of the court he asked the chancellor for **a court injunction**. This order was delivered in the court, lost his action, and this court injunction was **to not perform the decision ordered by the government injunction**.

Why?

Well, because he could claim that he **failed the court injunction** he will sentence to prison. So, the court injunction must be observed. In a way, the court injunction was a means of. A growing number and in response to this injunction he decided **to deliver a hit of habeas corpus** *"show me the body"*. By this rit, the court assumed **the body of the prisoner** so he could be **discharged of freedom of decision**.
It released **custody** of any kind. It is a meaning of a proper decision, so the rit of *habeas corpus*, became a ruler stone of actin 1675 which is one of the major acts regarding the **fundamental act.** It protects **individuals by custody**, and it protects **indefinite detention**. So, Coke was released.

Arose from the claim of the land of London. This plot of land was sold by the **Magdalen College** (Cambridge) to an **Italian merchant**, who sells it to the Earl of Oxford. The State belonging to the church was voided and therefore he **denied the ownership of the actual owner** and he claimed that. He referred to the **status that prohibited long-term conveniences**, land belonging to the church. The selling contract was void.

The first step was the **King's Bench** of the case was brought to the **court of chancery**. But the head of the M **refused to appear** because he said that the case did not fall into **the case of chancery.** So, he was put in jail and the chancellor decided to release him. In his decision, the chancellor **to not comply** with the bench role and all the procedures of the rule of common law.

He just defined his decision by stating that the reason why it was at the court of chancery and **not failed in circumstances** and it means that he cannot cover all the decisions, all the conflicts, and that is why the court of chancery of Oxford because the **legal system is limited**.

King James rules in favor of the chancellor deriving the idea that **equity takes precedence over Common law**. Contrary to a decision, the **equity should prevail**. As it can be seen in **the Oxford case**, it relies on the fact of the chancellor, which is in line, the court of Chancery was a **court of conscience but not of law**. Consistency with his role with the King Notion. And act in the conscience, and not of the law.

The office of the chancellor was **to correct men's conscience** for frauds, breach of trusts, wrongs, and oppression, of what nature soever they are, and to do something.

According to **John Selden**.
Equity decisions are based on the awareness of

Gradually, as commented by **Richard Francis**, a jurist of the XVIIIth century, he illustrates **Maxims of Equity** from examples of several cases. These maxims sum up the principle of the **case law of equity**. Later, jurists of the XVIIIth century **reduced the principles.** In fact, they were only **11**. This maximum is not a strict rule, equity on what they must rely on.

- Maxims of equity:

- Equity **follows the law;** equity should not be into question the common rules of the law.
- Equity is only the **gap in the common law.** They should turn to when the common law could **not provide a solution to the case**. The jurisdiction should not compete with one another. It should **not oppose** to the common law.

Chapter 4: Civil law and Common law traditions in Modern Times (18th-19th c)

The 18thc-19th c are the centuries in which the question of codification is prominent. It is the age of codes and codifications. In Europe this idea was variously implemented depending on the type of tradition.
CL functions as an adversarial system with the judge acting as a moderator between the 2 parties. Finally, a jury of ordinary ppl decides on the facts of the case and the judge gives the appropriate sentence based on the answer of the jury. On the contrary, civil law system have comprehensive and frequently updated codes covering all matters that can be brought to court. These codes also include the applicable procedures and the appropriate punishment/sanction for each situation.
different categories of law:

- Substantive law: which acts are subject to criminal or civil prosecution
- Procedural law
- Penal law:

The role of the judge is to establish the facts and enforce the relevant provisions of the code. Historically the role of the judge was primarily to enforce the provisions of the code: role less prominent than in the CL system (but not nonexistent).

- **Codification in the civil law tradition**

A/ The notion of codification

The word codification was invented and promoted by Jeremy Bentham (178-1832): British jurist who devised the notion in a series of letters sent to political authorities, including president Madison. He insisted on the benefits of a body of written laws containing all the available rules of each country. So, he was strongly in favor of codification and he referred to various examples of attempts of codification. Ex: Danish code (1683), Swedish code (1734), Prussian project (1749-1751).
Natural law in the MA was derived from the external nature: it was the law created by God that existed before human beings: the law of nature was the law of the natural environment of the human beings which were surrounded by nature. Therefore, natural law became a consistent and organized system. Punfendorf ad Grotius developed this theory and introduced the principle of axiomatic principles governing the legal system. An Actium is a statement regarded as obvious; a self-established rule that doesn't have to be proved. Grotius listed the natural laws and considered them as axiomatic principles governing the legal system.
According to him, 3 actions should govern human conduct in society:

- Not to damage the property of others
- To keep one's word
- To compensate for damages

From these 3 principles derived 3 positive rights:

- Ownership right (no damaging)
- Compliance with contractual commitments (keep one's word)
- Concept of civil liability (compensation)

 basis of contractual and ownership law.
 interest in the scientific reasoning, inner logic in all legal systems: each rule has logical consequences and always a chain of connection between the principals and positive law. (Leibniz who developed this parallel between scientific reasoning and legal reasoning, for him law as an exact science and he was in favor of the righting of a code but none of the others were).

B/ The political issues of codification

The history of codification comes from a long process of unifying the state. Especially in countries concerned by "enlightened despotism" like Prussia, Austria or Russia.
Codification came from the rationalizing ideas of the enlightenment, but in these countries, codification was intended to submit all subjects to the kings because they would be governed by the same laws given by the king: tools intended to bring more authority to the prince.

The goal of codification was dual:

- Break with the social divisions (German "stände"; French: order"; Italian "Ceti") refer to groups of ppl organizing soc in a specific way and each class has its own set of rules.
- Move away from the roman law, to be replaced by a national law: a vulgar law not in Latin. The purpose is to create a national law written down in the language of the country.

In the late 18th c, the focus was on codification of criminal law rather that civil law, especially with the work of Beccaria, Dei delitti e delle pene 1764: this book inspired the king of criminal code of Leopoldina 1786 (named after Leopold II, Grand duke of Tuscany and emperor of the German empire): famous because it abolished the death penalty. Also inspired the Austrian penal code in 1787 and the French penal code in 1791.
The purpose of codification in criminal law was to put an end to the arbitrary nature of the sentence, judgments, by making the penalty known in advance, and also by giving a strict definition of offenses.

C/ The French civil code and its influence

a. Napoleon and the code

Codification appeared as a program of massive framing of the state, interfering in private relations. It was seen as a tool to impose legislation as a source of law, especially true for the French codif and framed in an authoritarian and centralized authority.
Several projects of civil codes during the revolution but all of them framed: the skills of Napoleon were complementary. In 1806 the code of civ procedure was based on the ordinance of civil procedure of 1667. Then followed the code of trade (commerce) in 1807.

Also, the code is based on the equality of rights = direct legacy of the revolution which abolished feudalism and social privileges and established equality between all citizens. Main feature = abolition of all previous laws (tabula rasa). The spirit of the code is far more moderate than the rules before and designed for the bourgeoisie.

b. The impact of the French code civil

- In France:

One direct effect of the civil code was the restoration of the law schools in 1804 in which the teaching of the civil code was imposed by Napoleon as the core subject.
The code was really a byproduct of Napoleon but beyond his personality, the code was considered a masterpiece regarding civil law and this is why the following regimes kept the code civil: because of its efficiency and usefulness.
The role of case law and of judges extended through the 19th century, partly due to the fact that the code ordered the judges to decide every case: an invitation to develop case law. This process was reinforced by the creation of the supreme court.

The German civil code

It is different in stories regarding **codification**. Many jurists in **Germany** were many critical about the **French civil code** and about the influence and the **white distribution of the code**. The most famous of the was **Fredrich carl von savigny**, he is the billionaire jurist who shaped the civil culture in the century, mostly in the action of the **spreading of the French code**.

At that time, Germany was a model of **civilization**, the Rhineland was under the French civil code.
In this French civil code, it was enforced but there was also the Bavaria under **Bavarian code** and the **Prussian territories**, under ALR. Pression territory were on **specific collection of law** and the German common law who was based on **roman law**. So, there is a great variety of laws available in **Germany of the confederation**.
The idea was that **signification of common law** should be achieved through the combination of roman law because it was very technical and quite adaptable. But he also wanted to **mixt German law with customary law** because they explained, combined German law (Latin + local culture) and popular law.
Unification of **German law: roman law + customary law.**

He was against codification and considers the **negative effect of codification**. This negative effect would be the **facilitation of the law**. Once fossils, codification will freeze the rules of law and **focalize**.

On the contrary, **customary law** is in movement, adapting to the expectations of society. So savigny was the strongest **opponent of the interpretation** of any civil code in Germany. He was against the idea of **unification**. It progressed at the end of the XIXth century, with a **German association of jurists** the Deutscher Juristentag: German association of jurists who promoted the idea of codification.
The idea is that there will be **no common German law**. And this combination maintained the **diversity of the law**. It was in favor of the unification of the law, a predominant group of, also a General German Commercial Code of the state in 1861.

Proclamation of the 2nd Reich in 1871, because with this second empire, this unifocal codification gave a punch to **legal codification** to have a sort of legislation, of **legal unity**. So, the civil code was elaborated by **a group of jurists** representing the main German state and various legal professions. This project, labored for **10 years**, was extended to an extensive discussion among jurists. After this discussion was elaborated by a **second commission**. This new version was voted in **1896** as the civil code BGB.

Germany eventually got a **Civil Code**. The BGB was a masterpiece of success for jurists because they managed to achieve **a codification of Germany**. They were mostly opposed to this idea of codification. From the social point of view, the BGB was a compromised threw aspects of legislation and aspects keeping a mixture between **liberalization and tradition**.

Swiss Civil Code

ZGB: Civil code 1907

Civil code is the **second monument** of this new Europe of 1907. This ZGB achieved the legislation of civil law of Switzerland with **23 cantons**, a federal country. They used to live under **several civil codes** inspired by the French, or the Australian, or some of them have **no code** at all.
The first step was the **Code of obligations in 1881** which combined civil and commercial law and other fields of private law under the basis of the already **existing civil code**. The **Referendum** was held in 1907. The Promulgation was in 1912 In **3 languages** (French, German, Italian). It is the first civil code democracy adopted and clearly influenced by **a social project**. They favor wicker people. In the French civil code, there were only **two provisions** including workers.

- **The Civil code of Montenegro**: that allows space for family customs in 1888
- **The Spanish civil code** preserved the local laws,
- **Russian** law collection in 1833.
    - There are 60 000 articles and obviously it was impossible to resort to a code.

- Criminal law was added to this collection to have a special code.
- Penal code in 1845 and 1903
- Soviet civil code in 1922 on patrimonial rules compared to general law.
- Family code in 1926
- Labor Code in 1918

- **Turkish Civil code** in 1926 and he relied on the civil code of Switzerland.
- **Italian Civil code** between 1937-1942 included commercial code.
- **Greek civil code** in 1946

They decided to have a code and resorted to have previous example. We turn to another aspect regarding globalization including modernization of the law.

- **The Civil law tradition and the codification**

A/ Codification and the modernization of the law

One of the codes was to break with **social division** of the past and **technicity** with the law. It felt sometimes heavy.
It was considered as a **burden** and not as a **legacy**. Unified provision for the future, it was considered the best way to established new values, **social and political values**. The most important were **freedom and equality**. So, codification was the frame in which major social changes occurred with this idea of **reforming the society and the law** in the sense of more freedom or equality. Ex of changes of the law thanks to codification. The first has to do with **liability.**

a. Liability

Some provisions of the civil code **derive from the provision of school of natural law**. These schools have deeply influenced some areas of civil law. For example, the liability and the obligation to compensate the victim (Art 1382 Code Napoléon art 1295 ABGB). This principle was inspired of the **school of natural law** euphuized the link between the individual will and the interest of the society. It is **the common interest of the society** that everyone is responsible of the damages of his or her actions. It is not only a question of **morality** but of **common interest** of society. It allows life in society. So, this idea has influenced the **formulation** of the civil code which has been **largely imitated**. It reflects a law conception of civil wrong or rules. This formulation included every form of **negligence**.

There are not only actions that are executed, if you know you can't do it, and you are negligent. Actions that are **committed purposely**. It was first intended to protect the honors against damages. For instance, damages resulting from her, damages to properties, spread of fire. Negligence because it did not keep the hurt. First, the notion of liability was intended to damage to properties but then it was on compensation for personal injuries (industrial and labor accidents), It has to do with the development of accidents in groceries or by cars. It was new in society all these innovations of society have consequences.
Who is responsible in case of accidents?

At the end of the XVIIIth century, it was the case law. The **compensation at work**, it was mostly by judges. And this case law led to principle of **strict liability** (without fault), which is a major progress of the law but also it led to a new branch of law, civil liability, and compensation + unfair trading.

German and swiss civil codes preferred more **restrictive formulations**: Regulation about social insurances (outside the code).

In **France**, it was **liability** in the Civil code.

In **Switzerland and German,** address by **social insurances**.

b. commercial law

There is **freedom of trading** and choosing **one provision** are two procedures that exist in the **century of society**. That is not currently stated and implied by the **provision of the code**. Several major changes

took place **outside the code**. For instance, the abolition of the usury law, which is the interest attached to a loan, is forbidden by Canon law. The idea is that accepting that time that could create money or wealth is **immoral** because time was not considered as **consumable eaten**, which means that time cannot be consumed by use. The idea is that you could create time by. The development of trade so the **abolition of this usual law** took place outside the code but for the most part codification **reinforces freedom of trade**. During the XIIth century, new provisions of the workers gave rise to **labor law**, usury = interest attached to a loan, forbidden by Canon law. It developed after the century because workers needed **conception** of the law.

Time is not consumable eaten: time cannot be consumed by the use.

Usury: interest attached to a loan, forbidden by Canon law

There are examples of changes of **ownership**: the code was based on the definition of ownership as an individual and subjective right that gives the owner the exclusivity of proposal of possibility.
This definition of ownership derives from the **roman proportion**.

Revisited of the conception of law, it relies on the roman conception but with the improvement of **consummary law.** It is a **perfect** or **"absolute" power**.

The same approach was shared by the **British legislation** that liberal economy in the **British Sale of Goods Act (1893).** Both Great Britain and country have ownership.
Break with the **former feudal system**.

Feudal system: network of simultaneous holders (lords, vassals, tenants) the fact that they have the same right.

They enjoy nature at the same time.
In France, they **abolished the feudal system** and **confiscated** the estate of the church and of the emigrated nobles. These properties were sold to **individual processors,** mostly regarding the bourgeoisie. There was a shift of all these hands, members of bourgeoisie. Napoleon of ownership by making ownership an **absolute right**.

§544 du Code civil: ownership is the right to enjoy and dispose of things in the most absolute manner provided.

This echoes the world of Napoleon himself who said during the discussion, that it is **unliability**, with many armies of disposals, violated. The civil code has secured the massive in favor of **pleasantries** and the bourgeoisie. The process of abolition of the feudal system came before or after **codification** (Australia and Prussia). In any case, a new conception of ownership because of this **feudal simultaneity** was no longer adapted to the society. The process of land practice that enables the land of properties, continental properties. The land law in GB changed just after the World War.

There is this large movement in continental Europe regarding this **situation of ownership**, regarding **codification**.

g. Family law

Among all the codes, the **code of Napoleon** was the most revolutionary and the cause of the **revolution**. It made marriage a **secular contract** instead of a sacrament. Because of that, **divorce** was introduced. Marriage was a **secular institution**. Religious marriages were not legal valued and still are. They were

to be accrued only after the **civil marriage** and it had to be contracted before an **administrative agent**. Mixt marriages were authorized.
These formalities were created by **canon law**. It was the early **modern period**: they were intended to prove the existence of marriage. It is still established the **filiation of the feature**.
For children born outside the marriage. **Filiation** was considered as the question of evidence of marriage was crucial and when filiation was fully recognized by law. It was innovative, it implied only a **small number of European** countries.

- In **Prussia**, consent was accepted if the marriage **did not produce children**.
- In **France**, divorce was introduced during the revolution, and it was highly **debated** in the code. It was imposed on **Napoleon itself,** by most jurists of society. Napoleon wanted a divorce to be introduced in the code and participated in all meetings for the discussion of divorce. He divorces himself from his wife Josephine.

This provision was abrogated in **1816**. The moment when **monarchy** was reported in France, and it was based on **religion**. It was not possible to break the civil contract of marriage.

Denmark and Norway gave the ability to have the assets of the 18th century, and manage their own **assets**.

- Relationships between parents-children

No more patria *protestas* (paternal authority of the Roman father during his lifetime).
There was **no major ability**, you can still be considered not a subject of law until your father his lifetime.
There is a **list of their rights and duties** of both parents and children. For parents, it included r**eligion** and for it was written in the code.
In **France**, the father could punish the children. The age of majority was based on **21 years old.** But changes occurred.
The Italian Civil Code abolished the power of punishment; it was kept in **1865**. It set the age of majority in most European countries: **21 years old**.

Over the domestic jurisdiction, the judge was able to **provide proper education and abandon** the children for in treatment. It is the **control of the judge** over domestic jurisdiction. There is the development of **care and protection** of children by the judges (outside the codes). The legislation came afterward and the major changes occurred during the **second cold world war** and continue **today**.

• The question of codification in the common law system

The movement is not an emphininon in European legal history. As we have seen, the **codification movement** was not uniform, it was **never a pattern**.
Therefore, it relies on **diversity**, it reflects the various European nations. In a way, the codes are the image of the legal culture of many continental European cultures and that is why there are a lot of **differences in the civil code**, they are the variate of the nations.
There are strong instruments of **political and social agendas**.
So, the role of **codification** is crucial in continental Europe and cannot be dissociated with the **case law**, or the **law of the judges**. They pointed out the gaps in codification and triggered **new provisions** that considered some local vacuums left by the code. There is a strong codification of **jurisprudence** to inform the content of legislation, which is more and more connected to case law.

A/ The refusal of codification

The common law traditions were based on case law rather than legislation.
Francis Bacon, in his book, he suggested the Digest of the common law which means a summary of legal rules available in England but the attempt was unsuccessful and then it developed on the continent. This codification movement spread to England and Great Britain. Codification was intended to consolidate new legal value by the XVIIIth century. Codification also had the choices in Russia and in

Poland. On the contrary, England was some steps ahead in this practical contest. There was a Parliament in two chambers: the house of lords and the house of commons.
The Bill of Rights sets out some basic rights and it limits the royal power by imposing a government with the parliament and not against the parliament. It hence the role of the parliament. The condition. The European state and continental state were a monarchy, but they were. But. The only difference was a written constitution that doesn't exist.

B/ Bentham and the reform of the common law.

Great Britain didn't need codification. The notion of codification itself was heavily criticized. But despite this criticism, it has changed thanks to this idea of codification.
The other thing is that England never wanted a code, but the main promoter was the British philosopher, Jeremy Bentham.

a. Jeremy Bentham

He is the father of unilateralism, and he was a modern jurist, his theory is a form of consequentialism, which means that actions are assets according to the consequences they produce. The best action is the action that produces the most good, it maximizes the role of good. To put it in one single sentence, they should do the greatest amount of good for the greatest amount of people. So, the common view of his time is that England had already enlightened the juridic system which is the common law. William Blackstone: Common law is a clear, reasonable and efficient system. Bentham, on the contrary, considered it illogical because he said it advances the lawyers, instead of providing the greatest happiness of the greatest number".

He was in favor of codification, but this doesn't mean that he agreed with the approach of codification, he considered that the criteria of the code should be the social community. The code should contain the rule that has social utility. Jeremy was not in favor of criminal law; he preferred a single code collecting all the rules within the social community.
The main effect is that it reduces the conformism of common law and thanks to this procedure, the renewal was possible. And another major reform is the 1846 manor civil cases and magistrates court and country court. It could apply to both common law and equity. Besides, all legal structure was simplified by the judicature acts of 1873 and 1875.

- High Court of Justice (Common law + Chancery)
- No more distinction between common law and equity

This development of civil laws is in relation to the idea of codification. Resurgent with the ideas of codification. This revival of this idea of codification took place in the second half of the jury, with the support of jurists
Frederick Pollok
Frederic William Maitland

b. The reforms of common law

They experience the codification of common law. Codification took place in the mid XVIIIth century. In 1883, a commission was established. Shipping had simplified consequences on the British hi.

In 1886 to asset the diversity of the digest of common law. So these commissions took place more than a century before. It will be useful of having a summary rule of common law = purpose of the digest. All the laws in an effort of simplified and modernized the law. However, only several digests were drafted by the commission dealing with the law of evidence, criminal law, partnership law, bill of exchange, and the law of sale.

This digest was the basis of the statute law issued. Thanks to this work, it was possible to issued statute law and private law. It provided clear sentences; it was highly needed. It was clear. This commission prepared the major laws, the statutes law. But he was not prepared for the reluctance of the. And that is reflected in the conscienceless of the English people. Of the codification. And they were responsible for legal codification. Finally, it was field declined with the code of the criminal code it Is a good example of the resistance. The drafting of the criminal code was taken by. Of

For instance, reproduced for absorption. Character nature. The ideology of the code but another reason for the real notion of codification. This principle means that offenses' penalties are defined by the law. So, what is not punished by the law is permitted. The definition of a crime must be written down and must express. Of course, this principle of legality which is created on a continent by the XVIIIth century, this principle was intended to limit the power of the judge. So arbitrariness is detrimental to litigants. And the status law is defined. It could prevent the judge to use this arbitrary power. The notion of legacy. Reduce the power of the judge. Now the power of the court is the common law system, it has the public confidence. Having this public, new offenses. And it was fully accepted, and it was considered arbitrary. Because of this limitation of the judges. Codification and despite many failures are still on the table. From time to time, contraries.

C/ The development of statute law

Despite the providence, case law is a significant law.
Here are several examples of statute laws.

- the bill of exchange which is a major instrument for commercial credit. It modernized and updated the previous status and stages.
- Labor laws developed in the frame of the Industrial Revolution. It was passed in 1802 to limit the duration of work, they could not work 12 hours a day. With the Factory Act in 1833, the control and penalties in case of impeachment also emerged.

Case law gained the support of the population because many individuals were supposed to get simple access to the law.
Only the procedure was technical, but the substantial rules were not even formulated as such. It gave the impression that laws were close and that they could be understood by all. This is one of the many reasons why the British people stay attached to the common law tradition.
2 modelists:

- The French and the German civil code in 1856. They received the French and German civil codes in the context of military conquest. It was not a radical break. The legal practices were largely preserved. Old legal law is perceived as national patriotism, or tradition.