HANDOUT

HISTORY OF LAW

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HISTORY OF LAW

LAW AND LANGUAGE

Law has its specific vocabulary, with very typical and jargon words. In European law tradition, law and language interacted in particular ways, thanks to the common basis of the Latin language. This aspect is of particular importance when we consider jurisdictional lexicon across different languages. Different legal systems share many aspects, but the specific terminology is often not one of them.
We share the same words, but they often have **different meanings** in different languages.

e. g. We are students of “Giurisprudenza” not of "Law": they are not the same thing, as the words have two distinct meanings.

Multilingualism is of great importance and influence in the European judicial and political worlds. For example, to this day, the decisions taken by the Parliament of the European Union are translated into all the languages of the 27 State members. Translation has a fundamental role, as the specific vocabulary of law must be correctly reported in all the other languages. This kind of translation is, therefore, particularly complex, and tricky.

LATE ANTIQUITY (4TH-6TH CENTURIES)

Emperor Justinian revolutionised Law in the Eastern remains of the Roman Empire, by signing the homonymous **Compilation**. Despite his efforts, he was never able to enforce the Justinian Compilation in the former western part, which had already been occupied by German populations.
The language of the law is **Latin**, as it was commonly spoken among the population. It was, in fact, the lingua franca of the Empire. After the fall of the Roman Empire, however, Latin was increasingly influenced by local languages and dialects. In particular, the German populations who invaded the Western Empire had very different languages and law systems, specific to every single clan or tribe (so-called “personal law”). As these people moved, their languages and laws moved with them.
This is a turning point in legal history: after centuries of Roman law hegemony, there have been. populations who decided what legal systems to be subjected to.

German law is made of **oral customs** (rules that were transmitted orally). But after the invasion and their comprehension of their numerical inferiority, the Germans decided to write down their customs, in order not to lose them with time. They decided to write down their customs in Latin (in continental Europe). This was a huge operation of **translation**. Because very few people could read and write, the German population turned to Church ministers, as they were generally more cultured.
To complete this operation of translation, many words typical of the German languages couldn't be translated into Italian: so, a **new legal language** was created.
Examples can be found in the *Edictum Rothari* emanated by the king of the Lombards, in which “faida” has been translated to “inimicitia”: Rothari sought to eradicate the form of private reprisals (the “faida”) and substitute them with a system of pecuniary settlements. This intention led to the choice of the much less violent and aggressive Latin word “inimicitia”.

EARLY MEDIEVAL TIMES (9TH CENTURY)

The Frankish Empire rose and stabilised in Central Europe and the Northern part of the Italian peninsula. Charlemagne was proclaimed the Emperor of the Sacred Roman Empire.
Roman Law was completely abandoned, even though German law is still written in Latin. It is useful to notice that the language used in these texts is **Medieval Latin**, not Classic Latin. Medieval Latin was created through the use of Classical Latin by Medieval scholars in schools and cultural settings. This phenomenon was boosted by the use of the Latin language by the Church and its expansion through Europe with monasteries.

In the **Iberian Peninsula**, which had been conquered by the Arabs, the Emirate of Cordoba introduced Islamic law in the former Visigoth law system. It is important to note that religious freedom was guaranteed and that Islamic law was only applied to Muslims. The coexistence of these different religious and cultural traditions created an interesting **mix of legal systems**, almost unique in European history.

The Eastern Roman Empire, which was to withstand for much more time, started to use **Greek** as the language of law.

After the death of Charlemagne, king of the Franks, his heirs fought for the throne of the Sacred Roman Empire. In 842, with the Oath of Strasburg, the Empire was divided into **three parts**, each governed by one of the sons of Charlemagne. They swore in vernacular language, a vulgar romance language: this makes the **Oath of Strasbourg** the first written document containing Frankish and German languages.
Interestingly, this decision marked the last time that France and Germany were under the same rule.

Another example of the use of vulgar language in law is the *Carta Capuana*, the record of a trial celebrated in 960. The document is written mainly in Latin, except for a testimony, reported in the original Beneventan dialect.

At the end of the Early Medieval Ages, vulgar language started to be used in law.

NOTARIES

In the Early Middle Ages, schools were linked to monasteries or the Church in general. In continental Europe, law schools did not exist anymore. The **only surviving legal profession** was the one of the notaries. Also known as “clerks” and "clerici", they were officials vested with public powers and the guardians of technical knowledge. They had their schools, where they were not given legal teaching, but they only learned technical knowledge regarding writing the formal acts of their competence.

LAW AND LANGUAGE IN ENGLAND

ANGLO-SAXON ENGLAND (6th-9th CENTURIES)

England was divided between the **Anglo-Saxon kingdom** and the **Celt territories**. Anglo-Saxons were a German population who occupied parts of the British Isles and were ruled by a king and an assembly of “notable men”.
In Anglo-Saxon England, customary law was written down in a **Germanic language** (specifically, Old English). The most important collection of laws of this period is the *Seo domboc* (“Law book”) of King Alfred of Wessex. The linguistic choice is rather particular, as in Continental Europe

most German kings were translating their customs in Latin. This was dictated by the relatively weak Roman occupation of England: as the Roman presence in Britain had never been so strong, Latin was not perceived as the language of the law.
Although the law of Anglo-Saxon kings was written in vernacular language, Latin still exercised lexical influence, because of the role of the Church and the Christian religion. In the 5th century, St. Augustine was sent to Canterbury by the Pope, Gregory the Great, where he founded the first religious community in England with the grant of the king.

SCANDINAVIAN CONTRIBUTION TO ENGLISH LAW

The word “law" comes from the **Norse** term "*lagu*". Norse was a language spoken by Scandinavian populations, who had partially invaded the British islands. The term was used first by King Edgar (king of the Dames) from the late 10th century. It initially referred exclusively to the Danelaw, but it was later adopted by all of the other Anglo-Saxon populations.

NORMAN AND ANGEVIN REFORMS

After **William the Conqueror** defeated the Anglo-Saxons in the battle of Hastings (1066), the Norman age and the Angevin age succeeded. With the Norman conquest of the British Isles, French became the language of the gentry. The previous legal system, however, wasn’t disrupted. The kingdom was divided into **counties**, each with its sheriff, who had the power to administer justice.
There was a principle in Norman law: each right to the land was granted by the King, who yielded part of his ownership to private owners. This principle persists to this day.
This also meant that people who claimed legal problems regarding the property of the land could appeal to the king. He would take decisions regarding such cases, that the Chancellors, the members of the Chancery, wrote down.

THE CHANCERY

The Chancery came into existence shortly before the Norman conquest of England and it was in Westminster. It was staffed by **royal clerks**, who produced all kinds of official documents and acts. The role of the Chancery was fundamental, as the decisions of the king would further expand the protection of civil rights.
After the central courts in London were established in the 13th century, in Westminster, the judges would initially use the decisions collected in the Chancery to justify their decisions. The Central Courts were the evolution of the single royal court, and they were **three separate courts**:

- the Exchequer, the oldest of the three, which dealt with fiscal justice and other high functions of a fiscal administrative nature.
- the Court of Common Pleas, which decided on disputes between private parties.
- the King’s Bench, which dealt with the most important criminal, civil, and feudal cases. It was also the only court of the three in which the king would still be present during the 13th century.

This division was to last until the 19th century.

The **Common Law was thus created in the courts of London**, as opposed to local law of different origins that varied throughout the kingdom. Local law was, however, increasingly contrasted by the king with the expedient of periodically sending his judges out in the territory as *itinerant judges*, to administer criminal and civil trials in his name.

LANGUAGE AND JUDICIAL ACTS

Latin was the language of the Chancery. However, **multilingualism** was still present in English law, as various terms from the Anglo-Saxon and Danish legal vocabulary were transposed. English legal words such as *goods* and *bequeath* share a German origin.

A multitude of different acts and documents were produced in England during this time by the Chancery and judicial authorities. Some examples are:

- PLEA ROLLS: From the end of the 12th century, the decisions of the royal courts started to be written down in Latin, on specific parchment registers known as "plea rolls"
- BREVIA: Also known as "writs", brevia were judicial acts issued by administrative or judicial authorities, but manually redacted by chancellors in Latin.
- YEAR BOOKS: From 1292, the reports of discussions before the Royal Courts started to be collected in the Year Books, which were written in the technical language of the trials, so-called "law French"

THE MAGNA CARTA

It is the oldest act with which the king recognised some of the rights of his citizens. It was written in Medieval Latin in 1215.
The Magna Carta is a ground-breaking act in European legal and political history, as it is the only one of this kind to be kept alive and referred to during the successive centuries. It recognised, among many things, the right to protection against unlawful detention or imprisonment and the prerogatives of the lords regarding his subjects.

REDISCOVERY OF ROMAN LAW

In 1088, notary **Irnerius** started reading the Digest and the Codex by Justinian. This casual discovery was a turning point in Western European legal history.
There is not much information about Irnerius. It appears he was a notary with a good knowledge of ancient Latin and Greek. He had found the manuscript of the Digest of Justinian in a library not far from Bologna. It was a copy of the original Roman manuscripts, stored and copied by the monks in the previous centuries.
The **Digest** was originally composed of 15 books, and it contained fragments of Roman jurisprudence, carefully selected from the full works. The **Codex** originally contained the laws promulgated by Justinian himself.
He started reading it loudly, for other people: this way, they were all confronted with the richness of Roman Law and its complexity.

This way, Medieval notaries faced, for the first time, **Roman law**, and they felt that it should have been reintroduced into their legal system. But, at the time, the law was based on German customs and Charlemagne had founded the Sacred Roman Empire not too much time earlier.
The persistence of legal scholars and the fascination felt towards Roman culture, though, made this possible: Roman law was reintroduced in the Sacred Roman Empire.

THE SCHOOL OF THE GLOSE

The old manuscripts started to be studied by scholars, who all had access to the same copies: that is why students would write their own notes and linguistic interpretations on the side: the so-called "gloses". The school founded by Irnerius was called "the school of the glose" and its members are now known as "glossators".

They would read, which is referred to as “legere” in Latin. From “legere” comes the word “lectio”, which evolved into the word “lectura”, from which eventually originated the word "lecture", used nowadays. This connection among these words tells us about the origin of legal studies and the legacy they carry to this day: in fact, it’s traditionally recognised that to learn the law, it must be read, interpreted, and understood.

Furthermore, the birth of the **university** in Western Europe is linked to the school founded by Irnerius and the rediscovery of Roman law. The first university was founded in Bologna, in 1088: the same city and the same year of the rediscovery by the notary.

Roman law eventually spread out all through continental Europe in a spontaneous way, without any grant of any ruler.

OUTSIDE OF ITALY

The **diffusion** of the newly rediscovered Roman law started among law students, who would go to Bologna to enrich their studies. When they came back to their original countries, they would teach what they had learned. This way, Roman law became the **Ius Commune**, the "Common law" of Continental Europe. Legal students and scholars could discuss the same legal system (Roman law) in the same language (Medieval Latin), despite being from completely different countries. This further empowered the diffusion of the Ius Commune, which easily became one of the themes discussed topics among scholars and researchers of Law.
Roman law was started to be used everywhere in Continental Europe, but as an auxiliary law: in fact, it filled the technical legal gaps of other legal codes.

EARLY MODERN LEGAL DOCTRINE (15th-18th centuries)

In this period, the figure of the **lawyer** was finally reborn. Legal scholars started to offer services of legal protection to people undergoing trials, for which they expected to be paid. This costume encouraged even more young people to go to Bologna to study Law.
The Codex by Justinian was still studied and used, despite it had been rediscovered and promulgated many centuries before. It was only suppressed when the Code Civil des français (also known as Code Napoléon) was promulgated by Napoleon in 1804.

LEGAL DICTIONARIES

Legal, scholars soon started to write specific books meant to facilitate the translation of legal technical terms from Ancient Latin (the language used in the Code of Justinian) to Medieval and Postclassical Latin. Not only were they intended as dictionaries, but they often served as legal encyclopaedia, too. They were extremely successful.

IUS, A LATIN WORD

The Latin word for law or right, “*ius*”, was not retained by Neo-Latin languages in their vocabulary. In fact, in Italian the word “*diritto*" is used, in French there's “*droit*”, in Spanish “*derecho*”, in German "*Recht*". There's no trace of Latin in the words used to indicate such a concept, despite it being extremely important and dear to Romans.
All the words used today are related and they originated from vernacular languages.

LEARNED USE OF VULGAR LANGUAGES

Cardinal Giambattista De Luca was born in Basilicata, but he studied in Naples and later decided to enter the ecclesiastical hierarchy.
He was an estimated legal scholar who wrote the ironically entitled "*Il Dottor Volgare*" (The Doctor Vulgar"). It was a collection of all Civil, Penal, Administrative, and Canon law, summarised and translated in **vernacular Italian**. This text was crucial for the popularisation of law among the Italian population.

LOCAL LAWS AND STATUTES

Local laws in Europe started developing during the Middle Ages and they originated from local customs. They often represented an **implementation** of royal or imperial law, but they could also constitute a parallel legal system of its own.
In Italy, **customs** were referred to as "*consuetudini*", in France "*coutumes*", in Spain "*fueros*" and in Germany "*Laundrechte*". They were initially passed on orally until they were written down in Latin during the Middle Ages. They were then translated into their vernacular language of interest.

In the Middle Ages, the Italian peninsula was mainly divided into **"Comuni"**, local authorities inhabited by people who swore to live together peacefully and to help one another. Their lives were ruled by collections of laws called **Statutes**, or "*Statuta*" in Latin. They were often redacted by notaries, "*notari*", who were people responsible for translating laws into Latin.

During this process, some Latin words took **new meanings** in vernacular Italian. An example is the word "ars": from "ars" (which means art) originated "arte", the word commonly used in Contemporary Italian to refer to artistic activity. In the Medieval legal lexicon, however, it meant guild, as a medieval association of craftsmen or merchants for mutual aid or the pursuit of a common goal.
In many cases, there is a complete equivalence of meaning between the two languages, such in the cases of "promissio" for "promessa" (promise) and "mercator" for "mercatante" (merchant).
Many new terms were also coined during the medieval period in both Latin and vulgar languages, such as:

- "*bannum*" and "bando" (ban; punishment related to a fine; jurisdiction; official citation; official proclamation of peace)
- "*camerarius*" and "*camarlingo*" or "*camerlingo*" (treasuries)
- "*represalia*" and "*rappresaglia*" (an extraordinary procedure for civil enforcement against outsiders)

SOURCES OF LAW IN EARLY MODERN EUROPE

There was a **dualism** between "iura propria" and "ius commune" (dated back to the Middle Ages). Furthermore, local customs, city, guild Statutes, feudal law, Roman law, Canon law, and the decisions of superior courts all came together to create the legal asset of the Early Modern era. The legal history of Europe is the history of a plurality of languages and legal systems.

During the 15th century, princes and kings started to promulgate new laws, while the kingdom established by the Normans continued to gain importance. Moreover, their legacy still lives to this day, in the form of ceremonies and symbolism regarding the British Crown. The King or Queen was considered a sacred figure, sent by God to rule over the country: that is the reason why they were also the administrators of justice. This was considered their most important role and power. Therefore, in the Early Modern era, the powers in Europe were all administered by or in the name of the ruler.

It was only in 1748 that Montesquieu defined, for the first time, the theory of the **separation of powers**: legislative, judicial, and executive powers must be separated, and all practised by different subjects.

EUROPEAN SUPREME COURTS

In Europe there were many different Supreme Courts, each one being the most prominent court of its own country.

SENATO OF MILAN

The *Senato* ("Senate") was the highest court of Milan and one of the highest courts in Europe. It was founded by the French king, after the conquest of the Duchy of Milan. It represented both the French king and the duke. It worked for over three centuries, as it still served under the Spanish occupation of the city. It was one of the most powerful European courts of justice in the Early Modern period, and its case law greatly influenced the development of substantive law.
Despite it adopting the Roman word *senatu*s, the Senato of Milan did not have anything to do with the ancient Roman institution.

The judges of the Senato of Milano originally came from the most prominent families of the city. They usually studied Law at the University of Pavia and they were very learned jurists.
The Senato had really important powers. As it represented the Spanish king, the judges enjoyed the same powers as him; and because his power was thought to derive directly from God, the Senato's powers were also considered somewhat sacred. The judges would proceed and decide according to conscience (***secundum conscientiam***). They enjoyed unobjectionable discretionary judgement (the ***arbitrium***): in fact, the judges had to choose the most accurate source of law first, then the specific law to regulate the case; and if there was no accurate law, the judges had the power to freely decide the fate of the case. The Senato also did not give any reason for their judgement.
This shows a strong separation between the common people and the members of Senato. This barrier was also linguistic, as all the acts of the court were written in **Latin**, a language only known to scholars.

The citizens could appeal to the Senate through "*suppliche*" (appeals) or "*petizioni*" (petitions), which the Court was always willing to hear.

CRIMINAL PROCEDURE IN EARLY MODERN EUROPE

The law of criminal procedure of the Early Modern Age was characterised by the adoption of the **criterion of legal proo**f, the **discretionary assessment of pieces of evidence** (*indicia*) by the court, the use of **torture** as a means of gathering evidence, the application of the **death penalty** as well as recourse **to extraordinary punishment** inflicted at the discretion of the courts.
The *regina probationum* was the **confession** of the suspect, as it would give the court the evidence needed to condemn them. **Double testimony** also held the same judicial weight, so the suspect would have been condemned if there had been two testimonies of the crime. These measures served as a guarantee for the person involved in the judgement. Torture was widely used and abused in the Senate of Milan.
The suspect was considered **guilty until proven differently**: this principle was perfectly overturned with time. That is why the suspect was referred to as *reus* (guilty man/person) in official documents.
Furthermore, the **prison** was not considered a place for punishment (which was mainly corporal), but rather a place to wait for the process to end and the judgement to be made.
Using their arbitrium, the judges of the Senato could condemn to death the suspect, even without having the necessary proof: the judges were, effectively, above the law.

Pietro and Alessandro Verri, children of a judge of the Senato of Milan of the 18th century, read Montesquieu and consequently denounced the brutality and unfairness of the ways of the Senato.

THE ROMAN ROTA

The **Roman Rota**, also known as the *Sacra Rota Romana*, is still, to this day, the highest court of the **Catholic Church** and the **Vatican City**. It takes its name from the fact that the judges would sit in **circles** during the sessions. It still serves today as the most important court dealing with **Canon law** matters. Back in the day, when the Vatican State was much more powerful and extended in the Italian peninsula, it also dealt with **civil and criminal matters**, as it was the highest court that the inhabitants of those territories could refer to.

There also were other similar clerical courts outside of Rome, in cities such as Florence, Genoa, and Macerata: during the centuries, many of these courts specialised in **commercial law**, as they resided in commercial cities.

FRENCH PARLIAMENT

It was the court at the head of the French judicial system. It had a very important role even among the other Supreme Courts of Europe. During the French Revolution, the rebels destroyed it together with the Bastille, as it was perceived as one of the symbols of the Ancient Regime.
Aside from its judicial powers, it was also involved in the **legislative process**.

ROYAL SACRED COUNCIL OF NAPLES

It was founded by the Bourbons, who conquered Naples between 1734 and 1735. It was one of the first Supreme Courts in Europe.

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CONFISCATION OF PROPERTY

("Publicatio bonorum" in Roman law)

This punishment was inflicted on the condemned often along with the death penalty or banishment. It was a punishment for serious crimes, especially of a political nature.
It consisted of confiscating everything that constituted the property of the reus. Inevitably, this punishment involved the rest of the family, as the wife would lose any right over her dowry and the children could not inherit anything anymore.
Because of these unfair effects, confiscation of property was often **limited**, and part of the property would be saved to leave children an inheritance.

One of the most cited authors of the matter was Albertus Gandinus, who had studied the confiscation of property according to both Roman and local law (the town's statutes) during the second half of the 13th century.

CHRISTIAN STEREOTYPE OF PUBLIC EXECUTIONS

One of the greatest moments of "visibility" of justice during the Early Modern Era was offered by the **public display** of the executions of those who had been condemned to death. The platform where the reus was executed was put in public spaces, often in some of the most important squares of the city. The publicity of such punishment was considered fundamental, as it should have served as a **warning** to other aspiring criminals.

Only the **executioner** and the **comforters** were allowed to stand on the platform, next to the criminal. The former was responsible for killing the body of the criminal, whilst the latter was responsible for saving their soul.

THE COMFORTERS

The comforters were members of specific confraternities, so-called "**companies of justice**", formed by laymen who were devoted to different kinds of pious practices, such as the comfort of people condemned to death. They would try to allow the condemned to save their souls, saying words of comfort all through the parade from the prison to the scaffold. They tried to distract the convicts from what was happening: that's why comforters often wore particular ornaments.

The "Comfort of Giordano Bruno" is a famous example of such practice, as it involved a very important figure of Early Modern Italy. In this book, the famous philosopher tried to prepare himself for his death sentence with the help of a comforter.
In Milan, two criminals a month, on average, were executed.

The most prominent company of justice in the city of Milan was the *Scuola dei Battuti di Santa Maria della Morte alle case rotte*. They were particularly important because they kept **registers** of all public executions in Milan, along with the name and the crime of the convict, giving us an accurate estimate of the dimension of such a phenomenon. After the execution they would write the phrase "*giustizia*

fatta", but if the execution for some reason did not take place, they would write "*giustizia non fatta*".
Prominent enlightened philosopher Cesare Beccaria kept a copy of such a manuscript in his library.

Another important confraternity was the one of *Scuola di san Giovanni Decollato alle Case Rotte*. It is particularly important because they also accepted **noble family members**, who would eventually become prominent judicial figures. Many of the members of such a fraternity were able to later reform the matter of public execution and eventually abolish it. It is thought that this noble class directly involved in the confraternities was fundamental for the birth of the Italian Enlightenment movement.
In the 17th century, the Scuola di San Giovanni Decollato was granted by the Spanish king the privilege to ask the governor for **mercy** for two convicts each year.

These confraternities weren't unique to Milan: they were present in most Italian big cities, such as Rome and Florence. They had existed since the Middle Ages and their members were specialised in pious practices revolving around the comfort of people. They were always run by private citizens.

THE ENLIGHTENMENT

CHARLES DE SECONDAT, BARON OF MONTESQUIEU

He was a known philosopher, born in the French region of Bordeaux. Because of him being born into a noble family, he studied Law, and he was set to become a member of the Supreme Court of Bordeaux. But he was not interested in such a future, so he decided to **travel** through Europe and the British Isles. In the United Kingdom, he was able to observe and praise the English judicial culture, especially the element of the **popular jury** in criminal cases.
He wrote about his acquired knowledge in his book "*De l'Esprit de Loix*" (1748). He gave particular importance to the **trial by jury**, which he thought was better than traditional criminal trials in Europe. His description of this kind of trial made him acquire the attention of Scottish philosopher Adam Smith, who pointed out some inaccuracies. Later on, Montesquieu corrected such mistakes in a new edition of his work.

CESARE BECCARIA

He was a Milanese philosopher and author who wrote the booklet "*Dei diritti e delle pene*" ("Of law and punishment"), in which he famously condemned the **death penalty**. He also set the **principle of legality**, the principle of individual freedom, and the principle of equality among men.
Beccaria was deeply appreciated by Voltaire.

FROM LEGAL PARTICULARISM TO CODIFICATION

The apex of the Ancient Regime was characterised by **legal particularism**.
Legal particularism consists of the coexistence of more legal subjects, each with its legal collections, that are not coherent with each other. This lack of unity caused chaotic collections of laws, which were also difficult to find and often incomplete. They were especially common in Western Europe. These collections of laws were characterised by difficult wording, which made them difficult to interpret. Legal particularism caused both subjective and objective problems: the first was about what law to apply to the case, whilst the second was about conflicts of competence between systems of rules.
e.g., the coexistence of Regal Law and Canon Law

IUS COMMUNE AND IURA PROPRIA

Another notable example of legal particularism in the Late Middle Ages and the Early Modern Era is the coexistence of the *Ius commune* and the *Iura propria*.

The term Ius commune refers to a body of law consisting of the **Roman draw of Justinian**, reinterpreted by the Medieval legal science. The Canon law was also an important source of the Ius Commune. It was also known as "Common law", as it was a form of universal law, enacted in many different regions.

The Iura propria, on the other hand, consisted of the laws of local jurisdictions. They could have originated from **many different bodies of law**, such as:

- FEUDAL LAW: developed via custom, partially written down in some imperial constitutions and the *Libri tendom*. It was abolished during the French Revolution.
- SOVEREIGN LEGISLATION: The set of laws and decrees issued by sovereigns and princes, mainly connected to the protection of public order during the 17th-18th centuries, as the power of sovereigns strengthened.
- MUNICIPAL STATUTES: General legislative acts issued by the municipalities, developed above all in central-northern Italy.
- CORPORATE STATUTES: Normative acts typical of the corporations of arts and crafts.
- CUSTOMARY LAW: Unwritten law created by the customs and habits of every population.

Concerning Iura propria, Ius commune played a **subsidiary role**, ensuring legal uniformity, but it did not delete the multiplicity of sources. (Because these two kinds of bodies of law were used at the same time, especially in Italy, this dynamic was very peculiar).

LEGAL PARTICULARISM IN FRANCE

France was one of the first political unities, but from a legal point of view, it continued to be divided and broken into **different legal systems** until the French Revolution. In the beginning, this division was represented by the separation between Northern France and Southern France. Southern France

had been heavily controlled by the Roman Empire; therefore they had a written body of law. Northern and Central France, however, were much more influenced by the German traditions, which included customs and customary law.
Voltaire, in his Dictionnaire phylosophic, wrote that there were so many customs in France that "a man who travels in this country changes his law almost as often as he changes his post-horses". In fact, at the time there were one hundred and forty-four different customs in France.

Many **differences** between Northern and Southern France were found in the **family law**: the South expressed a more authoritarian and unitary conception, whilst the legal stature of women was better under customary law. Regarding **property**, Roman law in the South was more individualistic, whereas in the rest of the country there were legal forms of collective ownership. Finally, Roman law offered more solutions for the **voluntary disposal of one's property** than customary law: in fact, Roman law provided the instruments of the contract and of the testament.

LEGAL PARTICULARISM IN GERMANIC TERRITORIES

The basis of the Germanic legal system was customs until 1545, when the **Reception** (a legislative act) was promulgated and made Roman law (so, the ius commune) become the law of the Germanic Empire. Initially, it was supposed to have a subsidiary function to the *Landrechte* (Territorial rights), bodies of law that ruled the lives of inhabitants of the land, which were all different from each other. The core of the *Landrechte* consisted of the relationship between the territorial prince (*Landesfürst*) and the feudal classes (*Landstände*). There were several other sources of law, coexisting and not always competing with each other, for example, local customary rules, municipal legislation, and the corporative rules of the professions

There were fundamental distinctions among **three classes** of subjects (*Stände*): the *Adelstand* (noble class), the *Bürgerstand* (city of bourgeois state), and the Beuernstand (peasant class). Such classes divided people based on their class of birth and it had nothing to do with the means of production. As the territorial traditions gave power to the different Stände, municipal law was quite difficult to abandon. There was, in fact, the persistence of serfdom within the class of the *Unterthanen* ("the subjugated"), a kind of land-bound agricultural serfs.

ABSOLUTISM IN FRANCE

The French Regime of the 17th century is one of the best historical examples of absolutism. It managed to create legislative, administrative, and jurisdictional **centralisation**. During this time, the political power increased its strength, therefore there was a **concentration of powers** in the hands of the king, who decided if and who to redistribute it to. While the conception of social classes still existed, their importance increasingly diminished, as all subjects were the same in front of the King. Legislation started to be seen as the expression of the **will of the King**, who was also the promoter of the collection and reformulation of customs. This process culminated with the centralisation of the jurisdiction in the great territorial courts (*Parliament*), originally separated from the king, which judged according to different *coutumes* (customs). This was the most important factor for the persistence of legal particularism in centralised France.

THE ORDONNANCES OF LOUIS 14TH

Looking at the Ordonnances (Ordinances or Orders) of Louis 14th, issued from 1667 to 1681, it's noticeable that they dealt with different types of law:

- *Ordonnance civile* (1667) was concerned with Civil Law
- *Ordonnance criminelle* (1670) – Criminal Law
- *Ordonnance du commerce* (1673) – Commercial Law
- *Ordonnance de la marine* (1681) – Maritime Law

The Ordonnances represent a normative activity aimed at **reorganising** the civil and penal procedure and commercial law. The first step to codification was the implementation of royal rules. They also consisted of a **harmonious and systematic collection** of laws, subdivided into articles. Ordonnances also attempted, for the first time, to reduce law to a **set of norms**, reaffirming the concept of judges as subjected to the law, not as protagonists of it. The law was ultimately and exclusively identified with the will of the sole sovereign.

THE ORDONNANCES OF LOUIS 15TH

They dealt with subjects of **private law**, particularly important for the noble classes. They are particularly interesting, as many of their solutions were later adopted by the *Code civil*.
They regarded Donations (1731), Testaments (1735), and Substitutions (1747).

ENLIGHTENED ABSOLUTISM AND CODIFICATION

This phenomenon regarded France, Italy, and Russia. It triumphed in the 18th century and led to many legal reforms.
The Enlightenment was born in France, where it had the goal of promoting **political reforms** and was opposed by the sovereign. In other parts of Europe, however, such ideas were adopted and incorporated by sovereigns and princes, who combined them with the **demands of absolutism**.
Legal Enlightenment promoted the idea of **simple, comprehensible, and certain laws**, which the king had the obligation to protect and guarantee. This very paternalistic idea was actually the first step to equal rights for everyone.
These political tendencies took many different shapes, through Europe.

TOWARDS CODIFICATION IN PRUSSIA

In Prussia, which was the most important and modern *Lander*, Emperor **Frederick William I** started reforming the legal system in the 18th century. He did so by forming a committee responsible for the creation of a new legal system. This legal reformation strived to create a **universal, general code** that left the *Landrechte* untouched: it did not substitute them, but it was supposed to have a priority over them. Moreover, it intended to preserve the social structure of the Stände. Finally, it was characterised by the **alliance** of the monarchy with the land-owning aristocracy.
Frederick William I and his Secret Council (a very ancient assembly that had the role of advising the King) instituted a **new commission**, which was supposed to prepare a draft for a new system of law.

However, Frederick I died before then, so he was succeeded in such a project by his son, **Frederick II**, a very cultivated man who finally modernised the Prussian system. In his Ordinance of May 9th, 1746, he stated that: "Primarily, Roman Latin law is to be repudiated and a **German territorial law** is to be established on a Prussian basis, which is to be based directly on **natural reason** and the **constitutions of the country**".
He also wrote a "Dissertation on the reasons to establish or abrogate the laws", where he stated that legislation must be reasonable, and its task is to establish the **public welfare** (a main characteristic of Enlightened absolutism). This progressive mindset hid a paternalistic nature, as the establishment of such laws was completely reserved for the king. Additionally, he stated that the norms must be

formulated clearly and precisely so that they can be interpreted literally; they must also be few and united in a single body. In such a body of law, everything must be established as **due, allowed, or forbidde**n. Finally, in his view, law must be **benevolent**, particularly criminal law.

Frederick II consequently wrote the *Project des Corporis Juris Fredericiani*, a draft that was never actually promulgated. It was divided into **three parts**, which respectively dealt with:

- Part One (1749): *actiones*, persons, family;
- Part Two (1751): property, possession, real rights, and succession;
- Part Three: obligations and criminal laws. This part was never published.

The *Project des Corporis Juris Fredericiani* was **never accepted**, as the committee thought that Roman law thoroughly regulated natural law, even though that went against Frederick II's wishes. It also did not consider the status of the Stände. Furthermore, such a body of law was **not formulated clearly** and contained **too many provisions**, which were not concise. The style was not prescriptive, but instead, it was very discursive: it did not correspond to the Frederician ideal of a clear, manageable, and Prussian common law.

For such reasons, in 1780 Frederick II established a **new commission** for the general reform of the law. Opinions were sought from the judicial bodies and doctrine for the writing of the first draft. A second draft (the *Gesetzbuchs*) was prepared, but the name was ultimately changed to ***Allgemeines Landrecht für die Preussichen Staaten***. It was meant to completely replace the previous "common Roman law" and it was a supplementary law to the Landrechte, which continued to be in force. In its introduction, there is an explanation of its goals.
The text itself was divided into two parts, one for civil law and the other for various matters which previously fell under public law (such as successions, Stände, and criminal law). The structure was also very modern, as the text was divided into titles, which were in turn subdivided into short, clear paragraphs. It did not have, however, articles.

TOWARDS CODIFICATION IN AUSTRIA

During the Enlightened monarchy in Austria, which was represented by Empress Maria Theresia, partial and progressive reforms of common law were achieved in a very efficient way. Over time, these merged into a single-subject code that maintained subjective privileges by reducing them to the sphere of exceptional rules.
The Empress' policy of **centralisation** was meant to reform to law, while also strengthening and centralising her power. It started in 1748, with a **financial reform** due to military needs. In 1749, she created the *Oberste Justizielle*, exclusively **judicial bodies**, which did not have any political power. In 1761, she created the *Staatsrat* (State Council), an **administrative organ**.

During her reign, she appointed a commission to write a legal code, intending to guarantee legal certainty and the legal standardisation of the Germanic Hereditary provinces, through the reorganisation and reform of Roman law. This work will eventually lead to the ***Codex Theresianus***, in 1753.
In its edition of 1766, the Codex was divided into **three parts**:

- Book I: "Law of the Persons"
- Book II: law of property and rights in rem
- Book III: obligations

This tripartition stemmed from the one encouraged by Ancient Roman jurist Gaius. The Codex Theresianus was **exclusive**, meaning that it didn't serve as supplementary to the common law. It also dealt only with **private law**, with Roman-style systematics. It signed the subordination of the judge to the law and the subordination of customs to written laws. It did not contain general principles, but rather **particular provisions**, written in a discursive style. The Codex Theresianus was not ultimately promulgated, because of its too lengthy, "chaotic" structure.
Another example of Theresian codification is the **Criminal Constitution**, a body of law regarding Criminal Law.

A second distinct period of Austrian codification was led by Emperor Joseph II, who strived for a **reorganisation of the State in a single society**, gathered around the sovereign and the bourgeois. He tried to achieve this through the abolition of the privileges of the nobility and the Church. His actions were also heavily influenced by Jurisdictionalism, which consisted in reducing the Church's jurisdiction. To achieve this, he promulgated the *Toleranzpatent* (Tolerance edict), in 1781: it stated legal equality for people belonging **to tolerated religious creeds**. Coherently, the *Judentoleranzpatent* of 1782 included Jewish citizens in this protection. Lastly, the *Ehepatent* (Matrimonial law) of 1783 introduced **civil marriage**: in fact, it stated that, in the event of a religious marriage, the priest would be acting as a representative of the Austrian State, not only of the Church. This way, he achieved to reduce the Church's influence in Austria.
Concerning Austrian codification, Joseph II promulgated the *Allgemeine Gerichtsordnung* (General Code of Civil Procedure) in 1781, which let peasants buy the territories they were working on: a move that drastically **reduced the spread of peasantry**.
In 1787, he promulgated the first book of the *Josephinisches Gesetzbuch* (Joseph's Code), on the subject of **personal rights**.
The **Criminal Code** of Joseph II, promulgated in 1787, is considered the first modern of its kind. One year later, the **Code of Criminal Procedure** was promulgated, too. The division between the Criminal Code and the Code of Criminal Procedure is, itself, an element of modernity.

Joseph II's Criminal Code of 1787 deserves particular attention, as it contains a complete discipline of **criminal law as an autonomous field**. It also repeals all pre-existing criminal law, and it establishes the **principle of the legality of punishment**. It demands a **literal interpretation** and application of criminal provisions and the **prohibition of analogy**. Additionally, it states a **strict proportionality** between punishment and crime, and it abolishes judicial torture (but not the death penalty).

TOWARDS CODIFICATION IN THE GRAND DUCHY OF TUSCANY

After the death of Joseph II, his brother Peter Leopold (Grand Duke of Tuscany) succeeded him, taking the name of **Leopold II**. He focused his policy on Economics, Finance, and the relationship with the Church (Jurisdictionalist policy): he managed to improve agriculture by draining swampy territories, loosening feudal bonds, making the proprietor the sole subject of tax law, suppressing the Inquisition Tribunal and to banish the Society of Jesus (or Jesuits). The Jesuits were banished because they had a strong control over education, which Austrian sovereigns thought should be completely public.

He promulgated the ***Leopoldina***, the Reform of Tuscanian Criminal Legislation, a ground-breaking example of criminal law for its time, which Leopold II himself actively wrote and revised. Its contents were inspired by the **criminalistic Enlightenment**: it followed a **proportionality ideology**; it reduced the number of sanctions and it replaced the generic offence of "lese majesty" with specific offences against the person of the sovereign. Most importantly, the Leopoldina, for the first time in History, abolished the death penalty.
However, it also presented **elements of backwardness**, such as its structure, which was not systematic: it was made of an introduction and 119 articles, without internal partitions. It also did not consider the distinction between substantive and procedural law. Another problem is presented with its hetero-integrality: it only abrogates incompatible rules. Its form is also argumentative-persuasive, rather than prescriptive, and it requires judges to interpret "in the spirit" of the reform.

TOWARDS CODIFICATION IN RUSSIA

In the Modern Era, Empress Catherine II ruled over Russia. She is known as one of the most prominent Enlightened sovereigns. Inspired by the ideas of Beccaria, she decided to write the *Nakaz* ("Instructions"), aimed at the writing and promulgation of a body of law in Russia. She never accomplished such a goal, but Catherine II's *Nakaz* were still incredibly influential and important, as they introduced **more humane legislation**. She recognised, however, the "necessity of an absolute monarchy for the Russian Empire".

CODIFICATION OF RIGHTS IN COMMON LAW

In the 17th century, European monarchies strived to centralise their power, while increasingly approaching Enlightened ideas. Such dynamics also involved the Stuart dynasty in England. In 1689, after the Glorious Revolution, the Parliament promulgated the **Bill of Rights**, the first act of its kind in history. With the Bill of Rights, many contents already present in Common Law were legitimated. Such a document was a declaration meant to **protect the traditional rights and freedom** arising from customs and traditions based on the history of the English Kingdom.

The Glorious Revolution led to the **separation of powers** in the UK, as it was then recognised that the judicial power had to be exercised by the King, but through his courts; the executive power by the King, but in his Council (the Government); and the legislative power, still by the King, but in Parliament.
Despite the appearance that the King might oversee all 3 powers, they were prerogatives of other organs.

MAIN FEATURES OF THE COMMON LAW LEGAL SYSTEM

The "new" English Common Law system does not have a constitution that codifies the main governmental aspects of the Kingdom. The norms that regulate the functioning of the State were born out of **historical sedimentation**, as they were enriched through time by constitutional documents, such as the Magna Carta. The main "constitutional" principles of the United Kingdom are centred on the **defence of property**, as a means of guaranteeing freedom ("no taxation without representation"), and **judicial protection** (the "due process of law").

The features of this modern system were explained by **William Blackstone** in the "Commentaries on the Laws of England" (1765-69). His work was widespread in the Northern American colonies and Russia. In his work, Blackstone wrote that the new Common Law represented the **right mix of the three classical forms of government**: monarchy (the King), aristocracy (the House of Lords), and democracy (the House of Commons). He defined the English constitutional asset as "balanced" because of its system of **checks and balances**. It was also thought to be the best instrument to defend the traditional rights and freedoms of communities against interventions of the sovereign and to maintain the natural character of the English people.

Montesquieu dedicated Chapter VI of Book XI of his work "The Spirit of Laws" (1758) to the English Constitution, appreciating it and praising it. Such a book was consequentially translated into English and exported to the British Isles.
This admiration from Enlightened scholars is disrupted, however, by **Jeremy Bentham**, who in "An Introduction to the Principles of Morals and Legislation" (1780)
openly criticised Common Law. He argued against Blackstone that the primary legal source must be the law, an act of empire that must consider not tradition, but **justice**, defined as the welfare and happiness of as many citizens as possible. He had a utilitarian and imperative conception of the law.
Jeremy Bentham was the first of the few voices to propose the **codification of English law** with his "Codification Proposal".
Such ideas are a clear reflection of Beccaria's ideas.

The English constitutional asset was fundamental to inspiring the **ideas of freedom and liberty** in the Northern American territories. Such ideas were fuelled by Bentham.

NORTHERN AMERICAN CONSTITUTIONALISM

Northern American Constitutionalisation was inspired by all such elements.

The political relation between the holders of power and those subject to power is presented as a **legal relationship**, governed by cognisable legal norms (the Constitution). From a **liberal perspective**, the Constitution is a legal limitation of the authority of the State, to ensure citizens their rights (primarily liberty and property). Such rights are natural and inviolable. After the Enlightenment, common people were finally addressed as "citizens".

LAW OF THE NORTHERN AMERICAN COLONIES

In the English colonies of North America, the judicial system was based on the **new Common Law**, transposed in the mid-18th century, and filtered through **Blackstone's commentaries**. It also included some principles of the **law merchant**. Finally, it took into consideration **folk law**, a set of customs formed in the different English colonies.
The colonies tended to write down their law: an example of this is *The book of the general lawes and libertyes concerning the inhabitants of the Massachusetts* (Body of Liberties) of 1641. It collected rules from the English Common Law and the Old Testament. Similar examples regarded the States of New York and New Hampshire.

It must be taken into consideration that American society is very modern, therefore it is founded on **modern principles**. They took the new aspects of the Common Law and integrated them with the theories of the Enlightenment, particularly **contractualism** and **naturalism**. On the Mayflower itself, the pilgrims stipulated a contract in which they promised to unite in a democratic society that strived for the welfare of everyone involved.

THE INDEPENDENCE OF THE COLONIES

When King George III promulgated the **Stamp Act**, which introduced a tax on stamps from all over his empire, the colonies revolted. The pilgrims did not enjoy any representation in the Parliament. Such rebellion led to the **Boston Tea Party**, which caused a violent reaction from the English Monarchy. The **Independence War** broke out.

The colonies decided to meet for a congress in 1776, during which they decided to write their own Constitution. Every colony wrote its own act: one of the most important ones is the *Virginia Declaration of Right*s. It states the **iusnaturalistic nature of rights**, which are declared, not conceded, and cannot be denied or revoked. Some of the rights that are protected by this Declaration, it is stated, are the enjoyment of life and freedom, the right to property and the pursuit of happiness and safety.

After the victory of the War of Independence and the full independence from the British Crown, the ***Declaration of Independence*** was ratified on July 4, 1776. It was written by the "Committee of Five", made up of Thomas Jefferson, Benjamin Franklin, John Adams, Robert R. Livingston, and Roger Sherman. It restates the **natural and inviolable nature of rights**, but it also states the importance of **the right of resistance**, with the list of all illegitimate acts of government that should be despised, which referred to the behaviour of George III.

THE CONSTITUTION OF THE UNITED STATES

It was ratified on June 21, 1788, by a Constitutional Convention made of delegates from 12 of the 13 original States (Rhode Island refused to send any delegate). It is the **federal constitution** of the United States of America.
Its scope, as directly stated in the Constitution itself, is to form a "more perfect" union, ensure domestic peace and common defence, promote general welfare, and protect freedom.

Curiously enough, the Constitution was promulgated before the Bill of Rights (1791) which contains the first 10 amendments.
The Amendments have a mixed European background, ranging from the British to the Enlightened tradition. In particular, the V Amendment states the rules for a fair and just process.

THE FRENCH CODIFICATION PROJECTS

THE FRENCH REVOLUTION

The principles that derived from the American experience eventually inspired other historical events, such as the French Revolution. Despite it being very different from the American Revolution, they led to two very similar Declarations, from the point of view of principles.
The ***Déclaration des droits de l'homme et du citoyen*** (August 26, 1789) was drafted by the Assembly instituted after the downfall of the French monarchy, which later turned itself into a constitutional assembly. It focused especially on the aspects of **liberty** and **property**. There is an explicit mention of the view that society is born to protect the **innate rights** of the individual.

Together with the English *Bill of Rights* and the American *Bill of Rights*, the French *Declaration of the Rights of the Men and the Citizens* later inspired the *Declaration of Rights of the United Nations* of 1945.

The rights of women were not considered in either the American Bill of Rights and the French Declaration

THE FRENCH CONSTITUTION

On September 3, 1791, the first French Constitution was promulgated and it proclaimed the intention of drafting a general code of laws for the new Republic. It contained a Declaration, a Preamble, and some Fundamental Provisions. Most importantly, it established the **separation of powers** in France.

The Second Constitution of 1793 also proclaimed that such laws, which made up the *Code Civil*, would be valid all through France.

The French Constitution went through **many drafting processes**:

- 1793: The Legislation Committee led by Jean-Jacques Régis de Cambacérès prepared a simple project of civil laws, inspired by Roman Law. As the Code of Justinian, this project was divided into **three parts**: people, contracts, and obligations. It contained just 719 articles. This first draft followed the **principle of rationality**, and it abolished all previous legislation, as it would undermine the national conformity of the law.
- 1794: the second draft by Cambacérès with Philippe-Antoine Merlin was composed of even fewer articles (297). It was influenced by both Roman and customary law, and it was not written in an argumentative style, but rather in a **very dry style**. It was much more like a series of commands, which made it very readable.
- 1796: It was composed of 1104 articles, and it was accompanied, for the first time, by Cambacérès' *Discours preliminare*, in which he stated the necessity of such a body of law, and he praises both Roman and customary law. It was an attempt at a **compromise** between reform and tradition. To compromise, this draft had to represent a **regression in the themes of family law**, such as what regards the rights of women. Property and individuals will remain central in the field of rights in rem and obligations.
- 1798: Rapport by Jean-Ignace Jaqueminot, in which he proposes a **new way of drafting**: a code "par parties", made of a series of laws to be enacted separately and then merged into a single code. This would relieve the immense work that the drafting committee was subjected to.
- 1799: this version is also known as the Project Jaqueminot and is considered a preview of the Civil Code. It included around 900 articles, mainly centred around **family and inheritance law**. It represented **another regression in family law**. It was also a remedial intervention against the excess of egalitarianism of the Revolution. In fact, at the end of the 18th century, French

society still suffered a severe separation between classes, with the working class being suppressed by the aristocracy.

- 1800: **Napoleon**, after his coup d'etat, which led him to become Emperor, appointed a drafting commission composed of the most important and learnt lawyers and politicians: François Tronchet, Jean-Etienne Marie Portalis, Felix Bigot de Preameneu, Jacques Maleville. They were representatives of all the legal traditions present in France, as they were from different French Regions. Portalis, who guided such commission, wrote a *Preliminary Discourse*. In his Discourse, he states the duty of judges to apply the law, but also their **power to make the law**: their decisions should not rely on law alone, but firstly on justice. This element is problematic, as it led to many arbitrary decisions, and it was criticised by many Enlightened scholars. He also states the **limited capabilities** that drafters have: the voids left by the commission must be filled by the experience of jurists and judges. By doing so, he underlines the impossibility of creating a complete body of law.

The draft of 1800 was promulgated on the 21st of March 1804 with the name of ***Code Napoleon***.

THE CODE NAPOLÉON

It was promulgated with the *loi du 30 venteux année XII* (March 21, 1804) and it was also known as the *Code Civil de Française*. Through its Art. 7, it **abolished all previous legislation**, including any form of Roman law, ordonnances, and general or local customs that treated the subjects that make up the code. This implemented legal unification. The only source that was not repealed was the *Droit intermediare*, the law that was enacted between 1798 and 1804: its provisions could be abrogated, however, if they contrasted provisions of the *Code Napoleon*. It enacted the abolition of the distinction of subjects in society, therefore creating **unification of the subject of law.**

It is inspired by Enlightened principles and its main aim is to give unity to the French legal system, following the ideas of the *Cahiers de doléances*, the collection of complaints that the population presented to the King before the Revolution.

The *Code Napoléon* was also enacted in the Italian territories ruled by Napoleon.

COMPOSITION OF THE CODE NAPOLÉON

It is composed of **three books**; therefore it follows the division by Justinian.

Book I was dedicated to **persons**, and it dealt with topics such as freedom, property, marriage, divorce, maternity and filiation, and paternal power. Family law was widely inspired by revolutionary principles.

Book II was dedicated to **property**, whose conception was largely influenced by jurist Pothier, reminiscent of his experience during the *ancien régime*. During that time the **medieval idea of property** persisted, which saw property as corresponding to a real right. In the second half of the 18th century, however, the idea of medieval property became controversial, because it oscillated between property conceived as *domaine* and property conceived as *ius in re aliena*: it referred both to the land and a political-judicial notion.

Book III was dedicated to **obligations and contracts**. Its main influence is Roman law, to the point that the provisions sound like a translation in French of Roman provisions.

The subject matters are divided in a very clear and efficient way: that is why the Code Napoleon was a model for Civil Codes until the end of the 18th century. In France, it was abolished only in the middle of the 20th century.

Art. 4 of the Preliminary Title is an important provision because it states the **prohibition of interpretation**: the judge cannot make law, but they must give their judgement. Jurisprudence must

not make law, but it must operate through inductive analogy. From the single provision, they must find the general rule.

IMPORTANT INNOVATIONS FROM BOOK I

The status of "subjects" was changed to "**citizens**". All French citizens' civil rights were recognised and differentiated from the rights of foreigners.
In family law, **divorce** is permitted for the first time since Ancient Roman times. The obligation of marriage is born from the ceremony celebrated in front of a civil officer: therefore, **civil marriage** was the only legally recognised form of marital union. The **communion of goods** of consorts was set as the ordinary regime, whilst the separation of goods was possible only through marital convention. The distinction among children in succession is abolished, even though a natural child could not have the same pretences as a legitimate child.
Marriage was possible only with the consent of both parties.
Regarding divorce, the husband could ask for divorce on the grounds of his wife's adultery, while the wife could only ask for divorce in the case that her husband brought his concubine to their residence.
The adopter must have been at least 15 years older than their adoptee.
The dowry was managed solely by the husband.

The matter of **succession** is particularly important in the Code Napoleon, as the act presents elements of both Roman and customary law but, concerning succession, **customary law** prevailed: in fact, the idea of a testament was not considered. This is caused by the necessity of weakening the aristocracy: this way, the inheritance would be distributed among children, limiting a single person's power.

IMPORTANT INNOVATIONS FROM BOOK II

The second book was mainly influenced by Roman law. The distinction between ***dominium utile*** and ***dominium dire*****ctum** was overcome: in fact, art. 5 of Book II defines property as the "imprescriptible and inviolable right". It is exclusive and perpetual and could only be limited by the State. It was also considered an **extension of someone's freedom**, therefore the Constitution protected such right from the intervention of the State.
The distinction between moveable and immovable property is taken from customary law.

IMPORTANT INNOVATIONS FROM BOOK III

The legislation and classification of **contracts** are taken from Roman law. However, the contract is defined as the agreement which binds one or more persons, towards another or several others, to give, to do, or not to do something. Therefore, the *Code Napoléon* innovates the Roman concept of contract, which relies only on the agreement between parties and is not bound to any form. The distinction between contracts and pacts is also abolished.
Contractual legislation considered general rules to which all contracts are subjected, but specific rules regarding **specific contracts** were permitted.
The Code Napoleon also re-enacted the principle of ***pacta sunt servanda***, therefore the origin of obligations from the signing of a contract. The only possibility not to comply with an obligation was caused by superior force and fortuitous occurrence. Therefore, the *Code Napoleon* was very strict about obligations.

THE ABGB OF PRUSSIA

THE WESTGALIZISCHES GESETZBUCH

In 1790, the new emperor Joseph II appointed a *Hofkommission in Gesetzgebungsachen* headed by Karl Anton von Martini. This led, between 1794 and 1796, to the publication of the three parts of the *Martini Entwurf*. It lately developed into the *Westgalizisches Gesetzbuch*, which was published only in

West Galicia. It is very important, as it was the preliminary title of the "Of law and laws in general", the Austrian Civil Code.

It was structured as follows:
Part I: Subjects of law, marriage and family, incapacity, guardianship, and curatorship
Part II: Rights in rem, successions, obligations, and contracts
Part III: Heterogeneous provisions, from which Joseph II cared to exclude subjects such as criminal matters, civil and criminal procedures, and rules to be considered public law. This exclusion was justified by the willingness not to interfere with matters of social diversification into classes: such matters had to be regulated through special laws. This compromise was made to protect the administrative collaboration with the aristocracy while trying to eliminate reasons for the rebellion of the bourgeoisie.

The Westgalizisches Gesetzbuch contains **principles**, different from the French Civil Code, which contains rules.

> E.g. Art. 1:" Law is everything that is good in itself, that contains or produces something good according to its relations and consequences and leads **to the** general welfare."

The Austrian legislator tried to compromise tradition with new principles.

The idea of **restricting natural rights** is introduced, even though the legislator had stated that natural rights had to be respected. Rights explicitly protected in the *Westgalizisches Gesetzbuch* are the right to protect one's life, the right to obtain what is necessary to elevate one's intellect and situation, the right to protect one's possessions, the right to protect one's reputation and the right to happiness. Freedom of negotiation is also protected.
Furthermore, the German idea of entity is followed, as it is stated that natural rights remain unchanged even in civil society. But, concerning acquired rights, it is recognised that certain differences between people are inevitable, or even necessary. A civilised society is called to protect the weak against the strong through its unified forces.
This political principle culminates in a statement that recognises and justifies the **nature of privileges**, which are considered exceptions, outside of the law, conferred only for important reasons. This principle is linked to the exceptions not treated in Part III of Westgalizisches Gesetzbuch.

This experiment went very well: the government therefore decided to **extend** the Westgalizisches Gesetzbuch to all the Prussian Empire. This process was very lengthy, as it lasted 10 years, also because Napoleon invaded the Prussian territories in the meanwhile.

THE AUSTRIAN CIVIL CODE (ABGB)

The new emperor Leopold I continued the preparation of an Austrian Civil Code. It was drafted by Martini and Zeiller and it was promulgated in 1811, after preparatory works directed by Martini's pupil and well-known philosopher, Kant.
Kant thought law should not be without conscience: on the contrary, the law has the important role of **protecting people**. The lengthy process was caused by the Napoleonic invasions and the interference of the aristocracy, who feared that a Civil Code would fuel the revolutionary requests of the bourgeoisie. The emperor, however, was convinced otherwise (and rightly so).

It consisted of only **14 paragraphs**, whereas the *Westgalizisches Gesetzbuch* was made of entire explicative texts. The paragraphs were divided into **three parts**, therefore the traditional tripartition was respected. What is interesting about the ABGB is the **mixture of old legacies and very modern ideas**, much more modern than the ones stemming from the French Revolution. For example, in the Austrian Civil Code slavery was explicitly prohibited, and married women enjoyed much more rights than French women.

The ABGB was initially extended only to German-speaking territories. However, over time, it was extended to countries such as **Poland and Transylvania**, which had completely different legal

traditions. The influence of Maria Theresa made this integration difficult, over 60 years after her death.
It was also extended to Italian territories in the Kingdom of Lombardy-Venetia. However, the German model did **not** have **much success in Italy**. The French model, on the contrary, was becoming overwhelmingly popular all through Europe: this is because the French Civil Code is much better written, as it contains rules (not just principles). Another reason for that is the legislative tradition: the French tradition is much more like the Italian one, as it stems from both Roman and customary law. Furthermore, The Austrian occupation of Italy was despised by Italians, and it led to a poor execution of the Code of the Occupier.

MAJOR LEGAL AND CULTURAL TRADITIONS UNDERLYING THE ABGB

The traditions underlying the ABGB are very diverse.
First of all, it was influenced by the ***Ius commune*** (made of Roman Law and Canon Law), through the mediation of the *Usus modernus Pandectarum*. **Territorial law** was also a base of the ABGB. Finally, the "Law of Reason" (***Vernunfrecht***) is the reason for the philosophical nature of the Austrian Civil Code.

RIGHTS OF THE INDIVIDUAL

Inborn rights are considered by the ABGB as a **self-evident truth**. Slavery is abolished and equality among people is stated.

Matters of **religion** represent a true contrast between tradition and modernity: while differences in religions are stated not to affect private rights, interreligious marriages are prohibited.

Property is indeed one of the primary pillars of the ABGB. It is defined as an exclusive, absolute, and inalienable right and it is the union of both **enjoyment and disposal**. Consequentially, if someone owns only a right to the substance and another has a right to produce it, then the property is incomplete for both parties.
The **estates** into which property is divided are feudal, hereditary leases, and emphyteuses. Feudal estates were a kind of contract that required farmers to cultivate the land of the feudal lord, under seasonal payment. Hereditary leases were agricultural contracts that involved the permission of a family to cultivate the land. Emphyteuses were very long leases on land that were often given by the Church.
The ability of the legislator is in the decision to deal with feudal legislation in particular parts of the Code.

COMPARISON WITH ART. 4 OF THE CODE NAPOLEON

Art. 4 of the Code Napoleon states the abrogation of the optional *référé legislatif*, by obligating the judge to decide on the case before the court. Such provision and Art. 5 aim to abolish the so-called "denial of justice" and to stop the practice of interrupting judicial proceedings, waiting for the legislator to give the "authentic" interpretation of a rule. There is no rule for interpretation, thus showing great trust in the completeness and clarity of the *Code* on the one hand, and in the fairness of the judge on the other.

On the other hand, art. 6 of the ABGB states that in applying the law, it is not permitted to attribute it any other meaning than the one manifested by the proper meaning of the **words.** It is also important to consider their **connection** and the clear **intention of the legislator**. Furthermore, art. 7 enables judges to use **analogy** whenever a case cannot be decided either according to words or to the natural meaning of the law.

Between these two very different doctrines, the Austrian one will be adopted in the modern Italian *Codice Civile*.

OTHER CODES AND LEGAL SCIENCE

THE FRENCH MODEL IN THE WORLD

In the first half of the 19th century, the *Code Napoléon* represents the **exemplary model** of code, because of its intrinsic qualities. The major European and extra-European powers follow this model: some examples are Belgium, the Netherlands, Italy, Romania, and some areas of the American continents. It is only with the promulgation of the Swiss Code of Obligations in 1883, and especially of the German Code in 1900, that the *Code Napoléon* stopped being regarded as the primary model.

Nowadays, it has been adopted in many countries of Europe and South America, but also in Louisiana, which, despite being in the USA, was colonised for some time by the French.
The French model is **common**, thanks to its **clarity** and the **structure** of its commands, which could be clearly understood by everyone, even non-professionals. The values that the Code Napoleon protected, such as equality and liberal ideology, were appreciated in other countries.

The **reception** and influence of the French Code were either **direct** (meaning that other Codes were inspired directly, like in Italy), or **indirect** (when a French-influenced code inspired another code). In other cases, it is not clear. What is sure is that the promulgation of the *Code Napoléon* was a turning point in legal history. It was translated into many languages, and it was enforced in Italian territories until 1814 when Napoleon was defeated by the Allies.

According to historians Guido Astuti and Gian Pietro Chironi, the Code Napoléon was particularly popular in Italy not only because of its clarity but also because Italians could recognise their legal tradition in it, because of the common foundation of Roman law. They also seemed to see in the CN the **legal unity** of the Latin populations realised.

ITALIAN PRE-UNITARY CODES ADOPTING THE CODE CIVIL MODEL

During the Restoration, sovereigns understood that remaining in the past was not an option: many of them decided to **reform** their legislation, being inspired by the *Code Napoléon*.

In the **Regno delle Due Sicilie** (1819) the new Code had 5 parts corresponding to the 5 French codes; the first section deals with the *Leggi Civili*.
In the **States of Parma, Piacenza and Guastalla** (1820) the *Codice civile di Parma* was promulgated, which presented for the first time a mixture of Commercial and Civil Law in Private Law. It was also inspired by the AGBG.
In the **Regno di Sardegna**, the *Codice Civile per gli Stati di Sua Maestà il Re di Sardegna* was promulgated. It is the basis of the future *Statuto Albertino*. It was influenced by the *Code Napoléon*, and it mentions general principles of law. It also offers some legal innovations.
The *Codice per gli Stati estensi* was promulgated for territories in the Region of **Emilia-Romagna**. It was inspired by the *Codice di Parma*.

THE CIVIL CODE OF THE KINGDOM OF ITALY OF 1865

Just after 4 years after the reunification of the Italian peninsula the first Civil Code was promulgated. It is **much closer to the original French Civil Code** than to the pre-unification codes, already in the Cassini draft, one of the first. The *Code Napoléon* was considered of “undisputed excellence”, as it was considered an emanation of ancient Roman law. Because of its origin, the CN was considered a part of Italian heritage, since Roman law is Italian. Even though the reality was different, it was still conceived as such.
Additionally, the Code Napoléon had been previously observed in almost all Italian territories, so it was easier to implement on a national level.

Some scholars have noted that the Italian Civil Code was born **"already old"**, as it presented legal aspects that were already considered unmodern. Most European countries had already reformed many matters that the Italian CC kept. It adopts a secular position in referring, for instance, to civil marriage: this was caused by the social situation, but also by the situation with the Vatican City. The marital authorisation is maintained, causing many problems.
This aspect caused many controversies: for example, in former Austrian territories such as Lombardy and Venice, marital authorisation did not exist. Therefore, women there saw a worsening of their condition. The marital authorisation was not present in the Pisanelli draft and after the earthquake in Southern Italy, it was abolished. This was because women were requested to participate more in public life. The dowery and the succession through testament were reintroduced. Apart from the Civil Code, a Penal Code and the two Procedures were also promulgated.

The First Book is dedicated to **persons**. The structure is the same as the Code Napoleon: book, title, chapter, and article. It replicates the French model of the command role.
Civil marriage is introduced, to reaffirm the secularity of the State. However, the option to precede the religious rite is conceded. Divorce is not Introduced, but legal separation is better regulated, and its legal effects become greater. The marital authorisation is maintained despite the efforts of Pisanelli to abolish it, but its discipline becomes less strict. The rights of recognised or natural children are protected.
In the matter of **parental authority**, the possibility of appointing a guardian to the child's person or a curator to his or her property in the event of abuse of parental authority by the parent is introduced.
As regards **patrimonial relations** between the spouses (regulated in Book III, under the title *Contract of Marriage*), the separation of property is confirmed as the normal regime, with communion only admitted by agreement; the institution of the dowry is maintained, following Italian tradition.

The Second Book deals with **goods, property, and its modifications**. It contains an individualistic conception of property and the affirmation of the absoluteness of property rights. Both are characters directly inspired by the *Code Napoléon*.
As in the French Civil Code, there is a defect in the provisions concerning movable and industrial property: the code reflects an economy that is still essentially agricultural, and its provisions are now inadequate to regulate economic relations.
Ecclesiastic property is subject to civil laws and cannot be alienated without government authorization (artt. 433-434).

The Third Book deals with **rights in rem**. It is the longest book of the Italian Civil Code of 1865.
The first part is devoted to the subject **of hereditary successions**; as in the pre-unitary codes, the regime of legitimate successions is inspired by Justinian principles. Legally recognised natural children are included among the legitimate heirs; the surviving spouse is granted the *quarta uxoria*, as in the pre-unification codes; furthermore, distinctions concerning the nature and origin of the various hereditary assets are abolished.
In the general part of **obligations and contracts**, the legislation is almost entirely in line with the *ius commune* system, and the Italian code does not present any substantial novelties compared to the *Code Napoléon*. The affirmation of the **consensual principle** and **autonomy of negotiation** is fully taken from the French code, within a system of typical categories and figures.
The institution of **emphyteusis** as a land concession contract, even perpetual, is preserved; the emphyteutist is recognised as the owner of a right *in rem* with full powers of enjoyment and disposition, as well as the right to redeem the emphyteutic land.
The leasing of rustic land and the various **agricultural contracts** are regulated in detail, but there is a lack of adequate regulation of labour relations.

DEVELOPMENT OF LEGAL SCIENCE AND THE SCHOOL OF EXEGESIS IN FRANCE

All legal studies were always fundamental for the development of law in Europe: the rediscovery of Roman law was a result of such activity.

After the *Code Napoléon*, the prevailing belief in France was that the *Code* had achieved the legislative unification the country had long sought after. However, this did not mean that the new Code was a breach of the previous legal traditions. In fact, between 1804 and 1807, a lot of Roman works about Roman law and French customary law were still translated, studied, or even republished in France.

The **School of Exegesis** (or *École du Code*) was a particularly influential legal school in France. It had enormous success in France for almost the entire 19th century. Its main belief was that to learn the law, it was necessary to read every article and explain it word by word. The technique of **the article-by-article analysis** of the law was encouraged. The need to take the rule as the only point of reference arose from the concern of excessive freedom by the judges, without a fixed guideline.

THE SCHOOL OF EXEGESIS IN ITALY

This overwhelming practice extended to Italy, where the *Code Napoléon* was taken as an example, for many reasons (see the first paragraph of "The Civil Code of The Kingdom of Italy of 1865"). Inevitably, all the doctrinal positions and orientations in Italy find their inspiration in the *Code*. The influence and importance of exegesis in Italy is probably also due to all the translations into Italian of the commentaries to the *Code* of Demolombe, Duranton and Troplong.

The French School of Exegesis inspired most of the 19th-century Italian legal science. After the promulgation of the first Italian Codice Civile in 1865, exegetical legal studies were still very popular, but at the same time, Italian scholars had begun to be influenced by German legal science. Even though Italy had adopted a French-inspired legal system, it managed to achieve a middle point between that and the German legal school.

THE HISTORICAL SCHOOL OF LAW

It was an intellectual movement born and developed in Germany in the early 19th century. Friedrich Carl von Savigny is one of its most relevant figures.

Under the spirit of Romanticism, law is considered **the spirit of the population**, the expression of tradition, and the most profound legal culture of every community. It was therefore thought that **universal principle cannot exist** because every culture and population has its specific principles and laws. They are not considered natural. The only exception made is the Commonwealth legislation, as it was thought it represented a "characteristic spirit of the English people".
Law is to be considered an **uninterrupted flow** that arises from a community, develops with it, and transforms itself following the needs of each historical period, eventually dying with it. Therefore, the most legitimate legal source for Savigny is customs.

In one of his most famous works, *On the Vocation of our Age for Legislation and Jurisprudence*, Savigny takes a **very strong stance against codification** in all its forms, because he claimed that by fixing the norms into a written text, the natural transformative process of law is interrupted.
In *History of Roman Law in the Middle Ages*, he advocates for the **importance of the lawman**, whom he considers to be the only person capable of putting into law the thoughts, needs, and tendencies of humans. He also demonstrates the transformative process of law.
In ***System of Modern Roman Law***, Savigny rethinks the entire body of Roman law. It was an elaborate work on Contemporary Roman law, written by Savigny after he participated in the commission for the revision of the Prussian Code in 1820. He analyses the history and transformation of Roman law, trying to actualise it and eliminating norms that were not applied anymore. This work is the beginning of a new legal school, which will be created by his pupils and will eventually lead to the promulgation of the ABGB.

Savigny was not only one of the first legal historians, but he was also the first person to develop a systematic approach to law.

THE GERMANIC PANDECTIST SCHOOL

Savigny insisted on the need for a **systematic study of law** to illustrate the close connection and affinities among individual legal concepts and single rules. This approach of study was later developed and expanded by the Pandectist school, a natural prosecution of the historical school of law.

The link between the two schools is represented by one of Savigny's pupils, G.F. **Puchta**. He marks the shift from the historical conception of law to the jurisprudence of concepts: starting from a more general concept, it is possible to reach a more particular one through a logical method of **deduction**. Through this method, it is possible to build an "**architecture of law**", which is the general structure of all Codes object of the deductive analysis.

B. **Windscheid** (1817-1892) was one of the major representatives of the Pandectistic School. He breaks with the conception of custom and popular historical conscience and creates an exclusively dogmatic configuration. According to Windscheid the privileged source of law is reason and legal logic, not the popular sentiment. He will be among the main creators of the new German Civil Code

THE GERMAN CIVIL CODE (BGB)

The ***Bürgerliches Gesetzbuch*** or BGB follows a very conservative and bourgeois approach, mirroring German society under the rule of Bismarck. It is the offspring of the Pandectist elaboration by Windscheid. Therefore, it is the product of professional for professional jurists, very different from the French Code. It uses cultured and technical language, with a concise and elegant formulation. This caused great fascination among Italians, who would later use the BGB as an inspiration for the Codice Civile of 1942.
Its contents are inspired by the doctrine of modern Roman law the *usus modernus Pandectarum*, then re-elaborated by Savigny and the Pandectists.

It consists of **5 parts**: general principles, obligations, things, family, and inheritance.
In the BGB are inserted the most stable rules, those which were not supposed to change, because of an abstract approach. Matters and institutes linked to innovations in the economic field are therefore deliberately excluded by this Code.

ENGLISH COMMON LAW AND FRENCH CUSTOMS: A COMPARATIVE STUDY

For a very long time, customs were considered by the French as a matter of national identity.

OLD HISTORICAL DEBATE AND NEW PERSPECTIVES

According to Chancellor John Fortescue (d. 1479), common law is, first of all, **a law that the King cannot change** without the consent of his subjects: this is exactly what makes the United Kingdom a dominium at once political and royal (and not only royal, as it was in France). On the other hand, the law has **3 sources**: the law of nature, the custom, and the statutes (even if, once it is recorded in writing and promulgated by the King and the Parliament, the custom is difficult to distinguish from statutes).
Common law, in the eyes of the people of the time, was a constitutional guarantee of the power of the King. This idea also puts the law in an ideological and political perspective, that goes beyond simple jurisdiction: the law is an instrument through which a narrative is told, that influences the citizens' lives in one way rather than another.

This idea made changes difficult, but it wore out over time: **legislative change** is not only necessary but natural. For example, from the end of the 18th century and since the French Revolution, the law

has been organised around the written law (but not in England). Law has been reduced to the written provision, through the phenomenon of **legal centrism**.

For instance, talking about **international law and colonisation**, a similar thing happened when colonisers decided to change the local customs. Because they considered local laws "primitive", the colonisers would substitute them with written statutes. This caused enormous changes in the local societies, which were not yet ready for such an action. In many places, this led to dangerous separations in social classes, some of which withstand to this day.

AGAINST CUSTOMS

Customs have long been considered **confused and unfinished**: this accusation dates back to Roman lawyers but was discussed during the Middle Ages. In the span of a few decades during the 16th century, written law became the place where increasingly stronger sovereignty was established. Written law is seen as the main expression of royal power, and the expression of monarchical national sovereignty.

Jean Bodin discussed this topic in his work *Six Livres de la Republique*. It was written during the religious wars between Catholics and Protestants, which saw thousands of Protestants killed and the country torn apart by social pressure. Bodin wrote his books to try to find a way out of such disorder: for him, the answer was **absolutism**. He was one of its first theorists, which presented many theoretical problems: but for Bodin, an absolute power still represented the only instrument for peace. To establish such power, **written law** was considered the only instrument capable of guaranteeing a strong sovereignty: **to be a sovereign, one must be a legislator**.
This was a breakthrough for the time because customs were out of central control.

Another point of view was presented by the Romanist side, represented by **Jacques Cujas**. He argued that any legal need was contained in Roman law. Even French law comes from the Ancient Roman law basis, which still existed as a custom. Therefore, written law was considered more durable and Roman law was to be used as contemporary legislation.

IN FAVOUR OF CUSTOMS

Of another opinion was **Christophe de Thou**. He was a Parisian practitioner, who wrote a book about the customs of the city of Paris. It was a success and was read by many people of the time. He argued that the Parisian ones were not the most important customs, but that other French customs originated from them and, therefore, French customs should be interpreted based on the Parisian ones. This idea was a form of **legal nationalism**.

François Hotman wrote a book called *Antitribonian* (1547). Tribonian was a lawyer during the reign of Justinian. In his book, Hotman criticises Roman law, also arguing that law is the **coincidental product** of legal choices, religious choices, and moral choices. The question of law is also a question of vision of the world and of how the people belong together. Therefore, Roman law could not be adopted as a body of law in 16th-century France

Overall, customs were considered the **spirit of French law**, whilst Roman law was seen as an external, foreign source.

THE SCIENTIFIC REVOLUTION

In the 17th century, customs were more frequently considered of **secondary nature**, as opposed to natural law. On the other hand, Roman law was considered a product of reason.
At the time, **reason** was much more attractive to the minds of the people, who were living through a time of scientific revolution, led by people such as Galileo Galilei. It is important to remember, however, that the customs were still in practice and were influencing the lives of millions of people, who had no other legal instrument to appeal to. Customs were ruling many aspects of their lives, such as marriage and succession.

Voltaire in the *Dictionnaire Philosophique Portatif* criticised the diversity of customs in France. He saw this as unbearable and inexcusable for a modern State, as it made the lives of citizens and foreigners more difficult. Again, customs are considered **primitive and medieval**, in opposition to a progressive mentality that strived to modernity. Voltaire advocated for a written and detailed codification during the French Revolution. The reaction to Voltaire's work was so strong that it led to the codification through the Code Civil, after the fall of the Ancient Regime.

CUSTOMS AND VOLKSGEIST

During the Romantic period, a new vision of customs was developed. In Germany, folklore led to the belief that customs were **a product of the Volksgeist**, the spirit of the people, and therefore they should be kept. Customs were seen as a **national treasury** and a way to access the spirit of the people of a certain region. This vision did not have a scientific background.

THE COUTUMIERS OF THE 13TH CENTURY

In the 13th century in France, there was a strong movement advocating for the **transcription of customs**. It was led by private jurists, without the support of the authorities. Furthermore, these documents were written in **vernacular language**, not in Latin, which was the language of law at the time. This was because of the social need of laypeople to access the most important legal elements of their time, which were ruling their lives. This idea of redacting customs was particularly strong in some parts of France, as many manuscripts with this content have been found.

THE "DROIT COMMUN" DEBATE

There are some mentions of ***Droit Commun***, "Common law", in the *Coutumiers*. For legal historians, such mention of general customs is to be interpreted as a mention of the Ius Commune, the main source of Roman law that was studied all through Europe.

Philippe de Beaumanoir, however, argued that the main source of customs of the 13th century, the *Coutumier*, mainly related to general customs. Despite acknowledging that the Coutumier recognises and references Roman law, he argues that the *Droit commun* mention refers entirely to customs, and not to Roman law. He wrote that there is no proof demonstrating otherwise.

The idea of **general customs** was born simultaneously in France and England, despite it having a different meaning in England. We know that in England, "Common law" referred to the royal law that was enacted throughout the Kingdom.

The ***Etablissement of Saint Louis*** was found in many manuscripts written during the 13th century. The first manuscript does not mention *Droit Commun* at all. But later, they introduced the idea of common law: this goes to show that it was becoming increasingly important. However, copyists also decided to introduce the term "general customs", which could suggest that the common law referred to a form of law that was common to more people and areas.

NEW PERSPECTIVES

Ada Maria Kuskowski published a book entitled "*Vernacular Law: Writing and the Reinvention of Customary Law in Medieval France*" (2022).
She proposed a very theoretical framework to study this phenomenon. Kuskowski developed an approach to the *Coutumiers* different from most other scholars: while they tend to emphasise the local nature of customs and the separation between learned law and the law of ordinary people, she understood that the *Coutumiers* were not simply the collection of local customs, but the **work of legal scholars**. Through the writing of the *Coutumiers*, however, customs are made a separate form of law, collected in a separate body of law. Therefore, customs were the **object of learned law**. There is no more opposition between learned law and regular law: Royal law and customs are simply separate bodies of law.

The Medieval writers of the *Coutumiers* "invented" customs through the act of writing them, as no one had ever recognised their status before (as the writer himself recognised in the acknowledged of the book).

The fact that the *Coutumiers* were written in French is very important because it made it possible for laypeople to know their rights and defend them.

The question of customs should make us jurists think about the nature of law: is law something shared, or rather something people are simply subjected to?

THE POLITICAL FRAMING OF COMMON LAW

The Common law was initially conceived as the law of the king, the sovereign, but it soon escaped the political dimension.
Common law appears to be one of the **distinguishing features of English culture**, a kind of national treasure that is seen and praised as a characteristic of those people. However, Common law was the product of the conquest of Britain by the Normans, who imported such a system after 1066. This was despite the traumatic and violent nature of the conquest. The Common law was a **royal invention** by Henry II, the successor of William the Conqueror.
Therefore, it would be probably more correct to say that Common law was born thanks to the Norman conquest of Britain, rather than with it.

THE NORMAN CONQUEST

In 1066, **William Duke of Normandy**, son of a family of former Vikings, attacked and conquered Britain. He had carefully planned the conquest for years, with the intent of killing the British king and stopping the Anglo-Saxon expansion. This was the last time that England was invaded.

SOCIAL CONSEQUENCES

Once England was conquered, the settlers faced many challenges in maintaining their control over the region. The **local population reacted harshly** to the invaders, causing many minor battles on English territories. The Normans that came to England were approximately 5000 people, most of whom were knights: they were therefore very few, compared to the native population. The **Anglo-Saxons**, at the time, were the main population of Britain and they were accustomed to a certain freedom and forms of self-government. This **contrasted with the Norman system**, which was heavily centralised and with strong hierarchies. This aspect further fuelled the rebellions against the Norman rulers. In particular, the Anglo-Saxon aristocracy was opposing the new regime.

William the Conqueror faced these difficulties, first, by building **castles** around the region, to provide a place for soldiers and govern officers to stay and prevent rebellions. This inadvertently caused the insurgency of **feudality**. William also decided to attack the aristocracy, through **confiscation** of their possession. This was justified by the rebellion and resistance of these families or just some of their members. William then transferred these funds and possessions to people he trusted.
William also decided to provide his knights and fellows with land, acquired through the confiscations. This would strengthen the Norman control of the territory, through building **fidelity and trust with the armed class**.
With this act, William established himself as the owner of the land, which is not a characteristic of kings of the time. That land was originally the property of other people. William had acquired the land through the "**law of conquest**": the defeated lose any right, as "losers of history". From being free, under Anglo-Saxon law, they ended up being subjected (or even exterminated) by the invaders.

LINGUISTICAL CONSEQUENCES

The noble class was rebuilt from the Norman population who emigrated to Britain. This caused all the major families of the time to be of French origin, therefore they spoke French: until the 14th century, there was a **duality in language**, with the higher classes speaking French and the lower classes speaking English. This fact had repercussions on the modern English language, too.
Additionally, this led to the creation of the "**Law French**", a particular type of French used specifically to write the laws of the Norman kingdom.

THE DOMESDAY BOOK

It means "Book of Last Judgement" and it was written in 1086. It represents a unique source written by the Normans, as it is a manuscript record of the "**Great Survey**" of much of England and parts of Wales. It contains a very accurate and precise description of each village, city, country, forest, river, and anything present in the country. Its scope was to define the owner of every piece of land. This document has no equivalent in the Europe of this time.
It is known, thanks to this book, that at the time of the redaction, the entirety of the former Anglo-Saxon nobility had either died or fled: no other European Medieval conquest caused human destruction to the higher classes to such extent.

POLITICAL CONSEQUENCES

One of the challenges that the Norman monarchy had to face was the **geographical separation** between Normandy and Britain: families had to choose whether to leave their properties in Normandy to settle in England, or to stay. This political challenge is double-faced and represents the challenge of the Angevin empire.

The **Angevin Empire** was ruled directly by Henry II Plantagenet in all of England, some parts of Wales and Scotland, Eastern Ireland, and Normandy. Henry II married Alienor d'Aquitaine, the former wife of the French king and a very cultured woman. Through this marriage, Henry II acquired power over all of Western France.

During this time, **feudality** was born. During the 11th-12th centuries, people went from being free to be subjected to the feudal lord, who claimed power over those lands and often refused the sovereignty of the king. In England, this phenomenon took a **peculiar and hierarchical form**, with the King being at the top of the feudal ranking (as it is to this day). To every place in the hierarchy corresponded specific duties and specific extensions of land. It is a hierarchy linked to special duties or missions. To this day, the UK has one of the strongest aristocracies in Europe, in which wealth, power and capabilities correspond.

THE NEW JUDICIAL ORGANISATION IN THE HANDS OF THE KING

Henry II Plantagenet decided to enact a **judicial reform** that would empower the royal central courts.

There were two major judicial divisions: the **County**, the major one that would be kept by the Normans, and the **Hundred**, the local division. In this local justice, the **community** played a major role in the enactment of justice, because the goal of justice was to re-establish peace. People had an interest in testifying and getting involved in the trial, as it would have meant the return of peace in the village.

Henry II decided to change this system, devoting it to the idea of maintaining the **peace of the King**. The idea of the law of conquest led the King to believe he had the right to establish and control every title in the territory. This reform was therefore enacted following the King's interests, in particular monetary ones, as the reduction of local courts would lower costs. On the other hand, the King wanted to accentuate **centrality**, but this was seen as an injustice from the point of view of the local population. An example is the case of a felony: whenever someone was accused of a felony, they could lose their title.

The defendant was judged by the ***judges in eyre***, the itinerant judges. They were judges loyal to the King, but they travelled the country to decide cases. It is the activity of the itinerant judges that eventually led to the creation of the Common law as it is intended today. One of the main tasks of the itinerant judges was to establish who was the owner of a certain piece of land in *Common pleas,* requests of judgment from the common people.

Common law has long been considered (and it still is) an example of **case law**, a law system based on specific precedent judicial decisions, the *stare decisis*. It opposes the Civil law system, which is an inductive system based on written general rules. The English Common law is very pragmatic because it is based completely on concrete cases, and it implies a **step-to-step** way to solve problems.

The birth of Common law in England was therefore not the product of the institutionalisation of justice, but rather the **by-product of the King's judges** who decided based on precedent judicial decisions on the same topic. This paradox tells us that this system was **born from the administrative English power**, and it was not the product of the need for justice or peace.

Henry II succeeded in making the royal courts very attractive.
Before the judicial reform, there were independent local judges, dependent on the local laws of the feudal lords, while on the central level, there was the Curia Regis, a court subjected to the King that only dealt with feudal justice, so disputes between lords.
What Henry II did was not destroy the old system but build a way to make the Curia Regis able to decide on any kind of case. The system of local justice was kept as before, but **royal justice was made more attractive and efficient** so that other people would choose it. He therefore implemented the decisions that the central Court was able to make.
Common law is about power, as it is a clear way to affirm dominance.

THE TRIAL BY JURY

This transformation was possible through a series of reforms and many edicts, such as the a*ssize of Clarendon* (1166). It introduced the trial by jury, first for civil matters, then also for criminal matters. It gave people **3 actions** through which to access the jury: they were all about land, property, and inheritance.

What is interesting about these 3 actions is that they are **about possessory disorders** (or possessory troubles), problems regarding the *de facto* situation of possessing something.
Property is made of the right itself (the consciousness of owning something) and possession (physically using something).
The possible contestation was about the nature of property, whether it is mere possession or full property. The goal of the court was not to understand who the real owner was but to declare who was the possessor of the good or land.

The jury was made of **neighbours**, 12 men living near the area affected by the disorder. Because of their knowledge and testimonies, they would declare who was the actual possessor. The jury member had to take an **oath**, swearing to say the truth. The verdict was called *vere dictum*, "said truthfully", because the jury members had taken the oath.
The **Grand Jury** was responsible for declaring to the judge whether they believed the defendant was guilty or not. Therefore, they covered the role of the prosecutor. After the accusation, the **Petty Jury** was responsible for judging the defendant and declaring the sentence of the case.
All members of the jury were **ordinary men**, people who were not educated in judicial matters, but simply "reasonable men".

The practice of trial by jury was not native to the Common law, but it was introduced from the North of France, where it was used to solve controversies between parties. It eventually was abandoned in France, but the trial by jury had much success in England.

THE ORDEALS

Also called "*judicum dei*", they were practices used during trials in which was impossible to know the actual truth. In case of uncertainty, there would be an appeal to ordeals, so practices to "**appeal to God**". There were many types of ordeals, such as by fire and by water. In the ordeal by fire, a metal object would be put into the fire and then would be held by the defendant in their hand. Three days later, if the hand did not have any scar, the defendant was declared innocent; if the practice left a scar, they were considered guilty. In the ordeal by water, the defendant was thrown into the water, which was considered a sacred element. If the water repelled the person, they would be considered guilty; if they could stay in the water, meaning they floated, swam, or even drowned, they were considered innocent, because the water "accepted" them.

However, in 1215 the Fourth Council of the Lateran **abolished** the practice of ordeals, as they claimed that God would not intervene in trials. Because of this, the role of the Petty Jury became increasingly important, as they were entirely responsible for the fate of the accused.

THE WRITS

Also known as "*brevia*", writs were **very brief texts containing or**ders, that were sent from the King to the sheriff. Sheriffs were local agents in the country, subjected to the King. They were the product of a complaint from an ordinary citizen to the King. The King would order the royal agent to demand action from the subject of the aforementioned complaint. If the defendant refused to do what the King demanded through the writ, they would then need to go to the Royal Court to defend their case. It is not a trial, but an **administrative act**. As there was no disorder behind the complaint, there was no need for a trial. It simply is contempt for royal authority, a way for the King to create artificial competence for the Royal Court's judgement.

There were **different types** of writs, depending on the situation and the goal. Once a kind of writ was chosen, it was not possible to change it, so the choice of the writ was a very important process. The request for a writ had a monetary price, so people had to carefully ponder this decision.

The Statute of Westminster was issued in 1285 by the Parliament to **stop the creation of new writs**: it is only possible (even today) to use pre-existing ones, *brevia in consimili casu*. In the beginning, this did not cause any problems, but as English society and the world progressed, the needs of the people changed. Common law is a very ancient system, that makes lawyers deal with very old cases that cannot be ignored, as it would cause the collapse of the system. In this perspective, the abolishment of new writs is coherent with the overall idea behind Common law.

Common law is a very **procedural legal system**: while much importance is given to the respect of procedure, much less attention is given to substantial law.

THE NISI PRIUS SYSTEM

The first moot of Common law was created in **Westminster**, for them to be near the King. The decision was problematic, as it was very expensive for common people to travel to Westminster. This posed a problem to the King himself because the decision to centralise the judicial system was partly dictated by financial needs. That is why it was decided that a **commission** was allowed to collect evidence on the place where the controversy or the crime happened, to create a document where all testimonies and descriptions of evidence were collected. This document would be later taken back to Westminster, where the Court could examine it and declare their sentence. This happened when the people involved could not afford the trip to Westminster.
This system was very important for the establishment of Common law throughout the Kingdom.

COMMON LAW: A LAW AGAINST THE KING, A COMMON GOOD.

THE CRISIS OF ENGLISH MONARCHY (BEGINNING OF THE 13TH CENTURY)

King Richard became king at the end of the 12th century and spent most of his time outside of England. Despite that, the kingdom was still ruled perfectly, thanks to its efficient administrative system. Things changed radically with his brother, **John Lackland**.
He was not a very smart man and gave priority to the elimination of his opposition. Such a goal was **opposed by the higher classes**, but the King still tried to have the last word over the decisions of the two main parties of the time. King John's actions caused **antipathy in the Church**, too, as he aimed to limit their privileges in the kingdom. In particular, Bishop Stephen Langton, a very clever man, opposed the King and sided with the barons.

THE MAGNA CARTA

This situation of social pressure and possible civil war ended with the signing of the Magna Carta, in **1215**, a **peace settlement** between the King, the barons, and the Church. The document was written in Latin, but it was soon translated into French. Because of this, the Magna Carta is the first official document written in vernacular language. There is no proof that it was translated to English and there is no reason to believe so, as the common people were not among the recipients of the document.

John Lackland died one year later, in 1216, so he was unable to implement the Magna Carta. His son Henry was just 9 years old, so he could not do it either. Because of that, the Magna Carta was **reissued** in 1217 and 1225, to keep its meaning and importance alive until the new King Henry III could implement it. The original meaning of a peace agreement was soon forgotten, to leave space for its **political significance**: the Magna Carta represented the conquest of a space outside of the King's control. The disappointing part of the Magna Carta is the fact that it mostly contains **privileges of the higher classes**, so it cannot be argued that its value is based on its contents: it is based entirely on its political significance.
The most important and famous article relates to the **right to fair judgment**, which still today is important and problematic in many countries.

The long posterity of the Magna Carta is caused by the fact that it is the first document in history that grants **civil rights to subjects of power**, despite it not being the main goal with which it was issued. There are two main principles stated in the Magna Carta: the first one is the ground-breaking principle that the **King is subjected to the law**, and he is not a sovereign anymore. Even though at the same time, in Europe, monarchs enjoyed unlimited power and discretion, in England the King was spoilt of his sovereignty: this makes the Magna Carta a truly unprecedented document, extremely modern and progressive for its time. The second one is the principle of "**no taxation without representation**", for which the King cannot declare a new form of taxation without the approval of the Magnum Concilium. The King had the obligation to discuss his ideas with the representatives of the people (in this case, however, this only regarded the higher classes).

THE TRANSFORMATION OF PARLIAMENT

After the signing of the Magna Carta, the Parliament (then called *Magnum Concilium*) transformed from a temporary assembly to a **permanent** one, fundamental in the political decision-making process. The first purpose of the Parliament, as written in the Magna Carta, was to **discuss taxation**. In its first years, the Parliament looked like a **feudal council**, in which the vassals (the feudal Lords, members of Parliament) were all loyal to the Lord (the King).

In the mid-13th century, **Simon of Montfort** founded a movement that comprised both the higher and middle classes, even peasants, in rebellion against the request of the King for more money. This movement included people of all social classes and the Church. His action was successful, and he requested further support from the Parliament, to obtain more power. The rebellion led by Simon de

Montfort was a turning point in the history and the structure of Parliament, which lasted even after the death of Simon: the **representation of lower classes** was accepted into Parliament, and eventually, in the 14th century, the **House of Commons** was instituted in the English Parliament, alongside the pre-existing **House of Lords**.

Traditionally, the representation in Parliament was linked to feudality, which meant that a member of Parliament had to obtain a *fief* (a piece of land) from the King, becoming a direct vassal of the King and one of the richest Lords in the kingdom. Parliament was heavily characterised by a hierarchy of fidelity and wealth. These Lords would be also called "Tenants in Chief". In the 13th century, a new conception of representation arose, coming from the old principle of *quod omnes tangit ab omnibus debet aprobar*: the things that concern everybody should be decided by everybody. It is the foundation of the **representation of community**. Each vassal could advise the king, but now every member of the community had the right to also share their opinion.
This led to a **wider political representation**: as everyone cannot be part of the Parliament, **elections** were introduced, for everyone to choose the people to represent their ideas in the Parliament. This kind of representation will be present in the House of Commons from that moment forward.

The role of Parliament itself also evolved: it went from a merely consultative assembly to a **decisional and political organ**. What is quite striking as well is that the initial fiscal concern was the beginning of a proper political dialogue. This might be the reason why, to this day, the UK is one of the densest democracies in the world, because democracy is deeply rooted in the country's historical identity.

THE EVOLUTION OF PARLIAMENT AT THE END OF THE MIDDLE AGES

The main changes that happened were the **institutionalisation** of Parliament and the appearance of the **Speakers** of the House of Commons. The idea of the **immunity of members** of Parliament also arises. These dynamics are representative of the changes that the Parliament has gone through, to become a proper and independent political entity.

The **religious question** also arose: at the beginning of the 16th century, King Henry VIII decided to leave the Catholic Church and found his own Protestant doctrine, the **Anglican Church**. This happened in the middle of a wider and more violent movement that was spreading all through Continental Europe, which culminated in 1648, at the end of the Forty-Years War.
Following the decision of Henry VIII, his subjects were supposed to follow him and convert to Anglicanism; but before that, the King needed the support of the Parliament for his religious reform. Through this dynamic, the **Parliament is officially qualified as sovereign**: the King in Parliament means sovereignty for the assembly. The King and the Parliament enjoy the same power.

In the 17th century, another significant event happened: the alliance of the Parliament with the Courts of Common Law and the Puritans against the new King and the Courts of Equity. In 1603 the new dynasty rose to the throne, after the death of Elizabeth I: the **Stuart dynasty**, from Scotland. They wanted to restore the complete and absolute sovereignty of the King, because of the influence coming from France (for example, the ideas of John Bodin). They also had Catholic connections. The Stuart dynasty could count on the support of the Court of Equity, an English Court that judges according to a type of Civil law, the Canon law.
The side of the Parliament eventually succeeded: after the **Glorious Revolution** the Stuart dynasty was defeated, and the Parliamentarians remained the **only sovereign in Britain**. To this day, the King or Queen of the UK is not sovereign but covers a merely symbolic role.

The Common law is not only a question of judicial expertise, but it also carries a vision of society and power, of **limited power**. Even though it initially strived to represent the power of the King, it now has the goal of **limiting the royal power** over the subject's lives.

THE EMANCIPATION OF COMMON LAW COURTS

As a result of the success of the reform of Henry II, there was an **increase** in the common pleas and the request for judicial adjudication. To cope with this strong development, the itinerant judges requested a change in the system, because it had become impossible for them to solve all the cases on their own. This led to the creation of **new judicial institutions** that were responsible for the resolution of controversies.
People could choose whether to be judged by the King or by these new judicial subjects. The Courts guaranteed a faster judgement, so they were majorly preferred.

The history of the Common law is the history of separation from the King. The old Curia Regis is the origin of the English Parliament, the Court of Common Pleas, and the King's Bench. These Courts, in most cases little by little, were able to escape from the King's power: it was, therefore, a story of emancipation.

THE COURT OF COMMON PLEAS

The Court of Common Pleas judged controversies among **ordinary people,** and it mainly dealt with **civil jurisdiction**, but with the supervision of local and manorial courts as well. It was the **most active** though not the highest of the Common law courts. It has been defined as "the lock and the key of Common law".
It was mentioned in the Magna Carta, which meant that it existed before its signing, most likely since the reform of Henry II: therefore, it is a very old Court. It was settled at the beginning of the 13th century in **Westminster**. The Court of Common Pleas was very **sedentary**, as it was not supposed to move. On the contrary, the King was constantly travelling the country to keep a connection with his subjects. Therefore, since the beginning of the 13th century, the presence of the King was not necessary for the Court of Common Pleas to be functional: the King is not one of the judges of the Court of Common Pleas.

THE KING'S BENCH

The Court of Common Pleas was supposed to have a subsidiary role, as they were competent in cases regarding ordinary people. On the contrary, the King's Bench (which can be considered a higher court) was competent in cases regarding **higher subjects**, such as barons and Lords, Criminal law, and **administrative matters**.
This separation of competencies is strategic for the King's maintenance of power, as the **King presided over** the King's Bench. The Court also followed the King in his travels.

Around the end of the 13th century, nearing the 14th century, the King's Bench started to **settle** and to move less and less. That is why, in the 14th and 15th centuries, the King presided the King's Bench increasingly less. Consequently, the decisions of the King's Bench became more theoretical and complex.
At the beginning of the Stuart dynasty, King James wanted to get back his role and power in the King's Bench. The judge in charge of the Court, Edward Coke, refused, arguing that the King was not educated in Law and not a jurist. The same thing happened, at the same time (at the beginning of the 17th century), to the French King.

THE COURT OF EXCHEQUER

It is probably the oldest English Court, and its name comes from an ancient way of counting. It deals with **fiscal** and **financial** matters. Its business on the **equity side** included disputes over titles of land, manorial rights, tithes, mineral rights, ex-monastic land, debts, wills and so on. The types of cases heard under its common law jurisdiction included breach of contract, debt, personal injury, medical negligence and libel. These types of cases could be tried before a jury.

There was also a Court of Exchequer Chamber, which was a common law appeal court for cases from the Court of Exchequer, Court of King's Bench and from 1830, directly from the Court of Common Pleas.

THE FORMATION OF A CLASS OF JURISTS INDEPENDENT FROM THE ROYAL POWER

The first resource about the training of Common law jurists comes from the testimony of a French man in the 15th century. It is known that, by that time, the training was well organised and institutionalised.
The training had a **double mission**: the formation of young jurists and the control of access to the profession. It was understood very early that it was necessary to check the credentials of people defining themselves as jurists.

Universities existed since the 12th century and were initially devoted to the teaching of Roman law. The most important English universities in the matter were the universities of Cambridge and Oxford. There were also courses in Canon law, but they were not very popular.
One of the particularities of this kind of training was its **practicality**: the students would be very often taken to court hearings and expected to listen and understand the situation they were observing. The students should have acted as lawyers, even though they were not yet.
Common law, stemming from practice (trials), is not taught in Latin, as was the case in the rest of Europe. Furthermore, **moots** were a very common event, in which students would pretend to be the plaintiff, the defence, and the judge.

The **Inns of Court** and the **Inns of Chancery** were the places devoted to the education of lawyers, where they lived and received a **complete set of education**, as their activities ranged from law studies to eating, praying, and others. The Inns of Chancery provided more of a preliminary preparation to new university students, whilst the Inns of Court were built near courts and there were only four throughout Britain.
The Inns were a good way to get a **high-quality education**, as it would teach students not only how to be a lawyer, but also how to dance, write, and much more. It educated young English gentlemen. Because there were so few institutions dedicated to it, this way of training was a powerful tool to create a **distinct social group**, with very strong links with one another.
The Common law, which developed as a refusal to follow the King's power, was becoming **increasingly exclusive** and linked to the higher social classes.

THEORY OF COMMON LAW

THE JUDICIAL PRECEDENT

The origin of the rule of the precedent cannot be precisely dated, but we know that it is linked to the publishing of Year Books. They are the law reports of medieval England, containing the judicial decisions made in a year.
In the Common law system, what is obligatory is not the existence rule, but the **decision of the judge**, which must be commented on and justified thoroughly in the **mandatory statement**. This is very different from the Civil law system, in which the judge must follow a specific rule and is not always expected to explain their decision, as the law is an order that just must be followed. The mandatory statement can be very long, and it expresses the *ratio decidendi*, the reason why that decision was taken in the event of that case. It can be published along with **dissenting opinions** of other judges of the court who do not agree with the mandatory statement (**majority opinion**). In the Civil law system, the decisions of the court are supposed to be unanimous, so dissenting opinions are not published.

The rule of precedent is also called ***stare decisis***. The law is about reason; therefore a judicial decision is the result of a rational process: the idea is that if the use of reason has given a certain result, then that result is found. The use of reason cannot give different results: even if the decision

was made centuries ago, reason stays the same. The idea behind precedent is the one of **permanence of reason**.
But sometimes, there are brutal changes in the jurisprudence. In the Civil law system, the judge is an institution, but also an implementation of the political authority, as they follow the legislation, which might change. In the Common law system, **change** must be made differently.
In his declaratory theory (from *Commentaries on the Law of England*, 1765) Judge Blackstone argued that the judge is the **oracle of the law**: through a sentence, the judge simply reveals the rule, which already existed. The judge just makes it visible to everyone, and at that point, it cannot be changed, because no other rule can exist. If a precedent decision is not considered fit for the case that they are called to decide on, the judge cannot change it, nor can they state that the old one is a bad law. They can only say that the former was not law in the first place.

To be able to dismiss a precedent from the decision of their case, the judge can argue that the *ratio decidendi* does not apply to their case, through the **distinguishing**. The judge can also argue that their case is distinct from the object of a precedent because the facts are not the same. It is a distinction made because of ***obiter dicta***.
Therefore, despite the precedent being binding in Common law systems, this rule has a **margin of malleability** that enables the judges to enact changes in the legal system.

History of law does not exist in Common law systems: the history of the legal system is remembered through the study of old precedents. Because of this, it is even more important to recall and remember the history and development of law in these legal systems.

THE PLEA ROLLS

The plea rolls are **acts on procedures** written by the courts of Common law. In a way, they can be considered **normative documents** of Common law. They are in **Latin**, though some items, such as indentures and direct quotations in cases of defamation, are in English.
They are called "plea rolls" because they are long rolls of various materials on which the judges would write. They were kept from the 13th century, and they contain every act of procedure that has ever been made since then. They are not very much about facts, but they are very much **about the procedur**e and are used to determine the **fees** that people had to pay for the trial: therefore, they also covered a **fiscal role**.
In this type of source not much attention is paid to the actual facts because it is not so important to remember who and what was involved in the case. It is a very interesting source for historians, but it is not very entertaining to read.

THE REPORTS: THE YEAR BOOKS

They are the earliest **law reports** of England, which are kept by and inside the courts of Common law, in precious archives made to conserve them. The reports are not made by the judges themselves, but rather by other **jurists** (such as lawyers or even law students) who attended the trial and wanted to report the case. The language of the original manuscripts and editions was either Latin or Law French.
They are very important because they record the **facts** of the cases in question. These reports also circulated through the public and they played a major role in the **legal acculturation** of the population. Acculturation is the diffusion of knowledge from one social group to another. Thanks to the reports, even the ordinary alphabetised public was able to know more about the legal procedures and the rules they were expected to respect.
As soon as these reports are diffused and read by people outside the court, it means in a sense that the judges are supposed to follow exactly what was decided in those cases. Therefore, the reports played a role in the **development and affirmation of the judicial precedent**. This is another difference from the Civil law system, in which judicial decisions can be kept completely secret and so future decisions become unpredictable.
The Common law strives to protect the rights of people by giving them access to the law.
containing reports of pleas heard before the Common Bench

The Year Books were organised by the year of the reign of the sovereign (e. g. The third year of the reign of King James). They were written from the 13th to the 16th century, when their publication encountered a crisis because the invention of printing revolutionised the press industry: the old kind of Year Books (manuscripts) were replaced by the new kind (printed collections). Editors and authors took the responsibility to print, write, and diffuse reports. Judge Edward Coke worked on many editions of Year Books. In fact, in these collections, the decisions were also commented on by jurists. Year Books and reports continued to be written and published even after the 16th century, to this day.

CUSTOMARY LAW IN FRANCE

THE VERNACULARISATION OF LAW

Towards the end of the Middle Ages, a phenomenon of vernacularisation involved legislation in France: This was a breakthrough for French law, a **revolution** that was influenced by the rediscovery of Roman law and the Code by Justinian.
Roman law was written in Classical Latin, which was very difficult. Latin was useful because made law accessible to jurists all around Europe, but it also had a symbolic value, as knowing Latin meant that the person was cultured and knowledgeable. This eventually led to the **banishment of the vernacular in teaching**, as it was written in the rules of the University of Toulouse and Orleans. Latin was seen as the natural language of the law.
However, exactly at the same time, we can observe an **extraordinary flow of texts in the vernacular** language in university and among jurists. This is not a marginal or isolated phenomenon, as it was attested in many regions of Europe.
For example, *The Mirror of the Saxons* was a document composed in German between 1220 and 1230 by Eike von Reigpow. *Siete Partidas* is a document written in Castellan about the use of Roman law at the Court of Castille. In the Christian Kingdom of Jerusalem, there was a production of texts about the laws of that territory, such as the Assises de Jerusalem. In England, the highest number of legal texts in the vernacular was found.

13TH CENTURY FRENCH COUTUMIERS

The starting signal of the phenomenon of the *Coutumiers* was given in **Normandy**, which was, at the time, under the control of the Plantagenet Empire, but also at the centre of cultural exchange between English and French culture. Furthermore, the Exchequer of Normandy wrote down many of its rules as early as the middle of the 12th century. This movement was developed in the largest part of the regions of North-Western France, in cities such as Anjous, Orleans, Beauvaisis, and Artois. From the middle of the 13th century, the movement gathered pace, with documents such as:

- the *Coutumes d'Anjou et du Maine* (1246);
- the *Conseil à un ami* (Advice to a Friend), written by a royal bailiff, Pierre de Fontaine, who set out in French the customs of Vermandois, which are generally dated 1253;
- the *Summa de Legibus Normannie in curia laicali* (1254-1258), again written in Latin and soon translated into French as the *Grand coutumier de Normandie*, the text of which circulated in Latin and French

This movement has **not** been probably **considered and studied seriously**, because each text has been studied on its own, independently from the others. There is also the belief, among historians, that the "real" law is the one written in Latin, therefore customs should be a secondary form of legal texts. It is difficult for historians to consider customs a legitimate source of law.
One of the most important studies on the matter is the one by **Ana Kuskowski**, who uses the expression "**vernacular term**" in the law. What is interesting, too, is that the redaction of the *Coutumiers* is not the only expression of this vernacular term: **French translations of Roman law** have been recovered. These translations are not only about the law itself but also about commentaries on the law. Today, at least 90 manuscripts of translation have been recovered, which is a very big

number for the Middle Ages. It means that there was a **strong circulation** of these texts. These translations are also of exceptional quality: they were very long documents, made of hundreds of pages. These translations must have involved many people and they have probably been supported by massive amounts of money.
This is very strange because vernacular had been banned from the teaching of law and yet, these texts have been recovered and they are known to have been used to study because they present notes written by students. They were **practical manuscripts**. Furthermore, some of these translations were used in the coutumiers of the 13th century, where we have some extracts of these translations in the vernacular.
Therefore, French coutumier have been mixed with Roman law and translated into vernacular French.

STUDIUM OF ORLÉANS

The importance of the Reign of Saint Louis is also represented by the increase of these translations. The vernacularisation of the law was a high-quality phenomenon, and it was not about the creation of law: it was merely about the **creativity** of mixing Roman law with local customs.
The Studium of Orléans was born thanks to an Italian professor who disagreed with the dominant school of Irnerius and the school of the glose. He decided to move to Orléans, probably because of the city's proximity to Paris and the presence of many schools and universities. The studium also had links with the Royal court. The Studium of Orléans is important because it is the only school that was created in a **region practising customary law**. In Orléans, Roman law was studied and practised, but in the context of customs. This was the start of a narrative of relations between the university and the Royal court.

At the same time, during the Reign of Saint Louis, a major **judicial reform** was made. First of all, around 1250, the ***Parliament de Paris*** was established: it was only a judicial court, even though it aspired to be more. A new, strong organisation of justice was created thanks to the introduction of **inquiries**. King Saint Louis wanted to put the Kingdom in order before departing for the Crusades and the inquiries were part of this process of good administration. They were about sending **royal commissioners** everywhere all around the kingdom, to ask people whether they encountered any problem with administrative personnel or any crime in general. Inquiries were a way for the king to ask the people if there were any aspects to improve in the administration of the kingdom. In a sense, they were also part of a process of **modernisation**: the *Coutumiers* might have been born as a way to memorise laws and use them against the abuse of power by royal officials.

A new conception of law was born: Roman law, customs, royal legislation, and judicial decisions should all be part of law. This **unitary conception** constituted the basis of Common law in France, We have many references to *Droit Commun*: for many historians, it was only Common law, but it is now known that the Droit Commun is made of **all the sources of law available at the time**. The differences among the sources of law were introduced by modern historians, as in the Middle Ages people made no distinction between Roman law and customs, for example. During the Reign of Saint Louis, there was simply the idea of Common law, which was a developing idea, but it was still used in its entirety in courts. For example, Philippe de Beaumanoir said that "the clerks know very good Latin and want to impress people with it but laid-people do not know Latin and do not know how to defend their rights in front of them". Therefore, he wrote his collection of laws in the vernacular to empower laypeople.

MONARCHICAL CONTROL OF CUSTOMS (LATE MIDDLE AGES, ANCIÉNT REGIME)

CHARLES VII, THE RECONQUEST OF THE KINGDOM, AND THE REUNIFICATION OF THE COUNTRY

The *Coutumiers* were not an official product of the royal authority. At the end of the Middle Ages, the King decided for the first time to **manage the customs** in law himself: he decided to introduce the customary law in the legal order. In a sense, before that, customary law was independent from the royal legislation: this changed when the King decided to take control of it.
The King, who at the time was **Charles VII**, had won the Hundred-Year War against England thanks to Joan of Arc and he had reunited the country under his royal control. Taking control of the customs is exactly in the same direction as unifying the kingdom geographically: the King wanted **a united kingdom**. In 1454 it was decided to start an **official redaction of the customs**.

The first procedures were very long and demanding, so it was necessary to change them towards the end of the century.
The redaction process was very particular. Local people were called to an **assembly**, where they were called to express their opinions about customs. In some cases, this was easy, but in many others, it was difficult to reach a unanimous agreement about the topic. In this discussion, there were people in charge of the management of the assembly, who were from the *Parliament de Paris*. **Christophe de Thou**, the head of the Parliament de Paris, was extremely important and influential in the process of discussion of customs. When an agreement was reached on all topics, the decision would be published and this publication had **legal power**: through that, customs became **part of royal legislation**. In a sense, the custom changed in nature: it is not a form of spontaneous popular legislation, but a form of legislation approved by the King. This process went on until the first part of the 16th century.

CHARLES DU MOULIN AND THE SEARCH OF A COMMON LEGAL STANDARD

Towards the end of the 16th century, the old customs were considered to be old-fashioned, so a **renovation** was decided. This double process also transformed the content of the customs, to create homogeneity. In this sense, the most important customs were the ones of Paris, collected by Charles du Moulin, who used them to create a common legal standard. He wanted to unify the legal system in a general framework.
In the 17th and 18th centuries, Domat and Pothier also tried to unify the legal system in separate matters (for example, marriage, succession, property, etc.)

After the 16th century, during the 17th and 18th centuries, there were no more efforts to modernise customs because the focus shifted from customary law to the redaction of codes. After the French Revolution, **legislation** was seen as the expression of democracy and the power of the people through the assembly.

THE GREAT WAR AND THE NEW CONSTITUTIONS

THE "SHORT CENTURY"

Historian Eric Hobsbawm, who wrote the book "Short Century", stated that the 20th century was a short one, as he argues that it began in August 1914 with the **Great War** and ended in **November** 1989 with the **fall of the Berlin Wall**, which anticipated the end of the Soviet Union.

During this century, some of the most important **breakthroughs in history** took place, such as the rise of totalitarian regimes, the Second World War, the invention of nuclear weapons, the Holocaust, the Cold War, and the geopolitical tremors in the Levantine Region. They are events that inevitably changed the world as it was once known, to reach the situation that we live in now.

The wars led to the **three most tragic events** of the twentieth century, in the three symbolic places of the same century: the battle of Verdun during WWI, the Nazi concentration camp of Auschwitz, and the nuclear bombing of Hiroshima.

National borders dramatically changed multiple times during this time. The legacy of war lasts to the present day as the wars in the Balkans after 1991, the war between Russia and Ukraine, and the Israeli-Palestinian issue are happening today.

The first independent Ukraine was born in 1918, during the war, under the protection of Germany. Ukraine was later overwhelmed by the victory of the Red Army in the Russian Civil War and was integrated into the Soviet Union.
In 1917, the English government conceded the Zionist movement, founded by Theodor Herzl in 1897, the right to establish an independent Jewish State. The territory of choice was Palestine, which was, at the time, under the British Protectorate. Zionism was born in Central and Eastern Europe as a nationalist movement, advocating for the establishment of a Jewish State, Israel, where all diaspora Jews could reunite and live away from European antisemitism. Early Zionists supported the ethno-nationalist idea that Jews have a common descent, rooted in biblical Jews and Israelites. The establishment of the modern State of Israel, in 1948, was followed by the forced displacement of Palestinian Arab people from their cities and villages, an event that is known as *Nakba* ("catastrophe") in Arabic. This situation led to tensions between Israelis and Palestinians, as well as the ongoing fight of Palestinians to obtain their own free, independent State.

CULTURAL TRANSFORMATIONS

War was not only a historical-political, but also a **cultural event**, in an anthropological sense. It changed the mentality of people and led to the acceptance of violence and mass extermination as tools of political struggle in peacetime. The war brought about the **decline of rationalism**, which had originated during the Enlightenment, and of liberalism and trust in democracy and progress.
As a consequence of the war and post-war chaos, Lenin, Mussolini, and Hitler seized power and started **totalitarian regimes** with violence and terror.
This new age of insecurity shaped **culture**, with changes in literature, visual arts, and music. Some of the most important novelists of the 20th century, such as Joyce, Faulkner, and Celine, were heavily influenced by the war. Painters, such as Picasso, even portrayed it, and the style of others such as De Chirico changed.
In Germany, as a reaction to defeat and great inflation, "expressionism" was born as an art form in painting and cinema.

This goes to show that historical events do not just happen and pass by people who experience them, but, instead, they inevitably change or distort human minds to their core. Historical events therefore lead humans to radically change the way they think and act.

THE FIRST WORLD WAR

Politicians and generals thought it would only last a few months and end in October 1914, but instead, it became a **siege war**, based on daily artillery duels, asphyxiating gases and frequent attacks. Soldiers would go mad in the **trenches**, where they lived like mice.
It was a **total war**: the whole society was involved. Erich Ludendorff, Chief of the German Army Headquarters, defined it as a "Modern war of peoples" because civilians were also involved. In war zones, they fled their homes. Whole villages were destroyed. The cities were attacked directly through artillery and bombed from the sky. In Germany and Austria, the rationing of food products, determined by the naval blockade of England and France, led to famine among civilians. Women had to replace in factories the men who had become soldiers, with very hard shifts. The war brought about the **end of European power**: it was Europe's suicide. It shifted the economic centre of gravity: Europe lost its economic primacy to the USA and Japan. The United States became the strongest economy in the world, while Japan became the industrial power of the Far East. Latin American countries also grew thanks to exports of food and raw materials. European agriculture was ruined, while industry produced only war materials. These effects can still be seen in the political crises in Eastern Europe and the Middle East.

AFTERMATH OF WORLD WAR I

The violence of the war and the **hatred** generated by the propaganda determined that the enemy was considered **absolute evil**. This made it impossible to recreate true European peace and to return to normal relations among countries. The Allies considered Germany as the only one responsible for the war. They wanted to try the Kaiser as a war criminal, but he had fled to the Netherlands after the German Revolution in November 1918.
The Allies confiscated many German assets and forced Germany to pay a huge amount as war **reparations**. It was known that Germany would be unable to pay. World leaders were not able to find shared post-war solutions between losers and winners. Economist **John Maynard Keynes** wrote about it in "The Economic Consequences of Peace" (1919). He resigned from the British Economic Commission at the peace conference and accused Britain and France of setting the conditions for another European war. He believed the reparations to be wrong and thought that it was necessary to return to economic collaboration between the victorious and the defeated countries.
The hate also extended against **political opponents**, such as communists and nationalists, especially in Austria, Germany, and Italy.
Democracy was considered outdated and unable to govern post-war society.

World War I is also defined as an **"ideological civil war"**, because of the high meaning assumed by ideology. As the jurist Karl Schmitt wrote, the Allies behaved towards the Germans as if they were the winners of a civil war.

The First World War was a contradictory event: war is experienced as a classic war, while it is a **new kind of conflict**, where the defence prevailed on the attack, thanks to the use of trenches, barbed wire, and machine guns. Ernst Junger described the condition of soldiers in trenches in his book "In the Storms of Steel - Instahlgewittern".

THE MASSACRE OF VERDUN

The leader of the German army, Falkenhayn, attacked the city of Verdun, which was important for the defence of France. The German population was twice as much as that of France, so he thought that if for every German dead, they killed two French, France would no longer have the reserves of men to fight. The battle was in fact defined as "**meat grinder**". It lasted six months, from **February to October 1916**. The total death toll for the Germans and French was **one million dead**. Germany failed in its objectives. At first, the Germans conquered some land but lost it later. The French, to replace the losses, created indigenous troops from the colonies in Africa and Asia.
The battle was a **huge useless massacre**.

A NEW WORLD: THE MYTH OF REVOLUTION

For many, the war was considered a **palingenetic catastrophe**: destructive, but the premise of a better world. Revolutionary intellectuals and politicians believed that it would create a more equal society.
For others, through the war, there was **regeneration**. The nationalists and the military men thought that war would select the strongest Nations and peoples. This ideology is called **social Darwinism**.

However, the war betrayed expectations, creating instead **new prospects**: insecurity, inflation, unemployment, poverty, epidemics (such as Spanish fever), revolutions, and new political regimes. The inflation impoverished the middle classes and favoured the **more radical parties** such as Communists and Fascists. Democracy and moderate parties, but also socialists, were accused of not being able to manage the post-war period. The new independent nations, created by the Peace treaty in Eastern Europe, were too small, poor, and often enemies of each other. They all became **dictatorships**, except Czechoslovakia, which was the only industrial nation with a more educated population.
In Central and Eastern Europe, Jews were accused of being responsible for the military loss and general poverty, leading to **increased antisemitism**.

THE DECLINE OF LIBERALISM AND THE NEW MASS POLITICS

After the war, the figures of the fighter and veteran were haled, leading to the "**trincerocracy**" (expression coined by Benito Mussolini himself): the fighters aspired to a new classless society, combining socialism and nationalism. In all countries, including the United States, veterans' associations had hundreds of thousands of members and had great political strength. They usually supported the political parties that most favoured the economic and social demands of the veterans. Revolutionary nationalists, such as Fascists and Nazis, rejected middle-class liberal society.

The post-1870 political process was characterised by **discontinuity**, determined by technical-scientific progress and industrialisation. It is in this historical period that new mass parties with millions of members are born. They had bands of fighters, but also workers', women's and youth organisations, newspapers, and propaganda press.
Professional politicians and the totalitarian parties (with their military and civil organisations) were born. The Bolshevik revolution changed the rules of the game and created a new political and economic model: the myth of the revolution was born in soldiers and workers. They thought it was finally possible to overthrow capitalism and create a new, fairer society without social classes, where all men are equal.

In the post-war period, politics tend to assume a **total character**, that under the influence of ideology becomes resemblant a religion. The new totalitarian mass parties would organise mass demonstrations with identifying symbols (hammer and sickle, fasces, and swastika), uniforms, rituals, and devotion to their charismatic leaders.

There were new possibilities offered to the State by technology for the **control and monopoly of violence**. Totalitarian regimes controlled the traditional press and used new media, such as the radio and cinema, for propaganda and to increase the public's support for the government. Political and civil liberties were suppressed. New laws and new special courts were created to judge political opponents. Dissidents were portrayed as the enemies of the people who had to be exterminated or sent to concentration camps.

The war generated the historical outbreak of the mass parties. USSR, Italy, and Germany became **post-war political workshops**. The seed of totalitarianism can be found in the idea of a new state and a new man: the Bolsheviks wanted to eliminate social classes; the Fascists wanted to elevate the power of the State over individual rights; the Nazis aimed at the purity of the race to return to the ancient Germanic community, eliminating the inferior races.

THE SECOND WORLD WAR

It was the triumph of **nihilism**: modern weapons of mass destruction were created, such as asphyxiating gases and nuclear weapons
The war, which began as a classic war, soon became a siege warfare, mainly fought in trenches.

It was a **war of materials**: industrial mobilisation and globalisation of resources were prioritised. The whole industry was mobilised to supply the shops with weapons and ammunition, uniforms, and food products. War production was directed and planned by the State. The workers were regarded as soldiers, and they could not go on strike: it was the decline of the economic liberalism of the previous century.
In Germany, even the film industry was nationalised to create propaganda against the Allies.
The state drove the economy with **centralised planning**, as described by Walther Rathenau in "*The New Economy*". The heavy industry. which was concentrated in sectors such as shipping, mining, steel, mechanics, and electric fields, grew.

The **prerogatives of States changed**, along with their economic and social priorities.
During and after the war, the State greatly expanded its powers even in the most intimate spheres of citizens' lives. All countries, but especially totalitarian regimes, created demographic policies to increase their birth rates.

Following **eugenic doctrines**, policies were created to “improve” the human species through the selection of reproductive individuals. This was not only to prevent diseases or other health issues but also to eliminate those who were defined by the government as "inferior" individuals. In some democratic countries, some types of prisoners were sterilised. In Sweden, the same happened to prostitutes and girls who had children by unknown men. The Nazis, at first, practised eugenics to eliminate German citizens deemed inferior (such as people with mental health issues or disabled people), but they were blocked by the protests of the German church. Later, during the war, they applied these principles to European Jews and also to the Romani people.

We can see in the battles of the Somme and the Verdun Front that the lives of the soldiers were of no value to the generals. In the Battle of the Somme, the British attacked the German trenches, and within a few days, they lost 100,000 men without achieving any goals.

Today many experts, such as Stefan Zweig in "*Yesterday's World*", talk about a “Thirty Years' War”, suggesting **stricter continuity between the two World Wars**.

THE NEW CONSTITUTIONS

After the war, there was the rise of the conscience of the **social function of the State**: the State must provide the services and resources necessary to create a strong economy and a fair society. The state must guarantee the satisfaction of basic needs: work, health, and education. In particular, new Constitutions strived to protect the dignity of workers and their families by guaranteeing a social income. Even in capitalist countries, private property was guaranteed, but only if it had a social function for the whole community, otherwise it could be confiscated and redistributed (as it happened with the land that was redistributed to soldiers). To create a society where wealth was distributed more equally and where only manual, professional or business work (and not financial income) guaranteed **citizenship**.

Following this set of newly discovered principles, the Constitutions of Post-World War II were drafted.

THE REPUBLIC OF FIUME

During the Paris Peace Conference, the Allies did not want to give the city of Rijeka to Italy. In **September 1919**, the poet Gabriele D’Annunzio **occupied the city** with troops of Italian rebels. Volunteers came from all over Italy to fight for this cause. Mussolini and the Fascists supported D’Annunzio but did not participate directly. The occupation **ended in December 1920**, when the government, headed by Giovanni Giolitti, ordered the army to liberate the city.
Giuseppe Bottai, one of the fascist leaders and a former futurist, said: "The Declarations of the charter of Carnaro constitute the first expression of the new spiritual and juridical order of the Italians". In reality, it was an expression of **revolutionary, futurist, and anarcho-syndicalist interventionism**: generally libertarian, liberal, and federalist, very different from the centralism and planning of the second Fascism.

THE CHARTER OF CARNARO

There was an even more radical representation of the “**new economy**” in the Constitution of Fiume in 1920, drafted during the revolutionary episode which combined politics, poetry, and aesthetics. Even the Bolshevik leaders viewed it with interest.

The Charter of Carnaro was inspired by **Gabriele D’Annunzio** and written by trade unionist **Alceste De Ambris**; it proclaimed the Free State of Fiume to be “**a direct democracy**” based on “**productive work**”, aiming to elevate the “prosperity” of all its citizens. It guaranteed the right to primary education and to “paid work” with a minimum wage appropriate for the cost of living. It also provided unemployment benefits, health care, and old age pension. The Republic considered property to have merely “a social function” and that it was not an “absolute right or individual privilege”: the prerogative of property “over any means of production or trade” was legitimated only by the work that brings its benefit to the country’s economy.

The State recognised the **right to citizenship** only of those who contributed to the "material prosperity" and "civil development" of the Nation, the so-called "productive citizens". The Republic also created **corporations**, which grouped all the workers of a certain sector; these bodies were completely independent in terms of production and function, and they also enjoyed the right to "collective" ownership of all kinds of assets.

THE CONSTITUTION OF WEIMER

Primarily drafted by jurist **Ugo Preuss**, it is considered "**the mother of modern constitutions**". Preuss wanted to base their State on popular will, making it an **authentically democratic State**, rather than an authoritative one.
Whilst in the old Prussian constitution the Prime Minister was appointed directly by the Kaiser, the new constitution attributed the State's sovereignty on one hand to the **Parliament**, and on the other hand to the **President of the Republic**, to whom exceptional powers were granted in cases of emergency. Both the Parliament and the President of the Republic were elected by **universal suffrage**.
The power of the federal government was counterbalanced by that of the **regional authorities** (Lander) represented in a house of the Parliament (Bundesrat). The Weimar Republic was a presidential parliamentary regime in which political parties had acquired growing power. The Sozialdemokratische Partei, Katholik Zentrum, and the Liberals were the most important parties before 1929.

The second part of the Constitution of Weimar was dedicated to the **fundamental rights of the citizens**. The rights to personal freedom, freedom of expression, freedom of religion, and freedom of association (also of a political nature, such as political parties) were explicitly declared.

Many dispositions were dedicated to the **safeguarding of equality**, with particular attention to economic and labour conditions. Private property was said to have "obligations" and it should have been aimed at assuring the "common good" of the State, not only the benefit of private parties. A focus was dedicated to expropriation for public utility, which could also be interpreted as the purpose of finding private housing. Expropriation could be extended to private enterprise «subject to socialisation», which could be turned into collective property. Joint representative bodies of employers and workers were responsible for the creation of collective binding contracts and for overseeing production under State control.

THE REFORM OF THE ECONOMIC LAW IN GERMANY

The economic law was reformed in connection with and response to the double crisis of inflation in the early 1920s and the economic crisis of 1929. The Ordoliberal School wanted to limit the power of business cartels and big enterprises.
The reform in 1930 changed **corporate governance**:

- the executive board (Vorstand), which included the executive directors, acquired the actual decisional power that had belonged to the council (which was made up of company owner-representatives
- the supervisory council (Aufsichtsrat) was given greater controlling powers
- the duties of the General Assembly (Hauptversammlung) became more circumscribed.

This model was incorporated in the 1937 German Law on joint stock companies and, with the later established worker system representation in the control of the company (Mitbestimmung) after the Second World War, it survives as «**the German model**» to this day. It might be considered more in step with the concrete life of a company than the traditional models, as executive decisions are mostly made by managing directors after having also consulted the workers' representatives.

LAW IN A TOTALITARIAN STATE: ITALIAN FASCISM

THE ORIGINS OF THE FASCIST MOVEMENT

Fascism was born as one of the cultural movements that saw war as an opportunity for **national palingenesis**. The first fascist movement was made up of veterans, revolutionary trade unionists, and intellectuals (such as Toscanini, Marinetti, etc.). It was **hailed by the liberalists** because it had an economic program that seemed to overcome the old protectionism of the heavy industry, represented by Giovanni Giolitti. He was an old liberal politician who had ruled Italy for many years before the war.

The initial goals of the fascist movement were written down in the **1919 program**, which was considered "revolutionary". The fascist movement, however, was defeated in the elections of November 1919. Between 1919 and 1920, Fascism changed its public image: from an urban and elitist movement, it became above all an **armed wing of the agrarian movements**, led by regional leaders (Farinacci, Balbo, Grandi, Perrone Compagni, Caradonna, etc.). This will be decisive for its growth and to hide its already intrinsically totalitarian characteristics. Fascism was perceived as the "white guard" of the middle class, in reference to the Russian Civil War.
Their **military organisation** (and the sympathies of the ruling classes) allowed the fascists to win the civil war that had broken out in Italy: the king, the army leaders and right-wing politicians favoured the rise to power of the fascist movement and the formation of a first government led by Benito Mussolini after the "march on Rome", on 28th October 1922

ITALY: POLITICAL LABORATORY

Fascists and Communists were both **against liberal democracy** (which they accused of being inefficient in sustaining the post-war crisis) **and the Parliament** (accused of being inadequate to train and select the elites). The goal of these ideologies was to strengthen the executive power, at the expense of the legislative power.
Antonio Gramsci (the chief of the Communist Party) and Mussolini shared the same **rejection of economic liberalism** (embodied by Giolitti). However, their strategies were extremely different.
The **theory of the elites** (elaborated by Vilfredo Pareto, Gaetano Mosca and Roberto Michels) was used to justify the need for political change: the fascists were seen as the new political elite that emerged from the war.

Gramsci was also influenced by the theory of the elites: he believed that the masses must be organized and led by a minority of professional politicians. The **Communist party**, the core of revolutionary militants, was seen as a modern Prince, like the one described by Nicolò Machiavelli.

Philosopher Giovanni Gentile said that fascism was the **ideal continuation of the historical right-wing** elite (Cavour) and that it would have reversed the decline of Italy generated by parliamentarian transformism, used by Giolitti to maintain power. The strength of Fascism (in addition to violence) was the combination of the concepts of society and Nation, without class conflicts. Additionally, the fascist movement presented itself as the purest heir to the catharsis generated by the Great War. The priorities for fascism were **an order based on social discipline** (in which strikes are not permitted) and an economic program aimed at increasing **productivity** in all sectors, without class conflicts, regulated by the State.

In Germany, on the other hand, the new Republic of Weimar was able to **preserve democracy** because Social Democrats took responsibility for the government, while in Italy the two mass parties, the Socialist and the Popular Party, refused to enter a government with Giolitti. This would have most likely prevented the growth of fascism.

THE TOTALITARIAN STATE

The difference between an authoritarian state and a totalitarian state can be identified in the need for **conservation** against the need for **revolution**: in fact, the totalitarian state aims to create a new society and to mould men while enacting a blockade of society and mobilization of the masses.
In a totalitarian State, direct democracy is undermined, as the Parliament is ousted by the government. The Head of State speaks directly to the masses or proposes referendums. Elections are abolished or controlled by the government. The **leader** is charismatic: he is adored by the population and special qualities are attributed to him. Every word of him is law. He has the power of life and death over all citizens, even over other members of the regime. The totalitarian State exercises social control through the Political police, a special court and confinement institutes. Only the leader's party (in Italy, the Fascist Party) is permitted.

THE FASCIST STATE

Fascism is a **political religion**: it consists of the worship of the chief and the cult of the lictorium through demonstrations and mass parades. **Mass organizations** linked to the Party are created (such as GIL, OND, GUF, etc.) for people to aggregate in. The Fascist regime made clever use of **propaganda and mass media**, from the EIAR (Italian Body for Radio Broadcasting) to the institution of the Ministry of Popular Culture. Mussolini created a new radio broadcasting system, and he founded the Cinecittà studios in Rome, to produce movies. The model that he had in mind was American cinema: Mussolini's son even went to Hollywood to study the "American way" to make movies.

From 1925, with the promulgation of the **"Fascistissime" Laws** and even more with the **Rocco Code**, as well as the **Labour Charter** of 1927, the organic project of the "new" totalitarian state took shape. Giovanni Gentile, who was an Italian philosopher, professor, and politician, developed the idea of the **"State as Educator"** (*lo Stato Educatore*): the goal of public education was to educate the future ruling class, the "Ethical State", a politically organised community able to preside over and direct the entire national life (economy, politics, and society). Individual destinies had a meaning only if they fit into the wake of the national community.

The **corporate system** organised the average state between capital and labour with functions of direction for the benefit of the country (see the Labour Charter). Fascism permitted only one fascist union per category and only one employers' association. **Strikes and lockouts** were forbidden and criminally sanctioned. The left fascists are more daring, including the chief of fascist trade unions Edmondo Rossoni, Giuseppe Bottai and others. At the Ferrara convention in 1932 philosopher Ugo Spirito, a left fascist, and a pupil of Bottai, conceived a proprietary corporation, but he was accused of wanting to replicate the system of the Soviet Union and eliminate private property. Intervention policies of the State are used as myths of mass mobilization, as it happened with the 90 quotas, demography challenge, complete land reclamation, battle of the grain, and autarky.

The **Albertine Statute of 1848** (the Constitutional document of the Kingdom of Italy) was still formally in use, but the Head of Government could still submit nominations or revocations of ministers to the King. The Secretary of the Fascist Party became a minister. The government was granted broad powers to emit legally effective norms. Monarchy and parliament lacked effective power. Local elections were abolished, and the elected mayors were replaced with men appointed by the government.

Fascism repressed **freedom of the press and association**. Every opposing opinion of the regime was forbidden. In 1926 the Special Court for the Defence of the State was instituted to judge the political opponents of the regime. The condemned were imprisoned or sent to isolated places on the islands of the Tyrrhenian Sea.
In 1928, the designation of elective parliamentary candidates was set to be limited to the **Grand Fascist Council**, an organization which brought together the most important men of fascism chosen by Mussolini. In 1939, Mussolini replaced the Chamber of Deputies with the **Chamber of Fasces and Corporation**.

The **authoritarian reform** of the Criminal Code by Alfredo Rocco, the minister of Justice, had a strong repressive approach. It increased the **penalties** not only for political crimes, but also for all that was deemed contrary to the postulates of the totalitarian state (for example, to practice abortion or birth control and, later, when the racial laws were created in 1938, not to protect the prestige of the race). In 1926, the **death penalty** was reintroduced for the most severe political crimes. Rocco created a new criminal code that excluded any **defence rights** during the investigation phase of the trial, while the prosecuting attorney was favoured. The figure of the prosecutor was distinct from that of the judge and his function was that of protecting the public interest in the private law trial. Rocco wanted to translate the **full authority of the State** into the new legal system.
Individual freedoms themselves were to be seen as **self-limitations of the State**. Going on strike had become a criminal offence and the class of crimes against public finances was introduced. Criminal repression was founded on the principle of culpability.

COMPLETE RECLAMATION: TERRITORIAL PLANNING (METROPOLIS AND COUNTRYSIDE)

Complete reclamation was about the **geographical relocation** of the population and the creation of **new economic poles**: demographic policy plays a fundamental role because it should generate a balance between urban and rural society.
The integral reclamation, on the other hand, was an organic project of State intervention for the **cultivation of new lands**, which led to measures ranging from the elimination of swamps to the creation of new urban and agricultural centres.

Many important **intellectuals** collaborated with Mussolini like Corrado Gini for demography (the founder of ISTAT, the Italian National Statistical Institute). Another technocrat at the service of the regime was Arrigo Serpieri, the mind behind the integral reclamation and agricultural policies. Intellectuals, such as scientists, managers, economists, and architects thought that fascism was the **ideal third way** between liberalism and communism and that the regime was a powerful agent in Italy's modernisation.

The combined power of agriculture and industry was aimed to avoid the **"degeneration" of the capitalist system and urbanisation**. The Fascist Regime eliminated the class of labourers and consolidated the class of small landowners, to build consensus for the regime. The State even controlled the political and biophysical selection of settlers.
The *Opera Nazionale Combattenti* (the association of veterans) directed the complete reclamation. Another technocrat who offered his services to the regime to build the new cities of this "civilisation on the move" was Le Corbusier, one of the most famous architects of the twentieth century. The location of new towns and villages was designed to **favour the agricultural field**, in the region of Agro Pontino, in Southern Lazio (two examples are the cities of Sabaudia and Littoria, now called Latina); the **mining field**, in the regions of Istria and Sardinia (the city of Carbonia); the **industrial field**, in the cities of Ferrara and Ravenna.

THE EMPIRE AS A MYTH OF FASCIST UNIVERSALISM

After the war in Ethiopia, Mussolini launched the idea of the **empire as a totalitarian myth**. The empire was presented as an ideal spiritual destination to avoid the fate of the decadent peoples of the West. The meaning transcended the mere territorial and economic expansion of the Italian living space: "**Eurafrica**" (the new geopolitical concept that shaped fascist diplomacy) is an almost metaphysical concept that represented the process of the anthropological mutation of the Italians. "To place oneself on the level of the Empire" is the revolutionary aim of the regime, which aimed to shape the "new Italian" as the **ancient Romans**. The totalitarian colonial organic project involved the creation of large Italian communities overseas, in Libya and Italian East Africa.
To highlight the differences with classical colonialism, jurists define Fascist colonialism as "***corpus mysticum***". The elements of differentiation are racial and cultural. The hierarchy of this system sees Italy in the first place, then Albania, Libya and finally East Africa.

The empire determined the birth of **fascist racism**. Mixed marriages were prohibited in the Italian empire, children born out of interracial sexual relations were regarded as indigenous, and eventually,

any interracial relationship was banned, with offenders being sentenced to jail. In 1938 the **Racial Laws** completed the framework of fascist totalitarianism. Racism was codified with radical corporatism in the Constitution of the Italian Social Republic, written in 1944 by Carlo Alberto Biggini.

THE CRISIS OF THE BANKING SYSTEM AND PRIVATE INDUSTRY

The Italian economy was on the brink of collapse, toward the end of 1932. Banks were in imminent danger of bankruptcy and the consequent liquidation of the citizens' savings. Banca d'Italia itself was unable to deal with the situation adequately. Most corporate credit was impossible to recover and there were no short-term prospects of economic recovery

The State intervened through a new system of **corporate governance of public industry**. Only the State could save the banks from bankruptcy, and Italy's entire industrial system with them. January 1933 saw the creation of the *Istituto per la Ricostruzione Industriale* (**IRI** – Institute for Industrial Reconstruction). The State gave it the capital required to bail out banks, but at the same time, IRI acquired their shares and industrial holdings, managing them independently, and subsequently disinvesting. The three most important banks were nationalized. The new Institute was defined as "provisional" and consisted of two sections: the Finance section was to evaluate company assets and earnings, liquidating those without concrete possibilities of recovery, or re-launching them when market prospects were more encouraging; the Disinvestment section was to provide for privatization after restructuring.

THE STATE INTERVENTION

Mussolini decided to delegate the leadership of IRI to three technocrats: Alberto Beneduce, Donato Menichella, and Oscar Sinigaglia. The Duce wanted to leave out Corporations and the Fascist Party from the leadership of the IRI to avoid the formation of a bureaucratic class, as had happened in the USSR. The original idea by technocrats was **public ownership**, as a last resort control of the regime, and management as a private enterprise to make a profit. The corporate governance of the public industry saw the State as the owner; the banking system as a source of finances; and the IRI as a holding company that checks everything. Every industrial sector was to be directed by finance companies (such as Finsider, Finmare, and Finmeccanica), which financed industry bonds.

The reform of the banking system, published and enacted on 12th March 1936, established the **separation of banks and industry**, and the specialization of banks as providers of short-, medium- and long-term credit. It finally transformed Banca d'Italia into the central bank with powers of control. Medium- and long-term credit would be the exclusive prerogative of "special merchant banks" (*istituti di credito speciali*). IRI became a permanent body in June 1937, with the double function of acting as the fundamental organ of socialisation and formulating industrial policy. The objectives of IRI were standardisation, concentration of production and businesses, development of the continuous cycle steel industry, and training of industrial managers and technicians.

The experience acquired by IRI in combining public interest with private efficiency, as well as in operating with market principles, made it the ideal body to manage the companies that the regime decided to maintain. It became a holding company that managed the shares held by the State, and used bank bonds to finance its activities (this entailed less of a risk than using shares). In 1939, IRI possessed 44% of Italy's share capital. The State held substantial shares in the steel, electricity, construction, shipping, mining, heavy engineering, and arms industries.

THE AUTARKY

In October 1935, Mussolini decided to attack Ethiopia. The League of Nations imposed sanctions on Italy for the attack against another member state. In March 1936, the Duce launched the policy of autarky with the *Piano regolatore della economia italiana del prossimo tempo fascista* ("Regulatory Plan for the Italian Economy in the Next Fascist Period"). This heralded a new phase in which the

country would need to **expand its "economic autonomy"** to conduct "an independent foreign policy"; Mussolini also hinted at greater State interventions in industry.
The most important novelties particularly involved heavy industry. Since the largest joint-stock companies were "capitalistic or super-capitalistic" and therefore represented "an economic and social" problem, those directly or indirectly connected with defence would be organized into *grandi unità* (large units) defined as "key industries", with special status "within the State sphere" (this development was facilitated by the fact that the regime already controlled most of the arms industry through IRI).

Therefore, the Italian autarky programme was dictated by the awareness that the entire nation was being prepared for a future war. There were four reasons why autarky was also a **political** tool for national mobilization:
1) it accelerated the exploitation of Italy's domestic and imperial resources;
2) it consolidated the State's economic intervention and its control over foreign relations;
3) the general population learned the frugal attitude seen by Mussolini as an essential aspect of the Fascist ideal of self-sacrifice to benefit the community (see the "Day of the Wedding Rings" and countless campaigns to collect iron and copper);
4) it was supposed to permanently mobilise the entire national community towards the idea of war, seen by Mussolini as the highest calling of the State and its citizens, exalting the moral and spiritual qualities of single communities.

In this context, it is possible to see that an organized plan gradually took form between 1936 and 1945, whose origins lay in the *Carta del Lavoro* ("Labour Charter"), the manifesto of Fascist corporatism written in 1927. It consisted of three converging plans to create **a new corporative economy** of the totalitarian state:
1) centralized planning of resources, investments, and production;
2) strategic use of IRI to consolidate heavy industry and increase State control in the vital sectors of the Italian economy;
3) socialization of companies, meaning the participation of technicians and workers in company management; this is the distinguishing feature of Fascism's original mixed model, which combined private and state initiative and created a "third way" in alternative to the capitalist or Soviet systems

The first two were achieved immediately, whereas the third was partly achieved only at the end of the war.

The war in Ethiopia and the sanctions generated a **totalitarian acceleration**. The regime displaced the orders in the various plants of the country, based on political and economic considerations (demography, loyalty to the regime, unemployment, etc.). The economic policy choices of the 1930s were practically confirmed after the war and had a positive operational effect on the country's economy at least until the oil crisis of the 1970s. In the same way, the geographical location of the economic poles shaped by the regime between the two wars remained substantially unchanged until the crisis of the 1970s.

Autarky determines a **new geography of settlements and economic poles** (especially of new chemical and metallurgical industries, e.g. aluminium). The choice of self-sufficiency must be evaluated from two points of view: first, the disintegration of the international economic system after the Great Crisis of 1929; second, the "warlike" policy of the Totalitarian State (Mussolini said: "Imports are paid for with hard currency [gold], national raw materials with paper money"). That of totalitarian States is a war economy.
The autarky plans were drawn up between 1935 and 1937. The 22 corporations contributed to the plans and were approved by the Councils and the Central Corporate Committee. The most important public and private companies participated in the gathering of information and the formulation of the plans.

THE ITALIAN PRIVATE LAW CODE OF 1942

In inheritance law, the Code improved the position of **surviving spouses**, though in the presence of children, the widow was granted the simple usufruct, It also improved the position of **illegitimate children**; it introduced the principle of **affiliation**; it strengthened the role of the judicial processes in the **protection of minors**.
As to **property**, the code introduced many new limits to protect public interest: for example, the reorganisation of land property, expropriations for reforestation, hydro-geological restraints, conservation of the historic-artistic heritage and pollution. In 1940, a historical decision by Filippo Vassalli and Dino Grandi (Minister of Justice) was made to combine the two branches of private law in a single code, by dividing the rules of commercial law between Book IV (general principles, civil and commercial contracts, debt securities) and book V (company law, labour contracts, intellectual property, and competition law. With the adoption of a single code of obligations, the more efficient and functional rules for a trade economy, characteristic of commercial law, were to generally prevail over those of traditional civil law

The **discipline of companies** was separated from that of obligations and placed in Book V. As to governing bodies, these comprised bondholder assemblies and special assemblies. The administrators' responsibilities were modified to exclude the attributions of the executive committees and managing directors. As to company management, an important feature was limiting the competence of the assembly to matters earmarked in the founding act or submitted to the assembly by the administrative body.
It was the end of the "democratic" assemblies, derived from the Alberto Asquini project, already adopted in Germany. Alberto Asquini will be the manager of IRI in the Repubblica Sociale Italiana, the republic created by Mussolini in Northern Italy after the armistice in September 1943.
As to **labour law**, the code attributed broad discretion to the employer regarding the end of the contractual bond.

The contribution of the fascist regime can be seen, first of all, in the imprint of the Labour Charter. The State is given a decisive role in the sphere of voluntary and contentious jurisdiction, in family law and the economic relationships of commerce, labour and society. Fascist contribution can also be seen in the new limitations on private autonomy, regarding property and real rights, made in the name of public interest. It also introduced forms of State interventions in the economy - such as publicly owned companies and companies of national relevance - tied to the industrial and banking crisis, which had led to the creation of IRI and the banking law of 1936. Finally, Fascism introduced stricter rules regarding joint stock companies and imperative norms, in matters previously governed privately by the parties.

All such measures converged to increase the role of the State:
- as a source of the autonomous financial status of legal persons, granted by an administrative act
- as entrepreneur and protagonist of the economic activity
- as arbiter of conflicts between private parties, with the State as guarantor of the balance of interests among parties
- as protector of the weak

If it is true that the increase in the prerogatives of the State in the economy and society took place during the Great War and strengthened after the 1929 crisis, and was common to all countries, including democratic ones, it is equally true that the totalitarian ideology of fascism further expanded the power of the State. In this, Italy was second only to the Soviet Union and preceded Nazi Germany.

LAW IN A TOTALITARIAN STATE: THE SOVIET UNION

The Communist regime of the Soviet Union is arguably the most important totalitarian regime in history, because of its duration and because it has been a **"perfect" totalitarianism**. It influenced and embraced all aspects of the life of citizens of the country.

THE POLITICAL MODEL

The two basic principles of the new Communist State are "the **proletarian dictatorship**" and the **abolition of private property**. The former has a legal foundation in the field of constitution; the latter in that of economy and social and family law.
The Soviet Union is a society without social classes.
The **Communist party** is the heart of the state and all of the power of the Soviets was just a slogan to hide reality. The **Soviets** were organizations that arose after the overthrow of the Tsar and brought together soldiers, workers, and peasants. it was an example of direct democracy, which lasted between February and November 1917. The Petrograd Soviet was the most influential one.

The republican government, which was later revoked by the Bolsheviks, organized **new elections**. The most voted party was that of the Socialist Revolutionaries, which was popular in the countryside because it advocated for the distribution of the land to the peasants.

The biggest mistake committed by the democratic government, headed by Kerensky, was to want to continue their **participation in the First World War**, and to unleash a new attack in June 1917, urged by France and Great Britain, to ease the pressure of the Germans on the Western front.
In reality, the soldiers in Russia were tired, after millions of deaths and absurd attacks. The soldiers began to rebel and leave the trenches. It was the beginning of the **Bolshevik revolution**. Moreover, the democratic government was threatened by the tsarist officers and right-wing organisations. There was an attempt at coup d'etat by the chief of the army, Kornilov, with the Cossack troops. In the meanwhile, Germany helped Lenin reach Russia to start the revolution. When the Bolsheviks conquered Petrograd and Moscow, which became the new capital, the civil war against the royalist troops began.

THE CIVIL WAR

In February 1918 the Bolshevik government agreed to sign a **very tough peace treaty**, imposed by Germany in Brest Litovsk. Germany acquired most of the more fertile lands in Belarus and Ukraine: they therefore had the food resources to support a major offensive on the Western Front to win the war and improve nutrition for the starving civilian population at home. This act probably saved the Bolsheviks because a German attack would have ousted them from power.
Another decision that allowed the Bolsheviks to prevail in the civil war was to **leave the confiscated land to the peasants**, while the Whites wanted to return it to the owners. This way, the Bolsheviks were able to defend themselves from the White troops.

Civil war broke out in **1918 and 1919** between the **White Guards and the Red Army**. The White troops were armed and supported by Great Britain, France, and Japan, which also sent troops to Siberia, Northern Russia, and Southern Russia. At the end of 1918, the Communists seemed to be on the verge of collapse. The Tsar and his family, imprisoned in Ekaterinburg in the Ural Mountains, were shot to prevent their release.
At the end of 1918, after the war had been won, the Western powers, pushed by public opinion, revoked their support for the White troops.
There were **internal divisions** among White generals, who did not have a common strategy. Some, like Kolkak and Judenic, wanted to restore the monarchy, while others, like Denikin, wanted to keep the republic and proclaim the dictatorship. Because of such divisions, it was easy for the Bolsheviks to defeat them one by one.

The **climax of the civil war** was the attack of Poland in 1920 to conquer parts of Ukraine and Belarus. The Red Army defeated the Poles and advanced to Warsaw, which was besieged. However, the Russians were then defeated because the French sent their troops to defend the city. The Russians were forced to retreat.

The Russian Civil War ended in 1920 with the evacuation of Baron Pyotr Vrangel's White troops from their last stronghold in Crimea, and the last resistance in Ukraine was crushed in 1921. The **new Union of Soviet Socialist Republics** was proclaimed on **December 30, 1922**.

THE NEW COMMUNIST POWER

The proletarian dictatorship was converted into a **Bolshevik monopoly on power** through the institution of a *Council of Commissioners of the People* made up of fifteen party members, who had legislative power. The party also selected the members of the Soviet Congress, which had constituent power, and the Executive Committee derived from it. The **Party Secretary** was the head of the regime. With Lenin, discussion about possible choices was permitted, because he claimed to be a "Primus inter Pares". With Stalin this was no longer possible: the choices of the Secretary were the only valid ones.

The Party members occupied all the spaces of the public administration. In the Red Army, the officers were joined by an apolitical commissioner, who was higher in the chain of command. A class of untouchable officials was so created: they had great powers over ordinary citizens and enjoyed special privileges (such as housing, food, and benefits) in a very poor country.

THE WAR COMMUNISM

Land property was abolished in 1918, with no compensation to the owners for the expropriation. The State became owner of the land and farmers were granted plots of land, which were assigned to each household and cultivated within a rural community, the *mir*. Part of the harvest was supposed to be left to the peasants, but the supply needs of the Red Army and the population of the cities reduced it to the limits of hunger.

The Red Army's **violent requisitions of peasant property** discouraged the rural population from cultivating the land and provoked hundreds of revolts in the countryside. Agricultural production fell to less than half of pre-war levels, while the percentage of produce marketed was now only 8% of the 1913 total. Additionally, the breakdown of communications and interruption of the normal trading circuits made the USSR revert to a kind of natural economy. Only State requisitions ensured basic supplies for citizens, and around two million people migrated from towns and cities to the countryside between 1917 and 1921. In 1921, a terrible **famine** in the Lower Volga region aggravated a situation that was already desperate: despite international aid, around 1 million people died, adding to the losses caused by the war and epidemics.

Industrial companies were nationalised. Even the distribution of goods was centrally organised. In 1921, Russian industrial production stood at just 12% of the pre-war levels, while iron and pig iron output had dropped to 2% of the pre-war levels. The centralised State Planning Committee (the *Gosplan*), which had been created in 1920, proved ineffective. Furthermore, the nationalisation of businesses was mostly incomplete and did not, in any case, improve the situation.
The State was unable to manage or control the manufacturing industries. Many companies continued to operate independently, facing shortages of raw materials and worn-out machinery, and attempted to sell their products directly on the black market. This meant that the central administration had the monopoly of trade, but possessed very few goods that could have been bartered for agricultural products. The national currency, the rouble, was worthless and the circulation of money had dissolved.

THE NEW ECONOMIC POLICY

The most tragic **revolt**, which caused the Soviet government to change its economic policy, was led by the soldiers and sailors of the Kronstadt naval base on Kotlin Island in March 1920. They were the same troops which had been at the forefront of the Soviet revolutionary forces in 1917. The rebels constituted a Provisional Committee that immediately demanded freedom of expression, new elections, fairer and more generous food rations, the end of armed requisitioning, and the possibility of independent operativity for artisans and peasants who did not employ salaried workers. **Repression**

was brutal: thousands of rebels were killed and the survivors were deported to concentration camps (*gulag*) controlled by the political police (*Cheka*).

The uprisings accelerated a **review of the requisition policy**, convincing even Lenin of the need for a radical change. The New Economic Policy (NEP) adopted at the Congress of the Russian Communist Party in the spring of 1921 partially restored the market economy. Payment in kind replaced the obligation to consign almost all produce to the State; domestic trade was liberalised and peasants were allowed to sell their surplus produce on the market; small businesses were permitted, and those with fewer than twenty employees were privatized in exchange for giving the State a share of the total output (10-15%). Mixed companies were formed with the participation of foreign capital; workers could change their workplace, and technicians enjoyed greater prestige. The NEP marked a return, albeit partial, to capitalism.

The NEP was designed as a sort of **truce** after the terrible suffering caused by the Civil War: the aim was to attract middle-class technicians who had not emigrated and to increase public consensus towards the government and the Party. Although the NEP effectively represented a brief truce offered by the Communist regime and constituted a short-lived liaison between intellectuals and political authorities, its most ambitious economic objectives were not achieved. In 1927, industrial output was worth around 18% more than in 1913, and primary sector production was about 28%. However, agricultural output figures were inflated.

Cereal production in the Soviet Union never actually reached the levels of the tsarist era. Low State-imposed prices obstructed food supplies to the cities, as did the fact that the industry produced goods that the peasants either did not want or else could not afford to buy. In addition, the NEP limited investments in some strategic sectors, such as infrastructures and arms. Aside from the ideological divergences and discussions within the party, the NEP was totally **incompatible** with the war economy model typical of totalitarian regimes: rigid centralised planning and a definite bias towards investments in heavy industry and armaments, rather than towards mass consumer goods.

LENIN'S DEATH

Lenin, who was already ill in 1922, hoped for gradual progress marked by the collaboration between the working class and the peasantry set out in the NEP, He also hoped for advancement without any unforeseen rifts towards the construction of socialist society.
His death in January 1924 was followed by a **fight for succession in power**.
Stalin firstly supported Bucharin's defence of the NEP against Trotsky, who advocated launching a rapid process of industrialisation and subtracting resources from agriculture to invest in the secondary sector. In 1928, after finally gaining control of the Party, Stalin criticized the inadequacy of the NEP and proclaimed the need to plan the stages of economic development for the USSR, thus launching agricultural collectivisation and imposing industrialisation.

THE AGRICULTURAL COLLECTIVISATION

Agricultural collectivisation in the **kolchoz** was the pre-condition for **forced industrialisation**. The State intended to seize an important share of agricultural production, partly to feed the working class in urban centres, and partly to export. Export was necessary to obtain the technology required by the USSR. Stalin used the 1927 food crisis as a pretext to start forcing families into the collective farms. The ***kulaks*** (defined by the Soviet authorities as wealthy agricultural capitalists) were accused of sabotaging the programme and depriving the people of resources. In reality, the myth of the kulaks (a difficult class to define) was cunningly created by Stalin to have an "objective" enemy to attack and intimidate all peasants into spontaneously joining the kolchoz. Tens of thousands of Cheka members and party activists in the countryside were mobilised against presumed rebels and they would incite others to join them.

The Soviet regime blamed the resulting **food shortage** once more on the kulaks: this way they were able to justify the cruelty used in their campaign of unprecedented violence. Hundreds of thousands of families were **deported** to the prison camps (*gulags*), and thousands of peasants were slaughtered.

Other families had no choice but to enter the kolchoz. By the spring of 1930, about 60% of agricultural land had been collectivised and Stalin re-launched the programme continually. The peasants were effectively confined to the farms because the regime imposed an **internal passport for travel**, which they were unable to obtain. Managers of the kolchoz were frequently dismissed and deported when unable to meet the quotas imposed.

THE FIVE-YEAR PLAN

The first Five-Year Plan was launched in **1928**, with extremely **ambitious objectives**: it estimated that industrial production would grow by 136% and productivity by 110%, correlated with a 35% reduction in costs. Priority was given to the development of heavy industry, which was supposed to increase the Gross Domestic Product (GDP) from 8% to 16%. Estimates were continually revised and increased by Stalin. The heavy industry, mining and energy sectors developed a great deal, and the volume of investments was extremely high. On the other hand, the production of consumer goods was systematically neglected.
Soviet citizens had **very few resources** (unless they were Party members); they lived with other families in modest homes and constant terror of arrest by the political police.

THE LAW

The Criminal Code of 1922 **denied the principle of legality**. All those who opposed Soviet power were enemies and had to be eliminated. Political courts and special tribunals, directed by judges designated by the Party, were very active in the 1930s.
The use of **concentration camps** was extended, to form a gigantic network of gulag in Siberia and the Arctic Sea. Based on simple suspicion, in forty years, political dissenters, marginalised ethnic groups, farmers, workers, intellectuals and artists were confined to the gulags, where millions of them died. The inmates would die from hunger, being beaten and working in extremely cold temperatures (sometimes, they would go down to -40° C).

THE TERROR

The Terror had already begun with Lenin, who ordered to shoot all the peasants who did not deliver the grain requested by the State. Stalin began a new round of **purges**, firstly eliminating the old Bolsheviks and then progressively removing the younger generations of Soviets. In 1937, Red Army commander Mikhail Nikolayevich Tukhachevsky was accused of committing espionage for Germany and he was executed, together with many of the most high-ranking and competent Russian officers.

Lenin's comrades, like Bukharin, were persuaded to sign a **false confession**, as they were told that it would be for the good of the Party. People disappeared and relatives no longer knew anything about them. Many were killed immediately, while others were sent to the gulag.
Stalin used purges to renew the Party, industry, and army officers. Anyone could be arrested with no clue and be sentenced without evidence. A confession extorted by torture was enough to sentence them guilty.
Stalin used Soviet Terror as a **tool of mass mobilisation** to achieve the goals set by the Five-Year Plan and to eliminate the brightest minds of the Party and the army, who could rebel against him.

THE LAW IN A TOTALITARIAN STATE: GERMANY

THE LEGEND OF THE TRAITORS OF NOVEMBER

Thanks to the victory over Russia, which made it possible to transfer troops to the Western front, in March 1918 the Germans broke through the English front, in June through the French one, and threatened Paris again. They lost the second battle of the Marne and were repulsed. The arrival of a million American soldiers definitively reversed the course of the war. Since August, the German army has been on the defensive.
In October, the two leaders of the German army, Hindenburg, and Ludendorff, communicated to the emperor and the government that the German troops were exhausted and **no longer able to sustain an attack in force**. A new government was formed, headed by **Prince Max of Baden**, a liberal politician, to accept an armistice with the allies based on US President Wilson's fourteen points.
It was the beginning of the revolution in Berlin and throughout Germany. The Emperor was deposed and had to flee to Holland. A **new democratic government** was formed which was to negotiate an armistice with the Allies. At the beginning of 1919, the democratic government had to suppress a communist revolution, while a few months later it was the turn of a revolt of the far right.
After the democratic government of Weimar had to accept the **harsh peace conditions** imposed by the Allies in the face of the threat of an invasion of Germany, it was accused by the far-right of having betrayed the homeland.
So the **false legend of the traitors of November** was born, carried out by the Nazis, according to which the government would have betrayed the army and the homeland. Hindenburg and Ludendorff denied having said the war was lost. They also had the responsibility of participating in the war of the United States because they had launched an indiscriminate underwater war against the American ships carrying goods to Great Britain. So the democratic Weimar government was not legitimised by the German right and was also attacked by the extreme communist left.

GERMAN HYPERINFLATION

During the war, inflation had been higher in Germany and Austria than in the Western allies. Hyperinflation exploded in Germany between **1922 and 1923**. The value of the mark (the German currency) changed throughout the day. The prices of goods were quoted first in the millions and then in the **billions**. The Reichsbank continued to print banknotes. Eventually, the value would completely reset. Millions of citizens lost all their savings and could not afford to buy food on the black market, so they returned to bartering. Large debtors, such as industrialists, eliminated their debts to banks, as did Hugo Stinnes, a steel magnate.

The crisis was accelerated by the French and Belgian **occupation of the Ruhr**, despite the disapproval of Great Britain and the United States. Amid this economic turmoil (a communist uprising was attempted in Hamburg), the Weimar government paid for the passive resistance of the workers by **printing banknotes to pay wages and salaries** for workers and office staff. Inflation spiralled out of control.
When the crisis peaked with **Adolf Hitler's attempted coup** in November 1923, the German government took steps to stabilise the currency. It introduced a new currency, the ***Rentenmark***, the value of which was guaranteed by an international loan secured by real assets: land, buildings, and factories. The new currency issue was limited to 2,400 billion marks. The initial objective was to restore public confidence.

The situation improved in 1924 with the **Dawes Plan**, which recognised that Germany would never be able to pay its debts unless enabled to do so. Annual reparation payments were reduced and Germany was given more time to pay. In 1926, Germany was admitted to the **League of Nations**.

Some German historians have stressed that the population perceived military collapse in the autumn of 1918 and the total disintegration of the mark in 1923 as a single **"shock defeat"**: hyperinflation aggravated the trauma even more than defeat on the battlefields. The Germans felt **betrayed** by their leaders for the second time, first by the generals and then by the politicians, and lost faith in democratic institutions. German citizens were devastated when their illusions were shattered. Hyperinflation came as another devastating blow to German society, a dizzying feeling that everything was spiralling out of control and that previous stability was completely and utterly lost

An entire generation would **lose all their moral sense**, to abandon any kind of rational attitude a few years later and embrace the myths launched by Adolf Hitler if this would ensure a national revival. Hyperinflation, therefore, generated **widespread nihilism** and facilitated mass consensus for Nazism (National Socialism) in every social class and across generations, along with enthusiastic support (or at least silent indifference) for its antisemitism.

Following the Second World War, the new democratic Germany was aware of the moral disaggregation into which hyperinflation had plunged the country during the Weimar period. The **German Federal Republic** was proclaimed on 23rd May 1949, and Article 88 of its Constitution (*Grundgesetz*) defined it as a priority of the *Bundesbank* to guarantee stable prices; the same principle was also fully embraced by the new European Central Bank.

THE SEIZURE OF POWER

The great crisis of 1929 was fundamental for the victory of Nazism. Before the crisis, Nazism had only 10 deputies in Parliament (*Reichstag*). In 1930, in the first elections after the crisis, the number of deputies would be over 100.
The **elections of November 1932** returned Germany's National Socialists (NSDAP) as the country's strongest party (33%), although its consensus actually contracted for the first time (- 4%). **Adolf Hitler** became Chancellor on **30th January 1933**. The situation **evolved rapidly**. Following the burning of the Reichstag building, the Communist Party was banned. Elections held on 5th March were a victory for the National Socialists, who obtained 43.9% of the votes. At the end of March, parliament passed the Enabling Act that made Hitler a **dictator** to all effects. The Chancellor became the ***Führer*** of the German nation.
Jurist **Carl Schmitt** justified the juridical validity of the measure by presenting it as an evident case of his theory of "state of exception". Another German intellectual, philosopher **Martin Heidegger**, initially welcomed the rise of Hitler.

Political parties and trade unions were rapidly suppressed, together with all political rights and freedom of expression. On 30th June 1934, Hitler purged the National Socialist movement of its revolutionary elements, eliminating both Röhm and Strasser.

A law gave **full powers** to the Führer, giving him legislative powers and the right to derogate from the constitution (*Führerprinzip*). When Hindenburg died in 1934, Hitler also became **President of the Republic.**
Hitler disliked his current work in the government: he considered himself rather an artist and he preferred to devote himself to foreign policy and the preparation for the war. Therefore the whole administrative activity was delegated to the Reich Chancellery, headed by **Karl Lammers**, who prepared laws and decrees, which were signed by the Führer

The government **hardly ever met**. Hitler delegated to individual ministers, to whom he gave oral suggestions. The ministers had to know how to understand the will of the Führer. This way, **different centres of power** were created, often conflicting with each other. Hitler then intervened to mediate. During the war, Hitler was almost always in the headquarters at the front, so the ministers had to go to encounter him to be able to act.
After **Goering's fall from grace** caused by the defeat in the Battle of England, Hitler's successor was to be the party secretary, Hess, but in 1941 he flew to England because of unclear circumstances.

In the last three years of the war the most influential men with Hitler, who enjoyed great power, were the Minister of Propaganda, **Goebbels**, the Minister of Armaments, **Speer**, and the new party secretary **Bormann**. Great power was held by the head of the SS, **Himmler**, who had created a State within a State.

ECONOMIC POLICY

The regime's priority was **employment**. Germany had six million unemployed citizens. As Hitler announced via radio on 1st February 1933, the government would act "with steely determination and the most tenacious perseverance" to rescue German peasants from poverty and eliminate unemployment within four years. This was to be achieved with a **Four-Year Plan** involving a massive increase in State investments, paying little attention to the growing public debt. The regime designed a vast series of public works, giving more importance to ideology than to economics.

Hundreds of thousands of workers belonging to the ***Deutsche Arbeitsfront*** (German Labour Front) built motorways, airports, public buildings, and military installations, and were employed in reclamation programmes. Companies were helped, especially in the car industry, and the renovation of private homes was encouraged. The Nazi organization *Kraft durch Freude* (Strength through Joy) provided leisure activities and holidays for workers and their families. Thousands of the jobless enrolled in the *Schutzstaffel* (SS) and *Sturmabteilung* (SA).
The need for manpower was increased by **limiting the use of machinery in public works projects**. By 1934, the National Socialist government had spent almost five billion *Reichsmarks* on job creation. One effective economic and ideological instrument was the "**marriage loans**" to couples who were about to marry. The only condition was that the bride should leave her work immediately, demonstrating Hitler's traditionalist ideas of women's role in the family. In 1933, 200,000 more weddings took place than in 1932 and almost 400,000 loans had been granted at the end of 1934. The campaign to reduce unemployment was supported by the institution of the **National Labour Service** (compulsory from 1935) and by military conscription after Germany rejected the Treaty of Versailles. The policy achieved a success unrivalled elsewhere in the world; by 1936, unemployment had been drastically reduced and there were actually **manpower shortages**.

Naturally, the ultimate aim of the Third Reich's economic policy was **German rearmament** to launch another war, but in its early years, the military budget increased less than the spending on job creation and rebuilding national confidence. However, the **second Four-Year Plan** (1936) directed by Hermann Göring gave more importance to preparations for war than to civilian infrastructures, and the percentage of the national budget assigned to the *Wehrmacht* (the unified armed forces of Nazi Germany) gradually increased from 4% in 1933 to 50% in 1938.
The Plan encouraged **industrial concentration** to increase the efficiency of the manufacturing system, and investments were directed towards mining, the chemical industry, manufacturers of producer goods, and the arms industry.
Considerable efforts were made to **increase the degree of autarky**, especially involving raw materials like rubber, fuels and lubricants, wool, and cotton, which were essential to support the war effort. German companies were encouraged and funded to seek alternatives and devised some **innovative manufacturing processes**, such as synthetic rubber (*buna*) and synthetic petrol. However, these products were extremely expensive and were never able to satisfy the needs of the armed forces. Despite all the efforts to increase and improve the output of certain products (cereals, pulses, eggs, and fats), agriculture never became completely self-sufficient, and Germany continued to rely on **imports**, so the regime directed food consumption towards the most plentiful domestic produce (cabbages and potatoes). Only by brutally plundering the countries it occupied (especially in Eastern Europe) was Germany able to feed its soldiers and civilians during the war.

The centralized control exercised by the National Socialist regime did not take over the private sector (unlike the Soviet Union, and to some extent Italy). From 1934, the *Gesetzzur Vorbereitung des organischen Aufbaus der deutschen Wirtschaft* (Law for Organization of the German Economy) organized a **system of regional offices to supervise the industry**. Their initial task of regulating imports was subsequently delegated to the *Reichsbank*, which supervised currency controls. Entrepreneurs and workers were brought together in the *Deutsche Arbeitsfront*. Pay and production procedures were regulated by the *Treuhänder der Arbeit* (Labour Trustees), while disputes between capital and labour came under the jurisdiction of specific social courts.
The government managed to direct the big industrial corporations and the banks towards the achievement of Hitler's objectives, leaving the structure of private capitalism intact, although harsh conflicts sometimes occurred, as in the case of iron. Hitler established that imports from Sweden would gradually be reduced and replaced with German products, regardless of quality or the production costs involved.

Hitler gave precedence to the organisation of the **war economy** over any considerations of profitability or unprofitability regarding **State projects**, stating that "economic problems" were "first and foremost problems of willpower ". The establishment of the *"Hermann Göring" State Steel Works* demonstrated the regime's intention to control the steel industry. The company was given priority in the assignment of manpower and raw materials, together with considerable amounts of hard currency to buy industrial machinery in the USA. *Volkswagen* was founded in 1937 to produce the low-cost family car Ferdinand Porsche designed to Hitler's orders. The new model was intended as Germany's equivalent of the Ford Model T in the USA.
During the war, Heinrich Himmler's idea of creating an industrial empire under the SS culminated in the IG-Farben synthetic rubber factory attached to the Auschwitz death camp.

The regime's investment programme required an **exceptional financial outlay**. In 1938, only about 60% of public spending (30 billion Reichsmarks) was compensated by fiscal revenues. The cost of rearmament could be met only by increasing the size of the public debt, but military spending had to be concealed from foreign powers. The regime resorted to **domestic debt**, but not only for currency reasons. The regime also used **other forms of finance**, obliging the banks and the insurance companies to give their resources to the State. In this way, savings and insurance funds were converted into short-term and long-term State bonds. **Imports** were essentially limited to what could not be produced in Germany because it was vital to exercise rigid control over spending in hard currency.
The *Reichsbank* used the clearing houses to compensate for the purchase of raw materials from producer countries with German exports of the same value. This system based on **specific bilateral agreements** not only limited the amount of gold leaving Germany but also made it possible to pay for imports indirectly, creating a market for German goods, which gave Germany a strong influence over the producer states

The conflict between the governor of *Reichsbank*, Schacht, and Göring, who enjoyed Hitler's support, was precisely about the sustainability of the debt and the risks of inflation. Military spending was now **out of control**, but bankers and conservatives failed to understand that Führer's priorities were to launch a war aimed at acquiring vital space in the East (*Lebensraum*). The cost of the Nazi "war and conquest economy" would be paid by the countries Germany occupied. During the Second World War, this involved systematically plundering their resources and unscrupulously manipulating the exchange rate of the mark against the local currencies. Hitler's voluntaristic vision of economic policy meant constant fresh starts: only **victory** would definitively resolve all the Reich's economic problems. In November 1937, Schacht resigned from the government, and in 1939 he was removed from the Reichsbank.

Paradoxically, Hitler was not in favour of State intervention and centralised planning at all costs. At a **private meeting in November 1937** with some military commanders, Göring, and Foreign Minister von Neurath, he first stated that Germany's "need for land" made war essential: therefore it should have been launched as soon as possible by accelerating the preparations without considering the financial cost involved. He then told his collaborators that the future would bring "a great improvement in the living conditions of all Western countries", and that progress would be generated by close integration of the world market, once the Soviet Union had been eliminated. Hitler also proclaimed that the re-armament policy should not be seen as a "feasible basis for long-term economic stability". In February 1940, during a conversation with Goebbels, Hitler expressed **severe criticism of ministerial centralism**, blaming Goebbels for the failure of a large number of valid projects.
In fact, despite preparing for war well in advance, Germany was actually **behind** the Allies in terms of total mobilization. This was not merely because the Führer wanted to protect the home front from the sacrifices of the Great War, but also because he held that women should stay at home in the family, rather than work in the factories. The choice of a *Blitzkrieg* (lightning war) strategy resulted in abandoning "deep rearmament" in favour of "broad rearmament". For example, Germany abandoned the development of strategic bombers for its air force and initially wasted resources on surface shipping, which proved to be completely useless in terms of military objectives, instead of developing submarines.

It was only during the war - thanks at first to Fritz Todt and then, from 1942 to Albert Speer - that the country launched a great effort towards the **total mobilisation** of its resources and manpower. Concentration, rationalisation and standardisation of manufacturing plants and arms allowed Germany's munitions industry to achieve its maximum output in1944 despite intense Allied bombing; **innovative new weapons** were rapidly designed and put into production: V1 andV2 rockets, Messerschmitt Me-262 jet fighter planes, and submarines powered by a combination of diesel and electricity.

THE LAW

The ideology of the Nazi regime was founded on the myth of the **physical and moral superiority of Aryans** over other races. It legitimised the suppression of the races considered inferior. German **citizenship** was denied to whoever was not of Germanic blood. Schools and universities marginalised Western, Roman, and Christian cultures. Roman law was considered an expression of a decadent civilization compared to Germanic Law Traditions. The local and regional autonomies which Germany for centuries had known in its institutional organisation were abolished
Only the **private and commercial law codes** remained essentially unaltered.

The Führer was by this time above the law and had the authority in all sectors. The ideology of a people united in their faith in a single leader (the *Führer*) reached a frenzied pitch during the Second World War with the motto "*ein Reich, ein Volk, ein Führer!*" ("one people, one realm, one leader").

In the criminal code, the **principle of legality** was denied. Anything contrary to the "healthy sentiment of the people" was considered a crime. Special courts were created, first to judge political and racial crimes, and then all crimes (*Sondergerichte* and *Volksgerichtshof*). The judge was not supposed to be independent, but to judge based on **Nazi ideology**.

THE LAW: CRIMINAL LAW AS WAR

The Nazi German model is a kind of criminal law that arms the state, justice, and police to wage the war of the good against the wicked and the mean. Criminal law aims to protect the people, not the criminal. All judicial practice is revolutionised to achieve the goal of **hindering the criminal**, not the judge. Judges must be freed from any formality and formalism: popular common sense, the will of the Führer, and the Party program are the basis for judgment.
The meaning of criminal law is the **biological protection and improvement** of the blood of the German people. The judge is like a soldier who wages this war for the safety of the race. As the doctor eliminates the harmful elements from the human body, so the judge is the soldier who fights a war against crime and cleans the race of criminals and inferior elements.

CONCENTRATION CAMPS

The first camps, such as Dachau and Buchenwald, were used to lock up political enemies, criminals, and deviants, the "enemies of the people and the State". The camps protected the popular community and had the aim of **re-educating**. The internment is decided by the political police (*Gestapo*).
Prisoners are subjected to **torture** and **corporal** punishment. According to the phrase "Work makes you free" (*Arbeit Macht Frei*, infamously known for being at the entrance of the Nazi concentration camps), work in the camp should have freed the inmates from their sins. In practice, the one in concentration camps was imprisonment for life.

THE FINAL SOLUTION

After 1933, many German Jews migrated. Those who remained were persecuted and had to wear the Star of David sewn onto their clothing.

In 1941, after the attack on the Soviet Union, Hitler told Himmler, the head of the SS, to organize the "final solution" to the Jewish problem in Europe. It was a simple secret verbal order. The physical

liquidation of the Jews was discussed in Berlin at the **Wannsee conference**. The SS were shooting thousands of Jews in Poland and the Soviet Union, but that was deemed insufficient.
Therefore, **six extermination camps** were created in Eastern Europe (five in Poland alone) to eliminate all Jews captured, by asphyxiating them in the gas chambers. Auschwitz was the largest among all Nazi extermination camps.

Internment in the camps was a **purely administrative act**. In the capture, the Germans were aided by **collaborators** in occupied countries, such as France, Belgium, Holland, Italy, Croatia, Slovakia, and Hungary.
At the end of the war, the concept of "**crime against humanity**" was developed. It was the basis of the **Nuremberg trials** against the Nazi leaders.

LAW IN THE SECOND HALF OF THE TWENTIETH CENTURY

FROM THE LEGISLATIVE STATE TO THE CONSTITUTIONAL STATE

The consequences of the two World Wars and the violence generated by fascist totalitarian regimes demonstrated the aberrations of laws that can originate from the **lack of ethical and institutional limits**. The constitutional State was theorised and created to prevent these conditions from recurring. Legal provisions that place limits on individual freedoms are abrogated and **fundamental rights** of the people are, instead, integrated into constitutional documents. Because fundamental rights are written in the Constitution (as in the case of Italy, France, Germany, Spain, and other European countries) they cannot be modified or eliminated with ordinary laws. Legislative changes were made so that the same situation is also in Great Britain, despite the absence of a written Constitution.

Any law that violates fundamental rights or personal freedom can be rejected by **Constitutional Courts**, as is the case in Italy. The same applies to all laws and decrees issued by Parliament and the Government that are contrary to the norms of the Constitution. To **change the Constitution**, special procedures and qualified majorities are required.
Additionally in Italy, if the reform of the Constitution is not passed with the qualified majority of two-thirds of Parliamentarians in favour, it must be submitted to popular judgment with a confirmatory referendum. This has happened recently (the last time has been in 2016), just as the Constitutional Court rejected some electoral reforms voted by Parliament. An example of Italian constitutional reform is the electoral law: Italy had a proportional electoral law until 1993 when several electoral laws were drawn up (at least three up to now) with a fairly complex mixed proportional and majority system.

Modern Constitutions also include **principles** relating to freedom, justice, equality, and protection of the weak. They are not expressed as rules, but as **program objectives**: they indicate the fundamental values which must inspire both the legislator and the judge. This change stems from a **new legal order** in which different and opposing interests must be faced in the writing of the laws, represented in Parliament, and legitimised by popular vote with universal suffrage. Different principles in the Constitution can be opposed to each other: these situations must be evaluated by judges, case by case, to find a fair solution that reconciles individual interests and constitutional values.
For example, the rights of economic freedom can be opposed to social justice; private property, which must also have social purposes, can clash with the needs of the collective good of the national community.
Recently, with COVID-19, the conflict arose between those who demanded individual freedom not to get vaccinated and the need for the state to guarantee the collective health of the entire population.

For this reason, from the old model of the totalitarian legislator of the 19th century, a **multi-level juridical order** was created in Europe. It comprises the State level, which includes regional, legislative, and constitutional courts, and the European level. All these levels coexist in a hierarchical

structure following the **principle of subsidiarity**, which places decisions as close as possible to the citizens and ensures that that action at the UE level is justified in light of the possibilities available at national, regional, or local levels. Furthermore, in some countries, local administrations (municipalities) are recognised judicial power. In the sectors of economy and finance, **international treaties** have been stipulated to ensure uniformity of the rules.

THE ITALIAN CONSTITUTION

The escape of the king, Vittorio Emanuele III, to the South, while the Germans were occupying Rome, guaranteed the continuity of the State, unlike in Germany, where the collapse of the Nazi regime left a political vacuum.

The republican Constitution is the result of a **long journey** that began with Weimar, which makes **work** a priority of the State and entrusts it with the role of **reducing inequalities**.
The second part regarding federalism and Regions was delayed for political reasons: it was feared that some Regions would be governed by the Communist Party. Thus the Regions were only created in 1970 after the Socialist Party had entered the majority. The birth of the Constitutional Court was also delayed to 1956. The jurist Piero Calamandrei was in favour of the Court, whilst the Secretary of the Italian Communist Party, Palmiro Togliatti, and reluctant liberals such as Vittorio Emanuele Orlando, Francesco Saverio Nitti, and Luigi Einaudi (elected President of the Republic in 1948) were against it.

The constitutional referendum of **June 1946** saw the victory of the **Republic**, but the country was **split into two**. All the regions of the Centre and South of the country, including Lazio, voted for the monarchy. The differences were determined by the different positioning after the armistice of September 1943: in the North, Italian had to resist the German occupation and the Italian Social Republic, through the partisan war against the Nazis and Fascists.
In the history of the Republic, the South has always been more conservative than the North.
At the same time, a vote was taken for the **Constituent Assembly** which was supposed to write the new Constitution. The vote established the affirmation of the **three mass parties**: Christian Democracy (DC), Italian Communist Party (PCI), and Italian Socialist Party (PSI).
It was the first vote with **universal suffrage**: for the first time women were recognised the right to vote.

The new **Republican Constitution** was approved in 1947 and entered into force on **January 1st, 1948**. It was very different from the old Albertine Statute and consecrated the birth of a **new egalitarian mass democracy**. Italy became a **parliamentary Republic**. The Government is constituted through the mandate conferred by the President of the Republic on the President of the Council (usually a leader of the party that has obtained the most votes). The Government can operate after having obtained the **trust** of the two Chambers (Chamber of Deputies and Senate) and must resign if there is a vote of nonconfidence.
The memory of fascism, and the fear that in the future a new totalitarian party could prevail, led to a **perfect bicameralism** because every bill must be approved by both the Chamber of Deputies and the Senate. The **President of the Republic** is elected by the two chambers, joined by the representatives of the regions, and remains in office for seven years, while the normal duration of Parliament is five.

The **three main political ideologies** participated in the construction of the Constitution: the Catholics, the Liberals, and the Marxists. They were very different from each other and were united only by the **mutual rejection of fascism and totalitarianism**. The contradiction was that the most important party of the left, the Communist Party, was inextricably linked at the time to the totalitarian of the Soviet Union.
The **different contributions** are clearly distinguishable:

- The protection of the family, considered a "natural society" and the rigorous respect of the Concordat stipulated by Mussolini with the Church came from the Catholics;
- The distinction between the State and Church as independent and sovereign systems, the autonomy of the judiciary, freedom of business and economy, and the necessary coverage of public spending came from the liberals.

- The socialist current and the left of the Catholic party (Dossetti and Fanfani) influenced the full recognition of the right to work and the right to go on strike, the role of the State as a regulator of the economy to reduce inequalities and offer all citizens decent paid work

All parties recognised, as one of the most important objectives of the State, the **elimination of the obstacles** of economic and social nature that prevent the full freedom and equality of citizens. Thus, the **repudiation of war** and the acceptance of **limitations of national sovereignty**, if aimed at peace and justice among nations, was very important. The latter is a principle that has allowed the adoption of the main treaties of the European Community without having to change the Constitution, as it has instead happened in other countries

The **Constitutional Court** was created, which controlled compliance with the Constitution by the ordinary legislator and decided on the conflicts of attribution between the powers of the State and those between the state and the Regions. The Court has the power to declare an ordinary law, subject to its judgment, unconstitutional with the effect of repealing it immediately.

It was decided to adopt a **proportional electoral law** without a threshold because it wanted to ensure the maximum participation of all parties, even the smallest, in the political life of Parliament and also because, mindful of fascism, they did not want a political force to benefit from the majority system. When the centre coalition created a majority award in 1952 that assigned 65% of the seats to the coalition that took 50%+1 of the votes, Italian opinion split. However, in the 1953 elections, the centre coalition did not achieve that result and the law was abolished as early as 1954.

ITALIAN REGIONAL AUTONOMIES

A real revolution was the abandonment of the French centralist model to create a system that established **Regions**, endowed with large autonomies and legislative powers in some specific matters. Five regions with **special statutes** were created to regulate the rights of cultural and linguistic minorities in the border areas (Valle d'Aosta, Trentino-Alto Adige, and Friuli-Venezia Giulia), to manage economic, political, and social problems deriving from insularity (Sicily and Sardinia). These Regions had particular needs that required this special status, as their situations after WWII were very delicate.
At the end of the war, France had claimed **Valle d'Aosta**; in **South Tyrol**, fascism had uprooted German culture, imposing new Italian names on cities and villages and imposing Italian as the only official language. Before the war, Mussolini and Hitler had stipulated an agreement according to which the citizens of German language and culture could emigrate to Germany (since 1938, Austria had been part of the German Reich), but the war had blocked the exodus. After the war, Austria and Italy agreed to recognise special rights for the Tyrolean population.
During the occupation of the Allies, there was the rise of in **Sicily** the separatist movement, which also generated a conflict with groups of bandits, such as the one led by Salvatore Giuliano. Only after a few years, the army and the police were able to repress the insurrection, while Salvatore Giuliano was killed in 1950.
Sardinia had an economy still deeply rooted in agropastoral activities and there were problems related to banditry in the central part of the Region (mainly in Barbagia and parts of Ogliastra).
On the **Eastern border** (the "Iron Curtain"), there were political and cultural problems. Friuli-Venezia Giulia bordered the Soviet bloc (Yugoslavia would move away from the Soviet Union in 1949). In 1945, Trieste and Venezia Giulia had been occupied by the communist partisans led by Tito. Only after a month of harsh occupation did the Allies force the Yugoslavs to leave the city. Trieste and Istria were separated from Italy and integrated into a free territory administered by the Allies. Trieste returned to Italy in 1954, while Istria was annexed to Yugoslavia. It was also necessary to protect the Slovenian cultural and linguistic minority that still lived in Italy, after the violence suffered by fascism.

ITALIAN POLITICAL SCENARIO POST-WWII

In reality, the **anti-fascist union** born during the war and the partisan struggle had by now been

broken. East-West bipolarism and the Cold War conditioned the political scenario: in 1947 the communists and socialists, then allies, were excluded from the government and in 1949 Italy entered the Atlantic Pact (NATO).
Anti-fascism as the basis of constitutional unity could not survive the Cold War. There was the **contradiction** that within the constitutional forces there was the Communist Party, closely linked to Soviet totalitarianism: it would definitively cut its ties with the USSR only in the 1980s, practically on the eve of its dissolution (while the socialists abandoned the alliance with the communists in 1956, after the denunciation of Stalin's crimes and the revolt of Hungary).
The **Catholic party** was also favoured by the newly important role exercised by the Church in Italian society, which also matured thanks to the crisis of the State during the war. The Church fed the citizens and protected their political wants within the limits of their possibilities. Furthermore, the Christian Democrats attracted all those citizens who feared the Communist Party and Soviet Russia. In addition, American aid, such as the "Marshall Plan" was decisive in reviving the country.

The **elections of April 1948** gave the absolute majority of seats in Parliament to the **Christian Democrats** and sanctioned the defeat of the united left (Communists and Socialists). The President of the Council was Alcide De Gasperi.
He had the merit of governing with the secular parties (liberals, social democrats, and republicans) in a coalition government, and of having kept the distance between State and Church, limiting its most reactionary claims.

The Minister of the Interior, **Mario Scelba**, wanted the Communist Party to be outlawed, but the Prime Minister, Alcide De Gasperi, opposed it because it would have been very dangerous to leave a party with millions of votes and hundreds of thousands of members in hiding. So, when the new neo-fascist party, *Movimento Sociale Italiano*, was born in 1948, it was decided not to dissolve it even if a specific article of the constitution prohibited the establishment of any movement or party that explicitly referred to fascism.
The **purge of state officials** most compromised with fascism had been partial and essentially failed. In 1946, with Togliatti as Minister of Justice, it was decided to approve an **amnesty** for all criminal and political offences. The choice of amnesty was made opportune, not only for political reasons but also for opportunities to appease the political divisions, which in the North generated murders and insecurity.
The **judiciary power**, however, was in line with the past. Even the codes, purged of the most fascist and illiberal rules, remain substantially intact, like the Rocco Code.

ECONOMIC POLICY

At the Constituent Assembly all the political forces, even the liberals, agreed to keep **public ownership of the banks and industries** nationalised by Fascism and to keep the Institute for Industrial Reconstruction intact. Thus, with American aid **large investments** were made in the public steel, mechanical and shipbuilding industries. The push from the left of the Christian Democrats, led by Amintore Fanfani, reinforced public intervention to bridge the **gap between North and South**.

So new laws were promulgated:

- Tupini law for the financing of public works in municipalities (1949)
- "Fanfani plan" for the construction of public housing for workers, who could redeem the house after a certain number of years and become owners (1949)
- The separation between public and private industry. The public industry abandoned the private industry association (Confindustria) and was headed by a new Ministry for the Coordination of Public Industry, which became the Ministry of State Holdings in 1956 (1950)
- The establishment of the Cassa per il Mezzogiorno (1950)
- The Land Reform (1950)
- The creation of ENI (National Hydrocarbon Organization) (1950)

THE CASSA PER IL MEZZOGIORNO

The idea was to create an **autonomous body** modelled on the Tennessee Valley Authority, created by Roosevelt during the New Deal, to access funding from the World Bank and other international institutions. It was based on the theories of the Nobel Prize-winning Swedish economist Gunnar Myrdal to develop backward areas: building infrastructures and public works (roads, railways, power plants and aqueducts), and stimulating investment and economic growth through productive activity in the South. It was believed that the only road to growth in the South was **industrialisation**.

GERMANY

In 1945 the Allies organised the great **Nuremberg trial** to condemn the Nazi crimes. All the main defendants were sentenced to death. The most important, Hermann Goering, committed suicide the night before his execution. Other minor trials continued, but substantially the work of **denazification** was modest.

In 1944 the United States developed the **Morgenthau Plan**, written by a collaborator of President Roosevelt's. It provided for the division of Germany into **two States**, one in the North and one in the South, along with the internalisation of the most resource-rich areas and the annexation of others to the Allies and neighbouring countries. Germany would no longer have heavy industry and would have been completely demilitarized. The events of the Cold War oriented the Allies in a radically different way.

Berlin, which had been divided into four zones entrusted to the victorious powers, located in the heart of the zone occupied by the Russians, was the site of the clash. In June 1948 Stalin decided to block the access roads to the city to protest against the economic reconstruction of West Germany and to probe the American reaction. The Americans set up a large airlift that supplied the city until the end of the blockade in May 1949. It was the official start of the **Cold War**.
In 1949, the Westerners decided to create an independent Germany, the **Federal Republic of Germany**. Stalin reacted by creating the **German Democratic Republic** in the East.
In 1952, Stalin proposed the reunification of Germany into a single State, which should have been neutral and demilitarized, but the United States and its Allies refused. The West German government, led by Konrad Adenauer, also refused. In 1955, West Germany joined NATO.

THE CONSTITUTION OF WEST GERMANY

The new Constitution of West Germany, called the "Basic Law" (*Grundgesetz*) took many rules from that of Weimar, supplemented by some declarations aimed at preventing the power of a totalitarian party:

- the Republic was defined as a "democratic and social" State.
- the "right to resistance" to tyranny was stated (because the former Nazis and the military generals had appealed to the duty to obey the superior authority, which was the Führer).
- extreme parties with anti-democratic objectives were prohibited (such as the Nazi and Communist party).
- the powers of the President were limited, and he became a figure of pure representation, while the powers of the chancellor were increased.

To avoid the Weimar disaster, other **corrections** were made:

- To avoid political fragmentation, a proportional electoral system was adopted, but with a threshold of 5% of the votes; referendums and any form of direct democracy were excluded
- To guarantee the stability of the government (one of Weimar's weak points), the mechanism of "constructive distrust" was created, which admits the fall of the chancellor and the Government only if a new majority has already been formed in Parliament, capable of electing the new Chancellor and the new Government

Germany is not a real federal state, but the **nine regions** (*Länder*) are very important. The Constitution guarantees them legislative competencies competing with those of the State, such as matters of justice, police, school, taxation, trade, industry, and service law, but also civil and

criminal law. The State manages foreign policy, defence, money (now entrusted to the ECB), railways, post offices and customs. The representatives of the *Länder* sit in the ***Bundesrat***, in which delegates are based on the population of the different regions. It is **not a perfect bicameralism** because only the ***Bundestag*** (the other chamber) votes for confidence in the government.

The German **judiciary** is made up of different levels of justice. At the top, there are two central courts, the Federal Supreme Court (*Oberste Bundesgericht*) for ordinary justice, administrative finance and labour, and the Constitutional Court (*Bundesverfassungsgericht*) to guarantee the adherence of laws to the constitution and to judge disputes between the central State and Länder.

The **economic constitution** is oriented towards economic liberalism and the market. The Constitution explicitly provides for monetary stability to avoid the risks of high inflation (which weakened Weimar), giving great autonomy to the Central Bank.

GERMAN POLITICAL SCENARIO

German political life was dominated by **two large parties**, the Christian-Democratic (CDU-CSU) and the Socialist Democratic (SPD), with the presence of the smaller liberal party, which often constituted the needle of the balance and allied with one or the other of the two large parties to form the Government.
Today, also as a consequence of the political reunification of 1991, the situation is more fragmented because there are other parties such as the extreme left (*Linke*), the movement of the greens (*Grünen*) and the extreme right (*Alternative Fur Deutschland*)

FRANCE

After the defeat, in June 1940, France signed an armistice with Germany. Parliament gave full powers to Marshal Petain, a hero of the Great War, who formed a collaborationist government, through which the Germans left control of Southern France until November 1942: the **Vichy government**.
General De Gaulle took refuge in Great Britain and founded the movement Free France to continue the war against the Germans. Gradually, all overseas territories joined the general's movement.
France was raised to the status of **winner**, entrusting it with control of a part of Germany, although it was excluded from the conferences of Tehran in 1943 and of Yalta in 1945, where the big three winning Nations (UK, USA, and USSR) drew the map of the world after the war.

After the liberation of Paris in August 1944, General De Gaulle became President of the **Provisional Government**. He abruptly resigned in 1946 because political parties rejected his plan to strengthen the Government over the Parliament. In 1947 he founded his own party, which he then dissolved because he retired to private life.

The Fourth Republic wore out in the colonial wars. In 1954 it was defeated by the Liberation Movement in Vietnam. In 1958 the Algerian War (which was not a colony, but a metropolitan territory where a million French lived) caused serious political instability. The Government was accused of being too weak and some generals were organizing a coup d'etat. As a consequence, in 1958 De Gaulle was invited to preside over the Government, which obtained full powers. He created a **new Constitution**, approved by the French people in a referendum, which is still in effect.

The **Fifth Republic** is a **presidential regime**, in which the President of the Republic is directly elected by the people. The President chooses the Prime Minister, chairs the Council of Ministers, can dissolve the National Assembly (the Parliament), and represents France at European meetings. He also has direct power in foreign policy. The **risk** of the system is that if the majority of Parliament is held by the opposing political force, there is a dualism of executive power (this has occurred several times, the last being with Chirac and Jospin). Parliament is elected with a two-round electoral system, which has reduced the political fragmentation typical of the Fourth Republic.

The Constitution of 1958 established the Constitutional Court of nine members, chosen equally by the President of the Republic and the Presidents of the Assembly and the Senate. France has established

regions, which have less power than in Germany, Italy, and Spain because they do not have legislative and fiscal autonomy.

SPAIN

The **Spanish Civil War** brought about the end of the parliamentary republic and democracy. General Franco became head of state and created an **authoritarian regime**, where he was head of the government and controlled Parliament (Le Cortes). He designated Prince Juan Carlos Borbone as his successor. After he died in 1975, a transition to democracy began in Spain which culminated in the **1978 Constitution**. In 1981, a group of far-right military men attempted a coup, thwarted by the decision of King Juan Carlos to reject it.

The Constitution combines the canons of democracy with the Spanish **tradition of autonomy of the different regions** of the country: in fact, in the Basque region there was a terrorist group (ETA) which organised attacks to claim independence; in Catalonia, there was a strong separatist movement.
The Constitution entrusts twenty-two subjects to the regions: from agriculture to the environment, from fishing to crafts and historical monuments. They are **not exclusive competencies**, but they are exercised in competition with the State, which has exclusive competence over thirty-two matters.
As for civil law, regions can maintain their **historical traditions**, especially in the areas of family, succession, and property law. This has not prevented the Catalonian independentist movement from becoming very strong.

In **Parliament**, laws relating to fundamental rights and the organisation of the State and local autonomies must be approved by an absolute majority of votes. In the Constitution, the second Chamber (Senate) represents the local autonomies. Spain is a **parliamentary monarchy**, where the Prime Minister must obtain the confidence of the first Chamber (Congress), which has the relevance of State legislation.

The constitutional principles and rules are supervised by the **Constitutional Court**, which also decides on disputes between the State and the regions, but also on appeals presented by individual citizens.

EUROPEAN UNION LAW

EUROPEAN COOPERATION

During the Second World War some Italian intellectuals, imprisoned for anti-fascism, wrote the **Ventotene Manifesto** (named after the island of the Tyrrhenian Sea where they were imprisoned), which represented a real program for a new European federalism. They were Altiero Spinelli, Ernesto Rossi, and Eugenio Colorni. The idea was to transfer the power of individual sovereign States to a higher authority, as the United States had done, to prevent new wars in the continent.
The idea of a European federation was not new, but only after the Second World War there were the conditions necessary to create it:

- the horrors and destruction generated by the two wars, especially the second one;
- the Soviet threat (in 1949 the Soviet Union produced its first atomic bomb, equalising the American advantage, and punctually in 1950 the war broke out in Korea);
- American support considered European cooperation positive both to accelerate economic growth and to strengthen the defence against the Soviet Union (the North Atlantic Treaty Organization – NATO - was born in 1949).

The United States also favoured the cooperation of European countries with the Marshall Plan

THE EUROPEAN COAL AND STEEL COMMUNITY

The first step in European cooperation was the creation in 1951 of the European Coal and Steel Community. French minister **Robert Schumann** proposed that the management of coal and steel between France and Germany should have become common and been trusted by a higher authority. The access to these resources had caused political and economic rivalries that had provoked the wars of 1870, 1914 and 1939.

This was an idea of Jean Monnet, who during the war had been a diplomat of Free France under General De Gaulle. The project attracted German Chancellor Konrad Adenauer, who wanted to reintegrate the new federal Germany into the European system. Italy, Belgium, Luxembourg, and the Netherlands immediately joined the project. So, the core of the six founding countries was created.

THE EUROPEAN DEFENCE COMMUNITY

Amid the Cold War, the French minister Réné Pleven proposed the creation of a European Defence Community, in which the six countries would **integrate their armies**, organised within a common military and political structure. This would have also allowed German rearmament.
The project was presented in 1950, but in 1952 it was complemented by the creation of a **constituent European parliamentary assembly** which would elaborate the project of a future federal or confederal structure. This idea came from the Italian Prime Minister, Alcide De Gasperi.

The United States were also in favour of a common European army, to strengthen the defence against the Soviet Union and reduce American military spending in Europe.

The treaty had to be approved by the six Parliaments (Britain refused to enter), but the French National Assembly rejected it and the project **failed** forever.

EUROPEAN ECONOMIC COMMUNITY

It was a temporary braking. In the following years a study group, made up of politicians and technicians, chaired by the Belgian minister, Paul-Henry Spaak, designed a European authority for atomic energy and the birth of a common European market. The six countries approved the organic project in the two **Treaties of Rome** in 1957, which created Euratom and the European Economic Community. The project was based on the model of the German common market of 1834 (*Zollverein*), promoted by Prussia, which integrated the economy of the German states and favoured unification.

Euratom was not a success, because De Gaulle wanted to equip France with the atomic bomb (*Force de Frappe*), but the **European Economic Market** was a success later on. It progressively broke down internal borders and increased trade between the six countries. A common policy of external duties was also developed.
The father of the project was, again, Jean Monnet. He believed that the only way to create a federal Europe was to progressively integrate the economy with limited goals. When the economy is completely integrated, including a single currency, then it will be easier to create political unification. He defined his strategy as "**functionalist**".
The United Kingdom refused again to join and, with other countries, participated in the creation of the European Free Trade Association (EFTA).

The European Economic Community was founded on **four institutions**:

- The Commission, appointed by the governments, had the function of legislative initiative, an instrument of government and surveillance of the treaties.
- The Council of Ministers made up of the ministers of the national governments in office, had a legislative function and exercised executive powers.
- The Parliamentary Assembly, initially made up of national parliamentarians designated by individual parliaments, collaborated with the Council to approve community laws.
- The Court of Justice, made up of judges from member countries, judged in compliance with the treaties

THE TREATY OF MAASTRICHT

The great growth of the economy of the member countries of the European Community **stimulated other countries to join**. The United Kingdom was able to enter only in 1972 because General De Gaulle always opposed it during the years in which he governed France.
After the entry of new countries, the institutional growth of the European Community stabilised for a few years. It quickly resumed with the approval of **the Single European Act**, wanted by the President of the European Commission, Jacques Delors, in 1986. The act set out to complete European economic integration in six years, completing the full freedom of movement of people, goods, capital, and services. But the real turning point was the collapse of the Soviet Union and the end of the Cold War.

After the collapse of the Berlin Wall, the German Chancellor Helmuth Kohl sensed that it was possible to reunify the two Germanies. Only the approval of the four victorious powers of World War II was needed. The United States were in favour and President George Bush was thrilled with it. The head of the Soviet Union, Mikhail Gorbachev, also agreed. In fact, the Soviet Union could no longer afford to keep soldiers and armaments in Eastern Europe and had to invest a lot in Germany to restore the failing economy. The Soviet Union did not produce the grain needed for domestic consumption and had to buy it abroad. Only the governments of Great Britain and France did not agree with the project. Margaret Thatcher and Francois Mitterand feared the rebirth of a great Germany in the heart of Europe, as it had happened after 1870.
The French President proposed a solution: in an interview with the German Chancellor, he declared that France would accept German reunification only if Germany was willing to renounce the mark and quickly start the creation of the single European currency. Kohl agreed even though he was aware that the German public opinion was against it. Thus, the **way to the Maastricht Treaty** was open.

The Maastricht Treaty, in addition to the institution of the single currency, generated a significant **transfer of power** from the individual member States to the European Union. All subsequent treaties have reinforced this action. Individual nations were believed to be too weak to compete in the era of **globalisation**. To compete with giants like the United States and China, the European Union had to be stronger. The treaty constitutes the last step of the functionalist path by Jean Monnet.
Now it was the turn of politics to build a true federal union.
In the last twenty years, the **delay in politics** has generated a growing feeling of dissent towards the Union among people. The economic and financial crises have also had a decisive effect in pointing out the shortcomings of the treaty.

THE EUROPEAN SINGLE CURRENCY: EURO

The **fundamental parameters** for entering the single currency were an annual deficit of a maximum of 3%, no more than 60% GDP, and low inflation (1.5/2%). The situation in Italy was a deficit of 10/11%, debt of 120%, and higher inflation (4%).
The eurozone, according to economists, is not an "optimal monetary area". The economies of the States that form it are very different: not only between States (for example, Germany and Italy), but there are strong differences within themselves between the different regions (for example, between West Germany and East Germany, or between Northern Italy and Southern Italy).
The **exchange rate** between the old national currencies and the euro, imposed by Germany, was almost that of the German mark (for example, 1 euro = 1936.17 lire). This was too high for the weakest European economies. As a consequence, with the euro, Germany's exports increased a lot (because the euro was less strong than the mark anyway), while those of other countries, such as Italy, fell. For example, Italian industry can only be competitive with a strong squeeze of wages, but this reduces the wealth of the population and consumption, generating a stagnation of the economy, which in turn prevents the real reduction of public debt.

In Maastricht, it was believed that to guarantee the single currency it was necessary to compress public spending and reduce public debt. The **sovereign debt crisis of 2011** demonstrated the risks of the eurozone. After the 2007 crisis, governments had to increase spending to save banks and industries. The rating agencies lowered the ratings of countries with the highest public debt, such as Italy: speculation sold Italian bonds and the spread (the difference between Italian and German bonds) rose to over 500. To avoid default, the Italian government launched an **austerity policy** (reduction of

public spending and increases in taxes) which depressed the economy, failing to reduce the public debt. The situation worsened with the approval of the "**Fiscal Compact**" by the European Union, which also provided for a balanced budget.

The weakness of the eurozone is determined by the fact that a **unified budget** has not been created between the countries that are part of it. There is the spread, but it increases the economic differences among countries. The **European Central Bank** must also become a true central bank as a "lender of last resort", which in the event of a crisis injects liquidity to save the economy as the Bank of England and the Federal Reserve do. Instead, the ECB's statute only aims to control inflation at 2%. The sovereign debt crisis was resolved only when the President of the ECB (Draghi) proclaimed that they would do everything possible to save the euro: a decision that is remembered through the slogan "**Whatever it takes**". The ECB saved the euro by launching the "Quantitative easing" policy, which is about the indirect purchase of public debt securities and lowering interest rates. Furthermore, redistributions are needed when there are periods of crises (as in the United States and Germany), but political will is needed and the European budget is too small: 1.1% of Europe's GDP.

To overcome the crises and maintain the single currency, the **all-out defence of stability** wanted by Germany wants each country to control its own budget without external interventions, even at the cost of heavy cuts to the welfare State and the increase in unemployment. This policy has generated a **sharp increase in political and social inequalities** which have produced a growing mistrust in the ability of the European Union to improve the lives of citizens.
The participation of European citizens in European elections has collapsed. The electoral results in European countries (regardless of the difference in the economic situation) denounce a growing **disaffection** with politics, traditional parties, and a growing orientation towards new populist movements (such as *Podemos* in Spain or *Movimento Cinque Stelle* in Italy, that want a new direct democracy), the far-right populists, and the sovereign-wing.

THE CHALLENGES OF THE EUROPEAN UNION

Over time, many more countries entered the European Union. The entrance of the new Eastern European countries has reduced the homogeneity of the Union.
Some member States are witnessing a **democratic backslide**, with the promulgation of authoritarian legislation limiting freedom of expression of citizens, which is contrary to the principles of the Union. However, sanctions are difficult to be approved, because of a missing consensus among member States and because of economic and industrial interests.
Today COVID-19 has suspended the fiscal compact, but only until 2024. In Europe, there is a heated debate on **intervention policies**, the **single budget,** and the **issuance of European bonds**, which divides the countries of Northern Europe from those of Southern Europe.
Another matter of disagreement among Member States of the EU is the **stabilisation of exchange rates** between the currencies in the Union. In the past, two projects of European monetary systems, which had been built to this aspect, failed. The first was in 1974 due to the oil shock, while the second was in 1992 due to the failure of the German Central Bank to support the exchange rates of the pound and the lira attacked by international financial speculation.
Brexit taught that the process of political unification is not irreversible: this could encourage other unsatisfied European governments to follow the lead and exit the EU.

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