CLMG

A.A. 2024/2025

BLAB

DISPENSA

HISTORY OF LAW (MODULO 1)

-CLASS SPECIFIC-

A CURA DI

CLASSE 19

TEACHING DIVISION

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06/09 INTRODUCTION

The impact of the German Tradition

The impact of the customs of the German tribes over the development of law and European culture in the Middle Ages was fundamental. This is related to a key point: **the German tribes' tradition introduced something new in European culture**, thus our ancestors perceived this tradition as foreign and something different since they considered the Greek and Latin traditions as the very foundation of their culture. So they perceived the German traditions and the culture of these tribes as an external force from the established European culture. If we think about it, even the word Europe itself comes from a Greek word.

The general context of the Middle Ages

Several notions and ideas are to be considered as cornerstones of Middle Ages societies. The main protagonist of both the past and current legal system is the State; **nationalism** and identification were and are still means to reject the sovranism of the European context.

However, the State was actually absent in the Middle Ages and we must understand this: all the medieval experiences revolved around two elements after the Fall of the Roman Empire.

Two crises of antiquity left two major gaps: political and cultural.

A political vacuum: what about the State? Historians conventionally agree on the idea that the Middle Ages started with the fall of the Roman Western Empire in **476**. This event represented not only the ending of the ideals of the Roman Empire but also the ending of the political values of the Roman state. This is important because the same extent of political power and organization are nowhere to be found in the Middle Ages: there was no State. For us, it's difficult to understand society outside of the state and even talk about law in the absence of it. How was it possible that there were no states even though there were a lot of kings and armies?

- by **"State"** we address a well-defined political organization, that operates and is located on a delimited and proper territory, invested by effective power and means which aspires to be absolute and exclusive. Three elements are therefore fundamental: **people, territory, and political power**.

During the Middle Ages, however, there was no absolute nor exclusive political power: it wasn't interested in being related to a specific territory, it was people with no land. Moreover, those who were invested by the authority of policymaking had very **weak political power** and lacked interest in law (for example, German states didn't even have a real trial). The policymakers, or better, rulers wanted to be connected and relate to other powers (both internal and external) in order to extend their kingdom, such as the Church or even merchants and lords: for this reason, we talk about an incomplete political power and the main consequence of this is that law aroused from many different social backgrounds and places, **it was not an exclusive power of the legislator**. There was no exclusive power but on the contrary, it was **diffused**; there was no centralized "law" and many "laws". In the last couple of centuries the terms *ius* and *lex* merged, but they are not the same

thing. Laws differ from the law, the latter resulting also from the work of scholars (diritto, ius ≠ leggi). In this chaotic context, lacking a central authority, law was entrusted to practitioners.

This allows us to understand that law in the Middle Ages was defined by **pluralism**: it had many different sources, different organizations, and principles. Many systems cohabited and ruled the same people. *Relying on a single system of rules was insuficient*

A cultural vacuum: what about the legal culture?

- Culture is related to **society,** however, medieval societies were of a changing and living kind. During the Early Middle Ages, the economic and social reality was quite primitive thus culture suffered, especially the legal culture struggled; it proceeded to flourish in the late Middle Ages because of a renewed and richer social and economic context.

- Culture is also related to the **State:** the decline of the Roman empire went along with the cultural decline of its principles. The economic and social reality in the early Middle Ages was kind of primitive, reflecting many social issues. Of course, there was still some culture, such as the monastic one (manuscripts were exclusively written by monks), but it was limited and reserved to only the part of society that could access it; therefore, there was an exclusive culture.

Without much State intervention and lacking a legal culture, who was left with the law? More precisely, who ruled society? Legal practitioners: jurists and philosophers who discussed and practiced law in practical cases with a creative attitude.

The influence of the Roman culture in the Middle Ages:

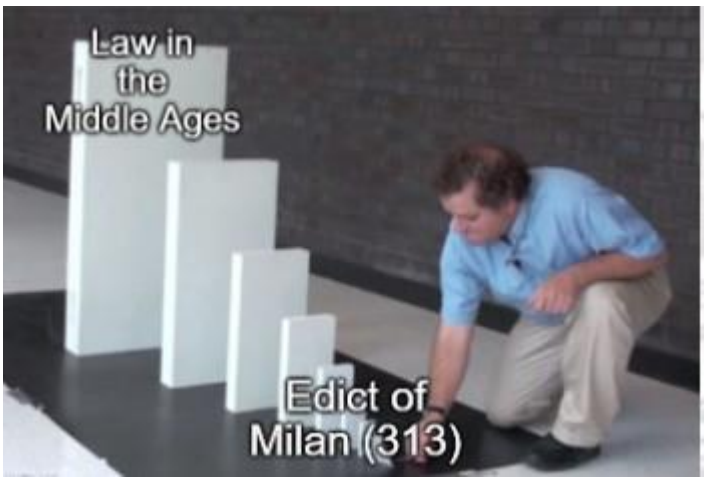
476: The fall of the Western Roman Empire: Barbarians invaded Italy and Emperor Romolo Augusto was dethroned. Barbarians started to merge with Romans during the 4th and 5th centuries, entering also in roman armies; Odoacre was of German origins but was a member of the roman army who entered Rome and dethroned the emperor. However, Roman law continued to live for hundreds of years due to certain aspects connected to it.

1. The first reason is that most of it was written; on the contrary, German law was oral so when the weak political power asserted itself in the Middle Ages (the second reason), the Roman one found once again its importance, also because of its greatness of the past that became a myth and impacted European history. The written character of Roman law and the weak political power of the Middle Ages made Roman law the greatest authority for a long time.

But was it just that?

The Roman Empire was already undergoing a profound transformation in the period immediately antecedent to its fall.

313: With the government of Emperor Constantine who enacted the Edict of Milan (313) Christians were allowed to legally perform their faith within Europe. This led to an evolution both from an administrative and cultural point of view. First of all, the political power of the Emperor started to be progressively closer and aligned to the traditionally eastern notion of political power: he was the only ruler, invested by a power directly deriving from God/ the divinity and it cannot be shared with others. The emperor was the owner of all the powers (therefore the legislative one as well), differing however from the classical notion of power which conceived a shared power. This shift was driven by Christianity, since the emperor couldn't identify as God directly anymore but as his chosen leader. This notion of being "the elected one" led to a conception of the central power which couldn't be shared with others. From here the idea of the emperor as the exclusive holder of power, and especially legislative one, led to a conception of law defined by the laws of the emperors (i.e. imperial constitutions- *quod principi placuit, leges habet vigorem*). Consequently, in the late roman age, the distinction between ius and lex became more complex: now the main source of law became the imperial constitutions, so the laws enacted by emperors. And even the classical roman thinking started to be interpreted differently: the entire law had to be reconducted to the will of the sovereign. As a matter of fact, after the Emperor Constantine, the roman emperors enacted a lot of constitutions.



One of the main consequences of this shift (growing relevance of the imperial constitutions and the consideration of them as the law) was the increase in the number of laws, causing a problem in which ones to apply to the case at hand. A connection of such sources started to be perceived as urgently needed

The first codes, collections of constitutions enacted by emperors were made:

- *Codex Gregorianus M Hermogenianus*: redacted under the government of Diocletian during the III Century
- *Codex Theodosianus* (438)- 1G books collecting all the imperial constitutions enacted since Constatine
- *Corpus Iuris Civilis* (524-534)- the most important collection encompassing the most important legal sources (not just imperial constitutions) promoted by Emperor Justinian. It was enacted after the fall of the Roman empire, nevertheless the political view of Justinian was closely related to the imperial myth of Rome. The emperor was a Latin speaker, despite being born in the Eastern roman empire (therefore considered by some to be the last roman emperor) and his political agenda aspired to restore the greatness of Roman empire by chasing:

i) The unification of Christianity;

ii) The reconquer of the Italian peninsula, in which he succeeded but later in 5G8 Longobards regained control of the territory;

iii) The codification of Roman Law in order to re-establish the greatness of the roman tradition; thus law was considered as one of the main elements of the roman culture. The emperor succeeded in this attempt by enacting the:

The *Corpus Iuris Civilis*: a collection of sources, divided into:

1. ***Codex* (529):** 12 books collecting all the Roman imperial constitutions;
2. ***Digest* (or *Pandectae* in Greek; 533):** 50 books which collected the iura, non-legislative sources; result of the opinions and traditions of the most distinguished Roman scholars and Lawyers;
3. ***Institutiones*:** an introductory textbook for law students containing the basic and fundamental legal concepts and principles of the Roman legal tradition;
4. ***Novellae* (534):** a collection of the new constitutions enacted after the year 529 (that is, after the Codex, a sort of update).

However, this collection disappeared during the Middle Ages and re-appeared only around the year 1000.

12/09 ROMAN LEGACY

Corpus iuris civilis is the medieval name given to the original Giustinian connection of roman sources which is made of 4 different parts:

1. Codex;
2. Digest: a connection of the so called iure so the opinions of the greatest scholars;
3. Institutions: a sort of textbook for law students;
4. Novellae.

Before talking about the impact of German tradition over the Middle Ages, we need to focus on the Roman law legacy by reading a brief first part of the institutiones. The first part of the first book of the institutiones contains the definition of **iustitia** and **iure**.

> "«Justice is a constant and perpetual will, giving to each his right. Jurisprudence is the knowledge of divine and human things, the knowledge of just and unjust.
> The precepts of law are these: to live honestly, not to injure others, to give to each his due. There are two positions of this study, public and private. It is a public right that concerns the state of the Roman state, a private right that pertains to the benefit of individuals. It must therefore be said of private law that it is tripartite; for it was collected from natural precepts, or from nations or civils.»

Then we have another word which is "jurisprudence" that is the knowledge of the divine and the human tents, the knowledge of just and not just. So, in defining what is the law and what is justice,

the work of the jurists came up in statutes. Another important distinction in roman law (and actually for all the western traditions of law) is between public law and private law.

- Public right concerns the state of the roman state, regards the ownership of roman state so property ownership but also in a political sense.
- private rights pertain to the benefit of individuals.

So, we have a collective dimension: a public one and a private individual one. Moreover, within private law, we have a tripartition which is quite interesting because what the last sentence says is that private law originated from three different sources. These sources are the nation precepts the so-called *ius gentium*, then nations or ius civils. But basically, what we are used to intending as private law is just the last one so the civil law. We have to highlight a couple of elements:

1. **the distinction between justice and jurisprudence.** Here it's quite clear that in Roman tradition the role played by the jurists, the lawyers and the legal scholars are essential because in order to know what is justice you have to study the law from a scholar and philosophical perspective, the lawyer cannot just know the rules but he must be an interpreter of the reality which in roman tradition is made by both divine and human beings;
2. **the distinction between public and private law,** this distinction wasn't clear for a large part of European legal history after the fall of the roman empire that was not so clear anymore. In the Roman tradition this distinction was clear because law is deeply related to the state and to political power. Law during the Middle Ages was actually just civil law, private law in roman culture was made of 3 different sources that are *natural precepts, nations or civils.*

Here emerges an important element which is that the reference to the natural law shows the **crisis of the law system during the Middle Ages**, in fact during the centuries after the fall of the western roman empire the view and the concept of law itself changes a lot trying to be very precise and practical. The demise of the Roman empire started in the 14th century, it changed the idea of power and law, there was the **political crisis** of the roman empire that was not the only one because there was also the **agricultural** one.
Agriculture was substituted with different kinds of survival activities like getting fruits from the forest: forest spread everywhere during the Middle Ages. It wasn't just changing the political and cultural context but also the economic and social context. The agricultural crisis that started in the 14th century led to a social reality in which nature plays a fundamental role but also in which nature is very difficult to control by man, thus according to this point of view man should follow nature. The strong connection between nature and man has a very important consequence on the law because **nature influences the activities of man** , so the attitude of men towards law and nature changes according to it.

This also means a **demographic and geographic crisis**. People organized themselves in small settlements which rarely had connections and relationships with other villages because those communities considered themselves as autarchic

communities so capable of providing themselves with everything they needed and because it was safer to do that instead of trying to communicate with the outside world.

To summarize, the consequences of the end of the roman empire are *political crisis, economic crisis and a cultural crisis* that led to the disappear of state and culture but society doesn't disappear since people still organized themselves in communities which were different from the roman ones but they still had a social and economic life, it was of course a **primitive society**.

So, the problem was how and where to find law. Basically, the question we must ask is who filled up the void left by the fall of the roman empire? The simple answer is that there are two traditions who try to fill up the void, on one side the **roman church** and the **German tribes** on the other side especially in continental Europe and Italy.

The evolution of the Roman church, the law and the culture introduced in Europe a partial filling of the gaps left by the fall of the roman empire. It is important to highlight a point, even if the Church and the German tribes partially fill up the voids, that doesn't mean that they wanted to completely fill up the voids, they didn't want to reestablish a strong state as the roman one. They didn't want to do it because of pluralism. During the Middle Ages we experienced many different legal systems which lived together and among these legal systems there were the German system and the Church system, the presence of a strong state would eventually condemn them to be irrelevant.

We cannot talk about unitarian German law, there were many different tribes and peoples (intended as "popoli") who carried different culture and traditions, even after the end of the roman empire, the German tribes continued to spread around Europe and settled in different parts of the continents. Among them probably the most famous and relevant are the **Franks**, who in the end established themselves in the area which is France.

Another one are the Longobards who **established their presence in Italy after the year 568,** thanks to them it ended the presence of the roman empire over the Italian peninsula; Justinian succeed in regain the control of Italy for few years so Italy was again under the control of the instant roman empire until 5G8 when the longboards invaded Italy and established the longboard kingdom for centuries.

Their law and their traditions impacted Italian culture the most, however we must always take in mind that there were other tribes around Europe important for the evolution of the European tradition. Another important element to take into account is the fact that despite those tribes had different legal traditions all of them shared the same concept of power, a notion which is very different from the roman one.

During the roman empire the *notion of power* was very close to the notion of divine, in the German conception of power it has nothing to do with that idea since the power surely doesn't derive from God. In german tradition the man that will lead people with the community in the time isn't chosen by god, this also means that that man is not a princeps, he's not a man who is different from the other people, on the contrary the man is just a leader because the leader is who actually had the

ability to take the opportunity to lead these people. The German tribes are usually very complex and often divided so they need to find unity in order to succeed and to survive, in order to beat other people and take control. The communities had the need to find a figure capable of leading them and unifying them in pursuing the military agenda, they insisted on the word leader because the head of a try is a leader (una guida). In German there's a word that means leader which is fundamental for Germanic tribes that is Fuhrer and is the typical idea and notion of the leader in Germanic tradition, a *person who leads these people and sees the opportunity to do that and that moreover is not chosen by god but by the people, by the magnates of the tribes, the most important members of the community usually the landers* (aristocrazia, proprietari terrieri).

In relation with the German notion of power, we can talk about a latin expression which is *"auctoritas spactionata*", it is a **conception of power according to which people agree on who should have the power,** here we have a power that derives from people to the leader and not from God to the leader, and this fact has a lot of consequences.

1. The first one is the fact that because the community is the actual holder of the power which transfers to the leader that means that leader is always bound, deeply thigh to the community, to his people and that also means that his hands were thigh, and this means that his power is limited by definition.
2. The second one is the fact that political power is weak by definition because it is always and intrinsically limited, it could be the strongest leader ever seen but still be limited in his powers including the legislative power.

So, according to the German conception of power: power is limited, it derives from community and it is tight from community. We can understand it from a very important source of the Lombards law which is the "edict of rothari" enacted by king rothary in G43 so almost a hundred years later after the longboards invasion of Italy.
An edict is a sort of royal deprivation and this edict wanted to define what were the laws of the Lombards.

« … but of our present disposition, the Edict... which, after investigating and recalling the ancient laws of our fathers, which were not written, we established, and which are expedient for the common benefit of all our nations, by equal counsel and agreement , with the magnates , judges, and all our most successful army we decided. . . »

It is important to notice that it is written in Latin and Germans have their own language and traditions, their traditions were portrayed from their language, it was oral. So, there's another element of distinction with the roman tradition which is the fact roman law was always written instead German laws were usually orals but after a century of coexistence in the Italian peninsula with Latin people they felt the need to write down the rules and to do that in Latin. It could mean that they considered latin as the main language of law. *We can see that the roman precedent still has an important impact also over the german tradition.* The Edict of Rothary is about the ancient old tradition of our fathers, the king Rothary is not creating the law but he is just recognizing the old traditions of his people and putting them in writing. The king of Lombards is not interested and has no power to make the law, he can just collect the law of his fathers and the costumes of his people which were before not written, but now there's the need to establish them. King Rothary

did that in order to satisfy the need and benefit of people but to do that he needed to receive the consent of the magnates, of the judges and of the army, all of whom have to agree with Rothary in order to collect the laws. King needed to find the agreement and the council of the magnates, the army and the judges. The edict highlights two important points about the German traditions:

- the law is independent from parties because leaders were not interest in making laws and they actually did not have the power to do that, the political power is limited by definition and cannot have such an extend power in policy making,
- The laws are just the costumes of the people, in fact the power of law derives from the community, from the society and not from the king. We can see how law continues to live despite the absence of a strong state, it continues to operate despite the end of the roman empire. Law is strongly related to reality, to the facts, law and facts during the middle ages are the same things, in fact in Italy two expressions are used that are "*fattualità del diritto"* e "*giuridicità dei fatti*".

13/09 THE LAW OF THE GERMAN TRIBES

The Evolution of Law from an authority recognized one to a facts-based one

Law was considered to originate solely from **facts**. Such a notion of law is completely different from both the ancient notion as the modern one, as law nowadays is based on a **formal** idea where it is an authority, as the state, that decides what rules are binding. Instead, everything that was born from society was considered to be part of the legal order. The constant repetition of an event became a custom that then became over time a rule. Facts became rules not because someone decided to but because **another fact** transformed that fact into a rule. Facts had a more relevant role than the real people in creating rules.

Between the consequences of such rule creation was the **difficulty in finding a system** within such order of law. There was **no systematic order** in the middle ages.

The law made by customs was the **main source of law** in the Middle Ages.

BLOOD AND THE LAW.

German culture had a **fundamental** role in shaping such notions of law in the middle ages, profoundly changing the previous and different forms of law as state-related law. The **two** main facts that influenced the evolution of law in the **German** conception of law are, **blood and time** . To be a part of a tribe, a group, a community, is merely a **question of blood**. I am a Lombard because I share the blood and the culture of the families who originally formed the Lombard tribe and of all the dynasties that followed. It's a matter of **bloodline**. Every ancestry has its own cultural heritage, which cannot be shared with others and also characterizes the person's **legal heritage**. The latter is formed by **customs** of the heritage which cannot be shared with other people who

don't belong to that same world. You must follow some rules because you are a **member** of the community.
This strong **group identity**, made it possible to identify with large group communities **Both politically and legally,** there is **no assimilation** of the people, conquered by the German tribes. So the German tribes invaded many parts of Europe and the people who already lived in those territories became under the political control of such German tribes or be it Lombard, French, of Vandals, et cetera. Outsiders cannot even if they live under German authority, but law is not related to territory. This is basically the principle of personality that deeply distinguished the law of the middle ages. On the contrary, one of the main characteristics of Roman law was the principle of territoriality.
"*Ego pedrus profiteor me lege romana vivere \ me lege langobardica vivere*"à standing in front of the judge people had to declare under which legal system they were.

So what rules did these people have to abide by? There was the need to **produce law,** a need for an **equal normal survival**. Also thanks to this conception of law even related to that **international condition**. Lombards, for instance, could not impose their law over all Italian people. Instead, **Italian** people continued to be led by Roman **law**, the previous one alone, being there was no unique **authority** that could make law for everyone to follow. The practitioners, the **judges** and the **notaries**, were the ones to decide on legal disputes and **referred to the Roman law principles** concepts that they knew at the time. So during the early Middle Ages the so-called **principle of personality of law** expanded, the idea that every person has his own laws.
PERSOLANITY LAW→ edict of Liutprando+ Judiciary customs →TERRITORIALITY LAW

Pluralism emerged: if everyone has **different** laws, there is an infinite number of **different systems developers**. Such a concept is the **opposite** of the **principle of territoriality of law,** which was one of the **essential** elements from ancient times and the roman age.
Both the Roman legal system and modern legal systems are based on **territoriality**, while during the middle ages it is based on **personality**.
A very particular and typical phenomenon of the Middle Ages were the so-called *declarations of law***,** in Italian, *professioni di legge*, an expression that sounds like the declarations of **fate**. When two people from two different legal systems had to solve a legal dispute, they questioned which laws to apply.
The judgement of the **synodaries** is essential because they must decide accordingly.The judge was not interested in political consequences because the political firewall was weak. Judges didn't **like to answer** to the King when they made law, when they declared justice.
The system to resolve such disputes was a very **complex** system, and what judges or monopolies could do in such cases, was to **create a solution, to invent one**. So they were the **main actors** of the legal system of the time, also because they were **close to the social reality of the time**, so they could understand which could be the **best solution for a case**, creating a solution. Basically transforming both the Roman and the Lombards rules (in our example) in order to find a solution that **fits with the social reality they need**. Creative activity created a new source of law, a new judicial custom which was connected to the community in which such custom originated and in which not everyone shared the same origins. Through this process the judicial customs became **common** to all people of different laws. So eventually the establishment of **judicial conditions**

would reestablish in the long run the principle of territoriality of law as if you live in such territory, you should follow some judicial **custom** that applies to the territory, despite your **personality**.
So two elements are quite important. One is the role played by **practitioners**, judges, and who had a **creative role**. A fundamentality of the creative role was so important as it established **judicial customs** that eventually would **become law** and would lead them again to l**aw concerning community beliefs** in a certain way.
The second element that would lead to the establishment of the principle of the duality of law was the **edict** which supported the notion of **selective laws**. In it the **king** gives the possibility for the parties involved in the legal dispute to agree on which law should be **used in their relationship**.
One of its articles says that if one of the parties wishes to depart from their own law then they should be allowed to do so if **both** parties agree to it **voluntarily**. It is their **common right.** The king was commanding the judges and notaries to take such agreement as **legally valid** and not contrary to the law. They should not be found guilty of **denying the principle of personality of the law** because they have the freedom of contract in the sense that parties get to decide which law should be applied to their case, *regardless of their afirmation of the blood*.

So the principle of freedom of contract gets established, the so italian called "**autonomia negoziale"**, in relation to the law. Consequently becoming a constitutional principle deeply connected to the public order as a **constitutive element** of the law while monarchy just becomes a **label-available principle**.

Time has legal consequences only, of course, alongside human behaviors, the activity or inactivity of a subject. So time has no real value in our current system and in the normal legal system without the will of the establishment of the **judiciary** and the consequences of the principle of individual re-establishments of the **evangelical law**. One of the main elements of the Middle Ages was radical law, which influenced the evolution of human society.
The principle of cultural development is a long, not easy process, it's always a mystery.
In fact, the use of prescription in the Roman law as well as in our current legal system is important because it is helpful in establishing the certainty of relationships even if these still still rely on the weight of the subjects. Could the passage of time alone be sufficient to have legal consequences without any other elements. **Prescription** creates legal consequences only if the right decides to not act, to not use this right. Prescription in our code says that after 20 years if the owner does not claim his ownership, does not exercise his right, then he will have dislocated it. So, time is not enough, it also requires a form of subject: the will of the subject. Because our system and the normal legal system is based on the will of the subject. On the contrary, during the legal age, **time has legal value "per se".** This was because it was hard to take count of time, to take control of time. Time was another of those natural elements, man had no control of. So, back in the Middle Ages, men were driven by time, not in control of time. So time was a very important **fact** that created **legal consequences** with legal validity, influencing customs.
A couple of elements to summarize the relevance of blood and time.Customary law is also important and it is related to community and based on the oral traditions passed from father to son.

So, law essentially in the **German tradition** is separated from the king's power as it is related to the **community** and to **facts** as blood, time, nature; facts that can change. So what is the King needed for? For **unity** in the organization and essentially because society has two levels.

- There is a surface, which is the **political** surface of society, in which things play a fundamental role, in which the king's role is very important. This level is related to military power, the relationship with the other kingdoms and a sort of very, very weak and primitive public law.
- On a deeper level there are instead the **private relationships**, those of private law, which are an asset precluded to kings, because the relationships among powers is the result of a sphere where kings cannot interfere. They must identify what are the legal conditions which are important to the people, they don't create this law, but sometimes have to connect such conditions. So they are **finders**, not creators.

They wanted just to **collect** the solutions of their fathers. So, in conclusion, law is connected not to political power of law, but to **facts**. And such actuality of law, such relevance of the facts, eventually would transform even the Roman law that still existed at the time, because it continued to work in relation to native people. Nonetheless, such a law was really transformed by the impact of the German Revolution and the German culture's idea of factuality with the violence of blood, of nature, of time.

There's a **cultural idea** of factuality. The importance of blood, of nature, of time. In fact, during the Middle Ages, also, those who still use the Roman law.

The economic relevance and concept of donations

During the Middle Ages, what has legal relevance is also **economic relevance**. Societies in the middle ages are primitive societies and very practical societies. They needed no abstraction. So the facts are **legal only** if they can be used, only if they have economic relevance, something that can help you to survive. This relationship between economic relevance and actuality of law affected the roman law of the region between the two countries. Some legal concepts continue to be religious, probably thanks to the fact that judges and notaries knew them thanks to the connection of the Roman laws made during the Roman Empire. And what is also interesting to notice is the fact that the **codex** they knew probably was the Emogenianos and Elysianos, not the Eusinianos codex.
I would like to accept the donation, a typical legal instrument of the roman law and it was conceived as an entire category of legal acts, free legal acts, legal acts without payment. The "donatio" justifies itself on the basis of **morality** and **spirituality**. The relentless reading of the subject is fundamental for the role of conceptual thought. It is an economic suicide as I give up something without getting something back. During the Middle Ages, as we said before, everything that was not economically useful was considered as nothing, surely not legal. So a legal act that allows someone to give to another man something without getting nothing back, it's out of the medial way of thinking.

So, how did donation survive throughout the middle ages?

The creative role of justices and notaries provided a solution: if there is the so-called analogy, an activity made by the beneficiary of the deed which justifies the act of donation. The donation gets transformed from being an agreement in place of the will of the donor into a **mutual agreement**. A donation just required the will of the donor. On the contrary, during the middle ages, with the donations, the donor's will is not enough, the contract became perfect. When the beneficiary is something also to the donor there must be an exchange. Is it a formal exchange? If I am the owner, I give you a huge territory of lands and it will be sufficient for you to give me a little necklace just as a symbolic gesture. Nevertheless, this was essential for the German conditions in order to have the donation considered as legal as there could not be a donation valid as a legal act without exchange.

TO SUMMARIZE

- *Law as Inherent Openness:* Every part of society embodies its own law, originating from cultural customs rather than solely from formal legal systems.
- *Cultural Roots of Law:* The German cultural heritage plays a significant role in shaping legal notions, emphasizing the importance of bloodlines and community identity.
- *Normative vs. Factual Law*: The distinction between normative facts (rules) and factual realities is crucial in understanding how laws evolve from customs.
- *Customs* serve as the primary source of law, particularly in the Middle Ages.
- Legal systems were **not** uniform; they were deeply rooted in **local** customs and community practices.
- During the early Middle Ages, the principle of personality of law emerged, suggesting that individuals have their own laws based on their cultural and community affiliations.
- This contrasts with the principle of territoriality found in modern legal systems.
- *Blood and Time* : These figures significantly influenced the evolution of law in the German context, highlighting the importance of cultural identity in legal matters.
- Judges played a **creative role** in resolving disputes, often inventing solutions that aligned with social realities rather than strictly adhering to existing laws.
- J*udicial customs* became common across different legal systems, eventually leading to a reestablishment of the principle of territoriality in law.
- The *principle of freedom of contract* allows parties to agree on which laws apply to their relationships, reflecting a blend of personal and territorial legal principles.
- The *judiciary* emerged as a crucial element in the Middle Ages, where **radical** (progressive) law influenced societal evolution.
- *Time* is not inherently valuable in legal systems without the **will** of the subject. The passage of time alone cannot establish legal rights; it requires human action or inaction.
- i.e. *Prescription* - a legal concept where rights are affected by the inactivity of the owner. It emphasizes that legal consequences arise from the will of the subject, not merely the passage of time.
- Law is fundamentally connected to community rather than individual rights. The existence of individuals is intertwined with their community, reflecting the communal nature of law.
- *Customary law* emphasizes community traditions and values, often passed down through generations, highlighting the importance of collective identity

- During the Middle Ages, legal relevance was closely tied to *economic utility*. Legal acts were only considered valid if they served a practical purpose in society.

19/09: EVOLUTION OF ROMAN LEGAL INSTITUTIONS THROUGH THE MA

Roman law and Lombard law, particularly in the Italian context, linked together during the Middle Ages and those legal traditions eventually influenced and we must see how they could link together and how different are the approaches to the law and to the society in Roman law and in Lombard law. We can see through, for example, for legal concepts which actually were surviving during the Middle Ages and were used by justice, by judges and by notaries in Italy, but somehow with some transformations, because all of these are of course legal concepts well- known by the roman law.

1. *Donation:* Roman legal concept that they defined as "donation", in the roman legal traditions there was a series of facts different from contracts, because of the absence of economic relevance. Among them, we have the so-called "**free contracts**", donation was one of them and in the Roman law found his validity on a moral ground, not in an economic one (no economic motivation, but an affective one), because a person decides to diminish his patrimony in a way is personal in the German view this concept was impossible. During the Middle Ages, people could not understand the legal relevance of some acts that were not economically relevant. The Roman contract of donation changed and adapted to the new reality; it became a contract in which both parties played a role to be valid. Both parties had to give something to the other party, in fact, the recipient had to give something to the donor, an object that justified the deed. This gesture and the actual object given by the recipient to the donor is called "*Launegild*". This gift for sure has a lesser value than the donation, the counter gift just aimed to save **formally** the economic nature of the contract, but it had to be something physical and symbolic. This concept of the Roman tradition had such an influence and changed the fundamental idea of this, because it became a mutual agreement (the economic value was the most important thing in the Middle Ages).

2. *Purchase agreement*: In roman law this was the contract of selling, the so- called "emptio – venditio" that was a consensual agreement, because the contract was valid if we have the consensus of the buyer and the seller, something in exchange behind the payment of a price. There are two elements that cannot be still avoided in the medieval people:

- **Money**: Some contracts are possible only in societies in which money has a clear value. On the contrary, the absence of a strong and established political power in the Middle Ages made money quite worthless, because we have no state that stays behind the money. They preferred the "emptio –

vendition" the exchange (la permuta). In Roman law existed the so- called "permutatio" that was still a contract based on the will of the parties (still a consensual agreement). On the contrary, in the Middle Ages the exchange based on the roman "permutatio" started to be valid only after the exchange. It became a real-estate contract (contratto reale) and not a consensual contract. The exchange became a contract that had validity only after **the transfer of the goods** ("*traditio*"), this shows how primitive the society was in the Middle Ages and how weak was the political power that could take into account only the close reality of the things.

3. *Inheritance*: There were two types of inheritance:
- *Legal inheritance;*
- *Inheritance of the will ;*

Only one of that survived in the Middle Ages, the legal one, because the legal inheritance survived because it was based on blood (influence of the German tradition). In the German mentality nobody can inherit something that is not a relative. Again, this was a very material society and there cannot be other considerations. It's impossible to think that the decease could have different desires or will, in fact we cannot change the blood, the "voluntas" cannot change the facts

How do we know the inheritance by will?The jurists rediscovered and transformed the Roman law. The church of course cannot inherit anything by **legal institutions**; on the contrary, the will of the deceased starts to be important thanks to the work of the church. Eventually, there was the possibility to inherit something by will.

4. *Legal person* The last example is related to the role played by canonists in the Middle Ages: the problem of a legal person in the "Middle Ages". A legal person is artificial and the fact that legal person is a problem is a perfect example of how material was the culture in the Middle Ages; in fact, there was no way of abstraction in the Middle Ages. It's impossible to think of legal concepts that cannot be touched, because it is an artificial institution of the legal system and so it disappeared in the Middle Ages. Again, such a concept appeared again thanks to the work of the churchmen. In fact, the church itself is a legal person.

Same mentality emerges not only in private law but in what we could call public law; so, also at the political level. On the political level, we can find how material the mentality was; in fact, the political assemblies worked by *consensus* (for every kind of the decision, every member of the assembly had to agree on the decision). This is because the political assemblies don't exist as well as the legal person, because it's an abstract entity. For us, the majority is the most obvious method of decision, but the majority is a very modern way of decision.

THE ROLE PLAYED BY CHRISTIANITY AND THE ORIGINS OF CANON LAW.

We have talked about the legacy left by roman law, we mentioned also how Christianity influenced roman law, but also Christianity was influenced by roman law. The Christians organised themselves in a proper institution: **the church**.
It was the structure that assumed a hierarchical organisation. The local communities organised themselves into publicises (parrocchie) that were linked to the roman territorial structure. The "parrocchie" were part of a larger institution, the so- called "curiae", held by the bishops (Vescovi). Eventually, a hierarchy was created among the bishops based on the importance of the towns. The bishop of Rome was considered as the **highest** among the bishops, because Jesus Christ himself had placed Peter as the head of the church, and he was the first Apostle to bring in Rome the Christian message. We should understand the church by considering one of the first definitions of the church itself, given by a so- called father of the church who lived in the first century of the Roman church. The quote was made by **Tertuliano** in his work called "*Apologeticum*" which is dated around the second century after Christ.

"The Christians are a body (Corpus) unified by the fact that we share the same religious script, a "disciplinarian" communion and the same belief in salvation ".

" Corpus sumus de coscientia religionis et disciplinae unitate et spei foedere" Tertullian → we, the Christians are a body unified by the fact that we share:

1. *The belief in a unitarian faith;*
2. *The hope for salvation ;*
3. *A disciplinarian unity;*

Tertuliano lived in the catacombs Age, the period in which Christian was persecuted. There is a hidden relationship with the Roman power at the time. The word "corpus" is a word used exclusively by the lawyers in the legal language and corpus is the term that we use to define a legal person. We can see the relevance played by law (interesting to discover that in the very beginning of the church, it used a legal terminology to define it as "societas").
In relation to the church, we should understand that there is a conflict between church and state, because both considered themselves as the legal primary order. The Roman church still has this attitude over the law, the roman church has always considered itself as a primary legal order. This strong connection between religion and law and the fact that the church cannot deny this relevance of law will be a propaedeutically aspect for the church itself.
If we want to describe the main characteristics, we can say that church is:

1. Roman: territorial organization.
2. Integralist: the church considers itself as an independent legal system, especially from the state that has its own rules.
3. Anti-humanistic: This means that the church's attitude towards individuals was sceptical. At the centre, there's the society, the community is fundamental to reach salvation. Every man could reach salvation only through society. There is no salvation outside the community.· The main motto is *extra ecclesiam nulla salus*, there is no salvation outside the church. Church is an intermediate between men and god, and the priest is the intermediary. The social dimension of the faith also contributed to making the law important for the church. This is the reason that led to the elaboration of canon law.

There is a close contamination between theology and law. Church mentality and medieval mentality defined themselves through the community. Men and women survived in the Middle Ages because they organised themselves in communities, this is the same for salvation. The Church is an intermediary between individuals and God.

20/09: THE ROLE PLAYED BY CHRISTIANITY AND THE ORIGINS OF CANON LAW.

- The Church is Roman because of the influence of Roman culture, especially for the protagonism of law.
- The Church is integralist because it considers itself an independent, primary, and original legal system.
- The Church is anti-humanistic because it has a view that is very focused on the communitarian dimension. The community is above individuality.

From these three elements, we can see how the religious dimension is related to law. Law for the Church is fundamental; there is no salvation outside the Church and the law of the Church.
Another element to understand is the fact that although law is fundamental, it is still instrumental. The law is a means to an end: the salvation of souls.
The fact that it is instrumental to the ultimate goal has consequences on how the law is conceived and applied.
The law must be elastic; the rules must adapt to reality, and this characteristic particularly refers to judges. In canon law, judges must treat different cases differently, because the goal is not the law but the salvation of the person who stands before the judge. The judge must not make the person respect the law but lead them to salvation.

Knowing this, we can identify two principles of canon law: **aequitas canonica** and **tolerantia canonica.**

- *Equitas canonica*→ By aequitas canonica, we understand that justice, law, and respect for the law are not the same. Justice is beyond the laws, and judges must always decide on a case-by-case basis how and whether to apply the laws. The goal is always salvation, so the judge can also decide not to apply the law. By applying the law case by case, the judge becomes a source of law. English common law has its roots in the notion of aequitas canonica, giving the judiciary a prominent role.
- *Tolerantia canonic*a→ It is the extreme consequence of the same principle that brought about aequitas. By tolerantia, members of the Church could decide to avoid reporting illegal activities of other members to prevent an even more serious illegality. For example, if a bishop knows that a priest did something against the laws but believes that reporting such activity might lead the priest to commit something even more serious, the bishop could decide not to report it. Of course, tolerantia applies to members of ecclesiastical orders but also to the faithful, so to the people of the Church.

But at this point, what are these rules? The sources of canon law.
IUS DIVINAE COSTITUTIONIS (law made by god)

Law and theology go along through the history of the church. The main distinction: : the law originated directly from God and the law created by man.
We can talk about, on one side, ius divinae constitutionis and ius humanae constitutionis. Moreover, within the classification of ius divinae constitutionis, we must distinguish between **revelation** and **tradition**.

1. Revelation: emerged from the **Bible**, including both the **Old and New Testaments** (e.g., the Ten Commandments).
2. Traditio is the law that originated somehow from God but is not included in the Bible.

a. The traditio divina are the teachings delivered from God to the Apostles
b. the traditio humana, divided into apostolica and ecclesiastica. These are teachings delivered by the Apostles or Fathers of the Church.
   - Apostolica
   - Ecclesiastica

Alongside this source of law, the Church started to elaborate a set of laws not derived from the Holy Scriptures but from the Church as an institution. This source is called ius humanae constitutionis and can be described as the rules enacted by Popes and sanctioned by Councils (both ecumenical and local). The decisions made by the councils became a source of canon law, and these decisions were called canons (from Greek), as they were sanctioned by councils.
Councils were particularly important for this reason.

Roman State And Church

The relationship between the Roman state and the Church is a complicated one, to say the least, and evolving profoundly throughout the centuries.

1. In the beginning, Christians were heavily persecuted, during the so-called **catacombal age**, and the Church was considered an unlawful association.
2. However, at the beginning of the fourth century, Christianity began to be tolerated and was then officially recognized by the emperor with the **Edict of Milan in 313**.
3. Later, Christianity became the only cult admitted within the empire with the **Edict of Thessalonica in 380.** As a result, the interplay between the Roman Empire and the Church only grew stronger with time. All the emperors and Popes tried to have authority over both theological and legal issues regarding both the empire and the Church, the most important issue at stake being administration of justice. In fact, Emperor Constantine allowed parties in a legal dispute to choose to be judged not by a civil judge but by a bishop. Of course, on ecclesiastical matters, bishops always had exclusive authority.

The main problem arising was to draw boundaries between the State and the Church: who should decide on religious or political matters?

Caesaropapism

In the Eastern Roman Empire, we can talk about **caesaropapism.** Emperors continued to have control over the Church, claiming supreme

authority in both spiritual and secular matters. A union was there between religious power and political power, and such a model persisted for centuries.
On the other hand, in the West, In the Eastern Byzantine world: pope Galsius I 492-49G established the principle of distinction.
There is the Pope, and there is the emperor, each with distinct dignity: two equal but separated powers were established. The Pope had to oversee spiritual matters and guide people towards salvation through the Church, while the Emperor had to focus on temporal matters and to avoid interfering in religious affairs. This is a unique and typical feature of Western legal culture that has lasted since the fifth century, although with occasional struggles when the Church tried to interfere with temporal power. This principle is summarized in the maxim: "Render to Caesar all things Caesar's, and to God the things that are God's.", as taken from the Gospel.

The reformation of the Church and the birth of Canon Law

During the last century of the Roman Empire, **bishop's councils** played a fundamental role in defining the boundaries of the Church's law as an independent legal system.
After centuries, a need to collect all these scattered sources emerged, as social changes created the need to reform both the Church and Canon Law.
One important reform of the Church as an institution was the **Gregorian Reform**, to which we owe our calendar. This reform emerged from decades of struggles between political and religious power, as the Church and the Empire contended for authority over the nomination of bishops (***lotta per le investiture***). In 1075, a text written by **Pope Gregory VII** reasserted the Pope's authority over these nominations. The Pope legitimately decided to excommunicate the emperor, an action of the gravest importance at that time, which brought along a great deal of consequences. The main one was that Christians were freed from their obligation of loyalty to the Emperor. The **Diet of Worms** ended the *lotta per le investiture* and establishe→d that the nomination of ecclesiastical roles would be attributed to the Church, reaffirming the principle of separation of powers.
As mentioned before, canon law was chaotic, so scholars decided it was time to organize its sources. At the very beginning, this operation was carried out by private citizens.
The first and most important collection was the ***Decretum Magistri Gratiani*** (1150), also called *Concordantia discordantia canonum.* Gratian, a monk from Bologna, aimed to resolve the conflicts between the various rules of canon law. His work reconciled these conflicts and selected the most important sources from the previous thousand years of canon law. He primarily collected canons from councils, papal decretals, and Roman legal sources found in the *Corpus Iuris Civilis*.
A few decades later, the Church recognized the need for a formal collection of canon law. Pope Gregory IX commissioned Raymond of Peñafort, a renowned Spanish scholar, to collect what was considered the main source of canon law at the time: the decretals and papal orders. This resulted in the ***Decretales (1234)***, a collection of five books, also called the ***Liber Extra***.
Lastly, Pope Boniface VIII continued the work started by Gregory IX by adding a sixth book, called ***Liber Sextus***, to the collection, in 1298.

26/09: PLACITA OF CAPUA AND MARTURI

Let's discover the **Capua Case**, and the so-called ***Placiti Cassinesi*. The Placiti Cassinesi** are four official juridical documents written between 9G0 and 9G3 in southern Italy, regarding a dispute on several lands among three Benedictine monasteries and a local landowner. They are the first documents written in a Romance vernacular italian that we know of.
The plaintiff, who went by the name of **Rodelgrimo**, was a local feudal lord who claimed the ownerships of some lands, which he deemed "illegally" occupied by the Abbey of Montecassino. In fact, he based his claim off inheritance, as supposedly the disputed land belonged to his ancestors.

Most interestingly, he claimed ownership of those estates despite not having possession. He wanted to affirm his legal right of ownership, his property, but he had to do this in front of a judge because he was not in possession of the land, as that was actually the Abbey's position. As we have already stressed, in the Middle Ages the actual possession and the factuality were always paramount.

Rodelgrimo claimed those lands by the so called "**rei vindicatio"** *(= to bring an action to enforce rights in specific property, especially for the recognition of ownership and the recovery of possession froma wrongful holder/possessor)*, an institute that was also well known in Roman Age; however he actually struggled to prove his ownership title, as we can imagine.

The judge deciding the case was named **Arechisi**, and was compelled to conform to **German law procedure**, as southern Italy was part of the Lombard Kingdom, so Lombard law and in particular under the **Germanic legal procedure** had to be applied: every trial, in this sense, relied heavily on evidence and concrete proofs. Once more, we must note how hard, material facts were important during the Middle Ages. So every trial revolved around the judge's decision on the burden of proof.

In this particular instance, it was placed upon the plaintiff, as he had to prove the ownership of lands which were not in his actual possession; however Rodelgrimo didn't have any documents proving his inheritance or proving the ownership.

So the judge left the process to the other party: the defendant, **Aligerno,** Abbot of Montecassino defended the rights of the Abbey both through legal reasoning (the law) and by proof.
Aligerno's objection to Rodelgrimo's claim was the so-called ***longissimi temporis praescriptio*** *(period of time after which a person who possesses a property can claim ownership of it without any challenge to their title, is also known as usucapio)*. He basically presented what we called today an **exception**, a fact which modified the right *("eccezione o fatto estintivo o modificativo del diritto")*.
Aligerno, to sustain his defense, could provide proof with some witnesses who could affirm that the Abbey had been in possession of lands for the last thirty years, which was the sufficient period of time in order to accept the *praescriptio longissimi temporis*. As we said before, the *longissimi temporis praescriptio* was a legal institute well known in Roman law but, in this case, Aligerno could invoke *praescriptio* because this institution was also provided in chapter 18 of Astolfo's edict. (Meaning, this institute was also recognized under lombard law).

Most important part of the case: considering the actual documents the historians are in possess, the most important one is the one which recites: "*Sao ko kelle terre per kelle fini que ki contene trenta anni le possette parte Sancti Benedicti*". Many people know or have read this vernacular

(*lingua vernacolare*: lingua caratteristica di una zona limitata) phrase at least once, a simple formula for settling a property issue. The importance of these words derives from the fact that they are contained in the **first official document in italian vernacular** known to us.

This quote, this sworn testimony, was repeated as a formula by all witnesses presented by Aligerno in the trial. What they affirmed here was that they knew that the lands had been owned by the Abbey of Montecassino for the past 30 years. So the only part in the trial who could actually prove his legal claim was the Abbey of Montecassino, therefore, by the Lombard civil law, the judge couldn't do something different from just saying that the Abbey won the case.

The legal document taken into consideration in this case is interesting for us for a couple of reasons:

1. ***cultural* reason**: this legal document is the first known document written in Italian language (in *volgare*). So it's the first official document which recognizes Italian vernacular as an actual language. This also suggests, in part, that a cultural transformation was ongoing during those years that led to consider Italian as valuable as Latin language. The ruling was still written in Latin, but within the ruling, the sworn testimony (the oath) made by the defense was reported using the Italian language because the oath was pronounced in Italian;
2. ***legal* reason**: this is one of the best examples of how Germanic law procedure works and we can focus on some elements that we've already discussed. As we mentioned before, facts were so important that they influenced not only the law but also procedures → *facts and proofs* are the most important things in the trials and the judge decides who must prove his claim or defense. We have then seen how great an autonomy the judge actually had in the Germanic process: he was free to decide who should bear the burden of proof, so we can say that he was entitled to interpret and qualify the facts. So when proofs were presented in the trial the judge could just accept them for what they were and for what they proved;
3. ***The relevance of oaths in evidence.*** They were a typical element in Germanic procedure: it is important to mention the **faith placed in the oath** (sworn testimony), as it was crucial for the legal procedure not only in Germanic law but also in the whole of medieval law. **Oaths** (*giuramento*) have been one of the main sources of proof in the history of the Western world, throughout the Middle Ages and beyond. Oaths were sacred testimony and no one could challenge them;

   The oath constituted for centuries the most enduring means of proof in the legal systems of the Western world and was instrumental in having a working justice that did not only rely on violence and revenge.

The one we have just examined was the first **placitum** which seems to be perfectly situated in the early Middle Ages because it was ruled by the Lombard law and by the typical aspects of Germanic legal procedure. Furthermore, it will also prove instrumental to introducing a second ruling, which will shed considerable light on the developments which interested law as we translate into the Late Middle Ages.

(Sidenote: a *placitum* was: tribunale del re, che giudicava soltanto i casi eccezionali, in mancanza di un altro Tribunale - *def. Dizionari Simone Online)*

Placitum of Marturi, 1076

Marturi was another town near Siena, and this particular ruling took place 100 years after the placitum of Capua. In the Marturi case, as well as in the Capua one, a private party and a monastery were fighting over ownership of some estates.
While in the Capua Case the feudal lord was the plaintiff, here the roles are reversed, with the Badia San Michele claiming ownership of some lands that were occupied by the defendant. However, in this case, the Badia had some documents to prove the ownership of the lands, which could prove the fact that the monastery had received these lands by donation of Ugo Marquis of Tuscany, a prominent local earl - *conte*.

In this case the monastery had some papers (so-called *chartula*) and documents to prove the legal title they claimed. But also **Sigizo**, namely, the defendant, could actually claim some legal title because his father paid for and received from the very same Ugo Marquis of Tuscany the *usus fructus* (usufruct) of the same lands allegedly donated to the Monastery/Badia of San Michele. He donated ownership of the lands to the monastery of the Badia of San Michele, but also gave the usufruct (*diritto reale di godimento*) to Sigizo's father.

So Sigizo had a legal title to occupy and use these lands, as he inherited the usufruct from his ancestors, and they had legally occupied the land over the last decades. He also presented to the judge the exception of *praescriptio longissimi temporis* (*un possesso ininterrotto della cosa per la durata di 30 anni → 40 anni per i beni dello Stato, della Chiesa, o di comunità minori od opere pie*) which in this case is of 40 years because it involved a moral person (*corporation, persona giuridica)* in the form of the ecclesiastical institution of Badia San Michele.
Sigizo affirmed that the *praescriptio longissimi temporis* occurred and he could prove it. However, the judge actually ruled in favor of Badia San Michele.
So the winner here is the plaintiff, not the defendant as it was in the Capua case.
From Capua to Marturi something happened → the most evident thing that happened was the passage of time (hundred years).

Principles (*in Italian*):

Sentenza, punti chiave:
→ Giudice **Nordillo**, un messo della marchesa Beatrice (contessa, detentrice del potere politico, quella da cui dipendeva la giustizia).
→ Vengono nominati, nella stessa sentenza, tutti quelli che partecipano: non solo le parti in causa, ma anche gli avvocati, gli altri giudici e i giuristi (gli odierni consulenti del giudice).
→ Sentenza favorevole al Monastero San Michele ai danni di Sigizo.
→ Contro questa tesi il citato Sigizo fece obiezione.

Despite **Sigizo** objected to the *praescriptio longissimi temporis*, the plaintiff replied to such an exception by the defendant, affirming that they already tried, during those 40 years, to claim back the lands, through *rei vindicatio*. They affirmed also that they never succeeded because they couldn't find a judge who would deliver them justice , so that these specific actions would have interrupted statutes of limitation (*si sarebbe cioè verificato un fatto interruttivo della prescrizione)* . They could prove it thanks to the sworn testimony by Mr.Giovanni, the lawyer.
However, the worst thing for Sigizo, now follows. (*sotto, parte della sentenza infra in grassetto*)

Placito di Marturi, testo:

Nel nome di Cristo. Breve riassunto a vantaggio dei tempi futuri di come, alla presenza di Nordillo, messo di Beatrice, signora e marchesa, e di Giovanni visconte, nel corso di un giudizio con alcuni residenti, cui parteciparono il giurista Pepone e il giudice Guglielmo, unitamente a Rodolfo figlio di Signore, Rolando figlio di Rustico, Adilberto figlio di Baroncello, Stefano figlio di Petronio, Benzo figlio di Benzo e Signorotto figlio di Bonizio, ed alcuni altri, Giovanni, avvocato della chiesa e del monastero di San Michele sito nel castello (che è chiamato) di Martuli, insieme con Gerardo, preposto della stessa chiesa e del medesimo monastero, si scontrò ed ottenne sentenza favorevole ai danni di Sigizone da Firenze a proposito di alcune terre e della chiesa di Sant'Andrea, situate nel luogo di Papaiano che erano state cedute al monastero dal marchese Ugo, cui, a sua volta erano state cedute da Vuinizio, dandone prova attraverso una chartula.

Contro questa tesi il citato Sigizone fece obiezione, opponendo l'intervenuta prescrizione e dicendo che su quelle terre per le quali era causa era stato esercitato un possesso che fra lui e suo padre ammontava a oltre quarant'anni. La difesa del cenobio, dopo aver replicato, confutò l'eccezione di Sigizone, sostenendo che nel periodo intercorso, durante la lite, i beni erano stati rivendicati. E prodotti tre testi adeguati, nelle persone di Giovanni avvocato della citata chiesa, Stefano figlio di Petronio e Adilberto figlio di Baroncello, tutti dissero che l'Abate Giovanni aveva rivendicato quelle terre al marchese Bonifacio e l'abate Guidrico al duca Gotofredo ed alla contessa Beatrice: e giurarono in tal senso. E, proprio in questo modo, l'avvocato Giovanni, con la mano sui vangeli fece giuramento; anche Stefano e Adilberto volevano giurare, ma entrambe le parti furono d'accordo che il giuramento del solo avvocato fosse suficiente. Esposte le prove, il citato **Nordillo,** *messo della signora Beatrice più volte nominata,* ***considerata con attenzione la normativa contenuta nei libri dei Digesta, per la quale il pretore sanciva la restitutio in integrum a favore di quei soggetti che non avevano potuto far valere i loro diritti per mancanza di giudici, dispose la restitutio in integrum a favore del monastero di San Michele e della chiesa, concedendogli ogni diritto e l'azione che aveva perduto in ordine alle terre ed ai beni che furono di Vuinizo e che lo stesso marchese Ugo attribuì e conferì alla chiesa di San Michele.***

Atto redatto nell'anno 1075 dall'incarnazione di nostro Signore Gesù Cristo, mese di marzo, quattordicesima indizione, nel borgo di Martuli, nel territorio fiorentino. Io Nordillo, in qualità di scrivente, confermo quanto detto.

In the end the decision was taken by the judge considering the proof but also relying on a rediscovered principle taken from the roman Digest.

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Wikipedia:

Digest (Roman law) = *compendium or digest of juristic writings on Roman law compiled by order of the Byzantine emperor Justinian I in 530–533 AD. It is divided into 50 books.*

The Digest was part of a reduction and codification of all Roman laws up to that time, which later came to be known as the Corpus Juris Civilis (lit. 'Body of Civil Law'). The other two parts were a collection of statutes, the Codex (Code), which survives in a second edition, and an introductory textbook, the Institutes; all three parts were given force of law.
During the VI-XI centuries every trace of the Corpus Iuris Civilis disappeared - Digest is not mentioned in any source.

. . . . . .

Remember that Digesta were parts of the **Corpus Iuris Civilis**, and specifically the most cultural and philosophical parts of the compilation. As such, they completely disappeared in the early Middle Ages because the only parts that were known by jurists at that time were some parts of the Codex and the Institutiones, so the easiest ones.

Digesta reappeared for the first time here in 1076, after almost G00 years the Digestum was used again to decide a case.
The judge articulated the fact that the proof led to the decision because he considered evidence in the light of what was written in the Digesto.
This re-discovery is a manifest sign of the ongoing transformation in the approach to law. In this particular century, in these hundred years between the placitum of Capua and the placitum of Marturi a lot was going on all around Europe in society, as we witness a crucial economic transformation, the law transformed accordingly to society and economy. The fact that jurists, judges and practitioners of law, felt the need to rely again on some legal documents and legal concepts, with a resurgence in theory, in order to decide cases, was emblematic of how strong this transformation was. Basically what was going on was that the cultural vacuum, left as a consequence of the Roman Empire's demise, was beginning to be filled again, especially in the field of Roman law.

Most notably, the first signals of this cultural evolution can be spotted within the Lombard kingdom. Around the first half of the XI century **in Pavia** a school to prepare judges for their job was created. Even though the school's approach was still very practical, it was extremely different from the usual medieval one, for two main reasons.
First of all, because political power felt that law and political authority were somehow connected again.
Secondly, because they thought that a **cultural approach** would have been the best one to prepare judges, attributing renovated relevance to theoretical aspects.

This transformation became very clear, to the point the people working in this school started to collect and organize the legal sources of German Law (including both the Lombard Law and the Frankish Law) and the results of this work were the so called **Liber Papiensis** books, a collection of the many laws enacted by kings, which were collected and systematically organized in order to establish a system of Lombard Law. This is the first instance of law-teaching which started incorporating theory once more.
Even more to the point, a comment on these collections was written, giving birth to the **Expositio ad Librum Papiensem**, which in order to comment the Lex Longobarda contained references to Roman law. Of course, these included some parts of the **Novellae** and **Institutiones**, which had never disappeared during the Early Middle Ages, but also **10 chapters of the Digestum** reappeared for the first time after centuries.

The German jurists who elaborated this commentary described Roman law as a *lex generalis omnibus*, as a sort of lex "superiore" which can be used in order to fill possible gaps left by Lombard law. In this way, they recognized Roman law as a "perfect system", while Lombard law was quite simple compared to it, even when collected and organized. Roman law was then considered an *authoritas* to rely on when the judges could not find a solution in the Lombard or in the German law.
This marked the passage from early Middle Ages to late Middle Ages

Lecture 27/09: The legal renaissance

The Digest was a collection of theoretical thinking of Roman scholars/jurists, and for a time it was considered a useless collection because those opinions in the Digest didn't have an immediate practical application. During the Middle Ages, people considered culture as something that people could not afford, a privilege of a *spoiled* society: the luxuries of theory were not something which could have been afforded during such harsh times.

From Early To Late Middle Ages

We may consider year **1076** as a valid separation point between Early and Late Middle Ages, because it was then that for the first time in centuries the Digest was used in a judicial decision. Once again, we must stress how this manifested important economic and social developments in European society.
This newfound relevance of culture was the consequence of such economical development.
We may better grasp these changes by comparing the same elements we have already used to illustrate the context of the Early Middle Ages.
To begin with, we must deal with lands and agriculture. At the beginning of the New Millennium, a great part of the lands, previously unsown, started to be cropped, thanks to a **revolution** in agriculture (***rotazione triennale delle culture)*** . It was an important achievement for the history of Western World because thanks to that, agriculture became a main economic source in Europe, much more products and fruits were available than in the past. Fields took over forests, which then

started to progressively disappear. During the passage from Early Middle Ages to Late Middle Ages, men regained control of the wilds, building new roads and enhancing travel and commerce.
This newfound economic prosperity led to a circulation of capitals, which is key in understanding the transformations to follow. Society lived in those decades a passage **from a static economy to a dynamic economy.**

In the Early Middle Ages the economy was quite self-sufficient, autarchic, and based off small communities. That type of economy was called manoralistic, or ***curtensis***, from the latin term curtis (in English, manor)**.** The entire economy was backyard-based. During the Late Middle Ages a new protagonist emerged, the **merchant** . Because of the agricultural revolution, there were more products than before, which meant that surplus production became relevant.
Trades became more and more important because of merchants travelling around Europe
The image of being assaulted in the forest was not actual anymore: crops and not forests characterized the European countryside, which then got safer as wars died down, invaders settled and culture began spreading once more.

It became progressively more common to travel from one place to another around Europe.
What is important for us is the fact that **merchants** were bringing around European ideas, not just goods. In a sense, merchants were vectors of goods and wealth but also of culture. They created a so-called ***κοινὴ***, a cultural community that connected people from all around Europe who started to share their culture, adding their different cultural backgrounds.
Alongside with the county's development, also **cities** started to develop or to regain importance as it was during the ancient times. The city is again an **act of faith** in the community, in all life.

If we compare cities to the early Middle Ages typical organization of community, we may notice a few differences: if we think of the Early Middle Ages it comes to our mind a castle situated on top of a hill , to allow isolation. On the contrary, a city of the Late Middle Ages would be situated in a plain, near rivers, in proximity to important connections. Cities were still surrounded by walls, but they were easy to reach, with big *portas* that allowed entrance and exit from and to the city, thus eventually creating a network of communities.

But What About The Law?

The law immediately perceives the ongoing transformation of society. And the first thing we can notice about the transformation of law is that the cultural gap left by the end of the Roman empire started to be filled, influenced by the fact that people were sharing their cultural heritages. Theology, philosophy, and literature started regaining importance, as these "free arts" started exiting the closed spaces of monasteries and cloisters.
It became a commoner feature also because of improving wealth, as more people could afford education. With a new society and economy, both very dynamic, legal rules that could go beyond customs where needed; the need for general, global rules not tied to local traditions were needed, so theoretical studies developed. To have such rules, society must rely on culture. They must rely on culture and on the skills of legal scientists; but we must note how, while the culture gap started to

be filled, **the political/authority gap remained.** There was not a strong political power which could have provided such a legal system, but society and the economy required it.
So **legal scholars provided it**.

Because of the inefficiency provided by political power, legal science emerged as a source to look at for more general legal elaboration. Secular authorities were not interested in regulating private law, they were self-confined.

Legal science needed a **cultural background** to rely on. Philosophy and theology started to develop during the Late Middle Ages and were considered as important subjects for the study of law by the legal scientists.
But what could have been the main cultural reference to look at by the legal science? The **Roman law**, of course, especially as the one collected by Justinian in the ***Corpus Iuris Civilis*** constituted the main cultural reference for the new legal science, with great relevance being attributed to the Digest.

Because of society and economy, many legal institutions typical of the Roman law (which had disappeared during the Early Middle Ages since they were useless due to the social and economic conditions of the Early Middle Ages) reappeared in the Late Middle Ages. One example could be the old roman "***locatio"*** (tenancy) which was unthinkable and quite useless during the Middle Ages. Now, thanks to the rise of the culture, the people need a contract, a legal instrument, capable of making estates lucrative.

When looking at the Roman Law, legal scientists wanted especially to find an **authority** who could give validity to the new legal scheme elaborated by the legal scientists.

The absence of a strong political power who could issue regulations led to law in the Late Middle Ages being created by legal scholars, who then had to rely on an authoritative principle to make their inventions binding, or at least to give them persuasive force. This was achieved through mythologization of the old Roman Law, because it was collectively believed to be ancient, longstanding and christian. As such, continuity with the "**glorious past**" of ancient Rome was established. Truly, we might way the we had a double-faced justification for its renaissance: one, formal and public, in the form we have just presented, and a second one, based off economical needs, which were particularly well-satisfied by the institutes present in the *Corpus Iuris*.
Furthermore, the formal front was well-maintained as the collection contained an explicit reference to Christianity, and was written down by order of a christian emperor: it did not matter that most of the content was actually of pagan inspiration.

On the contrary they don't want to rely on the *actual* contents of Roman law. They wanted to find in the Roman Law the validity for their legal schemes, but they didn't find the actual ***legal schemes.*** They were not students of Roman law. They do not want to apply the Roman Law to the current times, and it would have been extremely foolish to do so: the differences between the ages were too great to allow it. Basically, legal scholars more or less subconsciously wanted to rely on the Roman law authority to create a new law.

This means that the **medieval law** is **original**. Many times the medieval jurists ended up completely transforming the meaning of Roman law.

The **cultural renaissance** and the **importance regained by the Roman Law** in the Middle Ages are the two elements which are historically important for the creation of the *studium iuris*.

Studium Iuris (1088 - Bologna)

The foundation of the *studium iuris* represents the first secular modern university in the western world. The University of Bologna, the *Alma Mater Studiorum*, is considered the most ancient university in the Western world. Universities at the time were founded around the ***studium iuris*, so around the study of law**, so the only course existing basically was law.
The foundation of Studium Iuris is attributed to a mysterious figure, about whom we have many doubts and uncertainties about his life. His name is **Irnerius,** a scholar in philosophy and theology who founded and gave autonomous importance to the study of law. To him we owe an important work on the *Corpus Iuris Civilis*, and probably we have him to thank as one of the main authors of its rediscovery, especially as far as the Digest is concerned.
His pupils **Bulgarus**, **Martinus**, **Hugo**, **Jacobus** later also became teachers and masters of law. He had a quite philological approach to the *Corpus Iuris Civilis,* an approach that swiftly disappeared, in favour of the approach of legal science during the Middle Ages.
He established the *studium iuris* (a law school) on the study of the *Corpus Iuris Civilis*. To him, we owe the birth of our paradigm in legal sciences. From Irnerius and his students the first and most important school of legal thought of the middle ages was born: ***the school of Glossa.***

03/10

What was really important to the Law in the late Middle Ages: the discovery of Roman law around the 11-12th centuries and especially the discovery of the ***Corpus Iuris Civilis*** and the Justinian collection. It is basically an agent to research by mediaeval jurists of the sources which can give them some validity to the legal reasoning.
They are highly searching in the *Corpus Iuris Civilis* an **authority** on which rely on in legal reasoning, but we must always take into account the fact that jurists during the Middle Ages, ,even during the late Middle Ages, were always **lonely men**, there was no natural political authority and no political power in the law.
All was based on the Roman law, what we are going to see today is how actually different was the mediaeval law from the roman law, because they were built on the same laws, the same norms, same opinion by the roman jurist and the actual result was highly different. If you want to summarize we can say that they share the container, but not the contents.

The law was independent from politics and is well shown by the origins of the universities during the late middle ages, the place where the teachers were in the universities and such were founded by students.
Usually was a group of students who **associate themselves** to establishing a studium iuris and the first was in Bologna with **Irnerius** as the leading person of the *studium iuris*, but during the 11th centuries a lot of legal schools were established in Bologna because students associate themselves in

groups and found a teacher, called a "***iuris doctor***" who can teach them and explain them the roman law and the rediscover of the *Corpus Iuris Civilis* in order to help them to improve their legal knowledge, some technical legal knowledge that helps them in practising law.

The approach to the law was always practical in the Middle Ages, so the students are future practitioners of law, or want to find someone that can teach them some more complicated legal reasoning. During the institution of the studium iuris, he put a jar on the desk and the student will pay a fee. What is interesting is that this kind of teaching and study of law during the 11th century became incredibly famous all-around Europe. The rumour about an incredibly famous teacher, Irnerius, and the presence of other teacher in Bologna, make some s**tudents from other parts of Europe** come to the Italian city to attend the law school. Those students were associated in student groups by nationalities and these different groups created a "***universitas***", this is the origin of the name of "università". These universitas by time assumed a certain political and economic relevance, because in a city there were around 300/400 people who came to Bologna for studying, there was an **important economic factor**. Whitin a little community the presence of this group of different nationality the "commune" must be related with this universitas. This kind of legal education spread around Europe and many studia were founded.

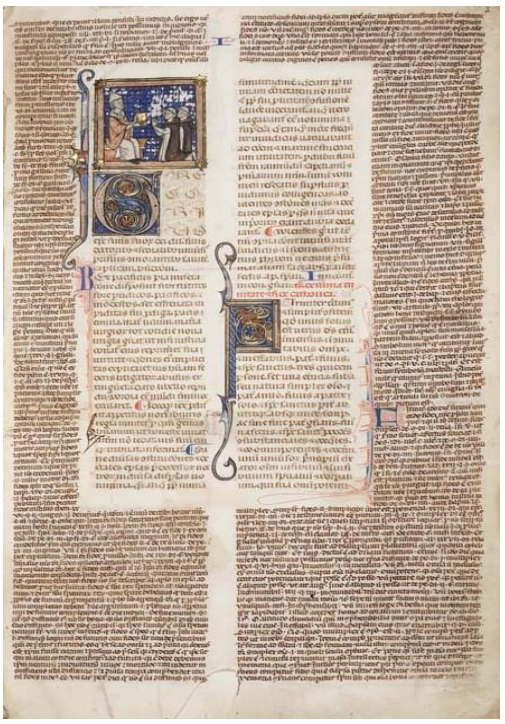
The studia were founded by the political power (The emperor and the pope), sometimes they started to compete to establish the best universities in their kingdom, this is the reason we have **several universities in Italy.** In Paris, the studia was founded as an association of professors. The origins of the legal studies in Europe were apart from politics and what is important to notice and remember is that because all around Europe the legal schools were based on the Bologna example and it is important to remember that the universities use the same method and legal program.

To Irnerius we also owe the actual rediscovery of the Corpus Iuris civilis and especially the part of the Justinian collection that had disappeared during the Middle Ages, especially the Digest. For this reason, Irnerius was soon defined the "***lucerna iuris***" because of his work of Roman law, which was quite a philological work. This rediscovery of Justinian collection of course was progressive, so the *Corpus Iuris,* thanks to the work of Irnerius was recollected and reorganised, so even if we know the origins of the Justinian collection that the original was made by the full part and the codex, Digest, Institutiones and the novella. During the Middle Ages, the *Corpus Iuris* was divided into five parts (*volumina*). The most important was the digest which was divided into three other books:

This was the division:

- **Digestum Vetus** Libri I – XXIV
- **Digestum Novum** Libri XXXIX - L
- **Digestum Infortiatum** Libri XIV – XXXXVIII
- **Codex**
- **Volumen Parvum**

1- Institutiones
2- Tres Libri (Codex X-XII)



3- *Novellae are* not the original novellae collected by Justinian, first one, the 9 books of 97 novellae were authentic (called **Authenticum**), meanwhile the last part is called the **Decima Collactio** that contains some laws that are from the mediaeval age.

The difference in the name of the parts of the digest are made from the different time of discovery. It is interesting that the digestum **was discovered progressively.** The last part was called in this way because it was rediscovered and Irnerius himself said "*ius nostrum infortiatum est*". This is the work made by Irnerius and other jurists during the 11th century and alongside the digestum we have the fourth book (the **codex**) and this is basically the same as the original one. The only difference was that they know only the first nine books of the codex (the original was made up of twelve books). What is interesting is the fact that the last three books are included in the fifth part (the ***volumen parvum***). It is a collection of different sources and they were the last one to be discovered and randomly collected. In the volumen parvum we had the Institutiones, the so-called "**Tres Libri**" , so the last three books of the Codex that were not a part of the Codex in the Corpus Iuris, last me have the **Novellae**. Them are not the original one, collected by Justinian, because the Novellae were composed by several parts: the first one are 97 of the actual original novellae collected by justinian (9 books and 97 novellae), which was known as the (**Authenticum**) and the latest part is called the **Decima Collactio** which actually contains non Roman sources but Medieval sources and, for instance, the so called ***libri feudorum*,** so some laws regulating the feudalist order, so the relationship between the law and his possession. In the end all of this reconstruction is useful to understand how the work made by Irnerius and the others was philological because they actual rediscover the Roman text, but they also changed the Roman text even in the act of recolleting and reorganising the text adding also some mediaeval, so more modern, legal sources because they are still imperial sources (in a sense) and they share the same political validity of the roman text.

The birth of the "school of glossa"

Irnerius was very important to us and it is important to the image of Bologna school and he was the founder of an innovative way of studying this renovated collection of roman sources. This method is called **the glossa**, Irnerius was the founder of the so-called **school of glossa.**

A glossa was a method to study and teach the Corpus Iuris in law school in Bologna. So the "*ius doctor*", the teacher, stayed in the class and the teacher read a brief part of the Roman text. And after making some practical examples connected to this part, they started to explain **word by word** the meaning of the text from his point of view. This explanation was written by the students, but also often by the teacher himself, on the text. These notes were called "***Glossa interlinearis***" or

"***Glossa marginalis***". Basically means that you can write the note in the between of the lines or on the side of the page.

It was a particular method of teaching that the legal renaissance since the 11th century took place, because of the connection between the *political and economic culture*. Thanks to this *scientific approach to law*, started by Irerius and his companies, **law became independent from the culture**. It was independent from the typical knowledge of the Early Middle Ages by which the law was part of the logic or rhetoric and now instead law was an independent subject to study. Especially thanks to this scientific process, also the secularisation of the law. Contrary to what was especially doing in the early middle ages, law started to be disconnected from morality and ethics. A rule could be considered a legal rule despite its *moral and ethics features*. It is a legal rule because it is a technical rule. We can create a system from this explanation, a system that works despite being immoral. Instead of creating the text, the world lecture came from the "**lettura**" in latin, that the professor in Bologna made in the class, of the several littera of the words. As a result of this apparently simple process lots of different literary genres originated, a lot of glosse (especially marginalis) became a sort of independent and complex legal reasoning, a technical explanation of a legal concept and not just a single word. This explanation all together started to have its own scientific relevance and this is called "*apparatus*" and we have several different legal literary genres originated by the glossators.

The glossators working during the 11th-12th-13th century by the method of explaining the word by the method of "glossing" the roman text actually ends up creating a whole books of work which takes different shapes and we have different kinds of books or works by this scholars:

1. **Distinctiones:** It is the most important and it is a kind of work made by the scholars and exposing several passages of the roman text so different parts of the roman text that regarded the same topic the Roman text is very complex and it is very messy, so you can find an opinion of P*aolo* and of *Cicero* on the property rights in page 1, 11, 25000 and over the text so the glossators find all this different quotation and put together and usually also tried to find the similarity and the defensive opinion on the roman jurist. Another work made by the glossator is the collection of the
2. **Regulae iuris or brocardia:** Probably you know some Brocardi, many are Brocardi adapted to our legal system, such as "nulla poena sine lege" is not an original one. They were synthetic sentences that explain a principle.
3. **Questiones:** It was a typical way of reasoning of the teaching process. The professor reads the quote from their own text and then makes some practical examples. The questions started to the opposite so a practical question to resolve and then the law students searched all the reasons in favour and finally, the professor showed his solution.
4. **Summae**: This is the most typical example of the work of the jurist of the school of glossa that is the summae which is a work of synthesis and collecting some specific topic and his work was on some parts of the *Corpus Iuris Civilis*, especially on the Codex because it was easier to synthesise the Codex that is a collection of imperial constitution, so a collection rules made by an emperor so they were already quite clear and in a systematic order. It is more complex to make a "summa" of the Digest. One of the most important is the **Summa**

Codicis made by Azzone

Azzone was known as a member of a school of glossator "*chi non ha azzo non va a palazzo*", if you don't know an opinion by Azzo, you can stay home, you will lose your case.
Exemplified very well how the work of jurist was important for the work of practitioner and you must be supported by the work of the legal science. The work of organisation and systematisation made by Irenrius and his disciples, the Corpus remains very complex and very technical legal sources often contradictory sources because its origin was the result of century of roman interpretation, so a very complex and very different interpretation made by the Roman jurist and law difficult to understand. It is precisely because of this complexity that the work of the glossators assumed a great relevance to the evolution of the law towards modernity because they transformed the meaning of the roman text, because for the legal sources of the roman text in different legal sources suitable for the present times and also suitable for practising the law. So from the actual practical use of these rules in the Late Middle Ages in a very different political and social context. That means that in the end this scientific approach on the law to the Roman sources ultimately created another source of law which is jurisprudence.

The law in the middle ages, and especially in the Late Middle Ages, is a law made by jurisprudence. The work of glossators went on for several day for century and probably and it was thanks to this school and to **Accursio (1184-1263)**, he was the author of one of this book but a very important one and different because it was the author of the **Glossa magna** or glossa ordinaria, which was a work that collected and summarise the entire scientific work made by the glossators until there.

He collected and organised and also chose which to take and what to leave the interpretation and the glossa made by the glossator. His work immediately became a best-seller, a *great vademecum* of a common law in Europe within the Glossa Magna you can find the law which had validity all around Europe. Every part is a very patch number of glossae of notes commenting on the notes and the legal concept that were written in the roman text in this pages. This glossae collected all the precedent interpretation made by several mediaeval jurists on this roman text. **Basically the glossa magna, and also the other glossae, became the law.**
What is important in a case if you are standing in a court you must use the glossa not the roman text. Basically it was the legal sense that was the actual legislator that was into the middle ages. Just to mention some things: magna glossa by Accursio would represent a **peak** of the school of glossa and after that the method of glossa is a create and change in a sense, the law students and professor have an approach to study the corpus iuris that evolved in something different and eventually became the so-called **commento**. Legal scholars started to write and elaborate the so-called **commentaria**. Explaining word by word the roman text now the time of work by the legal scholars became wider. So they sudden analyse the text focusing on some legal concept and not on the specific words so what actually changed was the matchup of reading and explaining the text because they added to his interpretation of the text a work of systematisation of the context and doing that they create legal concept and institutions which aim to a wider understanding of the roman legal concept themselves and the result in doing that was a more creative work by the commentators of the roman text. Unbeatable builder of dogmatic primarily aimed at a practical outcome. The logical categorism they created is relevant if they are functional to the new social and

economic reality. The logical Category created must be useful for creating and to rule the new legal remission, typical of the late mediaeval context.

04/10: The school of commento

After the Magna Glossa by Accursio was published, the method of the glossators appeared to have already reached its peak and, progressively, the approach to the Roman texts changed. From explaining specific words and specific concepts word by word now legal scholars started to take into account a **wider understanding** of the legal instruments provided by the *Corpus Iuris Civilis*, and they started elaborating wider legal concepts of their own, basing off the Roman texts.
They started commenting the Roman texts with a larger view and by doing that they willingly created their own system of law, a medieval system of law,

- by logically interpreting the Roman texts
- but also by adapting them to the needs of their times.

This was possible also thanks to previous works of glossators, because now the legal scholars **started from a deeper understanding of the Roman texts.**

Between the school of glossa and the school of commento there is no *definitive rupture,*

- as the school of commento focuses on a continuation of the glossators' work, even if the method and the kind of work they did are different.
- Thanks to the glossators, the commentators were now capable of managing the *Corpus Iuris Civilis*.

Both of them, as we already know, were not carrying out an historical operation on the texts. Neither the glossators nor the commentators wanted to apply the Roman law, on the contrary both of them wanted to rely on the authority of it.

Now the commentators stretched the Roman law,norms and legal concepts to even more original solutions: they wanted to *have legal institutions that were suited to the needs of the present times and they also wanted to have legal concepts that were actually useful for the practice of the law.* The Corpus Iuris Civilis acquired a completely new meaning, thanks to the theoretical elaboration of legal concepts, having to rule the medieval social and economic context. By commenting on the law the commento became an actual technique of *policy making, of law making.*

The school of commento from the early 14th century to the first half of the 15th century.

The most famous among commentators are **Cino da Pistoia,** who he lived between 1270-133G, as he probably was one of the first to use this kind of method of commenting and in doing so paved the way for **Bartolo da Sassoferrato** and his pupil, **Baldo degli Ubaldi.** They are paramount figures in the legal history of the western world. They were the real *auctoritates* of the time for lawyers, judges, rulers, and kings alike. Their texts, known as *commentaria, were* very famous and

circulated a lot throughout Europe. In continental Europe everyone who studied the law, who practiced the law knew at least some of the works of the Italian commentators.

Bartolo da Sassoferrato: born in Sassoferrato (Marche), he studied at the university of Perugia, a prominent one among the ones established in those years), under **Cino da Pistoia.** It is important to take into account the fact that the commentators' research was always deeply linked to the practice of law. From a methodological point of view, Bartolo's works probably are the most complete expression of the characteristics and of the merits of the school of "commento". In them, he made the most of his profound knowledge of the Roman text and especially of the technical rules of Roman law, and at the same time marked a clear distance from the Roman text, a distance that he was not afraid to show.

The Roman rules were very often just occasions for jurists to reflect upon legal problems of the time. Bartolo started from Roman law, but it was just an excuse to reflect and discuss; in fact, he elaborated solutions and built a more complex legal system using the raw materials of Roman law and the materials provided by glossators. The result of his work is an extraordinary reflection, deeply connected to its practical consequences, because he had the strong conviction that he could arrive to the ***enucleation of articulated*** *and complex theories to fill the normative gaps left by the absence of a political power and to solve the interpretative doubts that originated from the Roman law.*

It is important to remember how this theoretical elaboration is always related to **practice**, and this is shown especially by his consulting works. He believed in the connection between science and practice, and he believed that even the most sophisticated theories needed to **be verified on the field**, in courtrooms and in everyday life. By drafting the so-called "*consilia*" he offered to judges the best solution to the dispute, he used his theories to solve practical cases. This was the best way for him to prove the validity of his theoretical elaborations, it was the best way to test in practice the reasonableness and fairness of his theories, as justice and equity were also the leading principles of jurists in the Middle Ages.

Bartolo's opinions became the real *auctorictas* of the Middle Ages to which rely on when solving both legal and political disputes (also kings, rulers asked "consilia" to Bartolo in order to solve political problems). He was an author not just of *consilia* and *commentaries* but also of treaties on government; in fact, he was the authority on which cases were decided, and his works started a real following. A school of legal studies was established, where scholars, the so-called "bartolisti", studied his works.

For instance, at the university of **Padua** there was an entire class dedicated exclusively to the study of **Bartolo's work**, which lasted for centuries. But also, in other parts of Europe, for example in Spain and in Portugal, the political power recognized the relevance of Bartolo's works and established by statutory law that in case of uncertainty in deciding a legal dispute, the opinion of Bartolo should be held as decisive.

This is a perfect example of how important the work of commentators was and especially the work of Bartolo for their times but also later (until the beginning of the 20th century).

Bartolo has been important for history for centuries: it was common to hear the phrase "*nemo iurista nisi bartolista*" (nessuno è giurista se non è bartolista). Before looking at some actual examples of the work of glossators and commentators, it's important to focus on the consequences of their work.

By the establishment of the scientific method of *glossa* and *commento*, a new legal source was established as the main legal source of the Middle Ages, the jurisprudence. The consequence is that all jurists worked on the same legal source, they relied on the same legal text to build their own theories. This text is obviously the *Corpus Iuris Civilis.*

By virtue of the fact that they all shared the methods and the results of their scientific work all around the continent, the jurisprudence of the *Corpus Iuris Civilis* became a common law (not the English common law but in the sense of ius commune) for all European people. In continental Europe the Ius Commune is a law made by legal scholars and judges deciding cases on theories elaborated by the same legal scholars; but, still the main source of law were the theories elaborated from the legal scholars by looking, studying and commenting on the *Corpus Iuris Civilis*.

Because those theories found their validity in the Roman text, also the Ius Commune had a universal validity. The Ius Commune is not related just to a political and geographical context but it is common to all people living in continental Europe. In this way, the economical need which scholars had set out to fulfill was satisfied.

The Ius Commune was different from the other sources of law that are still present during the Middle Ages, known as ***iura propria*.** The *iura propria* were the laws enacted by the political power. Quite often these laws enacted by the political power are related to specific (local) political or socioeconomic contexts, so that they are valid only within limited spheres.

To summarize, Ius *Commune* is universal and it is made by jurists, while *Iura Propria* are made by the legislators, by political power, and they are specific rules with no universal power.

These two sources lived together, they were not in contrast. We can talk about **particularism** and **pluralism** at the same time (the presence of many legal systems that lived together, all regulating the life of people at the same time).

The relationship between the *Ius Commune* and the *Iura Propria* was that of **subsidiarity**: when deciding a case, a judge has to look at first to *Iura Propria*. But because the *Iura Propria* were so specific, often judges could not rely on them

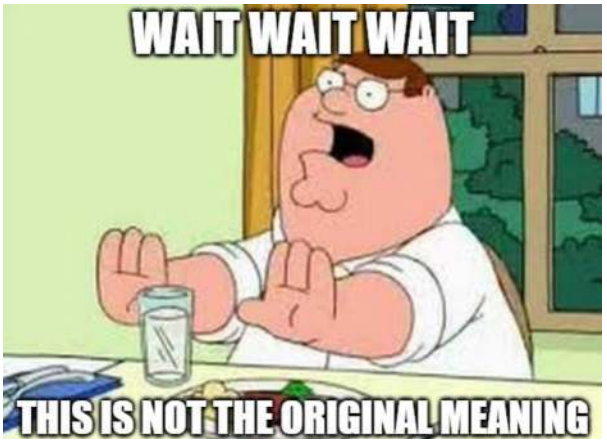
to decide the case, and they had to look at the *Ius Commune*.

The work of the jurists on the Corpus was a creative work, and in Latin, such activity was called "*interpretatio*". **When a jurist said something, he was speaking about the law**. It is important to understand these characteristics of law in the Middle Ages, to understand how different it is from today but also how that will shape modern legal systems. After the establishment of the legal state (stato di diritto), if the legislator said something he was speaking about the law, and a very legalistic approach to the law progressively decreased. Legal scholars and the role of legal science have never reached the same level of importance as it was in the Middle Ages.

Let's look at some practical examples of the creative work on the Roman text by the jurists in the Middle Ages:

- **Accursio on Customary law:** this work of *interpretatio* shows us how different the legal system of Rome was from that of the Middle Ages; they were based on different authorities and they were related to a different cultural and social context. So, despite having the same formal source to which they rely on to build the legal theories, they were different.

This example is contained in the ***Magna glossa,*** especially on a glossa on the *codex* of the ***Corpus Iuris Civilis.***



Precisely the glossa we are considering is made on an **imperial constitution**, a statute enacted by the emperor Constantine, establishing the boundaries of law and, especially, the ones of customary law. It is an imperial constitution that establishes what is a custom and what importance customs have in the Roman legal system.

The Roman text statutes: "*the authority of customs and prolonged use is not small, however, it is not an authority that goes so far as to overcome either natural reasonableness or law*" (non è piccola l'autorità della consuetudine e dell'uso prolungato, però non si tratta mai di un'autorità che arriva al punto di vincere o la ragionevolezza naturale o la legge). It's possible to see how this is very typical of the Roman conception of law and **how difficult this could be for the medieval jurists to accept such conception**. This is an example of how the contents of Roman law were not in line with the needs of the medieval times. The technicality was useful, the legal instruments were useful for medieval jurists but the content not so much.

What was the main source of law during the Middle Ages?

Customs, customary law. What the imperial constitution says about customs is that they are important but not enough to overcome natural reasonableness or law the Constantine constitution was establishing a clear hierarchy in the sources of law, putting the law (statutes enacted by the

political power) over the customs; there is a tripartition of the sources of law in the Roman view (at the top there is natural law, then there is statutory law, and lastly customary law).

While the idea that natural law stays on top is not problematic for medieval jurists because for them natural law is the law that God had posed in the heart of men (so from a medieval point of view we are talking about a moral law), the fact that Roman law puts in second place the laws enacted by the political power is a problem for medieval people it is a legalistic approach that cannot be understood or accepted by medieval men.

The main source of law in the Middle Ages was customary law interpreted by practitioners.

The medieval glossators, reading a text that basically **destroyed their beliefs**, their convictions, had to choose how to react. They had two possibilities:

- be faithful to the **original meaning** of the Roman text
- be faithful to their **own time and culture**.

Obviously, the medieval jurists chose for the betrayal of the Roman text in favor of an interpretation that could be in compliance with their own beliefs (if they accepted the Roman meaning of this passage, their legal theories would have been useless because they lived in a context where political power was not as important as it was in the Roman context).

There is another problem: **how can they do that?** The medieval jurists always had to rely on the *Corpus* to build their own legal instruments, because they needed an **authority**. So, how can we say something so different from the Roman text, without refusing the Roman text?

The solution found by the glossators is *"legem: idest rationabilem legem"* (glossa on the word legem) that means *"law: what corresponds to natural law"* (legge: ciò che corrisponde alla ragionevolezza naturale). The glossator says that the word *legem*, in its original meaning, referred to the laws enacted by the emperor, but that is the same thing as the **natural laws**. So, by explaining the Roman text he transformed it and created a new hierarchy: no more a tripartite hierarchy, but a bipartite hierarchy. At the top we have natural law and those laws that actually are natural laws. As it was typical of the medieval mentality, the laws enacted by the rulers cannot be considered nothing but the will of God transported by the rulers, if a king enacted a law that was contrary to the will of God, to the natural law, the medieval considered that law with no validity. So, the laws enacted by the political power **disappear in the medieval hierarchy** because under natural law there are just customary rules.

10/10

Legal scholars in the Middle Ages

We must go from Roman law, where the main property right was the ***dominium ex iure quiritum***, as to discuss roman conception of property we must bear in mind that roman legal culture was deeply connected to political power unlike medieval times so the issue of getting properties would be opposite to the medieval one.

In Roman law *dominium* was the most relevant property right a person could have, there were many kinds of property rights but the dominium was the **strongest one**, because it was a personal right; it is the owner who has the most independent and full power over a thing, (Relevance of personality). The focus posed on the subject is related to the fact that *dominium* is deeply related to the political roman context and so property and politics are related in Roman law, because this kind of property right is entitled only to one group of people, ***cives***. There were many types of citizens in the roman empire and those who are actual citizens of roman state were the cives, originally those who were born in the **italian peninsula** and just those could be entitled and be the holders of the dominium. This kind of property is **deeply linked with the personal quality of the owner** and because Roman law conceives it in relation with one specific object of property: **land**. The consequence is that dominium cannot be limited in any way because it mirrors the **absolute freedom** of the cives. Actually there are some limits, the only limit possible comes from the neighbourhood relationship, if you are a dominus you have absolute freedom, **except for the relationship with your neighbour**, who are also cives if they are landowner,it's a relationship *inter pares*, between equals, so this kind of limitation is easy to understand and to manage for the owner because it's "inter pares", so no one has more power or liberty than the other one, no disequilibrium.

The main concept is that Roman law conceives an absolute right and its titularity is the key, who is the owner is relevant, very weak relevance had the *iura in re aliena*, their weak relevance was because they limited the freedom of the owner, and since dominium is the projection of cives freedom over its belongings can't be limited, so "iura in re aliena" were a weaker kind of property rights than the actual dominium, as a consequence the use of goods of the owner in the end was not affected even by the presence of "iura in re aliena" due to the strong relation between freedom and political power, what is important is the personality of the owner and the titolarity of the dominum, tha actual fact that a third person uses and controls the thing is not important for roman law, who has the control is not important for the legal right, no one can affect the *dominium* because it is related to the personality of the dominus, even if the dominus doesn't use the thing he is still the owner and even if a third uses it he has no legal right apart from "iura in re aliena".

Roman law conceives the possibility that **others from the owner** could benefit or manage the thing without being the actual owner, that's why we can distinguish property, possession and detention.

Second step of evolution of property rights

After the crisis of roman empire and its end with barbarian invasion in 47G, we are now in the Middle Ages, during which all distinctions between property possession and detention

disappeared, because european society is a primitive society and the order is not political but natural, facts have impact on the law, reality has an impact, not the personal qualities that influence the law but the basic reality of things, the natural life and the survival is what drive men in the Middle Ages, this also means that during Middle Ages, as always in primitive society, people have a peculiar relationship with the things.
In primitive societies subject and object are not distinguished, the early medieval mindset conceived men and things as the same, actually things were overestimated, we can talk about materialism, recentrismo, the fact is that things are at the centre of the universe, not men, people, it is not the subject but the object the core of the law, so facts impact law, and which fact especially impact property rights? One that has been already encountered is time, a fundamental factor that impacts the development of law, it created customary law, people are obsessed with its passage and they were concerned with not having the skills to measure it. Time alongside labour, work created a legal relationship between men and things and finally they overlapped, men and things are quite the same during the Middle Ages. The main property in a primitive society is the land, roman law knows and uses the distinction between ownership and management, legal right and actual use respectively and just few subjects could have property rights as dominium, so property is connected to personal qualities, who controls the land is not relevant, what matters is who has the formal titularity, and even if a land is leased to a tenant creating a legal detention such tenure of the tenant is equally irrelevant, it does not matter if he has direct control of the land or not.
On the contrary in medieval society the formal entitlement has no value at all, what matters is who actually controls, manages, works the land, we have seen that discussing the two “Placita of Capua” and “Marturi”, what is relevant, because of the medieval mentality , is the relationship between the men and the thing itself which needed to be legally recognised, to find legal recognition by the law.

So while Roman law knew “dominium”, “possessio” and “detentatio” haD three distinct categories and legal concepts and kinds of relationships, men and things where only dominium is the perfect legal position and the property right. In the Middle Ages such distinction is irrelevant, a man who has direct control, relationship with the land which is not just temporary but longstanding, it is intensified by the two facts of time and labour, so the relationship acquires effectivity, it’s an effective relationship, time and labour are very important in the Middle Ages, we have already recalled the role of time, as far as labour in a primitive society the energy spent by a person to work has great value, in roman law it has no value because the legal right derived from the status of the owner, now the fight for survival transformed labour as a legal act with consequences over property rights, to work means to transfer your energy on the thing, thus establishing a strong relationship that must be rewarded and recognised, if i spend my energy working a land this work must be recognised by law, labour and time working together. What kind of property rights did we know in the MA? Not the dominum of course, the legal entitlement even if sometimes it remained (we have some medieval catasti where the formal entitlement of property was attributed but it had no value), what actually matters is who has the control, relationship with the land, being or not the formal owner is not relevant, primitive conception of property, it is the german conception of gewere, a kind of property mentioned in edict of rothari and it is a kind of property that has nothing to do with roman dominium, using property to define gewere is wrong, it is a position of effective control over a thing, nothing to do with dominium possessio nor detentatio, the idea of dominium disappeared and the owner registered has no importance, someone else is actually using the land.

Complete confusion between property and ownership, “dominium” and “possessio”, and this confusion is proved by the fact that historians discovered that notaries used the same formulary for selling, creating iura in re aliena and all other acts involving property, were regulated with the same type of contract, irrespectively of the fact that property or iura in re aliena was involved, all acts that involved the control of land where regulated with the same contracts.

All these different legal solutions are now regulated with the same contract because what actually matters is the control of the land, the “Gewere” and all these kinds of contracts involved who had the “Gewere” so these acts eventually transferred the “Gewere” which can’t be transferred without a direct control of land, it only exists insofar I have the direct control of the thing.

That’s why you don't need many legal contracts and concepts, just one kind because what matters is having direct control. If I were the formal titular but I have no control I lose any relationship with the thing, I cannot do anything with it. Basically we have a complete revolution of the conception of property rights, the main consequences are that of course an influence over contractual agreements to exchange properties and of course the main kind of property that circulated was that of land ownership, real estate property. First consequence of the demise of roman conception of property rights is that the main contractual agreements to exchange legal rights over land and especially agricultural lands (locatio conductio), the rent, soon disappeared for three reasons: the first one is that “locatio conductio” is a consensual type of contract, so it is based on the mere consent, will of contracting parties, while in the early Middle Ages the economy and trades were based on exchanges and real contracts were central; the second reason is that location in roman law was the contract who transferred “detentatio”, a weak legal position, the strongest was the “dominium”, “detentatio” is very weak, now the actual control does not establish a weak position as the detention was but it establishes the gewere, the only legally protected right over a thing; third reason is that in roman law renting was a legal relationship based on the equality of contracting parties, locatio realised an equal exchange, the land for a proportionate amount of money established on how many crops can be produced, how productive land was, it oculd have been economically assessed, this was impossible in Middle Ages as equality was not an idea, a legal concept present in Middle Ages, and also because such an agreement is impossible because you could not estimate the economic value of the land because the crisis of agriculture meant that land had potentially no value, you could not know that before, usually if you rent a land is because it is left uncultivated, if you rent it you are a lord that has it and you rent it ti farmers to cultivate it. Medievale people needed contracts to legally protect the activity of those who wanted to cultivate and answer to the agricultural crisis and while in roman law the dominus couldn’t and didn’t want to limit his dominium by establishing such contracts, in the Middle Ages the agricultural crisis paved the way for agricultural agreements, unknown to roman law but emerged in the Middle Ages as the most useful contracts regulating the exchange of land, these were of customary origin, they were customary agreements emerging from practice and there were a lot of agreements, but all of these contracts shared some characteristics, three main: first one is closely related to the agricultural crisis and people’s struggle to react to it is the fact that all these contracts are “ad meliorandum”. They are established on the fact that you must work land to make it more productive, they are focus on the improvement of agriculture, in order to have a land you must work it and increase its production, that is also typical, if you want the “Gewere” you must have a relationship with that

land; the second is that they are all long term contracts, because to transform a land from an uncultivated to productive one required time, the objective is to make land productive so they must give the time to the tenant to reach the goal and the owner to have the land transformed by the work of the tenant; last common element, more technical, is that they are all real contracts, the tenant has the "Gewere", the direct control, basically the property of the land and he must have the direct relationship, the possession and the "Gewere", so it is a real contract, if you establish the agreement but you don't have the direct control the contract is nullified.

Despite not formally transforming the property rights these contracts were very important for the Middle Ages, so that they found a very strong legal protection, a tenant with an agricultural agreement could not be expelled from the land: If I am the tenant I cannot be expelled from the land even if the formal property is transferred to someone else. We talked about "emptio non tollit contractum" in latin, even if there is an exchange of property, one of the parties of the agricultural agreement changes.
All these are emblematic characteristics of the medieval mindset built around the land, the thing, property is built on the thing, the object, not the subject which is only relevant to law for his relationship with the thing and not by chance the words dominium and possessio were used by medieval scholars with no difference to describe property rights because they overlapped.
The kind of right of the tenant is protected to the level that it is quite equal to a property right, these contracts realised a transfer of property from the landlord to the tenant which is temporary transfer, for a long time but temporary, at the end of the contract the landlord will reacquire property.
This is one of the main agreements, but many kinds emerged, like "precaria", interesting because it is in relation to land owned by ecclesiastic institutions, called "precaria" from preghiera, you pray to the ecclesiastic institution to have the land.
All these contracts are "ad meliorandum" and the classical formula is in the slide, used as opening close of contracts usually. One of these contracts, "emphyteusis" is a Roman law contract regarding land but it changed during Middle Ages, because in roman law it is not "ad meliorandum", the only duty was that of maintaining the land as it was, now the objective is that of making land productive, so important at the beginning of 12th century when a jurist from ravenna said that "contractum causa meliorationis graeco vocabulo enfiteusi solet vocari", so he concludes that all "ad meliorandum" contracts are emphyteusis, this is important because around that time the rediscovery of roman law was so important and the only contract already present is used as the one to understand all agricultural agreements.

11/10

Despite the great numbers of contracts, it is possible to find 3 characteristics common to all of them:

1. **Ad meliorandum contracts**
2. **Long term contract**
3. **Real contracts**

Example of agricultural agreement: “parzionaria”.

This kind of contract emerged in the Mediterranean area in the 8th century., and what is particularly interesting about this type of contract is the fact that it's a contract which basically establishes a **double real validity** (doppia efficacia reale del contratto). With this contract, in fact, a landowner of uncultivated land gives the land to a tenant for a long time, at least **10 years**, with the task to cultivate it, and also with the promise that at the end of the contract, the land itself will be split in two different parts:

- one will return to the landowner
- one will become property of the tenant, so of the beneficiary of the” parzionaria” contract.

This kind of contract explained very well how strong the position of the **tenant** in the eyes of the Early Middle Ages jurist was at the end of the contract, the tenant too became formal owner of a part a of land: *dominio pro parte.*

The act of working land became a means of acquiring property during the Middle Ages, which is unconceivable for the Roman conception of law. This reflects the fact that the main conception of property during the Middle Ages was the German one, the **Gewere**: the only thing that mattered to the law was the direct contact between a man and a thing.

But in the light of everything already discussed about the revolution occurring around the 11th century, we can easily understand that even in relation to property the medieval society started to change and to feel as needed a definition of property rights and the creation of some legal schemes, some legal theories, more elaborated and suited to the new economic and complex reality of the late Middle Ages.

There was especially a need for some theoretical and systematic categories capable of defining some general principle of property that could be applied all around Europe. Those who tried to answer this need for new and more complex legal schemes during the late Middle Ages were the legal scholars, who were not supported by the political power. They relied on a different authority, not a political authority, but a **cultural authority**, which is the *Corpus Iuris Civilis*. Their political authority was therefore the Roman law. However, the economic and agricultural context, in which they lived in was very different from the roman one. So, also keeping in consideration dominium, something different was to be made as the first operation by the scholars, who were called glossators.

The first operation they led was **creating a common language of the law** in the Middle Ages by starting from the reading of the *Corpus Iuris Civilis* and its explanation or translation. Doing so, glossators delivered many legal definitions concerning almost every area of Roman law contained in the *Corpus Iuris Civilis*, except for one: **Dominium.** It was the only Roman legal definition that glossators did not discuss about. First complete medieval definition of dominium will be delivered by Bartolo, who was a commentator.

In order to understand how the legal discourse during the Middle Ages about property evolved in the decades and centuries after the so-called “legal Renaissance", it is necessary to read some glossa and some comments.

The first attempt to define property by the legal scholars in the late Middle Ages emerged in a legal text written by an unknown jurist, the author of “***De Verbis Quibusdam Legalibus***”, at the beginning of the 12th century. This work is a perfect example of glossators’ work because it is completely dedicated to the explanation of the words contained in *Corpus Iuris Civilis*. There is a sentence that expresses that the jurist is wondering about two categories typical of the Middle Ages: “superficiario” and "enfiteuta”. Author asks himself if those who are the beneficiaries of a contract of **superficie** or **enfiteusi** could be considered as **usufruttuari**.

For the Roman law, *“usus fructus”* is another kind of use of *“res aliena”*, a real right on others things to enjoy, the fruits of the res, of the thing itself.

Medieval jurisdiction asserted that it is not the case: whoever has a right of **superficie** or **enfiteusi** must be considered **quasi owner**.

They are *almost domini*, because in the typical way of thinking of the medieval ages, they have the direct control of the res.

However, the jurist is struggling with the contrast between the Roman text and the medieval contrast, the medieval practice. That’s why he limits himself and affirms that they are not owners, but “quasi owners”.

The solution here is quite primitive yet, because there is no great theory, there is just an easy definition. However, already in this simple passage emerges an element that will be the main protagonist of the later legal discourse about property in the next decades. It is the fact that it is possible for the coexistence of different kinds of property over the same thing.

By looking at the Roman text, it is clear from the legal scholar now that there is a dominium in the strict Roman sense, so a formal entitlement of the property right, and there is also a dominium in a medieval sense, the effective control of the”res”. The latter is the one that should be elevated to the point of being a dominium itself, to become a property right. The issue is to find a legal protection of this kind of **quasi dominium**, that is called utilitas by the medieval jurist.

Utilitas = right of a person to use a thing. The productive relationship between the man and the thing is the focus. So legal scholars started to think about property in terms of *dominium*, and they started to wonder about a solution to give utilitas some legal protection, so as to transform utilitas into a dominium itself.

The second part of the text deals with legal *actions*. Utilitas gained the rank of dominium thanks to the action of *Rei Vindicatio Utilis*.

In the *Glossa Magna* of Accursio Fiorentino, he comments a part of the Digest in which the Roman jurist Paolo talks about the property of municipal lands. So a very limited kind of property, but this passage is used by the glossators to say something more general.

So, looking at the Roman text we can see that in Roman law some lands **could have been rented for life,** but even in this case the tenants are not considered as landowners by the Roman law. They are life holders of a right in re aliena, but they do not become owners of the land, that still is property of the city (vectigales). However, it seemed just to entitle tenants some legal actions to protect their right over this land. These actions are real actions, so very similar if not equal to those typical of the property holders.

Actions against whoever unlawfully deprived them of the land.

Accursio says that it means they do not become **direct owners**. That's why he added a word to the term *owner* and the next sentence it's improper that they should be entitled to the re election also says it has the useful de utilis, who is another crusader. Following Giovanni da Bassiano, that even if the Roman law does not say that they have useful ownership, so the *dominium utilis,* nevertheless it can be well said, because Roman law does not generally define heirs or domini those who had just utilis legal actions.

What Accursio was saying, by reading and explaining the Roman text from the medieval point of view, is that **two types of property exist**.

This is not true because *dominium ex iure quiritium* is a very **absolute and unique** legal concept. It's possible to sustain his theory on Roman law because of the presence in the Roman law of some legal actions.

In Roman law there were some legal actions established to protect the weak legal right entitled to the tenant for life of vectigales lands, and this kind of legal action was done with the name of "Rei Vindicatio Utilis", because it is modeled on the "rei vindicatio".

This is the typical remedy of the owner, of the dominus, to claim back his property, but in this case, the tenant is not claiming the property, (he is not the owner in the Roman law) his legal action is called "rei vindication utilis". This gave the opportunity to medieval jurists to give relevance to the economic relation between person and land, so to utilitas.

From this explanation by the Roman jurist **Paolo**, the medieval jurists concluded that if there is an action, there must also be a right.

The person who is entitled to this legal action becomes the dominus. Legal right has been established, a dominium utilis.

Roman law could never accept that, but the medieval **could and wanted to**. The first reason why is because for medieval jurists practice was even more important than theory. So if something exists in **practice**, should and must also **have value in theory.**

Although the Roman law started from the opposite conception: Roman law started from the political value to build legal rights and dominium was the perfect example. It is modeled on the idea of the political liberty and power of the civis. Roman law started from the political value to build rights, while on the contrary medieval juries started from the practice, from legal actions to build the legal right and law in action is very important for the medieval because it makes law effective.

Effectivity is always the focus, the core of the law in the Middle Ages: it is more important effectivity than validity. Legal actions allowed Accursio to sustain that it is possible to talk about two different kinds of property:

- **Dominium utilis**
- **Dominium directum**

This led to the main conception of property in the Middle Ages: **the dominium divisum.**

Theory of **dominium divisum** is the typical conception of property right elaborated by medieval scholars. It defined property rights for centuries: very important for European law and society. Theory that lasted until **1791**, so until the French Revolution. One of the main objectives of bourgeoisie was to eliminate dominium divisum: they wanted just one type of property and one owner of res.

Dominium divisum is typically medieval. Firstly because medieval jurists started to build theory of property from the object, from the res, and not from the subject. Starting from looking mainly at things and not the people, medieval scholars defined the res as complex. The res can be described, a sphere made of many levels. There is a core (*substantia iuris*), to which the classical dominus is entitled as in Ancient Rome. Substantia iuris was called ***dominus directus***: the person who has formal entitlement to a land/thing (entitled to dominium directum).

Another level existed where a person had a relationship with the thing different from dominium directum, **dominus utilis**: exercised by the ones who worked, managed and controlled the land/thing. Formal owner does not disappear as it was in **Gewere**.

The utilitas, that is the economic value of things, is protected and valued at most.

In the Middle Ages tenants became owners, “utilisti”, so the holders of domium utilis, of a useful right of property. They enjoyed the fruits of land because of their property right and in exchange **they paid a fee** to dominus directus, because he still had rights of property.

Dominus utilis is an actual dominus, called ad tempora dominus: he is the owner of the land for all the time covered by contract. If I am the owner of a land and rent it for 20 years, I get property rights. In roman and our mentality this is very hard to conceive because the conductor cannot act as the owner.

Dominium divisum was elaborated by the work of glossators and later on defined better by Bartolus, who delivered a comment on property rights.

«I wonder what property is; it can be understood in a very broad sense for any incorporeal right (ius incorporalis) as when I have ownership of a bond or usufruct but I do not mean it in this general way, rather I refer only to property that has a bodily thing (res corporales) as its object [...] one case is ownership of bodily things, a completely different case is ownership over incorporeal things»

Bartolus strongly critics the *corpus iuris civilis*. The level of knowledge of roman law of school of commento that allowed commentators to have the confidence of creating a complex medieval using the roman one as a source.

The criticism is about the internal confusion of *Corpus Iuris*, that was made up of mixed sources from different historical periods and, in relation to property, confuses the property of "res incorporales" and "res corporales". For the Roman jurists there was no problem in the distinction corporals-incorporales. It is interesting that in defining dominium, Bartolus is only interested in material things. àmaterialism of the Middle Ages.

Definition of property:

«What then is property? I answer: property is the right to perfectly dispose of the bodily thing, if the law does not prohibit it.

It stressed the power, the autonomy of the owner in disposing of the thing.

Bartolus seems to define an absolute property right similar to the roman dominium, however he added "«*I ask: how many species of property are there? It is claimed by some that property is of only one species, instead there are two: the emphyteuta is the owner and yet the grantor also remains the owner, so if there are two owners there are different property rights, since the same right cannot exist in a different title for two distinct people[...]»*

Property = absolute power over a thing but two kinds of properties are different because it is possible to have two owners on the same thing with the same kind of property rights.

So, the right definition is that property right means to have autonomy over a thing, not an absolute power. Both dominus directus and utilis had this kind of autonomy over the thing.

In fact, for example, both of them could sell the property.

Each owner is free to act without the consent of the other, otherwise it would be a situation of co-ownership and the two kinds of property wouldn't exist, there would be only a shared one.

17/10 The Origins Of English Common Law

Anglo-American legal tradition is different from the European continental ones.
It is important to discover the origins of the English experience; it actually represents one of the first examples of the transformation/revolution, that would eventually characterise all Europe: the ***process of centralization of law.***

The idea that law was started to be considered as a matter of interest for the States (again after the experience of the Roman Empire) From the English perspective, we can see an example of how the states eventually became to be involved in Law, especially in the process of law-making.
England was probably one of the first contexts in which this process of centralization of both the political power and the administration of justice took place in Europe.

In order to discover how that occurred we can start from some symbolic dates:
Year 1000: change of the millennial → it was a sort of passage or transformation from the Middle Ages to the modern era.

There are a lot of elements in common with the Continental context and with the continental general renaissance of culture, trades and economics in general, but England had its own peculiarities on the ground of political and legal developments.

The most important year to remember was **1066:** the English island suffered the last invasion of its history. **William of Normandy invaded England and became William the conqueror.**

He claimed the crown of England: he brought England to the power of Normans, from France.

Effects of the invasion: what are the consequences of the invasion and contamination between the Norman's tradition and the Anglo-Saxon's tradition?
Especially from a legal perspective the shift of power had some consequences: William brought with him Norman's cultural and legal traditions.
Initially he confirmed the Anglo-Saxons laws: at least at the beginning of the Norman's invasion, they did not change the legal traditions.

The Anglo-Saxon's legal tradition was very peculiar:

- numerous sources of law → pluralism = in England the main sources of law are:
    - **royal proclamations**: decisions of the king and king's council
    - **folk right**: customary rules and traditions of the several tribes (usi e consuetudini)

what is interesting of the Anglo-Saxon's legal landscape is that these sources of law were enforced by local assembles → each village or groups of small villages had its own:

- ***courts of the hundreds*** (corte dei cento): local court composed of all the adult free men such assembly met periodically in order to discuss and decide what was important for the life of the community, also for judicial hearings and decisions

- ***courts of the shire*** (shire courts) (corte della contea): covered a larger territory = usually presided by some king's representatives: related to the King of the England
  Helterman: representative of the king who presided these courts.
  Discuss over political matters, taxes, fines, criminal decisions and other important disputes (ex. land disputes over land's possessions).

There were also other courts: **private courts**
Every lord that who controlled a land had his own court in order to deliver justice to his tenants (people who lived within his own land) → very complex justice systems with different courts and other primitive justice's systems:
Justice in the Anglo-Saxon's tradition is **very primitive**: it relied basically on the **trial by ordeals** (processo per ordalia) = guilt or innocence is proved by a challenge
Main changes that actually occurred in Anglo-Saxon's traditions thanks to the invasion of the Normans

The context that William the Conqueror found was **numerous legal sources,** a strong accent to **customary rules**, a very complicated and primitive judicial system based on local assemblies and courts throughout the territories and trial by ordeals
The conquest was a pivotal event but not with immediate effects: initially he confirmed the Anglo-Saxon's legal tradition = the conquest did not subjected England to a new foreign law
As many example of this confirmation is the "Charter of London" of **1067**: it was rendered to the city of London by William the conqueror

The new king granted to the city of London and citizens all the previous rights and privileges:
He granted the respect of the bloodline's legal rights: political and military move thanks to which London surrendered = he didn't have to impose force of the military to invade London
While in those few years of invasion the general legal landscape remained unchanged, norma's actually introduced something new.
The innovations were three and all acted in the judicial system:

- ***separation of the ecclesiastical courts from the other civil courts*** = political act that has also legal consequences is the separation between the State and Church for a matter of justice
  - **ecclesiastical courts**: courts that had jurisdiction over ecclesiastical matter
  - **local and private courts.**

This separation of religious issues from civil and criminal cases in the administration of justice was an important feature of English law development in the years to come.

- the Normans introduced a different form of trial by challenge typical of the Norman's tradition: *the Trial by battle.*

This is a system that didn't completely replace the previous one, but complemented the trial by ordeals adding a new form of dispute resolution based on some skills and not just on luck as historian pointed out this kind of trial was especially important for the development of the military power of England because thanks to that people had formed their skills in combat

- ***introduction of a notion of "king's peace*** that eventually resulted in the **centralization of criminal justice**: = thanks to Normans every serious wrong committed by a subject of the kingdom now became a wrong made to another person (another subject of the

kingdom), but also a breach of the so called "king's peace", therefore an attack to the established order

If one commits a crime, he's not only causing a wrong to another person, but also to the kingdom, because he's also putting in danger the "king's peace".
These wrongs were started to called felonies and started to be judged by king's sheriffs

- ***Sheriffs***: new figures introduced by Normans as local king's representatives with jurisdiction over a territory and with the power to enforce the decision of the king, so the power to enforce the "king's peace" and so the power to prosecute criminal law started to be considered as a matter of public interest and not just a matter of private interests.

Main consequence of the Norman's invasion: **centralization of justice and law.**

- empowerment of the central political power over the other local political powers
- empowerment of the central political power due the independence from the Church → who benefitted the more of these changes was the king and the political power

One last important aspect imported from Normans: the establishment of a very continental-like **feudal system.**
Feudalism: typical government model spread throughout Europe during the Middle Ages
It was a system of relationships based on the concession of lands in return for tenant loyalty and services (military, religious and economic services).

This system was also closely related to the administration of justice: every lord should and must have a court for his tenants, where controversies were decided feudal courts = courts modeled on the private courts typical of the Anglo-Saxon's tradition.

At the top of this system there was the King's council (court of the lord of the lords).
Around the end of the XI century and the beginning of the XII century there was a very intricate context made of a system of local courts each of which had its own very limited sphere of jurisdiction.

Still, the introduction of a feudal system was to strengthen the king's power.
Another important aspect typical of the Middle Ages, but especially of the English development of the English common law: *strong nexus between law, political power and the land.*

Sarum Oath (giuramento di Sarum) in the **1086**: important to the development of this nexus in common law. The King ordered a census of all the lands of England: this census resulted in the famous "Domesday book".
The King asked to register all the lands and the landowners within his kingdom.
As a consequence of this great survey, the king also summoned all the King's English tenants and he made them swear loyalty to him, even against their own lords.

In a feudal system we have this sort of pyramid:

- on top there is the king: the Lord of the entirety system, and in a sense the owner of all the lands
- tenants-in-chief: people who received the lands from the king

- sub-tenants: people who received the lands from the tenants-in-chief
- commoners

All these people received **lands** in exchanged of loyalty and services to the category above
The king now summoned all them who had to owe allegiance to him: all the people should be loyal to the king in the first place even before to be loyal to their own lords.

The power of the crown impact the development of law in England because this revolution has two consequences:

- all the lands owners, tenants in the end were king's tenants
- the task and power to deliver justice to the tenants also meant that the king is the ultimate "*fount of justice*" = if the land owners are king's tenants (had ownership of the lands because the kings gave them) it meant that all these landowners could and must ask for justice to their lord, who is the king.

Basically, all the law related to the land, namely all the law, in the end originated from the king. Usually the justice was administered and delivered by local lords, but the foundation of that law was of the king.
As a consequence of this oath as the time passed, it forced the English law to be centralized in the King's hands.

The King's council, the *curia regis*, in the end would have authority on all the English subjects: all the men could address the king and his council asking for justice.
Especially when they couldn't find justice in the local courts: justice is not just related anymore to only the local lord and territory.

Initially he tried to deliver justice to all: it was usual that the king and his council travelled around the country to deliver justice (corti itineranti).

He tried to establish his authority throughout England by travelling the country and delivering justice.
Especially during the reign of **King Henry the II** (1154-1189) this system of justice developed and the king council was organized in specific courts with specific jurisdictions and power.

→ The king's started to delegate decisions to the internal courts of the curia regis.
The king's council was divided in 3 courts which stopped to travel around the country and established in Westminster:

- *Court of Exchequer* (or the Exchequer of pleas): was formed as an internal separated court internal to the Curia regis that had jurisdiction over **financial** and **economic matters**
- *Court of common pleas*: probably established in 1178 and had the vastest jurisdiction It would rule over the most **common controversies** and cases **among private** subject
- *Court of king's bench*: court that travelled with the king for a longer period and eventually also established in Westminster

In a few decades the so-called courts of Westminster were established, having their own independent jurisdictions.

Main consequence of this new justice system: **these three courts had jurisdiction over all the controversies** of the judicial issue and eventually resulted in the ***process of centralization and harmonization of justice,*** that moved away justice from the local courts: progressively the law was no more a matter of local customs and judicial decisions made by local lords, but became a *matter of common law.*
Justice is now a matter of the entire kingdom, it's related to the crown: the king had a great amount of influence on justice because he could control the courts.
Formally the courts were independent from the crown, but in practice the king still had the power Law remained basically practical as the Continental area: law is the result of the practice of the judges of the courts; but, the control of the political power over this judicial system increased a lot, especially contrary to the continental context, it is relevant the relation of the justice to the Crown.

Process of centralization and harmonization of law was further continued by the establishment of a system of legal action: **the writ system.**
It is a system of justice by legal action that allows people to enforce their rights.
It started with land-related rights: land is the most important subject in medieval law, especially in English medieval law.
The first kind of writ established was the ***writ of right*** (*Breve De Recto* in Latin) it was established because: I'm disposed of my land by someone else and my local lord does not intervene to give me my land back; then I can ask the king to issue an order/command addressed directly to local lords in order to command them to give my land back.

People could enforce rights by asking the king to deliver justice: other kinds of rights that followed, all of them ordered the sheriff (local authority of the king) to enforce a right:

- Otherwise the other solution was to summon the defendant to appear before the Court of Westminster: transporting the case from a local court to a central one → *writ of Preacipe quod reddat.*

The **writ of praecipe quod reddat** was also related to land dispute, but this kind of writ was addressed to the sheriff by the king to require the defendant to return the land to the tenant or to appear before the Court of Westminster in order to discuss the case in front of a central court:

- *Writ of debt*: impose a payment of a debt or appear before the Court of Westminster.
- *Writ of covenant*: ordering to enforce an agreement between the parties.
- *Writ of trespass*: related to felonies and so criminal justice. It required the sheriff to imprison the defendant or to pay some restitution or to appear before Court to prove his innocence.

Two main consequences of this system:

- All matters of law originated from the king: power and duty of delivering justice
- Centralization of justice itself: the king concentrated the power of delivering justice in the central courts, limiting the lords and local courts' jurisdiction and authority.

Initially the process started as a process related to land disputes and most rich and important lords of the kingdom: originally only the **wealthiest landowners could obtain a writ**, because it was very expensive (you must pay to have a writ from the king), and with time the price of writs lowered

a lot while the writs covered a wider range of controversies (not just land related one): the writ system became the common system to deliver justice.

These two developments laid the foundations of the English common law: the decisions taken by the central courts harmonized the law. Decisions were taken from precedent cases and were related to the mindset and the idea of justice that the courts of Westminster had.
This process shows us how England had **the feature of a modern state** earlier than the other countries: we have a very strong political power, capable of harmonizing law, not already making itself the law, the king is not the ultimate legislator; but he created a system of justice that was under his strict control.
Even if this power is delegated to judges (is not the king who practically makes law) but still it was a national law, connected to the political power, to the crown.
This system also modernized the English law and English law system because the writ issued by the king ordered the local lord to obey some basic rules of justice.
Justice should be delivered by a group of well-trained legal practitioners in Westminster who added technicality and rationality to the judicial system itself.
One of the consequences of the centralization of the judicial system: the trial of ordeal ended
new technicalities and rationality and theoretical notion of law in the system that could accept trial by ordeal.

18/10

English church scholars during the Middle Ages elaborated philosophical and legal theories and rulers had to act according to these understandings in order to preserve the natural order established by God.

The main problem discussed by scholars during the Middle Ages was about **constitutionalism**. When scholars discussed the power of rulers, the main issue was how to prevent *arbitrium* and rulers from making arbitrary and authoritarian decisions. An English church jurist, **John of Salisbury** tried to answer this question in his work called "***Policraticus***" (1159) .

He started from the quote: *«princeps legibus solutus [est], quod principi placuit legis habet vigorem»* (Ciò che è gradito al principe, ha valore di legge). That quote is from the Roman Jurist **Ulpian**, but was reinterpreted by Roman lawyers. The law is the will of the Emperor, so the exact same quote is used to say something greatly different from its original meaning. Saying kings were *legibus solutus* means kings are above the law because they must exercise justice,not because they are threatened by law itself, but because they have the moral quality to be the guardians of equity and peace. Despite that, using this quote he wanted to explain **how king is limited**. The king's idea of the law was connected to the rule played by kings into the community and tasks they had related to the community, so kings were on the top of the communitarian order.

The king has the duty of being **just and equitable** (*Aequitas*) with common people. This task of being just wasn't the right of the laws of the man. Kings were above the laws of men because they had the moral quality, not connected to the human rules.

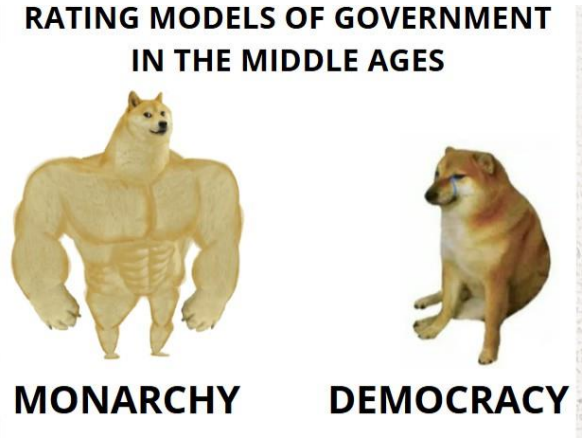
They had the moral qualities to be the rulers received by God and their "auctoritas" is beyond the law. they couldn't be limited by rules of the Land but they had to act according to the rule of God. Even if the power is outside the law the actual power of kings was very limited to them. In fact, **they had to maintain the established order,** they must judge and administer with equity.

The "*auctoritas*" of kings was limited because without binding their power it could become arbitrary. In such cases people had the power (not just the right) to remove the ruler.

Arbitrium: when a king does not act with equity he becomes a tyrant and consequently should be removed from the throne. This is a sort of right to resist in another theory of very modern law about the origin of the States.

Another aspect about the law and Government was highlighted by **Saint Thomas** (San Tommaso D'Aquino 1225-1274) who really influenced Europe. According to the problem of the authority, Saint Thomas said that the Pinceps was *legibus solutus* and kings were above the law. Moreover he said that the duty of the rulers is to protect the peace of the community (maintain the order). An interesting aspect of the theories of Saint Thomas was that the best system of government was monarchy.

He explained his theory in his work, the «*Summa Theleologica*» used the so-called **Organicist Metaphor,** in which the society is a human body, where every part of the body works according to the others. However, as in the human body everything functions if there's an organ who coordinates others, that happened also into society, where princeps had work. In the mindset of medieval people the heart was the center of the human body (The emotions and other things comes from that), like a center of command. As in the human body the center was the heart, in the social body the center was the king who had total control of the body, and could maintain the body's performance if he had total control of every part of it, preventing chaos which could lead to the death of the body. In summary, as the human body is formed of various parts that work perfectly together because controlled by the heart, society as well can be ruled peacefully only if there is a single center of command: the monarchy.



From Saint Thomas's point of view **democracy led to chaos**. In fact in Ancient Greek democracy was the most problematic model and for St. Thomas democracy during the Middle Ages led to chaos because **too many organs wanted to take control of the body**. The fact that medieval scholars insisted on preferring monarchy to democracy was a method of order and a way of preventing arbitrariness because in a divided government it was highly probable that someone would lose focus on the benefit of the entire community. In fact, it was possible that someone or limited parts of the community could start pursuing only their own interests. This would lead to the breakdown of order and the end of peace, while with monarchy it is easier to maintain order.

Optima Politia => «Mixed constitution» were the best form of government.

In this point of view it is clear that with the rise of medieval philosophers there's a revolution of concepts. The rights of resistance that people had was a way to prevent monarchy from becoming authoritarian by limiting his power and preventing civil war. They wanted order, not chaos. The perfect form of Government in Saint Thomas theory was a monarchy in which kings were surrounded by other people. Kings had the "*auctoritas*" and the political power but they should constantly relate with other members of the body. So, that wasn't unlimited power. At the end what really characterized constitutionalism in the Middle Ages is **the supremacy of community** and the peace order, where rulers had to pursue the common good.

Magna Charta libertatum (1215) -> From Magna Charta libertatum derives some features and elements that **still today characterized the Anglo-American constitutionalism** and the approach to law of the two Countries, connected to personal rights. In Magna Charta emerged some primitive notion of the rule of law. **Magna Charta wasn't a constitution**, but a document originated by a medieval idea of power and Government. Anyway it's a typical example of medieval constitutionalism. To be more precise, it was a «**Statement Of Law**» that ultimately led to modern constitutionalism

During those years John Lackland lost the lord's support. In that context started a civil war that ended with an agreement. The relationship between the king and his lords was really weak because he was unable to maintain peace in the kingdom (one of the main king's tasks). The solution was an agreement that limited the king and on the contrary intensifies the liberties and privilege of the lords. Magna Charta (re)-established the notions of **government by agreement** and **limited government.**

Medieval constitutionalism and the Magna Charta.

The notion of constitutionalism differs in each time period, nevertheless we can still talk about **constitutionalism in the Middle Ages**, bearing in mind the different meaning it had at the time. One of the first examples is the Magna Charta, which was a **typical medieval constitution**, an agreement between the king and the Magnati (tenants). It shows some of the typical traits of the medieval notion of government, law and constitutionalism and it represents an important step towards modern constitutionalism and for the legal Eastern tradition (the rule of law will be discussed, for example). Obviously, the Magna Charta is not a modern constitution as we intend it today, it could have emerged only in the middle ages since it is an example of the theories about power and law, elaborated by St. Thomas, J. Salisbury and many other scholars. It is a perfect example of how the **main issue** of the political agreement about power **was to limit the power of the king** in order to have a **legal system based on law** and not only on God. The king's power was checked by some of the other powers that represented the kingdom itself, such as ministers or even judges (these figures limited the power of the King).

England 13th century: the relations between the King and the landowners reached a critical point which jeopardized peace in the UK. The king, **John Lackland**, was opposed by a large group of his

tenants/lords, because he had imposed **taxes and duties** on them which they did not want to comply with. Since the king had the duty to guarantee peace in the kingdom, the solution was that of a **new agreement between the King and lords, the Magna Charta**.

Usually in these types of agreements in the Middle Ages the king gave the lords something, usually lands, in exchange for their support, but with Magna Charta, the situation was different: they already had land, so **the king had no choice but to grant a list of liberties and privileges**. He limited his power and intensified the lords'. This act established the basis of modern English constitutionalism. The modernity of the Magna Charta lies also in its **formal structure**, it is not divided in part, but in **several provisions**.

Typically, in the Middle Ages the agreement between the King and Lords was the so-called **consilium and absilium duties and privileges**, it was the privilege to consult personally the King. The Magna Charta changed this consilium and absilium into something more, the king **must obtain the consent of the tenants before exercising powers in relation to certain areas**. For example, **article 12** of Magna Charta says that the king must ask the lords for their consent before doing something such as imposing new taxes. This is the very primitive form of the so-called **"*no taxation without representation*"**, the fact that the political power cannot impose new taxes without the support of the people. This principle was already present in the Middle Ages, and it became more and more important, because it was essential to decide some issues.

Another primitive concept introduced by the Magna Charta was the "***king in parliament***", his power **was limited by the consent of someone else**, thus making him interact with parliament. In this case, the consent needed was from a small part of the actual population (the richest).

Another important aspect of the Magna Charta is the fact that the limits on the power of the King do not only come from the law, but also from a **collection of rights and liberties** which pushed the notion of **limited government**.

Magna Charta and the rule of law.

The Magna Carta was a typical constitution that contained elements which would lead this constitution to be something much more modern than its time.

The idea was that the Magna Charta contained an actual agreement of liberties and privileges that the king granted (some of these will become pillars of modern-day constitutionalism). These conventional liberties are not just decided and recognized by the institutional government by agreement because they are not just agreements among the king and the lords, but they also represent a convention of the **concept of liberties**. The **power** is not only the expression of God's will, but is also **directed by law**.

In fact, the Magna Charta is a **body of intangible principles that must be respected by the king himself**. The power of the king became a middle power, it derives not just from God but also from agreement. The Magna Charta stated that some **liberties were** actually **rooted in tradition**, thus they were **already established in common law**. This allows us to understand how, in the

English context, the distinction between the power of the king and rights and liberties is delimited by a notion of law which is outside the king's decision-making.

Magna Charta had some articles about privileges and liberties of **communities**. These kinds of privileges and liberties represented the **real elements of its time**. But even traditional privileges and liberties contained modern elements. To mention some clauses:

The idea of **proportionality between the crimes and penalties**: a lot of clauses referred to issues about criminal law in relation to the political power, which had **jurisdiction**. Magna Charta limited the power punishment.

The most important clauses in Magna Charta are those related to the freedoms and rights of the people, for example the **principle of intangibility** specifically of the body (article 39).

Article 39, Magna Charta: from this article stemmed the idea that there are some rights that the king did not have the power to remove, because they are rooted in English tradition and because his power is limited.

As for personal liberties, there were still many possibilities for the king to introduce some measures, but only with the consent of the other parties. Legally speaking, the **principle of general consent** was enforced, because the king could apply some particular rules only with the consent of the lords.

The principle of intangibility: *"No free man shall be seized or imprisoned, or stripped of his rights of possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send to others to do so, except by the lawful judgement of his equals or by the law of the land"*.

In the first part, the principle of **intangibility of the body and personal liberty** is affirmed. No one could arbitrarily be deprived of liberty. The article also mentioned the "**standing**", which recalls the idea that the people who this act referred to were **lords**, their **title** defined their status and it was deeply **connected to ownership**. To be deprived of your "standing" (title) means you'll be deprived of your possessions (your land, typically), which define who you are.

Going to jail was considered the same as being deprived of your properties. But in article 39, the focus is on the **intangibility of the body** which is very factual. This notion became a fundamental pillar of English constitutionalism, it is the so-called ***habeas corpus***. It affirms that **people cannot** be **deprived** of their **freedom** and **property without due process** of law, not even by the king himself.

Article 39 also added that you must be **judged by your peers**, meaning people of your same level. This idea represented a solution to the fact that usually people were judged by a court chosen by the king and weren't judged equally. This notion contained in article 39 would result in a very famous principle of Anglo-American constitutionalism, the **trial by jury** (this concept can also be present in continental law, but it is uncommon: in Italy, it can be found only in the court d'assise d'appello). This notion, once again, mitigated the powers of the king in trial; **he couldn't create special courts** in order to rule on specific cases anymore.

In this clause there is also another statement of law: what must be respected is **property**, it is by the **common law of the land** that you must be judged.

The fact that personal liberties would be judged according to legal institutions means that **they are protected by rights that are outside the power of the crown**. This is the very notion of **rule of law** contained in the Magna Charta, which limits the power of the king to limit liberties.

The pillars of Anglo-American Constitutionalism.

Magna Carta was essentially the legal document which created the basis of English constitutionalism; but it solved the conflict between the king and the lords just for a few years; it was followed by many documents which tried to solve further conflicts among the king and the lords. In the long run, it was a huge victory, especially on a legal ground, because it opened the door to **evolutionary parliamentarism**, and the **government by agreement** meant that some rights and liberties were outside the absolute power of the king. There is also another element that arose from article 39: **the strong connection between personal liberty and property**.

These 4 principles are the **basic principles** of the common law system of government, because they set the foundation between the government and the medieval organizations. Influencing the later evolution of the English common law, establishing the **rule of law** as a typical trait of the English government and **resulting in the constitutional revolutions of the 17th and 18th centuries**.

The **importance of the judiciary power increased** a lot (it is still fundamental today in common law systems) with the Magna Charta, according to which the power was limited by the decisions of the lords, the judiciary power is strictly connected with the decision of judges. This aspect that was **problematic at the beginning**, changed a lot during the 17th and 18th century with the industrial revolution, when the government needed to do something to regulate the market. A Welfare State was established, that would've been impossible without this reform.

The **due process** was a typical trait of the English **modern parliamentary culture of the 18th century**, because after the industrial revolution the due process and the Habeas Corpus principles became fundamental to fight the revolution and to fight the battle between people and lords and the king, again. The **Habeas Corpus Act** was created that finally emphasized that no one can be deprived of his life and property.

English Modern Constitutionalism is based on this Act, still today, it is a procedure to gain justice. This nexus is rooted in the English tradition, because it is obvious that **property has always played a role in English history**, and explains a relation between an individual and a thing.

This connection evolved into a **strong nexus between law and capitalism**, especially in the US.

The US constitution.

The US constitution was the **result of a revolution**, and also the result of a **conflict between federalists and liberalists** which were able to find a compromise with the constitution itself. The solution was to **add a list of rights and liberties**, **the Bill of Rights**. An important part of that list comprehended the Amendments of the US Constitution. One important amendment is the **5th**, used in a lot of judicial movies where a party said "I plead the Fifth" in a criminal procedure. This principle was established by a precedent, **Miranda v. Arizona**.

Fifth Amendment: "*(1) No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; (2) nor shall any person be subjected for the same offence to be twice put in jeopardy of life or limb; (3) nor shall be compelled in any criminal case to be a witness against himself, (4) nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."*

(1) The main aspect that emerged is the **idea of trial by jury**. (2) The principle of *"ne bis in idem"* (no twice in the same) can be found, **no one can be judged for the same crime twice**. (3) Contains the **constitutional right to not be a witness against yourself**, in Italy it is the judge who stops you from auto-incrimination when needed. (4) **No one can be deprived of liberty**, **life** and **property without a due process of law**. This clause is used in civil cases, not just criminal ones, because it establishes an absolute protection for the person's liberty and property without any interference by the federal government (if the federal government wants to do something with your property they have to make a request to a court in a trial). This means **you can always defend your property in a trial**.

The **rule of law** is a typical notion of modern constitutionalism, but it is linked to medieval constitutionalism thanks to the work of an English legal scholar, **Henry Bracton** (121G-12G8) who wrote the book "**De Legibus et consuetudinibus Angliae**". The relevance of this book was highlighted in 1914 by **Charles Mcillwain** in his "Constitutionalism Ancient & modern"-1940, in which delivered a fundamental **interpretation of Bracton's work** stressing the distinction between: **gubernaculum** and **iurisdictio**.

Those were two different elements of the power of the Crown, because the king had an **absolute power (gubernaculum)**, but he would also **exercise the iurisdictio**, a power **related to law**. Bracton was not contradictory because these elements were both essential to describe the power of the crown, which was **absolute**. In iurisdictio the **power of the king was limited by the laws**

(rule of law) established by courts (the common law), this means that there are **rights and liberties outside the king's jurisdiction**. This helped the English system develop towards an actual rule of law system which separates the different powers.

Towards a modern legal system, from Rationalism to legal Humanism.

As time goes by, the culture changes and the legal system with it, until a much modern notion of institutions is reached.
One of the main features of the **Middle Ages** was that the main source of law was **customary law**: it was connected to the **importance of nature and facts**. Medieval people were living in a **materialistic** society, so facts were very relevant, especially to the law. To some extent, **facts were the law**.

This idea that facts and law were connected gave a **greater importance to customary law** over any other source and led to another medieval characteristic: **the legal power was weak**. This happened because the **political power**, even when it was strong militarily or politically, was **not interested** in policymaking (especially in relation to private law).
The idea of law is not connected to political power; they were two different worlds.

The importance of **nature** and **facts** (materialism); the importance of **customary law**; the **absence of a connection** with political power and **personality** of law were the most important aspects of law in the Middle Ages.

Another important feature is the **anthropological idea of men** which was deeply focused on the **communitarian dimension** where everyone exists in relation with the others. This led to the creation of many **communities**, which meant that there were a lot of different sources of law related to different communities. The fact that **man is considered only as part of a group** implied **the individual was worthless**. People defined themselves as part of the community they belonged to (economic communities, families, cultural and religious communities forged the identity of men). As a consequence, law was also about the community instead of the individual.
The **legal subject** was the **community**, the family and social groups in hierarchy (aristocracy, commoners, etc).
All of that is a mentality that was deeply rooted in the medieval notion of the world, especially the **idea that men are humble in front of nature** and **incomplete without community**.

This started to change during the **14th century**: Europe experienced a **cultural transformation** that also affected the law. What emerged was a **new idea of the human being**, the individual and the state as a protagonist of the legal universe. This passage to the Modern Age was characterized by the **abandonment of communitarianism and pluralism** in favor of a **monistic conception** of both law and its protagonists.

We can define and identify 4 processes of transformation within the 14th century:

- **ANTHROPOLOGICAL** (which included cultural, philosophical and theological): the rise of **voluntarism**;

- **LEGAL**: it was connected to an anthropological transformation (law and culture always proceed hand in hand) so the new conception of the world influenced the rise of so-called **humanism** and the idea of law.
- **RELIGIOUS**: occurring since the 15th century, it led to the **protestant reformation** and to the end of a single vision of the Church. Thus canon law was impacted as a consequence. It was also related to the later revolution of the legal universities.
- **CONSTITUTIONAL**: the world of politics was also impacted, arriving to a transformation of the **idea of sovereignty, power and rulers**, and the relation between the political power and the law. The notion of the **modern state** emerged.
  - The clearest example is France because, from a civil law perspective, it was the first place in which a modern state came to existence.

This cultural transformation, that occurred since the 14th century, can be described as the **rise of voluntarism** on one side and on the other the **demise of medieval rationalism**. Medieval rationalism emerged from a philosophical and theological conception of many philosophers and religious scholars such as Saint Thomas (Tommaso D'Aquino) who presented an idea of men in which the **human being is incomplete** and an individual. To survive, men must be related to other men and to nature, to facts, because it is something that cannot be changed.
The view of men in the Middle Ages was of **humble** men, and the relation with nature and with community were well described by S. Thomas theories, according to whom the **difference between men and animals** is that men are **rational**, they have an **intellect**.
Men are **called to use their reason** in order to understand the reality, because nature is made by God, so what they must do is simply **try to understand** it.

From a **legal perspective**, men were not policy makers, but **mere interpreters** of rules already given to them by nature and by God. **Law was objective because** it was **connected to reality**, thus men must understand rules without creating new ones.
Men are a little piece of a bigger puzzle, even if it is an important piece, they would not be able to understand the whole reality.

The opposite point of view, after the 14th century, is that **men come first**. This solution came from a modern anthropological theory made by scholars who attempted to conceive the **individual as the center of the new order**. Men became the **protagonists** of the world, the medieval mentality started to show some flaws, because after economical and social growth, the **14th** century was characterized by a **deep crisis**, both economic and demographic because of the **plague** (the black death) and **wars** in Europe. As a consequence, all around Europe people started to experience **famine**. All these crises showed that the **medieval mentality** was not useful to survive anymore and the idea that men were related to things through the ratio **started to be contested**.

A new anthropological view started to make its way into people's culture thanks mainly to the Franciscan movement, a religious movement following the ideas of S. Francesco d'Assisi, according to whom **men want and love**. They were people, individuals made of flesh and bones, able to use love to relate to other individuals. **Free will started to be fundamental** when describing men. The relevance given to men's free will shifted the focus from the materialistic and communitarian

view into an **individualistic view**, because at the center standed men as individuals, as autonomous **and free** subjects.

A man who has free will was not subjected and related to the world because **he could rule it**: reality did not come before men anymore, it was at men's disposal. From being humble in the medieval mentality, men started to be **defined by their pride, they became presumptuous**.
Free will started to be described as "**dominium**" even in philosophical discourses, even if the word is a legal one.

Dominium, as dominium ex iure quiritium, was a **specific property right** which only citizens (cives) were entitled to. In Roman law, dominium was deeply connected to the **political relevance of men**, they could enjoy dominium because of their freedom. Free will was a dominium, so a **free man was a dominus, with power over himself**. This idea is expressed by the term "*dominium sui*", men as free owners of themselves.
Free men could also have the dominium of the outside world, a concept expressed by the term "*dominium rerum*". The man is dominus of himself (*dominium sui*) and dominum of nature and the world (*dominium rerum*).

This anthropological transformation had an understandable impact on the law: firstly on the idea that **law was related to things** that allowed or prohibited determined behaviors because of their consequences.
The very notion of what is good and what is bad started to be questioned in order to understand why certain things were prohibited instead of others. The notion of *prohibitum quia malum* and *malum quia prohibitum* were deeply discussed: **what is forbidden is bad** and **what is bad is forbidden**. Originally, the idea of positivism stemmed from this idea, **everything that is not forbidden by law is allowed**. As of today, we have other sources other than the positive ones thus it is not so true.

From the perspective of voluntarism, the *prohibitum quia malum* described the **medieval** mentality because **some behaviors were objectively bad**, thus they were prohibited by God. Even God was conditioned by reality because some actions were inherently bad.
Malum quia prohibitum, instead, represented the **voluntaristic** idea, some behaviors were forbidden because God says that are evil, he decided what was evil. **The will of God and later the will of men became decisive**.

This notion eventually led continental Europe systems to form themselves as positive systems.

This anthropological revolution impacted the law in **the idea of where rules came from**. The idea of **anthropocentrism** emerges also in the new culture which is **humanism**. The humanistic theory, the modern humanism, came to existence from this anthropological assumption that the human being is at the **center of the universe** and that gives relevance to men's will.
One of the most famous images from the renaissance and humanism is the Uomo Vitruviano of Leonardo da Vinci, which represents the idea that man can be at the center and everything can be made by man through the use of geometry.

This philosophical approach led to the **conception of men in logical and scientific way** which resulted in a different approach in the study of literature or philosophy or art: starting from 15th century the human idea was connected to **rediscovering some classics**, the ancient greeks and romans, but studied from a **different methodological perspective**. In this context **philology came to existence**. Philologists seek the **original meaning of the ancient texts**. This is a radical difference with medieval culture, according to which ancient works had to be interpreted in the light of the present context.

This impacted the law, individuals in the Middle Ages were incomplete without the community and the law derived from the facts, from nature, it was mainly **case law**. On the contrary humanism thought that **law must modify the facts**, because law is made by the men. Law must be reasonable and systematic, not conditioned by facts anymore. The systematic and voluntaristic approach still concerns Roman law, but in order to understand its original and historical meaning. Roman law, in fact, was a systematic and ordered system of law made by individuals, made in order to offer citizens some legal instruments to control facts.
The **humanists are the first "true" roman law scholars**, they were interested in the **original meaning** of the roman law, not in its authority during the present time.

Humanists were philologists, they wanted to understand their culture, because every legal system is related to the context in which it was created. Every context has its own law, thus the law created in ancient Rome cannot be used in the medieval era. **Humanists started to contest the medieval jurists** for this reason, the school of commentators and the glossators were called by humanist jurists "*asininia iurisprudentia*", because **they betrayed the original meaning** of the text.

Humanists vs. medieval scholars.

Humanists criticized the creativeness of the medieval jurists and the *mos italicus* (the iure docendi). The Italian way of interpreting law was criticised particularly by **French scholars and the Italian scholar Andrea Alciato**. French scholars, like Budé and Hotman, put the *mos gallicus* which mainly spread in France in neat opposition to the Italian way of practice and interpret law.

Their critics regarded not only the **medieval interpretation** which did not take into account the historical meaning of Roman law, but also **the Corpus Iuris Civilis itself** (the very source of Roman law). There were two types of critiques against the Corpus Iuris Civilis and his author:

1. **HISTORICAL**: it was related to the same accusation that humanist had for medieval jurists, the **emperor Justinian was a donkey** because, by collecting all the sources of Roman law from **different period** and putting them together in a collection **randomly organized**, the original meaning of such sources was lost; according to humanists, there was a misunderstanding of Roman sources which had been forced to be related to a different context with respect to the one they actually were part of. They claimed it was an **anti historical** operation. French critics started to look for **new Roman law sources** and a lot of humanists **elaborated works based on the** understanding and **re-thinking** of the Corpus Iuris Civilis (*editio critica*, critical editions of the work of the emperor).

2. **SYSTEMATIC**: from a voluntaristic and humanistic perspective, law must be the result of men's free will; therefore, a law system must be biologically and scientifically created in order to pose universally valid rules; but **law was not considered universally valid** only because of its **nature**, therefore Roman law should not be considered universally acceptable. These was criticism against the authoritative character of the Corpus Iuris civilis per se (it's not considered a holy book anymore), the **refusal** of the notion **of auctoritas**. Law should be organized on the basis of a system of principles and institutions, different from the one selected and chosen by Justinian and by the medieval lawyers.

The partitions of the Corpus Iuris Civilis were not considered correct nor useful anymore. This eventually led to humanists' works of re-organization of the Corpus Iuris Civilis, one of the main works is the **"Anti-Tribonian" by Francois Hotman**.

The title is quite significant and self-.explicative. Tribonian was one of the main authors and collectors of the Justinian collection. Hotman openly **accused him of mis-representation** of Roman law, he argued about the inadequacy of Roman law which was no longer useful to regulate French society.

There was a need to have a new commission of jurists, politicians and experts in order to decide what was still relevant and useful for contemporary French society. Hotman presented a new idea of creating laws that are **related only to the French context** in order to replace other sources of law. He firstly introduced the idea o**f monism of the sources of law** and advocated for the **nationalisation** of law, which must start from a **standardisation** of law.

What actually changed was the how (the methods used to interpret and make law), not the actual content; there was a **systematic, historical, scientific an philological approach** to the sources of law and the methods which led to the creation of a **new legal system logically perfect** and perfectly capable of being adapted to different contexts.

Nevertheless, the *Mos italicus* was still practiced in Italy and many other countries, the reason behind its survival was related to the political transformation occurring both in **France**, where it led to the establishment of a **stronger and much modern State** (a new relationship between political power and law was established) and in other **European areas**, were it still wasn't possible to talk about a proper state (for instance, Germany and Italy), thus the relationship between law and political power was still **struggling** and they both still **remained quite independent from one another**.

The result of the **religious revolution** was the **protestant reformation,** which originated from the same humanistic and individualist approach shared by lawyers and jurists with religious men, particularly in northern Europe.

The Roman Church from its origins was an **anti-humanistic** institution: focused on the community within and through which it's possible to find salvation (*extra ecclesiam nulla salus*).

Some examples of this are: the fact that the Bible and other books were only written in Latin and that, during the Middle Ages, a new Sacrament emerged which is the **confession**: the idea of finding salvation through the Church and the Church only.

But in the 14th century, the communitarian approach started to be seen as **problematic**, until the beginning of the 1G[th] century, when **Martin Luther criticized the Roman Church** by publishing his famous Thesis and the burning of two books in front of the Wittenberg Cathedral in 1520.

1. **THE CORPUS IURIS CANONICI**: according to Luther, it was the manifestation of the **biggest betrayal** of the Roman Church, especially in relation to its **spiritual task**; if the Church is considered as a legal order, it's choosing to be an institution more related to secular power, and **not an institution related to spirituality**; the Church should only focus on the spiritual life of its members. Individuals are free and they should have a direct relationship with God, without the interferences of the Church. This shows how the individualistic approach has been applied to religion: **being part of a community is a limitation of one's personality**.
2. **THE SUMMA ANGELICA**: it was a short book made by the Church in the Late Middle Ages, **delivering instructions to the confessors** on how to deliver confessions. The sacrament was a symbol of the interference of the Roman Church in the relationship between the individual and God, burning the book would represent **the refusal of this interference in the spirituality** of individuals.

The humanist and voluntarist revolutions led to the religious transformation and the application of the individualist approach in the spiritual life of human beings, who, according to these scholars, should be **set free of the chains of the Roman Church and its community**. This religious reformation is also connected to another process of transformation that occurred in the same centuries: the **economic revolution**.

This revolution was linked to the cultural and legal transformation, as well as the religious one, this link is described in the work of **Max Weber** the "**Protestant ethic and spirit of capitalism**"-1905 which resembles more a sociological study. He claimed there was a strong **connection between the rise of capitalism and the protestant reformation** and also a connection between the spread of the reformation and the following establishment of capitalism mentality in those same countries.

He believed the reasons that were at the basis of such nexus stemmed from the idea that the **Roman Church** was a **suffocating** power and institution and at the same time a **protective** institution: it was oppressive but also offered all the tools needed for salvation. Nevertheless, without the Confession and without someone that would guide people through the path of salvation (no mediation), individuals know if they are close to salvation on the basis of their relationship with god:

a. ***Mystic ascesis***: the **spiritual relationship** with god, achieved and cultivated through prayers, for example.
b. ***Secular ascesis***: it's used to test the love of God by measuring the success in one's life, which became **not just something morally accepted**, but also a **way to know how much God loved you**. This new mentality, particularly in relation to the leading groups in societies, for example, merchants, set them free from the previous fear of being sinners because they were rich.

Property and wealth became good values: rich people were protected and sustained by God; poor people were just not committed enough to their salvation which is their own fault: they were just considered to be lazy. This eventually led to an **overlap between having and being**: morality and wealth came together. Capitalism not only developed on the basis of the protestant reformation, but there were also other factors.

The **constitutional revolution** which brought **France towards the development of the modern state**. The idea of sovereignty was transformed and the notion of modern state emerged: in a civil law perspective France was the first political area in which a modern state eventually came to be.

The origins and development of statehood and sovereignty in France.

In order to understand the passage from the Middle Ages to the modern era four different paths can be followed, which will be intended as a **sort of liberation**. A medieval idea of law and the modern idea of law, and we have seen, through the rise of new legal theories, and a change in the philosophical and cultural approach to the idea of men, a transformation from the anthropological point of view.

The transformation of the State, the so-called constitutional transformation, the change in the idea of **political power in relation to the law**.
The Middle Ages were characterized by the **absence of the state**, at least in the modern sense; there are political institutions in the middle ages, but each of these institutions has just independence from one another but not sovereignty. The only truly absolute power and sovereign is God, that's why we can define the power at the time as **political universalism**. In the political context, the transition from the Middle Ages to modernity is a **transition from the notion of autonomy of the political power to the concept of sovereignty**, and this manifested for the first time in France which was characterized by a **clash** between **the French kings and the Roman Church**.

In the **beginning of the 14th century**, the conflict between the pope and the political power was particularly strong with the French kings. In **1302**, Pope Bonifacio VIII wrote a papal bull, called "*unam sanctam ecclesiam*", reaffirming the political role of the Church and that the Church is the only universalistic

institution in the world, because the church **holds** together the **spiritual, civil and political** powers.

Political power was already discussed by some Popes even in the early Middle Ages, and soon the notion of the so-called **two swords** (the idea that there were two different powers, **political** power and **spiritual** power) was established. This is probably the last chapter of this long fight between papacy and political power.

The papal bulls started with this affirming statement:

«Unam sanctam ecclesiam catholicam et ipsam apostolicam urgente fide credere cogimur et tenere, nosque hanc firmiter credimus et simpliciter confitemur, extra quam nec salus est»

The Pope affirmed that Christians are obliged to believe that there is **only one holy Catholic Church**, ("catholic and apostolic"), and as Christians they firmly believe that there is no salvation outside the Church itself. This opening sentence immediately stated that there is just an **unitarian and universal Church**, the **only universal power**, because it is an institution and a **power that cannot be divided** and, moreover, this sentence re-established the principle of **communitarianism** of the Roman Church: the idea that **outside of the church** people cannot find the eternal salvation ("*extra ecclesiam nulla salus*").

In the Middle Ages, the Church was the one and only universal power and institution, which everyone should be part of, in order to get **eternal salvation**. Consequently, the political power of the secular world must be under the authority of the Church.

The second sentence:

"*Hæc est tunica illa Domini inconsutilis , quæ scissa non fuit, sed sorte provenit. Igitur ecclesiæ unius et unicæ unum corpus, unum caput, non duo capita, quasi monstrum"*

"La chiesa (questa) è come la tunica inconsutile di cristo, che non fu divisa ma tirata a sorte, giocata a sorte (referring to the passage of the Gospel in which Christ is condemned and stripped, castigated and crucified; since the tunic he was wearing was valuable, the roman soldiers decided to not rip it and try to win it playing daces) quindi si dice che la chiesa è indivisibile come la tunica di cristo, quindi la chiesa è unica, ha un unico corpo, un'unica testa, quindi non è come un mostro bifronte, con due teste".

The church is compared to Christ's tunic by pope Bonifacio (**the "*tunica inconsutilis*" theory**), spiritual and secular power cannot be separated. The Church has both of them, it is an unitarian body, where spiritual and temporal powers live together.

Third passage:

«In hac eiusque potestate duos esse gladios, spiritualem videlicet et temporalem»

The church has **two swords** ("gladius"), "*spiritualem et temporalem"*, respectively the **spiritual** power and the **political** power.

That clashed with the will of the rulers, **emperors and kings** at the time who **wanted to affirm** at least **their autonomy** from the Church; despite this, the Pope wanted to re-establish the idea that the **Church** was considered the **only universal power**.

The "two gladius" theory is not in contrast with the fact that kingdoms and empires could exist. And of course the **Pope affirmed that those human institutions are legit** and useful in order to carry the mission of the Church which is eternal salvation, but **they must comply with the will of the Church**.

While spiritual power was exercised **exclusively and directly by the Church through its priests and ministers**, temporal power was administered by kings and soldiers, who were still under the control of the Church. This was an attempt by the Pope to **re-establish the supremacy of the Church and the doctrine of the two swords**.

The conflict particularly with the king of France Filippo il Bello (Philip IV) carried on despite the Pope's bull. Filippo il Bello wanted to **affirm his autonomy, his power** to rule and decide over his territory without any interference by the Church.
This resulted in the **Avignon papacy** (cattività Avignonese), a period of time in which the Popes were in Avignone, not in Rome, because they were appointed by the French king.

So from the beginning of the 14th century, the kingdom of France was the laboratory of the modern state, of the process of transformation from political power in a universalistic sense and from an incomplete political power, to an **absolute political power**, which is contained in every social activity, including law and economics.

Eventually the French experience transformed kingship itself, there was a passage **from a judge king** (who only has the power to judge and apply the law) **to a legislator king** who has the power to make the law.
During the middle ages law was a matter of jurists, of privates, but starting from the 14th century, in France law progressively became a matter of the state, so a matter of the rulers, kings.

During the Middle Ages, France had a very **typical legal panorama**, it was divided in two different areas.
A southern area, influenced by **Roman law and canon law**, Roman culture was stronger and consequently this area was known as "*pays de droit écrit*", countries of written law. And written law was made by **jurists**, by interpreting Roman and canon law; the ius commune was the main source of law.
And a northern area, the so-called "*pays de droit coutumier*", where the influence of Roman law was quite absent, and the law was mainly customary.
Both these systems are typical of the middle ages, and **they coexisted in the French context**.

This **complex system was not a problem** for the French kings throughout the Middle Ages, at least in the early 14th century of course. Law was simply something they were not interested in, it was not a matter for kings, it was a matter of society and privates, it was up to them to choose what rules to use in their private relationship.
This is a perfect **example of pluralism**, and especially of pluralism within the sources of law typical of the Middle Ages.

But there is an aspect that is interesting to notice: the coexistence of these two different systems in France led to the establishment of a ***droit commun***, so a common law of the French, that is different from both the notion of *ius commune* and English common law, because it was the result of the contamination between the customary law, that was relevant and the most important source of law in France, with the influence of the roman law and common law as well.
This confusionary system was also the result of a royal intervention, because the first step of involvement of the French kings with the law was marked by **Philip the Fair (Filippo IV)**: in 1312 he delivered an *ordonnance* (which is a royal command), intended to rearrange the study and the teaching of the law in the university of Orleans. This *ordonnance* actually influenced the law, it did not create the law, but it said something about how law must be studied and taught. The *ordonnance* imposed that the so called written law (*ius scriptum*) could be taught in the university of Orleans, not because it is a universal law with universal validity, as the medieval lawyers used to consider the roman law, but it said that the scholars who teach in the university of Orleans could continue to teach roman law because such law was useful for its logical and technical instruments, because it is an efficient law. So the King was trying to also start the process of de-mythization of the Roman law that we have seen humanism would realize some centuries later.
Moreover, what the king affirmed was that they could teach the roman law in the university of Orleans because the king wanted to, so essentially that became a decision of the king, so somehow the roman law, the use of roman law in France, was also dependent on the will of the king, of the ruler. In a very primitive sense. In Orleans they taught roman law before and continued to teach roman law. What changed was that he affirmed that it could be possible because of him.

So we can see here how already at the beginning of 14th century in France the common law of the French was already a little bit influenced by the state, by the authority of the state, and this was also an attempt to mark the distance from both the roman influences (ancient Romans and Roman Church). But in the late middle ages, in France, **customary law** was still the main source of law**.**
How can France be considered as a forerunner of modernity? The main problem of customs is that they are limited and fragmented, and surely they are not clear, as usually they are oral and especially related to case law (cases decided by the practitioners).
Since the Middle Ages, however, there have been private initiatives to make some compilations, some collections of these regional local customs. Generally, all the collections in the Middle Ages are made by privates, even the ***Corpus Iuris Canonici*** was firstly made by a private churchman, but also the *Corpus Iuris Civilis* was rediscovered by privates, as no political power was interested in rediscovering and collecting the sources of law. However, in the 15th century this phenomenon took an official character in France, as the State started to be involved in this process of collection. In order to achieve a clear and definitive text of customs and to make the administration of justice simple and more effective, in **1454** the king **Charles VII of Valois** delivered another *ordonnance*, the so called **Montils-Lès-Tours Ordonnance**, that established that in every administrative district a joint commission of jurists and local representatives of the three classes (commoners, aristocracy, merchants), under the supervision of royal officers, should and must perceive to collect and write local customs. This process took a lot of time, around a century, but in the end it resulted in the establishment of G0 *coutumes générales* (G0 books collecting all the general customs, related to the entire French territory) and 300 particular *coutumes* (local customary laws).

What is interesting is the fact that these collections are not private anymore, they are controlled by the central government; so the king was still not a **policy maker**, he did not make the law, he just limited himself to collect the law that was already established, that was customary law, but thanks to his intrusion in the legal field at least now such law was really common to all of France. Also the terminology was common, because the roman law terminology was applied to customary law, as the jurists and public officials involved in this process of collection were of course trained by the roman law, which further led to the establishment of the typical French *droit commun*, different from both the Italian *ius commune* and the English common law (case law). So by the **Ordonnance de Montils-lès-Tours** the typical medieval idea of pluralism was lowered and this ordonnance shows how the kings strived to establish a **national** customary law.
In this process of centralization and unification of the French law there was a social and economic group that was particularly important: **the merchants**. Pluralism and the fragmentation of law (**legal atomism**) was in contrast with the economic interests of the merchants, because they needed to know what the rules were and, especially, that such rules are the same in every part of the French territory. From here we can see a strong relationship that started to be re-established between French kings and French merchants. The French king **safeguarded the economic status** of the merchants, and the merchants would guarantee the state with **economic growth and wealth**, made by the business, and also with social strength. This is the premise of the later success of the French bourgeoisie, that will be fundamental for the French revolution, and the bourgeoisie will be fundamental for the establishment of the modern state in the nineteenth century.

This process of affirmation of the modern state in France is marked by **the Ordonnance de Villers-Cotterêts**, important to mention because it was another step forward in the establishment of a national legal system in France. In **1539** the king Francis I made a reform of justice in France ordering that all the legal acts, all the legal documents and consequently all the French collections of *coutumes* had to be translated to French, as the official language of the kingdom, as well as all new legal acts.
That is Interesting because France established a national official language centuries before other countries in Europe: latin was the language of the jurists, and the use of latin was also a symbol of a universal (roman) law; refusing to use latin marked another distance from the continental *ius commune* and took another step towards the nationalization of law. While Latin was the universal language of law, French became the national language of law. This choice too proved to move a step away from pluralism and universalism in favor of monism and nationalism.
Law was progressively perceived as **related to a specific and given context,** culturally and geographically, and also historically delimited, and here again humanism played its own role in this French process of nationalization of law, because the humanists, as well as the merchants, were great allies of the kings of France throughout the centuries, because they insisted a lot on the fact that law must be related to a specific context (king's idea of nationalization of law), but they also stated that law should be considered as the result of the will of the men, and especially of the will of the king. So the law must be intended as *loi* in French, so as law, *legge*, *lex*, not *ius*.

The discourse of legal humanist, specifically in the context of France, had a strong connection with the first great theorization of sovereignty made by a scholar, **Jean Bodin**, who was a French jurist, who lived during the XVI century and wrote a very famous and fundamental book called "***les six***

livres de la République" (*res publica,* the State). And what is interesting is the fact that Bodin was of course a jurist who established and stated a very modern theory of sovereignty, stating that the king has basically the power of making the law and doing whatever he wants. However Bodin's theory still had some elements of continuity with the past, with some medieval features.
To understand the theory of Bodin and his theorization of modern sovereignty: which is the ultimate goal of the state? what is sovereignty? and what are the prerogatives of sovereignty?
Sovereignty is basically the power of making the laws, to command everyone else on what they must do, and at the same time the power of not being subjected to such laws. So the sovereign is above the law. What is here recalled is the notion of "***princeps legibus solutus est***" and "*quod principi placuit legis habet vigorem*", so the ruler can decide whatever he likes and he has the power of making the laws. "*poiché tale è il nostro piacere*": what pleases the king is the law. But now this concept regained somehow not the original meaning but the roman meaning probably.
"le leggi del Principe sovrano non dipendono che dalla sua pura e libera volontà"; "*la legge è legge nel momento in cui è espressa dal sovrano, a prescindere dalla bontà della legge*": this is the aspect of true modernity of bodin's theory, the idea that the sovereign is the ruler and makes the laws.
"*Le prerogative sono quelle di fare la guerra e la pace. C'è ancora un potere giudiziario forte del re, discutere in appello i giudizi. Le nomine, la funzione amministrativa del re, destituire i più alti uficiali, imporre le tasse, concedere grazie o dispense, quindi un potere anche penale; un potere economico, abbassare o alzare il valore della moneta; poi il potere di vincolare al proprio giuramento i sudditi.*": so a defined and almost absolute power of the King. And these are the elements of modernity, but there are still some limitations to this absolute power of the king, even in this modern theory of Bodin. So even the king is subjected to the law, to the natural law, to the principles of God, and here there is a clear distinction In Bodin's theory between the *lois* and *droit*, between the law and the laws, *ius* and *leges.* The laws are the result of the will of the sovereign, the power of the king of making the laws, and this is sovereignty (= power of making the laws), but there is also a sphere of law of principles that are not in the hands of the sovereign, because the droit is something that cannot be changed and that also the king must abide to.
As it is something he makes, he is not subjected to the laws, he is above the laws, and this is the origin of the notion of "etàt legal", legal state in french, where the power of making the laws was considered as quite absolute and the most important power, even in the relation to the protection of rights and liberty.

The theory of **modern sovereignty** was elaborated by Bodin who provided a definition of sovereignty as the power of making the law, establishing a new idea of political and legal sovereignty as the power of making the laws, re-establishing from another perspective the idea of the ruler as above the law but in affirming that he also shows a very conservative notion of law distinguishing *droit* and *lois*, this distinction was fundamental for the later development of the modern legal system, the *lois* were the reign of sovereignty, *droit* was related to a deeply natural law and even the sovereign must respect those rules of law outside his power.
For this reason, another aspect of continuity was the fact that he established that the king had sovereignty with absolute power of government in relation to these different prerogatives of sovereignty, but for what was outside power of the king he must relate to social groups, community, and aristocrats in order to control and rule the administrative aspects of his kingdom.

There was a double standard, the power was **still not absolute** because for some aspects the king should mediate with the communities, this is another pre-modern aspect of Bodin's view.
The last aspect of continuity in Bodin's theory, later refused by other theories, was stated in the first passage of the first book: this passage provided an actual **definition of the State**, re-stating what was the government, the power of making laws commands, what the subjects must do, and the addressees of the command. To exercise sovereignty meant to regulate the relations that were between many atoms of society, creating a community, from the smaller to the bigger form, ruled and governed by the *paterfamilias* but still the power of the king over families, not individuals, subjects were members of communities.
In **1576** the notion, the common idea was that of communities: to be part of the community was still important even in that humanist and voluntaristic view delivered. Bodin's theory was one of the first **modern theories of law** and the relation between law and political power, the power of the king making the rules, but at the same time, this theory had a lot of elements of continuity with the medieval past. But soon another cultural and philosophical trend would lead to the establishment of a much modern theory of law. A consequence of the trend started by humanism and by voluntarism, since the 13th century, was the impact of the philological trend set by humanism, distinguishing the medieval approach to classics from the humanist one, the attention posed on voluntarism, and the emergence of a secular approach to philosophy and law because classics could not be related to Christianity. The voluntaristic discourse and humanistic one still had God and the idea of law as the origin of delivering justice.
This situation changed thanks to a cultural movement, influencing the evolution of law in Europe towards the modern age. The modern theory of **natural law** brought to the next level the conception of voluntarism, establishing individualism and the basis for the modern legal systems of western law spreading in continental Europe, the British islands and the New World. Lots of scholars defined natural law from different context contributing to the different perspectives on **how the law and the political power should be**, concluding the long process of transformation from medieval to modern legal context; however, natural law was discussed in its importance even before 1G-17th centuries, natural law was mentioned by medieval legal scholars but also in Roman law, during the Middle Ages, the idea of natural law was fundamental as a set of principles not resulting from human will, but permeating the order posed by God: **an idea of justice not depending on the will of the men.**
During the Middle Ages, natural law had theological interference, and even during Late Middle Ages and humanism, it was quite entirely God's law. Equity and justice were God's view of justice and equity. The modern theory of natural law had nothing to do with God, it started from the Middle Ages to establish a set of legal principles independent from religion and theology, and the first step marked to establish the foundation of modern natural law was the refusal of God's influence over such principles of law.
The modern theory of natural law wanted to achieve immutable principles, universal, and independent not just from the will of the men but also from the will of God. Still, the modern natural law scholars did not say that God did not exist, and that religious principles should be refused, in fact, almost all of them affirmed that the natural law's secular principles were the same as the theological ones. They were not anti christian, **religion still played a fundamental role.** Fundamental for this approach was how and why those principles were **immutable** and **unchangeable**.

Natural law scholars in the 17th-18th centuries were focused not just on a theoretical effort but were involved in the political arena, their contribution was aimed at influencing rulers, kings, and political sphere: natural law was a sort of cultural and legal agenda to alter the notion of power and the law throughout Europe, establishing law as an instrument for government.
This could be considered the actual achievement of the voluntaristic trend, the transformation of the role of law and political power was completed with a deep relation between the two; even this renewed role of legal scholars was a revolution in relation to the medieval past.
A famous philosopher, **Norberto Bobbio**, said that the revolution that occurred with natural-law theories was that the scholars passed from an approach to reality, analyzing questions, to the demonstration, stopped asking what was the order and affirming that that should be the order.
Those scholars started to understand the order we must live in and tried to make it real.

Hugo Grotius lived at the end of the 1Gth and the 17th centuries. The political context in which he lived was a very bad context, framed by religious wars: kingdoms fought each other also because of the different religions, this war was forced by the reformation (Protestant). This fact led **Grotius** to take distance from the medieval view of law and St Thomas theories of law, the medieval notion of justice and rights because **deeply influenced by religion** creating a system of law influenced by the different religious views travelling through Europe; these principles of law were not universal but contested and problematic, influenced by religion. According to Grotius, the natural law was independent from the will of men and from religious principles; he wanted to **secularize law,** removing every aspect of theology to have legal principles not influenced by religion. He still wanted to point out a set of principles immutable. Natural law is the result of human intellect. ***Ratio*** played a fundamental role in his research. The rules that sound reasonable and rational should be considered as a set of principles which are absolute and unchangeable.
The first objective was to distinguish a set of principles of **natural law** that differ from **positive law**, posed by the sovereign, that is an important fact, already well established in Europe. Natural law shouldn't be influenced by the will of men, it is not the result of sovereignty but also not influenced by God. The idea that natural law should be distinguished is established in the "*De Iure Belli ac Pacis"* - the most important work made by Grotius: "*Et haec quidem , quae iam diximus, locum aliquem haberent etiamsi daremus, quod sine summon scelere dari nequit, non esse deum, aut non curare ab eo negotia humana*". Natural law is valid even if we dare to imagine that **God does not exist**. Natural law principles do not belong to God. They are still universal principles despite the fact that you are catholic, protestant or whatever.
Principles of natural law:

1. ***Appetitus societatis***: every man has the need to create community, this is not because, outside the community, you have no right, no recognition, no salvation. This is the result of individual logical independent decisions to be part of the community. Individuals have their own instincts and needs that eventually lead to community, but individuals come first. Men and women have rights and liberties despite being part of a community. So every man **has a right to freely decide**.
2. ***Alieni abstinentia***: it means to abstain from others' things, refrain from stealing from others. **Every man is free to use his property without others' intrusion**. This principle confirms the great role of liberty and property in modern mentality.

3. ***Pacta sunt servanda***: the focus on contractual relationships between individuals is essential to the entire modern natural law theories. It is by the stipulation of a proper contract that individuals create the community which is the best way to live. Rights and liberties, we must observe these principles, we must create such a community through a contract between all individuals, establishing the passage to a civil association of individuals. The community is established on free decisions of individuals within society.

If society is created by **the agreement of individuals,** the consequence is that the ruler is entitled with sovereignty. The ruler is the head of a society. His power derives, in modern natural law, from society because political power is established by the agreement of individuals. This is the apex of the success of **voluntarism** and the origin of **contractualism**: political power is created through a contract so it depends on individuals. Some legal scholars would criticize this approach saying that the contractual view should stay weak.

The principle of *pacta sunt servanda* is important not just for the relationship between individuals and the state: in Grotius we can find the definition of a leading principle of international law.

Pacta sunt servanda in Grotius' theory is to find a set of rules: **states should respect agreements**. It also serves to establish some legal rules. The political goal was to solve religious wars and the attempt was to solve them through law instruments to make peace.

Thomas Hobbes and **John Locke**: we can define a few elements which characterize the theories of scholars, so the common elements of modern natural law.

Individualism is the very core. The end of communitarianism and the establishment of individualism as the very foundation of the legal order. All the theories of natural law start from the assumptions that rights are related to individuals and not the community. Every scholar would use to explain his own view through theoretical instruments:

- **State of nature**: this idea is a theoretical tool because it is imaginary and never existed. This instrument was used by scholars to define what was the reality before political institutions. So **the state of nature is not an actual state.** It is through this idealistic notion that the natural law scholars could elaborate concepts. This is useful because you can conceive men and women as individuals outside the community (no communitarianism). Every man has legal relevance despite social status. That led to the establishment of another principle that is equality. It is just thanks to the notion of natural law that equality became a fundamental principle of law. Before it, it wasn't conceived. In the Middle Ages, you didn't want to be treated as a merchant if you were a notary. You have different legal demands, rights, liberties and privileges. Different legal status means different legal treatments.
- **Social contract**: contractualism is the way people have to leave the state of nature and establish a community. This led the scholars to define different ideas of political power and constitutionalism.

The English Natural Law Theories: Thomas Hobbes (1588-1679) & John Locke (1632-1704)

Two English natural lawyers, shared nothing but nationality. Their theories of natural law will differ a lot. What mainly caused such a difference between them is the fact that they experienced very different phases of English history: **the 17th century.** This was a troubling century for the English monarchy. Both had personal experiences which will deeply influence their theory.

Thomas Hobbes wanted to find a solution to the civil war that England was experiencing in the beginning of the 17th century. The crisis of monarchy forced Hobbes to leave England and be a refugee in France.

His personal life makes him **very pessimistic** about nature and it was reflected in his main book "***Leviathan***" (1G51). In this book Hobbes delivered a first and groundbreaking theorization of legal positivism and political absolutism from an English perspective. Conflict originated between the Parliament and the king, which in those years would lead to the establishment of the **Cromwell Republic.**

So how to find peace again? The answer was through law for natural scholars; and through the recognition of natural law that would force the establishment of a political power and a natural law that would make it possible to live peacefully.

Hobbes was very pessimistic, though, so what describes the state of nature in Hobbes are two famous quotes: ***"Bellum omnium contra omnes"***: the state of nature (pre social condition of men) is not characterised by a peaceful co-existence; it was a chaotic context where men and women are dangerous for each other. It is characterised by a perennial war. ***"Homo homini lupus":*** Instinct that drives men in the state of nature. Men are wolves (aggressive) to the other men. Instinct of preservation is what drives men in the state of nature. Consequently the only nature right that man is entitled to in the state of nature is life, through survival.

We can already link his theory to other natural law theories because: State of nature is not ordered, it's **chaotic**. Thus cannot be true for medievals because nature is well ordered by God. **Equality**: all individuals are equal; equally dangerous and aggressive; all equally destructive for each other. (Chapter 14 of the Leviathan) What are the laws and traits in Hobbes view:

Entitled only to life (preservation) → The right of nature, "Ius Naturale", is the liberty to do anything in order to preserve your life. The only right present in the state of nature is to preserve your life. Laws are also posed by nature, one command of nature that everyone shall observe is the obligation to all individuals to not harm themselves, so to preserve their own life. A man can do whatever to protect his life because the only natural rule is to preserve his life. Preservation is NOT an instinct, but is the fundamental natural law. Preservation because they have a natural right to do so, but also a natural law which imposes them to do so. Natural stream of desire that led individuals to deny their own need of preservation. If I am aggressive I can find someone else who is more aggressive and stronger than me.

The fundamental law of nature (self preservation) is that naturally every man has tried to do everything. By his own words, because the condition of men is a condition of war of everyone against everyone, where everyone is governed by his own reason. In such conditions every man has a right to everything, even another one's body.

Two main elements:

- **Dangerous of men to other men**

- **The non respect of other men's lives**. Not even life seems to be a limit; murdering is not a crime in natural law.

From a civil law point of view, it's interesting to acknowledge that even property is not a limit. Everything is doable in order to satisfy their preservation needs.

Individuals will never be safe, so a solution must be found in order to defend the individual's integrity and to safeguard their life. The most reasonable thing to do is to create an institution that would let them live peacefully together; to leave the state of nature and to create a social and political institution. **To agree on a social contract and leave the state of nature**. The individuals would do that by using reason, which is no more a limit as it was in the middle ages. Here it assumes an individualistic meaning; it's what allows men to find the social contract. This is a decision they make because it's in their own interest. They use reason not to limit themselves, but to favour themselves.

Only way to find a solution is to create a society ruled by someone who can guarantee the survival of individuals. The political institution that men would agree on with the social contract is described by Hobbes as the "**Leviathan**". The political power that should and would protect your life is a monster (Leviathan) → pessimism. Described as a monster because Leviathan is what men need in order to be saved.

The social contract is an agreement made by the individuals who decided freely to deliver to a sovereign all their rights and liberties. They gave up **their rights and liberties**, which they had in the state of nature, when agreeing to the social contract, in order to have life in return.

The Political institution created by the social contract would be a very powerful entity. For this reason the political power is described as a political monster; defined as powerful as God basically. (Chapter 17 of the Leviathan): "*the creation of the political order (of a State) in order to leave the state of nature is the generation of a great Leviathan, that mortal God which we all got our peace and defense*". **The sovereign is a mortal God**. There is an immortal God who is not interested in the law and in the political and social institution. So men must create another divinity, mortal God, who is powerful as much as God but is not God.

To summarise: the political power is a mortal one, it is entirely human. It derives from the human will and reason that brought individuals to leave the state of nature. Political power is the result of the decision of men to leave the state of nature. We can see the importance of contractualism. After the decision of leaving the state of nature a political power is created, that must be absolute. So leviathan is an absolute power. Hobbes is considered to be one of the first theorists of political absolutism. The sovereign must NOT share his power with anyone. All three powers (judiciary, executive, legislative) must be concentrated in a unique figure.

If more institutions hold the powers, they could end up in a conflict. Absolute power is the only form of power that can assure peace and survival. This idea of absolute power comes along with another fundamental feature: they give up all their rights and freedom, establishing not only an absolute power in relation to the administrative institution, but they establish an absolute power also in relation to the citizen's rights and liberties. The citizens should just have the rights and liberties that the ruler let them have. They cannot claim anything but survival (life). According to Hobbes, under the Leviathan (after leaving the state of nature) everything must be ruled by the sovereign. Individuals under Leviathan have no space of authority, otherwise this would give rise to wars again and lead to conflict. Even property does not survive this intrusion of political power; if

Leviathan wants to grant property, then they do have property rights, otherwise citizens cannot claim property rights.
Hobbes delivered a **modern definition** of **modern positivism**. What emerged from Hobbes absolute power is rights and liberties that derived from the will of the sovereign. Law is entirely what the political power (the ruler) wants; positive rules posed by the sovereign. The law is entirely connected to this positive law. People establish political power in order to be safe, by giving this political institution a monopoly not only of law-making, but a monopoly of law in general. What is not established as legal rule by the sovereign is not legal at all. This is the very foundation of the strong idea of statutory laws as the only sources of law; especially in continental Europe.
To summarise: Hobbes is one of the first theorists of absolutism and positivism. Very interesting because he is a member of the natural law wave, which is the opposite of positive law.

John Locke. Between Locke and Hobbes there's a little chronological difference, but this short difference is relevant, because it shows different perspectives, especially regarding natural law, and, moreover, on the features of the political power originated in relation to natural law. The **political agenda** is always a crucial point of the work of every theorist in the natural law movement. As we've already seen, the Political agenda of Hobbes promotes absolutism. On the other side, a few decades later, the political agenda of Locke includes avoiding and defusing prevarications and iniquities, to entrust the powers of government and justice (social contract) to recognized authorities. This contrast between their ideas could be explained by the fact that: while Hobbes lived the worst days of the English Civil War, Locker experienced way better times. He was one of the protagonists of the Glorious Revolution.
The Glorious Revolution (1G88) was the overthrow of King James II of England by his daughter Mary II and her husband, William of Orange, who became joint monarchs. It was largely bloodless and resulted in the establishment of constitutional monarchy, with the Bill of Rights (1G89) limiting the power of the crown and affirming parliamentary sovereignty. The most important thing that comes from this revolution is the **Bill of Rights (1689)**, a list of some untouchable liberties. These two elements, the Bill of Rights and Parliamentarism, determined the victory of the Rule of Law in the English context.
To understand Locke's theories about the state of Nature we have to start with his book: "***Two Treatises of Government***", published in **1689**, the same year of the **Bill of Rights**. In the first treatise, Locke criticizes the theory of the divine right of kings, while in the second he explores his conception of the state of nature, in which individuals enjoy freedom and equality, but are subject to natural laws regulating their rights to life, to freedom and property.

While Hobbes thinks that the state of nature is a state of war, Locke thinks that it is a state of peace: *"We must consider what estate all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possession and persons as they think fit, within the*

bounds of the law of Nature, ***without asking leave or depending upon the will of any other man****"; "A state also of equality… … no one having more than another."* The two fundamental characteristics are **freedom and equality**. All individuals are free to do whatever they want. The equality regards what they could have. How is it possible that freedom and equality resulted not in a state of war (like the Hobbesian view) but in an "*obligation to mutual love amongst men*"? Locke was quite different from Hobbes, his vision is utopic, how is it possible to think about a state where no one has more than others? How can this state survive?
"*But though this be a state of liberty, yet it is not a state of licence; though man in that state have an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions*": in the state of nature men **don't have the absolute freedom** of doing whatever they wants. However, **they have a limit**: men have the limit not to destroy themself, or so much as any creature in their possession.
This limitation explains why the State of Nature of Hobbes is chaotic and the State of Nature of Locke is peaceful. Locke poses the rights of property, **the main natural right of humanity is property**. In origin only common property existed, everything was available to all men, except one thing: **the ownership of himself,** this is actually the connection between property and self-preservation. In order to preserve your life you must have everything you need to survive. *"Whether we consider natural reason, which tells us that men, being once born, have a right to their preservation, and consequently to meat and drink and such other things as Nature affords for their subsistence, or "revelation," which gives us an account of those grants God made of the world to Adam, and to Noah and his sons, it is very clear that God, as King David says (Psalm 115. 15), "has given the earth to the children of men," given it to mankind in common. But, this being supposed, it seems to some a very great dificulty how anyone should ever come to have a property in anything …"; "…but I shall endeavour to show how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners."*

God gives nature to satisfy human needs. Because I'm the owner of my body, when I use my body I transfer the ownership of myself to the thing I'm working on, neighbor is the reason for ownership. If I try as hard as I can to get to the tree to get the apple, I put my neighbor forces over this complex activity, the apple becomes mine. This instinct comes from the need of the apple, in order to survive, to respect the natural law of self-preservation. By this very simple action it is the formation of the private property. But again, this mechanism of transforming things from common property to private works without the consent of the other men, how is it possible this doesn't lead to war? The moment you take something not necessary for your survival, but necessary for someone else's, you are breaking the Rule of Nature, the limit is to not spoil things. And also, how to explain **the real economic disparities**, without breaking the Rule of Nature? The answer is **Money**, you can't spoil money. **Money allows men to share goods that they collected without spoiling them:** *"And thus came in the use of money; some lasting thing that men might keep without spoiling, and that, by mutual consent, men would take in exchange for the truly useful but perishable supports of life";* **men can collect money because it does not degrade (so they are not spoiling anything!) ...eventually all this is justified because it is the result of men's work;** *«And as*

different degrees of industry were apt to give men possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them.» If a man decides not to work, the one who works a lot can sell him apples, without being in conflict with the law of nature.
From Locke's theory, in connection with the Protestant Reformation, comes out a very strong relationship between property and morality. Who were the richest, in England, at the time? The richest were the Royal, the Aristocratic, well... people that don't work. How can we justify that richness? **Inheritance is the justification of estates**. Aristocratic are the people who collect the money, for their self-preservation but also for the preservation of their sons. In Locke's theory, the only person who needs the legal protection is the owner, who as the owner is the man who has proved his moral qualities. This Ideal Has Been Reflected In Many Practical Applications. Many subsequent revolutions are founded precisely on this law of nature. Locke was specifically cited by the founding fathers of the United States' Declaration of Independence.
The two treatises of government - chapter IX: Locke explains **why people leave** the state of nature. In fact, if men are the absolute lords of their possessions (*NB: people can acquire originally common property through labour and make it their own*) why will men choose another power to control their life? If the state of nature is so wonderful and people can be rich (*NB: accumulating wealth is allowed in the state of nature, spoiling goods is not*) and also live peacefully, why would they want to leave? **The exodus from the state of nature**: the main problem in Locke's theory is not the state of nature itself, but the fact that someone might not respect its rules. In fact, in a modern legal system, there are sanctions if someone breaks the rules imposed by judges, while **in the state of nature there is no punishment for infringements**. No one is more "important" or powerful enough to have that kind of authority, no one can either prevent or punish violations: **everything is perfect until someone breaks the law**. This is the reason why people leave that state. The main reason to create a political power is to **create a judge/jurisdiction** that can punish those violations. The need for a judge is related to the main right of nature: **property**. In the state of nature, the enjoyment of property is constantly **exposed to the invasion of others**, it is difficult to know when something is yours and when it is not without rules and laws. And since preserving private property is the main goal for Locke, people should leave the uncertainty in the state of nature, because **however free, it is full of fear and dangers** of being deprived of property.
The ruler in locke: despite being somewhat dangerous for men, which is what leads men to leave, the outcome Locke reaches is radically different from Hobbes. For Hobbes an **absolute power** is the only solution which allows men to have life preserved. They give up everything to the absolute power which guarantees survival. On the other hand, for Locke the solution is a **judge**, the goal is to not be deprived of one's property. *(NB: according to Bodin's theories, sovereignty is executive and legislative power, which are absent in the definition of political power given in Medieval times, the auctoritas of the Kings and rulers was that of judging, delivering justice*). In Locke we can find some of the main features of the Magna Charta: **government by agreement** (obviously in a very different perspective, more similar to the idea of contractualism which is the idea that power derives from the will of men, the king should also rule according with his subjects) and **limited power**, through rights, liberties and privileges. In Locke's theory the power of the king and the political power in general is limited by natural law, it is **born as limited** by the rights that men already had in the state of nature, especially **property**. Political power is limited because it cannot interfere with property or equality (we see that in the US declaration of independence: life, liberty and pursuit of happiness). Preserving their own property led people to leave the state of nature and the new

political power they created must respect all the conditions (rights and liberties) which men agreed on when they created the **social contract**. Such power is **limited by the will of the men** at the time of its very creation. It is created to protect and enforce a specific list of rights and liberties decided by the people, and this has a very important consequence: **the government has a very specific job**. In Locke's theory the government has a strong specific and **popular mandate** (*vincolo di mandato*) which means that when the government does something which violates such a mandate, it is not lawful anymore, it is **unjust**. When the government is violating the social contract, people have the **right and duty to oppose the ruler**.

Locke is not a revolutionary, the right to opposition is not a justification of revolutions. He is a man of the establishment, he did not intend to legitimize revolution, he defined this **power of opposition as an appeal to heaven**. It is a right of resistance, not revolution, you can appeal to natural law and god, and oppose such tyranny in order to **reinstate a lawful and just government**. In a sense it is a right to **restoration**, not to revolution. This theory can be found at the very root of the US revolution. The founding fathers throughout the whole revolution still declare themselves as English-men, their claim was that the **king was violating the law of the land** by not permitting the colonies to be represented in parliament ("no taxation without representation"). It was the king who was violating the contracts, the founding fathers were just establishing the order and the true government. Still, the right of resistance is a **very useful theoretical tool** for a lot of revolutions.

According to Locke, political power is created by people with a lot of limitations, first of all through the popular mandate. The main goal of the government is safeguarding liberties and rights. In Locke's view, to realise the common good, the government is obliged to protect property, because in property Locke sees the basis of other natural rights and liberties. Locke believes the government should pursue the common good, protecting everyone's property in order to achieve peace, safety and public good: *« [...] the power of the society or legislative constituted by them can never be supposed to extend farther than the **common good**, but is obliged to secure **every one's property** [...] And all this to be directed to no other end but the **peace**, **safety**, and **public good of the people**»*. He thought there was a strong nexus between property and liberty, basically saying that the respect for each other's property assures peace and freedom. Men can be free and equal because of property that is the fundamental natural right (that refers to all the others), this is why protecting property is the goal of positive law.

Moreover, it is important to clarify that, because government must be considered mainly as the jurisdiction of power, the preservation of properties and other liberties reveals the need to divide and organise the power of the State in several branches. We know that Hobbes is considered to be one of the main theorists of absolutism because he thought there should be a strong power, in the hands of only one man or assembly, who should hold all the three traditional powers (executive, legislative and judiciary). On the contrary, Locke refused this idea claiming that power should be divided because when there is a government that holds all the three powers, it tends more to violate the rights and liberties of men, infringing the social contract. In this way, Locke delivers a first and very primitive definition of the theory of separation of powers, according to which the legislative power, the executive power and the judiciary power must be divided. This concept was mirrored by the historical events of the time: Locke lived through the years of the Glorious Revolution (1G89), when, for the first time, the king entirely left his legislative power to the Parliament, establishing the

parliamentary monarchy. It is important to remember that the judiciary power was already in the hands of judges for centuries.
Locke believed in the importance of having the consent of people, expressing an elitist interpretation of popular sovereignty (very different from the one formulated by Rousseau, who believed in a changing constitution that evolved as a consequence of the expression of people). For Locke, popular sovereignty is important to establish the social contract, He thought that, after the constitutional power is created, it cannot be changed: when the government violates the constitution, people can oppose the sovereign and re-establish the constitution, but they cannot change it because the main rules and concepts are already established by the state of nature. In this way people have the right and duty to oppose the government if it violates the social contract. This principle, called the Appeal to Heaven, establishes the right of resistance that will be used as a theoretical tool in actual historical events, such as the American revolution.
To summarize: the key points of political power as described by Locke are: the **limitation of power**, the **separation of powers**, **popular sovereignty**, and the so-called **Appeal to Heaven**.
The political power in Locke derives from the will of the people and their need to create a power that can punish the violations of the Law of Nature, guaranteeing liberties and rights. For all of these reasons, while Hobbes can be considered as the theorist of political absolutism and legal positivism, Locke can be considered as the founding father of traditional Liberalism.
Traditional liberalism must be distinguished from the modern conception of liberalism (19th-20th century) that is associated with progressive government. Traditional liberalism originated from Locke's theories, especially from the concept of separation of powers and the idea that the State must be as absent as possible from any interference with the private sphere of the people. Traditional liberalism focuses more on the propertarian perspective, based on the principle that property and liberty are inherently related.

Last lesson: exam

1 open question (12 points: ability to understand and critically retrace the historical phenomenon and the historical evolution of some legal concepts; evoluzione del concetto), 20 multiple choice questions (contents discussed in class; 1 point for each correct answer, 0 pt for incorrect answer or no answer).
Note that in the open ended question we can choose to follow a chronological order, but not necessarily, as long as the answer is complete and consistent. (There is no word limit)
Here is a list of the **key concepts** we dealt with during the course (from the slides):

- **the State, political power, and the law**
  Sample question: Describe the evolution of statehood between the Late Antiquity and the Middle Ages
  - transformation and demise of the Roman statehood and Empire,
  - Early Medieval notion of power (political vacuum, German notion of power, who does deliver justice?)
  - Late Medieval notion of power (Medieval constitutionalism)
  - the modern sovereignty (humanism and Bodin's theory)

- Government and modern natural law (Hobbes and Locke)

- **Property**
  - From *dominium* to *Gewere* in the Early Middle Ages
  - The scholarly evolution of property in the Late Middle Ages
  - Property and the English common law (from feudalism to the Magna Charta)
  - Protestant Reformation and the rise of capitalism
  - Liberty and Property (Locke)
- **Law, laws and jurisprudence**
  - Roman Law as both statutory and jurisprudence; the ongoing (but evolving) role of the Roman Law)
  - Law and practitioners in the Early Middle Ages
  - The rise of jurisprudence (universities, glossa, commento, interpretatio, mos gallicus)
  - The national experiences: ius commune, common law, droit commun
  - The modern theories: sovereignty; natural law: positivism, liberalism
- **People and the Law**
  - Personality vs territoriality of the law
  - Pluralism, feudalism, corporativism… individualism?
  - *Ius naturale* v. natural law
  - Privileges, rights, liberties (the English experience)

The State, political power and the Law

The modern State and our current legal system is rooted in the notion of modern sovereignty, where the State and the Law are deeply related.

This notion of modern sovereignty and modern statehood is a modern and quite recent concept, we start to see the different historical relationship between the State and the law.

- Roman Empire, transformation of the conception of power itself. The idea of the power of the Emperor, policy-making, relationship between the sources of law in the roman empire: *Iura* and *leges*.

- Medieval conception of power, that started from the end of the Roman Empire and the disappearance of a strong political power. In the Early Middle Ages political power quite disappeared and the many political institutions that still were present in European territories were not interested in the Law. We can talk about a vacuum, a non-relationship between the State and the Law in the Early Middle Ages.

- German notion of power, that emerged from the law of the German tribes: *auctoritas pactionata* (the power is shared by the people). Blood and time play a fundamental role.

Example: Edict of Rothari, that is a law text enacted by a King but not created by the King, it is a recognition by the King of the traditions of the Lombards.
Then, we also mentioned the fact that the absence of a relationship between the political power and the law resulted in the fact the law was mainly administered by private practitioners (such as notaries and judges). Private law was a matter of privates, the political power had very little interest in interfering with privates in the administration of justice.
- Late medieval scholars that discuss the notion of power in the Late Middle Ages: medieval constitutionalism (scholarly works about auctoritas, iurisdictio…), especially with regard to the English tradiction: John of Salisbury, Bracton, Magna Charta Libertatum. We find a proto-modern conception of power and statehood.
- Modern sovereignty as considered by the humanists and Bodin.
- The French case: evolution of the relationship between the King and the power of making the laws in the French context.
- Natural law theories, that are at the origin of absolutism, positivism and liberalism. Many different systems that eventually led to monism: the fact the state, especially in the Modern Age, was the only institution to hold the power of making the law.
(N.B. l'ordinamento contemporaneo è sempre meno monistico)

Property: in the MA, one of the most obvious concepts to ask
- In the Middle Ages ownership rights evolved from the Roman conception of *dominium*, which is related to the personality of the owner. Property right is a personal property right.
In the Early Middle Ages the focus was on the thing, property is about the object (*res*), not the subject.
German notion of *Gewere* and the emergence of some hybrid agricultural agreements that tried to put together the Roman legal conception with the early medieval notion of property.
- Legal Renaissance: evolution of the rediscovery of the notion of dominium, completely transformed by medieval jurists through *interpretatio*.
- Origins of the English common law, not just in the *ius commune*: ownership was important in creating the feudal system. We can find the relationship between property and liberty already in the Magna Charta Libertatum. In general, the privileges, rights and liberties of the lords since the very beginning of the *common law of the land* were rooted in the ownership of the land, nobiliary title, feudal system (agreement btw the king and the lords).
- Dominium divisum
- Property was mentioned in the transformation of law during the humanist wave (from the XIII, XIV centuries onwards), focusing on the peculiar interpretation of Max Weber of the Protestant reformation as one of the main reasons that fuelled the rise of capitalism. There was a new view of property no longer as a sin but as a matter of moral qualities of the owner himself.
- Locke: Property. (Analisi lockiana e tutte le connessioni possibili con la tradizione inglese.)

(Da qui l'inglese si mescola all'italiano)

Ruolo dei giuristi e della scienza giuridica in generale

(ordinamento moderno come monistico, statocentrico. Nel Medioevo invece si registra l'esistenza di una lunga storia pluralista. Nel Medioevo il ruolo che di solito assume l'istituzione statuale è assunto dai giuristi.)

- Starting from Roman Law, Roman Law was essentially a mixed legal system made of statutory law, jurisprudence and the opinions of the jurists (the Justinian collection, 534). When Justinian made his collection of Roman Law he collected the imperial constitutions (laws enacted by Emperors) and the Digest (opinions of the most important Roman jurists). The Digest was the main argument of studying and teaching later by the medieval jurists.
- Before the Legal Renaissance and the origins of the Universities, during the Early Middle Ages the main role was played by practitioners.
- Origins of universities, Glossators, commentators. Late opposition between *mos italicus* and *mos gallicus*.
- Jurisprudence in the Late Middle Ages: *interpretatio*, that is different from the modern monist notion of interpretation. For instance, we saw the famous glossa on the word *leges*.

The problem again of legislation, the authority of the roman law, the natural law in the medieval period, absence of a political power and a universal legislation. Universal legislation was Roman law as interpreted by law scholars, that was *ius commune* in continental Europe, especially in the Italian and German context.

Note that ius commune ≠ droit commun (French) ≠ common law (English)

Modern theories => monism, protagonism of the sovereign of the State in lawmaking. Still, they originated from scholars (from jurisprudence). Never underestimate the role of theorists, scholars, historians.

Roman law: ossessione dei giuristi occidentali

quale ruolo del diritto romano nelle fasi che abbiamo visto?

Età imperiale: sviluppo del diritto romano durante l'Impero

Regni romano-barbarici: sistemi modellati sul diritto romano, che sopravvive in parte tramite il diritto canonico, scompare fino all'anno mille, quando poi viene ripreso dai commentatori, usato come fonte di auctoritas ma in modo astorico.

Con gli umanisti si toglie l'aura mitica che avvolgeva il diritto romano, lo si storicizza in funzione dell'emergere di un diritto nazionale.

People and the law

(Oggi prevale il principio personalistico, che mette insieme individualismo e solidarismo e presuppone l'uguaglianza.
La nostra concezione è che il principio di giustizia sia connesso al principio di uguaglianza.
Reazione tipica davanti alla discriminazione è: non è giusto.
Fino al 1789 l'uguaglianza non fa parte della tradizione occidentale.) Soggetti,
rapporto tra individui/soggetti/personalità e diritto.
Concezione territoriale e concezione personale del diritto: in base alla seconda l'appartenenza etnica condiziona il tipo di diritto cui si è sottoposti, sempre in funzione di garanzia del soggetto.
Durante il Medioevo si assiste alla sparizione della nozione individualista di diritto, in favore di una nozione pluralistica delle fonti e degli ordinamenti, nonché di trattamenti giuridici differenziati.
Pluralismo, feudalesimo, corporativismo sono tipici del Medioevo e della prima modernità e sono in contrasto con l'individualismo.
Dall'umanesimo in poi l'atteggiamento pluralistico e corporativistico, comunitario in generale, comincia a essere abbandonato in favore di un ritorno all'individualismo, che è alla base degli ordinamenti moderni e poi delle successive evoluzioni in senso personalistico.

Nel diritto canonico la salvezza è l'obiettivo base, e infatti l'*aequitas canonica* è finalizzata alla salvezza, trattamenti giuridici differenziati, *extra ecclesiam nulla salus*.

Discorso sottotraccia dei diritti: **diritti naturali nel diritto naturale**: concezione classica, medievale e diritto naturale moderno.
Oppure sempre l'esperienza inglese, emersione rule of law, tutela dei diritti rispetto agli abusi del potere sovrano.
La progressiva riaffermazione dell'individualismo è fondamentale per l'evoluzione della tradizione occidentale, nel senso dell'uguaglianza. Si assiste al rifiuto di concezioni storicamente radicate nella società, nel diritto: pluralismo, corporativismo, trattamenti giuridici differenziati. L'individualismo è problematico per certi versi; la nostra Costituzione repubblicana infatti si ispira al principio personalistico e non a quello individualistico.
L'origine degli ordinamenti moderni, codificazioni sette e ottocentesche, loro crisi ed evoluzione saranno oggetto del secondo modulo che affronteremo nel prossimo semestre.

PER DUBBI O SUGGERIMENTI SULLA DISPENSA

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