Comparative law

https://www.britannica.com/topic/civil-law-Romano-Germanic/The-German-system

Is an intellectual activity regarding the law, when comparing law there is a comparison between different rules to understand law and conceive it.
The dimension focuses on the international system and not only on the Italian one-> the globalized world has different legal systems and legal tradition.
Comparative law start in 1900-> Paris congress of comparative law by 2 continental lawyers; times of positivism with a deep faith in science leading to the progress of the human society in all fields.
The differences between the various law systems was due to the different levels and stages of developments of the various states-> according to the French lawyer all the states must reach the same level of development.
Comparative law gives the possibility of relaxation to the dogmatic system.

Comparative law dived comparison between:
-MACRO (spirits and style of different legal systems-> from the general point of view)
-MICRO (has to do with specific legal institution and specific problems, indeed needs specific rules)-> ex. Contract law
These are not 2 distinct aspects that never meet themselves, as micro comparative needs notions of macro comparative-> macro and micro must be done at the same time.

Negative point of view:
Comparative law must be distinguished from other international field such as international law and public IL and private IL.
Private IL: area of conflicts of law-> to establish which law shall resolve a specific problem, which law involve in such problem (when purchasing a French house while living in Italy); comparative law is the basis to understand the rules that may be different and their application; Private IL tells which part international system must be applied, it has the rule of competence
Public IL: deals with the law of nation, a sort of global system of law.
Comparative law is neither legal history: the relation between them is complex, at first sight someone would say that comparative law studies legal system in the same time, space in a sort of consecutive time (synchronic perspective) while legal history studies a system from a diachronic system (how a system was 2 centuries ago and how is it now); difference is that legal history does not resolve a concrete problems but gives the correct perspective to understand that problem (one must know also the historic development of the law).
Legal ethnology was a legal field developed during the 19th century, founders were Henry Maine and Bachofen, their aim was to produce a general order of history of law-> they believed that human kind had a common psyche -> human being is the same in all times and spaces and there is no difference based on language, race, ecc… all people in the wold develop in the same way and they go through the same stages of progress, at this point is easy to reconstruct the development since the beginning so since the primitive system of law.
KOSHAKER: The development of a legal system is the product of different factors some typical (always the same) and atypical (different for people and systems), also the typical factors are not universal and inevitable (not a geometric law) and can vary from a system to another basing on the historic period of time; legal ethnology focus in distinguish between typical and atypical factors and finding new atypical factors.
today legal ethnology study the changes suffered by the surviving society and are due to the introduction of a higher and different level and of civilization-> legal ethnology has become a field of comparative law.

Comparative law and sociology of law: there is a link between these two area of legal science.
These two area not only learn from each other but use a very similar method-> for sociology there is a link between law and society (ex. Law can change society. The implementation of a specific rule has changed

the society and the human behaviour); the consequences of the law can be considered from a political, economic, psychological and demographical point of view.
Sociology of law= the circumstances in which law affects the human behaviour and how law is affected by social change
Comparative law= how and why certain systems are different or alike and gives advice on legal policy.

Lecture 2- <u>main functions of comparative law</u>
CL has several functions; CL has the aim to create a transnational method of thinking law, a way to consider relation between different legal tradition, and approach to the problems of the law in other fields outside the law itself. The result: law becomes an international science.
For centuries, roman law on the continent (civil law legal system) was the essential source for all the law of the continent, there was a common frame of reference and unit; in the same way common law had a totally different approach to the law but still constituted a common resource for the all English speaking states.
Then, in 16-17th century in the continent this legal unity started disappearing-> that was the age of the national states each state created its own specific law using the roman sources plus other sources; in the 18th century was created the first codes of law. Now lawyers started to concentrate to the own state rules and problems and lose focus on the other countries, except for the colonies which had the same system and same law as the mother-state. -> there were a fragmented word.
CL is better suited to created more knowledge than the sole national law, as provide a wide range of legal solutions-> it studies a lot of different systems, the lawyer is able to provide different solution to solve a single problem (leads to a better critical capacity to the doctrinal disputes). CL offers the capacity to dissolve the national prejudice toward the foreign, and what is outside the boundaries the state.
CL is useful for the "developing" countries and those systems that had not reached the same level of wealth and stability of the western legal systems.
Functions and aims can be resumed as:
1-knowledge-> discovering of models for preventing and solving conflicts
2- dissolve prejudices
3-reform the law trough the doctrine of legal transplants
Other specific and concrete aims are:
1-aid to legislator
2-tool for interpretation of the law> not only of the other countries but also for the law of my country (interpretation: literal, for analogy…)
3-unification of the law> the creation in some legal fields of a unified law

Aid for legislator
In the last century legislators have found that on many matters a good legislation cannot be produced by a preliminary research of comparative legislation.
In the second half of 19th century, Germany was unified, but before the creation of a national sate, German scholars tried to create a common legal environment for all the single states that constituted Germany before the creation of the state-> not a count of the laws used in the German system but also in other such has the French ones.
Since the end of the II WW, no legislative project was undertaken with more or less research in the similar solution adopted in other states this process was one of the forces that contributed to the creation of the transnational legal instruments, e. Vienna convention on int. sales (to facilitate the business and based on a deep comparative research to find a common ground that could be accepted by all the different states and actors in the market).
In the common law lawyers are in some ways more comparative-> all the legislative proposal re based on CL. Common law has also commonwealth-> a deep relationship between the states involved.
After the end of cold war, eastern states used comparative law to create a new legislation after the fall of the soviet system; even outside Europe-> states of Africa and China.
CL suggest the adoption of a particular solution to a problem, but what works in a country can also be inacceptable in another country or cannot work in another system.

When finding a solution, 2 questions: did it work in a certain country? And will it work in the country such solution will be adopted? It cannot be possible to transplants a solution in a system and be sure that such solution will work at the same way it did previously.

Aid to interpretation
CL as a tool for the interpretation of the national law. A foreign law cannot be used to bypass national rules that are not equivocal, a national state cannot permit to be bypassed by foreign laws; the question is if the interpreter of national rules is entitled to invoke a superior foreign solution using interpretation, without making specific references to the law -> when establishing who is a consumer, it can be defined in very different way (each European state has a different interpretation about the meaning of consumer): in comparative law one can use one interpretation and introduce it in the domestic system.
In common law counties, courts since the beginning had made reciprocal references to each other decisions, and today there are also many references to continental decisions; in Italy for example these references during a decision are not required to the judge.

When law is uniformed it needs to be interpreted in order to have a common core in a specific field (ex. Business). The only way to avoid national divergences in the interpretation of uniform law is to establish a jurisdiction through an international court (a third party-> EuropeanUunionCourtJustice).

Improvement of legal education
A comparative formation is important because today is no more possible to approach law only in a national context, but this is an age where problems involves different jurisdictions and countries, so it's fundamental to have a formation that permit to grasp all the different solutions.

Uniform law projects
CL has a specific function in the preparation of project for the int. unification of law. The method used in the past is to draw up a uniform law on the basis of the work made by experts in CL and then to incorporate this project in a treaty (among states) that oblige state to implement the uniform law as their national law.
Uniform law is used for business purposes, the advantage of uniform law in some sectors is that make int business much easier and it also avoid applying the rules of private international law.
Uniform law reduces the legal risks in business, the disputes are resolved in a simpler way.

European common core

Lecture 3 – the methods of comparative law

All comparatists say that there is not a unique method, for a long time very little writing about the method. Comparative was a practical activity. In the contemporary age comparatist started to do a deep enquire on how to do comparative. It is not enough saying that methodology is a problem of intuition and application of different notion.
When comparatists became aware that CL had the aim to be the foundation a new legal science, the problem of method started to be faced with. The aim of enquire is to develop a new system related to all the necessities of the contemporary issues of the social and legal life, and so related to the problems of the legal environment in a transnational perspective-> create a methodology is also creating a way of thinking.
The starting point off any intellectual activity, in every field, is to pose a question and set a working hypothesis (=functional approach). Then the basic methodology of CL must be applied, the idea of functionality is the base for the methodology -> how to create a system after having compared a subject, however the starting point cannot be the concepts of one's own legal system.
The first answer of the comparatist is the one deriving from his own legal system -> his looking unconsciously at the problem with the eyes of his legal system but he must found a solution looking to other different systems (=many different terminology and sources).

Sources of solution can also be unknown or unusual for the comparatist: solutions can be found also in customs and social practices
Another element is the transformation of people and of all what they have understood, knowledge is in continuous development and this leads to change from the conceptual point of view, the role of the comparatist is to acquire a knowledge and upgrade it through time.

Step to found the sources of the law:
1- Found a rule-> in a written code of a foreign system, they must be functional and equivalent to the rules of the original country where the problem arose. Considering civil and common law traditions, continental lawyers solve problems according to a specific institution, common lawyers refers to different institutions. The functional approach is useful when establishing if we are facing a rule of law (must be observed by the citizens) or not. To grasp the difference can be involved also extra-legal instrument (i.e. considerations). Different legal systems can provide different legal solutions to a problem while starting from very different or very similar points of view: each legal systems doesn't want to change itself, its way of thinking so it's difficult to find a common core (EU tried to create the European company-> which would have operated with the same ideology but didn't work because each national system didn't want to find a compromise to all these different legislations).
-found the boundaries of the research-> when analysing a different system, the research must be deepening in such legal system, when deciding which legal system choose to compare there is a distinction between MATURE legal system and the AFFILIATED legal system.
Mature= are adopted and imitated by the other
Affiliated= maintain the ideology of the family to which the belong, they can demonstrate originality and for this reason this categorization of legal systems changes through time.
The research can usually be limited to the mature system; in some specific case the research can be extended to the affiliated legal system.
There are some scholars called DROBNIC that have doubted this distinction -> but must be considered all the options (there is no monopoly for a system to create solutions).

2-collection of data-> all the information useful for the research, one of the principal instruments are the reports of different legal systems (this is not comparison yet). The comparative activity starts only when the reports has been completed; it is fundamental that the lawyer has the access to the reports of other countries.
Collection data is only a preliminary step, to compare must be underlined the similarities and the differences repeating what has been found during the research; the process of comparison at this stage involves a new point of view from which consider the solution that have been found, when comparison begin each solution must be free from the context of its system, before evaluation can take place and must be set in the context of all the solution from the jurisdiction (countries have different need and so different or similar solutions).
When collecting data sources can vary and be outside the legal sphere

3-build a system-> not in a comprehensive system of the world, but considered as a system of thought, categories, vocabulary and terms bust be developed such to be helpful in explain the result acquired (to create a syntax of terminology); this activity need flexibility of the system in order to have a large range of application so that is possible to deal with institutions comparable one another.
A structure for the thought must be created, and be different from the structure given by one's national law.
System must be coherent, must explain why that particular problem is resolved in different or similar ways and what stays behind this solution

4-critical evaluation of the discovery-> comparatist when developing his evaluation is not doing a real evaluation based on some value of reference, he uses just a criterion to decide of the possible solutions which is more suitable for his purpose (practical aim): he wants a solution that can resolve in best possible way a problem of the system

Methodology:
SACCO's method-> guideline about how to approach and deal with the sources of the law. Based on the rejection of the assumption that any legal system is free from any internal contradiction. This doctrine identifies different level and voices (legal formants).
Legal formants are the constitution and statutory law, legal literature and the living law in the courts, can provide different solution to the same legal system.
Sacco intended to counter to go against the dominant fiction (esp. In civil law family) that only the legislator establishes legal norm.
This doctrine is important in the phenomena of legal transplants. The most important element in this doctrine is the idea that legal rules are defined by a distinction between DECLAMATORY rule and statements and the OPERATIONAL rule son the other hand-> legislative says the rule is A but the operative rule (after case law) resulted to be C; it is not unusual that declaratory and operational rule differ in practice.

Taxonomy of law:
The theory of legal family seeks to provide the answer to several fundamental questions that comparative law tries to solve.
Creation of groups of legal system for taxonomy purposes-> useful way to arranged a mass of legal system in a sort of comprehensible order; there are not only 2 systems but a lot of system and would be impossible to understand all of them without a categorization.
Categorization step:
-find system that are representative of the others then concentrate on this system and start a first analysis of differences with other representative state (comprehension of representative groups)-> not a single operation, but different approach using different criteria based on speciality= > Notion of style: every legal system has a specific style.
Style= is a concept not created by legal theory but developed in the field of arts and economics, means the distinctive element (unity of form) of a specific work, in law describe the particular feature of a legal system. This theory is in contrast with the bank approach (law and finance)->world bank is not interested in the style of a legal system but is interested in finding the most efficient legal system following measurable economic parameters (where I can do the best business).
The main idea is that there is a link between the concept of space and the concept of law, and there is also a deep link between development of specific legal systems and the modern political development-> a specific legal system is always created by a specific political development (not only a creation of our mind).
Grouping of legal system is similar to linguistic, since languages are divided in linguistic families; language is linked to law for the way in which language it's produced, language rules the world and lawyers rules the law through language.
When dividing in legal families 2 aspect must be taken in account:
-the theory was developed only taking into account what European continental lawyers called "private law", so taxonomy so depend on the area of law is in consideration;
- taxonomy much depends on the historical period of which one is speaking and also depends on the period in which the classification is made.
-division can be the result of radical changes in systems, this can lead to the creation of broad new families and divisions-> useful to change the taxonomy and underline new aspects which were previously not considered
-the legal culture of a system, so the type of rules of law that exist in such system, the legal techniques used (are specific features), the expectation that citizens have about the law.
The first taxonomy was developed by Hesmen in 1909, he divided the world in legal families: Romanists, Germanic, Anglo-Saxon, Islamic and Slavic; the criteria used was based on the originality of justice for each family, was important how the law was able to convey justice into society-> the starting point was the history, then general structure to arrive to the particular characteristics.
Few years later Sauser-Hall in 1913 another taxonomy: he uses a controversial criterion which was the concept of race to divide legal families (based on ethnicity but not geographical)-> Hindu, Celtic, Anglo-

Saxon, Hebraic, Egyptian, Germanic, Greek or Latin. All these legal families could be grouped into the laws of the Arians peoples (razza Ariana) and barbarians people (including all the African people).
In the same years was proposed also the first taxonomy based on Marxists theory.
Critic to Esmain was a lack of originality in the classification of families, this is not true because implicitly he already used the concept of originality when basing his study on justice.
In 1931 Ullmann created another taxonomy; the approach was based on the sources of law in the various legal systems. He criticized the previous classification for the lack of scientific character-> the only way to have a valid criterion is to analyse something clear, concrete and understandable as the sources of law; he identified 3 different families: continental countries (based on written sources), English language countries (common law, not written) and Islamic countries. He considers also the geographical, language, and religious aspects; his division is more linked to a nomic (nomos) conception of law.
Wigmore was expertized in the law of evidence, he focused on the Anglo-American system, he created another taxonomy based on the pictorial method criterion (based on material, pictures). He distinguished 16 legal systems, the classification was made through time (synchronic and diachronic): primitive law, ancient laws, religious, Afro-asiatic group and Euro-American group -> this distinction was made after IIWW, so taxonomy changes because time changes.
Wigmore for the first time analysed that law is not only the one deriving from books, judges, etc... but one that could be studied through different epistemic field such as literature.
Renè David published his main work in 1950, he criticized early writers for failing to produce valid criteria to divide legal families, he underlined only 2 different criteria already used:
- ideology = entire product of religion, philosophy, political economic and social environment (all the characteristic of a legal family)
-and legal technique= classical differences of legal technique used to resolve a legal issue, grounded on philosophical basis to resolve the issue of justice.
He divided, in the first edition of his book, legal systems in 5 families: western system, socialist system, Islamic law, Hindu law and Chinese law. In the second edition of his book he recognized only 3 legal families: Roman-Germanic family, common law family and socialist family.
The second division is only understandable if the cold war's geopolitical division is considered-> he tries to find a place for the French system (his country) opposed to the American system while it tries to have a major position within the European bloc.
In 1970 Zweigert u. Kotz proposes a new criterion for the division while provide a new power-> Germany; when considering the characteristic of a legal system there are some qualities that are more important than the other, these qualities demonstrate the originality of such legal family;
they elaborated some topics that can be considered crucial in the definition of a legal system:
-historical background and historical development, essential for the second element
-the dominant and characteristic thought on legal matters of a legal system (the feature of legal thinking)
-the distinctive institution that characterize a legal system (in private law, in constitutional law and criminal law)
-the kind of legal sources and the way in which lawyers of a system use them
-the ideology (all the other feature of social, political and economic environment).
They divided the world in these families: Anglo-American, socialist and the others (Hindu, Islamic), in Europe there is a roman family and a Germanic family (Germany was becoming the most powerful country in Europe) + Nordic/ Scandinavian model –> in this taxonomy there is a consideration of a wider spectrum.
They try to oppose to the French pattern-> Germany is not sub-France but is equal, their perspective is western oriented, since the discussion of common law is limited to one chapter, the rest of the world got only 25 pages, while the rest of the book is given to the Roman-German family.
Beside the division between legal family, there must be considered also the hybrid system which do not have a specific and clear position: ex. US 50 state characterized by the common law, however some states have an important history linked to the civil law (like Canada which is influenced by the French system, or Scotland, or South Africa).
The last author is Rudolph Schlesinger, with him there was for the first time the development of the notion of the "western legal tradition"-> underlines all the main characteristic of this legal family; according to him the American system opposed to the west tradition on this aspects:

-common sense of English common law
-rational value of French enlightenment
-scholarship of the Germans

History of French law
Part of the roman family.
With the age of colonialism, the French code became a model also for the colonial
The French civil code was the product of the French revolution, the aim was the creation of a new legal society, to implant the new values of enlightenment, the right of freedom from the personal relationship that characterized the ancient regime, the freedom to contract, introduce a new concept of family and inheritance law. Until this moment family law was regulated by the rules of the church, then became a matter of the public state (as a legal institution-> introduction of divorce).
The code is the result of the Napoleonic period, the age of the French empire-> there is an impetuous revolution in it, whose ideas started to be implemented. Is the result of a long legal development, of the long French legal tradition, which was divided in north (customary law, influenced by Germanic law) and south (written law, influenced by roman law renaissance).
North and south were in continuous relation between each other, so the north started to be influenced by roman law-> it was thought that roman law was a ratio scripta useful to supplement and explain the customs of the north when there was a gap, a situation without rule. In these years a lot of books were written which recorder the costume of a particular region-> for a long period customs were transmitted orally, later was needed more certainty of law (this process was not simple due to the enormous quantity and variety of custom).
1step: In the 15th century with the ordonnance of Mntils-les-Tours, custom was written down by a commission nominated by the king (the central power of national state begin to acquire control), came up a common customary law of France, which involved also the south = different customs for a unified reign.
2step: customary law of Paris-> started to be important after its publication in 1510, also the decision related to the custom of Paris where important (decision of parliament on general questions) not only in Paris but all over the France, much to prevail on roman law -> from this point the ratio scripta was the customary law of Paris.
In this process jurists practitioners (not professors) played a fundamental rule for the development of common private law; the most important lawyer was Dumulin, his main work is a commentary on the first book on the custom of Paris where he focuses his analysis in finding those general principles that could be applied in the whole kingdom; a second author is Coquille, he wrote a commentary on the custom of Never sing a comparative approach with the other main customs of the kingdom with the aim of harmonizing them and assimilate them in a common customary law.
3step: France developed a powerful group of plasticising lawyers interested in the centralization of justice which had the same aim of the monarch to centralize justice in the royal courts; they replaced the previous actor in the administration of justice (clergy, nobles, aristocrats). There were works of authors which constituted the basis of the French civil code: Domat and Pothier.
Domat -> wrote in 1689 a work which created an order to organize the new ideas of natural law and was useful to harmonize these rules with the customary law and roman traditional law, adapting all these legal material to the needs of that time (systematization)
Pithier -> had a huge legal knowledge of both customary and roman law, he had the capacity to harmonize these two sources in an eclectical way.
Meanwhile monarchy continued to use royal ordonnances in many fields of law for provide the kingdom of a common procedural system (ordonnance de Moulins, ordonnance du commerce, code de la marine).
An important role of the chancellor Daguesseau-> provided 3 important ordonnances (gift, wills, fideicommission).
However, by the end of 18th century France was far from having a common private law-> changes thanks to the French revolution and the Napoleonic empire
4step: French revolution-> destroyed all the institution of the ancient regime, tried to create a new order following the principles of the enlightenment, the man became a citizen= an individual without bonds with

other individuals (no subordination) he only to obey to the law established by the stat. the aim of the law was to free these man from all the previous authority (family, church…).
5step: unification of private law-> 3 drafts of the civil code. From 1793/1796 2 drafts that were rejected because too complicated, other more simple drafts were produced but never adopted due to change in political aspect (introduction of the empire with the adoption of the Napoleonic constitution); napoleon commission for the draft of his constitution composed by 4 practitioners + napoleon active participation to the drafting process. On 31st march 1804 the French civil code was published.

The French civil code
Was the first code in France, important from a political point of view. It was also a cultural code, determined a transformation from the cultural point of view since it was the result of the French revolution and the Napoleonic era. It is found on the creed of the enlightenment, in the sense of constructivism-> society could have been built only through reformed rules, possible thanks to the revolution.
In France there was the third estate which through the revolution and using revolutionary means had brought the ancient institutions (felt obsolete) to the end; in this way it funded a new state principle on the concept of the citizens -> the figure of the citizen started to be the object of many legal thinkers and started to be taken into consideration under the law (citizens are all equal, same right and duties).
In the code there are a large number of institutions developed in century, selected according to the traditions that were evaluated in the light of the new revolutionary thoughts (ex. Freedom of contract).
The French civil code uses both the written law (south France) and customary law (north France) + other rules derived by natural, rational law; in this situation the drafters were very skilful because they balanced tradition being able to use all the achievement of the previous practitioners.
The written law of south was the inspiration for the institutions of private law, using sources of roman law (ex. Ownership, contract, law of will).
Customary law played an important role in family law and in the law of inheritance, here the customs (especially of Paris) had a specific approach founded on the domestic power of the father, unity of family and the desire to maintain property within the range of family members.
Natural law influences from the conceptual point of view the code, giving to the law a social structure.
The role of judges in relation of the statue is a mechanic role -> the doctrine had the idea that the judge should not have the power to interpret and develop the role, so the legislative power must create a statue detailed in a way that the judge can apply it mechanically; if there was the need of a clear interpretation of a provision, the judge had to ask the solution the legislative power (it was never applied).
French code is not detailed because drafters realized that was not possible to foresee all the case of everyday life, so they provided provisions not so detailed in order to be easily adopted and applicable also in those unforeseen cases.
The language of the code is very simple, in order to be comprehensible for all the citizens, this could be seen as a sort of lack of juristic and legislative substance.
Structure:
no introductory session, only a title composed of 6 article, there are 3 books->
1. Law of individual (from art. 7 to 515) = civil rights of French citizens and the rules for French nationality + few provisions for foreigner (develop for the legal field of private int. law)
2. law of property= fundamental right, made a distinction between movable and immovable goods (roman division)
3. about 1000 articles on title= the way in which property can be acquired (ex. Will, contract, agreements).
This is the code of the third estate (bourgeoisie), it expresses its needs and wills (right to property, personal freedom, freedom of contract, patriarchal family, “neminem leadere” principle)
In the code there is no mention of labour law-> nothing about the dependent worker which was not recognized by the legislator.
French case law: interpretation was limited to the literal meaning of law (judge repeated what the law said), by the end of the century this approach gave no help in applying the provision of the court of he different situation of everyday life and did not permit to change and adapt the code to changing circumstances-> authors created the school of free scientific research; allowed a greater freedom from the text in order to develop the law (first systematic reform of the code from times).

The diffusion of the French civil code was due to its quality and the power of France-> power from political, theoretical and cultural point of view. 19th century was characterized by English and French power.
The diffusion and the reception of the code were facilitated by the words used to formulate code's provision (language was simple and understandable).
The vehicle for the diffusion was Napoleon himself and the military expansion of the empire, the influence spread all around Europe.
In Belgium the French civil code remains in force also after the fall of Napoleon, under William I- > however, it achieved different result in interpretation.
In the Netherlands reigned Napoleon's brother, became ally of France and applied the code only with small adjustments to the Dutch legal environment.
In 19th century practitioner in Holland criticized openly the new code and in 1970 was introduced a new part to the code, and was completely reformed in 1992-> was similar to the Italian one, abandoned the distinction between civil and commercial law; another influence by the BGB on the structure of the code with use of general clauses (ex. Good faith), technical and specific language more similar to the germane ay of thinking of a civil code (falls under the category of learned codes); aspects in common with English law.
Behind this code there is a huge comparative study-> many stets of principle belonging to the European tradition, to the European ius commune.
In Germany the French civil code remained din force in all the territories western Rhine till 19th century when the German civil code came into existence following the pandect's methodology -> not only in Germany but also French authors were interested in these studies.
In Switzerland the code was applied directly after the conquest, but after the fall of napoleon of the different Swiss canton produced their own codes and in 1912 these cantonal codes were replaced by a unique Swiss civil code-> French influence is still going on but not as the same of the German influence.
In Latin Europe such as Italy the code spread through the various fragmented territories conquered by Napoleon, each one producing its own model following a unified basis of private law -> when Italy was unified in 1861 was produced a new Italian CC, it was new but substantially inspired to the French one; during the last decade of 19th century Italian scholars were influenced by the method of the German school of pandect; the last decision to change the code was taken after IWW in 1942 in order to provide a law covering all the relationship between citizens.
After the separation with the church there were some reforms of law-> Art.34 of Lateran pacts stated that the effect of marriage sacrament had validity also in the Italian state and Italy did not recognized divorce.
In Spain-> customs laws of particular region have been developed since the middle ages, these fueros characterized the legal aspects of the various territories; from the end of the 14th century Spain tried to develop also a sort of legal framework of states to integrate fueros (this process is called las siete partidas); the final version of the code was introduced in 1889, it contains many indigenous institution, it is united under private law but it continually try to codify the existing fueros.
In Portugal-> law has been unified since 15th century, commercial law was the first to be codified in 1843 with the influence of French law, was replaced in 1966 with a modern version of CC as result of a comparative work of the other existing legislation, there is a string influence of German.
In the rest of the world there was a strong colonial influence of Europe in east globe-> nowadays in many of these territories the French influence is still present.
Near east in 19th century was under ottoman empire, they introduced a code for commerce in 1850 and ordonnance regulating the procedure in commercial cases based on French models; however Islamic law continued to rule the core of private law, indeed there was a rather incomplete code called Majallah promulgated in 1509 which covered all part of property law, obligation, not codified family law and inheritance law-> in these fields the special courts applied the different sources related to the different communities that inhabited the region.
In 1870 Egypt became independent (also in int. relationship), it stipulated a treaty with the main European countries to introduce the so called "mixed tribunals"-> judge in Egyptian tribunal were mostly European and had competences in civil and commercial cases involving foreigners and applied the mixed codes (the result of a discussion with European powers and were based on the French codification) but they had no jurisdiction in family and inheritance law. In 1883 were set up also tribunals for native peoples concerning properties and obligation, the law applied was the law of mixed courts but with relevant aspects influenced

by Islamic law. In 1937bthe consular courts (cases of family law between locals and foreigners) were abolished and the jurisdiction passed to mixed tribunals. In 1949 egypt adopted the first CC influenced by the French legislation+ Islamic provisions, but with the separation of religious and state courts the latter acquired jurisdiction of family law.
The most developed area of Ottoman empire tried to develop and become independence from the mother country (turkey) -> in this area (Arab league: Libya, Iraq) the Egyptian civil code had a great influence; However, the reception was not similar in all the states: ex. Geordan and Iraq when receiving the code had developed in a more Islamic way; the states of Maghreb were influenced by French occupation (they were colony) applied the same law in force in France a part for family law and all the rules related to the individual which were influenced by the Islamic tradition (created in the years of decolonization).
French had huge amount of colony in Africa, but after IIWW these colonies started a process to obtain independence (both in Maghreb and Sub-Saharan area), but France tried to maintain the French west area (they split in 8 different state at the end) and French Equatorial area (also in this area in 1960 were produced several different states. Also the states colonized by German and Belgium after IIWW were influenced by French power-> received the same legal idea as France (when these colonies were conquered by France it introduced the code -civil and commerce-, in some cases with few modifications), rules however were applied to French people living in these countries but not to the native people, so there were 2 different jurisdictions each one having its system; consequently there were 2 systems that tried to become a single one -> there was a process to assimilate natives, differently from the English system which preferred to apply the principles of an indirect rule (a way of ruing these territories using the already existing institutions belonging to the colonies), this because the revolutionary idea of the French culture, such as the principles of equality common to the all mankind. Despite there're were 2 systems, there was always the possibility for a native person to adopt the French legislation -> cultural assimilation was not successful, when colonies became independence double courts were abolished and were substituted by a single court which applied French law.
French civil code was popular also in Latin America even though the coloners of this continent were Spain and Portugal. The family of south America can be divided in 2 groups of code, one belonging to the French/romans system and one belonging to the American scholars (more original code).
The code that are translation of French code can be found in Haiti, Bolivia and Dominican Republic, the second type of code can be found in Chile (1855) and Argentina and can be considered the more independent and original deriving from the lawyers of south America-> code of Chile is superior and clear than the French model, this explains why this code was adopted also by other states of this area (1860 by Ecuador, 1863 Colombia).
Considering the doctrine, the American scholars had as model the French ones and in 20th century they followed also the German Pandect's approach.
Brazil had no code until 1960, it followed Portugal rules-> this code was drafted following the French code and the German BGB.
In north America the French influence can be found in Louisiana and in Canada (Quebec) -> are member of federal states dominated by the common law culture and there is a sort of mix in the legal instrument and legal thinking: there is a civilian approach within a common law framework.
The law applied in these territories were royal ordinances and the custom of Paris.
Today the law of Louisiana is connected by the law of the other federal states of United States-> they adopted the uniform commercial code; in Quebec new code was drafted in 1994 through a comparatist approach and present influence of common law and other European influences.

Courts and lawyers in France

The supreme court is the court of cassation-> provided by the French revolution, it changed name and function and was the model for the other courts of cassation in all Europe. It originally was called "tribunal of cassation" whose function was to assist the legislative power rather than act as a proper court, its main aim was to control other courts did not deviate from the text of civil code (give more force to the legislative power).
Doctrine of separation of power= a power that makes law + a power that apply the law (division of competences); French courts were allowed to refer questions about law to the legislative power which was

the correct meaning or interpretation of the law; in this moment the court of cassation was outside the system of the courts.
The consequences of this division-> the cassation could not cut the decision of the lower courts; it could not substitute itself in the decision on the merit of that specific case;
Refere facultatif=
Refere obligatoire= lower courts are not bound, after the intervention of the cassation the lower court could still decide as it previous did, in this case if the decision is still questioned it is submitted to the legislative power to obtain a clear position.
Today the judgment of the cassation-> lower courts are still not bound to follow the interpretation of the cassation but, also today if the lower courts refuse to follow the interpretation the cassation must follow a specific procedure creating a combine chamber of the court of cassation which will decide on the matter; if the second decision is questioned the matter is remitted to a third court now bound to follow the interpretation given by the court of cassation; this procedure is used also in other romanistic systems (in Italy the decision fo lower court can be brought to the cassation which can only decide the interpretation of law and not enter in the merit of the case, no question about fact; then the decision on the merit is send to another lower court which will decide according to the interpretation of the cassation).
In the French system all the decision can be brought to the cassation which will provide for the correct interpretation of the law, cassation must always provide for a decision (only question of law and not question of fact), the ability of the lawyers is to bring to the cassation all those aspects of facts that have a strict link with the interpretation of the law.
Structure of cassation->
-judicial courts: 6 chambers dealing with private law (3 civil, 1 commercial, 1 criminal, 1 labour), appeal courts, first instance courts (tribunals), statues; more than 3 hundred of judges working here, among these judges there are the ones hired to work in the plenary assembly (full court)
-administrative courts: council of state dealing with public law, administrative court of appeal, administrative tribunals, case law.
Decision of cassation-> the phraseology of French decision consist of a single sentence, there is no section devoted to the facts of the case or the history of litigation, facts are referred only to clarify grounds, there is a part containing the reasons of the decision (simple and brief-> a list of “attendu que”), decision do not contain references to scholar writing nor previous case, decision has a precise stylistic form.
In France the judge is a part of the state, his name is not important.
….
Avouè prepares the case and all the material, the avocat present the case before the court-> this distinction is because all the pleading was oral and was need a specific rhetorical ability to present the case to the judges, in this distinction no one had the priority or prerogative on the other.
In 1971 these two profession were combined and was created the new profession of the lawyer; in all the lower courts all the procedural steps and the pleadings were taken by this new figure; in the court of appeal the distinction remained-> the avocat could plead in all the courts in France, the avouè could only plead only in the tribunal he had his profession (he could not work everywhere, but only his own district).
A third figure of lawyer was made of other legal advisers called “conseils juridique”-> to become this figure one had to be registered (like the avocat), but he necessitated only of a master degree in law; there was an unfair competition (on knowledge) with the other figures.
In 1990 there was another merge between the profession of the avocat and this other figure.
All these lawyers today are members of one of the chambers of the district of France-> from 1990 to give a legal advice one must’ve been a lawyers.
These two reforms lead to changes in the professional life of the lawyer -> before he could deal with all the fields of law, now there is a cooperation between lawyers so that each one of them can be specialized in a specific field (normal law degree+ DESS for the specialization).
For a French lawyer what matters is the brilliant oratory and the prestige (he is the result of the French revolution); in Germany what is important is the deep and compete knowledge of the legal system.
The creation of administrative law is due to the French lawyers -> the possibility to defend the rights of the individual against the intervention of the state, while in Germany there was the pandectist movement developing a new way to consider the law (law is a science, perfect structured supposed to be not political)

History of German law

there is a difference between German and romanistic law, from the historical point of view of development. However, there are also similarity.

During the middle ages the whole Europe came in contact with the ancient civilizations (the roman empire), the Germanic territory were not conquered nor occupied by those civilizations-> the contact of roman law was not direct, and such contact did not happen until the 15th century; the reason of such late contact was the weak political situation of the romano-germanic empire and the power of the territorial rules was at the same time increasing; until 15th century there was not a common private German law, not a common law of Germany due to the weakness of the empire (there was not a common system of courts, no common fraternity of lawyers as in England, no judicial and legal unity -> different in England where we can talk of common law); in German there was not a capital (as in France) so also the bureaucratic office of the monarchy did not develop (German empire had not a specific place to stay and live on, there were not administrative central bodies) but there was an high imperial court with not a great influence.

The high imperial court acted as a sort of court of appeal for all the other courts -> it was not independent from the emperor, judges were not career judges, and did not stayed in the same place, it was not possible to create a corporation of specialized judges with the possibility to develop a case law.

The first stable court created in the German territory Reichskammergericht in 1495 -> in Frankfurt, there were career judges but it was too late for the development of a case law; the legal method used in Germany were not so developed and they were no more suitable for the need of that time (law was found in the tradition, in the customs); law was made of a large number of customs, every time there was a gap it was fulfilled with a vulgar version of roman law -> in this way roman law entered in Germany.

The introduction of roman law was due to 2 reasons, one political (was simple for the emperor to enforce It) and one concerned the level of development of roman law (vehicle were the jurists who were trained in roman law-> end of 15th century they substituted the practitioners' law and substituted them into the most important judicial position); university were the place in which roman law was studied and learned, so there was a new way to conceive such law.

Usus modernus pandectarum= the new way in which roman law was conceived, but not the original roman law rather the modified version (the one deriving from the scholars), universities had a rational and abstract method of thought, the practice of law there was no immediate direct influence.

There was no common system of private law, neither civil law system of court, corporation of lawyer did not develop.

During 15-16th century there was a roman penetration in German law, due to some characteristic of roman law; it provided a set of rules already developed from ancient roman jurists, by the corpus iuris civilis which responded to the necessity of the society of the end of the medieval period. Roman law had a deep authority: the roman-germanic empire conceived itself as the prosecution of the ancient roman law. Roman law was studied in all continental Europe, was the basic training for the lawyers and so also this attitude became a factor to the substitution of this kind of law through the ancient customs of Germany (ancient practitioners of German customary law were substituted). This progressive spreading of roman law is known as "usus modernum pandectarum" (modern use of ancient sources useful to resolve the problem of that present time); but this change in perspective was also the result of the enlightenment that broke the bound with the medieval mind, this movement gave to the German lawyer a sort of standpoint from which they could start to develop this new use of ancient roman law sources -> the foundation of this new usus can be found in the conception that was possible to build a new systematic order of law for those lands. One particular product of enlightenment was the codification (act of legislation building a clear order of rules); English law was less influenced by this process because their legal thinking-> in England always existed a tradition of legal thinking founded on the tradition itself (law is a continuous creation of tradition, not the creation of the will of one man or the legislator).

in Germany the law of reason gradually broke the link with its roots and became a system of private law that could be learnt and thought-> the creation of new way of thinking law and systematize it deriving from private law. This work was made by great scholars (pufendorf, thomasisus and wolf); the aim was the creation of a common system with common rules to be used everywhere in Germany (princes used this idea to create new institutions in their territories-> new movements with the aim to develop practice of law).

The 18th century is the period in which all these principles and the whole system tried to be implemented in the first codification of history (before the French civil code)-> the first code was very different from the French codification, so the concept itself can be declined in vary different ways.

A first code was in 1756 was called "codex maximilianeus bavaricus civilis", it contained the Bavarian variants of the usus modernus; another code was the "lad law of Prussian state" in 1794, in force until the 20th century (before BGB creation), it belonged to king Frederik II (was not the code of the free citizens, but an act of the willingness of the king himself) and had different characteristic from the French one ->

- the structure is the result of Pufendorf's thinking (man has double nature, he is an individual and he is the part of a larger group of people- the society- -> also a legal distinction of this feature which developed the rule related to the individual property and the legal position of this man in the society; in France it had a single nature, no different rules relating to the different position of the man in society)
- in Germany there is a bureaucratic administration of the power which regulates completely in every detail the life of the citizens
-different styles of codification-> there are many individual rules (almost 17 thousand).

The 19th century begins with the French civil code (the highest point of rationalism and codification), in Germany rationalism was substituted by a new movement which has its origin in the romantic movement about the society and the man attacking the perspective of rationalism (end of its golden age)-> romantic movement uncovered all that irrational elements that are at the basis of the human life, for the first time an intellectual movements reflects of thing like soul development, feeling, sensibility (converse of enlightenment-> rationalism, constructivism) which deals also with legal feeling; in this new intellectual environment In Germany arose the school of "historical law", the main author is Savigny (law is a historically determined product of civilization, having its root deep in the spirit of the people and maturing there in long processes -> law is determined by the level of civilization of people, product of the tradition of a specific territory, the spirit is a sort of characterization of history: the product of maturing process through history). When he speaks about spirit of people he is referring to the German spirit, not the product of legislation and deals with the organic growth of people. This approach emerged in 1814 after the dispute between the school of savigny and Thibaut-> different position on codification of law, in his article he replaces all the different German territorial law by a general German civil code (similarly to the French one), the aim was to lay the basis for legal unification of Germany with the further aim to achieve a political unity (savigny assumes that the time for unification was not matured in Germany-> the legislation was not organic and not scientific to a degree for german civil code-> no legislator because law belonged to people and they must be conducted by scholar as the necessity).

The debate was won by savigny since he was sustained by the other scholars-> the real starting point for the german law was the roman law received by the usus modernus, interest only in the roman law belonging to the corpus iuris civilis; savigny accepted the educational principles of contemporary humanism and adopted the aesthetic idea of classicism, so he made the same operation of Goethe; this produced the idealization of roman law (it was the maximum level achieved by man in creating law, it was elevate to a new level and was the most important conceivable way of law) leading to the new pandectist school whose aim was the dogmatic and systematic study of roman material (new method of studying law)-> gave the basis for the development of BGB.

No political unity until end of 19th century, legal unification of concept was already achieved. Now was possible to make the first step of german law unification, I 1848 there was a first law of negotiable instrument common to the german territory+ general commercial code 1861. The key moment of the political unification was action by Bismarck with the unification of the court system, civil procedure and private law -> first commission in 1874 and first draft by Windscheid in 1887 (lot of critics by Gierke bcs he said that a lot of german institutions were bypassed by this draft since they were still vital in the legal life), a second commission in 1890 with a second draft 1896 (alteration linked to the language and not to the substance, had more attention to social rights, mitigated the individualistic approach of the first version), the new BGB entered in force in 1900.

The BGB is the result of historical development and the feature of the german society, it reflects the aims of the drafters; it is a point of arrival-> the code is the product of Bismarck's government which tried to unify the country and provide it for a single one set of rules; it was also the end of the pandectism.

The BGB is the first step of the 20th century-> the idea of society in the code is linked to the first Reich, all the feature of the code reflects this society; the chef role in the state was played by the bourgeoisie characterized by a liberal way to conceive society and wanted the unification of Germany (Prussian state). Was the period after the industrial revolution, all the states were industrialized in continental Europe (+ Japan in development)-> from economic point of view there was a connection between different parts of the world which is the British empire, there was the belief that the general good would've been created by the force of the market (invisible hand), so there was individualistic opportunism in the long term to create growth and wealth for everyone (the private individual had the possibility to create richness and money),in this situation the role of the state was overcome (it could not intervene on the market) –this is the common conception of society-.
Another assumption deriving from lawyers, is the positivistic approach-> after the industrial revolution arose another class, the working class.
For the BGB these individuals were not the model citizens (but the landowner, the official of the state, the traders…), the characteristic of the citizen were clearly defined: male, great skilled, well learned, a man that has all the possibilities to create business and wealth (consequently all the legal institutions are related to this kind of man-> freedom of contract). –this from the ideological pov-.
About the style it can be said that the BGB is structured in the pandectist way:
-it is not addressed to all the citizens, but to the professional lawyers (converse from French CC), adopts a difficult conceptual approach, with a complex language not able to be comprehended by everyone except german experts (for them can appear flawless), it is very technical (ex. Where lies the burden of proof)
-there is no repetition but cross references within the text which amplify the sections of the code-> there are provision in the 1st book that are used in all the rest of provisions of BGB (to know what is property, one must start reading from the first part of the code, from the beginning), so it has not elegance nor compactness of French civil code
- it does not sum up concept and notions but still have technical merits.
The structure of BGB conceive different fields of private law, different books as the Justinian version of corpus iuris civilis, so roman law: general part (I book), law of obligations (II book), law of property (III book), family law (IV book) and law of succession (V book)-> this is a taxonomy of the most important rights in society, a conceptual division of roman jurists taken by the pandectist. This makes easy to understand how the code works: there are rules in different parts of the text useful to resolve concrete cases.
The most important book is the general part, also the most discussed-> it has a systematic aim, explains the basic institutions common to the whole private aw, the same institutions that lawyer will encounter in the other book in order to maintain a completeness and specific definition of every complex for all the different parts pf the law. This pedagogic approach is also learnt in university and was felt by the lawyers of the other country as something unnecessary for the correct application and comprehension of the code, so code influenced by german code there is no general introductory part (but only in few cases).
The legal institutions that are defined in the first book are not invented by the drafters, they were taken for the pandectist school studies which developed all these aspects. This general part is important in legal history because provides a new notion which is the idea of legal act (can be a pro for legal technique, contras for the comprehension)-> is a wide notion, can be the contract or the will (ex. Italian codification was influenced by pandectism this notion was not received), it is not used in the draft.
The general part had a string influence in France-> scholars started to write books about French law using the conceptual framework developed by the german doctrine, developed an exposition of French legislation in the way of the Germans (influence also in case law).
Influence in England-> land of common law, had a different approach to the law and to methodology, the teaching of pandectist had no impact on the English way of thinking. However, many Anglo-American scholars (ex. Pollock, Salmond, Holland, Anson) knew very well german authors that they changed their perspective on common law.
The most important elements of BGB law of obligations-> since it is the product of the liberal society, the contracting parties are both free and equal, have the duty to respect contract, only few norms protected the other party in bargain but it was possible to limits the power of parties using the general close of good faith (par. 242), the provision for the working class were old and unadapt to the social situation but with tort law and the principle of liability (+new system of compensation) this situation was overcome.

The field of family law was built at the beginning according to the patriarchal system, with the father at the centre of the family who exercised strong power and influence on it. This model of family changed due to the two WW-> moments in which the role of women arose up and was the moment I which the traditional 19th century structured family started to change. Another factor was the development of the industries and the work in factory; for the 95% of population the family was no more similar to the one of 19th century linked also to the agricultural contest.
Changes took place thank to statutory law which also modify the text of BGB-> rights for man and women, equal rights in 1957; these changes were anticipated by case law (ex. Approval of law of divorce).
At the beginning of 20th century children were not considered subjects of rights, nor member of society (only after 18/20 y.o.) till the creation of the parental care in 1979.
Other changes in legislation: creation of new field of law (due to economic, technological and social changes) and the creation of new rights -> use of general clause (which is not very detailed but could've still applied to many cases), the interpretation of this clauses aim to modernize the code without many modification (same code, different application/interpretation).
However, german code still needed to change radically due to the differences between the living law and the provision of the code (no more acceptable), modifications in provisions were made in 1997.
These provision of BGB are referred only to west Germany (there was the wall, and cold war) and not to the east in which were there was a communist and social legislation. After the fall of the wall in 1989 and the unification of Germany (3/10/90) there were two different situations (social, cultural, economical) so it was difficult a harmonization of legislation -> at the end of 1990 all the west legislation of private law was extended also to the east part of the new Germany.
The german model was not so influence outside Germany as the French code-> it was difficult for foreign lawyers to adapt themselves to the way of thinking of pandectist, but the code was still appreciated. BGB influence was upon scholars and practitioners in the way in which they approach to the law, the way in which they thought about law, so a cultural legal influence linked to legal doctrine. The countries which received BGB were neo-subjects to change and looked for a model for their legislation (ex. China) but the differed on two matters: family law and inheritance; spreading of german law started when in the European countries provided a valid model for commercial and civil procedure (also in Balkan states and Greece-> they were used to roman law and was easy to understand BGB).

The Austrian civil code

It is the third great code from the 18-19th century called ABGB, came in force after 7 years from French cc, is founded on enlightenment principles, in the belief to create a new set of rules and with the possibility to create a unique legislation for the Austro-Hungarian empire (which was not a unique state-> not a linguistic unity, no common culture nor common society) different from the other national European states.
So the empire tried to give to all these different people and territories a common code on the model of the principles of enlightenment that could replace the old-fashioned customs laws (traditional law) of the different regions -> Maria Teresa from Austria tried to unify the empire on a modern state model, she charged a commission with the task to prepare a cod in 1753 (gave also instruction on how achieve the final result), it was limited to private law and leaving aside all the provision related to public law and civil rights, were incorporated the law of the various territories and the principles of common law reason deriving from enlightenment and also roman law (in the form developed by the usus modernus pandectarum), first draft of the code is called codex tehresianus in 1766, the reception was complicated because it was not comprehensible with a specific knowledge of roman law; few years later begun a reworking on the first draft under Leopold II whit a new commission (martini and zeiller) with the task to use the critics pf the old code to improve it, in 1790 the second draft was published abandoning the roman law and gave may to more doctrines grounded upon the law of reason, it was a modern code inspired by the spirit of enlightenment; new code entered in force in 1811 (with the principles: citizenship, property, freedom of contract and movement -> in the pre modern period people had not the possibility to free move in the territories of the kingdom where they lived).
In Austria there was a huge contrast between the social reality of the empire and the principles of the civil code, due to the type of the Austrian state full of different social environment-> the peasantry was under feudal dependence so there were many privileges to the aristocratic social class which obstacled the

realization of the code's project; these differences between written rules and the rules implemented. A decade after the code the administration issued a list of decree to modernize the empire-> when the code was approved there was a sort of anachronism.
The first turning point was in 1848 with the revolutionary movements, there was the abolition of the peasantry, freedom of speech and press, more participation of citizens in policy (regression with restoration); other improvement in 1870-80 with the adoption of a code more congruent of society, beginning of the industrial process and the opening to the commerce (liberalist approach to the economic life of the state).
Austrian code is much more clear and comprehensible and modern than the Prussian land law, it was neither similar to the French CC in style and structure, indeed ABGB has man explanatory and theoretical provision (also unnecessary sometimes) which provided definition without a specific juridical content but still useful to specify what the law means; compared to the French one is drafted in a too detailed way, it has not many article but only 1502 so it is shorter than the French and the BGB, drafters achieved this brevity only leaving gaps in the normative which constituted a difficult of Austrian courts in applying the law.
From the structural point of view and the division of the field of matter is similar to the division of Gaius-> very short introduction followed by 3 different section (persons, property, provisions common to the law of property and law of persons). In the introduction there are only few provision about entry in force, application and effects of the code, par of aw of persons concerns family and relationship, property law is divided servitudes, ownership and possession, in the third part there is part of contract law (provision that in the BGB we find in 1st introductory book) and tort law (shows a deep influence of natural law theory-> there is not a taxonomy of different hypothesis in which civil liability can be recognized, but there is a general clause that can be applied to all those cases In which the principle of neminem laedere is not respected). ABGB does not recognized cases of liability without fault.
ABGB was a competitor of French CC even if the effect was null except for some non-German speaking territories of the Austro-Hungarian empire.

Swiss civil code
German canton did not experience the reception of roman law from the usus modernus pandectarum, because this canton was independent and for them self-determination of the communities was a fundamental trait of their identity, plus in these cantons there were not princes as germanic territories so there were not bureaucratic offices around the king-> there was not a staff of educated lawyers that had the interest in the diffusion of roman law. Until the age of codification, the law of the canton was based on customs applied by judges elected directly by the community (not lawyers).
French revolution changed this situation, the idea of codification also took roots in Switzerland. When the Napoleonic empire collapsed Swiss transformed its status to being a union of relatively independent cantons; enlightenment idea had a diffusion in the territory only at level of single cantons so every canton started to create their own code and writing all those rules and practices belonging to the custom of each territory.
South and west Swiss (Geneva and Lugano) were influenced by French culture and CC, north and east part (Zurich and Bern) adopted their own code which then influenced the other german speaking territory inspired by the ABGB.
In mid-19th century production of a code influenced by pandectist which had influence on the other cantons had resulted as the last step of codification in Switzerland.
Initially codification was made at cantonal level, but with the need of unification of private law in the confederation some constitutional reform took place in 1874 giving federal competence in some areas of private law (law of obligation in 1881). In 1884 was realized a comprehensive and comparative portrayal of the private law of each canton intended to be as the first step for the codification of PL in Swiss. Huber used all this stuff to create a draft of the unified code which was brought before the Swiss parliament in 1900 and then entered in force. In the Swiss code there are several provision which apply only to commercial transactions (so it can be considered a modern code).
The style is the result of a compromise between French and German CC, from the point of view of language it Is clear and popular, the structure is open and easy to comprehend giving the possibility to the code to

adapt to the society, rules are not so detailed but establishes rules that are not totally complete (the legislator left to the judge the task to adapt these incomplete rules to adapt them to the changing society-> the result is that the code can be integrated by case law using deciding standards that are reasonable and equitable starting from those principles enlisted in the code)-> possible because Swiss CC avoids the legal technique of cross references between paragraphs, simple sentences are preferred to complex sentences even if this means that the juridical element is lost, reflects so short articles (provisions are brief and clear), terminology prefers german words to foreign ones. (the code is translated in all the languages spoken in Switzerland)
The Swiss CC is divided in 5 sections: family, inheritance, obligation, property, contract -> division of the pandectist but it is more clear, lack in an introductory part. In art.7 the general provision of law obligation regarding the creation of a contract are applicable to all the other relation of private law (simpler to create a whole different category), the code uses general clauses (the judge is the back actor who can give a meaning and a content to the general provision), the length of the code is about 1.600 articles.
The active role of the judge resorts to different point of views about the code in the various cantons.
Legal environment: jurists were not trained in law, since there was a small reception of roman law, judges were selected for their personal qualities which gave authority to their judgment and not their knowledge of law, they were elected by the population, there was neither a central authority which selected them, the courts structure is determined by the law of cantons, the swiss code has not unified the private law as other code did in other states because the various cantons are very proud of their independence, their traditions and legislation and on many point also the open structure permits to the local institutions to have a role in the practice of the law.

To find general rule one must observe to the accepted doctrine and the tradition. To deal with all these particularities a code like the BGB could not be used, the problem of swiss law is that it is too localized and that judges are little specialized in law, so the result is indeed the swiss cc.
The diffusion and its reception concerned many other countries thank to its characteristic, so in other countries who wanted to codify private law has learned something from this code-> this code was useful for a comparative point of view. Direct reception took place only in turkey (creation of Turkish republic in 1922) as a whole, so was abolished the old Islamic legal practice that characterized such legal environment and were introduced provision and structure completely new to this environment (case of legal transplant with all the difficulties) in order to modernize the new born republic of turkey.

Common law tradition

it is different in approaching the problem of the law, in comparison with continental lawyers-> legal technique is not directed primarily in interpreting statutory text and codes, is not intended to approach concrete problems to fit them into a conceptual well organized system, but the common lawyer is more interested in the specific characteristic of the case in analysis and in finding precedents for that case in other previous case similar to it. Common law does not only include England and so there are difference between the countries belonging to this system: Australia, USA, New Zealand, India (each country is more or less tied to the history f common law and the traditional legal forms of common law).
The starting point is the English experience-> the common law of England has never received the roman law and this system was neither affected in practice by the idea of codification and there was a not a revolution as occurred in France in 1789 or other continental state. The revolution that took place in England (the glorious revolution) contained a religious element and It wanted to limit the power the power of the king and not to abolish or substitute it (William the II), it was a struggle between the king and the parliament (absolute monarchy vs parliament sovereign of the state); so this revolution was in a certain way conservative to maintain the guarantee of the common law threatened by the king (converse of French revolution which wanted a new society with new order and institutions).
1066-> battle of axting when Normans guided by William I crushed the Anglo-Saxon system, in these centuries there have been a legal practice (some also in written form) organized by enlightened king such as Alfred the great. Normans gave a feudal organization to the English territories where the king has the supreme feudal title and then there were the barons who received the land from the king

……

Judicature acts-> approved in 1875 and represented the reform of the English legal system and procedure and today are the main feature of common law in England; this because England failed from the procedural point of view. In order to reform the system one must also reform the court.
The supreme court of judicature was divided in the high court of justice (with other several divisions, each specialised in a type of litigation) and the court of appeal.
Queen's bench division, Exchequer division and Common Please Division since 1881 have been merged in the Queen's bench division (all under one name).
The Court of Chancery became the Chancery division; then another division called probate, divorce and Admiralty division for those trial dealing with will, marriage which previous had different court (now abrogated and merged under the high court of justice).
The court of appeal was the merge of court which previous worked as courts of appeal.
A third instance was created in 1876 and was the special juridical committee of the house of lords.
This is the starting point to understand how to rationalize the court, but it had another important aim: to consolidate the system of common law and equity-> all the division of high court (as well court of appeal) which from this moment must apply rules and principles regardless of whether they are developed by common law or equity, so was resolved the problem of different court applying different sets of rules, and the possible conflicts arising in common law were resolved by section 25 of the act saying that the rules of equity In case of conflict with common law will prevail.
The third main achievement was to abolish the technical procedural consequences of the system of the writs-> abolish the system of the form of actions, the system developed for centuries fall in this moment, now there was a single writ; all trial from this moment in the high court were started using the same writ of Summons (a sort of technical writ, it's a formal demand in which the plaintiff describes the basis and the substance of its claim in a non-technical language). In abolishing the firm of action, there was also the unification of different rules of the different procedures before the courts.
There were also reform on the substantive law during 19th century, also in this case legislation altered substantive common law of institutions-> the school of Bentham had an influence on this reform, so at the end of 19th century was approved several statutes covering different areas of the law, all having n common commercial law: bills of exchange act, the partnership act, the sale of goods act and the marine insurance act. They did not change the previous rule and the existing common law, but they simply codified statutes, so they were presenting the existing rules in order to be understood better. There was no codification of family law yet, neither statutes on inheritance law or acts about general contract and tort law (all these fields remained developed by the court without a sort of presentation in a specific statue).
Law of property needed rationalization-> it was and still is complicate, in 1925 with the law of property act which simplified English law and rationalised the concept elaborated previously in the field of private law (was really old-fashioned); were promulgated also reform in all the area of law concerning the modern-social legislation (ex. Labour law).
At the beginning of 20th century the dichotomy between common law and civil law lost its meaning, differences are still present but they are not so deep, what's remains different is the way in which the judges and lawyers find the law and apply it to the concrete cases.
In the modern UK there are different communities: wales, Scotland-> until now one could can had the idea that common law covered the whole British island, but in reality GB is not legally unified; in particular Scotland have a different system form the common law system of the other states, unification of Scotland and England happened in 14th century under Edward I, but few years later Scotland became allies with France and received roman law, so for century Scotland developed in contrast with common law (it was a mix of customary law, Scottish statues, roman law and also the teachings of natural law thinkers).
In 1681 lord Stairs published the institutions of the law of Scotland-> representing Scottish law using a romanistic model: all these elements could be studied in this publishing.
At the beginning of 17 century King James I of Scotland inherited all the land of England, in these years the two system combined both on constitutional and international point of view-> Scottish courts system remained with Scottish law but at the end English law influenced by common law.
Scottish law was not codified as in the continent; it is a civil law system in a common law environment.

Courts and judges in England

At the lower level:

-magistrate courts available at district level, dealing with most criminal offences and some civil matters, there are magistrate without legal training, are appointed by the queen and selected by the lord chancellor from a list of name, they receive little payment but have huge social prestige; the procedure does not involve a jury, when a serious crime happens and there is a need for a jury, the case is brought by the Crown court.

-county courts deals with most civil cases, are managed by a single judge called circuit judges, there are also district judges (difference between competences, the first ear cases which have a higher value from the legal point of view, there are recorder (barristers with occasional juridical functions)

-crown courts deal with the appeals against conviction and sentence from the magistrates' court, available for all indictable and some either-way criminal offences

-high court with its division, it hears the appeal of the lower courts, all the cases are decided by a single judge

…

Structure of high court is useful to understand also the structure of the other common law courts of other states.

The court of appeal is a higher level than the high court and deals with the appeal deriving from it plus the appeals of the county court. The president is the master of the rolls (instead of lord chancellor), then there are 29 lord justice seating in 3 division or occasionally in 2.

The role of the court of appeal reviews every point of the previous judgment, but it does not evaluate the facts neither hears again the case (similar of court of cassation in civil law), the evaluation is limited to the correct application of law by the lower court.

Lord justice of appeal are famous barristers, this ensure the high court are maned by people that are extremely competent not only in law but also in practice, able to commend the respect the whole legal profession. This fact is discussed between scholars: lawyers, barristers and judges belong to the same working class represent the fact that the common law system is very conservative. For some parliamentary commission the way in which statues are created considers also this conservative attitude of judges (no option for judges to interpret in a different way in respect to the parliament's position when it firstly drafted).

The system of the appeal receives appeals from employment tribunals dealing with labour law and other tribunals such as tax Chambery, migration Chambery (all specialised tribunal created together with substantive law in these fields).

This is the highest court if we do not consider the supreme court (house of lords); supreme court cannot be compared to the court of cassation-> differences in number of cases submitted to the court, supreme court works also for Scotland (except for criminal cases) and Ireland, decisions are taken by a special committee of 5 judge, it hears cases from the court of appeal (only the most important that will be resolved in a way that will influence the future of the law in the country). That's why this court is a part of the parliament.

A special judicial committee important in the past is the privy council-> could be appealed by the supreme court of the colonies, the aim is to give advice to the king or to the queen on the petitions made by individuals of the kingdom that have without success exhausted the other legal procedures (also petition from the colonies of the commonwealth), had role also for a general development of the law of other countries and to adapt common law to the European system that was to the most part civil law (the situation will change after brexit).

Professional lawyer in England are divided between solicitors and barristers.

Solicitor= independent lawyers that gives advice to clients, empowered to take the necessary steps prior to arrive to the trial, may act in the name of his clients (in the procedure that precedes the oral hearing before the judge), in trial they have the right of audience I the magistrature and county courts (at basic levels of courts system), they are concerned in the transactions regarding land, the professional organisation of the solicitors is the law society (disciplinary procedures against solicitors which has to defend himself before another independent body), the fees are agreed between the solicitors and the client

Barristers= specialised lawyers that usually work before the higher court of the country, their role is the oral presentation of the facts and juridical arguments before the judge (they have monopoly on this

activity), the relationship with the clients forbids any direct contact between them (the solicitor is the intermediary who then choose the barrister for his client), today barristers are not entitled to form partnership, they form the sets of chamber (groups of 12/17 barristers specialized in the same field of law in the inn of courts-organisation of barristers-, each with a chief called clerk who makes the contact between the solicitors and the barristers in the chamber), fees depend on the difficulty of the case.
The supreme organ of organisation of barristers is the general council of the bar, the members are elected by the whole bar and they represent the interests of this profession, they have an important role also in legislation, they have strict link with the law society and the aim of the council is to give rules to the life of the profession (provide guidelines for conduct) and organises the training of future barristers by a specific committee.
The judge is not a legal profession as in the continent: barristers at a certain point of the career can submit to the lord chancellor a petition where they ask that their name in submitted to the king for the nomination of king's council (which represents the elite of the bar and from this level are chosen the high court and circuit judges).
Different professions and training means also different examination.

Diffusion of common law in the world
Common law system can be found in America, Australia, India (in a mixed way) and some states in Africa (ex. South Africa). This geographical distribution can be divided in 2 colonies:
-the first group did not have an indigenous system (ex. North America-> there were natives but there was not a developed system) and they are characterized by the first settlements of European colonies; native were at very beginning stage of development in comparison with the EU countries-> in this group USA, Canada, New Zealand, Australia
-second group of colonies are those land where at the moment of conquest were governed by princes which already developed a juridical system (ex. India), here the situation was different due to the presence of already existing institutions; the approach of English colonizer was different from the French one: British policy left intact the law and the traditions already in force in the colonies and also the court and judicial system developed by natives; English followed the principles of indirect ruling using the institutions they already encountered during the occupation of these territories; progressively also common law spread into these territories (English man that lived in these countries used common law to resolve litigation between them); in areas of family and inheritance were maintained the previous rules.
Australia:
Discovered in 17th century, only after the great adventure of James Cook England started to set some colonies on the east coast of Australia, it was firstly used as British prison-> using the methods of common law. The parliament stated that the law of Australia had to be the common law plus the statues that were in force in that period.
During 19th century was given to Australians the possibility to have local legislator -> when gold was discovered in here many immigrants arrived from all around the world, started a process of growth and was necessary to better organize the structure of the colony. The solution was a federation with many difficulties, first of all the creation of a code. The first draft of constitution was brought in force as the common wealth Australian constitution which entered into force in the 20th century.
In the federation there are 6 states, each of one having a legislature, a government and a parliament+ federal institution.
Ex. Federal legislature has tasks only in the field expressed by the law, all the other fields such as private law are left to the single state.
Australian law is similar form the traditional English common law, without any serious variation.
Australian case law follows British case law in many topics.
The various states in their legislation often had limited themselves in adopting the same English model, also in the draft of statues.
During 19th century all the states adopted the reform of the adjudicatory act (exception of south wales); progressively Australia have developed also original solution-> ex. Family law act in 1975 and reform of land law with the creation of a system of registration of land.

The system of the court is divided between the federal courts and the commonwealth courts. Usually state have lower courts similar to English magistrate courts dealing with minor trials; at the top of each national system there is the supreme court; hearings are carried out by a single judges and the appeal goes before a commission of 3 judges; there is the possibility to appeal all the levels of the system until the top level (high court of Australia-> appeals from judgment of the various supreme courts of the various states, whether federal and national local law+ resolve constitutional dealing among states).
The high court of Australia is different but also similar to the supreme court of USA-> the constitution of Australia has not a list of rights constitutionally protected, but it is present in the USA, for this reason the high court of Australia does not have the power to strike down a statue on the ground that it is against a right of a citizen.
The legal profession in some states follows the division between solicitors/barristers, the techniques are similar to the English system.
Canada:
It's a federal state (with monarchy)?
In 1791 the British parliament approved an act between the English and French communities present on the Canadian territory-> Canada was divided in two areas both under the sovereign of the British crown but each having its own parliament and government.
In 1840 was created a system in which the regions were united but each was given an equal number of seats in a common parliament, in 1867 the English parliament enacted the British North America act creating the federal dominion of Canada.
Other provinces were added to the Canadian dominion and by the end of the mid-20th century the entire north America was completely occupied and divided between the federal state of Canada and the federal state of USA.
The court system also is divided in two systems, one provincial and the other federal. At the top of the 2 system there is the supreme court of Canada.
At provincial level: provincial tribunal, p. court, p. superior court and p. court of appeal
Federal level: federal tribunals, f. court trial division, f court of appeal.
From substantive/procedural point of view, the system is based on common law and until recently it has never departed from the English method (for exception of the Quebec characterized by continental method).
Since the moment of abolition of appeal to private council in London (1949), it seems that the Canadian legal system has acquired more independence and also had developed innovative solutions.
India:
Europeans arrived between 16-17th century, it had a high level of cultural and political development which have been ruled by the powerful of the empire of Islamic/Hindu faith (there were religious traditions important also from the legal point of view). Europeans were rather to create a strong trade link between Europe and this world, this was done into 2 different ways:
-the respect of the sovereignty of sovereign prices and local aspects
-the establishment of trade centres to use the resources of this continent and have market for European products-> use of trading companies that acted under royal patent (authorization of the crown) ex. East India company created at the beginning of17th century by the queen; in 1612 the emperor of India allowed this trade companies to establish the first settlement in the region of Bombay (European traders had a place for their products). During 18th century the empire fell in pieces and the huge countries was subject to frequent wars between different princes, at this moment the English power had the possibility to increase the influence in this continent: develop interest in more intense control of the country in order to guarantee good business and affairs, so progressively the British empire extended its influence also on the territories of continental India. At the beginning of the 20t century, the role of India was under English political control.
The system of courts developed when there were created some tribunals dealing with Indian and English cases, the statues were written according to justice and rights (case resolution according to the English common law with the addition of those English statues that were approved and that were in force in 1726); there was a safe-guard close stating that these rules were not applicable in the case of specific local conditions.

At the end of 18th century this first court system in 3 big cities was replaced by a system of supreme courts -> were staffed by professional English judges, so they were mainly to apply the common law. However, there were areas of law in which Islamic or Hindu law were applied (litigation concerning affairs to family and inheritance).
Then was created a system of provincial court stuffed with English administrator, from this moment common law became the law of India apart in family and inheritance law. These officials were replaced by barristers.
The codification and unification of Indian law begun in 1833 with a special commission which had the task to collect the rule of positive law in India, put them in order and codify them in a useful way.
In 1861 code on civil and criminal procedure+ statues in private law (Indian act about inheritance, Indian contract act). In the 2ith century was approved a sale of goods act and partnership-> similar to English statues. They are still in force today.
After IIWW the claim for independence were satisfied in 1947-> were created two countries India and Pakistan. With the constitution was created a federal state with a central parliament having jurisdiction only in some area, while local areas have jurisdiction only at local level.
African states:
East part of Africa was occupied by the British empire (common law tradition) -> Egypt, Sudan, till south Africa. Many of these states however are not under the dominion of just one empire, but they present different systems belonging to different legal traditions (therefore, in this area the presence of common law tradition can be more or less evident and sharply-> stratification of elements).
The common law legal elements were applied in this place according to the policy adopted by the British colonizer (maintain the structure when there was already one) which is the indirect ruling; but in the African legal environment of 18/19th century the social structure was divided in tribes, so a different way to organize the society and the legal environment, it means that in this places it cannot be possible to find structured kingdoms with a bureaucratic apparatus that could be used by the English apparatus; as a consequence the conquest was simple thanks to the military superiority and the legal environment of customary tradition of the traditional population influenced by religious elements where the conflicts within the tribe were resolved by the community (usually by the oldest person in the tribe).
British ruler did not have the possibility to use an already structure, so they applied the common law rules for the settlers while the natives were left to their traditions in the fields of family and inheritance (exception for commerce, trade which referred to English tradition).
Starting from the 20th century the east area of Africa gained independence and were created stats that are drawn on the paper-> the boundaries which divided the state were established on paper by European colonizer, so also during the decolonization these boundaries did not correspond to the cultural/religious characteristic of these areas (conflict is not only among state but also within the state where the real essence of society is still in the tribal system and not in the developed bureaucratic system).
Roman law in south Africa has shown a great vitality until today, it has interacted also with common law.
The first colonizer of south Africa were the Dutch, this first colony collected in its population also german and French settlers-> the law of this colony was the law of Holland in the form of roman law adapted to the social and cultural condition of that time (mix of roman law from glossators and Dutch customary law).
At the end of 18th century English acquired this colony with the aim to secure a strategic position for the control of the ocean-> adoption of indirect ruling on the colony, as a consequence there was not a substitution of the previous legal environment, so the form of roman-Dutch law remained in force (while in Holland that form of roman-Dutch law was replaced). The control of English power brought new settler with the English law reasoning in procedural and civil matters.
At the beginning of 20th century with the Boer-war-> reach of independence leading to a parliament approving the first constitution (deal between boearian elements and English elements), the previous law of roman-Dutch system still remained.
With the constitution born the union of south Africa the influence of the legal environment stopped -> this new political entity started to conceive itself more independent from the mother-land, the new community distinguished the boearian and the English langue (also in legal field and universities). Since compromise the courts paid more attention to the text of Dutch writers and tried to adapt these text to a new modern century and new circumstances, at the same time common law remained in the procedures and the

organisation of the court, in administrative law, in the doctrine of binding precedent. Was reached the equilibrium between the two elements-> it's a mix of system where the 2 legal tradition live and develop together (civil law matters cannot be divided from common law matters).
Israel:
Was influenced by common law, but the actual Israel environment comes from different historical influence-> ottoman period, British mandate (till 1948), Israeli legislature and courts.
After ottoman empire, the league of nation gave this territory to the British empire which established the british-palestine order where the courts had to apply the ottoman law that was in force till 1914, the law approved in the middle period and the rules brought in force by the new mandatory English authority.
It is difficult to establish what kind of ottoman law was in force, maybe the majallah; during the British mandate this law was influenced by common law by a replacement of ottoman law with provision deriving from the English environment (laws already in force in great Britain), plus the influence of common law became stronger because courts applied it when there was no positive law to apply (gap in law) but also when there were no clear and problematic rules on a specific issue (interpretation of rules or application of common law rules).
With the creation of the state of Israel, the previous law was maintained beside the new legislation adopted by the new institution-> modification took place through time: the legal environment was basically common law (many provision are still I force today), the rules of ottoman origin were replaced by new ordinances and statues, the huge part of obligation and tort law were changed starting from 1965. The new ordinances had a continental character, so from formal point of view had civil law characteristic (general clauses, general provisions, vague terms that had to be interpreted by courts); the role of courts in Israel was basically a comparative work and influenced by tradition of common law.

…..
The American civil war had huge impact on American economic and legal development -> there were fields that necessitated new rules (commercial law). Changes also the way in which American lawyers are trained; at the end of 18th century there were some universities where professor where charged of delivering law lectures, since this period the legal traineeship environment have been different the English one (university became the main actors of traineeship of lawyers, in common law it was practical).
An important professor of Harvard school was the first to establish a program for the traineeship, but the real turning point was in 1970 with Langdell who invented the case-method (a way of teaching -> rules of law must be presented to student in the context of analysis of practical cases) according to which the law must be taught from case law to derive a critical discussion of the context of the decided cases that is analysed. Still today the legal education is provided by law schools, it created the figure of professors similar to practitioners (students do not have only a theoretical study but also practical).
The cultural aspects of the value of the society of that time in America were purely individualistic, so a sort of social Darwinism developed in here -> society is not a community, but individuals who try to have the most benefit from the economic environment, that try to pursue profit creating a very competitive environment. In this environment the intervention of the state is seen as something that must be prevented, economy and society are made by individuals that must be left free to act according to their own interest, the control of the state is not useful to achieving the public good (achieved only by giving freedom to the individuals). This was only the idea, but in reality were approved statement s and statues to provide some rules to the economic environment, there was also an active legislation in this period only to limit freedom if necessary to achieve the aim of growth and profit (Sherman act in 1890-> against monopoly in economy, bcs they were not good for capitalism and the creation of a competitive environment; Clayton act + other statutes to protect at federal and state level the workers), USA developed a legislation similar to the german one (Bismarck empire). After crack of wall street and great depression were approved stronger legislation to help the economic environment through the interventions of the state (New Deal-> aimed to help economy) which encountered the hostility of lawyers and supreme court, which tried to disapplication this statutes using the constitutional provision (statue was unconstitutional) without any result because the statue was applied.

There was also a change in interpretation of law, the old analytical and conceptual method gradually became not able to grasp all the new need of the new social environment, so there was the need of a reform.
Steps of reform: from 1910/1930 acceptance of pragmatic philosophy of Dewey, he rejected all kind of formalistic deductive and abstract reasoning (in Germany entered in force the BGB); Holmes rejected the traditional mode of thought; Pound stated that the legal system is the product of interaction between political, social and economic fields. What was important was the law in action paying attention on the concrete economic and social effect of these decision-> from theoretical point of view was fundamental for the jurists to have knowledge on these fields of human science
American realism (Llewellyn and Frank)-> law cannot be learnt from paper rules or textbook but only from the observation of judicial behaviour of the judges, so only from what the courts actually do and also comprehend how judges arrive to a certain decision (realist approach). Comprehension of judges' reasoning must focus on the social environment, cultural and economic but also the personal believes of the judges, political and moral values as well.
Another important approach developed in American environment was the economic analysis of law-> American lawyers and scholars started to analyse law in terms of economics: there is an aim in society to maximize the general welfare in a world where resources are limited and are not available in the same quality and quantity for everybody. Resources must be allocated to those individual that can use them to the best advantage. This approach promotes a situation in which the acts of individuals are directed to gain their own private advantage which will bring to the general advantage for the whole society.
USA must be considered as a federation of states, the complexity of system is due to the presence of state and federal level having each one a court system. The constitution establishes the legislative competences of the federal congress and of the states (ex. Commerce and private law).
The supreme court used the constitution to develop a huge integrated market among the various states in order to resolve the legal differences between states. Under judge Marshall this clause built the doctrine of the implied powers, giving to the federal state an important role in the various member state to guarantee uniformity of legal environment. Another clause that maintain a common environment is the commercial clause according to which federal powers have the possibility to approve laws to regulate commerce among the different individual states. However, the most part of private law is under the legislation of the single member state, also judges of states are free to develop the aw of the state in different directions. Sometimes individual states are egoistic in approving law, so they can create also market deviations but in the USA there are institutions which help to guarantee the legal unification of the country or to emphasize the similarities among the various provision that exists in the state.
The most important actors are the law schools, they teach the students in the same way as existed a sort of common law of America, from a positivistic point of view it does not exist but they teach how to think in the same way. Here comparative law is very important.
Another instrument to consolidate the creation of a sort of common law of America is the compilation of restatements-> entrusted by the American law institute (from Bar associations), it created restatements for the most important area of private law excepts family, inheritance law.
Restatements= similar to civil law code in their structure with general rules (allows also continental jurists to approach to USA law), they represent the rules and principles that are common to the different member state.
At the end of 19th century, it was useful to the USA to have particular topics regulated by similar provision in all states.
Then USA created uniform acts (by national conference of commissioners) which include rules, principles but also detailed regulation in specific field of law where a clear intra-American uniformity was considered essential, and so this uniform act are not only consolidation of living law but are true legislative act proposed to the single states for the enactment with the minimum possible amendments -> promotion of real legal unification in certain areas of law among the various American states.
The most important act is the uniform commercial code.
The competence of federal level is related to the control of the economy, many cases in which federal law and national law interact.
International private law regulate disputes on which law must be applied on a specific case.

States are divided in district. At the top of the judicial system there is the supreme court of USA, the power is hold also by the different inferior courts that the congress may establish (it ca create inferior federal courts), in 1789 In the very first act approved by the congress, it established the district courts.
District courts are federal courts of 1 instance, then there are the federal courts of appeal (2nd grade) and then of course the supreme federal court.
Each district court can have more than one judge, there are about 615 judges, actually there are 12 district of appeal at federal levels. Each court of appeal has a circuit comprehending different states.
Supreme court is available only if the judge decide that the case is valid by the certiorari (the party that have the possibility to arrive to the court, get a decision on the merit of the case as well as on the law) by at least 5 judges.

The court system at national level is diverse that is not simple to make a general statement about it. All state courts have common features characteristic. Civil and criminal matters are dealt by the part-time judges of peace.
In large cities lower courts are called municipal courts staffed by qualified judges, civil and criminal matters that are not trivial are heard before courts having one single judge (county courts)-> procedure is formal and may involve the jury in specific cases. The appeals for these courts often goes straight to the highest court of the state, only the states with a large amount of population have an intermediate court of appeal and are able to provide 3 level court system. Where there is not appeal court, the appeal goes straight to the state supreme court.
The federal system is a solution to resolve problems arising from the fact that citizens belong to different states -> jurisdiction for diversity of citizenship.
For a century after the decision Swift vs. Tyson it was established that in areas of judge-made law, the federal court should apply not the case law of any particular state but the rules of federal law which were developed independently (another way to guarantee uniformity in jurisdiction), to avoid the development of deviant rules different from one state to another.
This position was subverted by another decision in 1938 according to which there are case in which there is a federal statue where the federal court must apply it, nut if there is not a federal statue for resolving the case, the court must apply the written or unwritten law of the state in which the case was settled (Railroad vs. Tomkins).
Each state has its own constitution, the organization of government follows the division of power (legislation, executive and judiciary). Legislative branch is represented by the chambers (similar to federal system).
American system developed many independent authorities to approach specific problems (similar to Italy) like trust law, privacy law… these authorities are established at federal level and usually they are also created by national level.

Law finding process
Centralized system of court in England permitted uniformity of law in country, different in Germany were the central system of courts lacked and prevented also the rise of a class of trained jurists. In german was impossible to develop a national law able to create an apposition to roman law (when roman law appeared it was a new kind with the pandectist school), this situation originates the attitude of French law toward the role of law.
In the continent the judge is only a function of the state, is a part of the bureaucracy and the judiciary system as a whole is composed by persons at the service of the state, in common law lawyers (solicitors, barrister…) are not servants of the state. The continental procedure is characterized by the authoritarian approach, was adopted the romano-canonical procedure, while in common law the procedure is based on equal man deciding on a case (here is also the judge but it is preferred the role of the jury).
In France the situation is similar to the german one, the judge consider himself an officer of the states and apply the law according to resolve the case with the source he has at his disposal.
Also the method to discover the law and the legal thought is different. A common lawyer habitually start the legal reasoning from the concrete and sees the fact in the concrete, not the abstract and uses experience rather than taxonomies and abstraction of complex legal environment, has an empiric

background, has faith in precedents. A civilian differs because he is more rationalist, he has faith in deduction and syllogism.
However, it cannot be said that today these two systems are so different as they were in the past.
Common law is based on the binding precedent (stare decisis doctrine)-> developed in 19th century in its rigid form and establishes that every English court is bound by the decision taken from the superior court (hierarchical approach); until recently this doctrine established that the superior court (appeal, house of lords) were bound on their own previous decisions. This concept was not a product of legislation but derived from a judicial decision, so courts created this doctrine and started to apply it.
Doctrine of distinguish precedent-> Common lawyers developed many means to distinguish a precedent, and in doing so to avoid following a previous decision which in the new particular case would be not satisfactory, so the starting point of this doctrine is that a previous decision can be considered binding only where the basic reason underlying the decision (ratio decidendi) covers also the new case.
Ration decidendi must be distinguished by the obiter dictum –> analyse the precedent and any related decision handed down before and after the precedent is considered, a clear intellectual process following rules that may be influenced by conscious and unconscious value judgements.
In USA the situation is more flexible, the attitude of the courts uses this technique but with the practice of American lawyers which underlying extra-legal arguments. The superior court of united states had never adopted that they were absolutely bound their own previous decision, it is free to develop the constitutional interpretation and be able to depart from a previous decision (overrule a precedent); at national level the attitude of the supreme court follows the imprinting of the federal system, also for them the adoption of a binding precedent rule would not have been satisfactory. The attention of USA to living law and the need of society is clear in this position that law is in touch with the social environment of the current period. There is an investigation on these aspects and if the investigation arrives to the conclusion that the old decision is no longer adapt for the society, a novel ruling decision is rendered without any bug problem.
The position of binding precedent in England was abandoned in 1966 with a declaration of lord chancellor in open court and in the name of all the lords of the court. In this statement was established that this rule will not be followed for its precedents anymore.
There is no positive rule compelling a judge to follow its precedents, but it is enshrined in the living law, so despite the absence of formal doctrine of stare decisis, there is a string tendency to follow precedents (especially of the high court, and establishing common line of similar decisions).
Common law start the decision by analysing precedents (rules= the solution of a particular living problem), then observe how these rules have been limited or extended by other precedents on that topic, then considers the concrete factual circumstances of the case submitted and starting from the concrete characteristic of the case and from the rules identified, the judge finds a sort of high level principle/standard which he uses to give a solution to the case and finally he tests this solutions by evaluating the appropriateness if compared to the previous similar cases resolved in the precedents (if solution is congruent there is the final decision, if not the process must be done again. This approach is discursive and is testified in the fact the provisions takes place in a single session, in which all the legal arguments are presented orally and are discussed in a discursive and argumentative manner.
Continental judges are still formed and trained with the positivistic idea that resolving a case involves no more than the application of a particular given rule of law to a set of concrete facts, by using an act of categorization (subsuming the concrete circumstances of the case in that positivistic rule previously identified), so the first step is the identification of the rule in the statutory acts and legislative acts.
French court of cassation does not take in account the facts, but in Germany and Italy there are quotes of previous decisions in line with the current decision.
Also the use of headnotes (massima) testifies the different attitude between common law and civil law, it is a short abstract of the decision which explains the principle to resolve the case, these headnotes are very brief and are used in an uncritical way, they are quoted without the analysis s of the decision itself, it is used only the maxima but every case is different.
Also common law has headnotes, but they serve as a preliminary indication of the problem, they never substitute the investigation in detail about the content of the decision.

Statutory construction-> how a legal provision is drafted; we can observe differences between common law and civil law regarding the method of drafting.
Until 19th century the English legal system considered the legislative activity as necessary only exceptionally, in order to counteract some difficulties of the legal system and social/economic environment. Thus the legislative activity was sporadic, clearly also in the ranking of sources of law the legal provision had much less force than the unwritten common law. In this legal environment the statutory provision was conceived as having an exceptional nature and so also in drafting the statutory provision there was the attention to build them in a narrow way, very focused, I order to be able to apply the statue only to those precise situations which were covered by the terms of the statue itself.
The situation has changed and as court in applying statue apply a liberal attitude in interpreting the wording and pay much more attention to the comprehensive goal of that legislation. This process accelerated when the UK entered in the UE and was held to adopt the directives of the European community, in this new common legal environment it would be inappropriate to give a literal interpretation of British enactment of EU directive. Also the mental attitude changed and the first great judge of the SC was lord Denning.
Since mid-19th century, the statutory activity has progressively accelerated the adoption of new acts that were able to deal with the new necessities of society, so this drawing activity needed also a more specific set of rule for interpreting these statues. Until 20th century there was a rule stating that the judge could not look what was said during the parliamentary process-> considered to be partial, unreliable, expensive to discover and they were not considered a useful means to interpret statue. This rule was abandoned in 1993 when was introduced a new rule for interpreting statue.
Court today adopt a purposive approach, seeks to give realization to the real aim of legislation and s they are open also to consider other material that can make more clear the background in which the legislation was adopted. In the sense the continent and England have become close on this topic, also considering the techniques for statutory construction and interpretation. The huge difference lies in the creation of the legislative act by the parliament.
English statue tend to be as precise as possible, they are detailed even on trivial points, while they in the content are left to regulations. The English approach adopt a very detailed formulation and precise use of words, often adopt a form of expression very complex and pedantic. The most important concern is to put this attitude in the statue above all else. Considering only the legislative act, the laws of the continent are more clear and comprehensible, shorter than in the Common law system.
On the continent bills are usually drafted in the relevant ministry, in England they are prepared by staff of specialist from the parliamentary draftsmen.
There are areas of law where statutory law offers no rules at all or only general clauses to deal with all the aspects of that field, in these sections the judicial law-making is the most important actor. As the civil and commercial codes created on the continent became older, they lost they initial power and the legislatore had the need to make more specific regulations for the new problems of everyday life and also the case law had the possibility to fill in these gaps opened by changing society. Also in the civil law system and countries judges are playing a large role in the development of the law.
Anglo-american lawyers have much more attention in analysing the distinctive facts of the case, are more careful and trained in distinguishing a case from a similar one and also in drawing principles, rules for the similar cases. So they are always in very close contact with the circumstances of the case to find the best solution. This technique develops itself constantly with a progressive indication of constantly new principles of law.
Even common law technique requires the judge to look the general rule behind the actual decision in the relevant precedents, this is the only way in which the judge can establish if such rule can be apply also to the similar case of today. But it is a different attitude towards general principles, as they are not established in statutory provision as tin the continent but derive form the judge itself and are drawn out of a mass of case material using that inductive technique (starting from the particular to arrive to the particular). There is a considerable high degree of systematic order in the English legal environment, a high level of predictability for the decision of the judges. Clearly there are some system that have made ore attempts to give s systematic order.
When judges started to quotes also the legal literature, they give also voice to scholars.

Jury is the cornerstone of the procedural process in common law system, it cannot be compared to the continental jury. Jury trials occurred only in criminal cases in England, only when the crime is serious enough and when the accused has pleaded not guilty at first statement, so civil litigation have no jury trial as standard provision, but the role of jury is still recognizable.
The preparation of the trial by attorneys is very important, in civil law system there is a division in the trial in several hearings separated by intervals (mans that if a party makes any surprinsg statement or uses a surprising argument in one of this hearing, the other party has the possibility to produce further evidence in rebuttal of what was said for the next hearing), in American procedure law there is one single hearing so that's why the preparation of the trial before it begins each party has to be thought not only to all the arguments and evidences he wants to produce but each party must also know the arguments and evidence that the other party wants to produce (meaning of discovery in procedure). When American trials begin, the attorney must be prepared for them, the judge will have only a vague idea of the circumstances of the case, about testimony, issues. In continental law, judge has a more important role