

European History of Law

INTRODUCTION

Law = political and economic factors + intellectual elaboration

1. ROMANS → linked community membership to law
2. MIDDLE AGES → projection of Roman Law in Asia, Africa, Europe
3. COLONIALISM → justify imposition of European Law on other territories
4. XVIII CENT → revolutions
5. XIX CENT → creation of nation states

Before: law was spontaneously created by the community

After: law is created and can be changed

English common law is different from Continental/Civil law but they have common traditions

PART 1 – ANCIENT TIMES

1. Roman Law

509 BCE > republic; 27 BCE > Augustus emperor; 285 > empire divided; 476 > fall of the western roman empire; 1453 > eastern empire conquered by Ottomans

Roman law = diving duck; derives from neighboring polities (Hellenistic world)

Important elements: *EMERGENCE OF A SECULAR LAW, CENTRALITY OF CONFLICT RESOLUTION, EMPHASIS ON PRIVATE LAW*

→ new ways to think about normativity

Roman law began as a system to adjudicate conflicts among individuals that was centered on society's responsibility to guarantee order (= rather than violence, courts, that became more powerful overtime)

This emerging system was called *ius civile* (communal law, law of the civitas) and it was administered by PONTIFICES (patricians, guardians, experts). They followed religious and secular *MOS* (unwritten customs) → Roman law was rigid and formal >> list of *legis actiones* that litigants could invoke doing a ceremonial oath, utterance of certain words and performance of certain acts.

TWELVE TABLES = oldest set of rules; law was written down in order to reduce pontifices' power by making the law better known (fundamental to the proper functioning of roman law):

- Obligation of court's appearance
- Procedural rules
- Norms of communal life
- Family law
- Management of property

LEX = law distinguishable from the religious order (operate among community members, controlled by lawmakers → secular officers giving responsa)

RISE OF CIVIL LITIGATION:

- a. *Praetor urbanus* (public officials): nominated annually in order to oversee the resolution of conflicts; initially followed existing procedures, lately adjudication is introduced.
- b. Division of adjudication into two parts: *in iure* (within the law → identifying the legal issue and appropriate remedy) and *apud iudicem* (in the presence of a iudex, that had to ascertain the facts, listen to the parties, apply the solution that the praetor identified).
This division was useful to isolate the normative order from the chaos of everyday life.
- c. Introduction of new legis actiones (causes of action): praetors could create new solutions
- d. Praetors were allowed to create formulas (new legal actions: short pronouncements that categorized the issue legally) = ad hoc solutions, negotiations, identification of the iudex, summary of questions, facts.
- e. Iudex decided whether the facts justify the application of the rules or not (his decisions could not be appealed)

LIST OF FORMULAS = praetors began drawing up standardized formulas (more abstract, more potential since they could be applied to more cases). The list of formulas was posted in the Forum Romanum; lists of remedies (edictum) were annually published by praetors → gradually praetors started to refer to precedent edicts and under Hadrian edict were collected in an official compilation considered sufficient and final. Norms they created, granting or refusing remedies, became a new source of law, *ius honorarium* (law of remedies) which was practical and casuistic.

Ius civile + *ius honorarium* = synthesis between custom rituals, systematic presentation and everyday conflicts and resolution.

COGNITIO = new procedure: preliminary hearing and reception of proofs to a judge (the process was no longer divided into two parts; new officers as judges) → conducting trials no longer a public duty (now under the privy of appointed judges which delivered the sentence) and litigation no longer based on an agreement between parties.

JURISTS = *iuris consultus/jurisprudentes*: group of private individuals/intellectuals who

- a. Advised praetors on how to proceed by suggesting new formulas (analyzed real cases and gave opinion on hypothetical ones) + transformed the law by molding different tenets into professional knowledge
- b. Compare real and hypothetical cases
- c. Distinguished between normative and non-normative elements identifying the *quaestio iuris* (legal problem)
- d. Typified an enormous range of activities and social relations into a list of preset categories (=distinguish different form of sale) → from acts of will (individuals' action) to acts of knowledge
- e. New legal model = comprehend how people dealt with one another and consequences of their actions, adopt procedures operating abstractly

- f. *Praesumptio iuris* = assume that certain things were true without having to prove their existence (adopted as a truism unless it was possible to demonstrate the contrary)
- g. Began collecting responsa and recording court decisions
- h. Gaius' *INSTITUTES* (practical manual to introduce to law/legal thinking) divided Roman law into: LAW OF PERSONS, LAW OF THINGS, LAW OF ACTIONS

Jurists answers could be normative → fact that private individuals could express their opinion wasn't agreeable to roman authorities → system of licenses that prescribed which jurists were to be followed:

- Augustus's listing of jurists
- Constantine's instructions that only certain works could be cited in roman courts
- Law of Citation: allowed only the use of the opinion of five selected jurists (ex. Papinian) → emperors often employed jurists in their court

JURIDICAL TRAINING (chronology):

- I. No special preparation: trained in rhetoric, no legal training per se
- II. Professional preparation began appearing → group of apprentices followed a master as he gave advice or speeches. Teaching was informal and voluntary.
- III. Two rival schools appeared: Proculians and Sabinians.
- IV. Locations = courses on a variety of subjects and final certificate
- V. 4th cent CE schools came under the control of emperors and teachers became civil servants (Theodosius II declared illegal to teach outside state institutions)

LEGISLATION:

- Assemblies could pass *leges* (statutes) or *plebiscita*
- Senate (legislative body) recommended and prescribed *senatus consulta* (solutions). Later, during the principate, a new form of legislation appeared: *oratio principis* (emperors could deliver speeches suggesting the senate the norm to be adopted)
- Collection of imperial constitutions: *CODEX GREGORIANUS* (from Hadrian to Diocletian), *CODEX THEODOSIANUS* (legislation from 306 to 437 CE)
- Roman emperors who wanted to influence the legal order legislated massively: published *edicta*, rendered *decreta* (judgements), gave *rescripta* (answers to questions of law)

IUS GENTIUM = since roman law was applied only to the citizens of Rome, peregrini had their own *ius civile* (different for each civitas). Around 4th-3rd cent BCE a system called *ius gentium* was created and the person who administered it was called *praetor peregrinus* → this was considered a universal system and it had a much greater liberty to add/subtract/change the law

>> principles, formulas, remedies and edicts that the praetor peregrinus adopted established important new practices and doctrines followed by other praetors and jurists.

>> *ius gentium* was said to represent human reason and the nature of things

EXTENTION OF ROMAN LAW THROUGHOUT THE EMPIRE:

- a. Roman law was tied to citizenship (inherited status)
- b. 4th-1st cent BCE > citizenship extended to most individuals living in Italian peninsula and Gaul
- c. 213 CE > Caracalla's edict granted citizenship to all free residents of the empire

>> to broaden validity of Roman law they broadened citizenship, transforming foreigners into citizens

Expansion= important developments: emergence of peripheral and provincial roman legal systems ("vulgar") → fragmentation of roman law accelerated → ANTONINE'S CONSTITUTION: tried to replace any previous legal tradition with roman law (this goal was unattainable, thus it resulted in a complex structure of parallel legal systems), extended citizenship

Jurists tried to conceal this extreme pluralism by redefining the scope of customary law, indeed all differences between old roman law and local law resided in local customs → roman law is transformed by a massive penetration of non-roman concepts and legal arrangements

Example: Iberian Peninsula evolution:

- Initially, roman law for roman citizens and indigenous law for natives
- Indigenous law became Romanized
- Provincial edicts added to the growing body of local law
- Citizenship expanded since more people were considered "worthy" → all free residents made roman citizens → in theory only roman law should exist, but indigenous law persisted due to the fact that there were few experts in roman law
- Amalgamation of roman and non-roman grew with the fragmentation of the western empire → *LEX ROMANA VISIGOTHORUM* which reproduced a simplified version of roman law (Gaius' Institutes and Theodosian code)

>> Diocletian's decision to divide the empire into two parts caused a gradual emergence of eastern (influenced by Hellenistic culture) and western (influenced by Germanic traditions) roman laws.

Byzantine law gave rise to the *Corpus Iuris Civilis*, most important compilation of roman law.

CORPUS IURIS CIVILIS (CIC)= collection of various pieces of roman law, sanctioned by Justinian. It included several independent compilations prepared by experts with the aims of 1) restoring the glory of roman law 2) supplying a practical code for the eastern empire. It contains:

- a. *CODEX*= various texts of imperial legislation. It is a fusion between three previous compilations: *Codex Gregorianus*, *Codex Hermogenianus*, *Codex Theodosianus* + Justinian's decisions on how to solve certain conflicts. (divided in subjects and laws disposed chronologically for each subject)
- b. *DIGESTA/PANDECTA*= extracts from jurists' writings. Topics: private law, family law, property law, contract law and inheritance. 50 books
- c. *INSTITUTES*= based on Gaius' manual for students. It contains the principle of roman law and divides it into three parts: 1) law of persons 2) things 3) actions.

>> juridical opinions in the digest and the institutes now acquire the status of law

>> Justinian prohibited references to the original material and forbade the elaboration of commentaries or glosses.

After 476, the CIC continued operating in the east, with some mutations:

- 1) Gradual adoption of the Greek, which was the legal language, rather than latin
- 2) Creation of a distinct roman legal system due to the 11th cent schism

Despite this divergence, eastern practitioners asserted their reliance on roman law → byzantine emperors presented their legislations as amendments of the CIC and it was maintained in legal education.

2. The creation of Latin Christendom

1st cent CE > new religion: Christianity, which initially was rejected by roman institutions but in the 4th cent Constantine recognized it as one of the possible religions and Theodosius I declared it the official religion of the empire.

Earthquake in law: NEW SYSTEM → normativity was now tied to a shared creed and it was propagated by believers, who introduced this creed and roman law across Europe, creating the Latin Christendom

Characteristics: God as a lawmaker and basis of the relationship between God and believers was a covenant that assured that is believers obeyed God they would be rewarded → God is a virtuous power that acts through legislation.

Differences with roman law:

Roman law	Christianity
Focused on conflict resolution	Based on an agreement between parties
Elaborated by praetors and jurists	Divine origin
Open to all citizens	Offered by God only to the Israelities
Different in identification of right/just behavior and conceptualization of what community consisted in and what it was destined to achieve	

CHRISTIANIZATION OF ROMAN LAW? = historians disagree on how important/pervasive Christian influence on roman law was

- 1) Little changes (= the idea of a divine law didn't immediately influence, officials applied same norms as before, criminal law upheld old traditions, families functioned as they did in the past, social stratification was still there) → mutations were not necessarily tied to Christianity but could be easily motivated by an evolutions common to Christians and non-Christians.
- 2) Contents of roman law shifted trying to reach an integration between roman law and Christianity (= sins became crimes, new regulations regarding pious bequest, distinction between appropriate public entertainment and not, indissoluble marriage, legitimization of natural children, pay alimony to wife and offspring, control of sexual conduct, practices concerned with charity and welfare) → Christian culture gradually penetrated roman law

Historians also debated why emperors introduced Christian ideas into their legislations: 1) motivated by religious beliefs, 2) were politicians seeking to maximize their power.

ROMANIZATION OF THE CHURCH = when Christianity became the religion of the empire it was subjected to a process of Romanization:

- 1) Christianity was influenced by Hellenistic culture (Greek-speaking) → Latin replaced Greek
- 2) Local in character and composed by different self-regulated communities → state, additional system of law and series of authorities began regulating Christian life >> process of CENTRALIZATION
- 3) → late roman emperors presented themselves as defenders of the correct faith and as leaders of its propagation
- 4) → 4th cent: emperors called meetings to declare basic tenets of Christianity:
 - a. Council of Nicaea (Jesus-God relationship + Nicene creed)
 - b. Council of Constantinople (divinity of Jesus + trinity)
 - c. Council of Carthage (official canon of the church)
 - d. Early councils (procedures to ordain clergy and synods + principal liturgical practices)
- 5) → Imperial intervention grew: interfered dictating solutions and forcing them on opponents (persecution and punishment)
- 6) → became matter of imperial law

HERESY = debates could be legitimate (schism) or not (heresy) → division in orthodox and heterodox

Roman emperors began legislating against heretics as criminal offenders (complete fusion church-empire)

St. Augustine advocate persecution of heretics (dangerous dissenters)

PROMOTING CONVERSION = fusion imposed a single dogma on all believers and punishment on heretics. It also promoted conversion:

- a. Granting privileges to converts
- b. Economic limitations to pagans + destruction of their temples + prohibiting pagan worship under death penalty
- c. Favoring Christians in public offices and prohibiting the employment of pagans
- d. Pressure on elites

>> St. Augustine advocated the use of coercion and violence to promote conversion → roman law became an instrument to impose conversion

CHURCH AS A ROMAN INSTITUTION = identification between church and roman structures:

- Bishops = consuls and praetors (judicial, administrative, legislative powers >> religious and secular realms) + in absence of the government undertook state officials' responsibilities
- Dioceses = roman units
- Church = corporation/universitas (own property, receive gifts, make contracts)
- Buildings = basilicas (places where assemblies met)
- Church canons followed imperial style and were obeyed as imperial decrees
- Bishops responded using jurists' forms and formulas.
- Divine Institutes after Gaius' Institutes

>> Hobbes: "papacy is no other than the ghost of the deceased roman empire"

Christianity transformed Rome and roman society transformed Christianity → *res publica christiana*

EARLY M.A. = Christianity, and therefore roman law, spread throughout Europe

- 1- Foundation of monastic orders + affirmation of the papacy = expansionistic mode
 - 2- Christianity spread in most of central, northern and eastern Europe → homogenizing effect (=roman law and structures all over Europe) → Christianized understanding of roman law won primacy (propagated language, rhetoric, culture, law, procedures...) and it's noteworthy especially in places that weren't part of the roman empire
 - 3- This diffusion and homogenization resulted in the "making of Europe"
- >> East → Hellenistic orientation; after 1453 eastern roman law survived in the institutions of the Orthodox church.

PART 2 – THE EARLY MIDDLE AGES

3. An age with no jurists

5th-1000 > chaotic → emergence and imposition of canon law across the continent; meanwhile:

- Extreme political fragmentation > multiplicity of small and independent polities
- Massive movement of Germanic people (initially allied with the roman empire and later worked to make it fall in the west) → kingdoms established in Germany, France, Italy, Switzerland and North Africa

>> introduction of new legal cultures mixed with the existing native/roman/canon laws → complex amalgamation (different from place to place)

800 > mix of local, Germanic, roman and canon law crystallized → first example of COMMON LAW

EARLY CANON LAW = Christian law was modified → entirely dependent on church authorities and power on all believers = Canon law (based on a spiritual authority, local in focus thus it could differ from one place to the next)

6th cent: to reinstitute a central authority, bishops in Rome began claiming a special role for themselves (since church was the only entity who could claim universality), identifying themselves as *Pontifex Maximus* or Popes → consolidation of papacy led to centralization (assemblies of bishops regulated relations between authorities and communities and defined contents of Christian dogma)

Reign of Charlemagne => collection of canon law and distribution of copies throughout the reign

Plurality of sources and absence of an authoritative compilation led to the formation of local collections = uncertainty and introduction of forgeries (false papal decrees, fake documents created by collectivities) into the collection by Isidore Mercator (letters/decrees attributed to early popes: treatise on early Christian church + authentic canons)

>> forged decretals limited secular rulers' control over church authorities and property since they were considered reliable and followed

ex. Donation of Constantine = Constantine had transferred imperial powers onto Pope Sylvester and his successors + pope is the successor of Peter and Paul + Rome is the main Christian center + popes could appoint secular rules → fundamental in 11th and 12th cent

>> despite anachronistic information and inappropriate style false decretals were well executed and fooled even high authorities

PRESENCE OF ROME:

>> canon law ensured presence of roman law/forms/formula/terminology/analysis. It was taught in abbeys and cathedral schools and was used where canon law was silent → 6th cent: Rule of St. Benedict and Etymologiae by Isidore of Seville made references to roman law/terms/normative solutions → *Ecclesia vivit lege romana*

>> in the Eastern Roman Empire CIC (roman law references/forms/discussions) was used

>> in Frankish Empire clerks imitated roman practices (donations, testaments, sales, contracts) + in Gaul formulas were used in secular and ecclesiastical administration

>> in Iberia = Visigothic rules with roman origins + in Galicia there were copies of the *Forum Iudicum* (lex visigothorum) which survived under Muslim occupation as the "personal law" of Christians

GERMANIC ELEMENT = did Germanic tribes have a common legal tradition?

Due to the intense contact with other cultures we can't distinguish their previous mores (our understanding is incorrect). If they shared anything at all it was an Indo-European culture → primitive approach to law (orality)	Elements inserted into the European mainland were Germanic (ex. Organization of public life: groups led by elders who decided everything)
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Legal systems were concrete, relational and influenced by rituals and formulas

3rd-4th cent: Germanic members influenced by roman law and Christianity = centralization and aristocratization (assemblies restricted to elites/military leaders claimed status of hereditary kings) and legal attitude changed (promulgation of more systematical and abstract law books and statutes in Latin to ensure the survival of "the good old order"/)

ex. Pactus legis Salicae → collection of older norms, legal basis by which European monarchs (exclusion of descendants from female line, long list of remedies, latin, organized as a roman edict)

Liber iudiciorum → roman and Germanic origins, enacted by Visigoth kings on Iberian subjects, approved during the Council of Toledo, covered legislation, administration of justice, family law, penal law, sanctions against Jews and heretics

Orality was no longer central → codices and books appeared, chanceries were founded, seals started to be used

10th cent: it is hard to distinguish between Germanic/roman/canon law, but Latin expressions and Latin/Christian ways dominated

DIVINE INTERVENTION

- 1) Before 13th cent: God's direct participation in communal assemblies considered possible and desirable → he could intervene indicating who was guilty and who was not with a form of miracle as an answer to ordeals (church encouraged tests)
- 2) 13th cent: Fourth Lateran Council prohibited the participation of the clergy to ordeals → result of the birth of the ius commune that provided society with jurists, who managed conflicts based on collection/evaluation of written/oral proofs

- 3) Criminal justice in both secular and ecclesiastical authorities → deauthorization of ordeals = major legal changes: new way of solving difficult questions, adoption of new legal procedures (inquisitorial process: judges decide on a verdict) >> from ecclesiastical to civil courts
- 4) Late 13th cent: use of torture to achieve certitude

In England: gradual delegitimization of ordeals, increasing power of lay juries in criminal cases (task of issuing final verdicts, determining the veracity of the accusations), qualification of jurors (local who was familiar with the case and ruled based on personal experience).

FRAGMENTED/UNIFIED WORLD = huge geographical extension in which norms could be radically distinct, since they derived from Roman, Germanic, local and canon law. Legal universe was segmented, multivalent and conflated morality and law (human order similar divine order) → settling difficult disputes required the intervention of local experts (*iuratores*), but other cases were adjudicated by village or town assemblies open to all.

Use of particular formulas and a specific script and rituals: some historians think they reproduced a customary law, others think that practices were always negotiated.

>> appeals to tradition (only tied to one generation's memory) were usually strategic

>> norms were recited orally in public meetings in order to fix them in people's memory. They were far more stable but modification was still persistent

FUSION OF SOURCES = Charlemagne's activity is emblematic of the mixture of local/Germanic/canon/roman law:

- 800 = nominated by the pope "emperor of romans" → Charlemagne guaranteed military support to the church and freedom from the eastern roman empire; Charlemagne was both king and emperor and could intervene on ecclesiastical affairs
- Arranged/systematize existing solutions to ensure obedience to them
- Intervened in religious ("protector of the church"/reformed ecclesiastical institutions/sought to restore clerical discipline and to recover church properties) and secular affairs (writing down of local laws/promulgated edicts in order to establish the authority of courts, while his empire was still fragmented)
- Canon law (= affected diverse activities as contract making or debt collection) and Local law (= covered members of communities and coexisted alongside princely norms) were parallel normative systems → potentially contradictory, but this amalgamated system never lacked in coherence → represented how things were and ought to be

JURISTS? = such system required no jurists, since norms were oral and supposed to be learned, but experts were not lacking: canon lawyers and moral theologians, legal advisors for emperors and kings...

Without these experts we would not have had the very successful 9th cent forgeries; they also wrote the first glosses and commentaries on roman and local law (ex. in Pavia scholars were divided in *antiqui e moderni* based on the field they were more competent).

Professionals gave advice to kings and subjects on how to proceed and pondered how God's law could be discovered and implemented.

4. Lords, Emperors and Popes around 1000

1000 > changes with chaos → extreme fragmentation (no common authority + attempts of unification failed) and migratory waves from within and Muslim's invasion → economic changes (decline of commerce and move to a subsistence economy) and birth of new social, economic and political institutions = FEUDALISM

11th-12th cent > feudalism came under attack → authorities called themselves kings and church centralization + competition between secular and religious power + competition between kingdoms (kings/lords) and within church (pope/bishops)

PORTRAIT OF FEUDALISM: not practiced identically everywhere; conventional portrait:

- Relations of personal dependency between lords (powerful individuals) and vassals (subject population)
- Unequal exchanges = lord protected vassals who had to be loyal, obedient and had to give aid, service and advice
- Ritualized affair: "homage" ceremony (= vassal declared his wish to become part of the lord's household and took an oath of fidelity/lord hugged or kissed the vassal who became his man)
- Initially was a mutual protection as military defense
- 10th cent > began involving property relations (economic protection = properties were given to a lord in exchange for protection) → lords are proprietors of large domains and allow vassals to have usufruct/tenure rights in exchange of some compensations (subjection/allegiance)
- Lords began ensuring vassals a financial aid and their duty extended to judicial protection too (judges who used customary laws of the land) → end of the communal justice practiced by assemblies and juries
- Became an economic system of exploitation → rights/obligations became hereditary for lords and vassals = system of personal dependency

FEUDAL SOCIETY= 1000 > Europeans lived in rural estates tied to a lord who exercised jurisdiction over them. Lords had legislative/executive/judicial powers and were guided by local law and supposed to follow also canon law.

Feudalism was multilayered in a hierarchical structure: megalords, lords and vassals → pyramid guaranteed loyalty and imposed restrictions on the emperor, who depended on the mediation of minor lords.

>> changes: monarchs began to expand their jurisdiction seeking to diminish the power of their peers → lords became member of royal households and kings to facilitate the submission encouraged the growth of cities ("free" = under the king's direct authority = no lords) → kings instituted themselves as supreme adjudicators.

ex. method succeeded in England with the birth of English common law

QUESTIONING FEUDALISM >> in 1990s it was considered only a model that was rarely put into place, indeed not all contemporaries lived in a feudal regime and existed free peasants → theoretical abstraction

9th-10th cent > structures of European polities changed: villages became dependent, demand for protection pervasive, pyramidal power structures → relations between communities and authorities mutated and led to the formation of monarchies and states.

LORDS, EMPERORS, CHURCH AUTHORITIES

- Mutual dependency between church and German emperors = Carolingian Empire → initially Charlemagne, lately Otto I crowned by Pope John XII as the emperor of the Holy Roman Empire
- 11th cent > relations become fraught: open conflict due to a disagreement over whether emperors could appoint bishops = **Investiture conflict**: which is the correct relation between pope and secular power?

>> roman traditions: emperors=*pontifices maximi* (no distinction); after fall of western empire: Popes Leo I and Gregory I pictured themselves as leaders of secular powers; 6th cent: Germanic monarchs called themselves protectors of the church.

>> with powerful lords' autonomy of the church was compromised → customary for lords to appoint bishops, were also feudal lords and had jurisdiction (administrative and financial powers) → both pope and overlords wanted to control the nomination of powerful bishops.

→ 11th cent: pope Gregory VII made a reform, whose aim was to obtain control over the nomination = *Dictatus Papae* (denied German emperors the right to nominate bishops + church founded by God and only universal body + popes could depose emperors and free vassals + secured the primacy of the pope → no one could judge the pope and his decisions couldn't be appealed + pope was the successor of Peter → only one who could use the imperial insignia + pope is holy)

>> 1076 > emperor Henry IV ignored the papal nominee for the archdiocese of Milan and the pope threatened him with excommunication → Henry called the **Synod of Worms** > bishops declared Gregory deposed and excommunicate the emperor. In 1077 Henry declared a new pontifex (Antipope Clement III) and went with armies at Rome's gates → Gregory escaped and died.

>> 1122 > **Concordat of Worms** = compromise between emperor Henry V and pope Callixtus II: election of bishops is a papal privilege and emperors can intervene in case of dispute.

EU LEGAL HISTORY

- 8th-9th cent: roman, Germanic, canon, local laws + determined by lords/superlords/emperors/kings → covenant between unequal partners (lords and vassals), indeed it wasn't neither religious nor secular, but lords identified as religious leaders and vassals obeyed because of an oath

>> consent, agreement, exchange are at the basis of political power → **contractual vision of politics**

>> Investiture Conflict = pivotal point: first attempt to reestablishing distinction between secular and religious power, picturing the church as an independent legal system which relied on legislative solutions created only by the pope. + propelled the rebirth of roman law in Italian universities

PART 3 – THE LATER MIDDLE AGES

5. The birth of European *Ius Commune*

12th cent > pivotal moment: **Renaissance** → demise of feudalism + economic prosperity + demographic boom + urban network enlarged + immigration intensified = monarchical powers expanded and towns grew in size

>> these changes affected European law that from really fragmented created the *ius commune*, that could bridge differences, supply to the need for reform in public law → novel method to approach normativity.

STUDY OF LAW IN EUROPE = in 12th-13th cent a legal revolution took place shaped by 3 interlocking elements:

- Discovery and reconstruction of ancient roman texts** = new sources
CIC fragments circulated in Europe through an abbreviated version of the Code and parts of the Institutes. In 11th cent "rediscovery of the Digest" in Bologna during the Investiture Conflict (church and lords wanted to appeal to roman law) → people began reconstructing the CIC, which they thought represented real roman law
- Scholasticism** = new methodology to analyze texts
new method based on the assumption that roman texts couldn't be contradictory, there was certainly a harmony. It consisted in: philological analysis (dialectical thinking); since sources couldn't be contradictory logical arguments were employed (ex. *distinctio*) → aim: uncover the *regula* (basic essence of roman law) that explained solutions' consistency = digest was an excellent source of terminology, concepts and criteria; textual exegesis (attention to specific terms/order/meanings) in order to ascertain that documents were accurate → ancient law of Rome was reinvented by medieval jurists
- Learning centers which grew into universities** = new intellectual environment
Universities appears. They weren't a completely new phenomenon:
 - Late antiquity > schools of grammar, dialectic, rhetoric, arithmetic, geometry, astronomy and music
 - 1st cent > schools where law students congregated
 - 5th cent > law school institutionalized
 - 6th cent > monastic schools appeared (poetry, astronomy, mathematics, understanding the Scriptures)
 - 8th-9th cent > episcopal and cathedral schools
 - 12th-13th cent > universities appeared in a bunch of European cities (Paris, Bologna, Oxford) with: *studium generale* (theology, medicine, law), truly pan-European environment, Latin as the teaching language → pope and emperors encouraged
Universities created a new sociological figure, the "intellectual" = studying became a way to advance to middle classes → new type of nobility based on intellectual achievements + legal councilors became essential in legal interactions

This revolution was driven by the prominence of new kings who needed to justify their extending powers, by municipal corporations and by the papacy. It created a new European normative order and new professionals (intellectuals)

HOW THE SYSTEM WORKED = discussions on the fragments (*glossa*= brief annotations of a text that explained its terminology/content/principles/main points) → glossators tried to harmonize the different parts and allowed to develop specialized terminology, categories

ex. **Rogerius' gloss** = studying the Institutes, he defined justice as "the constant and perpetual desire to give to each man the due right" and desire as "a purposeful choice" → the intention of dispensing justice was sufficient to qualify the action as just → importance of "intent": what you did and the result is no less essential than the state of mind

= justice contained central mandates: live justly (first precept referred to crimes against oneself/sins), not to injure others (referred to crimes against other people → commission), to render to each his own (referred to crimes against other people → omission).

Scholars began collecting and publishing legal questions (real or hypothetical cases jurists had to discuss); collecting glosses in the *apparatus*; publishing *summae* with discussions on contents of Institutes and *commentum/lectura* (reproduced lectures).

14th cent > scholars, basing analyses on glosses, began giving *consilia* (written opinions on law) → applied theoretical debates to everyday situations (practical applicability fundamental)

ex. Bartolus of Saxoferrato wrote commentaries giving counsel on power of German emperors in Italy + conflicts + legal consequences of changing the course of rivers upon property rights and jurisdiction → revolutionary conclusion: territorial jurisdiction can change due to human activity

CANON LAW = Scholasticism was applied to canon law too:

- Reconstruction of the law's corpus
- 12th cent > Gratian's Concordia Discordantium Canon (systematize different sources; describe church hierarchy; list activities; judicial procedures; church property; religious orders; doctrines and matters of law)
- 13th cent > Decretales and Liber Sextus + 14th cent > Clementinae
- 16th cent > Corpus Iuris Canonici

Centuries of analysis to explain apparent contradictions → canon law jurists wrote glossa and developed vocabularies, principles juridical thinking → roman and canon law became hard to distinguish > *ordo iudiciarius* (romano-canonical court procedures)

FEUDAL LAW = scholars began discussing feudal law:

- 12th cent > Libri Feudorum (collection of feudal courts' decisions, feudal customs and legislation)
- 13th cent > "feudists" wrote commentaries on the libri feudorum and feudal law was studied in universities → romanization of feudal law, since it was discussed using roman terminology + scholars appended part of it to the CIC

Scholars cared about feudalism when it started to decline everywhere, so it allowed to develop doctrines dealing with the relations between the different social classes and land rights → mutual obligations between rulers and ruled, therefore monarchs that didn't respect the pact could be considered tyrants → **identified elements that could serve to structure and control their society**

IUS COMMUNE = revolution in European normativity: scholars continued to disagree, but using common terms, concepts, arguments and techniques → new vision = juridical thought based on reason and new juridical method = *ius commune*

It was different from classical roman law (new scope, method and intention), but same idea that jurists are the forefront of juridical creation and that jurisprudence is the most important normative source

- New juridical science expanded in Europe > by the 16th cent, *ius commune* was present everywhere: it was initially backed by secular rulers and municipal authorities, who used it to solidify their power

(ex. king Alfonso X of Castile incorporated the new method into Castilian law, producing the collection *Siete Partidas* that became fundamental in 15th cent. Later Castilian monarchs limited the power of *ius commune*, in order to limit its effects, and established a hierarchy of legal sources: royal laws – customs (*fueros*) – *Siete Partidas*, thus *ius commune* doctrines couldn't be applied without their consent)

- Historians thought about *ius commune* as a substantive law, in opposition to other legal traditions; later they tried to systematize it and preexisting laws (indigenous, canon, feudal laws = *ius proprium*) and *ius commune* perfectly coexisted.

>> aim: synchronize local arrangements by reinterpreting > *ius proprium* gave concrete solutions to specific problems, but problems and solution should then be analyzed by *ius commune* + in cases in which local law didn't find any solution, *ius commune* could intervene, supplying terms, concepts, procedures and techniques

Since monarchs sought for help from jurists to rule their kingdoms, *ius commune* became pervasive and modified *ius proprium* (ex. juridical discussion of naturalization: individuals' adherence to a community was tied to birth or descent; foreigners who wanted to be part of a community had to change their nature and it required elapsed time and certain type of proofs they listed)

Main goal of *ius commune*: **make roman, Germanic, local, feudal and canon law cohere together into a common system.**

RESULTS = new techniques (ex. peasants in small villages between Spain and Portugal reproduced juridical doctrine regarding land rights → peasants had not studied law and it's hard to tell how they came to this knowledge → norms they invoked were natural, universal and needed no explanation) → conclusion of *ius commune* were logical, reasonable and so widely accepted that contemporaries assumed they were common to all humanity, immutable and true.

12th cent's study of law revolutionized European normativity, spread through institutions, who were convinced of its superiority.

6. The birth of an English Common Law

5th cent > Roman law was initially introduced in England, but what happened next is a matter of debate: 1) with the withdrawal of roman troops roman law and Christianity ceased or 2) pockets of both persisted among Celts.

6th cent > roman, canon, Germanic laws were introduced = situation was similar to the one in the continent

7th cent > Anglo-Saxon remedies were written down with the aim of replacing blood feuds with monetary payments + testaments cited *ius ecclesiasticum* as their guide and inspiration

9th cent > Christian influence on legal remedies was clear (references to the bible)

>> feudal law penetrated too → laws written after the Norman Conquest: *Quadripartitus* contained anglo-saxon laws translated in latin, latin documents, treatises on status that followed roman law structure.

11th cent > England developed a distinct legal system → English common law

UNDER NORMANS = Norman Invasion was accompanied by a legal continuity: record of laws that predated their arrival → William the Conqueror and Edward I employed men of letters as councilors (ex. Lanfranc, archbishop of Canterbury) that advised on secular matters and helped in the compilation of existing laws/customs

>> 12th cent > Vacarius introduced the study of roman law and composed the *Liber pauperum* (extracts from the Digest, Codex and glossa) → CIC became available + training in canon law was introduced in universities + Englishmen studied in the continent + canon law was used in the courts instituted by Normans, but after Reformation it needed a royal approval before it could be used.

IMPOSITION OF ROYAL JURISDICTION = at the beginning Norman kings depended on feudal lords and wanted to limit their powers → relinquish gradually the mediation of these lords and extend kings' jurisdiction: Henry I and II instituted a system of royal courts:

- Kings demanded the right to intervene only when they were physically next to the litigating parties

- Began appropriating the power to ensure peace in special days
 - From protecting dates, to protecting territories > 3 miles from where they physically were and railroads/waterways
 - Lawyers developed a legal fiction according to which the king was present everywhere in the kingdom, thus protection of the monarch included the entire realm → king's peace became a common right
- >> imposition of temporal and geographic royal jurisdiction was carried out by assigning matters to royal hands (issues that were worthy of their attention)
- >> local/municipal/feudal/ecclesiastical courts persisted, but royal jurisdiction superimposed on them → weak = 18th cent > royal judges had no supervisory functions, thus there was no hierarchical pyramid between different courts → litigants could decide to which court take their claims

SYSTEM OF WRITS = development of new legal mechanisms: king delegated plaintiffs to other men.

>> Initially royal intervention was administrative: when the king received reports of wrongdoing, sent trustworthy individuals to redress the situation with a writ (order written in latin with king's seal: reproduced the version of the offended and included an executive instruction meant to guarantee peace) → easily abused

>> From administrative documents, writs became orders to initiate litigation: they allowed wrongdoers to defend themselves and to chose whether to appear in front of the royal courts

>> A new procedure called pleading was born: plaintiff would present himself before the royal official to present the facts, defendant would respond confirming/denying/implementing, plaintiff invoked preestablished answers → formal procedure: the exchange continued until the parties found what was agreed and contested and then case went to trial → parties had to prove the facts and then the adjudicating official determined whether the remedy in the writ should be granted

Writs became instruments allowing litigants to begin a lawsuit before royal officials (justified king's intervention → if chancery decided that there was no reason for the king to intervene royal courts had no jurisdiction over the affair)

Initially writs were ad hoc and particular, delivered sealed and used only once, pragmatic and practical → royal attention was an exceptional grant (depended on the king's willingness to intervene → writs' creation was driven by private interests)

Writs became institutionalized → became a fixed formula (*praecipe quod reddat*) that litigants could obtain → royal jurisdiction extended and became routine >> writs success was tied to monarchs' ability to attract litigants to royal courts: litigants preferred royal jurisdiction, because thought it was more efficient → judgement were recorded and stored in the Tower of London and a system of conflict resolution was born = **common law** (common because it was superimposed on other jurisdictions and was open to all those subjected to the English king)

COMMON LAW = by granting writs, king modified the normative order, indeed allowing a specific remedy recognized the existence of a right. The relationship remedy-right became fundamental in the system → arguing that common law was a system of rights of Englishmen (*habeas corpus* regained prominence: remedy against unlawful imprisonment) → idea that remedies created rights (1704: House of Lords reversed a decision of the Queen's Bench on a case in which a man was deprived of the right to vote at the parliamentary elections: even if his candidate won he should receive a remedy, because no remedy=no right)

Common law was attentive to procedural issues: pleading was the most important issue and royal justices controlled that the parties followed an acceptable script. Since knowing and employing writs was difficult, legal literature concentrated in describing ceremonies and formulas and advised practitioners on how to channel cases, reproduced the dialogues between parties and judge. Procedural rules were at the center of how common law courts operated: many embodied the "due process" to make sure that judges would be impartial, since their task was to oversee the exchanges between litigants at the court.

"writs of error" allowed a superior court to review and correct the proceedings of lower courts but only on procedural errors → no appeal, despite exceptional cases in which a new trial was ordered (opposite of *ius commune*) → common law judges refused to depart from traditional system of rules in order to ensure material justice.

PROFESSIONALS = judges were trained professionals who studied canon/roman law in university

@ Ranulf de Glanvil (*Tractatus de legibus e consuetudinibus regni Angliae*: manual that surveyed the work of royal courts)

@ Henry of Bracton (*De legibus et consuetudinibus Angliae*: collected the norms of common law referencing to roman law. It appealed to *ius commune* categories and scholasticism, emulated the order and division of CIC)

These cases weren't unique, common law experts adopted roman solution frequently. 14th cent > monarchs appointed to the bench laymen with no university training, because they were obedient servants → parties needed a particular set of skills (knowledge of French and Latin). Need for growing expertise led to the emergence of legal specialists: procurators (stand for an absent party), barristers (specialized in the pleading), attorneys (counseled clients). Barristers began frequenting the Inns (spaces for socialization and training: offered apprentices sessions of mock trials focusing on the process of obtaining evidence, following procedures, analyze written texts, argumentation of the law=moots, usually watching courts in action)

HOW = 1608 pivotal moment "Calvin's case": birth in a territory under allegiance to the monarch was the condition that rendered individuals English (Calvin was born in Scotland under king James of Scotland. He had to inherit land but the parliament opposed. Courts made a remedy saying that he could inherit land: was he English? Yes!) → Calvin's case was a fabricated lawsuit, but it appointed that Scots were English subjects.

>> basic questions could be resolved by appealing to the courts and requesting a remedy → why inheriting was connected to foreignness? Procedural requirements: in order to inherit land, petitioners had to prove their genealogy by supplying local witnesses = impossible when petitioners were abroad → practical difficulty was interpreted as inability to inherit (absence of right)

BACKLASH = proliferation of writs and growing presence of royal jurisdiction weren't appreciated by the lords/barons → rebellion that ended with the adoption of the **Magna Carta (1215)** which sought to guarantee the privileges of barons and freemen, ensuring feudal control over inheritance and land → Henry III ordered to stop the creation of new writs and Edward I promised no new royal court would be established → 14th cent > new system: king would institute new procedures and litigants who could use writs took their cases to the ordinary royal courts, those who could not find an appropriate solution addressed the Chancery and requested extraordinary intervention → **equity**: new system of conflict resolution: gave remedies only in exceptional cases and it had no preset list of causes of action. Cases adjudicated by the Chancery Court → flexible system because it depended on the discretionary powers of the chancellor

14th-15th cent > legal developments: creation of new instruments: issuing of injunctions + means to enforce judicial decisions + prohibition of enforcing unreasonable contracts. New areas: trust, mortgages, guardianship, bankruptcy, corporations, fraud.

Equity became more institutionalized and evolved in a system of permanent solutions → clearly became a second system of royal adjudication that was parallel to common law > integration between the two began (T More)

ROYAL LEGISLATION = kings legislated enacting important statutes:

- Assize of Clarendon 1166 > Henry II modified criminal procedure (accusation by jury + jurisdiction by kings)
- Statutes of Edward I > jury's trial became compulsory even in scope of actions for damages + modified aspects of land regime
- Statute of Uses (ownership and taxation), Statute of Wills (inheritance and property law) and Statute of Fraud by Henry VIII

13th-14th cent > parliament began acquiring additional powers (legal/economic/political/administrative nature) + power to enact was still in king's hands → the importance of royal enactments is debated:

- Royal legislation could not contradict arrangements + common law was superior to royal legislation that mainly repeated existing norms + even if statutory law was important it was responsible only for a small fraction of the growth of law (criminal/property)
- Judges discussed what statutes prescribed and lawyers were taught to comment on royal legislation (statutes books were copied for their use)

WAS ENGLAND EXCEPTIONAL? = common law consisted of a collection of remedies and procedures for settling disputes that developed as a result of the prominence of royal jurisdiction (belief that royal courts were more efficient) + common law courts competed with local/feudal/ecclesiastical courts and even with chancery court (equity). Was England exceptional?

@ it was due to the impermeability to the influence of roman law and *ius commune*, which didn't penetrate because it wasn't necessary, indeed when it became available, England already had a modern and efficient legal system

@no modern/centralized/efficient English system ever existed → normative order was divided in numerous kinds of courts, with few judges, and contained rules originated in roman/feudal/canon/germanic/local law. It was developed by a French dynasty that used roman/canon law jurists, who employed *ius commune* terminology, concepts and methodology to better comprehend common law. Norman monarchs sought to achieve affirmation of royal legislation over others, appealing to their duty to keep peace in the realm = to kings in the continent, except for the fact that they used their own courts instead of *ius commune*.

>> England diverged from Europe only gradually → 14th cent > noticeable: kings selected laymen not trained in roman/ canon law to expand their jurisdiction (= common law gradually parted from the rest of Europe) → growing prominence of lay juries that became assemblies of local men who answered collectively under oath to questions asked by royal officials → employment expanded: in civil/criminal litigations as a mean of fact-finding

>> 13th cent > jury existed even in the continent but with a different role > in England, judges would oversee procedures, juries would decide whether to prosecute and whether a conviction should follow

>> historians point to similarities between common and ancient roman law: conflict resolution and courts were at the center of the legal system + trials were divided between a first stage (question was framed) and a second stage (nonprofessionals evaluated the facts) + granting remedies created rights + remedies (writs/formulas) were initially ad hoc solutions, then tended to be repeated + after they fossilized legal creation was channeled → jurisprudence and legislation in Rome + legislation and equity in England → legal system kings instituted was heir to a European past and engaged in their European present

PART 4 – THE EARLY MODERN PERIOD

7. Crisis and reaffirmation of *Ius Commune*

Premise of *ius commune* was the existence of a single community, the Latin Christendom, which was catholic. → heirs to the roman empire, shared: submission to the pope, single legal system, extreme localism but single ecumene → political division grew as monarchs affirmed their supremacy, strove to control territory and fought to establish themselves as sovereigns

16th cent > Protestant Reformation → political + religious fragmentation > idea of common Christian law under attack

LEGAL HUMANISM = intellectual sign of fissure, new current of thought, product of the Renaissance → **humanism**: intellectual, political, artistic movement that began in Italy, which sought to put man at the center, glorified antiquity (antiquarianism) and understood that human experience was circumscribed by the period and place. Stressing differences and divergences across Europe, criticized *ius commune* for disregarding context and employing no historical perspective, abusing roman law to solve present-day conflicts. Humanists insisted that law was the product of particular circumstances, thus sought to historicize and contextualize it. They also criticized Scholasticism, because it misunderstood the nature of the legal sources since it was based on the assumption that these must be coherent (useful method for developing a *ius commune*, nevertheless very wrong) → digest comprised fragments written by different people in different times, thus they couldn't be consistent, they each obeyed the logic of its time → to truly understand roman law jurists need to historicize and contextualize it

FRENCH METHOD = new: *mos gallicus*, practiced by most French legal humanists, included historical and philological approach to roman law (reconstructing texts, publishing critical editions, reorganizing roman compilations according to genealogy, studying revised texts) → made contradictions consequential, since they proved the development of law overtime. French humanists sustained that judicial exegesis obscured what law was and they strove to discover an evolving normative world → relied on close reading of texts and applied their knowledge of the past to their analysis (studying medieval jurisprudence underlined the misinterpretation due to the fact that people who elaborated it were ignorant of classical culture, dismissed change over time and adopted assumption that everything was coherent)

PROTESTANT REFORMATION = 1517 > Martin Luther published 95 theses against indulgence → legal rupture:

- Made people ask whether a single community of belief existed → answer was mostly negative → protestants began elaborating their own laws
- Can law guide Christians? Protestants believed in a lawgiving God, but salvation became an individual affair (didn't require legal mediation) → only secular authorities should elaborate sanctions, while faith depended on God's grace → need to obey God's will (translation of the Bible in vernacular)
- Interpretations affected the normative world (no single community/legal order + legal expert weren't necessary to guide to salvation) → century of religious wars

EFFECTS OF HUMANISM AND REFORMATION = subversive > *ius commune* depended on religious unity and tied to the prestige of Rome, thus it had to be questioned >> church reformers disputed the authority of the pope and advocated a return to an early Christianity, humanists claimed the same for roman law → return to an early and authentic past could be achieved by better understanding of antiquity

REIMAGINING LOCAL LAWS = legal humanists extended criticism to the political sphere, reacting against the assertion of supreme power → mos gallicus led some French humanist to turn attention to local law > France needed to have an authentic law (no ius commune), which was composed by local laws with their commonalities and differences → if there was a law of the land it must have been superior to others >> trying to affirm the specificity of French law attention was turned to feudal law: found the idea that relation between lords and vassals relied on a pact → political subjection was based on a pact: claiming that monarchs who didn't fulfil the pact could be considered tyrants and could be replaced (resistance and revolution)

CUSTOMS = François Hotman (humanist) had the idea of writing the laws particular to France, identifying them as customary, with Germanic origins. He wrote the Anti-Tribonian (purging French law from canon/roman law, critic to universities' monopoly of juridical training, professors should teach French law, believed that studying CIC as roman law was ridiculous) and the Francogallia (uncover institutions' origins, existence of a political pact that delegitimized claims for absolutism)

Under ius commune judges, customs had acquired this prominence: Local norms from oral/flexible to written/formal → campaigns to consolidate it greatly modified it: the process was slow:

- 1) Early MA > jurors decided how conflicts would be solved, without invoking to abstract principles/rules replicating preexisting norms
- 2) 13th cent > local decision making depended on customs, thus juries discovered and applied norms already existing > local law was made of a series of customs that evolved over time
- 3) High MA > assemblies were responsible for identifying and applying preexisting norms: jurists began inquiring what customs mandated and they asked whether jurors were sufficiently familiar with communal arrangements and whether their telling was true/just. → conclusion on what customs truly described
- 4) Jurists began formalizing law using abstract/general categories, systematized solutions → aim: find solutions more abstract that could be used in different cases >> centralization
- 5) Emergence of royal bureaucracies and relations between local and central powers > locals needed to obtain recognition of traditions and central powers to know the limitations in their freedom → to facilitate it = standardizing customs
- 6) Passage from orality to written forms → since germanic territories were deeply influenced by ius commune, customary law and ius commune merged together

MONARCHIES AND WRITING CUSTOMS = 13th-14th cent > jurists drew up compilations of local law; 15th-16th cent > kings began campaigns to write down customary law, which called representatives of noblemen/ecclesiastic/commoners with lawyers to agree on what local customs were and prepare written texts → territory divided in: *pays de droit écrit* and *pays the droit coutumier* (rhetorical opposition) → French customary laws claimed to be ancient, but they weren't: commissions negotiated with locals, seeking to influence norms by deciding what would be written down and how >> wrong to conclude that French customary law is in opposition with roman law, indeed jurists employed roman terminology, criteria, doctrines to register customs

POLITICAL UTILITY OF CUSTOMS = Hotman hoped that writing down customs would limit royal claims for sovereignty, but kings that did the same sought to achieve the contrary. Commissions imposed their opinion and favored the unification of various customary regimes and selected customs → law was fixed and no longer negotiable: it became royal law and was legitimized and obeyed because the king had so willed → **growing intervention of kings in the normative order, customary law would replace ius commune, kings augmented their power under the pretense they were conserving an ancient law > hegemonic presence**

8. Crisis and reinvention of Common Law

16th cent > England experienced religious/political/social/economic strife → creation of the Anglican church by Henry VIII (no male descendant, succession crisis); 17th cent > debates regarding the legal consequences of union between Scotland and England (legal unification?) → 1603 James I declared that all ancient laws were ipso facto null and void, determined that monarchs were above the law and divinely appointed → growing confrontation between king and parliament > 1611 James was dismissed

>> Edward Coke (chief justice) believed that since monarchs were under the law, judges could censure their activities → power struggles continued in Charles' reign too, with the dismissal/impeachment of some judges and abolishment of some courts → tensions within the judicial system: equity judges exercised a jurisdiction that allowed extension of royal power (trained in roman/canon law) and common law judges view them as allies of royal pretensions and followers of a foreign legal system → 1616 James declared that when equity and common law contradict, equity should prevail

>> Civil war: armies representing Charles I clashed with parliament's ones → anarchy, parliament accused the king of breaking the pact, convicted him to prison and sentenced to death → 1649 monarch executed and republic was instituted with Oliver Cromwell as the leader → 1660 monarchy was restored by Charles' son → 1688 > parliament invited William (Dutch prince) to marry Mary and rule over the country. After he confronted James, he took the crown. Terms were detailed by the parliament, which in 1689 published the Bill of Rights, listing also important checks on what the king could do → new modernity

DISSATISFACTION WITH THE LEGAL SYSTEM = 14th cent > common law came under pressure, due to the opposition of barons/lords and this led kings to stop creating new writs → pressures to reform the system led kings to authorize the chancery to intervene in new cases giving exceptional remedies + royal statutes created new rules and procedures. Growing complexity due to the variety of sources and the far too rigid/opaque system: remedies and procedures weren't obvious (written in Latin/French) and style of annotation was difficult to follow → legal system was uncertain, inefficient, dysfunctional > multinormativity was perceived as chaotic and needed to be systematized/clarify hierarchies between jurisdictions

QUESTIONING ROYAL JUSTICE = initially criticism to common law only suggested some reforms: 16th-17th cent > criticism against monarchy, which was a threat to common law, since it expanded due to the monarchy's prestige + discord regarding how to identify the legitimate king's heir + questions whether kings were subjected to the law + conflicts between common-law/equity judges (should common law, backed by parliament, be superior to equity, backed by king?) → 17th cent > conclusion that Charles I was a tyrant (executed) and James II was removed. Legal experts searched to rescue common law from traditional dependence on the crown and sought to subject equity to common law → **reinvent what common law was**

JURIDICAL RESPONSE TO CRISIS = 16th-17th cent > three measures to reform and safeguard common law; they changed the significance and substance of common law and by 18th-19th cent reinterpretation was no longer contested, common law was the only legal system of significance in England, which included customary laws and constitutional arrangements:

- 1) **Making common law independent from the king** (consider it based on a customary law that predated Norman conquest)
 Coke made up a fictitious story, which reversed the basic understanding of what the law was (political utility): common law wasn't created by the king through writs-giving, but it was a customary law, Anglo-Saxon in origin, that Norman kings recognized → law was created by the community and upheld by judges, thus it was an authentic autochthonous law > kings and judges were forced to obey the law, because it was customary and, with the pact, they had promised to do so (otherwise tyrants)
 Aim: place common law judges at the heart of the juridical system, charged with identifying/applying preexisting norms (autonomous body that obeyed only the law) → to do this it was necessary to rewrite history from the Norman conquest: Normans were legitimate heirs and willing to submit to the normative order > the conquest became a "non-event" since it had not changed the tenets of English law. 12th-13th-14th cent legal revolution (birth of common law) was ignored: considered a continuity with ancient times (development). In this way a powerful argument against James I's idea to unify kingdoms and impose a new legal regime was created: even Normans didn't dare to change the law, so he could be easily contrasted by legal experts.
 New fiction facilitated ideological transformations: "common" because it was created by the community + different from other jurisdiction because it was the experience of generations + essentially oral, was based on what communities thought to be normative, it was part of Germanic tradition, thus immune to canon/roman law (capable of resisting papal power)
 Support among experts: William Blackstone (Commentaries on the law of England) agreed with this analysis: common law was as old as primitive Britons, unchanged and unadulterated + England never experienced any exchange of system → reinterpretation was successful (Coke elaborated rules and explained their reasoning in order to propagate the view that common law was ancient and superior: "common law was what Sir Edward Coke said it was")
 Eliminating dependence from the king, experts placed the courts at the center of normative system, charged judges with the responsibility to implement and safeguard the law, solved the issue of what would happen to law if the throne were vacant (law would exist anyways) → experts disguised a profound change putting it as a continuity and saying they were restoring what kings had taken
WAS COMMON LAW CUSTOMARY? = ius commune and common law judges, by appealing to customs, sought not to confirm the good old laws, but to change them (IC judges had the aim of systematize what they considered customary laws, CL judges wanted to use resist royal jurisdiction) → ex. under a mask of continuity Norman kings sought to achieve change: "Laws of Edward the Confessor": said to reproduce the law of the land (Normans asked to write down norms asking to local jurors), with the aim of maintaining only those norms that favored them → Glanvil and Bracton perceived the law as customary and this idea can be traced back to specific authors who suggested that the true *lex terrae* included the customs of the land
- 2) **Making common law the law of the land** (all other courts/jurisdictions inferior and common law authorized to oversee them)
 Coke concluded that concluded that only common law could be considered the only *lex terrae*, because it was the only one that was shared by the entire realm → only law in the land. Maitland thought even that feudal courts were but a local projection of a general common law
WAS COMMON LAW SUPERIOR? = different opinions:
- Peasants didn't know how to access royal courts, thus feudal courts weren't clones of CL courts → no reason to emulate royal jurisdiction or allow royal norms to affect
 - Feudal and royal courts responded to similar constraints, while feudal sought to identify the most consensual solution → each time feudal/local norms were upheld by royal courts, royal jurisdiction won additional legitimacy
 - Since local norms maintained their power, locals struggled to identify which they were → diverse system of norms as valid as CL
 - Reformation courts followed canon law and kept doing it even after it was considered a foreign law → separate English ecclesiastical law never came into being
 - Equity had begun converging with common law, but was still separated enough to instruct monarchs to call it superior to CL
 >> common law is essential but it never operated on its own, it wasn't superior and neither absorbed nor affected other jurisdictions
- 3) **Common law also limited what the king could do** (ancient constitution)
 Important component: norms that governed the relations between individuals/community/king → Normans promised with a pact to respect what was now reinterpreted as an ancient constitution (included the duty of subject to obey the monarch and legitimized royal command, limiting what the king could do). However, it didn't say much about the contents of the pact: experts looked for documentary evidence, locating historical texts that contained central elements of this pact = Magna Carta would come to symbolize the monarchy's promise to uphold the existing law and agree to limit its powers
WHY THE MAGNA CARTA? = (Magna Carta: feudal charter, compromise between king and barons at the end of civil uprising; referred to the right of land, inheritance, taxation) It aimed to ensure the collaboration king-barons and was long and casuistic, it was considered a political document that could be used to pressure the king. In 17th cent it was considered the best proof of what customary ancient constitution of England included. Experts centered the attention only on few parts: ch. 39 > no free man shall be captured/imprisoned except by lawful judgement of his peers or by the law of the land > precedent and justification for the habeas corpus writ + ch. 12 > taxation could be levied only by the common counsel of the kingdom → selective reading introduced ideas mostly originated in 16th-17th cent. Magna Carta was chosen because:
- Easy to read different parts out of context → it was malleable
 - Written in the formative period of common law and expressed protest against royal jurisdiction
 - Perfect document because it mentioned negotiations between king and nobility
- >> final message: if England had an ancient customary constitution, the king was obliged to respect it.

PARLIAMENT AS GUARDIAN OF CUSTOMARY LAW = 17th cent > Parliament was the only that could guard this new law against infringement (assembly representing the kingdom) and ensured the primacy of the existing legal system → king must legislate in collaboration with the parliament → affirmation of parliament is evident in the **Bill of Rights (1689)**, solemn proclamation by the parliament presented to William and Mary upon their ascension to the throne; it placed parliament at the stage, stating that parliament was legitimate because it represented the people. It contained: liberties jury/due process/taxation + rules that sought to protect the parliament from royal intervention → incoming monarchs agreed: parliament gained capacity to choose/crown monarchs
 Common law was customary, thus legislation couldn't change/create it, legislative acts were only meant to clarify it → Dicey, in Introduction to the study of the law of the constitution, stated that parliament was sovereign → guaranteeing centrality of judges was the idea of binding precedent (previous judicial decisions could illustrate the meaning of the law to justify a future ruling), thus tendency to cite the past grew >> Coke made frequent use of precedent to determine what the law dictated. Binding precedent was introduced in common law and equity courts in 18th cent (common law as a judge-made law)

WAS ENGLAND EXCEPTIONAL? = refashioning local norms as customary included a constitutional pact, which limited the royal authority: this is common both to England and Europe. England had a genuine customary law on its own and English humanists were influential → proximity and potential permeability between England and continent; the possible differences happened in the early modern with the reinvention of common law, rather than in medieval times.

9. From *Ius Gentium* to Natural law: making European law universal

European countries engaged in overseas expansion: Portugal > western shores of Africa (trade gold/slaves); 1487 > Bartolomé Dias rounded the Cape of Good Hope; 1492 > Columbus reached the Caribbean; 1497 > Vasco da Gama reached Calicut; 1500 > Cabral reached Brazil → extension of European hegemony >>> complex outcomes: encounter with non-Europeans + need to settle rivalries among Europeans overseas + renewed use of roman law + discussions regarding natural law.

ANTECEDENTS = roman *ius gentium* (laws common to all polities and based on human reason and experience) → it is frequently identified as natural law, based on the assumption that what is common to all community is innate in humans and thus part of natural law (!praetor peregrinus!) > identification between *ius civile* and *ius gentium* led to the imposition of roman law in the entire empire. This assimilation came under attack with Christianity: center of Christian normative was God, creator and lawgiver, thus natural law was conceived as divinely mandated → writings of St. Augustine and Thomas Aquinas argued that god and bad were imprinted in men's heart by God. In Christian law, powers derived from the authority of God, thus it was superior to all normative orders and could criticize human institutions.

IBERIAN EXPANSION = what law should apply overseas? By what right they extended overseas? → Spain controlled large populations of non-Europeans and this caused moral/political/legal implications:

- 1493 > justify their activity with the papal license Inter Caetera: they were engaged in the expansion of Christianity. Giving this license to Spain, the pope give them the monopoly, excluding other European countries and setting a meridian passing 100 leagues from the Azores and Cape Verde islands → solution criticized: implication of papal authority outside Latin Christendom + papal authority extended to secular issues + restricted Spanish privileges, restricting their activity only to conversion
 - 1494 > treaty of Tordesillas: negotiation with Portugal that moved the meridian at 270 leagues west of Cape Verde → unsatisfactory: it wasn't observed by other Europeans and didn't indicate the relation between Europeans and natives
 - Jurists suggested to appeal to the doctrine of "just war": to be justified law had to be self-defense or against an enemy that was likely to attack → how to launch a just war in the new territories? To ensure that hostilities against natives could be portrayed as just they devised a new legal ritual, the requerimiento (formula to read before the battle began; contained summary of world history: creation + Adam and Eve + division into nations + Christ + papacy + Inter Caetera, and specified that to facilitate conversion Spaniards had the right to dominate lands, explained the natives' duty to obey and subjection to Spain). If natives refused the requerimiento, Spaniard would be authorized to enter the country forcibly making war
- >> this sought to transform Indian resistance into an act of disobedience, which validated the launching of a just war.

REBIRTH OF IUS GENTIUM = 1530s-1540s > new theories emerged: Francisco Vitoria's Second Scholastics gave theology the status of an autonomous discipline, that proposed solution to pressing political/moral questions. He explored the legal order in Spaniards' America and dismissed the 7 justifications used:

- Charles V wasn't the lord of the entire world, thus he had no jurisdiction on the new world
- Pope wasn't a universal lord, thus he couldn't have power in civil matters
- Papal bull could give Spanish nothing
- Discovery might be a good basis for the acquisition of rights only if the land is truly vacant
- Conversion to Christianity is illegitimate
- Voluntary choice to subject to Spain would be sufficient to legally legitimate acquisition, but there was none
- The idea that God gave Spaniards the Americas as a special gift was based only on faith → inconsistent

Vitoria came up with a new proposition: both Spaniards and natives formed legitimate organized societies, thus both were under obedience of the natural law, which was also called law of nations (*ius gentium*) and was universal. It recognized fundamental freedoms: allowed Spaniards to arrive, settle and trade in Americas + liberty to tell the truth, which included the duty to preach the gospels + Spaniards authorized by natural law to do so, thus if natives reacted violently, they contravened natural law and could be legitimately attacked.

>> the result of this analysis was the same of previous explanation, but the approach was revolutionary: idea that a natural *ius gentium* regulated relations between Europeans and natives > this relation didn't require intervention of a superior authority and it derived from nature and applied equally to all people

COLONIAL IUS GENTIUM = *ius gentium* founded on beliefs regarding what was just/reasonable → Vitoria tended to consider the norms of his place and time the most logical/universal (ex. the freedom of immigration, used only in Spain, was extended in the law of nations) → his idea was to move *ius gentium* into natural law and making them both universal: he imagined the *ius gentium* as a precursor of today's international law > European norms were decontextualized and made universally valid

>> these ideas were soon trod by intellectuals: Alberico Gentili referred to *ius gentium* as natural law in "On the law of war"; Hugo Grotius did the same to advocate the freedom of the seas; as *ius gentium* penetrated England, experts recognized it as part of common law → success of these ideas is tied to the need to solve concrete questions and motivated by the search of norms common to all Europeans: wars encouraged the quest for a new normativity. By the end of the process Europeans agreed that this law had some unquestionable principles, justified by reason and self-evident.

REIGN OF SELF-EVIDENT TRUTH = began with Grotius, who citing previous authors, appealing to commonsense, making a reasonable analysis, reached the conclusion that those ideas were so natural that could be understood by all (ex1. private property: god gave the world to mankind collectively, men began fighting, world divided among them + ex2. freedom of the seas: property is something that people can possess, since they can't possess the sea, it is free) >> the citation of authors and use of logic was tied to the needs of the period: find a normative system that could be shared among Europeans and non, Christians and non + scientific revolution, elaboration of epistemologies made people believe that knowledge could be acquired only by observation (René Descartes, Meditation on First Philosophy: reach truly logical conclusions through "systematic doubt") > only setting mind free, humans would be able to guarantee that their knowledge of the world is truly based on facts/reason; if humans domesticated bodies/senses they would be capable of true reason

17th cent > applying new epistemologies to analysis of society (Enlightenment), it could return to simplicity, nature and pure reason → after intellectuals understood what nature dictated, jurists translated it in a new normative system > philosophers and jurists attempted to reconstruct humans' primitive state, imagining a natural man who was unchangeable, timeless and universal (presocial being), but they differed as to what were the terms that led men to enter society:

- 1) **T. Hobbes**: presocial state of anarchy and war + social covenant: entered society consented him to obtain safety in exchange for some of his natural liberties; obey the state
- 2) **J. Locke**: presocial state was comfortable + social covenant: entered society and agreed to very few concessions and preserved most of his natural rights, chose society with the aim of further safeguarding his rights

>> profoundly political: justified or questioned emerging social/economical/political structures, no longer invoked the power of God, referred only to reason. At the center of the narrative there was man, individual who acted out of self-interest

ROAD TO REVOLUTION = **new natural law was rational and individualistic** > man and his needs at the center of the normative order; individuals had the capacity to govern themselves and determine their future; each individual was authorized to employ his own reason to decide what was right/wrong since there were self-evident truths and indisputable principles.

New natural law was radical > vindications were justified by rights said to be natural and inalienable → normative order seen as a system aimed at harmonizing the rights of different individuals, allowing free exercise as long as it didn't interfere with the right of others. All these things led to extreme turmoil: American and French revolutions.

PART 5 – MODERNITY

10. North American developments

1776 > 13 British colonies declared independence and formed a new republican government; 1787 > federal constitution proposed; 1789 > 12 amendments proposed; 1791 > 10 of the 12 amendments became the Bill of Rights

Why?? → 1) importance of a constitutional disagreement in Britain (whether parliament represented colonies and taxation should be applied there too + debate on status and authority of colonial assemblies) and 2) colonials believed that king and parliament violated their customs and liberties and this authorized them to rebel

>> colonists declared independence and appointed constitutional assemblies to draw up pacts between them.

FOUNDATIONAL DOCUMENTS = 1776's Declaration of Independence dissolved the political ties that connected the states to Britain; it contained: a) brief survey that stated that men are created equal and had inalienable rights (life, liberty, happiness) + governments originated from the consent of the people and had to protect rights (if it didn't, people have the right to elect a new one); b) enumeration of injuries and usurpations by Britain; c) assertion that those acting did so in the name of the "good people of these colonies"

>> colonies drew up constitutions, that eliminated references to king and Britain, but conserved the previous local legal/political systems + 8 states added a declaration of principles (bill of rights = universal principles + specific arrangements), necessary because the people invested in their governments all the powers they did not reserve for themselves

1787 > Federal Constitution with common institutions and set rules:

- Legislative = bicameral Congress (Senate + House of Representatives)
- Executive = president
- Judiciary = Supreme Court

>> Bill of Rights (10 amend) contained a list of protected rights (freedom of religion, speech, assembly, petition, to keep arms, protections in the field of criminal law...) and 2 amendments addressed general principles: 1) rights included in the bill weren't exclusive and 2) powers not specifically delegated were reserved for the states or the people.

NEW POLITIES = arrangements were almost all new: 1) separation of powers (proposed by Montesquieu) and 2) division between federal and state governments (citizens of a state are citizens of other too)

+ revolutionary transformation of the law itself, indeed English law was casuistic, made of ad hoc arrangements and had no legal checks on parliament → 13 colonies law mixed customary laws with innovations justified by reason and constituted a new pact → structural innovations (depended on intellectuals' beliefs and colonial experience):

- 1) **Elaboration of the constitution** = efficient and trusted program for government + general principles meant to be comprehensive and enumerated all the most important legal arrangements + profound belief in human reason and faith in human capacity
- 2) **Measures taken were supported by self-evident truths and Law of Nature entitled people to create them** = adopt rules that best fit their interests + seeing customary rights as natural rights
- 3) **Adoption of writing** = representatives wrote foundational documents that drew up the rules (ancient English law and natural law weren't written)
- 4) **Rights were something that each person owned by birthright** (not a privilege) = in Virginia and Pennsylvania's Declarations of Rights: assertion of certain inherent natural rights (life, liberty, property, happiness, safety) + power vested in the people + government instituted for the common benefit, protection, security and must adhere to justice, moderation, temperance, frugality and virtue + right to freedom of worship and expression + right to fair trial
Reproducing self-evident principles in writing proved extremely dangerous (Bill of Rights took a while to be understood to convey legal prescriptions) → although 9th Amend, were the rights absent in it ceased or inferior? → US courts avoided the use of the 9th Amend and tended to justify the recognition of new rights using existing clauses.
- 5) **Sovereign Constitution** = constitutional arrangements are higher normative and superior to ordinary laws, thus it limits the power of lawmaking and limits Congress and executive's actions (protects the people against the decision of majorities exercising the power)

ENGLISH ANTECEDENTS = affinities between what happened in the 17th cent England (legitimacy crisis and royal absolutism led to revolution and finally Magna Carta) and in 18th cent colonies (legitimacy crisis, colonists vindicated their ancient rights and broke ties with Britain instituting a government and a constitution) → different arrangements, but similar method and claim that the king couldn't rule by fiat but should obtain the consent to his laws; why? Opinions:

- 1) Events were natural because of English immigrants in the colonies.

>> This naturalness implies several assumptions, such as the fact that the legal system operating in north America was the common law, thus the "transfer theory" → criticized: since common law could be applied only by royal courts that were absent in the colonies (Coke and Blakstone agreed that common law had no authority oversea, since they believed that common law consisted on the sum of very specific and ad hoc procedures)

2) What consolidated the rights of Englishmen in the colonies was the way in which common law had evolved

>> as a customary law it could easily be brought oversea, since a set of principles could be applied also by the colonies' courts → colonial law converged with that of England and colonies gradually Anglicized (transfer theory was possible in this situation)
Which common law?? → principle of repugnancy: difference between colonial law and England was not problematic as long as arrangements were not repugnant/contradictory to English law → debate on which differences could be tolerated
+ great diversity of laws in England, thus multinormativity present in colonies too (English immigrants brought with them local and feudal laws too) → even if common law had been introduced it was not the only legal system operating, but the growth of demand for rights led it to prominence >> reliance on common law was a result of a long process.

ENLIGHTENMENT ROOTS = firm belief in rationality + in human capacity to reform the legal order + society is the result of a social covenant consequent to the state of nature + it is possible to discover the laws of nature and apply them using reason + humans are rational beings, conscious of their rights and duties + Kant: mark the end of men's dependence on knowledge obtained by others and designate the move to think for oneself relying only on his own ability → in North America these led to the decision to part from the England, design a new government and constitution that could protect people's rights better → federal constitution wasn't mandated from above but it came from "we, the people"

>> actors believed that they had the power to remake society following experience and reason, with no justification, since they came from the law of nature and were self-evident truths → same things invoked during French Revolution → both Americans and French ended up with writer constitutions affirming separation of powers, existence of self-evident inalienable rights

>> 13 colonies appealed to the law of nature (long history: ius gentium – divinely mandated – experience and reason) = repository of norms that governed Europeans, used to justify action overseas and to criticize existing laws (Vattel's Droit des Gens: nations are political bodies to procure advantage and security)

→ 13 colonies made use of these theories: natural law allowed them to contract with other powers being recognized as equals (claim directed to a international community) + affirming that colonies were "free and independent states", governors sought to transform a civil war into an international conflict, accusing George III of violating the laws of war/commerce.

>> convincing foreign powers to believe in their state status and association, created a model and a European discussion on perfect society and institutions → American example could be universalized

COLONIAL BACKGROUND = fundamental for the idea of a mechanism that would limit the powers of representative assemblies, for the writing down of the constitution, that gained transparency and clarity (writing was typical of colonial charters, used as a defensive mechanism to recognize rights)

LEGAL SIGNIFICANCE OF THESE DEVELOPMENTS

- New age in legal/political history: other countries declare independence, claiming the right to constitute new polities
- Adoption of constitutions, seen as superior normativity, that expounded a scheme of government that included separation of powers and judicial review
- Votes in assemblies to reflect the desires of the people

>> 13 colonies were the first to convert these ideals into reality: numerous countries affected and by the end of this process rights really became a self-evident truth that no longer required justification.

11. The French Revolution

July 14th, 1789 > Pris de la Bastille and beginning of the French Revolution → stormy era of "the terror"; 1799 > Napoleon Bonaparte ascended to power (end of revolution or its expansion throughout Europe?)

>> most radical transformation of European law (complete overhaul), due to constitutional changes and to the modification of the entire legal system → Aim: create a new order, where norms are no longer inherited from the past and herald a future in which decisions are taken by means of natural law and reason

REVOLUTION CHRONOLOGY

1. 1789 > Estates General declared their meeting as a National Assembly → assembly would only have one chamber to represent all estates and regions; they had the power to modify political and legal structures → August Decrees:
 - Abolish feudal system and privileges of the church
 - Eliminate the sale of judicial and municipal offices
 - End fiscal privileges
 - Union of all Frenchmen was more advantageous: single law applied over France
2. 1789 > Declaration of the rights of Man and the Citizen:
 - Existence of inalienable rights (equality, liberty, property, security, presumption of innocence, freedom of speech/press)
 - Series of constitutional elements (sovereignty resided in the nation, legislation expressed the general will...)
 - General principle: actions that are not prohibited by the legislation are allowed and no one can put constrains
 Things presented as requiring no explanations → considered "natural, inalienable, sacred, simple and incontestable principles"
3. 1790 > Abolition of ecclesiastical taxes, confiscated church property, clergy forced to become state employees + adoption of several constitutions
4. 1791 > New Constitution:
 - Abolish institutions that undermined the liberty and equality of men (no distinctions based on birth, no privileges, labor deliberated)
 - Guarantee the natural and civic rights of Frenchmen (right to hold job, freedom of movement, freedom of speech, press, assembly address the authorities + protection of the inviolability of private property)

- Declared France a single indivisible polity
 - Sovereignty, considered inalienable, resided in the nation
 - Separation of powers: executive=king, legislative=deputies elected by people, judicial=elected by people
 - Citizens divided in active (who could vote, male 25+) and passive (who couldn't vote)
5. 1792 > Republic + Louis XVI executed + new constitution → assembly, elected by all male citizens, would appoint an executive from a list of candidates + debates are public and decided by the majority + main rights of Frenchmen
6. 1795 > new constitution:
- Greater power to the Dictatorate, five-people executive body
 - Augmenting protection on private property
 - Prohibition of corporation/association contrary to the public order
 - Political rights exercised only by assemblies subjected to the law

NEW VISION OF THE LAW = arrangements were often a result of a compromise (often took to violence) and results weren't always as coherent as they intended to be → radical developments that contributed to the reformulation of what law was > new conceptualization was consensual even among rival factions: 1) sovereignty resided in the nation, 2) anything not prohibited by legislation was allowed and 3) no one could be constrained from doing anything unless the law so prescribed

>> legislation guided by the will of the people was the only legitimate normative source → upon the legal order it was possible to draw whatever one wanted as long as it was reasonable and obeyed the general will → laws would be adopted by politicians and content would be summarized in a textbook that every citizen could comprehend = simplicity that explains the elimination of professionals' mediation and the passage to informal arbitration → other normative sources were tossed out and the new legislation could be understood by any reasonable person

>> French Revolution measures enabled legal creation with the aim of changing/improving society = nature of the community changed: national law was applied equally on every Frenchmen + laws could be made by elected representatives + contemporaries could intervene in the legal order to improve society

+ 3 other changes:

- a) unification of the legal subject** = French Revolution declared all men equal (abandonment of a system with privileges granted to people based on who they were) → equality was not complete and some distinctions survived (gender, civic state, religion, wealth. To abolish distinctions, it was required to imagine a new type of abstract and decontextualized person (new legal subject), who was identical to all others.
>> before, there was no single legal personality to match private action of individuals → devising a system that would combine various personalities into one
- b) unification of various rights over things into "property rights"** = before, most rights we identify as property rights were distributed among many individuals and were recognized as communal rights (hard hierarchy of these rights created conflicts) → goal: change this chaotic situation = distinguish between jurisdiction and property (right to exercise power + right to own land)
>> French Revolution imagined a new property that included all the entitlements previously divided among many individuals: sole owner with the right to direct, use and collect income
(Art. 14, Declaration of the rights of man and citizen: "property is natural and imprescriptible, sacred and inviolable" + civil code)
- c) unification of power and the creation of an undivided sovereignty** = it was already proposed by Jean Bodin in response to the chaos provoked by Wars of Religion between Catholics and Protestants: government that would display supreme command over all citizens + one person that would accumulate all powers → 1791 constitution: "sovereignty is one, indivisible, unalienable and imprescriptible)

>> these developments are effects of the ENLIGHTENMENT PHILOSOPHY:

- society is ruled by natural law, instituted by rational individuals and regulated by a social pact, which couldn't be modified without refunding society
- society could improve if organization/laws were more attuned to nature → subjected to regular and uniform laws understood using reason
- social pact can become an instrument of change → since the existing social pact restricted human happiness, renewal needed: JJ Rousseau's Social Contract advocated society's refoundation and proposed a new social contract that would subject men only to the community of which he was a member = all men are equal and sovereign = true happiness

Enlightened beliefs were influenced by the revolution in north America, but had also deeper roots in debates and juridical discussions on social contract, sovereignty and property.

LEGISLATION = before French revolution, monarchs assumed the power to legislate → writing down of customary laws which were mutated by royal intervention (Louis XIV refashioned civil/criminal law...) >> intervention was said to be necessary since law was chaotic and impractical and required systematization → supported by Bodin (law continued to be justified by a theological veritas and depended on monarchs' voluntas)

>> the greater good justified contravening the ordinary way of doing things → royal intervention became an obligation, since France had a legal system that gave legislation a central role

PARLEMENTS = royal intervention had a resistance coming from parlements (= royal courts that represented the king locally and was supposed to register royal enactments) → they started using registration to place checks on royal will, argued that they can refuse to register (jurists considered registration as a de facto ratification) → pretext to complain was the violation of fundamental norms (acting as guardians of the law)

>> relations between kings and parlements at Fr Rev eve were locked in a power struggle: king attempted to levy new taxes and change state structures while parlements responded that he must obey fundamental law (acted as a constitution that the king couldn't change) → radicalization of conflict led to the abolishment of the parlements

>> Paris parlement expressed the conviction that France had a customary constitution → by the time the revolution started parlements were discredited: considered conservative and a petty institution that protected only the interests of its members
Some parlements' lessons were anyway followed: law was a formidable tool to limit the pretensions to absolutism (institution of a National Assembly with legislative power elected by/for the people) + judges, since they had much power, must be deprived of any lawmaking capacity = need to separate the powers

NATIONAL SYSTEM FOR AN UNIVERSAL AUDIENCE? = revolutionary measures were partly contradictory: empower the nation's sovereignty, but appeal to a larger community (including all humans) and to a universal natural law → idea that French law could potentially apply to all other countries, which justifies revolutionary wars and Napoleon's action

ex. 1789 Declaration of the rights of man and citizen: granted rights that were general + focused on men's equality + protection against a king that pretended to be the sovereign + safeguarding freedom of speech... → announce principles that were general, timeless, ahistorical, unchangeable (= global applicability, decontextualized rights: man is born free and must remain free, aim of any political association is to protect fundamental rights) → more abstract = more inclusive = more adaptable

THE STATUS OF NATURAL LAW = French lawmakers reproduced in legislative acts what they thought were the main points of natural law: affirmed superiority of the "natural, inalienable and sacred rights of man" and sought to give these rights normative value. Despite they were valid norms they weren't powerful enough to limit the sovereignty of the National Assembly, therefore to protect rights they appealed on legislators' conscience → guardianship of rights to the *fidelity* of legislative body/king/judges and the *vigilance* of all Frenchmen.

REVOLUTIONARY MOMENT? = France, England and 13 colonies: resistance to monarchy led to the invocation of an ancient constitution that the king was betraying

→ rights went from privileges to rational entitlements that should pertain to all humans according to the law of nature

→ law went from customary to new solutions that were based on investigating nature and society concluding what was reasonable/just

Diverse attitude: English = revolution as a continuity; 13 colonies = insisted on the superiority of their traditions; French = radical break:

- aspiration to refound a social pact, not always obtained → some measures were truly revolutionary, others implementations
- do away privileges, not fully prospered → need for political compromise + returning to a blank slate was impossible

BUT: - dramatic changes → legal system based on *ius commune*/customs/royal legislation relies on legislation by National Assembly

- normative system dedicated to preserving the status quo

>> developments led to the formation of a new type of legal system based on power of legislation by an assembly representing will of the people and guided by reason.