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COMPARATIVE PRIVATE LAW

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SOMMARY

INTRODUCTION

The **definition of law** has historical roots that are traced back to principally **roman law:** both **Romance** (or Neo-Latin) and **West German languages** have incorporated the word "***directum,"*** which in the common parlance of the Middle Ages meant "straight" in the sense of "just, equal."

The concept of nations in the modern sense and different state laws were born with the **peace of Westphalia** (1648) and the **French revolution (1789)**. Indeed, the first civil code was the **Code Napoleon (1804)**. Before the latter, in the European area, we had the so-called **Ius commune**, based on the legacy of roman law. In European area there was an **Ius unum**: one law based on the Justinian compilation, by the Justinian emperor, discovered by Irnerius in 1088 in Bologna.

Comparative law was not necessary because there was only one element. Nonetheless, it could have played a role because one may have compared how the law was applied in different countries.
However, it was only when different laws and civil codes were introduced that a possibility of comparison was given because comparative law is based on different and more rules: the comparative activity is always based on two or more elements.

Ius was the Latin word for law and its etymology is "obscure". Two meanings:

1. *Ius quia iustum* (what is just): the law is the law because it's just. Can we consider a law that way if it is unjust? The law is binding because law is just and creates equality (legal naturalism).
2. *Ius quia iussum* (what has been commanded): the law is the law because it's commanded. Can we consider a law that way just because it's posited (legal positivism) by someone (authority who can enact rules)?

1. **Legal naturalism** and the **ancient sense of law** *(ius quia iustum)*

By "legal naturalism" it is meant that this view of law was hinged on the ancient sense of nature as a rational order, where all men, animals and things were to accomplish their own, inner reason of being (*naturalis ordo*), whether or not a divine footprint was recognized in it.
Law was justice and justice was the rational truth of nature, where all beings and things were deemed to accomplish what they were designed to do.
An example is the Nuremberg's trial because legal positivism was overcome by the doctrine of legal naturalism.

Legal positivism and the **modern sense of law** (*ius quia iussum*)

During the 19th century, legal positivism has gradually overcome the doctrine legal naturalism, thus becoming the common ground of any discourse about law and embodying the current mentality of jurists. In the positivist view, the "source" of a law is the establishment of the law by a socially recognized legal authority.
The most famous conceptualization of legal positivism is to be ascribed to Hans Kelsen.

LAW AS A TECHNIQUE OF SOCIETAL CONTROL

No Society Without Law: "Law exists because and insofar as a society does" *(ubi societas, ibi (et) ius*).
No Law Without Society: "Law outside a society would constitute a mere abstraction"
Therefore, a **society without law is unconceivable**.

- **Negative function of law**: to prevent and solve conflicts among individuals.
- **Positive function of law**: guidelines of behaviours to encourage cooperation

So, under this point of view law and religion are very similar.

Comparative law	**Foreign law**
It aims at studying and noticing **similarities** and **differences among legal systems**: a method of studying with which we can detect commonalities and differences between private law in different countries. It is the result of an intellectual and cultural operation of comparison between a national legal system and another.	It is different from comparative law because it studies a proper legal system in force in a state other than that being used as the reference (it's not domestic so it's commonly defined as foreign).

- **Macro comparison**: the object of comparative law are **legal systems (focus on general questions)**.
  - Macro comparison of members of different legal families is likely to reveal differences amongst their members.
  - Macro comparison of members of the same family is likely to reveal similarities amongst their members.

- **Micro comparison**: it is based on **specific rules of a given system**/focus on specific legal problems (e.g. how the contracts in Italy are formed and how they are formed in Germany, or tort law in England or Germany): comparison between specific state laws.

WESTPHALIAN PARADIGM

The distinction between domestic law and international law arises with the Westphalia peace since modern states in the strictu-sensu were born.

DOMESTIC LAW

- The State's sovereignty entitles it to bind its own citizens by enacting legal rules.
- The way to legal nationalism was thus opened and led to the major codifications of private law of the 19th century.

INTERNATIONAL LAW

- The State's sovereignty can be voluntarily self-limited by means of agreements with other States.
- Each contracting State has a duty to give execution to the international agreements it has entered.

These distinctions led to the **modern codification**:

- French civil code (1804),
- Italian civil code (1865),
- German civil code (1900).

Since each State creates its own law, any discourse about law is possible only with regard to a national law, which depends upon the acts enacted by each State (exception: international law): a branch of legal science specifically **investigates the comparison between a national law and another**, which is referred to as **comparative law** (we can also compare customs because customary law is sometimes considered a source of law).

So, it was only after the **peace of Westphalia** that we had nations for the first time, so we had several domestic private laws and that's when **comparative private law was born,** because the need to compare surged: historically it was born **in 1900 when the comparative method was expressively recognized** and a German jurist, called **E. Rabel** defined the **scopes and methods of comparative law**.

Comparative law also helps to gain knowledge of a certain area of our society (ex. how the parliament or contract law works in a certain country).

Comparative law has the purpose of **ameliorating a legal system**, for example if there is a **gap in a legal system**, we can look at solutions in other countries in order to assess if the solution may work in another one: improve the system in which the comparison is carried out. There was no reason to do this when there was only one ius (late period of roman law). Since it is the result of these intellectual operations, comparative law is considered a way of studying and of understanding law in a better way.

It is possible to compare also other aspects of social life, like linguistics and religion: comparison is a method frequently used to study many sectors in the society.

From a methodological point of view, we have two steps to do comparative law:

1. **Study foreign law:** become acquainted with the foreign legal system (macro comparison) or study specific aspects of a certain system (like contracts etc.) (micro comparison)
2. We choose what we want to compare a **tertium comparationis:** (ex. How the contract is formed/how contract performance forms): it is the **paradigm** we choose before comparing, so it is a **shared**

quality among the legal systems being examined (ex. Compensation for damages in Italy, in Germany etc)- on that paradigm we can build our comparison (it's the common element).

What does comparison really mean? Two of the aims of comparison are gaining knowledge, finding potential **similarities and differences**. However, comparative law also facilitates **unification of law.**

Different degrees of similarities and differences: In some cases, similarities don't mean they are necessary identical, but maybe the **general approaches are similar**, however there are **still differences in the way the law is acted** (e.g. In compensation for damages the aim is to protect the victim- however the calculation of the compensation is different. There is a similarity, but it doesn't mean perfect coincidence).

The similarity of A and B with regard to a tertium comparationis: T may be defined as A and B's sharing a common property T, although the intensity of A's being T (IT(a)) may differ from of B.

NEW DEFINITION OF SIMILARITY: A and B are share similar that with property degrees of T, regard and if A to T' s if and both although different B' s, are similar.

Example

- In many countries (Spain, Italy, France), the transfer of ownership is possible with the consent of the parties: they agree on the price, on the object and if there is a valid consent, the transfer is valid (contract consensus). A sale/purchase in Italian law is a consensual contract in that it is concluded with the agreement of the parties. It is a transaction provided with real effects ("contratto obbligatorio an effetti reali"), and ownership is transferred by mere consent: the contract is valid even though there is no delivery, the ownership is transferred immediately after the contract is concluded and delivery comes after. (Art.1376 Italian codice civile).
- In Germany for the transferring of ownership of a movable thing it is necessary for the owner to deliver the thing to the buyer and for both to agree that ownership is to pass. If the buyer is already in possession of the thing, the agreement on the transfer of ownership is sufficient.

In both system consent/agreement is needed (**similarity**), however in Germany the delivery is also necessary (**difference**).

HOW IS THE TERTIUM COMPARATIONIS IDENTIFIED?

Weber was the first one who tried to do a tertium comparationis with the **idealtypus**: abstract notions and general notion (for example contract formation): in order to compare, there is a **tertium comparationis** which is the **paradigm**, the **general notion/abstract model** and definition, and **each thing that deviates** from it makes it a **comparison**. The tertium comparationis is the idealtypus.
The concept of Idealtypus allows one to understand reality as an "approximation" to the Idealtypus itself.

Critic: the **ideal typus** is very **subjective, because** the abstract definition is **chosen by party** and it does not tell us the truth because it's **not neutral**, therefore, this model was somehow rejected.

STEPS OF COMPARATIVE ENQUIRIES

1. **Selection**: what will be compared.
2. **Description**: of the law and its context in the legal systems under consideration

3. **Analysis**: result

1. **Selection**:
   - **Legal Institutions and Rules**
   - How the **courts apply** different laws/rules **in concrete**: not comparing articles but the interpretation and application of legal rules. This can be influenced by many aspects, like the cultural aspect etc. e.g. the concept of good faith in Germany is very broad and strong.
   - **Legal Context**
   - **Non-legal Context**
   - **Results**

AIMS OF COMPARATIVE PRIVATE LAW

1. **Aid to legislature**: help the legislator to create and make new laws.
2. A tool of **construction of national or international law**: (**find a common ground)**.
   E.g. Many states adopt the rule that property is transferred when there is consent (soft law).
   European law should be considered a **comparative law** since the **founding treaties of Europe** are an agreement between different states and the decision of which rules should be adopted at European level usually follows a comparison between states (research units gather materials: they are aware of the laws existing, the legal systems and they select the law that speaks for the purpose of the European union: the result follows a comparative study).
3. A **subject to be taught and studied at universities**: convey legal knowledge.
4. An **incentive and a guide to uniform existing law**: e.g. international conventions are carried out on the basis of comparative law: it is therefore helpful to reach the **uniformity** between rules.
5. **A driver of European law as such**: the European court of justice bases its work on comparative law, which is so continuously forging the European law.

METHODS OF COMPARATIVE LAW

To conduct a legal comparative analysis, it is essential to evaluate the similarities and differences among the laws under consideration.

HOW CAN WE CHOOSE THE TERTIUM COMPARATIONIS?

We should identify the **tertium comparationis** (the **shared element** among the legal systems being examined, which can legitimately serve as **the basis for comparing different legal systems**): a given paradigm is our guide for the following comparative inquiry.

In the late Middle Ages, there was the so-called *ius patrium* made by "comuni", so someone argued that it was possible to compare roman law with local law (also Montesquieu tried to do that), but the problem of the method to do it was not considered.

The problem of the method in the **modern sense**: we have **2/3 methods for comparative law** to find the tertium comparationis (the method has to be chosen before comparing)

1. **Historical-comparatist approach** (by **Zimmermann**): the tertium comparationis should be **found within the shared roman legacy** of the legal systems being compared (we choose the tertium comparationis in the past, according to the compilation by Justinian), (also the English common law has some connections with roman law).
2. **Functionalist approach** (by K. **Zweigert** & H. **Kötz**, German jurists): based on the c**oncrete function of the legal institution** (e.g. the contract is a way to make wealth circulate): the tertium comparationis

should be defined based on the function that resolves practical issues, regardless of the conceptual or dogmatic framework of these solutions (legal institutions are conceived to solve individuals' problems and are therefore a tool to solve problems).

These are completely different approaches. The model by Weber was even more different because it was very abstract (*idealtypus* was not aimed at solving practical problems of individuals, but was used just to assess if the two elements presented a deviation)

➔ Both these methods are normally aimed at doing **micro-comparison**. They are not destined for macro-comparison.

3. **Theory of dissociation of legal formants** (by **Sacco,** not based on history or practical function) based on the primary elements:

- **Legislature**: legislative material/legislative text.
- **Judiciary**: how the rules are interpreted by courts (they may reach different results and have the power to modify the law itself and society).
- **Scholars' opinion**: may have an impact on judiciary and legislative text.

However, a legislative text may not align or coincide with the interpretation given by the court, or a scholar may be providing a different interpretation of a legal rule: legislative text may not align with the practical rule enforced by the legal system's judicial decisions, or that a scholar might provide an incorrect or distorted portrayal of their own country's legal system.

➔ **Micro-comparison**: a comparative lawyer focuses his attention on **particular aspects or rules**: comparing legal systems that relies on the operational solutions they offer for addressing and resolving specific real-world problems within the realm of law.

➔ **Macro-comparison**: a method of comparing **general characteristics of legal systems**: comparing national laws by considering the varying constitutional and institutional characteristics, as well as the legal mindset of the jurists associated with each system (e.g. Common law vs. Civil law= in common law everything is based on the legal precedence and the precedence can create new law. Instead in civil law the decision by the judge can't create new law).

The functional approach

If law is seen functionally as a regulator of social facts (a tool helping people to solve problems), the legal problems of all countries are similar because people usually face similar problems.

Assuming that there are similarities among legal systems transforms the entire comparison into an endeavour focused on identifying and comparing those similarities.

The assumption of similarity only pertains to the **practical outcomes**, specifically the results observed in the case studies forming the foundation of a micro comparison: the main work would be identifying similarity, but the aim of comparative law is not that narrow since its aim is considered to be broader.

PRAESUMPTIO SIMILITUDINIS: we operate under the assumption that various legal systems provide identical or remarkably similar solutions, even in intricate details, for identical real-world problems, notwithstanding **significant distinctions** in their historical evolution, conceptual framework, and operational approach. Therefore, we can compare because we know in advance that there is a presumption of similarity.

Unification of laws

Another aim of comparative law is **unifying laws:**

- In the late 19th century, an increasing number of comparative lawyers turned their focus towards the alignment/harmonization of national legal systems via a process of unification.
- Its assumption that only similar things could be compared led to rather a narrow concentration on statutory law and on the legal systems of Continental Europe.
- **Unification** is only possible when significant initial differences exist, and any thorough investigation aimed at unification must acknowledge and consider these distinctions.

- Comparative law allows us to choose what element we want to uniform between countries (supernational levels).

The functional approach was very hard to applicate to the unification of laws: a jurist (Ernest Rabel) wanted to analyse legal systems from the point of view of the courts, the cases (to look at the societal needs), and not only at the articles.
The idea that national laws should provide for the qualification of legal institutions was primarily criticized by Ernst Rabel.

Uniform law: convergence among legal systems

- **Legal transplant**
- **Conventions to uniform laws** (e.g. Unidroit, Uncitral)- teachers, students, jurists provide common rules and laws, even though they are **soft law**, so not binding legal rules that are usually drafted at a supernational level after a comparative enquiry (vs. **hard law**, when it comes from an authority that enacts law that is immediately binding for all individuals).
  Soft law tools are usually conventions of law that serve lawyers and jurists to study the law or can be chosen by parties to solve a dispute (non-binding rules.)

There is a difference between uniform law and uniform legislation: the goal of uniformity of law can be achieved solely if uniform legislation is interpreted based on a comparative analysis of the legal systems involved.

- **Uniform legislation**: only one model of rules that has the **same wording** (can be interpreted in different ways)
- **Uniform law**: also embraces the **interpretation of the legislation text**. Make the law uniform means making an interpretation that is the same for jurists and scholars.

To make the law uniform we need the intention of the States.
E.g. One of the most important conventions is **The United Nations Convention on the International Sale of Goods (CISG)**, automatically applicable to most international contracts for the sale of goods between businesses (b2b since the two contracting parties must be two business. If one is a consumer who acts for other scopes, this convention doesn't apply), unless the parties involved explicitly exclude its application in advance (Article 6 of the CISG).
In the United States, the effort to establish a standardized set of commercial law led to the adoption of the Uniform Commercial Code (UCC).

The model laws are normally **bodies of principal** that are **not immediately binding** that are normally drafted by European scholars. They were drafted to try to cover the whole European area.
E.g. Formation of a contract: they studied contract law in several legal systems, and they tried to identify the common area. There are some variations, however they share some commonalities and because it was possible to identify this similarity, they prepared this draft, grasping the common law of contract law in the European area.

EXERCISE
A rule forbids the presence of dogs in a butchery (let's admit that same provision is enacted in Germany, France and US)
Does this rule also apply to guide dogs (in Germany, France and US)?

- **Literal rule**: guide dogs are dogs. No exemption is granted to them. Therefore, a rule prohibiting dogs from a butchery applies to guide dogs as well.
- **Legislative intent** (opted by scholars and courts): explanatory works and «whereas» may point out that the rationale of the prohibition consists in preventing unhygienic situations in food stores. Therefore, guide dogs are banned as well.
- **Teleological interpretation** (of the legislative intent): guide dogs are few and trained. They do not endanger the hygiene of butcheries. Therefore, they may deem to be allowed to enter.

(A different concrete result from 1-2.)

There may be a **lack of alignment between the legislative text and interpretation by courts.** Interpretation could also lead to differed results based on the interpretation itself: this shows the difference between uniform law and uniform legislation. The **interpretation given may be different** and lead to **differed results in legal systems** (**relevance of interpretation activity: different legal criterion**).

INTERNATIONAL CONVENTIONS AND MODEL RULES

- **International conventions** are essential tools for uniform law.
- **Uniform law** comes into existence when two or more states decide that one law must be interpreted in a certain way.
- States can enact the same legislative text (**uniform legislation**).
- Then we have agreements among institutions where we perform the **aim of uniformity**.

- **CISG**: International contracts of sale were tried to made uniform with the CISG: UN Convention on International Sale of Goods (CISG – Vienna Convention 1980)
- **UCC**: Uniform Commercial Code (1952) – by American Law Institute (ALI)
- **UNIDROIT:** *Institut international pour l'unification du droit privé* (UNIDROIT), established in 1926 by the League of Nations: common methods to address private law questions.
  Example: **Principles of International Commercial Contracts (PICC**) this body of rules made by Unidroit are **soft law** instruments ("**Range of quasi-legal instruments that do not bear an actual legally binding force (or the binding force of which is somewhat weaker than the one of traditional law**)".

  Soft law is a source of inspiration:
  - for courts/judges while settling a dispute (e.g. doubts about the interpretation of a given rule)
  - for parties while drafting a contract
  - can be chosen as the law applicable to the parties' agreement (they may decide in advance that the law solving the conflict in the future will be an international convention (ex. principles of international commercial contract, PICC, where the contract must be concluded by business) rather than a traditional law), **generally combined with an arbitration clause.**

- **Uncitral:** United Nations Commission on International Trade Law, established in 1966 by the United Nations Organization to improve the conditions and make more modern trade.
- **ELI:** European Law Institute was established (2011) and entrusted with the quest for better law making in Europe, the enhancement of European legal integration, and the building up of a European legal culture. National jurists coming from the states work together and propose laws at the European level e.g. They proposed some principles for artificial intelligence that may serve as a guide to the European system (soft tools).

Legal transplant (by Watson and Sacco)

The legal transplant was first theorised and introduced by **Watson and Sacco**.
The second tool that is used to make the legal uniform is the **legal transplant:** a legislative mechanism through which **a law from one country is applied**, with **relatively few modifications, in another country**, aiming **to minimize disparities** between legal systems and **promote their alignment** (there is an import/export of a piece of legislation that is moved to another country and is implemented).

However, **rigidity** or deeply **ingrained presumptions** within the legal scholarship and the case law of the receiving country can lead to a **rejection crisis** in that country, ultimately thwarting their intended purpose and turning into significant legal challenges.
The technical object of legal transplant may be broader than a written rule:

1. **Institutions.**
2. **Legal concepts**: e.g. legal theories that are cornerstones of a legal systems (results of an elaboration by jurists or judges that are moved from a country to another country.)
3. **Rules** (not only statutory rules).

WHY DO WE HAVE A LEGAL TRANSPLANT?

1. Legal transplant may be justified and encouraged by **economics, social factors**, **political reasons** etc: for example, the USA contracts influenced many European countries with their contract law (e.g. franchising, factoring, leasing).
2. The **authority of a legal system** and their **historical influence** of a country on another state may encourage a legal transplant. (e.g. the first Italian codice civile from 1865 was based on the napoleon codification, however the second one from 1942 is considered inspired from the French codification and the German jurists).
3. The **prestige and imposition** may also influence a legal transplant. For example, many civil codes were guided and inspired by the French code civil because France had a significant position in Europe and was considered a great example to follow.
4. **Necessity:** historically some eastern countries decided to attain the criteria of the European paradigm, resorting to the Dutch code civil to meet the European criteria (the Dutch civil code was considered very effective).

A legal transplant could happen because:

- **Act of imposition** of a legal transplant (political and economic reasons).
- **Voluntary legal transplant** (intention)
    1. An entire group of people moves to another territory where there is **no comparable civilization**: the **law** of the first territory **is moved** to the law of the **second territory**.
    2. There's **comparable civilization** and in this case the law from the first territory is **implemented in the second territory**.
    3. People from a portion of territory **accept voluntary the law of another territory**.

Legal families

Legal families: groups of national laws that are connected by several characterizing features.
An example is the family of common law vs the family of civil law:

- In the **common law** system, law is made by courts: the legislative power coincides with the activity carried out by courts: the decision of the court is binding (**stare decisis**).
- In **civil law** systems the authority that is competent to enact new laws is the Parliament.

Example: we analyse the case of Germany, of Italy, of Spain, Argentina, Brazil that share a great characteristic (the law is made by the Parliament): they are civil law systems because law is not decided by judges, and we can group them in the civil law family.
We can also put the USA law and the English law in the **same category** (common law), although there are still **differences that should be taken into consideration**.

The final result of the enquiry depends on the **point of view is adopted**. Even though we analyse two common law systems, still some **differences** will still **arise in micro-comparison**.

• **René David** gathers national laws of the world into "**families**", which share **similar concepts** and **historical roots** (it is said that civil law was more influenced by roman law than common law).
For example, contract law in civil systems is said to be derived from roman law. (common law is said not to be much influenced by roman law).
• Within the Western legal tradition, the most important families of national laws are two: that of **civil law** and that of **common law**.

- **PROS**: Individuals within each group exhibit shared features that set them apart from families outside their own. This allows "a **concurrent investigation of difference and similarity".**
- **CONS**: The concept of legal families can either **highlight the similarities** among members within the same family or **underscore the differences** between individuals from various legal families.

LEGAL FAMILIES, MIXED LEGAL JURISDICTIONS AND LEGAL TRADITIONS

There is a **distinction** between **legal families** and **legal traditions**.

However, there are also **mixed legal jurisdictions** that are not civil law nor common law: they are relevant because these systems **embrace some elements both from common law and civil law**.
For example, the **Quebec** civil code reflects the French civil code, but it's also based on some common law features. This also happens in **South Africa** where the influence of customary/common law is significant. It also happens in **Scotland** and in **Louisiana**.

Also, **hybridization of legal systems** is **not included in legal families** (e.g. Legal transplant: we transfer some piece of legislation to another country without replacing entirely a legal system). A hybridization could be a country with a **combination of civil law and common law features** so it can't be included in the two families.
Example: in Italy we are progressively recognising the decisions by judges, in fact these decisions are more followed by courts, therefore the power of the precedent is increasing in Italy (results of some new rules in the Italian procedural code)
Therefore, **common law** and **civil law don't include all the jurisdictions,** and these two families don't work perfectly.

Professor **Glen** elaborated the notion of "**legal traditions**": it's less focused on the state's characteristics and is **more dynamic** than that of 'legal families.
Legal traditions also include and show the phenomenon of hybridization: it is more centred on the **general characteristics** of a certain institution, instead of specific features of institutions.

Cryptotypes

Elaborated by **Rodolfo Sacco**: there are some **hidden formants** that are not result of the written rules enacted by legislators.
The jurists and **lawyers apply some rules without being aware of their presence**, (an example is customary law).

In many civil law countries there's a hierarchy between sources of law (customs, praxes etc.) but there are also other **behaviours** that are **not source of law** and still guide the behaviour of lawyers and jurists: **cryptotypes** are sometimes called **silent knowledge**.
The cryptotype can be unveiled through a **comparative analysis** with another legal system, especially when the same rule is clearly stated in that system.

There are some cryptotypes that guide the behaviour of other even though the law state something different because the **content of the crypotypes can be in line** or **not in line with the content of the law.**

Ex. Cryptotypes in line with the law: I compensate someone after causing a damage because I follow the behaviour of others even though I didn't know the rule existed.
Ex. In Italy third parties are allowed to harvest wild fruits on other people's land (source: custom).
However: the harvesting of fruit on the land adjacent to residential properties is prohibited, except for those who own them (art. 6, l. 23.8.1993). Nonetheless, people keep doing it because customs allow it.
The same happens in Switzerland: art. 699 (1) Swiss Civil Code Any person has the right to enter woodlands and meadows and to gather wild berries, fungi and the like to the extent permitted by local custom except where the competent authority enacts specific limited prohibitions in the interests of conservation.

Cryptotypes are not reflected only by customs but have a **broader source**.

Ex. If it is debated whether a lower speed limit should be introduced for road traffic, it will be helpful to know which other countries have introduced such a speed limit, and whether road traffic accidents have declined since the law was changed. The comparative lawyer examines variations in speed limits and correlates them with the evolution of road traffic accident rates.

However, the **disparities among legal systems** and their unique historical, economic, social, geographical, political, and cultural settings frequently pose **significant challenges** when drawing reliable conclusions about how specific legal regulations will function in contexts different from their place of origin: **legal irritant**.
Legal irritant: when we move a piece of legislation to another country there are some **risks** because we're not sure if the results are going to be the same because of the **different cultural background and heritage** and the **economic conditions** can change how the rule is applied by individuals and courts. If the result is negative, we have a legal irritant because the **implementation does not have the result we wanted.**

Comparative legal studies can offer persuasive points of view, even where causal links cannot be established with certainty.
Example: Marriage

- A Muslim couple has agreed on a mahr (dower) to be paid to the bride under certain conditions.
- The conflict rules of the forum are not express the discipline of dower.
- Need to identify the conflict rules that should govern the case (those on marriage, on matrimonial property, on maintenance, on divorce, or those of contract law, etc.)
- Once the first question is solved, another question arises: is the substantive law falling into the categories of a marriage contract, an agreement on matrimonial property, on pre- or post-divorce maintenance, or general contract law?
- Depending on the category into which one chooses to slot a mahr.
- Need for comparative legal enquiry?

INTRODUCTION TO THE DISTINCTION BETWEEN COMMON LAW AND CIVIL LAW

A HISTORICAL OVERVIEW

As we had said before, in the **Middle Ages** (until the twelfth century) **comparative law had no ground**: there was no space for comparative law because in that period we only had Roman law and **legacy of roman law** based on the discovery of Justinian compilation.

We did not have a science of comparative law, which was not regarded as a subject (jurists were not aware of the existence of comparative law as a science). This doesn't mean that there was no comparison of law at all. Indeed, at that time two systems existed: roman law and local law (+ customs and praxes).

The subject that was **taught in universities** was **roman law**, but **roman law** and **local law coexisted**. In light of this coexistence there was ground for **comparison enquiry**, and this was carried out by a jurist of that period.

Institutes by Gaius recognized the **existence of more laws** and provided a fairly accurate representation that **justified the need to compare**:

- **ius proprium (***plura iura propria*)**:** recognized the **existence of local laws.**
- **ius commune** (based on **roman law** and **canon law):** legacy of roman law and, according to the widespread opinion, canon law.
- **ius gentium: interaction between roman law and canon law with international rules (**rules from other countries). This understanding of the distinction could result from a particular Roman institution known as praetor peregrinus.

The **method used** for conducting the **comparison** was **not documented** in writing.

Civil law

HISTORICAL BIRTH OF CIVILIAN TRADITIONS

The beginning of that tradition may be traced back to the **renaissance of Roman law** between the **end of the 11th** and the **beginning of the 12th century.** In **Bologna Irnerius** rediscovered the **Justinian compilation**, made up in the 6th century, on the orders of Justinian, emperor of the Eastern Roman empire.

• Irnerius began to read, to comment on and to teach the Justinian compilation in Bologna.
• The **first university of the (Western) world** was thus established (the *alma mater studiorum*, the university of Bologna)
• The **study of Roman law**, and particularly on the **Pandectae or Digesta**, **spread throughout Europe**.

The **entry of the Germanic peoples** into the Roman empire created an **opportunity for comparison**.
In the **Kingdom of the Burgundians**, two «codes» were produced (late 5th and early 6th centuries):

- law of the Burgundians
- roman law of the Burgundians

Therefore, **several local laws coexisted**= *plura iura propria*.

It is still debated whether the glossatorial work carried out a comparative study.

- In the *Studia* at Bologna, they studied the Justinian *corpus* and the Gratian's *Concordance of Discordan Canons*.

- In the *Studia* at Pavia, they studied the Lombarda.
- In the South of France, they focused on Roman and Canon Law.

THE CANON LAW CASE

The primary canonical sources were lacking, especially in the realm of what we refer to as private law and complete segments of Roman Law were integrated into the canonical system (achievements: ex. Romano canonical procedure)

However, differences between Roman law and canon law remained.

Many **parts of roman law** have been **implemented into the system of canon law**. Despite these differences and content, these two bodies of rules remained, and in the Middle Ages this **distinction remained untouched**.

Comparison enquiry came into place because several scholars used to **quote local laws** in their text and this practice was combined **with the use of roman law**. In fact, several **legal scholars** have become accustomed to **citing differing customs and statutes of the Italian city-states.**

When they could not reconcile them with their knowledge, they merely **acknowledged their divergence**. Sometimes, they attempted to investigate the **reasons behind these differences**. (For instance, Panormitanus delved into the distinction between Roman Lawand Canon Law regarding the issue of parental consent).

THE LATER MIDDLE AGES

First distinction between common law and civil law.

In the common law systems, the influence of roman law was not much important.

NEW EMERGING PROBLEMS: **creation of a system to deal with conflicts of laws**.

1. Bartolus' repetitio on the imperial constitution *Cunctos populos*: application of **policy analysis** to determine **the legitimate scope of conflicting laws.**

To **determine which law will apply**:

1) the **citizenship of the deceased** (English or Italian).

2) and **the location of the property.**

2. The *consilia* of the Fifteenth and Sixteenth centuries: dealing with **conflicts between** or among **statutes of the Italian city-states** and **between statutes and ius commune.**
3. *De laudibus legum* Anglie and Governance of England of Sir John Fortescue: **comparisons between the English and the French legal systems (**the **influence of France** was **crucial**.)

SIXTEENTH CENTURY FRENCH LEGAL THINKERS

The use of the **comparative approach in law** and history was indeed a notable feature of the **sixteenth century in France** (e.g. Éguinaire Baron, François Baudouin and François Hotman). (Guy Coquille's (1523–1603) Institution au droit des François)

E.g. *Marital property*. According to the customary law of Nivernais and Burgundy**:** «a married woman must obtain the consent of her husband in order to make a testament». However, according to the customary law of Poitou, Auxerre, Berry, and Rheims the rule is to the contrary.

What is the «true rule»? The **solution** «**a testament cannot depend on the will of another**»: this anticipates the modern interpretation of testament in civil codes and common law. This was possible thanks to a **comparative enquiry between two customary laws** (comparative law is also useful to find the core of the law).

E.g. (Guy Coquille's (1523–1603) Institution au droit des François)
Customs show that the contract concluded by a woman was void.
Criticisms raised by Coquille against this rule:
- unmarried women who has reached the majority age can contract
- women can be sued for their delicts
- capacity to sue.
However, there was **no correspondence of this rule with social reality**.
That **rule was derived from Roman law** and by **analogy (contractual incapacity of *filiusfamilias***)
Therefore, there is no absolute rule of (female) incapacity (the incapacity is not personal).

(The comparative method was not universally followed in the sixteenth-century in France (ex. Christophe de Thou). Certainly, when compared with Roman law, French customary law was a chaotic intellectual entity. In the end, French customary law gained intellectual credibility, but it achieved this by employing the precise methods of analysis and comparison that de Thou appeared to be apprehensive about).

It is clear that ***"Iura propria"*** were still considered **highly chaotic** because the **sources of law** were **not easily identified** (for instance, customs are spontaneous behaviours that come from the lower part of the population).

MAY FRENCH LEGAL THINKERS OF THE SIXTEENTH CENTURY BE CONSIDERED THE FOUNDERS OF THE MODERN COMPARATIVE METHOD?

- If we insist that **the comparative approach** remains **impartial** in value judgments and focuses solely on elucidating similarities and differences, then it becomes apparent that the French legal scholars from sixteenth century did not adhere to the principles of the contemporary comparative method.
- If we demand that the comparative method involves examining legal systems beyond one's own to explore the **potential for establishing cross-system dialogues**, such as **identifying shared principles** if not specific rules, then it can be asserted that modern comparatists can trace their lineage back to the French legal thinkers of the sixteenth century (need to see which legal system is better).

THE SEVENTEENTH AND EIGHTEENTH CENTURIES

The true insights to be gleaned from Roman law extended beyond the specific rules within the system and operated at a **higher level of generality.**
Natural law school (e.g. Hugo Grotius, John Selden and Samuel von Pufendorf)

1. **Inductive method:** Comparative material is employed to extract broader and broader principles until the fundamental principles emerged.
2. **Deductive method**: The material served primarily as a means of illustrating, exemplifying, or confirming what had already been established through alternative methods (ex. Christian von Wolf).

Civil law

The basic characteristic of such jurisdictions is that they have fully implemented the **doctrine of separation of powers:**

LEGISLATURE **EXECUTIVE** **JUDICIARY**

Elaboration by **Montesquieu**: (1689-1755): «only the mouth that pronounces the words of the law, inanimate beings that are not able to modify either its force or its rigour». Three powers provided with specific competences:

1. The **judge** should **only apply the law** enacted by legislature (Parliament etc.).
2. The **legislature enacts** and approves **the law** (or amend/abolish/modify laws).
3. The **executive** should provide the **general guide** to govern a country.

This system is embraced by several law countries.
From **a private law** perspective, this culminated in the **enactment of the civil law codes**: the core of private law is gathered and systematically organized into a civil code (+ criminal codes + administrative codes.)

- ❖ Code civil (1804)
- ❖ Bürgerliches Gesetzbuch (1900)
- ❖ Codice civile (1865, 1942)

With the codes, we also have **more laws** which **shape the private law of a country**.
E.g. Italy where the choice of the Italian legislature was to implement the consumer law in another code (taken by a directive the European union). Therefore, in **Italy** we have **both the consumer code** and **the civil code**.
Instead, the **German** legislature decided to **implement the consumer code in the BGB** (German civil code) after the directive of European union.

Common law

HISTORICAL BASES

(English and American common law.)
The **influence of the ius commune** on common law was **not very significant**: it had a different path than other European countries.
Moreover, the French revolution (1789) that resulted in the **doctrine of separation of laws, didn't influence the common law system** where law was always made by courts.

- **1066**: after the battle of Hastings (1066) there was the rise of a "common law".
- **1642**: the political and juridical unity achieved by England already in the 11th century prevented the ius commune of continental Europe from expanding on the island + civil war (1642-1651)
- **1688**: Glorious Revolution (1688-1689)
- **1789**: the tenets of the French revolution could not gain ground in England, essentially because the democratisation of politics had already been achieved

In contrast to the continental ius commune, the **English common** law did not rely on a fundamental text to be dissected by scholars and taught at universities (common law is not based upon acts approved by the particularly Parliament and it is not codified), instead it is **evolved organically through the operation of a royal judicial system over time (common law develops through a case approach by courts)**- the **binding force of judicial precedent** in common law: the rule of **stare decisis** states the courts must follow the principle used in previous decisions.

So **how to modify the preexisting principles**?

- ❖ **Overruling/overturn previous decision** (it must be justified carefully): abolish/amend laws in the system.

(In civil law the legislature must enact new laws or abolish other laws, so there are different mechanisms and different sources of law: the main task in civil law is to apply the law enacted by the legal authority).

In the **English common law** system, the **judicial system** was **controlled by the king and queen**, which was highly **involved in the administration of the legal system**: IMPORTANT **RULE OF THE KINGDOM (CURIA REGIS).**

Structure of the Curia Regis (from 12th century …)

➔ **King**'s prerogative to **administer justice** to his subjects either **in person** (rare and in very important cases) or by **delegation to others**. The king made a **partial delegation of judicial power to appointed judges**.

1. **Exchequer**
   Jurisdiction on administration of **economic resources of the state** (**absolute rights** can be raised against everyone).
   - Tax
   - State (or national) accounting.
   - State property administration (ownership of the movable and immovable of the state)

(Abolished in 1875; relevant jurisdiction transmitted to Chancery and King's Bench Division of High Court).

2. **Common pleas**
   Jurisdiction on **obligation (relative rights**: one specific individual to another specific individual) and jurisdiction on possession that is (not an absolute right like property), but a state of fact over a given good, a res.
   - Claims for debts.
   - Possession recovery (ex. Stealing)
   - Writs of habeas corpus (order/decreto issued by the judge to see if there were the condition for the imprisonment) and writs pone.

(Abolished in 1875)

3. **King's bench**
   Jurisdiction on cases that were in the **interest of the crown.**
   - cases of interest to the Crown (effectively the supreme court for criminal cases)
   - Prerogative writs

(Transformed in 1875 in the Queen's [or King's] Bench Division of the High Court).

Common law and writs

«A written directive from the king, witnessed and bearing his seal, directed to a royal official or to an individual or group of individuals ordering the addressees to do or refrain from doing a designated act». A writ is a claim, and it was **issued upon the complaint of the alleged injured party**.

Over time wrists became an **ordinary judicial function of the crown**.

STRUCTURE OF WRITS:

- **Brief description of the fact**
- **Involvement of a royal official**

Example

"Stephen, king of the English, to the bishop of Norwich, greeting. I order you to reseize the monks of St. Edmunds of their church of Caistor as fully and justly as they were seized on the day when their abbot left for Rome. And if anything has since been taken away there, let it be justly restored. And let them keep it in peace that no injury is done of them thereof. «Witness: Aubrey de Ver. at Westminster. [from the reign of Stephen (1135-54)]

COMMON LAW, WRITS AND ITS RIGIDITY

Delegation of King's power was made **specifically in each case by writ** issued from the office of the chancellor in the name of the king.

Writs had a **strictly procedure** that had to be followed, otherwise the injured party had **no remedy**. The case in court had to **conform to the writ**, otherwise the **case was dismissed**. The common law judges having final power to quash the writ whenever it was deemed defective or inadequate to cover the facts of the plaintiff's case: this led the English common law to **provide remedies for the injured parties** because the system was too formal.

In the latter half of the **l3th century** the **chancellor's** powers of creating **new writs** to meet the advancing needs of society received radical checks, and a greatly retarded development of law ensued.

Therefore, in the 12th/13th century the **common law** was **divided** into:

- **Courts of equity/Courts of chancery**
- **Common law courts**

COMMON LAW, WRITS RIGIDITY AND ITS CONSEQUENCES

- **Defective of Substantive Law**: inadequacy of rights, both primary and remedial too rigid and formal).
- **Defective of Adjective (or Procedural) Law**: inadequacy of the common law procedure and remedies.

Gradual establishment of new system of courts: **courts of chancery**, or **courts of equity (12th century).**

COURTS OF EQUITY (or **Courts of Chancery**): where there were no satisfying remedies, equity courts came into place). By reason of his judicial prerogative, - his "**residuary jurisdiction**" - the **king** could **directly exercise judicial powers** in cases where **complainants could not**, for some reason, **gain relief from the ordinary courts** (from the beginning of the 14th century).
Therefore, before the Judicatures Act, equity courts may well be called to examine cases about receivership proceedings.

By the **reign of Edward III** (1326-1377) the **chancery** was **regarded as the regular court** (they were no more secondary courts).

It was stated the **supremacy of equity** with a revolution **(1616**): the supremacy of the court of chancery (equity) in relation, more especially, to the granting of injunctions against the bringing of actions and the enforcing of judgments at law was settled when, after a heated dispute between Lord Chancellor Ellsmere and Chief Justice Coke, King James I., by a prerogative decree issued in 1616, upheld the decision of the Chancellor: this marked the **triumph of equity courts** because equity courts **could refuse to implement a judgement from the common law court**.

The **judicatures act** (1873-1875) approved by the Parliament for the first time established that the English common law system was **not split anymore**: the **common law courts** and **equity courts** started to be **unified. Equity courts** aimed to create and, to the greatest extent possible, **adhere to maxims of equity**: equity is not justice but it's a system, it's a **body of courts**.

- "Equity will not suffer a right to be EQUITY without a remedy".
- "Equity regards that has done which ought to be done".
- "Equity looks to the intent rather than to the form".
- "He who comes into equity must come with clean hands".
- Equity aids the vigilant, not those who slumber on their rights.
- "Equality is equity"

Prevention vs. Reparation

- **Equitable remedies**: preventing the threatened violation of rights: the approach taken by the equity courts was an ex-ante approach.
- **Legal remedies:** generally mere reparation for the violation of rights. Common law courts were not worried about prevention but just wanted to restore the possession of the victim.
  Ex-post approach: after the damage is caused, the reparation is granted.

Specific Reparation vs. Non-specific Reparation

- **At law**, if a right has been violated, the remedy is nonspecific reparation (i.e., reparation for damages), except in exceptional cases: nonspecific performance (this still happens in common law countries

in tort law). Even though compensation is recognised as a monetary sum, the opposite approach was embraced by equity courts.

- **In equity**, specific reparation for a right that has been violated is granted, unless there is good reason for granting non-specific reparation. (The civil law tradition is based on the specific performance: if someone suffers a damage to a movable, the movable should be repaired).

Conditional Decrees vs. Unconditional Judgments

- **Equity** may, when necessary or just, give conditional decrees when it was considered just.
- **Common law courts** pronounce unconditional judgment finally in favour of one party (like today's decisions).

Example: An equity court's refusal of a temporary injunction in a patent infringement case on condition that the defendant keep account of all sales to be made pending the final hearing.

Administrative Functions

- **Equity** may exercise administrative functions and powers, as in probate and receivership proceedings.
- **Common law courts** cannot exercise administrative functions and powers, as in probate and receivership proceedings.

Limitations depend on nature of equity proceedings.

When an **equity court** gets personal jurisdiction over a defendant, it can grant a remedy by decreeing that the defendant does, or refrain from doing, a given act (e.g., the making of a conveyance), though the res subject to controversy is outside of the jurisdiction of the court.

Advisory and Continuous Functions vs Contentious Function

- **Equity** suits may be advisory as well as contentious: advisory + contentious function.
- **Legal** proceedings are only contentious (conflict between debtor and creditor).

Example: A trustee's bill for advice from a court of equity.

More Parties vs. Two Parties

- **Equity** can deal with a controversy to which there are more than two parties (or sets of parties) not identified in interest.
- **Law** can only deal with a controversy between two parties.

Example: Suretyship: creditor, principal obligor and surety obligor (guarantor) (fideuissione) and it involves 3 parties.

In some civil law jurisdictions, the liability of the surety is secondary so there's no solidary obligation (in Italy we have the solidary obligation so the surety and the debtor are jointly liable, and the creditor could ask for the performance from both.)

In Germany, Spain, France and common law countries is not like that, so the creditor must seek the performance from the main debtor and only after that he can ask the surety (no joint liability: surety is just a secondary mechanism).

- We must be aware of the roots of the foreign rule.
- Tertium comparationis: *which is the type of liability of the surety?* The tertium comparationis is the liability of the surety and creditor's powers.

- We have the materials: the article from codice civile and a decision/judgment (doctrine of the secondary liability of the surety).

Jurisdiction declined.

Equity will sometimes (on general grounds of policy and expediency) decline to exercise jurisdiction in relation to a foreign res or other matter, even though the court has personal jurisdiction over the defendant:

- Suit for partition/division of a foreign res (more owners) that was located in another country.
- Suit for winding up/cease the effect of a foreign trust (good were located in another country).
- Suit to compel defendant to do some affirmative act in a foreign jurisdiction.

THE SUPREMACY OF EQUITY

The supremacy of equity courts was established thanks to its flexibility: allegedly they could see their position be restored even though its position was not formal.

The equity courts and common law courts were **unified in a single court**.

Common law: reforms and modern system

Procedural reform aimed at reducing the gap between equity and common law.

There were initiatives aimed at reducing this difference:

- **Judicature Acts**, passed in the Parliament in 1873-1875 (influence of Bentham, pupil of Blackstone).
- Judicatures Acts created the **Supreme Court of Judicature**, based on the **High Court** and the **Court of Appeal:** we don't have the formal distinction between common law courts and civil law courts because we still have the tradition of common law courts.
- Creation of the **House of Lords (1876)**, that was originally not part of the Supreme Court of Judicature.

Judicature Acts

1. The system based on writs (formal writs) was **abolished**: **a system based on claims** was introduced and it was less formal.
2. Transformation of old courts (curia regis) administered by the king based on the three bodies governed by the kingdom: **Supreme Court of Judicature** + **County Courts**.

N.B.: Prior to the approval of Judicature Acts, if a breach of contract occurred, the creditor had to bring the case (i) before the common law court in order to be compensated had to bring the case in front of common law courts; and (ii) before the equity court for the specific performance: two procedures to solve the same conflict. To contrast this practice, they unified the courts.

ENGLISH COMMON LAW AND ITS LEGAL SOURCES

Lack of written Constitution; however, the word Constitution is used to describe the constitutional system as a whole (heritage of that environment).

The unwritten Constitution embraces:

- **Magna Charta libertatum** (1215).
- **Bill of Rights** (1689) (supremacy of the Parliament).
- **Representations of the Peoples Act** (1832, 1867), that have gradually introduced the universal suffrage for the first time (revolution).
- **Parliament Acts** (1911): supremacy of House of Commons over House of Lords.
- **Human Rights Act** (1998): each court should apply the Europ. Conv. Human Rights: it created some problems because if there is a conflict between a law adopted by the parliament and a rule from the European convention of the human rights. The English common law court **cannot declare a law unconstitutiona**l if there's a problem of compatibility between the human rights act and a given law: only the Parliament is entitled to do so.
- **Constitutional Reform Act (**2005) and **Constitutional Reform and Government Act (2010).**
- **Customs**: e.g. Royal Assent about each law approved by the Parliament

Based on the Europ. Convent. HR (ECHR), the Human Rights Act:

1. **«negative» civil rights** («**Residual Rights**»): State should refrain from taking harmful actions for citizens.
2. **«positive» civil rights:** State should be guarantee that some rights are respected (against discrimination, right to life, etc.).

CONFLICTS BETWEEN DOMESTIC LAW AND ECHR

The Human Rights Act is consistent with the **rule of supremacy of the Parliament**.

Two mechanisms:

1) Interpretation of the domestic law must be compatible with rights enshrined in the ECHR.

There is declaration of unconstitutionality in Italy and Germany.

In common law systems the Parliament can intervene to amend the law, but it cannot be pronounced its unconstitutionality. After Brexit, European directives are not binding anymore for England because they are outside the European system.

2) Duty of public authorities to act consistently with rights enshrined in the ECHR.

ENGLISH COMMON LAW: THE STYLE OF JUDICIAL DECISIONS

Main characteristics

- **Facts are clarified in detail**, wide description: judges elaborate principles starting from the facts. The principles will be followed from future courts, and this is described as an **upwards approach** (from bottom to up).
- In the **civilian tradition** we have abstract rules that must be applied (**downwards approach** and diffusion): the legislator/the statue is the central authority, and the principle is applied to the case.
- Distinction between the **legal principle upon which the decision is based** («**ratio decidendi**») and other sentences, fact descriptions and circumstances that are included in the judgment and do not amount to the legal principle upon the decision is based («**obiter dicta**»): the court is obliged to follow the ratio decidendi of the previous judgment: the juristic principle will be applied for following cases from future courts.

The **doctrine of stare decisis is based on ratio decidendi**: the rule of stare decisis obliges courts to follow the principles elaborated from previous decisions.

- One or more judges may disagree with the decision taken by the majority, either with respect to the result of the decision («**judgment**») or with respect to the reasons («**reasoning**»): **dissenting opinion**, in which a doctrine is elaborated.
  (For example, Court of Appeal is composed of 3 or more judges. This also happens in the US). Judges that don't agree (minority) can deliver a dissenting opinion (it is usually made available for everyone).
- Dissenting opinions are not binding in future cases.
- More opinions of judges may agree on the result of the decision/**final decision** («**judgment**»), dissenting on the reasons and they are called **concurring opinions**: although they agree on the final decision, reasons supporting the result may differ.
- Procedural aspect of the English legal system: distinction between **Pre-trial** (proofs are organized and defence briefs) and **Trial** (before the judge, based on orality principle + direct involvement of parties before the court and the judge)

Judicial Decisions as a source of law: critics

The preexisting law consists of customs: frequently **common law is often described as sort of customary law** that is formalised in decision by courts.
The **declaration theory** is based on the assumption that courts and judges are called to **expand on preexisting laws,** and they are not creating new law (**William Blackstone** (1723-1780) *the judge 'is not delegated to pronounce new law, but to maintain and expound the old one)*.
However, this view was considered to have some limits because accord to some modern theorists, this view could not explain the modern function of common law: new judges can create new law.
Therefore, in the modern scenario, decision issued from common law courts amount to source of law because they are capable of creating new law.

Historically, the main source of common law was always represented by customs, because if the law is made by the judge, he recognizes behaviours as binding: customs are a guide for society and law, and they start to be recognized formally in decisions.

However, a custom in England has no legal effect until it has been found and declared by a court or judge: to become a law, a custom has to be detected by the court/judge. The **custom i**tself is **not binding**, but **the decision** identifying and recognizing the custom **is binding**: the decision reflects the custom and makes it binding, formally.

A judicial decision may actually create law, as where the judge or court finds and declares a custom: **new law is created.**
An English judge or court may decide a case by virtue of a custom which has, in a previous decision, been found and declared: **no law is created** – simply a decision based on a previous decision.

Doctrine of stare decisis

To stand by the previous decision ("*To Stand by things decided*")

1. **Vertical Precedent**

A single precedent is provided with a binding force for a lower judge – there is a hierarchy, and courts are put at different levels. The courts put at the lower lever must follow the decision given by the higher court. «*Precedence of judge-made law over statutes, although this point looks like becoming less paramount over time. Judge-made law is typically expressed through the rule of stare decisis*».

2. **Horizontal Precedent**
   A single precedent is provided with a binding force for the same judge who rendered it, or for another court at a similar level (this rule is more influential in US courts than in UK courts): the following decisions must embrace the same direction of the previous court even if the courts are at the same/similar level.

A recent addition is the **statutory law** (laws enacted by the parliament) **+ judiciary decision**: nowadays **parliament also plays a role**, whereas before it did not.

Example: in *Re Schweppes Ltd's Agreement [1965] 1 All ER 195*, the Court of Appeal ordered discovery of documents in a case involving restrictive trade practices. Lord Justice Willmer dissented.
On the very same day, the same three judges issued a judgment in a second case concerning the same point – *Re Automatic Telephone and Electric Co. Ltd's Agreement [1965] 1 All ER 206*.
The second decision was delivered by Lord Justice Willmer who simply said:

"If the matter were res integra, I should have been disposed to dismiss the appeal in this case for the same reasons as those which I gave in my judgment in the previous case. It seems to me, however, that I am now **bound by the decision of the majority in the previous case**. In these circumstances, I have no alternative but to concur in saying that the appeal in the present case should be allowed".

The judge who dissented in a previous decision is still obliged to follow the same principle that he dissented in a different case, because he has to embrace the principles in a new decision because the dissenting opinion is not binding.

1. **Overruling**: A precedent ceases to be binding "if and when" a higher judge assesses it as unsound and wrong. The opinion given by a majority is not binding anymore because it is considered unjust or inadequate.
   Normally overruling is based on:
   a) **Interpretation**: the previous judge/court gave the wrong interpretation of the law. The conflict cannot be solved adequately resorting to this principle. (relevance of the equity approach even though they are unified).
   b) **Unjustness** (concept of justice and equity).
2. **Distinguishing:** A court is not bound by a precedent insofar as it acknowledges that it is hearing a case which is substantially different from that previously adjudicated.

Example: White v Jones [1995] UKHL 5: leading **English tort law case** (it was highly debated whether it was tort law) concerning professional negligence and the conditions under which a person will be taken to have assumed responsibility for the welfare of another.

Facts: Two daughters of 78-year-old Mr White sued Mr Jones, the defendant, for failing to follow their father's instructions when drawing up his will. Mr White and his daughters had fallen out; so, he asked the solicitor to cut them out of the will. Before he died, they solved their conflicts. Mr White asked Mr Jones to change the

will again so that £9000 would be given to his daughters. After he died, with the will still the same, the family would not agree to have the settlement changed.

Issue: Could a professional person be liable for negligence to another person with whom they had no direct contractual relationship or responsibility? Can the daughters ask the solicitor to be compensated even though there's no relationship between the sisters and the solicitor?

The claim was dismissed at first instance, upheld on appeal and the matter came to the House of Lords.

Judgment (majority of three to two in the House of Lords): The daughters would be able to claim. Influenced by the idea that solicitors may escape the consequences of not doing their job properly, it has been held that a special relationship existed between the daughters and the solicitor, and that Mr Jones had assumed responsibility towards them.

This was so even though there was no contract or fiduciary relationship between them, this lack of negligence existed between the solicitor action and the daughters: the daughter's interest had to be protected (**protection of duty** between tort law and contract law, although it's not technically a tort).
An ordinary action in tortious negligence along the lines proposed in Ross v Caunters [1980] Ch 297 was inappropriate and that there was a lacuna in the law.

- In common law systems, **judicial decisions** are the **main source of law** (**the dominant part**).
- Statutory law- **statues are additional elements**: they provide rules that combine with principles elaborated by courts (depending on the degree of specificity by the law enacted by the Parliament- they regulate specific subjects).
  It is said that they could subsite the judiciary opinion= however this is not true because statues are just additional elements and cannot replace the judiciary opinion.

Interpretation of common law

SUBJECTIVE TEST
It aims to ascertain the parties' subjective understandings and is therefore based solely on the inner intention of their communications or conduct (more common in civil law traditions).

OBJECTIVE TEST
It aims to ascertain the objective assessment of an external, detached observer and is therefore based solely on the outspoken meaning of the parties' communications or conduct: what does the text objectively convey- focus on the wording of the statue and what it does convey by words. If the text is clear, it is not necessary to go beyond but to only use the text (**textualism: interpret the law using only its text).**

In the civilian tradition there's a combination between subjective and objective test, and this does not happen in common law: «*If the words have a clear meaning, I cannot look at extrinsic matters to give them a different meaning (**textualism**)… If the words have not a clear and definite meaning in themselves, then I can look at the surrounding circumstances in which the agreement was made and give them a meaning from those circumstances provided I do not stretch the language of the words used*».
The subsidiary criteria are the legislature intention or the preparative approach for the law.

Us common law and the constitution

US and UK common law systems share some common ground, but they are different.

The English common law is based on an unwritten constitution (we have several documents that represent the heritage) while the US common law has a constitution that has an influence of private law.

The **US constitution** was written in 1787 and is in force from 1789: it is considered the foundation of the US federal law that combines with the state law. The US constitution followed the declaration of Independence (1776), and it co-exists with the constitutions of the different states, being the US a federal system.

It is based on 7 articles (basic rights), subdivided in Sections and now supplemented by 27 Amendments. Articles 1, 2, 3 are related to legislative, executive and judiciary branches (tripartition of powers): influence of French (legal) culture (Montesquieu) and rationalism (that did not influence much the UK common law).

The legislative branch (**US Congress**) consists of the **House of Representatives** and **the Senate** and there is the **Veto Power of the US President** (an initiative by which the president prevents an act passed by Congress from becoming law).

The legislative power of the Congress is highly relevant areas:

Art. 1, Sect. 8: The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; To borrow Money on the credit of the United States; To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.
If **a conflict** arises between federal law and State law, **federal law prevails** because it is on a higher level: the competences are divided between each State law and the federal law.

Role of each state

Art. 1, Sect. 10: "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.
No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.
No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay".

The bill of rights

It consists of the 1st ten Amendments of the US Constitution.
The Bill of Rights reflects the fundamental rights, and it combines with the Constitution:

- 1st Amendment: Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
- 2nd Amendment A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

- 4th Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
- 5th Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of la w; nor shall private property be taken for public use, without just compensation.

Thanks to general clauses, jurists can interpret law.

Doctrine of judicial review

The judicial review is one of the columns and cornerstone of the US common law structure. A judicial review happens when the legislature is in contrast with the US constitution, the law can be set aside. Each federal court can exercise this judicial review: authority of federal courts to declare that federal or state government actions violate the Constitution.
"US courts are vested with the authority to determine the legitimacy of the acts of the executive and the legislative branches of the government".

The doubt of compatibility can be raised only in connection with an actual case or controversy. **Advisory opinions are <u>not rendered</u> by US federal courts.**
(In other countries the authority to determine the compatibility is assigned only to one court).

They tried to modernize the US common law systems. David Dudley **Field** (1805-1894) tried to replace the authority of judiciary decision with an us codification.

- **Code of civil procedure of the state of New York** was enacted in 1848-1849 (also known as **Field Code**), which is nowadays adopted by some **thirty States** of America.
- Subsequently, **a code of criminal procedure of the state of New York** was enacted in 1850 and nowadays adopted in sixteen States.

However, when we examine substantive law, these attempts were less successful, so the authority of judicial decisions remained unchanged.

On the contrary, attempts to codify substantive private law has been less successful: although Field's civil code was passed in 1879, the bar of the City of New York successfully instigated the governor of the state to veto it. Subsequently, "five States, including California, adopted their civil codes on the basis of Field's blueprint; they are still in force, but they are looked upon just as a revised and improved compilation and systematization of common law rules and principles, far from attaining the degree of completeness and consistency that are a staple of civil law codifications" (Sirena).

Even though they have some statutory laws, our meaning of code is not equal to their meaning of code. The rules mentioned in their courts are more practical and try to solve concrete problem: it's better to use the word **compilation of laws**, especially in the private law sector.

Our codes tend to be consistent and want to provide all the possible solutions to the same case: this does not happen in the US compilation because they normally provide for specific areas.

- In the civil codes we have abstract rules and general principles for every situation.
- In the **US general principles of law are given by courts**.

Levels of the Federal court system

There's a hierarchy and it is important to understand the doctrine of the stare decisis in the US and how overruling works:

1. **Supreme Court**: court of final appeal; not all cases appealed to the supreme court are heard by the court. It is made of eight Justices and one Chief Justice.
2. **Circuit Court of Appeals**: appeals from District Courts; all cases appealed to the Circuit courts are heard by the court. There are 12 federal appeals courts, and each covers a specific jurisdiction called a circuit.
3. **District Courts**: Lower-level courts for trials; the only level of courts that include juries. There are 94 district courts, and every state has at least one.

US common law→ private law. STATE LAW VS. FEDERAL LAW

Private law is disciplined by state law. The role of federal law comes into play where's a gap in the state law, so it's a subsidiary tool for private law.

Private law of each American state may be considerably different from that of another: we have different of private law according to the number of states in the us since each state has its own private law.

- In the English common law, the role of customs is highly relevant, and the courts often recognize the customs formally in their decisions: customs are a crucial/essential element taken into consideration by courts (strict relation between old customs and judicial decisions).

Vs.

- In the US common law customs are a source of last resort: in us there's a written constitution. This is similar to the traditional civilian approach: the role of customs is less relevant in the US common law.

"The Constitution confers to the Congress the power to enact statutes of private law solely for certain limited purposes: to prevent the **risk of fragmentation**, the congress gives the **federal law** the **power to intervene** and regulate **particular areas of private law** (e.g., regulating interstate commerce: unform rules that apply in every state to ensure the commerce and transaction): federal rule works in the interstices/gaps of state law and private law falls out the scope of federal statutes.
(The most effective attempt to attain a certain degree of uniformity among states was achieved through the Uniform Commercial Code (UCC) of 1952.)

- Federal statutes are collected in the US Code.
- Statutes of each state are collected in codes (not similar to the codes of the civilian tradition- remember that the meaning of code is different in the civilian tradition).

Federal Law has a role in the interstices of state law, which typically governs private law.
General Rule

- Federal courts have jurisdiction on civil (and criminal) law issues when they are based on federal law.
- State courts have jurisdiction on civil law issues based on state law; however, in some cases, state courts may decide, subject to the principle of supremacy, issues of federal law; in others, federal

courts may decide cases where the parties come from different states and where state law is applicable to each party.

THE STYLE OF JUDICIAL DECISIONS in English/US common law

Main characteristics

- **Doctrine of "stare decisis" is less strong than in the English common law**: in US they have a written constitution and statutory law (there's less space for this doctrine to expand).
  As a result, we have:
- «**Prospective overruling**»: the court declares in the judgment that the previous decision is applied but adds that there are valid arguments that it will no longer be considered binding for the future (the court states in the sentence that for the future there's a valid justification for abandoning the result adopted up until that moment). Historically this is not rooted in the English common law.
- «**Anticipatory overruling**»: a lower court abandons the previous decision of a higher court if it is reasonably certain that, based on its precedents, this higher court will no longer follow that specific judicial precedent (relevance of hierarchy comes into place). This chance is not given to courts in the English common law system.
  On the contrary**, in the English common law the overruling is immediately effective** in the case at stake: we do not have prospective or anticipatory overruling, because it's immediately effective.
- **Written Constitution**: general clauses stimulating an evolutive interpretation of the US common law (ex. good faith is a general clause and in the US its role is more significant than in the English common law: the interpretation activity allows jurists to modify the law).
- In the US, courts of a given state **compare their decisions with decisions of other state courts**. Therefore, the **competition among US state systems** to detect the **most efficient decision** and most appropriate principle (or another paradigm): sometimes decisions of a given State court cease to be binding because judgments issued by other courts (in different States) are deemed to be more adequate. England is unified so this does not happen ≠ in the US we have a **federal** and a **state level**: the private law for example is governed by state law and the consequence is that we have several private laws made by each state and this stimulates a competition among states **comparison vs. competition** (Decision may create law, so this is also a competition between decisions that can create law).
  The paradigm is to detect which is the most efficient decision and so which principle should be embraced.

Decisions adopted by US courts unfold two main effects when examining the doctrine of stare decisis:

(i) binding effect

(ii) persuasive authority

- **Vertical Precedent (binding):** decision issued by the Supreme Court of Ohio (higher court) has a binding effect on state courts of Ohio (lower court).
- **Horizontal Precedent** (less strong than in the English common law): decision issued by a given court may bind the same court in a different case: this allows the court to detect differences between (or among cases) and potentially abandon that precedent over time.

Persuasive effect: A court may be not bound to follow a given judicial precedent; however, it decides to resort to the «ratio decidendi» of a decision issued by a different court located elsewhere (a Texas court may adopt the ratio decidendi of a decision issued by a court of California): persuasive authority has an impact on decision given by other courts.

US COMMON LAW- PRIVATE LAW

Important attempt to codify some rules and areas in the US and particularly this need was felt in areas that covers interstate competence like commercial law and that's how the **uniform commercial code (UCC)** was born by the American Law Institute (prominent jurists, studios people) that provided some rules for contracts and international transactions: from **a technical level** it is defined as a **model of rules**- it encompasses some principles and rules about commercial and sale contracts.

- ❖ Sale contracts and further commercial transactions (lease, guarantees, etc.)
- ❖ Model law: a sort of codification resembling a classic code.
- ❖ These rules are very pragmatic and not dogmatic: they often indicate the procedure that must be respected in commercial negotiations. It regulates the moment before the conclusion and the execution of the contract itself.

UCC has been prepared by the ALI and the National Conference of Commissioners on Uniform State Laws. It is not the result of legislative power, and it was firstly drafted in 1952.

This also happened in Europe with the European Law institute that like the American one only act as a source of inspiration since it's soft law and not hard law, and parties have to choose whether to use them or not.

Mixed legal jurisdictions

They are a complex case from a technical point of view because it's difficult to say whether they are part of the civil law jurisdiction or common law jurisdiction: they are the result of a combination of the elements typically characterizing common law and civil law jurisdiction **(**common law and civil law coexist) because they combine both tradition (result of an hybridisation, that can also be connected to the notion of legal transplant that we've analysed). That's why Patrick Gleen proposed to replace the notion of family (law) by David with the notion of tradition (law): the notion of tradition is more fluid and dynamic and less dogmatic.

If there is a civil country in which we import a piece of legislation from a common law country, this doesn't mean that we are changing completely the civil tradition in the country, this is just a legal transplant ≠ often mixed jurisdiction is a result of full hybridisation.

On the other hand, **a legal transplant does not necessarily lead to a hybridisation**.

For example, when we have a legal transplant typically characterizing the common law jurisdiction and this is accepted in a civil law country, we are just embracing a single theory.

There could be a mixed legal jurisdiction when **common law and civil law coexist**, but we could also have other elements forging a mixed legal jurisdiction because **they could also combine with other traditions (customary law, religion, etc.).**

Examples:

- South Africa (1809)
- Scotland (1707)
- Louisiana (between 1803-1812)
- Quebec (1763-1774)
- Botswana (1891)
- Puerto Rico (1898)
- Israel (2d half of 20th century)
- Philippines (1898)

For example, in **South Africa** (in 1809 mixed legal jurisdiction started to be relevant) they have mixed common law and customary law, and Roman law is still considered a source of law and is applied.

South Africa is based on a system deprived of a code, so it is an **uncodified civil law system**. The sources of law are:

- **Hierarchy of Sources of Law with binding force**:
  1. Legislation.
  2. Judicial decisions/judicial precedent.
  3. Customary law.
  4. **Roman–Dutch law**: **legacy of roman law elaborated by some Dutch jurist in the 16th century**. The law of that period was strongly influenced by Roman law, and it was somehow imported in south Africa, particular in the Cape of Good Hope (this influence remained in modern period), **legacy of ius commune (rules of roman law and canon law) elaborated by a Dutch jurist**: the ius commune interpreted by Hugo Grotius had a significant impact on south Africa.

     «The law of the Netherlands has been codified since 1809. The application of the Dutch version of the ius commune was thus ended, at least in Europe. This is not true, however, of the Dutch colonies, at least in so far as they were taken over by the English before the Napoleonic Code, as adjusted for the Kingdom of Holland, came into force» (MPIH). Dutch jurists of the seventeenth and eighteenth centuries brought new insight to the examination of the Roman sources while innovating approaches to the study and synthesis of local customary law within a classical Roman framework (**not classic Justinian law because it embraces the interpretation of Dutch jurists of Justinian legal institutions and law).**

     When Jan van Riebeeck landed at the Cape of Good Hope in 1652 to establish a refreshment station for the Dutch East India Company, he brought the influence of the Roman-Dutch legal system with him.
  5. **Roman law**

Sources of Law with new persuasive authority

- ❖ South-African legal literature.
- ❖ Foreign law.
- ❖ Obiter dicta of judges: it comes into place when jurist examine the facts of the case.

Main influence of Common Law: adjective/procedural law

- Criminal procedure
- Civil procedure
- Company law/commercial law
- Constitutional Law

Main influence of Roman-Dutch law on **private law and family law** (When Jan van Riebeeck landed at the Cape of Good Hope in 1652 to establish a refreshment station for the Dutch East India Company, he brought the influence of the Roman-Dutch legal system with him):

- Contract Law
- Law of Delict (Tort)
- Law of Persons
- Law of Things
- Family Law

Constitution of South Africa (Republic): was promulgated by President Nelson **Mandela** on 18 December 1996 and came into force on 4 February 1997; it replaced the Interim Constitution of 1993.

Style of decisions in South Africa: judicial system

Judicial decisions are unanimously accepted as a source of law and they are strongly motivated and descriptive, so judges play an important role in the system: they create new law. The final judgements are based on the previous decisions (precedent)= **institution of the judge follows the common law model, so judges are law-creators** and not only appliers.

Dissenting opinions and concurrent opinions (different reasons are provided for the same solution) are **admitted** even though the majority opts for a given solution (the system is very similar to common law).

To have **overruling** the **principle** must be **manifestly wrong** and not fit for the purpose.

Otherwise, they would adopt for the **distinguishing:** the previous principle is not abandoned, but they try to **find another principle that can work with the facts of the case**: South African courts will only explicitly **overrule** a previous decision when they are "satisfied that it is wrong." If they are not convinced that this is the case, they will try to find convincing reasons to distinguish the previous decision.

Like English and Scottish judgments, South African judgments are motivated and discursive in style:

- prior jurisprudence is mentioned.
- full account of the facts is provided.
- decisions explain prevailing as well as opposing legal arguments.

Customary law is very important and is expressively recognised by the Constitution in South Africa: there is a list of customs that are formally recognised, and they also have unwritten practices that have relevance without being formally recognised/written. Both the unwritten and written customs **must be compatible with the Constitution** (and the Bill of rights that is part of the Constitution).

Two forms of customary law:

(i) living / unwritten practices.

(ii) official customary law/compilation of customs that are written.

Both have been **recognised expressly by the courts and by the Constitution** and are now, subject to the Bill of Rights, embedded in our Constitution: this compatibility is mandatory and a prerequisite.

For a cultural practice to be recognised in South Africa:

1. the custom must have existed for a long time.
2. the community at large must recognise the custom.
3. the custom must be reasonable= standard behaviour adopted by a community.
4. the custom must be consistent and subject to the Constitution and other legislation.

Many variations depending on the tribal origin.

Scotland

Scotland is another example of a **mixed legal jurisdiction**: there is a hybridisation of common law and civil law. The influence of common law is historically relevant, and it became even more relevant in recent times. Scotland, England and Wales and Norther Ireland form the United Kingdom, and they have three different jurisdictions.

There was no influence exercised by English courts over Scottish courts, despite the treaty of union (**Historical reference: the Treaty of Union (1707):** the parliaments of Scotland and England endorsed the Treaty which

led to the Union of the parliaments in 1707. In constitutional theory both the English and the Scots Acts of Union were constituent documents transferring sovereignty to the new Parliament of the "United Kingdom of Great Britain")

NO AUTHORITY/INFLUENCE BY ENGLISH COURTS: The Treaty stipulated that no Scots case was to be heard by the English Courts of Chancery, Queen's Bench, Common Pleas, or "any other Court in West minster hall" and that the English courts were to have "no power to Cognosce, Review or Alter the Acts or Sentences of the Judicatures within Scotland, or stop the Execution of the same."

- ➔ Civil law texts were widely read in Scotland to supplement Scots sources.
- ➔ The **ius commune** was regularly cited and relied upon alongside Scots customary law and statute: the influence of ius commune in Scotland was highly significant until recent times and in fact in Scotland we have several civil law texts reflecting the structure of ius commune (roman law and canon law sources).
- ➔ No institutional or doctrinal separation between the rules of law and equity in the English sense.

Scottish law recognises four **sources of law**:

(i) Legislation, approved by the Parliament.

(ii) Legal precedent (with some peculiarities) is highly relevant, so judges can create new law: juristic principles that shape the source of law- the declaration theory by William Blackstone was not embraced in Scotland (the declaration theory is more in line with civil law because it states that the judge doesn't make law.) because it was considered inadequate: modern Scottish jurists recognised how judicial decisions are able to create new law and amend pre-existing laws.

(iii) Specific academic writings: based on the study/concepts of roman law and of ius commune. (it was a scholarly law, so the influence of scholars was highly significant).

(iv) Customs: the role of customs was highly relevant.

For an in-depth analysis: the **main influences on Scots law** arise from the Continent, particularly **France** and the **Netherlands**, having their **roots in Roman law**. These influences helped to establish an **"institutional" tradition**, with the major early legal texts modelled on the Institutes of Justinian, e.g. Lord Bankston's an Institute of the Laws of Scotland, Erskine's Institutes and Bell's Principles, and Dictionary. These sources are still accorded special status.

It is still debated whether the model of Scots law was highly influenced by ius commune and so the legacy of Roman law: while the influence of the ius commune persisted well into the eighteenth century and even **nineteenth century**, Scots law became increasingly **subject to Anglicization/common law** during the nineteenth century and use of ius commune sources declined sharply.

- ➔ In Scotland, there was **no separation between equity courts and common law courts** even though their vicinity. From a substantive point of view there was no distinction between equity rules and common law rules.

ROLE OF JUDICIARY (BETWEEN CIVILIAN AND COMMON LAW TRADITIONS)

The primary role of the judge is to **apply or develop existing legal rules** rather than to create new ones:

- In interpreting legislation or the common law, judges are **bound to conform with the exposition of the law** emanating from **superior courts**- decisions issued by superior courts influence decisions adopted by lower courts.

- However, where there **are gaps in the law**, a more **creative role** may be adopted because the given case is not regulated.

Judicial creativity is acceptable if it is within the law, so that fundamental principles may be extended to deal with new conditions or changing social and economic circumstances.

Style of Judicial Opinions: it is generally lengthy, encompassing the facts of the case and the arguments put forward by both parties; setting out detailed reasoning to justify the outcome of the case, usually with close attention to prior authorities (similar to English courts) + dissenting opinions are allowed.

QUEBEC (*French legal system + common law*)

The birth of Quebec's mixed system occurred with the transfer of **sovereignty from France to England**. In the initial period, 1760–1774, subsequent to the conquest (1759) of Quebec by the English at the Plains of Abraham and the formal cession of sovereignty by the Treaty of Paris (1763), it was English policy to attempt to subvert the whole of the pre-existing legal system, i.e. private as well as public law".
The pre-existing French law was officially maintained, but only as of 1774, rather than 1763 when the change of sovereignty occurred. However, this body of norms was gradually infiltrated with English legal ideas.

The Governor of Quebec, James Murray, established:

- **a Court of King's Bench (1764**), in which judges were instructed to determine criminal and civil matters "agreeable to the laws of England".
- **A Court of Common Pleas**, which had to determine certain property matters in a way "agreeable to Equity, having regard nevertheless to the Laws of England, as far as the circumstances and present situation of things will admit".

  - Strong influence of the traditional common-law model
  - Independence of the judiciary is a constitution alright- the courts are highly independent, mimicking the common law system.

Difference between **federal level** and **provincial level**: two lines that distinguish between the two levels. Before the higher court the federal decision may be reversed (supreme court of Canada).
For example, the civil code of Quebec has an influence on the provincial level.

- At federal level, Quebec is bound by Canadian federal law.
- At provincial level, hybridization between common law and civil law.

Most civil laws are made by the National Assembly, which is composed of members elected by Quebecers during provincial elections e.g. Civil Code of Québec. Civil Code of Lower Canada (which would today correspond to the province of Quebec) came into effect on 1 August 1866. It was repealed and replaced by the Civil Code of Quebec, which took effect on 1 January1994, (roots with code Napoleon and Quebec civil code).
e.g. Civil Code of Québec: Persons, Family, Successions, Property, Obligations, Prior Claims and Hypothecs, Evidence, Prescription, Publication of Rights, and Private International Law.

MALTA

Legal mentality of Maltin jurists was influenced by Italian legal thinkers: while some areas (maritime law) were influenced by common law, others were influenced by civil law.

Custom is considered a binding source from a formal point of view. In practice this is highly limited.

Hierarchy of Sources with binding force

- Constitutional law (Constitution Republic with written Constitution)
- Primary and secondary legislation
- Common law and European law
- Custom

The British Government oriented public law and maritime law towards the English common law model. Once Malta became de jure an English colony, the indigenous representative institutions were dissolved. Malta came closer to the British court system under the administration of the Governor, Thomas Maitland. It has only been independent of the United Kingdom, however, since 1964.
Today it is member of the 'Commonwealth of Nations' (formerly known as the 'British Commonwealth') and its member of the European Union (E.U. 2004) and a signatory of the European convention of Human rights.

- The jurisdiction combines an essentially continental substantive private law, particularly as expressed in modern codifications in the French manner, with significant French and Italian influence.
- English common law has a significant impact on company and maritime law.

British public law is a subsidiary source in public law matters; Custom is a binding source of law, even though its role is limited in practice Judicial decisions are not formally binding the ratio decidendi/obiter dictum distinction is sometimes invoked; however, generally the Maltese judiciary opts for a European model Dissents are not issued Decisions are only collegial.

NO HIERARCHY BETWEEN COURTS: no single superior court over both the ordinary civil and criminal courts. There are, however, some specialized courts within the ordinary court structure. Decision of higher courts are not binding for lower codes.

Malta's Constitutional Court: 3 judges, including the Chief Justice. It is entitled to interpret the rules of the Constitution, and to declare that a law is null and void due to its inconsistency with constitutional provisions However, the Maltese Constitutional Court is not empowered to strike down an unconstitutional law. A letter will be sent to the Clerk of the House notifying this.

Civil code of Malta: Although British rule was officialised in 1814, the British refrained from imposing common law in Malta. The first proper codification of laws the island ever had, 'Del Diritto Municipale di Malta' (Malta, 1784), often affectionately referred to as the 'Code de Rohan', which was promulgated in the dying days of the long rule of the Knights Hospitaller, was substituted by a local version of the 'Code Napoleon' in 1852.
The Maltese Legal System had already undergone several reforms under the rule of the Knights of St. John, the most recent of which at the time being the "Code de Rohan" of 1784. The "Code de Rohan" was based on many similarities with Roman law: it was unclear if reference would be made to the original Roman law.

THE DIVISION OF COMMON LAW AND CIVIL LAW TRADITIONS

- Dialogue between jurists of the two traditions has been significant. However, the distinction between the two traditions has become less significant.
- What role for **Roman law**? It has been demonstrated how the influence of roman law was highly important in both civil and common law, especially for private law (contracts).
- **Tendency** in common law towards intense **conceptual elaboration.**

- Empiricism of common law has been **mitigated**: common law started to abandon the practical approach they had always used - they started to elaborate abstract concepts that are the basis of the civil law system.
- **Common law lawyers** became increasingly interested in **comparative law**; for this reason, they have often adopted legal categories that are historically rooted in civil law, like contracts, tort law etc: these categories were typically elaborated by civilian lawyers and these categories were transmitted to common law (**hybridization between the systems**).
- Participation of the **UK in the European Union**, which had an impact on English common law («»Even in the aftermath of the **UK's withdrawal** from the EU, this patrimony of European legislation and judicature has been 'retained' in the UK's legal system, becoming domestic law») Many institutions of common law were modified because of the **supremacy of European law over domestic law: influence of European law rules.**
- Increasing **influence of statutory law** in the English common law: active role of the Parliament whose rules shaped the common law. These statutory laws coexist with precedent law.
- **Human Rights Act 1998**: 'So far as it is possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights' - domestic laws and principles had to conform with the European convention of human rights.

CIVIL LAW

The basic characteristic of such jurisdictions is that they have fully implemented the doctrine of separation of powers.

Legislature- Executive- Judiciary

Baron de Montesquieu (1689-1755): "only the mouth that pronounces the words of the law, inanimate beings that are not able to modify either its force or its rigour".

The core of private law is gathered and systematically organized into a civil code:

- Code civil (1804).
- Bürgerliches Gesetzbuch (1900).
- Codice civile (1865, 1942).

FRENCH CIVIL CODE (CODE NAPOLEON)

The doctrinal acknowledgment of a *droit commun français* dates back to the sixteenth century and gained further ground thanks to the legislative activism of Louis XIV, the Roi Soleil". The aim was to create:

- a national law after the French Revolution
- a unique law, intelligible to all men

The Code civil des Français entered into force on 21 March 1804.

The French civil code was and is a paradigm for all the civil codes in Europe: the main aim of Napoleon was unifying France.

Before the civil code we had several laws that had an influence: the roman ius commune was applied in the southern regions of France, while customary law was applied in central and northern regions of France.

The revolution brought an idea of nationalism and so the need to make the laws of France uniform and the French civil code met this need: it embraced some roman law traditions and institutions and the pre-existing customary law.

It was written in an intelligible way and the drafters started from canon law. However, there was the **secularization** of the law that reflected the detachment of the law as a product of the State that should be distinguished by the law of the church.
A clear example of secularization of private law was **marriage** which was **turned into a civil contract**: state authority and over time, this paved the way for divorce (possible that is compatible with marriage because it is now seen as a contract that now can be dissolute).

Code Napoléon Structure

- Succession (reflects the successione legittima where there is no will) and family law based on preexisting customary law,
- Law of contract and wills (testament), and dowries, based on Roman Law.

-Hybridisation between existing laws: customary law in the northern and central regions of France and roman law in the southern part of France.
-Main values: Freedom of contract and protection of private ownership.

Code Napoléon Objectives:

(i) make the law accessible to all citizens.
(ii) break the particularism which had characterized the feudal regimes= country had to be unified.
(iii) uphold the principle of equal treatment.
(iv) apply the law irrespective of the social class or group to which a citizen happened to belong".

The code was a result of a positivistic view: positivism and nationalism (*école de l'éxegèse: role of jurists)* which affirm that the law is binding because we recognise the existence of an authority able to enact laws ≠ naturalism that says that is a law is unjust then it is also invalid. On the other hand, nationalism is born with the peace of Westphalia and French revolution.
In the first period after the enactment of the civil code, judges and jurists were simply called to interpret existing laws: they had to read and explain the rules without adding anything so they could not create/elaborate new laws.

From 20th century, advent of sociological studies and legal comparison led to a **creative role of judiciary:** this modified the approach of French thinkers that had now **a more creative role.**
Reform in 2016 (causa): import. of Cassation: notion of causa (in the contract law) was abandoned. This notion of causa is very important in civil codes/traditions, for example in Italy (art. 1325) whereas in France was abandoned in 2016.

GERMAN CIVIL CODE (BGB)

- ❖ Anton Friedrich Justus **Thibaut** (1772-1840), professor at the university of Heidelberg, advocated for immediately drafting a German Code: **need to codify laws.**
- ❖ Friedrich Carl **von Savigny** (1779 1861) on the other hand, although not against the idea in principle, argued to first develop a stable corpus of doctrines and concepts and only afterwards to set them out in a comprehensive codification: **no need for codification**.

In 1874 a commission was charged with the task of drawing up a German Civil Code [**Gottlieb Planck** (1824-1910) and **Bernhard Windscheid** (1817-1892)].

BGB (1900)

- It is not based on local/pre-existing customs (different from the French civil code where pre-existing customs were mixed with roman law).
- It is not based on German law.
- **It rests on Roman law** (significant influence of the Historical School, Savigny: assumption that the popular mentality of German people was part of Roman law), highly based on institutions from roman law.

Evolution of Roman law rested on **conceptualism** and **formalism** and this characterised**:**

- ❖ German Pandectistic School (late 19th century)
- ❖ dogmatic approach, it became a paradigm in Europe.

➔ **Creation of a system of contemporary Roman law** (System des heutigen römischen Rechts)- crucial role of **Savigny**, who was the **founder of the Historical School of Jurisprudence**: legal institutions that were rooted in roman law had to be modernized.

➔ Historical School has been based on two methodological elements:

Organicist conception of the law (erected on juridical institutions) (two tenets to organize societal needs)

- the historical approach to the knowledge of law: need to resort to history to understand.
- the systematic approach to the knowledge of law: each legal institution has a specific function, and they should be combined to have a body of rules that forms the perfect structure.

The structure of the BGB was laid out along the so-called **Pandektensystem** – the civil code was strongly influenced by the pandect's school.
Matters divided as follows:

- ❖ obligations
- ❖ property
- ❖ family law
- ❖ succession

The BGB It does not have a practical approach: it is based on abstract concepts, especially in the General part we typically find the rules and definitions that are then supplemented in the other parts of the code.

One of most important aspect of the BGB is represented by the "General Part" (Allgemeiner Teil): first book of the BGB encompassing all definitions and rules to be supplemented in following provisions: abstract definitions that are historically connected to the elaboration of the important jurists who studied Roman law.

The BGB typically embraces abstract concepts elaborated by scholars and professors. Not connected to the legal practice and was really influencing for other civil countries. Scholarship was really important: German scholars were considered a great role to follow in Europe because they helped to draft this code.

- Increasing Dogmatism in 19th century led to a reaction and criticism- (see von Jhering): alternatives came into place, and this resulted into two new lines of thinking:
  - ❖ **Begriffsjurisprudenz (law based on concept): old dogmatic approach** based on abstract concept and definition elaborated by jurists.
  - ❖ **interessentjurisprudenz (Heck):** need to envisage a **system based on an analysis of concrete need of people and cases (practical need of parties, societal needs that enter into the realm of law).**
- Modern. Law of oblig. (2001) (consumer law rules): huge reform in 2001 when huge parts of civil codes were reformed. Some of the European directives were already implemented into the code + new **rules of consumers** (consumer law arose from European directives) were **implemented and transposed into the german civil code** by the legislator (no more split into the system, while in Italy we have the civil code and the consumer code which is considered as a special law).

INFLUENCE OF GERMAN CIVIL CODE (BGB)

Verwirkung (frequently understood as a "**tacit waiver of claim**") is a legal institution characterizing the German legal system (rooted in a judicial interpretation mainly based on § 242 BGB): the possibility of raising an exception to an claim brought by an individual who has generated in the other party a reasonable expectation that she/he will not exercise a right of her/his own (not expressively regulated by the bgb was nevertheless recognized as binding the legal basis is represented by the 242 paragraph because it is strictly correlated to the good faith: **§ 242 BGB Performance in good faith**: An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration (basically it was inferred by this paragraph and it became a component of German law).

This **institution was transplanted**: based on works of some Spanish jurists (they translated the BGB), courts in Spain (e.g., Tribunal Supremo) have started to apply (1950) this doctrine by resorting to the expression "retraso desleal". The object of the legal transplant was not a written rule: Spanish people adopted a rule/a theory based on the performance in good faith regulated in the BGB.

Art. 7 Código Civil of Spain (1889) (after the reform of 1974): recognised the theory and the possibility (**legal transplant based on a theory**)

1. Rights shall be exercised in accordance with the requirements of good faith.
2. The Law does not protect the abuse of the right or the antisocial exercise thereof. Any act or omission which, by the intention of its author, by its object or by the circumstances in which it is carried out, manifestly exceeds the normal limits of the exercise of a right, with damage to third parties, shall give rise to the corresponding compensation and to the adoption of judicial or administrative measures to prevent the persistence of the abuse.

ITALIAN CIVIL CODE

- ❖ National Unity in 1861: need to enact a uniform body of rules for the State of Italy
- ❖ Italian civil code of 1865
- ❖ In 1882 a commercial code was enacted in Italy. However, there were many discrepancies with the civil code:

1. art. 917 Italian Commercial Code (1882): 10 years **statute of limitation (prescrizione)** (ratio: in commercial subjects the traffic must be fast because we want to reach certainty before) vs. Art. 2135 Italian Civil Code: 30 years (need for certainty was less heavy).

The Italian legislature of 1942 opted for the rule in the commercial code: now the standard period for prescription is **10 years** (now there's an ongoing debate among scholars to bring it to 3 years).
In the German civil code, the time of limitation is 3 years (certainty about legal relationships: we want to know the result).

2. The **surety i**n the previous Italian civil code was not based on joint and several liability: no solidary obligation between the surety/guarantor and main debtor: surety **was a subsidiary mechanism**, so the creditor had to first seek the performance from the main debtor and only if the latter wasn't able to pay, the creditor could ask the performance to the surety (second debtor).

The Italian legislature of 1942 decided to abandon this rule (from a comparative law perspective, the Italian legislation was put in a bit of isolation because other continental legal systems (Germany, France, Spain) and English common law still conceive the suretyship as a subsidiary mechanism: the only legislation that recognises joint and several liability in suretyship is the Italian legislation. The legislator opted for adopting this different view because the creditor thanks to the solidarity of the obligation can be satisfied in an easier way: the creditor is free to seek the performance from the main debtor or secondary debtor and can seek the performance firstly from the secondary debtor as well (creditor is now free to choose).
However, there are two mechanisms:

- ***Beneficium escussionis* (judicial mechanism- done before the courts) (processo esecutivo)**: the creditor will execute the patrimony of the main debtor before the court and only if it is not able to satisfy the creditor, then the latter will satisfy his interest on the patrimony of the guarantor.
- ***Beneficio ordinis* (out of court procedure, it does <u>not</u> take place in front of a court) (richiesta stragiudiziale)**: request from the creditor towards the main debtor. If the answer of the debtor is negative <u>for a justified reason</u>, then the creditor will seek the performance from the guarantor/secondary debtor.

Italian legislation opted for joint and several liability: mechanism that **favours the creditor's interest** (connected to a commercial approach because we favour the circulation of the wealth): the *beneficium escussionis* was abandoned and is not the standard rule, but it can be agreed explicitly between the parties.
The traditional opinion is that the joint and several liability is in contrast with the *beneficium escussionis*: therefore, if there is solidary obligation, there can't be subsidiary mechanisms (*beneficium escussionis/ordinis*).

1923: Vittorio Scialoja, prominent Italian scholar, chaired a commission for the reform of the Italian civil code. His work was continued by Filippo Vassalli, a jurist.
1942: Italian civil code the code reflects the liberal culture of its drafters.

This resulted into the **unification of private law**: the **previous commercial code was abolished, and the Italian legislature opted for one code encompassing both civil law and commercial law subjects.**
Therefore, private law was unified: private law indicates an area covering both commercial and civil law subjects (private law is broader than civil law under this specific point of view).

Comparative Law and European Union Law

HOW COMPARATIVE LAW INFLUENCED THE MODERN SHAPE AND STRUCTURE OF EUROPEAN UNION LAW.

European union law formally is the result of an agreement between states (internation law). The agreement was first made of 6 states.

Maastricht ruling (1993) issued by the German Constitutional Court clarified that:

- **EU is not a federal state**: not based on a federal/dual structure (not like the US, where there is the federal level and state level).
- **EU has sovereign power** (the EU is **not a confederation of States**): this paves the way for the analysis of the relationship between European union institutions and European member states (**principle of supremacy of the European union**).
  Typically, the European union has specific competences, whereas member states have other competences (**distribution of competences**).
  In the realm of private law, the European union regulates areas that aren't regulated by member states: in private law, the competences of EU are connected to the need of **ensuring the well-functioning of the market** (ex. Consumer law): the EU feels the need to intervene and enact several norms (usually directives, that have to be transposed: directives are a source of law that must be implemented through an act of domestic legislation).
  E.g. More **fragility of the consumer position** (**information asymmetry** because when buying, the consumer does not the exact characteristics of the product). For example, prices could go higher when the consumer can't not assess the quality of the products/services and the raising of the prices could alter the well-functioning of the market.
  However, most of the **private law is left to domestic law**, to each legislator of the Member State.
  The legislator enacts rules with directives in order to mitigate this risk and to protect the legal position of the consumer: according to the EU, he is always a weak individual/party (a consumer cannot be a company) that interacts with a strong party (business/seller that acts professionally).

There is a connection between private law and competition law because the well-functioning of the market is also correlated to the realm of **competition law**: the European legislature operates and regulates those areas that are put at the intersection of private law and competition law because the protection of consumers interest is functional to ensure the well-functioning of the market (protection of the weak party)- **general scope is the protection the market.**

Member states govern private law/civil law subjects, but the Europe union sometimes is entitled to intervene.

For subjects falling within its competence, the EU exercises:

- legislative power (Parliament/Commission/Council/European Council).
- judiciary power (Court of Justice).

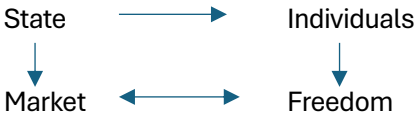
EU Law and the Doctrine of Ordo-liberalism

- The functioning of the **market** is based on the **freedom of private individuals** (consumers that autonomously decided to stipulate/perform/negotiate a contract), but it cannot develop properly unless it

is imposed/protected by **public power- intervention of the European union** (imposes some limits in advance to negotiations and relations).

- ❖ It is not necessary (nor appropriate) to economically plan the market, but it is essential to construct a **«legal order» of the market and define the fringes of the market-** contracting parties (who make the market prosper and flourish) must act within the boundaries of the rules decided by the public power (the rule of the game are decided by the public power and within these rules parties can decide the content of the contract, etc.).

This architecture/relationship between **public power** (reflected by the State), **market** and **freedom of parties** is at the basis of the **doctrine of ordo-liberalism**, the philosophical foundation behind European union law.



(cornerstones of the ordo-liberalism doctrine)

EUROPEANIZATION OF PRIVATE LAW

- ❖ **Negative integration** *Pars destruens*: EU private law aims at removing rules within the national laws of Member States (domestic law) that obstruct trade within the EU (free trade).
- ❖ **Positive integration** *Pars costruens*: EU private law establishes a legislative framework that harmonizes the legal systems of the Member States.

the intervention of the EU is needed because the EU wants to avoid the fragmentation of legal systems and ensuring the well-functioning of the market. For instance, this is true in consumer law, which the EU decided to regulate to avoid the market failure (private law vs. competition law)- before the EU regulated the consumer law, princes were going higher, and this had a negative effect on the market (difference between a real price and a biased price).

Interests protected:

1. General and systematic purpose= ensure the well-functioning of the market.
2. Protect the interest of the weak party, the consumer= the Eu legislator is also protecting the market by doing this.

The corpus of EU law is known as ***Acquis Communautaire***.

SOURCES OF LAW

The term "sources" can have two different meanings:

SOURCES OF PRODUCTION: change the law in force through, delete it or create it (civilian tradition)

- **Acts**: sovereign decisions intended to enact new rules, or to amend or repeal those already existing.
- **Facts**: customs and traditional practices meeting two requirements:
  1. objective stability over time.
  2. social perception a given behaviour is legally binding (so-called *opinio iuris ac necessitatis*).

SOURCES OF COGNITION (or **COGNIZANCE**): give legal notice about the sources of production (e.g., Official Journal of the European Union).

This structure is impacted by European law which enacts sources of production that are binding for the domestic sources enacted by member states. E.g. Founding treaties have the same relevance as

Constitution and they may prevail over sources of domestic laws in case there is a conflict between a domestic law and European law.

SOURCES OF EU LAW

Primary sources:
Founding Treaties
• 1951: Treaty of Paris: European Coal and Steel Community
• 1957: Treaties of Rome: EURATOM (European Atomic Energy Community); EEC (European Economic Community)
! Objective: **creating a European area of free trade, with no internal frontiers** (free circulation of goods, services, workers, capitals)
Last reform: Lisbon Treaty of 2007

The founding Treaties set out which competences are conferred to the European Union, regulate community bodies and their legislative powers.

PRIMARY SOURCES OF EU LAW

(The establishment of the EU was initiated by the member states).

- Treaty of the European Union (**TUE**).
- Treaty of the Functioning of the European Union (**TFUE**).
- Charter of Fundamental Rights of the European Union (art. 6 TUE); and general principles drawn by the ECJ.

If there is a conflict, these European sources prevail over the domestic law.

Art. 6(3) TUE: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the **constitutional traditions** common to the **Member States**, shall constitute **general principles of the Union's law**": in order to identify the general principles of the European union (primary source) we should look at the domestic constitutional traditions of member states (vertical comparison based on this upwards diffusion).

Van Genden Loos case (1963) established the **DIRECT EFFECT** so **directly applicable to member states, and it is also extended horizontally to citizens and not only vertically:** the founding Treaties have direct applicability not only to Member States but also to their citizens, as they establish both rights and responsibilities for individuals (both horizontal and vertical effect).

SECONDARY SOURCES OF EU LAW: ART. 288 TFUE

(Posited by the EU itself)

Binding

- **Regulations**: general application, binding in their entirety and directly applicable in all EU Member States (**unification**)
- **Directives**: binding as to the result to be achieved (**harmonization** and not unification= common purposes and objective but each state decides the tool to reach that goal). To implement the directive a domestic act of transposition is needed: how the directive is implemented in each member state- for example the European legislature chooses to enact some laws but in order to have these rules in the domestic background, the rules have to be implemented. The directive clarifies the objective that each state must pursue, but the concrete tools to reach those goals are left to member states, who

transpose the directive and choose the concrete instruments to reach the objective of the directive. This is because States have different conditions and tools to reach certain objectives.
For **example**, in Italy the Italian legislature opted for two separate codes: the Italian civil code and Italian consumer code which reflects the rule of the European directive, **Unfair terms Directive 13/93** (contracts are unilaterally drafted by the business, and the consumer is not entitled to negotiate or decide the content of the contract, so the EU wanted to protect them) while in Germany the legislature put the consumer code together to the civil code BGB.

- **Decisions**: binding legal act that either may be of general application or may have a specific addressee.

Non-binding acts

- Recommendations
- Opinions

Faccini Dori case (1994): The ECJ ruled out the direct applicability of non-executing directives in horizontal relationships (between individuals), but it mandated that national laws should be interpreted in alignment with these directives.

THE EUROPEAN COURT OF JUSTICE

It is made of two different entities:

1. **Court of Justice** deals with requests for preliminary rulings from national courts, certain actions for annulment and appeals. If there are **doubts of the interpretation of European law**, the nations may decide to let the European court of justice decide the interpretation and thanks to it, the domestic court is entitled to solve the controversy. **Indirect action**: it is the national court that decides to ask the court of justice, not the single party.
2. **General Court** rules on actions for **annulment** brought by individuals (**Direct action)**, companies and, in some cases, EU governments. In practice, this means that this court deals mainly with competition law, State aid, trade, agriculture, trademarks.

If you a private individual or a company has suffered damage because of action or inaction by an EU institution or its staff, she/he or it can take action against them in the Court, in one of 2 ways:

- **indirectly through national courts** (which may decide to refer the case to the Court of Justice).
- **directly before the General Court** (if a decision by an EU institution has affected individual (or company) directly and individually).

ADVOCATE GENERAL

Arts. 19 and 252 TFEU state that the **Advocate General** must act with c**omplete impartiality and independence.** It is not a public prosecutor: it does not advocate against one party but normally **elaborates an opinion on an issue at stake** (he is a part of the process before the court of justice: a highly competent individuals in the European law who drafts a legal opinion on the case at stake). He should not let his opinion influenced by the member state he/she comes from.
It becomes essential to make a **comparative assessment** so that his opinion will not be biased: examine the solutions offered. Therefore, a good opinion will include the comparison and examination of member state. The court of justice will base his decision taking into consideration the opinion by the advocate general but does not have the obligation to do so.

Impartiality and **independence** must be related not to (or not only to) the proceedings but to the way in which the Advocate General formulates its opinion. Hence, impartiality and independence should be interpreted as encompassing a degree of autonomy from the legal order from which the Advocate General is chosen and hails from.

In this way, it becomes essential for the Advocate General to draw up an opinion (i) grounded on a **comparative assessment** resting on several national laws, (ii) which, in line with the office's historical archetype, contributes to both the development of the CJEU's case-law and, significantly, also the doctrinal views of legal scholars. Advocate General is be **entitled to propose a solution** to the case by having **resort** to **a principle** that is typical of a **specific Member State's legal order** (this is justified if it is **done after a comparative assessment).**

Art. 252 TFEU: "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement".

Case C-17/98 Emesa Sugar (Free Zone) NV v Aruba, Order of the Court of 4 February 2000: "(...) the Advocates General, none of whom is subordinate to any other, are not public prosecutors nor are they subject to any authority, in contrast to the manner in which the administration of justice is organised in certain Member States. They are not entrusted with the defence of any particular interest in the exercise of their duties".

THE EUROPEAN COURT OF JUSTICE

Jurisdiction in disputes concerning reimbursement for damage inflicted by the Community:

- **Art 267 TFEU** Preliminary rulings.
- **Art 340(2) TFEU** «In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties».

RELATIONSHIP BETWEEN NATIONAL END EU SOURCES OF LAW

- Initial clash between the ECJ and national (Constitutional) Courts
- Today it is a shared principle that **EU law is always to be preferred** regardless of whether it was approved before or after the conflicting national law (ECJ, case Costa vs. Enel, 1964):

• The European Union and the Member States are considered distinct and autonomous jurisdictions, each of them having its own system of sources (not federal).
• When Italy signed the first Treaty, it transferred competence to the European institutions regarding certain subject matters and policy areas and, therefore, accepted that European law have precedence over Italian law (so-called supremacy).

The supremacy of EU law

Preliminary ruling: in a scenario where a national court encounters a matter of EU law interpretation during a case, the verdict is put on hold, and the interpretative issue is directed to the ECJ for resolution:

- **Costa v. Enel case** (1964): The ECJ clarified that an EU legislative act takes precedence over a national law, regardless of whether the national law was enacted after the EU act.

- **Simmenthal case** (1978): Every court should cease the application of legislation that conflicts with Community law, without requiring a ruling of unconstitutionality from the Constitutional Court (the court has to disapply the domestic law without having to declare its unconstitutionality).

A PATCHWORK OF DIRECTIVES

Necessity of **harmonization.** These directives tried to put on the same level business and consumer:

- Product Liability Directive.
- Doorstep Selling Directive (1985).
- **Unfair Contracts Terms Directive** (1993): if a clause is unfair (against the consumer), only the single clause will be considered invalid, while the rest of the contract will be valid (to protect the consumer). However, if the clause was essential and crucial (**legal significance**) for the stipulation of the contract, the contract may turn out to be completely invalid because without the clause, the contract would make no sense (it was decided by the court of justice to protect the consumer).
- Consumers Sales Directive (1999).

Currently, we have approximately **twenty Directives** related to conventional **private law matters**, along with numerous additional Directives covering areas beyond it, which tried to unify contract law among states (consumer law etc.).
It was highly discussed by the Parliament whether it was possible to have a CODIFICATION OF EUROPEAN PRIVATE LAW to avoid fragmentation.

Private law was the most suitable sector (because it involves relations between states or individual of different law and this is not true for civil liability or succession law), and the jurists/scholars tried to find the common core of contract law (**private law has common bases**): they try to extrapolate some **common principles** and tried to put them into a single code valid at the European level (in the area of sales contracts).
However, this **project of codification** was **abandoned** because of the **contrast between the principle of subsidiarity and a codification** (conflict between competences of member states and of EU law= member states have general competences on private law: the European codification would be in contrast with the principle of subsidiarity because many rules about the negotiations, formation of contract, performance would be enacted and these rules are **not intertwined with the logical market** and **not necessary tied to the well-functioning of the market**, so it is in contrast with the general competences of the member states.)

- Tobacco Advertising Directive case

CJ: The **European Union** is **authorized** to implement measures to harmonize the laws existing in Member States solely when these **measures** are directed toward **enhancing the operation of the internal market.**

- Consumer Rights Directive 2011is a consolidation of:
- Doorstep Selling Directive
- Distance Contract Directive

CODIFICATION OF EUROPEAN PRIVATE LAW

- Council of the European Union (Tampere, October 1999) requested «an overall study ... on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings».

- Council of the European Union – Action Plan (i) the creation of a set of Principles of the Existing EC Contract Law (ii) Draft Common Frame of Reference (DCFR).
- Green Paper (2010) «Policy options for progress towards a European contract law for consumers and businesses».
- Feasibility Study for a Future Instrument in European Contract Law.
- Draft codification: the **project collapsed**. **Withdrawn by the Commission in 2014**- **Common European Sales Law (CESL).** It was aimed at creating a second, additional system of contract law within the legal order of each Member State of the European Union, intended to serve as an alternative to national rules. However, this debated proposal was withdrawn by the Commission in 2014.

(Further) Relations between European Law and Comparative Law

Case 8/55 Fédération Charbonniere de Belgique v. High Authority [1954 to 1956], ECR 245; Case 29/69 Erich Stauder v City of Ulm – Sozialamt [1969] ECR 419, 422, 423 (paragraphs 1 and 3):

"[t]he protection guaranteed by fundamental rights is, as regards Community law, assured by various provisions in the Treaty, such as Articles 7 and 40(3); this is written law supplemented in its turn by **unwritten Community law, derived from the general principles of law in force in Member States**" (**comparative law** in the European union + **horizontal principle and upwards effect of vertical comparison**= examination examining different member state's systems and domestic traditions and after the principle are identified, the latter can be used to identify the background of EU principles: **unwritten community law rests upon domestic legal traditions and it's the base for EU law and fundamental EU rights,** thus there is a **connection between international treaties and unwritten community law)**, and "[a]s regards unwritten Community law, the Commission observes that the substantive constitutionality of the obligation to reveal identity can only be placed in doubt, under German constitutional law, by the principle that the means must be proportionate to the end. This results from the principle of the State founded on the rule of law".

The **horizontal comparison and vertical comparison influence the primary dimension of EU law (principle of proportionality):**

- Comparative law is important because **horizontal comparison** allows the scholars to examine the materials of member states' legal systems (principle of civil law, private law principles, written rules enacted by civil codes of member state and in the past also principles of common law)- it's **horizontal** because the first phase is based on the analysis of several traditions and rules of member states who are put on the same level (there's no hierarchy).
- **Vertical dimension** of comparative law because in order to choose the principles who are fit for the purpose of EU law, the interpreter (the court of justice, the advocate general etc.) selects the principle that are fit for the purpose of EU structure.

  Vertical teleological comparison establishes the objective that is pursued through the vertical comparison.

Case C-144/04 Werner Mangold v Rüdiger Helm [2005] ECR I 9981, para. 74. CJEU bestowed a **direct horizontal effect** on a general principle prohibiting discrimination on grounds of age in the field of employment: "the source of the actual principle [is to be] found (...) in various international instruments and in the constitutional traditions common to the Member States" (there is no provision in the EU that expressively recognises this right).

The European court of justice found this right in constitutional traditions common among member states= at first there was a large study about the traditions of member states: this showed that only two member states

recognized expressively a provision that prohibited this discrimination (principle was expressly set forth in the Finnish and Portuguese Constitutions). Although they were not the majority, the principle proved to be consistent with the European constitutional background and therefore the EU decided to protect it.

This principle became a **component of European private law without being mentioned by EU primary level legislation:** with the vertical comparison we verify whether the principles at stake are fit and appropriate for the purpose pursued by the EU (if its consistent with the legal constitutional background of the EU): if they are, the result of vertical comparison takes place.
It was a **judiciary** principle because it became relevant thanks to the **activity of the court of Justice**.

Case C-277/05 Société thermale d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie [2007] the payment of a deposit by the client, on the one hand, and the obligation of the hotelier, on the other, not to contract with anyone else in such a way as to prevent it from honouring its undertaking towards that client cannot be classified as reciprocal performance, because the obligation in those circumstances arises directly from the contract for accommodation, not from the payment of the deposit: does the obligation of the hotelier to reserve the room come from the payment of the deposit or from another thing? (common law of contract law). Legal obligations stem from tort, contract etc.

In accordance with the general principles of civil law, each contracting party is bound to honour the terms of its contract and to perform its obligations thereunder.
The obligation to fulfil the contract does not therefore arise from the conclusion, specifically for that purpose, of another agreement. Nor does the obligation of full contractual performance depend on the possibility that otherwise compensation or a penalty for delay may be due, or on the lodging of security or a deposit: that **obligation arises from the contract itself**.
The court of justice stated that the fact that the contract has been concluded generates an obligation (payment is an obligation of the contract). The legal justification (reserving the room) is based on the stipulation of the contract and not on the payment of the deposit: this is a principle common to many states (with some exceptions) and therefore was elected as a principle of European union law, after it was recognised by the court of justice.
Result: vertical comparison influencing the primary dimension of EU law (common principle in civil law).

Vertical comparison? A "downward impact- from EU law to member states" (vs. upward impact) **of European private law in the Member States' legal systems:**
An example: influence of European private law regarding the **principle of good faith**, whose relevance and significance increased in several domestic settings.
In the Italian context, the principle of good faith was **rarely applied** by the Corte di cassazione, but this **trend was reversed with the increasing relevance of the principle in EU law** (especially after the enactment of the Unfair Terms Directive 1993). In the BGB, in the Code napoleon and Italian civil code, the principle of good faith was already mentioned (performance, negotiations etc. and beyond contract law), but before the application of this principle was not so significance= the material importance of good faith increased crucially after the implementation of the Unfair terms' directive and the increasing relevance is seen in judiciary decisions of member states.

In Italy for example we have a difference between **behavioural rules** (rules that govern ways in which individuals should act when they are in the realm of law) and **validity rules (**contract may suffer from nullity +

other kinds of invalidity). The **only remedy is compensation for damages** from the party who was not consistent with the good faith principle.

Opinion of Advocate General Maurice Lagrange (Case 8/55 Fédération Charbonniere de Belgique v. High Authority [1954 to 1956], ECR 245 "(...) although the Treaty which the Court has the task of applying was concluded in the form of an international treaty and although it unquestionably is one, it is nevertheless, from a material point of view, the charter of the Community, since the rules of law which derive from it constitute the internal law of that Community. As regards the sources of that law, there is obviously nothing to prevent them being sought, where appropriate, in international law, but normally and in most cases, they will be found rather in the internal law of the various Member States.

The **CJEU** sometimes seems to opt for a **specific comparative method** (even it does not do so openly).
Ex. Joined casesC-120/06 and C-121/06, Fabbrica italiana accumulatori motocarri Montecchio-ECJ
Art. 340(2) TFUE: "In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".
In the Montecchio judgment, **the principle of public authorities' liability for "lawful acts"** (i.e., no-fault liability of public authorities) **was not deemed as existing in EU law because there is no convergence among the Member States' legal systems**. In other words, the problem was **whether art**. 288(2) TEC (now art. **340(2) TFEU**) had to be **read as authorizing the implementation into Community law of the public authorities' non-contractual liability only if it is shared by all the Member States.**

Opinion of AG M. Poiares Maduro, para 55–56: According to the Advocate General, there is no need that this principle be expressly mentioned in the legislation of the EU because "[i]ts enshrinement in Community law can only be the result of a comparison of the mechanisms adopted in this respect by the different national legal systems in order to identify the solution best suited to the particular requirements of the Community legal order. **However,** While the existence of this principle was subsequently rejected by the CJEU, it is of note that its decision equally rested upon comparative law. **Specifically, the crucial question was whether a convergence of Member States' legal systems occurred; where such convergence is lacking, a principle (here, liability arising from a lawful act or from an omission of the public authorities) cannot being recognized as existing.**

EUROPEAN PRIVATE LAW

IUS COMMUNITATIS	IUS COMMUNE EUROPAEUM
set of rules legal rules that are dictated by the European Union	Set of principles and general rules that the legal systems national legal systems have in common for historical reasons or related to their trade (lex mercatoria)
Ex: Treaties Regulations Directives	Soft law projects (ex: DCFR; PECL; PICC) ECJ decisions

EUROPEAN PRIVATE LAW AND COMPARATIVE LAW

A multi-level process of comparative assessment

1. **first, a horizontal comparison**: a comparison among national legal traditions.
2. **Second, a type of vertical teleological comparison**: the election of those principles that are common, but at the same time fit-for-the-purpose of the EU objectives, brings about a particular form of vertical

comparison, one which implies an "upwards diffusion" of such principles from domestic legal traditions to the supranational level.

CJEU is allowed to extrapolate and adopt not the entirety of the principles underpinning each national legal order but only those that are common to Member States and that prove fit for the EU law purpose:
a selective function that is crucial in detecting principles of civil law consistent with EU objectives.

The common core of European private law

"Idea that national laws share a common core that may be deemed European has gained a growing consensus and has been developed in different ways":

- **Law of the State (reflects hard law)**, law issued by the State (the parliament, the legislative power).
  vs
- **Law beyond the state (reflects soft law, quasi-legislative instruments**, not binding in the strict sense): rules qualified as soft law rules whose source is not rooted in legislative power, but it is rooted in particular study groups, results of enquiries made by institutions and scholars.
  This is very true for the private law sector where we had several attempts to publish rules and create law beyond the state, especially in contract law which allows us to elaborate inter-state rules (indeed sales contract may be done in different territories). There have been **several attempts to create the law beyond behind the states** (especially contract law) **+ draft projects of EU private law** which led us to have **common principles.**

Law beyond the state (soft law projects) is defined as:

1. **EUROPEAN LAW**: it symbolizes the shared essence of the Member States' national legal systems and reflects their historical foundation rooted in the **Roman legal tradition** (common core of civil law member states). These European law soft projects do not arise from European law institutions (they are not comparable to directives or regulations, but they are provided with European character).
2. **SCIENTIFIC LAW: p**rivate law scholars crafted it using doctrinal methodology (elaborated by jurists).

This results in the **Acquis commune (new ius commune europeum** grounded on these projects characterised as scientific law (elaborated by the scientific approach of jurists like the Dutch-roman law): this usually covers as we said before the area of contract law because it is based on inter-state/transnational transactions (differently from than tort law, family law or succession law).

vs. **Acquis communitaire** is the **ius communitatis** which is represented by the norms, treaties, directives, regulations= written rules for the EU).

ACQUIS COMMUNE	ACQUIS COMMUNITAIRE
Common core of general principles and rules shared among the national laws of European countries, as the legacy of their belonging to the same legal tradition, stemming from Roman law.	Set of rights, legal obligations and policy objectives set out by the EU. Candidate countries for accession to the EU must abide by the acquis in order to join the EU and for full integration must incorporate it into their national laws, adapting and reforming them according to it.

Law beyond the state (soft law projects) amounts to a **source of soft law** (which functions within the realm of interpretation, complementing and offering an alternative to national law).

-Demonstrated their efficacy as **model laws**, both within individual nations and within the European Union:

×Not binding in a positivistic sense.

×Not belonging to an individual legal system.

- ✓ Precise in their content and germane to a would-be enforcement.

These projects are **not binding** in the positivistic sense (they are not posited by the authority, and they do not reflect the law of a specific legal system): they encapsulate the **common core and shared principles** of member states (they are not the rules of a particular legal system).
However, there is a **similarity** between the typical **civil code rules** and these **rules** included in this **soft law projects**: they are **black letter rules** because they are very **specific** and precise (like standard rules of civil codes- ex. if A, then B structure, to say protasis and apodosis structure of norms).

Why are they called principles? There is a **strong debate on the distinction between principles and rules**. However, these **principles are very specific in their content** (they clarified in a very detailed manner what are the consequences, how it should be performed, etc.) = several rules resembling the civil law rules.

Role of comparative law

These soft law projects of European private law serve to:

- ❖ **create new codifications.**
- ❖ **source of inspiration to amend pre-existing civil codes**
- ❖ Find the best solution for **achieving harmonization of the law**: rules unknown in most legal systems or in all legal systems (comparative law behind soft law projects helps to find the shared principles common to member states).

-Accordingly: **Law beyond the State**
-This method was successfully adopted in the CISG
These projects often represented a blueprint for an approximation of laws in the European area.

However, these projects:
I. **Follow the usual standards of the legislature.**
II. **Resemble a true civil code (or part of it).**
III. **Consist of black-letter rules** (very precise in their content).

Example (Principles of European Contract Law):
Article 2:101: Conditions for the Conclusion of a Contract
(1) A contract is concluded if:
(a) the parties intend to be legally bound, and
(b) they reach a sufficient agreement without any further requirement.
(2) A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.
Art. 1326 Italian civil code:
The contract is concluded in the moment in which the offeror gains the knowledge of the acceptance by the offeree. The acceptance must reach the offeror by the time limit set up by himself or by the time usually necessary according to the nature of the contract or according to general use (...).

In the Italian civil code, the two contracts (one received by the offeree and given by the offeror) must be identical in content= more cautious approach.
This requirement is not mentioned in the European contract law.

The Italian legislature opted for a different approach, based on an objective approach (the offer and acceptance have the same content) vs. the European contract law has an opposite approach, a subjective approach (the parties have to want to be legally bound) so even though the content of the content is not identical, if the parties want to be legally bound, they can be. It is clear that the **European legislator wanted to stimulate more the circulation of wealth.**

Principles of European contract law (like international contract by UNIDROIT) reflect the new ***lex mercatoria*** (old and new customs in commercial practices).

Example (Principles of European Contract Law):
Article 10:101: Solidary, Separate and Communal Obligations
(1) Obligations are solidary when all the debtors are bound to render one and the same performance and the creditor may require it from any one of them until full performance has been received.
(2) Obligations are separate when each debtor is bound to render only part of the performance, and the creditor may require from each debtor only that debtor's part.
(3) An obligation is communal when all the debtors are bound to render the performance together and the creditor may require it only from all of them.

Article 1292 Italian codice civile (solidary obligations, in civil law):
An obligation is jointly and severally owed when several debtors are all bound for the same performance, in such manner that each can be required to perform it in its entirety and performance by one discharge the others. (...).

Differences:
In the European principles there's an express provision, since they give an express power to the creditor to ask for the performance. This power is not expressly provided by the Italian civil code: the **powers of the creditors** are **emphasized in the principles of European contract law** because they refer to the **libera electio** and **ius eligendi** of the creditors. The Italian civil code mentions solidarity together with *beneficium ordinis*, while the European contract law again favours more the circulation of wealth.

Contract law is an area within private law that is more naturally suited for internationalization and standardization. There was a project to unify common law, but it was abandoned. However, it was used as the blueprint for EU private/contract law.

- **PECL:** Principles of European Contract Law (or Lando principles, Lando was the head of the commission who had the task to draft the principles of European contract law)
- **PICC:** Principles of International Commercial Contracts (prepared by UNIDROIT): project of **global law** because these principles are **aimed at operating also beyond Europe.**

Subjective scope of application

PECL: Principles of European Contract Law (or Lando principles)	**PICC**: Principles of International Commercial Contracts (prepared by UNIDROIT), a project of **global law**+ (Contemporary systematization of international commercial customs within the lex mercatoria)

-Commercial contracts (b2b) -Consumer contracts (b2c)	-Only commercial contracts (business to business) (not applicable on asymmetrical contracts).
	Utilized as overarching legal principles in the context of arbitration

Both had a significant impact on both national and uniform EU legal systems:

- Influence on **NATIONAL LEGAL SYSTEMS:**
  - Reference to PECL and PICC into certain civil codes.
  - The PECL and PICC acted as a model for shaping the private codification in countries located in Eastern and Central Europe, which have recently become members of the EU.
  - National courts have turned to the PECL and PICC to evaluate fresh approaches and recommendations within their domestic private law from a European perspective.
- Influence on **EU LAW:**
  - the Advocate General of the ECJ cited PECL and DCFR multiple times to advocate for specific, harmonized solutions + the **advocate general** to solve a dispute in the European court of justice often mentions the PECL and PICC in his opinion.

1. When parties to a contract have included an **arbitration clause**, they also have the option to **select** either the **PECL** or the **PICC as the governing law for their agreement** (Implicitly allowed by Art. 28(1) UNCITRAL Model Law on International Commercial Arbitration).

Example of arbitration clause

"Any dispute or claim arising out of this Agreement shall be referred to and resolved by the International Chamber of Commerce (ICC) in Paris in accordance with the ICC Conciliation and Arbitration rules".

Arbitration is ruled by domestic jurisdictions as well as by international treaties, such as the 1958 New York Convention. In addition to this clause, parties often decide to choose PICC of PECL as the law governing the dispute.

2. When parties do not make this choice regarding the selection of PECL of PICC, this **sets of principles** can nevertheless **be chosen by the arbitral tribunal (arbitral court).**

   National and international rules on arbitration allow arbitration tribunals to apply the most suitable 'law', or 'rules of law', and that could be identified in the PECL or the PICC.

   However: see art. 28(2) UNCITRAL: "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable" (provided by international private law).

3. In cases where contracting parties have **NOT explicitly agreed upon an arbitration clause, do they have the option to select either the PECL or the PICC** as the governing law for their contract?

   - **Positive answer**: This appears to be implied or hinted at in recital 13 of the Rome I Regulation (Recital 13 of the Rome I Regulation refers explicitly to 'non-state body of law' and sets forth that the parties can incorporate it by reference into their contract).

   - **Negative answer**: According to the traditional conception of private international law, if there is no conflict of law, the will of contracting parties cannot stand as a connecting factor.

The question of proper law

Choice of the parties may be directed:

1. To the contract law rules of a national state (e.g. France, Delaware, etc.): **HARD LAW choice.**
2. To the contract law rules set out in a restatement (e.g. PICC, PECL, DCFR), generally combined with an arbitration clause: **SOFT LAW choice.**

The best-known **sets of soft law rules in contract law** are:

1. Unidroit Principles of International Commercial Contracts (**PICC**) of 1994 2016.
2. Principles of European Contract Law (**PECL**) of 1995.
3. Draft Common Frame of Reference (**DCFR**) of 2008-2009: PRINCIPLES DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW.

1. **PICC**: The UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (4th ed., 2016)- modern rationalization of lex mercatoria, so pre-existing international-commercial customs.
   • cover all the most important topics of general contract law
   • main source of inspiration was the CISG
   • general rules of international sales law and other contracts to be performed at one time
   • drafted by a working group composed by scholars and practitioners from all over the world
   The principles of international commercial contracts are **used to fill the gap existing in the CISG**.

2. PECL: **Principles of European Contract Law**
   • set of model rules drawn up by leading contract law academics in Europe set up by Ole Lando ("Lando Commission").
   -These principles are designed to operate in both consumer and commercial contracts.
   -They are the result of a comparative enquiry made by the scholars who studied the European legal systems.
   • Attempt to elucidate basic rules of contract law and more generally the law of obligations which most legal systems of the member states of the European Union hold in common
   • Are based on the concept of a uniform European contract law system.
   • Take into account the requirements of the European domestic trade.

3. **Draft Common Frame of Reference** (**DCFR**) of 2008-2009- PRINCIPLES DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: this project historically was justified because it could represent a new codification in Europe: attempt to enact a new civil code (two main attempts have been made in Europe: the one in 2011 and the DCFR which stayed as a model to interpret laws in Europe, like new rules about AI and used by domestic courts to interpret European rules).
   Intended to be from the outset a precursor of a proper civil code but there was an unfavourable reaction of European civil law scholars and commission's politic. caution
   - It was presented as a 'toolbox', i.e. as a repertoire of possible reference models, or as a shared vocabulary to be used by the European legislator and by each Member State.
   -Can work for b2b and to b2c.

4. **RESTATEMENT (SECOND) OF CONTRACT**

• Promulgated by the ALI (American law institute), a private organization of scholars, judges and practitioners.

• The first restatement of contract was promulgated in 1932, the second officially appeared in 1981= there was the need to overcome the particularism of private state law. These projects were an attempt to solve the legal fragmentation existing in the US private/contract law.
• Seeks to formulate "in the aggregate" the American law of contract, as though the U.S. consisted of only one, rather than fifty, state jurisdictions.
• When the single States are in conflict, it is represented not the rule adopted in their majority, but the "better view".

CISG (CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS)

- international treaty adopted in 1980 (in Vienna) within the framework of the United Nations (in part. By the United Nations Commission on International Trade Law): it is **not a soft law project** because it is the result of an international treaty adopted in Vienna: behind the CISG there's the work of Ernest Rabel, father of comparative law, because this treaty considers and applies his theory and his work.
- It goes **beyond the European** arena: it is an international agreement and treaty.
- Contracts for the sale of movable property entered by parties residing in different states (typical when a contract of sale is used) + the **two contracting parties must be businesses**, so it has to be **symmetrical** (it doesn't apply when the contract is asymmetrical, between a business and a consumer).
- CISG **applies automatically to international contracts of sale** of goods between businesses (art. 1 CISG), **unless excluded** by the contracting parties (art. 6 CISG).

CISG Objectives are fully in line with the aims of comparative law:

- ✓ To remove obstacles to the choice of law (remove fragmentation in the sale of goods, because otherwise there's the doubt about what rules have to be applied by parties of different countries- avoid complexities).
- ✓ To provide a uniform and harmonized regime for contracts for the international sale of goods.

The CISG replaced two previous treaties concluded in 1964: the Convention on Uniform law on the formation of contracts for the International Sales of Goods (ULF) and the Convention on Uniform law on the International Sale of Goods (ULIS). The content of the CISG largely drew on the comparative law studies contained in the two volumes of Das Recht des Warenkaufs by Ernst Rabel, who had personally contributed to the drafting of the ULF and ULIS. (Sirena).

Efforts to unify or bring consistency to the laws governing obligations across various European countries: projects aimed at finding the common core of private law sectors, although they were unsuccessful because they were dealing with domestic traditions (there was no inter-state approach like contract law).

- ❖ **Progetto italo-francese delle obbligazioni - Projet franco-italien du code des obligations (**1927)
- ❖ **Principles of European Tort Law (PETL)**: Liability for unlawful damages inflicted on someone else.
- ❖ **PECL IIIrd part**: rules for a general part of the law of obligations
- ❖ **VIIth book DCFR**: unjustified enrichment
- ❖ **Principles of European Family Law**: Family law

African law (general overview)

When we talk about African law, we should consider several traditions and state laws because **African law is <u>not unitary</u>**. Indeed, in Africa we have many **mixed legal jurisdictions**: in countries like South Africa, Botswana etc. we have traditions that come from both civil law and common law.
Additionally other legal sources are relevant: roman law, roman-Dutch law and customary law contributed to forge the legal system in South Africa.

Moreover, in African law there is the **issue of the authority**.
Indeed "authority" is a concept word intertwined with the main source of law in the western legal tradition.
We analysed the distinction between positivism and legal naturalism: in the positivistic view we need an authority to enact laws for a given society- legislative power is traditionally part of the tripartition of powers elaborated by Montesquieu and therefore particularly true for the civilian tradition.
On the other hand, in the realm of African law the main legal source is not represented by an authority who decides, because there is a **law coming from the bottom** (which is customary law).

> -***Law from the up***: authority that has been voted by citizens is entitled to enact laws that should be binding (western legal tradition)
> -***Law from the bottom***: related to the notion of customs, behaviours adopted by individuals and society (case of **Africa**).

Instead, in the western legal tradition, the customs are at the bottom of the legal sources: at the top of the hierarchy, we have the constitution and the European sources, then we have the standard laws written by the parliament, then other written sources and only at the bottom of the pyramid we have customs.

In Africa customary law combines with other sources and is not at the bottom of the hierarchy, and the latter is less strong because there's the strong influence of Roman-Dutch law (roman institutions forged by the Dutch jurists).

AS WE KNOW, Law and society are strictly intertwined (ex. in the desert island of Robinson Crusoe there's no society and therefore no law) because a society can't exist without law and law can't exist without a society.
However, law's features can vary significantly across the globe.

THE WESTERN PARADIGM

The approach typically adopted to analyse African law (and its characteristics) was the western legal point of view. This is because Western civilizations have developed a distinct legal framework (the **WESTERN PARADIGM**) that is often synonymous with the concept of law itself: the only law considered is the one of the western paradigms which is the main reference that the jurists adopt. Therefore, they opt for the western paradigm in order to state if a given legal order is advanced/modern or not and to evaluate the characteristics of a different legal system.
RISKS:

- **ETHNOCENTRISM**: The characteristics of Western society's laws, which are contingent and relative, are transformed into essential and universal principles of law itself.
  Therefore, any societal structure that doesn't meet Western criteria maybe perceived as lacking any form of law. Until recently, customary law was not described as a serious source of law because it was

not the result of elaboration by jurists, but instead of a spontaneous behaviour coming from the society (it was considered less developed).

- **TRADITIONALISM**: Western law is often regarded as the ultimate culmination of human history. Thus, any conceivable instance of advancement and civilization would have been elevated to its highest level of perfection.

Does the law require an authority to be binding? What requirements such authority should meet? Does law necessarily require an institutional authority to oversee its enforcement?
Law can coexist with vengeance and other means of self-assistance, as long as they can be employed subsequent to the resolution of a conflict.
If the law is not precisely observed, which authority can enforce this rule?
Thanks to the western paradigm we have an authority (decided in advance) that is capable of enforcing rules that are not respected: this authority can issue and inflict sanctions.
However, this does not hold true for African law, because enforcement in many instances comes from bottom and not from an authority. Indeed, legal systems can be observed within primitive tribes or indigenous communities that do not recognize central authorities responsible for enforcing them.

In the **western legal traditions**, there are **enforcements tools** (e.g. in criminal law we have the jail and in private law there's the formula "if there's a breach, then there's a sanction" which characterises the law coming from up/by the parliament: e.g. one of the contracting parties do not give the performance agreed in the contract, then there's a sanction).

- ❖ However, these **enforcement tools <u>do not characterise</u> the law coming from bottom** and therefore, **African Law**.

HISTORICAL OVERVIEW

The western paradigm was often used in in Europe: the systematic examination of foreign legal systems commenced during the 15th and 16th centuries (even though the formal/notion of comparative law was subsequent), coinciding with the conquest of the Americas and the establishment of trade connections to the East: there was the need and interest of the jurists to understand the legal systems of other countries.

The **interest for African law** came to be historical relevant was when the colonial authorities couldn't successfully impose their own legal systems on the native populations. Consequently, all colonial administrations were compelled to acknowledge and respect Africa's customary laws to some extent.
Indeed, it was only after a significant period, during the era of the **Scramble for Africa** (1880-1914), that focus turned towards the traditional legal systems of sub-Saharan Africa: jurists started to be more interested in these legal systems.
One of the most famous one, who gave us a great depiction of south Africa legal systems was **Zimmerman**, who spent eight years there and showed us how African law works (ex. contract law in Africa, the role of good faith etc.)
The interest increased because the authorities coming from Europe were not able to impose their laws on the colonies: elements of the colonial authorities were co-existing with the customs coming from African countries, because these customs were so strong that they could not be eradicated.

CUSTOMARY LAW

- A particular conduct has been regularly noted over an extended duration: a behaviour adopted by many individuals composing a given society and this behaviour is perceived as binding also for future cases (compulsory duty that must be observed).
  The source is not the authority that is elected, but a typical conduct that amounts to the law applicable by the community.
- As a result, it generated an anticipation within the broader community that it would occur again in the future.
- This anticipation could subsequently manifest as a compulsory right and duty.

Customary law paves the way to an institutional feature of African law: **diffuse power**.
This notion of diffuse power is opposed to the notion of central power:

- **Diffuse power**: it comes from the bottom, from more individuals composing a society.
- **Central power**: law coming from a central authority/from the up

! The most challenging aspect of this scenario lies in the transformation from a factual occurrence to a legal obligation, according to the old maxim, because a fact by itself cannot automatically become law (*ex facto non oritur ius*) and this is typical for European countries and the western legal traditions, where customs and praxes stand at the bottom of the hierarchy of sources and the "*ius*" is posed by the authority.
For example, if we consider the law forging the EU, the role of customs is almost none because the EU law rests on regulations, directives, primary and secondary sources that are posed by an authority.

Instead in African law: *ex facto oritur ius*, so from the behaviour/conduct, we derive the law that is applicable.

MAIN PROBLEMS RELATED TO CUSTOMARY LAW:

1. Custom is subject to alteration and seems to evolve without a clear purpose, often appearing arbitrary in its progression (vs. rules/law that are enacted have a specific function, like contract law which stimulates the circulation of wealth).
2. The positivist viewpoint held that law originated from the orders of a sovereign authority, making it rational and intentional in nature.
3. Asa result, according to the western paradigm custom was regarded as a primitive system, considered less deserving of examination compared to genuine «law».

Since the loosely organized, African political entities did not conform to European notions of statehood, they were not deemed sovereign, and as a result, they were believed to lack a legal system.

The object of comparative law almost never rested on customs because, according to the western paradigm they reflected primitive societies, and instead the object usually rested on written rules (decided by the authority, jurists, etc.), elaborations coming from roman law.
Moreover, the theory of dissociation of formants also was based on the western legal paradigm and did not consider customs.

AFRICAN LAW

- **Islamic law** mainly governs **North Africa** (there is an influence of Islamic law also in other parts of Africa but more in North Africa).
- **Customary law** prevails in Sub-Saharan Africa.

It is important to remember that African societies and cultures are not uniform: they exhibit diversity and are in a constant state of evolution due to various internal and external influences that vary in pace and location (+ they change very rapidly).

Traditional African Law and Sacredness

Many sources of African law are linked to the notions of supernatural and religion/the divine which is very present in the northern part of the Sahara.

From January 2-5, 1980, a colloquium organized by the *Laboratoire d'anthropologie juridique* was held in Paris on the topic "*Sacralité, pouvoir et droit en Afrique*":

In Africa, law is linked to the supernatural:

- in the **north of the Sahara**, it is linked to the **divine**.
- in the **south of the Sahara**, it is linked to the **sacred**.

However, there is no sharp contrast between what is Islamic and what (in a different sense) is sacred magical: the differences are very little but highly relevant (see Rodolfo Sacco).

To summarize, we can say that traditional African law is characterised by:

- **Diffuse Power**: Traditional African law is often a diffuse power law (customs of a society/individuals).
- **Scholarship and Science**: wisdom often transmitted by voice/orally (on the other hand, in Europe we have books etc.)
- **Unwritten Rules**: Traditional African rule is unwritten.
- **Process and Final Decision**: Process and final decision often ignore the written- they are not based on a written judgment.

Traditional African Law

Looking at African law, **private law does not have an individualistic approach**, but instead it focuses on the concept of clan/family which is very important.

- **Families and Rights**: the individual belongs to a family, to a clan: to understand how his rights work, one must know to which group she/he belongs.
- **Right to land**: the right to land belongs to the individual but also belongs to the group (i.e., community): the individual cannot alienate it outside the group.
  The individual is not entitled to alienate the good without the consent of the group because of the strong bond between the individual and the family: the individual does not act without the consent of the family, thus without confronting with the clan it is not possible to know what rights she/he has.
  - «**Head of the land**» (R. Verdier): who inherits from the founding Ancestor of the group the rights and responsibilities arising from the covenant concluded between the same Ancestor and Earth.
- **Contract** (preliminary assumption of Maine): in archaic societies/African context, human relationships and individuals are governed by status (in advanced societies, they are governed by contract).
  In old customary law in Africa there is no contract law that is applicable or that is similar to the one of western paradigm:
  1) **No distinction based patrimonial elements/rights**
     On the other hand, in western countries there's the distinction between patrimonial rights and non-patrimonial rights and it is fundamental to understand which exchanges are contracts and which not).
  2) **Embraces the idea of an exchange**: what we consider contract law in Africa is based on the idea of an exchange (something given with a counter performance).

In the civilian tradition the concept of contract is broader than the idea of an exchange (e.g. in Italy a donation is a contract not based on an exchange: donation is a gift with no counter performance, nevertheless it is qualified as a contract because it is an agreement provided with a patrimonial content but with no exchange present).

Tort law

- **No subdivision** between **civil** and **criminal consequences** according to the customary law in Africa (from a general point of view).
  How is it justified? There's a lack of an authority and consequently a lack of division between public and private law.
- In civil societies, we can identify an authority and therefore the distinction between public and private relations is clearly conceivable in a centralized society.
  Public law governs the relationship between the society and the State (vertical relation) while the private law governs the relationship between individuals. Because of this distinction we have the difference between civil and criminal consequences.

As a "pre-legal order" (according to this view), custom was considered to be no more than conformity to tradition- there was conception of the 'primitive' societies: 'spontaneous, traditional, personal, commonly known, corporate, relatively unchanging …'≠ the laws of Europe stood for all that was rational and progressive because law coming from authority is considered the expression of rationality and progress.

Colonial encounter

With the colonial encounter, there was a mix between the law coming from the European countries and customs in Africa: model laws coming from Europe could not be mixed with local laws existing in Africa. When this colonial encounter took place, customary law was relevant only for a matter of exception for a period. "Colonial standards provided the criteria for the study of custom, and these have proved difficult to shake. Throughout Africa, European laws, whether French, English, Portuguese, Belgian, or Roman-Dutch, have constituted the basic laws of the land" and "Customary laws were applied only as matters of exception"

(Comparative) Relations between European laws and customary laws

- European laws represented therefore the constant comparators for customary law, as the ideals to which it is expected to conform.
  Therefore, the model for comparing/the tertium comparations was always European law and the western paradigm. This is because comparative lawyers were usually European people who applied their culture
- Accordingly, courts could refuse to apply customary law if they found it incompatible with natural justice, equity, morality, or public policy.
- The fundamental rights and freedoms of Europe were to be the basis of the colonial legal order.

(Indigenous customary law is primarily preserved through oral tradition, with very limited exceptions.
Colonial courts had the option to handle the unwritten laws of Africa in a manner similar to the customs already known in various European legal systems.
The lack of a written record poses a significant obstacle to the Western concept of justice, which is based on the belief that courts must enforce a stable and definite set of rules. In each instance where a custom was claimed, witnesses had to be summoned to provide evidence of its existence.

The process commenced where oral customs were documented in written form to provide the judiciary and administration with official texts. Nevertheless, when an oral legal tradition is converted into written form, the rules undergo subtle and irreversible alterations.

PROBLEMS CONNECTED TO ORAL LAWS?

1. The creator is typically unknown, having faded into the distant past, and there is no way to reference an authoritative original source.
2. Whether intentionally or unintentionally, individuals inject their own personal interpretations into the information they communicate.
3. The way legal concepts are articulated is shaped by the context of the conversation and the characteristics of the listeners.
4. Customary law changes with society, thus it is impossible to amend it.

State authorities decided to include customs in compilations and recognise their relevance in order to answer to these criticism.
Additionally customary law is considered to be deprived of rationality because unlike the law coming from the authority, customary law is said not to be provided with a specific function/scope.

In order to keep oral laws alive:

(i) They are reiterated on every conceivable opportunity.
(ii) Only specific individuals have the privilege of speaking, and even then, it's restricted to specific moments.
(iii) Stylistic techniques provide spoken language with a structured framework, serving as a valuable tool for enhancing memory retention.

MAX GLUCKMAN was a scholar who has conducted extensive investigations among the Barotse, a population residing in the southwestern part of Zambia.
He compared the old and the new background in Africa and according to him it was the concept of contract that was historically lacking in African law, and the contract is important because it characterises modern and advanced societies: the element that had to be disseminated to ameliorate African law was the contract.
In Gluckman's perspective, a 'tribal' community like the Barotse was characterized by being 'status dominated' – which meant that the necessities related to sustenance and procreation were achieved by fulfilling responsibilities associated with an individual's position within a family structure.

Concept of status (the importance of individuals is related to the position they have in a given society) is in contrast with the widespread use of contract.

In the western legal tradition, the notion of contract is related to the freedom of contracting parties.
Gluckman could validate the well-known statement that the evolution of society involved a shift from a system based on social status to one based on contractual agreements. Building upon the 'tribal' characteristics of Barotse society, Gluckman developed a theory concerning property and social interactions within customary law.

- **Wills (no succession law)**: due to the concept of ownership, there are no specific concerns regarding the distribution of the deceased person's assets when they pass away: succession law is not covered in African law because they are not interested in how the wealth circulates.

- **Contracts**: During the pre-colonial period, trade was not consistent or widespread. Consequently, only a small number of customary legal systems had a well-defined notion of contracts, and they cannot alienate without the consent of the family/community.
  Vs. in the civil tradition, we have the rei vindicatio (azione rivendicatoria) and other actions that are conceived to protect the individuals: they express the need of the order to protect the party.

To sum up, the notion of contract does not exist in African law because:

1. Notion of status is fundamental
2. Economic reasons

Theory about property (property law):
- Since property rights were frequently superseded by the familial support claims, no person could possess food, livestock, or land in an absolute and unrestricted manner (concept of the status).
- The obligations stemming from social connections consistently hold greater importance, and as a result, '[p]roperty law in tribal society defines not so many rights of persons over things, as obligations owed between persons in respect of things'
- Traditional notions of property were shaped not just by the characteristics of social ties but also by a crucial economic factor, which is the scarcity of resources.

EXCHANGE OF GOODS AND THINGS.

In the pre-colonial period, trade was neither consistent nor widespread, resulting in only a limited number of customary legal systems having a well-defined understanding of contracts (no contract law).
Nevertheless, there were institutions similar to contracts: (i) **Promises**, such as pacts of brotherhood sworn by members of an age set during their initiation; (ii) **Gift giving**, which were offered by individuals already connected as family or close companions to reinforce their bonds or fulfil associated duties (similar to donation); or (iii) **Barter (**similar to permuta= you give me a good and as a counter performance I receive another good**)**.

(e.g.: Gluckman specifically examined the characteristics of collaborations that involved skilled hunters and craftsmen who exchanged their expertise and goods with the nearby agricultural community. Following a sequence of exchanges between the same parties, a bond of friendship would emerge. This approach would transform a series of unrelated transactions between two unfamiliar parties into a more profound and multifaceted connection.)

PROCESS AND DISPUTE RESOLUTION

1. **ACEPHALOUS SOCIETIES**: The sole **recourse for resolving conflicts** involves individuals taking matters into their own hands with the involvement of the local community (written rules were lacking), where aggrieved parties must either engage in a **direct test of physical prowess/**skill of persuasion (although customary rituals often temper the harm caused by physical confrontation) or participate in a **negotiation process**.
   Rules do not play a decisive role in determining the ultimate result: conflicts must be resolved through either superior physical strength or the skills of persuasion.
2. **STATE SOCIETIES**: The governing elites possess complete authority over the instruments of power, allowing them to wield institutionalized force in order to secure adherence to their decisions.

Gluckman's research on the Barotse people in southwestern Zambia aimed to demonstrating that the primary objective of village courts was to **sustain peaceful and cooperative social connections**: the absence of local authority, from at ethnological point of view, explains why there was no need to use the law to solve the conflicts, but instead manage the situation within the community.

Example one: in their examination of courts in Botswana, John Comaroff and Simon Roberts illuminated how the connection between litigants and the purpose of a hearing significantly influenced the patterns of argument and the specific rules that were relevant.
Example two: Holleman's investigation in a rural area of Zimbabwe revealed that individuals did not perceive the rigid and unbiased enforcement of regulations as "justice." Instead, they regarded the law as nothing more than 'a broad and flexible basis for discussion'. It was never "inviolable and imperative".

DECOLONIZATION

During the late 1950s the colonial encounter finished because European nations commenced their departure from Africa, and by the early **1960s**, the **decolonization process** was in full swing.
After the decolonization, the role of **customary law became again relevant**, especially thanks to **enactment of Constitution in African State**: customary law started to be recognised implicitly or explicitly in African state constitutions.

- **UNICATION OF THE COURT SYSTEMS**: the colonial judicial system operated with two concurrent sets of courts and legal systems. One, brought over from Europe, primarily catered to the requirements of the state and the colonial settlers, whereas the other, founded on the acknowledgment of traditional authorities, addressed the immediate domestic needs of African individuals
- **TO GIVE CUSTOMARY LAW A GREATER ROLE TO PLAY IN NEW POST COLONIAL LEGAL SYSTEMS**: It was regarded as an obstacle to achieving the two major goals of independence: national cohesion and modernization.

The **Ivory Coast** and **Ethiopia** were the only countries that completely **excluded customary law** from their legal systems.
Instead in South Africa customary law is still important and it is inferred from the Constitution.

LEGAL PLURALISM

The notion of legal pluralism came to be known in the 12th century and is strictly **intertwined with African law**: the **law** does not come from a single authority/source, but from **more sources/powers** that are capable of shaping the legal order (e.g. mixed legal jurisdictions).
For example, in many African countries we have statutory law (coming from a parliament), constitutions, customary law, roman law (in south Africa) etc.
This is historically in contrast with the traditional notion of law that we had in Europe for a long time, and it is in contrast with the legal positivism which does not recognise the possibility of having several sources.

Various diverse normative systems were actively in use within different forums, extending beyond the mere application of state law in courtrooms.

- Pluralism in law is a specific viewpoint that has emerged from a profound dissatisfaction with legal positivism and its belief in the state's exclusive control over all legal institutions.

- Studies on legal pluralism conducted in the field revealed that the state's authority was not as all-encompassing as positivism suggested, and in ordinary circumstances, the formal legal system was frequently regarded as a secondary, rather than the principal, source of governance.
- Positivism presupposes the necessity for a clear distinction between legal and non-legal norms, with legal norms being considered to possess ultimate authority.

According to a widespread view, **European Law** is also an **expression of legal pluralism** because the authority of the European union co-exists with the authority of State members: law comes from different and several sources.

JOHN GRIFFITHS

He criticized the **principles of centralism** as a **fallacy** and an unrealistic ideal: **law coming from one authority is not effective** and does not represent reality- thus he dismissed the notion that as pure ideology 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions'= the idea that law comes from only one authority is criticised (criticism to the positivism doctrine).

He supported what he referred to as a strong form, which involved openly acknowledging that **individuals' lives were governed by numerous separate yet interconnected legal systems,** each having its own legitimacy and relevance: law comes not only from the up but also from the bottom. This new point of view was historically significant because it was an attempt to overcome legal positivism.

The informal normative systems in place within specific social groups held just as much validity for the individuals as the official state laws did: the central concept in legal pluralism is the semi-autonomous social domain, which can be any social unit like a village, family, church, or workplace. Since individuals may belong to multiple semi-autonomous social domains simultaneously, they can be bound by concurrent and conflicting obligations *(Ehrlich, Fundamental Principles of the Sociology of Law (1936) Pospisil, Anthropology of Law (1971) Falk Moore, Law as Process (1973)*.

CUSTOMARY LAW

Customary law was traditionally maintained with the oral tradition. Today a part of customary law is still oral, but we have some compilations that have been written/drafted, therefore there is a division between:

1. **OFFICIAL CUSTOMARY LAW**: This type of law is typically found in documents produced/issued by state authorities, including statutes, codes, legal precedents, and specific restatements.
   Scholars argue that official customary law is more likely to have deviated from real social customs and practices.
2. **LIVING CUSTOMARY LAW** (**unwritten**): The law that is actively followed and practiced by its individuals, so they play a role in the legal orders even though they are not written. Several rulings of the South African Constitutional Court have established that courts must adhere strictly to the current legal standards, and, additionally, that customary law should be interpreted according to its own principles, rather than through the lens of Western legal 27 perspectives.

Investigations into customary law in Africa have undeniably gained the most from the principles of legal pluralism: ex. Women and Law in Southern Africa (WLSA).

UBUNTU

One custom that is spread in the African context is **Ubuntu**: it is generally taken to emerge from the Zuli saying "*umuntu ngumuntu ngabantu*"- **a person is a person through other people** (notion of community and status). Despite being not referenced in the final Constitution, ubuntu is nevertheless considered a central principle of South African constitutional law Between 1993 and 2007, for example, it was used in thirty-one court proceedings, including eight before the constitutional court.
Its fame seems to rest primarily on the epilogue of the **South African Interim Constitution of 1993**, in which it is invoked as a means of putting to rest past debates and disputes: "These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization".
Nowadays it is **not expressively mentioned in the constitution of South Africa**, nevertheless it is believed to govern the realm of contract law, and it acts as a guidance.

- Ubuntu does not contain a straightforward legal norm in the form of an if-then schema, that is, a formula that links certain legal consequences to the fulfilment of certain conditions: it is **not a black-letter rule.**
- Ubuntu as a "**meta norm for finding just results in hard cases**": a juristic principle that may serve as a guidance to solve some disputes. (it could be considered similar to the good faith principle and this general clause must be applied to the concrete case, so the court has to be acquainted with the issues at stake= concrete relevance of the principle).
- Ubuntu stresses the **role of the community** as opposed to the individual. It presumes that the individual realizes his personality primarily in the context of the community, and therefore requires the individual to behave in ways that foster **community harmony**.
- Ubuntu is the means to take this emphasis on the community into account when interpreting legal norms: it **acts as a guidance**.

Good Faith in Contract Law and Ubuntu

Example*: Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd 2017 (4) SA 243 (GJ) – issued by the High Court of South African*.

- "The tenant, Southern Sun, was running an hotel business in a building owned by the landlord, Mohamed's Leisure Holdings.
- Rent was to be paid by the seventh day of each month, and the contract contained an express termination clause (clausola risolutiva espressa= agreed right of termination) that allowed the landlord to terminate the contract in case of late payment of rent: the breach is decided in advance and if the breach takes place, the parties can termite the contract.
- The tenant paid late in June 2014, through an error of its bank alone and in circumstances where there was no shortage of available funds. As soon as the error was discovered, the tenant immediately instructed its bank to pay the landlord. The landlord accepted the late payment but informed the tenant in writing that a future late payment would be met with immediate cancellation of the contract.
- In July, August, and September, the tenant monitored its account closely and payment was in each case made on time.
- In October, however, rent was again not paid by the due date, a fact which went undetected by the tenant (he was not aware of the delay, so was he in good faith?). The landlord thereafter gave notice in writing to the tenant that it had cancelled the contract. The tenant immediately tendered payment in full plus interest, but this was rejected by the landlord".

High Court's decision appealed to Supreme Court of Appeal

"Applying the value of **ubuntu**, "carrying with it the ideas of humaneness, social justice and fairness" (Everfresh para 71), to the facts of this matter, finally leads me to conclude that an order for the eviction of the respondent, as sought by the applicant, would offend the values of the Constitution…, and that the application must accordingly fail" – by High Court Principle of sanctity of contract has been relaxed. Ubuntu: the tenant acted in good faith and had sufficient funds to pay, he just forgot. Direct relevance of constitutional values into private relationships: constitutional implicit provisions (this is never done for private law relationships).	**vs.**	Relevance of the principle of sanctity of contract a) the contract terms themselves were not unreasonable; b) (b) there was more or less an equality of bargaining power between the parties; c) (c) that performance on time was not impossible: the tenant could easily have monitored its own bank.

- **Order of eviction was granted.**

OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires)

It was founded by an **international treaty** which came into force in **1995** to overcome the fragmentation of the law in Africa.

- **OBJECTIVE**: organization's goal is to **attract** more **investors** by improving and harmonizing member states' legal systems, enhancing **legal certainty** and reduce the fragmentation.
- **OHADA AUTHORITY**: OHADA has the authority to establish uniform laws which **apply directly in all member states** and enjoy automatic priority over all conflicting domestic law (similar to the European union). National parliaments are not even included in this process.
- **LAW INTERPRETATION**: Uniform interpretation and application of these laws is secured by the **OHADA's court**, the Cour commune de Justice et d'Arbitrage, which also assists the Council of Ministers in the drafting of new uniform laws.
- **SUBJECTS COVERED**: to harmonize business law, OHADA has passed wide-ranging legal acts, principally addressing commercial transactions and other topics as:
  - **General commercial law**,
  - The law of trading companies,
  - Security interests,
  - Arbitration,
  - Accounting.

(This is similar to what happens with the PICC- principles of international commercial contracts- elaborated by Unidroit).

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