Chapter Three
Major Legal Traditions of The World

Objectives

- Identify the sources of the major legal traditions of the world.
- Define certain concepts such as equity, code and codification.
- Explain critically conceptions of law under the major legal traditions of the world.
- Compare and contrast the various major present legal systems of the world.
- Examine the interface between the western legal traditions and traditional legal systems.

1. The French Legal system

- The French legal system can be easily classified into: the era of customary law and codification.

❖The Era of Customary Laws

- Before the French Revolution, traditional customary laws prevailed in the north.
- The customs are of Germanic origin in the southern part, while the law was of Romanic.
- In general, The French legal system was not sharply divided because there were written rules influenced by Roman law but containing strong Germanic elements in the south. And Roman law was not entirely rejected in the North.

French legal system…continued

- The French legal system received Romanic laws based on compatibility with their customs and the merit of the laws. The existence of diverse customary rules and edicts created some degree of legal uncertainty in France. France's need for a single, unified code of laws had been keenly felt even before the collapse of the ancien regime.
- Before the introduction of the Civil Code, a patchwork of customary laws based on tradition and the whim of the monarch had ruled throughout the continent. The new Code introduced the concept of a unified, logical system based on general principles of law. This facilitated the export of the ideas of the French Revolution beyond French borders.

The French Legal System....continued

- The Drive Towards Codification: centralization of governance was the driving force for the codification. The Court of Paris, which had very wide jurisdiction in the16th century, was one of the key actors in France's effort to unify its private law. Practitioners and royal administrators also favored unification of law in France. For example, some legal practitioners believed that there was such a thing as a common law of France. They thought that such common law of France consisted of the totality of the ideas of law, which found expression in the different customs.
- The king played an important role by ordering compilation of customs. Professional lawyers` associations emphasized the careful and moderate acceptance of Roman law in France.

French Legal System…continued

- French Revolution:
- France on the eve of the Revolution was still very far from having a unified private law.
- important customary rules were codified.
- At the eve of the French Revolution, diversity of laws and thus legal uncertainty was the attribute of French law.
- French writer wrote: `Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws?" When you travel in this kingdom you change legal systems as often as you change horses.`

French Legal System…continued

- **The Revolutionary Period (1789–1799):** The French Revolution used law as a vehicle for political and social purposes. The French Revolution brought profound and general changes in French society. In order to accomplish these changes, it used the methods of revolutionary action, war, propaganda and law. It used law as a means for the overthrow of the old society and for building of a new one. The end of law was not actually a technical one but a rather an ideological one.
- The French Revolution was primarily interested in legal problems having political and ideological involvements.
- The French Revolution altered the traditional social order with almost unparallel speed and thoroughness.
- Under the government of Napoleon, France adopted a comprehensive code of law in 1804.

French Legal System…continued

- The code included many of the victories obtained during the Revolution such as individual liberty and equality before the law. The code also incorporated most parts of Roman law. The code became a model for civil law systems. The most important aspect of the code was that the law was written, as opposed to judge-made, and in a non-technical style and thus more accessible to the public. The code regulated much of private law matters such as property, will, contracts, liability and obligations. Many of its parts are traceable to Roman law.

The French Legal System…Continued

- The French Civil Code:

- Was founded on the ideas of enlightenment.
- Was based on the law of reason.
- The code conserved a large number of traditional institutions. The main aim of the drafts persons was to produce a reasonable and balanced compromise. Its spirit was of moderation and wisdom. The Code as a whole was highly influenced by the theory of natural law. The theory of natural law simply sates that there are autonomous principles of nature quite independent of religious belief.

French Legal System...continued

- The Spread of French Legal System:
- To Europe……..through military force
- Latin America……..reception for merit
- Africa…….colonialism and reception

German Legal System

- belongs to the civil law tradition.
- Germany came in contact with Roman law relatively late (by the middle at 15th century). The reception of Roman law was much greater in Germany than in France. Reasons:

- The reduction of imperial power in favor of too many principalities was very conducive to the reception of Roman law.
- There was no common private law;
- no common German courts system, and
- no common fraternity of lawyers, which could have opposed and delayed the introduction of Roman law.
- Generally, there were no central political and judicial organs to lay the foundations of common German private law by rationalizing and elaborating the traditional and very diverse laws of the various peoples and cities.

German Legal System…continued

- Roman law, unlike the diverse customary rules in German, enabled the German society to place facts in a rational framework, to see their implications and to make them the object of reasoned argument.
- Had the indigenous law been collected, ordered, and rationalized by an organized group of judges and jurists, the categories of Roman Law could have been used, as the French experience shows, to ensure it and make it suitable to totalized circumstances of the frames, but in Germany the necessary secret and political conditions just did not exist; the traditional law was still in a pre-scientific stage, diverse and disorderly so that instead of being harmoniously integrated into the local legal culture under the supervision of an organized class of lawyers Roman legal ideas and institutions were adapted wholesome in many parts of the country and for many areas of law.

German Legal System…continued

- The series of political transformations in Germany after the Napoleonic period centered on the development of national identity culminated in the defeat of Austria in 1866 and of France in 1870. For the next 30 years, the drafting of codes based on national needs and culture occupied all of German legal scholarship. The resultant codification was substantially an accomplishment of the “historical school” of German-Roman law scholarship and a reaction to the natural law orientation that influenced the French-controlled civil law tradition. New codes were enacted throughout the Empire for the first time. A commercial code adopted by the German Confederation in 1861 came into force for the Empire in 1871. And Prussia also adopted a criminal code in 1851. Codes of civil and criminal procedure were adopted in 1877.

German Legal System…continued

- The influence of Pandectist School: It was developed from the historical school of law.
- The school is known for its dogmatic and systematic study of Roman law material.
- For followers of the school of the Pandectist, the legal system was a closed order of institutions, ideas, and principles developed from Roman law.
- . One only had to apply logical or scientific methods in order to reach at solution of any legal problem. In this way, the application of law has become a merely technical process obeying only the logical necessity of abstract concepts.
- According to this school, the application of legal rules has nothing to do with practical reason, with social value judgment, or with ethical, religious, economic or policy considerations.
- Pandectists created a set of clear and clearly distinguished concepts, which contributed much to the technical sophistication of German Law

German Legal System…continued

- The German Civil Code:

- It had unnecessary scholastic structure.
- The Code uses legal jargons.
- The code has a complicated system of cross-references.
- It ignored many legal traditions of Germanic origins that were still vital among the German people.
- Its spirit was retrospective and reflective.

German Legal System...continued

- Low spread.
- They were transplanted at the end of the 19th century to Japan and thereafter to some African countries.
- Reasons:
- Germany did have few colonies, as she was a latecomer to the scramble for different parts of the world.
- The codes were a bit sophisticated and complex.
- codes were put in place at the beginning of the 20th century in Germany, many countries had already adopted laws from France and Great Britain.

Code and codification

- Codification:;- A code of law is an area of law documented in a general, systematic and comprehensive manner.
- compilation of laws is not expected to be as systematic and complete as a code of law. Compilation refers to putting together of several statutes in a readable form. Consolidation of laws relates to putting together of statues on different nature issued over time in a readable manner; the aim of consolidation of laws may be to know the laws repealed or amended. Compilation and consolidation of laws are not vested with validity.

Codification…continued

- Codes and Enlightenment:
- 17th century…
- The Enlightenment sought to free the individual from his medieval bondages by subjecting the traditional activities in religion, politics, law and culture to rational critics.
- New world view based on reason.
- Codification is the idea that the diverse and unmanageable traditional law could be replaced by comprehensive legislation, consciously planned in a rational and transparent order. In France, direct political action was the result of the enlightenment. In Germany, the Enlightenment led only to abstract conceptions of law.

Common law Tradition

1. British Style:

- The English legal system is principally interested in precedents and types of case. The English legal system is devoted to the careful and realistic discussion of live problem.
- ``the life of the law has not been logic; it has been experience`` by Justice Holmes, American Jurist.

❑ 11th Century William I succeeded to create a tight, integrated, rather simply organized feudal system. He made himself the supreme feudal overlord. He took land from his opponents. He distributed land to his supporters in return for rendering services so that his political power would tilt towards the center.

❑14th Century: England had developed common law for their country, mostly regarding procedural matters.

- there arose a class of jurists who organized themselves in a kind of guild and so exercised a very great influence.
- legal education was the monopoly of the Inns of laws throughout the whole middle Age and until the 19thc.
- legal education would tend to be primarily practical and the device of a professional skill than a scholarly science.
- The character of English law has unquestionably been deeply marked by the fact that the leading lawyers have never been professors or officials but legal practitioners.

British Legal system…continued

- The influence of Roman Law:

- England never received Roman law in comprehensive way. Reasons:

The closed organization, the professional solidarity, and the political influence which the class of English lawyers, who were devoted to the maintenance of the common law on grounds of principle and profit alike, had built up over three centuries.

British Legal System…continued

- The period of legal reform: Jermy Bentham was an English legal philosopher. He scrutinized the traditional institutions of England. He examined those traditional legal institutions in order to determine whether they were appropriate and useful to the central aim of any social order. He thought that the main aim of any society was to promote the greatest good for the greatest number of individuals in a given society. The rules of common law often based on historical accident rather than rational design were simply obstacles in the way of the conservative practitioners. He advocated for a complete codification replacing the common law with a code worked out at a table on the basis of a particular social philosophy. Given their practical sense and their collective interests, English lawyers could not tolerate Bentham's thought.

- In the 19th century, as a result of the influences of Bentham and his followers, many laws were issued. Such legal reforms included the alteration of the court jurisdictions, changes in court procedures, change in the law of civil procedure and to a lesser degree, the substantive law consolidation at the common law and abolition of the writ system. But no complete codification was made.
- The Spread of British legal system:

- Predominantly spread through colonialism.

The American Legal System

- The age of theocracy:
- Until the 17th century, the age of theocracy prevailed. The colonies settled disputes by priests applying the verses of the Holy Bible. The colonies had had loose connection with one another. In the 17th century, the age of theocracy gradually disappeared as a result of several developments.
- Reception of common law: In principle, the colonies accepted the common law. The colonies, however, made important exceptions to the common law. The colonies reflected that exception by issuing special statutes. First, the colonies saw that some aspects of the common law were unsuited to their local conditions.

- The victory of the north: In the 19th century, the tension between the North and the south was resolved in favor of North. The North argued for protective tariff and against slavery. The agricultural South stood for slavery and against tariff. The North and the South fought a civil war. Immediately after the war, economic expansion opened the west. The doctrine of economic liberalism dominated the American economy. This led to the emergence of legal creativity in the area of insurance law, company law, mineral law, banking law, stock exchange carriage and credit system. Universities started to emerge, focusing on the study of law as a practical preparation for the legal profession.

- The role of law professors: In the 20th century, America witnessed the emergence of law professors and their great influence in the American mode of legal thinking. The emergence of the professors and their influence led to some changes. First, it resulted in the gradual weakening of the extreme individualistic ideas of the period. Individualism advocated for little or no interference of the state in the economy. Second, America witnessed the growing tendency of the state to subject economic life to supervision and control and deliberately to limit the freedom of activity of the trader whenever it might cause undesirable hardship to individual citizens. The third effect is related to legal writing, legal practice, legal education and court behavior. The law professors dismissed the formalistic, deductive and abstract legal reasoning. They concentrated on the concrete effects legal rules produce in the society. They considered law as a means to balance competing interests in the society. The law professors argued that for a judge to live up to his/her expectations he/she must understand the prevailing social, political and economic situations. The same law professors argued that law in books and laws in action are different. Some of the law professors argued that law is not precedent, nor to be found in the statutes. But law is what the courts and officials do. This theory of law is known as legal realism.

Legal Convergence and Divergence

- Legal divergence and legal convergence are two opposing forces. Legal convergence brings legal systems of the world closer to one another while legal divergence drifts them apart.
- Both concepts could be seen as matters of degree and process. Legal convergence has different levels; for instance, one can speak of the convergence of the African legal systems, the legal systems of a given federal state, the legal systems of Europe and global convergence.
- Legal Convergence is: going apart. Concentrates on the study of differences in legal systems.
- Factors impending legal convergence:

a. Legal nationalism.

b. Economic, political and social factors.

Chapter four
Aspects of the Ethiopian Legal system

A. Conception of Law in Ethiopia

- The perception of law as of divine origin.
- The naturalist conception of law as the theory that determined the Ethiopian conception of law: The foundation of the natural law theory is the belief that law is divine by its very nature, and that law is something coeval with mankind itself. Therefore, when we attempt to look at this conception of law as the conception that has shaped the Ethiopian legal history, we are, in effect, looking at the history of the natural law theory in the Ethiopian milieu.

Traditional Laws in Ethiopia…continued

- At the time of Menelik (1889-1913), the court structure was based on woreda-awradja political divisions. A court structure consisting of 14 provincial courts, 92 awradjas courts, with each awradja containing 243 woredas, was affirmed by Emperor Haile Selassie in 1942 and for the first time judges were appointed to all the courts.

Traditional Laws in Ethiopia

- Ethiopia is a multination country. There are various nations and these nations have their own oral customary laws.
- *No formalized or institutional courts administered customary law until the end of the 19th century. Instead there was an informal hierarchy of administrative and judicial arbiters, beginning with village elders and culminating in the Emperor's Chilot.*

❖*The Fetha Negest, "The Law of Kings."*

- *was drafted in Egypt during the 13th century and introduced in Ethiopia in the 17th century.*
- The purpose of this code was to guide Christians living in a Moslem society.
- Because the Fetha Negast existed only in Geez, the code was inaccessible to all but the highly educated
- The Fetha Negast was never consistently applied in Ethiopia, even where introduced, and customary norms persisted despite its introduction.
- *By the mid-1950's, the Fetha Negast was considered out-of-date and it was unclear that it was applied with any regularity. Article 3347 of the Civil Code, in effect, repeals the Fetha Negast.*

Introduction of Western-based Codes

- Introduction of western-based codes-The first Ethiopian Criminal Code appeared in the early 1930's. In the 1960's, a large body of law was introduced into Ethiopia consisting of codes imported from Western nations with the Civil Law tradition. Between 1957 and 1965, six codes were enacted in Ethiopia: the Criminal Procedure Code of 1961, the Civil Code of 1960, the Commercial Code of 1960, the Maritime Code of 1960, the Civil Procedure Code of 1965, and the Penal Code of 1957.
- The Ethiopian Civil Code was drafted by Professor Rene David. While acknowledging the foreseeability of substantial resistance to the implementation of the code in Ethiopia, Professor David predicted that the Code would eventually be assimilated in the same manner that Roman law was absorbed in continental Europe.
- *The basic problem is that customary law continues to hold sway as administered by customary tribunals and mediators, and even the exceptional use of government courts produces judgments which may not serve to implement code provisions.*
- *Code attempted abolition of customary law.*
- In a study completed in 1968, it was found that customary dispute resolution based on customary law applied by local elders was alive and well despite the attempt of the Code to curtail it. Because the local elders are often illiterate, they do not apply a sophisticated legal treatise like the Fetha Negast. Elders do state that they apply customary practices and some moral rules and principles. They see their function as restoring harmony across a broad spectrum of relations between the parties.

- There are gaps in implementation of the codes, reasons:

- *more of the population are illiterate;*
- *the great majority of judges have received education only to the fifth grade; and*
- *there is a small and relatively informally educated attorney population.*
- *well-established distribution and communication networks do not exist to make people aware of the law, and administrative facilities may not exist to put laws into effect.*
- *In very remote areas, there are no government courts, so customary law will continue to hold sway.*

Does Ethiopia Have Legal System?

- The learned Professor J. Vanderlinden opens an article he wrote in 1966-67 after the Codes were introduced into Ethiopia with an intriguing sentence. "The main characteristic of the contemporary Ethiopian legal system is that it does not yet exist as such."
- To answer the question of whether Ethiopia has a legal system it is necessary to define a legal system. I conclude that according to Legal Positivism, it is uncertain whether Ethiopia has a legal system. Also, according to the natural lawyer orientation of Professor Lon Fuller, it is doubtful that Ethiopia has a legal system. But according to other definitions, such as those of Professor Poposil, Ethiopia meets the criteria for having a legal system.

Ethiopian Legal System…continued

- Positivists explanation: Ethiopia does not have a proper legal system. n Ethiopia, the Positivist model for a legal system is not realized because as previously discussed, much of the conduct in the society is not governed by official norms. The prevailing norms are customary or traditional.
- *-- Professor Poposil`s definitions of what constitutes law and a legal system abound. Professor Poposil, a specialist in legal anthropological studies, isolates four factors-- the presence of which denote the existence of a legal system. These factors are: (1) adjudication or mediation; (2) sanctions; (3) obligations or Hoffedian rights, and (4) future applicability of the norms established through conflict resolution.*

The Sources of the Six Codes

- Religious precepts, majorly Christianity and Islam.
- Natural law
- The Fetha Negest
- Cases
- Statutes: In 1920`s, early 1930`s and 1940`s Ethiopia passed several statutes. The following may be cited as examples: the nationality law, company law, loan law, bankruptcy law, business registration law and banking law. The 1930 Nationality Law was in force until recently. The Ethiopian Nationality Law of 1930
- Treaties