Definition of legal history:

- **The definition of legal history may be controversial.**
- **But as a working definition, you may take the following:**
- **Legal history is a systematic study of past legal systems.**
- **Legal history thus studies the origin and development of past legal systems, both early and modern legal systems.**
- **Legal history compares and contrasts the various past legal**

Definition cont'd. . .

- **A legal historian should adopt an interdisciplinary approach to the subject; which means, a legal historian should be informed by economics, political science, sociology and other relevant social sciences.**
- **This is so because a legal system of any country cannot be fully appreciated if it is considered independently.**
- **Religion affects a legal system; politics affects it and so are economic institutions of that country.**

Definition cont'd. . .

- **Legal History, www. http://en.wikipedia.org/wiki/Legal_history, Wikipedia, (accessed November, 1 2006)**
- ***Legal history is a term that has at least two meanings:***
- ***(1) Among certain jurists and historians of legal process it has been seen as the recording of the evolution of laws and the technical explanation of how these laws have evolved with the view of better understanding the origins of various legal concepts, some consider it as a branch of intellectual history.***
- ***(2) Twentieth century historians have viewed legal history in a more contextualized manner more in line with the thinking of social historians. They have looked at legal institutions as complex systems of rules, players and symbols and have seen these elements interact with society to change, adapt, resist or promote certain aspects of civil society.***

Definition cont'd. . .

- ***Such legal historians have tended to analyze case histories from the parameters of social science inquiry, using statistical methods, analyzing class distinctions among litigants, petitioners and other players in various legal processes.***
- ***By analyzing case outcomes, transaction costs, number of settled cases they have begun an analysis of legal institutions, practices, procedures and briefs that give us a more complex picture of law and society than the study of jurisprudence, case law and civil codes can achieve.***

Definition cont'd. . .

- https://en.wikipedia.org/wiki/ Legal_history (accessed on Oct. 05/2018)
- Legal history or the history of law is the study of how law has evolved and why it changed.
- Legal history is closely connected to the development of civilisations and is set in the wider context of social history.
- Among certain jurists and historians of legal process, it has been seen as the recording of the evolution of laws and the technical explanation of how these laws have evolved with the view of better understanding the origins of various legal concepts; some consider it a branch of intellectual history.
- Twentieth century historians have viewed legal history in a more contextualised manner more in line with the thinking of social historians.

Definition cont'd. . .

- They have looked at legal institutions as complex systems of rules, players and symbols and have seen these elements interact with society to change, adapt, resist or promote certain aspects of civil society.
- Such legal historians have tended to analyse case histories from the parameters of social science inquiry, using statistical methods, analysing class distinctions among litigants, petitioners and other players in various legal processes.
- By analysing case outcomes, transaction costs, number of settled cases they have begun an analysis of legal institutions, practices, procedures and briefs that give us a more complex picture of law and society than the study of jurisprudence, case law and civil codes can achieve.

1.1.2 Approaches to legal history:

- **There are four major approaches in studying legal history and traditions.**
- **The *first approach states* that the subject of legal history should focus on:**
- **the past societies themselves,**
- **the legal rules,**
- **legal principles,**
- **legal standards and**
- **the changes therein by disregarding factors such as social, political and economic for the sole purpose of understanding those past systems.**
- **This approach is called the unitary or isolationist approach.**

Approaches cont'd. . .

- **The second approach is called *the holistic or the sociological approach*.**
- **It refers to the inclusion of economic, religious, social political institutions of past societies.**
- **This approach, in addition to the elements that must be studied according to the first approach, should include both internal and external factors to a past legal system as a legal system does not stand in isolation from external factors.**

Approaches cont'd. . .

- **Thus, the study of legal history and legal traditions will not be complete unless it includes economic, social, religious and political elements.**
- **The sociological conception rests on the idea that society is a whole and is not made of separate elements. The sociological approach assumes further that a society is made up of interrelated elements that are constantly interacting with one another.**
- **Thus, the economic and social organizations of the society exert upon the law and force it to organization and search for solutions.**

Approaches cont'd. . .

- **The third approach is called *the technical approach*.**
- **This approach states that legal history should limit itself to gather the legal problems and understand the legal reasons why these solutions were chosen by past societies.**
- **The technical approach to legal history proposes that the present society should use the legal solutions the past society adopted when current societies face similar problems.**
- **There is a need to study the history of the laws of the past societies:**

➢ **not simply for the sake of knowledge of these societies (as in the historical conception);**

Approaches cont'd. . .

- it is not simply to reach a sociological explanation of their laws and their relations to other aspects of the social organization (as in the sociological conception);
- it is not also simply to discover general rules of the evolution and development of societies;
- rather it is to gather legal problems and to understand the reasons why these solutions were chosen plus the technical arguments and reasoning by which they have been justified by these societies.

Approaches cont'd. . .

- **The last view called *the mixed approach is a combination of the unitary, the holistic and technical approaches.***
- **This mixed approach bases itself on the idea that the three approaches have positive elements, which need to be taken into account when studying legal history and legal traditions.**
- **The four approaches to the study of legal history are different in terms of scope, purpose and the legal theory behind them.**
- **For example, the unitary approach to legal history is influenced by legal positivism which claims that the only valid source of law is the sovereign (law is the command of a sovereign).**

Approaches cont'd. . .

- To legal positivism, legal historians are supposed to study the history of the series of commands laid dawn by whoever was in possession of the sole and ultimate law making power in a given community.
- On the other hand, the holistic approach is dominated by those legal historians who believe that there are several sources of laws; of which the state is just one.
- Thus, to the proponents of the holistic approach, legal history should be the study of the history of the enactments of the numerous authorities laying down laws including those factors external to law which affect the shape and content of the law.

1.1.3 Importance of history

- ***History shows us what it means to be human.***
- ***History improves judgment.***
- ***History provides instructive examples.***
- ***History makes us better thinkers.***
- ***History supports common cultural understanding and dialogue.***
- ***History satisfies a need for identity.***
- ***Finally, history gives pleasure.***

/see pp.5-11/

1.1.5 Reasons for studying legal history:

- **Legal history is important to clarify the present legal systems.**

- **The present legal systems stand on the past. Thus, the present legal systems do not exist in isolation from the past.**

- **The present legal systems are the products of very long historical processes.**

- **Secondly, the study of legal history is important not only to appreciate the present legal systems but also to help us solve legal problems of to day.**

Reasons for studying legal history cnt'd…

- Certain legal problems the present legal systems face cannot be solved without reference to the past.
- Third, legal history allows us to be sensitive to legal systems, as legal history reveals that different communities have solved the same legal problems in quite different manner.

- The way past societies understood the concept of law is different from one another and from the present ways of appreciating the concept of law.

/see p.12/

1.1.6 Problems in the study of legal history:

- **The first effort of the legal historian is to find out what happened in the past. And their next step is to ascertain why those events occurred.**

- **Often there are insufficient data available to arrive at a provable conclusion and sometimes none at all.**

Problems cont'd…

- **Legal history should tell you why things happened and, sometimes, you may know; sometimes, you may simply make an educated guess and speculation.**

- **Some other times, you may have no idea about what happened. Thus the fundamental problem of legal history is lack of sufficient and reliable evidence of past events.**

1.1.7 The concept of legal system:

- **A legal system is defined as a synergy of legal rules, legal principles, legal standards, legal policies, legal structures, legal tradition, legal actors, legal extension and legal penetration operating in a given geographical area.**
- **The term `synergy` in this**

The concept cont'd. . .

- **A legal system is rather qualitatively different from and bigger than totality of those elements.**

- **The complexity of a legal system varies depending on the stage of development of a country.**

- **A legal system may refer to the**

The concept cont'd. . .

- **The purpose of legal system may be to sustain a slave-owning system or a feudal system or a capitalist system or to build a communist system.**

- **A legal system may be created to assure the survival of a theocratic system.**

The concept cont'd. . .

- **Legal structure encompasses law schools, bar associations, the police, courts, the legislature, the executive and prison administration.**
- **Legal structure means all those institutions responsible for creating, modifying, interpreting, improving and implementing laws.**
- **The structure has legal actors, which means the persons acting in legal structures, meaning members of the parliament, officers of the state, law students, law teachers, legal practitioners, etc.**

1.1.8 Classification of legal systems:

- **Currently, there are about two hundred legal systems in the world.**
- **It is not possible nor desirable to learn about all of them.**
- **Thus, it appears to be wise to consider only the major legal systems of the world.**
- **A legal system is taken as a major legal system based on such factors as:**

Classification cont'd. . .

- its influence on the development of other legal systems;
- its geographical spread,
- the technological and economic advances of the country being classified.

1.1.8.1 Tests of Classification:

- **There is no consensus on the proper criteria for the classification of legal traditions among legal historians.**
- **A great number of researchers have proposed a variety of criteria in their efforts to categorize systems into groups.**
- **Some of these criteria are: race, geography, language, sources of law, substance of law, ideology,**

Tests of Classification cont'd. . .

- **Some writers such as Zweigert and Kotz argue that it is not possible to classify legal systems into legal families merely by using a single criterion.**
- **In their view, it is sound to devise a set of tests that go through all legal systems that are determined to belong to the same family.**
- **They suggest that the critical test is the concept of a style of a legal system. To them, there is a need to realize their legal styles and to use distinctive stylistic traits as a basis for putting legal systems into groups.**

Tests of Classification cont'd. . .

- By legal style, they mean the totality of features that flesh out a distinctive form of legal systems.
- The critical thing about legal systems is their style since the styles of individual legal systems and groups of legal systems are each quite distinctive.
- It is not every minor difference between legal systems, which can rank as an element in their style; only essential differentiating qualities are distinctive. There can never be any final proof of what is essential. /See p. 14/

Tests of Classification cont'd. . .

- **The five factors adopted by Zweigert and Kotz are: the stylistic factors, which enable those who study comparative legal tradition to identify the families of legal systems and to attribute individuals systems to them.**
- **But the weight to be given to each of these factors varies according to the circumstances.**
- **Ideology is an effective ground for distinguishing the religious and socialist systems, but does not help you to distinguish the legal families of the west from one another.**

Tests of Classification cont'd. . .

- There it is history, mode of thought and distinctive institutions, which distinguish legal families.
- Sources of law are distinguishing feature of Islamic and the Hindu and also help you to divide the Anglo-American from the continental legal families.
- But you cannot use sources of law as a basis for distinguishing

Tests of Classification cont'd. . .

- **How many legal styles a scholar identifies and how he/she identifies them are largely matters of his/her judgment.**
- **His/her aim must, however, be to see the differences in reality, past and present, contained in distinctive form of economic life.**
- **One indication of the importance of a feature in a legal system is if a person from another system finds it surprising; if it is easier to discover the stylistically distinctive elements in a foreign system in one's own.**

Tests of Classification cont'd. . .

- **Zweigert and Kotz identify five elements constituting the legal style of any legal system.**
- **These are:**
  - **historical background and development,**
  - **predominant characteristics modes of thought in legal matters (especially distinctive institutions),**
  - **the kind of legal sources it acknowledges and the way it handles them and**
  - **ideology.**

1.1.8.2 Distinctive mode of legal thinking:

- **One of the styles of a legal system is its predominant and characteristic mode of thought in legal matters.**
- **The Germanic and Romanistic families are marked by a tendency to use abstract legal norms, to have a well-articulated system containing well-defined areas of law and to think up and to think in juristic constructions.**
- **Anti-formalism refers to the opposition of legal systems to needless formality in the law.**

Distinctive mode cont'd. . .

- **In private law, this shows itself in consensualism, that is, the rule that agreement creates contractual obligations, no matter how it is expressed.**
- **Consensualism is found at an advanced stage of every legal system.**
- **The formalism is present in all primitive system. It also exists in Anglo-American law. In Europe, that tendency to anti-formalism is strong.**

Distinctive mode cont'd. . .

- **The struggle for law is an element in legal thinking, which is found in several legal families, in deed in all Western law.**
- **The principle is that the goal of law is peace, one must struggle to achieve; it is the duty of a person, owed both to himself and to the idea of law itself.**
- **But this idea is not true in Far East and Latin American systems where written law is not very significant in practice.**
- **In the West man naturally fight for his rights and seeks a clear decision, treating a compromise as a thing perhaps to be settled for, and in the East the face-saving compromise is the ideal, and a firm decision only a necessary evil.**

1.1.8.3 Ideology:

- **Legal ideology means the political or economic doctrines or religious beliefs of the system in question.**
- **The role of ideology is clear in the case of the religious belief systems and of the socialist legal systems.**
- **The ideologies of the Anglo-American, Germanic, Romanist and Nordic families are essentially similar.**
- **And it is because of other elements in their styles that they must be distinguished.**
- **Legal ideology separates socialist law and the religious systems, from the legal families of the West.**

1.1.8.4 An Alternative Test:

- **Apart from the five stylic factors proposed by Zweigert and Kotz, there is Professor Rene David`s who holds the position that the classification of legal traditions should not be based on the similarity or dissimilarity of any particular legal rules.**
- **David proposes two tests that should be used together namely, legal concepts and techniques of employed by the system, and the system's ideology.**
- **Professor David defines legal ideology as the philosophical, political, and economic principles of the society in which the legal system operates.**

An Alternative Test cont'd. . .

- By `legal concepts and techniques`, David means the vocabulary of the law, the legal fictions employed by the system, hierarchy of sources of law, and the methodology employed by legal actors within the system.
- David, like Zweigert and Kotz, is of the opinion that particular rules of substantive law are not decisive for the classification of a legal system.
- But all three agree that general principles of law, including those of substantive law, help to determine the family of a given legal system.

An Alternative Test. . .

- They also agree that legal ideology plays a significant role in the classification of laws into legal families.
- The other elements of what Zweigert and Kotz refer to as legal style appear to correspond to what David calls as legal concepts and techniques.
- Despite these common denominators between the views of David and Zweigert and Kotz, they have arrived at different classifications.

An Alternative Test. . .

- **The latter two (Zweigert and Kotz) assert that there are eight modern legal systems:**

i. **the Romanistic,**
ii. **the Germanic,**
iii. **the Anglo-American,**
iv. **the Nordic,**
v. **the Socialist,**
vi. **the Far Eastern,**
vii. **Islamic and**
viii. **the Hindu.**

- **The list omits the African customary, Jewish law and the European Union law.**

An Alternative Test. . .

- On the other hand, Professor David's criteria of classification lead him to come up with the following list:

i. the Romano-Germanic,
ii. Socialist,
iii. the Anglo-American,
iv. Muslim,
v. Hindu,
vi. the Far Eastern, and
vii. the African and
viii Malagasy.

- Take note of the fact that some legal systems will not be easily classified as belonging to one or another group.
- These are the so-called hybrid systems, like those in place in Louisiana, Quebec, Scotland, South Africa, Israel and China. These systems are the products of a mixture of two or more legal traditions.

1.1.8.5 Reasons for classification:

- **Categorization of legal systems of the world has a couple of importance: technical and authority.**
- **The first reason for classification of the major legal systems of the world is technical because the study of the history of laws of societies is systematic.**
- **One best way of studying legal history and legal traditions is to classify and sub-classify the major legal traditions of the past and the**

Reasons for classification cont'd…

- **Such division and sub-division make the study of the subject convenient and gives your thought some degree of organization.**
- **Classification of legal systems helps you to arrange the mass of legal systems in an understandable order; understand and assimilate the mass of detail.**
- **The second reason for classification and sub-classification is the issue of authority in the sense that those legal systems that are grouped together can borrow legal materials from one another where there are gaps.**

1.1.9 Legal Tradition:

- **1.1.9.1 Definition of a legal tradition:**
- **Legal tradition refers to a set of deeply rooted and historically conditioned attitude of the majority of the members of a given legal system towards the other elements of that legal system, which means the way laws are made, modified, interpreted and the way the legal actors and structures function.**
- **Legal tradition is the abstract element of a legal system.**

Definition of a legal tradition cont'd…

- The attitude directed towards a legal system can be hostile, neutral or favorable.
- When the attitude of the governed is hostile, the legal system will show instability; it will have to be changed.
- When the attitude of the governed is supportive of the legal system, the system will show continuity.

Definition of a legal tradition cont'd…

- **So depending on the type of the attitude of the majority members of the legal system, the legal system may show deep and frequent changes or stability.**
- **When we say legal tradition, we are referring to the attitude of the majority members of a given community; we are not referring to the entrenched attitudes of the minority members.**
- **The attitude that constitutes a legal tradition should be directed to a legal system and should be something deeply embedded in the system.**

Definition of a legal tradition cont'd…

- **The attitude should also be historically conditioned in the sense that it should be there for a relatively longer period of time and that it should have the feature of perpetuating itself.**
- **In terms of frequency of change, legal traditions may be classed into three:**

i. **those legal systems that exist for a relatively longer period of time with some adjustments;**
ii. **those legal systems that undergo basic and frequent changes and**
iii. **thirdly those legal systems which experience little or no change.**

Definition of a legal tradition cont'd…

- The first category is known for stability and backed probably by a majority support; the second group relates to legal tradition with deep and revolutionary changes while the third belongs to the domain of the stagnant early legal traditions.
- Can you mention an example of a legal tradition for each category?
- To which class the Ethiopian legal system falls in?

1.1.9.2 The notion of civil law:

- **The meaning of the words “civil law” has not been the same in all-historical periods.**
- **In the framework of early and classical Roman law, *jus civile* was the law governing the relations of Roman citizens.**
- **In the Middle Ages and up to the era of “reception,” the term ``civil law`` referred mostly to the Justinian legislation and the accumulated doctrine of the commentators; it was contrasted to the canon law.**

- **Christian religious law:** the body of laws that governs the affairs of the Christian church or a particular branch of it **Microsoft® Encarta® 2009. © 1993-2008 Microsoft Corporation. All rights reserved.**

The notion of civil law cont'd. . .

- **In modern times, the term ``civil law`` refers to those legal systems, especially in their methodology and terminology, shaped decisively by the Roman law scholars from the Middle Ages to the nineteenth century.**
- **But within the framework of a civil law system, the term ``civil law`` is ordinarily reserved to designate the sum total of rules governing relations of private individuals as such, with the exception of commercial acts and relations which are subject to commercial law.**

The notion of civil law cont'd. . .

- The initial working assumption in the civil law world especially in the French legal system was that the codes are:
- (a) clear with no ambiguity and vagueness;
- (b) complete containing answer to every fact-situation; and
- (c) coherent with no inconsistency or contradiction.
- Thus, the function of the judge was assumed to be merely applying the written law to the facts.

The notion of civil law cont'd. . .

- The French entertained this idea of clear, complete and coherent code because:
- (a) they believed in the goal of certainty of the law; a thinking that people should, to the extent possible, know the nature of their rights and obligations and be able to plan their actions with some confidence about the legal consequence;
- (b) they believed in the strict separation of power in which judges are slot-machine (give them legal rules and facts, division are automatic);
- (c) they believed in legislative supremacy.

The notion of civil law cont'd. . .

- Over time, those thinking about the roles of judges, the nature of codes, the ideal of certainty and strict separation of power and as well as legislative supremacy have been modified.
- Discovered in the codes were several provisions that were incomplete, vague, ambiguous and inconsistent.
- To remedy these deficiencies, judges have been, though not in theory, making laws in practice.

The notion of civil law cont'd. . .

- The executive has started issuing tones of law through delegation.
- To fill gaps in the codes and adjust them to the changing needs of the French society, legislatures found it imperative to pass special statutes.
- The jurists have commented on the codes, cases and special statues passed by the executive and the legislatures.

1.1.9.3 The notion of common law:

- **Common law is the totality of the law of the Anglo-American legal family.**

- **It is related only to that part of the law created by the king's courts in England.**

- **The term ``common law`` is used as opposed to statue law, which is the enactment of the parliament in England.**

The notion of common law cont'd…

- The term ``common law`` is also used as opposed to the rules and practice of equity.

- The most appropriate connotation of the term, however, is a set of deeply embedded attitude held originally by the British people about the primacy of case law.

- **Legal transplantation is known by other names. These are:**
- **legal borrowing,**
- **legal importation,**
- **legal reception and**
- **legal taking.**
- **Legal transplantation refers to the transfer of legal rules, legal principles and legal concepts from one or more than one legal system to another legal system.**

Legal Transplantation cont'd . . .

- **A legal system borrowing laws can be called the recipient system while a legal system lending laws can be called the donor legal system.**
- **The lending system may be an existing legal system or a past legal system**
- **Countries, for example, borrowed from the Roman legal system that ceased to exist centuries ago.**
- **The recipient legal system should be an existing one or a system at its initial stage of development.**

Legal Transplantation cont'd. . .

- **Legal borrowing can involve a single legal rule; it can be a massive borrowing.**
- **For instance, Ethiopia borrowed large quantity of laws in late 1950`s and 1960`s.**
- **At the end of 19th century, Japan received large quantity of laws from Germany.**
- **Small-scale borrowings take place everyday.**
- **Appreciating legal transplantation is important to conduct legal research, as it enables you to trace the right material sources of the laws of a given country.**

1.2.2 Reasons for legal transplantation:

- **A recipient country may borrow laws since:**
  - **the laws are accessible in terms of language,**
  - **the laws are found out to be meritorious in terms of organizations,**
  - **the laws were transplanted to other systems and found out to be fruitful and**
  - **the recipient country decided to modernize its legal system.**
- **A country may adopt foreign laws as a result of migration or commercial intercourse.**

Reasons for legal transplantation cont'd…

- **A country may adopt the laws of another country because the important elites are attached to the legal system and education of the donor country.**
- **A country may be forced to accept the laws of other systems owing to war or conquest or colonization or physiological pressure.**

1.2.3 A historical account of legal transplantation:

- **Legal history indicates that legal transplantation has been rampant.**

- **The Greek gave important legal theories to the Romans; the Romans borrowed some conceptions of laws from the Greek legal system.**

- **The Romans converted the idealism of the Greek into practical legal rules.**

A historical account cont'd…

- **The Romans gave principles of private law to European countries such as France and Germany.**
- **France added to the laws it had received from the Romans some theories and techniques.**
- **France then codified its laws in early 19th century.**
- **France propagated its laws first to neighboring European countries.**

A historical account cont'd…

- Later, France transplanted its codes to Asia and Africa through the instrumentality of colonialism.
- Some countries in Latin America received laws from France voluntarily.
- England also transported its laws to all over the world via colonialism.
- Eastern European countries received laws from the civil law countries.

A historical account cont'd…

- **After the end of World War Second, however, East European countries were forced to adopt socialist system of laws.**
- **Again after 1980`s these countries went back to the civil law tradition owing to external pressures.**
- **The socialist legal system was developed as an idea in 19th century and in early 20th century; it was then translated into practice in Russia.**

A historical account cont'd…

- **Russia, later the USSR, became the mastermind behind the spread of socialist laws to Asia and Africa in some case through force and sometimes through pressure.**
- **The Islamic legal system, as an idea, originated in the Middle East in the 7th AD., and then it was taken to the coastal areas of Africa, Middle East and Asia.**
- **Now a kind of Islamic law belt is created. The spread of the Islamic legal system has been attributed to a combination of the following factors: migration and commerce.**

A historical account . . .

- **According to Dicey, there are three classes of recipients of common law:**

i. **Seeded nations-those where elements of the colonial legal system were introduced into a colony which had a relatively advanced society and developed legal system, but where the seeding power which gained control more by negotiation and its apparent capacity to conquer than actually using force. As an example, in Grand Mogul of India, local leaders authorized English occupation.**

ii. **Settled nations-those in which territorial expansion occurred in an area not possessing a strong and developed society and in which the colonial acquisition went to the first settling power. Examples in this domain are USA, Australia and New Zealand.**

iii. **Conquered territories-nations in which elements of force was used to wrest power from another authority, which might have been either a strong indigenous authority, or a previous colonizer as is in the case in South Africa.**

- **1.2.4 Notes:**
- **Common law was directly linked through its territorial expansion with each of the principal nations in which the common law developed.**
- **Roman law origins for these nations must be traced through a two-stage linkage, first the Roman law was directly linked to European systems and, secondly, that some Roman law is traceable through these European systems was linked to a second tier of civil law nations located in many parts of the world.**
- **In many parts of African countries, the English law and civil law affected a comparatively small percentage of the population.**
- **Reception of a legal system depends on the fusion of the local culture with that of the settling nation.**
- **Where a cultural assimilation has occurred, the English law and civil law have shown remarkable capacity for adaptation.**

1.2.5 Views on legal transplantation:

- **There are three views about legal transplantation.**
- **The first approach is referred to as the custom theory.**
- **F. von Savigny, a German thinker of 19th century, elaborated this approach.**
- **The approach states that law and society have unique relationships. Law and society have inherent connections.**
- **There is a unique relationship between law and society means that laws are found in the common consciousness of the people.**

Views cont'd. . .

- This common consciousness is manifested via the behaviors of individual members of that community.
- Laws are related to the identity of a society for which they are created.
- Further, this theory assumes that every community is legally self-sufficient; whenever a society faces a legal problem, it

Views cont'd. . .

- To this theory, if one attempts to take the laws of X community to Y community by way of legal borrowing, those transferred laws will inevitably fail.
- Further the proponents of the custom theory hold that legal transplantation will never solve the problems of a recipient legal system; if you know in advance that borrowed laws will fail, there is no reason to try it.

Views cont'd. . .

- An opposing theory, developed by Alan Watson holds that there is no unique connection between law and society.
- The theory also holds that no community has ever been legally self-sufficient in the history of mankind.
- The theory is named as legal engineering.
- This theory views laws as

Views cont'd. . .

- As laws are tools, they can be taken to any society and may be used with success.
- The following Justifications are given for this position:
- The first reason is that the fact that legal transplantation has been very common in the history of legal systems, which shows that people have found it rational and useful.

Views cont'd. . .

- **In the second place, if there are laws used by X community and if Y community needs those laws, why should the latter be asked to reinvent those legal concepts and legal rules?**
- **It is rational for Y community to receive the laws of X community, which are tested in practice.**
- **History gives us several examples where countries have borrowed laws as a result of external pressures.**

Views cont'd. . .

- The third theory attempts to strike a middle ground.
- In some areas of law, for example, in the area of commercial law, public law and technology law, there are gaps in laws or laws do not exist in developing countries.
- In such cases, developing countries do not have a choice; they have to borrow laws.
- In other areas of laws such as family law, inheritance laws and land laws, developing countries have longstanding laws.

Views cont'd. . .

- In the latter cases, it is difficult to transplant laws and even if transplantation takes place, the laws so transplanted will not be welcomed.
- This hybrid approach is articulated by Kahn-Freund.
- This position is also called the degree of transferability approach.
- This moderate approach to legal transplantation states that the contexts of the recipient country should be studied well before the borrowing of laws is made.

Views cont'd. . .

- **Which theory do you support:**
  - **the custom theory (also known as the historical theory)?**
  - **the social engineering theory (also called the instrumentalist theory)?**
  - **the hybrid theory?**
  - **Why?**

1.2.6 More on legal transplantation:

- The debate around the theory of legal transplants has almost unique beginning.
- In 1974 Alan Watson and Otto Kahn-Freund presented competing theories on the viability of legal transplants.
- The divergence of their views can be traced to the adoption of contrary propositions about the relationship between a state's law and its society.
- Watson's theory begins with the proposition that there is no inherent relationship between law and the society in which it operates.
- He believes that law is largely autonomous, with a life of its own.

More on legal transplantation

- **Watson states that law develops by transplanting, not because some such rule was the inevitable consequence of the social structure and would have emerged even without a model to copy, but because the foreign rule was known to those with control over lawmaking, and they observed the apparent merits that could be derived from it.**
- **Under Watson's theory, a legal rule is transplanted simply because it is a good idea.**
- **While Watson does not explicitly present a method to predict the viability of a proposed legal transplant, his writings provide guidance for such a method.**

More on legal transplantation

- He has further identified several factors that he believes must be considered to determine if the conditions are ripe for legal change by transplantation.
- Kahn-Freund's disagreements with Watson begin with Watson's proposition that there is no inherent relationship between a state's law and its society.
- He claims that laws must not be separated from their purpose or from the circumstances in which they are made.
- Kahn-Freund argues "we cannot take for granted that rules or institutions are transplantable`` and believes that "there are degrees of transferability``.

More on legal transplantation

- **Ewald summarizes Kahn-Freund's theory: "legal institutions may be more-or-less embedded in a nation's life, and therefore more-or-less readily transplantable from one legal system to another; but nevertheless at one end of the spectrum law is so deeply embedded that transplantation is in effect impossible.**
- **Kahn-Freund identified a two-step process to determine the viability of a proposed transplant.**
- **The first step is to determine the relationship between the legal rule to be transplanted and the socio-political structure of the donor state.**
- **The second step involves comparing the socio-political environment of the donor and receiving state.**

More on legal transplantation

- **There is agreement, however, that the phrase "legal transplants" refers to the movement of legal norms or specific laws from one state to another during the process of law-making or legal reform.**
- **However, as a consequence of these conflicting propositions, their theories clash not only over how to evaluate the viability of a proposed legal transplant, but also over the general conclusions that can be reached about the usefulness of legal transplants as a tool of comparative scholars.**
- **Other scholars debate nearly on every aspect of the legal transplant theory.**

More on legal transplantation

- **The study of legal transplants has been revived since the collapse of totalitarian rule. It is not, however, a new topic.**
- **The issue of reception of foreign law has a considerable history and a remarkable topicality.**
- **As states around the globe implement dramatic political and economic changes in response to external and internal developments, their legal systems must be radically altered.**
- **In making these changes, legislators determine whether the borrowing of foreign law is feasible and if the international harmonization of a particular set of laws is viable.**

More on legal transplantation

- **The argument is strong that there is no need for legislators to struggle to reinvent the wheel when others have dealt with the same issues.**
- **This argument is further supported by the fact that states are under pressure in the increasing interdependent world to create uniformity in law.**
- **Massive successful borrowing is common place in law. Borrowing is usually the major factor in legal change.**
- **Legal borrowing is of enormous importance in legal development.**
- **The borrowed rule would not operate in exactly the way it did in its other home.**

More on legal transplantation

- **Legal transplantations are inevitable. Since the time of late Roman Empire, legal transplantations have been a major factor in legal change in the western world.**
- **England is no exception. Nor is the United States. Nor is Québec, even with its differences from the other provinces.**
- **The real issue is whether there should be a deliberate concerted effort, spear-headed perhaps by academics, to create a common law.**
- **Beginning from early 1990`s, Eastern Europe began the unprecedented effort of lawmaking on a grand scale.**

More on legal transplantation

- **Almost overnight and at the request of their people and/or international organizations, former communist countries had to disassemble their political, economic, and legal institutions, which were based on centrally planned economies, to erect market-based democracies. Large sections of their old legal systems were now obsolete.**
- **The legislatures, however, were in most cases not free to from law and policy, as an "author is free to write a novel.``**
- **The legal establishment of the communist era held influential posts and had contacts in the East and the West. They were ex officio called to lead reform efforts.**
- **In addition to them, foreign technical assistance arrived with ideas for "legal surgery or reception of foreign law``.**

More on legal transplantation

- A great number of foreign concepts (e.g., negotiable instruments or credit security devices) were introduced as if they were legal transplants to replace malfunctioning organs.
- Comparative law was employed to decide either compatibility of foreign legal concepts or the merits of foreign legal systems and to provide an anthology of foreign legal ideas. Modern comparative legal methodology deals with legal transplants and reception of foreign law.

Legal penetration:

- **Those responsible for the importation of laws aspire that the transplanted laws would affect human conducts possibly hundred percent.**
- **The assumption is that the actors at the time especially of massive importation of laws desire that communities would adjust their behaviors to the imported laws.**
- **The actors who sponsored wholesome importation of laws plan that the imported laws would be implemented in all parts of the territory of the recipient country.**
- **For example, Ethiopia borrowed large scale laws in 1950`s and 1960`s; at that time, key personalities were responsible for such project expected that such laws would be accepted by the people; the people would shift their allegiance towards the new western oriented laws.**

Legal extension:

- **Legal extension refers to the extent to which people or the state actors are actually following the imported laws.**
- **If legal penetration is the aspiration, legal extension is the reality.**
- **The question is whether people have actually adjusted their behaviors to the prescriptions of the imported laws or whether people are still settling their social and economic conflicts pursuant to customary or**

Legal extension:

- **In the context of developing countries that transplanted laws from the west such as Ethiopia, there is a gap between legal extension and legal penetration.**
- **The gap is not a small one; it is quite substantial. You can cite examples.**
- **In Ethiopia, the imported family law states that:**

✓ **the spouses are equal, at the time of the creation of marriage, in the course of marriage and upon the dissolution of marriage;**

✓ **the husband and the wife should conclude marriage on their free consent.;**

✓ **the husband and the wife should share household burdens equally;**

✓ **the husband and wife should divide the common property equally when the marriage dissolves.**

- **But the customary laws do not conform to these prescriptions of imported laws.**

Reasons for the gap:

- **The first possible reason is that the imported laws have not yet been sufficiently communicated to the people.**
- **Secondly, the laws are published in the English language and Amharic in a country where millions of people do not understand either of these languages.**
- **The other possible reason is that there is a huge percentage of illiterate population. The imported laws assume a literate society.**
- **Thirdly, the state lacks the necessary resources to implement some of the provisions of the imported laws.**

Reasons for the gap cont'd…

- **The fourth reason is that the laws were defectively transplanted, which means the country's context was not properly studied and the customary and religious laws were not given the place they deserved.**
- **As a result, the imported laws lacked the necessary legitimacy from the people.**
- **The other factor is that the pre-existing laws in Ethiopia are so deeply rooted in the fabric of the society that they could not easily and quickly be replaced.**
- **People are deeply attached to the customary laws.**

Reasons for the gap cont'd…

- **People have inherited dispute settlement mechanisms that were used by their ancestors.**
- **Simply stated the force of tradition is the reason behind the tacit resistance put up against imported laws.**
- **Finally, it is argued that the transplanted laws could not succeed since the assumption of the customary laws is different from the assumption of the western laws.**
- **The customary laws focus on the group; paramount importance is attached to the survival of the collectivity.**
- **On the other hand, it is stated that western laws are designed for and around the interests of an individual.**

Unit Two
Ancient Legal Systems

- **2.1 Three early legal systems**
- **This section describes the Babylonian legal system, lists and explains the key features of the Code of Hammurabi.**
- **The section also describes the characteristics of the Greek legal system as well as the Roman legal system.**

2.1.1 The Babylonian legal system:

- **2.1.1.1 The three stages:**
- **The Babylonian legal system is also called the Mesopotamian legal system.**
- **This legal system flourished Before Christ (in the BC).**
- **The system was located along the valley of the great rivers, namely, Euphrates and Tigris.**
- **As historical documents indicate, the Mesopotamian legal system was located in the region south of the present-day Iraq.**
- **Legal historians consider this legal system as the first great legal system in human history.**

The Babylonian legal system cont'd…

- **The Mesopotamian legal system passed through three stages.**
- **In the first phase, there were different kingdoms. These kingdoms were fighting one another.**
- **There was great instability in the area. As a result, a stable political and legal system could not be realized.**
- **The legal system was**

The Babylonian legal system cont'd…

- **The second stage marked the coming into power of a powerful emperor-Hammurabi.**
- **Emperor Hammurabi defeated his contenders in the area in successive battles, which enabled him to monopolize political power.**
- **He imposed his rule on his power contenders.**
- **Emperor Hammurabi felt that he had to rule on the basis of a code of laws.**

The Babylonian legal system cont'd…

- He wrote, according to legal historians, the first real law code in the history of mankind.
- His code was named the Code of Hammurabi. The Code came into force in the year 1750 BC.
- The Code was carved on a huge rock column; it was not written nor published on papers.
- The Code had several features. The first and basic principle behind the Code of Hammurabi was an eye-for-an eye principle of punishment.

The Babylonian legal system cont'd…

- **An eye for an eye principle means a literal punishment.**
- **Mitigating or softening punishment was not known in the Code of Hammurabi.**
- **The Code imposed harsh or disproportionate penalties for offenses.**
- **For examples: when a person defamed another person, he was supposed to lose his tongue; when a person kissed a married woman, he was to lose his lips; when a person stole property, his hands were to be chopped off.**

The Babylonian legal system cont'd…

- **When a builder built a defective house, he was to lose his children.**
- **The basic reason for an eye-for-eye principle was that when a person committed an offense, the Mesopotamians thought that that act disturbed the natural balance and the only proper method of rectifying the wrong, according to them, was by imposing a literal and corresponding punishment.**

The Babylonian legal system cont'd…

- **The second feature of the Code was that it was not systematically written.**
- **The Code did not make any distinctions between public law and private law, and procedural law and substantive law; these distinctions were not known then.**
- **Thirdly, the Code was the expression of the Mesopotamians that the rule of law, in its crude form, was important, as the law was written and disclosed in advance.**

The Babylonian legal system cont'd…

- **Fourth, the Code lasted for a longer period of time; it was one of the codes in the history of legal systems that showed an amazing degree of stability.**
- **The third stage of the Mesopotamian legal system was the phase of decline; much has not been written about this fading phase of the kingdom of Mesopotamia.**

2.1.2 The Greek legal system:

- **The Greek legal system came into existence a thousand year after the Code of Hammurabi.**
- **The Greek civilization reached its highest stage in the 5th BC.**
- **The system started declining in the 4th BC and finally to collapse in the 2nd BC owing largely to the conquest of Greece by the Romans.**
- **The Greek provided the next generations legal systems with the principles of public law.**

The Greek legal system cont'd…

- **Why did not private law develop in Greece? The Greek did not contribute much to the development of a sound private law; the Greek did have private law but their private law was not as sound as the Roman private law. Why?**
- **A combination of three factors explains this failure.**
- **First, the Greek did not build an empire, unlike the Romans and the Mesopotamians.**
- **The Greek had had several geographically and politically fragmented polities called city-states.**

The Greek legal system cont'd…

- As a result, the city-states lacked political interactions; when there were connections it was that of enmity instead of that of friendship and cooperation.
- Historians state that lack of viable political connection hampered the development of an elaborate private law.
- In the second place, the Greek philosophers always thought that they were destined to address questions that mattered-philosophical questions.

The Greek legal system cont'd…

- **The Greek, for instance, were trying to develop constitutional principles, the best model of ordering a society as a whole.**
- **The Greek directed their energy to abstract thinking; they were not technocrats; rather, they were idealists.**
- **So the psychological and intellectual make-up of the Greek prevented them from**

The Greek legal system cont'd…

- **The third reason for the failure on the part of the Greek to formulate a developed private law was attributed to technical and institutional factors.**
- **The Greek city-states lacked legal structures such as courts, prosecution offices, police and prisons.**
- **They did not have detailed private rules. Ordinary people settled economic and social disputes on the basis of ethics and equity.**

The Greek legal system cont'd…

- **The Greek, it seems, operated on the assumption that law should not be monopolized by the few and that people had to be allowed to participate in the making and implementation of the law.**
- **The system of recording judgments was missing.**
- **They did not know of precedents.**

2.1.3 The Roman legal system

- **Like the Mesopotamian legal system, the Roman legal system went through three phases.**
- **The first phase lasted from 8th BC. to 2nd BC. In the course of these centuries, Rome was a little city.**
- **It was a city-state; state built in the city of Rome.**
- **The laws of the city of Rome were at their lowest stage in terms of organization and narrow in their coverage.**

The Roman legal system cont'd. . .

- **Rome formulated its laws in the form of one of the ancient codes named the XII Tables in the year 450BC.**
- **The XII Tables was developed in a response to popular demand; the lower class rebelled demanding that the law had to be known in advance.**
- **2.1.3.1. Aspects of the XII Tables:**
- **The XII Tables promoted an eye-for-eye principle.**
- **The XII Tables reflected the belief on the part of the Romans that law should be written in advance, communicated to the governed and the law had to be left to the judges alone to apply and interpret.**

The Roman legal system cont'd. . .

- **The other feature of the XII Tables was that it was rudimentary, in terms of arrangement, as the Code of Hammurabi.**
- **The XII Tables advocated for the supreme authority of the father over his wife and children.**
- **The XII Tables reflected the shift in the Roman legal system from god-given laws to human-created laws.**
- **Prior to the creation of the XII Tables, the Romans believed that laws were made and modified by gods.**
- **These god-given laws were to be applied and to be interpreted by those persons closer to gods-priests not by the laity.**

- **With the development of this code, however, there had been a complete shift in the legal system-the secularization of the legal system was witnessed.**

2.1.3.2 The significance of the XII Tables

- ***The Twelve Tables-In 451-450 B.C., a special commission drew up the earliest Roman code of seventy-six civil laws called the Twelve Tables, which were set up in the Roman Forum on twelve tables of bronze.***
- ***Rome was at this time the capital of the western world; Italy, Spain, France, England, Austria, the countries on the Mediterranean including the Holy Land and Egypt as well as Germany to the Rhine River were all under its control.***
- ***The Twelve Tables were eventually implemented throughout all seventeen administrative provinces of the Roman Empire.***

2.1.3.3 The second stage in the life of Roman law:

- **The next stage of the Roman legal system lasted from 2nd BC through 2nd AD.**
- **Roman in this stage formed an empire, one of the greatest empires in the history of mankind.**
- **The small city-state of Rome grew militarily and economically.**
- **Rome swallowed the outlying territories; Rome conquered numerous territories followed by their subjugation.**

The Roman legal system cont'd. . .

- For this big power an elaborate and sound private law was needed.
- This was the period of the Classic Roman Private Law.
- Roman private law of the period was sound both technically and philosophically.
- Unlike, the Greek the Romans were men of practice.

The Roman legal system cont'd. . .

- **Rome disintegrated after the 2nd AD. Rome was divided into two: the Western and the Eastern parts.**
- **The Western Roman part was conquered by the German tribes called Barbarians.**
- **The Barbarians came up with their own laws.**
- **The Eastern Roman empire, also called the Byzantine Empire, survived up to 15th century AD.**

The Roman legal system cont'd. . .

- Emperor Justinian was one of the famous emperors of the Eastern Roman Empire.
- He sponsored a code called Corpus Juris Civilis in the 6th century.
- This code is taken as the origin of the civil law tradition.
- Jurists coined the term `justice` after the name of Emperor Justinian.

2.1.3.4 The Law of Justinian (Reading assignment)

- *However significant his military and architectural achievements, it is the third grand effort of Justinian that concerns us most in this essay.*
- *It too was an expression of his faith and duty, of his understanding of the office to which God had called him.*
- *Justinian's most significant achievement, one to affect the history of the world to this day, was the production of the summary of Roman Law, the Corpus Juris Civilis, the body of civil law, as it has been called since the Middle Ages.*
- *This monumental writing remains the foundation of law for most of Christendom and beyond, and of impact even upon the non-civil system of the common law of English-speaking countries.*
- *Like the re-conquest of the west and the ecclesiastical building program, the writing of the Corpus Juris Civilis expressed Justinian's obedience to his divine call to rule Christendom after God's design.*
- *The emperor, under God, was the font of justice. And, while the emperor's will was law, he was yet under the law, for the law granted him his authority. His rule must reflect God's perfect justice.*

2.1.3.5 The organs of the state in Rome (Reading assignment)

- ***Introduction-no other country in the course of history has had a more profound impact on the evolution of western civilization, than Rome.***
- ***Some scholars may contend that the presence of the United States on the world stage is similar to that of the Roman Empire in the Second and Third Century. That may be so.***
- ***However, many attributes of our nation are deeply rooted in the Roman culture. For instance, our calendar system, our alphabet, our system of democracy, and our laws are of Roman origin.***
- ***The influence of Roman laws on our laws is often overshadowed by their English origin. Nonetheless, Anglo-American law is a progeny of Roman law.***

2.1.4 The Meaning of Roman law:

- **Roman law constitutes the foundation of the civilian tradition.**
- **Most contemporary civil law institutions can be traced directly to Roman sources.**
- **Roman law has been expounded and studied by great jurists and has been shaped into a substantively and formally rational system.**
- **As a closed system, Roman law lends itself to logical analysis which sharpens the intellect; as the**

The Meaning of Roman law cont'd…

- **The history of Roman law is frequently studied with reference to political and constitutional developments.**
- **In a strict sense, Roman law may be defined as the law of the Roman state (753 B.C. to 476 A.D.); in a broad sense, the term Roman law includes the law of the Byzantine Empire (325 A.D. to 1453 A.D.).**

The Meaning of Roman law cont'd…

The Justinian compilation

- **Emperor Justinian's (527-565 A.D.) ambition was to restore the Roman Empire under one system of law under one Church.**
- **The need for clarification of the legal situation was broadly felt: original manuscripts were scarce and inaccessible, and there was much uncertainty as to the state of law.**
- **Justinian appointed a commission in 528 A.D., charged with the duty to compile a collection of the law in force.**

The Meaning of Roman law cont'd…

- **Prime Minister Tribonian headed the commission and its members were mostly law professors.**
- **The assignment was completed by 534 A.D.**
- **Since medieval times the Justinian compilation is known as *Corpus Juris Civilis*.**
- **The Justinian compilation was designed to replace all literature and all legislation, to achieve unification of law, and to make the law accessible to all.**

The Meaning of Roman law cont'd…

- **To guard against "deterioration" of his legislation, Justinian banned all *Comments* and *Notes* with the exception of translations into Greek and the publication of Indices.**
- **To him, the Code was complete, clear and the values in it were undisputable.**
- **He did not want to see his code to be a point of controversy.**
- **Owing to these actions, some historians take Emperor Justinian as a revolutionary, a person who wanted to depart from the past in a decisive manner.**

The Meaning of Roman law cont'd…

- **The Justinian legislation is divided into four parts, which, in chronological order, are: the *Code*, the *Digest*, the *Institutes*, and the *Novellae.***
- **The Code:**
- **The Justinian Code contains the entire body of imperial legislation.**
- **As it includes imperial decrees issued prior to the days of Emperor Constantine and after the days of Emperor Theodosian, its coverage is complete.**

The Meaning of Roman law cont'd…

- **The Code was compiled in one year and acquired the force of law on April 16, 529 (ten days after its promulgation).**
- **After the promulgation of the Digest and the Institutes, the Code became in part obsolete and was revised.**
- **The revised Code entered into force on November 16, 534.**
- **The Code is extant as revised; the text of the original Code is lost.**

The Meaning of Roman law cont'd…

- **The contents of the Code are systematically arranged according to the subject matter regulated.**
- **The Digest:**
- **The Digest (Pandects) is the most important part of the Justinian compilation.**
- **It contains fragments of classical texts digested according to the subject matter regulated.**

The Meaning of Roman law cont'd…

- **The writers digested range from the 1st century B.C. to the 4th century A.D.**
- **Ulpian is given about one-third of the whole and Paul one-sixth.**
- **Two thousand books were examined with more than three million lines, and were condensed to 150,000 lines.**
- **The Digest consists of 50 Books subdivided into titles.**

The Meaning of Roman law cont'd…

- **The arrangement of the subject matter in the Digest follows, in general, the pattern of the praetorian Edict.**
- **Widely scattered sources have been brought together as bearing on the same subject matter.**
- **The source of each provision is always indicated (author and title of the book extracted).**

The Meaning of Roman law cont'd…

- **The Digest acquired the force of law on December 30, 533.**
- **The preparation of the Digest in a relatively short time has puzzled the jurists of subsequent generations, and several theories have been expounded concerning the compilers' method of work.**
- **According to one view, the compilers had at their disposal**

The Meaning of Roman law cont'd…

- **But Bluhme, a German jurist, has observed that the Digest is composed of mainly three masses of materials, *commentaries on Sabinus, commentaries on the Edict,* and *Responsa and Questiones of Papinian*.**
- **To these three masses may be a fourth one designated as the *Appendix* mass.**
- **The masses correspond to the first, second, and third year of legal studies in the law schools of the Empire.**

The Meaning of Roman law cont'd…

- **Thus, basically, the Digest appears to be a collection of school notes used by the members of the commission in their respective courses, plus an index-mass.**
- **There is some speculation as to whether the compilers were split into work groups.**
- **It is more probable that they were given individual**

The Meaning of Roman law cont'd…

- **The Institutes:**
- **The Digest needed introduction for the purpose of a better understanding and was accomplished by the Institutes.**
- **This part of the Justinian legislation is a coherent text based largely on Gaius' similar book.**
- **The sources of the particular provisions, however, have not been stated.**

The Meaning of Roman law cont'd…

- **The Institutes were promulgated on November 21, 533 and were given the force of law simultaneously with the Digest on December 30, 533.**
- **The Institutes are basically a textbook enacted into law for educational purposes.**
- **The Novellae:**
- **The *Novellae* (i. e., *Novellae constitutiones*, new imperial**

The Meaning of Roman law cont'd…

- They contain provisions concerning administrative reforms, church policies, and private law.
- Scattered ideas and rules were systematized and resulted in partial re-codification.
- Particularly affected were the law of marriage, the status of illegitimate children, and the law of successions.

The Meaning of Roman law cont'd…

- There has been no official codification of the *Novellae*; their text has been preserved in private collections.
- Although originally promulgated in Greek, the *Novellae* are extant mostly in Latin translation.
- The Justinian compilation is marked by an antinomy: an effort at reform and an effort at revival of the classical tradition.

The Meaning of Roman law cont'd…

- **The drive toward reform was manifested in direct legislation and the interpolation of classical texts.**
- **The interpolation is a historical fact, proved by Justinian's own admission.**
- **The Justinian compilation made Roman law an integrated system and marks the culmination of an era.**
- **It ought to be noted, however, that the compilation was too bulky to be really in force at any time.**

The Meaning of Roman law cont'd…

- **Byzantine law:**
- **The compilation of Justinian is the terminal point in the development of Roman law in a strict sense.**
- **In the following centuries a Byzantine legal system was developed in the East and a medieval Romanist science in the West.**
- **These developments led to the**

The Meaning of Roman law cont'd...

- **The eastern Empire became Hellenized Byzantine Empire which lasted until the fall of Constantinople (1453).**
- **The Empire was ruled by the Emperor who had concentrated in his hands on all political and religious authorities and powers.** **(Caesaropapism: political system combining church-state authority).**
- **The foundations of the Empire were Christian.**
- **There was new nobility in Byzantium but no feudalism.**

The Meaning of Roman law cont'd…

- **Imperial legislation was the only official source of law.**
- **Imperial enactments (*Novellae*) continued to be issued and there were several efforts at re-codification.**
- **Ancient customs survived and, frequently, were in competition with imperial legislation.**
- **An iconoclast emperor, Leo the Isaurian (714-741) promulgated the *Ecologa* (Selection).**

The Meaning of Roman law cont'd…

- This was a brief codification of civil law in Greek designed to reform the law, make it accessible to the indigenous population, and to sanction surviving Greek customs.
- The reformation, however, led to a religious war and Leo's successor repealed the Ecologa.
- Emperor Basil the Macedonian (867-886) promulgated the *Procheiron* (Handbook) and *Epanagoge* (Re-introduction).
- Both of these collections were ostensibly based on the Justinian compilation but in reality they re-introduced the substance of the *Ecologa*.

The Meaning of Roman law cont'd…

- **Finally, Leo the Wise (886-911) promulgated the *Basilica* (Royal legislation).**
- **This was the last attempt at re-codification.**
- **The new legislation, though based on the Justinian compilation, constituted an integrated whole into 50 titles.**
- **Obsolete rules were eliminated and a number of new rules were included.**

The Meaning of Roman law cont'd…

- **The Western Empire was dissolved in 476 by invading German tribes, the East and West Goths, Franks, Vandals, Longovards, and others.**
- **A general decline of civilization ensued. The conquered territories were subjected to a feudal organization.**
- **The Roman law was preserved by the Church (Canon law) and in certain areas it survived also as a custom.**
- **Several of the Germanic kings sponsored compilations referred to as *leges barbarorum*.**
- **There was no legal literature in those dark ages, except some short notes on the "barbarian legislation."**

The Meaning of Roman law cont'd…

- **Around 1100 political, economic, and psychological conditions led to the rediscovery of Roman law and to its renewed study.**
- **There were new kingdoms and new urban life in the former Roman territories; international communication and trade had grown; the Church was reorganized in search of political power; there was a renewed interest in classics and art; and law schools were founded in Provence, Pavia, and Ravenna.**

- **Glossators and Commentators:**
- **Irnerius (died in 1125), a professor of grammar at Bologna, studied the Digest intensely and became the founder of a new jurisprudence.**
- **His pupils were Martinus, Bulgarus, Jacobus, and Hugo.**
- **These jurists are known as *Glossators*. They wrote short comments on the Digest in marginal notes (*glosssary*).**
- **Their purpose was to eliminate apparent contradictions in the text of the Digest.**

- **Their contribution to the legal literature was titled *Summae* or *Distinctiones*.**
- **The last glossator, Accursius, published a *Glossa Ordinaria* incorporating the accumulated doctrine of his predecessors.**
- **The glossators laid the foundation for a better understanding of the Justinian legislation by subsequent jurists.**
- **Their treatment of the law was purely academic and the living law was completely neglected.**
- **The *Corpus Juris Civilis* came to be regarded as the *Ratio Scripta* (written reason) and as the law in force in the Holy Roman Empire.**

- **New legal scholarship emerged in Perugia (13th to 15th century).**
- **Bartolus and Baldus published coherent treatises on Roman law in combination with the study of contemporary statutes and Canon law.**
- **These jurists and their pupils are known as the Post-glossators or Commentators.**
- **They placed law on a truly scientific basis and founded the modern legal science.**
- **The fields of commercial law, criminal law, and law of conflicts, attracted the attention of the post-glossators and were elevated into the positions of independent branches of law.**

- **Glossators and commentator are characterized by a typical medieval way of thinking.**
- **They lacked historical sense; they ignored the historical fact of interpolations, and regarded Roman law as eternal truth.**
- **Their main concern was the harmonization of conflicting passages by the application of hair-splitting techniques.**

- **Humanists:**
- **A humanist movement spread throughout Europe in the seventeenth century.**
- **The founders of this movement were mostly Italian and French jurists at the University of Bourges (Jacques Cujas, surnamed *Gujacius*, 1522-90; Hugo Donneau, surnamed *Donnelus*, 1527-91).**
- **The humanists exhibited an overwhelming interest in classical antiquity and proceeded to the reconstruction of the ancient Roman legal system with the help of original manuscripts and Byzantine authorities.**

Humanists:

- They were philosophically inclined and in their analysis of the law applied juridical methods of interpretation rather than scholastic approaches.
- The humanists, by stressing the period of evolution of the Roman law, laid the ground for historical research.
- But the Justinian legislation obscured the law of ancient Rome and the living law was neglected.
- The “elegant jurisprudence” of this school remained a purely intellectual phenomenon.

- **Humanists:**
- **Humanism failed in Germany and Italy. The authority of the commentators was deeply rooted and Roman law was actually applied as expounded by these jurists.**
- **Thus there was need for practical books on Roman law rather than interest in intellectual acrobatics.**
- **The *Parlements* (superior courts) in France shaped the law on a practical basis.**
- **In Germany, courts and writers developed the *usus modernus Pandectarum* (modern use of the Pandects).**

Natural Law School:

- **Expounders of a revived natural law (Hugo Grotius, 1583-1645, Puffendorf, Thomassius), displayed a critical attitude toward positive law.**
- **Roman law came to be regarded as the positive law of ancient Rome.**
- **Natural law was defined as a body of principles underlying human nature and discoverable by the exercise of Reason.**
- **Emphasis was focused on ancient Greek philosophy, certain principles of the Roman law, and on the writings of St. Thomas Aquinas and St. Augustine.**

Natural Law School:

- **Eventually, the movement led to the growth of Protestant rationalism.**
- **Arguments drawn from the interaction of jus civile and jus honorarium necessitated study of Roman law in depth and helped to preserve Romanist thinking.**
- **Natural law doctrine became a closed system based on rational grounds; thus it led to the idea of codification.**

Historical school (*Pandectists*):

- **According to the doctrine of the historical school (Gustav Hugo, 1764-1844; Savigny, 1779-1861), law is the product of the spirit of the people.**
- **It is not a revelation of eternal truth but the result of a gradual evolution in accordance with social facts.**
- **Ironically, the followers of the historical school devoted their efforts to the reconstruction of Roman law and to the discovery of its true character in all stages of development.**
- **A subdued antinomy (the past v. the present) is apparent.**

- **The historical school is credited with the production of systematic treatises on Roman law.**
- **The lasting contribution of the school is the development of generalizations, which prove helpful in the reconstruction of ancient legal systems and for the understanding of contemporary civil law.**
- **Its dogma led to comparative**

2.2 The Attributes of Law in the Early Legal Systems

- **2.2.1 Definition of law under the Babylonian legal system:**
- **Emperor Hammurabi sought to get legitimacy of his Code by invoking the power of God.**
- **He presented himself to his subjects as an agent of God on earth.**
- **He advocated that he was an elect of God.**
- **He, thus, argued that whatever he did including the making of his Code was done under the guidance and instruction of God.**

The Attributes of Law in the Early Legal Systems

Babylonian legal system cont'd…

- So people had to obey the rules in his Code because they were not the expressions of his wish, but commands revealed to the people by God through him.
- Do you think that Emperor Haliselassie I of Ethiopia relied on the same theory?
- Can you guess the reason why Emperor Hammurabi argued that the sources of his laws were God?
- The Emperor chose this basis of legitimacy (acceptability) of his legal system as a whole since he thought that taking God, as a source of legitimacy was the most powerful of all basis of rule.

The Attributes of Law in the Early Legal Systems
Babylonian legal system cont'd…

- He could argue that people had to observe the legal rules on the basis of solidarity.
- He could have invoked customary rules or habits.
- He could have invoked popular sovereignty.
- He could invoke some other sources of legitimatizing his legal system.
- Instead he selected God as the basis of his system since he believed that it would be difficult for his subjects to question the power of God.

The Attributes of Law in the Early Legal Systems
Babylonian legal system cont'd…

- **Can you tell the effects of preaching on the part of emperors in Mesopotamia that his legal system was created and maintained by God?**
- **In the first place, Emperor Hammurabi easily secured obedience to his laws.**
- **In the second place, religion was accepted as the valid source of laws.**
- **Third, the theory of divine power served as the stabilizing factor. Mesopotamians did not dare to change their laws; they came to believe that what they had not created they could not change.**

The Attributes of Law in the Early Legal Systems
Babylonian legal system cont'd…

- **The fourth effect of the propagation of the divine-origin of laws in Mesopotamia was the empirical feature of the law, which means laws lacked general principles and coherent arrangements as well as distinctions and sub-distinctions.**
- **Can you point out the reasons for the Babylonian legal system demonstrated continuity? Why such legal system survived for more than eleven centuries?**
- **One factor for the high degree of stability of the system could be the religious basis of the same.**
- **Babylonians attributed the source of law to God; what God made human beings could not change.**

The Attributes of Law in the Early Legal Systems

Babylonian legal system cont'd...

- As already explained above, the second factor could be the conservative nature of ancient societies.
- In the third place, the geographical conditions of the area produced such stability and sense of regularity.
- Each year, the floods came and inundated the fields so that their crops would be harvested regularly, and the Mesopotamians desired to reflect such regularity of events in their social organization, means they desired a stable legal system.
- In sum, the key feature of the Mesopotamian legal system is its religious conception.

The Attributes of Law in the Early Legal Systems cont'd…

- **2.2.2 The Greek legal system**
- **2.2.2.1 Features:**
- **To the Greek, for law to be valid, it had to be tested in light of two cumulative tests: the law should be adopted by the vote of popular assembly composed of, for example, in the case of Athens, male adult Athenians (the law so enacted was called positive law) and the law so**

The Attributes of Law in the Early Legal Systems

Greek cont'd…

- The Greek, however, faced contradictions between the two criteria.
- By its nature, positive law was thought to be particular, mutable and temporal.
- Positive law means a law created by human beings.
- Positive law was time and place specific.

The Attributes of Law in the Early Legal Systems
Greek cont'd…

- On the other hand, natural law principles was taken as universal (applicable to all human beings regardless of where they live), eternal (not time bound) and immutable (not subject to change).
- Generally, natural law was presented as absolute while positive law was approached as relative.

The Attributes of Law in the Early Legal Systems

Greek cont'd…

- **The Greek faced contradiction since they accepted two quite different theories at the same time and endeavored to implement those theories.**
- **Natural law theory of the Greek demanded that the laws be maintained unchanged while positive law necessitated changes in the laws.**
- **In other words, the issue was the tension between continuity and change.**

The Attributes of Law in the Early Legal Systems
Greek cont'd…

- **The Greek experienced another contradiction.**
- **Natural law dictated that all human beings had to be treated equally while positive law of the Greek allowed the institution of slavery, which rested on the assumption that some human beings were less equal, in principle, than others.**
- **The Greek never solved this latter contradiction.**

The Attributes of Law in the Early Legal Systems

Greek cont'd…

- How did the Greek attempt to maintain a balance between the dictates of natural law (continuity) and the dictates of positive law (change)? They used three methods to ease the contradiction.
- One approach was to subject their law-making process to a screening.
- Any male adult Athenian citizen could initiate laws.
- These proposed laws would be examined by a city council.

The Attributes of Law in the Early Legal Systems

Greek cont'd…

- **The popular assembly was a collection of male adult Athenian citizens, as the Greek believed in direct popular representation.**
- **The second mode of checking the existence of the balance between change and continuity was taking two possible actions against a citizen who deliberately proposed unjust laws.**
- **A citizen who proposed unjust laws would be condemned, depending on**

The Attributes of Law in the Early Legal Systems
Greek cont'd…

- **The second course of action was to allow him to live in his city-state but his right to participate in the popular assembly would be taken away.**
- **The third method of accommodating change and continuity was the creation of a special body named *Nemothia* responsible for changing the positive law whenever the situation required so.**

The Attributes of Law in the Early Legal Systems
Greek cont'd…

- **No one is certain about the justification for invoking the principles of natural law.**
- **However, a couple of speculations may be offered. One is that the Greek were given to philosophical thinking.**
- **The other is that the Greek did not trust the popular will; they were quick to appreciate that human judgment might sometimes fail.**
- **You can say that natural law played the same role in Greek as a constitution of a modern state.**
- **In conclusion, the main feature of the Greek legal system is its philosophical conception.**

- ## 2.3 The Roman legal system:
- **Before 5th BC, Roman law was taken to be divine in origin.**
- **In this period, priests applied laws. Priests were experts in the interpretation and application of laws.**
- **Law was religious in character. People living in the city-state of Rome regarded themselves as passive participants in the legal system for they thought that they**

The Attributes of Law in the Early Legal Systems

Roman legal system cont'd…

- **Beginning from the middle of 5th B.C., in particular with the creation of the XII Tables, the city-state of Rome secularized its laws.**
- **The XII Tables were one major shift in the Roman legal system.**
- **Between 2nd BC and 2nd AD., the Roman legal system demonstrated another shift: the legal system transformed itself from being empirical into being technical and ethical.**
- **The system acquired technical and ethical bases.**

The Attributes of Law in the Larly Legal Systems

Roman legal system cont'd...

- **The legal system obtained technical basis means that the quality of decisions was enhanced.**
- **Lawyers emerged. The number of commentaries and legal writings increased. Authorities emerged. Experts and different opinions entertained.**
- **The laws came to be systematically and logically arranged.**
- **The system acquired ethical basis means that the Roman system searched for and developed foundational principles.**

The Attributes of Law in the Larly Legal Systems

Roman legal system cont'd…

- Attempt was made to find out general principles that could explain thousands of specific legal rules.
- The Romans did not want to get lost amidst detail legal rules.
- Three such principles developed were live honestly, injure no one and give every one his due.
- The Romans did not stop creating such general principles; they endeavored to translate them into thousands of specific legal rules and they checked whether these detail legal rules conform to those general principles.
- Later the Roman jurists equated the ethical principles with natural law.
- In a nutshell, the major feature of Roman law is its ethical conception.

2.5 Common Features:

- **The three ancient legal systems you examined above show some common characteristics.**
- **The three legal systems operated on the assumption that human beings were unequal.**
- **They did not accept the principle of equality of human beings.**
- **The Mesopotamians maintained the institutions of slavery. The Greek and the Romans did the same.**
- **Under the three systems, foreigners**

Common Features cont'd…

- In the third place, the early systems had shown an amazing degree of stability, which was attributed to the conservative nature of ancient societies.
- In general, early societies were taken as closed systems.
- They conceded little changes. The changes were not basic; the changes were very gradual and did not affect the fundamental assumptions.
- If changes had to be made, they

Common Features cont'd…

- **The three systems, in the fourth place, were believed to be religious in origin.**
- **The three legal orders, especially at the beginning, assumed that laws were made and modified by supernatural entity.**
- **Human beings were presented as passive actors. In addition, there was a belief that laws thus created and modified were put into application by not any laymen but by those who were assumed to have close relationship with gods.**
- **Finally, in the three systems laws initially were non-technical, which means the legal rules lacked developed principles and developed institutions.**
- **The legal rules lacked distinctions and sub-distinctions.**

Common Features cont'd…

- **Modern state law knows of classifications such as procedural and substantive laws, substantive laws are in turn divided into private and public laws.**
- **Public laws are further divided into constitutional law, administrative law, tax law, etc.**
- **Early legal systems did not have of such arrangements.**
- **The legal rules in force were situation-based.**

UNIT THREE
Major Legal Traditions of the World

- OBJECTIVE OF THE UNIT
- At the end of this unit, students should be able to:
- 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.

3.1 The French Legal System

- **The French legal system belongs to the civil law tradition.**

- **The French legal system has borrowed legal style from Roman law.**

- **3.1.1 Civil law:**
- **The meaning of the words “civil law” has not been the same in all-historical periods.**

The French Legal System Cont'd…

- **In the framework of early and classical Roman law, *jus civile* was the law governing the relations of Roman citizens.**
- **In the Middle Ages and up to the era of "reception," the term ``civil law`` referred mostly to the Justinian legislation and the accumulated doctrine of the commentators; it was contrasted to the canon law.**

The French Legal System Cont'd…

- **In modern times, the term ``civil law`` refers to those legal systems, especially in their methodology and terminology, shaped decisively by the Roman law scholars from Middle Ages to the nineteenth century.**
- **But within the framework of a civil law system, as defined, the term ``civil law`` is ordinarily reserved to designate the sum total of rules governing relations of private individuals (as opposed to public laws) as such, with the exception of commercial acts and relations which are subject to commercial law.**

The French Legal System Cont'd…

- **3.1.2 The era of customary laws in France:**
- **Before the French Revolution, traditional customary laws prevailed in the north.**
- **The rules were Germanic customs while Roman law influenced the southern part of France. Roman law gradually spread northwards.**
- **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.**

The French Legal System Cont'd…

- **France received Roman law not because it had been laid down by Rome, but on the ground that it had been accepted by custom or by reason of its quality.**
- **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 ancient regime.**

The French Legal System Cont'd…

- **Whereas, southern France had inherited Roman law, northern France was ruled by a system based on customary law.**
- **The two systems were fundamentally different.**
- **The laws differed not only from province to province but also from town to town. Nor were the laws always rational.**
- **Louis XIV, the Sun King, had summed up his approach to lawmaking with his famous phrase "It is legal because I wish it."**

The French Legal System Cont'd…

- **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 Cont'd…

- **In their move to eliminate legal uncertainty, some practitioners attempted to record customary laws of particular regions in France.**
- **It remained true, however, that the customary laws of Northern France depended principally on oral tradition.**
- **The judge who did not know the appropriate rule of the relevant area had to discover it by interviewing local inhabitants.**

The French Legal System Cont'd…

- **The proliferation of custom and the difficulty of discovering their content led to great legal uncertainty.**
- **As a result, a French king in 15th century declared that the customs of the various territories should be written down.**
- **The king also ordered that those, which were already recorded, should be drafted anew.**
- **The intervention of the kings in having the customs recorded invited opposition from some territories.**

The French Legal System Cont'd…

- **The intervention and the effort to write down the various customs in France strengthened the power of the traditional customary laws to withstand Roman Laws.**
- **The recording of customary rules saved France from the massive reception of Roman law, which took place in Germany.**
- **The codification of customary laws created conflict of different customary rules.**

The French Legal System Cont'd…

- **Recording of customary law in France had brought about legal certainty.**
- **Yet, it could not diminish the substantial differences between them.**
- **The recoding efforts of French customary laws made the difference among such rules sharp and conspicuous.**

The French Legal System Cont'd…

- **3.1.3 The drive towards codification:**
- **As the French kings consolidated their power, the multiplicity of legal systems became more and more unsatisfactory.**
- **The creation of a unitary private law common to the whole of France was increasingly felt to be necessary.**
- **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.**

The French Legal System Cont'd…

- **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.**
- **They argued that the goal was not**

The French Legal System Cont'd…

- **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.**
- **In France, like in England, there developed early a well-organized and thus powerful group of practicing lawyers allied with the king.**
- **These lawyers were interested in the centralization of justice in the royal courts.**

The French Legal System Cont'd…

- **Royal Ordinances were applied side by side with customary laws.**
- **These ordinances dealt with questions of feudalism, procedural law, and court organization.**
- **Only later did they regulate areas of substantive private law as well as some of the rules found their way into the civil**

The French Legal System Cont'd…

- **Despite all these efforts, France on the eve of the Revolution was still very far from having a unified private law.**
- **On the eve of the Revolution, all the important customary rules were codified.**
- **This codification only made it easier to see the differences between them.**
- **At the eve of the French Revolution, diversity of laws and thus legal uncertainty was the attribute of French law.**

The French Legal System Cont'd…

- **Observing that France was unable to unify her laws just before the revolution, a certain 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.`**

The French Legal System Cont'd…

- **3.1.4 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 French Legal System Cont'd…

- **The end of law was not actually a technical one but a rather an ideological one.**
- **The reformers of the French revolution were not interested in changing all parts of the law.**
- **They concentrated on certain areas and problems, which had major political and ideological importance.**

The French Legal System Cont'd…

- **The French Revolution attempted to adjust both the technical and the sociological content of the law to the changed times and ideas by preparing several drafts of general codes.**
- **But the task was found to be too large and the codes were not effective.**
- **The Revolutionary leaders gave up the idea of having general codes and in stead they introduced partial changes in the law by issuing fragmented laws such as family law, law of crimes, law of mortgages, etc.**

The French Legal System Cont'd…

- **The French Revolution was primarily interested in legal problems having political and ideological involvements.**
- **And therefore since the French Revolution made ideological changes, the next period of Napoleon and the codes concentrated on the technical concept of law.**

The French Legal System Cont'd…

- **At the close of the French revolution, the problem that remained was to change the technical parts of law that had not been touched by the revolution and to put into definitive technical form of the ideological concepts of the revolution.**
- **The revolution had settled the ideological problem of the law.**

The French Legal System Cont'd…

- The French Revolution altered the traditional social order with almost unparallel speed and thoroughness.
- All the institutions of the old regime were rooted out in a very short order.
- Such institutions included the absolute monarchy, the interlocking powers of king, nobility, clergy, judiciary, and the old territorial division of the country into provinces, the feudal regime of land and the court system.
- Human beings inherited status, chained together by the bondage of servitude and marriage.

The French Legal System Cont'd…

- **The influence of parental power was immense.**
- **In its place, proposition on the rational nature of man was articulated based on the assumptions that if information is given to him, he processes it, develops several alternative solutions and chooses the best option.**
- **Man was considered to be also autonomous, equal, selfish, responsible and with inalienable right at birth.**

The French Legal System Cont'd…

- **No longer did man had to deal with the intermediary status groups of the old regime.**
- **Man had to deal with the state itself directly.**
- **The state was seen as an entity bound through its legislation to free its citizens from the traditional authority of feudal, church, family, guild, and status groups, and to equip all its citizens with equal rights.**

The French Legal System Cont'd…

- **Under the government of Napoleon, France adopted a comprehensive code of law in 1804.**
- **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 French Legal System Cont'd…

- **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 Cont'd…

- **3.1.5 The birth of Code Civil:**
- **The demand for codification in France preceded the revolution.**
- **There was a general dissatisfaction with the jurisprudence of the Superior Courts (*Parlements*) and the diversity of local customs.**
- **The revolutionary Constituent Assembly adopted a resolution in 1791 providing for the enactment of a civil code "common for the entire realm."**

The French Legal System Cont'd…

- **Further steps towards drafting were taken by the National Convention of 1793, which established a special commission headed by Cambaceres and charged it with the task of completing the project within a month.**
- **This Commission produced a first draft consisting of 719 articles.**
- **Though truly revolutionary, as to both form and substance, the Convention rejected the draft was on the ground that it was too technical and too detailed. Several other drafts met the same fate.**

The French Legal System Cont'd…

- **Napoleon, First Consul of the Republic, became deeply interested in the project and succeeded in pushing it through the legislative machinery title by title.**
- **Napoleon contributed a lot in the process of making the code.**
- **Napoleon presided at 36 of the 84 council sessions devoted to the creation of the Code.**
- **He made many observations and contributions.**

The French Legal System Cont'd…

- **Further, Napoleon rested the existence of the Code on his own authority, beginning the document with the words "the laws are executory throughout the whole French territory, by virtue of the promulgation thereof made by the first consul" and concluding with the signature "Bonaparte, First Consul."**
- **When the Code was drafted the fanaticism of the Revolution had calmed down considerably.**
- **In the relatively stable political situation under Napoleon, people could have second thoughts.**

The French Legal System Cont'd…

- **Thus the draftsmen of the Code could make good use of the principles of law which had been slowly developed by the courts of the ancient regime and which had been carefully elaborated and refined by the writers of the 17th and 18th centuries.**
- **In this way, a compromise was made between the revolutionary ideas and the solid craftsmanship of traditional legal institutions.**

The French Legal System Cont'd…

- **3.1.6 The French Civil Code:**
- **The Code Civil is founded on the idea of the Enlightenment.**
- **The code was also based on the law of reason that social life can be put into a rational order if only the rules of law are restructured according to a comprehensive plan.**
- **In France, it was the bourgeoisie, which by revolutionary means had brought down the socially obsolete institutions of the old regime.**

The French Legal System Cont'd…

- **The same class had founded the new state on the principle of the equality of citizens.**
- **The same class again had created a code that reflected the demands of the Revolution for liberty and equality.**
- **Only in France was the Code was the product of a revolutionary movement.**
- **Only in France, there was complete harmony between social reality and the idea of society on which the code was based.**

The French Legal System Cont'd…

- **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.**

The French Legal System Cont'd…

- From those principles human beings can infer a system of legal rules that if given intelligible from according to a plan, can act as the basis for an orderly, reasonable, and moral life in society.
- For example, the draft code contained the statements: ``there is a universal and unchanging law which is the source of all positive law; it is none other than natural reason and that governs all mankind.``

The French Legal System Cont'd…

- **The function of the legislature was to set up general rules.**
- **Interference with the resolution of questions of interpretation affecting the affairs of private individuals would be time consuming and undignified.**
- **The quality of legislation would suffer and lawsuits would be prolonged. Thus, Article 4 of the Code states that"if a judge refuses to make a decision on the ground that the law is silent or obscure or inadequate he may be held responsible. ``**

The French Legal System Cont'd…

- **The Code avoids the danger of being too detailed. Even the most ingenious legislator could not foresee and determine all the possible problems that might arise.**
- **Thus room must be left for judicial decisions to make the law applicable to unforeseen individual cases and suited to changing circumstances of society.**
- **The Code leaves room for interpretation, for its terms are often inexact, incomplete and ambiguous.**
- **The Code is a masterpiece from the point of view of style and language.**
- **It has often been praised for its clear and memorable phrases, and for the absence of cross-references and jargon, all of which has significantly contributed to the popularity of the code in France.**

The French Legal System Cont'd…

- **The original Code Civil was the law-book of the third estate. The bourgeoisie had consolidated its position with growing self-confidence and political influence.**
- **The ideal man in the mind of the drafts men is thus not the little man.**
- **The ideal man the code had in mind was not the artisan or the daily laborer. The ideal man the code had in mind was the man of property; the responsible man of judgment, a person of reason, knowledgeable about affairs and familiar with the law.**
- **It is this idea which gives the code its particular flavor. The existence of the bourgeoisie depended on guaranteed personal freedom especially the freedom to engage in economic activities, and property especially the landed property.**
- **Freedom of contract is thus the principle that dominates the law of obligations in the Code Civil but restricted as little as possible by mandatory rules of law on the ground of public order.**

The French Legal System Cont'd…

- **How can the Code, which came into being 180 years ago, has withstood the tremendous political economic and social changes that have taken place in France in the 19th and 20th centuries? The legislature issued laws following the changing circumstances (e.g. law on the status of women.)**
- **The decisions of the courts helped the Code adjust itself to modern requirements in France.**
- **The courts have continually been construing these rules so as to develop, extend, or limit them.**
- **The courts in France have brought new legal ideas into play as well as developing old ones.**
- **This task has been made easier since the code did have unclear and deliberately designed to require completion of ambiguous, incomplete, etc., areas.**
- **The influence of law books and French legal writers interpreting and exposing the Code Civil in a creative manner also influenced the development of the French law.**

The French Legal System Cont'd…

- **3.1.7 Spread of French law:**
- **French law spread first to Europe, then, to Africa, Asia and Latin America. The French Civil Code was transplanted to Europe primarily through military force.**
- **In most areas where the Code was introduced, it was embraced, and survived till Napoleon's personal downfall.**
- **The Battle of Waterloo did not end the application of the Code in Europe, particularly in western Germany and Italy.**
- **In the Netherlands, the Code survived unaltered until 1838, whereas in Prussia the Code was gradually reintroduced.**
- **Even in areas where French rule had been unpopular, such as Spain, post-Napoleonic governments were held up to French standards for a codified law.**

The French Legal System Cont'd…

- **Latin America received the French codes primarily because of the careful evaluation of its technical merits and as a result of the reaction to the hated Spanish and Portuguese colonial rules.**
- **Latin American countries got independence from Spain in early 19th century.**
- **These newly founded states needed national and unifying civil codes; the only available model was the French Code Civil and Spanish law was out of the question since it was the law of the previous colonial power and since it was neither codified nor uniform even in Spain where local customary laws survived.**

The French Legal System Cont'd…

- **The Code Civil was a product of the great revolution, rooted in a world of ideas on which the Latin Americans had frequently drawn to justify their own struggles for independence.**
- **In its compactness and clarity of phrase, the Code Civil was far ahead of any other code.**
- **And furthermore, the code was so full of traditional concepts and ideas especially from Roman law, that its reception was not a deviation from the legal institutions known to the Spanish and Portuguese settlers.**
- **Some countries in Asia and Africa received French codes due to the existence of gaps and the force of French colonialism.**

The French Legal System Cont'd…

- **The Code had such a wide influence because it was the Code of the French Empire whose military powers, backed by an advanced civilization, made such a deep impression on people not only during its brief life but many years after it was over.**
- **The reception of the French Civil Code is attributable not only to the political power of the French Empire, or to the spiritual influence of French civilization, but also in a great measure to the merits of the Code Civil itself.**

The French Legal System Cont'd…

- **In the 19th century, the Code enjoyed intellectual authority and almost a supernatural appeal as the Code of the Great Revolution, which had abolished the ancient regime.**
- **The Code of Napoleon also produced legal unity and equality for the citizens of a centrally organized national state for the first time.**
- **The spread of the Code Civil throughout the world was greatly assisted due its admirable language and flexibility of its expression, in brief, its very quality.**

3. 2 The German Legal System

- **The German legal system belongs to the civil law tradition.**
- **The German legal system has borrowed legal style from Roman law.**
- **3. 2.1 Background:**
- **German law has its roots in the feudal and territorial law that emerged in the 11th century with the development and organization of the city-states and principalities.**
- **In Germany, by the 13th century, a legal system of written law in statute books and unwritten customary law coexisted side by side.**

The German Legal System cont'd...

- **During the 13th century, German law followed the movement towards compilation and further refinements of the territorial and feudal law of the region.**
- **There was a movement towards a general codification of laws.**
- **The movement for a general law was shared with an ongoing codification of local laws, applicable throughout large areas, kingdoms and fiefdoms, or very small territories.**

The German Legal System cont'd...

- **A parallel development in the 13th–14th centuries was the creation of a separate and distinct body of more sophisticated city law that is traced to Saxonian cities from the early years of the 14th century.**
- **During the period of emergent German law, Roman law refined and reshaped by late medieval Italian scholarship, was also finding its way to the German lands.**
- **The eventual "reception" of Roman law was facilitated by the general application of canon law and also by the continued inability of a fragmented Germanic legal tradition.**

The German Legal System cont'd…

- **While the reception of medieval Roman law was never total, it achieved dominance throughout the empire by the end of the 15th century.**
- **Even as the Holy Roman Empire was slowly falling into decay from the close of the Middle Ages, and as the various German kingdoms asserted independence in the drafting of legislation, Roman law remained the constant in the legal tradition.**
- **Germany came in contact with Roman law relatively late (by the middle at 15th century).**

The German Legal System cont'd…

- **The reception of Roman law was much greater in Germany than in France.**
- **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.**

The German Legal System cont'd...

- **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.**
- **In particular, there were no strong central courts endowed with royal authority, nor any group of royalist lawyers to make the effort to produce a unified private law.**
- **Roman law was not considered as a foreign law.**

The German Legal System cont'd...

- **The legal methods developed by Germanic law became increasingly unsuited to the needs of the time.**
- **The judge made his decisions on the basis of traditional legal knowledge, practical wisdom, experience, and practicality, and from an intuitive perception of what best answered the objective and concrete facts of the case.**
- **But such an irrational method of finding law, based on tradition,**

The German Legal System cont'd...

- **There was thus a legal vacuum. And Roman law flowered.**
- **Roman law began to dominate not because its rules were substantially better or more just than those of the traditional German law rather because it offered a whole range of concepts and methods of thinking which enabled lawyers to grasp difficult factual problems.**
- **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.**

The German Legal System cont'd…

- **Modern German law actually begins with the revived interest in natural law combined with a movement for national codification.**
- **The most extensive results were the Bavarian codes on criminal law and criminal procedure and civil procedure of 1751 and 1753, and the civil procedure code of Frederick of Prussia—the first book of the *Corpus juris Prussia* of 1781.**

The German Legal System cont'd...

- **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.**

The German Legal System cont'd...

- **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.**

The Padectist School:

- **It was the historical school of law** {note: this theory is also called the custom theory; you learned about it in the second section of unit 1 of this course} **that produced the Pandectist school whose only aim was the 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.**

The German Legal System cont'd...

- **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.**

The German Legal System cont'd...

- **In Germany, at the time there was no class of practicing lawyers bound together by professional solidarity.**
- **And the integrations of legal life on the political and practical levels were delayed by the influence of powerful territorial rules until late in 19thc.**
- **In such a situation, the pandects school could at least claim for itself that by producing a method of studding law that was common to the whole of Germany it had brought about integration at the theoretical level.**

The German Legal System cont'd...

- **The Pandectists created a set of clear and clearly distinguished concepts, which contributed much to the technical sophistication of German Law.**
- **But they did not seek out the real forces in legal life.**
- **They did not ask what ethical, practical, or social justification for their principles there might be. Consequently, much of what they wrote is abstract and hairsplitting.**

The German Legal System cont'd...

- **The first move towards the codifications of unified German private law occurred about the middle of 19th, the pace makers being commercial law and the law of negotiable instruments.**
- **The enactment of the German civil code was not accomplished until 1896.**
- **The German Civil Code was a major, detailed and innovative body of law and came into force on 1 January 1900.**

The German Legal System cont'd...

- **3.2.3 The German Civil Code:**
- **It had unnecessary scholastic structure. This structure is the result of the influence of the abstract conceptualism of the Pandectist School.**
- **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.**
- **It also seemed to have abandoned the traditional ethical obligations and relationships of trust in family and society in favor of an extreme and impersonal individualism.**

The German Legal System cont'd...

- **For example, the principle of freedom of contract could lead to the suppression of the socially weaker classes because the socially stronger class could dictate the terms of contracts.**
- **The institution of private property and succession guaranteed to the propertied classes, who alone benefited from them, the perpetuation of their power of controlling the means of production and the Code was created at a time of relative social and political stability.**
- **Its spirit was retrospective and reflective. It sought to maintain a situation favorable to the establishment.**

The German Legal System cont'd…

- **The Code was more the summation of the 19thc than the reflection of the 20th century.**
- **That is, rather than boldly anticipating the future it prudently sums up the past.**
- **It reflected the belief that the general good could spontaneously flow from the interplay of economic forces provided that the state did not interfere. It ignored some basic developments.**
- **For instance, the draftsmen seemed to have taken no notice of the great social change that was occurring in Germany in the final decades of 19th.**

The German Legal System cont'd...

- **Commerce and industry were becoming much more important economically than farming, and urban populations were expanding rapidly, especially with industrial workers.**
- **But for the Code, the typical addressee was not the small artisan on the factory worker but rather the moneyed entrepreneur, the landed proprietor, and the official, people who can be expected to have experience and sound judgment, capable of succeeding in a bourgeois society with freedom of contract, freedom of establishment and able to take steps to protect themselves from unfair freedom of competition.**

The German Legal System cont'd...

- **In language, method, structure and concept the code is the child of the deep, exact and abstract learning of the German Pandectist School.**
- **The Code did not address the citizen at all. It addressed the professional lawyer.**
- **It deliberately avoids easy comprehensibility and waives all claims to educate its reader.**
- **Instead of dealing with particular cases in a clear and concrete manner, it adopts an abstract conceptual language throughout.**

The German Legal System cont'd…

- **3.2.4 Spread of German laws:**

- **The German codes were not transported so extensively as the French codes.**
- **They were transplanted at the end of the 19th century to Japan and thereafter to some African countries.**
- **The reasons for the little expansion of the German codes lie in the fact that Germany did have few colonies, as she was a latecomer to the scramble for different parts of the world.**

The German Legal System cont'd…

- **There is another reason for this little influence. The codes were a bite sophisticated and complex.**
- **The third reason is that when the German 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.**
- **So there were then little legal gaps to be filled with in countries in Africa and elsewhere.**

The German Legal System cont'd…

Code and codification

- **A code of law is an area of law documented in a general, systematic and comprehensive manner. But Emperor Hammurabi liked to name his law as a code.**
- **The XII Tables of 5th BC is also taken as a code. Emperor Zerayacobe of 15th century could take his `Fewese Menfesawi` as a code of law.**
- **The concept of a code of law should be understood in context for there is no universal definition of a code.**
- **The Code of Hammurabi cannot be expected to be as complex, complete and systematic as the French Civil Code or the Ethiopian Commercial Code. Codification is the process of accomplishing this task.**

The German Legal System cont'd…

- **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.**

The German Legal System cont'd…

- **Compilation and consolidation of laws are not vested with validity.**
- **Codes of private law reflect the particular historical situation in which they are produced.**
- **Many codes consolidate the results of a recent reconstruction of society.**
- **Their advantage is that the idea of man and the model of society may be expected to remain valid for a considerable period.**

The German Legal System cont'd…

- Other codes, by contrast, are created at a time of relative social and political stability.
- Their spirit is often retrospective and reflective, seeking to maintain a situation favorable to the establishment.
- The German Civil Code, for example, is one of these rather conservative codes.

The German Legal System cont'd…

- **Codes and the Enlightenment:**
- **A decisive change occurred in the intellectual climate of Europe in the 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.**
- **The Enlightenment wished to make it possible for human beings to create a new view of the world on the basis of reason.**
- **The particular product of this idea was codification.**

The German Legal System cont'd…

- **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.**

The German Legal System cont'd…

- **Codification and nationalization of laws: Codification was a unique socio- historical phenomenon developed in the civil law tradition during the 19th century.**
- **The Codes drafted during this process differed from the compilations of the Roman, Canonic law, or other codes.**
- **The root of the Codification was the "intellectual revolution" that took place in Europe in the 18th century with its principles and doctrines based on the enlightenment, rationalism, secular natural law, Bourgeois liberalism, and nationalism.**

The German Legal System cont'd…

- **These ideas produced a new way of thinking about society, law, economy, and state with decisive consequences for the civil and common law tradition.**
- **This development deeply influenced western nations, producing dramatic events, specifically, the American and French Revolution, the wars of independence in Central and South America, and the unification of Germany.**

The German Legal System cont'd…

- **The Codification was not focused on gathering, compiling, improving or reforming the existent pre-scientific law.**
- **Codification rather focused on planning a better society by means of new systematic and creative law.**
- **According to John Merryman, one of the most important aims of the French Revolution was to unify private law.**
- **As a result, "the spirit of the intellectual revolution led the French to promulgate five codes.**
- **Of the five codes, the Code Civil is traditionally well known for its fundamental role in consolidating the modern Codification and its vast influence around the world.**

The German Legal System cont'd…

- **Since the ideology of the French Codification reflected the influence of the French Revolution, one of its principal objectives was to repeal entirely the old legal system.**
- **In fact, the institutions of the Ancien Regime, absolute monarchy, interlocking powers of the King, nobility, feudalism, territorial division, courts system and others, were eliminated. In its place, by means of the Codes, a new legal system was institutionalized.**

The German Legal System cont'd…

- **The legal system was based on principles of the French Revolution and the enlightened society.**
- **The primacy of the statute law incorporated the equality under the law, individual freedom, private property, liberty of contract and separation of powers to prevent intrusion of the judiciary into areas reserved to the legislative and executive.**

The German Legal System cont'd…

- **According to the principles of rationalism, the Codification focused on systematizing and simplifying the legal system.**
- **As a consequence, it was necessary to draft codes without gaps and with coherent, clear, and complete legal rules.**
- **Thus, as far as accessibility to the people was concerned, the French Civil Code represented the model of coherence and simplicity.**
- **The German Civil Code of 1896 (effective in 1900) had a profound impact on modern Codification.**
- **The differences between French and German civil codes are relevant.**

The German Legal System cont'd…

- **The former is based on the principles of rationalism and natural law whereas the latter is scientific, technical, and heavily influenced by the Pandectist system.**
- **The key reasons offered by scholars to explain the 19th century codification in Latin America have been the need to avoid uncertainty of the applicable law, to stabilize the legal system, and to consolidate new national regimes.**
- **In fact, after independence, drafting civil codes and constitutions was the primary interest of jurists and legislators in Latin American new independent republics.**

3.3 The Common Law Tradition

- **There is a common factor that goes through the British and American legal system: both systems give recognition to judge-made laws.**
- **Both systems also show a high degree of stability.**
- **The British legal system has maintained itself without major interruption since 11th century while the American legal system has survived since 17th century.**
- **Yet each system maintains its own unique historical origin and development.**

The Common Law Tradition: British legal system cont'd…

- **The British legal system**
- **The British style:**

➢ **legal technique is not interested in interpreting statutory texts or analyzing concrete problems so as to fit them into the system conceptually.**

➢ **is principally interested in precedents and types of case.**

➢ **is devoted to the careful and realistic discussion of live problem.**

➢ **seeks deal with concrete and historical terms than think systematically or in abstract.**

The Common Law Tradition: British legal system cont'd…

- **The well-known expression of the American judge Holmes: ``the life of the law has not been logic; it has been experience`` is true of other systems.**
- **But this expression was created for the Anglo-American legal system.**
- **No country has clung as firmly as England to its own style of law throughout the centuries.**

The Common Law Tradition: British legal system cont'd…

- **the influence of Roman law has been minor.**
- **was not affected in practice by the idea of codification.**
- **never had an explosive political upheaval such as the one occurred in France in 1789.**
- **In the middle of 11th century, William I succeeded to create a tight, integrated, rather simply organized feudal system.**
- **Fiscal reasons also justified the increasing intervention by the central royal administration in civil and criminal law to protect the biggest land owning class.**

The Common Law Tradition: British legal system cont'd…

- The Royal courts emerged.
- The royal courts applied more modern and progressive rules.
- These progressive rules gradually led to the disappearance of local laws.
- The prestige and authority of the royal judges increased.
- England very early enjoyed a unified law.
- England created the common law in the 14th century.

The Common Law Tradition: British legal system cont'd…

- **English Vs. Roman Law:**

- **litigation was initiated in English and Roman law led legal practitioners in Rome and England to think not so much in terms of rights.**
- **legal practitioners in both system thought in terms of types of action.**
- **both systems were dominated by procedural thinking.**
- **the rules of substantive law emerged later from procedural law.**

(Origin of Case Law: left for reading assignment available in soft copy on extracts given)

The Common Law Tradition: British legal system cont'd…

- **The role of equity:**

- **the legal creativity of the royal court gradually began to decrease towards the end of the 14th century.**
- **the procedure of those courts become in many respects too crude.**
- **the procedure was also rather formalistic and that the applicable law was too rigid and**

The Common Law Tradition: British legal system cont'd…

- **Cases were being lost because of technical errors.**
- **Cases were lost because witnesses had been bribed.**
- **Cases were lost also because of the opponent's political influence.**
- **in 14th century parties who had lost a lawsuit in the king's courts on one of the grounds or who could not obtain appropriate writ petitioned the king for an order compelling his adversary to do as morality and good conscience required.**

The Common Law Tradition: British legal system cont'd…

- the king entertained such petitions through the Chancellor.
- the decisions he made developed into complex special rules called "**equity**".
- the purpose of the hearing before the Chancellor was to discover whether, as the petitioner complained, the defendant had behaved in a way contrary to morals and good conscience.

The Common Law Tradition: British legal system cont'd…

- **Equity:**

- **is not meant a group of maxims of fairness.**
- **is a part of substantive law distinguished from the rest by the fact that it was developed by the decisions of a particular court, the Court of Chancellor.**
- **it's rules did not openly contradict those of the common law.**
- **it's rules did not seek to replace the common law.**

The Common Law Tradition: British legal system cont'd…

- **instead, it supplements to the common law.**
- **It is often extremely important; and sometimes goes so far as effectively to neutralize the common law rule.**
- **it was not a system but common law was or is.**

The Common Law Tradition: British legal system cont'd…

- **The period of legal reform:**
- **After the defeat of Napoleon, England's external position was one of the unprecedented strength.**
- **But internally, the 19th century started with a period of serious political and social crises.**
- **The center of economic activity had moved to trade and industry.**
- **Workers had increasingly migrated to the cities but both houses of parliament were still composed of extremely conservative aristocrats, bishops, and landed gentry.**

The Common Law Tradition: British legal system cont'd…

- 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.
- 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.

The Common Law Tradition: British legal system cont'd…

- 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.
- Bentham and his school believed that legislation was the only way to achieve legal certainty and to bring the law into a simpler and generally comprehensible form.

The Common Law Tradition: British legal system cont'd…

- **Spread of British laws:**
- **Originated in 11th century, the English legal tradition expanded itself predominately through colonialism.**
- **The expression ``the sun never sets in the British Empire`` has attained the level of a saying.**
- **In addition to some other meanings, the expression suggests the extent of the spread of the British law.**
- **The English law was transported to North America (the United States of America and Canada), Asia and Africa.**
- **England transported legal ideas, legal methods, and legal institutions of the common law to countries in these continents.**
- **Britain also carried the substantive and procedure laws to these parts of the world.**
- **These parts of the world also reflect the English court system and the structure of the legal profession.**

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.**
- **Such developments included law books,**

- **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.**
- **This implied that the idea that the content of law is determined by climate, geography, economic and social conditions of a given society.**

The American Legal System cont'd…

- **Second, the colonies introduced alterations in the common law because the ideals (spiritually, politically and economically) of the settlers were different from that of the British.**
- **As a result, the colonies introduced changes in criminal law, civil procedure, succession law, family law and land law.**
- **The settlers thought that these**

The American Legal System cont'd…

- **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 American Legal System cont'd…

- **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 American Legal System cont'd…

- **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.**

The American Legal System cont'd…

- **Legal uniformity:**
- **The United States of America has been concerned with lack of legal uniformity in its territory.**
- **There are more than 53 legal systems including the federal legal system.**
- **Each of these systems has its own elements of a legal system such as lawmaker, the judiciary and the executive.**
- **Americans decided to minimize the extreme case of divergence and have developed a number of strategies to that effect.**
- **One method of bringing national legal homogeneity is through the project of the Restatement of the Law.**
- **The Restatement of the Law does not claim authority as precedent or a statute does; but it is the expression of precedents and statutes.**
- **The second method employed to bring about legal uniformity has been standardizing law textbooks and encouraging the major law schools in the country to use those texts.**

The American Legal System cont'd…

- **Spread of the US laws:**
- **Itself a product of 17th and 18th centuries transplantation of the British legal system, the legal system of the United States of America (especially constitutional law, criminal procedure and anti-trust law) was taken to Japan immediately after the Second World War.**
- **Via the influence of international organizations such as the IMF and the World Bank, some aspects of constitutional law of the United States of America was transported to countries in Latin America, Africa and Asia**

Shared Features of the Western Legal Traditions:

- **The most obvious feature of modern civil law is that it is codified.**
- **Codification in the sense of a statement of the whole law in a coherent systematic form is a product of eighteenth century.**
- **Another prominent feature of modern civil law is the sharp distinction between public law and private law.**
- **In civil law, the first question that a lawyer is usually asked is whether he/she specializes in public or private law.**
- **If one is a public lawyer, one practices in a different set of courts from those that deal with private law, with a different procedure and a different atmosphere.**
- **The public lawyer deals exclusively with cases in which one of the parties is a public authority.**
- **As a result, his/her whole approach to law is different from that of a private lawyer.**

Shared Features of the Western Legal Traditions:

- The civil law conceives written law as the sole source of private law.
- And the highly systematic nature of modern codes of civil law lies behind the form of reasoning that characterizes it.
- Civil law reasoning may loosely be described as deductive reasoning. Deductive reasoning proceeds from a broad principle, expressed in general terms, and then it considers the facts of the particular case.
- A syllogism, on the other hand, applies the principle to the facts so as to reach a conclusion.
- This form of reasoning, syllogism, leads the civil law lawyer to present a legal argument as if there can be only one right answer to any legal problem.
- Disagreement on the application of the law to the facts of a case must, in the case of syllogism, be the result of faulty logic by somebody.
- Thus, civil law judges in general do not give dissenting opinions. In the civil law system, every judgment, even in appellate cases, is that of the court as a whole.
- Traditionally, the duty of the civil law judge is to apply the written law, and the meaning of that law is to be discovered from the writings of its academic exponents.

Shared Features of the Western Legal Traditions:

- **Modern civil law, however, makes a sharp distinction between substantive law and procedure.**
- **Academic courses on the substantive law say nothing about procedure.**
- **Courses on procedure include far more than the steps that a litigant must take in bringing or defending an action.**
- **In the civil law, rights derive from the substantive law. Wherever that law recognizes a right, the procedural law must provide an appropriate remedy.**

The Socialist Legal Tradition

- **Origin:**
- **The socialist legal tradition originated at the time of the October Revolution of 1917.**
- **Before that event, the dominant legal tradition in the Russian Empire was the civil law.**
- **One intention of the Soviet revolutionaries was to abolish the bourgeois civil law system and substitute a new socialist legal order.**
- **The actual effect of their reform was to impose certain principles of socialist ideology on existing civil law system and the civil law tradition.**

The Socialist Legal Tradition Cont'd…

- **Under the influence of the Soviet Union and Marxist thought, similar legal changes have taken place in those states of Eastern Europe (and in other countries, such as Cuba) that had the civil law tradition before they adopted the socialist legal system.**
- **The roots of the socialist legal system are traceable to the civil law system.**
- **This in itself may have been one of the greatest accidents of history.**
- **As it happened, Marxian socialist revolutions spread only to those countries that, before the revolution, were members of the civil law family.**

The Socialist Legal Tradition Cont'd…

- These countries saw fit to retain the civil law infrastructure of their pre-revolutionary legal systems.
- The result of this unique experiment in legal transplantation is the creation of a legal tradition that is qualitatively different from the one from which it so heavily borrowed.
- The state of affairs envisage under communism seems to be similar to the conditions that prevailed during the primitive society.
- In both primitive and communist systems, economic classes, private property, the state and law are non-existent.

The Socialist Legal Tradition cont'd…

- **Primitive society versus communism:**
- **In both systems, governance would be by non-legal rules of morality.**
- **Because of the consensual nature of these rules, they would or would not be enforced through any form of external coercion.**
- **To the Marxist-Leninist, however, the early society represented not communism, but communalism.**

The Socialist Legal Tradition cont'd…

- **Communalism is at best a form of primitive communism.**
- **Socialist legal system is unique not only in its social, economic, and political features, but also, its pseudo-religious character.**
- **Socialist law concerns itself not only with political organization of society and the social and economic welfare of the citizens, but also with the spiritual welfare of the individual.**

The Socialist Legal Tradition cont'd…

- **Perception about law:**
- **The socialist attitude is that all law is an instrument of economic and social policy.**
- **The common and civil law traditions basically reflect a capitalistic, bourgeois, imperialist, exploitative society, economy, and government.**
- **Socialists see the western legal system as incorporating and perpetuating set of goals and ideals that socialists regard as socially and economically unjust.**

The Socialist Legal Tradition Cont'd…

- **At the same time, the common law appears to a soviet lawyer to be unsystematic and undeveloped, in comparison with carefully drawn Soviet legislation that builds on the civil law tradition of system and order.**
- **Finally, to a socialist lawyer, both the civil law and common law traditions are subject to critics, because they embody but do not clearly state their ideologies.**
- **Such a lawyer sees the western legal systems as devices by which bourgeois ideals are concealed to exploit the proletariat.**

The Socialist Legal Tradition Cont'd…

- **The term ``natural justice`` denotes the general principles and minimum standards of fairness in adjusting a dispute.**
- **The term ``natural justice`` embodies the specific requirements that no man be judged in his own case, that each side be heard, and no man shall be condemned unheard.**
- **This principle of natural justice goes through socialist civil and civil procedure rules.**

The Socialist Legal Tradition Cont'd…

- **Among the principles of natural law that have found their way into socialist law is the social contract theory.**
- **That is, the principle of self-preservation in pursuance of which man sought to find security by transferring all his natural rights to the state and promising to obey that state.**
- **Under this theory, the delegation of power by the citizens to the state is unconditional.**

The Socialist Legal Tradition Cont'd…

- That is obligations voluntarily undertaken must be fulfilled.
- There is another principle of socialist law, which is the obligation to repair damage done by one's fault to others.
- Among the major contributions of socialist law to comparative jurisprudence is its general theory on the nature and functions of law.
- Socialist legal thinking on these questions was essentially shaped by the writings of Karl Marx, Frederick Engel's and Vladimir Lenin.
- Subsequent Soviet and other socialist legal thinkers have made contributions to this general theory.

The Socialist Legal Tradition Cont'd…

- **Generally speaking, Marxist-Leninist theory on the origin, nature, and functions of law may be reduced to the following fundamental tenets:**

➢ **The present man is imperfect and evil by nature.**

➢ **His imperfection, however, is historical and arose directly as a result of his socio-economic and political environment.**

➢ **Law is a coercive order or a sovereign command, not a set of**

The Socialist Legal Tradition Cont'd...

- **Law emerged as an instrument for regulating the external conduct of the evil man.**
- **Man's evil nature resulted from and was sustained by the exploitative nature of the environment created by the slave-owning society, feudalism, and capitalism.**
- **Even though a causal connection no longer exists between the environment under socialism and man's evil nature, the socialist man is nevertheless still imperfect primarily as a result of the cumulative effect of the past environments on his inner being.**
- **The historical mission of socialist law is to cleanse man of his evil nature and to prepare him for the ultimate demise of law under communism.**
- **In other words, since his environment corrupted the present man, the task of socialist law is to remold man in his original image.**
- **To return to his original, pre-law state of being is to prepare him for life in a post-law society.**

The Socialist Legal Tradition Cont'd…

- **A second of fundamental tenets of Marxian jurisprudence includes the following.**
- **Because law is an order emanating from the sovereign lawgiver, an individual citizen has no right to disobey the law.**
- **Law selectively incorporates certain rules of morality.**
- **But the legitimacy of law does not derive from its moral base.**
- **Even though the laws of a bourgeois society are immoral in absolute terms and even though the laws of a socialist society come closest to reflecting the morality of the majority, an immoral law is law nevertheless.**
- **And the province of the law is all embracing and all encompassing.**

The Socialist Legal Tradition Cont'd…

- **Accordingly, there is no zone of individual privacy that is precluded from legal regulation.**
- **A lawmaker, however, may impose certain limitations on his power to legislate on certain matters of individual privacy.**
- **Subject to such self-imposed restraints, the power of the sovereign to legislate is absolute.**
- **No area of human conduct lies outside the reach of the long arms of the law.**

The Socialist Legal Tradition Cont'd…

- **To the Marxist-Leninist, the emergence and continued existences of law is inseparably linked with the emergence and continued existence of the state.**
- **To him, the state is an organization of the political power of the ruling class.**
- **The state is a specific form of political organization through which the governing class asserts its authority over the entire society.**
- **But under advanced socialism, the state is perceived as the organization of the political power of the whole people.**
- **Like law, the state is an historical phenomenon. It is not eternal.**

The Socialist Legal Tradition Cont'd…

- **In the primitive society when there were no economic classes and no notions of private property there was no state.**
- **Historically speaking, the state arose only after the emergence of private property and the resultant division of society into antagonistic economic classes.**
- **The state was as a machine for the preservation of the dictatorship of one class over another.**

The Socialist Legal Tradition Cont'd…

- **The state, like law, is an element of the superstructure.**
- **Its nature and form are predetermined and preconditioned by the economic basis over which it is superimposed.**
- **Socialist law operates as its own gravedigger. By consciously engineering the advent of communism, socialist law lays the groundwork for its own death.**
- **The fact that there would be no laws under communism should not be taken to mean that anarchy would prevail in that society**

The Socialist Legal Tradition Cont'd…

- **All it means is that law will be replaced by a system of rules of communist morality to be enforced through a system of social pressure.**
- **In order to prepare society for the ultimate replacement of law with rules of communist morality, it is anticipated that during socialism the rigid demarcation between legal norms and moral rules would be gradually eliminated.**

The Socialist Legal Tradition Cont'd…

- **It follows, therefore, that one of the characteristic tendencies of the development of socialist law is the gradual but programmed convergence of the rules of law and morality.**
- **Thus, whereas socialist law started out by incorporating the rules of morality prevailing among the governing majority classes, it is expected to end its**

The Socialist Legal Tradition Cont'd…

- **Purposes of socialist law:**
- **The historical mission of socialist law is to advance society towards socialism and ultimately towards communism.**
- **Communism is the more advanced stage of socialism.**
- **In order to achieve this goal, socialist law seeks to abolish all capitalist and feudal forms of property ownership.**
- **Socialist law seeks to consolidate socialist economic relations and to lift domestic relations from the level of capitalist influence.**
- **Socialist legal rules are seen as an instrument of social engineering.**
- **Socialist legal rules are weapons in the hands of the political rulers aimed at achieving the set political goal through the coercion of general compliance.**

The Socialist Legal Tradition Cont'd…

- **The socialist legal system is characterized by elements such as an uncompromising recognition of the supreme leadership of the omnipotent Communist Party, state ownership of land and the collectivization of the use of land.**
- **Socialist law is the fundamental remaking of the conscience of the people.**
- **The purpose of the law is to inculcate in the people such ideals as high moral soundness, unwavering belief in the idealness of life under communism, and self-sacrifice for the common good.**

The Socialist Legal Tradition Cont'd...

- **Socialist law operates on the assumption that man has been corrupted by his socioeconomic environment and as such has become evil.**
- **The present imperfect man needs to be cleansed of his evil ways.**
- **The task of transforming society from capitalism to communism must be carried out at the same time as the reformation of man himself.**
- **Since the present man by virtue of his imperfection cannot live under communism, socialist law implicitly operates on the assumption that only the new man may enter the Promised Land.**

The Socialist Legal Tradition Cont'd…

- **The Promised Land is the lawless state of monolithic tranquility and dynamic equilibrium known as communism.**
- **This aspect of law focuses on the educational role of law.**
- **The social goal of this law is to create the new communist man who will not only willingly embrace atheism and look upon religion as an opiate, but also would be purged of all the evil tendencies of the present imperfect man.**

The Socialist Legal Tradition Cont'd…

- **In order to create the perfect man, socialist law mobilizes all available legal, quasi-legal and social institutions.**
- **This system calls upon everyone to be his brother's keeper.**
- **Everyone must come to the rescue of a fellow citizen in the times of need, and to love one another.**
- **Among some of the moral virtues which socialist law seeks to inculcate in the new man are love for the fatherland, international solidarity among the masses of the world, hatred for the class enemy, unmitigated support for communist party policies, selfless sacrifice for the benefit of society and socialist humanism.**

The Socialist Legal Tradition Cont'd…

- **Humanism as understood by the socialists constitutes respect for socialist property, honorable attitude toward state and social duty, respect for the honor and dignity of one's fellow citizens and the rules of socialist communal life, love of one's neighbor, and love for work and the dignity of labor.**
- **Viewed from this perspective, socialist law does not merely seek to regulate legal relations of today, but more importantly, it seeks to prepare society for the ultimate demise of law.**

The Socialist Legal Tradition Cont'd…

- **Socialist law is not a science. Socialist law operates on the premise that if you can affect the belief of the people and make them think a new magic has been found, even if your reasoning is wrong, you can probably change the system.**
- **In a sense, it is a challenge of faith. It is dogmatic, yet pragmatic also.**
- **Under the socialist legal system, law is totally subordinated to the prevailing socio-economic and political conditions.**
- **Law is only a conduit between politics and economics.**
- **And to that effect law is immediately preempted whenever it conflicts with overriding economic or political considerations.**

The Socialist Legal Tradition Cont'd…

- **A few notes on the way socialist China used to see law may help to concretize the discussion of the role of law in the socialist law tradition.**
- **According to Chinese communist ideology, the party controlled the state and created and used the law to regulate the masses, realize socialism, and suppress counterrevolutionaries.**
- **The party viewed that the law and legal institutions existed to support party and state power.**

The Socialist Legal Tradition Cont'd…

- **Law often took the form of general principles and shifting policies rather than detailed and constant rules.**
- **The Communists wrote laws in simple enough language that every individual could understand and abide by them.**
- **Technical language and strict legal procedures for the police and the courts were avoided to**

The Socialist Legal Tradition Cont'd…

- **Mao Zedong maintained that revolution was continuous.**
- **He opposed any legal system that would constrain it.**
- **Whereas Western law stressed stability, Mao sought constant change.**
- **Mao emphasized the contradictions in society, and called for relentless class struggle.**
- **The courts were instruments for achieving political ends.**
- **The political party used criminal law to conduct class struggle.**

The Socialist Legal Tradition Cont'd…

- **Mao believed it unwise to codify a criminal law that later might restrain the party.**
- **After 1949 the party also greatly altered the character of the legal profession.**
- **A number of law schools were closed. Most of the teachers were retired.**
- **Legal work was carried on by a handful of Western-trained**

The Socialist Legal Tradition Cont'd…

- **The Western-trained specialists were Cuomintang-era lawyers who chose to cooperate with the Communists.**
- **The western trained lawyers were considered politically unreliable.**
- **The party initially ignored most of their arguments for a modern legal system.**
- **As the 1950s progressed, however, this group was instrumental in China's adoption of a legal system based on the system of the Soviet Union.**

The Socialist Legal Tradition Cont'd…

- **In general, the specialists wanted codified law, enforced by a strict Soviet-style legal bureaucracy.**
- **Without such procedures, they felt, there would be too much arbitrariness, and eventually the legal system would become ineffective.**
- **Many of these specialists removed from the scene when the Soviet model was abandoned in the late 1950s, but some became party members and gained influential positions.**

The Islamic Legal Tradition

- **Islamic law owes it origin to divine power- Allah.**
- **Islamic law encompasses the spiritual as well as the secular activities of Muslims.**
- **Islamic law interplayed with common law and civil law systems in 19th and 20th century.**
- **Essential aspects:**
- **Islam is based on the principle of the inseparability of religion and politics.**
- **This conception necessitates the codification of Islamic law as the law of the country, proclaimed and administered by national governments.**

The Islamic Legal Tradition cont'd…

- **Islam links together all facets of life into a composite whole regulated by Shari 'a.**
- **Shari' a, which can be literally translated as "the road to the watering place" or "the clear path to be followed," means in the legal context, "the sacred law of Islam."**
- **It encompasses the entire system of Islamic law, dictating penal laws and daily religious, social, and personal interactions.**

The Islamic Legal Tradition cont'd…

- **And everything is measured by the standards of religious and moral rules.**
- **In Islam, there is an integral relationship between religion and morality.**
- **This relationship necessitates the set of rules embodied in Islamic law for the protection of the moral values of the Muslim community.**
- **The Islamic community is responsible for watching over the**

The Islamic Legal Tradition cont'd...

- **The heart of Sharia Law is that its validity emerges from divine origin.**
- **Allah is the source of Sharia law. Sharia law does not emanate from earthy human will.**
- **Every Muslim must follow these rules if s/he is to live up to the expectation of Allah.**
- **This will of the earth becomes manifest to man through revelation. The consequences of this thesis are multiple.**
- **According to Islamic law, the source of Western law is human origin while the source of Sharia Law is divine origin.**
- **Western law is mutable (law is the function of the changing circumstances in the society) while Sharia law is immutable (it is not subject to change).**
- **While western law governs the earthly life of human beings Sharia law deals with both the earthly and spiritual aspect of Muslims.**

The Islamic Legal Tradition cont'd…

- **Sources of Islamic law:**
- **The first and most important source of Shari'a is the Holy Koran. The Koran is the Holy Book for Muslims.**
- **In addition to monotheism and the postulate of the exclusive worship of Allah, the Holy Koran creates a complete moral system for human beings.**
- **This Holy Book sets down the foundations of the world order for humankind.**
- **There are ethics, history, wisdom, sayings and legislation in the Holy Koran.**
- **It is the totality of rules, which Allah has laid down and revealed to Prophet Mohammed for governing man's behavior.**

The Islamic Legal Tradition cont'd…

- **The Holy Koran is a code, which governs the religious and social life of mankind.**
- **The rules derived from the Holy Koran are, therefore, regarded as the highest rules.**
- **All rules derived from other sources should be in full accord with Koranic ones.**
- **The Suna is the second source of Islamic law. The Suna is the totality of the inspired practices of the prophet.**
- **The Suna includes the collections of sayings and records of Prophet Mohammed.**
- **It includes what the Prophet is recorded to have said, done, approved, or forbidden.**

The Islamic Legal Tradition cont'd…

- **The third source of Islamic law, Ijma, is the consensus of Islamic legal scholars on any particular point of law.**
- **The final major source is the concept of deduction by analogy, Qiyas, which involves the use of logic and reason.**
- **Qiyas comes to operation when the other three sources of law become inadequate to address a given legal issue.**

The African Legal Tradition

- **The idea of this section is not to claim that there is a single body of law applicable to all Africans.**
- **The idea of this section is rather to present the main common features of the traditional legal systems in Africa.**
- **The traditional African customary laws claim to govern the moral, religious and secular conduct of human beings.**
- **The scope of the African legal system is broader than the modern western legal system.**

African Legal Tradition cont'd…

- **The African legal system, the traditional one, is presented as being static.**
- **But some claim that the African legal system is not static; the African traditional laws are dynamic.**
- **The dead, gods and the living are considered to be the actors responsible for making the African laws.**
- **The gods and the dead are regarded as actors responsible for enforcing the African customary laws.**
- **The unit of analysis of the African customary law is not the individual but it is the community.**

African Legal Tradition cont'd…

- **The goal of the African legal system is conciliation and compromise.**
- **The idea is not to settle case in the sense of win-lose struggle in state courts but it is to be settled in the form of win-win.**
- **The participants in a given conflict should go back to the community and live peacefully, without losing the face of one another.**
- **Generally, the African customary law is attacked for being not gender sensitive.**

African Legal Tradition cont'd...

- **Designations:**
- **African Customary Law is the totality of norms comprised of what has variously been described as "native law," "native customary law," "primitive law," "folk law," "informal law," "non state law," "indigenous law" and even "tribal law."**
- **The nomenclature conceptualizes the perception of customary law as being inferior to other laws within a legal system.**
- **It also affirms the distinctiveness with which African Customary Law has been regarded.**
- **This form of isolation of African Customary Law has obscured its dynamism.**

African Legal Tradition cont'd…

- **Scope:**
- **The rules governing under developed societies deal both with behavior and with the settlement of disputes.**
- **They cover everything, which must be "making no distinction between religion, morals and law.``**
- **Features:**
- **The African systems of law are sufficiently similar in procedure, principles, institutions and techniques for it to be possible to treat them as a whole.**
- **The difficulty of subsisting and dangers from the outside world making life precarious, the inhabitants were obliged to seek refuge in communal life and solidarity, and to place themselves under the protection of supernatural forces.**

Legal Convergence and Divergence

(Coming Together and Going Apart)

- **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.**
- **Legal convergence simplifies legal rules and institutions for the lawyers, as legal convergence rests on uniformity.**
- **Legal divergence, on the other hand, complicates legal rules and institutions, as legal divergence rests on essential differences.**
- **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.**
- **The current section points out the elements of legal convergence and legal divergence, evaluates legal convergence and legal divergence, analyzes the theories of legal divergence and indicates trend in legal divergence and legal convergence.**