Legal History and Traditions

2nd year Law Students

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1.1 What is Legal History?

- Legal history is **a systematic study of past legal systems**. It studies the origin and development of past legal systems, both early and modern legal systems. It is a discipline that examines events of the past that pertain to all facets of the law, including the relationship that "law" and legal institutions have to the society that surrounds them.

- Legal history compares and contrasts the various past legal systems of the world.

1.2 What are the major approaches to legal history?

There are four major approaches in studying legal history and traditions.

A) Unitary or isolationist approach:- the subject of legal history should focus on the relevant 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**.

- Studying the history of the laws of the past societies

- Influenced by Legal Positivism (sovereign as a sole source of law). 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.**

Approaches to legal history---

B) <u>Holistic or the sociological approach</u>:- In addition to legal rules and principles, we should study about **both internal and external factors to a past legal system**. This is because a legal system does not stand in isolation from external factors.

- Thus, the study of legal history and legal traditions will not be complete unless it includes economic, social, religious and political elements, **which affect the shape and contents of the law.** The sociological conception rests on the idea that **society is a whole and is not made of separate elements.**

- 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.**

- Providing a sociological explanation of their laws and their

Approaches to legal history ---

C) Technical approach:- 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); **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**

Approaches to legal history ---

D) Mixed approach: it 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.

1.3 Why is it important to study legal history?

- **First**: **Legal history is important to clarify the present legal systems**. The present only comes about due to the past and so it explains how things came to be as they are. **History needs to be studied in order to understand the current status of law** and thus we can conclude that legal history allows us to understand modern-day law. 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.
- **Second**: Legal history helps to solve legal problems of today. 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.

1.4 What are the challenges in the study of legal history?

- The fundamental problem of legal history is **lack of sufficient and reliable evidence of past events.**

- For instance, lack of sufficient, accessible and reliable data is one of the main problems in the study of the Ethiopian legal history.

1.5 What is Legal system?

- A system implies that there are several elements put together to achieve a certain purpose (**not mere summation**).

- 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. It includes rules, procedures, and institutions by which public initiatives and private endeavors can be carried out through legitimate means.

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

- A legal system may refer to the present or the past legal system. The purpose of legal system **may be to sustain a slave-owning system or a feudal system or a capitalist**

Legal system---

- A legal system may exist at local level or national or regional or international level.

- **What is legal structure**? Legal structure means all those institutions responsible for creating, modifying, interpreting, improving and implementing laws. Legal structure encompasses law schools, bar associations, the police, courts, the legislature, and the executive and prison administration.
- 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.
- **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***

1.6 Classification of legal system

- Currently, there are about two hundred legal systems in the world. It is neither 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 **its influence on the development of other legal systems; its geographical spread, the technological and economic advances of the country being classified.**

A) 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, legal technique and the system of conception of**

Test of classification…

- Zweigert and Kotzargue that it is not possible to classify legal systems into legal families merely by using a single criterion, and adopted what they call “the stylistic factors” that help to classify legal systems. These are:-

- ✓ **Historical background and development**,
- ✓ **Modes of thought and** distinctive institutions,
- ✓ **Source of law (**help to distinguish Islamic and the Hindu systems; and also help to divide the Anglo-American from the continental legal families, but not important to distinguishing between the Germanic, Nordic and Romanistic legal families**)**.

- ✓ **Ideology: (help to** distinguishing the religious and socialist systems, but does not help you to distinguish the legal families of the west from one another).

- But the weight to be given to each of these factors varies according to the circumstances.

Test of classification…

- ❖ Using what they call stylistic factors, they argue that there are eight modern legal systems: the Romanistic, the Germanic, the Anglo-American, the Nordic, the Socialist, the Far Eastern, Islamic and the Hindu. The list omits the African customary, Jewish law and the European Union law.

- ★ Rene David, on the other hand, proposes two criteria to classify legal systems.
- ✓ **First** is legal concepts and techniques employed by the system. These include 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.

- ✓ second, the system's ideology. This means the philosophical, political, and economic principles of the society in which the legal system operates

Test of classification…

- 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.

B) Reasons for classifications

- The first reason is make the study of legal history convenient. 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 present, so that it helps us 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

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***.
- 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.
- Legal tradition is the abstract element of a legal system. The attitude directed towards a legal system can be hostile, neutral or favorable.

- 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.

Legal tradition…

- When the attitude of the governed is supportive of the legal system, the system will show continuity. 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.

- In terms of frequency of change, legal traditions may be classed into three:

- ✓ **First** is those legal systems that exist for a relatively longer period of time with some adjustments. **Known for stability and backed probably by a majority support.**
- ✓ **Second** is those legal systems that undergo basic and frequent changes. Known by deep and revolutionary changes.
- ✓ **Third** is those legal systems which experience little or no change. Example:-Stagnant early legal traditions

Legal Transplantation

- 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**.

- 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**.

- The recipient legal system should be **an existing one or a system at its initial stage of development**.
- 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.

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. **The spread of the Islamic legal system.**

- 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. For instance, France and England transported their laws to all over the world via colonialism

Views on legal transplantation

- Do you support legal borrowing? Is there any problem in borrowing laws?

- There are three views about legal transplantation.

First: The custom theory (F. von Savigny, a German thinker of 19th century)

- 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.
- 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 can create legal rules of its own and from its own internal sources alone.

Views on legal transplantation…

- 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.

<u>Second</u>: Legal engineering (an opposing theory by Alan Watson)

- It 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. There is no inherent relationship between a state's law and its society.s
- The theory is named as legal engineering. This theory views laws **as intangible instruments to achieve certain goals**. As laws are tools, they can be taken **to any society and may be used with success**.
- Justifications are given for this position.

Views on legal transplantation…

- **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.

- 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. **The custom theory wrongly assumes that countries always take the laws of other nations on the basis of their own free will. History gives us several examples where countries have borrowed laws as a result of external pressures.**

Views on legal transplantation…

- **Third: Hybrid approach (articulated by Kahn-Freund:-the degree of transferability approach):**It 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. In the latter cases, it is difficult to transplant laws and even if transplantation takes place, the laws so transplanted will not be welcomed.**
- **T**his moderate approach to legal transplantation states that the contexts of the recipient country should be studied well before the borrowing of laws is made.

Legal penetration versus legal extension

- **Legal penetration: is the aspiration** 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.
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Legal penetration versus legal extension

- **Legal extension is the reality** about the level of compliance to the imported laws.
- It refers to the extent to which people or the state actors are actually following the imported laws.
- 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 religious laws.

- 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.

- **What explains this gap in Ethiopia? What are the possible reasons for the divergence between official legal prescriptions and the reality?**

Legal penetration versus legal extension

- _**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.
- **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.

Legal penetration versus legal extension

- _**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.
- **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.

2.1 Early legal systems

A) The Babylonian legal system

- 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…

- 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 characterized by diversity, brevity and fragmentation.

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.** 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**

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The Babylonian legal system…

❖ Features of the Code of Hammurabi:

First was an eye-for-an eye principle of punishment. 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**. When a builder built **a defective house**, he was to **lose his children**.

Second 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.

Fourth, the Code lasted for a longer period of time; it was one of the codes in the history of legal systems that showed

Why Babylonian empire had a high degree of stability?

First, religion was accepted as the valid source of law. The Babylonian attributed the source of law to God; what God made human beings could not change.

Second, the society was highly conservative.

Third, the geographical advantage of the area.

B) The Greek legal system

- The Greek legal system came into existence a thousand year after the Code of Hammurabi.
- 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 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?

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. 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.

The Greek legal system…

In the second place, the Greek philosophers always thought that they were destined to address questions that mattered__philosophical questions. 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 working on details matters such as private rules.

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.**

C) 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. Rome formulated its laws in the form of one of the ancient codes named the XII Tables in the year 450 BC. **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.

Aspects of the XII Tables

- The XII Tables promoted an eye-for-eye principle.
- It 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.
- It was rudimentary in terms of arrangement, as the Code

The Roman legal system…

- It advocated for the supreme authority of the father over his wife and children.
- It 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.

The second stage in the life of Roman law: lasted from 2nd BC through 2nd AD (Anno Domini, Latin for "in the year of the Lord"). **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. **For this big power an elaborate and sound**

The Roman legal system…

- **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 third phase (after 2nd AD-in the year of lord)

- 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. **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.

Roman legal system

- **Main feature of corpus Juris Civilis….**

- **The code is taken as the origin of civil law tradition**. It is the basic document of all modern civil law.
- **The code aims to create sense of unity within the empire**. Like other Roman emperors before him, Justinian faced the challenge of maintaining control and creating a sense of unity within the Empire. One of the ways that Justinian sought this unity was through law. **Roman citizenship had been extended to the empire outside of Italy** in the third century CE, making inhabitants "citizens of Rome" and subject to its civil law.
- The Corpus Juris was an attempt **to systematize Roman law, to reduce it to order after over 1,000 years of development**. The resulting work was **more comprehensive, systematic, and thorough** than any previous work of that nature.
- **It consists of three original parts and one additional part that was developed separately**

Roman legal system

- **Main feature of corpus Juris Civilis….**

The three different original parts are: the Digest (Digesta), the Code (Codex), and the Institutes (Institutiones).

I) **The Digest** (533 CE (Common Era): collected and summarized all of the classical jurists' writings on law and justice. The Digest or Pandects, by far the most important part, intended for practitioners and judges and containing the law in concrete form plus selections from 39 noted classical jurists.

II) **The Code** (534 CE) outlined the actual laws of the empire issued prior to the days of Emperor Constantine and after the days of Emperor Theodosian, citing imperial constitutions, legislation and pronouncements.

III) **The Institutes** (535 CE) were a smaller work that summarized the Digest, intended as a textbook for students of law. It is a general introduction to the work and a general survey of the whole field of Roman law.

IV) **The Novella** (Novellae), which was not a part of Justinian's original project, was created separately by legal scholars in 556

Common features of the Early legal system

- **First,** all of them operated in the assumption that human being is not equal. For instance, they did maintain the institution of slavery. Foreigners did have few rights.
- **Second,** they had shown an amazing degree of stability. Ancient societies were are taken as closed system. There was little room for change.

- **Third,** the three legal systems were linked with religion. The three legal orders, especially at their initial stages, propagated the idea that laws were made and modified by supernatural entity. Human beings were presented as passive actors. There were a strong belief that laws were put into effects by those who have close relationship with God (not by layman).

- **Forth,** their laws, particularly at their initial stages , were non-technical. **They lacked developed principles and institutions.** They fail to distinguish between procedural and substantive laws, as well as between public law and private laws.

Chapter three: major legal traditions of the world

a) **Civil law legal system**

- Civil law systems, also called continental or Romano-Germanic legal systems, are found on all continents and cover about 60% of the world. It is the most widespread type of legal system in the world, applied in various forms in approximately 150 countries.

Some salient features of the civil law:

- The civil law system is derived mainly from the Roman Corpus Juris Civilus. There is generally a written constitution based on specific codes (e.g., civil code, codes covering corporate law, administrative law, tax law and constitutional law) enshrining basic rights and duties; **administrative law is however usually less codified and administrative court judges tend to behave more like common law judges;**
- Only legislative enactments are considered binding for all. There is little scope for judge-made law Laws are organized into systematic written codes. **Civil law systems place much emphasis on codification of the law** than they do on precedent . Civil law systems rely on written statutes and other legal codes that are constantly updated and which establish legal

Chapter three: major legal traditions of the world

- Nations with civil law systems have comprehensive, frequently updated legal codes. Most importantly, case law is a secondary source in these jurisdictions.
- The role of the judge is limited to applying the law. A judge merely establishes the facts of a case and applies remedies found in the codified law.
- **Limited freedom of contract**: There are a number of provisions implied into a contract under the civil law system.
- Writings of legal scholars have significance influence countries that follow the civil law tradition.
- **Simplicity and accessibility to the citizen**, at least in those jurisdictions where it is codified.
- **Advance disclosure of rules**, silence in the code to be filled based on equity, general principles, and the spirit of the law
- **Countries:** European countries such as France, Germany, Italy, and Spain are in this category. Other countries following a civil law system are typically those that were former French, Dutch, German, Spanish or Portuguese colonies or protectorates

b) Common law legal system

- **A common law system is based on the concept of judicial precedent**. The foundation of English common law is "legal precedent."
- Judges take an active role in shaping the law here, since the decisions a court makes are then used as a precedent for future cases. Whilst common law systems have laws that are created by legislators, it is up to judges to rely on precedents set by previous courts to interpret those laws and apply them to individual cases.
- There will be no codified laws or written constitution always.
- Judicial decisions are binding – decisions of the highest court can generally only be overturned by that same court or through legislation.
- The common law was nurtured in London law courts by judges and barristers.
- Common law systems are adversarial, rather than investigatory, with the judge moderating between two opposing parties.
- Writings of legal scholars has little influence.

Common law legal system…

- Extensive freedom of contract - few provisions are implied into the contract by law (although provisions seeking to protect private consumers may be implied);

- **Countries;** the legal system of the United Kingdom is classified as a common law system, similar to the U.S., although there are many codified laws in the form of statutes. It also in force in approximately 80 countries formerly part of or influenced by the former British Empire, including Australia, Canada, Hong Kong, India, and New Zealand.

C) Islamic legal system

- It is the legal system enforced in over 30 countries, particularly in the Near East, but also in Central and South Asia, Africa, and Indonesia.
- **There are five categories of Islamic law**: Islamic law categorises human behaviour into five classes: obligatory (wajib); recommended (sunnat or sunnah); neutral (mubah); not recommended but not forbidden (makruh); forbidden (haram).
- The main sources of Islamic law are the Holy Book (The Quran), The Sunnah (the traditions or known practices of the Prophet Muhammad), Ijma' (Consensus), and Qiyas (Analogy). There are two primary sources of Islamic law. They are the Qu'ran and the Sunnah.
- **First is the Qu'ran** is the book which contains revelations the prophet Muhammad received from Allah. The main source of Islamic law.
- **Second is the Sunnah:** the traditions and practices of the prophet Muhammad. There are three types of Sunnah. **The first is the sayings of the prophet** – Sunnah Qawliyyah/Hadith. **The second is the actions of the prophet** – Sunnah Al Filiyya. The

Islamic legal system …

- **Third is Ijma**: it refers to the consensus or agreement of the Islamic community on a point of Islamic law.
- **Fourth is Qiyas**: the principle of analogy applied in the interpretation of points of Islamic law not clearly covered in the Koran or sunna : analogical inference or deduction. **The method of reasoning used was a form of analogical deduction called Qiyas.** An example of **Qiyas is the prohibition of marijuana based on the Prophet's statement: "Every intoxicant is Khamr and every form of Khamr is abominable."** Since Marijuana has as intoxicating effect it can be classified as Khamr and thus abominable (prohibited)

D) socialist legal system

- Socialist law is the official name of the legal system used in Communist states.
- It is based on the civil law system, with major modifications and additions with Mrxist-Leninist ideology. Legislation is recognised as the primary source of law.
- Socialist law provide for most property to be owned by the state by agricultural co-operatives .
- Socialist law is similar to common law and civil law but with a greatly increased public law sector and decreased private law sector.
- Abolition of private property is considered as primary goal of socialism.
- Low respect for privacy and intellectual property.
- The judiciary process lacks adversary characters ; public prosecution is considered as provider of justice.

D) African Legal tradition

- There is no a single body of law applicable to all Africans. However, they share common features. **The traditional African customary laws claim to govern the moral, religious and secular conduct of human beings.**
- The most important African legislative is **invisible: composed of gods and ancestors. 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**.
- African law seeks **to preserve the group and peace.**
- **The goal of the African legal system is <u>conciliation and compromise.</u>**
- **<u>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</u>**. The participants in a given conflict should go back to the community and live peacefully, without losing the face of one another.
- **The African customary law is attacked for <u>being not gender sensitive</u>. African law sees the woman generally as inferior to man.**

African Legal tradition

- **African indigenous law is not static.** African law is subject to evolution. It is generally unwritten.
- **It has different branches including substantive and procedural laws.** There is a procedure to be followed and there are substantive laws to be applied.

External influence

- **African law has not escaped outside influence.** African society has been transformed by contact with the monotheist religions such **as Christianity and Islam, and under the influence of colonization.** For instance, the colonizing nations each organized the territories fallen to **their share according to their own law**.
- During European colonization**, in relation to the judicial structure as a whole the position of the local court varied from country to country**. But two basic patterns can be recognized. **One is an integrated system** where the **local courts were linked with higher judicial bodies, particularly the high or supreme courts byway of appellate jurisdiction**. **And the second pattern is a parallel system**, which involved the separation of the local courts from the judicial system administering primarily non-indigenous law. **Indigenous law was**

African Legal tradition

Debates After independence : After independence, there were debates between modernist and traditionalist regarding the place to be accorded for customary law.

- **Traditionalist view:** the first instinct of the new African authorities was to respect completely the old ancestral customs. **The reasons for respecting** traditions in Africa would be:
- **First, to promote internal legitimacy** (the new leaders would get greater acceptance by the people with African customary laws than without) ;
- **Second, to give due respect to African identity** (customary laws were taken as the reflections of the identities of Africans) ;
- **Third, to restore the correct versions of traditional dispute resolution methods in Africa** (for colonial rule distorted the authenticity of customary laws in Africa) ;
- **Fourth, to have effective** legal institutions; and
- Fifth, **to promote the desired social, economic and political developments.**

African Legal tradition

- **<u>Modernist view</u>:** For the modernists, Africa should not go back to the traditional legal institutions in general and customary law systems in particular since going back to the roots **would:**
- **1) Undermine national political unity;**
- 2) **Undermine the efforts of the political elites to bring about legal uniformity.**
- 3) **Be inimical to modernization;**
- 4) **Promote the divide between the urban (to be governed by the western transplanted laws) and rural** (to be regulated by the customary laws) population;
- 5) **De-link Africa from the rest of the world especially from the western world**;
- And
- 6) **Ignore the shortcomings of customary laws** (i.e., the gaps in them and the
- difficulty of ascertaining them).

Legal convergence and divergence

- Divergence generally means two things are **moving apart** while convergence implies that two forces are **moving together**.
- 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.**
- **Definition of legal divergence**: Going apart also called legal divergence **shows non-uniformity in legal systems.** Legal divergence focuses on differences in rules, legal institutions among legal systems of the world. A combination of many factors leads to and maintains legal divergence.
- **legal convergence** deals with the factors that make two or more legal systems alike.

Legal convergence and divergence

- **Importance of legal convergence: 1)** brings about simplicity and certainty in the application of laws. Legal convergence thus enhances predictability of the application of laws among several legal systems. Legal convergence is important for **international transactions**, as lawyers **would get the chance to apply a similar legal rule all over the world.** The elimination of differences in the national legal systems facilitates international transactions, increases the general welfare, promotes the diffusion of culture and leads to international understanding.
- Legal convergence suggests that **human beings, even if they live in different and separate territories, share essential commonality.** Thus, legal convergence promotes a sense of **closeness.**

Approaches to legal convergence

- There are four approaches about legal convergence. These approaches are: **the jus commune, legal evolution, the natural law theory and the Marxist theory.**

- **First**: **the jus commune theory**: this theory is based on the idea that, in the era before the rise of the nation State, the entire civilized world' was governed by one legal system: **the Roman-Canonic jus commune**. The two essential elements of the jus commune were: (i) the Roman law of Justinian's era and (ii) canon law, or the law of Roman Catholic Church-the universal Church. The jus commune was considered the law of Christendom, ruled by two supreme authorities: the Emperor, the temporal head; and the Pope, the spiritual head. Hence, there was, according to this theory, a common law of Europe, a common literature and language of the law and an international community of lawyers'.
- **Second: the Legal evolution theory:** This theory proceeds on the basis that legal change is a natural process, which will proceed inevitably and irresistibly because it is controlled by forces beyond human power. Thus, legal systems are at different stages of development and, when they converge, it is because **the less developed system is catching up with the more mature one.** Simply stated, the theory holds that legal systems move from the less developed stage to a more advanced stage of development.

Approaches to legal convergence

- **Third: Natural law theory**:. This theory argues that **the common nature of human beings** will eventually lead to the creation of similar social structures, laws and legal systems.

- **Fourth, Marxist theory**: argues that **differences between socialist and Western legal systems are irreconcilable**, whereas the legal systems of France, Germany and England are basically reconcilable. It assumes law is mere superstructure. Accordingly, law is merely another instrument for the furtherance of certain economic, social and political ideals. Western bourgeois capitalist nations will all share the same fundamental core values and beliefs and their systems will have converging tendencies, whereas socialist societies will have divergent legal systems which reflect the distinct nature of socialist politics, society and economics. Hence, differences between socialist and Western legal systems are irreconcilable, whereas the legal systems of France, Germany and England are basically reconcilable, since the differences in their laws tend to be more superficial, similarities being masked by superstructure and terminology.

Part two (Customary Law Custom, culture and tradition)

- What is custom? **Custom is an important source of law and it is desirable to define the same.**
- Custom has been defined by various jurists as per their notion, understanding, philosophy, views and opinion. The different jurists also defined custom on the basis of source, validity, practice, history &utility.
- **Custom is a habitual course of conduct observed uniformly and voluntarily by the people.** Custom occupies **an important place in regulation of human conduct** in almost all the societies. In fact, **it is one of the oldest sources of law-making**. But with progress of the

Part two (Customary Law Custom, culture and tradition)

- The chief characteristic of the custom is that, **it is a generally observed course of conduct.**
- Custom is created by the people, by their unconscious adoption of a certain rule of conduct and **its authority is based on nothing but its long-continued use and recognition by the people.**
- Custom may be considered as **a fact and as a law. As a fact**, it is simply **the frequent and free repetition of acts concerning the same thing**; as a law, **it is the result and consequence of that fact**.
- The word ‘custom’ generally means the following:

➢ It means a usage or practice common to many or to particular place or class

➢ It rests for its authority **on long consent, usage, and prescription**.

➢ "Custom" must be distinguished from "law." The former refers to practice; **<u>what people do.</u>** The latter **is the norm;** what people

Custom, culture and tradition…

- **What is culture?**
- Culture is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society.
- Culture can also **be defined as a broader aspect involving the life of people consisting of language, religion, dance, music, food and custom which may differ from place to place**. The word ‘custom’ generally means the following:
- Culture embodies (expresses) itself with in society, with in our families and institutions, in all their private and public traditions and customs; all those adopted, adapted, created ones we repeat time and time again.
- Culture is an umbrella under which we live, protect and grow in to or out of these customs and tradition.
- Culture affects behaviour and interpretations of behaviour.
- Culture is learned.

Custom, culture and tradition…

- **What is legal tradition?**
- ❖ Tradition can be defined as **‘a custom that people have been following for a very long time.’**
- ❖ **When a custom is transferred from generation to generation**, it takes the form of tradition.
- ❖ Traditional practices **reflect the values and beliefs held by members of a community for period often spanning generation.**

Classification of custom

Classification of custom

- **Custom can be classified into two types:**

1. **Custom without sanction, and**
2. **Custom having sanction.**

- **Custom having sanction can be further classified into two types:**

1. **Legal Custom, and**
2. **Conventional Custom.**

- **Legal Custom can be further classified into two types:**

1. **General Custom, and**
2. **Local Custom.**

Classification of custom

1) **Custom Without Sanction:** These are those customs which **are non-obligatory.** They are all **observed due to presence of the public opinion**. Austinian term for them is positive morality (moral laws disconnected from legal rights, and moral laws that are mere opinions regarding human conduct).

A. Custom Having Sanction: These are those customs **which are enforced by the State.** These customs are **backed by sanction.**

These customs have two types which are as follows:

I. Conventional custom: It is an established practice whose authority is conditional on its acceptance and in corporation in the agreement between the parties bound by it. In simple words, a conventional custom is conditional and condition is that it will be binding on the parties only, if it has been accepted and incorporated by them in their agreement. A conventional custom is binding on the parties not because of any legal authority, but

Classification of custom

I. **Legal custom**

- The legal customs are those whose legal authority is absolute and unconditional.
- They consist of custom which is **operative per se as a binding rule of law.**
- The parties, affected **may agree to a legal custom or not** but they are bound by the same.
- These customs **operate as a binding rule of law.** They have been recognized by the courts and **have become a part of the law of the land**. They are **enforced by the courts.**
- **Legal customs are of two types.** These are: Local custom General custom.
- **A local custom: it** is that which prevails **in some defined locality**, that is, to a **district, town or an area**. But they do not imply geographical locality only. Sometimes, certain sects or families take their customs with them wherever they go. They too are called local customs.

Habit Vs Custom

What is habit?

- Habit: **is a course of conduct which we regularly pursue but without any sense of obligation or compulsion to dos so.** For instance, **I may be accustomed** to take a motorcycle to work rather **than the university bus** (I do this automatically and without reflection, **but not socially compulsory**). **I can change to any other available means of transport** with out any sense of infringing any kind of norm.

- The vital difference between customs and habit is that **those who accept customs and adhere to them regarded themselves as in some way bound or obliged to observe them.**
- **Many, if not most, habits never assume a normative character** but remain on the level of personal idiosyncrasy (**mode of behaviour or way of thought peculiar to an individual).**

- Habit is an individual phenomenon. Habit is learnt and acquired.

What is customary law?

- There is **no uniformly accepted definition of customary law**, and different scholars define customary law in different ways. This is so because custom varies from place to place. However, it may be defined **as a rule of conduct, which is accepted and governs a group of people.**
- Customary law is **the written and unwritten rules which have developed from the customs and traditions of communities**. For customs and traditions to become law, they must be:

❖ Known to the community,

❖ Followed by the community, and

❖ Enforceable (able to be carried out)

- For many people, **customary law is the most important law in their lives**, controlling areas of their lives like their marriages, their property, and their right to inherit. **But some customary laws discriminate and make people vulnerable.** Rules of customary law allow for **inequality among people to continue, especially for women and girls,** who remain economically and

customary law…

- For instance, the legal status of women married under customary law result:
- No legal rights to own or inherit property in her own name.
- No legal right to enter into contracts on her own.
- Could not sue (take claims to court) or be sued without her husband's help.
- Customary law and practice may also perpetuate violence and harmful practice against women. These include: FGM, early marriage, abduction and rape.

customary law vs. customary practice

- Customary practice also called custom or convention implies **a behaviour** that is **followed by the majority** members of a given community **habitually and for a longer period** without having an obligatory force.
- **All customary laws are customary practices** while some customary practices are customary laws and others are not.

Customary law Vs. social control

- **Social control** consists of **the whole range of instruments and institutions** used **to bring an individual to conformity** (these include state law, customary law, international law, customary practices, religion and morality). **Social control aims in general at keeping a society together.**

Customary law vs. Traditional laws

- Traditional laws, also called cultural laws, are broader in scope than customary laws.
- Traditional laws may be made at certain point in time. **Customary law is just part of traditional laws.** Traditional laws, to be made, **do not have to wait for a longer period of time.**
- **Authorised elders of a given community may gather together to discuss a matter and to pass legislatio**n. This latter form of traditional laws **resembles modern state laws**.

Part two (Unit two) Theories regarding transformation of custom into law

For custom to be regarded as law, **more than simple usage is required,** even if the usage is general and has long flourished. The main problem for any theory of customary law is determining **the nature of the additional factor required to transform custom into law.** There are two basic theories regarding the transformation of custom into law, which are as follows:

1. **Historical theory:** Custom per se is law, independent of prior approval by the sovereign or the judge.

- The custom is independent of the law of sovereign. It is independent of any declaration or recognition by the state.
- The main exponents of this theory are Karl Von Savigny.
- **Custom is derived from the common consciousness of the people**. It springs **from an inner sense of right**. Law has its existence in the general will of the people.
- **Criticism:** The Historical theory has been criticized by Paton as “The growth of most of the customs is not result of any conscious thought but of tentative practice”

Theories regarding transformation of custom into law …

2. Analytical theory: - The main exponent of this theory is Austin.

- According to him, custom is not law in itself, but it is a source of law. If a custom is not recognized by the legislation and approved by the judiciary, it will not become a law. Gray also says that true view is that **the law is what the judges declare.** The legislation, precedents, customs and morality are all sources of law.
- According to Holland, customs are not laws when they arise but they are largely adopted into laws by State recognition. Custom is a legal material and source of law.

Theories regarding transformation of custom into law …

There are also different theories regarding the transformation of custom into law, these are:

1) The tacit consent of all:- Custom is the tacit consent of the people, deeply rooted through long usage. Customs, endorsed by the consent of the users, take on the appearance of statute.

- The theory of the tacit consent of all tells that custom would be transformed into customary law if and only if all members of a given community agree on such transformation.
- In this instance, the additional factor is expressed by "endorsed by the consent of the users.
- Thus, custom is law because the people accept it as law.

Criticism against the tacit consent of all theory

- **it is almost impossible to get the consent of all members of a given community** on each and every custom to be upgraded to customary law. It is almost impossible to obtain the unity of minds of all to the transform of custom into customary law.

- The second criticisms directed against the tacit consent of all theory is that customary law binds every member of a given community; **its breach would entail sanctions**. But this serious matter is reduced by the tacit consent theory of customary law **to a covert consent not an open and**

Theories regarding transformation of custom into law …

2. Theory of Opinion Necessitatis

- Under this view, custom becomes law **when it is known to be law, is accepted as law, and is practiced as law by persons who share the same legal system.**

- **The practice must be the expression of an intention of legal validity of the community** or of a general conviction of law provided only that one is clear that this "intention of legal validity" or the "general conviction of law" is not solely **a "psychological fact" but the "sense of fulfilling a norm" (of a legally commanded behavior**) developing or dwelling in the individual acts of conduct according to the judgment of those sharing the same law.

Criticism

Assume that once the custom is known to be law and is accepted as law, the practice changes. Does the old law cease to be law, and the new practice become law? If this does happen, at what moment does it happen? And, what is the machinery for change? The theory of opinion necessitatis fails to adequately answer these questions.

Theories regarding transformation of custom into law …

3. **The Common Spirit of the People**

- This theory was developed by von F. Savigny.

•Under this view, law arises not from individual acts of behavior but from common consciousness. Individual acts of behavior do not create customary law but are merely appearances or indications of a preexisting common conviction about the law.

•Criticism

The common spirit of the people is criticized for its several failings. **Firs**t, this theory presents a nation as a corporate entity; it assumes that a nation manifests unity of action when it comes to developing customary laws. **Second**, the theory hides several historical instances where the minority has imposed its will on the majority in the form of laws. **Third**, the theory dismisses the possibility of a country borrowing laws from other countries. **Finally**, the theory is criticized for being narrow or ethnocentric.

Theories regarding transformation of custom into law …

3. **Sovereign Recognition**

- According to john Austin, the state may establish customary laws either directly by statute, or indirectly by judicial decree.
- Thus, customary behavior does not make law; custom becomes law only when it is the subject of statute or judicial decision.
- Austin's theory implicitly assumes that all law is legislation and that judges, insofar as they create law, are legislators. Austin's theory is consistent with his position that law is the command of the sovereign.
- Austin's work suggests that custom becomes law only by the additional factor of state confirmation.

Criticism: The defects of the sovereign recognition theory of customary law are that **the state has no moral authority to validate or invalidate the wishes of the communities as reflected in their customary laws,** that the state may distort the authenticity of customary laws in the course of validating them, that it is unsound to state that the state is the only valid source of legal rules and that customary laws are already valid by the assent of the

Theories regarding transformation of custom into law …

3. **Judicial Recognition**

- So long as the courts treat the custom as law, the custom is the accepted customary law.
- Should the courts hold that the custom has changed, however, then the new ruling becomes the customary law.

4. Desuetude theory

- **The doctrine of desuetude states that when a practice that is recognized as law ceases to be followed or to be regarded as law, it ceases to be law. At that stage, but not before, the road becomes clear for the creation of new customary law**. Adherence to the new custom before the old customary legal rule becomes obsolete is a factor in making the old legal rule obsolete. It simply means the customary law in force has lost its obligatory force.

- Customary law may lose its obligatory force owing **to internal and external changes in the community that developed the customary law in the first place**. The community has developed the customary law in order to solve a given legal problem and when the context in which the customary law changes the



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