Chapter- One
Understanding Legal History and Legal Systems.

Definition of Legal History

Legal history is a systematic study of past legal systems which studies the origin and development of past legal systems, both early and modern legal systems. It compares and contrasts the various past legal systems of the world. Legal historians should adopt an interdisciplinary approach to the subjects; they should be informed by economics, political science, sociology and other relevant social science. This is so because a legal system of any country cannot be fully appreciated if it so considered independently. Religion, politics and economic institution of a country affects a legal system.

Legal history is a term that has at least two meanings

1. For some legal scholars it is 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.

Approaches to legal history

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

1. Unitary or isolationist approach: This approach states that the subject of legal history should focus on the past societies themselves, their legal rules, legal principles, legal standards and changes therein by disregarding factors such as social, political and economic for the sole purpose of understanding those past systems.

2. 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. 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 and rather it 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.

3. **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.

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.

Importance of history.

- ✓ *Shows us what it means to be human. Some of history's greatest historians have seen human self-awareness as the very essence of history.*
- ✓ *Improves judgment.*
- ✓ *Provides instructive examples.*
- ✓ *Makes us better thinkers.*
- ✓ *Supports common cultural understanding and dialogue.*
- ✓ *Satisfies a need for identity.*
- ✓ *Gives pleasure.*

Reasons for studying legal history

1. **To clarify the present legal systems**. The present legal systems stand on and the product of 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.
2. **To solve legal problems of today**. Certain legal problems the present legal systems face cannot be solved without reference to the past.

3. **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 ways past societies understood the concept of law is different from one another and from the present ways of appreciating the concept of law.

Problems in the study of legal history: The first effort of the legal historian is to find out what happened in the past and why those events occurred. Often there are insufficient data available to arrive at a provable conclusion and sometimes none at all. Thus, the fundamental problem of studying legal history is lack of sufficient and reliable evidence of past events.

The concept of legal system

The term legal system is one the key elements in the description of the term legal history. 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** implies that legal system is not a mere summation of the listed elements. A legal system is rather qualitatively different from and bigger than totality of those elements.

- It 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 system or to build a communist system or to assure the survival of theocratic system.
- A legal system may exist at local, national, regional and international level. 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.

Classification of legal systems: 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 is appears to be wise to consider only the major legal system 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.

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 justice.

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.

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. 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 opinion that particular rules of substantive law are not decisive for the classification of a legal system. But all three agree that general principle of law, including those of substantive law; help to determine the family of a given legal system. They also agree that legal ideology plays a significant role in the classification of laws in to 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. i.e. The latter two assert 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. On the other hand, Professor David's criteria of classification lead him to come up with the following list: the Romano-Germanic, Socialist, the Anglo-American, Muslim, Hindu, the Far Eastern, and the African and 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.

Reasons for classification

1. **Technical reason:** 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 present to make 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.
2. **Reason of authority:** In the sense that those legal systems that are grouped together can borrow legal materials from one another where there are gaps.

Legal Tradition

Legal tradition can be defined as 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 are made. It is the abstract element of a legal system. 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 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. 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.

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

Those legal systems that exist for a relatively longer period of time with some adjustments; those legal systems that undergo basic and frequent changes and those legal systems which experience little or no change

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.

Legal Convergence and Divergence

Legal divergence and 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.

Definition of legal divergence: Going apart, non-uniformity.
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 divergence should be seen as a process and degree. It should be seen as a process because it may have a lot of aspects and steps. Legal divergence should be seen as a degree because at the same time there is a tendency of legal convergence.

Definition of legal convergence: legal convergence deals with the factors that make two or more legal systems alike.

The basic question you ask, here, is: are there trends that make the legal systems of the world more alike? Legal convergence, like legal divergence, is a matter of scale because you cannot find two legal systems that are exactly identical. However, you may find two or more legal systems that are substantially similar. Likewise, it is unlikely for you to get two or more legal systems that are percent dissimilar. Legal convergence is a process because, on some occasions, you may find several factors that bring two or more legal systems of the world closer to one another.

Importance of legal convergence: Legal convergence 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 also pushes human beings away from the excesses of legal nationalism (which focuses on differences of laws across nations) and Promote sense of closeness
- It also suggests that human beings, even if they live in different and separate territories, share essential commonality.

Contributing factors for existence of high legal convergence:

- ✓ Single market,
- ✓ The trend towards convergence of European systems,
- ✓ The growing influence of European Community law on EC Member States,
- ✓ The global village phenomenon
- ✓ Communality of purpose in the protection and enforcement of human rights and humanitarian rights.

Approaches to Divergence and Convergence

There are four approaches in this connection.

1. **The jus commune theory:** It stated 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 as rediscovered and developed by the Glossators and Commentators and then received by a large part of continental Europe as the civil law of the Holy Roman Empire (the so called ‘Roman common law’); 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.

2. **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.

• Since the civil law is much older than the common law, the logical corollary to this thesis is that the common law will gradually become more like the civil law.

• However, trends toward convergence may be observed in both systems.

3. **Natural law theory:** The natural law theory is the third theory of legal convergence.

✓ This theory argues that the common nature of human beings will eventually lead to the creation of similar social structures, laws and legal systems.

✓ This common nature will therefore be observed and expressed by law. Unfortunately, there is no universal consensus about which common characteristics of human beings and human society determine, or ought to determine, the character of the legal system.

✓ As Merry man and Clark put it, the argument that we are all one does not take us very far if there is substantial disagreement about the nature of law.

4. **The Marxist theory:** The Marxist thesis is the final philosophy of legal divergence.

✓ It is basically argues that law is mere superstructure, i.e. it 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.

Legal Transplantation

The other names of Legal transplantation 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. For example; countries borrowed from the Roman Legal system that ceases to exist centuries ago. 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 or it may be a massive borrowing.

Reasons for legal transplantation:

- Accessibility of the law in terms of language
- Meritoriousness of the laws in terms of organizations,
- The laws were transplanted to other systems and found out to be fruitful.
- The recipient country decided to modernize its legal system.
- A country may adopt foreign laws as a result of migration or commercial intercourse.
- A country may adopt the laws of another country because the important elites 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 (receive by force).

Historical Account of Legal Transplantation:

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

1. **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.
2. **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.
3. **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.

Common law was directly linked through its territorial expansion with each of the principal nations in which the common law developed. 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.

Views on Legal Transplantation

There are three views (theories) about legal transplantation.

1. **Custom theory:** It was elaborated by 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. Example; if X community attempts to take the laws of 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.
2. **Legal engineering:** it is an opposing theory developed by Alan Watson. According to this theory there is no unique connection between law and society. This theory also holds that no community

has ever been legally self-sufficient in the history of mankind. 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.

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.

Second 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.

3. **Hybrid degree of transferability approach:** It is articulated by Kahn-Freund.

It strike a middle ground and says in some areas of laws, 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; hence in such cases, developing countries do not have a choice; rather than to borrow laws.

In other areas of laws such as family law, inheritance laws and land laws, developing countries have longstanding laws and in these cases it is difficult to transplant laws and even if transplantation takes place, the laws so transplanted will not be welcomed.

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.

Legal penetration versus legal extension

1. **Legal penetration:** This is the assumption that those responsible for the importation (actors of massive importations) of laws aspire (desire) at the time of transplantation that the transplanted laws would affect human conducts possibly hundred percent or that the 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.
2. **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. In the context of developing countries that transplanted laws from the western countries such as Ethiopia, there is a gap between legal extension and legal penetration.

The gap is not a small one; it is quite substantial.

Reasons for the gap

1. The imported laws have not yet been sufficiently communicated to the people.
2. The laws are published in the English language and Amharic in a country where millions of people do not understand either of these languages.
3. There is also a huge percentage of illiterate population who cannot read and write while the imported laws assume a literate society.
4. The state lacks the necessary resources to implement some of the provisions of the imported laws.
5. 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 customary laws and they have inherited dispute settlement mechanisms that were used by their ancestors. In short the force of tradition is the reason behind the tacit resistant put up against imported laws.
6. Finally, it is argued that the transplanted laws could not succeed because of the assumption of customary laws are different from the assumption of western laws. The customary laws focus on the group; paramount importance is attached to the survival of the collectivity, while that of western laws are designed for and around the interests of an individual.