Legal History and Customary Law

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PART ONE

Legal History and Tradition

I. Introductory Remarks

❖ **What is legal history?**

Legal history is a systematic/ organized 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 systems of the world.**
- **it involves 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.**

Ctd.

Approaches to studying Legal History

a. Unitary/isolationist approach

This approach states that the subject of legal history should focus

on the past societies themselves and,

- the legal rules,
- legal principles,
- legal standards and the changes therein

And disregard factors such as social, political and economic for the sole purpose of understanding those past systems.

b. Sociological/ Holistic Approach

- includes the study of economic, religious, social &political institutions of past societies.

Ctd.

- 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 impel it to organize and search for solutions.

c. 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.

Ctd.

- **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); or**
- **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); or**
- **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.**

d. Mixed Approach

- **is a combination of the unitary, the holistic and technical approaches.**
-

Ctd.

- **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.**
- **E.g. 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).**
- 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.**

2. The Importance of 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.

Ctd.

- **The study of legal history is important not only to appreciate the present legal systems but also to help us solve legal problems of today.**
- **Certain legal problems the present legal systems face cannot be solved without reference to the past.**
- **legal history allows us to appreciate how different communities have solved the same legal problems in quite different manners.**
  - **Challenges in the study of legal history**
    - lack of adequate, sufficient and reliable evidence of past events

What is a " legal system" ?

A legal system is defined as a synergy(the cumulative interplay) 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 complexity of a legal system varies depending on the stage of development of a country. That is, the reader cannot expect the Mesopotamian legal system to show the sophistication the current English legal system has.**

- **Moreover, the reader should not expect the Greek legal system to manifest the complexity of the present day French legal system in terms of the arrangement of the legal rules, the classification of laws, the legal professionals, recording etc.**

What could be the purpose of legal systems?

- **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 maintain the survival of a theocratic system.**
- **A legal system may exist at national or regional or international level.**

Ctd.

- **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 and of course includes legal actors.**

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**

Classification of legal systems

- **A great number of researchers have proposed a variety of criteria in their efforts to categorize systems into groups.**
- **Some of these criteria are: geography, language, sources of law, substance of law, ideology, legal technique and the system of conception of justice.**
- **However, for Zweigert and Kotz it is not possible to classify legal systems into legal families merely by using a single criterion.**
- **Instead it is sound to devise a set of tests that go through all legal systems that are determined to belong to the same family.**

Zweigert and Kotz identify the following elements constituting the legal style of any legal system and these are;

a. Historical background and development,

b. Predominant characteristics modes of thought in legal matters (distinctive mode of legal thinking)- the Germanic and Romanistic families (Italian, Spanish, French, Romania, Belgium..) are marked by a tendency to use abstract legal norms, to have a well-articulated system containing well-defined areas of law.

C. The kind of legal sources it acknowledges and the way it handles them- are distinguishing feature of the Islamic and Hindu legal systems and also help you to divide the Anglo-American from the continental legal families.

However, you cannot use sources of law as a basis for distinguishing between the Germanic, Nordic and Romanistic legal families.

Ctd.

d. Ideology- legal ideology means the political or economic doctrines or religious beliefs of the system in question.

- **its also 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.**

- **Zweigert and Kotz assert that there are eight modern legal systems:**

- **the Romanistic,**
- **the Germanic,**
- **the Anglo-American,**
- **the Nordic,**
- **Islamic and the Hindu**
- **the Far Eastern**
- **the Socialist,**

Ctd.

Professor Rene David`s Alternative Test

He holds the position that the classification of legal traditions should not be based on the similarity or dissimilarity of any particular legal rules and instead he proposes two tests that should be used together.

- **legal concepts and techniques employed by the system- 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.**
- **the system‘s ideology - the philosophical, political, and economic principles of the society in which the legal system operates.**

Ctd.

According to David's criteria of classification the major legal systems are:

- **the Romano-Germanic,**
- **Socialist,**
- **the Anglo-American,**
- **Muslim,**
- **Hindu,**
- **the Far Eastern,**
- **the African and Malagasy**

➢ **However, 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.**

Ctd.

why classifying legal systems?

a. **Technical reasons**

- **The first reason for the classification of the major legal systems of the world is technical because the study of the history of laws of societies should be 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.**
- **Such division and sub-division make the study of the subject convenient and gives your thought some degree of organization.**
- **Thus. Classification of legal systems helps you to arrange the mass of legal systems in an understandable order; understand and assimilate the mass of detail**.

Ctd.

b. Authority

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.

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.
- **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.**

Ctd.

- **Thus, by 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.**
- **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:**

➢ **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).

➢ **those legal systems that undergo basic and frequent changes and**

➢ **thirdly those legal systems which experience little or no change.**

Ctd.

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.**
- **Further, the lending system may be an existing legal system or a past legal system. E.g. Countries could borrow from the Roman legal system that ceased to exist centuries ago.**
- **However, the recipient legal system should be an existing one or a system at its initial stage of development.**

Ctd.

- **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.**
- **Recognizing 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.**

Why legal transplantation?(factors)

A country may adopt the laws of another country for reasons such as;

- ✓ 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.
- ✓ ease of accessibility in terms of language
- ✓ merit and fruitfulness of the law in other legal systems
- ✓ commercial transactions and merit of the laws in terms of organization
- ✓

Ctd.

Perspectives on legal transplantation

1. Custom or the historical Theory

F. von. Savigny coined this theory

- **These approach states that law and society have unique relationships. That is, law and society have inherent connections.**
- **Laws are related to the identity of a society for which they are created.**
- **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.**
- **The proponents of the custom theory hold that legal transplantation will never solve the problems of a recipient legal system;**

Ctd.

2. Social engineering or the instrumentality Theory

Alan Watson was its major proponent

- The theory 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 for this theory

- The first reason is 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. – Romans took from the Greeks (public laws)
- 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?

Ctd.

3. The Hybrid Theory/ degree of transferability approach

- This theory was proposed by Kahn-Freund
- and states that the contexts (the practical situation and need) of the recipient country should be studied well before the borrowing of laws is made.
- _That is, 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 cases such as in 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.

Ctd.

Legal Penetration Vs. Legal extension

Legal Penetration

- _The legal experts responsible for the importation of laws could have an escalated aspiration that the transplanted laws would impact the behaviors or conducts of the people completely.
- Thus, the notion of legal penetration denotes 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.

Ctd.

Legal Extension

- Legal extension refers to the extent to which people or the state actors are actually following the imported laws.
- Thus, if legal penetration is the aspiration, legal extension is the reality.
- The question in legal extension lies on 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.
- **legal penetration vs. legal extension in the Ethiopian case**

e.g. Family law, (equality of the husband and wife) but has the imported laws actually changed the pattern of behaviors and conducts of Ethiopians? Does the existing customary laws confirm with the imported laws?

Ctd.

The gaps between the legal prescriptions and their practical impact could be attributed to/ due to;

- Communication- proper and effective dissemination of the imported laws to the public
- if the state lacks the necessary resources to implement some of the provisions of the imported laws.
- if 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.
- 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 have a deep attachment to customary laws.
- the force of tradition is the reason behind the tacit resistance put up against imported laws.

CHAPTER TWO

Ancient legal systems of the world

Ctd.

The Mesopotamian legal system

- Legal historians consider this legal system as the first great legal system in human history.
- This legal system passed through three distinct stages
- The first stage was marked by the instability in the area due to the fights of several kingdoms contending for full complete control over the area.
- The legal system in this stage was characterized by diversity, brevity and fragmentation.
- The second stage was marked by the coming into power of Emperor Hammurabi and his code of laws (the code of Hammurabi) which were regarded by legal historians as the first real law code in the history of the human race.

features of the code of Hammurabi

1. The eye-for-an eye principle of punishment- and mitigating or softening punishment was not known in the Code of Hammurabi.

- ✓ The code imposed harsh or disproportionate penalties for offenses

Ctd.

2. The code was not systematically written/organized.

- The Code did not make any distinctions between public law and private law, and procedural law and substantive law as the distinction was not known by that time.

3. The code lasted for a long period of time- stability
4. 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. /a manifestation of their apprehension about the significance of laws being written and disclosed in advance.

The Greek Legal system

- _This legal system had made a paramount contribution to the development of public laws (governing the relation states have with citizens)
- __However, this legal system did not contribute to the development of private law in contrast to the Roman legal system and this was due to:

_____1.

Ctd.

- **The Greek did not build an empire**, unlike the Romans and the Mesopotamians. That is, 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 and accordingly, historians state that lack of viable political connection hampered the development of an elaborate private law.
- 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.

Ctd.

- **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 as ordinary people settled economic and social disputes on the basis of ethics and equity.
- 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 and precedents was missing from the Greek legal system.

The Roman legal System

- The Roman legal system has three stages

Phase I

- **lasted from 8th C. to 2nd BC.**
- **The laws in the city of Rome were at the lowest stage of development in terms of organization and had narrower coverage.**
- Later on, Rome formulated its laws in the form of one of the ancient codes named the **"Twelve tables" in 450 BC.**

- was the earliest attempt by the Romans to create a code of law and the earliest surviving legal literature from the Romans
- The twelve tables were developed in response to popular demand as lower class demanded that the laws should be known in advance.

The features of the Twelve tables

- **_The twelve tables promoted the principle of an eye for an eye.**
- 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 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 (secularization of the legal system)

Ctd.

The Relevance of the twelve tables

1. Procedural significance

- **The Twelve Tables established a procedural framework for the prompt and efficient adjudication of civil disputes.**

- **An array of procedures were enacted specifically to govern the conduct of civil litigation. That is, the procedural construct which was established by the Twelve Tables preserved in the individual - and not the state - the primary responsibility for pursuing and pressing civil claims and rights.**

- **The Roman civil adjudicatory process thus was not a totalitarian one, in which the state assumed the role of a protector but rather one founded on individual rights, in which the state provided only as much procedure as was needed to support the enforcement of those rights.**

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Ctd.

2. Replaced self-redress with judicial redress

- Before their enactment, private redress, under which an injured party was free to indulge in revenge, was widespread and led to constant disturbances, and violence in the community.
- elevating the role of the state as the peaceful arbiter of disputes among citizens to a degree far surpassing that of any prior civilization.
- The prescribed remedy in most cases under the Twelve Tables was to provide a retaliation in kind by replacing the thing injured or damaged – "**the Lex talionus**." – law of retaliation
- Usually, in cases of damage to property, compensation was made by either replacing or repairing the thing injured. In limited circumstances, a victim was given the option of accepting monetary damages.

Ctd.

- **The Lex Aquilla-** modified the eye-for-an eye principle of compensation in the Twelve Tables and instead provided for monetary compensation as a primary mode of remedy unlike the lex talionus
- A critical aspect of the Lex Aquilia was that it penalized only affirmative acts; that is, a mere failure to act was insufficient to trigger liability. Thus, for example, under the original Lex Aquilia, an action could be brought only if death or injury resulted from direct contact between the body of the wrongdoer and the thing. E.g- property damage caused by the wrongdoer's failure to prevent a property damage- while being in charge of protection

Some of the deficits of the Twelve Tables

- The procedural framework was primitive, incomplete, and cumbersome.
- The forms of action were inflexible and were characterized by pleading formulae(Which did not take into account the nature of the actions being initiated/ the nature of the violations) that had to be followed fastidiously.
- There was no mechanism for equitable relief that considers the specific nature of the cases.
-

Ctd.

The Law of Justinian

- _The Roman empire disintegrated after the 2nd AD into eastern and western Roman Empire
- Emperor Justinian was one of the famous emperors of the Eastern Roman Empire and he sponsored a code called Corpus Juris Civilis in the 6th century AD (also known as the Justinian compilation or the code of Justinian.
- This code is taken as the origin of the civil law tradition. Jurists coined the term `justice` after the name of Emperor Justinian.

The corpus Juris Civilis / The Justinian Compilation/code

- ✓ 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.

- ✓ Prime Minister Tribonian headed the commission and its members were mostly law professors.
- ✓ The assignment was completed by 534 A.D and since medieval times the Justinian compilation is known as *Corpus Juris Civilis*.
- ✓ _The compilation was designed to replace all literature and all legislation, to achieve unification of law, and to make the law accessible to all.
- ➢ the compilation was regarded as complete, clear and the values in it were undisputable and thus the emperor banned all comments and notes against the code with an exception of translations.
- ➢ 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 Justinian legislation is divided into four parts, which, in chronological order, are: the *Code*, the *Digest*, the *Institutes*, and the *Novellae*,

1. 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

Ctd.

- 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 AD. The Code is extant as revised. However, the text of the original Code is lost.
- The contents of the Code are systematically arranged according to the subject matter regulated.

2. The Digest

- The Digest (Pandects) is the most important part of the Justinian compilation.
- It contains fragments of classical legal texts digested according to the subject matter regulated. The writers digested range from the 1st century B.C. to the 4th century A.D.
- Two thousand books were examined with more than three million lines, and were condensed to 150,000 lines

Ctd.

- The Digest consists of 50 Books subdivided into titles.
- 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 Digest acquired the force of law on December 30, 533 AD.

3. **The Institutes**

- was an introductory document to the Digest in order to assist the reader in better understanding the digest.
- The Institutes are basically a textbook enacted into law for educational purposes. It contains a description of the law.
- The sources of the particular provisions, however, have not been stated.
- The Institutes were promulgated on November 21, 533 and were given the force of law simultaneously with the Digest on December 30, 533 AD.

Ctd.

4. The Novellae/ new imperial degrees

- ✓ is a collection of decrees issued by Justinian.
- ✓ They contain provisions concerning administrative reforms, church policies, and private law.
- ✓ It embodies scattered ideas and rules which were systematized and resulted in partial re-codification.
- ✓ It particularly affected the law of marriage, the status of illegitimate children, and the law of successions.
- ✓ 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.

Ctd.

The features of law in the early legal system

1. Law in the Mesopotamian legal system

legitimacy of Hammurabi's code

- Emperor Hammurabi sought the legitimacy of his code by relating the sources of his power from ancient gods and presented himself as the agent of these gods on earth.
- Thus, whatever he did including the making of his Code was done under the guidance and instruction of the gods.
- 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.

What was the purpose of propagating the divine- origin of laws?

- firstly, it enabled the emperor to easily secure the obedience of his subjects.
- religion was accepted as the main source of law

–

Ctd.

- The theory of divine law served a significant stabilizing factor as the Mesopotamians could not dare to alter the divine laws.
- However, the divine-origin of laws has severely affected the empirical feature of the law. That is, the laws lacked general principles, lacked proper organization in to divisions and sub-divisions.

The Greek legal system

Sources of legitimacy of the Greek laws

- 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 enacted had to be consistent with the principles of natural law.
- Natural law is a system of law based on a close observation of human nature and based on values that are intrinsic to human nature which can be deduced and applied independent of positive law.
- people have inherent rights which are not conferred by an act of legislation but by God, reason or nature.

Ctd.

- The Greek, however, faced contradictions between the two criteria. That is, by its nature, positive law was thought to be particular, mutable and temporal.
- Positive law means a law created by human beings and positive law was time and place specific. Positive law was thus relative to time, place and community.
- __While, 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).
- __The Greek faced contradiction since they accepted two quite different theories at the same time and endeavored to implement those

Ctd.

E.g.

- 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.
- Generally, natural law was presented as absolute while positive law was approached as relative.
- 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.
-

How did the Greek attempt to maintain a balance between the dictates of natural law (continuity) and the dictates of positive law (change)?

The Greeks came up with three solutions to solve the contradictions

1. Screening

- Any male adult Athenian citizen could initiate laws. These proposed laws would be examined by a city council.
- When the city council approved the proposed laws, it passed on to the popular assembly.
- The popular assembly was a collection of male adult Athenian citizens, as the Greek believed in direct popular representation.

2. Taking punitive measures

- a. A citizen who proposed unjust laws would be condemned, depending on the gravity of the situation even to exile from Athens.
- b. 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.
- c. special body named *Nemothia* responsible for changing the positive law whenever the situation required so.

Ctd.

The Roman Legal System

Main Features of the Roman legal system

Before the 5th c 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 and people living in the city-state of Rome regarded themselves as passive participants in the legal system for they thought that they had had nothing to do with the creation, modification and the application of laws.

Mid 5th c. BC.

- 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.

Ctd.

2nd c BC- 2nd AD

- The system acquired technical and ethical bases. That is, the legal system transformed itself from being empirical into being technical and ethical.
- _The legal system obtained technical basis means that the quality of decisions was enhanced. Lawyers emerged. The number of commentaries and legal writings increased.
- _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.
- 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. Thus, ethical conception characterizes the Roman legal system.

Ctd.

Common features of the early legal systems

- **stability-**he early systems had shown an amazing degree of stability, which was attributed to the conservative nature of ancient societies.
- the changes were very gradual and did not affect the fundamental assumptions. If changes had to be made, they were made by way of exceptions.
- The legal systems in the early periods demonstrate the short coming of operating on the assumption that human beings were not equal.
- The Mesopotamians maintained the institutions of slavery. The Greek and the Romans did the same.
- the treatment of foreigners- Under the three systems, foreigners did have few rights; they deprived foreigners of several rights.
- Religious in origin; 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.

Ctd.

- Laws were non-technical; In the three systems laws initially were non-technical, which means the legal rules lacked developed principles and developed institutions.
- Lacked classifications; the legal rules lacked distinctions and sub-distinctions unlike modern state law which contains 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	Modern legal systems
1. Sought to regulate all aspects of human relations tending to leave little space for personal decisions	Claim to govern some aspects of individual behavior leaving some others to his/her personal choice
2. Religious conceptions (e.g., the Greek legal system prior to 5th BC, the Roman legal system before 5th BC and the entire life span of the Mesopotamian legal system.)	Seek to address secular affairs of persons.
3. Stability owing to nature, religion and the conservative nature of early societies.	Experience major and basic changes (e.g., the French legal system during the revolution and the Ethiopian legal system after 1974 went to changes that affected every important lives of these societies)

Ctd.

4. Empirical in nature as expressed via lack of classifications and sub-classifications, lack of organizations, lack of generalities, and lack of modern legal infrastructures.	**Technical**
5. Human beings were treated as unequal	Formal equality is declared: the laws have declared formal equality of women with men and paternalism diminished in importance.

CHAPTER THREE

Major Legal Traditions of the World

Ctd.

The French Legal System

- The French legal system belongs to the civil law tradition as the system has borrowed largely from the Roman legal system.

What is Civil law? / The Civil law Vs. the Common law tradition

- The meaning of the words —civil law‖ has not been the same in all-historical periods. That is, In the framework of early and classical Roman law *"jus civile"* was the law governing the relations of Roman Citizens.
- In the Middle Ages, the term ``civil law`` referred mostly to the Justinian legislation and the accumulated doctrine of the commentators;

Ctd.

- 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 initial working assumption/guiding presumptions 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

Ctd.

- Thus, the function of the judge was assumed to be merely applying the written law to the facts.
- **_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 only in charge of applying the laws to the facts.
- (c) the believed in legislative supremacy.

Ctd.

- However, in the codes there 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 and the executive has started issuing tones of law through **delegation**.

The Common law

- The term ``common law`` is used as opposed to statue law, which is the enactment of the parliament in England.
- . 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/ Precedent/ Judge made laws.

Ctd.

Why did France accept Roman law?

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 Era of customary laws in France

- Before the French Revolution, traditional customary laws prevailed in the north and the rules were Germanic customs while Roman law influenced the southern part of France.
- The existence of diverse customary rules and edicts created some degree of legal uncertainty in France.
- 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 as Louis XIV, the Sun King, had summed up his approach to lawmaking with his famous phrase —It is legal because I wish it.

Ctd.

- 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.

Ctd.

The attempt to record customary laws

- The proliferation of custom and the difficulty of discovering their content led to great legal uncertainty.
- 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.
- 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.
-

Ctd.

The Codification phase

- 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, Practitioners and royal administrators in France were the key actors who favored France‘s effort to unify its private law. _
- However, 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. And this codification only made it easier to see the differences between them.
- Accordingly, at the eve of the French Revolution, diversity of laws and thus legal uncertainty was the attribute of French law.
- _

Ctd.

The French Revolution (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.

- 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 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.

Ctd.

- 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.

Ctd.

The French Civil Code/ The Code of Napoleon of 1804

- The code was 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.
- The Code was the product of a revolutionary movement./ unique to France/.
- In France, it was the bourgeoisie, which by revolutionary means had brought down the socially obsolete institutions of the old regime.
- 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
- 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.

Ctd.

Features of the French Civil Code

1.The code stipulates that the function of the legislature is to set general ppls. That is, Interference with the resolution of questions of interpretation affecting the affairs of private individuals would be time consuming and undignified.

- In addition, the quality of legislation would suffer and lawsuits would be prolonged.

2. The Code avoids the danger of being too detailed- as even the most ingenious legislator could not foresee and determine all the possible problems that might arise. That is, the Code leaves room for interpretation.

- Thus, room must be left for judicial decisions to make the law applicable to unforeseen individual cases and suited to changing circumstances of society.

3. The Code was a masterpiece in terms of language and writing style- clarity, unambiguous wording, absence of jargon and this had in fact led to the popularity of the Code in the Country.

–

- 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.
- **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.

. Immoral, unethical, or contractual agreements compromising public interest

Ctd.

The spread of French law

- French law spread first to Europe, then, to Africa, Asia and Latin America.
- _The French Civil Code was transplanted to European countries primarily through military force.
- It spread to Africa and Asia through colonial spread of the French Empire.
- 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. _

Ctd.

The German Legal System

- The German legal system belongs to the civil law tradition as it has borrowed from Roman law.
- In Germany, by the 13th century, a legal system of written law in statute books and unwritten customary law coexisted side by side.
- 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 also 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 or kingdoms.

How did Roman law finds its way into Germany?

- Germany came in contact with Roman law relatively late (by the middle of 15th century). The reception of Roman law was much greater in Germany than in France.

1. The reduction of imperial power in favor of too many

Ctd.

2. 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.

Why did not Germany have common private law?

1. 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 lawyers with royal endorsement to make the effort to produce a unified private law.

Ctd.

- Thus, there was thus a legal vacuum and gave way for Roman law to flower.
- Roman law began to dominate not because 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. – like a set of formula.
- 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.

Modern German laws

- Modern German law actually begins with the revived interest in natural law combined with a

Ctd.

- The series of political transformations in Germany after the Napoleonic period centered on the development of national identity.
- For the next 30 years, the drafting of codes based on national needs and culture occupied all of German legal scholarship.

- Subsequently, new codes were enacted throughout the Empire for the first time.
- commercial code.
- criminal code in 1851,
- codes of civil and criminal procedure were adopted in 1877.

Ctd.

The **German Civil Code**

- The first move towards the codifications of unified German private law occurred about the middle of 19th,c. 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.

Features of the German civil code

- 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 extreme individualism. 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

Ctd.

- Its spirit was retrospective. It sought to maintain a situation favorable to the establishment. That is, 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 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. That is,
  - Commerce and industry were becoming much more important economically than farming,
  - and urban populations were expanding rapidly, especially with industrial workers.

Ctd.

To whom the code is more favourable?

- the typical addressee was not the small artisan on the factory worker but rather the well off 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 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.

Ctd.

The spread of German law

- 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 the state was a latecomer to the scramble for different parts of the world.

Ctd.

- 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.

Ctd.

The Common law tradition

The British legal system

- The English legal system is principally interested in precedents and types of case instead of trying to interpret legal statutory texts or analyzing concrete problems so as to fit them into the system conceptually.
- The English legal system is devoted to the careful and realistic discussion of live problem.
- No country has clung as firmly as England to its own style of law throughout the centuries.

Roman law influences?

- Minimal unlike in France and Germany

- England was not affected in practice by the idea of codification.
- England never had an explosive political upheaval such as the one occurred in France in 1789.
- Codification can be stated as the idea that the disorderly historical growth of law could be refined and planned into a generally comprehensible form as a result of deliberate and planned legislation used on a rational system.
- In France, one of the principal effects of the Revolution was to overturn the legal system of the old regime and replace it by a radically new system and such a thing has never happened to English law.
- England very early enjoyed a unified law. That is. England created the common law in the 14th century though This was not the case in France until 19th or in Germany until 19th C.
-

Ctd

- Thus, there never existed in England one of the essential factors behind the idea of codification. These factors on the Continent were the practical need to unify the law.
- The influence of Roman law was minor due to the existence of;-
- a closed organization,
- the professional solidarity, and the political influence which the class of English lawyers, who were devoted to the maintenance of the common law on grounds of principle and profit alike, had built up over three centuries.
- the professional guild of jurists- advocated for the common law).

Reading assignment for quiz

"Origin of case law" by O.F. Robinson, T.D. Fergus & W.M. Gordon, An Introduction to European Legal History 1985)- page – 129-130.

The role of Equity in the British legal system

- In 14th century parties who had lost a lawsuit in the king's courts on one of the grounds (the procedures before the royal court was too formalistic, problems relate to bribe and political influence which led for cases to be lost and there were technical errors).
- petitioned the king for an order compelling his adversary to do as morality and good conscience required

e..g. Sale contract- defictful items were sold

Ctd.

- Thus, 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".*
- Equity 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.

Ctd.

The Period of legal reform in the English legal system

Jeremy Bentham's role

- 19th England had encountered Economic and political upheavals following the Napoleonic war leading to spread of strikes and starvation across the country.

- The continent of Europe impoverished by Napoleon‘s wars, offered a very poor market outlet for English industry, so that the number of unemployed grew alarmingly and wages dropped.
- Accordingly, the forces of progress in England began to realize that political and social reforms were inevitable if a revolution was to be avoided.
- **Jeremy Bentham’s move for a legal reform**
- Advocated for the codification of laws replacing the case law system
- 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.

Ctd.

- The rules of common law often based on historical accident rather than rational design were simply obstacles in the way of the conservative practitioners
- 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.

Subsequently, as a result of the influences of Bentham and his followers, many laws were issued;

- the alteration of the court jurisdictions,
- change in the law of civil procedure and to a lesser degree, the substantive but no complete codification was made.

The spread of English law

- colonialism- 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

- 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 as law books, lawyers and trade relations within the colonies themselves and England.
- **The Introduction of the common law**
- Even though the colonies accepted the English common law it came with some exceptions and such exceptions were expressed through statutes.
- the exceptions were justified on grounds such as;
- some aspects of the common law were not suited for their local conditions indicating that the content of the law could be determined by conditions such as geography, social and economic conditions.
- The spiritual, political and economic ideas of the settlers were different from that of the British.

Ctd.

- Thus, the colonies introduced changes in criminal law, civil procedure, succession law, family law and land law as the settlers thought that these areas of law were expressions of feudal oppression.
- The colonies also de-professionalized the practice of law. The colonies changed the manner in which judges came to power.

In the aftermath of the civil war (1861-85)

- Immediately after the war, economic expansion opened the west.
- The doctrine of economic liberalism dominated the American economy. And 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.

Ctd.

The role of law professors/20th C.

_The emergence of the professors and their influence led to some changes including:-

- ____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
- _America witnessed the growing tendency of the state to subject economic life to supervision and control and deliberately to limit the freedom of activity of the trader whenever it might cause undesirable hardship to individual citizens
- _The third effect is related to legal writing, legal practice, legal education and court behavior. The law professors dismissed the formalistic, deductive and abstract legal reasoning. They concentrated on the concrete effects legal rules produce in the society.
- _

The Civil law Vs. Common law

1. Structure: code and precedent

- **a. Codification:** It has been suggested that civil law and common law differ because civil law is codified while common law is based on precedents.
- the main aspect of civil legal systems is that they give primacy to legislations as sources of law but However, there have been civil law countries without a Civil Code(: Germany before 1900, France before 1804, that is , without a comprehensive, systematically arranged document incorporating statues on a similar area.
- While in some common law jurisdictions there has been codifications of laws into a single comprehensive legal document (e,g. India has a codified criminal law even though their criminal laws are based on the British common law of crimes, English code for the sales of goods, Insurance act, criminal laws of various states in the US are codified)

Ctd.

- the difference between the civil law and the common law relates to the function of judicial precedents within each system: precedents are not binding in civil law while they are binding in common law.
- in all civil law countries deviation from settled judicial practice needs special justification; and in most civil law countries a jurisprudence constante is binding on all courts.

e.g. proc no 454/20005- made judicial precedent of the federal supreme court cassation bench binding upon all regional and federal courts.

- On the other hand, the doctrine of stare decisis/ precdent has been tempered in the United States and what may be called an American theory of precedents permits a great measure of flexibility.

2. Roman law influence

- The civil law is characterized by a direct derivation from, or wholesale adoption of, Roman law. On the contrary, common law is supposedly free from Roman law influences.
- However, no civil law country has ever received the entire body of Roman law; to be sure, modern codes have discarded obsolete doctrines, rules and institutions and have introduced new rules based on indigenous ideas

Ctd.

- The common law, on the other hand, has not been completely immune to the infiltration of Romanist thinking. That is, a certain spiritual affinity between Roman law and common law is noticeable.
- In contrast to modern civil law, common law is basically case law (as Roman law was); the development of equity jurisdiction in England has had counterparts in Rome; and both common law and Roman law are characterized by adherence to tradition, strong individualism, the practical approach, and by the absence of a separate body of commercial law.

3. Technique of reasoning / inductive Vs. deductive

- the technique of reasoning in civil law is deductive while in common law is inductive.
- the civil law is largely university made law, has been influenced by broad principles of natural law, and tends to be abstract: thus, the deductive approach seems to fit it best.
- But the inductive approach is not unknown in civil law: according to civilian theory gaps in the law are to be filled by analogy from settled rules of law or by a free creative jurisprudence.

- The common law is a practical judge-made law: thus the inductive approach is best suited for it.
- However, the deductive reasoning is also known to the common law and it is quite frequently applied in constitutional and statutory interpretation as well as in the application of broadly formulated principles of case law.

4. Legal philosophy

- it has been suggested that the civil law favors positivism, as a result of its preference for legislation, while common law favors the achievement of justice in concrete cases.

5. Aspects of the judicial process

- the most striking difference between the two systems of law is to be found in the psychological attitude of the judge towards legislation.
- In common law jurisdictions statutes tend to be narrowly construed, and, at times, ignored; in civil law countries judges and lawyers alike start their judicial reasoning from statutes as embodying general principles capable of covering any conceivable fact situation. It has been said: in common law statutes have the force of law because judges permit it; in civil law judges can legislate because statutes allow the practice.

What are the shared features of western legal tradition?

Harold J. Berman, Introductory Remarks: Why the History of Western Law Is Not Written, U. Ill. L. Rev. 511 (1984)- p152

1. Codification: 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.
2. public vs. 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.

3. legal institutions and other types of institutions: a relatively sharp distinction is made in the Western legal tradition between legal institutions and other types of institutions. Law has a certain character of its own, a relative autonomy; it is disembodied from religion, politics, morality, and custom, although it is, of course, influenced by them

Ctd.

4. Administration of legal institutions**:-** in the Western legal tradition the administration of legal institutions is entrusted to a special corps of people, called lawyers or jurists, who engage in legal activities on a professional basis as a more or less full-time occupation.

5. legal professionals are specially trained in a discrete body of higher learning identified as legal learning, with its own professional literature and its own professional schools or other places of training.

6. The supremacy of law over the political authorities. It is thought that law, at least in some respects, transcends politics; it binds the state itself.

- This belief also goes back to the late eleventh and the twelfth centuries and to the separation of the ecclesiastical from the secular power.
- The secular authorities, it was then argued, may make law, but they may not make it arbitrarily, and until they have lawfully remade it, they are to be bound by it.

Ctd.

The socialist legal tradition

- it was developed as an ideological challenge to the capitalist legal system represented by the civil law and common law.

Origins of the socialist legal tradition

- 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.

Communism vs. primitive societies

- In both primitive and communist systems, economic classes, private property, the state and law are non-existent.
- In both systems, governance would be by non-legal rules of morality. Because of the consensual nature of these rules,

Ctd.

- **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.
- 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 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 rules imposed by the people from below or a set of rules that spring from within the group.

- 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.
- 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. 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.

Ctd.

- 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.
- 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 devised as a machine for the preservation of the dictatorship of one class over another. The economically dominant class also acquires political dominance over the economically powerless class. 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.

Ctd.

Codification and socialist law

- Socialist law is featured by the tradition of codification.
- Legislation is recognized as the preeminent source of law; deductive reasoning and an inquisitorial procedure.
- Socialist law does not recognize the division of law into public and private law. Socialist legal traditions consider all law as public.

Law in the Socialist system v. western system

- In the west, law is understood as setting limits to politics by defining rights to individuals. In the socialist legal system, law is supposed to give untrammeled power to the communist party. Law in socialist society is taken as a tool for educating the human person about the worth of collective values. The source of law should emerge from the communist party alone, not from the representatives of the people.
- In the socialist system, the systems of property would be: state property, collective/mass property and personal property. All the key means of production should be placed in the hands of the state. Individuals should own only personal property means that amount and kind of property that would be necessary for the survival of individuals

Ctd.

- **The spread of socialist law**

- socialist revolutions in different parts of the world
- revolutionaries in Russia converted the anti-western dominant socialist thinking about law and society to a full-fledged legal system.
- Russia, later USSR, used its global hegemonic power to take socialist law and policies to different corners of the world. / esp., after the WWII the USSR emerged as the other powerful nation of the world along with the US.
- However, with the collapse of the USSR, the country that created, spread and sustained the socialist legal tradition, countries located in Eastern Europe and in Africa abandoned the system in favor of the civil law tradition.
-

Legal Convergence and Divergence

- Legal divergence and legal convergence are two opposing forces.
- Legal convergence brings legal systems of the world closer to one another while legal divergence drifts them apart.
- Legal convergence simplifies legal rules and institutions and it rests on uniformity.
- Legal divergence, on the other hand, complicates legal rules and institutions, as legal divergence rests on essential differences.

What is 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.

Ctd.

- Instead you may find two or more legal systems that are substantially similar and by the same token it is unlikely for you to get two or more legal systems that are 100% percent dissimilar.
- Legal convergence is a process because, on some occasions, you may find factors that bring two or more legal systems of the world closer to one another. (e.g. progresses made by modernization could push for the simplification of the differences between legal systems for smooth transactions, to accelerate commercial interactions among nations through their commercial entities). – globalization- 20th c.

Ctd.

Why 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, promotes the diffusion of culture and leads to international understanding.

- **Legal convergence also pushes human beings away from the excesses of legal nationalism (a doctrine that unduly focuses on differences of laws across nations).**

- 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.

What factors could hinder legal convergence?

- There is likely to be conservative inertia, which means a tendency to cling to the familiar and to treat it as organically rooted in the culture, rather than as mere superficial structure.
- As lawyers may think of their legal systems as important. They may resist efforts to deprive their legal order of its unique features and It takes a strongly persuasive case to overcome this kind of legal nationalism.

What about Legal convergence in the contemporary world ?

- For centuries , differences between legal systems have been regarded as inconveniences that have to be overcome.
- The common law and civil law systems are clearly differentiated just in historical heritage.

Ctd.

- Currently, despite the substantial differences in attitude towards case law and legislation, both the civil and common law legal systems are converging in their use of these sources of law i.e. case law and legislation.

- **That is, in England for example, there has been a noticeable and fairly dramatic increase in the amount of legislation since 1979.**

- **The English legal system has begun to make more active use of the legislative process, as a means of implementing more speedy legal reforms rather than to allow the courts to develop the law at their own pace, as they have been doing for several 100 years**

- **On the other hand, civil law systems are beginning to rely increasingly on case law, particularly in the German constitutional courts and the French administrative courts.**

- **Even in subject areas where Codes and statutes have traditionally been the single authoritative source, the discovery of several "gaps" in the law has meant that the judges have been given a far greater "lawmaking role"**

- **Since the two main Civil Codes were enacted in the early and late 19th century in France and Germany, the drafters could not have anticipated the pace, scale or technology of the modern 20th century.**

- **Civil law judges have, therefore, had to create new legal rules to cope with situations that could not have been envisaged by the legislators of the Codes. – courts can't return cases back stating that there are no laws on to govern that case**

What is 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 .**
- **Legal divergence should be seen as a process and degree. Legal divergence 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**

What are the approaches to legal divergence and convergence ?

1. **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.
- **the theory holds that legal systems move from the less developed stage to a more advanced stage of development.**

2. 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.**
- This commonality of human nature would be expressed through common laws.

3. The Marxist theory:-

- is the philosophy of legal divergence.
- Marxist theory basically argues that 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 from that of western 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.

4. The "*jus commune*":-

- **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: or the law of Roman Catholic Church-the universal Church**. (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,**
- **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
-

- **Criticisms against this theory**
- the medieval *jus commune* only applied throughout Christendom and not to large areas of the world outside it.
- Further, it was not clear, even within Western Europe, that the *jus commune* was a normal accepted part of the civilized world, as it existed then. . England, for instance, was never part of the *jus commune.*
- A final difficulty with this theory is that it argues on the basis of the disruption caused by the nation State, whereas the nation State actually unified the many diverse laws of the towns, communes and principalities into one major convergence of laws within its jurisdiction.

CHAPTER FOUR

ASPECTS OF THE LEGAL SYSTEM IN ETHIOPIA

Ctd.

Questions for class reflections

- **#1. Conceptions of Law in Ethiopia**

Law as a gift of a supernatural power

"*Melaku Geboye, The Law as An Instrument of Social Change with Particular Reference to the Condition of Marriage under the Civil Code of Ethiopia: Failure and Successes of the Code"*

- **#2. Does Ethiopia have a legal system?**

"John W. Van Doren, Positivism and the Rule of Law, Formal Systems or Concealed Values: A Case Study of the Ethiopian Legal System 3 J. Transnat'l L. & Pol'y 165 (1994)"

- **#3. The sources of the six codes**

Preliminary issues

- **Sources**
- **Gaps**
- **Extent of accommodation**
- **Legal structure &**
- **The political land scape**

Ctd.

#4. Sources of the six codes

#5. The background to the six codes

#6. The development of the Ethiopian Penal law

#7. The judicial system of Ethiopia

PART II

CUSTOMARY LAW

CHAPTER ONE

INTRODUCTION TO BASIC NOTIONS

Ctd.

- Custom is a norm of action, percept or rules of conduct, which is generally accepted and practiced by group of people.
- Custom is a rule or law set by the people themselves by which they voluntarily accept to govern their actions.
- A custom can be partial, specific with regard to a certain subject matter or locality or general custom applicable through out the country.
- Customary law is not the mere stipulation of rights and obligation in a particular community but it is the mechanism of resolving dispute.
- There is a procedure to resolve disputes without the assistance of the institutionalized justice system.

Ctd.

- As custom varies from place to place, and so there is no single accepted definition of it and different scholars define customary law in different ways.
- However, it may be defined as a rule of conduct, which is accepted and governs a group of people.
- “mores” (plural of Latin _mos‘ meaning custom) defines mores as involving several sanctions when behavior deviates from the customary rule of the group.
- some scholars have referred to customary law as folk law, people‘s law, unofficial law, indigenous law or primitive law often implying its inferior positions as compared with the modern western state originated laws.

Ctd.

- Customary law is unwritten law and kept in the memory of people or elders. Therefore, when a case or dispute arises, the interested party have to ask these people for a “solution”.
- Customary law involves spontaneously evolved rules emerging through dispute and adjudication, customary law thus, provides a rather reliable process for discovering the natural law, because spontaneously evolved and voluntarily followed custom is more likely to result in mutual advantages than a rule imposed by a powerful group.
-

Types of customs

1. **Conventional custom**:- is one whose authority is conditional on its acceptance and incorporation in agreements between the parties to be bound by it.

- The binding authority of conventional custom emanates from not because it is in advance incorporated to the law, but because the parties have accepted it as practice.
- Fitzgerald argue that usage or conventional custom is, as has been indicated, on established practice which is legally binding, not because of any legal authority independently possessed by it, but because it has been expressly or impliedly incorporated in a contract between the parties concerned.
- Fitzgerald further argues how conventional custom may be applicable in the area of contract. He says that in the contract entered between two parties the implied terms of the contract is supplied by implication to make the contract workable and complete.

Ctd.

- In the absence of contract with fully expressed terms, it is advisable for the courts to look for the presumed intention of the parties by accepted business practice of a particular contract.
- Thus, the law presumes that where persons enter into a contract in any matter in respect of which there exists some established usage, and to incorporate it as a term of contract in the absence of any expressed indication of a contrary intention.
- in point of duration the custom shall be so well established, and therefore so notorious, as to render reasonable the legal presumption that it is impliedly incorporated in agreements made in respect of the subject matter.

e.g. costs of delivery/shipment

2. Legal custom

- is one whose legal authority is absolute, and one which in itself possesses the force of law.

Ctd.

- It is independently sufficient to create legal rights and obligation without prior consent of the parties.
- Such custom is that which is effective as a source of law and legal rights directly and per se, and not merely indirectly through the medium of agreement in the manner already explained.

Types of legal customs

1. Local custom

- Local custom, as the name indicates, is the custom whose applicability is limited to particular areas.
- It prevails only in defined locality. The present day local customs consists of the most part of customary rights vested in the in habitants of a particular place to the use for diverse purposes of land held by others in private ownership. – the right indigenous people have over their inhibitants/ land which in fact is associated with their way of life, their identity and mode of survival.
-

In order that a local custom may be valid and operative as a source of law, and duly considering the public interest, it must conform to certain requirements laid down by law.

(a) must not conflict with any fundamental principle of statute laws; /

(b) must have existed from time immemorial;

(c) has been continuously observed and peacefully enjoyed; be certain;

(e) must not conflict with other established customs;

(f) and be reasonable.

2. National Customary law:

- National customary law is also called general customary law. There is a legal requirement for the general custom too. As it is said for a local custom, there is time requirement for a general custom. There are also other requirements:

Ctd.

- The very same considerations of public interest which induced our early law to impose up on local custom the requirement of immemorial antiquity are applicable with equal force to the general custom of the realm.
- The public interest requires that modern custom shall conform to the law, and not that the law shall conform automatically to newly established customs.

Customary Practice versus Customary Law:

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

Ctd.

Customary laws V. state laws/ positive laws

What are their similarities?

- _dispute resolution
- _binding force each has though they differ in application/ social obligation/ the members of the community has accepted them as laws v. state backed obligation
- Both of them can adjust to the changing circumstances/ changing social, economic and political circumstances

What are their differences ?

- _written/unwritten
- _codified V. customary law passes from one generation to the next through songs, chants, proverbs
- _the fallibility of human memory alone must account for a good deal of gradual erosion of an accretion to the body of customary law.- lack of recording and heavy reliance on the accurate memory of village elders could led to the slow extinction of some customary norms

- organized body to enact, interpret and enforce the law made by the state, i.e., positive law. V. lack of institutionalized body to get assurance of being observed.
- customary laws lack the institution which is strongly organized and dedicated only for the enforcement of customary law/
- statute law is superior in that rules are logically arranged and may easily be discovered. However, the predominately unwritten nature of customary law makes it difficult to ascertain the rule thereof.

Custom, Habit, and convention

- _A habit is a course of conduct which we regularly, though not necessarily invariably, pursue but without any sense of external obligation or compulsion to do so.
- Such habits may become extremely rigid, for it is part of the psychological make-up of human beings that they tend to form habits, and without this tendency life would be so erratic that social order would be impossible.
- Some individuals are more regular in their habits than others.
- _habits generally is that they **are not regarded as socially compulsive.**

Custom:- socially obligatory element that is characteristic of customary observance.

- The vital difference, however, between such customs and habits of the kind previously referred to is that those who accept the customs and adhere to them regard themselves as in some way bound or obliged to observe them. – fear of societal judgment
- _it is customary for a man to dress in public in a certain way, to eat with a knife and fork, and so forth. These rules are neither absolute nor regarded as equally obligatory by all concerned
- _customs /social norms/ pyschological attachment to adhere to social norms (to be regarded as a person with proper manners & fear of societal judgments)V. legal norms binds prohibits individuals not to act.

Ctd.

- The ordinary citizen visiting a restaurant no more considers himself free to pick up his food in his fingers than to assault his Neighbour (this is prohibited by law and have legal sanctions).

- Although he is unlikely to analyze the reasons for this it seems clear that he regards himself as, in the one case, subject to a binding social norm or rule forbidding certain eating habits in public, as, in the other case, he feels bound by a legal norm or rule forbidding the use of physical violence.

Ctd.

- **Convention:**- (at societal level unlike habits which are observed at a personal level) Lying between habit and custom, in the sense explained, are to be found in a given society certain observances which, while not regarded as fully obligatory, may nevertheless be regarded as proper modes of behavior which people are expected to carry out, though in practice it is recognized they frequently fail to do so, and such omissions are accordingly tolerated.
- Such usages may be referred to as conventions, and as existing examples may be suggested the acknowledging of letters or of greetings.

Ctd.

- The weakness of such conventions may be due to the fact that they represent the attenuated survivals of customs of an earlier period, for instance, the now fast disappearing modes of etiquette towards women, such as offering them a seat in a public vehicle.
- The special feature, then, of conventional behaviour is that while particular individuals may feel themselves bound to observe it, it is not regarded as generally binding, and the individual may largely please himself whether he conforms or not.

- It will be observed that whereas both customs and conventions are normative in the sense that they establish rules of conduct for compliance, habits do not refer to or depend on norms, but simply involve regularities of behaviour which are in fact observed.
- Many, if not most, habits never assume a normative character, but remain on the level of personal idiosyncrasy.

Theories of Customary Laws

- what is required in order to transform customary practices having (even if the usage is general and the custom has flourished for long) in to law or for custom to be regarded as law.
- Thus, main problem for any theory of customary law is determining the nature of the additional factor required to transform custom into law.

1. The tacit consent of all:- The Roman sources clearly indicate that some additional factor is needed to recognize custom as law, even if the nature of this factor is not apparent .

- Roman source documents states that unwritten law is that which usage has approved. For long-practiced customs, endorsed by the consent of the users, take on the appearance of statute.
- In this instance, the additional factor is expressed by "endorsed by the consent of the users. – express consent of ppl is not required.
- The element that transforms custom into customary laws is deeply rooted custom is observed as a statute, not undeservedly; and this is what is called law established by usage. custom is law because the people accept it as law.

Ctd.

Short comings of this Theory

- _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.
- one problem is that 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.
- _Is it not impractical to obtain the assent of all? It is almost impossible to obtain the unity of minds of all to the transformation of custom into customary law. – how would we know all regard the custom as law?
- The second criticisms directed against the tacit consent of all theory is that customary law binds every member of a given community and 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 explicit consent.
- The point is that the idea of explicit consent makes more sense that the idea of tacit consent in such type of serious matters.

Ctd.

2. **Theory of Opinion Necessitatis: -** For opinion necessitatis, individuals purposely follow a certain rule simply because they believe it to be a rule of law. The practice must be the expression of an intention of legal validity of the community

- 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 – practicing the custom is an expression of its validity.
- 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" (a belief as to what the law is/ should be) 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.

Shortcomings of this theory

- Assume that once the custom is known to be law and is accepted as law, and afterwards 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?

However, the theory of opinion necessitatis fails to adequately answer these questions. Remembrance V. Forgetting customary practices

3. 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/commonly held attitudes and believes . – assumes that customary laws develop through a unified action of members of a certain nation. All members of a nation would have a common mechanism to develop customary laws.....

Shortcomings of this theory

- 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.
- the theory hides several historical instances where the minority has imposed its will on the majority in the form of laws.
- the theory dismisses the possibility of a country borrowing laws from other countries. – customs being transformed through commerce, occupation….
- the theory is criticized for being narrow or ethnocentric

4. Sovereign recognition

- John Austin suggests that customary laws originate as rules of positive morality, which arise from the consent of the governed.
- However, for moral rules to be transformed into positive laws, the state must establish these customary laws.
- The state may establish customary laws either directly by statute, or indirectly by judicial decree.
- Thus, under Austin's approach, 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. Under this view, a statute becomes law even before it is enforced by a court decision.

Shortcomings of this theory

- The societal treatment of judicial decisions. Societies that do not treat judicial decisions as binding legal precedents may nevertheless treat decisions establishing a custom as binding.
- _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.
- **_And that,** the state may distort the authenticity of customary laws in the course of validating them, that is, it's 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 community and thus not need to validate them any more.

Ctd.

5. Judicial Recognition:-

- _custom is a separate source of law distinct from both legislation and judicial precedent.
- But like judicial precedent, custom must be accepted by the sovereign in order to constitute law.
- To become law, custom, like legislation and binding precedent, must be clothed with the requisite form, which marks its official acceptance by the sovereign.
- This requisite form requires that adjudicators incorporate custom in a judicial decision. A society may accept custom as law when incorporated in a judicial decision
- So long as the courts treat the custom as law, the custom is the accepted as customary law.
- However, should the courts hold that the custom has changed, however, then the new ruling becomes the customary law.
- _

CHAPTER TWO

CUSTOMARY LAWS IN AFRICA

Common features of African customary laws

1. The perception considering African Customary laws as primitive

- For centuries, the commonly held view has been that African customary Law represents primitive, traditional, ancient and immutable regimes non-suited for modern administration of justice.
- 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.
- This historical misconception perceived traditional legal systems as 'extant and functioning in the ethnographic present. This tendency of considering African customary laws as primitive and backward ingrained in the perception of colonizers towards African customary law.

Ctd.

- This tendency of considering African customary laws as primitive and backward ingrained in the perception of colonizers towards African customary law.
- The colonizers wanted to eschew its applicability because their notion of justice and fairness contradict with African notion, which give high value for communal interests. African customary law ensures that every society exists as a coherent social whole.
- The perception that African costmary laws are devoid of reason and logic hence they cannot solve conflicts systematically is also a common critique that almost all of African customary laws faced.
- African customary laws also like many chthonic laws featured by their irrational procedures and harsh punishment
-

Ctd.

- However, it should be noted that customary laws are sources of almost all modern legal principles.
- That is, it is custom that prescribes the compensation due for example,

  for killing a man,

  the formalities for making a contract,

  the rules of inheritance, and so forth.
- Thus, custom (including customary law) resembles language in being a complicated, slowly changing, and decentralized system of highly exact rules.
- **The term African Customary Law implies that the only source of African law is custom. However,** The traditional African legal systems comprised, not only of rules derived from customs, but also legislation and precedents of important previous cases. For example, in the Buganda Kingdom of present day Uganda, the Kabaka were known to enact law. '
-

Ctd.

- Further, amongst the Meru of Kenya, a council of elders, (the Njuri Njeke) operated as a legislative body.
- In addition, the Maragoli and Bukusu of the Luhya sub-tribe were also known to have similar arrangements. In fact, a wider power to enact laws seems to have been wielded by the dream prophet and by certain clan elders who gained a reputation as warriors and successful arbiters in disputes.

2. The second common feature of African customary laws is the fact that African customary laws commonly cursed for being gender insensitive.

- African law sees the woman generally as inferior to man.
- In the traditional African context, customary law accentuated male domination in patriarchal family arrangements. Thus, customary law was used to 'control and limit women's rights as persons and to limit their access to income on property.
-

3. The interconnectedness of African customary laws with religious guidelines

- African law, some argued, was inchoate, just as it was difficult to understand, because it was enmeshed in customs and traditional practices.
- The realm of law was not articulated, defined, or formalized: It was an element of social life inextricably entwined in the religion, political, social, and moral structures of traditional societies.

4. The African legal system, the traditional one, is presented as being static.

- Nevertheless, some claim that African legal system is not static; there argument is that internally any costume is in constant change with out interruption. Culture resists only changes to be introduced by external forces.

Ctd.

5. Too much Normative

- The accepted principle in the scope of law is that legal regulations shall be limited only in regulating relations considered necessary for the normal functioning of the government and which are necessary to maintain social order.
- Purely private matters should be kept out of the scope of government regulations
- The customary laws of Africa are generally criticized for stretching hands in to private matters. To some extent this may be the result of the fact that African customary laws are very closely intermingle with religious doctrines
-

Ctd.

- e.g. religious laws such as Talmudic and Islamic law are known for their ambition to regulate even how a man should breath.
- African customary laws deal both with behavior and with the settlement of disputes. They cover everything, which must be —making no distinction between religion, morals and law. ``

5. Emphasizes on mediation and conciliation

- Conciliation plays a very important part in African law since community life and group isolation give rise to a need for solidarity.
- As a result, the Africans always seek unanimity through dialogue, since only reconciliation can put an end to disputes. Customary law is secreted by society itself.

Ctd.

- Every individual is immerged in it. Individuals in a traditional society cannot envisage living without observing it.
- Society as a whole accepts it and considers it a necessity. Custom is the work of Mr. `Everyman`, both private individuals and those who govern.
- Custom is the natural source in the full sense of the word, composed of precedents, imitations, and hereditary behavioral patterns

7. Its Oral Nature

- The teaching of the past is preserved through the informal, though sometimes highly disciplined, means of human speech and human memory.
-

- Most of African customary laws were not reduced in to written form.
- The customary laws simply transfer from generation to generation orally. Of course, this has a lot to do with the general lack of written culture in Africa.
- The facts that African customary laws are unwritten cause many problems in identifying and studying African customary laws
- This also imposes a doubt on the original nature of African customary laws because if the law is unwritten it is very difficult to identify the interlopes added by latter leaders and colonizers.
- The unwritten law also contributed for the existing lack of consistency and uniformity among African laws

Ctd.

The Status of African Customary Laws and legal institutions in Colonial and Postcolonial Period

- With the advent of colonial administrations in tribal areas concerted efforts were (e.g. through missionaries)made to abolish those practices that violated the colonizers‘ moral code, which was a product of their own western European cultures.
- Any cultural practice that emphasized the political autonomy of a tribal people was also considered threatening by the colonial power and was forbidden.
- Cultural practices that seemed immoral or offensive to the Europeans were also outlawed by the colonial authorities who continued those customs were fined or jailed.

Ctd.

The Europeans develop different tests to justify their actions.

1.The Barbaric Test: Britain was the architect of this test. This test best reflect the perception of Occident to the rest of the world.

- The colonizers consider the rest of the world as thrush and with out natural ability to develop acceptable legal and moral principles.
- Therefore, this test proposes for the complete demise of cultures and traditions of colonized peoples. The test was taken ethno-centric; it was uncompromising as it opted for the wholesome abolition of the customary laws.
- The colonial powers developed the barbaric test to re-determine resources especially rights over land and assumption political power.

2.The Repugnancy Test: The repugnancy test provides that customary laws are laws used by the people if not repugnant to justice or morality or inconsistent with legislation.

- During the colonial period, England introduced the concept of the repugnancy test.
- This test means those customary rules and practices prevalent in the colonies would be abolished if they offend natural justice, when they are found to be repugnant to fairness
- This test was an excuse for the colonial powers to destroy traditional institutions they did not like and Some may question if the colonial courts had the moral authority and the competence to invalidate customary laws that had been used by the local communities for generations

Ctd.

- It is implicit and obvious that where two systems of law exist, each of them may be based on different principles or concepts of morality or justice. – the conception of justice may vary in the west and African customary laws.
- Therefore , whose value are to be used in determining the validity of the customary laws is the main source of tension however the Europeans simply decided in their favor.
- Even in the level ground it is very difficult to apply this test because such terms as fairness, natural justice and public morality are not open to a clear-cut definition; thus the application of these terms had given unbridled discretion to the colonial administrators and colonial courts to nullify customary laws they did not endorse.

- After independence several countries in Africa determined the place of their respective customary law according to the repugnant test,

e.g. the Ugandan Constitution prohibits "any laws, cultures, customs or traditions" which undermine the status of women, the FDRE Constitution, in both Uganda and Kenya, customary practices will have application in so far as they are not inconsistent with some values recognized the respective constitutions.

3. Human rights test/ testing the impact of culture on internalizing human rights

- This test has got currency since 1980`s. The test states that any customary law or practice that offends human rights as stated in a constitution of a nation or human right instruments that country has ratified shall have not legal effect.
-

- Thus, a distinction is made between customary laws that contravene human rights values and those customary laws that are consistent with those human rights values.
- The criterion of such distinction is human right values.

The Merits of the Human rights test

- _The test stands for human dignity, as it states that those customary laws and practices that offend human dignity shall lose ground.
- The test is for the general welfare; it tries to free several people from the tyrannical aspects of customary laws.
- The test has the capacity not to eliminate but refine customary laws
- __The test is easier to ascertain as compared to the repugnancy test.
- Even if the test is European in origin, it can serve in other parts of the world; the proper consideration should be is it useful everywhere, irrespective of where it originated

Shortcomings of the Human rights Test

- The test is criticized for advocating for the existence of universal values.
- Some would like to regard some aspects of human rights as particular.
- The argument comes from those who argue for cultural relativism, that culture is peculiar to place, time and people.
- **The other criticism directed against this test is that it tends to integrate the world of values in the European perspective. _**

Universalism of Human rights

- The proponents of this argument insist that culture contrasts with progressive or independent thinking thereby hindering human rights from becoming internationally acceptable guidelines in the life of human beings.
- They believe that there should be the same version of human rights all over the world notwithstanding the cultural differences.
- When the culture of the community contravene with the established human right principles there should be immediate action to ban that culture.
- _Human rights are inherent with humanity therefore any culture or thinking which tend to limit their application or challenge their validity is the result of some kind of corruption committed on that culture by certain groups to protect their interest and privilege

- culture and tradition as source of inequality in many societies.
- The idea is that culture especially the non-western cultures are obstacles in creating a world free from any human right violations.

Cultural Relativism

There is also strong opposition to the conception that African cultures have hindered the establishment of modern and prosperous African society. That is;-

- One might wonder also just how much the current state of lack of rights in Africa has anything to do with African cultures at all. – chaotic situation in Africa (wars, poverty, diseases e.t.c.)
- The major abuses of political rights at the state level are the products of the political institutions bequeathed by the colonial powers. – the legacy of the colonial rule.

Cultural Relativism

- we should not use our standards of right/wrong to judge other cultures instead we should understand the cultural practices in other cultures in their own context.
- human right principles as they are advocated today are the result of western philosophy and history.
- The human rights as they are uttered know are born out of conflict and war occurred in the west.
- The activists of human rights also put first the interest of the individual over the interest of the community as a whole.
- The African communalism was attacked as primitive and inferior, which contravene human conscience and dignity.
- Then, they tend to conclude that human right principles as they are articulated in the international instruments are against the cultures and choices of Africans therefore Africans should not be obliged to embrace the alien principles by scarifying their own.
- They urge for the development of human rights based on African values and principles. That is, Africa shall develop its own version of human rights based on its own culture and choice of preference, which will contribute for social and economic development of the peoples of Africa

Striking a balance between the two opinion –/cultural transformation/

- The core idea of this argument is that cultures are not some thing biologically attached to a certain community/we're not born with cultures. We can transform and create culture. That is,
- every culture is constantly changing through the interactions of a wide variety of actors and factors at different levels of society.
- actors:- civic societies(NGOs), lay members of communities, institutional actors, Factors; geographic locations, commerce, ability and willingness of social actors to engage in deliberate strategies of cultural transformation.
- to quell the tension between universality of human rights and the tendency of maintaining the culture a given society we have to accept that tradition first and then to work to gather to refine that culture slowly not radically.
- Since this cannot and should not be done through external imposition, the very nature of the human rights paradigm requires its proponents to generate sufficient domestic constitutional protection of human rights. –we should resort to our own ways of internalizing those universal human rights values through granting domestic recognition and legal protection. / developing a domestic modality of implementing those values.

Ctd.

- The project of the universality of human rights is to be realized through a confluence of internal societal responses to injustice and oppression, instead of attempting to transplant a fully developed and conclusive concept and its implementation mechanisms from one society to another

- The way to get a universal idea accepted locally is to present it in local terms, which can best be done by local people. Conversely, local acceptance enriches the universal idea by giving it meaning and relevance to people's lives. – acting locally and thinking globally! E.g. the right to life, food, education, - are universal human right ppls- local/domestic ways of preserving this right./ presenting this values in local terms- incorporating this rights in local legal instruments.

- The speed and sustainability of change in particular ways tends to vary with such factors as the level of entrenchment of the values and institutions in question, degree of stability in the circumstances of conditions of the society, and ability and willingness of social actors to engage in deliberate strategies of cultural transformation.

Ctd.

Cultural Transformation and Human rights in Africa- post colonial era

- There is very little understanding of the actual process of cultural change or transformation. _We do not know why something that has often been said before will suddenly catch on, or why both events and opinions seem to remain static for a long time, and suddenly begin to move, and keep on moving.
- Most mysterious of all is how a consensus of opinion forms, and why it takes the shape it does.
- however, better understanding of the inner working of the formation and transformation of cultural norms or practices can be achieved by examining the synergy of context and process.
- how the context, and the terms of the interaction of actors and factors, influence transformation, whether in favor of, or opposition to, the domestic protection of human rights?

What is context?

- the role of the post-colonial state in Africa in its broader regional and global setting

Ctd.

- Even though each state should be understood in its own specific pre-colonial history, type of colonial experience, and political and economic conditions at independence, it would be useful to consider such factors in the light of the broader processes of interaction between the local and the global.
- And in fact, there are political, social and cultural, as well as economic, dimensions to what is commonly referred to as ‗globalization'.
- The interaction between the pull of self-determination and domestic jurisdiction, on the one hand, and the push of diminishing sovereignty under conditions of multifaceted globalization, on the other.
- what is meant by process ?
- it refers to the relationship between what we call internal discourse within each culture, and cross-cultural dialogue between cultures
- understanding the operation of process in context is important for mediating the dichotomy between the so-called internal and external actors and factors who participate in cultural transformation, and the likely outcome of their interaction.
-

Ctd.

what are the elements within context?

1. The status of African states in post colonial era was marked as both overdeveloped and soft.

- It was over-developed because it was erected, artificially, on the foundations of the colonial state. It did not grow organically from within civil society.
- It was soft because, although in theory all powerful, it scarcely had the administrative and political means of its dominance.
- Colonial economic relations, legal systems and administrative policies were largely continued by the post-colonial state.
- Even the lack of constitutional standing for the majority of African populations under colonial rule was continued after independence through the effective exclusion of major segments of citizens from the political process, despite the explicit terms of the constitutions of the newly independent African states
-

- The legitimacy of the state is derived from international agreements, earlier among European colonial states, and through the UN Charter and the Organization of African Unity (OAU) since I963, rather than the consent of their African populations
- The colonial system of government organized according to European colonial theory and practice (tempered by expediency) was simply continued after independence,
- their was a continuation of the colonial attitude of rights; the conception of rights was organized differently in rural areas from urban ones, tha that is, the colonial state contained a duality of two forms of power under a single hegemonic authority.
- So, _Urban power spoke the language of civil society and civil rights, rural power of community and culture.
- Civil power claimed to protect rights while customary power pledged to enforce tradition.
- The former was organized on the principle of differentiation to check the concentration of power, the latter around the principle of

- Another integral component of the context of cultural transformation is the nature of interaction between different levels of so-called internal and external actors or factors.
- With regard to this aspect of the context, it can be argued that human rights can be an instrument of mutual cooperation between European powers and African nationalist leaders in a new form of re-colonialization‘ of Africa that allows colonial power relations to continue without direct colonialism
- Instead of the dependency of former African colonies on their colonial powers diminishing, there are now multiple and complex dependencies, ranging from daily reliance on colonial ties in economic activities, political processes and security arrangements, to technological, legal, administrative and educational matters

What about Globalization/ as a form of interaction between external and internal actors and factors?

“the transformation of relations between states, institutions, groups and individuals; the universalization of certain practices, identities and structures; and the expression of the global restructuring that has occurred in recent decades within the framework of modern capitalist relations.”

What about the processes involved in the context of cultural transformation?

- cross-cultural discourse?- interstate economic and political relations
- Regarding human rights in particular, the governments of some developed countries, mainly in Europe and North America, claim to seek to influence the governments of developing countries through what is known as political conditionality, whereby the provision of foreign aid and assistance is linked to the _human rights record‘ of African or Asian governments.
- But the nature, size and scope and other features of such aid are determined by considerations of the domestic politics of Western countries, rather than the needs and conditions of developing countries
- “Much of the transfer of capital to developing countries ends up by profiting the giver more than the receiver. Conditions are imposed on the receiver, designed to —maximize return‖ for the donor countries”
- ethnocentrism vs. cross-cultural dialogues ?
-

Ctd.

How did the existence of customary laws facilitated colonial rules?

British Administration

- The best way forward for British administration was by way of conserving, recognizing officially and using the existing indigenous systems of rules and law of native authorities.
- The native courts and the native customary law were recognized as an essential part of the apparatus of indirect administration.
- Nevertheless, later the concept of integration was introduced. The concept of integration involved in the integration of special customary courts in the regular territorial court system without totally abolishing special courts for African customary laws.
- The African laws were to be steadily brought into in line with English ideas of law, justice and procedure.

Ctd.

- The recognition of African Customary Law was paramount to the colonial enterprise.
- With limited resources and incongruent policy objectives, it was highly unlikely that the governance of the colony could be achieved without the help of the indigenous communities.
- Moreover, implementation of the principles of indirect rule necessitated the maintenance of traditional rules and regulation so as to eliminate active dissent to the British occupation.
-

Post-colonial era

- It is difficult to tell exactly what happened to the African customary law after independence. The reason is that different countries handled customary practices differently.
- **1.** As in some countries, the elites who assumed power after liberation thought that customary practices were against unity.
- They believe that customary practices divide the nation instead of brining it together.
- This perception is mainly because of the fact that in every country there are different customary laws, which at the first glimpse appear to contradict with each other. What is your take on this view?
- Some may argue that recognition of customary practices imply tolerance and compromise in that community and for that reason; different communities may like to live together

Ctd.

- On the other hand, as Glenn put it the major legal traditions of the world achieved this by developing a capacity of embracing many traditions including contradictory traditions.

- The main idea here is that between and among different cultures and traditions, there is always a common ground. Therefore, to maintain unity what should be done is not to demise customary laws, what we have to do is to try to find the common ground lured deep inside the traditions and to use it to strengthen our unity.

2. The customary laws of Africa were also criticized for lack of matured principles and jurisprudence to regulate the post colonization African peoples.

- The African leaders find it difficult to please the western investors and partners with out scrubbing the customary laws, which according to the westerns are against development and modern human life style.
- so mercilessly cursed for not bringing development and better life for Africans. They thought that customary practices were against modernization; for them modernization of the state requires the introduction of western style laws and legal institutions.
-

Ctd.

- Some African nations, influenced by the so-called traditionalists were under the influence of nationalism.
- These countries took the other extreme of _turning back every thing in to its origin.‘
- They propagate that ever thing, which is indigenous and is part of the culture is good and every thing not developed there is bad. The first instinct of the new African authorities was to respect completely the old ancestral customs.
- This attitude involves a codification of custom. Pure and simple codification will tend to establish and promote the projected development.
-

Ctd.

The proponents of this idea mention the following points among others to justify as to why African countries should cling to customary laws.

- To promote internal legitimacy (the new leaders would get greater acceptance by the people with African customary laws than without.)
- To give due respect to African identity (customary laws were taken as the reflections of the identities of Africans.)
- To restore the correct versions of traditional dispute resolution methods in Africa (for colonial rule distorted the authenticity of customary laws in Africa)
- To have effective legal institutions.
- To promote the desired social, economic and political developments

Ctd.

In sharp contrast to this arguments, however, some scholars suggest; 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:

- Undermine national political unity.
- Undermine the efforts of the political elites to bring about legal uniformity.
- Be inimical to modernization.
- Promote the divide between the urban (to be governed by the western transplanted laws) and rural (to be regulated by the customary laws) population.
- De-link Africa from the rest of the world especially from the western world.
- Ignore the shortcomings of customary laws (i.e., the gaps in them and the difficulty of ascertaining them).

Traditional institutions of Africa

- After independence, many African countries retained and maintained with the institution of traditional leadership. The only exception in this respect is Tanzania, which abolished the institution of traditional leadership altogether.
- Many modern states in post-independent Africa did not really know what to do with the institution of traditional leadership.
- Due to the fact that some aspects of traditional rule are not only incompatible with democratic rule but are violative of some of the basic rights and freedoms, which form the basis of modern society.
- Specific examples of these range from the constitutional principles of succession to the throne (where according to customary law only males are generally favored) to the difficult question of the role of these leaders in public administration at local and national governmental levels.

Ctd.

Illustrations on some select African states and their dealings with the institution of traditional leadership after independence.

- **Namibia,**

- the Namibian Constitution provides that traditional leaders must pay allegiance to and accept the authority of the modern state.
- It also provides for Council of Traditional Leaders whose responsibility it is, to advise the president on the control and utilization of communal land and on all other such matters as may be referred to it by the president for advice.
- The Constitution also provides that traditional institutions should give support to the policies of the (central) government, regional and local authority councils in the performance of their duties and functions.
- Where their powers conflict with the powers of either central government regional or local authority councils then the powers of the central government should prevail.

Ghana

- The Constitution of Ghana recognizes the institution of traditional leadership. It provides for the national and regional houses of traditional leadership.
- Traditional leaders have a role to play in issues of development although they are forbidden from active participation in party politics.

Botswana

- _the constitution provides for a House of Chiefs, which is an advisory body to the National Assembly and the Executive.
- The House does not have legislative powers but must be consulted on certain specific Bills.

African customary laws Vis-à-vis Human rights principles

The existing relation between the universality of human right principles and the place the customary laws in international instruments.

The place given to customary rights in international instruments

1. UDHR

- Article 27 of this Declaration gives everyone the right to participate freely in the cultural life of the community- language, way of life/identity

2. ICESCR

- article 15 states that states should recognize the rights of everyone to take part in cultural life.-

3. ACHPR/1986

- Article 17 of the charter provides that every individual may freely take part in the cultural life of his community and that the pro motion and protection of morals and traditional values recognized by the community shall be the duty of the state.
- The Charter also obliges individual to preserve and strengthen positive African cultural values in his relations with other members of the society.
- This is to be done in the spirit of tolerance, dialogue and consultation, and, in general, to contribute to the production of the moral well being of society.

- It obliges him to contribute to the best of his abilities, at all times and at all levels to the promotion and achievement of African unity.
- Articles 22 of the Charter also provides that all peoples shall have the right to their cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of humanity.

4. Multinational conferences held by the **UNESCO**

- Participants at a 1965 UNESCO seminar on multinational society urged the "recognition of the importance of maintaining permissible legal traditions" in many fields of law.
- The seminar's participants unanimously agreed that states should not impose limitations on the customs of traditional groups.
- The 1970 Intergovernmental Conference on Institutional, Administrative and Financial Aspects of Cultural Policies stressed that all governments are responsible for the adequate financing and appropriate planning of cultural institutions and programs.
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CHAPTER THREE

LEGAL PLURALISM

legal pluralism Vs. legal centrism

- **legal pluralism** is an expression of tolerating the existence and operation of multiple legal orders in a given legal system at the same time. Legal pluralism allows several groups to handle some of their legal problems differently.
- Legal centralism/ singularism either silences multiple legal orders or denies their existence. Legal centralism rests on the assumption that law comes only from the central government. Laws coming from other sources should not have a place at all.
-
- Legal pluralism is concerned with what a legal system does with its several communities having their own method of solving legal problems. Thus, questions such as,

- Should the legal system simply abolish them? Should the legal system recognize all the diverse legal institutions? Should the legal system reject some of the customary rules and maintain the others?

➢ **further, l**egal pluralism is concerned with the relation between state law and indigenous law.

➢ State or government law is only one of the types of law that apply as in practice, there is co-existence and interaction between multiple legal orders such as international, state, customary, religious and local laws.

The four connotations of legal pluralism

1. The recognition by and in a system of law of differing or special customs and traditions within a society or the recognition and the protection of such customs within a certain society or could be the recognition customs in situations where the legal system is exported to a different community.
2. understanding legal pluralism as happening internally in every society.

➢ The plurality of legal cultures and legal systems in the world is paralleled by the plurality of legal attitudes, traditions, expectations, and 'cultures' within any one society

3. legal pluralism is the systematic and intellectual reconciliation, by a lawyer of such pluralistic demands and concerns within a general legal system that sees itself as creating rules binding on all citizens.

- and which gives a principled foundation for making distinctions between one class of citizens or activities and another and which coherently works out how such distinctions shall be made.
- 'Legal pluralism,' as the doctrine that there are competing legal systems, traditions, and expectations in the world and in any one society, is simply the statement of a fairly obvious fact that forms part of the background of the lawyer's work.
- It cannot do away with the need for the lawyer to consider whether, in given circumstances or even generally, some legal principles, arrangements, or presumptions are better than others and what kind of morality, view of society, and view of life particular legal systems incorporate and promote.

What are the importance of legal pluralism?

- Legal pluralism appears to advocate for popular justice. Popular justice means justice that is popular in form, in that its language is open and accessible; popular in its functioning in that its proceeding, are based essentially on active community participation; and popular in its substance, in that judges drawn directly from the people are to give judgment in interests of the people.
- in a multi-national states such as Ethiopia, there is a need to seek ways of organizing the peaceful coexistence of different communities, while at the same time strengthening and nurturing a common plane of shared values and institutions on the level of society as a whole.

Formal Vs. informal legal pluralism

- **formal legal pluralism/** official or sate legal pluralism**;-** is a concept referring to the inclusion within the national legal order of a principle of recognizing other law. Here the state picks certain customary rules and practices and gives them the status of the law. The state does this in the process of incorporation. The state uses its lawmaking institution to say that certain practices of a given community shall be taken as the law made by the state itself.
- is primarily associated with colonial and post-colonial societies. Formal legal pluralism is written under the sign of unification: unification is inevitable, necessary, normal, modern and good.
- **Informal legal pluralism** suggests that there are a number of institutions, practices and customary rules governing the society. But the state does not give recognition to these institutions, practices and customary rules. These institutions, practices and customary rules are outside the formal legal system

- legal pluralism in an informal sense covers any situation in which within the jurisdiction of a state a variety of differently organized systems of norms and patterns of enforcement effectively and legitimately control the behavior of specific parts of the population.
- legal pluralism concerns factual social practice
- Informal legal pluralism does not address the legal question whether or not this plurality has any official legal recognition within the legal order of society at large.
- Informal legal pluralism is an empirical state of affairs, namely the coexistence within a social group of legal orders, which do not belong to a single ―system‖. Ethiopia has an informal legal pluralism. Among the variety of legal orders are Islamic laws, a great many systems of customary law.

Approaches to legal pluralism

- The unitary approach to pluralism exists the case where government-made laws abolish all existing customary practices and traditional institutions and replace them a single system. Ethiopia in 1960`s did adopt this approach.
-
- **the dualist approach;-** A dual system attempts to undertake a compilation of customary rules subject to repugnancy test. The dual system also recognizes the operation of customary courts side by side with state-established courts. So, the dual system permits traditional institutions and customary rules to survive on certain matters parallel to the state created institutions. The dual system shows greater tolerance to customary institutions than the unitary system.
-

Ctd.

- **The integration approach**, like the dual approach, tries to make compromise between pluralism and legal uniformity.
- The integration approach, as the name indicates, tries to synthesize uniformity and diversity. The integration approach seeks to conduct the inventory of customary rules and examines if there are any common ground with the state-made laws.
- In the process conflicts among customary practices are removed and again conflicts between customary rules and the state-made laws are again attempted. Then, finally, the two systems are blended in a single system.
- The final approach is legal pluralism. This is theoretically leaving the diverse practices as they are. No repeal is made.
- No integration is attempted. The parallel systems are there to operate within their own jurisdiction. Some say that there should not be such approach as there should be a limit to official recognition of the other legal order.
- The basis of the limitation should be the identity of the distinct community whose customary practice is to be recognized or human rights values.

The issues involved in recognizing customary laws?

:A legal system may encounter problems while giving a space to customary rules. It is not simple and easy to integrate customary laws to the official (state-made law).

- Which group‘s law applies to a given transaction or conflict?
- How do you apply this rule to a person (e.g., by voluntarily or marriage)?
- In which areas (e.g., family or succession) customary law should prevail? How do you ascertain the customary rules?
- Who should be the institution settling the issue, should it be subject to review by a regular courts?
- To what extent non-uniformity is to be tolerated (criminal law)?
- How should customary rules adapt themselves to the changing situations?
-

- How many customary practices are there in the country?
- Is the Ethiopian state duty bound to prevent human rights violation by other groups?
- Does rule of law mean an elimination of customary practices?
- Is giving a space to customary system harmful to state power?
- Is it useful to recognize customary system for its own sake? Or is there a disadvantage to do so?
- Does the country need to study and list customary practices?
- Does the country need to rank customary practices?
- Does the country need to see if it can maintain some of the customary practices and eliminate others?
- Does the country need to give reasons why it should eliminate some customary practices?

Ctd.

The status of formal legal pluralism in the Ethiopian legal system

- There is a need to be aware of the provisions of the Ethiopian present constitution and the Ethiopian Civil Code that recognize the role of customary practices to a certain extent.

The FDRE Constitution

- Article 9/1
- t``…Any law… customary practices that are inconsistent with this Constitution shall be invalid.``
- The message of this constitutional provision is very important.
- This provision assumes that there are several customary practices in the country.
- It also assumes that some of those customary practices may not be in harmony with the provisions of the constitution
- The key message of this provision is that those customary practices that do not offend the constitution would be given space and application.

The test adopted by this provision

The values such as human rights the Constitution has incorporated.

e.g. the right to life, privacy and freedom of individuals

Others provisions of the FDRE Constitution

- Article 34 (5) states that: This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute.
- Article 35 (4) stipulates that: The State shall enforce the right of women to eliminate the influences of harmful customs. Customs and practices that oppress or cause bodily or mental harm to women are prohibited.
- Article 78 (5) provides that: …State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution
- Article 34 (2) of this Constitution states that marriage shall be entered into only with the free and full consent of the prospective spouses

1. The attributes of customary laws in Ethiopia

1.1. customary laws and Codes

The relationship between State and Customary law can be divided into three phases:

2. The first phase during the imperial period from the 15th century till the early 20th century can be characterized within the realm of the Empire by the imperial reliance on reference to indigenized translated texts based on 'imported' biblical and Roman-Byzantine traditions with a strongly sacred flavor.

   There was only nominal and limited reference to the importance or precedence of local customary law in imperial edicts and much of the country remained beyond the confines of the monarchies, administered in practice in legal terms through customary law.

   Ethiopia had its first written Constitution in 1931 under Emperor Haile Sellassie I (r. 1930-1974). Before this Constitution, customary law and some legal instruments governed the socio-political life of the people.

Ctd.

- The second phase began with Emperor Haile Sellassie's modernising drive from the early 1930s, pursued more vigorously after the Italian occupation especially in the mid 1950s and 1960s with the development of legal codes.
- Here again much of the legislative drive and influence, signalled most clearly in the assigning of the drafting work to foreign experts, was external to the Ethiopian context.
- Customary law was repealed by the Civil Code which included only token references to limited areas where customary rules could be applied.
- The second modernist nation-building phase ended with a socialist twist under the Derg, which continued the centralist project with very minor concessions to religious and ethnic interests as expressed in the 1987 Constitution.

- The third post-modern ethnic federalist phase began with the defeat of the Derg in 1991 and is most clearly expressed in the 1995 Constitution which represented a radical break from the centralist unitary past and was exceptional in the extent to which ethnicity was proposed as the organising principle.
- Logically this premise implied a greater recognition of customary values. In fact customary and religious laws and courts were provided at least some constitutional space in family and personal law.
- However, the translation of constitutional provisions into practice to date has not provided clear legal recognition of customary institutions and the lack of constitutional mention of their potential role in criminal and other legal areas restricts their mandate de facto despite their clear and vigorous involvement in all legal domains, and the strong informal reliance of the formal judicial system on them.

Women and customary laws in Ethiopia

The rights of women in the civil code

- Underlying the legal reform in the 1960s was a modernist approach that sought to revise customary laws and impose norms considered universally beneficial and conducive to economic and social development.
- Before the 1960 Civil Code, each of the diverse ethnic groups within Ethiopia applied its own laws to its own people. Muslims administered the provisions of the Sharia; Christians applied the traditional legal code, or the Feteha Negaast. In Gambella, Beninshanghul, and the southern regions, large numbers of groups practiced customs and traditions different from those of Muslims or Christians. The Civil Code adopted a rigid view of customary laws with the intent of harmonizing the diverse and mostly unwritten customary rules into a set of predictable and written legal provisions. It invalidated customary and religious laws as far as they related to personal matters governed by the Civil Code, and introduced far-reaching changes by imposing norms that were hitherto alien to large sections of the population. Ethiopia's reform went further than in other countries. It adopted a uniform code of personal laws for all Ethiopians, ignoring differences in religious practices

- The Civil Code tried to ensure greater equity in the allocation of economic resources within the typical household.
- For example, both sons and daughters inherited the property of their parents equally when there was no valid testament. Married women also obtained significant rights to and control over household property.
- The concept of "common property" was introduced, covering all property that was obtained by either spouse during the marriage. All property was presumed to be common unless one of the spouses proved that he or she was the sole owner.
- The Code gave spouses equal rights to common property both during and at the termination of a valid marriage.

Deficits within the civil code

- the Civil Code explicitly conferred the status of head of the household on the husband. The husband was presumed to be the primary manager or administrator of common household assets and resources
- The Civil Code also formally reiterated the culturally ascribed, gender-based division of household labor, requiring women to perform all household duties when the husband could not afford servants.

Dispute resolution on personal matters

- Although the 1960 Civil Code changed a number of discriminatory provisions in Ethiopia's customary laws, dispute-resolution processes were surprisingly kept decentralized and traditional as far as they applied to personal matters.
- Disputes continued to be settled through the traditional form of arbitration arranged at the request of the disputants, and the Civil Code maintained this mechanism.
- Each party to the dispute could select his or her arbitrator (shimagele), and the decision was provided jointly by the arbitrators along with a third neutral arbitrator. In the case of marriage-related disputes, the witnesses to the marriage were expected to act as arbitrators

The FDRE Constitution

- In Ethiopia, the law seems to have stepped away from a centralized legal framework in personal matters, an approach that was evident in the 1960 Ethiopian Civil Code and one that characterized the colonial and post-colonial era in other eastern African countries.
- The new approach complements the ambitious decentralization of administrative, legislative, and executive powers being implemented in these countries, and is in line with traditional legal institutions and processes.
- A second characteristic is a movement away from the imposition of norms in personal matters and a greater recognition of the validity of differing norms in personal laws. Within this framework exists a clear shift toward greater emphasis and deliberation on the processes rather than on the norms.

- In recognition of religious and cultural diversity, the Constitution also adopted a process-based approach (a more participatory approach that will support a process whereby men and women can have a say in the choice of applicable norms) unlike the norm based approach chosen by the civil code(an approach that involves the top-down imposition of norms considered beneficial for progress) to dealing with personal laws.
- This approach permits parties to settle a dispute related to personal matters by applying customary or personal laws, provided all parties agree.
- This process-based approach permits a range of norms to be applied to the dispute, and is focused on ensuring that both parties participate in the selection of these norms. It permits women to participate meaningfully in the resolution of their own disputes, and allows them to choose the option that is least costly or damaging in terms of personal status and standing within the community.
- If the process-based approach to customary laws is to succeed effectively and equitably, both men and women need to be fully informed of their choices under Ethiopian law in determining which norms should apply to them. Men alone should not make such critical decisions.

Customary laws V. Human rights in Ethiopia

- The tension between the customary law systems and the statutory and constitutional norms of the Ethiopian government is most clearly seen in the rules and practices relating to the crime of homicide.
- The FDRE Criminal code of 2004 uniformly applicable throughout the geographic confines of the Ethiopian state and at the same time cases of homicide are dealt with by the sixty Ethiopian customary law systems
- The nineteenth century model of uniform legal rules, expressed by code and uniformly applied throughout the country, is not viable in large multicultural nations such as Ethiopia.
- Ethiopia is a vast and multi-ethnic nation. The modern European-style legal apparatus of the state, established in the mid-20th century, has only recently been extended to the more distant regions of the country
- In those regions, (and even in central regions)the norms of behavior that govern the taking of human life, and the procedures that surround its sanctioning, are not those established by the (1957) Ethiopian Penal Code and the Ethiopian Criminal Procedure Code, but rather the norms and procedures of the ancient customary law systems of the Ethiopian peoples.

What are the attributes of customary laws concerning homicide?

- the typical outcome of customary law homicide procedure is that the slayer is freed by the payment of compensation to the families of the victim.
- there are variations as to the amount and mode of payment from one group (culture) to another. The slayer may be required to pay in compensation as many as a couple of hundreds heads of animal beginning with camels down the line to cattle, sheep and goats.
- the amount of compensation to be paid is extremely high, the slayer cannot pay it all by himself. It, therefore, is one of the principles of the law of homicide that the offender will be assisted by his clan, the members of which will contribute as much as they can to the full amount of the compensation fixed as payable and thus responsibility for homicide is thus familial rather than individual.
- the amount of compensation to be paid sometimes differs in the event of the homicide of a woman and that of a man

Differences between customary laws and modern criminal justice systems on homicide

- _revenge killing-_ the remedy provided by the shemageles is blood money
- _in light of modern criminal justice systems these monetary compensations are defective as the family of the killer pays blood money to the victim's family, and the killer walks free.
- A life has been arbitrarily taken, in violation of the applicable universal human rights norm, and yet the killer is not punished in the modern sense of " punishment" there are no incapacitation and rehabilitation which are vital part of criminal punishment
- _The fact that the killer is only expected to pay the blood money and walk free would not have a deterrence effect as he is honored by his family and community members as a hero.
- From the perspective of modern international human rights law, the Ethiopian state that tolerates this system is not carrying its burden of protecting the internationally recognized right to life of its people.

Ctd.