

Legal History

Chapter One

Preliminary Considerations





- Definition of Legal History
- Importance of Legal History
- problems of Legal History
- the Idea of Legal History and legal tradition

Definition and Approaches to Legal History



- Definition of Legal history
 - legal history is a **systematic** study of **past legal systems**. Legal history thus studies the **origin** and **development** of past legal systems, both early and modern legal systems.
- Approaches to Legal History
 - There are 4 major approaches to the study of legal history:
 1. unitary/isolationist approach: argues that legal history should focus on the past societies themselves, the legal rules, legal principles, legal standards and the changes therein by disregarding factors such as social, political and economic for the sole purpose of understanding those past systems.
 2. the holistic or the sociological approach: it purports that the study of legal history should include economic, religious, social political institutions of past societies. rests on the idea that society is a whole and is not made of separate elements.



3. Technical approach: legal history should limit itself to gather the legal problems and understand the legal reasons why these solutions were chosen by past societies. The technical approach to legal history proposes that the present society should use the legal solutions the past society adopted when current societies face similar problems.
4. mixed approach : combination of all.

Why study History in General/legal history?



- Some claim the study of history is waste of time, effort...

Reasons to study history:

1. History shows us what it means to be human.

Bruno Bettelheim asserted that human self-knowledge is the most important role of education.

2. History improves judgment.

3. History provides instructive examples.

4. History makes us better thinkers.

5. History satisfies a need for identity. Closely associated with the idea of shared cultural understanding is the concept of identity. Questions of identity are a central concern of psychology which has found that loss of identity results in loss of significance; without identity there is little meaning and purpose to life.

6. history gives pleasure.

problems in the Study of Legal History



- the fundamental problem of legal history is lack of sufficient and reliable evidence of past events.
- A legal system is defined as a synergy of legal rules, legal principles, legal standards, legal policies, legal structures, legal tradition, legal actors, legal extension and legal penetration operating in a given geographical area.
- time wise: a legal system can present or the past.
- can exist at local or international.
- Can aim at ensuring slave-ownership or feudal system.

Legal structure and Legal Actors



- 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.
- Legal Actors:- The structure has legal actors, which means the persons acting in legal structures, meaning members of the parliament, officers of the state, law students, law teachers, legal practitioners, etc.

Legal Systems of the World



- there are about two hundred legal systems in the world.
- it is proposed and desirable to study only the major legal systems of the world. Different criteria are identified by different scholars to chunk together these legal systems into major legal systems. among those are: race, geography, language, sources of law, substance of law, ideology, legal technique and the system of conception of justice.
- Zweigert and Kotz identify five elements constituting the legal style of any legal system. These are historical background and development, predominant characteristics modes of thought in legal matters (especially distinctive institutions), the kind of legal sources it acknowledges and the way it handles them and ideology.

Reasons For classification



- Categorization of legal systems of the world has a couple of importance: technical and authority.
- Technical: for research
- Authority: to borrow rules and institutions.

What is 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.
- In terms of frequency of change, legal traditions may be classed into three: those legal systems that exist for a relatively longer period of time with some adjustments; those legal systems that undergo basic and frequent changes and thirdly those legal systems which experience little or no change.

The Notion of Civil Law



- at first was the law governing the relations of Roman citizens.
- Middle Ages and up to the era of “reception,” the term ``civil law`` referred mostly to the Justinian legislation and the accumulated doctrine of the commentators; it was contrasted to the canon law.
- In modern times, the term ``civil law`` refers to those legal systems, especially in their methodology and terminology, shaped decisively by the Roman law scholars from the Middle Ages to the nineteenth century.

Legal Transplantation



- what is the origin of legal rules? Is it possible for a country to borrow legal rules from another system? What are the reasons for borrowing? Are there cases where a country may be forced to borrow? What are the implications of borrowing laws?
- Definition: refers to the transfer of legal rules, legal principles and legal concepts from one or more than one legal system to another legal system. also known as legal borrowing, legal importation, legal reception and legal taking.
- Recipient legal system vs donor legal system.
- Reasons: Accessibility in terms of language, merit in terms of organization, effectiveness, modernization of the recipient legal system.
- Force: colonization, war, conquest or economic and psychological pressure.

Views on Legal Transplantation



- There are three views about legal transplantation.
 1. Customs theory: F. von Savigny, a German thinker of 19th century, elaborated this approach.
 - argues that law and society have unique relationship. that means, laws are found in the common consciousness of the society, manifested in the behaviors of individuals.
 - assumes, every community is self-sufficient. thus, transplation will inevitably fail.
 2. Legal Engineering (by Alan Watson): argues there is no inherent relationship between society and law. No community has been self-sufficient in terms of law. Laws are tools to achieve certain societal goals.
 3. Mixed theory/the degree of transferability approach (Kahn Freud): In some areas of law, for example, in the area of commercial law, public law and technology law, there are gaps in laws or laws do not exist in developing countries. In such cases, developing countries do not have a choice; they have to borrow laws. In other areas of laws such as family law, inheritance laws and land laws, developing countries have longstanding laws.

Legal Penetration and Legal Extension



- Can you define legal penetration? What is legal extension? Do you think that there is a gap between legal penetration and legal extension? If there is a gap between the two, in which legal system, in developed or undeveloped legal systems does it exist? Can you give reasons for the gap?
- Legal Extension: The aspiration of legal actors who believe that the imported laws will affect the life of the populace 100%.
- Legal Penetration: is to mean the degree to which a rule, code, or law takes hold in a population. Key to

The gap between the Legal Penetration and Legal Extension



- Reasons for the gap: penetration of the Codes into the legal life of Ethiopia are (1) translation problems, (2) conflict between Christian values incorporated in the Code and Muslim values not incorporated, (3) extra-code norms which may nullify code provisions, (4) retention of jurisdiction by the Coptic Christian Church, and (5) the lack of a reporter system for the cases.