Legal History and Traditions

UNIT ONE

Preliminary Considerations

Definition of legal history- it is z study of the origin and development of past legal systems, both early and modern legal systems.

Approaches to legal history

***unitary or isolationist approach-** the subject of legal history should focus on the past societies themselves, the legal rules, legal principles, legal standards and the changes therein by disregarding factors such as social, political and economic for the sole purpose of understanding those past systems.

* holistic or the sociological approach- It refers to the inclusion of economic, religious, social political institutions of past societies.

* technical 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.

* mixed approach is a combination of the unitary, the holistic and technical approaches, bases itself on the idea that the three approaches have positive elements.

Reasons for studying legal history- to clarify the present legal systems, to help us solve legal problems of to day, allows us to be sensitive to legal systems, as legal history reveals that different communities have solved the same legal problems in quite different manner.

The concept of legal system- 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.

A legal system may refer to the present or the past legal system.

Legal structure encompasses law schools, bar associations, the police, courts, the legislature, the executive and prison administration.

Classification of legal systems- Currently, there are about two hundred legal systems in the world.

Categorization of legal systems of the world has a couple of importance: technical and authority. The first reason is technical because the study of the history of laws of societies is systematic.

authority in the sense that those legal systems that are grouped together can borrow legal materials from one another where there are gaps. Z basis of classification of a legal system/legal tradition r, Ideology, Historical development, Distinctive legal mode of thinking, Distinctive legal institutions, Source of law

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

-the laws are accessible in terms of language - found out to be fruitful

- the recipient country decided to modernize its legal system

- as a result of migration or commercial intercourse

- the important elites are attached to the legal system and education of the donor country

-A country may be forced to accept the laws

Legal penetration- z aspiration or z assumption

Legal extension- the extent to which people or the state actors are actually following the imported laws.

Reasons for the gap r, the imported laws have not yet been sufficiently communicated to the people, the laws are published in the English language, huge percentage of illiterate population, the laws were defectively transplanted.

UNIT TWO

Ancient Legal Systems

Three early legal systems

1) **The Babylonian (**Mesopotamian**) legal system-** passed through three stages, fighting b/n kingdoms, coming of Hammurabi, The Code

The first and basic principle behind the Code of Hammurabi was an eye-for-an eye principle of punishment.

The second feature of the Code was that it was not systematically written.

the Code was the expression of the Mesopotamians that the rule of law, in its crude form

the Code lasted for a longer period of time

2)The Greek legal system- reached its highest stage in the 5th BC. The system started declining in the 4th BC and finally to collapse in the 2nd BC owing largely to the conquest of Greece by the Romans.

-the Greek did not build an empire, unlike the Romans and the Mesopotamians.

- The Greek directed their energy to abstract thinking; they were not technocrats; rather, they were idealists.

- The Greek city-states lacked legal structures such as courts, prosecution offices, police and prisons. * so zey failed 2 formulate strong private law .

3) The Roman legal system- The first phase lasted from 8th BC. to 2nd BC. In the course of these centuries, Rome was a little city.

The XII Tables was developed in a response to popular demand; the lower class rebelled demanding that the law had to be known in advance.

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.

Prior to the creation of the XII Tables, the Romans believed that laws were made and modified by gods.

The next stage lasted from 2nd BC through 2nd AD, formed an empire.

For z big power an elaborate and sound private law was needed. This was the period of the Classic Roman Private Law. Roman private law of the period was sound both technically and philosophically.

Rome disintegrated after the 2nd AD, divided into two: the Western and the Eastern parts. The Western Roman part was conquered by the German tribes called Barbarians & came up with their own laws.

The Eastern Roman empire, also called the Byzantine Empire, survived up to 15th century AD. Emperor Justinian (527-565 A.D.) was one of the famous emperors of the Eastern Roman Empire.

He sponsored a code called Corpus Juris Civilis in the 6th C. This code is taken as the origin of the civil law tradition. Jurists coined the term `justice` after the name of Emperor Justinian.

The Justinian legislation is divided into four parts

* **The Code:** The Justinian Code contains the entire body of imperial legislation. it includes imperial decrees issued prior to the days of Emperor Constantine and after the days of Emperor Theodosian

* **The Digest:** contains fragments of classical texts digested according to the subject matter regulated. 1st century B.C. to the 4th century A.D., 2000 books were examined.

* **The Institutes** -are basically a textbook enacted into law for educational purposes.

* **The Novellae:** new imperial decrees, is a collection of decrees issued by Justinian, contain provisions concerning administrative reforms, church policies, and private law.

Common Features

Z 3 legal systems operated on the assumption that human beings were unequal eg slavery, foreigners did have few rights , had shown an amazing degree of stability, assumed that laws were made and modified by supernatural entity, laws initially were non-technical, which means the legal rules lacked developed principles and developed institutions.

UNIT THREE

Major Legal Traditions of the World

3.1 The French Legal System

Civil law- The French legal system belongs to the civil law tradition & has borrowed legal style from Roman law.

in early and classical Roman law, *jus civile* was the law governing the relations of Roman citizens.

In modern times, the term ``civil law`` refers to those legal systems, especially in their methodology and terminology, shaped decisively by the Roman law scholars from Middle Ages to the 19th C.

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

France received Roman law because on the ground that it had been accepted by custom or by reason of its quality. The existence of diverse customary rules and edicts created some degree of legal uncertainty in France, & need for a single, unified code of laws.

In their move to eliminate legal uncertainty, some practitioners attempted to record customary laws of particular regions in France.

The recording of customary rules saved France from the massive reception of Roman law, which took place in Germany.

The drive towards codification- The Court of Paris, which had very wide jurisdiction in the16th century, was one of the key actors in France's effort to unify its private law.

Practitioners and royal administrators also favored unification of law in France. The king played an important role by ordering compilation of customs.

On the eve of the Revolution, all the important customary rules were codified.

The Revolutionary Period (1789–1799)- The Revolutionary leaders gave up the idea of having general codes and in stead they introduced partial changes.

Under the government of Napoleon, France adopted a comprehensive code of law in 1804. The code included many of the victories obtained during the Revolution such as individual liberty and equality before the law.

incorporated most parts of Roman law. It became a model for civil law systems. Its most important aspect of the code was that the law was

written, as opposed to judge-made, and in a non-technical style and thus more accessible to the public. It regulated much of private law matters.

The Code Civil is founded on the idea of the Enlightenment & as a whole was highly influenced by the theory of natural law.
Only in France was the Code was the product of a revolutionary movement.
Only in France, there was complete harmony between social reality and the idea of society on which the code was based.

Spread of French law: French law spread first to Europe, then, to Africa, Asia and Latin America & was transplanted to Europe primarily through military force.

3.2 The German Legal System

Background- belongs to the civil law tradition, has borrowed legal style from Roman law, emerged in the 11th ^{C} with the development and organization of the city-states and principalities.
During the 13th century, German law followed the movement towards compilation and further refinements of the territorial and feudal law of the region.
Germany came in contact with Roman law relatively late (by the middle at 15th century).
The reduction of imperial power in favor of too many principalities was very conducive to the reception of Roman law. There was no common private law, no common German courts system, and no common fraternity of lawyers, which could have opposed and delayed the introduction of Roman law.
there were no strong central courts endowed with royal authority, nor any group of royalist lawyers to make the effort to produce a unified private law.
Roman law was not considered as a foreign law.
Modern German law actually begins with the revived interest in natural law combined with a movement for national codification.
The Padectist School: It was the historical school of law that produced the Pandectist school whose only aim was the dogmatic and systematic study of Roman law material.
The first move towards the codifications of unified German private law occurred about the middle of 19th, the pace makers being commercial law and the law of negotiable instruments. The enactment of the German civil code was not accomplished until 1896. It came into force on 1 January 1900.

It had unnecessary scholastic structure. This structure is the result of the influence of the abstract conceptualism of the Pandectist School. The Code uses legal jargons. The code has a complicated system of cross-references. It ignored many legal traditions of Germanic origins.

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.

Germany did have few colonies, as she was a latecomer to the scramble for different parts of the world, the codes were a bite sophisticated and complex, 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.

3.3 The Common Law Tradition- British and American legal system give recognition to judge-made laws.

The British legal system- has maintained itself without major interruption since 11th century while the American legal system has survived since 17th century.

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

American judge Holmes: ``the life of the law has not been logic; it has been experience``

The influence of Roman law on the common law of England has been minor.

England created the common law in the 14th century.

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.

The rules of equity did not seek to replace the common law. Instead, equity supplements to the common law.

The Influence of Roman law: For two reasons England never received Roman law in comprehensive way. The closed organization, the professional solidarity, and the political influence which the class of English lawyers.

Spread of British laws: Originated in 11th century, the English legal tradition expanded itself predominately through colonialism. The expression ``the sun never sets in the British Empire``

The American Legal System- The colonies settled disputes by priests applying the verses of the Holy Bible. The colonies had had loose connection with one another.(z age of theocracy)
The colonies made important exceptions to the common law. The colonies reflected that exception by issuing special statutes.
The emergence of the professors and their influence led to some changes. First, it resulted in the gradual weakening of the extreme individualistic ideas of the period.
Some of the law professors argued that law is not precedent, nor to be found in the statutes. But law is what the courts and officials do. This theory of law is known as legal realism.

Itself a product of 17th and 18th centuries transplantation of the British legal system, the legal system of the United States of America (especially constitutional law, criminal procedure and anti-trust law) was taken to Japan immediately after the WW2.

Via the influence of international organizations such as the IMF and the World Bank, some aspects of constitutional law of the United States of America was transported to countries in Latin America, Africa and Asia.

Shared Features of the Western Legal Traditions: The most obvious feature of modern civil law is that it is codified.

Another prominent feature of modern civil law is the sharp distinction between public law and private law.

Modern civil law makes a sharp distinction between substantive law and procedure.

3.4 The Socialist Legal Tradition

Origin: The socialist legal tradition originated at the time of the October Revolution of 1917. Before that event, the dominant legal tradition in the Russian Empire was the civil law.
Primitive society versus communism: The state of affairs envisage under communism seems to be similar to the conditions that prevailed during the primitive society.

In both primitive and communist systems, economic classes, private property, the state and law are non-existent.

To the Marxist-Leninist, however, the early society represented not communism, but communalism.

Perception about law: The socialist attitude is that all law is an instrument of economic and social policy.

Law emerged as an instrument for regulating the external conduct of the evil man.

Purposes of socialist law: The historical mission of socialist law is to advance society towards socialism and ultimately towards communism.

Socialist law is featured by the tradition of codification. It does not recognize the division of law into public and private law. Socialist legal traditions consider all law as public.

Spread of socialist laws- socialist law was rooted in the philosophy of Marx and Engle's; in early 20thc, revolutionaries in Russia converted this anti-western dominant thinking about law and society to a full-fledged legal system.

3.5 The Islamic Legal Tradition

owes its origin to divine power-Allah, encompasses the spiritual as well as the secular activities of Muslims. It interplayed with common law and civil law systems in 19th and 20th C.

Shari' a, which can be literally translated as "the road to the watering place" or "the clear path to be followed," means in the legal context, "the sacred law of Islam." It encompasses the entire system of Islamic law, dictating penal laws and daily religious, social, and personal interactions.

Muslim legal scholars admit that the Sharia law is not put in a comprehensive and orderly form.

There are ethics, history, wisdom, sayings and legislation in the Holy Koran.

It is the totality of rules, which Allah has laid down and revealed to Prophet Mohammed for governing man's behavior.

The first and most important source of Shari'a is the Holy Koran.

Qiyas comes to operation when the other three sources of law become inadequate to address a given legal issue.

The Suna is the second source of Islamic law. It is the totality of the inspired practices of the prophet.

Ijma, is the consensus of Islamic legal scholars on any particular point of law.

The final major source is the concept of deduction by analogy, Qiyas, which involves the use of logic and reason.

Degree of external influence: In cases where the conflict has been less manifest, acceptance of western commercial and maritime law was successful.

Spread of Islamic law- has been taken to the coastal parts of West, North, East and South East Africa, on some occasions also to deep into the heart of Africa, owing to such factors as commercial intercourse and migration.

3.6 The African Legal Traditions

The dead, gods and the living are considered to be the actors responsible for making the African laws.

The rules governing under developed societies deal both with behavior and with the settlement of disputes.

Features- African legislative is invisible: composed of gods and ancestors.

African law seeks to preserve the group and peace, sees the woman generally as inferior to man, Conciliation plays a very important part, Custom is the natural source, unwritten.

Modern African law is a collection of laws and habits of legal thought.

External contacts: African law has not escaped outside influence.

systems of most African countries allow courts to apply African Customary Law, though with some restrictions.

Legal Convergence and Divergence

Legal convergence brings legal systems of the world closer to one another while legal divergence drifts them apart. It simplifies legal rules and institutions for the lawyers, as legal convergence rests on uniformity.

Legal divergence, on the other hand, complicates legal rules and institutions, as it rests on essential differences.

Legal convergence brings about simplicity and certainty in the application of laws.

factors contribute r single market, the trend towards convergence of European systems, the growing influence of European Community law on EC Member States.

Approaches to Divergence and Convergence

1)The jus commune theory- 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*.

2)Legal evolution 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.

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

4) **The Marxist theory-** argues that law is mere superstructure. Accordingly, law is merely another instrument for the furtherance of certain economic, social and political ideals.

Modes of convergence

-Active programs for the unification of law - Legal transplantation

- Natural convergence - Current developments

UNIT TWO

Aspects of the Legal System of Ethiopia

Conceptions of Law in Ethiopia - The foundation of the natural law theory is the belief that law is divine by its very nature, and that law is something coeval with mankind itself.

The Sources of the Six Codes- A legal document may be a constitution, a proclamation, a regulation, a directive, a testament and any other legal document , Material source

Zese may be obtained from public opinion, pertinent books, experts, past legislation, foreign sources and research, etc.

Z Sources of the six codes r equity, religious percepts, natural law, the Fetha Nagast, treaties, Customary Laws, Fewese Menfesawi, z 1930 Penal Code,

Cases: On two occasions, Ethiopia compiled past decisions, in 1908 by Emperor Menilike II and 1950`s by Emperor Haileselassie I. The first attempt at compilation of judgements was made for the purpose of enhancing predictability in the legal system of the country. The latter

compilation of past decisions was made with the view to giving information to the drafters of the six codes. And compilation of past decisions immediately before the codification project in Ethiopia was called the Digest of the Old Ethiopian Judgments.

Statutes: In 1920`s, early 1930`s and 1940`s Ethiopia passed several statutes. The following may be cited as examples: the nationality law, company law, loan law, bankruptcy law, business registration law and banking law.

Justifications:- One reason is the country's exposure to codification. *Fewese Mefesawi*, The *Fetha Nagast* ,The 1930 Penal Code,There were several statutes issued in 1920`s, 1930`s and 1940`s.

-Policy instructions

* Amicus curiae suggests that interested individuals should be given a chance to participate in the administration of justice. The term ``interested individuals`` is very broad for sure the term includes the parties directly affected by the outcome of a given litigation.

Constitutional Development of Ethiopia- the 1931, 1955, 1987 and 1995 constitutions.

In the year 1974/75, Emperor Haileselassie I sponsored a draft constitution. The draft was finalized. The principal aim of the draft constitution was to calm down the various uprisings against his rule, among others, by trying to put a constitutional monarchy in place.