Legal History and Traditions

Teaching Material

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Table of Contents

Acknowledgment……..viii
Introduction……..1
U.1PreliminaryConsiderations…….3
Introduction……3
1.1 Explaining some notions……..3
1.1.1 Definition of legal history……...3
1.1.2Approaches to legal history…….....4
1.1.3 Importance of history……..5
1.1.4 Review questions……...11
1.1.5 Reasons for the study legal history…….....11
1.1.6 Problems in the study of legal history……12
1.1.7 The concept of legal system……..12
1.1.8 Classification of legal systems……..13
1.1.8.1 Tests of Classification…….13
1.1.8.2 Distinctive mode of legal thinking……...14
1.1.8.3 Ideology……15
1.1.8.4 An Alternative Test…….15
1.1.8.5 Reasons for classification……...16
1.1.9 Legal Tradition……..16
1.1.9.1 Definition of a legal tradition……17
1.1.9.2 The notion of civil law……17
1.1.9.3 The notion of common law……18
1.1.10 Review Questions……18
1.2 Legal Transplantation……...21
1.2.1 Legal transplantation…….21
1.2.2 Reasons for legal transplantation……21
1.2.3 A historical account of legal transplantation…….22
1.2.4 Notes……23
1.2.5 Views on legal transplantation……23
1.2.6 More on legal transplantation……..24
1.2.7 Interface: Imported laws and preexisting laws…….26
1.2.8 Review questions……...28
1.2.9 Interface: Imported laws and preexisting laws in Ethiopia….28
1.2.10 Review questions…….32
1.2.11 Legal penetration versus legal extension…….32
1.2.11.1Legal penetration……...32
1.2.11.2 Legal extension……..32
1.2.11.3 Reasons for the gap……...33
1.2.11.4 Review questions……..35
1.2.12 Summary ……..41

U.2 Ancient Legal Systems……...42
Introduction……42
2.1 Three early legal systems…….....42
2.1.1 The Babylonian legal system……42
2.1.1.1 The three stages……...42
2.1.1.2 The basis of legitimacy-Hammurabi`s Code……...43
2.1.1.3 Review questions……45
2.1.1.4 More on the laws of Mesopotamia……...45
2.1.1.4 Some aspects of the Code of Hammurabi……...47
1.2.1.5 Review questions……50
2.1.2 The Greek legal system……51
2.1.3 The Roman legal system……...51
2.1.3.1. Aspects of the XII Tables……...52
2.1.3.2 The significance of the XII Tables……52
2.1.3.3 The second stage in the life of Roman law……..55
2.1.3.4 The Law of Justinian……...55
2.1.3.5 The organs of the state in Rome……57
2.1.3.6 Review questions……63
2.1.4 Meaning of Roman law.....63
2.1.4.1 The Justinian compilation……..64
2.1.4.2 The Code……..64
2.1.4.3 The Digest……64
2.1.4.4 The Institutes……...65
2.1.4.5 The Novellae……65
2.1.4.6 Byzantine law……..66
2.1.5 The contributions of Roman law…….67
2.1.6 Review questions……...69
2.1.7 The transformation of the Digest and Canon law…….69
2.1.8 Review questions…….....72
2.1.9 Accessibility of the Digest…….72
2.1.10 Review questions…….78
2.1.11 Glossators and Commentators……...78
2.1.12 Humanists…….79
2.1.13 Natural Law School…….80
2.1.14 Historical school (*Pandectists*)…….80
2.1.15 Revival of Roman law…….80
2.1.16 Review questions…….92
2.2The Attributes of Law in the Early Legal Systems…….....97
2.2.1 Definition of law under the Babylonian legal system……..97
2.2.2 The Greek legal system…….....98
2.2.2.1 Features……98
2.3 The Roman legal system……100
2.4 Review questions……102

2.5 Common Features……...102
2.6 Summary.. ……...103
2.7 Review Questions ……..104
U.3 Major Legal Traditions of the World……..108
Introduction…….....108
3.1 The French Legal System……...108
3.1.1 Civil law…….....108
3.1.2 The era of customary laws in France…….....109
3.1.3 The drive towards codification……..110
3.1.4 The Revolutionary Period (1789–1799)…….111
3.1.5 The birth of Code Civil…….....112
3.1.6 The French Civil Code……113
3.1.7 Spread of French law……...114
3.1.8 Review questions……115
3.2 The German Legal System……118
3.2.1 Background……...118
3.2.2 The Pandectist School…….....120
3.2.3 The German Civil Code…….....121
3.2.4 Spread of German laws……...122
3.2.5 Code and codification……..122
3.2.5.1 Codes and codification……122
3.2.5.1 Code and the Enlightenment……...123
3.2.5.3 Codification & nationalization of laws……..123
3.2.6 Review questions……125
3.3 The Common Law Tradition……127
3.3.1 The British legal system……...127
3.3.1.1 The British style……127
3.3.1.2 Origin of Case Law…….....129
3.3.1.3 The role of equity……..130
3.3.1.4 The Influence of Roman law……131
3.3.1.5 The period of legal reform…….....136
3.3.1.6 Spread of British laws……...137
3.3.1.7 More on the roots of the British legal system……...137
3.3.1.8 Review questions……...141
3.3.2 The American Legal System……...145
3.3.2.1The age of theocracy……..145
3.3.2.2 Reception of common law…….....145
3.3.2.3 The victory of the north…….....146
3.3.2.4The role of law professors…….....146
3.3.2.5 Legal uniformity……...146
3.3.2.6 Spread of the US laws……...147
3.3.2.7 Review questions……..147
3.3.3 Civil law and common law contrasted……149

3.3.4 Shared Features of the Western Legal Traditions……...151
3.3.5 Review questions……157
3.4 The Socialist Legal Tradition……159
3.4.1 Origin……160
3.4.2 Primitive society versus communism……...160
3.4.3 Perception about law……...160
3.4.4 Purposes of socialist law……163
3.4.5 Codification and socialist law……....165
3.4.6 More on the hallmarks of socialist legal tradition……...165
3.4.7 Spread of socialist laws……...166
3.4.8 Review questions……166
3.5 The Islamic Legal Tradition…….....170
3.5.1 Essential aspects……...170
3.5.2 Sources of Islamic law……171
3.5.3 Doctrinal differences……171
3.5.4 External influence……....172
3.5.5 Degree of external influence……...172
3.5.6 Spread of Islamic law……..172
3.5.7 Notes on Islamic Law In Ethiopia……172
3.5.8 Review questions……174
3.6 The African Legal Traditions……175
3.6.1 Designations……176
3.6.2 Scope…….....176
3.6.3 Features……176
3.6.4 External contacts…….....178
3.6.5 Review questions……185
3.6.6 The Debate after independence……187
3.6.7 Review questions……188
3.7 Legal Convergence and Divergence……191
3.7.1 Definition of legal divergence……....191
3.7.2 Definition of legal convergence……192
3.7.3 Importance of legal convergence……...192
3.7.4 Obstacles to legal convergence…….....192
3.7.5 The current trend……192
3.7.6 Contributing factors…….....194
3.7.7 Approaches to Divergence and Convergence……195
3.7.7.1 The Jus Commune theory ……...195
3.7.7.2 Legal evolution theory……195
3.7.7.3 Natural law theory…….....196
3.7.7.4 The Marxist theory…….....196
3.7.8 Modes of convergence……196
3.7.8.1Active programs for the unification of law……....197
3.7.8.2 Legal transplantation……197

3.7.8.3 Natural convergence…….....198
3.7.9 Current developments……198
3.8. Summary…….199
3.9. Review questions……...200

U.4 Aspects of the Ethiopian Legal System……..202
Introduction……..202
4.1 Conceptions of Law in Ethiopia……...202
4.1.1 Law as a gift of a supernatural power…….....202
4.1.2 Review questions…….207
4.1.3 Western laws…….208
4.1.4 Review questions…….213
4.1.5 Excerpts (notes)……214
4.1.6 Review questions…….215
4.1.7 Does Ethiopia have a legal system?.....215
4.1.8 Review questions & notes……...219
4.2 The Sources of the Six Codes……...219
4.2.1 Preliminary issues……220
4.2.1 Source……220
4.2.2 Gaps……...220
4.2.3 Extent of accommodation……...221
4.2.4 Legal structure…….....223
4.2.5 Break in continuity…….....224
4.2.6The political landscape…….224
4.2.7Review questions…….....230
4.2.8 Notes & questions……235
4.2.9Two senses of the term sources of law…….....236
4.2.2 Sources of the six codes…….....236
4.2.2.1 Equity……..236
4.2.2.2 Review questions……..238
4.2.2.3 Religious percepts…….239
4.2.2.4 Natural law……....239
4.2.2.5 The Fetha Nagast…….....239
4.2.2.6 Review questions……...241
4.2.2.7 Cases…….....241
4.2.2.8 Statutes……...242
4.2.9 Treaties…….....242
4.2.2.10 Customary Laws…….243
4.2.2.11 Fewese Menfesawi…….....245
4.2.2.12 The 1930 Penal Code…….....245
4.2.3 Summary……...245
4.2.4 Review questions…….246

4.3 The Background to the Six Codes……247
4.3.1 The decision to modernize laws……....248
4.3.2 The model adopted…….....250
4.3.3 Justifications……..251
4.3.4 Review questions…….254
4.3.5 Policy instructions……254
4.3.6 The position given to customary rules……..254
4.3.7 Review questions…….256
4.3.8 The Codification Commission……256
4.3.9 Review questions…….262
4.3.10 The Ethiopian Civil Code……..265
4.3.11 Review Questions…….....270
4.3.12 Sources of the Ethiopian Civil Code……...272
4.3.13 Review questions……...277
4.3.14 The 1957 Penal Code……..278
4.3.15 The Commercial Code……...279
4.3.16 Review questions……...284
4.3.17 Potentials and limits of codification……284
4.3.18 Review questions and notes…….287
4.4 The Development of the Ethiopian Penal Law……292
4.4.1 The Fetha Nagast…….292
4.4.2 The 1930 Penal Code……292
4.4.3 The 1957 Penal Code……293
4.4.4 The Criminal Procedure Code……...295
4.4.5 The 1974 Revolution and criminal law…….296
4.4.6 Special Penal Code of 1981…….297
4.4.7 The 1980`s Legal Reform…….298
4.4.8 The Revised Criminal Code……298
4.4.9 Review Questions……299
4.5 The Judicial System of Ethiopia…….301
4.5.1 Pre-Italian occupation…….301
4.5.2 During Italian occupation (1936 to 1941)…….....304
4.5.3 Post-the liberation period (1942-1965)…….....304
4.5.4 Fusion of Power……305
4.5.5 The court system (1965-1975)…….308
4.5.6 Non-regular courts…….....311
4.5.7 Amicus curiae……...311
4.5.8 The court system (1993-1995)…….372
4.5.9 The courts system (since 1996)……...314
4.5.10 Cassation power…….315
4.5.11 Review questions and notes…….317
4.6 Constitutional Development in Ethiopia……..319
4.6.1 Pre-1931 Period…….319

4.6.2 The 1931 Constitution……..322
4.6.3 Review questions…….324
4.6.4 Review questions…….327
4.6.5 The Ethio-Eritrean Federation (1952-1962)…….....327
4.6.6 Review questions…….332
4.6.7 The 1955 Revised Constitution…….....332
4.6.8 Review questions…….338
4.6.9 The Revolution-Background…….....336
4.6.10 The Draft Constitution (1974)…….....342
4.6.11 Review questions……...345
4.6.12 Ethiopia under the PMAC (1974-1987)……...346
4.6.13 Review questions……...357
4.6.14 PDRE Constitution (1987-1991)……357
4.6.15 The Transitional Period Charter (1991-1994)…….363
4.6.16 The FDRE Constitution…….366
4.6.17 Review questions……...370
4.6.18 Collective self-redefinition……372
4.6.19 Review questions……...376
4.6.20 Excerpts……...376
4.6.21 Review questions……...379
4.6.22 A comparison……...379
4.7 Summary ……..381
References……..384

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Introduction

This course is a critical survey of the major past and present legal traditions of the world. It identifies and explains the central problems those legal traditions faced; the type of solutions they gave to such problems and the reasons why they chose those solutions. Identifying the key issues encountered by past legal systems and the solutions offered thereto is hoped to throw light on the foundations of the Ethiopian legal system since some major legal traditions have a tremendous influence over the same. In so doing, the course conveys the message that the Ethiopian legal system may not be properly appreciated without some knowledge about major legal traditions of the world. The course discusses the story of how non-western legal traditions such as the African customary law tradition and religious law traditions (e.g. the Islamic law tradition) were affected by the western legal thinking especially in the 19th and 20th centuries. Moreover, this course analyses such core concepts as legal history, legal tradition, legal system and legal transplantation in addition to examining the concepts of legal convergence and legal divergence, meaning the various forces which bring together and drift apart the principal legal traditions of the world.

The course emphasizes the significance of understanding past legal systems for an enhanced appreciation of present legal orders. It seeks to direct the attention of students to the co-existence of multiple legal orders in multiethnic countries such as Ethiopia. The course seeks to stimulate students to be appreciative of and sensitive to diverse legal traditions.

The course is organized into four units. It begins with the analysis of major concepts followed, in the second unit, by the examination of the major facets of four early legal systems, i.e., the Babylonian legal system, the Greek legal system, the Roman legal system and Egyptian legal system. The third unit focuses on the features of major legal systems in the world. Included in this unit are explanations, by way of comparison, of the history and development of civil law (exemplified by the French and German legal systems) and common law traditions (illustrated by the British and US legal systems), the socialist law tradition, the African law tradition and the Islamic law tradition. Finally, some aspects of the Ethiopian legal system are covered in unit four. Topics to be examined in this last unit include: conceptions of law in Ethiopia, sources of Ethiopian laws, background to the 1950`s and 1960`s codes of Ethiopia, the development of the administration of criminal justice system in Ethiopia, the development of the judicial system of Ethiopia and the constitutional development of Ethiopia.

Delivery of the course should include lecture, group discussions and assignment(s). On the top of a final examination, class participation, group discussions and assignment(s) should count in assessing the performance of students in the course. In view of the fact that students take a sequel course in constitutional law, instructors may skip the section which covers African and western constitutional development (Section 3.8). The references are not put in the order of their importance. Even if students cannot get some of the materials for their immediate consumption, having the bibliography is useful, especially to a student who likes to further pursue the subject.

Upon the completion of the course, students are expected to:

- Analyze some key concepts in legal history.
- Compare and contrast aspects of the principal legal traditions of the world.
- Discuss the distinctive features of the different legal traditions of the world.
- Explain the background to the Ethiopian legal system.
- Examine the sources of modern Ethiopian laws.
- Establish the relationship between traditional laws and state laws in Ethiopia and
- Critically explain the development of constitutions in Ethiopia.

U.1 Preliminary Considerations

Introduction

The present unit identifies and defines major concepts in the course. Legal history is defined; the importance of legal history is outlined; the problems linked to the study of legal history are described; the idea of legal system as well as legal tradition is discussed. It is hoped that the students` appreciation of the preliminary issues covered in this unit would throw lights on subsequent discussions in the course.

At the end of this unit, students should be able to:

- Define major concepts in legal history.
- Analyze the relationship among notions such as legal history, legal system and legal tradition.
- Explain the significance of studying legal history.
- Examine the various issues relating to transplantation.
- Identify the importance of legal transplantation to the Ethiopian legal system.

1.1 Explaining some notions

This section defines legal history and discusses lots of other related notions such as the concept of legal system and legal tradition.

1.1.1 Definition of legal history: Can you give some of the elements of the definition of legal history? What is history? Is history a subject about the study of past events and occurrence? What about legal history? Is legal history about a mere recording of those past events? Does history go beyond mere description of past events? Does it also include interpretation or reinterpretation of the past? The definition of legal history may be controversial. But as a working definition, you may take the following: 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. Legal history compares and contrasts the various past legal systems of the world.

A legal historian should adopt an interdisciplinary approach to the subject; which means, a legal historian should be informed by economics, political science, sociology and other relevant social sciences. This is so because a legal system of any country cannot be fully appreciated if it is considered independently. Religion affects a legal system; politics affects it and so are economic institutions of that country.

Legal History, www.http://en.wikipedia.org/wiki/Legal_history, Wikipedia, (accessed November, 1 2006)

Legal history is a term that has at least two meanings.(1) Among certain jurists and historians of legal process it has been seen as the recording of the evolution of laws and the technical explanation of how these laws have evolved with the view of better understanding the origins of various legal concepts, some consider it as a branch of intellectual history. (2) Twentieth century historians have viewed legal history in a more contextualized manner more in line with the thinking of social historians. They have looked at legal institutions as complex systems of rules, players and symbols and have seen these elements interact with society to change, adapt, resist or promote certain aspects of civil society. Such legal historians have tended to analyze case histories from the parameters of social science inquiry, using statistical methods, analyzing class distinctions among litigants, petitioners and other players in various legal processes. By analyzing case outcomes, transaction costs, number of settled cases they have begun an analysis of legal institutions, practices, procedures and briefs that give us a more complex picture of law and society than the study of jurisprudence, case law and civil codes can achieve.

1.1.2 Approaches to legal history: There are four major approaches in studying legal history and traditions. The first approach states that 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. This approach is called the unitary or isolationist approach.

The second approach is called the holistic or the sociological approach. It refers to the inclusion of economic, religious, social political institutions of past societies. This approach, in addition to the elements that must be studied according to the first approach, should include both internal and external factors to a past legal system as a legal system does not stand in isolation from external factors. Thus, the study of legal history and legal traditions will not be complete unless it includes economic, social, religious and political elements. The sociological conception rests on the idea that society is a whole and is not made of separate elements. 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 force it to organization and search for solutions.

The third approach is called the 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. There is a need to study the history of the laws of the past societies not simply for the sake of knowledge of these societies (as in the historical conception); it is not

simply to reach a sociological explanation of their laws and their relations to other aspects of the social organization (as in the sociological conception); it is not also simply to discover general rules of the evolution and development of societies; rather it is to gather legal problems and to understand the reasons why these solutions were chosen plus the technical arguments and reasoning by which they have been justified by these societies.

The last view called the mixed approach is a combination of the unitary, the holistic and technical approaches. This mixed approach bases itself on the idea that the three approaches have positive elements, which need to be taken into account when studying legal history and legal traditions. The four approaches to the study of legal history are different in terms of scope, purpose and the legal theory behind them. For example, 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.

1.1.3 Importance of history

ሚካኤል ሺፈራው ምስጢረኛው ባለቅኔ ኢትዩጵያ፣ ፀጋዬ ገ/መድህንና ስራዎቹ/1997/ ገጽ 37-41

አንድ ትውልድና ዘመን በሁለት ምክንያት የኋዋሊት ተመልሶ የአያት ቅድመ አያቶቹን መቃብር ይቆፍራል።አንደኛው ምክንያት የዛሬ ማንነቱ አሳፋሪና ባዶ ሲሆንበት መሸሸጊያ ፍለጋ ነው። የዛሬ ማንነቱ ባዶ ሲሆንበት ይህንን ባዶ ማንነቱን ለመለወጥ ከጉልበትም፣ ከጥበብም፣ ከውበትም፣ ከእውነትም፣ ከሁሉም ተራቁቶ በዓለም ፊት አንሶና ተጨብጦ፣ ትከሻው ጠብቦ፣ ራሱን ማስተዋል ሲያሳፍረው፤ ያው መቼም በህይወት ለመቆየት ህልውናውን ለራሱና ለሌሎች ማስረገጥ የግድ ነውና ከአያት ቅድመ አያቶቹ ማንነት ውስጥ ዛሬ የሚደገፍበት ምርኩዝ ፍለጋ መቃብር ቆፋሪ ይሆናል። በዚህም ጊዜ እንዲህ ዓየነቱ መቃብር ቆፋሪ ትውልድ የአያት የቅድመ አያቶቹን "ባለባትነት" ወይም የነገስታቱን ደምና አጥንት እየተረተረ የነተበች ሸሚዝ በአሮጌ ክራባት ለብሶ በየድግስ ቤቱ ሲቃርም እንደሚውለው ዘመን ያለፈበት ተሰፈኛ ይመስላል። እንዲህ ዓይነት ተሰፈኞች ማየት በኛ አገር ከቶም ብርቅ አይደለም።

ይኼኛው ዓይነቱ መቃብር ቆፋሪ የአያቶቹን ታላቅነት እየተነተነ የዛሬ ሽንፈትና ሞቱን ያስታምማል። በዚህ ረገድ አያቶቹን ለህይወት ሳይሆን ለሞት ራሱን ለመሸንገያ ይገለገልባቸዋል። ዛሬ ዛሬ በእኛ ሀገር ባብዛኛው ጉለቶ ያለው ይኸው ነው። ይሔ ሁሉ "የጥንታዊ ገዳማትን" የሙጥኝ ብሎ ተንጠልጥሎ ያለ ትውልድ የኋዋሊት የሚንጠለጠለው በእርግጥ የአያቶቹን የእምነት ጉልበት ተርቦ ሳይሆን ዛሬ ማንነቱ ስለምታስፈራራው ይመስለኛል። ይህን የምልበት ምክንያት በአንድፊት የኋዋሊት በአያቶቹ ገድልና መቃብር ላይ

ሲረባረብ በሁለተኛ ፊቱ በዚህችው ደቃቅ ምድራዊ ህልሙ ላይ ጉሮሮ ለጉሮሮ ተናንቆ ሲተላለቅ ስለሚታየኝ ነው። የአያቶቹን የእምነት ምርኩዝ /መቋሚያቸውን/ ለመውረስ ደግሞ አስቀድሞ በእነርሱ ማመን እነርሱ ባመኑባቸው በአማልክቶቻቸው ማመን ይፈልጋል። የኛ ዘመንና ትውልድ የተሳነው ደግሞ ይህን ማድረግ ነው። ማመን። በምንም ነገር በራሱ በወንድሙ በአምላኩም ጭምር ማመን ነው የተሳነው። የኛ ዘመን በጥርጣሬ ተበልቶ ውስጡን የነተበ ነው። በቃሉ ይዞ በሚተነትነው በአባቶቹ ገድል የሚያምንበት ልብ የለውም።

ሁለተኛው ዓይነት መቃብር ቆፋሪ ግን ከዚህ ይለያል። የኋሊት ተመልሶ የአያቶቹን ማንነት ሲበረብር አስቀድሞ ነገር የሚበረብረው ታላቅ ገድላቸውን ብቻ አይደለም። ይልቁንም የዛሬ በሽታዎቹን ስር ሁሉ ከጥንታዊ ስራቸው ለመርመር ነው እንጂ። እንዲህ ያለው የኋዋሊት አስተዋይ ትውልድ የኋሊት ሲያስተውል የዛሬ ባዶነቱን የሚሸፍንበት ሸፋን ፋለጋ አይደለም። ይልቁንም ለባዶነቱ ምክንያት የሆኑ ረጅም ስር ያላቸውን መንፈሱን የመረዙ የታሪክ ውርሶች ኬሚስትሪ ለማጥናት ነው። እንዲህ ያለው ትውልድ የኋዋሊት ሲመለከት አያቶቹን ሊያወድስ ወይም ሊረግም አይደለም፤ ይልቁኑም ሊያውቃቸው ነው እንጂ ። ለዚህ ትውልድ እነርሱን ማወቅም ከማውገዝና ከመርገም ከመውደድና ከመጥላት ባሻገር ነው። እነርሱን ማወቅም ራሱን ማወቅ መሆኑን ደህና አድርጎ ከመነሻው ያውቃልና።

በኦሪየንታል ጥንታዊ ፋልስፍና በቡድሐዝምና በሂንዱ አንድን ነገር በመወደድና በመጥላት በሁለቱም መንገድ እውነተኛ ተፈጥሮውን ማወቅ አይቻልም ይባላል። ወይም ደግሞ የምትወደውን ነገር ሁለቱንም ገፅታዎች ቆሞ ማስተዋልን ይጠይቃልና ነው። ስለምትወደው ነገር እንዲህ እና እንዲያ ነው ብለህ በምትመሰክር ጊዜ እንዲህ እና እንዲያ ሆኖ ያየኸው በመውደድ ዓይነት ስላየኸው እንጂ ላንተ ሆኖ የታየህ እውነተኛ ተፈጥሮው በመሆኑ አይደለም ይላል። በዚህም ምክንያት ለመውደድህ ምክንያት፣ መልካም ሆኖ ያየኸው ነገር ላይ የሚታይህን የብርሃን ፀዳል የጣለው ከራስህ ፍቅር የመነጨው ብርሃን ነው ይላል። በወደድከው ነገር ላይ የምታየው ብርሃን ከራሱ የመነጨ ቢመስልህም የብርሃኑ ምንጭ አንተው ራስህ ነህ ይላል።

የምትጠላውም እንዲሁ ነው። የጠላኸው ነገር አሁን እንዳየኸው ጠቁሮ የሚታይህ በጨለማ ውስጥ ሆነህ ስለምታየው እንጂ በእርግጥም የዚያ ነገር አብጅክቲቭ ማንነት ይኸው ሆኖ አይደለም ይላል። ይኸውም ታላቅ እውነት ነው። ስለዚህ ሁለተኛው ትውልድ እውነትን የሚያየው ከመውደድና ከመጥላት ከርግማንና ካድናቆት ማደ ነው። ለነገሩ የመጀመሪያው ዓይነት ትውልድ የአያቶቹን መቃብር ሙጥኝ የሚለው ስለሚወድና ስለሚያከብራቸው አይደለም። አስቀድሞም ነገር ለመውደድና ለማክበር የሚወደደውንና የሚከብረውን ማወቅ ወይም በትክክል ማየት ይጠይቃል። ይኼኛው ዓይነት ትውልድ አያቶቹን ከፍ ከፍ የሚያደረገው መንፈሳቸውን ሳያውቅ ከማንነታቸው ጥልቅ ትውውቅ ሳይኖረው ነው። እንዲህም የሚያደርገው እነሱን ከፍ ለማድረግ ሳይሆን ይልቁንም ራሱን ከፍ ለማድረግ ነው።

እንዲህ ዓይነቱ ትውልድ ኢትዮጵያ ቃላቅ ናት ሲል እኔ ታላቅ ነኝ ማለቱ ነው። ኢትዮጵያ ብቸኛይቱ የፃድቃን ደሴት ናት በእግዚአብሔርም የተመረጠች ምድር ናት፤ ሲል እኔ ከዚህች ብፅዕት ምድር የወጣሁ ነኝ ማለቱ ነው። እንዲህ ያለው ትውልድ ኢትዮጵያ ጥንታዊ የስልጣኔ መሠረት ናት ሲል እኔ ኢትዮጵያዊ ነኝ ስለሆነም የዓለም ስልጣኔ መሠረት አባት ነኝ ማለቱ ነው። ሁለተኛው ዓይነት መቃብር ቆፋሪ አያቶቹን ራቁታቸውን ለማየት የሚያበቃ አስርኅሪ አለው። በአያቶቹም ራቁት ውስጥ የራሱን ራቁት ያያል ይህ ትውልድ ሞቶ ሳለ ህያው ነኝ፤ ታሞ ሳለ በጉ ነኝ፤ አይልም በሽታውን ቁስሉን አፍረጥርጦ ያክማል። ይህን ሲያደርግ ሳለ የሚገድለው ቢሆን እንኳ ሞትን ራሱን አይፈራውም። እንዲህ ዓይነት ትውልድ የኋዋሊት የሚመለሰው ዛሬን ለመረዳት ነው። ልክ ሳይኮ-አናሊስቱ ከኒውሮቲኩ የልጅነት ህይወት ውስጥ ለዛሬ ቀውሱ ምክንያት የሆነውን ስር ለመፈለግ ኒውሮቲኩን የኋሊት የሚያስተውለው በዛሬ ጨለማው ላይ ብርሃን ለመፈንጠቅ ነው።

Southgate Beverly, Why Bother with History: Ancient, Modern and Postmodern Motivations, (2000).

The student who reads history will unconsciously develop what is the highest value of history: judgment in worldly affairs. This is a permanent good, not because "history repeats" - we can never exactly match past and present situations - but because the "tendency of things" shows an amazing uniformity within any given civilization. As the great historian Burckhardt said of historical knowledge, it is not 'to make us cleverer the next time, but wiser for all time.'" -Jacques Barzun

Why bother with history? This question is posed by British scholar Beverly Southgate as the title of his book exploring the status of history in contemporary culture. Southgate begins his analysis by noting a paradox; while the value of history has been questioned for over a century by progressive and postmodernist philosophers, history seems to be more popular than ever with the public. History has its own television channel to which countless Americans are addicted, and all five Academy Award nominations for a recent year went to films based on historical events. Obviously, the popular interest in history reflects a desire to know more about ourselves which is well and good, but does history possess sufficient value to warrant an extensive formal program of history instruction in the schools?

"Probably not" was the view of progressive educators whose philosophy gained ascendancy at about the time that compulsory public education was being adopted in Western societies. Academic subjects such as history and algebra were acceptable, they felt, for the privileged few who would go on to college and the professions, but the vast majority of students would be better served by training in more practical skills suitable to the workplaces of the Industrial Revolution. Critical of memorization and rote learning, progressives still tend to favor "learning by doing" over the acquisition of academic knowledge. Although the progressive philosophy held sway in schools of education (if not in actual teaching practice) for most of the twentieth century, it is on the defensive in the present climate of education reform that views past educational practices as inadequate and seeks high academic standards for all students.

"Probably not" might also be the response of postmodernist scholars who correctly observe that real objectivity is unobtainable and that truth is ultimately unknowable. It is a waste of effort, they suggest, to study a subject such as history which bears only a tentative and subjective relation to reality, which, itself, does not exist because reality is a fiction that we have made up. With our exquisite modern awareness of the relativity of all things, we are rendered powerless to believe in the truth of anything, and thus we have arrived at "the end of history." Well, as Freud liked to say, "Theory is good, but it doesn't prevent things from existing." History did, in fact, happen, and without it we would be largely ignorant of the workings of the world and of the human animal. What, then, are the perceived uses of history that have managed to preserve it as a central feature of the American school curriculum despite the misgivings of its critics? Here is a brief overview.

History shows us what it means to be human. Some of history's greatest historians have seen human self-awareness as the very essence of history. Arnold Toynbee said, "History is a search for light on the nature and destiny of man." R.G. Collingwood wrote, "History is for human self-knowledge...the only clue to what man can do is what man has done. The value of history, then, is

that it teaches us what man has done and thus what man is." Who better than Alexander the Great to teach us that human nature encompasses the entire range from cruelty to benevolence?

Psychologist Bruno Bettleheim asserted that human self-knowledge is the most important role of education. Most of all, our schools ought to teach the true nature of man, teach about his troubles with himself, his inner turmoil and about his difficulties in living with others. They should teach the prevalence and the power of both man's social and asocial tendencies, and how the one can domesticate the other, without destroying his independence or self-love." These words of Bettleheim, Toynbee and Collingwood were cited in Mark M. Krug's instructive 1967 book on history and the social sciences in which Krug himself wrote, "A historian is interested in the past because he is interested in life. The true historian's interest in the past...answers a deeply felt need to assure the continuity of human life and discover its meaning, even if the goal is never fully realized."

History improves judgment. This is perhaps the most often-cited practical reason for studying history, and it was foremost in the mind of Thomas Jefferson when he wrote that schooling in America's new democracy should be "chiefly historical." He said, "the people...are the ultimate guardians of their own liberty. History by apprising them of the past will enable them to judge of the future. It will avail them of the experience of other times and other nations; it will qualify them as judges of the actions and designs of men." A century later Woodrow Wilson agreed that history endows us with "the invaluable mental power which we call judgment." Now, some two centuries hence, Diane Ravich, a contemporary education policy analyst, affirms the continuing relevance of Jefferson's view, "History doesn't tell us the answers to our questions, but it helps to inform us so that we might make better decisions in the future."

How are we to understand present realities? On what basis shall we make decisions about the future? Shall we act blindly out of passion and ignorance, or shall we attempt to act rationally based on knowledge? If the choice is knowledge, there is only one place to find it. "The future is an abstraction, the 'present' but a fleeting moment, all else history." The great philosopher of education, John Dewey, wrote, "...the achievements of the past provide the only means at command for understanding the present."

In this age of the World Wide Web, globalism and international terrorism, knowledge of the larger world is seen as increasingly important. Mark M. Krug reasonably noted that, "some basic knowledge about the history of China is essential for an understanding of the present foreign policy of mainland China." While such background knowledge cannot predict future events, it can, according to Krug, provide helpful insights: "The knowledge of how men acted in the past, how they have striven to order the life of their respective societies, and how they have striven to overcome diversity, may not always suggest ingenious solutions to present crises, but it undoubtedly makes the task easier by providing a background and a body of past experience. History is indeed an inexhaustible source of examples and modes of life and 'styles of life,' and as such, and to that extent, it is a school of wisdom."

According to Peter N. Stearns the wisdom available from history is useful not only for understanding great public issues; it also has more personal applications: "...data from the past must serve as our most vital evidence in the unavoidable quest to figure out why our complex species behaves as it does in societal settings...and people need to have some sense of how societies function simply to run their own lives."

History provides instructive examples. The use of historical examples is ancient and no doubt predates written language. We can imagine cave dwellers sitting around the evening campfire sharing stories of admired ancestors worthy of emulation. Neitzche said people need models, and historical examples are especially powerful models because they actually existed. Joan of Arc demonstrates the power of individual belief and action. Galileo symbolizes the fight against authority for freedom of thought. Thomas Becket and Thomas More represent integrity in the face of deadly intimidation. Horatio Nelson exemplifies qualities of courage and duty. Hitler personifies evil. While it is not the province of American educators to tell students what their values should be, students can - by judging the actions of historical figures to be admirable or malevolent - advance the construction of their own moral belief systems.

As we know, humans are pattern makers. While many philosophers of history have believed that history is revealed only through its unique events, others have been unable to resist the urge to ascribe pattern to history. Two of the more useful of these patterns were developed by Georg Friedrich Hegel and Oswald Spengler, both of whom saw history as a dynamic process of change. Hegel's famous dialectic proposes that history inexorably moves toward greater freedom through a process of conflict between opposite ideas, such as capitalism versus communism (Marx's favorite). This conflict results in a synthesis combining the best elements of the two original ideas (welfare state capitalism perhaps). The synthesis will, over time, generate its opposite, and the historical pattern is repeated. Spengler developed the organic view that historical cultures, like plants and animals, follow a process of growth, flowering and decline. Certainly, history shows us that individuals and empires may rise, but eventually they will fall.

History makes us better thinkers. Professor and education theorist E.D. Hirsch, Jr. reports that the cumulative weight of research now supports the view that a "broad grounding in specific facts and information" of the kind supplied by history, science and other academic subjects promotes the development of general thinking skills. He writes, "There is a great deal of evidence, indeed a consensus in cognitive psychology, that people who are able to think independently about unfamiliar problems and who are broad-gauged problem solvers, critical thinkers, and lifelong learners are, without exception, well-informed people."

This common-sense view is supported by a report from the National Research Council citing studies on the reasoning abilities of experts. Such research is important, says the report, "because it provides insights into the nature of thinking and problem solving." The NRC report states, "It is not simply general abilities, such as memory or intelligence, nor the use of general strategies that differentiate experts from novices. Instead, experts have acquired extensive knowledge that affects what they notice and how they organize, represent, and interpret information in their environments. This, in turn, affects their abilities to remember, reason, and solve problems." Many historians and educators share a belief that expert knowledge possessed by historians includes not only factual information, but also the habit of critically analyzing evidence. In their workbook, The Methods and Skills of History, college professors Conal Furay and Michael J. Salevouris provide students with experience in analyzing and interpreting historical information. The authors claim that careful historical study teaches analytical and communications skills that "are highly usable in other academic pursuits - and in almost any career you choose."

History supports common cultural understanding and dialogue. Jefferson's hope that historical knowledge gained in school would improve the decision-making capacity of free citizens in a

democracy supposes that all citizens would be similarly informed and share a common basis for evaluating and debating the issues of the day. Robert J. Marzano terms this the "heritage model of schooling, which holds that it is the duty of the education community to help society maintain a common culture by passing on specific information to students." A Nation at Risk, the 1983 report by the National Commission on Excellence in Education, put the matter this way: "A high level of shared education is essential to a free, democratic society and to the fostering of a common culture, especially in a country that prides itself on pluralism and individual freedom." E.D. Hirsch, Jr. and his colleagues made an attempt to identify such shared knowledge in their 1993 Dictionary of Cultural Literacy.

Clearly, literacy depends not only on the coding and decoding skills of writing and reading, but equally on the possession of sufficient shared knowledge to give words and ideas meaning. According to Hirsch, "A citizenry cannot read and understand newspapers, much less participate effectively in a modern economy, without sharing the common intellectual capital that makes understanding and communication possible." These thoughts echo the words of eminent historian Jaques Barzun who wrote, "The need for a body of common knowledge and common reference does not disappear when a society is largely pluralistic, as ours has become. On the contrary, it grows more necessary so that people of different origins and occupation may quickly find common ground and, as we say, speak a common language...it also ensures a kind of mutual confidence and good will. One is not addressing an alien, blank as a stone wall, but a responsive creature whose mind is filled with the same images, memories, and vocabulary as oneself."

History satisfies a need for identity. Closely associated with the idea of shared cultural understanding is the concept of identity. Questions of identify 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. Beverly Southgate argues that history - the memories of things past - is of "supreme importance" in maintaining a sense of identity. In this context Southgate quotes a character from a Saul Bellow novel who says, "Everyone needs his memories. They keep the wolf of insignificance from the door."

In 1931, historian Carl Becker said that "Everyman...reaches out into the distant country of the past" to inform his present and his future. "Without this historical knowledge, this memory of things said and done, his today would be aimless and his tomorrow without significance." Southgate says the need for identity applies to nations as well as to individuals; cultural identity contributes to meaning, purpose and cohesion in society. Furay and Salevouris think of history as "society's collective memory. Without that collective memory," they say, "society would be as rootless and adrift as an individual with amnesia." They quote philosopher George Santayana who wrote, "A country without a memory is a country of madmen."

More uses of history. In The Methods and Skills of History, Furay and Salevouris identify two additional uses of history. By exposing us to the "foreign country of the past" (and to actual foreign cultures of today), history can help us develop tolerance and open-mindedness and "perhaps, rid ourselves of some of our inherent cultural provincialism." Furay and Salevouris also note that "Historical knowledge is extremely valuable in the pursuit of other disciplines - literature, art, religion, political science, sociology, and economics."

Finally, history gives pleasure. This is why history is popular with the public and why many of us find ourselves toiling in the fields of history education. Part of the joy comes from visiting

foreign mental landscapes, part from discovering new things about ourselves and a big part is simply the love of a good story. For those of us with an historical turn of mind, history supplies an endless source of fascination. Unfortunately, for many people, this fascination is not manifested until after high school - after the acquisition of greater experience and interest in the larger world. Teenagers are rightly focused on learning about matters close at hand, such as their emerging sexuality and how they will fit into the adult world. Still, students are only with us during their youths, so teachers must do their best to lay a solid foundation for that longer view while the opportunity exists.

History in school. The future, not the past, is the point of schooling; education is meant to assist both students and society to function effectively in the future. Learning about the past for its own sake is an interest or a hobby and not a proper subject for schooling. Voltaire said, "Life is too short, time to valuable, to spend it in telling what is useless." Nietzche said, "We want to serve history only to the extent that history serves life." We study the past in school not because students need to know a collection of old facts, but because history helps them understand how the world works and how human beings behave. Knowledge of the past is required for understanding present realities. When people share some common knowledge of history, they can discuss their understandings with one another. Students familiar with history know their unique place in the stream of time; they have a sense of the trajectory of human development, where it may veer off course and how it might be kept on track. A democracy needs citizens with such judgment and wisdom; the past is the only place to find it.

1.1.4 Review questions

Answer the following questions.

1. Do you agree with the opinions of Michael Shiferaw about the first class of ``gravediggers``? What about his comments on the second category of `gravediggers`?
2. What is the importance of the study of Ethiopian history for Micheal Shiferaw? Do you agree with his view on the importance of studying Ethiopian history? Why? Why not?
3. Do you think that the uses of history discussed above can be extended to the uses of legal history? Which of the uses of history explained in the above text cannot be extended to the case of legal history?
4. "Not to know what happened before one was born is always to remain a child." (Cicero) Comment!
5. "Everyone needs his memories. They keep the wolf of insignificance from the door." Can you tell the meaning of the statement in this quotation? Is it related to the use of legal history?
6. Nietzche said: "We want to serve history only to the extent that history serves life." Explain!

1.1.5 Reasons for studying legal history: Do you think that it is useful to study legal history? Can you give reasons for the study of 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. Secondly, the study of legal history is important not only to appreciate the present legal systems but also to help us solve legal problems of to day. Certain legal problems the present legal systems face cannot be solved without reference to the past. Third, legal history allows us to be sensitive to legal systems, as legal history reveals that different communities have solved the same legal problems in quite different manner. The way past societies understood the concept of law is different from one another and from the present ways of appreciating the concept of law.

E.P. Bruke, Historical Essay on the Laws of and the Government of Rome, Civil Law, Cambridge Press, London, 1827, (Reprint, W.M. W. Gaunt and Sons Inc. Florida 1994.)

Law is rooted in the past. Legal history is the forms of action human beings buried; but those forms buried long time ago still rule human beings. What then is the utility of legal history? Legal history helps us illustrate how legal concepts, rules, principles, conceptions and standards have met concrete situations of fact in organized human society in the past. Legal history enables us to judge how we may deal with such situations with assurance in the present. Legal history is a reflection of the judgment of its time. A child cannot wear the clothes of the full-grown man. Rather such child should have clothes of different size, as he grows mature. Similarly, a young civilization cannot adopt the law of an ancient society. Such young community must, if it desires to be alive, adjust its own law from age to age.

1.1.6 Problems in the study of legal history: The first effort of the legal historian is to find out what happened in the past. And their next step is to ascertain why those events occurred. Often there are insufficient data available to arrive at a provable conclusion and sometimes none at all. Legal history should tell you why things happened and, sometimes, you may know; sometimes, you may simply make an educated guess and speculation. Some other times, you may have no idea about what happened. Thus the fundamental problem of legal history is lack of sufficient and reliable evidence of past events. As you will notice in the fourth unit of this course, lack of sufficient, accessible and reliable data is one of the main problems in the study of the Ethiopian legal history.

1.1.7 The concept of legal system: As you might have noted, the term `legal system, `is one of the key elements in the description of the term `legal history. Can you tell the meaning of the term `a system`? A system implies that there are several elements put together to achieve a certain purpose. 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. The term `synergy` in this definition implies that legal system is not a mere summation of the elements listed. A legal system is rather qualitatively different from and bigger than totality of those elements. The complexity of a legal system varies depending on

the stage of development of a country. You cannot expect the Mesopotamian legal system to show the sophistication of the current English legal system has. Again you 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 legal professionals, recording etc.

A legal system may refer to the present or the past legal system. The purpose of legal system may be to sustain a slave-owning system or a feudal system or a capitalist system or to build a communist system. A legal system may be created to assure the survival of a theocratic system. A legal system may exist at local level or national or regional or international level. Legal structure encompasses law schools, bar associations, the police, courts, the legislature, the executive and prison administration. Legal structure means all those institutions responsible for creating, modifying, interpreting, improving and implementing laws. The structure has legal actors, which means the persons acting in legal structures, meaning members of the parliament, officers of the state, law students, law teachers, legal practitioners, etc.

1.1.8 Classification of legal systems: Currently, there are about two hundred legal systems in the world. It is not possible nor desirable to learn about all of them. Thus, it appears to be wise to consider only the major legal systems of the world. A legal system is taken as a major legal system based on such factors as its influence on the development of other legal systems; its geographical spread, the technological and economic advances of the country being classified.

1.1.8.1 Tests of Classification: There is no consensus on the proper criteria for the classification of legal traditions among legal historians. A great number of researchers have proposed a variety of criteria in their efforts to categorize systems into groups. Some of these criteria are: race, geography, language, sources of law, substance of law, ideology, legal technique and the system of conception of justice.

Some writers such as Zweigert and Kotz argue that it is not possible to classify legal systems into legal families merely by using a single criterion. In their view, it is sound to devise a set of tests that go through all legal systems that are determined to belong to the same family. They suggest that the critical test is the concept of a style of a legal system. To them, there is a need to realize their legal styles and to use distinctive stylistic traits as a basis for putting legal systems into groups. By legal style, they mean the totality of features that flesh out a distinctive form of legal systems. The critical thing about legal systems is their style since the styles of individual legal systems and groups of legal systems are each quite distinctive. It is not every minor difference between legal systems,

which can rank as an element in their style; only essential differentiating qualities are distinctive. There can never be any final proof of what is essential.

The five factors adopted by Zweigert and Kotz are: the stylistic factors, which enable those who study comparative legal tradition to identify the families of legal systems and to attribute individuals systems to them. But the weight to be given to each of these factors varies according to the circumstances. Ideology is 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. There it is history, mode of thought and distinctive institutions, which distinguish legal families. Sources of law are distinguishing feature of Islamic and the Hindu and also help you to divide the Anglo-American from the continental legal families. But you cannot use sources of law as a basis for distinguishing between the Germanic, Nordic and Romanistic legal families.

How many legal styles a scholar identifies and how he/she identifies them are largely matters of his/her judgment. His/her aim must, however, be to see the differences in reality, past and present, contained in distinctive form of economic life. One indication of the importance of a feature in a legal system is if a person from another system finds it surprising; if it is easier to discover the stylistically distinctive elements in a foreign system in one's own.

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. Next, description of two of these factors is given.

1.1.8.2 Distinctive mode of legal thinking: One of the styles of a legal system is its predominant and characteristic mode of thought in legal matters. The Germanic and Romanistic families are marked by a tendency to use abstract legal norms, to have a well-articulated system containing well-defined areas of law and to think up and to think in juristic constructions. The European is given to making plans, to regulating things in advance, to drawing up rules and systematizing them. He approaches life with fixed ideas, and operates deductively. The Englishman improvises never making a decision until he has to. He is an empiricist. Only experience counts for him; theorizing has little appeal; and so he is not given to abstract rules of law. Convinced, perhaps from living by the sea that life will controvert the best-laid plans, the Englishman is content with case law as opposed to enactments.

Anti-formalism refers to the opposition of legal systems to needless formality in the law. In private law, this shows itself in consensualism, that is, the rule that

agreement creates contractual obligations, no matter how it is expressed. Consensualism is found at an advanced stage of every legal system. The formalism is present in all primitive system. It also exists in Anglo-American law. In Europe, that tendency to anti-formalism is strong.

The struggle for law is an element in legal thinking, which is found in several legal families, in deed in all Western law. The principle is that the goal of law is peace, one must struggle to achieve; it is the duty of a person, owed both to himself and to the idea of law itself. But this idea is not true in Far East and Latin American systems where written law is not very significant in practice. In the West man naturally fight for his rights and seeks a clear decision, treating a compromise as a thing perhaps to be settled for, and in the East the face-saving compromise is the ideal, and a firm decision only a necessary evil.

1.1.8.3 Ideology: Legal ideology means the political or economic doctrines or religious beliefs of the system in question. The role of ideology is clear in the case of the religious belief systems and of the socialist legal systems. The ideologies of the Anglo-American, Germanic, Romanist and Nordic families are essentially similar. And it is because of other elements in their styles that they must be distinguished. Legal ideology separates socialist law and the religious systems, from the legal families of the West.

1.1.8.4 An Alternative Test: Apart from the five stylic factors proposed by Zweigert and Kotz, there is Professor Rene David`s who holds the position that the classification of legal traditions should not be based on the similarity or dissimilarity of any particular legal rules. David proposes two tests that should be used together namely, legal concepts and techniques of employed by the system, and the system's ideology. Professor David defines legal ideology as the philosophical, political, and economic principles of the society in which the legal system operates. By `legal concepts and techniques`, David means the vocabulary of the law, the legal fictions employed by the system, hierarchy of sources of law, and the methodology employed by legal actors within the system. The following text summarizes the heart of Professor David's idea on the issue of the basis of classification of legal systems:

From the technical stand point, it is advisable to ask whether someone educated in the study and practice of one law will then be capable, without much difficulty, of handling another. If not, it may be concluded that the two laws do not belong to the same family; this may be so because of differences in the vocabularies of the two laws (they do not express the same concepts), or because the hierarchy of sources and the methods of each law differed to a considerable degree. The first criterion, no matter how essential, is nevertheless insufficient, and it should be complemented by the second consideration. Two laws cannot be considered as belonging to the same family, even though they employ the same concepts and techniques, if they are founded on opposing

philosophical, political, or economic principles, and if they seek to achieve two entirely different types of society. The two criteria must be used cumulatively, not separately.

David, like Zweigert and Kotz, is of the opinion that particular rules of substantive law are not decisive for the classification of a legal system. But all three agree that general principles of law, including those of substantive law, help to determine the family of a given legal system. They also agree that legal ideology plays a significant role in the classification of laws into legal families. The other elements of what Zweigert and Kotz refer to as legal style appear to correspond to what David calls as legal concepts and techniques.

Despite these common denominators between the views of David and Zweigert and Kotz, they have arrived at different classifications. The latter two assert that there are eight modern legal systems: the Romanistic, the Germanic, the Anglo-American, the Nordic, the Socialist, the Far Eastern, Islamic and the Hindu. The list omits the African customary, Jewish law and the European Union law. On the other hand, Professor David's criteria of classification lead him to come up with the following list: the Romano-Germanic, Socialist, the Anglo-American, Muslim, Hindu, the Far Eastern, and the African and Malagasy.

Take note of the fact that some legal systems will not be easily classified as belonging to one or another group. These are the so-called hybrid systems, like those in place in Louisiana, Quebec, Scotland, South Africa, Israel and China. These systems are the products of a mixture of two or more legal traditions.

1.1.8.5 Reasons for classification: Categorization of legal systems of the world has a couple of importance: technical and authority. The first reason for classification of the major legal systems of the world is technical because the study of the history of laws of societies is systematic. One best way of studying legal history and legal traditions is to classify and sub-classify the major legal traditions of the past and the present. Such division and sub-division make the study of the subject convenient and gives your thought some degree of organization. Classification of legal systems helps you to arrange the mass of legal systems in an understandable order; understand and assimilate the mass of detail. 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.

1.1.9 Legal Tradition: Can you define legal tradition? Do you notice that it is an element of a legal system? Do you think that it is an important element of a legal system? Can you tell the meaning of the term `tradition`? Does the idea of tradition imply continuity?

1.1.9.1 Definition of a 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. Legal tradition is the abstract element of a legal system. The attitude directed towards a legal system can be hostile, neutral or favorable. When the attitude of the governed is hostile, the legal system will show instability; it will have to be changed. When the attitude of the governed is supportive of the legal system, the system will show continuity. So depending on the type of the attitude of the majority members of the legal system, the legal system may show deep and frequent changes or stability. When we say legal tradition, we are referring to the attitude of the majority members of a given community; we are not referring to the entrenched attitudes of the minority members. 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; those legal systems that undergo basic and frequent changes and thirdly those legal systems which experience little or no change. The first category is known for stability and backed probably by a majority support; the second group relates to legal tradition with deep and revolutionary changes while the third belongs to the domain of the stagnant early legal traditions. Can you mention an example of a legal tradition for each category? To which class the Ethiopian legal system falls in?

1.1.9.2 The notion of civil law: The meaning of the words "civil law" has not been the same in all-historical periods. In the framework of early and classical Roman law, *jus civile* was the law governing the relations of Roman citizens. In the 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. 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 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. 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 slot-machine (give them legal rules and facts, division are automatic); (c) the believed in legislative supremacy. Over time, those thinking about the roles of judges, the nature of codes, the ideal of certainty and strict separation of power and as well as legislative supremacy have been modified. Discovered in the codes 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. The executive has started issuing tones of law through delegation. To fill gaps in the codes and adjust them to the changing needs of the French society, legislatures found it imperative to pass special statutes. The jurists have commented on the codes, cases and special statues passed by the executive and the legislatures.

1.1.9.3 The notion of common law: Common law is the totality of the law of the Anglo-American legal family. It is related only to that part of the law created by the king's courts in England. The term ``common law`` is used as opposed to statue law, which is the enactment of the parliament in England. The term ``common law`` is also used as opposed to the rules and practice of equity. 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.

1.1.10 Review Questions

Part I. Essay-type Questions

1. Do you think that a legal system can be constructed?
2. Define legal structure.
3. What is synergy?
4. Can you mention and explain two problems in the study of legal history?
5. Do you think that it makes sense to categorize legal systems of the world into three, namely, those legal systems with major and frequent interruptions, those that exist for a longer period of time with minor adjustments and those that experience little or no change (stagnant legal systems)? Can you give an example

for each category? Where do you locate the Ethiopian formal legal system in this scheme?

6. What is legal style according to Zweigert and Kotz?
7. Is it sound to consider the tests for classification of legal systems developed by Zweigert and Kotz as the multiple-factors approach?
8. Can you state the reasons for designating some legal systems as hybrid?
9. Do you think that the criteria for classification developed by Zweigert and Kotz, and David are essentially the same?
10. Can you explain the surprise factor?

Part II. Multiple-choice Questions

1. One of the following can be a term you find in the definition of legal history?

A) Legal system
B) Past
C) Systematic
D) All of the above

2. One of the following is not an element of a legal system?

A) Synergy
B) Legal actors
C) Legal structure
D) Legal tradition
E) None of the above

3. A set of deeply embedded attitude of the majority members of a given legal system towards that system is called.

A) Legal tradition
B) Legal system
C) Legal history
D) Legal penetration

4. When the majority members of a given legal system has hostile attitude towards their system:

A) It is likely that a revolution in that legal system is inevitable.
B) It is likely that the system will continue to survive for a longer period of time.
C) It is probable that a basic change will take place in that legal system.
D) It is difficult to make a conclusion.

5. Identify the correct statement about the surprise test approach to classification of legal systems of the world.

A) W/ro ``K`` is versed in ``X`` legal system. She goes to a country following ``Y`` legal system for legal education. After examining ``Y`` legal system, the key

aspects of the` legal system have surprised her. She then concludes that ``X`` and ``Y`` legal systems pertain more to the civil law tradition than to the common law tradition.

B) W/ro ``K`` is versed in ``X`` legal system. She goes to a country following ``Y`` legal system. After examining ``Y`` legal system, the key aspects of ``Y`` legal system have surprised her. She then concludes that ``X`` and ``Y`` legal systems should be put in the same category in the classification of legal systems.

C) W/ro ``K`` is versed in ``X`` legal system. She goes to a country following ``Y`` legal system. After examining ``Y`` legal system, she finds herself not surprised by any of the key aspects of ``Y`` legal system. She then concludes that ``X`` and ``Y`` legal systems should be put in the same category in the classification of legal systems.

D) W/ro ``K`` is versed in ``X`` legal system. She goes to a country following ``Y`` legal system. After examining ``Y`` legal system, she finds not surprised by any of the key aspects of ``Y`` legal system. She then concludes that ``X`` and ``Y`` legal systems should be put in different categories in the classification of legal systems.

E) ``A`` & ``C``

F) W/ro ``K`` is versed in ``X`` legal system. She goes to a country following ``Y`` legal system. After examining ``Y`` legal system, she finds herself not surprised by any of the key aspects of ``Y`` legal system. She then concludes that ``Y`` legal system should be taken as a hybrid legal system.

G) W/ro ``K`` is versed in ``X`` legal system. She goes to a country following ``Y`` legal system. After examining ``Y`` legal system, she finds herself not surprised by any of the key aspects of ``Y`` legal system. She then concludes that she is unable to determine to which legal tradition legal systems ``X`` and ``Y`` belong.

6. A basis of classification of a legal system/legal tradition is:

A) Ideology
B) Historical development
C) Distinctive legal mode of thinking
D) Distinctive legal institutions
E) Source of law
F) All of the above
G) A, C &D

7. The importance of legal history is_____.

A) to clarify the present on the basis of the past
B) to learn from the past generations the goods and the wrongs
C) to look for wisdom that can help us to solve current problems
D) to realize the existence of many alternative solutions for a problem
E) All

1.2 Legal Transplantation

The central aim of this section is to examine the concept of legal transplantation. The previous section of this unit outlined issues pertaining to the nature of legal history, of legal system and of legal tradition. Now, the questions to be examined are: 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? The current section is set out to describe the answers to these questions.

1.2.1 Legal transplantation: Legal transplantation is known by other names. These are legal borrowing, legal importation, legal reception and legal taking. Legal transplantation refers to the transfer of legal rules, legal principles and legal concepts from one or more than one legal system to another legal system. A legal system borrowing laws can be called the recipient system while a legal system lending laws can be called the donor legal system. The lending system may be an existing legal system or a past legal system. Countries, for example, borrowed from the Roman legal system that ceased to exist centuries ago. The recipient legal system should be an existing one or a system at its initial stage of development. Legal borrowing can involve a single legal rule; it can be a massive borrowing. For instance, Ethiopia borrowed large quantity of laws in late 1950`s and 1960`s. At the end of 19th century, Japan received large quantity of laws from Germany. Small-scale borrowings take place everyday. Appreciating 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.

1.2.2 Reasons for legal transplantation: Can you identify and explain the factors that may drive a country to receive laws from another system? Do you think that in a country borrows laws based on its free decision alone? Do you think that there are cases where a country may be compelled to take laws from another system? A recipient country may borrow laws since the laws are accessible in terms of language, the laws are found out to be meritorious in terms of organizations, the laws were transplanted to other systems and found out to be fruitful and the recipient country decided to modernize its legal system. A country may adopt foreign laws as a result of migration or commercial intercourse. A country may adopt the laws of another country because the important elites are attached to the legal system and education of the donor country. A country may be forced to accept the laws of other systems owing to war or conquest or colonization or physiological pressure. Can you give concrete examples for each of these reasons? Is it possible to say, for example, that many countries in Africa and Asia received laws from France and England as a result

of colonization? Is it possible to say that the socialist laws were spread to several countries all over the world as a result of ideological threat from the ex-USSR? Can we say that Islamic law was propagated to the other parts of the world through via methods such migration and commercial interaction?

1.2.3 A historical account of legal transplantation: Legal history indicates that legal transplantation has been rampant. The Greek gave important legal theories to the Romans; the Romans borrowed some conceptions of laws from the Greek legal system. The Romans converted the idealism of the Greek into practical legal rules. The Romans gave principles of private law to European countries such as France and Germany. France added to the laws it had received from the Romans some theories and techniques. France then codified its laws in early 19th century. France propagated its laws first to neighboring European countries. Later, France transplanted its codes to Asia and Africa through the instrumentality of colonialism. Some countries in Latin America received laws from France voluntarily. England also transported its laws to all over the world via colonialism. Eastern European countries received laws from the civil law countries. After the end of World War Second, however, East European countries were forced to adopt socialist system of laws. Again after 1980`s these countries went back to the civil law tradition owing to external pressures. The socialist legal system was developed as an idea in 19th century and in early 20th century; it was then translated into practice in Russia. Russia, later the USSR, became the mastermind behind the spread of socialist laws to Asia and Africa in some case through force and sometimes through pressure.

The Islamic legal system, as an idea, originated in the Middle East in the 7th AD., and then it was taken to the coastal areas of Africa, Middle East and Asia. Now a kind of Islamic law belt is created. The spread of the Islamic legal system has been attributed to a combination of the following factors: migration and commerce. Do you realize from these descriptions that legal systems develop through borrowing? Do you appreciate that legal borrowing has implied power relations in the sense that laws usually flow from powerful legal systems to less powerful ones? Do you agree with the proposition that legal transplantation can take place faster in the cases where the recipient system has gaps?

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

a) Seeded nations-those where elements of the colonial legal system were introduced into a colony which had a relatively advanced society and developed legal system, but where the seeding power which gained control more by negotiation and its apparent capacity to conquer than actually using force. As an example, in Grand Mogul of India, local leaders authorized English occupation.

b) Settled nations-those in which territorial expansion occurred in an area not possessing a strong and developed society and in which the colonial acquisition went to the first settling power. Examples in this domain are USA, Australia and New Zealand.

c) Conquered territories-nations in which elements of force was used to wrest power from another authority, which might have been either a strong indigenous authority, or a previous colonizer as is in the case in South Africa.

1.2.4 Notes: Common law was directly linked through its territorial expansion with each of the principal nations in which the common law developed. Roman law origins for these nations must be traced through a two-stage linkage, first the Roman law was directly linked to European systems and, secondly, that some Roman law is traceable through these European systems was linked to a second tier of civil law nations located in many parts of the world. In many parts of African countries, the English law and civil law affected a comparatively small percentage of the population. Reception of a legal system depends on the fusion of the local culture with that of the settling nation. Where a cultural assimilation has occurred, the English law and civil law have shown remarkable capacity for adaptation.

1.2.5 Views on legal transplantation: Do you support legal borrowing? Is there any problem in borrowing laws? There are three views about legal transplantation. The first approach is referred to as the custom theory. F. von Savigny, a German thinker of 19th century, elaborated this approach. The approach states that law and society have unique relationships. Law and society have inherent connections. There is a unique relationship between law and society means that laws are found in the common consciousness of the people. This common consciousness is manifested via the behaviors of individual members of that community. Laws are related to the identity of a society for which they are created. Further, further this theory assumes that every community is legally self-sufficient; whenever a society faces a legal problem, it can create legal rules of its own and from its own internal sources alone. To this theory, if one attempts to take the laws of X community to Y community by way of legal borrowing, those transferred laws will inevitably fail. Further the proponents of the custom theory hold that legal transplantation will never solve the problems of a recipient legal system; if you know in advance that borrowed laws will fail, there is no reason to try it.

An opposing theory, developed by Alan Watson holds that there is no unique connection between law and society. The theory also holds that no community has ever been legally self-sufficient in the history of mankind. The theory is named as legal engineering. This theory views laws as intangible instruments to achieve certain goals. As laws are tools, they can be taken to any society and

may be used with success. Justifications are given for this position. The first reason is that the fact that legal transplantation has been very common in the history of legal systems, which shows that people have found it rational and useful. In the second place, if there are laws used by X community and if Y community needs those laws, why should the latter be asked to reinvent those legal concepts and legal rules? It is rational for Y community to receive the laws of X community, which are tested in practice. The custom theory wrongly assumes that countries always take the laws of other nations on the basis of their own free will. History gives us several examples where countries have borrowed laws as a result of external pressures.

The third theory attempts to strike a middle ground. In some areas of law, for example, in the area of commercial law, public law and technology law, there are gaps in laws or laws do not exist in developing countries. In such cases, developing countries do not have a choice; they have to borrow laws. In other areas of laws such as family law, inheritance laws and land laws, developing countries have longstanding laws. In the latter cases, it is difficult to transplant laws and even if transplantation takes place, the laws so transplanted will not be welcomed. This hybrid approach is articulated by Kahn-Freund. This position is also called the degree of transferability approach. This moderate approach to legal transplantation states that the contexts of the recipient country should be studied well before the borrowing of laws is made. Which theory do you support: the custom theory (also known as the historical theory), the social engineering theory (also called the instrumentalist theory) or the hybrid theory? Why?

1.2.6 More on legal transplantation: The debate around the theory of legal transplants has almost unique beginning. In 1974 Alan Watson and Otto Kahn-Freund presented competing theories on the viability of legal transplants. The divergence of their views can be traced to the adoption of contrary propositions about the relationship between a state's law and its society.

Watson's theory begins with the proposition that there is no inherent relationship between law and the society in which it operates. He believes that law is largely autonomous, with a life of its own. Watson states that law develops by transplanting, not because some such rule was the inevitable consequence of the social structure and would have emerged even without a model to copy, but because the foreign rule was known to those with control over lawmaking, and they observed the apparent merits that could be derived from it.

Under Watson's theory, a legal rule is transplanted simply because it is a good idea. While Watson does not explicitly present a method to predict the viability of a proposed legal transplant, his writings provide guidance for such a method.

He has further identified several factors that he believes must be considered to determine if the conditions are ripe for legal change by transplantation.

Kahn-Freund's disagreements with Watson begin with Watson's proposition that there is no inherent relationship between a state's law and its society. He claims that laws must not be separated from their purpose or from the circumstances in which they are made. Kahn-Freund argues "we cannot take for granted that rules or institutions are transplantable`` and believes that "there are degrees of transferability``. Ewald summarizes Kahn-Freund's theory: "legal institutions may be more-or-less embedded in a nation's life, and therefore more-or-less readily transplantable from one legal system to another; but nevertheless at one end of the spectrum law is so deeply embedded that transplantation is in effect impossible.

Kahn-Freund identified a two-step process to determine the viability of a proposed transplant. The first step is to determine the relationship between the legal rule to be transplanted and the socio-political structure of the donor state. The second step involves comparing the socio-political environment of the donor and receiving state.

There is agreement, however, that the phrase "legal transplants" refers to the movement of legal norms or specific laws from one state to another during the process of law-making or legal reform. However, as a consequence of these conflicting propositions, their theories clash not only over how to evaluate the viability of a proposed legal transplant, but also over the general conclusions that can be reached about the usefulness of legal transplants as a tool of comparative scholars. Other scholars debate nearly on every aspect of the legal transplant theory.

The study of legal transplants has been revived since the collapse of totalitarian rule. It is not, however, a new topic. The issue of reception of foreign law has a considerable history and a remarkable topicality. As states around the globe implement dramatic political and economic changes in response to external and internal developments, their legal systems must be radically altered. In making these changes, legislators determine whether the borrowing of foreign law is feasible and if the international harmonization of a particular set of laws is viable. The argument is strong that there is no need for legislators to struggle to reinvent the wheel when others have dealt with the same issues. This argument is further supported by the fact that states are under pressure in the increasing interdependent world to create uniformity in law.

Massive successful borrowing is common place in law. Borrowing is usually the major factor in legal change. Legal borrowing is of enormous importance in legal

development. The borrowed rule would not operate in exactly the way it did in its other home. Legal transplantations are inevitable. Since the time of late Roman Empire, legal transplantations have been a major factor in legal change in the western world. England is no exception. Nor is the United States. Nor is Québec, even with its differences from the other provinces. The real issue is whether there should be a deliberate concerted effort, spear-headed perhaps by academics, to create a common law.

Beginning from early 1990`s, Eastern Europe began the unprecedented effort of lawmaking on a grand scale. Almost overnight and at the request of their people and/or international organizations, former communist countries had to disassemble their political, economic, and legal institutions, which were based on centrally planned economies, to erect market-based democracies. Large sections of their old legal systems were now obsolete. The legislatures, however, were in most cases not free to from law and policy, as an "author is free to write a novel.`` The legal establishment of the communist era held influential posts and had contacts in the East and the West. They were ex officio called to lead reform efforts. In addition to them, foreign technical assistance arrived with ideas for "legal surgery or reception of foreign law``. A great number of foreign concepts (e.g., negotiable instruments or credit security devices) were introduced as if they were legal transplants to replace malfunctioning organs.

Comparative law was employed to decide either compatibility of foreign legal concepts or the merits of foreign legal systems and to provide an anthology of foreign legal ideas. Modern comparative legal methodology deals with legal transplants and reception of foreign law.

1.2.7Interface: Imported laws and preexisting laws

John Gillespie, ``Globalization & Legal Transplantation: Lessons from the Past`` http://www.austlii.edu.au/au/journals/DeakinLRev/2001/5.html (accessed October 28, 2006)

Two main themes are discernable in the legal transplantation discourse. Convergence theorists contend that nation-states are enmeshed in an inevitable and accelerating shift towards internationalisation and globalisation. Ever increasing telecommunications, urbanisation, international investment and trade are credited with collapsing regional differences, which in the past inhibited legal transplantation. Ignoring the path-dependent trajectory of legal development, multilateral funding agencies like the International Monetary Fund, World Bank and Asian Development Bank routinely make loan agreements to developing Asian states conditional on enacting Western-style commercial law. Similarly, multilateral organisations like the World Trade Organisation (WTO) and APEC pursue legal harmonisation strategies designed to transmogrify domestic capitalist laws (especially those of the United States) into global legal templates. Underlying this vision of global equivalence and convergence is the unsubstantiated

assumption that legal transplants no longer convey national culture from one society to another, but rather, function as a series of technical adjustments between legal systems.

The other main theme originates from Montesquieu's skepticism that laws can not traverse cultural boundaries. He proposed that laws express the spirit of nations and are consequently deeply embedded in, and inseparable from their geographic, customary and political context. The transfer of laws across cultural boundaries constitutes a 'grand hazard', because laws can not change manners and customs, which must evolve.

Taken together these explanations fail to account for East Asia's uneven legal reform. There is a need for theoretical alternatives to the unproductive convergence and cultural-essentialist dichotomy. At issue is whether laws arising out of, and serving the sociopolitical needs of one society, can induce similar effects in other societies…Previous research suggests that Vietnam's contemporary legal system is constructed from legal transplants historically derived from – China, France, the former Soviet Block, and more recently East Asia and Western countries. Together these sources form a complex legal architecture based on different systems of knowledge, the new overlaying and interweaving the old. The 'official' legal system has always reflected the laws of conquerors, colonists and patron-states, which were superimposed over the pre-existing habits and practices forming the 'unofficial' legal system. In order to unravel the myriad influences on legal development, a theoretical means of analyzing interaction between legal transplants and host country legal systems is required.

Proponents of legal transplantation contend that laws reflect the legal traditions of governing elites, rather than extrinsic social, political and economic factors. Globalizing forces are also credited with accelerating legal reification, by creating one international legal dialogue comprised of a collection of regional sub-variations. In its extreme form, some multilateral donors postulate a future where a single transnational jurisdiction emerges as national legal systems wither away. Others contend that since laws are cultural artifacts that mirror the 'felt needs' of society, they are unlikely to induce the same behavior in different societies. Put differently, there is much 'law' beyond legal rules and the transplantation of statutory and doctrinal rules does not necessarily transfer the 'whole law'. Rules, it is argued, lie on the surface of legal systems and do not accurately represent deeper underlying sociopolitical dynamics.

Legal history shows that certain legal transplants take root in foreign legal terrain, though successes are largely limited to borrowing between Western countries. Explaining this phenomenon, Otto Kahn-Freund offered the valuable insight that there are 'degrees of transferability'. Even so, 'laws designed to allocate power, rule-making, decision making, above all, policymaking power' remain deeply embedded in social institutions and are unlikely to easily transplant. His complex theories are scattered in fragments throughout his writings, however, it is possible to discern three main hypotheses. One, all laws have to some extent de-coupled from their sociopolitical moorings, making legal transplants across sociopolitical boundaries a theoretical possibility. Two, since laws de-couple to varying degrees, some are more likely to survive the journey than others. Three, sociopolitical institutional factors determine the degree of coupling between law and society, they are: the ideological role of law, the distribution of state power, and pressure from non-state interest groups.

Three working postulates have been synthesized from Kahn-Freund and later legal-sociological writings to identify the likely sites of interaction between imported laws and host country

sociopolitical structures: 1 Legal Ideology: Transplanted laws should accord with the dominant ideology in host countries. The success of legal transplantation is strongly influenced by the congruence between the ideological content of transplanted laws and host country political-legal ideologies. Here ideology is used in the Gramscian sense to identify categories of meaning to understand social reality. Ideology has the 'capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.'

2. Structural Variance in Power Distribution: Transplanted laws should comport with host country legal frameworks and political legal cultures. The effectiveness of transplanted law is also profoundly influenced by its compatibility with host country power structures and legal cultures (epistemologies). Political-legal culture is the historically conditioned, deeply rooted attitudes that influence the way bureaucrats and judges use law to find reality. It encompasses epistemological assumptions regarding rationality, efficiency and merit, which in turn shape understandings of borrowed law. Pierre Legrand suggests '[t]he aim must be to try to define why different legal cultures invest similar legal rules with different meanings'. 3. Special Interest Groups: Transplanted laws should attract support from host country special interest groups and comport with local production regimes. Certain laws require specific configurations of state and non-state interest groups, such as market support organizations (for example banks, lawyers, accountants, unions, political parties, markets and family-based commercial structures) to function effectively.

1.2.8 Review questions

1. Does John Gillespie propose for a new approach to legal transplantation? Is he opposed to legal transplantation?
2. What are the three ``likely sites of interaction between imported laws and host country sociopolitical structures?`` according John Gillespie? Which one of these sites do you think would be most resistant to a successful legal borrowing? Why?

1.2.9 Interface: Imported laws and preexisting laws in Ethiopia

Daniel Haile, ``Law and Social Change in Africa: Preliminary Look at the Ethiopian Experience,` 9JEL2 (1973)

The terms laws and legal order have been defined in so many ways and identified with so many things that at times one is led to believe that the two mean practically anything. A reason commonly given for this web of unclarity about the nature and functions of law is the fact that most legal thinkers try to capture the essence of law in a single sentence which like all single sentence formulations leave out far too much and are likely to mislead. However, without going into this jurisprudential labyrinth for our purposes we shall take the working definition suggested by Professor William B. Harvey and consider law as a technique of social ordering deriving its essential characteristic from its ultimate reliance on the reserved monopoly of systematically threatened or applied force in politically organized society. Although this definition may be criticized for being too positivist, it is this particular characteristic which is appealing to us. For by viewing law as a moral or neutral tool this definition helps us to focus our attention on the casual connection between law and social change, without any moral or ethical consideration eclipsing our analysis.

Not only has its definition been vague but in addition the desirability and feasibility of using this social technique in the engineering of social changes has always been a controversial subject. As Friedman puts it " the controversy between those who believe that law should essentially follow, not lead and that it should do so slowly, in response to clearly formulated social sentiment and those who believe that the law should be a determined agent in the creation of new norms is one of recurrent themes of the history of legal thought. Two prominent schools of thought that reject both the desirability and feasibility of law in inducing changes are the Historical School and the Marxian school of thought. To attempt to present a detailed analysis of the various reasons presented by these two schools in few lines would be presumptuous. What is attempted here is to select the basic reasons on the basis of which the two have rejected both the desirability and feasibility of law in inducing social changes and examine whether these are valid in the African arena.

To Savigny, the founder of the historical school, law was something that is connected with the being and character of the people and he maintained that it grows with the growth of the people and strengthens with the strength of the people and finally dies away as the nation losses its nationality. Similarly classical Marxist theory, regarding law as a superstructure on technology and economy considered it to be inconceivable for law to bring about changes- in the basis technology and economy of society.

We find the views of these two schools of thought on this point to be generally out of tune with modern reality and totally inapplicable in the African arena. Although social change may be revolutionary, it normally comes about in a more or less orderly manner, out of the conscious and unconscious attempts of people to solve social problems through collective action. It is purposive and rational and involves definition of a state of affairs as a "problem" and an attempt to solve that problem by rational means. In Africa as elsewhere-rapid rational social change implies the utilization of society's most potential tool-state power. It requires that law be employed as a means of social engineering. The fact that most African countries gained their independence only very recently and sectarian or tribal sentiments are still rampant is an important factor that enhances the role of law as a means of social engineering. Certainly, education may be the best solution for this, but taking the amount of time that it takes and considering the fact that these nations are trying to accomplish in the life span of one or two generations what took centuries, the appeal of this remedy becomes very low. Under these circumstances, we are of the opinion that it is essential to use the law to give legitimacy to the state action and to erode the power of groups adverse to it.

Not only is there a great need for legal programming in the African countries, but as these nations are undergoing more rapid change than their industrialized counterparts, capitalist or socialist, this rapid rate of growth accentuates the resulting pressure on the legal system. In this sense the scope and need for legal engineering are far greater in the countries of the third world than in Europe or North America, where changes can be brought gradually, by incremental process or by well established legislative mechanisms. The fact that many African counties have adopted laws based on foreign models as a means of revamping or overhauling their socio-economic systems even after attaining independence is by itself a concrete evidence of the wide acceptance and legitimacy that the law as a means of social engineering has received in these countries, negating the views of both the Historical and Marxist school of thought.

Definitely, the aggressive codification in Ethiopia is based on this basic premise. As the drafter of the Ethiopian Civil Code put it, like the Soviet Union and co-communist counties, although with another ideal, Ethiopia and a number of African counties are presently in a revolutionary period. While safeguarding certain values to which she remains profoundly attached, Ethiopia wishes to modify her structure completely, even to the way of life of its people. Consequently, Ethiopians do not expect the new code to be work of consolidation, the methodical and clear statement of actual customary rules. They wish it to be a program envisaging a total transformation of society and they demand that for the most part, it set out new rules appropriate for the society they wish to create.

Although as we stated earlier, due to lack of sufficient data it becomes extremely difficult to reasonably measure the degree of effectiveness of law in the different spheres of life, one can still make some generalizations as regards this issue based on the experience in other countries and the meager data that is available about the Ethiopian legal system. As the experience of Turkey, which drew its codes from those of European countries in the 1920's, clearly shows, it seems that the aspects of social action of a mainly instrumental character such as commercial activities were significantly influenced by new law, while those aspects of social action involving expensive activities and basic beliefs and institutions such as family life and marriage habits were very little changed in spite of explicit laws trying to shape them.

Although it is too early to report, the experience of Ethiopia may not be quite different from that of Turkey. An empirical research carried out on the impact of the various laws on the Ethiopian society revealed that in the area of commercial law some major conflicts in the mercato between law and practice. However, according to the researchers these conflicts appear due to lack of education or knowledge on the part of the merchants with respect to accounting practice and registration requirements and reluctance on the part of authorities to strictly enforce many harsh legal provisions. Little if any, evidence of resistance to these laws on the basis that they are "foreign" to customary way of doing things was detected.

While in the area of family law, it was found that despite the fact that the new law's attempt to break the customary practice of adoption by imposing a requirement of court approval, people are still continuing to adopt according to customary procedures without seeking court approval. Although no empirical research was made and we cannot positively say that the law is not being followed, it is very doubtful whether the Civil Code's requirement that a man be eighteen and a girl be fifteen years old in order to marry is being followed. In addition one can cite the provisions dealing with names which up to now have been more or less a dead letter.

However, even though law as an instrument in achieving the desired results may be slow or weak in matters that affect basic drives and values, the mere fact of affirmation through acts of law and government as it expresses the public worth of one set of norms, of one sub-culture vis-à-vis those of others and demonstrates which cultures have legitimacy and public domination and which do not is significant in itself. Thus the law aside from its effectiveness as an instrument can still have this symbolic effect, as an act, decision or gesture important in itself.

Up to now we have been concerned with norm changes initiated by the law to be followed by behavioral changes. But unless we define social change tautologically as identical with norm changes, which seem unjustifiable, we must accept three possible types of change— norm change

followed be behavioral change, behavioral change followed by norm change or law as response to change.

In a modern society, the decline of old the rise of new industries, changes in the strength and balance of classes, new ideas on the value of the individual, on wrongdoing and on family and sex relationship, are continuously disintegrating the old pattern of society, outmoding its machinery here and there, rendering some of its laws and sanctions harsh and inoperative. The question that one must address himself is thus, when changed ideals and objectives have rendered unpalatable the certainties of a precious generation must social repose be maintained as though it were the sleep of death? The answer is certainly no, and it is imperative that the law in order to facilitate the changes must be made to tune with the times. Unless it can effectively perform this function the law would be as Roscoe Pound remarked in very truth a government of the living by the dead. The moral sense of a community changes as the balance of various interests change. An example of such a process can be found in what is presently happening in many of the western countries. Although most of these countries do have prohibiting abortion, except for medical reasons, and make homosexualism a crime even when committed by adults in private, the constant lobbying to legalize to these lead one to believe that the above laws are lagging behind the moral sense of the societies that they purport to serve. However, such phenomena are neither particular nor limited to these societies. Even in developing societies such as Ethiopian, one can note this lag between a professed ideal and reality. For example if one examines the Ethiopian Civil Code which is basically designed for the future Ethiopian society and tries to introduce new norms, one can note that some of its provisions are already out of turn with the times. One of the few mandates in the code regarding marital dispute resolution is that the parties should submit the disputes to arbitrators selected by them, although this system of having relatives, neighbors and friends attempt to resolve a couple's dispute makes sense in the abstract, litigants with divorce petitions are coming to courts initially in increasing members in the cities.

Family arbitration is a codified customary practice with its origins in rural Ethiopia before the rise of cities. In that milieu destinies are closely intertwined. Family friends and community elders are quick to agree and often to volunteer to arbitrate material disputes. But the city filled with migrants, where independence is fostered, it is relatively difficult to get acquaintances to devote the long hours, seldom compensated that are required by family arbitrators. For this reasons then many couples approach a court to obtain an "order" that arbitrators, whom the parties select shall act in a dispute. It apparently puts the fear of authority into some otherwise reluctant candidates. The reason that the institution of family arbitration does not reduce the court congestion and the fact that the divorces in present Ethiopia demand a degree of expertise not commonly possessed by most family arbitrators are some of the reasons that were given by Aklilu Wolde Amanual to justify his recommendation to abolish the institution. Constant legislative, judicial and administrative innovation are thus necessary to keep the law abreast of life and this process of innovation requires sociological investigation, for a mere guess of politicians combined with the skill of legal draftsman is not an adequate basis of law reform, nor is a more armchair analytical legal study of existing alternative rules. But since in most African countries legislators, courts and administrative tribunals do not have the time and personnel to hunt for the relevant data, it may be needed to create new institutions entrusted with the sole duty of law revision.

In this paper we have attempted to examine, by way of examples selected from Ethiopia, how social attitudes and institutions can hamper the process of development and the role that the law

plays in making these attitudes and institutions with the need of development. The dual roles of law as an agent of change and as a means of facilitating change (Response) and it possibilities and limitations were considered. In our opinion law can be an agent of social change although one should not try to use it where it is inappropriate; i.e. when other more effective means can be restored to without much trouble. Although we may have good intentions as to what ought to do, we should always remember that this special social technique if misused might lead to its disrespect. To know what it can do an empirical study has to be made.

1.2.10 Review questions

1. Which theories does Daneil reject? Why does he reject those theories?
2. Do you that think Daneil Haile advocates for the social engineering approach to law making? Which law is he referring to: customary law or western law? What justifications does he offer in support of the doctrine he advances?
3. What is his main conclusion? Do you think that Daneil Haile`s conclusion has current application in Ethiopia?

1.2.11 Legal penetration versus 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?

1.2.11.1Legal penetration: Those responsible for the importation of laws aspire that the transplanted laws would affect human conducts possibly hundred percent. The assumption is that the actors at the time especially of massive importation of laws desire that communities would adjust their behaviors to the imported laws. The actors who sponsored wholesome importation of laws plan that the imported laws would be implemented in all parts of the territory of the recipient country. For example, Ethiopia borrowed large scale laws in 1950`s and 1960`s; at that time, key personalities were responsible for such project expected that such laws would be accepted by the people; the people would shift their allegiance towards the new western oriented laws.

1.2.11.2 Legal extension: Legal extension refers to the extent to which people or the state actors are actually following the imported laws. If legal penetration is the aspiration, legal extension is the reality. The question is whether people have actually adjusted their behaviors to the prescriptions of the imported laws or whether people are still settling their social and economic conflicts pursuant to customary or religious laws.

In the context of developing countries that transplanted laws from the west such as Ethiopia, there is a gap between legal extension and legal penetration. The gap is not a small one; it is quite substantial. You can cite examples. In Ethiopia, the

imported family law states that the spouses are equal, at the time of the creation of marriage, in the course of marriage and upon the dissolution of marriage. The husband and the wife should conclude marriage on their free consent. The husband and the wife should share household burdens equally. The husband and wife should divide the common property equally when the marriage dissolves. But the customary laws do not conform to these prescriptions of imported laws. You can take the case of land. Land since 1974, in Ethiopia, has been taken as a collective property. But under customary law some tribes still believe that land belongs to them. You can go on citing examples. In developed countries, people have sufficiently adjusted their conducts to the official laws.

1.2.11.3 Reasons for the gap: What explains this gap? What are the possible reasons for the divergence between official legal prescriptions and the reality? You can simply speculate for want of sufficient empirical data. The first possible reason is that the imported laws have not yet been sufficiently communicated to the people. Secondly, the laws are published in the English language and Amharic in a country where millions of people do not understand either of these languages. The other possible reason is that there is a huge percentage of illiterate population. The imported laws assume a literate society. Thirdly, the state lacks the necessary resources to implement some of the provisions of the imported laws. The fourth reason is that the laws were defectively transplanted, which means the country's context was not properly studied and the customary and religious laws were not given the place they deserved. As a result, the imported laws lacked the necessary legitimacy from the people. The other factor is that the pre-existing laws in Ethiopia are so deeply rooted in the fabric of the society that they could not easily and quickly be replaced. People are deeply attached to the customary laws. People have inherited dispute settlement mechanisms that were used by their ancestors. Simply stated the force of tradition is the reason behind the tacit resistance put up against imported laws. Finally, it is argued that the transplanted laws could not succeed since the assumption of the customary laws is different from the assumption of the western laws. The customary laws focus on the group; paramount importance is attached to the survival of the collectivity. On the other hand, it is stated that western laws are designed for and around the interests of an individual.

John H. Beckstrom, ``Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia `` 21Am. J. Comp. L, 3. (1973), at 570.

Until the 1950's, the "law" of Ethiopia was incomplete and unsystematic. There was some legislation in terms of statutes and decrees. These laws concentrated primarily on public law areas. Ethiopia had had, for example, a Penal Code that had been promulgated in 1930. But, taking Ethiopia as a geographical whole, by far the major de facto source of rules governing social relations was found in the customs, traditions of the various tribal, ethnic, and religious

groupings. The codes Ethiopia adopted in 1960`s repealed pre-existing law explicitly in some codes and in others by implication. Generally, explicit incorporation of Ethiopian customary practices in the codes was not possible because no systematic survey of customary law had even been attempted in Ethiopia. Thus, there was little for the draftsmen to draw upon except fragmentary largely impressionistic reports. In addition to some of the customary rules included in the codes, the codes included domestic thoughts and inspiration in the Codification Commission and parliament before enactment. The Codification Commission included a number of well-experienced Ethiopians. However, the insights of the Codification Commission and the parliament were just the reflection of the personal preferences of the elite, urbanized individuals in those bodies. The insights did not represent the customary practices of the Ethiopian masses.

The main objective of the codifiers was giving Ethiopia a set of laws that would serve to draw the country into a modern legal system. The rules for traditional ones were deemed desirable only when they were very deeply ingrained in the social fabric. The codifiers took this position of ignoring the traditional rules despite the likelihood that this approach would create a large gap between the codes and actual practice in the early years at least. The new laws were aimed immediately at the more developed elements of the population. The codifiers could not expect to apply in other regions in the near future.

The areas of law likely to be most resistant to change in developing countries in general are family relations, succession and landholding. Conversely, new commercial laws would most easily be absorbed because of the lack of customary law in that field. The commercial, educational, social elites in the nation would be the first to absorb and utilize new laws and legal institutions to a modern society. However, the ultimate testing ground for the reception of large bodies of new law and new legal institutions is to be among the Ethiopian sub-elites, who constitute the overwhelming majority of the urban population.

John H. Merryman & David S. Clark, <u>The Civil Law Tradition: Europe, Latin America and East Asia</u> (Virginia: The Michie Company Law Publishers, 1994) P5-8.

Like other social systems, a legal system has boundaries, and its components are interrelated by an internal logic. Legal extension and legal penetration help define the boundaries of the legal system. In every society, much is left to custom and tradition, to religion, to informal negotiation and settlement, to social convention and peer influence. But the precise location of the boundaries between such non-legal matters and those of legal concern is unlikely to be always and precisely the same. The range of variation becomes particularly significant if we identify law with the official legal system, manned and operated by the state.

The degree to which a legal system seeks to penetrate and control social life is often quite different from the extent to which it actually does so. For example, a large number of Ethiopians live much of their lives relatively free of any substantial contact with the official legal system, which actually applies with most force to an urban middle class and rapidly loses its power as one moves down the socio-economic scale and away from the major cities. In a substantial number of such nations as Ethiopia, Kenya and Indonesia, the paper legal system will look much like that of France or Spain or Italy, or England or the United States of America. But if one looks at the actual role of law in the lives of important elements of the population the resemblance is only

superficial. Thus along two dimensions, the aspects of social life that proposes to affect and the extent to which it actually does so, the scale of divergence of legal extension and legal penetration between societies can be, and often is, substantial. Both the social reach and the social grasp of the law are important variables. Legal penetration can take to mean the degree to which a rule, code, or law takes hold in a population. Key to closing the gap and improving penetration is better communication of law to the populace…

1.2.11.4 Review questions

Part I Multiple-choice Questions

Choose the best answer from the given choices.

1. In relation to reasons for legal transplantation, which one of the following is different from the other choices?

A) War
B) Migration
C) Commercial interaction
D) The desire of the recipient legal system to modernize itself
E) Merit of the laws

2. Which one of the following legal systems do you expect to show the widest gap between legal penetration and legal extension?

A) The Ethiopian legal system
B) The American legal system
C) The German legal system
D) The British legal system
E) None of the above

3. The aspiration of the personalities responsible for importing large-scale laws to put the same in practice to the fullest possible degree is known as

A) Legal system
B) Legal extension
C) Legal penetration
D) Legal tradition

4. A theory of legal transplantation that states that there is an inherent connection between law and society is

A) The historical school
B) The social engineering school
C) The middle approach
D) All of the above

5. A theory of legal transplantation that states that there is no inherent connection between law and society is

A) The historical school

B) The social engineering school
C) The middle approach
D) All of the above

6. The element that connects one legal system with another is:
A) Legal system
B) Legal tradition
C) Legal transplantation
D) Legal extension
E) Legal penetration
F) Legal structure
G) All of the above

7. Which one of the following elements best explains the existence of a wide gap between legal extension and legal penetration in Ethiopia in the area of family law and land tenure?
A) Imported laws have not yet been sufficiently communicated to the people.
B) The core laws are published in languages (English and Amharic) inaccessible to millions of people in the country.
C) There is a huge percentage of illiterate population yet the imported laws assume a literate society.
D) The state lacks the necessary resources to implement some of the provisions of the imported laws.
E) The laws were defectively transplanted, i.e., the country's context was not properly studied, and the customary and religious laws were not given the place they deserved.
F) Customary laws in Ethiopia are so deeply rooted in the fabric of the society that they could not easily and quickly be replaced.

8. Identify the sound statement about the probable effect of Article 9(1) of the present Ethiopian Constitution, which states, in part, that ``…Any …customary practice…which contravenes this Constitution shall be of no effect. ``
A) It is probable that there will continue to be a big gap between legal penetration and legal extension in the foreseeable future in the country.
B) It is probable that the gap between legal penetration and legal extension will dramatically narrow down in the foreseeable future in the country.
C) It is impossible to predict the existence of a gap between legal penetration and legal extension in the foreseeable future in the country.
D) It is probable that there will be little gap between legal penetration and legal extension in the near future in the country.
E) It is probable that the deep rooted customary practices among the different communities in Ethiopia will very soon give way to the ideals in the Constitution.
F) It is probable that there will be no gap between legal penetration and legal extension in the near future in the country.

G) It is probable that the deep-rooted customary practices among the different communities in Ethiopia will very soon give way to the ideals in the Constitution provided the details of the article under consideration are fully worked out.

9. A legal system that accepted customary rules as one of its elements in its life span is

A) The African legal system
B) The French legal system
C) The German legal system
D) The Hindu legal system
E) The Ethiopian legal system
F) All of the above

10. The reason why some writers argue for legal transplantation is:

A) Based on the prevalence of legal borrowing in legal history.
B) Based on the idea that recorded legal history does not indicate a country that was legally self-sufficient.
C) Based on the idea that external circumstances might compel a country to transplant laws.
D) Based on the idea that there is no inherent relationship between law and society.
E) All of the above
F) A & B.

11. Identify the correct comparison between the modernization theory and the diversity theory.

A) The modernization theory plans to bring about legal uniformity in a country while the diversity theory tends to tolerate the existence of two or more authoritative sources of laws.
B) The modernization theory advocates for unofficial legal pluralism while the diversity theory advocates for legal centralization.
C) The modernization theory supports a unitary form of state while the diversity theory seeks to have a federal form of state.
D) A, B & C
E) A & C
F) None of the above

12. Daniel Haile, in his article reproduced above (Sub-section 12.9), claims that:

A) Transplanted laws alone should lead society in the context of developing countries such Ethiopia.
B) Society should lead law in the context of developing countries such Ethiopia.

C) The Ethiopian Civil Code was assessed to be a failure.

D) Law should be defined as a technique of social ordering deriving its essential characteristic from its ultimate reliance on the reserved monopoly of systematically threatened or applied force in politically organized society.

E) The fact that many African counties have adopted laws based on foreign models as a means of revamping or overhauling their socio-economic systems even after attaining independence is by itself a concrete evidence of the wide acceptance and legitimacy that the law as a means of social engineering has received in these countries, in support of the views of both the historical and Marxist school of thought.

F) It is not clear whether law should lead society or society should lead law in developing countries such as Ethiopia.

G) Law can be an agent of social change although one should not try to use it where it is inappropriate; i.e. when other more effective means can be restored to without much trouble.

Part II Essay-type questions

1. State the possible reasons for the existence of divergence between legal penetration and legal extension in the Ethiopian legal system.
2. State the criticisms directed against the custom theory of legal transplantation.
3. The reception of foreign law, i.e., legal transplantation, and the question whether and under what circumstances it can succeed has generated a controversy between Khan Freund and A. Watson. Explain!
4. `The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has as good or better at home, but only a fool would refuse quinine just because it did not grow in his back garden.` Comment!
5. Explain the supposed relationship between the social engineering theory and the custom theory on the one hand and the social and economic development of developing countries.
6. Do you think that the following factors account for legal transplantation?

a) The general respect in which the received law is held (e.g. Roman law);

b) The accessibility of the received law (means in writing and a form that makes it relatively easy to find and understand including language);

c) Its high technical conceptual quality (e.g. Roman law);

d) The desire to modernize the legal system of the recipient country (e.g. Ethiopia in the 1950`s and 1960`s);

e) The belief that transported laws would contribute to the development of the recipient country (e.g. Ethiopia in the 1950`s and 1960`s);

f) The belief that modern codes would help to achieve political centralization (e.g. Ethiopia);

g) Perceived colonial conquest and the need to preempt such conquest (e.g. Thailand);
h) Perceived deterioration of its relationship with the western powers (e.g. Japan) and
i) Desire to regain sovereignty.

7. Are revolutionary changes always against everything against the past? Or do you think that there are certain elements of the past even social and political revolutions try to preserve?
8. Do you agree with the following analysis? At present, the Ethiopian legal system has triple faces: (a) a legal system painted by the laws issued and institutions established by both the federal and state governments (paper legal system); (b) a legal system observed in the way in which these laws are actually applied (actual legal system) and the institutions are operating, and (c) the traditional legal systems. The central issues then are how to approximate (a) the paper legal system to (b) the actual legal system and whether (c) should be wiped out or given some breathing space. Do you endorse this observation? Why?
9. In terms of periodization, legal transplantation can be divided into two: first generation legal transplantation and second generation legal transplantation. The former took place prior to 1980`s and is featured by its massiveness, coercion, competition among the ideologies of western law, socialist law and Islamic law (though dominated by the western ideology), and dualism or triplism featured the preexisting legal systems of the recipient nations. The second generation legal transplantation, on the other hand, is marked by the structural adjustment programs, backed by powerful international institutions, dominated by the capitalist ideology, pressure in lieu of sheer force, and linked to aid and donations. Do you think that classification of legal transplantation into first and second generation is important? Which category of legal transplantation has affected the Ethiopian legal system? Do you think that second generation legal transplantation pertains more to constitutional law, human rights law, trade and investment law and intellectual property law than to the first generation legal transplantation?

11. ``*Roman law distinctions embedded within the codes are critical to the modern divisions of law: the public-private distinction, the development of specialized tribunals for handling administrative matters, separation of commercial law from the law of obligations generally, even the divisions within the law of obligations. The sources of modern civil law are considered, and Watson shows that, although the role of statute differs from what it was in the pre-codification period, the role of the jurist and of case law is a direct descendant of what had come before.*`` Comment! Charles Donahue, Jr., Survey of Books Relating to the Law, Legal History and Roman Law Influence on The Civil Law,81Mich. L. Rev. 972 (1983). See also Alan Watson,` `The Making of The Civil Law,`` Cambridge: Harvard University Press, 1981 at 201.

12. ``*…at the present time there is little knowledge of why law changes when it does, or why it changes in the direction that it does, or when and why it responds to pressure. This may be the central problem of legal history, if not at all times, at least in our time, and many…would rank it among the central problems of the academic study of law. Professor Watson looks at the problem of legal change in the context of the basic division between civil law and common law legal systems and asks how this basic division came about. He concludes that: [t]he basic differences between civil law and common law systems are explained in terms of the legal traditions themselves; that is, the differences result from legal history rather than from social, economic, or political history. Above all, the acceptance of Justinian's Corpus juris civilis, in whole or in part, as authoritative or at least as directly highly persuasive[,] determined the future nature of civil law systems and made them so distinctive.*`` See Charles Donahue, Jr., Survey of Books Relating to the Law, Legal History and Roman Law Influence on The Civil Law, 81Mich. L. Rev. 972 (1983). See also Alan Watson, ``The Making of The Civil Law, ``Cambridge: Harvard University Press, 1981 at 201. Do you agree with the observations about the central problems of legal history indicated in this excerpt?

13. ` `*With the discussion of modern codifications, Watson changes his style of argumentation, offering more explicit consideration of possible contrary arguments…political backing is necessary for any kind of codification, but Watson argues that neither the difficulty of finding the law nor social upheaval adequately explains why modern codifications took place. What Watson has shown, and shown quite powerfully, is that both the French and the German codes are deeply rooted in the particular legal traditions of the countries and that the important differences between them can be explained in terms of those traditions. Watson next analyzes the effects of codification by contrasting codes with institutes as sources of law. Codification leads to even greater abstraction, to a total loss of the sense of history, to a loss of the international character of law, and to a fixity which makes codes difficult to change. On the other hand, drafters of new codes frequently undertake comparative work. Watson clearly believes that general political, social and economic developments do not explain why a legal system is the way it is. The most powerful evidence for this proposition, Watson stated a number of times although never elaborated, is the fact that England and the Continental countries with which he is dealing have gone through basically the same political, social and economic development and yet have arrived at very different legal systems. Some, of course, would want to argue the uniqueness of the English political experience. Certainly England had in place very early a group of institutions which allowed it to develop its native law in a way that was comparatively free from the all-pervasive effect of the Corpus Juris that existed on the Continent, particularly in the early modern period.*`` See Charles Donahue, Jr., Survey of Books Relating to the Law, Legal History and Roman Law Influence on The Civil Law,81Mich. L. Rev. 972 (1983). See also Alan Watson, ``The Making of The Civil Law, ``Cambridge: Harvard University Press, 1981 at 201. According to Watson what principally explains the key difference between the civil law and common law tradition? Do you agree with the finding of Watson in this regard? Why? Why not?

14. For John Beckstrom:

a. What was the state of the Ethiopian formal legal system just prior to the massive codification of 1960`s?

b. Why was Ethiopia unable to base her codes on custom?

c. Which segment of the Ethiopian population was for all practical purposes the immediate addresses of the codes?
d. What should be the ultimate measurement of the success of the Ethiopian codes?
e. In the areas of family law and succession high degree of resistance to transplantation of laws is expected in developing countries? Why is that?

15. For John Merryman and David Clark:

a) What is legal extension? What about legal penetration? Is there a gap between legal extension and legal penetration in developing nations such as Ethiopia? Is the gap significant?
b) What factor is the key to closing the gap between legal extension and legal penetration? Do you agree with their proposal? Why? Why not?

16. Is there any similarity or difference among the assertions made above by Daniel Haile, John Beckstrom, and John Merryman and David Clark? What is that?

Part III Sound/Unsound Type Questions

1. A fundamental unfavorable attitude of the majority of people towards their legal system is most likely to result in the destruction of that legal system.
2. As legal history witnesses, a legal system receiving laws from another system has always its own preexisting laws and legal institutions.
3. Indigenous legal traditions often have developed commercial and public laws.

1.2.12 Summary

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. 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. 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. 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. Legal transplantation can take place voluntarily and involuntarily. Some times a recipient country may freely choose to borrow or not to borrow laws from other systems. In many cases, however, a recipient system does not have a choice at all. Legal borrowing has been very common in the history of legal systems. The middle ground is stricken in relation to legal transplantation holding that in some cases legal borrowing is desirable while in other situations it should be resisted.

U.2 Ancient Legal Systems

Introduction

This unit dwells upon ancient legal systems such as the Babylonian legal system, the Greek legal system and the Roman legal system. The first section describes the Babylonian legal system, the Greek legal system and the Roman legal system. The second section examines the definition of the notion of law in the early systems and the main shared features of these systems.

At the end of this unit, students should be able to:

- Describe the principal aspects of ancient legal systems.
- Compare and contrast early legal systems.
- Examine the way law was understood in the early legal systems.

2.1Three early legal systems

This section describes the Babylonian legal system, lists and explains the key features of the Code of Hammurabi. The section also describes the characteristics of the Greek legal system as well as the Roman legal system. It enumerates and examines the aspects of the XII Tables.

2.1.1 The Babylonian legal system: A short account of the various aspects of the Babylonian legal system is provided here.

2.1.1.1 The three stages: The Babylonian legal system is also called the Mesopotamian legal system. This legal system flourished Before Christ (in the BC). The system was located along the valley of the great rivers, namely, Euphrates and Tigris. As historical documents indicate, the Mesopotamian legal system was located in the region south of the present-day Iraq. Legal historians consider this legal system as the first great legal system in human history.

The Mesopotamian legal system passed through three stages. In the first phase, there were different kingdoms. These kingdoms were fighting one another. There was great instability in the area. As a result, a stable political and legal system could not be realized. The legal system was characterized by diversity, brevity and fragmentation.

The second stage marked the coming into power of a powerful emperor-Hammurabi. Emperor Hammurabi defeated his contenders in the area in successive battles, which enabled him to monopolize political power. He imposed his rule on his power contenders. Emperor Hammurabi felt that he had

to rule on the basis of a code of laws. He wrote, according to legal historians, the first real law code in the history of mankind. His code was named the Code of Hammurabi. The Code came into force in the year 1750 BC. The Code was carved on a huge rock column; it was not written nor published on papers.

The Code had several features. The first and basic principle behind the Code of Hammurabi was an eye-for-an eye principle of punishment. An eye for an eye principle means a literal punishment. Mitigating or softening punishment was not known in the Code of Hammurabi. The Code imposed harsh or disproportionate penalties for offenses. For examples: when a person defamed another person, he was supposed to lose his tongue; when a person kissed a married woman, he was to lose his lips; when a person stole property, his hands were to be chopped off. When a builder built a defective house, he was to lose his children.

The basic reason for an eye-for-eye principle was that when a person committed an offense, the Mesopotamians thought that that act disturbed the natural balance and the only proper method of rectifying the wrong, according to them, was by imposing a literal and corresponding punishment.

The second feature of the Code was that it was not systematically written. The Code did not make any distinctions between public law and private law, and procedural law and substantive law; these distinctions were not known then. Thirdly, the Code was the expression of the Mesopotamians that the rule of law, in its crude form, was important, as the law was written and disclosed in advance. Fourth, the Code lasted for a longer period of time; it was one of the codes in the history of legal systems that showed an amazing degree of stability. The third stage of the Mesopotamian legal system was the phase of decline; much has not been written about this fading phase of the kingdom of Mesopotamia.

2.1.1.2 The basis of legitimacy-Hammurabi`s Code

The Code of Hammurabi (Epilogue),http://www.wsu.edu/~dee/meso/code.htm (accessed October 31 2006)

When Anu the Sublime, King of the Anunaki, and Bel, the lord of Heaven and earth, who decreed the fate of the land, assigned to Marduk, the over-ruling son of Ea, God of righteousness, dominion over earthly man, and made him great among the Igigi, they called Babylon by his illustrious name, made it great on earth, and founded an everlasting kingdom in it, whose foundations are laid so solidly as those of heaven and earth; then Anu and Bel called by name me, Hammurabi, the exalted prince, who feared God, to bring about the rule of righteousness in the land, to destroy the wicked and the evil-doers; so that the strong should not harm the weak; so that I should rule over the black-headed people like Shamash, and enlighten the land, to further the well-being of mankind.

Hammurabi, the prince, called of Bel am I, making riches and increase, enriching Nippur and Dur-ilu beyond compare, sublime patron of E-kur; who reestablished Eridu and purified the worship of E-apsu; who conquered the four quarters of the world, made great the name of Babylon, rejoiced the heart of Marduk, his lord who daily pays his devotions in Saggil; the royal scion whom Sin made; who enriched Ur; the humble, the reverent, who brings wealth to Gish-shir-gal; the white king, heard of Shamash, the mighty, who again laid the foundations of Sippara; who clothed the gravestones of Malkat with green; who made E-babbar great, which is like the heavens, the warrior who guarded Larsa and renewed E-babbar, with Shamash as his helper; the lord who granted new life to Uruk, who brought plenteous water to its inhabitants, raised the head of E-anna, and perfected the beauty of Anu and Nana; shield of the land, who reunited the scattered inhabitants of Isin; who richly endowed E-gal-mach; the protecting king of the city, brother of the god Zamama; who firmly founded the farms of Kish, crowned E-me-te-ursag with glory, redoubled the great holy treasures of Nana, managed the temple of Harsag-kalama; the grave of the enemy, whose help brought about the victory; who increased the power of Cuthah; made all glorious in E-shidlam, the black steer, who gored the enemy; beloved of the god Nebo, who rejoiced the inhabitants of Borsippa, the Sublime; who is indefatigable for E-zida; the divine king of the city; the White, Wise; who broadened the fields of Dilbat, who heaped up the harvests for Urash; the Mighty, the lord to whom come scepter and crown, with which he clothes himself; the Elect of Ma-ma; who fixed the temple bounds of Kesh, who made rich the holy feasts of Nin-tu; the provident, solicitous, who provided food and drink for Lagash and Girsu, who provided large sacrificial offerings for the temple of Ningirsu; who captured the enemy, the Elect of the oracle who fulfilled the prediction of Hallab, who rejoiced the heart of Anunit; the pure prince, whose prayer is accepted by Adad; who satisfied the heart of Adad, the warrior, in Karkar, who restored the vessels for worship in E-ud-gal-gal; the king who granted life to the city of Adab; the guide of E-mach; the princely king of the city, the irresistible warrior, who granted life to the inhabitants of Mashkanshabri, and brought abundance to the temple of Shidlam; the White, Potent, who penetrated the secret cave of the bandits, saved the inhabitants of Malka from misfortune, and fixed their home fast in wealth; who established pure sacrificial gifts for Ea and Dam-gal-nun-na, who made his kingdom everlastingly great; the princely king of the city, who subjected the districts on the Ud-kib-nun-na Canal to the sway of Dagon, his Creator; who spared the inhabitants of Mera and Tutul; the sublime prince, who makes the face of Ninni shine; who presents holy meals to the divinity of Nin-a-zu, who cared for its inhabitants in their need, provided a portion for them in Babylon in peace; the shepherd of the oppressed and of the slaves; whose deeds find favor before Anunit, who provided for Anunit in the temple of Dumash in the suburb of Agade; who recognizes the right, who rules by law; who gave back to the city of Ashur its protecting god; who let the name of Ishtar of Nineveh remain in E-mish-mish; the Sublime, who humbles himself before the great gods; successor of Sumula-il; the mighty son of Sin-muballit; the royal scion of Eternity; the mighty monarch, the sun of Babylon, whose rays shed light over the land of Sumer and Akkad; the king, obeyed by the four quarters of the world; Beloved of Ninni, am I. When Marduk sent me to rule over men, to give the protection of right to the land, I did right and righteousness in . . . , and brought about the well-being of the oppressed.

2.1.1.3 Review questions

1. What was Emperor Hammurabi trying to intimate to his subjects in the above excerpts? Is he trying to explain the sources of legitimacy of his rule?
2. What are the various names Emperor Hammurabi mentions in the text reproduced above? Was he making reference to gods?

2.1.1.4 More on the laws of Mesopotamia

James Lindgren, Symposium on Ancient Law, Economics & Society and Part II Measuring the Value of Slaves and Free Persons in Ancient Law 71 Chi.-Kent L. Rev. 149 (1995)

The Ancient Sumerian Law Collections: Ur-Namma and Lipit-Ishtar-The earliest recorded law collections are from ancient Mesopotamia -- the Laws of Ur-Namma (ca. 2100 b.c.) and the Laws of Lipit-Ishtar (ca. 1930 b.c.). Both of the surviving texts are in Sumerian. The Laws of Ur-Namma (often called Ur-Nammu) come from the city of Ur in southern Mesopotamia. They are attributed to King Ur-Namma (r. 2112-2095) or his son, King Shulgi (r. 2094-2047). The Laws of Ur-Namma provide that if a man deflowers the virgin wife of a young man, the husband kills the wrongdoer. This is not self-help, but rather the punishment that might be ordered by a court after a trial. If a man deflowers a virgin slave woman, the penalty is only five shekels.

The Laws of Lipit-Ishtar (ca. 1930 b.c.) are attributed to King Lipit-Ishtar (r. 1934-1924) of the First Dynasty of the city of Isin in southern Mesopotamia. Sections d and f provide that if a man strikes a man's daughter so as to cause a miscarriage, the penalty is thirty shekels, while if he so strikes a man's slave woman, the penalty is only five shekels.

The Laws of Eshnunna-The Old Babylonian Laws of Eshnunna (ca. 1770 b.c.) come from the city of the same name in Mesopotamia. Often unattributed, these rules may have been promulgated by a ruler named Dadusha. Written in Akkadian, they provide for different penalties for the owners of dogs or oxen who have been previously warned (an ancient version of the modern one-bite rule), depending upon the status of the victim. When a dog or an ox kills a free man, the penalty is forty shekels, while the penalty for killing a slave is only fifteen shekels. Thus, in Eshnunna slaves are given a higher explicit value than in Lipit-Ishtar.

The Laws of Hammurabi-The Laws of Hammurabi make up the most famous ancient code outside of the Bible. The collection was compiled near the end of Hammurabi's reign (r. 1792-1750 b.c.). Hammurabi, the sixth king in the First Dynasty of Babylon, expanded the empire and organized its complex government. The Laws were copied many times over the succeeding centuries.

The social structure reflected in the Laws of Hammurabi is subject to much debate. The three main classes are the awilum, the muskenum, and the wardum (slaves). Often awilum is used as the unmarked, indefinite subject to refer to simply a man or person. At other times, it is contrasted with the muskenum, reflecting a class distinction in favor of the awilum. Although one might be tempted to assign the full free value to the muskenum, thus making the awilum a form of nobility, awilum in the Laws of Hammurabi and elsewhere is "usually a term referring to 'man,' 'person,' 'someone,' 'anyone,' etc."Thus, here the class awilum is assigned the value of a

free man with full rights, and the lower free class (muskenum) and the slave class take their values by contrast with the awilum.

Hittite Laws-The Hittite Laws are from Asia Minor in the 14th-13th century b.c. On their face, they are revisions of earlier laws. The Hittites figure prominently in modern discussions of law because they left an elaborate law collection, as well as a range of treaties. I used an unpublished 1963 translation by Harry A. Hoffner. The valuation of slaves in the Hittite Laws was 38% of the value of free persons (both male and female).

The Covenant Code (Torah)-As Raymond Westbrook has noted about the Covenant Code in Exodus 21-22, "It is impossible to date this code with any certainty, but it is one of the earliest strata of biblical literature, probably from the beginning of the first millennium or even the end of the second millennium b.c.]."

The Code of Gortyn-The great Law Code of Gortyn is the most extensive penal code surviving from ancient Grecian civilization, though it is actually from one of the major cities of Crete. It probably dates from 480-450 b.c., but is in part considerably older. The social structure of Gortyn was complex and partly obscure. At the top were the fully free men who associated in clans and took their meals in eating clubs -- was Gortyn the Princeton of the eastern Mediterranean? Clubless or clanless men (apetairoi) were apparently free but without full rights. Serfs and slaves were at the bottom of the social structure.

The Twelve Tables-The first Roman code is the Twelve Tables, traditionally dated at 451-450 b.c. The origins of the law code have been widely debated, with some attributing it to a political move by the plebeians and Raymond Westbrook claiming Mesopotamian origins for the provisions. It is more egalitarian than most ancient law collections, but one law provides that, if anyone knocks out the tooth of a freeman, the punishment is 300 asses, while the punishment for inflicting the same injury on a slave is half as much.

The Laws of Manu-The Laws of Manu are usually dated about 200 years on either side of the beginning of the Common Era. The Hindu caste system that has continued into modern times is set out in a rudimentary form in the Laws of Manu. Although the laws are mostly religious, there are many sections on wrongs of various kinds. In the provisions on sex with women of different classes, there are different punishments depending on the social class of the victim. But the pattern revealed shows that it is not the class of the victim that matters. Rather, the Laws of Manu are concerned with the pollution of the wrongdoer. Sex with the lower classes is punished more severely than sex with the upper classes.

The Burgundian Laws-The Burgundians, one of the many Germanic tribes that conquered parts of the former Roman Empire, settled in southeast Gaul. King Gundobad promulgated the Lex Gundobada in Latin about a.d. 483. Like many of the Germanic codes, the laws were written in Latin. Although a subject of long dispute, most commentators believe that the Germanic codes are made up of a large dose of traditional Germanic customary law, mixed with Roman-influenced law. The closer the proximity to Rome, the greater the supposed influence of Roman law. The Burgundian Laws are based on the traditional Germanic wergeld. The wergeld is often not clearly laid out, rather it can be inferred from other provisions that base their penalties on the wergeld. As in other law collections, coding was a problem. Sometimes the Burgundians lumped the free classes together; at other times, they split them into the lower, middle, and upper free classes.

Laws of the Franks-In Gaul, the Germanic King Clovis consolidated the Salian and the Ripuarian Franks into a single kingdom. He then issued a code of laws for the combined kingdom in about a.d. 507-511, usually called the Pactus Legis Salicae (Pact of Salic Law). This Pact was originally set out in Latin in sixty-five titles.

2.1.1.4 Some aspects of the Code of Hammurabi

Babylonian Law, http://en.wikipedia.org/wiki/Babylonian_lawFrom Wikipedia, (accessed November 1, 2006)

The material for the study of Babylonian law is singularly extensive. The so-called "contracts" exist in the thousands, including a great variety of deeds, conveyances, bonds, receipts, accounts, and most important of all, the actual legal decisions given by the judges in the law courts. Historical inscriptions, royal charters and rescripts, dispatches, private letters and the general literature afford welcome supplementary information. Even grammatical and lexicographical works contain many extracts or short sentences bearing on law and custom. The so-called "Sumerian Family Laws" are thus preserved.

The discovery of the now-celebrated Code of Hammurabi (hereinafter simply termed "the Code") has made a more systematic study possible than could have resulted from the classification and interpretation of the other material. Some fragments of a later code exist and have been published; but there still remain many points whereof we have no evidence.

This material dates from the earliest times up to the commencement of the common era. Evidence on a particular point may be very full at one period, and almost entirely lacking for another. The Code forms the backbone of the skeleton sketch that is here reconstructed. The fragments of it that have been recovered from Assur-bani-pal's library at Nineveh and later Babylonian copies show that it was studied, divided into chapters, entitled Ninu ilu sirum from its opening words, and recopied for fifteen hundred years or more. The greater part of it remained in force, even through the Persian, Greek and Parthian conquests, that affected private life in Babylonia very little; and it survived to influence Syro-Roman and later Islamic law in Mesopotamia. The laws and customs that preceded the Code, we shall call "early"; that of the Neo-Babylonian empire (as well as the Persian, Greek, etc.) "late." The law of Assyria was derived from Babylonia, but conserved early features long after they had disappeared elsewhere.

Tribal influences-When the Semitic tribes settled in the cities of Mesopotamia, their tribal customs passed over into city law. The early history of the country is the story of a struggle for supremacy between the cities. A metropolis demanded tribute and military support from its subject cities, but left their local cults and customs unaffected. The city rights and usages were respected by kings and conquerors alike.

As late as the accession of Assur-bani-pal and Shamash-shum-ukin, we find the Babylonians appealing to their city laws that groups of aliens to the number of twenty at a time were free to enter the city; that foreign women, once married to Babylonian husbands, could not be enslaved; and that not even a dog that entered the city could be put to death untried. The population of Babylonia was of many races from early times, and intercommunication between the cities was incessant. Every city had a large number of resident aliens. This freedom of intercourse must

have tended to assimilate custom. It was, however, reserved for the genius of Hammurabi to make Babylon his metropolis and weld together his vast empire by a uniform system of law.

Almost all trace of tribal custom had already disappeared from the law of the Code. It is state-law; self-help, blood-feud, marriage by capture, are all absent; though the Code of family solidarity, district responsibility, ordeal, the lex murabi, talionis, are primitive features that remain. The king is a benevolent autocrat, easily accessible to all his subjects, both able and willing to protect the weak against the highest-placed oppressor. The royal power, however, can only pardon when private resentment is appeased. Judges are strictly supervised, and appeal is allowed. The whole land is covered with feudal holdings, masters of the levy, police, etc. There is a regular postal system. The pax Babylonica is so assured that private individuals do not hesitate to ride in their carriage from Babylon to the coast of the Mediterranean. The position of women is free and dignified.

The Code did not merely embody contemporary custom or conserve ancient law. It is true that centuries of law-abiding and litigious habitude had accumulated, in the temple archives of each city, vast stores of precedent in ancient deeds and records of judicial decisions, and that intercourse had assimilated city custom. The universal habit of writing, and perpetual recourse to written contract, even more modified primitive custom and ancient precedent.

Provided the parties could agree, the Code left them free to contract, as a rule. Their deed of agreement was drawn up in the temple by a notary public, and confirmed with an oath "by god and the king." It was publicly sealed, and witnessed by professional witnesses, as well as by collaterally interested parties. The manner whereby it was thus executed may have been sufficient guarantee that its stipulations were not impious or illegal. Custom or public opinion doubtless secured that the parties would not agree to "wrong." In case of dispute, the judges dealt first with the contract. They might not sustain it, but if the parties did not dispute it, they were free to observe it. The judges' decision might, however, be appealed against. Many contracts contain the proviso that in case of future dispute, the parties would abide by "the decision of the king." The Code made known, in a vast number of cases, what that decision would be, and many cases of appeal to the king were returned to the judges with orders to decide in accordance with it. The Code itself was carefully and logically arranged, and the order of its sections was conditioned by their subject-matter. Nevertheless, the order is not that of modern scientific treatises.

Three classes-The Code contemplates the whole population as falling into three classes: the amelu, the muskinu and the ardu. The amelu was a patrician, the man of family, whose birth, marriage and death were registered; of ancestral estates and full civil rights. He had aristocratic privileges and responsibilities, and the right to exact retaliation for corporal injuries, but was liable to a heavier punishment for crimes and misdemeanours, higher fees and fines. To this class belonged the king and court, the higher officials, the professions and craftsmen. The term became a mere courtesy title over time, but originally carried with it a certain status. Already in the Code, when status is not concerned, it is used to denote "anyone." There was no property qualification, nor does the term appear to be racial.

It is most difficult to characterize the muskinu exactly. The term came in time to mean "a beggar", and with that meaning has passed through Aramaic and Hebrew into many modern languages; but though the Code does not regard him as necessarily poor, he may have been landless. He was free, but had to accept monetary compensation for corporal injuries, paid smaller

fees and fines, even paid less offerings to the gods. He inhabited a separate quarter of the city. There is no reason to regard him as specially connected with the court, as a royal pensioner, nor as forming the bulk of the population. The rarity of any references to him in contemporary documents makes further specification conjectural.

The ardu was a slave, his master's chattel, and formed a very numerous class. He could acquire property and even hold other slaves. His master clothed and fed him, and paid his doctor's fees, but took all compensation paid for injury done to him. His master usually found him a slave-girl as wife (the children were then born slaves), often set him up in a house (with farm or business) and simply took an annual rent of him. Otherwise, he might marry a free woman (the children were then free), who might bring him a dower that his master could not touch, and at his death, one-half of his property passed to his master as his heir. He could acquire his freedom by purchase from his master, or might be freed and dedicated to a temple, or even adopted, when he became an amelu and not a muskinu. Slaves were recruited by purchase abroad, from captives taken in war, or by freemen degraded for debt or crime. A slave often ran away; if caught, the captor was bound to restore him to his master, and the Code fixes a reward of two shekels that the owner must pay the captor. It was about one-tenth of the average value. To detain or harbour, etc., a slave was punishable by death. So was an attempt to get him to leave the city. A slave bore an identification mark, removable only by a surgical operation, and that later consisted of his owner's name tattooed or branded on the arm. On the great estates in Assyria and its subject provinces, there were many serfs, mostly of subject race, settled captives, or quondam slaves; tied to the soil they cultivated, and sold with the estate, yet capable of possessing land and property of their own. There is little trace of serfs in Babylonia, unless the muskinu be really a serf.

Citizens tenants of gods-The god of a city was originally considered the owner of its land, that encircled it with an inner ring of irrigable arable land and an outer fringe of pasture; and the citizens were his tenants. The god and his vice regent, the king, had long ceased to disturb tenancy, and were content with fixed dues in naturalia, stock, money or service. One of the earliest monuments records the purchase by a king of a large estate for his son, paying a fair market price and adding a handsome honorarium to the many owners, in costly garments, plate, and precious articles of furniture. The Code recognizes complete private ownership of land, but apparently extends the right to hold land to votaries, merchants (and resident aliens?). But all land was sold subject to its fixed charges. The king, however, could free land from these charges by charter, which was a frequent way of rewarding those who deserved well of the state.

It is from these charters that we learn nearly all we know of the obligations lying upon land. The state demanded men for the army and the corvée, as well as dues in kind. A defined area was bound to find a bowman, together with his linked pikeman (who bore the shield for both), and to furnish them with supplies for the campaign. This area was termed a "bow" as early as the 8th century BC, but the practice was much earlier. Later, a horseman was also due from certain areas. A man was only bound to serve so many (six?) times, but the land still had to find a man annually. This service was usually discharged by slaves and serfs, but the amelu (and perhaps the muskinu) also went to war. The "bows" were grouped in tens and hundreds. The corvée was less regular. The letters of Hammurabi often deal with claims to exemption. Religious officials and shepherds in charge of flocks were exempt.

Special liabilities lay upon riparian owners to repair canals, bridges, quays, etc. The state claimed certain proportions of all crops, stock, etc. The king's messengers could commandeer any

subject's property, giving a receipt. Further, every city had its own octroi duties, customs, ferry dues, highway and water rates. The king had long ceased to be owner of the land, if he ever was. He had his own royal estates, his private property, and dues from all his subjects. The higher officials had endowments and official residences.

The Code regulates the feudal position of certain classes. They held an estate from the king, consisting of house, garden, field, stock, and a salary, on condition of personal service on the king's errand. They could not delegate the service, on penalty of death. When ordered abroad, they could nominate a capable son to hold the benefice and carry on the duty. If there were no capable son, the state put in a locum tenens, but granted one-third to the wife to maintain herself and children. The fief was otherwise inalienable; it could not be sold, pledged, exchanged, sublet, devised or diminished. Other land was leased from the state. Ancestral estate was strictly tied to the family. If a holder would sell, the family kept the right of redemption, and there seems to have been no time-limit to its exercise.

Temple-The temple occupied a most important position. It received from its estates, from tithes and other fixed dues, as well as from the sacrifices (a customary share) and other offerings of the faithful, vast amounts of all sorts of naturalia; besides money and permanent gifts. The larger temples had many officials and servants. Originally, perhaps, each town clustered round one temple, and each head of a family had a right to minister there and share its receipts. As the city grew, the right to so many days a year at one or other shrine (or its "gate") descended within certain families, and became a kind of property that could be pledged, rented or shared within the family, but not alienated. Despite all these demands, the temples became great granaries and store-houses, as they were also the city archives. The temple had its responsibilities. If a citizen were captured by the enemy and could not ransom himself, the temple of his city must do so. To the temple came the poor farmer to borrow seed, grain, or supplies for harvesters, etc. — advances that he repaid without interest.

The king's power over the temple was not proprietary, but administrative. He might borrow from it, but repaid like other borrowers. The tithe seems to have been considered the rent due to the god for his land. It is not clear that all lands paid tithe; perhaps only such as once had a special connection with the temple. The Code deals with a class of persons devoted to the service of a god, as vestals or hierodules. The vestals were vowed to chastity, lived together in a great nunnery, were forbidden to enter a tavern, and, together with other votaries, had many privileges.

1.2.1.5 Review Questions

Answer the following questions.

1. Describe the various services the state exacted from land holders in Mesopotamia.
2. Establish the relationship between land and the powers of kings in Mesopotamia.
3. Identify the three classes considered to constitute the Mesopotamian society.
4. State the relationship between kings and his citizens in relation to the administration of justice.

2.1.2 The Greek legal system: The Greek legal system came into existence a thousand year after the Code of Hammurabi. The Greek civilization 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 provided the next generations legal systems with the principles of public law.[1]

Why did not private law develop in Greece? The Greek did not contribute much to the development of a sound private law; the Greek did have private law but their private law was not as sound as the Roman private law. Why? A combination of three factors explains this failure. First, the Greek did not build an empire, unlike the Romans and the Mesopotamians. The Greek had had several geographically and politically fragmented polities called city-states. As a result, the city-states lacked political interactions; when there were connections it was that of enmity instead of that of friendship and cooperation. Historians state that lack of viable political connection hampered the development of an elaborate private law. In the second place, the Greek philosophers always thought that they were destined to address questions that mattered-philosophical questions. The Greek, for instance, were trying to develop constitutional principles, the best model of ordering a society as a whole. The Greek directed their energy to abstract thinking; they were not technocrats; rather, they were idealists. So the psychological and intellectual make-up of the Greek prevented them from working on details matters such as private rules.

The third reason for the failure on the part of the Greek to formulate a developed private law was attributed to technical and institutional factors. The Greek city-states lacked legal structures such as courts, prosecution offices, police and prisons. They did not have detailed private rules. Ordinary people settled economic and social disputes on the basis of ethics and equity. 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 was missing. They did not know of precedents.

2.1.3 The Roman legal system: Like the Mesopotamian legal system, the Roman legal system went through three phases. The first phase lasted from 8th BC. to 2nd BC. In the course of these centuries, Rome was a little city. It was a city-state; state built in the city of Rome. The laws of the city of Rome were at their lowest stage in terms of organization and narrow in their coverage. Rome formulated its laws in the form of one of the ancient codes named the XII Tables in the year 450

[1] Generally, public law means as area of law which deals with the relationship between citizens and government; it sets forth rights of citizens; it outlines the powers and responsibilities of the state. The principal ideal aim of public law is to restrain state behavior.

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

2.1.3.1. Aspects of the XII Tables: The XII Tables promoted an eye-for-eye principle. Can you explain this principle? 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. These god-given laws were to be applied and to be interpreted by those persons closer to gods-priests not by the laity. With the development of this code, however, there had been a complete shift in the legal system-the secularization of the legal system was witnessed.

2.1.3.2 The significance of the XII Tables

Richard A. Pacia, Esq., Raymond A. Pacia, Roman Contributions to American Civil Jurisprudence 49Rhode Island Bar Journal5 (2001)

The Twelve Tables-In 451-450 B.C., a special commission drew up the earliest Roman code of seventy-six civil laws called the Twelve Tables, which were set up in the Roman Forum on twelve tables of bronze. Rome was at this time the capital of the western world; Italy, Spain, France, England, Austria, the countries on the Mediterranean including the Holy Land and Egypt as well as Germany to the Rhine River were all under its control. The Twelve Tables were eventually implemented throughout all seventeen administrative provinces of the Roman Empire.

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. Significantly, 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. Hence, the Roman legal system incorporated a legal culture much as our own - governed by laws and prescribed rights while, at the same time, "afford(ing) the private individual himself more or less freedom of action."

The impact of the Twelve Tables cannot be understated. Before their enactment, private redress, under which an injured party was free to indulge in revenge, was widespread and led to constant disturbances, violence and vendetta in the community. The Twelve Tables provided the procedural framework through which peace between man and woman was peacefully accomplished. Thus, self-redress was replaced by judicial redress, elevating the role of the state as the peaceful arbiter of disputes among citizens to a degree far surpassing that of any prior

civilization. Damages and injuries to persons and property were actionable under the Twelve Tables. Classes of basic wrongs, or torts, were established, e.g., damage to another's property, bodily injury to a person, etc. Further sub-classifications, e.g., injury to a four-legged animal, cutting down a tree, setting fire to crops, etc., also were established.

The prescribed remedy in most cases under the Twelve Tables was to provide a retaliation in kind - the "lex talionus." 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. The enactment of the Twelve Tables, in effect, signified the first systemic development of an organized body of tort law. Still, the Twelve Tables had shortcomings. Notably, it did not recognize a general action for damage to property. Also, the procedural framework was primitive, incomplete, and cumbersome. The forms of action were inflexible and were characterized by pleading formulae that had to be followed fastidiously. Significantly, there was no mechanism for equitable relief.

The Lex Aquilla-The shortcomings of the Twelve Tables prompted the promulgation of the Lex Aquilia, (circa 287 B.C.). The Lex Aquilia departed dramatically from the "eye for an eye" mentality of compensation, which was the dominant modality of relief under the Twelve Tables, and provided in most instances for awards of monetary compensation. The Lex Aquilia also provided more specific and effective remedies. Significantly, the Lex Aquilia also provided for punitive damages, stating that the damages for certain specified injuries "will be double against one who denies liability." Under the Lex Aquilia, a parent's remedy for injury to his child gave rise to recovery for loss of earning capacity and medical expenses - elements which clearly are recognizable in American courts today.

A critical aspect of the Lex Aquilia was that it penalized only affirmative acts; 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. The law, in effect, thus only punished trespassers. The Lex Aquilia's narrow applicability in this regard, however, was later cured by the creation of actions which diminished the requirement of an affirmative act. Another central tenet of the Lex Aquilia was that liability could be imposed only if the defendant acted with inuria, that is, with culpability, unlawfulness or the absence of right. The concept of inuria also extended to actions involving incorporeal losses, making it the forerunner of modern torts, such as defamation and slander.

As in the American legal system, the Roman tort system imposed different levels of duty in assessing culpability for negligent conduct. In certain circumstances, for example, when a defendant was acting as a professional, a jurist could find him liable if the defendant did not know what he was expected to know as a professional. Similarly, culpability could not be attributed to children or to the insane, who respectively were deemed incapable or incompetent of understanding the implications of their behavior. The Lex Aquilia also addressed intentional acts and helped form initial thinking for our modern concepts of interference with contractual rights and personal relations. A final requirement to the Lex Aquilia was that the offended party must have suffered a loss or damnum (damages). This requirement, of course, exists as one of the essential elements of a modern day negligence action.

The Classical Jurists-In the second century, Gaius, a distinguished Roman jurist born during the reign of Hadrian, wrote many works interpreting the Twelve Tables. He is best known for his authorship of the Institutes, a beginner's text in law. Gaius observed that "all our law relates either to persons, to things or to actions." In the Institutes, Gaius accordingly broke law down into three basic divisions - one covering persons, another on the subject of things (i.e. property, obligations and succession) and a third relating to causes of action. The Institutes had a profound impact upon the development of Roman law and provided the impetus for expanding tort law beyond the narrow procedural parameters which had characterized - and limited - the Twelve Tables and the Lex Aquilia.

Gaius interpreted Roman law to give a man the right to suffer an injury not only through himself but also through his dependent children and his wife - originating, in effect, the philosophical rationale for loss of consortium. The laws, which Gaius developed to address "actions," e.g., to restrain and enjoin behavior, or to enforce acts by mandamus, gave rise to the birth of equity jurisprudence. Gaius' Institutes also influenced the development of much subsequent law. In 306 A.D., Constantine declared himself Holy Roman Emperor, created a stable currency, a Christian Church affiliated with the state and a legal system which adhered to the Lex Aquilia and the jurisprudence of Gaius. In 438 A.D., the Emperor Theodosius II created a commission, which further expanded and refined pre-existing Roman law in a manner consistent with the erudition of Gaius.

Another important jurist of the third century was Ulpian. Approximately 40 percent of Justinian's Digest was taken from Ulpian, who was murdered in 223 A.D. Ulpian was a proponent of natural law and in his writings we find such statements as "by natural law all men are equal." To Ulpian is attributed the maxim "Honeste Vivere, Alterum non Laedere, Suum Cuique Tribuere," i.e., "Live honestly. Injure no one. Give every man his due," which is the basic overriding precept found in book one of Justinian's Institutes. The simplicity and compassion underlying this canon is almost breathtaking, summing up in one brief phrase all that modern legislators and jurists have endeavored to achieve through endless legislation and innumerable judicial opinions. This simple directive reveals the essence of the Roman law as a universal law which is fixed and immutable, shared by all and applicable to everyone at all places and at all times. Indeed, it is clear that even the pre-amble to the American Declaration of Independence, which enshrines the principal that "all men are created equal" and are "endowed with certain inalienable rights" embodies many tenets of Roman jurists who confessed the alliance of philosophy with natural law.

One cannot mention the contributions of Ulpian without citing, in tandem, the contributions of Papinian. Professor Wigmore, in his instructive A Panorama of the World's Legal Systems, reminds the reader that "for us, these two bear also the sentimental distinction, that (with Paulus) they once dispensed justice in the Roman province of Britain, as Roman magistrates." Papinian wrote more than 300 opinions and has been referred to as the greatest name in Roman law. He enjoyed the unique distinction that, among the five principal jurists, when they were divided on an opinion, his opinion should prevail. But Wigmore points out that Papinian's "truest fame should be that he died a martyr to his professional honesty." When the ruthless Caracalla caused the assassination of his own brother, who shared the throne with him, and directed Papinian, then his attorney general, to write a legal opinion in justification, Papinian replied with these immortal words: "I do not find it so easy to justify such a deed as you did to commit it." For this rebuke, Caracalla had Papinian put to death.

2.1.3.3 The second stage in the life of Roman law: The next stage of the Roman legal system lasted from 2nd BC through 2nd AD. Roman in this stage formed an empire, one of the greatest empires in the history of mankind. The small city-state of Rome grew militarily and economically. Rome swallowed the outlying territories; Rome conquered numerous territories followed by their subjugation. For this big power an elaborate and sound 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. Unlike, the Greek the Romans were men of practice.

Rome disintegrated after the 2nd AD. Rome was divided into two: the Western and the Eastern parts. The Western Roman part was conquered by the German tribes called Barbarians. The Barbarians came up with their own laws. The Eastern Roman empire, also called the Byzantine Empire, survived up to 15th century AD. Emperor Justinian was one of the famous emperors of the Eastern Roman Empire. He sponsored a code called Corpus Juris Civilis in the 6th century. This code is taken as the origin of the civil law tradition. Jurists coined the term `justice` after the name of Emperor Justinian.

2.1.3.4 The Law of Justinian

Craig A. Stern, Justinian: Lieutenant of Christ, Legislator for Christendom 11 Regent U. L. Rev. 151(1998-1999)

However significant his military and architectural achievements, it is the third grand effort of Justinian that concerns us most in this essay. It too was an expression of his faith and duty, of his understanding of the office to which God had called him. Justinian's most significant achievement, one to affect the history of the world to this day, was the production of the summary of Roman Law, the Corpus Juris Civilis, the body of civil law, as it has been called since the Middle Ages. This monumental writing remains the foundation of law for most of Christendom and beyond, and of impact even upon the non-civil system of the common law of English-speaking countries. Like the reconquest of the west and the ecclesiastical building program, the writing of the Corpus Juris Civilis expressed Justinian's obedience to his divine call to rule Christendom after God's design. The emperor, under God, was the font of justice. And, while the emperor's will was law, he was yet under the law, for the law granted him his authority. His rule must reflect God's perfect justice.

The state of law at Justinian's accession (and for some time before) was a sorry affair. The edicts of the emperors--statutes with the force of law--had not been collected and organized for generations. The chief body of Roman law-- the centuries of opinions of the lay legal scholar "jurisconsults"--survived in jumbled assortments. The diversity of views of these jurisconsults had led to rules of citation in which emperors commanded judges to follow the preponderant opinion, or ranked jurisconsults in order of authority and commanded judges to follow the view of the highest authority on the question. Unfortunately, the very richness of the Roman legal

tradition made for expensive and unreliable litigation, a situation intolerable to the chief minister of God's justice on earth.

Justinian had harbored plans for comprehensive legal reform during his uncle's reign, and hit the ground running upon his own accession. Committing the work to his chief legal expert--the brilliant, but pagan and corrupt, Tribonian, owner of the finest law library in the world--Justinian first directed the collection of imperial edicts into a Code in 528. In effect, this work was an update of the previous Code assembled by the Emperor Theodosius a century before. Now lawyers needed only to look to the Code to find the statutes of the Roman Empire. A superseding version of the Code, the only one that survives, replaced the original several years later.

The success of this enterprise emboldened Justinian for the major work of his legal reform, the promulgation of the Digest, or Pandects, the authoritative collection and harmonization of the main body of Roman law, the opinions of the jurisconsults. For this, Tribonian gathered panels of law professors, lawyers, and judges, who poured through hundreds of texts, thousands of opinions, to find and harmonize the best views of a millennium of Roman legal thought. Justinian's edict described the task:

[S]ince there is nothing to be found in all things so worthy of attention as the authority of the law, which properly regulates all affairs both divine and human and expels all injustice: We have found the entire arrangement of the law which has come down to us from the foundation of the City of Rome and the times of Romulus, to be so confused that it is extended to an infinite length and is not within the grasp of human capacity; and hence We were first induced to begin by examining what had been enacted by former most venerated princes, to correct their constitutions, and make them more easily understood; to the end that being included in a single Code, and having had removed all that is superfluous in resemblance and all iniquitous discord, they may afford to all men the ready assistance of their true meaning.

After having concluded this work and collected it all in a single volume under Our illustrious name, raising Ourself above small and comparatively insignificant matters, We have hastened to attempt the most complete and thorough amendment of the entire law, to collect and revise the whole body of Roman jurisprudence, and to assemble in one book the scattered treatises of so many authors; which no one else has heretofore ventured to hope for or to expect...

Therefore We order you [Tribonian] to read and revise the books relating to the Roman law drawn up by the jurists of antiquity, upon whom the most venerated princes conferred authority to write and interpret the same; so that from these all the substance may be collected, and, as far as may be possible, there shall remain no laws either similar to or inconsistent with one another, but that there may be compiled from them a summary which will take the place of all. Instead of the ten years allowed by the emperor to produce the work, Tribonian's staff, under the watchful eye of the amateur lawyer Justinian, took only three. It was a miracle. It is this Digest, promulgated by the emperor as positive law, that makes Justinian's Corpus Juris Civilis a landmark of western civilization. The rediscovery of the Digest in the west in 1080 worked a revolution in legal science the fruit of which remains to this day.

Promulgated along with the Digest was the Institutes, a textbook for law students. This third part of the Corpus Juris Civilis, a new work constructed on the model of the then three-hundred-

year-old Institutes of Gaius, distilled the massive Digest and set forth basic principles of Roman law for the beginner not yet ready to tackle that intimidating collection.

2.1.3.5 The organs of the state in Rome

Amir Aaron Kakan, Evolution of American Law, from its Roman Origin to the Present (Our Legal Roots Can Be Traced to Ancient Rome) 48-Orange County Law. 31(2006)

Introduction-no other country in the course of history has had a more profound impact on the evolution of western civilization, than Rome. Some scholars may contend that the presence of the United States on the world stage is similar to that of the Roman Empire in the Second and Third Century. That may be so. However, many attributes of our nation are deeply rooted in the Roman culture. For instance, our calendar system, our alphabet, our system of democracy, and our laws are of Roman origin. The influence of Roman laws on our laws is often overshadowed by their English origin. Nonetheless, Anglo-American law is a progeny of Roman law.

The Birth of the Republic-As legend has it, the city of Rome was founded by Romulus and his brothers around the Eighth Century B.C.E. Romulus, who was rescued and raised by wolves, established the city of Rome on the Palantie Hills. Following a series of battles among Romulus and his brothers, Romulus managed to become the sole ruler of the newly founded city. As one of his first acts, Romulus established an advisory council consisting of the 100 heads of families, called Patres ("Fathers").This body soon got the name Senatus (senate) which in Latin is understood to mean the council of elders or committee of old men. After the death of Romulus the senate was assigned with the task of selecting the future king. The task long with advisement were the only roles the senate had during the monarchy.

Following its birth, Rome was under the rule of kings for approximately two centuries. Thirsty for expansion, the Roman rulers immediately began conquering the neighboring cities and villages. Along with Rome, the newly claimed lands attained the title, Latinum. Despite the expansion and economic prosperity, the Roman people were not very fond of their royal leaders. This was primarily due to the harsh treatment of the people. As a result, in 510 B.C.E., Romans revolted against the last Estruscan King, Tarquinias Superbus, who was accused of raping a noble lady. Under the leadership of Lucius Junius Brutus, who was a dominant figure at this time, and with the help of the Gauls, a Celtic people in the north, and from the Greeks in the south, the Romans successfully defeated Tarquinias. With the Roman support, the revolt against the Estruscan King spread throughout Latinum. With the fall of Tarquinias Superbus, Rome had attained its independence from the Estruscan King and for the second time (Athens being the first) in the human civilization, a republic was born.

After the fall, Rome was the largest city in the Latinum, and as such it immediately took the dominant role as the decision maker for all of Latinum. In 495 B.C.E., a treaty was signed between Rome and the other provinces of Latinum. The document proclaimed Rome as the sole ruler of Latinum. To fill the leadership gap left by the involuntary departure of the king, the Roman elite selected two consuls to govern the new republic. Each consul was in power for one year and their authority was similar to that of a king. The consuls, who were required to consult with senate on various matters, were vested with the military, judicial, administrative, and religious powers of a king. The two shared all the powers bestowed upon them by the senate and had the authority to veto each other's actions.

The Senate-In the meantime, the senate, which survived the revolution, witnessed a new dawn of superiority and dominance in the republic. Under the monarchy the senate was only an advisory body. It did not possess any real power. However, in the republic, the senate evolved into the most powerful governing body. In achieving this, the senate increased its membership from one hundred to three hundred, with membership being limited to Roman Aristocrats.

The most common misconception that people share about the Roman senate is the belief that the senate was a legislative body. However, the senate was a committee comprised of influential Roman elites who issued recommendations on legal practices Although the senate possessed no legislative power, it had considerable authority over matters of religion, foreign policy and public finance. Moreover, its decrees in other matters were well respected. As the embodiment of Rome, the senate also had the authority to manage and control land, appoint and receive ambassadors on behalf of the republic, declare war, appropriate public funds, aid its citizens in foreign lands, and select consuls. Additionally, during national emergencies, the senate had the power to appoint a dictator whose powers were not constrained by the law of the state.

Despite all its power, the senate operated in accordance with religious restrictions. The senate could only convene for certain governmental meetings at selected temples. For instance, discussions pertaining to war were held in the Temple of Bellona, where, as an act of war, a spear was cast against the distant enemy. (Bellona was the Roman goddess of war, popular among the Roman soldiers. She accompanied Mars in battle, and was variously given as his wife, sister or daughter. She had a temple on the Capitolinus, which was inaugurated in 296 B.C.E. and burned down in 48 B.C.E.) Her festival was celebrated on June 3. Matters dealing with new years had to be heard in the Temple of Jupiter Optimus Maximus. In Roman mythology, Jupiter (Jove) held the same role as Zeus in the Greek pantheon. He was called Jupiter Optimus Maximus as the patron deity of the Roman state, in charge of laws and social order.

The Assembly-The main legislative body of the Roman republic was the assembly, which like the senate, was established during the monarchy. However, unlike the senate that had tremendous authority, the assembly had very little power both in the monarchy and the republic. The assembly was comprised of male Roman citizens serving in the army. These men were mostly commoners from lower economic standings. Further, the members of the assembly were divided into five classes. The classes were determined by wealth, with the wealthiest being in the higher class and the poor in the lower. (In Roman time a man's wealth was measured by how much equipment a man could afford.) These classes which were known as "Centuries" varied in size and power. The lower centuries, which were reserved for the landless and the poor had tens of thousands of members while the higher centuries had two to three hundred members. Despite their larger size, the lower centuries had little to no power. Most of the voting and decision making were done by the higher centuries. In fact, the lower centuries were often denied the opportunity to cast their votes.

During the monarchy the assembly was the second most powerful political institution. (The king being the most powerful.) It had the power to regulate the senate and guide them in their selection of counsels. The assembly convened to witness the announcement of a new king or a declaration of war. Further, the assembly had the power to rule on matters of wills and transfer of lands. However, in the republic the assembly lost many of its powers to the senate. The assembly's role was limited to passing laws, electing magistrates, declaring war and repealing old laws. The lessening of the assembly's power was rooted in the struggle between the orders.

In the monarchy, Rome was under the sole rule of a king. With the exception of a few landowning families, almost all the people were at the mercy of his rule. As such, the Roman aristocrats, called patricians, were unable to fully exert their influence on the commoners who were known as the plebs or plebeians. Following the fall of the monarchy, there was a gap in the Roman governance. Without any hesitation, the patricians filled this gap by taking full control of the new government. These aristocrats, who were members of the senate and powerful centuries, made the decisions for all of Rome. The Plebeians, whose support was a key factor in the overthrow of the king, were dissatisfied with rule of the Patricians. Although many of the commoners were members of the assembly, their views and requests were often denied or ignored. At the same time, the Roman economy was extremely dire. Poor peasants unable to work or pay debts fell into ruins. A great number of commoners lost lands and were forced into slavery. Thus, in an effort to express their frustration against the Roman elite, the plebs organized themselves against the patricians and so began the legendary "struggle between the orders."

In the early days of the republic, Rome was threatened by its neighbors and naturally the patricians needed the help of the plebeians to defend Rome against its enemies. This weakness gave the plebs a great opportunity to gain political ground in the new city. Hence, around late Fifth Century B.C.E., the commoners refused to engage in any military service or agricultural work until the senate agreed to grant them some political power. After months of protests, the patricians recognized the plebs' right to hold meetings and elect their own political officers. The result was the tribuni plebis, or people's tribunes, who represented the grievances of the commoners to the senate and the consuls. Tribuni plebes also had the power to veto consuls' laws introduced by the senate. Additionally, the tribuni plebes had the duty to aid any citizen (regardless of wealth) in need.

The patrician concessions eased the strife between the Roman classes for a brief period. However, the plebs contended that their rights and properties were not adequately protected by the unwritten laws. In essence, Rome had two set of laws, those passed by the senate (Senatus Consulta) for the patricians and those passed by the assembly tribuni plebes for the commoners. Neither class honored the laws of the other. The plebs maintained that the patricians' laws were unfair and the patricians held that their laws were superior to the plebians' laws. Consequently, in 462 B.C.E., the tribuni plebes proposed that a commission be established to reduce to writing the entire body of Roman law. The patricians fiercely opposed the proposal, but after ten years of debates, the commission was established.

Codification of Laws and the Twelve Tables-The commission was comprised of ten men, five plebs and five patricians. The members of the commission, who were referred to as decemviri, wisely codified the Roman laws into ten chapters and unveiled it to the Republic in 451 B.C.E. A year later, a newly elected commission, added two more chapters. The twelve chapters were then inscribed into twelve metal or wood tablets, and permanently placed in the Roman Forum for the inspection of all the citizens. Small copies were also made for the public and they were widely used. Thereafter, the laws established by the decemviris were commonly designated as the Twelve Tables of Roman Law.

The Twelve Tables covered all the areas of the law. Unfortunately, the Tables were destroyed in 390 B.C.E., during the invasion of Rome by the Gauls. As a result, the exact content of the Twelve Tables remains a mystery. Nonetheless, numerous fragments have been gathered from the writing of ancient authors such as Cicero, Dionysius and Gaius. From their references historians

have been able to extract laws governing theft, property, fraud, debts, and various other crimes. The following are some of these laws. "One was permitted to remove a branch from a neighbor's tree which overhung one's property.""For the theft of crops there was the death penalty (clubbing to death).""For slander there was the death penalty (clubbing to death)."" Marriage between patricians and plebeians is forbidden"

Amazingly, the Tables differentiated between intentional and accidental crimes. This illustrates that the concept of Mens Rea possibly dates back to ancient times. There were also different degrees for assaults, and murders. However, despite its legal sophistication, the Twelve Tables was not the perfection of equity or justice. The law assigned different degrees of punishment in accordance with classes. For instance, slaves and peasants received the harshest punishments while the nobles received milder punishments. Furthermore, as often is the case in modern legislation, the tables were deliberately codified in obscure and ambiguous language to allow the patrician judges to interpret them in a manner that would serve their interest. Regardless of its bias, the Twelve Tables remain as one of the greatest achievements in the history of human civilization. In fact, many scholars contend that the codification of the Twelve Tables marks the beginning of European law.

In the aftermath of the Twelve Tables, the strife between the plebeians and the patricians continued. The plebeians demanded political power, land control legislation along with debt relief. When the nobles ignored their demands, the commoners, once again, refused to serve in the military. The patricians agreed to meet the plebs' demands. The result was the Licinian Legislation of 367 B.C.E. The new law limited land ownership and it allowed for one of the two consuls to be a plebeian. This was a tremendous victory for the plebs because in the years following the Licinian Legislation, the plebeians witnessed a period of great equality. A wave of new legislation provided for marriage between plebeians and patricians along with equal protection of the laws for all free men. The term noble was no longer synonymous with patricians because many commoners had accumulated great wealth. The peace and tranquility at home allowed Rome to center its attention on expansion. Within a span of one hundred years, Rome conquered all of Latinum and much of the neighboring territories. In 286 B.C.E., after 70 years of war, Rome defeated the Samintes, and later in 146 B.C.E. Rome crushed Carthage. (The Samintes were an ancient people who lived in Samnium, the mountainous center of southern Italy. Carthage was a great city of antiquity, on the northern coast of Africa, near modern Tunis, Tunisia. By the middle of the Second Century B.C.E., Italy (from Sicily to the Rubicon) and portions of northern Africa were under the dominion of the Republic. At this time the Roman Republic was wealthier and stronger than it had ever been, but its glory was short lived.

The Fall of the Republic and the Rise of the Empire-The expansion of the Republic brought tremendous wealth to Rome. However, the riches were in the hands of a few. The rich were getting richer and the poor, impoverished by the long wars, were getting poorer. The social disparity once again led a series of reform legislation. Land ownership regulations along with new debt relief were introduced. New criminal courts were established and jurors were allowed to be taken from the middle class. The law of appeal was brought back so citizens could request a rehearing before the assembly. However, around 66 B.C.E. a new breed of aristocrats appeared who wished to return Rome to the early years of the republic and to isolate the power in the hands of a few.

Among the political hopefuls were Gnaeus Pompeius Magnus, known as Pompey, Marcus Licinius Crassus and one of the greatest Roman figures Gaius Julius Caesar. These nobles were military men of great respect and together they formed a strong political alliance known as the First Triumvirate. Though the Triumvirate passed a few laws for the betterment of Rome, its legislative ambitions was overshadowed by its thirst for war and glory. In 58 B.C.E., Caesar embarked upon his infamous campaign of the Gauls. In a span of ten years, Caesar captured millions and took in great wealth for Rome and himself. Caesar's success over the Gauls turned Pompey against him and made the two bitter enemies. On January of 49 B.C.E., Caesar crossed the Rubicon River (the boundary between the Gauls and Italy) and crushed Pompey in a bloody civil war. The defeat of Pompey made Caesar the sole master of the Roman State. Caesar retained the senate but vested all the powers of the state in his own hands. This did not go well with many of the senators and as a result in 44 B.C.E. Caesar was stabbed to death by the members of the senate at the Roman Forum.

Evolution of Roman Law and the Rise of Law Schools During the Empire-The death of Caesar marked the end of the Republic. Following his assassination, Rome fell into a short period of war, but Caesar's successor and grandnephew Gaius Octavius quickly mobilized his forces and proclaimed himself the absolute ruler of Rome. The reign of Octavius (also known as Emeror Augustus) marked the beginning of the Roman Empire. For the next two hundred years the sole concern of Rome was glory and expansion. There were a very few laws passed of any importance. Private laws of the aristocracy governed the domestic life of the citizens. The life, liberty and property of the people were at the mercy of the king. The senate, which was still in existence, only passed laws that promoted the power of the king. However, in the late Second Century, there was a revival of Roman jurisprudence. By this time, the empire had become so vast that a new legal system was needed. Thus, jurisdictions were assigned to courts through the empire and the procedures for appeals were made more definite. Moreover, judges were allowed to publish their opinions. This was significant to the study of law because it allowed individuals to examine the rationales of the judiciary. Nonetheless, the biggest piece of legislation was The Perpeual Edict, which regulated procedural laws, property and the market. The law required vendors to disclose hidden defects and imposed liability on the intentional destruction of the property of another. These laws were the first of their kind and they would lay the foundation for many similar laws in future societies.

From the Second Century to the Fifth Century, Roman law witnessed limited progress. During this period, the empire's primary concern was expansion. By the end of Fourth Century, Rome had conquered Gaul (Modern France), Spain, Judea, Britain, Africa, and much of Asia Minor. In the process, Rome adopted Christianity as its official religion and established a new capital in the eastern part of the empire. The new city was named Constantinople, after the infamous Roman emperor Constantine the Great who was the first Roman ruler to embrace Christianity. Constantine ruled from 306 to 337 B.C.E. and was the founder of Constantinople (present-day Istanbul), which remained the capital of the Eastern Roman (Byzantine) Empire until 1453.

With the rise of Constantinople, came the birth of law schools in Rome and Constantinople. The law schools were public institutions under the direct control of the emperors. They offered a five year program in areas of law prescribed by the imperial authority. Students were taught by authorized instructors who had attained a license from the imperial office. Severe punishments were imposed upon those who taught without a license. Like the Twelve Tables, the establishment of law schools was a monumental achievement in the advancement of Roman law. It provided an

arena where the law could be analyzed, discussed and taught by prominent jurists. In a short time, these scholarly institutions became the breeding ground for many revolutionary legal doctrines, but none were more revolutionary than the Corpus Juris Civilis.

Justinian's Corpus Juris Civilis-Often referred to by scholars as the greatest legal product of Roman law, the Corpus Juris Civilis, also known as the Justinian Compilation or the Justinian Code, was codified during the reign of Roman emperor Flavius Petrus Sabgatius Justinianus (Justinian, 483-565 C.E.). Justinian was born to a peasant family on May 11, 483 C.E. in modern Romania. He received his education in Constantinople and he was well versed in theology, philosophy, poetry, architecture, and law. At age 35, his uncle Justin became emperor. Justin was a former soldier and he lacked experience in public affairs. Thus, in 524 C.E., he appointed Justinian as his co-emperor. In 527 C.E., upon his uncle's death, Justinian became the sole ruler of Rome. Justinian was an "executive of rare qualities." He understood the needs of his empire and he had the energy and the know how to meet those needs. Upon coming to power, he began extensive public construction projects, by building new roads, and bridges. Militarily, he led successful campaigns against the Vandals in Africa and the Persians. Nonetheless, Justinian's greatest accomplishment was the codification of Roman law and the publication of the Corpus Juris Civilis.

By the time of Justinian, Roman law had reached its highest peak. The laws were highly developed and scattered in various manuscripts and imperial scrolls. Justinian was extremely passionate about the rich history of Roman law. His desire was to collect all of Roman laws and transform them into a coherent body. To do so, he appointed a sixteen member commission (comprised of law professors and consuls) to gather all the imperial scripts, imperial laws and the writings of renowned jurists. On December 15, 530 C.E., in an imperial instruction to the commission, Justinian said: "It is our desire to arrange the constitution of former emperors in a proper order ... we shall rearrange the entire Jurisprudence of Rome and to present in one volume the scattered works of many authors ... this is a task that no one has dared to do ... it is a task not only of great difficulty but impossible ... However trusting in God ... we shall be glorious."

Per Justinian's instructions, the commission gathered all the laws and organized them in a systematic manner. They presented their work in twelve book volumes, entitled Justinian Codex or Justinian Code. The books were divided into chapters, with each being devoted to a specific area of the law. Shortly after, the commission embarked upon reviewing the work of jurists. In a span of three years the commission examined and summarized over two thousand books or rolls. Each excerpt was accredited with the name of the author and the book from which it was extracted. The final product was a fifty book volume called the Digest. Each book was divided into chapters in accordance with different legal topics and theories. Upon its approval by Justinian, the Digest became the supreme law of the land. In a proclamation to his people Justinian said: "In every trial or other legal contest ... where rules of law have to be enforced, let no one quote or strive to maintain any rule of law save such as are composed and promulgated by us."

Prior to completion of the Digest, Justinian had recognized that the Corpus Juris Civili was too burdensome a task for a law student to carry. Accordingly he ordered the commission to compose a text book based on the primary principles of Roman law. The book, which was titled the Institute of Justinian, was comprised of four parts. Overall the book encompassed areas governing parental rights, marriage, adoption, servitudes, gifts, wills, and other areas of civil law. In a short time, the Institute of Justinian became the official text for all the law schools throughout the

Roman Empire. In fact, the Institute of Justinian was the basis for Roman law teaching in the law schools of Medieval Europe. Furthermore, many modern legal scholars contend that the Institute of Justinian was the blueprint for the curriculum of Anglo-American law schools.

With the completion of the Code, the Institute of Justinian, and the Digest, Justinian had finished his masterpiece. The three volume document, which embodied the entire Roman civil law, subsequently came to be known as Corpus Juris Civili. This document has been without a doubt one of the most important and influential legal documents ever composed. With his work, Justinian preserved Roman law and its traditions for subsequent generations. Nonetheless, Corpus Juris Civili's, greatest significance has been its impact on the legal systems of the Western World. Areas such as continental Europe, Latin America, and parts of Africa, Canada, Sri Lanka, South Africa, modern Turkey, China, Japan, and the United States derived their legal concepts, approaches, structure, and system of civil laws from centuries of laws and legal writings codified in the Corpus Juris Civili. In other words, by composing Corpus Juris Civili, Justinian laid the foundation for modern law.

2.1.3.6 Review questions

Answer the following questions.

1. What is *Jus Corpus Civilis*? What did it signify to the Eastern Roman emperors?
2. State the procedure followed in developing the Code of Justinian.
3. Was the Code of Justinian a rejection of the accumulated legal wisdom? Was it a restatement of this past experience?
4. What motivated Emperor Justinian to compile the four legal documents?
5. Why did Justinian prohibit jurists from writing commentaries on his code?
6. Can the Code of Justinian be regarded as a mere compilation or an equivalent of a modern code of laws?
7. Briefly describe the evolution of the Roman Empire.

2.1.4 The Meaning of Roman law:[2] Roman law constitutes the foundation of the civilian tradition. Most contemporary civil law institutions can be traced directly to Roman sources. Roman law has been expounded and studied by great jurists and has been shaped into a substantively and formally rational system. As a closed system, Roman law lends itself to logical analysis which sharpens the intellect; as the foundation of a living tradition and of a superb conceptual technique, leads to juristic craftsmanship.

The history of Roman law is frequently studied with reference to political and constitutional developments. In a strict sense, Roman law may be defined as the law of the Roman state (753 B.C. to 476 A.D.); in a broad sense, the term Roman law includes the law of the Byzantine Empire (325 A.D. to 1453 A.D.).

[2] The discussions under 2.1.4 and from 2.1.11 to 2.1.14 are adapted from Planiol`s Treatise on the Civil Law, and Aubry and Rau a treatise on the same topic, Ryan`s Introduction to the Civil Law.

2.1.4.1 The Justinian compilation: Emperor Justinian's (527-565 A.D.) ambition was to restore the Roman Empire under one system of law under one Church. 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. Since medieval times the Justinian compilation is known as *Corpus Juris Civilis*.

The Justinian compilation was designed to replace all literature and all legislation, to achieve unification of law, and to make the law accessible to all. To guard against "deterioration" of his legislation, Justinian banned all *Comments* and *Notes* with the exception of translations into Greek and the publication of Indices. To him, the Code was complete, clear and the values in it were undisputable. He did not want to see his code to be a point of controversy. Owing to these actions, some historians take Emperor Justinian as a revolutionary, a person who wanted to depart from the past in a decisive manner.

The Justinian legislation is divided into four parts, which, in chronological order, are: the *Code*, the *Digest*, the *Institutes*, and the *Novellae*, a brief account of each follows.

2.1.4.2 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. The Code was compiled in one year and acquired the force of law on April 16, 529 (ten days after its promulgation). 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. The Code is extant as revised; the text of the original Code is lost. The contents of the Code are systematically arranged according to the subject matter regulated.

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

The Digest consists of 50 Books subdivided into titles. The arrangement of the subject matter in the Digest follows, in general, the pattern of the praetorian Edict. 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.

The preparation of the Digest in a relatively short time has puzzled the jurists of subsequent generations, and several theories have been expounded concerning the compilers' method of work. According to one view, the compilers had at their disposal "pre-digests" and "anthologies" of the law in force. But Bluhme, a German jurist, has observed that the Digest is composed of mainly three masses of materials, *commentaries on Sabinus*, *commentaries on the Edict*, and *Responsa and Questiones of Papinian*. To these three masses may be a fourth one designated as the *Appendix* mass. The masses correspond to the first, second, and third year of legal studies in the law schools of the Empire. Thus, basically, the Digest appears to be a collection of school notes used by the members of the commission in their respective courses, plus an index-mass. There is some speculation as to whether the compilers were split into work groups. It is more probable that they were given individual assignments corresponding to their law-courses.

2.1.4.4 The Institutes: The Digest needed introduction for the purpose of a better understanding and was accomplished by the Institutes. This part of the Justinian legislation is a coherent text based largely on Gaius' similar book. 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. The Institutes are basically a textbook enacted into law for educational purposes.

2.1.4.5 The Novellae: The *Novellae* (i. e., *Novellae constitutiones*, new imperial decrees) is a collection of decrees issued by Justinian. They contain provisions concerning administrative reforms, church policies, and private law. Scattered ideas and rules were systematized and resulted in partial re-codification. Particularly affected were 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.

The Justinian compilation is marked by an antinomy: an effort at reform and an effort at revival of the classical tradition. The Digest is a manifestation of the drive for revival of the tradition. The drive toward reform was manifested in direct legislation and the interpolation of classical texts. The interpolation is a

historical fact, proved by Justinian's own admission. 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.

2.1.4.6 Byzantine law: The compilation of Justinian is the terminal point in the development of Roman law in a strict sense. In the following centuries a Byzantine legal system was developed in the East and a medieval Romanist science in the West. These developments led to the era of "reception" and finally to modern codifications.

The eastern Empire became Hellenized Byzantine Empire which lasted until the fall of Constantinople (1453). The Empire was ruled by the Emperor who had concentrated in his hands on all political and religious authorities and powers (Ceasaropapism). The foundations of the Empire were Christian. There was new nobility in Byzantium but no feudalism.

Imperial legislation was the only official source of law. Imperial enactments (*Novellae*) continued to be issued and there were several efforts at re-codification. Ancient customs survived and, frequently, were in competition with imperial legislation. An iconoclast emperor, Leo the Isaurian (714-741) promulgated the *Ecologa* (Selection). This was a brief codification of civil law in Greek designed to reform the law, make it accessible to the indigenous population, and to sanction surviving Greek customs. The reformation, however, led to a religious war and Leo's successor repealed the Ecologa. Emperor Basil the Macedonian (867-886) promulgated the *Procheiron* (Handbook) and *Epanagoge* (Re-introduction). Both of these collections were ostensibly based on the Justinian compilation but in reality they re-introduced the substance of the *Ecologa*. Finally, Leo the Wise (886-911) promulgated the *Basilica* (Royal legislation). This was the last attempt at re-codification. The new legislation, though based on the Justinian compilation, constituted an integrated whole into 50 titles. Obsolete rules were eliminated and a number of new rules were included.

The Western Empire was dissolved in 476 by invading German tribes, the East and West Goths, Franks, Vandals, Longovards, and others. A general decline of civilization ensued. The conquered territories were subjected to a feudal organization. The Roman law was preserved by the Church (Canon law) and in certain areas it survived also as a custom. Several of the Germanic kings sponsored compilations referred to as *leges barbarorum*. There was no legal literature in those dark ages, except some short notes on the "barbarian legislation."

Around 1100 political, economic, and psychological conditions led to the rediscovery of Roman law and to its renewed study. There were new kingdoms and new urban life in the former Roman territories; international communication and trade had grown; the Church was reorganized in search of political power; there was a renewed interest in classics and art; and law schools were founded in Provence, Pavia, and Ravenna. But the Digest was still unknown. Other parts of the Justinian compilation had been introduced in Italy in 554 and had acquired some practical significance. The discovery of a manuscript of the Digest (dated 600) in Piza gave a new impetus to legal studies.

2.1.5 The contributions of Roman law

John H. Merryman, The Civil Law Tradition: An Introdcution to the Legal Systems pf Western Europe and Latin America (Stanford: Stanford University Press, 1985) p 6-13

The Code Corpus Juris Civilis, also called the Code of Justinian, was made up of four documents, i.e., the Codex, the Institutes, the Novel and Digest. The Institute is an official elementary textbook for students. The Institute contains a description of the law. The Digest is also called the Pandects; it contains quotations from writings of thirty-nine leading Roman jurists. The quotations are arranged in an order taken from a document issued each year by the new chief legal officers of Rome called the Praetors. The Digest is unclear and contains many contradictions. The Codex consists of decrees of the various Roman emperors. The Novel consists of later decrees and completes the work known as the Corpus Juris Civilis. Emperor Justinian ordered all the four parts of his code to apply with equal force.

The civil law tradition is a composite of several distinct sub-traditions, with separate origins and developments in different periods of history. The oldest sub-tradition is directly traceable to the Roman law as complied and codified under Justinian in the sixth century A.D. Although the rules actually in force have changed, often drastically, since 533, the first three books of the Institutes of Justinian (of Persons, of things and of Obligations) and the major nineteenth-century civil codes all deal with substantially the same set of problems and relationships, and the substantive area they cover is what a civil lawyer calls "civil law." The belief that this group of subjects is a related body of law that constitutes the fundamental content of the legal system is deeply rooted in Europe and the other parts of the world that have received the civil law tradition, and it is one of the principal distinguishing marks of what common lawyers call the civil law system.

The Corpus Juris Civilis of Justinian was not restricted to Raman Civil Law. It included much that had to do with the power of the emperor, the organization of the empire, and a variety of other matters that lawyers today would classify as public law. But the part of Justinian's compilation that deals with Roman Civil Law is the part that has been the object of the most intensive study and has become the basis of the legal systems of the civil law world. With the fall of the Roman Empire, the Corpus Juris Civilis fell into disuse. The invaders applied cruder, less sophisticated versions of the Roman civil law to the peoples of the Italian Peninsula. The invaders also brought with them their own Germanic legal customs. The customs of the Germanic tribes stated that the law of a person's nationality followed him wherever he went. They applied their customs to themselves but not to those they had conquered. Even so, a fusion of some Germanic

tribal laws with indigenous roman legal institutions did begin to take place in parts of Italy, Southern France and the Iberian Peninsula. Over the centuries this produced what still referred to as a "vulgarized" or "barbarized" Roman law. As light returned to Europe, as Europeans regained control of the Mediterranean called the Renaissance began, an intellectual and scholarly interest in law regained. What civil lawyers commonly refer to as "the revival of Roman law" is generally conceded to have had its beginning in Bologna, Italy late in the eleventh century. It was at Bologna that the first modern European University appeared, and law was a major object of study. But the law that was studied was not the barbarized Roman law that had been in force under the Germanic invaders. Nor the body of the rules enacted or customarily followed by local towns, merchants' guildes, or petty sovereigns. The law studied was the Corpus Juris Civilis of Justinian.

Within a short time, Bologna and the other universities of northern Italy became the legal center of the Western world. Men came from all over Europe to study the law as taught in the Italian universities. The law studied was the Corpus Juris Civilis, and the common language of study was Latin. There was a succession of schools teaching the proper way to study and explain the Corpus Juris Civilis. Of special prominence, for both their views of the law and their styles of scholarship, were the groups of scholars known as the Glossators and the Commentators. They produced an immense literature, which itself became the object of study and discussion and came to carry great authority. Those who studied in Blolga returned to their nations and established universities where they also taught and studied the law of the Corpus Juris Civilis according to the style of the Glossators and Commentators. In this way, the Roman Civil Law and the works of the Glossators and Commentators became the basis of the common law of Europe, which is actually called the jus commune by legal historians. There was a common body of the law and of witting about law, a common legal language and a common method of teaching and scholarship.

With the rise of the nation state and the growth of the concept of national sovereignty, particularly from the fifteenth century and with the demise of the Holy Roman Empire as anything but a fiction, and the age of the jus commune of a common law of Europe waned, and the period of the national law began. In some part of Europe (e.g. Germany), the Roman Civil Law and the writings of the Belgians scholars were formally "received" as binding law (civil lawyers use the term "reception" to sum up the process by which the nation - states of the civil law world came to include the jus commune in their national legal systems[3]) in other parts of Europe the reception was less formal; the Corpus Juris Civilis and the words of the Glossators and Commentators were received became of there value as customary law or because of their apple as intellectually superior system. But, by one means or another, Roman Civil law was received thought a large part of Western Europe, in the nations that are now the home of the civil law tradition.

[3] *Roman ideas and rules gradually penetrated the actual legal life through the efforts of law professors, judges, and practitioners. The extent of this "reception" in the several countries has varied. Its content, however, was identical: as source of law was regarded the accumulated doctrine of the glossators and post-glossators rather than the Corpus Juris Civilis itself. The forces behind this movement were many. The centralization of power by emperors was a prominent one. A centralized government needs trained jurists and a rational legal system. The local customs were unrecorded, with notable exceptions, and largely unsystematic. The supremacy of Roman law (Ratio scripta), a growing humanism and intellectualism, and, in short, social, economic, and political conditions in combination with the intellectual urge for Roman ways of thinking led to this development. Centrifugal forces, namely, landed aristocracy and political subdivisions, striving for independence proved to be forces resisting reception of Roman law. This explains why reception was less intensive in France, the Italian cities, and in the Swiss Confederation. Resistance to the reception was also displayed in areas where local custom had been recorded.*

The appearance of the modern bureaucratic state, the competing ideas of dynastic and popular sovereignty, and the growth of legal positivism led to the idea that legislation is a function of the state. An awakened nationalism and the development of natural law jurisprudence led to the era of codification and brought to an end the period of direct application of Roman law. Eventually, in the nineteenth century, the principal states of Western Europe adopted civil codes (as well as other codes) of which the French Code Napoleon of 1804 is the archetype. The subject matter of the civil codes was almost identical with the subject matter of the first three books of the Institutes of Justinian and the jus commune of medieval Europe. The principal concepts were Roman and medieval common law in nature, and the organization and conceptual structure were similar.

2.1.6 Review questions

Answer the following questions based of the text reproduced (J. Merryman) above.

1. What are the elements of the Code Corpus Juris Civilis?
2. What are the elements of the civil law tradition? What is the oldest component of the civil law tradition?
3. What is the principal distinguishing mark of the civil law tradition?
4. Which laws were applied in the Western Roman Empire under the Germanic invaders?
5. What is Jus commune? What factors contributed to the emergence and prevalence of Jus commune in Europe between 11th-18 century A.D?
6. What circumstances led to the decline of jus commune and the emergence of national laws in Europe in 19th century onwards?

2.1.7 The transformation of the Digest and Canon law

M.H. Hoeflich, ``Legal History and the History of the Book: Variations on a Theme,`` 46 Kan. L. Rev. 415 (1998).

The Romans left two great monuments to the European peoples long after their political and military dominance had faded into memory. The first was their remarkable civil engineering infrastructure of roads, bridges, aqueducts, baths, and public buildings. The second was their legal system. Roman law has survived for over two thousand years. Its use has ebbed and flowed. It was a living, vital legal system from the first century B.C. until the sixth century A.D. During the early part of the sixth century, Emperor Justinian decided to revitalize and purify Roman law by effecting a massive codification. Between 529 and 534, a group of lawyers and civil servants produced a comprehensive codification of more than six centuries of legal learning. The principal parts of this codification- known since the sixteenth century as the Corpus Iuris Civilis-consisted of the Institutes, designed to be an elementary textbook of Roman legal principles for use in law schools; the Digest, a compilation of legal writings by the classical jurists; and the Code and the Novels, compilations of imperial enactments and bureaucratic law. Of these three, it was the Digest, which contained the overwhelming amount of Roman private law and virtually all of the Roman legal theory that survived.

During the centuries that followed the sixth century codification and the increasing isolation of the residual empire now based in the Greek East, Roman law continued to play an important role in the developing legal systems of early medieval Europe, but it was Roman law as known from

pre-sixth century sources, primarily the Theodsian Code, and from the actual practices then common. The learning of the Digest was hardly known at all from the British Channel to the Danube River. During the eleventh and twelfth centuries, a great deal of interest in law in general-and in Roman law in particular-began to arise in Northern Italy. This increase in interest in things legal was immensely accelerated by two things: the composition of a coherent, scholastic text of canon law by a monk, Gratian, and by the "rediscovery" of a sixth century manuscript of the Digest. The combination of Gratian's Decretum (as it was known) and the newly found Digest manuscript provided the two fundamental texts needed to foster the rebirth of a legal profession in western Europe, the rise of university law schools, and the growth of medieval legal systems throughout Europe, which, of course, are the progenitors of our modern systems of civil law.

The history of the rediscovery of the Digest and the role of Roman Law within this history, a part of what Charles Homer Haskins called the "renaissance of the twelfth century ``is far too large a subject for my talk today. I want to focus on one, small point of legal and textual history. Virtually every scholar of medieval law believes that the rediscovery of the Digest manuscript was one of the most important events of the high Middle Ages. To this event the rebirth of legal science is ascribed. The manuscript is discovered, we are told, and suddenly Roman law is reintroduced in all its glory to Western Europe. A marvelous vision, perhaps, but is it accurate?

I am, as you all know, a lawyer. As a lawyer, I tend to think in rather simplistic and practical terms. I have studied the Digest manuscript to which is attributed the rebirth of Roman law. I can tell you only one thing new about it. I can guarantee that manuscript alone could not have caused a rebirth of legal science. It could not have done so for a very simple reason. The Florentina, as the manuscript is commonly known, is a manuscript of enormous size. It does, after all, contain the accumulated wisdom of almost six centuries of Roman jurisprudence. Furthermore, its arrangement is not easy. It is, in fact, unbelievably confusing. The precise rationale behind the structure of the Digest as it has come down to us remains a subject of debate and controversy. What is clear is that it was not arranged for ease of use. It is arranged neither chronologically, which would be of maximum use to the historian, nor topically, which would be of maximum use to the lawyer. If one turns to the Digest to discover the Roman legal rule on a particular topic-validity of wills, for example-one cannot find the answer easily. In fact, without help, the only way to find the answer, if one wants to be thorough, is to read the whole thing. I would suggest that this unwieldy, difficult, and terribly long manuscript, written in Roman legal jargon, was not very helpful as a legal text to its discoverers. In modern terms, it was simply not easily accessible. Any historian who fails to understand this simple fact cannot possibly understand the renaissance of the twelfth century.

The renaissance of the twelfth century-at least in so far as the law was concerned-depended not only upon its fundamental texts, the Digest and the Decretum, it also depended upon the discovery of ways to access those texts. Indeed, I would suggest that the development of university legal education during the twelfth and thirteenth centuries was, to a large extent, the development of techniques and devices designed to make these two texts accessible and therefore useable. The whole format of early university education was, in essence, designed to provide tools for accessibility. We can understand the importance of the development of mnemonic techniques, so wonderfully chronicled by Professor Mary Carruthers, in this light. We should most certainly understand the development of the standard commentary or gloss to these texts, known as the Glossa Ordinaria, in this way as well. These early glosses provide two things for the student and

the reader. They provide definitional help in that they explain the technical terms, and they provide cross-references to other passages in the text that permit the reader to find all of the necessary learning on a particular topic. Thus, if a lawyer can find one relevant passage in the text that is glossed, then he will, by using the gloss, be able to find other relevant passages. The gloss is, in effect, a dictionary and a finding aid. University law lectures, in which masters glossed particular sections of the fundamental texts, were, in the earliest period, specifically designed to provide these ancillary, but absolutely necessary, tools to their auditors. One needed to attend university lectures in order to acquire these tools necessary to practice law. Without the text and the finding aids, one simply could not look up the answers to questions as they arose.

By the end of the thirteenth century, the glosses to the fundamental texts had become standardized and, even more importantly, sometime in the late thirteenth century, according to Professors Richard and Mary Rouse, somebody had invented the best finding aid of all: the alphabetical index. While the evidence suggests that the first indices were made for biblical texts, there is also strong evidence that very soon after indices began to be made for the Bible, they began to be made for the Digest and the Decretum. If one wants to understand the true nature of the rebirth of legal science in the Middle Ages, one must not simply speak of the rediscovery of the Digest and the creation of the Decretum. The rebirth of legal science took place over a period of roughly 150 years and required a combination of the availability of the fundamental texts and the development of ancillary texts that made these texts accessible. Without the efforts of these early commentators and indexers, the Florentine manuscript of the Digest would have remained nothing more than an antiquarian curiosity, suspended in a cage in a Florentine church. The rebirth of legal science required both a text and a means of accessing and understanding that text. In studying the history of the development of medieval finding aids-the gloss and the index-one can then and only then begin to understand what actually happened. Without the history of the book, there can be no accurate history of the development of the law and of legal doctrine in this situation. Put simply, without the development of the index, the gloss, and other finding aids, Roman law-and canon law to a degree-might well have remained a closed book.

The second example to which I will draw your attention also concerns the transmission of one legal system to another, not in the twelfth and thirteenth centuries, but in the eighteenth and nineteenth centuries. The rediscovery of Roman law during the Middle Ages set the groundwork for the development of national legal systems throughout Western Europe. The legal systems of France, Germany, Austria, Spain, Italy, and Portugal, among others, all derived their substantive and procedural rules from a combination of Roman law and national custom. Indeed, as Professor Manlio Bellomo and others have argued, there developed throughout Western Europe what may be called ius commune, a common law, based upon Roman models. Thus, from the Middle Ages on, the study of Roman law flourished throughout Europe as did the development of the systems based upon it. The one non-participant in this shared Roman-based system was England. In England, there developed, essentially in isolation, another system of jurisprudence that came to be called the common law. This system spread to Ireland and to many of the English colonies, including the United States. At the time of the American Revolution, the Anglo-American common law was the common legal heritage of England and her colonies (with the exception of Scotland which had a hybrid common-civil law system).

When the English colonies in America declared their independence from England and formed the United States, the law, as it then existed, was English common law. This posed a number of difficulties for the new nation, its legislators, and its lawyers. First, there was quite a bit of

hostility to the English following the Revolution. After the War of 1812 and the sacking of Washington, this hostility intensified until anything English, including its legal system, was anathema to many United States citizens. Second, the English common law developed within the very peculiar circumstances of England. Many of the legal doctrines developed there were simply inapposite for the new United States. For instance, in the field of water law, the common law developed in an environment in which water was relatively plentiful. In the United States, particularly in the West, circumstances were quite different and different law was needed. For these and other reasons, many Americans in the antebellum period sought alternatives to the English common law as a source for American law. They turned, not surprisingly, to the Roman and civilian systems of Europe.

2.1.8 Review questions

Attempt the following questions based on Hoeflich`s material reproduced above.

1. Identify the two legacies left behind by the Romans.
2. What accelerated the increase in interests in the study of law in 11th and 12th centuries in Europe?
3. What caused the re-birth of legal science?
4. Identify the methods employed to make the Digest accessible to users.
5. Characterize the Digest in terms of volume, consistency, simplicity and language.
6. What is the main argument of Hoeflich?
7. Did American colonies turn to the civil law tradition? Why did they do that?
8. Is there any relationship between Jus commune and the emergence of national laws?

2.1.9 Accessibility of the Digest

Charles Donahue, Jr., On Translating the Digest (Book Review) Stan. L. R. (1987)

As part of his effort to restore the grandeur of the Latin Roman Empire, the Byzantine emperor Justinian (r. 527-565) appointed a commission, under the leadership of his quaestor palatii, Tribonian, to collect the disparate sources of Roman law. In 533, just three years after the commission had begun its work, Justinian promulgated the commission's chef d'oeuvre, the Digest (or Pandects). The Digest is a collection in fifty books of excerpts from the writings of the classical jurists dating from the late Roman Republic to the beginning of the third century A.D. The year 533 also saw the promulgation of the Institutes, an elementary textbook based in large part on the work of the same name by the second-century jurist, Gaius. In the following year, Justinian promulgated the Code, a collection in twelve books of excerpts from the constitutions (roughly, legislative pronouncements) of the Roman emperors dating back to Hadrian (r. 117-138). Justinian's constitutions that date from after 534 were not officially collected in his lifetime, but an unofficial collection, known as the Novels, was compiled shortly after his death.

These four works, the Institutes, the Digest, the Code, and the Novels (which have been known in the West since the sixteenth century under the name Corpus Juris Civilis ("Body of Civil Law"'), rank with the Bible as the most important works through which the culture of the ancient world has been transmitted to the modern. No western legal system, including the Anglo-American, is free from the influence of the Corpus Juris. Law students on the Continent and in England have

studied the Corpus Juris from the thirteenth century to the present day. Its structure, its vocabulary, and its rules are immediately visible in the "civil law"' systems of western Europe and of those countries that were colonized by western Europeans or that borrowed their legal systems from western Europe. Perhaps more important, the legal method and general legal ideas reflected in the Corpus Juris are the source of, and remain remarkably similar to, those employed by lawyers in the West today and by those non-western lawyers who have fallen under the sway of western legal culture.

Of the four parts of the Corpus Juris Civilis, the Digest is by far the longest. It is an indispensable source for anyone seeking a more than superficial knowledge of Roman law, whether it be the Roman law of the period of the jurists (c. 100 B.C. to c. 240 A.D.), or of Justinian, or of the "second life"' of Roman law, when Roman law was an object of academic study in the West (c. 1100 to the present). Clearly, the work ought to be available in translation, but the structure of the Digest, the manner in which it was compiled, and the fact that the reader's purpose may be to understand the law of three very different periods all pose serious problems for the translator. Readers of the Digest, moreover, have varying degrees of sophistication in Latin and Roman law. Although the translation under review is a great improvement over the prior one, a few words about the Digest, how it was composed, and how it has been interpreted may more fully explain the problems with translating it and may suggest that a more literal translation would serve the needs of most types of readers better than this one.

The 9,127 extracts that make up the Digest range in length from a few words to several pages. Most approximate the length of a modern paragraph. Each is headed by the name of the jurist to whom it is ascribed, the title of the work from which it comes, and the number of the book in the original work--e.g., "Ulpian in the eighteenth book on the Edict"'; "Modestinus in the first book of Rules."' The extracts are gathered into titles, the rubrics of which indicate the subject that the extract was meant to illustrate--e.g., "On the lex Aquilia [the basic Roman statute on wrongful damage to property]"; "On the rite of nuptials."' The 430 titles are arranged in fifty books of roughly equal length. The titles themselves, however, vary greatly in length, ranging from De legatis et fideicommissis ("Concerning legacies and 'trusts"DD"), which occupies all of books 30-33, to the thirty-three brief titles on interdicts that make up book 43.

The order of the titles and books is puzzling. It is related to the course of legal education in Justinian's time but is determined more by the order of the praetor's edict, a collection of formulae and official promises to allow actions that had formed the basis of the private law in the period of the jurists. The edict had grown over time. Some of the topics covered in the edict are related to others close by, but the edict as a whole is not systematic. The order of the extracts within the titles of the Digest is also puzzling. We occasionally find groups of texts that go together and some that make no sense unless they are read together. By and large, however, the order of the extracts is not dictated by the sense of the texts but by the largely arbitrary order in which the compilers did their extracting. A text that is not in this arbitrary order is of interest, because someone, probably the compilers, thought it important to rearrange its order.

We have, then, a collection of extracts, the vast majority of which were written at least three hundred years before the compilation of the Digest and some of which were written more than six hundred years before its compilation. The compilers assembled the extracts to serve the purposes of a Byzantine emperor who ordered their use in legal education and in the courts of his Empire.

Each of the jurists who wrote the extracts reflected the law and conditions of his own time--law and conditions that varied considerably over the course of the juristic period. Likewise, those who extracted and arranged the jurists' writings reflected the law and conditions of their own time. For example, the earliest jurists extracted in the Digest wrote when Rome was a Republic; the last jurists wrote when Rome was an autarchy that still preserved the facade of a Republic, and the compilers worked in a period when Byzantium was unabashedly an autarchy.

The modern reader can use the Digest to study three distinct periods of Roman law. If one wants to reconstruct the law of the time in which the jurists wrote, the fact that our principal source of knowledge is extracts compiled almost three hundred years after the last jurist died is an obvious source of difficulty. Even if the compilers had slavishly copied the extracts from the original texts, they would have left out much that was not relevant in their own time but that is relevant for understanding the law of the time in which the jurists wrote. The most notable omissions are in the area of civil procedure: An entirely different form of procedure was in effect in Justinian's time from that assumed in most juristic writing. Sources independent of Justinian's compilation allow us to understand most of the procedural references embedded in the texts in the Digest, but large gaps still exist in our knowledge of how the older procedure worked.

But the problem is more serious than just the compilers' omissions. They did not simply copy the original juristic texts. Rather, Justinian instructed them to emend the extracts to make them conform to the law of their time, to remove contradictions, and to shorten them. That they followed their instructions is evident: A few of the texts in the Digest survive independent of the Digest, and we can see how the compilers of the Digest changed them. How much they changed the texts that do not survive independent of the Digest is a subject of much debate. The question is made more difficult by the fact that we know that some of the texts that the compilers were extracting had already been changed during the period between the jurists and that of the compilers.

Scholarly opinion has varied considerably on this question of "'interpolations"' in the Digest. The previous generation of Romanists tended to view the texts as radically altered. They proposed radical emendations to restore them to their original state. Modern Romanists tend to be more cautious; they reject the more radical reconstructions of the past generation, either on the ground that the evidence does not warrant the inference that so much was changed, or on the ground that however much the texts were changed we have insufficient evidence to reconstruct their original state. This more cautious approach stresses *1061 *that the compilation was an essentially conservative enterprise, a restoration of the glories of the Roman legal past, and that the compilers simply did not have the time to do extensive editorial work.*

Whatever view one takes of the amount of interpolation in the Digest texts, no one denies that interpolations exist and that the best way of finding them is to study the texts themselves. For example, if a Republican author appears to use a word not otherwise recorded until the late Empire, then that is a pretty good clue that someone has been fooling around with the text. Similarly, awkwardness in the syntax, restrictive clauses added to the end of a quotation, and the absence of expected qualifications all indicate that the text at which we are looking is not what the cited jurist wrote.

If the problem with the Digest text for those who are seeking to restore the original text is figuring out what changes the compilers made, then the problem for those interested in the law of Justinian's time is figuring out what texts should have been changed but were not. Here, too, the

discovery of interpolations is important. When the compilers changed a text, they did so for a reason. Sometimes they changed the text simply because the original was too long, but they frequently changed the text because it did not conform to the law as they knew it. Thus, the changes the compilers made provide clues to what the law was in Justinian's time. But knowing that a text is not suspected of interpolation is also useful for reconstructing the law of Justinian's time: If the text says something that does not conform to what we have other grounds to suspect was Justinian's law, we may view that text as unrepresentative of Byzantine law on the ground that the compilers failed to change it to conform to the law of their time.

The problem for those looking for the law of the Middle Ages or the early modern period is somewhat different. The text of the Digest used in the universities until the time of the great critical editions of the nineteenth century was not quite the same as that of the critical editions. Further, from the middle of the thirteenth century, this "Vulgate"' text was accompanied by an elaborate series of commentaries, principal among which was the great gloss (basically a set of explanatory notes) compiled by the Bolognese scholar Accursius. In many cases, a reading of the gloss shows that the Romanists of the Middle Ages or the early modern period understood the text differently from the way in which the jurists or Justinian's compilers probably did.

*Some might argue that the Digest should not be translated. It is simply *1062 too difficult a text. I tend toward the view that it must be translated. It is simply too important a text to leave to those increasingly few specialists who can manage the Latin of the original. If English-speaking law students and historians are to have access to the Digest in the late twentieth century, it must be available in English. A translation is useful for readers of all levels of Latin proficiency. The reader who is fully capable of translating the original can check his own translation (especially of particularly troublesome passages) and can more easily locate passages on a given topic. A translation is even more useful for the reader who knows some Latin, but cannot translate the Digest without help: The translation then becomes a guide, a "trot"' if you will, to the translation of the Latin. A third type of reader, one with no background in Latin at all, will have to rely on the translation to bring him as close to the original as he is going to get.*

The interesting thing about this spectrum is that each of these types of readers will benefit from a slavishly literal translation. With such a translation, the sophisticated reader will spot the passages for which he is looking faster and will know that the passage he finds troublesome troubled someone else. The less sophisticated reader who knows some Latin will have just the type of guide he needs to puzzle out the original text. The reader who knows no Latin will be able to get a feel for a difficult Latin text through the medium of a difficult English text and will end up having the original text speak to him more directly.

But to say that an English translation of the Digest ought to be done is not to say that this one should have been done. When this translation was undertaken, S.P. Scott's translation, done in the early part of this century and published as part of his massive The Civil Law, already existed. Scott, however, was an amateur. He was a lawyer by profession, and his command of classical literary Latin was good. But knowledge of American law and acquaintance with Cicero's Latin are insufficient qualities for a translator of the Digest. If Scott had immersed himself in the Roman law scholarship available in his day, he probably could have produced an adequate translation-- one good enough that it might not be worth doing again. But Scott chose to operate on his own. He did not use Mommsen's great critical edition of the Digest and translated instead from the Vulgate edition of the glossators, thus limiting the usefulness of the translation for those concerned with the classical or Byzantine world. Although Scott's work was published in 1932, it

shows no knowledge of any of the impressive achievements of Roman law scholarship made since the middle of the nineteenth century.

Even this might not lead one to reject the translation if Scott had exercised more care. The translation would have been odd, but the very oddness would have pointed to the difficulties with the text. But Scott was not careful. He translated a great deal, perhaps too much for one man in one lifetime, and he did not live to see the work through the press. The work, therefore, is sloppy. It contains a large number of mistakes ranging from slips of the pen and typographical errors to flat out mistranslations. But the main problem lies some place in between--virtually no passage is free from imprecision resulting from the combination of Scott's haste and his lack of thorough familiarity with the technical terminology and legal principles with which the jurists dealt.

Unlike some teachers of Roman law, I did not think that Scott's translation was so bad that students should not be told of its existence. It was there; I told them about it; they used it, and we wished there were something better. Whenever a given text was available in someone else's translation, I insisted that the students use that translation. When they did use Scott, I had to spend a great deal of time in class correcting misapprehensions. In short, Scott was better than nothing, but it was in no way satisfactory.

Thus, we needed a new translation of the Digest. Translating the Digest, however, is a formidable task. Translation is always difficult. Words do not carry the same connotations in one language as they do in another. Syntax that is perfectly normal and important to convey meaning in one language may be awkward or impossible in another. A style of writing in one language may not be replicable in another, or when replicated, it may carry a quite different meaning from what is conveyed by the original. In the case of literary texts, however, there is at least an agreed-upon starting point: The translator is to try to convey as much of the meaning of the author of the original text as can be done in another language. Where the original "won't go"' into the translator's language, the translator must make choices depending on what characteristics of the passage he thinks most important for conveying the original author's thought. The choices will be difficult, and in some cases the translator may never capture the full import of a passage, but at least he has the lodestar of the original author's meaning to guide him.

The translator of the Digest, however, in addition to all the normal difficulties of translation, does not have this lodestar to guide him. If the translator views the Digest as a collection of extracts about classical Roman law, then he will try to capture what he thinks the original text said or meant. If the translator views the text as reflecting the law of Justinian's time, he will try to capture the meaning of the compilers. Similarly, if he views the text basically as a work that was used as a source of law and of study in the West, long after Justinian, then he will try to capture the received understanding of the text in later times.

The possibilities of shading the translation in the direction of one or another meaning are great. The Digest is a cryptic text. The juristic style of writing Latin, in contrast to other forms of literary Latin, tends to compression. In addition, because the compilers were told to eliminate prolixity, an already quite compressed style was made more so in the interest of brevity. The vocabulary of the Digest is another source of ambiguity. Juristic Latin has a large technical vocabulary that consists not only of technical legal terms (which have no equivalents in many other languages, including English), but also of peculiarly juristic usages of quite standard Latin words. A technical rendering of such words will lose the flavor of the normal word, but a non technical rendering will lack the precision of the juristic usage. Finally, the Digest is a collection

of extracts. Passages that probably made perfectly good sense in their original context are in many instances difficult to translate because the compilers took them out of context.

Translating the Digest, then, is somewhat like translating the Bible. The text can be understood and used in so many ways that one really needs different translations suited for different purposes. In the case of the Bible, a number of translations are available, so that the reader can select the one best suited for his purposes and can compare translations in cases of doubt. No translation tradition exists for the Digest, however. Unless the translator wishes to choose a particular approach in advance (and thus automatically frustrate the purposes of at least some readers), the best all-purpose translation would, again, seem to be a strictly literal one. The translator must be aware of the various meanings that have been ascribed to the text and then give a rendering that, within the limits of accuracy and those of the English language, opens the way to every possible interpretation.

This literal approach will serve the purposes of many readers, but not all. The reader who is sophisticated in interpreting the Digest is looking for passages that don't quite hang together, for peculiar words, and for specific technical terminology (which must, therefore, be left in the original language). All of these are clues to interpretation, clues for the reconstructive enterprise in which he is engaged. Whatever this reader's purpose in examining the Digest, the more literal the translation, the better it is for the reader prepared to do his own interpretation.

For the reader at the middle level of sophistication, a literal translation is also the most satisfactory. Such a reader may not be able to interpret the Digest texts on his own, but he will know that there are considerable problems with their interpretation. He will also know that many standard handbooks attempt to restate the classical private law, that some do the same for the law of Justinian's time, and that the Roman law of the medieval and early modern periods has at least some buoys in largely uncharted waters. If he does not fully understand the translated text, he will at least know that the reason is that the text cannot be fully understood standing by itself.

On the other hand, the reader who is unsophisticated about the problems of interpreting the Digest probably will find a literal translation--one that will help the other two types of readers--more difficult than he can take. Such a reader will not know that the text is difficult because it is difficult and will attribute his inability to understand what is being said to the translator's incompetence or perversity.

The ideal translation, then, differs depending on the translator's audience. The difference depends neither on the reader's level of sophistication with Latin nor on his purpose in examining the text, for at all levels of Latin sophistication and for most purposes, the reader is best served by a literal translation. Rather, the difference depends on the reader's level of legal sophistication. Whereas the legally unsophisticated reader will get little out of a literal translation, the more sophisticated reader will get just what he wants and needs. Again, the ideal would be to have different translations for the different readers; but if there is to be only one translation, a scrupulously literal and accurate translation would probably serve the purposes of more readers than any other.

The deficiencies of the Scott translation suggested the need for a new English translation of the Digest, despite the formidable difficulties entailed. We should therefore welcome the new translation. Professor Watson and his group possess just those qualities that Scott lacked: familiarity with the technical vocabulary and scholarship of Roman law. The translation they have produced is a vast improvement over Scott's work. It is also a handsome set of books. A

reprint of Mommsen's great critical edition, from which the translation is taken, appears on the facing page, allowing one to check the translation against the original (or vice versa) immediately. The republication of the Mommsen edition is itself a boon even without the new translation, because Mommsen is otherwise difficult to obtain. We can now retire that part of The Civil Law that deals with the Digest (alas, we cannot do the same for the Code or the Novels), for it has been definitively replaced by the new translation.

We must ask, however, how this translation measures up against what might have been done and how these translators resolved the fundamental problems with translating the Digest suggested above. What do the translators assume about the reader's knowledge of Latin and of Roman law? Where it makes a difference, are we given the jurists' law, that of Justinian, or that of the medieval and early modern commentators? And how has the translation dealt with the problem of interpolated texts?

Unfortunately, these questions do not have simple answers. The new translation of the Digest was done by a committee. The principles of translation remained largely with the individual members of the committee. No one exercised overall editorial control, except a minimal control to ensure that a relatively few technical terms were consistently translated and that mistranslations did not occur. How successful this last control was only time will tell. I do not pretend to have read the whole work, much less to have compared the whole work to the original. I have, however, checked a number of passages at random, read through a number of titles with which I am familiar, and examined a few titles painstakingly. The results are impressive: There are very few of what I would regard as mistranslations, far fewer than in Scott's work, and those passages that I think are mistranslated are not egregious errors. In these cases, I can usually hear the translator making a plausible argument in defense of the translation.

2.1.10 Review questions

Attempt the following questions.

According to Charles Donahue,

1. Is translating the Digest a means of making its content accessible to users.
2. What are the factors that should be taken into account in translating the Digest?
3. What are the defects in the translation of the Digest made by Scott?
4. Why should Watson's translation be preferred?
5. What are some of the problems in Watson's translation of the Digest?

2.1.11 Glossators and Commentators: Irnerius (died in 1125), a professor of grammar at Bologna, studied the Digest intensely and became the founder of a new jurisprudence. His pupils were Martinus, Bulgarus, Jacobus, and Hugo. These jurists are known as *Glossators*. They wrote short comments on the Digest in marginal notes (*glosssae*). Their purpose was to eliminate apparent contradictions in the text of the Digest. Their contribution to the legal literature was titled *Summae* or *Distinctiones*. The last glossator, Accursius, published a *Glossa Ordinaria* incorporating the accumulated doctrine of his predecessors. The glossators laid the foundation for a better understanding of the Justinian legislation by subsequent jurists. Their treatment of the law was purely academic and the living law was completely neglected. The *Corpus Juris Civilis* came to be

regarded as the *Ratio Scripta* (written reason) and as the law in force in the Holy Roman Empire.

New legal scholarship emerged in Perugia (13th to 15th century). Bartolus and Baldus published coherent treatises on Roman law in combination with the study of contemporary statutes and Canon law. These jurists and their pupils are known as the Post-glossators or Commentators. They placed law on a truly scientific basis and founded the modern legal science. The fields of commercial law, criminal law, and law of conflicts, attracted the attention of the post-glossators and were elevated into the positions of independent branches of law.

Glossators and commentator are characterized by a typical medieval way of thinking. They lacked historical sense; they ignored the historical fact of interpolations, and regarded Roman law as eternal truth. Their main concern was the harmonization of conflicting passages by the application of hair-splitting techniques. Yet, they are the founders of the new legal science.

2.1.12 Humanists: A humanist movement spread throughout Europe in the seventeenth century. The founders of this movement were mostly Italian and French jurists at the University of Bourges (Jacques Cujas, surnamed *Gujacius*, 1522-90; Hugo Donneau, surnamed *Donnelus*, 1527-91). The humanists exhibited an overwhelming interest in classical antiquity and proceeded to the reconstruction of the ancient Roman legal system with the help of original manuscripts and Byzantine authorities. They were philosophically inclined and in their analysis of the law applied juridical methods of interpretation rather than scholastic approaches. The humanists, by stressing the period of evolution of the Roman law, laid the ground for historical research. But the Justinian legislation obscured the law of ancient Rome and the living law was neglected. The "elegant jurisprudence" of this school remained a purely intellectual phenomenon.

Humanism failed in Germany and Italy. The authority of the commentators was deeply rooted and Roman law was actually applied as expounded by these jurists. Thus there was need for practical books on Roman law rather than interest in intellectual acrobatics. The *Parlements* (superior courts) in France shaped the law on a practical basis. In Germany, courts and writers developed the *usus modernus Pandectarum* (modern use of the Pandects).

2.1.13 Natural Law School: Expounders of a revived natural law (Hugo Grotius, 1583-1645, Puffendorf, Thomassius), displayed a critical attitude toward positive law. Roman law came to be regarded as the positive law of ancient Rome. Natural law was defined as a body of principles underlying human nature and discoverable by the exercise of Reason. Emphasis was focused on ancient Greek philosophy, certain principles of the Roman law, and on the writings of St. Thomas Aquinas and St. Augustine. Eventually, the movement led to the growth of Protestant rationalism. Arguments drawn from the interaction of jus civile and jus honorarium necessitated study of Roman law in depth and helped to preserve Romanist thinking. Natural law doctrine became a closed system based on rational grounds; thus it led to the idea of codification.

2.1.14 Historical school (*Pandectists*): According to the doctrine of the historical school (Gustav Hugo, 1764-1844; Savigny, 1779-1861), law is the product of the spirit of the people. It is not a revelation of eternal truth but the result of a gradual evolution in accordance with social facts. Ironically, the followers of the historical school devoted their efforts to the reconstruction of Roman law and to the discovery of its true character in all stages of development. A subdued antinomy (the past v. the present) is apparent.

The historical school is credited with the production of systematic treatises on Roman law. The lasting contribution of the school is the development of generalizations, which prove helpful in the reconstruction of ancient legal systems and for the understanding of contemporary civil law. Its dogma led to comparative research, reform, and modern codifications.

2.1.15 Revival of Roman law

Henry Mather, The Medieval Revival of Roman Law: Implications for Contemporary Legal Education, Catholic Lawyer (2002)

Legal systems have often borrowed laws or ideas from other legal systems. For example, Solon's laws for Athens in the sixth century B.C. were influenced by the legal codes of other Greek city states. Much of the English Statute of Frauds of 1677 was copied from the French Ordonnance de Moulins. The 1960 Civil Code of South Korea borrowed extensively from German law. Perhaps the most momentous borrowing occurred when European lawyers transplanted into medieval society the ancient Roman law contained in Justinian's Corpus Juris Civilis. This article deals with the medieval revival of Roman law. Part I provides a brief historical survey of the revival. Part II attempts to identify some of the factors that made the revival successful in the sense that it brought about vast improvements in the law. Part III suggests that these same factors can help us improve our American law, but only if we make substantial reforms in legal education.

A Brief History of the Medieval Revival of Roman Law in Western Europe-Our historical sketch focuses on the period from the middle of the eleventh century to the end of the fourteenth century. Law in the Mid-Eleventh Century-In the mid-eleventh century, Europe had no written,

organized, and comprehensive legal system. Law was largely a matter of social custom, which is mainly unwritten. Even the written law codes were primitive. They consisted largely of penalties for various forms of violence and contained little contract, commercial, or property law.

Good examples are found in the written codes promulgated by various Lombard kings from 643 to 755 A.D. and still in effect in mid-eleventh century Italy. The code issued by King Rothair (or Rothari) in 643 A.D. contains 388 titles. Titles 1 through 152 and titles 277 through 358 prescribe in very detail penalties for offenses we would characterize as crimes or torts. Title 48, for example, sets the penalty for gouging out a freeman's eye, while title 50 prescribes a different penalty for cutting off a freeman's lip. The penalty for cutting off a freeman's index finger (title 64) is sixteen solidi, whereas the penalty for cutting off a freeman's middle finger (title 65) is only five solidi. Rothair's code contains no contract or commercial law except for titles 245 through 252, which deal with the pledge of collateral for a debt (what we would call a possessory security interest). A creditor could not take a pledge of collateral until he had three times demanded payment and had not been paid. This is not the kind of law that stimulates secured lending. The Laws of King Grimwald (668 A.D.) contain no contract or commercial law. The Laws of King Liutprand (713-35 A.D.) contain 153 titles; of these, twelve deal with pledges of collateral, and only three deal with other commercial matters. The Laws of King Ratchis (745, 746 A.D.) contain fourteen titles; two of these titles provide evidentiary rules concerning pledges and sales. The Laws of King Aistulf (750, 755 A.D.) contain no contract or commercial law.

Throughout Western Europe in the eleventh century, many people were governed by written law codes issued by Germanic rulers, but based on ancient Roman law. Some of these codes were a bit more sophisticated than the Lombard codes. In the Germanic kingdoms that replaced the Western Roman Empire in the fifth century, Roman law survived to some extent and was incorporated into written codes; however, what survived was a small part of the legal system developed by the ancient Romans, and even that small part was retained in a crude and simplified form. Historians thus refer to it as "vulgar Roman law."

A good example of vulgar Roman law is the Lex Romana Visigothorum (or "Breviarium") promulgated in 506 A.D. by Alaric II, King of the Visigoths. This code was probably intended only for the Visigoths' Roman subjects but may have been applied to Visigoths as well. Either way, the code governed a vast majority of the people in Visigothic territory, as the Visigoths were far outnumbered by the Romans. The Breviarium was based largely on the Roman Theodosian Code, a collection, completed in 438 A.D., of imperial laws issued since the time of Constantine and concerned to a large extent with matters of imperial government rather than private law such as contract or commercial law. The Breviarium also included some writings of the Roman jurist and legal scholar Paul, and an abridgment of Gaius' Institutes, a hornbook for Roman law students. Therefore, the Breviarium was an abridgment of an abridgment. Peter Stein suggests that the Breviarium became the main source of Roman law in Western Europe from the sixth century to the eleventh.

The Germanic codes, including those based on vulgar Roman law, were primitive, partly because they were compiled by lawmakers who had little legal learning, and partly because these lawmakers had very limited aims. They assumed that the purposes of law were merely to prevent violence and enforce customary social practices. Some New Questions-By the twelfth century, assumptions about the purposes of law had changed profoundly. A new class of intellectuals began to think that new social practices could be developed, practices that would not only prevent

violence, but also give ordinary men and women the opportunity to live truly good lives in a secular world outside the monasteries. These new intellectuals began to ask three questions: Philosophically, what kind of human can live a good life in this world? Educationally, what kind of education does he need? Jurisprudentially, what kind of laws does he need? Because these were the questions asked, the major innovations of the "Renaissance of the Twelfth Century" tended to be in the fields of philosophy, education, and law.

The third inquiry, regarding the kind of law that was needed, was easily answered. Medieval polities needed law written in Latin and comprehensive enough to regulate all the various aspects of societies that were becoming increasingly complex. A special need existed for law that could facilitate contractual exchange and thus promote a commercial revolution, already underway, that promised to enhance the material basis of a good life. And because the good life required the exercise of moral virtue, medieval societies needed law that enforced the virtues of good faith and fair dealing in private transactions.

Justinian's Corpus Juris Civilis-One and only one existing body of law could meet these needs. Justinian's Corpus Juris Civilis was the obvious choice for the wholesale legal borrowing that was necessary, since there was neither enough time nor enough legal imagination to construct complete legal systems from the ground up. The Corpus Juris Civilis is a vast compilation of ancient Roman legal materials, arranged and somewhat modified by a group of Byzantine professors and lawyers appointed by Emperor Justinian. Work on the Corpus Juris began in 528 A.D. and was largely completed by 534 A.D.. The Corpus Juris thus provided a picture of Roman law as seen through a Greek lens many years after the demise of the Western Roman Empire. The most important part of the Corpus Juris is the Digest, which contains scholarly commentary by Roman jurists and supplies the most detailed explication of Roman private law. Most of this commentary comes from the period 100-250 A.D. and presents various and often conflicting positions on each legal issue. The Corpus Juris also contains: the Institutes, a hornbook for students based partly on Gaius' Institutes; the Code, which includes imperial statutes and other pronouncements of Roman emperors; and the Novels, which added imperial pronouncements issued after the publication of the Code.

In 554 A.D., after Justinian took Italy from the Ostrogoths, he put his Corpus Juris into force as the law of Italy. After the Lombards ousted the Byzantines, parts of the Corpus Juris were still used, but the Digest disappeared. Fortunately, the Digest was rediscovered in Italy in the late eleventh century; Justinian's complete Corpus Juris was now available to European lawmakers, and it met their most important needs. It contained the world's most detailed and comprehensive private law written in Latin. It provided a relatively sophisticated body of contract law and enforced the moral virtues of good faith and fair dealing.

An examination of Roman contract law reveals some serious defects, but also indicates why contract law has been the most highly regarded part of Roman law. The Romans had no general theory of contract. To be enforceable, an agreement had to fit squarely within one of a few contract types. The stipulatio was an oral contract formed when party A asked party B whether he would promise to do something and B immediately responded that he did so promise. Stipulatio could be used to promise anything not prohibited by law. However, it had limited usefulness for commercial exchange contracts. In the first place, the promise had to be made in a face-to-face meeting of the parties, not in a letter delivered to a distant party. Secondly, it was difficult and cumbersome to use stipulatio for bilateral exchange contracts. Each party had to

make a very detailed stipulation, not only stating all of his duties, but also stating how those duties were conditional upon the other party's performance.

Each of the four "real" contracts were formed informally but only when one party had delivered some tangible property to the other. Of these real contracts, only pignus (pledge) had commercial importance. A debtor transferred possession of property to his creditor as collateral security for the debt. If the debtor paid the debt, the creditor was obligated to return the pledged property. If the debt was not paid, the creditor could sell the collateral, but was obligated to pay the debtor any surplus of the sale proceeds over the amount of indebtedness. The three other real contracts involved gratuitous transactions, usually between friends.

In Roman contract law, the four "consensual" contracts were emptio venditio (sale), locatio conductio (hire), societas (partnership), and mandatum (mandate). Unlike the stipulatio, the consensual contracts required mutual consent but no particular formal expression. Unlike the real contracts, the consensual contracts could be purely executory, with no prior delivery. In all consensual contracts, both parties were obligated to act in good faith in every aspect of the transaction. There could be no duress, fraudulent misrepresentation, or even fraudulent nondisclosure. The mandate contract was formed if A gratuitously promised B, usually a friend of A's, to execute a commission given to him by B. This contract was not useful in commerce because A's performance of the commission was gratuitous and not for a reward, and because A lacked any agency power to create binding contracts between B and third parties. Nor was the societas partnership contract commercially useful. Among other things, a partner lacked the agency power to bind his partners to contracts he formed with third parties, and the partners owed each other only a minimum of obligations. The emptio venditio (sale) was used for sales of specific goods or real property in exchange for a money price and was a contract of great commercial importance. The contract included an implied warranty by the seller that the buyer would have quiet enjoyment of the thing being purchased (that the buyer would not be evicted by someone with a better title). Various implied warranties by the seller also existed to protect the buyer in the event of latent qualitative defects in the thing being purchased. Protection against mistakes in contracting was provided by a complicated set of rules that made a sales contract unenforceable if there was some "fundamental" mistake. Fundamental mistakes included mutual misunderstanding concerning the specific thing to be sold and mutual mistake about the materials with which the thing was made, but it was not always clear which other mistakes counted as fundamental.

Like the contract for sale, locatio conductio (hire) was commercially useful. It was a versatile contract that could be used for leases of goods or real estate, service contracts, and virtually any bilateral agreement involving a money price, so long as it was not a sale. The Law School at Bologna-Justinian's Corpus Juris, with its complex body of contract law, could not be used to improve European legal systems until it was understood. This long process of understanding began in earnest when a man called Irnerius began teaching the entire Corpus Juris at Bologna near the end of the eleventh century. Although Irnerius was merely a private teacher and not an employee of any educational institution, he soon began to attract students from all over Europe.
In the twelfth and thirteenth centuries, the private law schools of Irnerius and his early successors at Bologna were transformed into an institutionalized law school that was the leading center of legal studies in Europe. The leadership of Bologna was due in large part to the fact that it taught Justinian's Corpus Juris, with increasing emphasis on the Digest, the part of the Corpus Juris that was the most fruitful source of legal ideas. The institutionalized law school at Bologna

had one especially interesting feature. Until it was taken over by the city in the late thirteenth or early fourteenth century, the University of Bologna was a student corporation, an amalgamation of student guilds, that controlled the professors. Each time a professor was late for class or ended class before the closing bell, the students fined him. If he did not cover all the material in the syllabus by the end of the term, he was again fined by the students.

By the end of the twelfth century, the law school at Bologna taught both Roman law and canon law and had an enrollment of at least 1000 students. Yet the school taught little, if any, royal law, municipal law, customary law, or other primary source of local positive law. What the school taught was legal method and an ideal law (Roman law and canon law) containing general principles that could be applied to any area of law in any part of Europe. Apparently, the students flocked to Bologna because they knew what they needed in order to participate in the development of new legal systems back home. There is thus justification for Hastings Rashdall's claim that in many respects, the work of the law school at Bologna "represents the most brilliant achievement of the intellect of medieval Europe." The Bolognese model was copied by new law schools that sprang up in the twelfth century (Modena, Pisa, and Montpelier, for example) and thirteenth century (notably Naples, Toulouse, Orléans, and Salamanca). Like Bologna, these new schools taught Roman law and canon law but deemphasized or ignored local law.

Glossators, Commentators, and Canonists-From the early twelfth century to the middle of the thirteenth century, legal scholarship was dominated by the "Glossators," Irnerius and the teacher-scholars who succeeded him at Bologna. In addition to Irnerius, some of the most important Glossators were Bulgarus, Martinus, Bassianus, Placentinus, Azo, and Accursius. The Glossators focused on mastering the text of Justinian's Corpus Juris, an important first step that had to be taken before the Corpus Juris could be successfully used by medieval lawmakers. The Glossators intensively studied and explained each fragment in the text, interpreting difficult passages, providing cross-references to other fragments dealing with the same issue, identifying conflicts between different fragments, and trying to reconcile such conflicts. All of this was done in glosses (annotations) written between the lines of a Corpus Juris manuscript or in its margins or, when no space was left in the manuscript book, on separate pieces of paper.

From the late thirteenth century to the end of the fifteenth century, the most important legal scholars were the "Commentators" (or "Post-Glossators"), a group who taught at various law schools, not just Bologna, and included influential scholars such as Cinus de Pistoia, Bartolus de Saxoferrato, and Baldus de Ubaldis. The Commentators wrote broad and systematic commentaries that attempted to apply Roman law to the needs of medieval society in a practical way. They thus took a significant step beyond the work of the Glossators, who had chiefly been concerned with understanding and explicating Roman law. The Commentators studied customary, feudal, royal, and municipal law and were aware of the gaps in these systems. Many of these gap issues also had not been addressed in Justinian's Corpus Juris. The Commentators therefore derived general principles from the Corpus Juris, canon law, and the works of natural law philosophers such as Aristotle and Thomas Aquinas, and then used these principles to suggest how the gaps in contemporary positive law should be filled in order to make European legal systems not only more complete but also more equitable. The major achievement of the Commentators was showing how Roman law, canon law, and moral philosophy could be used to improve European legal systems.

The accomplishments of the canonists were as significant as the work of the Glossators and Commentators. In medieval Europe, canon law was important because the Church courts asserted a wide jurisdiction over matters we now regard as secular. This jurisdiction extended to marriage and the other sacraments, and to anything closely related to sin or the welfare of human souls; it thus included marriage, the termination of marriage, the legitimacy of offspring, the validity of testamentary wills, contracts made under oath or requiring good faith, usury, the manipulation of commercial markets, defamation, perjury, homicide, theft, sexual misconduct, and the lawful times and conditions of work. In the late eleventh century, Popes Gregory VII and Urban II had issued many new canons in their attempt to reform the Western Church, and by 1100 A.D. canon law consisted of a greatly enlarged but disorganized and unsystematic mass of materials taken from the Bible, works of the early Church Fathers, canons enacted by Church councils, and papal decretals (letters announcing papal decisions on actual cases). The needed systematization was provided by Gratian, a monk who taught canon law at the monastery of San Felice in Bologna. About 1140 A.D., he published his Concordance of Discordant Canons, which became known as the "Decretum" and was the first truly scholarly study of canon law. In this work, Gratian reorganized the canonical authorities and added his own comments, many of which were drawn from Roman law. He also noted apparent conflicts in the authorities and used a dialectical method in trying to reconcile them. Gratian's Decretum served as the basic guide to canon law for many centuries.

After the middle of the twelfth century, canon law scholars and Roman law scholars worked in close cooperation. Canon law was strongly influenced by Roman law. The procedural rules for ecclesiastical courts were based in large part on Justinian's Corpus Juris. The canonist concept of marriage as a consensual union, based on mutual affection and respect, came from Roman law. Canonist doctrine concerning mistake as a ground for nullifying marriage was partly borrowed from Roman doctrines of mistake in contracts of sale. Canon law also allowed nullification of marriage contracts made under duress, and the test for duress (consent induced by fear that a "constant" man would not overcome) was taken from Justinian's Digest. In turn, Roman law scholars borrowed ideas from the canon law. For example, canon law was the major inspiration for the gradually successful attempts by the Glossators and Commentators to liberalize Roman law so that contracts could be enforced even when they did not fit within any of the contract types recognized by classical Roman law.

Spread of the Ius Commune-By the fourteenth century, the combination of Roman law and canon law had become known as the ius commune and had spread throughout a good part of Western Europe. The reception of the ius commune was, of course, facilitated by the fact that it was written in Latin, the common language of educated Europeans. Equally important was the legal education of the men who filled new positions as judges, advocates, and assistants to secular and ecclesiastical rulers; most of these new legal professionals had been trained in law schools that concentrated on Roman and canon law. The ius commune was thus the law that the new lawmakers knew best.

Canon law had an easy victory. It was the primary source of law in Church courts throughout all of Catholic Europe, including the British Isles. The spread of the new Roman law based on Justinian's Corpus Juris was slower, and the pace varied from one region to another. The new Roman law was quickly received in Italy, the southern part of France, and the Iberian peninsula. In the northern part of France, customary law continued to prevail, but by the thirteenth century, Roman law had become an important supplement. In the German principalities of the Holy

Roman Empire, Roman law was not received to any great extent until the late fifteenth and early sixteenth centuries. But when it occurred, the reception was massive. In Scotland, Roman law was established as the primary gap filler in the sixteenth century. However, Roman law never really took hold in the English royal courts (except for chancery and admiralty courts).

We must remember that nowhere in late medieval Europe were Roman law and canon law the only kinds of law being used. In each geographical region, there were a number of legal systems, each with its own law and its own courts: canon law, feudal law, manorial law, royal law, municipal law, and the law merchant. And everywhere, social custom was still a recognized source of law. The primary role of the ius commune was to fill the huge gaps in the local legal systems. Roman law and canon law were also used in interpreting existing local law, and provided standards by which courts determined whether a local custom was unreasonable and thus legally invalid. In these ways the ius commune gradually shaped the legal systems that ruled most of Western Europe until they were replaced by the massive codifications of the eighteenth and nineteenth centuries.

Reasons for the Success of the Revival-Why was the medieval revival of Roman law successful in the sense that it substantially enhanced the quantity and quality of law in Western Europe? The following summary will provide a partial answer to our question and will focus on factors that have important implications for contemporary legal education. The medieval revival of Roman law involved a massive transplant into medieval societies of a legal system that had been developed in ancient times before the fall of the Western Roman Empire. We will therefore begin by identifying some factors that are essential for the success of any legal transplanting or "borrowing" enterprise.

For borrowing to even occur, lawmakers who work within one legal system must be aware of and receptive to legal ideas and intellectual concepts that come from outside that system (factor 1). The external ideas and concepts might be found in the contemporary legal system of a foreign country. They might be found in the legal history, the legal past, of the borrowing system itself. They might be found in some non-legal discipline such as philosophy, economics, or sociology. Whatever their source, these external ideas and concepts must be studied and understood before they can be truly borrowed and not caricatured (factor 2).

If the enterprise of borrowing is to succeed in improving the borrowers' legal system, some additional factors are required. The ideas being borrowed will probably have to be modified somewhat if they are to fit the borrowing legal system and its social and cultural context. The borrowers will thus have to perform a critical analysis of the external ideas, identify their strengths and weaknesses and eliminate, or at least mitigate, the weaknesses (factor 3). In order to determine what is a strength or weakness in the external ideas, the borrowers must consider contemporary social and economic circumstances in their own society (factor 4). They must also ask whether a particular external idea would promote the purposes or goals of their own legal system (factor 5).

Finally, legal education will have to be structured so that future generations of lawyers working within the borrowing legal system will be able to use the newly borrowed ideas--and ideas that may be suitable for future borrowing--in ways that improve that legal system (factor 6). Law schools must therefore train their students to do all the things involved in factors 1 through 5. In the remainder of Part II, we will see that each of the factors necessary for a successful legal

transplant was present in the medieval revival of Roman law. Indeed, all six factors were present to a high degree.

Receptive Awareness of Legal History and Comparative Law (Factor 1) Factor 1 in our list of requirements for successful borrowing is a receptive awareness of ideas that come from outside the legal system that is to engage in borrowing. The medieval revival began with an awareness of legal history. With the rediscovery of Justinian's Digest in the late eleventh century, the entire Corpus Juris became available to legal scholars. Almost immediately, Irnerius and his Glossator successors at Bologna made their students and other law professors aware of Justinian's compilation of ancient Roman law, a body of law that had been developed more than eight centuries earlier, and after the fall of the Western Roman Empire had been applied only in "vulgar" and mutilated form.

Medieval lawyers not only borrowed materials from a historically prior legal system, they also engaged in what we would call comparative law, the study of contemporary legal developments in other countries and other legal systems. Law professors and lawmakers throughout Europe borrowed ideas from Italian Commentators, such as Bartolus de Saxoferrato and Baldus de Ubaldis. The Italian Commentator, Cinus de Pistoia, was heavily influenced by the French legal scholars, Jacques de Révigny and Pierre de Belleperche. We have already seen that secular courts and professors of Roman law borrowed ideas from canon lawyers, who in turn derived much of their canon law from Justinian's Corpus Juris.

Receptive Awareness of Other Disciplines: Teleological Natural Law Philosophy (Factors 1 and 5)-Factor 1 in our list of requirements for successful borrowing can be satisfied by a receptive awareness of ideas found in non-legal disciplines. Medieval lawyers were in touch with other disciplines and borrowed ideas from them, especially from philosophy. Lawyers were particularly interested in moral and political philosophy, and here the most influential tradition was natural law theory. Medieval notions of natural law were drawn from Cicero, Justinian's Digest, Aristotle, and Aquinas. A key idea found in all of these sources is that human conduct should be regulated by norms that are both derived by means of rational reason and consistent with human nature. Although natural law theory is rationalistic, it is also aware of both the potentialities and limitations of the human animal. This rational but not unduly optimistic approach produced helpful answers to all three of the questions posed by twelfth century intellectuals: What kind of human can live a good life in this world? What kind of education does he need? What kind of laws does he need?

Natural law theory provided a teleological answer to the first question. In natural law teleology, everything is evaluated according to how well it fulfills its telos, its end or purpose. Aristotle had said that the natural end of a human being was to live well, rationally, and virtuously. Thus, the kind of human who can live a good life in this world is a human who lives rationally and virtuously. Because the purpose of educational institutions is to enable people to live good lives, natural law teleology provided an answer to the second question: humans need education that teaches them how to live rationally and virtuously.

Natural law theory gave a similar answer to the third question. Humans need laws that help them live good lives. The purpose of positive law, according to Aquinas, is to facilitate good lives for all citizens (the "Common Good"). The law should therefore help people to live rationally and virtuously. Legal rules and penalties can perform a moral education function that supplements

familial training by teaching citizens to treat others fairly, without coercion, deceit, or exploitation. In suggesting that the purpose of law was to help people live good lives, natural law theory provided medieval lawmakers with a teleological criterion that could be used in evaluating the various rules of ancient Roman law. Medieval lawmakers were thus able to satisfy factor 5 in our list of requirements for successful borrowing: lawmakers in the borrowing system must judge particular ideas in the borrowed system by asking which of these ideas would promote the purposes or goals of their own legal system.

The teleological approach of natural law theory was used not only to identify the general purposes of law, but to resolve particular legal issues as well. In the field of contract law, the obligations of parties to a contract depended on the immediate end or purpose of the type of contract the parties formed. The purposes of the marriage contract, for example, were the good of the offspring and the mutually beneficial association of the two spouses. Therefore, the contractual duties of the spouses were determined by these purposes. A second example also involves contract law. The Commentators Bartolus de Saxoferrato and Baldus de Ubaldis suggested that, although a sales contract cannot be avoided for mistake about the "accidental" form of the thing to be sold, such a contract can be avoided for mistake about the "substantial" form of the thing, and the substance (or essence) of a thing may depend on the human purpose it serves.

Natural law theory was also influential in the development of the method by which lawmakers derived legal rules from general principles. The typical natural law method was to begin with very general moral principles, derive more specific principles from them, and finally arrive at rules to be applied to particular situations. Canon lawyers readily adopted this method and began searching for general moral principles that could be applied in all areas of law. Soon, both canon law scholars and Roman law scholars were busy identifying significant principles and teaching them to their students.

Some of these general principles were found in book 50 title 17 of Justinian's Digest. They include important principles that are still applied today: in interpreting testamentary wills, we should try to carry out the wishes of the testator; no one can change his mind to another person's disadvantage (the estoppel principle); nothing is so contrary to consent as force or duress; no one should be allowed to profit from his own wrongdoing; there is no obligation to do something that is impossible; no one should become richer through another person's loss (the unjust enrichment principle). Digest 50.17 was a favorite subject of the Glossators and the Commentators, who wrote extensively about how the Roman principles might be interpreted and applied in order to improve positive law.

In developing specific legal rules, medieval lawmakers used general principles flexibly and cautiously. Aquinas wisely observed that as we work our way down from general principles toward specific rules, we descend into levels of greater particularity and contingency, and our reasoning becomes more fallible, more prone to error. For example, goods that have been deposited for safekeeping should, as a general rule, be returned. But this rule should not be applied in a case where the depositor wants his goods back so that he can use them to attack his own country. The canon law regarding usury provides an example of how medieval lawmakers used general principles flexibly and recognized the fallibility of legal rules. Canon law had long held that loaning money at interest was sinful and illegal. Gradually, canon lawyers realized that lending was necessary for continued economic expansion, and that lenders deserved compensation for the opportunity costs they incurred when they loaned money they could have spent on themselves or

their own businesses. By the end of the medieval period, canon law allowed lenders to charge interest, so long as it was not excessive.

The impact of natural law philosophy on medieval law was profound. Due to natural law theory, lawyers were constantly aware of the moral purposes of law. They used natural law ideas when they interpreted Roman law. They used natural law principles to develop new legal rules that could fill gaps, and to identify existing rules that were unjust and thus candidates for elimination or alteration. The contribution of natural law philosophy is well summarized by Harold Berman: Natural law was not an ideal law standing outside the existing legal systems but rather the morality of the law itself standing within the existing legal systems It was because of the programmatic or political character of the law, represented particularly by that part of it that was called natural law, that thousands of young men went annually to the universities to study law in order to prepare themselves for political careers. These were among the most intelligent and ambitious young men of Europe. They were taught the positive law and the techniques of applying it, but they were also taught the natural law, the law that was to be. [The impulse for legal growth and reform] was manifested in the continuity of the legal profession, as successive generations of lawyers were trained in the universities and went out into the ecclesiastical and secular chanceries and courts to practice what they had been taught.

Intensive Study of External Ideas (Factor 2)-External ideas from legal history, comparative legal studies, or non-legal disciplines must be carefully studied and understood before they can be usefully borrowed by a legal system. This was factor 2 in our list of requirements for successful borrowing. Medieval lawyers undoubtedly devoted much effort to the study of ancient Roman law, contemporary legal developments in foreign countries, and natural law philosophy. The study of Roman law was especially intensive. We noted in Part I that the Bolognese Glossators who dominated legal scholarship from the early twelfth century to the middle of the next century were devoted to mastering each fragment in the text of Justinian's Corpus Juris. Their study must have been intensive; it was continuous, not sporadic, and it took about 150 years to complete.

Critical Analysis of External Ideas (Factor 3)-If external ideas are to be successfully borrowed by a legal system, they must be critically analyzed so that their weaknesses can be identified and eliminated. This was factor 3 in our list of requirements for successful borrowing (Borrowing is not successful if it does not improve the borrowing legal system).

Medieval lawyers analyzed Roman law with a critical and questioning spirit. We will note in section II. F that this spirit was an important aspect of the "scholastic" method, which dominated medieval intellectual activity. Here, we will merely mention two examples of this medieval ability to spot weaknesses in Roman law and correct them. In Part I, we noted that a weakness in Roman contract law was the lack of a general theory of contract that could be applied to any type of agreement; to even be enforceable, an agreement had to fit squarely within one of a few prescribed contract types. We also noted in Part I that the medieval Glossators and Commentators, inspired by the canonists, gradually succeeded in liberalizing Roman law so that contracts could be enforced even when they did not fit within any of the ancient Roman types. A second example was also previously noted. In our discussion of natural law philosophy, it was pointed out that the medieval canonists rejected the Roman law's harsh and discriminatory treatment of poor people and tried to ensure that the poor would not be disadvantaged in Church courts.

Awareness of Contemporary Social Circumstances and Needs (Factor 4) In order to determine how borrowed ideas should be modified and adapted to the borrowing legal system, the lawyers of that legal system must consider contemporary circumstances and needs in their society. This was factor 4 in our list of requirements for successful borrowing. In Part I, we saw that a major concern of the Commentators was to adapt Roman law to the needs and circumstances of medieval society. We also noted, in our discussion of natural law theory, that the relaxation of the canon law prohibition of lending at interest was partly due to a perceived need to stimulate lending in order to assist economic development.

Legal Education (Factor 6)-For legal borrowing to be successful, law schools serving the borrowing legal system must educate their students so as to enable future generations of lawyers to use imported ideas in ways that improve that legal system (factor 6 in our list of requirements for successful borrowing). The ability of medieval lawyers to make vast improvements in European legal systems was due, in large part, to the quality of legal education. The law schools provided their graduates with the new legal concepts of Roman law, canon law and, even more importantly, the intellectual skills and attitudes necessary for socially useful lawyering.

Entering law students were well prepared. To be admitted to law school, a person usually had to have a liberal arts degree. Obtaining a bachelor of arts degree required four to six years of study. The master of arts degree, a license to teach arts anywhere in Western Europe, required another two to four years. The arts curriculum emphasized the "trivium," which consisted of (Latin) grammar, rhetoric, and logic. Other courses included the "quadrivium" of arithmetic, geometry, astronomy, and music, and (by the middle of the thirteenth century) a healthy dose of Aristotelian moral philosophy. The beginning law student had thus already been trained to read and write good Latin, think logically and analytically, and argue persuasively.

The law school course of study consumed from five to ten years, depending on the school and the type of degree being pursued. A student could obtain a doctorate in civil (Roman) law in seven or eight years, a bachelor's in five. A bit less time was required for the degrees in canon law. In ten years, one could obtain a joint degree in civil law and canon law. The curriculum was rigidly fixed. Civil law courses covered Justinian's Corpus Juris; canon law students studied Gratian's Decretum and subsequent collections of canons. There were no electives. All students pursuing the same degree took the same courses.

Law school teaching techniques were based on the new "scholastic method," so called because it was the method of analysis employed by the schoolmen, the professors in various institutions of higher learning. This method, used in both scholarship and teaching, was already rather fully developed in the twelfth century and made use of both authority and reason. The analysis began with authoritative texts dealing with a particular question. A civil law professor might begin with Justinian's Digest; a theology professor was likely to begin with Biblical texts.

Apparent conflicts would then be identified. In order to decide whether two textual passages really conflicted, the schoolmen would interpret each of them, using reason and hermeneutic techniques that focused on contextual variables such as time, place, author, and issue. Great efforts were made to harmonize the texts. If they could not be interpreted as consistent, the schoolmen might reconcile them by means of a reasoned distinction. They would suggest, for example, that one rule should be applied to marriage contracts while a contrary rule was appropriate for commercial contracts. If the opposing texts could not be reconciled, schoolmen

could either choose one and reject the other, or reject both of them in favor of a new synthesis. Any proposed solution of the conflict was proposed because it seemed the best way to promote human well-being, given the ultimate purposes of life and contemporary circumstances and needs. The criteria for identifying the proper conclusion of the scholastic analysis were thus teleological.

The spirit of scholastic method was interrogative. Although the schoolmen tried to harmonize authorities so as to preserve as much of the existing body of authority as possible, each authoritative proposition was questioned and open to doubt. Peter Abelard, one of the early developers of scholastic method, asserted that "the first key to wisdom is called interrogation, diligent and unceasing. By doubting we are led to inquiry; and from inquiry we perceive the truth." Scholastic method thus involved a ruthless analysis of traditional views. Quoting authority was not a way to end debate; it was the way to open debate.

Law school teaching exhibited both the form and spirit of scholastic method. In a morning lecture, the professor would read a portion of the assigned text, read the interpretive glosses to that text, try to resolve apparent conflicts, propose conclusions, note general principles that could be derived from the text, and raise questions not directly addressed in the text (for example, how some hypothetical case should be decided). In an afternoon or evening session, the students and professor would discuss questions that arose from the morning lecture.

In the twelfth century, the "disputation" developed into an important educational device. The disputation was like a modern moot court, except that anyone present was free to argue and there was no assigned hypothetical fact situation. The disputation was a debate on a previously announced topic, usually an important contemporary issue not covered in the Corpus Juris or canon law. Sometimes the disputation was merely a classroom exercise, sometimes it was a public event in which all students and professors of the university were free to participate. The designated "disputant," who might be a professor or a student, would begin by stating his position and would then have to listen to objections raised by the other persons present and respond to these objections. The disputation was, like the chivalric tournament, a very competitive and dangerous game. Teaching methods in the medieval law schools helped students acquire the intellectual skills they would need in order to be effective counselors and advocates for their clients. Law students learned to read legal texts carefully, to be aware of alternative interpretations, to consider all arguments on both sides of a question, to reason logically, and to argue persuasively.

At the same time, law students acquired intellectual habits that enabled them to contribute to the improvement of legal systems. They learned to question everything. They developed a critical attitude toward existing authority. They learned to construct general principles that could be used in fashioning new rules for developing areas of law. And in learning how to reconcile disparate authorities, they acquired an antidote to oversimplification and extremism; they learned to appreciate what is valuable in each opposing theory or proposition and construct a synthesis that preserved those valuable elements. The medieval law students thus learned how subtle and complex our normative world is. In all these ways, the law schools enabled their graduates to achieve one of the great goals of medieval civilization: to improve society by improving the law.

Conclusion-The medieval revival of ancient Roman law led to a vast improvement in the legal systems of Western Europe. What had been rather primitive bodies of law were transformed into

modern and comprehensive systems, enlightened in their moral foundations and sophisticated in their practical details. In large part, this transformation was due to the skill with which medieval lawyers made careful and critical studies of ideas borrowed from legal history, comparative law, and philosophy. This skill was achieved by means of the curricular structure and teaching methods of the medieval law schools.

2.1.16 Review Questions

Part I Essay-type Questions

Answer the following questions.

1. Enumerate and explain the main features of the Code of Hammurabi.
2. Contrast the Babylonian legal system with the Roman legal system.
3. Compare the Roman legal system, the Greek legal system and the Babylonian legal system.
4. List and discuss the key features of the XII Tables.
5. What is the Corpus Juris Civilis? What are its components?
6. Did Emperor Justinian adopt a revolutionary approach to codification? Give reasons for your position.
7. Discuss the two lives of Roman law: the Primary Life and the Medieval Life of Roman Law.
8. Outline the roles of Glossators and Commentators.
9. What is the meaning of the term `` reception`` used in connection with Roman law?
10. Legal history amply demonstrates that political unification comes first followed by the codification of public and private laws. Explain this assertion. Your explanation should include four concrete examples.

Part II Multiple-choice questions

Choose the best answer from the given alternatives.

1. A factor that contributed to the emergence of the common European law (Jus Commune) prior to 15the century was:

A) Glossators and Commentators
B) The existence of a common body of law and legal writing
C) The use of a common legal language
D) The prevalence in Europe of a common method of teaching and scholarship.
E) All of the above
F) ``A`` & ``C``

2. Identify the sound proposition.

A) There is evidence in legal history to conclude that where absolute monarchs prevail, public law is unlikely to reach highest stage.

B) There is evidence in legal history to conclude that where absolute monarchs prevail, there could be a developed private law.

C) There is evidence in legal history to conclude that a high degree of stability is one of the key aspects of early legal traditions.

D) There is evidence in legal history to conclude that the first stage of early legal systems is uncertain and unsophisticated.

E) All of the above

F) ``A`` & ``D``

3. Identify the correct statement.

A) The Mesopotamian legal tradition was religious in conception.

B) The Roman legal tradition had been ethical in conception in its entire history.

C) The Greek legal tradition was philosophical in its entire course of development.

D) The French legal tradition was ideological and technical in its entire life span.

E) The French legal tradition was empirical and ideological in its entire course of history.

F) The Code Civil was partly technical and partly empirical.

4. To John Maryman, a legal tradition that is ``older, more widely distributed, and more influential than the common law tradition`` is

A. The civil law tradition

B. The Germanic law tradition

C. The Islamic law tradition

D. The Hindu law tradition

E. A &B

F. The European law tradition

G. The Buddhist law tradition

H. A, B & D

I. None of the above

5. One of the following was the historical/doctrinal sources of the civil law tradition:

A) Canon law

B) The German legal science

C) Natural law and the doctrine of Enlightenment

D) Customary law

E) Roman law

F) The French Revolution

G) All of the Above

H) A, C & E

6. Which one of the following statements is *incorrect* about the *Corpus Juris Civilis* that acquired the force of law on April 16, 529?

A) It was a compilation designed to replace all literature and all legislation, to achieve unification of law, and to make the law accessible to all.

B) It was prepared by a commission established in 528 A.D., charged with the duty to compile a collection of the law in force.

C) It invited an extensive study beginning from 11th century AD. onwards at the University of Bologna as the Commentators and Glossators recognized its high intellectual quality.

D) It invited, as canon law and merchant law did an extensive study beginning from 11th century AD., onwards at the University of Bologna as the conception of a Holy Roman Empire was very strong and real in twelfth century Italy.

E) It invited an extensive study beginning from 11th century AD., onwards at the University of Bologna as Emperor Justinian was thought of as a Holy Roman Emperor, and his compilation (i.e., Corpus *Juris Civilis*) was treated as imperial legislation.

F) It was prepared by commissioners entrusted by Justinian to collect excerpts from the writings of the jurists and to make of them a single work in which could be found a complete statement of Roman law.

G) It was prepared by commissioners entrusted by Justinian to compile a complete collection of Imperial legislation and to amend where necessary.

7. One of the following statements is *incorrect* about the position of Emperor Justinian regarding the legal system he built up.

A) Even if he planned to depart from the past in a significant manner, he did not want to abolish the past entirely, as he incorporated preexisting legal rules in his code.

B) He was unhappy about the legal uncertainty in his empire, as he granted a code to the empire.

C) He was intolerant of diversity of legal opinions in his empire, as he removed past legal documents from public discussion.

D) He worked on his codification project with the sense of a mission of rescuing the previous Roman legal system from further deterioration.

E) Bringing legal uniformity as a central value motivated him to undertake codification.

F) He planned to depart from the past without any regard to the past legal thinking, as he burnt down preexisting legal materials and forbidden commentaries on his code.

G) He came up with a compilation designed to replace all literature and all legislation, to achieve unification of law, and to make the law accessible to all.

8. One of the following statements best represents the position of M.H. Hoeflich as outlined in his article entitled ``Legal History and the History of the Book: Variations on a Theme:``

A) He outlines the two great monuments the Romans left to the European peoples long after their political and military dominance had faded into memory, i.e., their remarkable civil engineering and legal system.

B) He discusses how the Medieval Roman law scholars (Glossators and Post-Glossators) made the *Digest* and *Decretum* accessible in terms of language, of style and of organization to law students and legal practitioners.

C) He explains the principal features of the Digest.

D) He discusses under whose instruction, how and why the Digest was prepared.

E) He claims that legal scholars in nineteenth century America chose to use the Institutes rather than the acknowledged source of jurisprudence used by European scholars for more than half a millennium (the Digest) owing to availability of the texts of the former.

F) He claims that the Digest was accessible to many nineteenth century American lawyers and, thus, its influence upon the development of law and of legal doctrine was big.

G) He gives an account of the transportation of western thinking about law to non-European nations.

9. Identify the wrong statement about ancient Greek legal system.

A) The Greeks did not have strong private law as compared to their public law.

B) The public used to participate in the law making process

C) The judiciary was not given much attention

D) Greeks legal system did not recognize equality of sex

E) None

10. The major causes of Justinian codification of the 5th century A.D. were

A) The existence of large number of laws which were contradictory and inaccessible

B) Justinian's aim to control law teaching and interpretation.

C) The need to improve legal education

D) All

E) A and C only

11. Corpus *Juris civilis*_____.

A) Was the collective name of the four Justinian codes
B) The law applied to Romans before 6th Century A.D.
C) Was later studied by Scholars in Europe
D) A and C
E) All

12. One of the following is different from the rest.

A) Roman law
B) French law
C) the Justinian Code
D) the common law
E) none

13. Which one is true about ancient Greek legal system?

A) Its fundamental basis was philosophical thinking.
B) The Greeks enacted a code known as the XII Tables.
C) It successfully accommodated natural law and positive law.
D) By applying the principles of natural justice, the Greeks abolished slavery.
E) All are true

14. Identify the wrong statement.

A) The Code of Hammurabi contained mitigating grounds of punishment.
B) Through the enactment of the XII Tables, Romans started to secularize their law
C) The Ethiopian legal history is characterized by major interruptions and discontinuity.
D) The English legal development is little affected by the Roman law
E) According to some scholars if family law is imported from another country, it is likely to face problem of non – compliance by the people of the receiving country.

15. The ancient Babylonian and the Ethiopian legal systems had, at least one, similarity_____.

A) Both were unstable.
B) Both invoked religion as source of legitimacy.
C) In both systems, there was popular demand to change the law .
D) Both were based on republican system of government.
E) There was no similarity between the two systems.

Part III. Instruction: Read the following questions with care say `Sound` if you think that the statement is an accurate description of a principle in legal history/comparative legal tradition, or say `unsound` if you think that the statement is inaccurate description of a principle in legal history/comparative legal tradition.

1. One can characterize a legal tradition as rational or empirical depending on the existence or absence in that legal tradition of legal profession, legal education and legal writers.
2. Nationalism and the theory of natural law emphasized the importance of the continuation of the jus commune in 18th and 19th centuries in Europe.
3. The Digest was like a modern code in terms of consistency, completeness and readability.
4. As legal history witnesses, a legal system receiving laws from another system has always its own preexisting laws and legal institutions.

2.2 The Attributes of Law in the Early Legal Systems

This section explains the definition of law in the Mesopotamian legal system, the Greek legal system and the Roman legal system. It outlines the main features of the early legal systems and the effects of the divine-origin of the Mesopotamian legal system.

2.2.1 Definition of law under the Babylonian legal system: To Emperor Hammurabi, why did his subjects have to respect the principles in his Code? Can you guess the reason? Emperor Hammurabi sought to get legitimacy of his Code by invoking the power of God. He presented himself to his subjects as an agent of God on earth. He advocated that he was an elect of God. He, thus, argued that whatever he did including the making of his Code was done under the guidance and instruction of God. 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. Do you think that Emperor Haliselassie I of Ethiopia relied on the same theory?

Can you guess the reason why Emperor Hammurabi argued that the sources of his laws were God? The Emperor chose this basis of legitimacy (acceptability) of his legal system as a whole since he thought that taking God, as a source of legitimacy was the most powerful of all basis of rule. He could argue that people had to observe the legal rules on the basis of solidarity. He could have invoked customary rules or habits. He could have invoked popular sovereignty. He could invoke some other sources of legitimatizing his legal system. Instead he selected God as the basis of his system since he believed that it would be difficult for his subjects to question the power of God.

Can you tell the effects of preaching on the part of emperors in Mesopotamia that his legal system was created and maintained by God? In the first place, Emperor Hammurabi easily secured obedience to his laws. In the second place, religion was accepted as the valid source of laws. Third, the theory of divine power served as the stabilizing factor. Mesopotamians did not dare to change their laws; they came to believe that what they had not created they could not change. The fourth effect of the propagation of the divine-origin of laws in Mesopotamia was the empirical feature of the law, which means laws lacked general principles and coherent arrangements as well as distinctions and sub-distinctions.

Can you point out the reasons for the Babylonian legal system demonstrated continuity? Why such legal system survived for more than eleven centuries? One factor for the high degree of stability of the system could be the religious basis of the same. Babylonians attributed the source of law to God; what God made human beings could not change. As already explained above, the second factor could be the conservative nature of ancient societies. In the third place, the geographical conditions of the area produced such stability and sense of regularity. Each year, the floods came and inundated the fields so that their crops would be harvested regularly, and the Mesopotamians desired to reflect such regularity of events in their social organization, means they desired a stable legal system. In sum, the key feature of the Mesopotamian legal system is its religious conception.

2.2.2 The Greek legal system

2.2.2.1 Features: To the Greek, for law to be valid, it had to be tested in light of two cumulative tests: 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. The Greek, however, faced contradictions between the two criteria. By its nature, positive law was thought to be particular, mutable and temporal. Positive law means a law created by human beings. Positive law was time and place specific. Positive law was thus relative to time, place and community. On the other hand, 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). Generally, natural law was presented as absolute while positive law was approached as relative. The contradiction between positive law and natural law lies in these features of the two. The Greek faced contradiction since they accepted two quite different theories at the same time and endeavored to implement those theories. 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.

The Greek experienced another contradiction. 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. The Greek never solved this latter contradiction.

How did the Greek attempt to maintain a balance between the dictates of natural law (continuity) and the dictates of positive law (change)? They used three methods to ease the contradiction. One approach was to subject their law-making process to a 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. The second mode of checking the existence of the balance between change and continuity was taking two possible actions against a citizen who deliberately proposed unjust laws. A citizen who proposed unjust laws would be condemned, depending on the gravity of the situation, to exile, means forced to leave the territory of Athens. 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. The third method of accommodating change and continuity was the creation of a special body named *Nemothia* responsible for changing the positive law whenever the situation required so.

Can you explain why the Greek subjected the laws issued by the popular assembly to higher principles, natural law principles? Why did the Greek decide to test positive law in light of higher principles? No one is certain about the justification for invoking the principles of natural law. However, a couple of speculations may be offered. One is that the Greek were given to philosophical thinking. The other is that the Greek did not trust the popular will; they were quick to appreciate that human judgment might sometimes fail. You can say that natural law played the same role in Greek as a constitution of a modern state. In conclusion, the main feature of the Greek legal system is its philosophical conception.

2.3 The Roman legal system: Before 5th 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. 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. Beginning from the middle of 5th B.C., in particular 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. As you have seen above, even with the XII Tables, the Roman legal system was still empirical in character.

Between 2nd BC and 2nd AD., the Roman legal system demonstrated another shift: the legal system transformed itself from being empirical into being technical and ethical. The system acquired technical and ethical bases. The legal system obtained technical basis means that the quality of decisions was enhanced. Lawyers emerged. The number of commentaries and legal writings increased. Authorities emerged. Experts and different opinions entertained. 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. The Romans did not stop creating such general principles; they endeavored to translate them into thousands of specific legal rules and they checked whether these detail legal rules conform to those general principles. Later the Roman jurists equated the ethical principles with natural law. In a nutshell, the major feature of Roman law is its ethical conception.

The Twelve Tables (451-450 B.C.), http://www.csun.edu/~hcfll004/12tables.html (accessed October 31, 2006)

This is the earliest attempt by the Romans to create a CODE OF LAW; it is also the earliest (surviving) piece of literature coming from the Romans. In the midst of a perennial struggle for legal and social protection and civil rights between the privileged class (patricians) and the common people (plebeians) a commission of ten men (Decemviri) was appointed (ca. 455 B.C.) to draw up a code of law which would be binding on both parties and which the magistrates (the 2 consuls) would have to enforce impartially. The commission produced enough statutes (most of them were already `customary law' anyway) to fill TEN TABLETS, but this attempt seems not to have been entirely satisfactory--especially to the plebeians. A second commission of ten was therefore appointed (450 B.C.) and two additional tablets were drawn up. The originals, said to have been inscribed on bronze, were probably destroyed when the Gauls sacked and burned Rome in the invasion of 387 B.C. The Twelve Tables give the student of Roman culture a chance to look into the workings of a society which is still quite agrarian in outlook and operations, and in which the main bonds which hold the society together and allow it to operate are: the clan (genos, gens),

patronage (patron/client), and the inherent (and inherited) right of the patricians to leadership (in war, religion, law, and government).

The Twelve Tables were written by the Decemviri Consulari Imperio Legibus Scribundis,(the 10 Consuls) who were given unprecedented powers to draft the laws of the young Republic. Originally ten laws were drafted; two later statutes were added prohibiting marriage between the classes and affirming the binding nature of customary law. The new code promoted the organization of public prosecution of crimes and instituted a system whereby injured parties could seek just compensation in civil disputes. The plebeians were protected from the legal abuses of the ruling patricians, especially in the enforcement of debts. Serious punishments were levied for theft and the law gave male heads of families enormous social power (patria potestas).The important basic principle of a written legal code for Roman law was established, and justice was no longer based solely on the interpretation of judges. These laws formed an important part of the foundation of all subsequent Western civil and criminal law.

Twelve Tables, early code of Roman law: Most modern authorities accept the traditional date of 450 B.C., but several place the work later. The tables were supposedly written in response to the plebeians' protest that the patrician judges were able to discriminate against them with impunity because the principles governing legal disputes were known only orally. Two decemvirs [10-man commissions] were appointed to state the law in writing, and they first produced 10 tablets, probably wooden, with laws inscribed thereon; in the next year they produced two more. Exact quotations of the Twelve Tables are rare, but from references in later Latin writings their content has been approximately reconstructed. They appear to have been an exceedingly formalistic statement of the customary law. In later times the Twelve Tables were regarded with reverence as a prime legal source.

If he (plaintiff) summon him (defendant) into court, he shall go. If he does not go, (plaintiff) shall call witnesses. Then only he shall take him by force. If he refuses or flees, he (plaintiff) shall lay hands on him. If disease or age is an impediment, he shall grant him a team (of oxen). He shall not spread with cushions the covered carriage if he does not wish to. Whoever is in need of evidence, he shall go on every third day to call out loud before the doorway of the witness. When a debt has been acknowledged or a judgment has been pronounced in court, 30 days must be the legitimate grace period. Thereafter, arrest of the debtor may be made by the laying on of hands. Bring him into court. If he does not satisfy the judgment (or no one in court offers himself as surety on his behalf) the creditor may take the debtor with him. He may bind him either in stocks or fetters, with a weight of no less than 15 lbs. (or more if he desires). [After 60 days in custody, the case is returned to the court, and if the debt is not then paid, the debtor can be sold abroad as a slave, or put to death.]

*If a father surrender his son for sale three times, the son shall be free." "Our ancestors saw fit that "females, by reason of levity of disposition, shall remain in guardianship, even when they have attained their majority." A spendthrift is forbidden to exercise administration over his own goods. The inheritance of a Roman citizen-freedman is made over to his patron, if the freedman has died intestate and has no natural successor. When a party shall make bond or conveyance, what he has named by word-of-mouth that shall hold good. Marriage by `usage' (*usus*): If a man and woman live together continuously for a year, they are considered to be married; the woman legally is treated as the man's daughter. "If any person has sung or composed against another person a SONG (*carmen*) such as was causing slander or insult.... he shall be clubbed to death."*

*"If a person has maimed another's limb, let there be retaliation in kind, unless he agrees to make compensation with him." (*Lex talionis*) "If a patron shall defraud his client, he must be solemnly forfeited (`killed'). ""Whoever is convicted of speaking false witness shall be flung from the Tarpeian Rock." "No person shall hold meetings in the City at night.`` "The penalty shall be capital punishment for a judge or arbiter legally appointed who has been found guilty of receiving a bribe for giving a decision. "Putting to death... of any man who has not been convicted, whosoever he might be, is forbidden." "Women must not tear cheeks or hold chorus of `Alas!' on account of a funeral." "Anointing by slaves is abolished, and every kind of drinking bout....there shall be no costly sprinking, no long garlands, no incense boxes." "Marriage shall not take place between a patrician and a plebeian." "Whatever the People has last ordained shall be held as binding by law."? "There are eight kinds of punishment: fine, fetters, flogging, retaliation in kind, civil disgrace, banishment, slavery, death.*

2.4 Review questions

Attempt the following questions based on the text reproduced above.

1. List three examples showing that the XII Tables adopted an ``eye-for-eye`` principle.
2. What caused the adoption of the XII Tables? Who drafted it? What were the sources of this code?
3. In what way one can say that the XII Tables were a departure from the past tradition of Romans with regard to the source of law?
4. Why do you think is the name ``tables`` or ``tablets`` given to this ancient Roman code of laws?
5. Given some of the contents of the XII Tables reproduced above, how can you explain the empirical nature of early laws?

2.5 Common Features: Can you identify the key common features of the early legal systems from the preceding discussions? The three ancient legal systems you examined above show some common characteristics. The three legal systems operated on the assumption that human beings were unequal. They did not accept the principle of equality of human beings. The Mesopotamians maintained the institutions of slavery. The Greek and the Romans did the same. Under the three systems, foreigners did have few rights; they deprived foreigners of several rights. In the third place, the early systems had shown an amazing degree of stability, which was attributed to the conservative nature of ancient societies. In general, early societies were taken as closed systems. They conceded little changes. The changes were not basic; 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. Deep and sweeping changes, which we see in modern societies, were unknown. 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. Human beings were presented as passive actors. In addition, there was a belief that laws thus created and modified were put into application by not any

laymen but by those who were assumed to have close relationship with gods. Finally, in the three systems laws initially were non-technical, which means the legal rules lacked developed principles and developed institutions. The legal rules lacked distinctions and sub-distinctions. Modern state law knows of 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 did not have of such arrangements. The legal rules in force were situation-based.

2.6 Summary

The five ancient legal systems described in this unit have several common grounds that are visible in their conception of equality, in the stability of law as well as in their search for higher principles. The Mesopotamian legal system was known for its religious conception of law throughout its life span. The Greek legal system was linked to philosophical foundation of law while the Roman legal system based itself on ethical principles. The table that follows presents the key features of modern western legal traditions and early legal traditions. Do you think that the table summarizes the features of the early legal systems correctly?

No	Feature of Early legal systems	Features of Modern western 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)
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.

2.7 Review Questions

Choose the best answer from the given choices.

1. To Emperor Hammurabi, his Code was valid because

A) God made it.
B) He himself made it.
C) Customary authorities made it.
D) Solidarity demanded so.
E) Habit dictated so.

2. The two tests necessary for the validity of law among the Greek were

A) Human will and god.
B) The voice of popular assembly and natural law principles.
C) Custom and natural law principles
D) The voice of the ruler and indirect representation.
E) None of the above

3. The two shifts that occurred in Roman legal system took place in

A) 5th BC and 2nd BC to 2nd AD
B) 8th AD.
C) 10th AD
D) 6th AD
E) 4th BC

4. Between 2nd BC and 2nd AD, the Roman legal system shift from

A) Technical to ethical
B) Technical to empirical
C) Empirical to technical
D) Traditional to modern

5. In the middle of 5th BC, Roman law shift from:

A) Secular to religious
B) Religious to secular
C) Traditional to modern
D) Made no shift

6. Which one of the following may be regarded as an ethical principle of Roman law?

A) Act honestly
B) Harm no one
C) Give every one his due
D) All of the above

7. One of the following is the common aspect of early legal systems.

A) Stability
B) Religion as the basis of the law
C) The institution of slavery
D) Empirical in nature
E) All of the above

8. Emperor Hammurabi advocated for the divine origin of his Code. What were the consequences of such theory?

A) Disobedience
B) Obedience of the Code
C) Stability of the system
D) Empirical feature of the law
E) All except A

9. One of the following is a mismatch in connection with a test of validity of laws:

A) The Mesopotamian legal tradition-God
B) The Greek legal tradition-Natural Law
C) The Classic Roman legal tradition-Ethical Principles
D) The Greek legal tradition-Direct popular representation & Natural Law
E) The Hindu legal tradition-the Holy Veda
F) None of the above

10. Identify the sound proposition.

A) There is evidence in legal history to conclude that where absolute monarchs prevail, public law is unlikely to reach highest stage.
B) There is evidence in legal history to conclude that where absolute monarchs prevailed there used to be a developed private law.
C) There is evidence in legal history to conclude that a high degree of stability is one of the key aspects of early legal traditions.
D) There is evidence in legal history to conclude that the first stage of early legal systems is uncertain and unsophisticated.
E) All of the above
F) ``A`` & ``D``

11. Which one of the following terms is different from the other?

A) *Decretum*
B) Digest
C) *Pandect*
D) *Florentia*
E) *Ratio Scripta*
F) None of the above

12. According to John Merryman and David S. Clark, key to closing the gab between legal extension and legal penetration in Ethiopia is:

A) Revising the existing codified laws in line with customary laws.
B) Better communication of existing codified laws to the addressees.
C) Directing greater state resources to the implementation of the existing codified laws.
D) Abolishing the existing codified laws.
E) Eradicating customary laws in favor of the existing codified laws.
F) None of the above.

13. Which one of the following followed an eye for eye principle of punishment?

A) XII Tables
B) Code of Hammurabi
C) The Fetha Nagast
D) *Nomo* canon
E) The French Civil Code
F) *Decretum*

14. John H. Beckstrom argues that the ultimate testing ground for the reception of large bodies of new law and new legal institutions is to be among Ethiopian:

A) People as a whole
B) Economic elites
C) Rural people
D) Urban people
E) Political elites
F) None of the above

15. The law that had been in force under the Germanic invaders in the Western part of the Roman Empire was:

A) Germanic legal custom
B) Roman Law
C) A mixture of Germanic legal custom and Roman law
D) Vulgarized Roman Law
E) All of the above
F) the law of the Catholic Church

16. One of the following could not be taken as a component of the Corpus *Juris Civilis* (Body of Civil Law):

A) The Codex
B) The Institutes
C) The Novel
D) The Digest
E) Public Law
F) None of the above

17. One of the following did not contribute to decline in importance of Jus Commune in Europe starting from 19 century:

A) The demise of the Holy Roman Empire
B) The rise of the nation state
C) The popularization of the notion of popular sovereignty
D) The growth of legal positivism
E) The Development of natural law jurisprudence
F) The emergence of the notion of dynastic sovereignty.

18. According to Harlod J. Berman, the history of Western law is not adequately written because of:

A) Nationalist ideology of legal historians
B) Legal positivist inclination of legal historians
C) The predominance of scientific history among legal historians
D) Absence of a common ground in the Western legal tradition
E) All of the above except ``D``
F) ``A`` & ``B``

U.3 Major Legal Traditions of the World

Introduction
This unit is a survey of the principal traditions of the world. It seeks to develop the point that there are several and distinct conceptions of law under the major legal systems of today. The unit draws the distinctions among the various major present legal traditions of the world. It traces the background to major legal systems of the world. The interaction between the western legal systems and traditional legal systems is outlined. The unit consists of several sections. Section one is about the French legal system. The next section covers the German legal system. Section three deals with the common law: British and the American legal system. The fourth section discusses socialist legal tradition. Section five covers the Islamic legal tradition. Finally, sections six and seven cover the African law systems, the doctrines of convergence and divergence, respectively.

At the end of this unit, students should be able to:

- Identify the sources of the major legal traditions of the world.
- Define certain concepts such as equity, code and codification.
- Explain critically conceptions of law under the major legal traditions of the world.
- Compare and contrast the various major present legal systems of the world.
- Examine the interface between the western legal traditions and traditional legal systems.

3.1 The French Legal System[4]

The French legal system belongs to the civil law tradition. The French legal system has borrowed legal style from Roman law. This section discusses the historical and theoretical background to the French legal system. The section enumerates the features of the French Civil Code of 1900. Moreover, the section gives you an opportunity to contrast the French legal system with the German legal system.

3.1.1 Civil law: Perhaps, it is pertinent here to throw light on the term ``civil law` that is more often not associated with the French legal tradition. The meaning of the words "civil law" has not been the same in all-historical periods. In the framework of early and classical Roman law, *jus civile* was the law governing the

[4] The discussions in this section are principally adapted from the following materials: David, Rene & Brieley, John E. C., ``Major Legal Systems in the World Today: An Introduction to Comparative Law``, 2nd ed.(1978) and Zweigert, Konrad & Kotz, Henin, ``Introduction to Comparative Law,`` (Oxford: Clarendon Press, 1992).

relations of Roman citizens. In the 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 Middle Ages to the nineteenth century. But within the framework of a civil law system, as defined, the term ``civil law`` is ordinarily reserved to designate the sum total of rules governing relations of private individuals (as opposed to public laws) as such, with the exception of commercial acts and relations which are subject to commercial law.

3.1.2 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. 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.

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 existence of diverse customary rules and edicts created some degree of legal uncertainty in France. France's need for a single, unified code of laws had been keenly felt even before the collapse of the ancien regime. 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. Louis XIV, the Sun King, had summed up his approach to lawmaking with his famous phrase "It is legal because I wish it."

Before the introduction of the Civil Code, a patchwork of customary laws based on tradition and the whim of the monarch had ruled throughout the continent. The new Code introduced the concept of a unified, logical system based on general principles of law. This facilitated the export of the ideas of the French Revolution beyond French borders.

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

The intervention of the kings in having the customs recorded invited opposition from some territories. The intervention and the effort to write down the various customs in France strengthened the power of the traditional customary laws to withstand Roman Laws. The recording of customary rules saved France from the massive reception of Roman law, which took place in Germany. The codification of customary laws created conflict of different customary rules. Recording of customary law in France had brought about legal certainty. Yet, it could not diminish the substantial differences between them. The recoding efforts of French customary laws made the difference among such rules sharp and conspicuous.

3.1.3 The drive towards codification: As the French kings consolidated their power, the multiplicity of legal systems became more and more unsatisfactory. 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, 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. For example, some legal practitioners believed that there was such a thing as a common law of France. They thought that such common law of France consisted of the totality of the ideas of law, which found expression in the different customs. They argued that the goal was not merely assimilating and harmonizing different customs, but the legal systems of the nation. The king played an important role by ordering compilation of customs. Professional lawyers` associations emphasized the careful and moderate acceptance of Roman law in France. In France, like in England, there developed early a well-organized and thus powerful group of practicing lawyers allied with the king. These lawyers were interested in the centralization of justice in the royal courts. Royal Ordinances were applied side by side with customary laws. These ordinances dealt with questions of feudalism, procedural law, and court organization. Only later did they regulate areas of substantive private law as well as some of the rules found their way into the civil code.

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. This codification only made it easier to see the differences between them. At the eve of the French Revolution, diversity of laws and thus legal uncertainty was the attribute of French law. Observing

that France was unable to unify her laws just before the revolution, a certain French writer wrote: `Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws?" When you travel in this kingdom you change legal systems as often as you change horses.`

3.1.4 The Revolutionary Period (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. It used law as a means for the overthrow of the old society and for building of a new one. The end of law was not actually a technical one but a rather an ideological one.

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. 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.

The French Revolution was primarily interested in legal problems having political and ideological involvements. And therefore since the French Revolution made ideological changes, the next period of Napoleon and the codes concentrated on the technical concept of law. At the close of the French revolution, the problem that remained was to change the technical parts of law that had not been touched by the revolution and to put into definitive technical form of the ideological concepts of the revolution. The revolution had settled the ideological problem of the law.

The French Revolution altered the traditional social order with almost unparallel speed and thoroughness. All the institutions of the old regime were rooted out in a very short order. Such institutions included the absolute monarchy, the interlocking powers of king, nobility, clergy, judiciary, and the old territorial division of the country into provinces, the feudal regime of land and the court system. Human beings inherited status, chained together by the bondage of servitude and marriage. The influence of parental power was immense. In its place, proposition on the rational nature of man was articulated based on the assumptions that if information is given to him, he processes it, develops several alternative solutions and chooses the best option. Man was considered to be also

autonomous, equal, selfish, responsible and with inalienable right at birth. No longer did man had to deal with the intermediary status groups of the old regime. Man had to deal with the state itself directly. The state was seen as an entity bound through its legislation to free its citizens from the traditional authority of feudal, church, family, guild, and status groups, and to equip all its citizens with equal rights.

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. The code also incorporated most parts of Roman law. The code became a model for civil law systems. The 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. The code regulated much of private law matters such as property, will, contracts, liability and obligations. Many of its parts are traceable to Roman law.

3.1.5 The birth of Code Civil: The demand for codification in France preceded the revolution. There was a general dissatisfaction with the jurisprudence of the Superior Courts (*Parlements*) and the diversity of local customs. The revolutionary Constituent Assembly adopted a resolution in 1791 providing for the enactment of a civil code "common for the entire realm." Further steps towards drafting were taken by the National Convention of 1793, which established a special commission headed by Cambaceres and charged it with the task of completing the project within a month. This Commission produced a first draft consisting of 719 articles. Though truly revolutionary, as to both form and substance, the Convention rejected the draft was on the ground that it was too technical and too detailed. Several other drafts met the same fate. Napoleon, First Consul of the Republic, became deeply interested in the project and succeeded in pushing it through the legislative machinery title by title. Napoleon contributed a lot in the process of making the code. Napoleon presided at 36 of the 84 council sessions devoted to the creation of the Code. He made many observations and contributions. Further, Napoleon rested the existence of the Code on his own authority, beginning the document with the words "the laws are executory throughout the whole French territory, by virtue of the promulgation thereof made by the first consul" and concluding with the signature "Bonaparte, First Consul."

When the Code was drafted the fanaticism of the Revolution had calmed down considerably. In the relatively stable political situation under Napoleon, people could have second thoughts. Thus the draftsmen of the Code could make good use of the principles of law which had been slowly developed by the courts of the ancient regime and which had been carefully elaborated and refined by the

writers of the 17th and 18th centuries. In this way, a compromise was made between the revolutionary ideas and the solid craftsmanship of traditional legal institutions.

3.1.6 The French Civil Code: The Code Civil is founded on the idea of the Enlightenment. The code was also 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. 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. 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.

The code conserved a large number of traditional institutions. 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. The theory of natural law simply sates that there are autonomous principles of nature quite independent of religious belief. From those principles human beings can infer a system of legal rules that if given intelligible from according to a plan, can act as the basis for an orderly, reasonable, and moral life in society. For example, the draft code contained the statements: ``there is a universal and unchanging law which is the source of all positive law; it is none other than natural reason and that governs all mankind.``

The function of the legislature was to set up general rules. Interference with the resolution of questions of interpretation affecting the affairs of private individuals would be time consuming and undignified. The quality of legislation would suffer and lawsuits would be prolonged. Thus, Article 4 of the Code states that"if a judge refuses to make a decision on the ground that the law is silent or obscure or inadequate he may be held responsible. ``

The Code avoids the danger of being too detailed. Even the most ingenious legislator could not foresee and determine all the possible problems that might arise. Thus room must be left for judicial decisions to make the law applicable to unforeseen individual cases and suited to changing circumstances of society. The Code leaves room for interpretation, for its terms are often inexact, incomplete and ambiguous.

The Code is a masterpiece from the point of view of style and language. It has often been praised for its clear and memorable phrases, and for the absence of

cross-references and jargon, all of which has significantly contributed to the popularity of the code in France.

The original Code Civil was the law-book of the third estate. The bourgeoisie had consolidated its position with growing self-confidence and political influence. The ideal man in the mind of the drafts men is thus not the little man. 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. It is this idea which gives the code its particular flavor. 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.

How can the Code, which came into being 180 years ago, has withstood the tremendous political economic and social changes that have taken place in France in the 19th and 20th centuries? The legislature issued laws following the changing circumstances (e.g. law on the status of women.) The decisions of the courts helped the Code adjust itself to modern requirements in France. The courts have continually been construing these rules so as to develop, extend, or limit them. The courts in France have brought new legal ideas into play as well as developing old ones. This task has been made easier since the code did have unclear and deliberately designed to require completion of ambiguous, incomplete, etc., areas. The influence of law books and French legal writers interpreting and exposing the Code Civil in a creative manner also influenced the development of the French law.

3.1.7 Spread of French law: French law spread first to Europe, then, to Africa, Asia and Latin America. The French Civil Code was transplanted to Europe primarily through military force. In most areas where the Code was introduced, it was embraced, and survived till Napoleon's personal downfall. The Battle of Waterloo did not end the application of the Code in Europe, particularly in western Germany and Italy. In the Netherlands, the Code survived unaltered until 1838, whereas in Prussia the Code was gradually reintroduced. Even in areas where French rule had been unpopular, such as Spain, post-Napoleonic governments were held up to French standards for a codified law.

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. Latin American countries got independence from Spain in early 19th century. These newly founded states

needed national and unifying civil codes; the only available model was the French Code Civil and Spanish law was out of the question since it was the law of the previous colonial power and since it was neither codified nor uniform even in Spain where local customary laws survived. The Code Civil was a product of the great revolution, rooted in a world of ideas on which the Latin Americans had frequently drawn to justify their own struggles for independence. In its compactness and clarity of phrase, the Code Civil was far ahead of any other code. And furthermore, the code was so full of traditional concepts and ideas especially from Roman law, that its reception was not a deviation from the legal institutions known to the Spanish and Portuguese settlers. Some countries in Asia and Africa received French codes due to the existence of gaps and the force of French colonialism.

The Code had such a wide influence because it was the Code of the French Empire whose military powers, backed by an advanced civilization, made such a deep impression on people not only during its brief life but many years after it was over. The reception of the French Civil Code is attributable not only to the political power of the French Empire, or to the spiritual influence of French civilization, but also in a great measure to the merits of the Code Civil itself. In the 19th century, the Code enjoyed intellectual authority and almost a supernatural appeal as the Code of the Great Revolution, which had abolished the ancient regime. The Code of Napoleon also produced legal unity and equality for the citizens of a centrally organized national state for the first time. The spread of the Code Civil throughout the world was greatly assisted due its admirable language and flexibility of its expression, in brief, its very quality.

3.1.8 Review Questions

Part I Multiple-choice questions

Choose the best answer from the given choices.

1. The French codes were issued in

A) Early 19th century

B) Late 19th century

C) 18th century

D) 20th century

2. One of the following statements is incorrect about the French Civil Code.

A) The Code left no gap at all.
B) The Code envisaged a creative judge.
C) The Code was a product of the French Revolution.
D) The Code was based on the ideals of rationalism.
E) The Code included certain customary laws.

3. The Following is correct about the French legal system prior to codification.
The French legal system lacked legal uniformity.
There were various official and unofficial efforts to codify customary laws.
The compiled customary laws made the need for legal unity evident.
The French politicians and legal scholars believed that legal unification would promote the political unification of the country.
All of the above

4. Identify an element that was not taken into account in the preparation of the French Civil Code.
A) Customary laws
B) Roman laws
C) The French Revolution
D) The idea of rationalism
E) None of the above

5. One of the following statements is correct about the feature of the French Civil Code?
The Code was still inspired by the enlightened excitement of the French Revolution.
When the Code was drafted the fanaticism of the Revolution had calmed down considerably.
The language of the Code was forceful and free from heavy logic and detailed digression.
The Code as a whole was highly influenced by the theory of natural law.
All of the above

6. A legal tradition that worked for the slogan ``One Code-One State! ``
A) The French legal tradition under Napoleon
B) The Mesopotamian legal tradition under Emperor Hammurabi
C) The Roman legal tradition during the Classic Roman Law
D) The Eastern Roman Empire under Emperor Justinian
E) All of the above
F) ``A``, ``C`` & ``D``

7. One of the following contributed to the shaping of the French Civil Code of 1804?
A) Statism
B) Rationalism
C) Radicalism
D) Nationalism
E) Traditionalism
F) Individualism
G) All of the above

8. One of the following statements is incorrect about the French Civil Code.

A) The Code left no gap at all.
B) The Code envisaged a creative judge.
C) The Code was a product of the French Revolution.
D) The Code was based on the ideals of rationalism.
E) The Code included certain customary laws.

9. One of the lessons that can be drawn from the assumptions of the Code Napoleon and from its subsequent application to the dynamism of the French society is that:

A) It is possible to design a code of laws that is simple, non-technical, and straightforward, one in which the professionalism and the tendency towards technicality y and complication could be avoided.
B) It is possible to design a code of laws that would state the law clearly and in a straightforward fashion, so that the ordinary citizen could read the law and understand what his/her rights and obligations are, without having to consult lawyers and go to court.
C) It is sound to emphasize on complete separation of powers, with all lawmaking power lodged in a representative legislature to insure that the judiciary would be denied lawmaking power.
D) It would be utopian to think that it is possible to draft a systematic, complete, coherent and clear code limiting the judges to selecting the applicable provision of the code and giving it its obvious meaning in the context of the case.
E) It is sound to assume that a code of laws should repeal all prior law, whether customary or religious.
F) All of the above.
G) ``A & ``C``

Part II Sound/Unsound Type Questions

Instruction: Read the following questions with care and say `Sound` if you think that the statement is an accurate description of a principle in legal history/comparative legal tradition, or say `unsound` if you think that the statement is inaccurate description of a principle in legal history/comparative legal tradition.

1. The French codes were spread to the other parts of the world much more widely than the German codes.
2. Roman law was in force all over France prior to the codification.
3. One of the key factors for the codification of laws in France in early 19th century was Napoleon.
4. The French codes of 19th century were reflections of France's distrust for the judiciary.

5. The French Civil Code is known for its moderate approach, means giving due attention to modern principles of 19th century and the traditional past of France.
6. The French codes reflected the rights of man.
7. The French Revolution had shaken the foundations of the old order and paved the way for the new order.
8. The French codes reflected the rights of man.

Part III. Essay-type Questions
Answer the following questions.

1. `Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws?" When you travel in this kingdom you change legal systems as often as you change horses.` Comment this.
2. What do you think is the problem with having many legal systems in a given country at the same time?
3. Describe the natural law theory.
4. Define a code.
5. Offer the various connotations attached to the term `civil law.``
6. Enumerate the reasons for the spread of the Code Civil.

3. 2 The German Legal System[5]

The German legal system belongs to the civil law tradition. The German legal system has borrowed legal style from Roman law. This section discusses the historical and theoretical background to the German legal system. The section enumerates the features of the German Civil Code of 1900. Implicit in this section is an attempt to draw similarities and distinctions between the German legal system and the French legal system.

3. 2.1 Background: German law has its roots in the feudal and territorial law that emerged in the 11th century with the development and organization of the city-states and principalities. 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 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, kingdoms and fiefdoms, or very small territories. A parallel development in the 13th–14th centuries was the creation of a separate and distinct body of more sophisticated city law that is traced to Saxonian cities from the early years of the 14th century.

[5] Id.

During the period of emergent German law, Roman law refined and reshaped by late medieval Italian scholarship, was also finding its way to the German lands. The eventual "reception" of Roman law was facilitated by the general application of canon law and also by the continued inability of a fragmented Germanic legal tradition. While the reception of medieval Roman law was never total, it achieved dominance throughout the empire by the end of the 15th century. Even as the Holy Roman Empire was slowly falling into decay from the close of the Middle Ages, and as the various German kingdoms asserted independence in the drafting of legislation, Roman law remained the constant in the legal tradition.

Germany came in contact with Roman law relatively late (by the middle at 15th century). The reception of Roman law was much greater in Germany than in France. 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 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 royalist lawyers to make the effort to produce a unified private law. Roman law was not considered as a foreign law. The legal methods developed by Germanic law became increasingly unsuited to the needs of the time. The judge made his decisions on the basis of traditional legal knowledge, practical wisdom, experience, and practicality, and from an intuitive perception of what best answered the objective and concrete facts of the case. But such an irrational method of finding law, based on tradition, seemed increasingly unsuitable to the social and economic circumstances of the later middle ages.

There was thus a legal vacuum. And Roman law flowered. Roman law began to dominate not because its rules were substantially better or 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. 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. Had the indigenous law been collected, ordered, and rationalized by an organized group of judges and jurists, the categories of Roman Law could have been used, as the French experience shows, to ensure it and make it suitable to totalized circumstances of the frames, but in Germany the necessary secret and political conditions just did not exist; the traditional law was still in a pre-scientific stage, diverse and disorderly so that instead of being harmoniously integrated into the

local legal culture under the supervision of an organized class of lawyers Roman legal ideas and institutions were adapted wholesome in many parts of the country and for many areas of law.

Modern German law actually begins with the revived interest in natural law combined with a movement for national codification. The most extensive results were the Bavarian codes on criminal law and criminal procedure and civil procedure of 1751 and 1753, and the civil procedure code of Frederick of Prussia—the first book of the *Corpus juris Prussia* of 1781. The final efforts of the *ancien régime* in all of Germany were overshadowed by the revival of a national spirit in Germany after the Napoleonic Wars.

The series of political transformations in Germany after the Napoleonic period centered on the development of national identity culminated in the defeat of Austria in 1866 and of France in 1870. For the next 30 years, the drafting of codes based on national needs and culture occupied all of German legal scholarship. The resultant codification was substantially an accomplishment of the "historical school" of German-Roman law scholarship and a reaction to the natural law orientation that influenced the French-controlled civil law tradition. New codes were enacted throughout the Empire for the first time. A commercial code adopted by the German Confederation in 1861 came into force for the Empire in 1871. And Prussia also adopted a criminal code in 1851. Codes of civil and criminal procedure were adopted in 1877.

3.2.2 The Padectist School: It was the historical school of law {note: this theory is also called the custom theory; you learned about it in the second section of unit 1 of this course} that produced the Pandectist school whose only aim was the dogmatic and systematic study of Roman law material. For followers of the school of the Pandectist, the legal system was a closed order of institutions, ideas, and principles developed from Roman law. One only had to apply logical or scientific methods in order to reach at solution of any legal problem. In this way, the application of law has become a merely technical process obeying only the logical necessity of abstract concepts. According to this school, the application of legal rules has nothing to do with practical reason, with social value judgment, or with ethical, religious, economic or policy considerations.

In Germany, at the time there was no class of practicing lawyers bound together by professional solidarity. And the integrations of legal life on the political and practical levels were delayed by the influence of powerful territorial rules until late in 19thc. In such a situation, the pandects school could at least claim for itself that by producing a method of studding law that was common to the whole of Germany it had brought about integration at the theoretical level. The Pandectists created a set of clear and clearly distinguished concepts, which

contributed much to the technical sophistication of German Law. But they did not seek out the real forces in legal life. They did not ask what ethical, practical, or social justification for their principles there might be. Consequently, much of what they wrote is abstract and hairsplitting. 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. The German Civil Code was a major, detailed and innovative body of law and came into force on 1 January 1900.

3.2.3 The German Civil Code: 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 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 an extreme and impersonal 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. The institution of private property and succession guaranteed to the propertied classes, who alone benefited from them, the perpetuation of their power of controlling the means of production and the Code was created at a time of relative social and political stability. Its spirit was retrospective and reflective. It sought to maintain a situation favorable to the establishment.

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 reflected the belief that the general good could spontaneously flow from the interplay of economic forces provided that the state did not interfere. 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. Commerce and industry were becoming much more important economically than farming, and urban populations were expanding rapidly, especially with industrial workers. But for the Code, the typical addressee was not the small artisan on the factory worker but rather the moneyed 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. In language, method, structure and concept the code is the child of the deep, exact and abstract learning of the German Pandectist School. The Code did not addressthe 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 throughout.

3.2.4 Spread of German laws: 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 she was a latecomer to the scramble for different parts of the world. There is another reason for this little influence. 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. So there were then little legal gaps to be filled with in countries in Africa and elsewhere.

3.2.5 Code and codification

What is codification of laws? Is it different from compilation/consolidation of laws? Do we have different approaches to codification of laws? This sub-section is set out to briefly throw light on these questions.

3.2.5.1 Codes and codification: A code of law is an area of law documented in a general, systematic and comprehensive manner. But Emperor Hammurabi liked to name his law as a code. The XII Tables of 5th BC is also taken as a code. Emperor Zerayacobe of 15th century could take his `Fewese Menfesawi` as a code of law. The concept of a code of law should be understood in context for there is no universal definition of a code. The Code of Hammurabi cannot be expected to be as complex, complete and systematic as the French Civil Code or the Ethiopian Commercial Code. Codification is the process of accomplishing this task.

Compilation of laws is not expected to be as systematic and complete as a code of law. Compilation refers to putting together of several statutes in a readable form. Consolidation of laws relates to putting together of statues on different nature issued over time in a readable manner; the aim of consolidation of laws may be to know the laws repealed or amended. Compilation and consolidation of laws are not vested with validity.

Codes of private law reflect the particular historical situation in which they are produced. Many codes consolidate the results of a recent reconstruction of society. Their advantage is that the idea of man and the model of society may be expected to remain valid for a considerable period. Other codes, by contrast, are created at a time of relative social and political stability. Their spirit is often retrospective and reflective, seeking to maintain a situation favorable to the

establishment. The German Civil Code, for example, is one of these rather conservative codes.

3.2.5.2 Codes and the Enlightenment: A decisive change occurred in the intellectual climate of Europe in the 17th century. The Enlightenment sought to free the individual from his medieval bondages by subjecting the traditional activities in religion, politics, law and culture to rational critics. The Enlightenment wished to make it possible for human beings to create a new view of the world on the basis of reason. The particular product of this idea was codification. Codification is the idea that the diverse and unmanageable traditional law could be replaced by comprehensive legislation, consciously planned in a rational and transparent order. In France, direct political action was the result of the enlightenment. In Germany, the Enlightenment led only to abstract conceptions of law.

3.2.5.3 Codification and nationalization of laws: Codification was a unique socio- historical phenomenon developed in the civil law tradition during the 19th century. The Codes drafted during this process differed from the compilations of the Roman, Canonic law, or other codes. The root of the Codification was the "intellectual revolution" that took place in Europe in the 18th century with its principles and doctrines based on the enlightenment, rationalism, secular natural law, Bourgeois liberalism, and nationalism. These ideas produced a new way of thinking about society, law, economy, and state with decisive consequences for the civil and common law tradition. This development deeply influenced western nations, producing dramatic events, specifically, the American and French Revolution, the wars of independence in Central and South America, and the unification of Germany.

The Codification was not focused on gathering, compiling, improving or reforming the existent pre-scientific law. Codification rather focused on planning a better society by means of new systematic and creative law. According to John Merryman, one of the most important aims of the French Revolution was to unify private law. As a result, "the spirit of the intellectual revolution led the French to promulgate five codes. Of the five codes, the Code Civil is traditionally well known for its fundamental role in consolidating the modern Codification and its vast influence around the world.

Since the ideology of the French Codification reflected the influence of the French Revolution, one of its principal objectives was to repeal entirely the old legal system. In fact, the institutions of the Ancien Regime, absolute monarchy, interlocking powers of the King, nobility, feudalism, territorial division, courts system and others, were eliminated. In its place, by means of the Codes, a new legal system was institutionalized. The legal system was based on principles of

the French Revolution and the enlightened society. The primacy of the statute law incorporated the equality under the law, individual freedom, private property, liberty of contract and separation of powers to prevent intrusion of the judiciary into areas reserved to the legislative and executive.

According to the principles of rationalism, the Codification focused on systematizing and simplifying the legal system. As a consequence, it was necessary to draft codes without gaps and with coherent, clear, and complete legal rules. Thus, as far as accessibility to the people was concerned, the French Civil Code represented the model of coherence and simplicity. The German Civil Code of 1896 (effective in 1900) had a profound impact on modern Codification. The differences between French and German civil codes are relevant. The former is based on the principles of rationalism and natural law whereas the latter is scientific, technical, and heavily influenced by the Pandectist system.

The key reasons offered by scholars to explain the 19th century codification in Latin America have been the need to avoid uncertainty of the applicable law, to stabilize the legal system, and to consolidate new national regimes. In fact, after independence, drafting civil codes and constitutions was the primary interest of jurists and legislators in Latin American new independent republics.

Maria Luisa Murillo, The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification & Recodification, 11 J. Transnat'l L. & Pol'y 163 (2001).

The development of the Roman law in a strict sense ended with the compilation of Justinian. But the study of the Roman law and the radiation of the Corpus Juris Civilis continued through the middle ages and led to the era of "reception." Then, social, economic, political, and intellectual developments brought about the quest for, and the achievement of, codification in a number of countries. The variety of forces behind the movement for codification makes generalizations difficult. Nationalism (and quest for national integration), the bureaucratic organization of modern states, paternalistic despotism, natural law doctrine, quest for rational legislation, and the desire for the consolidation of revolutionary achievements may be mentioned. For a better understanding of the historical process of codification, we may distinguish four types of codes. These types correspond to four distinct conceptions concerning methods and purposes of codification.

The first type is the digest code: a clarification and systematization of existing law without significant alteration. It secures orderly arrangement of legal provisions, convenience of ascertaining, and accessibility of the law. This type of code, which is exemplified by the Justinian legislation, is a "compilation" rather than a true "codification". A second type is the reform code: an effort at systematization, clarification, and reform of the law in accordance with the desiderata of an enlightened despotism. Definite legal consequences are attached to all conceivable fact situations. Of this kind is the Prussian Code of Frederick the Great. A third type is the revolutionary code: a complete legislative statement of principles rather than rules in accordance with a logical scheme. This involves enactment of new law which is intended to replace the law of the past. The Napoleonic Code was originally conceived as a revolutionary code but actually is in

part revolutionary and in part a reform code. Finally, a fourth type of codification is represented by the so-called common law codes. These are restatements of the case law, "declaratory" of the common law in force in particular jurisdictions. They are characterized by casuistry and by the broad authority accorded to judges. Of this kind are the codes prepared by David Dudley Field.

3.2.6 Review Questions

Part I Answer the following questions.

1. What is codification? Give at lease two meanings of codification?
2. What motivated the 19th codifications in Europe most?
3. Is there any connection between code and the doctrine of enlightenment?
4. Is it correct to state that a code of law is a child of its time? Assuming that you endorse this assertion, can you illustrate it.

Part II Read the following questions with care and say `Sound` if you think that the statement is an accurate description of a principle in legal history/comparative legal tradition, or say `Sound` if you think that the statement is inaccurate description of a principle in legal history/comparative legal tradition.

1. The Historical School is related to the Pandectist School.
2. As opposed to the French legal system, the German legal system was highly affected by Roman law.
3. The French legal system was not influenced by the principles and techniques of Roman law.
4. The Historical School wished Germany to depart from the Natural Law theory, which influenced the development of the French legal system.
5. Like the French legal system, the German legal system was featured by legal uncertainty before codification.
6. Prior to the issuance of the German Civil Code, Germany had the tradition of codifying its laws.
7. The western legal tradition can be put into a single category in terms of geographical origin and of identical basic assumptions.

Part III Multiple-choice Questions

Choose the best answer from the given choices.

1. Which one of the following statements is incorrect about the German Civil Code of 1900?

A) It had unnecessary scholastic structure, which is the result of the influence of the abstract conceptualism of the Pandectist School.
B) The Code uses legal jargon; it has a complicated system of cross-references.
C) The Code ignored many legal traditions of Germanic origins that were still vital among the German people on the top of abandoning the traditional ethical

obligations and relationships of trust in family and society in favor of an extreme and impersonal individualism.

D) The Code was created at a time of relative social and political stability.

E) The Code was more the summation of the 19th than the reflection of the 20th century.

F) None of the above

2. The German Civil Code was transplanted much less extensively than the Code Civil and the common law because:

A) Germany did not have a colony.

B) Germany had had few colonies.

C) The German code was known by its high degree of abstraction.

D) Germany made codes very late and at the time the German code came into force the legal space in developing countries had already been occupied by the Code Civil and the common law.

E) Germany did not want to impose its codes on other countries.

F) ``B``, ``C`` & ``D``

3. The German Civil Code was transported to fewer countries as compared to the French Civil Code since:

A) Germany had fewer colonies.

B) The German Civil Code was found out to be highly abstract.

C) By then there were little gaps in developing countries.

D) All of the above

4. Find out the correct statement.

A) F. von Savigny developed the Historical School.

B) The Historical School wished Germany to follow the Roman law style.

C) The Historical School was responsible for the delay of codification in Germany in 19th century.

D) The Historical School resulted in the adoption of a highly abstract code.

E) All of the above except B

5) A factor that can be used to distinguish the French legal tradition form the German legal tradition is:

A) Distinctive ideological factor

B) Assumptions about human beings

C) Distinctive historical development

D) Material and authoritative sources of law

E) Distinctive legal institutions

F) The existence of a monarchy system in the French legal tradition

6. The German Civil Code was transported to fewer countries as compared to the French Civil Code since:

A) Germany had fewer colonies.

B) The German Civil Code was found out to be highly abstract.
C) By then there were little gaps in developing countries.
D) All of the above.

7. Identify the correct statement.

A) The Mesopotamian legal tradition was religious in conception.
B) The Roman legal tradition had been ethical in conception in its entire history.
C) The Greek legal tradition was philosophical in its entire course of development.
D) The French legal tradition was ideological and technical in its entire life span.
E) The French legal tradition was empirical and ideological in its entire course of history.
F) The Code Civil was partly technical and partly empirical.

3.3 The Common Law Tradition[6]

There is a common factor that goes through the British and American legal system: both systems give recognition to judge-made laws. Both systems also show a high degree of stability. The British legal system has maintained itself without major interruption since 11th century while the American legal system has survived since 17th century. Yet each system maintains its own unique historical origin and development. The present section traces the origin of the British legal system, describes the unique features of the British legal system, explains the role of equity in the British legal system, considers whether Roman law influenced the British legal system and examines the factors that accounted for the 19th century legal reform in England. The same items of discussions are raised in relation to the USA legal system too.

3.3.1 The British legal system

The sub-section maps out the key features of the British legal system.

3.3.1.1 The British style: In the English legal system, legal technique is not interested in interpreting statutory texts or analyzing concrete problems so as to fit them into the system conceptually. The English legal system is principally interested in precedents and types of case. The English legal system is devoted to the careful and realistic discussion of live problem. The English legal system seeks deal with concrete and historical terms than think systematically or in abstract.

The well-known expression of the American judge Holmes: ``the life of the law has not been logic; it has been experience`` is true of other systems. But this

[6] Id.

expression was created for the Anglo-American legal system. Some legal systems are more consciously tied to their past than others, more attached to traditional forms of legal thinking despite social and economic changes. No country has clung as firmly as England to its own style of law throughout the centuries.

Many areas in Germany accepted Roman law in its entirety. Roman law had an essential influence on the principles of the law in France. The influence of Roman law on the common law of England has been minor. England was not affected in practice by the idea of codification. The idea was born of the law of nature and the Enlightenment. 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.

England never had an explosive political upheaval such as the one occurred in France in 1789. 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. Such a thing has never happened to English law.

In the middle of 11th century, William I succeeded to create a tight, integrated, rather simply organized feudal system. He made himself the supreme feudal overlord. He took land from his opponents. He distributed land to his supporters in return for rendering services so that his political power would tilt towards the center. The most influential barons were relegated to the peripheries to protect the borders against the hostile Scots Welsh. The invaders place tax laws and implementing institution in place. Fiscal reasons also justified the increasing intervention by the central royal administration in civil and criminal law to protect the biggest land owning class. The Royal courts emerged. The royal courts applied more modern and progressive rules. These progressive rules gradually led to the disappearance of local laws. The prestige and authority of the royal judges increased.

England very early enjoyed a unified law. England created the common law in the 14th century. This was not develop in France until 19th or in Germany until 19th and even then only in theory of the Pandectists School. 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 as well as on the philosophy of the Enlightenment and the thinking of natural lawyers. Roman and England gave judicial protection to rights only if the plaintiff could obtain a particular document of claim. The very similar ways in which litigation was initiated in English and Roman law led legal practitioners in Rome and England to think not so much in terms of rights. Legal practitioners in England

and Roman system thought in terms of types of action. Roman law and medieval common law were both dominated by procedural thinking. In both systems, the rules of substantive law emerged later from procedural law.

3.3.1.2 Origin of Case Law

O.F. Robinson, T.D. Fergus & W.M. Gordon, An Introduction to European Legal History (1985)

The origin of the idea of judge-made law can be traced back to the time when the king himself presided as judge, earning for himself the title of, "Dispenser of Justice" or "The Fountain of Justice. In England, although the kings gave up the practice of presiding as Chief Judge very early, the courts always followed the king in his travels throughout the country, until the Magna Carta in 1215 enacted that the Royal Courts should be fixed in one particular place for the convenience of the public. Case law grew up in England because of the accident of the early English judges being Normans. They were foreigners to England. They were bound together by an esprit de corps. The binding element made early judges in England respect each other's decisions, especially when these decisions dealt with matters, which were strange and unfamiliar to them. In England, the Norman judges when they used to meet at the Temple discussed their cases, and started the practice of following each other's decisions. Once the Bar discovered that the best argument in favor of a particular case was the decision of a brother judge in a similar case, they began to take notes of cases by these judges. And in that manner law reporting came into existence. Law reporting became an established practice in this manner.

And now the opinions of one judge are regarded as an authority binding on the other judges. The growth of case law in England was also accelerated by the reaction that set in against the reception of Roman law. On the continent, particularly in countries like Germany and France, the indigenous or local law was found to be unsatisfactory as society progressed. And whenever a complex case came up, to which the local law could supply no remedy, it was the practice of the judge to apply Roman law.

In England also, the local law was found to be unsatisfactory with the advance of civilization. The same remedy of introducing Roman law was attempted. But the common lawyers resisted it. In order to meet the exigencies of the situation, the judges resorted to a fiction. The fiction stated that there was no legal problem that could not be solved by the application of customary law. Every judge carried about in his brains a complete body of such law ''of amplitude sufficient to furnish principles which would apply to conceivable combination of circumstances.'' A judgment or declaration of a judge was supposed to be in conformity with the custom of the land. When subsequent judges followed such declarations for the sake of conformity, there grew up in England the practice of following precedents. It is possible that the judges were influenced by Roman law principles. And that they borrowed in large quantities from the Roman law, but that they did not rest the authority of their decisions on the Roman law. They based their decisions on the fiction that their judgments indicated the custom of the land.

Soon however this fiction was dropped. Decisions began to be followed for the sole reason that they came from judges who were delegates of the king, entrusted by the king himself to administer justice. During the time of James I, official reporters were first appointed. And later on, each single decision standing by itself had become an authority, which no succeeding judge was at

liberty to disregard. In conclusion, the first reason for the emergence of the case law doctrine is an accident of history, namely the Norman Conquest. The Normans were strangers to England. As strangers, the Norman judges had naturally a strong sense of brotherhood, which led them to follow each other's decisions.

Moreover as Maitland remarks, this was an age of texts and the written word in a law report had a special sanctity of its own ''Let us not explain this by saying that the men of the time could do no better. On the contrary, we must remember that the educated men of the time were great citers of authorities. The medieval scholar, were the divine, philosopher, canonist or civilian, could give you a text for everything, and a text you could find without much labor, if you had a copy of the book to which he refereed. How is it that this system has been such a success in England? Any way has it not speed to other countries, to France or to Germany? Dr. Holdsworth answers this question, and says that the peculiar success of case law in England is due to certain special conditions in which it originated and was developed. The foremost reason, he suggests, is the early centralization of the administration of justice in England. Thanks to the love of uniformity and order of the Norman conquerors, England obtained this at a very early period in her history, and even "at the beginning of the nineteenth century the English judicial system was more completely centralized than in Europe." Another reason he suggests is the limitation in the number of reports and in the number of courts whose decisions are reported in England. Too many courts and too many reports would burden the law with "so great a mass of decisions of different degrees of excellence that its principles will become sufficiently uncertain to afford abundant material for the infinite disputations of professors of General Jurisprudence."

3.3.1.3 The role of equity: Towards the end of the 14th century, the legal creativity of the royal court gradually began to decrease. It became clear that the procedure of those courts was in many respects too crude. The procedure was also rather formalistic and that the applicable law was too rigid and incomplete. Cases were being lost because of technical errors. Cases were lost because witnesses had been bribed. Cases were lost also because of the opponent's political influence.

Thus, in 14th century parties who had lost a lawsuit in the king's courts on one of the grounds or who could not obtain appropriate writ petitioned the king for an order compelling his adversary to do as morality and good conscience required. 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 not meant a group of maxims of fairness. 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 openly contradict those of the common law. The rules of equity did not seek to replace the common law. Instead, equity supplements to the common law. Equity is

often extremely important; and sometimes goes so far as effectively to neutralize the common law rule. Equity was not a system but common law was or is.

In the 14th century, the nature of English law and the course of its development were fundamentally affected. The main factor for such development was the fact that very early in its history, there arose a class of jurists who organized themselves in a kind of guild and so exercised a very great influence. In the continent, legal education has always been the task of universities. Legal education in the continent was rather theoretical and remote from practice. In England, legal education was the monopoly of the Inns of laws throughout the whole middle Age and until the 19thc. In these circumstances, legal education would tend to be primarily practical and the device of a professional skill than a scholarly science. The Inns shaped court procedures through moot courts, court proceedings, character shaping, disciplinary power, etc. Beginning from the 13th c, there had been a tendency to choose the judges of the royal courts from the ranks of lawyers without any intervention by the kings. The character of English law has unquestionably been deeply marked by the fact that the leading lawyers have never been professors or officials but legal practitioners. They lived, judges and barristers alike, in the closest social and professional contact at the central seat of the major courts. They were strongly organized in powerful professional bodies. The Inns of Court not only saw to the recruitment of new lawyers and admitted them to the profession but also had a monopoly over their legal education.

In the 10th and 17th centuries, the common law faced the threat of being entirely ousted or at least pushed into the wings by Roman law; this was the time of great conflict between parliament and the English kings who wanted an absolute monarchy. In this dispute, Roman law had a great appeal for the royalists for it alone could support the political claim that whatever it pleased the king had the force of law. The kings moved to establish the Star Chamber, a special court, as there was a favorable intellectual climate from lawyers and churchmen who were not practitioners and educated on Roman law.

3.3.1.4 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, who were devoted to the maintenance of the common law on grounds of principle and profit alike, had built up over three centuries. These lawyers censoriously threw all their weight behind parliament, the eventual victor in the political battle, of the time. The common law became a mighty weapon in the hands of the parliamentary party in the struggle against the absolutist prerogatives of the king, for in its long history it had developed a certain tenacity, its very cumbersome and formalistic technique serving to make it less vulnerable to

direct above. After a bitter struggle in the course of the 17th century, all threats to the survival of the common law as the supreme law of land disappeared and a long period of internal peace began. In this period, the English Bar produced a whole series of eminent judges under whom common law and equity developed peacefully, adapting themselves to the needs of a country whereas industry and trade, both internal and external, increasingly grew in importance with agriculture.

Amir Aaron Kakan, Evolution of American Law, From Its Roman Origin to the Present 48-FEB Orange County Law 31 (2006)

Influence of Roman Law on English Law-Tracing the influence of Roman law on Anglo-American jurisprudence requires one to examine the impact of Roman rule over Britain. This inquiry also entails the effect of Roman law on the evolution of English law, in particular the English common law. Originally, Britain came into existence around 100 B.C.E. when it was settled by a group of people known as the Iberians. In 55 B.C.E., as a part of his campaign at the Gulls, Julius Caesar attempted to conquer England. However, his efforts were hampered by more important matters at home. Following the fall of the republic, Roman emperors continued their military actions against Britain, until it was conquered around 84 C.E. Britain remained under Roman control for over four centuries during which Rome established a sophisticated road system and towns such as Londinium, the modern city of London, and Eboracum, the modern city of York. More importantly, the Romans imposed a well established legal system, similar to that of Rome, on a society that for the most part was lawless. Additionally, Britain became home to some of the empire's highest courts. Unfortunately Britain's glory years were numbered. In 410 C.E., the Romans abandoned Britain to defend Italy against German invaders. In the aftermath of their departure, Britain fell into the hands of savage Saxons and Germanic tribes, who brought a culture of darkness to the former Roman colony.

The Saxons' invasion wiped out everything that was "Romanized." However they failed to completely eradicate the Roman legal system that was already in place. Although the Saxons imposed their own laws on England, Roman law survived through the work of Christian clergy of England "whose personal laws were rooted in Roman law." This trend continued until the 11th century when England witnessed a revival of Roman law. In 1066 C.E., William the Conqueror and the Normans of France captured Britain and reconnected it with the rest of Europe. William, along with his sons, established a new court system that favored Roman law. They also placed the administration of justice in the hands of legal scholars who were trained in Latin and Roman law. In 1149 C.E., Oxford University began teaching and analyzing Roman law. "William I (of England), was called The Conqueror (1027-1087), was the first Norman king of England (1066-1087), and has been called one of the first modern kings and is generally regarded as one of the outstanding figures in western European history." Until the Seventeenth Century the study of Roman law at English Universities held a rank second only to theology.

This led to the exploration of the Twelve Tables, Justinian's Code and other Roman legal works by law students, judges and law scholars. By the 13th century, the study of Roman law had spread to other universities, including Cambridge. Until the Seventeenth Century the study of Roman law at English Universities held a rank second only to theology. At the same time, Roman law also channeled into England from France by the wife of Henry II, Eleanor of Aquitaine. Henry II, king of England (1154-1189), was the first monarch of the house of Anjou, or

Plantagenet, and was an important administrative reformer. He was one of the most powerful European rulers of his time. (See generally Encarta.) The laws, which attained the title Oleron's Law, was a body of law governing various matters. Oleron's Law was inspired by the ancient Roman law and it was received into English law by the Eighteenth Century. Overall, the revival of Roman law, which Britain witnessed from the Twelfth Century onwards, uprooted English law from its "Saxonian" Dark Ages into the era of common law.

The Rise of the Common Law- The common law derives from English medieval law, as administered by the courts of the realm and reflected the "common" customs of the kingdom. The very term "common law" is the English translation of the Canon Law term Jus Commune. Canon Law (Greek kanon, "rule" or "measure") usually refers to the body of legislation of various Christian churches dealing with matters of constitution or discipline. Although all religions have regulations, the term applies mainly to the formal systems of the Roman Catholic, Orthodox, and Anglican communions. It is believed that Canon Law attained many of it features from Roman law.

In the simplest terms, the common law is the accumulation of precedents or prior decisions made by the courts. It is believed that common law was invented under the reign of Henry II during the Twelfth Century. The jury, which is a prized feature of the common law, was also introduced around the same time. The prevailing view is that the jury is not of Anglo-Saxon origins, but of Frankish or continental European origin. Legal scholars also contend that the concept of the jury was borrowed from the Judices. In Roman times Judices was a person who was appointed by the praetor to determine facts in legal controversies. Using the common law system, the English courts began to rule on matters and issued writs during the reign of Henry II. In developing their legal philosophies, English judges commonly referred to Roman law for guidance. Accordingly, they incorporated elements of Roman law into their holdings.

Roman Influence on English Legal Works-As the common law developed, so did the study and scholarly writings on English law. The earliest known work on English law was composed in the late Twelfth Century by England's Chief Justiciar, Glanville. Written in Latin, Glanville's masterpiece was an imitation of the Institute of Justinian and as such it frequently cites to Roman law. Almost 25 years after Glanville's work, the English produced the Magna Carta (Latin for Great Charter). Considered by many historians and legal scholars as the foundation of individual liberties, the Magna Carta was the byproduct of disputes between King John of England and the Church. John (of England), called John Lackland (1167-1216), King of England (1199-1216), was best known for signing the Magna Carta. He was the youngest son of King Henry II and Eleanor of Aquitaine.

During the Thirteenth Century, there were constant political battles between the Monarchy and the English church. John had alienated the Church by quarreling with Pope Innocent III over the appointment of archbishops. The Pope responded by excommunicating King John and halting all public church services in England. Furthermore, John had angered his subjects by imposing heavy taxes and violating feudal law. Thus, in an effort to ease public tension and to make peace with the Church, John agreed to sign the Magna Carta on 1215 C.E.

Composed by Cardinal Stephen Langton, Archbishop of Canterbury, the Magna Carta extended the liberties of the Church and individuals. Langton (?-1228), was an English prelate and cardinal. He was educated in Paris, where he became the friend of Cardinal de' Conti, later Pope

Innocent III. Innocent made him a cardinal in 1206, and the following year Langton was elected archbishop of Canterbury. His election was resisted by King John of England, but after six years he was admitted to the office, when John made terms with Innocent in 1213. Langton was a prolific writer and erudite scholar who wrote extensive commentaries on most of the books of the Old and New Testaments and was responsible for the chapter division of the Scriptures still in use today.

The Great Charter granted every citizen equal access to the courts. This principle was expressed in the following words: "To no one will we sell, to no one will we deny or delay right or justice." The document also stated that "no free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land." This clause required the king to follow certain procedures in assigning punishment and it established the notion of trial by jury in criminal cases, which was non existent prior to the Thirteenth Century. Along with these revolutionary principles, the Magna Carta also introduced other monumental legal doctrines such as "equal protection," "due process of law," "law of the land," and "free man," all of which were later incorporated into the Constitution of United States, which guarantees "equal protection and due process of law," in 14th amendment, and the right to jury trial in all criminal proceedings in the 6th amendment.

Although, there is no direct evidence linking the Magna Carta to Roman law, many historians and legal scholars believe the Magna Carta was heavily influenced by Roman law. After all, the document was drafted by the Church whose laws traced its origin to Roman law. In fact, during the reign of the Saxons, it was the Church that kept Roman law alive in England. Moreover by the Thirteenth Century, Roman law was the only rich and concrete source of law available. Thus, in drafting the Magna Carta, writers of the Charter would have had to analyze the civil liberties proclaimed in Roman law. Lastly, when the Magna Carta was written, the study of Roman law was very popular in English law schools, like Oxford. In fact, until the Seventeenth Century, many English law schools exclusively taught Roman law. Such high regard for Roman law certainly had to have substantial impact on the Magna Carta.

Approximately, 50 years after the enactment of the Magna Carta, Britain witnessed the rise of the greatest English jurist of the middle ages--Henry Bracton(?-1268 C.E). He was the last Chief Justiciar of England and is often regarded as the father of English common law. Although there is no proof, it is widely believed that Bracton received his education at Oxford, where he attained Doctoral degrees in Civil law and Canon law. His most famous work is The Treatise of Laws and Customs of England, composed in Latin around 1258 C.E. Bracton's treatise was similar to Glanville's works. However Bracton's importation of Roman Law was immensely greater. Bracton's works were also modeled after the Institute of Justinian and the Justinian Code. In his works, especially The Treatise of Laws and Customs of England, Bracton's objective was to remedy the imperfections of English law by introducing elements of Roman law from Justinian's Corpus Juris Civili into the common law. For centuries, Bracton's treatise was considered as the ultimate authority in English law. Even Edward Coke, a renowned English jurist of the Seventeenth Century, referred to Bracton's as the authority in English common law. In sum, Bracton's treatise "not only testifies to the influence of Roman law and of its medieval exponents, but at the same time, it remains a statement of genuine English law ... so detailed and accurate that there is nothing to match it in the whole legal literature of the Middle Ages."

In the centuries following the Magna Carta and Bracton, the English continued to import Roman legal principles into their laws. In the Fourteenth and Fifteenth Centuries, English judges and legal writers commonly relied upon Roman law as the authority in many areas. In doing so, concepts of Roman law infiltrated into the English Law. Unfortunately, the influence of Roman law was not always acknowledged by the courts. In general, the British had a tendency to be hostile towards foreign laws. However, England's lack of acknowledgment had very little impact on its use of Roman law. In fact, around the Sixteenth Century, England witnessed the second revival of Roman law. Royal academies dedicated to the study of Roman law were established at Cambridge and Oxford. Additionally, there was a new wave of writing on various doctrines of Roman law. All these events further reinforced Roman influence on the English common law.
The Arrival of English Common Law in North America-When the British colonized the American continent, they introduced the English common law to the 13 colonies. After the American Revolution in the Eighteenth Century, the English common law, as it existed at the time of the revolution, became the foundation of the American legal system. In adopting the English common law, the American Colonies embraced the nuances of Roman law embedded in the English common law. These nuances have had significant impact on the evolution of American law. Although, the American legal system was not directly influenced by Roman law, the "Romanization" of American law has been tremendous. Most of our basic legal doctrines are deeply rooted in Roman law. Laws governing Wills, Successions, Obligation, Contracts, Easements, Liens, Mortgages, Adverse Possession, Judgment, and Evidence come from Roman law. The fundamental concept of Habeas Corpus and trial by jury as well as many principles of Tort law are of Roman origin. Further, the "dearly cherished principle and familiar palladium of English law and American liberty, every man's house is his castle, is not of Anglo Saxon, but of Roman origin." In the remainder of this article, I will explore the impact of Roman law on American legal principles. To do so, I will examine various areas of our laws and discuss their Roman origin.

Latin and Anglo-American Legal Terminology-In no other area is the influence of Roman law on the Anglo-American legal system greater than in the language of the law. When Justinian established law schools in his empire, he required all law students to study the origin of the word "law." In the introduction to the Digest, Justinian wrote: "When one is about to give himself to the study of law, he ought to first know the origin of the term." The Romans believed that the mastery of Latin was essential in understanding Roman law. This principle was echoed in England as well. Consequently, from the time of Roman occupation up to the Seventeenth Century, Latin was the official language by which law schools in England taught law. Naturally there was a tremendous influx of Latin terms into the English legal vocabulary.

For instance, the English word "law" derives from the Latin word "lex," which means that which is laid down. During the republic the term "lex" referred to laws passed by the Roman Assembly. Moreover, in Latin the equivalent word for law is "jus" meaning that which is fair, impartial or right. Naturally, our English word "Just" shares its roots with the Latin word "jus." During Roman times the word "jus" referred to things that were fair and neutral and also to laws that equally applied to all. Branches of Law-According to the Roman Jurist Ulpian, (?-228 C.E.), there are two branches of the law, public law and private law. Ulpian was a member of the council of the jurist Papinian. As Praetorian prefect from 222 C.E., he enjoyed the favor of Emperor Alexander Severus, and he was murdered by the jealous Praetorian Guard. Much of the Corpus Juris Civilis is extracted from Ulpian's writings.

For Ulpian, public law deals with the welfare of a state. It is the law that governs the administration of a nation. Private law deals with the welfare and interest of individuals. This branch of the law entails natural law and Jus Civile or civil law. Natural law is what the English philosopher John Locke (1632-1704) referred to as innate rights--a man's right to life, liberty and property. Locke was an English philosopher, who founded the school of empiricism. Locke's influence in modern philosophy has been profound and, with his application of empirical analysis to ethics, politics and religion, he remains one of the most important and controversial philosophers of all time. Civil laws are laws that nations enact to govern their citizens. The Roman civil law, which was the first of its kind, encompasses the Law of Person and Law of Property or Things. Not surprisingly, these laws form the bases of our own civil laws and the civil laws of many other nations.

3.3.1.5 The period of legal reform: After the defeat of Napoleon, England's external position was one of the unprecedented strength. But internally, the 19th century started with a period of serious political and social crises. The center of economic activity had moved to trade and industry. Workers had increasingly migrated to the cities but both houses of parliament were still composed of extremely conservative aristocrats, bishops, and landed gentry. 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. Starvation and strikes spread. The forces of progress in England began to realize that political and social reforms were inevitable if a revolution was to be avoided. A statute issued in 1831 gave the middle classes a share of political power for the first time.

Jermy Bentham was an English legal philosopher. He scrutinized the traditional institutions of England. He examined those traditional legal institutions in order to determine whether they were appropriate and useful to the central aim of any social order. 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. The rules of common law often based on historical accident rather than rational design were simply obstacles in the way of the conservative practitioners. He advocated for a complete codification replacing the common law with a code worked out at a table on the basis of a particular social philosophy. Given their practical sense and their collective interests, English lawyers could not tolerate Bentham's thought.

In the 19th century, as a result of the influences of Bentham and his followers, many laws were issued. Such legal reforms included the alteration of the court jurisdictions, changes in court procedures, change in the law of civil procedure and to a lesser degree, the substantive law consolidation at the common law and abolition of the writ system. But no complete codification was made. 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.

3.3.1.6 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`` has attained the level of a saying. In addition to some other meanings, the expression suggests the extent of the spread of the British law. The English law was transported to North America (the United States of America and Canada), Asia and Africa. 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.

3.3.1.7 More on the roots of the British legal system

Richard A. Pacia, Esq. and Raymond A. Pacia, Roman Contribution to American Civil Jurisprudence 49 Rhode Island Bar Journal5 (2001)

Roman Influences During Pre-Roman Times- in Britain, the arrival of St. Augustine in 596 A.D. is of significance. St. Augustine had been sent to Britain by Pope Gregory to "reconvert" the island to Christianity and, in short order, he established a ministry, founded an Episcopal seat at Canterbury and converted to Christianity Ethelbert, King of Kent. Pope Gregory knew The Digest of Justinian. As Ethelbert embraced St. Augustine and his missionaries, he likewise embraced Roman legal influences because at 600 A.D. on "St. Augustine's Day" he compiled or codified the laws of his kingdom in "Roman Style." The increased clerical presence which St. Augustine brought to Britain enhanced the revitalization of Roman law during this pre-Norman period of English legal history in other respects as well. For example, the clerics introduced the island to the Roman method of taxation, which divided the land into units ("hides") of equal assessment instead of equal area. This gave impetus to, and formed the origins of, the modern system of conveyancing.

Committing the laws to writing, first accomplished by Ethelbert at a time when Justinian was dead scarcely forty years, set a precedent to be followed by other Kings such as Alfred the Great who ruled from 871 to 901 and Canute who ruled from 1016 to 1035. Both Alfred and Canute had visited Rome in their youths and endeavored to import to England the learning of the Continent. Another important advocate of Roman law in England was Edward the Confessor. King Edward ruled from 1042 to 1066. Edward, who had spent about thirty years of his life in exile on the Continent, was destined to continue Roman influence in Britain. Because of the spread of Norman influence during his reign, this period, just preceding the Norman conquest, has been dubbed "a sort of peaceful Norman conquest." Since the early Norman kings, in order to obtain favor with the people, swore to keep the laws of Edward the Confessor, his laws form an important basis of the later English law. In 1066, Edward died without issue and was succeeded to the throne by his wife's brother, Harold. This succession was disputed by William, Duke of Normandy, who defeated Harold at the Battle of Hastings on October 14, 1066, thus becoming in the pages of history, William the Conqueror, King of England.

Roman Influnces in Europe at the Turn of the First Millenium-The return to the study of Roman law had its start with a re-awakening of interest in Justinian's Corpus Juris Civilis and the

opinions of Roman jurists, such as Pepo and Irnerius just after the turn of the first millennium. Pepo was a judge at Ravenna, at the court of the duchess of Tuscany, and also at Bologna. It has been said that the beginning of civil law was reborn like a surging sunrise through magistar Pepo. Pepo played an epochal role in the rekindling of Roman law at a celebrated gathering of judges and dignitaries in the Kingdom of Italy called by Emperor Henry IV in 1084. The primary item on the agenda was to decide on the penalty for the murder of a serf by a freeman. The other judges proposed to fine the murderer in accordance with Lombard law. But Pepo "as a guardian of the Code and Institutes of Justinian" insisted that "who annihilated a man in the tribe of men had injured the universality of all men, so that whoever destroyed a man in the universality of men should himself be taken out of their midst and the murderer should be killed, because he had violated the consortium of natural relationship." Pepo's insistence that the punishment must fit the crime was based on book nine of Justinian's Code as well as the introductory chapter of the Institutes, which dealt with the natural law of peoples and civilizations. Ultimately, the position of Pepo was adopted by the Emperor, who thereupon proclaimed that henceforth Justinian's Corpus Juris Civilis would have priority over the Liber Papiensis, the Lombarda and other conflicting law.

Irnerius, a teacher of rhetoric at the cathedral school of Bologna, began commenting on, or glossating, the writings of the Roman legists. Irnerius himself later became a jurist and between 1112 and 1115 received imperial approval for the world's first law school, the studium of Bologna. The Roman law taught at the studium penetrated, supplemented, transformed and ultimately overwhelmed the competing logic of the Liber Papiensis and the Lombarda, which were the fixation of customs from an earlier period of tribal immigration into Italy of German emperors who had considered themselves the successors of the Roman Emperors. At the studium, law was taught as an "autonomous science" and a rigorous curriculum was developed, with Justinian's Corpus Juris Civilis being utilized as the fundamental text. The faculty which numbered among it renowned clerics - including Pepo and Irnerius - added their own personal commentaries, called glossae, utilized the Socratic method of teaching and developed the casebook method of study as well. Many of the students were foreigners and, upon graduation from Bologna, returned to their native countries, which they then pollinated with the nectar of Roman jurisprudence. In essence, Bologna served as the incubator from which was generated many of the laws of European nations.

Roman Inlenunces from the Normna Conquest to the Signing of the Magna Carata-The most important immediate consequence of the Norman conquest was the introduction into Britain of an orderly system of law and government. William, the Conqueror, apparently a gifted administrator, had developed a sound financial organization called the "camera" or chamber. His victory over Harold at the Battle of Hastings and the date, 1066, are matters of historical fact. However, even those who know of the contribution of William in systematizing the administration of the island may not know of the role played by Lanfranc, the lawyer from Pavia, most often described as "the Conqueror's right-hand man." This distinguished scholar, who in 1070 became Archbishop of Canterbury, was William's prime minister and chief adviser. Not only was he a great prelate and theologian, but he was also an accomplished lawyer who had studied and taught Roman law at Pavia, in his native Italy. He knew canon, Roman and common law, but he also developed a mastery of English law. In fact, upon his arrival at Normandy, Lanfranc established a secular school where, for a time, he taught rhetoric and Roman law. Most recently, Lanfranc has been described as William's "eminent collaborator, above all in the legislative field."

By virtue of the special confidence, reposed in Lanfranc by William, his influence upon the law at this most crucial period in Roman law cannot be understated. Lanfranc's role in the development of the common law also helped to prepare the English soil for the reception of the legal and intellectual revival that was beginning in northern Italy, at Bologna, where the world's first law school was established. Another important academician who had a significant impact upon the continued influence of Roman law in England was Vacarius, a gifted scholar who had taught Roman law at Bologna. Vacarius founded the law school at Oxford and it is generally recognized that his influence "began a new era in the history of English law and of its connection with the legal system of Rome." Vacarius was the first professor of law in England and one of his most popular texts, a summary of law for poor students, was essentially a condensed version of Justinian's Code and Digest.

The most ancient work on the common law, a Latin text written between 1187 and 1189 called A Treatise of the Laws and Customs of England, was written by Ranulf deGlanvill who was a student of Vacarius. Glanvill enjoyed the complete confidence of Henry II and became his Chief Justice in 1190. Glanvill's treatise, which clearly pays tribute and reference to Roman law and Justinian's Code and Digest, was the standard text book on the laws of England and established the method of legal writing for centuries to come. Henry DeBracton is recognized as another scholar who influenced the development of early common law in England. Bracton was an ecclesiastic and a royal judge and, from 1265 to 1267, was Chief Justice of England. His book, Tractatus de Legibus et Consuetudinibus Angliae, has earned such unparalleled tributes as "the crown and flower of English medieval jurisprudence," "the finest production of the golden age of the common law," and the "great ornament" of the reign of Henry III. Five centuries would pass away before another English lawyer, in the person of Blackstone, was to appear, competent to write a treatise upon the whole subject of English law.

The influence of Roman law upon Bracton's writings are of such significance as to warrant special treatment. Some historians regard his Romanism so great that they would deny him a place in a discussion of English legal literature. Perhaps the most forceful critic is Sir Henry Maine, who refers to "the plagiarisms of Bracton" and, with seeming contempt and scorn, writes: That an English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally proscribed, will always be among the most hopeless enigmas in the history of jurisprudence.

Finally, no remarks concerning the era commencing with Glanvill and ending with Bracton during the reign of Henry III, could conclude without mentioning King John from whom "the Army of God and the Holy Church wrested the Great Charter. Magna Carta is the very symbol of freedom, liberty and the rule of law in Anglo-American jurisprudence."The historical roots and humble origins of the Magna Carta are not well known or remembered. They trace back to King John's difficulties with Pope Innocent III. When the Pope compelled King John to accept Cardinal Stephen Langton as Archbishop of Canterbury, John retaliated by confiscating church property. Langton joined with the barons in a firestorm that precipitated the signing of the Magna Carta by King John on June 15, 1215. Although the specific author of the Magna Carta is not known with certainty, the most reasonable assumption is that the draftsman was Stephan Langton, a Doctor of Laws from the University of Bologna. The belief that Langton authored the Magna Carta is

fortified by its style and content. The very first article of the document proclaims the freedom of the church. From this it has been inferred that the charter is "to a far greater extent the work of Langton and the bishops than it is of the barons." Beyond cavil, the source and inspiration for the Magna Carta were not English feudalistic institutions but notions of the universality of natural law as proclaimed by the Roman legal tradition.

Roman Law and the Development of English Common Law-Notwithstanding the Roman influences, it is clear that Norman laws were in many respects divergent from much Roman law. Much Norman law was devised to perpetuate the dominance of the king. However, Norman laws also were, in part, religious laws, giving great power to the priesthood in lay legal matters and, in this regard, the ecclesiastical influence of Roman law remained strong. Ecclessiastical courts in Britain exercised wide jurisdiction, not only with respect to matters involving the clergy and religion, but also over matters relating to marriage, divorce and legitimacy, and testamentary jurisdiction which included all matters pertaining to the administration of estates, intestate succession and supervision over executors, administrators and fiduciaries.
Despite the writings of Glanvill and Bracton, Norman law developed in a manner which departed more and more from Roman legal precepts. As the system of English common law began to stretch across the isle, the influence of Roman law began to fade in the eyes of some justices. Part of this waning of influence has been attributed to an hostility regarding "foreign laws," a religious prejudice and a certain "insular patriotism, which may have affected English legal historians." Ever increasingly, citations in cases to Roman authority became displaced by "the conservation of some English writers ... (and their) pride in the alleged indigenous laws of their own country and prejudice, perhaps, against foreign influence." This all changed following the revolution of 1688, when after great turmoil in the common law system, Sir John Holt, in 1703, brought into one case almost the entire Roman law concerning bailments. A similar phenomenon occurred almost sixty years later when, in 1760, Lord Mansfield incorporated the Roman notions of quasi-contract into the English common law. While the latter decision was the last large scale overt incorporation of Roman legal principles into the English common law, it did not mark the end of Roman influence, but rather the beginning of an extended period during which legal scholars either purposely or advertently down-played the contributions of Roman law. In fact, the English would continue to improve their common law system by incorporating Roman principles in an almost insensate fashion, generating ever-changing precedents to coincide with an ever-changing society.

Roman Influences on the Development of English Equity Jurisprudence-The Court of Chancery, which administered "equity," took root in the notion that the King "with us has ever been considered the fountain of justice." Since he could not personally decide all controversies and remedy all wrongs, tribunals were established to execute the law, hence, the King's Courts. The first occupation of the Chancellor was to assist the King in the administration of justice. The second, of infinitely greater importance, was in deciding, always in the King's name, "a peculiar class of suits as a judge." These cases involved petitions addressed to the King, as a matter of grace, because the common law afforded no remedy or the remedy was inadequate. This became the "equitable" jurisdiction of the Chancellor which, as it expanded, incurred the wrath of the common law judges, thus creating a problem that was not solved until 1616 when James I personally decided in favor of Chancery.

A treatise on the law of equity that has had much influence upon generations of lawyers and judges in the United States is Pomeroy's Equity Jurisprudence. It is appropriate to cite the

following quotation from that work: The growth and functions of equity as a part of the English law were anticipated by a similar development of the same notions in the Roman jurisprudence. In fact, the equity administered by the early English chancellors, and the jurisprudence of their court, were confessedly borrowed from the aequitas and judicial powers of the Roman magistrates; and the one cannot be fully understood without some knowledge of the other.

3.3.1.8 Review Questions

Part I. Multiple-choice Questions

Choose the best answer from the given choices.

1. The main reason for the wide spread of the English legal system is:

A) Colonialism
B) Voluntary reception
C) Capitulation
D) Trade
E) Migration

2. The British legal system was taken to one of the following areas:

A) Areas controlled by natives without developed political organizations.
B) Areas controlled by ex-colonial powers such as the Dutch in South Africa.
C) Areas controlled by princes with more or less developed political organizations as well as legal systems.
D) All of the above

3. One of the following thinkers challenged the English legal system as backward and as promoting the greatest interest of the few and argued a major reform in the British legal system on the basis of the principle of the greatest good for the greatest number.

A) J. Bentham
B) J. Stuart Mill
C) F. Engles
D) Henry Main
E) Coke

4. The reasons for proposing for legal reform in the 19th century in Great Britain were

A) The legal system was criticized for being messy.
B) The legal system was criticized for promoting the greatest good for the few.
C) The legal system was attacked for promoting the greatest good for the majority of the British people.
D) The legal system was challenged for being primitive.
E) A & B

5. Roman law affected the British legal system to a lesser extent, as compared with the influence of Roman law in the French and German legal systems. Why?

A) There had been in place very powerful inns in Great Britain; the inns resisted massive acceptance of Roman law.
B) Members of the British parliament's active supported the common law.
C) Roman law was found out to be defective.
D) A & B.

6. The institution that mitigated the harshness of the written law from 14th century to 19th century in England was called:
A) Equity
B) Natural law
C) The Decrees of the kings
D) The Inquisition
E) Roman law

7. One of the following describes the essential feature of the British legal system.
A) Law is understood to grow inductively, means from specific cases legal principles are distilled.
B) Court made laws, through the inductive method, are the heart of the common law if not superseded by statues.
C) The British legal system has never experienced major interruptions, it is featured by stability.
D) All of the above

8. To Professor John Maryman, a legal tradition that is ``older, more widely distributed, and more influential than the common law tradition`` is:
A) The civil law tradition
B) The Germanic law tradition
C) The Islamic law tradition
D) The Hindu law tradition
E) A &B
F) The European law tradition
G) The Buddhist law tradition
H) A, B & D
I) None of the above

9. A legal tradition not even slightly affected by the Roman law tradition:
A) The common law tradition
B) The Civil law tradition
C) The Romanistic law tradition
D) The Germanic law tradition
E) The English law tradition
F) The European Union law tradition
G) A, F & C

H) A, D & B
I) None of the above

10. A legal tradition unworried by legal uncertainty in the course of its development is
A) The English legal tradition
B) The American legal tradition
C) The Islamic legal tradition
D) The French legal tradition
E) The German legal tradition
F) None of the above

11. A legal tradition that accepted religious conception of laws in its initial stage is
A) The Roman legal tradition
B) The Babylonian legal tradition
C) The Greek legal tradition
D) The American legal tradition
E) The Hindu legal tradition
F) All of the above

12. A legal tradition that rejected customary rules as one of its elements in its life span is
A) The African legal tradition
B) The French legal tradition
C) The German legal tradition
D) The Hindu legal tradition
E) All of the above
F) None of the above

13. The British legal system was taken to one of the following areas:
A) Areas controlled by natives without developed political organizations.
B) Areas controlled by ex-colonial powers such as the Dutch in South Africa.
C) Areas controlled by princes with more or less developed political organizations as well as legal systems.
D) All of the above

14. Currently the highest court in England is_____.
A) Court of Chancery
B) House of Lords
C) Supreme Court of Judicature
D) The crown Court
E) High Court

15. Identify the wrong statement.

A) English legal system was based on doctrinal writings.
B) Common law was developed by selecting reasonable customs of English people
C) Court of Chancery continued even after the third quarter of 19th century
D) By introducing the Royal Courts, William the Conqueror consolidated the administration of justice
E) None

16. One of the following is true about the common law during and after its formation time.

A) It was highly flexible.
B) Equity was developed to correct its defects.
C) Equity was applied to override the common law.
D) During its formation the contribution of scholars was very significant.
E) A,C and D

18. The principle of specific /forced/ performance owes its origin to_____.

A) Royal courts of England
B) The Justinian Code
C) The court of chancery
D) A and C
E) None

19. Which one is true about the Magna Carta?

A) It contained constitutional principles relevant to the present society as well.
B) It was made by Emperor Justinian.
C) It resulted from the struggle between the king of England and the English nobility.
D) It was made to control the arbitrary use of power by the English king.
E) All except B

19. _____ was the most important reason for the widespread of the common law.

A) Trade
B) Migration
C) Reception
D) Colonialism
E) None

20. During the Anglo-Saxon period_____.

A) English law was primitive and diversified

B) The common law started to develop
C) The law was written
D) All except D
E) A & B

21. The major cause for the development of equity in English legal system was _____.

A) The rigidity of common law
B) The Normans` interest to change the culture of English inhabitants
C) The development of the principle of supremacy of parliament
D) The lack of trained lawyers
E) All

Part II. Essay-type Questions

Answer the following questions.

1. What are the major differences between the British legal system and the French legal system?
2. What are the key differences between the British legal system and the American legal system?
3. Describe the situations in which equity applied in the history the English legal system.
4. What were the impacts of the proposal for legal reform in 19th century in Great Britain? Did such proposals for reform materialize?

3.3.2 The American Legal System

This sub-section covers the salient features of the American legal system including the nature of laws in early periods, the extent to which the American colonies received the common law, the changes attending to the victory of the north and the role of the law professors in America.

3.3.2.1 The age of theocracy: 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 developments included law books, lawyers, and trade relations among the colonies and with England.

3.3.2.2 Reception of common law: In principle, the colonies accepted the common law. The colonies, however, made important exceptions to the common law. The colonies reflected that exception by issuing special statutes. First, the colonies saw that some aspects of the common law were unsuited to their local conditions. This implied that the idea that the content of law is determined by climate, geography, economic and social conditions of a given society. Second, the colonies introduced alterations in the common law because the ideals

(spiritually, politically and economically) of the settlers were different from that of the British. As a result, the colonies introduced changes in criminal law, civil procedure, succession law, family law and land law. 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.

3.3.2.3The victory of the north: In the 19th century, the tension between the North and the south was resolved in favor of North. The North argued for protective tariff and against slavery. The agricultural South stood for slavery and against tariff. The North and the South fought a civil war. Immediately after the war, economic expansion opened the west. The doctrine of economic liberalism dominated the American economy. 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.

3.3.2.4The role of law professors: In the 20th century, America witnessed the emergence of law professors and their great influence in the American mode of legal thinking. 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. Individualism advocated for little or no interference of the state in the economy. Second, 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. They considered law as a means to balance competing interests in the society. The law professors argued that for a judge to live up to his/her expectations he/she must understand the prevailing social, political and economic situations. The same law professors argued that law in books and laws in action are different. 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.

3.3.2.5Legal uniformity: The United States of America has been concerned with lack of legal uniformity in its territory. There are more than 53 legal systems including the federal legal system. Each of these systems has its own elements of a legal system such as lawmaker, the judiciary and the executive. Americans decided to minimize the extreme case of divergence and have developed a number of strategies to that effect. One method of bringing national legal homogeneity is through the project of the Restatement of the Law. The

Restatement of the Law does not claim authority as precedent or a statute does; but it is the expression of precedents and statutes. The second method employed to bring about legal uniformity has been standardizing law textbooks and encouraging the major law schools in the country to use those texts.

3.3.2.6 Spread of the US laws: 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 Second World War. 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.

3.3.2..7 Review Questions

Part I Multiple-choice Questions

Multiple-choice Questions

Choose the best answer from the given choices.

1. Which one of the following was the role of law professors in the United States of America in early 20th century?

A) The emergence of the professors resulted in the gradual weakening of the extreme individualistic ideas of the period, which advocated for little or no interference of the state in the economy.

B) 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.

C) 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.

D) All of the above

2. _____is a theory of law that argued that what is important is the concrete effect legal rules produce in the society; that considered law as a balancer of competing interests in the society.

A) Sociological jurisprudence

B) The Historical school

C) Legal realism

D) The interest approach

3. _____is a theory of law that holds that law is not precedent, nor to be found in the statutes. But law is what the courts and officials do.

A) Sociological jurisprudence

B) The Historical school

C) Legal realism
D) The interest approach

4. The initial stage of the American legal system can be featured by:
A) The age of theocracy
B) The age of secularism
C) The age of the common law
D) None of the above

5. One of the following is an incorrect statement about the extent of reception of common law by the colonies in North America.
A) In principle, the colonies accepted the common law.
B) The colonies made important exceptions to the common law.
C) The colonies saw that some aspects of the common law were unsuited to their local conditions, which implied the idea that the content of law is determined by climate, geography, economic and social conditions of a given society.
D) The colonies introduced alterations in the common law because the ideals (spiritually, politically and economically) of the settlers were different from the ideals of the British.
E) None of the above

6. Identify the proper statement about the relationship between the north and the south.
A) In the 19th century, the tension between the North and the South was resolved in favor of North.
B) The North argued for protective tariff and against slavery. The agricultural South stood for slavery and against tariff.
C) Immediately after the war, economic expansion opened the west.
D) After the civil war, the doctrine of economic liberalism dominated the American economy, which 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.
E) All of the above

7. The theory advocated, (by J. Bentham), that states that laws should be issued to satisfy the greatest good for the greatest number is called
A) Utilitarianism
B) Pragmatism
C) Realism
D) Socialism
E) None of the above

Part II Essay-type Questions

Answer the following questions

1. Explain economic liberalism.
2. State the measures the USA is now taking to promote uniformity in its legal system.
3. Discuss the factors that contributed to the transportation of the laws of the USA.

3.3.3 Civil law and common law contrasted

Maria Luisa Murillo, The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification & Recodification, 11 J. Transnat'l L. & Pol'y 163 (2001).

Romanist infiltration-It has been said that 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. The truth is that 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. The common law, on the other hand, has not been completely immune to the infiltration of Romanist thinking. 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.

Structure: code and precedent- It has been suggested that civil law and common law differ because civil law is codified while common law is based on precedents. However, there have been civil law countries without a Civil Code: Germany before 1900, France before 1804, and Greece until as late as 1946. On the other hand, codes have been enacted in several common law jurisdictions: in Massachusetts (1648), Virginia, Georgia, Bermuda, and in a number of western states in the United States after the model prepared by David Dudley Field last century. Accordingly, the criterion of codification cannot be accepted.

It has also been said that 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. Yet, 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. On the other hand, the doctrine of stare decisis has been tempered in the United States and what may be called an American theory of precedents permits a great measure of flexibility. Characteristically, it has been suggested that the increase of precedents in the United States will eventually lead to an eclipse of the stare decisis doctrine. The function of precedents, therefore, cannot be acceptable criterion for the differentiation between civil law and common law.

Technique of reasoning: deduction v. induction-The observation has been made that the technique of reasoning in civil law is deductive while in common law is inductive. Indeed, 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. The deductive reasoning is also known to the common law, however: it is quite frequently applied in constitutional and statutory interpretation as well as in the application of broadly formulated principles of case law.

Philosophy: natural law v. positivism-Another criterion for the differentiation between civil law and common law is the underlying legal philosophy in each system. Thus, 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. Similar statements are at best questionable.

What is the difference? The difference between the civil law and the common law is not to be found in the content of specific rules or in results reached in litigation. Nor is it to be found in the criteria of Romanist influence, type of reasoning, structure, and legal philosophy. Perhaps, technique and methodology, the relative position of the legislator and the judge, and the nature of the judicial process may furnish a tentative acceptable answer. However, it should be noted that differences between the two systems of law are fewer than similarities: both systems are products of the western civilization.

Technique and methodology: judge-made v. university-made law: It is an ascertainable fact that the common law is basically the product of judicial legislation. Judge-made law tends to be practical, unsystematic, and casuistic. Modern civil law is the product of professorial elaboration in universities; as such, it tends to be doctrinaire, abstract, and conceptualistic. The legislator and the judge-Common law has grown in a slow process and has absorbed new doctrines and elements without breaking with the past; this may be regarded as an incident of judicial legislation. Civil law, on the other hand, has been drastically overhauled in recent times in almost all countries and the new codes have done away with most of the law of the past…An historical excursus tracing parallel developments during the 18th and 19th centuries in civil law and in common law may be illustrative. In civil law jurisdictions, Roman law during this period became unpopular: it was foreign law, reduced in Latin, doctrinaire, and a ready tool for absolutistic claims. Its logical perfection tended to stifle the spirit of innovation. Gradually, the growth of rationalism and of natural law philosophy led to the recognition of the importance of direct legislation and to the quest for national codification. The enactment of civil codes resulted in nationally uniform, comprehensive, reform legislation.

Common law courts during this period protected individual freedom through writs: mandamus, habeas corpus, prohibition, certiorari, and quo warranto. Thus the common law came to be regarded as the "birth right" of Englishmen. The old rules were gradually adapted to meet new needs through fiction, special writs, and the creation of new remedies. The doctrine of stare decisis has never been followed too rigidly. Rationalism and natural law philosophy became absorbed into the common law, but concessions were made slowly and smoothly. There have been no nationalistic claims fot the unification of law through codification. And, characteristically, Bentham's efforts had only partial success.

Aspects of the judicial process: The statement that the judicial process in civil law systems is purely mechanical does not correspond to the truth: but differences in the method of deciding cases in civil and in common law jurisdictions are noticeable. Perhaps, the most striking difference between the two systems of law is to be found in the psychological attitude of the judge towards legislation. In a way, this is related to the problem of the sources of law: where will a

lawyer look for the law? 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. A comparison of doctrine surrounding codification and legislation in general may be summarized as follows.

Modern civil codes are not like early codes. The code of Hammourabbi, the laws of Solon, the Sachsenspiegel, the Corpus Juris Civilis and the Siete Partidas were compilations rather than codifications. Modern civil codes have their spiritual origin in Romanist doctrine and in natural law philosophy; they were the result of movements already discussed, and they were intended to break definitively with the past. The philosophical background of the various civil codes is rationalism rather than traditionalism. A code, in order to do away with the past, must be comprehensive. Earlier codes, to exclude judicial law making, contained detailed provisions. Later codes included "general clauses" allowing the judges much freedom. A code, in order to break with the past, must also be systematic and logically arranged so that reasoning should furnish answers to all questions. Statutes bearing on civil law matters are not always included in civil codes. But these statutes, like the codes, are subject to logical and teleological interpretation and capable of application by analogy.

Common law codes, on the other hand, have been described as "digests" of case and statutory law. These codes have their spiritual origin in Bentham's utilitarianism. They have not been intended to break definitively with the past; they have been considered as merely declaratory of the common law in force and they were construed narrowly. Rationalism did not replace tradition or precedents. Statutory legislation in common law has been interstitial rather than comprehensive and has varied rather than displaced old rules: common law judges did not need the guidance of comprehensive codes. In the framework of the common law the relevant question is whether a statute applies. There is no search for underlying principles; and where a statute does not apply the common law governs.

3.3.4 Shared Features of the Western Legal Traditions: 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.

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

The civil law conceives written law as the sole source of private law. And the highly systematic nature of modern codes of civil law lies behind the form of reasoning that characterizes it. Civil law reasoning may loosely be described as

deductive reasoning. Deductive reasoning proceeds from a broad principle, expressed in general terms, and then it considers the facts of the particular case. A syllogism, on the other hand, applies the principle to the facts so as to reach a conclusion. This form of reasoning, syllogism, leads the civil law lawyer to present a legal argument as if there can be only one right answer to any legal problem. Disagreement on the application of the law to the facts of a case must, in the case of syllogism, be the result of faulty logic by somebody. Thus, civil law judges in general do not give dissenting opinions. In the civil law system, every judgment, even in appellate cases, is that of the court as a whole. Traditionally, the duty of the civil law judge is to apply the written law, and the meaning of that law is to be discovered from the writings of its academic exponents.

Modern civil law, however, makes a sharp distinction between substantive law and procedure. Academic courses on the substantive law say nothing about procedure. Courses on procedure include far more than the steps that a litigant must take in bringing or defending an action. In the civil law, rights derive from the substantive law. Wherever that law recognizes a right, the procedural law must provide an appropriate remedy.

Harold J Berman thinks that the western legal traditions have ten common features. These features are reproduced below.

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

It is the tragedy of "scientific" history that it was invented in the nineteenth century, in the heyday of nationalism. From Ranke on, history was to be an objective study of "how things actually happened." It was simply taken for granted, however, that "what happened" was chiefly what happened in, or to, the nation. History was to be primarily national history, and more than that, it was to emphasize those elements that distinguish the nation's history from that of other nations. This was a hidden ideological bias of scientific history, which had important repercussions on the study of law. Not only in England and America but also in France, Germany, and elsewhere, it contributed to the virtual exclusion from the law curriculum, or at least the strict isolation, of canon law, the law merchant, the law of nations, military law, and other branches of Western law that transcend national legal systems. Natural law was relegated to philosophy, and divine law to theology.

The narrowness of legal historiography has been due not only to its nationalist ideology but also to its positivist presuppositions. It was presupposed that law is primarily, if not exclusively, a manifestation of the will, i.e. the policies, of lawmaking authorities, namely, the legislative, administrative, and judicial branches of the state. Law, it was thought, cannot exist without the state, and since there was no European state, there was no European, or Western, law. Neglected in this jurisprudence were other sources of law, such as custom, equity, and tradition. Neglected also were such shaping factors as legal language, legal scholarship, and legal science. There is, to be sure, no European state -- at least there was none prior to the formation of the European Economic Community; yet European countries share a host of common legal values, legal

concepts, and legal institutions. There is a Western legal tradition. As Edmund Burke said, the laws of every European country are "[a]t bottom all the same," being "derived from the same sources.``

What are the principal features of the Western legal tradition? What are the characteristic elements that give it its structure and its dynamic? I would list the following ten elements, each of which may be traced to the great transformation of Europe that took place in the late eleventh and the twelfth centuries: First, 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. Second, 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.

Third, 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. Fourth, the body of legal learning in which legal specialists are trained is supposed to have a strong effect on the legal institutions; the legal learning conceptualizes and systematizes the law, with the result that the law is seen to contain within itself a legal science, a meta-law, by which it can be both analyzed and evaluated.

These first four elements of the Western legal tradition -- the relative autonomy of law, its professional character, its learned character, and its scientific character -- had been features also of classical and post-classical Roman law. They were not present to any substantial extent, however, in the legal order that prevailed among the Germanic peoples of Western Europe prior to the eleventh century. Germanic law was almost completely fused with political and religious life and with custom and morality. There were, of course, laws, but there was no professional corps of lawyers or judges, no corps of professional legal scholars, no legal literature, and no developed legal science.

The church also, prior to the eleventh century, lacked an autonomous, systematized body of law and a developed legal profession. Canon law was fused with theology. While there were some local collections of canons, and also local Penitentials, there was little else that could be called a literature of canon law. The very phrase "canon law" (jus canonicum) was rarely if ever used. It was the revolutionary upheaval of 1075-1122, traditionally called the Investiture Struggle or the Gregorian Reform, and more recently the Papal Revolution, which, by freeing the clergy from imperial, royal, and baronial domination and by creating a strong papal monarchy within the Western church, laid the foundation for the rediscovery of the Roman texts of Justinian; for the creation of the first European university, at Bologna, to train jurists and to create a science of law; and for the emergence of separate ecclesiastical and secular jurisdictions as well as separate ecclesiastical and secular legal institutions. The church, which was the first modern state, needed a modern legal system to regulate its internal relations as well as its relations with the newly secularized polities. Those polities, in turn, needed modern legal systems for similar reasons.

The fifth characteristic of the Western legal tradition was not present in the older Roman law of Justinian; it is, I believe, uniquely Western. It is the conception of law as a coherent whole, an integrated system, a "body." Using the twelfth-century scholastic technique of reconciling

contradictions and deriving general concepts from rules and cases, Western jurists were able to coordinate and integrate the chaotic mass of rules and concepts that constituted the older Roman legal texts. They converted those texts into a corpus juris -- a phrase that was not known to Justinian. The same technique made it, possible for Gratian to write his Concordance of Discordant Canons, which was the first comprehensive legal treatise, the first systematic analysis of a body of law.

The Western concept of a body or system of law carries with it a sixth characteristic of the Western legal tradition, namely, the belief in the ongoing character of law, its capacity for growth over generations and centuries. This belief, too, seems to be uniquely Western. Each generation consciously develops the legal institutions handed down by its forebears. The body of law is thought to contain a built-in mechanism for organic change. Seventh, the growth of law in the West is thought to have an internal logic. Changes are not only adaptations of the old to the new but are also part of a pattern of changes. The process of development is subject to certain regularities and, at least in hindsight, seems to reflect an inner necessity. Changes proceed by reinterpretation of the past to meet present and future needs. This is the myth, the faith. The law is not merely ongoing; it has a history.

Eighth, the historicity of law is linked with the belief in its supremacy 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.

Ninth, perhaps the most distinctive characteristic of the Western legal tradition is that diverse jurisdictions and diverse legal systems coexist and compete within the same community. This characteristic originated in the late eleventh century with the church's establishment of an "external forum," a hierarchy of ecclesiastical courts, with exclusive jurisdiction in some matters and concurrent jurisdiction in others. Laymen, though governed generally by secular law, were also subject to ecclesiastical law, and to the jurisdiction of ecclesiastical courts, in matters of marriage and family relations, inheritance, spiritual crimes, contract relations where faith was pledged, and a number of other important matters. Conversely, the clergy, though governed generally by canon law, were also subject to secular law, and to the jurisdiction of secular courts, with respect to certain crimes, certain property disputes, and related matters. Secular law consisted of various competing types, including royal law, feudal (lord-vassal) law, manorial (lord-peasant) law, urban law, and mercantile law, each with its own jurisdiction. Throughout Europe, the same person might be subject to the ecclesiastical courts in one type of case, the king's court in another, his lord's court in a third, the manorial court in a fourth, a town court in a fifth, and a merchant's court in a sixth.

The pluralism of Western law was a source of legal sophistication and of legal growth. It was also a source of freedom. A serf might run to the town court for protection against his master. A vassal might run to the king's court for protection against his lord. A cleric might run to the ecclesiastical court for protection against the king. Finally, a tenth characteristic of the Western legal tradition is the tension that has existed between its ideals and its realities, between its dynamic qualities and its stability, and between its transcendence and its immanence. These tensions have periodically led to the violent overthrow of legal systems by revolution.

Nevertheless, the legal tradition, which is bigger than any of the legal systems that comprise it, eventually survived and, indeed, was renewed by such revolutions.

Six great revolutions have punctuated the organic development of Western legal institutions: the Papal Revolution of 1075-1122; the German Revolution -- that is, the Lutheran Reformation in Germany -- of 1517-55; the English Revolution of 1640-89; the American Revolution which began in 1776; the French Revolution, which began in 1789; and the Russian Revolution, which began in 1917. These revolutions represent great explosions that occurred when a legal system proved too rigid to adapt to new conditions and was perceived to have betrayed its ultimate purpose and mission. Each revolution marked a fundamental, rapid, violent, and lasting change in the social system as a whole. Each sought legitimacy in a fundamental law, a remote past, and an apocalyptic future. Each took more than one generation to establish roots. Each eventually produced a new system of law, which embodied some of the major purposes of the revolution, and which changed the Western legal tradition but ultimately remained within that tradition.

Clearly, the Papal Revolution may be called Western, but one might ask whether the national revolutions since the sixteenth century can be properly characterized in the same way. The legal system that emerged from the Papal Revolution -- the new canon law of Gratian and the papal decretals, culminating in the decrees of the Fourth Lateran Council in 1215 -- was a transnational body of law. But is it proper to characterize the law of the German principalities after the Lutheran Reformation, or the law of England after 1689, as in some sense transnational, or European?

Two points support an affirmative answer to this question. First, all the national revolutions since the sixteenth century -- except the American -- were directed in part against the Roman Catholic Church or, in Russia, the Orthodox Church, and all of them transferred large portions of the transnational canon law from the church to the national state. Second, all the great national revolutions of the West were Western in nature; that is, each was partially prepared in other countries and each had repercussions in other countries. Before breaking out in Germany, the Protestant Reformation was prepared by Wycliffe in England, by Hus in Bohemia, and by active reform movements in every country of Europe. The Puritan movement in England was based on the earlier teachings of the French-Swiss reformer John Calvin and had close ties with Calvinist movements in Holland and elsewhere on the Continent. The Enlightenment of the eighteenth century was, of course, an all-Western phenomenon, which formed the ideological basis not only of the American and French Revolutions but also of agitation for radical change in England and elsewhere. The Russian Revolution was born in the international communist movement founded by two Germans; its roots lay in the Paris Commune of 1870.

Similarly, these national revolutions had enormous repercussions throughout the Western world. Lutheranism contributed to the rise of absolute monarchies supported by a strong civil service. This form of government eventually appeared in England, France, and other non-Lutheran countries. A century later, English Puritanism contributed to the development of parliamentary supremacy and constitutional monarchy in England, and in the late 1600's and early 1700's, somewhat similar developments took place in various other European countries. After the French and American Revolutions subsided, England reformed its political process in a democratic direction, enlarging the electorate to include some of the middle classes. After the Russian Revolution subsided, "socialist" or "new deal" governments appeared in Western Europe and the United States.

Also in criminal and civil law, the great national revolutions had important consequences that extended beyond national boundaries. Lutheran concepts of the Christian conscience influenced the protection of individual contract and property rights in many Western countries. The English Puritans laid the foundations for a more independent judiciary, trial by jury, and increased civil rights -- not only in England but eventually in other countries of the West as well. The codification of French law after the French Revolution stimulated the movement for codification throughout Europe. The development of socialist law in the Soviet Union affected the socialization of various aspects of law in many other countries.

All the various national systems of law in the West have certain important features in common. All share some basic modes of categorization. For example, all strike a balance between legislation and adjudication and, in adjudication, between code law and case law. All make a sharp division between criminal and civil law. In all, crimes are analyzed (as they were first analyzed by Abelard in the early twelfth century in terms of act, intent or negligence, causation, duty, and similar concepts. In all, civil obligations are divided, either expressly or implicitly, into contract, delict (tort), and unjust enrichment (quasi-contract).

Behind these and other common analytical categories lie common policies and common values -- above all, a common concept of legality. In the 1930's, for instance, a statute of National Socialist Germany, which made criminally punishable any act that "deserves punishment according to sound popular feeling (gesundes Volksgefuhl)," was generally viewed as a violation of the traditional Western concept of legality, and the Permanent Court of International Justice struck down a similar law of the Free City of Danzig, based on the German statute, as contrary to the rule of law (Rechtsstaat).

A history of Western law would reveal not only the origin and development of common concepts, but also the interconnections among the various legal systems that have prevailed in the West. For example, in the twelfth century, which Maitland called "a legal century," one may see a broad range of legal activity within a period of fifty or sixty years. Within the church, the first major series of papal decretals appeared, as well as the first major treatise on canon law -- Gratian's. Developments in secular law included the first major treatise on royal law -- Glanvill -- as well as the first major royal legislation: the Assizes of Ariano of Roger II, the peace statutes of Frederick Barbarossa, and the possessory assizes of Henry II. In addition, the first major collections of urban law developed in various Italian, Flemish, German, and other cities; and the first major writings on feudal law appeared. Certain basic concepts and principles run throughout all of these twelfth century firsts. One example is the concept of seisin, saisina, and the principle of novel disseisin, namely, that one who has been recently disseised is to be restored without reference to right of ownership. The study of these interconnections is not a matter of comparative legal history, but rather a matter of the legal history of a single civilization.

To say that the history of Western law has not been written is not to say that it has been wholly neglected. Distinguished scholars such as Heinrich Mitteis and John P. Dawson have written brilliant works comparing legal institutions of various countries of Europe in their historical development. The challenge laid down by Paul Koschaker just after World War II, in his Europa und das romische Recht, to restore the historical unity of European law against nationalist barbarism, has not gone without response. Especially among Italian and German historians there

has been a movement toward the "Europeanization" of legal history. The Western dimensions of our law are also being studied by some of the younger American legal historians.

Yet, for the most part scholars study each country's legal system independently. Consequently, the mutual interaction of the legal institutions and the legal thought of the various polities of the West has barely been explored. Above all, English and American legal history have been isolated; indeed, they have often been isolated even from each other. It is, once again, the old story of the blind men and the elephant. Historians of each country have a firm grasp of a leg, or the trunk, or the tail, or an ear. They may, to be sure, make no claim to understand the whole animal. But how can one understand a part without understanding what it is a part of?

Why, then, is the whole not studied more frequently as a whole? Some easy answers have been given. It is said: "there is no time to study the law of more than one country," "it requires too much training, too many skills," or "there is no demand for work in comparative legal history." However, more complex reasons may also be suggested. Many legal historians prefer to be nationalistic because they tend to accept the belief-system -- the ideology -- of the national revolutions, and especially the belief-system of the revolution or revolutions to which the historian's own country looks for its origins. Such historians do not wish to seek the sources of their own beliefs in the pre-Protestant, pre-humanist, pre-nationalist, pre-individualist, pre-capitalist era of Western history, when the Western legal tradition was first formed. They view the period prior to the sixteenth century as a period of feudalism, to which they feel alien, and they think of it as the Middle Ages rather than as the beginning of the modern era. English legal historians, on the other hand, may identify themselves much more affirmatively with medieval English law, viewing it as the source of the English common law that triumphed over its rivals in the seventeenth century. By the same token, however, they may be quite unhappy to be told that the first modern Western legal system was the canon law of the Roman Catholic Church, and that all royal legal systems in Europe, including the English, first developed in rivalry with and in emulation of the canon law.

Also, many legal historians are unwilling to trace legal institutions to their political, economic, social, and ideological (which in Western history chiefly means religious) sources. They are especially unwilling to trace the sources of legal evolution to the upheavals of political revolution. The interaction of revolution and evolution has not captured the imagination of legal historians. They prefer to trace the origins of laws to earlier laws. The need for a broader and longer view of legal history derives from the predicament in which the Western legal tradition finds itself in the twentieth and twenty-first centuries. Our law has become uprooted; it is no longer viewed as founded in a universal reality. Furthermore, the West itself is in danger of losing its identity, and no longer believes either in its future or in its past. Nationalist legal historiography is incapable of providing an understanding of the basic changes that have taken place in the various Western legal systems in the past or the direction in which they are now moving. We must therefore retrace the steps by which our entire legal tradition has come to its present predicament, beginning with its origins and proceeding in the widest possible context.

3.3.5 Review Questions

Part I Essay-type Questions

Answer the following questions.

1. A good number of Emperors, in the course of legal history, advocated for the motto: ``one nation, one code, and one religion! `` Comment! Your explanation should be supported by at least a couple of concrete examples.
2. Like seedlings, foreign laws need a fertile ground to take root in a country. Foreign laws have little or no space to flourish where indigenous laws and legal institutions occupy the fertile ground in that country. Explain these statements by citing two real examples.
3. The debate over a revolutionary versus an evolutionary approach to codification of laws arose in some past and modern legal systems/ traditions. Briefly explain the concerns behind such debates. Illustrate your explanation through two examples, one example from an early legal system/tradition and the other example from a modern legal system/tradition.
4. Enumerate the ten attributes of the Western legal tradition discussed in Berman`s article.
5. Can you explain what Berman meant by legal pluralism? Is he in favor of or against legal pluralism? Why does he assume that stance?
6. Does Berman think that there is a history of western law?
7. According to Berman, what are the contributions of the national revolutions that erupted in nations in the west?
8. Can you explain the meaning of ``scientific history`` as discussed in Berman`s article?

Part II Multiple-choice Questions
Choose the best answer from the given choices.

1. A legal tradition not even slightly affected by the Roman law tradition:

A) The common law tradition
B) The Civil law tradition
C) The Romanistic law tradition
D) The Germanic law tradition
E) The English law tradition
F) The European Union law tradition
G) A, F & C
H) A, D & B
I) None of the above

2. One of the following was the historical/doctrinal sources of the civil law tradition

A) Canon law
B) The German legal science
C) Natural law and the doctrine of Enlightenment
D) Customary law
E) Roman law

F) The French Revolution
G) All of the Above
H) A, C & E
I) A, B, E & F

3. One of the following is a mismatch with regard to law validating power:
A) Hindul law tradition-Holy Veda-Simritis
B) Civil Law Tradition-legislature-codes
C) Confucian law tradition-Confucius-the doctrine of proper behavior
D) African law tradition-gods, ancestors and the living-customary law
E) Islamic law tradition-Allah-the Koran
F) None of the above

4. Identify the statement that best represents Berman`s position as outlined in the article entitled: ``Introductory Remarks: Why the History of Western Law Is Not Written:``
A) There is such a thing as western legal tradition with ten attributes even if that is unwritten owing to nationalism and legal positivism of 19th century in Europe.
B) There is such a thing as the history of western law that is written owing to nationalism and legal positivism of 19th century in Europe.
C) There is such a thing as the history of western law with ten principal features and is fully recorded even if Europe was dominated by nationalism and legal positivism in 19th century.
D) In Medieval time, western law was featured by pluralism, which was a source of legal sophistication and of legal growth and of freedom.
E) He maps out the tension that has existed between the ideals of the history of western law and its realities, between its dynamic qualities and its stability, and between its transcendence and its immanence.
F) He describes when, how and why the western legal tradition with its ten attributes was transplanted.
G) He documents that the history of western law is fully written for scientific history, invented in 19th century, encouraged European legal historians to look beyond their respective national border.

3.4 The Socialist Legal Tradition[7]

This section covers issues of the origin, the spread and the reasons for the spread of the socialist legal tradition. The socialist legal tradition, as you might know, was developed as an ideological challenge to the capitalist legal system

[7] Id.

represented by the civil law and common law. The aspiration of this system was to destroy law and state and create an egalitarian society.

3.4.1 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. 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. Under the influence of the Soviet Union and Marxist thought, similar legal changes have taken place in those states of Eastern Europe (and in other countries, such as Cuba) that had the civil law tradition before they adopted the socialist legal system.

The roots of the socialist legal system are traceable to the civil law system. This in itself may have been one of the greatest accidents of history. As it happened, Marxian socialist revolutions spread only to those countries that, before the revolution, were members of the civil law family. These countries saw fit to retain the civil law infrastructure of their pre-revolutionary legal systems. The result of this unique experiment in legal transplantation is the creation of a legal tradition that is qualitatively different from the one from which it so heavily borrowed.

3.4.2 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. In both systems, governance would be by non-legal rules of morality. Because of the consensual nature of these rules, they would or would not be enforced through any form of external coercion. To the Marxist-Leninist, however, the early society represented not communism, but communalism. Communalism is at best a form of primitive communism. Socialist legal system is unique not only in its social, economic, and political features, but also, its pseudo-religious character. Socialist law concerns itself not only with political organization of society and the social and economic welfare of the citizens, but also with the spiritual welfare of the individual.

3.4.3 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. At the same time, the common law appears to a soviet lawyer to be unsystematic and undeveloped, in comparison with carefully

drawn Soviet legislation that builds on the civil law tradition of system and order. Finally, 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 term ``natural justice`` denotes the general principles and minimum standards of fairness in adjusting a dispute. The term ``natural justice`` embodies the specific requirements that no man be judged in his own case, that each side be heard, and no man shall be condemned unheard. This principle of natural justice goes through socialist civil and civil procedure rules. Among the principles of natural law that have found their way into socialist law is the social contract theory. That is, the principle of self-preservation in pursuance of which man sought to find security by transferring all his natural rights to the state and promising to obey that state. Under this theory, the delegation of power by the citizens to the state is unconditional. And the exercise of the delegated authority by the sovereign is absolute. The other principle is sanctity of contracts. That is obligations voluntarily undertaken must be fulfilled There is another principle of socialist law, which is the obligation to repair damage done by one's fault to others.

Among the major contributions of socialist law to comparative jurisprudence is its general theory on the nature and functions of law. Socialist legal thinking on these questions was essentially shaped by the writings of Karl Marx, Frederick Engel's and Vladimir Lenin. Subsequent Soviet and other socialist legal thinkers have made contributions to this general theory.

Generally speaking, Marxist-Leninist theory on the origin, nature, and functions of law may be reduced to the following fundamental tenets: 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. In other words, since his environment corrupted the present man,

the task of socialist law is to remold man in his original image. To return to his original, pre-law state of being is to prepare him for life in a post-law society.

A second of fundamental tenets of Marxian jurisprudence includes the following. 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. Subject to such self-imposed restraints, the power of the sovereign to legislate is absolute. No area of human conduct lies outside the reach of the long arms of the law.

To the Marxist-Leninist, 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. But under advanced socialism, the state is perceived as the organization of the political power of the whole people. Like law, the state is an historical phenomenon. It is not eternal. In the primitive society when there were no economic classes and no notions of private property there was no state. 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.

Socialist law operates as its own gravedigger. By consciously engineering the advent of communism, socialist law lays the groundwork for its own death. The fact that there would be no laws under communism should not be taken to mean that anarchy would prevail in that society. All it means is that law will be replaced by a system of rules of communist morality to be enforced through a system of social pressure. In order to prepare society for the ultimate replacement of law with rules of communist morality, it is anticipated that during socialism the rigid demarcation between legal norms and moral rules would be gradually eliminated. It follows, therefore, that one of the

characteristic tendencies of the development of socialist law is the gradual but programmed convergence of the rules of law and morality. Thus, whereas socialist law started out by incorporating the rules of morality prevailing among the governing majority classes, it is expected to end its development by being fully assimilated into the rules of communist morality.

3.4.4 Purposes of socialist law: The historical mission of socialist law is to advance society towards socialism and ultimately towards communism. Communism is the more advanced stage of socialism. In order to achieve this goal, socialist law seeks to abolish all capitalist and feudal forms of property ownership. Socialist law seeks to consolidate socialist economic relations and to lift domestic relations from the level of capitalist influence. Socialist legal rules are seen as an instrument of social engineering. Socialist legal rules are weapons in the hands of the political rulers aimed at achieving the set political goal through the coercion of general compliance. The socialist legal system is characterized by elements such as an uncompromising recognition of the supreme leadership of the omnipotent Communist Party, state ownership of land and the collectivization of the use of land.

Socialist law is the fundamental remaking of the conscience of the people. The purpose of the law is to inculcate in the people such ideals as high moral soundness, unwavering belief in the idealness of life under communism, and self-sacrifice for the common good.

Socialist law operates on the assumption that man has been corrupted by his socioeconomic environment and as such has become evil. The present imperfect man needs to be cleansed of his evil ways. The task of transforming society from capitalism to communism must be carried out at the same time as the reformation of man himself. Since the present man by virtue of his imperfection cannot live under communism, socialist law implicitly operates on the assumption that only the new man may enter the Promised Land. The Promised Land is the lawless state of monolithic tranquility and dynamic equilibrium known as communism. This aspect of law focuses on the educational role of law. The social goal of this law is to create the new communist man who will not only willingly embrace atheism and look upon religion as an opiate, but also would be purged of all the evil tendencies of the present imperfect man.

In order to create the perfect man, socialist law mobilizes all available legal, quasi-legal and social institutions. This system calls upon everyone to be his brother's keeper. Everyone must come to the rescue of a fellow citizen in the times of need, and to love one another. Among some of the moral virtues which socialist law seeks to inculcate in the new man are love for the fatherland, international solidarity among the masses of the world, hatred for the class

enemy, unmitigated support for communist party policies, selfless sacrifice for the benefit of society and socialist humanism. Humanism as understood by the socialists constitutes respect for socialist property, honorable attitude toward state and social duty, respect for the honor and dignity of one's fellow citizens and the rules of socialist communal life, love of one's neighbor, and love for work and the dignity of labor. Viewed from this perspective, socialist law does not merely seek to regulate legal relations of today, but more importantly, it seeks to prepare society for the ultimate demise of law.

Socialist law is not a science. Socialist law operates on the premise that if you can affect the belief of the people and make them think a new magic has been found, even if your reasoning is wrong, you can probably change the system. In a sense, it is a challenge of faith. It is dogmatic, yet pragmatic also. Under the socialist legal system, law is totally subordinated to the prevailing socio-economic and political conditions. Law is only a conduit between politics and economics. And to that effect law is immediately preempted whenever it conflicts with overriding economic or political considerations.

A few notes on the way socialist China used to see law may help to concretize the discussion of the role of law in the socialist law tradition. According to Chinese communist ideology, the party controlled the state and created and used the law to regulate the masses, realize socialism, and suppress counterrevolutionaries. The party viewed that the law and legal institutions existed to support party and state power. Law often took the form of general principles and shifting policies rather than detailed and constant rules. The Communists wrote laws in simple enough language that every individual could understand and abide by them. Technical language and strict legal procedures for the police and the courts were avoided to encourage greater popular appreciation of the legal system.

Mao Zedong maintained that revolution was continuous. He opposed any legal system that would constrain it. Whereas Western law stressed stability, Mao sought constant change. Mao emphasized the contradictions in society, and called for relentless class struggle. The courts were instruments for achieving political ends. The political party used criminal law to conduct class struggle. Mao believed it unwise to codify a criminal law that later might restrain the party. After 1949 the party also greatly altered the character of the legal profession. A number of law schools were closed. Most of the teachers were retired. Legal work was carried on by a handful of Western-trained specialists and a large number of legal cadres hastily trained in China.

The Western-trained specialists were Cuomintang-era lawyers who chose to cooperate with the Communists. The western trained lawyers were considered

politically unreliable. The party initially ignored most of their arguments for a modern legal system. As the 1950s progressed, however, this group was instrumental in China's adoption of a legal system based on the system of the Soviet Union. In general, the specialists wanted codified law, enforced by a strict Soviet-style legal bureaucracy. Without such procedures, they felt, there would be too much arbitrariness, and eventually the legal system would become ineffective. Many of these specialists removed from the scene when the Soviet model was abandoned in the late 1950s, but some became party members and gained influential positions.

In the first thirty years of the People's Republic, the new legal cadres--chosen more for their ideological convictions than legal expertise--conducted the day-to-day legal work. These cadres favored the Maoist system of social and political control and regarded themselves as supervisors of the masses who subscribed to a common set of communist values. The new cadres saw this common ideology as providing better overall direction than strict legal controls could. They believed that China was too large to be governed by any single set of fixed rules or a legal bureaucracy. They preferred to administer justice by simplified directives tailored to the needs of local communities so that the people (and the new cadres) could participate fully in their implementation. As part of this plan, the cadres organized "study groups" to familiarize every citizen with current directives and circulars.

Most cultures agree that the purpose of criminal law is to control deviancy. The Chinese traditionally have sought to do so through peer groups rather than through the courts. This practice continued after 1949. Ideally, peers helped the deviant through criticism or persuading by talking. The stress was on education and rehabilitation. A policy linked to the Confucian and Maoist principle that, with patience and persuasion, a person could be reformed.

3.4.5 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.

3.4.6 More on the hallmarks of socialist legal tradition: 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. Law is to die with the state and in the classless society; law will be

replaced by community morality that will emerge on the basis of consensus. A transformation of class society is inevitable and historically proven: the slave-owning society moved to the feudal society, the feudal society changed itself into the capitalist class and the capitalist class in turn would inevitably die and in its place the communist society would emerge. In the socialist system, law and state would have temporary existence. 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.

3.4.7 Spread of socialist laws: As mentioned earlier, socialist law was rooted in the philosophy of Marx and Engle's; in early 20th century, revolutionaries in Russia converted this anti-western dominant 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. 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.

3.4.8 Review Questions

Part I. Read the statements under ``aspects of law/socialist legal system`` and tick under ``applies to socialist law` and tick under ``does not apply to socialist law` as the case may be. You may tick under ``cannot be determined`` if you think that it is difficult for you to take a position.

No	Aspects of law/socialist legal system	Applies to socialist law	Does not apply to socialist law	Cannot be determined
1.	Aims at creating a new person.			
2.	It will wither way.			
3.	Made by the communist party			
4.	Should have educational role			
5.	Will be replaced by communist morality.			
6.	Law is seen as having element of the superstructure.			
6.	Law is seen as a tool of exploitation.			
7.	The fate law is the same as the fate of state.			
8.	Law should not serve to limit politics and define the liberty of individuals.			

9.	In socialist phase, public law will have predominance.			
10.	The judiciary must be subservient of the communist party.			
11.	Law should serve to consolidate the idea of unity of power.			
12.	Law should be used to fight selfishness, bring about collectivism.			
13.	Law should be used to undermine private property and to enhance the institution of socialist property.			
14.	Law should be used to replace incentive and market principles by command system.			

Part II Sound/Unsound Type Questions

Instruction: Read the following questions with care and say `sound` if you think that the statement is an accurate description of a principle in legal history/comparative legal tradition, or say `unsound` if you think that the statement is inaccurate description of a principle in legal history/comparative legal tradition.

1. Since the present man by virtue of his imperfection cannot live under communism, socialist law implicitly operates on the assumption that only the new man may enter the Promised Land.
2. The Promised Land is the lawless state of monolithic tranquility and dynamic equilibrium known as communism.
3. Socialist philosophy was first attempted to be translated into reality in the ex-USSR.
4. Socialist law spread from ex-USSR to other parts of the world via coercion and pressure.
5. Socialist legal system has essentially collapsed since 1980`s.
6. It is important to study the socialist legal system since it is part of legal history, since it is a recent past and likely to influence the present.
7. Socialist law operates as its own gravedigger, by consciously engineering the advent of communism, socialist law lays the groundwork for its own death.
8. According to the socialist legal thinking, the Workers` Party shall take excessive private accumulations continuously in order to avert the reversal of the socialist revolution.
9. Countries that abandoned the socialist legal system in favor of the civil law tradition are still affected by the left over of socialist thinking?

10. The Chinese communist party did not initially want to codify laws because it thought that codification of laws would constrain the government.
11. The Chinese communist party did not initially want to codify laws because it thought that codification of laws would complicate the laws and make it difficult for the cadres to understand the laws.

Part III Multiple-choice Questions
Choose the best answer from the given choices.

1. Identify the wrong statement.

A) In socialist legal tradition, plans prevail while competition and incentives dominate the civil law tradition.
B) In the socialist legal tradition human beings are considered to be inherently collectivist while human beings are taken as individualist in the civil law tradition.
C) In the socialist legal tradition the key role of law is to educate the ``old man`` while the basic function of law in the civil law tradition is putting a limit on state action.
D) In the socialist legal tradition, the Workers` Party makes laws while the civil law tradition assumes the representatives of the people make.
E) The socialist legal tradition uses law as the implementation of state policy while the civil law tradition dose not take law as a means of implementing state policy.
F) The socialist legal tradition assumes that law in the sense of the command of the sovereign would vanish in the long run while law in the civil law tradition continues to be the central ordering of society.

2. The idea in the socialist legal tradition that only the communist party is in possession of the best means (e.g. the education and the training) to sense the stage socialism reached and design the appropriate law and social organization for that stage is referred to as

A) Socialist legality
B) Continuous revolution
C) Continuous nationalization
D) Socialist enterprise
E) Perspective plan
F) Legal indoctrination

3. A legal tradition that accepted religious conception of laws in its initial stage is

A) The Roman legal tradition
B) The Babylonian legal tradition
C) The Greek legal tradition
D) The American legal tradition
E) The Hindu legal tradition
F) All of the above

4. Identify the proposition that goes with socialist laws in China.

A) According to Chinese communist ideology, the party controlled the state and created and used the law to regulate the masses, realize socialism, and suppress counterrevolutionaries. The party viewed that the law and legal institutions existed to support party and state power.

B) Law often took the form of general principles and shifting policies rather than detailed and constant rules. The Communists wrote laws in simple enough language that every individual could understand and abide by them. Technical language and strict legal procedures for the police and the courts were avoided to encourage greater popular appreciation of the legal system.

C) Mao Zedong maintained that revolution was continuous. He opposed any legal system that would constrain it.

D) Whereas Western law stressed stability, Mao sought constant change. Mao emphasized the contradictions in society, and called for relentless class struggle.

E) The courts were instruments for achieving political ends. The political party used criminal law to conduct class struggle. Mao believed it unwise to codify a criminal law that later might restrain the party.

F) All of the above

5. A legal tradition that did not make its hostility towards legal values other than its own explicit was:

A) The Socialist legal tradition
B) The Western Roman legal tradition under emperor Justinian
C) The Legist School during the Ts`in Dynasty
D) The French legal tradition under Napoleon (early 19th century)
E) The Confucian legal tradition
F) None of the above
G) Only ``A``

6. A legal tradition unworried by legal uncertainty in the course of its development is:

A) The English legal tradition
B) The American legal tradition
C) The Islamic legal tradition
D) The French legal tradition
E) The German legal tradition
F) The Confucian legal tradition
G) None of the above

3.5 The Islamic Legal Tradition[8]

Islamic law owes it origin to divine power-Allah. Islamic law encompasses the spiritual as well as the secular activities of Muslims. Islamic law interplayed with common law and civil law systems in 19th and 20th century. The section, among others, briefly discusses the sources and foundations of Islamic law, factors of the expansion of the Islamic law and the place of doctrinal writers in the Islamic legal tradition. A little bit is also said about Islamic law in Ethiopia.

3.5.1 Essential aspects: Islam is based on the principle of the inseparability of religion and politics. This conception necessitates the codification of Islamic law as the law of the country, proclaimed and administered by national governments. Islam links together all facets of life into a composite whole regulated by Shari 'a. 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. The whole of the law is permeated by religious and ethical considerations. And everything is measured by the standards of religious and moral rules. In Islam, there is an integral relationship between religion and morality. This relationship necessitates the set of rules embodied in Islamic law for the protection of the moral values of the Muslim community. The Islamic community is responsible for watching over the practice of what is good and decent, and prohibiting that which is evil. In the Holy Koran, Allah is quoted as saying, "Ye are the best community that hath been raised up for mankind. Ye enjoin right conduct and forbid indecency." The premise of Shari'a is that one lives his or her public and private life, twenty-four hours a day, under the watchful eyes of Allah.

The heart of Sharia Law is that its validity emerges from divine origin. Allah is the source of Sharia law. Sharia law does not emanate from earthy human will. Every Muslim must follow these rules if s/he is to live up to the expectation of Allah. This will of the earth becomes manifest to man through revelation. The consequences of this thesis are multiple. According to Islamic law, the source of Western law is human origin while the source of Sharia Law is divine origin. Western law is mutable (law is the function of the changing circumstances in the society) while Sharia law is immutable (it is not subject to change). While western law governs the earthly life of human beings Sharia law deals with both the earthly and spiritual aspect of Muslims. Muslim Law claims to cover all aspects of human life. And while western law is subject to time and that Muslim law is eternal, as it claims to be beyond time.

[8] Id.

Muslim legal scholars admit that the Sharia law is not put in a comprehensive and orderly form. There are gaps to be filled in by discovery, understanding and formulation of already existing rules. Sharia law is spread over areas populated by 1/6 of world population as a result of factors such as trade, migration and voluntary acceptance.

3.5.2 Sources of Islamic law: The first and most important source of Shari'a is the Holy Koran. The Koran is the Holy Book for Muslims. In addition to monotheism and the postulate of the exclusive worship of Allah, the Holy Koran creates a complete moral system for human beings. This Holy Book sets down the foundations of the world order for humankind. 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 Holy Koran is a code, which governs the religious and social life of mankind. As the aggregate of divinely ordained rules known as Ahkam alshari'a, the Holy Koran is first among Islamic legal sources. The rules derived from the Holy Koran are, therefore, regarded as the highest rules. All rules derived from other sources should be in full accord with Koranic ones. The Suna is the second source of Islamic law. The Suna is the totality of the inspired practices of the prophet. The Suna includes the collections of sayings and records of Prophet Mohammed. It includes what the Prophet is recorded to have said, done, approved, or forbidden. The third source of Islamic law, 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. Qiyas comes to operation when the other three sources of law become inadequate to address a given legal issue.

3.5.3 Doctrinal differences: In Islamic law, doctrines that are too generally phrased have arisen and these doctrines do not have the characteristics of a legal rule. Some of these doctrines area: Medina, Hanafi, Maliki, Shafii and Hanbali.[9] This doctrinal difference arose because of geographical difference, influence of the style of life, stage of development and legal practice of the neighboring community. The doctrine of the four roots of Islamic Law was developed in order to minimize the great diversity in doctrines. During the 9th century, the fertile grounds for diverse ways of looking at a Koranic verse dried up as a result of the view that Muslim scholars may not hold independent opinion. Muslim scholars must rather stick to the Koran or already existing authoritative texts.

[9] Some however claim that there are only four schools of thought namely: the Hanefite, the Malikite, the Shafite and the Hanabalite schools named after the jurists who coined and developed each of these doctrines.

3.5.4 External influence: Before 19th century, Islamic law could regulate the social, political and economic conditions. The Islamic world became content with the Sharia law. The need for legal reforms arose from 19th century on wards. The Islamic section of the world came in close contact with the European influence. It was sensed that the legal life of this community had to undergo changes. The proposal for reform led to conflict with traditional Islamic doctrine – mutability and Immutability, man made versus Allah made law.

3.5.5 Degree of external influence: In cases where the conflict has been less manifest, acceptance of western commercial and maritime law was successful. In other areas (family law, succession), the western laws failed to deeply penetrate the Sharia law. In the 20th century, reforms began even in the areas where the influence of Islamic law was deeply entrenched. The influence and authority of the classic Muslim legal scholars was immense and incomparable with the influence of continental legal scholars.

3.5.6 Spread of Islamic law: Islamic law, since its date of inception, in the Middle East in 7th century, 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. This brand of law and its thinking have been spread to countries in the Far East. The geographical location stretching from West Africa to the Far East constitutes what may be called Islamic law belt. In the areas to which Islamic law has been spread, there used to be customary laws already in place, and in those areas in 19th and 20th century, western conceptions of law, i.e., common law and civil law, arrived thus creating an opportunity to the interaction of the four legal traditions.

3.5.7 Notes on Islamic Law in Ethiopia[10]

As one of the oldest recipients of Islam, Ethiopia has a significant Moslem community. Although there was a general cultural of tolerance in Ethiopia, the relation between state and Islam was embarrassing. Historically, the Moslem community was disfranchised, particularly in the Christian highlands, as they were excluded from the traditional land-holding system. The Solomonoid emperors considering themselves as lord protectors of the monophysite faith, i.e., Orthodox Christianity, ignominiously marginalized the Moslem community, relegating them to second class citizenship. The Gragn interlude marked a departure from traditional state-Islam relation. Besides, forced conversion was brought to bear upon the Moslem community. The post Zemene-Mesafint (Era of Princes) period saw the same tendency, as the empire-building started off by Tewodros.) Boru Meda Council is a case in point for which Emperor Yohannes IV had been hailed as a 'saint-hero'. The empire-building process called not just for the reconciliation of the

[10] Taken from Alemayehu Fentaw, Legal Pluralism in Light of the Federal and State Constitutions of Ethiopia: A Critical Approach, (AAU, Law Library, Unpublished) (2004) at 63-65 and 83-84

prevalent doctrinal differences within the established Orthodox Christian church, but also for the unification of faith by stamping out Islam of the face of the Christian empire. Following his campaign to Harar, Emperor Menelik II called upon both Moslems and Christians to live and coexist peacefully.

Islamic law has been used to regulate the secular and religious affairs of Moslems since time immemorial. In Ethiopia, there are three sects of Islam, all of which belonging to the Sunni tradition. These are (a) the Shaffi, (b) Hanafi; and (c) Maliki. The long de facto existence of Shaira courts in Ethiopia got recognition in law in 1942 when the Proclamation for the Establishment of Kadis' Courts was issued. This proclamation legitimized the competence of Islamic courts in matters relating to marriage, divorce, gifts, succession and will. It provided that "any question regarding marriage, divorce, maintenance, guardianship of minors and family relationship, provided that the marriage to which the question relates was concluded in accordance with Mohammedan law or when the parties are all Mohammedans, shall fall under the jurisdiction of the Shari'a Courts. It further stipulates that the government will appoint the judges including the Chief Kadi who was invested with a number of prerogatives ranging from working-out procedures and rendering final decisions in his appellate jurisdiction to attachment and execution.

In 1944, the Kadis and Naiba Councils Proclamation No. 62/1944 was promulgated, repealing the earlier proclamation. Under the new proclamation, Shari'a courts were re-established and a new set of courts were introduced. Pursuant to this proclamation, there are three sets of Islamic courts: (1) the Naiba council; (2) courts of the kadis' council and (3) the courts of Shariat.

However, in 1960 a Western-based Civil Code was enacted which purports to repeal Islamic law. Despite the sweeping thrust of the repeal provision, Shari'a courts remained in tact and kept on functioning and applying their law independent of the regular state court structure. "The code," Abdulmalik writes, "remained a purely theoretical work devoid of real value in respect to those matters governed by the Sharia rules despite the fact that those matters were supposed to be ruled by the Civil Code which automatically would have brought the abrogation of the Sharia'a rules by virtue of Art. 3347(1)"

The 1994 Ethiopian Constitution also recognizes the independent validity of Islamic law and the competence of Islamic courts to adjudicate cases concerning personal and family law. In order to execute this constitutional provision the House of Peoples' Representatives has issued proclamation No. 188/1999. This legislation spells out the circumstances under which Islamic law can be applied by Shari'a courts. The hitherto existent Shari'a courts have been reconstituted into a three-level federal judicial structure, distinct from the regular (state) federal judicial structure. These are: (1) Federal First Instance Court of Shari'a, (2) Federal High Court of Shari'a and (3) Federal Supreme Court of Shari'a. Like the federal state judicial organs, all the federal Sharia courts have been made accountable to the Federal Judicial Administration Commission. All of the State Councils have also given official recognition to Shari'a courts within their respective jurisdictions.

Article 4 (1) of Proclamation No. 188/1999 stipulates that: Federal Courts of Shari'a shall have common jurisdiction over the following matters:

a) any question regarding marriage, divorce, maintenance, guardianship of minors and family relationships; provided that the marriage to which the question relates was concluded or the parties have consented to be adjudicated in accordance with Islamic law;
b) any question regarding Wakif, gift/Hiba/, succession of wills, provided that the endower or donor is a Muslim or the deceased was a Muslim at the time of his death.
c) Any question regarding payment of costs incurred in any suit relating to the aforementioned matters.
Sub-Article (2) of the same reiterates the principle of parties' consent as the basis for the adjudicatory jurisdiction of Shari'a courts. Shari'a courts can assume jurisdiction "only where… the parties have expressly consented to be adjudicated under Islamic law." Tacit consent has also been provided for in addition to express consent. Pursuant to Article 5(2), a person who appears before the court amounts to consent to the courts jurisdiction on condition that the defaulting party has been duly served with summons. Thus, the suit will be heard ex parte. Sub-Article (3) of the same provides, that "In the absence of clear consent of the parties for the case to be adjudicated by the court of Shari'a before which the case is brought, such [a] court shall transfer the case to the regular federal court having jurisdiction." Moreover, once a choice of forum has been made by the plaintiff and the defendant has consented to the jurisdiction of such a forum, under no circumstance can either party have their case transferred to a regular court (Article 5(4).

3.5.8 Review Questions

Part I Multiple-choice Questions
Choose the best answer from the given choices.

1. One of the following is the wrong contrast between the common law tradition and the Islamic law tradition.

A) Law in the common law tradition can come from judges while law in the Islamic law tradition must be traceable to the Koran.
B) Law in the Common law tradition is relative while law in the Islamic law tradition is absolute.
C) Law in the common law tradition covers only some secular aspects of human behavior while law in the Islamic law tradition seeks to regulate the spiritual and secular conduct of a Muslim.
D) The Islamic law tradition found itself in a theoretical tension at the end of 19th century and 20th century in its confrontation with the western law tradition while the common law tradition did not face a similar tension.
E) A & D
F) None of the above

2. One of the following is the sources of Islamic law:

A) The Koran
B) The Qyias
C) The Igma
D) The Suna

E) All of the above

Part II. Fill in the Blank Questions.
Fill in the blank space provided below with the most appropriate words/phrase that completes the statements below.

1. _____,_____,_____and_____are the four sources of Islamic law.
2. _____is the primary source of Sharia.
3. Islamic law is also called_____.
4. _____is a collection of rules agreed upon by Muslim community.
5. _____means analogy in Islamic law.

Part III Sound/Unsound Type Questions
Instruction: Read the following questions with care and say `Sound` if you think that the statement is an accurate description of a principle in legal history say `unsound` if you think that the statement is inaccurate description of a principle in legal history.

1. The influence and authority of scholars of Islamic law is greater than the influence and authority of scholars of common law.
2. Islamic law is assumed to be immutable.
3. The Islamic legal tradition faced a doctrinal conflict in 19th and 20th centuries.
4. Islamic law did not allow itself to be penetrated by the Western legal tradition.
5. The heart of Sharia Law is that its validity emerges from Divine origin.
6. The Koran consists primarily of principles of ethical behavior too generally stated to have the precision of legal rules.
7. Even if indigenous legal traditions such as the Hindu legal tradition often have family laws firmly embedded in their belief system, importation of laws into these legal traditions in this area of law is not likely to encounter strong resistance.
8. One can characterize a legal tradition as rational or empirical depending on the existence or absence in that legal tradition of legal profession, legal education and legal writers.

3.6 The African Legal Traditions[11]

The idea of this section is not to claim that there is a single body of law applicable to all Africans. The idea of this section is rather to present the main common features of the traditional legal systems in Africa. The traditional African customary laws claim to govern the moral, religious and secular conduct

[11] Id.

of human beings. The scope of the African legal system is broader than the modern western legal system. The African legal system, the traditional one, is presented as being static. But some claim that the African legal system is not static; the African traditional laws are dynamic. The dead, gods and the living are considered to be the actors responsible for making the African laws. The gods and the dead are regarded as actors responsible for enforcing the African customary laws. The unit of analysis of the African customary law is not the individual but it is the community. The goal of the African legal system is conciliation and compromise. The idea is not to settle case in the sense of win-lose struggle in state courts but it is to be settled in the form of win-win. The participants in a given conflict should go back to the community and live peacefully, without losing the face of one another. Generally, the African customary law is attacked for being not gender sensitive. The section outlines the key facets of the African customary law.

3.6.1 Designations: 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. It also affirms the distinctiveness with which African Customary Law has been regarded. This form of isolation of African Customary Law has obscured its dynamism.

3.6.2 Scope: The rules governing under developed societies deal both with behavior and with the settlement of disputes. They cover everything, which must be "making no distinction between religion, morals and law.``

3.6.3 Features: The African systems of law are sufficiently similar in procedure, principles, institutions and techniques for it to be possible to treat them as a whole. The difficulty of subsisting and dangers from the outside world making life precarious, the inhabitants were obliged to seek refuge in communal life and solidarity, and to place themselves under the protection of supernatural forces. Such forces included God and ancestor people, laying down its laws and guarding man to survival. Thus the most important African legislative is invisible: composed of gods and ancestors. Their decrees, however, are not only legal but moral also. Their action extends to the individual conscience since they are also the counselors and judges of each individual.

The African mentality is mystic. And the fear inspired by the environment causes the African to stand still in contemplation of the past and respect for that which is. African law seeks to preserve the group and peace. Persons subject to African law are the gods, the dead and the individual. African law is designed for a structured society. African law sees the woman generally as inferior to man.

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.

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. This view was reinforced by the common law tradition, which perceived law as ancient and immutable. Thus, in order to search what the law "really is," judges must study precedents. Similarly, custom was recognizable by the courts if it was ancient and unchanging.

The source of customary law that dominates primitive law is custom. It is custom that prescribes the compensation due, for killing a man, the formalities for making a contract, the rules of inheritance, the obligations of kinship, and the limitation on which one may marry and so forth. Custom (including customary law) resembles language in being a complicated, slowly changing and decentralized system of highly exact rules.

Customary law is secreted by society itself. 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. It can be taken as a path, which appears on the ground when the passers by follow in the footsteps of those who have gone before. The path changes a little under the feet of each passer by; it is not in the nature of custom to be fixed.

"Custom" must thus be distinguished from "law." The former refers to practice; what people do. The latter is the norm; what people ought to do. Custom is the "raw material out of which customary norm is manufactured." According to Hoebel, both custom and law have regularity. They define relationships and promote sanctions. However, the sanction of law "may involve physical coercion" and is distinguishable from custom since "it endows certain selected individuals with the privilege-right of applying the sanction of physical coercion, if need be." Moreover, law has been described as the coercive instrument for regulating human behavior. In fact, it is the compulsion element in the legal norm that makes it a superior mechanism for achieving broad social goals. Such goals may include reordering and stabilization of society, the planning and direction of change, and the consolidation of political power. Every society enjoys a measure of social equilibrium imparted by the instrumentality of law. Law, thus, ensures that every society exists as a coherent social whole, which is

not a unique attribute of African traditional societies. Specifically, their legal control and response to violation of norms was backed by use or threat of force. Force varied from one group to another and was applied directly against a person, or generally against his property, to bring about the settlement of a dispute, while punishment for the guilty involved fines.

Modern African law is a collection of laws and habits of legal thought. African indigenous law is not static. African law is subject to evolution. It is generally unwritten. It has different branches including substantive and procedural laws. African law does not simply focus on reconciliation. There is a procedure to be followed and there are substantive laws to be applied. After independence, African law is restated. Restatement does not mean it is thereby made inflexible and frozen. Restatement of African law is done for the purpose of unification and convenience of administration.

One of the sources of indigenous African law is custom. Custom is the body of standardized patterns of behavior that have been established by the usages and observances of people and having the force of law. Indigenous legislation (declaration of legal rules by a competent authority) and precedents are also sources of African law.

3.6.4 External contacts: African law has not escaped outside influence. African society has been transformed by contact with the monotheist religions such as Christianity and Islam, and under the influence of colonization, but without the successive contributions of civilization really becoming unified. The colonizing nations each organized the territories fallen to their share according to their own law. It is not without cause that African Customary Law has been underestimated. Primarily, the prevalence of customary norms and practices is questioned by the very existence of the "modern" state structure in Africa. Commentators on the subject have observed that African Customary Law tends to be insensitive to gender equity and several other individual freedoms and rights guaranteed by modern constitutional and international human rights instruments. Despite this, legal systems of most African countries allow courts to apply African Customary Law, though with some restrictions. This process is indeed an attempt to fit the customary law principles into definitive legal criteria capable of supporting a "modern" judicial process. The adjudication of customary law issues is, thus, undertaken within an integrated legal system largely informed by the laws inherited from the colonizers.

During European colonization, in relation to the judicial structure as a whole the position of the local court varied from country to country. But two basic patterns can be recognized. One is an integrated system where the local courts were linked with higher judicial bodies, particularly the high or supreme courts by

way of appellate jurisdiction. And the second pattern is a parallel system, which involved the separation of the local courts from the judicial system administering primary non-indigenous law. Indigenous law was invalidated where it was found out to be contrary to natural justice, equity and good conscience.

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. But 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 court for African customary law. The African law was to be steadily brought into in line with English ideas of law, justice and procedure.

Modibo Ocran, The Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-colonial Africa, Akron Law Review (2006)

The historic Berlin Conference on Africa in 1885 is often credited with the official beginning of colonialism in Africa. However, this Conference, held among the principal colonial European powers (Germany, France, Britain, Belgium, and Portugal), essentially marked the agreement among those powers to define territorial areas of influence in Africa. Long before this Conference, individual European powers had reached their own accommodation with indigenous peoples of Africa in various corners of the continent.

Thus, in the southern part of Ghana, then called the Gold Coast, the Bond of 1844 was signed by the British and the local chiefs in the southern part of the country under which the locals accepted British sovereignty or dominion over them in exchange for protection from their warlike neighbors further to the north. Indeed, Europeans interacted with the peoples of Africa for centuries before 1844. In the Gold Coast, for example, as far back as 1475, the Portuguese had set foot at a coastal place they called Elmina (Portuguese for "the mine"). However, the Portuguese did not have much success with colonialism in West Africa. In the Gold Coast, they were kicked out successively by the Dutch and then the English, and the territory became a British colony.

The story of the legal relationship between European and African legal systems that intrigues comparative lawyers starts in the 19th Century. As part of the Colonial Administration, the British naturally wanted to enforce law and order and to generally regulate the lives and habits of the people that they conquered. This was not always easy for the British, both as a practical matter and as a matter of legal doctrine and ideology. They encountered a legal system quite different from their own legal traditions. They had to deal with a religion-based legal system simultaneously meant for secular application that was unlike other forms of religious law, such as Canon Law, which largely applied to the spiritual realm of life. They also faced hostile reaction from strong indigenous cultures which were not necessarily prepared to accept the assumptions of the Western cultural mind. Ultimately, the culture accepted the creation of legal pluralistic systems in which the English dominated, but indigenous law also was maintained up to a certain point.

In other parts of Africa, it was not simply the clash between European and indigenous African cultural norms, but between European and Muslim or Islamic Law as well. A cultural influence of a different sort had already taken root. People had converted to Islam in some parts of Africa, and indeed in sections of the same community, while others in the same society had embraced Christianity. This was the beginning of the "triple heritage" of the African legal system: traditional, Judeo-Christian, and Islamic legal culture.

At the start of the legal history that we are concerned with, the characteristics of African society were either pre-industrial or traditional. Society was characterized by a subsistence level of living, using the sociological classificatory scheme of societies based on their level of socio-technical complexity. African economy at that point was heavily agrarian. Societies tended to be organized in small groupings, and "[t]he most important basis for [a] relationship was kinship." Sociologists refer to them as "kin-dominated" societies. However, there were other factors that bound together individuals, such as their economics, politics and religion. Thus, these societies are also referred to as "multiplex" societies. Because of these socio-economic characteristics, there inevitably was a close identification of traditional society with customary law. Individuals' roles typically were allocated "on the basis of ascriptive criteria" or birthright-related characteristics, which consequently depended on one's "sex, kinship, nob[ility of] birth, age and birth order." The people were soaked in traditionalism and custom. Their mindset was: "[P]erform the ritual customs because your ancestors did so," and "stick with something that seems to work."

The starting point of custom is of course practice or long usage. In traditional African societies, custom became the principal, if not the only, source of law. Kings or chiefs occasionally issued edicts, but custom was decidedly the main source of law. The chief himself was bound by custom and indeed was the repository of custom. Thus, in Western discussions of sources of law, the focus on this epoch in Africa would not be on legislative or judicial formulations, but rather on custom; viewed as usage of a long duration. Usage led to custom, and part of custom eventually became customary law. Customary law comes partially from the customs of the people, that is, that portion of customs that the people have accepted as community-governing principles, the violation of which would result in punishment. The rest of custom, that is non-legal custom, would not normally lead to punishment when violated, but could still effectively regulate norms of conduct. Custom itself emerged not simply from what was practiced, but also from the highly influential morals and religious beliefs of the people.

Traditional or customary law at that time was wholly unwritten for the simple reason that it was not a literate culture. Even today, much of customary law is unwritten, but there has been a growing corpus of treatises and court decisions setting down customary rules of law as the authors judge them to be. Therefore, it is now much easier to state the rule of customary law on a particular issue.

Indigenous or customary law in pre-colonial Africa is simply defined as rules of custom, morality, and religion that the indigenous people of a given locality view as enforceable either by the central political system or authority, in the case of very serious forms of misconduct, or by various social units such as the family. In terms of Western literature on the nature of law, jurists in these African societies were much closer to philosophies articulated by the German Karl von Savigny, and others in the historical school of jurisprudence. The core tenets of African customary law are its emphasis on collective responsibility, respect for the elderly, collective rights, and respect for long-established institutions.

However, this indigenous body of law began to face an assault from external influences in the form of Christian colonial power and Islamic religion. Would the new colonial powers reject African Law outright as somehow inconsistent with the primary imperative of colonialism to dominate the colonized people? If customary law was not to be accepted, could European law rule both European and non-European peoples in the enlarged colonial community? In any case, what should be the actual content of customary law in the new, multi-ethnic, African colonial states, where there are vastly different cultures and languages within one community? This was a problem, because if custom partially defines customary law, and if custom itself is something that emanates from the people, then there would be as many customary laws as there were different communities. In the Gold Coast, for example, there were at least ten major ethnic groups. In terms of custom and customary law, whose customary law should the British apply? Further, assuming the British knew what customary law consisted of, would they automatically apply it? Now that the British were the unchallenged colonial masters, intent on keeping their own proud tradition and culture, executing their so-called dual mandate in Africa, protecting the possessions of the Empire, and concurrently civilizing the peoples of Africa in the European ways, what were the British to do with the cultural norms of the conquered indigenous population?

By way of comparison, a similar problem also arose in Latin America at the start of Spanish and Portuguese rule there. Woodrow Borah, writing on the accommodation of Spanish and Indian law in colonial Mexico, noted that during the mid-16th century, a series of discussions among Spanish policy-makers had "attempted to settle [the nature of] the relations[hip between the ruling Spanish group] and the subjugated communities." This discussion took center stage particularly "from 1511 on[wards when] some members of the [Spanish] bureaucracy, disturbed by the destruction of the Indian population in the Antilles and on the mainland, [sought to establish] less murderous systems of exploiting the colonies."

Borah notes that in general there were three schools of thought on this matter. One [school] held that the Indians, having developed their own [organized] society, were entitled to [keep] their own institutions and laws. Should they come under the rule of a foreign sovereign [such as] the Spanish King, he was bound to uphold and defend native institutions and laws since he [in effect] served as the native prince. The most that might be conceded [in the name of change was the minimum necessary for extirpating idolatry and introducing Christianity.

The second school of thought focused on the idea of one society, which signified a determined assimilation of the Indians into Castilian institutions. This view was held by most crown jurists involved in "developing a unitary legal system which would replace feudal diversity with a uniform royal administration [based in Spain]." The third school "urged the Indians and Spanish [to] be organized into two separate commonwealths, each with its own laws, customs and systems of government." An extreme exposition of this view held "that the Indian commonwealth be so completely separate that it would be linked with the Spanish only by being subject to the same [metropolitan ruler]." The difference between the first and the third schools appeared to be that in the first, the Spanish and Indians would be within the same political and legal community, whereas the third school envisaged a kind of federalism or separate states both working toward the potentate in Spain.

As Borah notes, the official Spanish response was ambivalent but did suggest a rejection to a large extent of the "two republics idea" and the approximation of the first school of thought. This

response was somewhat predictable. Indeed, this appeared to be one of the imperatives inherent in the imposition of alien sovereignty and religion, as well as the settlement of an alien upper class. [I]t was unthinkable that the Spanish [would] permit the continued practice of idolatry and human sacrifice, and the continued existence of the heathen religious hierarchies. It was equally unthinkable that the Castilian crown officials [would leave intact] the old native political superstructures and their administrative hierarchies.

Moreover, on the level of human relations, there eventually developed a considerable intermingling between Spanish and Indians. As "Spaniards took up residence in Indian towns to establish businesses and care for properties, large numbers of Indians were drawn into Spanish households as permanent or semi-permanent workers." In colonial Africa, the merger of the two cultures occurred as the British accepted customary law to some extent, but also riddled it with so-called repugnancy clauses, in order to avoid those aspects of African customs that European culture found most appalling, ridiculous, or simply unhelpful to the inculcation of Christian ideals.

The Ashanti crime of suicide refers to successful suicide and not attempted suicide, which is viewed as a crime in many non-African legal systems as well. It was a crime to commit suicide, with only a few exceptions where suicide was excused. For example, it "was considered as honourable and praiseworthy to kill oneself in war by taking poison or sitting on a keg of gunpowder to which a light was supplied, rather than to fall into the hands of the enemy; or to return home from war to a tell of defeat." It was also excusable "to take one's own life in order to accompany a beloved master to the world of the spirits." Apart from these and other similar situations, suicide was considered to be a serious crime for which the society provided serious consequences"[T]here was always a legal presumption that the motive for self destruction had been evil."

But so what? In the "right to life" discourse, the bottom line is who has the right, if it exists at all? In this traditional society the life and the body of individuals were supposed to belong to the community, and the central authority was the only party which had the right to take a life. Therefore, the central authority viewed with disfavor any attempt to interfere with "its prerogative as the sole dispenser of capital punishment." It was also said that "the tribal authority may have placed suicide [among the capital offenses out of] a dislike [for] evil[-inclined] disembodied spirits wandering about in its midst."

The spirit of the suicide became a ghost wandering about in search of an abode; for it was debarred from entering the land of spirits until the expiration of its destined time upon earth, which it had itself wrongfully curtailed. There was yet another criminal act among the Ashantis, this time of a sexual nature, that seemed ridiculous to the European mind, but vividly demonstrated the thought-process of a mind steeped in animism. In the belief system of animism, the gods are supposed to lurk in the bushes, rivers, mountains, trees, and in the elements in general. Basically, it illustrates the impact of religious beliefs on law and on people's attitudes toward punishment. Rattray described this offense as "sexual intercourse in the leaves," and in the Twi language of the Ashantis was referred to as "ababantwe" or "ahahantwe."

A better English translation is having sexual intercourse in the bush. It was not that the Ashanti culture was unromantic, but no form of romance could come close to the defilement or desecration of the Goddess Earth, which the Ashantis called "Asaase Yaa." Thus, an act which otherwise

would not be a sin was regarded as such because of the impudence displayed in the face of the great supernatural powers In some parts of Africa, there was "the absolute claim of the husband to legal paternity" despite the natural parenthood of the child. Thus, in the famous Zimbabwe case of Vela v. Mandanika and Magutsa (1936 S.R. 171) plaintiff, M's husband under customary law, successfully sued Defendant, the wife's lover who had been living with her, for the custody of M's children, fathered by Defendant. The Igberra tribe in Nigeria had the rule "that any child born within ten calender months of a divorce could become the property of the former husband," in spite of the well-known rule that a child's best interest is of primary importance. There was a practice of domestic slavery, along with other deprivation of personal freedom that had many of the attributes of slavery.

In the face of this clash of cultures and of legal thought, what were the British to do in Africa? As with the Spanish and the Portuguese in Latin America in the 16th Century, the matter had to be resolved one way or another. At least in some parts of Africa, the indigenous communities had very ancient and proud cultures. Their animist religious beliefs were strong and they were not about to give up their way of life and their core beliefs, despite the overwhelming military and political presence of the British. Were they to be physically exterminated? Were they to be allowed to maintain themselves as a people. If so, what should happen to their body of laws and customs? The British eventually accepted customary law but put limitations on their content and application. The British had to retain their status as an imperial power as well as their public posture of introducing the indigenous people to the civilized ways of Britain.

The legal strategy was to introduce "repugnancy clauses" into the definition of customary law. These clauses defined the portions of African customs that were to be viewed and applied as law within the colonial legal system. Not all customs would be tolerated as having the force of law under the British dispensation. Further, the content of customary law was subject to a time limitation. Customs did not have to exist from time immemorial, but such customs should at least have come into existence by the establishment of the colonial legislature in that particular territory (e.g. 1876 in the case of the Gold Coast). Finally, any customary rule that was inconsistent with colonial legislation would be declared invalid.

The repugnancy clauses were meant to rule out laws and customs perceived to be against Christian values and morality or cruel and unusual by the standards of the colonizers. There were various formulations of these clauses. Some stated that the rules should not be "repugnant to natural justice, equity and good conscience." Others read: "Not contrary to [religious] justice, morality or order." Still others read: "Not repugnant to morality, humanity or natural justice or injurious to the welfare of the natives." The repugnancy clauses were typically contained in a statutory definition of customary or native law.

Natural justice is supposed to encompass such propositions as follows: No man should be a judge in his own cause; [n]o man is to be condemned unheard; [a] man is entitled to know the particulars of the charge or claim against him; [d]ecisions should be supported by reasons; and [p]unishments and rewards should not be excessive, but should be proportionate to the circumstances of the offense. As used in this legislation, the term "equity" did not refer to technical equity or to the body of rules formerly administered in the English Court of Chancery, but to equity in the sense of fairness. "This would permit a judge to waive technicalities of either English or African law and to disregard contemporary rules of law which would produce manifestly unfair results."

"'Morality' or 'good conscience' is the least precise component of the repugnancy clauses." It refers to morality in the general sense and thus lead to the inadmissibility of slavery, many forms of marriage without both parties' consent, and many other invasions of freedom. However, it was not morality in any particularly English sense because much of what the "English might have been tempted to call immoral was not always declared repugnant by the colonial system of justice." It is also quite clear that the standards of morality in different communities are by no means the same. In fact, one British judge in a 1938 Tanzanian case stated frankly: I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard. Otherwise we should find ourselves in certain circumstances having to condone such things, for example, as the institution of slavery.

Soon after Africa attained political independence, from the late 1950s onward, the African intellectual elite decided to modify the colonial repugnancy clauses. They felt insulted by the notion that their own African laws were somehow repugnant. "Repugnant to what or to whom?," they asked. They wished to emphasize the fact that these laws represented their own ethos. Similarly the term "native law" fell into disfavor because of its colonial connotation as uncivilized. Thus, a new type of legislation emerged in countries like Ghana, Sierra Leone, and Botswana. Incompatibility with legislative enactments or of decisions of the highest court of the land became the main criteria for distinguishing between unacceptable and permissible customary rules within the legal system.

Yet one could deduce from the language of post-colonial statutes and constitutions that customary law is still subordinate to other sources of law in the African legal systems. A hierarchy of norms had been created, and customary law was not on top of the list. The Judiciary in Africa still has some juridical problems in applying customary law as a source of law. First, at least a portion of customary law is still the law of particular ethnic or tribal groups or communities in Africa and not necessarily the general law. Second, certain aspects of those rules are outmoded and inconsistent with modern ideas of morality, even as viewed by Africans. Third, some customary norms may be inimical to development. Thus, rather than being ultranationalist in our attitude as jurists, the task is to modify customary law in aid of modernization. The judiciary and legislature need to adapt African indigenous law to make it a tool of socio-economic development without sacrificing the core values of African society: the values of fellowship, of being each other's keeper, and the notion that the free development of each is indeed a condition for the free development of all.

The modern African judge will be the first to acknowledge that, in many senses, the problems faced by the British judges in colonial Africa have not vanished. Almost one hundred percent of the African judiciary is now African. But even though there is no longer the gross disparity of national origin between a judge and his community, a judge often does not come from the particular locality whose ethnic law he is administering. Apart from this ethnic question, there is an enormous educational and cultural gap between a senior judge with a Western education and the ordinary families he may deal with. Thus, the judicial system may have moved from a problem of race and ethnicity to one of class.

The promise of legal pluralism is still dear to us, but the fundamental difficulties in its administration are real. Jerome Frank, one of the theorists of American Legal Realist school, in his 1949 book entitled Courts on Trial, discusses what he calls "the myth about the non-human-ness

of judges." In a chapter entitled "Are Judges Human," Frank notes that "legal rules express social policies and a judge's conception of such policies respond more or less to his social, economic and political outlook, which usually derives from his education, his social affiliation and his social environment." In our own time, the Critical Legal Studies scholars have restated this point of view in more radical terms, much to the annoyance of other contemporary legal theorists. But the gravamen of their complaint, and their determination to blow away the myth of the universally objective judge, is very real. It is real even with African Judges when they are called upon to apply or reject certain norms of African customary law

3.6.5 Review questions

Answer the following questions

1. ``…*The core tenets of African customary law-which should not be sacrificed under any circumstances-are its emphasis on collective responsibility, respect for the elderly, collective rights, and respect for long-established institutions… or the values of fellowship, of being each other's keeper, and the notion that the free development of each is indeed a condition for the free development of all…*`` Do you think that there should be limit (s) to the principle advocated in the quotation? Yes or no? If your answer to this question is `yes,` state your reasons by giving two examples as to how such `core values` should be restricted. If, your answer to the question is `no, demonstrate as to why those `core values` should not be limited.
2. According to Madibo, why did the colonial powers gave even a second place to customary laws?
3. Did the repugancy test vanish with the end of colonialism?
4. Why does Madibo mean by clashes of cultures in Africa? Which cultures clash with which ones?
5. What are the three conditions/limits imposed on traditional laws in Africa by the colonial administration?
6. Can you identify the juridical problems associated with the application of customary laws in Africa?
7. Does Madibo support legal pluralism? Does he suggest that African should go back to their roots in complete disregard of the laws they received in the course colonialism? What did the pre-colonial legal landscape look like?

Part II Multiple-choice questions

Choose the best answer from the given alternatives.

1. In case of a clash between recognition of customary laws and the unity of a country, those who give preference to national political and legal unity at the expense of legal diversity justify their position on account of

A) The difficulty of ascertaining customary laws
B) The difficulty of articulating customary laws
C) The necessity of fostering national identity
D) The quest for international legitimacy
E) The quest for social and economic progress

F) All of the above

2. The London Conference on the Future of Law in Africa held from December 1959 to January 1960:

A) Was supportive of the newly independent African states` effort towards the promotion of legal uniformity
B) Was supportive of the newly independent African states` efforts towards the promotion of legal diversity in their respective territories
C) Was supportive of the newly independent African states` efforts towards the promotion of a blend of customary laws and state laws
D) Expressed a loss of faith in traditional legal institutions in Africa
E) Glorified African customary laws
F) Stated the need for a deeper investigation into traditional legal institutions in Africa with the view to their restoration.

3. Ocran Madibo conceptualized`…the right to be heard…proportionality of punishment and rewards…the right to be judged by a neutral arbiter… and the requirement of reasoned decision`` as:

A) Equity
B) Natural justice
C) Morality
D) Due process of Law
E) Human rights
F) Legality

4. Among the_____ ``…it was considered a capital offense to have sexual intercourse with a married woman in the bush through seduction or use of force; it was not so much the rape aspect or the woman's marital status that attracted this type of punishment but the fact that it was done in the special preserve (in the bush)…``

A) Masai
B) Gumuz
C) Tiv
D) Ashanti
E) Igberra
F) Lou

5. Upon independence, the traditionalists and the modernists in various African nations invoked one of the following grounds-though in different senses-to justify their respective position on the issue of whether or not to restore traditional legal institutions:

A) Legitimacy
B) Effectiveness
C) Authenticity
D) Uniformity
E) Identity

F) Certainty

6. To the early anthropologists who paved the way for colonialism in Africa, African customary laws:

A) were static and without sanction
B) were repugnant to fundamental principles of humanity
C) were incomprehensible and uncertain
D) were fused with religion, morality and politics
E) claimed to govern the religious, secular and moral as well as the thoughts of an African
F) All of the above

7. According to Judge Madibo Ocran, a key feature of African customary laws which should be maintained at any cost is:

A) Flexibility
B) Dynamism and effectiveness
C) Its capacity to command group allegiance to post-independence governments
D) Diversity
E) Relativity
F) Solidarity

3.6.6 The Debate after independence: After independence, some African nations were under the influence of nationalism. 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. This movement towards "the source" and towards Africanism was immediately frustrated by the demands of modern life.

For the modernists, Africa should not go back to the traditional legal institutions in general and customary law systems in particular since going back to the roots would:

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

To the traditionalists, on the other hand, the reasons for respecting traditions in Africa would be:

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

3.6.7 Review Questions

Part I Multiple-choice Questions

1. A legal tradition that rejected customary rules as one of its elements in its life span is:

A) The African legal tradition
B) The French legal tradition
C) The German legal tradition
D) The Hindu legal tradition
E) All of the above
F) None of the above

2. In terms of the scope of application of legal rules, which one of the following legal traditions is the narrowest?

A) The Romanistic legal tradition
B) The Islamic legal tradition
C) The Hindu legal tradition
D) The African legal tradition
E) Cannot be determined
F) ``B``, ``C`` & ``D``

3. A legal system that accepted customary rules as one of its elements in its life span is:

A) The African legal system
B) The French legal system
C) The German legal system
D) The Hindu legal system
E) The Ethiopian legal system
F) All of the above

4. A legal tradition not influenced by a theory in its development:

A) The civil law tradition
B) The common law tradition
C) The socialist law tradition
D) The Hindu law tradition
E) The Confucian law tradition

F) The Germanic law tradition
G) The American law tradition
H) The African legal tradition
I) None of the above

5. A legal tradition not even slightly affected by the Roman law tradition:

A) The common law tradition
B) The Civil law tradition
C) The Romanistic law tradition
D) The Germanic law tradition
E) The English law tradition
F) The European Union law tradition
G) The African legal tradition
H) A, F & C
I) None of the above

6. A legal tradition that seeks to regulate beyond the secular conduct of an individual:

A) The Anglo-American law tradition
B) The civil law tradition
C) The Hindu law tradition
D) The African law tradition
E) The Islamic law tradition
F) The European Union law tradition
G) A, C & F
H) C, D &E
I) All of the above

7. A legal tradition that sidelines the Western conception of law:

A) The Confucian law tradition
B) The African law tradition
C) The Islamic law tradition
D) The Hindu law tradition
E) The socialist law tradition
F) All of the above
G) A, C & E
H) B & D
I) None of the above

8. A legal tradition that experienced a fundamental doctrinal tension in its development is:

A) The Greek law tradition
B) The Roman law tradition
C) The Islamic law tradition
D) A, B & C
E) A& C
F) The English law tradition

G) The civil law tradition
H) The Babylonian law tradition
I) None on the above

9. A legal tradition that did not/does not believe in the equality of human beings is

A) The African law tradition
B) The Hindu law tradition
C) The Confucian law tradition
D) The Islamic law tradition
E) The Greek law tradition
F) The Roman law tradition
G) All of the above except A & B
H) A, B, C, D, E & F
I) None of the above

Part II Sound/Unsound Type Questions

Instruction: Read the following questions with care and say `Sound` if you think that the statement is an accurate description of a principle in legal history, or say `unsound` if you think that the statement is inaccurate description of a principle in legal history.

1. Customary laws in Africa are static in the sense that they are never subject to change.
2. Customary laws cannot in any way address the modern needs of Africans.
3. Early European writers analyzed customary laws in Africa as inherently inferior to Western laws.
4. The central focus of customary laws in Africa is the group rather than the individual.
5. A habit or practice is not equivalent with a customary law.

Part III Fill in the Blanc Questions.

Fill in the blank space provided below with the most appropriate words/phrases that complete the statements below.

1. _____,_____and _____are the legislatures of customary laws.
2. _____is a conduct habitually followed for a longer period of time by the majority members of a given community with the intention to be bound by it.
3. After independence in Africa, those who argued for the restoration of traditional legal institutions were called_____.
4. After independence in Africa, those who argued for against the restoration of traditional legal institutions were called_____.

Part IV Essay Type Questions

Answer the following questions.

1. Contrast the African law tradition with the civil law tradition.
2. Can you define customary law?
3. Do you think that customary laws in Africa are not open to change?
4. Do you agree with the following observations made by Rene David? Why? Why not? *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. In some countries, the elites who assumed power after liberation thought that customary practices were against unity. Customary practices divide the nation instead of brining it together. So they decided not to give any formal place on this ground. Those leaders had had another reason fro undermining customary practices. They thought that customary practices were against modernization; for them modernization of the state requires the introduction of western style laws and legal institutions. On this ground too those leaders failed to give a place or little place to customary laws. It is hard to tell precisely whether customary laws hinder modernization and unity. 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. Some areas of customary law had gaps, for example, in commercial matters customary rules often have nothing or little to say. In these areas modernization may require that laws should be imported and customary rules are hardly harmed by this effort.*

3.7 Legal Convergence and Divergence[12]

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 for the lawyers, as legal convergence rests on uniformity. Legal divergence, on the other hand, complicates legal rules and institutions, as legal divergence rests on essential differences. Both concepts could be seen as matters of degree and process. Legal convergence has different levels; for instance, one can speak of the convergence of the African legal systems, the legal systems of a given federal state, the legal systems of Europe and global convergence. The current section points out the elements of legal convergence and legal divergence, evaluates legal convergence and legal divergence, analyzes the theories of legal divergence and indicates trend in legal divergence and legal convergence.

3.7.1 Definition of legal divergence: Going apart also called legal divergence shows non-uniformity in legal systems. Legal divergence focuses on differences in rules, legal institutions among legal systems of the world. A combination of many factors leads to and maintains legal divergence. Legal divergence should be seen as a process and degree. Legal divergence should be seen as a process

[12] The discussions in this section are primarily adapted from: Cruz, Peter de, Comparative Law in a Changing World: London: Cavedish Pub.Co., 1999.

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.

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

3.7.3 Importance of legal convergence: Legal convergence brings about simplicity and certainty in the application of laws. Legal convergence thus enhances predictability of the application of laws among several legal systems. Legal convergence is important for international transactions, as lawyers would get the chance to apply a similar legal rule all over the world. The elimination of differences in the national legal systems facilitates international transactions, increases the general welfare, promotes the diffusion of culture and leads to international understanding. Legal convergence also pushes human beings away from the excesses of legal nationalism (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.

3.7.4 Factors impeding legal convergence: National legal systems do not want to lose their cherished aspects of legal systems. 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. Lawyers may think of their legal systems as important. They may resist efforts to deprive their legal order of its unique features. It takes a strongly persuasive case to overcome this kind of legal nationalism.

3.7.5 The current trend: From at least the time of Cicero, 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. These two systems are also different in a wide range of matters including their sources of law, the structure of their legal professions and legal education, divisions of law, their court structures and fundamental attitudes to law and legal philosophy. Yet, the two systems have similarities in the way they deal with various aspects of sales of goods, contract and in their forms of business organization. Current trend shows that, despite a different attitude

towards case law and legislation, both systems are 'converging' in their use of both these sources of law. In England, 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. The French law on torts is, therefore, primarily found in widely published and cited decisions of the courts. Common law judges have always had a high profile and have resorted to judicial law making whenever a 'gap' has appeared in the statute or in cases where the statute has been ambiguous or could produce a manifestly absurd or unjust result.

German lawyers and judges continue to rely very heavily on the short Commentary on the German Civil Code for daily practice, which contains thousands of cases. This again resembles common law legal practice, although there is no doctrine of binding precedent, as such, on the continent.

There has also been a growth in public administration, in Europe, which has accompanied this decline in legislative authority. Members of the public administration itself, sitting in a council of State, decide on the propriety and legality of State administrative actions. In England, there has been a dramatic increase in the use of the application for judicial review of administrative actions and most of the law is laid down by parliament. Further, most of the non-legislative law is being created by the growing network of administrative tribunals. Case law has tended to feature heavily in the German Constitutional Court and French administrative court. However, recent cases tend to indicate that the distinction between public and private law is breaking down both on the European continent and in England.

Apart from these developments, there has been a rise in constitutional power, in the sense that constitutions are increasingly being treated as supreme sources of

law, in civil law countries and in the United States. In both types of jurisdiction, there is a move to promote, guarantee and expand individual rights. Judges, in this regard, have acquired an enhanced status and expanded role in the civil law courts.

Finally, there is the existence and growing influence of European Community law. In some cases, Community law prevails over inconsistent national law. An analogy could be drawn between Community law and the canon law *jus commune,* since EU law and the European Human Rights Convention could be seen as the foundation of a new *jus commune* 'based on common culture and common interests'.

3.7.6 Contributing factors: The following factors contribute to the existence of a high degree of convergence of legal systems of the world: single market, the trend towards convergence of European systems, the growing influence of European Community law on EC Member States, the global village phenomenon and a communality of purpose in the protection and enforcement of human rights?

Many legal historians argue that the civil law and common law traditions are growing progressively closer in Western Europe and that a new *ius commune (a Latin tem, which means a law common to several communities such as countries located in Europe)* is in the making. The main basis for their assertions is that rules, concepts, substantive and adjectival law and institutional bodies in Europe are converging. The argument that the legal systems of countries in Europe is getting little difference and so much shared features to the extent of convergence is sound when you look at the context of the European Union.

Legrand (1996) has argued that some writers are wrong, if one considers the deeper meaning of convergence, because rules are ephemeral and contingent and are basically unreliable guides to how a legal system really operates or how their lawyers really think. He argues that rules are merely surface manifestations of legal traditions and are, therefore, superficial indicators. He submits that rules, thus, do not present the whole picture of what really lies at the heart of a particular legal tradition. Legrand`s position is that it is not sound to say that Europe is coming together based on the similarities of rules and legal institutions alone. For him, legal convergence demands more than mere similarities of legal rules.

Other writers disagree with the position of Legard. They raise two points to reject his position. First, as long as some degree of convergence is taking and continues to take place the case for convergence is already proven. The only scope for debate is: to what extent is it taking place? Secondly, convergence,

may take place at different levels. Some people will achieve a deeper level of understanding of legal rules and their evolution and socio-legal implications, while others might only understand them at the basic level as rules. It is highly unlikely that all the countries of Europe are suddenly going to live together in geographical and culturally identical terms. It is simply unnecessary for a legal historian to get into the mind of the foreign legal system in the sense of getting to know its innermost thoughts and motivations. In short, European systems are converging in the context of their commonality of rules, procedures, and institutions. The differences will remain, but the growing similarities are all too apparent.

3.7.7 Approaches to Divergence and Convergence: There are four approaches in this connection. These approaches are: the *jus commune, l*egal evolution, the natural law theory and the Marxist theory.

3.7.7.1 The jus commune theory: This theory is based on the idea that, in the era before the rise of the nation State, the entire 'civilized world' was governed by one legal system: the Roman-Canonic *jus commune*. The two essential elements of the *jus commune* were: (i) the Roman law of Justinian's era as rediscovered and developed by the Glossators and Commentators and then received by a large part of continental Europe as the civil law of the Holy Roman Empire (the so called 'Roman common law'); and (ii) canon law, or the law of Roman Catholic Church-the universal Church. The *jus commune* was considered the law of Christendom, ruled by two supreme authorities: the Emperor, the temporal head; and the Pope, the spiritual head. Hence, there was, according to this theory, a 'common law of Europe, a common literature and language of the law and an international community of lawyers'.

Merryman and Clark point out the problems in this particular thesis. To begin with, 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. Hence, although it was sustained by the Church, it seems unsound to expect nations that were never part of, nor had received anything of, the *jus commune* to 'return' to it. 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. Forcing common law and civil law jurisdictions into accepting one law would be unacceptable.

3.7.7.2 Legal evolution theory: This theory proceeds on the basis that legal change is a natural process, which will proceed inevitably and irresistibly

because it is controlled by forces beyond human power. Thus, legal systems are at different stages of development and, when they converge, it is because the less developed system is catching up with the more mature one. Simply stated, the theory holds that legal systems move from the less developed stage to a more advanced stage of development. Since the civil law is much older than the common law, the logical corollary to this thesis is that the common law will gradually become more like the civil law. However, trends toward convergence may be observed in both systems.

There is a great deal of 'codification' in common law countries, particularly in the United States; there is also the phenomenon that civil law judges are becoming more active 'law makers'. And the rights of the defendant in civil law criminal proceedings are also becoming more like their common law counterparts. In the absence of any universally acceptable criteria, it is extremely difficult to say whether the common law or civil law is more 'developed'. Thus, any discussion of legal evolution, divorced from its socio-cultural or ideological context is too abstract to be of any practical value.

3.7.7.3 Natural law theory: The natural law theory is the third theory of legal convergence. This theory argues that the common nature of human beings will eventually lead to the creation of similar social structures, laws and legal systems. This common nature will therefore be observed and expressed by law. Unfortunately, there is no universal consensus about which common characteristics of human beings and human society determine, or ought to determine, the character of the legal system. As Merryman and Clark put it, the argument that we are all one does not take us very far if there is substantial disagreement about the nature of law.

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

3.7.8 Modes of convergence: Merryman and Clark identified in 1978 three main 'strategies' or modes of convergence, active programs for the unification of law, transplantation of legal institutions and natural convergence.

3.7.8.1Active programs for the unification of law: Unification of law is sought to be achieved through the use of international institutions specifically intended to promote the unification of law – agencies, such as the International Institute for the Unification of Private Law in Rome, the Hague Conference on Private International Law and the UN Commission on International Trade Law. Programs of international organizations with broader objectives also seek to generalize or standardize legal rules and practices, for example, in the European Community. Other examples of agencies that include unification of law as one of their objectives are the International Labor Organization, the European Commission on Human Rights and the Organization of American States.

Unification of law is often attempted through supranational legislation and judicial decision binding on, and applicable within, individual Member States, in the case of regulations of the European Community, the decisions of the European Court of Justice and provisions of treaties and multilateral conventions (for example, the International Copyright Convention). Another recent example of a UN Convention, which has revised an original version of a uniform law, which has had global input, is the UN Convention of Contracts for the International Sale of Goods.

Unification of law is sought through the use of international institutions specifically intended to promote the uniformity of laws. This strategy of legal convergence has limitations in the sense that it focuses on a few narrow areas in which there are sufficient international consensus and identity of interest. You can mention the international trade law as an example. The objective of unification of law attaches a great weight to legislation and focuses on rules of law. The practical efficacy of unification will, however, face difficulty form the legal structures, institutions and procedures existing within nations, which will determine the degree of uniformity in the application and interpretation of rules.

3.7.8.2 Legal transplantation: As Alan Watson puts it, 'Borrowing from another system is the most common form of legal change' and legal transplantation has a long history. There was the reception of Roman law in later Europe. There was the spread of English law through the colonies of the British Empire, even into parts of the United States, which had never been under British rule. The French Civil Code had a big impact on other civil law systems in Europe and abroad, and, later, the spread of American law to Europe, especially in places like Switzerland. The so called hybrid or 'mixed jurisdictions' still shows the effects of such transplantation in their unique blends of common law, civil law and local customary law.

As discussed in Unit 1 Section 2 of this material, transplantation may occur voluntarily by, for example, the adoption or imitation of a foreign Code. Or legal transplantation may be involuntarily, as when a country is colonized and has a foreign legal system imposed on its indigenous culture. Legal transplantation across the common law-civil law boundary inevitably may lead to convergence of the two systems. Yet it is to be admitted that transplantations may or may not be 'successful', depending on a country's particular conditions for receptivity. Legal transplantation may affect the speed and direction of change in civil law and common law countries. So may revolutions, even if they are non-violent ones, such as the recent global movement towards the liberal idea and principles of democracy.

3.7.8.3 Natural convergence: Natural convergence is the third mode of convergence. The theory is about the tendency of nations with similar political, economic and social features to develop similar legal systems. The basis of this theory is that the legal systems of societies will tend to become more alike as the societies themselves become more like each other. Thus, there are similarities in constitutions in Western democracies. There is also a common international culture. This shared culture is brought about factors such as increased international communication and travel, international trade, international organizations, the internationalization of business and technology and a growing awareness of shared global concerns (pollution, the environment, global warming and so on), student exchange programs and scholarly exchange schemes.

There are several examples of this type of convergence of civil law and common law: safeguards for defendants in criminal proceedings; adoption of graduated income tax; legal aid schemes; uniformity in definition and protection of individual rights; the rise in constitutional review.

There are many practical similarities between the common law and the civil law in their legal solutions. Yet, fundamental and deep rooted differences exist in juristic style, philosophy and substance, in court structures and sources of law and, more importantly, in their judicial and administrative ethos, legal divisions and categories and their professional structure and legal education.

3.7.9 Current developments: In 1989, Francis Fukuyama published a book. The theme of his book was that liberal democracy is the only ideology left in the greater part of the civilized world. In Southern Europe, Latin America, Asia and Eastern Europe, free market economies and parliamentary democracy are fast becoming the norm. Fukuyama emphasizes the victory of the principles of liberal democracy. Hence, as Fukuyama puts it, 'for a very large part of the world, there is now no ideology with pretensions to universality that is in a

position to challenge liberal democracy and no universal principle of legitimacy other than the sovereignty of the people'.

As Fukuyama argues, there were 13 liberal democracies in 1940, 37 in 1960 and 62 in 1962. By his reckoning, there was not a single true democracy in the world until 1776, if one defines democracy as including the 'systematic protection of individual rights'. By the end of the 1980s, therefore, China, the former Soviet Union and the countries of Eastern Europe had all 'adhered to the economic logic of advanced industrialization. Even the Chinese leadership had accepted the need for markets and decentralized economic planning and 'the close integration into the global capitalist division of labor'.

Another writer, Alex, argues that there are a good number of essential factors promoting global convergence. First, he states that the continuous importance of international events is a defining feature of the convergence. He observes that transnational activities and affairs now have continuous importance, repeatedly affecting not just distant countries, but also the entire global communities at times. Another factor, for Alex, is the convergence of basic economic and political values of the industrialized democracies, the west. He claims that today there are greater similarities between the economic and political systems of nations than at any other time. He adds that the influence of international institutions at present is higher than in the past. Finally, he advocates for the existence of a crucial value, what he calls the human race, this is a belief that all individuals living in the different corners of the world will develop the conviction that they belong to the same human race. These people will start to identify themselves with this human race. Alex claims that all these factors in combination would lead to the convergence of systems.

3.8 Summary

The unit covered many core legal traditions. The civil law tradition, illustrated by the French legal system and the German legal system, is code based. The major laws are expected to be written comprehensively and systematically at a given point in time and will be employed for years to come. This is the deductive approach to law making. The other major category of legal tradition is the common law system as exemplified by the British legal system and the American legal system. This latter category rests on the belief that law should come from the decisions of judges; law should develop from the inductive approach. As opposed to the civil law tradition, the common law tradition is affected by the Roman law style to a minor extent. The socialist legal tradition takes law as temporary; law is understood to be a tool of exploitation. This tradition was put to practice first in the ex-USSR and then propagated to the other parts of the world from there. You also considered the different aspects the Islamic legal tradition. The central conclusion of this unit is that there is no single way of

defining the concept of law; this concept is understood differently by different legal traditions. The legal traditions such as the African legal tradition and the Islamic legal tradition faced western originated legal traditions in 19th century and 20th century to which they did not react in a similar fashion.

Although the legal systems of the world appear to have come full circle, there are many elements that will not change and have not changed. The fundamental ideological, doctrinal and religious differences that exist between countries in the Muslim world and the West still exist. Newly emergent and poor nations need to borrow legal experiences from the west. In the process of such borrowing, as well as aid, the poor countries will find themselves borrowing legal rules and institutions. This type of borrowing may result much degree of similarities among legal systems of the world. Western aid, technology, experience and advice, Western legal ideas may have the same effect.

3.9 Review questions

Part I Essay-type Questions

Answer the following questions.

1. List the advantages of legal convergence.
2. Enumerate obstacles to legal convergence.
3. Enumerate the approaches to legal convergence.
4. List and explain the three strategies currently hoped to accelerate legal convergence.
5. What is legal divergence?
6. Do you think that the following factors contribute to the existence of a high degree of convergence of legal systems of the world: single market, the trend towards convergence of European systems, the growing influence of European Community law on EC Member States, the global village phenomenon and a communality of purpose in the protection and enforcement of human rights?
7. Identify and explain critically four approaches to legal convergence.

Part II Fill in the Blanc Questions

Fill in the blank space with words/phrases that best complete each statement below.

1. _____focuses on differences in rules, legal institutions among legal systems of the world.
2. _____is one of the programs for bringing about legal convergence by transporting laws form developed countries to developing ones.
3. _____is a theory of legal convergence that rests on the tendency of nations with similar political, economic and social features to develop similar legal systems stating that the legal systems of societies will tend to become more alike as the societies themselves become more like each other.
4. _____is a theory of legal convergence that 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.

5. _____is a theory of legal convergence 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*.

U.4 Aspects of the Legal System of Ethiopia

Introduction

This unit explains the development of the Ethiopian legal system. It discusses the background to the codification process of 1950`s and 1960`s in Ethiopia. It outlines key issues in the Ethiopian constitutional development. The unit consists of five sections. The first section deals with the sources of the six codes. The second section covers the codification process. The third and the fourth sections map out the development of criminal laws of Ethiopia and the administration of justice, respectively. The final section discusses the major aspects of the history of the constitutional law of the country.

In this unit, students should be able to:

- Examine the development of some aspects of the Ethiopian legal system.
- Explain critically the different conceptions of law in Ethiopia.
- Explain the background to the Ethiopian codification process of 1950`s and 1960`s.
- Describe the development of the penal law of Ethiopia.
- Discuss the development of the court system in the country.
- Analyze the major aspects of the history of constitutions in Ethiopia.

4.1 Conceptions of Law in Ethiopia

4.1.1 Law as a gift of a supernatural power

Melaku Geboye, The Law as An Insrument of Social Change with Particular Reference to the Condition of Mariage under the Civil Code of Ethiopia: Failure and Successes of the Code, (Addis Ababa University, Faculty of Law, Law Library, Unpublished) (1993)

In a country that houses such a large number of ethnic groups and cultures, it is very difficult, or even impossible, to speak of an ''Ethiopian conception of law.'' Expectedly, the conception varies from group to group and region to region, depending on a multitude of factors. What we are interested in is, however, just to show what the dominant popular conception has been. This has been found to be necessary for three reasons:-(1) it is believed that the type of conception a people has about law shows the degree of its preparedness for the so-called modern life and modern laws; (2) the nature of the people's conception of law indicates the type of legal personnel that is expected to exist in a society; and (3) it will present a good point of reference from which to see and appreciate the new laws under consideration.

To serve these purposes, therefore, we will say something depending mainly on broad generalizations leaving aside the details. Hence, we will try to show the dominant perception from as far back as possible till the time of the codification. A little experience with the ordinary Ethiopian at this time reveals that he conceives law as something divine by nature; as something

that has some form of attachment with god himself. Although nobody can give an authoritative statement on the question of when this conception began to show itself up in Ethiopia, anybody can say with certainty that this conception is the product of centuries of development, that it is not an overnight creation.

When we try to study its historical development, however, at least two important factors will come to our memory to tell us their intimate relationship with this Ethiopian conception of law: religion and philosophy of law. As regards the latter, it is a difficult one to trace in Ethiopian history, simply because in the nature of philosophical thought, unlike religion, it does not run after followers. It rather manifests itself in the theoretical and practical activities of enlightened and interested individuals. As a result one cannot say that the natural law theory comes to Ethiopia and dictated its terms at this or that time. When it comes to religion, however, it seems that we are in a better position to say something about it. It is not without problems, however. There is, for instance, a problem of distinguishing religion from philosophy (and particularly of the natural law philosophy). As both religion and philosophy developed in the ancient days within 'neighboring' and interacting lands of the Greeco-Roman world and that of the Middle East, it will not be without ground to expect that there were mutual borrowings of ideas and doctrines between or among them. And for our purpose, we will proceed by assuming that the natural law theory that developed in the Mediterranean world, being in line with the religious views of law, was translated into practice through the instrumentality of religion. Hence, our assumption to the Ethiopian situation is that the natural law theory came to Ethiopia and shaped the Ethiopian conception of law via religion. The details will be as follows.

The naturalist conception of law as the theory that determined the Ethiopian conception of law: 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. Therefore, when we attempt to look at this conception of law as the conception that has shaped the Ethiopian legal history, we are, in effect, looking at the history of the natural law theory in the Ethiopian milieu. This theory thus tells us that, just as in any other society, law has always been part of the values of the Ethiopian society from the very early days of its formation. It naturally follows from this that a study of the beginning of this conception of law in Ethiopia is dependent on the achievements of studies conducted on the history of religion in Ethiopia.

Then, what is the first religion to come to Ethiopia, and when did it come? Two religions may present themselves as rival answers to this issue: Christianity and Judaism. However, the time of the coming to Ethiopia of Judaism is highly controvertial, while that of Christianity is relatively not. Nonetheless, even if Judaism could win precedence over Christianity, it cannot as such be taken as a point of departure for the naturalist's conception of law because it was a belonging of such a religious minority that it could not disseminate its doctrine to the extent of having a significant place in the history of Ethiopian legal thought.

Now, once we have eliminated Judaism from the list of alternatives, the only to remain, and that which has been proved beyond any shed of doubt, is Christianity. Historians tell us that Christianity came to Ethiopia in the fourth century A.D. during the reign of Ezana- the first Axumite king to be converted to Christianity and who ruled both as a pagan and a Christian king that Ezana had ruled as pagan immediately before he was converted is, incidentally, a proof that Judaism did not precede Christianity in Ethiopia at least as far as the ruling class is concerned.

Christianity, as may be seen from this, started from the top-the king-and began to flow down the hill to the subjects of the king.

Thus, in Ethiopia, law began to be conceived as the will of one God with the coming of Christianity to the kingdom of Axum. And the diversion of this conception of law was able to expend to the then population mainly from the time of the translation into Geez of the Holy Bible by about the end of the fifth century A.D. With time and, of course, with the expansion of Christianity, this conception of law was also sending its roots deeper and deeper into the minds of more and more people. This role of Christianity was also getting support from the influence of the developed thoughts of the Mediterranean world through the different commercial contacts that Axum had with these civilizations.

Christianity was nevertheless frustrated by the rise and spread of Islam as of the seventh century A.D. In that same region which had born Judaism and Christianity the Middle East- and , as usual, its subsequent expansion to the territory of Axum. It should be emphasized further that Islam, too, came with its own holy book –the Koran – which also had ''laws'' of both a religious and secular nature. Needless to say, the coming to Ethiopia of Islam, though peacefully, had an impact upon the dimension of Christianity. If we try to see them from our point of view, however, they have at least one similarity that law is given a sacred character in both cases. And this, we may say was another, additional forum or means of disseminating that conception of law into the minds of Ethiopians- though from different points of reference. In other words, Islam, using its holy Koran in the same manner as Christianity /though surely based on different ideals/, was also spreading into the people the idea that law was the divine revelation of the will of one God-this, Allah.

Whatever that supernatural power might have been called, therefore this conception of law was sending its roots further deeper and deeper into the minds of the masses with greater momentum. And this all, it should be repeated, is the result of the multi-dimensional contacts that Ethiopia had with the Mediterranean world and the Arabian Peninsula since the ancient days. In short, the seed of the conception of law as the word of God, a conception which seems to exist in the minds of a substantial majority of our people up to now, was sown and grown with the raining of these religions from the clouds of the Middle East.

The two important religions continued to be practiced in Ethiopia side by side-Christianity in most of the highlands, and Islam in most of the lowlands of Ethiopia. But Christianity, unlike Islam, got from its very coming to Ethiopia the status of being the religion of the ruling class or the state religion so to speak. As a result the relation that Ethiopia had with the Mediterranean world and particularly of the church of Alexandria continued with relative stability. The ultimatum, one may say of this relationship was the coming to Ethiopia of that historic and monumental compilation called Fethea Negest in about the fifteenth century A.D. The Feteha Nagast a collection of religious and secular laws was we are told compiled by Egyptian Christian called Abu'l Fada Ibn al Assal commonly known as Ibn al-Assal. The book that was originally called collection of canons was compiled as a guide for the Christian copts living among the Moslem people of Egypt. The Feteha Nagast though its position as law strictly speaking may be doubted nobody doubts its contribution to the strengthening and further expansion of the conception of law as having a divine origin in Ethiopia.

On the whole a vast majority of our people at present being either Christian or Moslem and both religions having been disseminating the sacred nature of law in their religious teachings the conception of law as the work of the creator has been spreading from the very introduction of the religions themselves up to now. In fact when we are speaking of the history of this conception it is submitted we are referring for the most part only to the northern part of country. The history of this conception spread down to the southern parts of the country together with and by means of the southward movement of these religions. Even now after a tide of nearly two decades of the atheist Marxist ideology the people conceive law more as having that sacred character than not this conception of theirs is expressed through a number of ways in their day- to – day communications. If an individual is for instance intending to demand the cessation of some form of interference by a neighbor he would more often than not use the expression (in the name of the Divinity of the law) and this is not just a thing of the past but also of the present (probably with the exception of the educated ones) what should be said here is that the law being given such a sacred character demands made in the name of its divinity would usually end up in compliance. This means had there been the know-how of using it, the conception would have been a fertile ground to sow the seed of observance of the law and harvest law abiding culture.

But if we say the sacred nature of law is still what the people conceive of a question would arise as to how such a conception did not change with the enactment of a number of codes by the earthly authorities in our country. Leaving the issue of whether the codes were successful aside, we may state at least one thing even after the enactment of the codes the belief that the king was elected by God himself and as such was the final source of justice which had been prevalent since time immemorial continued to pervade in the minds of the people. And this was deliberately done by way among others of the new laws themselves. For instance the 1955 Revised Constitution and the 1957 Penal Code indicate that kingship is an exclusive belonging of one line and that it is declared so in the laws because God willed it to be so as a result the king had always been given a superhuman status in the history of Ethiopia. It is this special status of the king that we see in the common Amharic saying which goes (which may roughly be translated as to charge the king is as impossible an attempt as to till the sky

Not only that the historical conception of the Ethiopian king as the ultimate source of justice found its way into the procedure codes so that the Emperor could adjudicate cases of exceptional importance. We may cite Article 138 of the Criminal Procedure Code and Article 322 of the Civil Procedure Code to this effect. Accordingly the Emperor was made to continue to sit and adjudicate cases that possibly had exhausted their chances in accordance with the normal procedural process of appeal through the institution called Zufan Chilot. In Chilot the emperor is not bound by the provisions of the strict law….'' Say professors Paul and Clapham while speaking on the meaning and extent of the Chilot jurisdiction. Hence in the Chilot decisions that might have been rendered on the bases of the written rules of the codes could be reversed on the basis of justice (whatever that might mean) it should be clear right here that we are not saying that such decisions rendered by the chilot were prejudicial to justice simply because they were made contrary to the written law. What we are intending to show is that such practices were a manifestation of a practical expression of the belief that the king was the representative of God – supposedly the ultimate fountain of justice- and therefore that the justice of the positive law and of the decisions of courts rendered thereupon were subject to the power of the king.

On the whole what has been presented so far is a brief indication of haw far the naturalist understanding of law has been the Ethiopian conception of law as well. Nevertheless, when one is

told that Ethiopians have had a divine conception of law, one is justified to imagine or to expect that laws claiming their origin from the creator are unquestionably observed without exception. This has however not been the case to Ethiopia. It may seem anomalous to say this but it is not and this will be seen in the next section dealing with customs and their place in Ethiopia.

Customs and their place in Ethiopia: It is worthy of note that some jurists have concluded that customary laws never existed in Ethiopia while customs did and do leaving aside the subtle distinctions that these scholars draw between these two concepts disregarding the controversy as to whether customary law existed in Ethiopia and taking the conclusion of David's that customs existed in Ethiopia for granted we will see the place and role that customs had in Ethiopia as briefly as possible.

Ethiopia is a home of diverse and disparate customs while we have more customs than the number of ethnic groups themselves. This is so because even those groups speaking the same language but living in different localities often practice very divergent customs. A simple look at the Wollega Oromo and Harrar Kotu would testify to this fact and would further strengthen the common assertion that geographical proximity of settlement matters more on the determination of customs than language. Here comes a problem when we are asserting the existence of a wide-range of customs that may be numbered beyond the sheer number of Ethnic groups, it seems that we are cornered against one contradiction with what we have said earlier on the history of legal conception in Ethiopia that means if law has been given a sacred conception in Ethiopia and if there are only two major religions in the country it seems logical to expect that the customs all over the country have been basically of two types-Christian oriented and Islam oriented. In other words if we have only two major religions and if even secular laws are taken as divine by origin then we logically expect that the followers of the two religions practice in line with the religious precepts of their holy book-hence, only two important groups of customs. This expectation though not in full accord with the reality is not without practical bases. There are indeed these two major categories of customs however we have a series of serious reservations to this.

One and probably very obvious reservation is that Ethiopia also houses other peoples than Christians and Muslims-people who may generally be called animists or pagans. This means, again in crude generalizations that a third category of customs or paganism. And the various customs forming this category unlike those of the previous two should be emphasized do not have as such any connecting threads. They are almost independent from one another. A second and still important reservation to the expectation of two broad groups of customary practices is that the people though belonging to either of these religions do not as such observe the precepts of the religions and this is usually explained by writers to reflect the Ethiopian perception of the law as sort of ideal as something abstract metaphysical and beyond practice. Professor Rene David has stated his view in a comparative fashion as follows as in Europe before codification as in Islam, the law has a moral aspect for Ethiopians that removes if from practical affairs. He has concluded from this that Ethiopians are not at all shocked that customs and court decisions are not in accordance with the law.

What David has said may be part of the explanation to the problem. In the opinion of this writer however the root cause of this perception of the law (as put by Rene David) lies deeper than that it lies in the peoples knowledge of the law be it secular or religious. The people could not know the law the law was inaccessible to almost all the people with the exception of the negligible minority who were versed in the languages of the holy book- Geez and Arabic. For one thing both the

religions and the Feteha Nagast introduced new ideals to the people- ideals that had no much customary bases. To make the matter even worse the ideals came inscribed in languages that were not spoken outside of the church and the mosque. Even if it is true that the people have to know the new ideals before they are to change or modify their customs. Accordingly the sources of knowledge it should be repeated remained inaccessible to the people. The Bible, the Koran and the Feteha Nagast were available in Geez, Arabic and Geez, respectively. Until very recently, as a result the people were so to say in state of utter cultural confusion for a good deal of time in the early days of the religions, it is accepted that the ideals brought about by the religions were mixed with the indigenous customs of the people. The people have therefore been following and practicing their respective religions not as such as religions having detailed rules on a variety of matters but rather as some sorts of traditions inherited from ancestors and transferable to the followers or descendants. The paganism based customs thus gave way to the religion- based ones only in very few and of course fundamental areas of life such as feeding, fasting praying and the like. In most other cases the earlier customs were able to continue side by side or intermingled with the new ones.

As a result we may say that the customs that have existed for a long period in the history of Ethiopia up to the present time are of three types by origin-Christian oriented, Islam- oriented and indigenous. This triple heritage coupled with historical interactions and mutual or reciprocal cultural exchange has shaped the customs that existed at the time when the new all-inclusive codes of law were introduced in the first few years of the second half of this century. The cumulative effect therefore of all this was that by the time the code came to life Ethiopia had customary practices that varied from locality to locality and that mostly had different and in some cases contradictory ways of treating the same problem. It was this ocean of diversity that the new laws were thrown into surely with the object of unforgiving them around new ideals and of course of accelerating development.

4.1.2 Review questions

Answer the following questions based on the passasge reproduced above.

1. What are the major conceptions of law in Ethiopia according to Melaku Geboye?
2. Does Melaku think that law in Ethiopia has traditionally been mixed with religion?
3. Does Melaku think that the laws historically in palce in Ethiopia were accessible to the adressees? What fatctors hidered the accessibilitiy of laws: language barrier or something else?
4. Which part of Ethiopia is Melaku referring to when he says ``Ethiopian conception of law``?
5. ``…Therefore, when we attempt to look at this conception of law as the conception that has shaped the Ethiopian legal history, we are, in effect, looking at the history of the natural law theory in the Ethiopian milieu…`` Exaplin the relationship between the natural law theory and the `Ethiopian conception of law`` as described by Melaku.
6. Do people in Ethiopia believe in the idea that law is ordained by a supernatural entity? Do you agree with this assertion by Melaku? Why? Why not? To Melaku, what fators contributed to the emergence of the belief among the governed in

Ethiopia that law is God-ordained/ divine right of kings? Judaism, Christinaity? Islam? The practices of the various emperors?

7. Do you agree with Melaku`s remark that ``the conception of law as the word of God`` is a conception which seems to exist in the minds of a substantial majority of our people up to now…``
8. What does the expression ``…in the name of divinity…` mean?
9. Explain the the saying ``…to charge the king is as impossible an attempt as to till the sky…``
10. Do you agree with the following conculsion made by Rene David as stated in the above text: ``Ethiopians are not at all shocked that customs and court decisions are not in accordance with the law.`` Do you agree with this assertion?

4.1.3 Western laws

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)

Historically, the major forces of the power elite in Ethiopia have been the Emperor, the feudal nobility and the Church. For many centuries, Ethiopia has developed the tradition of rule by an Empress or Emperor. As the empire expanded, there was an amalgamation of tribes into some concept of a distinct "Ethiopian" entity. Currently, there are [several] tribes. Each tribe has developed its own distinct mores or law. Historically, emperors might be strong or weak, effective or ineffective. As in the history of England, power alternated between a somewhat centralized authority and a feudal nobility. Transportation and communication were undeveloped until the late 19th and 20th centuries, and thus there were strategic and logistical problems in the exercise of centralized power.

Ethiopia evolved from Axum, a highly-developed, Christian, slave-owning kingdom. Axum was located in the area now occupied by the northern Ethiopian province of Tigre and former province of Eritrea. Nearly all the lands of modern day Ethiopia were Axum's vassals. Maintaining economic, political, and cultural ties with Egypt, Persia, Arabia, Greece and India, Axum reached its peak development between the 4th and 6th centuries A.D. The linking of the authority of the Emperor with the Church has its origin in Axum. Ethiopian legend tells that the Queen of Sheba traveled from Axum to Jerusalem to visit King Solomon. The first Emperor, Menelik I, is said to be the product of the union of Solomon and Sheba. The Ethiopians believe that Menelik I spent several years in Jerusalem as a young man, and returned to Ethiopia with the Ark of the Covenant. The object believed by Ethiopians to be the Ark is still kept, guarded by monks, in the town of Axum, province of Tigre.

The decline of Axum, triggered by the 7th century Muslim Arab conquests, marked the beginning of a long period of conflict. The 8th century saw Christian, feudal-slave-owning principalities warring both against each other and against the Muslim Sultanates. This post-Axum period of war resulted in the loss of much of the products of Axum's culture. In a feudal society the ownership of land carries with it the bulk of social, economic and political power. The Ethiopian Orthodox (Coptic) Church was a prominent player in this arena. At one point, the Church owned one-third of the land in Ethiopia. The Church had supported the "true descendent" of the line of Solomon during a 13th century contest over the power to rule. When

Yekuno Amlak, this true descendent, in fact gained power, he allocated one-third of the land to the Church for its support. Thereafter, the Church lost its realm at one point but gained it back in 1632. Thus, as late as the reign of Emperor Haile Selassie, the Ethiopian Orthodox Church continued to be a powerful landowner.

Traditional law-Ethiopia has within it several tribes. Each of these groups has an oral customary law which may vary from group to group. Since Positivists indicate that written law is crucial to a legal system, Ethiopia's legal culture may not meet the requirements of that definition of a legal system. No formalized or institutional courts administered customary law until the end of the 19th century. Instead there was an informal hierarchy of administrative and judicial arbiters, beginning with village elders and culminating in the Emperor's Chilot. The Chilot was the court of last resort in which the Emperor dispensed justice without being necessarily bound by law. It is said that the Ethiopians have traditionally been quite litigious, and have had numerous traditional rights of appeal, with the Emperor exercising a final judicial power since the middle ages. Customary law was not binding and could be disregarded by decision makers.

The Fetha Negast, meaning "Laws of the Kings," was drafted in Egypt during the 13th century and introduced in Ethiopia in the 17th century. The purpose of this code was to guide Christians living in a Moslem society. Written in Arabic, the Fetha Negast was translated in Ethiopia into Geez. Geez, an ancient liturgical language, was the language of the educated. The Fetha Negast was never consistently applied in Ethiopia, even where introduced, and customary norms persisted despite its introduction. Because the Fetha Negast existed only in Geez, the code was inaccessible to all but the highly educated. By the mid-1950's, the Fetha Negast was considered out-of-date and it was unclear that it was applied with any regularity. Article 3347 of the Civil Code, in effect, repeals the Fetha Negast. However, the Fetha Negast remains the text of the canon law for the Ethiopian Orthodox Church and its tradition may continue to influence decisions today. At the time of Menelik (1889-1913), the court structure was based on woreda-awradja political divisions. A court structure consisting of 14 provincial courts, 92 awradjas courts, with each awradja containing 243 woredas, was affirmed by Emperor Haile Selassie in 1942 and for the first time judges were appointed to all the courts.

Introduction of western-based codes-The first Ethiopian Criminal Code appeared in the early 1930's. In the 1960's, a large body of law was introduced into Ethiopia consisting of codes imported from Western nations with the Civil Law tradition. Between 1957 and 1965, six codes were enacted in Ethiopia: the Criminal Procedure Code of 1961, the Civil Code of 1960, the Commercial Code of 1960, the Maritime Code of 1960, the Civil Procedure Code of 1965, and the Penal Code of 1957.

The Ethiopian Civil Code was drafted by Professor Rene David. While acknowledging the foreseeability of substantial resistance to the implementation of the code in Ethiopia, Professor David predicted that the Code would eventually be assimilated in the same manner that Roman law was absorbed in continental Europe. Professor David envisioned that the codes would be rapidly assimilated in the Supreme Court in Addis Ababa, in the disposition of disputes where the matter is sufficiently important and where one of the parties is a foreigner, but that the remainder of the Civil Code would only gradually be put into effective execution. While Ethiopia may be better off with the codes than without them, even this forecast of acceptance by gradual assimilation was perhaps overly optimistic. The basic problem is that customary law continues to

hold sway as administered by customary tribunals and mediators, and even the exceptional use of government courts produces judgments which may not serve to implement code provisions.

Code attempted abolition of customary law. Attempts to substantially reduce the reach of customary law have not been successful. The Civil Code of 1960 has a provision which declares that the Code replaces customary law. Unless otherwise expressly provided, all rules previously in force, whether written or customary, which concerned matters provided for in the Code, were to be repealed and replaced by the Code. This text repeals even those pre-existing rules which would have supplemented the code in such matters as succession, family and property.

In a study completed in 1968, it was found that customary dispute resolution based on customary law applied by local elders was alive and well despite the attempt of the Code to curtail it. Because the local elders are often illiterate, they do not apply a sophisticated legal treatise like the Fetha Negast. Elders do state that they apply customary practices and some moral rules and principles. They see their function as restoring harmony across a broad spectrum of relations between the parties. Apparently, at least in the tribe studied, there is no standing body of elders to hear disputes, and the selection of decision makers is ad hoc, chosen as in arbitration. In an attempt to introduce government courts in outlying areas, the Atbia Dagnia was introduced or local judge, into rural areas in 1947. The complexities of the reception of the Atbia Dagnia need not detain us here except to note that where such judges exercise power, they often use customary law or equity rather than the Civil Code.

Moreover, the omnipresence of customary law is kept alive by the practice of ordinary courts referring matters to a council of elders, though it is not clear which situations justify this approach. The elders also settle criminal cases. In Southern Ethiopia it is estimated that only 3% to 4% of litigation is brought before government courts, and tribe members feel a moral obligation to seek tribal rather than government court resolution. The Gurage tribe, for example, has courts that use customary norms to determine disputes between members of the group which could erupt into violence and otherwise disturb social equilibrium. Government courts play little part in this process. Considering that 80% of Ethiopians live approximately one day's walk from the nearest all-weather road, can the foreign norms codified in the Ethiopian Civil Code have much influence? Thus, the people still view the proper dispute resolution procedure to be the customary one. While section 3347 of the Ethiopian Civil Code purports to eliminate customary law, such law continues with remarkable vitality.

Another avenue for the survival of customary law was provided by the Civil Code itself through the retention of arbitration and compromise. Compromise possibilities consist of referral to a conciliator, or an agreement of the parties to resolve their dispute without such a reference. Conciliation must be made on a basis of mores not repugnant to law or to public morality. Arbitration is supposed to be made on the basis of principles of law. However, conciliators and arbitrators may be using customary law or equity even if it conflicts with the Code despite what seems to be the elimination of the customary law by section 3347.

Gap between codes and legal reality-As indicated in the last section, many disputes are settled by traditional sources such as elders whose use of customary law may conflict with the Code. This failure to assimilate the Code is not limited to rural areas but extends to disputes in urban areas. The fact that the Codes are not substantially implemented or regarded as authoritative creates a chasm between official norms and prevailing norms. The conflict between the Codes and

traditional law is illustrated by Professor Beckstrom's study, which indicates that the Codes still had not taken hold in 1974. Beckstrom lists these reasons: 90% or more of the population are illiterate; the great majority of judges have received education only to the fifth grade; and there is a small and relatively informally educated attorney population. Even the small group of educated lay persons, including business persons aware of the Code, may not use it, e.g., bankruptcy is available but not used. Professor Beckstrom states that well-established distribution and communication networks do not exist to make people aware of the law, and administrative facilities may not exist to put laws into effect. One could add that Ethiopia lacks a tradition of applying codes because of the historical reluctance to be bound by an application of existing rules.

Areas of private law such as inheritance and family law either codify existing practice or, where different, the Code-enacted reforms may be ignored by judicial nullification, or avoided through alternative dispute resolution. In very remote areas, there are no government courts, so customary law will continue to hold sway. Government law, such as the Civil Code, is only resorted to in exceptional situations such as those involving tax or penal law or where traditional dispute resolution has failed. Even in those cases, judges may be unaware of applicable state sanctioned law, misunderstand it, or simply refuse to apply it. Judges purporting to utilize the Codes in deciding cases have cited irrelevant code provisions and failed to cite appropriate provisions. Ethiopian judges may not be conditioned to apply the Codes as a binding force. There is also a lack of knowledge about what is occurring in rural areas. Sedler states: "It simply is not known what is happening in many parts of the country, or what will happen, and any prediction is hazardous." It is at best uncertain to what extent the code is in use outside of Addis Ababa.

Studies have indicated that the Civil and Commercial Codes are not used in the small business arena even in Addis Ababa. In the small business arena relief is sought through informal dispute resolution where the Commercial Code is seldom used. In the past, the Code sections dealing with negotiable instruments received little use, but are now used in some commercial circles. With regard to the application of the Codes in general, the only evidence from personal experience of the author is highly impressionistic and incomplete. On November 3, 1990, the author interviewed four judges in the Civil and Criminal High Court in Dira Dawa, Ethiopia, and a Public Prosecutor. These judges stated that they refer to and use the Civil and Criminal Code in Amharic. They have an English Civil Code translation at home, and use it in case of the ambiguities in the Amharic version. The English translation is often obscure and the French text in Dira Dawa would be of no aid because the judges do not comprehend French.

The Dira Dawa High Court judges said they would not have felt that they had the "jurisdiction," or authority, to decide a case on the basis of the 1987 Constitution. I said that the Constitution contained a provision that women were to be seen in law as equal to men. There, the Kadi or customary courts still function to handle certain disputes. One judge smiled and said that in the cases involving Muslims which he decides in the Kadi Court that such a provision "would not be practical." Another judge said he found no difficulty in using the Code. After all, he had studied the Code in law school and they were all law graduates. In difficult cases, they gathered together to discuss the appropriate outcome. The judges stated that while precedent does not matter in theory, it does in practice. Despite the pro-code thrust of this anecdotal information, those who seek to implement the Codes face substantial obstacles. The Codes are a challenge even to the educated, and conflict with the oral tradition. There is, however, a tradition of respect for written codification, as illustrated by the Fetha Negast. Those who wish to see the Codes implemented hope that the tradition will be transferred to the Codes. Other factors hampering the

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. An initial obstacle to assimilation of the Codes is the translation problem. The Codes were originally drafted in French and English and then translated into Amharic. Though rich and subtle, the Amharic language did not have a highly developed legal vocabulary. Hence the project to translate Professor David's French text into Amharic proved formidable.

What are the prevailing norms?The prevailing norms are indigenous and are both written and unwritten customary understandings about who will exercise power. To borrow Hart's terminology, these norms consist of primary rules and secondary rules. The primary rules govern behavior. These rules are internalized, consisting of largely unwritten custom with a lesser component of written indigenous norms. The secondary rules govern who is authorized to make decisions and which sources of rules are authoritative. The secondary rules may also include significant unwritten components.

The Ethiopian society functions, however; people seem to know what is expected of them. In Ethiopian rural areas, tribal life is composed of patterns based on kinship. Social cohesion is created more by informal social pressures than by resort to litigation. Life is still organized in such a manner that there is individual responsibility for subsistence, e.g., the harvesting and cultivation of crops. Village citizens are dependent on the group for approval and assistance relating to marriage and burial. As one writer puts it: "The threat of withdrawing kinship services from a recalcitrant remains always a potential which, together with moral and ethical sanctions, reinforce (sic) the overall system of order and social control, thereby giving conformity to the norms of expected behavior." Could it be that this is the key to the continued stability and primary importance of the indigenous norms despite the challenge of artificially imposed external norms?

Not all official norms are functionless. For example, the Mengistu regime promulgated a series of land reform measures, and the state took over much of the means of production. Indigenous norms, even when officially imposed, are distinguishable from external norms. Indigenous norms are those precepts which originate from Ethiopian tradition and culture, or are generated by those in power, but not superimposed wholesale such as codes and constitutional human rights provisions. External norms are those legal standards of behavior which come from the outside of Ethiopia, frequently from the West. Official norms which are indigenous to Ethiopia tend to be more operative than those which are external. Thus, Ethiopia has a traditional system of exercising power. Power may be defined in terms of effective decision-making, and the ability to influence it. Numerous factors may be present in influencing decision-making: opinions, values, customs, educational experience, and the role of elites. Perhaps unwritten rules, based on church teachings, attitudes toward work, commerce, military prowess, authority and so on, are governing and influencing decision-making. Historically, these factors may have produced a system understood by people and taken to be legitimate, thereby producing a social equilibrium.

Imported norms vs. customary norms-ideological incompatibility-There are basic ideological conflicts between imported Western norms in the Constitutional setting and the host social context. Another prominent source of contradiction is the presence of a capitalist-oriented Civil Code in a regime which has a socialist orientation. The Draft Economic Policy calls for increased

privatization of wholesale and retail services, export-import operations, and tourism. The Draft refers to a possible encouragement of private enterprise in banking and insurance. But the fact is that the land, banking, and large buildings (perhaps those over two stories) will remain under state control. Privately-owned houses in excess of one, confiscated under Mengistu, will be returned. State farms will be eliminated and freight transport and public transport will be denationalized.

While land and what major commercial enterprises there are remain state owned, what can be the role of a Civil Code designed for a capitalist laissez faire liberal regime? The French Civil Code had bourgeois presuppositions. While the French Civil Code declared private property an entity free of feudal obligations, it carried with it the bourgeois ideas of the protection of real property within the family unit of small farms and small family businesses. Professor Brietzke sums it up well: "The outstanding characteristics of Ethiopian private law are its orientation towards nineteenth century capitalism and the lack of meliorating provisions associated with the welfare state in the West and with broadly-based development in the Third World." Thus, the conception of property contained in the Civil Code is that of absolute ownership with no social obligations. This concept seems utterly at odds with the state ownership of land under the leadership of Mengistu or for that matter President Zenawi. There was a lack of synchronization between Commercial Code provisions governing corporations "for gain" (profit), and the socialization of the 100 largest companies in Ethiopia in 1975 under Mengistu's socialism. The presence of freedom of contract in the Civil Code also created a situation of inefficiency because of inequality of property distribution and consumer inexperience. Because the bargaining power of landlords was so great, formal equality was of no helpful relevance. Theoretically, the Code law remained applicable during Mengistu's leadership. However, the Code law simply did not lend itself to application to the bulk of transactions relating to the means of production, including land, which was socialized. It appears that, under President Zenawi, social ownership will continue to render application of the Code law somewhat irrelevant.

Summary-In sum, a study of the Ethiopian legal system reveals a large variety of state originated norms in an uncertain relationship with each other and with customary norms. The prevailing norms appear to be unwritten and customary, and certainly indigenous, rather than imported written norms. First, most relevant is traditional customary law, which varies from place to place, and is unwritten. Second, and related, customary tribunals are alive and well and their resolutions do not appear to be based on Code-originated norms. Third, there is an overlay of imported Codes carrying the Western imported ideological baggage with, at best, uncertain acceptance outside of Addis Ababa. Difficult translation problems of the Codes from French to Amharic, and the lack of terms comparable to Western legal terms in Amharic further compound the problems. Moreover, as in the Civil Law tradition, there are few reported cases, and those which are, are practically unavailable. And even if found, with no stare decisis, the cases themselves need not be viewed as authoritative. Fourth, norms of the Coptic Christian Church may be applied by church tribunals which may not be consistent with Code norms. Finally, imported constitutional norms have also not fared well.

4.1.4 Review questions

Answer the following questions based on the above excrept.

1. Does Van Doren think that the codes Ethiopia adopted some four decades ago succeed in penetrating the Ethiopian society? What factors have served as obstacles for lack of sueessful penetration?

2. How does Van Doren define law?
3. To Van Doren, do judges support the continued application of customary laws in the rural parts of Ethiopia?
4. Do you think that Van Doren believes that the transplanted laws are being applied in cities?
5. Did Rene David foresee substantial resistance to the implementation of the Ethiopian Civil Code? Why did he antiticpate that? Did Rene David expect that the people would gradually adjust their behaviours towards the standards of the Civil Code? How does Van Doren assess this expectation of Rene David?
6. What makes traditional dispute settlement methods most effective in rural Ethiopia?
7. What does Van Doren mean by the idologiacl incompatibility of customary laws and imported laws?

4.1.5 Excerpts (notes)

Claude Sumner, Ethiopian Philosophy: The Treatise of Zara Yaqob and of Walda Haywat: An Analysis (Vol. II) (Addis Ababa, Commercial Printing Press (1978) at 271-272.

In the Book of the Wise Philosophers, the state was the object of elabaorate development. The persons spoken of included the king, his appointees like the notbales, the lords, the governors, the officers; the slave, the beggar, the drunkard, the prostitute; occupational groups like the physicians, the messengers, the mucisicans, the blacksmith and the witch. The spectrum of the Hatats is much more reduced: the king in Zara Yaqob, those who govern in Walda Haywat. But the difference goes beyond the diversification of the persons who make up the state. The views of the falasfa are based on respect, order and law; it has its paradigms in the family, the world and God; its breach is as well known as its harmonious functioning. The importance of the king within the social unit of the state is so great that it amounts to a quasi-identification. It is as if there were a cascde of representation: the king is God`s representative, and in turn the king`s appointee represents the king. The authority flows from above, in a vertical line.

In Zara Yaqob-the king: Zara Yaqob`s life was conditioned by two kings: Susanyos and Fasiladas. He was the victim of the first; he left his voluntary solitidude in a cave when the latter`s reign began. And yet he has described the regin of the latter in worse terms than the former`s. The author speaks of the expulsion of the Portugese, and stigmatizes Fasiladas more severely than the Jesuits victims of this king ever did themselves. He depicts his unique encounter with Susanyos in colors that are fortright favorable in spite of the somber prelude of his enemy`s intrigues at the court against him. He says: but God had made his (Susanyos) heart soft, he received me well and mentioned nothing of the things I was afraid of. He only questioned me on many points concerning the doctrine and the (sacred) Books and he said to me: ``You are a learned man, you should love the Frang, because they are learned.`` I answered ``Yes, they truly are; ``for I was afraid, and the Frang are really leanred. After this the king gave me five measures of gold and sent me away peacefully. After leaving (the king), as I was still marveling (at my fate), I thanked God who had treated me so well.

Zara Yaqob writes: King Fasiladas governed at first with good advice and wisdom; but he did not persevere in goodness; he became a wicked king and persevered in his wretchedness; he shed blood, he came to hate and persecute the Frang who had well deserved from him by building towers and beautiful houses, and had adorned his regin in so many wise ways; in turn for their good he mistreated them. This Fasiladas was doing evil in every respect: ``he killed people without a trial; he used to fornicate with women, and then murder those he had committed adultery with; in his iniquity, he would send soldiers who plundered the land and the houses of the poor. God had given a cruel king to a cruel people.`` But whether the king is Susanyos or Fasiladas or any other one, the few moral judgements that accompany Zara Yaqob`s Treatise and which represent, on the subjective level, the expression of his own reflection on the monarchy, are always negative. Kings love riches, hypocrisy, treachery and perfidy. Walda Haywat, states qualities of those who govern justly as follows: ``Be just towards all: the great and the common folk, the rich and the poor. Adminsiter justice without wrath or passion. Take care of them as if they were your children; they will not fear but love you; you will find peace among them and favor in the presence of God.``

4.1.6 Review questions

Answer the following questions on the basis of the above excrepts.

1. What does the assessment of King Fasiladas`s actions by Zra Yakob the philosopher show? Is it something to do with the rule of law or rule by law or unbridled arbitrariness?
2. Explain the qualities of those who govern justly as stated by Walda Haywat the philosopher.

4.1.7 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)

Does Ethiopia have a legal system?-The learned Professor J. Vanderlinden opens an article he wrote in 1966-67 after the Codes were introduced into Ethiopia with an intriguing sentence. "The main characteristic of the contemporary Ethiopian legal system is that it does not yet exist as such." By contrast, Professor Sedler wrote, in 1967, that he found Ethiopia had accomplished a substantial start in the creation of a modern legal system. Professor Sedler notes that the Ethiopian Constitution of 1931 set out that judges should decide according to law, which was an important beginning. A state court system had developed, and Western Codes had been enacted, though serious problems of implementation remained. To answer the question of whether Ethiopia has a legal system it is necessary to define a legal system. I conclude that according to Legal Positivism, it is uncertain whether Ethiopia has a legal system. Also, according to the natural lawyer orientation of Professor Lon Fuller, it is doubtful that Ethiopia has a legal system. But according to other definitions, such as those of Professor Poposil, Ethiopia meets the criteria for having a legal system. Suspicions are activated where these varying results occur and we may legitimately ask if the definitions are not value-laden and culturally biased.

Modern positivism indicates Ethiopia has no legal system-In the West, Positivism is the prevailing mode for conceptualizing legal systems presented by officials and professors. However, in United States academic circles, Positivism exists in terrific tension with competing

explanations. There exists so much controversy that in a recent decision on abortion, three Supreme Court Justices openly argued that the legitimacy of the legal process was at stake if the development of law were not given a greater appearance of coherence. The assault on Positivism by American Legal Realists during the 1920's and 1930's has been revived, post-1977, by the Critical Legal Studies Movement. It is startling to read that even a critic of Realism and Critical Legal Studies can conclude that there is a consensus among the American academic community, left, right and center, that at least as regards Constitutional Law, there can be no objective basis of morality discoverable from which to project an interpretive strategy.

The exposition of texts, constitutional or otherwise, is often indeterminent. Indeterminacy analysis strikes at the heart of Positivist claims that by and large, a legal system is deemed to exist only if there is a discernable rule structure which determines rights and duties. If the cases, codes, constitutions, and texts are indeterminent, as this author believes, and no undisputed moral standards exist outside the text, formalists such as Positivists, talking about a Rule of Law have a problem! According to modern Positivist definitions, Professor Vanderlinden is correct: Ethiopia probably fails the "legal system" test. Viewed from another perspective, however, it is the definition of modern Positivism that fails and is revealed as value-laden, mono-dimensional, and culturally biased.

In Ethiopia, the Positivist model for a legal system is not realized because as previously discussed, much of the conduct in the society is not governed by official norms. The prevailing norms are customary or traditional. Official norms are rules and precepts generated through official state organs such as the President, ministries, parliament, the courts and so on. Thus, while state norms exist in profusion, it is not clear that they are taken seriously, particularly with regards to the imported norms. The governing norms may often be unwritten and are not derived from state sources. Thus, there are enormous gaps between the official norms and the actual norms governing the conduct of society. Another way to look at these gaps is, in terms referred to by Ehrlich, as a gap between the positive law and the living law.

The question for Positivists becomes, how much of a gap can there be, consistent with the presence of a legal system? For example, even the indigenous-based norms (the public law of Mengistu), did not affect the lives of large rural areas which are defined as those areas one half day's walk from the nearest all-weather road. Yet, the Ethiopian daily life is not chaotic. Society functions reasonably well on a day-to-day basis. Citizens know what is expected of them. These expectations are largely realized despite the lack of any strong demonstrable relation between many official norms and the behavior actually required. In significant instances, it is not that the official norms were subject to erosion, but that the norms were never operative, and in some instances never intended to be operative.

The preceding discussion would lead some jurisprudents to deny that such a regime had a legal system. Professor H.L.A. Hart, the Oxford Positivist, might deny that a regime with a low correlation between official norms and functionally operative norms has a legal system. It is fundamental to Hart's Positivism that the rules that govern society be derived, to a significant extent, from the official norm structure. Law is to be separated from custom and morality. Officially derived rules are to be applied by decision makers because they are the rules of the society, not necessarily because of their inherent fairness. Officially derived rules may or may not be in accord with the custom and morality of the society, but must be applied regardless. Hart defines a legal system as a system which is composed of a union of primary and secondary rules.

Primary rules are those rules which determine disputes and guide citizen conduct. One analogy is that the primary rules of a legal system are like the rules in a rule book governing a chess game. The most important secondary rule is the rule of recognition. The rule of recognition serves to identify sources of primary rules. In our analogy, the rule of recognition would be that which identified the rule book as the source of primary rules governing the chess game. Hart argues that a legal system has a rule of recognition, a social rule that makes a reference to sources of primary rules.

Suppose that, in our chess analogy, some of the rules in the rule book are not regarded seriously by officials. The rule book contains some indigenous rules and others that are foreign imports placed there to give the local chess game the appearance of progressivity without the substantive burden of the silly rules imposed by foreigners. Just to make matters even more interesting, sometimes officials use the foreign rules, or at least cite to them. A Hartian could point out that Hart did say that officials may have the "internal point of view" as regards the source of the rule of recognition or at least, an attitude that the secondary rules are acceptable. But, arguably, officials in Ethiopia have not had the internal point of view with regard to at least the non-ingenious based norms. There is evidence that Ethiopian officials have not really accepted Western norms underlying the imported legal system. This is but another reason that a Hartian could say that Ethiopia does not display the requisites for a legal system, which is so much the worse for the Positivist criteria.

Where, as in Ethiopia, officials who make adjudicatory decisions may not justify decisions or where the sources officials refer to in justifying decisions may bear little relationship to actual norms used in making decisions, the Hartian system would be of very limited utility. Equally significant, there is a confusing array of norms officially promulgated which are not used at all. Perhaps it is more accurate to describe the situation as one in which there is an indefinite pattern of use of sources of official norms. There are comprehensive codes and there have been constitutions referred to in some circumstances as an official justification for decisions, but ignored in other situations. The Nagarit Gazeta, where law emanating from the state is published, cannot be the source for the Ethiopian rule of recognition because laws set out there are not necessarily operative norms. A modern Positivist would have difficulty finding a legal system in Ethiopia.

Professor Lon Fuller, who wrote from a Natural Law perspective, argued that there may be no legal system where Rex (an imaginary king) promulgates a set of legal norms but then decides disputes on other grounds. Professor Fuller stressed that the concept of law necessarily involves communication between officials and the people. Professor Fuller referred to this as an aspect of the "internal morality of the law." That which masqueraded as law was not in fact law unless the criteria he enumerated were observed.

In analyzing the early regime of the Derg, later dominated by Haile Meriam Mengistu, critical legal observers found that the Derg displayed all the characteristics which negate a legal system, namely eight characteristics which Fuller refers to as the internal morality of the law. These factors are described as excessive specificity, incommunicativeness, retroactivity, incomprehensibility, contradiction, unfulfillable demands, capricious change, and irrelevant administration. Professor Fuller indicated that it was important to have a correlation between official norms and governing norms in order to aid communication between the ruler and the ruled. Thus, perhaps Fuller might not be troubled if everyone knew that the official norm

structure was there for other reasons, such as symbolism, or the creation of a progressive appearance. Professor Fuller stressed the importance of official norms correlating substantially with enforced norms because of the importance of citizens being able to plan behavior. But if everyone either knows that the officials norms are inoperative or has no knowledge of them at all, Fuller's communicativeness criteria may not be a problem.

My point is, however, a variation of this theme: At least since the 1930's Ethiopia's lawmakers have had communicative intent only in specific instances in their lawmaking. Nor am I here concerned with the lack of communicativeness that comes from vagueness. My concern is the need for a scorecard, so to speak, as an aid in separating prevailing norms from the mass of competing norms. One starting point is to separate non-functional norms, often foreign, adopted norms, whose purpose was symbolic or propagandistic rather than functional. The Codes were aspirational in the sense that they are designed to alter social practices rather than to reflect them. But the problems of such an approach for the Positivist paradigm is serious. It is as though someone said, "Here is the rule book for chess, but please note some of these rules are aspirational; that is, it is improbable that officials will pay any attention to them in the near future. Some of the rules conform to existing customs (e.g., those dealing with marriage and divorce), but others do not conform. Have fun figuring out which are which."

Other definitions of legal systems -- Professor Poposil`s definitions of what constitutes law and a legal system abound. Professor Poposil, a specialist in legal anthropological studies, isolates four factors-- the presence of which denote the existence of a legal system. These factors are: (1) adjudication or mediation; (2) sanctions; (3) obligations or Hoffedian rights, and (4) future applicability of the norms established through conflict resolution. Poposil stresses only those rules or norms arising out of conflict resolution, thus de-emphasizing rules in the abstract. Poposil makes no effort to separate law and morality, custom and law, or adjudication and legislation. By Professor Popsil's criteria, virtually all societies have a legal system, which was no doubt his intention. Professor Singer, a close and able observer of the Ethiopian legal culture, defines law as does Professor Poposil: (1) an effective authority which need not be governmental, (2) social attitudes considered to be law by the society, (3) affected persons recognize their rights and duties, and (4) sanctions are present. Singer refers to the Amharic law as customary law, but notes that the Amhara did not regard their law as customary since it formed the basis of the law of the new empire. If this definition is accepted, the Ethiopian legal culture displays the relevant attributes of a "legal system."

Professor Brietzke states that the Rule of Law was not present in Ethiopia under the Emperor Haile Selassie. Commentators on the Ethiopian legal culture observe that the idea that inflexible rules exist which govern disputes is not traditional. The Fetha Negast was a guide only. The fact that the Ethiopian emperor could alter any court judgment is taken as evidence that a Rule of Law did not exist. In summary, there does not seem to be a master rule of recognition in Ethiopia which ranks potential sources of law as required by Professor Hart in his description of a legal system. For example, during the Mengistu period, the grundnorm or master rule of recognition might be said to be "Ethiopia Tikdem" (Forward Ethiopia). But the phrase was so vague as to be meaningless.

In Ethiopia, prevailing norms are often customary and unwritten. Professor Hart refers to a situation in which there are no rules of change, adjudication and recognition as "primitive." Hart may have indicated that a regime with oral customary rules may not have a rule of recognition, a

necessary component of a legal system. Hart may also have concluded that a regime in which customary law governed without official determination that it was authoritative did not have a legal system. Finally, Hart would have a hard time finding a legal system under his criteria where there was a huge gap between official norms and the operative norms which are in Ethiopian customary norms. In this context it is ironic that the English Constitution itself is customary and "unwritten," not to mention American constitutional practice. The Positivist John Austin stresses that law is the command of a sovereign backed by force. Professors Scholler and Brietzke described the Mengistu state and its predecessor as exemplary of the Austinian command Positivism: the orders of a sovereign gunman backed by force. Such a definition is helpful, but it cannot avail modern Positivists because they strenuously reject it. Finally, Professor Poposil's definition is the only one that clearly embraces the Ethiopian case, and accommodates the idea that Ethiopia has a legal system.

4.1.8 Review questions & notes

1. Do you think that the following anaysis is correct? The Ethiopian legal system has multiple faces. One face of it is that the picture painted by the legal documents, i.e., codes, constitutions, proclamations, regulations and directives; the picture one gets when he examines these legal documents. The other picture of the Ethiopian legal system is the one which is disclosed when one examines the way these laws are applied; the picture obtained through observations of the behavours of the adressees of the existing laws. The third picture is the various traditional legal systems; the customary laws which govern human relationships espesically in the country side.
2. What is the implication of the legal pluralism which prevails in Ethiopia? What do we mean by the assertion that the Ethiopian legal landscape is a meeting point of multiple notions of law, i.e, there are several customary law systems; the country received for example, notions of Islamic law, socialist law, common law and civil law?
3. Does Ethiopia have a legal system seen in light of Hart`s and Fuller`s theories of law? Does Van Doren think that Ethiopia does have a legal system?
4. Why does J. Vanderlinden conclude that ``the main characteristics of the contemporary Ethiopia is that it does not yet exist as such``?
5. What does Ehrlich mean by ``postitive law and living law``?
6. What are the eight features that negate a legal system?
7. Is it possible to conclude that the Ethiopian codes were adopted for aspirational or propaganda prupose? Were the codes meant to be functional?

4.2 The Sources of the Six Codes

The present section deals with two main topics: preliminary issues and the sources of the 1950`s and 1960`s codes of Ethiopia. The first topic discusses the problems one faces in studying the history of the Ethiopian legal system. The other topic conveys the message that the Ethiopian legal system has drawn, on different occasions, from numerous legal traditions. The two central conclusions

of this section are: first there is no sufficient, reliable and accessible material in studying the background to the Ethiopian legal system. The second conclusion is that the Ethiopian legal system has borrowed legal rules and principles from multifarious sources.

4.2.1 Preliminary issues: Before this section takes the reader to the discussion of the major inspirational and material sources of the Ethiopian codes adopted some four decades ago, it may be instructive to make the following preliminary points.

4.2.2.1 Source: There is a problem of insufficient information. There are no enough reading materials. Little research has been conducted on the Ethiopian legal history. Even the little information available on the Ethiopian legal history is not accessible. The information is recorded in the French or Italian or Spanish languages. To access this information, obviously one has to master at lease one of these languages. Some say that some of these pieces of information are not reliable in the sense that they were recorded not by historians. Travelers and those who had closer relationship with the palace and kings recorded this information. Thus, these materials tended to be anecdotal or glorify the achievements of Ethiopian kings.

The little recorded information on the Ethiopian legal system is unrepresentative. The available information of the Ethiopian legal history does not say much about the various legal systems of the kingdoms in the Eastern, Southern, western and southwestern parts of the country brought under the umbrella of the central government in 19th and 20th centuries. We know little about the features and developments of the pre-integration legal systems of those kingdoms. We know also little about the fate of the legal systems of those kingdoms after the integration. There is obviously the need to undertake serious researches regarding the nature and effectivenss of traditional legal instiutions in the country; their historicall and current relationship with the state laws and institutions; their place in the present and future Ethiopian state legal system; the manner in which the state should give support to the development of these traditional legal institutions. Given the lack of pertinent and relable information on the matter under consideration and the introductory nature of this course, much cannot be said about the administration of justice under customary laws in Ethiopia. The course on Customary Laws is quite relevant in this regard.

4.2.2.2 Gaps: There are gaps between the official laws and unofficial laws. Here `official laws` means the laws made by the Ethiopian government, which include the six codes as well as other state-made laws. The official laws were and are transplanted essentially from the western legal traditions. The term `unofficial laws` means legal rules and principles generated by the community; laws that

grow from below, especially the various customary laws that take hold on the ground. Do you recall the discussion on the existence of a divergence between official and unofficial law in Ethiopia in Unit 1 of this course that examined the concept of legal penetration and legal extension as well as the justifications for the existence of the gap between the two, i.e., trnansplanted laws and home grown laws? Readers are advised to refer to that section.

4.2.2.3 Extent of accommodation: Ethiopia gave little space for the customary law systems in 1950`s and 1960`s grand codification project. Generally, in 1950`s and 1960`s, Ethiopia did not assign sufficient roles to customary laws. As suggested above in this section, the transplanted laws could not get the necessary legitimacy, among others, because of a rejectionist stance followed by those in charge of government affairs.

Why do you think that Ethiopia assigned a minor role to customary laws in 1950`s and 1960`s when codifying laws on the basis largely of civil law model? Ethiopia thought that recognition of customary laws would undermine its international legitimacy. The western powers made their intention very clear via the consular courts as well as via the consultative committee, which will be explained in the next section, that they could not do business with Ethiopia and Ethiopians without her laws being modernized. Second, Ethiopia thought that recognition of customary laws would be anti-social and anti-economic progress. Ethiopia thought that there were several customary laws inconsistent with the demands of modern life in the country. Third and most important, Ethiopia felt that customary laws would be against the project of modernization, which was planned to be implemented through such strategies as industrialization, urbanization, assimilation, integration, centralization of political power as well as legal unification on the basis of western codes. Customary laws were taken to be misfits in this process; customary laws were associated with political fragmentation. Customary laws were seen as undermining legal uniformity. Finally, the customary laws were not sufficiently recorded to be of some help.

David, A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries, 37Tulane Law Review 2, (1963) p. 187-204.

Relation between the Code and Custom: A question which arose is the following: With respect to the laws which would ultimately be adopted, to what degree is it fitting to take into account the customs actually followed in Ethiopia. For a jurist of Western Europe to understand well how the question presents itself in a country like Ethiopia, a certain effort is necessary to rid himself of a number of ideas or prejudices he might have. The first idea of this jurist will be to think that a code will be a purely theoretical work devoid of real value if it is not strictly in accord with local customs. Especially in matters of private law we are profoundly marked in our Western countries by the thesis of the historical school, taken over by the sociological school of law. We observe the stability of our private law, and we believe with difficulty in the efficacy of laws which

pretend to impose on private individuals another mode of conduct than that practiced by them according to their tradition.

This position is not that of the Ethiopians, nor of other countries comparable to Ethiopia, which are looking toward a total renewal of the basis of their society. Like the Soviet Union and the communist countries, although with another ideal, Ethiopia and a number of African countries are presently in a revolutionary period. While safeguarding certain traditional values to which she remains profoundly attached, Ethiopia wishes to modify her structure completely, even to the way of life of her people. Consequently Ethiopians do not expect the new Code to be a work of consolidation, the methodical and clear statement of actual customary rules. They wish it to be a program envisaging a total transformation of society and they demand that for the most part, it set out new rules appropriate for the society they wish to create.

Does his conception lack realism? Certainly neither a total nor immediate success must be expected in all fields from the principles on which the new Code was founded. But it is not useless to enunciate the objective on which they have settled. We do not condemn as useless our constitutions with their preambles or declarations of laws which often wait a long time to be put into practical application. In the matter of private law especially, it must be remembered that for centuries an ideal law, a Roman law, which had little by little been transformed into natural law, was taught in our universities of all countries, and not the positive law, the customary, jurisprudential or legislative rules applied here and there. Gradually, in the course of centuries, this ideal law was received or made its influence felt on the practical law, up to the time when, in the nineteenth century, it became plainly positive law by the codification of national laws.

In the same manner, the schools of Islamic law traditionally teach a Moslem religious theory distinct from customary rules or other rules that local tribunals apply. Likewise in Ethiopia, the eminent authority of that precept, the Fetha Negast (Justice of the Kings), has been recognized for centuries, while it was realized that its rules were very imperfectly followed in practice. Was it necessary to abandon this conception of an ideal law to adopt a sociological positivism contrary to tradition? The Ethiopians considered rather that their codes were to precede a new edition of the Fetha Negast, founded on reason and on the teachings of comparative law. They considered it offensive to formulate laws under the form of legislative precepts which are perhaps followed in fact by the majority, but which Ethiopians are unanimous in considering as bad in themselves and which they follow only because man is an imperfect being.

A code is, in the Ethiopia conception as well as in our own traditional conception, and likewise in the Soviet conception, a model of social organization. It aims at the perfection of society and not only to a static statement of behaviour served by the sociologist. For these reasons it is apparent that it was doubtlessly necessary to take customs into account, that it was necessary to keep this accounting limited, and not a fear changing them. It was necessary to take customs into account in order that the Code not be an abstract, theoretical work without ties to the profound sentiments of the Ethiopian people. But it is necessary to account for customs only to the extent that they correspond to a profound sentiment of the Ethiopian people, and conform to that which is felt by them as being just. This is not the case for all these customs, many of which correspond to the conditions of life then and new: it is hoped that the years to come will render these customs inconceivable and odious even to Ethiopians.

The Ethiopians have definitely stopped in an intermediate position, with a view toward conciliating the contradictory positions which one sees in the Code: One the model for society to come, the other the statement of the rules to be followed by judges for the solution of litigation in the immediate present. The Ethiopians have sorted out their customs, keeping only the necessary ones which either correspond to their profound sentiment of justice, or else appear too generally followed and too profoundly rooted for one to hope to take them away from Ethiopians in the foreseeable future. Naturally customs were elsewhere followed when they were conformable to, or simply when they were not in contradiction with, the ideal order of which the Code pretended to state the rules. Had they wished to do so; to follow strictly Ethiopian customs would have been to run up against an impossibility of fact; an impossibility because in certain matters there is a total absence of customs. For example, the entire matter of contracts in the Code is a new thing, for the Ethiopian society of yesterday did not know the concept of contract. The few rules concerning contracts that were found in Ethiopian law were imported or of recent fabrication, eminating from the legislature or from tribunals, without relation to true Ethiopian custom. The same impossibility existed in other cases as to a variety of customs. The Ethiopian nation is composed of communities which often do not follow the same customs. This fact is true not only when one considers the diverse ethnic groups. But it is also true even when one considers the same ethnic group. It is aggravated by the fact that the customs remarkably lack stability. The idea of a custom with a sacred character, quasi-immutable, does not conform to the facts when one envisages the populations of the Ethiopian plateau. The circumstances of the present epoch are of a nature to precipitate this evolution. In anticipation of this evolution, in choosing the custom which now and henceforth appears to be the most modern among the many customs in being, it has been possible to cast an eye to progress without breaking the tie that legislation must necessarily have with the state of mores and customary practices in the country to which it is called to be applied, if it is to have a national character and to be realistic.

The progressive character of the Civil Code, envisaged as a model, was adjusted from a realistic point of view in the preparatory plan with the aid of sufficiently elaborate "transitory dispositions" which provisionally maintained in force the rules actually followed on a certain number of points. Special dispositions had thus been forseen on that which concerns matters of personal status for persons of the Moslem religion. It is permissible to regret that the Ethiopian Minister of Justice did not hold to these dispositions at the time of the discussion of the Civil Code in Parliament. These dispositions were intended to prepare a halting point on the road to progress, which seems to us indispensable in terms of the application of the Civil Code.

4.2.2.4 Legal structure: The codes adopted in 1950`s and 1960`s were not supported by a developed legal structure. Do you remember the concept of legal structure in the first section of Unit 1 of this course? Legal structure is an element of legal system and refers to institutions such as law schools, legal professional associations, executive, legislature, the judiciary as well as the prison administration. It means all the institutions that engage in the study, refinement, making, modification and implementation of the law. Do you think that these institutions were well developed at the time of the adoption of codes some forty years ago? Do you think that the advanced codes were put in the country where these structures were equally advanced or were they put in place in the situation of a very weak legal structure?

4.2.2.5 Break in continuity: Some fifteen years after the coming into force of the modern codes, the country faced a major ideological change. The codes assumed a forthcoming capitalist system; the codes assumed individualism; the codes assumed that Ethiopia would follow the footsteps of the western market economy systems. The codes assumed that the center of the Ethiopian legal system would be the individual, i.e., the recognition and protection of the various legitimate interests of the individual person such as his life, bodily integrity, property, reputation and the peace and stability of the community. But the revolution assumed a major turn around; now the claimed center of the legal system being the community. The codes were found out to be misfits in the process. The socialist government moved to revise the codes completely in late 1980`s by establishing a body known as the Law Revision Commission under the auspices of the Ministry of Justice. The socialist government was overthrown before the Law Revision Commission brought its assignment to fruition. Yet the codes were never repealed. The foundational assumptions of the codes were not the product of internal intellectual (Ethiopian) discourse; rather such assumptions were debated about and articulated in the West and by western jurists in the course of several centuries. The codes did not have the chance to be tested continuosly and for a relatively longer period of time owing nearly two decades of idological change in the legal system of Ethiopia following the 1974 Revolution.

4.2.2.6 The political landscape: The Ethiopian formal legal system was remade several times. The reordering was a major one. If you focus on the making of constitutions, Ethiopia introduced a constitution in 1931, which was a theocratic constitution. Ethiopia had got a revised constitution in 1955, which in essence was the same as the ideals of the 1931 Constitution. Then in the year 1974, another constitution was drafted but was not put in place for the revolution took over situations. In the year 1987, a new constitution with different basic assumptions was put in place. Finally in the year 1995, the FDRE Constitution was adopted. The 1931, 1955, 1987 and the 1995 introduced basic re-makings of the Ethiopian legal system. These constitutional exercises within 70 years also led to changes in the subordinate legal documents.

Can you figure out the cuases of these basic and frequent interruptions in the Ethiopian legal system? It is stated that the root cause of these fundamental shifts in the Ethiopian legal system lie in the differing interpretation of, by the key political actors of the past and today, the 19th and 20th integration of the several kingdoms under one central authority.

There are three ways of understanding the historical process of bringing the various entities together in the past two centuries. Emperor Hileselassie I and his supporters understood the process as a re-union or expansion. They argued that

prior to 19th and 20th centuries Ethiopia lost territories as a result of wars and migrations. And in 19th and 20th centuries, Ethiopia successfully regained her lost territories. These actors worked to bring about political centralization. They used western oriented codes. They used the methods of assimilation and integration to unify the country. The 1931 Constitution and the next constitution were designed to implement the state policy of political centralization as well as legal unification. Their concern was political disintegration.

The second group of personalities understood the historical process of bringing multiple ethnic groups 19th and 20th century in Ethiopia as a problem of class exploitation. The issue was not ethnic exploitation. The economic elites, who were few in number, oppressed the mass. The various groups brought together under the umbrella of the central government suffered injustice in the hands of the economic and political elites. The solution sought was to end this exploitation by building a communist society in the country. Ethiopia was led for about 17 years by the advocators of this view. As the promoters of the re-union approach remade Ethiopia, the promoters of the second view, called the conquest approach, reordered the Ethiopian polity.

The conquest approach has two models. The first model is the one already explained; the model that thinks that the main problem is class oppression whose solution is to eliminate this exploitation by constructing a classless society. The second model in the conquest approach thinks that the main problem is national exploitation. The various previously autonomous entities, once brought together under the authority of the central government, were subjected to humiliation. The solution proposed was to accord true self-rule especially in the form of an ethnic based federal state. The second model is reflected in the FDRE Constitution.

The third approach thinks that the problem lies not in lack of centralization, as the first approach thinks, nor lies in class and ethnic oppression. The key problem is colonialism whose solution should be independence. The historic Ethiopia also called Abyssinia colonized the ethnic groups located in its eastern, southern and western parts. The proponents of this view of the Ethiopian history would like to settle for not less than political independence.

Merera Gudina, ``Ethiopia: Competing Ethnic Nationalities and the Quest for Democracy, 1960-2000,``(2003)

The competing ethnic nationalist perspectives: There are three major ethnic nationalist perspectives. The differences basically concern the way they interpret the historical road to modern Ethiopia and the political solutions they provide for the country's contemporary problems. Their characterization of that historical process ranges from (re) unification and expansion to colonization. Of course, each of these implies what type of solution each of the

contending elite offers for the country's chronic problem of ethnic conflict. Those who see little or no injustice in the actions of the empire builders usually consider the empire- building process as reunification or unification, the former means bringing back territories formerly under the control of historic Ethiopia. Those who advance the expansion thesis are generally the main-stream Ethiopian intelligentsia and multi-ethnic political groups with a Marxist tradition, who recognize the injustice done during the process of the expansion but search for solutions within greater Ethiopia. Those who uphold the colonial thesis take the injustice done in the process more seriously and advocate a separatist political agenda as a panacea for the country's political malaise.

The 'nation-building' thesis: The 'nation-building' thesis holds that the creation of the modern empire-state of Ethiopia through force by the successive empire builders is a historical accomplishment. The empire builders are seen as 'nation builders'. Tewodros (1855-1868), who started the process of empire building by ending the Zamana Mesafint (Era of the Princes), Yohannes (1872-1889), who took a step further in the empire-building project, and Menelik (1889-1913) and his generals who completed the empire creation-are all celebrated as founding fathers and architects of Ethiopian unity.

The 'making of modern Ethiopia' had begun in the second half of the 19th century and one of the moving spirits of the 'making of modern Ethiopia' was what is generally known as the 'nation-building' process, a project of creating one Ethiopian nation out of diverse peoples and cultures. In practical terms, this involved political centralization and modernization, which were assumed to be complementary in the over-all drive of the empire-building project: political centralization involved the pacification of the incorporated regions as well as effective control of the regional power centers in 'historic Ethiopia' while modernization generally meant introduction of European technology and education.

In reality both the process of political centralization and modernization started with Menelik, who has been rightly considered as the founder of the modern empire-state of Ethiopia. After the incorporation of new territories was complete and the Battle of Adwa settled the European challenge in 1896, at least for a generation, centralization of power by creating a prototype of modern bureaucracy and the introduction of modern education started in the first decade of the 20th century. The first council of ministers was formed in 1907 while the first modern school was opened the following year, which led to 'the birth of a modern intelligentsia.' Such initiatives continued, especially under Haile Selassie, who was destined to dominate the country's political history for much of the 20th century. By effectively using the authority of the Church, Amharic language, modern education, especially modern bureaucracy and army, he completed the perennial quest for political centralization as well as the limited modernization drive that was designed to serve the political interest of the Emperor. Central to his modernization, he promulgated a written constitution in 1931, which was supplemented by introduction of a parliament. The constitution was revised in 1955 and a parliament was 'elected' in 1957 with somewhat universal suffrage. In fact, by the turn of 1960s, modern education reached a level that a university, a modern army and policy were built, urbanization, communication, industry and modern commerce were all visible in a manner unknown in Ethiopian history.

All these measures were viewed as historic achievements by the believers in the goal of 'nation-building.' Especially to the empire-builders of the 19th century and their contemporary counterparts, Menelik's achievement amounted to a historic 'nation-building' process. As they

see it 'Masgabar' (enserving) and 'Makinat' (pacifying or colonizing) are positive historical acts necessary for the process of 'nation-building.' They argue that no great power in history ever built a nation without conquest and the use of force. More apologetically, they further argue that what Menelik did was to reunify territories historic Ethiopia had lost in the past. According to them, Menelik`s victory at Adwa was an all-time hero without whom Ethiopia would be inconceivable. Many of them also consider the superimposed cultural, linguistic and religious values of one ethnic group over the others as positive factors for the formation of 'one united Ethiopian nation.' Therefore, 'one Ethiopia' is their motto and they consider those Ethiopian forces that recognize the supposed rights of marginalized ethnic groups to be less than patriotic and even as anti-Ethiopia. The unity/anti-unity dichotomy in the country's political discourse is most pronounced in this group and they seriously look upon themselves as the authentic representatives of the indivisible Ethiopian 'nation.'

Upholders of the 'nation-building' thesis see no wrong in the creation of imperial Ethiopia; in fact, it is holy to them. Nostalgic about the imperial past, they vehemently oppose those who accept the reality of national inequality in the past, and even accuse them of 'national nihilism.' They are strongly opposed to the present restructuring of the country along ethnic/linguistic lines. Alternately, they argue for a non-ethnic, federal formula and question the merits of granting collective rights to ethnic groups. In fact, they question both the legitimacy of the present constitution and the political process as a whole. Generally, they advocate a non-ethnic-based state structure that ensures the individual rights of citizens, including private landownership, which is increasingly becoming a bone of contention in the country's politics.

The above view not only puts them at loggerheads with the ruling party, but also in opposition against the proponents of the colonial thesis and the various ethnic nationalist movements who support group rights. To be fair, the supporters of the 'nation-building' thesis are not from one ethnic group exclusively. However, the Amhara elite, the main beneficiary of the spoils of the empire, is the most dominant among them. In the current politics of Ethiopia, the organized representatives of this trend are Moa Ambassa, AAPO and EDU, all of which are considered to be pro-monarchist by those who see themselves as progressive forces on the country's political landscape. At any rate, subscribers to the 'nation-building' thesis are no longer dominant in the country's alignment of forces. As the imperial legacy is being discarded in the building of a new Ethiopia, the initiative of 'nation building' under the new conditions seems to have passed to the forces of change with a more accommodative political agenda, i.e., a democratic reconstitution of the Ethiopian polity.

The national oppression thesis: The national oppression thesis came into the Ethiopian political vocabulary with the ascendancy of the Ethiopian Student Movement (ESM) in the 1960s. As part of their struggle for social justice and national equality, the ESM, whose leaders were inspired by the Marxist-Leninist political philosophy and the solution provided by this school of thought for national inequality, popularized the term 'national oppression.' The ESM and the two major political organizations that were the direct offspring of this movement, the MEISON movement and the EPRP, characterized the national and/or ethnic inequality in Ethiopia as 'national oppression' and made it part of their political programs.

According to the ESM and the two leftist groups, MEISON and EPRP, there was one oppressor nation whose political system, culture and language dominated the others, and there were many oppressed nations and nationalities who were politically and economically marginalized,

culturally and linguistically dominated. The Amhara nation was identified as the oppressor nation while the Oromo and the Gurages and Afars were characterized as oppressed nations and nationalities. Unlike the confusion of today, the national oppression thesis was formulated within the broader thesis of class struggle and neither the whole of Amhara people were presented as oppressors nor all people of the marginalized nations and nationalities were seen as the oppressed. The Marxist position on the national question used to make a clear distinction between the real oppressor class in the ranks of the oppressor nation on the one hand and the oppressed broad masses and the local gentry in the ranks of the oppressed nations and nationalities on the other.

In this regard, the first well-articulated Marxist position on the question of nationalities in Ethiopia was the article of Wallelign Mekonnen, a student leader who was later killed in an attempt to hijack an Ethiopian airliner in 1973.The gist of his article reads: ``Is it not simply Amhara and to a certain extent Amhara-Tigre supremacy? Ask anybody what Ethiopian culture is? Ask anybody what the Ethiopian language is? Ask any body what Ethiopian religion is? Ask anybody what is the national dress? It is either Amhara or Amhara-Tigray!! To be a 'genuine Ethiopian' one has to speak Amharic, to listen to Amharic music, to accept the Amhara-Tigre religion, Orthodox Christianity, and to wear the Amhara-Tigre Shama in international conferences. In some cases to be an 'Ethiopian', you will even have to change your name. In short, to be an Ethiopian, you will have to wear an Amhara mask (to use Fanon's expression).``

This article came as a bombshell to the regime, which had been entertaining an illusion of a success story about its 'nation-building' project. It also had great impact on a majority of the students who were to that date only allowed to know 'one Ethiopian nation and one destiny' under the Emperor's empire. Thereafter, recognition of the principle of 'the right of Ethiopian nations and nationalities to self-determination, including secession' became the crucial test for qualifying as a revolutionary. Non-recognition automatically identified someone as 'reactionary' and likely to be branded as a die-hard chauvinist. With the increased radicalization of the student movement and the creation of its leftist political organizations, together with the rise of ethnic and/or regional oriented liberation movements, the debate on the national question became a heated issue. A serious controversy soon arose across the country's political spectrum. To the imperial regime, the recognition of 'rights of nations to self-determination, including secession' by the students and other groups meant a betrayal of the national cause, treason to the holy cause of the indivisible Ethiopian nation.

The students' ability to combine the issues of social justice, especially the question of 'land to the tiller', further angered the regime, as land was linked to its own very foundation and survival. The regime turned its propaganda against the students and the radical political groups. The imperial regime portrayed the students and the other radical political groups as paid agents of international communism. The primary objective of exaggerating the students' link to international communism was to isolate the students from the larger Ethiopian public who were generally suspicious of foreign intrusion. The secondary objective was to solicit support from the Western powers, especially the US, which was then fighting the Cold War and prepared to suspect communism everywhere. The regime's action was not limited to propaganda alone. As of 1970, students were detained and even killings had begun-activities that grew more violent up to the demise of the regime in 1974.

At the time, the issue of a nation's right to self-determination, including secession' had a very decisive effect on the forces of change, both within and outside the Ethiopian Student Movement

(ESM). Within the larger group that can be lumped together as forces of change, there were four identifiable trends with mutually contradictory agendas. The first trend consisted of those who advocated the softer option – the regional autonomy formula (e.g. a group which was later organized around the leftist Waz League). In the second category we find those who recognized stated rights both in principle and in practice (e.g. EPRP). Finally, the various ethno-nationalist movements, which shared the common view of the colonial thesis and sought separation as a better option, can be taken together as a fourth trend.

In the period between 1974 and 1978 (between the outbreak of the revolution and the defeat of the civilian left (who brought about the revolution in the first place) the national question became a major controversy among the various leftist groups. The military elite, who controlled the state, joined the controversy by adding fuel to the already burning issue. They exploited the division within the civilian left; their defeat of the Somali army conferred on them the image of championing Ethiopian unity. Using the support of the Soviet Union, they had thoroughly defeated the civilian left by the end of 1978. The defeat of the civilian left had the unexpected effect of ensuring the ascendancy of national liberation movements from the 1989s onwards. The ascendancy of the national movements also settled, at least temporarily, the burning question of which comes first, the national struggle or the class struggle.

There are two paradoxes that need to be noted here. The first paradox is that a), the Ethiopian Student Movement and the multi-ethnic leftist movements had popularized the 'right of nations and nationalities to self-determination, including secession' to solve the national inequality created by the imperial regime. However b), the national liberation movements effectively used it for mass political mobilization and successful marginalisation of the multi-ethnic leftist movements. The second paradox is that a), the students and the civilian left brought about the 1974 popular revolution, but b), the military, with no past revolutionary credential, usurped the leadership of the revolution and used it to destroy the civilian left as an allegedly counterrevolutionary force. Consequently, the final outcome was a double defeat for the multi-ethnic leftist movements and/or multi-ethnic politics in contemporary Ethiopia.. The defeat of the civilian left has not however guaranteed final victory for the military elite. On the contrary, it opened the way for the ascendancy of the liberation movements.

The national liberation movements that destined to dominate Ethiopian politics in the 1980s and 1990s were not monolithic in their demands and actions. In fact, different theses meant different things to different groups. The TPLF, for example, although at one point advocating secession has long been advancing the national oppression thesis, which seemed more appealing to the Tigrayan people, who consider themselves as an important component part of historic Ethiopia. The Eritrean movements, on the other hand, basing their claims on the legacy of Italian colonialism, pressed for the right to be independent from what they characterized as 'Ethiopian colonialism' from the beginning. As the bulk of the Oromo population and the Ethiopian Somalis was brought into the orbit of the expanding empire-state in the last quarter of the 19th century, most of the organized Oromo movements and the Ethiopian Somali groups appear to prefer the colonial thesis. While the TPLF and EPLF have succeeded in their national oppression and colonization thesis, respectively.

The colonial thesis: The colonial thesis in Ethiopian politics was started by the Eritreans in the 1960s. The historical basis for characterizing the Eritrean question as a colonial one was the Italian occupation of Eritrea during the European scramble for Africa. The Eritrean nationalists

consistently argued that the Eritrean issue was a 'delayed decolonization.' The Eritreans supported their case with military resistance virtually unparalleled in Africa. For their part, pan-Ethiopian nationalists had been arguing all along that Eritrea was part of historic Ethiopia and its reunification with the motherland was justified on historical, cultural, linguistic or demographic grounds. Whatever the validity or invalidity of the arguments on either side, the issue was decided in May 1991, after a bloody thirty-year war.

4.2.2.7 Review questions

Part I Tick (cross) under the `the Reunion approach` if you think that the expression under `Feature` explains it, and tick (cross) under `the conquest approach` if you think that the feature explains it, and so on.

No	Feature	Re-union approach	Conquest approach	Colonial approach	Applies to none of them	Comment
1.	Emperor Hialeselassie I					
2.	Lack of political unification is the problem					
3.	Class exploitation					
4.	Ethnic oppression					
5.	True self-rule.					
6.	Communist society					
7.	Independence					
8.	Integration and assimilation					

Part II Answer the following questions on the basis of the text taken from Merera Gudina`s book.

1. According to Merera, what elements were employed by the Imperial regime to create a centralized state administration?
2. State and explain the mottos used by the Ethiopian centrists.
3. What does Merera mean by ``a democratic reconstitution of the Ethiopian polity``?
4. What is the main claim of Merera? Which of the three approaches to the interpretation of the 19 and 20 century history of Ethiopia (i.e., colonial thesis or national oppression thesis or the reunion thesis) does he appear to endorse?
5. Do you think that the Ethiopian legal system has lacked a favorable legal tradition since 1931? Can you indicate signs of instability in the Ethiopian legal system in this period?

6. Map out the three approaches to the construction of 19th century Ethiopian history? To Merera, are the representatives of these approaches still on the Ethiopian political scene?

Part III. Multiple-choice Questions
Choose the best answer from the given choices.

1. Which one of the following is sound about the Ethiopian legal system?

A) There is a problem of insufficient information.
B) Even the little information available on the Ethiopian legal history is not accessible.
C) Some say that some of these pieces of information are not reliable in the sense that they were not recorded by historians.
D) The little recorded information on the Ethiopian legal system is unrepresentative.
E) All of the above

2. In connection with the forces of centralization and forces of decentralization in Ethiopia, which one of the following is a mismatch?

A) Emperor Theodrows II-initiated the efforts at political centralization.
B) Emperor Yohannes IV-elaborated the efforts at political centralization.
C) Emperor Menelik II-consolidated the efforts at political centralization.
D) Emperor Haileselassie I completed the efforts at political centralization.
E) The socialist government continued the efforts at political centralization.
F) The FDRE Constitution attempts to balance the forces of political centralization and the forces of political decentralization.
G) None of the above

Part VI. Sound/Unsound Questions
Instruction: Read the following questions with care and say `Sound` if you think that the statement is an accurate description of a principle in legal history, or say `unsound` if you think that the statement is inaccurate description of a principle in legal history.

1. The Ethiopian legal system suffers form instability.
2. The Ethiopian legal system has never had the opportunity to have a developed legal structure.
3. There is a gap between legal penetration and legal extension in the present Ethiopian legal system
4. Ethiopia gave little attention to customary laws while adopting western laws in mass in 1950`s and 1960`s.

Alemayehu Fentaw, Legal Pluralism in Light of the Federal and State Constitutions of Ethiopia: A Critical Approach, (AAU, Law Library, Unpublished.) (2004)

A brief account of Ethiopian political history: Emperor Menelik II (r.1889-1913), spurred on by a fierce ambition of empire-building, embarked on a campaign of expanding his rule from the central highland regions to the South, West and East of the country and established the current map of Ethiopia, a country housing more than eighty different ethnic groups. Bahru Zewde writes that: Menlik… pushed the frontier of the Ethiopian state to areas beyond the reach even of such renowned medieval empire-builders… as Amda Tseyon… in the process, the Ethiopia of today was born, its shape consecrated by the boundary agreements made after the Battle of Adwa in 1986 with the adjoining colonial powers.

Put differently, the nineteenth century witnessed the radical shift of the country from an "outpost of Semitic civilization" to what Carlo Conti-Rossini called "un museo di popli"(a museum of peoples). Following his successful campaigns of expansion, if not conquest, to the periphery, Menelik sent governors from the center to administer the periphery. They were sent with contingents of their own so that they would install themselves in the vicinity for their respective administrations. Having been unsalaried, the administrators along with their soldiers were maintained by a system, which in lieu of wages, allotted each man the over lordship of certain number of tenants. In the words of Margery Perham, "the land was regarded … as confiscated to the crown, a varying proportion being allotted to the conquered chief and people and the rest used to reward or maintain Amhara, and especially Shoa soldiers, officials and notables." As a result, the subject people were literally reduced to tenants and become victims of national oppression.

Center and Periphery: Haile Sellassie's rule (1930 1974) was marked by a ceaseless rivalry between the monarchy and the nobility. The promulgation of the first constitution in 1931 was seen as the first move towards settling the center-periphery rivalry by affirming the absolute power of the crown. Andreas remarks that "[t]he political triumph of the center over the regions, initiated and legitimated by the constitution, was practically demonstrated when the Emperor prevailed over Abba Jiffar II of Jimma and Ras Hailu of Gojjam in 1932." Apart from a brief interlude during the Ethio-Italy war (1935-1941), Emperor Haile Sellassie resumed the historic task of centralizing the state, which he had begun in the first half of the decade following his ascension to the throne. In connection with this, Bahru Zewde has the following to say: The period after 1941 witnessed the apogee of absolutism. The tentative beginnings in this direction of the pre-1935 years matured into untrammeled autocracy. The power of the state reached a limit unprecedented in Ethiopian history. Donald Levine, in the preface to the second edition of Greater Ethiopia, has also this to say: Throughout Ethiopian history there have been tensions between the national center and diverse regional and ethnic groups. Yet the bureaucratic centralization of the postwar years was bound to exacerbate these tensions.

Although the 1955 Revised Constitution granted basic freedoms to speak, to assemble and to vote, essentially it was, to use Bahru's words, "a legal charter for the consolidation of absolutism." Article 5 expressly spells out the absolute powers of the emperor: "By virtue of His Imperial Blood, as well as by the anointing which he has received, the person of the Emperor is sacred, His dignity… inviolable and His power … indisputable." In the words of John Spencer, the 1955 Constitution was "a screen behind which conservative positions could be entrenched." Furthermore, Amharic was made the official language, and what is worse it alone was used in all

the newly established institutions. The Ethiopia Orthodox Church was accorded the official status of national religion.

The resistance that Haile Sellassie's rule faced from the periphery-First, his autocratic rule was met with peasant rebellions, and latter with nationalist resistance in Eritrea, in Tigray, in the Oromo areas, in Sidamo, and in Ogaden. Andreas writes succinctly that: Nationalist struggle was a reaction against the suppression of national and regional identity as well as the encroachment on land often by people from other nationalities. Peasant revolts were directed against the growing burdens of taxation and tenancy, highhandedly administered by officials appointed or backed by central government.

It is very important at this juncture to note that there has been a shift of emphasis from an all-inclusive national identity to a particularistic national (ethnic) identity. In the words of Donald Levin "primordial assertions germinated during the last years of Haile Sellassie and sprouted under the Derg. In view of the foregoing, it should be clear that both Menelik and Hailesellassie pursued three distinct but interrelated goals, namely, centralization, modernization and integration. Although all of them had a lasting effect on the legal and political culture of the country, I would like to, by de-emphasizing modernization, draw attention to centralization and integration, and try to make a general remark about unity and diversity in contemporary Ethiopia.

In an effort to bring about national integration, emperors Menelik and Haile Sellassie embarked upon cultural and religious homogenization by way of Amharization and Orthodox Christianization. First, Menelik's conquest of the southern areas resulted in the suppression of local customary law by Abyssinian (Amhara-Tigre) traditional laws and practices.The southern conquest had the same effect on the indigenous laws as colonialism in most the third world countries. Next, the legal transplants of the 1950's and 1960's had a detrimental effect on customary laws of the country in general. Paul H. Brietzke, commenting on the integration attempts, wrote that: ``Strong disintegrative forces exist in most societies, but Ethiopia is nonintegrated even in comparison with most other Third World States; internal armed combat has been a constant feature. Traditional integrative devices such as conquest and the charismatic authority of an emperor failed to secure a high degree of national unity the ultimate prize of social integration.``

The rise of socialist autocracy: As Lovise Aalen, commenting on the tendency to describe the events in 1974 as a revolution, points out: "Although the events in 1974 are most commonly described as a revolution, implying fundamental changes to the society the continuities from the imperial regime to the new military regime became more apparent as the years went by after the coup. Andreas is clear on this point: The government that supplanted Haile Sellassie perpetuated his quest for centralization. The overthrow of the monarchy offered an opportunity to reconsider Ethiopia's imperial status and to redress the plight of aggrieved cultural communities, who increasingly saw themselves as captives of the empire. Despite declarations of cultural equality and occasional gestures in the direction of cultural autonomy, the successor regime showed little sign of political will to seize this opportunity. Instead, the commitment was to a unitary state in order to uphold what was called the "indivisibility of Ethiopian Unity."

The military government's initial program, Ityopia Tikdem or Ethiopia First, was a telling example of, to use Andreas's words, "The priority accorded to an inclusive national identity."

The new regime did not only refuse to give recognition to Eritrean nationalism, but also outlawed any conduct challenging the state's integrity. Derg's conception of national unity eventually degenerated into an obsessive dogma, which brooked no cultural or ethnic diversity among the peoples of Ethiopia. Mengistu's linguistic and cultural oppression, actually, ended up stimulating regionalism and peripheral nationalism in Ethiopia.

Another program, which was meant as a socialist gesture, constitutes a range of radical policies. The most important and comprehensive was probably the land reform whose significance lies not only in demolishing the economic foundation of feudalism, but also in removing a major cause of national discord in some parts of the country. Commenting on the land question alongside the nationality question, Pausewang writes: In 1974, the key to legitimacy of the new government of the Derg lay in solving the land question. The land reform of 1975 was clearly a response to a compelling political demand of necessity. In 1991 no new government could have hoped to win legitimacy without solving the nationality issue. A far-reaching decentralization was, at that moment, the only chance to keep Ethiopia together. It would be denying realities to ignore this need. In the following years, the regime focused on the consolidation of its power. Meanwhile, urban opposition forces led by the Ethiopian Peoples Revolutionary Party (EPRP) gathered momentum and engaged the military government in urban guerrilla warfare. And the military's reaction to EPRP's challenge was fatal. The Red Terror was declared in 1977, where the Derg and its supporters hunted EPRP members, imprisoning 30,000 and killing over several thousand of them.

From 1976 onward, demands for regional autonomy became significantly more intense. After 1976, Mengistu emerged as the unchallenged leader, "the continuities from the imperial era became more prevailing." Like Haile Sellassie, Mengistu who was under the illusion that his regime was that of Ethiopian state, perpetuated the despotic centralization and deprived other regional opposition forces of legitimacy. Under his rule, the nationalist liberation movements replaced the role of the nobility as centrifugal forces. Despite the regime's appeal to a socialist ideology, the Derg was identified with "an Amhara suppresser" by the nationalist liberation movements. Pausewang, a close observer of the Ethiopian politico-legal order, has this to say: Mengistu's regime increasingly reverted to the Pan-Ethiopian ideology of national development, abandoning the initial libratory promise of the revolution to allow all ethnic groups their freedom of cultural development and ethnic self-determination. Instead, the ideology of 'nation building' with Amharic as the common language and Amhara as the leading nationality was becoming official policy again.

A coalition of three ethnic insurgent groups, namely, the Eritrean People's Liberation Front (EPLF), Tigray Peoples Liberation Front (TPLF), and Oromo Liberation Front (OLF) overthrew the Derg and set up a civilian government in 1991. With the demise of the Derg in 1991, Ethiopia's borders returned to where it was nearly a century ago. In July 1991, the National Conference on Peace and Reconciliation was held in Addis Ababa meant to lay foundations for a transitional period. In this conference, Eritrea, represented by EPLF, was an observer, as it became a de facto independent state. Commenting on the 1991 Ethiopian Revolution, Christopher Clapham writes that: The overthrow of the Mengistu government in May 1991 amounted to more than the collapse of a particular regime. It effectively marked the failure of a project, dating back to Menelik's accession in 1989 of creating a 'modern' and centralized Ethiopian state. This project, which provided theme for Haile Sellasie's long reign, was tested to self-destruction by a revolutionary regime which provoked a level of resistance that eventually

culminated in the appearance of guerrillas on the streets of Addis Ababa – a dramatic reversal of the process which, over the previous century, had seen central armies moving out to incorporate and subdue the periphery.

This assembly, as it appears from its composition, made it crystal-clear that state restructuring, henceforth in Ethiopia will scrupulously follow ethnic lines. Donald Levine remarks that "[W]hen …these ethnic insurgent groups overthrew the Derg it was not surprising that ethnic allegiances and identities became politicized in consequence". This was evident when the right to self-determination, including and up to secession made its way to the National Charter. Furthermore, Proclamation No. 1/1992 delimited the boundaries of the self-governing ethnically based regions. As Andreas notes: "The history and identity of the protagonists that emerged in the wake of the victory over tyranny thus explains why ethnic federalism proved to be a decisive political instrument in Ethiopia's transition to democracy.

In this manner the ideology of national self-determination and autonomism made its way into Ethiopian democratic political consciousness. In sum, the development of peripheral nationalism, regionalism and autonomism can be regarded as an unintended outcome of the extreme centralization pursued by Haile Sellassie and Mengistu. The rise of regional self-government during the Transitional Period was thus largely due to a desire to establish democratic institutions which would guarantee the right of national self determination.Since then democratization has been inextricably linked to the protection of the sovereignty of Ethiopia's nations, nationalities and peoples. Such a generalization has its support in the works of several historiographers. A case in point is the following statement by Harold Marcus and Kevin Brown: ``The Mengistu regime never understood that the insurgencies in Eritrea and Tigray were political in nature and required a political solution. The leadership in Addis Ababa saw Ethiopia in highly centralized terms and believed that any success by provincial movements would undermine the state's character. Though the struggle was couched invariably in Marxist terms of class and dialectic the fight was between conceptualizations of Ethiopia as a unitary nation or as a federal, even ethnically based state.``

4.2.2.8 Notes & questions

Answer the following questions on the basis of the materials covered in the preceding portion of this unit.

1. The major conclusion under the issue of the justification for the lack of stability in the country's official legal system looks to be instability of the political system. In Ethiopia, when politics fails, the legal system in place fails or is fundamentally changed. Do you agree with this asseration? Why? Why not?
2. What is the relationship between the position of Merera Gudina and of Alemayehu Fentaw regarding the center-periphery intercourse in Ethiopia? What is the bearing of their writings on the stability of the formal legal system in Ethiopia?
3. What were the unintended outcomes of the centralization process undertaken by Ethiopian in 20century?
4. What seems to be the argument advanced by Alemayehu Fentaw?

4.2.2.9 Two senses of the term sources of law: The term `source of law` has a couple of connotations. One sense of the term might suggest all the pieces of information used in the preparation of a legal document. A legal document may be a constitution, a proclamation, a regulation, a directive, a testament and any other legal document. This sense of the term is also referred to as a material source. Material source of the document may be obtained from public opinion, pertinent books, experts, past legislation, foreign sources and research, etc.

Secondly, the term refers to the reason for a given legal rule is valid or must be respected. When you ask the question: why should people respect law? The answer to this question gives you the second sense of the term `source of law.` The second sense of the term, the validity requirement, is very controversial. As you learned in the first two units of this course, in the Mesopotamian society law was perceived as god-given. The Greek society secularized law. The French legal system attributed the source of law to the legislature. The French pattern was followed in the German legal system. The Islamic legal system thought laws to come from a supernatural entity, Alah. The Confucian legal system believed a prophet, Confucius, has to do with the creation of binding legal rules. The socialist legal system has taken the communist party as the sole source of law. The table below shows source-law pair in some legal traditions. Do you agree with the nalysis made in the table? Why? Why not?

	Civil law	Common law	Socilaist law	Islamic law	African law	Hindu law	Confucian law
Key valid source	Legislature: codes	Judges: precedent	Communist party	Alah: the Koran	Community: customary law	Holy Veda: Simrities	Confucius
Secondary sources	Judges, and jurists	Legislature Jurists	Judges and jurists	The Sunna, Ijma, Qiyas and customary laws	?	Proper behaviour and customary practices	Proper behaviour and customary practices

4.2.2 Sources of the six codes: This sub-topic briefly outlines the principal sources of the six codes. The intention here is not to dwell on the specific sources of each of the six codes. Unavailibility of sufficient data hinders one from trying to trace the specific origins of the codes. Even assuming that data were available on the issue, in an introductory such as this, it would be unnecessary to make a detail examination of the material sources of the six codes.

4.2.2.1 Equity: It is not easy to define equity. Equity is one of the legal standards in law. As any other legal standards such as reasonable person, prudence, beyond reasonable doubt and good cause, equity has the feature of elasticity of meaning. That is equity gives you a range of meanings; equity is not open to a clear-cut definition. You know the meaning of this term when you see or understand the situation of a case in dispute. In the abstract, equity is a

conception of justice based upon the equality of everyone and respect for the rights of each. Equity fills the unavoidable gaps in the positive law and, in its absence, governs the case. (See: Articles 2099 to 2103 & 2172 of the Ethiopian Civil Code).

Equity is applied in two major situations, namely in case where the law is very clear, not ambiguous or vague, but its direct application causes harsh consequences. The other situation is the case where the law does not say anything about the matter but the dispute must be settled. Some describe equity as natural justice or fairness or common senses.

Before the revision of the Ethiopian family law an irregular union did not have any legal effect. In cases where a man and a woman lived together without a formal marriage and terminated their relationship, the man would be required under equity to give a-three-month maintenance to the woman. To offer another example: in the Ethiopian extra-contractual law, the judge is expected to consider equity in assessing damages.

There is a certain story told in the Ethiopian legal history illustrating a clever application of equity. Different persons tell it differently. But the message is clear. A man picked a woman from a bar for a night. He agreed to pay her a single *amole chew*, which means, a bar of salt used traditionally as a medium of exchange. The woman continued to live with the man for several years regarded each other and taken by the community as husband and wife. They did not conclude any formal marriage. After several years, a dispute arose. The law on the subject stated that the woman did not get anything from the man. The judge disregarded the harsh law and applied equity. He ordered the man to give property of substantial value. This case shows that equity can be applied to mitigate the harshness of the application of a given legal rule.

John H. Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America, (2nd ed., 1985) at 49.

In its general sense, equity refers to the power of the judge to mitigate the harshness of strict application of a statute, or to allocate property or responsibility according to the facts of the individual case. Equity is, in other words, a limited grant of power to the court to apply principles of fairness in resolving a dispute being tried before it. It is a recognition that broad rules, such as those commonly encountered in statutes, occasionally work harshly or in adequaltely, and that some problems are so complex that it is not possible for the legislature to dictate the consequences of all possible permutations of the facts. Where problems like these are involved, it is thought better to leave the matter to the trier of the case for decision according to equtable principles. Equity is thus the justice of the individual case. It clearly implies a grant of discretionary power to the judge.

G. Krzeczunowicz, The Present Role of Equity in Ethiopian Civil Law, 13 Journal of African Law (1969)

We give equity the straightforward meaning of a justice that is natural, that is, results from a conscientious judge`s discretionary appreciation of what is fair in the circumistances of a case. Since appreciations of what is `fair` vary with the man on the bench, a necessary corollary of equity is incertitude of result. People in Ethiopia did not feel strictly bound by the largely religion-inspired laws of the venerated Fetha Nagast nomocanon, written in ancient language hardly comprehensible to laymen or even lower clergy (Geez). The `law` had a moral aspect for Ethiopians that largely removed it from practial affairs, although in capital cases before rulers or higher courts citations from the Fetha Nagast were used as justifications for the equitable decisions aimed at, and there existed learned commentators of the text.

It thus seems that the Ethiopian litigants of the past often had to rely more on the sense of fairness of the particular ruler or adjudicator at hand, than on prior knowledge of precise written or customary rules strictly applicable to his case. Justice was often based on rulers rather than rules. At other levels, it was largely based on conciliatory arbitration. Equity premeated the system. Legal certitude was lacking. In the period preceding the recent codifications, a growing quest for a minimum of predictability has ocassionaly induced high court judges to use, albeit erratically, foreign precedent as ``persuasive`` covers for their equitable decisions. This situation had to change when the social and economic development of the country acquired momentum. Such development could not be maintained without security in legal relations. This has been assured by the codifications of 1955-1961. The Civil Code`s Preface shows that legal security is intended to be reconciled with equity, rather than obliterate it: No law which is designed to define the rights and duties of the people can ever be effective if it fails to reach the heart of those to whom it is intended to apply and does not respond to their needs and customs and to natural justice.

Custom and natural justice are here mentioned jointly. The repeal of past laws and customs by Article 3347 of the Civil Code of Ethiopia cannot affect `equity` (natural justice), which, based on fairness, has no identifiable content. Equity plays a necessary part in cases where the legal provision to be applied is neither clear in itself, nor capable of clarification by the ordinary processes of interpretation. In a conflict soluble with difficulty between two possible meanings of provision, the choice may inevitably be influnced by the adjudicator`s sense of fariness. Similarly, the meaning of inherently vague legal concepts such as `reasonablness`, ``good faith``, morality, etc., evidently depends on his equitable appreciation. Equity has some three other functions, namely: it is used to override a clear legal provision; it is used to fill voids in matters that are left partly or wholly unregulated; and it is used to where the law itself, either by express or implied reference, calls for application of equity. The third function of equity is found in the following articles of the Ethiopian Civil Code: Articles 1710, 1713, 1766, 1770, 2535/3, 2243/2, 2692/3, 2099-2103, 2106-2115, 2142 and 2157.

4.2.2.2 Review questions

Answer the following questions.

1. What does this remark:``Justice was oftent based on rulers rather than rules`` mean?
2. Is the following statements taken from the Preface of the the Ethiopian Civil Code an indication of the place given to equity in the Code? ``*No law which is designed to define the rights and duties of the people can ever be effective if it fails to reach the*

heart of those to whom it is intended to apply and does not respond to their needs and customs and to natural justice.``

3. What is wrong with a country entirely relying on the application of equity as opposed to the use of legal rules and principles in the settlement of disputes? Was Ethiopia trying to end the era of equity and usher in the era of the written rules at the time of codification? What goals are pursued through equity? What about through codification? Is this dispute over equity versus written law the issue of flexibility versus predicatibility in the disposition of cases?

4.2.2.3 Religious percepts: the drafters of the Ethiopian codes, it is argued, drew principles from the two religions: Christianity and Islam. The Penal Code rests on the general principle that you should not harm the interests of another. The Civil Code also upholds this percept. In general, the same may be claimed in respect of the Commercial Code. The holy books of the two religions prohibit a person from causing harm to the life, property, the good name of and physical integrity of another person. The codes go beyond threatening a person who fails to respect these admonitions with the sanctions of reproach and of hell; the codes attach sanctions in the form of compensation or sentencing or fine or a combination of these three sanctions.

4.2.2.4 Natural law: the principle of natural law was, it is argued, used as an inspirational source of the Ethiopian codes. This principle has been invoked as higher principle since the Greek legal system. Over time, the meaning of the principle of natural law has been controversial. There is one position that thinks that natural law is absolute in the sense that its principles are not bound by time, place and situations. The principle of natural law is thus universal, eternal and immutable. The other view is that natural law is subjective and relative in the sense that natural law principles are particular, temporal and changeable. As to the origin of natural law, some attributes it to God; others to human reason and still others to nature.

4.2.2.5 The Fetha Nagast: This religious document was brought to Ethiopia in the middle of 15th century during the reign of Emperor Zerayacob, who was responsible for the transplantation of this venerable document. According to the predominant view, a Coptic Church scholar named Ibn Al Assal created the document in 13th century. The document was compiled in Arabic language and named *Nomo Canon*. Ibn Al Assal used the principles of Christianity, the principles of Byzantine legal tradition and the principles of Islamic commercial law. The name Fetha Nagast (the Law of the Kings) was given to the Nomo Canon after it reached the Ethiopian soil. The Fetha Nagast consisted of religious and secular parts. The Fetha Nagast was translated by church scholars into Geez in the middle of 15th century; it was also translated into Amharic in the middle of 20th century again by a church scholar.

The following may be cited as the contributions of the Fetha Nagast to the Ethiopian legal system. Kings and emperors in the highland parts of the country used the document to obtain legitimacy of their respective rule. They argued that they came to political power by following the procedures described in this venerable document. This document, in the second place, served as the valid source of dispute settlement both in the church affairs and secular matters. Third, certain principles of commercial law were taken from it and incorporated in the Ethiopian Commercial Code. Some rules and principles were also drawn from it and included directly in the 1930 Ethiopian Penal Code and via the latter in the 1957 Ethiopian Penal Code. Fourth, the application, interpretation and translation of the document helped the Ethiopian Orthodox Church build church scholarship. The other contribution of the Fetha Nagast is that it helped the development of methods of statutory construction. Three modalities of interpretation of legal rules were generated: interpretation by way of listing, interpretation on the basis of the spirit of a legal document and interpretation on the basis of context. Finally, it was a step forward in the development of a rudimentary concept of the rule of law. The document sent the message that the rules of the game should be written in advance even if it was not accessible to the wider public in terms of language and association with the clergy.

Heinrich Scholler, Ethiopian Constitutional and Legal Development: Essays on Ethiopian Constitutional Development (Vol. I) (2005) at 23-25

Ser'ata Mangest: Ser'ata Mangest an Early Constitution? The Ser'ata Mangest is as useful a document as it was an important guideline for the political life of the royal court as well as for the ruling elements connected with it. The writing or compilation of the ser'ata Mangest as well as its rewriting must have been necessitated by a complexity of problems, among which are the problem of succession to the throne and need for terms of reference. The problem of succession was indeed a recurring headache to the monarchy throughout Ethiopian history. The principle of primogeniture was more theoretical than practical as incessant rivalries among members of the rouyal house intermittently switched the lines. The long prosperous reigns of the outstanding sovereigns were usually followed by political aberrations and civil strife. The tradition of mountain prisons was doubtless a by product of such an anomaly. The second significant factor that could have caused the compilation or rewriting of the ser'ata Mangest must have been the need for terms of reference.

The ser'ata Mangest was in fact a protocol of ceremonies, which had to be consulted whenever occasions required it. The literary heritage of medieval Ethiopia had suffered destruction through civil wars and invasions, and many documents were reproduced several years later from memory and/or fragmentary records. Emperor Amde Sion (1314-44) and Emperor Gelawdewos (1540-59) are among the sovereigns who contributed to the reconstruction of Ethiopian Literature. The chronicler of Emperor Yasu the Great (1682-1706) also tells his master summoned all the learned men and grand officials to rewrite the rules and regulations legislated and practiced during the reigns of his royal predecessors. From all indications it was once the custom for the sovereigns to consult the elders and the learned and past practice, whenever new problems cropped up. Thus,

one would assume that the ser'ata Mangest was rewritten and became prominent in the late seventeenth and first half of the eighteenth century when prosperous Gondar enjoyed its grandeur. The ser'ata Mangest had been translated only into German and to a certain extent Italian and a translation into English has now been presented.

The importance of the ser'ata Mangest had been already emphasized some years ago by another Belgian scholar of legal history, J. Vanderlinden, who states. This short collection (it contains altogether twenty-one articles of law) appears to record a continuous legislative activity which started in the 14th century and culminated in the 17th; the first elements are attributed by Guidi to Amda Sion (1314-1344) and the last Fasiladas (1632-1667), although the eminent Italian scholar was apparently unable to date with precision every element of the collection. It consists mostly of enactments on the organization of the Ethiopian Royal Court (including many provisions defining the status of dignitaries recognized as members of that Court), but it also contains some provisions on more general matters such as civil procedure, although these are always connected with members of the Royal Court.

Naturally, we cannot expect to find human rights granted in this constitutional instrument, which quite clearly states the hierarchical power so confronting the individual with the next higher-ranking dignitaries. The large extent of organization power-rules shows the typical features of a feudal system trying to centralize the imperial power. The state-church relationship is mentioned and a system of settling trouble-cases arising between both of them had been set up. The judicial power of the king and the dignitaries is mentioned in describing the process of decision-making. This process ends with the following statement: ''finally, the king would give verdict and all would be finished.'' Another interesting regulation refers to the royal succession. It shows to what extent in Ethiopia the succession was left to the decision of the late king and the consent of the army:'' if a king died, they would put his dead body in the Grand House. They would bring out one of his sons or brothers, chosen by the late king and his army, and they would enthrone him.

4.2.2.6 Review questions

Answer the following questions

1. What is ser'ata Mangest
2. Why was ser'ata Mangest developed or re-written? What was the central matter intended to be addressed in this document?
3. Is ser'ata Mangest different from Atse Serat?
4. What notion of the oirigin of valid law was reflected via ser'ata Mangest: divine right of kings or something else?

4.2.2.7 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. The

method followed was to give a very brief, as the name of the project indicates, the digest or the essential features of earlier decisions. The decisions compiled in the 1908 and 1950`s were made by kings, emperors, courts, the consular courts and customary tribunals. The decisions were made on the basis of customary laws, decrees, equity and the Fetha Nagast. Some of these decisions were found orally and while others were already on record. The compilations were not systematic in the sense that distinctions and sub-distinctions between substantive and procedural, and between public and private laws were not made. These compilations were believed to have been consulted by the drafters of the Commercial Code, the Civil Code and the Penal Code.

4.2.2.8 Statutes: Pre-codification statutes were used as information in the making of the Ethiopian codes. 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. The 1930 Nationality Law was in force until recently. The Ethiopian Nationality Law of 1930 adopted the principle of Jus Sangunis which states that a person gets the nationality of a country if s/he is born into an Ethiopian father or Ethiopian mother. The other basic nationality principle, called Jus soli, states that a person gets nationality of a country where s/he is born. The drafters of the Civil Code and the Commercial Code used provisions of these statutes.

Ethiopia found these statutes to be unsatisfactory. These laws were incomplete and unsystematic. The statutes were developed in a response to a particular legal problem. These statutes concentrated on the area especially of commercial laws and to a minor extent on public law. Ethiopia decided to undertake a general codification of laws.

4.2.2.9 Treaties: Ethiopia entered into several international treaties with Italy, France and Great Britain. Treaties are rules governing the relationship between or among states. Treaties also regulate the relationship between states and international organizations. The relationship might be economic, political, cultural, military or a combination of any of these. Treaties may lead to capitulation. Capitulation refers to surrendering part of the sovereignty of a state.

Egyptians occupied Harar from 1875 to 1885. They brought their own laws particularly in areas of land and tax laws and applied them in Harar. Laws designed by Italy for her African colonies called "*Africa Orientale Italian'* was applied in Eritrea from 1890-1941. And the Italian colonial law was imposed on Ethiopia by Italy from 1936 – 1941.

Manifestations of capitulation in Ethiopian were: (a) Consular courts: tribunals set-up pursuant to international treaties at the consulate level by the super powers to dispose of civil and criminal cases arising in the host country but involving exclusively foreigners. (b) Mixed courts in which judges of the host country (Ethiopia) and foreign judges sat together to hear and dispose of civil and criminal cases involving the nationals of the host country and foreigners. Typical examples of capitulation treaties were: 1849 treaty between Britain and Ras Ali, 1883 Treaty between Menelike II and Italy and 1908 Franco-Ethiopian Treaty.

In 1908, a serious disagreement broke out between Great Britain and France. France supported the establishment of a mixed court, where Ethiopian and foreign judges would sit to decide cases involving foreigners. On the other hand, Great Britain argued in favor of a court manned by international judges on the grounds that to do so was: less expensive, much simpler, much more likely to be accepted by all members of the foreign communities, and under the mixed court, ultimate auhtoirty would rest on the Emperor.

Their argument was rejected and in 1922 special (mixed court) was established pursuant to a decree which lasted until 1936. After liberation (1941), the special courts were not re-instated. Upon restoration of freedom, the country faced pressure to conclude a treaty assuring the protection of the interests and well being of foreigners in Ethiopia since the foreign countries argued that both the 1930 Penal Code and the 1931 Constitution of Ethiopia were found to be inadequate to safeguard the interests and well being of their citizens residing or would like to do business in Ethiopia. Ethiopia consented to appoint judges recommended by Great Britain and to create a committee composed of British and Ethiopian members to see whether a draft law would be contrary to the principles of natural justice. The committee established in 1942 and continued until 1955. The Committee was called the Screening Committee or the Consultative Committee.

Consular courts amounted to a limitation on the territorial jurisdiction of Ethiopian and the mixed or special courts legalized the participation of foreign laws in adjudicating cases arising in Ethiopia. The net effect of both of them was however acceptance of the capitulation policy of the then major powers. The material effect of the establishment of the special court was that it served as a forum in which the ancient Ethiopian legal system had to confront sophisticated modern foreign laws.

4.2.2.10 Customary Laws: Customary laws were used, to some extent, as a material source of the Ethiopian codes. The orthodox view of customary law is that a practice habitually followed by the majority of the members of a given

community for a relatively longer period of time with the intention to be bound by it. Customary law is diverse. Different communities answer a question differently. For example, there is no consensus among the various ethnic groups in Ethiopia on whether marriage requires the consent of the prospective partners. There is no agreement on issue pf whether a dowry should be paid, if yes, by whom, how much and the type of dowry. There is also variation on the grounds for divorce. There is variation on the issue of the blood relationship between the spouses. In addition, who succeeds and how much, how common property should be divided upon divorce and what are the rights of a child adopted are not treated in a similar fashion. You can say that there is diversity in the area of land law, family law, succession, and homicide law and dispute resolution in Ethiopian customary laws. It is argued by some that customary laws can easily and substantially be disregarded in contract law, administrative law, penal law and labor law because either there are no customary rules in these areas, or even if there are, some customary rules are so crude and not highly entrenched. The argument is that personal laws such as family matters and succession are highly embedded in the fabric of traditional societies such as Ethiopia that it would be very difficult to modernize this area of law. On the other hand, in the areas of public law and commercial law, the promise of successful importation of laws would be upheld.

Professor Rene David, the drafter of the Ethiopian Civil Code argued that he included a number of customary rules. He stated that he used several methods to do so. One method is incorporation. The term ``incorporation`` refers to the direct writing of a given customary rule into a code. He stated that he incorporated customary rules if those rules met the following criteria. Incorporation of custom took place when the custom was sufficiently general as to be practiced by at least a majority of the highland population, when the custom was not repugnant to natural justice which permeated that ultimate old authority, the Fetha Negast, when custom was not contrary to imperatives of social and economic progress and when the custom was sufficiently clear and articulate as to be capable of definition in civil law term.

The second means the Professor used to give room for custom is explicit reference to custom. Professor Rene David also stated that several provisions in the Ethiopian Civil Code made an explicit reference to custom. The third strategy the drafter of the Civil Code used was to give a gap-filling role to custom. The idea was to state that whenever the Code is silent about a given issue, custom might step in. Article 3347 is designed to play this role. Fourthly, judges are permitted to attach customary meaning to disputable code terms. You may, for example, look at Article 1168 of the Civil Code. The meaning of the term ``family`` in this Article can be ascertained by reference to local custom.

4.2.2.11 Fewese Menfesawi: The codification process in Ethiopia started in the middle of 15th century. The process culminated with the codification process of 1950`s and 1960`s. The first known code of law in the country is called Fewese Menfesawi. This was essentially a religious document. Emperor Zerayacobe had this document prepared in the middle of 15th century. This was a step forward in the codification process of the country, as the emperor thought that to legitimatize his empire pre-determined legal rules were necessary. The application of Fewese Menfesawi, prepared by church scholars, under the order of Emperor Zerayacobe, was short lived, since the emperor had heard about the existence of a document of superior quality in Egypt. This document is called the Fetha Nagast. He had brought the latter partly religious and partly secular document and had it translated into Geeze, using church scholars.

4.2.2.12 The 1930 Penal Code: Ethiopia got its first penal code in the year 1931, a year before it issued a constitution. The 1930 Penal Code got its inspiration from the Fetha Nagast. The Code of 1930 represented the first effort to unify and to systematize Ethiopian traditions in criminal matters. The 1930 Penal Code combined customary with comparatively more modern concepts. The Code took as its source from the Law of the Kings (Fetha Negast) and from advanced European penal codes. The Fetha Nagast and customary laws remained the basis of criminal judicial procedure until 1930. In the year 1930, Emperor Haile Selassie I introduced a penal code. The 1930 penal code was primitive in its application since there were several defects in its contents. The 1930 Penal Code aimed at modernization of the administration of the Ethiopian criminal justice system.

4.2.3 Summary: Ethiopia used, to varying degree, the above information as material sources of her codes in 1950`s and 1960`s. The incomplete and unsystematic nature of the sources together with her need to consolidate political and legal centralization made the need for a comprehensive and systematic system of law evident. Generally the Ethiopian legal system of today has been shaped by many traditions and ideas. Islam and Christianity contributed to the development of the Ethiopian legal system. The common law gave insights and principles to the Ethiopian legal system. The Anglo-American law influenced the Ethiopian legal system in the period immediately after the liberation of Ethiopia from Italian occupation. In particular, in 1940`s, a number of statutes originated from England. Several English legal experts also assumed important positions in the administration of justice in the country. Italian laws affected the Ethiopian legal system during their military occupation. The Italians planned enacted laws to apply to the territories Italy occupied in east Africa including Eritrea, Italian Somali Land and Ethiopia. The experiences and principles of comparative laws crept into the Ethiopian legal system via the principal draftspersons of the Commercial Code, the Civil Code and the Penal Code. The civil law tradition has

obviously left its significant impressions on the Ethiopian legal system. The customary laws, de facto or de jure, influenced or continue to affect the legal system. Ethiopia had to live under the socialist legal system for a period close to a couple of decades. Beginning from early 1990`s, international human rights instruments have found their way into the FDRE Constitution and other legal instruments in the course of Ethiopia`s attempt to comply with the demands of post-socialsit structural adjustment programs. The Ethiopian landscape is truly a confluence of, and an example of co-existence of, multiple and disitinct legal tradtions.

4.2.4 Review questions

Part I. Fill in the Blank Questions
Fill in the bank space with the most appropriate words/phrases that complete the statements below.

1. _____refers to any pieces of information employed in the course of making a legal document.
2. _____relates to the reason why a legal document is valid.

Part II. Multiple-choice Questions
Choose the best answer from the given choices.

1. Identify the legal tradition that has affected the Ethiopian legal system.

A) The common law system
B) The civil law system
C) Customary laws
D) The Islamic legal system
E) The Socialist legal system
F) All of the above

2. One of the following may be mentioned as the contributions of the Fetha Nagast.

A) Kings and emperors in the highland parts of the country used the document to obtain legitimacy of their respective rule.
B) This document served as the valid source of dispute settlement both in church and secular matters.
C) Certain principles of commercial law were taken from it and incorporated in the Ethiopian Commercial Code.
D) The application, interpretation and translation of the document helped the Ethiopian Orthodox Church build church scholarship.
E) It helped the development of methods of statutory construction.
F) All of the above

3. The test not used in assigning a space to customary laws in Ethiopia in the codification process especially of the Civil Code was:

A) Clarity test
B) The social and economic progress test
C) The repugnancy test
D) None of the above

4. One of the following is not the material source of Ethiopian modern laws?

A) The Hindu Law
B) Statutes
C) The Fetha Nagast
D) Foreign laws
E) Teachings of scholars
F) A & D.

5. The aspect of Emperor Haileselassie`s regime the Ethiopian Revolution did not seek to transform was:

A) The form of private ownership of land.
B) Legal and political centralization.
C) The question of the rights of nations and nationalities.
D) The legal structures.
E) The country's foreign relation.
F) The state ideology.
G) The role to be played by civil societies.

4.3 The Background to the Six Codes

In early 1950`s, Ethiopia sought to depart from the prevailing diverse and incomplete customary laws; the country desired to respond to international ciritisims directed against her legal system which was based on haphazard and incomplete customs and equity as well as some statutes. Ethiopia, on her own, was ready to embark on the task of modernizing her legal system. This modernization venture was the one desired to look not internally and but outwardly, i.e., a decision to transform Ethiopia on the basis of western laws. The section discusses the reasons for such decision. It also examines the model Ethiopia followed and states the justifications for the country to choose to follow the civil law model. The working of the Codification Commission is outlined and the main features of the Commercial code, the 1930 Penal Code, the 1957 Penal Code and the Civil Code of 1960 are mapped out. The focus in this section will be on the substantive codes, not on the procedural codes of Ethiopia.

4.3.1 The decision to modernize laws: Ethiopia made a decision to modernize its laws in 1950`s. Many factors dictated this policy decision. The capitulation doctrine affected Ethiopia, through the establishment of the consular courts. The doctrine states that a country should surrender some features of its sovereignty. Some of the judges of the consular courts were foreigners; the laws applied therein were made by foreign powers and the parties to these courts were foreigners and Ethiopians. The doctrine of capitulation was the expression of the backwardness of the Ethiopian legal system by the western power in particular France, Italy and England. Ethiopia wanted to get rid off the influence of the doctrine of capitulation; the country sought to re-gain her sovereignty. Moreover, the country sought to terminate the function of the Screening Committee put in place by the British military administration. The Screening Committee also referred to as the Consultative Body was established to check whether draft laws by the Ethiopian legislature would offend the principles of natural justice or equity. The application of the Revised Constitution also warranted the issuance of detail laws. As you studied in the previous section of this unit, the existing statutes lacked technical quality and were not complete. The mixed courts, as a specific application of the theory of capitulation, the Consultative Committee and the the need to work out the details of the Revised Constitution led Ethiopia to make a decision to upgrade its legal system. In this regard, moreover, the stress in the writings of Ethiopian intellectuals of the day (also referred to as Ethiopian Japanizers) on the need for a comprehensive legal reform could be regarded as a contributory factor.

Rene David, Sources of the Ethiopian Civil Code, 4JEL2 (1967).

At the time of codification Ethiopian law was unsystematised and often hard to discover. It differed from place to place. There were no codes, very few statutes, no case reporting system, and no legal treatises. Now, where a country has neither codes, statutes, court reports, nor authoritative doctrinal works, it is often said that the country has a customary legal system, but this would not be an accurate description of the situation in Ethiopia.

Until the reign of Emperor Menelik II, Ethiopia was unable to live according to law. The foremost consideration was the cohesion of communities that were so constantly menaced by hostile neighbors and natural catastrophees that their very existence was precarious. Cohesion was assured, rather than by the idea of law, by a system of equity that attempted to maintain harmony and peace. This system was administered by local notables acting as arbitrators – and sometimes acting arbitrarily. Although customs spontaneously followed by the people would often influence arbitral decisions, these customs lacked the force of strict law. They had a persuasive authority, but arbitrators would not feel bound by them. Customary law did not rule Ethiopia.

Customary rules, used without being legally obligatory, differed from one place to another. No effort was made to group and unify them on a territorial basis. In addition, they were often elusive, since they had not been systematically described. Their scope and effect were ambiguous, and it was often unclear under what conditions they would be obligatory. Studies carried out in

Eritrea by the Italian occupation authorities in order to define the local customary laws bring out this territorial variation and uncertainty and the absence among the people of a concept of legally binding customs, as contrasted with simple non-legal rules of social behavior and air dealing. Finally, one should note that for many years, and especially for the last fifty, customary rules have been very unstable, no effort having been made to freeze them.

Rene David, A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries, 37Tulane Law Review 2, (1963) p. 187-204.

The usefulness of a code: "The first question which is presented for these countries is whether it is appropriate for them to codify. Does the formula for codification as it was received in the nineteenth and twentieth centuries in the countries of continental Europe constitute a formula appropriate to the circumstances and to the needs of countries such as Ethiopia?

In our countries of Western Europe we can but little conceive that our law – notably our civil law, our commercial law, and our penal law – could not be codified. It is appropriate always to bear in mind that in certain highly developed countries (England, the English speaking countries and Denmark), these branches of law have not been codified. Even in France codification in its present form goes back only to a recent past, the Napoleonic era; the end of the nineteenth or the twentieth century for other countries. This technique has not, in fact, been applied to the entirety of the law: administrative law, private international law and the law of delictual responsibility have either not utilized, accepted nor adopted it or have accepted, utilized and adopted it only to restrained degree and with great reservations. All of these factors seem to indicate that codification, if it can on occasion present advantages, constitutes a recommendable formula only in certain surroundings and circumstances. Would the Ethiopian civil law – to which we are restricting our study – be likely to profit, under its present circumstances, from the fact that it could be codified? The question hardly appears to have been raised. The decision to codify was apparently based on the idea held in Ethiopia that codification in itself was progress, a desirable and even necessary thing for the country. This belief is, in my opinion, justified. It is true that for a long time, and even today in certain countries or for certain subjects, people have been able to live without having codes. But this is possible in certain advanced societies only because there are in these different countries substitutes for the nonexistent code. There are large bodies of laws equivalent to small codes, even though they do not bear that title. There exists a body of jurisprudence that doctrine has systematized to a large extent by presenting in digests or texts. The formula of codification can be avoided in certain countries or for certain subjects because the absence of codes does not lead to insecurity and arbitrariness. The existence of an abundant juridical literature and of numerous sources of legal documentation permits advanced countries to question whether codification is the best technique when the moment has arrived to codify some subject, or whether it is not preferable to wait to see more clearly the trend of some development which is in progress, so as to intervene only when the rules will appear more clear cut or become more stable.

Ethiopia and other countries in similar circumstances have not had the same choice. Only ten years ago there existed in that country neither collection of jurisprudence nor a doctrinal work on the civil law; neither were there any laws except some very fragmentary dispositions contained in a law on loan, a law on nationality and an ordinance on prescription. Under these conditions citizens were left without a guide to their rights and obligations. The door was open wide to arbitrariness and all security was lacking.

With conditions in the modern world, where highly developed states exist, it is inconceivable that one might build in a country such as Ethiopia the road which has been built in Western Europe in the course of centuries of grouping. Ethiopia cannot wait 300 or 500 years to construct in an empirical fashion a system of law which is unique to itself, as was done in two different historical eras by the Romans and the English. The development and modernization of Ethiopia necessitate the adoption of a "ready made" system; they force the reception of a foreign system of law in such a manner as to assure as quickly as possible a minimal security in legal relations (with an understood reservation for a subsequent adaptation, to specific Ethiopian needs, of the corpus juris thus received).

Consequently codification was thrust on Ethiopia as it is thrust on all countries which find themselves in an analogous situation. To this conclusion it is always befitting to assign a reservation. What was peculiarly necessary was the technical formula of codification. Doubtless, it would hardly have been conceivable that Ethiopia adopt, as once did the diverse territories of the British Empire, "the English law (or some other law) as it existed at such and such a date." It would have been perfectly conceivable, however, that a strange law be received and adapted to the needs of Ethiopia, not in drafting a code, but in giving the force of law to works of doctrine. Before assuming its preference toward codification, Western Europe used this formula: the Roman law had its "books of authority," Hungarian jurists have considered a law like the Tripartitum of Verboczy, and other doctrinal works have been considered as being the authorized and incontestable exposition of a national or regional law.

The same formula could have been used in Ethiopia and it would have had certain advantages there. With its highly technical form, the civil code is not perhaps the best adapted tool for countries where today and for a long time in the future one must not expect to find a number of jurists trained in Western legal method. A presentation of the law in book form, not only formulating rules but giving an explanation of them, furnishing a commentary on them, illustrating them by examples, would have perhaps been preferable to a code strictly conceived on the French model.

Ethiopia has chosen to have a code. I believe that this was right. In the absence of previous monuments, it would undoubtedly have been more difficult to present Ethiopian civil law in treatise form than it was to present it in the form of a code. We fear in any case that the code may be too schematical and abstract, especially in certain sections, and we think that it ought to be quickly completed by a doctrinal work, the Institutes of Ethiopian Civil Law, presenting rules in a more readily comprehended and concrete form, helping Ethiopians understand the meaning of technical expressions which have been used in the Code but which are not familiar to them.

4.3.2 The model adopted: Having decided to modernize its laws, the next step the country had to take was adopting a model. The country preferred to design her laws predominantly after the civil law system. The adjective predominantly is used here to indicate that other sources were also consulted. For instance, as you learned in the previous section of this Unit, the Ethiopia legal system in general and the six codes in particular were taken from multiple sources. As a result, some legal historians suggest that the Ethiopia legal system is a

confluence of multiple legal traditions. The codes were influenced by common law and comparative law.

David, A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries, 37Tulane Law Review 2, (1963) p. 187-204.

Code of the Continental or English Model?: Once admitted that Ethiopia was interested in adopting a civil code, the second question presented was whether the model of this code should be taken from a Romanist system or laws from the common law system. The question was not resolved a priori. It is true that the formula of codification appears to us as being a formula strictly "continental;" the "codes" of the United States or of other countries of the common law do not seem to be the full equivalent of civilian codes.

The codes of continental Europe, even if they lean heavily on tradition and in fact perpetuate it, are considered as operating a sort of novation; they constitute an expose of the law sufficient in itself, and the point of departure for a new development of juridical rules. The codes of the common law countries, on the contrary, do not abolish the prior law. Their essential function is to set out systematically principles which are thus confirmed and remain in force; the rules of law therefore accepted are modified and modernized by codification only on occasion and only on special points. Law and code, one can say, are synonymous in the continental European conception. The code in common law countries is only an accident in the development of a law which was existing and continues to exist in a way independent from the new code.

4.3.3 Justifications: several reasons are offered for Ethiopia's option for basing her codes primarily on the civil law model. One reason for Ethiopia's policy stance to transplant laws mainly from the continental legal tradition is the country's exposure to codification. *Fewese Mefesawi* was regarded as a code. The *Fetha Nagast* was also taken as a form of a code. The 1930 Penal Code was another example. There were several statutes issued in 1920`s, 1930`s and 1940`s. The experience of Ethiopia under Italian occupation for five years did not detach it from the code system, as Italy put in place a code called *Italiana Africa Orientale.* Convenience and expense was the second factor for the decision under consideration. The key personalities of the day thought that to transport cases from England or the United States of America would be costly and most inconvenient. Instead, they assumed that codes could be transplanted with greater ease. In the third place, the same key personalities of the day had had sentimental attachment to France and French legal education.They liked the French approach of modernization of laws. Codes taken from France and Germany to the other parts of the developing world were found to be successful. The argument was that if codes transplanted to countries similar in context with Ethiopia already became a success, then there would be no reason for the same codes not to meet with success in Ethiopia.

Rene David, A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries, 37Tulane Law Review 2, (1963) p. 187-204.

Did there exist reasons for preferring the continental model to the English model? It is probable that the final decision was motivated not so much by juridical arguments as by considerations of a political or cultural order: the desire to counter-balance, by an appeal to other sources, an English or Anglo-American influence which they feared was becoming excessive. The Ethiopian situation on this subject is not without analogy to that of Latin America, where countries are preoccupied with maintaining close cultural ties with Europe to counter-balance the pressure exercised on the economic level by the United States.

Aside from this argument the choice made by Ethiopia can be explained by another consideration, that of the desire to live faithfully in the Ethiopian tradition. This tradition, without any doubt, is weak enough if one considers it from a practical point of view. Ethiopian juridical science has not existed up to our time, and the rules applied by the tribunals of Ethiopia are apparently inspired little by the principles set out in the Fetha Negast. Whatever the differences between the rules contained in this collection and the solutions applied in practice, it remains no less true that the Fetha Negast has been constantly considered in Ethiopia as the model, crowned with a character nearly sacred, to which model is related to the Byzantine tradition of law; the Fetha Negast is a translation into géez of Arabic precepts of law which found their first inspiration in the book of Syro-Roman law, and consequently in the Roman law. In making his decision to link Ethiopian codification to the system of Roman-Germanic law, undoubtedly Emperor Haile Selassie was guided in part by an instinctive desire to remain faithful to a venerated tradition; the allusion that he made to the Fetha Negast in his address inaugurating the work of the Codification Commission left no doubt in this regard.

መንግስቱ ኃ/ማርያም አርዓያ እና አቶ መዝገቡ ምትኬ፣ ጥርስ የገባች ሀገር /ትርጉም/ (ህዳር 1986)[13]

የተጣለብኝ አደራ ብዙ አማራጮችን እንድዳስስ አስገደደኝ። አንድ ነገር ግን ግልፅ ነበር። ወግ አጥባቂ ለሆነ ንብረተሰብ ንብረትንና ጋብቻ በተመለከተ ትልቅ ለውጥ አመጣለሁ ብሎ ተስፋ ማድረግ ዕውነታን አለመመልከት ይሆናል። በተመሳሳይ ሁኔታ በወንጀል ሕጎች የሚደረገው ለውጥም የጎላ ሊሆን አይችልም። በልምድ የወንጀለኛ መቅጫ ሕግ ሆኖ የሚሠራበት ፍትሐነገስት ከአስራ ሶስተኛው ክፍለ ዘመን አንስቶ የመጣ ነበር። ነገር ግን ከዘመናዊው ዓለም ጋር ዕለት ተዕለት የሚያገናኙት የንግድና የኢንዱስተሪ/የውጭ ንግድንም ጨምሮ/ መስኮች ያለችግር በዘመናዊ መልክ ሊቀረፁ የሚችሉ ናቸው። ይህን ሰፊ ችግር ለመወጣት ቅድሚያ ትኩረት የሰጠሁት ለፋትሐ ብሔርና ለንግድ ሕጎች ዝግጅት ነበር።

ከሁሉ በፊት ኢትዮጵያ የእንግሊዝን የአሜሪካንን ወይስ የኮንቲኔንታል አውሮፖን የሕግ ስርዓት ትከተል የሚለው ምርጫ መወሰን ነበረበት። የኮንቲኔንታል ሰርዓት ትከተል የሚለውን ምርጫ በመደገፍ የፍርድ ሚኒስትር ለነበርው ለወልደጊዮርጊስና ለአክሊሉ የማቀርብበት በርካታ ምክንያቶች ነበሩ። በመጀመሪያ ምንም እንኳን ከነፃነት በኋላ እንግሊዞች በፍርድ ቤቶች ውስጥ የሠሩ ቢሆንም በተማረው ክፍል የፈረንሳይ ተፅዕኖ የጎለ ነበር። አክሊሉ የሕግ ዲግሪውን ያገኘ ው ከፖሪስ ነበር። ወልደጊዮርጊስ የሚያውቀው የውጭ ቋንቋ ፈረንሳይኛ ነው። ከፋሽስት ወረራ በፊት በስራ ላይ የዋለው አሁንም ያልተሻረው የንግድ ድርጅቶችን /ኮርፖሬሽኖችን/ የሚመራውና የሚቆጣጠረው ሕግ ከፈረንሳይ የተገኘ ነው። የፈረንሳይ ሕጎች በተወሰኑ ቃላት ተሰባስበው እጥር ምጥን ብለው መዘጋጀታቸውን ሁለቱ ሰዎች ያደንቃሉ። እኔ በስራ የተገናኘ ኋቸው ኢትዮጵያውያን ባለስልጣናት በሙሉ ለሚያቀርቡልኝ የሕግ ጥያቄዎች አጭርና ከመጽሐፍ የወጣ መልስ ይጠብቁ ነበር። በፍርድ የተወሰኑ ጉዳዩች መጠቀሳቸውን ባይቃወሙም የአሠራር ደንብ ሆኖ አንዱ ጉዳይ ከሌላው የሚለይበትን ወይም የአንዱ በሌላው ውስጥ ተጠቃሽ የማይሆንበትን የማንሳቱ ውጣ ውረድ አይጥማቸውም። ይህ አመለካከታቸው ግን ግራ የሚያጋባ ነው። ምክንያቱም ኢትዮጵያውያን በፍርድ ቤቶች ውስጥ ሲሟገቱ ጥቃቅን ልዩነቶችን

[13] This is a book written by John Spencer; the title of the book is `Ethiopia at Bay.

በማሳየትና የቀደሙ ፍርዶችን በመጥቀስ ረገክ ብለው ስለሚከራከሩ ነው። መመሪያ እንዲሆናቸው ግን ምንጊዜም እንደ ፍትሕ ነገስት ያለ የተጻፈ ሕግ ማየት ተፈጥሮአዊ ልማዳቸው ነው።

ሁለተኛው ምክንያት የኮንቲኔንታል አውሮፖ የሕግ መጻሕፍት በተዋጣ መልኩ ወደ ውጭ ለመሠራጨት መቻላቸውን የመገንዘብ ጉዳይ ነው። ለዓይነትም በፖሪስ የሕግ ፋኩልቲ ኘ ሮፌሰር የነበረው ዢን ኤስካራ ወደቻይና የወሰዳቸውን የስዊስን ከውል ውጭ ግዴታ የፍትሐ ብሔር ሕግ መጥቀስ ይቻላል። ጃፖንም የጀርመንን የንግድ ሕግ ተቀብላ በስራ ላይ አውላለች። የመንግስታቱ ማኅበር የሐዋላ ወረቀቶችን የመርከብ ጭነት ዝርዝሮችንና እነዚህም ያቋቋሙትን የሕግ ደንቦችን የባሕር ኃይል በሚፈጽማቸው ድርጊቶች የመንግስት ተጠያቂነትን የሚገልጡ የብሩሴልስ ደንቦችን የሕግ መጽሐፍ ሆነው እንዲወጡ አድርገዋል። የባሕር ኃይልን በተመለከተ የሚወጡ ሕጎች በመሠረቱም የመነጩት ከኮንቲኔንታል አውሮፖ መሆኑን በአሜሪካም የታወቀ ነው። የአሜሪካ አንድ ወጥ የንግድ ወረቀቶች /Negotiable Instruments/ ሕግና የመርከብ ጭነት አንድ ወጥ ሕግ /Custom Bills of Lading Act/ የኮንቲኔንታልን ሕጎችና የአፈጻጸም ልምዶች ተከትለው የወጡ ናቸው። የሕጎችን አለመጣጣም /Conflict of Laws / እና የአስተዳደርን ሕግ ዘመናዊ በማድረጉ ሂደት ከእንግሊዝና ከአሜሪካ ይልቅ ማዕከላዊው አውሮፖ በተለይም ፈረንሳይ ከላቀ ደረጃ ላይ ነበሩ።

የበለጠ ያስጨነቀኝ የፍትሐ ብሔሩ ሕግ ነበር። ከውል ውጭ የሚመነጭ ግዴታን በተመለከተ በፈረንሳይ የፍትሐ ብሔር ሕግ የወጡት አራት አንቀጾች ብዙ የሚቀራቸው ነበሩ። ምንም እንኳን ይህ የሕግ ዘርፍ ከእንግሊዝና ከአሜሪካን የሕግ ስርዓትና ከቀደሙ ፍርዶች ተቀናጅቶ የዳበረ ቢሆንም ቅሉ የአሜሪካ የሕግ ተመራጭ ነበር። እኔን ያሳሰበኝ በተናጠል ጉዳዮች ላይ በሚሰጥ ፍርድ ስብስብ መመራት ነበር። ምክንያቱም አንድን ጭብጥ አስመልክቶ የተሰጠ የቀደመ ፍርድ ከወዴት ይመጣል? ኢትዮጵያ ሕጎቿን ዘመናዊ ለማድረግ የእንግሊዝንና የአሜሪካንን ስርዓት የተከተለች እንደሆነ የአሠራሩ ሰርዓት ዘለቄታ እንዲኖረው በቅርቡ የተወሰኑ ፍርዶችን ወይም መለዋወጫ ዕቃዎችን በየጊዜው ከአሜሪካንና ከእንግሊዝ ልታስመጣ ነው። ከዚህ በቀር የእንግሊዝና የአሜሪካ የሕግ ጽሑፎችን በመሉና የሸፖርድ ጥቅሶችን /Shepard's Citations/ ጭምር ማስመጣት ሊኖርባት ነው። የሕግ ዘመናዊነት የግዴታ የሕግን ነፃነት ተጭኖ መውጣት ሊኖርበት ነው። የሕጎች በመጽሐፍ መልክ መውጣት ሀገር ውስጥ የተፈረዱ ውሳኔዎችን ሕግ ለማውጣት ያስችላል።

ሌላው መታየት የነበረበት ነጥብ የኮንቲኔንታል የሕግ ሥርዓት በኤርትራም ላይ የሚሠራበት መሆኑ ነው። በፌደራል ፍርድ ቤቶች ታይቶ የተወሰነውን ጉዳይ መልሶ ማየት የሚናር ከሆነና በሁለቱ ክልሎች መከካል ንግድና ግንኙት እንዲያድግ ከተፈለግ የተወሰነ የማስተባበር ዘዴ መኖር አለበት። የትኛው የሕግ ስርዓት ይመረጥ የሚለውን በተመለከተ ያቀረብኩትን ትንታኔ ጃንሆይ ወልደጊዮርጊስና አክሊሉ ስለተስማሙበት አስፈላጊዎቹን የሕግ መጽሐፍት የሚያዘጋጁ የማዕከላዊ አውሮፖ የሕግ አዋቂዎችን እንድመርጥ ኃላፊነት ተሰጠኝ። በመጀመሪያ ሙሉ በሙሉ በኮንቲኔንታሉ የሕግ ሥርዓት ውስጥ ላለመግባት ከሁለቱ የሕግ ሥርዓቶች አውጣጥተው ይጠቀማሉ የሚባሉትን የስካንዲኔቪያ ሀገሮች ባለሙያዎችን መፈለግ ጀመርኩ። ስመጥር የሆነው የሕግ ባለሙያና የኢትዮጵያ ወዳጅ የዴንማርኩ አምባሳደር ላኑንግ ከዴንማርክና ከኖርዌይ የሕግ ባለሙያዎች ጋር አገናኘኝ። ራሴ በሰዎች አማካኝነት ባደረግሁት ጥረትም ከስዊድን የሕግ ባለሙያዎች ጋር ተገናኘሁ። እንደ ዕድል ሆኖ ከነዚህ አገሮች አንድ እንኳን ለስራው እንዲገኙልን ማድረግ አልቻልንም። ይህ መስመር በመዘጋቱ ትኩረቴን ወደ ጆርጅ ሪፐር የፈረንሳይ የሕግ ፋኩልቲ ዲን አደርግሁ። በሱም አማካይነት ኘሮፌሰር ኤስካራ የባሕር ሕጉን እንዲያዘጋጅ ከፋኩልቲው አንድ ኘሮፌሰር ከጄኔቭ ዩኒቨርሲቲ ደግሞ የወንጀለኛ መቅጫ ሕጉን የሚያዘጋጅ ኘሮፌሰር አገኘን።

በመረጥኳቸው የሕግ ባለሙያዎች ስራ ጨርሶ አልረካሁም ነበር። ምክንያቱም ስራቸው ነጥብ የሚመታ ሳይሆን በአጠቃላይ ሐሳብን የሚያንፀባርቅ ስለነበር ነው። ከዚህም በላይ በተለይ የፍትሐ ብሔር ሕጉ ዝግጅት ያለበቂ ምክንያት ከሚገባው በላይ ዘገየ። ከዚህ ኘሮፌሰር ጋር በተፈራረምነው ውል ውስጥ መላ ጊዜውን ለዚህ ሥራ እንዲያውልና የኢትዮጵያ መንግስትን የጽሑፍ ፈቃድ ከማግኘቱ በፊት ሌላ ስራ እንዳይጀምር ግዴታ አስገብቼው ነበር። ነገር ግን ለፍርድ ሚኒስትሩ ግዳጁን እየተወጣሁ ነው ብሎ እያረጋገጠ ውጭ ሌላ ሥራ መቀበሉ ተደረሰበት። ሁኔታው የትኛው ግዳጅ ብሎ ለመጠየቅ የሚያሳስብ ነበር። እንዲህም እየሆነ የሕግ መጻሕፍቱን የማዘጋጀት ስራ አልፎ አልፎ ለዚሁ ተብለው በተቋቋሙት

ኮሚቴዎች ዘንድ ቀርቦ እየታየ በ1960 ላይ ተጠናቀው ለሕትመት በቁ። የመጨረሻው ውጤት አጥጋቢ ነው ለማለት አይቻልም። ሌላው ቀርቶ የንግድ ሕጉን እንዳለ መቀበል ሁኔታው የሚያስገድድ ቢሆንም እንዲህ ያለው ውጭ በቀል ሥርዓት ተቃውሞ ሳይገጥመው እንዳለ በስራ ላይ ይውላል ተብሎ አይጠበቅም።

4.3.4 Review questions

Answer the following questions based on the above Amharic text.

1. Did Spencer anticipate that the imported laws would take root?
2. Why did Ethiopia opt to get experts from Scandanevia, acoording to Spencer? Why did Ethiopia then turn to France?
3. Why did the country decide to copy the civil law model? According to Spencer which of these reasons most significantly influenced the decision to follow the civil law model?
4. Is the Commercial Code of Ethiopia home-grown?
5. Which of the laws imported were expected to be resisted most? Why?

4.3.5 Policy instructions: Following the decision to modernize her laws and after adopting the policy position of designing her laws after the civil law model, the next step was to form a body responsible for accomplishing the actual task of codification and giving policy directions to the same. Emperor Haileselassi I, offered policy guideline to the members of the Codification Commission and to key foreign draftspersons. You find these guidelines in the prefaces of the Ethiopian Commercial Code, the Civil Code and the Penal Code. The Emperor directed these persons first to take rules mainly from the continental legal system. But he gave them discretion to take rules from any sources so far as they were convinced that these legal rules and institutions would promote the best interest of the country. In confirming compliance with this first instruction of the Emperor, the drafter of the Commercial Code stated that: `…without taking into account the so-called preference to be given to this or that model in the continental or Anglo-American legal system, I have always had in mind the interest of Ethiopia and I have selected the solutions which I believe to be the best no matter where they come from, on condition that they may be applied to Ethiopian conditions, if not immediately, at least within a reasonable time. Second, the Emperor advised members of the Codification Commission and the drafspersons to endeavor to adapt these legal rules and institutions to Ethiopia's situation. In third place, he instructed them to incorporate customary laws and traditional legal institutions of the country.

4.3.6 The position given to customary rules: On the issue of whether tradition was disregarded or adequately incorporated into the code, there are different views. Emperor Haileselassie I believed that the codes, especially the Civil Code gave adequate place to customary laws. He expressed this idea in the preface of the Civil Code and in his address to the Codification Commission on the completion of the codification project. The Emperor`s policy direction

delivered to members of the Codification Commission in general and the drafters in particular states that "the genius of Ethiopian legal traditions and institutions as revealed by the ancient and venerable Fetha Nagast, natural justice and the needs and customs of the people must be incorporated; that law must be clear and intelligible to each and every citizen of our empire; the laws must form a consistent and unfired whole; must be that which keep pace with the changing circumstances of this world of today." Upon the completion of the codification project, the Emperor confirmed that his instructions had been properly observed.

Professor Rene David also joined hand in supporting the Emperor. This draftsperson argued that the essence of the Civil Code lies in the sufficient incorporation of traditional legal institutions of the country. Rene David thinks that the areas of family law, tort law and property law of the Civil Code are significantly influenced by the customary rules then prevalent in the country. To the draftsperson, the only cases where he did reject customary rules were those that, in his opinion, would conflict with the demands of modern life in the country and those that impede the social and economic progress of the country. Rene David was in the opinion that the active participation of influential and knowledgeable person at the various stages of the codification, e.g., in the Codification Commission, in the Council of Ministers and in the two chambers of the parliament, assured the sufficient indignization of the Civil Code.

There are, however, those who think that customary laws were not given the place they deserve. They raise the following points. If customary laws then prevalent were given proper place, why has the Civil Code not got the acceptance of the addressees some 40 years after its coming into force? They think that defective transplantation should explain the absence of legitimacy on the part of the provisions of the Ethiopian Civil Code. The other justification provided is the fact that customary laws in Ethiopia were not sufficiently recorded prior to and in the course of the codification process. So there was no sufficient recorded information regarding the nature and types of customary laws prevalent in the country to be used by the drafters. The other factor mentioned in support of the position that there are reasons not to believe that the Civil Code adequately included the traditional legal rules and institutions is that the code provisions themselves; there are few provisions in the Civil Code that assign some roles to customary laws. Finally, the main justification for the limited role assigned to customary laws is the general policy stance of the then government. The basic policy was to bring about legal unification via a general codification of laws in line with the civil law tradition. Legal unification through western style codes was aimed at facilitating the intended political unification, assimilation and integration of the various groups in Ethiopia.

4.3.7 Review questions

1. On the issue of whether the codes adequately considered customary rules and Ethiopian traditional legal institutions, Professor Rene David, the drafter of the Civil Code made the following statements on different occasions. Do you think that these statements are consistent? The Professor stated that: ``*the Ethiopian feeling for justice is the basis of the Code. No rule in the Code violates this feeling. The dispositions of the preliminary draft prepared by foreign jurists were rejected or modified whenever they seemed contrary to it even when the foreign advisors considered them useful and advantageous for Ethiopia. The most important accomplishment of the Civil Code in the area of persons, family law, property and delictual liability was clarity, rather than to change the customary rules, to clarify these rules, to distil their essence and to unify them on the basis of those which appeared most reasonable. Our goal was to end an intolerable confusion and uncertainty by choosing the rule most in conformity with the Ethiopian sense of justice and Ethiopia`s interests, economic and otherwise.*``

2. In David`s view, customary law was not stable, was not really jurisprudential, and differed greatly from place to place. He argued that it was responsible for Ethiopia`s underdevelopment. Are the messages conveyed by the quotation in question 1 and the following quotation the same? Are they conflicting? Is it possible to explain the conflict away? Is Rene David suggesting that either Ethiopia must wait for five centuries or accept massive ready-made western laws? Do you agree with this `either or`` approach? Could Ethiopia have followed another, a third approach? "*Like the Soviet Union and co-communist countries, although with another ideal, Ethiopia and a number of African countries are presently in a revolutionary period. While safeguarding certain values to which she remains profoundly attached, Ethiopia wishes to modify her structure completely, even to the way of life of its people. Consequently, Ethiopians do not expect the new code to be work of consolidation, the methodical and clear statement of actual customary rules. They wish it to be a program envisaging a total transformation of society and they demand that for the most part, it set out new rules appropriate for the society they wish to create.`` Thus, "Ethiopia cannot wait 300 or 500 years to construct in an empirical fashion a system of law which is unique to itself, as was done by the Romans and the English. The development and modernization of Ethiopia necessitate the adoption of a "ready-made" system; development and modernization force the reception of a foreign system of law in such a manner as to assure as quickly as possible a minimal security in legal relations.*

3. Beckstrom stated that ``*Ethiopianization of the codes occurred in the Codification Commission and Parliamnet before enactment but this appears to have been as much a reflection of the personal preferences of the elite, urbanized individuals in those bodies as of the customary practices of the Ethiopian masses.*`` Do you agree with this conclusion? Why? Why not?

4.3.8 The Codification Commission: The Codification Commission was established to actually carry out the tasks of codification as well as supervise the works of the foreign draftspersons. The Commission was composed of 29 members, some foreigners and some Ethiopians. The Commission had divided itself into sub-committees. Each subcommittee was assigned to work closely with

a foreign draftsperson. When the sub-committee finished the assigned task, the wok was submitted to the Codification Commission. The Codification Commission deliberated on the draft document and upon approval passed it to the Council of Ministers. From the Council of Minister, the draft documents were sent to the joint meeting of the two chambers. Finally, upon the assent of Emperor Haileselassie I, the draft documents obtained the status of law. This pattern was followed in respects of the Civil Code, the Commercial Code, the Penal Code and the Maritime Code.

Rene David, A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries, 37Tulane Law Review 2, (1963) p. 187-204.

Procedure of elaboration of the Ethiopian Civil Code: The Ethiopian Civil Code was elaborated in three stages. A preparatory plan drawn up by a French expert was followed by a project established by a codification commission. The paroject became the Code, with the modifications effected by Parliament. The preparatory plan was established by the expert in the period from October, 1954, when the title Of Contracts in General was sent by him to the Ethiopian Minister of Justice, to April 20, 1958, when the Alphabetical Table completing the Code was drafted. It is good to know that during all this period, the redactor was able to dedicate himself exclusively to his task of codification, having been discharged from all his other obligations and in particular, having abandoned his teaching on the Faculty of Law of Paris. In a general manner the work was begun on the more technical books, IV and V, since to edit them the redactor felt it less necessary to familiarize himself with customs and Ethiopian points of view. Next, the title Of Ties of Kinship and marriage was drafted, the three titles of book I, the different titles of Book III, the title Of Successions, and finally two titles Of the Application of the Laws which contain the rules of conflict of laws, and Of the Enforcement and Application of the Civil Code, which notably contains transitory dispositions.

The order thus indicated is only approximate. In the course of his work, the expert was led to propose changes or to make additions to the parts that he had already established. It is thus that the chapter On Donation, that on The Contract for Real Estate, that on Public Domain and Expropriation, and the title Of Administrative Contracts were drafted only after Books I to III of the Civil Code. At the same time as the different titles were presented, or shortly thereafter, the redactor presented to the commission an exposé des motifs and a commentary on this title. These commentaries were originally very well developed. They became more brief when it appeared that the translation service, dedicating itself by priority to the texts themselves, was not able to assure translation in the time desired.

These documents remain useful, nevertheless, in order to make known the sources used by the expert, and especially in order to explain the reasons for various dispositions, notably those that the commission could be surprised in finding in the preparatory plan, or those tied to Ethiopian particularities that a stranger would be surprised to find in the Ethiopian Civil Code. To the extent that it was elaborated, the preparatory plan was translated to the Minister of Justice and submitted to the criticism of a codification commission. This commission, composed principally of judges and high Ethiopian functionaries, comprised also certain foreign members residing in Ethiopia. Very rapidly, however, it appeared that the presence of these foreign members was never essential, and that on the contrary their presence created the risk of slowing up or handicapping

the work of the commission, because very often it had to discuss problems of Amharic terminology, and the foreigners were not able in all hypotheses to fulfill in a satisfactory manner the role of the commission in discussing the Amharic language. In fact all the work was accomplished by a "restricted commission" composed of only Ethiopian members of the commission.The expert participated in only a limited number of commission sessions, principally to hear objections made to certain texts of the preparatory plan, to discuss possible problems arising with the commission, and to be in position to revise his work to give effect to the decisions rendered by the commission.

The commission accomplished work in two directions. On one hand it had to formulate in the Amharic language, with precision and elegance, the definitions translated from French. It is justifiable to emphasize the difficulty of work which was imposed in this regard. The Amharic language does not very often admit words apt to give an exact idea of the institutions that one wished to regulate, and it was necessary for the commission in many instances to coin new expressions, sometimes borrowing them from the gé'ez language in which the out-dated Fetha Negast was drafted, in each case with the need for establishing an Amharic text comprehensible to Ethiopians of today. Amharic thought does not even develop as does western thought, and the work of transposition and of adaptation which was made would not have been able to be concluded satisfactorily except for the presence on the commission of persons versed in the grammar and the philology of the Amharic language.

The expert had taken, it is true, all precautions incumbent on him to facilitate this work. The division of the articles into numbered paragraphs and the limitation of each paragraph to only one sentence had as its object facilitating the task of the commission and elucidating that obscurity which would have been inevitable in free play had been allowed to the Amharic tendency to combine into a single sentence, generally devoid of punctuation and as long as necessary, all the elements of an argument. The members of the commission were in accord in recognizing that the discipline accepted by them made their work easier and permitted them to express with more clarity the rules of the Civil Code. Their task was no less than overwhelming on this subject.

It is not within the province of a foreigner to judge the extent to which the nuances of the French text have been faithfully rendered in the Amharic text of the Code. Nevertheless I had the curiosity to have the Amharic text of the Code translated into French by an Ethiopian, on matters concerning articles 1763 to 1804 in Title XII of the Civil Code. The experience was conclusive and a favorable witness to the very precise work that the Ethiopian commission had accomplished. The French text restored in the translation of the Amharic text was doubtless not identical to the text from which the commission departed, but the sense of the articles was understood, and it is concerning the nuances only that the Amharic text can appear different from the French text.

The second task of the commission was naturally the critical study of the preparatory plan concerning the basis of its dispositions. Here again the commission accomplished a very important task. To convince oneself it is sufficient to consult the documents entitled Modifications to the Dispositions of Title, which were compiled by the redactor. Certain of these modifications are due undoubtedly to the draftsman himself, and spring from the necessity of coordinating the different parts of the Civil Code which were not entirely established at the same time. But the great majority of modifications have as their objective giving effect to the decisions of the commission. Having to establish the Amharic text of the Code, the commission found it necessary, because of this fact alone, to study the preparatory plan with great attention, to

examine, one might say, each word. This examination was conducted in questioning the soundness of the proposed dispositions, in asking for explanations from the expert, and in deciding on many hypotheses to modify the rule originally propsed.

Conforming to the directives given by the commission, the preparatory plan established by the expert was recast by him, thus becoming the work submitted to Parliament. A gap yet should be pointed out before relinquishing the exposé made by the commission. The latter unfortunately did not have the time to study Title XXI of the preparatory plan which bore on the Application of the Laws. Consequently, this title was taken out of the project with the exception of that which related to the application of the laws at that time (non-retroactivity of the laws); but all that concerned conflict of laws was omitted. We have deplored this omission and have confidence that a new edition of the Code will permit its reparation.

The text of the project submitted to parliament was discussed article by article without the cooperation of the expert, and he was called from time to time only to give his advice to the Minister of Justice, who was preoccupied with defending the project on certain points against amendments demanded in Parliament. On the whole, in comparing the project to the text of the Code which was definitely retained, it is permissible to say that the project underwent victoriously the test of parliamentary discussion. Only in the book Of Goods have important modifications intervened, the matter of the proof of ownership and of usucaption having been recast. The position of him who built buildings or sowed seed and planted on the property of others was regulated with an extreme severity not contemplated by the project. Modification, constantly favorable to owners, were equally interposed in the regulation of the relationship between owners and farmers. Modifications called for on the law of persons and on family law are less extensive. Outside of that which has just been pointed out, practically no other modification has been imposed on the dispositions of Books IV and V relating to obligations and contracts.

One other modification imposed by Parliament is, in our opinion, at the same time important and regrettable. The last title of the project which bore on putting the Civil Code into force and which contained in particular numerous and important transitory dispositions was profoundly recast by parliament and practically emptied of its content. Only ten articles were retained of the eighty-four that the project of the Civil Code called for. It is to be feared that this amputation may be the source of great difficulties in the application of the Civil Code.

The procedure followed in Ethiopia for the elaboration of the Civil Code gave good results on the whole. The discussion of the Code article by article in Parliament was definitely a good thing because it confirmed the national Ethiopian character of the new Code and was useful in forming new jurists. This advantage, in our eyes, largely compensated the inconvenience of some modifications made by Parliament that we regarded us unwelcome. It appears to us, however, that the procedure thus followed in itself would, in a country other than Ethiopia, have seriously risked involving the downfall of codification. We regret moreover that the Code, promulgated in May, 1960, was put in force in September, 1960. This delay, very brief for Ethiopia, in any other country would be clearly insufficient.

The procedure that we had advocated was different. It consisted, first, in publishing the project of the commission at the conclusion of a debate which would have taken place in parliament and which would have borne exclusively on the desire for having a code on one hand, and on the other,

the acceptance of the principle of the project as the basis of the new Code. The project published as the result of such a debate would have become the Code and gone into force at the end of the sufficient delay of three or even five years, giving an accounting in the new edition of the modifications that, in this delay, parliament would have made. This procedure was suggested too late to be adopted.

Alemayhu Fenta, Legal Pluralism in Light of the Federal and State Constitutions of Ethiopia: A Critical Approach, (AAU, Law Library, Unpublished) (2004).

Adopting the periodization suggested by Getachew legal history may be divided into two periods, taking the year 1957 as a watershed. Until 1957, Ethiopia did not have a distinct formal legal system. Rather, it had, to use the words of Brietzke, "numerous and overlapping systems of laws." According to Brietzke, there are, on the one hand, "customary rules," which were used to regulate the day-to-day activities of individual members of the numerous ethnic groups. On the other hand, there were "traditional rules," which were used to regulate various relations within the Amahara-Tigre Empire and the Orthodox Church from the 14th century. Therefore, during the pre 1957 period, except for the 1923 law of loans, the 1930 Nationality Act and the 1948 statute of limitations, Ethiopian normative orders were informal, unsystematized, undifferentiated and particularistic customary laws. In this connection, John H. Beckstrom writes that: Until 1950's the "laws" of Ethiopia was a rather amorphous mix. There were some legislation in the form of statutes and decrees, primarily in the public law sphere, as well as a penal code that had been promulgated in 1930. But taking Ethiopia as a geographic whole, by far the major de facto source of rules governing social relations was found in the customs and traditions of the various tribal and ethnic and religious groupings.

Since 1957, however, a comprehensive process of codification, which mainly drew upon European sources, took place in Ethiopia: a Penal Code (1957), Civil Code (1960), Commercial Code (1960), Maritime Code (1960), Criminal Procedure Code (1961) and Civil Procedure (1965). This codification process was guided by the modernization ambition of the Emperor. The Emperor, in the preface to the Civil Code, pointed out: The progress achieved by Ethiopia requires the modernization of the legal framework of our empire's social structure… in order to consolidate the progress already achieved and to facilitate further growth and development; precise and detailed rules must be laid down.

Thus, a comprehensive legal transplant was carried out throughout this period. In other words, the legal rules and principles found in the newly enacted codes had been taken in the main from European sources. Professor Rene David, the draftsman of the Civil Code, commenting on it writes that: The development and modernization of Ethiopia necessitate the adoption of a "ready-made" system… while safeguarding certain traditional values to which she remains profoundly attached Ethiopia wishes to modify her structures completely, even to the way of life of the people. They wish it to be a program envisaging a total transformation of society and they demand that for he most part, it set out new rules appropriate for the society they wish to create.

To David, therefore, once Ethiopia had opted for the path of legal modernization, it could not have settled for anything less than adopting a foreign legal system. He maintained the view that it would not have been practical to wait for a law to emerge from within the indigenous culture.This appears starker no where than in his statement that Ethiopia could not afford to wait 300 years to have a modern system of private law. The adoption of a Civil Code based on the French model,

would according to David, "assure as quick as possible a minimal security of social relations." However, the rationale for these western imports cannot be modernization. It must lie elsewhere. Lawrence Friedman is helpful in unmasking the real motivation: "a single, uniform system of law should act as a tool of unification; like a common language, a common law should help wield a single nation out of the jumble of classes or tribes. The new nation will have to be built from the center. The center will have to grow at the expense of provinces… and outlying culture…" Julio Faundez points to a major flow in David's thought as well as the ill-founded project of adopting a Civil Code based on the French model.

David's remarks on Ethiopia's Civil Code could be seen simply as a legal consultant's rationalization of the assignment that he had undertaken. It could be argued that David misrepresents the choice confronting an external legal consultant: for in the statement quoted above he appears to suggest that the choice was between either waiting for a modern indigenous legal culture to emerge or introducing an imported Civil Code. An alternative course of action would have been to ensure that the new legislation was as far as possible consistent with local practices.

Furthermore, Faundez points to an important problem raised by legal transplantation namely, the question of whether the role of an external legal adviser amounts to policy making. This raises the problem of legitimacy of the enacted laws. Brietzke joins tune with us in saying that "the 1960 codes represent an almost complete break with the past. They also illustrate virtually all of the pitfalls that attend legal transplantations." He goes on to say that: Notwithstanding the eclectic approach claimed by the French draftsmen [R. David & J. Escarra], the predominant flavor of the Ethiopian codes is French. The draftsman displayed an interest in the internal logic of abstract concepts rather than their social effect, and, above an ethnocentrism.

Although it was claimed that a very eclectic approach was deployed, I tend to dismiss as disingenuous such a claim. For the bulk of the legal system procedures and structures introduced tended to impose western patterns upon a non-western polity. In so doing, much of value in the traditional/customary systems such as informal dispute resolution and group rights tended to be ignored. In short, despite claims that allowances were made for pockets of native juris-culture, the legal system introduced by these codes worked to the detriment of the customary laws of the various ethnic groups in Ethiopia. According to John Beckstrom, in order for transplants to bring about the desired result, the economic and cultural gaps between the importing and exporting states should be the least. He points out that: "[….] no greater distance has existed between the receiving country and the places of origin of the transplanted laws than in the Ethiopian experience."

In fact, as David explains, he actually tried to incorporate elements of customary laws into the Code. Yet, in the words of Beckstrom, "explicit incorporation was minimal." Because of diversity of local customs and lack of systematic survey of the same in Ethiopia, "there was little for the draftsmen to draw upon except fragmentary and largely impressionistic reports." Beckstrom makes a further point: an additional "Ethiopianization" of the codes occurred in the Codification commission and Parliament before enactment, but this appears to have been as much a reflection of the personal preferences of the elite, urbanized individuals in those bodies as of the customary practices of the Ethiopian masses.

Following the tack taken by Getachew, I contend that the codification process failed to understand that the formal legal system only reaches a small section of the population as in most developing countries. Thus, by focusing largely on the formal legal system the codification process went astray, as it ignored customary laws and other informal systems of law. The legitimacy crisis of the formal legal system was further deepened where the application of the codified laws, both in the civil and criminal jurisdiction, has actually been displaced by indigenous norms and practices. As Brietzke points out "Many centuries of legal history and social relations are not transformed into a tabula rasa by simply legislating custom out of existence." That is what Arthur Schiller meant by an Ethiopian "fantasy law" embodied in Civil Code Article 3347(1): Unless otherwise expressly provided all rules whether written or customary previously in force, concerning matters provided for in this code shall be replaced by this code and are hereby repealed.

One way to think about the 1960 Civil Code is as a process that has gone on for over 40 years and has been continually challenged. For much of that period, the tendency appeared to be in the direction of greater homogeneity. Since 1991, forces of difference appear to have strengthened the heterogeneity of personal law, culminating in adopting varied family laws by the regional states. Unity, if not better, homogeneity was served powerfully in law by the processes of codification. The homogenization of personal law was effected through an express repeal of the ethnically as well as religiously based personal laws. Besides, the great wave of legal codification by the continental European drafter in the mid-twentieth century swept away the particularities of criminal law (via the Penal Code of 1957), preserving neither religious nor customary penalties.

Getachew has recently suggested that the adoption of a federal system could give latitude for legal pluralism: The existence of the traditional mechanism of undertaking legal affairs in the various Ethiopian communities is one aspect of the problem of legitimacy crisis of formal legal system. To do away with this problem, mechanisms of harmonizing the modern legal norms and the traditional ones must be designed. With the adoption of the federal form of government in Ethiopia, the system of allowing the play of traditional norms in various parts of the country (the states) could be easily done. The codification project in Ethiopia should be seen as a historical process instead of a one-shot experience; this is the story of the homogenization process. Seen in this light, codification of laws forms part of the country's political history.

4.3.9 Review questions

Part I Answer the following questions.

1. To Alemayehu, what is the core issue in the political tradition of Ethiopia?
2. How does Alemayehu establish a link between politics and codification?
3. To Friedman, as quoted in Alemayehu`s thesis reproduced above, what is the real motive of massive codification followed in a traditional polity such as Ethiopia?
4. To Brietzke, did Ethiopia adopt the French model or the eclectic approach in relation to her Civil Code?
5. Beckstrom states that, in order for transplantation to be a success, the conceptual gap between the recipient country and the donor country should be the least? What does this mean? How can you measure this gap in context?
6. What does the expression ``fantasy law``?

Part II Multiple-choice questions

Choose the best answer from the given choices.

1. Identify the incorrect statement about the 1957 Ethiopian Penal Code.

A) Its principal material foreign source was the1937 Swiss Penal Code.
B) It borrowed rules from the 1930 Ethiopian Penal Code.
C) It was an improvement of the 1930 Ethiopian Penal Code in the area of punishment.
D) It used many penal statutes issued in Ethiopia between 1930 and 1956.
E) It followed a tri-partite division of offenses.
F) None of the above

2. Codes have become major source of law in Ethiopia after_____.

A) 1960's
B) 1908
C) 1950s
D) 1970's
E) None

3. The six codes of Ethiopia_____.

A) Were strongly influenced by liberalism
B) Were mainly imported from continental legal system
C) Do not give much emphasis to Ethiopian customary laws
D) All
E) A & B

4. Identify the wrong statement.

A) Ethiopia did not have uniform customary laws
B) Ethiopia's legal history is characterized by discontinuity
C) *Atse Ser'at* is the decision of the Ethiopian Orthodox Church
D) The Law of Addis Ababa City was enacted during the reign of Emperor Menelik.
E) none

5. The Law of Addis Ababa City which was issued in early 20th century _____.

A) Legalized urban land
B) Introduced the idea of title certificate for land ownership
C) Declared the priority of public debt over private debts
D) All
E) A & B

6. One of the following was not a source of law in the pre-codification period.

A) Treaties

B) Religion
C) Custom
D) Precedent
E) none

7. The 1955 Revised Constitution of Ethiopia_____.
A) Was pimarily based on the American Constitution
B) Abolished absolute monarchism
C) Was intended to decentralize power
D) Was drafted by a foreign scholar
E) A & B

8. The major source of the Ethiopian Civil Code is_____.
A) French Civil Code
B) The Swiss Code of Obligation
C) The Egyptian Civil Code
D) The German Civil Code
E) All except D

9. Identify the wrong statement
A) The 1931 Constitution of Ethiopian established a parliament which had only advisory role
B) Ideologically the codes of Ethiopia and the PDRE (Dergue) Constitution contradicted.
C) The Ethiopian legal system was radically changed after 1955
D) The federation of Eritrea with Ethiopia necessitated the revision of the 1931 Constitution.
E) *Negarit Gazeta* was established before the Italian occupation

10. In developing countries, there is a big gap between the written law and the practice. The possible reason is_____.
A) Lack of public awareness about the written law.
B) Communities have strong attachment to their tradition.
C) Language barrier between the community and the law.
D) All of the above.
E) B & C

11. One of the following is not true about the Ethiopian law.
A) At present, case law does not have any significance in the Ethiopian legal system.
B) The modern codes of Ethiopia are primarily based on customary law.
C) The *Fitha Negest* never had significance for secular matters.
D) The 1930 Penal Code of Ethiopia substituted the application of the *Fitha Negest* in criminal matters.

E) All except D

12. Identify the wrong match.
B) Ethiopian legal tradition-secularism
C) Greek legal system- popular adoption of the law and conformity to natural law
D) Roman law – ethical principles
E) Mesopotamian legal system – religious basis
F) None of the above

13. The 1931 Constitution of Ethiopia _____.
A) Was modeled on the Meiji Constitution of Japan
F) Restricted the power of the Emperor
G) Aimed at centralizing and modernizing the nation.
H) Established a unicameral parliament.
I) Introduced a popularly elected lower house of legislature
J) Only A and C are correct.

14. Why did Ethiopia opt for the civil law system?
A) Proven success of the system elsewhere
B) Consideration of convenience
C) Ethiopia already had exposure to that system
D) It is impossible to know the reason.
E) All except D
F) None

15. One of the following is not the cause for the revision of the 1931 Constitution
B) Political change in the country
C) The federation of Eritrea with Ethiopia
D) Public pressure for change in the political system
E) All
F) None

4.3.10 The Ethiopian Civil Code: The Civil Code came into force in early 1960. The code is composed of five books. Book I deals with persons. Book II covers family and succession. Book III discusses property. Book IV regulates general obligations. And Book V governs special contracts. Each book is divided into titles. Titles are broken into chapters and chapters lead to sections. Sections in turn break into sub- sections and the subsections give birth to paragraphs. The paragraphs lead you to sub-paragraphs. Several articles constitute sub-paragraphs. The articles lead to sub-articles. The smallest elements of the Civil

Code are words. These organizational patterns are observed in connection to the Commercial Code, Penal Code and Maritime Code.

In terms of size, the Civil Code, as compared to the French Civil Code and the German Civil Code, is the largest comprised of more than 3,000 articles. The Code, on several occasions, is not concerned with economy of words. There are repetitions here and there. These repetitions are deliberately made. You find several provisions, which could easily be inferred from general legal principles and legal rules explicitly mentioned in the code. The size of the code is a deliberate construct; it was not done by accident. The reason given for the bulky nature of the Ethiopian Civil Code is lack of a developed legal structure in the country; the drafter aimed at contextualzing the code. For instance, Ethiopia did not have then a fully developed legal education, legal profession, legislature, judiciary and executive. Emperor Haileselassie I stated that: ``our parliament has seen to it that these detailed provisions of this Code are well suited to the needs of our own country and to those persons and enterprises from other lands who are participating and sharing in the benefits of the commercial life of our Empire.`` The French Civil Code and the German Civil Code did not have to be bulky for these countries did possess a relatively mature legal structure.

The Civil Code, like the case of the other codes, was written for the future as well as the then existing context. The idea was that Ethiopia would head for the market economy. In the context of a fully developed market economy, several legal disputes would crop up and the code provisions would easily capture this future development of the country. In the context of the Commercial Code, the draftsperson observed that: ``above all it is essential to insist on the need to prepare a commercial code for Ethiopian which not only takes into account the present economic development of the country but also will encourage Ethiopia's future economic evolution. Thus one can consider it as a truth difficult to contest that the future Commercial Code of Ethiopia must be able to adapt itself easily to the unplanned transformations, which will probably take place in the commercial and economic life of the country at a rapid rate during the course of at least a generation, if not a half-century. ``

David, A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries, 37Tulane Law Review 2, (1963) p. 187-204.

Content of the Civil Code: What matters are appropriate for regulation in a Civil Code? Questions concerning frontiers with other codes inevitably present themselves on this subject in all countries. These questions do not call for particular remarks on matters concerning Ethiopia or countries placed in a condition analogous to Ethiopia. On the other hand, it appeared that in drafting the Ethiopian Civil Code there was interest in expanding to a certain degree the framework of matters commonly regulated in civil codes. Research on juridical rules is a difficult thing in all modern countries; its difficulty risks enlargement in countries where one cannot rely on legal periodicals to cover the laws appearing in the official journals. There is interest in these countries in grouping all the juridical rules into a small number of codes which can be re-edited and brought up to date periodically. Also there was no hesitation in Ethiopia to include in the domain of the Civil Code certain matters which in other countries can be considered autonomous as they relate to other branches of the law: registration of civil status, registration of immovables, expropriation or administrative contracts. We regret that the matter of nationality and that of conflict of laws, which were included in the preparatory plan, have, for different reasons, been excluded form the Civil Code.

Such as it is, with 3367 articles the Ethiopian Civil Code presents itself as one of the longest contemporary civil codes. This is due, aside from the reason which has just been given, to the preoccupation with being as complete as possible in a country where there exists outside the code no inherent doctrinal or jurisprudential monument to guide the jurists in the interpretation of the Code. Thus certain contracts such as the contract with a medical doctor or with a hotel keeper, which in other countries are often regulated by their own "general principles," have given way to special regulation. The matter of extra-contractual responsibility has given way to much more detailed regulation than in other civil codes.

Very important and very detailed alphabetized tables appear in the Ethiopian Civil Code which unfortunately [does not?) have Amharic and English editions, but appear in the Negarit Gazeta. The redaction of these tables has contributed strongly to making the terminology used in the Code uniform in such a manner as to avoid discussions which would have inevitably been provoked by the use of dissimilar terms to denote the same thing or to express the same idea. The tables ought, on the other hand, considerably to facilitate legal advice from the Code in a country where counselors cannot yet be familiar with the system and classification of the Civil Code.

Finally a word deserves to be said on the accord between the Civil Cod and the Code of Commerce. This duality corresponds to a division of the work which was effected by two jurist consults charged with preparing the codification. It has no other significance and in no case can one find the same institution regulated at the same time in a different way in both the Civil Code and in the Code of Commerce. It appeared to the experts that it would be a useless complication in Ethiopia to distinguish in principle between civil law and commercial law. There can exist, as in Switzerland, special rules for commercial matters, but these rules are set out within chapters which envisage civil and commercial matters at the same time. The distribution of matters between the Civil Code and the Code of Commerce, not being dominated by commercial criteria, is in large measure arbitrary. All sales, all mandates, and all pledges are thus regulated in the Civil Code, while all insurance, all conveyances, and all partnerships are regulated in the Commercial Code.

Application of the Civil Code: The Ethiopian Civil Code, having been promulgated, went into force on the second of September, 1960 (the first day of the year 1953 according to the Ethiopian calendar). What are the prospects for its effective application by citizens and by judges? One must guard against making an absolute judgment here, and against voicing an opinion influenced by a great number of experiences, successful or unsuccessful, which have taken place in other eras or in other countries. In an objective manner, in taking into account conditions peculiarly Ethiopian, it appears possible to us to make the following forecasts.

It is quite certain that the Ethiopian Civil Code will not immediately be applied over the whole country and in all its dispositions as the Civil Code can be applied in France. Ethiopia is a vast country. The imperial administration has for 80 years brought a previously unknown peace into the new provinces, but the benefits of this order have as yet been followed only in a weak degree by administrative organization, economic development, and elevation of the cultural level. The country still lacks basic unity; in certain peripheral regions, some communities exist in a primitive state of civilization. The Civil Code was drafted for the more developed populations, those which inhabit the plateau of Ethiopia and Eritrea. Its application in other regions is not excluded, but can be envisaged in the near future only in exceptional cases regarding that which concerns, for example, the rules of concessions granted by the administration.

On the plateau itself, which makes up the heart of Ethiopia, the application of the Code will run against tremendous difficulties. Certain of these difficulties were foreseen by the transitory disposition kept or retained by the Parliament; the registration of immovables, the services of the civil registry foreseen by the Code remain to be created, and the legal registry of the tribunals must be instructed on the new tasks which are incumbent upon them. Moreover, judges and jurists who know and understand the dispositions of the new Code ought to be appointed. An educational task is imposed on all citizens to guide them in conforming to the precepts of the Code and in making them understand how their development and perhaps even the existence of their country are tied to the necessary course of a transformation which must be effected in all the provinces and on all planes.

That all this demands time and that many obstacles must be surmounted and resistance conquered leaves no doubt for anyone. One cannot expect from the foregoing that the application of the Code be integral nor that it be immediate on every matter. Is this to say that the Code is useless work? We are very far from believing this, and the enthusiasm with which the Ethiopian population hailed the promulgation of the many recent codes convinces us that the work accomplished was truly necessary.

The African revolution needs to be brightened by a program bestowing the order and the rules of society that Africa wishes to install. Ethiopia has suffered to the present from a vice inherent in the customary law, which is the uncertainty of customs giving rise in too numerous circumstances to the arbitrariness of the chief of the village or of the judge: an arbitrariness particularly formidable in a time of transformation where new questions are presented to which ancient customs provide no response. The promulgation of the Civil Code will not put an end to this arbitrariness. Nevertheless it will permit the gradual stoppage and limitation of mistakes. In the absence of the Code arbitrariness would be able to conceal itself again being equity. With the Code citizens and judges are furnished with a manual cutting the uncertain contours of equity. In the proportion that the tribunals will be staffed with judges instructed in the Code, it will be

possible to draw away from arbitrariness and to effect the reigns of security of transactions in Ethiopia, completely necessary for the progress of the limited security which now reigns in the country.

The Civil Code will not reform Ethiopian customs and manners today or tomorrow. Meanwhile it is not unprofitable to make known to the citizens how the directors of the country envisage the new order, on which principles they mean to found it, how it is desirable for men to behave, and what behavior to the contrary should be condemned. An organization for education in the law and for a structure of jurists becomes equally possible in Ethiopia from the existence of the codes, while up to this point the better minds wondered about the way in which they ought to conceive and organize such a teaching. The Civil Code gives to citizens, to administrators, to judges, directives on the objectives they ought to envision and accuracy on the equity of new times. That is far from being indifferent in our opinion. But there is more, and we are waiting for the code which will comply with another function in the immediate future.

The Ethiopian Civil Code is not immediately applicable to the entire country in all its dispositions. But it is perfectly applicable in the same manner as European codes for a certain category of dispositions and in certain circumstances which particularly concern the development of Ethiopia. The Code cannot be applied immediately by all Ethiopian judges, but it can without difficulty be applied by a restricted number of judges grouped in a superior jurisdiction which sits in the capital itself, at Addis Ababa. The Code cannot be applied immediately in all its dispositions; but it can be immediately applied in certain of its parts in which it meets no opposition from traditional mores and customs.

In this double way, one sees a sector appear, very important for the development of Ethiopia, in which the Code can without difficulty receive immediate application. The whole part concerning contracts is in fact a new part in the Code which fills a gap in Ethiopian law but which runs against no tradition. This is true likewise for the whole Code of Commerce. The dispositions here envisaged ought to be immediately put into application in a way conforming perfectly to the application which is given in Europe to civil codes. It can and must be thus in all cases, at least when the matter will be judged sufficiently important to be carried directly in the first instance to the judges on the Supreme Court at Addis Ababa who are able to know and apply the Codes. That ought to occur and occurs in fact in two series of circumstances: when the matter is sufficiently important and when one of the parties is a foreigner. For the remainder we envisage only gradually putting the Civil Code into effective execution. The spirit in which we have participated in its elaboration has been that it is first befitting to establish a model serving to guide judges or arbitrators to orient the development of customs; the decision rendered by these judges or arbitrators ought to justify an appeal only in cases where elementary principles of the administration of justice, not the rules of the Code, would have been violated. It is in gradually extending the notion of the elementary principles of the administration of justice, in making it cover more and more certain basic principles adjudged from the public order that we have conceived the effective application of the Ethiopian Civil Code for a number of years with a possibility of variation according to the provinces.

We had to renounce, being called on by other tasks, the establishment of the preparatory plan of the Ethiopian Code of Civil Procedure for which the Ethiopian government had given us the honor of resorting to our services. We wish that the principle which has just been sketched be retained by those who will have charge of preparing this Code. The Civil Code will appear in

these circumstances as having a double function, representing in certain conditions the immediate positive law of Ethiopia, sketching in other circumstances the contours of the law of tomorrow. It is in that manner that it is necessary to conceive, it seemed to me, the role of a civil code in all countries where, as in Ethiopia, one is preoccupied in creating, on one side, the material conditions of an economic development of the country, and on the other hand, aims at renewing at the social level the very foundations of a society which has been frozen for too long a time.

4.3.11 Review Questions

Answer the following questions.

1. What does David say is the traditional Ethiopian concept of law? How does he say this was reflected in the role of the *Fetha Nagast*? How was it reflected in the standard applied by judges or arbitrator in setting disputes? In your experience, to what extent is this a correct statement of the traditional Ethiopian concept of law? What alternative concepts of law are there? Is it possible to have several concept of laws in a single society at a single time? How?
2. David recognizes that "the common law world" has moved far in the direction of codified law. How is it that he says these "codes" differ from continental codes?
3. What is the area of the Code that David foresees the least problem of transaction? Why is this area different in this regard? Is there any way in which this area of the law has particular importance?
4. What alternatives to codification does Professor David suggest that Ethiopia had? Are these the only alternatives you think existed?
5. According to David, how much time did he spend drafting the Ethiopian Civil Code.
6. According to David, why did he draft the part of the code dealing with contract in general first? Was this a reasonable thing to do? Why or why not?
7. What does it mean to say that codification in itself is progress in Ethiopia? Does this mean that "bad laws are better than no laws"?
8. What is the relationship between the Civil Code and the Commercial code in Ethiopia?
9. When David says that Roman Law had its "books of authority, "what is he referring to?
10. What does it mean to say that one country has "received" the law of another? Why is this word inappropriate to describe the Ethiopian codification to the extent that it is based on foreign sources?
11. What procedures were followed in the codification to ensure that the Ethiopian Civil Code would not be at variance with the aims, traditions, and feelings of Ethiopians as to be rejected by the Ethiopian people?

12. Do you think that the Ethiopian Civil Code incorporated sufficiently representative Ethiopian indigenous legal institutions? Present as many views as possible on the issue.
13. Critically examine the reasons why Ethiopia in 1950`s and `960`s preferred to model her codes after the Civil Law traditions, not the Anglo-American law tradition.
14. Explain the idea of the following excerpt. In a codification, one must not be exclusively, or even principally preoccupied with respecting customary law: *the code must not be thought of as being in essence a reformed and modernized customary system. The code must attempt to give the answers which, in a given time and place, are the best for a particular society. If this society is in a satisfactory state, the code will naturally be based on its customs. However, if the society is such that a revolution is necessary if it is to reach a satisfactory state of development, it cannot be founded on custom. The idea that the task of codification must be performed by developing the customary law is varied only in certain circumstances. In others, it is necessary to fight against the customary law with resolution, and cause it to disappear, as an obstacle to the necessary transformation of the society.*
15. Comment on the message of the following quotation.

In Ethiopia, during the codification process, codification was seen as a process intended to use the law as a tool for social engineering in order to improve the development prospects of the country. In so doing, it was intended that the best out of the external systems of law and practices that happened appeared to have worked in those societies would be adapted to the new socio-political milieu in Ethiopia. Although the point of adaptation was stressed and the importance of infusing Ethiopian traditions and culture into the law was an objective, it was clear that those who were responsible for the new codes were guided by the keen desire of modernization rather than by attempts to infuse traditional practices and values. Indeed, "after a general meeting of the Codification Commission established to oversee the codification, the expert then retired to the privacy of his workman, located in Paris, to do the actual drafting.

16. Comment on the following text, which is the preamble of the Ethiopian Civil Code of 1960. Your comments should focus on the objectives of the code, the aspirations of the Emperor and the sources of the rules. *The Civil Code has been promulgated by Us at a time when the progress achieved by Ethiopia requires the modernization of the legal framework of Our Empire's social structure so as to keep pace with the changing circumstances of this world of today. In order to consolidate the progress already achieved and to facilitate yet further growth and development, precise and detailed rules must be laid down regarding those problems which do not only face the individual citizen but the nation as a whole. The rules contained in this Code are in harmony with the well-established legal traditions of Our Empire and the principles enshrined in the Revised Constitution granted by Us on the occasion of the Silver Jubilee of Our Coronation, and have called, as well, upon the best systems of law in the world.*

No law which is designed to define the rights and duties of the people and to set out the principles governing their mutual relations can ever be effective if it fails to reach the heart of those to whom it is intended to apply and does not respond to their needs and customs and to natural justice. In preparing the Civil Code, the Codification Commission convened by Us and whose work We have directed has constantly borne in mind the special requirements of Our Empire and of Our beloved subjects and has been inspired in its labors by the genius of Ethiopian legal traditions and

institutions as revealed by the ancient and venerable Fetha Neguest. It is essential that the law is clear and intelligible to each and every citizen of Our Empire, so that he may without difficulty ascertain what are his rights and duties in the ordinary course of life, and this has been accomplished in the Civil Code. It is equally important that a law which embraces a varied and diverse subject matter, as is the case with the Civil Code, form a consistent and unified whole, and this requirement, too, is fully satisfied by the law which We promulgate today. The careful preparation of this Code by the Codification Commission and the painstaking review which it has received in Our Parliament assure that this law will achieve the purpose for which it is intended.

17. Do you subscribe to the view that the Ethiopian codification process was slolely based on French codes?
18. Do you think that the transplantation of laws by Ethiopia in 1950`s and 1960`s was entirely a voluntary decision? Was it induced by external threat or pressure?

Part II Sound/Unsound Questions
Instruction: Read the following questions with care and say `Sound` if you think that the statement is an accurate description of a principle in legal history, or say `unsound` if you think that the statement is inaccurate description of a principle in legal history.

1. The theory of capitulation was one of the reasons why Ethiopia decided to transplant laws in 1950`s and 1960`s.
2. Article 3347 (1) of the Ethiopian Civil Code gives some recognition to customary laws.
3. In a sharp contrast with the English legal system, the Ethiopian legal system lacks stability.
4. According to Professor Rene David, the Ethiopian Civil Code included sufficiently representative customary laws.
5. Unity of political power was one of the key attributes of 1987 PDRE Constitution.
6. Indigenous legal traditions often have developed commercial and public laws.

4.3.12 Sources of the Ethiopian Civil Code

The following article by Rene David outlines the sources of the Ethiopian Civil Code.

Rene David, Sources of the Ethiopian Civil Code, 4JEL2 (1967).

Rather than associate the idea of law with the infinitely varied and always disputable customary rules, Ethiopians have connected it with compilations that were assumed to reflect great wisdom and eminent dignity. Leaving aside Islamic law, which Muslim Ethiopians consider, at least theoretically, to be sacred, Ethiopian Christians acknowledge the authority of a religious canon that was drafted in the mid-thirteenth century by an Egyptian scholar, Al-Asad Ibn-al-assal, and translated in the sixteenth or seventeenth century from Arabic into Ge'ez, the liturgical language

of the Coptic church. This collection, the Fetha Negast (Justice of the kings), was invoked reverently, but the fact that it was never translated into Amharic, the official language of Ethiopia, and has never been printed in Ethiopia, creates doubts as to whether courts have ever consistently applied it. What is interesting to note, however, is the concept of law that is revealed by the respect professed in Ethiopia for the Fetha Negast.

Ethiopians see the Fetha Negast as The Law, even though their customs and conduct do not strictly conform to its commands. For them, court decisions in disputes cannot embody The Law; since such decisions must be expedient and practical. Neither could The Law be defined as the prediction, even if sufficiently certain, of the solutions that the judges might give in future litigation. As in Europe before the codification, as in Islam, The Law has a moral aspect for Ethiopians that removes it from practical affairs. It is a basis for social order, closely connected with the moral commands of religion. Ethiopians are not at all shocked that customs and court decisions are not in accordance with The Law. That is seen only as proof, alas wholly unnecessary, that society is imperfect. What would shock them would be for the sovereign, by adopting these customary rules, to require of them behaviour which is indeed their own, but whose reprehensible character recognize fully and on occasion deplore. In order to understand the Ethiopian concept of The Law, we need only recall that all European universities until the nineteenth century taught principally, and often exclusively, a body of ideal law – Roman law or natural law – without bothering to describe the rules which, in practice, were being applied by the courts.

Although a century of legal positivism took us to form this concept of law, we seem to be rapidly returning to it by the circuitous route of teaching more social sciences in our law schools. In addition, the present trend toward a welfare State and the efforts that are being made, particularly in the socialist countries, to reorganize society on a new, more just, basis are leading us back to the idea that The Law ought not simply to reflect customary behaviour and the present state of human relations. Legislation must be progressive, ahead of present practice; it must be designed to reform the society. The Law's functions cannot be merely to declare and enforce custom.

If this be true in developed countries, it must be even more so in countries like Ethiopia, that are less developed, where everyone, and especially government leaders, wish to work a revolution that will close this gap. If the goal of codification had been seen as the enactment, articulation, and systematization of customary rules, tradition would have been maintained only in appearance. In reality, such a work would have betrayed this tradition, by abandoning its high idealism. An unjustified preoccupation with legislating anthropological findings would have perpetuated the mediocrity inherent in old customs rather than reforming them as was intended.

As a result, when the Ethiopian sovereign decided to codify Ethiopia's law, and particularly the civil law he never intended that the new code should be based exclusively on Ethiopian customs. Rather he wanted a new edition of the Fetha Negast, just as the European codifications of the nineteenth and twentieth centuries aimed to renew the ideal base formerly furnished by Roman law, setting forth what was conceived to be natural law. The difference is that the way for this European exposition of natural law was well prepared by the successive schools of Roman law scholars and writers, from the glossators to the pandectists, with the aid of political scientists and anthropologists of the time. In Ethiopia, nothing of this sort could have taken place, and it was to

foreign legal scholarship, to comparative law, that one had to look to determine what rules would be proposed as the model for the Ethiopian people.

There was a danger that one consequence of this would be that the new code would be foreign to Ethiopia, and that though the Code might be admired as a masterpiece, it would become irrelevant to legal practice, as the Fetha Negast had too often come to be. The Code's authors were aware of this danger and, without reproducing customary rules, which had to be reformed they sought to create a work that would be, in spite of its progressive character, or because of this character, an Ethiopian work, and thus be capable of guiding legal practice in the future.

The preceding considerations explain the importance and role of both Ethiopian and foreign sources in the Civil Code of Ethiopia. Its authors wanted the new code to correspond to what Ethiopians consider just, but at the same time they had to create a useful work. Thus, they tried to renovate, modernize and supplement Ethiopian customs by utilizing comparative law. The Ethiopian feeling for justice is the basis of the Code. No rule in the Code violates this feeling. The dispositions of the preliminary draft, prepared by a foreign jurist, were rejected or modified whenever they seemed contrary to it, even when the foreign advisor considered them just and advantageous for Ethiopia. Let us look at some examples of this process.

In the area of successions, the preliminary draft gave the surviving spouse fairly important rights of inheritance. But an Ethiopian concern for keeping property within the blood family required that these provisions be eliminated. It was inadmissible that a spouse might inherit property that the deceased had received from his family. The spouse does not even inherit where the deceased leaves no relatives; the State is preferred. The preliminary draft contained several provisions protecting a person who, even in bad faith, knowing that he is not the owner, sows, plants trees, or builds something on the property of another. It also provided for usucaption with respect to immovable property. And in order to combat the excessive breaking up of land, it gave neighbors a right of recovery. All of these provisions were substantially revised because they did not accord with Ethiopian values, which are passionately attached to immovable property and reject the idea that a person might be deprived of his property without an intentional act on his part.

The preliminary draft made the owner liable for accidents caused by his automobile even where it was driven by a thief that had stolen it from him. The drafter argued that the owner of the automobile ought to carry liability insurance and that the insurance premium would not be any higher if it covered the risk of an accident caused by a thief. The victim of an accident, on the other hand, was in danger of not being indemnified if the Code provided that only the thief who caused the accident would be liable. Although no answer could be given to these arguments the result so offended the Ethiopian sense of justice that it was not possible to include this extreme case of liability without fault. Thus, the preliminary draft's recommendation was rejected.

On the other hand, the Ethiopian code includes a case of liability without fault that is not to be found in western codes but that is in accord with Ethiopian concepts and customs. A person who causes death or bodily injury to another is liable to the victim or his family even in the absence of any fault. This provision was included because of the great concern of the Code's authors to have it in harmony with the Ethiopian sense of justice.

Many other examples could be given.They are found primarily in the first three books of the Code (Persons, Family and Successions, Goods) and in the chapter on extra-contractual liability. To

read these parts of the Code is to be convinced that it is an Ethiopian civil code, made for a society which is different in many respects from the societies of Western Europe. The relation between the new Civil Code and the old Fetha Negast is easy to see in these parts. While reflecting Ethiopian society, these provisions still do not reproduce past customary rules without change. Rather they endeavor to respect these customs, while taking a forward step to guide Ethiopian society toward a level which is more developed and, in the author's eyes, more just.

The rules on divorce show how this approach worked. On divorce, the code does not follow the Fetha Negast, which only deals with religious marriage and thus prohibits divorce. The Code's drafters thought that their work would be useless if they disregarded the facts that religious marriage is fairly rare and ordinarily contracted late in life and that divorce can be obtained without difficulty and occurs frequently. The Civil Code follows custom in providing that divorce ought to be pronounced whenever one of the spouses insists. The concern for progress, however, is apparent in these divorce provisions. The Code differentiates according to whether or not there exists a "serious cause", or ground, for divorce. If there is a serious ground, divorce must be pronounced quickly, and the spouse who is at fault may be subject to sanctions. But if there is no serious ground, divorce need not be pronounced so quickly and sanctions may be imposed against he who, without a serious ground, has requested the divorce.

What about the law of property? The Code keeps the right of recovery which was customarily given to the family when an immovable is sold. But the possible inconveniences of this rule are attenuated by specifying the persons who can claim the right and by setting forth the way in which it must be exercised. The most important accomplishment of the civil code in the areas of persons, family law, property, and delictual liability was clearly, rather than to change the customary rules, to clarify these rules, to distill their essence, and to unify them on the basis of those which appeared most reasonable. Our goal was to end an intolerable confusion and uncertainty by choosing the rule most in conformity with the Ethiopian sense of justice and Ethiopia's interests, economic and otherwise.

In these traditional areas, the principal contributions of western legal systems relate to the critical process used to select those rules that appear best suited to Ethiopia and the techniques used to formulate the rules. Thus, the Code limits itself to suggesting some new approaches and solutions, sometimes inspired by western practices, sometimes different from these practices but judged desirable in the social context of Ethiopia. The western contribution is much more important, and in some cases even exclusive, in those parts of the Civil Code where Ethiopian customs provided no assistance. This is particularly true of most of Books IV and V of the Civil Code (Obligations In General and Special Contracts) and of the chapters on registers of Immovable Property and Literary and Artistic Property in Book III (Goods). In these areas it is not just a technique, a system, and directives for further development that are adopted from the west. Whole slices of western law have been imported to Ethiopian law.

Still, even here the importation is not total and conditions peculiar to Ethiopia have of course been considered. This can be seen easily if one reads the Title dealing with Contracts for the performance of Services, and particularly the Chapter of this Title which deals with contracts for agricultural employment. Ethiopia is not in a position to offer its citizens the same social security benefits that are enjoyed by citizens of economically more developed, western states, and the need to attract foreign capital often prevailed over considerations of what was human and even just, which might have discouraged the establishment of foreign enterprises in Ethiopia. It has been

rightly said that "Before having anti-trust laws, one must have trusts"; before thinking of protecting Ethiopians in their labour relations, attention must be given to securing work for Ethiopians. On contracts relating to immovable property, also, one will often find reflections of conditions peculiar to Ethiopia.

Reservation made for provisions particularly suited to Ethiopia, it is nevertheless a modern, western system that has been adopted in these areas. The word "reception" cannot properly be used, however, for no specific code or western legal system has been adopted. The Ethiopian Civil Code is an original creation, based on comparative law, in which rules have been selectively adopted from various foreign legal systems, supplemented, and organized in a manner that is unique in some respects. Thus, we have a synthesis, put together with an effort to be comprehensive, rather than a reception. In these areas, the Ethiopian Civil Code could best be viewed as a possible uniform European law, rather than a reproduction of some particular national law.

In this work of synthesis, it was natural to utilize the efforts which have been made from time to time to create uniform European law. Thus, the draft uniform laws that were prepared in Rome on sale of goods: arbitration, and liability of hotel owners were generally adopted by the Ethiopian Civil Code, just as the Ethiopian Commercial Code adopted, in the area of checks and bills of exchange, the provisions of the international conventions signed in Geneva in 1930 and 1931. The provisions of the Rome draft laws were modified slightly, but only in their presentation so they would conform to the style of other articles of the Code; these are divided into a maximum of three sub-articles, each sub-article being composed of a single sentence. Only in very exceptional cases was the substance of the draft uniform rules modified.

Where there was no international statute or draft statute, it was necessary to start from the various national laws and develop rules to regulate the subject as seemed best. The principal sources that were used in this way were the civil codes of Egypt, France, Greece, Italy and Switzerland. In the area of obligations, the author of the preliminary draft gathered together the provisions of these five codes, for the most part in order to supplement each by the others. He endeavored to make the code as complete as possible. To this same end he went beyond the codes and considered some non-code statutes and treatises. This was necessary because of the absence of judicial decisions or scholarly writings that could otherwise have filled the gaps in the Ethiopian Code. The authors of the Ethiopian Civil Code did, however, readily eliminate provisions contained in foreign codes where they seemed either to deal with questions of no practical importance, to introduce uselessly subtle distinctions, or to deal with situations peculiar to the foreign country that do not exist in Ethiopia.

Our primary purpose in considering these various codes was to see what questions need to be covered. The solutions of the various relating codes/to each of these questions were then compared and their differences noted. Finally we asked what formula would be best, whether imported or original, for the Ethiopian Civil Code, in light of the special circumstances that exist in Ethiopia and of the most modern tendencies. In fact, it is doubtful that a single article of the Ethiopian Civil Code is absolutely identical with an article of the codes considered, since the rules that governed the formal presentation of the articles and the choice of terminology led the authors of the preliminary draft in almost all cases, if not in all, to avoid the formulas employed elsewhere.

The search for the best legal rules went beyond examination and comparison of the codes cited above. Comparative law research was pushed even further, and, in particular, some articles of the Ethiopian Civil Code are of common law inspiration. Examples of this are the manner of determining breach of contract damages, the frequent reference to the idea of "reasonable time," and the detailed rules provided for specific cases of delictual liability.

On the whole, however, it is possible to say that the principal source of the Ethiopian Civil Code with respect to the law of obligations was the Swiss Federal Code of Obligations. And French law was a very important source. The French Civil Code itself seemed to us to have surprising merits in spite of its age when put to the test of comparison. In addition, doctrinal works were used where it appeared opportune to cover an area but there was no appropriate legislative regulation. Thus, M.Rodier's "La responsabilité civile" was used extensively in preparing the rules on delictual liability, M. Waline's "Droit administratif" in the area of expropriation, and M. de Laubadére's "Traité théorique et pratique des contrats administratifs" for administrative contracts. The other codes, in the final analysis, provided less material: the Italian Civil Code often appeared too dogmatic and too subtle, the Greek Civil Code too casuistic, and the Egyptian Civil Code too concise. These comments are not criticisms of these codes; for the countries they serve, they may be perfectly appropriate. We are setting forth here only the difficulties that were experienced in using them to prepare a civil code for Ethiopia. Similar considerations dissuaded us, for example, from using the German Civil Code (BGB), in spite of the admiration that this work deserves from a scientific point of view.

Outside the area of obligations, a wider group of sources was used. A Portuguese draft law and an Israeli draft law thus served as the basis for the successions provisions. Rules were borrowed from the former Turkish Civil Code (Medjelle) and from the Iranian Civil Code concerning the ownership of water. Even the agrarian code of Soviet Russia was used, along with a Russian treatise on Kolkhozes, in order to regulate the position of certain collective exploitations, although this part of the preliminary draft was rejected later in the codification process. Also abandoned was the idea of beginning the Ethiopian Civil Code with general principles, presented as "Rules for Judges," after the Swedish tradition of "Domarereglerna"; the Swedish code also abandoned this technique several years ago.

Finally, it should be added that some parts of the Ethiopian Code are "original" in the sense that they are based neither on Ethiopian customs nor on provisions of foreign legal systems. Of particular note are the rules governing water rights, those on registers of civil status, and to a lesser degree the provisions on registers of immovable property, guardianship, and wills. In these areas, it was thought imperative to establish rules, but the Ethiopian customs did not offer a solid basis for the rules and the regulations found in western countries were unsuitable. Creative legislation was therefore required and it seemed possible to integrate it into the code's general system.

4.3.13 Review questions

1. Enumerate the various sources Rene David claimed to have used in drafting the Civil Code.
2. Does Rene David imply that he adopted an eclectic approach: taking materials from every useful source not just from one?
3. What does Rene David mean by reception? Why does he think that the Ethiopian case of codification cannot be designated as reception?

4. What are some of the remarks Rene David has made in relation to custom? Why could custom be the foundation of the Ethiopian Civil Code?
5. How does Rene David describe the state of the Ethiopian legal system just prior to the massive codification?
6. Which parts of the Ethiopian Civil Code may rightly be, to Rene David, home grown and which parts of it may be taken as foreign grown? Why?

4.3.14 The 1957 Penal Code: In 1950`s, Ethiopian criminal law was mainly contained in the Penal Code of 1930. Subsidiary legislation published in the Official newspaper (Negarit Gazeta) supplemented the code provisions. But by then, the conditions in Ethiopia had changed since 1930. It was also expected that conditions and laws had to change in the future. Ethiopia also made a decision to modernize all areas of her laws. Some of the shortcomings of the 1930 Penal Code also became an additional factor for Ethiopia to revise her penal code. For example, the 1930 Penal Code lacked in general principles. It showed too many traces of the ancient and formalistic conception of the criminal law with regard in particular to attempts, participation, excuses, aggravating and extenuating circumstances, the imposition of fines, the punishment for injuries to persons. The code was also incomplete and out of date in matters such as criminal responsibility and guilt, the treatment of juveniles and habitual offenders, probation, and the like. These considerations led Ethiopia to replace the 1930 Penal Code. The primary objective of the Code was to meet the needs of a developing nation. A British legal expert drafted the 1961 Criminal Procedure Code, which supplemented the 1957 Penal Code. The former was based on the Swiss Penal Code and many secondary sources. The latter reflected the influence of English common law.

Professor Jean Graven prepared a draft of the revised penal code based on the civil law tradition. He adopted the civil law tradition after he received instruction from Emperor Haile Selassie I and after he deliberated with the Codification Commission. The code also included "the contributions of the most significant systems of jurisprudence in the world of today". This means, the code incorporated some legal rules seen as best even if they came from the common law system and from comparative law. The model adopted in preparing the revised Penal Code of Ethiopia was also applied to the preparation of the other codes. The revised Penal Code did also take some traditional perspectives into account, for example, in the areas of arson and bigamous marriage.

Jean Graven submitted his draft in French to the Codiffication Commission. The Commission was composed of Ethiopians and foreigners. After review and some alterations by the Commission, it was then translated into Amharic and English. The Code was officially adopted in 1957. It was modeled after continental penal codes, primarily the Swiss Penal Code.

The main domestic sources used in preparing the revised penal code were: the Fetha Negast, the 1930 Penal Code and the subsidiary legislation published in the Negarit Gazeta. The Codification Commission considered the Fetha Negast. The Fetha Nagast was taken into account because it contained several prescriptions of a penal nature. It was taken into account because it was taken as the source of Ethiopian legal tradition. The other reason for the drafters taking the Fetha Nagast as a source of the Revised Penal Code was that it had a number of fundamental principles that had to be taken into account in the drafting of an Ethiopian penal code. An instance of such basic principles was the essentiality of guilt.

The Codification Commission and the drafter consulted the Code of 1930. The 1930 Penal Code indicated to the Commission and the drafter that customary rules had been very important and which modern rules had been acceptable in 1930. The 1930 Penal Code served as the starting point in the process of preparing the revised Penal Code of 1957. All subsidiary legislation containing penal provisions enacted since 1942 was also taken into consideration. This was done as result of the proposal of the Codification Commission to incorporate the said provisions in the Penal Code.

In addition to these national sources, foreign sources had been used. The foreign sources came mainly from European penal codes. The country preferred European codes because the Codification Commission thought it consistent with the country's tradition. The 1930 Penal Code adopted the European model and the Fetha Nagast also preferred the codified law approach. This does not mean that the Anglo-American model was not considered at all. Some areas of the Revised Penal Code were of British origin. For example, matters relating to juveniles, suspension of sentences and probation etc. came from the English legal system.

One can cite the following specific European penal codes: the Italian (1930), Swiss (1937), Greek (1950) and Yugoslav (1951) penal codes. The Swiss Penal Code was the primary source for many reasons. The Swiss Penal Code had deep and lasting influence in and outside Europe. Second, the Code ranked among the most recent Codes as it was partially revised in 1950. And the Swiss Code was drafted to apply to conditions somewhat similar to those in Ethiopia (diversity of people, languages and legal traditions). Certain provisions of the Ethiopian Code either are directly derived from the Swiss Code or incorporated views expressed by Swiss courts and legal writers.

4.3.15 The Commercial Code: Multiple considerations dictated the adoption of a comprehensive, systematic, clear and solid commercial law in Ethiopia in 1950`s

and 1960`s. With the increase in the number of cities and towns along Ethio-Djibouti railway, the increase in the number of people with interest in commerce and possessing managerial skills and the developments attendant to the Italian occupation, the country witnessed a gradual increase in its commercial life. It was rightly realized that these emerging commercial activities in the country could not adequately be governed by the then existing incomplete and unsystematic laws as embodied in the Law of Companies (1933), the Law of Bankruptcy (1933), the Law of Loans (1924), the Law on Registers of Commerce and the few commercial rules in the *Fetha Nagast*. The available court cases were found out to be unsatisfactory on accounts of lack of comprehensiveness, of consistency and of accessibility. At the time the country did not have comprehensive and systematic contract rules. The government desired not only to regulate the then nascent commercial activities in the country, but also it desired to capture future commercial development, as the drafter made it unambiguously clear, the commercial law Ethiopia adopted was a forward looking law. The state earnestly wished to collect revenue through the instrumentality of commercial devices. Therefore, these considerations led to the adoption of a commercial code to meet the old age basic needs of commerce: predictability and sanctity of contracts.

Once Ethiopia reached the decision to have a comprehensive commercial code, the next query was the sources of those commercial rules. The then mainstream theory about law and society, the instrumentalist theory, pointed outward. This theory held that traditional communities such as Ethiopia could not furnish the urgently needed commercial principles and rules internally. The supporters of this school of thought argued for a wholesale importation of commercial policies and laws. Moreover, the key client of the codification project in Ethiopia was Emperor Halieselassie I who also directed the draftspersons to take from every best aspects of the law of commerce of any country so long as such laws were found out to best suit Ethiopia's need. Owing to the influence of the instrumentalist approach to the relation between law and society, the policy direction given to the draftspersons and the natural vacuums in customary laws and the specialty of the persons whose services were sought, the Ethiopian Commercial Code heavily drew both on continental and common law perspectives.

Following the decision to adopt a foreign grown code for Ethiopian based on a hybrid approach, a code anchored on continental, common and comparative law thinking, the specific material sources had to be identified. The specific domestic documents consulted were the Fetha Nagast, Laws on Loans, Laws on Registration, Laws on Bankruptcy, Laws on Companies, court decisions, commercial practices and experiences while international conventions, insights

of the drafters and the commercial laws of some foreign countries such as Switzerland, France and England were considered.

As to the relation between the Commercial Code and the Civil Code, Ethiopia preferred to come up with two separate but related codes deviating from the unification in a single code of commercial law and civil law opted by Switzerland and Italy. The legal connection between the two codes is established in Articles 1 and 1677/1 of the Commercial Code and the Civil Code, respectively. These stipulations make it clear that on commercial dealings the former preempt the latter while in the case of civil dealings the latter prevails over the former. Because of its comprehensive character, in the case of gaps, the Civil Code plays gap-filling role. In the words of Escarra, ``the Ethiopian Commercial Code contains, on the one hand, specifically commercial institutions, and, on the other hand, by reference to the Civil Code, the general rule of law for those contracts and obligations which apply to both traders and non-traders, with the exception of a small number of cases…``

The draftspersons did not prefer the Code to be too detail nor did they want to see it to be too brief. Too detail a code would introduce unnecessary rigidity in future legislative development. Too brief a code would invite unnecessary interpretations, supplementary legislation rather frequently and unsuitable to a country without developed legal structures. The code, like in number of areas, struck a balance in including those commercials concepts, rules and principles that are absolutely indispensable for regulating commercial life in Ethiopia in a sufficiently complete, solid and enduring manner, of course, without ruling out the need for supplementary legislation occasionally.

Drafted in French, then translated into English and then subsequently into Amharic and following closely the footsteps of the Ethiopian Civil Code in terms of fundamental tenets as well as organizational pattern, the Code is composed of five books. Book I introduces several foundational concepts of which the most important to the understanding of the Code is the subjective approach to crafting a commercial code. The subjective approach, as opposed to the objective approach (which sets out to define commercial dealings or acts) begins with the definition of status, i.e., by defining the attributes of those who engage (in the language of the Code called traders) in commercial as opposed to civil transactions. In the words of Escarra, the subjective approach to the definition of the scope of a commercial code is: ``the legislature which promulgates the Commercial Code can declare, by a sovereign act, that the Code will regulate a community of persons designated as ``traders.`` In his expression, the objective approach is ``the Commercial Code will regulate not persons but ``acts,`` called ``acts of commerce,`` to which commercial law applies no matter what the status of the individuals who carry out these acts.``

In Book I the Code also included such concepts as business, freedom to engage in commercial activities and unfair commercial competition. Book II puts together rules which govern the formation, operation, expansion, dissolution and winding-up of business associations. The next portion, Book III, of the Code addresses two significant types of commercial transactions: carriage and insurance. Book IV deals with two cases where law concerns itself with chance, i.e, games and gambling. The last book, Book V, regulates bankruptcy and schemes of arrangement, which among others, refers to the case where a trader is unable to satisfy the claims of his creditors followed by court declaration to that effect. Like the organizational pattern of the Ethiopian Civil Code, the Commercial Code beginning with the smallest functional unit (word) extends to the largest unit of the Code, a book. In between, one finds sub-articles, articles, paragraphs, sections, chapters and titles.

Here, it is befitting to describe the masters of the Code. In late 1953, Professor Jean Escarra, professor of comparative commercial law at the University of Paris and Chairman of the Commission for the revision of the French Commercial Code, accepted an offer from the Imperial Ethiopian Government to draft a Commercial Code and Maritime Code for Ethiopia. During 1954, he made several trips to Ethiopia to consult with the Ethiopian Codification Commission and submitted to the Commission the bulk of the texts later promulgated as Book II, IV and V of the Ethiopian Commercial Code together with brief explanation for including certain provisions for most of these texts. Unfortunately, Professor Escarra`s death in August 1955 interrupted work on the Commercial Code and it was apparently not until several years later that the Imperial Ethiopian Government invited Professor Alfred Jauffret, professor of commercial law at the University of Aix-Marseille in France, to draft the texts of Books I and II as well as to revise Professor Escarra`s work. Professor Jauffret submitted his final draft texts with a Final Report on March 1, 1958. The Codification Commission reviewed these drafts in April 1958 and made several amendments to the text of Book I. The Amharic translation of these texts was then submitted to the Parliament, which in early 1960 approved the draft with several amendments. On May 5, 1960 Haile Selassie I promulgated the text of the Commercial Code by Proclamation No 166 of 1960 and the Code came into force on September 11, 1960. (See Background Documents of the Ethiopian Commercial Code of 1960 (ed. & trans. Peter Winship), (Addis Ababa, 1974) at iv.

The Commercial Code of Ethiopia was designed to facilitate the creation and sustenance of capital and managerial skills in the belief that such capital and business know-how would in aggregate better off Ethiopians in general, not just to enrich persons of wealth. This assumption, i.e., the welfare of the majority, was a natural assumption by a country like Ethiopia that was aspiring to

transform itself from the heavy hand of feudal elements to capitalist structures. The Code with this assumption lasted a little more than a decade. Though informal attacks on the feudal system in Ethiopia dated back to early 1960`s, the annihilation of the system formally came in early 1970`s. The Ethiopian Revolution destroyed the spirit and the letter of the Code`s stipulations. The Code gave primacy to private initiatives whereas the policies and the laws of the revolution rested on the primacy of public initiatives on the explicitly stated commercial policy that the creation, re-creation and maintenance of capital and managerial skills by private persons would only benefit men of wealth to the utter detriment of the majority. The stated anti-thesis of the Code the revolutionary government promoted was that the interests of state institutions such as state owned enterprises and cooperatives was similar, if not identical to, with the interests of the people. This thesis ended up with putting resources, material and human, in the hands of the state.

Armed with this commercial policy, the state issued several laws including that which nationalized rural and urban land, extra-houses in towns and cities, and mass nationalization of private businesses, limited the number of businesses a private person could run to one and with a limited amount of capital and prohibited private persons form engaging in certain economic activities, etc. The net effect of the revolutionary thesis on commercial matters was stifling private initiatives and opening a wide avenue for a transition from business associations to cooperatives and state enterprises.

In May 1990, the Ethiopian Government compromised its stance on command economy by declaring the mixed economy. The compromise entailed the lifting of the numerous restrictions on private initiatives such as on matters of land lease, capital ceilings, sectors of the economy, the number of businesses one could operate, etc. Such gesture, however, was short-lived as the government was overthrown. The government that assumed political power liberalized the economy, leading to the revival of the spirits of the Code that had never been repealed in the period between 1974 & 1991; there were few opportunities for its full-fledged application. Since 1991, Ethiopia has been advocating for privatization of public enterprises and private investment. Since 1991, Ethiopia has been removing the earlier multifarious limitations in terms of forms of business, capital ceiling, types and number of businesses and marketability of land.

The development of commercial law in Ethiopia passed through (a) the period of piece-meal legislation (prior to 1960), (b), the period of a comprehensive and systematic commercial law (1960 & 1974), (c) the period of anti-western commercial law (between 1975-1990) and (d) the period of the revival of the spirit and letter of western-based commercial code, which is since 1991.

4.3.16 Review questions

Answer the following questions.

1. *The future Commercial Code of Ethiopia must be able to adapt itself easily to the unplanned transformations which will probably take place in the commercial and economic life of the country at a rapid rate during the course of at least a generation, if not a half-century. One very important and relevant point to keep in mind is the attitude towards foreign capital which might be invested in national enterprises and which could contribute to the development of the Ethiopian economic life without dominating it. Commercial legislation which, while respecting national sovereignty, gives foreign capital, if not special advantages, at least sufficient protection, would have beneficial effects for the economic future of Ethiopia.* (See Escarra, Preliminary Report on the Preparation of the Commercial Code of Ethiopia, submitted to the Imperial Commission for the Codification of Ethiopian Law (18 January 1954, Comm. C Doc. No. 1.) Comment!

2. *The Ethiopian Commercial Code has a foot in both English and French camps. Although based on continental principles, the Code has been published in both English and French, has amalgamated continental and English rules on many substantive legal points (notably on the rules governing commercial paper), and has adapted these rules to the African context.* Comment! (Peter Winship, in Background Documents of the Ethiopian Commercial Code of 1960 at iii.

3. *By the very nature of things, traders in all countries have similar needs and consequently the same institutions may be viable in many countries whereas their civil concepts may be very different. For example, family, marriage and succession laws or even the law of property may be completely different in many countries. But all traders buy in order to resell; all enter into contracts whether of sale, agency, pledge, or carriage; and all use forms of banking credits. Bills of exchange, share companies, private limited companies, bankruptcy and other collective procedures for liquidating the goods of a trader are all institutions known almost everywhere. Thus, to use comparative law as an element of legislative policy is less dangerous in commercial matters than in the domain of pure civil law*… Do you agree with this analysis? Escarra, in Peter Winship, Background Documents of the Ethiopian Commercial Code of 1960 at 7.

4.3.17 Potentials and limits of codification

Arthur Taylor van Mehren,``The Potentials and Limitations of Codification`` 8JEL1 (1972).

On May 5, 1960, the Emperor promulgated the Ethiopian Civil Code. In the Preface to the new code, the Emperor speaks of the need for "precise and detailed rules" and further states that: "It is essential that the law be clear and intelligible to each and every citizen of Our Empire so that he may without difficulty ascertain what are his rights and duties in the ordinary course of life, and this has been accomplished in the Civil Code. It is equally important that a law which embraces a varied and diverse subject matter, as is the case with the Civil Code, form a consistent and unified whole…"

In this passage are underlined two of the values traditionally emphasized in discussions of codification, simplicity and intellectual coherence. The problem of codification is, however, more complex and subtle. My purpose is to develop a fuller statement of the potentials and the

limitations of codifications. Such a consideration may assist in understanding better the proper role and possible contribution of the new code.

The classical Western codifications, for example, those of France and of Germany, can be looked upon as historically inevitable responses to their society's need to have a law coextensive with effective political and economic units that had already emerged. France and Germany were for historical reasons politically and economically nations before they had a uniform national law and administration of justice. Indeed, England is the only European country in which a gap between the effective political and economic units and the effective legal unit did not persist into relatively modern times. And when a contemporary polity faces the need and has politically speaking, the opportunity to close such a gap, considerations of convenience and of expedition make recourse to legislation normal.

A somewhat related purpose-that of modernizing the society's legal rules and principles-is typically encountered in developing societies where it is desired to change certain aspects of social and economic patterns that are not fully consistent with the requirements of a modernized social and economic structure. Both these potentials of codification underlie in significant measure the Emperor's decision to promulgate a Civil Code. Of course, promulgation alone does not ensure that these goals will be achieved. A wide gap often exists between official law, whether codified or not, and actual practices and conceptions. Article 32 of the Ethiopian Civil Code, which requires that every individual have a family name, furnishes a convenient example of this proposition. The difficulties of obtaining legal unity and modernization through formal law-in particular codification-are many in a society such as Ethiopia. This is not, however, an occasion for the exploration of this topic. For present purposes, it suffices to note that codification serves to provide the structures of formal and uniform rules and principles in terms of which legal unity and modernization can be pursued by a society.

Let us turn then to a consideration of some of the other purposes that a codification serves. The Preface of the Civil Code emphasizes, as pointed out above, simplicity, clarity, and coherency. In what sense and to what extent can a Code promote these values? A well-drawn Code forwards simplicity and clarity in the administration of justice by providing a very useful law ordering and finding device. A successful code is a sophisticated index to legal rules and principles and draws together subject matter that is related in terms of policy and purpose so that interrelations are more easily perceived and understood. Other, but more cumber-some, devices serve these functions in uncodified systems. For example, in the United States elaborate digest-indices keyed to a comprehensive system of unofficial law reports orders the decisional materials in terms of which so many problems are approached in a case-law system.

In addition, a code can provide a definitive answer to certain kinds of problems; in particular, questions that are frequently encountered in identical or nearly identical terms in the administration of justice and that admit of categorical answers as distinguished from answers derived from a weighing of various relevant elements. Thus the age for majority can be clearly prescribed but not what constitutes hindrance of performance "so that the essence of the contract is affected" and cancellation is available under Article 1788 of the Civil Code. No system of law, codified or otherwise, can provide simplicity or certainty where the problem requires for wise resolution or exercise of judgment by the adjudicator as distinguished from a mechanical application of a dispositive rule. And for various reasons, including the tendency of life to defy attempts to contain it in a single, simple category, the areas in which legal rules can be truly

simple and precise are fewer and more restricted than one initially assumes. Some codes, in particular the ill-fated Prussian Allgemeines Landrecht at the end of the 18th century, have ignored this natural limit upon codification. The effort to do too much inevitably results in a confusing and unworkable situation. When natural limitations upon codification are largely ignored by the codifier or, subsequently, by those charged with the code's administration, the codified system cannot long endure.

Another limitation upon codification that must be kept in mind is that the Code, with the passage of time, inevitably becomes less central to the administration of justice and loses, as well, a significant measure of its original simplicity and intellectual coherence. The reasons for this phenomenon are obvious. As time passes, new problems and new values, which the code did not-indeed, could not-take into account, emerge. Consequently, new solutions are required that may not derive easily or directly from the code. In addition, the materials that must be mastered in order to understand what meaning the code has in actual application expand significantly as a body of adjudicative experience is built up with respect to code provisions. Ultimately, this process of aging reaches the point at which the code is nothing more than a formal starting point for legal reasoning and-in the form of annotated edition-a convenient law ordering and finding device. In some fields, for example, that of delicts, the French Civil Code of 1804 is now in this position.

There is another limitation upon codification that deserves mention. A limitation that flows directly from certain advantages of codification, those already mentioned of simplicity, clarity, and intellectual coherence. There is a human tendency, especially where a code is still relatively young, to overestimate its potential. This leads to rather mechanical and wooden interpretation and impedes the further development of the legal order. A code is a useful aid in our thinking about legal problems but it should not replace thought and reflection.

In reflecting upon codification it is also well to keep in mind that wise solutions to legal problems require attention not only to general structure and intellectual symmetry but also to the specific facts of individual cases. A code system, especially when it is still relatively young, tends to operate in many fields on a higher level of generalization than is probably wise. (Conversely, uncodified systems in many areas may be too particularized and lose the ordering and disciplining value of intellectual structure and coherence.) Codified systems thus benefit greatly from study of the judicial decisions applying the code. Such study sensitizes the jurist to the importance of understanding a particular problem in its full factual complexity. (Conversely, uncodified systems benefit greatly from the structure and discipline that are imposed by reflective legal scholarship upon the particularized solution of disputes.)

In suggesting some of the potentials and some of the limitations inherent in codified legal systems, my basic purpose is to show that no legal system-codified or uncodified-can provide complete or permanent solutions. At some periods, it has been urged that certain codified systems were logically complete; that is to say that the system either contained explicitly the solution to any given problem or, if not, a solution could be derived from the code through purely logical procedures that did not involve considerations of policies and of values. This audacious claim of logical completeness has not survived the hard test of experience. The legal materials in the case of Ethiopia, a civil code-with which we begin our efforts to resolve wisely legal problems embody, of course, a great deal of organized and disciplined human experience. A sound legal order accepts the discipline and direction contained in the system's authoritative starting points for

legal reasoning, but does so understandingly and with awareness that where circumstances or values have changed, new solutions may be required. A jurist's responsibility is always to understand and, where past solutions no longer appear appropriate, to create new solutions adapted to the society's needs and to its legal and social traditions.

You will, therefore, as future men of the law do your country and your profession a disservice if you approach understanding your code as a simple exercise in grammar and in dictionary definition. You need to study the policies that inform its provisions and to be aware, as well, that the drafters could not fully grasp even the complexity of the present, let alone what the future will bring. With such awareness, you will be less likely to abdicate your responsibility as jurists to develop and adjust the law as society comes both to understand more fully problems that were foreseen when the code was drafted and to face new problems that either did not then exist or were not foreseen by the drafters.

4.3.18 Review questions and notes

Part I Answer the following questions.

1. To Mehren, what are the pros and cons of codification? What precautions should be taken in applying codes to specific situations?
2. What pieces of advice Mehren offers to those in charge of teaching or applying codes?
3. Is it correct to state that the assumption of Mehren is that the vagaries of life cannot under all situations be subject to pre-determined comprehensive and systematic codes? Do you agree with his assumption? He says a judge may encounter situations that existed prior to or at the time of codification but not addressed in codes or situations that did not exist nor could be anticipated at the time of codification may arise. How should judges treat those cases?
4. Is Mehren advising us not to apply code provisions mechanically?
5. Give a brief description of the Ethiopian Civil Code.
6. Give a sketch of the working of the Codification Commission.
7. Describe the Fetha Nagast.
8. The Civil Code can be described largely as transplantation than an adaptation. Even if the Code incorporated traditional legal institutions, it has not, it is argued, adequately included those indigenous institutions. Do you endorse these assertions?
9. *Ethiopia's juristic development presents, in most respects, a striking contrast to the rest of sub-Saharan Africa. Only Ethiopia had its own ancient code of law. Ethiopia alone evolved a unique legal system related to its tradition and to both continental and common law concepts. Also extremely original is the pace of development in, respectively, Ethiopian public and private law. Indeed, while in the constitutional field, Ethiopia can be distinguished from most of Africa by the caution and gradualness with which its political structures evolved from the traditional Ethiopian concepts of government, in the sphere of private law the reverse is true: in another contrast to most of Africa, the recent reform of private law in Ethiopia was sudden and total. The reward for the gradualness in Ethiopian constitutional development has been a political stability unique on this strife-torn continent. As to the reasons for the abruptness of our private law reform, they are discussed below.*

It is now generally admitted in Africa that the diversity and the communal features of tribal custom in the fields of land tenure, family law and succession, and its voids in other areas of law (e.g. contract) hamper trade, investment and social progress. The necessary modernization of Africa's private law structures has started or is overdue. It is hardest to achieve in the above-named fields of law, wherein tradition is strongest and elaborate. Granting this, by what methods should private law be reformed: should there be a legal revolution, or juristic revolution? The expert drafter of the Ethiopian Civil Code, Professor R. David, has declared himself in favor of and has followed what may be called the ``revolutionary`` approach…

Ethiopia cannot be considered in a purely African context. Its tradition embodies elements of Mediterranean (incorrectly called ``Western``) civilization, with its Judeo-Christian and Greco-Roman components. Constantine and the Nicea Council loom large in Ethiopian lore. The Kingdom of Axum was an ally of Justinian. Above all, there is a tradition of one basic authority and law at the center, which preserved this empire through centuries of tribulation. Codification is no new concept here. The Ethiopian Christians` ancient canon and civil law was comprehensively formulated-possibly in the 16th century-in the Fetha Nagast (Law of Kings), drawing nearly in all its percepts from the monophysite mother church at Alexandria. The civil law part contains, among others, elements of East-Roman law.

Though codification in its comprehensive aspect, is a familiar concept here, the venerable Fetha Negast has become outdated as to be rarely invoked. Prior to 1960 Ethiopian civil adjudication was based mainly on equity (including persuasive foreign precedents) and custom, the latter being varied and uncertain. Save for Eritrea, Ethiopian customary laws were not reduced to writing, though description of social customs have appeared, e.g., in travelers` reports and in the ethnological bulletins of the University College of Addis Ababa. The tribal and local variations of legal customs are legion. Their progressive unification by gradual processes in a non-leisurely age require speedier solutions. So rightly or wrongly, a short cut was taken in enacting the present Ethiopian Civil Code with its sweeping abrogation of the legal past. This most unusual method includes, however, devices for safeguarding some continuity. George Krzeczunowicz, ``Code and Custom in Ethiopia,`` 2JEL2 (1965)

Based on the above excerpts, answer the following questions.

9.1 Does *Krzeczunowicz* approve of the path Ethiopia followed in codifying her private laws?

9.2 Are you convinced by the reasons *Krzeczunowicz* offers for sweeping abolition of customary laws in Ethiopia?

9.3 Do you accept the incidental remarks *Krzeczunowicz* makes in relation to Ethiopia's constitutional development?

10. Summary table: Do you think that the following table sums up the materials covered in the preceding three section of this Unit? Answer the questions posed in the table.

Pre-codification problems	Decisions to overhaul the legal system	Inputs employed	Process followed	Output	Effects	Reasons for lack of penetration
Incompleteness, Unsystematicness, etc. Any other additional problems?	Modernization based primarily on the civil law model. What other sources were employed?	Domestic and foreign sources Mention some of the foreign and domestic sources?	Principal actors and steps followed Identify some of the foreigners involved in the drafting to the codes.	Six codes Enumerate the six codes.	Inability to penetrate the society Why inability to penetrate?	Outline the reasons for absence of adequate penetration of the transplanted laws.

Part II Sound/Unsound Questions

Instruction: Read the following questions with care say `sound` if you think that the statement is an accurate description of a principle in legal history, or say `unsound` if you think that the statement is inaccurate description of a principle in legal history.

1. The Screening Committee (Consultative Committee), established after liberation from Italian invasion by the British military administration in Ethiopia, applied the repugnancy test.
2. The mixed courts, established in Ethiopia as an application of the capitulation theory, contributed to the development of Ethiopian laws.

Part III Multiple-choice Questions

Choose the best answer from the given choices.

1. The test (s) Professor Rene David, the principal drafter of the Ethiopian Civil Code, used in including certain customary laws in and excluding some other customary laws from the Code was:

A) The social and economic progress test
B) The clarity test
C) The repugnancy test
D) The sufficient generality test
E) All of the above
F) He did not use any test.

2. One of the following does not belong to the methods Professor Rene David, the key drafter of the Ethiopian Civil Code, used to give a space for customary laws.

A) Incorporation
B) Express reference to customary laws
C) Gap-filling
D) Tools of interpretation

E) None of the above
F) A, C & D

3. One of the following *can* be a reason for preferring the civil law model to the English model in relation to the adoption of the Ethiopian Civil Code?

A) The decision was motivated by the desire to counter-balance, by an appeal to another source; an English influence that the then key personalities feared was becoming excessive.
B) The decision was guided in part by an instinctive desire to remain faithful to the tradition of codification as reflected in, among others, the *Fetha Nagast* that was crowned with a character nearly sacred.
C) Pragmatic considerations such as convenience and expense went into the decision as the key personalities of the day thought that to transport cases from England would be costly and most inconvenient.
D) Another account given for the choice was that if codes transplanted to countries similar in context with Ethiopia already became successful, then there would be no reason for the same codes not to meet with a success in Ethiopia.
E) Sentiment had its own share: the influential personalities of the day had had sentimental attachment to France and French legal education.
F) All of the above
G) `B,` `C,` `D` & `E`

4. One of the following was the principal explanation of the little room assigned to customary laws in the Ethiopian Civil Code:

a. The failure could be attributable to the fact that customary laws in Ethiopia were not sufficiently recorded prior to and in the course of the codification process.
b. The failure could be attributable to the general policy stand of the then government, which was to bring about legal unification, political unification, assimilation and integration of the various groups in Ethiopia via a general codification of laws in line with the civil law tradition.
c. The failure could be attributable to the fact that Ethiopia was pressurized by the western powers to disregard customary laws in favor of western-oriented laws.
d. The failure was attributable to the fact that Ethiopia decided to avoid the adoption of multiple codes of laws.
e. The failure was attributable to the fact that the government thought that the compilation of customary laws would be exorbitant.
f. The failure was attributable to the fact that the government faced internal resistance against the adequate indigenization of the Civil Code.
g. All of the above

5. One of the following approaches to the interpretations of the 19th century and early 20th century Ethiopian history proposes extra-constitutional solution:

A) The Re-union approach-reunion
B) The Conquest approach-class exploitation
C) The Conquest approach-national question
D) The Colonial approach-secession
E) The Conquest approach- secession
F) None of the above

Part III. Matching

A

1. Mesopotamian Law
2. Ancient Greek law
3. The Derge Constitution of Ethiopia
4. Equity
5. Civil Code of 1960
6. Penal Code of 1957
7. Commercial Code of 1960
8. Establishment of ministries for the first time
9. Ethiopian Nationality Law
10. Fetha Negast

B

i. Supplements the common law
ii. Established federalism
iii. Founded on Philosophical conception
iv. Considered god- given
v. Based on socialist ideology
vi. John Spencer
vii. Menilik II
viii. Jean Graven
ix. Haile Selassie I
x. Rene David
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4.4 The Development of the Ethiopian Penal Law

This section discusses the main facets of the various penal codes Ethiopia has adopted since 1930. In particular, it outlines the sources, structures and principal purposes of those penal laws.

4.4.1 The Fetha Nagast: Ethiopian has long depended on written laws. In writing the Fetaha Nagast, Ibn Al Asal used the first five books of the Old Testament, the New Testament, and canons of the Christians' early church councils, Roman civil law and principles of Kuranic law. The Fetha Nagast characterized a number of behaviors as criminal offenses. The Fetha Nagast based itself on harsh punishments. The Fetha Nagast adopted ``an-eye-for-an eye`` principle of punishment.

However, the Fetha Nagast applied only to Christians. The Fetha Nagast was written by and for Christians. Muslims in Ethiopia continued to be judged in their own courts according to the Sharia law. Also, outside the ordinary judicial system, clan and tribal courts exercised unofficial but effective coercive powers. People rarely appealed the decisions of the traditional courts to regular courts. The Fetha Nagast and customary laws remained the basis of criminal justice until 1930.

4.4.2 The 1930 Penal Code: The Code of 1930 represented the first effort to unify and to systematize Ethiopian traditions in criminal matters. The 1930 Penal Code combined customary with comparatively more modern concepts of penal law. The Code took rules and principles from the Law of the Kings (Fetha Negast) and from advanced European penal codes. The 1930 Penal Code was primitive in its application since there were several defects in its contents. The 1930 Penal Code aimed at modernization of the administration of the Ethiopian criminal justice system.

In 1950`s, Ethiopian criminal law was mainly contained in the Penal Code of 1930. Subsidiary legislation published in the Official newspaper (Negarit Gazeta) supplemented the code provisions. But by then, the conditions in Ethiopia had changed since 1930. It was also expected that conditions and laws had to change in the future. Ethiopia also made a decision to modernize all areas of her laws. Some of the shortcomings of the 1930 Penal Code also became an additional factor for Ethiopia to revise her penal code. For example, the 1930 Penal Code lacked general principles. It showed too many traces of the ancient and formalistic conception of the criminal law with regard in particular to attempts, participation, excuses, aggravating and extenuating circumstances, the imposition of fines, the punishment for injuries to persons. The code was also incomplete and out of date in matters such as criminal responsibility and guilt,

the treatment of juveniles and habitual offenders, probation, and the like. These considerations led Ethiopia to replace the 1930 Penal Code.

Unlike the old system (i.e., the Fetha Nagast), the 1930 Penal Code laid down specific punishments for defined offenses. It was a legal principle that a person who performed an act not prohibited by law committed no crime. Under the code, acts of omission were punishable by law. The code made distinctions among preparatory acts, attempted crimes, and completed offenses. The code did not consider preparation in itself as a criminal offense. The Code did not even take as offense unsuccessful attempts. Under the Code courts were authorized to impose punishment if the accused acted out of superstition or "simplicity of mind."

The Penal Code was strong on retribution. The code allowed the courts to determine penalties according to the degree of individual guilt. In addition, the courts took into consideration an offender's background, education, and motives. The code also took into consideration the offense's gravity and the circumstances of its commission. The code permitted courts to impose the most severe punishments to persons of title and wealth. The reason for such harsh punishment on wealthy persons was that such offenders had less reasonable motives for criminal action than did persons of lower status. The code abolished mutilation. The code, however, retained capital punishment and permitted flogging. The 1930 Penal Code lacked a comprehensive approach to the disposition and treatment of offenders. The 1930 Penal Code was replaced by the new Penal Code promulgated on July 23, 1957, and put into force on May 5, 1958.

4.4.3 The 1957 Penal Code: In 1957, Ethiopia had revised her penal code. The primary objective of the code was to meet the needs of a developing nation. A British legal expert drafted the 1961 Criminal Procedure Code, which supplemented the 1930 Penal Code. The former was based on the Swiss Penal Code and many secondary sources. The latter reflected the influence of English common law. Professor Jean Graven prepared a draft of the Revised Penal Code based on the civil law tradition. He adopted the civil law tradition after he received instruction from Emperor Haile Selassie I and after he deliberated with the Codification Commission. The code also included “the contributions of the most significant systems of jurisprudence in the world of today.” This means, the code incorporated some legal rules seen as best even if they came from the common law system and from comparative law. The model adopted preparing the Revised Penal Code of Ethiopia was also applied in the preparation of the other codes. The Revised Penal Code did also take some traditional penal rules into account.

Jean Graven submitted his draft in French to the Codification Commission. As mentioned earlier on, the Commission was composed of Ethiopians and foreigners. After review and some alterations by the Commission, it was then translated into Amharic and English. The main domestic sources used in preparing the Revised Penal Code were: the Fetha Negast, the 1930 Penal Code and the subsidiary legislation published in the Negarit Gazeta. The Commission considered the Fetha Negast. The Fetha Nagast was taken into account because it contains several prescriptions of a penal nature. It was taken into account because it was regarded as the source of Ethiopian legal tradition. The other reason for the drafters taking the Fetha Nagast as a source of the Revised Penal Code was because it contained a number of fundamental principles that had to be taken into consideration in the drafting of an Ethiopian Penal Code. An instance of such basic principles was the essentiality of guilt.

The Codification Commission gave some instructions to the drafter of the Revised Penal Code as to the form, content and arrangement of the code. The two instructions related to the scope and accessibility of the code. Firstly, the Commission instructed the drafter that the Code had to be complete. It should omit nothing that might be necessary to its proper understanding and application. That is, the reasons why the commission decided the code to be complete were: lack of adequate codified laws, lack of precise law reports and lack of legal doctrine. In Ethiopia, statues were recent, the habit of publishing court judgments was absent and legal literature was almost non-existent. The Code did not enumerate, e.g. all the means whereby an offence might be committed. The code simply used general clauses, that is, it set out the principle and illustrated it in a non-exhaustive manner. This was true of most of its provisions. Secondly, the Commission expressed the desire that the Code be written in a language as simple as possible so as to avoid ambiguities and be accessible to everyone, layman and scholar. The Commission wanted the code to include new concepts in the sciences of sociology, psychology and penology. The drafter was said to have met these expectations.

The 1957 Code follows a bi-partite classification of offences. Bi-partite classification of offenses permits laying down principles applicable to all offences, regardless of the kind or term of punishment they carry or of the court by which they are triable. It is divided into a "General Part" and a ``Special Part``. The general part contains the punishment provisions, defenses and other fundamental principles of criminal law. The special part followed detail and specific crimes. Some argue that the content and the structure of the code were made sufficiently close to the Swiss Penal Code in order to allow Swiss cases and commentary to be considered as authoritative in Ethiopia in most instances. The Code deals with serious offences (Arts. 1-689) and petty offences (Arts. 690 – 820). The provisions concerning serious offences were contained in the General

Part and the Special Part of the Code. A similar division was found with regard to petty offences. The General Part set out rules common to all serious offences and explained what is meant by a criminal offence, irresponsibility, criminal intention or negligence, imprisonment probation, limitation, and the like. The Special Part described the various acts considered to be criminal. The special part laid down the penalties applicable to each offense. The special part defined the elements of offences such as murder and theft, as well as the corresponding penalty.

For almost every offense listed in the Revised Penal Code, there were upper and lower limits of punishment. The effect was to stress acceptance of the concept of degrees of culpability, as well as the concept of extenuating and aggravating circumstances. Separate provisions existed for juveniles.

4.4.4 The Criminal Procedure Code: Professor Graven had prepared a first draft of a criminal procedure code for Ethiopia. He then presented it to the Ethiopian Commission in 1956. The Commission did not however accept the draft. The main reason for the rejection of the draft by the commission was that Ethiopia had been using English-based adversarial procedures since 1941. Ethiopia then asked Sir Charles Mathew to rework Professor Graven's draft and to produce a code with more of a common law, adversarial system. Sir Charles Mathew was a known English legal expert. He had had drafting experience in Malaya and India. Sir Mathew prepared a draft criminal procedure code for Ethiopia and Ethiopia adopted his version in 1961.

As already stated, the Penal Code adopted the civil law model of the penal code. On the other hand, the Ethiopian Criminal Procedure Code of 1961 has more elements of the adversarial, common law approach. (Note: an adversarial system is a type of trial system. The essence of an adversarial system is to substantially leave litigation to the parties themselves; judges are expected to act as an ampire.)

Stanley Z. Fisher, Some Aspects of Ethiopian Arrest Law: The Eclectic Approach to Codification, 3JEL2 (1966)

The Criminal Procedure of 1961 is one of Ethiopia's most recent codes, and one of the least ``developed`` in terms of published commentary and reported cases. In contrast to the `introduced`` and ``explained`` Penal and Civil Codes, the Criminal Procedure Code has apparently been disowned by its drafters, none of whom have written a word of commentary on it. Its origins remain obscure, and at first glance it is difficult to see which, if any, ``system`` was its inspiration. In fact, it seems, the Code has roots in no single system, nor even in any single ``family`` of systems. Rather, it is the product par excellence of an eclectic approach to codification, more than any other Ethiopian code. The importance of this fact is magnified by the consideration that in adjective law even more than in substantive law, it is extremely hazardous

to construct a code eclectically, borrowing across the boundaries which divide one legal family from another. The danger is that confusion and inconsistencies will result from the mixing in one code of concepts and procedures strange to each other. In the writer's view, precisely this happened in some parts of the Criminal Procedure Code.

The history of the Criminal Procedure Code is not yet a matter of public record. From informal sources, guess-work and internal analysis it appears that initial draft was done by Professor Jean Graven, the (Swiss) drafter of the Penal Code, as part of a project comprehensive ``code judiciaire`` covering evidence, civil procedure and criminal procedure. The first draft was along continental lines, although it reflected some English-commonwealth influences. When it was later decided by the Codification Commission that Ethiopia`s adjective law ought to follow not continental but English-Commonwealth lines, the original draft was substantively revised by Sir Charles Mathew, a distinguished Britisher with judicial experince in Malaya, Tanganyika and Ethiopia. Sir Charlres` draft was the one eventually approved by the Commission and, after some changes, enacted by Parliament. This background would account for the otherwise odd fact that the Code contains ``pockets`` of rules clearly patterned on continetal models, within a general scheme which is of the English-Commonwealth type adapted of course to suit local problems and traditions.

4.4.5 The 1974 Revolution and criminal law: Following the 1974 revolution, a "revolutionary" system of neighborhood justice emerged. It was difficult to distinguish between criminal acts and political offenses according to the definitions adopted in post-1974 revisions of the penal code. In November 1974, a proclamation was issued. The Proclamation introduced martial law. The martial law set up a system of military tribunals empowered to impose the death penalty or long prison terms for several political offenses. The Proclamation applied the law retroactively to the old regime's officials. The revolutionary government accused these officials of responsibility for famine deaths, corruption, and mal-administration. These officials had been held without formal charges. Special three-member military tribunals sat in Addis Ababa and in each of the country's fourteen administrative regions.

In July 1976, the government amended the Penal Code of 1957 to institute the death penalty for "antirevolutionary activities" and economic crimes. Investigation of political crimes came under the overall direction of the Revolutionary Operations Coordinating Committee in each *awraja*. In political cases, the courts waived search warrants required by the criminal procedures code. The government transferred jurisdiction from the military tribunals to *kebele* and peasant association tribunals. Political trials constituted the main business of these tribunals until 1978.

Generally, the 1976 revision of the Penal Code empowered association tribunals to deal with criminal offenses. The revision limited the jurisdiction of association tribunals to their urban neighborhood or rural area. Elected magistrates, without formal legal training, conducted criminal trials. Procedures, precedents, and

punishments varied widely from tribunal to tribunal, depending on the imperatives of the association involved. Peasant association tribunals accepted appeals at the wereda (district) level. Appellate decisions were final. But decisions disputed between associations could be brought before peasant association courts at the awraja level. In cities, kebele tribunals were similarly organized in a three-tier system. Change of venue was arranged if a defendant committed an offense in another jurisdiction.

The judicial system was designed to be flexible. Magistrates could decide not to hear a case if the defendant pleaded guilty to minor charges and made a public apology. Nonetheless, torture was sometimes used to compel suspects and witnesses to testify. Penalties imposed at the local association level included fines of up to 300 birr. The tribunals could determine the amount of compensation to be paid to victims. The tribunals could impose imprisonment for up to three months and hard labor for up to fifteen days.

Association tribunals sitting at the awraja or wereda level handled serious criminal cases. These tribunals were qualified to hand down higher sentences. Tribunal decisions were implemented through an association's public safety committee and were enforced by the local People's Protection Brigade. Without effective review of their actions, tribunals were known to order indefinite jailing.

The 1976 Special Penal Code, which was further elaborated in 1981 created new categories of so-called economic crimes. The list included hoarding, overcharging, and interfering with the distribution of consumer commodities. More serious offenses concerned: engaging in sabotage at the work place or of agricultural production, conspiring to confuse work force members, and destroying vehicles and public property. Security sections of the Revolutionary Operations Coordinating Committee investigated economic crimes at the awraja level and enforced land reform provisions through the peasant associations. These committees were empowered to charge suspects and held them for trial before local tribunals. Penalties could entail confiscation of property, a long prison term, or a death sentence.

4.4.6 Special Penal Code of 1981: In 1981, the Revised Special Penal Code replaced the Special Penal Code. This amended code included offenses against the government and the head of state, such as crimes against the state's independence and territorial integrity, armed uprising, and commission of "counterrevolutionary" acts. The 1981 amendment also included breach of trust by public officials and economic offenses, grain hoarding, illegal currency transactions, and corruption; and abuse of authority, including "improper or brutal" treatment of a prisoner, unlawful detention of a prisoner, and creating or failing to control famine. The Amended Special Penal Code also abolished the

Special Military Courts. The code created new Special Courts to try offenses under the Amended Special Penal Code. Special Courts consisted of three civilian judges and applied the existing criminal and civil procedure codes. Defendants had the right to legal representation and to appeal to a Special Appeal Court.

**4.4.7 The 1980`s Legal Reform:** In mid 1980`s, Ethiopia initiated a large-scale law reform project. As one of the components of this massive law reform project, the country started revising its penal code and criminal procedure code. The basic policy justification for the revision under way was to redesign the law so that they would facilitate the construction of socialist system. The then socialist government collapsed without finalizing the law reform.

4.4.8 The Revised Criminal Code: On May 2005, the Federal Government put in force a Revised Criminal Code while the revision of the existing Criminal Procedure Code is underway. It seems that, the revision of the 1957 Penal Code was dictated by the need to make criminal law ``gender sensitive, ``for example, by revising the domestic violence against women and rape related provisions of the code. The revision was also intended to make the code compatible with the Federal Constitution. In addition, the revision attempted to revise the drug trafficking provisions of the code. In the case of the revision of the Criminal Procedure Code, the plan is to make it compatible with the Federal Constitution and fill the many gaps one finds in the Code. The Preface of the new Criminal Code (Proc. No. 414/2004) in part reads:

It is nearly half a century since the 1957 Penal Code entered into operation. During this period, radical political, economic and social changes have taken place in Ethiopia. Among the major changes are the recognition by the Constiution and international agreements ratified by Ethiopia of the equality between religions, nationalites and peoples, the democratic rights and freedoms of citizens and residents, human rights, and most of all, the rights of social groups like women and children. After all these phenomona have taken place, it would be inappropriate to allow the continuance of the enforcement of the 1949 (sic) Penal Code.

Another discernible gap in the Penal Code is its failure to properly address crimes born of advances in technology and the competition of modern life. The Penal Code does not incorporate crimes such as the hijacking of aircrafts, computer crimes and money laundering. Besides, as regards crimes related to corruption and drugs although they are nowadays, attracting attention both in legislation and follow-up not only within national frontiers but also on the regional and international levels, due to the grave crises they are causing, the Penal Code does not adequately deal with such crimes with the degree of seriousness they deserve.

Another point that should not be overlooked is the Penal Code`s failure to acknowledge the grave injuries and sufferings caused to women and children by reason of harmful traditional practices. Surely, the Constitution gurantees respect for the cultures of peoples, but it does not buttress up those practices scientifically proven to be harmful. It is also futile to issue a law that does not have

the trust and support of the people for it usually remains impracticable. But it is well recognized in the philoshophy of criminal legislation that the legislature should by adopting progressive laws at times, educate and guide the public to dissociate itself from harmful traditional practices.

Furthermore, it is desirable to adopt a comprehensive body of code assembling the various criminal provisions published in the Negarit Gazeta in a disintegrated manner. Similarly, since the parallel application, of the regular Penal Code and the Revised Speical Penal Code in respect of similar matters disregards equality among citizens, the existence of a comprehensive Criminal Code will put an end to such practice. Finally, one point that must not be left unmentioned is the matter concerning the determination of sentence. Since it is essential to facilitate the method by which courts can pass similar punishments on similar cases, some major changes have been made in the provisions of the Code. Provisions of the Penal Code that used to make sentencing complicated and difficult have been amended. Provisions have been inserted which enable the courts to pass the appropriate penalty for each case by carefully examining from the lightest to the most severe punshiment. A sentencing manual will also be issued to ensure and control the correctness and uniformity of sentencing.

4.4.9 Review Questions

Answer the following questions.

1. Comment on the following text, which is the preamble of the 1957 Ethiopian Penal Code. Your comment should focus on the policy objectives of the Code.

The codification of the principal branches of law of any country is always a difficult task, since it must be profoundly grounded in the life and traditions of the nation, and it must, at the same time, be in keeping with and responsive to the influences, not only juridical, but also social, economic and scientific which are in the process of transforming the nation and our lives and which will inevitably shape the lives of those who come after us.

These considerations apply with particular validity to penal legislation at a time when, throughout the world, the expanding frontiers of society brought about through the contributions of science, the complexities of modern life and consequent increase in the volume of laws that require effective, yet highly humane and liberal procedures be adopted to ensure that legislative prescriptions may have the efficacy intended for them as regulators of conduct. New concepts, not only juridical, but also those contributed by the sciences of sociology, psychology and, indeed penology, have been developed and must be taken into consideration in the elaboration of any criminal code which would be inspired by the principles of justice and liberty and by concern for the prevention and suppression of crime, for the welfare and, indeed, the rehabilitation of the individual accused of crime. Punishment cannot be avoided since it acts as a deterrent to crimes; as, indeed, it has been said, "one who witnesses the punishment of a wrong-doer will become prudent." It will serve as a lesson to prospective wrongdoers. We have, therefore, taken upon Ourselves the responsibility of ensuring to Our beloved subjects, both of the present and of the future, that the codification which We are today promulgating is, in all respects, consonant with these high principles and preoccupations.

To this end, We have personally directed the labors and recommendations of the Commission of Codification convened by Us three years ago, after the completion of many years of preparatory

work, and which throughout the ensuing period carried on its work at Our Imperial Palace. We have ensured that their concepts adopted as point of departure the venerable and well-established legal traditions of Our Empire as revealed in the Fetha Neguest and in subsequent legislation and practice, including those customs and usages which are common to all citizens. To this end also, We have utilized these services not only of our most qualified publicists and jurists, but also those of the most distinguished jurists of the Continent and the contributions of the most significant systems of jurisprudence in the world today. All of these contributions have been carefully assessed and have been adopted to the extent that they respond to the particular needs of Our Empire and can be incorporated into legislation so as to provide a fresh impulse to the forces of progress, justice and humanity. As We stated three years ago on the occasion of the formal convening of the Codification Commission: "Although Ethiopia claims what is, perhaps, the longest-standing system of law in the world today, We have never hesitated to adopt the best that other systems of law can offer, to the extent that they respond and can be adapted to the genius of our particular institutions . . . However, the point of departure must remain the genius of Ethiopian legal traditions and institutions which have origins of unparalleled antiquity and continuity."

It is in this sense also, that the work of the Codification commission has progressed in the allied fields of criminal and civil procedure and civil, commercial and maritime law. The penal code forms, therefore, but a part, although a highly significant part of one integrated whole, itself conceived within the yet larger framework of the Revised Constitution as granted by Us on the occasion of the Jubilee of Our Coronation, and designed to serve and supplement in practice the high principles of the instrument. It has been Our constant aim that the primary result of this vast undertaking should be to give reality and depth to the principles of human rights contained in that historic document.

2. The 1930 Penal Code of Ethiopia served as one of the material sources of the 1957 Penal Code. Elaborate on the extent to which the 1930 Penal Code was used as a material source of the 1957 Penal Code.
3. The six major codes of Ethiopia were largely products of importation. Would you wish to qualify this statement?
4. The Ethiopian legal system is a confluence of multiple legal traditions. Comment!
5. What do you think are the primary sources of the present Criminal Code of Ethiopia?
6. Enumerate at least five topics which are new additions to the current Criminal Code of Ethiopia.
7. Do you think that the present Criminal Code of Ethiopia has accommodated traditional criminal law system, for example, in the areas of homicide? What about the 1930 Penal Code? The 1957 Penal Code?
8. Do you think that dualism (existence of modern criminal laws and traditional criminal laws) features the Ethiopian criminal law system? Do you think that traditional criminal laws should be accommodated? To what extent?
9. State some factors which necessitated the revision of the 1957 Revised Penal Code.

10. Is it sound to conclude that the state criminal law in Ethiopia sought to replace the multiple traditional criminal justice systems, protect feudal and capitalistic relations between 1931 and 974, to primarily safeguard socialist interests between 1975 and 1991, and then back to the protection of individual or capitalist relations after 1991? Is it also sound to conclude that the attempt of the state criminal justice system to replace the traditional criminal justice systems has not yet met with success?

a. Explain pre-1930 penal law system in Ethiopia. What did it look like?

4.5 The Judicial System of Ethiopia

Administration of justice can be defined as the process of making decisions in conformity with the letter and the spirit of the law. The justice to be administered could be criminal or civil. This definition implies that certain institutions involve in the administration of law. There are several types of justice rendering institutions which include regular courts and administrative tribunals. One of the key institutions that render justice is a court of law. The main focus in this section is on the historical development of the regular court system in Ethiopia.

4.5.1 Pre-Italian occupation: Some people claim that doing justice in Ethiopia was taken as one of the duties of each and every Ethiopian citizen as manifested through the roadside courts. This was reflected through the informal establishment and operation of roadside courts and family arbitration. Any person alleged to have committed an offence or failed to meet his obligation was required, under pain of penalty, to submit to the authority of such a spontaneously called upon person. Irrespective of sex and social status, the person who assumed such responsibility could exact coercive obedience. Such a person would try to bring about the settlement of the issue between the parties in an amicable manner. S/he could also require the assistance of others, usually elders or members of the clergy, to mediate between the disputants so as to settle the case out of court. If all modes of settlement of disputes available in the community in question did not work, the roadside judge would bring the disputants before the local chief. Or the roadside judge would send the litigants to the court of first instance by tying up the tips of their garments. The roadside courts were most common in the northern part of the country.

If the arbitration resulted in a decision accepted by the parties that was the end of the matter; though there would be only the pressure of public opinion to enforce the settlement. If there was no decision at this stage, or if one of the litigants desired it, the parties, with the judge and witnesses, would go to the lowest official court. The lowest official judge would be the *chiqa shum,* who corresponds to the village head elsewhere in Africa. Such cases would take place with the help of guarantors who went 'bail' for the parties agreeing to accept the

penalties in case of their escape. Assessors, whose function appeared to correspond somewhat with that of a jury, were also used. The taking of oaths was a very important part of the procedure. It was common for litigants to make in addition to the material stake, which might be at issue a wager, some part of which might go to the judge.

The next court, especially for criminal cases, was that of the *Malkanya,* or governor's deputy in the district. According to a decree of 1931, these officials were to be appointed by the governor. They must be 'honest men and sympathetic to the poor' with knowledge of the law. They were to take the legal oath upon their appointment, to keep court clerks and to see that all cases were recorded in a court register. They were supposed to choose two assessors from those in the court, while the litigants each chose a guarantor. On appeal the case went, with a copy of the record signed by all concerned, to the governor. The governor could hear the appeal himself. Or the governor could refer it to his judges to decide the case called the W*ombars* with four assessors.

Appeal from the governor lay to the central court at Addis Ababa. There were in the capital men known as *Wombar-Rases,* judges appointed to represent each of the provinces and to help in dealing with their appeals. This central court used the services of four assessors and two guarantors. The next appeal was to the court of the *Afe Negus* (the Mouth of the King). The *Afe Negus* would take the case with the help of judges from the court below.

The appeal then went to the Emperor himself. This was his duty from the earliest times. We have the following account of the role of the Emperor's court as it was at the end of the Middle Ages from Alvarez, a traveler. In the moving capital, there was a long tent of justice, close to the Emperor's tent. From respect to the Emperor and his justice each man must dismount before passing between these tents. Within the tent of justice were thirteen chairs, six on each side, and one for the chief justice in the middle though the judges actually sat on the ground beside them. 'The plaintiff brings his action and says as much as he pleases without anyone speaking and the accused answers and says as much as he pleases. After further question and answer between them a recorder repeats all that has been said and gives his verdict. Each judge, rising in turn, does the same, the chief justice speaking last. There may then be a delay for bringing any proof that may be required. Finally the judges go to the Emperor's tent, speaking to him through the curtains, and return with his decision.

Another traveler, De Castro, gives us some account of the supreme court of Menelik's day sitting to take appeals on Wednesdays and Fridays. Designated area in front of the palace was turned into an open-forensic hall; many colored eastern carpets were spread out. The judges sat at the top and the chiefs, soldiers,

and servants at the wings. The accused, the witnesses and the advocate occupied the fourth place. Behind these was the public watching. In the absence of the Emperor, the *Afe Negus* would preside.

Coming to Haile Selassie's day, you find that the usual procedure was for the *Afe Negus* to make a concise report of the case to the Emperor. According to the 1930 Penal C*ode*, the Emperor alone could sentence to death. The Emperor allocated two days a week for his judicial duties. Some claim that from the earliest times until 1935 appeal lay from the humblest peasant to the Emperor himself. Tradition required that the Emperor should be accessible to all. Even in the nineteen-thirties, it was difficult for the Emperor to delegate his power to handle cases entirely to a court of appeal over which he did not normally preside in person.

Abera Jembere, Yatayyaq Muget: The Traditional Ethiopian Mode of Litigation, 15JEL (1992)

General E. Virgin summarized his vivid eye-witness account of court proceedings conducted according to the indigenous mode of litigation of Ethiopia, in the following manner: The Abyssinian is a born speaker and neglects no opportunity of exercising this talent. A law-suit is a heaven-sent opening and entails as a rule a large and appreciative audience: now threatening and gesticulating, now hoarsely, whispering with shrugged shoulders, now tearfully, he tells of his vanished farthing, and points a menacing, trembling finger towards the accused.

The judge in the midst of a circle spectator, having listened to the eloquence with a grave and thoughtful men, now invites the accused to reply. Like a released spring he leaps up, and with raised hands calls heaven to witness his innocence, then falls on one keen, rises, stands on tiptoe, drops back on his heels, shakes his fist under the nose of his adversary and approaches the judge with clasped hands, while all the time an unceasing stream of words pours from his lips. This theatrical exposition of court proceedings shows the tatayyaq mode of litigation, which forms part and parcel of the Ethiopian cultural heritage. Customary law, together with the tatayyaq mode of litigation, had become the prevailing practice in large part of Ethiopia by 1936.

What are the major fatures of the instituion involved in the application of the tatayyaq muget? Litigation at the initial stage was in genera a voluntary and spontaneous form of arbitration. A party to a dispute was entitled by law to call upon any passer-by to decide his case. If the parties to the alleged dispute were satisfied by the rulings of the road-side courts, the matter would be considered settled. However, if a decision satisfactory to either or both of the parties could not be obtained, they would go to court, or sometimes the person who acted as a road-side judge would take them to the lowest offical judge. The lowest official judge could be the Chika shum or the Melkegna. The Chika shum and the Melkegna were basically administrative officials who exercised judicial power. The concept of separation of power was alien to the then existing society. Every government official was thus refereed to as Dagna (judge).

The Techiwoch or Korqwaris (assessors) stand next to the Dagna in order of importance. Some of them were selected by the contending parties, and some by the regular court from among those people attending a court session. The third typical feature of the judicial process was Was

(gurantee.) The fourth and the last element of a legal process involved in this system was the institution known then as Negerefej; which pertained to a person who usually had a fair knowledge of the law, and who had agreed to represent before a court. The system of litigation conducted in accordance with the rules of the tatayyaq muget, during the last century and the beginning of this century, was indigenous and unique to Ethiopia.

A close observation of the old laws of Ethiopia reveals that the procedural laws were more developed than the substantive laws. This is attributed to the teaching of scholars of the Fetha Negast, to the experiences gained in the practice of the legal profession and to the traditional value attached to the practice of bringing up young men as legal apprentices in the courts of governors and in the imperial palace. The fact that litigation, at least as regards the road side courts, was a voluntary and spontaneous form of adjudication has greatly contributed to making the administration of justice a civic obligation of any law-abiding citizen. This and other factors combined have succeeded in making traditional procedural laws relatively well developed.

4.5.2 During Italian occupation (1936 to 1941): Italian colonial power attempted to create its own court structure during the occupation. In civil matters, the customary law and religious laws were to remain in force and to be applied by the lower level native civil courts. Italian judges manned criminal courts.

4.5.3 Post-liberation period (1942-1965): structure wise, the Administration of Justice Proclamation (Proc. No 2/1942) established a four tier court system. The court system was characterized by a unitary court structure. This Proclamation provided for an integrated hierarchy of courts. The initial jurisdiction of which was to be determined principally by the value of the claims in civil cases and the seriousness of the crime in criminal cases. The primary consideration was to provide a court that people could reach and where disputes of a relatively minor nature could be heard. The means of transportation existing at that time was poor. This consideration dictated the establishment of a court in the lowest administrative unit. The more important the case, the further the parties could be expected to travel. Thus, the concept of a tiered court system based on administrative units was introduced.

Proclamation No 2/1942 attempted to reduce the number of appeals to one. Did Proclamation 2/1942, in practice, prevent endless litigation? Why? Repeated appeals and transfer of cases to the High Court caused delay in litigation. According to Proclamation 2/1942, each court heard appeals from the next lowest court and there was to be only one appeal. In practice, however, multiple appeals were taken. The higher courts would often hear the appeal, although they had no jurisdiction to do so. When courts were first established, there was a tendency on the part of dis-satisfied litigants to seek review in higher courts, and thus it may have been difficult for them to accept a system of courts with a single appeal. The higher courts may have believed that they should not refuse to hear the appeal in view of the prior practice or may not have trusted the lower courts to arrive at a sound decision. These factors, coupled with an absence of effective

procedure, resulted in endless delays in litigation. It was also possible for a defendant to obtain a transfer of his case from lower courts to the High Court upon posting security for costs. This enabled foreigners and wealthier Ethiopians to have their cases heard in the High Court, where there were some foreign judges and where the more competent Ethiopian judges sat. In addition to imposing a burden on the plaintiff who would often have to travel to Addis Ababa to have his case heard, these transfers had the effect of substantially increasing the caseload of the High Court.

4.5.4 Fusion of Power: A feature of the history of the administration of justice in Ethiopia was the fusion of judicial power and administrative function. A single person was both a governor and judge at a time. There was not a sharp distinction between the executive and the judiciary functions of government. The governor of the administrative area was the president of the court in that area. This had two purposes. In the first place, it avoided the necessity of sending additional judicial personnel to those areas at a time when many officials were reluctant to leave the capital. Second, and more important, the governors insisted that they had to exercise judicial power as well as executive power to keep order. This was continuing the past tradition of the ruler of territory adjudicating the cases that arose there with a view to maintaining order in the territory. Proc. No. 323/1973 formally brought to an end of the influence of the administration. This marked the first move for the formal independence of courts from the administration in Ethiopia.

In the period under discussion, the courts in Addis Ababa, particularly the High Court and the Supreme Imperial Court were functioning more effectively. A number of British judges came following the Liberation and together with the Chief Justice, senior Ethiopian judges, and Ministry of Justice officials, undertook to develop a modern system of administering justice. In 1943 procedural rules following the common-law mode were promulgated. Written judgments were issued, though not reported. Judges of these courts began to enjoy some prestige.

Assefa Fiseha, Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study,(Netherlands, Wolf Legal Publishers, 2005/06) at 390.

In historic Ethiopia, adjudication of cases formed part and parcel of public administration. One finds a merger of functions within the executive, the administration of justice and the executive function proper. Indeed, adjudication of cases was considered to be the principal function of the exccutive. For example, in Menlik`s era of appontiment of the miniters in 1908, the Minister of Justice was also the Chief Justice. The attempt to separate the judiciary from the excutive was not that easy either. A long and tiring process of negotiation in 1942 led to a partial victory as far as the judiciary is concerned: only the highest benches, that is the High Court and the Supreme Imperial Court were able to be relatively free from the influence of provincial administratators. In

all other respects, the court structure reflected until 1992(?) the traditional practice of combining judical and excutive functions in the person of the local chiefs and provincial governors. At the apex of the court structure one found until 1974, the emperor, dispensing justice in the Zufan Chilot (Crown Court).'

This belnd of judical and excutive functions in the latter is not without implications. First and foremost, the judiciary never had a separate existence of its own as an institution. It was subject to all kinds of pressures from the other branches. Thus, external pressure on the judiciary has deep roots and is not without some hangovers on the new federal judiciary. Administrators at state level, even today, think that it is natural to order the judge. Second, the judiciary never survived the regime it established. It was no surprise so see every new regime setting up its own version of the judiciary that suits its mission. It was never designed to be an institution as the third branch of the government in the real sense. This has left an impression on the ordinary citizens to the effect that changes in government will entail another round of appointments and dismissal of judges. Thus in 1992 when EPRDEF came to power and introduced the new federal system, the prestige and reputation of the judiciary was at its ebb, associated with all forms of nepotism, corruption and worst of all, an arm of the most despotic regime on earth, well-known for execution of life without any semblance of due process of law.

Heinrich Scholler, Ethiopian Constitutional and Legal Development: Essays on Ethiopian Constitutional Development (Vol. I) (2005) at 47-50

The legal basis of Chilot lies in the sovereign prerogative of the emperor to see that justice is done. This jurisdiction is distinct from the jurisdiction of the courts under the 1955 Constitution. And since Chilot is based on this sovereign prerogative, its exercise is significantly different from the exercise of judicial power of the courts. This is so in two important respects. Firstly, the exercise of jurisdiction in chilot is discretionary. The Emperor is not required to hear a particular case nor to exercise Chilot jurisdiction at all. The omission of Chilot in the constitution is significant. Under the constitution the emperor is given certain duties, but he is not given the duty to exercise jurisdiction in Chilot. In Chilot also the Emperor is not bound to decide the case in accordance with the provisions of the formal law, but may base his decision on principles of ''justice and fairness'' without reference to the law. He may mitigate the rigors of the application of the strict law in a particular case. In Chilot the Emperor can grant relief from the effect of the law, which the courts cannot do in the exercise of their judicial power. This does not mean that the Emperor may not set aside a judgment because he believes that the application of the law in the particular case was incorrect or because the proceedings were unfair. This is also a part of the sovereign prerogative to see that justice is done.

The other Courts: The annex to the agreement is nothing less than the systematization of the judiciary, and it was enacted, word for word, in Proclamation No. 2 of 1942 which under the Anglo-Ethiopian Agreement of 1944, has been confirmed. This law (part 1) (Proc 2/1942) set up the following courts: the Supreme Imperial Court, the High Court, the provincial courts and regional and communal courts

Under part v of the Proclamation, regional and communal courts were to be set up by warrant. This allowed for the recognition and systematization of the large number of subordinate courts in the provinces. In the law setting up provincial administration, the governors reside, are put under their presidency and called Woreda Courts. Below this came the court of the misselenia, the

governor's deputy. Appeals are granted from the lower to the regional courts. Part vi of the Proclamation allowed for the appointment of assessors who might give opinions which should not be binding in the court. Part vii sets up a consultative committee for legislation consisting of the judicial advisor, the president of the High Court, and three persons of long judicial experience. This committee was to draft and review laws and to signify to the Emperor whenever a law was submitted to him that is not repugnant to natural justice and humanity and is a fit and proper law to be applied without discrimination to Ethiopians and foreigners alike. This provision was reinforced by a final declaration'' that no court shall give effect to any existing law that is repugnant to natural justice or humanity or which makes harsh or inequitable differentiation between our subjects and foreigners''. (Part viii, 24)

In the agreement of 1944 those engagements were modified. The new judicial article (Mo. 4) states that:'' there shall be substituted for'' judges of British nationality the words 'judges of proven judicial experience in other lands' and(b) that, in the hearing by the High Court of any matter, all persons shall have the right to demand that one of the judges sitting shall have had judicial experience in other lands'' ''This is [..]'', says Perham in a concluding statement about law and justice in Ethiopia, ''[..] of course, a very important modification of the former agreement (of 1942). It leaves the emperor free to dispense, if he wishes, with the service of any British or other European judges.''

The Courts under the 1955 Constitution: The 1955 Constitution dedicated only four articles on the subject of the judiciary. Art. 111 of the constitution states that the appointment of the judges was the power of the Emperor. One can notice how deeply the emperor's power goes into all activities of the State. However under the Draft Constitution of 1974 a radical change in the role of the Emperor took place. For example, under Article 121 the formation of a Supreme Administrative Council for selection and administration of judges was introduced. This organ had the chairman of the Supreme Court (Afe Nigus) as a chairman and other six members. The Afe Nigus was nominated by the National Assembly and formally by the Emperor. The Supreme Court under the Draft Constitution was a court with final authority in interpreting the Constitution. The Emperor's court (Zufan Chiolt) was maintained. He had the power to dismiss from all posts at his court such person as he shall see fit (Art. 18(v)) ''Provisions detailing the rights and duties of the judiciary parallel those of the 1955 Constitution except that the Emperor's right to intervene in the judiciary process has been abolished and a Supreme Administrative Council headed by a powerful Chief Justice (Afe Nigus) would attempt to insure judicial independence (Art. 120-121)

The Court under the Constitution of 1987: During the PDRE the judicial power was vested in courts that were established by law. The judges of the Supreme Court were elected and dismissed by the National Shango. The highest judicial organ was the Supreme Court. It had the authority to supervise the judicial function of all courts in the country. Interpretation of laws during the PDRE was done not only by courts. State organs such as the Shango, the Council of State and the General Procurator were entrusted with such power.

4.5.5 The court system (1965-1975)

Robert Allen Sedler, Ethiopian Civil Procedure (Ethiopia: Addis Ababa, Oxford University Press, 1968) at 8-9, 12, 15-16 & 18.

Since the Supreme Imperial Court is provided for in the Constitution, it can never be abolished by legislation, although its jurisdiction, as that of the other courts, is to be determined by law, i.e., legislation. The basic structure of the Ethiopian court system was established by the Administration of Justice Proclamation of 1942. Until this proclamation is repealed or superseded, it remains the `law authorizing other courts,` as the term is now used in Art. 109 of the Revised Constitution. The Jurisdiction of the courts now is defined by the Criminal Procedure Code and the Civil Procedure Code. The 1942 proclamation provided for, in addition to the Supreme Imperial Court, the High Court and the Provincial (Taklay Guezat) Courts. It further provided that `it shall be lawful for Us to establish by warrant under Our hand other courts of criminal and civil jurisdiction which shall be subordinate to the Provincial Courts.`` Subordinate courts were subsequently established, but the orders formally establishing them and setting jurisdictional limits were not published in the Negarit Gazeta. It is believed that this was accomplished by a circular published by the Ministry of Justice. The courts so established were the Aweradja Guezat Court, the Woreda Guezat Court and the Mektl-Woreda Court.

The 1942 Proclamation has never been repealed or superseded, and the courts established under that proclamation and the subsequent circular must be considered to constitute the courts established by law within the meaning of Article 108. Thus, it is technically correct to say that there are six levels of courts in Ethiopia. However, the 1961 Criminal Procedure Code did not confer any criminal jurisdiction on the Mektl-Woreda or Takla Guezat Courts. In 1961 the Parliament enacted a Courts Proclamation, which abolished those two courts and increased the jurisdictional limits of the others. That proclamation has been suspended except for Eritrea, and was not reinstated, so those courts continued to exercise jurisdiction in civil cases in accordance with the 1942 Proclamation and the subsequent circular. The 1965 Civil Procedure, like the Criminal Procedure, did not vest any jurisdiction in those courts, and for all practical purposes they have been abolished. But until the 1962 Proclamation is reinstated, those two courts technically form part of the judicial system, though they do not presently exercise jurisdiction.

There are four levels of courts in Ethiopia. The Supreme Imperial Court, which hears appeals from the High Court; the High Court, which exercises original jurisdiction in the more important cases and which hears appeals from the Awradja Court; the Awradja Court, which exercises original jurisdiction in cases of intermediate importance and which hears appeals from the Wordeda Guezat Court; the Woreda Guezat Court, which exercises original jurisdiction in the less important cases. There are also local judges who hear cases of a very minor nature, which may be tried over again in the Woreda Guezat Court. Mohammedan courts continue to function, although there is a question as to whether the Proclamation establishing them has been impliedly repealed by the Civil Code.

His Imperial Majesty chilot forms a very important part of the judicial system of Ethiopia. However, it is necessary to recognize that chilot is not a court in the legal sense, and that the exercise of jurisdiction in chilot is a very different thing than the exercise of judicial power by the courts. The exercise of jurisdiction in the chilot is discretionary. The Emperor is not required to hear a particular case nor to exercise chilot jurisdiction at all. In chilot, the Emperor is not bound

to decide the case in accordance with the provisions of the formal law but may base His decision on principles of ``justice and fairness`` without reference to the law.

Heinrich Scholler, Ethiopian Constitutional and Legal Development: Essays on Ethiopian Constitutional Development (Vol. I) (2005) at 158-161.

The historical background: The earliest legal document concerning the court structure: the "Administration Justice Proclamation." Pursuant to this Proclamation, the Supreme Court, the High Court, the Provincial Court and the Regional and Communal Court were established. In spite of the establishment of these courts, this Proclamation also recognized the existence of traditional Ethiopian dispute settlement mechanisms. Therefore, Article 23 of Proclamation 2/1942 makes a clear reference to this point. "Nothing contained in this Proclamation shall prevent the hearing and settlement of minor disputes in any manner traditionally recognized in Ethiopian law until such time as regular courts can be established for the hearing of such disputes by judges duly appointed by us on the recommendation of our Minister of Justice."

Hence for this purpose, a proclamation was issued to establish local judges (Atibia Dagna).The Criminal Procedure Code of Ethiopia of 1961 and the Civil Procedure Code of Ethiopia of 1965 have changed the then existing system of courts. Accordingly, Atibia Dagna, Communal Court (Miktle Woreda Court) and Teklay Gizat Court were abolished without express provisions to that effect in these two procedural codes. The two Codes established the Woreda Court, the Awradja Court and that of the High Court. Since the advent of the two procedure codes, there have been many changes in the court system. Later in 1987 with the establishment of Peoples' Democratic Republic of Ethiopia, the Woreda Court vanished with the elimination of the Woreda as a unit of administration. Besieds all these courts, there were various special courts. The Social Courts (Kebele Courts) are still functioning. Moreover, there are other courts like that of the Tax Appeal Commission and the CPA-Administration Court which have special nature and jurisdiction.

Since it was assumed in the old Ethiopia that the king has the power to enact laws, to execute these laws and adjudicate cases, his power was absolute. The 1955 Revised Constitution of Ethiopia has at least in theory envisaged the division of the power into its three main branches; namely, the legislative, executive and the judiciary. Chapters IV, V and VI of this constitution deal with the Executive, the Legislative and the Judicial organs, functions respectively. By virtue of this division the independence of judiciary from any organ of the state was recognized at least in principle. To this effect Article 110 of the 1955 Revised Constitution declares: The judges shall be independent in conducting trials and giving judgments in accordance with the law, in the administration of justice, they submit to no other authority than that of the law'' In one case it was decided by the High Court of Addis Ababa that an order to a President of an Awradja Court, issued by a Governor directing the former to hand over possession of a plot of land to a party who was involved in litigation concerning the right of ownership of the same, it was held that the Governor's order constituted a clear interference with the independence of the judiciary granted by the 1955 Revised Constitution and the order was declared null and void.

In spite of such facts which go in line with the principle of the independence of the judiciary, there were other situations which negatively contributed to its implementation. Due to the fact that Ethiopian kings were seen as "source of justice", the Emperor continued to interfere in the administration of justice through the Chilot. This situation existed up to the 1974 Popular Revolution which over threw the Emperor. Not only had the Emperor the power to adjudicate

cases but he also had the power to appoint judges from Woreda Court level to the Supreme Court. This point is clearly put in Article 111 of the 1955 Revised Constitution which provides:" Judges shall be appointed by the Emperor [..]"

However, one may question: judges of which court shall be appointed by the Emperor? Though the Revised Constitution is silent as regards this question, one may refer to the provisions of other legislations and reach a conclusion. One of the various laws to refer to is that of Decree No.1 of 1942. The power granted to Governor General, Governor and that of Mislenes as regards the administration of justice was not expressly amended. Under Articles 78, 82 and 83 of this decree the Emperor had power to appoint those judges. The theory of separation of power which was recognized by the Revised Constitution seems to contradict itself by the practice of appointing members of the Executive to be judges in the area of their jurisdiction. There was no organ until this time (1955) which followed the manner in which judges were elected, promoted and transferred and which was free from the influence of the Executive.

Finally, it was after eighteen years that a law was enacted to implement the principle of the independence of the judiciary envisaged under Article 111 of the Revised Constitution. In 1973 a proclamation was issued for the governing of the judicial administration. By virtue of the proclamation the Judicial Administration Commission was established and this Proclamation set judges free from influences exerted upon them from Governor-Generals, Governors and Mislenes. According to this Proclamation the Commission has the power to select persons for appointment as judges, to make recommendations for the promotion of a judge, as well as to regulate their transfer. Without a change on the members of the Commission this Proclamation was lat amended in 1968, by virtue of which the Commission's power was extended to include registrars and public prosecutors. Although the principle of the independence of the judiciary was expressly included in the 1987 Constitution and in the Proclamation 9/1987 the point is whether or not it was implemented in reality.

Judicial commission: Then Part Six of Proc 40/1993 deals with miscellaneous provisions among which are an election and appointment and removal of judges of the Central High Court and Central Courts:" Presidents and Vice-Presidents and Judges of the Central High Court and Central First Instance Court shall be selected by the Judicial Commission pursuant to the provisions of the Independence of Administration of Justice, Proclamation No. 23/1992.

Those judges who are presented to the Judicial Commission by its chairman, who is the President of the Central Supreme Court and approved by the Commission, will be submitted to the President through the Prime Minister. Upon obtaining approval by the Council of Representatives the President of the Transitional Government of Ethiopia appoints as judges the candidates presented to him. The appointment of the President and Vice-President of the Central Supreme Court is regulated by Proclamation No. 23/1992. Accordingly, they are appointed by the President of the Transitional Government of Ethiopia subject to the approval of the Council of Representatives. Both proclamations include provisions which deal with the removal of judges of the Central Courts. Pursuant to Article 13 (2) of Proclamation No. 23/1992: "[,..] judges shall be appointed for an indefinite period." And this is in accordance with the principle of the independence of the judiciary. It is evident that this principle is more respected when that of separation of powers is respected. In addition, Article 6 (2) of Proclamation No. 23/1992 provides:" No person may be appointed as a judge while being simultaneously engaged in any legislative or executive organ of the state or a member of any political organization."

4.5.6 Non-regular courts: Prior to 1936, there were quite a number of courts other than the regular courts. The Ethiopian Orthodox Church had a religious court. It was called Ecclesiastical Court. These courts had jurisdiction over divorce of a religious marriage, the administration of the church and disputes over the property of the church. Courts of the Ministry of War established to hear cases relating to land given to soldiers in active duty and other types of benefits received in return for military service. The Ligaba Court had had jurisdiction over matters arising out of land given to former soldiers in return for the services they rendered to the government. The Slave Emancipation Court had jurisdiction to hear cases involving the contravention of the law prohibiting slavery proclaimed in September 1923.

Between 1941 and 1974, the following non-regular courts were in place: the Ethiopian Orthodox Church Courts, Muslim Courts, Military Courts (courts martial), the Hamle 16th Committee (which was given the powers of the court of the Ministry of War and the Legaba Court), Political Court (had the power to hear cases of persons who had collaborated with the occupying enemy), Committee for the Protection of Honor (established for the purposes of adjudicating cases involving the defamation or degradation of the honor of the emperor and that of the members of the imperial family), the Pension Appeal Tribunal, the Tax Appeal Commissions, the Civil Service Tribunal and the Labor Relations Board.

Litigation has always been a prominent feature of the Ethiopian scene, as it is in many developing societies. Once courts had been established, people resorted to them frequently, even with minor cases. The burden was excessive. To reduce this burden, in 1947 a system of *Atbia Dagnas* (local judges) was established. Traditionally, people submitted their disputes to local elders, and under the 1947 Proclamation an attempt was made to institutionalize this process. An *Atbla Dagna* was appointed for each "locality."

4.5.7 Amicus curiae: Amicus *curiae* expresses the desire to involve the grass root in the administration of justice. 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. The term also includes those individuals who may not have a direct interest in the final result of the litigation but are seeking to give information or any other sort of assistant to the court or the tribunal examining a given case. You can say that the concept of amicus curiea advocates for the participation of individuals in the administration of justice. You can say that the role of individuals who try to influence the outcome of a given case play a role similar to the jury in the common law. Just for your information, in the United States of America, in

criminal litigation, some group of individuals participate in criminal litigation and they give the verdict of guilty or not guilty after hearing the facts of the case.

In Ethiopia, amicus curiea was recognized. You can take the following examples of the recognition of the institutions of the amicus curiea. There are certain provisions in the Ethiopian Criminal Procedure Code formally giving a place to assessors. Before 1942, assessors had had a big place in the administration of justice in Ethiopia. In the Zufan Chilot, dignitaries expressed their views before the Emperor had a lasting word on the case. Article 19 of the Administration of Justice Proclamation issued in 1942 gave some roles to assessors in the administration justice. Another example is the traditional roadside courts. The roadside courts as the name suggests heard cases by the roadside. Where a dispute arose between two or more individuals, they could approach an elderly person, even a passerby, and ask him/her to settle the case. Normally, it was customary for the elderly person to rest by the roadside in order to settle the matter. The institution of the roadside courts was the practice in the highland parts of Ethiopia. The roadside courts in Ethiopia were signs of the desirability of the recognition of the participation of ordinary individuals in the administration of justice in the country. One finds another example of the recognition of the concept of amicus curiea in the current Ethiopian Criminal Procedure Code. It is desirable to reproduce Article 223 of the Ethiopian Criminal Procedure Code. The Article states: *The atbia dagnia shall whenever possible settle by compromise all cases arising out of the commission, within the local limits of his jurisdiction, of minor offenses of insult, assault, petty damage to property or petty theft where the value of the property stolen does not exceed five Ethiopian Birr. Where the atbia dagnia is unable to effect a compromise he may sitting with two assessors adjudicate on such offenses and on conviction impose a fine not exceeding 15 Ethiopian Birr. The atbia dagnia shall cause a record to be kept which, among others, shall show the opinion of the assessors.*

Assessors are supposed to have no interest in the outcome of a case in which they are involved. Assessors give important input to the decision of a court. However, the opinions assessors give do not bind the court; the court may disregard such opinions. The involvement of assessors in the administration of justice is believed to increase the acceptability of a judgment.

4.5.8 The court system (1993-1995)

Heinrich Scholler, Ethiopian Constitutional and Legal Development (Vol. I: Essays on Ethiopian Constitutional Development (2005) at 154-157.

Purpose of Proclamation No. 40/1993: Due to the federal structure of the administration prevalent in Ethiopia today, two court structures were envisaged. The court structure of the Central Transitional Government and that of National/Regional Self Governments. These dual structures of courts arose from the fact that the Central Government and the National/Regional Self Government had different powers and responsibilities which were defined by law. Here, we

will try to discuss the Proclamation which provided the structure of the courts of the Central Government. One can cite two objectives which the Central Government Courts establishment proclamation No. 40/1993 tries to achieve. These were: to establish and organize a court system based on fundamental principles of justice which would guarantee the observance of human and democratic right to the peoples of Ethiopia, considering the fact that the courts of the previous regimes and their manner of rendering justice and inherent weaknesses and short comings; to organize the courts of the Central Government in pursuance to the spirit of the proclamation defining the powers and responsibilities of the Central Government and the National/Regional Self Governments.

The central courts: The Proclamation No. 40/1993 has tried to transform the wish of the legislator into practice by fixing such provisions as to deal with its purpose. The Central Courts have as an objective to "safeguard [[...]] individual and democratic rights, freedoms, and interests guaranteed by the Constitution and ensure the maintenance of law and order and the prevalence of peace and justice. The "Central Supreme Court of the Transitional Government of Ethiopia" and the "Central First Instance Court of the Transitional Government" are established by this Proclamation. The main body of this Proclamation deals with the "Establishment of the Central Court and their Jurisdiction, Various provisions of this Proclamation have dealt with material and local jurisdictions of the Central Courts. They have dealt also with judicial jurisdictions. While defining the jurisdiction of the Central Courts a list of those cases which fall within their jurisdiction is provided.

In civil cases material jurisdiction of the Central High Court pursuant to Article 14 and that of the Central First Instance Court, under Article 18, is determined by giving due regard to the amount of money each case involves. Accordingly, the minimum amount of money which a certain civil action should involve in order for this action to come before a Central High Court is Birr 500.000. And for a Central First Instance Court the minimum amount is set by Birr 10.000 and the maximum by 500.000." This is without contradicting the fact that there are matters which fall within the jurisdiction of the Central High Court and the Central First Instance Court taking into consideration only the nature of the suit. For example, suits regarding private international law, and suits regarding nationals and foreign nationals fall within the material jurisdiction of the Central High Court, whereas, suits regarding liabilities of employees of the Central Government arising from their official duties" fall within the material jurisdiction of the Central First Instance Court. Furthermore, Article 18 (10) provides that "[...] suits to be based on the Charter or the laws of the Central Government and the subject matter of which cannot be expressed in money" fall within the jurisdiction of the Central First Instance Court.

Before analyzing the other parts of Proclamation No. 40/1993, it would be appropriate to raise a few points which are relevant to part two of the Proclamation. One of these points relates to the following provision which declares: "The judicial power of the Central Government shall be vested in the Central Courts. To what does the term "judicial power" in the above provision refer to? Usually the legislative organ of a state is the law maker while the executive organ executes those laws issued by the legislature whereas the judiciary interprets and applies these laws. In our understanding, according to the above provision the Central Courts are made to be interpreters of the law. But it would appear that there exists a certain provision in a certain law which contradicts the provisions contained in Article 5 (1) of Proclamation No. 40/1993. This article reads as follows: "Any question arising from the interpretation of this Proclamation shall be submitted to the Council of Representatives for decision. By this provision the Council of

Representatives is made the interpreter of the law; a law which is issued by the same organ.

The other point concerns substantive laws to be applied by Central Courts. Dwelling on this point, Article 8 (1) provides the following: "The Central Courts shall settle disputes before them on the basis of the Charter, International Treaties or laws of the Central Government." The usual way of making international treaties part of our domestic law is ratification, a power exclusively reserved for the Council of Representatives by the Charter. For example, the Convention on the Right of the Child which was adopted by the General Assembly of the United Nations is ratified by the Council of Representatives thereby accepting it as the law of the land. This decree of ratification was published in the Negarit Gazetta. But this act of ratification though published in the Negarit Gazetta does not provide the text of the document which is ratified. All international treaties which are ratified by the legislative organ do not have official translations. The problem then is in the absence of such translations, are courts authorized to apply non official translations?

The last point refers to the principle of judicial review and in this regard, Article 11 provides the following:" The Central Supreme Court shall have appellate juris-diction over judgments of the Central High Court nullifying the provisions or parts of the laws of the Central Government International Treaties as inconsistent with the Charter International Treaty, as may be appropriate, judgments of the Central High Court which determine: a provision of a National/Regional Constitution or a law to be contrary to the Charter or International Treaty; a decision of the National/Regional Supreme Court nullifying a part or a whole provisions of the laws of the Central Government, International Treaty or the Charter."

Organization of Central Supreme Court: The other basic issue dealt by Proclamation 40/l993 is organizational set up and the judicial process at the Central Courts doing so, the Central Supreme Court has three divisions: civil, criminal and labor. Each of these divisions is composed of one presiding judge and two other judges. There are situations where a division constitutes not less than five judges. The Central High Court and Central First Instance Court do have two divisions: civil and criminal "The Central High Court shall, in addition, have a labor division. Each division is composed of a presiding judge and two other judges; but there is discrepancy between the Amharic and the English versions of Article 25 (2). In the Amharic version of this provision, it is stated. "[...] where the Central Supreme Court deems it necessary, it may decide that only one judge sits in a division." Article 48 provides that Amharic is the working language of Central Court. However, where a party does not understand Amharic it is the court which furnishes an interpreter.

4.5.9 The courts system (since 1996): As an organ of government, the judiciary, is entrusted primarily to construe a law issued by a legislature and applies the same to a case before it. In order to put this judicial power into effect, this organ needs to have courts established. These courts may be structured in various states differently depending on the form of the government or economic reality or the size of the states concerned or the combination of any of these factors. Although a country which follows a federal system will not necessarily have a parallel court structure, Ethiopia has organized a dual court structure. Consequently, we see the division of judicial power between the courts of the federal government and that of the Regions, horizontally, and again vertically among the different levels within each structure. The matters allocated to the

federal courts appear to be of national concern, while matters relating to the units are left to the courts of the regions. Within the federal court structure, there are three levels of courts according to Proclamation No 25/96. Thus put from bottom to apex: the Federal First Instance Court having only original jurisdictions, the Federal High Court possessing both original and appellate jurisdiction and the Federal Supreme Court with its original, appellate and cassation powers. Proc.No. 25/1996 allocates jurisdiction to Federal Courts mainly on two criteria: laws and persons. Federal Courts are to settle cases or disputes submitted to them within their jurisdiction on the basis of Federal laws, international treaties, and regional laws where the cases relate to same and if not inconsistent with federal laws and international treaties. The regional states do have their own tier of courts. For instance, as per Article 3 and Article 27(b) of the Oromia National Regional State Courts Proc. No. 6/1995, the Region has four tiers of courts, namely: the Social Courts, District Courts, the Zonal Courts and Supreme Court. The Oromia National Regional State has also a cassation division within its Supreme Court. Petitions can be filed to the Cassation Division of the Federal Supreme Court from any level of the Federal or state courts, both on federal and regional matters as long as a decision being challenged is final and contains a basic error of law.

4.5.10 Cassation power: In Ethiopia, cassation, some say, was introduced in 1987. This assertion is correct if it means cassation proper i.e., cassation as it exists today was introduced in the year 1987. The prototype of today's cassation seems to have a long history in this country. Thus the assertion the cassation was introduced in the country in 1987 is incorrect if it is set out to show that a remedy similar, though not identical both in shape and purpose, to the present day cassation in our country did not exist before 1987.

If we consider the institution before the coming to power of Hailesillasse I, we get the accounts of scholars such as M. Perham. Perham wrote: ``after a case had been heard elsewhere, eg., by a king or other ruler of territory, a party could petition the Emperor for review and his decision was final.`` Although this power of the various emperors was said to have been motivated by their desire to see that justice is done, one may counter-argue that they did have another motive, namely, the strong desire to see laws declared by them or their sense of equity would have prevalence over the various lords in the country. The same motive dominated the earliest stage of the development of cassation in France, Italy and England.

During the reign of Emperor Hailesilasse I, there was a special tribunal referred to as the Imperial Chilot, which deviated from the then ordinary courts in peculiar ways. The emperor established an organ called 'Seber Semi,' meaning a body which hears petition for cassation. Its function was to give an opinion on

questions of law when such question had been referred to it by the Emperor and it did not possess the power to decide cases in accordance with the law, but can only make recommendation to the Emperor. A prototype of cassation also existed in the period between 1975 and 1987. Proc. No. 52/1975 came up with an interesting provision. Art. (4,1,[d]) stipulated that: "Every division of the Supreme Court shall be fully constituted by three judges provided that where the President of the Supreme Court is of the opinion that the complexity of any case so requires, he may decide that a division be constituted by more than three judges."

Thus discretion was given to the President of the Supreme Court in deciding whether or not a given case was 'complex' or not. In case where a case was discovered to be 'complex,' more than three judges were supposed to dwell upon it. And no discrimination was made as between question of law and question of fact; the same was also true as between civil cases and criminal ones. When we consider the practice during this period, the president in fact exercised its power since there are very significant cases decided by what was then called 'Panel'- a temporary division of the Supreme Court in which at least four judges used to sit in settling what was considered to be a complex case

Proc. No. 9/1987 heralded cassation proper. A final decision of the Supreme Court or other courts containing a fundamental error of law was supposed to be reviewed by a division of the Supreme Court which used to be tentatively constituted. At least five judges used to sit in deciding a case when the President of the Supreme Court so decided or where the Procurator General submitted a protest. Where the latter submitted a protest, the President had to refer the matter directly, that is, without any further scrutiny, to the division. The purpose of remedy in cassation was clearly legislated to be the correct and uniform application of law throughout the country.

All other things with respect to the cassation court being somewhat the same, two noticeable changes were introduced during the Transitional Period. To begin with, the cassation court had the power to interpret the Transitional Period Charter which could be equated with the then supreme law of the land. Finally, interestingly enough the decision of the cassation division was given the status of precedent. At present, the Cassation Division of the Federal Supreme Court, located at the apex of the present court system in Ethiopia, is a judicial unit of last resort. It considers any final court decision over any matter, whether federal or regional and regardless of the tier of the court, provided such decision contains a basic error of law.

4.5.11 Review Questions and notes

Part I Essay-type Questions

Answer the following questions.

1. What sense should be attached to the term `fusion of power` in the context of the development of courts in Ethiopia?
2. Define the term `amicus curiae.`
3. Describe the role of kings in the administration of justice in Ethiopia.
4. Describe the principal aspects of the regular court system in Ethiopia after 1942.
5. Fill out the incomplete parts of the following table which is intended to partly summarize the materials covered in this section.

Period	Level	No. of Judges in a bench	No. of appeals	Court system	Relation with the executive	Appoint-ment of judges	Accessibility	Recognition of of traditional tribunals
1920`s-1942								
1942-1965								
1965-1974								
1975-1987	four							
1991-1994								
1994-1996								
Since 1996								

6. Article 7 of the Provisional Military Government Establishment Proclamation (Proc. No. 1/1974) stated that `` all courts of law throughout the country shall continue their normal functions`` Articles 8 and 9 of the same provided that `` A Military Court shall be established to try those who conspire against the motto `` Ethiopia Tikdem,`` engage in any strike, hold unauthorized demonstration or assembly or engage in any act that may disturb public peace and security; judgment handed down by the Military Court shall not be subject to appeal. Article 3 (1& 2) of Proc. No7/1974 established a two-level court martial (Special General Court Martial and Special District Court Martial) to hear criminal charges instituted against any person under the Special Penal Code. No appeal could lie from the decisions of the special court martial. But decisions relating to persons charged with offenses punishable by death or imprisonment of ten years to life could be reviewed by the Head of State. Do you see any objections to the prescriptions in these provisions?

7. Article 4/2 of the Administration of Justice Proclamation (Proc. No. 52/1975) stated that ``whenever it is necessary the Minister (the Minister of Ministry of Justice) …may assign any judge of High Court to sit in an Awradja Court or any judge of Awradja to sit in a Woreda Court.`` Article 4 of the Judical Administration Commission Re-establishment Proclamation No 53/1975

established a Judicial Administration Commission chaired by the Minister of the Ministry of Justice. Members of the Commission included the Attorney General, the Commissioner of the Central Personnel Agency and other three persons appointed by the Head of State. Explain the significance of these provisions. Article 6 of Proc. No 53/1975 empowered the Minister of the Ministry of Justice to issue regulations regarding salary scale of judges, prosecutors and registrars.

8. Articles 3 and 4 of the Administration of Justice Proclamation (Proc. No. 52/1975) established a three-tire courts system namely Woreda Court (one judge), Awraja Court (one judge) High Court (normally one judge, in some cases three judges) and Supreme Court (three judges and in some cases more than three judges). What dictated the determination of the number of judges in a bench? What do you think is the number of judges in a bench and the quality and quantity of decisions?

Part II Multiple-choice Questions

Choose the best answer from the given choices.

1. Identify the statement that does not properly describe the state court system in Ethiopian between 1942 and 1974.

A) The court system was accessible to the people in terms of language and of spatial distribution.
B) The court system was featured by fusion of the two arms of the state, i.e., judicial and executive powers.
C) The *Zufan Chilot,* whose decision was not supposed to be based on legal considerations alone, was placed at the pinnacle of the court system.
D) The court system was unitary in form following the unitary form of state the country adopted.
E) The court system was designed to solve the problems of the previous court system in the country such as endless litigation that caused delay of justice and cost.
F) The court system sought to give room for community participation in the administration of justice through assessors.
G) The court system was not successful in replacing the traditional court systems.

2. One of the following period marks a departure in the history of the court system in Ethiopia with regard to form:

A) 1942-1965
B) 1965-1974
C) 1974-1987
D) 1987-1990
E) 1991-1994
F) Pre-1942

4.6 Constitutional Development of Ethiopia

This section discusses the main constitutional developments in Ethiopia. It describes the key features of the four constitutions of Ethiopia, namely the 1931, 1955, 1987 and 1995 constitutions. The section also touches upon the 1952 Eritrean Constitution, the 1974 Draft Constitution of Ethiopia and the Transitional Period Charter of 1991. Ethiopia put in place two constitutions that promoted the idea of empire state. The PDRE Constitution of 1987 advocated for a unitary and socialist oriented state. Then the present constitution rests on ethnicity, federalism, human rights and decentralization of political power.

4.6.1 Pre-1931 Period: Before 1931, Ethiopia did not have a written constitution. Various emperors ruled the country without regard to such constitutional principles as separation of power and the rule of law. The emperors enjoyed absolute power; they did not know of any legal limitations. Emperors adopted unitary form of state. The absolute emperors aspired for political centralization. Force, religion and the legend of the Solomonic Dynasty served as tools of political legitimacy. Only those who could establish a link with the tradition of the Solomonic Dynasty were taken as the right persons to rule the country. Those who could not establish such connection faced legitimacy crisis. In the latter category, you can cite the Zagwe Dynasty and Emperor Theowodrows II as examples. Those kings or emperors who could show that they belonged to and were ready to defend the Orthodox religion could easily establish themselves as rulers proper. Those who failed to do so would be ousted. In the latter category, you can mention the cases of Emperor Susuneous, who converted himself into a Jesuit and Lij Eyasu, who sympathized with Muslims. Practical limitations such as the existence of power contenders and lack of effective control of the periphery by the center dictated the concession of some degree of local autonomy to the regional lords.

Tsegaye Regassa, Ethnic Federalism and The Right to Self-Determination As A Constitutional Legal Solution to the Problem of Multi-Ethnic Societies: The Case of Ethiopia (LLM Thesis, Ethiopian Civil Service College, Law Library, Unpublished) (2001)

A constitution of a given country may be unwritten or written. In the case of an unwritten constitution, you do not find the principles of the organization of state and other principles reduced in a given document. In the case of a written constitution, you find those principles written in a given document. Ethiopia had had a constitution before 1931 but it was not put in writing. After 1931, Ethiopia started experiencing a written constitution. Ethiopia has long history of people and state. Yet, Ethiopia has little experience with written constitution. Ethiopia's experience with written constitutions started with the 1931 constitution. During the long years of the era of unwritten constitutions, the Ethiopian society had an uncertain territorial

border. This uncertain border has been shaped by the extent of conquest made by Ethiopian Emperors on the outlying territories of what is called Ethiopia today.

Before 1931, the Ethiopian state was monarchical. Its emperors were absolute sovereigns. They were autocratic. The monarchs led a feudal state. As any feudal system, it was hierarchical. The monarchs for various reasons left some degree of local autonomy to the regional lords. Formally, the state has always been unitary in its structure. The source of legitimacy of the regimes was force and religion. Especially, the Ethiopian Orthodox Christianity that relates the bloodline of kings to Judaism through the legend of the Queen of Sheba was the principal source of legitimacy. Ethiopia, in the unwritten constitutional era, had been unitary state. The kings were absolutely sovereign supported by force and religion. The degree to which the Emperors allowed regional autonomy varied. Emperors of the 19thc such as Tewodros, Yohannes, Menelik II, and Lij Iyyasu had the plan of unification. However, only Emperor Haileselassie I succeeded in creating a united country in the 1930s that was no more troubled by a regional lord.

Before 1931, the idea of separation of powers was absent. The idea of separation of state and church was also absent in the Ethiopian legal tradition. The King was not only the supreme executive but also a center of legislative and ultimate judicial power. Even during the written constitution time, Emperor Haileselassie I used to preside over an Imperial court named the Zufan Chilot. Another concept that was absent to Ethiopia's legal culture was of federalism. The principles of rule of law, limited government and of human rights were generally unknown during the time of unwritten constitution in Ethiopia. There was no systematic mechanism of handling problems of diversity except through conquest.

Although constitution in Ethiopia is as old as the history of the state, there were also rich heritages of customary constitutional laws. One example is the Gada System, which elaborates systems of separation of powers and democratic governance. This could be judged as impressive as the written constitutions of the modern times. The system has limited the concentration of power in order to avoid dictatorial rule. It had separated governmental functions. Gada in traditional forms incorporated the values of representative government and believed in the periodic change of leaders. In many ways, Gada operated on a participatory form of government. Regular discussions and consultations were part of the overall power structure.

Assefa Fiseha, Federalism and the Accomodation of Diversity in Ethiopia: A Comparative Study,(Netherlands, Wolf Legal Publishers, 2005/06) at 19-21.

In theory, it is often stated that the throne's authority was absolute. But it was not so in practice. Primarily, until the twentieth century where provincial nobilities were effectively and systematically abolished, the Ethiopian state did not possess the structure and means required to impose the absolute claims the throne may have demanded. The vastness of the empire, the geographical obstacles, absence of transport and communication facility, fiscal and manpower constraints ethnic, linguistic and regional disparity, hindered direct central authority. To the extent that the central power was hindered, it meant also that regional forces enjoyed themselves as autonomous kingdoms merely acknowledging the existence of a distant emperor. Indeed, the administration of the state was carried out by the nobility (the kings), a group that resisted the attempts for centralization. Even though the status, power, and privileges of the nobility depended on the appointment and grants dispensed by the emperor, quite naturally the nobility strove to secure continuity of status and privileges vy rendering both office and status sometimes

hereditary and free of royal control. Appointments were often given to leading families in the area, since provincial sentiments usually precluded the appointment of outsiders. The more powerful provincial kings were sometimes contenders for the throne itself. As Levine stated rightly: the perennial tendency of certain regional families to become endowed with an aura of legitimacy in their own right often was a threat to itself. When a conducive environment was found, provincial forces never hesitated to crown themselves emperors. This demonstrates the fact that they were not only administrators of decentralized power by right, but they were also potential contenders to the throne.

Secondly, tradition and religion also imposed limits on the power of the Emperor. Some authors argue that Ethiopia had experience with constitutional government that predated by many centuries the promulgation of the written constitution in the 20th century. If a constitution is defined, as stated by Clapham, `not as written document but as set of practices which guide the exercise of political power, then Ethiopia enjoyed constitutional government over a long period of time.` One aspect of the constitutional practice limiting the power of the emperor, emanated from the famous Kibre Negast, a document of great relevance in explaining the constitutional documents in the entire world. This is probably one of the oldest constitutional documents in the entire world. Written in 1320 by a group of authors from Axum, interestingly after the downfall of the Zagwe Dynasty, (roughly from 1137 to 1270, that succeeded the Axumite state, and believed to have usurped power without belonging to the Solomonic line) and during the reign of Yikuno Amlak, an Amhara from Wollo, who overthrew the Zagwe Dynasty and inaugurated a dynasty which called itself `Solomonic` to emphasize its legitimacy as opposed to its predecessor. Among other things, the Kibre Negast defined the core of the Ethiopian ethos and the source of legitimacy of the Emperor. It provided the rules for succession for the highest office. Accordingly, no one except the descendants of King of Solomon shall ever reign to the Ethiopian throne. It also provided about the complex organization of the Imperial court and government and regulated the relation between the state and the church. These rules combined together played a crucial limit to whoever failed to claim the legend. Even when one succeeded to the throne by might, its legitimacy was questioned immediately and would subsequently lead a downfall. The cases of Emperor Tewodros and Michael Sehul represent good examples. The former`s inability to expressly affiliate with the Solomonic line as his radical position against the church frustrated his project of building a centralized state. The latter who was known for making and unmaking seats to the throne in Gondar although he was capable of throning himself, never claimed it probably because he failed to affiliate himself with the same line.

Religion was another crucial factor. Indeed the connection between emperors and church was so strong that the imperial authority was committed to the church's faith. The emperor was required not only to be a believer of ancient Orthodox Christianity but also required to defned it. Religious conversion is one charge, which was not tolerable. Rulers who violated this injunction fortified the allegiance of their subjects and their right to the throne. To mention a few, Emperors Ze Dingil (1603-04) and Sysneus (1607-32) were removed from the throne because of their conversion to Catholicism. In 1916 the charge of alleged apostasy, however obscure the fact may be, was instrumental in the overthrow of Lij Iyassu. It is not surprising then that Christianity remained state religion until 1974.

For the most part, consciousness of unity and autonomy co-existed more or less in the balance the emperor slightly prevailed over regional forces. The plurality of kings, with the Niguse Negast above them signifies some kind of federal or con-federal government structure. The throne

represented the symbol of unity and regional forces exercised decentralized power. The Neguse Negast de facto with national matters while the kings exercised powers over matters of local interest. There is no doubt that this represents in the words of Livingstone, a typical federal society. These essential features of what we understand today as the federal principle. Suffice to emphasize that before the emrgence of the modern federal system in the United States in 1787, its features were never as clearly articulated as they are today. The more amorphous confederate form was predominant.

The beginning of the twentieth century marked the first serious attempt to curb the autonomy of the regional forces. It was in 1906 that Emperor Menlik II (1889-1913) could at any time take away the authority of the highest rases without giving any reasons for his action. But this is far from the measures taken by Haile Selassie. According to Levine Menlik did not decisively undercut the authority of the great provincial lords towards the end of his reign the provincial rases became largely independent. It is true that the power of Jima Aba Jifar II survived for instance unitl 1932.

The coming to power of Emperor Haile Selassie in 1930 and the subsequent issuance of the 1931 Constitution, the first written constitution in the history of the country, marks a new epoch. It heralded the end of the role of the duality that existed for centuries. Provincialism and or the autonomous kingdoms, the traditional check against the power of the king of kings, were completely absorbed into the centralized administration. Haile Selassie in conformity with his policy of centralization refused to confer the title of kings, thereby disappointing expectations at the time of his coronation. This is particularly clear from the nature of the houses established under the 1931 Constitution. The emperor made sure that all potential contenders for power were members of these chambers that in effect had only an advisory role.

Apart from the introduction of the modern army after dissolving private armies of the regional notables, Haile Selassie`s measure of direct individual taxation without the involvement of the intermediary notables which in a way centralized the taxation system, hit hard the economic base of those regional notables. Their right to collect tax was taken over by the center. Nor did the 1974 revolution, which gave a mortal blow to the old monarchy, bring any change in the move towards more centralization of power. As far as regional autonomy is concerned, except for the change of ideology from the Solomonic genealogy to Socilaism, the centralist character of the state remained intact and was even strengthened to a degree that far exceeded the imperial regime.

4.6.2 The 1931 Constitution: The excerpts reproduced below discuss the sources, the significance, the contents and the shortcomings of the 1931 Constitution. The texts outline the factors that necessitated this constitution as well.

ቀዳማዊ ኃይለ ስላሴ፣ ሕይወቴና የኢትዮጵያ እርምጃ /ኢንግላድ ባዝ/ 1ኛ መጽሐፍ/ (1929) ገጽ 142

ሕገ መንግስት ስለ ማቆማችን-በቀድሞ ዘመን በአውሮጳም በእስያም በአፍሪቃም ቢሆን ነገስታቱ ሕዝቡን እንደፈቃዳቸው በሚገዙበት ጊዜ በነገስታቱና በሕዝቡ በነገስታቱም ቤተ ዘመዶች መካከል ሁከትና መለያየት ነበር። ይህንንም የብዙ አገሮች አስተዳደር ታሪክ ያስረዳል።ባገራችን በኢትዮጲያም እንደዚህ ሲደረግ ይኖር ነበር። ስለዚህ ሁከትና መለያየት ነበር። ይህንንም ለአገዛዛችን ሕግ እዲኖረው ለወራሾቻችንም በሕግ የተመሠረተ አገዛዝ ለማቆየት ሕዝባችንም የመንግስቱን ስራ ተካፍይ ሆኖ እንዲከታተል ለማድረግ አስበን ገና የኢትዮጵያ መንግስት አልጋ ወራሽና ባለሙሉ ስልጣን እንደራሴ ሆነን ሳለን ሕገ መንግስት ሲቆም ለመንግስቱም ለሕዝቡም

ትልቅ ጥቅም የሚያመጣ መሆኑን ለንግስት ዘውዲቱ አስታውቀን ነበር። ነገር ግን ያለሕገ መንግስት አገርን መግዛት ጥቅማቸው የሆነ አንዳንድ ትላልቆች መኳንቶች ሕገ መንግስት የቆመ እንደሆነ የንግስት ዘውዲቱን ማዕርግና ስልጣን የሚያጐድል እያስመሰሉ ስለ ተናገሩ በዚህ ምክንያት አሳባችን ሳይፈጸም ቆየ።

በዚያ ጊዜ ምንም እንኳን ባለሙሉ ስልጣን እንደራሴ ብንሆን በመካከሉ የሚያስቸግር ነገር ነበረበት። ትልልቁን ጉዳይ ሁሉ ከመፈጸሙ አስቀድሞ ለግርማዊት ንግስተ ነገስታት ዘውዲቱ አስታውቃቸው ነበር። ጉዳዩንም እርሳቸው የሚቀበሉት ሲሆን በቶሎ እንዲፈጸም አደርጋለሁ። የማይቀበሉት ሲሆን ግን እየመላለሰሁ ከማስረዳት በቀር ባለሙሉ ስልጣን እንደራሴ ነኝ ብዬ በኃይል ለመስራትና እርሳቸውን ለማሳዘን አልፈቅድም ነበር። ምክንያቱም በዚህ የተነሳ ባገር ውስጥ ሁከት እንዳይሆንና የሰው ደም እንዳይፈስ መጠንቀቅ የሚያስፈልግ ስለ ነበር ነው። ስለዚህ ሕገ መንግስት ማቆሙን በትዕግስት አቆየሁት። ነገር ግን ንግስት ዘውዲቱ በመጋቢት 24 ቀን 1922 ዓ.ም ካረፉ በኋላ ዘውዱንና ዙፋኑን በሚገባ ሕግ ስለ ወረሰን ቀድሞ በእንደራሴነት ሳለን አስበነው የነበረውን ሕገ መንግስትን ለማቆም ቆረጥን። ስለዚህ የልዩ ልዩ አገሮችን ሕገ መንግስት መርምረን የውጭ አገር ልማድና ትምህርት ያላቸውን ካገሩም ውስጥ ያውራጃውን ልማድና የቀድሞውን ታሪክ የሚያውቁ ሰዎች መርጠን ከዚሁ ከውጭ አገሮች ሕገ መንግስት ለኢትዮጵያ ሕዝብ የሚስማማው ተመርጦ እየተዋጣ እንዲቀርብልን አዘዝን።

ተጽፎም ቀርቦ እኛ ከመረመርነው በኋላ ከመሳፍንቱ ወገን ራስ ካሣ ኃይሉ፣ ራስ ኃይሉ ተክለ ሃይማኖት፣ ራስ ስዩም መንገሻ፣ ራስ ጉግሳ አርአያ፣ ራስ እምሩ ኃይለ ሥላሴ ፣ ከሚኒስትሮች ወገን የጦር ሚኒስትሩ ፊታውራሪ ብሩ ወልደ ገብረኤል ያገር ግዛት ሚንስትሩ ቢትወደድ ወልደ ጻድቅ ጐሹ የውጭ ጉዳይ ሚኒስትሩ ብላቴና ጌታ ኀሩይ ወልደ ስላሴ የጽሕፈት ሚኒስትሩ ጸሐፊ ትእዛዝ ወልደ መስቀል ታረሱ ከመኳንንት ወገን ደጃዝማች ይገዙ በጅሮንድ ተክለ ሐዋርያት ባንድነት እንዲመረምሩትና ለመፈረም የተዘጋጀ አድርገው እንዲያቀርቡ ትእዛዝ ሰጠን።

እነዚህም ነገሩን መርምረው ለመፈረም የተዘጋጀ አድርገው እንዲያቀርቡ የታዘዙት ሰዎች በአሳብ ሳይጋጠሙ ስለ ቀሩ ብዙ ጊዜ በእኛ ፊት ሲከራከሩበት ቆይተው ነበር። ከመሳፍንቱ ራስ እምሩ ብቻ አሳቡን ከሚኒስትሮችና ከመኳንንቱ ጋራ አድርጎ ነበር እንጂ የቀሩት አራቱ መሳፍንት በአሳብ አንድ ሆነው ነበር።

የመሳፍንቱ አሳብ ኢትዮጵያ በየትልልቁ አውራጃ ተከፍሎ ለመሳፍንቱ ለልጅ የሚያልፍ ርስት እየሆነ እንዲሰጥ በንጉሰ ነገስቱና በመንግስቱ ላይ ትልቅ የወንጀል ስራ ሠርተው ካልተመሰከረባቸው በቀር ዘራቸው እንዳይነቀል በየውስጣቸውም ያለው የያውራጃው ባላባት የያዘው ግዛት ርስት ሆኖለት ለመሳፍንቱ እየገበረና እየታዘዘ እንዲኖር ነበር። በጠቅላላም የፊውዳል መንግስት ማለት ነው።

የሚኒስሮችና የመኳንንቱ አሳብ ግን ኢትዮጵያ በየትልልቁ አውራጃ ተከፍሎ ለመሳፍንትና ለባላባቶች ለልጅ ልጅ የሚያልፍ ርስት ሆኖ ከተሰጠና ሹመት በዘር ይሁን ከተባለ ወደ ፊት የሚነሳው ትውልድ እንደምን ሊሆን ነው። ቢማርስ ቢያገለግልስ ሹመትና ግዛት ከላገኘ ኢትዮጵያ አገሬ ናት ለማለት እንደምን ይችላል። ስለዚህ አሁን ያሉት መሳፍንትና ባላባቶች ጥፋት ካልተገኘባቸው ባገር ገዥነት ብቻ ይቆዩ ጥፋት ተገኝቶባቸው ቢሻሩ ወይም ቢሞቱ ግን በግዛታቸው ዕውቀትና ችሎታ ያለው ማንም ኢትዮጵያዊ እንዲሾምበት ይሁን እንጂ ለዘር ማለፉ የሚገባ ነገር አይደለም። ዳሩ ግን ልጆቻቸው በዕውቀትና ባገልግሎት እንደ ሌሎቹ ሰዎች ሆነው ቢገኙ ንጉሰ ነገሥቱ እንዳወቀ በአባቶቻቸው ግዛት ወይም በሌላ ማዕረግ ስፍራ ይሹማቸው እንጂ ግዛታቸው ለልጅ ልጅ የሚያልፍ ርስት መሆኑ በሕገ መንግስቱ ሲጻፍ እይታየንም የሚል ነበር።

መሳፍንቱም ይህን ያቀረቡትን አሳብ ሚኒስሮችና መኳንንቱ እንዳልተቀበሉዋቸው ባዩ ጊዜ ይህም ካልሆነ ከዚያው ከግዛታችን ከብዙ አውራጆች ውስጥ እንዳንዱ አውራጃ ብቻ ለልጅ ልጅ የሚያልፍ ነው ተብሎ በሕገ መንግስት ይጻፍልን የሚል አሳብ አቀረቡ። ሚኒስሮችና መኳንንቱ ግን ይህንም አሳብ አልቀበልም ብለው በፊተኛው አሳባቸው ጸኑ።

እኛም ለዚህ ስራ የመረጥናቸው ሰዎች በአሳብ መለያየታቸውን በሰማን ጊዜ ሁለቱም ወገኖች አሳባቸውን ከነማስረጃው በጽሕፈት እንዲያቀርቡ አድርገን ከመረመርነው በኋላ ንጉሰ ነገስቱ ለመሳፍንቱም ቢሆን ለሌሎችም የመንግስት አገልጋዮች ቢሆን ርስትና ጉልት ለመትከል ይችላል የሚል አንድ ክፍል በሕገ መንግስቱ ይጻፍና ወደ ፊት አገልግሎታቸው እየታየ እንደሚያስፈልግ ይደረጋል እንጂ የፊውዳል መንግስት በዓለም ላይ መቅረቱን እያወቅን አሁን እንደ ገና ያንኑ አጽንተን በሕገ መንግስት መጻፍ ወይም ያለ ሕገ መንግስት መግዛት የማይገባ መሆኑን ለመሳፍንቱ አስረድተን ተጣርቶ ተጽፎ እንዲፈረም ይሁን በማለት ነገሩን ቆረጥን::

4.6.3 Review questions

1. In his own opinion, what prevented Emperor Haile Selassie I from pushing for a written constitution while he was serving as a regent?
2. State the relative position of the nobility and the ministers on the content of the draft constitution as described by Emperor Haileselassie I. Was the struggle between the two groups a question of merit versus blood or some thing else?
3. Who won the struggle for power in the 1931 Constitution?

Tsegaye Regassa, Ethnic Federalism and The Right to Self-Determination As A Constitutional Legal Solution to the Problem of Multi-Ethnic Societies: The Case of Ethiopia (LLM Thesis, Ethiopian Civil Service College, Law Library, Unpublished) (2001)

This period starts with the promulgation of the first written constitution in 1931. This constitution had a couple of functions. Domestically, it was designed to serve as an instrument of legitimatization of the powers of Ethiopian monarchs. Internationally, the constitution was meant to play the role of modernization. The constitution established the legal framework for absolutism. The constitution "legalized the emperor's absolute powers in appointments and dismissals, the rendering of justice, the declaration and termination of wars, and the granting of land and honors." Moreover, the constitution snatched the power of the traditional nobility to sign treaties with foreign states in their own rights. The constitution looked more like an agreement between the monarchy and the nobility, inclining the balance in favor of the monarchy. The constitution was an attempt to grant Ethiopia a modernized image to the outside world. The constitution at the same time served as an instrument of compromise between tradition and modernity.

Bajerond Takla-Hawariyat drafted the Constitution of 1931. He was the Minister of Finance. The draft was then submitted to the major noble men of the country. The draft was promulgated after the nobles had discussed and approved it. The nobility participated in the process of making the 1931 Constitution because Emperor Haile Selassie I wanted to give further weight to the document. The constitution had greatly reduced the powers of the nobilities in the provinces. Even if the nobility participated in the process of making the constitution, they were unable to change those parts of the constitution that limited their power. The Emperor, for his part, had difficulties in enforcing it on the nobility in the provinces.

There were two major sources: traditional sources and the Maji Constitution. As a mode of putting together the tension between the traditionalist nobility and the modernizing monarch, it used the 1989 Meiji Constitution of Japan as a model. In addition to the main text of the

constitution, Takla-Hawariyat prepared a law implementing and expanding parts of the Constitution. This legislation can be called an implementing law. The Emperor had taken much power from the nobilities. He stated this snatched powers in the constitution and made himself an absolute ruler. However, he needed to give some sort of concession. He stated those minor concessions to the nobilities in the form of an implementing law. The implementing law contained the law of the Imperial House referred to in the Constitution. The implementing law gave further powers to Parliament. The implementing law granted a number of minor privileges to the great lords. The implementing law gave privileges to the nobilities in the form of price Emperor Haile Selassie I had to pay in order to get support from the nobilities. The implementing law was not published at the time. Without those concessions to the nobilities, his rule would face some degree of problems. The legal status of the implementing law was not clear.

The Constitution was an instrument of centralization under the Emperor. The Constitution reflected the traditional principle of absolute imperial power without the practical limitations, which modified it. The Emperor received the entire executive power over both central and provincial government. The nobility and provincial governors were granted no independent authority. The newly instituted Parliament provided no check to the Emperor. The Emperor could disregard the human rights provisions of the Constitution in emergencies. The Constitution reflected the centralizing policies of the time. The constitution provided the formal basis for a process of centralization necessary both for national unity and for effective modernization.

The Constitution was an instrument of modernization. The Constitution followed the tendencies of the period by adopting a cautious and gradualist approach. A Parliament was founded. But, the Parliament was given powers only of discussion. The Emperor appointed the members of one chamber. The nobilities appointed the members of the other chamber. A number of rights were recognized, subject to limitation by law. A democratic or liberal constitution, however, could not at that time have been implemented. The constitution did not make any distinction between different branches of government. However, the 1931 constitution could be taken as a beginning for Ethiopia to experiment with a written constitution. The constitution founded the Parliament. The constitution lacked implementing legal or administrative machinery. It was subject to no judicial interpretation. The provisions on rights could have had little relevance to a people to whose traditions they were largely strange. The power of the Emperor over the provinces was expanded. Relations between the Emperor and the executive branch of government were left so vague. The major part of the document simply confirmed in the Emperor powers.

In its content, the 1931 constitution was "a royal charter guaranteeing rights and privileges to the nobility." The constitution created a semblance of a bicameral parliament whose Upper House is strong, composed of important members of the nobility, and whose lower House had an advisory role. There was no popular election of any of the members of the Houses. The Upper House members, being important members of the nobility, were to be handpicked by the monarch, while the members of the Lower House were nobles elected by the nobility in the Upper House. The Houses served as a communication bridge between the government and the people. The 1931 Constitution established a ministerial executive and a judiciary of regular and administrative tribunals with the Emperor's Court (Zufan Chilot) as the last court of appeal.

The Constitution did not address the issue of ethnic and religious diversity. The constitution did not contain the rights of citizens. The constitution, being a written law, however, started a period of legal formalism. This means, the constitution necessitated decisions to be made in conformity

to the text of law. Although there was a written law (e.g., the Fetha Nagast) applied in the highland Ethiopia for long, the fact of the existence of customary and religious laws had forced the Ethiopian judge to dispense justice without any need to conform to laws. Thus, in the absence a written law and in the presence of diverse customary rules officials such as judges had had wide discretion in their decision making powers. The written constitution was the beginning step to limit the officials` discretion.

Two factors made the 1931 constitution inadequate. One was the changing political climate of the early nineteen-fifties. And especially Ethiopia's Federation with Eritrea in 1952 led the country to revise its constitution. As compared with the liberal Constitution adopted in Eritrea, the 1931 Constitution seemed somehow backward. Emperor Haileselassie I hoped that a new constitution might be used to bring Eritrea more closely under the control of the central government in Addis Ababa. Supporters of reform further urged that Ethiopia was being criticized for the illiberality of the existing Constitution both abroad and by the growing number of educated Ethiopians. These supporters thought that it would be wise to anticipate demand for change before it became obvious that the government was giving in to pressure. The revision of the Constitution thus followed closely from the political development of the time…

Jay Clarke, Seeking a Model for Modernization: Ethiopia's Japanizers, Selected Annual Proceedings of the Florida Conference of Historians 11 (Spt. 2004) at 35-51.

Ethiopia's Constitution of 1931, modeled on Japan's Meiji Constitution of 1889, best illustrates Ethiopia's desire to follow in Japan's progressive footsteps. As the emperor himself put it in a speech on the occasion of his signing the constitution on July 16, 1931: ``Everyone knows that laws bring the greatest benefits to mankind and that the honor and interest of everyone depend on the wisdom of the laws, while humiliation, shame, iniquity, and loss of rights arise from their absence or insufficiency.``

The constitution paid homage to the traditionally absolute, imperial power. The emperor held executive power over the central and provincial governments—the nobility and provincial governors receiving no independent authority. The newly instituted parliament, which had only powers of discussion, provided no check on the emperor, who could disregard the human rights provisions of the constitution in emergencies. For the most part the constitution merely confirmed powers to the emperor, which he would have exercised in any case. In short, the constitution was an instrument of centralization under the emperor—such centralization was necessary for national unity and effective modernization. The constitution, however, merely echoed modernizing developments and did little to further them. Its only direct result was the founding of the parliament, but in no other field was there legal or administrative machinery available to implement it. The constitution was subject to no judicial interpretation, and the provisions on rights had little relevance to a people to whose traditions they were largely alien.

The emperor had ordered the Russian-educated intellectual and "Japanizer," Bejirond Tekle-Hawaryat to draft the constitution. Tekle-Hawaryat examined copies of the English, German, Italian, and Japanese constitutions for their usefulness to Ethiopia; he also read works on Japanese history, politics, and economy. His guiding principles were to maintain the monarchy as the basis of Ethiopia's unity and to protect the public from arbitrary rule. He and his advisers, Heruy and Ras Kasa Darge, wrote a draft, which the emperor modified. Then the leading nobility and rulers

of each region approved it. In his capacity as finance minister, he introduced the constitution to Ethiopia's Parliament.

With only a couple of exceptions, when comparing the 1889 Japanese constitution and the 1931 Ethiopian constitution, even the chapter divisions were identical, and in both cases, the guarantees of civil liberties were constrained by nullifiers such as, "within the limits provided for by the law" or "except in cases provided for in the law." The two constitutions were similar not only in content, but also somewhat in origins. Both were "granted" from above; both were intended as a foundation for strong monarchical government rather than for popular representation – that is, sovereignty represented in the emperor; both consciously borrowed from outside sources; and both were preceded by a period of deliberation to choose the type of constitution best suited to the two countries' needs.

In Japan, the period of deliberation was quite extensive. An Imperil edict in 1876 mandated the preparation of drafts of a national constitution, and the revision of drafts continued into 1887. The Meiji Constitution was finally promulgated on February 2, 1889. Deliberation took much less time in Ethiopia. Hayle Sellase revealed in his memoirs that, although the idea of a constitution had first occurred to him while heir to the throne, he had had to abandon the idea in face of opposition from Empress Zawditu instigated by some of the nobility. Serious work in formulating the constitution could begin only after April 1930 when the empress died and Teferi had ascended to the throne. Thus, the constitutional writing process in Ethiopia lasted only slightly over a year.

4.6.4 Review questions

Answer the following questions.

1. State the similarities between the 1931 Constitution and the Meji Constitution. Any differences between them?
2. Why did Ethiopia try to imitate the Meji Constitution?
3. Who drafted the 1931 Constitution?
4. Which sources other than the Meji Constitution were taken as input in preparing the 1931 Constitution?
5. What was the central guiding principle behind the 1931 Constitution?
6. Did the 1931 Constitution contain provisions relating to human rights?
7. Describe the composition and the relative importance of the two houses under the 1931 Constitution.

4.6.5 The Ethio-Eritrean Federation (1952-1962)

The excerpts below describe the historical and political contexts leading to the adoption of the 1952 Eritrean Constitution as well as the fate of the federation.

Assefa Fiseha, Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study,(Netherlands, Wolf Legal Publishers, 2005/06) at 28-32.

The territory now called Eritrea was historically an integral part of Ethiopia since the Axumite Era in the first century AD. Eritrea did not exist as an entity of its own prior to 1890 when it was created by Italy. The historical and cultural background of the Christian Eritreans is identical to those in Tigray. The language Tigrigna is the same as the one spoken in Tigray and

belongs to the family of Semitic languages. The Tigrayans, therefore, form a solid bridge connecting Eritrea with the rest of Ethiopia. The death of Emperor Yohannes in 1889 and the shift of center of power from Tigray to Showa created a favorable condition for Italian colonial expansion.

Between the years 1869-1889 Italy insisted on expanding southwards, despite suffering defeats brought upon them by Ras Alula at Dogali. As early as 1887, Menlik the King of Showa had expressed readiness to negotiate with the Italians about supplies of arms in exchange for concession of territory, if this would ensure his speedy accession to power. Menlik seized the opportunity provided by the political vacuum created and sealed an Italo-Ethiopian pact, the treaty of Wuchale, in May 1889. As a result, part of the territory was ceded and in January 1890, Eritrea was born as an entity. In spite of the treaty of Wuchale, Italy continued expanding southwards and occupied some territories leading to the famous Battle of Adwa in 1896. Even after the battle of Adwa, the treaty of Addis Ababa (October 1896) which abrogated the treaty of Wuchale, recognized the independence of Ethiopia, but confirmed the Italian possession of Eritrea until 1941.

Menlik was in no position, according to some writers, to expel the Italians from Eritrea and he left Eritrea in Italy's possession. Controversies exist as to why Menlik did not insist on expelling Italy from the whole of Eritrea as a victor of this famous war in history. One version of the controversy states that he was compelled to halt rurther Italian expansion into his territory owing to geopolitical and logistic reasons. If Menlik pursued pushing the Italians out as Ras Alula had wished, then Italy could send more reinforcement and the hard won victory could be lost. Whereas the other version states that the territorial cession is seen from the angle of the then existing rivalry between Tigray and Showa. One should note the fact that Menlik was consolidating his power both in terms of weapons and territory when Emperor Yohannes was busy fighting foreign forces. Because of this, they believe Menlik gave the territory to Italy in a bid to weaken his northern rivals. For instance James Paul recently wrote: 'Menlik's 1896 post Adwa treaty with Italy guaranteed Ethiopia's independence within settled borders in exchange for its recognition of Rome's sovereignty over the territory still occupied (even after Adwa) by reinforcing Italian armies based in Asmara. Thus was created in a legal sense a new typical artificial colonial territory, which Rome named Eriterea. Menlik was praised for his real politik but in appeasing Italy's colonial appetite he had sanctioned the partitioning of the Tigrayan peoples; those north of the Mereb River became subjects of an Italian colonial rule and those to the south remained independent Ethiopians but were governed by a new monarchy from distant Showa.

As a result, from 1890 until its liberation in 1941, Eritrea was administered as a colony by the Italian colonial Ministry, under a governor nominated by the Italian king. After liberation Eritrea remained under British rule till 1952. After World War II Italy renounced all right and title to its colonies and the Treaty of Peace signed in Paris in 1947 provided for the final disposal of the former Italian colonies to be determined by agreement among the four allied powers, the USA, USSR, UK and France. Failing agreement, the matter would be submitted to the UN General Assembly for disposition. The four victorious allies established an investigating committee to come up with a proposal on the future of Eriterea. The United States based on its interest in the region and good relations with the Emperor was keen to see Eritrea joined to Ethiopia in unity. The USSR and some Afro-Arab countries were on the other hand opposed to this move. They took the position that only separate existence could guarantee the sovereignty

and progress of Eritrea. At the same time, however, they were sympathetic to Ethiopia's need for access to the sea. Because of disagreements the matter was referred to the United Nations. In November 1949 the General Assembly set up the United Nations Commission for Eritrea, constituting members from Burma, Guatemala, Norway, Pakistan and South Africa whose task was to visit Eritrea and after taking into account the interests of the inhabitants and the interests of all the countries involved to report its findings to the UN. The findings were however divided. Burma and South Africa proposed federation with Ethiopia, Norway proposed union with Ethiopia while Pakistan and Guatemala proposed UN trusteeship for ten years and independence to follow thereafter.

In the period preceding the federation, the demand of political parties in Eritrea was diverse concerning the destiny of Eritrea. Many Eritreans demanded unity with Ethiopia, others requested for immediate independence and still others urged for a partition or at least a different status for the western side of the province. In short, the internal situation was divided. On the Ethiopian side, Haile Selassie demanded the full incorporation of Eritrea and nothing less. Ethiopia's claim was based on her need for access to the sea and by the claim of historical title and cultural affinity of the two populations. Furthermore Ethiopian diplomats successfully invoked the OAU principle of non-territorial intervention in the internal affairs of the state and the need to respect the territorial integrity of African States whose territories were defined by colonial borders. Ethiopia argued that if Eritrea's plea received a hearing, it would upset the entire post-colonial African state system as legitimized by the Cairo Resolution of the OAU in 1964.

The proposal by South Africa, Norway and Burma, constituting a majority, was finally approved by 46 to 10 with four abstentions. The Eritrean domestic situation, the international context and Ethiopia's case finally brought what is commonly described as the 'compromise formula,' which became UN General Assembly Resolution 390 A(v). The UN General Assembly passed this resolution of December 2, 1950 and the Resolution stated that Eriterea should form 'an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian crown.' The first seven Articles of the Resolution passed by the UN General Assembly on December 2, 1950 formed the Federal Act. A draft constitution prepared by UN experts was submitted to an Eritrean Assembly and the latter adopted it on 10 July 1952. By Proclamation No. 124 of 11 September 1952 the Eritrean Constitution with the Federal Act was put into force in Negarit Gazetta. At this point in time, the federation of Eritrean with Ethiopia came into effect. The Federal Act as well as the Eritrean Constitution provided for a 'federal arrangement between the two governments. According to the Constitution "Eritrea is an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown'. The government of Eritrea was authorized, as a manifestation of its autonomy, to exercise legislative, executive and judicial powers. The actual division of power under the federal act vested a number of basic functions in the federal government notably defense, foreign affairs, currency and external trade while reserving residual powers to the Eritrean government. These included civil and criminal law, police, health, education natural resources, agriculture, industry and internal communication.

Many controversies arose over the ambiguity of some of the concepts included in the documents as well as over the whole federal compromise. There seemed a consensus that the term `autonomous unit` signified not a sovereign state but rather a politically organized unit linked federally with Ethiopia and that the phrase under the sovereignty of the Ethiopian crown implied that the federation not the autonomous unit, enjoyed sovereignty.

More controversial were the status of the federation and its subsequent dissolution in 1962. Closer observation of the 1955 Constitution and the Eritrean Constitution seems to suggest that Eritrea was only an autonomous region rather than a full-fledged unit in a federation, as we understand it today. The Resolution characterized Eritrea as 'an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown'. It did not accord Eritrea the status of a state in a federal union with Ethiopia. In a federation resulting from two units, one would expect there to be three institutions. The two constituent units and one other overarching federal government for both of them. Furthermore, a supreme constitution which both units submit to, is a requirement. None of them existed in the UN sponsored federal compromise. The Resolution had provided for a Federal Council, an institution that was a faint approximation of a federal body. This body was to comprise Ethiopian and Eritrean representatives in equal numbers and advise the Emperor on matters of the federation. The Council was simply ignored and practically done away with before it could even start functioning. As a result, the federal powers belonged to the Ethiopian government. The Ethiopian Emperor was the sovereign, the Ethiopian courts were the federal courts and the Ethiopian Ministers were the ministers of the federal government. Tekeste states, 'For all intents and purposes the resulting relationship between Ethiopia and Eritrea was not in the least federal. Even according to the intentions of the union, Eritrea was not granted a federal status but only a status of autonomy.

However, this constitutional ambiguity could not serve as a justification for not implementing even the regional autonomy. Even Eritrea's mere status of autonomous region was not tolerated by Haile Selassie's regime. The reasons as stipulated by many writers seem to relate to the nature of the two incompatible Constitutions. Ethiopia by then had a feudo-monarchichal system of government, ideologically sustained by some notion of the divine right of kings. It was imperial. The emperor ruled as an absolute monarch and as head of an empire every part of which he sought to subordinate to himself. The government had a notion of territorial integrity that was incongruent with federal or other structures of decentralization and hence the dissolution was no surprise. By contrast, the Eritrean Constitution was one modeled on those of Western democracy. It provided for three branches of government based on rule of law, it stipulated for fundamental freedoms and a multi-party system.

Haile Selassie demonstrated a considerable diplomatic success when he orchestrated a federation between Ethiopia and Eritrea with the approval of the UN. However, the regime lacked the political wisdom and political will to maintain the regional autonomy. As early as 1955 the Emperor's representative in Eritrea already hinted at the fact that 'there are no internal or external affairs as far as Ethiopia is concerned…' and pointed out that 'the affairs of Eritrea concern Ethiopia as a whole and the emperor.' In 1958 the Eritrean Assembly voted unanimously to abolish the Eritrean flag and use only the Ethiopian flag. In 1959 the Ethiopian Penal Code replaced the existing legislation in Eritrea. In 1960 the Eritrean assembly voted unanimously to change the name Eritrea government to Eritrean administration and other adjustments connoting its lower position than a federation. On 14 November 1962 again the Assembly voted unanimously for the abolition of the federation. Whether this important series of events was undertaken with full backing from the Ethiopian side or not is a troublesome question. But few seem to doubt the fact that these events were taking place with full knowledge and influence from both sides of the 'federation.' In as much as the Imperial regime had wanted to terminate the federation, the Eritrean Union Party, the then governing party in Eritrea, cooperated equally to the demolition of the autonomous status.

Richard Pankhurst, A History of Early 20th Century Ethiopia, (Civic Webs Virtual Library, Accessed 2 April 2005).

Emperor Haile Sellassie's foreign policy, during the post-war years, was largely preoccupied with the future of the Italian colonies. This was a seemingly intractable question, which led to lengthy international discussions. The Ethiopian Government, for historical reasons, was particularly interested in the disposal of Eritrea. The colony, much of which prior to the late nineteenth century had formed part of Ethiopia, had been the base for two major invasions of the country, in 1895-6 and 1935-6. Acquisition of Eritrea likewise offered access to the sea, for which Ethiopian rulers had long hankered.

The future of Eritrea first came to the fore during the 1941 Ethiopian Liberation Campaign when the British had promised the colony's inhabitants freedom from Italian rule. Later, in October 1944, British Foreign Secretary Eden had declared, in answer to a Parliamentary question by a Labor MP (drafted incidentally by my mother) that the Italian colonial empire in Africa was "irretrievably lost". Italy in a Peace Treaty with the United Nations, signed in Paris on 10 February 1947, was accordingly made to surrender its colonies. The disposal of these ex-colonies was to be the responsibility of the then four Great Powers, i.e. the Soviet Union, Great Britain, the United States, and France. The treaty laid down, however, that, if they failed to agree within a year, the matter would be transferred to the United Nations General Assembly.

The Four Powers, as it turned out, did not agree. They dispatched a joint Commission of Enquiry to the ex-Italian colonies in 1947. It found the Eritrean population divided into three main factions: pro-Ethiopian Unionists, for the most part Christians, who demanded "reunion" with Ethiopia; adherents of a Muslim League, strongly opposed to such union; and members of a Pro-Italia party, many of them Italian pensioners, who advocated the restoration of Italian rule. The commissioners, whose findings reflected the political biases of their respective governments, produced divided conclusions and recommendations. The question of the colony's future was then transferred to the United Nations, which, after inconclusive discussion, appointed a further commission of enquiry for Eritrea. Its members came from Burma, Guatemala, Norway, Pakistan, and South Africa.

Opinion in the ex-colony had by then crystallized into two factions: the Unionists on the one side, and an Independence block, formed by a coalition of the Muslim League and pro-Italia party, on the other. The new commissioners, like their predecessors, came forward with different proposals. Guatemala, representing the pro-Italian position, then held by the Latin American countries, and Pakistan, a strong protagonist of Islam, both favored independence for the colony; Burma and South Africa, supported its federation with Ethiopia; and Norway, outright union. The UN General Assembly influenced by the proposals of the three latter powers, finally decided, at the end of 1950, that Eritrea should be federated with Ethiopia, under the Ethiopian Crown. The Assembly further laid down that it would appoint a Commissioner for Eritrea, and that an Eritrean Assembly would be democratically elected by the people. The first task of the latter body was to approve an Eritrean Constitution, to be drafted by the UN Commissioner in consultation with the then British administration of the territory as well as the Ethiopian Government.

The Eritrean Assembly was duly elected, under UN auspices, and chose the Unionist leader, Tedla Bairu, as the territory's Chief Executive. This seemed, to many observers, to give the Federation a stamp of popular approval. The Eritrean Constitution was likewise drafted, and

approved, in 1952. The text of the constitution was, not surprisingly, considerably more democratic than Ethiopia's old 1931 Constitution.

In Asmara, the Eritrean Assembly voted, under Ethiopian Government pressure, on 14 November 1962, for the territory's complete union with Ethiopia. Eritrea, on the following day, was accordingly declared an integral part of Ethiopia. The legality of this act was, however, challenged by many Eritreans. Some of them shortly afterwards founded their territory's first militant opposition organization, the Eritrean Liberation Front, ELF.

4.6.6 Review questions

Answer the following questions.

1. Describe the events that led to the creation of Eritrean federation.
2. State the two views on as to why the Italians were not evicted from Eritea after the Battle of Adwa? What do you think is Assefa`s position on this matter?
3. Was Eritrea (1952-1962) a federal unit or an autonomous region? What are the three institutional arrangement that should be in place for a given unit to be regarded as a federal unit? Were those three elements missing from or present in Eritrean federation?
4. Map out the developments that led to the dissolution of the federation between Ethiopia and Eritrea. Which factor principally explains its dissolution?
5. State the so called ``compromise formula.``

4.6.7 The 1955 Revised Constitution

Paul, J.C.N. and Clapham, C., Ethiopian Constitutional Development: A Source Book, vol. 1(Addis Ababa: Hailesellasie I University, 1967).

This Revised Constitution was a long time in preparation. The Emperor said that the process took six years. It was noted in July 1952 that the revision was under way. The lengthy procedure itself marks a considerable development from the informal drafting of 1931. The first formal step appears to have been the setting up of a committee of ministers under the chairmanship of the Prime Minister. The name of the then prime minister was Bitwadad Makonnen Endalkachew. This Committee suggested a number of changes to the existing Constitution. Those suggested changes included provisions on the status of the family, non-retroactivity of legislation, and freedom of speech and assembly, the liability of ministers and civil servants and the need for additional parliamentary representation of large cities.

These suggestions in turn served as a base for the work of the Constitutional Commission. The Commission worked in a house in the Palace grounds with the close supervision of the Emperor. Three American legal advisors did most of its detailed work. Even if these foreign experts prepared the most part of the draft, they worked under the close supervision of Ethiopian officials. The Commission started intensive work in the summer of 1953. Its first completed draft was dated 2 February 1954. It was written in English. And was translated into Amharic by the Imperial Chronicles Department. Twenty-one months were to elapse between this draft and the final promulgation of the Revised Constitution. This fact indicates the leisurely pace at which the revision was carried out. This fact also suggests that the government was under no urgent pressure for reform.

The draft was then submitted for revision and review to the Emperor, the leaders of the Church and the nobility, and important officials. Five amended versions were produced between February 1954 and June 1955, adapting the original to their suggestions. As in 1931, the agreement of the major figures of the country was needed. The agreement was necessary to secure a general acceptance of the new Constitution. And in particular, the agreement was needed to persuade conservative nobles and churchmen to accept its more liberal aspects. This process was carried out more institutionally than in 1931. Ras Kass took the role of convincing the conservatives to accept the most liberal aspect of the revised constitution. Ras Kass was the cousin of the Emperor and was the most influential figure of the day. Ras Kass was one of the great lords who had considered the Constitution of 1931, and so great was the respect in which the Church and the noblemen held him that his support was essential for general consensus.

The 1955 Revised Constitution replaced the 1931 Constitution. The constitution was a grant for it was not a product of popular vote. This constitution consolidated absolutism. The constitution created the impression that Ethiopia is modern. The revised constitution was, among others, an attempt to solve the problem created by the side-by-side existence of the 1931 Constitution with the more advanced constitution of Eritrea, which, since 1952, had been federated with Ethiopia as per the decision of the United Nations.

The Revised Constitution solidified absolutism of the monarchy. Two chapters were devoted to the institution of the monarchy. These two chapters dealt with the Solomonic root of the dynasty, the sacredness of the person and dignity of the Emperor, etc. There were provisions indicating the Emperor's power over the executive and the judiciary. He had power to appoint the members of the Senate; the Senate was one of the two chambers of legislature. He also had power to dissolve the House of Deputies. The House of the Deputies was the lower chamber of parliament. Moreover, he had a co-legislative function reserved to him. He could veto power legislation passed by the parliament. He had the power to issue decrees on emergency situations when the parliament is not in session. He is the commander-in-chief of the army. He guides and directs all activities pertaining to foreign relations. Taking advantage of the absence of the principle of secularism and being "defender of the Holy Orthodox Faith", he exercised power over the church. He had oversight of church activities. He issued all church decrees, edicts, and regulations. He approved the election and appointment of the Patriarch (Abun). The various institutions attempted to assert their powers. For example, exploiting the principle of checks and balances, the chamber of Deputies used to exercise their power to question the executive (i.e. the ministers) when they appear for reports especially on matters relating to budget.

መንግስቱ ኃ/ማርያም አርዓያ እና አቶ መዝገቡ ምትኬ፣ ጥርስ የገባች ሀገር /ትርጉም/ (ህዳር 1986)

አስተዳደራቸውን ዘመናዊ የማድረግ የጃንሆይ ጥረት ሕጎችን በማውጣት ብቻ አልተወሰነም። ከጦርነት በኋላ የመጣው ትውልድ ግፊትና ጊዜው እጅግ ቢያንስ የሕገ መንግስቱን መሻሻል እንደሚጠይቅ ጃንሆይ አስቀድመው ተገንዝበውታል። በኤርትራ ውስጥ የሕገ መንግስት መኖር ከ1848 የኘሩሺያ ሕገ መንግስትና ከ1889 የጃፖን ሕገ መንግስት ተውጣጥቶ ወጥቶ በሥራ ላይ የነበረውን የ1930 የኢትዮጵያ ሕገ መንግስት ባስቸኳይ ማሻሻል አሰገድዷል። ስለዚህም በወልደጊዮርጊስ ሊቀመንበርነት የሚመራው ኮሚቴ የዕለት ተዕለት ሥራውን ሲያከናውን ግርማዊነታቸው ከዘውድ መማክርት ጽሕፈት ቤት ተቀምጠው ይጠባበቃሉ። ከወልደጊዮርጊስ ጋር አክሊሉ ጋረትሰን እና ከዋሽንግተን ዲ.ሲ. የመጣው ስመጥር የዓለም አቀፍ ሕግ ሊቀና

ከአሜሪከን ጆርናል ኦፍ ኢንተርናሽናል ሎው አዘጋጆች አንዱ የሆነው ኤድጋር ተርሊንግተን ነበሩ። ምርምር የማድረጉና አብዛኛውን የመጀመሪያውን ፈቂቅ የማዘጋጀቱ ተግባር የኔ ነበር።

ተርሊንግተን በኤርትራ የንጉሰ ነገስቱ ተወካይ ለሆነው ለቢትወደድ አንዳርጋቸው የሕግ አማካሪ እንዲሆን ሐሳቡን ያካፈለኝ አምባሳደር ጀሰኝ ነበር። ምርጥ ሙያተኛ ከመሆኑም በላይ በጣም ትሁትና ተግባቢ ሰው ነበር። ብዙ ኢትዮጵያውያንና ኤርትራውያን ዘወትር የሚደነቁበት የተለየ ሁኔታ ነበረው። ጆሮው የማይሰማ ስለነበር በቅድመ-ዘመን-ትራንዚስተር ለመስሚያ የሚጠቀመው በግራ ጆሮው ውስጥ የሚገባው መሳሪያ በሸሚዝ ኪስ ውስጥ ከሚቀመጥ ባትሪ ጋር በሽቦ በማያያዝ ነበር። በዚህ መሳሪያ በመጠቀም በጥሩ ሁኔታ መስማት ይችል ነበር። ተርሊንግተንም ሐኪም የሬድዩ ጆሮ እየተባለ ይጠራ ነበር። ሁልጊዜ የምስጢር መልዕክትና መመሪያ ይቀበላል እየተባለም ይጠረጠራል።

ጋረትሰን ተርንግተንና እኔ ከቤተ መንግስቱ አጠገብ በሚገኘው የዘመድ መማክርት ጽሕፈት ቤት ወይም ዱክ ቤት በየጊዜው ከወልደጊዮርጊስ ከአክሊሉና ከዕውቁ የታሪክ ሰው ከብላታ መርሰዔ ጎዘን ጋር እንገናኝ ነበር። ውይይታችንን ከጨረስን በኋላ ወልደጊዮርጊስ አክሊሉና ብላታ መርሰዔ ጎዘን ስለዕለቱ ክንውን ለዘመድ መማክርት መግለጫ ያቀርባሉ መማክርቱ ደግሞ በተራቸው ለንጉሰ ነገስቱ መግለጫ ያቀርባሉ። ብዙውን ጊዜ የዘወድ ምክር ቤቱ በጣም ወግ አጥባቂ በነበሩት በራስ ካሳ ተዕዕኖ ስር የወደቀ ስለነበር የምናቀርበውን ሐሳብ ውድቅ ስለሚያደርጉብን አስታራቂ ሐሳብ ይዘን ለመቅረብ እንጥር ነበር። በዚህም የተነሳ ስራው በጣም ይጓተት ነበር።

አዲስ ሕገ መንግስት በምናዘጋጅበት ጊዜ የዘውድ መማክርት ጉባዔ ንጉሰ ነገስቱ ያላቸውን የማይገሰስ ስልጣን አጠንክረን እንድንገልጥ ያስገድደን ነበር። አክሊሉና ወልደጊዮርጊስ ምንጊዜም ተጭነውን አያውቁም። የ1930 ሕገ መንግስት ጃንሆይ ለሕዝባቸው የሰጡት እንጂ ሥልጣን የሕዝብ መሆኑን በማወቅ የተዘጋጀ በሕዝብ የበላይነት ላይ ተመስርቶ የወጣ ባለመሆኑ ስራችን ያንኑ አስተሳሰብ ማሻሻል ብቻ ነበር።የሚያባራና በአብዛኛው ውጤት የለሽ ውይይት ይካሄድ የነበረው የንጉሳውያን ቤተሰብን የግል ሀብት ከማይሸጥ ከማይለወጠው የቤተ መንግስት ንብረት በመለየቱ ላይ ነበር። በመጨረሻም ይህን በሚመለከት የወጣው አንቀጽ 19 ችግሩን የሚያብራራ አልነበረም። ትልቅ ግምት ከሚሰጠው ከአንቀጽ 13 ይልቅ የውርስ የቅደም ተከተል መብትና የመንግስትን ውርስ ጉዳይ የሚመለከተው ብዙ ውይይት አላስፈለገውም። አንቀጽ 13 ውስጥ የሠፈረው አሻሚ ቋንቋ አልጋ ወራሹ ዙፋኑን ለመውረስ የነበረበትን ችግር ለመሸፈን ታስቦ የተደረገ ነው። ይህም ጥርጣሬ ድንገተኛ ሕመም ሲደርስበት ይበልጥ ጎለበተ። አንቀጽ 13 ንጉሠ ነገስቱ ዙፋኑን ለመውረስ ተፈላጊ ሁኔታዎችን የሚያሟላ ወንድ ልጅ የሌለው እንደሆነ ከዘመድ ምክር ቤት ጋር በመማከር አልጋውን የሚወርሰውን ሰው መርጦ ለሕዝብ ያስታውቃል የሚል ነበር። ይህ አንቀጽ እያለም ንጉሰ ነገስቱ ፍጻሜ መንግሰታቸው ጥቂት ወራት እስከቀረው ድረስ አልጋ ወራሽ ሳይሰይሙ ቆይተዋል።

ጃንሆይ የኢትዮጵያን ሕገ መንግስትና ሌሎችንም ሕጎች የተባበሩት መንግስታት ለኤርትራ ባወጣው ሕገ መንግሰት ውስጥ ስተካተቱት ውስጥ አዳዲስ ሐሳቦች ጋር ተመጣጣኝ እንዲሆን በዘመናዊ መልክ እንዲዘጋጅ ያደረኩት ለቀቅ ያሉ ሁኔታዎችን ለመፍጠር በመፈለግ አልነበረም። ነገሩ ተቃራኒው ነበር። ከዚህ ሁኔታ በስተጀርባ ለረጅም ጊዜ የቆየውን ስልጣን የማማከል ፖሊሲያቸውን ያራምዱና ነገሮች ለቀቅ እንዲሉ እየገፋ የመጣውን ተቃውሞ ማስተንፈሻ ያበጁ ነበር። በመጨረሻው ግን እሳቸው ከጠበቁት በተቃራኒው ሁኔታዎች በይበልጥ ለቀቅ እንዲሉ የሚቀርበውን ጥያቄ አጠናከረ/ከንጉሰ ነገስቱ የማይገሰስ ስልጣን በተጨማሪ ጃንሆይ ባስቸኳይ ጊዜ ድንጋጌ ለመግዛት የሚያስችል መብት እንዲኖራቸው ለምክር ቤት ሳያሳውቁ ሚኒስትሮችን ለመሾም ለመሻርም የሕግ መወሰኛ አባላትን ዳኞችንና የማዘጋጃ ቤት ከንቲባዎችን ጭምር ለመሾም የሚያስችል ስልጣን እንዲኖራቸው አደረጉ።ባንዳንድ ጉዳዮች ላይ የተወሰነ ለውጥ ለማስገኘት ተችሏል። ሰብዓዊ መብትን የሚመለከቱ 27 አንቀጾች ገብተዋል። እነዚህም ከአሜሪከና ከአውሮፖ ሕግጋት መንግስት እንዲሁም ከዓለም አቀፍ ሰብዓዊ መብቶች መግለጫ/Universal Declaration of Human Rights/ የተወጣጡ ነበሩ። በሞዴልነት ብዙ ጊዜ የሚጠቀሰው የአሜሪከ ሕገ መንግስት ነበር። ከዚህ ውስጥ የተወሰዱት የተያዘ ሰው በ 48 ሰዓት ውስጥ ፍርድ ቤት እንዲቀርብ የሚያስገድደው ሕግ/Habeas Corpus/ ባለፈ ድርጊት ሕግ እንዳይወጣ መከልከሉ የኘሬስና የመሰብሰብ ነፃነት ያለፍርድ ቤት ትዕዛዝ ብርበራ እንዳይካሄድ

አንዳይያዝ ተገቢው ግምት ሳይከፈል ንብረት እንዳይወሰድ ማንም ያለ ሕግ ሕይወቱን መብቱንና ነፃነቱን እንዳያጣ የሚጠብቀው ሕግ ተከሳሽ በሌለበት ምስክር እንዳይሰማ የሚከለክል ሕግና ምስክሮች እንዲቀርቡለት ተገቢውን እገዛ የማድረጉ ሁኔታ ናቸው::

አንድ ሰው ራሱን በራሱ እንዳይወነጅል የሚጠብቀውን አንቀጽ እና በሕግ መሠረት የሚል ሐረግ ተቀጥሎባቸው ዋጋቢስ የሆኑትን አንቀጾች በሙሉ ለማስገባት ያደረግሁት ጥረት ሳይሳከልኝ ቀርታል:: ነገር ግን በአውሮፖ በተለመደው መሠረት ግለሰብ በመንግስት ላይ /ንጉሰ ነገስቱን መክሰስ አይቻልም/ ክስ የማቅርብ መብት እንዲኖረውና ማዕድናትን ጨምሮ በአርሰ ምድር ውስጥ ያለ ሀብት በሙሉ የመንግስት እነዲሆን የሚለው ተሳክቶልኛል:: የሚገርመው የኢትዮጵያን ሕግ ዘመናዊ ለማድረግ የአሜሪክ የሕግ ሰርዓት አይበጅም ባልኩበት መንፈስ ሆን ብዬ በአሜሪካ የመብቶች ድንጋጌ /Bill of Rights/ ውስጥ የሠፈረውን ኃይል ቃል ተጠቅሜያለሁ:: የኢትዮጵያን ሕጎች ለመተርጐም የአሜሪክን ሕጎችና የፍርድ ቤቶች ውሳኔዎችን የማየት ሁኔታ እንዳይኖር ብፈልግም ሰብዓዊ መብቶችን በተመለከተ ግን ይህ እንዲሆን ፍላጎት ነበረኝ::

የምክር ቤት አሠራር ሰርዓት ለማምጣት ከፍተኛ ጥረት ባደርግም ብዙ አልተሳከልኝም:: የሚወጡ ሕጎች ሁሉ የምክር ቤቱን ይሁንታ ማግኘት ብዙ አልተሳካልኝም:: የሚወጡ ሕጎች ሁሉ የምክር ቤቱን ይሁንታ ማግኘት እንደሚገባቸው ቢገለጥም ጃንሆይ ድንጋጌ በማውጣት ሊጠቀሙ ይችላሉ:: የሕግ መምሪያ አባላትን ግን በሕዝቡ ተመርጠው የሚመጡ ይሆናሉ:: የሴቶች የመምረጥና ለመንግስት ስልጣን የመመረጥ መብት ተረጋግጧል:: ውክልናው በሕዝብ ብዛት ላይ የተመሠረተ እንዲሆን በማድረግ 20000 ኗሪዎች በሚገኙበት የምርጫ ክልል ሁለት እንደራሴዎችን እንዲመረጡ ተወሰነ:: የመጀመሪያው ብሔራዊ ምርጫ የተካሄደው የመርጫ አዋጅ ከወጣ በኋላ በ1957 ነበር:: ንጉሰ ነገስቱ ሁለቱን ምክር ቤቶች የመበተን ስልጣን ቢኖራቸውም ይህን ማድረግ የሚችሉት በአራት ወር ጊዜ ውስጥ እንደሁኔታው አዲስ የመወሰኛ አባላት የሚሾሙ ወይም የሕግ መምሪያ አባላትን የሚያሰመርጡ ከሆነ ነው:: በፖርላማው ሰርዓት ውስጥ የመድበለ ፖርቲ ሕልውና ለማቋቋም አደገኛ የክልል መራራቅን ያስከትላል ከሚል ፍርሃት ከኤርትራ በስተቀር በሌላው የኢትዮጵያ ክልል የፌደራል ሰርዓት ሐሳብ ተቀባይነት አላገኘም::

አሳሳቢው ችግር የሚኒስትሮች ምክር ቤት ለሕግ መምሪያው ምክር ቤት ተጠሪ ነው በሚለው ጭብጥ ላይ የተነሳው ነበር:: በዚህ ጉዳይ ላይ ሕገ መንግስቱ ከመውጣቱ በፊት ብቻ ሳይሆን ከወጣም በኋላ ተሳክቶልኝ አያውቅም:: የማቀርበው ሐሳብ ሁሉ ጠንካራ ተቃውሞ ያስከትል ነበር:: ጥቂት ለውጥ እንኳን የተገኘው በሁለት ምክንያቶች ነበር:: አንደኛው ወልደጊዮርጊስ በጠቅላይ ሚኒስትሩ ቢተወደድ መኰንን እንዳልከቸው ላይ የነበረው የግል ጥላቻ ሲሆን ሁለተኛው ሚንስትሮች የዘውድ ምክር ቤት እና ጃንሆይ የምክር ቤት አሰራር ሰረዓት ስለማይገባቸው ነበር:: ነገር ግን ሁኔታው ግለፅ ስላልነበረ ወይም ከማስረዳት ጉድለት የተፈጠረ አልነበረም:: የሚኒስትሮች ምክር ቤት የጋራ ኃላፊነት ጠንካራ ተቃውሞ ገጥሞት የወደቀ ቢሆንም የእያንዳንዱ ሚኒስትር በተለይም የጠቅላይ ሚኒስትሩ ተጠያቂነት እንዲኖር ሆኗል:: ወልደጊዮርጊስ እተካዋለሁ ብሎ በሚያስበው ጠቅላይ ሚኒስትር ላይ የነበረው ንቀት ለሁለቱ ምክር ቤቶች የሚኖረውን ተጠሪነት ነጥሎ በማስቀመጥና ጠቅላይ ሚኒስትሩ ከያንዳንዱ እንደራሴ ለሚቀርብለት ጥያቄ የተሟላ መልስ ለመስጠት አቅቶት ሲሸማቀቅ በዓይነ ሕሊናው ይታየዋል:: አንቀጽ 72 ጠቅላይ ሚኒስትሩ ከፖርላማንቱ አንደኛው ምክር ቤት በሚያደርገው ስብሰባ ወይም ሁለቱም ምክር ቤቶች ባንድ ላይ በሚያደርጉት ስብሰባ በድምጽ ብልጫ ሲጠይቁት ራሱ ወይም እሱ የሚወክለው የመስሪያ ቤቱ አባል ቀርቦ መስሪያ ቤቱን ስለሚነኩ ጉዳዩች በቃል ወይም በጽሑፍ መልስ መስጠት አለበት ይላል:: ጠቅላይ ሚኒስትሩ እሱ የሚወክለው ሰው የሚለው አነጋገር እንዲገባ ለማድረግ ችሏል:: የሚኒስትሮች የግል ኃላፊነት በተመለከተ ሊገባ የቻለው ይህ ብቻ ነበር::

4.6.8 Review questions

Answer the following questions.

1. Indicate the areas of improvement by the committee in charge of preparing the draft of the Revised Constitution.

2. Enumerate the process of adoption of the Revised Constitution. Can you distinguish the 1955 Constitution from 1931 Constitution in terms of adoption?
3. State the main objectives of the 1955 Constitution? What external factors pushed Ethiopia to adopt it? What about the internal factors?
4. How did Emperor Haileselassie solve the dispute between the forces of centralization and the forces of decentralization (regionalism)?
5. State the sources of the Revised Constitution.

4.6.9 The Revolution-Background

Assefa Fiseha, Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study,(Netherlands, Wolf Legal Publishers, 2005/06) at 34-39.

The Revolution and the Coming to Power of the Military: Towards the end of the imperial regime, the centralization and the tension between the traditional forces backing the regime and the modern elite was gaining momentum. Opposition to the regime took many forms. Perhaps the 1960 attempted coup-d'etat was a watershed. Infuriated with Ethiopia's backwardness compared to the newly emerging states in Africa, the designers wanted to restore Ethiopia to its proper place. They promised new factories and schools and also had a plan of introducing a constitutional monarch although the land issue was not raised. Despite its failure the coup succeeded to attract the attention of the university students who became the heirs of the rebels. It was fundamental in the sense that for the first time many realized that the regime whose legitimacy came from the divine right to rule could be overthrown.

The aristocracy that had lost its military and administrative functions to the new elite was no longer the pillar of the monarchy. The young returnees from school abroad on the other hand thought they were working for a regime in which personal loyalty was of prime importance. It was clear to them to see how ignorant, corrupt and inefficient their superiors were. In the course of the 1960s and 1970s the new elite armed with western ideology became the main antithesis of the ancient regime. Alienated from the center and backed by Ethiopia's traditional opponents of the Middle East, Somalia, Eritrea, Oromos of Bale and the Ogaden were challenging the center. Finally, in the early 1970s, the regime lost two of its Western allies, the United States and Israel at a time when the Middle East was in ascendance because of the power and prestige it derived from its ability to control oil prices. With a view to end hostilities in Eritrea and Somalia and following Arab-Israeli war in 1973 Ethio-Israeli relations were severed. This was followed by cold diplomatic reactions from the United States apparently taken to accommodate the Arabs.

Finally, the urban uprising of 1974, the events of January to June of the same year showed a total collapse of the regime and the absence of any obvious successor to it. It should be noted though that when the revolution was about to erupt, the nations teachers, taxi drivers, students, unemployed and the labor union had shown a stake in it thus making it very popular at inception, towards the end of February the cabinet of Aklilu Habetewold was forced to resign and Endalkachew Mekonene was instructed to form a new cabinet but despite the good profile of the team, it never succeeded to stop the course of the Revolution. The plea for patience (fata) fell on deaf ears and indeed the radicals insisted gulcha bikeyer wot ayatafitim (changing the stove does not make the stew any better). Endalkachew was removed in July and replaced by Mikael Imiru, the latter to be replaced soon by the Derg.

Another crucial aspect of the revolution, however, came from the military. It started with a modest request for economic and social reform like food and uniforms for their members but as many have described it became a 'creeping coup' implying the slow but systematic erosion of imperial power culminating in the deposition of the Emperor. Towards June of 1974 the Derg (which means committee in Amharic) which started as a movement within the capital was subsequently broadened with the inclusion of representatives of various units from all over the country and slowly it grew into a military parliament, constituting some 120 members under the chairmanship of General Aman Mikael Andom and Mengistu as the first vice chairman, mainly constituting lower ranking officers. Taking the lessons of the 1960s, the Derg expressly declared loyalty to the emperor and did not show any ambition to size power.

As far as the affairs of the government were concerned dual power prevailed for some-thing like a month between that of the Endalkachew cabinet and the Derg but powers continued to shift out of the hands of the former to the latter. However, the Derg had already the armed forces, the media and police behind it and also secured the blessing of the Emperor. The cabinet was already divided between those working with the Derg and those who opposed it. The Derg continued to replace or isolate those who were not amenable to its whims. As a result Micheal Imiru replaced Endalkachew Mekonen as a Prime Minister on July 22. The Derg arrested the then Minister of defense Abiye Abebe and replaced him by Aman Andom. This time Derg's control of the cabinet was almost complete.

The Derg continued to weaken and abolish all institutions associated with the Emperor and finally confiscated businesses owned by the Emperor and the royal family. On 11 September, the ultimate attack against the Emperor was perpetrated as the famous film on the 1973 famine (that was kept secret) produced by Jonathan Dimbleby was made public. On September 12, 1974 the Derg suspended the Constitution, deposed the Emperor, and dissolved parliament, thus ending the regime. Although the Derg took over power from June 1974 with the set-up of a military committee, 12 September 1974 marks the official taking over of power. A convergence of domestic as well as international factors fueled by the urban uprising reflecting regional, ethnic as well as class contradictions as championed by the student movement, was accelerated by the military thus ending the regime with its Solomonic legend. Not only did it end the Monarchy but this time the Derg filled the political vacuum by introducing socialism., a complete change of direction.

What is unfortunate about the Revolution was that despite its popular background, there was no organized civil force that could articulate 'road map' for the masses. It was only the military that was organized and that filled the political vacuum. The two leftist political groups that were in existence allegedly, MEISON (All Ethiopian Socialist Movement) as of 1968 and EPRP (Ethiopian Peoples Revolutionary Party) as of 1972 had remained clandestine and their activities were limited to their student constituency. The military as the only organized force, therefore, exploited the existing power vacuum and easily took over leadership of the revolution. Because of this, what came to power was the military, not the revolutionaries, defeating the cause of the revolution. Through the mentors, mainly MEISON, the Derg was able to catch up with the leftist dialogue and declared the National Democratic Revolution (NDR)Program in 1976 and its ultimate objective was the setting up of the Peoples Democratic Republic of Ethiopia (PDRE) which came out in 1987. From 1974 up to 1987 the Derg ruled by decree.

Richard Pankhurst, A History of Early 20th Century Ethiopia, (Civic Webs Virtual Library, Accessed 2 April 2005).

Complaints at the slow pace of Ethiopian economic development, which was seen as comparing unfavorably with that of other African countries, and criticism of the Emperor's autocratic rule, led to an escalation of political discontent in the late 1950s. During his absence on a state visit to Brazil, in December 1960, his Imperial Bodyguard staged a coup d'etat. Its mastermind was Garmam Neway, an American-educated radical and dedicated civil servant, whose brother, Mangestu, happened to be head of the bodyguard. The plotters arrested most of the Ministers, several of the Emperor's closest confidants.

The coup received immediate support from University College students, who demonstrated in its favor. The population as a whole, however, failed to rally behind the insurrection, as Garmam and Mangestu had hoped. The coup was speedily crushed by the army and air force. Before surrendering, however, the plotters killed most of their ministerial prisoners. The Emperor, who, on hearing the news of the rebellion, had immediately decided to return, entered Addis Ababa in triumph. The coup's student supporters on the other hand refused to accept defeat. In the months and years which followed they continued to agitate, and gradually succeeded in permanently politicizing the country's steadily expanding student body.

Discontent in Ethiopia itself was by then markedly on the increase. Students, particularly after 1965, demonstrated against the government more or less regularly each year, with escalating determination. They focused on the need for land reform, with the cry, "Land to the Tiller!", as well as on the treatment of the capital's beggars, on the alleged corruption of senior officials, on the catastrophic famine of 1972-4 in Tegray and Wallo, which was comparable in intensity only to the Great Famine of the previous century, and on rising prices. Discontent also manifested itself in several small-scale peasant disturbances, mainly in the southern provinces, and in on-going agitation among the trade unions many of whose members thought that their official leadership was too subservient to the government.

Many people, even within the ruling elite, were moreover increasingly of opinion that the then Ethiopian mode of government was antiquated. Many were also concerned that the ageing Emperor was not apparently grooming his heir, the Crown Prince, to succeed him. Haile Sellassie, then in his eighties, was by this time increasingly concerned with foreign rather than internal affairs, and had relaxed his previous day-to-day scrutiny and control over the administration. The Government, as a whole, seems moreover to have been half-hearted in its recognition of the need for reform.

It was decided in 1960 that the Prime Minister, Aklilu Habtawald, instead of the Emperor, should choose the cabinet, but this limited constitutional reform failed to change either the composition or the spirit of the administration, and left the government's critics unsatisfied. A landlord-tenant reform bill was presented to Parliament in 1968, but met with such strong opposition in the landlord-dominated assembly that it had not been passed six years later when the Revolution erupted.

U.S. Library of Congress, http://countrystudies.us/ethiopia/107.htm (Accessed 2 February 2005)

Background to Revolution, 1960-74: In early 1974, Ethiopia entered a period of profound political, economic, and social change, frequently accompanied by violence. Confrontation between traditional and modern forces erupted and changed the political, economic, and social nature of the Ethiopian state. The last fourteen years of Haile Selassie's reign witnessed growing opposition to his regime. After the suppression of the 1960 coup attempt, the emperor sought to reclaim the loyalty of coup sympathizers by stepping up reform. Much of this effort took the form of land grants to military and police officers, however, and no coherent pattern of economic and social development appeared.

In 1966 a plan emerged to confront the traditional forces through the implementation of a modern tax system. Implicit in the proposal, which required registration of all land, was the aim of destroying the power of the landed nobility. But when progressive tax proposals were submitted to parliament in the late 1960s, they were vigorously opposed by the members, all of whom were property owners. Parliament passed a tax on agricultural produce in November 1967, but in a form vastly altered from the government proposal. Even this, however, was fiercely resisted by the landed class in Gojam, and the entire province revolted. In 1969, after two years of military action, the central government withdrew its troops, discontinued enforcement of the tax, and canceled all arrears of taxation going back to 1940.

The emperor's defeat in Gojam encouraged defiance by other provincial landowners, although not on the same scale. But legislation calling for property registration and for modification of landlord-tenant relationships was more boldly resisted in the Chamber of Deputies and the Senate. Debate on these proposals continued until the mid-1970s. At the same time the emperor was facing opposition to change, other forces were exerting direct or indirect pressure in favor of reform. Beginning in 1965, student demonstrations focused on the need to implement land reform and to address corruption and rising prices. Peasant disturbances, although on a small scale, were especially numerous in the southern provinces, where the imperial government had traditionally rewarded its supporters with land grants. Although it allowed labor unions to organize in 1962, the government restricted union activities. Soon, even the Confederation of Ethiopian Labor Unions (CELU) was criticized as being too subservient to the government. Faced with such a multiplicity of problems, the aging emperor increasingly left domestic issues in the care of his prime minister, Aklilu Habte Wold (appointed in 1961), and turned his attention to foreign affairs.

The Establishment of the Derg: The government's failure to effect significant economic and political reforms over the previous fourteen years--combined with rising inflation, corruption, a famine that affected several provinces (but especially Welo and Tigray) and that was concealed from the outside world, and the growing discontent of urban interest groups--provided the backdrop against which the Ethiopian revolution began to unfold in early 1974. Whereas elements of the urban-based, modernizing elite previously had sought to establish a parliamentary democracy, the initiation of the 1974 revolution was the work of the military, acting essentially in its own immediate interests. The unrest that began in January of that year then spread to the civilian population in an outburst of general discontent.

The Ethiopian military on the eve of the revolution was riven by factionalism; the emperor promoted such division to prevent any person or group from becoming too powerful. Factions included the Imperial Bodyguard, which had been rebuilt since the 1960 coup attempt; the Territorial Army (Ethiopia's national ground force), which was broken into many factions but which was dominated by a group of senior officers called "The Exiles" because they had fled with Haile Selassie in 1936 after the Italian invasion; and the air force. The officer graduates of the Harer Military Academy also formed a distinct group in opposition to the Holeta Military Training Center graduates.

Conditions throughout the army were frequently substandard, with enlisted personnel often receiving low pay and insufficient food and supplies. Enlisted personnel as well as some of the Holeta graduates came from the peasantry, which at the time was suffering from a prolonged drought and resulting famine. The general perception was that the central government was deliberately refusing to take special measures for famine relief. Much popular discontent over this issue, plus the generally perceived lack of civil freedoms, had created widespread discontent among the middle class, which had been built up and supported by the emperor since World War II.

The revolution began with a mutiny of the Territorial Army's Fourth Brigade at Negele in the southern province of Sidamo on January 12, 1974. Soldiers protested poor food and water conditions; led by their noncommissioned officers, they rebelled and took their commanding officer hostage, requesting redress from the emperor. Attempts at reconciliation and a subsequent impasse promoted the spread of the discontent to other units throughout the military, including those stationed in Eritrea. There, the Second Division at Asmera mutinied, imprisoned its commanders, and announced its support for the Negele mutineers. The Signal Corps, in sympathy with the uprising, broadcast information about events to the rest of the military. Moreover, by that time, general discontent had resulted in the rise of resistance throughout Ethiopia. Opposition to increased fuel prices and curriculum changes in the schools, as well as low teachers' salaries and many other grievances, crystallized by the end of February. Teachers, workers, and eventually students--all demanding higher pay and better conditions of work and education--also promoted other causes, such as land reform and famine relief. Finally, the discontented groups demanded a new political system. Riots in the capital and the continued military mutiny eventually led to the resignation of Prime Minister Aklilu. He was replaced on February 28, 1974, by another Shewan aristocrat, Endalkatchew Mekonnen, whose government would last only until July 22.

On March 5, the government announced a revision of the 1955 constitution--the prime minister henceforth would be responsible to parliament. The new government probably reflected Haile Selassie's decision to minimize change; the new cabinet, for instance, represented virtually all of Ethiopia's aristocratic families. The conservative constitutional committee appointed on March 21 included no representatives of the groups pressing for change. The new government introduced no substantial reforms (although it granted the military several salary increases). It also postponed unpopular changes in the education system and instituted price rollbacks and controls to check inflation. As a result, the general discontent subsided somewhat by late March.

By this time, there were several factions within the military that claimed to speak for all or part of the armed forces. These included the Imperial Bodyguard under the old high command, a group of "radical" junior officers, and a larger number of moderate and radical army and police officers

grouped around Colonel Alem Zewd Tessema, commander of an airborne brigade based in Addis Ababa. In late March, Alem Zewd became head of an informal, inter-unit coordinating committee that came to be called the Armed Forces Coordinating Committee (AFCC). Acting with the approval of the new prime minister, Alem Zewd arrested a large number of disgruntled air force officers and in general appeared to support the Endalkatchew government.

Such steps, however, did not please many of the junior officers, who wished to pressure the regime into making major political reforms. In early June, a dozen or more of them broke away from the AFCC and requested that every military and police unit send three representatives to Addis Ababa to organize for further action. In late June, a body of men that eventually totaled about 120, none above the rank of major and almost all of whom remained anonymous, organized themselves into a new body called the Coordinating Committee of the Armed Forces, Police, and Territorial Army that soon came to be called the Derg (Amharic for "committee" or "council"). They elected Major Mengistu Haile Mariam chairman and Major Atnafu Abate vice chairman, both outspoken proponents of far-reaching change.

This group of men would remain at the forefront of political and military affairs in Ethiopia for the next thirteen years. The identity of the Derg never changed after these initial meetings in 1974. Although its membership declined drastically during the next few years as individual officers were eliminated, no new members were admitted into its ranks, and its deliberations and membership remained almost entirely unknown. At first, the Derg's officers exercised their influence behind the scenes; only later, during the era of the Provisional Military Administrative Council, did its leaders emerge from anonymity and become both the official as well as the de facto governing personnel.

Because its members in effect represented the entire military establishment, the Derg could henceforth claim to exercise real power and could mobilize troops on its own, thereby depriving the emperor's government of the ultimate means to govern. Although the Derg professed loyalty to the emperor, it immediately began to arrest members of the aristocracy, military, and government who were closely associated with the emperor and the old order. Colonel Alem Zewd, by now discredited in the eyes of the young radicals, fled.

In July the Derg wrung five concessions from the emperor-- the release of all political prisoners, a guarantee of the safe return of exiles, the promulgation and speedy implementation of the new constitution, assurance that parliament would be kept in session to complete the aforementioned task, and assurance that the Derg would be allowed to coordinate closely with the government at all levels of operation. Hereafter, political power and initiative lay with the Derg, which was increasingly influenced by a wide-ranging public debate over the future of the country. The demands made of the emperor were but the first of a series of directives or actions that constituted the "creeping coup" by which the imperial system of government was slowly dismantled. Promoting an agenda for lasting changes going far beyond those proposed since the revolution began in January, the Derg proclaimed Ethiopia Tikdem (Ethiopia First) as its guiding philosophy. It forced out Prime Minister Endalkatchew and replaced him with Mikael Imru, a Shewan aristocrat with a reputation as a liberal.

The Derg's agenda rapidly diverged from that of the reformers of the late imperial period. In early August, the revised constitution, which called for a constitutional monarchy, was rejected when it was forwarded for approval. Thereafter, the Derg worked to undermine the authority and

legitimacy of the emperor, a policy that enjoyed much public support. The Derg arrested the commander of the Imperial Bodyguard, disbanded the emperor's governing councils, closed the private imperial exchequer, and nationalized the imperial residence and the emperor's other landed and business holdings. By late August, the emperor had been directly accused of covering up the Welo and Tigray famine of the early 1970s that allegedly had killed 100,000 to 200,000 people. After street demonstrations took place urging the emperor's arrest, the Derg formally deposed Haile Selassie on September 12 and imprisoned him. The emperor was too old to resist, and it is doubtful whether he really understood what was happening around him. Three days later, the Armed Forces Coordinating Committee (i.e., the Derg) transformed itself into the Provisional Military Administrative Council (PMAC) under the chairmanship of Lieutenant General Aman Mikael Andom and proclaimed itself the nation's ruling body.

The Struggle for Power, 1974-77: Although not a member of the Derg per se, General Aman had been associated with the Derg since July and had lent his good name to its efforts to reform the imperial regime. He was a well-known, popular commander and hero of a war against Somalia in the 1960s. In accordance with the Derg's wishes, he now became head of state, chairman of the Council of Ministers, and minister of defense, in addition to being chairman of the PMAC. Despite his standing, however, General Aman was almost immediately at odds with a majority of the Derg's members on three major issues: the size of the Derg and his role within it, the Eritrean insurgency, and the fate of political prisoners. Aman claimed that the 120- member Derg was too large and too unwieldy to function efficiently as a governing body; as an Eritrean, he urged reconciliation with the insurgents there; and he opposed the death penalty for former government and military officials who had been arrested since the revolution began.

The Derg immediately found itself under attack from civilian groups, especially student and labor groups who demanded the formation of a "people's government" in which various national organizations would be represented. These demands found support in the Derg among a faction composed mostly of army engineers and air force officers. On October 7, the Derg arrested dissidents supporting the civilian demands. By mid-November, Aman, opposed by the majority of the Derg, was attempting unsuccessfully to appeal directly to the army for support as charges, many apparently fabricated, mounted against him within the Derg. He retired to his home and on November 23 was killed resisting arrest. The same evening of what became known as "Bloody Saturday," fifty-nine political prisoners were executed. Among them were prominent civilians such as Aklilu and Endalkatchew, military officers such as Colonel Alem Zewd and General Abiye Abebe (the emperor's son-in-law and defense minister under endalkatchew), and two Derg members who had supported Aman.

Following the events of Bloody Saturday, Brigadier General Tafari Banti, a Shewan, became chairman of the PMAC and head of state on November 28, but power was retained by Major Mengistu, who kept his post as first vice chairman of the PMAC, with Major Atnafu as second vice chairman. Mengistu hereafter emerged as the leading force in the Derg and took steps to protect and enlarge his power base. Preparations were made for a new offensive in Eritrea, and social and economic reform was addressed; the result was the promulgation on December 20 of the first socialist proclamation for Ethiopia.

4.6.10 The Draft Constitution (1974): 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. A constitutional monarch exists when a constitution actually limits the absolute powers of a royal family or institution. The draft constitution did not come into effect for the revolution destroyed the absolute regime.

Heinrich Scholler, Ethiopian Constitutional and Legal Development: Essays on Ethiopian Constitutional Development (Vol. I) (2005) at 55-56 & 67-70.

The Draft Constitution of 1974: The development made on the Draft Constitution with regard to the rights and duties of the citizens is very noticeable. The articles have been expanded to cover vast areas of rights. The article of the 1955 constitution which makes the emperor immune from any judicial procedure has been omitted.

When compared to the 1955 Constitution, Arts 21-59 of the Draft Constitution provide a more extensive and precisely defined catalogue of Human Rights, Duties and Responsibilities.'' It is therefore surprising that one of the Derg's reasons for rejecting the the draft constitution was the need to insure the ''human rights of the people''. The Derg, perhaps wished to add social or socialist human rights to what was, for the most part, a draft in the nineteenth century liberal tradition. The ''equal protection'' provisions of the 1955 constitution, Arts. 37-38, are expanded in the Draft Constitution to include the rights to receive equal pay and to vote (Arts. 46,48), and Art. 22 specifically prohibits discrimination on the basis of 'Birth, property, religion, race, language or political affiliation''. Freedom of speech and conscience were substantially broadened and made more precise, and included the specific rights to communicate, meet and demonstrate, and to form religious, political and occupational association (Arts 24-25, 27-29). The rights of those facing criminal procedure were also expanded, including the express right to bring suit against authorities who detain a person or restrict his free movement (Art, 44) Laws cannot ''… hinder the effective and continuous applications of rights and liberties guaranteed…'' (Art 54) except upon declaration of a state of emergency of defensive war, or a proclamation of military administration (Arts. 1111- 113)

The Draft Constitution also included social rights that were not present in the 1955 constitution. Child labour and forced labour were to be prohibited and freedom of occupation and the right to join labour unions were more specifically guaranteed (Arts. 47 and 49-50) Art 55 recognizes rights to free education, health care, social security and retirement benefits, '' the level of development and wealth of the country permitting.'' These provisions were mostly programmatic and require the promulgation of additional laws for their implementation. They nevertheless represent a shift of emphasis in hitherto feudal Ethiopia.

One conspicuous omission, when compared to Art. 44 of the 1955 Constitution, is the absence of a guaranteed right of property and ownership, reflecting the changed and changing nature of law and political structures. Property was dealt with in a separate Chapter of the Draft Constitution (Arts. 136-139) that is, significantly, removed (spatially at least) from human rights provisions. Ethiopia was to become "self-reliant" and property could only be owned "within the limits of the law" (Art. 136). No mention was made of the right to dispose of property or of procedural safeguards against unwarranted expropriations, except for the "payment of, legally determined just compensation.`` Although Art. 44 of the 1955 Constitution made expropriation much too difficult in terms of a developing country's need, and resources, the Draft Constitution made no provision for any form of property security.

The Draft Constitution detail, numerous duties and responsibilities of Ethiopian" citizens must pay lawful taxes; parents must educate their children to at least elementary level; and responsibilities of employ'" to employees are outlined (Arts. 52, 56-57). The wording of Art. 51 has ideological nuances, in addition to obeying the Constitution, "every Ethiopian has the duty to defend the country and the society against all enemies, and to perform public services ..." In addition to anticipating the Progress Through Co-operation Campaign (Zemecha) this, provision implies the recognition of the draftsmen of an emerging class struggle and the ongoing identification of enemies, of society."

It is difficult to assess this Constitution as the effect of law-inaction cannot be observed, the minutes of the Constitutional Conference have not been made public, and there is no official English translation (the translation used here is by an Addis Ababa University law student) The gap between the proposed constitutional law and political reality is,if anything, greater than the gap which existed under the 1955 Constitution; events had, by August 1974 completely overtaken the sluggish Drafting Committee of the Constitutional Conference. The somewhat ambiguous Grundnorm of the Constitution refers both to a constitutional monarchy (Article 5 (1)) and the people as the origin of all Governmental authority (Article 1 (ii)) and attempts to reconcile the previous imperial Grundnorm with an emerging nationalist-socialist ideology, as understood by the draftsmen.

Their understanding was rejected by the Derg, who held that the absence of any reference to Ethiopia Tikdem was the critical defect: Article 5 (b) of Proclamation No.1 of 1974 provides that the Draft Constitution would be "[...] put into effect after necessary improvements are made to include provisions reflecting the social, economic and political philosophy of the new Ethiopia [...]" The Draft Constitution had only partially anticipated Ethiopian Socialism: Article 5 (i) states that a "fair distribution of property and uniformity in the living standard of all Ethiopians [...]" is the aim of the nation; and Article 36 (iii) declares that "[...] all land is a free commodity and a common property of all Ethiopians [...]" Article 55 - 59 contain such related ideas as the provision of education and development aid without discrimination, the alignment of education with tradition, and the introduction of a social security scheme.

The most striking changes that were made, in comparison with the 1955 Constitution, concerned the powers of the Emperor: although the Draft Constitution is longer than the 1955 Constitution by 23 Articles,fewer Articles refer to the powers and prerogatives of the Emperor, who was reduced to the nominal position of "Head of State" and "symbol of the nation's unity and history" (Article 7) possessing only symbolic lawmaking functions (Article 19,20, and 61 (b)) References to the Judaic background of the Monarchy and an Ethiopian Empire have been excluded and more prosaic and democratic references substituted.

Although Article 9 requires that the Emperor professes the faith of the Ethiopian Orthodox Church, there is no provision that establishes this Church as a State institution, and a separation of Church and State is obviously intended. Article 22, 25 (i), and 30 (ii) provide that there is to be no discrimination on the basis of religion, that freedom of conscience is guaranteed, and that (largely Orthodox Church) barriers to divorce are abolished. Article 4 establishes Amharic as the official language, but adds that "this in no way affects the other provisions on the languages of the country." Although the meaning of this statement is unclear, the provisions, taken together, suggest an intention to lessen Amhara domination of the political process. When compared to the

1955 Constitution, a substantial weakening of traditional jural postulates can be noted.

This can be seen most clearly in Draft Constitution Articles providing for a genuine separation of powers, including checks and balances, between branches of Government. The Emperor is Commander-in-Chief of the Armed Forces (Article 20 - a provision that was heavily criticised) but his duties were to be limited by law. His other duties must be performed in accordance with the resolutions of the Council of Ministers (Art: 19. The bicameral National Assembly "shall have the final authority in all matters of legislative activity" (Article, 60 (ii», and the right to establish political parties is guaranteed (Article 29). The Council of Ministers "[...] shall have the supreme authority of the Government" (Article 92), but "[...] shall be answerable, for all its actions, to the National Assembly" (Article 98).- The same conditions are imposed on the Prime Minister, and each Minister is additionally responsible to the Prime Minister (Article 99 - 100). If the Council of Ministers refuses to proclaim a law, this refusal can be overridden by a two-thirds majority of the National Assembly, and emergency decrees by the Council can be nullified if they fail to gain the Assembly's approval (Article 76 - 77). Provisions detailing the rights and duties of the judiciary parallel those of the 1955 Constitution, except that the Emperor's right to intervene in the judicial process has been abolished and a Supreme Administrative Council headed by a powerful Chief Justice (Afe Negus) would attempt to ensure judicial independence (Article 120 - 121). The Emperor's appeal court, the Chilot, has hitherto been an extra-constitutional institution and was abolished by the Derg's public statement.

As under the 1955 Constitution, the Auditor General was to be responsible to Parliament (Draft Constitution Article 135). A new institution was, however, to be created by Article 143 - 146: an ombudsman was to collect information and complaints about administrative malpractices and report to the Prime Minister and National Assembly. Related functions were performed by the Commission of Enquiry. Several new provisions concerning local administration (Article 140 - 142) were also inserted. The National Assembly was to possess exceedingly broad powers of impeachment, the draftsmen having been influenced, perhaps, by American Watergate investigations.

Taken as a whole, the Draft Constitution was another attempt to compromise the interests of the old regime with new and non-formal sources of power. The Constitutional Conference, like the Commission of Enquiry and the short-lived cabinet of Endalkatchew Mekonnen, was an intermediate institution through which, it was hoped, the conflicting interests of the Emperor and the military could be mediated and the pace and direction of the revolution controlled. The Conference and Cabinet were, by their very nature, weak and their efforts could only be destroyed by the pressure of fast-moving events.

4.6.11 Review questions

Attempt the following questions.

1. Examine critically the immediate causes of the 1974 Ethiopian Revolution.
2. What does the slogan ``Ethiopia Tikdem`` signify in the context of the 1974 Ethiopian Revolution?
3. State the key objectives of the 1974 Draft Constitution of Ethiopia. Why did the military junta reject that constitution?
4. What position was taken by the Draft Constitution regarding land ownership?

5. Who drafted the Draft Constitution? What were the major sources of the document?

4.6.12 Ethiopia under the PMAC (1974-1987): There is a controversy on the issue of whether Ethiopia had a written constitution in this period. There are some who believe that the Provisional Military Administrative Council (the PMAC) ruled the country without any, written or unwritten, constitution. On the other hand, others such as Fasil Nahum think that Ethiopia had had a written constitution in the course of 13 years. He argues, in his article published in the Journal of Ethiopian Law, that even if there was no single document that may be called a constitution the basic tenets of the socialist government were embodied in several proclamations. Some of these proclamations were: the proclamation that nationalized rural land, the proclamation that nationalized urban land and extra-houses, the proclamation that nationalized key means of productions and the proclamation that provided for the establishment of mass associations. Fasil argues that the 1987 PDRE Constitution merely elaborated and refined these basic socialist prescriptions. So, he concludes that the constitutional principles of the then Ethiopia were found in these major statutes. Do you agree with his analysis?

The answer to the issue at hand, whether Ethiopia adopted in this period a constitution, depends on the type of definition of a written constitution one has in mind. You can define a constitution as a document that describes the powers and responsibilities of the various organs of government. You may view a written constitution as a document that includes the powers and responsibilities of the branches of a government as well as the rights and obligations of citizens. Third, you may approach the definition of a constitution in terms of a process, which means the process of incorporating powers of the different segments of the government, describing the rights of citizens including human rights. You may approach the definition of a written constitution as a document that outlines the powers and responsibilities of the branches of a government including the rights of citizens, and such prescriptions are to be observed in practice. Do you think that Ethiopia did have a document or documents which qualify any of these definitions in the period between 1974 and 1987?

Heinrich Scholler, Ethiopian Constitutional and Legal Development: Essays on Ethiopian Constitutional Development (Vol. I) (2005) at 70-77.

The suspension of the 1955 Constitution: Proclamation No.1 of 1974 states that the Constitution of 1955 is' hereby suspended (Article 5 (a)), existing laws that do not conflict with the Proclamation and future laws, orders and regulations shall continue in force (Article 10) and all courts shall continue their normal functions (Article 7). The suspension rather than the repeal of the Constitution reflects the fact that, initially at least, the Armed Forces Committee (later the Derg or PMAC) considered itself to be a provisional or temporary institution. More important,

however, is the fact that the Derg's Proclamations uphold several important constitutional institutions and relations, giving rise to the argument that the suspension of the 1955 Constitution is only partial. The monarchy is retained (albeit in altered form), Parliament acquires a de facto successor in the Provisional National Advisory Commission, and a concern for the protection of human rights continues, at least as a goal to be attained in the indefinite future. The Preamble of Proclamation No. 1 suggests, however, that a partial or temporary suspension was not intended, and that the 1955 Constitution is abrogated since it "[...] was prepared to confer on the Emperor absolute powers; [...] it does not safeguard democratic rights but merely serves as a democratic facade for the benefit of world public opinion; [...] it was not conceived to serve the interests of the Ethiopian people; [...] it was designed to give the baseless impression that fundamental natural rights are gifts from the Emperor to his people; and [...] above all, it is inconsistent with the popular movement in progress under the motto "Ethiopia Tikdem" and with the fostering of economic, political and social development.

This statement suggests that the "fundamental" rights of the people that were at least reflected by the Constitution have not been suspended along with the Constitution itself. One of the Derg's stated aims is the reestablishment of human rights, and Article 5 (b) of Proclamation No.1 gives as one of the reasons for the rejection of the Draft Constitution the insufficient protection of human rights. Likewise, it can be argued that the prohibition of conspiracies against Ethiopia Tikdem, strikes, demonstration, etc., found in Article 8 of the Proclamation would be unnecessary if human rights related to those granted by the suspended Constitution had not somehow survived. The second Chairman of the Derg, Brig. Gen. Taferi Bante, has emphasised that the Rule of Law is a major guideline of the Movement and stated that "the laws existing in the country" would be applied in trials of detained officials. Since the Rule of Law is often invoked as a safeguard of the status quo, however, it is doubtful that it will be implemented in areas where it conflicts with revolutionary policy.

The Special Penal Code states that "fundamental human rights and natural justice" will be preserved and restored after having been perverted for so long. Human rights are, however, mentioned in conjunction with "natural law" and "basic legal philosophy, giving rise to the suspicion that the Derg's notion of human rights is (perhaps intentionally) vague and exists only at a high level of abstraction. The most logical referent for these vague phrases is the Universal Declaration of Human Rights, which provides broader definitions of human rights than those found in the suspended Constitution, but contains no enforcement mechanisms.

Obviously, the suspension of the 1955 Constitution means that the Derg does not have to face (theoretically possible) challenges to the new Proclamations based on their constitutionality. If legal coherence was to be preserved, the Constitution had to be suspended, since the new law-making process is in direct conflict with its provisions and, for example under Article 108, military courts, could only try persons on active military service. We can therefore conclude that, although the Constitution was not formally repealed, it is unlikely, in view of political changes, that it will be reinstated at some future date. The Constitution could not, by its very nature, contain the power struggles of the past, since it reinforced the traditional political authority that the Derg is displacing and it failed to deal with what have become the most pressing political issues - (socialist) development and land reform.

"Constitutional" Law and Institutions since September, 1974: The process of disintegration of the old constitutional law and its related institutions, the widening gap between law and reality,

the neutralization of imported public law rules and institutions and, finally, the destruction of institutions and the imprisonment and execution of officials have taken place. This process was accelerated by the inflationary world-wide energy crisis and a serious national famine, but was largely the result of the emergence of new military and civil service elites, whose value preferences are reflected in the new laws. These laws are evolving gradually in reaction to the changes in these value preferences and the disintegration of the old law, and are "constitutional" in the positivist sense: under the Grundnorm of Ethiopia Tikdem the Derg's Proclamations (definitely the "commands of the sovereign") provide the jural postulates under which Government now operates. These Proclamations have a marked effect on the lives of urban Ethiopians, but have barely touched the rural areas, except for the agrarian reform.

The attempted ''counter-coup" at the end of June 1974 brought a sudden, but not unforeseen, end to the Cabinet of En Dalkatchew. For a brief period, Lij Michael Imru became Prime Minister, but the Prime Minister's office was soon abolished (along with the deposal of Haile Selassie) by Proclamation No. I, Article 6, which stated that:" The Armed Forces, the Police and Territorial Army has hereby assumed full government power until a legally constituted people's assembly approves a new constitution and a government is duly established."

According to Article 3 of Proclamation No. 1, the monarchy was to continue within the line of Haile Selassie, with Crown Prince Asfa Wossen assuming the functions of a King (not Emperor) when he returned from Geneva-functions that are entirely symbolic. The Preamble of the Proclamation refers to monarchy as a highly esteemed Ethiopian institution, not corrupt in itself, but abused by the deposed Emperor:" Although the people of Ethiopia look in good faith upon the Crown, which has persisted for a long-period in Ethiopian history, as a symbol of unity, Haile Selassie I, who has ruled this country for more than fifty years ever since he assumed power as Crown Prince has not only left the country in its present crisis by abusing at various times the high and dignified authority conferred on him by the Ethiopian people, but also being over 82 years of age and due to the consequent physical and mental exhaustion, is no more able to shoulder the high responsibilities of leadership. [...]"

In some of his speeches, Lt. Gen. Aman Andom had referred to Ethiopian Imperial traditions, praising Emperors Tewodros, Yohannes IV. and Menelik II. In other speeches, however, he referred to the continuation of monarchy, in the reduced form of "King of Ethiopia" as a merely transitory step on the way to a republic. Given the November executions and the poor physical condition of the Crown Prince, it is unlikely that the monarchy will continue, but no moves have been made towards laying the foundations of a republic. As far as the laws are concerned, Ethiopia is a monarch;, in which the monarch has no administrative or political authority.

Many of the institutions existing under the suspended 1955 Constitution, such as the Crown Council, were simply abolished by a public statement from the Derg. This was also true of "intermediate" institutions like the Constitutional Conference and Endalkatchew's Cabinet, yet one intermediate institution showed a remarkable process of development - the Commission of Enquiry. Initially composed of non-influential members appointed by the Emperor, the Commission was dissolved after its members resigned. Later, the Parliament, particularly the House of Deputies, argued in favor of reorganization of the Commission and elected some of the Commission members, including the Chairman. Under the chairmanship of Prof. Mesfin Wolde Mariam, the Commission's purpose changed. It did not investigate maladministration or abuse of authority in general, as was expected, but focused on fixing the blame for concealing the Wollo

drought and famine. The lengthy Commission Report was examined by a new enquiry group composed of 35 members of the Police. At this time, the Chairman resigned for reasons not yet clear and was replaced by a Naval Commander. The executions that took place in November 1974, shortly after the commission had finished its investigation of the famine and two days after the Special Penal Code had been published, showed the complete breakdown of the old institutions, the intermediate' institutions and the disregard for new institutions like the Special Courts, Martial that had not begun to function.

Parliament was heavily criticized in the Preamble to Proclamation No. 1, in that "[….] the present system of parliamentary election is undemocratic; that Parliament heretofore has been serving not the people but its members and the ruling and aristocratic classes; that as a consequence it has refrained from legislating on land reform which is the basic problem of the country while passing laws at various times intended to raise the living standard of its members, thereby using the high authority conferred on it by the people to further the personal interest of its members and aggravating the misery of the people; and that its existence is contrary to the motto 'Ethiopia Tikdem' [...]"

The Chamber of Deputies and the Senate have been dissolved and there will be no further deliberations by these bodies until a new Parliament (under a new constitution and electoral law) has been created. The law-making process established by the suspended Constitution, defining proclamations (enacted by Parliament and the Emperor) or decrees and orders (the Emperor acting alone has been replaced by a new process of enactment. Proclamation No. 2 states that: "[The Provisional Military Administrative Council] shall enact all types of laws and provide for their implementation, provided, however, that nothing herein shall affect the authority given by law to Ministers and Public Authorities to issue regulations.

All treaties 'of peace and all treaties and international agreements involving a modification of the territory of the State or of Sovereignty or jurisdiction over any part of such territory or laying a burden on Ethiopian subjects or modifying legislation on existence or requiring expenditure of State funds, or involving loans or monopolies shall, before ratification by the [Military] Council, be deliberated upon by the Council of Ministers and the same shall be submitted to the Council for ratification.

Under this new "constitutional" law, the Derg and its subcommittees and regional committees have concentrated an almost unlimited power, with the merger of legislative and executive functions in its hands, and its collective exercise of the functions of Head of State under Proclamation No.2, Article 2, pending the unlikely return of the Crown Prince. Given the political changes, the law could hardly read otherwise. The Chairman of the Council has few legal powers. He receives foreign emissaries, conducts meetings, introduces policy matters and executes administrative and policy matters when directed to do so by the Derg (Article 8, 10).

The only limitations on the Derg's power are that previously-established courts are to continue their normal function. Special Courts Martial created to try certain types of cases, and Ministries can continue to function under pre-existing administrative law that is consistent with the Proclamations and retain the right to issue regulations. It would be a bold administrator indeed, however, who would risk action without the approval of a so powerful body as the Derg.

It might be hoped that these limitations on the Derg's power (which are, in effect, self-limitations) would lead to the advancement of the concept of the Rule of Law. The limitations do not, however,

operate continuously or independent of other developments. The November executions were not only unlawful but were also not ordered by any kind of court, and are an example of the complete breakdown of the Rule of Law. In making this decision, the Derg assumed the highest judicial authority, re-establishing the traditional practice that made the Head of State the supreme judge of the land. When the Derg perceived its political interests at stake, it made a political decision in which law was irrelevant.

The Derg is not a mere junta, although it succeeded a "Coordinating Committee" that more closely paralleled the structure of other juntas. It is a body of "revolutionary" soldiers, and we know little about its structure and specific functions, owing to its secrecy and anonymity. The participation by all units of the Armed Forces, through their elected representatives, and the manner of deliberation and decision making within the Derg bring the 120-odd body close to the concept of a "revolutionary parliament". The Derg is continuing an Ethiopian tradition in "revolutionary" fashion: an old Ethiopian 'constitution', the Ser'ata Mangest, states that a new king was always nominated by the late king with the consent of the army. As the traditional Ethiopian army included soldiers between the ages of 12 and 60, the participation of the army came very close to a selective male plebiscite. Obviously, the 120 representatives of four Army Divisions, the Police and the Territorial Army do not represent the Ethiopian people in the true sense of that word; but, as there are no political parties, and Parliament was clearly unrepresentative, no other institution, except, in a limited sense, the Orthodox Church represented the interests and demands of the people.

With the passage of time, the Derg seems to be evolving from a sort of radical parliament to a revolutionary party. When the continuing discussion on the need for political parties is resolved, it is probable that a one-party system would be created, and that party, or at least the nucleus of it, may turn out to be the Derg itself. In Africa, where fourteen states have experienced military dictatorship since 1960, it is not uncommon for the military to be affiliated with political ideologies.

It would, however, be a unique development if Ethiopia Tikdem, which already constitutes the Grundnorm of public law, and the Derg were transformed into the ideology and structure of a political party that is fused with the State. With the abolition of Parliament there must have been a felt need for a new body to assume its de facto functions - advice and debates without any real power, and the appeasement of public (and, to some extent, military) demands for progress towards civilian rule. As a result, a Civilian Advisory Body was outlined by Proclamation No.2, Article 7: "[...] to advise [...] on economic, political, social development projects and other national affairs. It shall be the primary duty of the [Advisory Body], together with designated members of the [Military] Council, to study and prepare, in accordance with the motto "Ethiopia Tikdem", on how a permanent govemment elected by the people can be established and present the same within a short time to the [Military] Council [...]"

The body began to function on 25 October 1974 and was two members short, as the University community refused to send representatives. More specific legislation was finally provided, when the Provisional National Advisory Commission was established by Proclamation No. 12 of 1974. Development projects, the CELU, teachers, Christian and Muslim leaders, Ministries, government bodies, provinces and businessmen elected 58 of the 60 Commission members. In addition to drafting a constitution, the Commission is to prepare for elected government, gather data and expert information, deliberate on beneficial matters, particularly those referred to it by

the Derg, and "study all legislation enacted to strengthen and maintain the feudal-bourgeois and imperialist order" and propose changes (Article 7). Commission sessions are not public, no action can be taken against members if they follow the appropriate procedure, and members can resign only with the Derg's consent (Article 8 (I), 10 (2) and 11).

The 'law-making' process, as carried out by the PMAC and the Advisory Commission, is similar to the procedure formerly employed by the Emperor and Parliament. If the Advisory Commission makes a proposal with which the PMAC does not agree ("needs further study or elaboration" is the euphemistic phrase used), it will be sent back to the Commission "along with the necessary directives and explanation for further deliberation" or the PMAC may "refer the matter to a joint meeting of the appropriate committees of the Provisional Military Administrative and of the Advisory Commission." Neither Parliament nor the Commission is directly representative of the peasants, in whose name the revolution is being undertaken. Perhaps the Derg feels the need to compromise with and make concessions to city-dwellers, while dictating to the peasants who are viewed as being unable to perceive, their own best interests.

Assefa Fiseha, Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study,(Netherlands, Wolf Legal Publishers, 2005/06) at 34-39.

After consolidating power the first measure the Derg took was to herald, the same date of its crowning, by decree all demonstrations and assemblies illegal. The proclamation that deposed the Emperor transformed the Derg into the Provisional Military Administrative Council (PMAC), which assumed full state power. Simultaneously it suspended the Constitution, dissolved parliament banned all strikes and demonstrations and declared Ethiopia Tikdem (Ethiopia First) with its socialist doctrine. As it started to catch up with the Marxist thoughts it nationalized financial institutions and private commercial and industrial enterprises in January 1975. This was followed by the nationalization of urban land and extra houses. According to Bahru the nationalization measures transferred resources from private to government hands and thereby constituted the economic foundations of totalitarianism.

The Derg also proclaimed the land reform in March 1975. Since 1965 University students had already popularized the slogan 'land to the tiller' calling for an end to the Neftegna and Gebar system in the South. The land reform, in as much as it eradicated centuries of social inequalities, appears to have had enduring positive impact. Indeed, by doing this the Derg was able to rob one of the causes of the revolution and at this point in time the Derg was at the height of its popularity. The proclamation abolished all forms of private land ownership and prohibited the sale, lease or mortgage of rural land. In short, it put an end to landownership. Thus, a large section of the people of the south as such was emancipated from servitude, at least in the short run. The large section of the peasantry saw a stack in the emerging regime and was to constitute the bulk of the army. However, even this popular measure had its own drawbacks. Not only did the proclamation fall short of making the peasant the absolute master of the plot but it was also accompanied by a series of unpopular measures. These measures ranged from state control of agricultural marketing that required the peasant to supply produce at fixed government prices to forced resettlement, collectivization and the relocation of peasant neighborhoods to new sites selected by government cadres (villagization). At later stages dissatisfaction with these measures was to be one of the factors for the rallying of the northern peasantry behind the EPRDF in its campaign to bring the Derg rule to an end.

The Derg continued to consolidate power by crushing all sorts of opposition and on November 24, 1975 it announced the shocking news of the death of its chairman General Aman and the execution of some sixty top government officers of the imperial regime. This initiated the cult of political violence that attained its climax in the so-called Red Terror. It was first aimed at the urban guerilla resistance by EPRP members in which thousands of young intellectuals were killed but at latter stages, MEISON too was a victim of this terror. It was the official launching of state killing any one suspected of dissenting from the regime.

U.S. Library of Congress, http://countrystudies.us/ethiopia/107.htm (Accessed 2 February 2005)

In keeping with its declared socialist path, the Derg announced in March 1975 that all royal titles were revoked and that the proposed constitutional monarchy was to be abandoned. In August Haile Selassie died under questionable circumstances and was secretly buried. One of the last major links with the past was broken in February 1976, when the patriarch of the Ethiopian Orthodox Church, Abuna Tewoflos, an imperial appointee, was deposed.

In April 1976, the Derg at last set forth its goals in greater detail in the Program for the National Democratic Revolution (PNDR). As announced by Mengistu, these objectives included progress toward socialism under the leadership of workers, peasants, the petite bourgeoisie, and all antifeudal and anti-imperialist forces. The Derg's ultimate aim was the creation of a one-party system. To accomplish its goals, the Derg established an intermediary organ called the Provisional Office for Mass Organization Affairs (POMOA). Designed to act as a civilian political bureau, POMOA was at first in the hands of the All-Ethiopia Socialist Movement (whose Amharic acronym was MEISON), headed by Haile Fida, the Derg's chief political adviser. Haile Fida, as opposed to other leftists who had formed the Ethiopian People's Revolutionary Party (EPRP), had resourcefully adopted the tactic of working with the military in the expectation of directing the revolution from within.

By late 1976, the Derg had undergone an internal reconfiguration as Mengistu's power came under growing opposition and as Mengistu, Tafari, and Atnafu struggled for supremacy. The instability of this arrangement was resolved in January and February of 1977, when a major shootout at the Grand (Menelik's) Palace in Addis Ababa took place between supporters of Tafari and those of Mengistu, in which the latter emerged victorious. With the death of Tafari and his supporters in the fighting, most internal opposition within the Derg had been eliminated, and Mengistu proceeded with a reorganization of the Derg. This action left Mengistu as the sole vice chairman, responsible for the People's Militia, the urban defense squads, and the modernization of the armed forces--in other words, in effective control of Ethiopia's government and military. In November 1977, Atnafu, Mengistu's last rival in the Derg, was eliminated, leaving Mengistu in undisputed command.

Soon after taking power, the Derg promoted Ye-Itiopia Hibretesebawinet (Ethiopian Socialism). The concept was embodied in slogans such as "self-reliance," "the dignity of labor," and "the supremacy of the common good." These slogans were devised to combat the widespread disdain of manual labor and a deeply rooted concern with status. A central aspect of socialism was land reform. Although there was common agreement on the need for land reform, the Derg found little agreement on its application. Most proposals-- even those proffered by socialist countries-- counseled moderation in order to maintain production. The Derg, however, adopted a radical

approach, with the Land Reform Proclamation of March 1975, which nationalized all rural land, abolished tenancy, and put peasants in charge of enforcement. No family was to have a plot larger than ten hectares, and no one could employ farm workers. Farmers were expected to organize peasant associations, one for every 800 hectares, which would be headed by executive committees responsible for enforcement of the new order. Implementation of these measures caused considerable disruption of local administration in rural areas. In July 1975, all urban land, rentable houses, and apartments were also nationalized, with the 3 million urban residents organized into urban dwellers' associations, or kebeles, analogous in function to the rural peasant associations.

Although the government took a radical approach to land reform, it exercised some caution with respect to the industrial and commercial sectors. In January and February 1975, the Derg nationalized all banks and insurance firms and seized control of practically every important company in the country. However, retail trade and the wholesale and export-import sectors remained in private hands. Although the Derg ordered national collective ownership of land, the move was taken with little preparation and met with opposition in some areas, especially Gojam, Welo, and Tigray. The Derg also lost much support from the country's left wing, which had been excluded from power and the decision-making process. Students and teachers were alienated by the government's closure of the university in Addis Ababa and all secondary schools in September 1975 in the face of threatened strikes, as well as the forced mobilization of students in the Development Through Cooperation Campaign (commonly referred to as zemecha) under conditions of military discipline. The elimination of the Confederation of Ethiopian Labor Unions (CELU) in favor of the government-controlled All-Ethiopia Trade Union (AETU) in December 1975 further disillusioned the revolution's early supporters. Numerous officials originally associated with the revolution fled the country.

Although Addis Ababa quickly developed a close relationship with the communist world, the Soviet Union and its allies had consistent difficulties working with Mengistu and the Derg. These difficulties were largely the result of the Derg's preoccupation with internal matters and the promotion of Ethiopian variations on what Marxist-Leninist theoreticians regarded as preordained steps on the road to a socialist state. The Derg's status as a military government was another source of concern. Ethiopia's communist allies made an issue of the need to create a civilian "vanguard party" that would rule a people's republic. In a move geared to ensure continued communist support, the Derg formed the Commission to Organize the Party of the Workers of Ethiopia (COPWE) in December 1979, with Mengistu as its chairman. At COPWE's second congress, in January 1983, it was announced that COPWE would be replaced by a genuine communist party. Accordingly, the Workers' Party of Ethiopia (WPE) was proclaimed on September 12, 1984.

http://www.globalsecurity.org/military/world/war/ethiopia.htm (accessed 3April 2004)

In early 1974, Ethiopia entered a period of profound political, economic, and social change, frequently accompanied by violence. Confrontation between traditional and modern forces erupted and changed the political, economic, and social nature of the Ethiopian state. The government's failure to effect significant economic and political reforms over the previous fourteen years--combined with rising inflation, corruption, a famine that affected several provinces (but especially Welo and Tigray) and that was concealed from the outside world, and the growing discontent of urban interest groups--provided the backdrop against which the

Ethiopian revolution began to unfold in early 1974. Whereas elements of the urban-based, modernizing elite previously had sought to establish a parliamentary democracy, the initiation of the 1974 revolution was the work of the military, acting essentially in its own immediate interests. The unrest that began in January of that year then spread to the civilian population in an outburst of general discontent.

The revolution began with a mutiny of the Territorial Army's Fourth Brigade at Negele in the southern province of Sidamo on January 12, 1974. Soldiers protested poor food and water conditions; led by their noncommissioned officers, they rebelled and took their commanding officer hostage, requesting redress from the emperor. Attempts at reconciliation and a subsequent impasse promoted the spread of the discontent to other units throughout the military, including those stationed in Eritrea. There, the Second Division at Asmera mutinied, imprisoned its commanders, and announced its support for the Negele mutineers. The Signal Corps, in sympathy with the uprising, broadcast information about events to the rest of the military. Moreover, by that time, general discontent had resulted in the rise of resistance throughout Ethiopia. Opposition to increased fuel prices and curriculum changes in the schools, as well as low teachers' salaries and many other grievances, crystallized by the end of February. Teachers, workers, and eventually students--all demanding higher pay and better conditions of work and education--also promoted other causes, such as land reform and famine relief. Finally, the discontented groups demanded a new political system. Riots in the capital and the continued military mutiny eventually led to the resignation of Prime Minister Aklilu. He was replaced on February 28, 1974, by another Shewan aristocrat, Endalkatchew Mekonnen, whose government would last only until July 22.

On March 5, the government announced a revision of the 1955 constitution--the prime minister henceforth would be responsible to parliament. The new government probably reflected Haile Selassie's decision to minimize change; the new cabinet, for instance, represented virtually all of Ethiopia's aristocratic families. The conservative constitutional committee appointed on March 21 included no representatives of the groups pressing for change. The new government introduced no substantial reforms (although it granted the military several salary increases). It also postponed unpopular changes in the education system and instituted price rollbacks and controls to check inflation. As a result, the general discontent subsided somewhat by late March.

By this time, there were several factions within the military that claimed to speak for all or part of the armed forces. These included the Imperial Bodyguard under the old high command, a group of "radical" junior officers, and a larger number of moderate and radical army and police officers grouped around Colonel Alem Zewd Tessema, commander of an airborne brigade based in Addis Ababa. In late March, Alem Zewd became head of an informal, inter-unit coordinating committee that came to be called the Armed Forces Coordinating Committee (AFCC). Acting with the approval of the new prime minister, Alem Zewd arrested a large number of disgruntled air force officers and in general appeared to support the Endalkatchew government.

Such steps, however, did not please many of the junior officers, who wished to pressure the regime into making major political reforms. In early June, a dozen or more of them broke away from the AFCC and requested that every military and police unit send three representatives to Addis Ababa to organize for further action. In late June, a body of men that eventually totaled about 120, none above the rank of major and almost all of whom remained anonymous, organized themselves into a new body called the Coordinating Committee of the Armed Forces, Police, and

Territorial Army that soon came to be called the Derg (Amharic for "committee" or "council," see Glossary). They elected Major Mengistu Haile Mariam chairman and Major Atnafu Abate vice chairman, both outspoken proponents of far-reaching change.

This group of men would remain at the forefront of political and military affairs in Ethiopia for the next thirteen years. The identity of the Derg never changed after these initial meetings in 1974. Although its membership declined drastically during the next few years as individual officers were eliminated, no new members were admitted into its ranks, and its deliberations and membership remained almost entirely unknown. At first, the Derg's officers exercised their influence behind the scenes; only later, during the era of the Provisional Military Administrative Council, did its leaders emerge from anonymity and become both the official as well as the de facto governing personnel.

Because its members in effect represented the entire military establishment, the Derg could henceforth claim to exercise real power and could mobilize troops on its own, thereby depriving the emperor's government of the ultimate means to govern. Although the Derg professed loyalty to the emperor, it immediately began to arrest members of the aristocracy, military, and government who were closely associated with the emperor and the old order. Colonel Alem Zewd, by now discredited in the eyes of the young radicals, fled.

In July the Derg wrung five concessions from the emperor-- the release of all political prisoners, a guarantee of the safe return of exiles, the promulgation and speedy implementation of the new constitution, assurance that parliament would be kept in session to complete the aforementioned task, and assurance that the Derg would be allowed to coordinate closely with the government at all levels of operation. Hereafter, political power and initiative lay with the Derg, which was increasingly influenced by a wide-ranging public debate over the future of the country. The demands made of the emperor were but the first of a series of directives or actions that constituted the "creeping coup" by which the imperial system of government was slowly dismantled. Promoting an agenda for lasting changes going far beyond those proposed since the revolution began in January, the Derg proclaimed Ethiopia Tikdem (Ethiopia First) as its guiding philosophy. It forced out Prime Minister Endalkatchew and replaced him with Mikael Imru, a Shewan aristocrat with a reputation as a liberal.

The Derg's agenda rapidly diverged from that of the reformers of the late imperial period. In early August, the revised constitution, which called for a constitutional monarchy, was rejected when it was forwarded for approval. Thereafter, the Derg worked to undermine the authority and legitimacy of the emperor, a policy that enjoyed much public support. The Derg arrested the commander of the Imperial Bodyguard, disbanded the emperor's governing councils, closed the private imperial exchequer, and nationalized the imperial residence and the emperor's other landed and business holdings. By late August, the emperor had been directly accused of covering up the Welo and Tigray famine of the early 1970s that allegedly had killed 100,000 to 200,000 people. After street demonstrations took place urging the emperor's arrest, the Derg formally deposed Haile Selassie on September 12 and imprisoned him. The emperor was too old to resist, and it is doubtful whether he really understood what was happening around him. Three days later, the Armed Forces Coordinating Committee (i.e., the Derg) transformed itself into the Provisional Military Administrative Council (PMAC) under the chairmanship of Lieutenant General Aman Mikael Andom and proclaimed itself the nation's ruling body.

Although not a member of the Derg per se, General Aman had been associated with the Derg since July and had lent his good name to its efforts to reform the imperial regime. He was a well-known, popular commander and hero of a war against Somalia in the 1960s. In accordance with the Derg's wishes, he now became head of state, chairman of the Council of Ministers, and minister of defense, in addition to being chairman of the PMAC. Despite his standing, however, General Aman was almost immediately at odds with a majority of the Derg's members on three major issues: the size of the Derg and his role within it, the Eritrean insurgency, and the fate of political prisoners. Aman claimed that the 120- member Derg was too large and too unwieldy to function efficiently as a governing body; as an Eritrean, he urged reconciliation with the insurgents there; and he opposed the death penalty for former government and military officials who had been arrested since the revolution began.

The Derg immediately found itself under attack from civilian groups, especially student and labor groups who demanded the formation of a "people's government" in which various national organizations would be represented. These demands found support in the Derg among a faction composed mostly of army engineers and air force officers. On October 7, the Derg arrested dissidents supporting the civilian demands. By mid-November, Aman, opposed by the majority of the Derg, was attempting unsuccessfully to appeal directly to the army for support as charges, many apparently fabricated, mounted against him within the Derg. He retired to his home and on November 23 was killed resisting arrest. The same evening of what became known as "Bloody Saturday," fifty-nine political prisoners were executed. Among them were prominent civilians such as Aklilu and Endalkatchew, military officers such as Colonel Alem Zewd and General Abiye Abebe (the emperor's son-in-law and defense minister under endalkatchew), and two Derg members who had supported Aman.

Following the events of Bloody Saturday, Brigadier General Tafari Banti, a Shewan, became chairman of the PMAC and head of state on November 28, but power was retained by Major Mengistu, who kept his post as first vice chairman of the PMAC, with Major Atnafu as second vice chairman. Mengistu hereafter emerged as the leading force in the Derg and took steps to protect and enlarge his power base. Preparations were made for a new offensive in Eritrea, and social and economic reform was addressed; the result was the promulgation on December 20 of the first socialist proclamation for Ethiopia.

In keeping with its declared socialist path, the Derg announced in March 1975 that all royal titles were revoked and that the proposed constitutional monarchy was to be abandoned. In August Haile Selassie died under questionable circumstances and was secretly buried. One of the last major links with the past was broken in February 1976, when the patriarch of the Ethiopian Orthodox Church, Abuna Tewoflos, an imperial appointee, was deposed.

In April 1976, the Derg at last set forth its goals in greater detail in the Program for the National Democratic Revolution (PNDR). As announced by Mengistu, these objectives included progress toward socialism under the leadership of workers, peasants, the petite bourgeoisie, and all antifeudal and anti-imperialist forces. The Derg's ultimate aim was the creation of a one-party system. To accomplish its goals, the Derg established an intermediary organ called the Provisional Office for Mass Organization Affairs (POMOA). Designed to act as a civilian political bureau, POMOA was at first in the hands of the All-Ethiopia Socialist Movement (whose Amharic acronym was MEISON), headed by Haile Fida, the Derg's chief political adviser. Haile Fida, as opposed to other leftists who had formed the Ethiopian People's

Revolutionary Party (EPRP), had resourcefully adopted the tactic of working with the military in the expectation of directing the revolution from within (see Political Participation and Repression, ch. 4).

By late 1976, the Derg had undergone an internal reconfiguration as Mengistu's power came under growing opposition and as Mengistu, Tafari, and Atnafu struggled for supremacy. The instability of this arrangement was resolved in January and February of 1977, when a major shootout at the Grand (Menelik's) Palace in Addis Ababa took place between supporters of Tafari and those of Mengistu, in which the latter emerged victorious. With the death of Tafari and his supporters in the fighting, most internal opposition within the Derg had been eliminated, and Mengistu proceeded with a reorganization of the Derg. This action left Mengistu as the sole vice chairman, responsible for the People's Militia, the urban defense squads, and the modernization of the armed forces--in other words, in effective control of Ethiopia's government and military. In November 1977, Atnafu, Mengistu's last rival in the Derg, was eliminated, leaving Mengistu in undisputed command.

4.6.13 Review questions

Attempt the following questions.

1. Was a constitution in place in Ethiopia in the decade immediately before the PDRE Constitution?
1. Why do you think is the issue of whether or not a written constitution was put in place between 1974 and 1987 significant both to those who cliam that the Derg did not have a constitution and those who argue that there was a constitution in this period? Is it related to the issue of legitimacy?
2. Can you describe the fundamental causes of the 1974 Ethiopian Revolution? Was the issue of the ownership of rural land one of them?
3. Describe the contents of Proclamation 1/1974.

4.6.14 PDRE Constitution (1987-1991)

U.S. Library of Congress, http://countrystudies.us/ethiopia/107.htm (Accessed 2 February 2005)

About the same time, work continued on a new constitution for the planned people's republic. On February 1, 1987, the proposed constitution, which had been submitted to the public for popular debate and changes the prior year, was finally put to a vote. Although the central government claimed an 81 percent approval of the new constitution (with modifications proposed by the public), the circumstances of its review and approval by the general population were called into question. The task of publicizing the document had been entrusted to the kebeles and the peasant associations--organizations that had a state security mission as well as local administrative duties. Observers noted that little commentary or dissent was possible under such circumstances. Additional criticism included the charge that the proposed constitution was not designed to address or even understand Ethiopian needs; in fact, many noted that the constitution was "almost an abridged translation of the Soviet Constitution of 1977."

The People's Democratic Republic of Ethiopia: On September 10, 1987, after thirteen years of military rule, the nation officially became the People's Democratic Republic of Ethiopia (PDRE) under a new constitution providing for a civilian government. The PMAC was abolished, and in

June of that year Ethiopians had elected the National Shengo (National Assembly), a parliament. Despite these changes, members of the now-defunct Derg still ran the government but with different titles. For example, the National Shengo elected Mengistu to be the country's first civilian president; he remained, however, the WPE's general secretary. Other high-ranking Derg and WPE members received similar posts in the new government, including the Derg deputy chairman, Fikre-Selassie Wogderes, who became Ethiopia's prime minister, and Fisseha Desta, WPE deputy general secretary, who became the country's vice president.

Despite outward appearances, little changed in the way the country was actually run. Old Derg members still were in control, and the stated mission of the WPE allowed continued close supervision by the government over much of the urban population. Despite the granting of "autonomy" to Eritrea, Aseb, Tigray, Dire Dawa, and the Ogaden, the 1987 constitution was ambiguous on the question of selfdetermination for national groups such as the Eritreans, except within the framework of the national government. And although the constitution contained provisions to protect the rights of citizens, the power of peasant associations and kebeles was left intact.

The 1987 Constitution: The primary task facing the WPE following its formation in 1984 was to devise the new national constitution that would inaugurate the People's Democratic Republic of Ethiopia (PDRE). In March 1986, a 343-member Constitutional Commission was formed to draft a new constitution based on the principles of scientific socialism. Eventually, the 122 full and alternate members of the WPE Central Committee who had been appointed to its membership dominated the commission.

The Constitutional Commission had its origins in the Institute for the Study of Ethiopian Nationalities, which the Derg had established in March 1983 to find solutions to problems resulting from Ethiopia's extreme ethnic diversity. The institute was staffed mostly by academics from Addis Ababa University, who continued to serve as advisers to the Constitutional Commission. The commission's diverse membership included religious leaders, artists, writers, doctors, academics, athletes, workers, and former nobility. There was also an attempt by those who chose appointees to the commission to make sure that all major ethnic nationalities had representation in the body.

For about six months, the commission debated the details of the new constitution. In June 1986, it issued a 120-article draft document. The government printed and distributed 1 million copies to kebeles and peasant associations throughout the country. During the next two months, the draft was discussed at about 25,000 locations. The regime used this method of discussion to legitimize the constitution-making process and to test the mood of the populace. In some cases, people attended constitutional discussion sessions only after pressure from local WPE cadres, but in other cases attendance was voluntary. Where popular interest was apparent, it centered on issues such as taxes, the role of religion, marriage, the organization of elections, and citizenship rights and obligations. By far the most controversial draft provision was the one that outlawed polygamy, which caused a furor among Muslims. Few questions were raised about the document's failure to address the nationalities problem and the right to selfdetermination. According to government officials, the citizenry submitted more than 500,000 suggested revisions. In August the commission reconvened to consider proposed amendments. In all, the commission accepted ninety-five amendments to the original draft. Most of the changes, however, were cosmetic.

The referendum on the constitution was held on February 1, 1987, and Mengistu announced the results three weeks later. He reported that 96 percent of the 14 million people eligible to participate (adults eighteen years of age and older) actually voted. Eighty-one percent of the electorate endorsed the constitution, while 18 percent opposed it (1 percent of the ballots were invalid). Although this was the first election in Ethiopia's history based on universal suffrage, the presence of communist cadres throughout the country ensured that the constitution would be adopted. In Tigray and Eritrea, however, the regime held referenda only in urban centers because much of these territories was controlled by the Tigray People's Liberation Front and the Eritrean People's Liberation Front, respectively. In other places, such as parts of Welo and Gonder regions, the vote took place amid heightened security measures.

The constitution officially took effect on February 22, 1987, when the People's Democratic Republic of Ethiopia was proclaimed, although it was not until September that the new government was fully in place and the PMAC formally abolished. The document, which established the normative foundations of the republic, consisted of seventeen chapters and 119 articles. The preamble traced Ethiopia's origins back to antiquity, proclaimed the historical heroism of its people, praised the country's substantial natural and human resources, and pledged to continue the struggle against imperialism, poverty, and hunger. The government's primary concern was proclaimed to be the country's development through the implementation of the Program for the National Democratic Revolution (PNDR). In the process, it was assumed that the material and technical bases necessary for establishing socialism would be created.

*The constitution attempted to situate Ethiopia in the context of the worldwide movement of so-called "progressive states" and made no direct reference to Africa. Critics claim that the constitution was no more than an abridged version of the 1977 Soviet constitution, with the exception that strong powers were assigned to the newly created office of the president. A second difference between the Ethiopian and Soviet constitutions is that the former declared the country to be a unitary state rather than a union of republics. It was reported that the problem of nationalities was hotly debated in the Constitutional Commission, as well as in the WPE Central Committee, but the regime would not abandon its desire to create a single multiethnic state rather than a federation***.***

Tsegaye Regassa, Ethnic Federalism and The Right to Self-Determination As A Constitutional Legal Solution to the Problem of Multi-Ethnic Societies: The Case of Ethiopia (LLM Thesis, Ethiopian Civil Service College, Law Library, Unpublished) (2001)

The Constitution advocated for socialist values and national unity. The provisions of the constitution affirmed socialist values. The preamble starts by making the "working people of Ethiopia" owners of the constitution. It stresses their determination to fight backwardness and to transform the country into a socialist society. It aspires to attain development with the ideals of justice, equality, and social prosperity. Recognizing the long history of independent survival, the preamble further goes to note the fact that Ethiopia is a multinational state with various nationalities and diverse communities with essential unity created by cultural intercourse, migration, and commerce. Moreover, the inviolability of the country is stressed. The history of oppression and exploitation, of hunger, disease and mass death in feudal Ethiopia is noted. The fact that the PMAC emerged as a vanguard leadership of the revolution and took revolutionary

measures was taken into account. Some of the activities in this regard included abolition of the monarchy, nationalization of rural land, urban land, extra houses, major enterprises, and ensuring equality of nationalities, sexes, and religions. The fact that development is the primary concern is stressed. Completion of National Democratic Revolution (NDR) to lay the basis for socialism is stated as the aspiration. Furthermore, the supremacy of the constitution is asserted. That it is the expression of the sovereignty and unity of the country that it ensures the equality of nationalities based on the right to self-determination, that it guarantees freedoms and rights are all made explicit in the preamble.

Chapter 1 of the Constitution defined Ethiopia's social order. The People's Democratic Republic of Ethiopia (PDRE) was declared to be "a state of working peasants in which the intelligentsia, the revolutionary army, artisans, and other democratic sections of society participate." The commitment to socialist construction was reaffirmed, as was the idea of egalitarianism within the context of a unitary state. The official language remained Amharic. The functioning and organization of the country was proclaimed to be based on the principles of democratic centralism, under which representative party and state organs are elected by lower bodies. The vanguard character of the WPE was asserted. And its roles as well as those of mass organizations were spelled out.

Chapter 2 dealt with the country's economic system. The state was dedicated to the creation of a "highly interdependent and integrated national economy" and to the establishment of conditions favorable to development. In addition, the constitution committed the state to central planning. The chapter included state ownership of the means of production, distribution, and exchange, expansion of cooperative ownership among the general population.

Chapter 3 addressed social issues, ranging from education and the family to historical preservation and cultural heritage. The family was described as the basis of society and therefore deserving of special attention by means of the joint efforts of state and society. In addition, the constitution pledged that health insurance and other social services would be expanded through state leadership. National defense was the subject of Chapter 4. The first article asserted the nation's need to defend its sovereignty and territorial integrity and to safeguard the accomplishments of the revolution. It was declared that the Ethiopian people had a historical responsibility to defend the country. The defense force was to be the army of the country's working people. The army's fundamental role would be to secure peace and socialism.

Foreign policy objectives were spelled out in four brief articles in Chapter 5. The foreign policy objectives were based on the principles of proletarian internationalism, peaceful coexistence, and nonalignment. Chapters 6 and 7 were concerned with defining citizenship and spelling out the freedom, rights, and duties of citizens. Ethiopians were declared to be equal before the law, regardless of nationality, sex, religion, occupation, and social or other status. They had the right to marry, to work, to rest, to receive free education, and to have access to health care and to a fair trial. Ethiopians were guaranteed freedom of conscience and religion. Unlike the Revised Constitution, religion and the state were proclaimed to be separate institutions. Citizens were assured the freedoms of movement, speech, press, assembly, peaceful demonstration, and association. Regarding political participation, citizens had the right to vote and the right to be elected to political office. Their duties included national military service, protection of socialist state property, protection of the environment, and observance of the constitution and laws of the country.

The constitution's most detailed sections related to the central government's organization and activities. In these sections, the document described the various state organs and explained their relationship to one another. The supreme organ of state power was the National Shengo (National Assembly). Its responsibilities included amending the constitution; determining foreign, defense, and security policy; establishing the boundaries, status, and accountability of administrative regions; and approving economic plans. The National Shengo was also responsible for establishing the Council of State, the Council of Ministers, ministries, state committees, commissions, and state authorities, the Supreme Court, the Office of the Prosecutor General, the National Workers' Control Committee and the Office of the Auditor General. In addition, the National Shengo elected the president and officials of the Council of State and approved the appointment of other high-ranking authorities.

Candidates to the National Shengo had to be nominated by regional branches of the WPE, mass organizations, military units, and other associations recognized by law. Balloting for seats in the National Shengo was required to be secret. All individuals eighteen years of age and above were eligible to vote. Elected members served five-year terms. The body met in regular session once each year. These sessions were usually public but might on occasion be held in camera. In 1987, the National Shengo had 835 members.

The Council of State consisted of the president of the republic, several vice presidents, a secretary and other members. The Council of State was an organ of the National Shengo. The Council of State served as the most active oversight arm of the government. The Council of State exercised the national legislative role when the National Shengo was not in session. In addition to its normal functions, the Council of State was empowered to establish a defense council. The National Shengo might assign special duties to the Council of State. The Council of State had the further authority to issue decrees in the pursuit of the duties stipulated by law or assigned by the National Shengo. The power of this organ was clear in the constitutional provision. For example, a provision in a constitution stated that: "When compelling circumstances warrant it, the Council of State may, between sessions of the National Shengo, proclaim a state of emergency, war, martial law, mobilization or peace."

The 1987 Constitution established the office of president. Apparently, the Council of State ruled along with the president and exercised legislative oversight in relation to other branches of government. In reality, however, the office of the president in particular and the executive branch in general were the most powerful branches of government. The president was able to act with considerable independence from the National Shengo.

Although the constitution stipulated that the president was accountable to the National Shengo, President Colonel Mengistu Hailemariam demonstrated repeatedly that there was no authority higher than his own office. By law he was responsible for presenting members of his executive staff and the Supreme Court to the National Shengo for election. At the same time, the president, "when compelling circumstances warrant it" between sessions of the National Shengo, could appoint or relieve the prime minister, the deputy prime minister, and other members of the Council of Ministers; the president, the vice president, and Supreme Court judges; the prosecutor general; the chairman of the National Workers' Control Committee; and the auditor general. The National Shengo was by law supposed to act on such decrees in its next regular session, but this appeared to be only pro forma.

The president could be elected to an indefinite number of successive five-year terms. The president could submit nominations for appointment to the Council of Ministers (his cabinet) to the National Shengo for approval. However, by the time nominations reached the National Shengo for consideration, their appointment, in practice, had already been decided. In practice, President Mengistu would chose individuals for particular offices without any apparent input from the National Shengo, the WPE, or the Council of State. The president, who was also commander in chief of the armed forces, was also responsible for implementing foreign and domestic policy, concluding international treaties, and establishing diplomatic missions. If he deemed it necessary, the president could rule by decree.

The Council of Ministers was defined in the constitution as "the Government.`` The Council of Ministers was the government's highest executive and administrative organ. The body consisted of the prime minister, the deputy prime minister, the ministers, and other members as determined by law. Members were accountable to the National Shengo. But between sessions they were accountable to the president and the Council of State. Members of this council were chosen from regularly elected members of the National Shengo and served five-year terms, unless they resigned or were removed by the president. For example, in early November 1989 Prime Minister FikreSelassie Wogderes resigned his office, allegedly for health reasons. However, some reports maintained that he was forced out by Mengistu because of his apparent loss of enthusiasm for the regime's policies. At the same time, Mengistu reshuffled his cabinet. Significantly, these events occurred weeks after the annual session of the National Shengo had concluded.

The Council of Ministers was responsible for the implementation of laws and regulations and for the normal administrative functions of national government. It prepared social and economic development plans, the annual budget, and proposals concerning foreign relations. In their respective areas of responsibility, members of the Council of Ministers were the direct representatives of the president and the government.

In 1991 there were twenty-one ministries. Portfolios consisted of the Ministry in Charge of the General Plan and the ministries of agriculture; coffee and tea development; communications and transport; construction; culture and sports affairs; domestic trade; education and fine arts; finance; foreign affairs; foreign trade; health; industry; information; internal affairs; labor and social affairs; law and justice; mines, energy, and water resources; national defense; state farms; and urban development and housing. In addition to these ministries, there were several other important state authorities, such as the Office of the National Council for Central Planning, the Institute for the Study of Ethiopian Nationalities, the Relief and Rehabilitation Commission, and the National Bank of Ethiopia.

The constitution provided for Ethiopia's first independent judiciary. Traditionally, the Supreme Court and various lower courts were the responsibility of the Ministry of Law and Justice. After Haile Selassie's overthrow, much of the formal structure of the existing judicial structure remained intact. Over the years, regional and district level courts were reformed somewhat. The constitution stipulated that judicial authority was vested in "one Supreme Court, courts of administrative and autonomous regions, and other courts established by law." Supreme Court judges were elected by the National Shengo. Those who served at the regional level were elected by regional Shengos (assemblies). In each case, the judges served terms concurrent with that of the Shengo that elected them. The Supreme Court and higher courts at the regional level were

independent of the Ministry of Law and Justice, but judges could be recalled by the relevant Shengo.

The Supreme Court was responsible for administering the national judicial system. The court's powers were expanded to oversee all judicial aspects of lower courts, not just cases appealed to it. At the request of the prosecutor general or the president of the Supreme Court, the Supreme Court could review any case from another court. In addition to separate civil and criminal sections, the court had a military section. In the late 1980s, it was thought that this development might bring the military justice system, which had been independent, into the normal judicial system.

Between 1987 and 1989, the government undertook a restructuring of the Supreme Court. The intention of the reform was to improve the supervision of judges and of making the administration of justice fairer and more efficient. The Supreme Court Council was responsible for overseeing the court's work relating to the registration and training of judges and lawyers. The Supreme Court Council's first annual meeting was held in August 1988, at which time it passed rules of procedure and rules and regulations for judges.

Chapter 15 of the constitution established the Office of the Prosecutor General. The Office was responsible for ensuring the uniform application and enforcement of law by all state organs, mass organizations, and other bodies. The Prosecutor General was elected by the National Shengo for a five-year term. He was responsible for appointing and supervising prosecutors at all levels. In carrying out their responsibilities, these officials were independent of local government offices.

Local tribunals, such as kebele tribunals and peasant association tribunals, were not affected by the 1987 Constitution. People's courts were originally established under the jurisdiction of peasant associations and kebeles. All matters relating to land redistribution and expropriation were removed from the jurisdiction of the Ministry of Law and Justice and placed under the jurisdiction of the peasant association tribunals. The members of the tribunals were elected by association members. In addition, such tribunals had jurisdiction over a number of minor criminal offenses, including intimidation, violation of the privacy of domicile, and violations of peasant association regulations. The tribunals also had jurisdiction in disputes involving small sums of money and in conflicts between peasant associations, their members, and other associations. Appeals from people's tribunals could be filed with regional courts. Kebele tribunals had powers similar to those of their counterparts in peasant associations…

4.6.15 The Transitional Period Charter (1991-1994): In early 1991, the socialist government crumbled. The victorious EPRDF took over political power. A Transitional Period Charter was adopted in June of the same year. The Charter indicated the direction Ethiopia would follow. For example, it made the idea of decentralization explicit. The Charter announced the idea of re-mapping of the country in line with ethnicity. The Charter expressed the intention of the key actors to balance group rights, the rights of ethnic groups, and human rights. The Charter in essence put forth the pillars of the constitution to come, the FDRE Constitution.

Heinrich Scholler, Ethiopian Constitutional and Legal Development: Essays on Ethiopian Constitutional Development (Vol. I) (2005) at 57.

The Charter of 1991: The "Democratic Rights" section of the Charter has only two articles. Art. I of the Charter declares the full application of the Universal Declaration of Human Rights without any limitation. Then it gives a special emphasis on the freedom of conscience, expression, association, peaceable assembly, the right to engage in unrestricted political activity and the right to organize political parties. This is peculiar to the Charter as compared to the previous constitutions. It has opened the door to opposition parties to participate in the polities of the country. The other peculiarity of the Charter and to the Ethiopian history is the right to self determination. This right has been extended up to independence when the concerned nation, nationality and people is convinced that the above rights are denied, abridged or abrogated.

Aaron P. Micheau, THE 1991 Transitional Charter of Ethiopia: A New Application of The Self-determination Principle? 28 Case W. Res. J. Int'l L. 367 (1996)

Division of Power Issues in Ethiopia: The Charter's guarantee of internal self-determination is found primarily in Article II. It provides for the preservation of national identities, the creation of autonomous political units that are represented within a central government, and a subjective test for the right to full independence. In addition, Article XIII provides for local and regional councils based on nationality. It is the task of the drafters of the Ethiopian Constitution to eliminate any ambiguity with respect to the Article IIc grant of full independence. If the Charter's provision of "self-determination, up to and including independence" was only intended to permit Eritrean secession, the Constitutional text can omit references to independence. Instead, the Constitution should expressly emphasize internal self-determination. Genuine decentralization of power and protections for participation in local and regional governments may defuse nationalist aspirations to secession.

Internal self-determination in Ethiopia also requires the resolution of division of power issues between federal and regional governments. The Charter contains some precision on this issue. Article Thirteen states that "(t)here shall be a law establishing local and regional counciles (sic) for local administrative purposes defined on the basis of nationality." Referring back to Article IIa, one could infer, at least, that these councils will have some jurisdiction over education, broadcasting, and other cultural activities. What the Charter lacks is some mechanism for determining the boundaries between regional and central power. These mechanisms would provide guarantees to nations and regions that have been exploited by the central government policies in the past, such as burdensome taxation or resettlement plans. Allocating resources to regional governments will be a necessity if these governments are to be effective at all. This allocation must be done both by local taxation and support from the central government. To the extent that the latter is constitutionally or statutorily guaranteed, the regional councils will be more independent.

Conclusion: Ethiopia provides an excellent example of the appropriate limits of the nondiscrimination principle. In the future, its central government must make an effort to recognize and assist groups that have been excluded under the empire and the Derg. If the spirit of regional autonomy is followed and funds are distributed fairly, the need for organizations like Macha-Tulama might be obviated. Regions will be able to build their own infrastructure, and develop their own regional taxation and linguistic education policies.

To provide for equality of opportunities at the federal level, such as among university students and federal officials, the central authorities might take nationality into account in the provision of spaces, the selection process, or other ways. Additionally, the central government will have to develop rules and mechanisms to protect minorities within each of the regions. To be sure, Ethiopians should strive for an ultimate goal of legal recognition of the Ethiopian identity and none other. But to recognize the nondiscrimination principle to the exclusion of the self-determination principle will perpetuate the cultural hegemony of the Amharas and the marginalization of other groups. This is why the nations of Ethiopia have applauded the Charter, without necessarily supporting secession. It is necessary that the limits placed upon the right of self-determination are recognized and accepted by all Ethiopians as well, given the uniqueness of including that right in a domestic instrument. But these limits cannot infringe upon the cultural expression of the ethno-nations.

Beyond Ethiopia, it is evident that the principle of self-determination must be clarified. If external self-determination is simply an anachronism (because traditional colonial relationships no longer exist), internal self-determination should be emphasized as a vital and appropriate prophylactic for the sorts of problems which have erupted in states with hierarchical forms. Ethiopia is in a precarious transition period, but has much to gain, not the least of which is to become a positive example for other societies who are struggling with issues of nationalism.

The initial slogan of the Derg, Ethiopia Tidkem, loosely translated as "Ethiopia First," was publicly defined in December of 1974, six months after the Derg came to power, as Ethiopian Socialism, meaning "equality, self-reliance, hard work for the overall interest of the people and above all the supremacy of Ethiopian unity."

With regard to nationalist movements, the Derg's position was that, although self-determination, and even secession, was among the rights of all nations, self-determination was unjustified under a socialist government. The Derg's conceptual framework, which was similar to that of the Soviets, led it eventually to dismiss the nationalist movements as wholly external in derivation. These positions were extensions of Ethiopian essentialism in socialist garb, whereas during the Imperial history, essentialism was expressed in religious terminology. In either case, recognition of cultural differences among Ethiopians was suppressed, and internal dissent was projected to a plausible external source. The nondiscrimination principle was official policy under the Derg, and is a variant of the essentialist position. One of the Derg's fundamental precepts prohibited discrimination on the basis of tribe, sex, language, or religion. Developing a principle of ethnic or cultural nondiscrimination presupposes that no legally significant distinctions exist along these lines. While the principle of nondiscrimination might seem to be recognizable only in liberal societies, several writers have shown otherwise. This principle is analogous in practice to the socialist concept of the "universal man," who has no ethnic or national identity --only a class identity, which itself disappears when Communism is achieved.

This presupposition of universality is difficult or impossible where peoples speak different languages, have different lifestyles, and live in different geographic regions. Law cannot ignore the existence of identities to which significant numbers of people subscribe. Where the state supports one identity or culture in the interests of unity, it necessarily supports the characteristics of the dominant state actors, assimilating, ignoring, or destroying all others in the process.

The "Inclusionist" Position: The adoption of the Charter seems to have eliminated essentialism as the dominant conceptualization of Ethiopian identity. The new position allows for legal and ideological recognition of distinct nations within Ethiopia. The most obvious example of this is the recognition of self-determination as a collective right of nations. Certain nationalist positions, or aspects of them, embrace the inclusionist view. There is a limit to inclusionism, however, where multiple views of Ethiopian identity are incompatible with one another, and conflict, rather than coexist. The best illustrations of this limit are nationalist positions which demand secession. The Charter retains an Ethiopian identity; it only recognizes that this identity can have many forms. A substantial rejection or attack upon the Ethiopian identity is beyond the scope of the Charter's guarantees.

4.6.16 The FDRE Constitution

Tsegaye Regassa, Ethnic Federalism and The Right to Self-Determination As A Constitutional Legal Solution to the Problem of Multi-Ethnic Societies: The Case of Ethiopia (LLM Thesis, Ethiopian Civil Service College Library, Unpublished) (2001)

The FDRE Constitution is a text of 106 articles. The preamble gives the "ownership" of the constitution to the "Nations, Nationalities, and Peoples of Ethiopia". The right to self-determination, the rule of law, democracy, economic and social development, equality and non-discrimination are stressed. The historical and cultural interaction of the people is noted. The need to rectify historically unjust relations is readily pointed out. The aspiration "to live as one economic community" is made evident. The text of the constitution created a federal state and divides powers between the Federal and state governments. Nine sub-national states were recognized as constituting Ethiopia.

By adopting a federal structure, the constitution provided for plural law-making institutions. Consequently, legislation that affect a citizen can have two sources i.e., the federal and the state legislatures. At the federal level, a kind of parliamentary government is set up with a parliament [called House of Peoples' Representatives (HOR)] that has supreme legislative decision-making power. It appears that there is a bicameral legislature. Yet, in fact, that is not the case for the House of Federation (HOF) has no legislative power. The HOF is principally an institution entrusted with the tasks of interpreting the constitution.

The FDRE Constitution also provides for a strong executive government led by a Prime Minister. The constitution also stipulated to the effect that an independent judicial power is established. In line with the federal set up, dual court structure seems to be the trend. The jurisdiction of the Federal Courts vis-à-vis the state court is stated.The Constitution also envisaged an institution in charge of assisting the HOF in the interpretation of the Constitution, i.e., the Council of Constitutional Inquiry (CCI). The CCI, composed of legal experts investigates constitutional disputes and submits its recommendations to the HOF.

The offices of the Auditor General, National Election Board and the National Census Commission are other organs established by the FDRE Constitution.The National Human Rights Commission (HRC) and the Office of the Ombudsperson are other institutions whose legislative establishment

is envisaged by the constitution. The supremacy of the Constitution subordinates all laws, practices and official decisions to the constitution and nullifies them in case they contradict it. The idea that international human rights instruments are to be used as standards in the interpretation of human rights provision is another concept built into the constitution. The principle of secularism enunciated in Art. 11 is another principle laid down in the FDRE Constitution. The FDRE Constitution includes the following principles: supremacy of the constitution, human rights, secularism, transparency and accountability of government. The FDRE Constitution declares the supremacy of the constitution and established a constitutional state that subordinates all laws, practices, or decisions to the constitution. This principle asserts the sovereignty of the people, the expression of which is the constitution. Moreover, it compels any actors to observe its provisions.

The constitution came up with the complex and rigid mode of amendment built into the constitution. Characteristic to federal constitutions is the difficult mode of amendment. In the FDRE Constitution, amendment of human rights provisions requires majority vote of all state legislatures, two third majority vote of both the HPR and of the HOF, while amendment of other provisions requires two- thirds majority vote of the joint session of HPR and the HOF along with majority votes in 2/3 of the state legislature, i.e., in 6 of the 9 states.

The principle of sovereignty of Nations, Nationalities and Peoples is one of the pillars of the FDRE Constitution. Unlike the 1955 Revised Constitution that asserts sovereignty and inalienability of the Ethiopian territory and vests this sovereignty in the Emperor, the FDRE Constitution makes it explicit that "All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia," further attaching to this that the constitution is "an expression of their sovereignty." The other basic principle of the FDRE Constitution is the principle of Human Rights. The constitution declares that human rights and freedoms are "inviolable and inalienable". The fourth basic principle of the FDRE Constitution relates to the separation of religion from state. According to Article 11, "State and religion are separate."

The last norm in the list of fundamental principles of the constitution is the principle of transparency and accountability of government. The conduct of affairs of government shall be transparent. It also stresses the fact that "any public official or an elected representative is accountable for any failure in official duties." The possibility of recalling an elected official "in cases of loss of confidence" is reserved. There is a rule that holds the Prime Minister and the Council of Ministers accountable to HPR. There is the requirement that the council of ministers get the approval of the HPR in order to exercise its emergency powers. There is also the need to consult the people on environmental policies. These rules are examples of rules that reinforce the principle of accountability and transparency of government.

Abdulkarim A. Guleid, the Challenges of Transformation and Demobilization: An Ethiopian Perspective, (Unpublished) (1995)

Analysis of the New Structures Created by the New Constitution: Samuel P. Huntington's article, "The Clash of Civilizations?", in the Summer 1993 edition of the prestigious "Foreign Affairs" magazine, and his later best-selling book with the same name, provoked more discussion among the readers of Foreign Affairs in three years than any other article published by Ministry of Foreign Affairs -- including some dissent. Is his conclusion correct that "clashes of civilizations are the greatest threat to world peace, and an international order based on civilizations is the

surest safeguard against world war"? He distinguishes among "civilizations" using differences in heritage, language, culture, and religion. We might consider more than 80 different ethnic groups in Ethiopia as "mini civilizations," since each has its own distinctive heritage, language and culture. Some are predominantly Ethiopian Coptic, some predominantly Islamic, and others are of predominantly older Animist religions. In this sense, Ethiopia today is like a "mini World" composed of more than 80 different "mini civilizations". Are clashes among these "mini civilizations" the greatest threat to national peace and a national order based on "mini civilizations" the surest safeguard against civil war? In Ethiopia, the surest safeguard against civil war is the culture of the "mini civilizations." The culture of tolerance in Ethiopia is also unique in the world. In certain parts of Ethiopia, especially in the Wollo zone of the Amhara Region, the inter-marriage between Moslems and Christians is common. Since the parents have different religions, the children are also allowed to take the religion of their choice without being influenced by the parents. This is something unique that can be witnessed only in Ethiopia, where the culture of tolerance and freedom of faith is at home!

The Italian comparative lawyer, Ugo Mattei, has compared the new Constitution of Ethiopia with other constitutions around the World in the Cardozo Law Review in 1995 in an article entitled "The New Ethiopian Constitution: First Thoughts on Ethnical Federalism and the Reception of Western Institutions". Mattei notes that, although it was drafted with the assistance of international experts, the new Constitution does reflect primarily the US Constitution, which is not unusual around the World today. He questions whether it is really appropriate to copy the US model for "rule of law" (to an African setting) where it is quite alien to African traditions. He is particularly concerned about the federal structure, stating that for federalism to work "requires a high degree of political and legal expertise that not many countries in the world enjoy today. It should be added, however, that ethnical federalism particularly when ethnicism gets represented by political parties (politicized ethnicism) is the worst of the possible worlds. In particular, "If there is something that the American model can teach, it is the absence of any ethnic element in an efficient federalism." In general, Mattei praises this new Constitution from a technical perspective but questions whether it is too complex and foreign to the local culture for any government to be able to successfully implement it.

New World Order Vs. Old World Order: President George Bush and his Secretary of State James Baker of the USA defined a concept for a New World Order as being a composite of the historical precedents for guiding ad-hoc policy decisions. However, within two years of this approach, no coherent policy could be abstracted from these precedents. Therefore, they stopped even talking about a New World Order.

In this vacuum of creative political leadership, a different definition of the concept of the New World Order has been developing objectively and spontaneously by itself - despite resistance and lack of leadership from the ministries of foreign affairs, parliaments, and academics around the world. This new evolving real New World Order was defined for the first time by Jack L. Davies, which is based very generally upon a two-phase model. In the first phase, multi-ethnic and multi-religious states that were created instantaneously from the top down under the rules of our Old World Order are being allowed to disintegrate into smaller and more homogenous political entities. This is necessary to relieve the pent-up tensions that have been held together by the brute force under the rules of our Old World Order.

In the second phase, these smaller political entities are re-integrating regionally on the basis of voluntary and gradual democratic processes. The driving force towards this regional integration is the economies-of-scale for large-scale industrial production and for large integrated markets, which permit the achievement of higher standard of living in large and integrated markets rather than in smaller economic entities.

Ethiopia is the first African state that has accepted and implemented the principles of this New World Order without external influence. This was a risky adventure, but an essential one. Many people thought (Ethiopians as well as many African politicians and Europeans) this untested path taken voluntarily was going to be the end of Ethiopia. But this decision was the only right option to hold Ethiopia together. It is this model that has saved Ethiopia from disintegration. The different ethnic and religious groups in the country were given full autonomy to organize themselves, choose their own leaders and decide on their future to the extent of secession.

Ethiopia, therefore, deserves all the credit for taking the political leadership to implement this new evolving New World Order in the Horn of Africa. By taking this decision, the Ethiopian ruling party also paved the road for Eritrean independence. Therefore, Mr. Ugo Mattei is not the only person with this paradigm. Many have shared the same beliefs and assumptions with him, including Ethiopians with different motives. But Ethiopia is the first African state that has understood and implemented the principles of the New World Order without external influence.

Huntington provides a logical basis for granting as much regional autonomy to ethnic groups as possible, considering the extensive scattering and mixing of these groups geographically. Mattei, dislikes the "politicized ethnicism" of political parties based upon representing ethnic groups rather than more-general political views. We can learn from these two quite different views and the specific arguments that can be applied to our new Constitution. They warn us of potential difficulties along the way in our implementation, giving us the opportunity to take timely corrective actions.

The best-selling book ``The Disuniting of America: Reflections on a Multicultural Society`` by Arthur M. Schlesinger, Jr. is closer to the arguments of Mattei than those of Huntington or Davies. Schlesinger claims that the success of the American model has been based upon the "melting-pot" approach where individuals from many different ethnic groups or "civilizations" immigrated to the USA where they voluntarily integrated into a new common political ethic and culture. His concern today is with the concept of a "Multicultural Society" that is now evolving in the USA, whereby immigrants and descendents of immigrants from different ethnic groups and civilizations no longer try to integrate into a common culture, but rather try to establish separate mini-cultures within the USA, one for each ethnic group or civilization from which they came. He sees this as a divisive force, that may ultimately destroy the USA, much like we have seen the multi-ethnic former Yugoslavia disintegrate, because the emphasis of the people there was not on being integrated into Yugoslavia, but rather insisting upon maintaining their original identities.

Schlesinger finds it difficult to understand why any new nation would want to implement a "multicultural society", which he sees it as a deliberate act to create a nation that will sooner or later disintegrate precisely because it is organized as a "multicultural society". Davies argues that, since we are starting out with a "multicultural society" with substantial tension among different ethnic groups, we need to at least give them as much political autonomy as possible to

reduce such tensions to a level where they feel comfortable in re-integrating voluntarily. Like Mattei and Schlesinger, Davies has expressed reservations concerning the formation of clan-based "political parties" in Somalia, that ultimately become "lobbies" for the interests the individual clans that they represent, rather than true "political parties". (See``Reunification of the Somali People`` by Jack L. Davies.)

In summary, the TGE (Transitional Government of Ethiopia) launched a brave and creative strategy for solving the complex political problems facing it, through the way that it supported the Ethiopian people in creating their new Constitution, structure of government, and the creation of new political parties. So far, this strategy has been far more successful than most critics expected. But much work remains to be done before we can achieve lasting peace, democracy, and economic development on the Horn of Africa -- and can say "mission accomplished``

4.6.17 Review questions

Part I Answer the following questions

1. What are the principles of the New World Order?
2. What distinguishes the Old World Order from the New World Order?
3. Does Abdulkarim approve the tenets of the FDRE Constitution? Why?
4. Assess the merits and demerits of establishing political parties along ethnic lines.
5. What is the concern of Schlesinger?
6. *Professor Scholler elaborates on jural posulates of Ethiopian constitutional law in a lengthy and incisive article published in 1976. His theme is that some "jural postulates" or grundnorms (Kelsen) were operative outside of the Constitutional framework and constituted contradictions or sources of tension between the premises of the Revised 1955 Constitution and the existing order. These jural postulates were feudal in origin. First, was the idea of monarchy itself as having derived from the union of the Queen of Sheba and King Solomon which produced the first Emperor of Ethiopia, Menelik I. The tradition is that legitimate Emperors come from this line, and that the promises made by God to Israel devolved upon Ethiopia when the Jews rejected Christ. The Emperor is thus Elect of God, Conquering Lion of Judah, and rules as God's representative on earth, by divine right. The second postulate relates to the role of the Church. The Orthodox Church is an established Church, and the legitimacy of the Church and State are merged, inseparable, and symbiotic. Scholler elaborates on his theme by articulating six premises of the Constitutional development in Ethiopia from 1931-1974. Those premises are: (1) the strengthening of the traditional monarchy; (2) the modernization of administration through ministries; (3) the addition of a Senate and elected House; (4) the emphasis on the Rule of Law; (5) the affirmation of a judicial arena; and (6) enumerated human rights. The last five policies are seen as Western. The basic position is that these latter five, grafted onto Ethiopian tradition, did not take hold, and were neutralized whenever important conflicts with the pre-existing traditional grundnorms existed. Put less delicately, the Constitutions were neutralized, i.e. rendered a dead letter, whenever important conflicts with traditional norms arose. The judiciary was basically unwilling or unable to implement such norms as the human rights guarantees and the Rule of Law.* Do you support Professor Scholler`s analysis?

7. *The basic problem with the transplant of Western norms is that these norms may fail to take root when introduced into a non-Western arena. Western norms have frequently not fared well in*

Ethiopia, or elsewhere in Africa, and one comes away wondering why. Perhaps Professor Scholler's analysis provides us with some clues. Professor Scholler points out that these Western norms conflict with the power of traditional feudal elite in Ethiopia, the Church and the nobility. Feudalism involves the idea that the main productive resource, land, is owned by the emperor or king. In feudal England, the land would return to the king upon the death of the holder. Therefore, land ownership was limited to a life estate. Theoretically, the feudal system of Ethiopia was even more centralized than that of England because titles and offices could be revoked at the will of the emperor. However, the reality may have been different.

Another variable is the ruler's state of mind with regard to the appropriate use of power. The ruler's attitude that power should be exercised personally is a key to understanding. Delegated authority was deemed demeaning and untraditional. Remnants of feudalism remained in the Parliamentary regime when local peasants returned former and current feudal lords to power. Land ownership retained its feudal character in that corvee labor was owed, and feudal payments for the use of land were continued. Traditional feudal elites stand to loose power from modernization, progress and development. The elites have good reason to resist development.

An example of the conflict between the traditional forces and modernizing forces is indicated by the experience with the Land Tax Proclamations of 1942 and 1944, enacted during the regime of Emperor Haile Selassie. The traditional forces allowed the law to be enacted, but were successful in preventing its implementation. Thus, the forces for modernization (sometimes students), were in continuing conflict and stalemate with the landowning elite and the Ethiopian Orthodox Church. Emperor Selassie's regime was unable to reconcile these forces, and it appears that any regime will have the same difficulty. Both the Mengistu regime and the current regime continued the ownership of land under a form of socialism which provides continuity between feudalism and socialism. The modern state in Ethiopia may be seen as simply standing as a successor to the feudal rights of the emperors of Ethiopia. However, important changes, brought by the regime of Mengistu, have weakened the traditional power base. The Church has lost much of its land, though it retains considerable spiritual power. The traditional aristocracy has lost much of its power base in land. Land reform, stalled and perhaps impossible under Emperor Haile Selassie's regime, was realized in part under Mengistu. These were achievements of the Mengistu regime, though the cost in terms of human life, violence and repression was excessive. The policies of the existing regime of Mr. Meles Zenawi remain to be seen. Do you endorse this analysis by Professor Van Doren? 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)

Part II Multiple-choice Question

Choose the best answer from the given choices.

Identify the statement that best represents the position of Abdulkarim A. Guleid as outlined in his article entitled ``the Challenges of Transformation and Demobilization: An Ethiopian Perspective.``

A) He aims at offering a description of the rise and fall of the Old World Order.

B) He aims at outlining the attributes of the New World Order -disintegration and reintegration.

C) He claims that the best solution to the complex political problems Ethiopians have confronted lies in bottom up reintegration of the various ethnic groups as reflected in the FDRE Constitution.

D) He aims at criticizing the works of Samuel P. Huntington's article, ``The Clash of Civilizations?``

E) He aims at fully supporting Schlesinger who sees ethnic federalism as a deliberate act to create a nation that will sooner or latter disintegrate.

F) All of the above.

G) He explains the different meaning attached to the concept of the New World Order.

4.6.18 Collective self-redefinition

እንድሪያስ እሸቴ፣ የአዲሲቱ ኢትዮጵያ ገፅታ ከብሔር ብሔረሰቦችና ሕዝቦች ማንነት አንጻር (ሀዳር 28/1999) ገጽ 1-4 /ያልታተመ/

የብሔርዊ ማንነት ዕውቅናን ቁም ነገርና ፍሬ ቁልቋሎ አድርጎ ለማየት የቀድሞውን ኢትዮጵያዊነት መለስ ብሎ መቃኘቱ ይጠቅማል፡፡ ለአያሌ ዓመታት ለኢትዮጵያዊነት ብቁ ለመሆን ለበዙሀን የኢትዮጲያ ሕዝቦች የራስን ማንነት መሸሸግ ወይም ጨርሶ መሻር ግድ የሆነበት ሁኔታ ነበር፡፡ በኢትዮጵያዊነት ለመታቀፍ፣ ብሔራዊ መለዮ የሆኑትን ለምሳሌ፣ የግል፣የጋራ የአካባቢ ስም፣ ባሕልና ቋንቋ፣ ሀይማኖት ሳይሸሩ ወይም ሳይሸሸጉና በዘውድ የተደገፈውን ሳይከናነቡ ኢትዮጵያዊ ነኝ ማለት ዘበት ነበር፡፡ ወደ ቀድሞው ኢትዮጵያዊነት የሚያሸጋግረው የማንነት ክህደት ጐዳና ለሁሉም ሕዝብ እኩል ክፍት አልነበረም፡፡

የንጉሰ ነገስትነት አልጋ በወረሱና ባለርስት አገር ብሔሮች ለምሳሌ ዋግና ትግራይ ጐዳናው እጅግ ውጣ ውረድ አልነበረውም፡፡ በሌላ አኳያ፣ የባርነት ቀንበርን ለተሸከሙ፣ ለቀላድና ለገባር አገር ብሔሮች ጐዳናው አዳጋች ነበር፡፡ ልዩነቱን ለመረዳት የቸሀን ምሳሌ እንመልከት፡፡ የጉራጌን ሕዝብ የማንነት ጉዳይ ያጠኑት ጆን ማርካኪስ ታሪኩን እንደሚከተለው ያቀርቡታል፡፡

በ1875 ዓ.ም የመጀመሪያው የሸዋ ግፊት በጎይል ተመክቶ /የጉራጌን ሕዝብ/ ማንበርከክ አልቻለም፡፡ የጉራጌን ሕዝብ ከአንዱ በስተቀር ለማሸነፍ የአሰር ዓመት ጦርነትና ድርድር ፈጅቷል፡፡ የመጨረሻው የጦር ግጥሚያ በ1886 /ዓ.ም/ ዋቢ ወንዝ ጋ በሸዋና ከሰባት ቤት አንዱ በሆነው በቸሀ መሀል ነበር፡፡ ቸሀ በመዋጋቱ በጽኑ ተቀጣ፣ ብዙዎቹ በባርነት ተሸጡ፣ የአካቢውም መሬት ቤተ ርስት ሆነ፡፡ በጎይል በተያዙት አገሮች የሚዘረጋው የገባር ስርዓት ተመሠረተ፣ አብዛኛውን ምርጥ መሬት መንግስት ቀምቶ ለድል አድራጊዎቹና ለአጋሮቹ አደለው፡፡ እነሱም የአካባቢው ባለመሬትና ገዥዎች ሆኑ፡፡ በተነጠቀውም መሬት ላይ የነበሩት የጉራጌ ተወላጆች ወደ ገባርነት ወርደው፣ ያፈሩትን ለባለርስቱ እያካፈሉ በዓይነትና በጉልበት እንዲገብሩለት ተገደዱ፡፡ '' (Ethnicity and the State in Eastern Africa) M.AM. Salih and I. Markakis (eds.), Stockholm, 1998, P. 132) በተጨማሪ፣ የማንነት ክህደት ጐዳናው ለአንድም ሕዝብ ዜጋ ቢሆን እኩል ክፍት አልነበረም፡፡ በመሳፍንትነት፣ በመኳንንትነት ወይም በባላባትነት፣ ቢጋብቻ፣ በመንግስት አገልግሎትና በቅርቡ በትምህርት ማንነታቸውን አሌ ብለው ለጨዋ ኢትዮጵያዊነት ተመልምለው የባዕድ ባሕል የተላበሱት ብዙ አልነበሩም፡፡ በሰርዓተ መንግስቱ ክብር የተደረገውን ቋንቋ፣ ሀይማኖትና ባሕል ለማወቅ፣ ለመቀበልና ለማንጸባረቅ ወደ መንግስተ ሰለሳን መጠጋትን ይጠይቅ ስለነበር፣ ይህ ዕድል--ዕድለ ከተባለ--የጥቂቶች ብቻ ብርቅ ዐጋ ነበር፡፡ በጠቅላላው፣ የራስን ማንነት ክዶ ወደ ኢትዮጵያዊነት መሸጋገር በታሪካዊና መደባዊ ምክንያቶች የተዛነፈ ነበር፡፡ ከኢትዮጵያዊነት ከተገለሉት ባሻገር ለኢትዮጵያዊነት የታጩትም ቢሆኑ በኢትዮጵያዊነትም እኩል አልነበሩም፡፡ ለዘመናት ለብዙሀን ማንነትን በመክዳት የተመሠረተ ኢትዮጵያዊነትን ተቀብሎ መኖር ያስከተለውን በደል፣ ውርደት፣ የራስና የሌላ ጥላቻ በብቃት ለመርዳት አሁንም ቀላል አይደለም፡፡ ድንገት ፍንጭ ቢሆነን፣ ገናናው የሰነ ጥበብ ሰው ነጋድራስ

ተሰማ እሸቱ በጠላት ጊዜ የገጠማቸውን ሳስታውሳችሁ፡፡ ኃጋድራስ ቤታቸውን ለጣሊያኖች አከራይተው፣ ተከራዮቹ ምግብ ቤት ከፈተውበት ነበር፡፡ ኃጋድራስ አንድ ቀን እዚያው ሊመገቡ ሲሄዱ፣ ተከራዮቹ ኢትዩጵያዊ እንደማያስተናግዱ ይነግሯቸዋል፡፡ ግን ባለቤት ስለሆኑ ማድቤት ሊያቀርቡላቸው ዝግጁ መሆናቸውን ይገልጹላቸዋል፡፡ ኃጋድራስ ይህ አስገራሚ ሁኔታ ያሳደረባቸውን ስሜት በለዛ ገልፀውታል፡፡ በሳቸው ቃል፣

"ታሪኩ ብዙ ተሰማ እሸቱ
ተደብቄአለሁ በገዛ ቤቴ"

ገበታ ያውም እኩል ሳይሆን- ለማቅረብ ብሔራዊ ሕልውናውንና ማንነቱን መደበቅ የተገደደው ሰንቱ ነው የበታችነትህን አውቀህ፣ የበላይህን መስለህ በገዛ ቤትህ ባዳ ወይም ዝቅተኛ እንግዳ ሆነህ ትቅርባለህ የተባለው ሰንቱ ይሆን በገዛ ቤቱ ሰንል ኢትዩጵያዊነታቸውን ለማስመስከር ብሔራዊ ማንነትታቸውን እነዲያዋርዱ የተገደዱት፣ ኢትዩጵያ የትውልድ አገራቸው በመሆኑ ብቻ አይደለም፡፡ ከዚህም አልፎ ለኢትዩጵያ ሕልውናና ለዐላዊነት መሰዋዕትነት በመክፈላቸው ነው፡፡ ይህንን ለመረዳት ከደቡብ ወደ አድዋ የዘመቱትን ማስታወስ ይበቃል፡፡ የአድዋ ጦርነት ቅርስ ከየትም በላይ በሚገኝበት ፒተርስበርግ በተባለው የሩሲያ ከተማ ቤተ መዘክር የተሰማቹ የደቡብ ልዩ ልዩ ብሔራዊ ጋሻዎች የደቡብ ሕዝቦች አርበኝነት ቋሚ ማስረጃ ናቸው፡፡ ሆኖም፣ ማንነታቸውን የተነሱበት፣ ገባርነትን የቀመሱበት ወቅት በአድዋ ጦርነት አካባቢ ነው፡፡ ስለሆነም፣ አንደ አፍሪካዊ አሜሪካኖች፣ አንደ አገራችን ሴቶች የኢትዮጵያ ጭቁን ብሔሮች ለአገራቸው በክፉ ቀን ቢደርሱም፣ በደጉ ቀን በገዛ አገራቸው ለበደል ተጋልጠዋል፡፡ ለማንኛውም፣ በኃጋድራስ ተሰማ እሸቱ በአንዲት ዕለት በወራሪ ባዕድ እጅ የደረሰባቸው ነገር፣ በርካታ የኢትዮጵያ ብሔሮች ለዘመናት በሰላም ወቅት በወገን እጅ ለደረሰባቸው የብሔራዊ ማንነት ውርደትና ጥቃት መለኪያ ሚዛን ይሆናል፡፡

T. S. Twibell, *E*thiopian Constitutional Law: The Structure of the Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems 21 Loy. L.A. Int'l & Comp. L.J. 399 (1999)

The Ethiopian Constitution: As with all constitutions, the Ethiopian Constitution was drafted to address the ills of the previous regime and the political turmoil that preceded it. The new Constitution then becomes a sort of solution or recipe to remedy past mistakes, and to put the nation on the path of a chosen policy. The language of the Ethiopian Constitution makes its goals and remedies very clear, especially considering Ethiopian political history and the strife it has experienced during this century.

In its brief existence, the Constitution has drawn only a modest amount of scholarly attention. Much of this work was written at almost the exact moment the Constitution was ratified, calculating the time for publication and editing. Of course, most of the authors were attempting to evaluate the Constitution and determine whether it would accomplish its ratifiers' goals.

The Constitution's Preamble specifically sets forth Ethiopia's goals. Each clause evidences Ethiopia's past and its desired future. These goals should first trickle down from the 105 specific articles of the Constitution into Ethiopia's statutory law, administrative regulations, codes and case law, and finally to the state and local governments. While no one disagrees with the goals of the Preamble, commentators debate whether the cause of Ethiopia's problem is the Constitution or some other component of Ethiopian law, such as the codes, statutes, and administrative regulations. The Preamble is not the most comprehensive list of Ethiopia's goals. It does, however, protect human rights and freedoms, promote economic development, equal treatment for all ethnic

groups, and democracy. The question of Ethiopia's "true" goals is debatable, but it is enough to evaluate the Constitution to determine whether its execution furthers the goals listed therein.

Discussion: As with the post-ratification onset of many bodies of law, most discussion stems from outside observers taking a critical look at the new legislation. The Ethiopian Constitution certainly has its detractors. The few scholars who have written on the subject within the Constitution's short new life have criticized it rather severely. These scholars tend to have close links to the country. Most of their criticism, while raising some interesting points, is fundamentally flawed. Specifically, Professor Haile criticizes virtually every aspect of the Ethiopian Constitution, including human rights protections. While Haile would seem to be qualified to comment on the Constitution soon after it was ratified, his experience with the Ethiopian government was under Sellasie's monarchal regime.
Many of the critical articles on the subject were written barely after the Constitution was ratified. Now that some time has passed, the supposed fears of the Constitution's critics can be more clearly seen, and their true causes better correlated. Jon Abbink's analysis of the Constitution is the most accurate and objective. Abbink maintains that ethnicity must be considered when analyzing the Constitution. Moreover, other authors, such as Professor Bereket Selassie, Jerome Wilson, and Derege Demissie, view Ethiopia's implementation of ethnic federalism in a much more positive light.

The critics say that the Ethiopian Constitution's content is excellent in many ways. The criticism mainly revolves around the issue of ethnicity in the Constitution, and that any reflection of ethnicity in its provisions creates a shroud of failure. In the years since the passage of the Constitution, however, despite some cultural road blocks, the fears of secession and ethnic quarrels have not been realized. Yet, as these authors have speculated, the humans rights violations and workings of democracy have failed. The actual causes, however, are not rooted in the Constitution itself. Moreover, a proper evaluation of the history and characteristics of Ethiopia demonstrate that they support the ideals and workings of the Constitution; they do not work against it.

Western Characteristics of the Ethiopian Constitution: The United States' and Ethiopian Constitutions are similar. The Ethiopian Constitution is essentially Western. This quality, in and of itself, has been viewed as a detraction. Not only does the Ethiopian Constitution have content similar to the United States Constitution, such as a federalist design and protection of liberties, but United States common law interpreting the Constitution is actually implemented in the Ethiopian Constitution itself. For example, a provision mimicking Miranda rights, which is only a small part of United States Constitutional case law, is included directly in the text of the Ethiopian Constitution.

Professor Haile's assertion that Ethiopia is still experiencing economic strife and no actual enforcement of individual or democratic liberties is correct. The problems, however, are not rooted in the Constitution or its demarcation with ethnicity. Neither is the problem rooted in the failure to properly follow the western federalism recipe. Such conclusions are difficult to support when an article is published barely a year after the Constitution was officially ratified. The United States Department of State on January 30, 1997, and on January 30, 1998 issued reports on human rights practices. These reports, along with some news reports, shed light on how Ethiopia and its Constitution are adapting to the first democracy in Ethiopia's history. Although Haile relied on a 1996 U.S. State Department Report, it was published a year earlier, and the

information was presumably gathered months before it was actually issued. As Mattei points out, laws in Ethiopia cannot be analogized to laws applied in Western societies such as the United States. Almost all critics warn that the federal nature of the Constitution is weak and that the Constitution dangerously relies on ethnicity as the standard for many of its determinations. Although a reliance on ethnicity is perhaps not the best method for making determinations, it does serve some useful purposes for the time being. Specifically, if such reliance minimizes the dangers due to Ethiopia's unitarial nature. Furthermore, it allows for the release of tensions that would otherwise build up if Ethiopia became too centralized or nationalistic after hundreds of years of monarchal rule, and a decade of dictatorial rule, during which one ethnic culture was dominant.

One weakness of the Ethiopian Constitution is that it does not follow some of the better aspects of the United States Constitution. The problem is not that the vague western principles are not being properly followed, or that the United States' Constitution is not followed exactly. Rather, the Ethiopian Constitution is too complex. Ethiopia, like many African and Middle Eastern countries, has borrowed heavily from civil law countries such as France. Civil law, unlike common law countries, which have more complex, detailed law, tends to be more simple. Although it would seem that laws from civil law countries would tend to be more simple, that is not the case here.

Mattei is correct in asserting that culture is an important consideration to the application of the Ethiopian Constitution. Although cultural considerations are a significant factor, Mattei's analysis is not on point. The use of the term "western" alone does not make the application difficult. Rather, the underlying principles distinguish the different cultures. For example, principles of individuality and freedom, instead of Ethiopia's tradition of monarchal rule, should not be viewed as "western" just because they originated in strong western legal roots. Even the western origins began in cultures with a strong history of oppressive monarchal rule.

The strength of the United States Constitution is that it is simple, yet its structure allows it to grow and adapt to the evolving social and political processes. The United States Constitution remains the longest surviving constitution, and many countries have replicated its effect. Its effectiveness, however, is not simply because it is a product of a "western" culture. Rather, it is the underlying principles of a free and open society that establishes the constitution's effectiveness. Thus, its principles have been adapted to very diverse cultures with great success. For example, after the Allied Occupation of Japan, a very "un-Western" culture, and Germany, both countries adopted constitutions strongly influenced by the United States' Constitution. Furthermore, they continue to thrive while retaining their unique cultural characteristics. Due to technological advances in association with freer political movements and governmental structures, societies around the globe are gaining freedom.

Contrary to Mattei and Haile's cultural reasoning, the ethnicity aspect of the Constitution will be a relief of ethnic tension, rather than a problem. Moreover, you can apply principles of United States constitutional law to Ethiopia and Africa. In the ethnic considerations, however, the Constitution must protect democracy and individual rights in the process, as Abbink concludes. Specifically, Abbink states that ethnicity should be encouraged if: [F]irst, it is generally interpreted and implemented as liberation and democratization; secondly, it is sustained also in the domain of respecting individual human rights within the ethno-regions; thirdly, it works in the economic domain: and finally, it is a tendency and frame of mind accepted by the "rural

masses," the majority. Ethiopia, while struggling to better human and individual rights, is also battling to improve in many other ways.

Review questions

Attempt the following questions.

1. What is the main thesis of Professor Andreas Eshete?
2. Does Professor Andreas Eshete think that ethnic groups in the country had been put in collective self-denial?
3. Is Twibell in support of ethnic federalism? Why does he appear to support ethinc federalism in Ethiopia?
4. Is it accurate to state the fundamentals of the FDRE Constitution were enshrined in the Transitional Period Charter of 1991?
5. Distinguish the FDRE Constitution from the PDRE Constitution with respect to the `key national problems` addressed.

Excerpts

Ugo Matti, the New Ethiopian Constitution: First Thoughts on Ethnical Federalism and the Reception of Western Institutions CardozoElectronicLawulletin (1995) accessedat::http://www.jus.unitn.it/cardozo/Review/Constitutional/Mattei2.html

The new Constitution, to be sure, is a big change in the Ethiopian constitutional tradition. To much regret, however, short from putting Ethiopia as a frontrunner of a new and ripe African Constitutional tradition, it locates it within the mass of countries that, for one reason or another, follow the rhetoric (part of) the structure, and many of the categories of the American model in a more or less conscious attempt to import the strongest version of the western conception of the rule of law. The new Ethiopian constitution, in my mind, offers to the scholarly community an occasion to ask fundamental questions such as: is the western rule of law a desirable goal for an African Country?

What are the fundamental structural and cultural arrangements that a legal system must offer in order to make the rule of law work as a legitimate problem-solving device? Can a Constitutional document, although a very sophisticated one, provide, if left alone, the basis for the rule of law? Was it an unrealistic dream to expect from Ethiopia new and original constitutional arrangements able to face ethnic tensions and problems of development outside of a dangerous intellectual dependency from the western concept of the rule of law.

The Ethiopian Constitution of December 8, 1994 is a new wall made of old imported bricks. How solid such a wall will result in front of the tremendous pressure that it will have to face, is a question that it is too early to answer. I argue here that, given the bricks of which it is made, there is not much to be optimistic about. Getting rid of the African legal tradition one step at the time: 1987 and 1994 Constitutions: Many scholars argue that a non-ethnocentric classification of the major legal systems in the world needs to give up the old tripartition between common law, civil law and socialist law. In particular, the role of legal pluralism should be taken into account because many countries of the so called third world do share this particular legal style Africa is no exception within the third world. The Horn of Africa is no exception within Africa and Ethiopia is no exception in the Horn of Africa.

Pluralism, however, falls short from offering a structural qualitative criterion of distinction between the Western Legal Tradition (WLT) and the different legal traditions in the world. A complementary perspective focuses on the main characteristic of the western rule of law: that of a legal process separated in principle both from the religious tradition (lawyers and priests are different social actors) and from the political process (lawyers and politicians perform different jobs). In non-western legal traditions either one or both these distinctions are absent. In Ethiopia, the political, religious and legal processes were deeply intermingled during the Negus regime. Both the 1931 and the 1955 Haile Selassie's Constitutions were almost "cynical" in their realism. The emperor was recognized full political religious and legal power. Religion as well as force was the source of legitimation of the Negus. This was possibly the strongest antidote to political fragmentation in the hands of the Amhara ruling class.

The Marxian turn that was taken after the Derg revolution (1974) went a step ahead in separating different social functions. The Stalinist regime of Mengistu Haile Mariam, of course, did not proceed any step in the direction of the rule of law and of the separation between law and politics. The 1987 Constitution however made clear that Mengistu was not claiming any religious power. Law and politics were separated from religion. In this sense it was a step forward in reaching the separation between the three spheres of social control that we assumed typical of the western rule of law(6). Of course, it has been argued that the change between the Negus and the Mengistu regimes was just nominal. While no signs of limitation of the sovereign power appear in the 1987 Constitution, Marxian ideology was just proposed as the new state religion. It is however undeniable that a traditional Ethiopian (or more broadly African) source of legitimization and of political unity was lost.

The final step is taken in the 1994 constitution whose task appears to be introducing the "rule of law" in Ethiopia. Thanks to the help of foreign experts, not only the clear separation between law and religion is confirmed. For the first time in Ethiopia, the political leadership is subject to the law. The legal and the political processes are finally separated. Even the military is kept aside of the political scene. The Western Legal Tradition has found its way all the way to Addis Ababa.

Everybody who puts a value on political unity may be worried. It is not granted any more by a religious monarchy. It is not granted anymore by a Marxian egalitarian ideology. It is not granted anymore by unrestricted political\military leadership. The enthusiastic western reaction to the reduction of the inflation rate may not be something appealing enough for the people to substitute the rule of tradition and the rule of politics as effective means for keeping unity. While some scholars may welcome this remarkable achievement, in this paper I will take a rather different perspective. I will argue that this evolution is just another example of an ethnocentric and historical episode of cultural imperialism. It is the result of intellectual dependency, the last but not least dangerous, between the power relations in postcolonial Africa.

It is likely that the result of this constitutional evolution, inherently foreign to the African structure of power and decision making, will simply result in another piece of unapplied written legislation. The new Constitution locates itself clearly in the modern (or modernized) layer of the law. It is at this level of the legal system that it must be analyzed: and this is why it is likely to remain largely unapplied. Chances are, however, that this remarkably sophisticated constitutional document, the product of an enlightened western brain trust, will create serious damages in a political scenario which is already complicated and dramatic enough. In particular, I see problems arising from an American-patterned rhetoric of rights and of competition, the foundations of an

ethnic federalism extremely dangerous in Africa as elsewhere, the institutional weakness, and the unbearable complexity of the constitutional organization.

Some final remarks: The federal Constitution confirms the mixed nature of the modern layer of the Ethiopian legal system. This characteristic was already at play with Haile Selassie whom, as it is very well known, was freely borrowing legal institutions from the French (Civil Code) and from the Anglo-American tradition. This mixed nature is probably the product of the weak colonization which affected Ethiopia. In African States which experienced a strong and long lasting colonization by one single power the flavor of the legal system has not changed after decolonization. The American model that dominates today's Ethiopian Constitution is the leading legal system worldwide: Most of its success is due to its effectiveness in protecting individual rights in the course of the two world wars. The rhetoric of individual rights, of individualism and of competition that is produced by the American model could not be more foreign to the African mentality.

A strong and ideological assertiveness of rights can have a very destabilizing impact on the Ethiopian society. This is in particular true when such rhetoric touches such crucial problems as self-determination and secession. A Somali legal scholar, Ahmed Botan, has conveyed with bitterness this idea with a sad joke which was circulating in Addis Ababa during the negotiations for the peace in Somalia: "Somalia and I against the world. My clan and I against Somalia. My family and I against my clan. My brother and I against my family. Me against my brother!``.

A well developed rule of law based on individual rights can not live outside of a constant process of mediation, that in more advanced western societies is given by the legal culture. In Ethiopia at the moment there is no legal culture and the state in which legal scholars are abandoned in the University of Addis Ababa does not allow many hopes for the future. It is not rights assertiveness that should be borrowed from the American experience: it should be the ability to arrange continuity and change within a flexible institutional framework accepted by a number of very different people.

In Africa, rights assertiveness is particularly dangerous if it is understood as rights of a clan to be asserted against the others. The traditional decentralized ethnic African society endorsed and endorses a decision-making style that could not be more far from the western right assertiveness. It was a culture of mediation, of unanimity, of peacekeeping not much different from the international law which governs the international community. Possibly the Ethiopian constitution opens to this model by granting an important right of secession.

Such right, however is in contradiction with the very idea of a federalist constitution and a lawyer should point out this contradiction. If the right to secession will become a possible way to find new arrangements of coexistence more simple and suitable to the African reality than a very complex American-based mechanism of federalism is an open question. It is sure however that federalism to work requires a high degree of political and legal expertise that not many countries in the world enjoy today. It should be added, however, that ethnical federalism particularly when ethnicism gets represented by political parties (politicized ethnicism) is the worst of the possible worlds.

If Africa desires to borrow from western institutions, which I do not believe to be a sound policy, I believe it should do so after a serious comparative analysis of the pros and the cons of each

institutional alternative. If there is something that the American model can teach, it is the absence of any ethnic element in an efficient federalism. What is crucial is to detect the best institutional level in which decision making should be exercised. From this point of view, some hopes may come from Art. 55/ 6 which mandates the Federal legislature to codify in civil law only to the extent that "The Federal Council deems necessary to maintain and sustain one economic community".

This idea or perhaps its lighter application, the so called principle of subsidiarity which is nowadays leading the European integration, may be considered as alternative ways to create federalism without pointing all the stress on the ethnical level. Another secret of the success of the American political system, which can be crucial in multiethnic communities, is that it has protected the minorities in their fundamental political rights in a rather satisfactory way, thanks to its high level of legal culture. Even more important, the American political system has worked out an electoral system that attracts minority views into the mainstream, rather than causing the proliferation of parties.

Despite the presence of nearly one hundred nations within it, Ethiopia is a rather unitary nation state if compared with other African realities. Ethnicity should not be disregarded, as it happened in the past history, but we should not fall into the opposite extreme of interpreting every and all African social dynamics as a function of it. To make this constitution work, there is much need of intermediate circuits of decision making between the State and the ethnic group. A serious political and institutional effort should therefore be made, when and if the constitution will be actually applied, to keep low the number of political parties by means of ad hoc electoral laws. This would be the only possible way to defeat the "politicized ethnicism" because it will force ethnic political groups to seek coalitions before participating in political elections eventually bringing to the birth of two major parties.

As it has been noticed in a recent article, it is within the political party that the whole African art of mediation and of search for unanimity could find a "modern" substitute for the village meeting and for the other traditional decision making devices. Leadership within major parties may eventually reduce some of the problems created by the potentially weak government described in the constitution. Of course all of this leads us to question the assumption that the rule of law as distinguished from politics and the rule of tradition is a good achievement in Africa in general and in Ethiopia in particular.

4.6.21 Review questions

Part I Essay-type Questions

Answer the following questions based on Mattei`s article reproduced above.

1. Describe the strongest version of western legal tradition.
2. What is the major model followed in the FDRE Constitution?
3. What are the central problems of the FDRE Constitution?
4. Why has the American Constitution met with success?
5. What is the principle of subsidarity?
6. What are the achievements of the FDRE Constitution over the PDRE Constitution?

4.6.22 A comparison: The table that follows compares and contrasts the elements of the 1931, 1955, 1987 and 1995 constitutions of Ethiopia.

No	Points of comparison	`31	`55	`87	`95
1	Human rights	Not incorporated	Incorporat-ed	Socialist oriented human rights approach followed	A separate chapter devoted
2	Form of state	Unitary	Unitary	Unitary	Federal
3	Type of legislature	Bicameral, but both houses played deliberative/consultative	Bicameral	Unicameral	Unicameral since the House Federation does not possess law-making power.
4.	State and religion	Theocratic, state and religion fused.	Theocratic, state and religion fused.	Secular	Secular
5.	Tool of legitimacy	The legend of the Solomonic Dynasty and religion	The legend of the Solomonic Dynasty and religion	The formation of classless society	Ethnicity and democracy
5.	Form of property	Private	Private	Collective	Private
6.	Separation of power	Was not included	Included	Was not included	Included
7.	Method of adoption	Grant	Grant	Referendum	Constituent assembly
8.	Key national Problems and solutions	Backwardness, need for modernization, political and legal centralization	Backwardn ess, need for moderniza tion, political and legal centralizati on	Transform the human person and prepare the basis of the construction of a classless society	The national question via federalism
9.	Source	Maji constitution of Japan…	1931 Ethiopia's Constitution , the USA Constitution , etc.		
10.	Multi party system	What do you think?	What do you think?	Not recognized	Recognized
11.	Universal suffrage	What do you think	What do you think?	Recognized	Recognized
12.	The state ideology	Feudo-capitalism	Feudo-capitalism	Socialism	Capitalism
13.	Ownership of land	Private	Private	Collective	Collective
14.	Independence of the judiciary				

15.	Constitutionl-ism				
16.	Independent civil societies				
17.	Owners of the constitution				
18.	Form of government				
19.	Form of government				
20.	Civil societies				
21.	Form of land ownership				
22.	Checks and balance				
23.	Recognition of legal pluralism				
24.	Judical review of legislation				

4.7 Summary

The Ethiopian legal system prior to the codification lacked completeness, reliability and technical adequacy; undifferentiated and conflicting customary laws dominated the legal system. Ethiopian codes of 1950`s and 1960`s drew from several sources. It is argued that the codes were substantially products of legal transplantation. Since 1930 Ethiopia, Ethiopia has consistently been favoring codified penal laws. Before the 1930 Penal Code, traditional penal system prevailed. The Fetha Nagast also had a role in the administration of criminal justice in the country. The 1930 Penal Code was the first effort to systematically write down penal laws in the country. The 1930 Penal Code showed some defects in the course of time. Thus the need arose to replace it with another more modern penal code, the 1957 Penal Code. Ethiopia attempted to revise the 1957 Penal Code in 1980`s; that effort, however, failed. The 1957 Penal Code was re-revised in 2005 and was renamed as the Criminal Code of Ethiopia. The revision of the Criminal Code of Ethiopia is underway.

Ethiopia has adopted four constitutions for the last seven decades. The two imperial constitutions were based on the same premise; both sought to promote the principle of political and legal centralization. Both were based on the same tools of legitimacy-the legend of the Solomonic Dynasty and religion. The next constitution, even if it did not alter the ideals of political and legal unification or centralization, came up with a fundamentally different ideology. The ideological basis of this constitution was the construction of an egalitarian society. The

present constitution rests on the ideal of unity through diversity by attempting to entrench group rights. The four constitutions of Ethiopia have not pursued the same ideals; they rather promoted quite different assumptions. That is why it is said that the Ethiopian formal legal system lacks stability in the sense that it has gone through major breaks with the past.

4.6.23 Review Questions

Part I Answer the following questions

1. The 1955 Revised Constitution and the 1987 PDRE Constitution differed, among others, in respect of tool of legitimacy.
2. The constitutions of Ethiopia indicate the instability of the formal legal system of the country.
3. The 1991 Transitional Period Charter essentially declared the pillars of the FDRE Constitution.
4. Contrast the four written Ethiopian constitutions (i.e., 1931 Constitution, the 1955 Revised Constitution, the PDRE Constitution [1987] and the FDRE Constitution [1995]). Your contrast should be in terms of method of adoption, form of state, recognition of human rights and state philosophy.
5. According to the key personalities behind the 1931 Constitution, the 1955 Revised Constitution and the PDRE Constitution (1987), these constitutions were designed to answer questions of national significance. Critically examine the problem (s) attempted to be solved in these three constitutions of Ethiopia.
6. C. Clapham writes: ``*If a constitution is intended to be a document enjoying a wide degree of popular acceptance, which in turn helps to convey legitimacy on public authorities and guides the exercise of power along the lines which the constitution lays down, then none of the Ethiopian constitutions to date comes remotely close to meeting this specification. Even as a means of helping to maintain the current regime in power, their impact has been minimal…The only ``lessons`` I can suggest are that constitution-making should not be regarded as an isolated exercise, but must be intimately related to the actual structure of political power, and that the formal provisions of any constitution may well prove to be relatively unimportant. What matters, rather, is the structure of power embodied in the constitution correspond to the effective bases of political power in the country as a whole, and the extent to which different authorities are willing and able to collaborate with one another in the management of the very difficult problems that any set of authorities must inevitably face.*`` Do you agree with these remarks? See Christopher Clapham, ``Constitutions and Governance in Ethiopian Political History,`` (1994) (unpublished).

Part II Multiple-type Questions

Choose the best answer from the given choices.

1. In the course of preparing the 1931 Ethiopian Constitution, the conservatives and the progressives had a divided opinion. Identify the correct statement.

A) The progressives had the support of Emperor Haileselassie I and the intellectuals of the period.
B) The progressives sought to include in the constitution the rule that power of the nobilities shall be based on appointment by merit, not by inheritance.
C) The conservatives sought to include in the constitution the rule that the nobilities shall be given a certain locality to be under their control and to be inherited.
D) The debate between the conservatives and the progressives was essential whether lower political positions should be based on blood tie or merit.
E) The constitution marked the victory of the progressives over the conservatives.
F) All of the above

2. One of the following is an incorrect description of the written constitutions of Ethiopia (in terms of the problems attempted to be solved and the solution sought)

A) In the text of the FDRE Constitution, the major problem addressed is the question of nationality whose solution is the self-determination of ethnic groups via ethnic federalism.
B) In the text of the PDRE Constitution, the major problem addressed was the question of class exploitation whose proper solution was articulated to be the construction of socialist Ethiopia.
C) In the text of the Draft Constitution of 1974, the main problems were identified as concentration of political power in the hands of Emperor Haileselassie I, the question of ownership of land and lack of institutional means to protect human rights and the solutions sought thereto were establishing a limited monarchy, land reform and the establishment of the institution of the Ombudsman.
D) In the text of the Revise Constitution of 1955, the main problems identified were underdevelopment and political fragmentation and the solutions sought were modernization, political and legal centralization.
E) In the text of the 1931 Constitution, the main problems identified were underdevelopment and political fragmentation and the solutions sought were modernization, political and legal centralization.
F) In the text of the PDRE Constitution, the major problem addressed was the question of national exploitation whose proper solution was to accord the nations and nationalities in the country with self-determination.
G) None of the above

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