NEAR EAST UNIVERSITY LAW FACULTY

A BRIEF HISTORY OF LAW

ELAW-209 HISTORY OF LAW TEXTBOOK

Nicosia 2015

Preface

This textbook is written in short amount of time to catch up with “History of Law” lessons held in Near East University during 2015 fall. Footnotes are insufficient due to rush. Even the preface is insufficient because of the very same reason. Hope to make it sufficient in future...

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An Obscure Introduction;

We have big questions like; “What is the purpose of universe?”. But universe does not have a consicious, so it can’t have a purpose. You might say “But many things without conscious has a purpose, like a teapot’s purpose is making tea”. Yes, but it is just because as conscious beings we made sense of it. If we want, we can paint that teapot pink and pretend like it is modern art. As consicious beings we can change objects designated purposes. So we need a consciousness, something alive for a purpose. So that takes us to the question “What is the purpose of life?”. Well while answering this question, we mostly think about ourselves, but life is not somthing exclusive for us. If we are going to answer this question, it should contain a meaning for all living things from a bacteria to a big blue whale. Than, what is common for all life forms? Have you ever listened Bee Gees famous song “Stayin alive”? Yes, it is staying alive, it is maintaining existance. We all need nutritions, and we all have to reproduce. If not we cease to exist. It may sound reductionist, too simplified, but most of the first Taboos[1] are about these two objectives. Because we live together, and make these objectives together. As we evolve phsycally and socially we made rules for basicly these two objectives. But it all became extremely complex during couple of million years. We are still stayin alive.

We are bipedal creatures since 8-5 million years, and since 2,5 million years we are using tools. We are social animal as Aristo has pointed out. We evolved phsycally and socially, from bipedal homonids to tool making savage humans (various types of homo familia) to producing barbars (from now on only homo sapien) with neolithic revolution to civilized humans who lives in a class society with state[2]. Homo sapiens or modern humans evolved about 200.000 years ago but neolithic revolution happend 12.000 years ago, so during savagery homo sapiens were living with various kinds of homo familia like homo neanderthalensis and homo floresiensis, but after barbarism there are only homo sapiens left. The progress of humans on the globe is unequal, many people lived and still living different

[1] Taboo is prohibition of an action based on religious belief. It might seen as “primitive law”. You may also check “Totem and Taboo” written by Sigmund Freud (but it is not highly recomended).
[2] You may check Gordon Childes books for neolithic revolution. “What happened in history” or “Man makes himself”.

phases in same time[3]. So untill now we disected time into pieces of BT.8-2,5 million years homonid era, BT.2,5 million years savagery era, BT 12.000 years barbaric era, BT 5000 civilized era (BT. Stands for before today). But be cautious, this could be missleading because it is not valid for all humans, those dates are the begining points just for some humans.

It is hard to imagine, to comprehend, to understand such great numbers. Time is a relative concept. Einstein says "If an object speeds up time will slow down for it. When the object reaches speed of light, time will stop for that object". But by relativity we did not mean his theory of physics. We meant our perception of time. Time is an ongoing process, but our perception and scaleing time is a different story. Daniel Dennett calls this effect as timescale chauvinism. He says it is hard for our minds to understand processes faster or slover than our mind for processing them[4].

If we see existance as whole, we should start with the big bang (13.7 billion years ago). Because matter and energy neither be destroyed nor be created they only change their forms. History is not repeating but evolving. It is a neverending and ongoing process, so we should always look back to understand present. Carl Sagan says we are children of the stars (literally). We and almost all other living things are carbon based. But at the begining there were no carbon in the universe. First there should be stars to produce most of the elements just like a baking oven. When those stars died and exploded, they send those elements to space and to our home planet, so we could be. It took 10 billion years to matter evolve into life in here. "*The nitrogen in our DNA, the calcium in our teeth, the iron in our blood, the carbon in our apple pies were made in the interiors of collapsing stars. We are made of starstuff*"[5]. As humans, we all are unique, but we are not too much different from eachother actually. Forwhy? We are the same spiecy. Me, you, or a craftsman in China who lived 2000 years ago. We see many similarities in ourselves and societies. Anything psychological is actually biological based. It is all about our brain and biochemical activities in it. We saw that in Phineas Gage example[6]. Because we are anatomically almost same, we may claim "the psychic unity of mankind". This postulate was originally formulated by Adolf Bastian. All

[3] In 2008, FUNAI (National Indian Foundation of Brasil) agent Jose Carlos Meirelles and BBC crew took footage of an indegenious tribe on Peru-Brasil border. Tribesman tried to shoot down the plan with bows and arrows unsuccessfully.

[4] You may check "Kinds Of Minds" written by Daniel Dennet.

[5] You may check "Cosmos" written by Carl Sagan. Also, Alfred Crosby in his book, "Children of the Sun", says almost all of the energy that humans use has been directly or indirectly generated by the sun, whether that be food energy from plants, wind energy, direct solar energy, or fossil fuels.

[6] He was a railroad worker in USA, who lost some part of his frontal lobe in a accident. An iron stick was driven completely through his head yet he survived. Afterwards his personality changed.

human beings, regardless of culture or race, share the same basic psychological and cognitive make-up. We are all of the same kind. Adolf Bastian distinguish our way of thinking into two forms, wich are working simultaneously, elementergedanken and völkergedanken means elementarythiking and folkloricthinking. Elemanter thinking is common way of our mind working, but folkloric thining is the codes of our society which shapes our behaviours. So again there is no different between a neolithic farmer and a medieval european blacksmith and a computer engineer in today Japan. Their differences are caused by their societies. We can learn from eachother, but we also can make same solutions in same situations, like pottery or pyramid building. It is obvious potters in Afro-Euro-Asia effected eachother, but from whom Polynesian potters learned pottery? And in some remote Pacific islands we see people use wood or coconut for bowls because there is no clay in those islands. They came up with same solutions, becasue they had the same needs and same mind/brain.

Taxonomy is the science of defining groups of biological organisms on the basis of shared characteristics. Like plants, animals, fungus, bacteria, etc.. They may seem different, but all life forms are relative to eachother. Even velvets or ebola virus is our distant cousins. So maybe now you can see how unimportant the difference between each human[7]. From that point of view we may see the history of existence as whole, as the Big History. Also we may see history of law as a whole just like we see history of mankind as a whole.

In Marxist theory, human society consists of two parts; the base and superstructure. We may say that the base is everything about production (means of production, productive forces, economy) and the superstructure is everything not to do with production (family, religion, art, culture, law). Both shape and maintain eachother. To give an example, we see this relation in Roman Property Law. Today we distinct property movable and immovable but for the Romans it was “res mancipi” and “res nec mancipi”[8]. Because the Romans were an agricultural society, agricultural properties were seen as more important then the others. Slaves, beasts of burden, land and servitudes on land were “res mancipi” properities. Transferring the ownership of “res mancipi” properities was following two different procedures called as “mancipatio” and “in iure cessio”. But transferring ownership of the less important properties “res nec mancipi” was not supposed to follow any specific procedure. However it is hard to detect such a relation between base and superstructure if there is no

[7] You may check the last universal common ancestor and abiogenesis theory from any sane biologist.
[8] “Res nec mancipi” means, non mancipi properities. It is the opposite of “res mancipi”.

production at all. Before neolithic revolution humans were hunter and gatherers. Means hand to mouth “economy”; no production, no surplus, not even preserving resources for tomorrow.

Technical, Geographical, Historical and Human productive forces are crucial in transforming the society[9]. Each has effects on base and superstructure.

1) Technical: Equipments, tools and methods we use while struggling with nature. It could be crop rotation and irrigation methods for flourishing the fields, or a plow for digging soil, or a steel sword for plundering. Imagine the impact of a Hittite steel sword against an Egyptian bronze sword.

2) Geographical: The material environment surrounding us in physical sense. Natural forces, mines, resources, climate etc. are geographical productive forces. For instance there was no nomadic economy in the Americas, because before colombian exchange there was no animal suit for shepherding. Also indigenous australians could not achieve the neolithic revolution because there was no available livestock or grain for agriculture.

3) Historical: The immaterial environment surrounding us in spiritual sense. Although they are the most resistant productive forces, customs and traditions could change in time.

4) Human: Power of collective action that changing the material and spiritual environment with technical productive forces. Ibn Khaldun uses the word “asabiyyah”. It is not just collective action but collective feeling and thinking as well. With this we can understand how barbaric tribes can prevail against civilized societies.

While living together as a society we follow so many rules. Rules that we don't even aware that we are following. Without them living together would be unbearable. Today we call most of them as law, ethics, moral, religion, etc. Savigny describes law as the product of the “volksgeist” (spirit of folk or common consciousness of the people). But what distinguishes the law from others kind of rules? Law can be defined as the sum of rules of human conduct which the State will enforce. So the law is command of the sovereign power as John Austin said. But without legitimacy law can’t stand long. This takes us to Radbruch formula. According to Gustav Radbruch if a law is unbearably injust or in deliberate disregard of human equality than it is not law after all. So state enforcement and justice is essential for calling a norm as law. Also as Claude Frédéric Bastiat sited in his book “La Loi”; “*Law is organized justice and the purpose of the law is to cause justice to reign, is not a rigorously*

[9] From “History Thesis” of Dr.Hikmet Kıvılcımlı.

accurate statement. It ought to be stated that the purpose of the law is to prevent injustice from reigning. In fact, it is injustice, instead of justice, that has an existence of its own. Justice is achieved only when injustice is absent".

Romans said "Ubi societas ibi ius est", means "where there is a society there is law". "Law"[10] is immanent in primitive communities. It was a communal living for survival. The rules of their communities were their way of life, and way of their living was creating a precedent, even though the ancestors were not creating those rules consciously, but just living them. They were sincerely close people, their asabiyah was strong as Ibn Khaldun would say. They were classless and stateless. It was a gemeinschaft[11]/community. That way of ancestors is crystallized in time as customary law. That was the transition from totem to taboo. Rules were created and followed communally. They were following the way of their ancestors which constituted a customary law for them. In time chiefs of those communities might manage to create their own rules. It is not law yet but we may call it as "order". Of course those chiefs would need legitimacy while trying to create this order, so they mostly took old ways and transform into new ways slightly. So if a "primus inter pares" chief could complete this transformation that order might turn into law, and that chief might turn into a king. We saw that transformation from kinship communities to civilized societies all around the world. But with this study we are going to examine Roman, İslamic and Common Law exclusively.

[10] Law is between inverted commas because we use that word here as figuratively. It is not the law we use today but the primitive law. Today we distinguish law from other rules by state enforcement.
[11] Look up to Ferdinand Tonnies's Gemeinschaft–Gesellschaft dichotomy.

ROMAN LAW

Now we are in year 2768 AUC[12] according to Roman calendar, which means Rome was builded 2768 years ago, and Constantinople was conquered by the Turks in 2206 AUC / 1453 AD so that means Roman State standed for 2206 years. Dividing such a vast history would make it easier to comprehend.

Regnum (753 BC – 509 BC)

Res Publica (509 BC – 27 BC)

Principatus (27 BC – 284 AD)

Dominatus (284 AD – 476 AD[13])

Byzantinum[14] (476 AD – 1453 AD)

Regnum (753 BC – 509 BC)

1) Magistra (Rex): Origin of the word "Regnum"(Kingdom) is "Rex"(King), and there have been seven reges (kings) during this period, starts with the legendary first king Romulus, founder of the city, and ends with the last king Tarquinius, whom been exiled.

Rex is the sole magister of regnum era, also called as Magister Populi (Master of the People). His power was absolute. He was the high priest[15], lawgiver, judge, and the sole commander of the army. There was no real restriction to his power. He was controlling all property held by the state. He had the sole power to divide land and war spoils. He was the chief representative of the city during dealings with either the gods or leaders of other

[12] AUC: Ab Urbe Conditia or AU: Anno Urbis is the establishment date of Rome and starting point of Roman calender (753 BC).
[13] 476 AD end of Western Roman Empire, 565 AD age of Corpus Iuris Civilis, 610 AD Emperor Heraclius changes official language into Greek.
[14] Actually "Byzantine" word first used in 16.century after the collapse of Roman Empire. The so called "Byzantinians" referred themselves as Romans.
[15] pontifex maximus

communities, and could unilaterally decree any new law. It was a lifetime duty, and if the king dies without assigning the next king, his power reverted to the Roman Senate (Senatus) to choose an Interrex to facilitate the election of a new king.

2) Senatus: The word senate derives from the Latin word senex, which means "old man". Therefore, senate literally means "board of old men" or "Council of Elders". Senatus was also known as Consilium Regis (Council of the King). During regnum era, senate was basically consulting to king with Senatus Consultum (decree of the senate).

3) Populus: Population of Rome would be divided into three parts; Plebs, Clientes, Patrici or Gentiles (members of a gens - tribe). Every gens had its own land, chief and religious ceremonies. Gens lost their othonomy while civitas gaining more power. During regnum era patricians were the only citizens. Plebs were not citizens therefore they were neither paying tax nor joining army and could not enjoy rights given by roman law. Clientes were also non-citizens but they were subjects of Gentiles. They were under the protection and patronage of Patricis. With the republic era plebs became citizens and clientes joined into ranks of plebs. The populus romanus (citizens), could collectively acquire property, and make contracts. Tribus (tribe - family group) was an financial and militaristic organization. Every tribus was providing 1000 pediles (foot soldiers) and 100 equites (cavalry) to state. Taxation was not regular, but collected if it is needed.

Res Publica (509 BC – 27 BC)

SPQR, Senatus Populus Quae Romanus, means "The Senate and People of Rome". Last rex Lucius Tarquinius Superbus overthrown and exiled form Rome, because of his tyrannical rule. With that coup d'etat Romans established a new way of government instead of changing the king. It was Res Publica, we might translate it as “public property”. SPQR letters stands for that republic, or that commonwealth. With this period we see many new magistra positions established, and to avoid tyranny those officials whom been elected are serving only for limited times. Increasment of magistras and serving for limited time was the main differance from the prior era.

1) Magistras: There were two kind of forces magistras had; imperium and potestas. Magistras with imperium (dictator, consul, praetor) could rule armed forces and assemble committees, but the magistras with potestas (censor, quaestor, aedilis curilis) could not. Magistras could invite or withheld citizens or confiscate their goods or force them (coercitio) to follow their rule if the issue is about their domain. Every magistra declares their policy of rule with an edictum during their time. Magistra edictums lose their power of implementation with the end of magistras duty.

a) Consul: It was the highest elected political office, there were two consules to rule instead of rex. They were elected together, to serve for a one year term. Their actions did not need other ones approval but each has veto power over the other's actions. That veto power was also called as intercessio. After serving their times, all magistras could be trialed behalf of their actions. Also all these titles were honorary, none of the magistrates ever paid for the duty.

b) Pontifex Maximus: It was the high priest of the republic. They were leading the religious ceremonies, marriage ceremonies, regulating roman calendar, and administrate burials. Due to its legitimizing effect it was vested by rex before res publica era, and after that we see that title used by emperors.

c) Dictator: This was an extraordinary magistrate for extraordinary circumstances. One of the consuls could nominate the other consul, but not themselves, as dictator. A consul can not use his veto against dictator which makes dictator the absolute power. It was just like the rex but that title could be held maximum six months. Gaius Julius Caesar was stabbed to death in senate for making himself dictator for lifetime.

d) Tribunus Plebis: This office is a consequence of patrici – pleb struggle. As we mentioned before, plebs were not citizens of Rome. At the beginning of res publica era, plebs had left the city, and gone to a nearby hill called Mons Sacer for establishing a new city state over there. A rival in such short distance to Rome seen as a problem by citizens, so they started a negotiation. Plebs had no right to be elected as a magistra, and Patricies refused to lose their privileges but eventually a new magistrate (tribunus plebis) established just for the plebs. Tribunus Plebis accepted as the leader of the plebs, and supposed to protect the rights of plebs. His only power for this reason is, veto state actions which concerning plebs. He was sacrosancti which basically means untouchable. At the beginning there were only two

tribunus, but later romans increased their quantity. They were elected to serve for one year, just like consules.

Because there were no written laws uneducated plebs had no knowledge about law, and in 462 BC Terentilius Arsa who was a tribunus plebis made a legislative proposal to make written laws just for the plebs. Patricians opposed to that which might creat a dual system among citizens, so they compromised to make a law for all citizens. Lex Duodecim Tabularum (Twelve Table Law) ensured equality before the law among all citizens despite being pleb or patrici...

e) Censor: There were two censors elected to serve for five years. The reason for the long term was the nature of their business. That officers were responsible of census and statistics in Rome. Although they did not had imperium, they had a crucial power. They were evaluating citizens. A citizen who enlisted as infamia can not held certain positions in government or can not testify in a court.

f) Quaestor: The quaestorship was established at the begining of the Republic although certain sources place its origin in the period of kingship. Originally two quaestores were assistants of the consuls and were appointed by them; later they were elected by the comitia tributa. The activity of quaestores concentrated on the financial affairs of the state. During the Republican period their number constantly increased and reached twenty.[16]

g) Praetor: The praetors were the highest magistrates after the consuls and were vested with imperium. Their domain was jurisdiction. The praetor urbanus had jurisdiction in Rome over citizens and applies Ius Civile. The praetor peregriunus was in charge of foreigners cases and applies Ius Gentium. Every praetor declares their principles with an edictum praetoris (praetor's edict) when they elected. Later on those legal principles standardized and become edictum perpetuum.

h) Aedilis Curulis: The aediles were responsible for maintenance of public buildings and regulation of public festivals. They were like municipal police who oversaw the purchase and sale in the market place, also had powers to enforce public order.

2) Senatus and Populus: Earning citizenship made plebs Comitia (parliament) members. Citizen seats in comitia was designated by census wich held in every five years according to their wealth and status, so the plebs who become wealthier in time start to get first ranks.

[16] Encyclopedic Dictionary of Roman Law, Adolf Berger, Philedelphia 1991.

Senatus was composed of fixed and permanent members. At the beginning it was excluded for patricis, but in time wealthier plebs also became senatus members. Although senatus has no binding force on magistras, their consult (senatus consultum) mostly followed by magistras.

With the extension of SPQR, people who lives out of Rome gain citizenship. Cheap wheat in colonies, changed agriculture tradition in Italy. Wine yards and fruit gardens were more lucrative but also more expensive to maintain. That caused many citizens to left their farms. Tribunus Plebis Gracchus brothers tried to gave land to poor citizens but failed and assassinated. Economic structure created two new classes; wealthy nobilitas, and poor proletarii. Joining army became an profession to maintain poor people's life instead of an honorable civic duty. This also made soldiers more loyal to proconsuls (governors of colonies) than the state. Caesar was the proconsul of Gallia, he had an army loyal to him, but also he gain sympathy of proletarii by giving them land. He assassinated after being dictator for lifetime.

Principatus (27 BC – 284 AD)

After Ceasars death, his nephew Octavius rises as an important character in Rome. Wining the civil war against Marc Antonius, made him Imperator Agustus. He gathered the powers of tribunus plebis and proconsul on himself. Owing to the first title he gained veto power to prevent any state action he disagrees, and owing to second title he had the armed forces. The name of this era comes from emperors official title princeps (first citizen). All other magistras, senatus and populus become puppets of princeps, yet Agustus claims republic is continuing with all of its institutions. Princeps was a new magistrate empowered by senatus and populus, but not an elected magistra it was. Prior princeps designates its successor mostly by adopting him as a son or by entitling him as caesar. Emperors had their own treasury (fiscus) to run state affairs by their paid officers like praefectus, as you remember magistras had no wages. During this era praetor's edict standardized and fixed as a permanent edictum which called edictum perpetuum. Praetores were still acting as the judiciary branch of the state, but emperor also had the right to judge. Establishment of a paid army made censorship a useless office. In 212 AD, emperor Caracalla granted citizenship to all residents of roman

empire, that was also the begining of “Pax Romana” (Roman Peace), a peaceful and prosperous time for all romans.

Dominatus (284 AD – 476 AD)

The dominatus term is derived from the Latin word dominus, which means lord or master. Emperor Diocletianus abandoned the appearances of republic for the sake of control, and system of dominatus evolved into autocratic absolutism. Crisis of the third century caused by migrations, invasions, civil wars, plague, and economic depression was almost going to be the end of Roman Empire. Emperor Diocletianus tried to fix economy by changing monetary system and granted a law to fix prices[17]. To put an end the political crisis he divided empire into two pieces as west and east which run by two co-emperors. Old state institutions left their authorities to emperial officers. Diocletianus was cruel against christians, but his successor Constantinus brought freedom of belief by Edict of Milan in 313 AD. Later he become the first christian emperor, christianity become the state religion and church become a state institution. Emperors became head of the church and bishops acted as state agents with judiciary powers. Roman empire was divided into two but accepted as one entity, both emperors was equal and their laws was valid in both sides until fall of western roman empire in 476 AD.

Byzantinum (476 AD – 1453 AD)

After the fall of western empire Justinianus tried to reunite empire by conquering old western provinces but it was a short term victory. Roman empire was declining, Sassanids were attacking from east and Germanic tribes plundering in the west. After fall of Sassanid empire, Roman empire diminished by Islamic conquests. Yet Justinanus achived another task which lasts even after the fall of Roman empire, the Corpus Juris Civilis (Body of Civil Law).

[17] “Edictum de Pretiis Rerum Venalium” was basically fixing the maximum prices of all goods and services. It suppose to re-set economy but also impossible to rule that law so ignored by all. Economic fluctuations continued until the Constantine's reign.

After Justinian became emperor in 527 AD, he decided the legal system needed reform. There were prior codexes (collection of legal documents) like Codex Theodosianus, Codex Gregorianus and Codex Hermogenianus taken as an example. Justinanus gathered a council directed by Tribonianus, an official in emperial court. The Code as planned had three parts; Codex Justinianus, Digesta, Institutiones but a fourth part (Novellae) being added later.

1) "Codex Justinianus" (529) compiled all of the extant imperial constitutiones from the time of Hadrian.

2) "Digesta" or Pandectae (533), was a compilation of passages from juristic books and law commentaries of the great Roman jurists of the classical period, mostly dating back to the second and third centuries, along with current edicts.

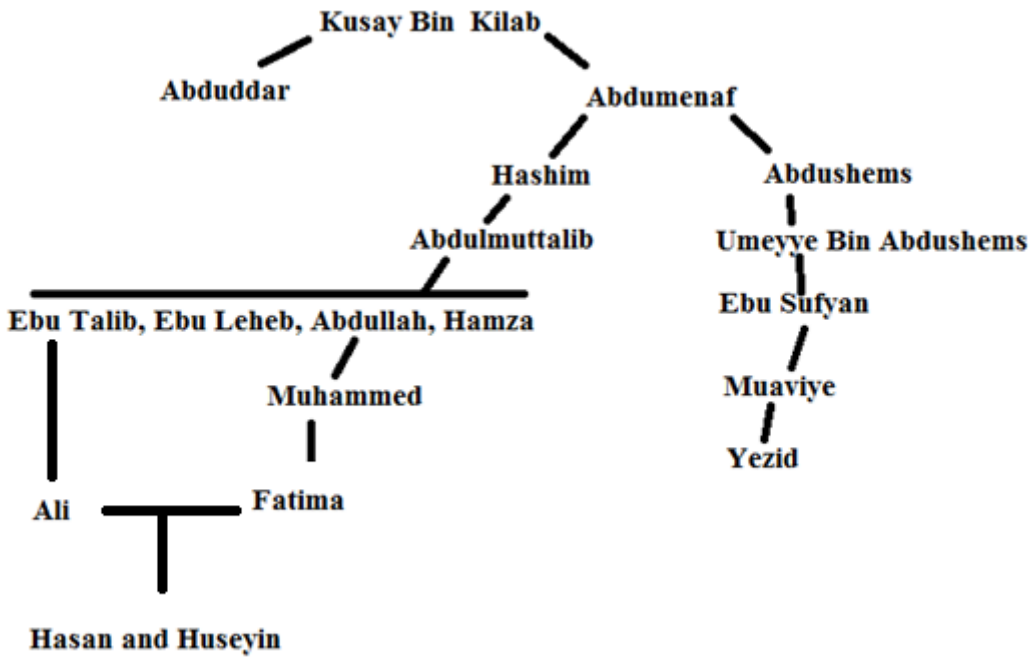
3) "Institutiones" or Elements (533), were intended as a legal textbook for law schools. The Institutes divide law into the law of persons, things and actions.

4) "Novellae", a number of new constitutions that were passed after 534, issued mostly in Greek.

Roman law practiced by many people even after the fall of Roman empire. It became the Ius Commune (commun law of Europe). During medieval age, corpus iuris imitated as private law, and it's public-law content was quarried for arguments by both secular and ecclesiastical authorities. Universities established all around Europe for teaching roman law. Education was in Latin language, scholars and students traveled between those universities without a language barrier so the ideas flourished. Glossators and pandectist made comments on corpus iuris and revised roman law for themselves. The legal thinking behind the corpus iuris served as the backbone of the single largest legal reform of the modern age, the Napoleonic Code, which marked the abolition of feudalism. French civil code set an example for legal reformations in all Europe.

ISLAMIC LAW

In 7. Century north of the Arabic peninsula was devastated because of proxy wars between two superpowers; Roman and Sassanid empires. Gassanids were Roman, and Lakhmids were Persian allies. During this struggle, Yemen conquered by another Roman ally Axum (the Ethiopian kingdom). Ethiopians tried to conquer Mecca as well yet they failed and lost their power in the region so a Sassanid army taken Yemen from Axum. Arabia was so valuable and strategic for beign in the middle of trade route between Southeast Asia and Mediterranean. Mecca was flourished by that trade. The Kuraysh tribe became dominant in the region with the rule of Kusay Bin Kilab. The city was not a civilized society yet so Kusay was not a king but a primus inter pares. Public meetings were held in the city council "Darun Nadwah", to discus important matters. Tribal asabiyyah[18] was highly important for the Arabs at that time, Muhammed destroyed that tribal asabiyyah to unite all men for one cause. But uniting men is not an easy cause, that is why there are many different sects.



[18] Remember how Ibn Khaldun uses the word "asabiyyah". It is not just collective action but collective feeling and thinking as well.

After Muhammed's death muslims ruled by Caliphs[19]. "Rashidun Caliphate" the four Caliphs; Abu Bakr, Omar, Uthman and Ali was elected. Most of the muslims thinks it was an age of peace and prosperity but all the rashidun caliphs was assassinated except Abu Bakr. Assassination of Uthman caused a schism among muslims. Ali was elected as the new caliph but Muaviye, kinsman of Uthman and governor of Syria, rebelled against caliph for not founding the murderers of Uthman. It is regarded more as an attempt by Muaviye to take over the caliphate, rather than to take revenge for Uthman's murder. Ali fought Muaviye forces swiftly, until an arbitration held between both sides. Arbitration caused the foundation of Kharidji sect, which literally means "those who went out". They are the ones who left Ali's forces because he made an arbitration with Muaviye like he was his equal not a subject. Later a Kharidji was going to assassinate Ali, and Ali's son Hasan elected as the next caliph but he resent his power to Muaviye for ending this civil war. Many Muslims saw Muaviye and his successor-son Yezid illegitimate rulers. Muaviye created Umayyad monarchy, and his son Yezid become the next caliph. Ali supporters (Shia Muslims) saw Huseyin (Ali's son) as their legitimate ruler. Yezid killed Huseyin and his followers for being a treat to his rule. Mecca and Medina also rised up against Yezid, and his forces massacred people of Medina and besieged Mecca. Catapults throwed fireballs to Kabe, the most sacred place for the Muslims. Besiege had ended with the death of Yezid. For all this bloodshed Yezid seen as an infamous figure among many Muslims. These political struggles divided muslims into three sects; Sunni, Shia, Kharidji. With time they all created their own legal traditions.

Sources of Islamic Law :

1) Kuran: The Kuran is the primary source of Islamic law. Believed to be the direct words of God.

2) Sunnet: Muslims believes Muhammed sent by Allah to reveal his word and act as a role model to people. That made Muhammed's words (kavli), actions (fiili), or silence (sukuti) legal sources. For instance Kuran commands all muslims to pray, but it does not explains how to, so the muslims followed Muhammed's actions on praying. Or when Muhammed saw childrens playing in mosque he kept his silence, so muslims accepts that it is not a wrong doing. The Sunnet is primarily contained in the hadis[20] or reports of Muhammed's sayings, his

[19] Caliph: A person considered as political and religious successor to the prophet Muhammad and the leader of Muslim community.
[20] Muhammed's sayings are called as "hadis".

actions, his tacit approval of actions and his demeanor. While there is only one Kuran, there are many compilations of hadis, which creates disputes between sects about sunnet.

3) Ijma: The ijma, or consensus amongst Muslim jurists on a particular legal issue, constitutes the third source of Islamic law. It is believed to be that Muhammed said; "*My followers will never agree upon an error or what is wrong*". So if there is a consensus among muslim jurists on a certain issue, than it should be lawful.

4) Kiyas: Kiyas or analogical reason is the fourth source of the Islamic law. This legal sourse also depends on a hadis. While Muhammed sending Muaz bin Jabal as his representative to Yemen, he asks Jabal how would he decide on a trial. Jabal said he would decide according to Kuran, Sunnet, and his reasoning (ichtihad). Ictihad word derived from cehd, which means struggle, so it is the struggle of reason to find a legal solution, it could also translated as legal precedent.

5) Fetva: While Kuran and Sunnet are seen as primary sources of Islamic law, Ijma and Kiyas are accepted as secondary sources. According to some muslims the gates of ictihad closed, but it created demand for *opinio juris*. What followed the closing of the gates was fetva. Because there is no clergy in Islam, every sane muslim could grant fetva if has enough knowledge about Islamic law, but muslim states often used fetva to legitimize their rule by assigning muftis for granting fetvas exclusively.

Branches of Islamic Law:

1) Ibadat: This branch contains the norms about worshipping, like praying or fasting. Ibadat regulates the relation between God and humans.

2) Muamelat: The word muamelat means transactions or dealings. This branch regulates the dealings between people. We might call it as the “Islamic Civil Law”. Family law, marriage, inheritance, trade contracts, debts and obligations are all topics of muamelat.

3) Ukubat: This branch is the Islamic criminal law. Islamic law divides crimes into three different categories depending on the offense;

a) Hadd: Crimes whose punishment is fixed in the Kuran or Sunnet. Theft, fornication (zina), false accusation about fornication (kazf), drinking alcohol (hamr), apostasy and blasphemy (irtidad and kufr), or piracy[21] (kat-ul tarik) are accepted as hadd crimes.

b) Kisas: Crimes whose punishment is equal retaliation, like an eye for an eye. This punishment is applicable for murder or injuries unless the complaint ask for diyet (compensation or the blood money).

c) Tazir: Crimes whose punishment is not specified in the Kuran or Sunnet, and is left to the discretion of the ruler or judge. According to Islamic understanding all offenses are accepted as sins, and will be punished by God after all.

[21] Kat-ul tarik, literally means "cutting the road", intercepting travellers for robbery, either on land or sea. Threatening trade routes seen as a high felony which punishable by death. It is not surprising if we approach this subject by the relation between base and superstructure.

COMMON LAW

In 1066 William the conqueror invaded England with his Norman army. Before him the island had various legal customs like Wessex law, Mercian law, or Danelaw brought by Viking invaders, also some Roman law for being former Roman provincia. Under the Norman rule those various customs begin to unified. William did not changed the legal system at once but judicial eyres[22] under his reign could be seen as the beginning point of this long run unification which made different customs common for all subjects. In Saxon era justice was served by local shire courts[23]. Shires were small administrative divisions ruled by shire reeve (sheriff), in Norman era shires became counties. Although shire courts not abolished, king's judges sended to circuit around realm. Those judges were also supposed to decide according to local customs, but they did not knew the local customs, so the juries with local people assembled. People's participation to justice system with juries can be seen as a legitimizing tool, but juries are also practical tools of the procedure. Itinerant judges were acknowledging each other about the local customs and their decisions when they back to Westminster. These decisions would be recorded and filed.

The legal reformation of Henry II on courts was essential in making law common. In the beginning itinerant justice was not regular basis. Eyres was sent out from center as representatives for making records of wealth, collecting taxes, and solving disputes. Henry II divided country into circuits and made this system working on a regular basis. In time, a rule, known as stare decisis developed, whereby a judge would be bound to follow the decision of an earlier judge. That bound made laws common. Ronald Dworkin, compares chain novel writers with common law judges because of stare decisis. Like a writer of a chain novel, judges also follows prior chapters storyline. With precedent judges are not copying prior decisions but they are copying the notion of justice in the prior case. That uniformity also brings certainty and predictability to law. Actually that is what plebs were fighting for, the rule of law.

[22] Also known as Circuit Courts.
[23] Also known as Moot.

Henry II saw crimes not as offences against individuals but as an attack to king's peace. That is why Crown must be a party in every criminal case. This was the beginning of distinction between civil and criminal laws in England. He also abolished the system of trial by ordeal in favor of trial by jury. Trial by ordeal was a way of proving innocence with gods intervene like holding a hot iron, if the holders hands does not injured it proves the innocents.

The church also had judiciary powers mostly about family law, but after a famous divorce case church lost its judiciary power gradually. That famous divorce case is also caused England to leave Catholic church, it was Henry VIII. vs. Catherine of Aragon. Schism between catholics and protestants continued until another William[24] conquered England, which also known as the glorious revolution. It is called as a revolution because it ended the absolute power of the monarchy with the Bill of Rights, so not the writs of king but the acts of parliament is the source of statutory law today.

[24] William III of England, or William of Orange.

Common Law vs. Equity:

William the conqueror was sole ruler and literally owner of the England. He distributed his lands among his barons. Basically they were kings loyal tenants, until being powerful enough to rise up against crown for high taxes, two century furter they did and it ended up with Magna Carta Libertatum. But before that, kings were ruling without any restraint, even though rulers of such vast domains would needs assistance and delegation. Curia Regis, or king's council was assisting the crown on legislative, executive, and judiciary manners. From curia regis special courts were instituted;

1) Common Law Courts

a) The Court of Exchequer: The Court of Exchequer was formed by Henry I, for the matters about national revenue. The department split into two branches: one administrative, collecting taxes; the other judicial, dealing with disputes over taxation. The court extended its jurisdiction to hear common-law actions connected with the royal revenue.

b) The Court of Common Pleas: or Common Bench, was covered "common pleas"; actions between subject and subject, which did not concern the king. The name of the court is not coming after common law but the commoners.

c) The Court of King's Bench: The king himself used to sit at a bench with the judges to decide disputes. Its jurisdiction included criminal cases, and civil cases. The Kings Bench had a supervisory jurisdiction over the activities of all inferior courts. This court survives today with its civil, criminal and supervisory jurisdiction.

2) Equity Law Court

a) Court of Chancery: In medieval times criminals were arrested and placed in jail until they could be tried, either by local manorial court or by eyre. In civil cases proceedings were based on writ system. The writ was a formal document addressed to the sheriff of the county where the defendant resided. For every civil wrong there was a separate writ. If the wrong kind of writ were selected, the common law judge would throw out the case. Writs were issued by Chancery, and in time clerks of chancery created new kind of writs, which means creating new rights. The Provisions of Oxford, 1258, forbade the practice of creating new writs. The petitions from persons unable to obtain justice in the common law courts were sometimes examined by the King and his Council and the relief was granted or refused. Later,

due to pressure of business in council, the petitions sent to Lord Chancellor. The Chancellor had set up his own court to deal with the petitions. He was not bound by the writ system or technical rules of the common law, and considered petitions on the basis of conscience and rights. Later, "*where common law and equity conflicted, equity should prevail*" accepted as a principle.

Practice questions:

1) Describe sources of Islamic law.

2) Describe branches of Islamic law.

3) Describe any three magistras of Res Publica.

4) What is the main distinction between Regnum and Res Publica era?

5) What is the main distinction between Principatus and Dominatus era?

6) What is Corpus Juris Civilis? How did it effected modern European law?

7) What is edictum perpetuum?

8) What is Stare Decisis? Explain it's importance for common law.

9) Why is the common law called as common?

10) Why the king's judges needed jury?

11) How did equity evolved?

12) What is Radbruch's formula?

13) The case "Antigone vs. Creon"; which side would you pick? Why?

14) If you were the lecturer of this lesson what would you ask? Why?