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Subject: Legal Systems (LL.B Part II)

Topic no: 2

Civil Law Tradition and Legal Systems

INTRODUCTION:

Civil law systems are also called 'Continental' or 'Romano-Germanic legal systems'. The term Civil law tradition applies to those legal traditions which originated in the Ancient Rome and to those traditions which are contemporary to these legal systems. They are based on concepts, categories, and rules derived from Roman law, with some influence of canon law, sometimes largely supplemented or modified by local custom or culture. The Civil law system regulates the matters of contracts, marriage, defamation, suits relating to property etc.

DEFINITION:

According to Oxford Dictionary of Law, Civil Law is defined as:
'The system of law predominant on the European continent, historically influenced by that of ancient Rome.'

ORIGIN AND HISTORICAL ASPECT OF CIVIL LAW TRADITION:

Civil Law Tradition can be termed as the most prevailing legal tradition in countries of Central America, Europe, South America, some parts of Africa, Asia and also in some of areas of the world of Common Law such as Quebec and Louisiana. In the 2nd century BC, the Civil Law had its foundations and roots during the period of the Roman Republic even before the Empire.

In 27 BC, when the Roman Republic came to an end, legal experts and jurists got their eminence.The judges and jurists of Roman Empire made great contribution to the development of Civil Law.

JUDGES: In Roman Empire, there were two types of Judges;
Praetor and Judex.

•Praetor: The judicial authority of praetor was limited. They were appointed for one year and could hold pre-trial proceedings. They instructed Judex on issues, procedures and remedies available for the cases. Praetor published their '*Edicts'* annually. These edicts were comprised of the public proclamation or laws made by Praetor during their tenure. These edicts became primary source of Private Law.

•Judex: The legal authority of Judex was even less than praetor. They were appointed for particular cases at the time of trial.

JURISTS:

As the legal authority of praetor and judex was limited, they needed Jurists for legal advice. The jurists were men from the upper class of Roman Society, the reward for their services was influence and popularity. Jurist's main aim was to develop relationships between citizens and those which were non-residents including traditional *Jus Civille* applicable to Roman citizens. The Jurists developed the idea of cross border trade and they introduced various commercial terms, which are still applicable nowadays. They also developed the concept of counseling assistance and advice to parties regarding their litigation cases, trials remedies, procedures, and resolution of dispute.

THE INSTITUTES:

Gaius, a Roman Jurist, wrote a book in 2nd Century named as '*The Institutes'.* He collected all Roman Laws (written in Treatises) in a comprehensive statement of Private Law and named it as *The Institutes* and later on it became a part of *Corpus Juris Civilis.*

CORPUS JURIS CIVILIS:

Justinian I, Byzantine emperor, ordered the compilation of a book, in the 6th Century, comprising all the Roman Laws into one body, named as *Corpus Juris Civilis*, also named as *Code of Justinian.* It is consisted of four main parts:

•The Digest (533 CE): A collection and summary of classical jurists' writings on law and justice.
•*The Code* (534 CE): A outline of the actual laws of the empire, citing imperial constitutions, legislation and pronouncements.
•*The Institutes* (535 CE): A summary of the Digest, intended as a textbook for students of law.
•*the Novella* (556 CE) A summary of Justinian's constitution/ legislation.

MEDIEVAL DEVELOPMENT IN ITALY

•**11th-15th Century**:

During 11th to the 15th centuries, a group of Roman jurists came from Italy to know about the increase in trade activities, business, and commerce between different cities, thus they needed a system of law, to cope with the social and commercial needs of society.

•**Glossators of Bologna**:

Glossators of Bologna were different from the Roman jurists and revived the code of *Corpus Juris Civilis* to fulfill the standards of private law in building a system of logical form. They developed a technique called "*Gloss"* i.e: 'An interpretation/ addition to the text of *Corpus Juris Civilis* made between lines.' Thus, They interpreted the textual material from *Corpus Juris Civilis* and disseminated these interpretations to other scholars and Law students. But, when *Corpus Juris Covilis* and theological doctrine could not conform to the needs of society, they used '*Legal Customs'* to fill the void. Thus, the importance of customs increased and it developed as a source of law.

•**Great Gloss**:

Accursius was a Roman Jurist. He decided to arrange into one body the tens of thousands of comments and remarks upon the *Code*, the *Institutes* and *Digests*. Accursius assembled from the various earlier glosses for each of these texts a coherent and consistent body of glosses and

named it as '*Glossa magna* (The Great Gloss)*'.* For the next 500 years the Glossa of Accursius remained an indispensable complement to the texts of Roman law. His work made Roman law a popular course of study during the *Renaissance period.*

•**Codigo de las siete partidas**:

Alfonso the Learned, the King of Spain in the late 13th Century, with the help of Glossators, prepared a Digest named as 'Codigo de Las Siete Partidas'. He used Roman Law as its primary source. This digest served as the basis for the reception of Roman law in those regions. It served as the basis of 'Spanish Private Law' until 1889, then it was replaced by *'The Codigo Civil* (the Civil Code)'.

CHARACTERISTICS OF CIVIL LAW

Following are the characteristics of civil law tradition:

a) Systematic and Codified Law

Compilation of civil law legal rules is systematic and in a written code of law. Civil law is a comprehensive system of rules and principles usually arranged in codes and easily available for all.

b) Accessibility

Civil law is codified so it is easily accessible to the citizens and jurists, at least in those jurisdictions where it is codified and adopted, specifically in civil law countries.

c) Difference between Public and Private law

Public law deals with that part of law which regulates the relationship between legal persons and a government, between different institutions with in a state, between different branches of government and relationship between persons that are of direct concern to society. It comprises of constitutional law, administrative law, tax law and criminal law. Public law basically deals with the rights and obligations of the State towards its citizens and vice versa. *Private law*deals with that part of law which regulates the relationship between person and person, the parties to a case may either be, natural or artificial persons and the State only acts as an arbiter through its courts. The laws of property, contracts, corporations, torts, trusts etc. are instances of private law.

d) Role of Judges

Judges of civil law follow those legal rules which are enacted by legislators only. In a civil law system, a judge merely establishes the facts of a case and apply remedies found in the codified law. They do not interpret the case on their own.

e) Role of Legislators

Legislators of civil law tradition modernize the codes and principles with the advice of professors, scholars, jurists and administrators according to the needs and demands of society.

f) Differ from criminal law

Criminal law deals with the punishment of individuals who commit crimes against the public, society or the state e.g. murder, theft etc. It relates to the public rights of the public.While civil law deals with the relationship between private citizens e.g. defamation., property damage etc.it relates to the private rights of private persons.

Sources of Civil Law

Judicial Decisions-Case law

Civil law system depends on written statutes and other legal codes which are updated from time to time. It is said that in civil law jurisdiction, the function of the court is merely to apply the written law. This is not true. Actually, when a court applies a law, it has to interpret that law. In the process of interpretation, the court may well extend the scope of the law considerably beyond that originally contemplated. The classical approach states that it is the judge's duty to apply the law, but not to change or make it. But practically, the law is effectively change or made by the civilian courts. Where the written law is silent or insufficient, the civil law court can make laws. In the civil law system, courts are not bound to follow previous judicial decisions. Each decision must be grounded on the authority of legislative text. The same result is not applied in a later case, because the same text and the same reasons lead to the same conclusion. However, there is no binding rule of precedent; each case must be decided on the primary authority of legislation, and the reasons for the decision must be stated. A court may not render a judgement in the nature of a general rule. Modern research shows that precedent is followed in Civil Law countries in much the same way as in Common Law countries. In a Civil

Law country, therefore, precedent exercise its influence not by reason of its pronouncement, but because of its inherent persuasiveness.

Legislation

Legislation is supreme and self-sufficient in itself. It is considered as a primary source of law. Formerly, judicial decisions play an important role in development of civil law legal system, but now legislation is considered the most fundamental part of civil law legal system. Generally, in civil law jurisdictions, the main source or basis of the law is legislation and large areas are codified in a systematic manner. These codes constitute a very distinctive feature of a Romanist Legal System, or the so-called Civil Law. These codes are different from ordinary statutes. A civil code is a book which contains the laws that regulate the relationships between individuals. In practical sense, there are three basic legislation forms; *Supreme Legislation. Subordinate Legislation,* and*Delegated* or *Administrative Legislation.*

Legal or Juristic Writings

In civil law countries, the treatises and commentaries of legal writers are generally expressed in the form of systematic expositions. These works formulate theories about basic codes and legislation, in relation to the evolution of legal system as a whole. That's why legal writers are more respected in Civil Law countries than their counterparts in Common Law world. Historically, their writings sometimes enjoyed the status as a force of law. But in modern times, legal writings are merely of persuasive force, never a source of law. The authoritativeness of legal writings is of course not always the same, but depends on such variable factors like the strength of law in issue, the degree of unanimity among legal writers and the extent to which doctrinal opinion corresponds to social reality and need.

Customs

Customs are the habitual practices which are observed and followed by people voluntarily. It is one of the oldest sources of law making. It is a primary source of law. Laws based on customs are called customary laws. They always play an important role in the development of civil law. Many customs obtain the status of law. These are those rules which are observed over years and now part of social and economic thinking. It tends to be less important in practice, because of

its difficulty to prove its pervasive observance in society. In view of acknowledged supremacy of legislation, these laws can never invalidate it. But play its role in clarifying or extending it. Modern research shows that reasonable customs are recognized in modern legal systems and they are kept in view, when the legislative authorities formulate any new law.

Corpus Juris Civilis

Code of Justinian, formally *Corpus Juris Civilis* known as "body of rues" is a collection of laws and legal interpretations developed under the Byzantine Emperor, *Justinian* during 529 to 534. It created great impact upon the public and public law in the Early Middle Ages. It was influenced by the Canon Law system and Common Law system. It was being practiced by Eastern Empire. Legal codes of new Greeks were based upon Corpus Juris Civilis. Roman law provided the foundation for civil law, the legal code currently being used in Continental Europe and throughout Latin America.

Code of Hammurabi

The Code of Hammurabi is considered an important figure in history of law and regarded as a true legal code. It was one of the earliest and most complete written legal codes. The Hammurabi code of laws, a collection of 282 rules, established standards for commercial interactions and set fines and punishments to meet the requirements of justice. Although Hammurabi's code was the first Mesopotamian law collection discovered, it was not the first written; several earlier collections already present. Hammurabi's code provides some of the earliest examples of the doctrine of "*Lex talionis*," or the laws of retribution.

Codification developments

Throughout the history, scholars attempted to systematize the scattered legal provisions and customary laws and bring them into harmony with principles of civil and natural law. These codification developments have helped a lot in the formation of civil law tradition. The main purpose of codification was the consolidation of laws and not the compilation and to provide a creative and systematic law.

Conclusion

To conclude, we can say that civil law system has been spread all over the world. The European scholars has been following civil law tradition. Compilation of civil law legal rules is systematic and in a written code of law. The civil law system regulates the matters of contracts, marriage, defamation, suits relating to property etc.

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BEST OF LUCK … !!