

Introduction to Law and the Ethiopian Legal System

Teaching Material

Prepared by:

Tesfaye Abate
Alpha University College

**Prepared under the Sponsorship of the Justice and Legal
System Research Institute**

2009

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PREFACE

This material was first prepared and the panel of assessors have gone through it several times. The members of panels of assessors have contributed constructive ideas to the material. Thus, the writer is indebted to

Ato Abdulmelik Abubeker;

Ato Tsegaye Regassa;

Ato Hagos Woldu

Ato Woldemichael Messebo;

The writer is privileged to get important ideas from the instructors and students of the course on the workshop held in August 2008. The writer wants to express his indebtedness from the within his heart for their contribution. The first task made according to the comments of the instructors is related to its bulkiness: accordingly, the material is reduced to some 256 pages from 345. In the course of revising the material,

- ✚ the concept of legal pluralism is more elaborated;
- ✚ the units on sources of law, and interpretation of law are made short to the extent possible;
- ✚ the unit on juridical acts is made simple;
- ✚ the unit on alternative dispute resolution is very much summarized;
- ✚ the contents are reflected on the outline of the course;
- ✚ practical court cases are included;
- ✚ some additional materials are included and the material is updated.

With regard to the nature of the material, the writer has tried to make it more original than the first one. What is more, varieties of questions are included in the material. In general the material is upgraded and simplified. Finally the writer extends his thanks to the Justice and Legal research Institute with out it such a task could not be made.

Tsfaye Abate Abebe

Addis Ababa, October 9, 2008

ABBREVIATIONS USED

- **UNDHR**- United Nations Declarations of Human Rights
- **FDRE Const**- the Federal Democratic Republic of Ethiopia, Constitution
- **Civ. C.** – Civil Code
- **Art.**- Article
- **Proc. No.**- Proclamation Number
- **JOL**-Journal of Ethiopian Laws
- **RFC**-Revised Family Code
- **Cri. Pro. C.**- Criminal Procedure Code
- **ECSC**- Ethiopian Civil Service College
- **USAID** -United States Agency for International Development
- **ICCPR**-International Covenant on Civil and Political Rights

COURSE INTRODUCTION

This course mainly focuses on the nature of law and the Ethiopian legal systems. Thus, basic features of law, sources of law in general and the sources of Ethiopian law are covered. The making and repeal of laws will also be dealt with under this course. In addition, hierarchy of laws and classification of laws will be covered by the course. Most important, the student shall be introduced to the modern legal systems of the world. Further, the student will begin to learn how to interpret written laws, an essential legal skill of lawyers.

The course will also focus on the Ethiopian legal systems. In addition, the Ethiopian legal traditions are included in the course. Further, the course will explore some traditional mechanisms of Dispute Resolution in Ethiopia.

COURSE OBJECTIVES

After the completion of this course, the student will be able to:

- explain the nature of law;
- describe the distinction between legal norms and non-legal norms;
- evaluate the significance of material sources of Ethiopian laws;
- compose ideas on formal sources of our laws;
- identify methods of classification of laws along with the criteria based on which laws are classified;
- compare and contrast law making process in Ethiopia;
- categorize laws in their hierarchical order;
- state the process of making of laws in Ethiopia;
- interpret Ethiopian laws based on rules of interpretation;
- identify the technique of repealing laws in Ethiopia;
- explain the common rules applicable to all juridical acts;
- state the features of traditional dispute resolution mechanisms in Ethiopia; and
- apply the rules and principle of law in practice.

TEACHING METHODS

In order to deliver the course, a combination of lectures, discussions, and group works will be used. Personal and group reflections will also be required from students. Moreover, students will be encouraged to comment upon real and/or hypothetical cases as may be found necessary. Small papers and/or essays will also be expected of students in order that they will have the opportunity to read and gain an understanding of the concepts that the course exposes them to. It is to be noted that these methods will be adapted to the needs, learning styles, potentials of students with disabilities and/or special needs.

MODE OF ASSESSMENT

In order to assess the performance of the students, diverse methods that can ensure continuous assessment may be utilized. Tests, assignments, presentations, papers/essays, and /or exams will be used to this effect.

PART I: INTRODUCTION TO LAW

UNIT ONE: NATURE AND FUNCTION OF LAW

UNIT OBJECTIVES

After completing this unit, the student will be able to:

- define law;
- explain basic feature of law;
- analyze theories of law;
- identify the purposes of law;
- state the relation between law and state;
- Distinguish between legal norms and non-legal norms.

UNIT OBJECTIVES

After completing this Unit, you will be able to:

- define the main legal systems of the world;
- discuss the criterion to classify laws into common law and civil law legal system;
- explain the general characteristics of common law and civil law legal systems; and
- compare and contrast the merits and demerits of these legal systems.

UNIT INTRODUCTION

In order to achieve the above-mentioned objectives, we will consider definitions given to the term ‘law’. Next, we shall discuss the basic features of law. There are different theories with regard to the concept of law. Considering those theories would help us to understand the concept of law. Thus, we will be considering these theories. Law is not without function; it is promulgated to perform certain purposes. The fourth part of the unit is covering this issue as well.

Law and state have relationships. What are the relationships between these two, i.e. the law and the state? The fifth part of this unit is devoted to consider this point. Further, we will be treating the difference between legal norms and non-legal norms. Then, we will summarize our discussion by pointing out main ideas. What is more, questions are given at the last part of the unit to help you to check your progress in learning the unit.

Lastly, references are given to facilitate your further readings on the unit.

1.1. DEFINITION OF LAW

What is Law? Can you guess what essential points should be taken into account to define law?

Jurists have defined law differently from different point of views. It has been called *Dhama* in Hindu jurisprudence and “*Hukum*” in Islamic system. Romans called it *jus* and in Germany and France, it is called as *Recht* and *Droit* respectively [N.V. PARANJAPPE; 2001: 133].

Defining the term ‘law’ is not an easy task because the term changes from time to time and different scholars define the term variously. Definition of the term may vary due to the different types of purposes sought to be achieved. Definitions given to the term law are as many as legal theories.

According to Black’s Law Dictionary [Garner; 2004: 900] law consists of rules of action or conduct. These rules are issued by an authority. In addition, these rules have binding force and are obeyed and followed by citizens. Sanction or other legal consequence may help the law to be abided by citizens.

From the pragmatic point of view, American jurist, Benjamin N. Cardozo defines law as “a principle or rule of conduct so established as to justify a production with reasonable certainty that it will be enforced by the courts if its authority is challenged.” [Steven; 2003: 8]. According to Holmes “the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law”. It is observable from these definitions that courts play great role in applying as well as creating the law.

From the sociological perspective, Max Weber suggests that an order will be called law if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation will be applied by a staff of people holding themselves especially ready for that purpose [Steven; 2003: 8].

He argues that law has three features that distinguish it from other normative orders such as custom or convention [[Steven; 2003: 9]:

- a) There must be a pressure that comes from external in the form of actions or threats of action by others regardless of the person wants to obey the law or not;
- b) These external actions or threats of action always involve coercion or force;
- c) Individuals whose official role is to enforce the law must enforce the coercive action.

He refers to state particularly when he talks about officials who enforce the law because they are state officials who are empowered to do that.

In general, law may be described in terms of legal order tacitly or formally accepted by the society and enforced. A body of binding rules sufficient compliance of them is ensured by some mechanism accepted by community is called law [Paton; 1967].

1.2. BASIC FEATURES OF LAW

[Biset Beyene, Introductory Note on Law in general, 2006, Unpublished, Alpha University College, Pp. 1ff]

Analysing the features and nature common to all laws would help us to understand the concept of law. Among these features and natures, the ones considered as essential include generality, normativity and sanction.

I) GENERALITY

Law is a general rule of human conduct. It does not specify the names of specific persons or behaviours. Hence, its generality is both in terms of the individuals governed and in terms of the social behaviour controlled.

The extent of its generality depends on-on whom the law is made to be applicable. Consider the following illustrations.

1. “Every one has the right to life, liberty and the security of a person.” [Art 3, UNDHR; 1948].

- This law is made to be applicable to every person on this world. Therefore, it is universal.

2. “Every person has the inviolable and inalienable right to life, the security of person and liberty.” [Article 14 of the 1995 Constitution of the Federal Democratic Republic of Ethiopia].

- This constitutional provision is made to be applicable to every person in Ethiopia. so, the extent of its generality is national. This is less general than the first illustration.

3. “Every Ethiopian national, without any discrimination based on colour, race, nation, nationality, sex, status, has the following rights...

(b) On attainment of 18 years of age, to vote in accordance with the law.” [Article 38(1)(b) of the 1995 Constitution of the Federal Democratic Republic of Ethiopia].

- This law is made to be applicable only to Ethiopian nationals who attain 18 years of age. Therefore, it is even less general than the second illustration.

4. “Whoever intentionally spreads or transmits a communicable human disease is punishable with rigorous imprisonment not exceeding ten years.” [Article 514 (1) of the 2004 Criminal Code of the Federal Democratic Republic of Ethiopia].

- This law is made to be applicable only on a person who commits the crime. Therefore, it is even less general than the third illustration.

5. “The term of office of the presidents shall be six years. No person shall be selected president for more than two terms” [Article 70(4) of the 1995 Constitution of the Federal Democratic Republic of Ethiopia].

- This law is made to be applicable only to a person who becomes a president in Ethiopia. Therefore, it is even less general than the fourth illustration.

Under all these illustrations, the subjects of laws are given in general terms. However, the extents of the generalities decrease from universality to an individual person. Generality of the subject of the law may serve two purposes. Firstly, it promotes uniformity and equality before the law because any person falling under the group governed by the law will be equally treated under the same law. Secondly, it gives relative permanence to the law. Since it does not specify the names of the persons governed, the same law governs any person that falls in the subject on whom the law is made to be applicable. There is no need to change the law when individuals leave the group. This is what can clearly be seen from the fifth illustration. Even if the former president’s term of office has lapsed, the same law governs the present and future presidents without any need to change the law. The

permanence of law is indicated as relative for there is no law made by person, which can be expected to be applicable eternally.

Generality of law, as indicated above, does not only refer to the subjects governed but also the human conduct, which is controlled. The human conduct in any law is given as a general statement on possible social behaviour. It does not refer to any named specific act like stealing, killing by shooting and killing by spearing. Just a law can govern millions of similar acts and that saves the legislator from making millions of laws for similar acts, which may make the law unnecessarily bulky.

II) NORMATIVITY

Law does not simply describe or explain the human conduct it is made to control. It is created with the intention to create some norms in the society. Law creates norms by allowing, ordering or prohibiting the social behaviour. This shows the normative feature of the law. Based on this feature, law can be classified as permissive, directive or prohibitive.

A) Permissive Law

Permissive laws allow or permit their subjects to do the act they provide. They give right or option to their subjects whether to act or not to act. Most of the time such laws use phrases like:

- has/ have the right to
- is/are permitted/allowed to
- shall have the right
- shall be entitled to
- may
- is/are free to

Illustrations:

1. "Every person is free to think and to express his idea." [Article 14 of The 1960 Civil Code of Ethiopia].

- The human conduct to think and to express ideas is permitted by this law. Therefore, it is a permissive law.

2. “Accused persons have the right to be informed with sufficient particulars of charge brought against them and to be given the charge in writing.” [Article 20(2) of the 1995 Constitution of the Federal Democratic Republic of Ethiopia].

- “have the right to” in this law shows that the subject is given the right or permitted to get the charge in writing and to be informed its particulars. Therefore, it is permissive law.

B) Directive law

Directive law orders, directs or commands the subject to do the act provided in the law. It is not optional. Therefore, the subject has legal duty to do it whether s/he likes it or not, otherwise, there is an evil consequence that s/he incurs unless s/he does it as directed by the law. Directive law usually uses phrases like:

- must
- shall
- has/have the obligation
- is/are obliged to
- is/are ordered to
- shall have the obligation/duty

Illustrations:

1. “The debtor shall personally carry out his obligations under the contract where this is essential to the creditor or has been expressly agreed.” [Civ. C. Art. 1740(1)]. “Shall.... carryout” in this law shows that the contracting party, the debtor, is directed, ordered or commanded by the law as it is provided. Therefore, this law is directive law.
2. “Every worker shall have the following obligations to perform in person the work specified in the contract of employment.” (emphasis added) [Article 13(1) of the

2003 Labour Code Proclamation No. 377/2003].

”Shall have the ... obligations to” in this law shows that the worker is directed by the law as it is provided in the law. Therefore, it is directive law.

In general, directive laws are mandatory provisions of laws. They oblige the subject to act, as they require him/her to act.

C) Prohibitive law

Prohibitive law discourages the subject from doing the act required not to be done. If the subject does the act against the prohibition, an evil follows as the consequence of the violation. All criminal code provisions are prohibitive laws. Prohibitive laws usually use phrases like:

- must not;
- shall not;
- should not;
- no one shall/should;
- no person shall/should;
- may not;
- is/are not permitted/allowed;
- is/are prohibited;
- is/are punishable; and
- is a crime.

Illustrations:

1. “Any unmarried person who marries another he knows to be tied by the bond of an existing marriage is punishable with simple imprisonment.” [Article 650(2) of the 2004 Criminal Code of Ethiopia]

”is punishable” in this law, indicates that the law discourages such act. Therefore, it is prohibitive law.

2. “No one may enter the domicile of another against the will of such person, neither may a search be effected there in, except in the case provided by law.”[Civ. C. Art 13].

“No one may” shows that any one is discouraged from acting as provided by the law and so it is a prohibitive law.

III) Sanction

Each and every member of a society is required to follow the law. Where there is violation the law sanction would follow. Sanction according to Black’s Law Dictionary [Garner; 2004: 1368], is a penalty or coercive measure that results from failure to comply a law. The main purpose of sanction is to prompt a party (a wrong doer) to respond. In other words, sanction will make the wrong doer to think that s/he made a fault and s/he should correct it. Sanction may be criminal. Criminal sanction is a sanction attached to criminal liability [Garner; 2004: 1368]. If the fault committed is defined by criminal law, the person will be liable to a sanction provided under the criminal law.

LEARNING ACTIVITIE

- 1) Law is general, Explain.
- 2) One of the natures of law is normativity. Analyse the concept of normative.
- 3) Explain sanction as a basic feature of law.

1.3 . MAJOR THEORIES OF LAW

[Biset Beyene, Introductory Note on Law in General, 2006: 5-10]

Different legal theories developed throughout societies. Though there are a number of theories, only four of them are dealt with here under. They are Natural, Positive, Marxist, and Realist Law theories. You may deal other theories in detail in your course on jurisprudence.

1.3.1. NATURAL LAW THEORY

Natural law theory is the earliest of all theories. It was developed in Greece by philosophers like Heraclitus, Socrates, Plato, and Aristotle. It was then followed by other philosophers like Gaius, Cicero, Aquinas, Gratius, Hobbes, Lock, Rousseau, Kant and Hume. In their studies of the relation between nature and society, these philosophers have arrived at the conclusion that there are two types of law that govern social relations. One of them is made by person to control the relations within a society and so it may vary from society to society and also from time to time within a society. The other one is that not made by person but controls all human beings of the world. Such laws do not vary from place to place and from time to time and even used to control or weigh the laws made by human beings. These philosophers named the laws made by human beings as **positive laws** and the laws do not made by human being as **natural laws**.

Natural law is given different names based on its characteristics. Some of them are law of reason, eternal law, rational law, and principles of natural justice.

Natural law is defined by Salmond as “the principles of natural justice if we use the term justice in its widest sense to include all forms of rightful actions.” Natural law theory has served different societies in many ways. The Romans used it to develop their laws as *jus civile*, laws governing roman citizens, and *jus gentium*, laws governing all their colonies and foreigners.

The Catholic Pope in Europe during the middle age become dictator due to the teachings of Thomas Aquinas that natural law is the law of God to the people and that the pope was the representative of God on earth to equally enforce them on the subjects and the kings. At the late of the Feudalism stage, Locke, Montesque and others taught that person is created free, equal and independent by taking the concept of Natural law as the individual right to life, liberty, and security. Similarly, Rousseau’s teachings of individual’s right to equality, life, liberty, and security were based on natural law. The English Revolution of 1688, the American Declaration of Independence and the French Revolution of 1789 were also results of the Natural law theory.

Despite its contribution, however, no scholar could provide the precise contents of the natural law. As a result, it was subjected to criticisms of scholars like John Austin who rejected this theory and latter developed the imperative called positive law theory.

1.3.2. POSITIVE LAW THEORY

Positive law theory is also called, imperative or analysts law theory. It refers to the law that is actually laid down by separating “is” from the law, which is “ought” to be. It has the belief that law is the rule made and enforced by the sovereign body of the state and there is no need to use reason, morality, or justice to determine the validity of law.

According to this theory, rules made by the sovereign are laws irrespective of any other considerations. These laws, therefore, vary from place to place and from time to time. The followers of this theory include Austin, Bentham and H.L.A Hart. For these philosophers and their followers law is a command of the sovereign to his/her subjects and there are three elements in it: command; sovereign; and sanction. Command is the rule given by the sovereign to the subjects or people under the rule of the sovereign. Sovereign refers to a person or a group of persons demanding obedience in the state. Sanction is the evil that follows violations of the rule.

This theory has criticized by scholars for defining law in relation to sovereignty or state because law is older than the state historically and this shows that law exists in the absence of state. Thus, primitive law (a law at the time of primitive society) serves the same function as does mature law [Paton; 1967: 72-3].

With regard to sanction as a condition of law in positive law, it is criticized that the observance of many rules is secured by the promise of reward (for example, the fulfilment of expectations) rather than imposing a sanction. Even though sanction plays a role in minority who is reluctant, the law is obeyed because of its acceptance by the community “habit, respect for the law as such, and a desire to reap the rewards which legal protection of acts will bring” are important factors the law to be obeyed [Paton; 1967:74]

The third main criticism of definition of law by Austin (positive law theory) is that it is superficial to regard the command of the sovereign as the real source of the validity of law. It is argued that many regard law as valid because it is the expression of natural justice or the embodiment of the spirit of people [Paton; 1967: 77].

1.3.3. MARXIST LAW THEORY

Marxists believe that private property is the basis for the coming into existence of law and state. They provide that property was the cause for creation of classes in the society in which those who have the means of production can exploit those who do not have these means by making laws to protect the private property. They base their arguments on the fact that there was neither law nor state in primitive society for there was no private property. The theory has the assumption that people can attain a perfect equality at the communism stage in which there would be no private property, no state and no law. But, this was not yet attained and even the practice of the major countries like the former United Soviet Socialist Russia (U.S.S.R.) has proved that the theory is too good to be turn[Beset; 2006]. Nevertheless, this theory is challenged and the theory of private property triumphs.

1.3.4. REALIST THEORY OF LAW [Biset; 2006]

Realist theory of law is interested in the actual working of the law rather than its traditional definitions. It provides that law is what the judge decides in court. According to this theory, rules not put to use to solve practical cases are not laws but merely existing as dead words and these dead words of law get life only when applied in reality. Therefore, it is the decision given by the judge but not the legislators that is considered as law according to this theory. Hence, this theory believes that the lawmaker is the judge and not the legislative body.

This theory has its basis in the common law legal system in which the decision previously given by a court is considered as a precedent to be used as a law to decide future similar case. This is not applicable in civil law legal system, which is the other major legal system of the world, and as a result this theory has been criticized by scholars and countries following this legal system for the only laws of their legal system are legislation but not

precedents. This implies that the lawmaker in civil law legal system is the legislative body but not the judge. The followers of this theory include Justice Holmes, Lawrence Friedman, John Chipman Gray, Jerom Frank, Karl N. Lewelln and Yntema.

LEARNING ACTIVITIES

- 1) Enumerate and explain important theories of law.
- 2) Explain the natural law theory.
- 3) Discuss the realist theory of law.

1.4. FUNCTIONS OF LAW [Biset; 2006]

Why we need law? What functions does law have in your localities? As the issue of definition of law, there is no agreement among scholars as to the functions of law. Jurists have expressed different views about the purpose and function of law. It is well known that law is a dynamic concept, which keeps on changing with time and place. It must change with changes in the society. Law, in the modern sense, is considered not as an end in itself, but is a means to an end. The end is securing of social justice. Almost all theorists agree that law is an instrument of securing justice. As Salmond rightly pointed out, “law is a body of principles recognized and applied by the State in the administration of justice.” Even Hobbes and Locke recognised the positive role of law when they said, “the end of law is not to abolish or restrain but to preserve or enlarge freedom and liberty.” For Kant, the aim of law is the adjustment of one’s freedom to those of other members of the community. Bentham gave a very practical version of the purpose of law, which according to him, is maximization of the happiness of the greatest number of the members of the community.

According to Holland, the function of law is to ensure the well-being of the society. Thus it is something more than an institution for the protection of individuals’ rights.

Roscoe Pound attributed four major functions of law, namely: (1) maintenance of law and order in society; (2) to maintain status quo in society; (3) to ensure maximum freedom of individuals; and (4) to satisfy the basic needs of the people. He treats law as a species of social engineering.

The Realist view about the purpose and function of law is that for the pursuit of highest good of the individuals and the state as such controlling agency.

The object of law is to ensure justice. The justice may be either distributive or corrective. **Distributive** justice seeks to ensure fair distribution of social benefits and burden among the members of the community. **Corrective** justice, on the other hand, seeks to remedy the wrong. Thus if a person wrongfully takes possession of another's property, the court shall direct the former to restore it to the latter. This is corrective justice. Rule of law is *sine qua non* for even-handed dispensation of justice. It implies that every one is equal before law and law extends equal protection to everyone; judges should impart justice without fear or favour and like cases should be treated alike.

It must, however, be stated that justice alone is not the only goal of law. The notion of law represents a basic conflict between two different needs, namely, the need for uniformity and the need for flexibility. Uniformity is needed to provide certainty and predictability. That is, where laws are fixed and generalized, the citizen can plan his/her activities with a measure of certainty and predict the legal consequence of his/her conducts. This is even more necessary in case of certain laws, notably, the law of contract or property. Uniformity and certainty of rules of law also bring stability and security in the social order.

Today the following are taken as important functions of law.

- A) **Social control** – members of the society may have different social values, various behaviours and interests. It is important to control those behaviours and to inculcate socially acceptable social norms among the members of the society. There are informal and formal social controls. Law is one of the forms of formal social controls. As to Roscoe Pound, law is a highly specialized form of social control in developed politically organized society. Lawrence M. Freedman explains the following two ways in which law plays important role in social control: first, law clearly specifies rules and norms that are essential for the society and punishes deviant behaviour. “Secondly, the legal system carries out many rules of social control. Police arrest burglars, prosecutors prosecute them, courts sentence

them, prison guards watch them, and parole boards release them [Steven; 2003: 19]

B) Dispute settlement

Disputes are unavoidable in the life of society and it is the role of the law to settle disputes. Thus, disagreements that are justiciable will be resolved by law in court or out of court using alternative dispute settlement mechanisms [Steven; 2003: 20].

C) Social change

A number of scholars agree about the role of law in modern society as instrument to social change. Law enables us to have purposive, planned, and directed social change [Steven; 2003: 20-21]. **Flexibility** of law provides some measure of discretion in law to make it adaptable to social conditions. If law is rigid and unalterable, it may not respond to changes spontaneously which may lead to resentment and dissatisfaction among the subjects and may even result into violence or revolution. Therefore, some amount of flexibility is inevitable in law [Biset; 2006].

LEARNING ACTIVITIES

- 1) Explain the concept of distributive justice.
- 2) Analyse the functions of law as stated by Roscoe Pound.
- 3) State the functions of law as stated by Holland.
- 4) Do you think that the functions of law as stated by Cheeseman are wide? Reason out.

1.5. RELATIONSHIP BETWEEN LAW AND STATE

What relationship do you envisage between law and state? [A note taken from Paton; 1967: 301-311]

There are three main legal theories with regard to the relationship between law and state. They are: the state is superior to and creates law; law precedes the state and binds it when

it comes into existence; law and the state are the same thing looked at from different points of view.

Austin explains that state is superior to and creates law when he defines law as the command of the sovereign. According to Austin, there must be a political society of 'considerable' numbers, and a superior in that society who is habitually obeyed by the bulk of the members of that community. Within this community, the superior has a sovereign power to lay down the law. Collectively considered, the sovereign is above the law, but a member of the legislature is individually bound by the law. Do you agree with this proposition? Reason out

The theory of sovereignty has been of service as a formal theory, but some writers go farther and seek to justify sovereignty as a moral necessity instead of as a convenient hypothesis. For example, Hegelianism treats the state as a supreme moral end being a value in itself; it is not bound by the rules of ethics that apply to individual person. This theory 'grants to state absolutism the virtue of moral truth'. 'The state is the divine idea as it exists on earth'. Do you share this idea?

This theory has been carried farther by the Nazi and Fascist conceptions, which regard law as but the will of the Leader. These doctrines treat law as an instrument of executive action, not as a check upon it: law is a weapon to achieve the ends of state policy, not a chain to hamper the executive.

According to the second theory, law may bind the State. The sovereign has absolute power over positive law, but is bound by *ius naturale*. Ihering considered that law in the full sense was achieved only when it bound both ruler and ruled. Ihering regards state as the maker of law and he argues that law is the intelligent policy of power, and it is easier to govern if the state voluntarily submits to the law it has created. Then, Jellinek develops this doctrine into a theory of auto limitation-the State is the creator of law, but voluntarily submits to it.

However, Krabbe and Duguit deny that the State creates law. Once we postulate that law is created by a source other than the State, it is easy to see how the State can be bound. According to Krabbe, the source of law is the subjective sense of right in the community.

He asserts that any statute, which is opposed to the majority sense of right, is not law. The legislature, executive, and the judiciary are subordinate instruments through which the community expresses its sense of values.

How can a sense of right be effective unless persons are willing to put their wills at the service of the ends they desire?

What is the gist of the third theory on the relationships between law and state?

Kelsen illustrates the third type of theory that law and the state are really the same. The state is only the legal order looked at from another point of view. When we think of the abstract rules, we speak of the law: when we consider the institutions, which create those rules, we speak of the State. However, the practical importance of Kelsen's approach is that he emphasizes that law is a more fundamental notion than that of the State. While it is true that law cannot exist without a legal order that order may take forms other than that of the state. Hence, the theory is wider, and therefore more acceptable, than that of Austin. A legal order may be created in the international sphere even though no super state is set up.

What is state? The normal marks of a state are a fixed territory, population, and competence to rule which is not derived from another state. Kantorowicz, defines the state as a juristic person endowed with the right to impose its will on the inhabitants of a given territory, of which right it cannot by law be deprived without its own consent.

It may be argued that the law being an instrument of the state is created and established along with it. No state has ever been without system of law, however crude it may have been. In like manner, system of law has been without a state defining either directly (i.e., through enactments) or indirectly (through recognition) the law is and assuring its validity and guarantying its endowment through the special machinery at the disposal of the state only. That is why law is generally defined as a set of general statements aimed at regulating choices in possible human behaviour that is defined or recognized, published and sanctioned warded by the state.

The definition of law in terms of the State possesses some advantages. It gives a clear-cut and simple test. It supplies an easy manner to show a conflict between various juridical orders for example between Church and State. If only the State can provide positive law, then the Church can have only such legal rules the state grants it. It gives an easy answer to the problem of validity of law, since law is valid for the simple reason that it has been laid down by the sovereign. It is easy to mark the moment when primitive rules become law, for we have only to ask whether there is a determinate sovereign body that has issued a command [What is law?: 33-4].

LEARNING ACTIVITIES

- 1) What are the theories on the relationship between law and state?
- 2) State creates law. Explain.
- 3) Law and state are the two sides of the same coin. Do you agree with this assertion? Reason out.

1.6. DIFFERENCE BETWEEN LEGAL NORMS AND NON-LEGAL NORMS

What are legal norms? What do you understand by non-legal norms? What do we mean by norm?

According to Black's Law Dictionary [2004: 1086], norm is "a model or standard accepted (voluntarily or involuntarily) by society or other large group, against which society judges some one or something". Thus, norm connotes a standard that is accepted by society voluntarily or involuntarily. The society can judge some one or something against the norm. For example, the standard to determine a given behaviour as right or wrong is norm.

We have seen that one of the natures of law is that it is a norm. The general statement of a legal norm is not a mere rendition. In fact, all social norms differ from the mere resumption of a philosopher or a doctor, etc. True such propositions made by philosophers and medical doctors may be useful addresses; but nobody is bound to follow them. In contrary, legal norms are binding. In fact, the essence of the legal norms is that members of the society are bound to behave in accordance with the law. That is why we usually refer to statements

about what will happen to an addressee who behave in accordance with the law attached to the general statements. These are what we call sanctions. Sanctions answer the question: How does the community or group in case the norms are not obeyed? What are the guarantees to ensure that the norm will be adhered to? Sanctions are various types but their common objective is to form norm and to follow the prescribed norms. Even permissive norms are protected by sanctions; though in their case the sanction is addressed to the person permitted to do the thing but to the rest of the world commanding everybody else not to interfere with the rights of the person so entitled.

To summarize, normativity means the choice, which the rule presents with respect to the described human behaviour; the mandatory character of the norm as well as the possibility of enforcing the norm where it is ignored. Of course, law is not only social norm that has this character of normativity. Essentially, all kinds of social norms have it because it is only this character of normativity that converts any general statement into a norm. Hence, in as far as this character of normativity is concerned, legal norms differ from the other social norms mainly by the number of persons they address themselves to and by the nature of the sanctions they apply. Every legal norm is formally structured; and the three formal elements of a norm's structure are the premise (hypothesis), the disposition and the sanction. The premise describes the social circumstances or the situations or events, which are the background for the social behaviour that the norm has in mind, and this includes a description of the addressees themselves. The dispositive element describes the kind of human behaviour envisaged and preferred by the norm as well as the choice that norm makes in this respect. It is said that it is this element that contains the essence of the norm. The sanction is that part of the norm that describes what will happen if the norm is disobeyed.

However, note should be made of the fact that we do not find all the three formal structural elements in one formulation of a single legal norm (i.e., one paragraph, one article, etc.). Often also we see that provisions of criminal code only embody half of the dispositive element and the sanction alone, leaving the rest for inference. It therefore means that complete comprehension of a single norm implies the linking together of various provisions of the law that often belong to different branches of the legal system. That is

why it is said that it is always necessary to have a comprehensive understanding of the whole legal system in order to correctly apply even one norm.

We can observe that law is a set of norms regulating, in a general and binding manner, the general behaviour of person, there by organizing, protecting and develop certain social relations. Do you agree with this? Why or why not?

Both legal and non-legal norms are normatives, that means both need to create and develop human behaviours.

Non-legal norms have been inexistent before state is created while legal norms have come into existence with the coming into being of state. Thus, societies have been used to be regulated by non-legal norms fo0r example, at the time of communal society. But legal norms were gradually emerged.

What are the relations between legal and non-legal norms?

What is the distinction between law and ethics? Law tends to prescribe what is considered necessary for the given time and place. Ethics concentrates on the individual rather than upon society; law is concerned with the social relationships of the society rather than the individual excellence of their characters and conduct. Ethics must consider the motive for action as all-important; whereas law is concerned mainly with requiring conduct to comply with certain standards, and it is not usually concerned with the motives of persons. It is too narrow, however, to say that ethics deals only with the individual, or that ethics treats only of the 'interior' and law only of the 'exterior', for ethics in judging acts must consider the consequences that flow from them and it is not possible to analyse the ethical duties of person without considering his/her obligations to his/her fellows or his/her place in society. It is equally misleading to concentrate upon those aspects of the law which are concerned directly with conduct and with 'exterior' factors in person's social relations, to the exclusion of those which, explicitly or implicitly, are aimed at intention, motive and the ends which persons seek[What is Law: 33-7].

Law, in elaborating its standards, must not try to enforce the good life as such; it must always balance the benefits to be secured by obedience with the harm that the crude instrument of compulsion may do. There are many ethical rules the value of the observance of which lies in the voluntary choice of those who attempt to follow them. Nevertheless, there are other rules, which it is essential for law to enforce for the well-being of the community. Ethics thus perfects the law. In marriage, so long as love persists, there is little need of law to rule the relations of husband and wife-but the solicitor comes in through the door, as love flies out the window. Law thus lays down only those standards, which are considered essential, whatever be the motive of compliance. In one sense law may be a 'minimum ethic', but frequently law has to solve disputes on which the rules of ethics throw very little light-where two persons, neither guilty of negligence, have suffered by the fraud of a third, who is to bear the loss? Ethics may suggest that the loss should be equally divided, but this is not a very practical rule for the law that requires definite rules for the passing of title and the performance of contracts.

Law and ethics are also interconnected. What are today regarded as purely religious were once enforced by law; conversely, modern law will enforce many rules designed to save the individual from him/herself in a way that would have seemed absurd to a disciple of LAISSEZ-FAIRE. There is no immutable boundary to the area of the operation of law.

Another important difference between law and ethics is that a person is free to accept or reject the obligations of ethics, but legal duties are heteronymous, i.e., imposed on the individual without his/her consent. If a rule of ethics, which is in accord with positive morality, is broken, there may be the effective sanction of the pressure of public opinion, but ethical rules are in advance of the views of a particular community are imposed by no earthly force.

What is more, it has been suggested that law creates both duties and rights whereas ethics can create only duties. This, however, may easily become a mere matter of terminology. If Ayalew is under a duty to support his father, why cannot we say that the others have ethical right to be supported? This right will not, of course, be enforced merely because it is

decreed by ethics, and neither will breach of the duty to be punished, but logically even in case of ethics it is hard to conceive of a duty unless there is a corresponding right.

Furthermore, ethics deals with the absolute ideal, but positive morality is made up of the actual standards, which are adopted in the life of any particular community. Positive morality therefore (like law), emphasizes on conduct rather than the state of mind; it is also similar to law in that it is imposed on the individual from without, for it has behind it the effective, if unorganized, sanction of public opinion. How many persons would rather break the law than wear the wrong tie with a dinner jacket? Here we see the sanction behind a mere rule of etiquette, and the fear of ridicule or social ostracism protects strongly the more important rules of positive morality.

In general, there are similarities and differences between law and morality. Their similarities, according to Hart [1986: 168], are:

- 1) they are alike binding regardless of the consent of individual bound and supported by serious social pressure for conformity;
- 2) compliance with both legal and moral obligation is considered as a minimum contribution to social life. This is because as we have already discussed compliance with legal norms enable the members of the sociality to live together. The same holds true with respect to moral obligations.
- 3) Both law and morals include rules that are essential for life in general even though they also include special rules applicable to special activities. Thus, the members of the society are required to comply with those rules to live together. Thus, prohibition to violence to person and property are found in both law and morals.

What are the differences between law and positive morality?

Various tests have been suggested to distinguish a rule of law from a mere dictate of positive morality. Firstly, a rule of law is imposed by the State; secondly, while there may be a sanction behind the rules of positive morality, it is not applied by organized machinery, nor is it determined in advance... Third, some argue that the content of law is different from that of social morality: but, while it is true that law, having a different object, covers

a different scope, there is no immutable boundary to its operation. Law, positive morality, and ethics are overlapping circles, which can never entirely coincide, but the hand of person can move them and determine the content that is concerned to all or two or confined to one. Ethics condemns murder, because it is once accepted by both positive morality and law.

We do find a close relationship between the rules of law and rules of positive morality, for the latter determine the upper and lower limits of the effective operation of law. If the law lags behind popular standards it falls into disrepute; if the legal standards are too high, there are great difficulties of enforcement... The close relationship between law and the life of the community is shown by the historical school, and if we admit that positive morality influences law, it must be recognized that law in its turn plays a part in fixing the moral standards of the average person. Fourthly, it has been suggested that the method of expression should be used as a test-rules of positive morality lack precision, whereas rules of law are expressed in technical and precise language. There is much truth in this, but the distinction is only relative; for early law is fluid and vague, and some social usages may be expressed very precisely, for example, the modes of address of those bearing titles.

Theoretically, there may be some difficulty in determining the exact distinction between positive morality and law. In practice, however, the legal order provides machinery for the determination of difficult cases. If a sick relative, dependent on Ayalew for the needs of life, is so neglected by Ayalew that death results, is this a breach of a legal duty or merely an infringement of positive morality?

LEARNING ACTIVITIES

- 1) Define the term norm in your own words.
- 2) What are social norms?
- 3) Compare and contrast legal norms with social norms.
- 4) Explain the distinctions between legal and non legal norms.

1.7) MAJOR LEGAL SYSTEMS IN THE WORLD

Laws are categorised into legal systems. What are the major legal systems? Under this part, we will be discussing the criterion employed to distinguish between the common and civil law legal systems, first. In so doing we will define the concept of legal system itself. Further, we will consider the general characteristics of common law and civil law legal systems respectively.

1.7.1.) LEGAL SYSTEM

How could one classify laws? What points should be employed as criteria to categorize laws?

Legal system is defined by Hart, as that it includes a fundamental rule for the identification of the other rules of system [Paton; 1967: 76].

[Rene David and John E. C. Brierley, Major Legal Systems in the World today An Introduction to the Comparative Study of Law, Pp. 19-20]

The grouping of laws into families, thereby establishing a limited number of types, simplifies the presentation and facilitates an understanding of the world's contemporary laws. There is no, however, agreement as to which element should be considered in setting up these groups and, therefore, what different families should be recognized. Some writers base their classification on the law's conceptual structure or on the theory of sources of the law; others are of the view that these are technical differences of secondary importance, and emphasize as a more significant criterion other the social objectives to be achieved with the help of the legal system or the place of law itself within the social order.

From the technical standpoint, 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), because the hierarchy of sources and the methods of each law differ to a considerable degree. This 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 opposed 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.

LEARNING ACTIVITIES

1. What do you understand by legal system?
2. Analyse the criteria used to classify legal systems.
3. Why we need to classify laws into different legal systems?

1.7.2) THE ANGLO-AMERICAN LEGAL SYSTEM (COMMON LAW)

[Rene David and John E. C. Brierley, Major Legal Systems in the World Today An Introduction to the Comparative Study of Law, Pp. 23-4]

A first family of law is that of the Common law, including the law of England and those laws modelled on English law. The Common law, altogether different in its characteristics from the Romano-Germanic family, was formed primarily by judges who has to resolve individual disputes. Today it still bears striking traces of its origins. The common law legal rule is one, which seeks to provide the solution to a trial rather than to formulate a general rule of conduct for the future. It is, then much less abstract than the characteristic legal rule of the Romano-Germanic family. Matters relating to the administration of justice, procedure, evidence and execution of judicial decisions have, for common law lawyers, an importance equal, or even superior, to substantive rules of law because historically their immediate preoccupation has been to re-establish peace rather than articulate a moral basis for the social order. United States of America and Canada belong to this legal system.

LEARNING ACTIVITIES

- 1) What do we mean by common law system?
- 2) What are the basic features of common law?
- 3) Which countries are followers of common law legal system?

1.7.3) THE CIVIL LAW LEGAL SYSTEM [Yannopoulos; 24]

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 that regard, it was contrasted the *jus gentium* and the *jus naturale*. From a different point of view, the *jus civil* was contrasted to the *jus honorarium* and to the *jus publicum*. In the middle ages and up to the era or “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 which, especially in their methodology and terminology, were shaped decisively by the Roman law scholars from middle ages to the nineteenth century. Germany, French, and Italy are the forerunners of civil law legal system.

LEARNING ACTIVITIES

- 1) Explain civil law legal system.
- 2) What are the basic features of civil law?
- 3) Enumerate countries that follow civil law.

1.7.4) COMMON LAW AND CIVIL LAW LEGAL SYSTEMS COMPARED

[Taken from Comparative Legal Systems- MSN Encarta, 12/5/2006]The best way to explain the main elements of the civil and the common law families and to compare and contrast the two is to subdivide them further into the following features

- 1) **Beginnings** The common law was conceived in 1066 and born of union between older Saxon law and the custom of the Norman conquerors. The civil law was older than the common law is now.
- 2) **Nurture** The common law was nurtured in London law courts by judges and **barristers**. The older **Roman Law** was developed to an important extent by jurists,

- who were not practising lawyers but public-minded citizens. It was they who strive to expound, explain, and adapt the ancient and sporadic legislation and the edicts of the officials; the high point of their contribution occurred in the decades around AD 200.
- 3) **Spread** The common law spread only by conquest and colonization: no one ever accepted it freely. The Roman part of the civil law, preserved in the collection of **Justinian** of AD 533, was rediscovered in the 11th century, embraced by the university law schools of northern Italy, and spread from them throughout continental Europe. From there like the common law it went to the New World and the parts of Africa by colonization. In addition, however, especially in the 19th century, the French and then the German versions were freely selected as models by countries in the Middle and Far East.
 - 4) **Language** Although originally written in Latin and spoken in Norman French, the language of the common law today is virtually exclusively English. In most civil law systems the terminology is likely to be wholly in the local language.
 - 5) **Makers** The main creators of the common law are the judiciary: that is to say the matrix, the basic operation system, is laid down by case law. While deciding cases, judges lay down the law. In civil-law systems, at least until very recently, judges played the comparatively minor role of settling the dispute in front of them. They did not make the rules of the system, and their decisions are not cited in later cases.
 - 6) **Legislation** The modern countries of both systems of laws produce large amounts of legislation. However, that of the common-law countries tends to be piecemeal. Save for the constitution, and fiscal matters, basic principles are not enacted (except as codifications of existing case law in such statutes as the partnership Act). The typical statute merely adjusts some detail of the rules laid down by the courts. In complete contrast, modern civil-law systems tend to think of themselves as codified. The word code in this context means that a whole area of law so laid down in one legislative document, with the aim of providing a closed, coherent, and consistent set of propositions that, if used in good faith, can be applied to solve any dispute in that area. The most obvious example is that of a criminal code.
 - 7) **Precedent** in civil law legal system, decisions in individual cases and the opinions

handed down by courts in particular lawsuits never have the force of law; they cannot be extended to other cases or to other people (Article 2). This approach is fortified by the historical fact that civil-law judges did not see their job as creating law, the professional fact that they are career civil servants, and the political fact that it is thought more democratic to entrust lawmaking to the elected representative of the people.

Common-law perceptions are quite different. Historically, judges made the law. Furthermore, to this day the legislator in common-law countries does not lay down the basic rules of the legal system. However, they are needed, and so a notion of precedent comes into being. For instance, the English Parliament has never defined murder, has never laid down that contracts must be kept, or that a person must pay compensation for damage unlawfully caused to others, since such definitions and rules are necessary, courts and lawyers can find them only in earlier case law. As it would be absurd and unfair if judges could remake the basic law of murder or of contract in any case before them, a rule of precedent binds them to the law as declared by higher courts in their jurisdiction. The doctrine of precedent is an operational rule of a common-law system.

- 8) **Fact:** The judges who built up the common law system were few in number, and left the hard work of fact-finding to laypeople: that is, the jury. Originally made up of neighbours who might be thought to know the background, and then of disinterested strangers empowered to hear the evidence and decide. Nowadays only the United States makes much use of the jury for non- criminal matters (as required by the seventh Amendment).

The civil-law systems, by contrast, have always left the task of finding the facts to a professional judge. This has a number of consequences. First, there were always far more judges in civil-than in common-law countries. Second, the judge could be given more control from the outset of the dispute in deciding which witnesses to call and which questions to put to them. Third, the procedure could be more sporadic, spread over a number of sessions, and reduced to writing. Fourth,

the rules of evidence can be flexible, since a professional judge is presumed capable of accurately assessing testimony. Finally, it is easier for a higher court to correct or reverse a decision.

- 9) **Structure:** One result of the above features is that in common-law countries the legal system is not organized in a coherent and clear structure. Its development tends to be incremental and pragmatic, and it is not easy for the civil lawyer to approach. Civil lawyers lay great emphasis on system and structure. Furthermore, they tend to follow similar patterns in their organization of legal topics, and once these are understood it is relatively simple to locate the law on any given topic.

LEARNING ACTIVITIES

- 1) What are the basic differences between common law and civil law legal system?
- 2) Who are the makers of law in common law?
- 3) Analyse how law is made in civil law.
- 4) To which legal system does the Ethiopia belong? Give your reasons.

CONCLUSION

Some lawyers define law based on its purpose while others define it taking into account its effect on society. Some others will define the term emphasising on its source. Law, by its nature, is ever changing and the definition given to it changes accordingly. Therefore, we do not find one and universally acceptable definition of the term 'law'. Law is related with human being. It is the product of the intellect of persons.

As to the purpose of law, lawyers have different ideas. Therefore, different purposes and functions have been attached to law. However, almost all authorities agree that the fundamental purpose of law is to securing justice.

Law is enacted by lawmaking organ in the modern world. It is intended to be used as a guidance of the people. Law gives a remedy for the violations. Its application ensures that

the law accomplishes the general and social welfare of the community. Law regulates human behaviour backed by coercion as sanction. This is the nature of normativity of law.

In addition, the nature of law is that it is fair, flexible and general. Different theoreticians formulated different ideas on the concept of law. Natural law theory regards principles of natural justice. According to positive law theory, law is the rule made and enforced by the sovereign body of the state. Marxist Theory attaches class to law by explaining it as an instrument to exploit the working class. The realists, on their part, argue that law is that not given by the legislature but that is used by the court of law to solve practical disputes that are brought before the court.

As we discussed, law may be explained with its relationship with the state. Even though law existed before the coming into being of state, in the enforcement of the former by means of coercion, i.e. sanction. We have noted that the existence of sanction does not explain the reason for the law to be obeyed; it should be in line with the principles of morality as well.

Thus, we have discussed that law can be seen as a system of rules of social behaviours acceptable by the members of the community. However, that does not mean that legal and non-legal norms are the same. Legal duty should be performed unlike ethical duties; law is imposed by state and sanctioned in organized manner as apposed to non-legal norms. In general, non-legal norms play in perfecting the legal norms but both are distinct each other.

Further, we have seen that law may be described in terms of legal order tacitly or formally accepted by society at large and enforced. It consists of a body of binding rules; sufficient compliance of them is achieved by some mechanism accepted by community.

We have seen that legal system covers and includes a fundamental rule that distinguishes one from another law. One of the criteria used to categorise laws into different legal systems is conceptual structure of the theory of sources of law. In addition, we have seen that the purpose of the law or the object it strives to achieve is a criterion to distinguish laws. However, it is essential to consider the political, economic and philosophical foundations of a law in classifying.

Further, we have seen that common law is one of the major legal systems nowadays. Common law legal system is a system of law that is originated from the judgments of judges. The rules and principles are not written by the legislature (Parliament), but created by courts in solving the disputes that are given to them to be decided. Thus, the law develops through times.

Civil law, on the other hand, is a system of law whereby the rules and principles intended to govern the behaviours of the society are given by the Parliament, i.e. the legislature.

The basic feature of Romano-Germanic family is that it was developed from the works of Universities of Latin and German courts. Then it was disseminated to other parts of the world by reception or colonization. In the modern world, there is a tendency that Civil Law and Common Law come closer to each other the rules being inspired by the idea of justice.

We have seen that in common law private law rules developed from the decision of courts unlike civil law. In addition, jury system is applied in common law as opposed to civil law in non-criminal cases.

REVIEW QUESTIONS

I) True/False

- 1) It is possible to give one wonderful definition to the term law.
- 2) A person will follow the law for the mere reason for fear of sanctions imposed by the state.
- 3) A theory that is based on the principles of natural justice is called natural law.
- 4) Legal norms and non legal norms strive to create norms in the society.
- 5) Law and state exist always

II) Matching

A

B

- | | |
|-------------------------|--|
| 1. Distributive justice | A) The purpose of law is to preserve or enlarge freedom and liberty. |
| 2. Holland | B) The function of law is to adjust one's freedom to that of the members of the society. |
| 3. Realists | C) The purpose of law is to ensure the well-being of the society. |
| 4. Kant | D) The purpose of the law is for the pursuit of highest good of individuals. |
| 5) Hobbes and Locke | E) Which seeks to ensure fair distribution of social benefits and burden among members of the society. |
| | F) That seeks to remedy the wrong |

III) Answer the following questions.

- 1) "To attempt to establish a single definition of law is to seek to confine jurisprudence within the straight jacket from it is continually striving to escape." Keeton. Comment.
- 2) We do not find one definition given to the term 'law'. Explain why that is.
- 3) Define the term 'law' in your words.
- 4) Explain the fundamental functions of law.
- 5) Do you convinced by the functions of the law? Why or why not?
- 6) What are the functions of law according to Roscoe Pound?
- 7) "The object of law is to ensure justice." Comment.
- 8) Write a note on the features of law.
- 9) One of the important features of law is its generality. Expound this idea.
- 10) What do we mean by permissive nature of the law?
- 11) Explain the concept of law based on natural law theory.
- 12) How do you explain the law on the bases of positive law theory?
- 13) How does Marxist Law Theory explain the Law?
- 14) "Law is what the judge decides in court." On which theory of law does this

- proposition is based? Explain the proposition.
- 15) "Morality perfects the legal rules." Comment.
 - 16) Compare and contrast legal norms and non-legal norms.
 - 17) "Law, positive morality, and ethics are overlapping circles which can never entirely coincide..." Comment.
 - 18) Do you appreciate the nature of law?
 - 19) "Common law spread only by conquest and colonization". Explain
 - 20) Discuss how civil law was originated and spread on the world.
 - 21) Explain the difference between common law and civil law legal systems with regard to language.
 - 22) "In civil law system judges are trained to produce an excellent decision only for one case". Comment
 - 23) Explain the concept 'Code' with respect to civil law legal system.
 - 24) In common law legal system, judges make the law. Explain this proposition based on the feature of common law legal system.
 - 25) In common law, the rules are given by ancestors rather than the parliament. Expound this statement
 - 26) What was the basic reason for nation to receive the Romano-Germanic law other than colonization?
 - 27) Discuss the manner of reception of Romano-Germanic law by countries where 'Muslim law' was prevalent.
 - 28) What are the criteria to categorize laws into civil law or common law legal system?
 - 29) What do we mean by legal system? Define the term 'legal system'.
 - 30) Discuss the points that both common law and civil law legal systems come closer.
 - 31) Discuss the main differences between common law and civil law systems.
 - 32) Which legal system do you think is better for Ethiopia? Why?

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UNIT TWO: SOURCES OF LAW

UNIT OBJECTIVES

After completing this unit, you will be able to:

- explain the meaning of the term source of law;
- analyze the material sources of law;
- comprehend the concept of formal sources of Ethiopian laws;
- compare and contrast the role of our Constitution and other laws as sources of laws;&
- apply the rules of sources of laws.

UNIT INTRODUCTION

This unit is meant to discuss the sources of laws in general and Ethiopian laws in particular. Therefore, the first step we will take here is to treat the concept of the term sources of laws. Second, we will discuss the material sources of laws. Thirdly, we will focus on the formal sources of laws. Then, some essential points are summarized. In addition, questions are provided at the end of the unit. References are also indicated to facilitate your further readings on the unit.

2.1. MEANING OF THE TERM ‘SOURCE’

In the literature of jurisprudence the problem of ‘sources’ relates to the question: where does the judge obtain the rules by which to decide cases? In this sense, among the sources of law will be commonly listed: statutes; judicial precedents; custom; the opinion of experts; morality; and equity. In the usual discussions, these various sources of law are analyzed and some attempt is made to state the conditions under which each can appropriately be drawn upon in the decision of legal controversies. Our concern here will be with ‘sources’ in a much broader sense than is used in the literature of jurisprudence. From whence does the law generally draw not only its content but its force in person’s lives?”[Lon L. Fuller in Garner; 2004: 1429]. This question directs to the source of law.

In the context of legal research, the term ‘sources of law’ can refer to three different concepts, which should be distinguished. One, it can refer to the origins of legal concepts and ideas ... Two, it can refer to governmental institutions that formulate legal rules. Three, it can refer to the published manifestations of the law. [J. Myron Jacobstein & Roy M. Mersky, in Garner; 2004: 1429-30).

The source of law is also defined in three ways as follows [What is law, Pages 47-52]:

- (1) It may mean the **FORMAL SOURCE**, that which confers binding authority on a rule and converts the rule into law. We noticed that even primitive societies were governed by rules, and that these rules became laws in the full sense of the term only when the state came into existence. The state therefore is the formal source of law and for every law this type of source is the same, the will of the state. No rule can have authority as law unless it has received the express or tacit acceptance of the state.
- (2) The source of law may mean the place, if a person wants to get information about the law, s/he goes to look for it. The place where a person can get information about the law is naturally the literature on the subject. In this sense, the term source means **THE LITERARY SOURCE** i.e., that from which actual knowledge of the law may be gained. These are: (i) statutes; (ii) reports of decided cases; and (iii) text books. These are the authorities from which a person can obtain information about the law.
- (3) Thirdly, it may mean that which supplies the matter or content of the law. Custom, religion, agreement, opinion of text –writers, statute, precedent or judge made law, all come under this category. All these may supply the material for law.

Those are all **material sources**, but among these material sources some are regarded as authoritative by the law itself-that is to say judges are bound to follow them if they apply to a dispute before them-and some are regarded as merely persuasive-the judge may or may not base his/her decision on them. Salmond calls those **LEGAL MATERIAL SOURCES**, and those are only persuasive, **HISTORICAL MATERIAL SOURCES**. The legal material sources include statute law or legislation, precedent or

case ... custom and agreement or conventional law. The historical material sources influence more or less extensively the course of legal development, but they speak with no authority. They are persuasive.”

LEARNING ACTIVITIES

- 1) What does the source of law refers to?
- 2) Explain the formal source of law.
- 3) Analyse the material source of law.
- 4) What do you mean by historical source of law?
- 5) Discuss the concept of literary source of law.

2.2. MATERIAL SOURCES OF LAW

We have seen above that one of the sources of law is material, which would include custom, religion, legislation, and court decision. Thus, we will discuss these sources of law herein under.

2.2.1. CUSTOM AS A SOURCE OF LAW

Custom is one of the oldest sources of law making. However, the importance of custom as a source of law continuously diminishes as the legal system grows. The reason being that with the emergence and growing power of the State, custom is largely superseded by legislation as a source of law[Paranjape; 2001: 190ff].

A) DEFINITION AND NATURE OF CUSTOM

What do we mean by custom? What is its nature? A custom may be defined as a continuing course of conduct which by the acquiescence or express approval of the community observing it, has come to be regarded as fixing the norm of conduct for members as society. Dr. Allen defines custom as the uniformity of habits or conduct of people under like circumstances. When the people find any act to be good and beneficial, apt, and agreeable to their nature and disposition, they use and practise it from time to time, and it is by frequent use and multiplication of this act that the custom is made.

Prof. Keeton defines custom as those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by court and applied as a source of law because they are generally followed by the political society as a whole or by some part of it [Paranjape; 2001: 190-91]. In general, different authors define custom in various manners.

The controversy over custom as a source of law [What is law, Pages 47-52]

There are two views regarding custom, and as usual, the Historical school and the Analytical school differ from one another. According to Savigny and the German Historical School, custom is in itself an authoritative source of law.

According to them, the present cannot be understood without reference to the past, and to understand the true source of law we must go back to the days when society was in its infancy. Now, the laws that govern early society are all based on custom; in fact, customary rules are the only kind of laws known, and they are nothing more than the consciousness of the people that rule their approval. Custom then is the reflection of the people's intention, and therefore the source of law in these early days. As conditions have changed, and instead of the people legislating themselves through customs, they have in their capacity as a political unit delegated this function to a sovereign who enact all laws with his authority

Austin and the Analytical School, on the other hand, with their regard of the past have come to the opposite conclusion; the custom is not an authoritative source of law at all. Austin points that as far as English law is concerned the so-called English customary law is purely an invention of the early English jurisprudence.

If the judge does base his judgment on custom, it becomes part of judge-made law, and until it is thus adopted and incorporated in a decision Austin maintains the rule of custom has no authority at all.

True, a good number of authorities hold that custom is equally a formal source of law.

Which idea do you share? Reason out.

Does **custom** constitute a formal source of law? [What is law; Page 78-79]

Neither the view of Savigny nor that of Austin can be accepted as correct. Savigny, when he states that national consciousness or approval by the people is the source of all law, custom being the manifestation of our world expression of this national consciousness must be assumed to mean that in his opinion it is not state reorganization that converts a rule into law, but the conviction of the people who follow the rule. In addition, if he means by the statement 'custom is a formal source of law, this cannot be accepted to be correct because as we have seen for all law there is only one formal sources that is, the will of the state. Custom or usage may create rules of conduct but they cannot become laws without first obtaining the recognition of the state. As Holland points out, usage PLUS a state organization enforcing its observance is customary law. Legal custom is different from social custom, and before a custom is recognized as legal and therefore binding, it has to satisfy certain tests, which the state has laid down. When there are customs, which fail to satisfy these tests and are consequently not recognized by the state, how can we maintain that custom and law are co-ordinate in authority? The formal source of law therefore must be that which converts custom into law-namely severing sanction or approval. Moreover, customs are usually brought to notice of the court by evidence of witnesses. If therefore we told hold that customs are laws before judicial adoption, we are actually admitting that the judges learn a part of the law from the custom cannot be a FORMAL SOURCE of law. The only element of truth in the view of the Historical school is, as Holland points out, that the adoption of customary rules of conduct is unconscious.

For that reason it may be better adapted to national feeling, but for all that it cannot become law until it is recognized and adopted by the state-usually through some judicial body.

Nevertheless, we cannot accept Austin's view that custom is nothing more than a HISTORICAL SOURCE. What ever may have been the position in the early days of English common law, Austin is wrong in saying that at the present day, when a new case comes up for decision, in the absence of a statute or an establishing precedent, the judge may look guidance where he bases. The Austinian theory forgets that the operation of

custom is determined by fixed legal principles just as much as the operation of precedent itself.

Nor is Austin correct in saying that until a rule of custom is adopted and incorporated into a decision it has no authority at all. It is no doubt true that ordinarily custom enters the field of law only through a judicial decision. But “custom is law not because it has been recognized by the courts but because it will be so recognized in accordance with the fixed rules of law, if the occasion arises.” And when a judge adopts a rule of custom s/he gives effect to it “not merely prospectively from the date of such recognition but also retrospectively; so far implying that the custom was law (to some extent already) before it received the stamp of judicial recognition.”

To sum up, custom is not a formal source of law, for that can only be the will of the state. State recognition alone can invest custom with the full authority of law. It is not a historical source because the judge is bound to base his/her decision on it. If it satisfies the tests that the state lays down, and because it is not destitute of all authority until it is thus applied. It is whoever one of those sources which supplies the principles to which the will of the state gives legal force, and since it is recognized as of right, it can properly be classed among the LEGAL MATERIAL SOURCE of law.

B) IMPORTANCE OF CUSTOM [Paranjape, 2001: 201-02]

Custom occupies an important place as a source of law even to this day because most of the material contents of the developed systems of law have been drawn from ancient customs. The laws relating to succession, inheritance, property, contract, sale of goods, negotiable instrument etc, are evolved from early customary rules.

With the emergence of legislation as a potential source of law making, the law creative efficacy of custom has declined. The doctrine of precedent has also gained primary over customary law in modern time but even then, at times courts do resort to ancient custom in order to remove inconsistency or ambiguity in the existing law.

Although custom has lost its significance as a source of law in modern age but it still exerts great influence in certain areas such as personal law, mercantile law and even the international law.

C) REQUIREMENTS FOR CUSTOM TO BE RECOGNIZED AS LAW

There are pre requisites that must be fulfilled a custom to be recognised as law. What are they?

[Taken from Paranjape; 2001: 195-98]

1. **Reasonableness:** - A custom must be reasonable. It must be remembered that the authority of a prevailing custom is never absolute, but is authoritative provided if it conforms to the norms of justice and public utility. A custom shall not be valid if it is obviously and seriously repugnant to right and reason and it is likely to do more mischief than good if enforced.

As to the reasonableness of a custom to be recognised as valid, Professor Allen observed, “the true rule seems to be not that a custom will be admitted if reasonable, but that it will be admitted unless it is unreasonable.” The period of ascertaining whether a custom is reasonable or not, is the period of its inception. Sir Edward Coke pointed out that a custom is contrary to reason if it is opposed to the principles of justice, equity and good conscience.

2. **Consistency:** - A custom to be valid must be in conformity with statute law. In other words, it should not be contrary to an act of Parliament. A custom should necessarily yield where it conflicts with a statutory law.
3. **Compulsory Observance-** A custom to be legally recognised as a valid custom must be observed as of right. It means that custom must have been followed by all concerned without recourse to force and without the necessity of permission of those who are adversely affected by it. It must be regarded by those affected by it not merely as an optional rule but as an obligatory or binding rule of conduct. If a practice is left to individual choice, it cannot be treated as a customary law. Before

accepting a custom as a binding source of law, the court should satisfy itself that the custom has transformed into an unmistakable conviction of the community as to the rights and obligations of its members towards one another. Citing an illustration of the compulsory observance of a valid custom, Blackstone pointed out, “A custom that all the inhabitants shall be rated towards the maintenance of a bridge, will be good, but a custom that every person is to contribute thereto at his own pleasure, is idle and absurd and indeed no custom at all.”

If the observance of a custom were suspended for a long time, it would be assumed that such a custom was never in existence.

4. **Continuity and immemorial antiquity:** – A custom to be valid should have been continuously in existence from the time immemorial. To quote Blackstone, “A custom in order to be legal and binding, must have been used so long that the memory of person [runs] not to the contrary. If anyone can show the beginning of it, it is no good custom.”
5. **Certainty:**—in order to prove the existence of a custom since time immemorial, it must be shown that it is being observed continuously and uninterruptedly with certainty. The element of certainty evidences the existence of a custom, therefore a custom cannot be said to be in existence from the time immemorial unless its certainty and continuity is proved beyond doubt.

Some writers include **public policy** also as one of the essential requisites of a valid custom. In their view, a custom should not be opposed to public policy. Nevertheless, it is submitted that this aspect is already conversed under reasonableness of the custom that presupposes that a custom to be valid must not be contrary to public policy of the place and time.

D) CUSTOM IN ETHIOPIA

Custom has been the important source of Ethiopian laws. For example, family rules, succession, are based on custom. Today, however, the legal role of Ethiopia’s traditional customs has thus dwindled and is now reduced.

What is the place of custom under Ethiopian laws?

The methods of gradual adaptation therein recognized seem strikingly at variance with the all-out repeals contained in the comprehensive Ethiopian Civil Code of the same year (1960), whose Article 3347 (1) reads as follows regarding “Repeals”:

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.

The above Article repeals prior law and custom whether it be *contra* or *prater legem*. It might have been less destruction of tradition and custom to replace the sweeping terms “concerning matters provided for in this Code” by the terms “inconsistent with the provisions of this Code.” Such terms would have restricted the repeal to what contradicts the law, without affecting what would merely supplement it. The French Civil Code repealed in its entirety all the old law while the Ethiopian one imports unfamiliar legal concepts from abroad. Therefore, it may indeed be expected that its effects will sometimes be “...stultified where the people themselves persist in doing a thing which they are supposed by legislation to have ceased from doing...” Such persistence, if generalized, could undermine the public order; disputes might be settled prevalently out of court and law [George Krzeczunowicz, Journal of Ethiopian Law, Vol. II, No. II]

It is worth noting that any law or customary practice that contravenes the FDRE Constitution shall be of no effect [Art 9(1) of the FDRE Constitution].

2.2.2. RELIGION AS SOURCE OF LAW

[Taken from Paranjape; 2001: 234-35]

In ancient time religion exerted great influence on primitive societies. It contributed very largely to the growth of legal systems in most parts of the world. The ancient Roman and Greek laws were largely based on religion. In England, during the middle ages law was

mostly contained in religious testaments because of the dominance of Church over the State.

A) THE MOSLEM LAW

How Muslim law is used as source of Ethiopian law?

[Taken from Peter H. Sand, Journal of Ethiopian Law, Pp. 79-80]

In Ethiopia, with regard to Fetha Nagast, the nomocanon also reflects the political and cultural environment in which its author lived and wrote: viz., the Islamic civilization, under whose domination the Coptic community has existed since the 7th century. Although Ibn al- ‘Assal for obvious dogmatic reasons avoids any reference to Muslim sources, it has been shown that certain provisions of the nomocanon were taken directly from Islamic law (more specifically, from the malikite school), particularly in the area of sales, charitable legacies, divorce, penal provisions, procedure.

Further to substantive borrowings, the jurisprudential approach of the Fetha Nagast clearly reflects an Arabic literary background. Nallino notes that the arrangement of the subject matters follows the Islamic rather than the Roman system; the inclusion of such topics as diet and clothing certainly is closer to *fiqh* than to *ius civile*. The very idea, fundamental to Islam, of treating all law as part of one’s religion, would hardly have occurred to a Roman jurist. In addition, the style of the Fetha Nagast shows characteristic features of Muslim legal scholarship: Ibn al- ‘Assal states in his introduction that his personal contributions to the nomocanon are “arrived at by reasoning and through analogy” from the authoritative sources- a formula clearly reminiscent of the *qiuas* of Islamic jurists; and the annex on successions adds rules “on which Abba *Querillos*, patriarch of Alexandria, agreed with bishops, chefs and magistrates” - apparently deriving legal authority from such consensus, not unlike the *ijma* of Islamic jurisprudence.

Interaction of Roman and Islamic law, which has been noted in the former Eastern provinces of the Empire, may also have had some effect on the contents and conceptual framework of the nomocanon.

In general, it is observable that the second (secular) part of the Fetha Nagast was influenced by Muslim Law. Such an influence is not discontinued. The FDRE Constitution permits the adjudication of family and private disputes according to the rules of religion (Art. 34(5) of the Constitution). It is also recognized that marriage concluded pursuant to the rules of religion as one type of marriage under our law (Art. 579 of the Civil Code and Art. 3 and 26 of RFC).

B) CHRISTIANITY

Christianity also influenced Ethiopian laws. The best example is the Fetha Nagast. Thus, we will discuss it.

[Peter H. Sand, Journal of Ethiopian Law, Pp. 79-80]

When some of the obvious anachronisms are eliminated, the immediate source of the Fetha Nagast can thus be identified with sufficient historical accuracy. Except for the first part of the preface and for the appendix, it is a literal translation of a well-known Coptic “nomocanon” originally written in Arabic, of which some 30 authentic manuscripts are known in European and Egyptian libraries, with two printed editions published in 1908 and 1927. The author of the nomocanon is the Coptic Christian scholar, as *–saff abul ibn al Assal* who lived during the first half of the 13th century, the “golden age” of Coptic literature (and not, as the preface of the Fetha Nagast suggests, during the reign of Constantine). Besides serving as legal advisor to the 75th Patriarch of Alexandria, *Cyril III Ibn Lalqololq* (1235- 1243), he produced a number of literary works, mainly on theological subjects.

In his introduction, Ibn Al assal himself identifies the sources of Fetha Nagast on which his nomocanon purports to be based. Besides a list of holy scriptures and canons of the Coptic church, which are relevant mainly for the first (ecclesiastic) part, the principal source of the second (secular) part is described as the “Canon of the kings” consisting of law for books said to have been “written at the court of the Emperor Constantine”.

Among these four books, only three are of interest to comparative law, the fourth being the so-called “precepts of the old Testament. Books I, II, III of the “canons of the kings” (cited in abbreviation as TS, MAK and MAG through out the text of the nomocanon and its Ethiopian translation) thus remain as the truly secular sources of the Fetha Negast.

According to an introductory note (repeated in the Fetha Nagast), they are based mainly on the writings of Abba Cosmas (probably the patriarch Quzman III, who died in 933) and on some unidentified law-books, probably identical with the Byzantine sources. An Amharic gloss to the Fetha Nagast appendix mentions, in addition to Cosmas, one Abba Gabriel; this could be a reference to the inheritance laws of another Coptic patriarch, Gabriel II Ibn Tariq (1131-1145), which contain detailed classes and orders of succession (attributed to Emperor Constantine), and which specifically acknowledges the “Canons of the kings” as a source.

Peter Sand summarises the sources of Fetha Nagast into three: manual of Roman Laws; legislation of Constantine; and the old and new testaments. Rene David, on the other hand, explains five sources of Fetha Nagast as follows: 1) seuo Roman Benzantine laws (known by different names); 2) ritual and moral laws of the five old testaments; 3) enactments of Lubia; 4) enactments of Nicaea (second council held in 887); and 5) writing of Aba Kalilios (father of church before Nicaea) [Tsfaye Abate, Offences against Morals under the 1957 Penal Code of Ethiopia, Senior Thesis, Addis Ababa University, Faculty of Law, 1994, p 35]

The 1960 Civil Code of Ethiopia incorporates Christian principles in family and other areas. For example, one to one marriage. The Criminal Code also punishes bigamy under Art 650.

2.2.3. THE FEDERAL CONSTITUTION AS SOURCE OF ETHIOPIAN LAWS

A) GENERAL

What are the characteristics of constitution? The instrument in which a constitution is embodied proceeds from a source different from that whence spring other laws, is regulated

in a different way, and exerts a sovereign force. It is enacted not by the ordinary legislative authority but by some higher and specially empowered body. When any of its provisions conflict with the provisions of the ordinary law, it prevails and the ordinary law must give way [Bryce in Thompson; 1993: 4].

From where does a constitution drive its power?

The authority for the constituent act derives from a constituent power, i.e., an authority that is both outside and above the system, which it establishes. In liberal democratic societies, the people are normally the constituent power. This usually means that, only after the constitution has been approved by the people, will it take effect. Therefore, in liberal democratic States the people's approval of the constitution legitimises the system, which the constitution creates. This may be done directly by the people in a referendum, as occurred in Ireland in 1937, or indirectly, through the people's representatives. This is what happened in the USA. Although the preamble to the Constitution of the USA begins with the words 'We the people', it was first agreed at a special convention and then approved by the elected representatives in the legislatures of the founding States [Thompson; 1993: 4]. Similarly, the FDRE Constitution was approved by elected representatives of the peoples.

In the opinion of Newbauz the rationale for the paramount of the constitution, is that it is an emanation from the will of a body superior to the legislator namely the people. Thus, the fact that the federal constitution derives its validity from the ultimate body (peoples of the federation and of the states) enables it to be "the ultimate measure of legality of the acts of the legislators and other organs of state power established it or in pursuance of and in accordance with its provisions. Consequently, all legislation, be they made by the central authorities or state authorities, are subordinate to the federal constitution of the given country. To this effect both the federal and the unitary constitutions contain provisions which declare the supremacy of the respective constitution [Ayele; 1999]

Constitution is not only higher in hierarchy but also a source for all other laws because any law that contravenes the Constitution have no effect. All laws should be made to implement the principles incorporated under the Constitution.

B) THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA AS SOURCE OF ETHIOPIAN LAWS

The Constitution of the Federal Democratic Republic of Ethiopia clearly provides for the individual and people's fundamental freedoms and rights, in its preamble, as the basis to live together without any discrimination. Accordingly, Chapter 3 of the Constitution is devoted to fundamental rights and freedoms (Arts. 13-44). Thus, we can say that the Constitution is the source for the rules on human rights and freedoms.

A constitution, as a supreme law in the country, serves as source for other laws as well. The Constitution, being brief by its very nature, contains only the basic principles of law. Then, these basic principles are needed to be given in other legislation in detail. For example, the FDRE Constitution laid down the equality of both sexes, i.e. female and male under Article 34 with regard to 'marital, personal and family rights'. Thus, women and men have equal rights at the time of concluding a marriage, during marriage and at the time of divorce [Art. 34(1) of the FDRE Constitution]. Both women and men are allowed to marry when they attain marriageable age defined by law. Here, the Constitution does not and not expected to define marriageable age and other essential conditions of marriage: a subordinate law would do perform that job. Accordingly, the legislature enacted the 2000 Revised Family Code at the federal level. The Revised Family Code has incorporated detailed provisions that ensure the equality of women and men that is recognized under the Constitution. For example, according to Article 6 of the Revised Family Code, marriage should be concluded on the free consent of a woman and a man. This provision ensures the equality of both sexes.

In criminal cases, arrested persons have the right to be released on bail. This is a constitutional principle enshrined under Article 19(6) of the FDRE Constitution. The Constitution only envisages the details to be given under other law where by courts of law

“may deny bail or demand adequate guarantee for the conditional release of the arrested person” (Art-19(6) of the Constitution). The detailed rules have been given under the Criminal Procedure Code (See Arts, 63-79 of the Cri.P.C). It is also provided under Articles 4 and 5 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005. According to Article 4(1) of the same, an arrested person charged with a corruption crime may not be released where the crime s/he is of suspected is punishable for more than ten years. What is more, the court may not allow a person on bail where (Art. 4(4) of the same): the suspect or the accused, if released on bail,

- a) is likely to abscond;
- b) is likely to tamper with evidence or commit other offences (Art 5 of the same)..

It is also essential to note that the Constitution is the source for other laws as well.

C) INTERNATIONAL AGREEMENTS AS SOURCE OF ETHIOPIAN LAWS

[Ibrahim Idris, The Structure of the Human Rights Regime of the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution: Fundamental Rights and Freedoms, 2000, Faculty of law, Ethiopian Civil Service College(ECSC) and United States Agency for International Development (USAID), Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution].

International human rights law establishes international standards. The enforcement of these standards primarily depends on national laws of states for the benefit of the nationals of which they are developed. Consequently, it induces states to conform their national legal systems to the standards it set-up. By signing international human right instruments, states undertake to comply, in good faith, with rights and freedoms recognized in the instruments they endorse. As members of community of nations, they are also under obligations to live up to the standards entrenched in customary international human rights law. They are also duty bound to accomplish all those other tasks necessary for the realization of the rights and freedoms.

In the realization of these internationally guaranteed rights and freedoms within their domestic systems, it is the primary obligations of states to, among many other things, adopt national legislative measures, if such rights and freedoms have already not been provided for by legislation. For instance, the International Covenant on Civil and Political Rights (ICCPR) states:

Where not already provided for by existing legislation or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional process and with the provisions of the present covenant, to adopt legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

As regards discharging of its international obligations, Ethiopia has accomplished a major legislative measure. This, *inter alia*, pertains to the promulgation of the FDRE Constitution through which international human rights rules and principles are transformed into the Ethiopian legal system. The FDRE Constitution has indeed established the basis of the Ethiopian human rights system that is entrenched in international human rights.

Article 13(2) of the FDRE Constitution expressly commits Ethiopia to refer to the Universal Declaration of Human Rights and other international human rights principles as guidelines to interpret the fundamental rights and freedoms embodied in the Constitution. The provision reads:

The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the Universal Declaration of Human Rights, International covenants on Human rights and international instruments adopted by Ethiopia

As a close look into this constitutional provision might evidence, in case of interpreting constitutionally guaranteed rights and freedoms, guidance is sought from those international human rights laws and agreements adopted by Ethiopia. To date, in addition to endorsing the Universal Declaration of Human rights, Ethiopia has adopted several international and regional human rights conventions. It has also, ratified numerous international human rights instruments advanced by the United Nations subsidiary

organizations such as ILO, UNHCR and UNESCO. The Four Geneva Conventions of 1949, the 1977 two protocols and several others conventions have also been endorsed by Ethiopia. In general, international agreements are one of the sources of our Constitution.

2.2.4. LEGISLATION AS A SOURCE OF LAW [Paranjape; 2001: 203-04]

A) GENERAL

What do we mean by legislation?

The term ‘legislation’ is derived from Latin words, *legis* meaning law and *latum* which means “to make” or “set”. Thus, the word ‘legislation’ means ‘making of law’. Legislation is that source of law, which consists in the declaration of legal rules by competent authority.

The term legislation has been used in different senses. In its broadest sense, it includes all methods of law making. In its technical sense, however, legislation includes every expression of the will of the legislature, whether making law or not. Thus, ratification of a treaty with a foreign State by an Act of Parliament shall be considered law in this sense. Nevertheless, in strict sense of the term, legislation means enacted law or statute law passed by the supreme or subordinate legislatures.

Jurists and legal thinkers have expressed divergent views about legislation as a source of law. According to Bentham and John Stuart Mill, legislation includes both, the process of law making and the law evolved as a result of this process. Salmond observed, “legislation is that source of law which consists in the declaration of legal rules by a competent authority”. Gray pointed out that legislation includes “formal utterances of the legislative organs of the society.”

Professor Holland has interpreted the term legislation in its widest sense and observes, “The making of general orders by our judges is as true legislation as carried on by the Crown. In his view, in legislation, both the contents and the rules are devised, and legal force is given to it by Acts of the sovereign power which produce written law.”

Referring to legislation as a source of law in England, Blackstone points out that the law that has its source in legislation may be most accurately termed as **enacted law**, and all other forms may be distinguished as **unenacted law**. In England the former is called *statute law* while the latter as *common law*. Blackstone prefers to call them written and unwritten law. Thus the Acts enacted by Parliament are statutory laws as they proceed from legislation whereas the customs which have assumed the shape of law are called common law in England. The common law is, therefore, customary law and unwritten in its nature.

According to Austin, legislation includes activities, which result into law making or amending, transforming or inserting new provisions in the existing law. Thus, there can be no law without a legislative act. Austin further holds that when a judge establishes a new principle by means of his judicial decision, he is said to exercise legislative powers and not judicial power.

James Carter, a staunch supporter of the historical school of jurisprudence, however, thinks that legislation is the least creative of the sources of law, as it is not possible to make law by legislative action alone.

In general, there are two obvious reasons for legislation being regarded as one of the most important sources of law. Firstly, it involves laying down of legal rules by the legislatures, which the State recognises as law. Secondly, it has the force and authority of the State.

B) Legislation compared with other sources of Law [Paranjape; 2001: 210-12]

Legislation as a source of law is gaining more and more importance in modern times so much so that the significance of custom and precedent is receding gradually.

What is the relationship between legislation and custom as source of law?

Legislation and Custom –Pointing out the importance of enacted law over customary law, Prof. Keeton observed that in earlier times legislation was supplemental to customary law but in modern times the position has reversed and customary law is treated supplementary to the enacted law. Laws enacted by Legislature being definite, written and comprehensive

are easy to understand. That apart, enacted law is created by Legislature, therefore, it is an expression of the general will of the people. A custom can be accepted as a customary law only after it is practiced for a long time. Legislation as a source of law differs from custom in the following aspects:-

- 1) The existence of legislation is essentially *de jure* whereas customary law exists *de facto*.
- 2) Legislation grows out of the theoretical principles but customary law grows out of practice and long existence.
- 3) Legislation as a source is historically much latter as compared with custom, which is the oldest form of law.
- 4) Legislation is an essential characteristic nature of modern society whereas the customary law has developed through primitive societies.
- 5) Legislation is complete, precise, written in form and easily accessible, but customary law is mostly unwritten (*jus non scriptum*) and is difficult to trace.
- 6) Legislation results out of deliberations but custom grows within the society in natural course.
- 7) Legislation expresses the relationship between person and the State but customary law is based on relationship between people inter se.

In Ethiopian history, we find the legislative enactments beginning from the 13th century. We have proclamations, decrees, orders, etc in Ethiopia. [See J. Vanderlinden; 228-41] which are considered as sources of law.

C) FEDERAL AND REGIONAL LAWS

Laws that are enacted by the Federal and regions are also used as sources of Ethiopian laws. At the Federal level, the House of Peoples' Representative enacts laws such as a law on commerce and foreign trade, natural resources, nationality, immigration, patents, copyrights etc. (See Art. 55 of the FDRE Constitution). All such laws are enacted in the form of proclamation. These proclamations incorporate laws that are intended to guide the behaviours of the community in respective sectors of life.

Likewise, regions are empowered to promulgate proclamations with regard to matters that fall under their respective jurisdictions. For example, they could enact laws on trade in their respective localities (see Art. 52(2) (b) of the Constitution).

For example, family law is enacted at the federal level. Regions also came up with their own family laws. Accordingly, the Amhara Region, Tigry Region, Oromia region, to mention some, enacted their own family laws respectively.

The federal Government enacted Criminal Law while Regions have the power to enact penal legislations that are important to regulate peace and order in their respective jurisdictions [Art 55(5) of FDRE Constitution]. In general, federal and regional laws are sources of law in Ethiopia.

2.2.5. COURT DECISIONS AS SOURCE OF LAW

A) Doctrine of Stare Decisis [Paranjape; 2001: 229-30]

The doctrine of *stare decisis* literally means “let the decision stand in its rightful place.” When a decision contains a new principle, it is binding on subordinate courts and has persuasive authority for equivalent courts. This rule is based on expediency and public policy. Although this doctrine is generally followed by the courts but it may not be applicable if the court is convinced that the earlier wrong is likely to perpetuate resulting into erroneous decision.

The operation of the doctrine of *stare decisis* presupposes the existence of a hierarchy of courts. For example, in India the lowermost courts or the courts of the first instance are the subordinate courts, above them are High Courts and the Supreme Court is at the apex. Thus the Supreme Court is the highest judicial court in India.

There are four general principles on which the doctrine of *stare decisis* is based.

They are as follows:

- (1) The first general principle is that each court is absolutely bound by the decisions of

the courts above it.

- (2) To a certain extent, higher courts are bound by their own decisions. In India the Supreme Court, however, is not bound by its own earlier decision.
- (3) The decision of one High Court is not binding on another High Court and it has only a persuasive value.
- (4) A single Bench Judge is bound by the decision of a Division Bench of the same High Court but a Division Bench is not bound to follow a decision of a Single Bench (judge) of the same High Court.

What is important is where the correctness of a decision has been challenged time and again, the rule of *stare decisis* need not be applied.

B) THE ROLE OF COURT DECISIONS AS SOURCES OF LAW IN ETHIOPIA

[Taken from Dr. J. Vanderlinden, 244 ff]

Case law may be defined as that part of the law originating from the judicial power, judicial power being understood to include more than the courts of justice, contrary to the traditional much more circumscribed meaning of the phrase. It obviously includes in Ethiopia a jurisdiction such as that of *courts*, and administrative tribunals set up to deal with special problems such as labour relations [at the time of the Emperor]. The common characteristic of all formulations of the law in this category is that they arise out of litigation and are, in principle, not normative. In Ethiopia, unlike many other code countries, this last principle is not expressed in a formal way; no Article of the Constitution or of the codes is an equivalent to Article 5 of the French Civil Code, which reads: “Judges are not allowed to decide cases submitted to them, by way of general rule-making decisions.”

Court decisions were and still are used as sources of law in Ethiopia. For example, if the *Digest of Ethiopian Case-Law* can be considered as a precious source for these periods, it is obvious that the collection out of which the *Digest* was made is even more precious as it would provide a huge amount of first-class case materials in addition to decisions confirmed by the Afa Negus and contained in the *Digest*.

[The following Notes are taken from Woldetensay Woldemelak, Perspectives on the Ethiopian Legal System, 2005, Pp 18-]

The Ethiopian legal system belongs to the Continental-a system where law is promulgated by the legislature. Whether decision rendered by courts did have any contribution in terms of lending principles by way of precedents as in the Common law during the period of law reform in the sixties, especially when the Civil Code was codified, needs to be researched. But such task is not an easy one as materials in this regard are not within the reach of researchers. In this respect, J. Vaderlinden [1964: 246] has this to say:

Unfortunately, it must quickly be pointed out that in all periods of Ethiopian legal history our information concerning case law is very limited.

Perhaps, an available material in this regard ... is the Digest of old Ethiopian Judgments prepared for the work of drafting and codifying the Civil Code of 1960 as indicated in the “CAVEAT” of an English translation of ‘digest of old Ethiopian Judgments.

The available materials in this regard-the three volumes of hand written old judgements- contain 7,296 summaries of civil judgments.

The three-page preface of the three volumes does not specify the period in which the collected summary judgments were rendered i.e. it simply refers to the judgments as old/ancient judgments. The three volumes of old/ancient judgments were prepared in 1952.

The first paragraph of the preface of the Book of Old Judgment indicates that such judgments were rendered by scholars of Fatha Negest and by those who were well versed (gifted) in judging as that of Daniel (of the old statement).

The second paragraph of the introduction also indicates that the judges of latter ages have added certain modifications in their judgements, through the basis for such modifications were prior judgments.

It is noted that some of the old Ethiopian judgments have been incorporated into the existing Civil Code.

In fact, the Amharic version of this preface refers to the legal tradition as revealed by the written judgments, which had been collected since the time when entering such judgments was first commenced in the nation.

As indicated earlier, the Digest of Old Ethiopian Judgments was prepared for the use by the codification commission in their work. It is also the opinion of the persons/(not identified) who organized the translation of the Digest of old Ethiopian judgments that principles of the Ethiopian customary law have been incorporated into such judgments as reflected in the 'Caveat' of the Digest of the Judgments under discussion.

Today, the Supreme Court Cassation division is empowered to render a decision that is binding on federal as well as regional council at all levels [Proc. No. 454/2005, Art 4]. A decision to be binding must be 1) rendered by the cassation division of the Supreme Court; 2) the members of judges must not be less than five; 3) the decision should be with regard to interpretation of laws [Proc. No. 454/2005, Art 4]. In interpreting laws, the Supreme Court cassation division will create rules (laws). Therefore, the decision of the cassation division is a source of laws in Ethiopia so long as the requirements are fulfilled. In general, judgements were/are used as source for Ethiopian laws.

Read the following case carefully and answer the questions that follow.

The Provisional Military Government of Socialist Ethiopia

SUPREME COURT

Civil Appeal No. 1202/73

Addis Ababa

Tir 17, 1974 Eth. Cal.

Judges 1.
2.
3.

Kenna Dagim Appellant

Woubie Amdie for Respondent

The case was adjourned on the request of both parties to settle their dispute out of court by conciliation and to submit the result to the Court when they had come to an agreement. Since the parties have now informed the Court that they have not reached any agreement, we have given the following decision, after a careful consideration of the case.

Decision

The appellant had instituted an action in the Awreja Court against his fiancée, the latter's father and mother jointly. The ground of the action is a breach of the contract of betrothal without any reasonable ground. The appellant had demanded the return of presents received by his fiancée, and the payment of Birr 1050.00 as compensation for the expenses and the moral prejudice he had suffered. The Awraja Court had decided in favour of the plaintiff for the payment of Birr 1050.00 and the return of the presents by the present respondent.

The mother of the first defendant against whom the judgement was passed had appealed to the High Court against this decision. The High Court had quashed the judgement of the Awraja Court and remanded the file back to the latter, basing its decision on Art. 723(1) for re-trial by family arbitrators.

We on our part have examined the case carefully. The High Court had quashed the judgement of the Awraja Court, reasoning that a breach of a contract of betrothal should be submitted and decided in the first instance by the family arbitrators. It had based its decision on the provision of Art. 723(1). This Article provides that disputes arising out of a betrothal or a breach of betrothal shall be submitted to the arbitration of the persons who were the witnesses to the contract of betrothal. But the scope of application of this provision should be seen in relation to the purpose of family arbitration and the provisions stipulated under Chapter 2 of the Civil Code concerning betrothal. The law provides that cases concerning marriage should be submitted in the first instance to the family arbitrators. The aim of the law in providing this is to deter the easy dissolution of marriage, to make the necessary effort to settle the conflict of persons who have agreed to marry each other, and to reconcile the disputing spouses, and, if there is no success in reconciling them, it is to

keep the family secret within its own circle. We fail to accept that this aim is fully applicable to those who have agreed to marry each other but have not yet established a family. The betrothed have only agreed to marry each other but have not yet established a family. Because they have not yet established a family, there is no family secret that should be kept from being open to the public. If there is any secret at all, it is not of such a nature that should be given weight. Betrothal can be assimilated with contract but not with marriage. Because betrothal is more contractual in character, it cannot be taken as a well-established social institution, and it cannot be said that any dispute arising out of betrothal should always be submitted in the first instance to the family arbitrators. This can be understood from the provisions of Arts. 573(2) and 576. In relation to a breach of betrothal and compensation for the moral prejudice it entails, Art. 573(2) provides that, in establishing the amount of the indemnity and who is qualified to require it, the Court shall have regard to **local custom**. And Art. 576 provides that all actions based on breach of betrothal shall be barred if not instituted within one year from the day when the betrothal has been broken. As provided under Art. 573(2), it is the Court and not the family arbitrators which is given power to determine the amount of the indemnity and who is qualified to require it. The use of the word “actions” in Art. 576 indicates that disputes arising out of betrothal may be instituted in court in the first instance. What is to be submitted to the family arbitrators is a petition and not an action. If all disputes arising out of betrothal were to be submitted in the first instance to the family arbitrators, using the word Court under Art. 573(2) and selecting the word actions under Art. 576 would have been unnecessary. Nevertheless, when we say this, we do not mean that all disputes arising out of betrothal can be submitted, or shall be submitted to the Court. So as not to render Art. 723(1) a useless provision, it should be interpreted in a way that it may not conflict with Arts. 573(2) and 576, making a clear identification as to the content of the dispute arising out of betrothal, and as to what remedy is required, is necessary before going on to the merits of the case. If the request of the party is against the refusal of the other party to conclude marriage, and the former is seeking reconciliation so that their contract of betrothal would continue to be effective (in other words, if it is a request for an attempt to reconcile them so that they would be able to conclude their marriage), undoubtedly such a case should be submitted in the first instance to the family arbitrators, in accordance

with Art. 723(1). But if the request is for the payment of expenses incurred, the return of presents and payment of compensation for moral prejudice because of the other party's breach of a contract of betrothal without good cause, there is no reason why such a case may not be submitted in the first instance to the Court. We do not think such a case should be submitted to the family arbitrators. The request relates to the breach of a contract without good cause. There is no request for reconciliation, nor is it to bring the parties into agreement so that they would conclude the marriage.

In the case at hand, the fiancé of the appellant had previously made her position clear: she does not want to conclude marriage with the former. The appellant's request too is not for reconciliation and for the conclusion of marriage with her. He requested the payment of the expense he incurred, for the return of the presents and for the payment of compensation for the moral prejudice, he suffered because his fiancée and her parents breached the contract of betrothal without good cause. There is no reason why such a case should be submitted to the family arbitrators. In the case at hand, it is the mother of the fiancée and not the latter who is found responsible of the breach of the contract of betrothal and against whom the decision was made for the payment of the expenses and the compensation for the moral prejudice the appellant suffered. The litigation between the appellant and the mother of his fiancée who is the present respondent relates to the payment of money. So, for what reason should such a case be submitted to the family arbitrators? Therefore, the decision of the High Court which quashed the Awraja Court's decision by stating that the dispute of the parties should be first submitted to the family arbitrators is not found proper, and is thus quashed. We hereby order that the High Court proceed with the substance of the case and give the decision it finds appropriate. A copy of this decision should be sent to the High Court, so that it shall act as decided.

ACTIVITY QUESTIONS

1. What is the role of custom in the case above?
2. Explain the principle, which helps the court to apply rules of custom to settle the dispute.
3. Do you appreciate the role of custom in solving family dispute?

2.3. FORMAL SOURCES OF LAW

2.3.1. CONCEPT OF FORMAL SOURCES

In a modern state, the concept of formal source of law is the will of state manifested in statutes or decisions of the courts of law. It is from which a rule of law derives its source and validity. It includes law making authority, procedure through which law shall pass before it comes into existence and constitutional validity.

2.3.2. ELEMENTS OF FORMAL SOURCES

The elements of formal sources of law are: sovereignty; procedural values; and constitutional values of a law that derives its validity.

A) Sovereignty

As a postulate to explain the working of a legal order, the concept of sovereignty has its uses. Nevertheless, the term is used with so many conflicting meanings and so easily stirs the emotions that it is better for jurisprudence to forgo its use. The ‘initial premise’ is a better and more neutral phrase: there is no need for jurisprudence to postulate sovereignty in the sense of power that is unlimited, illimitable, and indivisible. These qualities are not a priori necessary, but depend only on particular political theories, as is demonstrated by a study of the functioning of actual states. The basis of law is a legal order, the presuppositions of which are accepted by the community as determining the methods by which law is to be created, and those presuppositions will vary from one community to another....[Paton; 1967: 304-306]

B) Procedural Validation

There are procedures a particular draft of law should pass through in order to get its binding force. As it is provided under the FDRE Constitution (Art 57), laws should be deliberated upon. Then, the House of Peoples’ Representatives will pass it. After that, the President of the Country signs the law. Next, it should be promulgated on Negarit Gazeta so as the court

to have take judicial notice and apply it to solve practical disputes brought before it [Arts. 57 of the FDRE Constitution; and Proc. No 3/1995, Art 2).

C) Substantive Validity

Every law shall conform to the rules and principles to the FDRE Constitution. Pursuant to Article 9(1) of the Constitution, a law that contravenes the Constitution shall be of no effect. Thus, a law will derive its force only where it is made in line with the Constitution. The substance or content of the law shall be valid tested against the supreme law of the country.

LEARNING ACTIVITIES

1. Enumerate the essential proclamations enacted by the Region of your locality.
2. Explain how proclamations, rules and directives are used as sources of our law.
3. Analyse the concept of formal source of law.

CONCLUSION

We have discussed that the term “source” is subject to various meanings. In general, when we say source of law, we meant that from where the law derives its binding force and its contents. Source of a law may be formal or material. We have seen that material source of law is that from which the law derived the matter, i.e. the content. A formal source of law is that from which a rule of law derives its force and validity.

We discussed that custom is material source of law because the law derives its contents from the custom. Custom is a set of social attitudes that the society regarded as part of law and enforced. Custom, to be regarded as source of law, it must be reasonable; be consistent with a written law; be observed as of right; it should have been continuously in existence from the time immemorial; and be certain.

According to the historical school, custom can change, or modify the law. Analytical theory considers custom derives its binding force from the recognition of state. Under Ethiopian law, custom is applicable where the law refers it, and when the judge interprets the law.

We have also seen that religion is the material source of Ethiopian law. The other source of law that we have dealt is legislation. Legislation are enacted by the formal deliberations of the legislature. The legislature derives its power to make laws from the Constitution. Laws are made to implement the principles incorporated in the Constitution. Any law that contradicts the provisions of the Constitution is null and void. Thus, the constitution is one of the sources of Ethiopian law. Agreements and treaties are also other important source of our law, particularly the constitution of 1995.

Codes are also important source of our law, starting from Fewse Menfesawi down to the recent codes, like the 2000 Revised Family Code. We have also discussed that proclamations, regulations and directives issued are sources of our laws.

Further court decisions are sources of our law. We have seen that the old Judgments are the sources of the 1960 civil code. In addition, the 2000 Revised Family Code of the Federal government is also sourced from the decisions that are rendered by our courts. The Supreme Court of the Federal government has still the power to pass decisions that will be used in future by other courts to solve practical disputes.

REVIEW QUESTIONS

I) True/False

- 1) Custom is not a source of Ethiopian law
- 2) Source of law could be defined differently by varies authors
- 3) Ethiopian laws do not incorporate Muslim religion principles.
- 4) International treaties are sources of our Constitution.
- 5) The will of the state manifested in laws is called material source of law.

II) Choose the best answer

- 1) The source of law from which the law derives the matter is called

A) formal source B) historical source C) legal source D) all

- 2) Religion is _____ source of law
- A) material B) Social C) formal D) all
- 3) The FDRE Constitution is a source of Ethiopian laws, because,
- A) all laws are made according to the Constitution
B) all our laws need not to conform to the Constitution
C) the law maker can avoid the rules in the Constitution
D) all
- 4) Court decisions may be the source of Ethiopian laws
- B) if it considered less important and no value
C) if it is incorporated in statutes
D) A and B D0 none
- 5) Which of the following is not a source of Ethiopian laws?
- A) the FDRE Constitution B) the laws of Regions
C) the 1948 Universal Declaration of Human Rights D) none

III) Answer the following questions

- 1) Analyse the concept of source of law.
- 2) What do you understand by the material source of law?
- 3) Explain the historical source of law.
- 4) Analyze the formal sources of Ethiopian laws.
- 5) Discuss the elements of formal sources of law.

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UNIT THREE: CLASSIFICATION OF LAWS

UNIT OBJECTIVES

After completing this unit, the student will be able to:

- discuss general concepts with regard to classification of law;
- compare public law with private law;
- compare and contrast international law and national law;
- discuss substantive law;
- explain the rules with regard to procedural law; and
- compare and contrast civil and criminal law;

UNIT INTRODUCTION

Classification is a shaping and developing of traditional systematic conceptions and traditional systematic categories in order to organize the body of legal precepts, so that they may be:

1. stated effectively with a minimum of repetition, overlapping and potential conflict;
2. administered effectively;
3. taught effectively, and developed effectively for new situations.

We get three views as to the nature and end of classification. One is that the exhaustion. Another is that classification is a means of revealing natural law that it may be made to reveal the real order of interdependence in the things classified. A third is that it is simply a means of organizing knowledge and thus of making it more effective for some purpose. It is difficult to establish a sharp division between the different branches of the law.

Under this unit, classification of laws into public and private will be dealt. Next, the classification of law into international and national, substantive and procedural, civil and criminal will be considered respectively.

3.1) PUBLIC AND PRIVATE LAW

Public law regulates the acts of persons who act in the general interest, in virtue of a direct or mediate delegation emanating from the sovereign [What is Law? Pp, 8-9]. As Salmond propounded ‘public law’ is not the whole of the law that is applicable to the state in its relations with its subjects, but only those parts of it which are different from the private law concerning the subjects of the state and their relations to each other. Private law is thus the residue of the law after we subtract public law [Paton, 1967, Pp. 291-92]. **Private law** regulates the acts, which individuals do in their own names for their own individual interest. Public law is sub divided into constitutional and administrative law [What is Law? Pp, 8-9].

Constitutional law defines the organization of the state, its fundamental rules, mode of government, and the attributions of its political organs, their limits and their relations [What is Law? Pp, 8-9]. Constitutional law deals with the ultimate questions of the distribution of legal power and of the functions of the organs of the State [Paton, 1967, P. 292].

Administrative law regulates the operation of the executive power in all its degrees, beginning with cabinet ministers and descending to its most humble representatives. It also regulates such local, departmental and communal administrations. Very wide in its application administrative law comprises many matters, which impinge upon private law. This is because the administration often takes individuals under its tutelage. It is thus that the operation of mines, of waterfalls, and of railways is governed by provisions of administrative law. In addition, the creation and functioning of certain groups of persons, such as labour unions, associations, and mutual aid societies are governed by administrative law, even though private persons may be acting in their own private interest [What is Law? Pp, 8-9].

Criminal law, the infliction of punishment directly by the organs of the state, is also usually regarded as falling under the head of public law. Some would say that **civil procedure** should also be placed in this section, since these rules regulate the activities of courts, which are mere agencies of the State; but civil procedure is so linked with the enforcement of private rights that it is more convenient to regard it as belonging to both public and private law [Paton; 1967: 292].

Private law governs in principle all the acts of individuals in their private capacity. However, in France and in most civilized states, it is at present divided into three sections. They are civil law, procedure, and commercial law.

LEARNING ACTIVITIES

- 1) What is public law?
- 2) Explain the scope of private law.
- 3) What are the criteria to distinguish law into public and private? Explain.

3.2) INTERNATIONAL AND NATIONAL LAW

Law may be classified into international and local law. [Paranjape; 2001: 150-52]

A) International law – The law of nations of the 18th century was named as international law by Bentham in 1780. It consists of rules which regulate relations between State *inter se*. Oppenheim has defined international law as “the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other.” [Paranjape; 2001: 150-52]

Starke defines International law as “rules of conduct which states feel themselves bound to observe and therefore do commonly observe in their relations with each other and which includes also (a) the rules of law relating to functioning of international institutions and organisations, their relations with each other and their relations with States and individuals; and (b) certain rules of law relating to individuals so far as the rights and duties of such individuals are the concern of the international community.” [Paranjape; 2001: 150-52]

Salmond, however, believes that international law is essentially a species of conventional law and has its source in international agreements. These international agreements may be of two kinds, namely – (1) express agreements as contained in treaties and conventions; and (2) implied agreements as found in customary practices of the States.

John Austin, Willoughby and Holland consider international law as positive morality and do not agree that it is law properly so-called. Austin defines law as a body of rules for

human conduct set and enforced by a sovereign political authority. Since international law is not set or enforced by a political sovereign authority, it is not law. Also, there is no common superior over sovereign states. In the absence of any binding force, the validity of international law is solely dependent on the voluntary acceptance of the States and, therefore, it cannot be called as “law” in true sense of the term. [Paranjape; 2001: 150-52]

Dr. Holland subscribes to this view of John Austin. He observed, “the rules of international law are voluntary, though habitually observed by every state in its dealings with the rest, can be called “law” only by courtesy”. According to him, international law is a vanishing point of jurisprudence since it lacks any arbiter of disputed questions save public opinion, beyond and above the disputant parties themselves. [Paranjape; 2001: 150-52]

Professor Dias suggests that there is no doubt that the respect which States pay to International Law is less than what individuals pay to municipal law, but still it is called “law” to inspire a sense of obligation among States to follow it. Therefore, it is a weak law. Although there is International Court of justice functioning at Hague, it does not have any universal compulsory jurisdiction for settling legal disputes between States. Again, international law having not yet been codified, suffers from uncertainty. However, Dr. Oppenheim defends international law as “Law” and says, “a weak law nevertheless is still a law”. [Paranjape; 2001: 150-52]

Salmond, however, agrees that Private law branch of International Law be regarded as law in strict sense of the word. In the ultimate analysis, it may be suggested that despite criticism against international law being treated as law proper, it has assumed great importance in modern world. A large part of this law is based on natural justice and principles of right reason which the States are expected to follow in their dealings with one another. Although this law does not have any binding force behind it but the positive morality, underlying it does inspire States to feel obliged to follow it [Paranjape; 2001: 152]

As one can observe from the above discussion, international law is classified into public international law and private international law. **Public international law** regulates the

relation between states. For example the relations between Ethiopia and Sudan are governed by public international law. **Private international law**, on the other hand, governs the relations between individuals of different nationalities. Different nationalities involve in commercial and other civil transactions beyond their countries. Since the laws of different countries are not the same, the problem arises as to which law should be applied to the relations of different nationalities. For example, let us assume that Ethiopian national and Chinese are married in Addis, and they live in Beijing. Let us further assume that a dispute arises between them with regard to the administration of their household. Whose law is to apply to solve their dispute: the Ethiopian or Chinese law? Private international law solves this problem. Private international law is known by different names. For instance it is called **conflict of laws** [See Alpha University College; 2006: 36-7]

B) National law- law that pertains to a particular nation (as opposed to international law) [Roger and Frank; 2002: 17]. It is a law of a nation, for example the law of the United States of America, France, or Ethiopia. Such law is applicable all over a country in question. It is also known as law of the land. It is in effect in a country and applicable to its members. The law may be statutory, i.e. enacted law, administrative or case law [Garner; 2004: 904].

Local Law [Paranjape; 2001: 157] - Local law is the law of a particular locality and not the general law of the whole country. They may be of two kinds – local customary law and local enacted law.

Local customary law has its roots in those immemorial customs, which prevail in a particular part of the State and therefore, have the force of law. The local enacted law, on the other hand, has its source in the local legislative authority of municipalities or other corporate bodies empowered to govern their spheres by by-laws, supplementary to general law.

LEARNING ACTIVITIES

- 1) What do you understand by local law?
- 2) Explain the essence of international law.

- 3) There is no a concept as such international law. Comment.

3.3) SUBSTANTIVE AND PROCEDURAL LAW

Civil procedure is nothing but a detached part of the civil law governing the manner of asserting and defending rights before courts. Neither the Romans nor the Old French jurists segregated actions from the body of the law... [What is Law? P. 10]

According to Salmond, substantive law is that which defines a right while procedural law determined the remedies. Procedural law is also called 'law in action' as it governs the process of litigation. Substantive law is concerned with the administration of justice seeks to achieve while procedural law deals with the means by which those ends can be achieved. For example, law of contract, transfer of property, negotiable instruments, crimes etc are substantive laws whereas the laws of civil procedure or criminal procedure are procedural laws [Paranjape; 2001: 157]. The rules that are provided under procedural law are inseparable from the substantive law. For example, civil procedure law is inseparable from the civil; code that deals about contract, filiations, adoption, and the like [What is Law? p. 10].

EVIDENCE LAW

Law of Evidence is the law that consists of the rules and principles, which govern the relevancy, admissibility, weight and competency of evidence. It compress the legal rules regulating those means by which any alleged matter of fact, the truth of which is submitted to investigation is established or disproved [Carter; 1990: 3].

Law of evidence is an adjectival as opposed to substantive law. Rules of substantive law are characterized by given fact situation. Rules of substantive law govern the legal significance of a set of facts, which either are admitted or have been established. A party to the dispute may admit facts and adduce arguments as to the substantive law. Alternatively or additionally, the party may dispute some or all of the facts. Such disputed facts are said to be facts in issue and are open to proof or disproof. Adjectival law is concerning with the regulation of this process. Adjectival law includes the law of procedure

and the law of evidence. Perhaps no clear-cut distinction can be drawn between law of evidence and other adjectival law. However, evidence law focuses on the trial process, particularly on the fact-finding element in the trial. It is concerned with such matters as the role of judges, the rights and duties of the parties, the nature of proof, the availability of witnesses, documents and other means of proof, the admissibility of evidence and other similar matters [P. B Carter; 1990: 3].

LEARNING ACTIVITIES

- 1) Analyse how law is categorised into procedural and substantive law.
- 2) Is evidence law a procedural or substantive law? Expound.

3.4) CIVIL AND CRIMINAL LAW [What is Law?]

Civil law is that branch of law dealing with the definition and enforcement of all private or public rights, as opposed to criminal matters [Roger and Frank; 2002: 15]. The law enforced by the State is called **civil law**. In Ethiopia, we have a civil law codified in 1960, which is known as Civil Code. The force of State is the sanction behind this law. Civil law is essentially territorial in nature as it applies within the territory of the State concerned. The term civil law is derived from the Roman word *jus civile*. Austin and Holland prefer to call civil law as ‘positive law’ because it is enforced by the sovereign political authority. However, Salmond justifies the term ‘civil law’ as the law of the land. He argues that positive law is not necessarily confined to the law of the land. For example, international law is a kind of jus positivism but it is not a civil law.

On the other hand, **Penal law** unquestionably forms part of public law. The state alone, representing the nation, has the right to punish. Prosecutions and condemnations are carried out in its name. The application of penalties is a part of the administration of a state. Today we have a criminal law enacted in 2004 which is a revision of the 1957 Penal Code of Ethiopia. The designation is changed to criminal law because penal law has negative connotation which carries penalty only.

LEARNING ACTIVITIES

- 1) Analyse the essence of civil law.
- 2) What do we mean by Criminal law?
- 3) What are the purposes of Criminal law/

CONCLUSION

We have seen that law can be grouped in different categories. Classification of law is a systematic grouping of law so as to understand easily.

Law can be classified into public and private law. We have seen that public law is that regulates public interest. Constitutional law and administrative law are the two main subdivisions of public law. On the other hand, we have seen that private law is one that consists of rules that regulate relations between individuals. It is divided into substantive and procedural law. Further, we have seen that substantive law defines rights of persons. We have discussed that procedural law governs the process of litigation.

Furthermore, we have observed that law may be divided into international and local law. International law includes rules that govern the States and other international subjects like multinational corporations. Local law, as we have seen, encompasses rules that are applicable to a locality.

What is more, we have discussed that law may be classified into civil and criminal law. Civil law is that which is enforced by the state. It is also called as ‘positive law’ since it is enforced by a state as sovereign. Criminal law, called as penal law, on the other hand, is intended to keep the peace of the people and order of the State. We have seen that criminal law is one type of public law.

REVIEW QUESTIONS

I) True/False

- 1) Private law is that branch of law regulates the relations between the individual and administration of the state.

- 2) Public law regulates the relations between the state and the individuals.
- 3) A law that pertains to the transactions of states as sovereign body is called national law.
- 4) Local law is a law that is applicable only in Addis Ababa.
- 5) The Ethiopian Civil procedure Code is a substantive law.
- 6) Criminal law is that subscribes what are prohibited and the violation of which is punishable.

II) Choice

- 1) Civil Procedure is categorized under

A) Civil law B) Criminal law C) Procedural law D) all

- 2) The law that defines the rights and duties of the individuals is _____ law

A) Criminal B) Procedural C) Public D) Civil

- 3) If one of the parties to the dispute is the state, the law that regulates this dispute is _____ law.

A) Civil B) Public C) Private D) all

- 4) The public law that imposes a sanction on a defendant is _____ law.

A) Civil Code B) Public C) Criminal D) Administrative

- 5) The law that resolves the issue which law to be applied in case where two individuals of different nationalities involve in dispute is _____ law

A) national B) international C) private international D) public international

III) Answer the following questions

- 1) What do we mean by classification of law?

- 2) Do you believe that classification of law is important to understand Ethiopian laws?
Why or Why not?
- 3) Discuss the nature of public law.
- 4) 'Private law regulates the transactions between individuals'. Explain.
- 5) Discuss the nature of substantive law.
- 6) Analyze the nature of procedural law.
- 7) Law of Evidence is a procedural law, expound.
- 8) Compare and contrast international law and national law.
- 9) What do you understand by civil law?
- 10) Explain the purpose of criminal law.
- 11) What is your attitude towards the classification of laws?
- 12) What is your attitude with regard to the civil law legal system and Ethiopian law?

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UNIT FOUR: THE MAKING AND REPEAL OF LAWS

UNIT OBJECTIVES

After the completion of this Unit, the student will be able to:

- discuss the steps in law making;
- compare and contrast the law making in Ethiopia the past and present; and
- apply the doctrines of law making.
- discuss the general principles with regard the repeal of laws;
- compare the different types of repeal of laws;
- explain the effects of repeal of laws; and
- apply the principles of repeal of laws.

UNIT INTRODUCTION

Under unit three, we have learnt the classification of laws. How laws are made? This is the main concern of this unit. Law making is the process of establishing a new rule of law on a particular subject. There are disputes with regard to the power of making of laws. Those who believe in separation of power argue that it is the legislature that should be given the power to make laws. The protagonists of the Doctrine of Separation of powers assert that the state's power of sovereignty is in no way divisible. Consequently, they argue, that the law making power should be carried out by the state as one whole entity. As you may discuss in the course on Constitution, our Constitution incorporates the doctrine of Separation and check of power on the federal level as well as Regional level. Under this unit we shall discuss the law making in Ethiopia.

There are steps a given draft should pass to be enacted as a law and this is one of the points this unit will deal with. Then, we will consider the law making in a comparative manner. We will summarize important points and this will be followed by questions that are intended to help students to promote their learning on the Unit. What is more, references are given so as to facilitate further readings on the subject under discussion.

Laws may be repealed. Under this Unit, we will be discussing the principle of repeal of laws. Thus, the first section of this part is devoted to discuss the general principles of repeal of laws. The second section of this part is meant to discuss the types of repeals. Then, we will consider the effects of repeal of law.

4.1) THE MAKING OF LAWS

4.1.1) STEPS IN LAW MAKING [What is Law?]

What are the steps in law making?

The first stage of the legislative process is the introduction of a bill. A bill either proposes a change in the existing law or makes new proposals; it is the first draft of what will ultimately become a statute.

From this stage onwards, the legislative monopoly of Parliaments is markedly encroached upon. The right to introduce bills is usually shared between the government and parliament.

Who may initiate legislation?

It is implicit in the concept of democracy that the initiative in law making should rest with the elected officials. At the same time it is understood in fact and in law that law making right is always shared with the executive. The function of government here is to supply a given policy. The government being better acquainted than anyone else with the needs of the society and because of the more and more complex nature of the problems that have to be solved, it is technically better equipped with individual members of parliament to draft laws, which makes able from the legal standpoint. In most countries, the government has the right to introduce draft laws whether they are members of Parliament or not.

Laws are implemented in the day to day activities of the society. Those who directly involved in the administrative activities have practical knowledge on the problems of existing laws or the activities that need rules to and can propose a draft [Ann, Robert and Nalin; 2001:22].

In countries where there is strict separation of power as in the United States, members of the legislative assemblies alone have the right to introduce bills. The president may also initiate drafting of laws in USA.

In the Western parliamentary democracies the separation of powers is not strict, and the governments have the right to initiate legislation directly. While the right to initiate laws is generally exercised only by Parliaments and by governments, it can also be granted to other bodies. In the Peoples' Democracies specific parliamentary bodies are so empowered such as the Presidium in Albania, Hungary and the U.S.S.R, the Council of State in Poland and Rumania, and the Presidential Bureau in Czechoslovakia where the right to initiate bills is also accorded to the President of the Republic and the Slovak National Council. In Italy, the national council on the economy and on labour may, if the appropriate majority agrees, submits drafts to Parliament on matters within its competence. Unusually in the United Kingdom, Finland and Sweden the church has the right to initiate legislation on ecclesiastical matters.

Apart from the procedure by petition for a private bill in the British Parliament, the direct initiation of legislation by the people is rare. The peoples' right to initiate laws arises from the fact that sovereignty resides on them.

What is the next step after a bill is initiated?

When a draft is introduced, members of Parliament are informed of the variety of ways by posting of notices, by announce in the chamber, by an entry in the minutes of the proceedings report of debates, and in some countries by a purely formal first readings. If it complies with the rules of order, the bill then printed and distributed. It has been noted for in the United Arab Republic bills must first be submitted to the committee whose duty is to prepare proposals and decide goes forward. At this stage before publication, bills will be examined by talented individual members in France to ensure that they have no financial implications. In Great Britain, it may be withdrawn after it has been presented and printed. Officials of the government will check to ensure that no contradiction is there to the standing orders of the House. In Yugoslavia before any debate takes place, every bill is

considered by the Assembly's legislative and judicial committee, to check that it conforms to the situation and the existing law and that it is correct.

Once published or at least distributed to members of the legislature and to the government, a bill follows a procedure the details of which may take a vast variety of forms according to the different countries. Nevertheless, in almost all countries there are two essential phases to be passed. First, it will be entrusted to committees. The committee may be an ad hoc or standing committee. Secondly, there is the phase of debate and decision, which is generally a matter for the House. That means the members of the House will debate on the draft and decide.

In some countries, this division of labour is subject to variations of greater or lesser importance, ranging from the exclusive jurisdiction of the House itself to the less orthodox practice of handing over that jurisdiction to committees. The tendency of committees to increase their power has already been noticed, and in some countries such as Italy, this indication has been approved by law.

Article 72 of the Italian Constitution specifies that the two Chambers may entrust to committees not merely the examination of bills, but also their final enactment. In practice, the President of the Chamber designates the bills, which follow the ordinary courses. It is true that even up to the final enactment of the statute the Chamber has the power to recall a bill from a committee, and in practice it must be referred to the Chamber if the government, or one tenth of the members, or one fifth of the members of the committee so request. This is known as automatic return. However, this procedure cannot apply to certain kinds of bills such as bills on constitutional and electoral matters, bills delegating legislative power, bills to ratify treaties, or bills relating to taxation of public expenditure.

In the same spirit the constitution of Senegal authorizes committees to make law when this power is expressly delegated to them by the Assembly. By contrast, in several countries Parliament may decide to debate a bill in the House without referring it to a committee. This procedure is mostly used to consider bills that are urgently needed. It is used in Albania, Czechoslovakia, and the former U.S.S.R. In Iran and the Lebanon, a bill must be

given status of extreme urgency by the Assembly in order to be debated right away. An analogous procedure is found in the Chamber of Deputies in Japan. In the Argentina a decision to debate the bill must be taken by a majority of two-thirds of the votes cast, even so this can only be done if the bill has no financial implications. It has to be remembered that in the Argentine the House cannot resolve itself into committee as is done in Assemblies on the British model. This is what is done in the Congress of the United States where in order to gain time and to evade the formalities of procedure the two Houses deliberate in committee of the whole House.

The importance of the part played by committees can be determined first by the stage at which bills are referred to them and secondly by the extent of the powers conferred on them to consider bills.

The powers of committees vary considerably according to Parliaments, which appoint them. In Great Britain and countries, which have been influenced by British institutions committees have relatively little power. The exception is the Committee of the whole House, a body that is only distinguishable from the House itself that is considered as the essential working unit. The task of committees is to consider matters of detail, especially when a bill is complex. Although they can amend a bill, if such a power is given to them. However, if the draft has been approved by the House on second reading, no amendment contradict with the main purpose of the bill is admissible. Thus, a committee must confine its consideration within these purposes unless it is specially instructed by the House to do otherwise. Would committees perform proper functions? In fact they give invaluable help to Parliament since it relieves the House of all questions of detail, and they fully devote precisely the task entrusted to them, which is the minute of both form and substance of every clause in the bill.

The power of the committees working in United States Congress is opposite to what we have discussed above. In the first place, they can amend or transform as they wish any bill, including those, which derive from the President. More important, the fact that they are entirely independent of the House and Senate, which have no way of controlling their activity, means that the future of a bill depends in large measure on their will. In practice,

the chairperson of the committee plays the key part. If s/he is personally hostile to the bill and the majority in the committee is favourable, s/he can apply a whole series of delaying tactics to prevent the bill from being considered. What ever its origin the bill has no chance of success unless s/he is personally in favour of it. However, one fact limits that is s/he has to take accounts of the policies and pressure of the two political parties.

As ministers are also members of Parliament, they attend, as required and where necessary, meetings of the standing committees and the special committees. The government is in practice represented at every stage of legislative process without any need for a written rule.

The data sought by committees do not necessarily commend the minister personally. They are often furnished by civil servants on the authorization of the head of the department, which they belong. Therefore, it is possible for the government to obtain information.

Another means of obtaining information is the hearing of private individuals, whether they are interested parties or the subject matter of the committee's inquiry or person with knowledge. As a rule, the object of these hearings is to help the committee to understand the problem.... However, in Parliaments private persons may be heard by committees ..., their function is to explain the draft or to present their arguments against the draft.

The complex nature of certain problems occasionally made the committees highly dependent on experts and the important of the interests touched by some bills frequently give to pressure groups who seek especially at the level of committee to obtain favourable decisions from Parliament.

Generally, persons and bodies outside Parliament who are interested in the subject matter of a bill are consulted at some stage in order that it may be drafted with full knowledge.

Extra-parliamentary consultants are also held after a bill has been introduced in the House, they may at times represent a particular concept of the sovereignty of the people. In India and Pakistan a bill may be formally placed 'in circulation' in order to elicit further opinion on its merits.

The most elaborate form of extra-parliamentary consultation, which derives from the principle of popular sovereignty as opposed to the strictly representative system, is the consultative referendum.

When extra-parliamentary consultations have been committed, the ordinary procedure for the making of laws is taken in the assemblies. The contents of the bill are made known by all available means and first and for most the press, so all sections of society are informed. Discussion follows in the basic organizations, industrial and agricultural undertakings, professional, trade organizations of all kind people's councils, social, scientific and economic institutions and local and regional administrations. Opinions are gathered and suggestions, amendments, and perhaps counter proposals drawn up which are forwarded to Parliament and in particular their appropriate committees. These committees examine any matter and may if necessary formally take them into consideration. Thus, countrywide discussions takes place, which introduces in greater degree a new form of direct democracy, made possible by the available media of communications. Nevertheless, the last word rests on the representatives of the people; it is for them to accept or reject the large number of suggestions addressed to them.

Promulgation is the last stage in law making. What is promulgation? The passing of a bill by the legislature is generally the stage of the legislative process. The work done by the two Houses must then be promulgated. Promulgation authenticates a bill as a law and gives it binding force; it also entails publication.

4.1.2) COMPARATIVE STUDY OF LAW MAKING PROCESS IN ETHIOPIA

In the above discussion we have learnt about law making in various countries abroad. Under this part we will discuss the law making process in Ethiopia: the past and present.

4.1.2.1) HAILE SELASSIE'S ERA

[What is Law, pp. 20 ff] The purpose of this part of the material is to present a systematic description of the Law Making process in Ethiopia in simple, concise and accurate form.

A) FORMS OF LAW

There were four major types of Ethiopian law (Orders, Proclamations, Decrees and Legal Notices) which are the subjects of this monograph, although never so officially prescribed, are in accordance with the divisions of legislative authority set out in the Constitution of 1931 and the Revised Constitution of 1955. The first three (Orders, Proclamations and Decrees) are best known as Primary Legislation. Thus under the title of “Order”, the Emperor exercises his prerogative under Article 27 of the Constitution of 1955 to determine “the organization, powers and duties of all ministries, executive departments and the administration of the government”. Substantive legislation passed by Parliament and approved by the Emperor is called a “Proclamation”. The Emperor acting alone may promulgate legislation only “in cases of emergency that arise when the Chambers are not sitting”. This law is known as “Decree”.

The fourth term, “Legal Notice”, is used mainly for the publication of Rules and Regulations, and Municipal Law, authority for which has been delegated to various government officials. It can best be labelled as subordinate legislation.

The two minor forms of law which were not discussed herein were “General Notice”, which is mainly used to announce Government appointments and awards of honour by the Emperor, and “Notice” which was the vehicle for the announcement of certain matters of public interest, such as Notice No 10 of 1950, dealing with the encouragement of foreign investment.

B) PUBLICATION OF LAW

Negarit is Amharic for drum. Gazata is Italian by origin and Amharic by adoption for newspaper. Years ago, public announcements and the promulgation of Laws were proclaimed in Ethiopia by the beating of a drum. The combination of the traditional word Negarit with the imported word Gazata therefore constitutes the designation of the governmental medium of communication of legal information to the public.

The Negarit Gazata is the official legislative, executive and administrative Law Reporter of Ethiopia. Written in Amharic and English, the first issue appeared on March 30, 1942, and it has been published regularly since that date. Of course, if there is any language conflict, Amharic was the only official language. Occasionally, a law published in the Negarit Gazata contained a specific provision naming a later date at which time the law will become effective.

Proclamations, Decrees, Orders and Legal Notices used to appear in the Negarit Gazeta under their generic name, number and year they were so cited (For example, Decree No. 42 of 1962, Legal Notice No 257 of 1962.) Laws were published in the Negarit Gazeta in strict chronological order.

C) LAW MAKING UNDER THE REPEALED (REVISED) 1955 CONSTITUTION

The now repealed Constitution of the Empire of Ethiopia, 1955 used to envisage two types of laws made at two different levels. These were primary legislations, which were the result of the legislative activities of the supreme organs of state power of the Empire, and subordinate legislations, which were enacted by organs of authority, delegated to them by the supreme organs of state power.

The sources of primary legislations under the Repealed 1955 Constitution were the Emperor and Parliament. The Emperor used to be constitutionally empowered to issue two types of primary laws, i.e., Orders and Decrees, while the Parliament has the authority to issue one type of primary legislation, i.e., Proclamations. Orders, which used to be exclusively enacted by the Emperor were primary laws principally related to issues of the creation or dissolution of organs of state and government power or their branches, the chartering of municipalities, the raising and disbanding of units of the army, etc. vis, questions of state and governmental structure. It should be noted that the Emperor had the power to issue orders without referring to any other organ of state or governmental power.

It used to be possible to initiate orders in two ways. Firstly, the Emperor himself could unilaterally initiate and subsequently issue them whenever he saw it fit to do so. Secondly, their initiation could start at the level of a specific governmental body concerned or

interested in their enactment. Such a governmental body would, as the first step, submit such legal opinion or draft to the Council of Ministers from where, if approved, it is passed on to the Emperor in the hands of the Prime Minister for enactment or shelving as the case may be.

Proclamations were capable of being initiated in various ways. Since the Parliament was bicameral, draft proclamations could be initiated from either of the two Chambers of the Parliament. If such a draft succeeds in gaining majority approval in the Chamber it was initiated in, it would then be transferred to the other chamber where it was again subjected to discussions and a vote. If it again gains a majority vote in the second Chamber it means that it has won the approval of the whole Parliament and was then submitted to the Emperor who, as the supreme sovereign, would have to give the go ahead before it is promulgated. Draft proclamations could also start at the level of any governmental body interested in having a certain law passed. Such a draft was submitted to the council of Ministers from where, presumably after sufficient scrutiny and ironing out, it was submitted to the Emperor in the hands of the Prime Minister. Where the Emperor agrees with the proposed law he, in turn, sends it to any of the two Chambers of the Parliament, where it was subjected to debate and finally a vote. If it meets with majority approval of the Chambers, it is forwarded to the Emperor for final approval and promulgation.

Decrees were the third type of primary legislation in force then and were the second legal prerogative of the Emperor. Decrees used to deal with the same area of legislation as proclamations and used to be enacted only during the temporary absence of the Parliament, i.e. presumably, when it was out of session during the summer. Theoretically at least, all decrees were subject to a vote of approval when the parliament subsequently reconvened.

Considering the whole law-making process it is often said that all laws in pre-revolution Ethiopia were in effect made by the Emperor.

4.1.2.2) THE DERG'S ERA

The first noticeable change in the law-making process that could be observed was a direct consequence of the deposition of the emperor and the disbandment of the parliament. The

net effect of this was the disappearance of the previous distinctions in names between the various types of primary legislations. There was only one type of primary legislation under the Derg, i.e, the proclamation that was enacted by its congress.

The congress of the PMAC, being the highest organ of state power then, was also the only source of the sole primary legislation of the time, i.e., the proclamation. It is true to say that usually the authority to enact proclamations is given to an organ of state power by virtue of a constitutional provision. But when it comes to the PMAC, the power to issue proclamations was granted to its congress by another proclamation. And, at the time, this odd fact was though the Derg has no other alternative, in the absence of a constitution, except to out this legal problem in the manner described above.

With respect to the initiation of draft proclamations, we firstly see that the congress of the PMAC itself had this right. Secondly, the law-making process could also be initiated by governmental organs by their submission of the draft to the Council of Ministers. If the draft meets the approval of the Council of Ministers, it was submitted to the PMAC's Congress for deliberation voting and finally, enactment.

Subordinate legislations of this period, which generally went under the general name of Legal Notice, used to be drafted and issued at the level of the governmental body authorized to issue them, though the fact that most legal notices used to be enacted among with the proclamation enabling that both the enabling proclamation and the Legal Notice came from the same source.

4.1.2.3) UNDER THE PDRE

The process of law making under the PDRE day Ethiopia was radically different from the previous two legislative regimes discussed above. The law-making process in Haile Selassie's Ethiopia, though it formally paid lip service to the Doctrine of the Separation of Powers, was, in reality, a highly autocratic were concentrated in the person of the Emperor. The law-making process under the Derg, on the other hand, can best be described as a provisional stop-gap process wherein the only top of primary legislation, i.e., the proclamation, was often strengthened, amended and elaborated upon by innumerable

directives which had a *de facto* force of law (though not in the formal sense) and were justified as binding because they most often had the same source of the proclamations.

Two types of laws, i.e., primary and subordinate legislation were envisaged under the Constitution of the PDRE. This was similar with the previous forms of law making steps.

Under this set-up, there exist five types of primary legislations. Proclamations are enacted by the National Shengo, which was the supreme organ of state power in the PDRE (Art. 63 sub Art 1).

The Council of State had the power to enact Decrees to facilitate the implementation of the powers and duties entrusted to it by the Constitution (Art. 82/3/). The Council of State also had the authority to issue special Decrees when necessary and compelling circumstances arise. This power to issue special Decrees was, however, qualified by the fact that the Council of State may exercise it only between the sessions of the National Shengo, i.e., when it was not meeting. Finally, president of the Council of State, which in turn was, the standing body the National Shengo, was entitled with the right to issue the final two types of primary legislation. Primarily, he had the authority to enact presidential Decrees, for the purposes of facilitating the implementation of the powers and duties entrusted upon him/her by the Constitution (Art. 86/4). He was also entitled to issue, under compelling circumstances, special Presidential decrees during periods when the National Shengo was not in session. However, such special presidential Decrees were also subject to submission and approval by the National Shengo at its next session, again leading us to conclude the special Presidential decrees also related to situation normally regulated or governed by the proclamations issued from the National Shengo (Art. 87).

With respect to the initiation of legislation, i.e. proclamations, Article 71 of the Constitution states that the Council of State, the President of the Republic, Commissions of the National Shengo, members of the National Shengo, the Council of Ministers, the Supreme Court, the Procurator General, Shengos of higher administrative and autonomous regions, and mass organizations through their national organs, had this right.

We found, in the PDRE, various and hierarchical distinguishable depositories of state power in the forms of Autonomous Region Shengos, Administrative Region Shengos, Special Administrative Shengos and Awraja Shengos which were declared by the Constitution and the subsequently enacted administrative proclamations as the highest organs of state power at their respective levels (the Constitution. Art .95, Proclamation No. 15/1988, Arts 3/1, 18/1 and 32/1, Proclamation No. 16/1988, Arts 3/1/and 18/1 and Proclamation No. 17/1988. Arts 3/1 and 18/1).

The primary legislation of the PDRE were laws issued by the highest organ of state power of PDRE, namely the National Shengo as well as these issued by its standing body, i.e., the Council of State and the President of the Republic. Attempts to make a superficial distinction between the National Shengo, on the one hand, and the Council of State and the President of the Republic, on the other, and then proceed to call only the Naion Shengo the supreme organ of state power there by indirectly giving a secondary status to the latter two is erroneous. This is because these two specialized organs of state power were firstly, part and parcel of the National Shengo and secondly, the ones entrusted with the task of representing and carrying out the National Shengo's tasks of legal sovereignty on a day-to-day basis.

Thus, the PDRE's subordinate legislation were all the enactments issued by all the other organs of both state and administrative power outside the above-mentioned supreme organs of state power on the basis of delegated authority flowing from the National Shengo.

All subordinate legislations in the PDRE went by two names Directives and Regulations, with a certain exception. In general, we have seen thus that the supreme source of law, the National Shengo, was in firm control, directly and indirectly, over the nature and scope of all laws enacted by subordinate organs of power and state administration.

4.1.2.4) LAW MAKING IN THE PRESENT DAY OF ETHIOPIA

In the present day of Ethiopia, the sovereign, i.e. the legislature has the power to make laws [Art. 55 of the FDRE Constitution]. Thus, the House of Peoples' Representatives has the

power to enact laws in the form of proclamation, for the Federal State, in the following sectors [Art. 55 of the FDRE Const]:

- Natural resources of the Federal State;
- Inter-region and foreign trade law;
- Federal transportation laws;
- Electoral laws and other laws with regard to the enforcement of political rights;
- Nationality and other laws;
- Standard and calendar;
- Patent and copyright laws.

The House of People's Representatives is also empowered to enact laws in the form of codes on [Art. 55(3), (4) and (5), (6) of FDRE Constitution].

- Labour Code;
- Commercial Code;
- Criminal Code;
- Civil laws necessary to establish and sustain one economic community.

As per Article 62(8) of the Constitution, the House of Federation has the power to determine civil matters on which the House of Peoples' Representatives makes laws. But what are the detailed points to be taken to determine a given matter as essential to establish one economic community?

We observe that legislative power is given to the House of Peoples' Representatives because it is the highest authority of the Federal Government. In addition to the House of Peoples' Representatives, executive organs have also given the power to enact regulations and directives. The provision of Article 77(3) of the FDRE Constitution states that the Council of Ministers shall enact regulations pursuant to powers vested in it by the House of Peoples' Representatives. Here, the provision makes clear that legislative power vested to the Council of Ministers is legislative power delegated from the legislature (i.e. the House of Peoples' Representative).

According to Article 74(5) of the Constitution, the Prime Minister has the power to supervise the implementation of regulations and directives adopted by the Council of Ministers. The provision of Art. 74(5) of the same implies that the Council of Ministers has the power to enact directives in addition to regulations.

Ministries are also given the power to enact directives to implement the powers given under proclamations. For example, Ministry of Labour and Social Affairs was given the power to issue directives concerning the registration of employers' and workers' union [Proc. No 4/95 Art. 20(3)].

We have seen that the executive bodies have the power to enact regulations and directives. These are non-sovereign law making bodies. Bodies other than the legislature are non-sovereign law making bodies.

What are the characteristics of non-sovereign law making bodies? They are subordinate legislatures because:

- A) there are laws such bodies must obey and cannot change;
- B) there is a distinction between fundamental law and ordinary laws;
- C) there must be a body having authority to pronounce upon the validity or constitutionality of laws passed by such law making body [Dicey; 1961:91].

The regulations and the directives made by the non-legislative bodies should not contradict with the Constitution [Art. 9(1) of the FDRE Constitution]. This principle applies to all laws irrespective of who made it. In addition, the House of Federation is empowered to interpret the Constitution [Art. 62(1) of the same]. Therefore, the House of Federation could ensure that all laws are in line with the Constitution.

The other essential characteristic of non-legislatures is that they have given the power to make laws by delegation of power [Dicey; 1961: 91].

Who does initiate laws? The Constitution clearly provides that the Council of Ministers “shall submit draft laws to the House of Peoples’ Representatives on any matter falling

within its competence, including draft laws on a declaration of war” [Art. 77(11) of the Constitution]. We understand that the Council of Ministers has the power to initiate draft laws on matters that fall under the jurisdiction of the federal Government. In addition, it has the power to initiate and submit draft on a declaration of war to the House of Peoples’ Representative, and the latter may declare state of war [Art. 55(9) of the Constitution].

Further, each ministry has the power to initiate policies and laws [Proc. No. 471/2005, Art. 10]. According to Art. 4 of Proc. No 470/2005, the Government; the House of Federation; the Speaker; and the Federal Supreme Court; members of the House; Committees of the House; and other governmental institutions directly accountable to the House have the power to initiate and submit draft bills to the House on matters within their jurisdictions. However, it is only the Government empowered to initiate draft financial law [Art 6(4) of Proc. No. 470/2005].

Any draft must be made in writing and be submitted to the Speaker to its presentation to the House.

Then the Speaker must present the summary of the draft law and deliberation on the content in general must be held [Proc. No. 470/2005, Art. 7(a)]. Then, the Speaker will refer it to the concerned standing committee [Proc. No 470/2005; Art. 7(b)]. The House shall have the following Standing Committees [Proc. No. 470/2005; Art. 18]:

- 1) the Capacity Building Affairs;
- 2) the Trade and Industry Affairs;
- 3) the Rural Development Affairs;
- 4) the Natural Resources and Environmental protection Affairs;
- 5) the Infrastructure Development Affairs;
- 6) the Budget and Finance Affairs;
- 7) the Legal and Administrative Affairs;
- 8) the Foreign, Defence and Security Affairs;
- 9) the Women’s Affairs;
- 10) the Information and Cultural Affairs;

- 11) the Social Affairs; and
- 12) the Pastoralists Affairs.

The committee which took the assignment will present it to the House with its proposal after 20 working days [Pro. No 470/2005; Art. 8]. Thus, second reading will be held in the House [Proc. No 470/2005; Art 9]. If the deliberation can not be exhausted, the bill shall be referred for further scrutiny to the pertinent committee [Art. 9(c) of the same]. The committee who received for the second time shall read out the amended version and its final decision to the House. [Proc. No 470/2005; Art. 10(a)].

Then the House shall pass the bill (draft law) after a through discussion on the final proposal (Art. 10(b)). Then, the Speaker shall send the draft to the president for signature (Art 11(a)). The President is required to sign the bill within 15 days other wise the bill will be effective after 15 days if the President fails to sign it [Proc. No 470/2005; Art. 11(b)]. What is more, the ratified law must be numbered by the Speaker and thereby published in the Federal Negarit Gazeta [Art. 11(c)].

Promulgation of the law upon the ratification of the draft, the Speaker of the House of Representatives sends the law to the President for signature [Art 57 of FDRE Constitution and Proc. No. 470/2005, Art. 11(b)]. The President needs to sign the law within fifteen days, the law will have effect with out his signature if the president fails to sing within the specified time [Art 57 of FDRE Constitution and Proc. No. 470/2005, Art. 11(b)].

LEARNING ACTIVITIES

- 1) Who does initiate law under present day of Ethiopia?
- 2) How do you evaluate the law making process in Ethiopia?
- 3) What do you mean by second reading of bills?

4.2) REPEAL OF LAWS

4.2.1) GENERAL CONCEPTS

Repeal of law is an abrogation of an existing law by legislative act. In other words, repeal of law means making the law no longer have a legal effect [Garner; 2004: 1325]. What are the general concepts with regard to repeal of laws?

[The following note is taken from What is Law? Charter 4, pp. 1 ff]

The law making process discussed above basically relates to the manner in which a certain normative standard is legalized or converted into a rule of law. What we will now be discussing under this part relates to the opposite process of making a law that is delegating a certain normative standard that had been part and parcel of the law of the land. Note should be made here that the process of delegating is equally the task of the law making organs discussed above and implies a more or less similar process as the one described for the making of laws.

Is there a difference Between **Repeal and Expiry of Laws**?

A law (statute) is either perpetual or temporary. It is perpetual when no time is fixed for its duration, and such a statute remains in force until its repeal, which may be express or implied. A perpetual statute is not perpetual in the sense that it cannot be repealed; it is perpetual in the sense that it is not abrogated by elapse of time or by non-user. A statute is temporary when its duration is only for a specified time, and such a statute expires on the expiry of the specified time unless it is repealed earlier. Simply because the purpose of a statute, as mentioned in its preamble, is temporary, the statute cannot be regarded as temporary when no fixed period is specified for its duration. Cessation of transitional legislative power has no effect on the continuance of a perpetual Act enacted during the continuance of that power. The duration of a temporary statute may be extended by a fresh statute. But it appears that after a temporary statute expires, it cannot be made effective by merely amending the same. The only apt manner of reviving the expired statute is by re-enacting a statute in similar terms or by enacting a statute expressly saying that the expired Act is herewith revived.

Who May repeal Laws? A power to make a law with respect to the topics committed to Parliament or State legislatures carry with it a power to repeal laws on those topics. Subject to any constitutional restriction, the general rule is that “the power of a legislative body to repeal a law is co-extensive with its power to enact such a law” and a legislature which has no power to enact a law on a particular subject matter has also no power to repeal the same.

What parliament has done parliament can undo.

A law may be repealed by a latter “distinct and repealing enactment or an enactment inconsistent and irreconcilable therewith.” Putting in other words, no repeal can be brought about “unless there is an express repeal of an earlier act by the latter Act, or unless the two Acts cannot stand together.” Repeal may thus be express words of a later statute or may be implied on considerations of inconsistency, or irreconcilability of the provisions of an earlier statute, with those of a later statute. A power “to amend or repeal” will, therefore, imply a power to amend or repeal by implication, i.e., by making inconsistent laws. Repeal, express or implied, cannot be brought about by subordinate legislation, since a power to repeal cannot be delegated. In Ethiopia, the legislature has the power to repeal laws.

LEARNING ACTIVITIES

- 1) What do we mean by repeal of laws?
- 2) Explain the difference between repeal of laws and expiry of laws.

4.2.2) TYPES OF REPEAL [What is Law?]

The repeal of laws may be EXPRESS or IMPLIED

4.2.2.1) EXPRESS REPEAL

A former statute is said to be expressly repealed where the new repealing statute refers to the whole or a part of this former statute and withdraws its obligatory force and thereby denies it further effect as law. For a new law to be said to have expressly repealed a former law, moreover, the reference it makes to the former law must be clear and exact in relation to what extent or proportion it is no longer operative.

Example: consider Art. 319 of the Revised Family Code of FDRE

Article 319- Inapplicable Laws

- 1) The following provisions shall not be applicable in the administrations[Dredawa

and Addis Ababa] where this Code applies:

- (a) provisions of the Civil Code of 1960 on Persons(Book One, Articles 198-338);
- (b) provisions of the Civil Code of 1960 on Family and Successions(Book Two, Articles 550-825).

It clearly indicates the provisions of the Civil Code that it repeals, and therefore, it is an express repeal.

The above provisions repeal the indicated provisos of the 1960 Civil Code.

Apart from the total and partial express repeals, there is also a third type of express repeal is only a variety of the partial express repeal, it is distinguished from it by the fact that it does not withdraw the obligatory force of the substance of the former law but only restricts the scope of applicability of the substance of this former law. This means that it only affects the so-called “extent clause” of the former law and leaves the rest of its provisions intact. If, for example, a statute used to exist that had applied to all the coffee producing regions of Ethiopia with respect to the price of coffee beans and a new statute was enacted subsequently which provided that the former statute on the price of coffee beans was no longer applicable in the Harer and Sidamo such a new statute would be said to only have affected the “extent clause” of the former statute and repealed (and thereby restricted) its former scope of applicability.

The use of any particular form of words is not necessary to bring about an express repeal. The usual form is to use the words “is or are hereby repealed” and to mention the Acts sought to be repealed in the repealing section or to catalogue them in a schedule. The use of words “shall cease to have effect” is also not uncommon. When the object is to repeal only a portion of an act, words “shall be omitted” are normally used. When a new provision is substituted for an existing provision, the result is an express repeal of the existing provision and enactment of a new one in its place. In such a case even if the re-enacted provision be later declared invalid, it may not have the effect of reviving the old provision. The result may be different in the case of a mere suppression of an existing provision by a

new provision and a declaration of invalidity of the new provision may revive the superseded provision. An amending act, which limits the area of operation of an existing Act by modifying the extent clause, results in partial repeal of the Act in respect of the area over which its operation is excluded. The legislature sometimes does not enumerate the Acts sought to be repealed, and only says that “all provision inconsistent with this Act” are hereby repealed.

Article 319- **Inapplicable Laws**

- 2) Any laws, regulations, directives, decisions or practices inconsistent with this Code shall not be applicable on matters provided in this Code.

With respect to such a repealing provision it has been said that it merely substitutions for the uncertainty of the general law an express provision of equal uncertainty; and in determining whether a particular earlier provision is repealed by such a repealing provision on the ground of inconsistency with it, the same principles which are applicable in determining questions of implied repeals have to be applied. Where the act repealed provides substantially for all matters contained in the act effecting the repeal there is correspondence between the two Acts, and the earlier act would thus be repealed. It is not necessary that there should be complete identity between the repealing Act and the Act repealed in every respect. There will, however, be no “correspondence” and therefore no repeal, where the two acts are substantially of differing scopes. However, it is possible that there may be a partial correspondence resulting in a partial.

4.2.2.2) IMPLIED OR TACIT REPEAL

A) General

Law may be repealed impliedly or tacitly. There is a presumption against repeal by implication; and the reason of this rule is based on the theory that the legislature while enacting a law has a complete knowledge of the existing laws on the same subject matter, and therefore, when it does not provide repeal the existing legislation explicitly, the presumption is that it repeals the previous law. When the new law contains repealing

section mentioning the laws, which it expressly repeals, the presumption against implied repeal of other laws is further strengthened on the principle EXPRESSIO UNIS EST EXCLUSIO ALTERIUS. The presumption is, however, rebutted and repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent or repugnant to the provisions of the earlier Act “that the two can not stand together”. Nevertheless, if the two may be read together and some application maybe made of the words of the earlier Act, a repeal will not be inferred. It is indicated that the test applied for determining repugnancy, may be applied for solving a question of implied repeal and that it should be seen:

- I. Whether there is a direct conflict between the two provisions;
- II. Whether the legislature intended to lay down an exhaustive Code in respect of the subject-matter replacing the earlier law;
- III. Whether the two laws occupy the same field. The doctrine of implied repeal is intended on the part of the legislature, which is presumed to know the existing law, did not intend to create any confusion by retaining conflicting provisions and, therefore, when the court applies the doctrine, it does no more give effect to the intention of the legislature by examining the scope and the object of the two enactments and by a comparison of the two Acts. A recital in a later Act that it was not repealing an earlier Act will be of no avail if the later act enacted which was quite contrary to the earlier Act, and the earlier act would stand repealed as effectively as if it had been expressly repealed. Repeal by implication is just as effective as by express words.

B) Prior Particular Law and Later General Law

A prior particular or special law is not readily held to be impliedly repealed by later general enactment. The particular or special deals only with a particular phase of the subject covered by the general law, and, therefore, reconciliation is normally possible between a prior particular act and a later general act and so the particular Act is construed as an exception or qualification of the general Act

.... Where general words in a later Act are capable or read able and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so.

However, there is no rule that prevents to repeal a partial prior law by the subsequent general law. It is only the principle of construction we use.

C) Prior General Law and Later Particular Law

A prior general Act may be affected by a subsequent particular act if the subject matter of the particular Act prior to its enforcement was being governed by the general provisions of the earlier Act. In such a case, the operation of the particular Act may have the effect of partially repealing the general Act, or curtailing its operation, or adding conditions to its operation for the particular cases. In other words, the latter particular law may have the effect to amend or repeal the prior general law on the same subject matter.

D) Laws defining offences and penalties

If a later statute again describes an offence created by an earlier statute and imposes a different punishment, or varies the procedure, the earlier statute is repealed by implication... The principle, however, has no application where the offence described in the later act is not the same as described in the earlier Act, i.e., when the essential ingredients of the two offences are different.....In short, a new law may repeal the existing criminal law even if there is no specific reference to the effect of repeal.

Why we did an implied repeal?

Repeal by implication is a matter of construction and is a very striking instance of ‘control’ exercised by the courts over the operation of a statute. It is a common law rule that *LEGES POSTERIORE PRIORES CONTRARIAS ABRAGANT*. The principle is that the new law prevails over the old law. Thus, if the new law is inconsistent with the old law, the old law

is considered as repealed, because one of the principles making a law is to make a change in the law.

LEARNING ACTIVITIES

- 1) What do we mean by implied repeal of law?
- 2) Explain the principle of expressed repeal of laws.

4.2.3) EFFECTS OF REPEAL

[A note taken from What is Law?]

If a law is repealed it is considered as if it had never been enacted. Thus, no obligation and duty arise out of the repealed law. Another effect of repeal of law is that if one Act is repealed by a second which again is repealed by a third the first Act is not revived unless the third Act makes an express provision to that effect. It is understood from this that a third law that repeals the second may revive the first law.

In spite of the repeal of law rights accrued and liabilities incurred may be intact and it may permit continuance of institution of any legal proceeding or recourse to any remedy which may have been available before the repeal for enforcement of such rights and liabilities. Thus, offences committed during the continuance of statutes can now be prosecuted and punished even after it is repealed.

Making the distinction between what is and what is not a right preserved is essential. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere “hope or expectation of”, or liberty to apply for acquiring a right. A distinction is drawn between a legal proceeding from enforcing right acquired or accrued and a legal proceeding for acquisition of a right. The former is save while the latter is not.

What is the effect of repeal of legislation on subordinate ones? As a consequence of the general principle that a statute after its repeal is as completely effected for the statute book as if it had never been enacted, subordinate legislation made under a statute ceases to have

effect after repeal of the statute. This result can be avoided by insertion of saving clauses providing the contrary.

LEARNING ACTIVITIES

- 1) What do we mean by effects of repeal of laws?
- 2) Explain the concept of revival.
- 3) Analyse the effects of repeal of laws.

4.2.4) EXPIRY OF LAWS

What do we mean by expiry of laws? What is a distinction between repeal and expiry of law? A distinction is to be drawn between repealed and expiring statutes. The difference in effect between these two kinds of laws is that repealed statutes, except so far as they relate to transactions already completed under them, become as if they never existed, but with respect to temporary statutes, the extent of the restriction imposed by them becomes a matter of construction. The question sometimes arises whether a temporary statute which has lapsed still applies to acts or things done, for instance, the crime committed before it ceased. This can be determined only by reference to the exact language of the enactment, which should be clear and unambiguous on such a vital point, but unfortunately is not always so.

4.2.4.1) CONSEQUENCES OF EXPIRY

The effect of expiry of law depends upon the construction of the Act itself.

A. Legal proceedings under expired statute

A question often arises in connection with legal proceedings in relation to matters connected with a temporary Act whether they can be continued or initiated after the Act has expired. The normal rule is that proceedings taken against a person under a temporary statute *IPSO FACTO* terminates as soon as the statute expires. A person, therefore, cannot be prosecuted and convicted for an offence against the act after its expiration in the absence

of a saving provision, and if a prosecution has not ended before the date of expiry of the act, it will automatically terminate as a result of the termination of the Act.

B) Notifications, Orders, rules, etc. made under temporary statute

When a temporary Act, expires the normal rule is that any appointment, notification, order scheme, rule, form or by-law made or issued under the Act will also come to an end with the expiry of the Act, and will not be continued even if the provisions of the expired act are re-enacted. Similarly, a person's detention under a temporary statute relating to preventive detention will automatically come to an end on the expiry of the statute.

C) Expiry does not make the statute dead for all purposes

A temporary statute, even in the absence of a saving provision ... is not dead for all purposes. As already stated the question is essentially one of construction of the Act. The nature of the right and obligation resulting from the provisions of the temporary Act or their character may have to be regarded in determining whether the same right of obligation is encoring or not. Thus, a person who is prosecuted and sentenced during the continuance of a temporary act for violating its provisions cannot be released before the person serves his/her sentence, even if the temporary Act expires before the expiry of full period of the sentence.

4.2.4.2) REPEAL BY A TEMPORARY STATUTE

When a temporary statute effects a repeal of an existing statute a question arises whether the repealed statute revives on the expiry of the repealing statute. The answer to the question, whether a statute which is repealed by a temporary statute revives and the expiry of the repealing statute, will depend upon the construction of the repealing statute. As regards the effect of the repealing of an earlier Act made by a temporary Act, the intention of the temporary Act in repealing the earlier act will have to be considered, and no general or inflexible rule in that behalf can be laid down. A law, though temporary in some of its provisions, have a permanent operation in other respects..... If the repealing section in a

temporary statute on construction is held to expiry with the expiry of the act, the repeal will be construed as a temporary repeal.

Does disuse make Law Non-obligatory?

A law subsists indefinitely as long as its provisions have not been regularly repealed. Recourse may always be had to it to obtain its execution.

A law may be disused for a long period of time. However, age cannot wither an Act of parliament, and at no time, has it ever been admitted in jurisprudence that a statute might become inoperative through obsolescence.

“The doctrine that, because a certain number of people do not like an Act and because a good many people disobey it, the Act is therefore ‘obsolescent’ and no one need pay any attention to it is a very dangerous proposition to hold in any constitutional country. So long as an Act is on the statute book the way to get rid of it is to repeal or alter it in parliament, not for subordinate bodies, who are bound to obey the law, to take upon them selves to disobey an act of Parliament”.

Thus, the executive body may not be active in implementing a given law and individuals may also use the law. However, the disuse of a law can not make it repealed because it is the legislative body that must repeal the law, not the subordinates.

LEARNING ACTIVITIES

- 1) Do you believe that the disuse of a law repeals it? Reason out.
- 2) Explain the concept of expiry of laws.

4.3) NULLIFICATION OF LAWS

What do we mean by nullification? What is nullification of law? Who has the power to nullify a given law?

Nullification, according to Black's Law Dictionary [2004: 1098], is "the act of making something void; specifically the action of a state in abrogating a federal law, on the basis of state sovereignty". Thus, nullification is the act of making void. An act may be nullified if it is against the law of the state.

In common law, juries may nullify law, that is known as jury nullification. Jury nullification means making a law void by jury decision. It is "the process where by a jury in a criminal case effectively nullifies a law by acquitting a defendant regardless of the weight of evidence against him or her." [Wikipedia, 2008 (August)]. A jury may acquit a defendant despite s/he violates the law in a criminal case. Such a decision has the effect of disabling the enforcement of the law. Thus, it is considered as a means for the people to express apposition to an unpopular legislative enactment [Wikipedia, 2008].

In common law, the jury, since it is established by a group of people to judge a given case, the a group of people to judge a given case, the members would be less likely to be corrupted since they are working for a short period of time; it would be more likely to render a just verdict. Jury nullification is believed to give an opportunity to take a dissenting view about the justness of a statute or official practices [Wikipedia, 2008].

However, it is essential to note that sympathy, bias or prejudice can influence some juries to wholly disregard evidence and instruction and thereby acquit the defendant. Jury nullification is a de facto and traditional power of juries that is not normally disposed to juries by the system when they are instructed as to their rights and duties.

Jury nullifications is debatable. Some argue that it is an important safeguard of last resort wrongful imprisonment and government tyranny. However, others maintain it as an abuse of the right to a jury trial that undermines the law. Some consider it as a violation of the oath sworn to by jurors, while others view the requirement that jurors take an oath to be unlawful. Others still view the oath's reference to "deliverance" to require nullification of unjust law [Wikipedia, 2008]. In general some argue in favor of jury nullification while others maintain it as an act as a violation of jurors duty.

As Doug Linder [2001] explains, a jury nullifies a law that it believes is either immoral or wrongly applied to the defendant.

Jury nullification, in general, “means that a jury finds a defendant innocent because the law itself is unjust, or is unjust in a particular application, and should not be applied”.

But what is the relationship between jury nullification and rule of law? Does nullification contradict the rule of law? It is argued that nullification is not a violation of the rule of law. But what are the reasons for that? First and for most, nullification is part of the rule of law. A law is nullified if it is unjust. It is said that “an unjust law is no law at all.” [Doug Linder [2001].

However, the problem is who can judge whether a given law is unjust? In common law, jury (the group of persons) could judge whether a given law is unjust, and that is the principle of moral conscience. The rule of law is not an injunction to blind obedience rather it is a principle of the limitation of the authority of government [Doug Linder [2001].

In addition, the rule of law basically means to be “ruled by laws, not by men” However a jury nullifying a law does not engage in ruling. Jury engages in negating the instructions and actions of government. The rule of law also is meant to limit the actions of individuals in the government authority, because the principle requires actions to be as specified by the law. The rule of law denies to government unlimited or discretionary power and authority. Thus, the rule of law is part of a system of checks and balances to prevent dictatorship and despotism. Do you agree with this argument? Why or why not?

In Ethiopia, if the law contradicts the FDRE constitution, it will be nullified by the House of Federation, not by a jury or the court.

LEARNING ACTIVITIES

- 1) Once the law is enacted, judges (including juries in common law) are required to apply the law. Do you agree with this assertion? Reason out
- 2) Define nullification of law.
- 3) Do juries have the power to nullify the law? From where does the power arise, if any?
- 4) How do you relate the concept of nullification in Ethiopia?

- 5) Discuss how law could be repealed by a temporary statute.

CONCLUSION

We have seen that law making is establishing a new rule of law on a particular subject. We have seen that it is the legislature, which is empowered to make laws in Ethiopia. We have also seen that the executive body, particularly, the Council of Ministers is given the power to enact Regulations. Further, we have discussed that each ministry has the power to enact directives.

With regard to the steps in law making, we have seen that a draft should be prepared first. Then, discussion will be held. After that, the draft could be indorsed and it will become law. The law will also be published.

We have seen that repeal of law means making the law no longer have a legal effect. We have observed that a law could be perpetual until it is repealed. The principle is that a body that has a power to enact a law has also a power to repeal the same.

We have discussed that repeal of laws may be express or implied. A repeal of laws is said to be express where the law is replaced by a law by specific declaration to that effect. On the contrary, an implied repeal of law is repeal by irreconcilable conflict between an old law and a recent one.

With regard to the effect of repeal of laws, we have observed that all right and legal actions will be vanished. The first law may provide expressly to that effect.

Further, we have discussed that expiry of law automatically terminates a legal transactions. However, the rights or obligations may continue notwithstanding the expiry of a law if their nature determines. Finally, we have seen that disuse of a law does not wither away it.

REVIEW QUESTIONS

I) True/ False

- 1) The first step in law making is reading the draft in the parliament.

- 2) At the time of the Emperor, the house of the parliament had the real power to make laws in the past Ethiopia
- 3) The Derg had exercised the law making power as it was given to it by the people.
- 4) Today the speaker of the House has the power to initiate laws.
- 5) Once a written law is made it is not possible to change it.
- 6) Where the law clearly indicates the repealed law that is called an express repeal.
- 7) In the context of Ethiopian objective reality, it is easy to identify laws that contradict the new coming law.
- 8) Once the law is repealed, one will be not allowed to claim rights under the repealed law.

II) Answer the following questions

1. A statute may be perpetual. But that do we mean by that in relation to repeal of laws?
2. Please go to the legislative body of your locality (or locality where you are attending your class) and assess how laws are repealed. Present your report to the class or to your colleagues (To the instructor: please choose the options and make facilities for the students to carry on this task).
3. Discuss how a repealed law may revive.
4. A body that has no power to enact law, has nether a power to repeal it. Comment.
5. Compare and contrast an express repeal and implied repeal of laws.
6. Discuss the effect of repeal of laws.
7. Discuss the tests used to determine whether a given law is repealed by the legislature.
8. What do you understand by the maxim “LEGES POSTERIORE PRIORES CONTRARIAS ABROGANT”?
9. Discuss the distinction between repeal of law and expiry of laws.
10. What are the types of law that are promulgated in Ethiopia in the present time?
11. Explain the law making process in Ethiopia.

12. Do you think that the law making process in our country is fair? Why or why not?
13. Do you appreciate the importance of the comparative study of law making process in Ethiopia?

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UNIT FIVE: HIERARCHY OF LAWS

UNIT OBJECTIVES

After completing the discussion on this unit, you will be able to:

- explain the general principles with regard to the hierarchy of laws;
- discuss the reasons for supremacy of constitution;
- compare and contrast hierarchy of laws in the history of Ethiopia;
- analyze the hierarchy of laws under federal states;
- committed to apply the principles of hierarchy of laws; and
- apply the rules and principles

UNIT INTRODUCTION

Under the previous unit, we have learnt about the law making process and repeal of laws. Under this unit, we will consider the hierarchy of the laws that are made. To understand fully the essence and nature of laws, it is essential to consider their hierarchies. **What do we mean by hierarchy of laws?** The term “hierarchy” expresses the “ascending series ranks or degrees of power and authority with the correlative subjection, each to the one next above” [See Ayele; 1999: 5]. It is used to describe the structure of power relationship with varying amount of power and authority. It is believed that laws derive their validity from the authority that respective makers possess. Thus, the superior and subordinate kind of relationship exists between the laws. Therefore, hierarchy of laws is “a chain of subordination” between laws [Krzeczunowicz; 1964: 111]. Hierarchy of laws is a system in which all the laws of a certain country are put at various levels or ranks according to their order of importance. The order of importance of laws is very much related to the order of importance of state organs that make laws [Alpha: 58]. In other words, hierarchy of laws is the reflection of, a coordinated aggregate of persons among whom power relationships hold so as to establish an order of superiors and subordinates.

We will discuss the application of the principle of hierarchy of laws under some federal states. Further, the hierarchy of laws under the 1955 Revised Constitution, and the 1987

Constitution will be treated. Having discussed the concept under the former unitary form of Ethiopia, we will be discussing the hierarchy of laws under the current federal legal system.

We will wind up our discussion by way of summing up essential points. Finally, questions will be given so that you can enhance your learning by attempting those questions. To facilitate your further readings on the points covered under this unit, references are given at the end of the unit. [This unit is mainly based on the senior paper written by Ayele Bogale in 1999, Addis Ababa University, Faculty of Law]

5.1) HIERARCHY OF LAWS UNDER THE UNITARY FORM OF ETHIOPIA

Under this topic, we will be discussing hierarchy of laws in the 1955 Revised Constitution and the 1987 Constitution of the People's Democratic Republic of Ethiopia. Both these constitutions established the unitary form of government in Ethiopia.

5.1.1) THE HIERARCHY OF LAWS UNDER THE REVISED CONSTITUTION OF 1955 AND THE PDRE CONSTITUTION OF 1987[Ayele Bogale; 1999: 23-60]

Though the present constitution is basically different from its predecessors in its approach of treating the status of laws, since we can not divorce the past from the present in most cases it would be worthwhile, if not indispensable, to have a bird's eye view of the status of laws under the 1955 Revised Constitution and the 1987 PDRE Constitution.

A) HIERARCHY OF LAWS UNDER THE REVISED CONSTITUTION OF 1955

With regard to hierarchy of laws, Art. 122 of the Constitution declared that all primary and subordinate legislations were inferior to the Constitution. Thus, "in the hierarchy of laws, on top is the Constitution and below are other legislation. Accordingly, one can understand the hierarchical relation of the laws under the Revised Constitution by reading Arts 122 and 64 of the said Constitution. The latter reads as: "every one in the empire has the duty to respect and obey the Constitution, laws, decrees, Orders and regulations of the Empire." Here, the laws are mentioned in hierarchical order from the higher to the lower. It is clear

that the Constitution is on top and other legislation are below. Pursuant to this Article, all citizens were primarily bound by the Constitution of 1955. Thus, their acts should be consistent to it. The supremacy of the Revised Constitution could also be understood from the oaths that the officials of the then government used to take under Arts. 20 through 251 of the Constitution. While taking the oath they were required to promise to respect and defend the Constitution.

Which one does prevail if conflict arises between international treaties and the Constitution? One may argue that the latter (i.e. the Constitution) should prevail, because the Constitution is deemed to be the direct expression of the people and they all acts of what ever their kind should be consistent to it.

B) TYPES OF LEGISLATION AND THEIR HIERARCHY UNDER THE REVISED CONSTITUTION OF 1955

Legislation can be categorized as primary and subordinate. The former, that is primary legislation are laws that are made by the legislative body, that is, by the House or Houses of parliament as the case may be. Thus, in the case, under consideration, Chamber of deputies and senate of Ethiopia made such laws.

Under the Revised Constitution of 1955, primary legislation include proclamations, decrees, and Orders, which were made by the Emperor himself.

Although both proclamations and decrees were under the category of primary legislation, in so far as proclamations were enacted by the concordant wills of the two supreme law making bodies (Parliament and Emperor), they assumed supremacy over decrees. Because the latter was made by a single will that is, only by the will of the Emperor pending decision on them by the Parliament. Nevertheless, this was true only until the time that they were upgraded to the status of proclamations by the approval of the Parliament.

Legislation were not only of primary nature, they were also subordinate in character. In the words of Salmond;

Subordinate legislation [are] that which proceed from any authority other than the sovereign power and [are] therefore dependent for [their] continued existence and validity on some superior or a supreme authority. They may be regarded as having their origin in a delegation of the power of parliament to inferior authorities, which in the exercise of their delegated function remain subject to the control of sovereign legislator.

In other words, subordinate (subsidiary) legislation are those administrative orders and regulations which are made by executive authorities having derived their law making power from the legislator by way of delegation. Thus, so long as the executive authorities are granted the power to enact such laws by the legislator the laws made by them should be consistent to the laws enacted by the legislator.

Subsidiary legislation at the time under consideration covered: orders, which were made by each ministry; regulations; legal notice; general notice; and notice of approval. Orders made at that time were of two types. They were those with the capital letters and passed by the Emperor himself and those with the small letters, which were issued by the office of each ministry. The one, which was made by the Emperor by his prerogative power as provided in Art 27 of the Constitution, was not categorized under this type of legislation. Since the Emperor was empowered to enact this type of order by the Constitution and thus it belonged to the group of primary legislation. Therefore, the type of order, which fell under the category of subordinate legislation, was the one, which was mentioned in Art. 144 (ministerial order) of the Constitution.

Like orders, regulations were mentioned under Art. 64 of the Constitution. Although, the other types of legislation such as legal notice, general notice and notice of approval were not clearly indicated in the Constitution, they used to appear in the a Negarit Gazetta having the force of law.

5.1.2) HIERARCHY OF LAWS UNDER THE PDRE CONSTITUTION OF 1987

The Constitution as the basic law is regarded to be the source of all laws and thus those laws which derive their validity from it have to be in full ordinance with the spirit of the constitution. Conformably to this, Art. 118 of the PDRE Constitution declared that it was superior to all other laws. The PDRE Constitution was binding on all departments and offices of the government and hence any act made by them in Contradiction of the said constitution would be invalid.

Under the PDRE Constitution, the supreme organ of state power was the National “Shengo (Art .62 of the PDRE Constitution). Thus, the Constitution in its Art .63 granted it the power to enact laws on matters of national interest. However, the fact that National Shengo was empowered to determine on all issues having national importance does not mean that it was free from any constitutional limitation. This limitation can be understood from the declaration of the Constitution itself [Art 118]. In effect, this organ was subordinate to the PDRE Constitution. Hence, all laws made by it were also subordinate to the Constitution.

Unlike the Revised Constitution, the PDRE Constitution did not grant international treaties the status of supreme law. With respect to treaties Art. 82(1) (D) of the Constitution stated that the Council of State would, “ratify and denounce international treaties.” Thus, from this provision it is possible to say that international treaties under the PDRE Constitution were on equal footing with the decrees proclaimed by the Council of State. This is because they came into application by the act of this organ, that is to say, by the ratification of the Council of State. As a result, the Constitution alone was superior to all laws including international treaties.

The other point that can show the special position of the Constitution is its formal aspect. This aspect includes the adoption and the amendment of the Constitution. However, the method by which the Constitution is adopted is not the same. It can be adopted either by referendum or by the constitutional assembly or by the act of the legislator as the case may be. In this regard, even though the majority of the (socialist) constitutions have been

adopted through the normal legislative procedure in the normal legislative body, the 1987 PDRE Constitution was adopted by referendum.

Like in the case of its adoption, the amendment of the Constitution also differs from the normal law making process. It requires a qualified majority of vote in the legislative body. In like manner, the PDRE Constitution provided a special majority of vote under Art. 119 of the same. It says, “The constitution of the people’s democratic republic of Ethiopia may be amended only by a three fourth majority decision of the members of the National “Shengo”. Therefore, from all these points we can understand that the PDRE constitution was on top on the ladder of hierarchy.

What were the legislation and their hierarchy at that time?

We have seen in the preceding part of this material that the National “Shengo” was the supreme legislative body. Consequently, the laws enacted by this body and by its standing bodies (the President and Council of State) constituted the primary legislation and thus they stood second in hierarchy to the Constitution. The forms of legislation passed by those organs included proclamations, which were enacted by the National “Shengo”, decrees and special decrees, which were made by the Council of State and decrees and special decrees that were enacted by the office of the President. However, the fact that all these types of legislation were under the category of primary legislation does not imply that they were on equal footing in hierarchy.

The hierarchy between such laws can be seen in connection with the power relationship that existed among the makers themselves. Thus, for our purpose, we need those powers the national “shengo”, the Council of States and the Office of the President. Accordingly, one can understand from the close reading of chapters nine, ten and eleven of the PDRE Constitution that the National “Shengo” was the highest authority and the other two (the Council of State and the President of the Republic) were accountable to it. As a result, the legislation made by the National “Shengo” (Proclamation) were superior to the other legislation (decrees and special decrees) passed by the Council of State and by the Office of the President.

Since proclamations were enacted by the superior organ(National Shengo), they were superior to decrees and special decrees.

However, the supremacy of the proclamations over the presidential special decrees and the special decrees of the Council of State was not always true. Because there were certain circumstances in which such decrees came to have equal authority with the statutes enacted by the National “Shengo” These special decrees were enacted by the Council of State and by the President of the Republic as provided in Arts 83 of the PDRE Constitution respectively. As stated in the Articles, both the special decrees of the Council of State and of the President were issued when compelling circumstances necessitated their issuance. The issuance of these decrees was done between the sessions of the National “Shengo”.

According to Art, 83 (3) of the constitution, the special decree of the Council of state should be transmitted for consideration by the National “Shengo” at its next session. This was also held well in the case of the special presidential decrees [Art 87 (2) of the PDRE constitution]. Therefore, after consideration, if the National “Shengo” approved such. Special decrees to be upgraded to proclamations, they would appear in the Negarit Gazette, in the form of the said legislation (Proclamations). However, if the “Shengo” refuted them, they would cease to continue in force.

Contrary to this, ordinary decrees those were legislated by the Council of State and by the President in accordance with Arts. 82 and 86 of the Constitution consecutively were lower in hierarchy than the proclamations and the special decrees of the Council of State and of the President. Both the Council of State and the President were conferred with the power to make such decrees at any time when legislation of such types were required for the exercise of their powers and duties given to them under the Constitution. For this reason, the two organs were not expected to submit those decrees to the National “Shengo” for approval.

What was the hierarchy, if any, between the decrees and the special decrees made by the Council of State, on the one hand, and the decrees and the special decrees passed by the President, on the other hand? As indicated in the foregoing discussion, both the Council of

State and the President were the standing bodies of the National “Shengo”. Therefore, it seems that the two organs (Council of State and the Office of the President) had equal rank in the power order. For this reason, their relationship was not vertical but rather it was horizontal. As a result, Ayele argues that, there was no hierarchical difference between those decrees in question. Do you agree with him?

Art 92(1) of the PDRE Constitution authorized the Council of Ministers to issue regulations and directives. Therefore, in such a case so long as the Council of Ministers did not derive the right to do so from the primary legislation (proclamations), the regulations issued by it were non-derivative and thus they fell within the group of the primary legislation. Nevertheless, the fact that such regulations were categorized as primary legislation does not show us that they had equal status with proclamations. What made them primary legislation was their being enacted by the organ empowered to do so by the Constitution, nothing else.

Regarding the position of these regulations on the ladder of hierarchy of laws, we can say that in so far as the Council of Ministers was lower in the power order than the National “Shengo” and its permanent bodies (sections) the laws enacted by this organ were subordinate to the proclamations and decrees of whatever kind they be. Moreover, the Council of Ministers and each ministry had the right to issue regulations and directives. However, their position on the ladder of hierarchy was below the non derivative regulations issued by the same organ (Council of Ministers).

In addition, the “Shengos” of the administrative or autonomous regions at the time under discussion were empowered by the Constitution of the PDRE to issue directives. Their right to issue the directives was provided in Art, 97 (2) and (4) of the Constitution. Thus, so long as the “Shengos” of the administrative or autonomous regions derived their power to issue those directives from the Constitution itself, such legislation were non-derivative in character. However their being non-derivative in character did not make them higher or equal in hierarchy with any legislation enacted by the central authorities. This is because,

In a unitary state, there is only one central system of government, parliament, cabinet, head of state, high court e.t.c. The powers and duties

of the organs of this system of government cover in principle, the whole territory of the country in all administrative levels. All state's organs below the level of the central system of government are organs of local government and there for subordinate to the central organs.

Therefore, the directives issued by the “Shengos” of the administrative or autonomous regions were even lower in hierarchy than the derivative regulations and directives issued by the Council of Ministers and each ministry.

ACTIVITY QUESTIONS

- 1) Explain the hierarchy of laws under the 1987 Constitution of Ethiopia.
- 2) What was the role of Shengo?
- 3) Discuss the concept of primary and secondary legislation.

5.2) THE HIERARCHY OF LAWS WITH IN THE PRESENT LEGAL STRUCTURE OF ETHIOPIA

The Constitution of 1994 guaranteed the peoples, nation and nationalities of Ethiopia their right to self-determination and put an end to the long-lived unitary form of government. Thus, Ethiopia adopted a federal state structure

Under the present federal structure, the nine autonomous states which constitute FDRE, enjoy the right to have their say on their own affairs. Hence, they have their own laws made by their own state councils in the same way as what the central government does have. Thus, we do have two sets of laws: State's and federals. Accordingly, we will see the hierarchical relationship of the states/regions/ and the federal government.

5.2.1) THE SUPREMACY OF THE FDRE CONSTITUTION

A federal constitution is a covenant of the union by which federal relationship is established. So as to make this relation perpetual, the covenant should be reduced to a written document.

Furthermore, in order to avoid misunderstanding arising there from, the terms of the agreement should be simple and understandable.

The federal constitution, being the source of powers of both the central and the regional governments, is believed to be the supreme law. In the original sense of the term as used by Bryce, it is “rigid”. So as to say that a constitution is supreme, we need to see its declaration to the effect that the power of the legislator to alter the constitution is either limited or non-existent. In this respect, the federal constitution usually embodies a provision, which prohibits both the legislators of the whole country and of the parts to alter the constitution unilaterally. The supremacy of the constitution and its rigidity are the essential characteristics of the federal constitution and they are also the manifestations of the idea of federalism itself.

The 1994 FDRE Constitution in its Art 9(1) states that the Constitution is the supreme law of the land. It reads as “any law, customary practice, and act of an agency of government or official act that contravenes the Constitution is invalid.” In this Article, the phrase “any law” is used to cover all laws, which are now in force both at the central and at the regional levels. This can be understood from the reading of Arts. 50 through 55 in conjunction with Art. 9(1) of this Constitution. Therefore, the Constitution of the FDRE is superior to all federal and state laws including the state constitutions. This Constitution is binding on all the authorities of both the federal and of the regional states [Art 9(3) of the Constitution]. Hence, all acts made by their authorities in contravention of the supreme law are invalid.

Pursuant to Art. 9(4) of the Constitution, all international agreements ratified by Ethiopia are integral parts of the laws of the country. According to this sub-Article, since international treaties (agreements) are part of the laws of Ethiopia, they should be included under the phrase “any law” in sub-Article one of the present Article. We have said above that the said phrase is used to cover all laws (federal and state) that are subordinate to the

Constitution. Thus, it would be fair to conclude that international treaties, being part of those laws, are lower in hierarchy than the Constitution. Do you agree with this conclusion?

By virtue of Art 13(2) of the FDRE Constitution, the chapter on fundamental rights and freedoms:

Shall be interpreted in conformity with the Universal Declaration of Human Rights, international human rights covenants, humanitarian convention and with the principles of other relevant international instruments, which Ethiopia has accepted or ratified.

Does the declaration of the above sub-Article make the international instruments mentioned superior or equal in hierarchy to the Constitution? If it does so, does not it contradict the conclusion that we have arrived at, in the proceeding paragraph, which says that international agreements are positioned below the Constitution on the ladder of hierarchy?

Of course, the inclusion of the term “conformity” under Article 13(2) of the FDRE Constitution makes some people understand the position of international instruments indicated under the said sub-article as equal as the Constitution of FDRE. In support of this position, Kenenissa said that, “one possible way to come out of this /dead lock/ is to make the international human rights instruments as supreme as the Constitution.” However, while saying this, he did not make clear as to when they become as supreme as the Constitution. Nevertheless, can one say from the reading of Article 13(2) of this Constitution that the international instruments are paramount to the provision under chapter three of the same in all cases? Or does the “conformity” in Art 13(2) of the same imply that the provisions dealing with the fundamental rights and freedoms under the 1994 FDRE Constitution must conform to the instruments in question even there is no need for interpretation? As can be understood from this short discussion, the position of Kenenissa seems to answer the above question in the affirmative. In dealing with this issue, he tended to give more emphasis to the “conformity” than the “interpretation”. Accordingly, his stand

appears to make the instruments in issue as supreme as the Constitution of FDRE even when there is no need for interpretation.

However, in the opinion of Ayele, Art 13(2) of the Constitution does not make the international instruments paramount to the provisions under chapter three of the same in all cases. Because as it is clearly provided under Art 13(2) of the PDRE Constitution, the need to conform to those “international standards for the bill of rights” is required only in case of interpretation. In other words, such international standards are used as references when the provisions under the chapter on fundamental rights and freedoms of the Constitution become vague, ambiguous, equivocal, etc. Because it is, in such cases, that the rule of interpretation comes into application. However, if the provisions under chapter three of the Constitution become clear, the reference to the said instruments is not required. Therefore, Art 13(2) of the FDRE Constitution is there to serve for the sake of clarity but not to create contradiction with the basic principle enshrined under Art 9(1) of the same. In short, Ayele seems to conclude that the Constitution is superior. Do you agree with that?

5.2.2) THE STATUS OF INTERNATIONAL TREATIES VIS-À-VIS OTHER DOMESTIC LAWS

As we have discussed in the preceding part of this material, the status of international treaties under the present legal system of Ethiopia is not clear. Thus, it is only by interpretation that we can determine their position.

In respect of the status of treaty in our present legal structure, Ayele has already reached on the conclusion by reading Art 9(1&4) of the FDRE Constitution that they are subordinate to the Constitution. However, this Article except stating in its sub-Article four that international agreements are the integral part of the laws of Ethiopia, it does not indicate as to where their position lies in relation to other laws (federal and state). As said before, in case, where determining hierarchy of laws is difficult, it is submitted that the identification of the power order of the respective makers is of great importance. Thus, in order to know the status of treaties in Ethiopia, it is significant to identify the organ empowered to ratify treaties.

As it is clearly indicated in the Constitution of the FDRE, the House of Peoples' Representatives is conferred the power to ratify international agreements negotiated and signed by the Council of Ministers [Art. 55(12) of the FDRE Constitution].

This organ is also empowered by the Constitution to enact proclamations (federal statute) [Art 55 of the same]. Thus, both treaties and proclamations come in to force by the act of this organ. Hence, now a question may arise with regard to the hierarchy between the treaties and proclamations. To put it in question, which one is superior in hierarchy between the treaties and proclamations? Which one is superior in hierarchy when conflict arises between the two? When laws are passed by the same body, the rule is that such laws are on equal stand on the ladder of hierarchy. Therefore, so long as international treaties and proclamations are ratified and enacted by the same body (the House of Peoples' Representatives), they have equal status on the ladder of hierarchy.

However, in order to say that international treaties have such position on the ladder of hierarchy, they have to be concluded in accordance with and the spirit of the Constitution of FDRE. In this regard, the present Constitution in its Art 86 asserts that international agreements concluded in the promotion of the external relation should respect and accord with the sovereignty of Ethiopia and the interest of its people. On this point, Dr. Fasil[1997] wrote: "taking a lesson from history, the Ethiopian Constitution insists on making it a matter of record that the promotion of foreign relation must accord with the interest of peoples of Ethiopia". Therefore, it is only so long as they conform to the declaration of Article 86 of the Constitution that international treaties being ratified by the same body which enacts the proclamations that they can stand equal in hierarchy with the latter. In such a case, if conflict arises between the two (treaty and proclamation) the one which is subsequent in time prevail over the other which is prior in time.

It is essential to note that proclamations are normally higher in hierarchy than other federal legislation. Thus, in so far as we have reached on the conclusion that proclamations and treaties have equal status on the ladder of hierarchy, Ayele argues that those laws that are subordinate to the proclamations are also inferior to international treaties. Do you agree with this conclusion?

Is there a hierarchical relationship between international agreements and state/regional laws? As already mentioned above, the FDRE Constitution does not clearly show the relation of international treaties with the other domestic laws including laws of regions. However, although there is no a clear indication in the Constitution as regards the relation between international treaties and state laws, to the opinion of Ayele, the reading of chapter five of the Constitution is of some help to this effect. In its chapter five, the Constitution states that the federal government “shall negotiate and ratify international agreements”[Art 54(8) of the Constitution]. Hence, the making of international treaties falls under the exclusive jurisdiction of the federal government. In a federal system, there is no a superior and inferior relation of laws that are enacted on matters falling under the federal and the state lists. Similarly, in so far as international agreements fall under the federal list, we can not establish a hierarchical order between such agreements and the state laws. Nevertheless, since the 1994 FDRE Constitution imposes the states the duty to respect the federal power, international agreements that are negotiated and ratified by the federal authorities are not affected by the state laws. Do you agree? Can one conclude that treaties are superior over Regional laws?

5.2.3) FEDERAL LEGISLATION AND THEIR HIERARCHY

As already mentioned in the foregoing part of this material the position of federal legislation on the ladder of hierarchy is below the federal Constitution. We have seen that primary legislation normally refers to the enactments made by the supreme legislative organ of the country to which it belongs. Therefore, in our case, federal statutes (proclamations) enacted by the House of Peoples’ Representatives, which is the supreme legislative organ of the federal government [Art 50 (3) of the Constitution] fall under this group of legislation (primary legislation).

In addition to this, there are certain circumstances in which the primary legislation may include laws that are issued by the executive (subordinate) authorities. However, in such a case, for those laws to be categorized under the above group of legislation, the authorities enacting them should be empowered to do so by the supreme law (constitution). In connection with this, the FDRE Constitution confers the Council of Ministers the power to

proclaim a decree of emergency [Art. 93 of the Constitution]. Hence, such decrees passed by this organ may also fall under the said category of laws.

Nevertheless, the fact that both the proclamations and the decrees of emergency belong to the same group of law does not mean that they have equal authority in the hierarchy of laws. This is because, as a rule, in order to say that legislation made by different authorities are on equal footing in hierarchy; their makers should be on the same position in the power order. However, this is not true in the case under consideration. As said shortly before, the House of Peoples' Representatives is the supreme authority of the federal government. As a result, the federal statutes (proclamations) enacted by it are superior to all other laws made by the federal authorities. Accordingly, the Council of Ministers, being a federal authority, is subordinate to the House of Peoples' Representatives and thus the laws made by it are inferior to the proclamations.

However, the status of the decrees of emergency proclaimed by the Council of Ministers is exceptions to what is said above. This is because, the Constitution empowers the Council of Ministers to suspend even democratic and political right provided there under through the decrees issued by it in time of emergency. Therefore, for stronger reason, it is possible to say that the decrees of emergency proclaimed by the Council of Ministers can repeal the proclamations.

Unlike the decrees, those were issued under the Revised Constitution of 1955 and the Constitution of the PDRE, the decrees that are proclaimed under the FDRE Constitution have short span of life. In other words, they are expected to stay as decrees for a maximum of 15 days as it is indicated in Art 93 (2) of the Constitution. If the House of Peoples' Representatives is in session, the decrees of emergency proclaimed by the Council of Ministers are submitted to it within 48 hours of its adoption. However, if the House of Peoples' Representatives is not in session, the decree is submitted to it within 15 days of its adoption. If such decree is approved by a two-thirds majority vote of the House, then it will be promulgated as a proclamation of emergency [Art. 55(8) of the Constitution]. However, if the decree does not obtain the required majority vote, it will be annulled. The practice in the previous two constitutions was different from this, because the decrees in

both the Constitution of 1955 and 1987 were proclaimed only when the parliaments were not in session and they were submitted to them at their next session. For this reason, the decrees issued under the two Constitutions might be in force for a longer period of time. This was especially true in the case of decrees issued under the PDRE Constitution because the National “Shengo” which was the supreme legislator under this Constitution was not in session throughout the year. It was only once in a year that it had a regular session [Art 67 of the PDRE Constitution].

The other group of law (derivative legislation) that are issued at the federal level include regulations and directives. The Council of Ministers and each ministry issue these legislations. In this case, the Council of Ministers derives its power to make the regulations from the supreme legislator i.e. the House of Peoples’ Representatives through the primary legislation. Consequently, the position of the regulations and directives on the ladder of hierarchy is below the proclamations and decrees. However, in so far as the regulations are passed by the Council of Ministers, they are higher in hierarchy than the directives passed by each ministry.

Generally, as we have seen above, the legislation that are enacted at the federal level are not as such of many kinds. Therefore, their hierarchy can be easily identified.

5.2.4) STATE LAWS AND THEIR HIERARCHY

At present, the Federal Democratic Republic of Ethiopia comprises nine states [Art 47(1) of the Constitution]. They are: Tigray; Afar; Amhara; Oromia; Somali; Benshangul (Gumuz); Southern Nations, Nationalities and Peoples; Gambella peoples and Harari people. The powers of the Federal Government and of these states are defined by the Constitution of FDRE [Art 50(8) of the same]. The federal Constitution grants the State councils the power to enact laws on matters falling under the state [Art 50(5) of the same]. As it is mentioned in Art 52(2)(b) of the same, the laws that are enacted by the State Councils include the state constitution and other state laws.

In order to see the hierarchy of those laws in the states mentioned above, the following four state constitutions are taken as instances. These are: the Constitutions of Tigray Regional

State, Amhara Regional State, Gambella People Regional State and the Southern Nations, Nationalities and Peoples' Regional state. All these Constitutions declare in their supremacy clause that subject to the supremacy of FDRE Constitution, they are the supreme laws of the respective state. To this effect, the Constitution of Tigray Regional state in its supremacy clause states that consistent to the FDRE Constitution, it is the supreme law of that regional state. According to this Constitution, any law, customary practice and an act of agency of government or official that contravenes it shall have no effect [Art 9(1) of Tigray Regional State Constitution]. The Constitutions of Amhara Regional State (Art 9(1)) and Gambella Peoples' Regional State (Art. 9(1)) have also employed the same wording.

The forms of legislation existing in the states under consideration are similar to that of the federal legislation. These legislation cover: state statutes, decrees, regulations, and directives. As provided under Article 49 of the three regional state constitutions (Tigray, Amhara, and Southern Nations Nationalities and peoples), the state councils of these Regional states are empowered to enact laws that do not contravene the federal Constitution and other laws. The Constitution of Gambella people regional state also confers power to the State Council of the same to make laws that are applicable in that regional state [Art. 50(3)(1) of Gambella regional State Constitution].

What is more, as per Art 93(1)(b) of the FDRE Constitution, state executives have the power to make laws in case of emergency. Art 93(1) of the FDRE Constitution reads:

State executives can decree a State wide state of emergency should a national disasters or an epidemic occur. Particulars shall be determined in State Constitutions to be promulgated in conformity with this Constitution.

Accordingly, the Constitution of Amhara Regional State empowers the executive committee to issue a decree of emergency when the state Council of that regional state is not in session (Art. 54(8) of the Amhara Regional State Constitution).

In the regional States under discussion, both decrees and regulations are issued by the same bodies (the state executives). Moreover, both legislation are non-derivative. However, the

question is which one of the two is higher on the ladder of hierarchy? Decrees are issued in special circumstance with a view to avoid a series danger that may destruct the whole society. Thus, though both are issued by the same organ and have the same character (non-derivativity), Ayele thinks that decree should prevail over regulation. In general, hierarchies of laws in states (regions) seem to be the same with that of Federal State.

LEARNING ACTIVITY

- 1) Discuss the status of FDRE Constitution in the Ethiopian Legal System.
- 2) Which one is superior in hierarchy: the FDRE Constitution or international treaties that Ethiopia adopts?
- 3) Discuss the hierarchy of international treaties and other domestic laws in Ethiopia.
- 4) Analyse the hierarchy of Federal Legislation under the present day of Ethiopia.
- 5) Analyse the hierarchy of Laws the regions.

CONCLUSION

We have seen that the concept of hierarchy of laws indicates a chain of subordination between laws that emanates from the power chain of the lawmakers.

In the federal legal system, it is difficult to determine the hierarchy of laws of the federal and the states or regions in our case.

We have seen that the Constitution was, under the Revised Constitution of 1955, and the Derg regime and is now, supreme, i.e. it is at the higher level of the hierarchical order of laws. The 1955 Revised Constitution also granted supreme power to the emperor. Accordingly, the emperor had the final say on laws to be enacted. Proclamations, decrees and orders were under the Revised Constitution. In addition to these primary legislation, subsidiary legislation as orders, regulations, legal notice, general notice and notice of approval come to the next ladder below to the primary legislation. We observed that orders enacted by the Emperor have the character of primary legislation since the Emperor was empowered to enact them by the Constitution.

Coming to the PDRE Constitution of 1987, legislation enacted by the President and the Council of State stood second in the hierarchy to the Constitution. We have discussed that laws that were made by the National “Shengo” were superior to decrees and special decrees passed by the President and by the Council of State. What is more, special decrees made by the Council of State and approved and upgraded to proclamations have the same hierarchy with proclamations.

On the other hand, regulations and directives were subsidiary legislation. These came under the hierarchy of laws enacted by the Council of Ministers. Administrative regions were also empowered to enact directives, which were lower in hierarchy to regulations and directions, and directives issued by the Council of Ministers and each Ministry.

Under the 1994 FDRE Constitution, international treaties have been given the place of proclamation at the federal level. These international treaties and agreements, being part of the federal laws of Ethiopia, should not be affected by the laws of Regions. However, it is hard to determine the hierarchy between such treaties and agreements and the law of Regions.

Further, all laws (proclamations) made by the House of Peoples’ Representatives are second to the Constitution. Other laws enacted by subordinate bodies of the Federal State are inferior to the proclamations, except decrees enacted by the Council of Ministers in case of emergency. Such decrees may be promulgated as emergency proclamation where the House of Peoples’ Representative approves them.

Furthermore, we have seen that the House of Peoples’ Representatives enact regulations and directives according to the power given under proclamations.

Under Regions, Constitutions are superior in hierarchy. Regions have the power to enact emergency decrees where the State Council is not in session. The decrees should be submitted to the Councils and they may prevail over regulations made by the same body. We have seen that decrees come on the upper ladder compared with regulations in the regions.

REVIEW QUESTIONS

I) True/ False

- 1) At the present time, decrees are given equal status with proclamation.
- 2) The system by which we put laws in their order is known as hierarchy of laws.
- 3) Constitution is always at the higher in hierarchies of laws.
- 4) The Federal Legislation are higher in hierarchies of laws today in Ethiopia.
- 5) International treaties are under the FDRE Constitution.

II) Answer the following questions

- 1) Put the following legislation in their hierarchical order pursuant to PDRE Constitution: Decrees, constitution, special decrees, proclamations.
- 2) The supremacy of proclamations over the presidential special decrees and the special decrees of the council of states way not always true under the regime of PDRE. Explain.
- 3) Legislation may be classified as primary and secondary. Explain the criterion of doing this.
- 4) Where is the place of international treaties and agreements ratified by Ethiopia in the ladder of hierarchy of laws in Ethiopia? How do we can determine this?
- 5) Compare and contrast the hierarchy of law of Regional states and the Federal Government under the current legal system.
- 6) What is the status of decrees of emergency under the current regime of Ethiopia?
- 7) What is your attitude towards the hierarchy of laws in Ethiopia?

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UNIT SIX: INTERPRETATION OF LAWS

UNIT OBJECTIVES

After completing this unit, the student will be able to:

- discuss the general concepts of interpretation of laws;
- analyse the types of interpretation;
- state who interpret our Constitution;
- discuss the role of international agreements in interpreting the Constitution;
- analyse the rules of interpretation.

UNIT INTRODUCTION

Under unit five, we have learnt the hierarchy of laws. Determining the hierarchy of laws would help us in interpreting them. Interpretation of laws is the search for true meaning of a law where it is not clear. This unit is meant to discuss issues relating to interpretation of laws. Thus, general concepts of interpretation, including the definition, will be dealt with under this unit. Types of interpretation are also considered. Constitutional interpretation is also the area this unit focuses. Hence, the student will be acquainted with the constitutional interpretation in Ethiopia.

In addition, theories of interpretation of laws will be considered under this unit. Lastly, the rules of interpretation will be covered by this unit.

The unit is presented in a comparative manner so as to make a student to appreciate the similarities and differences of legal systems with regard to interpretation of laws.

A student should be encouraged to study practical cases in respect of interpretation of laws in Ethiopia, including the Federal Constitution. Some cases are included in this material to help the student to make him/her self familiarize to our practice. Thus, the instructor is kindly requested to encourage the students to interpret laws and acquire knowledge in addition to developing the skill of interpreting laws as lawyers.

Accordingly, the student must be assessed on the basis of his/her performance of interpreting laws and commenting upon practical cases.

6.1) GENERAL

All laws must be sufficiently clear and reasonably formulated to address their purposes. Laws should be clear not only to the lawyer but also to the layperson. However, this may not be achieved all the time. There may be certain situations that give rise the need to give meaning to a law.

What do we mean by interpretation?

Interpretation is a process of giving meaning to the phraseology of the law. It is reducing the law into reality. “Interpretation is the art or process of discovering and expounding the intended signification of the language used, that is, the meaning which the authors of the law designed to convey to others”[Garner; 2004: 837]. Interpretation of a law comprises of search for the soul of the law. The word interpretation can have a narrow meaning, i.e. finding the literal meaning of the words used and a wide meaning, i.e. ascertaining the intention of the law maker [M. A., Sujana; 2000: 181]

What is the distinction between interpretation and construction? [Paranjape; 2001: 217-18]

Although these two terms appear to connote the same meaning, but in fact it is not so. Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words, that is the sense in which their author intended to convey and enabling others to derive from them the same idea, which the author intended to convey. Construction, on the other hand, is the drawing of conclusion, respecting subjects that lie beyond the direct expressions of the text from elements known from and given in the text, conclusions which are in the spirit though not within the latter of the text.

Interpretation only takes place if the text conveys some meaning or the other. But construction is resorted to when, in comparing two different writings of the same individual or two different enactments by the same legislative body, there found contradiction where

there was evidently no intention of such contradiction or where it happens that part of a written or declaration contradicts the rest.

Why we need to interpret the law?

[Taken from Mohammed; 1999: 2]. Words are the only means for all legal instruments through which the intention of the lawmakers can be expressed. Because of the inherent nature of language, words are susceptible to ambiguity and vagueness. Such defect gives rise to bread and butter of lawyer thereby making the task of interpretation to be considered as an indispensable and inseparable attribution of the field of law. In this connection, Cooley's in Farani[1970: 584] writes;

The deficiencies of human language are such that, if persons skilled in the use of words prepared written instruments carefully, we shall still expect to find their meaning often drawn in question or at least to meet with difficulties in their practical application. But when [draftspersons] are careless or incompetent, these difficulties are greatly increased and they multiply repeatedly when the instruments are to be applied not only to the subjects directly within the contemplation of those who framed them but also to a great variety of new circumstance which could not have been anticipated but which must nevertheless be governed by the general rules which the instruments establish. Moreover, [there could be] different points of view from which different individuals regard these instruments themselves. All these circumstances tend to give to the subject of interpretation and construction great prominence in the practical administration of law.

In addition to the ambiguity created by the doubtful meaning of words, there are other instances where the words used, due to their inherent nature, do not express the legislative intent perfectly and thereby necessitate interpretation. Such is the case where the words used exceeds or fall short of expressing the meaning intended. As a result, most of the time over-vagueness and over-precision are considered as twin danger that must be avoided by

interpreter. This can be achieved by looking the general policy consideration of certain legal instrument thereby the interpreter tries to ascertain the true and exact intent of the lawmakers.

Further, the breadth and scope of human knowledge are very much limited, thus, the lawmakers cannot enact a law that will regulate every microscopically detail of human relation. In order to remedy such deficiencies, the legislature usually uses general words deliberately so as to enable certain legal instrument to accommodate new circumstances that have not been contemplated by the legislature at the time of law making. The vagueness created by the legislature leads to more room for interpretation there by enabling the court to handle new circumstances within the purview of the general policy consideration of the statutes.

In sum, we need to interpret law where the language is not clear, vague and to find the true meaning of the law to apply to certain situation.

LEARNING ACTIVITIES

- 1) Define interpretation of law.
- 2) Analyse the distinction between interpretation and construction.
- 3) Explain the situations that necessitate interpretation of law.

6.2) TYPES OF INTERPRETATION

Interpretation may be of different kinds. for example, we have grammatical and logical interpretations. Grammatical interpretation implies that the meaning of the law is to be sought in the actual words used in it, which are to be understood in their ordinary and natural meaning. In other words, where there is no ambiguity in the language employed by the statute any other interpretation except grammatical interpretation is permissible. This is known as *litera scripta* [Paranjape; 2001: 214].

Logical interpretation, on the other hand, is that which departs from the letter of the law and seeks elsewhere or some other or more satisfactory evidence of the intention of the

legislature. This is known as “*sententia legis*”. Interpretation may also be classified as doctrinal, judicial, or legislative interpretation depending on who interprets the law [Paranjape; 2001: 214].

6.2.1) TYPES OF INTERPRETATION IN GENERAL

Who interprets the law: the scholars, the court (judges), or the legislature? In answering this question, interpretation may be doctrinal, judicial or legislative. We shall now discuss, in turn, the doctrinal, the judicial and the legislative interpretation.

A) Doctrinal Interpretation

Doctrinal interpretation is that “which is made in books, in reviews, in the classroom”. It is performed mostly by the legal scholars when they lecture, prepare articles, and books. Apart from that, the doctrinal interpretation propounded by scholars has “no other use than to influence court decisions”. This is best achieved through commenting on laws and judicial opinions, grouping points of law involved in analogous cases, and stressing inconsistencies, if any, that may crop up in the judges decision. Therefore, scholars interpret laws and would help judges to solve practical cases. Ethiopian cases, being mostly unreported, cannot be, a system so discussed. In other jurisdictions, the influence of scholarly commentators is strong when their opinions are unanimous (*communis opinio doctorum*) and thus constitutes “doctrinal custom”. In Ethiopia, there is no custom of such scholarly commentators and it is imperative to develop the culture. In so doing the Supreme Court case reports would help us [What is Law].

B) Judicial Interpretation

When a case is lodged before the court, lawyers must argue why the law covers or does not cover the behaviour in question. Then, the judges must “find the meaning” of the law to decide whether it regulates the particular conduct at issue. This search for “meaning” is known as judicial interpretation [Paranjape; 2001: 214].

“Judicial interpretation is that which emanates from a court when, in order to decide a case, it applies a law whose meaning is discussed before it.” Administrative organs may interpret law to adjudicate cases. It is important to note that if the meaning is not disputed, no need of interpretation but a simple application of the law.

Where a law’s meaning is disputed before the court, the decision after interpreting the law may constitute what some call “settled” case law or judicial custom. Judicial interpretations thus become a source of law. “In the judgments alone is to be found the law in its living form.” This is hardly the case in Ethiopia, where most judicial opinions are not exhaustively researched and, being largely unreported, cannot be readily “found”. However, the Supreme Court is empowered to interpret laws on cases and the decision to be followed by lower courts.

C) Legislative Interpretation

Legislative interpretation is that made by the lawmaker. In ancient France, the king alone could interpret his ordinances. It followed, therefore, that when the meaning of one of them was doubtful judges should abstain from interpreting it, the action was suspended and the parties sent before the king in order to have the meaning of the law definitely established. At present, such appeals are no longer permitted, hence, a judge may not refuse to pass judgment on the pretext that the law is silent, obscure or insufficient. S/he would be guilty of a denial of justice. Under present Ethiopian law, such refusal to pass judgment might be charged as a breach of official duty under Article 420 Criminal Code, unless the law provides otherwise.

Now a day, we do not find the government (King, president) directly interprets the law. What is the fashion is that more frequently a law contains, from the outset, a section defining the main terms used in it. This technique, rather unfamiliar in continental Europe, is prevalent in common law countries and has been introduced in Ethiopia. (You can refer any proclamation, Art 2 that is the definitional provision).

6.2.2) INTERPRETATION OF STATUTES (Common Law)

What is a statute? Statute is defined as a law passed by a legislative body [Garner; 2004: 1448]. The term ‘act’ is interchangeably used as a synonym to statute.

Any positive enactment to which the state gives the force of law is a ‘statute’, whether it has gone through the usual stages of legislative proceedings, or has been adopted in other modes of expressing the will of the people or other sovereign power of the state [William M. Lie et al. Brief Making of Law Books in Garner; 2004: 1448].

In short, a statute is a written law enacted by the legislative body. In other words, the end product of the legislative process is a statute (also referred to as an act or legislation).

Since a statute is a written law, the language may be unclear or ambiguous.

When a statute is unclear with respect to a particular question, lawyers and courts generally begin their search for statutory meaning by asking the question: did the legislature intend this particular statutory provision to cover this particular fact pattern?

In Common Law, there are two tools for statutory interpretation: Canons of Construction and legislative history[Note taken from Supreme Court Compilation].

a. Canons of Construction

Canons of construction are judicially crafted maxims for determining the meaning of statutes.... Canons expressly intend to limit judicial discretion by rooting interpretive decisions in a system of aged and shared principles from which a judge may draw a “correct, ‘unchallengeable rule of ‘how to read’.

There are multitudes of canons. Some of those most frequently used by the courts are listed below with their commonly used Latin phrases in parentheses. The following are canons of construction:

- 1) A thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.
- 2) Statutes in derogation of the common law are to be read narrowly.
- 3) Remedial statutes are to be read broadly.
- 4) Criminal statutes are to be read narrowly.
- 5) Statutes should be read to avoid constitutional questions.
- 6) Statutes that relate to the same subject matter (*in pari materia*) are to be construed together
- 7) The general language of a statute is limited by specific phrases that have preceded the general language (*ejusdem generis*).
- 8) Explicit exceptions are deemed exclusive (*expressio unius est exclusio alterius*).
- 9) Repeals by implication are not favoured.
- 10) Words and phrases that have received judicial construction before enactment are to be understood according to that construction.
- 11) A statute should be construed such that none of its terms are redundant.
- 12) A statute should be read to avoid internal inconsistencies.
- 13) Words are to be given their common meaning, unless they are technical terms or words of art.
- 14) Titles do not control meaning.

The use of canons of construction for the interpretation of statutes has been held in scholarly ill repute for over a century. So consistently unfavourable has their use been viewed that two contemporary scholars of statutory interpretation have matter of – fact written that “almost everybody thinks that canons are bunk.

Canons of construction are criticised: first, that canons are not a coherent, shared body of law from which correct answers can be drawn, and second that, viewed, individually, many canons are wrong.

Another criticism of the canons... is that for every canon one might bring to bear on a point there is an equal and opposite canon, so that the outcome of the interpretive process depends on the choice between paired opposites—a choice the canons themselves do not

illuminate. (You need a canon for choosing between competing canons, and there is not any.)” [Richard A. Posner; 1983: 806].

Canons, as individual rules, are considered equally flawed. Canons are considered presumptions about legislative intent. To see this clearly, reread the canons listed above, adding the word *why* to each. For example, why should remedial statutes be read broadly? The answer to this question must be that this is what the enacting legislature intended, unless there is constitutional authority for another answer.

Canons, despite the criticisms, continue to provide judges (and consequently attorneys) with a necessary rationale for making interpretive choices. This is particularly true on the state level, where legislative history is slim and often inaccessible. In this context, some canons make sense. For example, without legislative history to the contrary, the canon that “explicit exceptions are deemed exclusive” would seem to be useful.

b. Legislative History

The formal steps of the legislative process are officially documented. In congress of the United States of America, ideas for legislation are introduced as bills or as amendments to bills; committee hearings, debates, and mark-ups (committee meetings at which bills are read line by line for review and amendment) are transcribed; committee actions are set forth and explained in committee reports; legislative debate is transcribed; and votes are recorded. For all legislatures, the documentation of these steps is part of the process of building majorities and providing the public with access to the work of the legislature. For the courts, this documentation is *legislative history*. However, significant steps in the legislative process are not recorded in the USA. The discussion of a bill on political issues, for example, might reveal very probative evidence of legislative intent, if documented, but, for various political reasons, it is not documented.

A legislative history of a statute might contain all or some of the following documents or documentation.

Introduction: the bill or bills through which the statute was introduced; the transcript of introductory remarks; memoranda that accompanies such introduction (New York, for example, requires introductory memoranda); and the record of a bill's assignment to committee should be consulted.

Committee Proceedings: transcripts of committee hearings, debates, and mark-up sessions; amendments; committee votes; and, finally, committee reports, which in Congress contain a statement of a bill's purpose and scope, a statement of the reasons for which a bill should be enacted, a section by section analysis, a statement of changes the bill would make in existing law, committee amendments to the bill, votes taken in committee, a minority report setting forth reasons for opposition to the bill .

Floor proceedings: transcripts of debates; floor amendments; and votes

Conference committee proceedings: conference committee reports are significant.

Executive proceedings: signing or veto statements and memoranda submitted in favour or opposition to the bill are also essential to interpret a statute.

Not every statute has as complete a legislative history as set forth above. Not every statute goes through every possible step of the legislative process. Not every state legislature transcribes committee debates or includes conference committees as part of the legislative process. In beginning a search for legislative history, two initial inquiries are important: First, what legislative steps has the statute been through, and second, which of these steps are documented?

Judges use legislative history as a tool for statutory interpretation. As Justice Breyer[1992: 848] has written, "Using legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute". It seems natural because, if the judicial goal is to discover whether the legislature intended to cover the particular conduct under litigation, intended to cover the particular conduct under litigation, reference to relevant legislative history logically advances that

goal. The value of legislative history as a tool of statutory construction is not universally accepted.

The criticism of the use of legislative history for statutory construction is two-pronged. First, it is argued that the use of it is inconsistent with the democratic theory encapsulated in the constitution. “Committee reports, for speeches, and even colloquies between ‘‘Congressmen... are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.’’ In this same vein, it is said that if the goal is to find the intent of the legislature,” [1] legislative materials... at best can shed light only on the ‘intent’ of that small portion of Congress in which such records originate; [the legislative materials] therefore lack the holistic ‘intent’ found in the statute itself” [Kenneth W. Starr; 1987: 375].

Second, serious questions have been raised about the reliability of legislative history. The sharpest example of this criticism comes from Justice Scalia [1989: 98-9] it is said that the information gathered from the documents about the legislative history is not reliable.

It is important to note that legislative history is only useful as a general guideline for statutory interpretation. Knowing, for example, that the committee reports are an extremely important part of congressional practice alerts one to the importance of committee reports but does not answer the question of whether a particular committee report is important to determine legislative intent with respect to a particular provision of a statute, every statute has its own legislative history that must be explored in the search for the meaning of the particular statutory language. Today, legislative history as a canon of construction gains acceptance. The court requires giving proper weight to the materials indicating the legislative history rather than automatically excluding such materials from consideration as an aid to interpret a statute [Avtar; 2006: 87].

Despite criticisms, canons of construction and legislative history are important tools of interpretation. In the United States of America it is fundamental that in construing the words of a statute “[t]he legislative intent is the great and controlling principle.” Indeed, “the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.” What is important is that where a problem as to the meaning

of a given term arises, a court's role is not to delve into the minds of legislators, but rather to effectuate the statute by carrying out the purpose of the statute as it is embodied in the words chosen by the legislature.

LEARNING ACTIVITIES

- 1) What are the tolls to interpret a statute?
- 2) Canons of construction are essential to interpret a law. Expound.

6.3) CONSTITUTIONAL INTERPRETATION

[Taken from MOHAMMED BENTI SIRAG, Senior paper, Addis Ababa University, Faculty of Law, 1997]

Constitutional interpretation envisages a situation where somebody tries to “effectuate the intent of those individuals who drafted the constitution and the electorate which ratified it.” Constitutional language is always the product of group effort and compromise and may be deliberately chosen to be bridge over difference of opinion. Therefore, the intentions involved, here, are the intentions of many individuals who participated to a greater or less degree at various stages in the process of constitutional draftspersonship and subsequent ratification.

The afore-mentioned intention hides a host of complication:

For one thing, an intention is a mental state. But the constitution was written and ratified by many people, not just one, and it is hard to see how group can literally have minds, mental states, or intentions...[for another] several groups are involved in constitutional making and they disagree deeply both among and within themselves... so, whose intentions are relevant? Many intent theorists claim that provision of the constitution should be interpreted according to the intention of the people who wrote them, namely, the framers. However, [others argue that] it was the ratifiers who turned the words of the framers into a part of the constitution, and it is the ratifiers,

not the framers, who represent the majority. Consequently, the concerns with democracy and with the creators of the constitution, which provide the main rationales for original intent theories, should lead original intent theorists to emphasize the intentions of the ratifiers.

Ato Mohammed agrees to the latter position because it is only upon approval by the ratifiers that the words of the framers have binding nature.

On top of the factors for interpretation of statutes, constitutional interpretation has its own peculiar character. Such peculiarity has to do with the very nature of constitution and the purpose for which the latter is enacted.

The judge is required to interpret the constitution by putting into consideration of its special nature. This makes constitutional interpretation different from other forms of interpretation. This fact is clearly demonstrated by Brandies Stone [in Mohammed; 1999: 6-7] in such manner:

Constitution is primarily a charter of government... Hence its provisions were to be read not with the narrow literalism of municipal code or a penal statute, but so its high purpose should illumine every sentence and phrase of the document and be given effect as of a part of harmonious frame work of government (Emphasis added)

In sum, constitution must be interpreted taking into account its nature.

With regard to the United States of American Constitution, H. Jefferson Powell, concludes:

It is commonly assumed that the “interpretive intention” of the Constitution would be construed in accordance with what future interpreters could gather of the framers’ own purposes, expectations, and intentions [Wellington; 2005: 50].

How we interpret the constitution? We have to start by searching for authoritative sources of law and should do so [Wellington; 2005: 48]. The text of the constitution is authoritative. It is also vague, sometimes ambiguous, which needs elaboration. The search for authoritative sources of law is therefore the search for interpretative tools [Wellington; 2005: 48].

The question is who should interpret the Constitution?

In general, some jurisdictions give the power to interpret the constitution to courts or other political bodies. The political, philosophical and historical factors peculiar to a given nature influenced the constitutional tribunal's jurisdiction, composition and procedure to be followed [Assefa; 2001: 6].

Some jurisdiction empowered their ordinary courts or their special constitutional courts to interpret constitutional issues. The American Model accords ordinary courts the general power to interpret the Constitution [Assefa; 2001: 7].

The centralized system, on the other hand, empowers one single special constitutional court to interpret it. For example, the German Constitutional Court is conferred the power to interpret the constitution. The court does not settle ordinary disputes unless the case involves a constitutional interpretation [Assefa; 2001: 8]. The FDRE Constitution empowers the House of Federation to interpret the constitution [Art. 62(1) and 83(1)].

The House of Federation is required to be helped by the Council of Constitutional Inquiry [Art.82 of FDRE Cons]. The members of the Constitutional inquiry are by large lawyers and this is made to assist the House of Federation by professionals. In addition, this would enable the constitutional interpretation balanced. That means the nature of political instrument and legal document of the constitution are to be taken into account to interpret the Constitution.

There are debates on the issue of interpretation of our constitution by the House of Federation. Some argue that the fact that it is interpreted by the House of Federation makes it political interpretation rather than professional one. The House may be biased by politics

in interpreting it. The House of Federation is not accessible to any body who wants to lodge a case for constitutional interpretation since it is situated in the parliament.

On the other hand, it is argued that the House of Federation being the political body can interpret the constitution without any political fear. In addition; the interpretation task carried on by the constitutional inquiry which mainly consists of lawyers, is the recognition of interpretation of the constitution by lawyers. It is also said that this fits to the unique character of our objective reality [See Mohammed; 1995: 39-48].

Which argument do you share? Reason out.

6.4) RULES /TECHNIQUES OF INTERPRETATION

6.4.1) RULES OF INTERPRETATION IN GENERAL

There are rules of interpretation of statutes that developed through time. We will discuss them under this part of the material.

A) The golden Rule of Interpretation [Paranjape; 2001: 214-18]

The main purpose of judicial interpretation is to ascertain the intention of the legislature. In ordinary cases the Judges must resort to grammatical interpretation for ascertaining the true intention of the legislature. The golden rule of interpretation is that “if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound words in their natural and ordinary sense. The words themselves alone do, in such cases, best declare the intention of the law-giver”

Lord Wensleydale called grammatical interpretation as the “golden rule” for the interpretation of statutes. He observed that in construing statutes and all other written instruments “the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnancy or inconsistency but no further.”

The golden rule of interpretation guides us to interpret words as they are employed in the statute. In short, grammatical interpretation is known as golden rule of interpretation.

B) The Eiusdem Generis Rule

According to *eiusdem generis* rule, a sweeping clause in a statute which says “all other articles whatsoever” may be interpreted to mean only articles of the same genus or species as those expressly dealt with by the statute.

Salmond gives an interesting example of *eiusdem generis* which serves to restrict the meaning of general words to things or matters of the same kind as the preceding particular words. If a man tells his wife to go out and buy butter, milk, eggs and anything else she needs, he will not normally be understood to include in the term, ‘anything else she needs,’ a new hat or an item of furniture.

It must, however, be remembered that where words are clearly wide in their meaning, they ought not to be restricted or qualified on the ground of their association with other words..

C) The Mischief Rule

The *Mischief Rule* was first enunciated in Hyden’s case. When the language of the statute in question cannot determine the true intention of the legislature, the court may consider the historical background underlying the statute, .i.e. the circumstances under which the Bill was introduced and it finally became law. The law is to be interpreted in such a way as to suppress the mischief and advance the remedy. The case of *Gorris v. Scott*, illustrates the rule. In this case the statute provided that animals carried on board a ship should be kept in pens. The defendant shipping company failed to enclose the plaintiff’s sheep in pens, and the sheep had been washed away by a storm. It was proved that if sheep were kept penned as required, they would have not been washed away. The English Court however, rejected the plaintiff’s suit for breach of duty on the ground that the Act had been passed to prevent infection from spreading from one animal to another and should, therefore, not be used to provide for an altogether different mischief.

As per the mischief rule the court must adapt the construction that shall suppress the mischief and advance the remedy [Avtar; 2006: 51].

D) Logical Interpretation

The logical interpretation has to be used when grammatical interpretation fails in ascertaining the meaning of the statute. If the words used in the statute are ambiguous and the true intention of the legislature is doubtful, logical interpretation may be resorted to in order to prevent the law from being misused. Thus, there can be two situations in which it is permissible to depart from the ordinary and natural sense of the words of the statute; namely, (1) it must be shown that the words taken in their natural sense lead to some absurdity, or (2) some clause of the statute is inconsistent with, or repugnant to the enactment in question.

E) Liberal Interpretation

When *litra-legis* suffers from ambiguity, liberal interpretation may be resorted to. Liberal interpretation may be either restrictive or extensive. The restrictive interpretation is applied to penal and fiscal statutes. These statutes impose restraints on the liberty of a person or on enjoyment of property. In such cases, Courts are not allowed to interpret these statutes, in a manner which impose a greater burden on the subject than warranted by literal meaning of the statute. In extensive interpretation, on the other hand, the words are given a wider meaning.

F) Historical Interpretation

At times when the language used in a statute gives no clue to the intention of legislature, courts may consider the historical circumstance attending the local enactment. But historical interpretation cannot be stretched too far. Thus, lord Wrenbury observed, “the debate upon the bill, the fate of amendments proposed and dealt with by the Committee of either House cannot be referred to, to assist in construing the language of the act as ultimately passed into law with the Royal assent.”

In several cases, it becomes necessary to take the help of preamble to know the real intention of the legislature. Preamble is a key which opens the gate way to the thoughts of legislators while framing a particular statute and it quite often helps in remedying the mischief.

G) General Rules of Interpretation

In common law legal system, courts have framed certain general rules for ascertaining the literal meaning of the words used in a statute.

Some of these rules are as follows:-

1. As stated earlier, the golden rule of interpretation is that the words of the statutes must *prima facie* be given their ordinary meaning. That is to say, so long as the meaning of the statute is clear, certain and unambiguous, judges should not interpret the law.
2. A statute must be read as a whole in order to give effect to the intention of the framers of it. As observed by Lord Davey, “every clause of a statute should be construed with reference to other clauses of the Act”.
3. It is not competent for any court to proceed upon the assumption that the legislature has made a mistake. The court must proceed on the footing that the legislature intended what it had said. Even if there is some defect in the phraseology used by the legislature, the court cannot aid the legislature’s defective phrasing of an Act or add and amend or by construction, make up deficiencies which are left in the Act.
4. No statute shall be construed to have retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary or distinct implication. It is the cardinal principle of construction that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have retrospective operation. A new law ought to regulate what is to follow and not the past.

It must, however, be noted that the statutes dealing with substantive rights and merely with matters of procedure are presumed to be retrospective unless such a

construction is textually inadmissible. In other words, if the new Act affects matters of procedure only, then *prima facie*, it applies to all actions pending as well as future...

5. It is an important rule of interpretation that a general latter law does not abrogate an earlier special law by mere implication. The rule is contained in the well known maxim: *Generalis specialibus non derogant* which means that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, it cannot be construed that earlier and special legislation is indirectly repealed, altered or derogated merely by the force of those general words.
6. The meaning of the word may be affected by its context. This is known as the rule of *noscitur a sociis* which means that the meaning of a word be judged by the company it keeps. Thus, sometimes the word “void” used in a statute may also mean “voidable” in the context of reference to that Act....
7. Penal statutes must be construed strictly. In case there is any doubtful word or phrase in a penal statute it should be construed in favour of the accused. This, however, does not empower the court to twist the meaning of the word which is clear and unambiguous for the sake of beneficial construction in favour of the accused.

The rules of interpretation stated above are, however, illustrative and not exhaustive. There are other rules as well which guide the court in construing the statutes.

It is significant to note that the political, social, moral or legal changes in a country greatly affect the principles of interpretation. The developing trend towards public interest litigation in modern times bears testimony to this change. The courts now a days tend to interpret law in context of modern social welfare policies through the process of judicial review.

In general, the rules of interpretation are no longer treated as mere compilations for the guidance of judges but they are taken as an instrument of affecting social change keeping

in view the needs of the society. The liberalization of *locus standi* rule in public interest litigation cases and expanding dimensions of epistolary jurisdiction of higher courts best illustrates the point.

LEARNING ACTIVITIES

- 1) Explain the general rule of interpretation.
- 2) Evaluate the historical interpretation.
- 3) Analyse the restrictive rule of interpretation.
- 4) Expound the logical rule of interpretation.
- 5) What do we mean by mischief rule of interpretation?

6.4.2) RULES OF INTERPRETATION IN ETHIOPIA [Biset Beyene; 2006]

Rules of interpretation are very important to judge the judge and to minimize the evils of interpretation. As a result, states fix or set rules and the judge should follow in interpretation.

Yet, Ethiopia does not have such rules for the draft prepared by the scholars in 1960 was not publicized. Yet, just like in the case of private international law which has remained as a draft, so does it mean that Ethiopian judges are free to interpret the law as they like?

This question cannot in any way be answered positively for it amounts to giving recognitions to and allowing the evils of interpretation, so, scholars provide that this vacuum or lacuna can be filled by applying the draft even though not published or by using laws of other countries in the same legal system with Ethiopia or following the rules of interpretation of contracts provided in the Civil Code or by combining all these alternative solutions. None of these except those in the Civil Code can, however, be binding for they are not laws recognized by the state. And again, which one of these solutions Ethiopian judges have been following in practice can not be authoritatively determined for there is no judicial custom yet developed to reveal out the uniformities in the rules of interpretation followed. Yet the civil code provisions dealing with interpretation of contracts can be used by analogy by making some *mutatis mutandis* (-i.e. necessary changes) to make them

applicable to law. Thus, “contract” and “intention of the contracting parties” can be replaced by “law” and “intention of the legislator” respectively, by analogy that arises from Article 1731 of the Civil Code which analogizes a law fully created contract with law.

In other words, if a lawfully created contract is binding as if it were law and rules of interpretations of the contract are also given, the same rules can be used by analogy to apply to law even for stronger reason.

Based on these provisions, particularly Articles 1733-1737 of the Civil Code, the rules can be seen to govern what should the judge do when there is:

- A) Clear law
- B) lack of clarity in law due to
 - I. Ambiguity of a word
 - II. Vagueness of a word
 - III. The intention of the legislator is not clear
 - IV. Total silence of the law
 - V. Partial silence of the law
 - VI. Inconsistency or contradiction

A) Clear law

As we have seen earlier, when the law is clear the judge is not allowed to make any interpretation pursuant to Art 1733 Civil Code which forbids not departing from the clear provision of the law. This is due to grammatical or literal interpretation we discussed above that provides that the literal ordinary and natural meaning of the law has to be applied as far as it is clear even if the law may seem injustice. As far as the law is clear the legislator is presumed to clearly say what it intended and also intended what it clearly said. Hence, there is no need to search for the intention of the legislator as it is clear from the law itself.

But, there is an exception to this rule in which the judge may go beyond the clear law. That is when it causes absurdity. For instance, a law provides that any person who inflicts injury of another is liable to pay damages. A physician may cause injury to the patients when

making operations, yet, can the clear law given be applicable to him/her to make him liable to pay damages to this patient? No, because if that would be the case it would create absurdity and that is not intended by the legislator.

B) Lack of clarity in Law

The law lacks clarity due to ambiguity or vagueness of the word in it or due to the legislator's intention itself, which is not clear. These are the situations under which interpretation becomes necessary to get the true meaning of the law.

I. Ambiguous Word

Ambiguous word refers to a word in the law which may have more than one meanings and it is not clear to which one of the meanings it refers. In this situation the legislator's intention must be sought to arrive at which of the meanings is intended by the legislator.

According to Art 1736 of the Civil Code the whole law must be read and used to choose the contextual meaning of the ambiguous word and this is by contextual interpretation.

II. Vague word

Vague word refers to a word in the law that has no clear meaning causing lack of meaning or absurdity. Just like in the case of ambiguous word, again contextual interpretation can be used. This is by reading the whole law and interpreting laws through one another referring to how the same word is used in the same law in different provisions and to arrive at the possible meaning in accordance to the subject matter of the whole law.

III. Not clear intention of the legislator

If the law is not still clear, due to the intention of the legislator which could not be arrived at through contextual interpretation, it requires going beyond the reading of the whole law.

The judge has to use “*expose de motif*” interpretation. That is searching the true intention of the legislator in the “*avan proje*” of the law. *Expose de motif* refers to the general policy behind the making of the law and this is to referring by the *avan proje* which means the research works undertaken when preparing the draft of the law and the discussion made when making it. This may help to arrive at what the legislator really intended in making the particular law. This is also called historical interpretation or mischief rule.

IV. Total Silence in the law

When the area has no law at all, it implies that the law is totally or completely silent on that particular area. For instance, the two situations rose as problems of lack of published law on areas of interpretation and private international relations are the good examples of complete or total silence. Hence, the solution becomes just only opinion and not binding or authoritative solution. Because, in civil law legal system unlike the common law it is only the legislative body and not the judge who has the power to make law and so, the judge cannot make law to fill the gap.

On the other hand, as far as the case falls under his/her jurisdiction the judge cannot refuse to give decision alleging that there is no law for that it would amount to breach of his/her constitutional duty and denial of justice. Hence, s/he may be forced to use any mechanism s/he thinks right and reasonable to decide the case. Some of such mechanisms may include referring to the draft of law or previous judgments if there are any in the country or referring to the laws and practice of other countries on similar issues.

V. Partial silence of the Law

Partial silence refers to the situation in which the law provides some rules yet not governing all the relations that fall in that area on which the law is made. This implies the existence of some relations, which ought to be governed by in the law but actually not.

In such case logical interpretation can be used to either include or exclude what is left outside the law. Some partial silences of law are logically incomplete which means they can be completed by logical reasoning using analogy. But other partial silences of law are logically complete in which logical interpretation can be used through reasoning to the contrary to exclude what is left outside the law.

Logically incomplete partial silence in law include illustrative listings of things or persons. These listings are examples and illustrations implying that other things or persons can be added to the list to complete it by using analogy and ejusdem generic principle i.e. law providing for a general class allows inclusion of similar things.

The things or persons in the list are only exemplary or illustrative and the things or persons not included and left outside may be of similar or of greater status.

If the thing or person left outside is of the same status a pari reasoning is used to include or add it to the list. A pari implies the same status. For instance if the law provides that all agricultural products should be taxed except products like maize and barley which are tax exempted. The issue whether or not wheat is tax exempted is to be treated under partial silence in law as it is an illustrative listing. Maize and barley are provided in the list as exemplary so that any other similar agricultural product including wheat can be added to it by analogy using a pari reasoning for maize, barley and wheat have the same status and there fore it is tax exempted.

What is left out from the illustrative list may even be logically included in to the list for stronger reason by using a fortiori reasoning. For instance if the law provides that a marriage may dissolve by divorce or death of one of the spouses, the issue whether or not a marriage may dissolve by death of both of the spouses can be

addressed using partial silence in the law which is illustrative listing to which other causes like death of both of the spouses can logically be added to the list.

Nonetheless, when the partial silences logically complete listing the things or persons left out should be excluded from the list by using the logic known as *contrario* reasoning. If for instance, the law provides that all cattle except sheep are tax exempted, the issue whether or not a goat is tax exempted can be decided by using a *contrario* reasoning. That is the law expressly exempts only sheep from taxation and there fore by reasoning to the contrary goats are not exempted. This is also what is known under the rule of “*expressio unius exclusion alterius*” (i.e. the law expressly providing only for one person or thing implies the exclusions of all others).

VI. Inconsistency or contradiction in law

Two provisions of the same or different laws may some times be inconsistent or contradictory. In such a situation, which of the provisions should be applicable becomes the issue that has to be decided by using rules of interpretation. There are three ways to decide this issue.

Firstly, the hierarchical position of the two laws must be seen. If they exist in different hieratical position like one in constitution and the other in primary or subordinate legislation, the rule applicable is the higher law prevails over the lower law. In other words, it must be the higher law that should be applicable and the lower will have no effect for it violates the higher law.

Secondly, the two provisions may exist in the same hierarchical position cannot serve to decide the issue, because both are in the same hierarchical position. In such a situation their effective date i.e. the date on which they entered in to force must be considered as a reference. Because, the rule is that the later law prevails over the former law (*exposterior derogate priori*). In other words, the new or recent law must be applicable and the old law will have no effect for it is assumed that the legislator who made a mew law that contradicts

with an old law of the same hierarchical position intended to repeal the old law by implication.

Finally, both the contradicting provisions may sometimes exist in the same law like for instance in the same code which implies that neither hierarchy nor effective date can be used to decide the issue because they are in the same hierarchical position even in the same law and also have the same effective date. The remedy for such a problem is referring to the nature of the laws whether one is general and the other is special rule in which it is usually the case. If one is in the general rules and the other is in the special rules *lex special derogate generalis* (i.e. special Rules prevail over general rules). Thus, the special rules must be applicable because they are special to the case at hand where as the general rules are applicable where there is no special rule governing the issue. Even though it may not arise in practice it is also possible to extend the issue to what would be done if both provisions in the same law are general or both are special. In this case it is possible to remedy the problem by applying the less general if both are general and the more special if both are special rules.

LEARNING ACTIVITIES

- 1) Explain the rules of interpretation of laws in Ethiopia.
- 2) Discuss the situation where we resort to expose de motive of a given law.
- 3) Discuss what would be done where the law is clear but its application would end up in vain.

CONCLUSION

We have seen that interpretation of laws means searching for the true meaning of laws as intended by the legislature. No matter how much effort has been exerted to make laws clear so as to make them able to address their purposes, it is not possible to avoid interpretation.

Interpretation may be made by judges while they are trying to solve disputes in the cases; this is called judicial interpretation. In addition, we have seen that scholars interpret laws when they write articles, books or giving lectures on laws. This is known as doctrinal

interpretation. Further, we have discussed that the legislature itself gives meaning to laws through the means of legislation and this is called legislative interpretation.

We have seen that there are canons of interpretation developed through practice and accepted by courts in common law system. They are:

- 1) A thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.
- 2) Statutes in derogation of the common law are to be read narrowly.
- 3) Remedial statutes are to be read broadly.
- 4) Criminal statutes are to be read narrowly.
- 5) Statutes should be read to avoid constitutional questions.
- 6) Statutes that relate to the same subject matter (*in pari materia*) are to be construed together
- 7) The general language of a statute is limited by specific phrases that have preceded the general language (*ejusdem generis*).
- 8) Explicit exceptions are deemed exclusive (*expressio unius est exclusio alterius*).
- 9) Repeals by implication are not favoured.
- 10) Words and phrases that have received judicial construction before enactment are to be understood according to that construction.
- 11) A statute should be construed such that none of its terms are redundant.
- 12) A statute should be read to avoid internal inconsistencies.
- 13) Words are to be given their common meaning, unless they are technical terms or words of art.

Considering the legislative history of a given statute is also important to interpret the same. Thus,

- a. Committee reports (including conference reports);
- b. Mark up transcripts;
- c. Committee debate and hearing transcripts;

- d. Transcripts of “hot” (actual) floor debate are important in interpreting a law.

Further, we have seen that the House of Federation has empowered to interpret the Constitution. The members of the House of Federation being politicians be able to interpret the Constitution as a political document. As to its legal aspect, the House is assisted by the Constitutional Inquiry whose members are mainly lawyers. However, the interpretation seems to be time consuming.

Furthermore, we have discussed that the provisos on human rights of the Constitution shall be interpreted in light of the international instruments of human rights.

We have seen that the rules of statutory interpretation. Pursuant to the golden rule , grammatical interpretation should be relied on and the grammatical and ordinary sense of the words should be adhered to unless that would lead to absurdity. The ejusdem generic rule restricts the general words to refer to specific things. According to the mischief rule the background of the law (legislative history) should be considered to interpret the law to find out the meaning intended by the legislature. We have also seen that logical interpretation is a rule to ascertain the meaning of an ambiguous word. The other rule which we discussed is the literal interpretation.

REVIEW QUESTIONS

I) True/ False

- 1) Interpretation is the searching for the true meaning of a given law.
- 2) Interpretation made by taking only the words of the law is called literal interpretation.
- 3) If the law is clear it is possible to interpret to favour the party.
- 4) Rules of interpretation of a statute could also be used to interpret constitution.

- 5) In our country the Federal Supreme Court has the power to interpret the FDRE Constitution.

II) Chose the best answer

- 1) An interpretation of a given law taking into account the debates made in the parliament and the minutes of discussions is called_____ interpretation.

A) literal B) historical C) grammatical D) all

- 2) An interpretation of a statute with the intent to curb the mischief is known as _____

A) mischief interpretation B) *ejusdem generic* rule C) mischief rule D) all

- 3) In Ethiopia it is important to interpret the law where it is

A) ambiguous B) vague C) lacks clarity D) all

- 4) A body empowered to interpret the FDRE Constitution, is

A) the Supreme Court B) the High Court C) the House of Federation D) none

- 5) The Organ which role is to helping the interpretation of the FDRE Constitution is

A) Constitutional Organ B) Constitutional Inquiry C) Court D) all

III) Answer the following question

- 1) What do we mean by literal interpretation?
- 2) Discuss the merits of entrusting the power to interpret the Constitution to the House of Federation.
- 3) What are the demerits of entrusting the power to interpret the Constitution to the

House of Federation?

- 4) Discuss the grammatical interpretation.
- 5) Do you appreciate the importance of the rules of interpretation of laws?

IV) Practical Cases

Civil appeal case number 1436/80

Appellant- Orbis Trading and technique Section

Respondent- Payment Department of the Ministry of Finance

Facts of the case

The now appellant Orbis lodged a claim against an individual named Bekele Mengesha, and have a decision for the payment of Birr 2367.07 with legal interest and started execution. Birr 1760.00 was put in the Ministry of Finance by Model 85 in the form of bail. The court in execution of the decision wrote a letter to the Ministry of Finance Department of Payments for the payment of money. But the Department in the Ministry refused payment arguing that it had received a order from the Council of Ministers dated Tikmet 14/1976 unless the claimant submits evidence as to the payment of tax. The case was brought to the High Court and the Court decided that the judgment creditor should give the evidence asked by the Department. Then an appeal was lodged to the Supreme Court.

The issues of the case

The Supreme Court has framed two issues:

- A) whether the order given by the Councils of Ministers is applicable on the money put by the order of the court; and
- B) Whether the Department could refuse payment of money out in the form of bail.

Reasoning of the Supreme Court

The Supreme Court reasoned that the order given by the Council of Ministers did not directly address the money put in the Department. The court reasoned that the order did not apply to the case in hand since it was applicable sell of moveable and immovable. It argued that it was not appropriate to make wider interpretation beyond the words of the order so as to govern the issue at hand.

With regard to the second issue the Court reasoned that the Department could not refuse payment of the money it is given in the form of bail unless and otherwise it is given a right decided by court.

Decision

The court decided that the decision of the High Court was erroneous and be dismissed.

Questions

- 1) Which principle of interpretation was applied by the Court? Reason out.
- 2) Do you agree with the interpretation of the Court? Why or why not?

Case No – Civil Appeal Case Number 73/81

Appellant-Shbru Kelecha

Respondent-Siraji Ali

The supreme court examined the case and decided as follows:

Facts of the case

The respondent was the claimant in the High Court lodged a claim saying that she had an agreement with the now appellant- On 27/3/77 and 28/3/77 E.C. She sold sheets of clothes as she imported from Djibouti with Birr 90,000.00 (ninety thousand Birr), and she pleaded the appellant to pay her the remaining Birr 20,000.00 (Twenty thousand Birr), accepting that she had received Birr 70,000 (seventy thousand) in several times without a receipt. The then defendant denied the claim saying that there is no evidence as to the claim. Then the High Court has examined the witnesses of both parties and the written evidence and

decided that the now appellant should pay the money and other costs as well. The appellant applied from this decision to the Supreme Court.

The issues

The Supreme Court has framed the issues of the case as:

- the first issue is whether it is possible to prove the case by oral evidence;
- Second, whether there is a trade relationship between the parties.

Reasoning of the Supreme Court

The Supreme Court reasoned that as per Art 2273-2302 of the Civil Code, the sales and payment transactions should be proved by the written evidence and admission made in court or affidavit. The witness evidence of both parties is irrelevant according to Art. 2472(1).

The appellant gave an admission in High Court on 10/3/79 E.C and the Supreme Court reasoned that such evidence is relevant and admissible to the case at hand. Finally, the Supreme Court decided that since the appellant admitted in the High Court that he had received the clothes worth Birr 90,000.00, such evidence is admissible under Art. 2472(1) of the Civil Code, and decided that the applicant is liable to pay the 20,000.00 Birr by majority. However, one of the judges dissented by opinion. He argued that the appellant should be set free from the liability.

He argued that the Amharic version of the Civil Code Art. 2472(1) makes a reference to Arts 2472-2302 in parenthesis, where as the English version makes reference not as the same as the Amharic but after the phrase “the liability of the borrower”. Thus, he dealt the principle of interpretation of law when there is a discrepancy between the Amharic and English versions. He argued that in such a case the Amharic version often prevails over the English one.

He continued his argument that the provisions of Arts. 2474(1) expresses the burden of the seller and the provisions of Art. 2472(1) are not applicable in Arts. 2273-2302 of the Civil Code. Finally he concluded that he should be set free.

Questions

- 1) Identify the principle of interpretation applied in the case. Give your reasons.
- 2) Do you agree with the interpretation of the provisions in the case? Reason out.

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UNIT SEVEN: JURIDICAL ACTS

UNIT OBJECTIVES

At the end of this unit, you will be able to:

- define juridical acts;
- analyze the nature of juridical acts;
- explain the importance of juridical acts;
- state common rules applicable to all types of juridical acts; and
- compare and contrast the rules with those incorporated under our laws;

UNIT INTRODUCTION

To achieve the above-mentioned objectives, we will be discussing the definition and importance of juridical acts, first. Secondly, the nature of juridical acts is to be discussed. Next, we will learn the rules common to all juridical acts. Further, we will consider the effects of juridical acts. We will summarise the unit by pointing out the main points. What is more, questions are included with the intent to help the student to check his/her progress in learning.

7.1) DEFINITION AND IMPORTANCE OF JURIDICAL ACTS

[Konard Zweigert and Hein Kotz, INTRODUCTION TO COMPARATIVE LAW(SECOND Revised Edition), Clarendon Press, Oxford,(1992), page 348]

Juristic act- is defined as “as act that is intended to create, transfer, or extinguish a right and that is effective in law for that purpose.” [Garner; 2004: 26]. It is also explained as “the exercise of legal power” [Garner; 2004: 26].

Yiannopoulos noted that according to the contemporary civilian analysis, the most important of the events by which legal relations are formed, transferred, altered or terminated are lawful volitional acts are called “juridical acts”. A juridical act is ordinarily defined as a **declaration of will by a private person directed to the creation of intended**

legal consequences. The term juridical act thus is broader than contract or even agreement. It includes, for example, a demand to vacate the premises to a lessee, a declaration by which a party wishes to avoid a contract on the ground of fraud, the grant of authority to an agent, and the making of a testament.

The essential element in every juridical act is the declaration of will. Sometimes the juridical act consists of nothing else but the declaration of will as in the case of a testament. Sometimes, however, the declaration of will must be accompanied by another act of one or several of the parties.

It is characteristic of juridical acts that the legal result to which the declaration of will is directed be **intended**. This distinguishes juridical acts from another category of lawful volitional acts, which result in legal consequences by the operation of law, regardless of the intention of the maker. For example, a demand of rent due may bring about the quite unintended result of putting the lessee in default as to his obligations deriving from the contract of lease. These acts, termed **quasi-juridical** acts, are in principle subject to the same rules governing juridical acts applied by analogy.

Juridical and quasi-juridical acts are distinguishable from a third category of lawful volitional acts termed **material acts**. These consist in some action or physical relationship to which the law attributes certain consequences. Such is the specification, i.e., the acquisition of the ownership of a moveable by what is styled in the Louisiana Civil Code as the “right of accession” (Article 526). Material acts are also: the occupancy of a *res nullius*, the finding of a treasure or of lost things, and the writings or composition of a literary work. The rules governing juridical acts have no application to material acts.

Events other than lawful volitional acts (i.e., juridical acts, quasi juridical acts and material acts) by which legal relations are formed, transferred, altered, or terminated are **unlawful acts** (i.e., offences and quasi offences), physical facts (i.e., the birth or death of human being, an earthquake or a fire), and the acquisition of a certain personal **status** (i.e., minority, majority, or citizenship). These various events are subject to special rules, materially different from those applicable to juridical acts.

LAWYERS on the Continent, particularly in Germany, are familiar with the notion of juristic act (*Rechtsgeschäft*). The expression '*Rechtsgeschäft*' (juristic act) is quite recent and developed by scholars in Germany. The French legal regime also incorporates the doctrine of juridical acts. In Italy, the doctrine of juristic act is incorporated in the Civil Code. The common law legal system accepts the continental doctrine of juridical acts. Thus SALMOND deals with juristic acts and distinguishes between those 'vestitive acts' which are 'voluntary' and those which are 'involuntary'; the *Realakte* of German doctrine he calls 'acts of the law' while *Rechtsgeschäfte* are called acts of the party' or acts in the law (see jurisprudence (10th edn., 1947) 345 ff.). So also when HOLLAND speaks of 'juristic act' he is referring to the *rechtsgeschäft* of German doctrine (see Jurisprudence (13th edn..., 1947) [Konard and Hein; 1992: 348].

7.2) GENERAL THEORY AND CLASSIFICATION OF JURIDICAL ACTS

[Planiol, Traite elementaire de droit civil, Vol. 1, part 1, 187-90 (translation by the Luisiana State Law Institute, 1959)].

Most of the legal relations which exist among men spring from juridical acts. Those acts, which are performed solely in order to bring about one or several legal effects, are called juridical acts. They are said to be juridical on account of the nature of their effects.

Juridical acts, their forms, their conditions and their effects constitute in themselves alone, the principal subjects of the science of the law. They are most diversified. The rules especially applicable to each category will be explained in the appropriate place. But there are a few elementary rules common to all juridical acts, or which suffer but infrequent modifications. It was formerly customary to set forth these common rules, without order or method, whenever they arose in connection with a given act. They thus lost something of their identity and importance. Their generality and their value were not perceived. It is worthwhile grouping them by themselves in order to make them stand out.

A) The number of wills uniting in the act: To perform a juridical act, there must be, in principle, at least two persons. The reason for this is that most juridical acts are contracts, that is to say, a meeting of minds between two or more persons. In this case, those who

figure in the juridical act as its authors or makers are called “the parties to the act” or more briefly “the parties.” The term “consent” is applied to the conformity of the will of each of the parties to that of the others. It denotes that concordance of wills which collaborate in the formation of the act.

The number of persons who may be parties to an act is not limited. It may attain any figure. Example: the founding of a big company, made up of shares, may bring together several thousands and even several hundreds of thousands of shareholders.

It is possible that a juridical act will be performed by a single person acting alone; that it be the work of a single will. Examples: the drafting of testament; an offer to sell, to buy, etc: the acceptance or repudiation of succession.

In these examples, the singleness of the will is but apparent or it may even be temporary. Thus, the testament, or the offer of sale, can of themselves and by themselves have no effect. It is necessary that later on another will be found to join the first. Moreover, it is only then that the juridical effect takes place by the acceptance of the legacy, or of the offer. Even in the case of succession *ab intestato* this meeting of wills is discernible. The offer of the succession is made by the lawmaker, who often confines himself to presuming the probable will of the deceased. He does so when he attributes a succession to this or that relative. When, nevertheless, the whole act is divided into two parts, an offer followed by an acceptance, as each of the party’s acts separately and is governed by rules appropriate to his act; each may be considered to be an isolated juridical act, accomplished in each instance by a single will.

B) Classification Juridical acts are distinguished into unilateral and bilateral; those addressed to a particular person and those addressed to anyone; *intervivos* and *mortis causa*; onerous and gratuitous; obligatory and real; promissory and dispositive; causal and abstract.

Unilateral juridical acts are those completed by the declaration of will of only one person or by identical declarations of several persons acting in the pursuit of a common interest. For example, the notice of termination of a contract, the promise of a reward, and the

execution of a testament are unilateral juridical acts. Juridical acts, which require several identical declarations of, will, not complementary to each other, as where several parties meet to form an association or where co-lessees give notice of termination of the lease, are specifically called joint juridical acts. Bilateral juridical acts are those completed by corresponding declarations of will of several persons acting independently and in the pursuit of individual interests. According to this definition, all contracts are bilateral juridical acts.

* * * *

In general, a unilateral act is one in which the will of only one party is operative: a testamentary disposition is the best example here. A bilateral act, on the other hand, is the result of an agreement between two or more parties [Paton; 1967: 282].

* * * *

Juridical acts are distinguished, in the second place, according to whether the declaration of will contained therein is addressed to a particular person or anyone. Offers, an acceptance, the rescission of a contract, the revocation of donation, and the acceptance or renunciation of a legacy are examples of juridical acts addressed to a particular person. The promises of a reward, the execution of a testament, and the acceptance or renunciation of a succession are examples of juridical acts not addressed to any particular person. Juridical acts of the first kind are complete and effective only after communication to the addressee whereas juridical acts of the second kind are complete and effective merely upon objective manifestation of the declaration. The distinction thus has practical consequences and bears, particularly, upon the maker's power to revoke his declaration of will: upon the completion of a juridical act and its becoming effective revocation is excluded unless the law provides otherwise, as it does for example in the matters of mandate, emancipation of a minor, and *mortis causa* dispositions.

In the third place, juridical acts are distinguished into *inter vivos* and *mortis causa*. *Inter vivos* juridical acts are those designed to produce effects while the person who declares

his/her will is still living. *Mortis causa* juridical acts are those designed to produce effects only after the death of the person who declares his/her will

Juridical acts, “considered in relation to the motive for making them, are either gratuitous or onerous”. This fourth division of juridical acts rests on the *motive causa* of the maker which can be either gratuitous (*causa lucrativa*) or onerous (*causa onerosa*). According to Article 1773 of the Civil Code of 1870, “to be gratuitous, the object of [the juridical] act must be to benefit the person with whom it is made, without any profit or advantage received or promised as a consideration of it”. A pure and simple donation, the institution of an heir, the giving of a legacy, and the contracts of mandate and loan for use are examples of gratuitous juridical acts. On the other hand, “anything given or promised as a consideration for the engagement or gift, any service, interest or condition, imposed on what is given or promised, although unequal to its value, makes [a jurisdiction act] onerous in its nature”. All reciprocal and all communicative contracts are, by definition, onerous contracts.

The fifth division of juridical acts is into obligatory and real. Obligatory juridical acts are those creating, transferring, altering or terminating obligatory rights where as real juridical acts are those creating transferring altering and terminating real rights. This division, resting on the nature of rights affected by a particular juridical act, may be fully comprehended only in the light of the general theory of rights. Quite frequently, both kinds of juridical acts are combined in a single transaction. The sale of property, for example, involves an obligatory juridical act (i.e., the promise to transfer ownership) and a real juridical act (i.e., the delivery or transfer of possession).

In the sixth place, juridical acts are distinguished into promissory and dispositive. Promissory is one involving an obligation to make a performance, i.e., one containing merely the promise of a performance. The contracts of mandate, of lease, and of loan, and the unilateral juridical acts of the promise of a reward and of a legacy are examples of promissory juridical acts. Dispositive juridical acts, on the other hand, are those by which rights are transferred, altered, encumbered, or terminated, i.e., those containing a disposition. The term is of great importance in continental legal terminology. The creation

of a mortgage is a dispositive juridical act because the right of ownership is there by encumbered. The concept of obligatory juridical acts is broader than that of dispositive juridical acts. Indeed, an obligatory juridical act may involve the transfer or termination of an obligation, i.e., a disposition, as in the case of the remission of a debt.

Lastly, juridical acts may be distinguished according to contemporary civilian theory into causal and abstract. This distinction will be fully understood in the light of the theory of cause.... It suffices to state for our present purposes that, ordinarily, juridical acts are made by parties having a definite purpose or cause in mind. There are three kinds of causal acts: the *causa solvendi* (discharge of an obligation), the *causa donandi* (conferment of a liberality), and the *causa adquirendi* (acquisition of something). Existence and law fullness of cause are prerequisites for the validity of obligations in Louisiana. Indeed, according to Article 1893 of the Civil Code of Louisiana “an obligation without a cause, or with a false or unlawful cause, or with a false or unlawful cause, can have no effect.”

The relation between a juridical act and its underlying cause may be one of identity and complete interdependence. Indeed, the cause may be so closely interwoven with the content of the juridical act that the validity of latter may depend entirely on the existence and lawfulness of the former. In this case the juridical act is termed causal. On the other hand, juridical act and underlying cause may not so closely interwoven and the validity of the juridical act may be quit independent of the existence and law fullness of the underlying cause. In this case, the juridical act is termed **abstract**

In civil law systems, and indeed in all western legal systems, causal juridical acts constitute the rule. This is particularly so in the case of the so called nominate contracts which, like sale, lease, mandate loan, are subject to detailed regulation in the various civil codes. A case is inherent in the nature of these contracts. Abstract judicial acts are recognized as valid only in exceptional cases for the purpose of facilitating commerce and securing certainty of transaction and acquisition. In addition, even when recognized as valid, abstract judicial acts are looked upon with a measure of suspicion as they may well conceal the absence of unlawfulness of underlying cause.

In the framework of the central European legal systems, the abstract juridical acts are quite numerous though still only exceptionally recognized by the law. The transfer of movables, the remission of a debt, the ratification, the assignment, the novation, the acknowledgment of a debt and the procreation are examples of juridical acts of the civil law, which are abstract in character. Certain juridical acts of the commercial law, such as promissory notes, letters of exchange and cheques may also be added to this.

In the framework of the French legal system, the notion and the function of abstract juridical acts have been controversial matters. Article 1132 of the French Civil Code, corresponding to Article 1894 of the Louisiana Civil Code 1870, provides that “an agreement is nonetheless valid, through the cause be not expressed. It has been suggested in France rather unsuccessfully, that the purpose of this article is to permit the creation of abstract juridical acts by the parties and to attribute to these acts a function corresponding to that of similar acts in central European system, i.e., to secure the effectiveness of abstract juridical acts even where there is proof of absence or of unlawfulness of the underlying cause. According to the prevailing view, the purpose of this article is merely to enable the creditor of an abstract title (billet non-cause) to bring action with out having to prove the underlying cause and to recover on the basis of document, unless the debtor proves the absence or unlawfulness of the underlying cause.

LEARNING ACTIVITIES

- 1) Explain the concept of juridical acts.
- 2) Analyse the classification of juridical acts
- 3) What do you understand by an abstract juridical act?

7.3) RULES COMMON TO ALL TYPES OF JURIDICAL ACTS

7.3)1. PRE-REQUISITES FOR THE VALIDITY OF JURIDICAL ACTS

[Notes taken from Sockrider, The Concept of Juridical Acts and Its Embodiment in the Louisiana Civil Code, a term paper presented in the course on foreign and Comparative Law, 1962].

There are six pre-requisites for the validity of juridical acts:

A) General legal capacity Under the Louisiana Civil Code, there are two types of persons: individuals, and corporations. Individuals are given general legal capacity to receive and transmit legal rights, without distinction being made between males and females. The code further, indicates that all persons, even incompetents, may transmit and receive property *ab intestao*, though they may not have the specific capacity to make a judicial act. Specifically, minors and idiots are seized of successions. Further, all persons may dispose of or receive by donation, except those specifically declared incapable. Lastly, the general capacity of individuals to contract is found in Article 1782 of the Louisiana Civil Code.

Corporations are granted the same general legal capacity to be subject of rights as individuals, except for certain limitations imposed on them by their nature or by law. Art. 440. For example a corporation cannot administer a trust, be imprisoned, or bring an action for assault and battery.

B) Specific legal capacity The Louisiana Civil Code contains detailed provisions concerning what can be classified as the specific legal capacity to make juridical acts. Treatment of these provisions will be subdivided for purposes of clarity into the following types of incapacities: insanity; minority, civil death; married women; and special incapacities.

Insanity- under the Louisiana Code, insane person cannot give their consent freely; hence, they cannot make juridical acts. Proof of interdictions is considered sufficient to establish that a person is without capacity to make juridical acts after his/her interdiction, but not prior to interdiction. Where insanity is alleged to avoid a gratuitous contract, it is unnecessary to show the insanity was generally known; however, to invalidate an onerous contract, it is necessary to private person seeking avoidance knew or should have known of the insanity. Further, if the insane person is seeking avoidance, and the defence is that the juridical act occurred during a lucid interval, the party seeking to prove validity of the act has the burden of proving the lucid interval.

The Code further provides that a person who is not insane, but is suffering from temporary mental derangement, such as drug addiction or drunkenness, lacks capacity to make a juridical act during this period of time if his situation and incapacity are apparent.

In addition, the Louisiana Code restricts the formation of juridical acts by providing that one who is incapable of contracting obligations, such as an interdict, cannot accept an inheritance; but his curator can accept by pursuing certain formalities. Since only one who has the capacity to alienate can renounce a succession, an interdict cannot validly renounce without the judge's or his curator consent.

An insane person, according to Art. 339 of the Ethiopian Civil Code, is one who, as a result of insufficient development of mind, or mental disease or senility, is not capable to understand the consequences of his/her action. Persons who are feeble minded, drunkards or habitually intoxicated persons who are prodigals are in appropriate cases assimilated to insane persons.

Minority-The Louisiana Code provides that age forms a distinction between those who do and do not have enough reason and experience to govern themselves, (Art. 34) and determines the ages at which minors may perform certain juridical acts. Article 26 indicates that children are subject to potential authority, but article 35 allows them to be emancipated from that authority without disturbing those effects derived from natural right.

A minor under sixteen cannot dispose of property *inter vivos* or *mortis causa*; if over sixteen, however, s/he can dispose *mortis causa* but not in favour of his/her tutor or instructor. However, if the minor's contracts are made with the consent of his/her tutor and the assent of a family meeting, the contracts are valid. Further, a minor's contracts or quasi-contracts for necessities or an education are valid.

A minor of fifteen may be emancipated by his/her parents, or of eighteen, by a judge. In these two emancipation situations, the minor acquires the capacity to administer his/her estate, but cannot obligate him/herself for a sum exceeding one year of his/her income, alienate or mortgage his/her immovable without court consent, or dispose of his property

by donation *inter vivos* except by marriage contract. Yet, if the emancipated minor is engaged in a trade, all his acts relating to the trade are valid.

Minors may also be emancipated by marriage. If under eighteen, they acquire the same capacities bestowed on minors emancipated by parental or court consent; if eighteen, they have the same capacity as majors.

All emancipated minors may sue for the partition of their estates, but apparently can neither accept nor renounce a succession falling in their favour. Lastly, emancipation by parental or court consent may be revoked if the minor contracts contrary to his authority; but if emancipated by marriage, the emancipation is irrevocable.

Coming to Ethiopia, pursuant to Article 215 of the Revised Family Code, a person who does not attain eighteen years of age is called a minor. A minor has no legal capacities. Consequently, a minor “shall not perform juridical acts except in the cases provided by law” (Art. 216(3) of the Revised Family Code). A minor is not allowed to exercise the functions of guardian or tutor because s/he is incapable. However, a minor can exercise the functions of a guardian over his/her child(ren), (Art. 242 R.F.C.).

In Ethiopia, a minor is not allowed to make a Will. However, s/he can make a Will where s/he attains the age of sixteen years (Art 295(2) of the R.F.C). The Will made by a minor before attaining sixteen years of age must be of no effect, even though the minor attains the age of sixteen years after s/he made the Will (Art. 295(3) of the R.F.C).

A minor may be authorized by the tutor to conclude only contracts pertaining to acts of everyday life. The authorization may be implied (tacit) (Art. 292 of the R.F.C). A juridical act which requires the authorization of the court is excluded from the ambit of acts of everyday life. In addition, a juridical act that entails an expense or obligations the value of which is more than three hundred Ethiopian Birr is not an act of everyday life (Art. 293 of the R.F.C). For example, a minor cannot donate a property the value of which is more than three hundred Birr, say Birr 320.

According to Article 310 of R.F.C. disability of a minor must cease at the time when a minor attains majority, i.e. the age of eighteen; or where s/he is emancipated. An emancipation of a minor may result from two reasons: first, a minor will emancipate where s/he concludes a marriage before 18 years of age but after 16 years of age (Art 311 of R.F.C); secondly, a court may decide on the emancipation of a minor who attains fourteen years of age for the best interest of the minor (Art. 312 of the R.F.C). For example, a court may decide a minor to emancipate so as to be employed on the application of his/her tutor, guardian or any interested person (Art 312 R.F.C)

Civil death- what is civil death? Though at early civil law there existed incapacity called “civil death” depriving convicts of the capacity to make juridical acts, this does not exist in Louisiana today. The Code merely provides that persons interdicted for crimes have the capacity to contract with anyone other than persons having power over them during their confinement. In Ethiopia the criminal court may decide an accused not to exercise his/her rights, like to be a witness, or to carry out trade and profession (Art. 123 Of the Criminal Code).

Married women- Pursuant to Art. 34 of the Constitution of the Federal Democratic Republic of Ethiopia, women are equal with men at the time of entering into, during marriage and at the time of divorce. What is more, no woman is allowed to conclude a marriage before attaining eighteen years of age (Art. 7(1) of the R.F.C). In all respect, women are equal with men. Therefore, married women can make juridical acts so long as they are capable in other respects.

B) Declaration of will- The second pre-requisite for the validity of juridical acts is that the actor must declare his/her will that is directed towards the creation of legal consequences. The declaration may be either express (verbally or in writing), or implied (by action, inaction, or silence).

The Louisiana Civil Code provides generally that one’s intention to make a juridical act must be evidenced in some manner that causes it to be understood by the other parties to the act. Specifically, the Code allows the declaration to be either express or implied, but

article 1766 indicates that in bilateral contracts the declaration must be express, but that in unilateral contracts it may be implied. In certain situations, the declaration may be expressed by silence or inaction.

A problem is the time at which the declaration of will would be regarded as completed. Three general approaches have been taken for a solution to this problem, namely: the expression theory, the receipt theory, and the knowledge theory. Under the expression theory, the declaration is considered completed as soon as expressed. Under the receipt theory, the declaration is not completed until the party to whom the juridical act is addressed receives it, whether or not he understands the declaration. Lastly, under the knowledge theory, the declaration is completed only upon its receipt and an understanding of it by the party to whom it was directed. The knowledge theory is used by most civilian jurisdictions.

C) Correspondence between declaration and will- The third general pre-requests for the validity of a juridical act is that there must be a similarity between that manifested and that intended. If there is no correspondence between these elements, there are conflicting views as to the consequence. One view, the theory of the will, takes a subjective approach by saying the controlling factor is what was actually intended. Another view, known as the **Manifestation** Theory takes an objective approach, and concludes that what is actually expressed controls.

The problem of correspondence between declaration and will arises in two contexts: where there is an intentional difference between the two; and where the difference is **unintentional**. Intentional differences may result from one or both parties' mental reservations or the use of words which would usually amount to a juristic act, but with an obvious lack of intention that they should have that effect. Unintentional differences may be the result of "essential" errors. It has been said that the prevalent view is that a lack of correspondence between the declaration and will is a ground of nullity except in the case of intentional differences.

Under the Louisiana Civil Code, article 1815 sets forth the basic premise that in order for a juridical act to be valid, the declaration of intention should be serious. In the case of “simulation” which is intentional differences, the transaction is considered valid as between the parties, such as creditors, bonafide purchasers and forced heirs. Where property sold remains in the vendor’s possession or control, Article 2480 establishes a presumption of simulation. On the other hand, the Code provides that where immovable property is involved, third parties are bound by the recorded manifestation, regardless of the parties’ actual intention.

Unintentional differences occur between the manifestation of intention when there exists either an error of law or fact. The Louisiana Civil Code contains detailed provisions dealing with both errors of law and errors of fact. Errors of law are defined as erroneous legal conclusions based upon the particular facts involved. An error of law which relates to the principal cause of the juridical act invalidates the act, except where one undertakes to perform a moral obligation under the conception that it is also a legal obligation, to perform a juridical act in avoidance of litigation, to invoke error of law as a means of acquisition, or to invoke error for the invalidation of a judicial confession.

The Louisiana Code provides that errors of fact may proceed either from ignorance or a mistaken belief as to any circumstance relating to juridical acts, but that only those errors relating to the “principal cause” for making the act will be grounds for invalidating the act. Errors of fact are divided into errors in the motive, as to the person, and as to the nature and object of the juridical act. Error in the motive is defined as “that consideration without which the contract would not have been made” (Art. 1825 of the Louisiana Code). It is only where the errors in the motive is as to the principal cause for making the act and that motive is apparent to the other party to the act, that the act is considered voidable. Error as to the person with whom the act is made will also be grounds for invalidating the contract, but again, only if the consideration of that person was the “principal cause” of the juridical act. In onerous juridical acts, except for certain exceptions, the consideration of the person is presumed not to be the principal cause of the act; in gratuitous acts, however, it is presumed the principal cause. Error as to the nature or object of the juridical act renders the act voidable only if it bears upon the substantial quality of nature of object. The

substantial quality is defined as that quality giving the juridical act's object its greatest value. If the error is as to a quality other than the substantial quality, the act is voidable only if the qualities were the principal cause of making the act.

Coming to our country, pursuant to Article 1680(1) of the Ethiopian Civil Code, the declaration must conform to the will, i.e. all the points of the subject of contract. It is only where there is agreement between the minds of parties that consent is said to be give.

D) Will (consent) free from vice- The fourth pre-requisite for the validity of juridical acts is that the will must be free from vice. Put another way, the manifestor's consent must not have been procured through fraud, violence, or threats.

Under the Louisiana Civil Code, fraud vitiates the will. Fraud is defined as an inducement of error bearing on the material part of the juridical act, created or continued by artifice with the desire to obtain an unlawful advantage or to cause loss or inconvenience. An important distinction arises from this definition: error producing fraud need only relate to a **material part** of the juridical act, not to the principal cause, as is the case in simple error. An artifice is defined as an assertion of falsehood or suppression of truth. If there is a false assertion as to the value of the juridical act's object, fraud exists if the fraud was detectable only by an expert or through difficulty or inconvenience, but not if an ordinary, reasonable man could have detected it. The loss or advantage need not be suffered; it is sufficient that a party is precluded from obtaining a gain or advantage. However, if there is no adverse effect whatsoever caused by the artifice, there is no fraud.

If the fraud is caused by one not a party to the juridical act, without knowledge of the party who would benefit thereby, the juridical act is not invalidated, but the aggrieved party may recover damages from the perpetrator of the fraud. According to Article 1696 of the Ethiopian Civil Code , the consent must be given free from vices.

E) Form – In principle there is no general requirement of form for the validity of juridical acts: however, form is considered necessary in some cases. Three reasons may be advanced for requiring form: (1) in the interest of the parties it allows an opportunity for serious thought before entering a juridical act; (2) in the interest of legal order, it enables one to

distinguish between final legal documents and mere proposed drafts thereof; and (3) it facilitates proof of juridical acts in that formal written instruments are more reliable than parole evidence.

Thus, the law may provide that a will must be expressed in a formal way and where the parties failed to comply with it the juridical act will have no legal effect. A juridical act may be required to be reduced into writing and be signed by two witnesses [Paton; 1967:279-80].

Sometimes the law strictly laid down the form of a certain juridical act to be followed in order that clear evidence may be available with regard to the act, and to make forgery more difficult [Paton; 1967: 280].

What are the effects of formality?

The effects of formality are two; **constitutive** and **evidentiary**. If it is constitutive, a certain form must be used or the juridical act is void. An example is a donation of immovable property which is void even as between the parties, but it may cause it to be ineffective as to third parties. If the effect is evidentiary it merely means that the form facilitates proof of the juridical act.

Several provisions of the Louisiana Civil Code pertain to the requisite form of juridical acts. If a transfer of immovable property is not in writing, it is ineffective as to third parties, but is effective as against the parties to the transfer provided delivery has been made. All juridical acts relative to movable property and for the payment of money, in which the value exceeds five hundred dollars, must be in writing, and if contested, must be proved by at least one credible witness plus other corroborating circumstances; if the value is less than five hundred dollars, normal proof suffices.

According to Article 1719 of the Ethiopian Civil Code, generally, there is freedom of formality in relation to contracts. What matters is the consent of the parties. However, when the law requires form, such formality must be complied with by the parties.

Article 1725 of the Civil Code provides that some contracts must be made in writing. According to Article 1727 of the Civil Code written contract shall be of no effect unless it is attested by two witnesses.

Pursuant to Article 1728 of the Civil Code signature is required. Here hand written signature is important. In accordance with sub 3 of Article 1728 of the Civil Code, the signature or thumb mark of the illiterate person must be made in front of notary public to bind him/her. The law gives a special protection to him/her. However, one would wonder how this is done in practice.

F) **Lawful content-** The sixth and last pre-requisite for the validity of judicial acts is that their content must be a lawful one. The law usually prohibits juridical acts that would tend to bring about an immoral result, limit freedom of will or limit one's civil and economic liberties.

Under the Louisiana Civil Code, Article 11 indicates that an individual cannot derogate from the force of laws made for good morals or public order, but one can renounce what the law has established in his/her favour, provided such does not infringe on the rights of others. Then, Article 12 states the general principle that any judicial act in contravention of a prohibitory law is void even though the nullity is not specifically provided for by law. Specific provisions are modern regard to certain juridical acts. Conditions in donations *inter vivos* and *mortis causa*, which are contrary to law or morals, are regarded as not written. A specific requisite to the validity of a contract is "a law full purpose." Further, all contracts having objects forbidden by law or contrary to morals are considered void.

The civilian tradition considers juridical acts whose content is contrary to good morals as absolutely void. However, since only "causal" juridical acts could show on their face the immoral purpose, and "abstract" juridical acts would not, it would seem only the former would be *absolutely void*, and the latter, only voidable by the parties to the act. Juridical acts whose purpose is evasion of the law are also considered as void, but whether they may be attacked by third parties may also be subject to the same difficulty as acts contrary to good morals. Still another problem arises as to promises of unlawful performances.

Remembering the distinction between “promissory” and “dispositive” juridical acts, it is possible to have a lawful promise to make an unlawful disposition. When the promise alone is valid, the question arises whether the promisor may be compelled to pay damages for non-delivery. Under the Louisiana Civil Code, factual and legal impossibilities are considered the same, and their Code seems to imply that impossible promises are void; however, Louisianan courts have yet to pass upon the issue.

According to Article 1716 of the Civil Code of Ethiopia, the object must be lawful. In addition, the content of a contract should not contravene the morality of the society.

LEARNING ACTIVITIES

- 1) Enumerate the pre-requisites for the validity of a juridical act.
- 2) Expound the concept of civil death.
- 3) Why consent be free from vices a juridical act to be valid?
- 4) What do we mean by lawful consent?

7.4) RELATIVE EFFECT OF JURIDICAL ACTS

[Taken from Planiol, *Traite elementaire de droit civil*, vol.1 part 1, part 1, 203-208 (translation by the Louisiana state law **Institute**, 1959)].

In principle, acts produce no effects except for those persons who perform them. Those who remain strangers to them, and who are called third parties, neither profit by nor suffer on account of them. This is what the Latin maxim expresses when it says that: “*Res inter alios acta aliis neque prodesse necque nocere potest*”. This rule is mainly applied to contracts and to judgments. The effects produced by them are merely relative.

In order to determine exactly this relativity of the effects of juridical acts, a distinction must first be drawn between the authors of the act or the parties, on the one hand, and third parties, on the other. If an act emanates from a single person, s/he is called the author of the act. If the act has several authors, as is the case when there is a participation and collaboration of several persons, each of them is party to the act.

It is not the signature that designates who is a party. An act may be signed by persons who are not parties to it, as for example, by the public officer before whom it is passed and by the witnesses who are present. The terms “signatory” and “party” are thus in no sense synonymous. A party, on the other hand, may not have signed the act and may not have figured in it. This takes place when a party to an act is represented by another person...

To be assimilated to parties are: 1st those represented in the act; and 2nd successors, who stand in the shoes of the parties. Therefore, to know who are third parties, account must be taken of two important conceptions, that of representation and that of succession. In short, juridical acts produce rights and obligations only upon parties, and not third parties.

Of representation in juridical acts: A juridical act is often performed by someone other than the person interested. This replacement of a person by another may be necessary in two cases. They are: (1) when it is impossible for the interested person to go to the place where the act should be performed, because s/he is travelling, sick, or in prison, etc; and (2) when the interested person is not able to comprehend what is done. Examples are the case of a very young child, or a lunatic or an old person whose faculties are impaired. This representation of a person by another may be convenient and advantageous sometimes, without being necessary.

This use of someone other than the person interested is generally allowed. There are in French law but two acts, which must necessarily be carried out by the person him/herself. They are marriage and the making of a will. There were more such instances in Roman law. But, acts which were essentially personal at all times formed the exception.

There is considerable difference in regard to acts performed by the intermediary of another between the Roman epoch and the present. This is due to the introduction of a new idea, that of representation in juridical acts. This concept has transformed many theories.

The person represented drew directly from it neither profit nor burden because s/he remained a stranger to it. It was thus the tutor, the manager, the mandatary who became owner, creditor or debtor as a result of the act performed. In other words, the juridical effects pertain to the person who is represented by another.

In modern terminology, that the third party employed to perform the act (mandatary, agent, tutor, administrator, etc.) represents another person (his principal, his ward, etc.). At present the term “to represent” designates the intervention of a person acting for another without being him/herself affected by the juridical effects of the act, which s/he performs.

Under the Ethiopian law, juridical acts (including contract), are binding as between the parties as though they are laws [Art. 1731(1) Civ. C. Cum Art 1677(1) of the same]. This makes clear that the person who represented another will not be affected by his/her act.

LEARNING ACTIVITIES

- 1) What are the effects of juridical acts?
- 2) Explain the concept of representation in juridical acts.
- 3) Analyse the effects of juridical acts under Ethiopian law.

7.5) RIGHTS AND DUTIES

The term “**right**” is defined as “something that is due to a person by just claim, legal guarantee, or moral principle (the right of liberty).” It includes a “power, privilege, or immunity secured to a person by law (the right to dispose of one’s estate)” Further the term is defined as a “legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong (a breach of duty that infringes one’s right)” [Garner; 2004: 1347].

Right is a correlative to duty; where there is no duty there can be no right. But the converse is not necessarily true. There may be duties without rights. In order for a duty to create a right, it must be a duty to act or forbear. Thus, among those duties which have rights corresponding to them do not give rise to the duties, if such there be which call for an inward state of mind, as distinguished from external acts or forbearances. It is only to acts and forbearances that others have a right. It may be our duty to love our neighbour, but s/he has no right to our love [John Chipman Gray, in Black’s; 2004: 1347].

The term “duty” is defined as follows: “a legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right” [Garner; 2004: 543].

A legal right – what is a legal right? The test for a legal right is –is the right recognized and protected by the legal system itself? Thus, a person may have a legal right to do an act, which is unethical and opposed to the standards of positive morality. However, this does not mean that the law is unreceptive to the general conception of right, which exists in a community, for the ethical views and positive morality of a given community naturally influence the law in its determination of the conduct, which it will protect, and of the actions, which it will prohibit. ‘Rights spring from right. Principles of liability, in the last analysis, must be derived from the moral sense of the community.’ [Paton; 1967: 248].

The term ‘right-duty’ covers several legal relations, each with its distinct characteristics. However, it would be sufficient to emphasize that there are four elements in every legal right: (1) the holder of the right; (2) the act or forbearance to which the right relates; (3) the *res* concerned (the object of the right); (4) the person bound by the duty. Every right, therefore involves a relationship between two or more legal persons, and only legal persons can be bound by duties or be the holders of legal rights. Rights and duties are correlations, that is, we cannot have a right without a corresponding duty or a duty without a corresponding right. When speak of a right we are really referring to a right-duty relationship between two persons, and to suppose that one can exist without the other is just as meaningless as to suppose that a relationship can exist between father and son unless both father and son have existed [Paton; 1967: 249].

In the definition of legal rights, it is essential to consider the following three elements. A right is legal because it is protected (or at least recognized) by a legal system-hence the criterion of enforceability must be considered. The holder of right exercises his/her will in a certain way, and that will is directed to the satisfaction of a certain interest. Each of these elements- protection, will and interest-is important to a true description of a right, but many disputes have arisen because of a false emphasis either on the will, which is exercised, or on the interest desired [Paton; 1967: 250].

A) The protection afforded by the state

In case of a right, which is recognized only by morality or ethics, the law will grant no remedy. Enforceability by legal process has, therefore, sometimes been said to be the *sine qua non* of a legal right. Three qualifications must, however, be made to this statement, for enforceability is only the most obvious mark of recognition [Paton; 1967: 250].

Firstly, the law will not always enforce a right, but may grant the injured party only a remedy in damages.

Secondly, there are certain rights, some times called imperfect rights, which the law recognizes but will not enforce directly. Thus, a statute-barred debt cannot be recovered in a court of law, but for certain purposes, the existence of the debt has legal significance. If the debtor pays the money, s/he cannot later sue to recover it as money paid without consideration; and the imperfect right has the faculty of becoming perfect if the debtor makes an acknowledgement of the debt from which there can be inferred a promise to pay..[Paton; 1967: 250].

Thirdly, in some systems courts of justice do not control adequate machinery for enforcement. Thus, in international law there is no power in the court to enforce its decree. Hence, ultimately, the answer to the question whether the essence of a legal right lies in its enforceability will depend on our definition of law...[Paton; 1967: 251].

B) The Element of Will

Proponents of the doctrine of natural rights uphold the will theory on the ground that the very purpose of the law is to grant the widest possible means of self-expression-the maker of individual self-assertion. Rights, therefore, are inherent attributes of the human will. However, this is based on a confusion of what is and what ought to be.

It is true that person can realize an effective life only in a society, but that does not mean more than that his rights must be adjusted to those of his/her fellows. The individual will may be directed to social or anti-social ends, but the will is the ‘mainspring’ of the

individual personality, and for the law to attempt to create a system, which ignored the wills of individuals, would be futile. The aim of the law is not primarily to create a new life for society and new desires for persons, but rather to regulate such life and such desires as already exist. Will may be an essential element in many attempts to analyse the conception of legal right, but it is not the only element [Paton; 1967: 252-53].

C) The Element of Interest

There is a debate that interest is essential, not a will as the basis legal rights. The main argument of those who hold that interest and not will is the fundamental basis of right is that persons may have rights, although they have no wills: a baby one day old, an irrational idiot, a corporation, or a foundation cannot be regarded as having wills, but undoubtedly the law grants to such persons legal rights, for the law sets up a guardian to protect the rights of the child,... and it imputes to the corporation or foundation the acts of human beings to whom power to bind the artificial entity has been granted [Paton; 1967: 253].

Ihering attacked the will theory because he thought that the purpose of law was not to protect individual assertion but certain interests. He therefore defined rights as legally protected interests. These interests or values are not created by the state for they already exist in the life of the community, and the State merely chooses such as it will protect [Paton; 1967: 253].

It is true it is an exaggeration to set interest and will too much in opposition to each other. 'The essence of legal right seems ... to be not legally guaranteed neither power by itself, nor legally protected interest by itself but the legally guaranteed power to realize an interest'. The human will does not operate in *vacuum* but desires certain ends, and interests are but objects of human desire. An interest is a claim or want of an individual or a group of individuals which that individual or group wishes to satisfy. The law grants rights not to the human will as an end in itself, but to a human will that is pursuing ends of which the legal system approves. There is danger in assuming that the law can in every case dictate to man wherein his interests lie [Paton; 1967: 253-54].

LEARNING ACTIVITIES

- 1) Define the term right.
- 2) Describe the protections afforded by the state to rights.
- 3) Analyse interest in relation to rights.
- 4) Explain legal right.

CONCLUSION

We have seen that a juridical act is a declaration of will of a person with the intention to create legal consequences. A juridical act has the power to create legal relations, alter or terminate the same.

Juridical acts are distinguished from material acts in that the latter consist in some action of physical relationship, such as claims for compensation for a literary work. Juridical acts, as we have discussed, are categorized into unilateral and bilateral, those addressed to a particular person and to anyone, *intervivos* and *mortis causa*, onerous and gratuitous, obligatory and real, promissory and dispositive, causal and abstract.

We have learnt that some essential elements must be fulfilled for a valid juridical act to exist. First and foremost, we have seen that legal capacity is important: persons must be capable in the eyes of the law to perform legally binding juridical acts. In addition, a person should have a specific legal capacity that means s/he/it should have sane mind; attain the age of majority; and so on. Secondly, the actor must declare his/her/its will to create the legal consequences to have valid juridical acts. The declaration, as we have seen, may be either express or implied. The third pre-requisite for validity of a juridical act is that there must be concordance between what is manifested (or declared) and that is intended. Further, in order to have a valid juridical act, the declaration of intention should be serious. In accordance with the fourth pre-requisite for a valid juridical act, the will should be declared free from vices. Accordingly, the person is required to declare his/her/its will without fraud, violence or threats. The fifth pre-requisite for valid juridical acts, as we discussed, is that the juridical acts must comply with the formality, particularly where the law provides the form. Further more, we have learnt that, the contents of juridical acts must

be lawful. Thus, according to Article 1678 of the Ethiopian Civil Code, a contract (and a juridical act) must have lawful purpose and need not contravene the morality of the society.

We have also discussed the effects of juridical acts. The basic principle is that juridical acts create rights and obligations only as between persons who perform them. Thus, the rights and obligations of third parties may not be affected by juridical acts. This clearly shows the relative effect of juridical acts. Juridical acts performed by some one else representing another person will produce effects to the person for whose favour (name) they are performed.

REVIEW QUESTIONS\

I) True/ False

- 1) A duty always implies a right.
- 2) A person must be capable to perform a juridical act.
- 3) The doctrine of juridical act was first developed in common law and borrowed to civil law legal system.
- 4) One of the effects of formality of juridical acts is for the purpose of evidence if it made in written.
- 5) If a person has no right to make juridical acts, it may be called civil death.

II) Choose the best answer

- 1) The number of parties to a juridical act could be
A) one B) two C) none D) A and B
- 2) A juridical act can give rise to
A) rights on the parties B) duties on third parties C) A and B D) none
- 3) Which of the following is a requirement for valid juridical act?
A) will B) free consent C) fraud D) all except C

4) A corollary to a duty is

A) obligation B) freedom C) Right D) all

5) Juridical acts are divided into

A) bilateral and Unilateral B) unilateral and multilateral

C) unilateral and Multilateral D) A and B

III) Answer the following questions

- 1) A concordance between what is declared and what is intended is essential to have a valid juridical act. Explain
- 2) State what you felt just after you have learnt this unit. Do not hesitate to jot down your feelings: write them as they are flowing without editing yourself. Then, compare it with your attitudes at the beginning of this Unit.

(To the **instructor**: please check how far and to what extent each student has developed his/her attitude positively towards juridical acts. You have to compare their responses with what they had at the beginning).

- 3) Explain the Latin maxim: “*Res inter alios acta aliis neque prodesse necque nocere potest.*”
- 4) True actions sprang from the act of the person and it follows that third parties may not be obligated to perform it. Elaborate.
- 5) Analyze the situation whereby a ‘signatory’ may not be a party to a juridical act.
- 6) Define the term “juridical act” in your own words.
- 7) Analyze consent with regard to juridical acts.
- 8) Cheru wants to donate five hundred Birr to a student, Ayalew with the intent to cover the expenses of his/her study. Accordingly Cheru sent the Birr to Ayalew. However, Ayalew refused the donation. Is there a juridical act, which gives rise rights and duties? Why or why not?
- 9) Enumerate the pre-requisites for valid juridical acts.

- 10) Aklile wants to buy a television set for Birr 4, 238.00 from Genanaw Trading Private Limited Company. Aklile requires the seller to make the transaction in writing. However, the agent of the seller told her that it is safe to buy it without a written contract. After a bit hesitation, she paid the price of the television set and brought it to her home.
- 11) Evaluate the transaction from the point pre-requests of a valid juridical act.
- 12) What are dispositive juridical acts?
- 13) Compare and contrast unilateral juridical acts and bilateral juridical acts.

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PART TWO: ETHIOPIAN LEGAL SYSTEM

So far, we have discussed the general principles of law. Under this unit, and the following we will focus on Ethiopian legal system. The main objective of this part is to familiarise students with the Ethiopian legal system. Under this part, we will discuss about the legal framework in Ethiopia, institutional framework in Ethiopia, and traditional mechanisms of dispute resolution mechanisms.

UNIT EIGHT: LEGAL FRAMEWORK IN ETHIOPIA

UNIT OBJECTIVES

After completing this Unit, the student will be able to:

- analyse the unity and diversity of Ethiopian laws and African laws;
- discuss the legal pluralism;
- compare and contrast the advantages and disadvantages of legal transplantation in Ethiopian legal system;
- analyse the federal legal system of Ethiopia;
- discuss the laws of Regions;
- apply the rules in practice.

UNIT INTRODUCTION

This Unit is meant to discuss the Ethiopian legal system. Therefore, we will be discussing our law in comparison with the African legal system. Then, we will discuss the Ethiopian laws from the federal point of view. As usual, we will have a summary of important points. What is more, references will be given for further readings.

8.1) GENERAL SURVEY OF COMMON FEATURES IN AFRICAN LEGAL TRADITION: ETHIOPIA IN FOCUS

8.1.1) GENERAL

[A note taken from Rene and John; 1978: 505-11]

The parts of Africa south of the Sahara-“black” Africa, Ethiopia, Somaliland, the Sudan and Madagascar- were ruled for centuries by their own ancestral customary laws. Obedience to custom was generally spontaneous since it was thought that one was obliged to live as one’s ancestors had; the fear of supernatural powers and of group opinion were most often sufficient to assure a respect for the traditional way of life. The social system had means for the resolution of disputes or the creation of new rules of conduct when new circumstances created fresh problems for the community in question.

There were of course many ancestral customs in this vast African territory. Contacts between different groups were minimal and each community, largely self –sufficient, had its own customs and social habits. However, the differences between customs in the same region, or as between related ethnic groups, were largely secondary or even negligible in importance, but outside such general groupings, they were sometimes very distinctive. In Africa, there are tribes with monarchical or democratic social structures, and there are others so primitive that it is difficult even to discover elements of any social organization at all. The family is sometimes matrilineal, but even within these two general types there maybe many variant structures. The land system varies from region to region as well. For these reasons it is difficult, if indeed not altogether arbitrary, to speak in general terms of an African and Malagasy customary law.

Does this mean, then, that there is no legal unity among these various communities, that there is no “African” law properly speaking? Opinions have in fact differed on this question. While acknowledging the great diversity of customs in a continent divided into some many communities, there is, however, no general agreement that certain characteristics, common to all African laws do set them off from the laws of Europe. An English author, summarizing the generally received opinion, has put it this way. “[African

law] is not.. a single system, even one with variant schools, but rather a family of systems which share no traceable common parent... But, more fundamentally, African laws reveal sufficient similarity in procedure, principles, institutions, and techniques for a common account to be given of them.” In other words, we find similarities among laws of African countries.

How African life is lead?

In the African mind, ancestral custom is linked to a mystical order of the universe. To obey custom is to pay respect to one's ancestors whose remains are fused with the soil and whose spirits watch over the living. Violations of custom will release unknown by certainly unfavourable consequences in a world where forces natural and super natural, person's behaviour and the movements of nature are all linked.

African custom is thus based upon notions entirely different from those, which have dictated modern western thinking. The African conception of the world is essentially static; it rejects the idea of progress and, therefore, frowns upon any act (such as the sale of land) or institution (such as prescription or usucapion) which has the effect of changing a previously established situation. In Africa, the principal concern is for those social groupings (tribes, castes, villages, bloodlines) which endure throughout time, rather than, as in the west, those that are transient (individuals, couples households). Land belongs to one's ancestors and to future generation as much if not more than to those living. Marriage is an alliance between two families rather than a union between two people. The individual is not ignored, and his personality is recognized, but the group is the visible basic unit. Such a view of the world leaves little place for the notion of individual rights deriving from the personality of individuals. Much greater emphasis is placed upon the obligations of each person, given his/her social condition; and obligations properly juridical in character are not clearly distinguished from those, which may be classed as simply moral. While this distinction can be drawn in respect of African customs themselves by European jurists, it is, for the Africans, difficult to understand in a country where there is neither any legal science nor jurists. In the same way, the distinctions between public and private law, civil

and criminal law, law and equity are, a fortiori, unknown; the law of property, contract and story, linked to the notion of status, depend upon, or form part of, the law of persons.

What are the procedural peculiarities of African custom and law?

Consider what happens when someone is accused of having violated custom or when there are some kinds of disputes. Disputes are resolved according to the customary laws in Africa. Hence, we do not find substantive rules that are applicable to Justice. Justice will not always consist of what we know as applicable substantive rules. Here what is important is to bring about an amicable settlement between the parties rather than to see to the enforcement of their “rights”; the end in view is not to attribute to each his due “Justice” in the African context consists, above all, in assuring whatever is necessary for the cohesion of the group and resorting peace and understanding among its members.

Law and justice in the context of the small, pre-colonial societies of Africa and Malagasy are inevitable different from what they are in the vast communities of the European states. Native justice, in Africa therefore, is an institution for peace rather than a means for the strict enforcement of law; its purpose is to reconcile the parties and to restore harmonious relations within the community. Searching for an agreement is even more necessary in view of the lack of procedures for the enforcement of judgments, which, in any event, because they are based only on some principle of authority, might well, be of no effect whatsoever. Moreover, it is not rare, for the successful party, acting in that generous spirit characteristic of African society, to forego the enforcement of his/her judgment.

How do we ascertain customs of African society?

Customs in Africa are different from European countries. The social order is governed by custom. Thus, customary laws are applicable in Africa side by side with laws enacted by states. This indicates the existence of legal pluralism in Africa.

How much Islamic and Christian peoples influence African laws?

Even in the pre-colonial period, there were non-African influences at work in Africa and Malagasy and among these the Christian and the Islamic were of most significance.

The conversion of Africa to Christianity took place in two stages. Ethiopia was Christianized at the start of the fourth century.

Both Christianity and Muslim have gradually had a considerable influence on most of the peoples of both Africa and Madagascar. The question of most interest is the extent to which they exerted an Influence on the customs.

Whether Christian or Islamic, the extent of this influence varied considerably. Some customs were still observed despite the fact that they may have been contrary to either of the newly adopted faiths.

Quite apart from the particular points on which the customs underwent transformation, both Christianity and Islam exerted a considerable general influence. Both religions play great role in changing customary social order.

Where is the place of Ethiopia?

In the above respects, Ethiopia may serve as a typical example. This country even though dominated by a Variety of Christian peoples- Amharas, Tigreans and [Oromos]-has until now lived in observance of a wholly customary and extremely fragmented law. Custom has either religious or sacred character for the Ethiopian law was contained in a nomocanon. Fetha Nagast or “The Law of Kings” drafted in Egypt in the thirteenth century and translated from the Arab into the ge’ez language in the sixteenth century was applicable in Ethiopia.

8.1.2) LEGAL PLURALISM

The concept of legal pluralism was summarized in John Griffiths’ article in 1986. Griffiths argued that legal pluralism is “a concomitant of social pluralism; the legal organization of society is congruent with its social organization”. As a result, “Law is present in every ‘semi-autonomous social field, and since every society contains many such fields, legal

pluralism is a feature of social organization” [Griffiths; 1986: 38]. A situation of legal pluralism is therefore “one in which law and legal intuitions are not all subsumable within one ‘system’ but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another” [Griffiths; 1986: 39].

On this argument, African societies are amongst the most pluralist in the world, comprising as they do a diversity of tribal, ethnic, cultural and religious groups, different traditions, and people divided along urban and rural lives. It would therefore appear to follow that African states would manifest a healthy legal pluralism reflecting this diversity-but reality demonstrates that this is not necessarily a logical conclusion. Indeed, it may be possible to argue that there is a cleavage between social pluralism and rules which it generates on the one hand, and constitutional pluralism on the other [Adelman; 1998:73-4].

Democratic organizations in Africa are said to be pluralist at the level of grass roots. The constitutions come about as a result of initiatives from below. Second, the constitutions reflect direct democracy. Third, they emerge from where people actually live and work such as work places, residents, villages and schools. Fourth, their organizing principle is opposite to separation of power: they are legislative, judicial and executive at one and the same time. Fifth, they establish constant accountability to the people. This is revealed by periodic elections, and political parties. They also incorporate the principle of recall in one or another form [Adelman; 1998: 85].

African peoples in general and Ethiopian peoples in particular want to have direct control over the government. Therefore, African democracy is based on the principle that the masses must consent and legitimacy confers on both the state and the democratic process [Adelman; 1998: 86].

Ethiopia being a country of different nations and nationalities, the Constitution grants the legislative, executive and the judiciary power to them. Therefore, both the federal government and the regions have those powers at the same time. This is the sense of legal pluralism in Ethiopia.

In general, Ethiopia, being federal state, there is a possibility to have more than one law to govern the same area. In this regard, the important constitutional provision that should be recalled is Article 55(5). It reads:

[The House of Peoples' Representatives] shall enact a penal code. The States may, however, enact penal laws on matters that are not specifically covered by Federal penal legislation.

Thus, it is possible for Ethiopia to have penal laws that are enacted by the Federal government and regions. But the penal laws enacted by regions could only be supplementary to the Federal Penal Code. Hence, legislative power of the regions is limited. The federal Government as well as the Regions have legislative, judicial and executive (Art. 50 (2) of the Constitution) organs. Accordingly, State Councils, which are the highest organs of regions, have the power to enact laws on matters falling under their jurisdictions respectively (Art 50(5) of the Constitution). Thus, Regions have the power to legislate their own constitutions and other laws. However, the laws should not contradict the Federal Constitution (Art. 50(5) ad 52(2) (b) of the same).

In practice regions have enacted their own family laws, for example, Amhara region, Oromya Region, Tigray Region all have enacted their own family laws. Thus, we have several family laws including the Federal Family law that is applicable only in Addis Ababa and Dire Dawa. In general, there is legal pluralism in Ethiopia.

The 1994 Constitution of FDRE stipulates multinational federalism which in corporate nations, nationalities and peoples [Art 8,]. Cultural pluralism is recognized under Art 354(5) of FDRE Constitution [Alemayehu; 2007: 36].

Federalism is inherently intertwined with the concept of pluralism, and since Ethiopia is a federal state, pluralism is incorporated. The division of powers between the federal state on the one hand and Regions on the other inevitably results in pluralism in law since the federal state and the Regions have the legislative power. This is referred as “structural pluralism” [Alemayehu; 2007: 36].

Legal pluralism is considered as an important federalist policy and practice. We have seen that Regions have legislative power, and different Regions have enacted family laws that contain various contents. For example marriageable age for men in Tigry family law is 22 while it is 18 in Federal Revised Family law. In short, Regions have the legislative power over civil matters [Alemayehu; 2007: 41].

Alemayehu [2007: 42] argues that Regions have little legislative autonomy dispute the purported decentralization or devaluation of legislative powers. How? Professor Andreas argues that regions have executive power, and they have no real legislative power. He concludes that regions have power to administer justice, not legislative, power since the constitution puts limitations [Alemayehu 2007: 42].

Legal pluralism in Ethiopia, currently, recognizes and legitimizes the personal laws of Ethiopia's religious and customary groups legal pluralism is the manifestation of federalism in Ethiopia that accommodates the rights of various multicultural society [Alemayehu: 2007:40].

The principle of legal pluralism relates to equitable treatment. It takes into account the rights and interests of groups rather than individuals. Thus, specific legal rights and duties are bound up with collective identities such as Tigre, Oromo, and the Muslim and Christian. In short, the Ethiopian federal structure is fundamentally the expression of the principle of legal pluralism.

Legal pluralism may be classified formal and non formal. In case of formal legal pluralism, the law clearly recognizes the applicability various laws. The Ethiopian Constitution recognized the validity and applicability of non state laws such as religious and customary laws in some fields of social activity (Art. 34(5))

As Andre Hoekema (in Alemayehu; 2007: 44) explains, formal pluralism "is a legal concept referring to the inclusion within the legal order of a principle of recognizing 'other' law".

Article 34(5) of FDRE Constitution stipulates as follows:

This constitution does not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law.

This provision clearly allows the application of religious and customary laws to settle personal and marriage disputes. To implement this, Article 78(5) provides:

Pursuant to sub-Article 5 of Article 34 the House of Peoples' Representatives and State Councils can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution.

It is observable from the provisions of the constitution that formal legal pluralism in Ethiopia recognizes only personal status and family law. The state legal system monopolizes the public law area such as constitutional law. However, the role of customary criminal courts is paramount to settle disputes in Ethiopia [Alemayehu; 2007:45].

Proclamation No, 188 (1999, a proclamation to provide for the Federal Courts of Shari'a consolidation; clearly indicates the applicability of Islamic law. The essential point worth to mention is that parties are required to give their consents to be adjudicated by Shari'a courts and Islamic law to apply their case(s) [Proc. No 188/1999, Art. 4(2)]. Once a party has given his/her consent, s/he is not allowed to withdraw (Proc. No 188/1999, Art. 5(4))

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Now let us consider the informal legal pluralism in Ethiopia. What is informal legal pluralism?

According to Andre Hoekema, "Anthropological or empirical legal pluralism covers any situation in which within the jurisdiction of a more encompassing entity (e.g., a state) a variety of differently organized systems of norms and patterns of enforcement effectively and legitimately control the behavior of specific parts of the population".

In short, the existence and practice of law in Ethiopia other than formally recognized ones may be categorized under informal legal pluralism.

There are traditional dispute settlement mechanisms in Ethiopia. In traditional dispute settlement mechanism, customary laws of the respected ethnic group apply. We will discuss this point in the coming part of this material.

8.1.3) LEGAL TRANSPLANTATION FROM FOREIGN SOURCES

[A note taken from ALAN WATSON; 2005]

In most places at most times borrowing is the most fruitful source of legal change. The borrowing may be from within the system, by analogy-from negligence in torts to negligence in contract, for instance-or from another legal system. The act of borrowing is usually simple. To build up a theory of borrowing, on the other hand, seems to be an extremely complex matter. Receptions come in all shapes and sizes: from taking over single rules to (theoretically) almost a whole system.

What is the basis for a reception of law?

It goes without saying that practical utility is the basis for much of a reception of law. The paramount reason for reception of law is economical for the borrowing country because it saves time that could be spent to draft a new, original law. Thus, it avoids a labour some law making particularly a new law. An important example of reception of law is the Duth law which borrowed from Roman law.

What is the role of chance in reception of law?

Chance plays an important role in reception. Members of the law makers or drafter of a law may prepare a draft based on the law s/he, they come across. They read a book that is available for them, e.g., in a library. By chance, we mean something that could not be predicted.

A problem related with reception is misunderstanding. The principle of a law may be misunderstood in the process of reception. For example, Huber's theory of conflict of law was accepted in common law jurisdictions but not in the civil law. His third axiom was misunderstood. This misunderstanding was followed by James Kent, then by his friend, Joseph Story, who laid new foundations for conflict of law in the U.S. but based in his view, on Huber. If Story had correctly understood Huber, the Dred Scott case, with all its consequences – whatever they were – could never have arisen because it would have been obvious that Dred Scott was free.

THE NEED FOR AUTHORITY

Borrowing is often creative. However, it needs authority. This creativity may be very open. Ulrich Huber's own theory of conflict of laws which he founds on three axioms all ostensibly based on Roman law. For the first two he relies on Digest texts, which said something very different in the original context. He has no Roman authority, no matter how fake, for the third axiom (which he says has never been doubted). His argument is wonderful. The rule comes, he says, from the *ius gentium*; in the sense common in his time of 'law found everywhere among civilized nations.' Huber took the term "axiom" from mathematics, and used it to mean a proposition that is so self-evident that it need not be proved. Thus, his axiom three is from the *ius gentium*.

The enormous need for legal authority for legal decisions and reasoning is unveiled. It is this need for legal authority that often lends strength to transplants (or apparent transplants).

There are four aspects of legal transplantation. First, they highlight the enormous influence of legal education or legal attitudes. Lucas Drenth (?) was so fixated by his training in Roman law that he approached his own system through it. Southern African students educated in law at Edinburgh imported to Botswana, Lesotho and Swaziland some Scots law. Thus, transplantation influences the legal education.

Second, they show that though patterns of development can be discerned, the future development cannot be predicted. Chance plays too great a role. The role of Roman law in

Roman-Dutch and South African law might have been rather different if Lucas Drenth had written a textbook in Dutch with numerous case references. He was apparently capable of doing so. The power of mistake must also not be overlooked.

Third, when foreign law is given high authority, then when new situations arise, jurists may not find it easy to develop new law on the basis of irrelevant or even non-existent sources.

Fourth, they confirm the central role of authority in law making by subordinate lawmakers. Judges cite with all apparent seriousness what are regarded as the appropriate authorities, who are unhelpful or irrelevant, and they may seem to follow them when constructing their own route.

The rules contained in this Code are in harmony with the well-established legal traditions of Our Empire..., and have called, as well, upon the best systems of law in the world.

LEARNING ACTIVITIES

- 1) Explain the basic features of marriage in African custom.
- 2) Analyse the common features of African legal system.
- 3) What is the main purpose of law and justice under African societies?

8.2) A GENERAL OVERVIEW OF LAWS AND PRACTICES IN ETHIOPIA

8.2.1) THE 1995 CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA (FDRE)

The 1995 Constitution of the Federal Democratic Republic of Ethiopia provides for a federal state structure with nine member states making up the federation. It has thus brought into being two layers of administration i.e. the federal state and self-governing regional states. The regional units are formally designated as national Regional States. Legislative, executive and judicial functions are exercised at both levels of state within the limits of powers constitutionally defined. The Constitution allocates state power between the federal state and the regional states. Power not specifically provided for either or both of them or of what is called residual power is given to the regional states [Art. 52 of the Constitution].

8.2.2) FEDERAL AND REGIONAL LAWS AND PRACTICES

Regarding the need for concurrent jurisdiction, the joint parliamentary committee on Indian constitutional reform in 1934 reached on the following conclusion. It remarked:

Experience has shown both in India and else where, that there are certain matters which can not be allocated exclusively either to the centre or to a provincial legislator, and for which though it is often desirable that provincial legislation should make provision, is equally necessary that the central legislator shall also have a legislative jurisdiction to enable it in some cases to secure uniformity in the main principles of law. Throughout the country in order to guide and encourage provincial efforts, and in others again, to provide remedies for mischievous of a single province.

For this reason, even though the concurrent power as a third list is included in most of the federal constitutions, the need for this jurisdiction is given great emphasis in the Indian constitution more than in others. As a result of this, the third list (concurrent) in the seventh schedule of the Indian constitution contains 47 items on which both the union and the state legislators have the power to enact laws. Thus, the existence of such sizeable concurrent field along with the large exclusive fields of the centre and of the states gives the scheme of division of powers contained in the Indian Constitution a unique feature. As Where said, having two lists creates difficulty in interpretation. Hence, according to him, if another third list, that is , the concurrent list is added,

There are not only disputes about the meaning of the words in the list, but about the extent to which these words overlap or conflict with words in the exclusive list, and about the extent to which laws passed by the general and regional legislatures on concurrent subjects conflict with each other and are void.

Having said this about the importance of the concurrent power and the fact that the chain of subordination between the federal and the state laws is depicted, in this jurisdiction, now

let's see how it is significant and how the superior and inferior relation of the laws enacted in the exercise of the concurrent power if any, is manifested in the FDRE Constitution.

In order to know the fact that the concurrent list is added as a third list in the Constitution of FDRE, it is important to look at the part which deals with the distribution of power in the Constitution. In connection with this, Art. 52 (1) of the Constitution states: "all powers not given separately to the federal government or powers not given separately to the federal government or powers not given expressly and concurrently to the states and the federal state, are reserved to the states". From the reading of this provision, we can know that the FDRE Constitution contains the three fold enumeration of powers, that is, the federal, the state and the concurrent powers. The Constitution enumerates the powers of the federal government under Arts 51, 55 and 96 of the same. In addition to the residual power given to them in Art 52(1), the States are empowered by the Constitution to have the exclusive jurisdiction on matters that are enumerated under Arts 52(2) and 97 of the same. As has been mentioned earlier on, in this material, since both the federal and the state governments are sovereign in their jurisdiction, each has the duty to respect the power of the other. In like manner, Art 50(8) of the FDRE Constitution should be understood to mean that the federal and the state governments have the reciprocal duty to observe the power of each other although this provision does not expressly impose such duty on the part of the federal government.

We have discussed previously that the concurrent field is the area in which the hierarchy of laws that are enacted by the federal and the state legislators is exhibited. Because of this, out of the three powers listed in Art 52(1) of the FDRE Constitution, our dealing here in after will focus on the concurrent power. Like the other federal constitution, the Constitution of FDRE expressly provides the concurrent jurisdiction in Art 98 of the same. Nevertheless, it is limited only to the area of taxation. This includes the collection of taxes on incomes and profits of enterprises which are jointly established by the federal and the state governments, sales tax, profits of corporations and dividends paid to share holders taxes on incomes derived from large scale; mining, petroleum and gas operations. As has been indicted above, the existence of the concurrent list is of great importance so as to secure uniformity in the main principles of law through out the country to guide and

encourage regional efforts in developing and implementing laws. Thus, it is for these and other purposes that the third list in the seventh schedule of the Indian constitution consists of 47 items that are to be exercised by the two levels of government. Though they are less than what are contained in the Indian constitution, the German basic law also provides 23 items that are to be included under the FDRE Constitution is intended to serve the same purpose, mentioned above. Art 98 should not be limited only to taxation although it is one of the main principles, which are required to be uniform through out the country.

It may be possible to argue that the laws of the federal government should be considered as laws of the whole country in the federal system of government. Therefore, federal laws should be taken as part and parcel of the laws of the regions. Consequently, regions should enforce federal laws. In the United States of America, the US Supreme Court reasoned out that laws of the US are laws in several states and are binding on citizens as the laws of states. In addition, the Court argued that the laws of the federal government and that of the states form one system of jurisprudence, which constitutes the law of the United States of America [Abebe Mulat; 2001: 138].

Similarly, the laws of the federal government of Ethiopia may be considered as integral part of the law of the regions, which constitute the federal state. If federal laws are part of regional laws, the regional courts are duty bound to enforce federal laws.

However, there is a grey area between the federal law making power and regional law making power. Thus, whose power should prevail over, the federal government or the regions? The federal government and regions may enact different laws that govern one and the same matter. For example, the federal government has enacted family law and some regions promulgated their own family laws. If there is contradiction between federal law and regional law, which should be applied?

Other federal systems have solved this problem by making federal laws supreme over state laws. Unfortunately, our Constitution does not provide a clear answer to the problem. The federal state can ensure uniform interpretation of laws through the Federal Supreme Court Cassation Division [Abebe; 2001: 139-140].

8.2.3) CONFLICT BETWEEN FEDERAL LAWS AND REGIONAL LAWS

[Ayele Bogale, Hierarchy of laws within the present Federal legal Structure of Ethiopia, 1999, Pp. 53-60]

As we have discussed above, the laws that are enacted by the federal authorities and the state authorities are similar in form. The hierarchy of laws manifested at each level (federal and state) is also the same. But now the issue is, what is the hierarchical relationship between the federal and state laws?

In a federal system, the power of the state is divided between the two governments, which are not subordinated one to another but coordinate, and sovereign within their own sphere of jurisdiction. Therefore, since each of them is sovereign within the sphere of jurisdiction allotted to it, we cannot say that the idea of superiority exists between the federal and state laws that are enacted on matters under the federal and the state lists. The doctrine of paramount between the federal and state laws is understood in relation to the concurrent power. In connection with this, Where says "...if there is a concurrent jurisdiction, there must also exist some provisions to determine which authority, in case of conflict, to prevail. Because it is in this field that both of the legislators of the federation and of the member states enact laws on the same matters and thus conflict arises between the two.

However, although the concurrent jurisdiction seems to be the area in which the two laws come into conflict frequently, today most of the federal states include in their constitutions as a third list of power with the assumption that it can help them in facilitating their political and economic development through greater coordination of the two levels of government (central and regional).

In order to say that there exists conflict of laws in federal systems, such laws should be made by the federal and the state legislators having the same power (concurrent). In addition, there should be repugnancy between the command or power contained in the federal statutes and the command or power contained in the state statutes. Thus, in such a case, the state enactments shall, to the extent of repugnancy, be void, and the federal statute

shall prevail. In this respect, Art 254 of the Indian Constitution also declares that the union laws prevail over state laws in case of repugnancy between the two.

Nevertheless, does Art. 98 of the FDRE Constitution clearly indicate whether or not that the legislators of the two governments enact laws independently in the exercise of their concurrent power and thus conflict arises between the two laws? Art 98 of the Constitution is not clear on this point, and hence, this provision can be interpreted in two ways:

1. The above article can be interpreted to mean that the legislators of the two competent governments can independently make laws which enable the two governments to collect their revenue from the taxes mentioned hereunder. This can be understood from the heading of the article. It says “the concurrent power”. Therefore, since we have said before, that the concurrent field is the area in which both the general and regional governments have common jurisdiction, they enact laws with respect to the same subjects. In such a case, if conflict arises between the federal and state laws, the rule is that the federal laws should prevail over state laws. However, this rule is not embodied in the FDRE Constitution. In other words, the Constitution of FDRE does not stipulate a provision, which shows the superior and inferior relation between the federal and state laws. However, it would have been better had the Constitution incorporated a provision to solve the problem of conflict between federal and regional laws.

According to the interview held with the legal expert of the Ministry of Finance, at present, the laws dealing with matters those fall under Art 98 of the constitution are national laws. For instance, the income tax proclamation as amended by the federal legislator is applied through out the country. However, the fact that such national legislation become applicable through out the country is not due to political reasons but for convenience.

2. Art 98 of the Constitution may also be understood to mean that the two governments by agreement, concluded as between them, may levy and collect together the taxes that are listed in the same article. The term “jointly” as employed

in the article under discussion supports this very interpretation. If the provision which deals with the concurrent power is interpreted in this way, it is, their agreement which becomes the governing law in case dispute arises between the two government and thus there is no need for the two legislators of the federation and of the member states to enact laws independently for the purpose indicated in art 98 of this Constitution.

The interview held with the legal expert of the Ministry of Finance also reveals that Art 98 of the FDRE Constitution should not be interpreted to say that the federal and the state governments have the power to levy and collect independently the taxes mentioned under the article in question. This is because, the term “jointly” as used in the provisions of Art 98 of the present Constitution does not show the parallel actions to be taken by each government. But rather it shows the simultaneous action which is to be taken by the two governments together. From the reading of Art 98 of the Constitution of FDRE, we can understand that it embodies two concepts. These are in “levying” and “collecting”. The collection aspect also has two concepts. These are the collection of the tax and the sharing of the revenue. The interview conducted with the above expert discloses that, out of the above two concepts (levying and collecting) the latter has faced a practical problem. Although it was not foreseen at the time of drafting of this Constitution there is a possibility that the joining collection of those taxes provided in Article 98 of the same resulted in imposing double taxation on the people. Moreover, such joint collection of the tax resulted in creating conflicts between the federal and the state governments. However, according to the chairperson of the Council of Constitutional Inquiry, though the joint collection of those taxes resulted creating problems, the problems observed still now are not as such serious and thus no case is submitted to the Council of Constitutional Inquiry on such constitution issue.

Having understood such practical problem on the collection aspect, the Ministry of Finance proposed an amendment on Article 98 of the Constitution of FDRE. According to this proposed amendment, the federal government shall collect the taxes mentioned under the said article. Nevertheless, after collecting them, it shares the revenue with the state concerned.

Therefore, from the discussion so far, it is difficult to say the Article 98 of the Constitution embodies a true concurrent jurisdiction. Because as we have seen above, the concurrent jurisdiction is one under which both the federal and the state government exercise the power independent of each other. However, this is not true under the Constitution of FDRE. Moreover, since the Constitution does not stipulate a provision which deals with the hierarchy between the federal and state laws. In case conflict arises between the two, such conflict is resolved only by the amendment of the provision dealing with this issue. However, in so far as the amendment of the constitution requires a special procedure, resolving such conflict does not become easy.

LEARNING ACTIVITIES

1. What is the principle that applies where conflict arises between federal laws and regional laws?
2. Is there any principle that is incorporated under our laws, particularly under the FDRE Constitution? How should the problem be solved in our country?

8.2.4) OFFICIAL NORMS AND UN OFFICIAL NORMS

Official norms are standards that emanate from the law of the government. An official is expected to behave according to those standards that are accepted as guidelines in performing official duties.

Unofficial norms, on the other hand, are those standards of behaviour accepted by the society. Therefore, the right or wrongness of a given behaviour is tested against the “basic norms” that are accepted by the society. In general, a norm is a model or standard accepted by society against which society judges someone or something. For example, the society has a standard to judge a given behaviour as right or wrong [Garner; 2004: 1086].

Conflict could arise between official norm and unofficial norms. In such a case, the official norms should prevail over, and the officer should be judged by the standards of his/her office.

Norm-also called social norm, is a rule or standard of behaviour shared by members of a social group. Norms may be internalized i.e. incorporated within the individual so that there is conformity with out external rewards of punishments, or they may be enforced by positive or negative sanction. The social unit sharing particular norms may be small (e.g., a group of friends) or may include all adult members of a society. Norms are more specific than values or ideas: honesty is a genera value, but the rules defining what is honest behaviour in a particular situation are norms.

There are two schools of thought regarding why people conform to norms. The functional school of sociology maintains that norms reflect a consensus, a common value system developed through socialization, the process by which an individual learns the culture of his/her group. Norms contribute to the functioning of the social system and are said to develop to meet certain assumed “needs” of the system. The conflict school holds that norms are mechanisms for dealing with recurring social problems. The Marxian variety of conflict theory states that norms reflect the power of one section of a society over the other sections and coercion and sanctions maintain these rules. Norms are thought to originate as a means by which one class or caste dominates or exploits others. Neither school adequately explains difference between and with societies.

LEARNING ACTIVITIES

- 3) What is the relation ship between official norms and un official norms?
- 4) What would happen if there is a conflict between the Federal and Regional laws?
- 5) Analyse the difference between the official and un official norms.

CONCLUSION

We have seen that customary law is a common feature of African legal tradition. We discussed that each group has its own custom, which is self sufficient to govern the activities of the society.

We have seen that religion (Christian and Moslem) influenced African laws. We have made clear that the process of codification of laws in Ethiopia replaced customary law. As we have discussed, Ethiopia being a Federal State, is a country where we found legal pluralism.

We have seen that transplantation is not only the feature of Ethiopian laws: it is also a feature for other countries as well. Thus, our law has received Roman law and common law concepts.

Further, we observed that both the federal and regional state laws are integral parts of the law of the country. If there arise contradictions, the law of the federal State must prevail over.

What is more, official and non-official norms may be applied side by side so long as they do not contradict. Where a contradiction arises, we have seen that official norms shall prevail.

REVIEW QUESTIONS

I) True/ False

- 1) Official norms are norms accepted and applied by the state.
- 2) Un official norms have the organised form of sanction.
- 3) Borrowing laws from abroad would save costs for the country.
- 4) In Ethiopia, we have the practice of legal pluralism.
- 5) If there is contradiction, un official norms should prevail over official norms.

II) Choose the best answer

- 1) The standards of vale accepted by a certain segment of a society is called____ norm
A) un official B) official C) state D) Community

- 2) African customary law may show
- A) legal pluralism B) unitary law C) federalism D) all
- 3) The borrowing of law from abroad is known as
- A) legal plantation B) legal transplantation C) bringing D) all
- 4) The FDRE Constitution recognises the application of religious and customary laws in
- A) public area B) personal law C) A and B D) none
- 5) Which of the following necessitates legal pluralism?
- A) unitary form of government B) federalism
- C) Parliamentary form of government D) all

III) Answer the following questions

- 1) The customary law which is common to African countries are similar and one. Comment ?
- 2) Analyse the common elements of African legal system?
- 3) African custom is distinct from European custom. Discuss the distinctive feature of African customs.
- 4) African customary laws require anthropological rather than legal research. Do you agree with this proposition? Why or why not?
- 5) How do you appreciate the influence of religion on law?
- 6) Ethiopia is a country of legal pluralism. Explain the reason for that.
- 7) Discuss the Relationship between Federal Laws and Regional laws. How would you solve the problem if the Regional law contradicts the law of the Federal Government?

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UNIT NINE: INSTITUTIONAL FRAMEWORK IN ETHIOPIA

UNIT OBJECTIVES

After completing this unit, the student will be able to:

- compare federal legal institutions with state legal institutions;
- analyse the powers of Regional institutions;
- explain how conflict of power is resolved;
- evaluate the administration of justice in Ethiopia.

INTRODUCTION

Under the previous unit, we have discussed the legal framework in Ethiopia. The legal framework needs institutions to implement the laws under the respective jurisdictions. Thus, this unit will expose you to learn about the justice institutions in Ethiopia. The first point to be considered under this unit is the issue of federal institutions and their responsibilities. Secondly, the powers of regional institutions will be treated. Further, we will be considering conflict of powers of the Federal and Regional States. Furthermore, we will discuss the administration of justice in Ethiopia. As usual, we will summarise points, and we will have questions.

9.1) FEDERAL INSTITUTIONS AND THEIR RESPONSIBILITIES

9.1.1) THE FEDERAL LEGISLATURE [Ministry of Justice: 2005]

The House of Peoples' Representatives constitutes the Federal Legislature. The House of Peoples' Representatives is composed of a maximum of 550 members elected for a five-year term. They are elected to the house based on size of population. Election is held along electoral constituencies organized for the purpose. Save the foregoing up to twenty seats are reserved for minorities designated by law as such.

The House of Federation is composed of representatives from each of the ‘nations’, nationalities’ and ‘peoples’ in Ethiopia, which means that there would at least be one representative for each of the nations, nationalities and peoples by virtue of being so ipso facto. Yet for every additional one million people there shall be another representative. Members of the House are elected by State Councils or directly through popular election. The term of the House of Federation is for a period of five years.

The specific powers and functions of each of the Houses are provided as follows.

A) THE HOUSE OF PEOPLES’ REPRESENTATIVES

The House of People’s Representatives exercises federal legislative powers pertaining matters that follow:

- utilization of land, natural resources, of rivers and lakes crossing the boundaries of the national territorial jurisdiction or linking two or more states;
- inter-state commerce and foreign trade;
- air, rail, water and sea transport, major roads linking two or more states, postal and telecommunication services;
- enforcement of the political rights established by the Constitution and electoral laws and procedures;
- nationality, immigration, passport, exist from and entry to the country, the rights of refugees and of asylum;
- uniform standards of measurement and calendar; patents and copyrights;
- the possession and bearing of arms;
- enactment of the penal, labour and commercial codes;
- enactment of such civil laws as are designated by the House of Federation necessary to establish and sustain a single economic community;
- determine the organization of national defence, public security, and a national police force;
- declaration of state of emergency and a state of war;
- enactment of state of emergency and a state of war;

- administration of the National Bank and foreign exchange;
- levying of taxes and duties on revenue sources reserved to the federal government;
- ratification of international agreements concluded by the executive;
- approval of the appointments of federal judges, members of the council, ministers, commissioners, etc.
- enactment of laws to determine the powers and functions of the Human Right Commission and the Ombudsman;

B) THE HOUSE OF FEDERATION

The House of Federation has the principal power of interpreting the Constitution authoritatively or better still, it is the ultimate interpreter of the Constitution. Thus, it can adjudge with final authority any law to be contrary to the Constitution hence with not legal effect or vice versa.

Its other powers and functions include the following:

- It organizes the Council of Constitutional Inquiry, a kind of a technical body that gives its recommendations to the House of Federation on issues of constitutional interpretation as they arise from any interested party. Members of the Council include the President and Vice-President of the Federal Supreme Court, six other legal experts, three members of the House of Peoples' Representatives.
- Decides on matters relating to the rights of nations, nationalities and peoples to self-determination.
- Determines the division of revenues derived from joint federal and state tax sources and the subsidies that the federal government may provide to states.
- Single out those civil matters, which seek enactment of laws by the House of Peoples' Representatives.
- Orders federal intervention in the event of any state, in violation of the

constitution endangers the constitutional order.

LEARNING ACTIVITIES

- 1) Analyse the powers of the federal legislative organ.
- 2) Explain the powers of the House of Federation.

9.1.2) FEDERAL JUDICIAL ORGANS

So far, we have discussed about legislature and the House of Federation. Now, let us consider federal judicial organs. The Constitution enshrines a broad range of principles of cardinal importance regarding the judiciary. One of these is the establishment of the independence of the judiciary. By so doing it puts on a firmer pedestal both institutional and personal autonomy. Further, it incorporates specific provisions that are recognized indifferent human rights conventions and UN guidelines such as the relationship between the courts and the organs of the state, the specific reasons for retirement of judges etc special or ad hoc courts that take away judicial powers and do not follow legally prescribed procedures may not be established. Further, no judge may be relieved of duty unless it is established by the federal judicial council that s/he has either violated disciplinary rules, or is adjudged to be incompetent to carry out her/his responsibilities, or is unable to work as a judge because of a failing health subject to approval by the House of Representatives'. This is true of judges at the regional level as well.

Federal judicial authority is vested in federal courts tiered along three layers based on their competence as provided for by law. By virtue of this arrangement, we have the Federal Supreme Court, which is the highest federal judicial organ, the federal high courts and the federal first instance courts.

Federal judicial power in relation to matters falling under the jurisdiction of federal high courts and first instance courts at the state level is delegated to state supreme and high courts respectively.

Federal high courts have recently been established in five national Regional states thus bringing the delegation to an end in respect of jurisdiction of federal high courts.

Federal Shari'a courts also form part of the federal judicial system. They are established along the structures of regular federal courts and exercise judicial authority mostly on marital matters (personal law) falling under Shari'a law.

The Constitution recognizes religious and customary courts and envisages their establishment by law, while those already functioning continue to exist.

The common and specific jurisdictions of federal courts are provided by federal Courts Proclamation No. 25/96 as amended by Proclamation No 321 and 322/2003 are follows:-

A) Common jurisdiction of federal courts

They have jurisdiction on the basis of the constitution and as specified in the constitution. Accordingly the Federal courts have common criminal and civil jurisdiction on the following matters.

I) A common Criminal Jurisdiction

- offences against the national state;
- offences against foreign states;
- offences against the law of nations;
- offences against the fiscal and economic interests of the federal government;
- offences regarding counterfeiting of currency;
- Offences regarding forgery of instruments of the federal government;
- Offences regarding the security and freedom of communication services operated in more than one region or at the international level;
- Offences against the safety of aviation;
- Offences in which foreign nationals who enjoy privileges and immunities and who reside in Ethiopia are victims and offences in which foreigners are victims of defendants and which entail more than five years rigorous imprisonment;

- Offences regarding illicit trafficking in dangerous drugs;
- Offences failing under the jurisdiction of courts of different regions or under the jurisdiction of the federal and regional courts as well as concurrent offences.
- Offences committed by officials and employees of the federal government in connection with their official responsibilities or duties;
- Offences involving conflicts or hostilities between various nations, nationalities, religious or political groups;
- Offences committed against property of the federal government and which entail more than five years of rigorous imprisonment.

B) COMMON CIVIL JURISDICTION

I) FEDERAL COURTS

Federal courts have common civil jurisdiction on the following matters:

- Civil cases in which a federal government organ is a party;
- Civil suits between persons permanently residing in different regions;
- Civil suits regarding the Liability of Federal Government officials or employees in connection with their official responsibilities or duties;
- Civil suits in which a foreign national is a party;
- Civil suits involving matters of nationality;
- Civil suits relating to business organization registered or formed under the jurisdiction of federal government organs;
- Civil suits relating to patent, literary and artistic ownership rights;
- Civil suits regarding insurance policy; and
- Applications regarding habeas corpus.

II) MUNICIPALITY COURTS

Pursuant to the provisions of Art. 31(1) of the FDRE Constitution, the power of judiciary is given to a court of law or any other competent body. Accordingly, municipal courts are established in Addis Ababa pursuant to Proclamation Number 361/2003.

Offences of a less serious nature like contraventions of traffic regulations fall within the competence of these courts in the city of Addis Ababa, a prosecution unit in charge of petty offences subject to the jurisdiction of these courts is already well in place.

Similar courts are in the process of being established in other parts of the country as well.

III) THE FEDERAL CIVIL SERVICE TRIBUNAL

It is within the right of employees of the federal government to lodge their grievances over their employer government agency with the tribunal after exhausting all available remedies within this agency. With quasis-judicial functions, the tribunal has the power to look into matters put before it and gives an authoritative decision that is capable of enforcement. Where there are disputes on points of law there is always the avenue to resort to regular courts of law. Analogous bodies exist at the regional level.

LEARNING ACTIVITIES

- 1) What are the powers of municipality courts?
- 2) Explain the common criminal jurisdiction of the federal courts.
- 3) What are the powers of the Federal Civil Service Tribunal?

9.1.3) THE EXECUTIVE ORGAN

The executive organ is the other organ of a state. However, our discussion is limited only to the justice organ.

A) FEDERAL PROSECUTION ORGANS

There are various prosecution organs at the Federal level. Let us discuss them below.

I) The Ministry of Justice

The Ministry of Justice is principally and pretty exclusively responsible for the prosecution of federal crimes throughout the land. Its specific powers and functions of prosecution relate to offences subject to the criminal first instance and appellate jurisdiction of federal courts provided by law. The Ministry also institutes, causes to be instituted or intervenes in civil proceedings affecting the public and federal government.

The duties and responsibilities of the Ministry of justice are provided for under Proclamations No 471/2005 and No 546/2007. Accordingly the Ministry of Justice [Proclamation No. 471/2005, Art, 23]:

- Acts as chief advisor to the federal Government on matters of law;
- Represents the federal Government in criminal proceedings falling under the jurisdiction of the Federal courts;
- Instructs investigation where it believes that a crime falling under the jurisdiction of the federal Courts has been committed, orders the discontinuance of an investigation or further investigation on good cause;
- Conducts study and research with respect to causes and ways of preventing crimes;
- Ensures that witnesses to a criminal case are accorded protection, where necessary;
- Assists victims of crimes or violations of human rights in civil proceedings for the recovery of damages resulting from grave injury where such victims are unable to institute such proceedings by themselves in the Federal Courts;
- Institutes, cause to be instituted or intervenes in proceedings before federal and regional courts, judicial bodies or arbitration tribunals where the rights and interests of the public and of the federal Government so require;
- Registers religious organisations, non-profit making foreign and non governmental organizations and associations operating in Addis Ababa and in Dire Dawa cities or more than one regional states;
- Follows up as necessary, the handlings of civil suits and claims to which the Federal Government or its organs are parties; causes reports to be submitted to it on same, where it finds it necessary, and ensures that competent human power is assigned for the purpose;

- Assists in the preparation of draft laws when so requested by Federal Government organs and Regional Governments;
- Provides or cooperates with pertinent bodies in providing legal education through the use of various methods, with a view of raising public legal consciousness in relation to the protection of human rights;
- Issues, supervises and revokes licenses to advocates practising before courts of the federal government;
- Carries out the codification and consolidation of laws, collects laws of regional governments and consolidate same where necessary. It also undertakes legal reform studies.

II) The Federal Ethics and Anti-corruption Commission

The commission carries out exposition, investigation and prosecution of offences of corruption and impropriety falling under the jurisdiction of the federal government [Proc No. 433/2005, Art 6(3)]. Accordingly the Commission has given the power to investigate or cause the investigation of any complaints of alleged or suspected serious breaches of the codes of ethics falling under its jurisdiction[Proc. No. 433/2005, Art. 7(3)] with regard to corruption crimes, the Commission has the power to investigate and prosecute or cause the investigation and the prosecution of any alleged or suspected corruption crimes as specified under the Criminal Code falling under its jurisdiction[Proc. No. 433/2005, Art 7(4)] Similar institutions are being established in the regional states.

III) The Special Prosecution Office

It appears obvious from the way it is labelled that it is a prosecution institution. It is constituted by law to conduct investigation and prosecution of crimes of genocide and crimes against humanity (which are punishable crimes under the penal code of the country) by members and officials of the previous regime. It carries the appellation special because it would only function for the duration of the proceedings. Once the proceedings are over (which they apparently are nearing completion) it shall cease to exist as institution.

IV) The Ethiopian Revenues and Customs Prosecution

The Ethiopian revenues and customs prosecution, just another of the few special prosecution institutions, exercises the power of investigation and prosecution of crimes in respect of violation of federal customs and tax laws [Proc No 587/2008, Art 6(10)]. The Authority shall have its own investigators and prosecutors in order to carry out the power on investigation and prosecution of tax and customs crimes [Proc No 587/2008, Art. 16]. The Authority may delegate its power of investigation and prosecution to regions [Proc No 587/2008, Art. 6(13)]. This would enable the Authority to carry on its power properly.

V) The Federal Police

The Federal Police is established by law with major responsibilities of investigation of federal crimes and the prevention of crimes. It carries out its functions in close working relationship with the Regional Police Commissions. This is particularly so because the Federal Police has not organized its regional representations whereupon the regional commissions to a large part undertake federal investigations by themselves excepting a few specific cases where the Federal Police itself involved directly. The main objectives of the Federal Police may be summarised as: a) maintaining peace and security by applying the Constitution and other laws; b) preventing crimes through participation of the people [Proc No 313/2003, Art. 6].

Some of its powers include the following [Proc No 313/2003, Art. 7]:

- Prevent and investigate crimes that fall under the jurisdiction of the federal courts;
- Prevent acts violative of the Constitution and may endanger the constitutional order;
- Prevent breaches of peace, hooliganism, terrorism, trafficking in drugs;
- Prevent crimes against the interests and institutions of the federal government;
- Maintain law and order where there is a deteriorating security situation which is beyond the control of a given region and a request for an intervention is made, or more regions such as to endanger the federal security;
- Maintain the security of borders, airports, railway lines and terminals, mining

areas and other vital institutions of the federal government;

- Provide security protection to higher officials of the federal government and dignitaries of foreign countries;
- Execute orders and decisions of courts;
- Execute orders issued by the federal public prosecution with regard to the investigation of crimes;
- Issues certificates of criminal records,
- Undertake studies for the enhancement of the prevention and investigation of crimes.
- Provide training and support for regional police commissions;
- Establish relations and exchange information with the international police.

C) The Federal Prisons Administration

The Federal Prisons Administration established by Proclamation No. 365/2003 (as amended by Proc no 471/2005) executes sentences and convictions rendered by decisions of federal courts. The Administration is empowered to admit and ward prisoners. Prisoners are required to change their attitude to wards the commission of crimes and develop behaviours that are acceptable by the society and in line with the laws. Hence, the Administration has to provide them reformatory and rehabilitative services so that they would be law abiding peaceful and productive citizens [Proclamation No. 365/2003, Art 5]. The powers and functions its custody on judicial decisions or orders of the Federal Prisons Administration include the following [Proclamation No. 365/2003, Art 6]:

- warding and work to reform prisoners under custody;
- to produce prisoners in court and upon court order transfer prisoners with warden escort from a federal prison to a regional prison or from any prison to another;
- to undertake and encourage activities necessary for the physical and mental well being of prisoners;
- to provide prisoners with academic education, vocational training, and counselling services to facilitate their rehabilitation;

- to determine and take disciplinary measures against prisoners that infringe prison rules;
- to gather and organize country-wide data and statistics about prisoners;
- to submit to the competent organ recommendations of parole or pardon;
- to undertake studies that will improve the custody and treatment of prisoners, and that facilitate country-wide uniformity in the service of prison wardens;
- to provide professional and technical assistance to Regional Prison Commissions.

D) The Justice and Legal system research Institute

Established by the Council of Ministers Regulations NO 22/1997, the Institute is accountable to the Prime Minister [Regulations No 22/1997, Art 2(2)]. The main objective of the instate, as its name implies, is to undertake studies and research activities so as to strengthening and modernizing the legal and justice system of the country [Art. 4]. With the above mentioned objective, the Institute shall revise the laws of the country to guarantee the reflective implementation if the constitution; ensure the province of the rule of law and promote economic and social development (Art 4(1). What is more, it shall also strive in building the capacity and improving the efficiency of organs involved in the administration of justice (Art 4(2)).

The Institute has given the powers and duties to review existing laws and design law revision research programs [Art 5(1)]. In addition, it is empowered to conduct research on the revision of existing laws in order to consolidate and update them so as to make them accessible to users (Art-5(2)). Further, it is empowered to indicate new laws that would promote the development of the country's legal system after it has conducted research on the sector [Art 5(3)]. It is also empowered to conduct a research with a view to improving the efficiency of ladies involved in the administration of justice (Art 5(4)). Further more, it is given the power and duty to publish legal information (Art 5(5)).

In Ethiopia the legal and justice reform is undertaken. The institute, with this regard, is empowered to assist Federal and Regional organs in the legal and justice reform [Art 5(6)].

What is more, the institute is empowered to conduct research necessary to promote legal education and training in cooperation with the respective organs. It also assists those organs in implementing the research conducted (Art 5(7)).

This material, being sponsored by the Institution could be taken as the implementation of this power given by the regulations.

LEARNING ACTIVITIES

- 1) Explain the roles of the Ministry of Justice.
- 2) Evaluate the role of the federal Ethics and Anti-corruption Commission.
- 3) What are the powers of the Federal Police Commission?
- 4) Discuss the powers of the Federal Prisons Administration Commission.
- 5) Compare and contrast powers and duties of the Ministry of Justice and the Justice and Legal Systems Research Institute.

9.2) STATE INSTITUTIONS

9.2.1) STATE COUNCILS

The State Councils exercise exclusive legislative power on matters falling under state jurisdiction provided by the Federal Constitution and over matters not expressly given to the Federal and/or State Councils by the Constitution.

The following include the major and specific legislative powers of state councils:

- the enactment of laws on the state civil service;
- the enactment of State constitution and other laws;
- to levy income tax within their particular and joint tax jurisdiction with the federal government;
- the enactment of criminal laws on matters that are not specifically provided for by federal criminal law;
- the enactment of family law etc...

9.2.2) STATE COURTS

State judicial power is vested in state courts. The structure of the state courts comprises state supreme, high and first instance courts. These courts exercise judicial authority within state jurisdiction and the jurisdiction of federal courts as delegated by the federal Constitution.

9.2.3) REGIONAL JUSTICE BUREAUS

They are charged with the prosecution of criminal offences falling under the jurisdiction of state courts in their capacities as such and carry out other functions, which in most cases are a mutatis mutandis application of the functions of the federal Ministry of Justice as stated in the foregoing here.

In some regions, there are Shari'a Courts with analogous structures to the regular state courts that exercise state judicial functions mostly over marital matters falling under Sharia laws.

9.2.4) STATE POLICE COMMISSIONS

Regional Police Commissions are responsible to conduct investigations in relation to offences falling under state jurisdiction and also undertake investigation of federal crimes in cooperation with the Federal Police Commission. Other functions of state police in most cases are analogous to the Federal Police Commission described hereinabove.

9.2.5) STATE PRISONS ADMINISTRATIONS

They are responsible to enforce judgment rendered by state courts and rehabilitate individuals convicted of a crime. The specific powers and functions in relation to enforcing judgments and rehabilitation are fairly comparable to that of the federal prison Administration as provided in this material.

LEARNING ACTIVITIES

- 1) What are the roles of state (regional) councils?
- 2) Explain the powers of regional justice bureaus.
- 3) Analyse the powers of state prison administrations.

9.3) CONFLICT OF POWERS OF THE FEDERAL STATE AND THE REGIONS

We have discussed that the Federal State and the Regions have legislative powers. However, what would be done if their powers come to conflict?

There are concurrent jurisdiction of the Federal State and the Regions. In other words, either the Federal State or the Regions have no sole power to enact laws on such matters. Both the Federal and Regional states have the power to enact laws on their respective jurisdictions, on the other hand.

Under Art. 98 of the FDRE Constitution concurrent power is clearly provided for with regard to tax. However, the following are also matters that should be done both by the federal and regional states:

- to protect and prevent the Federal Constitution (Arts. 51(1), 52(2)(A));
- enact laws (Arts. 55(1), 52(2)(B);
- to enact (issue) social and economic development policy (Art. 51(2), 52(2)(C);
- to regulate natural resources and land (Arts. 51(5), 52(2) (D);
- enact civil servant laws (Art. 55(6), 52(2) (f);
- to organize and lead the police power (Art. 55(7), 52(g);
- to enact Criminal Law (though in limited manner) (Art. 55(5));
- to organize and appoint the executive and judiciary and their personnel;
- to establish ombudsman and Human Right Commission.

So, if both the federal and regional states enact laws on the same matter, which law should be applicable? We do not find a clear provision which respond to this. In case of land

administration, for example, it is the power of both federal and regional states. However, some argue that the regional states should enact laws taking into account the spirit of the law enacted by the federal government. It follows that a law of a given region that contravene the federal laws seems not applicable [Menbere; 2006: 125].

Do you agree with this? With regard to the executive power, we learnt that both the federal and regional states have this power of execution. The power and function of the federal executive organ is to implement the laws of the federal state. Therefore, its power is related with that of the federal state. In the same token, the power of the regional executive organ is to implement the powers under its jurisdiction. However, the constitutions of regions also empower the executive organs to implement the laws of the federal government as well (Art. 54(1) of the Tigray Constitution and Art. 55(1) of Afar Constitution).

LEARNING ACTIVITIES

- 1) What do you understand by conflict of powers?
- 2) What are the remedies where there is a conflict of powers between the power of the federal state and the states?

9.4) ADMINISTRATION OF JUSTICE IN ETHIOPIA

Courts play a great role in the administration of justice. The FDRE Constitution makes clear the role of courts. The preamble of the Constitution articulates that the Nations, Nationalities and Peoples of Ethiopia are strongly committed to build a political community founded on the rule of law. It also emphasizes on the respect of individual and people's fundamental freedoms and rights [Preamble, 1st and 2nd paragraphs]. This shows the close relationship between rule of law and the respect of rights and freedoms in Ethiopia.

The principle of rule of law and respect of rights is ensured by the application of laws on each and every person by the courts. The government is required to work within the limits without violating the rights of individuals and people's. On the other hand, individuals are required to live up to their rights. The administration of justice made by courts is to

adjudicate on disputes so as to ensure a balance between the power of state and rights of individuals.

In general, the court is empowered to check that the rights of individual are not abridged or violated by the government.

Now let us turn to the issue of criminal justice administration. The Criminal justice administration is not without problems. The first problem is related with attitude that the Ethiopian people are thirst of justice in addition to hunger to bread. Thus, such an idea should be considered. The second is the problem of crime prevention. There is also problem of proper understanding in this respect. Methods of crime prevention should be implemented.

Thirdly, (criminal) prosecution policy is essential. Most developed countries, for example, European countries, have prosecution policies. The European Union has adopted prosecution policy. The problem with this regard is believed to be solved when we begin implementing prosecution policy.

Fourth, in Ethiopia the justice agencies like law schools, police, prosecution office, the judiciary, and prison administration are islands isolated each other. They should work together so as to solve the problem [Harka; 2005:20].

The fifth problem has to do with crime investigation. Criminal investigation needs the scientific and modern method to employ. Investigating officers should be trained in Criminal law, Criminal Procedure Code, law of evidence, criminology, human rights and other investigation techniques. Currently, there are numerous people who indulge in the task of investigation without having such training. The other related problem is that the relationship between the prosecutor and investigator is loose or the prosecutor cannot control the investigation process properly. In addition, there are numerous incidents whereby the investigator does not comply with the orders of the public prosecutor.

Sixth, there is a problem of attitude among prosecutors. A public prosecutor should work to promote the interest of the country, people, and prosecute in the name and on behalf of

the people. They should work for the rule of law and justice, but that may not be the case in practice. S/he were to work efficiently, effectively, transparently and fairly [Harka; 2005: 21]. However, a prosecutor is seen instituting charges that were to be closed according to Art. 42(10(a) of the Criminal Procedure Code.

LEARNING ACTIVITIES

- 1) Explain the powers of the federal Police Commission.
- 2) Analyse the powers of the federal courts.
- 3) Do you appreciate the problems of administration of criminal justice in Ethiopia? Reason out.
- 4) Evaluate the powers of the executive organs.

CONCLUSION

We have seen that the Federal State has the power to enact laws within the jurisdiction of the federal government. It has also the power to execute those laws. What is more, the Federal State has its own courts that are empowered to interpret laws.

Similarly, Regions have the right to establish legislative, executive and judicial organs. Consequently, Regions have the power to enact laws, to execute these laws within their respective jurisdiction. Being institutes of the federal state, all institutions are duty bound to execute the laws of the country. We have also discussed that both the federal state and regions have concurrent power to enact laws and execute them.

We have observed that the administration of justice in our country is not free from problems. There are situations whereby non-professionals conduct investigation of crime. Besides to insufficient evidence to prove criminal charges, there are attitudinal problems on the part of public prosecutors.

In addition, we have seen that courts are not up to the standard to render a decision within a short period of time. However, we have seen that all the problems of administration of justice may be resolved through the effort of all of us.

REVIEW QUESTIONS**I) True/ False**

- 1) The House of Federation is the legislative organ in Ethiopia.
- 2) The Justice and Legal Systems Research Institute is empowered to undertake research in any federal organ with the view to promote justice.
- 3) We have only one government organ to prosecute criminal cases at the federal level.
- 4) The Councils of the Regions have the power to enact laws under their jurisdiction.
- 5) Administration of justice in Ethiopia is up to the world standard.
- 6) The power of the federation must prevail over that of Regions should conflict arises.

II) Chose the best answer

- 1) Which of the following has the power to charge a criminal case on a person who is suspected of corruption?

A) Ministry of Justice B) the federal Ethics and Anti Corruption Commission

C) A and B D) None
- 2) Which of the following is a problem related to administration of justice in Ethiopia?

A) Attitudinal B) Commitment C) Hardworking D) A and B
- 3) Which of the following is not directly related in the administration of justice?

A) Police commissions B) Prison administration

C) A Private Limited Company D) all
- 4) A municipality court is _____ organ.

A) executive B) legislative C) judicial D) all
- 5) Which of the following is the power of the public prosecutor?

- A) Prepare a charge B) Closing an investigation where there is evidence
- C) To close an investigating file where there is no sufficient evidence to convict
- D) None

III) Answer the following questions

1. Discuss the responsibilities of the institutions of the federal government of Ethiopia.
2. Compare and contrast the structure of the judiciary at the federal level and regions with that of their responsibilities.
3. Discuss the relationship of the federal and regional institutions
4. What are the areas of given for both the federal government and Regions to enact laws?
5. Discuss the problems of administration of justice in Ethiopia with regard to prosecution.
6. What are the fundamental problems of administration of justice related to Courts?

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UNIT 10: TRADITIONAL MECHANISMS OF DISPUTE RESOLUTION IN ETHIOPIA

UNIT OBJECTIVES

After completing this unit, you will be able to:

- analyze the general concepts of alternative dispute resolution;
- discuss the modes of the traditional co-existent mechanisms of dispute settlement in Ethiopia;
- explain the conflict between formal and traditional mechanisms; and
- apply the rules of traditional dispute resolution mechanisms.

UNIT INTRODUCTION

This unit is devoted to discuss the general concepts with regard to alternative dispute resolution mechanisms, and the traditional mechanisms of dispute resolution mechanisms in Ethiopia. We will conclude our discussion by summarising important points. We will have questions to help the student to check his/her development in studying the unit. References are also indicated to help the student's quick reference for further readings.

10.1) General Concepts of Alternative Dispute Resolutions(ADR)

What is the meaning and nature of ADR? Why do people resort to ADR?

10.1.1) Definition and Nature of ADR

The concept of dispute resolution mechanism is as old as human being. To have a resolution mechanism, first there should be a dispute. Dispute is inherent in the life of people: dispute arises when individuals disagree on certain points.

Courts of law form these various means emerged as formal disposition mechanisms of peaceful means while others were left to customary practices. Forceful resolution of disputes, in time, have been disregarded, although not completely, at least theoretically.

Yet, the practice of using alternative dispute resolution means other than the courts of law continued, especially in family, labour and commercial disputes. In addition, congestion of cases in courts of law forced most states to incorporate in their laws other alternative dispute resolution mechanisms such as mediation, negotiation, conciliation and arbitration.

What is ADR? It may be defined as a procedure for settling a dispute by means other than litigation, such as arbitration or mediation [Garner; 2004: 86]. This meaning envisages the presence of variety of alternative processes to litigation although it does not enumerated many of the mechanisms of ADR. In any case, it makes clear that alternative dispute resolution (ADR) is a mechanism employed to settle disputes other than courts of law which are established by the government of a given state.

Stephan J. Ware[Garner; 2004: 86] on his part defines the term as follows:

ADR can be defined as encompassing all legally permitted processes of dispute resolution other than litigation ADR is defined as everything but litigation because litigation, as a matter of law, is the default process of dispute resolution.

We can understand that ADR is a mechanism of dispute resolution to the exclusion of litigation. This means that, in the normal course of circumstances, if litigation is excluded, courts and arbitration proceedings are also excluded for litigation is unthinkable in the absence of courts and arbitration.

ADR procedures, as a matter of principle, emanate from private or contractual acts subject to some limitations imposed by the law for some important reasons. The parties to a dispute resort to these procedures through agreements to resolve their differences by any of the alternative means. The mechanism chosen by the parties may be to negotiate to reach a common understanding or to hand over their controversy to a neutral third party so that the latter will assist them to arrive at an agreement. The whole process of ADR depends upon the will of the disputing parties and it is free from the formal and public structure of the courts.

One of the distinguishing features of ADR procedures is that the disputants try to find a solution peacefully and in a friendly manner. They come together to discuss their problems in good faith and find a way out of their differences without putting their relationship at risk. They sit and negotiate until a compromise is reached – a situation from which both parties could benefit. They may also seek the assistance of any third party neutral in cases of mediation and conciliation. In the case of arbitration, they may agree to be bound by the decision of a neutral third party who looks into the matter and gives the best possible decision, which is binding upon the parties to the dispute. Here too the good relationship is maintained even if one party may be disappointed by the outcome of the decision. In spite of this, the party will honour the decision of the third party neutral and continue the relationship since he consented to the mechanism before hand.

However, in courts of law, in the majority of cases, this may not be possible. After the final judgment is rendered, the parties to the dispute may still hold grudges against each other and may even refuse to be bound by the judgment and continue on a process of appeal.

10.1.2) Types of ADR Methods: An Overview

The following are essential types of ADR:

A) Negotiation

Black's Law Dictionary[Garner; 2004: 1064] defines the term as a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter.¹⁰

In negotiation, the parties to a dispute, through communications and discussions, convey their positions to each other and attempt to persuade the other to take a position by making compromises. Thus, the whole process of negotiation is centred on communications and discussions to resolve the disputes. The parties to a dispute direct and conduct the negotiation procedures. There is no neutral third party who assists or offers points of compromise. The parties themselves have control over the whole process and its outcome.

B) Mediation

Mediation, according to Black's Law Dictionary [Garner; 2004: 1003], is a method of non-binding dispute resolution mechanism involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution.

Mediation is negotiation by its nature, the only difference being the appointment of one or more neutral third parties to the conduct of the negotiation process. The neutral third parties, called mediators, assist and give their expert opinions or suggest points of compromise to resolve the controversy by recommending common grounds.

An important part of the mediation process is that the parties take responsibility for solving their dispute. Therefore, a solution to the dispute must be one that the parties create to mutually satisfy their interests. The mediator is, however, responsible for making sure that a process is followed that helps the parties work together to create their own solutions. In technical terms, a mediator will not recommend solutions, but instead tries to facilitate the communications and negotiations between the parties. It is the parties themselves who must create and voluntarily agree to the solution to their dispute. Mediation is less formal than arbitration or court adjudication.

C) Conciliation

Conciliation is also another type of ADR, which may be used in settlement of a variety of disputes. In spite of this, however, a number of authors on ADR, do not consider conciliation as a means of settlement of disputes. Rather they focus on negotiation, mediation and arbitration.

However, what is conciliation? Is it different from mediation? According to Black's Law Dictionary [Garner; 2004: 307], conciliation is a settlement of dispute in an agreeable manner; a process in which a neutral person meets with the parties to a dispute and explores how the dispute might be resolved, especially a relatively unstructured method of dispute resolution in which a third party facilitates communication between the parties in an attempt to help them settle their differences.

D) Arbitration

The term arbitration comes from a Latin word ‘arbitr’ with a meaning, one who goes and sees. Arbitration is defined by Black’s Law Dictionary as “a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.”[Garner; 2004: 112]

The word arbitration is defined in American Jurisprudence as “a mode of settling differences through the investigation and determination, by one or more unofficial persons selected for the purpose of some disputed matters submitted to them by the contending parties for decision and award, in lieu of a judicial proceeding.”

From the above definitions, we can understand the salient features of arbitration. The salient features are: that arbitration is an alternative dispute resolution method, which it involves a neutral decision-maker appointed by the parties that arbitrators can give binding decisions just like judges of regular courts who are appointed by the sovereign. In other words, from the definitions given, one can understand that arbitration involves the agreement of the disputing parties, dispute presupposes arbitration, the parties to the dispute are free to choose arbitrators of their choice and arbitrators can hand down binding awards, which are enforceable on the same footing as court judgments.

It is worth mentioning here that such traditional dispute resolution mechanisms are not covered by any other course. Therefore, it is essential to pay attention to them. The concept of alternative dispute resolution mechanism is incorporated under Ethiopian legal regime though not sufficient. For example, compromise is dealt in the Civil Code Arts. 3307-3317, conciliation is governed by Arts. 3318-3324 of the same Code, the concept of arbitration is dealt in the Civil Code Arts. 3325-3346. In addition, the Civil Procedure Code deals the concept of arbitration in Arts. 315-319, 350-357. Here, we do not intend to discuss the principles as incorporated in our legal regime since there is a course on the subject. However, we will discuss some points about the traditional dispute resolution mechanisms in Ethiopia.

LEARNING ACTIVITIES

- 1) Define alternative dispute resolution mechanism.
- 2) Discuss the types of ADR.
- 3) Explain the reasons why people resort to ADR while there is court litigation.

10.2) MODES AND NATURE OF TRADITIONAL /CUSTOMARY/ MECHANISMS OF DISPUTE SETTLEMENT IN ETHIOPIA

As we have discussed above, ADR is an alternative to the modern /formal civil justice system. Customary law is a comprehensive body of law that governs every aspect of the life of a certain society: social, economic, political, environmental, etc. In the realm of law, the customary laws govern all aspects of relationships. Family and personal, criminal/tort-related acts, ownership/ (dis)possession, succession/ inheritance, contracts, adoption, etc. Customary system is the lifeline of a society; it is not alternative. Consequently, it is not ADR. Having in mind this, let us consider some of the traditional mechanisms of dispute resolution in Ethiopia.

We will discuss the traditional mechanisms of dispute settlement mechanisms in Gurage, Amhara, Oromo, Tigray and Afar. We will only concentrate on disputes related to economy, crime, marriage and clans or tribes.

A) Mechanisms of economic dispute settlement -an economic matter that would rise to dispute is any action or proposal that is related to the production or distribution of economic goods, or any issue related to land, labour and capital [Giday; 2000: 22]. A dispute arises from debt is also an economic in nature. In Gurage, the following are traditional politico-administrative organs that settle disputes:

- ‘**Sabugnit elders committee**’ –established to settle disputes between neighbors;
- ‘**Gosa elders committee**’ – fore inter-clan disputes;
- ‘**Hager elders committee**’ – is to settle inter-tribal disputes. The terms of the agreement depends on the agreement of the disputants.

In Amhara, an economic dispute may be related to land division and grazing lands and steams. Economic disputes will be settled by arbitrators who are selected by the disputants. A dispute to recover a debt will also be settled by mediators or arbitrators. The decisions of arbitrators are morally compulsory and binding [Giday; 2000:].

In Ormia, economic disputes are settled by elders' arbitration. The Oromo believe in Orra Duu'li (I swear), that means an evidence given by offidarit plays a great role [Giday: 200]. In Tigry, a 'Siwa meeting' of a locality, consisting of three members, are elected and these elders' committee settle economic disputes. Restraint from trespassing into prohibited areas us to let the disputants use the land for grazing communally is the most frequent salustion. In case of a dispute to recover a debt, the debtor is asked by elders and the "Abbat-Nebissi" to swear, where there is no witness. If there are witnesses for the creditor, the dispute is resolved using the elders' mediation [Giday]. Similarly, in Afar, a dispute is resolved by local elders who act as mediators. [Kelemework; 2006: 43].

B) Dispute settlement of acts that constitute a crime. An individual could committee a crime against another. Each has a mechanism to settle disputes in such a case. In Gurage, the traditional politico administrative organs decide on a criminal case and it inflicts a punishment upon the offender. The punishments include: deciding the offender to give cliff; making him/her to pay one hundred helpers and money, slaughtering his/her animals or cattle; making him/her pay for clothing, his/her harvest.

Coming to Oromia, in the days of Gadaa system, a public campaign settled a dispute that arised from the commission of a crime. If a person flew away after plundering a property, s/he was hunted by and caught by Lame Korro (people fit for war) under the guidance and instruction of the Abba Dulla (member of the GAdaa council, Lubba responsible for the prevalence of peace and order). The offender would be brought to trial at the court of the Gadaa council if s/he surrenders peacefully. The council would decide the offender to give back the plundered property or to pay commensurable amount. If the offender refused to surrender peacefully, s/he would be chased and killed. Arrest, physical punishment and confiscation of property are also punishment passed on the wrong doer. If the offender

could not pay, part of the confiscated property would be given to the victim as compensation. There could be a situation where by the wrong door would have no any property. In such a case, the captive is obligated to render physical service. While fed by the victim [Giday Similar procedure was used in case of hold barning and theft.

How a dispute criminal in natures settled in Tigry?

In Tigry, quarrels, physical attacks, plunder, homicide etc are considered as breaking public peace and order. Where the damage caused by these acts in limited to physical injury, the disputes would be settled easily through arbitration by elders and possibly end up in forgiveness or compensation in money or any other kind. On the other hand, if the acts resulted in server damage and deaths, settlement of such cases take longer priors because the victims) hold a grudge and wants revenge [Giday]

With regard to plunder of property, there is a proverb that says “Tselai” hoger shifta, Tselai Genzeb Meshetta.” A “shifta”, a plunder is an enemy of a country, just as alcoholism is of money. The settlement of such a case would take either of the following:

- C) Compensation is paid to the victim if the offender and/or members of his/her family approached the injured family through one of the mediators.
- D) If the offender has become a threat to the whole community, s/he would either be killed or captured and imprisoned [Giday]

In case of theft, the dispute is settled by mediation and therefore the thief [Giday]

- A) has to give back what s/he has taken peacefully; or
- B) has to compensate or replace the stolen goods or household properties; or
- C) If s/he fails to fulfill the above, s/he is either killed or imprisoned.

A dispute may also be raised from a rope. The dispute is settled by mediation and the punishment would be [Giday]

- Payment of money for the injured girl or her family; or
- Marrying her; or
- Decorating the victim lady with ornaments

In Afar, they believe that all disputes with their ethnic group should be settled peacefully and according to the long-standing customary laws (mad'aa). Mad'aa consists of guidelines

and rules how to handle disputes. A dispute will be given to elders. Once a dispute case in the hands of elders, the individual has very little chance to promote his/her interest. Payment of certain compensation both in livestock and in cash is a method of resolving a dispute arising from a crime. The clan in whole is responsible for a crime committed by one or some of its members. Then the members of the clan will contribute money and live stock to pay compensation to the victim. The amount of compensation depends on the type of a crime and its context [Kelemework]

C) Mechanisms to Settle Disputes that arise from family relationship- How a dispute that arises from marriage is settled in traditional mechanisms?

In Afar family disputes involve the spouses. The causes for family dispute may be adultery or economic or a social neglect of wives by husbands. Disputes may also arise due to competition over domestic authority between the spouses. The case will be given to an arbitrator and the arbitrator will hear the disputants one by one before he reaches on a decision [Kelemework; 2006: 55-61].

In Tigray, family disputes are resolved by mediation of close relatives of the disputants so that an excuse or foreigners could be made. Where the dispute is grave, elders' Committee will mediate the case and a dispute between spouses could end up with divorce [Giday;]. How marital dispute is settled in Oromia? In Oromia, the settlement of marriage disputes varies. If a wife is red-headed while committing adultery, she was liable to a knife cut on her nose and lip to leave a permanent sign of her act. The adulterous husband was also liable for severe punishment up to death. The Lubba judicial court would decide upon the wrong doer to pay compensation for the victim.

Coming to ordinary marriage dispute, the spouses would be reconciled by the respective families, and then by the elders and Gadaa authorities [Giday]

In Amhara, a marriage dispute is/was settled by arbitrating elders-yehager or Yebeteseb Shimaglewock' [Giday]

In general, we can observe from the discussion made that counseling, mediation and arbitration are the traditional dispute settlement mechanisms.

D) Mechanisms of Resolving Tribal Disputes- In a society where various tribes and ethnic groups are living, it is obvious that a dispute would arise between them.

Inter tribal clan conflicts may be caused by economic, political or social causes, for example, grazing lands, watering areas, abduction of girls etc. In such cases, the settlement in Oromia, would be

- A) the Lubbas would first go to the area of conflict to calm down the disputants;
- B) then, the pre-Lubbas (32 years of age) and elders mediate to settle the dispute amicably.

If that fails, the dispute would be resolved by Abba Bokky in cooperation with recognized elders [Giday;]

To solve a dispute between Afars and Tigrayans, Gereb council members (ABo Gereb) are elected by their respective groups. The criteria to elect members are the proven capability of the persons of decision making, impartiality and honesty. When a crime is committed by a Tigrayan, the Tigrayans have to send their representatives (AboGereb) to Ab'ala for the meeting. In like manner, the Afars must send their representatives to Tigry where the meeting will be held if an Afar commits a crime against Tigrayans .[Kelemework

In general, it is discernable that traditional dispute settlement mechanisms use different mechanisms. Those “settlement forms” are commonly accepted by the communities as a direct reflection of the good values of the forms [Giday;]

LEARNING ACTIVITIES

- 2) Explain the agencies that solve disputes in Oromia.
- 3) State the mechanisms of resolving disputes arising from property are resolved in Oromia out side courts.
- 4) Discuss how disputes arising from attacking parents are resolved.
- 5) What are the dispute resolution mechanisms in Amhara?
- 6) Analyse how a marriage dispute is resolved in Oromia.

- 7) Discuss the mechanisms how disputes between Tigrias and Afar are resolved?
- 8) Evaluate the traditional dispute resolution mechanisms in Gurage.

10.3) CONFLICT BETWEEN FORMAL AND TRADITIONAL MECHANISMS

In Ethiopia, we may face with conflict between formal and traditional mechanisms of dispute resolutions. For example, if one kills another person in Afar Region, s/he may not be arrested rather s/he may go to his/her tribe. Then, the victim's relatives may go to the tribe of the offender and claim damages. The tribe is obliged to effect the compensation. In addition, the tribe may impose a punishment upon the wrong doer. Hence, the traditional mechanism contradicts that of formal. In such a case, the principle is that the formal mechanism should prevail over.

However, the practice revealed that the traditional mechanism is very pragmatic and problem solving.

Let us consider one more example. Let us assume that Alemu caused a grave wilful injury on Kebede. Alemu and Kebede are neighbours living in Addis Ababa. Kebede lodged a petition against Alemu and police conducted an investigation. The investigation file was send to the public prosecutor. After having examined the investigated file, the public prosecutor has prepared a charge against Alemu by citing Article 555 of the New Criminal Code.

One of the witnesses of the public prosecution is Kebede himself, as a victim of the act of Alemu. The neighbours of Alemu and Kebede heard their case and solved the dispute amicably.

On the day of the hearing of the case by the Court, Kebede prayed the Court to discontinue the case since they solved the problem amicably. However, the Court rejected the petition and told Kebede to lodge the petition to the public prosecutor. Accordingly, Kebede lodged the petition to the prosecution office.

Assume that you are a public prosecutor, what decision would you pass on the petition? Why?

In principle, the case should be continued to be heard by the Court since the crime is punishable without complaint. That means, the offence or the wrong primarily affects the interest of the public. Therefore, Alemu should be answerable to the deed he committed.

However, the practical problem is that if Kebede continues the case and gives his testimonial evidence, not only Alemu but also their neighbours will consider Kebede as doing wrong. Consequently, they could outcast Kebede. On the other hand, the public prosecutor cannot prove his/her case where Kebede is not volunteer to testify. Consequently, Alemu will not be punished by the court of law. In addition, this would carry a direct opposite message to the public to the intention of the legislature; the person who committed a crime would be set free. Thus, what should be done with this regard?

LEARNING ACTIVITIES

- 1) What are the mechanisms to resolve the contradiction between formal and traditional dispute resolution mechanisms?
- 2) Analyse the practice in your locality.

CONCLUSION

We have seen that alternative dispute resolution is a mechanism to settle disputes out of the court of law. Arbitration, mediation, conciliation are types of alternative dispute resolution mechanisms. Alternative dispute mechanism offers more informal procedure than that of courts, it is expeditious, and less expensive.

In addition, the Ethiopian people are very much accustomed to settle their disputes rather than going to the courts of law. Customary laws that are easily accessible to the people are applicable. Thus, we have seen that settling disputes out of court is a co-existent mechanism in Ethiopia.

We have seen that the possibility of contradiction between formal and tradition mechanisms of dispute settlement is very high in Ethiopia. In such a case, we have observed that the formal mechanisms should prevail.

REVIEW QUESTIONS

I) True/ False

- 1) All disputes should be resolved by courts of law.
- 2) In arbitration we find litigation even though not similar with that of court.
- 3) Conciliation is not incorporated under the Ethiopian legal regime.
- 4) The traditional forms of dispute resolution mechanisms in Ethiopia are important institutions of the society.
- 5) We do not find conflict between the formal and traditional mechanisms of dispute resolution mechanisms in Ethiopia.

II) Choose the best answer

- 1) Which of the following could be resolved by traditional modes of dispute resolution mechanisms in Ethiopia?

A) Family dispute B) Political Dispute C) disputes on grazing lands D) all
- 2) A traditional institution to resolve a tribal disputes in Afar is

A) Litigation B) ABo Gereb C) Court preceding D) All
- 3) Which of the following is a dispute economic in nature?

A) A dispute between spouses B) a dispute to collect a debt

C) A and B D) none
- 4) In traditional Oromia, economic disputes are settled by

A) Elders' arbitration B) conciliation C) mediation D) all

5) In traditional Tigry, family disputes are resolved by

A) Conciliation B) mediation of elders C) mediation of close relatives D) none

6) In traditional Amhara, family disputes are resolved by

A) yebeteseb shimaglewoch B) court C) Gadaa D) all

III) Answer the following questions

- 1) Define an alternative dispute resolution.
- 2) Compare and contrast ADR with settling disputes by courts of law.
- 3) Discuss the solution where conflict arises between formal and traditional mechanisms.
- 4) Discuss how economic disputes are settled in Amhara Region.
- 5) Discuss how family disputes are settled out of court in Afar.
- 6) How does political dispute settled in Gurage?
- 7) Discuss briefly traditional dispute settlement in Oromiya.
- 8) Analyze how and when disputes are settled out of court in your locality. What kind of disputes are subject to settlement out of court? Economic, political, family...?
- 9) What are the basic rules applicable to settle disputes out of court? Are they written? Or...?
- 10) How much are the rules accepted by the members of the community? Who are the subjects of these rules, novices?
- 11) What is your appreciation with respect to traditional mechanisms of dispute resolutions in Ethiopia?

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- Kelemework Tafere, **Indigenous Institutions of Conflict Resolution Among the Ab'ala Afar of North –East Ethiopia**, Addis Ababa University, Department of Sociology and Social Anthropology, Social Anthropology Dissertation Series No. 11, Addis Ababa, Ethiopia, 2006.

UNPUBLISHED MATERIAL

- Aschalew Ashagre, **Arbitration and Conciliation of Labour Disputes in Ethiopia**, Master Thesis, Addis Ababa University, Faculty of Law, 2006.

SUBJECT REVIEW QUESTIONS**I) Choose the best answer**

- _____ 1) Source of law may be
A) formal B) material C) Both D) none
- _____ 2) Custom could be a source of law if
A) it is recognized by law B) the practice is definite
C) it is unstable D) All except C
- _____ 3) There are bodies other than the legislature which are non-sovereign law making bodies. Which of the following describes the subordinate nature of those non-sovereign law making bodies?
A) There are laws such bodies cannot change but obey.
B) No one is allowed to control such subordinate bodies to check the constitutionality of laws they made.
C) The head of State is entitled to ensure that all laws that are enacted by those bodies are essential for the public at large. D) all
- _____ 4) Which of the following has the power to initiate laws in Ethiopia?
A) Political parties B) Ministries C) Best experts in law D) French experts
- _____ 5) Repeal of law, in Ethiopia, may be made by
A) the lower body B) courts C) the higher body D) all
- _____ 6) An organ which is empowered to examine and determine the laws enacted contradict or not the Constitution, in the United States of America, is _____
A) the House of Federation B) the Federal Supreme Court
C) the Congress D) all
- _____ 7) An organ that has the power to check the constitutionality of enacted laws in Ethiopia is _____.

- A) the Federal Supreme Court B) the House of Peoples' Representatives
C) the House of Federation D) the Prime Minister

_____ 8) Which of the following is the reason that necessitate interpretation of law?

- A) The capacity of individuals in the parliament is so high that enable the legislature to enact a perfect law.
- B) Human language is imperfect by its nature.

- C) Words may not have more than one meaning D) all

_____ 9) Which of the following help us to interpret the law where there is an ambiguity in legislative intent?

- A) Minutes of the law making organ. B) Committee reports about the law making process C) Both D) none

_____ 10) Which technique of interpretation is employed where the law is contradictory?

- A) The lower law should prevail over the higher one.
B) General Law prevails over the special law where the laws are at equal level.
C) A law that is best in the opinion of the court should apply.
D) Posterior law prevails over prior law where a contradiction arises between laws at equal level.

_____ 11) Which of the following is the function of law?

- A) Law is required to adjust human relations in accordance with the ideal of justice.
- B) Law should determine which of the claims or interests of individuals and groups are reasonable and should be protected.
- C) Both
- D) none

_____ 12) Which of the following are public interests?

- A) Property claims. B) Claims one is endowed with by being a person.
C) Interests that are protected by criminal law. D) The interests of society in general.

- _____ 13) A law that contains the phrases like ‘shall not’, ‘is punishable’, and ‘should not’ _____ is _____ law.
A) permissive B) prohibitive C) directive D) all
- _____ 14) A sanction that may be imposed upon a person as a result of violation of law can _____ be _____.
A) civil B) criminal C) Both D) all
- _____ 15) A law may be applied retroactively where
A) it goes back to the past either to evaluate the conditions of the legality of an act.
B) to modify the effects of a right already acquired. C) both D) none
- _____ 16) Which of the following is a test to determine a legal right?
A) Where a right is recognized by the legal system.
B) The recognition and protection of the law by the legal system itself.
C) Only the protection of the law. D) none
- _____ 17) Which of the following is a juridical act?
A) Will B) Contract C) none D) A and B
- _____ 18) Juridical acts are categorized into _____ and _____.
A) unilateral and bilateral B) unilateral and unilateral
C) bilateral and multilateral D) all
- _____ 19) Which of the following is not a rule common to all juridical acts?
A) Capacity B) non-correspondence between declaration and will.
C) Form D) Consent free from vices.
- _____ 20) The Latin maxim “*Res inter alios acta allis neque prodesse necque nocere potest*” _____ means:
A) judgments are binding on third parties. B) contracts have binding effect on third parties. C) juridical acts have legal effects only on the parties to them.

II) Write TRUE where the statement is correct, and write FALSE if the statement is incorrect

- _____ 21) Social norms are rules that regulate the interactions of persons.
- _____ 22) Custom is an excellent example of a formal source of law.
- _____ 23) A law could be repelled by irreconcilable conflict between an old law and a more recent law.
- _____ 24) A system in which all the laws of a given country are put in various levels according to their order or importance is known as hierarchy of laws.
- _____ 25) Interpretation is the process of searching for the correct meaning of the law that is acceptable by lawyers.
- _____ 26) Once it is made, law should be enforced so long as it is not repealed.
- _____ 27) Social interests that are protected by criminal law are those intended to preserve the safety, peace and order of a given society.
- _____ 28) When we consider the obligatory nature of law, it could never be permissive.
- _____ 29) Sanction is a force that gives coercive, authoritative or binding nature to legal rules.
- _____ 30) The general principle is that a law is obligatory upon all citizens and susceptible of execution by the State retroactively.
- _____ 31) The principle that is applicable under Ethiopian law is that “no one is deemed to be ignorant of the law”.
- _____ 32) The term “title” is a legal concept that can be defined and expressed precisely, by avoiding any differences of opinion among writers.

_____ 33) Right is a correlative to duty. i.e., where there is no duty there can be right.

_____ 34) According to contemporary civilian theory, juridical acts may be classified into abstract and causal.

_____ 35) Juridical acts by their very nature never be performed by some one other than the person interested. In other words, agents can never perform juridical acts.

III) Matching

_____ 36) Formal source of law

A) Executive body

_____ 37) The House of Peoples'

Representatives

B) The determination of the meaning
of the law by the law maker

_____ 38) Legislative interpretation

C) Legislative body in Ethiopia

_____ 39) Doctrinal interpretation

D) The determination of the meaning
of the law by lecturers

E) That from which the matter of the
law is derived

_____ 40) Ambiguity in word meaning

F) Interpretation by the context

G) The will of the state as manifested
in statutes or decisions of the
courts.

IV) Essay 41) Enumerate and explain the sources of Ethiopian laws (10 points).

GLOSSARY

- **Acceptance**- A voluntary act by the person that shows assent, or agreement, to the terms of an offer.
- **Act**- Something done or performed.
- **Civil law**- The body of law given by statutes or constitutions.
- **Common law** – The body of law derived from judicial decisions, rather than from statutes or constitutions.
- **Consent** – An approval to some act given voluntarily by a competent person.
- **Custom** -a set of social attitudes that the society regarded as part of law and enforced.
- **Duty**- A legal obligation that is owed or due to another and that needs to be satisfied.
- **Immunity**-Any exemption from a duty or liability.
- **Inter alia**- Among other things
- **Jus Civile** – The traditional law of the city of Rome, which covered areas of law restricted to Roman citizens.
- **Jus gentium** – The body of law, taken to be common to all civilized peoples, and applied in dealing with the relations between Roman Citizens and foreigners.
- **Jus non scriptum**- Un written law.
- **Law** – A body of binding rules sufficient compliance of them is ensured by some mechanism accepted by community.
- **Legislation**- The process of making a positive law, in written form, according to given procedures by competent authority or branch of government. The whole body of laws.
- **Litigant(s)**- A person who is fighting a legal case. The parties to a case in court.
- **Mandatory** – Something which must be done, or which is demanded by law.
- **Maxim** – A statement of a general truth, principle or rule for behavior. For example, “justice delayed is justice denied”.
- **Moral** – Relating to the standards of good or bad behavior, fairness, honesty which each person believes in, rather than to laws or other standards.

- **Normative** – Establishing or conforming to a norm or standard.
- **Obligation**- A legal or moral duty to do or not to do something.
- **Power**- The legal right or authorization to act or not act; the capacity to change a legal relationship.
- **Precedent**- The making of law by a court in recognising and applying new rules while administering justice; Law made by courts.
- **Privilege**-A special legal right, exemption, or immunity granted to a person or class of persons.
- **Prohibits** – To forbid by law
- **Remedy** –The relief given to an innocent party to enforce a right or compensate for the violation of a right.
- **Repeal** – To make a law no longer have any legal force.
- **Right**- A power, privilege or immunity secured to a person by law.
- **Right in personam** – A right conferred on the winning party after a legal proceeding, the judgment of which binds the defeated party to a personal liability.
- **Right in rem** – A right obtained on the status of property after a legal proceeding concerning the fate of the property.
- **Sanction** – A strong action taken in order to make people obey a law, rule or custom or a punishment given when they disobey.
- **Stare decisis**- The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.
- **Statute**- A law passed by a legislative body.
- **Suit**- Any proceeding by a party or parties against another in a court of law; case.