

Chapter One

WHAT IS LAW?

1.1 Defining the term 'law'

Starting from Plato and Aristotle down to the 21st Century different scholars have tried to give their own definition of the term 'law'. But so far no universally acceptable and an all convincing definition has been found. None of the definitions so far forwarded were satisfactory or complete. All of them have defects.

To better understand this problem let us see some of the definitions and theories propounded by different scholars. The various scholars that tried to define the term 'law' are categorized based on their views in to groups known as School of thought and we will pick a definition from each category of philosophers and briefly examine them to show the impossibility of coming up with a single universally acceptable definition or theory for the concept 'law'.

The most important school of thought are:-

1. The Natural Law School (theory)
2. The Positivists (Imperatives) School of thought
3. Realists School of thought (Legal Realism)
4. The Marxian Theory of law

1. The Natural law school

It is the oldest of all school of thought. It originated in ancient Greece. The founders of this school of thought are Plato and Aristotle.

According to the philosophy of followers of this school of thought there are two sets of laws that govern the relation of the human society. These are Natural law which is eternal and unchangeable and the man-made law which differs in space and time. The natural law is a set of rules that are given by supra natural power- God – in the form of justice and morality and it is to serve as a standard against which man made laws are to be tested for their validity. Natural law which is eternal and unchangeable and whose content is justice and morality is once handed down by God and the power of men in making laws is to discover these principles of justice and morality by the dictate of reason and logic. The man made law, although it differs from one country to another and from time to time due to different conception of justice and morality of societies at different times and places, must follow universal principles of morality, justice and religion.

The problem with this theory is that, as stated above it presupposes that law is a set of rules which is just and morally correct. But this is not always the case. We have ample evidences and historical facts that illustrate that sometimes law may be contrary to logic, morality and justice. Look for example the extermination of millions of Jews by Nazi Germany. It was all done by issuing a law which by no means can be considered as just and acceptable to the Christian morality of the then Europe and the World at large. Take also the 1975 proclamation in Ethiopia which nationalized without compensation major

means of production and distribution owned privately. The various laws that provide for period of limitations for demanding a certain right cannot be by any account be considered just at least from the point of view of the right holder. So, it is not always true that law is logical, just and morally correct.

Who is to judge a certain law as just or unjust or as morally correct or immoral and by what parameters is the other unanswerable question of this theory of law. A given rule may be just for one person and may appear for another person unjust. We do not have commonly acceptable standard to say something just or unjust, right or wrong.

2. The Positivists (Imperatives) School of taught

This school of taught founded by Thomas Hobbes and which got predominance in the 19th and 20th century sharply separates law from morality and justice. It sharply contrasts with the natural law school theory of law which is based on the belief that all written laws must follow universal principles of morality, religion and justice.

A typical definition adopted by this school of taught is that: “law is a command of a political sovereign backed by sanction”. In this definition we can see three important elements. That law is a command, that it is a command of a political sovereign and thirdly that it is backed by sanction.

As can be seen from this definition legal positivists see law as a command. In the context of this definition a command is the sovereign’s express desire, order or imperative direction that a person act or refrain from acting in a certain way. The political sovereign hands down all its laws by way of commands to the subjects who are there to obey the law given by the sovereign in the form of command without having regard to the contents, i.e. whether it is just or unjust, right or wrong, moral or immoral. For the positivists it doesn’t matter whether the law conforms to the dictate of universal principles of justice, religion and morality. What matters is whether or not it is handed to test them against principles of justice, equity or morality. Because, the positivists say that these principle differ from the law in that are unenforceable and should play no role in the making and application of law.

Another important element of the definition provided above is the “Political sovereign”. It is the political sovereign, which is the source of the law according to the positivists. The positivists define the political sovereign as a person or body of persons or politically supreme organ that the bulk of the society habitually obeys and who doesn’t himself obey any person or organ. In the earlier times it denotes the king which has all power and whose words were the sources of all laws of the land. Now a day the political sovereign refers to the parliament and other organs of the state that are empowered to make or create laws in various ways. So, according to the legal positivists theory of law the only sources of the law are those written rules, regulations, and principles that have been expressly enacted, adapted or recognized by a government body, including administrative, execrative, legislative or judicial bodies, regardless of whether it offends anyone’s sense of right or wrong.

According to the positivists law is not a mere command of the political sovereign. The command for the purpose of its enforcement is backed by sanction. The subject or citizens have to obey the law not at their own wish but at the pain of penalty. If and when people fail to observe the law which is handed down in the form of command they will be subject to punishment which may be in the form of loss of life (death penalty), loss of liberty (imprisonment) or loss of property (fine or confiscation).

This theory of law has its own positive and negative values. To start from the positive, legal positivism serves two values. First by requiring that all laws be written, it ensures that the government will explicitly

apprise the members of the society of their rights and obligations. In legal system run in strict accordance with positivist principles, litigants will never be surprised or burdened by the government imposition of an unwritten legal obligation that was previously unknown and non-existent. Second, positivism curbs judicial discretion.

Despite these, this theory has various defects. First it equates all laws with commands which is not always valid. Some sections of the law may be in the form of command but not all. For example do not steal! ; Do not commit adultery! ; Come to rescue a person at peril! Are rules of the law which are in the form of command? But we have also right or power conferring rules which are not in the form of command. Take for example provisions of the constitution which provide everyone's right to marry and found a family or the right to acquire and own property. All these and other similar provision of the constitution are enabling rules and do not command obedience of its addressees. Nor is a sanction necessary in these cases. All laws are not commands and nor are all commands laws. Only some categories of commands form a section of the law.

Another pitfall of this theory is that it associates all laws with a sovereign political authority. For the positivists all laws emanate from the sovereign. But this doesn't always hold true. Yes, it is true that most of the laws in our contemporary world emanate from the parliament or other organs of the state that are vested with the power to make rules and regulations. But we have customary laws that developed out of nothing but from repeated practice only. Customary laws do not emanate from the parliament or other organ rather from habitually repeated practice in a certain fashion over a long period of time. International law is also a case in point. It is a living fact that we have a body of rules referred to as international law which is meant to regulate the international relation of states. But we do not have an internationally recognized sovereign organ that legislate the body of rules that constitute international law. So, legal positivism tends to ignore international law which is a fact on the ground. Because positivists say that law emanates from a sovereign organ but we do not have an international sovereign law-making organ- so, international law is non-existent.

Another major defect of the positivists' theory of law is that it views the sovereign as unlimited and unaccountable to anyone whereas today every government organ is legally limited and accountable to the public.

A major defect in this theory of law is that it divorces law from the ethical foundation of equity, justice, morality and fairness. This separation of law from principles of justice fairness and equity has resulted in the degeneration of the human value and disintegration and collapse of social systems. The extermination of Jews by Nazi Germany, the discriminatory treatment of Black Americans in America and blacks in South Africa under the Apartheid regime were all carried out by issuing law inspired by positivist thinking. This has demoralized the human race and resulted in human crisis.

So, the theory of legal positivism with these shortcomings is not complete and universally acceptable.

3. Legal Realism

It is the theory that understood law not as formal rules and principles set by the parliament but something that are pronounced by courts of law which are based on social interests. Proponents of the theory of legal realism like legal positivists agree that law is not eternal and uniform rather it is man-made and very in space and time. The point of divergence between the Positivists and legal realists is that the Realists believe that it is not the legislatures that constitute the law of a country. For the Realists law is what the judge says in his decision to a particular case. For them it is the judge who gives life to the dead statements of the law maker. Realists believe that the law made by the parliament is nothing unless it is applied by the courts. They say that a law made by the legislature is a mere prediction on what the judges courts may decide. It is only when the judge make a rule by applying the law to the particular fact

situation that the law is known. It is for the courts to define refine and delineate the scope of the law given by the parliament and that which is worked out by the court in this way is the law.

This theory is popular among scholars who advocate judicial discretion to allow judicial law making. It is constructed to justify the judge made law or precedent system of the common law legal system. The theory was first made popular by the famous American Supreme court chief Justice Oliver Wendle Holmes when he published his book entitled the common law in the 19th century. Rousco Pound who described law as “social engineering” and the utilitarian Bentham are also staunch advocates of this theory of law.

Like all the other theories of law, the theory of legal realism hardly escaped criticisms. Although this theory has different versions, its central theme, as we have seen above, is that the rules and principles laid down by the parliament cannot be considered as the law proper until it is interpreted and pronounced by the courts. So; this theory views the courts as the real law makers. But this severely violates the well-established and operating constitutional principle of separation of power and functions. Under the principle of separation of power and functions state power and functions are apportioned to the three branches of government. Accordingly, law making is the exclusive business of the legislative branch, interpretation of law and adjudication of disputes is the responsibility of the judicial organ (courts) while execution and implementation of laws is the task of the executive organ of the government. Each of these branches of the government is independent and no one interfere in the affairs of the other. The theory of legal realism is violating this principle by advocating judicial law making which means over taking the function.

4. Marxist Theory of Law

The Marxists define law as an instrument of the economically dominant group in a class society to perpetuate its dominance. The Marxists like the positivists and Realists agree that law is man-made. The Marxists, however, contend that law comes in to existence with class society following the emergence of the institution of private property. It is with the coming of the system of private property that class societies come in to existence. Those who have more private property or the economically advantaged formed one class while those who are economically less advantaged formed the other class.

The Marxists` main thesis is that law emerged at a certain point in history (with the emergence private property) and it will disappear in the future when classless society emerge at communism stage of the evolution of society. The Marxists say that in the primitive communal society there was no class since there was no concept of private property. Because everyone was living communally by collecting only for daily consumption. The idea of accumulation was then unknown. In this era law was unknown latter in history the idea of accumulation of private property was realized. In the competition for accumulation of wealth some section of the society got richer and wealthier while the remaining mass become poor. The wealthier or the economically advantaged class, in order to ensure its continued economic dominance and to control and exploit the economically disadvantaged group, created the state with all its structures like courts, police and the military. The Marxists contend that in order for the state to serve the interest of the economically dominant group it began to make all its activities and operation by using rules and regulations (law). So, Marxists believe that law emerged with the emergence of state to serve the interest of the economically upper class. For Marxists law is an instrument of operation of the state in its endeavor to protect the interest of the dominant group in the society.

This is exhibited in the slave owning system, the Feudal system and Capitalist system. The Marxists are of the opinion that law has served the interest of the slave owner, the Land Lord and the Capitalist which are the dominant groups in the respective social systems.

Marxists hope that at the stage of communism there will be no idea of accumulation of private property. So, there will be no class differentiation consequently the state and law will weather away. They will become unnecessary.

So, the Marxists theory of law views law as a feature of the class society. It assumes that in the classless society law is unnecessary. Because there is no class confrontation.

There is again criticism directed against this Marxian theory of law. Critics say that even the communism system cannot survive without the law. Human existence without private property is near to impossibility and if the existence of law is related with the existence of private property then law is to be there forever.

The first reason for the failure of the various school of thought to satisfactorily answer the question 'what is law?' is that in defining it they give emphasis only to one or some of its aspects and do not address all aspects of law. For example, as pointed out above the Natural law theorists emphasis only on the content of law while the legal positivists emphasized on the form (the fact that it is a command backed by sanction). So the various definitions so far forwarded view law from different angles instead of looking it as a whole with all its essences and features.

The other explanation for the problem why it is difficult to get complete and universally acceptable definition of the concept of law is the dynamic nature of law itself. Law is a complex social institution like any concept in the field of social science. The meaning of law changes with changes and developments in social, political and economic situation of society due to the interaction of different social forces. The rise and fall of different political, social and economic ideologies in this world has contributed a lot to make law, a fluidly and elusive concept causing it to become difficult to define.

Generally, for one reason or the other the concept of law is indefinable in the sense that it is near impossibility, as shown above, to come up with commonly and universally acceptable definition of law and we need not venture to find one or to create our own definition. In order to better understand what it is, we will rather look into the basic features of law, its functions in the society and its relation with the state and what distinguishes it from other category of social norms like customary, religions and moral rules.

1.2 Basic Features of Law

Although it is difficult to come up with a single commonly accepted definition of law, it is still possible to enumerate its basic features or characteristics. In this subsection you will study these basic characteristics of law in detail.

1. Law is general statement on a possible human behavior.

Rules and regulation that constitute the law of a country are general statements on a possible human behavior. Legal rules are said to be general because:-

- a.** They do not deal with a particular person that is, they are not meant to regulate the behavior of a specific person. A legal rule cannot be made expressly by name to Ato Kebede or Ato Abebe. Generally legal rules are made in such a way as to be applicable to any person- the young or elderly, females as well as males. They are addressed to a supposed group of human beings by abstracting from the concrete individual. The level of generalization or the group size to which the law addressed itself, however, varies depending on the type of the law.

For example Art 3 of the Universal Declaration of Human Rights says that, “Everyone has the right to life, liberty and security of person.” This and other provision of the Declaration which starts by such introductory words as “everyone”, “all men” etc are addressed to all mankind in the world men and women, young or old.

When we come to national laws, for example if we look at art 40(1) which provides that “every Ethiopian Citizen has the right to the ownership of private property” the level of generalization or the size of the group is reduced only to Ethiopian Citizens – from billions to millions. The level of generalization may even be reduced to certain section or group of citizens of a country in some cases. For example take a provision of the labour proclamation which provides that “Every worker is entitled to annual leave”. This provision is addressed to all workers of Ethiopia which form only part of the Ethiopian Citizens. The provision is general because it addresses all workers indiscriminately.

Legal rules can still be addressed to an individual or single person. For instance look at Art.74 (1) of the FDRE constitution which provides that “The prime Minister is the chief Executive, the chairman of the council of Ministers, and the Commander- in-chief of the national armed forces.”

Although this provision is addressed to a single person, it is still a general rule. Because it is drafted in such a way that it can be applicable to any person that assume the office of the Prime Minister. For the moment it is addressing itself to Prime Minister Melese. If another individual is elected as a prime minister in the upcoming election the same provision will apply to him/her. It is still a general statement because it can continue to apply irrespective of the identity of the individual that assumes the post of premiership.

- b.** Legal rules are also said to be general because it is possible to apply a single rule to a potentially unlimited number of cases. That is legal rules will not go in to the particulars of daily life but they set general criteria by which many acts and situations are covered. Look for instance Art. 685 of the FDRE Criminal code which says that:-

“Whosoever, with intent to obtain or to procure to a third person an unlawful enrichment abstracts a movable or a thing detached from an immovable, the property of another whether by taking and carrying or by direct appropriation, or by having it pass indirectly to his own estate is punishable with simple imprisonment”.

This provision is drafted or made in such a general way that it can be applicable to different instances of theft. It can apply to theft committed by man or woman, young or old. It covers thefts of different tangible movable items-money, chair, ox, bike, etc...

- C. Another aspect of the generality of the legal rules is that legal rules are usually designed to apply for indefinite period of time for the future. It is because of this nature of laws that made the Ethiopian Civil code of 1960 and other laws to apply or to be valid for more than 40years. The applicability in other jurisdictions (notably in France) of a single legislation for more than a hundreds of years is explained by the general nature of laws.

Because of the dynamic nature of the society there will always be a change of circumstances causing the emergence of new situations which are beyond the purview of the law. Such changes of circumstances are accommodated by interpreting the law to fit the new fact situations. You will study how this is to be made on the chapter that deals with the interpretation of laws.

It is, however, important to note that the assertion that laws are made to apply for an indefinite period for the future doesn't always hold true. Some laws are issued only for a definite period of time.

Example - Emergency decree
- Fiscal year budget proclamations

2. Law Is a Normative Statement

Another basic feature of law is its normative aspect. A statement of the law is not a mere description of things or facts. It is not a statement of fact. It is not interested in what happened in the past. It is not all about facts. It is prescriptive rather than descriptive. It is interested in stating what ought to be done or what must not be done in the future. It is interested in shaping human behavior. The law describes a certain human behavior (eg. theft, adultery, corruption, bigamy etc) and takes position towards that behavior. That is it will either allow, order to or prohibit from exhibiting that particular behavior. In doing so it is shaping the way how individuals in a society should act or behave.

Consider for example art. 11 of the Revised Family code which provides that:-

“A person may not conclude marriage so long as he is bound by the bond of a preceding marriage”.

This provision described bigamy as the act of concluding another marriage by a person who is already married. And the position of the law towards this behavior is prohibitive. It prohibits married persons from exhibiting the behavior of entering in to another marriage so long as they are bound by a previously concluded marriage.

Based on the position that they take towards specific behavior legal norms are classified in to:-

A. Permissive norm (rule)-

Such rules allow or permit persons to do a certain act or to exhibit a certain behavior that is defined or described in the rule itself. That is, it is the choice of the individual whether to do or exhibit the behavior or conduct which is described in the rule itself. If the individual wants to do that act, he/she is at liberty to do so. If he doesn't want, he is not obliged to act, according to the rule.

Such legal norms are drafted by employing such permissive words as “may”, “has the right to...”, “is allowed to...”, “is entitled to do...” etc.

Example

1. Art 34(1) of the FDRE constitution :-
“All men and women attaining marriageable age shall have...the right to marry and found a family.”
2. Art 25(1) of the Civil code:-
“Every person having the capacity to make a will may prescribe the condition of his funeral.”

B. Prohibitive norms (rules)

These are those rules that prohibit a person from acting or exhibiting a certain behavior that is identified in the rule itself. Prohibitive norms of the law state what individuals must not do. Sometimes, acting in a certain way or showing a certain behavior may be desirable for the peaceful and orderly life of the society. In such cases the law interferes and provides that individuals should not act or behave in that particular manner. Prohibitive legal norms impose on individual’s negative obligation. That is it does not require individuals to act, but to refrain or abstain from acting or behaving in a certain way.

Prohibitive legal norms are made by employing such prohibitive words as “must not...”, “may not...”, “is not allowed...”, “is prohibited ...” etc.

Example:-

1. Art 9(1) Revised Family Code
“Marriage between persons related by affinity in the direct line is prohibited”.
2. Art 13(2) Civil code
“No one may enter the domicile of another against the will of such person; neither may be search effected therein, except in the cases provided by law.”

C. Directive Legal norms (rules)

This type of legal norms command individuals to do something. Such types of legal rules require individuals to act or behave in the manner provided or described in the rule. Sometimes the interest of society to live in peace and to conduct an orderly economic, social and political interaction requires that individuals should act or behave in a certain manner. So, the law, whenever it is found necessary, commands individuals to act or behave in the manner which is necessary to meet the interest of society to live in peace and prosperity.

Unlike prohibitive norms, directive norms entail on individuals a positive obligation that is they call individuals to act or respond in a certain manner or to become active.

The directive norms are by implication permissive norms since they are enabling rules. All directive norms are permissive norms. If the law orders you to do something, then it means that it is permitted to do that thing. Directive norms are always permissive. But the vice versa is not true. That is all permissive norms are not directive norms. When we say that a certain rule is

permissive, it is at the option of the individual to do or not to do but in directive norms the individuals are ordered to behave or act in that particular manner at the pain of suffering penalty.

Directive norms are drafted by employing such directive or commanding words and phrases like “shall..”, “ must do...”, “is obliged to do...”, “is compelled to do...”, “has the duty to...” etc

Example:-

- Art 547 penal code
”Every one has the duty to come to rescue a person in imminent and grave peril his life, person or health”.
- Art12(3)- Labour proc. no 377/2003
“The employer shall respect the workers human dignity”
- Art 438- Penal Code
“Everyone has the obligation to inform the commission of an offence to the law enforcement organs”.

D. Rewarding Legal norms (rules)

These are the kind of legal rules which usually exempt from observing the mandatory prohibitive or permissive norms or entitle a person to receive some benefits in return for the useful activity that an individual performed.

Example:-

1. Proc No 15/1992 Art 13(2) says
“Domestic and foreign investors... shall be entitled to exemption from payment of income tax for a period of three years from the date of commencement of production or operation”.
2. Income tax proc.No 286/2002 Art 84(1)
“Where a person provides information of tax evasion through concealment, under reporting, fraud or any other improper means, the informer shall be granted up to twenty percent (20%) of the amount of the tax evaded at the time of the collection of the said tax.”

The civil sanctions that the law prescribes assume the form of either

- a. nullity of the action, or
- b. payment of compensation

When an act which is contrary to the mandatory provisions of the law is done the law provides for the action which is done in contravention of the law to have no effect so that it does not yield the intended result. This compels individuals to act according to what is provided by law,

Example:-

1. Art 9 of the Revised Family Code provides that marriage between persons related by affinity is prohibited.
Concerning the effect of not observing this requirement Art 32 of the same Code provides that dissolution of the marriage will be ordered by the court upon the application of the public prosecutor or any interested person.

2. Art 1723 of the civil Code states that contracts relating to immovable property shall be made in writing. But if this requirement is not fulfilled the law under art.1720 provides that the act (contract of sale made orally) shall be considered as nonexistent or as never have been made depriving it of any value.

The other form of Civil Sanction is the obligation to pay compensation imposed on individuals who cause damage on the life, person (body), property or reputation of others by acting contrary to that which is provided by law. For instance if a driver while driving in excess of the speed limit in Piazza collide with and damage a car parked on the road side, then the driver is responsible, under the law of extra contractual liability (Art 2027 – 2161), to pay compensation to the owner of the car he has damaged.

Paying compensation is not, in fact, as punitive as the penalties provided under the penal law. But it still helps to shape the behavior of human beings.

3. Law Regulates The Social Behavior Of Man.

It is also interesting to note that law is not concerned with every kind of human behavior, But only with the social behavior of man, his behavior as far as it matters to certain social relations. Law addresses itself to man as a social being. Law essentially regulates relations between human beings. Law is concerned with the man – to -man relation. In other words law is not interested in the relation of man with machines or animals. If a single man were to live in absolute salubrity in one of the Pacific Ocean islands, then law is unnecessary for him. Because law is necessary only to regulate man-to-man relationship.

4. Law Is Intimately Related With The State

The other important feature of law and in fact which distinguish it from other category of social norms is its affinity or relation with the state. The relation of state and law is such that it is impossible to think the existence of one without the other. In fact we can say that they are two sides of the same coin. You can not envisage the state without law and law without the state.

There are several factors that relate state and law. These factors make the two mutually interdependent. Let us look at these factors.

Factors that relate law with the state:-

To understand the relation of law with the state first it is necessary to understand that the state has three branches or arms. These are:-

- i. The legislative organ (branch) - this branch of the state has the function of making new laws. In different countries this organ is known by different names. It is referred to as parliament in Britain, Congress in USA, Duma in Russia, Bundestag in Germany, Knesset in Israel, etc.
 - ii. The Executive Organ (branch) - has the function of executing or enforcing the law and policies of the country.
 - iii. Judiciary: - has the function of interpreting the law and resolving disputes by applying the law. It refers to courts.
1. Law is made by the state particularly by the legislative branch of the state. So, it is the state, through its legislative branch that brings the law in to existence.

2. The law is enforced or implemented by the state, particularly by the executive branch. The law for its practical implementation fully dependent upon the state. If any of its provisions are violated, then the executive organ of the state, which is represented by the president or prime minister depending on the type of the government, will take appropriate measures to ensure its observance by subjects.
3. The law is interpreted and applied by the courts.
4. Law is also destroyed or repealed by the state. This is usually done by the legislative organ of the state. In the same way it is made by the state it is also unmade by the state. So, law for its creation, life and extinction is dependent on the state.

However, on the other side of the coin the state for its existence is dependent on the law. To start with the state is itself created by law-particularly by the constitution. It is the constitution which is the supreme of all laws that constitute or establish the state. Look for example the preamble and provisions of the constitution of the Federal Democratic Republic of Ethiopia (FDRE). It is the constitution that establishes the state and determines and define the respective powers and responsibilities of its organs.

Second, the state is dependent on the law for making its operation. The state act through the medium of the law. Every action of the state is made by the dictate of the existing law or by issuing new law. It is the law that legitimatizes the action of the state.

1.3 The Distinction between Law and Other Category of Social Norms

Although, both law and other category of social norms are similar in that they are general, normative and regulate or shape human behavior, there is a significant difference between them. Please study these differences carefully.

1. Mechanism of Enforcement

The first difference relates to the mechanism of enforcement of legal norms and other category of social norms. Law has centralized and institutionalized mechanism of enforcement. The state with its organs like the police, public prosecutor, prison administration court and the like, is behind the law. The state has taken the monopoly of enforcing the law centrally and by establishing the necessary institutions.

Social norms other than law (non-legal norms), however, have no centralized and institutionalized enforcement mechanism. The enforcement mechanism of non-legal norms is weak. Although they have sanction it is weak and it is taken in a decentralized manner. That is, it the society in a decentralized manner that take the sanction, for example by out casting or segregating those who contravene the alleged customary, religious or moral norm. In most cases there is no institution established for this purpose and where there is one it is not as strong as the state. So, legal norms have the advantage of better enforcement mechanism.

2. Scope of Application

Legal norms enjoy the privilege of state-wide and uniform application. A law enacted by the appropriate organ of the state is applicable within the entire territorial jurisdiction of that state, be it a sovereign state or member of a federation.

Non-legal norms on the other hand are local in application. Customary and moral norms are limited to a certain locality. Religious norms apply only to followers of that religion. None of the non-legal norms have uniform application. They cannot help to govern inter religious or ethnic group transactions between members of different customary groups or followers of different religions or sects. So, legal norms are uniting forces of diversity in religion and custom.

3. Exhaustiveness and Clarity of Rules

Legal Rules are exhaustively and clearly written. A punishment that takes into consideration the importance of the interest protected by the particular rule and the gravity of fault is in advance fixed by the law itself. So, citizens will be able to know in advance what the rules are and the possible punishment for the violation of the rules. This helps to reign regularity and certainty of expectations in the life of the society.

Non-legal norms, however, are devoid of such type of calculations. The contents of customary, religious or moral norms are not exhaustively written and in advance known. Nor is the punishment in advance determined. So, law is preferable for it brings regularity and certainty of expectations in the life of citizens of a nation.

5. The Making and Issuance of Rules.

Legal Rules emanate from a centrally established and defined institution. It has a definite source and it can be easily amended or modified when circumstances so require.

Non-legal norms, however, have no traceable enacting institution. They are not made by an organized institution. They usually develop out of repeated practice by the society in a certain manner from religious taught and the society's feelings of what is right or wrong, just or unjust. They are not as such amenable for a timely amendment when changes in circumstance require their amendment.

<u>Legal Norms</u>	<u>Non-legal Norms</u>
- General Statements - Normative - Regulate Social behavior of man - Supported by centralized and institutionalized mechanism of enforcement. - Nationwide and Uniformly applicable - Made by a centrally organized institution (parliament) (Centralized) - Can be easily amended or modified - Exhaustively written - Punishment is in advance fixed.	- General Statement - Normative - Regulate social behavior of man - Lack centralized and institutionalized mechanism of enforcement. - Local in application - Originate from the practices and beliefs of the society (Decentralized) - Cannot be easily amended. - Almost unwritten - The punishment is not in advance known.

1.4. The Functions of Law

The law by itself is not an end; it is rather a means to ensure peace, order and prosperity in a regional or international level. We can reduce this general function of law into the following specific functions.

1. Maintaining Peace and Order in the Society

In their daily life people engage themselves in deferent types of social, cultural, economic or political activities. If people are to conduct these activities of daily life in a descent manner, peace and order must be maintained. If a band of robbers attack citizens, or if hooligans create nuisance to the public, then peoples will not be in a position to regularly and properly perform their daily activities. The law (particularly the criminal law) is there to crate peace and order by the threat of death, imprisonment and/or fine penalties.

2. Regulate Social Interactions.

Social interactions (political, economic, social or cultural) are part of the life of a society. There are positive interactions (concluding marriage or entering into contracts, etc) as well as negative interactions (disputes or conflicts). The law in its own way regulates these interactions.

It provides how individuals should make their interactions or unilateral actions (example family law, law of contracts and law of successions). It also lays down substantive and procedural rules on how disputes between or among individuals should be resolved. Example: the law of civil procedure. It also determines organs that are competent to settle conflicts.

3. Protection of Citizens from Excessive and Arbitrary Government Power.

The government has every sort of power that enables it to compel citizens. It has the purse and the gun. Unless its power is curbed citizens may become victim of excessive and arbitrary exercise of power by the government. It is one of the functions of law to protect citizens from unlimited government power. The constitution in the form of fundamental rights and freedoms of citizens imposes limitation on arbitrary exercises of government power. Human rights and freedoms are limitations on government power. Administrative law also protects citizens from maltreatment of citizens by administrative agencies.

5. Bringing Efficiency, Harmony and Balance in the Functioning Of the Government Machinery.

The function of the state as a social institution is to maintain peace and order internally, to protect the territory from external invasion and to direct and facilitate economic growth. To enable the state to achieve these goals effectively and prevent abuse of power, state power is apportioned to the three

branches of government: legislative, executive and judicial branches. Each of these branches has their own sphere of power that they exercise which is a component of the states task of administration. An in built system of check and balance is also found among these branches. Law is instrumental in doing all these. It is the constitution that establishes the state, determine its organs and responsibilities and lay a system of cheek and balance among the three organs of the government.

5. Fight Harmful Traditional Practices.

Law is also instrumental in fighting traditional practices that are harmful to the society such as genital mutilation, abduction, rape, early marriage, traffic in drug etc.

6. Protect and Encourage Innovative and New Ideas.

The patent and copyright laws by giving recognition and extending protection to innovative ideas and new works encourage more and more inventions.

Generally, the function of law is to create harmony, peace, stability and economic progress in the society. It is an instrument to create an environment suitable to human survival and translate human desire into reality. In fact it must be also noted that law can be abused by political forces to serve as an instrument of oppression and barbaric rule. History is full of evidence of this fact. We can cite for example the case of Nazi Germany, Fascist Italy and socialist Russia.

Chapter Two

Sources of Law

The term “source of law”. It is used in different contexts. It may mean the origin from which a particular legal rule is derived (the material/ historical source) or the organ from where the law derives its binding force (formal source) or the meaning of the term depends on how we approach to study the source of law.

2.1.1– The Formal Source of Law

By formal source of law we mean the source from where the law derives its force and validity. When you study Chapter One you have seen that legal rules are binding normative statements. Here we are questioning the source from where they derive their binding force; what makes legal norms binding? What makes them an authoritative statement?

A legal rule derives its force or validity or authority from the will or desire of the state. It is the state that makes law and declares it to be binding on the subjects. If legal rules were not enacted by the state they would not have acquired any binding force. It is the state, therefore, which is the formal source of the law. The law derives its authority to bind citizens from the will of the state that it do so.

2.1.2 The Material Source of Law

By material source of law we mean the origin of the law or the matter or substance from which it is derived or made up. It refers to the source material or input which is used to make the law.

In most cases legal rules are conventional and have no specific origin. Usually they are created by the law maker based on what it determines appropriate to the fact situation that needs regulation by law. That is some legal rules have no *a priori* source but are brought in to existence by the decision of the law-maker based on pragmatic considerations to regulate human behavior in a manner that is socially beneficial. They are the product of the let-it-be-in this manner decision of the law maker. There are legal rules which are original.

Some legal norms, however, have their origin in *a priori* legal and non-legal norms which are transformed to make the existing law. In fact a significant part of the existing legal rules starting from the constitution down to administrative regulations are derived from existing legal and non-legal norms some of which are the following.

- A. Non-legal norms:- because some are socially important rules and since it is also the purpose of the law to maintain those customary, religious and moral values of the society which are not harmful, customary, religious and moral rules are incorporated or used to make legal rules.

Some legal norms are derived from customary rules of the society. Particularly legal rules relating with family and succession matters are related with customary norms of our society. An example may be the Ethiopian law of succession under the 1960 E.Civ.Co which prohibits a woman from succeeding to the estate of her deceased husband.

Other legal norms have their origin in the moral norms of the society. Every society has its own rules of conduct which are based on its conception of what is right or wrong, just or unjust, human or inhuman. Some of these moral norms are taken and transformed to the status of legal norms. Legal provisions such as those which prohibit adultery, marriage between affinal and consanguinal relatives and gay marriage have their root in the moral norms of society.

Religious teaching and precepts also serve as a source of law. In fact laws of the earlier days were much influenced by Christian taught.

B. Legal Norms

Some legal rules are derived from legal norms that are/were in force. These legal norms that supply the content of the law may be domestic or international in origin.

Domestic laws which were in force in the host country or other countries serve as a source for making new laws. In the Ethiopian context, for instance old laws or laws which were in force like the *Fetha Negast* and other old legislations serve as a source. Moreover, the laws of other countries particularly that of French and Swiss has served as a basis for making the Ethiopian laws. A significant part of our laws are taken from other legal systems particularly from the developed

countries. The rules and principles of international law also serve as a source for making national laws. International law is composed of international customary rules, bilateral and multilateral treaties, and decisions of international tribunals and generally recognized principles of law. The rules contained in these instruments particularly in international treaties serve as an important source to legislate national laws. They are taken and adapted to the Ethiopian situation and form part of the Ethiopian legal text. It is through transformation that they serve as a source of the Ethiopian law.

I- Non-legal norms as a source of the law of Ethiopia. There are a number of cases where the law provides for the direct applicability of non-legal norms such as customary, religious or moral rules to govern certain fact situations.

1. Customary rules

Custom has the power to govern the behavior of the society and it has greatly served as a source of law in Ethiopia before the 1960 Civil Code was issued. With the issuance of the 1960 Civil Code, however, Article 3347 of it has repealed customary norms which were previously in force. Although the 1960 Civil Code has repealed customary rules, they have, to a certain extent continued to be applicable through the following mechanisms.

a. By reference to customs

There are a number of instances where the statute (written and promulgated) law makes reference for the applicability of customary rules.

Look the following examples from different legal texts

Art 3495) FDRE Constitution

"This constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with and customary laws..."

Art 1713 Civil Code

"The parties shall be bound by the terms of the contract and by such incidental effects as are attached to the obligations concerned by custom..."

Art 1(2) Revised Family Code

"...marriage may be concluded in accordance with the custom of the future spouses"

Art 27(2) Revised Family Code

"The conclusion of customary marriage and the formalities thereof shall be as prescribes by the custom of the community concerned"

By providing so, the law gives recognition for customary norms to be applicable alongside with the law itself there by making customary norms one of the sources or body of the Ethiopian law. It means that customary rules have the same binding effect on these specified matters as the statutes.

b. Filling legal Vacuums

Art 3347 of the civil code repeats customary rules only on matters that are covered by the code. By a *contrario* reading this means that customary rules are still applicable on

matters that are not covered by the civil code. So, this means that customary norms are still the sources of law on matters that are not covered by the law.

2. Religious Rules:-

There are also instances where religious norms are given effect to govern the social behavior of man alongside with legal norms. Look the following legal provisions that provide to this effect.

Art. 34(5) FDRE Constitution

“This constitution shall not preclude the adjudication of disputes relating to personal and family laws, in accordance with religious or customary laws.”

Art 1(2)

“...marriage may be concluded in accordance with the religion ...of the future spouses.”

26(1) Revised Family Code

“The conclusion of religious marriage and the formalities there of shall be as prescribed by the religion concerned.”

To this extent, again, religious norms are part of the Ethiopian law. We have the clear case of the Sheria law which governs family affairs among the Muslim Community.

B. Legal Texts

These are the most important source of law. They are contained in different enactments and legal instruments. There are national and international sources of law.

1. National Sources of law:

These are the major sources of law of a country. They consist of the various legislations that are issued by the competent national organs and are applicable within the national territory. In particular it consists of the following set of laws.

A. Constitution

The constitution of a country establishes the state and its organs and determines the respective powers and duties of the state and its organs. It's also governs the relationship between the state and citizens. On these matters the constitution is the principal source of rules. In fact it is the supreme of all laws and other laws are to be tested against the rules of the constitution for their validity. Other laws of the land are

supposed to be in conformity with spirit and letters of the constitution. That is, if any other law contradicts and constitution, it shall be of no effect.

B. Primary Legislations

Below the constitution we have primary legislations as the national sources of law. Primary legislations constitute the bulk of the law of a country. But what are primary legislations? Primary legislations are laws issued by the organ of the state that is constitutionally empowered to make laws. The organ that is constitutionally recognized to make laws is the legislative organ and this organ is known by different names in different countries.

- Britain - Parliament
- USA - Congress
- German - Bundestag
- Russia - Duma

In Ethiopia under the present constitution this organ is known as House of People's Representatives. It is this organ that is empowered by the constitution to enact laws which are referred to as proclamations. The proclamations issued by this organ from time to time constitute an important part of the Ethiopian law.

The Proclamations issued by the parliament may be in the form of a code or piece of legislations. Codes are a systematically organized comprehensive body of laws on a certain subject matter(s) and have permanent nature. For Example the Penal Code, Civil Code, Commercial Code, Civil Procedure Code, Criminal Procedure Code, Revised Family Code, Maritime Code.

In addition to these we have also pieces of legislations (Proclamations) issued by the parliament on specific or particular matters.

The other state organ that is empowered by the constitution to make laws is the council of Ministers. As per Art. 77 (10) and Art. 93 of the FDRE Constitution the Council of Ministers is empowered to issue as state of emergency decree. The Emergency Decree so declared by the council of Ministers is to replace all laws including provisions of the constitution except those provisions that are mentioned under Art. 93(4) (c). Until it acquires the status of a proclamation within the next 48 hours or 15 days, as the case may be, following the approval by the House of People's Representatives as per Art. 93(2)(a) and (b) of the constitution, the state of emergency Decree Proclaimed by the Council of Ministers serves as an important source of law to which everyone must have a look at in the period of emergency.

C. Secondary/Subsidiary Legislations

Secondary legislations are laws issued by other government organs pursuant to a delegation from the legislative organ of the state. When the legislative organ (i.e. the House of People's Representatives) enacts proclamations usually it delegates some law making power to other government organs particularly to the executive branch of the government and its agencies.

Regulations and directives issued pursuant to such delegation are also the sources of law. Although this delegation and the legislation of laws by the executive branch of the government seem to contravene the well-established constitutional principle of separation of power which states that law making is the

business of the law making organ and no other organ should involve in this activity it has its own justifications.

The main justification for delegating law making power to the executive organ of the government is the lack of technicality and expertise on the part of members of the legislative organ which administration of the daily life of citizens require. Members of the House of People's Representatives are drawn from different walks of life which lack the know how of legislating detailed and technical rules necessary for regulating, controlling, directing and inspecting the multifaceted daily activities of citizens. Take for example the duty of determining or fixing the standard and quality of food stuff and other items to be manufactured and distributed in the market or fixing the traffic regulations which are too technical for the House of People's Representatives to deliberate and make a rule. Rather this will be effectively done by the executive organ which has the experts and professionals. Moreover, the executive organ of the state as an organ engaged in the administration of the daily affaires of citizens is always in touch with citizens and knows every practical contingency that arise in connection with the duty of administration. So, the executive branch is more competent to issue technical rules within the framework of general guidance given by the legislative organ of the state. This is necessitated by the need to be technical and give a room for flexibility for the executive organ in response to the demands of effective administration.

The following are the major types of subsidiary legislation issued pursuant to a delegation.

Regulations: - this is a law issued by the council of Ministers by virtue of a delegation made to it by the House of People's Representatives. The council of Ministers is composed of the prime Minister, Deputy Prime Minister, Ministers and other officials (Art.76(1) FDRE con.).

The Council of Ministers has the power to issue Regulations as well as Emergency Decree. Its power to issue emergency decree emanates from the constitution while its authority to make regulations is obtained only from the proclamation that the House of People's Representative Issues. The regulations that the Council of Ministers issues must be in conformity with the enabling legislation, i.e., the delighting proclamation. If the regulations issued by the Council of Ministers contravene the enabling proclamation then the whole or part of it which is inconsistent will be rendered null and void for excess of power. It will have no effect.

Directives: - directives are laws issued by individual government offices or administrative agencies. Individual government offices like Ministries, Commissions, Authorities, Agencies, Bureaus issue directives concerning the internal organization of the institution itself or providing for the implementation of a legislation issued by the House of peoples Representatives or Council of Ministers.

Individual government offices derive their power to issue directives from proclamation or regulations issued by the House of Peoples Representatives or by the Council of Ministers. Proclamation and regulations issued by the House of people's Representatives usually provide for the concerned administrative agency to issue directives for the effective and proper implementation of the proclamation or regulations itself. The directives issued pursuant to such

delegations must be in conformity with the law that authorizes the making of that particular directive.

Municipality Regulations: - the establishing legislation of city administrations empowers them to issue rules relating to traffic, sanitation, and other matters. Rules and regulations thus issued by municipalities are also part of the general law.

Judicial Decisions: - judicial decisions (precedents) are not the major sources of law in the civil law legal systems. Judges are not bound by previous higher level court decisions, but by legislations. This is true for the Ethiopian legal system. But with the issuance of proc. no. 454/2005 the precedent system is partly being introduced. Decisions of the cassation division of the Federal Supreme Court are binding on lower courts of any level. So, judgments of the Federal Supreme Court cassation division are one source of law in the Ethiopian legal system.

2. International Sources of Law

International law principally regulates the international relation of sovereign states. Apart from regulating the international relation of states, international law also serves as a source of national law. There are instances where the various bodies of international law form part of the domestic law. The following are the main international sources of domestic law.

2.1 Treaties

2.2 International Customs

2.3 Decisions of international tribunals.

A. International Treaties:-

International treaties are agreements between two or more sovereign states and/or international organizations. Although they are concluded for the purpose of regulating the international relation of states they also serve as a source of domestic law in the following two main ways.

1. By Incorporation

Art 9(4) of the FDRE constitution provides that all international agreements ratified by Ethiopia are an integral part of the laws of Ethiopia. International agreements are concluded by the executive organ of the government. The international agreement concluded by the executive binds Ethiopia and becomes an integral part of the Ethiopian law when it is ratified. Ratification refers to the act of approving the treaty concluded by the executive and expression of desire to be bound by the treaty. The power of ratifying international agreements ratified by the executive is vested in the House of People's Representatives by Art. 55(12) of the FDRE constitution.

Once a treaty concluded by the executive is ratified by the House of Peoples Representatives it will be considered as part of the Ethiopian law for all practical purposes. That is they have equal applicability like any of the proclamations or regulations issued at the national level. Individual can invoke in their

litigation provisions of international treaties and judges can also cite provisions of international agreements in their judgments.

2. By Reference to international treaties

Apart from incorporation, the other mechanism through which treaties become a source of national law is by making reference to international agreements.

The extensive catalogue of human rights of the FDRE constitution is subject to a special interpretative regime. Art 13(2) of the FDRE constitution ordains the fundamental rights and freedoms provisions of the constitution to be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights (UDHR), international covenants on human rights and international instruments adopted by Ethiopia. This provision allows those human rights instruments that do not find their way in to the Ethiopia legal system via Art. 9(4) of the constitution, to serve as a source of Ethiopian law. Thanks to this provision, the UDHR, which contains the whole gamut of human rights and other international human rights instruments adopted but not ratified by Ethiopia, can still serve as a source of Ethiopian law.

B. International Customary rules

Custom is the oldest and the original source of international law as well as of law in general. International custom develop out of a repeated practice by states in a certain way with the internal attitude that such course of conduct is mandatory.

Although international customary rules are meant to regulate the international relation of states it also serves as national source of law. International custom is binding on every state and no state can deviate from rules of international custom particularly those termed as obligation *erga omnes* (binding on every state). The rules of international custom, where possible, are also applicable within the domestic legal system.

In fact our constitution doesn't indicate international customs as a source of Ethiopian law. This, however, is not important, since international customary rules are in any event binding on every state of the world whether they consented to it or not. So, we can say that international customary rules are also source of law for the Ethiopian legal system.

C. Decisions of International Tribunals

Judgments of international tribunals like the International Court of Justice (ICJ), the European Court of Human Rights, African Court of Human Rights, etc serve as a precedent for domestic litigations and judgments. Although it is not known to the Ethiopian legal system, decisions of international tribunals are important source of law in some countries of the world. For instance, decisions rendered by the European Court of Human Rights are regularly invoked in domestic litigations and judgments in most European countries. It is expected that the same trend will develop in Ethiopia and other African countries when the African Court of Human Rights and African Human Rights Commission fully start operation.

