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Chapter One

WHAT IS LAW?

Objectives: After completing the study of this chapter the distance learner is expected

to:-

- Understand the indefinable nature of law;
- Know the various theories of law;
- Know the basic features of law;
- Understand the functions of law;
- Distinguish law from other category of social norms
- Know the major legal systems of the world and understand how they function.

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 taught 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 taught are:-

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

1. The Natural law school

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

According to the philosophy of followers of this school of taught 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 which 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 with out compensation major means's 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 whom 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 which 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).

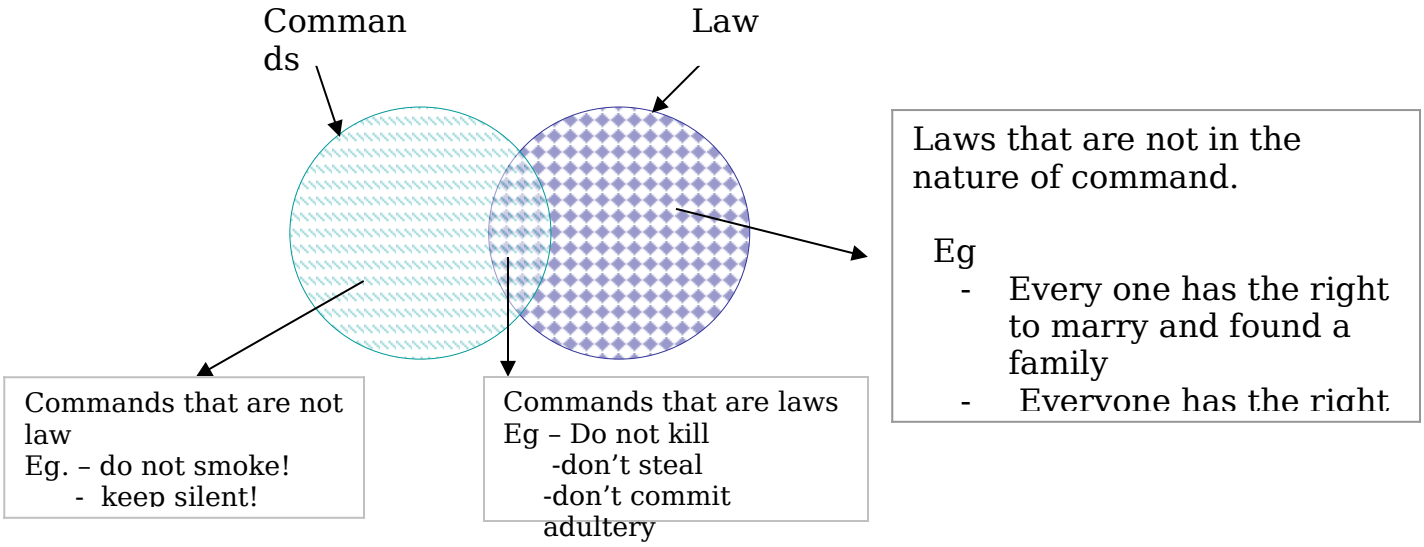
This theory of law has its own positive and negative values. To start from the positive, legal positivism serves two values. First by requiring that all laws be written, it ensures that the government will explicitly apprise the members of the society of their rights and obligations. In legal system 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. This theory of law doesn't allow an appeal to equity and principles of natural justice by courts whenever they are not satisfied with the out come of a case that would be dictated by the orthodox application of the existing laws.

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.

Look the following diagram that illustrates the common points of law and commands.



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 where as 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 can not 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 every one 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 can not survive with out the law. Human existence with out 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.

Dear distance learner so far we have seen some of the theories of law developed by different scholars and tied to demonstrate that none of the definitions or theories so far forwarded was satisfactory or compete. They have their own defects or in completeness in answering the question 'What is law?' to the satisfaction of everyone. Some theorists (natural law theory) have tried to explain it in terms of its content (justice and morality), others positivists have defined it in terms of form (as a command) while others (the Realists & Marxists) analyzed it in terms of its practical application and significance, respectively.

The first reason for the failure of the various school of taught 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 it self. 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 fined 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.

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 can not 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, “Every one has the right to life, liberty and security of person.” This and other provision of the Declaration which starts by such introductory words as “every one”, “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 up coming 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 thy 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 more 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 conchiding 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
  "Every one 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."

Dear distance student you have studied above the major forms or styles in which legal rules are to be made giving them their normative nature permissive, prohibitive, directive or rewarding. It is important

to note that these are not the only forms in which the law is to be issued. We have rules or provisions of law that provide definitions. There are also rules that set procedures to be followed and measures to be taken to attain a contain goal.

Dear distance learner, you have to take cognizance of the fact that legal rules are not mere descriptions of what individual can do, should do or should not do. It is non simple recommendation of what individuals should do or shouldn't do. In this respect the law differs from such recommendations as do not smoke, respect your elders and the like. Law is mandatory social norm. Where the law is serious and provide that individual should refrain from acting or behaving in a certain manner or command individuals to act or behave in a manner that is good for the welfare of the society, it attaches sanction for ensuring its observance by the subjects. The law doesn't simply prescribe directive and prohibitive norms. To ensure that individuals act or behave accordingly the law also provides sanctions. The sanction provided by the law takes the form of either.

a. penal liability (punishment) and/or
b. Civil sanction

Depending on the gravity or seriousness of the offence committed the punishment provided by the penal law may cause.

- Loss of liberty (death penalty) e.g. Art 522 of the penal lode of 1957
- Loss of liberty penalty or temporarily (sentence of imprisonment), and/or
- Loss of property (punishment in the form of fine or confiscation).

The penal sanctions are enforced or applied through the institutions of police, court, public prosecutor and prison administration. Generally, the purpose of these penal sanctions is to:-

a. deter the wrongdoer not to engage in similar wrongful acts.
b. Deter others from engaging in that type of wrongful act.
c. Rehabilitate the offender and make him/her a responsible citizen.
d. Revenge him for the wrongful act that he/she committed against the society.

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 (contact of sale made orally) shall be considered as non existent 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.

Dear distance student, at this point you have to note that we don't always find all elements of the normatively (description of possible human behavior (eg. theft) → taking position (prohibits, permitting, ordering or rewarding → sanction) in one formulation (Article, paragraph etc) of the legal text. Take for example incestuous marriage. It is defined and prohibited under the family laws while the sanction is found in the penal code. Therefore, in order to understand and to apply the entire norm correctly it is always necessary to have in mind the whole legal act or even the whole legal system.

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 salutary in one of the Pacific Ocean islands, then law is unnecessary for him. Because law is necessary only to regulate man-to-man relationship.

Dear distance student, do you agree with the idea that law regulates only man-to-man relation? How do you see for example Art 777 of the 1957 penal lode which prohibits cruel treatment of animals or the law protecting the natural environment? Do not you think that in these instances the law is regulating rather the man – to- animal relation or the man- to-environment relation? Think for yourself before proceeding to read the following paragraph.

Dear distance student, you have to note that even in these instances the law is regulating the man – to – man relation. If you take for instance Art.777, it prohibits the cruel or brutal treatment of animals to protect individuals from feelings of embarrassment and moral indignation. And this is clear from the phrase in the provision which says "… in a public place or a place open to public or which can be viewed by the public…" so, the law is indirectly saying that individuals should not cause others feel shock by scandalously treating animals. The law protecting the natural environment is also regulating the man – to- man relation by regulating the way how individuals should interact with the natural environment without

degrading it which is every one's common abode. It is saying don't damage the environment when you use and affect others natural entitlement to use it or use it for the common good. The law protecting the natural environment is there simply because man is living with other fellow men.

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.

Dear distance learner what makes the two inseparable? How are they related? Please try to answer these questions before you proceed to read the following paragraph.

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 Execrative 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.

Dear distance learner, from this account itself, I think the relation of law with the state is clear for you. Just to recap or restate them, the following are the factors that relate law and the state:-

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.

Dear distance learner, in this section you have seen law as a general norm governing the social behavior of man. But is law the only mechanism to regulate social relation? What would happen if there were no law in our society? Is law the only means to create an orderly life in the society? What would be the fate of society if there were no law? Please try to answer these questions before you proceed to read the following paragraph.

Dear distance learner, it is interesting to note that law is not the only institution that regulate social relations or shape human behavior. We have also other category of social norms like religious rules, customary norms and morality which have their own role in shaping human behavior and creating smooth relation in the society. Like law they are general, normative and regulate the social behavior of man.

So, if we have these (customary, religious and moral rules) which regulate social relation and share the basic features of law, why do we need to have law with all its accompanying apparatuses like the

police, the public prosecutor, prison administration, court and the like? Is it redundancy?

No, law is not an unnecessary redundant institution over that of the traditional customary, religions or moral norms. There are some fundamental differences between law and other category of social norms that make law necessary and preferable over that of other category of social norms. This leads us to the next sub-topic.

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.

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 with in the entire territorial jurisdiction of that state be it a sovereign sate 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 group 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, religions 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.

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.

Dear distance student please study carefully the following table that summaries the similarities and differences between legal norms and non-legal norms.

Legal Norms	**Non-legal Norms**
- General Statements	- General Statement

- 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.	- 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

Dear distance student, in this sub section you will study why law is necessary in a society? What Purposes it serve to society?

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.

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 will 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.

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.

1.5. Legal Systems of the World

Every independent country has its own legal system. The system varies according to each country's social traditions and historical development. But most systems can be classed as either:

(1) Civil-law (Continental) legal system, or

(2) Common-law (Anglo-Saxon) legal system

Australia, Britain (except Scotland), United States of America, Canada and most former colonies of Britain have a common-law legal system. Most other countries like France, Germany, Italy, Spain and former colonies of France and Spain follow the civil-law legal system. Many other countries have adopted a hybrid of the two legal systems. For example, Quebec in Canada, the state of Louisiana in the United States and South Africa follow a combination of the two legal systems.

All legal systems have the same purpose of regulating and harmonizing the human activity within their respective societies. Their difference lies in the mechanism of achieving that end. They operate some how differently to achieve the same goal of harmonizing social relations.

1.5.1. The Common Law Legal System.

The common law legal system, as exemplified by Britain is largely based on case law, that is, on court decisions. The common law legal system began in England many hundreds of years ago. The English call their legal system the common law because it applied throughout the land.

English common law developed from the rules and principles that judges traditionally followed in deciding court cases. Priori to the 12th century in England cases were decided by local courts by applying local customs. Since customs vary form locality to locality similar cases were judged differently in different districts. To avoid this problem and to consolidate his power in the early 1100’s strong English king began to setup a nation wide system of royal courts. The

crown courts established by the king soon began to decide cases by applying customs. The cases decided in this manner by the crown courts were made to have uniform applicability throughout the land and bind on all courts of lower level. This system helped to establish a common law that is law which applied equally any where in England. The case that set rules which are binding on other courts of lower level are called *precedents* while following or adopting the precedent system is known as the doctrine of *stare decise*. Since that time judges based their decisions on precedents, that is, on earlier court rulings in similar cases. But judges could expand precedents to make them suit particular cases. They could also overrule (reject) any precedents that they consider to be in error or outdated. In this way, judges changed many laws over the years. The common law thus came to be law made by judges.

Case law is still important in common law countries. However, the law making role of legislatures in these countries has increased greatly during the 20th century. The legislative enactments have dealt with such matters as employment relationship, environmental protection and other public law areas. Nevertheless, Common law countries have kept the basic features of English legal system, which is the power of judges to make law. The common law legal system is essentially a judge made law system.

1.5.2. Civil Law Legal Systems

Civil law legal systems are based mainly on statutes (legislative enactments). The civil law countries have assembled their laws into one or more carefully organized collections called codes. The development of the civil law legal system as a distinct legal system can be traced back to the famous code commissioned by the Roman emperor Justinian I around 533A.D. Justinian's code updated and summarized the whole of Roman law. It was called the *Corpus Juries Civilis*, meaning body of civil law. For this reason, legal systems that are based on Roman system of statute and code law are known as civil law systems. This use of the term civil law should not be confused with its use as an alternative term for criminal law.

In Civil law Countries such as France, Germany and Mexico, the statutes, not the courts provide the final answer to any question of law. Judges may refer to precedents in making their decisions. But they must base every decision on a particular statute and not on a precedent alone.

1.5.3. Merits and Demerits of the Civil law and Common Law Legal Systems.

In the preceding section we have seen that the common law legal system is essentially based on judge made law while the civil law legal system is based on statutory enactments. Both systems have their own positive and negative aspects that springs from the way they function. Let as look at the advantages and disadvantages of each legal systems.

Common Law Legal Systems

Merits

1. The common law legal system allows judges to make law in response to the emerging problem of the society and adapt the law to the changing needs of the society. The judge made law or case law is the outcome of the practical need of the society. The judge made law is flexible and can conform to the dynamic nature of the society easily.
2. When the judge makes law, he is trying to solve an actual and concrete problem. The legislative, however, makes laws by imagining hypothetical situations. The judge made law is a solution to the real problem.
3. Case laws are made by judges who are experts at law. It is a product of the professionals.

Demerits

1. Case law is reported only in court cases which are bulky in size.
2. Case law is an ex-post-facto law, that is, it comes into existence only after the occurrence of the dispute. It is only after the parties have gone to the court and revealed their case that the principles to guide it and other similar cases are formulated by the judge.
3. It violates the separation of power principle. While the constitutional duty of the judge is to interpret and apply the law made by the legislature, the common law systems is allowing the judge to engage in the task of law making which is the exclusive business of the legislative organ.

Civil Law System

Merits

1. The civil law system which is based on the statute law allows division of labour which results in an increased efficiency. In case of judge made law, the judge is engaged in making the law in addition to his duty of applying the law which is made by the legislature. In the civil law legal system the judge devotes his whole time for applying the law.
2. The statute law, which is the basis of the civil law system, is direct, precise, easily accessible and knowable by the ordinary citizens. However, the judge made law is contained in bulky materials of cases which are accessible and knowable only to the legal professionals.
3. The statute law is a pre facto law. It provides law for a case beforehand, i.e. before they have actually arisen. It helps individuals to predict the outcome of a case.

Demerit

1. The system which is based on statute law is rigid as it doesn’t allow judges to adopt the law to changing conditions and needs a very long time for laws to be made by the legislature when compared with the judge made law.
2. Statute laws are made by the legislator by imagining hypothetical cases. The problem is that the legislative organ can only imagine possible controversies, and it is impossible for it to make rules for all the particularities of circumstances that arise in the real world.

3. The statute law is deliberated and made by persons who are not legal professionals. The legislative organ is composed of persons who are drawn from different walks of life.

Generally both legal systems have their own advantages and disadvantages. Off late each legal system is making a move in the direction of each other. Each legal system is making an attempt to adopt the positive side of the other. Legislations are now assuming an important place in the common law while the civil law system is adapting the common law model.

The Ethiopian Legal System.

The Ethiopian legal system belongs to the civil law system block. It is entirely based on statutory laws. The codes and other legislations issued by the legislative organ supply the source of authority for the courts. Generally, courts in Ethiopia have no power to make law. They have the power only to apply the laws made by the legislative. Hence as a matter of principle in Ethiopia lower courts are not bound by decisions of higher courts on similar cases.

There is, however, an exception to this general situation of the Ethiopian legal system. That is decisions given by the federal Supreme Court cassation division are binding on all lower level of courts including regional courts. This system is introduced by the federal courts proclamation re-amendment proclamation no.454/2005.

2 (1). *"Interpretation of law by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional*

courts at all levels. The cassation division may however, render a different legal interpretation some other time."

As per this provision interpretations of law made by the federal Supreme Court cassation division have a binding effect on all courts of lower level.

This has its own importance. It helps to bring a uniform system of interpretation and application of the law. The adoption of different interpretation of law has been the source of divergent judgments by courts of different place and level and even in the same court. The introduction of the precedent system by proc. No. 454/2005 helps to make uniform the outcome of a case wherever the individual may institute it. It avoids the problem of forum fetching which is essential to reign a system where all citizens are identically treated.

Review Questions

1. Why do you think it is difficult to define the concept 'Law'?
2. Why do we need to have law with all its enforcement apparatuses like the police, courts, prison administration, etc while we have other social norms (customary, religious, and moral rules) that can regulate the social relation of man?
3. "Law is a general norm of social behavior" Give your reasoned comment on the above statement.

4. Write out some of the functions that law gives in the locality where you live.
5. Mention the similarities and differences between the common law and civil law systems.
6. To which legal systems does the Ethiopian legal system belong? Why?
7. Do you agree with the assertion that the Ethiopian legal system is getting a common law element? Why?

Chapter Two

Sources of Law

Dear distance student, to better enlighten your understanding of the concept of law, you will study in this chapter the sources of law. At the end of your study of this unit you are supposed to:-

- understand what we mean by sources of law
- know the sources of law
- list out the various sources of law

General Remark

Dear distance learner, generally there is no a single understanding of 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 document where a particular legal rule is to be obtained (literary source). The meaning of the term depends on how we approach to study the source of law. In the following sections you shall study them in detail.

– 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.

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 praiori* 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 consaguinal 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.

Dear distance learner, at this point you must note that it is nearly impossible to distinguish legal norms that have their origin in the customary, religious or moral norms of the society from the conventional legal rules. But we have evidences here and there in the law that show the non-legal norms supply the content of the law.

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 server as a source of the Ethiopian law.

The Literary Source Of Law

The Literary Source of law refers to the source where the laws of a particularly country are to be found or the text where they are contained. The judge to pass decisions, the advocate to advise clients, the public prosecutor to prosecute those who offend the public and scholars to make research may want to consult the relevant laws of a country. But where should they look for? What constitutes the laws of a country? Where should they consult? It is that thing where the judge, advocate, public prosecutor or the legal scholar look for or consult for the appropriate legal rules for their respective consumption which is referred to as the literary sources of law or sometimes as the textual sources of law.

The literary sources of law are the collection of legal texts that are currently active and enforceable and serve as the source of authority of courts and other organs to make valid decisions. These literary sources of law are classified in to legal and non-legal instruments.

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 applicable through the following mechanisms.

a. By reference to customs

There are a number of instances where the statue (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 along side 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. Rules of Public Morality

Social behavior is governed not only by legal norms but also by rules of public morality. This is evident from Art. 2030(1) of the civil code which provides the tort liability of a person who contravenes public morality in the following terms:-

"A person commits an offence where he acts or refrains from acting in a manner or in conditions which offend morality…"

This provision illustrates the tacit admission by the law maker of moral rules as part of the general law governing human conduct.

Dear distance students, generally non-legal norms of the different type, to a certain extent, serve as a source of the Ethiopian law. However, you should note that compared with the legal norms their share as a source of law is insignificant.

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. Its 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 inconformity 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 constitutional 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 law's 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 with in the next 48hours or 15days, 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 Minister's 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.

Example:

a. Drugs Administration and Control proclamation No. 176/99

Art. 41 (1). "The council of Ministers shall issue regulations necessary for the effective implementation of this proclamation".

b. Labour Proclamations No. 377/2003

Art. 170(1). "the Minister may issue directives necessary for the implementation of this proclamation."

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.).

Dear distance student you have to note that 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 inconformity 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, sanitations, and other matters. Rules and regulation 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 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.

Treaties

International Customs

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.

Dear distance student, so far we have seen the literary source of law at the federal level only. Yet we have to consider the source of law of the regional member states since, following the federal system of government, member states are vested with exclusive power of law making on some matters under Art 52 of FDRE Constitution, the compositions of the law of the regional states will be slightly different from that of the federal level. We can enumerate the source of law of the regional states as follows:-

1. the federal constitution

2. Proclamations and regulations issued by the House of people's Representatives and by the Council of Ministers respectively on matters that are given to the federal government under Art. 51 of the constitution. It does not include legislation of the federal government issued to be applicable only in the Addis Ababa and Dire Dawa Administrative Council which are under the direct control of the federal government.
3. The regional constitutions.
4. Proclamations, regulations and other executive acts issued by the concerned regional organs on matters that are with in the jurisdiction of the regional states as indicated under Art. 52 of the constitution.
5. International treaties concluded by the federal government. The federal government is given the power to negotiate and ratify international treaties under Art. 51(8) of the federal constitution. The federal government negotiates and ratifies international treaties to make them applicable in the member states. International treaties concluded by the Executive and ratified by the House of People's Representatives are binding on regional states and as such they serve as a source of law for each regional state.
6. Customary norms know to the region
7. Religious norms particularly on family matters.
8. Rules of public morality
9. International Customary rules
10. Judgments of international tribunals.

Review Questions

1. What do you understand by the term “source of law”?
2. What is the formal source of the law?
3. Mention the three mechanisms by which international treaties serve as a source of law for the Ethiopian legal systems.

Chapter Three

Classifications of law

Dear distance student welcome to the new lesson that introduces you the idea of classification of lows.

Objectives:- After studying this chapter the distance student will:-

- Explain the concept of classification of law
- Understand the various classification of lows.
- Know the importance of classifying lows.
- Know the shortcoming of classification of low

3.1. Introduction

Classification of law refers to the systematization of the law based on subject matter. One of the major tasks of legal learning in schools of law since early times was the systematization of law.

The purpose for doing this, as you shall study it in the later part of this chapter, was not only to find the law more easily, but also to determine whether different legal rules were required depending on their area of application.

Roman law has distinguished between those legal institutions which were orientated to matters of public interest and those which were of private interest. This distinction between private law and public law assimilated in to civil low system of modern times. The civil law system, relying on the distinction made by Montesquieu – who differentiated between *droit politique* and *droit civil* – recognizes the distinction between public law, which is that pertaining to the relationships between the government and the governed and private low, which pertains to those matters arising among private individuals.

This classification of law is still maintained today. Our legal system is also based on such classification.

The classification of law in to public and private is not the only way of classifying law.
There are also other ways of classifying law. Law can be classified into civil law and criminal; domestic and international; substantive and procedural law. These ways of classifying law have their own incompleteness and we will not consider them here . Relatively the

best and widely accepted way of classifying law is in to public and private. In this section you will study the grounds for classifying law in to public and private and their sub-classifications. To better understand the classification look at the diagrammatic representation of the classification of law at the end of this chapter.

There are some areas of law which do not fall under any of the classifications here. You will study them at the end of this section.

1. Public Law

Public low involves government directly. It determines the organization and scope of public powers and their exercise in relation to those who are governed (citizens). It defines a person's rights and obligations in relation to government. Public law also describes the various divisions of government and their powers.

While the power of the state was weak under the *laissez faire* philosophy the role of public law was relatively minimal compared to private law. The *laissez faire* philosophy of Adam Smith was propagating the reduction of the power of the state and enhancement of that of the power of the individual.

This meant that for a long time private law has pre-eminence. However, the growth of the state and its institutions during the 20th century following the fall of the *laissez faire* philosophy and the adoption of the wale fare state doctrine, has seen a corresponding increase in the importance of pubic law. The number of public agencies has multiplied and expanded in to a range of sectors which were previously the preserve of private law bodies, for example the commercial, industrial, economic and social sectors, and the provisions of services such as gas, electricity, communications, health etc. This has necessaritated the expansion and consolidation of that

body of law referred to as public law. Public law is further classified in to domestic public law and public international law.

I- Domestic public law is that which made at the national level and govern the formation, operation, powers, duties and responsibilities of the government and its organs and the rights of citizens in their relation towards the government. Domestic public law includes the following main areas of law.

A. Criminal law: deals with crimes, i.e. actions considered harmful to society. Crimes range in seriousness from disorderly conduct to murder. Criminal law defines these offences and sets the rules for the arrest, the possible trial, and the punishments of offenders.

In the majority of countries, the central government makes the majority of the criminal laws.

In some countries such as Australia and United States, each state as well as the federal government, has its own set of criminal laws. When we come to our country the power to enact a criminal code is given to the federal government under Art. 55(5) of the FDRE constitution. Regional states have also the power to issue criminal law on matters that are not covered by the federal criminal code.

B. Constitutional law - A constitution is set of rules and principles that define the powers of government and the rights of the people. The principles outlined in a constitution form the basis of constitutional law. The law also includes official rulings given by organs that are empowered to interpret the constitution (such as Supreme Court in US, constitutional council in France and House of Federation in

Ethiopia) on how a constitution's principles are interpreted and applied.

Major exception is Britain. The British constitution is unwritten. It consists of all the documents and traditions that have contributed to Britain's form of government. In most democratic nations the national constitutions take first place over all other laws.

C. **Administrative Law** - centers on the operations of government departments.

Governments setup many administrative departments (administrative agencies as they are commonly called) to do the works of government. They deal with such matters as education, public healthy and taxation. Other departments administer social welfare provisions, such as pensions, and social security. In most cases the departments are established in the executive branch of government under powers granted by the legislature.

Administrative law comprises the body of laws which determine the organization of administrative agencies, the administrative structure of the state itself including local governments; the exercise of delegated power, and the operation and control of public services and the relationship of administrative agencies with individual.

D. **Law of Public Finance**:-Deals with public expenditure and revenue.

It governs matters such as public expenditure, debt, and source of revenue of the state.

II. Public International Law:-Governs the relationship of states both in peace and war times. It regulates the international relationship of sovereign states.

Public international law regulates the behavior of states in their relations with one another. It concerns trade, communications, boundary disputes, methods of warfare, the use of the ocean, and many other matters.

Laws to regulate international relations have been developed over the centuries by customs and treaties. But international law, unlike domestic law is difficult to enforce.

Private Law

Private law regulates the relationship between two or more private individuals. It deals with the rights and obligation of individual persons in their relationship with one another. In their daily life individuals enter in to different types of social and economic transactions. The respective rights and obligations of the individuals that are engaged in different types of private transactions are determined by private law.

Private law is further divided in to domestic private law and private international law.

I. Domestic (National) private law.

This branch of private law governs the relationship of individuals within a nation which does not contain foreign element. It is further classified in to the following main areas.

A. **Contract Law: -** deals with the rights and obligations of people who make contracts. A contract is an agreement

between two or more persons that can be enforced by law. People enter into a variety of contracts ranging from taking a taxi or a cup of coffee in a cafeteria to buying a home or a business enterprise. Contract is an indispensable party of life of modern society. The varieties of contracts that individuals conclude are subject to regulation by the contract law.

B. Extra- Contractual Liability (Fort) Law:- This branch of private law deals with the manner of compensating a person who has sustained damage by the person or property of another individual. An individual may, by his action or property he own, cause damage to the life, body, property, reputation or business or may make unauthorized use of another person's property. The victim may sue the person responsible for the damage. The law of extra- contractual liability deals with the rights and obligations of the persons involved in such cases.

Although it has a punitive effect the main purpose of extra contractual liability law is to compensate the victim and reinstate him, to the extent possible, to the position he was before the materialization of the risk.

If the act that caused the damage is deliberate and causes serious harm it may also be treated as a crime.

C. Property law: - governs the manner of acquiring ownership and use of property. Property may be tangible, such as land car and building or intangible such as patent and copyrights. The law ensures a person's right to own property. However, the owner must use the property properly. People also have the right to sell or lease their property and to buy or rent the

property of others. Property law determines the rights and obligations involved in such dealings.

D. **Succession (inheritance law):-**Concerns the transfer of property upon the death of the owner. Nearly every country has succession law which lists the relatives or other persons who have first right of inheritance. People may also will their property to persons other than those specified by law. In such case the inheritance law also sets rules for the making of wills.

E. **Family Law:-** Governs the formation, effect and dissolution of marriage. It determines also the legal rights and obligations of husbands and wives and of parents and children. It covers such matters as marriage, divorce, adoption, and child support.

F. **Commercial Law: -** Governs the formation and operation of commercial undertakings.

Hybrid and Indeterminate Areas of Law

There have, from the outset, been areas of law which do not easily fall under either private law or public law. These are, for example, the law of civil procedure, labour law, administrative contracts law and that of private international law. These are gray areas which we cannot categorize them under either the private law or civil law category.

Civil procedure is the body of rules governing the administration of civil law, and controls the process where by parties to a dispute may have their rights recognized and remedies awarded. As such civil procedure includes aspects which fall in to public law, for example the organization and functioning of the courts, and aspects of private law, particularly the locus stand of the plaintiff to seek a remedy. Consequently civil procedure is viewed as being a collection of heterogeneous rules.

Similarly private international law is seen as combing aspects of both divisions of law.
Questions relating to issues of nationality and the rights of aliens are the domain of public law, while matters relevant to civil law, particularly issues arising under conflicts of law, and are private in nature. Labor law and public contracts law also fall under this gray area of law.

The Importance Of Classification Of Law

Classification of law by the subject matters it regulates has its own advantages. The following are the main advantages of classifying law by subject matter.

1. It simplifies the law making process for the legislature by helping it to conduct its deliberations in specific areas of law.
2. It also makes the work of the executive and the judiciary efficient because the executive and judiciary will easily pick up the provision of the law they want when discharging their duties.
3. It also simplifies the study of law at law-schools as well as for conducting research in to legal problems.

Shortcoming of the Classification of Law

The importance of understanding law in its subject classification is obvious but there are a number of short comings and criticisms of it. Firstly, the dividing line between the various classifications is imprecise and unable to adapt to the complexity and diversity of contemporary social and commercial transactions, with the consequence that a growing number of indeterminate areas arise, leading to increasing problems of determining the appropriate category. As we have said above there are some indeterminate areas which are difficult to classify into any of the classifications.

Secondly, the distinction between the state and the individual, upon which the classification rests, is false because the aim of both public law and private law should be to establish rules of law directed at the general interest of society. Thus, private law no less than public law, has to take into account the interest of individuals and the needs of society in general. This is reflected in the increasing incursion of imperative rules in to private law, and the growing number of constraints being imposed on public law and the exercise of administrative power.

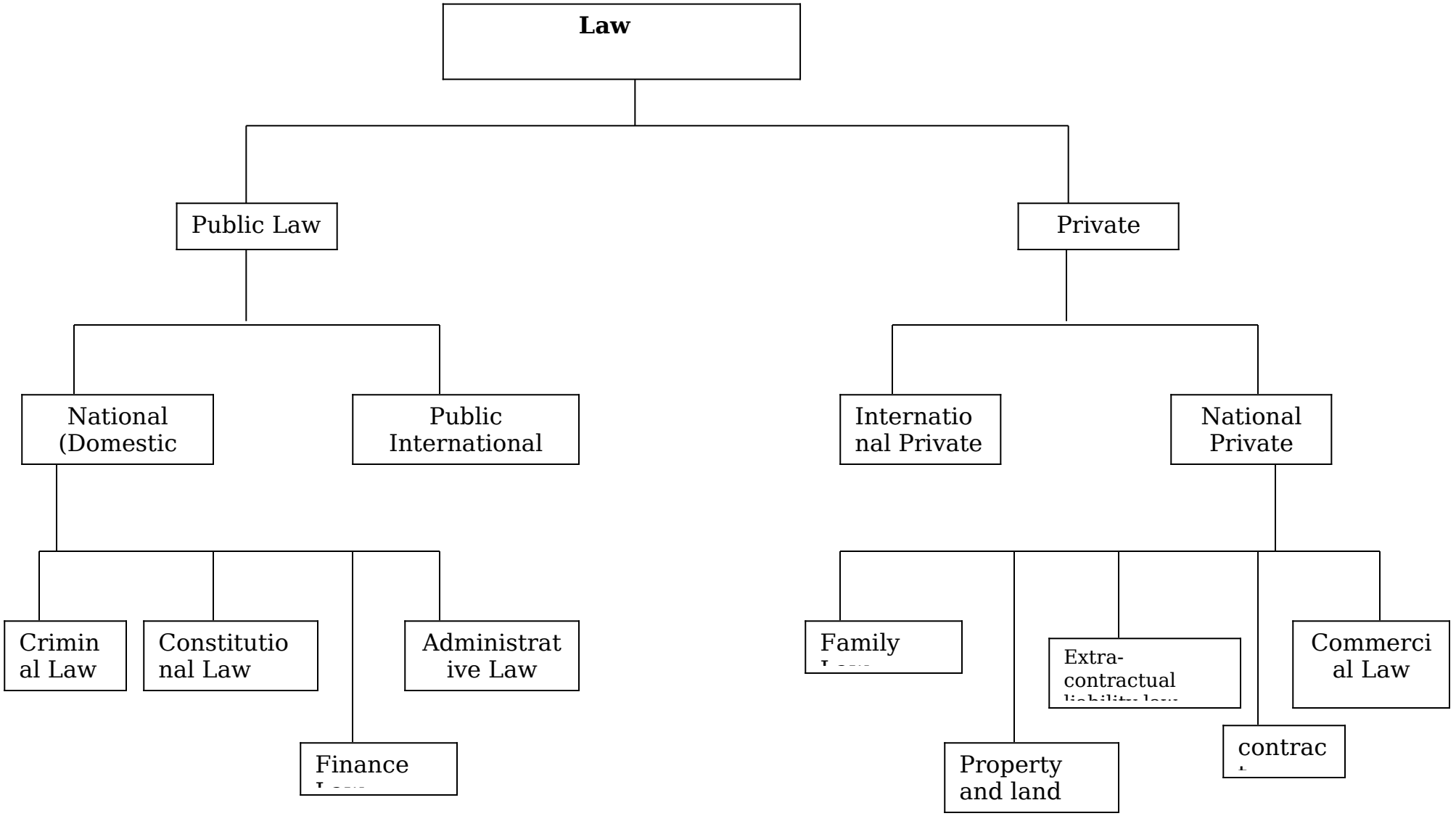
There is also the view that as the public sector has expanded into industrial and economic activities which are characterized by private law rules, state organs ought to be subject to private law and not benefit from the special regimes of public law.

Lastly, the subject classification of law tends to err judges and lawyers by directing them to concentrate in one branch of law and ignore the remedies or solutions that may be available in other areas of law. Thus, lawyers may rigidly classify their client’s claim in terms

of extra-contractual liability and fail to see that there might have been a successful argument based on the law of property that might have been put to the court. At times judges may also fall prey to the same blinkered thinking. The warning here is clear; conceptual classifications should be the lawyer's servant not his master.

Nevertheless, the distinction or subject classification of law remains still today, perhaps primarily because the administration of government and matters falling within the public domain are regulated by rules and subject to jurisdictions which are different from those applicable to private individuals.

Further, differences still persist. The aim of public law is to fulfill the collective interest of the nation through the organization of its government and the management of its institutions and public services, whereas that of private law is to ensure the maximum fulfillment of individuals' interests. Further, despite the encroachment of imperative rules into private law, the latter remains an area of law in which much is left to the individual wishes of the parties and, for the greater part, rules of private law are suppletive, with individuals being free to depart from them in order to best achieve their purposes.


Law
Public Law
Private
National (Domestic
Public International
Internatio nal Private
National Private
Crimin al Law
Constitutio nal Law
Administrat ive Law
Finance
Family
Extra-contractual
Commerci al Law
contrac
Property and land

REVIEW QUESTIONS

1. What do you understand by classification of law?
2. Why it is necessary to classify laws?
3. How is laws often classified?
4. What pitfalls do you see in the classification of law by subject mater?
5. Take the laws in the region that you are living and try to classify them.
6. Try to explain why it is difficult to classify some areas of law either in to private law or public law category.

Chapter Four

THE LAW MAKING PROCESS AND AMENDMENT OF LAWS

Hello! dear distance student! Well come to this unit that introduces you the law making process.

Objectives:-

Upon completion of the study of this unit you are expected to:-

- Explain the general concept of the law making process
- Discusses the initiation of legislation
- Identify forms of legislations and the law making process of the respective types of legislations.
- Identify the similarities and differences of law making under different periods.
- Identify the mechanisms through which law is amended or modified.

4.1. General Over View

The law making process refers to the procedures through which certain draft legislation (bill) must pass to acquire the states of binding law.

Generally there is no single formula concerning the law making process. The law making process varies from country to country. The law making process in the United States is different from the law making process in Britain, France or Ethiopia. The law making process varies even within a country from time to time depending on the constitutional set up. The constitution of a country shapes the law

making process of that country. So, the process of law making varies in a country from time to time when the constitutional set up changes. That is why we have different types of legislations and law making process under the 1931, 1955, 1987 and 1995 constitutions.

The law making process also varies depending on the type of the legislation under consideration. We have different types of laws. We have the constitution, proclamations, regulations, emergency decrees etc. The law making process varies in each case.

Irrespective of this variance in the law making process due to various factors, we have some commonly accepted and adopted steps in the making of the various types of laws. That is:-Initiation of draft law- discussion by the law maker---Adoption (approval) – signing- publication- publication (promulgation).

The draft law must pass through these stages before it becomes binding law.

The power of making law is subject to certain rules and procedures. In the accomplishment of the power of law making, that is to say, the act of giving or enacting law the legislative body usually follows certain rules of procedure referred to as Legislative Rules of Procedure.

Legislative body needs a set of formalized rules for administering its internal organization and mode of the proceedings in conducting its business.

Legislative procedure and law making on inextricably linked in at least three ways. First, procedures affect policy outcome. Some matters only gently pass through the rules, while others become locked in their grip. Procedures are employed to define, refine, restrict or expand the policy option, available to members during floor debate. They may prevent consideration of certain issues or presage policy outcomes. Such structured procedures enhance the policy

influence of certain members, committees or party leaders, facilitate expeditions treatment of issues, grant priority to some policy alternatives but not others, and determine, in general the over all character of policy decisions.

A second point is very often policy decisions are expressed as procedural moves. The one who shapes the legislative procedures of the legislative body rules the kind and scope of political debate.

The third point is that policy out comes are more likely to be influenced by members with procedural expertise. Members who are skilled parliamentarians are better prepared to gain approval at their proposal than those who are only vaguely familiar with the legislative rules of procedure. Members who know the legislative rules of procedure will always have the potential to shape legislation to their ends and to become key figures in coalitions trying to pass or defeat legislations. Those who do not understand reduce their proficiency and influence as legislators.

In some countries some of the legislative rules of procedure are put in the constitution and the legislator abides by them. In this case the legislative rules of procedure have a constitutional status, which is beyond the reaches of the power of the legislative bodies. In some other countries the constitution enshrines general guidelines and allows the legislative bodies to draw up its own rules of legislative procedure, as they deem necessary.

The legislative rules of procedure provided in these manners have their own importance .Firstly, the legislative rules of procedure provides the framework for and determine the nature of parliamentary proceeding which consists of the rules and arrangements made by the legislative assembly for proper and efficient discharge of its duties.

Secondly, the legislative rules of procedure provides stability legitimize decisions, divide responsibility, reduce conflict and distribute power.

Thirdly, legislative rules provide opportunities for members of minority parliamentarian or individual legislators to protect themselves against legislative excess by majority. The enactment of rules of procedure is important for the purpose of securing fair play between the majority and the minority, and consideration of the right of the individual members. Thus, a parliamentary rule of procedure is helpful to the observance of regularity and order among the members that the minorities look for protection against the illegal encroachment by the power of the majority.

Because of this importance of adopting legislative rules of procedure, in most countries of the world we find rules governing the process of law making. These rules usually spell out the stages that the law making process involve. Although, as indicated above there is no single formula which is commonly adapted by all law making organs in all countries, it usually involves the following stages.

Initiation of legislation

The genesis of the process of making law is the stage of initiation. Initiation of legislation means presenting a draft law (bill) for the law making organ for its consideration and approval. It should be noted that invitation of legislation is different from proposing legislation. Initiation of legislation means the presenting of draft law directly for the parliament by organs that are empowered to do so by law, while proposing law can be done by individuals or organizations not included in the list of organs that are empowered to initiate laws. A

concerned individual or non-governmental organization, may for example propose draft legislation on protecting the environment. Yet he may not have the right to present it directly to the law making organ. However, he/it can submit the proposal to the organs that is empowered to initiate draft legislations.

In different countries we find different institutions and organs empowered to initiate draft legislations. Although it varies from country to country, in most countries the organs that are empowered to initiate draft legislations are:-

- Members of the legislative organ
- The president
- The executive organ
- The supreme court
- Member states in a federal state
- Mass organizations like, trade unions, women's association, youth Associations, etc.
- Civic societies (non-governmental organizations) like professional associations, humanitarian organizations, etc.

The increase in the number of organs that are empowered to initiate bills is important to ensure that a variety of laws that represent and take in to consideration the interest of different section of the society are initiated and legislated.

II. Preliminary Reading

When draft legislation is presented before the concerned law making organ it is read out to members of the law making organ and a

preliminary discussion is made on the general essence of the draft legislation. Then the legislator may set aside it if it is not interested in it or send it to the appropriate standing or ad-hoc committee(s) for further and detailed study of the draft legislation.

III. Study by Standing Committees.

Committees are one of the main working arms of the legislative body in the law making process as well as the focus of most of the legislative activity. The system of committees is so significant that it helps to facilitate and to make smooth the legislative task and it is through this system that legislative bodies are able to effectuate the levels expertise, specialization and participation necessary to satisfy the vast demand on their resources. The rational behind the establishment of committees within legislative bodies is because the enormous volume of work which comes before the legislative body and the limited time at the disposal of the legislative body make it impossible that every matter should be considered at length on the legislative floor. Thus, if the legislative task is to be done effectively, the responsibility for priori investigation of the bill's desirability and feasibility must be decentralized and entrusted to other agency in which members of the legislative assembly has confidence. The most practical means so for devised for achieving this purpose is to setup standing sub organs of the legislative assembly composed of small number of members of the legislative body.

Standing committees are the most outstanding type of committee, which is established on a permanent basis to serve on a defined area of subject matter or jurisdiction. The rules of procedure of almost all legislative bodies provide for the creation of a set of standing committees to which all matters are reserved for investigation and

report priority consideration by the legislative body as a whole. In addition to standing committees, there are many other types of committees such as ad hoc committees, which are charged with specific tasks.

Generally, legislative task is difficult to accomplish effectively in a crowed of legislative members in the modern world characterized by in creased complexity of life and role of government in collective social security which requires time, thought and discussion in detail as well as the governing number and type of laws, which itself is necessitated by the growing role of legislature, as a factor that cost the need of forming a small sub-organ of the legislative body's committee with specialized function. This presupposes that usually the legislative standing committee is elected from among the members of the law making organ.

The committee system of the law making process enhances, rather than curtailing, the law making process and as well because of the committee system the executive department initiatives can be evaluated and criticized effectively. The committees' allow legislative function division. Without a clearly defined separation of responsibility within the internal structure of the legislative body, the legislative body could not process hundreds of bills and resolutions that it considers every year nor could it adequately over see the executive branches activity.

In spite of the fact that legislative committees are established for the above mentioned function, there is, however, difference in degree of power of action from country to country. In some countries the committee acts as an advisory body without the power to give final decision on the fate of the draft bill referred to it whereas in some

other countries the committee is given full fledged power to give final judgment on the bill that is submitted to it. In United States, for example, the committees have almost complete power to determine on the fate of the bill referred to it for investigation and study. This is to say that after the committee has discussed and investigated the bill referred to it, it may or may not remand it back. This means the committee is not required to remand all bills and resolutions referred to it from the legislative body. Only those bills which are approved with or without amendment are referred back. One argument against reporting back all bills is that many are unimportant and should not be allowed to close the agenda and take up the time of legislative body. Consideration of unimportant bill not only takes the time of the legislative body, it would also consume the time of the committee. This, in other words, amounts to defeating the very purpose of the parliament committee to which it is established. The fundamental objection to such sort of setup is that it vests power in a small group of committees even to prevent the legislative body from considering and taking action on draft legislation. Such a system denies the legislative organ its constitutional right to legislate and violates the principle of representative government.

In some other countries the legislative committee doesn’t have as such strong power to take its own stand on a draft legislation forwarded to it. Whatever the committee has discussed, investigated, examined and arrives at a certain conclusion as to its feasibility or its practicability has to be always reported back to the legislative body. So it means that such types of committee have only advisory role. The committee does not have entitlement to discuss on the merits and demerits of the bill under consideration but it can propose amendments as to the detail but with due care as to the substance. So in this approach the legislative body is the sole determinant body on

the set of the bills. The proponents of this approach argue that in this system the legislative action would be controlled by a majority of the members of the legislative organ.

IV. Enactment

This is the stage where by a draft bill is debated by the body competent to do so. In other words, this is the stage whereby the draft legislation is concretized and converted into laws which affect the rights and duties of citizens who are subject to it. The enactment stage covers the law making processes before signing and publication but after initiation of a bill and it is exercised by using systematically organized legislative enactment rules of procedure. Well established system of procedure is essential to expediency and efficiency in law making especially in the view of constant increase of pressure of business in the legislature.

The legislative rules of procedure that are designed to regulate the law making process at the enactment stage has to be rules governing talking in such a way to ensure sufficient and reasonable time for members to express their opinion. The same rules must guard the right to speak, the relevance in debate, and also regulate how to close the debate at an appropriate time. Reasoned deliberation is important in the law making process. Law making consists of more than long rolling, compromise or power plays. Critical discussion and debates enable members to gain a better understanding of the complex issue and influence the collective decision of the legislative organ.

Once deliberation is made by the legislative body on the draft legislation that is reported back by standing committee the legislative body votes for or against it. In most cases what is required for approval is simple majority vote (50% + 1) of the members present. Sometimes due to the critical nature or special importance of the draft legislation special majority vote (2/3) or (¾) may be required. For the draft legislation to acquire the force of law it must obtain the required vote.

Where the law making organ is bicameral (i.e. has two chambers or houses) the draft law must pass this rigorous procedure in both chambers. The legislative organs of some countries have two chambers (upper house and lower House). For example in the United States the Congress is composed of two houses the Senate and the House of Representatives. Both chambers are composed of members taken from different walks of life. In such types of legislative organs the bill must pass through both chambers and obtain their assent.

V. Signature

In the process of creation of law, the signing stage comes after the stage of enactment or adoption of a certain bill by the legislative body. In other words it comes after a given law is accepted or approved by the legislative body. It completes the law making process.

The significance of the act of signing lies in the fact that it establishes authenticity of the text or the law and confirms that a particular statute is indeed adopted by an authorized body, the

legislative body. It is through signature that an enactment becomes an enforceable and binding law

In fact signature may be nominal or validity requirement. The legal system of some countries requires that the head of state to sign on the bill adopted by the law making organ but without any veto power. The law will become effective even without the signature of the head of state. Example, Ethiopia. See Art. 57 of the FDRE constitution.

In some other countries the head of state have veto power. He can decline from putting his signature on the bill there by hindering the coming into effect of the law that is approved by the law making organ. This is part of the check and balance system among the three government organs which we find entrenched in the constitution of various countries of the world. For example in the United States the president has veto power. He can refuse to sign bill passed by congress there by checking the power of the congress. However, still here the congress can by two-third majority overturn the president's veto power and promulgate the law without the signature of the president.

VI. Publication

The publication of the law is the final stage in the law making process. This stage is aimed at making the law known to the public. In other words it is a stage designed to make a law enforceable by giving official notice of it to citizens. This notice is essential both for authorities who have to apply the law and for concerned bodies at large. By means of publication the state ensures that the law is known

by the public whose knowledge promote the operations of the law and justifies sanctuary measures. Obviously there could be no justice if the state were to hold its citizens responsible for their actions if it had not previously made known the unlawfulness of certain actions.

4.2. The Law Making Before the 1995 FDRE Constitution.

4.2.1. Law Making During the Emperor's Era

The history of modern law making in Ethiopia can be traced back to the 1991 constitution of the country. To begin with, the constitution provides that "No law may be put into force without having obtained the confirmation of the emperor." In the same constitution the chamber of deputies was given power to deliberate on proposed laws and on any other matter which is important to the empire and the people after it has been communicated and approved by the emperor. This shows that the emperor was the final authority to affirm either the proposed law to be enforced as law or not. Legislative power was indeed shared between the two chambers (chamber of Deputies and chamber of senate) on the one hand and the emperor on the other.

The situation is somehow different under the 1955 revised constitution. Under this constitution the prime Minister was considered as middle man between the emperor and the parliament proposals of legislation made by the council of ministers. The power of the emperor in relation to legislation is manifested under this constitution through his right to initiate legislation and to originate other resolutions and to proclaim all laws after they have been passed

by the parliament. Like the 1931 constitution the 1955 Revised constitution established a bicameral parliament. These are:-

1/ The upper chamber /senate/:-

Its members numbering up to 125 were appointed for 6 years by the emperor at irregular intervals and are chosen from among the nobility, dignitaries, hierarchy of the Ethiopian Orthodox Church and other prominent personages.

2/ The Lower Chamber /chamber of Deputies/

Its members, numbering 250, were elected by the people for four years of term.

In the practice of the then parliament laws were proposed by the emperor, by ten or more members of either chamber and by any concerned ministry. Provided that the bill has been duly approved in both chambers, it shall be forward to the emperor through the prime Minster. Having received the approval and signature of the emperor such laws shall be published in the *Negarit Gazetta*. Whenever, there is a complete disagreement on the proposed legislation, the emperor may there up on communicate to both chambers his observations on such proposals. The other prerogative of the emperor as regards to legislation was his power to make decrees where a pressing need arises when the parliament was at recess. However, such laws are subject to approval by the parliament at its next session.

4.2.1. Forms of Legislations

Based on the authority from where they derive they derive their validity we can broadly classify laws into primary legislations and secondary /subsidiary legislations.

The primary legislations are those legislations that are enacted by the organ which is constitutionally empowered to make laws, that is the

legislative organ of the government, which in our case is the House of People's Representatives.

The secondary legislations are laws issued by organs through delegated power. Usually the executive organ of the government and administration agencies is delegated by the legislative organ of the government to issue regulations and directives to implement the primary legislation. The legislation that empowers the making of subsidiary legislation is referred to as the enabling legislation.

Under the 1955 Revised Constitution there were five major types of legislations namely proclamation, Decrees, orders, directives, legal notices and regulations.
Let us examine each of these forms of legislations one by one:-

A. Proclamations:-

According to the Revised Constitution proclamations were the major and primary legislations of the country. Proclamations were substantive legislations passed by the parliament and approved by the emperor.

According to the 1955 Revised constitution proclamations in the form of draft legislation may be submitted to either chambers of the parliament for consideration and approval by:-
1/ The emperor acting through the prime minister
2/ Ten or more members of the parliament
3/ Any concerned minister.

The draft legislation is then read to the members of the respective chambers to whom it has been submitted. The members by majority vote then decide:-

A- To consider it immediately in the chamber, or

B- To refer it to the appropriate committee,

If referred to committee, the members of the committee discuss in detail each provisions of the draft proclamation. Thus, it may amend, or add to the draft legislation. The committee, which considered the draft legislation, presents to full chamber its recommendations along with an accompanying report. The full chamber then deliberates on the bill and may finally by its vote:-

1 → send back the bill to the same or another committee for further consideration

2 → Reject the bill

3 → Approve the bill in the form in which it was submitted.

4 → approve the bill with amendments.

If alternative (3) or (4) are taken, the president of one chamber sends the bill to the president of the other chamber. When draft legislation is so approved by one chamber and sent to the other, the receiving chamber may refer it to a committee for reporting back or consider it immediately.

If the other chamber accepts and approves the proposal as it is, the draft legislation is forwarded to the emperor through the usual channel for his consideration. If the other chamber doesn't approve the legislation forwarded from the other chamber as it is within 30 days or if it makes other amendments or takes no action, a joint session would be held. If the other chamber rejects the draft

legislation, full report on the matter is submitted by the president of both chambers through the prime minister to the emperor for any action he may wish to take.

The emperor, after examining the reasons for their disagreement, will call a joint session of the two chambers in order to seek a compromise possession. In the joint session there are two alternative outcomes.

A- The draft may be approved by majority vote in which case the matter will be referred immediately to the emperor for his action.

B- The chambers may disagree in which case the respective presidents of both chambers make a report of deadlock through the prime minister to the emperor. In this case the Emperor has the power either to select and promulgate the opinion of one of the chambers or to defer the matter.

Whenever a legislative proposal is approved by a majority vote of the parliament, whether in a separate or joint session, the emperor may do one of the following:-

1- Approve the draft legislation as it is. In such case, the signature and Great Seal of the emperor are affixed thereto and the minister of pen publishes the law in the *Negarit Gazetta*.

2- Approve with amendment

In this case the prime minister will take it back to the chambers so that they would consider the amendment.

3- Consider it differently

In this situation the parliament calls the prime minister or the concerned government office for explanation.

B- Decrees

This is a form of law issued by the emperor. The emperor enacts a decree, which has the force of law upon publication in the *Negarit Gazetta* in case of emergency and when the parliament is not in session. When the parliament returns to office it may approve the decree as it is or approve it with amendments. In such a case the decree continues in force and the approval is published in the *Negarit Gazetta.*

C- Order

It is a form of law issued by the emperor alone under his own sovereign powers and prerogatives without any involvement of other government organs. Under the 1955 Revised Constitution the emperor is vested with the power to issue orders in various matters such as the creation and organization of Ministries and Agencies; the powers, duties, promotions and transfer of all ministers and government officials and many other similar officers.

D- Legal Notices Regulations

This is a delegated legislation. The legislator delegates the making of detailed laws to the executive. The executive issues legal notices using this power. Legal notices are the equivalent of directives today. Legal notices are not required to be submitted either to the emperor or parliament.

Law Making During the Derg Era

During the Derg regime the law making process had two versions: under the Provisional Military Administrative Council (PMAC) Charter and under the Peoples Democratic Republic of Ethiopia (PDRE) Constitution.

The Law Making Process under PMAC

The provisional military administrative council did away with the government of Emperor Haile Selassie I and assumed full government power on September 12, 1974 and, by proclamation No. 1/1974 (the Charter of PMAC) suspended the 1955 revised constitution. The chamber of Deputies and Senate (Parliament) were also dissolved.

The Provisional Military Administrative Council (Derg) has not issued any law that directly and exclusively deals with the process of making law. There are, however, some laws that shade some light on the subject. The most important of all is the Redefinition of the Power of the Military Administrative Council and the Council of ministers proclamation No. 110/1977. Art 5 (6) of this proclamation provides that the congress of the Derg issues proclamations. The power of enacting primary law (i.e. proclamations) belonged to the congress of the Derg. From Article 217 the same proclamation we know that ministers as well as commissioners were given power not only to initiate but also to enact regulations. The regulations are subsidiary legislations issued pursuant to a delegation from the congress.

The power to initiate legislation is also given to some non-governmental organizations, urban dwellers Association, women's Association, youth Association.

Laws are usually originally drafted by the concerned ministry or administrative organ.

Some laws that originate from the decisions of the Council of Ministers or from specific order of the Head of State are prepared by the legal department of the office of the chairman of the council of ministers either way the draft law is sent to the council of ministers for its consideration.

The Secretary General of the Council with the approval of the deputy chairman of the council of ministers, either presents it to the plenary session of the council of ministers or sends it to the legal committee of the council of ministers for its consideration. In practice we find that the draft legislation that are discussed by the council of ministers before they are sent to its legal committee are the ones that demand major policy decisions or, are those that have to be published urgently.

After deliberation on these draft legislation, the council sends them to the legal committee together with policy directives. Draft legislation that do not seem to demand prior policy decisions by the council of ministers are, as stated above, directly referred to the legal committee by the secretary general with the approval of the deputy chairman of the council of ministers.

The draft approved by the committee is sent to the council of ministers. The council discusses the draft proclamation, and if approved, it is sent to the Provisional Military Administrative Council, since it is the congress of this organ that has the power to issue proclamations. The draft proclamation approved by the Provisional

Military Administrative Council is sent back to the council of ministers which in turn sends it to the office of the chairman of the council of ministers for publication in the Negarit Gazetta. The copy of the approved law that is sent to the council of ministers is signed by the secretary general of the Provisional Military Administrative Council (Derg).
Proclamations appear in the name of the collective body-the Provisional Military Administrative Council (Derg).

Regulations, that is, subsidiary legislations, issued by ministers by virtue of the power given to them by an enabling legislation, are not sent to the Provisional Military Administrative Council for approval. Once they are passed by the plenary of the council of ministers, they are directly sent to the office of the chairman of the council of ministers for publication in the Negarit Gazetta. Regulations appear in the name of the minister or commissioner that issued them.

4.3.2. The Law Making Process under the PDRE

In 1987 the Constitution of the People's Democratic Republic of Ethiopia was adopted by referendum. This constitution re-established a parliament but it was unicameral, i.e. one chamber (house). This was the National Shengo which was composed of 835 members who were elected for a term of 5 years. The regular session of the National Shengo was once a year for 5 days and hence was not a permanent organ. It was simply a "rubber stamp" which put its approval on the works of other government organs in the year. The National Shengo issues proclamations.

The Council of State was another organ established by the constitution. The Council of State was permanent organ that represent the National Shengo and its members were also elected from the members of National Shengo. It issues decrees. The president of the republic who was also the chairman of the council of state was empowered to issue Presidential Decrees when the National Shengo is not in session and do not require the approval of the National Shengo. Regulations, as a subordinate legislation, were issued by the council of ministers and other organs empowered to do so.

The genesis of the process of law making under this constitution starts from initiation of a draft law. The relevant article of the PDRE Constitution on the institution of legislation is article 71. According to this Article, the following organs have the right to initiate legislation:

- The Council of State
- The president of the republic
- Commissions of the national Shengo
- The council of ministers
- The supreme court
- The prosecutor general
- Shengos of higher administrative and autonomous regions, and
- Mass organizations through their national organs.

The initiated legislation could be of the type of law that has to be issued by the National Shengo, in which case it becomes a proclamation or by the council of state as Decree law or special – Decree-law or by the president of the republic as presidential Decree law. It is also possible that initiated legislation may have to be issued

in the form of regulations by the organ in whom the constitution has vested the power to do so.

The next stage following initiation is enactment. The enactment is the act of approval of the bill or draft law by the appropriate law making organ once the draft law is approved or authorized to have the force of law it will be submitted for the president of the republic for signature.

Finally it would be published in the Negarit Gazetta in the name of the president for proclamations, and Decrees and presidential Decrees in the name of the head of the state organ that issues the regulations for regulation.

Law making during the transitional government of Ethiopia (TGE) 1991-1995

During this period instead of a constitution there was a transitional period charter and instead of a parliament there was the Council of Representatives.

The council of representatives had the power of legislation and power to promulgate proclamations and regulations. With respect to decrees, there was no need for the Council of Representatives to issue decrees because it was in office throughout the year. A law may be initiated by a governmental agency and submitted to the council of ministers. If it is approved by the council of ministers, it would be submitted to the Council of Representatives. If the draft law is approved by the Council of Representatives it would be signed by the president who is the chairman of the council of representatives. Then it is published in the *Negarit Gazetta* in the name of the president.

Under the transitional period charter law making power was shared between the central government and regional governments.

4.4. The Law Making Process under the FDRE Constitution (Since 1995)

Following the adoption of the 1995 FDRE Constitution a federal state structure is adopted in Ethiopia. Consequently, state power is apportioned between the federal government and regional member states. The federal government is given certain powers under art 52 of the federal constitution. The federal government enacts laws on matters that fall within its competence and have effect to create one economic community. Regional member states also enact their own laws on matters that are reserved to them by the federal constitution.

Dear distance student in this material you will study the law making process by the federal law making organs. You are required to make your own study of the law making process in your region.

4.4.1. Forms of Legislations

Before we proceed to consider the law making process at the federal level we need to distinguish the forms of legislations issued by the federal government. The following are the major forms of legislations that are issued by the federal government.

A- Proclamations:- Proclamation is the major and primary legislations of the country. It is enacted by the supreme

legislative organ of the country, that is, by the House of People's Representatives (Art. 55 of the FDRE constitution).

B- Regulations: - It is a delegated or subsidiary legislation. It is issued by the Council of Ministers pursuant to a delegation given to it by the House of People's Representatives. Usually when the House of People's Representative enact a proclamation in the form of general principles and guidelines on substantive matters and delegates the Council of Ministers the power to issue detailed laws for the implementation of the proclamation. Based on such delegation the Council of Ministers issues regulations. The regulations so issued by the Council of Ministers are supposed to conform to the enabling (delegating) proclamation.

C- Emergency Decree

This is a law issued by the Council of Ministers as per art. 93(1) (1) (a) of the FDRE constitution when external invasions, a breakdown of law and order which cannot be controlled by the regular law enforcement agencies and personnel, a natural disaster, or an epidemic occur. It is subject for approval by the House of People's Representatives within forty-eight hours of its adoption if the House is in session or within 15 days if it is in recession.

Unlike the power of the Council of Ministers to issue regulations which it derives from proclamations, its power to issue emergency decrees is derived from the constitution (see Art 77(10) and 93(1) (a) of the FDRE constitution

D. Directives

Directives are laws issued by individual administrative agencies. Administrative agencies issue Directives concerning their internal structure and organization, operation, and manner of giving service, implementation of proclamations and regulations. Administrative agencies derive their authority to make Directives from proclamations and regulations. The process of making of Directives is governed by Administrative law.

The Law Making Process of Proclamations

Under the FDRE construction the power to issue proclamation is given to the House of Peoples Representatives. It is a unicameral or a one chamber legislative organ. The law making process by the House of People's Representative is governed by The House of People's Representatives' Legislative Procedure Proclamation no 14/95 as it is amended in May 1997. The constitution and other relevant laws have their own role in shaping the making of proclamations. Now let us consider the stage involved in the law making process.

I- Initiation

The first stage in the making of proclamations is the initiation stage. Legislative initiation refers to the act of presenting certain draft legislation for the legislative organ. The power to initiate draft legislation for consideration by the House Of People's Representatives is given to different organs. The following are the organs that are

empowered to initiate a draft law to the House of People's Representatives.

1. **Members of The House Of People's Representatives:-**

Under Art 3(1) of the House of People's Representatives Legislative Procedure Proclamation no 14/1995 members of the House are given the power to present draft legislation for the House for deliberation and approval. Under this proclamation draft legislation initiated by the member of the parliament must obtain the approval of at least 20 members of the House in order for it to be itemized in the agenda of the House and to be considered by the House. So in effect the power to initiate legislation was given to at least 21 members of the House. This was later amended in May 1997 E.C and for members of the House to initiate draft legislation they must constitute at least 50% of the members of the House. So, it is only at least 50% of the members (274 members) or more which can initiate draft legislation. This has the effect of sacking the voice of the minority members of the parliament and making their presence in the parliament without role.

2. **The council of Ministers**

Under Art 77(11) of FDRE Constitution and Art 3(3) of the House of Peoples Representatives Legislative Procedure Proclamation no.14/1995 the Council of Ministers is given the power to initiate draft legislation to the House of People's Representative on any matter.

3. **The Plenum of the Federal Supreme Court**

The plenum of the Federal Supreme Court is composed of the president and vice president of the Federal Supreme Court, judges of the federal Supreme Court, presidents of the federal high court and first instance courts and presidents of Regional Supreme Court. This

organ is empowered under Art 33 of the Federal Courts Proclamation no 25/96 to initiate draft legislation.

4. Trade Unions and Employers Associations

Under Art 115(3) of the labour proclamation no 377/2003 trade unions and employers organization are empowered to initiate laws.

All the draft legislations that are initiated by the various organs empowered to initiate draft legislation will be submitted to the speaker of the House of People's Representatives through the secretary of the house.

II. Preliminary Reading

The next stage in the law making process by the House of People's Representatives is the preliminary reading stage. The speaker of the House to whom the draft legislation is submitted notifies the House of its content and essence and causes it to be itemized in the agenda for preliminary reading. After the draft legislation is itemized in the agenda, at the time therein set for it will be openly read out to the House by the Speaker, by a person whom the Speaker delegates or by the deputy having submitted it. Where the draft legislation submitted is found voluminous and time consuming for a reading, the speaker may rule that it be individually sent out to deputies' priori to the date set for the agenda and that deliberation be started upon it without open reading. Upon completion of the reading of the draft legislation discussion will be made on the general sprit of the law. Then the House has the following options:-

- It can dismiss the draft altogether

- ❖ Deliberate and pass decisions directly in its regular meeting.
- ❖ Refer it to the appropriate standing or ad-hoc committees organized within the House.

If the House opted to reject the draft that will be the end of the matter. If the House wants to consider the draft, then it has the option of either to directly discuss and pass its decision in its regular meeting or refer it to standing committees for detailed study of the draft. This is to be decided by a 2/3 majority vote of the members of the House. If the members of the House by a 2/3 majority vote opt to directly deliberate on the draft in its regular meeting then it can discuss and pass its decision without the need to refer the draft legislation to standing committees. This is usually for legislations of urgent nature. Where the House has not opted by 2/3 majority vote to consider the draft directly by its own, then the draft is referred to one or more of the standing or ad-hoc committees established with in the House.

III. Study by Legislative Committees Made and Operation of Legislative Committees.

The House of People's Representatives is vested with the power to establish committees with in it under Art 55(19), which provides that "the House of People's Representatives shall establish standing and ad-hoc committees as the house finds it necessary to accomplish its legislative and other related responsibility vested to it by FDRE constitution." Accordingly, the House of People's Representatives has

established nine (9) standing committees based on the area of function. These are:-

a. the Legal Affairs Committee
b. the Budgetary Affairs Committee
c. the Economic Affairs committee
d. the Defiance and Security Committee
e. the Foreign Affairs Committee
f. the Labour and Social Affairs Committee
g. The Committee for the Administrative Affairs of the House.
h. The Mass Media and Cultural Affairs Committee
i. The Women's Affair Committee

Each committee has thirteen (13) committee members. All committee members and the chairman and secretaries are to be elected directly by the House from among the members of the House. No deputy can be a member to more than one committee. Each committee is empowered to drawing its own rules of procedure and implements it after having it approved by the House.

The House standing committees are established with the intention and purpose of serving a defined objective in the law making process. The committees are supposed to provide the House with the expertise necessary to deal with the national social, economic and political problems. This logic shows that the members of the legislative standing committee have to have special skills, education and competence in an area they are to be assigned to work. However, there are no clearly stated criteria in making the committee assignment. The only criterion is that one has to be the member of the House to be a member of the standing committees. Expertise or

experiences are not taken in to account. This commission will obviously bring problem in the law making process. In other countries, for instance in USA, there are various criteria in making committee assignments. Seniority, service in the House, geographical representation, personal preference, and previous committee services are the most important one.

The main function of the standing committee of the House is consideration of draft legislation which is referred to it by the decisions of the House after the first reading and an overall consideration is made by the House.

The House standing committees are authorized and directed to make full and compete studies as to investigation and examination of the draft legislation in detail. It shall arrange public hearing (forum) where all concerned body shall give their opinion on the matter. By conducting public hearing it is possible to gain information from the concerned individuals or organizations. The public forum has high significance. First it introduces the public of the introduction of a new bill. Second it enables the public to evaluate the significance of the legislation. And finally, it provides opportunity for interested parties to voice at a particular bill.

Once public hearing is conducted and completed, the bill is going to receive its most concentrated institutional studies by the committee itself. The committee now reads line-by-line usually in an open session of committee, explanations for particular provisions are referred and discussion goes on. Amendments are, if any referred and considered. The next stage is giving vote on the provision that is considered.

The final decision of the standing committees of the House upon the bill which has been discussed is given by unanimous vote; however, if this is impossible, the decision will be rendered based on majority vote. If the committee is divided in to two equal numbers, the chairman will vote to break the tie.

Once the committee has completed its operation, it has to report the bill to the House of People's Representatives for legislative actions. The committee report contains an explanation for the bill and its purpose, a section- by – section analysis, committee's views, and investigations, study and decision on the matter. In short the committee has to submit its findings as to the bill consisting of its investigation, study and decision on the bill.

In the House, the committee report is a corner stone in the lawmaking process because the House has standing rules that normally require the committee report be available for the members, before the House considers the bill that is the subject of the report.

Inter-Committee Coordination

Inter-committee coordination is desirable in order to avoid jurisdictional overlap, promote consistency and coherence between different areas of legislative activity. Let the right hand know what the left hand is doing, avoid duplication and accelerate the legislative process. This inter-committee – coordination is achieved through different mechanisms: realignment of committee jurisdiction, inter-locking committee membership, inter-committee bill referrals and finally joint committee and joint staffing.

When we come to inter-committee relationship of the House of People's Representatives, we can find some mechanisms, which allows inter committee function. If the House of Peoples Representatives has refereed the bill to one of the nine standing committees and as a matter of fact the bill referred may have overlap in jurisdiction or have close connection with one or two or more standing committee of the House, it is possible for that committee to which the bill is referred to form joint meeting with the concerned standing committee(s).

The other way out to avoid jurisdictional conflict is taken by the House itself. When the draft bill is found out to be such that it cut across the jurisdiction of two or more standing committees the House at the spot establishes an ad-hoc committee from among the committees that are likely to have mutual interest on the bill.

IV. Discussion and Adoption by the House

Once a committee has investigated and analyzed, its puts the bill to the floor for legislative action. When the standing committee of the House decide to send the bill it has to prepare a report with an explanation of the bill, the investigation conducted and the decision taken on the bill.

The report of the standing committee of the House together with the bill on which the report is made, would be placed in the

agenda for the House discussion. This is the stage where the House makes hot and critical debate.

The bill that has been discussed by the standing committee of the House is reported to the speaker of the House. Once the Speaker received the committee report which serves as a source of information to the House, he shall cause it to be distributed to each deputy and list down in the agenda for consideration in the regular meeting or, as may be necessary, in consecutive sessions, and extra ordinary meetings.

Here one point has to be considered that is the issue of quorum. Art 58(1) of the FDRE constitution provides that on each session it is the presence of more than half of the members of the House that constitutes quorum. All the decision of the House of people's Representatives is required to be made by majority vote of the member who have attended the meeting except in cases where otherwise expressly provided by the constitution itself.

If more than half of the House of People's Representatives present at the session, then the report of the committee will be opened for consideration, examination and discussion .

As soon as reasonable time allocated for sufficient study by the individual legislator is lapsed, then the report is considered by the House as a body. The respective committees which studied over the meeting shall elaborate on the matter and conduct deliberation on the bill.

Having made sufficient and well-reasoned deliberation on the committee report, the House finally takes a vote on the legislation. In

principle the House of People's Representatives shall give its vote by acclamation. However, if the system of acclamation is impossible, the other alternative will be based on majority vote. Voting will be given by raising hands openly or by secret ballot or by calling the names of each member of the House present at the session.

The decision that the House takes on the draft bill may be accepting, modifying, approving or rejecting. The speaker shall make official declaration to the House the action that is taken by the House. If the action that has been taken by the House is approval, then we call the law is enacted. The end product of the lawmaking process is law.

V. Signing Stage

Once the draft is approved by the House, the speaker of the House shall together with a statement that the draft legislation has been considered and approved by the House, pass it in two working days to the president of the federal government for signature. As indicated under Art 57 of the FDRE constitution the President of the Republic must put his signature with in 15 after the adopted law is referred to him. If the president failed to do so with in the time limit of 15 days then the law becomes effective without bearing the signature of the president. Thus the power of the president is nominal. The signing or the non-signing of the president has the same effect; that is the law is binding in both cases.

VI. Publication Stages

In order to let Ethiopian subjects know the law that is enacted by the legislative organ, the bill that is adopted by the House of People's Representative will be published in the Federal *Negarit Gazetta*, which is the official gazette of the federal government. This gazette was first established in 1942 as *Negarit Gazetta*. Now it is re-established as the *Federal Negarit Gazetta* by the Federal Negarit Gazetta Establishment Proclamation no. 3/1995. Under this proclamation it is a must that all laws of the federal government must be published in the Federal Negarit Gazetta. It is also the duty of all federal or regional legislative, executive and judicial organs as well as any natural or physical person to take judicial notice of the laws published in the *Federal Negarit Gazetta*. The publication is to be made in Amharic and English language. Incase of discrepancy between the two versions the Amharic version will prevail as it is the official language of the federal government through which the House of Peoples Representatives deliberate and it is this version that is believed to reflect the intention of the lawmaker.

The Process of Making Regulations

Dear distance student, you have seen in the preceding chapters that regulations are subordinate legislations issued by the council of Ministers of the federal government when it is delegated by the House of Peoples Representatives. Like proclamations draft regulations must pass serious of steps before they become binding law.

The process of making regulations by the council of ministers is governed by the internal rules of procedure of the council of Ministers. As per the internal rules of procedure of the council of

Ministers the stages that a draft regulation must pass are the follawing. It is almost identical with the process of making.

I. Initiation

This is the stage at which draft regulation is presented for consideration and approval by the Council of Ministers. The power to initiate draft regulation is given to individual administrative agencies. The concerned government agency (Ministries, commissions, Agencies, Authorities, etc) prepares draft regulation and submits it for the Council of Ministers. Apart from individual government agencies trade unions and employers associations have the power to initiate draft regulations (Art 115 (3) of labour proc 377/2003).

II. Preliminary Consideration by the Council of Ministers

When the draft regulation is submitted for the Council of Ministers by the concerned organ it will be readout to the members of the council Ministers with an accompanying explanation on the general essence of the regulation. Then the Council will make a general discussion on the sprit of the law. Then the council has two options. If it is interested in the draft regulation the Council will refer the draft regulation to one of the standing committees established with in it. If the council is not interested in it, it will automatically reject it.

III. Detailed study by Standing Committee

When a drafted legislation is adopted by the Council of Ministers in its preliminary session. Then it will be refereed to the appropriate standing committee organized with the council of Ministers. The committee to which the draft legislation is referred to makes detailed study of the draft regulation and makes amendment when it finds necessary. After completing its examination of the draft regulation, the committee reports its findings to the council of Ministers.

IV. Deliberation and Approval by the Council of Ministers.

When the concerned standing committee completes its study of the draft regulation and submit its report to the council of Ministers, the council of Ministers consider and discuss in detail on the draft regulation which is studied and examined by the standing Committee. Then the council has the option to accept it, reject it or accept it with amendments.

V. Signature

Once the draft regulation is approved by the Council of Ministers it will be signed by the Prime Minister who is the chairman of the Council of Ministers and referred for publication in the *Federal Negarit Gazetta.*

VI. Publication

The last stage in the process of making regulations. As one type of federal law, regulations once approved by the Council of Ministers and signed by the prime Minister, must be published in the Federal

Negarit Gazetta as required by the Federal Negarit Gazetta Establishment proclamation no. 3/1995.

Review Questions

1. Elaborate the basic steps that are involved in the law making process.
2. Compare and contrast the lawmaking process under the 1995, 1987 and 1995 constitutions.
3. What do you think is the importance of publication of laws?
4. What is the difference between initiation of law and proposing law?
5. Explain the importance of having standing committees within law making assemblies.
6. What are the organs that are empowered to initiate laws?
7. What does the lawmaking process in your region look like?

8. What impact do you think the present federal structure have on the lawmaking process?
9. How do you see the present legislative procedure of the House of People's Representatives in light of ensuring the participation of the minority members?

CHAPTER FIVE

HIERARCHY OF LAWS

Hello dear distance student! Welcome to this unit that introduces you the hierarchy of the different types of legislations.

Objective:-

Upon completion of the study of this unit you will be able to:-

- Define the concept of hierarchy of laws
- Establish the hierarchical relationship of laws under the present federal structure

- Establish the similarities and differences in the hierarchy of laws under the different regimes.
- Show the status of international treaties under the Ethiopian legal system

5.1. The Concept of Hierarchy of Laws

Hierarchy of laws refers to the superior subordinate relationship that exists among the various types of legislations. It is used to express the ascending series of ranks or degrees of power and authority with the correlative subjection of each to the one next above. It is used to describe the structure of power relationship involving a varying amount of power and authority. It is believed that laws derive their validity and force from the authority that their makers posses. Thus, it can be said that the superior- subordinate relationship that exist among the law makers also exist among the laws and we can conclude that hierarchy of laws is a direct reflection of the hierarchical relationship that exist in the law making authorities.

Dear distance student, why do you think it is important to establish and know the hierarchy of laws within a country? What purpose does it serve?

Knowing the hierarchy of laws of a country is important for the purpose of interpretation of laws. As you will study in the next chapter one of the rules of interpretation is that whenever there is a conflict between two types of legislation the one higher in status will prevail and become applicable over the law which is lower in status. So, hierarchy of law is important to determine the applicable law in case there occur conflict between different types of legislations.

Just like the law making process the hierarchy of laws vary under different constitution. Though there are similar explanations and rules of hierarchy of laws, there are differences in the hierarchy of laws, depending on the constitutional setup. Dear distance student, why do you think that the hierarchy of laws vary under different constitutions?

5.2. The Hierarchy of Laws under the Revised Constitution of 1955

The Status of the 1955 Revised Constitution

The contents of laws are broadly categorized into two: - The basic law and other legislations. Here the basic law refers to the constitution of each country. At least in principle it is recognized by all countries that the constitution is the supreme law of the land. There are a lot of reasons for making the constitution the supreme law. First most constitutions contain *supremacy clause*. The supremacy clause is a provision of the constitution itself which declare the constitution to be above all other laws of the nation. Second, fundamental principles like the inalienable rights of man to life, liberally and property are embodied in the constitution of every country. The constitution also contains provisions which provide for the division of government power among the three branches of the government, i.e. the legislative, executive and the judiciary. Generally, the constitution establishes the state and its organs and defines their powers and responsibilities and the relationship of the state with its citizens. It is considered as the manifestation of the will of the citizens which are the ultimate holders of power. For this reason the

constitution stands above all other laws in the hierarchy of laws. Further more, the constitution as a fundamental law is adopted and amended under special and stringent procedure. This is also the other factor that makes the constitution the supreme law.

When we come to the 1955 Revised Constitution the supremacy clause of the constitution itself declares that the constitution along with international treaties is the supreme law of the land (Art. 122). It reads, “The present revised constitution together with those international treaties, conventions and obligations to which Ethiopia shall be party, shall be the supreme law of the empire, and all future legislations, decrees, orders, judgments, decisions and acts inconsistent there with shall be null and void.” Legislation here apparently means parliamentary statute (proclamation) (Arts. 88-90), “Decrees” the emergency legislation under art. 92, “Orders” the general administrative rules, “Decisions”, the particular administrative acts. Hence, pursuant to art. 122 of this constitution, all types of enactments shall be void if they contradict the supreme law of the empire, i.e. the constitution and international treaties to which Ethiopia is a party.

In actual fact the constitution was not as such absolutely supreme as declared under Art. 122 of the constitution. There are provisions of the constitution which made the emperor above the constitution. Despite this the supremacy of the constitution is reflected in many other provisions of the same. As has been said above Art. 122 of this 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 legislations. 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. That being the case here also the constitution is on the top and other legislations are below. Pursuant to this article, all citizens were primarily bound by the constitution of 1995 and 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 of the constitution. While taking the oath they were required to promise to respect and defend the constitution.

But what if there is contradiction between the constitution and international treaties? It appears that the constitution should prevail. Because the constitution is deemed to be the direct expression of the people and thus all acts of whatever kind they be should be consistent to it.

Types of Legislation and their Hierarchy under the 1955 Revised Constitution

Under the 1955 constitution there were primary and subordinate legislations. The primary legislations include proclamations, decrees, and orders which were made by the emperor himself. After being duly processed and deliberated by the two chambers proclamations were enacted in pursuance of Art. 88 through 90 of the Revised Constitution. As said before, for proclamations to be enacted the approval of the emperor was mandatory. For this reason the emperor along with the parliament was considered as the supreme law maker of the empire. The

constitution of 1955 in its Art. 92 also conferred the emperor the right to proclaim decrees. The decrees proclaimed under this article would have the force of law upon publication in the *Negarit Gazetta*. Then the text of each decree would be transmitted for consideration by the parliament at its first meeting in its next session. If the parliament opted to approve, the decrees could continue in force. But in the event that, the parliament opted to disapprove them, they would cease to continue in force, upon the publication in the *Negarit Gazetta* of such disapproval.

Although both proclamations and decrees were under the category of primary legislations, in so far as proclamations were enacted by the concordant wills of the two supreme law making bodies (parliament and the emperor) they assumed supremacy over the decrees. Because the later 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.

Secondary legislations under the 1955 Revised Constitution covered: order which were made by each ministry, Regulations, Legal Notices, General Notice and Notice of approval. The word order has been mentioned under the revised constitution in Arts. 122, 144 and 64 of same. As indicated before, 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 were not categorized under this type of legislations. Because 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 subordinated 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 legislations such as legal notice, general notice and notices of approval were not clearly indicated in the constitution, they used to appear in the *Negarit Gazetta* having the force of law.

5.3. Hierarchy of Laws under the PDRE Constitution Of 1987

The 1987 PDRE 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 conformity with the letters and spirit of the constitution. Conformably to this, Art. 118 of the PDRE constitution declared that it was superior to all other laws. It reads "the constitution of the people's Democratic Republic of Ethiopia is the supreme law of the country. Any laws or decisions contrary to this constitution shall have no effect." In this article while the phrase "any law" refers to the acts of the parliament or to acts of legislators of whatever kind they are, the word "decision" may refer to the administrative decisions or judicial acts. Therefore, the PDRE constitution was binding on all departments and offices of the government and hence any act made by them in contradiction of the constitution would be invalid. For this reason, written constitution like the PDRE constitution are not only the direct and basic expression of the sovereign will, but are the absolute rules of action and decision for all departments and offices of government with respect to all matters

included by them and must control as they are written until they shall be changed by the authorities that established them.

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 Article, it is possible to say that international treaties under the PDRE constitution were on equal stand with the decrees proclaimed by the council of state. This is because, they come in to 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.

5.4. Forms of Legislation and their Hierarchy under the PDRE constitution.

We have already seen the position of the PDRE constitution and now we shall also deal with the legislation that existed under this constitution. There were primary as well as subordinated legislations. The primary legislations are ordinary enactments that are made by the supreme legislative body. Thus, their position on the ladder of hierarchy is next to the constitution.

The national “Shengo” was the supreme legislative body. Consequently, the laws enacted by this body and by its standing bodies (the President and the Council of State) constituted the primary legislations and thus they stood second in hierarchy to the constitution. The forms of legislation passed by those organs mentioned here, covered proclamations, which were enacted by the

national “Shengo”, decrees and special decrees which were made by the council of state and presidential decrees enacted by the office of the president. However, the fact that all these types of legislations were under the class of primary legislations does not imply that they were on equal status in hierarchy.

The hierarchy among such laws can be seen in connection with the power relationship that existed among the makers themselves. In other words in order to establish the hierarchical relationship among the laws we need to see the power order that existed between the national “Shengo”, the council of state and the office of the president. This is because the hierarchy of laws is the reflection of the power order among the law makers.

One can understand from the close reading of chapter 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 legislations made by the national Shengo” (Proclamations) were superior to the other legislations (decrees and special decrees) passed by the council of state and the office of the president.

From the fact that the national “Shengo” assumed the highest position in the power order among the state organs stated above, it becomes easy to establish the chain of subordination between the proclamations Vis-à-vis the decrees and the special decrees. In other words, in so far as proclamations were enacted by the national “Shengo”, they were superior to the other two (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 come 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 Articles 83 and 87 of the PDRE constitution respectively. As stated in these 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”.

Having looked at the hierarchical order between the proclamations and decrees, we shall now see the hierarchical order 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. Both the council of state and the president were the standing bodies of the national “Shengo”. Therefore, it seems that the two organs (the council of state and the office of the president) had equal rank in the power order. Because of this, their relationship was not vertical but rather it was horizontal. As a result there was no hierarchical difference between those decrees in question.

The second type of legislation, i.e. the subordinate legislations enacted by the council of Ministers under the PDRE constitution comprised of regulations and directives. We have see in the previous chapters that in majority of cases, the executive organ is empowered to make subordinate legislations delegated to it by the sovereign legislator and thus the legislations enacted by such delegated organ become subsidiary type of legislations. Nevertheless, there are also some constitutions which confer constitutional right on the executive organ to enact executive orders and regulations in which case they

fall under the category of primary legislations instead of the subordinate ones.

In this regard 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 legislations (proclamations), the regulations issued by it were not derivative and thus they fell within the group of primary legislations. 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. In so far as the council of ministers was lower in the power order than the national “Shengo” and its permanent bodies, the laws enacted by this organ were subordinate to the proclamations and decrees of whatever kind. Moreover, the council of ministers and each ministry had the right to issue derivative legislations and directives. However, their position on the ladder of hierarchy was below the non derivative regulations issued by the same organ (council of ministers).

5.5. Hierarchy of Laws under the 1995 FDRE Constitution.

Under the 1995 constitution a federal state structure has been adapted in Ethiopia. Under this constitution state power is apportioned between the federal government and regional status. Accordingly, both the federal and state governments can make laws on matters that fall within their competence. In this section you will study the hierarchical relationship that exists among the federal and regional laws as will as between the federal and state saws.

5.5.1. **The Supremacy of the FDRE Constitution**

The federal constitution being the source of powers of both the central and regional governments is believed to be the supreme law. So as to say that the 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 and that all legislations are below the constitution. In this respect the federal constitution usually embodies a provision which prohibits legislators to alter the constitution unilaterally.

The rationale for the supremacy of the constitution is that it is an emanation from the will of the body superior to the legislator, namely the people. Thus the fact that the federal constitution derives its validity from the ultimate body (the people) makes it the ultimate measure of legality of the acts of the legislators and other organs of state power established by it or in pursuance of and in accordance with its provisions. Consequently, all legislations be they made by the federal government or state government organs are subordinate to the federal constitution.

In like manner, 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, acts of an agency of government or official 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 regional levels. Therefore, the FDRE constitution is superior to all federal and state laws including the state constitutions. This constitution is binding on all authorities of both the federal and

of the regional states. Hence, all acts made by these authorities in contravention of the supreme law are invalid.

However, in order to say that the FDRE constitution is positioned on the top in the hierarchical order, we should also be able to prove whether or not this constitution is superior to international treaties that are ratified by Ethiopia. Although the position of international treaties under Ethiopian legal system is not easily identifiable, for this purpose the reading of Arts. 9(1), 9(4), 13(2) and 55(12) of the FDRE constitution is relevant. As provided in art. 9(4) of the constitution "all agreements ratified by Ethiopia are an integral part of the laws of the land." Therefore, since international treaties are part of the laws of Ethiopia, they should be included under the phrase "any law" in sub-article 1 of the present article. If this is so, so long as we have said above that the said phrase is used to cover all laws of Ethiopia, we can conclude that international treaties, being part of those laws, are lower in hierarchy than the constitution.

But that is not the end of the whole problem. We have yet Art. 13(2) of the constitution that further complicate the task of determining the status of international treaties under the Ethiopian legal system. Art. 13(2) of the FDRE constitution read as:

> *"The fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of the universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia."*

Does the declaration of the above provision make international human rights superior or equal in hierarchy to the constitution? If it does so,

doesn’t it contradict the conclusion that international agreements are positioned below the constitution in the hierarchy of laws?

The inclusion of the phrase “… inconformity” under Art. 13 (2) of the FDRE constitution seem to imply that the international instruments are superior to the constitution. Because when interpretation is required to be made in conformity with some other legal document then the legal document to which conformity is sought, must have been given higher status than that whose conformity is required. The import of Art. 13(2) of the constitution seem to say that international human rights instruments prevail over those fundamental rights and freedoms provisions of the constitution.

5.5.2. **The Status of International Treaties Vis-à-vis Other Domestic Laws**

Art. 9(4) of the FDRE constitution except stating that international agreements ratified by Ethiopia are an integral part of the laws of the land, it does not indicate as to where their position lies in relation to other laws (federal and state). As stated earlier, incase where knowing the hierarchy of laws is difficult it is submitted that the identification of the power order of the respective makers is of great importance. Hence 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 FDRE constitution under Art. 55 (12) the House of Peoples Representatives is conferred the power to ratify international agreements negotiated and signed by the executive organ. This organ is also empowered by the constitution to enact proclamations. Thus both treaties and proclamations come into force by the act of this organ. Now a question may arise with regard

to the hierarchy between treaties and proclamations. In other words, which one is superior in hierarchy when conflict arises between the two? When laws are passed by the same organ, 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 organ they have equal status.

Having said this about the status of treaties at the federal level, now we shall see their position at the Regional State level. As already mentioned above the FDRE constitution doesn't clearly show the relation of international treaties with other domestic laws including state laws. However, although there is no a clear indication in the constitution as regards the relation between international treaties and state laws 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. 51 (8)). 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 state lists. The relationship is parallel. So, by the same token in so far as international agreements fall under the federal list, we cannot establish a hierarchical order between such agreements and the sate laws. Nevertheless, since the 1994 FDRE constitution imposes on the states the duty to respect the federal power, international agreements that are negotiated and ratified by the federal authorities are not to be affected by the state laws.

Dear distance student, as you have noted from the above discussion the status of international agreements in the hierarchy of laws under the Ethiopian legal system is not clear. Unlike the previous

constitutions of Ethiopia, the FDRE constitution does not clearly indicate the position of international treaties. For this reason different authors make different conclusion concerning the status of international treaties. In order to enable you to make your own conclusion read the two articles attached at the end of this module written by different authors on the status of international treaties. Read them carefully and try to make your own conclusion.

5.5.3. **Federal Legislations and their Hierarchy**

As mentioned above the position of federal legislations on the ladder of hierarchy is below the federal constitution. Dear distance student, you have noted earlier that legislations can be classified in to primary and subordinate (subsidiary). Primary legislation normally refers to the enactments made by the government organ that is constitutionally empowered to make laws while subordinate legislations are legislations issued by other government organs when delegated by the legislative organ. In our case federal statutes (proclamations) enacted by the House of People's Representatives which is the supreme legislative organ of the federal government fall under primary legislation.

In addition to this, there are certain circumstances in which the primary legislation may include laws that are issued by the executive organ. However, in such a case for those laws to be categorized under

primary legislation, the authorities enacting them should be empowered to do so by the supreme law (the constitution). In connection with this the FDRE constitution under Art. 77 (10) and Art. 93 confers the Council of Ministers the power to proclaim emergency decree. Such decrees passed by the Council of Ministers also fall under primary legislations. But the fact that both the proclamations and the decrees of emergency belong to the same group of law doesn't mean that they have equal status in the hierarchy of laws. This is because, as a rule, in order to say that legislations made by different authorities are on equal stand in hierarchy, their makers should be in the same position in the power order. However, this is not true in the case under consideration. As said above the House of People's Representatives is the supreme authority of the federal government (Art. 50(3) FDRE constitution). As a result, proclamations enacted by it are superior to all other laws made by the federal government. Accordingly the Council of Ministers being a federal organ is subordinate to the House of People's Representatives and as a result the laws made by it are inferior to the proclamations.

Nevertheless, the status of emergency decrees 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 rights provided in the constitution itself through the decrees issued by it in times 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 that were issued under the Revised Constitution of 1955 and the PDRE constitution, the decrees that are proclaimed the FDER constitution have short life span. 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 emergency decree proclaimed by the council of ministers is to be submitted to it with in 48 hours of its adoption. But if the House is not in session the decree is to be 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. But if the decree does not obtain the required vote, it will be annulled.

Subordinate legislations that are issued at the federal level include Regulations and Directives. These legislations are issued by the council of ministers and each ministry. In this case the council of ministers derives its power to make the regulations from the supreme legislator, i.e. the House of People's Representatives through primary legislations. Individual ministries derive their power to issue directives from proclamations or regulations issued by the House of People's Representatives and the Council of ministers respectively. Consequently, the position of the regulations and directives on the ladder of hierarchy is below the proclamations. However in so far as regulations are issued by the council of ministers, they are higher in hierarchy than the directives issued by individual ministry.

Dear distance student so far you have studied the hierarchy of laws at the federal level Look at the constitution of your region and try to establish the hierarchy of law in your region. Now we shall proceed to study the relationship between the federal and state laws.

5.5.4- The Relationship between Federal and State laws.

The laws that are enacted by the federal and state government organs are similar in form; the hierarchy of laws manifested at each level is also the same. But now the issue is what is the hierarchical relationship between the federal and state laws?

Dear distance student, as you learned from your constitutional law course, in a federal system, state power is divided between the federal and state governments which are not subordinate one to another but coordinate and sovereign within their own sphere of jurisdiction. Since each of them is sovereign within the sphere of jurisdiction allotted to it, we can not 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 idea of the superior subordinate relationship between the federal and state laws is understood in relation to concurrent power, i.e. Power given both to the federal and regional states concurrently. It is in this field that both the federal and state legislators enact laws on the same matters and thus conflict arise between the law issued by the federal and state governments.

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 a list of concurrent powers 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.

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 state power. In connection with

this Art. 52(1) of the constitution states that “all powers not given separately to the federal government or power not given expressly and concurrently to the states and the federal state are reserved to the states”. From the reading of this article, we can know that the FDRE constitution contains the three fold enumeration of powers, that is, the federal, the states and the concurrent powers. The constitution enumerates the powers of the federal government under Arts. 51, 55 and 96. 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 Art. 52(2) and 97. Since both the federal and the state governments are sovereign in their jurisdiction, each has duty to respect the powers of the other.

The concurrent field is the area in which the hierarchy of laws that are enacted by the federal and the state legislators is exhibited. The FDRE Constitution under Art. 98 expressly provide the concurrent jurisdiction of the federal government and the states. 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 and royalties.

In order to say that there exist conflicts between federal and state laws, 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 legislation and the command or power contained in the state statutes.

Art. 98 of the constitution do not clearly indicate whether or not the legislators of the two levels of governments enact laws independently on the areas marked as concurrent jurisdiction. It is only then that the issue of superior subordinate relationship between the federal and state laws can arise. But the constitution is not clear on this point and you are left to make your own inquiry.

Review Questions

1. What do you understand by hierarchy of laws?
2. Why it is necessary to study the hierarchy of laws of a country?
3. What are the factors that contribute to the supremacy of the constitution?
4. Compare and contrast the hierarchy of laws under the 1955, 1987 and 1995 constitutions.
5. What do you think is the status of international treaties ratified by Ethiopia under the FDRE constitution?
6. Rearrange the following legal instruments according to their hierarchical relationship under the FDRE constitution.
    - Federal civil service Directive no. 20/9
    - Council of Ministers regulation no. 32/2000
    - FDRE constitution.
    - Proclamation no. 26/2000.
    - Amhara National regional state constitution
    - The international child convention.
    - Amhara national regional state proclamation No. 15
    - Council of ministers emergency decree
    - Amhara Regional state education bureau directive

- Amhara Regional state Regulation. No. 23
- The International Convention on the protection of the environment.

CHAPTER SIX

INTERPRETATION OF LAWS

Hello, dear distance student! Well come to this unit that introduces you the techniques of interpretation of laws.

Objectives:
After completing the study of this chapter you will be able to:

- Understand the need for interpretation of law
- Know when interpretation of law is necessary.
- Understand the techniques of interpretation.
- Explain/define the concept of interpretation of laws.
- Know the organs empowered to interpret laws

6.1. Introduction

Interpretation refers to the art or process of determining the sense, real meaning, or proper explanation of obscure or ambiguous terms in statutes, contracts, wills, etc. Interpretation as applied to law is the process of discovering and expounding the intended meaning of the language used, that is, the meaning which the authors of the law designed it to convey to others.

The interpretation of law is fundamental to the process and practice of law and the administration of justice. Interpretation takes place whenever the meaning of a legal document must be determined. Lawyers and judges search for meaning using various interpretative approaches and rules of interpretation. In the following sections you will study why interpretation is necessary, when it is necessary, how interpretation is to be made and by whom the interpretation is to be made.

6.2. Why Do We Need To Interpret Laws?

In ordinary life, if some one says something that you do not understand, you ask him to explain his meaning more fully. This is impossible with the application of the law. You cannot bring the law maker and put it into the witness box and ask it to explain what it intended to mean by a certain provision.

On the other hand there are a lot of factors that contribute for the obscurity and ambiguity of the law there by calling the need for explanation. Although, as a matter of principle once a law is enacted it must be applied as it is, an automatic application of the law is not always possible. There are certain factors that make the need for

interpretation inevitable. Next, you will examine these factors in detail.

A. the nature of Law

Dear distance student do you remember the basic features of law that you studied in chapter one of this course? Which of these basic features do you think pose the problem of interpretation of law?

One of the basic features of law that you studied in chapter one is the generality of law. Law is a general statement on a possible human behavior. The law maker cannot afford to make law for every individual on every aspect of life. Rather by abstracting from the individual behavior it tries to address a group of human beings although the size of the group may vary depending on the type of legislation. Thus laws are made in a general form. The law that is made in a general form has to be applied to specific situations that occur in the day-to-day life of society. We make the law that is made in a general form to govern specific situations only through interpretations. The system of interpretation enables us to apply the law that is issued in a general form to specific cases that arise in every day life.

For example Art. 665 of the FDRE Criminal Code provide that:-

> *"Whosoever, with intent to obtain or to procure to a third person an unlawful enrichment, abstracts a movable or a thing detached fro an immovable, the poverty of another, whether by taking and carrying or by direct appropriation, or by having it pass indirectly to his own state is punishable, with simple imprisonment, or*

according to the gravity of the case with rigorous imprisonment not exceeding five years".

This provision is intended to govern cases of ordinary theft. It is this rules which is crafted in general terms which we apply to different cases of ordinary theft. Theft committed by a man or woman, theft committed against ox, chair, cars, bicycles, TVs, radios, etc. are governed by this provision. We apply this provision to particular situations of theft by interpreting it to apply to that particular fact situation. The general terms of the law are made to govern particular fact situation through interpretation.

B. The problem of Language:

The law maker transmits its rules through language by using words. The problem, however, is that words are imperfect and incomplete instruments in expressing one's message or idea. Ambiguities and vagueness always emanate from the very nature of word. They often fail to express the real intention of the lawmaker. This problem is resolved by resorting to interpretation of laws.

C. Social dynamism and The static nature of law

Once a law is enacted its is intended to be applied for an indefinite period of time. It is static. The lawmaker does not change the law now-and-then. On the other hand the circumstances in which the law is applied changes fast. Society is dynamic. It is always in the process of change. In the process of change new situations which were not envisaged by the lawmaker at the time of the making of the law occur. Until such time that a new law is enacted to govern the new situations

that arise in the process of social change, the existing law must be adapted to apply to the new situations. This is done through the system of interpretation. Interpretation enables us to adapt the existing law for newly emerging situations.

For example Art. 31 of the 1960 civil Code on the inviolability of correspondence provide that:

> *"The addressee of a confidential letter may not divulge its contents without the consent of its author."*

This rule is made at the time when letter was the widely used means of correspondence. There is no reason why we do not apply this rule for the correspondence through the e-mail (electronic mail) that occurred recently in our country.

D. The Possibility of Making error

Although the lawmaking process is ascribed to the juridical person of the legislature laws are drafted, deliberated and approved ultimately by human agents. Since no human being is perfect errors may be made in the process. Interpretation helps us to rectify such errors.

For these various reasons interpretation is necessary. But who interpret laws? That is your next point of discussion.

6.3. Who Interpret Laws?

In ordinary life, it some one says something that you do not understand, you ask him to explain it more fully. This is not possible with statutes. Once statutes are enacted you can not regularly resort to the legislature for an explanation of its intention in a certain rule. To whom then shall we turn to for an authoritative explanation of the laws?

In an attempt to answer this problem various interpretation systems have been developed over many years. We have doctrinal interpretation by scholars, judicial interpretation by courts and legislative interpretation by the law maker. The first one is a non-authoritative interpretation in the sense that it does not have binding effect except persuading courts and future decisions. The judicial and legislative interpretations are authoritative in the sense that they have legally binding force. We shall now discuss, in turn, the judicial, doctrinal and legislative interpretation.

I. Doctrinal Interpretation

Doctrinal interpretation is that which is made in books, in reviews, in classrooms. It is performed mostly by legal scholars when they lecture on law or write legal articles or textbooks. Such law lectures, articles and books mould the future lawyers. Apart from this the interpretations propounded by the scholars have no use other than influencing court decisions. They have no binding effect.

II. Judicial Interpretation

Judicial interpretation is that which emanates from a court when, in order to decide a case, it applies a law and discuss its meaning.

Many judgments involve no interpretation, only simple applications of law. The meaning of the law to be applied is often not disputed. The case is then won by the party who proves his facts. The facts once established application of the law to them will follow without need for interpretation.

Where the meaning of the law is disputed before a court, the decision involves its interpretation. The court then resorts to the task of ascertaining the interned meaning behind the word, phrase or statement or even behind the entire legislation. In this effort the judge employs logic, legitimate purpose and reason.

A line of similar judgments made in this manner leads to what some call settled case-law or judicial system. Judicial interpretation thus becomes 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 can not be readily found.

III. Legislative Interpretation

Legislative interpretation is that which is made by the legislative organ of the government. Under the modern principles of separation of powers, interpretation of law in litigation belongs to the judge, not to the law-maker. But this was not always so. Under some monarchies, the law-maker had to be asked where appropriate to explain his meaning more fully. In old France, for instance, 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.

Such practice is criticized for different reasons. First, it violates the separation of power principle. Second, it increases the work load of the legislature. Third, it results in delay of justice. If every time a doubt as to the meaning of certainly law arise it is to be referred to the law maker then it will results in the delay of the justice to be delivered. And it is known that justice delayed is justice denied.

At present such a practice is no long permitted. A judge may not refuse to pass judgment one the pretext that the law is silent, obscure or insufficient judges may not stay a case demanding legislative interpretation. More frequently, particularly in recent years, legislation enacted in Ethiopia contains a section defining the main terms used in it. Thus the labour proclamation no. 377/2003, the civil servants proclamation 262/2003 and other proclamations and regulations contain a provision that provide for the intended meaning of key terms used in the legislation. Rather unfortunately we have no such legislative glossaries in the Amharic-English aversions of our codes whose divergent transactions from the French master drafts are a continuing course of legal controversy.

Interpretations by scholars, by courts and by the legislature are the traditionally accepted forms of interpretation. In addition to these, particularly in recent years, other organs have emerged as authorities to interpreter law. This is particularly true in areas of constitutional interpretation. Although in most countries constitutional interpretation is the task of the ordinary courts, in some other countries the task of interpreting the constitution is given to other organs. For instance, in France and Italy we have constitutional

council which is empowered to interpret the constitution of the respective counties. Here in Ethiopia we have the House of Federation that interprets the federal constitution with the help of the advisory opinion of the Constitutional Inquiry Council. But it doesn't mean that the ordinary courts can not interpret the constitution. As part of their duty to protect and enforce the constitution the courts can interpret the constitution but in terms of giving final and binding decision it is the power of the House of Federation.

6.4. How Should One Interpret the Law?

In the previous sections we have seen the need for interpretation of laws. But how should one interpret it? There must be some rules governing the interpretation of laws in a uniform and consistent way. If law were to be interpreted in many different ways, there will be no legal security. For this reason interpretation of laws is governed by certain widely accepted rules, often dating from Roman times. Such rules, which evolved by commentators and judges, are based on logic and common sense. Although not well developed, these rules of interpretation are generally accepted in Ethiopia. We have no rules of interpretation setout in the form of legislation. We use these traditional rules of interpretation. We shall now discuss these basic rules of interpretation which have world wide recognition. We shall discuss the rules to be applied, respectively, where the law is clear, ambiguous, silent, contradictory, and unreasonable.

1. Where the Law is Clear

The rule of interpretation to be applied where the law is clear is *ubi lex non distinguitnec nos distiguimus* which means no distinction must be drawn where the law draws none. Where the words of the legislator are clear, there is no room for applying any principles of interpretation. Where the provision of a law is clear, the court may not depart form it and determine by way of interpretation the intention of the legislator. As mentioned above many practical cases involve no interpretation, applicable law being clear. In such cases judges may not render arbitrary decision based merely on their dislike of the law which may be unjust or unreasonable or work hardship in a particular case. The emotions, feelings or attitude of the judge should not influence him in applying a clear law. Even if the judge thinks that the law is illogical or contrary to commonsense justice, he is not allowed to deviate from the clearly provided rules of the law by way of interpretation. This prohibition may be waived only in one case: where a given provision, though literally clear would lead to an evidently uncontemplated absurdity. For instance if a law had provided a penalty for bloodletting in the street, a surgeon who had bled a patient injured in a street accident would be held innocent, although this is drawing a distinction where the law draws none. The justification for this is that far from endangering people's safety, which this law protects, the patient-bleeding surgeon was preserving it. We presume that had the legislator contemplated this contingency, it would evidently itself have made our distinction. Save in such extreme cases, derogating from a clear rule is inadmissible. Otherwise, legislation become pointless and legal security would vanish. The rule that allows us to deviate from the clear law is known as golden rule of interpretation.

2. Where the law is Ambiguous

A law is ambiguous when its meaning is not clear. We generally follow the following techniques in interpreting an ambiguous provision of the law.

A. Word Meaning:

Where the provision of the law is found to be ambiguous try to ascertain its meaning by giving words their meaning. The words which makeup the ambiguous provision of the law must be given their ordinary meaning and not their technical meaning. The law is addressed to the ordinary persons and every citizen needs to understand the law that governs his behavior and action. So, unless words are given their ordinary meaning, ordinary citizens cannot understand them.

If a word has more than one ordinary meaning its meaning must be determined contextually. The contextual meaning of a word may be determined either by taking only the context of the section of the law or in the context of the whole body of the law. The meaning of a word is to be judged by the company it keeps. The provision of a law shall be interpreted through one another and each provision shall be given the meaning required by the whole body of the law. Further, a word should not be interpreted in such a way that the meaning given to it makes the law ineffective, but it should rather be interpreted in a way that makes the law effective. This is what we call positive interpretation.

B. Legislative Latent

Where a provision of the law is not clear in itself nor fully explained by the context, the judge is still not quite free to follow his whim, but should try by another means to discover what the legislator had in mind. If the law's own context does not sufficiently clarify the legislator's intention, source documents, such as legislator's preparatory studies, or committee reports or minutes of parliamentary discussion should be consulted. The practice of referring to these reports is very important, because they very often supply the best commentary upon the wording of the legislation. A legislation's preparatory document that can be consulted for the purpose of finding the legislator's intent include the text of the projects of laws, accompanied by statement of reason and source for them; the reports made on the projects; and minutes of parliamentary discussion.

3. Where the law is Silent

Sometimes the law may be silent on an issue the judges are required to resolve. In such cases the following rules of interpretation are used to fill the vacuum.

A. Argument *a Pari* or Argument for Similar reason (Analogy)

A rule may enumerate the points it covers, omitting other matters. Such enumeration may appear as merely illustrative, that is non-exclusive of other similar matters to which the rule will extend by analogy. This is the case where the enumerative provision is

accompanied by such words as “Like”, “etc”, “Such as”, … which show the illustrative nature of the provision . Under such circumstances we use the argument *a pari* or similar reason type of interpretation. This rule of interpretation is used when the law is enumerative not exhaustive which given us a room to add other lists. For instance if a law has a provision which says “Agricultural export products like coffee and flower are subject to customs duties”, then we can add by argument a pair or for similar reason ‘Chat’ in to category of agricultural products subject to customs duties. This rule of interpretation is not, however, applicable to provisions of the law which exhaustively list the items that it wants to govern. It should also be noted that the rule of analogy is not permitted with regard to penal and exceptional provisions. It is a generally accepted principle of criminal law that the courts may not create offences by analogy. As to exceptional provisions the well-known Latin maxim runs: *exceptio est strictae interpretationis* which means exceptions should be interpreted narrowly. Any rule, therefore, providing exceptions from more general rules must be interpreted strictly, which excludes their extension by analogy. For example if a 5% tax is imposed on the sale of cattle’s, goats being expressly exempted, the goats exemption must not be extended, by analogy, to sheep.

B. Argument *a fortiori* (for stronger reason).

The argument of analogy sometimes takes the form known as *a fortiori* (for stronger reason). For example if the nationality law provides that any person of either sex shall be an Ethiopian national where either parent is Ethiopian, then how about a child born from parents who are both Ethiopian. The child is an Ethiopian for stronger reason. If a child is an Ethiopian in the case where only one of his

parents is Ethiopian, then for stronger reason he will be accorded Ethiopian nationality if both of his parents are Ethiopian.

C. Argument *a contratio* (Contrary Reason)

A countrario reasoning is about reading the other side of a legal provision and arriving at a certain conclusion to fill a legal vacuum. This rule of interpretation is usually employed in our daily life. Usually if someone says something then you proceed to extract the possible meaning or implications of that statement. It is all about reading the unwritten rule. For example if we have a rule which states that driving trucks on the main city streets from 6.00 A.M through 6.00 P.M is prohibited, then a contrario we can understand that it is allowed to drive trucks on the main city streets from 6.00PM through 6.00 AM.

4. Where the Law is contradictory

It may happen that there exists contradiction among the existing laws applicable for a particular matter. The contradiction may be between laws of the same hierarchical order or in different hierarchical order. To avoid this problem of contradiction we use the following rules of interpretation. The rules of interpretation applicable depend on the type of contradiction that exists, i.e. whether it is between laws of the same hierarchy or of different hierarchical order.

A. **The law that is higher in the hierarchy prevails over the law that is lower in the hierarchy of laws**. This rule of interpretation is applicable when the contradiction is between laws of different hierarchical order. Laws higher in the

hierarchy of laws are made by law making organs that are superior authorities while laws in lower hierarchical order are made by law making organs with subordinate authority. So, logic dictates that the law made by the organ with superior authority should prevail over the law that is made by an organ with subordinate authority. For instance laws made by the House of People's Representative prevail over regulation issued by the Council of Ministers as the later is subordinate authority to that of the house of people's representative.

B. ***Lex posterior derogate lex priori*** **(Posterior law prevail over proof law).** This rule of interpretation is applicable if there exist contradiction between laws that are in the same hierarchal order but which are issued at different times. In such cases it is believed that when the law maker issues a new legislation that is inconsistent with an earlier legislation it has the intention of repealing or derogating the earlier law. It is presumed that the legislature or other subordinate law making organs know all the laws they have issued previously and if it issued any legislation inconsistent with the already existing legislations then it is considered as if the legislator has the intention of repealing the old legislation which is inconsistent with the new one. So, if we have inconsistent or contradictor legislations issued at different times, then the later on time will prevail.

C. ***Lex posteriori generals non derogate lex priori specialist*** **(a later general legislation cannot override an earlier special legislation**. This is an exception to the preceding rule. If the inconsistency or contradiction is between an earlier

legislation special or specific in nature and a subsequent legislation general in nature then it is the earlier legislation which is specific which shall be given effect despite the existence of a subsequent issued inconsistent legislation.

D. ***Lex Specialist derogate lex generalist*** **(The special law prevails over the general)** This rule is applicable when provisions of a single legislation contradict with each other or where the contradiction is between laws of the same hierarchical position that are issued at the same time. In such cases the law which is more specific or special prevails over that which is general. The specific is more explicit and tells us clearly the intention of the legislature.

5. Where there is discrepancy between the provisions of the law written in different languages

The *Federal Negarit Gazetta* Establishment proclamation No. 3/1995 provides the federal laws shall be published in the Gazette in Amharic and English languages. It may happen that a discrepancy may occur between the laws issued in Amharic and English languages due to errors in the publication or translation process. In such cases which one should be taken or made applicable? Obviously the Amharic version should be given effect. This is because as the Amharic language is the working language of the federal government, the House of People's Representative makes it discussion in Amharic and it is believed that the Amharic version of the law contains or reflects the intention of the lawmaker.

6. Where there is discrepancy in amounts written in words and figure.

Sometimes it happens that amounts, percents or ratios written in words and figures may show discrepancy. For Example if a given provision is written as follows:

Twenty (200) Birr tax shall be levied on export animals.

Then, what is the exact amount of tax payable on export animals? 20 or 200 birr? When such cases occur, amounts given in words are preferable than amounts written in figures. Because, figures are more susceptible to error than words. So, it is presumed that when there is such discrepancy, the amount written in figures is erroneous.

Review Questions

1. Elaborate the need for interpretation of Laws.
2. In your opinion who is appropriate to interpret laws? Why?
3. When do we need to interpret laws?
4. What is the importance of introducing the Golden Rule of Interpretation?
5. Explain the techniques of Interpretation of law in your own words.

CHAPTER SEVEN

The Amendment and Repeal of Laws

Dear distance student, welcome to this last chapter of the course on introduction to law. In this chapter you will be able to:-

- ⇒ Understand the concepts of amendment and repeal of law
- ⇒ Know the types of repeal of laws
- ⇒ Identify the organs that are empowered to amend and repeal laws.
- ⇒ Understand the effect of repeal of laws.

6.1. Introduction

Society is dynamic. Its political, social and economic conditions change from time to time creating new problems and complexities. As a result the law enacted at one time becomes unsuitable and inadequate to the new situation. The ideas upon which the law is based in may be rejected as an undesirable. Thus it becomes necessary to have some mechanism or a process by which the law may be adapted according to the existing social needs or discarded from use.

The mechanisms that are employed to achieve this purpose are amendment and repeal of laws.

Amendment of law refers to the systems of adapting the existing law to the new circumstances and situations of the nation. Look for example the preamble of the investment proclamation amendment proclamation no.280/2002.

> *"Whereas, the system of administration of investment needs to be transparent and efficient----to this end, it has become necessary to amend the existing law on investment----"*

The amendment of existing laws is usually made by the state organ that issued them.

Repeal of law on the other hand refers to the total or partial abrogation of a given legislation. It refers to the unmaking of the law that has been once enacted. There are different forms of repeal. We shall now discuss them in detail.

6.2 Types of Repeal

The systems by which laws are repealed takes different forms. Repeal of law may be made in any of the following forms.

A. Express/Explicit Repeal/

Repeal of laws is said to be express when a new law expressly and explicitly withdraws the obligatory force of the law and thereby deny it further effect. To say that an existing legislation is expressly repealed a newly enacted legislation (the repealing law) must state specifically that the previous legislation is no more operative in the future. It must indicate which legislation and which of its provisions are repealed.

Express repeal itself takes two forms. It may be general or partial. An express repeal is said to be general repeal when the repeal concerns the entire body of a given legislation. That is in case of general express repeal the repealing legislation abrogates the whole body of an old law stating it expressly and specifically.

An express repeal is said to be partial when the repeal affects only part of an old legislation. In other words repeal is partial when the new repealing legislation limits only the scope of application of an earlier legislation without abrogating it totally.

Example from Determining Public Procurement Procedure and its Supervising Agency Establishment Proclamation no. 430/2005

Art .56. Repeals and non applicability

"1/ The following laws are hereby repealed:

a) Article 54-56 of The Federal government financial Administration proclamation no.57/1996

b) Article 66-73 of the Council of Ministers Financial regulations No.17/1997"

This is an example of partial express repeal. It does not hinder the applicability of the proclamation or regulation as a whole. The repeal indicated in the new proclamation affects only those provisions of the old legislation that are expressly mentioned in the repealing proclamation.

C-Tacit (Implied) Repeal

Implied repeal refers to the case where the repeal of the old legislation is not expressly provided but inferred from the incompatibility between the provisions of a new legislation and an old one. The existence of tacit repeal is known by way of interpretation. Dear distance student do you remember that in your lesson on interpretation of law you have studied the rule that as new legislation repeals an inconsistent earlier legislation of equal or lower in status?

The law making organ may sometimes issue a law that is inconsistent with an existing legislation without expressly providing the repeal of the earlier legislation. It is generally presumed that the legislature knows all the laws in force. So, if it issued a subsequent inconsistent legislation then it is believed that it has the intention of replacing the old by the new one. Here we say that the old legislation is impliedly repealed (the repeal is inferred/ implied from the existence of an inconsistent subsequent legislation. The legislature

could issue this inconsistent legislation only out of its desire to repeal or replace the existing legislation and could not be out of ignorance of the existence of that old legislation.

Like express repeal, implied repeal may also be general or partial. Usually it is partial. Implied repeal often affects only the applicability of some provisions of an old legislation.

C. Expiry of Laws

In most cases laws are issued to serve for an indefinite period of time for the future and such type of law come to an end either by express or tacitly repeal or when they are replaced by a new legislation. There are, however, some instances where laws are issued to serve only for a definite period of time after the expiry of which they will cease to have a force of law. Such types of laws for instance, include, emergency decrees, annual budget proclamations, laws establishing an ad-hoc committee or body.

Deer distance student can you mention any ad-hoc committee that is established by law?

D- Repeal by disuse

Although legislations issued for an indefinite period of time and come to an end through either express or tacit repeal, there are cases where such types of law fall in to disuse and there by rendered in applicable even if there is no express or implied repeal. Laws fall in to disuse when they, through years, become incompatible with the prevailing social, economic and political realities and conceptions of the society. In such cases the law becomes obsolete and persistently

disregarded by the society. Such laws are considered as non-existent or null. A good example may be the 1957 penal code provisions on offences against the emperor. These provisions were applicable until the 1974 Revolution, the year the existence of the emperor come to an end. After 1974 the penal code provisions governing offences against the emperor were still in existence up to 2005 but not applicable. They were then obsolete and fallen in to disuse. These provisions were not repealed expressly or tacitly, but they ceased to be applicable because they are no longer in accord with the political conception of the then Ethiopian society.

6.3. Effects of Repeal of Laws

Generally, the effect of repeal is it renders the repealed law inapplicable for the future. It will neither create nor destroy rights and duties there after. There are further effects of repeal of law. Study them carefully.

1. **the non-revival of repealed laws:-**

Dear distance student think of the following hypothetical situation.

Legislation ‘A’ is repealed by another subsequent legislation ‘B’. suppose that legislation ‘B’, which repeals legislation ‘A’ is repealed by legislation ‘C’ which comes after legislation ‘B’, do you think that this will revive legislation ‘A’? In other words, can the repeal of the repealing legislation revive the law that is repealed by the repealed law?

The principle of non-revival of repealed laws tells us that a legislation once repealed will not revive by the mere fact that the repealing law is itself repealed. Thus, in the above example, legislation 'A' will not revive even if legislation 'B' that repealed it is itself repealed.

2. Subsidiary Legislations in case of repeal of the parent legislation.

This is about subordinate legislations issued under an enabling legislation. When the legislative organ issue primary legislation, it also delegate some law making power to the executive and judicial organ of the government. The issue here is what would be the fate of the subordinate legislation if the parental legislation under which it is issued is repealed? Suppose we may have a regulation issued under proclamation no 09/2005. What will happen to the regulation if the proclamation is repealed?

If the parental legislation is repealed it naturally follows that the subordinate legislations issued under it are also repealed. However, if the legislature wants to save the subordinate legislation from being repealed, it can expressly provide a saving clause which provides that the subordinate legislations are not repealed.

3. The Non-Retroactivity of the Repealing law

Dear distance student, what would be the effect of the repealing law? As of when is it to be applicable? What would happen to rights acquired under the repealed law? Do they cease?

Generally newly enacted laws have effect only for the future. They have only a forward looking effect. Rights acquired under the repealed legislation remain effective. The retroactive application of law, particularly criminal law, is prohibited. As provided under Art-22(1) of the FDRE constitution no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed. If an act which was not criminal under the previous law was done the new law can not penalize that act which was committed before it coming in to effect. This is based on the philosophy that the citizens must be warned what conduct will be considered criminal so that he/she can decide how to behave.

There is, however, exceptional situation where the newly enacted criminal law can be applied for acts done before it taking effect. This is when the law promulgated after the commission of the offence is advantageous to the accused or convicted person (Art. 22(2) FDRE constitution). The new law will be advantageous to the accused or convicted person if it decriminalizes the act or reduces the punishment provided in the previous law.

6.4. Who Repeal law?

As you have studied earlier in this course, laws are made by the legislative organ of the government and by other organs empowered by it following a definite and well established procedure. The repeal of laws, however, does not follow the same pattern. Laws are not always repealed by the organ that issued them. They can be repealed by

other organs. The following are the bodies or organs that can repeal laws.

A. Laws may be repealed by the organs that make them. Principally it is for the organ that enacted the law to repeal it. A government organ that enacted either a primary or subsidiary legislation can repeal it by issuing another subsequent legislation. It is also important to note that the legislative organ can repeal a subsidiary legislation issued under a delegated power. For instance the House of Peoples Representative by issuing a new legislation can repeal a priori proclamation issued by it or a Regulation issued by the Council of Ministers or a Directive issued by an individual Ministry.
B. The organ that interprets the constitution: - another organ that has the power to repeal laws is the organ that is empowered to interpret the constitution. The power to interpret the national constitution is given to different organs in different countries. In the United States of America this power is given to the Supreme Court; in France to the Constitutional Council; in Germany and Italy to the Constitutional Court and in Ethiopia to the House of Federation as assisted by the Constitutional Iniquity Council. These organs are encharged with the responsibility of looking after the proper observance of the constitution by different actors. They will ensure that laws which contravene the provisions of the constitution are not enacted and acts or omissions are not done that violate the constitutional principles. If these organs in discharging these duties encounter a legislation that violates the constitutional provision, they can overturn it partially or totally depending on the extent of the conflict. In doing so these organs are repealing the law, i.e. denying it of any effect for the future.

In our country at the federal level it is the House of Federation that is empowered to interpreter the constitution. If a certain legislation issued either by the House of People's Representatives or by the Council of Ministers is contested as unconstitutional and if it is found out to be unconstitutional it can abrogate that legislation as an unconstitutional wholly or partially.

C-Courts:-The other organ that has the inherent power to repeal laws is the regular court. In the process of applying the law the courts may discover that a given legislation conflict with the constitution or that a given subordinate legislation or that a given subordinate legislation is in contradiction with parent legislation. In such cases they can over rule wholly or partially the inconsistent legislation.

In our country, the Federal Courts have no the power to rule a legislation as an unconstitutional. This is a power given to the House of Federation. However, the Federal courts can still test whether subordinate legislations are in line with the parental legislation and if in case they find inconsistency they can annul the inconsistent subordinate legislation.

Review Questions

1. What is repeal of law and how is it distinguished from amendment of laws?
2. How are laws repealed? Explain the various ways in which laws are repealed.
3. Explain the relation between implied repeal and the rules of interpretation of laws.
4. Who repeal laws?
5. Do you agree with the assertion that laws are repealed in the same way they are made? Why/why not?

ATTACHMENTS

Taken from JEL from an Article Publisher by Asst professor Ibrahim Idris on the title "The place of international conventions in the 1994 FDER constitution" page 129 ff

Hierarchy of International Human Rights Conventions under the FDRE Constitution

In international jurisprudence, the relation of international law to national law can be looked at from two different dimensions: international and national. Internationally, i.e., regarding the position of national law within international sphere, the accepted view is that international law is binding upon states and failure to observe international law within their respective domestic jurisdictions entails legal responsibility. States are in no way excused to rely on constitutional or domestic laws to extricate themselves from their international obligations. The supremacy of international law over national law is emphatically maintained by the *Vienna Convention of Treaties of* 1969 which in its Article 27 provides that a state party may not invoke its national law so as not to carry out an international convention.

International legal scholars and international tribunals are in support of this position. The legal scholars stress the supremacy of international law and reject any idea on the part of states to invoke national laws as an excuse for a breach of international obligations. As regards this issue, the contributions made by the Permanent Court of International Justice were indeed enormous. In several cases that came before it, the Court held that a national law, which is in conflict with international law, could not be effected." For instance, in the case of Polish Nationals in Danzing (1931), the Court held that a state can not rely on its own Constitution "with a view to evading obligations incumbent upon it under international law as conventions in force.”

When viewed internally, however, it is now a common practice of states to define the , position of ratified international conventions in the hierarchy of their respective national legal orders. This practice has no doubt resulted in conflicts between the ratified international human rights conventions and the national laws. Ratified international human rights convention may come into conflict with a state's constitution; prior or subsequent national legislation of equal status; and other statutes

A. International Human Rights Conventions versus the Constitution

A ratified international human rights convention may come into conflict with a state’s constitution. Where there exists conflict between the two, the convention may, depending on the position taken by the constitution or law of the state concerned, be accorded superior position to the constitution, viewed on equal footing with the

constitution, or obtain subordinate position to the constitution. On this issue, two states may not follow a similar practice

For instance, in The Netherlands, a ratified treaty occupies superior position *to* the Constitution. Similarly, in Swiss law, according to the view commanding stronger support, a ratified international human rights convention would be applied even where it is in conflict with the Swiss Constitution. Also according to Articles 54 and 55 of the French Constitution of October 4, 1958, a convention may, on the order of the French Constitutional Council, be ratified after an amendment of the Constitution is made.

There are also states in which treaties may be accorded equal status with constitutions. For instance, in the United States, ratified international human rights conventions are placed on an equal footing with the U.S. Constitution. Article VI. Par. 2 of the US Constitution provides that all conventions made, or which shall be made under the authority of the United States, shall together with the Constitution itself and laws made in pursuance thereof, be the supreme law of the land. Similarly, in Article 122 of the 1955 Revised Constitution of Ethiopia, ratified international conventions were accorded equal status with the Constitution.

Few other states accord international human rights conventions subordinate position to their respective constitutions. In these countries, .international conventions are rendered inapplicable owing to their inconsistency with constitutional laws. For instance, in Portuguese, Spanish and Greek laws, international human rights conventions have status inferior to the Spanish, Portuguese and Greek Constitutions respectively.

Under Article 9(4) of the FDRE Constitution, ratified international human rights conventions are an integral part of the law of the country. The term 'law' denotes those ratified international human rights conventions published in the *Negarit Gazetta*. And since the FDRE Constitution is proclaimed as the supreme law of the land any law, including a ratified international human rights convention, contravening the Constitution is deemed to be invalid. In ratifying international human rights convention, the House of Peoples' Representatives is, under the Constitution, also required to take every precaution that such convention does not contravene the principles enshrined in the FDRE Constitution. Thus, in Ethiopian law, all ratified international human rights conventions are subordinate to the constitution.

B. International Human Rights Conventions versus National Legislation

As stated earlier, under the FDRE Constitution, a convention negotiated and signed by the Executive is submitted in the form of a bill to the House of Peoples' Representatives for its consideration. Where the House finds the bill consistent with the Constitution, it may ratify and enact it in the form of proclamation. As indeed it is true, in Ethiopian law, a proclamation, i.e. a ' statute issued by the House, ranks next to the Constitution, and higher than regulations which the executive branch of the government legislates. In view of this fact, it is sensible to maintain that, in Ethiopia, a country in which the Constitution is given a standing superior to a proclamation, a ratified

international human rights convention is given the standing of a proclamation enacted by the House of the Peoples' Representatives.

The FDRE Constitution is silent as to whether or not an international human rights convention would prevail over a proclamation, in case of conflict. Indubitably, a conflict between an international human rights convention and a proclamation may emerge in two situations: where the convention is ratified and published before and after the proclamation is enacted. Prior to suggesting as to what the Ethiopian constitutional position should be, it might first be advisable to turn our attention to the different positions employed by states to address the conflict between conventions and national laws of equal status.

In addressing a conflict between a ratified international human rights convention and a proclamation, three widely accepted positions may be identified. The first pertains to that position of states conferring superior status to a convention over a national law. France, Italy, The Netherlands, Luxembourg and Portugal are few of those states adhering to this position. The French Constitution of 1946 was the first Constitution to take a step in this direction. The tradition continued in the Constitution of 1958 and was followed by the constitutions of former French colonies. Accordingly, .the national laws are set aside irrespective of the kind of the convention and whether the law is *anterior* or *posterior* to the convention.

Under Article 10 of the 1948 Italian Constitution, Italian legal order is required to be brought into accordance with the universally recognized rules of international law. In The Netherlands, according to Article 94 of the Dutch Constitution, 'statutory regulations,' meaning laws, regulations and decrees, that conflict with an

international convention are inapplicable. In Luxembourg, in case of conflict between the provisions of a national law and an international convention, the latter prevails over the former. In Portuguese law, a convention has a status superior to a national law.

The second position insists that a ratified international human rights convention which is in conflict with a national law be accorded subordinate position. This position is adhered to by several states. For instance, in Swedish legal system, the practice seems to support the view that an international human rights convention conflicting with Swedish law is not operational. The laws of Norway, Canada and Belgium also accord subordinate position to international human rights conventions

The third position accords ratified international human rights conventions equal position with national laws of equal status. Accordingly, in case of conflict between these two laws, the principle *lex posterior derogate priori* governs the situation, i.e. repeal of legislation by later legislation of equal status. As regards all other laws of subordinate position, the international human rights convention is deemed to prevail.

In referring to the Ethiopian situation ratified international human rights convention obtains the standing of a proclamation enacted by the House of Peoples' Representatives. Thus, a conflict arising between an international human rights convention and a proclamation is regarded as a conflict existing between two sets of domestic laws of equal status. In case of a conflict between a convention and a proclamation, however, the FDRE Constitution does not provide an express solution as to whether the international human rights convention would prevail over the proclamation.

In such a situation, one may be persuaded to resolve the conflict in the light of either of the following two alternatives. *Firstly,* a conflict between an international human rights convention and a proclamation could be resolved by relying on whether the former would-violate national interests. *Secondly,* the conflict between an international human rights convention and a proclamation may be resolved in light of the legal maxim *lex posterior derogate priori.* This maxim lays down that an international human rights convention made part of the law of the land would prevail over an earlier proclamation, and conversely, a proclamation that came later would prevail over an earlier international human rights convention As regards the first alternative, to determine the conflicts existing between an international human rights convention and a proclamation, it is indeed appropriate to evaluate as to whether the very convention in question would violate Ethiopia's interests. Certainly, this may require case by case investigation into the conventions assumed to be posing a threat to Ethiopia's interests. As provided in Article 86(2) of the FDRE Constitution, an international convention concluded by Ethiopia must be one promoting its interests. Article 86(3) of the Constitution has also imposed a duty on the Federal Government to ensure that an international convention would advance the interests of the peoples of Ethiopia. In other words; Ethiopia would not sign and ratify any international convention that undermines its national interests. If a convention signed and ratified were ascertained at a later time to be inconsistent with a proclamation considered to be promoting Ethiopia's interests, the proclamation would override the international convention. Article 86(4) of the Constitution requires Ethiopia to observe only those international conventions respecting its sovereignty and promoting its national interests. Hence, any ratified international convention that poses a threat to Ethiopia's interests

could be subject to repeal. It can thus be maintained that a national law prevails over an international convention in case the latter runs contrary to Ethiopia's interests

In applying the second alternative, a ratified international convention may be repealed only on ground of conflict with a proclamation subsequently enacted. Adhering to this position would no doubt bring Ethiopia into the category of those third world countries which seem to be wary to accord primacy to 'a highly generalized and hence undefined international law.' To adherents of this alternative, international conventions are seen as collections of norms that are fluid and incapable of genuinely representing their interests in as much as they represent those of the stronger nations. States may adhere to this alternative because they want to accord a secondary position to international conventions. Hence, they may resort to the principle of *lex posterior derogate priori* as a justification to repeal the international convention by a law of equal status enacted subsequently.

However, any strict application of the above two alternatives, in the case where a proclamation overrides a prior international human rights convention, would no doubt undermine Ethiopia's international commitment. Unquestionably, such move would contradict the fundamental principles of the *Vienna Conventions of Treaties,* which oblige states such as Ethiopia to comply with their international obligations. Under the Vienna Convention, a state should enter into a convention only on its own free will. But once a state ratifies the convention, it is required to fulfill its obligations in good faith. It may not invoke its domestic provisions to justify its failure to perform its obligations under the treaty, except under very exceptional circumstances.

According to this author, to define the position of ratified international human rights convention vis-à-vis proclamations in Ethiopia, the above two alternatives may together be applied. However, the second alternative need not be applied in a way that contracts the first alternative. As indeed it is true, ratified international human rights conventions are special types of treaties. They are backed by customary international human rights law which no doubt represent the common values and interests of the international community of which Ethiopia is a part. Many of the norms and principles embodied in the Universal Declaration of Human Rights and several international human rights conventions are *jus cogens* in nature from which no derogation is allowed by states except by a subsequent norm of general international law having the some character.

International law requires states such as Ethiopia to observe these human right norms and principles at all times. Invoking Article 13(2) of the FDRE Constitution could strengthen this argument. The provision expressly states that the fundamental rights and freedoms guaranteed in the Constitution should be interpreted in the light of the Universal Declaration of Human Rights, international human rights and humanitarian treaties and principles adopted by Ethiopia. Indeed, this is a confirmation of the high position the principles of international human rights conventions occupy in Ethiopia law.

Hence, all international human rights conventions ratified by the House of Peoples'
Representatives may be deemed as collections of norms and principles promoting the Ethiopian public's interests as well. Therefore, the fact that such conventions may appear to be in conflict with subsequent proclamations does not imply that they

pose a threat to Ethiopia's interests that the FDRE Constitution is committed to protect. If that is the case, it is both against Ethiopia's interests and also contrary to international law to rely on the principle of *lex posterior derogate priori* as justification to abrogate, modify or suspend ratified international human rights conventions by subsequent proclamations.

Conclusion

International Human rights conventions are special types of treaties. Under international law, and also as expressly stipulated in Article 9(4) of the FDRE Constitution, international human rights conventions, once ratified by Ethiopia in accordance with its constitutional requirement, are binding on the country on the international plane. However, for such conventions to have internal binding force, the requirement of publication should be met.

Indeed, Ethiopia ratifies international human rights conventions for the benefit of its nationals. Hence, the Ethiopian public has the right to know the existence of such conventions. And certainly, this could only be made possible through the act of publication. In view of this fact, pursuant to Article 71(2) of the FDRE Constitution and Article 5(a) of the Federal Negarit Gazetta Establishment Proclamation, publication should be regarded as a precondition for ratified international human rights conventions to be internally applicable. Moreover, individuals and groups in the country need to know the contents of all international human rights conventions ratified for their benefit. This, *inter alia,* would enable them to defend their rights and freedoms and also to respect those of others. For this reason, it is

essential to publish the whole texts of the ratified international human rights conventions in the *Federal Negarit Gazetta.*

In international law, ratifying an international human rights convention by a state implies that the state has committed itself before an international community to implement the convention. The maxim *pacta sunt servanda,* also enunciated by Article 26 of the Vienna Convention of Treaties, requires a state party to a convention to perform obligations imposed on it by the convention in good faith. This principle requires states as Ethiopia to accord ratified international human rights conventions a high position in their respective legal systems.

As it stands, Article 9(4) unequivocally affirms that the Constitution is the supreme law of the land. Accordingly, ratified international human rights conventions, like all other laws of the land, are subordinate to the Constitution. This, however, does not lead to the conclusion that, in case of conflict between ratified international human rights conventions and the Constitution's provisions on fundamental rights and freedoms, the latter would prevail over the former.

In practical cases, Article 13(2) of the FDRE Constitution could be applied to address this controversial issue. As stipulated in the provision, the fundamental rights and freedoms of the FDRE Constitution should be interpreted in light of the Universal Declaration of Human Rights and norms and principles of international human rights conventions adopted by Ethiopia. This confirms the fact that international human rights conventions ratified by Ethiopia occupy higher or at least equal position, to the FDRE Constitution. As regards those laws of equal status with ratified international human rights conventions, no proclamation; even one

enacted subsequently, should be invoked to abrogate, modify or suspend earlier ratified international human rights conventions.

Problem of Implementing International Human Right laws by Ethiopian Courts

Taken from an paper prepared by Getachew Assefa

The problem with respect to the status of the Human Rights Instruments in the Ethiopian Legal System

The fact that the Constitution of the Federal Democratic Republic of Ethiopia (henceforth the Federal Constitution) does not settle conclusively the hierarchical relationship between the international human rights instruments on the one hand and the Federal Constitution and other laws of the country on the other is one problem the Ethiopian courts face in the application of the international human rights treaties and documents which Ethiopia ratified or adopted.

True that the Constitution under its Art. 9 (4), makes all international agreements ratified by Ethiopia integral part of the law of Ethiopia. If we ask about what this provision of the Constitution tells us, I suppose, it is not much more than the importance of the ratification (which is the competence of the House of Peoples' Representatives) as a link between international treaty laws (international human rights treaties included) and domestic laws of Ethiopia. In this connection it must be noted that the international instruments made integral part of the law of the land are those requiring ratification, not all treaties. Incidentally, it is believed by the writer to be imperative to mention the reception (integrality) or otherwise in to the Ethiopian law of other sources of international law. By this I mean the sources of international law as entrenched in Art, 38 of the Statute of the International Court of Justice (ICJ) such as international customary law, general principles of law recognized by [civilized] nations of the world and decisions of the international courts and tribunals on matters of international dispute. As said shortly above, the Constitution provides that only ratified international agreements are integral part of the law of the land. In other words it does not in any place refer to the reception of such source of international law as international customary law or general principles of law.

One may however argue that international customary law may not have to be expressly incorporated by the Constitution or the legislature to be part of the Ethiopian law. This is because once a principle attains the status of being international customary law it would be automatically applied on Ethiopia so far as its international responsibility is concerned. However, it may not be possible to peruse the same line of argument when it comes to the application of the international custom by Ethiopian courts in case a party basis its

claim on international customary law. Because, the courts can not decide on basis of a law unless that law is appropriately Ethiopianized. Such is to be made by the decision of the legislature in accordance with the Constitution. And with regard to international customary law, the avenue seems to be closed by the Constitution as it expressly says that it is only the international agreements ratified by Ethiopia that can be integral part of the law of the land. The only possibility the author could see is the one that could happen if the Ethiopian courts take a highly inclusive stand and apply international customary principles since not applying them entails breach of Ethiopia's international obligation. Some European countries' courts have taken such a stand of course with respect to international agreements ratified but not incorporated into the domestic law. They by interpretation try to avoid conflict between the treaties such as the European Convention on Human Rights and the national laws. This also is what regularly happens in the U.S. Courts in which they entertain cases based on the Universal Declaration of Human rights, Declaration Against Torture and such other declarations and practice thought to constitute customary international law of human rights and the law of nations. In connection with this, it is interesting to make mention of the relevant provisions of the 1957 Penal Code of Ethiopia. Under its title II which is entitled, "**offences against the laws of nations"** criminalize certain acts and omissions. In its catalog of prohibitions of war crimes against the civilian population, it states:

> *Whosoever, in time of war, armed conflict or occupation, organizes, orders or engages in, against the civilian population and in violation of the rules of public international law and international humanitarian conventions*

Therefore, the reference of the Penal Code to rules of public international law alongside with conventions is a testimony that other sources of international law in the area can be applicable in the field by Ethiopian Courts when and where appropriate.

At this juncture a reference may be made to the 1993 South African Constitution. Under its section 231 (4), it provides that" the rules of customary international law binding on the Republic [South Africa], shall, unless inconsistent with this constitution or Act of parliament, form part of the law of the Republic". So whatever may be said as to the stand the constitution takes by making international customary law subordinate even to Acts of parliament, the Constitution would not be blamed for unclarity and courts are clearly told where the constitution or the acts of parliament stand in relation to rules of international customary law.

Coming back to the problem at hand; i.e. the problem of confusion on the status of international human rights agreements hold in the Ethiopian legal order, I. would like to talk about the status of the human rights treaties with respect to the Constitution first and then take up the case of other domestic law's hierarchical relation with human rights treaties.

Under Art 9 of the Federal Constitution which provides for the supremacy of the Constitution, treaties ratified are made to be the integral part of the law of Ethiopia. However, this Article or any other article in the Constitution for that matter, do not conclusively tell us where exactly treaties stand in relation to the Constitution. One may want to take a position that since Art. 9 (1) of the Constitution unequivocally states the supremacy of the Constitution the latter is supreme to the ratified international agreements, including

international human rights treaties. However, there is another provision in the Constitution that does not allow the above conclusion so easily. Art: 13 (2) darkens the little light one can throw on the hierarchical relationship between the Constitution and human rights treaties by using art 9(1) and 9 (4) together. Art 13 (2) of the Federal Constitutional reads:

> *The fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International* Covenants on Human Rights and international instruments adopted by Ethiopia.

This sub-article therefore adds new element and puts the whole system of hierarchical relationship in flux. What it basically purports is that with respect to the third chapter of the Constitution which deals with human and democratic rights of individuals and peoples (ranging from Arts 14-44), international Covenants and instruments adopted by Ethiopia are to serve as guidelines, points of reference or pacemakers or so in interpretation.

At least two problems are apparent from the reading of Art. 13 (2). The first one is the incorporation by it of such non-treaty instruments as UDHR and its employment of the term " adoption" which I believe could mean mere adoption at international conferences like UN General Assembly or OAU summits without solemn commitment to be bound, or because the nature of the instruments does not call for such solemn commitment as the UDHR is. The second one is that it makes the relationship of international agreements and the Constitution that seems apparently settled with the supremacy to them of the Constitution to be doubted when it comes to human rights treaties.

So now what should a court of law do when it finds the provisions of the third chapter of the Constitution in conflict with those of anyone of the relevant international human rights instruments ratified or adopted by Ethiopia? Does Art. 13 (2) mean that international human right instruments ratified or adopted by Ethiopia are superior to the third chapter of the Constitution?

These are not questions to be asked out of mere speculation of problems but these are questions that would happen in real life any time from now in view of the disparity we have between third chapter of the Constitution and the international instruments adopted or ratified by Ethiopia.

There are two views with respect to the possible meaning that should be attached to Art. 13 (2) providing for the ways of interpretation of the Constitution. One view holds that Art. 13 (2) is asserting the supremacy of the international instruments of human rights since it says that the Constitution is required to be interpreted in conformity with the concerned international instruments. Therefore the supremacy of the constitution is to be deferred so far as the human rights instruments are concerned.

Further argument may be forwarded in support of this view. When and where the provisions of the Constitution are in conflict with those of the rarified or adopted human rights provisions, if the latter provide for better protection, the meaning of the latter may be adopted by courts by what is known as historical or teleological interpretation. This approach would let courts to depart from the clear wording of the provisions of the Constitution in favor of the legislative intent which Art. 13 (2) seems to require conformity with.

Argument on the basis of what is known as dynamic interpretation could again be supplied in favor of departing from the provisions of the third chapter of the Constitution to adopt those of the international instruments relevant in case of conflict between them. This is the rule of interpretation that takes into account the changed circumstances and the evolution of insight shared by certain society. If such interpretation technique is used, the meaning to be arrived at by interpretation may change over time and may depart from historical legislative intent or even the wording of the provision. This technique of interpretation is said to be used in most European countries.

The second view holds that the role of human rights instruments envisaged by Art. 13 (2) of the Constitution is nothing more than being a mere interpretative guidelines. Interpretation as ordinarily understood is to be applied to what Art 13 (2) is saying. This view rules out the departure from the provisions of the Constitution when and where it stands in clear contradiction with the terms of the human rights instruments ratified or adopted by Ethiopia. In other words, whether the Constitution provides for a better or a lesser protection to individuals and groups, its terms prevail over those of human rights instruments to the extent the latter conflict with the former.

It is argued, in favor of this latter's view that the provisions in chapter three of the Constitution are to be interpreted only when such a need arises. A need for interpretation arises when the provisions of the Constitution are unclear, ambiguous, or are capable of doubt or equivocal or so. Not in cases when the terms, even if undesirable, are clear. So, the conclusion is that in the event of contradiction of the international instruments with the provisions of the Constitution, the

latter would prevail with all its consequences.

We may invoke the intent of the makers of the Constitution in favor of this view. I had an access to the Minutes of the Constitution Drafting Commission (Commission that drafted the 1994 Constitution) when I was writing my LL.B. thesis in 1996. The relevant part of the Minute is quoted in my thesis as follows.

> .." *However, if conflict arises between the provisions of this chapter [of the Constitution] and those of the international instruments Ethiopian Courts must use the provisions of this chapter which are adopted by the representatives of the peoples of Ethiopia, and hence, the provisions of those international* instruments must yield to the provisions of the Constitution (Translation mine).

Therefore, when the drafters were adopting Art. 13 (2), they were not intending to supersede any of the provisions of chapter three of the Constitution, rather they were, with an the optimism that the Constitution and the provisions of the human rights instruments will not contradict, intending to use the international human rights instruments as clarifier of the unclear, ambiguous, doubtful, etc, provisions in the Constitution. In view of this intention of the makers and also for the reasons I tried to give shortly above, I believe that the second view is more persuasive than the first one.

It is interesting to note in this connection that the 1993 Constitution of South Africa has a certain similarity with that of art 13 (2) of the Federal Constitution in respect of interpreting the third chapter of the

South African Constitution. It provides:

> *In interpreting the provisions of this [third] chapter, a court of law shall promote the values which underline an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.*

There is in fact much more difference than similarity between Art. 13 (2) of the Ethiopia Constitution and Art. 35 (1) of South Africa Constitution. The first and probably the most important difference is that in the case of the South African Constitution, it is not the interpretation in conformity which is sought. It rather is just "having regard" that is required of the South African courts. The other point of difference is that the courts of South Africa in interpreting the Constitution, are required among other things, to have regard not only to international agreements ratified by South Africa or rules of customary international law as recognized by same, but also to public international law applicable to the protection of the rights entrenched in the third chapter of the Constitution. The South African courts may also have regard to comparable foreign case law as per Art 35 (1) of the Constitution.

Perhaps it would be even much easier to hold the second view articulated shortly above about the interpretation of the third chapter of the Ethiopian Constitution if such term as "regard" was used under the Ethiopian Constitution. Unfortunately this is not the case in our Constitution.

One might ask as to why the Ethiopian Constitution demands the attachment to the international human rights instruments of its third chapter. This could be because not only are the human rights provisions of the Constitution inspired by the said instruments but also the former draws heavily on the language and structure of these conventions. It is possible to say that almost all provisions in the third chapter of the Constitution have counterparts in the human rights instruments referred to Such courts as of Canada, Zimbabwe and Namibia have drawn on the international human rights treaties, customary law and the decisions of the European court of human rights while their constitutions do not contain express direction to apply international law.

The second aspect of the problem under consideration relates to the status relationship between the human rights instruments ratified and adopted by Ethiopian and the other laws of the country. So even if we agree that courts would be or should be in favor of the second view articulated above (i.e., the Constitution is Supreme to treaties they will still find themselves in a difficulty because of the unsettled status problem between the human rights instruments ratified or adopted and the national laws, principally the Federal proclamations. Once again Art. 9(4) of the Constitution except making the ratified treaties integral part of the law of the land did not deal with the hierarchical relationship between the treaties and federal legislation. A judge however may take a position, that international agreements that have become the integral part of the law of Ethiopia have the same effect and status as federal proclamations. This is because international agreements are to be ratified by the House of People's Representatives. The same House enacts federal Proclamations. Therefore, the identity of the enacting authority makes such a stand a

plausible one. And in the event of the conflict between the provisions of a treaty and those of a proclamation, the principle *lex posterior derogat lex prior* would apply as both are equal in hierarchy.

But I would again say that this principle should not be sweepingly applied. This is because in some instances the prior treaty or legislation might be specific and the later (posterior) one may be a general one in which case as far as circumstances allow, the earlier provision should be let to survive if not directly superseded. This approach has been developed and maintained by the courts of USA. It is held, in the USA, that treaties that have become part of the internal legal order have the same domestic effect as federal statutes. A treaty thus supersedes earlier inconsistent legislation, and a latter statute similarly would supersede a prior treaty. However, it is to be noted that the maxims of interpretation encourage a judicial effort to construe the later in-time statute not to violate the treaty.

In conclusion, I would like to underscore that in the event of interpretation of provisions of federal proclamations providing for human rights and freedoms, Art 13 (2) of the Constitution should be applied so that the international instruments could be utilized as a guideline. The basic philosophy behind the adoption of Art 13 (2), as I think, is to realize that adequate protection is given and original meanings are attached to the fundamental human and democratic rights.

Module Two

Law of Persons

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Chapter One

The Concept of Personality

Objective:-

In this chapter the distance students will be able to:-

- Understand the concept of personality;
- know the meaning of the term "person";
- Understand the attributes of personality;
- know the types of persons, and
- know the similarities and differences between physical persons and artificial persons

1.1 The Meaning of the term "person"

Dear distance student, in your lesson on Introduction to Law you have studied that law is an instrument that regulates the relation of persons. By determining the respective rights and duties of persons, law helps to create smooth relation in the life of the society.

However, in the language of the law the term "person" is not used in it’s literally or usual meaning. In the field of law the term has acquired a wide and technical meaning. It refers to all entities (human and non-human) to which personality (i.e. the ability to hold rights and duties) is ascribed or attributed to them by law. It refers not only to human beings but also to other entities or things to which personality is given to them by law for reason of convenience. All entities or things capable of having rights and duties are persons in the eyes of the law. So, the criteria in law to determine weather a certain entity is a person or not is the ability to hold rights and duties irrespective of the fact that it is human being or not. If a thing is capable of having rights and duties by law, then in the language of the law that thing is a person and subject to regulation by law.

What things are to be considered as persons is determined by law. It is the law that determines things or entities to be considered as persons. For the purpose of convenience and control the low designates entities to be considered as person subjects it for its control.

Generally, the concept of personality is a fundamental one in law. It is the most fundamental one as it provides for the definition of those

beings or things, either natural or artificial, which will be bound by the law. If an entity or being is considered as person capable of having rights and duties, the whole field of law will be applicable to him or it; if not, it will not be bound by the law.

1.2 Types of Persons

Those entities or beings that are regarded by the law as persons are of two types. These are:-

a- Physical persons, and

b- Artificial persons

A. Physical Persons:-

Also known as natural persons, refers to human beings. In the earlier times where there was the slave owning practice all human beings were not considered as persons by law. Slaves, which were persons in the strict sense of the term, were not considered as persons by law. They were considered as property of their masters and they used to have no rights and duties under the law. Now a day the dichotomy of human beings in to slave and freeman has disappeared and all human beings are considered as person by law and are subjects of it. So, every human being acquires rights and duties at some point in his life and losses them upon death.

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B. Artificial Persons (Also known as fictitious persons; juristic persons; legal persons; moral persons, bodies corporate)

Artificial persons are non-human entities which are recognized by law as persons and given certain rights and duties and are treated more or loss like human beings for the sake of convenience in control and makes them the subject of rights and duties. The most common artificial persons are:-

- The state and it administrative units
- Religious groupings like the Ethiopian Orthodox Church (EOC), the Evangelical Church, the Catholic Church, Islamic council, etc.
- Business organizations like the Ethiopian Air Lines, Commercial Bank Ghion Hotel.
- Civic organizations established for philanthropic purpose like Action Aid Ethiopia or the Ethiopian Human Rights Council (EHRCO)
- Professional Associations like the Ethiopian Lawyers Association, the Ethiopian Accountants Association.
- Committees
- Trusts
- Endowments

These are the most common artificial persons recognized under Ethiopia law. They have their own personality district of the personality of the human beings that constituted or formed them.

Dear distance student, you will study in detail the importance of artificial personality, how it is acquired and the basic features of artificial persons in the last chapter. Here let us consider the similarities and differences between physical persons and artificial persons.

1.3. Similarities and differences between physical persons and Artificial Persons.

Dear distance student what similarities and difference do you see between artificial persons and physical persons? Please try to list down the similarities and differences before you proceed to read the following passage.

Both physical persons and artificial persons are persons in the legal sense of the term and as such they are subjects of rights and duties as defined by law. Both share the basic features of personality. However, there are striking differences between them.

To begin with, physical persons are animate living creatures that have their own will, volition and the faculty of thinking. On the other hand artificial persons are imaginary inanimate non-living creatures that have no their own volition and will. They do not as such physically exist unlike physical persons. They can not act by their own and exercise their rights and duties. They act through human agents. Artificial persons are represented by physical persons in the exercise of their rights and duties. The managers of business enterprises, directors, chairmen or presidents of different associations, heads of the different government institutions and the employees working therein are nothing but agents of the artificial person for whom they are working for. When the manager of an enterprise, or the prime Minister or the President or the head of any government agency acts in its official capacity it is acting in the name and on behalf of the institution. It is in this fashion that artificial persons exercise their rights and duties.

Furthermore, although artificial persons are subjects of rights and duties, there are certain rights and duties that do not apply to artificial persons because of their inanimate nature. For instance such rights like the right to remain silent, the right to marry and found a family, the right to life does not apply to artificial persons. Such types of rights are applicable purely to physical persons because of their nature.

1.4. Attributes of personality

By attribute of personality we are referring to the characteristics, qualities or distinguishing features that entities with legal personality are endowed with. Once an entity or a unit is recognized as person by law, then it will have certain attributes from the mere fact of it being recognized as a person. Some of these are the following:-

1. The ability to sue or be sued in its own name. Once an individual human being or an artificial person acquired its personality after fulfilling certain requirement it can bring an action against others. Similarly others can institute an action against it.
2. The ability to own and administer property. Only a person can own and administer properly. Both physical persons and artificial persons can own and administer properly of any kind, i.e. tangible or intangible, movable or immovable.
3. The ability to enter in to contracts. An entity whether a human being or any other entity, once it acquired personality, it can enter in to contracts and acquire rights and duties for itself.

4. The obligation to pat taxes. Once an entity acquired a personality as per the conditions prescribed by law, it will have the obligation to pay tax on the income they earn and the properly they own, as defined by the tax law.
5. Having name. Every person, physical or artificial is identified by name.

These are some of the attributes that physical persons and artificial persons commonly share. There are also specific attributes that are applicable only to physical persons or artificial persons. The ability to make will, holding fundamental rights and duties are for example, attributes of only physical persons.

1.5. The important of artificial personality.

Dear distance student, what do you think is the reason for creating the system of artificial personality? Why do we need the system of artificial personality? What purposes does it serve? Why is personality given for the state and its administrative bodies? Why is personal given for business and non-business associations or organizations and other grouping of human beings?

The system of artificial personality is created by law for the following purposes:

1. **For the purpose of continuity in transaction.**

Dear distance student, have you ever noted why the laws issued during the term of one parliament continue to be binding during the term of the next parliament? Have you wondered why acts done during the region of one president or prime Minster or any other official continue to have effect despite the change in the identity of the president or the prim Minister or the official who was in charge? This can be explained only by the personality that the parliament, the office of the president, the office of the prime minister or the individual government office has. Every act done by members of the parliament, or by the president or prime minister is attributed as an act of the office itself. This helps ensure continuity in transactions by persons in office.

2. For the purpose of convenience in control

Human beings make innumerable activities individually and in such cases the law controls or regulates their individual conduct. However, human beings also act in group. Two or more individuals may come together, pool their resources, form an organization and engage in a certain type of activity-business activity, etc. Sometimes, the size of the members of the organization gets huge and some of the members engaged in the activity may be inaccessible for control. For instance individuals from different corner of the world may become a share holder in a certain business enterprise that operates here in Ethiopia. In such cases it is convenient for the purpose of control to give personality to the group as a unit or individual and ascribe all the activities of the group to it and make it a subject of law.

When the size of the group becomes large, considering the group as an entity having its own district personality from the personality of its members simplifies the task of controlling the activity of the group. Rather than controlling or regulating hundreds or thousands of individuals engaged in similar activity it is easier to control a single entity. The group once given personality will have its own rights and duties under the law.

3. The benefit of limited liability

This is particularly important in the field of business activity. An individual may engage in a business activity. If in the process of his activity he incurs a debt, all of his personal assets may be used to satisfy the debt and it may cause him to loss all of his assets if he has a lot of debt. The individual can, however, avoid this problem by establishing a business organization. If the individual establish a business organization by earmarking some capital, the organization will have its own personality. All the debts incurred and the rights acquired in the process of the trade are considered as the debts rights of the organization itself. It will be up to the organization to pay its debts. Creditors will direct their actions only against the business organization and cannot proceed to property of the owner of the organization. The owner's liability is limited only to the extent of the amount he put to establish the organization. The liability of the organization will not affect other assets that the owner may have. The only thing the owner may lose is the capital he contributed to establish the organization. This system encourages individual to invest their capital without being inhibited by the fear that their whole asset will be taken away for debts they incurs in connection with their business activity.

1.6. Commencement of Artificial Personality

The way how artificial personality commences depends on the type of the artificial person itself. There is no uniform rule concerning the acquisition of artificial personality. It all depends on the type of the artificial person mentioned above.

If we look at the state, in order to be considered as a person, it must fulfill all the requirements under international law. It must have sovereign territory, population and an established government or a political system. If it fulfills all these, then it will be considered as a person under international law. On the other hand the various state organs derive their legal personality from establishing domestic legislations.

If we consider civic associations, they acquire personality when they fulfill all the requirements provided under Articles 408-414 of the Civil Code and register within the Ministry Of Justice Or Regional Justice Bureaus.

Business organizations in the same way acquire personality when they fulfill all the requirements under the commercial Code and register with the Trade and Industry Ministry. Some business organizations, i.e, public enterprises, however, acquire personality not by

registration but by establishing legislation to be issued by the Council of Ministers pursuant to the Public Enter Praises Proclamation.

Review Question

1. What do you understand by the term "person"?
2. Write out the similarities and differences between physical persons and artificial persons.
3. Why it is necessary to create the system of artificial personality?
4. How is artificial personality acquired?

Chapter Two

The Commencement of Physical Personality

Objective: - After completing the study of this chapter the distance student will be able to:-

- Know the moment physical personality commence as a matter of principle and exception.
- define birth
- know the conditions under which a conceived child acquires personality

2.1 Introduction

Dear distance student, when do you think the personality of human beings commence? In other words, when does human being start to exist in the eyes of the law and become the subject of rights and duties? What exactly is the moment human beings acquire rights and

duties? At the time of conception? At the time of birth? Or after birth? In this chapter we shall try to answer this question. And the answer for this question is found in the first two provisions of the Ethiopian Civil Code. Generally, as per these provisions physical personality commences at the time of birth (Art 1). It is also provided under Art 2 of the Civil Code that exceptionally a conceived child may also have personality let us now consider them in detail.

2.2. Birth

As a matter of principle personality begins with birth. This is clear from Art.1 of the Civil Code which provides.
"*The human person is the subject of rights from its birth to its death.*"
So, in this respect the beginning of physical and legal existence are simultaneous. This rule applies today to all human beings without distinction, although this was not always true. In the ancient legal traditions human beings could be born in slavery and thus deprived of the status of a person. But in this era of human rights the distinction between the free man and the slave has disappeared and the rule that all human beings are persons by birth is generally true.

But the problem is that the Codes do not define the term "birth". When do we say that the child is born? Jacques Vanderlinden in his book on The Law of Physical Persons defines birth as the complete extrusion of the child from his mother's womb, weather in a natural way or by Cesarean section. This is a definition based on early Roman medical science. Now a day we have children developed in a test tube and it is necessary to adopt a new definition of the term birth. It may be better to define birth as the condition of being wholly brought in to separate and independent existence. So, a child is said to be born at

the moment he starts to respire by himself after he comes out of his mother's womb or test tube.

In the Ethiopian legal system birth alone is sufficient to confer personality; No other conditions are laid down. This differentiates Ethiopian law from the laws of many other countries. In some other legal systems there exists either a single or double condition required for the new born child to acquire personality: in most cases, he must be born alive and must be viable.

As far as the condition of being born alive is concerned, one does not see clearly the justification. If one considers a new born child, he is either alive or dead at the moment of his birth. If he is alive, there is no problem and becomes a person in the full sense of the term unless the law requires also the condition of viability. If he is dead at the moment of his birth, death has preceded live birth and it is clear that he could not acquire personality as he has lost it already. In other words, it seems obvious that a child, in order to acquire personality by birth, must be born alike.

The second condition required by some legal systems, is that of viability. Viability is defined as the possession by the child of the aptitude or potential to live. This requirement can be justified by the fact that if the child is not going to live, there is no need to give him rights or duties with the inevitable consequences on the pattern of rights and duties governing his next of kin. In the earlier times this requirement applied mainly to premature children who were delivered so early that they clearly had no chance of survival. It was extended to all kinds of anomalies which could prevent the development of life. The requirement of viability is useful as there is no need to give rights

and duties to a child, if one can decide at birth that it shall not to be able to live as a human being.

There is also a third requirement which is found in some foreign legal systems which provides that the child must have a human figure. This condition tends to exclude monsters and physically disfigured persons from the category of physical persons. The problem here is defining monsters. It is difficult to determine what separates monsters from the human. The difficulty lies in the fact that the conception about monsters changes with time and the progress of medical science. The dividing line between monsters and humans is imprecise.

As we have said above under Ethiopian law birth alone is sufficient to acquire personality. The law does not attach any other condition. The above conditions are found only in other legal systems. Our Civil Code does not make any explicit reference to such types of conditions as a prerequisite to acquire personality upon birth. The sole fact of being born is enough to acquire personality under Art 1 of the Civil Code.

An interesting point worth noting here is that Art. 1 of the Civil Code makes physical persons only the subjects of rights. Does it imply that they have no obligations of whatsoever? Does it mean that no obligations apply to physical persons? Obviously the answer is in the negative. As we have seen in chapter one personality by definition is a bundle of rights and as well obligations. Right and duties are inseparable. They are two sides of the same coin i.e. personality. It is a problem of translation from the French version of the draft. It is perhaps better to say **subject of rights and duties** which would reflect the idea behind personality. So, it is appropriate to read in to Art.1 of the Civil Code the idea of duties by way of interpretation to make it complete and meaning full.

2.3. Conception

As we have seen above in principle physical personality commences at the time of birth. And the moment a child is born he will acquire personality. However, there are cases where it seems that birth is not by itself a satisfactory criterion to confer personality. The most obvious is the case where the father of a conceived child dies. The succession of the farther opens before birth and the conceived child, not being a person, as he is not yet born, he will not be able to take part in the succession of his deceased father.

To avoid this types of unjust and unfair situation the law, since Roman times, has come up with a solution. Accordingly, the law has permitted for the conceived child to have personality. But for the conceived child to acquire personality it must fulfill the following conditions:-

- it must have an interest that justify the granting of personality at conception
- it must be born alive, and
- it must be viable.

If the conceived child fulfills these three cumulative conditions then personality will be extended to him. Let us examine each of these conditions in detail.

1. The child must have an interest that justifies the extension of personality.

It is not always that personality is granted to the conceived child. Since, as indicated under Art.1 of the Civil Code, in principle physical

personality commence only at the time of birth, it is only when there exist a justifying ground that personality is extended to the conceived child only in exceptional circumstances. It is only when the conceived child has an interest which needs protection that personality is extended to him. In other words no conceived child can be granted personality if his interest does not require it. But what is exactly the meaning of the term "interest"? Is it identical with right? No, the interest is not exactly identical with right. By interest we are not referring only to rights. Restricting personality to the possession of rights without duties would first of all be in contradiction with the notion of personality as being composed of rights and duties. There are cases where the fact of holding rights is bound to that of having simultaneous duties, the balance between the two beings highly favorable to the conceived child. This would be the case for instance in matters of succession, where the heir to an estate is bound to pay heavy succession tax at the same time that he acquires the rights which are part of the estate of the deceased person. Without paying the tax he will not be able to enjoy the rights he could acquire. Thus the acquisition of rights is clearly connected with corresponding duties (e.g. paying tax); one would at the same time prevent him from taking advantage of the connected rights. This does not seem to be the purpose of the legislator who used a general word like interest in order precisely to convey a general idea containing the sum of both rights and duties which could be attributed to the conceived child. For example, it would be in the interest of the conceived child to be an heir to a succession of which the assets would, by far exceed the liabilities. In such case he would, at the same time, have rights and duties, but the fact of being considered as a person would be in his interest.

Finally one must also note the particularity of the personality granted to the conceived child. Such personality is granted to the conceived child in particular situations where his interest so requires. Thus, if the conceived child is considered as a person for the purpose of accepting a donation, it will not automatically become a person until his birth. He is only considered a person for the purpose of accepting the donation and upon him later on, of which the debts exceed the assets, his personality will not be invoked in connection with that succession while it has been invoked earlier in connection with the donation. Thus, the conceived child may be considered as a person but this personality lasts only the time needed to assess his rights when his interest so requires.

2. The child must be born alive

In order for the child to benefit from the extension of personality during conception it must be born alive. Interest alone does not suffice to extend personality for the conceived child. As indicated under Art, 2 of the Civil Code the child need to be born alive in order to benefit from the extension of personality during conception. Thus, even if the interest of the child in his mother's womb requires that personality be extended to him, this will be effective only if he is born alive. But the requirement of being born alive seems to have no importance given the viability requirement which we are going to look in the next paragraphs. Obviously if the child's viability is to be tested

in order to be considered a person, he must necessarily be born alive. If he is born dead, he will certainly not prove viable.

3. The child must be viable.

Again in order for the child to benefit from the extension of personality during conception, not only it has to be born alive, but also it must be viable. By viability we mean, it must have the aptitude or the potential to live or survive. As stated earlier this requirement is justified by the fact that, if the child is not going to live, there is no need to give him rights or duties with the inevitable consequences on the pattern of rights and duties on his next of kin.

But how do we know weather a newly born child is viable or not? What is the criterion to say a newly born child is viable or unviable? Art. 4 of the Civil Code provide a solution to this problem. This provision provides some presumption that help one to determine if a newly born child is or is not viable. According to the rule laid down under Art. 4(1) a child is deemed to be viable if it survived for full 48 hours after birth. Once the child survived for full 48 hours after birth it is presumed to be a person from the moment of conception. This presumption is irrefutable. No proof can be admitted to the contrary to show that the child is unviable even if it survived for 48 hours. However, if the child dies before the expiry of the 48th hour, there is the presumption that he is not viable and consequently the child will not be considered as a person even if his interest has required it during conception. But if the child died before the 48th hour due to an external factor, the child is still deemed viable even if it died before the 48th hour. In other words the child is deemed unviable only if it died before the 48th hour due to an internal factor. The child is said to

have died due to internal factor if it died because of a deficiency or defect in his constitution or make up, for example a detect in the lung, in the blood circulation system or may be a defect in his digestion system. So, if the child died before the 48th hour due to these types of internal problems, then the child is considered as unviable. On the contrary if the death of the child before the 48th hour is due to external factor such as accident or intentional killing, the child is deemed viable, even if the child died before the 48th hour. This is based on the belief that the child would have survived had it not been for the intervening external factors. This means the child will be considered viable:-

1. If it survived for full 48 hours, or
2. Even if it died before the 48th hour if the death is due to an external factor.

The child will be considered unviable only if it died before the 48th hour after his birth and the death is due an internal factor

To sum up, a conceived child whose interest requires the extension of personality will be considered as a person for the purpose of protecting his interest. But how do we know the exact date of conception? In order for the child to benefit from the extension of personality, it is important to know whether he has been conceived on the date the alleged interest was at issue. Otherwise, we will be making the child a beneficiary of a right which he does not deserve. To avoid this type of problem, we need to know the exact date of conception of the child.

To avoid this problem Art.3 of the Civil Code has laid down a presumption fixing the date of conception at the 300th day preceding the birth of the child. As per this provision a newly born child is

considered as conceived on the 300th day preceding his birth. Sub-article 2 of the same article makes this presumption irrebutable. Accordingly, no proof (medical or otherwise) can be admitted to show that the child is conceived before or after the 300th day preceding his birth.

However, although the presumption laid down in article 3(1) is irrebutable, Art 3(3) establishes the principle that the rule laid own in Art 3(1) shall have no bearing on the previsions of the law dealing with filiations, in the case where the identity of the father of the child is in issue. This seems to refer to the prevision of the various Family Codes that lay presumption as to conception in wedlock and fix the moment of conception between the 300th and 180th day preceding the birth of the child. Thus, in principle, the moment of conception is not necessarily fixed at a certain number of days before birth; it can vary between 300 and 180 days. On the contrary, Art. 3 fix the precise date for the moment of conception. The purpose of Art 3(3) is to avoid what could seem a contradiction between Art. 3 and the Family Codes by reserving the rules laid down in the latter about filiations.

Review Questions

1. When is physical personality acquired as a matter of principle and exception?
2. W/ro Azeb gave birth to a daughter on Meskerem 10 at 6:00 local time. Her husband, Ato Beshah, while rushing to the hospital where his wife gave birth was run over by a car at 7:00 local time. Sometime later W/ro Azeb brought a suit against the driver claiming compensation for herself and for her daughter.

The driver admitted liability for W/ro Azeb, but denied liability for the daughter who died on Meskerem 11 at 10:00 local time.

- What is the possible argument that can be raised by W/ro Azeb and the driver respectively?
- What if the daughter died on Meskerem 12 at 10:00 local time?

3. W/ro Aster gave birch to a baby on Tahisas 24 at 2:00 local time. The baby was born without arms and legs and with only one eye. From the moment of his birth the doctor has to fight for his life and with the help of modern medical science the child lived until 4:00 local time on Tahisas 25. At that moment, however, because of a blockage in the dialysis machine which was supporting his kidney, the child died. The blockage was later found to be due to the fault of the hospital technician who had failed to service the machine correctly.
    - Do you think that the child will successed to his father who died four months before his birth?
4. W/ro Ziyin and Ato Habtamu were living for many years as husband and wife after concluding marriage in 1980. In their long years of marital life they were unfortunate to have a child. Meanwhile, Ato Habtamu died due to a car accident on Mekerem 15, 1997. To the surprise of the families of both, W/ro Ziyin gave birth on Nehasie 5, 1998 at 3:00 o'clock in the morning. Even if the child was born alive and healthy it died six hours after its birth which was medically proved to be due to the fault of the mother.

After all these events, the succession of the deceased Ato Habtamu is at issue. W/ro Ziyin is claiming on behalf of her child. On the other hand, relations of Ato Habtamu are contesting her claim.

- Discuss the arguments that can be raised by W/ro Ziyin.
- Do you think that Ato Habtamu's relatives claim have legal ground?
- What would be your ruling if you were a judge?

Chapter Three
Characteristics of Physical Personality

Objective: - after completing the study of this chapter the distance student will be able to:-

- ♣ Know the characteristics of physical persons.
- ♣ Understand the nature of rights of personality
- ♣ Understand and explain the basic rights of personality

3.1. Introduction

Physical persons have certain distinguishing marks that distinguish them from other entities that have no personality. As soon as

personality is conferred on human being upon birth or at the time of conception, they become holder of certain attributes which distinguishes them from other entities devoid of personality. These are the characteristics or distinguishing features that every physical person is endowed with when conferred with personality. The characteristics of physical persons include:-

- ⇒ the holding of rights of personality by physical persons
- ⇒ the holding of name
- ⇒ capacity
- ⇒ Residence, domicile and nationality

In the following pages, you will study these characteristics of physical persons.

3.2. The Holding of Rights and duties by physical persons.

As soon as personality begins, all rights and duties under the law are held by an individual, although the exercise of such rights can be entrusted to other persons because of some incapacity which prevents the holder from exercising by himself. The Ethiopian Civil Code deals extensively with the problem of the rights attached by law to personality. They are called rights of personality or individual rights.

Until very recently, the rights of the individual were exclusively considered in constitutions where they were affirmed as against the state much more frequently than in connection with other citizens.

Thus they were found only within the field of public law and not private law. However, based on the general principle of civil law underlying liability for prejudice to another person, individual rights were progressively introduced in to the field of private law.

It should be noted, however, that the incorporation of individual rights in to the Civil Code doesn't prevent the mention of similar rights in the constitution which is the case with the FDRE constitution. The constitutional individual human rights provisions are asserted against the state while those individual rights incorporated in to the Civil Code are asserted against other individuals, as the Civil Code is a body of low governing the relation of private individuals. So, if the violation of individual rights comes from private individuals then its cessation is to be required based on the Civil Code; but if the infringement comes from the state then remedy is to be requested based on public law particularly the constitution.

3.2.1. Principles of Governing the Holding of individual Rights

The Civil Code provides general principles governing the whole area of individual rights. These are

- The absolute equality of all persons in respect to individual rights.
- The fact that the rights of personality are extra-commercium
- The fact that the individual is not free to renounce the rights of personality, and
- The fact that the individual whose liberties are infringed is free to require the cessation of the infringement.

The holding of rights of personality is governed by these general principles. It is subject to these principles that physical persons become holder of rights and duties. You will now turn to study them in detail.

1. All physical persons hold the rights of personality with absolute equality. For a long time in the history of human civilization, inequality was the essence of the law and one was treated in accordance with one's status in society. There often was a different law and a different court according to the status of the individual. The idea of human equality which has now got wide recognition in all legal systems is not very old. All human beings now hold the rights of personality. All human beings are equal as regards the holding of individual rights. However, it must be noted that legal equality is only a first step in which the law points the way for social and economic equality. It is still too often true that men, although equal before the law, are deeply unequal because of different factors.

   When we look at the Ethiopian Civil Code provisions that deal with the rights of personality, Art.8 (1) affirms the absolute equality of human beings in holding and enjoying the rights of personality. In this respect no discrimination is made even as regards foreigners. The wordings of Art.8 (1) which starts by saying "Every physical person shall..." and Art 389 of the Civil Code clearly indicate the absolute equality of Ethiopians as well as foreigners in the enjoyment of the rights of personality. The rights of personality belong to all physical persons without any regard to the race, colour, religion or sex of the person.

2. The rights personalities are extra-commericium (Art.9 (1)) which means that they are out of the field of legal transactions. They

cannot be the object of contractual transactions. You cannot sell or donate them. At the same time sub-article 2 of the same article provides that no voluntary limitation or renunciation of the rights of personality or the individual rights enshrined in the Civil Code are, not only out of the field of commercial transactions, but also no voluntary limitation is acceptable. Both of the rules indicated in under Art. 9 are intended to protect the individual against himself. The rights of personality incorporated in the Civil Code are not only rights in the sense of a privilege but also they are duties which persons have to respect without being free to make them the object of legal transaction or to limit them.

Of course one may limit his individual rights in the cases where one has an interest to do so and where such interest has a legitimate character, i.e., is recognized by the laws of Ethiopia. In such case and in such cases only, is the physical person free to limit his individual rights as they are defined in the Code. One has to note here that, in the case of Article 9 (2), the limitations are subject to the existence of legitimate interest, i.e. an interest which is recognized by and protected by Ethiopian laws.

3. Article 10 of the Civil Code provides for remedies in cases where an individual right is the object of molestation. The person who is the victim of infringement of his right can request the immediate cessation of the molestation and ask for compensations from the author of the molestation if damage has materialized. The person suffering from the molestation can ask that it stop immediately and such request as most legal remedies has to be made through the court with a view of obtaining an injunction to this effect. If damage or loss is sustained by the

person whose right is infringed he can claim compensation lender these relevant provisions of the Civil Code on extra-contractual liability.

Dear distance student, so far you have studied the general rules governing the holding of rights by physical persons. Now you shall turn to study the specific individual rights as enshrined in the Civil Code. These individual rights are classified in to several broad categories. The discussion will follow this classification.

A. Rights concerning the body

Rights concerning the protection of the body of physical persons are found in Articles 18, 19, 20,22,22,25 and 26 of the Civil Code. These rights concerning the human body are not only given to the individual as protection against others, but also to protect the individual against himself. The integrity of the human body is considered by the Code in an abstract way, as a value by itself, which the law has estimated worthy of protection.

To start with Art 18 prohibits a person from disposing of his body part if:-

1. The act of disposition is to be effected before the death of the person, and
2. the result of the act would be a serious injury to the integrity of the body

In other words one is totally free to dispose of one's body as he wishes provided that the disposition is to be effected after death. Again one is

also able to dispose of a part of one's body while he is alive provided that the act of disposition does not cause serious injury to the body integrity. In other words what is prohibited by the law is disposing the body during one's life time in a manner that can cause serious injury to the integrity of the body. If the act of disposing the body part is to take place after the death of the individual or even during one's lifetime but without causing serious injury it is not prohibited.

But what would be the sanction or the consequence if a contract is concluded in violation of these conditions? What if an agreement is made by an individual to dispose his body part during his life time in a manner that cause serious in jury? Obviously if the contract is performed as agreed that will be the end of the matter. But it may happen that one of the parties may challenge the validity of the contract. In such cases what would be the ruling of the courts? The answer is clear from the wordings of Art 18(1) of the Civil Code which contain the phrase "... shall be of no effect ....” The contract is void and the court will rule that it is unenforceable. It will be denied any effect or value.

This is, however, the general rule and there is an exception to it. There is the possibility still to dispose part of the body during one's life time even if it causes serious injury to the body. As indicated under Art 18(8) this is allowed only where the act of disposing the body part is justified by the rules of medical practice. This refers to the numerous cases in modern life where important operations are performed which have as a result a serious injury to the integrity of the body. A person may suffer from serious disease that may need the amputation of the limbs. In such cases, the agreements of the patient to the operation or amputation are valid and have effect.

Art 19 of the Code provides that a person who has entered into contract to dispose his body part during his life time or after death is free to revoke the contract. The only obligation of the individual in this case is to indemnify the contracting party only the actual loss that he has sustained on the basis of the contract. It is important to note here that the liability of the party revoking the contract is only to indemnify actual losses incurred and does not include compensation for moral damage or prejudice.

Apart from the disposition of one's body either in whole or in part, physical integrity may be threatened by medical examinations and treatment. This is recognized by Articles 20-22 of the Civil Code. The position of the law in this regards is that in principle anyone may in any circumstance refuse to submit himself to a medical or surgical examination or treatment. The individual is free not to submit himself for medical examination. But such freedom of the individual is restricted in the following four ways:-

1. Public interest stands above individual liberty, in the sense that no one can refuse to submit himself to physical examination or vaccination or any similar measures, when he is required by laws or regulations concerning the public interest Art 20(2). No freedom of right is absolute. There are always limitations imposed on rights or freedoms for the sake of the public. Sometimes an epidemic may occur and in order to prevent the spread of the epidemic the concerned government organ may issue a regulation requiring all residents in a given locality to take vaccination. In such cases the individual cannot invoke his freedom not to submit himself for the vaccination.
2. Minors or interdicted persons can always be submitted to physical examination or treatment by their guardant provided

the treatment or examination is beneficial to his health (Art. 20(3)).

3. Where there is no abnormal risk or danger in the examination or treatment but the individual refused it, such individual shall not be able to avail himself of the illness or infirmity which the treatment could have prevented, eliminated or lessened (Art. 21). A person may be required to submit himself for medical examination voluntary, but if he refused he will not be able to invoke the disease or incapacity that resulted but which might have been held if it were not for his refusal to submit himself for the examination.
4. If one refuses to undergo an examination of which the purpose is to establish certain facts and which do not involve any serious danger for the human body, the courts can consider as established the facts which were to be ascertained through the examination. The individual may be required to submit himself for medical examination to ascertain a certain alleged fact but if he refuses to submit himself for such purpose, the court can conclude the existence of the fact which was to be ascertained by the examination. For instance the court may request the accused to undertake examination to proof whether he is sane or to find an indication as to whether he has raped a girl. In such cases if the individual refused to undertake the examination, then the court can presume that he is sane or that there exists indication as to fact of rape by the individual.

Another right of individual in connection with his body concerns the disposal of his body after death (Art. 25 and 26). As soon as an individual has the capacity to make a will, i.e., if he is a minor, as soon as he has reached 15 years of age and if he is a judicially interdicted person after the termination of his

interdiction, he is empowered, under Art. 25, to prescribe the conditions of his funeral. He may among other things, appoint one or more persons who will have as a duty to ensure that his decision concerning his funeral is respected. The person so appointed or any other person who has material or moral interest the case, can ask the courts for the enforcement of the will of the deceased person as to the conditions of the funeral. The words “failing such” in Art. 25(3) seem to imply that the person appointed by the deceased are, provided they exist, competent to the exclusion of all others and that other possible persons with justifiable interest can intervene only if no one has been appointed. However, this does not seem to be the case. The article should be understood as giving also to the unappointed persons who can prove an interest the power to enforce through the courts the last will of the deceased, in cases where the appointed persons are negligent their duties.

In the case where the deceased person has not left any special will insofar as his funeral in concerned, his surviving spouse or his nearest relatives are entitled to carry it out as they wish (Art. 26). If none of these persons is present or known at the time of death, anyone may take the initiative in this respect. Finally if a contestation arises may be as between the various relatives who have different ideas as to the way the funeral should be made, the matter can betaken to the court of the place of the death by the most diligent party.

B. Rights Concerning Privacy

With the constant increase in social intercourse, due, among other things, to the progress in technology, the sphere of privacy of the individual has been constantly diminishing. This has reached a point where it was felt necessary to ensure to the individual some legal protection against the encroachment of his privacy. There is an ultimate sphere of privacy which is defined by the law and which no one is allowed to penetrate without the permission of the individual concerned.

In the Ethiopian Civil Code rights concerning privacy are found in Articles 11, 13, 27 to 31.

Article.11 deals with two problems, the one concerned with the privacy of the individual and the other with his freedom of action. We are concerned here about the former. It protects individuals against illegal searches. Thus searches are not forbidden as long as they take place in accordance with the law. It should be noted here that we are in the field of law that governs private relations and this provision does not give us the meaning it has in the field of public law, particularly criminal procedure or constitutional law.

The privacy of the individual is also protected by Article 13 of the Civil Code which prevents the violation of the domicile of a physical person. The provision prohibits not only searches, but also the mere fact of entering somebody’s domicile.

The right of the individual to his privacy can be limited by the law (in the case of legally authorized searches) and by the individual himself who is free to accept the entrance of other people in his domicile at his own will.

Articles 27 to 30 establish the principle that not only the person of the individual is protected against possible violations, but also that special protection is granted by the Code to the image of the person. In this respect one could question the meaning of the word image. The word image can be defined as any artificial representation of the external form of a person such as Photography, Portrait, Sculpture, Cartoons, etc.

What the law prohibits is:-

- The exhibition of the image in a public place, thus not preventing its being shown in a private house.
- The reproduction of the image.
- The offer of the image for sale.

A person can not exhibit, reproduce or offer for sale the image of another person without his consent. However, if the person concerned gives his consent then the prohibition will be lifted.

There are, however, cases where the consent of the concerned person is not necessary to reproduce the image of an individual. The image of a person can be reproduced even if he has not consented to. The consent of the individual is not necessary when:-

- The reproduction is justified by the notoriety of the person or by the public office which he occupies, or by the requirement of justice or of the police, or by a scientific, cultural or didactic interest;
- The reproduction is done in connection with facts, events or public ceremonies st or which have taken place in public.

It should be noted that it is only the prohibition to reproduce which fall under the exception to the requirement of consent. It does not

include the exhibition in public place or offer for sale. As a result one might say that in these cases, the consent of the interested person is always required.

As for the possible sanctions in case of violation the rights of the individual under Article 27, they are considered in Article 29 which deals only with cases of public exhibition and offer for sale and not with the cases of reproduction. Does this mean that there is no sanction when there is unauthorized reproduction? That should not be, and one must proceed by analogy and assume that remedies will be identical in all cases of violation. Thus a person whose right under Article 27 is violated may:

- Demand that the illegal action cease immediately; and
- Ask the courts for the payment of damage. The damage can only be awarded if equity so requires and within the limits of the enrichment derived by the person who is responsible for the action; and
- Ask the court for moral damages, in the cases where the illegal action does not cease immediately when its cessation has been demanded.

Finally the Code deals with cases where the person whose right under Article 27 has been violated is not in a position to manifest his will (Art. 30), for instance when the person is dead, absent or an inmate of a medical institution. In such cases, his rights are vested in his relatives. But they can only exercise his rights in so far as the violation of the preceding articles results in prejudice to the honor or reputation of the deceases person.

The competent relative is in the first place, the spouse of the deceased person. In the absence of the spouse the nearest descendant, or in

default of a descendant, the nearest ascendant will be competent to exercise the right. In the case of the existence of many descendant or ascendant the eldest ascendant will represent the deceased person.

Article 31 of the Code protects the privacy of the contents of the correspondence of a person. The provision prohibits the communication of the contents of confidential litters. What exactly is meant by a confidential letter is not clear. One can consider it in a narrow sense as, referring only to letters marked confidential or take it in its wider sense to mean any closed letter, as opposed to a letter which goes through the post in an unsealed envelope. On the basis of the general principle that all correspondences ought to be protected from indiscretion, the latter meaning seems to be preferable. It must be underscored that some communication of the contents of correspondence is necessary, and that the mere fact of being acquainted with the contents of another person's mail is not prevented under the Civil Code. It is not the content of the correspondence of another person which is protected but its communication or disclosure without the priori permission of the author.

This is, however, one limitation to this right. As per Article 31(2), the addressee can produce the letter in judicial proceedings if such action is justified by a legitimate interest.

C. Rights Concerning Privacy

Rights concerning the freedom of action of physical persons are contained in articles 16,11,12,14,15,17,23, and 24. These provisions define the general rights of the individual to act as he wishes provided

that he respects the law and the rights of other individuals. Here we find the basic concept that liberty is only allowed in so far as it does not prejudice other members of the society.

Article 16 of the Civil Code lays down the general principle concerning privacy. It is drafted in general terms and provides the right of the individual to exercise any activity whether it is professional or in leisure time. Sub-article 1 of Article 16 contains no limitation to the right as it stands now. The subsequent sub articles, however, provide two limitations to the freedom of action of the individual provided under Article 16(1). Art.16 (1) protects society against possible abuse by the individual. This provision protects the society in the sense that the individual can only exercise his freedom of action with in the limits which are provided in the Code. These are respect for the right of others, morality and the law. This reduces considerably the huge field apparently given to an individual's freedom of action in Article 16(1). It places freedom of action within social life and gives precedence to public interest than to freedom of action.

Article 16(3) is provided to protect the individual against himself, as it prevents him form being bound by any agreement to do or not to do a certain thing. There is a huge exception to this rule. One may validly enter into agreements to do or not to do something if it can be justified by an interest which is recognized by the law. It is widely practiced for instance that, through contracts, individuals bind themselves every day to do or not to do a certain thing. These contracts are valid because their existence is admitted by the law (contact law). If it were not so, the undertakings of the parties to the contract would be without any validity.

Article 11 is concerned with the negative side of the freedom of activity. It deals with the possible restrictions to freedom. Under this article no person may agree to restrict his freedom except in the cases provided by law. There are cases where the law provides a restriction to the freedom. To mention one example, it is clear that the guardian of a child has the power to restrict his freedom of action by for bidding him to leave the house at specific times or by preventing him to go to certain places. This would be contrary to Article 11 of the Civil Code if the guardian were not given power by the law to restrict the freedom of the minor.

Article 12 of the Civil Code deals with a particular case of freedom of action. It is about the freedom to establish one's residence wherever one wishes to do so and to change his place of residence whenever he wants. Article 12 distinguishes between cases where a person undertakes to reside in a particular place and cases where a person undertakes not to reside in a particular place.

The agreement where by a person undertakes to reside in a particular place is, without any exception, of no effect under the law. It means that if the agreement is referred to the courts for enforcement, they cannot enforce the undertaking to reside in a particular place. This is particularly important in contracts for the performance of services, especially contracts of employment, which often include such agreements. This can be taken as an exception to the general principle laid down in Art. 9(2), according to which a voluntary limitation to one's individual rights can be admitted, if justified by a lawful interest. In the case of the agreement to reside in a particular place, not even the lawful interest of the person considered is admitted to justify the limitation to his right to freedom of residence.

On the other hand, the undertaking of a person not to reside in a particular place can be considered as valid, if it can be justified by a legitimate interest. Again one will have to refer to the law in order to decide whether or not the interest of the person involved in the agreement is protected by law or not. It must be noted that it is the undertaking not to reside in a place which is considered by Article 12, and not the undertaking not to exercise an activity.

Art. 14 deals with two further points in connection with freedom of action: freedom of thought and the freedom to express such thought. The reference to freedom of thought in the Code has not real significance. It is obvious that the freedom of thought alone does not need to be protected, unless the result of such thinking is expressed in one way or another. Like any other freedoms or rights the freedom of thought and expression is limited by the law, the rights of other people and good moral.

The freedom of exercising religious activities of all creeds is considered in Article 15 of the Code. It is the exercise of religious activities which is guaranteed by the provision and not the fact of having adopted any religion or creed, and this is appropriate as the latter is no more controllable than thought, unless it is expressed through the rites of some religion or creed.

The freedom of physical persons with respect to marriage and divorce is considered in Article 17 which declares all promises by an individual not to marry or not to remarry and to divorce or not to divorce. An exception worth noticing here in, this respect, is that the promise to marry or remarry is allowed under the family Codes. Such agreements are in fact contracts of betrothal as recognized and

regulated in some regional family Codes including the Amahra Regional State Family Code.

Finally, there are some individual rights which do not fall in to a single category as they clearly belong to more than one of them. This is the case with Art. 23 and 24 of the Civil Code, which protect the right to silence and professional secrecy. Here one sees the body of the individual protected from physical harm (thus there is connection with protection of the human body) incases where he might by forced to disclose something which has come to his knowledge. This means protection of his freedom of activity, i.e. he cannot be forced to do something he does not with to do, and it also protects his right to privacy since he cannot be forced to divulge private information.

Generally, Articles 23 and 24 of the Civil Code are concerned with possible violations of the physical or moral integrity leading to admissions or manifestations of the will which do not in fact, represent a person's own will, and are only made because of the pressure exerted upon him. The principle is laid down in Article 23, which speaks of molestation of the personality as a means of pressure. This is not restricted to physical molestation in the English version of the Code and it can then be admitted that moral molestation (such as blackmail) is included in the terms of Article 23. But, the Amharic version by referring explicitly to the infliction of injury to the body limits itself to physical harm and thus excludes moral pressure. This is erroneous as in the modern world non-physical pressure on individual is more likely to occure in the field of private relations that physical pressure and the idea of moral coercion must be read in to Article 23.

If an admission or a declaration of the will is obtained through such means, the result is the lack of effect of either the admission or the declaration.

A particular case of such pressure exerted upon individuals in order to obtain information is that dealt with in Article 24. It refers to persons whose profession depends to a great extent on the confidence of other people. Among these we can mention for instance priests (who here confessions), doctors (bound by medical secrecy) or journalists (whose profession consists essentially in seeking out information from as many sources as possible). if such persons happen to learn something in the exercise of their professional activity the revelation of which would amount to betrayal or a risk of betrayal of the confidence people put in them because of their professional status, they cannot be compelled to reveal what they have learned. A right is granted to a person to stop the divulgation of facts which he has confided to another whose discretion he has trusted.

The only exceptions to this general rule are the cases of Articles 254 and 335 of the FDRE Criminal Code. Article 254 deals with the duty to inform the authorities of the preparation of any offence against the Ethiopian state and constitutional order. Article 335 deals with cases of plans to commit or the commission of mutiny or dissertation. In both provisions there is a legal duty to report any information of such crimes to the authorities. In both cases, it is expressly provided in the Criminal Code that neither official nor professional security shall be admitted as a defense to a charge under these provisions.

Review Questions

1. Explain the characteristics of the rights of personality.
2. Ato Birhanu made an agreement to donate one of his kidneys to Ato Tadesse. Ato Tadesse is suffering from a serious kidney disease and if he doesn't get a transplant he will die. As part of the agreement Ato Tadesse Offered Ato Birhanu a job at his house as a guard.

   Now Ato Birhanu is unwilling to undergo the operation for the removal of his kidney. Further more he says his religion does not permit such conditions. Because of Ato Berhanu's refusal to donate the kidney, Ato Tadesse has dismissed him from his job as a guard.
   Ato Birhanu comes to you to know if he can get his job back under the agreement. Advise him

3. Ato Yohannes is accused by Zenebech of being the father of her illegitimate child. Ato Yohanes denies the accusation. Zenebech has now brought a paternity action against Ato Yohanes. The court has requested that both parties and the child be given blood tests. Zenebech has agreed to blood tests for herself and her child. However, Yohanes has refused to undergo such a blood test. Advise him the consequence of his refusal to undergo the test.
4. A tetanus epidemic broke out in Bahir Dar in 1997. Vaccination was compulsory for all persons and accordingly instructions were given in all factories to employees that they could be free from work for one afternoon in order to obtain a vaccination.

W/ro Abebech worked at the Bahir Dar Textile Factory. Her colleagues all went to be vaccinated but w/ro Abebech refused to go since her religion does not permit such medical treatment. Some days later she became sick with tetanus and was absent from work for two months. When she returned she found that her job had been given to another person. Her boss told her that her absence from work for two months had cost her job. When Abebech said that she had had a tetanus the boss replied that "That is because your own fault."

- Can her claim to be reinstated to her job would be successful? Why?

5. Ato Gebeyehu and Asrat are lawyers in Bahir Dar. They have been established there for 20 years and have the biggest legal practice. Recently they have been so busy that they have decided to take on a junior associate to help them. However they are worried that the associate may soon leave them taking their best clients with him. So, they have inserted a clause in the contract of employment which reads as follows:-

> "The Junior associate agrees that should he leave the employment of Gebeyehu and Asrat, he will not set up legal practice in Bahir Dar."

- Do you think that the restriction in the contract of employment will prevent the junior associate from setting up his own firm in Bahir Dar at a later date? Why?

Chapter Four

Name

Objectives: after completing the study of this chapter the distance student will be able:

- Know the importance of name for physical persons
- Know types of names of physical persons
- Know the method of attribution of names
- Know how names are changed
- Understand the protection accorded to names

4.1. Introduction:

A name is a technical device enabling the identification of a physical person. Every physical person is identified legally by his names. It is also one of the essential attributes of personality, and as such the law maker has felt that it has to be protected by law.

The Ethiopian Civil Code establishes the principle that every physical person has a family name, one or more first names, and a patronymic mentioned in that order in all administrative document relating to a person (Art. 32). But these names are applicable for persons born after the coming of the Civil Code. Persons born before that time are not obliged to comply with the Code previsions. They are, however, free to do so (see Articles 3358 and 3359 of the Civil Code). This being, however, it should be noted that the organization of names is in a transitory stage particularly because the institution (the Office of Civil Status) and the provisions governing it which are necessary to enforce the provisions on name are not in force.

4.2. Attribution of Names

4.2.1. Attribution of Family Names

The family name is the one which is always mentioned first on all official documents concerning a person (Art. 32). The family name is attached to family of descendants and will serve to characterize all members of that group of descendants.

The main function of the family name is to unite the family group under one common designation. It is the visible legal bond uniting all the member of the lineage. If someone switches from one lineage to another as in the case of marriage or adoption, he is either encouraged or compelled to adopt the name of his new group. It must also be noted that changing one’s family name while one remains a

member of a group is not left to the free decision of the individual. It is submitted to the control of the courts.

It must be noted here that whenever the word “name” is used in the Code without specification it means family name. This clearly results from Articles 33, 39, 40, 41 and 42, where the word name is clearly used alone and clearly refers to family name, while names other than the latter are always qualified as first names or patronymic.

The attribution of family names depends on the date of birth of the individual, i.e. whether he/she is born before or after the coming into force of the Civil Code.

A – People Born after the coming into force of the Code.

Every Ethiopian born after the coming into force of the Civil Code must have a family name (Art. 3359). That name shall be determined or given in the following manner.

1. If the mother’s husband is known, if he has not disowned the child and if he has a family name, the family name of the child is the family name of the father (Art. 33).
2. If the mother’s husband is known and if he has not disowned the child but he has no family name, the family name of the child shall be his patronymic, i.e. according to Article 36(1) the usual first name of his father (Art. 3359(2)).
3. If the father is not known or if he has disowned the child, the family name of the child will be the family name of the mother, if she has one, and if she has none, her patronymic, i.e. her father’s usual first name (Art. 33(2) and 3359(3)). Article 33(3)

states that these rules are also applicable in cases where the paternity of the child has been judicially declared. This means that the child will keep the name acquired from his mother at birth and will not automatically replace it with one from his father if the latter happen to be judicially declared under the rules of the family law all ascertainment of paternity.

4. If the father and the mother are not known, it is provided under Art. 39 that the Officer the Civil Status will give a family name by selecting from names which are common in the locality.

B. Peoples Born before the Coming in to force of the Civil Code.

If someone is born before the coming into effect of the Civil Code, he is free to assume or not to assume a family name under Art.3358(1)). If he decides to have a family name, the attribution of the family name shall be made in the following manner.

1. It the mother's husband is known, if he has not disowned the child and if there are two or more male ascendant generations of his family alive one the coming into force of the Civil Code, he will take as a family name the patronymic (the usual first name of the father) of the senior male ascendant alive on that date (Art. 3358).
2. If the mother's husband is known, if he has not disowned the child but if there is no generation of his family or if there is only one alive on coming into force of the Code, he will take as a family name his patronymic, i.e., the usual first name of his father (Art. 3358(2)). In this last case, the individual will have a family name which will coincide with his patronymic and Article

36(3) will be applicable to this situation (Omission of patronymic in administrative documents).

3. If his father is not known or if he has been disowned by him, he will take as a family name the patronymic of his mother (Art. 3358(3)). Thus there is no necessity to take into account in this case the possible existence of many generations within the mother's family at the moment of the coming into effect of the Code.
4. In the case where the mother and the father are unknown, the Code is silent. It seems to be possible, by analogy with Art. 39(1) and 59(2), far someone to ask the Officer of Civil Status to give a family name.

4.2.2 Attribution of First Names.

Whereas a person may have only one family name and only one patronymic, he may have one or more first names (Art. 32(1)). This follows the family name and precedes the patronymic, if one adheres to the order set down in Article 32(2). But it must be noted that when Art. 32(1) refers to "many first names", it means in fact two. This results from Article 34 which entitles the mother to give:

(a) a second first name when the first has been choosen by the father, and
(b) Two first names when the first has not been choosen by the father.

The first names of physical persons are attributed:-

1. By the father, when the father is known and exercises his right to choose a first name. If he does not, the choice will be that of family of the father (Art. 34(1)). For this purpose the family will

be represented by the child's nearest ascendant, or in his absence, by the child's nearest collateral relative. If there are many ascendants or collateral relatives of the same degree, the eldest among them is entitled to choose the first name (Art. 35). If the father or parents of the father are not willing to exercise this rights under Art. 34(1), it results in the transfer of such right to the mother in accordance with Article 34(2). This is not mentioned in the Code, but seems a reasonable solution for a situation which is unlikely to occur very frequently in practice.

2. By the mother (Art. 34(2) and (3)). According to these provisions, the mother (or here family where she is not exercising her right) must decide the first name in cases where the father is unknown or the child has not family on the paternal side. It must be noted that in such cases the mother (or here family) may give two first names. It would be more correct if it say 'must give a first name and may give a second first name', as the child has, in any case, to have a first name. Thus in cases where the father (or his family) has selected a first name of the child, the mother (or her family) has the right to choose the second first name of the child. In the case where the father (his family) has not decided upon the first name and the mother (or her family) has made the choice, they are still free to give an additional first name to the child. The Code limits the intervention of the mother (her family) to the cases where the father is unknown or the child has no family on the paternal side. By analogy, such intervention can be admitted in the case where the father (or his family) has not exercised his right for any reason.
3. By the Officer of Civil Status in the case where both parents are unknown (Art. 39). In such a case, the child must receive two first names, while in the previous cases the attribution of first

name the second family name is optional. The first name given by the Officer of Civil Status shall be choosen among first names which are common in the locality and any person with any interest to do so may request the court to change these first names before the child reaches the age of five.

4. By agreement of the parties taking part in a contract of adoption (Art. 41). The Code provides that by a contract of adoption, the adopted child may receive a new first name. Thus the change is optional in the case of the first name, while it is mandatory for the family name. The Code does not refer to the person who is competent to make the attribution, but as it has to be made through the contract, one can coincide that these persons will be the parties to the contract. These are the adopter and the guardian of the adopted child.

Generally, the choice of a first name by all the above mentioned persons is free (excepting the Officer of Civil Status who has to choose among names common in the locality). There is, however, one common exception or limitation. That is no child can be given purely and simply the first name of his father or of this mother or that of one of his brothers and sisters who is alive (Art. 38). The purpose of this provision is to avoid confusion among members of the same family, especially for third parties. The law provides that if a child is given the first name of the above mentioned relatives, then he must also be given at the same time an additional first name which will help to distinguish him from other members of the family who have identical first name. Normally, as you have studied above, the choice of additional first name is optional and left to the mother (or her family). It seems in this case also the choice seems to be that of the mother’s, unless the father (or his family) asserts that this is a compulsory

provision and not an optional one and that such choice should accordingly be left to him.

4.2.3 Attribution of Patronymic Name

The patronymic is the last name to be mentioned in official documents in Ethiopia. As the term itself indicates, it is one of the father's names and the law provides that it must be his usual first name (art. 36). This does not seem to imply that it should be the first of its first names. It must only be the usual one. It should be noted that patronymics are always connected with the father. There can not be a patronymic coning from the mother's side. The only exception to this situation is temporary one to be found in the transitory provisions of the Code (Articles 3358(3) and 3359(3), where the patronymic of the father is used for the purpose of attributing a family name. As a result a person will have no patronymic name if his mother is unknown (Art. 36(2)). This seems to show the little regard by law to patronymic names.

The general rule on the patronymic also apply to artificial filiations, as the adopted child may receive as a patronymic the adopter's usual first name (Article 41(2)). This will come about by the agreement of the parties to the contract of adoption, in the same way as for first names. This raises the question of further possible changes in patronymics. The Code does not mention any such possibilities. Since one has only one father, it would seem that there can accordingly be only one patronymic. But this is not always true. There may be cases where the identity of the father may change. This would be the case for instance where these were conflicts of paternity. If the child is subsequently attributes to a new father, it would seem normal to allows him to take a new and correct patronymic. As this is allowed in

case of adoption, there is no reason that prohibits us to say by analogy that it is possible in this case also. The law does not expressly allow it nor does it expressly prohibit it.

In cases where the patronymic is the same as the family name, it is omitted in all acts of Civil status. This will be case for instance where, under the transitory provisions on attribution of family names, persons assume as a family name their patronymic (Articles 3358(2) and 3359(2)). This is just a clerical device to avoid repetition.

4.3 The Protection Names

As stated earlier, a name is not only a technical device enabling the identification of a physical person. It is also considered as one of the essential attributes of personality, and as such they are protected by the law. On the one hand the individual is protected against himself, when the law forbids him to dispose of his name and on the other hand the individual is protected against other persons who may either abuse their own name or usurp his. In the following paragraph you will study these protections in detail. It should, however, be noted that surprisingly these protections, as indicated in the Code, apply only to family name and our discussion is only by reference to family names. Since the requirement of family name is not in force, we may say that these protections apply to given names (first names).

A. Names are Extra Commercium

The first protection extended by law to names prohibits making them the object of commercial transactions. Names are, thus, declared extra commercium. No contract having name as an object can be

considered as valid under Ethiopian law (Article 44). Thus one is not free to give, sell, hire or lend one's name. The only exceptions to that rule are trade names which are governed by special provisions of the Commercial Code.

B. Usurpation of Name

The term usurpation is derived from the word "Usurp" which means to take away something belonging to someone for on self illegally or without having the right to do so. As used in our context, usurpation means an unlawful use of another's name.

Under Article 46, the Code establishes the conditions under which one cannot use another person's name. From this provision we can understand that the use of another's name is not altogether prohibited by the Code. The use of someone else's name is prohibited under Article 46 only under the following conditions.

1st – There must be usurpation; that is the use of another's name which is not justified by some right.

2nd – The usurpation must cause or be likely to cause material or moral damage. Thus, the damage need not be immediate. There need only be a likely hood that it will result from the usurpation. As to the damage, it could be moral or material. The protection granted is thus extensive and this is justified by the desire to sanction all actions tending to hurt another person through the use of his name.

The right of the victim in this case is that of resisting the usurpation. Article 46 states that one can resist the usurpation and that compensation can be claimed in cases where the requests for

cessation of the usurpation have not been observed by the perpetrator. On the basis of this, it can be argued that it is sufficient for the aggrieved party to require from the usurping party the cessation of the usurpation. The sanction for non-compliance with such a request is damages. This can only be granted by a court. In order to do that the court has to see:-

- The existence of usurpation
- The existence or possibility of damage and
- The existence of a valid objection by the holder of the name which has been ignored by the defendant.

The right to require the cessation of the usurpation or damages is not vested solely in the bearer of the name. In cases where he is dead or unable to manifest his will, the same right to resist the usurpation will be rest in each of his descendants and in his spouse, whether or not they bear the name themselves.

C. Abuse of Name

In the same way that one is not permitted to usurp another's name, one is not also allowed to abuse his own name and cause damage to others (Art. 45). In other words one is not free in the use of his name. Individuals are prohibited from abusing their name and cause damage to others under the following cumulative conditions:

1. If the abuse of one's name has to take place in the course of professional activities. Out of the field of any professional activity, there is no question of abusing one's name. The abuse of one's name is prohibited only in the field of professional activity. As to the meaning of the term professional activity, it seems to refer to any activity which is regularly performed with

the purpose of financial gain for one's living. Thus, there are two elements to be considered. It must be performed regularly (not occasionally) and it must be for gain.

2. If the abuse is done with an intention to inflict some damage on the credit or reputation of a person. The damage can be potential or actual. In the first case the intention is considered whatever the result may be, while in the second the result is considered whatever the intention may have been. Accordingly, third parties are fully protected from damage to their credit that might come from some one's abuse of his name.
3. The prejudice suffered by the credit or reputation must have resulted in confusion. It means that there must be a similarity sufficient to create confusion between one's name and the name of the person injured in his credit or reputation.

Article 45(2) provides for remedies in case of abuse. The remedy for abuse of name is provided by way of reference to the provisions of the Civil Code relating to unfair competition or to defamation, according to the circumstances of the case. The provisions on unfair competition (Art. 2057) and defamation (Arts. 2044 – 2049) are applicable for remedies to be sought by the victim. If the abuse of name is only likely to cause damage, the remedy lies in Article 2122 on unfair competition. It gives to the judge power to order the one who abuses to stop his activities. If the abuse has already resulted in damage, then Article 2109 on defamation is applicable in which case an equitable amount of compensation would be awarded.

4.4 Change of Names

Once people have name, they must keep it for the sake of stability in social relations. If there is a good reason, however, application for a change of name can be made to the courts. Courts will generally accept such cages if the name is bringing serious inconvenience to the one who bears it. Rules are not as such strict for the change of family names and first name except that it has to be made through the court with justification. As for the patronymic, it cannot be changed. This results from its nature, although one could wonder whether it should not be changed if the usual first name of the father is changed or the identity of the father changes for some reason. In the following paragraph, you will study the rules governing the change of family names and first name.

In general, once a family name has been assumed, it can not be changed. There are, however, various cases in which a change is possible. These are:-

1. When a woman marries, she normally keeps her own family name. But the Code makes it possible for her to designate herself or to be designated by her husband’s name for the duration of her marriage. Her right to do so remains after marriage even when the latter is dissolved as a result of death, provided that she remains unmarried. If the marriage is dissolved by divorce or if the woman remarries, then she takes back her maiden name as indicated in Article 40.
2. When a child is adopted, his family name is replaced by the family name of the adopter, since he relinquishes all bonds with his original family (Art. 41).
3. When both parents of a child are unknown and he receives his family name from the officer of Civil Status, any person showing he has a moral or material interest in the matter,

may ask the court to change that name. This, however, must be done before he reaches the age of five (Art. 39(3)).

4. When a person applies to the court for permission to modify family name, the court may find that the person concerned has a good cause for so doing. The court must also ensure that the interest of third parties will not be prejudiced by the change of name (Art. 42). The decision as to what constitutes a good cause is a matter to be decided by the court. Among such good causes one can mention cases where the name has obviously bad connotation in common parlance, or where a child happening to know the identity of his father, wishes to abandon his mother's name and take his father's.

As to first name, once it has been attributed it can not be changed freely by the person who bears it. As in the case of family names, one has to request permission for the change from the court (Art. 43). But in the case of family names, the law requires good reason for change, while in the case of first name the law requires none. This difference shows the primary importance attached to family names by the legislator. According to Article 43 one is entitled to request from the court that one or more of his first names be struck out, but that only one added. Thus, if someone has only one or two first names(s), he can request that one or both be struck out, but must also request the addition of one so that he keeps a first name. The application of Art. 43 do not lead to the disappearance of all first names, as every individual must have at least one first name.

REVIEW QUESTIONS

1. What is the importance of name?
2. Do you think that it is possible to change the patronymic name?
3. Ato Birhane Haile and W/ro Almaze Belay have a son born to them in 1975. They decide to call him Kebede. What will his full name be? When Kebede marries, he may give the name Solomon to his son. What will Solomon's full name be under the Civil Code?
4. W/t Alem gave birth to a baby in 1970. She refused to tell her family who the father of the baby is. She herself is illegitimate and has no patronymic. She decided to call the baby Tesfaye. What will Tesfay's full name be under the Civil Code?
5. Ato Hailu Belew is a famous Ethiopian Athlete. He has won many medals in many competitions and two years ago, at the age of 40, he decided to retire. This decision was announced in the news papers and was accompanied by a photograph of Ato Hailu. One day, Ato Hilu received a telephone call from a sports wear manufacture suggesting a meeting for business conversation. According to Ato Hailu the conversation was as follows.

   Sports wear manufacturer: Said that: "You may have heard that I have just started a sport clothes factory with retails out let in various parts of the country. I would like you to came in to the business as an advisor and lend your name to the enterprise your name to the enterprise. Your

salary will be 1000 birr per month. Of course you must not lend your name to any other business. Ato Hailu agreed and the business, both factory and three shops became known as the “Hailu Belew Athletic Sports Goods.”

For some months the business went well. Sweat shirts stamped with a picture of Ato Hailu and bearing the legend “Hailu Belew Athletic sports Goods” were sold all over the country. However, the other sports goods have not sold at all. The sports wear manufacturer informed Ato Hailu six months ago that he will have to take a salary cut of 500 birr and that from henceforth the business will be limited to the production of sweat shirts.

Ato Hailu is very unhappy about the cut in his salary. Also he has been approached by another shoe manufacturer, to lend his name to the shoe factory. It has offered a salary of 1500 birr a month, on condition that Ato Hailu removes his name from the sports business.

- Can Ato Hailu prevent the sports wear manufacturer from using his name and portrait for business purpose?
- What possible arguments can the sports wear manufacturer can raise against Ato Hailu if Ato Hailu enters into agreement with the shoe manufacturer?

Chapter Five
Residence, Domicile and Nationality

Objective: After completing the study of this chapter the distance student will be able to:

- Understand the concept of residence, domicile and nationality.
- Known the importance of residence, domicile and nationality.
- Known how the residence and domicile of a person is determined.
- Know how Ethiopian nationality is acquired and lost.

5.1. Introduction

Residence, domicile and nationality are meanses of individualizing physical persons. But in this case, unlike in the case of name, the

individualization does not refer to the individual per se, but to his location in society. These are meanses of localizing individuals, who are in most cases mobile, for proposes of legal transactions.

The residence, domicile or nationality of a person is the place where he can always be found or belong in a legally valid way (although he may not be physically present) for all legal purposes.

Dear distance student, residence, domicile or nationality of a person has different legal purposes in the whole life of the individual and now you shall study them in detail.

5.2. Residence

The function of residence is not indicated in the section of the Code that deals with residence (Articles 174 – 182 of the Civil Code). It is to be found only in other parts of the law such as in the law of Civil procedure (for the purpose of serving summon), in the family law (for the purpose of celebrating civil marriage), in areas of contract law (for the purpose of performance), in the law of succession (for the purpose of opening the succession) etc. The section of the Code on residence has no other purpose than to establish bases valid for the whole body of the Ethiopian law by defining where the residence of a person is in order to localize the individual some where within the society for the purpose of legal relations or transactions.

The definition of residence in the Ethiopian legal system results from the combined reading of Articles 174 and 175 of the Civil Code. According to these two provisions the residence of a person is:-

- The Place where he normally resides. Here *normally* means regularly, not occasional, although it does not necessarily be undisrupted. So, as indicated under Article 175(1), the mere fact that a person is for a time in a certain place will not be sufficient to constitute for him a residence in such place.
- The place where a person has stayed or has the intention of staying for more than three months (Art. 175(2)). Although the Code is not clear, it seems that the period of three months must be uninterrupted. Thus one may conclude that in all cases a residence exists in any place where somebody intends to reside or resides in for more than three months. This does not, however, preclude the existence of a residence in a place where a person stays for less than three months provided that he comes normally to this place and not just occasionally (As per Art. 174).

The result of the application of the above rules is that an individual may have many residences, provided that these are places where he resides normally, or for more than three month. This possibility is acknowledged by article 177 of the Code which specifies that a person may have many residences and that, if such is the case, one of them may have the character of principal residence, while the others are considered as secondary one. The existence of principal residence is optional and not mandatory as the word “may” indicates. One will have to refer to one of the residences as being the principal one where the law, for one purpose or another, requires consideration of

the principal residence (e.g Article 826 on opening of succession). The question is how to decide or determine on what basis a residence becomes principal residence while others remain secondary. As the factors of normality and of time spent in a place are important in order to define residence, one might say that the principal residence is the place in which someone stays more normally or more frequently or for the longest period.

Article 181 provides that one is free to decide that one's residence will be a given place for the purpose of one's relation with a specific person or for a specific business activity, apart from the residences determined according to the above rules. This is called a stipulated residence. The effects of stipulated residence are that the party for whose benefit a residence has been stipulated can consider as a valid residence of the stipulating party either his real residence (determined according to the Code) or the stipulated residence. He has a free option. But it is also possible to limit the choice of the other party to the stipulated residence only. This can be the case only if the two parties have expressly agreed to make the stipulated residence the only residence for any thing connected with the transaction. If there is no such express agreement, then the option remains.

The Code also provides for some specific cases where residence of a person is determined by the law. Thus it is provided that:

a. The residence of traders shall be deemed to exist in the place where they carryout their trade (Art. 180).
b. The residence of public officials shall be deemed to exist in the place where they exercise their functions or duties (Art. 179).

In these two cases of legally determined residences the individual disappears behind his social functions. In fact nothing prevents him/her from having many residences as per the rules discussed earlier (Articles 174 and 175).

Apart from these two categories of people whose residence is fixed by the law, one is free to establish one's residence where one withes. This is applicable even for persons who are dependant on others, namely married women, minors and interdicted persons. The Code expressly states that they are free to have a residence of their own (Art. 178). The general right of all physical persons to establish freely a residence at the place of their choice is one of the fundamental civil rights that is recognized under Article 12 of the Civil Code. Article 178 is included only to avoid possible confusion where married women and minors are considered. As far as minors are concerned, one should also consider the relevance of Article 256 of the Revised Family Code which gives to the guardian the exclusive right to determine the residence of the minor. Thus the minor may have a different residence that his guardian, but the place of this residence shall be determined by the guardian.

The law has a firm stand that every one must have a residence. One is not free not to have a residence. In the case of someone moving so frequently that he can never be said to reside anywhere according to the previous articles, the law considers that the place where he is, is his residence. The only way to escape such a presumption is to prove that one's residence is effectively elsewhere. If this is done, one is bound by such proof, and the purpose of the law (that everyone must have a residence) is fulfilled.

5.3. Domicile

As defined under Article 183 of the Civil Code the domicile of a person is the place where that person has established the principal seat of his business and of this interests with the intention of living their permanently.

Thus there are two factors that have to be considered in order to define domicile.

1st – The establishment of principal seat of business and interest. The domicile of a person can only be the place where he has established the principal seat of his business and interest. This element of the definition concerns the effective activity of the individual. The word business refers to the economic aspect of his activities and the word interests to his social life. In most cases the centre of business and social life of individuals are located in the same place and no problem exist in such cases. But there are also many cases in modern life where the centre of business, social and family life is situated in different places. In such cases what should be the test?

Article 185 solves this problem by deciding in favour of social and family life as the determing factors in so far as domicile is concerned. There still exists another factor here. The seat of business and interest (the seat of interest if the centre of business and the centre of

interest are different) must be the principal one, not any of the various centers of the business and interest that the individual may have.

2nd – intention to live permanently. Again the domicile of a person can only be the place where he has the intention of living permanently. The word “permanently” is to mean for an indefinite period of time. In the case of shatto v. shatto, the Supreme Imperial Court of Ethiopian construed Articles 183 and 184 of the Code and concluded that permanent meant for an indefinite period of time. (Read another case attached at the end of this module).

But the problem is how do we know whether a person intend or not to reside permanently in a particular place? This is difficult to ascertain as intentions are psychological in nature and can only be fully known only by the interested person. Article 184, provides a solution for this problem by laying a presumption which states that where a person has a principal residence, he is supposed to have an intention of residing there permanently.

This presumption is in fact rebutable. But the mere declaration by the interested person that the said individual has no intention to reside permanently is not sufficient.

As in the case of residence, the law does not allow a person to be without a domicile. If the domicile of a person is unknown or can not be determined according to the above rules, the Code under Article 188 provides that the principal residence of the individual will be taken as this domicile. In the absence of principal residence the first established secondary residence is taken as the domicile of the individual. You have studied above that a person has always at least

one residence in the place where he is in the ultimate analysis and that place will also be that of his domicile.

Apart from the domicile established in accordance with the above principles the law settles a few special cases. Thus:-

1. The domicile of a married woman is that of her husband as long as the marriage lasts (article 189).
2. The domicile of an unemancipated minor is that of his guardian (Article 190);
3. The domicile of an interdicted person is where he was domiciled at the time of the interdiction (article. 191).

Once a person has a domicile in a given place, he shall keep it, as long as he does not establish it in another place. Thus once someone has a domicile, everyone can consider it as valid. In case of conflict, it will be for the person whose domicile is contested to prove that he has effectively established his domicile in another place.

Under Article 189(2), the married woman is able to change here domicile and acquire one of her own when her husband is affected by a judicial or legal interdiction.

Domicile differs from residence in two respects first, domicile is a unitary concept. A person may have several residences, but only one domicile under the law of particular country (see Art. 186). Second, domicile denotes an element of permanency. It is the place where a person resides and has established his interests with the intention of living their permanently.

The legal effect or importance of domicile is not indicated in the Code or any other part of the law. The only concept important for the

application of the law and which is referred to in many areas of the law is residence. The importance of domicile is only for the purpose of private international law and one cannot see why it is in chided in the Civil Code. Perhaps it may have been included to facilitate the implementation of the Private International Law rules which were included in the draft Civil Code, but left out at the time of promulgation.

5.4. Nationality

Nationality is the status of being a subject to a given state. It is the quality or character which arises from the fact of a person's belonging to a state. It is explained in terms of the status that an individual has vis-à-vis a given state.

The concept of nationality is important both for domestic (municipal) law and international law. Under domestic law nationality provides a normal basis for the exercise of civil and criminal jurisdiction even in respect of acts committed abroad. It is also a basis for the exercise of democratic and political rights. Under public international law nationality is a prerequisite for the purpose of diplomatic protection, extradition and expulsion.

Although nationality is important concept both for international law and municipal law, it is the power of each individual sovereign state to determine matters of nationality through their own domestic laws. A state can legislate on how one become its national, how one lose its nationality, how one can be readmitted to its nationality, etc.

5.4.1. Acquisition of Ethiopian nationality

Generally, there are two basic approaches to determination of nationality. These are the rules of:-

- *jus sanguinis* (nationality by blood)
- *jus soli* (nationality by birth)

Under the principle of *jus sanguinis*, a child takes the nationality of his parents (where the parents are of different nationality, it is usually the nationality of the father) irrespective of where the child was born. For example, Germany has adopted *jus sanguinis* as the decisive factor; children born of German whether born in Germany or abroad acquire German nationality while children of foreigners born in Germany are not German nationals but take the nationality of their parents.

Under the principle of *jus soli*, children born in a country, whether the parents are nationals or foreigners, become national of that country. Conversely, children born to its nationals residing abroad are not nationals. Argentina is taken as an example where the territory on which the birth occurs is the exclusive determining factor for determining nationality.

Many nations also recognize elements of both principles in their nationality law, with one or the other usually predominating. For instance the United States of America is primarily a *jus soli* nation. The Fourteenth Amendment of the US constitution provides that all persons born in the United States are nationals of the United States. At the same time the US law allows nationality to children even born abroad provided that one of his/her parents had a residence in the United States or its possession priori to the birth of the child.

Since some states use *jus soli*, and others *jus sanguinis* and many states a combination of both, frequently individuals are born with dual or multiple nationality (being national of two or more states). For example, a child born in the United States from German immigrants who had never renounced German nationality would be considered an American by the United States nationality law and the same child would be considered German by the Germany nationality law. Dual nationality may arise also if a woman takes her husband's nationality upon marriage under his nationality law, but does not lose nationality under her nationality law. Some states provide that a national loses his nationality by accepting foreign nationality. Others permit their nationals to take on foreign nationality without losing their original nationality. In this last case also dual nationality arises.

Another problem that arises in connection with nationality is statelessness. This results when a person loses the nationality of one state without acquiring nationality in another. For example, under the laws of some states a woman loses nationality by marrying a foreigner. If her husband's nationality law does not give her his nationality, she is stateless. In certain circumstances a person may be deprived of his nationality by his national law without acquiring another nationality.

Most people acquire their nationality at the time of birth. Whether a newly born child is national of this or that state is determined, as discussed above, based on the principles of *jus sanguinis* or *jus soli*. It should, however, also be noted that nationality can be acquired after birth through different meanses. Nationality can be acquired after birth:-

- by naturalization:- assimilation of aliens to nationals after they fulfilled certain conditions and requirement as provided by the law of the state to which application is made.
- Reintegration or readmission:- an individual who has lost his original nationality may recover the original nationality upon fulfillment of certain condition.
- Annexation and cession: – nationality is acquired by annexation or cession by peoples inhabiting a ceded or annexed territory.

Concerning the acquisition of Ethiopian nationality the relevant laws are Article 6 of the FDRE Constitution and the Ethiopian Nationality Proclamation no. 378/2003 which is issued pursuant to Article 6(3) of the FDRE Constitution and repealed the 1931 Ethiopian nationality law.

According to these laws Ethiopian nationality can be acquired either:-

- by Descent:- being born from Ethiopian parents, or
- by law (naturalization):- acquisition of Ethiopian nationality by foreigners by law.

1. Acquisition by Descent

Article 6(1) of the FDRE Constitution provides that any person of either sex shall be an Ethiopian national where both or either parents are Ethiopian. The same rule is reproduced under Article 3(1) of the Ethiopian nationality proclamation no. 378/2003 with slightly different wording. Thus the simple fact of birth from parents both or one of whom are Ethiopian nationals confers upon the child the Ethiopian

nationality. By making descent from nationals a determinant factor for acquisition of Ethiopian nationality, the Ethiopian nationality law incorporates the principle of *jus sanguinis*. This rule is also extended to an infant who is found abandoned in Ethiopia. Such a child shall acquire Ethiopian nationality by presuming that he is born from Ethiopian parent unless proved to have foreign nationality (Art. 3(2)). The extension of nationality to the foundling protects the child from becoming stateless. If it is proved that the child has a foreign nationality he shall not become Ethiopian national.

2. Acquisition of Ethiopian Nationality by Law.

It is a foreign person who is not an Ethiopian national by descent (blood) that can acquire Ethiopian nationality by law. Acquisition of Ethiopian nationality by law means that foreigner shall become Ethiopian through naturalization.

Under the nationality proclamation there are five categories of foreigners who can apply for the acquisition of Ethiopian nationality by law.

These are:-

- any foreigner who want to become Ethiopian
- a foreigner who is married to an Ethiopian
- a foreign child adopted by Ethiopian national
- a foreign person who has made an outstanding contribution in the interest of Ethiopia, and
- children of a naturalized person.

The first category of foreigners has to fulfill all the conditions provided by the proclamations under Article 5. But foreigners in the rest four categories are not required to fulfill all the conditions provided by the proclamation for the acquisition of Ethiopian nationality by law. They are required to fulfill only some of the conditions. Therefore, we can say that there are two types of acquisition of Ethiopian nationality by law or through nationalization.

These are:-

a) Naturalization proper, and
b) Specially privileged nationalization

As to the specific requirements and the procedure to be followed in the acquisition of Ethiopian nationality by law see the Ethiopian nationality proclamation attached at the end of this module.

5.4.2. Loss of Ethiopian Nationality

An Ethiopian national may lose his Ethiopian nationality by renunciation of Ethiopian nationality. Renunciation of Ethiopian nationality may be express or implied.

a. Express renunciation:

Any person who is an Ethiopian national can renounce his Ethiopian nationality expressly (Art. 11(3) Nationality Proclamation). However, any person who wants to renounce his Ethiopian nationality has to acquire or has been guaranteed the acquisition of the nationality of another state. Such requirement aims at avoiding the occurrence of statelessness.

The person who intends to renounce his Ethiopian nationality has to inform the Security, Immigration and Refugee Affairs Authority in advance. In case of a minor child the renunciation of Ethiopian nationality shall be effected by the joint decision of his parents or by the decision of the Ethiopian parent where one of the parents is a foreigner (Art. 19).

An Ethiopian national who has the intention of renouncing his Ethiopian nationality and declared his intention to the Authority may not be released of his nationality till he has discharged his outstanding nationality obligation or until he has been acquitted or served the penalty, if he has been accused or convicted for a crime (Art. 19). This is because the right of renunciation of nationality should not be used as a way to evade national obligation or escaping penalty. Upon ascertaining that the person who intends to renounce Ethiopian nationality has discharged his national obligation or has been discharged from criminal proceeding or served his sentence, the Security, Immigration and Refugee Affairs Authority shall issue the applicant with a certificate stating the effective date of his release (Art. 19(2)).

Renunciation of nationality is a right and as such it can be enforced through court of law. Any Ethiopia, therefore, has a right under the nationality proclamation to appeal to the Federal High Court from the decisions of the Security, Immigration and Refugee Affairs Authority denying him of release from Ethiopian nationality. (See Art. 19(3) for Proc. No. 378/2003 and procl. No. 25/96, Art. 5(5), and 11(2) b)

b. Implied Renunciation

Under the Ethiopian nationality proclamation there are cases where the renunciation by an individual of his Ethiopian nationality is presumed. These presumptions are implied from the following acts of the individual.

- When an Ethiopian individual acquires another nationality by his voluntary act. An Ethiopian national who voluntarily acquires another nationality is deemed to have renounced his Ethiopian nationality voluntarily (Art. 20(1) Proc. 378/2003). For Example, if an Ethiopian national applies for naturalization in another state and is granted the nationality of that state, such individual is presumed to have renounced his Ethiopian nationality voluntarily. However, such a presumption is without prejudice to the provisions of the proclamation that require an Ethiopian who intends to renounce his Ethiopian nationality to discharge his national obligations and to be acquitted or served a penalty where he is accused or convicted of a crime (Art. 20(1) and 1994)). An Ethiopian who acquires another nationality may not be released until he has discharged his obligations under Article 19(4) (a) and (b) of the Nationality Proclamation.

- When an Ethiopian acquires another nationality involuntarily. An Ethiopian national may loss his Ethiopian nationality involuntarily, i.e. without his initiation. This may happen at the time of birth or after birth.

  A child, who is born of parents, one of them having a foreign nationality while the other is an Ethiopian, may acquire at birth both Ethiopian nationality, because of his

Ethiopian parent, and a foreign nationality, because of his foreign parent. Still a child may acquire a foreign nationality even if he is born of parents both of whom are Ethiopian, if he is born in a foreign state that follows the principle of *jus soli* for acquisition of nationality by birth. So, any Ethiopian who has acquired another nationality at birth and not already renounced his Ethiopian nationality voluntarily before attaining majority, shall be deemed to renounce his Ethiopian nationality unless he has declared to the Security, Immigration and Refugee Affairs Authority his option to retain Ethiopian nationality by renouncing the other nationality within one year after attaining the age of majority (Art. 20(2)). It is also possible that the renunciation of the nationality of the child before he attain majority can be made by the joint decision of the parents or where one of his parents is a foreigner by the decision of the Ethiopian parent.

The Child is, however, considered solely Ethiopian national until he loss his Ethiopian nationality by being presumed to renounce his nationality (i.e. until the age of 19) see Art.20 (4). If before completing the 19th year the child did not declare his intention to maintain the Ethiopian nationality, the law presumes that he has renounced his Ethiopian nationality.

An individual, although solely Ethiopian at the time of birth, may thereafter acquire another nationality involuntarily by the operation of the law. For instance an Ethiopian woman who is married to a foreign national can acquire, without her consent, her husband’s nationality

because of marriage and incase of cession or annexation of a territory an Ethiopian national living in that territory may be conferred with the nationality of the ceded or annexing state. In such a case an Ethiopian shall be deemed to renounce his Ethiopian nationality, if he fails to declare his option to the Security, Immigration and Refugee Affairs Authority to retain his Ethiopian nationality by renouncing his foreign nationality within a period of one year (Art. 20(3) b). He shall be deemed to renounce his Ethiopian nationality if he starts to exercise the rights conferred to such acquired nationality (Art. 20(3) a). Such individual is considered solely Ethiopian national till he loses his Ethiopian nationality for the purpose of his relation with Ethiopia (Art. 21).

5.4.3. Re-admission to Ethiopian Nationality

Any person who was an Ethiopian national at one time but has lost his/her Ethiopian nationality, either through voluntary renunciation or presumption of renunciation, shall be readmitted to Ethiopian nationality after he has fulfilled certain conditions. These conditions are:

- returning to domicile in Ethiopia,
- renouncing the foreign nationality, and
- applying to the authority for re-admission (Art. 22(1))

The law does not make any distinction between persons who were nationals of Ethiopia by descent and by naturalization. Both can apply for readmission to Ethiopian nationality. The application is, then submitted to the Nationality Affairs Committee within the Security,

Immigration and Refugee Affairs Authority for the ascertainment of the requirements mentioned above. The authority may give a readmission based on the recommendation of the committee.

Review Questions

1. Explain the similarities and differences between residence and domicile.
2. Explain the conditions under which Ethiopian nationality is acquired and lost.
3. Ato Ayalew lives in Addis Ababa and owns a house in Debre Zeit. He goes there every year on holiday. This year he dies in his house in Debre Zeit. Where is his residence for the purpose of the opening of his succession?
4. Ato Tamirat is a person who wanders around the country on a bike sleeping where he can. He has no family and never stays in one place more than a few days. He is involved in a traffic accident in Addis Ababa and the Police wants to serve summon. Where should the police give him the summon? Why?
5. Ato Bekele lives in Addis Ababa for 6 months and in Bahir Dar for 6 months. He has stores in both places. His wife, to whom he is married two months before is from Harar. After she has lived in Bahir Dar for two months, Ato Alemu wishes to serve summon on her in connection with a debt she owed in Harrar.
6.

Ato Bekeles's eldest son by his first marriage, Admasu, is 17 years of age and has been in France for six years at school. He wishes to be married and has applied for Ethiopian courts for permission. But the court wants to know where his domicile is.

Answer the following questions:

a. Where is Ato Beklele's residence? Domicile?
b. Can Ato Alemu serve a Summon on Ato Bekele's wife in Bahir Dar?
c. Where is Admasu's domicile? Residence?

7. W/ro Lucy who is an Ethiopian was a winner of the diversity Visa lottery and she has now entered in to the United States of America.

   Immediately after her arrival she gave birth to a baby boy christened Yoseph.

   - What is Yoseph's Nationality?

CHAPTER SIX

The Capacity of Physical Persons

Objective:

After studying this chapter the distance student will be able to:-

- Define the concept of Capacity
- Know the sources of incapacity
- Know the organs of protection of incapacitated persons and how they function
- Know how the incapacity of physical persons terminates.

6.1. Capacity in General

The term capacity in its legal sense refers to the ability of physical persons to exercise their rights and discharge their duties by themselves. The fact that physical persons are holders of rights and duties, since the moments of birth, and exceptionally, at the time conception does not always mean that they will exercise them. Exercising rights and duties requires capacity; the law must have given the holders the power or ability to exercise their rights. Those who are hindered by law from exercising their rights and duties are said to be under incapacity.

Concerning capacity of physical persons the capital principle as contained under Article 192 of the Civil Code is that capacity is the rule and incapacity the exception. In other words in the same way that all physical persons, as soon as they exist, become holder of all rights and duties, they are capable of exercising them. There must be an explicit declaration before some one can be considered as incapable, that he is unable to exercise of perform acts of civil life. What is more in the field of evidence capacity is presumed (Art. 196), and if someone alleges the existence of incapacity it is incumbent on him to bring satisfactory evidence to that effect. Thus in all acts of daily life, physical persons may assume that they are dealing with equals who not only hold but also exercise the same rights and duties as theirs.

In the same way as a person can not decide to renounce the holding of rights and duties, he can not as well renounce the exercise of them (Art. 195(1) Civil Code). There is one exception to this rule, however. Voluntary renunciation of the exercise of rights and duties is possible where it is justified by the law and public order (Art. 195(2)). Among

the cases where the law admits voluntary renunciation of the exercise of one's rights and duties are, for example, the case where one appoints an agent to act in his place and the case where one asks the court to pronounce a judicial interdiction of himself.

Although, as laid down under Art. 192, the general rule is that every physical person is capable, the law for one reason or another, declares some members or groups of society incapable. Once a person has been declared incapable by law, the extent of his incapacity is also defined by the law. In fact incapacities are never absolute. There is always a limited sphere which remains within the powers of the person declared incapable. The individual is left free to perform, without outside interference, some categories of acts of legal life. In respect of these acts left to the person declared incapable, the incapable person has full capacity and thus exercises his rights and duties in the same way as a normal person. This is justified either by the deeply personal character of some rights (the right to make will) or by the necessities of practical life (as in the case of acts of daily life). Thus, some rights and duties are still exercised by the person whose capacity has been lessened.

Article 193 and 194 of the Civil Code divide incapacities into two main categories:-

1. General incapacities, which depends on age (for minors) or on mental condition (for judicially interdicted persons) or on a penal sentence (for legally interdicted persons).
2. Special incapacities, which depend on nationality (for foreigners) or on functions (the case of persons who are prevented under special laws from

exercising rights and duties in connection with special functions which they perform).

It should be noted that these are the only cases where a physical person can be considered as incapable.

6.2. Persons with Incapacity

As mentioned earlier the Ethiopian law recognizes five categories of incapacitated persons. These are minors, judicially interdicted persons, legally interdicted persons, foreigners and persons with special functions.

The law defines, for each category of incapable persons, the manner in which the incapacity is established, the rights and duties that can still be exercised by the incapable person himself, the organs of protection of the incapable and their respective rights and duties, and finally the manner in which the incapacity ends. You shall now study them in detail.

6.2.1. Minors

The rules concerning minors that were incorporated into the Civil Code are repealed and replaced by the various Family Codes issued by the federal government and regional states. For the purpose of this study we will use the rules contained in the Revised Family Code proclamation no. 213/2003 which is the mother text for all other family Codes issued by the regional states. It should, however, be noted that the Civil Code provisions concerning minority are still

applicable in regions which have not yet promulgated their own family laws.

As defined under Article 215 of the Revised Family Code
"*A minor is a person of either sex who has not attained the full age of eighteen years*".
Any person who has not reached 18 years of age is a minor and as provided under Art. 216(3) of the Revised Family Code he may not perform juridical acts except in the cases where the law allows him to perform. Thus the principle that the minor is powerless is established and it is for the law to exempt him from the incapacity and allow him to perform some juridical acts. Even if minors are generally under incapacity as regards the exercise of their rights and duties or the performance of juridical acts, exceptionally, the law allows them to certain specific types of juridical acts. These are the following:

1. From the age of fourteen onwards, the minor himself receives the income deriving from his work and is free to dispose of such income as he wishes under the sole condition that he contribute to his maintenance (Art. 263). The law does not fix the amount of such contribution. From the wording of the provisions one can point out that it must be a contribution and that, consequently, the whole burden of his maintenance cannot be put on him.
2. At any age the minor can receive the income of any property donated, bequeathed or left to him, provided the person who has left the property to the minor expressly declared to this effect (Art. 264). It should be noted here that the minor cannot freely dispose of such income, unless the person who donates or bequeaths the property expresses his will that the minor receive that income and be able to dispose of it. Thus regard shall be had to the instructions given by that person in the contract of

donation or will. If no instructions are given, the guardian will dispose of the income under the general provisions of Art. 261.

3. Under Article 134 of the Revised Family Code the minor is allowed to acknowledge an illegitimate child. Such acknowledgement may also be revoked by the minor during the time of his incapacity or one year after his incapacity has come to an end unless the acknowledgement has been authorized by his guardian (Art. 140(2)).
4. The minor can be authorized by his tutor to conclude those contracts which, considering his age and his financial position, are to be regard as acts of every day life. Article 292 such authorization may be tacit but cannot, in any case whatsoever, be applicable to contracts which would normally require the authorization of the court (Art. 293) for their conclusion or to contracts which would entail on the minor an expense or obligation the value of which exceed three hundred Ethiopian birr.
5. Having reached the age of sixteen years, the minor can make his will (Article 295). If he makes a will before he attains 16, it can have not effect, even if it has not been revoked after the minor has reached the age of sixteen.
6. After attaining the age of fourteen, the minor can conclude a contract of employment under Article 48 and 89 of the Labour Proclamation no. 377/2003.

These six cases are those in which the Ethiopian law authorizes minors to perform juridical acts. In the case of an act being performed which is not within these precise limits the sanction would be that such act would be of no effect (Art. 299). The nullity of the act performed by the minor in excess of these limits has to be invoked by someone and the law, in Article 300, explicitly enumerates those

persons who are entitled to invoke the invalidity if the act. These are the minor himself, his heirs or his representatives (guardian and tutor) only. The nullity can always be invoked even if the minor has declared to the contracting party that he has reached his majority. This does not even entail the extra-contractual liability of the minor for the fault he committed by declaring false statements (Art. 304).

An exception to this rule of the nullity of any act performed by a minor when he has not the power to perform it, is the case where the contracting party can establish his good faith under Article 301. There are two conditions for the application of that article.

- The contracting party must in good faith believe that the minor has authorization to enter into the contract.
- The contracting party must not have taken advantage of the minor's inexperience.

Provided these two conditions exist, the contract entered into by the minor is valid. It shall take full effect with no possibility for the minor or any one else to invoke its nullity.

Another special case is considered under Article 302. Where payments have been made to the minor in performance of a contract the minor shall return it to the extent of the enrichment derived by the minor on the day when the action of nullity is required.

Under Article 303, the minor is submitted to the general rules of extra-contractual liability and unjust enrichment (as stated in Articles 2027 to 2178) in cases where the conditions laid down in these provisions apply to the situation resulting from his action. For instance the provisions of the extra-contractual liability law will not apply to the cases considered under Article 304.

6.2.2 The Protection accorded to Minors by Law

As mentioned earlier persons below the age of eighteen are under legal incapacity as regards the exercise of their rights and duties or the performance of juridical acts. This is done by the law purposely to protect the minor and not to imply that their personality is incomplete. They are persons in the full sense of the term and are holders of rights and duties from the moments of birth and sometimes from the moment of conception. Because of their age, persons below the age of eighteen are presumed that they do not understand the nature and consequence of their acts. As a result there is the fear that they may engage in acts that are prejudicial to their interest (personal and pecuniary interest). In order to protect minors from this danger and up bring them as a responsible citizen, the law has put them under incapacity and entrusted the exercise of their rights and duties to organs that are established and organized by the law. For their protection and well-being minors are put under the protection of a variety of organs which ranges from the guardian and the tutor to the courts, which only intervene as controlling organ, and include the tutor ad-hoc, each of them assuming a specific function. For most acts, however, the active organs of protection are the guardian or tutor who, usually, are one and the same person.

1. Guardian

The guardian of the minor is person who assumes the proper case of the person of the minor. The guardian of the minor is responsible for caring for the health, lodging, education and other matters affecting his personality.

The following persons are the ones to assume the position of guardianship.

A. The Father and the Mother of the Minor (Art. 219).

The father and the mother of the minor are joint guardians of their minor children. The father and mother can be considered as joint guardians only as long as they are united by a bond of marriage. Thus, if the bond is dissolved, the whole framework of guardianship will be affected.

The express reference to marriage in Art. 219 raises the issue of irregular union. Who is the guardian of children born out of such union? The Family Code does not answer the question in the provision on guardianship. On the one hand there is no doubt as to the existence of a parent child relationship in this case. Article 104 of the family Code, dealing with filiation in the case of irregular unions, refers back to the rules on filiation in the cases of marriage and these apply to irregular unions, as they clearly do not refer to marriage exclusively, but to a relation provided for by law (see. Art. 125(1) and 130 of the Family Code). But this doesn’t altogether justify the assimilation of irregular union to marriage under Article 219. It is, however, the opinion of this author that the Ethiopian legislator wanted to consider children born out of irregular unions in the same way as children born out of marriage, as the articles on filiation clearly show. The fact that the legislature has made no mention of irregular union cannot be interpreted as a lack of concern for the

protection of children. The reference to the existence of marriage in Article 219 is only made with the purpose of imposing the existence of a legal bond between the parents. Accordingly the words **"during marriage"** can be considered as meaning **during a relation recognized by law**.

B. The Surviving Parent in the case where one of the parents dies (Article 220(1)).
C. The other parent in the case where one parent becomes incapable or is declared unworthy (Article 220(1).
D. The person appointed by the parents when the marriage is dissolved by divorce (Article 221(1)). Where the spouses decide to divorce by mutual consent in accordance with Article 77 of the Family Code, they can decide by agreement as to who should take the guardianship of their children. If they cannot reach in an agreement as to who should assume the guardianship, it would be for the court which decides the divorce to decide also as to who the guardian should be.
E. The mother of the child in the case where the father is unknown (Article 22092)). This is the logical result of the principle that the parents are the guardians and that the father is exercising guardianship so long as he is able to do so. As unknown father is obviously in no position to manifest his will, the guardianship is entrusted to the mother. If the father is legally determined later on, then he takes up his duties as a guardian from the moment hat he is known as the father.
F. The person appointed by the last will of the surviving parent (Article 222). It should be noted here that the appointment can only be made by the surviving parent. This means that if a parent appoints someone in his will and the other parent

dies during the period between his death and the opening of the will the appointment made in the latter shall not be valid, as not having been made by the surviving parent. Another condition is that the appointment can only be made by a parent who had, during his lifetime, been a guardian of the child. This is an essential condition and there can be no appointment by will unless this condition is fulfilled.

G. Various persons determined by law in the case where both parents are dead and no valid appointment has been made by the will of the last survivor parent (Art. 225) Article 225 lists persons who will assume the position of guardianship in case where both parents have died without a will left by the last surviving parent. These persons are:-

    a. ascendants of the child, which could only mean the paternal and maternal grandfather and grandmother of the child.
    b. In their default, the brothers or sisters of the child who have attained majority,
    c. In their default, the uncle or aunt of the child.

The word in default seem t refer to four possible situations of the person in whom the guardianship is vested. Thus he may:

- Not exist
- Ask for exemption of the function of guardian (Art. 238).
- Be incapable of exercising the function of guardian (Art. 242 – 243).
- Have been declared unworthy of exercising the function of a guardian (Art. 244).

In all these cases, the guardian appointed by virtue of Article 225 is not in a position to exercise his functions and the next person on the list will assume the responsibility.

The appointment of a guardian by the law under article 225 is subject to the possible action of any relative of the child either by consanguinity or affinity (Art. 226). Any relative of the child by consanguinity or affinity may apply that the function of guardian of the child be accorded to him instead of the person who should perform such function under Art.225. The application is to be made to the family members mentioned under Art. 225 or incase where there is a disagreement to the court (Art. 226 (2)). The decision taken by the family members (relatives) or the court upon such application will only take into consideration the interest of the minor (Art. 226(3)).

H. A person appointed by the court in the case where no guardian has been appointed according to the previous rules (Art. 227). Where no guardian is appointed according to other procedures discussed above, the intervention of the courts is the ultimate remedy. The court will take up the matter and consider it upon the application of:-
    - An authority which has received from the law the duty of following up the security of children which may be the Ministry Of Labour and Social Affairs or regional appropriate Bureaus (Art. 227(3)).
    - The heirs of the deceased guardian according to Article 252(2).

- Any interested party, whether he is relative of the minor or not (Art. 227(2)).
- The court can also consider the matter by its own motion (At. 227(2)).

The intention of the legislator clearly seems to be that no child should remain without a guardian and that, accordingly, no single possibility of giving him one should be neglected.

Art. 228 recommend the appointment of specific persons as guardians of the child. These are/is near relatives weather by consanguinity or by affinity.

Ultimately, if no individual can be found for the purpose of exercising guardianship, the court may entrust the function to an institution of assistance under Article 229.

Powers and duties of the guardian

The general powers and duties of the guardian of the minor are defined in Art. 216(1) of the Family Code. This provision entrust to the guardian the “Proper care” of the minors person. The field of activity of the guardian is thus broadly defined by these five words. “Proper care of the person”. It will be for the courts to determine more precisely the exact meaning of these words. For the moment we can note that the words “proper care” seem to convey the idea that the care of the minor is not left solely to the guardians will, but that it has to satisfy some criteria which can be objectively ascertained and are represented by the word “proper”.

It must also be noted that the power of the guardian appointed by the will of the last surviving parent under Article 222 may be limited or subjected to special conditions by the testator. These restrictions or conditions may, where the interest of the minor so requires be revoked or modified by the court.

Apart from these general principles, the law also provides for specific rights and duties of the guardian. These are:-

1. Under Article 256, the right to fix the place where the minor shall reside. This does not mean that the minor must necessarily reside at the same place as his guardian as the minor is entitled to have a residence distinct from that of his guardian (Art. 178(2)). The right of the guardian to fix the residence is sanctioned by the power the guardian to compel the minor to his residence if he leaves it without the guardian's authorization, such authorization being required whenever the minor wishes to change his place of residence. It must be noted that the right of the guardian to fix the residence of the minor is as much a duty as a right as indicated by the words "Shall fix".

   As for domicile, Article 190 of the Civil Code provides that the unemancipated minor shall have the domicile of his guardian. Thus no choice is left here to the guardian: his domicile will necessarily be that of the minor.

2. Under Article 257, the guardian is responsible for the minor's health. If his health is affected, the guardian is bound to take all necessary measures for the minor's recovery. In this respect, it must be remembered that the guardian, under Article 20 of the Civil Code, has the power to submit his ward to any medical examination or treatment beneficial to his health.

3. Under Article 260, the guardian is responsible for the minor's education. No definition of the term education is given here. And this is because the nature and the extent of the education given to the minor will very much depend on the place where he lives, on the circumstances under which he is brought up, on the financial means of his parents, etc. Thus in each case it is necessary to consider the circumstances peculiar to the case of the minor, to determine if adequate education has effectively been given by the guardian to the minor.
4. Under Article 258, the guardian is given the right to direct the up bringing of the minor. In this effort the guardian, when necessary, take disciplinary measures for the purpose of ensuring his proper upbringing. This provision imposes on the guardian the duty of shaping the behavior of the child and make him a disciplined citizen.
5. Under Article 259, the guardian is given the power to control the social contacts of the minor, and this includes control of the minor's correspondence, which the guardian may cause to be delivered to him. The only limitation in so far as social contacts are concerned, is that the guardian cannot, unless he can show good cause restrict the contacts between the minor and his ascendants whether by directly seeing them or by correspondence.
6. Article 261 to 265 deal with the only patrimonial attributions of the guardian, these attributions being generally within the jurisdiction of the tutor concerns exclusively the income of the minor.

   The income of the minor is received by the guardian (and not by the tutor) under Article 265. But this article must be read in conjunction with Article 283 which defines the role of the tutor

in so far as the income of the minor is concerned. In fact, the guardian does not receive directly the income of the minor as Articles 265 and 283 seem to indicate. He receives it from the tutor who transfers it to him on the conditions and at the time specified by the court under Article 262(2).

7. The last matter in which an intervention of the minor's guardian is possible is that of the acknowledgement of an illegitimate child by the minor. Such intervention is not compulsory and we have seen above that the minor has full power on this matter. Yet a possible intervention of the guardian has the effect that the minor, under Article 140 (2) of the Family Code, no longer has the power to revoke the acknowledgement he has made. Thus the intervention of the guardian makes the acknowledgement irrevocable.

Control over the Guardian

The law provides for various means of controlling the activity of the organs of protection of the minor. In this respect the guardian's activities are controlled in the following ways:-

- Article 245 places the guardian under the control of the courts. Any relative of the minor, whether by consanguinity or affinity, or the public prosecutor may apply for the courts for the removal of the guardian (Art.248 (1)). Such request will have to be justified by the fact that the minor either does not receive the care which his condition requires, or that he does not receive a morally sound education, or that he does not receive instruction in accordance with his disposition (Art.245(1)).

It can also be justified by the fact that the minor has committed a criminal offence and when it appears that such behavior was the result of bad education or a lack of education given by his guardian (Art.245(3)).

- Article 247 requires that a decision to remove the mother or the father or any other ascendant of a minor shall be made with extreme caution. Moreover, such a decision shall never be final and shall be reconsidered by the court at the request of the person who has been removed.
- Before declaring the guardian's removal, the court shall allow him to present his defense, if this is possible without causing serious danger to the person or the property of the minor (Art. 249(1). If the court thinks fit, it may hear the minor himself (Art. 249(2)). The essential guideline of the courts in these matters is the interest of the minor, and they have complete discretion as to how best to do this under Article 249(3).

Termination of the Function of the Guardian

The functions of the guardian of the minor may come to an end when:-

a. The incapacity of the minor is terminates either because he reached his majority or when he is emancipated (Art. 241(1)).
b. The minor dies. The Code does not mention absence, but it seems clear that the declaration of a minor's absence would have the same effect, in so far as guardianship is concerned, as the death of the minor (Art. 241(1)).
c. The guardian dies. Although the law is silent, the declaration of absence of the guardian entails the termination of his functions. (Art. 241(2)).

d. The guardian becomes incapable. If someone exercising the functions of a guardian is interdicted by a court judgment, he ceases, by the sole effect of that judgment, to be a guardian. Apparently it is only judicial interdiction which brings the guardianship of the minor to an end. Legal interdiction has no such effect unless the court has declared the person unworthy of exercising the functions of guardianship.
e. The guardian is declared unworthy of exercising his functions by the court (Art. 241(2)). This can only happen as an accessory to a criminal sentence which either restricts the liberty of the accused or is a death sentence. If the punishment is one of these two possibilities, the court may declare the unworthiness of the guardian.
f. When a new guardian is appointed to the minor (Art. 227(3)). This provision may seem strange, as it would appear at first sight that no new guardian could be appointed to a minor without the previous departure of the existing guardian. Normally termination of the functions should result in a new appointment and not the vise-versa. Yet it seems that there is a justification for this particular provision. It covers the case of the guardian whose functions come to an end for various reasons, but who is bound to exercise them until he has been replaced so that the minor does not remain without a guardian. In such a case one could assume that the functions terminate as soon as the new guardian is appointed for the minor.
g. When the guardian is exempted by the court from exercising his functions (Art. 244) or 245). As a result of Article 240, which states the compulsory character of the functions of guardian, grounds for exemption do not relieve the appointed guardian of his functions until his case has been considered by the court. Thus if an exemption is granted, it will be a cause for the

termination of guardianship, even if the latter has been exercised for a very short time.

The grounds for exemption from assuming the function of guardianship are the existence of particular difficulties or inconveniences resulting from the guardianship for the person assuming the responsibility of guardianship (Art. 238). such difficulties or inconveniences are supposed to exist in following two cases where the exemption has to be granted by the court on a mere declaration by the guardian. These are the cases where the guardian is:

- a person who has completed his sixty-fifth year
- Soldier in active service.

Yet the exemption cannot be granted, even in these cases, where the minor is the child of the person applying for exemption.

2. Tutor

The tutor is the persons who takes care of the pecuniary interest of the minor and invest his capital. According to Art 231 of the Family Code, the person who is the guardian of the minor is at the same time his tutor. That means the appointment of a guardian by the court shall be an appointment to the function of tutor as well, unless the contrary results from the circumstances. Thus the appointment of the tutor is the same as the appointment of the guardian and I refer back the distance student to the previous paragraphs about the appointment of guardian for provisions regulating the appointment of a tutor. These are, however, a few exceptions to this principle:

a. The appointment of a tutor by the father and mother of the child, while they keep the function of guardianship (Article 232).

   This power belongs exclusively to the father and mother of the child and not to other persons appointed either by will, by law, or by court. The power lies within the exclusive jurisdiction of the parents. There is no condition to its exercise. They can do as they think it fit.

b. The appointment of a tutor by the surviving parent in his will (Art. 231(2)). This provision implies that the surviving mother or father may, in his/her will, appoint a tutor who is different from the guardian. Such appointment by will must of course comply with all the conditions already mentioned in the case of the appointment of a guardian by a will.
c. The appointment of a tutor by the court (Art. 233). Where the court has the power to appoint a guardian (art. 227 – 228), it also has the power to appoint a tutor who is not the same parson as the guardian.

Powers and duties of the tutor

Article 216(2) defines, in the most general way, the powers of the tutor of the minor. It normally restricts them to his pecuniary interests and the administration of his property, and states that, in such matters, the tutor shall represent the minor. Another article which deals with the same principle is Article 269. It repeats the same principle that the minor is represented in all civil matters by the tutor,

that he shall be responsible for these interests of the minor. It also introduces the idea that the tutor shall perform his duties as *bonus pater familias*. It must be noted also that, like the guardian, the power of the tutor appointed by a will may be limited or subjected to specific conditions by the testator. These restrictions or conditions may where the interest of the minor so requires, be revoked or modified by the court. Apart from these general principles, various articles of the Family Code consider in detail specific rights and duties of the tutor. You shall now study them in detail.

1. The fist specific duty of the tutor is to ensure that no confusion can exist between his property and that of the minor. This is considered in Articles 270 to272 of the family Code.

   Article 272 states the principle that there can be no confusion between the respective properties of the tutor and the minor, and illustrates this point by referring to specific case: that of the deposit of properties of the minor in the tutor's bank account. This is explicitly for bidden by Article 272(2). This is only a particular example of the more general rule that there must not be on any ground, confusion of the minor's property with that of the tutor.

   In order to facilitate the distinction between the property of the minor and that of the tutor, the law prescribes in Article 270 and 271 various inventories of the minor's property by the tutor.

   The first inventory must take place within forty days of the assumption of his tutorship by the tutor. It is the basic inventory which will serve as a starting point for all

accounts in connection with the tutorship. The inventory must include an evaluation of the various properties included in the inventory and in order to avoid possible undervaluation by the tutor, the law prescribes that reliable witnesses has to be present.

The same rules of inventory apply exactly whenever a succession is devolved upon the minor. Before accepting it on behalf of the minor, the tutor shall make an inventory of the succession under the same conditions as in the above case.

If some damage is suffered by the minor because no inventory is made, the tutor shall be liable to the minor for such damages.

2. Once the basic inventory and valuation have been made, one may consider that the tutor has to keep it up-to-date by regularly rendering account of his activities on behalf of the minor. This results implicitly from Article 297 which states that the tutor shall render account to the ascendants of the minor or his brothers and sisters who have attained majority, acting either individually or jointly.
3. Article 273 orders the tutor to deposit in a safe place (usually a bank) all securities, articles of value, important documents and other similar things which belong to the minor, on the condition that, no inconvenience results therefrom for the administration of the minor’s property.
4. Under Article 272, the tutor is given the power to alienate corporeal chattels, stocks and securities belonging to the minor.

5. Article 278 obliges the tutor, with the exception of the tutor who is the father or the mother of the child, to alienate all securities to bearer which come in to the property of the minor or if he does not wish to alienate them to covert those into registered securities within a period of three months after they devolve upon the minor.
6. Under Article 279, the tutor is obliged to pay all debts of the minor. He has to also collect any income from his capital. At the same time that he receives such capital or income the tutor has the right to give receipt for the person who pays.
7. Article 238 to 282 deals with the administration of capital belonging to the minor. The principles laid down in these articles are that capital belonging to the minor must be invested by the tutor as soon as it exceeds five hundred Ethiopian birr. Article 281 fixes a time limit within which capital must be invested. It is at a minimum of three months of the moment when the capital is at the disposal of the tutor.

   Article 282 provides for possible sanctions for the tutor who does not comply with the provisions of Article 280 and 281.

8. It is the duty of the tutor to deliver on a monthly interval, unless the court prescribes otherwise, that part of the income of the minor which shall be used by the guardian to ensure the education and maintenance of the minor (Art. 283).
9. Article 284 authorizes the tutor to enter leases on behalf of the minor. But there is a limit to his power in this

respect. He cannot bind the minor for more than three years after he reaches his majority unless it has been authorized by the court.

10. As far as successions are concerned, it is provided under Art. 285 that the tutor can either accept or renounce them on behalf of the minor. But, whereas there is no limitation to his power to accept a succession devolving upon the minor, he cannot renounce it unless the succession is insolvent.

11. The powers of the tutor concerning donations or bequests are defined under article 264. According to is provision the tutor may not refuse a donation or bequest made to the minor unless he can show that it is unimportant. On the other hand he cannot make donation on behalf of the minor unless they are small presents required by custom. This clearly refers to all kinds of presents which are exchanged on occasions such as anniversaries, birthdays, etc. The law clearly limits the powers of the tutor in this respect. Not only must the present be customary but they must also be of little value. Even if custom requires valuable presents it is not within the power of the tutor to make them.

12. Under Article 287, there is a very clear restriction on the powers of the tutor. In no case whatsoever may the tutor stand as guaranty for the debts of another person on behalf of the minor. The result of this absolute and clear cut provision is that no minor can ever be found in the status of surety for a debt.

13. Concerning compromise agreements, the tutor cannot, under Article 301, enter into such agreements on behalf of the minor without the authorization of the court,

unless the amount involved in the compromise agreement is less than one thousand Ethiopian birr in which case the tutor is free to act alone.

14. Contracts between the minor and the tutor cannot exist, unless there is an authorization from the courts (art. 289) and the same is true for the acceptance by the tutor of any assignment of rights or claims against the minor. No regard is made here to the amount involved. Such acts are totally forbidden unless the court authorizes.

15. The same rule is true concerning loans contracted on behalf of the minor. They can be concluded by the tutor only with the authorization of the court (Art. 290).

16. Under Article 291 the tutor has an obligation to consult with the minor, if:-

- The minor has reached the age of fourteen. However the consent of the minor will not relieve the tutor of his liability for any misdeeds.

17. Under Article 292 and 293, the law gives fairly wide powers to the tutor to authorize the minor to contracts of daily life. This power is in fact limited in two ways:-

- the act to be authorized should not exceed three hundred Ethiopian birr, or
- the act should not be one which requires the authorization of the court to be performed by the tutor himself.

Under Article 294, the tutor in ordered to stand as a surety in favour of third parties, for the obligation which the minor has assumed by virtue of the authorization.

18. Under Article 295 the tutor is not allowed under any circumstances, to make a will on behalf of the minor. Making a will is strictly personal to the minor.

19. Under Article 296 the tutor is given the right to be refunded all expenses which he has incurred in connection with his tutorial activities.

The family Code does not make clear how these refunds are to be made. The most practical solution seems to be for the tutor to render an account of his expenses in his regular account to the ascendants or brothers and sisters of the minor as indicated under Art. 297 and ask them at the same time for an authorization to be paid upon their instruction.

Dear distance student, these refunds are the only payments a tutor may receive for the performance of his functions, as the office is gratuitous under Art. 250(1). However, it is provided under article 250(2), that the tutor may be entitled to compensation when the administration of the property of the minor takes a considerable part of his time.

Under Article 250(3), such compensation may only be taken from the income of the minor and may not exceed one third (1/3) of such income.

If the tutor acted within the limits of the rights and duties which are described above, the acts which he will perform on behalf of the minor will be considered as being within the limits of his powers. As a result they will not be

subjected to a possible invalidation based on the fact that they have been performed by the minor. They will be binding on the minor, exactly as if they have been performed by him, being an adult.

Control over the power of the Tutor

The tutor is certainly the organ of protection which is subject to the heaviest control under the law. Under the family Code the control over the tutor is made at three stages.

1. Before tutorship beings
    - The tutor, as soon as he is appointed must under Article 270, draw up an inventory of the property of the minor in order to avoid to avoid possible contusion between his property and that of the minor.
    - Once the inventory is drawn up, the tutor will be given instruction by the court concerning the management of the property of the minor (Art. 274).

    This requirement applies to the tutor who is not the father or mother of the child and up on the application of one of the

ascendants, or one of the minor's brothers or sisters who has attained majority (Art. 274(1)).

Once the inventory is made and instructions are given to him the tutor is free to begin the full exercise of his activities.

2. During The Tutorship
   - While the tutorship lasts the original inventory must be dept up to date by the tutor which are to be submitted to the ascendants or brothers or sisters of the minor. The father and the mother when they exercise tutorship personally, are exempt from such obligation.
   - Many specific kinds of acts of the tutor are subject to control by the court or, in some cases by other people. this is the case fro succession developing upon the minor, of which an inventory must be made in the presence of reliable witnesses (Art. 271); for leases which would bind the minor for more than three years after he attains majority, for renunciation to succession devolving on the minor unless the succession is notoriously insolvent (Art. 285); for the refusal of donation or bequest made to the minor unless it is unimportant (Art. 286); for entering into contract with the minor or accepting any assignment of rights or claims against the minor (Art. 289). All these acts cannot be performed by the tutor freely, unless he has received the permission of the court. If the tutor performs without the permission of the court, he violates legal provisions and incurs the liability attached to such violation.
   - The tutor may be removed from his function by the court where it appears that he administers badly the property of the minor or where he does not comply with instructions

given validly to him by the person or institution who entrusted him or he is declared by a court insolvent (Art. 246). The grounds for removal are thus different from those in the case of the guardian, but exactly the same limitations, conditions, and procedures exist in both cases.

3. After the Tutorship has ended:-
   - When the function of the tutor comes to an end as the consequence of the death or attaining of age by the minor, his emancipation, or the removal or resignation of the tutor, the tutor must render an account of his administration to his former ward or his hiers (315(1)). An inventory of the rights and duties pertaining to the minor shall be prepared by the tutor (315(2)). At the same time that he renders his accounts and the inventory, the tutor shall also handover to the minor all properties belonging to the minor (Art. 315(2)).
   - If, at the beginning of his functions the tutor was negligent and did not prepare an inventory of the property of the minor in violation of Article 270, the minor is allowed to prove by all means the fact that such property effectively belongs to him Article 316(1)). Among these meanses, the law makes express reference to the production of reliable witnesses in Article 316(2). Proof to the contrary can always be presented by the tutor. Exactly the same rule apply where the tutor was negligent when some property developed on the minor through a successions (Art. 316).
   - The accounts presented by the tutor have to be approved by the minor or his heirs (Art. 317).

- Under Article 309, special liability is imposed upon the tutor when his behavior causes some damage to the minor. This is particularly true when the tutor has been negligent, has mismanaged the affairs of the minor, has not obeyed instructions given to him by the court, or has acted incases when his interests were in conflict with these of the minor.
- As for Article 318, it establishes a period of limitation for the action brought by the minor or his heirs against the tutor and based upon the liability of the tutor in connection with acts performed during the tutorship. This action will be barred, if they are not instituted with acts performed during the tutorship. This actions will be barred, it they are not instituted within five years of the cessation of the functions of the tutor. Yet, even of the period of five years has lapsed, the minor, but not his representatives or heirs, can still claim the restitution of his property from his former tutor, or institute an action against him based on unlawful enrichment.

Termination of Function of the Tutor

The rules described above in so far as guardianship is concerned are valid without any exception to the termination of the functions of the tutor of the minor. All articles of the Code apply to both the guardian and tutor. You need any to revisit the discussion on the termination of the guardian of the tutor.

3. Tutor Ad-hoc

The tutor ad-hoc is appointed by a court in the place of the tutor when there is a conflict of interest between the tutor and the minor or between may minors of whom the tutor is the common representative. The function of the tutor ad-hoc must be exercised by their holder as soon as he is aware that he has to exercise them. He cannot refuse to do so even if he intends to apply for exemption. His situation is exactly the same as tat of the tutor. All rules applicable to the tutor proper are also pertinent to the tutor ad-hoc (See Art. 254 and 308).

4. Courts

The courts are the ultimate organ of protection of protection of minors. As discussed else where in this module, the courts have a very wide power in controlling the activities of the guardian, tutor and a tutor ad-hoc of the minor and ensuring the wellbeing of the minor. Since the role of the courts is extensively discussed in connection with other topics discussed earlier, no much need be said here.

Termination of the Disability of the Minor.

Minority (i.e. the disability of the person below the age of eighteen years) comes to an end in two ways:-

1. by reaching the age of eighteen years, or
2. By Emancipation

Reaching the age of eighteen is the most common way in which a person ceases to be a minor. This results from the definition of minority as stated in Article 215 of the Family Code: a minor is one who has not attained the full age of eighteen years. It must be emphasized that the law requires the full eighteen years to have been reached before minority ceases to exist. This means that one is still a

minor while one is, according to the common expression, in one's eighteenth year.

Emancipation may come from either:-

- The decision of a court to emancipate the minor, Art. 312, or
- The fact of concluding marriage by the person below the age of eighteen (Art. 311).

When a minor is married in accordance with the provision of Art. 7(2) of the family Code, then the sole fact of marriage will emancipate him and bring him to the class of persons with capacity.

Emancipation, as indicated above, may also be abstained from a decision of a court. Where a minor has attained the age of fourteen years, his guardian or his tutor or any interested person may apply to the court for his emancipation. after considering the conditions of the minor, the reason applied for and where it finds that the emancipation is in the interest of the minor, the court can decide to emancipate (to free from his incapacity) the minor.

The effect of emancipation obtained by the sole fact of marriage or by decision of a court of law is the same. The emancipated minor will be considered before the law to have attained majority (Art. 313).

Another important point in connection with emancipation is, the fact that emancipation is irrevocable 9Art. 314(1)). Even the dissolution of the marriage will have no effect on the effect of the emancipation, unless the court, exceptionally, give otherwise decision at the time when it pronounces the dissolution of the marriage (Art. 314(2)(3)).

Insanity and Infirmity

The rules governing insanity and infirmity are contained in the Civil Code. Accordingly all the articles cited in these sub section is that of the Civil Code unless otherwise indicated.

Article 339 of the Civil Code defines insanity in the following way.:-

An insane person is a person who as a result of insufficient mental development or a mental disease or a comparable lessening of the reasoning capacity due to, such as, feeble mindedness, drunkard, habitually intoxication or prodigality is under an incapacity to understand the importance of his actions.

Thus there are two elements in this definition to identify a person as an insane one. These are:-

1. The incapacity to understand the importance of one's actions, and
2. this must be due to insufficient mental development of the individual, or mental disease or a lessening of the reasoning capacity due to drankardness, habitual intoxication, feeble mindedness or prodigality.

These two elements must exist simultaneously in order to consider a person as an insane. Thus it a man is occasionally drunk, the first condition exists, but not the second.

In the same way a man can be senile and yet still be able to understand fully the importance of his actions, the second condition exists but not the first one.

According to Article 340, some persons can be assimilated to insane persons. These are infirm persons.
Infirm persons are defined by the code as a person with a permanent infirmity like deafness, dumbness or blindness as a result of which they are not able to take care of themselves or administer their property. The code refers here to a deficiency in the physical constitution of the individual as opposed to a deficiency in the mental constitution which is considered above.

The law makes further distinction between insanity or infirmity and notorious insanity or apparent infirmity (art. 341-342 and 343). The conditions required for notorious insanity depends upon the place of residence and are as follows:-

1. in communism of tow thousand or more inhabitants, the registration as an inmate of a hospital or of an institution for insane persons or of a nursing home, as long as the person remains in such institutions by reason of his mental condition by reason of his mental condition.
2. In communes of less than two thousand inhabitants, a watch dept over a person by this family or those with whom he lives, being required by his mental condition, and the fact that his liberty of moving about is, for this reason, restricted by those who are around him.

These are the tests to determine whether the insanity is notorious or not. Thus notoriety is a matter of fact, which has t be examined carefully in each case. It is also meant to be a temporary character of insanity as it only lasts as long as the factual conditions leading to notorious insanity exist.

Thus a person escaping from a mental hospital would not be considered notoriously insane for the period during which he is out of the institution.

In so far as apparent infirmity is concerned, the criteria is that the infirmity should under normal circumstances appear to all persons concerned. It that is the case they will be governed by the same rules as in the case of notorious insanity.

Legal Effects of Insanity and Infirmity

In the case of insane or inform persons whose conditions is not notorious or apparent as defined above, their condition is without special effect on te juridical acts they can perform (Art. 347). That means they are able to perform all acts of civil life without any account being taken of their insanity or infirmity. Yet, they are protected in a slightly species way by the law under Article 347(2) which enables them to invoke a defect in consent if their insanity or infirmity has been the cause of such defect. It must be noted that the law does not establish any presumption in favour of the insane or infirm person. They have to prove that their consent was vitiated by their insanity or infirmity. This is te only way, for the infirm or insane person to have his juridical acts annulled. He cannot, under Article 347(1), challenge the validity of his acts solely because he is insane or infirm. It he wishes to challenge the validity of an act, he has to bring a suit on the basis of a possible vice of consent caused by his insanity or infirmity at the time his consent was given. This is obviously a very difficult task and it virtually makes the provisions in article 347(2) inapplicable.

Under Articles 348 and 349 his heirs or creditors, who are the main persons who should be protected against the results of insanity or infirmity, apart from himself, cannot, as a rule, demand the annulment of an act performed by the infirm or insane person on the grounds that he was not able to give a consent free from defects as a result of his insanity or infirmity. They can any do so when the infirmity is apparent from the act or when the interdiction of the infirm or insane person has been requested even if such request has been made after the act in question is performed.

In conchision not much protection is offered by the law to the insane or infirm person who is not qualified as notoriously insane or apparently infirm person or who is not interdicted by a court of law clearly the law wishes insane or infirm persons to make their condition notorious or apparent or to be interdicted so that they can take advantage of the protection of the law.

As far as persons whose insanity or infirmity is notorious or apparent, the situation is in some ways similar and in same respects different from that of persons whose insanity or infirmity is not notorious or apparent. It is similar in the sense that the principle of the full capacity of the infirm or the insane remains in fact, as in the case where the infirmity or insanity is neither notorious nor apparent. Thus a notoriously insane person or an apparently infirm person can still perform by himself all juridical acts without any restriction. He will be extra-contractually liable as though he were of sound mind under Article 350(1), and the same is true under Article 350(2) about his liability resulting from obligations under the provisions on unjust enrichment. However, the notoriously insane or the apparently infirm person is granted more protection that the person whose insanity is not notorious or infirmity not apparent. Under Article 343, the law

enables him or his representatives and heirs to claim the annulations of any juridical act performed by him at the time and in the place where the insanity or infirmity was notorious or apparent. There is not need here to plead the defect in consent. The notoriety of the condition of the insane or infirm person is enough in itself to allow him to require the annulations. There is a presumption of a defect in consent as soon as the insanity or infirmity is notorious or apparent. as a result of such presumption the provisions of the civil code relating to the annulation's of contracts on the ground of error (Articles1696-1703) shall apply (Art. 344).

Thus the notoriously insane or apparently inform person is protected. but so also are third proteins who contract in good faith with the insane or the infirm, as under Article 345, the insane or infirm person is liable for the damage caused to the third party as a result of the annulation's of the contract. the good faith of the third party is presumed, under Article 346(1), unless there is proof to the contrary. but in the case of article 342, if the third party lives in the same commune as the insane or infirm person or in an adjacent commune, his bad faith is presumed and no proof is possible to the contrary (Art. 346(2)).

Judicial Interdiction

to interdict means to prohibit someone from doing something or taking away the capcity of a person. judicial interdiction exists in the case where a person is insane as defined under Article 339 of the civil code and where he has been interdicted by the court because his health and his interest so requires, or because his heirs interest so requires (Art. 351(1) and (2)). the infirm, defined under Article 40, can

also be interdicted by the court when he is incapable either to given himself or to administer his estate (Art. 351(3)).

an application for judicial interdiction by:-

- The insane or infirm person himself
- Any of his relatives by consanguinity or astinity
- The public prosecutor

any of these persons may apply for the interdiction of the insane or infirm person and there is no preference among them.

in order for the decision of interdiction to be made, the person whose interdiction is required must be alive, but he may still be a minor.

Before declaring the interdiction, the court has to check the factual conditions establishing insanity or infirmity exist and the necessity for the interdiction.

the person whose interdiction is required must be seen by the court, unless such appearance is impossible in which case the court will delegate either one of its members, or an expert (Art. 354).

An appear can be made from the decision of interdiction by any of the persons competent to make an application for interdiction. The law under Article 355 provides only for an appeal from the decision of interdiction. Then how about an appeal against the decision of the court, which has dismissed a request for interdiction?

When the court decides in favor of the interdiction, it may give to its judgment a retroactive effect by deciding that the insanity of the interdicted person was publicly known since such date as the court

wishes to mention with the sole restriction that it can not precede the date of the application for interdiction by more than two years (Art. 352).

Legal Effects of Judicial Interdiction

Once the interdiction of a person has been declared by the courts, the rights and duties which are normally exercised by this person can no longer be exercised by him and he becomes incapable. The code establishes the principle that a judicially interdicted person is subject to the same rules of protection as a minor (Art. 358). Thus the judicially interdicted person can only exercise those rights or incur those obligations, which he is specifically allowed to exercise or obliged to incurred the provisions of the law. These include:

- contracting marriage upon permission by the court under Article 15 of the R. Family Code.
- Requesting a divorce or putting an end to irregular union on the condition that the guardian agree to such act (Art. 370(1)).
- disowning a child under the condition that the court agrees to such act (Arts. 270(2) of the civil code and Art. 175(1) of the R. Family Code).
- Any act which the court authorizes the interdicted person to perform in the judgment of interdiction or in a judgment posterior to the judgment of interdiction (Art. 371)

It a judicially interdicted person performs an act, which he has no power to perform, such act can be invalidated in the same way as an act committed by a minor. The rule is general and does not admit exceptions, even if it is proved that the act was performed by the insane persons during a lucid interval (Art. 373). This means that the

interdicted person, his representatives, or his heirs can ask for the annulment and that the provisions of the code dealing with nullities resulting from mistake shall apply. Yet Article 26993) extends the field of persons capable of requesting the nullity in the special case where the interdicted person has been married without the authorization of the court. in such case, any interested person is entitled to apply to the court to declare the nullity of the marriage.

6-2-6. Protection accorded to judicialy interdicated persons

Once a person is judically intendicated he cannot exercise his rights and duties by himself. The exercise of his rights and duties will be transterred to organs that are organized by the low for the protection of judicially interdicted persons. As provided under Article 558 of the civil code except for some exceptions a judicially interdicated person is subject, in respect of the protection of his person and property, to the same rules of protection as a minor. all rules pertaining to the protection of the minor are applicable to the judical interdicated person except those special provisions (Art. 359-379) which are specificales applicable to the conditions of the judicially interdicted person.

Thus all organs of protection applicable to the minor are also applicable to the judicially interdicted person although there is a slight variance in their constitutional and responsibilities.

Dear distance student, in this section you will shedy the aorgans of protection of the judicially interdicted person. Since, as indicated above, the organs of protection of the judicially interieted person are almost identical with that of the minor we need not to repeat all that is said. here we will focuse only on those points where the organs of

protection of the judicially interdicted person differs from that of the organs of protection of the minor.

1. Guardian of the judicially intendicted person the guardian of the judicially interdicted person is ahuays appointed by the court in the judgement pronouncing the interdiction (Art. 359). The rules concerning the appointment, the compulsory nature of the functions and the incapacities to exercise such functions are similar to those existing in connection with minor. The only difference is that under Article 359 no one who is not the spouse, the ascendant or descendant of an interdicted person can be forced by the court to retain the functions of guardian of on interdicted person for more than five years. Everyone is free to do so, but cannot be forced into it.

As for as the powers and duties of the guardian of the judicially interdicted person is concerned, according to Article 358 of the civil code, he is in the same position as the guardian of the minor. thus we can assum that his rights and duties are similar to these of the minor except for the cases which or specially provided under Article 362 and the follows.

These special lades are:-

1. Under Article 362, it is an obligation for the guardian of the judicially interdicted person to ensure that the interdicted person lives in the place where his interdiction has been given publicity are as required under Article 356. This is an essential point in the protection of the public and of the interdicted person, as judical interdiction is conceived on a locasl bosis. if the interdicted person is free to move around the country

without control, the publicity required under Article 356 and 357 will be without value.

2. As in the case of minority, the guardian administers a part of the income of the interdicted person in order to provide for his case and maintenance (Art. 363). But unlike minority, the guardian of the interdicted person is required to render accounts of his use of that income.

The guardian of the judicially interdicted person is liable for third parties who in good faith, contracted with the judicially interdicted person (Art. 374). But his liability only exists when there is a prejudice carised to the third parts is the invalidation of the contract. thus for Article 374 to be effective, there must be an invalidation of the contract entered into by the judicially interdicted person and a prejudice resulting there from for the contracting third party.

The functions of the guardian of the judicially interdicted person may come to an end when:-

a. The interdiction is withdrawn by the court
b. The judicially interdicted person dies or is declared absent
c. The guardian dies.
d. The guardian becomes incapable
e. The guardian is declared unworthy by court
f. A new guardian is appointed to the interdicted person
g. The guardian is exempted by the court from exercising his function
h. the guardian ask for exemption under Art. 359 (2).

2. Tutor of Judicially Interdicted person

The tutor of the judicially interdicted person is appointed exclusively by the court, in the same was as the guardian is the same limitations also exist in so far as an appointment for more thane five years of a person who is not the spouse, the ascendant or the descendant of the interdicted person is concerned.

While in the case of the minor a distinction is made between tutors in general and tutors who are the father or the mother of the child, this is not true for the tutor of the judicially interdicted person under Article 365. The mother or father of such person, when exercising the function of tutor are not differentiated from other tutors and are subject to exactly the same control as any ordinary tutor.

Article 366 provides a rule which is absolutely similar to the one existing in the case of minority bind the judicially interdicted person for more than there years after his disability has ceased unless there is an authorization from the court to that extent. thus the tutor is completely free to enter into any lease which would not bind the incapable person beyond that period and he is free to enter into any kind of lease authorized by the court.

In so for as donations are concerned, under Article 367, there is no limitation on the power of the tutor to refuse donations mode to the judicially interdicted person. the tutor can also make donations on behalf of the interdicted person, provided that:-

- The donation is made to the descendants of the interdicted person, and
- They are authorized by the court

The control of the tutor of the judicially interdicted person is organized under Article 368, in the same way as the control of the tutor of the minor. thus all the above mentioned rules dealing with the control of the tutor of the minor apply to the control of the tutor of the judicially interdicted person.

There are, however, special rules established in connection in connection with the control of the tutor of the judicially interdicted person. thus, under Article 367 donations made by the tutor of the judicially interdicted person has to be approved by the court.

The function of the tutor of the judicially interdicted person terminates in the same way as the guardian and there is no need to repeat it.

6.2.7. End of the Incapacity of Judicially Interdicted Person.

Judicial interdiction and the incapacity it entails ceases through a regular procedure of withdrawal of interdiction. This means under Articles 377 and 378:-

- An application to the court for withdrawal of interdiction by the persons who are entitles, under Article 353, to apply for the interdiction. but contrary to what is provided under Article 353 the interdicted person himself is not allowed to require the end of the interdiction. such power is vested by the law in his guardian and tutor the application is to be made to the court and the law does not say whether or not it must be the one which has pronounced the interdiction.
- Once an application is filed, the court will have to be satisfied with the improvement in the condition of the formerly insane or infirm and interdicted person. If it appears that the cause of

interdiction have disappeared, which means that the interdicted person is now able to conduct himself and to take case of his interests, the court can decide to withers the interdiction.

As indicated under Article 379, the effects of such withdrawal will be the same as emancipation. This means that the formerly interdicted person will now have his full capacity with respect both to his personal conduct and his patrimonial interests. but the irrevocability of emancipation does not apply to the withdrawal of the interdiction. it is obvious that if the mental or physical condition of the formally interdicted person necessitates a new interdiction and such interdiction may be pronounced by the court in spite of the previous withdrawal.

6.2.8. Legally interdicted persons

This kind of interdiction results from the law, and more particularly from the penal law. This is clearly stated in Article 380, which define legal interdiction.

It appears that interdiction is not among the principal or secondary punishments considered under the criminal code. Interdiction, in the sense the civil code gives meaning to the word, i.e. the withdrawal of the power to administer one's property, does not appear in the criminal code. The only problem which is considered in the criminal code under Art. 122 is the deprivation of "Civil" rights. Thus one may conclude that the provisions of the civil code on legal interdiction are not yet enforceable.

Contrary to minority and judicial interdiction, legal interdiction concerns exclusively the property of the person subject to the

interdiction. As a result his powers, as far as his person is concerned, remain normal. This is confirmed by Article 386 of the civil code, which states the right of the legally interdicted person to marry, divorce, acknowledge an illegitimate child or disown a child. these acts can not be performed in his name by the tutor. in so far as his properly is concerned, the legally interdicted person is subject to the same rules as the judicially interdicted person. This principle is affirmed under Article 381. if the interdicted person perform an act which is in excess of his powers, such act shall be of no effect.

Since legal interdiction affects only the power of the individual to administer his property and not the regulating of his person, a legally interdicted person has only a tutor for the protection of his pecuniary interest. as indicated under Article 382 a legally interdicted person has no guardian.

The tutor who administers the property of the legally interdicted person is appointed by the court under Article 383. the person appointed to these function may be replaced at his own request or at the request of the spouse or a relative of the interdicted person, or at the request of the public prosecutor. Once a person has accepted the functions, he cannot be replaced unless he has a good reason and established to the satisfaction of the court. However, once the tutor of a legally interdicted person has served fro five years, his request shall be accepted by the court (Art. 384).

under Article 386(3), expressly forbids the tutor from performing some personal acts on behalf of the legally interdicted person to contract marriage, acknowledge an illegitimate child, request divorce or disown a child.

The function of the tutor of the legally interdicted person comes to an end when:-

- The tutor is relieved of his function by the court by showing good cause (Atrt. 384).
- the interdiction comes to an end, when the person has undergone the interdiction for the prescribed duration (Art. 388).
- the interdicted person or is tutor dies
- The tutor becomes incapable or is declared unworthy by the court.
- a new tutor is appointed.

The incapacity of the legally interdicted person comes to an end as soon as the period the interdiction which is provided in the judgment of interdiction expires (Art. 388).

i. Foreign Nationality

Foreign nationality is, according to Articles 194 and 389-393 of the civil code, another source of incapacity. The sources of the incapacity in this case is th fact of a person having a nationality distinct from Ethiopian nationality. but the incapacity that results from foreign nationality is not general. in fact the principle as lead down under Article 389(1) is that all rights and duties under the civil law are guaranteed for foreigners and it is only exceptionally that foreigners are under incapacity in respects of the exercise of some civil rights. The objects of the incapacity of foreign nationals are:

- The owning of an immovable property n Ethiopia, and
- The free exercise of professional activity

Under Article 390 foreigners are prohibited from owning an immovable situated in Ethiopia. But the incapacity of the foreigner to own an immovable situated in Ethiopia is not absolute in the sense that the foreigner may receive an authorization, from the appropriate government office.

it a foreigner acquires immovable in Ethiopia without authorization from the appropriate government organ, he is obliged to sell such immovable to an Ethiopia with in a period of six months.

If the foreigner does not comply with an order to sell given to him by the competent authority, within a period of six months, the property can be seized and sold by the competent authority. The proceeds the sale shall be paid to the foreigner by deducting twenty percent as a penalty and also to cover the expenses resulting from the process of the sale. The amount to be deducted will be reduced to only ten percent when the property has been acquired by succession (Art. 392).

Article 393 provides that the provisions that prohibit the acquisition of an immovable by foreigners is applicable to the case where a foreigner acquires rights for a period exceeding fifty years or terminable upon death.

Another incapacity of foreigners all concerns the free exercise of their profession. Under the Ethiopian employment law (Civil service law and labour law) foreigners can be employed only after securing a permit from the ministry of labor and social affairs. Furthermore foreigner can enter into a contract of employment only for definite period of time and in no can they can enter into permanent contract of employment.

It is quite clear that these incapacity of foreigners disappears when the foreigner adopts Ethiopian nationality.

6.2.9. Incapacity from the Exercise of Specific Functions.

Article 194 of the civil code provides that incapacity may result from the exercise of some functions or assuming some position. However, it does not refor to them in more detail. Defining the cases where incapacity results from the exercise of a given case is left to special provisions wighin the code or to special legislation. For instance we can mention as a special incapacity the case where the tutor of the minor cannot contract with his ward under the Revised Family Code. This is clearly an incapacity connected with the exercise of specific function.

Review Questions.

1. Explain the difference between the holding of rights and the exercise of rights.
2. Explain the rationale why the law puts some category of persons under incapacity as regards the exercise of some rights and duties.
3. Elaborate the distinction between general incapacity and specific incapacity.
4. Dawit, aged 16, wants to buy some new clothes for the Ethiopian new year. He had a good job and thought he could repay a loan. He, therefore, borrowed seventy-five birr from a money lender after his father had given him a written authorization to borrow. Dawit did not show the authorization to the money lender as the latter made no inquiry about his age.

Dawit bought the clothes but now he does not want to pay the money back to the money lender on the ground that the contract of loan is invalid.

What remedies are available for the money lender?

5. A seventeen years old girl, Bekelech, was injured by a car driven by Melaku. Meladu's insurance company agreed to compensate Bekelech who was given 2000 birr. Bekelech spent the money on an education course in type writing. When she reaches the age of eighteen she told Melaku that the compensation was invalid as she was a minor and that he must pay again.

   Is Melaku liable to pay again?

6. Ato Habte was continued to a lunatic asylum because he was subject to fits of insanity. During one of his sane periods Ato Habte expend from the asylum. He met a man, with whom he become friendly, in a bar. The man offered to buy Habte's farm for 10,000 birr. Habte agreed and signed a contract of sale which was witnessed by the barman and either people present.

   When the man took over the farm, Habte's brother, who is also his heir, objected. He said the form is worth at least 30,000 birr and that Habte was not only drank but also insane when he sold it. Unfortunately Habte spent some of the money on a ten-day drinking bout in which he entertained everone he met. The rest of the money has disappeared, either lost or stolen, Habte does not remember.

Habte is now back in the asylum. His brother wants to nullify the sale of the farm.

Can be successful in invalidating the contract of sale?

7. Ato Hailu was sentenced to life imprisonment for a political offence and was legally interdicted. He escaped from prison in Addis Ababa and Sought political asylum in Somalia. His extensive property in Ethiopia is under adininistration of a tutor. The turor now wished to give up his office of tutorship. Ato Hailu wishes to make a new will and he also wishes to appoint a new tutor to send him the income from his property.

   Advise Ato Hailu on the following Points:
   A. Whether the tutor may regign and whether Ato Hailu may appoint another.
   B. Whether Ato Hailu may make a will
   C. Whether a now tutor may send to Ato Hailu the income from Ato Hailu’s property.

8. Explain the similarities and Differences between judicial interdiction and Legal interdiction.

Chapter Seven

The End of physical Personality

Objectives:- After completing the study of this chapter, the distance student will be able to:-

- Know when physical personality comes to an end;
- Understand the concept of declaration of absence

- Understand the procedures to be followed in declaration of absence
- Know the effects of declaration of absence
- Know how declaration of absence terminates and its effect.

a. Introduction

Dear distance student, in the preceding cheaper you have studied how physical personality commences, the protections accorded to physical persons and the various attributes of physical persons as well as their presumed ability to exercise their rights and duties. physical personality, how ever, is not eternal and in one way or another comes to an end. In this chapter you shall study how physical personality terminates.

The civil code recognizes two ways in which physical personality comes to an end these are:-

1. Death, and
2. Declaration of absence

There is no reference, in the civil code to such concept as civil death, which is common in some wester legal system. Civil death applied, for example, to persons entering to monasteries or to criminals sentenced to prison for life. Monks and nuns were declared dead as soon s they entered into monastic life and criminate were so declared by the court decision sentencing tem for their crimes. the effect of such action or sentence was, in all respects, equivalent to physical death. The same was true in systems where slavery existed. as soon as someone became a slave, he ceased to be a person and became a thing, and thus his legal existence was brought to an end. The Ethiopian law recognizes only death and declaration of absence as the only events

that bring to an end physical personality and you will study them in the order.

b. Death

Article 1 of the civil code deals with the problem of the end of personality by death when it states that human persons hold rights and duties from birth to death. thus in the same way that physical personality generally concides with physical existence, it also comes to an end when the human being ceases to exist physically, i.e. when he dies personality which begins at birth, ends with death. The civil code does not provide a detention for the word death. Thus problems may arise with the development of modern medical science, especially in cases where a person has been clinically dead for some period of time and them revive artificially.

c. Declaration of Absence

as stated under article 154 of the civil code a person may be declared absent if:-

- he has disappeared, ie. he is no longer seen by others, and
- the complete lack of new about that person for a minimum of two years.
-

If such situation exists, any interested person many apply to the court of the place where the person who has disappeared had his principal residence. The low does not limit to any extent the natures of the personal who can apply to the court. It is sufficient for the applicant to have some interest in the declaration of absence. Thus he can be a guardian or tutor, a representative, a pasent, an heir, a creditor, etc, of the absent person.

As soon as the application is mode, the court shall prescribe its publication in the manner and place which the court thinks appropriate. The publication is mandatory in the place of the last principal residence of the absentee (Art. 155). The court is free as to the means of pulslociry and it would normally include oral or visual means such as radio, television, etc, apart from the more clerical means, such as a posting of a notice.

The court may also order that an inquiry be in made, with the assistance of the public prosecutor, in all places where the court considers of to be useful and in particular where the absentee had his last residence and where his presence was noticed for the last time (Art. 156).

All these preliminary actions lead to the declaration of absence by the court. The duty of the court to declares the absence may be mandatory or discretionary depending upon the conumstances of the case.

Declaring the absence of the person is mandatory for the court under Article 159 if:-

- the application to the court is made after a minimum of five years has lapsed since the disappearance, and
- these has been no news of the absent person following the p0ublicits prescribed by the court upon the application being made.

If these two conditions are not met the court has to consider the probability of the death of the absent person, and it such death seems probable, it shall declase the absence (Art. 157). Such decision is

entirely within the discretion of the court, but it must consider two particular sets of einumstances: the possible appointment of a representative by the absent person priors to his departure and the factors which might impede the arrival of news from the absent person. Within these limits the final decision lies with the court, provided that it meets the basic requirements of a thorough and extensive enquiry. In these cases, it must be noted, the court is not bound to deliver judgment immediately. It can either postpone its decision for a year or provide for the enforcement of the judgment only after the lapse of a year (Art. 158).

In all cases, whether the declaration is mandatory or not, the court shall, in its judgment, establish the day when the last news of the absentee was received. This is important as this date will be the point of reference for all effects resulting from the declaration of absence (Art. 160).

Under Article 161, the court may also deliver a judgment declaring the death of the absentee in the base where such death seems certain and not simply probable, as in Article 157. The kind of decision is again within the discretion of the court on the basis of the available evidence. This is the any case where legal death results from something other than the end of physical life. In such case the provisions absence will not apply.
All the effects of physical death will apply.

7.3.1. Effect of Declaration of Absence

The effects of the declaration of absence can be devided into two categories: general effects and special effects. These consequences which will be discussed in the following paragraph are only these of a simple declaration in the following paragraph are only these of a

simple declaration of absence. If this is accompanied by a lodgment declaring the death of the absent person, it will have all the consequences of physical death and the provisions on absence are not applicable.

1. General Effects of Declaration of absence

A declaration of absence affects all those rights and duties whose enforcement depends upon the death or existence of the absentee.

Insofar as rights are concerned (Art. 165), persons who have rights dependent an the death of the absentee may enforce them as soon as the judgment declaring the absence becomes final and effective. The code only refer to the fact that the judgment has 6to be final, which seems to refer to possible appeases from the judgment. But even in the case where an appeal has been introduced and judgment has been confirmed, it does not mean that it is necessarily effective, as the court may postpone the effect for a year under Article 158. But once the judgment is final and effective, the rights can be enforced. Such would be the case, for instance, for all rights conferred to persons in whose favour the absentee had concluded an insurance contract. The beneficiary of the insurance contract can claim payment after the declaration of absence.

But absence is not death in the full sense of the term, and accordingly, the exercise of these person’s rights is some what limited in the sense that the court may require a guarantee or some other security against the eventual reappearance of the absentee. This guarantee must be provided before the rights are enjoyed and caver only things which could be subject to restitution.

Insofar as duties are concerned (Art. 166), persons who have duties whose performance is bound to the fact that the absentee is alive, shall no longer be bound to perform such duties. This would be, for instance, be the case for all contracts in which the personality of the either parts is of paramount importance for the conclusion of the contract of persons who have the obligation to supply maintenance to the absentee. But the possibility of the absentee's return is taken into account and person who claim to be relieved from their duties may be obliged by the court to provide a guarantee or some other securities.

2. Special Effects of Declaration of absence

The special effects of absence considered in the code are concerned with the problem of marriage, succession and property.

The marriage of all absentee is dissolved on the day on which the judgment of absence becomes final and effective. For all practical purposes, it seems that the provisions of the family cades on the liquidation of pecuniary relation upon the dissolution of marriage shall apply. As for their personal relations if seems that the declaration of absence has the effect of lighting the provision of the visions family laws which provides that a person may not conclude marriage if he is bound by a previous marriage. The declaration of absence frees the spouse from his existing massage and enables him or her to remarry.

The only limitation to the passes of remarriage is that the absentee can always impugn the validity of the subsequent marriage who he reappears. The same power is given to the proves in an indisputable manner that the absentee is alive an the day when he institutes the action for dissolution.

The some principle exists concerning property which could devolve by succession upon the absentee after the date of the last news (Art. 164). If a succession opens after that date and if the absentee would have had some rights in the succession the portion f the estate which could have beers assigned to durin will be attributed to the other heirs of the deceased. Person in whom the short of the absentee devolved will be bound to produce a guarantee or other security in order to safe suas the right of the absentee incase he reappears (Art. 164(2))/

As for as the estate belonging to the absentee at the moment when the lest news has been head is concerned, the devolution and partition will take place among his heirs (Art. 167). If these is a will left by the absentee, this shall be opened at the request of any interested parts. Once the problems of devolution are settled, the properly can be partitioned and the heirs and legatees put in to possession of their respective shares.

But this does not mean that these persons have became the full owners if the property of the absentee. Their rights are li8mited by the low under Articles 168 and 169 which subjects them to four duties:

1. The way in which they can enjoy the absentee’s property is not absolute. They must act as a good ‘patter familias’ to mean as a normally careful and delizent man.
2. If the property is made up of sums of money, this must be invested within these months of the moment they are received.
3. The property of the absentee cannot be transferred to another person gratuitously, unless the possessor whishes to establish the children of the absentee. This is the only case where gratuitous disposition is allowed.

4. The last duty of the possessor is not mandatory. It can be imposed upon them by the court at its discretion. As in other cases where persons benefit from absence, the court may oblige the possessor to give a guarantee or security for all things which would be subject to restitution in case the absentee should reappear. Such surety or guarantee must be provided before the possessor commences enjoyment over the property.

7.3.2. Germination of Declaration of Absence

Unlike death which has absolute effects, declaration of absence has relative effects and it can be terminated at any time. It can be terminated by two circumstances:-

- ascertainment that the absentee is alive, or
- ascertainment that the absentee is dead.

If the fact that the absentee is alive is proved it will terminate the absence and its effects the life of the absentee is established most satisfactorily by the reappearance of the absentee. In the same way that, under noticle 5 (2) the best way of proving the existence of a person is to produce him, the reappearance of the absentee is definite evidence that he is alive. But this is not the only indispensable means to terminate the absence. Proof by any means that the absentee was alive on a data subsequent to that of the judgment declaring the absence has also the effect of terminating the absence. What matters here is not the date of the last news but the fate of the judgment. If follows therefore that termination of absence will be affected by news received after the judgments of absence.

It can also be established to the satisfaction of the court that the absentee was dead on a date different from that received by the court as being that of the last news. This has, again, the effect of

terminating the absence. Here what matters is the date which has been established by the court. In the judgment declaring the absence as the date of lest news. If it coincides with the date of death these is no problem. If it does not coincide, one will have to reconsider possible problems of succession in the light of the date of tenth. But it must be noted that the discrepancy between the date of last news and the date of death cannot be established by any one after ten years have estepsed since the date of last news indicated in the judgment of absence. One ten years have elapsed, it is only the absentee himself or a special attorney, which he has appointed after the date of the judgment declaring the absence, who can establish the date of death as being different from that of the last news (Art. 172).

The requirement that the affornes be as special one and appointed after the date of the judgment, are these to ensures beyond all doubt that the absentee did not doe on the date of the last news as established in the judgment of absence. This is a result of the need to protect, after a period of ten years, those in possession of the absenter’s property, without proof provided by the absentee or by his special attorney, the persons who have been put in possession of the absentee’s property mas act as having the right which justified them being placed in possession. They are no more limited by the provisions of Artices 168 and 169 (Art. 173).

If the absentee is alive, the consequences are well defınal under article 171. The basic principle is that the absentee is reinstated in all his patrimonial rights and duties as they when he reappears. This includes property which may have been acquired as a result of the obligation to invest sum of money (Art. 168) and all sums of money which have not yet been invested, whether they were orsinalls in this state or are the proceeds of an onerous transfer of some of his original

properties. The consequence of this principle is that the income of the property remains the property of the heirs or legates which have received such income.

If the heirs or legatees have failed in their duties either by not complying with their legal obligations (eg. Arts 168 and 169) or by committing frarit at the expense of the absentee, the absentee, when he reappears, will be entitled to clains compensation from them (Art. 171 (3)). These are the only circumstances under which an action by the returning absentee is possible. No action is possible in the case where, for example, the heirs or legatees have made mistakes in their administration which do not violate their legal obligation or cannot be considered as fraudulent.

Review Questions

1. What do you think is the i8mportance of the institution of absence?
2. What are the rights and obligations of persons put in possession of the property of the alisentese?

3. W/ro Yeshi was married in 1985 she lived happing with her husband Ato Abiyu for six years. One day Ato Abiyu left the house in the evening saying that he was going out to nearby ky6osk. Since then noting has been heass from him. W/ro Yedi was very much upset for man month. She visited all her husbands relations in seasce of news of him. In 1995 one of her husband’s cousins alleged that he had seen someone on the street who looked like Ato Abiyou. This person was accompanied by a woman and two small siris who resemble Ato Abiyu W/ro Yeshi was most worried to receive this news. However, in 1998 she met Ato Girma a charming rich man. Ato Gorma and W/ro Yeshi wish to get married.

W/ro Yeshi asks you for advice on the question of whether she can have her husband declassed absent and also as to what she should do with her husband's property. Advise W/ro Yeshi.

SUPREME IMPERIAL COURT ASMARA
NOVEMBER 23, 1965
Justices :

Ato Haile Arnan
Doctor Giancarlo Po1era
Ato Berhe Sekwar

EZABEL YOUSUF MA TOL ET AL. v. /ABA LOCHIS K:IDIY AS ET AL.
Civil Appeal No. 155/57

Successions- wills - disherison - administration of estate - principal residence of deceased. Civ. C. arts. 183, 184, 826(1), 882, 939, 3348, 3355.

On appeal from an action iTIstituted in the High Coun to

compeladmi1Iistrator of the
d=d'sestate to r,.liTTqni<;h~possession ofthe~te -and the 2.CCOtIIIts.

Heid: Decision affumed.

1. The principal residence of a deceased person under Civ. C. art. 826(1) is the person's
domicile as defined in Civ. C. am. 183,184.
2. A public will made abroad prior to the coming iDIto force of the Civil Code is valid
under av. C. art. 3355 where it complies with the form requirements of Civ. C. art. 882.
3. Where the national law of the deceased -pennits ctacit .disherison of relatives in con
formity with Civ. C. art. 939, ,the disinherited relatives are not entitled to the succession.

This case concerns the succession to .the estate of the late Woz. Meri Medewar, wife of the late Wadi Habib Medewar, daughter of Yousuf Matin. The fact that the late Mari Medewar and the appellants are children of the same father is not contested. It is also a known fact that the deceased was living in the town of Asmara, Eritrea Teklay Ghiz;at.

It is alleged ,thaot 'On tAugust 9, 1947 G.c., .the deceased, while in Egypt, appeared before a notary and made a public will in the presence of two witnesses. ~he died in Egypt without returning to Ethiopia.

The testator, in her will of Aug. 9, 1947 G.c., provided that after her death the Syrian Catholic A!S6ociation in Alexandria would 6ucceed to all her movable and immovable propetry. She also stipulated that the Association could sell all her immovable property outside Egypt,

purchase immovable property in Egypt and establish a welfare Organization as follows:

I. One part of the property would be used for housing old and disabled persons found in ,the Syrian Catholic Association in Alexandria;

2. A second part of the property would be used for bringing up the poor

orphans who are members of the Syri.an Catholic Association in Alexandriao;

3. A third part of the property would be used for help and religious service in the Syrian Catholic Church in Alexandria; on Fridays, services would be held in the name of the testator and her late husband; and

4. The representative Patriarch is empowered to execute her will and look

after the grave of the testator as well as that of her late husband.

The respondent had petitioned the Egyptian court to empower him to take possession of and administer the estate of the deceased on behalf of the Syrian Catholic Association in Alexandria.

The Egyptian court, in an order given on January 21, 1963 G.c., had empowered the respondent to take over and administer the movable and immovable property of the deceased for the time being.

However, since the immovable property and its fruits are situated in Asmara, Ethiopia, and since a decision of a foreign court cannot be executed unless it is seen and authorized by the Imperial Ethiopian Government Courts, the respondent submitted the order of the Egyptian Court to the High Court located in this Teklay Ghizat under Probate and Administration file 52/56. On Megabit 24, 1957 (April 2, 1965, G.c.) pursuant ,to the Courts ,Proclamation 195/62, the High Court permitted the Reverend Aba Lochis Kidiyas to take possession

of and administer the estate of the deceased for the time being.

No appeal has been made on this order.

But Professor Aldo Fornazini, the person who was ailminl~tering.the deceased's estate under the power of attorney given to him by the brothers and sisters *of* the deceased, was unwilling to hand over possession of the _.estate and.its fruits to the .new administrator. The respondent petitioned the High Court, to_compel Professor AIdo Fomazini tohaDd it over. In an order given on Miazia 16, 1957 (April 24, 1%5 G.c.) the High Court-dirPMed-::the presen!.appellants' agent. Professor Aido Fomazini, to hand over the estate and the accounts .from the time he took over as ailminl~trator together with any docmnents concerning the estate to the respondent The appellant's agent through his anomey hadcfiled an in1erlocutory~appeal to this court under file No. 77/57.

But-this court, under a decision given-on 'Miazia 28, 1957 (May 6, 1965 G.C.) rejected uthe appeal and remanciffi the file back to the High Court.

The connation of the appellants was that the deceased made her will in Egypt and died there. She was domiciled in Egypt and the-litigation concerning the succession was initiated in an Egyptian court. Therefore, the court that has the jurisdiction is the Egyptian court. This contention of the appellant was not found adequate. The High Court found:

1. The fact that the deceased had made her domicile the place where her main property was situated could be ascertained from the will.

2. Since the immovable property over which the dispute arise is found in Ethiopia, the case must be seen by Ethiopian courts in

accordance with the
Ethiopian law. .

3. Art. 939 *of* the Ethiopian Civil Code, permits tacit disherison of relatives of the second, third or fourth degree, unless they are ascendiants or descendants, therefore, .the awellants are not entitled to the succession.

Based on the above findings, the court overruled their contention, declared
the will of the deceased valid and dismissed the case.

The appeal was lodged against this judgment.

The grounds *of* a;ppeal are identical with appellant's contention in the High
Court and may be summarised as follows:

The deceased had made Egypt her domicile for about twenty years. She died there. The action concerning the succession was initiated in an Egyptian court and the result is pending there. The appellants can partake *of* the succession

under the Egyptian law. In accordance with Art. 3348 of the Ethiopian CiviL' Code and the Italian Civil Code Art. 11 23 - 456 - 923 which was in force in the Eritrean Internal Administration at the time the deceased died, any action
regarding the succession must be inittiated in the court of' the place where the. deceased was domiciled. Therefore, the decision of the High Court should be. reversed on the ground that the Ethiopian courts do not have jurisdiotion.

The reply submitted by the respondent contained the following:

L The deceasedand-ller late husband lived and were domiciled in Asmara
for over forty years.

2. Even though the deceased left for Egypt for old age and health reasons,
she had explicitly declared in her will that she was a domiciliary of Asmara.

3. Her will was -IDade in accordance with the law before an officer of civil status_ifn. this will she_had made the Syrian Catholic Association ~in Alexandria universaLlegatee.. for all her property.

As the testatorhacL.appointed the representative Patriarch of the Synan
Catholic Association in Alexandria executor of her will, the respondent had petitioned the Ethiopian court to empower him to administer the estate of the deceased purSllaIlt to the testator's will. The -respondent did not raise questions before the Ethiopian court concerning the testator's property in Egypt for the appropriate couT! is 1he Egyptian Court.

4. The reason why the deceased stated in her will the fact that Egypt was her residence and Ethiopia, the place where her property is situated, her
domicile was; beyond 'any~doubt, to confer jurisdiction on Ethiopian Courts=regarding s~ccession to her property.

5. The universal legatee of the deceased, the Syrian Catholic Association in Alexandria, came to know about the succession on January 21, 1963, G.C., at which
time it applied to the Egyptian Court. By this time the Ethiopian Civil Code was in. force in Eritrea. Therefore the applicable law is the

Ethiopian Civil Code and not tlle Italian Civil Code as submitted by <the appellants.

6. In accordalIlce with Courts Proclamation 3/1943, Art. 1, Sub-Art. 4, any actions concerning immovable property must be instituted in the court of the place woore tJhe immovable property is situated. Where .there is dispute concerning a succession, Art 826 of ilie Ethiopian Civil Code makes it clear that the suit must be instituted at the place where the deceased had his domicile at the time of his death. Art. 183 of the Civil Code makes it clear that the domicile of a person is the place where such person has established the principal seat of h.is interests and of his business, with the intention of living there permanently. Therefore, the case must be tried in the court of the place which the tes.tator had chosen as his place of domicile and also in the court of the place where the immovable property is situated. This is not a question of discrepancy between the Italian Law which was in force in Eritrea and the Ethiopian Law, but only a matter of procedure.

7. For example, in order to show that there is no difference between the former law and the present law, it may be appropriate to cite Article 923 of theItalian Civil Code and Art. 826 (1) of the Ethiopian Civil Code. Likewise, Article 16 of the Italian Civil Code and Art. 183 of the Ethiopian Civil Code are identicaL

8. Again, comparison of kticle 1, Sub~. 4(f) of !the Courts Pll"ocedure Proclamation 3/1943 and Articles 94 and 95 of the Italian Civil Procedure Code, similary Articles 23 and 456, shows that there is no difference between the former law and the present law.

Therefore,

A. the suit must be instituted in the Ethiopian Courts,

B. Article 3348 of the Ethiopian Civil Code is inapplicable to this case,

C. tbe deceased's will, .in accordance with Article 3355 of the Ethiopian Civil Code, is valid under the former and the present law,

D. frem the ev.idence subnlitted by the respondent, the law of ,the nationality of the deceased (the Libyan Republic) is in agreement with AJricle-939 of the Civil Code of Ethiopia, and

E. unrle:- Art. 939 of the Ethiopian Civil Code the appellants are not entitled to succ...~;the decision of the High Court must be affumed and the appeal of the defendants must be dismissed w.ith costs.

The above arguments reveal the whoie matter:

1. The fact that the deceased was a Libyan National and had no children is known.

2. The facts that the deceased and her late husband were living in Ethiopia and that the deceased was the owner of the immovable prQperty which is the subject matter of the suit are also known.

3. Even though the deceased died in 1962 G.c. without coming back to Ethiopia, since she had ascertained in her will of 1947 G.c.

that she was a domiciliary of Asmara in the Eritrean Teklay Ghizat, it is beyond doubt that she had established Asmara as her principal seat of her interests with the intention of living there permanently witihin the meaning of Art. 184 of the Civil Code of Et!hiopia.

4. However, not only was the deceased domiciled in Ethiopia, but also her immovable property is found here. In such a case, both under the former law of Ethiopia and Art. 20 of the new Civil Procedure Code any suit concerning immovable property must be instituted in "the court of the place where such property is situated." Nevertheless, the advocate for the appel1ant argued that the Ethiopian courts do 1110t have power to try the suit. Such a contention is iTrelevant and this has surprised the court.

5. The appellant's argument that since the suit is instituted in a foreign court with a result pending, the Ethiopian courts do not have jurisdiction is irrelevant because in accordance with Art. 8(2) of the Civil Procedure Code the pendency of the suit a foreign court cannot preclude the courts in Ethiopia from taking jurisdiction of the suit when founded on the same cause of action.

6. Since Proclamation 195/62 and Articles 456 and 460 of the Civil Procedure Code make it clear that in ,the absence of international conventions, judgments and decisions may not be executed in Ethiopia without the authorization of Ethiopian courts, the appellants should not have been surprised.

7. 'It must be de'ar that the Ethiopian courts have jurisdiction to try the case and power to authorize ,the execution of fOTeign decisions submitted to them after finding them final and enforceable.

8. The will was made before a notary in the presence of two witnesses in accordanre with Art. 882 of the Civil Code of Ethiopia. So. we have accepted it as a valid will.

9. Since under Art. 939 of the Civil Code of Ethiopia permits tacit disherison of Telatives of the secood. third or fourth degree. the appellants are not established to ,the succession.

10. Frem the respondents' written reply. it is clear that under the law of the nationality of the deceased, she can pass her property to anyone she likes provided that she is not survived by any decendants, ascendants or spouse.

11. Since the will as was made for a welfare purpose, that is to say to help the monastery of her country to make sure that her grave yanL and tlrat of her iate husband-are looked aftecand:-for-religious services held. in their names. there ,s no reason why the will should nnt be held valid.

For the above reason, we have affirmed the decisions of the High Court and dismissed the case. The appellant shall !pay the respondent E$350 (three hundred and fifty Ethiopian dollars) as costs plus any other costs in accordance with the receipts forwarded by the respondent.

We order .that a copy of this Order be served on the High Court.

Given and delivered in Open Court this 15 day of Hedar 1958 (November 23.
1966 G.c.) in the presence of both parties.