Introduction to Law and the Ethiopian Legal System

Course Code: Laws -1012

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Chapter I: Nature and Functions of Law

Objectives of the chapter

After completing this unit, You will be able to:

- Define law;
- Eexplain basic feature of law;
- Analyze theories of law;
- Identify the purposes of law;
- state the relation between law and state;
- Distinguish between legal norms and non-legal norms.

1.1. **Definition of Law**

What is Law?

- Jurists have defined law differently from different point of views.
- It has been called **Dhama** in Hindu jurisprudence and "Hukum" in Islamic system. Romans called it ***jus*** and in Germany and France, it is called as ***Recht*** and ***Droit*** respectively.
- **Jurist:-one who have thorough knowledge of law like, a judge and legal scholar.**

- Defining the term ‘law is not an easy task. Because the term changes from time to time. And then, different scholars define the term law in different was.
- Its definition may vary due to the different types of purposes sought to be achieved.
- Late us see some of the definition of the term Law.

- Black’s Law Dictionary defines law consists of rules of action or conduct. These rules are issued by an authority. In addition, these rules have binding force and are obeyed and followed by citizens. Sanction or other legal consequence may help the law to be abided by citizens.
- Law can be define from different perspectives.

- From the pragmatic perspective, American jurist, Benjanin Nation Cordazo defines law as a principle or rule of conduct so established as to justify a production with reasonable certainty that it will be enforced by the courts if its authority is challenged.

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

- Paton puts the meaning of law by saying law may be described in terms of legal order tacitly or formally accepted by the society and enforced. A body of binding rules sufficient compliance of them is ensured by some mechanism accepted by community is called law.

- The Greek philosopher **Aristotle**, Stated law as a "***pledge that citizens of a state will do justice to one another***". Aristotle defined "law" as " **a Rule of Conduct**".
- Aristotle's student, **Plato**, asserted that law was "*a* ***form of social control***".

- **Cicero**, a Roman philosopher, believed law was "**the *agreement of reason and nature*, the *distinction between the just and the unjust***".
- The British legal scholar **Sir William Blackstone,** described law as "a **rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong**".

- US Supreme Court ***Justice Oliver Wendell Holmes,*** on his part contended that ***law was a set of rules that allowed one to predict how a court would resolve a particular dispute,*** "the prophesy of what the courts will do in fact and nothing more pretentious …".
- Generally, No consensus in defining the term "law". Accordingly, different scholars have tried to define law differently.

1.2. Basic features of Law

i) Generality:- The most obvious feature of law is its generality. Law is a general statement regarding a possible human conduct. Any valid legal norm is applicable to all the *subjects* in the author's territory.

- Law is not meant to shape the behavior of a certain category of persons and leave others. Every one is subject to the application of any duly existed law, saving extremely exceptional circumstances (such as exemption from legal liability to a certain degree because of immunity provisions, Article 54(5 & 6), Article 63 of FDRE Constitution)

- For instance, a law passed by the Ethiopian legislator (the House of Peoples' Representatives) demands all Ethiopians to comply with it, irrespective of ***race***, ***language***, **religion**, social status, sex and political outlook.
- The generality of laws also implies that a ***law is applicable to all similar cases*****,** and it does not leave others and govern some.

- ***ii)*** ***Normatively:-*** One of the distinctive features of law is that it is a **normative statement**. This accords with the philosophical discourse on the dichotomy between the "**is**" and the "**ought**".
- The characterization of law as a normative statement refers to the "***ought***" aspect of the discourse, the statement of **what should be** rather than **what is**.

- Law is not a factual statement (description is not in the nature of law). It is rather a **prescriptive/regulatory tool** which purports to **shape human behavior in the future**.

iii) **Establishment in Permanence**

- The coming into force of law presupposes at least presumably its ***indefinite existence in the future***.

- In ***principle*** it is unusual to **fix a time-limit** for the application of law.
- A frequently changing law creates **social instability** and more prone to **losing legitimacy**. This does not mean, however, that laws live forever.
- They have to be **reasonably** flexible to accommodate changing social realities.
- Change in societal circumstances is normally a gradual process and the corollary gradual **remolding of laws** cannot be regarded as resulting in an unstable phenomenon.

- Laws violate the virtue of permanence and create instability when they **change quickly and unnecessarily** without having regard to the status of the situation it is meant to govern.
- Nonetheless, law might exist **exceptionally for temporary application**.
- The possibility of the **declaration of sate of emergency** (e.g. six months-Art.93(3) of FDRE Constitution) explains such a circumstance. The law declaring the emergency situation remains in force until the matter that called for the declaration of emergency **secede/pullout**.

iv) **Intimacy with Human Behavior and State**

- Law is a **social norm** and its ultimate concern is **regulation of the social behavior of human beings**.
- The claim of law would naturally be **made by men with respect to or as against each other**.
- Law cannot be employed to govern relationships of other **animate/living or inanimate/non-living things** as among themselves. It is not concerned with a claim between humans and other things either.

- Further more, the intimacy of the law and the state is also far from question.
- In reality, one cannot conceive/imagine, without the other (they are two inseparable aspects of the same system).
- One cannot have validity or legitimacy without the other.
- Indeed, the state is itself brought into life by law and cannot continue in that status without using law.
- The law, on the other hand, would have life and produce the desired effects only by the backing of centrally organized state machinery.

v) Strongly Institutionalized

- We have said above that law is backed by an established system of a state. The state is known for its strong institutionalization and this provides the law with **institutionalized system of enforcement**. The state is constituted by centrally established institutions of **legislature**, **executive** and **judiciary** entrusted with the tasks of **law making**, **law enforcement** and **interpretation of laws** respectively.
- The combined operation of these organs sanctions the law to be applicable by a strong force.

1.3. Theories of Law

- Read about the theories of law and prepare a note not more than 3 pages.
- Reflect in the class what you have read and understand?

1.4. FUNCTIONS OF LAW

- Similar to its definition, there is no agreement among scholars as to the functions of law.
- Jurists have expressed different views about the purpose and function of law.
- It is well known that law is a dynamic concept, which keeps on changing with time and place. It must change with changes in the society. Law, in the modern sense, is considered not as an end in itself, but is a means to an end. The end is securing of social justice. Almost all theorists agree that law is an instrument of securing justice.

- Salmond correctly stated, that “law is a body of principles recognized and applied by the State in the administration of justice.

- Hobbes and Locke recognised the positive role of law when they said, “the end of law is not to abolish or restrain but to preserve or enlarge freedom and liberty.
- Kant, stated the aim of law is the adjustment of one’s freedom to those of other members of the community.
- Bentham gave a very practical version of the purpose of law, which according to him, is maximization of the happiness of the **greatest number of the members of the community**.

- Holland, state the function of law is to ensure the well-being of the society. Thus it is something more than an institution for the protection of individuals' rights.
- According to Roscoe Pound law has four major functions:-

(1) maintenance of law and order in society;

(2) to maintain status quo in society;

(3) to ensure maximum freedom of individuals

(4) to satisfy the basic needs of the people.

- He treats law as a species of social engineering.

- The Realist view about the purpose and function of law is that for the pursuit of highest good of the individuals and the state as such controlling agency.
- The object of law is to ensure justice. The justice may be either distributive or corrective. **Distributive** justice seeks to ensure fair distribution of social benefits and burden among the members of the community.

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- **Corrective** justice, on the other hand, seeks to remedy the wrong.
- So, if a person wrongfully takes possession of another's property, the court shall direct the former to restore it to the latter. This is corrective justice.
- Rule of law is *sine qua non* for even-handed dispensation of justice. It implies that every one is equal before law and law extends equal protection to everyone; judges should impart justice without fear or favour and like cases should be treated alike, rather than unlike.

- Now a days, following are taken as important functions of law.

A) Social control – members of the society may have different social values, various behaviours and interests.

- It is important to control those behaviours and to encourage socially acceptable social norms among the members of the society. There are informal and formal social controls.

- Law is one of the forms of formal social controls. As to Roscoe Pound, law is a highly specialized form of social control in developed politically organized society.
- Lawrence M. Freedman explains the following two ways in which law plays important role in social control.

- **First**, law clearly specifies rules and norms that are essential for the society and punishes deviant behaviour.
- **Second**, the legal system carries out many rules of social control.
- Police arrest burglars, prosecutors prosecute them, courts sentence them, prison guards watch them, and parole broads release them.

B) Dispute settlement

- Disputes are un avoidable in the life of society and it is the role of the law to settle disputes.
- Hence, disagreements that are justiceable will be resolved by law in court or out of court using alternative dispute settlement mechanisms (ADR).

C) Social change

- A number of scholars agree about the role of law in modern society as instrument to **social change**.
- Law enables us to have purposive, planned, and directed social change.
- **Flexibility** of law provides some measure of discretion in law to make it adaptable to social conditions.

- If law is rigid and unalterable, it may not respond to changes spontaneously which may lead to resentment and dissatisfaction among the subjects and may even result into violence or revolution.
- Therefore, some amount of flexibility is inevitable in law.

1.5. RELATIONSHIP BETWEEN LAW AND STATE

- There are three main legal theories with regard to the relationship between law and state.
- They are:
- 1) The state is superior to and creates law,
- 2) Law precedes the state and binds it when it comes into existence,
- 3) Law and the state are the same thing looked at from different points of view.

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

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

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

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

- Then, Jellinek develops this doctrine into a theory of auto limitation-the State is the creator of law, but voluntarily submits to it.

- However, Krabbe and Duguit deny that the State creates law. Once we postulate that law is created by a source other than the State, it is easy to see how the State can be bound.
- According to Krabbe, the source of law is the subjective sense of right in the community.
- He asserts that any statute, which is opposed to the majority sense of right, is not law. The legislature, executive, and the judiciary are subordinate instruments through which the community expresses its sense of values.

- Kelsen illustrates the third type of theory that law and the state are really the same. The state is only the legal order looked at from another point of view. When we think of the abstract rules, we speak of the law: when we consider the institutions, which create those rules, we speak of the State.
- But, practical importance of Kelesen's approach is he emphasizes law is a more fundamental notion than that of the State.
- While it is true that law cannot exist without a legal order that order may take forms other than that of the state.

- Hence, the theory is wider, and therefore more acceptable, than that of Austin. A legal order may be created in the international sphere even though no super state is set up.

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

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

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

1.6. DIFFERENCE BETWEEN LEGAL NORMS AND NON-LEGAL NORMS

- What is NORM?
- According to Black's Law Dictionary, norm is "a model/standard accepted either voluntarily or involuntarily by society against which the society judges some one or something".
- So, norm implies a standard that is accepted by the society willingly or unwillingly.

- Generally, Law is a social norm, though not the only one. There are also other values of normative significance in a society.
- This "**other social norms**" category is filled perhaps by **ethics or morality**, **culture**, **religion**, and the like.
- These ethical/moral, or religious values are normative in the sense that they just like law, prescribe what should be and what should not be and accordingly shape the social behavior of a society.
- To this extent, law possesses an identical attribute to that of ethics, morality or religion.

- Nevertheless, there are ***conspicuous differences between law and other social norms.***

Firstly, one important issue that differentiates law from the other social norms is **mechanism of their enforcement.**

- Law is backed by a strong sanction of the state and would be **institutionally enforced**.
- Ethical/moral/religious norms on the other hand **lack** such external and effective enforcement mechanism.
- Their observance is more often demanded in point of conscience/ Right or wrong/ rather than through external organ.

- Individuals can breach these norms with impunity and the most they would suffer is moral guilty.
- ***Secondly:- Scope Of Application*** is a distinguishing mark between law and “other social norm” category.
- Law enjoys **uniform and nationwide** application. But the other social norms are **peculiar to particular groups** and, therefore, characterized by ***extremely localized*** (restricted) application.
- There could be a number of religions, cultures or customary practices in a state. But none of them would have norms that apply beyond their own **peculiarities**.

- ***Thirdly***, law can still be identified from other normative values of the society on the basis of the **mechanism by which it is created and changed**.
- Law originates from a centrally established and clearly defined **institutional framework**.
- The existence of clear institutionalized system would make it easy to bring law into effect and to amend it.
- Non-legal norms, on the other hand, do not normally have an **easily traceable institutional origin** or they are not made in an organized way.

- They come into existence through a practice by a concerned group over a relatively longer time in a **scattered and decentralized manner**.
- The development of these non-legal norms out of **unclear and gradual process** makes it equally difficult to them.
- They cannot be **amended** amenably. So easy and fast amendment is not their character as they are rigidly established.
- ***Fourthly:-*** further important factor that can be regarded as a virtue of law over non-legal norms is the **exhaustiveness and clarity embedded in law**.

- Law is **exhaustively proclaimed** (mostly written) and **sufficiently clear**.
- The conduct it purports to command or prohibit and the consequences of behaving otherwise is **fixed in advance**.
- Normative rules of ethics, morality, or religion are, on the other hand, **hardly exhaustive** and known mostly for their **manifest** & **lack clarity**.
- Again, most of the time non-legal norms do not determine the **consequences of breach in advance.**
- Since they are ***mostly unwritten***, they are surrounded by a ***cloud of vagueness and obscurity/darkness***.

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

Similarities B/n Law And Other Social Norms

- They are alike binding regardless of the consent of individual bound and supported by serious social pressure for conformity;
- Compliance with both legal and non-legal norms obligation is considered as a minimum contribution to social life.
- This is because as we have already discussed compliance with legal norms enable the members of the sociality to live together. The same holds true with respect to non-legal norms.

- Both law and other social norms include rules that are essential for life in general even though they also include special rules applicable to special activities.
- Thus, the members of the society are required to comply with those rules to live to gather.
- Thus, prohibition to violence to person and property are found in both law and morals.

Chapter II: Sources of Law

- After completing this chapter, you will be able to:
- explain the meaning of the term source of law;
- analyze the material sources of law;
- comprehend the concept of formal sources of Ethiopian laws;
- compare and contrast the role of FDRE Constitution and other laws as sources of laws;&
- apply the rules of sources of laws.

2.1 **Managing of the term source**

- The term ‘sources’ relates to the question: where does the judge obtain the rules to decide cases?
- In this sense, among the sources of law the commonly listed are: statutes, judicial precedents, custom, the opinion of experts, morality and equity.

- But in the context of law, the term ‘sources of law’ can refer to three different concepts, which should be distinguished.
- **One**, it can refer to the origins of legal concepts and ideas ...
- **Two**, it can refer to governmental institutions that formulate legal rules.
- **Three**, it can refer to the published manifestations of the law.

- **Sources of law can also be defined in three ways:-**
- **FORMAL SOURCE:-** which confers binding authority on a rule and converts the rule into law bay the state.
- The state is the formal source of law and for every law this type of source is the same, the will of the state.
- No rule can have authority as law unless it has received the express or tacit acceptance of the state.

- **The source of law may refer the place:-**
- If a person wants to get information about the law, s/he goes to look for it. The place where a person can get information about the law is naturally the literature on the subject.
- In this sense, the term source means **THE LITERARY SOURCE** i.e., from which actual knowledge of the law may be gained. These are: (i) statutes; (ii) reports of decided cases; and (iii) text books. These are the authorities from which a person can obtain information about the law.

- Thirdly, it may mean that which supplies the matter or content of the law. Custom, religion, agreement, opinion of text – writers, statute, precedent or judge made law, all come under this category. All these may supply the material for law.

- Those are all **material sources.** Among these material sources some are regard as authoritative by the law itself-that is to say judges are bound to follow them if they apply to a dispute before them-and some are regarded as merely persuasive-the judge may or may not base his/her decision on them.
- Salmond calls those LEGAL MATERIAL SOURCES, and those are only persuasive, HISTORICAL MATERIAL SOURCES.
- The legal material sources include statute law or legislation, precedent or case … custom and agreement or conventional law.
- The historical material sources influence more or less extensively the course of legal development, but they speak with no authority. They are persuasive.

2.2. MATERIAL SOURCES OF LAW

- Material sources of law are sources which would include custom, religion, legislation, and court decision.

2.2.1. CUSTOM AS A SOURCE OF LAW

Definition and important of custom

- A custom may be defined as a continuing course of conduct which by the acquiescence or express approval of the community observing it, has come to be regarded as fixing the norm of conduct for members as society.

- Dr. Allen defines custom as the uniformity of habits or conduct of people under like circumstances.
- When the people find any act to be good and beneficial, apt, and agreeable to their nature and disposition, they use and practise it from time to time, and it is by frequent use and multiplication of this act that the custom is made.

- Prof. Keeton defines custom as those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by court and applied as a source of law because they are generally followed by the political society as a whole or by some part of it.
- Generally, the term custom has no one wonderful definition. Accordingly, different authors define custom in various manners.

- There are d/t controversies concerning whether custom can be treated as an Authoritative law or not.
- There are two views regarding custom. A view by the Historical school and the Analytical school.
- According to Savigny and the German Historical School, custom is in itself an authoritative source of law.

- As per these scholars, the present cannot be understood without reference to the past and to understand the true source of law, we must go back to the days when society was in its infancy.
- Custom is the reflection of the people’s intention and, therefore, the source of law in these early days.

- On the other hand, the Analytical School scholars, like Austin, argues that custom is not an authoritative source of law at all. He points that as far as English law is concerned the so-called English customary law is purely an invention of the early English jurisprudence.

- If the judge does base his judgment on custom, it becomes part of judge-made law, and until it is thus adopted and incorporated in a decision.
- Austin maintains the rule of custom has no authority at all.
- Generally, custom is not a formal source of law, for that can only be the will of the state.
- State recognition alone can invest custom with the full authority of law. It is not a historical source because the judge is bound to base his/her decision on it.

- If it satisfies the tests that the state lays down, and because it is not destitute of all authority until it is thus applied. It is whoever one of those sources which supplies the principles to which the will of the state gives legal force, and since it is recognized as of right, it can properly be classed among the LEGAL MATERIAL SOURCE of law.

IMPORTANCE OF CUSTOM

- Custom occupies an important place as a source of law even to this day. Because most of the material contents of the developed systems of law have been drawn from ancient customs.
- The laws relating to succession, inheritance, property, contract, sale of goods, negotiable instrument etc, are evolved from early customary rules.
- With the emergence of legislation as a potential source of law making, the law creative efficacy of custom has declined. The doctrine of precedent has also gained primary over customary law in modern time but even then, at times courts do resort to ancient custom in order to remove inconsistency or ambiguity in the existing law.

2. 2 Requirements for custom to be recognized as Law

- There are requirements that must be fulfilled a custom to be recognised as law. These are:-

A) <u>Reasonableness</u>:- A custom must be reasonable. It must be remembered that the authority of a prevailing custom is never absolute, but is authoritative provided if it conforms to the norms of justice and public utility.

- A custom shall not be valid if it is obviously and seriously repugnant to right and reason and it is likely to do more mischief than good if enforced.

- The period of ascertaining whether a custom is reasonable or not, is the period of its inception. In this regard, **Sir Edward Coke** pointed out that a custom is contrary to reason if it is opposed to the principles of **justice**, **equity** and good **conscience**.

B. Consistency: - A custom to be valid, must be in conformity with statute law. In other words, it should not be contrary to an act of Parliament. A custom should

C) <u>Compulsory Observance</u>-

- A custom to be legally recognised as a valid custom, it must be observed as of right. It means that custom must have been followed by all concerned without recourse to force and without the necessity of permission of those who are adversely affected by it.

- It must be regarded by those affected by it not merely as an optional rule but as an obligatory or binding rule of conduct. If a practice is left to individual choice, it cannot be treated as a customary law.
- Before accepting a custom as a binding source of law, the court should satisfy itself that the custom has transformed into an unmistakable conviction of the community as to the rights and obligations of its members towards one another.

- Citing an illustration of the compulsory observance of a valid custom, **Blackstone** pointed out, “A custom that all the inhabitants shall be rated towards the maintenance of a bridge, will be good, but a custom that every person is to contribute thereto at his own pleasure, is idle and absurd and indeed no custom at all.”
- If the observance of a custom were suspended for a long time, it would be assumed that such **a custom was never in existence**.

D) <u>Continuity and immemorial antiquity</u>:–

- A custom to be valid should have been continuously in existence from the time immemorial.
- To quote Blackstone, A custom in order to be legal and binding, must have been used so long that the memory of person [runs] not to the contrary. If anyone can show the beginning of it, it is no good custom.
- Recent or modern practices cannot be custom until they become firmly established in society.

E) Certainty:–

- In order to prove the existence of a custom since time immemorial, it must be shown that it is being observed continuously and uninterruptedly with certainty. The element of certainty evidences the existence of a custom.
- Therefore, a custom cannot be said to be in existence from the time immemorial unless its certainty and continuity is proved beyond doubt.

F) Must not be opposed to Public Policy

- Whatever the public policy may be of the state the custom is operating in, has to be conformed too.
- Some writers include **public policy** as one of the essential requisites of a valid custom.
- According to the writers, custom should not be opposed to public policy. Thus, a custom to be valid must not be contrary to public policy of the place and time of the state.

G) Must be General or Universal

- According to **Carter**, “Custom is effectual only when it is universal or nearly so. In the absence of unanimity of opinion, custom becomes powerless, or rather does not exist.”

2.3.Theories regarding mechanisms of transformation of custom into Law

- For custom to be regarded as law, more than simple usage is required, even if the usage is general and has long flourished. Consistent behavior in accordance with particular implicit rules does not indicate that people should so behave, or conversely should be subject to some sanction if they do not. The main problem for any theory of customary law is determining the nature of the additional factor required to transform custom into law.

- Try to study this topic by considering some five theories of customary law, namely:-

- **The Tacit Consent Theory**,
- **The Theory Of Opinion Necessitates**,
- **The Common Spirit Of The People**,
- **Sovereign Recognition,** And
- **Judicial Recognition**.

CUSTOM IN ETHIOPIA

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

The place of custom under Ethiopian laws

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

  Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby

- The FDRE Constitution under Article 9(1) also states the following regarding custom. Any law or customary practice that contravenes the FDRE Constitution shall be of no effect.
- This implies that as a matter of principle, under the current Ethiopian legal system, custom has no a significance place and role.

- However, in exceptional cases custom has a place in Ethiopia laws. In this regard, for instance, Art. 1713 of the CC. states the following. The parties shall be bound by the terms of the contract and such incidental effects as are attached to the obligations concerned by CUSTOM, equity and good faith, having regard to the nature of the contract.

2.3.1. Religion as source of Law

- In ancient time religion exerted great influence on primitive societies. It contributed very largely to the growth of legal systems in most parts of the world. The ancient Roman and Greek laws were largely based on religion.
- In England, during the middle ages, law was mostly contained in religious testaments because of the dominance of Church over the State.

2.3.4. **Islamic Law**

- Although **Ibn al- ‘Assal** the writer of Fetha Nagast for obvious dogmatic reasons avoids any reference to Muslim sources, it has been shown that certain provisions of the **nomocanon** were taken directly from Islamic law (more specifically, from the **malikite** school), particularly in the **area of sales, charitable legacies, divorce, penal provisions, procedure.**

- The FDRE Constitution (Art. 34(5) allows the adjudication of family and private disputes according to the rules of religion.
- It is also recognized that marriage concluded pursuant to the rules of religion as one type of marriage under our law (Art. 579 of the Civil Code and Art. 3 and 26 of RFC).

2.4. **Christianity**:

- Christianity also influenced Ethiopian laws. The best example is the Fetha Nagast. Peter Sand summarises the sources of Fetha Nagast into three:
- ✓ Manual of Roman Laws;
- ✓ Legislation of Constantine;
- ✓ The old and new testaments.
- The 1960 Civil Code of Ethiopia incorporates Christian principles in family and other areas. For example, one to one marriage. The Criminal Code also punishes bigamy under Art 650.

2.5. Formal sources of Law

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

2.5.2. Elements of formal sources

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

A) Sovereignty

- As a postulate to explain the working of a legal order, the concept of sovereignty has its uses. Nevertheless, the term is used with so many conflicting meanings and so easily stirs the emotions that it is better for jurisprudence to forgo its use.

- These qualities are not a priori necessary, but depend only on particular political theories, as is demonstrated by a study of the functioning of actual states.
- The basis of law is a legal order, the presuppositions of which are accepted by the community as determining the methods by which law is to be created, and those presuppositions will vary from one community to another.

B) Procedural Validation

- There are procedures a particular draft of law should pass through in order to get its binding force.
- As it is provided under Art. 57 of the FDRE Constitution, laws should be enacted deliberately. Then, the House of Peoples' Representatives will pass it. After that, the President of the Country signs the law. Next, it should be promulgated on Negarit Gazeta so as the court to have take judicial notice and apply it to solve practical disputes brought before it.

C) Substantive Validity

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

A) The Federal Constitution as source of Ethiopian Laws

- The constitution, as a supreme law in the country, serves as source for other laws. It must be brief by its very nature and contains only the basic principles of law. The basic principles are needed to be given in other legislation in detail. For example, the FDRE Constitution laid down the equality of both sexes, i.e. female and male under Article 34 with regard to ‘marital, personal and family rights’.
- For example, according to Article 6 of the Federal Revised Family Code, marriage should be concluded on the free consent of a woman and a man. This provision ensures the equality of both sexes.

- The FDRE Constitution as it was approved by elected representatives of the peoples derives its validity from the ultimate body (peoples of the federation and of the states) enables it to be “the ultimate measure of legality of the acts of the legislators and other organs of state power established by it or in pursuance of and in

- As a result, all legislation, be they made by the central authorities or state authorities, are subordinate to the federal constitution of the given country. The, Constitution is not only higher in hierarchy but also a source for all other laws because any law that contravenes the Constitution have no effect. All laws should be made to implement the principles incorporated under the Constitution.
- A constitution, as a supreme law in the country, serves as source for other laws as well. The Constitution, being brief by its very nature, contains only the basic principles of law. Then, these basic principles are needed to be given in other legislation in detail.

B) **International agreements as sources of Ethiopia**

- International human rights law establishes international standards. The enforcement of these standards primarily depends on national laws of states for the benefit of the nations of which they are developed.
- Consequently, it induces states to conform their national legal systems to the standards it set-up. By signing international human right instruments, states undertake to comply, in good faith, with rights and freedoms recognized in the instruments they endorse.

- As regards discharging of its international obligations, Ethiopia has accomplished a major legislative measure. Article 13(2) of the FDRE Constitution expressly commits Ethiopia to refer to the Universal Declaration of Human Rights and other international human rights principles as guidelines to interpret the fundamental rights and freedoms embodied in the Constitution.
- Ethiopia has adopted several international and regional human rights conventions. It has also, ratified numerous international human rights instruments advanced by the United Nations subsidiary organizations such as ILO, UNHCR and UNESCO. The Four Geneva Conventions of 1949, the 1977 two protocols and several others conventions have also been endorsed by Ethiopia.
- Generally, international agreements are one of the sources of our legislations.

C) Legislation as sources of Law

- The term ‘legislation’ is derived from Latin words*, legis* meaning law and *latum* which means “to make” or “set”. Thus, the word ‘legislation’ means ‘making of law’. Legislation is that source of law, which consists in the declaration of legal rules by competent authority.
- The term legislation has been used in different senses. In its broadest sense, it includes all methods of law making. In its technical sense, however, legislation includes every expression of the will of the legislature, whether making law or not.

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

- Thus, ratification of a treaty with a foreign State by an Act of Parliament shall be considered law in this sense. Nevertheless, in strict sense of the term, legislation means enacted law or statute law passed by the supreme or subordinate legislatures.

- According to **Austin**, legislation includes activities, which result into **law making or amending, transforming or inserting new provisions in the existing law**. Thus, there can be no law without a legislative act. Austin further holds that when a judge establishes a new principle by means of his judicial decision, he is said to exercise legislative powers and not judicial power.
- In genera, there are **two** obvious reasons for legislation being regarded as one of the most important sources of law.

1. **It involves lying down of legal rules by the legislatures, which the State recognises as law.**
2. **It has the force and authority of the State._**

- Legislation as a source of law is gaining more significance in modern times whilst the significance of custom and precedent is receding regularly.
- In this regard, Pointing out the importance of enacted law over customary law, Prof. Keeton observed that in earlier times legislation was supplemental to customary law but in modern times the position is reversed and customary law is treated

Legislation

- Existence of legislation is essentially *de jure(existing according to law)*
- Grows out of the theoretical principles.
- Essential **characteristic nature of modern society**
- Complete, precise, written in from and easily accessible.
- Results out of deliberations.
- Expresses the relationship between person and the State.

Custom

- ✓ Customary law exists *de facto* (not legally recognized)
- ✓ Grows out of practice and long existence.
- ✓ Its source is historically oldest.
- ✓ Customary law has developed through **primitive societies rather than modern state.**
- ✓ Costmary law is mostly unwritten (*jus non scriptum*) and is difficult to trace.
- ✓ Grows within the society in natural course.
- ✓ Customary law is based on relationship between/among the society.

Federal And Regional Laws

- Laws that are enacted by the Federal and regions are also used as sources of Ethiopian laws. At the Federal level, the House of Peoples' Representative enacts laws such as a law on commerce and foreign trade, natural resources, nationality, immigration, patents, copyrights etc. (Read Art. 55 of the FDRE Constitution). All such laws are enacted in the form of proclamation.

- Likewise, regions are empowered to promulgate proclamations with regard to **matters that full under their respective jurisdictions**.
- For example, they could enact laws on trade in their respective localities. (Read Art. 52(2) (b) of the Constitution). For example, family law is enacted at the federal level. Regions also came

D) **Court decisions as a source of law**

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

- The operation of the doctrine of *stare decisis* presupposes the existence of a hierarchy of courts. For example, in India the lower most courts or the courts of the first instance are the subordinate courts, above them are High Courts and the Supreme Court is at the apex. Thus, the Supreme Court is the highest judicial court in India.
- **There are four general principles on which the doctrine of *stare decisis* is based.**

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

The Role of Court Decisions As Sources Of Law In Ethiopia

- The Ethiopian legal system belongs to the continental system whereby law is promulgated mainly by the legislature. As a result whether decision rendered by courts did have any contribution in terms of lending principles by way of precedents like the common law legal system was not clearly known till recently.
- But in 2005, the HPR of the Federal government enacted Proclamation

- This proclamation empowered the Federal Supreme Court Cassation division to render a decision that is binding on federal as well as regional council at all levels.
- As provided under Art 2(4) of the proclamation, the decision to be binding must be:-

1. **Rendered by the cassation division of the Supreme Court,**
2. **The members of judges must not be less than five and,**
3. **The decision should be with regard to <u>interpretation</u> of laws.**

- In interpreting laws, the Supreme Court cassation division will create rules (laws).
- Therefore, the decision of the cassation division is a source of laws in Ethiopia so long as the requirements are fulfilled.
- In general, today, judgements are used as

Chapter III: Classification of Laws

3.1. General Introduction

- The body of law is huge. To study it one must break it down by means of classification.
- Classification of laws is, therefore, refers the **systematization of the law** based on the subject matter for the purpose of finding the relevant law more easily and determining whether different legal rules were required depending on **their area of application.**
- Nonetheless, no single classification system can cover the large mass of legal information. Consequently, those systems that have been devised tend to overlap to each other.

- Classification of laws which denotes the shaping and developing of traditional systematic conceptions and systematic categorization of laws, in order to organize the body of legal precepts, may help:-

1. To State effectively with a minimum repetition, over lapping and potential conflict of laws.
2. To manage effectively and efficiently.
3. To teach effectively and developed effectively for new situations.

3.2. Public and private Law

1) Public Vs Private Law

- ***Public law*:-** addresses the relationship between persons and their government and between various governments. ***They are public in the sense that the interest of the public at large is at stake*** as represented by the government.
- **Criminal** law and **Constitutional** law, for example, are generally classified as public law. This is because they deal with persons and their relationships to government.

- Criminal acts, though they may involve only one victim, are seen as offenses against the society as a whole and prohibited by governments for the purposes of protecting the public.
- Constitutional law is a public law because it involves question of whether the government (federal, state or local in a federal setting, or the central government in a unitary system) has the power to act in a particular fashion.
- ***Private law*:-** governs direct dealings between persons. When persons deal or affect other persons, such as in a contractual relationship, the law governing these relationships is classified as private law.

- Private law may ultimately advance societal interests as a whole, ***but its immediate concern is with individual transactions*** that affect the legal positions of the transacting persons.
- Agency, law of commercial paper, trade and business organizations, sales, torts, insurance and any other area of

3.3. International and National law

A) International Law

- As stated by Oppenheim, international law refers “the body of customary and conventional rules which are considered legally binding by civilised States in their interaction with each other.
- It consists of rules which regulate relations between/among States.

- **Starke** defines International law as “rules of conduct which states feel themselves bound to observe and, therefore, do commonly observe in their relations with each other. It includes

A) The rules of law relating to functioning of international institutions and organisations, their relations with each other and their relations with States and individuals;

B) Certain rules of law relating to individuals so far as the rights and duties of such individuals are the concern of the international community.”

- The main source of international laws are agreements. There are two kinds of agreements.

1. Express agreements as contained in treaties and conventions.
2. Implied agreements as found in customary practices of the States.

- According to **Article 38 of the Statute** of the International Court of Justice (the judiciary body of the UN, the sources of International Law are the following.

i) International conventions/treatise

ii) International customary law: (state practice opinion juris)

iii) General principles of law recognized by civilized states

iv) Judicial decisions and the teaching of most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

- International law can be classified into two:

1. Public International law:-

- A law which, regulates the relation between/among states. For example the relations between Ethiopia and Kenya, or Somalia, or Sudan…are governed by public international law.

2. Private International law:-

- A law which governs, governs the relations between individuals of different nationals. Different nationals involve in commercial and other civil transactions beyond their countries.
- Since the laws of different countries are not the same, the problem arises as to which law should be applied to the relations of different nationals.

Defects of Public international Law

- **International law lacks:-**

1) Central law making organ

2) Enforcing mechanism

- **Professor Dias suggests that there is no doubt that the respect which States pay to International Law is less than what individuals pay to municipal law, but still it is called “law” to inspire a sense of obligation among States to follow it. Therefore, it is a weak law.**
- **Although there is International Court of justice functioning at HAGUE, it does not have any universal compulsory jurisdiction for settling legal disputes between States. Again, international law having not yet been codified, suffers from uncertainty.**

B) National law:-

- It is a law which pertains to a particular nation/state. It is a law of a nation. for example the law of the United States of America, France, or Ethiopia. Such law is applicable all over a country in question.
- It is also known as law of the land. It is in effect in a country and applicable to its members. The law may be statutory, i.e. enacted law, administrative or case law.
- Local law is the law of a particular locality and not the general law of the whole country. They may be of two kinds-local customary law and local enacted law.

A) **Local customary law:-**

- **H**as its roots in those immemorial customs, which, prevail in a particular part of the State and, therefore, have the force of law.

B) **The local enacted law**:-

- It has its source in the local legislative authority of municipalities of other corporate bodies empowered to govern their spheres by-laws, supplementary to general law.

3.4. Substantive and adjective/Procedural laws

- *Substantive law* includes all laws that define, describe, regulate and create legal rights and obligations of persons.
- This body of law establishes acts and situations producing effect at law. For instance, a rule stating that promises are enforced only when each party has received something of value from the other party is part of substantive law.

- So too, is a rule stating that a person who has injured another through negligence must pay damages. Most of the bodies of law we have highlighted above, both public and private, are substantive laws.
- **Generally, substantive laws tells us what our rights are.**

- ***Procedural laws:-*** sets out the methods of enforcing the rights established by substantive law.
- Questions about how a lawsuit should begin, what documents need to be filed, which court will hear the suit, which witnesses can be called, how the judicial proceedings are conducted, and so on are all questions of procedural laws.
- Civil procedure, criminal procedure and evidence are typical examples of procedural laws.

Civil Vs Criminal Law

- ***Civil law:-*** is concerned with the duties that exist between persons or between citizens and their government (the latter as an ordinary legal person), excluding the duty not to commit crimes.
- Contract law, for example, is part of civil law. The whole body of tort law, which has to do with the infringement, in the absence of contract, by the person of the legally recognized rights of another is an area of civil law.

- ***Criminal law:-*** in contrast to civil law, is concerned with wrongs committed against the public as a whole.
- Criminal law is always public where as civil law is sometimes public and sometimes private. In a criminal case, the government seeks to impose a penalty on an allegedly guilty person.

Chapter IV: The Making and Repeal of Laws

4.1. Introduction

- **How laws are made? And, What Law making process refers to? is the main concern of this chapter**
- Law making refers a process of enacting/formulating a new legislation/a new rule of law concerning a particular matter or subject.

4.2 Steps In Law Making

- There are different steps a given draft should pass to be enacted as a law. What are these steps in law making?

A <u>Initiation of Bill</u>:-

- The first stage in the legislative process is the introduction of a bill. A bill either proposes a change in the existing law or makes new proposals.
- It is the first draft of what will ultimately become a statute. The right to introduce bills is usually shared between the **government and parliament.**

- Most of the time the initiative in law making should rest with the **elected officials**. Accordingly, in most countries, the government officials introduce draft laws whether they are members of Parliament or not.
- It is true that laws are implemented in the day to day activities of the society. As a result, those who directly involved in the administrative activities have practical knowledge on the problems of existing laws or the activities that need rules to and can propose a draft **law**.

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

B) Introduction of the bill:-

- When a **draft is introduced, members of Parliament** are informed of the variety of ways by posting of notices, by announce in the chamber, by an entry in the minutes of the proceedings report of debates, and in some countries by a purely formal first readings.
- If it complies with the rules of order, the bill then printed and distributed.

C) Referring to committees:-

- The committee may be an ad hoc or standing committee which have related functions to the proposed bill.

D) Debate and discussion in the parliament:-

- Is the phase of debate and decision, which is generally a matter for the House. That means the members of the House will debate on the draft and decide on its next step.

E) Second time Referring to the committees:-

- **A**fter the parliament makes debate and discussion on the proposed bill and reports from the committee and yet not the issue gets finalised then second time referring to the committee takes place.
- It is optional depending up on the exhaustion of the issue in the first reading of the drat Bill.
- But sometimes the Parliament may decide to debate a bill in the House without referring it to a committee. This procedure is mostly used to consider bills that are **urgently needed**.

- Sometimes it may be important to undertake Extra-parliamentary consultations in the process of drafting laws. In this case after a bill has been introduced in the House, they may at times represent a particular concept of the sovereignty of the people.
- The most elaborate form of extra-parliamentary consultation, which derives from the principle of popular sovereignty as opposed to the strictly representative system, is the **consultative referendum**.

- When extra-parliamentary consultations have been committed, the ordinary procedure for the making of laws is taken in the assemblies.
- The contents of the bill are made known by all available means and first and for most the press. Consequently, all sections of society are informed.
- Discussion follows in the basic organizations, industrial and agricultural undertakings, professional, trade organizations of all kind people’s councils, social, scientific and economic institutions and local and regional administrations.

- Opinions are gathered and suggestions, amendments, and perhaps counter proposals drawn up which are forwarded to Parliament and in particular their appropriate committees. These committees examine any matter and may if necessary formally take them into consideration.
- Thus, countrywide discussions takes place, which introduces in greater degree a new form of direct democracy, made possible by the available media of communications.
- Nevertheless, the last word rests on the representatives of the people and it is for them to accept or reject the large number of suggestions addressed to them.

F) Promulgation:-

- It is the last stage in law making process. The passing of a bill by the legislature is generally the stage of the legislative process. Then a work done by all concerned organ including the parliament must then be promulgated.
- Promulgation refers the authenticates of a bill as a law and gives it binding force.
- At the end the bill will be sent to Publication, which implies the just announcement of the law what is already promulgated by the parliament to the people in readable form.

4.3. Comparative study of law making process in Ethiopia

1. During the Era of Emperor Haile Selassie

FORMS OF LAW:-

- There were four major types of Ethiopian law namely, **Orders, Proclamations, Decrees and Legal Notices.** The first three, i.e, **Orders, Proclamations and Decrees** are best known as Primary Legislation.

1. **Order:-** refers the Emperor exercises his prerogative power under Article 27 of the Constitution of 1955 to determine “the organization, powers and duties of all ministries, executive departments and the administration of the government”.
2. **Proclamation:-refers** Substantive legislation passed by Parliament and approved by the Emperor.
3. **Decree:-refers t**he Emperor acting alone may promulgate legislation only in cases of emergency that arise when the Chambers are not sitting.

4. **Legal Notice**:-is used mainly for the publication of Rules and Regulations, and Municipal Law, authority for which has been delegated to various government officials. It can best be labelled as **subordinate legislation.**
5. **General Notice:-** which is mainly used to announce Government appointments and awards of honour by the Emperor.
6. **Notice:-** which was the vehicle for the announcement of certain matters of public interest, such as Notice No 10 of 1950, dealing with the encouragement of foreign investment.

4.3.1. PUBLICATION OF LAW

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

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

4.3.2. LAW MAKING UNDER the 1955 CONSTITUTION

- The sources of primary legislations under the Repealed 1955 Constitution were the **Emperor** and **Parliament**. The Emperor was constitutionally empowered to issue two types of primary laws, i.e., **Orders and Decrees**, while the Parliament has the authority to issue one type of primary legislation, i.e., **Proclamations**.

Orders:- used to be exclusively enacted by the Emperor were primary laws principally related to issues of the **creation or dissolution** of **organs of state** and **government power** or their branches, the **chartering** of **municipalities**, the **raising and disbanding** of **units of the army** etc.

- It should be noted that the Emperor had the power to issue orders without referring to any other organ

- It was possible to **initiate Orders in two ways**. **Firstly**, the Emperor himself could unilaterally initiate and subsequently issue them whenever he saw it fit to do so.
- **Secondly**, Initiation could start at the level of a specific governmental body concerned or interested in their enactment.
- Such a governmental body would, as the first step, submit such legal opinion or draft to the Council of Ministers from where, if approved, it

Proclamations :-

- were capable of being initiated in various ways. Since the Parliament was bicameral, draft proclamations could be initiated from either of the two Chambers of the Parliament.
- If such a draft succeeds in gaining majority approval in the Chamber it was initiated in, it would then be transferred to the other chamber where it was again subjected to discussions and a vote.
- If it again gains a majority vote in the second Chamber it means that it has won the approval of the whole Parliament and was then submitted to the Emperor who, as the supreme sovereign, would have to give the go ahead before it is promulgated.

- Draft proclamations could also start at the level of any governmental body interested in having a certain law passed.
- Such a draft was submitted to the council of Ministers from where, presumably after sufficient scrutiny and ironing out, it was submitted to the Emperor in the hands of the Prime Minister.
- Where the Emperor agrees with the proposed law, he in turn, sends it to any of the two Chambers of the Parliament, where it was subjected to debate and finally a vote.
- If it meets with majority approval of the Chambers, it is forwarded to the Emperor for final approval and promulgation.

Decrees were the third type of primary legislation in force then and were the second legal prerogative of the Emperor.

THE DERG'S ERA

- The first noticeable change in the law-making process that could be observed was a direct consequence of the deposition of the emperor and the disbandment of the parliament.
- There was only one type of primary legislation under the Derg, i.e, the **Proclamation** that was enacted by its congress.
- The **Provisional Military Administrative Council (PMAC)**, being the highest organ of state power then, was also the only source of the sole primary legislation of the time, i.e., **the proclamation**.
- It is true to say that usually the authority to enact proclamations is given to an organ of state power by virtue of a constitutional provision.

- But when it comes to the PMAC, the power to issue proclamations was granted to its congress by **another proclamation**.
- Subordinate legislations of this period, which generally went under the general name of **Legal Notice**, used to be drafted and issued at the level of the governmental body authorized to issue them, though the fact that most legal notices used to be enacted among with the proclamation enabling that both the enabling proclamation and the Legal Notice came from the same source.

- **Decrees** used to deal with the same area of legislation as proclamations and used to be enacted ***only during the temporary absence of the Parliament***, i.e. presumably, when it was out of session during the **summer**.
- Theoretically at least, all decrees were subject to a vote of approval when the parliament subsequently reconvened.

LAW MAKING UNDER THE PDRE CONSTITUTION

- The process of law making under the Peoples' Democratic Republic of Ethiopia (PDRE) day Ethiopia was radically different from the previous two legislative regimes discussed above.
- The law-making process in Haile Selassie's Ethiopia, though it formally paid lip service to the Doctrine of the Separation of Powers, was, in reality, a highly autocratic were concentrated in the person of the Emperor.

- The law-making process under the Derg, on the other hand, can best be described as a provisional stop-gap process wherein the only top of primary legislation, i.e., the proclamation, was often strengthened, amended and elaborated upon by innumerable directives which had a *de facto* force of law (though not in the formal sense) and were justified as binding because they most often had the same source of the proclamations.
- Two types of laws, i.e., primary and subordinate legislation were envisaged under the 1987 Constitution of PDRE. This was similar with the previous forms of law making steps.

- Under this set-up, there exist five types of primary legislations.

Proclamations:- are enacted by the **National Shengo**, which was the supreme organ of state power in the PDRE (Art. 63 sub Art 1).

Decrees:-The **Council of State** had the power to enact Decrees to facilitate the implementation of the powers and duties

- **Special Decrees** :-The Council of State also had the authority to issue special Decrees when necessary and compelling circumstances arise. This power to issue special Decrees was, however, qualified by the fact that the Council of State may exercise it only between the sessions of the National Shengo, i.e., when it was not meeting.

- **Presidential Decrees:- P**resident of the Council of State, which in turn was, the standing body the National Shengo, was entitled with the right to issue the final two types of primary legislation. Primarily, he had the authority to enact presidential Decrees, for the purposes of facilitating the implementation of the powers and duties entrusted upon him/her by the Constitution (Art. 86/4).

- **Special Presidential Decrees**:- He was also entitled to issue, under compelling circumstances, special Presidential decrees during periods when the National Shengo was not in session.
- However, such special presidential Decrees were also subject to submission and approval by the National Shengo at its next session, again leading us to conclude the special Presidential decrees also related to situation normally regulated or governed by the proclamations issued from the National Shengo (Art. 87).

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

- We found, in the PDRE, various and hierarchical distinguishable depositories of state power in the forms of Autonomous Region Shengos, Administrative Region Shengos, Special Administrative Shengos and Awraja Shengos which were declared by the Constitution and the subsequently enacted administrative proclamations as the highest organs of state power at their respective level.
- The primary legislation of the PDRE were laws issued by the highest organ of state power of PDRE, namely the National Shengo as well as these issued by its standing body, i.e., the Council of State and the President of the Republic.

- Attempts to make a superficial distinction between the National Shengo, on the one hand, and the Council of State and the President of the Republic, on the other, and then proceed to call only the Naional Shengo the supreme organ of state power there by indirectly giving a secondary status to the latter two is erroneous.
- This is because these two specialized organs of state power were firstly, part and parcel of the National Shengo and secondly, the ones entrusted with the task of representing and carrying out the National Shegno’s tasks of legal

- Thus, the PDRE's subordinate legislation were all the enactments issued by all the other organs of both state and administrative power outside the above-mentioned supreme organs of state power on the basis of delegated authority flowing from the National Shengo.
- All subordinate legislations in the PDRE went by two names **Directives and Regulations**, with a certain exception.
- In general, we have seen thus that the supreme source of law, the National Shengo, was in firm control, directly and indirectly, over the nature and scope of all laws enacted by subordinate organs of power and state administration.

LAW MAKING IN THE PRESENT DAY OF ETHIOPIA

- In the present day of Ethiopia, According to Art. 51 FDRE Constitution **(on the powers and functions given to the Federal Government)** the legislature has the power to make laws on maters stipulated under Art. 55 of the FDRE Constitution.
- The House of Peoples' Representatives has the power to enact laws in the form of proclamation, for the Federal State, in the following sectors.
- Read Art. 55 of the constitution.

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

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

- Labour Code;
- Commercial Code;
- Criminal Code;
- Civil laws necessary to establish and sustain one economic community. As per Article 62(8) of the Constitution, the House of Federation has the power to determine civil matters on which the House of Peoples' Representatives makes laws.

- We observe that legislative power is given to the House of Peoples' Representatives because it is the highest authority of the Federal Government. In addition to the House of Peoples' Representatives, **executive organs have also given the power to enact regulations and directives.** The provision of **Article 77(13) of the FDRE Constitution states that the Council of Ministers shall enact regulations pursuant to powers vested in it by the House of Peoples' Representatives**.

- Here, the provision makes clear that legislative power vested to the Council of Ministers is legislative power **delegated from the legislature** (i.e. the House of Peoples' Representative).
- According to Article 74(5) of the Constitution, the Prime Minister has the power to supervise the implementation of regulations and directives adopted by the Council of Ministers. The provision implies that the Council of Ministers has the power to enact directives in addition to regulations.

- **Ministries** are also given the power to enact **directives** to implement the powers given under proclamations.
- We have seen that the executive bodies have the power to enact regulations and directives. These are non-sovereign law making bodies.

- Bodies other than the legislature are **non-sovereign law making bodies**.

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

I. There are laws such bodies must obey and cannot change;
II. There is a distinction between fundamental law and ordinary laws;
III. There must be a body having authority to pronounce upon the validity or constitutionality of laws passed by such law making body.
IV. They have given the power to make laws by delegation of power

Initiation of Law making

- The Constitution under Art. 77(11) clearly provides that th Council of Ministers shall submit draft laws to the House of Peoples Representatives on any matter falling within its competence, including draft laws on a declaration of war.
- We understand that the Council of Ministers has the power to initiate draft laws on matters that fall under the jurisdiction of the federal Government. Further, each ministry has the power to initiate policies and laws as provided under Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 471/2005. Art. 10

- Any draft must be made in writing and be submitted to the Speaker to its presentation to the House. Then the Speaker must present the summary of the draft law and deliberation on the content in general must be held as provided under Ar.6(5) of HPR Working Procedure and Members' Code of Conduct Proc. No. 470/2005.
- Then, the Speaker will refer it to the concerned standing committee, Art. 6(6). As provided under Art. 18, the House shall have the following Standing Committees. These are:-

1. The Capacity Building Affairs;
2. The Trade and Industry Affairs;
3. The Rural Development Affairs;
4. The Natural Resources and Environmental protection Affairs;
5. The Infrastructure Development Affairs;
6. The Budget and Finance Affairs;

7. The Foreign, Defence and Security Affairs;
8. The Women's Affairs;
9. The Information and Cultural Affairs;
10. The Social Affairs; and
11. The Pastoralists Affairs.
12. the Legal and Administrative Affairs;

- The committee which took the assignment will present it to the House with its proposal after 20 working days, Art. 6(8). Thus,
- **Second reading** will be held in the House, Art 9. If the deliberation can not be exhausted, the draft shall be referred for further scrutiny to the pertinent committee, Art. 9(c).
- The committee who received for the second time shall read out the amended version and its

- Then the House shall pass the draft law after a through discussion on the final proposal, Art. 10(b). Then, the Speaker shall send the draft to the president for signature, Art 11(a).
- The President is required to sign the bill within 15 days other wise the bill will be effective after 15 days if the President fails to sign it, Art. 11(b).
- What is more, the ratified law must be numbered by the Speaker and thereby published in the Federal Negarit Gazeta Art. 11(c).

The process seems the following

- 1) **Initiate and submit draft bills to the House on matters within their jurisdictions**
- 2) **First Reading**. At this stage, a draft written bill will be submitted to the speaker and the speaker will present the summary of the draft bill to the house
- 3) Discussion and deliberation at the house
- 4) Referral to the standing committees

5) **Second Reading** in the house

- 6) Deliberation in the house
- 7) Referral to the standing committee
- 8) The house shall pass the bill
- 9) sends it to be numbered and then signed by the president, and then to publication.

REPEAL OF LAWS

- **Repeal of law**:- is an abrogation of an existing law by legislative act. In other words, repeal of law means **making the law no longer have a legal effect**.
- The law making process discussed above basically relates to the manner in which a certain normative standard is legalized or converted into a rule of law.

- What we will now be discussing under this part relates to the opposite process of making a law that is-: de-legalizing a certain normative standard that had been part and parcel of the law of the land.
- Note should be made here that the process of de-legalization is equally the task of the law making organs discussed above

Repeal of Laws Vs Expiry of Laws

- A law is either perpetual or temporary. Law is Perpetual. It is perpetual when no time is fixed for its duration and such a statute remains in force until its repeal which may be express or implied.
- A perpetual statute is a statute in the sense that it can not be

Temporary Law :-

- Law is temporary when its duration is only for a specified time, and such a statute expires on the expiry of the specified time unless it is repealed earlier.
- Simply because the purpose of a statute, as mentioned in its preamble, is temporary, the statute cannot be regarded as temporary when no fixed period is specified for its duration. Cessation of transitional legislative power has no effect on the continuance of a perpetual Act enacted during the continuance of that power.

- The duration of a temporary statue may be extended by a fresh statute. But it appears that after a temporary statute expires, it cannot be made effective by merely amending the same. The only apt manner of reviving the expired statute is by re-enacting a statute in similar terms or by enacting a statute expressly saying that the expired Act is herewith revived.
- A power to make a law with respect to the topics committed to Parliament or State legislatures carry with it a power to repeal laws on those topics.

- Subject to any constitutional restriction, the general rule is that the power of a legislative body to repeal a law is co-extensive with its power to enact such a law and a legislature which has no power to enact a law on a particular subject matter has also no power to repeal the same.
- What parliament has done parliament can undo, what the parliament can make, can unmake!!

TYPES oF REPEAL

- The repeal of laws may be **Express** or **Implied**.

  Express Repeal:-A former statute is said to be expressly repealed where the new repealing statute refers to the whole or a part of this former statute and withdraws its obligatory force and thereby denies it further effect as law.

- For a new law to be said to have expressly repealed a former law, moreover, the reference it makes to the former law must be clear and exact in relation to what extent or proportion it is no longer operative.

- Apart from the total and partial express repeals, there is also a third type of express repeal is only a variety of the partial express repeal, it is distinguished from it by the fact that it does not withdraw the obligatory force of the substance of the former law but only restricts the scope of applicability of the substance of this former law.
- This means that it only affects the so-called **extent clause** of the former law and leaves the rest of its

IMPLIED OR TACIT REPEAL

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

- When the new law contains repealing section mentioning the laws, which it expressly repeals, the presumption against implied repeal of other laws is further strengthened on the principle EXPRESSIO UNIS EST EXCLUSIO ALTERIUS.(the explicit/{clear} mention of one (thing) is the exclusion of another]).
- The presumption is, however, rebutted and repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent or repugnant to the provisions of the earlier Act “that the two can not stand together.

- Test applied for determining repugnancy ....., may be applied for solving a question of implied repeal and that it should be seen:
- Whether there is a direct conflict between the two provisions;
- Whether the legislature intended to lay down an exhaustive Code in respect of the subject-matter replacing the earlier law.

Repeal by implication is just as effective as by Express Words.

- Prior Particular Law and Later General Law.

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

- However, there is no rule that prevents to repeal a partial prior law by the subsequent general law. It is only the principle of construction we use.
- Prior General Law and Later Particular Law

  A prior general Act may be affected by a subsequent particular act if the subject matter of the particular Act prior to its enforcement was being governed by the general provisions the earlier Act.

- In such a case, the operation of the particular Act may have the effect of partially repealing the general Act, or curtailing its operation, or adding conditions to its operation for the particular cases. In other words, the latter particular law may have the effect to amend or repeal the prior general law on the same subject matter.

- If a later statute again describes an offence created by an earlier statute and imposes a different punishment, or varies the procedure, the earlier statute is repealed by implications... The principle, however, has no application where the offence described in the later act is not the same as described in the earlier Act, i.e., when the essential ingredients of the two offences are different.

- In short, a new law may repeal the existing criminal law even if there is no a specific reference to the effect of repeal. It is a common law rule that LEGES POSTERIORE PRIORES CONTRARIAS ABRAGANT (Later laws abrogate prior contrary laws.).
- The principle is that the new law prevails over the old law. Thus, if the new law is inconsistent with the old law, the old law is considered as repealed, because one of the principles making a law is to make a change in the law.

Effects of Repeal of Laws

- If a law is repealed it is considered as if it had never been enacted. Thus, no obligation and duty arise out of the repealed law.
- Another effect of repeal of law is that if one Act is repealed by a second which again is repealed by a third the first Act is not revived unless the third Act makes an express provision to that effect. It is understood from this that a third law that repeals the second may revive the first law.
- Thus, offences committed during the continuance of statues can now be prosecuted and punished even after it is repealed.

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

- What is the effect of repeal of legislation on subordinate ones?
- As a consequence of the general principle that a statute after its repeal is as completely effected for the statute book as if it had never been enacted, subordinate legislation made under a statute ceases to have effect after repeal of the statute. This result can be avoided by insertion of saving clauses providing the contrary.

EXPIRY OF LAWS

- A distinction is to be drawn between repealed and expiring statues. The difference in effect between these two kinds of laws is that **repealed statues**, except so far as they relate to transactions already completed under them, **become as if they never existed.**
- But with respect to temporary statutes, the extent of the restriction imposed by them becomes **a matter of construction**. The question sometimes arises whether a temporary statute which has lapsed still applies to acts or things done, for instance, the crime committed

Consequences of Expiry statutes

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

Legal proceedings under expired statute

- A question often arises in connection with legal proceedings in relation to matters connected with a temporary Act whether they can be continued or initiated after the Act has expired.
- The normal rule is that proceedings taken against a person under a temporary statue IPSO FACTO terminates as soon as the statute expires.

- A person, therefore, cannot be prosecuted and convicted for an offence against the act after its expiration in the absence of a saving provision, and if a prosecution has not ended before the date of expiry of the act, it will automatically terminate as a result of the termination of the Act.

DISUSE OF LAW

- A law subsists indefinitely as long as its provisions have not been regularly repealed. Recourse may always be had to it to obtain its execution. A law may be disused for a long period of time.
- However, age cannot wither an Act of parliament, and at no time, has it ever been admitted in jurisprudence that a statute might become inoperative through obsolescence.
- Thus, the executive body may not be active in implementing a given law and individuals may also use the law.
- **However, the disuse of a law can not make it repealed because it is the legislative body that must repeal the law, not the subordinates.**

NULLIFICATION OF LAWS

- Nullification refers the act of making something void; specifically the action of a state in abrogating a federal law, on the basis of state sovereignty. Thus, nullification is the act of making void. An act may be nullified if it is against the law of the state.

- In common law, juries may nullify law, that is known as jury nullification. Jury nullification means making a law void by jury decision. It is “the process where by a jury in a criminal case effectively nullifies a law by acquitting a defendant regardless of the weight of evidence against him or her.”
- A law is nullified if it is unjust. It is said that “an unjust law is no law at all.” However, the problem is who can judge whether a given law is unjust? In common law, jury (the group of persons) could judge whether a given law is unjust, and that is the principle of moral conscience.

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

Chapter V: Hierarchy of Laws

- Hierarchy of laws refers a system in which all the laws of a certain country are put at various levels or ranks according to their order of significance.
- The order of importance of laws is very much related to the order of importance of state organs that make laws .
- In other words, hierarchy of laws is the reflection of a coordinated collective of persons among whom power relation ships hold so as to establish an order of superiors and subordinates.

A) HIERARCHY OF LAWS UNDER THE REVISED CONSTITUTION OF 1955

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

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

- Legislation can be categorized as primary and subordinate.
- Primary legislations are laws that are made by the legislative body, i.e, by the House or Houses of parliament as the case may be. Thus, in the case, under consideration, Chamber of deputies and senate of Ethiopia made such laws.

- Under the Revised Constitution of 1955, primary legislation include proclamations, decrees, and Orders, which were made by the Emperor himself.
- subordinate (subsidiary) legislation are those administrative orders and regulations which are made by executive authorities having derived their law making power from the legislator by way of delegation.
- Thus, so long as the executive authorities are granted the power to enact such laws by the legislator the laws made by them should be consistent to the laws enacted by the legislator.

- Subsidiary legislation at the time under consideration covered: orders, which were made by each ministry; regulations; legal notice; general notice; and notice of approval. Orders made at that time were of two types. They were those with the capital letters and passed by the Emperor himself and those with the small letters, which were issued by the office of each ministry.
- The one, which was made by the Emperor by his prerogative power as provided in Art 27 of the Constitution, was not categorized under this type of legislation.

- Since the Emperor was empowered to enact this type of order by the Constitution and thus it belonged to the group of primary legislation.
- Therefore, the type of order, which fell under the category of subordinate legislation, was the one, which was mentioned in Art. 144 (ministerial order) of the Constitution.

HIERARCHY OF LAWS UNDER THE PDRE CONSTITUTION OF 1987

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

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

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

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

5.2. THE HIERARCHY OF LAWS IN THE PRESENT LEGAL STRUCTURE OF ETHIOPIA

- The Constitution of 1995 guaranteed the peoples, nation and nationalities of Ethiopia their right to self-determination and put an end to the long-lived unitary form of government. And then, Ethiopia adopted a **federal form of state structure**.
- Under the present federal structure, the nine autonomous states which constitute FDRE, enjoy the right to have their say on their own affairs.
- Therefore, they have their own laws made by their own state councils in the same way as what the central government does have.

THE SUPREMACY OF THE FDRE CONSTITUTION

- A **Federal Constitution** is a covenant of the union by which federal relationship is established. So as to make this **relation perpetual**, the covenant should be reduced to a written document.
- The Federal Constitution, being the **source of powers of both the central and the regional governments** is believed to be the supreme law.

- In the original sense of the term as used by **Bryce, it is "rigid**". So as to say that a constitution is supreme, we need to see its declaration to the effect that the power of the legislator to alter the constitution is either limited or non existent.
- The **supremacy** of the constitution and its **rigidity** **are the essential characteristics of the Federal Constitution** and they are also the manifestations of the idea of Federalism itself.

- The 1995 FDRE Constitution in its Art 9(1) states that the Constitution is the supreme law of the land.
- It says ***any law, customary practice, and act of an agency of government or official act that contravenes the Constitution is invalid***.
- In this Article, the phrase "**any law**" is used to **cover all laws, which are now in force both at the Federal and at the regional levels.** This can be understood from the reading of Arts. 50 through 55 in conjunction with Art. 9(1) of this Constitution.

- Accordingly, as per Art. 9(2) the Constitution is binding on all authorities of both the Federal and of the Regional states. Hence, all acts made by their authorities in breach of the supreme law are invalid or do not have any legal effect.
- Moreover, as stipulated under Art. 9(4) of the same, ***all international agreements*** **ratified by Ethiopia are an integral parts of the laws of the country**. According to this sub-Article, ***since international treaties are part of the laws of Ethiopia, they should be included under the phrase "<u>any law</u>" in sub-Article one of the present Article.***

- We have said above that the said phrase is used to cover all laws (federal and state) that are subordinate to the Constitution.
- Thus, it would be fair to conclude that international treaties, being part of those laws, are lower in hierarchy than the Constitution.
- **Nevertheless,** Art 13(2) of the FDRE Constitution states, the chapter on fundamental rights and freedoms: Shall be interpreted in conformity with the Universal Declaration of Human Rights, international human rights covenants, humanitarian convention and with the principles of other relevant international instruments, which Ethiopia has accepted or ratified.

- So, the inclusion of the term "**conformity**" under Article 13(2) of the FDRE Constitution makes some people understand the position of international instruments indicated under the said sub-article **as equal as the Constitution** of FDRE.

- But, can one say from the reading of Article 13(2) of this Constitution that the international instruments are supreme to the provision under chapter three of the same <u>in all cases</u>?
- <u>Or</u> does the "**<u>conformity</u>**" in Art 13(2) of the same imply that the provisions dealing with the fundamental rights and freedoms under the 1995 FDRE Constitution

- As can be understood from this short discussion, the position of Kenenissa seems to answer the above question in the affirmative. In dealing with this issue, he tended to give more emphasis to the **"conformity"** than the "interpretation".
- Accordingly, his stand appears to make the instruments in issue as supreme as the Constitution of FDRE **even when there is no need**

- However, in the opinion of Ayele, Art 13(2) of the Constitution does not make the international instruments paramount to the provisions under chapter three of the same in all cases.
- Because as it is clearly provided under Art 13(2) of the FDRE Constitution, **the need to conform to those "international standards for**

- In other words, such international standards are used as references when the provisions under the chapter on fundamental rights and freedoms of the Constitution become vague, ambiguous, equivocal, etc.
- Because it is, in such cases, that the rule of interpretation comes into application. However, if the provisions under chapter three of the Constitution become clear, the reference to the said instruments is not required.
- Therefore, Art 13(2) of the FDRE Constitution is there to serve for the sake of clarity but not to create contradiction with the basic principle enshrined under Art 9(1) of the same. In short, Ayele seems to conclude that the Constitution is superior than the international treaties.

THE STATUS OF INTERNATIONAL TREATIES Vs OTHER DOMESTIC LAWS

- The status of international treaties under the present legal system of Ethiopia is not clear. *Thus, it is only by interpretation that we can determine their position*.
- As said before, in case, where determining hierarchy of laws is difficult, it is submitted that the identification of the power order of the respective makers is of great importance.
- Thus, in order to know the status of treaties in Ethiopia, it is significant to identify the **organ empowered to ratify**

- As it is clearly stipulated under Art. 55(12) of the Constitution of the FDRE, the **House of Peoples' Representatives is conferred the power to ratify international agreements** negotiated and signed by the Council of Ministers.
- This organ, as per Art.55 of the Constitution, is also empowered enact proclamations. Thus***, both treaties and proclamations come in to force by the act of this organ.***
- Hence, now a question may arise with regard to the hierarchy between the treaties and proclamations.

- When laws are passed by the same body, the rule is that such laws are on equal stand on the ladder of hierarchy. Therefore, so long as international treaties and proclamations are ratified and enacted by the same body, i.e, the HPR, they have equal status on the ladder of hierarchy.

- However, in order to say that international treaties have such position on the ladder of hierarchy, they have to be concluded in accordance with and the spirit of the Constitution of FDRE.
- In this regard, **the FDRE Constitution under Art 86** asserts that ***international agreements concluded in the promotion of the external relation should respect and accord with the sovereignty of Ethiopia and the***

- On this point, Dr. Fasil wrote: “taking a lesson from history, the Ethiopian Constitution insists on making it a matter of record that the promotion of foreign relation must accord with the interest of peoples of Ethiopia.
- Therefore, it is only so long as they conform to the declaration of Article 86 of the Constitution that international treaties being ratified by the same body which enacts the proclamations that they can stand equal in hierarchy with the latter.
- In such a case, ***if conflict*** arises between the two (treaty and proclamation), **the one which is subsequent in time prevail over the other which is prior in time.**

- It is essential to note that proclamations are normally higher in hierarchy than other federal legislation.
- Thus, in so far as we have reached on the conclusion that proclamations and treaties have equal status on the ladder of hierarchy, Ayele argues that those laws that

Hierarchical relationship between international agreements and state/regional laws

- AS stated before, the FDRE Constitution does not clearly show the relation of international treaties with the other domestic laws including laws of regions.
- However, although there is no a clear indication in the Constitution as regards the relation between international treaties and state laws, to the opinion of Ayele, the reading of chapter five of the Constitution is of some help to this effect.

- In its chapter five, the Constitution as per Art. 51(8) states that the **Federal government shall negotiate and ratify international agreements.**
- Hence, the making of international treaties falls under the exclusive jurisdiction of the federal government.
- **In a Federal system, there is no a superior and inferior relation of laws that are enacted on matters falling under the Federal and the state lists**.

- Similarly, in so far as international agreements fall under the federal list, we can not establish a hierarchical order between such agreements and the state laws.
- Since FDRE Constitution as per to Art. 50(8), imposes a duty on states to respect the Federal power, international agreements that are negotiated and ratified by the federal authorities are **not affected by the state laws.**

FEDERAL LEGISLATION AND THEIR HIERARCHY

- It is clear that **the position of federal legislation on the ladder of hierarchy is below the Federal Constitution.**
- We have seen that primary legislation normally refers to the enactments made by the supreme legislative organ of the country to which it belongs.
- Therefore, in our case, Federal proclamations enacted by the House of Peoples' Representatives, which is the supreme legislative organ of the federal government [Art 50 (3) of the Constitution] fall under this group of legislation (primary legislation).

What is the status of Emergency decrees?

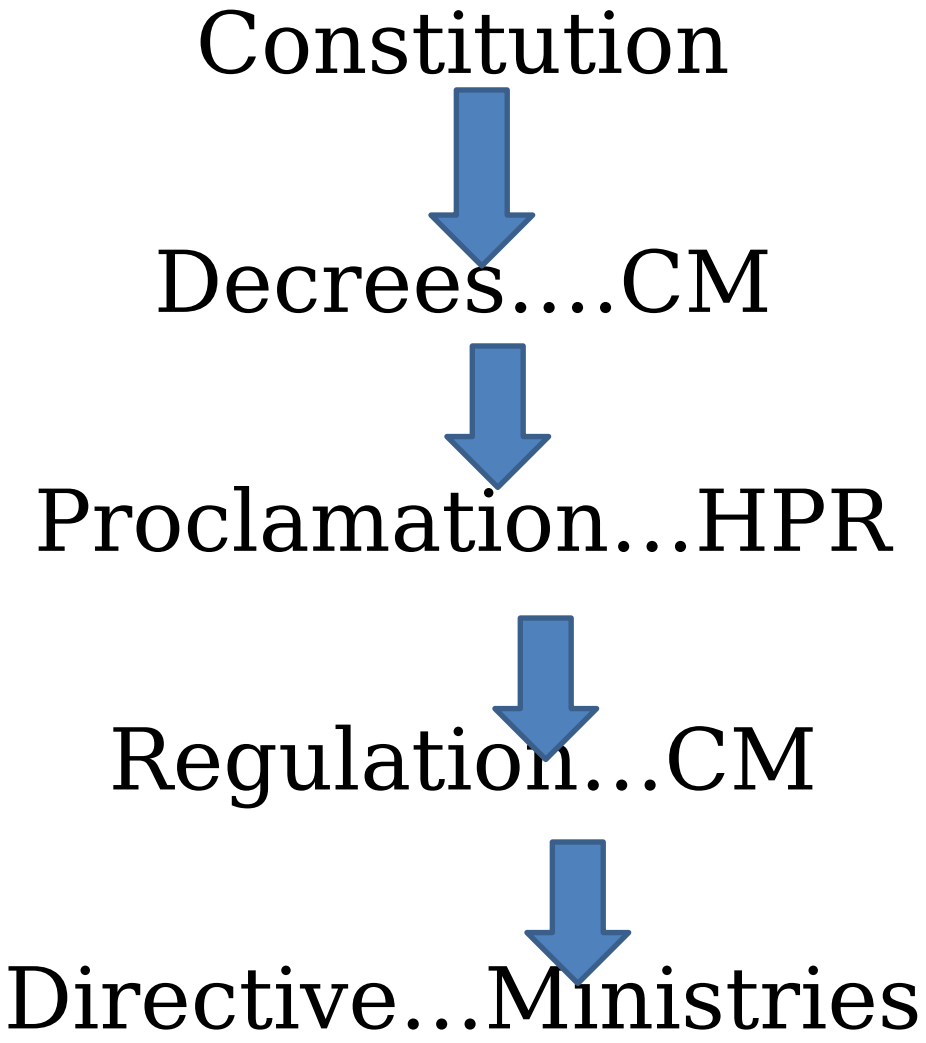
- As said before, the House of Peoples' Representatives is the supreme authority of the Federal government. As a result, the federal statutes (proclamations) enacted by it are superior to all other laws made by the federal authorities.
- Accordingly, the Council of Ministers, being a Federal authority, is subordinate to the House of Peoples' Representatives and thus

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

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

- The other group of law, the so called **derivative legislation,** that are issued at the federal level include **Regulations** and **Directives**.
- The Council of Minister and each ministry issue these legislation. In this case, the Council of Ministers derives its power to make the regulations from the supreme legislator i.e. the House of Peoples' Representatives through the primary legislation. **Consequently, the position of the regulations and directives on the ladder of hierarchy is below the proclamations and decrees**.

- However, in so far as the regulations are passed by the Council of Ministers, they are higher in hierarchy than the directives passed by each ministry.
- Generally, as we have seen above, the legislation that are enacted at the Federal level are not as such of many kinds.
- Therefore, their hierarchy can be easily identified.


Constitution
Decrees….CM
Proclamation…HPR
Regulation…CM
Directive…Ministries

Constitution

Decrees ... CM

Proclamation ... PM

Regulation ... CM

Directives ... Ministries

STATE LAWS AND THEIR HIERARCHY

- As provided under Art. 47(1) of the Constitution,, the Federal Democratic Republic of Ethiopia comprises Nine Rional states.
- **The Federal Constitution, as per Art. 50(5) grants the State Councils the power to enact laws on matters falling under their jurisdiction.**
- As it is mentioned in Art 52(2)(b) of the same, the laws that are enacted by the State Councils include the state constitution and other state laws.
- **Regional Constitutions declare in their supremacy clause that subject to the supremacy of FDRE Constitution, they are the supreme laws of the respective state**.

- **The forms of legislation existing in the states under consideration are similar to that of the federal legislation**.
- **These legislation covers state Proclamations**, **decrees**, **regulations**, and **directives**. What is more, as per Art 93(1)(b) of the FDRE Constitution, state executives have the power to make laws in case of emergency as provided under Art 93(1) of the FDRE Constitution reads.

- State executives can decree a State wide state of emergency should a national disasters or an epidemic occur. Particulars shall be determined in State Constitutions to be promulgated in conformity with this Constitution.
- Accordingly, the Constitution of Amhara Regional State empowers the executive committee to issue a decree of emergency when the state Council of that regional state is not in session (Art. 54(8) of the Amhara

- In the regional States under discussion, both **decrees and regulations** are issued by the same bodies (the **state executives**).
- Moreover, both legislation are non-derivative. However, the question is which one of the two is higher on the ladder of hierarchy? **Decrees are issued in special circumstance** with a view to avoid a series danger that may destruct the whole society. Thus, though both are issued by the same organ and have the same character (non-derivativety), Ayele thinks that **decree should prevail over regulation**.
- **In general, hierarchies of laws in states (regions) seem to be the same with that of Federal State**.

UNIT VI: INTERPRETATION OF LAWS

6.1. General Concepts Of Interpretation Of Laws

- In Principle, all laws must be sufficiently, clear and reasonably formulated to tackle their purposes.
- More over, laws should be clear not only to the lawyer but also to the layperson. However, this may not be **achieved all the time**.
- There may be certain situations that give raise the need to interpret a law when it puts to practice.

So, at this time the concept of interpretation of Laws comes in to picture.

- **<u>What do we mean by interpretation</u>**?
- According to Garner, Interpretation is a process of giving meaning to the phraseology/terminology of the law.
- It is the process of reducing the law into reality.
- It is the art or process of discovering and clarifying the intended signification of the language used, i.e, the meaning which the authors of the law designed to convey to others.

- It is a rational activity that gives meaning to a legal text.
- It is a bout pinpointing the legal meaning of a text along with the spectrum of its semantic meaning.
- It refers giving meaning based on reasons. It has its own input, process and effect.

- Interpretation of a law comprises of search for the soul of the law.
- **Interpretation of law can be classified in to two:-**
- **Narrow** interpretation or meaning i.e. finding the literal meaning of the words used.
- **Wider** interpretation or meaning, i.e. ascertaining the intention of the law maker .

- But here, it is also important to understand the difference between **interpretation** and **construction**.

Interpretation

- It is the art of finding out the true sense of any form of words, that is the sense in which their author intended to convey and enabling others to derive from them the same idea, which the author intended to express.
- Interpretation only takes place if the text conveys some meaning or the

Construction

- Ii is the drawing of conclusion, respecting subjects that lie beyond the direct expressions of the text from elements known from and given in the text, conclusions which are in the spirit though not within the latter of the text.

- It resorted to when, in comparing two different writings of the same individual or two different enactments by the same legislative body, there found contradiction where there was evidently no intention of such contradiction or where it happens that part of a written or declaration contradicts the rest.

Why the need to interpret Laws/Statues?

- Words are the only means for all legal instruments through which the intention of the lawmakers can be expressed.
- Because of the inherent **nature of language, words are susceptible to ambiguity and vagueness**.
- Such defect gives rise to bread and butter of lawyer thereby making the task of interpretation to be considered as an indispensable and inseparable attribution of the field of law.

- In addition to the ambiguity created by the doubtful meaning of words, there are other instances where the words used, due to their inherent nature, do not express the legislative intent perfectly and thereby necessitate interpretation.
- Such is the case where the words used exceeds or fall short of expressing the meaning intended.

- As a result, most of the time over-vagueness and over-precision are considered as twin danger that must be avoided by interpreters.
- This can be achieved by looking the general policy consideration of certain legal instrument thereby the interpreter tries to ascertain the true and exact intent of the lawmakers.
- Further, the **breadth and scope of human knowledge are very much limited, thus, the lawmakers cannot enact a law that will regulate every microscopically detail of human relation.**

- In order to remedy such deficiencies, the legislature usually uses general words deliberately so as to enable certain legal instrument to accommodate new circumstances that have not been contemplated by the legislature at the time of law making.
- The vagueness created by the legislature leads to more room for interpretation there by enabling the court to handle new circumstances within the purview of the general

- Generally, as a lawyer, we need to interpret law :-
- ✓ Where the language is not clear,
- ✓ Where vague and
- ✓ To find the true meaning of the law to apply for certain situation.

6.2. Types of Interpretation of Laws

- Interpretation may be of different kinds based on:-
- ✓ The **Method,** and
- ✓ The **Body** which interprets the Laws.
- Based on the **Methods** of interpretation we can classify interpretation of laws in the following ways.

1. **<u>Grammatical Interpretation</u>**:-

- Implies that the meaning of the law is to be sought in the actual words used in it, which are to be understood in their ordinary and natural meaning.
- In other words, where there is no ambiguity in the language employed by the statute any other interpretation, except grammatical interpretation, is not permissible. This is known as **litera scripta.**

2. **Logical interpretation**:-

- On the other hand, is that which departs from the letter of the law and seeks elsewhere or some others or more satisfactory evidence of the intention of the legislature. This is known as ***"sententia legis"***.

Depending on **who interprets the law, i.e. the Body**, interpretation may also be classified as **Doctrinal**, **Judicial**, or **Legislative**.

A. Doctrinal Interpretation

- Ii is a method of interpretation, which is made in **books**, **in reviews**, in the **classroom**.
- It is performed mostly by the legal scholars when they **lecture**, **prepare articles**, **books etc**.

- Doctrinal interpretation propounded by scholars has no other use than to influence court decisions. This is best achieved through commenting on laws and judicial opinions, grouping points of law involved in analogous cases and stressing inconsistencies, if any, that may crop up in the judges decision.
- Therefore, scholars interpret

- Ethiopian cases, being mostly unreported, cannot be a system so discussed. In other jurisdictions, the influence of scholarly commentators is strong when their opinions are unanimous (*communis opinion doctorum*) and thus constitutes "doctrinal custom".
- In Ethiopia, there is no custom of such scholarly commentators and it is imperative to develop the culture.
- In so doing the Supreme Court case

B) Judicial Interpretation

- When a case is lodged before the court, lawyers must argue why the law covers or does not cover the behaviour in question. Then, the judges must find the meaning of the law to decide whether it regulates the particular conduct at issue or not.
- This search for “meaning” is known as **judicial interpretation**.
- Judicial interpretation emanates from a court when, in order to decide a case, it applies a law whose meaning is discussed before it.

- Administrative organs may interpret law to adjudicate cases. It is important to note that if the meaning is not disputed, no need of interpretation but a simple application of the law.
- Where a law's meaning is disputed before the court, the decision after interpreting the law may constitute what some call "**settled" case law or judicial custom**.

- Judicial interpretations become a source of law. In the judgments alone is to be found the law in its living form. This is hardly the case in Ethiopia, where most judicial opinions are not exhaustively researched and, being largely unreported, cannot be readily found.
- However, the Supreme Court is empowered to interpret laws on

C) Legislative Interpretation

- Legislative interpretation is that made by the lawmaker. Now a day, we do not find the government (King, president) directly interprets the law.
- What is the method is that more frequently a law contains, at the beginning, a section defining the main terms used in it.
- This technique, rather unfamiliar in continental legal system, is prevalent in common law countries and has been introduced in Ethiopia.

INTERPRETATION OF STATUTES (Common Law)

- Statute is defined as a law passed by a legislative body. The term '**act**' is interchangeably used as a synonym to **statute**.
- Any positive enactment to which the state gives the force of law is a 'statute', whether it has gone through the usual stages of legislative proceedings, or has been adopted in other modes of expressing the will of the people or other sovereign power of the state.

- In other words, the end product of the legislative process is a statute also referred to as an act or legislation. Since a statute is a written law, the language may be unclear or ambiguous.
- When a statue is unclear with respect to a particular question, lawyers and courts generally begin their search for statutory meaning by asking the question: **did the legislature intend this particular statutory provision to cover this particular fact pattern?**

In Common Law, there are two tools for statutory interpretation:-

1. Canons of Construction

- Canons of construction are judicially crafted maxims for determining the meaning of statutes.... Canons expressly intend to limit judicial discretion by rooting interpretive decisions in a system of aged and shared principles from which a judge may draw a "correct, 'unchallengeable rule of 'how to read'.
- There are multitudes of canons. Some of those most frequently used by the courts are listed below with their commonly used Latin phrases.

- A thing may be within the letter of the statute and yet not within the statute, because not with in its spirit, nor within the intention of its makers.
- Statutes in derogation of the common law are to be read narrowly.
- Remedial statutes are to be read broadly.
- Criminal statues are to be read narrowly.
- Statutes should be read to avoid

- Statutes that relate to the same subject matter (*in pari materia*) are to be construed together
- The general language of a statute is limited by specific phrases that have preceded the general language (*ejusdem generis*).
- Explicit exceptions are deemed exclusive (*expressio unius est exclusio alterius*).
- Repeals by implication are not favoured.
- Words and phrases that have received judicial construction before enactment are to be understood according to that construction.

- A statute should be construed such that none of its terms are redundant.
- A statute should be read to avoid internal inconsistencies.
- Words are to be given their common meaning, unless they are technical terms or words of art.

2. Legislative History

- The formal steps of the legislative process are officially documented.
- In congress of the United States of America, ideas for legislation are introduced as bills or as amendments to bills, committee hearings, debates, and mark-ups (committee meetings at which bills are read line by line for review and amendment) are transcribed, committee actions are set forth and explained in committee reports; legislative debate is transcribed; and votes are recorded.

- For all legislatures, the documentation of these steps is part of the process of building majorities and providing the public with access to the work of the legislature. For the courts, this documentation is **legislative history.**
- **Introduction**: the bill or bills through which the statute was introduced; the transcript of introductory remarks; memoranda that accompanies such introduction.

Committee Proceedings:

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

- ✓**Floor proceedings**: transcripts of debates; floor amendments; and votes
- ✓**Conference committee proceedings**: conference committee reports are significant
- ✓**Executive proceedings**: signing or veto statements and memoranda submitted in favour or opposition to the bill are also essential to interpret a statute.

The criticism of the use of legislative history for statutory construction of statues.

- **First**, it is argued that the use of it is inconsistent with the democratic theory summarize in the constitution.
- Legislative materials… at best can shed light only on the ‘intent’ of that small portion of Congress in which such records originate; [the legislative materials], therefore, lack the holistic ‘intent’ found in the statue itself.

- **Second**, serious questions have been raised about the reliability of legislative history. It is said that the information gathered from the documents about the legislative history is not reliable.

CONSTITUTIONAL INTERPRETATION

- Constitutional interpretation envisages a situation where somebody tries to “effectuate the intent of those individuals who drafted the constitution and the electorate which ratified it.”
- Constitutional language is always the product of group effort and compromise and may be deliberately chosen to be bridge over difference of opinion.

- Therefore, the intentions involved, here, are the intentions of many individuals who participated to a greater or less degree at various stages in the process of constitutional drafts person ship and subsequent ratification. For one thing, an intention is a mental state.
- But the constitution was written and ratified by many people, not just one, and it is hard to see how group can literally have minds, mental states, or intentions…[for another] several groups are involved in constitutional making and they disagree deeply both among and within themselves… so, whose intentions are relevant?

- Many intent theorists claim that provision of the constitution should be interpreted according to the intention of the people who wrote them, namely, the framers.
- However, others argue that it was the ratifiers who turned the words of the framers into part of the constitution, and it is the ratifiers, not the framers, who represent the majority.
- Consequently, the concerns with democracy and with the creators of the constitution, which provide the main rationales for original intent theories, should lead original intent theorists to emphasize the intentions of the ratifiers.

- On top of the factors for interpretation of statutes, constitutional interpretation has its own peculiar character. Such peculiarity has to do with the very nature of constitution and the purpose for which the latter is enacted.
- The judge is required to interpret the constitution by putting into consideration of its special nature. This makes constitutional

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

- We have to start by searching for authoritative sources of law and should do so .
- The text of the constitution is authoritative.
- It is also vague, sometimes ambiguous, which needs elaboration. The search for authoritative sources of law is therefore the search for

- In general, some jurisdictions give the power to interpret the constitution to courts or other political bodies.
- The political, philosophical and historical factors peculiar to a given nature influenced the constitutional tribunal's jurisdiction, composition and procedure to be fallowed.
- Some jurisdiction empowered their

- The American Model accords ordinary courts the general power to interpret the Constitution.
- The centralized system, on the other hand, empowers one single special constitutional court to interpret it.
- For example, the German Constitutional Court is conferred the power to interpret the constitution.
- The court does not settle ordinary disputes unless the case involves a constitutional interpretation.

- The FDRE Constitution empowers the House of Federation to interpret the constitution, Art. 62(1) and 83(1).
- The House of Federation is required to be helped by the Council of Constitutional Inquiry, Art.82 of FDRE Cons.
- The members of the Constitutional inquiry are by large lawyers and this is made to assist the House of Federation by professionals.

- This would enable the constitutional interpretation balanced. That means the nature of political instrument and legal document of the constitution are to be taken into account to interpret the Constitution.
- There are debates on the issue of interpretation of our constitution by the House of Federation.
- Some argue that the fact that it is interpreted by the House of

- The House may be biased by politics in interpreting it. The House of Federation is not accessible to any body who wants to lodge a case for constitutional interpretation since it is situated in the parliament.
- On the other hand, it is argued that the House of Federation being the political body can interpret the constitution watch out any political fear.

- In addition; the interpretation task carry on by the constitutional inquiry which is mainly consists of lawyers, is the recognition of interpretation of the constitution by lawyers. It is also said that this fits to the unique character of our objective realty.

Rules or Techniques of Interpretation

- There are rules of interpretation of Laws that developed through time. We will discuss each of them :

1) The golden Rule of Interpretation:-

- The main purpose of judicial interpretation is to ascertain/find out the intention of the legislature.
- In ordinary cases the Judges must resort to grammatical interpretation

- The golden rule of interpretation is that **if the words of the statutes are in themselves precise and unambiguous, then no more can be necessary than to expound words in their natural and ordinary sense**.
- The words themselves alone do, in such cases, best declare the intention of the

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

2) The Ejusdem Generis Rule

- According to Ejusdem generis rule, a sweeping/comprehensive clause in a statute which says “all other articles whatsoever” may be interpreted to mean only articles of the same genus or species as those expressly dealt with by the statue.
- Salmond gives an interesting example of *ejusdem generis* which serves to restrict the meaning of general words to things or matters of the same kind as the preceding particular words.

- If a man tells his wife to go out and buy butter, milk, eggs and anything else she needs, he will not normally be understood to include in the term, ‘anything else she needs, a new hat or an item of furniture.
- It must, however, be remembered that where words are clearly wide in their meaning, they ought not to be restricted or qualified on the ground of their association with other words.

3) The Mischief Rule

- When the language of the statute in question cannot determine the true intention of the legislature, the court may consider the historical background underlying the statute,.i.e. the circumstances under which the Bill was introduced and it finally became law.
- The law is to be interpreted in such a way as to suppress the mischief and advance the remedy.
- As per the mischief rule the court must adapt the construction that shall suppress the mischief and advance the remedy.

4) Logical Interpretation

- The logical interpretation has to be used when grammatical interpretation fails in ascertaining the meaning of the Law.
- If the words used in the statute are ambiguous and the true intention of the legislature is doubtful, logical interpretation may be resorted to in order to prevent the law from being misused.

- Thus, there can be two situations in which it is permissible to depart from the ordinary and natural sense of the words of the statute. When:-

1) It must be shown that the words taken in their natural sense lead to some absurdity, or

2) Some clause of the statute is inconsistent with, or repugnant to the enactment in question.

5) Liberal Interpretation

- When **litra-legis** suffers from ambiguity, liberal interpretation may be resorted to. Liberal interpretation may be either restrictive or extensive.
- The restrictive interpretation is applied to penal/criminal and fiscal/economic laws/ statutes. These statutes impose restraints on the liberty of a person or on enjoyment of property.

- In such cases, Courts are not allowed to interpret these statutes, in a manner which impose a greater burden on the subject than warranted by literal meaning of the statute.
- In extensive interpretation, on the other hand, the words are given a wider meaning.

6) Historical Interpretation

- At times when the language used in a statute gives no clue to the intention of legislature, courts may consider the historical circumstance attending the local enactment.
- But historical interpretation cannot be stretched too far. In several cases, it becomes necessary to take the help of preamble to know the real intention of the legislature.
- Preamble is a key which opens the gate way to the thoughts of legislators while framing a particular statute and it quite often helps in remedying the mischief.

7) General Rules of Interpretation

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

Some of these rules are as follows:-

1. As stated earlier, the golden rule of interpretation is that the words of the statutes must *prima facie* be given their ordinary meaning.

- That is to say, so long as the meaning of the statute is clear, certain and unambiguous, judges should not interpret the law.
- A statue must be read as a whole in order to give effect to the intention of the framers of it.
- As observed by Lord Davey, ***every clause of a statute should be construed with reference to other clauses of the Act***.

3. It is not competent for any court to proceed upon the assumption that the legislature has made a mistake.

- The court must proceed on the footing that the legislature intended what it had said. Even if there is some defect in the phraseology used by the legislature, the court cannot aid the legislature's defective phrasing of an Act or add and amend or by construction, make up deficiencies which are left in the Act.

4. No statute shall be construed to have **retrospective or backward-looking** operation unless such a construction appears very clearly in the terms of the Act or arises by necessary or distinct implication.

- It is the cardinal/fundamental principle of construction that every statute is *prima facie* **prospective/future** unless it is expressly or by necessary implication made to have retrospective operation. A new law

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

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

6. It is an important rule of interpretation that a **general latter law does not abrogate an earlier special law by mere implication**.

- The rule is contained in the well known maxim: ***Generalis specialibus non derogant*** which means that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, it cannot be construed that earlier and special legislation is indirectly repealed, altered or derogated merely by the force of those general words.

6.The meaning of the word may be affected by its context.

- This is known as the rule of ***noscitur a socis,*** which means that the meaning of a word be judged by the company it keeps. Thus, sometimes the word “void” used in a statute may also

7. Penal statutes must be **construed strictly**. In case there is any doubtful word or phrase in a penal statute, it should be construed in favour of the accused. This, however, does not empower the court to twist the meaning of the word which is clear and unambiguous for the sake of

- The rules of interpretation stated above are, however, illustrative and not exhaustive.
- There are other rules as well which guide the court in construing the statutes.
- It is significant to note that the political, social, moral or legal changes in a country greatly affect the principles of interpretation

- The developing trend towards public interest litigation in modern times bears testimony to this change. The courts now a days tend to interpret law in context of modern social welfare policies through the process of judicial review.
- In general, the rules of interpretation are no longer treated as mere compilations for the guidance of judges but they are taken as an instrument of affecting social change keeping in view the needs of the society.

Rules Of Interpretation In Ethiopia

- **Rules** of interpretation are very important to judge the judge and to minimize the evils of interpretation.
- As a result, states fix or set rules and the judge should follow in interpretation. Yet, Ethiopia does not have such rules for the draft prepared by the scholars in 1960 was not publicized.

- Yet the civil code provisions dealing with interpretation of contracts can be used by analogy by making some **mutatis mutandis**, i.e. by necessary changes to make them applicable to law.
- Thus, contract and intention of the contracting parties can be replaced by law and intention of the legislator respectively by analogy that arises from Article 1731 of the Civil Code which analogizes a law fully created contact with law.

- In other words, if a lawfully created contract is binding as if it were law and rules of interpretations of the contract are also given, the same rules can be used by analogy to apply to law even for stronger reason.
- Based on these provisions, particularly Articles 1733-1737 of the Civil Code, the rules can be seen to govern what should the

A) Clear Law

- As we have seen earlier, when the law is clear the judge is not allowed to make any interpretation pursuant to Art 1733 Civil Code which forbids not departing from the clear provision of the law.
- This is due to grammatical or literal interpretation we discussed above that provides that the literal ordinary and natural meaning of the law has to be applied as far as it is clear even if the law may seem injustice.

- As far as the law is clear the legislator is presumed to clearly say what it intended and also intended what it clearly said.
- Hence, there is no need to search for the intention of the legislator as it is clear from the law itself.
- But, there is an exception to this rule in which the judge may go beyond the clear law. That is when it causes **absurdity, i.e, illogical/irrational**.

- ***For instance, a law provides that any person who inflicts injury of another is liable to pay damages.***
- A physician may cause injury to the patients when making operations, yet, can the clear law given be applicable to him/her to make him liable to pay damages to this patient?
- No, because if that would be the case it would create absurdity and that is not intended by the legislator.

B) Lack of clarity in Law

The law lacks clarity due to ambiguity or vagueness of the word in it or due to the legislator's intention itself, which is not clear.

These are the situations under which interpretation becomes necessary to get the true meaning of the law.

C . Ambiguous Word

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

D. **Vague word**

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

E. No clear intention of the legislator

- If the law is still not clear, due to the intention of the legislator which could not be arrived through contextual interpretation, it requires going beyond the reading of the whole law.
- The judge has to use **expose de motif" interpretation**. That is searching the true intention of the

- **Expose de motif** refers to ***the general policy behind the making of the law and this is to referring by the avan proje which means the research works undertaken when preparing the draft of the law and the discussion made when making it.***
- This may help to arrive at what the legislator really intended in making the particular law. This

F. Total Silence in the law

- When the area has no law at all, it implies that the law is totally or completely silent on that particular area.
- For instance, the two situations rose as problems of lack of published law on areas of interpretation and private international relations are the good examples of complete or total silence. Hence, the solution becomes just only **opinion and not binding or authoritative solution.**

- Because, in civil law legal system unlike the common law it is only the legislative body and not the judge who has the power to make law and so, the judge cannot make law to fill the gap.
- On the other hand, as far as the case falls under his/her jurisdiction the judge cannot refuse to give decision alleging that there is no law for that it would amount to breach of his/her constitutional duty and denial of justice.

G . Partial silence of the Law

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

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

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

- If the thing or person left outside is of the same status a pari reasoning is used to include or add it to the list.
- A pari implies the same status. For instance if the law provides that all agricultural products should be taxed except products like maize and barley which are tax exempted.
- The issue whether or not wheat is

- Maize and barley are provided in the list as exemplary so that any other similar agricultural product including wheat can be added to it by analogy using a pari reasoning for maize, barley and wheat have the same status and ,therefore, it is tax exempted.
- What is left out from the illustrative list may even be logically included in to the list for

- For instance if the law provides that a marriage may dissolve by divorce or death of one of the spouses, the issue whether or not a marriage may dissolve by death of both of the spouses can be addressed using partial silence in the law which is illustrative listing to which other causes like death of both of the spouses can logically be added to the list.
- Nonetheless, be excluded from the list by using the logic known as **contrario reasoning** when the partial silences logically complete listing the things or persons left out should, the issue whether or not a goat is tax exempted can be decided by using acontrario reasoning.

- If for instance, the law provides that all cattle except sheep are not tax exempted is contrario reasoning.
- That is the law expressly exempts only sheep from taxation and there fore by reasoning to the contrary goats are not exempted.
- This is also what is known under the rule of ***expressio unius exclusion alterius*** i.e. the law expressly providing only for one person or thing implies the exclusions of all others

H. Inconsistency or Contradiction in law

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

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

- **Second**, the two provisions may exist in the same hierarchical position cannot serve to decide the issue, because both are in the same hierarchical position.
- In such a situation their effective date i.e. the date on which they entered in to force must be considered as a reference.
- Because, the rule is that the later law prevails over the

- In other words, the new or recent law must be applicable and the old law will have no effect for it is assumed that the legislator who made a new law that contradicts with an old law of the same hierarchical position intended to repeal the old law by implication.

- **Third,** both the contradicting provisions may sometimes exist in the same law like for instance in the same code which implies that neither hierarchy nor effective date can be used to decide the issue because they are in the same hierarchal position even in the same law and also have the same effective date.
- The remedy for such a problem is referring to the nature of the laws whether one is **general** and the

- If one is in the general rules and the other is in the special rules ***lex special derogate generalis*** (i.e. special Rules prevail over general rules).
- Thus, the special rules must be applicable because they are special to the case at hand where as the general rules are applicable where there is no special rule governing the issue.

- Even though it may not arise in practice it is also possible to extend the issue to what would be done if both provisions in the same law are general or both are special.
- In this case it is possible to remedy the problem by applying the less general if both are general and the more special if both are special rules.

CHAPTER VII: JURIDICAL ACTS

7.1. **Definition and importance**

- Definition of Juridical Acts:-
- It is defined as an act that is intended to create, transfer, or extinguish a right and that is effective in law for that purpose.”
- It is also explained as “the exercise of legal power”
- Ordinarily it defined as a declaration of will by a private person directed to the creation of intended legal consequences.

- The term juridical act, therefore, is broader than contract or even agreement.
- It includes, for example, a demand to vacate the premises to a lessee, a declaration by which a party wishes to avoid a contract on the ground of fraud, the grant of authority to an agent and the making of a testament.

- The essential element in every juridical act is the declaration of will.
- Sometimes the juridical act consists of nothing else but the declaration of will as in the case of a testament.
- Sometimes, however, the declaration of will must be accompanied by another act

- Sometimes the juridical act consists of nothing else but the declaration of will as in the case of a testament.
- Sometimes, however, the declaration of will must be accompanied by another act of one or several of the parties.
- Juridical and quasi-juridical acts are distinguishable from a third category of lawful volitional acts termed **material acts**.

- These consist in some action or physical relationship to which the law attributes certain consequences.
- Such specific material acts like the occupancy of a **res nullius**, the finding of a treasure or of lost things, and the writings or composition of a literary work are not under the category of juridical acts.
- The rules governing juridical acts have no application to material acts.

- Accordingly, the rules governing juridical acts have no application to material acts.

CLASSIFICATION OF JURIDICAL ACTS

- Most of the legal relations which exist among men spring from juridical acts. Those acts, which are performed solely in order to bring about one or several legal effects, are called juridical acts.
- They are said to be juridical on account of the nature of their effects. Juridical acts are most diversified. The rules, especially applicable to each category, will be explained in the appropriate place.
- However, there are a few elementary rules common to all juridical acts. These are the following.

A) The number of wills uniting in the act:

- To perform a juridical act, there must be, in principle, at least two persons.
- The reason for this is that most juridical acts are contracts, that is to say, a meeting of minds between two or more persons.
- So, those who figure in the juridical act as its authors or makers are called the parties. The term **consent** is applied to the conformity of the will of each of the parties to that of the others.

- The number of persons who may be parties to an act is not limited. It may attain any figure. Example: the founding of a big company, made up of shares, may bring together several thousands and even several hundreds of thousands of shareholders.
- It is possible that a juridical act will be performed by a single person acting alone; that it be the work of a single will. Examples: the drafting of testament; an offer to sell, to buy,

Classification Juridical Acts

JA can be classified in two. These are:-

A. **Unilateral juridical acts:**

- **Are t**hose acts completed by the declaration of will of only one person or by identical declarations of several persons acting in the pursuit of a common interest.
- For example, the notice of termination of a contract, the promise of a reward and the execution of a testament are unilateral juridical acts.

- Juridical acts, which require several identical declarations of will, not complementary to each other, as where several parties meet to form an association or where co-lessees give notice of termination of the lease, are specifically called **joint juridical acts.**
- In general, a unilateral act is one in which the will of only one party is operative: a testamentary disposition is the best example of unilateral JAs.

- **Bilateral juridical acts:**
- **A**re those act completed by corresponding declarations of will of several persons acting independently and in the pursuit of individual interests.
- According to this definition, all contracts are bilateral juridical acts. A bilateral act, on the other hand, is the result of an agreement between two or more parties.

- **Juridical acts are also clisified into Inter vivos and Mortis causa.**
- Inter vivos juridical acts are those designed to produce effects while the person who declares his/her will is still living.
- Mortis causa juridical acts are those designed to produce effects only after the death of the person who declares his/her will.

- Juridical acts, “considered in relation to the motive for making them, are either gratuitous or onerous”.
- This division of juridical acts rests on the *motive causa* of the maker which can be either gratuitous (*causa lucrativa*) or onerous (*causa onerosa*).

- **Gratuitous (*causa lucrativa*):-**
- To be gratuitous, the object of [the juridical] act must be to benefit the person with whom it is made, without any profit or advantage received or promised as a consideration of it".
- A pure and simple donation, the institution of an heir, the giving of a legacy, and the contracts of mandate and loan for use are examples of gratuitous juridical acts.

Onerous (*causa onerosa*):-

- Anything given or promised as a consideration for the engagement or gift, any service, interest or condition, imposed on what is given or promised, although unequal to its value, makes a jurisdiction act onerous in its nature.
- All reciprocal and all communicative contracts are, by definition, onerous contracts.

Juridical acts can also be classified into obligatory and real

Obligatory juridical Acts:-

- **Are** acts those creating, transferring, altering or terminating obligatory rights .

Real juridical Acts:-

- **Are** cts those creating, transferring, altering and terminating real rights.

RULES COMMON TO ALL TYPES OF JURIDICAL ACT

- There are pre-requisites for the validity of juridical acts. Consequently, There are six (6) pre-requisites for the validity of juridical acts.

A) General legal capacity:-

- There are two types of persons: individuals and corporations (Artificial Persons).
- Individuals are given general legal capacity to receive and transmit legal rights, without distinction being made between males and females.
- Corporations are granted the same general legal capacity to be subject of rights as individuals, except for certain limitations imposed on them by their nature or by law.

- For example a corporation cannot administer a trust, be imprisoned, or bring an action for assault and battery.

Specific legal capacity:-

- what can be classified as the specific legal capacity to make juridical acts are classified as follows.
- Treatment of these provisions will be subdivided for purposes of clarity into the following types of incapacities: insanity, minority, civil death, married women and special incapacities.

- **Insanity-**
- Proof of interdictions is considered sufficient to establish that a person is without capacity to make juridical acts after his/her interdiction, but not prior to interdiction.
- Insane person cannot give their consent freely. Therefore, they cannot make juridical acts.

- An insane person, according to Art. 339 of the Ethiopian Civil Code, is one who, as a result of insufficient development of mind or mental disease or senility, is not capable to understand the consequences of his/her action.
- Persons who are feeble minded, drunkards or habitually intoxicated persons who are prodigals are in appropriate cases assimilated to insane

Minority:-

- **A**ge forms a distinction between those who do and do not have enough reason and experience to govern themselves and determines the ages at which minors may perform certain juridical acts.
- A minor of fifteen may be emancipated by his/her parents, or of eighteen by a judge.

- In these two emancipation situations, the minor acquires the capacity to administer his/her estate, but cannot obligate him/herself for a sum exceeding one year of his/her income, alienate or mortgage his/her immovable without court consent, or dispose of his property by donation *inter vivos* except by marriage contract

- Yet, if the emancipated minor is engaged in a trade, all his acts relating to the trade are valid.
- Minors may also be emancipated by marriage. If under eighteen, they acquire the same capacities bestowed on minors emancipated by parental or court consent; if eighteen, they have the same capacity as majors.

- All emancipated minors may sue for the partition of their estates, but apparently can neither accept nor renounce a succession falling in their favour.
- Lastly, emancipation by parental or court consent may be revoked if the minor contracts contrary to his authority; but if emancipated by marriage, the

- Coming to Ethiopia, pursuant to Article 215 of the Revised Family Code, a person who does not attain eighteen years of age is called a minor.
- A minor has no legal capacities. Consequently, a minor “shall not perform juridical acts except in the cases provided by law” (Art. 216(2) of the Revised Family

- A minor is not allowed to exercise the functions of guardian or tutor because s/he is incapable.
- However, a minor can exercise the functions of a guardian over his/her child/ren, Art. 242 Rfc.

Civil death:-

- Though at early civil law there existed incapacity called “civil death” depriving convicts of the capacity to make juridical acts.
- In Ethiopia the criminal court may decide an accused not to exercise his/her rights, like to be a witness, or to carry out trade and profession, Art. 123 Of the Criminal Code.

Married Women:-

- Pursuant to Art. 34 of the Constitution of the Federal Democratic Republic of Ethiopia, women are equal with men at the time of entering into, during marriage and at the time of divorce.
- What is more, no woman is allowed to conclude a marriage before attaining eighteen years of age (Art. 7(1) of the R.F.C).
- In all respect, women are equal with men. Therefore, married women can make juridical acts so long as they are capable in other respects.

B) Declaration of Will:-

- The second pre-requisite for the validity of juridical acts is that the actor must declare his/her will that is directed towards the creation of legal consequences.
- The declaration may be either express (verbally or in writing), or implied (by action, inaction, or silence).

- A problem is the time at which the declaration of will would be regarded as completed.
- Three general approaches have been taken for a solution to this problem.

The Expression Theory:-

- The declaration is considered completed as soon as expressed.

The Receipt Theory:-

- The declaration is not completed until the party to whom the juridical act is addressed receives it, whether or not he understands the declaration.

The knowledge Theory:-

- The declaration is completed only upon its receipt and an understanding of it by the party to whom it was directed.
- The knowledge theory is used by most civilian jurisdictions.

C) Correspondence Between Declaration and Will:-

- The third general pre-requests for the validity of a juridical act is that there must be a similarity between that manifested and that intended.
- If there is no correspondence between these elements,

I. The theory of the will :- takes a subjective approach by saying the controlling factor is what was actually intended.

II. The **Manifestation** Theory :- takes an objective approach, and concludes that what is actually expressed controls.

- The problem of correspondence between declaration and will arises in two contexts: where there is an intentional difference between the two; and where the difference is **unintentional.**

- Intentional differences may result from one or both parties' mental reservations or the use of words which would usually amount to a juristic act, but with an obvious lack of intention that they should have that effect.
- Unintentional differences may be the result of "essential" errors

- It has been said that the prevalent view is that a lack of correspondence between the declaration and will is a ground of nullity except in the case of intentional differences

D) Will Consent Free From Vice:-

- The fourth pre-requisite for the validity of juridical acts is that the will must be free from vice.
- Put another way, the manifestor’s consent must not have been procured through fraud, violence, or threats.

E) Form:-

- In principle there is no general requirement of form for the validity of juridical acts: however, form is considered necessary in some cases.

Three reasons may be advanced for requiring form:-

- 1) in the interest of the parties it allows an opportunity for serious thought before entering a juridical act
- 2) in the interest of legal order, it enables one to distinguish between final legal documents and mere proposed drafts thereof; and
- 3) it facilitates proof of juridical acts in that formal written instruments are more reliable than parole evidence.

- Thus, the law may provide that a will must be expressed in a formal way and where the parties failed to comply with it the juridical act will have no legal effect.

- The effects of formality are two; **constitutive** and **evidentiary**. If it is constitutive, a certain form must be used or the juridical act is void.
- An example is a donation of immovable property which is void even as between the parties, but it may cause it to be ineffective as to third parties.
- If the effect is evidentiary it

F) Lawful content:-

- The sixth and last pre-requisite for the validity of judicial acts is that their content must be a lawful one.
- The law usually prohibits juridical acts that would tend to bring about an immoral result, limit freedom of will or limit one’s civil and economic liberties

Relative Effect of Juridical Acts

- In principle, acts produce no effects except for those persons who perform them.
- Those who remain strangers to them, and who are called third parties, neither profit by nor suffer on account of them.
- This rule is mainly applied to contracts and to judgments. The effects produced by them are merely relative.

- In order to determine exactly this relativity of the effects of juridical acts, a distinction must first be drawn between the authors of the act or the parties, on the one hand, and third parties, on the other.
- If an act emanates from a single person, s/he is called the author of the act. If the act has several authors, as is the case when

- It is not the signature that designates who is a party. An act may be signed by persons who are not parties to it, as for example, by the public officer before whom it is passed and by the witnesses who are present.
- The terms “signatory” and “party” are thus in no sense synonymous.

- A party, on the other hand, may not have signed the act and may not have figured in it.
- This takes place when a party to an act is represented by another person.

- Therefore, to know who are third parties, account must be taken of two important conceptions, that of representation and that of succession.
- In short, juridical acts produce rights and obligations only upon parties and not third parties.

Representation in juridical acts*:*

- A juridical act is often performed by someone other than the person interested. This replacement of a person by another may be necessary in two cases.
- They are: (1) when it is impossible for the interested person to go to the place where the act should be performed, because s/he is travelling, sick, or in prison, etc; and (2) when the interested person is not able to comprehend what is done.

- Examples are the case of a very young child, or a lunatic or an old person whose faculties are impaired.
- This representation of a person by another may be convenient and advantageous sometimes, without being necessary

- In modern terminology, that the third party employed to perform the act (mandatary, agent, tutor, administrator, etc,) represents another person (his principal, his ward, etc.).
- At present the term “to represent” designates the intervention of a person acting for another without being him/herself affected by the juridical effects of the act, which s/he performs.

- Under the Ethiopian law, juridical acts (including contract), are binding as between the parties as though they are laws, Art. 1731(1) Civ. C. Cum Art 1677(1) of the same.
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RIGHTS AND DUTIES

- The term **“right”** is defined as “something that is due to a person by just claim, legal guarantee, or moral principle (the right of liberty).”
- It includes a “power, privilege, or immunity secured to a person by law (the right to dispose of one’s

- Further the term is defined as a “legally enforceable claim that another will do or will not do a given act; a recognized and protected interest the violation of which is a wrong (a breach of duty that infringes one’s right)”.
- Right is a correlative to duty; where there is no duty there can be no right. But the converse is not necessarily true. There may

- In order for a duty to create a right, it must be a duty to act or forbear.
- Thus, among those duties which have rights corresponding to them do not give raise the duties, if such there be which call for an inward state of mind, as distinguished from external

- The term “**duty**” is defined as follows: “a legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right”.

Legal right:- what is a legal right? The test for a legal right –is the right recognized and protected by the legal system itself?

Thus, a person may have a legal

- However, this does not mean that the law is unreceptive to the general conception of right, which exists in a community, for the ethical views and positive morality of a given community naturally influence the law in its determination of the conduct, which it will protect, and of the actions, which it will prohibit.

A) The protection afforded by the state

In case of a right, which is recognized only by morality or ethics, the law will grant no remedy.

Enforceability by legal process has, therefore, sometimes been said to be the *sine qua non* of a legal right.

Three qualifications must, however, be made to this statement, for enforceability is only the most obvious mark of recognition.

Firstly, the law will not always enforce a right, but may grant the injured party only a remedy in damages.

- **Secondly,** there are certain rights, some times called **imperfect rights,** which the law recognizes but will not enforce directly.
- Thus, a statute-barred debt cannot be recovered in a court of law, but for certain purposes, the existence of the debit has legal significance.
- If the debtor pays the money, s/he cannot later sue to recover it as money paid without consideration; and the imperfect right has the faculty of becoming perfect if the debtor makes an acknowledgement of the debt from which there can be inferred a promise to pay.

Thirdly, in some systems courts of justice do not control adequate machinery for enforcement.

- Thus, in international law there is no power in the court to enforce its decree.

- Hence, ultimately, the answer to the question whether the essence of a legal right lies in its enforceability will depend on our definition of law.

B) The Element of Will

- Proponents of the doctrine of natural rights uphold the will theory on the ground that the very purpose of the law is to grant the widest possible means of self-expression-the maker of individual self-assertion.
- Rights, therefore, are inherent attributes of the human will. However, this is based on a confusion of what is and what ought to be.

- It is true that person can realize an effective life only in a society, but that does not mean more than that his rights must be adjusted to those of his/her fellows.
- The individual will may be directed to social or anti-social ends, but the will is the ‘mainspring’ of the individual personality, and for the law to

- The aim of the law is not primarily to create a new life for society and new desires for persons, but rather to regulate such life and such desires as already exist.
- Will may be an essential element in many attempts to analyse the conception of legal right, but it is not the only element.

C) The Element of Interest

There is a debate that interest is essential, not a will as the basis legal rights.

The main argument of those who hold that interest and not will is the fundamental basis of right is that persons may have rights, although they have no wills:

- Ihering attacked the will theory because he thought that the purpose of law was not to protect individual assertion but certain interests.
- He therefore defined rights as legally protected interests.
- These interests or values are not created by the state for they already exist in the life of the community, and the State merely chooses such as it will protect.

- It is true it is an exaggeration to set interest and will too much in opposition to each other. ‘
- The essence of legal right seems … to be not legally guaranteed neither power by itself, nor legally protected interest by itself but the legally guaranteed power to realize an interest.

- The human will does not operate in *vacuum* but desires certain ends, and interests are but objects of human desire.
- An interest is a claim or want of an individual or a group of individuals which that individual or group wishes to satisfy.

- There is danger in assuming that the law can in every case dictate to man wherein his interests lie
- The law grants rights not to the human will as an end in itself, but to a human will that is pursuing ends of which the legal system approves.