Session one – HANDOUT 1.1

 1.1. DEFINITION OF LAW

**What is Law? What are essential points that should be taken into account to define law?**

Jurists have defined law differently from different point of views.

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

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

From the pragmatic point of view, American jurist, 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.”** [Steven; 2003: 8]. According to Holmes “**the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law**”. It is observable from these definitions that courts play great role in applying as well as creating the law.

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

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

**a)  There must be a pressure that comes from external in the form of actions or threats of action by others regardless of the person wants to obey the law or not;**

**b)  These external actions or threats of action always involve coercion or force;**

**c)  Individuals whose official role is to enforce the law must enforce the coercive  action.**

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

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

**1.2. BASIC FEATURES OF LAW**

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

I) GENERALITY

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

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

1. “**Every one has the right to life, liberty and the security of a person.**” [Art 3, UNDHR; 1948].  - This law is made to be applicable to every person on this world. Therefore, it is universal.
2. “**Every person has the inviolable and inalienable right to life, the security of person and liberty**.” [Article 14 of the 1995 Constitution of the Federal Democratic Republic of Ethiopia].

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

1. “**Every Ethiopian national, without any discrimination based on colour, race, nation, nationality, sex, status, has the following rights...**  (b) On attainment of 18 years of age, to vote in accordance with the law.” [Article 38(1)(b) of the 1995 Constitution of the Federal Democratic Republic of Ethiopia.]. - This law is made to be applicable only **to Ethiopian nationals who attain 18 years of age.** Therefore, it is even less general than the second illustration.
2. “**Whoever intentionally spreads or transmits a communicable human disease is punishable with rigorous imprisonment not exceeding ten years.**” [Article 514 (1) of the 2004 Criminal Code of the Federal Democratic Republic of Ethiopia].  - This law is made to be applicable only on a person who commits the crime. Therefore, it is even less general than the third illustration.
3. “**The term of office of the presidents shall be six years. No person shall be selected president for more than two terms”** [Article 70(4) of the 1995 Constitution of the Federal Democratic Republic of Ethiopia].

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

Under all these illustrations, **the subjects of laws are given in general terms. However, the extents of the generalities decrease from universality to an individual person**. **Generality of the subject of the law may serve two purposes.** Firstly, it **promotes uniformity and equality before the law** because any person falling under the group governed by the law will be equally treated under the same law. Secondly, **it gives relative permanence to the law.** Since it does not specify the names of the persons governed, the same law governs any person **that falls in the subject on whom the law is made to be applicable**. **There is no**

**need to change the law when individuals leave the group.** This is what can clearly be seen from the fifth illustration. Even if the former president’s term of office has lapsed, **the same law governs the present and future presidents** without any need to change the law. The permanence of law is indicated as relative for there is no law made by person, which can be expected to be applicable eternally.

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

II) NORMATIVITY t

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

A) Permissive Law

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

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

Illustrations:

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

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

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

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

B) Directive law

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

* **-  must**
* **-  shall**
* **-  has/have the obligation**
* **-  is/are obliged to**
* **-  is/are ordered to**
* **-  shall have the obligation/duty**
* Illustrations:  1. “**The debtor shall personally carry out his obligations under the contract where this is essential to the creditor or has been expressly agreed**.” [Civ. C. Art.

1740(1)]. “Shall.... carryout” in this law shows that the contracting party, the debtor, is directed, ordered or commanded by the law as it is provided. Therefore, this law is directive law.

2. “**Every worker shall have the following obligations to perform in person the work specified in the contract of employment**.” ( emphasis added) [Article 13(1) of the 2003 Labour Code Proclamation No. 377/2003].

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

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

C) Prohibitive law

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

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

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

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

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

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

III) Sanction

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

**1.3. MAJOR THEORIES OF LAW**

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

1.3.1. NATURAL LAW THEORY

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

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

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

**The Catholic Pope in Europe during the middle age become dictator due to the teachings of Thomas Aquinas that natural law is the law of God to the people and that the pope was the representative of God on earth to equally enforce them on the subjects and the kings.** At the late of the Feudalism stage, Locke, Montesque and others taught that person is created free, equal and independent by taking the concept of Natural law as the individual right to life, liberty, and security. Similarly, Rousseau’s teachings of individual’s right to equality, life, liberty, and security were based on natural law. The English Revolution of 1888, the American Declaration of Independence and the French Revolution of 1789 were also results of the Natural law theory.

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

1.3.2. POSITIVE LAW THEORY

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

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

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

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

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

1.3.3. MARXIST LAW THEORY

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

1.3.4. REALIST THEORY OF LAW [Biset; 2006]

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

**This theory has its basis in the common law legal system in which the decision previously given by a court is considered as a precedent to be used as a law to decide future similar case.** This is **not applicable in civil law legal system**, which is the other major legal system of the world, and as a result this theory has been criticized by scholars and countries following this legal system for the only laws of their legal system are legislation but not precedents. This implies that the lawmaker in civil law legal system is the legislative body but not the judge. The followers of this theory include Justice Homes, Lawrence Friedman, John Chpman Gray, Jerom Frank, Karl N. Lewelln and Yntema.

**1.4. FUNCTIONS OF LAW [Biset; 2006]**

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

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

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

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

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

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

Today the following are taken as important functions of law.

A) **Social control** – members of the society **may have different social values, various behaviours and interests. It is important to control those behaviours** and to inculcate socially acceptable social norms among the members of the society. **There are informal and formal social controls**. **Law is one of the forms of formal social controls**. As to Roscoe Pound, law is a highly specialized form of social control in developed politically organized society. Lawrence M. **Freedman** explains the following **two ways in which law plays important role in social contro**l:

first, **law clearly specifies rules and norms that are essential for the society and punishes deviant behaviour**. “Secondly, **the legal system carries out many rules of social control**. Police arrest burglars, prosecutors prosecute them, courts sentence them, prison guards watch them, and parole broads release them [Steven; 2003: 19]

B) **Dispute settlement**

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

C) **Social change**

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