**Session one – HANDOUT 1.2**

1.5. RELATIONSHIP BETWEEN LAW AND STATE

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

There are **three main legal theories with regard to the relationship between law and state**.

* **the state is superior to and creates law**;
* **law precedes the state and binds it when it comes into existence**;
* **law and the state are the same thing looked at from different points of view**.

**Austin explains that state is superior** to and creates law when he defines **law as the command of the sovereign.** According to Austin, **there must be a political society of ‘considerable’ numbers, and a superior in that society who is habitually obeyed** by the bulk of the members of that community.

Within this community, **the superior has** **a sovereign power to lay down** the law. Collectively considered, **the sovereign is above the law, but a member of the legislature is individually bound by the law**.

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 Nazi and Fascist conceptions, which regard law as 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.

However, **the practical importance of Kelesen’s approach is that he emphasizes that law is a more fundamental notion than that of the State.** While it is true that law cannot exist without a legal order that order may take forms other than that of the state. Hence, the theory is wider, and therefore more acceptable, than that of Austin. A legal order may be created in the international sphere even though no super state is set up.

**What is state?** The normal marks of a state are **a fixed territory, population, and competence to rule which is not derived from another state**.

Kantorowicz, defines the state as a **juristic person endowed with the right to impose its will on the inhabitants of a given territory, of which right it cannot by law be deprived without its own consent.**

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

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

1.6. DIFFERENCE BETWEEN LEGAL NORMS AND NON-LEGAL NORMS

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

According to Black’s Law Dictionary [2004: 1086], **norm is “a model or standard accepted (voluntarily or involuntarily) by society or other large group, against which society judges some one or something”.**

Thus, norm connotes a standard that is accepted by society voluntarily or in voluntarily. **The society can judge some one or some thing against the norm.** For example, **the standard to determine a given behaviour as right or wrong is norm.**

We have seen that one of the natures of law is that it is a norm. The general statement of a legal norm is not a mere rendition. In fact, all social norms differ from the mere resumption of a philosopher or a doctor, etc.

**True such propositions made by philosophers and medical doctors may be useful addresses; but nobody is bound to follow them**. In contrary, **legal norms are binding. In fact, the essence of the legal norms is that members of the society are bound to behave in accordance with the law.** That is why we usually refer to statements about what will happen to an addressee who behave in accordance with the law attached to the general statements. **These are what we call sanctions.**

Sanctions answer the question:

**How does the community or group react in case the norms are not obeyed?**

**What are the guarantees to ensure that the norm will be adhered to?**

**Sanctions are various types but their common objective is to form norm and to follow the prescribed norms**.

**Even permissive norms are protected by sanctions; though in their case the sanction is addressed to the person permitted to do the thing** but to the rest of the world commanding everybody else not to interfere with the rights of the person so entitled.

To summarize, **normativity means the choice, which the rule presents with respect to the described human behaviour; the mandatory character of the norm as well as the possibility of enforcing the norm where it is ignored.** Of course, law is not only social norm that has this character of normativity. Essentially, all kinds of social norms have it because it is only this character of normativity that converts any general statement into a norm.

Hence, in as far as this character of normativity is concerned, **legal norms differ from the other social norms mainly by the number of persons they address themselves to and by the nature of the sanctions they apply.**

**Every legal norm is formally structured; and the three formal elements of a norm’s structure are the premise (hypothesis), the disposition and the sanction.** The premise describes the **social circumstances or the situations or events, which are the background for the social behaviour** that the norm has in mind, and this includes a description of the addressees themselves. The dispositive element describes **the kind of human behaviour envisaged and preferred by the norm as well as the choice that norm makes in this respect.** It is said that it is this element that contains the essence of the norm. The sanction is that part of the norm that **describes what will happen if the norm is disobeyed.**

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

**Similarity - Both legal and non-legal norms are normative, that means both need to create and develop human behaviors.**

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

**What is the distinction between law and ethics?**

**Law tends to prescribe what is considered necessary for the given time and place. Ethics concentrates on the individual rather than upon society; law is concerned with the social relationships of the society rather than the individual excellence of their characters and conduct.**

**Ethics must consider the motive for action as all-important; whereas law is concerned mainly with requiring conduct to comply with certain standards, and it is not usually concerned with the motives of persons.** It is too narrow, however, to say that ethics deals only with the individual, or that ethics treats only of the ‘**interior’** and law only of the ‘exterior’, for ethics in judging acts must consider the consequences that flow from them and it is not possible to analyze the ethical duties of person without considering his/her obligations to his/her fellows or his/her place in society. It is equally misleading to concentrate upon those aspects of the law which are concerned directly with conduct and with ‘**exterior’** factors in person’s social relations, to the exclusion of those which, explicitly or implicitly, are aimed at intention, motive and the ends which persons seek [What is Law: 33-7].

**Law, in elaborating its standards, must not try to enforce the good life as such; it must always balance the benefits to be secured by obedience with the harm that the crude instrument of compulsion may do.** There are many ethical rules the value of the observance of which lies in the voluntary choice of those who attempt to follow them. Nevertheless, there are other rules, which it is essential for law to enforce for the well- being of the community. Ethics thus perfects the law.

**In marriage, so long as love persists, there is little need of law to rule the relations of husband and wife-but the solicitor comes in through the door, as love flies out the window**. **Law thus lays down only those standards, which are considered essential, whatever be the motive of compliance.**

In one sense law may be a ‘minimum ethic’, but frequently law has to solve disputes on which the rules of ethics throw very little light-where two persons, neither guilty of negligence, have suffered by the fraud of a third, who is to bear the loss? **Ethics may suggest that the loss should be equally divided, but this is not a very practical rule for the law that requires definite rules for the passing of title and the performance of contracts. Eg. Loan on wife**

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

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

**What is more, it has been suggested that law creates both duties and rights whereas ethics can create only duties.** This, however, may easily become **a mere matter of terminology**.

**If Ayalew is under a duty to support his father, why cannot we say that the others have ethical right to be supported? This right will not, of course, be enforced merely because it is decreed by ethics, and nether will breach of the duty to be punished, but logically even in case of ethics it is hard to conceive of a duty unless there is a corresponding right.**

Furthermore, **ethics deals with the absolute ideal, but positive morality is made up of the actual standards,** which are adopted in the life of any particular community.

**Positive morality therefore (like law), emphasizes on conduct rather than the state of mind; it is also similar to law in that it is imposed on the individual from without, for it has behind it the effective, if unorganized, sanction of public opinion.**

**How many persons would rather break the law than wear the wrong tie with a dinner jacket?** Here we see the sanction behind a mere rule of etiquette, and the fear of ridicule or social ostracism protects strongly the more important rules of positive morality.

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

**1) they are alike binding regardless of the consent of individual bound and supported by serious social pressure for conformity;**

**2) compliance with both legal and moral obligation is considered as a minimum contribution to social life. This is because as we have already discussed compliance with legal norms enable the members of the sociality to live together.**

The same holds true with respect to moral obligations. 3) **Both law and morals include rules that are essential for life in general even though they also include special rules applicable to special activities.** Thus, the members of the society are required to comply with those rules to live to gather. Thus, prohibition to violence to person and property are found in both law and morals.

**What are the differences between law and positive morality?**

Various tests have been suggested to distinguish a rule of law from a mere dictate of positive morality.

**Firstly, a rule of law is imposed by the State;**

**secondly, while there may be a sanction behind the rules of positive morality, it is not applied by organized machinery, nor is it determined in advance...**

**Third, some argue that the content of law is different from that of social morality: but, while it is true that law, having a different object, covers a different scope, there is no immutable boundary to its operation.**

**Law, positive morality, and ethics are overlapping circles, which can never entirely coincide, but the hand of person can move them and determine the content that is concerned to all or two or confined to one.** Ethics condemns murder, because it is once accepted by both positive morality and law. We do find a close relationship between the rules of law and rules of positive morality, for the latter determine the upper and lower limits of the effective operation of law. If the law lags behind popular standards it falls into disrepute; if the legal standards are too high, there are great difficulties of enforcement... The close relationship between law and the life of the community is shown by the historical school, and if we admit that positive morality influences law, it must be recognized that law in its turn plays a part in fixing the moral standards of the average person. Fourthly, it has been suggested that the method of expression should be used as a test-rules of positive morality lack precision, whereas rules of law are expressed in technical and precise language. There is much truth in this, but the distinction is only relative; for early law is fluid and vague, and some social usages may be expressed very precisely, for example, the modes of address of those bearing titles.

Theoretically, there may be some difficulty in determining the exact distinction between positive morality and law. In practice, however, the legal order provides machinery for the determination of difficult cases.

**If a sick relative, dependent on Ayalew for the needs of life, is so neglected by Ayalew that death results, is this a breach of a legal duty or merely an infringement of positive morality?**

1.7) MAJOR LEGAL SYSTEMS IN THE WORLD

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

1.7.1.) LEGAL SYSTEM

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

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

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

**The grouping of laws into families, thereby establishing a limited number of types, simplifies the presentation and facilitates an understanding of the world’s contemporary laws.** There is no, however, agreement as to which element should be considered in setting up these groups and, therefore, what different families should be recognized.

**Some writers base their classification on the law’s conceptual structure of on the theory of sources of the law; others are of the view that these are technical differences of secondary importance, and emphasize as a more significant criterion other the social objectives to be achieved with the help of the legal system or the place of law itself within the social order.**

From the technical standpoint, it is advisable to ask whether someone educated in the study and practice of one law will then be capable, without much difficulty, of handling another. If not, it may be concluded that the two laws do not belong to the same family; this may be so because of differences in the vocabularies of the two laws (they do not express the same concepts), because the hierarchy of sources and the methods of each law differ to a considerable degree. This first criterion, no matter how essential, is nevertheless insufficient, and it should be complemented by the second consideration. **Two laws cannot be considered as belonging to the same family, even though they employ the same concepts and techniques, if they are founded on opposed philosophical, political or economic principles, and if they seek to achieve two entirely different types of society.** The two criteria must be used cumulatively, not separately.

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

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

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

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

The meaning of the words “civil law” has not been the same in all historical periods in the framework of early and classical Roman law, jus civile was the law governing the relations of **Roman citizens.** In that regard, it was contrasted the jus gentium and the jus naturale. From a different point of view, the jus civil was contrasted to the jus honorarium and to the jus publicum. In the middle ages and up to the era or “reception” the term civil law referred mostly to the Justinian legislation and the accumulated doctrine of the commentators; it was contrasted to the cannon law.

In modern times the term civil law **refers to those legal systems which, especially in their methodology and terminology, were shaped decisively by the Roman law scholars from middle ages to the nineteenth century.** Germany, French, and Italy are the forerunners of civil law legal system.

1.7.4) COMMON LAW AND CIVIL LAW LEGAL SYSTEMS COMPARED

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

1)  Beginnings The common law was conceived in 1066 and born of union between older Saxon law and the custom of the Norman conquerors. **The civil law was older than the common law is now.**

2)  Nurture **The common law was nurtured in London law courts by judges and barristers.** The older Roman Law was developed to an important extent **by jurists, who were not practicing lawyers but public-minded citizens.** It was they who strive to expound, explain, and adapt the ancient and sporadic legislation and the edicts of the officials; the high point of their contribution occurred in the decades around AD 200.

3)  Spread **The common law spread only by conquest and colonization: no one ever accepted it freely.** The Roman part of the civil law, **preserved in the collection of Justinian of AD 533, was rediscovered in the 11th century, embraced by the university law schools of northern Italy, and spread from them throughout continental Europe.** From there like the common law it went to the New World and the parts of Africa by colonization. In addition, however, especially in the 19th century, the French and then the German versions were freely selected as models by countries in the Middle and Far East.

4)  Language Although originally written in Latin and spoken in Norman French, the language **of the common law today is virtually exclusively English. In most civil law systems the terminology is likely to be wholly in the local language.**

5) Makers **The main creators of the common law are the judiciary: that is to say the matrix, the basic operation system, is laid down by case law.** While deciding cases, judges lay down the law. In civil-law systems, at least until very recently, **judges played the comparatively minor role of settling the dispute in front of them. They did not make the rules of the system, and their decisions are not cited in later cases.**

6) Legislation The modern countries of both systems of laws produce large amounts of legislation. However, that of the common-law countries tends to be piecemeal. **Save for the constitution, and fiscal matters, basic principles are not enacted (except as codifications of existing case law in such statutes as the partnership Act). The typical statute merely adjusts some detail of the rules laid down by the courts.**

In complete contrast, **modern civil-law systems tend to think of themselves as codified. The word code in this context means that a whole area of law so laid down in one legislative document, with the aim of providing a closed, coherent, and consistent set of propositions that, if used in good faith, can be applied to solve any dispute in that area. The most obvious example is that of a criminal code.**

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

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

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

The civil-law systems, by contrast, **have always left the task of finding the facts to a professional judge.** This has a number of consequences. First, **there were always far more judges in civil-than in common-law countries.**

Second, **the judge could be given more control from the outset of the dispute in deciding which witnesses to call and which questions to put to them.**

Third, **the procedure could be more sporadic, spread over a number of sessions, and reduced to writing.**

Fourth, **the rules of evidence can be flexible, since a professional judge is presumed capable of accurately assessing testimony**.

Finally, **it is easier for a higher court to correct or reverse a decision.**

9) Structure: One result of the above features is that **in common-law countries the legal system is not organized in a coherent and clear structure.** Its development tends to be incremental and pragmatic, and it is not easy for the civil lawyer to approach. **Civil lawyers lay great emphasis on system and structure.**

**Furthermore, they tend to follow similar patterns in their organization of legal topics, and** once these are understood it is relatively simple to locate the law on any given topic.

CONCLUSION

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

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

Law is enacted by lawmaking organ in the modern world. It is intended to be used as a guidance of the people. **Law gives a remedy for the violations.** Its application ensures that the law accomplishes the general and social welfare of the community. **Law regulates human behaviour backed by coercion as sanction.** This is the nature of normativity of law.

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

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

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

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

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

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

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

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

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