

Study

Session

One

Nature and Functions of Law

Study Session Outline

- I. Definition of law
- II. Purpose of law
- III. Core Characteristics of law
- IV. Sources of law
- V. Classifications of laws
- VI. Public and private laws
- VII. International and national laws
- VIII. Substantive and procedural laws
- IX. Law- & law-making process

Duration of formal study session= 3hrs

Unit Objectives

- ❖ Introduce students to the meaning and nature of law.
- ❖ Acquaints students with the function of law.
- ❖ Introduces the characteristics of law
- ❖ Hosts about law and morality.

INTRODUCTION

Welcome to the module “understanding law and justice systems” This session general familiarizes students with the meaning, function and core characteristics of law. Moreover, it deals with the classification of laws and tries to equip students with the practical skills of law-making process.

Learning Outcomes of

Study Unit One

After completing this unit, you are expected to:

- *Discuss about the meaning; & nature of law*

- ❖ Familiarize the students with the different types of law.
- ❖ It presents the student law making process.

- *Explain the functions of law.*
- *Discuss the core characteristics of law.*
- *Distinguish the different types of law.*
- *Describe the law-making process.*

UNIT ONE: Nature and function of law

In this chapter of the module, we will see the details of law and nature of law. As we all know the term law is widely mentioned in our day-to-day life. And to make sure the valid meaning of law, it is very important to understand the definitions, origin, and nature of law. Consequently, this section discusses the meaning of law, essential characteristics of Law sources and common features of law in a broader sense.

1.1 Meaning of law

Our daily activities and behaviors are controlled by a complicated system of rules, norms, and settlements. Among those sets of behaviors few are categorized as ‘Law’. Human being’s introduction to rules comes from our home and our parents or guardians – for instance to accept the rules of our house is the first expectation from the child to not talk with unacceptable words, to not shout; and it will continue at school to not speak in class, to not eat in class, to do our homework on time and so on. Out of those parental rules and school regulations, other rules are ‘socially accepted customs or socially recognized norms covering your mouth when you cough,

asking apologies are some indicators that we human being are adaptive with norms and customary laws.

However, the set of rules, referred to as laws that we are dealing with under this module are enforceable by the state. For example, if you break rules the state made laws put sanctions against you. Or may pay compensation in order to make the damage good. While on the other hand, if you break societal norms and rules, you will face social condemnation. If you injure someone while driving carelessly, you may be liable to compensate the injured. But when you pass the socially accepted norms and customs you will simply disapproved by society.

For the word law, there are many definitions according to different dimensions and subject matters, but the Black's Law Dictionary defines law as "law consists of rules of action alternatively, conduct. An authority issues these rules. 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."

We can also find different meanings given for the term law; however, we can derive the following core elements from the various meanings given to law. The core elements are;

- Law is a system of mandatory norms
- Law is Enacted by a competent authority
- Law is normative in which it sets standards and norms
- Law is backed by sanction
- Law is devised to regulate human conduct.

Activity: can you discuss about the meaning of law with your colleagues?

1.2 Law and Morality

Dear learners do you have any idea about the difference between law and morality?

Well, morality is the reasoning of a certain social behavior. Morality is connected with certain values in the ethics of a society that labels something as good or bad, just or unjust. The standard of measurement is based on the values and perceptions of the society that set the moral values. Hence, the sanction for violating moral values/committing immoral acts/ could be societal sanction

for e.g. isolating someone from the society in all social affairs. However, when it comes to law, the sanctions provided for violating the law are legal sanctions such as imprisonment fine, etc...

Activity: can you discuss the difference between law and morality with your colleagues?

The following are the common characteristics of law.

- 1) Law is a collection of instructions: This feature of law is shared among the formal laws.
- 2) Law controls the human behavior: It is known that why we need law from the beginning it is to regulate the human behavior
- 3) Law is shaped and upheld by the government: formal laws are created and implemented by a state, which shapes all formal laws to share some mutual Uniformity bases.
- 4) Law has certain amount of stability, flexibility and consistency: it's obvious that law should be stable to manage and regulate human behavior since instable law cannot be accepted and tolerated by the people, having this in mind why do we need law to be flexible? this is because when a culture, group interests and more demand on social change introduces to the people the law must incorporate clause of flexibility. And those concepts of law need also to be consistence each other if law is not consistence the people who are going to regulate by it will get confused and it will be hard to apply the law on the actual ground.
- 5) Law is applied by a responsible authority: for the execution of the law there are responsible organs of the state
- 6) Breach of law leads to punishment: Be it a civil or criminal matter, failure to achieve the goal of law leads to carry over the consequences, and those consequences are specified by the law itself.
- 7) Law is the manifestation of the will of the people; law is generally the will and interest of the people who are consented to regulate themselves by the defined law and it could be written down to give it inevitability.
- 8) Law is associated to the perception of 'sovereignty' which is the very most important element of state:

1.3 Purposes of law

The general purposes of law are to maintain social, economic, public, political, international and moral order. To be more specific, let us see some of the purposes of law as follows:

A) Controlling human behavior

Members of the society have various social standards, these numerous Human conducts and Interests. One group of the society may demand inversely from the other group of the society and it is imperative to regulate those behaviors and to become in to common interests and demands, and to comply and inculcate the socially acceptable norms within the community. To control those behaviors and demands there are informal and formal means of social controls. Law is one of the formal ways of regulating social conduct; law is a highly quantified and particular form of social control in developing common politically organized society. *(Tefaye Abate, 2009, p15-16)* Law plays significant role in social control: to facilitate the purposes of law there are clear steps to follow and firstly law clearly stipulates the rules and norms which are significant for the society, this means law should first integrate very pure and easy to understand specific laws and when individuals didn't accept what the specific law says law penalizes the deviant human conduct. In addition to this the legal system of countries encapsulates many rules of social control through different hierarchies of laws such as proclamations, directives and regulations. Among the very common organs of justices most countries use Police to arrest thieves and impending persons who don't respect the law, and they are prosecuted by prosecutors, and courts pass decisions on them, prisoners imprison them, and may be released by the parole boards. *(Ibid, 2009, p15-16)*

B) Dispute Resolution

Disputes are the most common feature of a society and it is inescapable in the life of society, since this character of a society is common it is the contribution of the law to resolve those disagreements. For the viable existence of the society such kind of disputes must acquire some resolution. In settling disputes, we can lay under the formal or informal system and formal or informal laws can be pertinent, And to solve those socially created disputes we can use both laws and socially accepted norms, disputes or conflicts that are justiciable are settled by law in court and those disputes that can entertain out of court will use alternative dispute settlement mechanisms (ADR). *(Mohamed Abdela, Dispute settlement, DISH, 2013)* As it is stated in the above lines both formal and informal mechanisms can be used to resolve the disputes. The Formal laws are those set by the government backed by legal sanction and the informal laws are those set

by the society such as customary norms, socially accepted norms and principles and the traditional and religious values of that society. (Tefsaye Abate, 2009, p15-16)

C) Social transformation

Law is a means of social transformation in which it allows us to hold a useful function, intended, and brings social change. This notion of social change is among the main thoughts of law; the suppleness of law offers some degree of decision in law to make it adjustable to social conditions. One of the core features of law is that it has coercive nature and this nature of law can help societies to cultivate an adoptive environment for the acceptance of the newly assimilated views. If law is inflexible, it may not reply to changes impulsively which may lead to anger and dissatisfaction among the people and if the people are not satisfied by the set of the rules this may even amount to violence or rebellion. That's why we say that, some level of flexibility should be incorporated in each law. (Tefsaye Abate, October 08, 2009, p15-16)

Activity: put a 'tick' mark under the table below if the list corresponds to the purpose and function of law?

No.	Function of law	Yes	No
1	Maintain peace and order		
2	Promote social justice		
3	Promote rule of law		
4	A mechanism of social control		
5	To settle disputes		
6	To build democratic order		
7	To advance social and economic development		

1.4 Sources of law

Literally when we search out for the sources of law it should answer the question from where do we get Laws? We have different sources of law and the following are among the key foundations of law.

Sources of law can be viewed from different dimensions and Perspectives. The law giver or legislator is among the fundamental sources of law. The Formal state made law in most countries is enacted by legislator. This is called state made laws or statutes. (Ayalew Getachew, 2012, pp22) For e.g. The *Ethiopian* parliament may enact proclamations to regulate different affairs. Similarly other countries such as the *Sudan, Somali, and South Sudan* can enact laws through the relevant government authority in order to regulate certain affairs.

Judicial decisions are also another major source of law another major source of laws. This means courts decisions can be sources of law for example in common law countries such as the Kenya, , South Africa. Laws given by the procedurally finalized decision of courts are called *case laws or precedents*. And this precedent can be used as one source of law. Customary, practices can also be among the sources of laws, every society has its own traditional dispute settlement mechanisms and reconciling measures and those measures and traditions can serve as sources of laws. Laws can also originate from religions. The norms and dogmas of different religions have contributed to the laws of modern laws. For example, Christianity, Islam, Buddhism e tc. have contributed to the contents of different laws in the world. Furthermore, contracts made between individuals, companies or states can contribute as a source of law. For example, states, individuals, different organizations and companies can conclude bilateral or multilateral agreements and this can serve as binding law among themselves. For the countries the agreement can be used as treaties and conventions. Different opinions and views of renowned writers, the opinions of Law Scholars, or judge's view on different legal issues are also among the sources of law. (Tesfaye Abate, 2009, p37-57)

1.5 Classifications of Laws

Classification is a determining and categorizing of the different types of law. Systematic categorizing helps in order to organize the body of legal concepts. Accordingly, laws can be classified according to the following categories.

1.5.1. Public and private laws

Public law is a subdivision of law that regulates relations among state structures and legal relations in which a state as a public power is involved. Public law regulates the Behavior of persons who act in the overall interest, in asset of a direct or arbitrate allocation coming from the sovereign. ‘Public law’ shouldn’t be considered as the whole of the law that is applicable to the state in its interaction with its subjects, but only those parts of it, which are different from the private law concerning the subjects of the state, and their relations to each other. In a nutshell, public laws are those laws that define the relation and interests of the public. For example, when a person commits a criminal act the first step by which the suspect is arrested is through the police acting on behalf of the public/government, the next organ is the prosecutor. The prosecutor continues prosecuting the suspect, and finally the court will decide whether the person is criminal or not. In this example of criminal case both the person who got harm and the state are responsible to sue the person who is alleged for the action. Among the examples of public law constitutional law, administrative law, criminal law etc. can be mentioned. (*Ayalew Getachew, 2012, pp 39-40*)

Private law is another category of law that controls associations among persons and state when the latter is engaged in private business sectors, in this type of law the relation of beneficiaries are individual entities and if a state is also involved in activities which are of private nature such as through commercial banks, transport, tourism industry etc. Private law Controls and manages the actions of persons, which persons do in their own names for their own individual interest; in private laws the notion to get in to law is to keep the personal interests, vested interests, of individuals. To preserve the personal interest of individuals and their relation those private laws that regulate the personal matters of individuals have real duty. Among the Examples of private law includes law of contract, family law, property law and tort law. (*Tesfaye Abate, 2009, p70-75*)

1.5.2 International and national laws

A) **International law:** In 18th Century National wide laws started to be called law of nations and it was named by Bentham in 1780. International law comprises of rules which control relations between and among states. As it is indicated in the sources of law Agreements or contracts are one sources of law and international laws are created by the mere fact that states are interested to have a universally accepted conventional law. And this International law is a set of customary and conventional rules, which are regarded as legally binding by civilized states in their interaction

with each other. (*Ayalew Getachew, 2012, pp40*) Here, the international law gets its obligatory binding nature emanates from each state that is interested to be bound by the treaty or *opinio-juris* intention to be bound by customary practices of states. Mostly, international laws are one of the soft laws; this is to mean that when a member state of the universal convention fails to do accordingly there is no way of mechanism to punish or commend the state as we see stronger enforcement mechanisms at domestic levels. Of course, we shouldn't forget that there are international organs to enforce the international laws. The difficulties to enforce international laws primarily rely on the commitment and passion of states to apply the treaties. Some of the examples of international laws are the human rights conventions, trade agreements signed between and among states. (*Tesfaye Abate, 2009, p70-75*)

B) **National law-** National laws is those laws which created and enforced by the subjective state government. In notional laws the legislator is always obliged to enact laws according to the interests of the people. And the courts are the organs to interpret the law. Those national laws and the issues that enacted by the law maker might be different according to the demand of the people. National laws are generally regarded as law of a nation, for example the law of the *South Sudan, Sudan, Somalia, or Ethiopia*. Such laws are applicable with in a country. In those laws of the states, it could be family law of South Sudan, the criminal law of Ethiopia and so. (*Ibid, 2009, p70-75*)

1.5.3 Substantive and Procedural Laws

Substantive law: is a collection of laws which defines different rights, privileges and imposes duties of either an individual or a state. Substantive laws are those laws which specify each article in the enacted laws of a state. Those laws may subjectively orders acts to do or not to do, while those laws specify the rights and duties it could be for individual persons and the state itself. Examples of Substantive laws include, administrative law and criminal law financial laws, contract laws, tort laws and business laws, etc... (*Tesfaye Abate, 2009, p70-75*)

Procedural law: A procedural law determines remedies. It specifies the details with the means by which those ends can be achieved. The legal procedure or process that determines how a law suit is initiated, how a file is opened, how trails are lead, how appeals are taken, how a judgment is

enforced is called procedural law. A procedural law encompasses civil procedure laws and criminal procedure laws. (Ayalew Getachew, 2012, pp43)

For example, in *Ethiopia, Somalia, or the Sudan* there are substantive laws that define rights and obligations that include the family law, property law, criminal law etc. At the same time there are procedural laws that provide rules of procedures or mechanisms by which the substantive laws are enforced. For example, civil procedure laws provide set of rules of enforcement of civil rights and duties, and the criminal procedure laws encapsulate set of procedural laws that are used to enforce the substantive laws in criminal law.

1.5.4 Civil and Criminal laws

Laws can also be classified in to civil laws and criminal laws.

Civil laws: Is category of national private law that deals with civil matters. Civil laws are those laws that regulate the relationship of individuals and their interests. Those demands of individuals and personal interests can be for example issues related to marriage or business transactions but they don't have any public interest behind. Law of contract, concluding marriage, making a will, donations, and agreements made on buying and selling goods etc. can be mentioned among examples of civil laws. (Tesfaye Abate, 2009, p70-75)

Criminal Law: Is a division of public law that regulates criminal acts. Criminal laws are mostly enforced by the state since those sets of laws protect the interest of the public as a whole and the state is also there to keep the public interests. Criminal laws always prescribe acts that are crimes along with their respective penalties (*The principle of legality*). A person cannot be criminally held responsible for any act which is not priority provided as a criminal act. Moreover, the principle of legality dictates that criminal laws must be specific, clear and understood to all. For those which are very specified under the criminal law and failure happens the criminal law itself provide punishments for committing those criminal acts. For example, criminal laws may stipulate acts such as rape, theft, murder, corruption as acts which are punishable by the criminal law. (*Ibid*, 2009, p70-75)

Self-review Exercise

Under the following table there is list of national private and public laws, put an “X” mark in the corresponding column that matches with the list.

Law	Private law	Public law
Law of property		
Criminal law		
Commercial Law		
Administrative law		
Law of contract		
Law of succession		
Law of public finance		
Constitutional law		

1.6 Law Making Process

Formation of law through law making process is a means of creating an innovative rule of law on a specific subject. The formal Law-making process which takes place under the relevant authority to make laws has certain steps to undertake. As mentioned earlier, among the purpose of laws is to address societal problems and serve as a means of social transformation. Therefore, in order to address any problem, the first step in the law-making process is to undertake assessments and researches about the importance of enacting that law. When researches made by the relevant organ suggest that enacting new laws are significant in addressing certain problems, the next step can be drafting laws by experts; the draft law then passes through hearings dialogues with relevant organs and the public as it deems convenient. The draft legislation then includes feedbacks gathered from the addressee of the legislation and relevant organs. Finally, the final draft may undergo a final hearing with relevant organs or experts and shall be submitted to the law-making organ for final endorsement/ratification. The final approval of the law-making organ shall render the legislation a binding effect. In Ethiopia for example the law-making body, the parliament endorses laws and that ratification will give the law a binding effect. (*Ayalew Getachew, 2012, pp48, Tesfaye Abate, 2009, p82-100*)

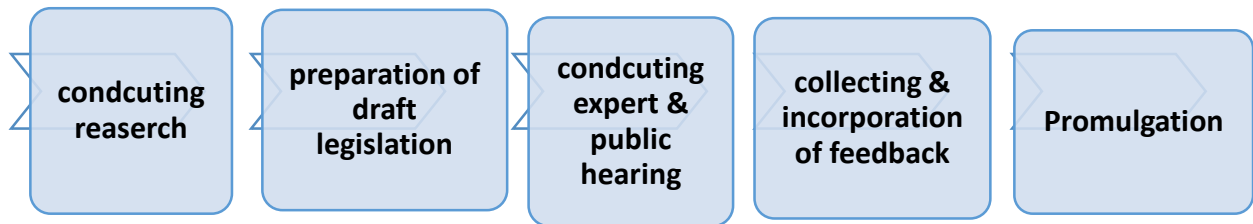


Fig. 1 brief summary of Law-making process (Ayalew Getachew, 2012, pp48)

For example, when we see the law-making process in Ethiopia it is the law giver, which is authorized to make laws, moreover, the Council of Ministers, which is an executive body is given the power to pass Regulations. Considering the steps in law making; primarily a draft is prepared. Next to the preparation of the draft, discussion is held in the House of Representatives. After that, the draft could be indorsed and it will become law, and the law will be published.

Self-Review Questions

1. Try to discuss the meaning of law?

2. Why do we need law?

3. Describe about public and private laws?

4. Differentiate national laws from international laws? Criminal law from civil law?

5. From where can we get laws? From where do laws emanate? Briefly describe the law-making processes in your country?
