**UNIT TWO: SOURCES OF LAW**

* **2.1. MEANING OF THE TERM ‘SOURCE’**
* In the literature of jurisprudence, the problem of ‘sources’ relates to the question: **where does the judge obtain the rules by which to decide cases?** In this sense, among the sources of law will be commonly listed: **statutes; judicial precedents; custom; the opinion of experts; morality; and equity.** In the usual discussions, these various sources of law are analyzed and some attempt is made to state the conditions under which each can appropriately be drawn upon in the decision of legal controversies. Our concern here will be with ‘sources’ in a much broader sense than is used in the literature of jurisprudence. From whence does the law generally draw not only its content but its force in person’s lives?” [Lon L. Fuller in Garner; 2004: 1429]. This question directs to the source of law.

In the context of legal research, **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.** [J. Myron Jacobstein & Roy M. Mersky, in Garner; 2004: 1429-30).

The source of law is **also defined in three ways** as follows [What is law, Pages 47-52]:

* (1)  It may mean the **FORMAL SOURCE,** that which **confers binding authority on a rule and converts the rule into law.** We noticed that even primitive societies were governed by rules, and that these rules became laws in the full sense of the term only when the state came into existence. **The state therefore 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.
* (2)  The source of law may mean 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., that 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.**
* (3)  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**, but 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 extensively the course of legal development, but they speak with no authority. They are persuasive.”

**2.2. MATERIAL SOURCES OF LAW**

We have seen above that one of the sources of law is material, which would **include** **custom, religion, legislation, and court decision**. Thus, we will discuss these sources of law herein under.

**2.2.1. CUSTOM AS A SOURCE OF LAW**

Custom is one of the **oldest sources of law** making. However, the importance of custom as a source of law continuously diminishes as the legal system grows. The reason being that **with the emergence and growing power of the State, custom is largely supersede**d by legislation as a source of law[Paranjape; 2001: 190ff].

**A) DEFINITION AND NATURE OF CUSTOM**

What do we mean by custom? What is its nature? A custom may be defined as **a continuing course of conduct which by the acceptance 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 [Paranjape; 2001: 190-91]. In general, different authors define custom in various manners.

**The controversy over custom as a source of law** [What is law, Pages 47-52]

There are two views regarding custom, and as usual, the Historical school and the Analytical school differ from one another. According to Savigny and the **German Historical School,** **custom is in itself an authoritative source of law.**

According to them, **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. Now, **the laws that govern early society are all based on custom; in fact, customary rules are the only kind of laws known, and they are nothing more than the consciousness of the people that rule their approval.** Custom then is **the reflection of the people’s intention, and therefore the source of law in these early days.** As conditions have changed, and instead of the people legislating themselves through customs, they have in their capacity as a political unit delegated this function to a sovereign who enact all laws with his authority

Austin and **the Analytical School, on the other hand, with their regard of the past have come to the opposite conclusion; the custom is not an authoritative source of law** at all. Austin 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.**

Neither the view of Savigny nor that of Austin can be accepted as correct. Savigny, when he states that national consciousness or approval by the people is the source of all law, custom being the manifestation of our world expression of this national consciousness must be assumed to mean that in his opinion it is not state reorganization that converts a rule into law, but the conviction of the people who follow the rule. In addition, if he means by the statement ‘custom is a formal source of law, this cannot be accepted to be correct because as we have seen for all law there is only one formal sources that is, the will of the state. Custom or usage may create rules of conduct but they cannot become laws without first obtaining the recognition of the state. As Holland points out, usage PLUS a state organization enforcing its observance is customary law. Legal custom is different from social custom, and before a custom is recognized as legal and therefore binding, it has to satisfy certain tests, which the state has laid down. When there are customs, which fail to satisfy these tests and are consequently not recognized by the state, how can we maintain that custom and law are co-ordinate in authority? The formal source of law therefore must be that which converts custom into law-namely severing sanction or approval. Moreover, customs are usually brought to notice of the court by evidence of witnesses. If therefore we told hold that customs are laws before judicial adoption, we are actually admitting that the judges learn a part of the law from the custom cannot be a formal source of law. The only element of truth in the view of the Historical school is, as Holland points out, **that the adoption of customary rules of conduct is unconscious.** For that reason it may be better adapted to national feeling, but for all that it cannot become law until it is recognized and adopted by the state-usually through some judicial body.

Nevertheless, we cannot accept Austin’s view that custom is nothing more than a HISTORICAL SOURCE. What ever may have been the position in the early days of English common law, Austin is wrong in saying that at the present day, when a new case comes up for decision, in the absence of a statute or an establishing precedent, the judge may look guidance where he bases. The Austinian theory forgets that the operation of custom is determined by fixed legal principles just as much as the operation of precedent itself.

Nor is Austin correct in saying that until a rule of custom is adopted and incorporated into a decision it has no authority at all. It is no doubt true that ordinarily custom enters the field of law only through a judicial decision. **But “custom is law not because it has been recognized by the courts but because it will be so recognized in accordance with the fixed rules of law, if the occasion arises.”** And when a judge adopt a rule of custom s/he gives effect to it “not merely prospectively from the date of such recognition but also retrospectively; so far implying that the custom was law (to some extent already) before it received the stamp of judicial recognition.”

C**ustom 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.**

**B) IMPORTANCE OF CUSTOM** [Paranjape, 2001: 201-02]

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.

Although custom has lost its significance as a source of law in modern age but it still exerts great influence in certain areas such as personal law, mercantile law and even the international law.

**C) REQUIREMENTS FOR CUSTOM TO BE RECOGNIZED AS LAW**

There are pre requisites that must be fulfilled a custom to be recognised as law. What are they?

1. **Reasonableness**: - 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 inacceptable to right and reason and it is likely to do more mischief than good if enforced.**  As to the reasonableness of a custom to be recognised as valid, Professor Allen observed, “the true rule seems to be not that a custom will be admitted if reasonable, but that it will be admitted unless it is unreasonable.” The period of ascertaining whether a custom is reasonable or not, is the period of its inception. 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.
2. **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 necessarily yield where it conflicts with a statutory law.
3. **Compulsory Observance**- A custom to be legally recognised as a valid custom 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.

**Continuity and immemorial antiquity**: – A custom to be valid **should have been continuously in existence from the time ancient.** 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.”

**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**.

Some writers include **public policy** also as one of the essential requisites of a valid custom. In their view, a custom should not be opposed to public policy. Nevertheless, it is submitted that this aspect is already conversed under reasonableness of the custom that presupposes that a custom to be valid must not be contrary to public policy of the place and time.

**D) CUSTOM IN ETHIOPIA**

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

**What is 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 repealed.***

The above Article repeals prior law and custom whether it be *contra* or *prater legem*. It might have been less destruction of tradition and custom to replace the sweeping terms “concerning matters provided for in this Code” by the terms “**inconsistent with the provisions of this Code.”** Such terms would have restricted the repeal to what contradicts the law, without affecting what would merely supplement it. The French Civil Code repealed in its entirety all the old law while the Ethiopian one imports unfamiliar legal concepts from abroad. Therefore, it may indeed be expected that its effects will sometimes be “...stultified where the people themselves persist in doing a thing which they are supposed by legislation to have ceased from doing...” Such persistence, if generalized, could undermine the public order; disputes might be settled prevalently out of court and law [George Krzeczunowicz, Journal of Ethiopian Law, Vol. II, No. II]

**It is worth noting that any law or customary practice that contravenes the FDRE Constitution shall be of no effect** [Art 9(1) of the FDRE Constitution].

**2.2.2. 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.

**A) THE MUSLIM LAW**

In Ethiopia, with regard to Fetha Nagast, the nomocanon also reflects the political and cultural environment in which its author lived and wrote: viz., the Islamic civilization, under whose domination the Coptic community has existed since the 7th century. Although Ibn al- ‘Assal 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.

Further to substantive borrowings, the jurisprudential approach of the Fetha Nagast clearly reflects an Arabic literary background. Nallino notes that the arrangement of the subject matters follows the Islamic rather than the Roman system; the inclusion of such topics as diet and clothing certainly is closer to *fiqh* than to *ius civile*. The very idea, fundamental to Islam, of treating all law as part of one’s religion, would hardly have occurred to a Roman jurist. In addition, the style of the Fetha Nagast shows characteristic features of Muslim legal scholarship: Ibn al-‘ Assal states in his introduction that his personal contributions to the nomocanon are “arrived at by reasoning and through analogy” from the authoritative sources- a formula clearly reminiscent of the *qiuas* of Islamic jurists; and the annex on successions adds rules “on which Abba *Querillos*, patriarch of Alexandria, agreed with bishops, chefs and magistrates” - apparently deriving legal authority from such consensus, not unlike the *ijma* of Islamic jurisprudence.

Interaction of Roman and Islamic law, which has been noted in the former Eastern provinces of the Empire, may also have had some effect on the contents and conceptual framework of the nomocanon.

In general**, it is observable that the second (secular) part of the Fetha Nagast was influenced by Muslim Law.** Such an influence is not discontinued. **The FDRE Constitution permits the adjudication of family and private disputes according to the rules of religion(Art. 34(5) of the Constitution). 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).**

**B) CHRISTIANITY**

Christianity also influenced Ethiopian laws. **The best example is the Fetha Nagast.** Thus, we will discuss it. When some of the obvious anachronisms are eliminated, the immediate source of the Fetha Nagast can thus be identified with sufficient historical accuracy. Except for the first part of the preface and for the appendix, it is a literal translation of a well-known Coptic “nomocanon” originally written in Arabic, of which some 30 authentic manuscripts are known in European and Egyptian libraries, with two printed editions published in 1908 and 1927. The author of the nomocanon is the Coptic Christian scholar, as –*saff abul ibn al Assal* who lived during the first half of the 13th century, the “golden age” of Coptic literature (and not, as the preface of the Fetha Nagast suggests, during the region of Constantine ). Besides serving as legal advisor to the 75th Partriarch of Alexandiria, *Cyril* III *Ibn Lalqololq* (1235- 1243), he produced a number of literary wolks, mainly on theological subjects.

In his introduction, Ibn Al assal himself identifies the sources of Fetha Nagast on which his nomocanon purports to be based. Besides a list of holy scriptures and canons of the Coptic church, which are relevant mainly for the first (ecclesiastic) part, the principal source of the second (secular) part is described as the “Canon of the kings” consisting of law for books said to have been “written at the court of the Emperor Constantine”.

Among these four books, only three are of interest to comparative law, the fourth being the so-called “precepts of the old Testament. Books I, II, III of the “canons of the kings” (cited in abbreviation as TS, MAK and MAG through out the text of the nomocanon and its Ethiopian translation) thus remain as the truly secular sources of the Fetha Negast.

**According to an introductory note (repeated in the Fetha Nagst), they are based mainly on the writings of Abba Cosmas (probably the patriarch Quzman III, who died in 933) and on some unidentified law-books, probably identical with the Byzantine sources.** An Amharic gloss to the Fetha Nagast appendix mentions, in addition to Cosmas, one Abba Gabriel; this could be a reference to the inheritance laws of another Coptic patriarch, Gabriel II Ibn Tariq (1131-1145), which contain detailed classes and orders of succession (attributed to Emperor Constantine), and which specifically acknowledges the “Canons of the kings” as a source.

**Peter Sand summarises the sources of Fetha Nagast into three: manual of Roman Laws; legislation of Constantine; and the old and new testaments.** Rene David, on the other hand, explains five sources of Fetha Nagast as follows: 1) seuo Roman Benzantine laws (known by different names); 2) ritual and moral laws of the five old testaments; 3) enactments of Lubia; 4) enactments of Nicaea (second council held in 887); and 50 writing of Aba Kalilios (father of church before Necaea) [Tesfaye Abate, Offences against Morals under the 1957 Penal Code of Ethiopia, Senior Thesis, Addis Ababa University, Faculty of Law, 1994, p 35]

**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.**

**2.2.3. THE FEDERAL CONSTITUTION AS SOURCE OF ETHIOPIAN LAWS**

**A) GENERAL**

The instrument in which a constitution is embodied proceeds from a source different from that whence spring other laws, is regulated in a different way, and exerts a sovereign force. It is enacted not by the ordinary legislative authority but by some higher and specially empowered body. **When any of its provisions conflict with the provisions of the ordinary law, it prevails and the ordinary law must give way** [Bryce in Thompson; 1993: 4].

**From where does a constitution drive its power?**

**The authority for the constituent act derives from a constituent power, i.e., an authority that is both outside and above the system, which it establishes.**

**In liberal democratic societies, the people are normally the constituent power. This usually means that, only after the constitution has been approved by the people, will it take effect.** Therefore, in liberal democratic States the people’s approval of the constitution legitimises the system, which the constitution creates. This may be done directly by the people in a referendum, as occurred in Ireland in 1937, or indirectly, through the people’s representatives. This is what happened in the USA. Although the preamble to the Constitution of the USA begins with the words ‘We the people’, it was first agreed at a special convention and then approved by the elected representatives in the legislatures of the founding States [Thompson; 1993: 4]. Similarly, the FDRE Constitution was approved by elected representatives of the peoples.

In the opinion of Newbauz the rational for the paramount of the constitution, is that it is an **emanation from the will of a body superior to the legislator namely the people.** Thus, the fact that the federal constitution 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 it or in pursuance of and in accordance with its provisions. Consequently, all legislation, be they made by **the central authorities or state authorities, are subordinate to the federal constitution of the given country**. To this effect both the federal and the unitary constitutions contain provisions which declare the supremacy of the respective constitution [Ayele; 1999]

**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.

**B) THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA AS SOURCE OF ETHIOPIAN LAWS**

The Constitution of the Federal Democratic Republic of Ethiopia clearly provides for the individual and people’s fundamental freedoms and rights, in its preamble, as the basis to live together without any discrimination. Accordingly, Chapter 3 of the Constitution is devoted to fundamental rights and freedoms (Arts. 13-44). Thus, **we can say that the Constitution is the source for the rules on human rights and freedoms.**

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.** 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’. Thus, women and men have equal rights at the time of concluding a marriage, during marriage and at the time of divorce [Art. 34(1) of the FDRE Constitution]. **Both women and men are allowed to marry when they attain marriageable age defined by law**. **Here, the Constitution does not and is not expected to define marriageable age and other essential conditions of marriage: a subordinate law would do perform that job.** Accordingly, the legislature enacted the 2000 Revised Family Code at the federal level. The Revised Family Code has incorporated detailed provisions that ensure the equality of women and men that is recognized under the Constitution. For example, according to Article 6 of the 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.**

In criminal cases, arrested persons have the right to be released on bail. This is a constitutional principle enshrined under Article 19(6) of the FDRE Constitution. The Constitution only envisages the details to be given under other law where by **courts of law “may deny bail or demand adequate guarantee for the conditional release of the arrested person”** (Art-19(6) of the Constitution). **The detailed rules have been given under the Criminal Procedure Code** (See Arts, 63-79 of the Cri.P.C). It is also provided under Articles 4 and 5 of the Revised Anti-Corruption Special Procedure and Rules of Evidence Proclamation No 434/2005. According to Article 4(1) of the same, an arrested person charged with a corruption crime **may not be released where the crime s/he is of suspected is punishable for more than ten years. What is more, the court may not allow a person on bail where (Art. 4(4) of the same): the suspect or the accused, if released on bail, a) is likely to abscond; b) is likely to tamper with evidence or commit other offences (Art 5 of the same)..**

**C) INTERNATIONAL AGREEMENTS AS SOURCE OF ETHIOPIAN LAWS**

[Ibrahim Idris, The Structure of the Human Rights Regime of the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution: Fundamental Rights and Freedoms, 2000, Faculty of law, Ethiopian Civil Service College(ECSC) and United States Agency for International Development (USAID), Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution].

International human rights law establishes international standards. The enforcement of these standards primarily depends on national laws of states for the benefit of the nationals 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 members of community of nations, they are also under obligations to live up to the standards entrenched in customary international human rights law. They are also duty bound to accomplish all those other tasks necessary for the realization of the rights and freedoms.

In the realization of these internationally guaranteed rights and freedoms within their domestic systems, it is the primary obligations of states to, among many other things, adopt national legislative measures, if such rights and freedoms have already not been provided for by legislation. For instance, the International Covenant on Civil and Political Rights (ICCPR) states:

*Where not already provided for by existing legislation or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional process and with the provisions of the present covenant, to adopt legislative or other measures as my be necessary to give effect to the rights recognized in the present Covenant.*

As regards discharging of its international obligations, Ethiopia has accomplished a major legislative measure. This, *inter alia*, pertains to the promulgation of the FDRE Constitution through which **international human rights rules and principles are transformed into the Ethiopian legal system.** The FDRE Constitution has indeed established the basis of the Ethiopian human rights system that is entrenched in international human rights.

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. The provision reads:

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

As a close look into this constitutional provision might evidence, in case of interpreting constitutionally guaranteed rights and freedoms, guidance is sought from those international human rights laws and agreements adopted by Ethiopia. To date, in addition to endorsing the Universal Declaration of Human rights, 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.

**2.2.4. LEGISLATION AS A SOURCE OF LAW A) GENERAL**

What do we mean by legislation?

**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. 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.

Jurists and legal thinkers have expressed divergent views about legislation as a source of law. According to Bentham and John Stuart Mill, legislation includes both, the process of law making and the law evolved as a result of this process. Salmond observed, “legislation is that source of law which consists in the declaration of legal rules by a competent authority”. Gray pointed out that legislation includes “formal utterances of the legislative organs of the society.”

Professor Holland has interpreted the term legislation in its widest sense and observes, “The making of general orders by our judges is as true legislation as carried on by the Crown. In his view, in legislation, both the contents and the rules are devised, and legal force is given to it by Acts of the sovereign power which produce written law.”

Referring to legislation as a source of law in England, **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 unenacted 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.

**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.

James Carter, a staunch supporter of the historical school of jurisprudence, however, thinks that legislation is the least creative of the sources of law, as it is not possible to make law by legislative action alone.

In general, **there are two obvious reasons for legislation being regarded as one of the most important sources of law**. **Firstly, it involves lying down of legal rules by the legislatures, which the State recognizes as law. Secondly, it has the force and authority of the State.**

**B) Legislation compared with other sources of Law** [Paranjape; 2001: 210-12] Legislation as a source of law is gaining more and more importance in modern times so much so that the significance of custom and precedent is receding gradually.

**What is the relationship between legislation and custom as source of law?**

**Legislation and Custom** –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 has reversed and customary law is treated supplementary to the enacted law.** Laws enacted by Legislature being definite, written and comprehensive are easy to understand. That apart, enacted law is created by Legislature, therefore, it is an expression of the general will of the people. A custom can be accepted as a customary law only after it is practiced or a long time. **Legislation as a source of law differs from custom in the following aspects:-**

* **1)  The existence of legislation is essentially *de jure* whereas customary law exists *de facto*.**
* **2)  Legislation grows out of the theoretical principles but customary law grows out of practice and long existence.**
* **3)  Legislation as a source is historically much latter as compared with custom, which is the oldest form of law.**
* **4)  Legislation is an essential characteristic nature of modern society whereas the customary law has developed through primitive societies.**
* **5)  Legislation is complete, precise, written in from and easily accessible, but costmary law is mostly unwritten (*jus non scriptum*) and is difficult to trace.**
* **6)  Legislation results out of deliberations but custom grows within the society in natural course.**
* **7)  Legislation expresses the relationship between person and the State but customary law is based on relationship between people inter se.**

In Ethiopian history, we find the legislative enactments beginning from the 13th century. We have proclamations, decrees, orders, etc in Ethiopia. [See J. Vanderlinden; 228-41] which are considered as sources of law.

**C) 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.** (See Art. 55 of the FDRE Constitution). All such laws are enacted in the form of proclamation. These proclamations incorporate laws that are intended to guide the behaviors of the community in respective sectors of life.

Likewise, **regions are empowered to promulgate proclamations with regard to matters that fall under their respective jurisdictions. For example, they could enact laws on trade in their respective localities** (see Art. 52(2) (b) of the Constitution).

For example, family law is enacted at the federal level. Regions also came up with their own family laws. **Accordingly, the Amhara Region, Tigry Region, Oromia region, to mention some, enacted their own family laws respectively.**

The federal Government enacted Criminal Law while Regions have the power to enact penal legislations that are important to regulate peace and order in their respective jurisdictions [Art 55(5) of FDRE Constitution]. In general, federal and regional laws are sources of law in Ethiopia.

**2.2.5. COURT DECISIONS AS SOURCE OF LAW**

**A) Doctrine of Stare Decisis** [ Paranjape; 2001: 229-30]

**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 lowermost 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 three general principles on which the doctrine of *stare decisis* is based. They are as follows:

* **(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.**

What is important is where the correctness of a decision has been challenged time and again, the rule of *stare decisis* need not be applied.

**B) THE ROLE OF COURT DECISIONS AS SOURCES OF LAW IN ETHIOPIA**

**Case law may be defined as that part of the law originating from the judicial power, judicial power being understood to include more that the courts of justice, contrary to the traditional much more circumscribed meaning of the phrase.** It obviously includes in Ethiopia a jurisdiction such as that of *courts*, and administrative tribunals set up to deal with special problems such as labour relations [at the time of the Emperor]. The common characteristic of all formulations of the law in this category is that **they arise out of litigation and are, in principle, not normative**. In Ethiopia, unlike many other code countries, this last principle is not expressed in a formal way; no Article of the Constitution or of the codes is an equivalent to Article 5 of the French Civil Code, which reads: “Judges are not allowed to decide cases submitted to them, by way of general rule- making decisions.”

**Court decisions were and still are used as sources of law in Ethiopia.** For example, if the *Digest of Ethiopian Case-Law* can be considered as a precious source for these periods, if is obvious that the collection out of which the *Digest* was made is even more precious as it would provide a huge amount of first-class case materials in addition to decisions confirmed by the Afa Negus and contained in the *Digest.*

The Ethiopian legal system belongs to the Continental-a system where law is promulgated by the legislature. Whether decision rendered by courts did have any contribution in terms of lending principles by way of precedents as in the Common law during the period of law reform in the sixties, especially when the Civil Code was codified, needs to be researched. But such task is not an easy one as materials in this regard are not within the reach of researchers. In this respect, J. Vaderlinden [1964: 246] has this to say:

***Unfortunately, it must quickly be pointed out that in all periods of Ethiopian legal history our information concerning case law is very limited.***

Perhaps, an available material in this regard ... is the Digest of old Ethiopian Judgments prepared for the work of drafting and codifying the Civil Code of 1960 as indicated in the “CAVEAT” of an English translation of ‘digest of old Ethiopian Judgments.

The available materials in this regard-the three volumes of hand written old judgements- contain 7,296 summaries of civil judgments.

The three-page preface of the three volumes does not specify the period in which the collected summary judgments were rendered i.e. it simply refers to the judgments as old/ancient judgments. The three volumes of old/ancient judgments were prepared in 1952.

The first paragraph of the preface of the Book of Old Judgment indicates that such judgments were rendered by scholars of Fatha Negest and by those who were well versed (gifted) in judging as that of Daniel (of the old statement).

The second paragraph of the introduction also indicates that the judges of latter ages have added certain modifications in their judgements, through the basis for such modifications were prior judgments.

In fact, the Amharic version of this preface refers to the legal tradition as revealed by the written judgments, which had been collected since the time when entering such judgments was first commenced in the nation.

As indicted earlier, the Digest of Old Ethiopian Judgments was prepared for the use by the codification commission in their work. It is also the opinion of the persons/(not identified) who organized the translation of the Digest of old Ethiopian judgments that principles of the Ethiopian customary law have been incorporated into such judgments as reflected in the ‘Caveat’ of the Digest of the Judgments under discussion.

Today, the Supreme Court Cassation division is empowered to render a decision that is binding on federal as well as regional council at all levels [Proc. No. 454/2005, Art 4]. **A 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; 3) the decision should be with regard to interpretation of laws** [Proc. No. 454/2005, Art 4]. **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, judgements were/are used as source for Ethiopian laws.

**2.3. FORMAL SOURCES OF LAW**

**2.3.1. CONCEPT OF FORMAL SOURCES**

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 into existence and constitutional validity.

**2.3.2. 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. The ‘initial premise’ is a better and more neutral phrase: **there is no need for jurisprudence to postulate sovereignty in the sense of power that is unlimited, illimitable, and indivisible**. 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....[Paton; 1967: 304-306]

**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 the FDRE Constitution (Art 57), **laws should be deliberated upon.** **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** [Arts. 57 of the FDRE Constitution; and Proc. No 3/1995, Art 2).

**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.

**CONCLUSION**

We have discussed that the term “source” is subject to various meanings. In general, when we say **source of law, we meant that from where the law derives its binding force and its contents.** Source of a law may be formal or material. We have seen that **material source of law is that from which the law derived the matter, i.e. the content. A formal source of law is that from which a rule of law derives its force and validity.**

We discussed that **custom is material source of law because the law derives its contents from the custom**. Custom is a set of social attitudes that the society regarded as part of law and enforced. Custom, to be regarded as source of law, **it must be reasonable; be consistent with a written law; be observed as of right; it should have been continuously in existence from the time immemorial; and be certain.**

**According to the historical school, custom can change, or modify the law**. **Analytical theory considers custom derives its binding force from the recognition of state.** Under Ethiopian law, **custom is applicable where the law refers it, and when the judge interprets the law**.

We have also seen that **religion is the material source of Ethiopian law.** The other source of law that we have dealt is **legislation**. **Legislation are enacted by the formal deliberations of the legislature. The legislature derives its power to make laws from the Constitution.** Laws are made to implement the principles incorporated in the Constitution. Any law that contradicts the provisions of the Constitution is null and void. Thus, the constitution is one of the sources of Ethiopian law. **Agreements and treaties are also other important source of our law, particularly the constitution of 1995.**

**Codes are also important source of our law, starting from Fewse Menfesawi down to the recent codes, like the 2000 Revised Family Code**. We have also discussed that proclamations, regulations and directives issued are sources of our laws.

**Further court decisions are sources of our law.** We have seen that the old Judgments are the sources of the 1960 civil code. In addition, the 2000 Revised Family Code of the Federal government is also sourced from the decisions that are rendered by our courts. **The Supreme Court of the Federal government has still the power to pass decisions that will be used in future by other courts to solve practical disputes.**